

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)
)
 v.)
)
 KEVIN A. RING,)
)
 Defendant.)
_____)

No. 1:08-cr-274-ESH

**GOVERNMENT’S OPPOSITION TO DEFENDANT’S MOTION
FOR RELIEF REGARDING POTENTIAL WITNESSES’
INVOCATION OF THEIR FIFTH AMENDMENT RIGHTS**

In his motion, defendant Kevin A. Ring seeks relief the Court cannot provide. The law is clear: “[O]nly the Executive can grant statutory immunity, not a court.” United States v. Lugg, 892 F.2d 101, 104 (D.C. Cir. 1989). Ring does not and cannot cite a case in this circuit in which a court ordered the government to immunize a defense witness. Moreover, Ring does not and cannot point to any prosecutorial misconduct that would militate in favor of such an order.¹ For these reasons, discussed at length below, the Court should deny Ring’s motion.

BACKGROUND

The government recently told Ring that it would not immunize David or Laura Ayres, or Laura Blackann. David Ayres was Attorney General John D. Ashcroft’s Chief of Staff and Laura Ayres was and is his wife. Briefly, the government believes that David Ayres helped Ring secure government funds for the Mississippi Band of Choctaw Indians (the “Choctaw”), specifically funds for a justice center on the Choctaw’s reservation. After the decision was made

¹ The court of appeals has expressly declined to decide whether “courts may intervene in the prosecutorial immunity decision where the prosecutors’ decision not to grant a witness use immunity has distorted the judicial fact-finding process.” United States v. Perkins, 138 F.3d 421, 424 n.2 (D.C. Cir. 1998) (quotation marks and alterations omitted).

to grant the Choctaw those funds, Ring sought David Ayres's further help to ensure that the Choctaw could award the construction contract for the justice center to a contractor of its choosing. In March 2002, Ring, with Jack A. Abramoff's consent, gave David Ayres tickets to the March Madness NCAA college basketball tournament at the then-MCI Center. The evidence at trial will show that Ring hoped and intended that David Ayres would "pay . . . back" Ring and his lobbying colleagues for those and other things of value. (GX 572.)

Moreover, in January 2003, Laura Ayres asked Ring for several expensive tickets to a professional basketball game at the MCI Center, telling Ring that she wanted to give them to her husband for his birthday. Ring, with Abramoff's consent, gave Laura Ayres the tickets. On his annual financial disclosure forms for 2002 and 2003, David Ayres did not disclose his receipt of any of those tickets. Neither Ayres has been willing to speak to the government, which consequently has no idea what either would say about those events.

Blackann was then-U.S. Representative John T. Doolittle's Communications Director when, while helping Ring with an issue in February 2004, she emailed Ring, "Haha! just earning my Sigs Sushi :)." Ring replied, "Exactly. I will keep you occupied." The government interviewed Blackann on July 11, 2007 and November 21, 2008. By letter dated November 21, 2008, the DOJ Criminal Division, Public Integrity and Fraud Sections agreed to give Blackann, for purposes of those conversations, immunity largely coextensive with 18 U.S.C. § 6002.

Based on those conversations, the government believes that Blackann would testify that her email described above was a joke. However, the government believes that Blackann would also testify that she usually did not have to pay for drinks or food, including sushi, at Signatures restaurant. Blackann would likely testify that she did not know Ring before she began working

for Doolittle. Moreover, Blackann would likely testify that Ring had a unique relationship with Doolittle's office and that at times her interactions with Ring were unusual as compared to other lobbyists. Though Blackann did not admit committing a crime, she would likely testify that in hindsight, Doolittle's staffers should not have asked for or accepted tickets and other things of value from Ring.

ARGUMENT

I. The Court Lacks the Power to Grant Statutory Immunity

A court is “authorized by statute to immunize a witness claiming a Fifth Amendment privilege—but only ‘upon the request of the United States attorney.’” United States v. Perkins, 138 F.3d 421, 424 (D.C. Cir. 1998) (emphasis added) (quoting 18 U.S.C. § 6003). Where the government makes no such request, a court “lack[s] authority to invoke the statute.” Id. (citing United States v. Doe, 465 U.S. 605, 616 (1984) (“We decline to extend the jurisdiction of courts to include prospective grants of use immunity in the absence of the formal request that the statute requires.”)); Ellis v. United States, 416 F.2d 791, 796-97 (D.C. Cir. 1969) (concluding that with § 6003 “on the books, the power to grant immunity is plainly outside the judicial province”).

Indeed, “[t]he cases are legion and uniform that only the Executive can grant statutory immunity, not a court.” United States v. Lugg, 892 F.2d 101, 104 (D.C. Cir. 1989) (holding that “the District Judge did not err in not granting immunity that he could not grant nor in not ordering the prosecution to grant immunity when he could not so order.”). Moreover, “it is not the proper business of the trial judge to inquire into the propriety of the prosecution’s refusal to grant use immunity to a prospective witness.” Perkins, 138 F.3d at 424 (quoting United States v. Heldt, 668 F.2d 1238, 1283 (D.C. Cir. 1981) (quotation marks omitted)).

II. The Government Has Not Distorted the Judicial Factfinding Process

Without adopting it as the law of this circuit, Lugg and Perkins noted that other circuits have allowed courts to compel immunity in “extraordinary circumstances.” Id. at 424 n.2; Lugg, 892 F.2d at 104. Citing Seventh and Ninth Circuit cases, the Lugg court emphasized that such “extraordinary circumstances” largely involve prosecutorial misconduct, such as where a prosecutor’s decision not to immunize a witness “has distorted the fact-finding process.” Id. (quotation marks and alteration omitted) (quoting United States v. Paris, 827 F.2d 395, 403 (9th Cir. 1987) (Kozinski, J., dissenting)). Lugg found no cause to compel the government to immunize where the defense witnesses “would have presented at most questionable impeachment of a prosecution witness as to a collateral matter.” Id.; see also United States v. Quinn, 537 F. Supp. 2d 99, 113-14 (D.D.C. 2008) (concluding that court would not have authority to immunize former prosecution witness who prosecution concluded had lied when inculcating defendant).

Here, Ring does not and cannot proffer the Ayreses’ likely testimony and therefore cannot establish that the government’s failure to immunize them constitutes a distortion of the judicial factfinding process. In his motion, Ring insists that he has a “good faith basis to believe that Mr. Ayres and Ms. Ayres would each provide critical exculpatory testimony,” yet in the next paragraph writes that the Ayreses have told him that they will invoke the privilege against self-incrimination. (Mtn. at 2-3.) Ring’s “good faith basis” is little more than hollow speculation made even less reliable by the Ayreses’ invocation of their Fifth Amendment rights. In any event, even assuming arguendo that David Ayres would testify, for example, that Ring did not expressly link the tickets and other things of value with an official act, or that David Ayres did

not receive the benefits with that understanding—and the government has no reason to believe that he would so testify—David Ayres’s mens rea is irrelevant, as the case will not present the question of whether David Ayres joined the charged conspiracy.

Turning to Blackann, her likely testimony would do little more than impeach her “Sigs Sushi” email. Indeed, the government believes that Blackann would testify to instances in which she treated Ring differently, and more favorably, than other lobbyists. Lugg is clear that this sort of “questionable impeachment” of the government’s evidence would not allow the Court to compel the government to immunize Blackann, even assuming that the Seventh and Ninth

Circuit's law is the law of this circuit, a question that Lugg and Perkins expressly declined to decide.

CONCLUSION

For all of the foregoing reasons, the Court should deny Ring's motion.

Respectfully submitted,

RAYMOND N. HULSER
Acting Chief
Public Integrity Section

STUART M. GOLDBERG
Acting U.S. Attorney
District of Maryland
Special Attorney to
the Attorney General

STEVEN A. TYRRELL
Chief
Fraud Section

Dated Sept. 6, 2009

By: /s/ MICHAEL FERRARA
Trial Attorney, Public Integrity Section
1400 New York Ave. NW, 12th Fl.
Washington, DC 20005
Tel.: 202-205-2593
Fax: 202-514-3003
michael.ferrara@usdoj.gov

NATHANIEL B. EDMONDS
Senior Litigation Counsel, Fraud Section

MICHAEL J. LEOTTA
Appellate Chief, District of Maryland
Special Attorney to the Attorney General

CERTIFICATE OF SERVICE

I certify that on September 6, 2009, I served a copy of the above opposition on Andrew T. Wise, Esq. and Timothy P. O'Toole, Esq., counsel for defendant Kevin A. Ring, by filing electronically on ECF.

/s/ MICHAEL FERRARA
Trial Attorney