

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

RICHARD ALEXANDER MURDAUGH,

Plaintiff,

vs.

D. SHANE KITCHENS, CJM
In his official capacity as Interim Director
Alvin S. Glenn Detention Center, Richland
County Government,

Defendant.

C/A No.: 8:22-608-BHH-JDA

**MOTION FOR PRELIMINARY
INJUNCTION AND SUPPORTING
MEMORANDUM**

Plaintiff Richard Alexander Murdaugh (Murdaugh), by and through his undersigned counsel, hereby moves the Court for a preliminary injunction to prohibit Defendant Shane Kitchens, the Interim Director of the Alvin S. Glenn Detention Center (ASGDC) from disclosing intercepted telephone communications between Plaintiff and others in response to media requests. This motion is made pursuant to Rule 65(a) FRCP and Section 2520(b) of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), 18 U.S.C. § 2520(b).

INTRODUCTION

Murdaugh is being held at ASGDC, unable to post a \$7 million bond on South Carolina state court charges alleging financial crimes. His criminal case has attracted intense media attention, from national, regional, and local news organizations, as well as from podcasters and bloggers on social media sites. Defendant is the Interim Director of ASGDC. ASGDC contracts with a third-party communication provider to process outgoing collect phone calls from inmates. This third-party communication provider creates and stores call detail records (CDRs) for each call and call recordings on a data center which is accessible to ASGDC, upon request.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), codified at Title 18 United States Code, Section 2510, *et seq.*, forbids the willful interception of wire communications, including telephone conversations, without prior judicial authorization except in very limited circumstances. Courts have uniformly held that Title III applies to prison monitoring of inmate calls. *See United States v. Amen*, 831 F.2d 373, 378 (2d Cir. 1987). Courts have allowed prisons and jails to engage in routine monitoring of inmate calls relying on two Title III exceptions. Section 2510(5)(a)(ii), read in context, permits interception of inmate telephone conversations by, “an investigative or law enforcement officer in the ordinary course of his duties,” and § 2511(2)(c) allows interception where, “one of the parties to the communication has given prior consent to such interception.” *United States v. Cheely*, 814 F. Supp. 1430, 1440–41 (D. Ak. 1992), *aff’d*, 21 F.3d 914 (9th Cir. 1994), *opinion amended and superseded*, 36 F.3d 1439 (9th Cir. 1994), *and aff’d*, 36 F.3d 1439 (9th Cir. 1994).

Due to understaffing, ASGDC does not have any correctional officers who review and/or monitor inmate telephone calls in the ordinary course of their duties. Because the correctional officers at ASGDC do not record, monitor, or review inmate calls in the ordinary course of their duties, the Title III exception under Section 2510 (5)(a)(ii) is not applicable. Upon information and belief, ASGDC relies upon the consent exception under Title III, Section 2511(2)(c) to record and monitor inmate telephone calls. Upon entry into ASGDC, an inmate is provided with eighteen (18) pages of rules and on page six (6) the inmate is informed “All calls from the housing modules are collect calls and subject to recording and monitoring.” *See* Exhibit 1. However, the inmate is not informed that recordings of these calls will be provided to the public.

Even when the interception and recording of telephone communications is permitted, Title III strictly limits the disclosure of these communications. *See* 18 U.S.C § 2517. Importantly, Title

III prohibits the disclosure of recorded telephone communications of inmates to the public in response to a records request. *See Lam Lek Chong v. United States Drug Enf't Admin.*, 929 F.2d 729, 735-36 (D.C. Cir. 1991).

In January 2022, an electronic media organization submitted a request under the South Carolina Freedom of Information Act (FOIA) for recordings of Plaintiff's outgoing telephone calls from ASGDC. Defendant, or persons acting on his behalf, provided copies of Plaintiff's intercepted telephone communications with his family members pursuant to the FOIA request. On February 22, 2022, portions of Plaintiff's intercepted calls were posted on Twitter, as a promotion for a podcast titled "Incoming Call from Alex Murdaugh, The Jailhouse Tapes." *See Exhibit 2.* The following day, February 23, 2022, the podcast publicly released approximately one hour of intercepted telephone conversations between Plaintiff and his son, Plaintiff and each of his brothers, Plaintiff and his sister, Plaintiff and his sister-in-law, and Plaintiff and his son's girlfriend. Portions of these calls were also posted on the media organization's website and made available to paid subscribers via YouTube. *See Exhibit 3.* Subsequently, other news organizations have submitted similar FOIA requests for copies of Plaintiff's intercepted telephone communications.

TITLE III AND MONITORING OF INMATE CALLS

Title III forbids the willful interception of wire communications, including telephone conversations, without prior judicial authorization except in very limited circumstances. Courts have uniformly held that Title III applies to prison monitoring of inmate calls. *See Amen*, 831 F.2d at 378. Even assuming that ASGDC is permitted to engage in the monitoring of inmate calls pursuant to the consent exception under Title III, Section 2511(2)(c), ASGDC's disclosure of recordings of inmate telephone calls is strictly limited.

In enacting Title III, Congress sought to regulate comprehensively both the use of electronic surveillance as an investigative tool and the disclosure of materials obtained through such surveillance. *See Gelbard v. United States*, 408 U.S. 41, 46, 92 S.Ct. 2357, 2360, 33 L.Ed.2d 179 (1972). Title III safeguards privacy in the first instance by significantly restricting the initiation of electronic surveillance. *Lam Lek Chong*, 929 F.2d at 732–33. Congressional sensitivity to privacy rights is perhaps most evidently reflected in Title III's strictly limited disclosure provisions. *Id.* at 732.

Apart from two instances in which judges authorizing interception may, at their discretion, release intercepted material to parties overheard, 18 U.S.C. § 2518(8)(d), (10)(a), use and disclosure is governed by Section 2517 of the statute. Section 2517 permits disclosure of intercepted communications in three circumstances only:

- (1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication ... may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
- (2) Any investigative or law enforcement officer ... may use such contents to the extent such use is appropriate to the proper performance of his official duties.
- (3) Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication ... may disclose the contents ... while giving testimony under oath....

18 U.S.C. § 2517(1)–(3)

Title III does not permit disclosure of intercepted communications in response to a records request. *Lam Lek Chong*, 929 F.2d at 732.

STATUTORY REMEDY INCLUDES INJUNCTIVE RELIEF

Title III explicitly authorizes the recovery of civil damages by persons whose communications are disclosed in violation of the statute. 18 U.S.C. § 2520 (1988). Taken together,

these provisions represent a comprehensive statutory scheme dedicated to preserving personal privacy by sharply limiting the circumstances under which surveillance may be undertaken and its fruits disclosed. *Lam Lek Chong*, 929 F.2d at 723. Section 2020(b) states “[i]n an action under this section, appropriate relief includes--

- (1) *such preliminary and other equitable or declaratory relief as may be appropriate;*
- (2) damages under subsection (c) and punitive damages in appropriate cases; and
- (3) a reasonable attorney's fee and other litigation costs reasonably incurred.

18 USC §2020(b)(emphasis added).

Plaintiff seeks a preliminary injunction to prevent Defendant, and anyone on Defendant's behalf or in concert with Defendant, from disclosing to anyone the intercepted telephone communications between Plaintiff and others in response to a records request or for any other purpose except as expressly permitted in Section 2517(1)-(3) of Title III.

Plaintiff further requests expedited discovery to determine the extent of Defendant's prior disclosures of Plaintiff's recorded telephone conversations.

Respectfully Submitted.

s/ Richard A. Harpootlian
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