UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DISTRICT

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| UNITED STATES OF AMERICA | ) | |
| | ) | No. 02 CR 1050-4 |
| v. | ) | |
| | ) | Judge James B. Zagel |
| FRANK CALABRESE, SR. *et al.*, | ) | |

**GOVERNMENT'S CONSOLIDATED RESPONSE TO DEFENDANT FRANK CALABRESE AND JAMES MARCELLO'S MOTIONS *IN LIMINE* TO PRECLUDE EVIDENCE ON THE BASIS OF THE MARITAL COMMUNICATIONS PRIVILEGE**

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, for the reasons set forth below respectfully requests that this Court deny defendant Frank Calabrese [Document #227] and James Marcello's [Document #257] Motions *In Limine* To Preclude Evidence on the Basis of the Marital Communication Privilege.

## I. SUMMARY OF DEFENDANTS' CLAIMS

At trial the government may seek to introduce a few of the recorded prison telephone conversations the government obtained via subpoena. These calls, recorded by the Bureau of Prison pursuant to 28 C.F.R. § 540.102 for prison security reasons , are between defendant Frank Calabrese and his wife Diane Calabrese, as well as between defendant James Marcello and his wife Sandra Marcello. At the time of the conversations defendants were incarcerated at FCI Milan. Defendants contend that the government is precluded from introducing these taped conversations because of the martial communications privilege.

## II. ARGUMENT

The marital communications privilege protects certain communications between spouses from being admissible at trial.[1] The privilege "is firmly rooted in our common law" and "reflects

[1] The marital communications privilege is one of two types of marital privilege. The other is the privilege against adverse spousal testimony. Trammel v. United States, 445 U.S. 40 (1980). Defendants' motions only relate to the first category of privilege.

the value our society places on uninhibited communications between spouses." United States v. Lea, 249 F.3d 632, 641 (7th Cir. 2001).[2] "The communications privilege, assertable by the defendant himself, applies only to communications made in confidence between the spouses during a valid marriage." United States v. Byrd, 750 F.2d 585, 590 (7th Cir. 1984).

It is well-settled that the marital communications privilege must be construed narrowly. Lea, 249 F.2d at 641. In United States v. Nixon, the Supreme Court declared that "exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." United States v. Nixon, 418 U.S. 683, 710 (1974); see also United States v. Singleton, 260 F.3d 1295, 1300 (11th Cir. 2001) ("The Supreme Court has held that privileges must be narrowly construed because they impede the search for truth."). In the context of marital privilege, the Seventh Circuit echoed this view in subsequently holding that, "while privileges are important, we must construe them narrowly to protect the search for truth." Byrd, 750 F.2d at 592; see also United States v. Clark, 712 F.2d 299, 301 (7th Cir. 1983) (noting "policy" of narrow construction).

Three conditions must be satisfied to qualify for the marital communications privilege. Byrd, 750 F.2d at 592. There must be (1) communication (2) made in confidence (3) in a valid marriage. Id. The only issue before this court is whether defendants' recorded conversations with their wives were (2) made in confidence.

[2] The Seventh Circuit has ruled that the availability of a privilege in a criminal trial must be evaluated according to Rule 501 of the Federal Rules of Evidence. Lea, 249 F.3d at 641. Rule 501 provides in part: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

The defendants correctly note that "marital communications are presumptively confidential." Blau v. United States, 340 U.S. 332, 333 (1951). However, "that presumption may be overcome by proof of facts showing that they were not intended to be private." Pereira v. United States, 347 U.S. 1, 6 (1954). Moreover, "[t]he party asserting an evidentiary privilege, such as the marital communications privilege, bears the burden of establishing all of the essential elements involved." United States v. White, 950 F.2d 426, 430 (7th Cir. 1991), quoted in United States v. Acker, 52 F.3d 509, 514-15 (4th Cir. 1995); see also United States v. Hamilton, 19 F.3d 350, 354 (7th Cir. 1994) ("The party asserting an evidentiary privilege, such as the marital communications privilege, bears the burden of establishing all the essential elements involved."); but see In re Grand Jury Investigation v. United States, 603 F.2d 786, 788 (9th Cir. 1979) (holding that the government bears this burden of overcoming the presumption). Here, however, defendants' telephonic communications with their wives made while defendants were incarcerated fall short of satisfying the condition of confidentiality because they were made in the presence of third parties. Defendant has failed to satisfy his burden of establishing the applicability of the privilege.

Circuit and Supreme Court precedent instruct that communications are not confidential if the spouses are aware (either constructively or directly) of the presence of a third party. See, e.g., Pereira v. United States, 347 U.S. 1, 6 (1954) ("The presence of a third party negatives the [required] presumption of privacy."); United States v. Sababu, 891 F.2d 1308, 1329 (7th Cir. 1989) (same). The Seventh Circuit has uniformly ruled that any expectation of privacy under such circumstances is unreasonable. In United States v. Madoch, for example, which is the leading case on point in this Circuit, the defendant-wife conducted conversations with her incarcerated husband over a prison phone. United States v. Madoch, 149 F.3d 596, 602 (7th Cir. 1998). She subsequently objected to the admittance of these recorded conversations on the grounds that they

were protected by marital privilege. Id. The trial court found the conversations admissible, ruling it unreasonable for the defendant and her husband to intend to have confidential phone conversations over a prison phone. Id. In affirming the trial court's judgment, the Seventh Circuit held:

> [U]nder the unusual circumstances where the spouse seeking to invoke the communications privilege knows that the other spouse is incarcerated, and bearing in mind the well-known need for correctional institutions to monitor inmate conversations, we agree with the district court that any privilege [the couple] might ordinarily have enjoyed did not apply.

Id.; see also Sababu, 891 F.2d at 1329 (concluding that a non-prison spouse "did not have a reasonable expectation of privacy in her telephone conversations with [her spouse], an inmate in a federal prison" because the Code of Federal Regulations placed her on constructive notice of the monitoring).

Cases from other jurisdictions are in line with Seventh Circuit precedent. In United States v. Harrelson, for example, the Fifth Circuit examined "whether [a couple] had a reasonable expectation of privacy as they spoke to each other in jail." United States v. Harrelson, 754 F.2d 1153, 1169 (5th Cir. 1985). The Harrelson court found it "unnecessary to consult the case law to conclude that one who expects privacy under the circumstances of prison visiting is, if not actually foolish, exceptionally naïve." Id. Similarly, in United States v. Griffin, the defendant asserted that letters he sent his spouse (who was also serving as his attorney) from prison were protected by the marital communications privilege. United States v. Griffin, 440 F.3d 1138, 1140-1141 (9th Cir. 2006). The Ninth Circuit observed that the prison authorities had the right to read any letter not protected by attorney-client or work-product privileges. Id. at 1144.

Turning to the facts of the instant case, Diane Calabrese and Sandra Marcello at all relevant times knew their husbands were incarcerated, and prison visitor logs confirm this. Defendants' wives therefore knew that the phone calls they received from their husbands were from a federal prison. Indeed, the wives mention the fact of their husbands' incarceration, and many of the phone calls were preceded by the routine pre-recorded message informing the recipients of the calls (that is, wives Diane Calabrese and Sandra Marcello) that the calls were being placed from a federal prison. With regard to defendants, they signed a Prisoner Acknowledgment Form consenting to the monitoring, and at the time of the communications a sign posted next to all of FCI Milan's prison telephones read:

> Pursuant to Bureau of Prisons telephone regulations: *All conversations* on this telephone are subject to monitoring. Your use of this telephone constitutes consent to this monitoring. You must contact your unit team to request an unmonitored attorney call.

(Emphasis in original). By placing the phone calls to their wives the defendants have consented to the recordings, thereby preventing them from claiming the privilege.

Moreover, at least with regard to Diane Calabrese it is clear from a number of her conversations that she knew she was being intercepted/recorded; there is no other way to explain her consistent use of coded language during the conversations. The Sababu court ruled that the fact that a non-incarcerated spouse "frequently spoke in coded language demonstrated her awareness that there was no privacy to the conversations."[3] Id. By way of example, one of

[3]Though defendants' motions must fail for the reasons set forth above, it is worth noting that the Seventh Circuit has joined other circuits in carving out an exception to the privilege when the communications under consideration are used to facilitate a crime. See United States v. Kahn, 471 F.2d 191, 194 (7th Cir. 1972) (finding that a lower court's approval of the marital communications privilege was erroneous "[i]f the intercepted conversations had to do with the commission of a crime and not with the privacy of the [] marriage"); see also United States v. Lofton, 957 F.2d 476, 477 (7th Cir. 1992) (holding that the privilege "exists to ensure that spouses generally, prior to any involvement in criminal activity or a trial, feel free to

these conversations concerned "recipes." According to information provided by defendant's son, Frank Calabrese, Jr., to law enforcement, and consistent with other conversations discussed below, "recipes" is Calabrese code for illegal collections (typically from gambling or from juice loans).[4] The following is from a November 11, 1999, prison phone call between defendant Calabrese and his wife:

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| Defendant | : | Miss Engel (ph) was supposed to give you a recipe that you were supposed to send me, with all the different size of the, of the ounces of, of a flour and stuff. |
| Diane Calabrese | : | Yeah. |
| Defendant | : | What happened? |
| Diane Calabrese | : | She's working on it, she's, you know, a little slow. |

communicate their deepest feelings to each other without fear of eventual exposure in a court of law") (emphasis added); United States v. Marashi, 913 F.2d 724, 730 (9th Cir. 1990) (collecting cases). The rationale for the exception is that the value of protecting the privacy of marriage in such a context is outweighed by the public's interest in "discovering the truth about criminal activity." United States v. Sims, 755 F.2d 1239, 1243 (6th Cir. 1985); see also United States v. Van Drunen, 501 F.2d 1393, 1396 (7th Cir. 1974) (finding that "the goal of preserving the family "does not justify assuring a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or coconspirator he is creating another potential witness"). At least some of the converations the government may seek to introduce at trial, such as the ones above, are in fact related to criminal activities being facilitated by Diane Calabrese. Moreover, to the extent that conversations such as the one concerning Diane Calabrese talking to others about obtaining the "recipes" (collections from illegal activities) for defendant involve the parties relaying information to others, the Seventh Circuit has stated "we remain steadfast in our position that the necessary element of confidentiality is lost when a spouse divulges to a third party the communication which he or she seeks to exclude from evidence." Lea, 249 F.3d at 642; see also Pereira, 347 U.S. at 6.

[4]For example, on February 24, 2000, a prison call between defendant Calabrese and his son was recorded. Defendant Calabrese during the call said he wanted to know if "Smiley" picked up the "recipes" (collections) or not. Defendant Calabrese's son said that "Smiley" was working on the "recipes," and that one of the "recipes" was taken care of. Defendant then instructed his son to send the "recipes" to him (defendant Calabrese) so he knows about the "recipes." Defendant Calabrese's son then told defendant that he (the son) has worked on the one "recipe," but that there were some problems. Defendant Calabrese therefore consistently uses the code "recipes" for illegal money collections, and it is fair to conclude that he and his wife would not feel the need to employ such use of code if they believed their conversations were private.

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| Defendant | : | Okay, because I got a guy that wants his wife and maybe one of the counselors over want here want to . . . . |
| Diane Calabrese | : | You talking about the German Chocolate one? |
| Defendant | : | Yes. |
| Diane Calabrese | : | Yeah. |
| Defendant | : | That's right. |
| Diane Calabrese | : | We'll get it to you. |
| Defendant | : | Right. Did she used to make the bon bons too? |
| Diane Calabrese | : | Yeah. |

Similarly, on October 25, 2000, defendant Calabrese called Diane Calabrese and said that "Mish [according to defendant Calabrese's son another code name for defendant's son] is supposed to be 65 years old" [$6500 should be collected; defendant Calabrese was incorrect because 11 months, or $5500, should have been collected]. Diane Calabrese responds , "No, he's 50" [according to defendant's son, he (the son) had on the previous day dropped a total of $5000 off at his grandmother's house for Diane Calabrese]. The use of code serves to erase any remaining doubt that defendant Frank Calabrese and his wife Diane not only had constructive notice of the monitoring, but that they in fact had actual notice.[5]

[5]Of course, per Madoch and Sababu, no such actual notice is even required. See discussion on page 4 above.

## III. CONCLUSION

Based on the argument made above, the government respectfully requests that this Court deny defendant Frank Calabrese and defendant James Marcello's Motions *In Limine* To Preclude Evidence on the Basis of the Marital Communication Privilege.

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

By: s/ T. Markus Funk
T. MARKUS FUNK

s/ Mitchell A. Mars
MITCHELL MARS

s/ John J. Scully
JOHN J. SCULLY
Assistant U.S. Attorneys
219 South Dearborn
Chicago, Illinois 60604
(312) 353-5300

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**CERTIFICATE OF SERVICE**

The undersigned Assistant United States Attorneys hereby certify that the following document:

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was served on August 25, 2006, in accordance with FED. R. CRIM. P. 49, FED. R. CIV. P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

s/ Mitchell A. Mars
MITCHELL A. MARS
Assistant United States Attorney

s/ John J. Scully
JOHN J. SCULLY
Assistant United States Attorney

s/ T. Markus Funk
T. MARKUS FUNK
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois
(312) 353-5300