

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of August, two thousand and seventeen.

Before: Pierre N. Leval,
Rosemary S. Pooler,
Peter W. Hall,
Circuit Judges.

United States of America,

Appellant,

v.

Raymond Krug and Joseph Wendel,

Defendants - Appellees.

JUDGMENT

Docket No. 16-4136

The appeal in the above captioned case from an order of the United States District Court for the Western District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the order of the district court is REVERSED.

For The Court:

Catherine O'Hagan Wolfe,
Clerk of Court




A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit




MANDATE ISSUED ON 10/19/2017

16-4136-cr

United States v. Krug, et al.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2016

(Argued: May 11, 2017)

Decided: August 18, 2017)

Docket No. 16-4136-cr

UNITED STATES OF AMERICA,

Appellant,

v.

RAYMOND KRUG and JOSEPH WENDEL,

*Defendants-Appellees.*¹

Before: LEVAL, POOLER, and HALL, *Circuit Judges.*

Appeal from the December 10, 2016 order of the United States District

Court for the Western District of New York (Skretny, J.) precluding the

government from introducing at trial certain testimony by a co-defendant turned

¹ The Clerk of Court is respectfully directed to amend the caption as above.

1 government witness on the basis of the common-interest rule of attorney-client
2 privilege. The excluded statements were not made to, in the presence of, or
3 within the hearing of an attorney for any of the common-interest parties; nor did
4 the excluded statements seek the advice of, or communicate advice previously
5 given by, an attorney for any of the common-interest parties; nor were the
6 excluded statements made for the purpose of communicating with such an
7 attorney. While expressing no view as to whether all such circumstances would
8 invoke the privilege, we find nothing in the circumstances here to support the
9 application of the privilege, and accordingly reverse the district court's order of
10 exclusion.

11 Reversed.

12

13 JOSEPH J. KARASZEWSKI, Assistant United States
14 Attorney, *for* James P. Kennedy, Jr., Acting United
15 States Attorney for the Western District of New York,
16 Buffalo, NY, *for Appellant*.

17

18 TERRENCE M. CONNORS, Connors LLP, Buffalo, NY,
19 *for Defendant-Appellee Raymond Krug*.

20

21 RODNEY O. PERSONIUS, Personius Melber LLP,
22 Buffalo, NY, *for Defendant-Appellee Joseph Wendel*.

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1 POOLER, *Circuit Judge*:

2 Appeal from the December 10, 2016 order of the United States District
3 Court for the Western District of New York (Skretny, J.) precluding the
4 government from introducing at trial certain testimony by a co-defendant turned
5 government witness on the basis of the common-interest rule of attorney-client
6 privilege. The excluded statements were not made to, in the presence of, or
7 within the hearing of an attorney for any of the common-interest parties; nor did
8 the excluded statements seek the advice of, or communicate advice previously
9 given by, an attorney for any of the common-interest parties; nor were the
10 excluded statements made for the purpose of communicating with such an
11 attorney. While expressing no view as to whether all such circumstances would
12 invoke the privilege, we find nothing in the circumstances here to support the
13 application of the privilege, and accordingly reverse the district court's order of
14 exclusion.

15 **BACKGROUND**

16 Defendants-Appellees Raymond Krug and Joseph Wendel and Defendant
17 Gregory Kwiatkowski were officers in the Buffalo Police Department. On or
18 about May 31, 2009, the three officers allegedly used excessive force during the

1 course of arresting four individuals. As relevant here, Krug and Wendel
2 allegedly used excessive force by shooting an arrestee with a BB gun they
3 recovered from the crime scene.

4 By indictment dated May 27, 2014, Krug and Wendel were each charged
5 with one count of depriving an individual of his constitutional rights while
6 acting under color of law, in violation of 18 U.S.C. § 242, and one count of
7 conspiring to injure, oppress, threaten, or intimidate individuals to deprive them
8 of their constitutional rights, in violation of 18 U.S.C. § 241. Kwiatkowski was
9 similarly charged with three counts of depriving an individual of his
10 constitutional rights while acting under color of law, in violation of 18 U.S.C. §
11 242, and one count of conspiring to injure, oppress, threaten, or intimidate
12 individuals to deprive them of their constitutional rights, in violation of 18 U.S.C.
13 § 241.

14 After the indictment, the three officers entered into a Joint Defense
15 Agreement (“JDA”). Under the JDA, the officers’ defense counsel participated in
16 meetings together, transmitted emails, and shared legal memoranda and
17 research.

1 [REDACTED]

2 Following this disclosure, Krug moved in limine to preclude Kwiatkowski
3 from testifying about the hallway discussion. In his motion, Krug argued that,
4 because there was a JDA between the officers at the time of the hallway
5 discussion, the statements made therein “constituted the mutual sharing of
6 defense strategies, thoughts, and theories that would be privileged pursuant to
7 that agreement.” Appellees’ Br. at 4. Krug argued further that the common-
8 interest rule protected the statements from disclosure under the JDA even
9 though the officers’ attorneys were not present during the conversation.

10 After receiving written submissions from the parties and hearing oral
11 argument, the district court granted Krug’s motion to preclude the government
12 from introducing Kwiatkowski’s testimony about the hallway discussion at trial.

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

13 [REDACTED] The district court accordingly precluded the government
14 from introducing Kwiatkowski’s testimony about the hallway discussion at trial.

15 The government timely appealed the district court’s order.

16 **DISCUSSION**

17 **I. Standard of Review**

18 Although “[w]e have repeatedly held that this Court reviews rulings on
19 claims of attorney-client privilege for abuse of discretion[,]” there are “occasions
20 where the attorney-client privilege raises a question of law, which we review de
21 novo.” *United States v. Mejia*, 655 F.3d 126, 131 (2d Cir. 2011) (internal quotation
22 marks omitted). “[T]o determine the appropriate standard of review, we must

1 establish whether the district court based its decision on a consideration of the
2 application of the privilege to the communication or on an understanding of the
3 privilege's scope." *Id.* We review the former for abuse of discretion and the latter
4 de novo. *Id.*

5 Here, we are, as the district court was, asked to determine a question of
6 law regarding the breadth (or scope) of the attorney-client privilege in a common
7 interest setting. Accordingly, we review the district court's decision de novo.

8 **II. The Attorney-Client Privilege**

9 The underlying purpose of the attorney-client privilege is "to encourage
10 full and frank communication between attorneys and their clients." *Upjohn Co. v.*
11 *United States*, 449 U.S. 383, 389 (1981). As a result, the attorney-client privilege
12 creates a rule of confidentiality that "recognizes that sound legal advice or
13 advocacy serves public ends and that such advice or advocacy depends upon the
14 lawyer's being fully informed by the client." *Id.*; see also *United States v.*
15 *Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) (explaining that the privilege
16 "recognizes that a lawyer's assistance can only be safely and readily availed of
17 when free from the consequences or the apprehension of disclosure" (internal
18 quotation marks omitted)). To that end, "[t]he attorney-client privilege protects

1 communications (1) between a client and his or her attorney (2) that are intended
2 to be, and in fact were, kept confidential (3) for the purpose of obtaining or
3 providing legal advice.” *Mejia*, 655 F.3d at 132.

4 “In order to balance this protection of confidentiality with the competing
5 value of public disclosure, however, courts apply the privilege only where
6 necessary to achieve its purpose and construe the privilege narrowly because it
7 renders relevant information undiscoverable.” *Id.* (internal quotation marks and
8 brackets omitted); see *Fisher v. United States*, 425 U.S. 391, 403 (1976) (explaining
9 the attorney-client privilege “protects *only* those disclosures necessary to obtain
10 informed legal advice which might not have been made absent the privilege.”
11 (emphasis added)). “The part[ies] asserting the privilege, in this case [Krug and
12 Wendel], bear[] the burden of establishing its essential elements.” *Mejia*, 655 F.3d
13 at 132.

14 “The joint defense privilege, more properly identified as the
15 common[-]interest rule,” is “an extension of the attorney[-]client privilege.”
16 *Schwimmer*, 892 F.2d at 243 (internal quotation marks omitted). “It serves to
17 protect the confidentiality of communications passing from one party to the
18 attorney for another party where a joint defense effort or strategy has been

1 decided upon and undertaken by the parties and their respective counsel.” *Id.*
2 The common-interest rule protects “[o]nly those communications made in the
3 course of an ongoing common enterprise and intended to further the enterprise.”
4 *Id.* As with all attorney-client privilege claims, a claim of privilege under the
5 common-interest rule “requires a showing that the communication in question
6 was given in confidence and that the client reasonably understood it to be so
7 given.” *Id.* at 244.

8 Although the common-interest rule “somewhat relaxes the requirement of
9 confidentiality by defining a widened circle of persons to whom clients may
10 disclose privileged communications,” Restatement (Third) of the Law Governing
11 Lawyers § 76 cmt. c (2000) (internal citation omitted), “a communication directly
12 among the clients is not privileged unless made for the purpose of
13 communicating with a privileged person,” *Id.* § 76 cmt. d, i.e., the lawyer, “agents
14 of” the client or of the lawyer “who facilitate communications between” the
15 client and the lawyer, and “agents of the lawyer who facilitate the
16 representation.” *Id.* § 70. In this vein, we have stated that it is not “necessary for
17 the attorney representing the communicating party to be present when the
18 communication is made to the other party’s attorney” under a common-interest

1 agreement. *Schwimmer*, 892 F.2d at 244. Ultimately, “[w]hat is vital to the
2 privilege is that the communication be made *in confidence* for the purpose of
3 obtaining *legal advice from the lawyer.*” *United States v. Kovel*, 296 F.2d 918, 922 (2d
4 Cir. 1961) (Friendly, J.).

5 The communications at issue in this case did not serve the interests that
6 justify the privilege. The communications occurred outside the presence of any
7 lawyer. Notwithstanding that the lawyers for the defendants were nearby and
8 had recently been in communication with their clients, the excluded statements
9 were not made for the purpose of obtaining legal advice from a lawyer, nor did
10 the excluded statements share among defendants advice given by a lawyer, nor
11 did the excluded statements seek to facilitate a communication with a lawyer.
12 Here, the hallway discussion consisted of one member of the JDA (Wendel)
13 conveying his independent, non-legal research to another member of the JDA
14 (Krug) while noting he had sent the same research to his attorney. No legal
15 advice was mentioned, much less shared or otherwise conveyed, among the co-
16 defendants. The mere fact that the communications were among co-defendants
17 who had joined in a joint defense agreement is, without more, insufficient to
18 bring such statements within the attorney-client privilege. We know of no

1 precedent applying the attorney-client privilege on such facts and we find no
2 circumstances present here that could justify extending the attorney-client
3 privilege to these communications.

4 **CONCLUSION**

5 For the reasons discussed above, we reverse the order of the district court.
6 The government may offer the proffered testimony by Kwiatkowski regarding
7 the hallway discussion at the trial of Krug and Wendel.