

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 3:11-cr-248(S2)-J-34TEM

DONALD MITCHELL, et al.

**UNITED STATES' RESPONSE IN OPPOSITION TO
DEFENDANT'S THIRD MOTION TO SUPPRESS EVIDENCE**

In his third motion to suppress (Doc. 189), Mitchell again seeks the protection of the attorney-client privilege over communications that furthered his criminally fraudulent activities. The majority of the conversations that Mitchell seeks to protect were not confidential, thus the privilege does not apply. Even if the communications were confidential, they are still not afforded protection by the attorney-client privilege since Mitchell used the communications as an attempt to further his crimes. As more fully set forth below, Mitchell's third motion to suppress should be denied.

I. BACKGROUND

On December 28, 2010, Donald Mitchell was arrested on two outstanding state warrants for grand theft. Mitchell posted bond on those charges on January 11, 2011. However, on February 7, 2011, Mitchell failed to appear for a court hearing on the grand theft charges, so a failure to appear warrant was issued. On February 18, 2011, Mitchell was arrested in Orange County on the failure to appear warrant, and was transported back to the Duval County Jail.

On April 11, 2011, Mitchell's attorney at the time, J. Stephen Alexander, was allowed to withdraw from Mitchell's pending state cases. On that same date, the judge in Mitchell's state case entered an order for the Duval County Jail to allow Mitchell telephone and visitation privileges in order to contact possible new defense counsel.¹ Mitchell subsequently made contact with attorney Michelle Kalil Taylor, but never officially retained Taylor. During Mitchell's phone conversations with Taylor, he had Taylor call one of the victim's of Mitchell's investment scheme, M.R. Unbeknownst to Taylor, Mitchell used Taylor to relay messages to M.R. to put M.R. at ease regarding the status of the \$12,000 that M.R. had provided to Mitchell for investment. These messages were relayed to M.R. while Taylor was on a separate line speaking to Mitchell, who was still in jail custody.

II. ARGUMENT

The attorney-client privilege encourages "full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). The party invoking the attorney-client privilege has the burden of proving that an attorney-client relationship existed and that the particular communications were indeed confidential. See United States v. Schaltenbrand, 930 F.2d 1554 (11th Cir. 1991). In order to show that communications made to an

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Mitchell's phone and visitation privileges had previously been revoked because Mitchell abused his privileges by contacting individuals in furtherance of fraudulent activities.

attorney are within the privilege, it must be shown that the communication was made to the attorney confidentially, in the attorney's professional capacity, and for the purpose of securing legal advice or assistance. Id.; In re Grand Jury Investigation (Schroeder), 842 F.2d 1223, 1224 (11th Cir. 1987). Further, at the point where attorney-client communications are no longer confidential, i.e., where there has been a disclosure of a privileged communication, there is no justification for retaining the privilege and it can no longer be asserted. See United States v. Suarez, 820 F.2d 1158 (11th Cir. 1987).

Protecting the privilege comes at a significant cost to the truth-seeking function of the adversarial system. United States v. Zolin, 491 U.S. 554, 561-63 (1989). Accordingly, when a client abuses the system by consulting an attorney for the purpose of furthering criminal or fraudulent activity, the application of the attorney-client privilege is overcome by the "crime-fraud exception" and such information loses its protected status. Id.; see also Clark v. United States, 289 U.S. 1 (1933).

A determination of whether the crime-fraud exception applies involves a two-part test:

First, there must be a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice. Second, there must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it.

Schroeder, 842 F.2d at 1226 (11th Cir. 1987) (citing In re International Systems and Control Corporation Securities Litigation, 693 F.2d 1235, 1242 (5th Cir. 1982); In re Sealed Case (Sealed Case I), 676 F.2d 793, 814-15 (D.C.Cir. 1982); In re Murphy, 560 F.2d 326, 338 (8th Cir. 1977)). There is no requirement that the attorney have knowledge that he/she is furthering a crime or fraud in order for the exception to apply. See Schroeder, 842 F.2d at 1227 (citing In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026, 1028 (5th Cir. 1982); In re Grand Jury Proceedings in Matter of Fine, 641 F.2d 199, 203 (5th Cir. 1981)).

A. Mitchell's conversations with M.R., via Michelle Taylor, do not constitute confidential communications.

As set forth above, Mitchell has the burden of establishing the attorney-client privilege, and the privilege only applies to *confidential* communications solely between the attorney and client. Here, Mitchell's invitation of a third party, M.R., into his conversation with Taylor destroys any claim of privilege. Further, the portions of Mitchell's jail calls with Taylor that include M.R. were not made for the purpose of securing legal advice. Absent a confidential communication, Mitchell cannot claim the privilege.

B. Even if the communications are confidential, they are intertwined with Mitchell's attempt to further his investment scheme, which triggers the crime-fraud exception.

The crime-fraud exception permits the use of any alleged privileged communications that furthered Mitchell's investment scheme. On April 29, 2011,

Mitchell used Taylor to relay a message to M.R., saying that in case M.R. was worried about their "stuff," their "stuff was successful" and they "made it to the point where [they] were supposed to make it to." At this point, M.R. had already provided Mitchell \$12,000 with the understanding that Mitchell would invest the money for a high-yield return. The message that Mitchell instructed Taylor to relay M.R. furthered Mitchell's crime of inducing M.R. to believe that Mitchell was a legitimate investor. Just because a court order was entered allowing Mitchell access to the telephone, does not mean that Mitchell was authorized to engage in fraud. Therefore, even if this Court were to find that a communication involving a third party is confidential, the crime-fraud exception still applies.

III. CONCLUSION

For the reasons set forth, the United States respectfully requests that the third motion to suppress be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Noel Lawrence, Esq.
Counsel for Donald Mitchell

Donald Mairs, Esq.
Counsel for Amy Newby

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