

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA)	
)	No. 08 CR 846
vs.)	Judge Joan H. Lefkow
)	
JON BURGE)	

**RESPONSE TO DEFENDANT’S MOTION
REGARDING CERTAIN DEFENSE WITNESSES**

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, submits the following response to defendant’s motion regarding certain defense witnesses. In his motion, defendant requests three alternative remedies with respect to two defense witnesses who claim through counsel that they will assert their Fifth Amendment rights and refuse to testify. First, defendant requests that the Court hold a hearing and direct the witnesses to testify. Second, defendant requests that the Court immunize these witnesses. Third, defendant gives notice of his intent to seek to admit the witnesses’ prior testimony pursuant to Federal Rule of Evidence 807.

I. This Court Should Hold a Hearing to Determine Whether the Witnesses have a Valid Fifth Amendment Privilege.

The government agrees with defendant that this Court should hold a hearing to determine whether the witnesses at issue are entitled to invoke their Fifth Amendment privileges against self-incrimination. The Seventh Circuit has held that it is the trial court’s duty to determine whether “a witness can demonstrate any possibility of prosecution which is more than fanciful,” before that witness is entitled to assert a Fifth Amendment privilege.

See In Re Folding Carton Antitrust Litigation, 609 F.2d 867, 871 (7th Cir. 1979); *see also National Acceptance Co. of America v. Bathalter*, 705 F.2d 924, 927 (7th Cir. 1983) (finding that validity of a claim of privilege “hinges not on the witness’s say so alone: the trial judge must determine whether the witness’s silence is justified”). Among other ways to determine whether there is any possibility of prosecution is an examination of whether the statute of limitations has run for all criminal offenses the witness may have committed. *Id.* at 872. Unless each witness makes a showing that he “has reasonable cause to apprehend danger from a direct answer,” the witness is not entitled to assert the protection of the Fifth Amendment. *See Hoffman v. United States*, 341 U.S. 479 (1951).¹

The government also agrees with defendant that the witnesses should not be allowed to invoke their Fifth Amendment right because they claim they might be charged with perjury for their trial testimony. “A witness may not claim the privilege of the fifth amendment out of fear that he will be prosecuted for perjury for what he is about to say. The shield against self-incrimination in such a situation is to testify truthfully, not to refuse to testify on the basis that the witness may be prosecuted for a lie not yet told.” *See United States v. Whittington*, 783 F.2d 1210 (5th Cir. 1986); *United States v. Vavages*, 151 F.3d 1185, 1192 (9th Cir. 1998).

For these reasons, the government joins in defendant’s request that the Court hold a

¹ Although the government does not know the topics that defendant seeks to question the witnesses about, it is likely that all took place prior to 1992. The general statute of limitations for criminal offenses except for murder and sexual offenses in the state of Illinois is three years. 720 ILCS 5/3-5.

hearing to determine whether the witnesses at issue have a valid Fifth Amendment privilege.

II. This Court Cannot Immunize the Witnesses.

Assuming that the witnesses have a valid Fifth Amendment privilege, defendant requests that the Court immunize the witnesses. Defendant's request should be rejected, as there is no legal basis for the Court to act.

Congress has delegated the authority to grant immunity to the executive branch of government. *See* 18 U.S.C. § 6003 (1982); *United States v. Taylor*, 728 F.2d 930, 934 (7th Cir. 1984). As the Seventh Circuit has stated, "[t]he power to grant use immunity is delegated exclusively to the executive branch of the government; federal courts play only a ministerial role in ensuring the power is properly exercised." *United States v. George*, 363 F.3d 666, 671-72 (7th Cir. 2004).

Defendant cites no cases from the Seventh Circuit that hold otherwise. In fact, the only opinion defendant does cite with this holding, *Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980), was noted by the Seventh Circuit as being contrary to its case law. *See United States v. Herrera-Medina*, 853 F.2d 564, 568 (7th Cir. 1988). And *Smith* itself was limited to its facts by the Third Circuit. *See United States v. Santtini*, 963 F.2d 585, 597-99 & 598 n.6 (3d Cir. 1992).

Because the Seventh Circuit has rejected defendant's argument that a judicial grant of immunity for a defense witness is ever appropriate, defendant's motion for judicial

immunity must be denied. *See, e.g., United States v. Burke*, 425 F.3d 400, 411 (7th Cir. 2005).²

III. Rule 807 Notice.

Finally, the defendant gives notice of his intent to seek the admission of the prior testimony of these two witnesses under Federal Rule of Evidence 807, if the Court finds that their Fifth Amendment privilege exists and that immunity is inappropriate. The government objects to the use of this testimony under Rule 807, as defendant has not demonstrated the “exceptional circumstances” that Rule 807 requires. *See e.g., United States v. Sinclair*, 74 F.3d 753, 759 (7th Cir. 1996) (“Congressional commentary on the exception indicates that courts should define these conditions narrowly so that they do not use the exception as a way of dramatically revising the hearsay rule”); *United States v. Hughes*, 535 F.3d 880, 882 (8th Cir. 2008) (Congress intended the residual exception “to be used very rarely, and only in exceptional circumstances”); *United States v. Walker*, 410 F.3d 754, 757 (5th Cir. 2005) (same); *United States v. Lawrence*, 349 F.3d 109, 117 (3d Cir. 2003) (use of residual exception is rare, and requires exceptional circumstances, exceptional degree of trustworthiness, and high degree of probative value and necessity); *United States v. Libby*,

² Defendant also intimates that the government should grant these witnesses immunity. However, the Seventh Circuit has held that the government is not required “to give an ‘immunity bath’ to defense witnesses.” *Resnover v. Pearson*, 965 F.2d 1453, 1461 (7th Cir. 1992). The immunity statutes “were not designed to benefit defendants,” *United States v. Frans*, 697 F.2d 188, 191 (7th Cir. 1983), and the government is given “significant discretion” to refuse to grant immunity to witnesses that it anticipates will testify untruthfully. *See United States v. Burke*, 425 F.3d 400, 411 (7th Cir. 2005). Absent a substantial showing that the government is refusing to grant immunity with the intention of distorting the fact-finding process – a claim defendant has not attempted to make in this case – a defendant’s rights are not violated.

475 F. Supp. 2d 73, 79 (D.D.C. 2007) (discussing D.C. Circuit law favoring narrow use of residual exception).

Should this Court determine that it needs to reach the issue of whether the testimony should be admitted pursuant to Rule 807, the government joins in the defense's request for supplemental briefing on the issue.

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

By: s/ April M. Perry
APRIL M. PERRY
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604