

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	No. 08-CR-274 (ESH)
	)	
KEVIN A. RING	)	
	)	

**KEVIN A. RING’S MOTION FOR RELIEF REGARDING POTENTIAL WITNESSES’ INVOCATION OF THEIR FIFTH AMENDMENT RIGHTS WITH MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Kevin A. Ring, through undersigned counsel, moves this Court pursuant to the Fifth and Sixth Amendments to the U.S. Constitution, for relief related to potential witnesses’ invocation of their Fifth Amendment rights.

The government intends to focus heavily at trial on the conduct of a number of people whom it will not call as witnesses. It will seek to introduce emails and other documents without eliciting live testimony relevant to explain the circumstances surrounding the documents or the content of the emails. In many circumstances, actual witness testimony would establish the context of the government’s evidence and would be highly exculpatory. As such, the defense seeks to present individuals’ testimony to the jury, subject to cross-examination by the government.

Some witnesses, however, have indicated they will invoke their Fifth Amendment privilege against self-incrimination if called to testify. The defense has asked the government to grant use immunity to those individuals to ensure their testimony at trial, see attachment A, and the government has refused. As a result, the jury will receive an inaccurate and distorted view of critical events and Mr. Ring will be denied his right to present an effective defense.

Mr. Ring seeks the Court's resolution of three issues: first, whether the witnesses at issue face a reasonable prospect of prosecution supporting an invocation of privilege given the issues the defense intends to explore (thereby defining the scope of any cross-examination); second, whether, if the Court determines a reasonable fear of prosecution exists, it can and should compel the government to provide use immunity to these witnesses under 18 U.S.C. § 6002, and third, what remedy the Court should impose if the government refuses to grant immunity to ensure the jury is not presented a distorted and inaccurate account of critical events, which would deprive Mr. Ring of a fair trial in violation of his constitutional rights.

### **ARGUMENT**

This motion concerns two potential witnesses, David Ayres and Laura Ayres, whose testimony is indispensable to a fair trial.<sup>1</sup> The government intends to suggest that Mr. Ayres, after being involved in an official decision benefiting one of Mr. Ring's clients, received a ticket to one sporting event and a set of tickets to a later event. Mr. Ring has a good faith basis to believe that Mr. Ayres and Ms. Ayres would each would provide critical exculpatory testimony regarding the circumstances of Mr. Ayres' receipt of those tickets and regarding Mr. Ring's contact with Mr. Ayres on relevant issues. As a result, the defense has indicated to Mr. and Mrs. Ayres' counsel an intention to subpoena them for the trial pursuant to his constitutional right to present a defense. *See* U.S. Const. Amend. VI (accused shall have the right "to have compulsory process for obtaining witnesses in his favor."); *Washington v. Texas*, 388 U.S. 14, 19 (1967) ("[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is

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<sup>1</sup> A third witness, Laura Blackann, also falls into this category. The government has indicated it will advise Mr. Ring's counsel by noon on Thursday, September 3, 2009 if it will grant Ms. Blackann immunity.

in plain terms the right to present a defense.”); see *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (describing right to present a defense as grounded in Fifth and Sixth Amendments).

Counsel for Mr. Ayres and counsel for Ms. Ayres have indicated that each would invoke their Fifth Amendment privilege if subpoenaed.<sup>2</sup> Mr. Ring’s constitutional right to compulsory process thus appears at first blush to conflict with the Fifth Amendment privileges likely to be invoked by Mr. and Mrs. Ayres.

If a true conflict exists between the right to self-incrimination and the right to compulsory process, a witness cannot be compelled by the defense to testify without a grant of immunity. *United States v. Reese*, 561 F.2d 894, 899-900 (D.C. Cir. 1977). That inquiry, however, resolution of the first question: whether either witness has a reasonable fear of prosecution arising out of testimony that would be given in Mr. Ring’s case.

**A. The Court must first determine whether the government could bring any charges against Mr. or Mrs. Ayres arising out of the subject matter of their sought testimony.**

On that preliminary issue, it does not appear that the government would be able to prosecute either Mr. Ayres or Ms. Ayres in connection with events at issue in this case. Neither Mr. Ayres nor Mrs. Ayres is alleged by the government to be an “unindicted co-conspirator.” Moreover, the acts in question largely occurred in 2002 and the last event of relevance to either testimony occurred in or around February 2003. The applicable statutory limitations period for all charges is 18 U.S.C. § 3282, which provides that for all non-capital offenses “no person shall be prosecuted, tried, or punished for any offense, unless the indictment is found or the

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<sup>2</sup> Mr. Ring has not yet formally subpoenaed each witness, but their respective attorneys have confirmed that service of a subpoena will be accepted.

information is instituted within five years next after such offense shall have been committed.”

As a result, these incidents are well beyond the statute of limitations.

No Fifth Amendment privilege exists in connection with conduct that occurred beyond the limitations period. *United States v. Rendahl*, 746 F.2d 553, 557 (9th Cir. 1984); *United States v. Blumberg*, 787 F. Supp. 67, 70 (S.D.N.Y. 1992). Under such circumstances, a witness does not have a reasonable fear of prosecution in the event of his or her testimony. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189-190 (2004) (“The Fifth Amendment prohibits only compelled testimony that is incriminating . . . . A claim of Fifth Amendment privilege must establish ‘reasonable ground to apprehend danger to the witness from his being compelled to answer...’”) The defense cannot contemplate a permissible government cross-examination that would implicate the statute of limitations issue. So long as the testimony was confined to the events at issue in this case, the refusal to grant immunity and the blanket invocations of the Fifth Amendment privilege in response are unsustainable.

To permit a witness to invoke the privilege against self-incrimination fundamentally undermines the Sixth Amendment right of the accused to compulsory process, and should be done only as a last resort. This Court is accordingly required to “make an appropriate inquiry into the basis of the privilege claimed by the witness, and may not permit the witness to refuse to testify where a narrower privilege will adequately protect him.” *United States v. Thornton*, 733 F.2d 121, 125 (D.C. Cir. 1984), *quoting in part*, *United States v. Reese*, 561 F.2d 894, 900 (D.C. Cir. 1977). In the event that the government seeks to question the witnesses about events outside the scope of the defense direct examination, the Court could fashion a protective order to allow the witnesses to testify under a narrow invocation of privilege. Such an order could direct examination of Mr. and Mrs. Ayres to be restricted to questions about events that occurred on

and before March 2003. The government can have no legitimate opposition to tailoring the questioning in such a fashion, thus eliminating any possibility that the witness will incriminate himself or herself by testifying at the trial, while at the same time ensuring that jurors hear from the relevant witnesses.

**B. If the Court determines the government could bring a viable case, it should compel the government to grant immunity.**

Should the Court determine that a reasonable fear of prosecution nonetheless exists for these witnesses, Mr. Ring requests that the Court compel the prosecution to grant immunity to them under 18 U.S.C. § 6001 *et seq.* The government has suggested that events related to Mr. Ayres and Mrs. Ayres will form critical parts of its proof at trial. *See Government Exhibits* 551, 552, 553, 554, 556, 557, 560, 561, 563, 571, 572, 584, 597, & 598. The government's reliance on out-of-court statements devoid of context and live explanation creates the potential to grossly distort the fact-finding process.

While the defense cannot force the government to call relevant witnesses in its case, it can seek to present the full picture to the jury through its case. In exceptional circumstances where the exclusion of testimony pursuant to an invocation of the right against self-incrimination would deprive the defendant of a fair trial, the United States Attorneys' Manual suggests that granting immunity to defense witness under 18 U.S.C. § 6002 is proper. USAM 9-23.214. ("As a matter of policy, 18 U.S.C. § 6002 will not be used to compel the production of testimony or other information on behalf of a defendant except in extraordinary circumstances where the defendant plainly would be deprived of a fair trial without such testimony or other information.") The government has granted immunity to witnesses it intends to call in its case in chief. Its refusal to do so for exculpatory defense witnesses raises the clear potential of distorting the fact-finding process.

Faced with this situation, this Court has two potential options. First, law in this Circuit suggests that the Court may have the power to compel the government to grant immunity. *United States v. Perkins*, 138 F.3d 421, 424 n. 2 (D.C. Cir. 1998)(noting that some circuits permit district courts to compel a grant of immunity where prosecutor’s denial “has distorted the judicial fact-finding process” and suggesting that Court may follow that rule in appropriate circumstances). The *Perkins* decision followed the D.C. Circuit’s earlier discussion of the issue in *United States v. Lugg*, 892 F.2d 101, 104 (D.C. Cir. 1989), where it recognized “[s]ome cases have indicated that the government may be compelled to grant a defense witness immunity in ‘extraordinary circumstances.’” *Id.*, citing *United States v. Pinto*, 850 F.2d 927, 935 (2d Cir.); *United States v. Praetorius*, 622 F.2d 1054, 1064 (2d Cir. 1979). Specifically, the Court recognized that the Seventh and Ninth Circuits “have indicated that courts may intervene in the prosecutorial immunity decision ‘where the prosecutor’s decision not to grant a witness use immunity has distorted the judicial fact-finding process.’” *Id.* (See *United States v. Taylor*, 728 F.2d 930, 935 (7th Cir. 1984); *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir. 1976).

**C. If the Court concludes it cannot compel immunity, it should consider alternative remedies to avoid the unfairness to Mr. Ring.**

If the Court concludes it cannot force the government to grant immunity, it should fashion an alternative remedy that prevents the government from leaving the jury with an unfair and mistaken impression from the selective presentation of evidence. If the government maintains its refusal to grant immunity, the Court may force the government to choose between granting immunity and dismissing the case. *Carter v. United States*, 684 A.2d 331, 344 (D.C. 1996) (en banc) (noting that where witness invokes valid privilege and court has determined that grant of immunity is necessary to a fair trial, Court may dismiss the indictment if government refuses to grant immunity). Inherent in that holding is the prospect that the Court can fashion an

alternate remedy. In this situation, a fair remedy would be the preclusion of documents or testimony from the government's witnesses (which would be largely if not exclusively second-hand accounts introduced as "co-conspirator" statements) regarding the subject matter Mr. and Mrs. Ayres would testify about.

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Mr. Ring seeks to meaningfully exercise core Constitutional rights to challenge the government's evidence against him and to present a defense. The government's refusal to grant immunity to key exculpatory witnesses impermissibly interferes with those rights. The Court should fashion appropriate relief if it finds, in the first instance, that the government's position regarding the reasonable prospect of prosecution is valid.

Respectfully submitted,

/s/ Andrew T. Wise

Andrew T. Wise (D.C. Bar # 456865)  
Timothy P. O'Toole (D.C. Bar # 469800)  
MILLER & CHEVALIER CHARTERED  
655 Fifteenth Street, N.W., Suite 900  
Washington, DC 20005-5701  
Tel. (202) 626-5800  
Fax. (202) 626-5801

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