

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	CASE NO. 2:10-cr-186-MHT
)	
JARROD MASSEY,)	
JARRELL W. WALKER, JR.,)	
)	
Defendants.)	

ORDER

Pending before the Court is Defendant Walker’s *Motion for Production* (Doc. 1466, filed on July 16, 2011) and Defendant Massey’s *Motion to Quash Defendant Walker’s Motion for Production* (Doc. 1470, filed on July 17, 2011). The motions have been referred by the District Judge to the undersigned for disposition. After due consideration of briefs, arguments, and applicable law, it is hereby **ORDERED** that the motion for production is **GRANTED** and the motion to quash is **DENIED** as further discussed below.

I. BACKGROUND

On December 20, 2010, Defendant Jarrod Massey (“Defendant Massey”) entered a guilty plea and has since that time, worked with or testified on the behalf of the Government. Defendant Jarrell Walker (“Defendant Walker”) filed his motion for production wherein he purports that Defendant Massey “referenced a diary or journal that Mr. Massey was keeping” that discussed meetings with the Government about his participation as a witness against other co-defendants. Doc. 1466 at 2. Defendant Walker also avers that Defendant Massey

testified that “he last referred to that diary a few days before taking the witness stand in this case.” *Id.* Defendant Walker cites to Fed. R. Evid. 612, whereupon “in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.” *Id.* Defendant Walker also raises the issue that any claim of privileged communications by the part of Defendant Massey is in direct conflict with Defendant Walker’s Sixth Amendment Constitutional right under the Confrontation Clause. *Id.* Defendant Massey asserts the document was prepared for and at the direction of Massey’s attorney and therefore falls within the attorney-client and work product privilege. Doc. 1470 at 1-2.

On July 18, 2011, the Court ordered the production of the document in question to the Court for an in camera review. The United States Marshals provided the original document - a two page front and back document written on what appeared to be a white legal pad sheet of paper.

II. DISCUSSION AND ANALYSIS

To invoke the attorney-client privilege, Defendant Massey bears the burden of establishing the following: "(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is [the] member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either

(i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. *United States v. Noriega*, 917 F.2d 1543, 1550 (11th Cir. 1990). Counsel for Defendant Massey indicated in the hearing that there was no definitive purpose in requesting this information from Defendant Massey but rather that it may be used at any point for any reason. In drafting this document Defendant Massey was not seeking to secure "(i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding." *Noriega*, 917 F.2d at 1550. The Court finds under FED. R. EVID. 612, and in the interest of justice, the document was used by Defendant Massey to refresh his memory and shall be made available to all parties to the litigation. The information in the document is brief and the information on each entry is essentially the same. As this Court cannot separate which part or parts of the documents were used to refresh Defendant Massey's memory the four pages shall be released in their entirety.

Furthermore, the Court finds that denying production of the document/journal in question may infringe upon Defendant Walker's right under the Confrontation Clause. The Supreme Court has examined the potential conflicts between the Confrontation Clause and rights and privileges wherein the Constitutional rights are superior to those provided for via other mechanisms, such as rules of evidence or rules of procedure. *See e.g., Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965) (finding the Alabama courts erred when they denied a criminal defendant the right to cross examine a witness who had previously been convicted for the same crime and had made a statement inculcating the

defendant, but rather allowed for a statement made by the witness to be read into court under the guise of cross-examination when the witness claimed the privilege provided him under the Fifth Amendment privilege against self-incrimination); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (finding the defendant was denied his constitutional right of confrontation of witness when he could not cross-examine key prosecution witness regarding the witnesses status of being on probation for a juvenile offense).

Consequently, Defendant Walker's *Motion for Production*, is **GRANTED**, and Defendant Massey's *Motion to Quash Defendant Walker's Motion for Production*, is **DENIED**. In addition, it is hereby **ORDERED** that the two pages of documents, front and back, is released to the parties. A copy was provided to the Government and Defendant Walker.

DONE this 21st day of July, 2011.

/s/ Terry F. Moorner
TERRY F. MOORER
UNITED STATES MAGISTRATE JUDGE