

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA )

v. )

THOMAS A. SHAY )  
ALFRED W. TRENKLER )

CRIMINAL NO. 92-10369-Z

OPPOSITION TO GOVERNMENT'S MOTION  
FOR ISSUANCE OF IMMUNITY ORDER AND  
FOR RECONSIDERATION OF ITS ORDER QUASHING SUBPOENA

Thomas A. Shay ("Shay Jr.") hereby opposes the government's motion for an immunity order and for reconsideration of this Court's order quashing a subpoena issued to Shay Jr. To the extent this Court has already ruled on the matter, this is a motion for reconsideration of that ruling. Since such an order would impact upon Shay Jr.'s constitutional rights, he is entitled to respond to the government's motion.

First, Shay Jr. continues to oppose a subpoena compelling him to testify without immunity on the basis of his rights against self-incrimination under the Fifth Amendment to the Constitution of the United States and Part I, Article 12 of the Massachusetts Declaration of Rights. Shay Jr. opposes compulsion of his testimony even with immunity, as the government is still specifically permitted to use his compelled testimony in a prosecution for perjury, giving a false statement, or failing to comply with the order to testify, all very real dangers in this case.

Given Shay Jr.'s particular mental condition and the numerous conflicting statements he has given in the past, there

are substantial questions concerning Shay Jr.'s competency as a witness. Moreover, quite apart from competency questions, AUSA Kelly cannot present testimony which he knows or should know is false. It is with extraordinary hubris that AUSA Kelly asserts that he alone can disentangle fact from fiction where Shay Jr. is concerned, when Nancy Gertner, Amy Baron-Evans, Dr. Phillips, Jefferson Boone, and his own mother, cannot.

Finally, such an immunity order is not co-extensive with Shay Jr.'s rights under the constitution and laws of Massachusetts.

I. THIS COURT CLEARLY HAS THE POWER TO DENY THE GOVERNMENT AN IMMUNITY ORDER ON THE BASIS SUCH AN ORDER WOULD VIOLATE SHAY JR.'S CONSTITUTIONAL RIGHTS.

The immunity statute requires that the government "request an order" from a court. See 18 U.S.C. § 6003. This statute, by empowering the Court to issue an order, necessarily conveys discretion to the Court. United States v. Nieberger, 460 F.2d 290, 291 (6th Cir. 1972). The Court clearly has authority to grant or deny an immunity order upon the government's request, according to its power to determine constitutional questions, or its inherent power to ensure that judicial proceedings are not abused. See United States v. Frans, 697 F.2d 188, 191 (7th Cir. 1983) (review proper where claim is that prosecutor abused discretion, thereby violating due process), cert. denied, 444 U.S. 840 (1979); United States v. Nieberger, 460 F.2d 290 (6th Cir. 1972) (obligation to make a showing in support of immunity application that grand jury actually investigating crimes

referred to in application); In re Baldinger, 356 F.Supp. 153 (D.C.Cal. 1973) (court may exercise its discretion to deny an immunity order in the face of violation of witness' constitutional rights); Matter of Doe, 410 F.Supp. 1163 (D.C.Mich. 1976) (same). Cf. United States v. Angiulo, 897 F.2d 1169, 1190 (1st Cir. 1990) (district court has power to require a grant of immunity if defendant's constitutional rights violated by prosecutorial misconduct amounting to intentional distortion of the fact-finding process).<sup>1</sup>

While the Court may or may not have the power to rule on whether an immunity order would be "in the public interest," that is not this case. Shay Jr. contends that his constitutional rights against self-incrimination and to due process of law would be violated by an immunity order. This Court certainly has the power to decide these questions.

---

<sup>1</sup> In In re Daley, 549 F.2d 469 (7th Cir. 1977), upon which the government relies, the issues before the court were (1) whether a grant of immunity purporting to proscribe use of testimony in state bar disciplinary proceedings actually prevented use of the testimony in such proceedings; and (2) whether the immunity order could stand if it exceeded the scope of the Fifth Amendment privilege. In answering both questions in the negative, the court determined that the prosecutor had exceeded his statutory authority. This necessarily involved a review of the immunity application.

**II. COMPULSION OF SHAY JR.'S TESTIMONY PURSUANT TO AN IMMUNITY ORDER WOULD VIOLATE HIS RIGHT AGAINST SELF INCRIMINATION AND HIS RIGHT TO DUE PROCESS OF LAW IN THAT THE EFFECT, IF NOT THE PURPOSE, OF SUCH ORDER IS TO EXPOSE HIM TO FURTHER PROSECUTION AND PUNISHMENT.**

**A. Shay Jr. Is Not a Competent Witness.**

Shay Jr. does not merely have psychiatric problems. He has psychiatric problems which directly and severely affect his ability to relate events truthfully or accurately. Since he is not "capable of giving a correct account of the matters which he has seen or heard," he is not a competent witness. United States v. Devin, 918 F.2d 280, 292 (1st Cir. 1990), citing District of Columbia v. Armes, 107 U.S. 519, 521-22 (1883).

**B. The Government Is Prohibited From Putting on False Testimony.**

The government may not use testimony which it knows or should know is false. See, e.g., Napue v. Illinois, 360 U.S. 264 (1959); DR 7-102(A)(4).<sup>2</sup> Given Shay Jr.'s psychiatric makeup and the plethora of conflicting statements he has made, it is inconceivable that anyone putting him on as a witness could avoid putting on false testimony. It is with extraordinary hubris that AUSA Kelly asserts that he alone can disentangle fact from fiction where Shay Jr. is concerned, when Nancy Gertner, Amy Baron-Evans, Dr. Phillips, Jefferson Boone, and his own mother, cannot. AUSA Kelly has stated in open court and in

<sup>2</sup> Nor may the government be willfully blind with respect to the truth or falsity of the testimony it presents.

correspondence that Shay Jr. had not been truthful and that he could not corroborate any aspects of his story.<sup>3</sup>

**C. The Government May Not Put Shay Jr. in the Position of Either Perjuring Himself or Incriminating Himself for Giving a False Statement, or Taking a Contempt.**

The federal immunity statute provides that testimony compelled according to a grant of immunity "may be used against the witness in . . . a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. § 6002. There is a clear danger that such use will be the effect, if not the purpose, of the the immunity order sought by the government here.

It is an abuse of the judicial process to call a witness for the purpose of extracting perjury, or to subject a witness to repetitious questioning to coax him into the commission of perjury or contempt. In re William F. Poutre, 602 F.2d 1004, 1005 (1st Cir. 1979). See also Brown v. United States, 245 F.2d 549, 554-55 (8th Cir. 1957) (where testimony had no tendency to support any material fact under investigation, the government was not pursuing a bona fide purpose in eliciting it; perjury conviction reversed); United States v. Cross, 170 F.Supp. 303, 309 (D.D.C. 1959) (where purpose of calling witness was to provoke perjury rather than provide information, statements could not be used in perjury prosecution); United States v. Icardi, 140 F.Supp. 383,

---

<sup>3</sup> In addition, it would be entirely improper for AUSA Kelly to cross examine Shay Jr. on the basis of statements he has said he did not believe, or to pit his credibility against that of Shay Jr. by cross examining him.

388 (D.D.C. 1956) (same). See also United States v. Koonce, 485 F.2d 374, 379 (8th Cir. 1973); Bursey v. United States, 466 F.2d 1059, 1078-79 & n.10 (9th Cir. 1972); Gebhard v. United States, 422 F.2d 281, 289-90 (9th Cir. 1970).

Given the variety of conflicting statements made by Shay Jr. and his particular psychiatric makeup, Shay Jr. would have three choices if forced to testify according to a grant of immunity. He could expose himself to prosecution for giving a false statement by admitting that he gave a false statement at an earlier time (assuming he thinks the earlier statement was false at the given moment he is on the stand). Or he could expose himself to prosecution for perjury by testifying falsely that he earlier either did or did not tell the truth (assuming he knows). Or he can risk contempt by declining to testify.

Whatever Shay Jr. could possibly say or do, he is at risk for further prosecution and punishment. The Supreme "Court has long recognized that the Fifth Amendment prevents the [government] from forcing the choice of this 'cruel trilemma' on the defendant." South Dakota v. Neville, 459 U.S. 553, 563 (1983). The First Circuit has recognized that a witness cannot be placed in the position Shay Jr. will be in if he is compelled to testify. In United States v. Chevoor, 526 F.2d 178 (1st Cir. 1975), cert. denied, 425 U.S. 935 (1976), the witness claimed that his only choices were perjury or exposure to a prosecution for false statements, and that he therefore should have been given Miranda warnings. The court stated:

When a grand jury witness is knowingly put in the position, if he testifies at all, of either perjuring himself or incriminating himself, a number of courts have recently held that he should be given Miranda warnings or at least the advice that he may remain silent as to incriminating matters--the position taken by the district court. We have considerable sympathy with this approach.

Id. at 181. See also cases cited at 181 n.8. If a witness is entitled to be warned of the right to remain silent in such a situation, it certainly follows that he must be permitted to exercise the right.

The court found that Chevoor was not entitled to the warning, however, since he was not in fact subject to prosecution for giving a false statement. Rather, his responses to government agents' questions fell within the "exculpatory no" exception to the false statements statute. Id. at 182. Therefore, the witness was only in the typical position of choosing between telling the truth or subjecting himself to perjury.

Unlike the situation in Chevoor, compulsion of Shay Jr.'s testimony is the paradigm of the trilemma condemned by the Supreme Court, the First Circuit, and other courts. Shay Jr.'s earlier statements do not fall within the "exculpatory no" exception to the false statements statute. Furthermore, given Shay Jr.'s psychiatric condition and numerous conflicting statements, this is not the ordinary case where the witness may simply choose to tell the truth or take the consequences. Nor is it the ordinary case where the truth as the witness knows it is even capable of determination, AUSA Kelly's assertions

notwithstanding. Anything Shay Jr. may say on the stand can be construed as a lie or an admission of an earlier lie.<sup>4</sup> The immunity order should therefore be denied.

**III. A Federal Immunity Grant is not Sufficient to Vitiating Shay Jr.'s Right Against Self-Incrimination Under the Constitution and Laws of Massachusetts.**

A grant of immunity must afford protection commensurate with the privilege it seeks to supplant. Kastigar v. United States, 406 U.S. 441, 453 (1972). As an initial matter, since transactional immunity is required to protect the right against self incrimination under Part 1, Article 12 of the Massachusetts Declaration of Rights, and Massachusetts General Laws chapter 233 § 20G, federal use and derivative use immunity cannot suffice.

Even use immunity would not automatically attach in a Massachusetts court to Shay Jr.'s testimony simply because of a federal immunity order. In Massachusetts, immunity may only be granted according to an exacting procedure. Under Massachusetts General Laws chapter 233 section 20F, immunity may only be granted by a justice of the superior court, and only then if such

---

<sup>4</sup> Since no one can count on Shay Jr.'s testimony, we believe that AUSA Kelly's purpose in calling Shay Jr. as a witness is not to elicit useful evidence, but to impeach him with otherwise inadmissible and/or untrustworthy statements. This the government may not do. See United States v. Webster, 734 F.2d 1191, 1192 (7th Cir. 1984) (abuse of rules of evidence to call a witness knowing that witness would not give useful evidence, for the purpose of introducing prior statements which would otherwise be hearsay); United States v. Morlang, 531 F.2d 183, 190 (4th Cir. 1975) ("impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible"); United States v. Miller, 664 F.2d 94, 97 (5th Cir. 1981) (same); United States v. DeLillo, 620 F.2d 939, 946 (2d Cir. 1980) (same).

witness has previously been granted immunity by a justice of the supreme judicial court. The attorney general or a district attorney must apply to the supreme judicial court to set the process in motion. M.G.L. ch. 233 § 20E.

Given the outcry by state law enforcement officials in response to Shay Jr.'s sentence, there is some likelihood that the state may seek to prosecute him again. Shay Jr. has no guarantee that a given superior court judge would hold that the Commonwealth could not use testimony compelled in Trenkler's case against him in a further prosecution.

Since Shay Jr. and the state government would not be left in the same position as if he had claimed his privilege in the absence of a federal grant of immunity, Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964), he should not be compelled to testify at Trenkler's trial.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(c), Shay requests that the Court schedule a hearing on this matter on the ground that oral argument will be of assistance to the Court.

Respectfully submitted,

THOMAS A. SHAY  
By his attorneys

*Amy Baron-Evans*  
Nancy Gertner (BBO #190140)  
Amy Baron-Evans (BBO #560312)  
Dwyer, Collora & Gertner  
400 Atlantic Avenue  
Boston MA 02110  
(617) 357-9202

Dated: November 1, 1993

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney or record for each other party by mail (by hand) on 11/1/93

*Amy Baron-Evans*

DWYER, COLLORA & GERTNER

ATTORNEYS AT LAW

100 WASHINGTON STREET

NEWTON MASSACHUSETTS 02459

TEL: (617) 552-1100

FAX: (617) 552-1105

THOMAS E. DWYER JR.  
MICHAEL A. COLLORA  
NATHAN GERTNER  
DANIEL J. DEBONO  
PATRICK J. COUGHLIN  
JAMES J. O'NEILL  
DAVID A. RYAN  
PATRICK J. COUGHLIN  
MARGARET A. COUGHLIN  
ANDREW J. COUGHLIN  
KATHLEEN M. COUGHLIN

Client  
THOMAS E. DWYER  
Off Counsel  
MARKEN LITWIN

Confidentiality Notice

The information contained in this facsimile message is legally privileged and confidential information intended only for the use of the individual or entity named below. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this fax is strictly prohibited. If you have received this fax in error, please notify us immediately by telephone and return the original message to us at the address above. Thank you.

FAX TRANSMITTAL COVER SHEET

Date: 11/1/93

To: Ally Johnson

Fax No.: 782-2505 No. of Pages 11  
(including Cover Sheet)

From: Amy Jean Ryan  
Dwyer, Collora & Gertner

Message: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Client No. 11/1/93

If there are any problems with the transmission of this fax, please call us immediately at (617) 357-9202.

ID:

NOV 01 '93

5:37 No.009 P.02

**DWYER, COLLORA & GERTNER**

ATTORNEYS AT LAW

400 ATLANTIC AVENUE

BOSTON, MASSACHUSETTS 02110

(617) 357-9202

Telecopier # (617) 357-6866

THOMAS E. DWYER, JR.  
MICHAEL A. COLLORA  
NANCY GERTNER  
NANCY S. SHILEPSKY  
KATHY B. WEINMAN  
WILLIAM H. KETTLEWELL  
JODY L. NEWMAN  
DAVID A. BUNIS  
PATRICIA CORREA  
MARIA R. DURANT  
AMY M. BARON-EVANS  
KATHERINE J. MICHON

Counsel  
THOMAS E. DWYER

Of Counsel  
SHAREN LITWIN

November 1, 1993

**BY HAND DELIVERY**

Catherine Dello Russo  
Clerk for Judge Zupel  
United States District Court  
for the District of Massachusetts  
J. W. McCormack Building, POCH  
Boston, MA 02109

Re: United States of America v. Thomas A. Shay, Jr.  
Criminal No. 92-10396-Z

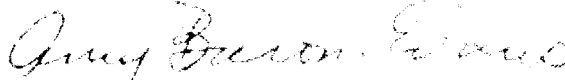
Dear Cathy:

Enclosed please find our opposition to government's motion for issuance of immunity order and for reconsideration of its order quashing subpoena.

It is necessary that the judge receive this as soon as possible.

Thank you very much for your attention to this matter.

Very truly yours,



Amy Baron-Evans

ABE:smt

Enclosures

CC: AUSA Paul Kelly  
Jefferson Boone, Esquire  
Terry P. Seigal, Esquire