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## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal Action No. 04-81-KAJ
	)	
PAUL J. LEARY, JR., and TRAVIS E.	)	
LEARY,	)	
	)	
Defendants.	)	

### MEMORANDUM ORDER

#### **Introduction**

Presently before me is a "Provisional Motion Seeking Order of Judicial Grant of Immunity to Defense Witnesses" (Docket Item ["D.I."] 48; the "Motion"), filed by defendant Travis E. Leary ("Leary"). Leary and his brother Paul J. Leary, Jr., are charged with arson, mail fraud, and conspiracy in this matter. (See D.I. 1.) The Motion springs from an unusual turn of events during the final preparations for trial, which is now scheduled to begin on April 6, 2005. For the reasons that follow, the Motion is denied.

#### **Background**

On March 23, 2005, counsel for Leary requested an emergency teleconference to request a 60 day continuance of the trial, then scheduled to begin on April 4, 2005. (See 3/23/05 teleconf. transcript ["Tr."] at 2.)<sup>1</sup> As described by Leary's counsel, the basis for the request was the discovery that a document provided by Leary to his

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<sup>1</sup>Counsel for all parties subsequently agreed to a delay in the start of trial until April 6.

counsel, and then from counsel to the Government, bears a forged signature and appears to have been created with fraudulent intent. (See *id.* at 2-4.) The document purported to be a lease for the real estate on which a restaurant, known as the "Yankee Restaurant," owned by Leary and his brother, operated. (See *id.* at 3.) When defense counsel learned that the document was, in all likelihood, a fraud, he immediately addressed the matter with the Government. The AUSA leading the prosecution has, according to defense counsel, taken the position that the document is relevant to credibility and to show Leary's consciousness of guilt. (See D.I. 48 at ¶ 6.)

Leary's counsel has filed the instant Motion, arguing that the real estate broker who signed the apparently fraudulent document as a witness is now a critical witness for the defense in this case but that he might well assert his Fifth Amendment right to remain silent, thereby depriving Leary of the chance to prove that the broker is the one responsible for the forgery. (*Id.* at ¶¶ 4-7.) The Government counters that the broker is not critical, that the proffered evidence is highly speculative, and that the Government has a countervailing interest against immunity. (See D.I. 54 at 7-9.)

## **Discussion**

For the proposition that the court is empowered to grant immunity to a defense witness, Leary relies on *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980). (D.I. 48 at ¶ 2.) However, the opinion in that case emphasized that "opportunities for judicial use of this immunity power must be clearly limited," and listed five requirements for the exercise of the strictly circumscribed authority: "immunity must be properly sought in the district court; the defense witness must be available to testify;

the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity." *Id.* at 972. Leary's application fails on at least three of those grounds.

First, it is not at all clear that the real estate broker's testimony would be exculpatory. On the contrary, it appears that Leary merely hopes that his counsel will be able to break the broker down on cross-examination. (See D.I. 48 at ¶ 4.) A prayer for a Perry Mason moment does not constitute the kind of "clearly exculpatory" evidence contemplated in *Smith*.

Second, the testimony is not "essential" to the defense case. While the admittedly forged lease may speak to an alleged consciousness of guilt on Leary's part, what the broker would say about the lease is a matter of speculation at this point. His testimony seems first and foremost to have relevance to Leary's credibility. Indeed, the lease itself may be used primarily for impeachment. (See Tr. at 7-8 (Leary's counsel asserting, "[t]he Government has said ... that they intend to cross-examine my client in the following fashion: See this document? It's a phony. ... You were trying to mislead us. This was part of your defense. And you're not only a liar but a bad guy, an obstructor of justice.").) Given the character of the as yet vague proffer, it cannot be said that the broker's testimony is "essential" and therefore a basis for witness immunization. *Smith*, 615 F.2d at 972 ("Immunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or if it is found to relate only to the credibility of the government's witnesses.").

Finally, there is a countervailing Government interest against the granting of immunity. As the Government notes in its memorandum in opposition to the Motion, if

the broker did create the fraudulent lease, he may himself be subject to prosecution for mail or wire fraud. (D.I. 54 at ¶ 9.) "A potential prosecution of the prospective witness is a sufficient governmental interest to countervail a grant of judicial immunity." *United States v. Cohen*, 171 F. 3d 796, 802 (3d Cir. 1999).<sup>2</sup>

### **Conclusion**

Accordingly, defendant Leary's Motion is not well-founded, and it is hereby ORDERED that the Motion (D.I. 48) is DENIED.



UNITED STATES DISTRICT JUDGE

April 5, 2005  
Wilmington, Delaware

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<sup>2</sup>In addition to this specific countervailing interest, there is a more general countervailing interest rooted in the separation of powers so fundamental to our form of government. See *Smith*, 615 F.2d at 973 (recognizing that a grant of immunity is "traditionally an exercise of the executive's power"). That is perhaps why the Third Circuit has specifically limited *Smith* to the facts therein and has noted that the holding in *Smith* has been "flatly rejected" in other Circuits. See *United States v. Santtini*, 963 F.2d 585, 598 n. 6 (3d Cir. 1992) ("It should be noted that *Smith* has subsequently been limited to its particular facts by this court. ... Moreover, other courts of appeals to consider the possibility of a court's inherent authority to immunize a witness have flatly rejected the result reached in *Smith*.").