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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

United States of America

Plaintiff,

v.

Jacqueline L. Parker,

Defendant.

CR-10-757-PHX-ROS

**UNITED STATES’ RESPONSE TO
DEFENDANT JACQUELINE
PARKER’S MOTION TO
PRECLUDE THE ADMISSION OF
PRIVILEGED MARITAL
COMMUNICATIONS**

I. Overview.

Defendant Jacqueline Parker has moved to preclude unidentified marital communications. This Motion is even more opaque than her companion Motion to Preclude the Admission of Attorney-Client Communications. (CR 76.) There is nothing in her Motion that even hints at a specific communication. As such, the Motion does not raise a legal issue for this Court to decide.

II. Legal Principles.

There are two privileges that may be germane when dealing with communications between married individuals. They both are discussed below.

A. Anti-Marital Facts Privilege.

The “anti-marital facts” or “adverse spousal testimony” privilege allows a testifying spouse to refuse to testify against his or her defendant spouse. The privilege exists only during the marriage, that is if the parties are divorced at the time the testimony is sought, no privilege exists. *Marashi v. United States*, 913 F.2d 724, 728 (9th Cir. 1990). The witness-spouse alone

1 has the privilege to refuse to testify adversely. *Trammel v. United States*, 445 U.S. 40, 52
2 (1980).

3 **B. Marital Communications Privilege.**

4 This privilege bars testimony concerning statements that were privately communicated
5 between spouses during their marriage. *Marashi*, 913 F.2d at 728; *United States v. McCown*,
6 711 F.2d 1441, 1452 (9th Cir. 1983). The non-testifying spouse may invoke the privilege. *Id.*
7 It covers only those communications made during a valid marriage. *Id.*

8 **1. Confidential Communications.**

9 The privilege applies only to those marital communication that are confidential. *Id.* Marital
10 communications are presumptively confidential. *Id.* The United States has the burden of
11 demonstrating that they are not confidential. *Id.* That presumption of confidentiality is
12 “narrowly construed” because it obstructs the truth-seeking process. *Id.* “Use of the privilege
13 in criminal proceedings requires a particularly narrow construction because of society’s strong
14 interest in the administration of justice. *Id.*; *United States v. Montgomery*, 384 F.3d 1050, 1055
15 (9th Cir. 2004). The privilege does not extend to statements which are made before, or likely
16 to have been overheard by, third parties. *Id.*

17 In *McCown*, the testifying wife was asked “who instructed her to write out a check (which
18 was later used by co-defendants....to purchase a firearm at a Phoenix pawn shop).” She
19 responded “My husband.” 711 F.2d at 1452. The Ninth Circuit held that the defendant’s
20 instructions to his wife about writing out the check were not confidential. *Id.*

21 **2. Does Not Apply to Acts or Observations.**

22 The privilege applies only to words or acts intended as communications to the other spouse.
23 *Pereira v. United States*, 347 U.S. 1, 6 (1954); *Marashi*, 913 F.2d at 728. In *United States v.*
24 *Ferris*, 719 F.2d 1405 (9th Cir. 1983), the defendant was charged with possessing and
25 distributing LSD. *Id.* at 1406. At trial, defendant’s wife testified that she saw LSD in the trunk
26 of his car. *Id.* at 1407. The Ninth Circuit held that her observations were not marital
27 communications. *Id.* In *United States v. Bolzer*, 556 F.2d 948 (9th Cir. 1977), the defendant’s

1 former wife was allowed to testify that a pair of pants found along with stolen mail resembled
2 pants which belonged to her defendant-husband. *Id.* at 951. The Ninth Circuit concluded her
3 testimony “related only her knowledge and observations” about defendant’s pants. No
4 communications were involved at all. *Id.* Similarly, in *United States v. Klayer*, 707 F.2d 892
5 (6th Cir. 1983), the defendant was tried for mail and wire fraud for filing a false insurance claim
6 regarding a \$4,000 silver tray, which defendant claimed was stolen. *Id.* at 892. The defendant
7 tried to preclude his wife from testifying that they never owned a \$4,000 silver tray. *Id.* at 894.
8 The Sixth Circuit held that the marital communication privilege did not apply to his wife’s
9 objective observations. *Id.*

10 **III. Argument.**

11 **A. The Relief Requested is Oblique.**

12 It is unclear why this Motion was filed. No marital communications have been identified
13 in any fashion. Defendant filed a pleading without any substance. For example, at the bottom
14 of page 3 of defendant’s Motion, she wrote:

15 “However it decides to attempt to prove what the Defense maintains
16 will ultimately be un-provable by any burden of proof, not to
17 mention beyond a reasonable doubt, the Government cannot elicit
18 communications between the Parkers to reach that end.”

19 Another example is on page 5, lines 9-11, which read:

20 “Without such a showing, the Government must be precluded from
21 using the Defendants’ privileged marital communications at trial.”

22 The government is unable to discern what the defendant is seeking in this Motion.

23 **B. Communications to Third Parties, and Observations, Are Not Covered.**

24 A marital communication must be confidential. If already known to the government
25 because it was told to third parties, or overheard in public, no marital communication privilege
26 applies to that communication. The privilege also does not apply to objective observations
27 within the marital community. For example, a spouse can be asked if he or she recognizes the
28 signature of the other spouse on legal documents. Thus, no public communications, or other acts
or conduct not intended as marital communications, are privileged.

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C. Objections Based on Privileges are Best Decided At Trial.

Defendant seeks a pretrial determination that unknown communications are privileged. Without knowing the substance and circumstances to any such communications, and whether issues of waiver or other nullifying acts apply, this Court has no basis from which to rule on the defendant's request. Those determinations are best left for trial.

IV. Conclusion.

For the reasons expressed above, defendant's Motion should be denied.

Respectfully submitted this 9th day of May, 2011.

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Certificate of Service: I hereby certify that on this day , I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants: Joy Bertrand, John McBee, and Michael Minns, Ashley Arnett.