IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA *v.* TELDRIN FOSTER AND CARLA JACKSON	Criminal Action No. 1:20-CR-296-JPB

United States' Opposition to "Missing Witness" Jury Instruction

The United States of America, by Ryan K. Buchanan, United States Attorney for the Northern District of Georgia, and Tal C. Chaiken and Samir Kaushal, Assistant United States Attorneys, and by Glenn S. Leon, Chief of the Fraud Section, and Siji Moore, Trial Attorney, respectfully files this Opposition to "Missing Witness" Jury Instruction.

Background

Nine days ago, on February 5, 2024,[1] in discussing issues that may come up during trial, the United States previewed that there may be a Fifth Amendment privilege issue for co-defendant Ricky Dixon:

> Mr. Foster may be having a witness appear, Ricky Dixon, which is another individual who may testify on behalf of the defense. And if he testifies, the same issue [the Fifth Amendment privilege] comes up. According to the docket, he is pro se at this time and he has a pending 2255. So this is an

[1] The trial date of February 5, 2024, was set over eight months ago, on May 11, 2023. (Doc. 676.)

> issue that there just needs to be a frank discussion about. This is not an effort to influence any particular Witness's testimony. It is simply a way to protect those defendants' rights. That is all the government has proposed and tossed out there for the Court to consider as we approach these -- as we move towards that part of the case.

(February 5, 2024 Transcript at 32:1–11.)[2] After the United States raised the issue, defense counsel[3] stated that they were going to ask that Dixon be appointed counsel and the Court authorized Dixon to receive court-appointed counsel. (*See id.* at 33:2–5.) Even though the issue was raised on February 5, defense counsel did not seek to confer with the United States on that day. Defense counsel also chose not to do so on February 6, 7, 8, 9, 10, and 11.

On February 12, the United States again sought clarity from defense counsel on Dixon's testimony, asking to have an "educated discussion" beforehand so that everyone could be prepared for issues that might arise:

> With Mr. Dixon, he has been appointed counsel by the Court. I'm not certain if he has had an opportunity to speak with his attorney. He may not even know why he is coming to this

[2] The United States learned of Dixon's subpoena from the Bureau of Prisons, which mistakenly believed that the United States had issued the subpoena. (February 5, 2024 Transcript at 42:9–18.)

[3] All references to "defense counsel" in this motion refer to defendant Teldrin Foster's counsel.

> courthouse. And there may need to be some time that he needs to speak with his lawyer. We have no idea what the substance of his testimony might be and, therefore, can't really say what issues might arise if he is called to testify. And we think it makes sense to have a discussion about what the defense intends to elicit from Mr. Dixon so that we can have an educated discussion about what issues may come up during his testimony.

(February 12, 2024 Transcript at 219:25–220:10.) Defense counsel declined the United States' request to address Dixon's testimony. (*Id.* at 221:5–6 ("[I]t sounds like, [United States], [defense counsel] has declined your offer to give a proffer of what she intends to elicit from Mr. Dixon.").) After defense counsel declined to discuss the matter, the United States noted that it was trying to engage in an effort to work through issues and "facilitate a smooth completion of this trial so that we don't have to inconvenience [the Court] and the jury." (*Id.* at 221:12–16.)

The next morning, on February 13, before Dixon was scheduled to testify, defense counsel conveyed that Dixon was purportedly willing to testify on behalf of Foster if he received immunity. (February 13, 2024 Transcript at 48:20–49:8.) With the trial set to resume, the United States conveyed that it was not in a position to grant immunity because it lacked authority to do so and that it had no reason to do so here. (*Id.* at 50:2–3.) The Court asked defense counsel what Dixon would say on the stand, defense counsel replied that they had not met with Dixon, and the Court observed that "this is not a situation in which [the defense] investigator has spoken with Mr. Dixon before, knows what Mr. Dixon is going to say, and now he is refusing to testify." (*Id.* at 50:14–23.)

Over the United States' objection, Dixon was later called by defense counsel and he testified, with his court-appointed lawyer standing by his side at the witness stand. (*Id.* at 95:4–97:7.) Defense counsel asked numerous questions of Dixon, with each question crafted to effectively testify through the question. (*Id.* at 98:7–101:10.) After a few preliminary questions, Dixon invoked the Fifth Amendment over and over. (*Id.*) When defense counsel's questions were complete, the Court required Dixon to answer whether he participated in a proffer session with the United States and he answered affirmatively. (*Id.* at 101:12–102:8.) The United States did not cross-examine Dixon.[4]

After Dixon testified, defense counsel stated that, without his invocation, she believed that Dixon would have testified that co-defendant Darrell Thomas told Dixon to identify Foster and deny knowledge of Thomas. (*Id.* at 105:24–106:3.) When the United States noted that defense counsel's claims were speculative, defense was invited by the Court to elaborate on the record and declined to do so. (*Id.* at 108:17–109:13 ("I'll just say that it's based on communications that have not happened in this courtroom.").)

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[4] Dixon's counsel noted that he was advising Dixon not to answer questions in part because he did not want to open the door to cross-examination from the United States. (*Id.* at 101:21–23.)

Thus, it appears that: (i) even though this trial has been set for months, defense counsel and their investigator never spoke with Dixon prior to his testimony and (ii) defense counsel spoke with Dixon's attorney prior to his testimony. Although the United States is not certain, the conversation with Dixon's attorney seemingly necessarily had to have occurred on the day of Dixon's testimony because Dixon's attorney had not met with Dixon until that day.

At the end of the trial, during the charge conference, defense counsel requested a "missing witness" instruction.

Argument

Foster is not entitled to a "missing witness" instruction nor should he be permitted to argue during closing for an adverse inference based on Dixon's invocation of the Fifth Amendment. "Under the missing witness instruction rule, '[i]f it is peculiarly within the power of either the prosecution or the defense to produce a witness who could give material testimony on an issue in the case,' then failure to call that witness permits an inference that the testimony would have been unfavorable to the party who refused to call the witness." *United States v. Raphael*, 487 F. App'x 490, 500 (11th Cir. 2012) (quoting *United States v. Link*, 921 F.2d 1523, 1529 (11th Cir. 1991)); *United States v. Richard*, 678 F. App'x 927, 941 (11th Cir. 2017). "Ordinarily no inferences are permitted as a result of the failure to call to the witness stand one whose testimony would be privileged." *McClanahan v. United States*, 230 F.2d 919, 926 (5th Cir. 1956).[5]

While the Eleventh Circuit has not addressed the issue of whether the government's refusal to grant immunity to a witness may serve as a basis for a missing witness instruction, "every circuit to have considered this question has held that the government's mere ability to grant immunity, without more, does not make a witness who invokes the Fifth Amendment right not to testify peculiarly available to the government." *Richard*, 678 F. App'x at 941 (internal quotation marks omitted) (citing cases); *Raphael*, 487 F. App'x at 500 (same).[6]

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[5] Decisions of the Fifth Circuit rendered before October 1, 1981, constitute binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

[6] Defense counsel suggested yesterday that the "without more" clause referred to whether there was a showing that the testimony would be favorable. They are mistaken. *See United States v. St. Michael's Credit Union*, 880 F.2d 579, 597–98 (1st Cir. 1989) (holding that "the government's power to grant immunity from prosecution" does not make a witness "peculiarly available" to the government); *United States v. Brutzman*, 731 F.2d 1449, 1453–54 (9th Cir. 1984) (where the government "chose not to seek use immunity to obtain" testimony from a witness, holding that "[w]here a witness' unavailability results from an invocation of the privilege against self-incrimination, the witness is unavailable to both parties, and the court's refusal to give an absent witness instruction is proper"); *United States v. Simmons*, 663 F.2d 107, 108 (D.C. Cir. 1979) ("Reed had indicated out of the presence of the jury that if called to the witness stand she would invoke her Fifth Amendment right and refuse to testify . . . a witness has the right to exercise such privilege without taking the stand. It was also correct in such circumstances for the court to refuse a missing witness instruction, since Reed was unavailable to either party.").

First, the law plainly does not support issuance of the instruction. "[T]he government's mere ability to grant immunity to a witness who claims the Fifth Amendment privilege does not make that witness peculiarly available to the government." *Raphael*, 487 F. App'x at 500. This general rule remains true even if "the government could have easily granted immunity and had no legitimate reason for refusing to do so." *Id.*

Cases from the Eleventh Circuit on this issue are instructive. In *Raphael*, the defendant attempted to present an entrapment defense that alleged coercion by a confidential informant. *Id.* at 495. By the time trial was held, the confidential informant was in state custody on an attempted murder charge. *Id.* at 498. The defendant wanted to call the confidential informant to "demonstrate that [the confidential informant] lied to the police." *Id.* at

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The "more" that the *Raphael* and *Richard* Courts appear to be referring to are two possible exceptions to the general rule against issuing a "missing witness" instruction when an individual invokes his Fifth Amendment privilege: "a substantial showing of abuse of prosecutorial discretion" and where "circumstances suggest that the witness's testimony would have been exculpatory," *Raphael*, 487 F. App'x at 500. *United States v. Rios*, 636 F.3d 168, 172 (5th Cir. 2011) ("[Defendant] does not argue prosecutorial abuse of discretion, so we need not consider whether exceptions apply."); *United States v. Flomenhoft*, 714 F.2d 708, 713 (7th Cir. 1983) ("Absent a substantial showing of prosecutorial abuse of discretion, courts will not review a prosecutor's immunization decision."); *United States v. Myerson*, 18 F.3d 153, 160 (2d Cir. 1994) ("[I]n the absence of circumstances that indicate the government has failed to immunize an exculpatory witness, a district court does not abuse its discretion by refusing to give a missing witness charge.").

499. In a hearing outside the presence of the jury, the district court determined that the confidential informant could invoke his Fifth Amendment right and canceled a writ of habeas corpus ad testificandum to produce the confidential informant at the request of the government. *Id.* After closing argument, the defendant requested a "missing witness" instruction and the district court—even though it expressed concern that the government had not granted the confidential informant immunity, *id.* at 499–500, and stated that it would have "signed [an] immunity order in a minute if the government had requested one," *id.* at 500—rejected the instruction because the confidential informant was absent as a result of his Fifth Amendment invocation. *Id.* at 500.

On appeal, the defendant claimed that "the government could have easily granted [the confidential informant] immunity for any conduct" and that "the government had no legitimate interest in refusing to grant . . . immunity." *Id.* But the Eleventh Circuit found no error, noting that whether "the government could have easily granted immunity and had no legitimate reason for refusing to do so does not affect our application of this general rule." *Id.* The Eleventh Circuit added that without a "substantial showing of abuse of prosecutorial discretion" or circumstances that "suggest that the witness's testimony would have been exculpatory," *id.*, the defendant's arguments failed. *Id.* at 501 ("[T]his is not a proper case to consider whether the government's refusal to grant its confidential informant immunity, where the defendant otherwise presented sufficient evidence to get an entrapment defense instruction, would have satisfied one of these exceptions.”).

In *Richard*, a confidential informant was involved in a series of drug transactions at the DEA's direction. *Richard*, 678 F. App'x at 930–33. Days before trial, the confidential informant was arrested by the DEA for unauthorized drug transactions. *Id.* at 934. The government notified the district court and defense and also said that it would not call the confidential informant in its case-in-chief. *Id.* The confidential informant was produced at trial and his attorney said that the confidential informant would invoke the Fifth Amendment. *Id.* In a hearing outside the presence of the jury, the district court determined that the confidential informant was “unavailable” due to his invocation. *Id.* Although the confidential informant was unavailable, the defense was still able to impeach him through other witnesses. *Id.* at 935. The defense sought a “missing witness” instruction that the district court declined to issue. *Id.* On appeal, the Eleventh Circuit held that “[t]he district court did not abuse its discretion in declining to give a missing witness instruction because [the confidential informant's] Fifth Amendment invocation rendered him equally unavailable to both the government and the defense.” *Id.* at 941.

The principles of *Raphael* and *Richard* apply with even more force here. In this case, the United States could not have “easily granted immunity,” as the *Raphael* Court speculated might be possible. *Raphael*, 487 F. App'x at 500. The United States, due to defense counsel's dilatory tactics, was not positioned to handle an immunity request right before Dixon's testimony. A grant of immunity is not a simple act done on the spur of the moment. It requires supervisory approval (here, not just from the U.S. Attorney's Office but from the Fraud Section in Washington, D.C.). Logistically, initiating and completing the processes required for evaluating an immunity request in the brief time available before Dixon was going to testify was not a viable option for the United States, nor would it have been conducive to an orderly completion of this trial. Additionally, unlike the confidential informants in *Raphael* and *Richard*, the investigation (and also the United States' case-in-chief at trial) never relied on Dixon nor was Dixon a confidential informant for the government.

Second, and relatedly, defense counsel waited until the last minute to even broach the topic of immunity with the United States, despite the United States' two invitations—once over a week ago and, again, the day before Dixon was set to testify—to discuss Dixon and determine what issues might arise. Having waited until just before Dixon's testimony, Foster's requested instruction, which suggests to the jury that they may infer that Dixon's testimony would be unfavorable to the United States due to the "[t]he government's failure to grant immunity," (Doc. 922 at 2), rings hollow. The reality is that the failure lies with Foster for delaying addressing this matter until the United States had no way to meaningfully address it. In *Myerson*, the Second Circuit "noted that "eminent authority suggests caution in developing elaborate rules of law defining the circumstances when the right [to a missing witness charge] exists." *Myerson*, 18 F.3d at 160 (internal quotation marks omitted). "This is particularly true," the Second Circuit continued, "in light of the usual aura of gamesmanship that frequently accompanies requests for a missing witness charge." *Id.* (internal quotation marks omitted). This request for the "missing witness" instruction appears to be exactly that, gamesmanship.

Third, the possible exceptions to the general rule against issuing a "missing witness" instruction when an individual invokes his Fifth Amendment privilege—"a substantial showing of abuse of prosecutorial discretion" and where "circumstances suggest that the witness's testimony would have been exculpatory," *Raphael*, 487 F. App'x at 500—do not change the analysis. There is nothing in the record to suggest any showing of "abuse of prosecutorial discretion," much less "a substantial showing." *Id.* The opposite is true. The United States twice expressed its desire to defense counsel to identify and address any witness issues that may arise with Dixon and was twice rebuffed. There is likewise nothing in the record showing that Dixon's testimony would have been exculpatory. After-the-fact claims that the testimony would have been exculpatory should be viewed highly skeptically. When given the opportunity to establish a fulsome record at the appropriate time, Foster did not do so.[7]

[7] Even if Foster's speculative claims about what Dixon would say were true, there has not been a showing that that evidence would be

Finally, Foster has already accrued significant benefit to his defense through Dixon's examination and therefore has not been prejudiced in any way. In questioning Dixon, defense counsel asked questions that essentially operated as testimony and invited the jury to draw improper inferences. *United States v. Feliciano-Francisco*, 701 F. App'x 808, 813 (11th Cir. 2017) ("Generally, it is improper to put a witness on the stand for the purpose of having the witness invoke her Fifth Amendment privilege against self-incrimination before the jury because doing so would invite the jury to draw an improper inference.") As such, there is no unfair prejudice that could accrue against Foster. He has already made his point—albeit by inviting an improper inference—through his questioning of Dixon.[8]

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exculpatory. If, hypothetically, Thomas instructed Dixon to identify Foster, that would not be exculpatory because it does not show that Foster was not involved. It merely would show that Thomas, after having been indicted and while still fighting his charges, wanted to deflect blame from himself. Yesterday, even defense counsel said that Dixon's testimony would have been, at most, just favorable, not exculpatory.

[8] Foster elicited substantial information about Dixon on cross-examination of the case agent, including that Dixon lied to the FBI about Foster. (*E.g.,* February 9, 2024 Transcript at 10:23–11:19; February 8, 2024 Transcript at 269:22–277:22.) Foster also elicited testimony from the case agent that Dixon and another individual, Charmaine Redding "both had implicated Teldrin Foster in this investigation." (February 9, 2024 Transcript at 14:14–17.) As such, Dixon's testimony would have been cumulative.

Conclusion

For the reasons stated above, the "missing witness" instruction should not be issued.

Dated: February 14, 2024.

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