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Piercing of attorney-client privileges could lift the veil in Trump case

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Evidence from Trump's lawyer in the classified documents and obstruction case may prove critical to prosecutors if admitted to the jury.

On June 9, federal prosecutors led by Special Counsel Jack Smith unsealed the criminal indictment of former President Donald Trump, charging him in the Southern District of Florida with 37 counts relating to his mishandling of classified information, including conspiracy to obstruct justice. Aside from the salacious photographs revealing a chaotic scene of banker's boxes scattered across the Mar-a-Lago Resort, the indictment brings to light some truly astonishing evidence, particularly the communications between Trump and his lawyer, Evan Corcoran, and transcripts of Corcoran's contemporaneous audio recordings. The inclusion of this evidence in the historic and first ever federal criminal indictment of a former U.S. President is part of a tale so extraordinary that it could easily be mistaken for a movie script. However, while the circumstances that led federal prosecutors to invoke the crime-fraud exception and breach the attorney-client and work-product privileges are laid bare in the 44-page indictment, it is yet to be determined if the evidence from Corcoran will ever make it in front of a jury.

Efforts to obtain Corcoran's attorney-client communications and work-product began earlier this year, when prosecutors requested District of Columbia District Judge, Beryl Howell, to compel Corcoran to testify before a federal grand jury regarding his communications with Trump and produce his contemporaneous iPhone voice recording transcriptions. The testimony and transcriptions describe work Corcoran performed in response to a May 2022 subpoena requiring Trump produce the withheld classified materials, a key period for investigators that is cited in the indictment.

In making her decision, Judge Howell reviewed the evidence *in camera* before deciding whether to have it turned over to prosecutors. Despite the objections raised by Trump's legal team, Judge Howell issued a sealed 80+ page ruling on March 17, ordering Corcoran to testify before a grand jury and produce the transcribed iPhone voice recordings based on the crime-fraud exception to the attorney-client and work-product privileges.

Corcoran's evidence reveals Trump's attempts to obstruct the investigation and hide classified documents, with references that Trump suggested lying to investigators or withholding documents. The significance of Corcoran's evidence lies not only in its potential to corroborate other evidence but also in its capacity to

establish Trump's state of mind and level of involvement in the alleged criminal activities. It is among the most noteworthy evidence contained in the indictment.

One of the most incriminating pieces of evidence from Corcoran involves his account of Trump making a "plucking motion" after Corcoran arranged approximately 40 confidential documents into a folder, preparing to hand them over to federal prosecutors in response to the May 2022 subpoena. In his notes, Corcoran recorded his interpretation of the gesture, perceiving it as an indication from Trump to selectively remove any potentially damaging content from the folder, as if suggesting, "take the folder to your hotel room and if there's anything really bad in there, like, you know, pluck it out."

Consequently, the damaging evidence from Corcoran ("Attorney 1") made it directly into Trump's indictment. Count 32 of the indictment, Conspiracy to Obstruct Justice (18 U.S.C. §1512(k)), charges Trump with "[s]uggesting that Trump Attorney 1 falsely represent to the FBI and grand jury that Trump did not have documents called for by the May 11 Subpoena...[and] suggesting that Trump Attorney 1 hide or destroy documents called for by the May 11 Subpoena."

Although Corcoran's attorney-client communications and work-product supports the indictment, Trump's attorneys will undoubtedly contest its future admissibility by filing a motion to suppress at some point before trial commences.

"In deciding whether the crime-fraud exception applies to a communication between a lawyer and his client, courts apply 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." (*In re Sealed Case* (D.C. Cir. 1985) 754 F.2d 395, 399; *see also In re Grand Jury Investigation* (11th Cir. 1987) 842 F.2d 1223, 1226.)

The *prima facie* standard is met by showing the "evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud." (*In re Grand Jury* (D.C. Cir. 2007) 475 F.3d 1299, 1305; *see also In re Grand Jury Investigation* (11th Cir. 1987) 842 F.2d 1223, 1226.)

A communication's furtherance of a crime or fraud typically can be demonstrated "by evidence of some activity following the improper consultation, on the part of either the client or the lawyer, to advance the intended crime or fraud." (*In re Pub. Def. Serv.* (D.C. Cir. 2003) 831 A.2d 890, 910; *see also In re Federal Grand Jury Proceedings 89-10* (11th Cir. 1991) 938 F.2d 1578, 1582.)

The crime-fraud exception applies to the work-product in addition to the attorney-client privilege. (*Cox v. Administrator United States Steel & Carnegie* (11th Cir. 1994) 17 F.3d 1386, 1422.)

While the privileges were pierced by Judge Howell in the District of Columbia, whether or not the government will inevitably be able to use crucial evidence from Corcoran at trial in the Southern District of Florida rests on the decision of the current trial judge, Trump-appointed Aileen Cannon. Trump has multiple arguments to attack the admissibility of Corcoran's evidence.

First, Trump's legal team can argue that Corcoran's iPhone transcriptions are opinion work-product, as opposed to fact work-product, which requires a higher standard to pierce.

The work-product doctrine encompasses a two-tiered approach to work product in which "fact work product" and "opinion work product" are afforded different levels of protection. (Fed. R. Civ. P. 26(b)(3).) Fact work product consists of "documents and tangible things...prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative." (Fed. R. Civ. P. 26(b)(3); *United States v. Pepper's Steel & Alloys* (S.D.Fla. 1990) 132 F.R.D. 695, 697.) Opinion work product consists of materials that reflect "an attorney's mental impressions, conclusions, opinions, or legal theories." (*Cox v. Administrator United States Steel & Carnegie* (11th Cir. 1994) 17 F.3d 1386, 1422.)

Although authority is limited in the 11th circuit where Trump's case is currently venued, the 4th circuit has held that "[a] party seeking to compel the production of opinion work product under the crime-fraud exception must demonstrate attorney knowledge of or participation in the client's crime or fraud, but no such showing is necessary to discover fact-work-product privileged materials related to a client's crime or fraud." (*See In re Grand Jury Subpoena* (4th Cir. 2017) 870 F.3d 312, 316.) These standards may likely be the subject of the Trump's legal team's future challenges to the admissibility of Corcoran's work product.

Second, Trump's legal team may argue that Judge Howell's ruling in the District of Columbia should not be automatically applied in the Southern District of Florida, where the trial is expected to take place because legal considerations in the two jurisdictions differ. However, the crime-fraud exception standards are essentially the same in both jurisdictions.

Third, Trump's legal team may question the accuracy of the transcriptions or argue that the conversations between Trump and Corcoran do not provide substantial evidence of criminal activity or obstruction of justice. Yet, the overwhelming amount of evidence included in the indictment alone makes this an uphill battle.

Fourth, Trump's legal team can argue that the ruling by Judge Howell was made in pre-indictment posture, as opposed to the pre-trial posture, which requires a higher level of review and burden to pierce the attorney-client and work-product privileges.

In California, the crime-fraud exception is codified in the Evidence Code. The attorney-client and work-product privileges are lost if the relation is abused by a client who seeks legal assistance to "enable or aid anyone to commit or plan to commit a crime or fraud." Cal. Evid. Code, § 956. Like the District of Columbia and Southern District of Florida rules, the proponent of the exception has the burden to prove a *prima facie* case of crime or fraud and that the information sought to be excepted from a claim of privilege is reasonably related to that crime or fraud. (*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal. App. 3d 1240, 1262.)

Whatever legal challenges Trump's legal team bring to the admissibility of Corcoran's evidence, when making their decision, the court in the Southern District of Florida will have to review the facts the same way that the D.C. judge reviewed the facts. Based on the allegations in the unsealed indictment, it seems clear that there is a strong case that Corcoran's evidence obtained piercing the attorney-client and opinion work-product privileges should be admitted to the jury during Trump's trial.