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COMMENTS

NO MORE CONFIDENCES? THE CRIME-FRAUD EXCEPTION AS A BAR TO THE MARITAL PRIVILEGE: UNITED STATES v. NEAL

At common law, there existed a blanket prohibition against the testimony of a non-party spouse when the other spouse was a party to an action,1 as well as a more limited marital privilege that prevented spouses from testifying to certain confidential communications.2 As the rules that prevented all testimony of non-party

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1 See E. Cleary, McCormick on Evidence § 78, at 188 (1972) [hereinafter cited as McCormick]; J. Maguire, Evidence, Common Sense and Common Law 80-81 (1947); Note, Competency of One Spouse to Testify Against the Other in Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend, 98 Va. L. Rev. 359, 360-61 (1952) [hereinafter cited as Note, Competency].

The first testimonial prohibition prevented either spouse from testifying as a witness against the other. See 8 J. Wigmore, Evidence in Trials at Common Law § 2227, at 211 (McNaughton rev. ed 1961). This rule prohibiting adverse spousal testimony was classified as a privilege. See id. There was, however, a difference of opinion among commentators as to which spouse could exercise the privilege. See McCormick, supra, § 66, at 161-62. Some argued that the privilege vested in the defendant-spouse while others believed it belonged to the testifying spouse. See Comment, Evidentiary Privilege and Incompetencies of Husband and Wife, 4 Ark. L. Rev. 426, 426-27 (1950). There were still others who argued that either spouse had the power to invoke the privilege. See Note, Evidence—Adverse Spousal Testimony in Federal Courts, 33 Tul. L. Rev. 884, 886 (1959) [hereinafter cited as Note, Adverse Spousal Testimony]. The second common law rule prohibiting marital testimony forbade either spouse from testifying on the other's behalf. See Maguire, supra, at 80; 8 J. Wigmore, supra, § 2227, at 211. Some commentators categorized this rule as a disqualification, see McCormick, supra, § 66, at 161; 8 J. Wigmore, supra, § 2227, at 221, while others argued that since the wife was considered inseparable from the husband, see, e.g., McCormick, supra, § 66, at 163 (citing Coke, Commentary on Littleton 6b (1628) (wife and husband are “two souls in one flesh”)), each was incompetent to testify for the other because they were actually parties in interest, see Recent Cases, Evidence — Competency of Wife to Give Adverse Testimony Against Husband, 32 Temp. L.Q. 351, 352 (1959); Note, Adverse Spousal Testimony, supra, at 885; Comment, supra, at 427. The third principle governing the admissibility of spousal testimony was the marital confidential communications privilege. See infra note 2.

2 See McCormick, supra note 1, § 78, at 188; United States v. Byrd, 750 F.2d 585, 590 (7th Cir. 1984); United States v. McCown, 711 F.2d 1441, 1452 (9th Cir. 1983); Note, Pillow
spouses fell into disfavor and were narrowed in scope, the marital

Talh, Grim Grippers and Connubial Bliss: The Marital Communication Privilege, 56 Ind. L.J. 121, 128 (1980). The marital communications privilege satisfied the requirements basic to all rules of privileged communications. 8 J. Wigmore, supra note 1, § 2332, at 642-43. Wigmore lists these requirements as:

(1) The communications originate in confidence. (2) The confidence is essential to the relation. (3) The relation is a proper object of encouragement by the law. And (4) The injury that would inure to it by disclosure is probably greater than the benefit that would result in the judicial investigation of the truth.

Id. at 642.

A prerequisite to the availability of the privilege is that the communication take place within a valid marriage. See 8 J. Wigmore, supra note 1, § 2335, at 647. Therefore, communications between husband and wife made before their marriage or after their divorce are not privileged. McCormick, supra note 1, § 81, at 195; see, e.g., United States v. Pensiger, 549 F.2d 1150, 1151 (8th Cir. 1977); Yoder v. United States, 80 F.2d 665, 668 (10th Cir. 1935). However, to effectuate the policy of promoting confidences, communications made during a valid marriage will remain privileged even after the marriage is dissolved, whether by divorce or death. See McCormick, supra note 1, § 85, at 200. The privilege has been interpreted to encompass both verbal and written expressions as well as disclosive acts. See 3 B. Jones, JONES ON EVIDENCE § 830, at 1555 (1958 & Supp. 1971); McCormick, supra note 1, § 79, at 191.

The presence of third parties at the time of the communication complicates the application of the privilege. See 3 B. Jones, supra, § 819, at 1536-37. If a third party whose presence is unknown to the spouses at the time of the communication overhears the conversation, the privilege exists as to testimony by either spouse but cannot prevent disclosure of the communication by the third party. See id. § 819, at 1535-38; McCormick, supra note 1, § 82, at 196. This rule is also applicable in situations in which a written communication is intercepted or lost. See McCormick, supra note 1, § 82, at 196. If, however, the communication is knowingly made in the presence of a third party, the communication will be deemed non-confidential and the third party, as well as either spouse, will be free to testify. See Pereira v. United States, 347 U.S. 1, 6 (1954).

* See Recent Decisions, Evidence—Privilege Regarding Non-Confidential Marital Testimony is Vested Only in Witness Spouse, Trammel v. United States, 445 U.S. 40 (1980), 11 Cum. L. Rev. 465, 470 (1980) (by mid to late 1800’s, incompetency grounded in “parties in interest” theory was no longer tenable); 8 J. Wigmore, supra note 1, § 2334, at 644-45. The justification for retaining the spousal disqualification rule was to ensure domestic harmony. See 8 J. Wigmore, supra note 1, § 2228, at 216; Reutlinger, Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege, 61 Calif. L. Rev. 1353, 1359-60 (1973). While spousal disqualification did not necessarily ensure domestic tranquility, it could, and frequently did, stand in the way of justice. See 8 J. Wigmore, supra note 1, § 2228, at 216.

Under state law in most jurisdictions, statutory modifications have narrowed the blanket rules prohibiting non-party spouse testimony, and have made either spouse competent to testify for or against the other in civil actions. See McCormick, supra note 1, § 66, at 161; Editorial Note, Spousal Testimony, 28 Brooklyn L. Rev. 259, 260 (1962). It was not until 1933 that the Supreme Court granted one spouse the right to testify on behalf of the other in criminal cases. See Funk v. United States, 290 U.S. 371, 380-82 (1933); Note, Competency, supra note 1, at 360. The Court in Funk pointed out the incongruity of preventing a witness-spouse from offering favorable testimony on behalf of the other spouse when the defendant-spouse was free to offer testimony in his or her own behalf. See 290 U.S. at 381. The Funk Court did not, however, address the competency of the witness-spouse to testify
privilege for confidential communications took on increased significance. The privilege, however, is not absolute, and various exceptions to its use have been established.

The crime-fraud exception against the defendant-spouse. *Id.* at 373. This issue was addressed by the Supreme Court in 1958, when, based on deference to tradition, the Court upheld the privilege of the party-spouse to bar any adverse testimony by the witness-spouse. See *Hawkins* v. United States, 358 U.S. 74, 77 (1958). In subsequent cases, support for the privilege against adverse spousal testimony began to erode. See *Trammel* v. United States, 445 U.S. 40, 48 (1980). At the state level, the number of jurisdictions that permitted an accused to claim a privilege against adverse spousal testimony began to decrease. See *id.* at 48 & n.9. The *Trammel* Court modified *Hawkins* and held that the “witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying.” *Id.* at 53. It was thought that by allowing the witness-spouse to choose to testify, an accommodation would be made between preserving marital peace and serving the ends of justice. *Id.* at 52. However, *Trammel* did not affect the defendant-spouse’s right to prevent the other spouse from testifying as to confidential communications that passed between them. *Id.* at 51.

*See* *McCormick*, *supra* note 1, § 78, at 189; *8 J. Wigmore*, *supra* note 1, § 2333, at 644-65. At common law, the marital privilege was so inextricably intertwined with the absolute prohibitions on spousal testimony that it was not until the late 1800’s that the privilege was recognized as a separate entity. Note, *Adverse Spousal Testimony*, *supra* note 1, at 887. While there was no doubt that the marital privilege was separate and distinct from the broader prohibitions on spousal testimony, see *McCormick*, *supra* note 1, § 78, at 188, it was only after the rule of incompetency and the privilege to prevent adverse spousal testimony underwent substantial modification that the distinct privilege of preventing evidence of confidential spousal communications came into existence, see *8 J. Wigmore*, *supra* note 1, § 2333, at 644; Note, *Competency*, *supra* note 1, at 361. There was little opportunity for the privilege to be recognized judicially before these modifications since earlier laws covered nearly all situations in which a need for testimonial evidence of confidential communications existed. See *McCormick*, *supra* note 1, § 78, at 189. In situations in which a witness spouse wished to reveal confidential communications in a manner adverse to the other party-spouse, the privilege against adverse spousal testimony, not the marital privilege, would prevent such testimony. See *8 J. Wigmore*, *supra* note 1, § 2333, at 644. Similarly, in situations in which testimony of confidential communications was desired on behalf of a defendant spouse, that testimony by the witness-spouse was precluded on the incompetency principle. *Id.; see supra* note 1.

*See* *8 J. Wigmore*, *supra* note 1, § 2336, at 648-67. The stated purpose of the marital confidential communications privilege is to protect only confidential communications. *See id.* While there is a presumption that all marital communications are confidential, see *Wolfe* v. United States, 291 U.S. 7, 14 (1934); *8 J. Wigmore*, *supra* note 1, § 2336, at 648-56; *infra* note 43 and accompanying text, there are certain situations in which the privilege will be deemed inapplicable. When a crime is committed by one spouse against the other or their children, the acts are deemed non-confidential. See *McCormick*, *supra* note 1, § 84, at 199. Actions for divorce, abandonment, and non-payment of support will also render the privilege inapplicable. *Id.* Communications between spouses concerning business transactions are not privileged since each parties’ role as spouse is merely incidental. See United States v. Kahn, 471 F.2d 191, 194 (7th Cir. 1972), cert. denied, 411 U.S. 986 (1973), *rev’d on other grounds*, 415 U.S. 143 (1974); *3 B. Jones*, *supra* note 2, § 819, at 1535-38. Likewise, communications between the couple in furtherance of a crime or fraud are not protected under the marital privilege. See *McCormick*, *supra* note 1, § 79, at 192. The marital privilege may also be waived by the holder expressly or by failure to assert the privilege. *See id., § 83, at 198.*
prevents use of the marital privilege when a husband and wife conspire or otherwise actively participate in the commission of a crime. This exception is based on the idea that communications dealing with the joint commission of a crime do not involve the privacy of the marriage, and are therefore outside the scope of the marital privilege. Recently, in United States v. Neal, the United States Court of Appeals for the Tenth Circuit extended the scope of the crime-fraud exception and held that the marital privilege is not available when one spouse participates as an accessory after the fact to a crime committed solely by the other spouse.

In Neal, the defendant, Jake Keller Neal, was convicted of murder and the robbery of a savings and loan association. On the night of the robbery, the defendant returned to his home and emptied a pillowcase of the stolen money in the presence of his wife. After Neal told his wife where the money came from, the two separated it by denomination and put it back into the pillowcase. Thereafter, at Mrs. Neal's request, the couple removed wrappers

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* See, e.g., United States v. Entrekin, 624 F.2d 597, 598 (5th Cir. 1980) (conversations between husband and wife regarding their commission of mail fraud are outside privilege), cert. denied, 439 U.S. 988 (1981); United States v. Price, 577 F.2d 1356, 1364-65 (9th Cir.) (privilege not applicable when husband and wife engage in criminal conspiracy), cert. denied, 439 U.S. 1068 (1978); United States v. Mendoza, 574 F.2d 1373, 1381 (5th Cir.) (conversation about ongoing crimes not protected), cert. denied, 439 U.S. 988 (1978); Note, The Future Crime or Tort Exception to Communications Privilege, 77 Harv. L. Rev. 730, 734 (1964). But see In re Grand Jury Subpoena United States, 755 F.2d 1022, 1028 (2d Cir. 1985).

* See United States v. Mendoza, 574 F.2d 1373, 1380 (5th Cir.), cert denied, 439 U.S. 988 (1978); United States v. Kahn, 471 F.2d 191, 194 (7th Cir. 1972), cert denied, 411 U.S. 986 (1973), rev'd on other grounds, 415 U.S. 143 (1974). The Mendoza court stated that "marital communications having to do with the commission of a crime and not with the privacy of the marriage itself do not fall within the privilege's protection." Mendoza, 574 F.2d at 1380. The existence of the crime-fraud exception does not violate the marital privilege because admitting the communications between "spouses about crimes in which both spouses participated would offend neither the family harmony nor the public interest . . . ." Id.

* 743 F.2d 1441 (10th Cir. 1984), cert. denied, 105 S. Ct. 1848 (1985).

* Id. at 1446.

10 Id. at 1442. Neal was convicted for violations of 18 U.S.C. § 2113(a),(e). Id. At the time of the robbery, Neal was employed as a security guard by the savings and loan institution which he robbed. Id. His wife had previously been employed as a teller at the same institution. Id.

11 Id. The facts on appeal were derived mainly from the testimony of Neal's wife at an in camera hearing held to determine the admissibility of her trial testimony. See id. at 1442-44. Mrs. Neal was interviewed by the police on several occasions immediately following the crime, and, when granted immunity, related her husband's commission of the crime. Id. at 1442.

12 Id. at 1442-43.
from the stolen currency and Mrs. Neal destroyed the wrappers and some of the money.\textsuperscript{13} Subsequently, Mrs. Neal spent the remaining funds.\textsuperscript{14} Prior to trial, the district court granted Neal's motion to exclude certain inter-spousal conversations on the ground that admitting them would violate his confidential communications privilege.\textsuperscript{15} At the trial, however, Mrs. Neal was permitted to testify about a conversation she had with her boyfriend in which she stated that her husband had robbed the savings and loan and had killed the teller.\textsuperscript{16} On appeal from his conviction, Neal claimed that the admission of his wife's testimony had been contrary to the district court's pre-trial motion, and had violated Neal's marital confidential communications privilege.\textsuperscript{17} The Tenth Circuit disagreed and held that the testimony of the defendant's spouse was admissible.\textsuperscript{18}

Writing for the court, Judge Barrett suggested that the suppression of certain conversations by the district court was an unduly cautious measure.\textsuperscript{19} The court, after ruling that Mrs. Neal had become an accessory after the fact when the defendant physically disclosed the money in her presence and explained where it had

\textsuperscript{13} Id. Mrs. Neal suggested to her husband that the $50 bills be burned because she knew, based on her past experience as a teller at the savings and loan, that the $50 bills were marked for detection. Id. Mrs. Neal also suggested that the $100 bills be burned because she feared that passing them would be too noticeable. Id. After the money was burned, Mrs. Neal washed the ashes down the drain. Id.

\textsuperscript{14} Id. The stolen money was all spent by Mrs. Neal with her husband's knowledge within one month after the robbery. Id. Mrs. Neal stated that the police began to suspect her when they learned of her extravagant purchases, and that she cooperated with them in order to avoid prosecution. Id.; see supra note 11.

\textsuperscript{15} Id. at 1442. The district court conducted an in camera hearing to determine the admissibility of Mrs. Neal's trial testimony. Id. The district court ruled that Mrs. Neal could not testify that her husband dumped the money on the bed or informed her that he had robbed the bank and killed the teller, id. at 1444, but permitted her to testify that she discovered the money on the bed and to the manner in which the money was counted, hidden, and spent, id. The district court also excluded testimony regarding a telephone conversation wherein Mrs. Neal lured her husband into confessing his guilt, while FBI agents listened in with the permission of Mrs. Neal. See United States v. Neal, 532 F. Supp. 942, 944-47 (D. Colo. 1982), aff'd, 743 F.2d 1441 (10th Cir. 1984), cert. denied, 105 S. Ct. 1848 (1985).

\textsuperscript{16} 743 F.2d at 1443-44. On direct examination, Mrs. Neal was asked, "[W]hat did you tell [your friend] your problem was?" Id. at 1443. Mrs. Neal replied, "I told him that my husband had robbed this Midland Savings and that he had killed this girl . . . ." Id. at 1444. Upon admission of this statement, Neal moved for a mistrial, but the motion was denied. Id. Neal then requested that the court give the jury a cautionary instruction, but this request was also denied. Id.

\textsuperscript{17} Id. at 1444.

\textsuperscript{18} Id. at 1446.

\textsuperscript{19} Id. at 1444.
come from. The Neal court reasoned that the marital communications privilege is not applicable when a spouse actively participates in the "fruits" of a crime or "covers up" evidence and then elects to testify against the other spouse. Judge Barrett held that such accessories after the fact may testify under the crime-fraud exception.

Concurring in result only, Judge Logan stated that the adoption of a crime-fraud exception to the marital privilege effectively abolishes the privilege. Judge Logan posited that, due to the overwhelming weight of the other evidence, the conviction could have been affirmed without application of the crime-fraud exception and without the improper admission of the testimony of the defendant's wife.

It is submitted that the Neal court's analysis of the law of accessory after the fact and its subsequent application of the crime-fraud exception is erroneous and effectively diminishes a defen-

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20 Id. at 1445-46. The court stated that at the time Neal emptied the money and explained where it came from, "Marcia did not then recognize any marked bills nor was she aware of the source of the money except for and by reason of Neal's remarks that he had robbed Midland." Id. at 1446 (emphasis in original). The court noted that Mrs. Neal could be prosecuted as an accessory after the fact. Id. at 1445 (citing United States v. Balano, 618 F.2d 624, 630-31 (10th Cir. 1979)).

21 743 F.2d at 1446. The majority opinion quoted extensively from both the Tenth Circuit and Supreme Court decisions in Trammel v. United States, 445 U.S. 40 (1980). See 743 F.2d at 1445. The court adopted the language "we conclude that the existing rule should be modified so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying." Id. (quoting Trammel v. United States, 445 U.S. 40, 53 (1980) (emphasis omitted)).

22 743 F.2d at 1446. Id. at 1445-47. For a discussion of the crime-fraud exception, see supra notes 6-7 & accompanying text.

23 Id. at 1448 (Logan, J., concurring). Judge Logan noted three reasons why he would not adopt the crime-fraud exception. First, Judge Logan did not think the court was free to abolish or modify an explicitly recognized Supreme Court rule. Id. (Logan, J., concurring). Second, Judge Logan stated that even if the court was free to modify the rule, no persuasive evidence to justify such a change was present. Id. (Logan, J., concurring). Finally, Judge Logan foresaw problems in either creating a crime-fraud exception or giving the witness spouse the option to testify. Id. (Logan, J., concurring). The main problem contemplated by Judge Logan was that prosecutors might manipulate the less-culpable spouses by offering immunity in return for voluntary testimony. Id. (Logan, J., concurring).

24 Id. at 1449 (Logan, J., concurring). Judge Logan recognized that the admission of the wife's testimony relating to her conversation with her boyfriend violated the defendant's confidential marital communications privilege. Id. (Logan, J., concurring).

25 See infra notes 32-41 and accompanying text.

26 See infra text accompanying note 32. The Neal court held that under the crime-fraud exception, Neal's disclosures were not confidential, and, therefore,
dant's marital privilege. This Comment will discuss the policies underlying the crime-fraud exception, and, after analyzing the shortcomings of the Neal court's decision, will propose a standard for applying the exception to situations involving accessorial culpability.

**The Crime-Fraud Exception and Accessorial Culpability**

Prior to Neal, the crime-fraud exception to the marital privilege had been applied only in situations in which the husband and wife actively conspired or participated in the joint commission of a crime.28 The rationale for disallowing the marital privilege under such circumstances is that such communications are not made within the privacy of the marriage, but in furtherance of a crime or fraud.29 The policy underlying the crime-fraud exception, however, is not furthered unless both spouses are actually preparing or in

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28 See supra note 6 and accompanying text.

29 See supra note 7 and accompanying text. The purpose behind preserving confidential marital communications is that the free flow of confidential feelings is essential to a healthy marriage. See United States v. Kahn, 471 F.2d 191, 194 (7th Cir. 1972); Comment, *The Husband-Wife Privileges of Testimonial Non-Disclosure*, 56 Nw. U.L. Rev. 208, 218-19 (1961). However, when the marital communications privilege is used for conversations primarily designed to promote criminal activity, the privilege is in reality a mere tool for circumventing the law. According to one court:

We do not believe that the purpose behind the marital privilege is served by permitting spouses engaged in criminal activity to raise a shroud of secrecy around their communications regarding that activity. Such communications do not foster the type of honesty and mutual trust upon which fulfilling marital relations ought to be predicated.

State v. Smith, 384 A.2d 687, 693 (Me. 1978). Therefore, husband-wife conversations referring to a joint conspiracy are not induced by the marriage. "They [are] nothing more than exchanges between partners in crime discussing business matters of interest to the parties as criminals, not as spouses." People v. Watkins, 63 App. Div. 2d 1033, 1034, 406 N.Y.S.2d 343, 345 (2d Dep't), cert. denied, 439 U.S. 984 (1978).
the process of committing a joint crime or fraud. Extending the exception to cover situations involving accessories after the fact requires that the accessorial spouse have actually engaged in the wrongful conduct.

To preserve Mrs. Neal's inculpatory testimony, the Neal court ruled that she became an accessory after the fact and had actually engaged in wrongful conduct "concurrent" with her husband's act of disclosing stolen money in her presence and explaining where it had come from. There are three essential elements, however, that must be satisfied before culpability as an accessory after the fact can be established: there must be a completed felony, the alleged accessory must have knowledge of the commission of the felony, and personal aid must be given to the felon with the purpose of hindering the felon's apprehension or punishment. In Neal, al-

50 See United States v. Byrd, 750 F.2d 585, 590 (7th Cir. 1984); supra notes 6, 7, & 29, and accompanying text.
51 See supra note 6 and accompanying text. The Neal court itself recognized that any extension of the crime-fraud exception must necessarily be limited to cover only communications made at the time when both spouses were participants in criminal activity. See 743 F.2d at 1447. The court mandated that joint activity was required even though one spouse participated merely as an accessory. See id.
52 743 F.2d at 1446.
53 See 18 U.S.C. § 3 (1983); infra notes 34-36 and accompanying text. 18 U.S.C. § 3 provides:

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.


24 See 18 U.S.C. § 3 (1983); United States v. Balano, 618 F.2d 624, 630-31 (10th Cir.), cert. denied, 449 U.S. 840 (1979). The completed-offense requirement demands, for example, that in order to establish a defendant's guilt as an accessory after the fact to bank robbery, the government must first prove that a bank robbery had in fact been committed. See United States v. Rux, 412 F.2d 331, 333 (9th Cir. 1969). However, a person could not be an accessory to murder because of aid rendered to the murderer subsequent to infliction of the wound, but prior to the victim's actual death. See W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 66, at 522 (1972).

25 See 18 U.S.C. § 3 (1983); United States v. McCoy, 721 F.2d 473, 474-75 (4th Cir. 1983), cert. denied, 104 S. Ct. 1918 (1984); United States v. Rux, 412 F.2d 331, 333 (9th Cir. 1969). At common law, the government had to prove that an accessory after the fact knew of the specific crime committed by the principal. See United States v. Ferrebeeuf, 632 F.2d 832, 836 n.2 (9th Cir. 1980), cert. denied, 450 U.S. 934 (1981). Today, however, less stringent standards dictate that the defendant must only have actual knowledge that the principal has committed a federal offense. See United States v. Bissonette, 586 F.2d 73, 76 (8th Cir. 1978). The requirement that the accessory have actual knowledge of the principal's guilt may be satisfied by circumstantial, as well as direct, evidence. See id.; United States v. Burnette, 698 F.2d 1058, 1051 (9th Cir.), cert. denied, 461 U.S. 936 (1983) (citing United States v. Mills, 597 F.2d 693, 696 (9th Cir. 1979)).

though the testifying wife did have knowledge of the completed felony "concurrent" with her husband's confession and disclosure of the stolen money, it is submitted that she could not have satisfied the third element of providing aid with the purpose of hindering a felon's apprehension "concurrent" with her husband's disclosive acts, and therefore, could not have been an accessory at that point in time.

To establish the third element, that aid be given to the perpetrator, the nature of the assistance must be affirmative—the mere failure to report a crime or apprehend a criminal is insufficient.

given to a principal that results in the hindrance of his apprehension, conviction, or punishment must have been given with the intent to so assist before one can be held an accessory. See United States v. Bissonette, 589 F.2d 73, 76 (8th Cir. 1978); People v. Prado, 67 Cal. App. 3d 267, 271, 136 Cal. Rptr. 521, 523 (1977). Comfort or assistance having "no tendency to frustrate the due course of justice" has not given rise to accessorial liability. See R. Perkins & R. Boyce, Criminal Law 749 (1982). Examples of culpable assistance include harboring and concealing the felon; aiding the felon in making his escape; concealing, destroying or altering evidence; inducing a witness to absent himself or to remain silent; giving false testimony at an official inquiry into the crime; and giving misleading information to authorities in order to prevent detection of the felon. W. LaFave & A. Scott, supra note 34, § 66, at 523. It has been argued, however, that the mere receipt or concealment of stolen goods is not the sort of assistance to which accessorial liability will attach because such aid is not rendered personally to the felon. See W. Clark & W. Marshall, A Treatise on the Law of Crimes § 8.07, at 526 (1967).

37 See 743 F.2d at 1445-46. The fact that the crime was actually committed satisfied the first element of accessorial culpability, see supra note 34 and accompanying text, while Neal's confession provided Mrs. Neal with the knowledge to satisfy the second element, see supra note 35 and accompanying text.

38 At common law, a wife was actually incapable of being an accessory after the fact to her husband's crime. See W. Clark & W. Marshall, supra note 36, § 8.07, at 528. Although accessorial liability could attach if children assisted their brothers or sisters, or servants their masters, a wife "[could] not become an accessory by the receipt and concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she, to discover her lord." 4 W. Blackstone, Commentaries 38-39 (1769). Today, many states have statutorily broadened the common law rule, see W. LaFave & A. Scott, supra note 34, § 66, at 524, so that a felon's wife, husband, brother, sister, parent, child, grandparent, or grandchild are exempted from accessorial liability, see, e.g., Fla. Stat. Ann. § 777.03 (West 1976); Mass. Gen. Laws Ann. ch. 274, § 4 (West 1970); N.M. Stat. Ann. § 30-22-4 (1978); Vt. Stat. Ann. tit. 13, § 5 (Supp. 1984); see also Morse, A Survey of Accessory After the Fact Exemptions, 54 Dick. L. Rev. 324 (1950) (categorizing accessory after-the-fact). The federal accessory statute, however, contains no such exemptions. See 18 U.S.C. § 3 (1983).

39 See supra note 36 and accompanying text. Authorities on the subject of criminal law portray "assistance" as an overt attempt to delay the felon's capture or punishment. See R. Perkins & R. Boyce, supra note 36, at 749-50; W. LaFave & A. Scott, supra note 34, § 66, at 523.

40 See W. LaFave & A. Scott, supra note 34, § 66, at 523; R. Perkins & R. Boyce, supra note 36, at 749; accord Russy v. State, 257 Ark. 570, 409 S.W.2d 751, 755 (1975); State v. Hicks, 22 N.C. App. 554, 557, 207 S.E.2d 318, 320, cert. denied, 285 N.C. 761, 209
It is suggested, therefore, that the court erred in determining that the defendant’s wife became an accessory after the fact concurrent with the disclosive acts of the defendant. It is submitted that under the elements required to be an accessory after the fact, it is not possible for an individual to become an accessory “concurrent” with the knowledge-gathering events.

CONFIDENTIAL COMMUNICATIONS

Once the determination is made that a testifying spouse cannot become an accessory after the fact concurrent with the disclosures of the other spouse, the disclosures themselves must be analyzed to determine whether they were in fact confidential, and thus deserving of the protection of the marital privilege. Although private oral disclosures between husband and wife are presumed to be confidential, this presumption can be lost if it is shown that the oral communication was not intended to be, or was not in fact, confidential. In addition to verbal communication, disclosive ges-
tures intended to convey a message may also be deemed confidential and given the protection of the marital privilege.\(^4\) Although communicative acts are not privileged if there is insufficient reliance on the confidentiality element,\(^4\) it has been stated that disclosive acts that evidence a crime performed openly by one spouse in front of the other are made in reliance on the confidential nature of the relationship, and are therefore protected.\(^4\) It is submitted that Neal's oral confession and communicative act of emptying stolen money in front of his wife meet the confidentiality requirements.\(^4\)

was made in the actual presence of third persons destroys the confidentiality of the communication, see Wolfe v. United States, 291 U.S. 7, 14 (1934); United States v. Lustig, 555 F.2d 737, 748 (9th Cir. 1977); supra note 2, as does the intent to disclose that information to a third person, see Pereira, 347 U.S. at 6; supra note 2.

\(^4\) See United States v. Smith, 533 F.2d 1077, 1079 (8th Cir. 1976); United States v. Lewis, 433 F.2d 1146, 1150 (D.C. Cir. 1970); 8 J. Wigmore, supra note 1, § 2337, at 657; B. Jones, supra note 2, § 830, at 1555. The protection of the privilege, however, "extends only to communications, not to acts which are in no way communications." Lewis, 433 F.2d at 1150 (emphasis in original) (quoting 8 J. Wigmore, supra note 1, § 2337, at 657); see Smith, 533 F.2d at 1079.

\(^4\) See United States v. Lewis, 433 F.2d 1146, 1150-51 (D.C. Cir. 1970). The mere fact that one spouse observes acts of the other does not enable such acts to be considered confidential communications. Id. In Lewis, the court found insufficient evidence to determine whether a husband's conduct, upon returning home following criminal activity, was secretive or unnoticed. See id. The court stated that if either circumstance were proven, the confidential communications privilege would not apply, because the elements of communication and confidentiality would be lacking. Id. Conversely, in Neal, the open and communicative nature of the defendant's acts upon his return from the robbery indicate the requisite communication and reliance on confidentiality. Shortly after arriving home from the robbery, Neal proceeded to the bedroom where he dumped the money in front of Mrs. Neal and informed her where the money had come from. See supra text accompanying note 11. Thus, the facts in Neal do not indicate any attempt by the defendant to hide his wrongdoing from his wife.

\(^4\) See United States v. Lewis, 433 F.2d 1146, 1151 (D.C. Cir. 1970); 8 J. Wigmore, supra note 1, § 2337, at 657; S. Stone & R. Lieberman, Testimonial Privileges § 5.11, at 347 (1983). Open acts evidencing a crime can imply a reliance on the confidentiality in the marital relationship. See Lewis, 433 F.2d at 1151; see also People v. Daghita, 299 N.Y. 194, 199, 86 N.E.2d 172, 174 (1949) (wife's knowledge gained as result of defendant's bringing home and storing stolen property product of confidential communication); Menefee v. Commonwealth, 189 Va. 900, 912, 55 S.E.2d 9, 15 (1949) (wife who witnessed husband with gun used to commit crime not permitted to testify).

\(^4\) The Neal court relied heavily on United States v. Trammel, 583 F.2d 1166 (10th Cir. 1978), aff'd, 445 U.S. 40 (1980), in determining that Marcia Neal could testify voluntarily against her husband. See 743 F.2d at 1445. It is submitted, however, that the Trammel decision is completely inapposite to the Neal case. First, in Trammel, the defendant and his testifying spouse were both co-conspirators from the outset of the criminal conduct, see 445 U.S. at 42, while in Neal, the testifying spouse was only involved as an accessory, see 743 F.2d at 1445-46. Second, the Trammel decision dealt only with the privilege against adverse spousal testimony. See 445 U.S. at 41-42. The Trammel court reaffirmed the vitality of the marital privilege and specifically stated that "[t]he privilege as to confidential marital com-
Because the *Neal* court erroneously determined that the defendant's wife became an accessory after the fact concurrent with the defendant's confession rather than when all three elements of accessorial liability were established, the court found it unnecessary to decide whether the accessory spouse's testimony should be limited to disclosures made after the onset of accessorial culpability. It is submitted that this issue was left unanswered because the *Neal* court failed to address the elements of accessorial liability. It is proposed that the best method for extending the crime-fraud exception to accessory after the fact situations is to apply the exception prospectively from the time at which accessorial culpability commences. Such an application would further the underlying theme of the exception, permitting disclosure of communications made with a criminal motive while preserving the confidentiality of those communications that are validly made in reliance on the marital relationship. The *Neal* court's extension of the crime-fraud exception has the effect of applying it *nunc pro tunc*, thus allowing testimony of communications made both prior to, as well as after, any actual criminal participation by the testifying spouse. It is submitted that this application is erroneous because once made, a confidential communication should not lose its status merely because of a subsequent non-confidential act or communication.

When an attorney-client privilege is present, the crime-fraud communication is not at issue in the instant case . . . ." *Id.* at 45 n.5. The option given the testifying spouse in *Trammel* was meant to be applicable only in *Hawkins*-type situations and not to confidential marital communications. *See Id.* at 53. Because the communications between Neal and his wife were confidential, *see supra* notes 42-47 and accompanying text, it is submitted that the *Neal* court's reliance on *Trammel* was misplaced.

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49 743 F.2d at 1445-46.
50 *Id.* at 1446. The court stated:
We do not here decide whether, in accessory-after-the-fact cases, there may be a basis for limiting the testimony of the spouse who becomes an accessory-after-the-fact to that which was said and that which occurred after the non-principal spouse first actively participated in the fruits of crime or actively engaged in a cover-up, with prior knowledge of the fact that the opposite spouse committed the principal crime.

*Id.*

51 *See Id.* at 1445-46; *supra* note 50.
52 *See supra* notes 7, 29 and accompanying text.
53 The *Neal* court applied the crime-fraud exception to communications made subsequent to the overt criminal participation of the defendant's wife. *See 743 F.2d* at 1446-47. Yet the court, in allowing evidence of the defendant's confession to his wife, *see id.* at 1444, applied the crime-fraud exception retroactively, as the defendant's wife was not a criminal participant at the time of the confession, *see supra* notes 37-41 and accompanying text.
exception to accessory after the fact situations operates prospectively. The attorney-client privilege is not recognized when a client seeks advice or assistance to further an ongoing or contemplated wrong. The rationale behind this application is that attorney-client communications are only privileged when the attorney is legitimately consulted in his or her professional capacity.

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64 See Fisher v. United States, 425 U.S. 391, 403 (1976); Clark v. United States, 289 U.S. 1, 15 (1933); Gardner, The Crime or Fraud Exception to the Attorney-Client Privilege, 47 A.B.A. J. 708, 708 (1961). The attorney-client privilege was available at common law, see In re Berkley & Co., 629 F.2d 548, 552 (8th Cir. 1980); R. Weinberg, CONFIDENTIAL AND OTHER PRIVILEGED COMMUNICATION 8 (1967), and today is embodied in the American Bar Association's Code of Professional Responsibility, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1982). The ability of a client to make complete disclosures to his or her attorney is essential for the proper functioning of the adversary system of litigation, see Fisher, 425 U.S. at 403 (1976); United States v. Hodge & Zweig, 548 F.2d 1347, 1355 (9th Cir. 1977); Comment, Legal Ethics: Confidentiality and the Case of Robert Garrow's Lawyers, 25 BUFFALO L. REV. 211, 212-13 (1975), notwithstanding the fact that the privilege is a hindrance to accurate fact finding, see Gardner, supra, at 713. Full disclosure serves the adversary system of litigation by ensuring that an attorney has all the means with which to advise a client and properly raise defenses at trial. Hodge & Zweig, 548 F.2d at 1355; see Grant, Attorney-Client Privilege and the Proposed Model Code of Professional Responsibility, 6 NAT'L J. CRIM. DEF. 163, 163 (1980). It has been suggested that the right to counsel provided in the sixth amendment implies the need for an attorney to have at his or her disposal any and all pertinent information relating to the client's case. See Lewis v. State, 265 Ark. 132, 134, 577 S.W.2d 415, 416 (1979).

A crime-fraud exception exists with respect to the attorney-client privilege. See In re Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984); In re Berkley, 629 F.2d at 553; United States v. Loften, 507 F. Supp. 108, 112 (S.D.N.Y. 1981); McCormick, supra note 1, § 95, at 229; Hazard, An Historical Perspective on the Attorney-Client Privilege, 66 CALIF. L. REV. 1061, 1063 (1978). In return for the grant of privilege attaching to attorney-client confidences, society exacts a quid pro quo from the client—he or she must not abuse the privileged relationship to further an illegal enterprise. Hodge & Zweig, 548 F.2d at 1355. The Supreme Court has stated that "[a] client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told." Clark, 289 U.S. at 15. Although the Supreme Court spoke in terms of fraud alone, the exception has been enlarged so as to apply to crimes and torts. See Duplan Corp. v. Deering Milliken, Inc. 397 F. Supp. 1146, 1172 (D.S.C. 1974).

66 See United States v. Dyer, 722 F.2d 174, 177 (5th Cir. 1983); In re Berkley & Co., 629 F.2d 548, 553 (8th Cir. 1980); Prizel v. Kahlen, Kahlen, Lawrence & Nathan, 74 F.R.D. 134, 138 (S.D.N.Y. 1977). Condoning a limitation on the use of the attorney-client privilege to admissions of past wrongdoing, Dean Wigmore stated that the confidences of people who have already committed crimes may legitimately be protected, wrongdoers though they may have been, because . . . the element of wrong is not always found separated from an element of right; because, even when it is, a legal adviser may properly be employed to obtain the best available or lawful terms of making redress . . . . But these reasons all cease to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing.

Dyer, 722 F.2d at 177 (quoting 8 J. WIGMORE, supra note 1, § 2298, at 573) (emphasis in original).
with regard to prior completed crimes of the client.\textsuperscript{58} Once the privilege attaches, however, it cannot be retroactively eliminated, notwithstanding subsequent joint criminal activity between the attorney and client.\textsuperscript{57} Similarly, in \textit{Neal}, the defendant's confession and disclosive act were confidential,\textsuperscript{58} and therefore should have been protected from disclosure under the marital privilege. It is submitted that any subsequent criminal conduct or conspiracy between husband and wife should preclude protection for only those communications, and should not retroactively expose bona fide confidential communications made prior to the wrongdoing.

\textbf{CONCLUSION}

The crime-fraud exception to the marital privilege prevents criminally conspiring husbands and wives from hiding behind the protection of the privilege. It is aimed only at communications between spouses that are clearly designed to promote criminal or fraudulent ends. It is suggested that in accessory after the fact sit-
utions, the crime-fraud exception should allow testimony of communications made only after the onset of the joint wrongful conduct and should forbid testimony regarding prior confidential communications. By limiting the crime-fraud exception in this manner, the confidentiality of disclosures made in justifiable reliance on the marriage will be preserved, while communications made with a criminal motive will not be protected. Such a prospective application would comport with the goals of the crime-fraud exception and preserve the marital privilege and all confidential communications made in reliance on the marital relationship.

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