IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

JOY MAJOR HOOP,

Petitioner, : Case No. 1:06-cv-603

-vs- : District Judge Susan J. Dlott
Magistrate Judge Michael R. Merz

PAT ANDREWS, Warden,

Respondent. :

SUPPLEMENTAL DECISION ON PRIVILEGE OBJECTIONS DURING THE DEPOSITION OF LAWRENCE HANDORF

On December 29, 2008, the Magistrate Judge filed a Decision and Order ruling on the privilege objections made during the deposition of Lawrence Handorf (Doc. No. 57). Intervenor Carl Lindsey has now appealed from that Decision (Doc. No. 58). No other appeals were taken within the time allowed by Fed. R. Civ. P. 72, but Petitioner has now responded to the Intervenor's appeal (Doc. No. 60). The General Order of Reference for the Dayton location of court permits a magistrate judge to reconsider decisions or reports and recommendations when objections are filed.

First Objection: Carl Lindsey is a Nonparty

Mr. Lindsey first objects that, as a nonparty to this litigation, the exception to work product protection in Fed. R. Civ. P. 26(b)(3) should not apply to him. To put it another way, he says he is not an adversary to Ms. Hoop in this litigation and the exception in Rule 26(b)(3), making work

product discoverable in certain circumstances, only applies to adversaries in litigation.

That position is contrary to the very authority cited by Intervenor in the same paragraph where this claim is made. In *FTC v. Grolier, Inc.*, 462 U.S. 19, 25 (1983), the Supreme Court held that Exemption Five in the Freedom of Information Act, " which is coextensive with the federal work-product rule, protects work-product materials without regard to the status of litigation for which it was prepared and thus in dicta suggested the same rule would apply for work-product protection." Epstein, The Attorney-Client Privilege and the Work-Product Doctrine, 5th ed., at 901. See also *United States v. Leggett & Platt, Inc*., 542 f.2d 655, 660 (6th Cir. 1976).

In fact, Intervenor's argument turns the rationale of work-product protection on its head. One reason for protecting work-product is to prevent one party in a case from parasitically using his or her opponent's preparation. *Hickman v. Taylor,* 329 U.S. 495, 510 (1947), That rationale completely disappears when information is sought from a nonparty. As Petitioner argues, Mr. Lindsey's status as a nonparty argues in favor of disclosing his work product, not against.

Second Objection:
Handorf's Information is Opinion Work Product, Not Fact Work Product

Mr. Lindsey's second objection is that what Mr. Handorf learned from the source with whom he spoke is opinion work product, not fact work product. He claims that the Magistrate Judge's contrary conclusion is clearly erroneous.

The distinction between fact and opinion work product is reflected in Fed. R. Civ. P. 26(b)(3) which provides that, when ordering the disclosure of work product materials (or "trial preparation" materials as they are called in Rule 26), the court "must protect against disclosure of the mental

impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."

In support of his position, Lindsey cites *Upjohn Co. v. United States*, 449 U.S. 383 at 399-400 (1981). What is discussed in *Upjohn*, however, are an attorney's notes of his witness interviews, described by the attorney as containing

> . . . what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, , my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere.

Id. at n. 8. What is at issue in this case involves nothing that would disclose any attorney's or even the investigator's analysis of the case. Instead, it is raw fact work product, the answers to a very limited set of questions put to the person whom Mr. Handorf interviewed. As the District Judge will see from reviewing the sealed transcript, any person investigating this crime who knew the identity of this person would ask the person these questions. If the definition of opinion work product were stretched far enough to cover these questions and answers, it is difficult to see how any work product would be fact as opposed to opinion work product. After all, the simple question "what did you see" to a bystander eyewitness to an automobile accident by an insurance claims investigator reveals in some sense what the claims investigator regards as important – what did the eyewitness see?

There are simply no attorney mental processes involved in what Handorf asked the person he interviewed. Mr. Lindsey's second objection is without merit.

Third Objection: Hoop Cannot Show Substantial Need or Undue Hardship

Mr. Lindsey first argues in his Third Objection (Doc. No. 58 at 6-8) that Ms. Hoop has not shown "any attempts to secure this information from a non-privileged, non-work product source." *Id*. at 7. To show the possibility of obtaining the information from other sources, he lists potential witnesses to the events of the evening in question who have not been deposed or interviewed.

This argument is a red herring. As Mr. Lindsey's counsel well know, but as Ms. Hoop's counsel cannot know because he has not yet received the work product ordered to be disclosed, it is very unlikely that interviewing any of the witnesses referred to on page 7 of the appeal would disclose the information Ms. Hoop seeks and which Mr. Handorf testified to.

Lindsey's second argument under his Third Objection is that the information Petitioner seeks cannot be tied to a meritorious claim (Objection and Appeal, Doc. No. 58, 8-10). The Magistrate Judge took a parallel position in his Decision and Order Denying Renewed Motion to Expand the Scope of Discovery (Doc. No. 36) and Second Decision and Order Denying Renewed Motion to Expand the Scope of Discovery (Doc. No. 38). Of course, Chief Judge Dlott reversed those decisions and ordered the Handorf deposition to take place. That is now the law of the case.

Fourth Objection: Forcing Handorf to Disclose the Requested Information Violates Lindsey's Constitutional Rights to a Defense in his Capital Case

Mr. Lindsey notes that the work product in question was gathered as part of his defense to a capital murder charge. He argues that forcing Handorf to disclose that work product would violate his right not to incriminate himself under the Fifth Amendment and his right to effective assistance

of counsel under the Sixth Amendment, including the very extensive right to have his counsel investigate the case. (Objections, Doc. No. 58, at 10-11, citing *Williams v. Taylor*, 529 U.S. 362, 393 (2000); *Wiggins v. Smith*, 539 U.S. 510, 533-34 (2003); and *Rompilla v. Beard,* 545 U.S. 374, 381-88 (2005).)

Intervenor has not demonstrated how the information Handorf has and which the Magistrate Judge has ordered disclosed would in some way be incriminatory. The Lindsey case is assigned to Judge Sargus and the undersigned has not had occasion to review the evidence in that case so as to know whether this information would provide some link in the chain of evidence as to Mr. Lindsey's guilt which was in fact disputed. Intervenor has not produced in this case sufficient evidence from which the Magistrate Judge can conclude that the information is incriminatory of Mr. Lindsey.

The core of this Fourth Objection is that "invoking Lindsey's [attorney-client] privilege is a hollow ritual if Hoop is able to now force Lindsey's investigator to reveal the substance of his follow-up to these privileged communications." (Objections, Doc. No. 58, at 10). In this particular instance, requiring the disclosure that the Court has ordered may enable Hoop and her counsel to guess accurately the content of a piece of information Lindsey told Handorf. In order to prevent that accurate guess, Lindsey's lawyers apparently want this Court to adopt a rule that work product resulting from leads gained in privileged conversations can never be discovered. They cite no authority for that proposition, nor do they even make an argument for that broad a rule except that it would make the attorney-client privilege stronger. They do not suggest why the attorney-client privilege needs to be stronger except by adverting obliquely to the "death is different" argument by reminding us that Mr. Lindsey's is a capital case. But the law already protects attorney-client privilege very strongly, virtually absolutely except for waiver and the crime-fraud exception.

The work product at issue gets close to the attorney-client privilege because it was produced by the person who had the privileged conversation. But Lindsey has not shown how revealing this material will defeat the purpose of the attorney-client privilege. And Ms. Hoop has a very strong need of this work product as it may be material to her conviction and long-term confinement for murder.

Stay Pending Circuit Review

Mr. Lindsey requests a stay pending appeal under § 1292(b) or mandamus review if the Court upholds the Magistrate Judge's ruling. However, Mr. Lindsey has offered no authority in support of his proposition that work product gained from privileged leads is to be protected. Nor has he shown any way in which disclosing this particular piece of information will prejudice his own capital habeas corpus case. As a death row inmate, he has little concern with speeding up the legal process. Ms. Hoop, however, is losing her liberty day-by-day and has already spent twelve years imprisoned on a crime of which she claims she is innocent. In the interest of expedition of her claim, the Court should deny any stay pending appeal.

February 7, 2009.

s/ **Michael R. Merz**
United States Magistrate Judge