

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	CR. NO. 2:10cr186-MHT
)	
MILTON E. McGREGOR,)	
)	
Defendant.)	

OPPOSITION TO DOCS 1925 AND 1930, “STATE OF ALABAMA’S MOTION TO QUASH SUBPOENAS TO TESTIFY AT TRIAL OR IN THE ALTERNATIVE TO LIMIT SCOPE OF TESTIMONY” AND “FORMER GOVERNOR BOB RILEY’S MOTION TO QUASH SUBPOENA TO TESTIFY AT TRIAL.”

Milton McGregor respectfully submits this opposition to Docs. 1925 and 1930, which are (1) a motion by the State to quash subpoenas *ad testificandum* to former Governor Bob Riley and former Public Safety Director Chris Murphy, or to limit the scope of their testimony; and (2) a motion by former Governor Riley to the same effect, with regard to himself.

The proper disposition of these motions is to deny them. Specifically, the Court should deny the motions to quash the subpoenas, and should deny without prejudice the motion to limit testimony. The Court should thereby leave any particular questions of privilege, relevance and admissibility to be addressed by the Court at trial, if there turn out to be real disputes over such matters.

Proceedings on prior related motion

The present motions are similar to ones that the State and former Governor Riley filed before the first trial, Docs. 1182 and 1186. Mr. McGregor opposed those motions. A hearing was held before Magistrate Judge Moorer on June 11, 2011; the transcript of that hearing is Doc. 1280.

Judge Moorer issued an order that, in form, granted the motions to quash. Doc. 1265. Yet in substance, the order was something different.

Judge Moorer accepted as an assumption, at least for purposes of his review, that the witnesses would have relevant and admissible testimony to give; and he recognized that any actual decision on those issues would have to be left to the District Court at trial. *See* Doc. 1265, p. 6 (“For the purposes of this opinion, the court will assume, *without deciding*, that the evidence McGregor seeks is relevant and that Rule 613 applies, so the relevancy and admissibility requirements are met for the purposes of this analysis.”) (emphasis in original); *id.* at p. 6 n.2 (“The parties are not to interpret this as a dispositive ruling on the admissibility of any testimony as that would be a decision left for the District Judge. The undersigned merely assumes that it *could* be met for the purposes of this analysis.”) (emphasis supplied).

Judge Moorer also recognized that, insofar as the motion was based on claims of privilege, questions of privilege likewise should be left for resolution by the District Court at the appropriate time (meaning that they would be resolved at trial when there is a basis for specific invocation of privilege in response to particular potential questions). *See* Doc. 1265, p. 7 (“The State of Alabama and former Governor Riley (both through the

State's motion and his own independent motion to quash) assert that ... any information sought by McGregor would be privileged. However, the question as to privilege is not one before the undersigned, but is more properly put before the District Judge at the appropriate time should McGregor be able to establish the Nixon factors. In short, the undersigned makes no finding pertaining to the admissibility of the testimony sought.”).

Judge Moorner quashed the subpoenas based on his conclusion that Mr. McGregor had not shown with adequate “specificity” what testimony he would need from the witnesses. *See* Doc. 1265, pp. 6-7.

However, Judge Moorner required that the witnesses remain available for testimony at trial. *Id.*, pp. 7-8 (“Moreover, though the Court finds that the subpoenas are due to be quashed, the Court directs that the four individuals remain physically available to testify in person should it later be determined that their testimony is necessary. Counsel for Riley and McGregor already advised the Court that an agreement had been reached so that Riley’s travel plans could continue. As such, to avoid a potential future problem regarding availability - as aptly noted by the United States - the witnesses should remain reasonably available should a future subpoena be appropriate.”)

Thus the upshot of Judge Moorner’s order was that all questions of privilege, relevance and admissibility remained open questions for trial – and that the witnesses had to remain available for trial.

Mr. McGregor appealed Doc. 1265 to the District Court, arguing that the more appropriate course was simply to deny the motions to quash. *See* Doc. 1287. Mr. McGregor showed that Judge Moorner erred by applying a “specificity” test derived from

United States v. Nixon, 418 U.S. 683 (1974), to subpoenas *ad testificandum*. The *Nixon* test has to do with documentary discovery-type subpoenas, not to subpoenas for trial testimony. He showed that there was no basis under the law for quashing the subpoenas. He showed that once it was recognized (as Judge Moorer recognized) that the witnesses may have relevant and admissible testimony to give, and that questions of admissibility, relevance and privilege would have to be dealt with by the District Court at trial, the proper order was simply a denial of the motion.

The District Court held the appeal in abeyance until such time as it might actually become a live dispute at trial; and after trial ended without the dispute having become a live one, the District Court held the matter to be moot. *See* Doc. 1316; Doc. 1652.

Proper disposition of the current motion

1. Claims of privilege are not a proper basis for granting the current motion.

As before, the State's motion is based first on a claim of various privileges – “law enforcement privilege,” “executive privilege,” and “deliberative process/consultative privilege.” And, as before, Governor Riley echoes those claims.

None of those privileges is an absolute one, in a criminal case. Each can be overcome by relevance and need – if, indeed, they are even privileges that are cognizable under federal law as to former state officials. *United States v. Nixon*, 418 U.S. 683 (1974) (executive privilege is qualified); *Aguilar v. Department of Homeland Security*, 259 F.R.D. 51, 56 (S.D.N.Y. 2009) (law enforcement privilege is qualified); *United*

States v. Cathcart, 2009 U.S. Dist. LEXIS 20078 (N.D. Cal. 2009) (“deliberative process” privilege is qualified).

As Judge Moorer recognized in Doc. 1265, therefore, consideration of any privilege issue is premature when presented as a blanket matter before trial, as the State and Governor Riley have presented the issues here. Instead of ruling on such a blanket invocation, and instead of using such a privilege as a basis for staying off the witness stand entirely, the proper procedure is to rule on invoked privileges on a question-by-question basis to the extent that there are real disputes. Any such privilege claim has to be made, and assessed, in context of particular questions. The Eleventh Circuit so held, in *In the Matter of Certain Complaints Under Investigation*, 783 F.2d 1488, 1518 (11th Cir. 1986), which was the investigation of then-Judge Alcee Hastings. Staff members were subpoenaed to testify, and they (and Judge Hastings) invoked privileges that were analogous to those at issue here. The Eleventh Circuit said that the witnesses had to testify:

It is well settled that a witness whose testimony is subpoenaed cannot simply refuse to appear altogether on grounds of privilege, but rather must appear, testify, and invoke the privilege in response to particular questions. ... Otherwise, a court would be forced to attempt to determine the existence, application, and scope of an asserted privilege in ignorance of the context in which it is alleged to apply. No possible testimonial privilege here would be of such a kind as could excuse Williams and Ehrlich from the fundamental obligation of appearing before the Committee for testimony, and then invoking the privilege before the Committee. Thus, we will not adjudicate Williams' and Ehrlich's claims of testimonial privilege as they are currently framed.

Therefore, the subpoenas cannot be quashed on the basis of privilege. Nor is there a basis for a pretrial ruling limiting the scope of testimony, based on privilege. The motions must be denied, insofar as they are based on claims of privilege.

The State and former Governor Riley have also asserted that there is special protection for high-ranking officials, allowing them to escape subpoena without a heightened showing of need. Eleventh Circuit law does not support that argument, in the case of *former* officials, which is the situation here. In the Eleventh Circuit, this doctrine is based in *In re United States*, 985 F.2d 510, 512-13 (11th Cir. 1993). The Eleventh Circuit explained the basis for the doctrine, in a way that makes it clear that its rationale applies only to current officials, not former ones. This is what makes it different from a “privilege” – it is about not interfering with the job of a current official by making him or her appear for testimony at all.

The reason for requiring exigency before allowing the testimony of high officials is obvious. High ranking government officials have greater duties and time constraints than other witnesses. In this case, the government notes that Commissioner Kessler is responsible for the regulation of all drugs, foods, cosmetics and medical devices as well as overseeing the enforcement of statutes and regulations governing the distribution and sales of these items. Thus, his time is very valuable. This concern about a high official's time constraints is particularly relevant to selective prosecution claims. If the Commissioner was asked to testify in every case which the FDA prosecuted, his time would be monopolized by preparing and testifying in such cases. In order to protect officials from the constant distraction of testifying in lawsuits, courts have required that defendants show a special need or situation compelling such testimony.

In re United States, 985 F.2d at 512 (emphasis supplied).

Because of the time constraints and multiple responsibilities of high officials, courts discourage parties from calling them as witnesses and require exigent circumstances to justify a request for their testimony.

Id. at 513 (emphasis supplied). The best understanding of this doctrine, therefore, is that any protection for former officials is only whatever protection that *privileges* give, not a protection against being subpoenaed altogether. Former officials do not have a special protection against being subpoenaed *ad testificandum*, at least not in a criminal case where they have potentially relevant testimony to give.

2. A pretrial assessment of relevance, including a requirement of showing of specific need, is not a proper basis for granting the current motion.

The State and former Governor Riley also claim that these witnesses do not have relevant testimony to give. This is not a valid basis for quashing the subpoenas. The District Court will of course be able to rule on questions of relevance (and other questions of admissibility) at trial, in context. At that time, the District Court will know what factual questions are material, what doors have been opened by prior testimony or argument, and the like. A pretrial ruling on admissibility would be premature, as a basis for quashing a subpoena *ad testificandum*.

First, there is an issue of standing. The State does not have standing to move to quash the subpoenas based on “relevance” or even “specificity,” as contrasted with a claim of privilege. That is, insofar as any privilege “belongs to” the State, the State may have a valid interest that it can litigate. But when the question becomes one of relevance as contrasted with privilege, the State has no interest of its own that gives it the right to seek the quash the subpoena. *See, e.g., In re Doe v. Under Seal*, 584 F.3d 175, 184 n.14 (4th Cir. 2007): “See 9A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper,

Federal Practice and Procedure § 2459 (3d ed. 1998) ("Ordinarily a party has no standing to seek to quash a subpoena issued to someone who is not a party to the action unless the party claims some personal right or privilege with regard to the documents sought.")

This issue of standing should be dispositive of the question of whether to quash the subpoena to Mr. Murphy; Mr. Murphy himself has not moved to quash, and the State has no standing to seek that result on the basis of relevance.

Second, on the merits, the movants have shown no valid basis for quashing these subpoenas at this time. Mr. McGregor has a Sixth Amendment right to call witnesses in his defense, including the constitutional right to subpoena such witnesses. The subpoenas at issue here, which were served with ample notice (and which seek no documents) are a proper exercise of that right. Both former Governor Riley and former Public Safety Director Murphy may well be called as defense witnesses in this case, with relevant testimony to give. While they were not called in the prior trial, it is understood by all parties that each side's trial presentation will be different in any second trial. The defense cannot know, now, how the Government's presentation will be different, and therefore cannot know what matters the Government will introduce that will render these witnesses' testimony important in clarification or rebuttal.

Furthermore, the law does not require the defense to disclose, in a pretrial filing like this one, just what testimony the defense will or may introduce from defense witnesses. The defense has a right not to make those disclosures either to the prosecution, or to the witnesses themselves. A likely-adverse witness such as Governor Riley should not be permitted to obtain an advance notice of what he will be asked about,

so that he can get ready for it, by filing a motion claiming that he has no testimony to give.

Even with that caveat that the full relevance of these witnesses' testimony cannot be stated at this time, still the proceedings thus far confirm that these witnesses may have relevant testimony to give. Some aspects of the relevance of their potential testimony were discussed at length in the June 11 hearing, Doc. 1280. As part of that discussion, the Government (through Mr. Feaga) agreed that quashing the subpoenas would be problematic to the Government as well as to the defense. The Government agreed that it could not be determined with certainty, before trial, what relevant testimony these witnesses might have to give. The Government urged that it would be dangerous to quash these subpoenas if it left the defense unable to call the witnesses at the appropriate time.

Thus Mr. Feaga stated (Doc. 1280, p. 46, lines 17-21), "I don't think that the United States has any disagreement, frankly, on the technical aspect of this with the Defense. When I say 'technical,' I mean, I just don't think that you are going to be able to today, resolve these evidentiary issues that Mr. Espy has raised." Mr. Feaga went on to explain that the Government might well contend at trial that there was no relevance of any testimony that the defense sought to offer from these witnesses – but he recognized that the defense might have a different view, and he recognized that the important thing was to let the District Court decide that matter in context at trial. *Id.*, pp. 46-47. He continued, *id.* at p. 47, lines 8-16, "Here's the problem. I think for the Defense, in order to make the showing that the State wants to make now, they're saying

that they might have to reveal, if I catch the drift, their defense strategy. In fact, they're saying that until the evidence that Judge Thompson lets in before the jury, is actually before the jury, they don't know for sure whether or not they will even try to offer this testimony, or whether it will be relevant or not. And I understand their dilemma in that regard." And so Mr. Feaga recognized, *id.*, p. 47 lines 22-24, "But there's no way to really address that now until we see the evidentiary rulings that Judge Thompson makes and until we see the witnesses' testimony." Thus Mr. Feaga emphasized that "the thing for the Court to do today" is to "preserve" for the District Court the "ability" to make a ruling about that in context, once the trial had progressed to the point where it was possible for the defense to say in context what evidence would be sought from these witnesses. *Id.*, p. 47 line 25 to p. 48 line 6. Mr. Feaga recognized that "what we don't want to happen is, we don't want Mr. Espy to not have the witness available and that be the reason that Judge Thompson, if he wants to hear it outside the presence of the jury or whatever, we don't want that to become an issue." *Id.*, p. 48 lines 19 to 22. *See also id.*, p. 50 lines 15-20 ("But what the Court just said makes imminent sense to the United States. And that is to make sure that if Mr. Espy, at any time during our trial, can demonstrate that any of these people have admissible evidence to put before the Court or the jury, that they're available to him. That I think is important. And we agree with him that they should be available."); *id.* p. 51, lines 13-16 ("We don't think that any of that [potential sources of relevance to these witnesses' testimony] is going to happen, but we don't want [the defense] to not have access to the witness if they want to argue that it does. We don't want the unavailability of the witness to be the problem.")

The likely relevance of these witnesses' testimony, including specifically the testimony of former Governor Riley, has become even more clear since the Government made those statements near the beginning of the first trial. For instance, it is now clear that Governor Riley has direct personal knowledge about, because he had direct personal involvement in, a matter that was the subject of evidence in the first trial. That is, FBI Special Agent George Glaser testified that agents of the federal government met with the Governor (among other state officials) about stopping the legislative consideration of SB 380. *See* Transcript of July 21, Doc. 1834, p. 65 line 1 to p. 67 line 3; Transcript of July 19, Doc. 1810, p. 93 line 19 to p. 94 line 6. Former Governor Riley will have personal knowledge of whether Agent Glaser's testimony in that regard was correct, or not.

Moreover, the District Court has issued an opinion that makes the relevance of some of Governor Riley's potential testimony even more clear. That is, the Court's decision on the admissibility of certain statements under Rule of Evidence 801(d)(2)(E) includes the Court's findings about the relevance of *motivation* on the part of Government cooperating witnesses Beason and Lewis. *See* Doc. 1916. Those Government cooperating witnesses, Beason and Lewis, had motives that were (among other things) partisan; they worked to inculcate Mr. McGregor and others, and to block passage of SB 380, for partisan gain. It is very likely that former Governor Riley has relevant testimony to give about their motivation in that regard.

Furthermore, Governor Riley has personal knowledge of his own discussions with then-Representative Lewis, which led to Governor Riley's appointment of Rep. Lewis to a judgeship. Governor Riley has personal knowledge, and may be called to testify, as to

whether the appointment was a political favor rather than being based on any belief that Rep. Lewis was the person most objectively qualified for the position. The honest answer, we expect, is that the appointment was connected to Rep. Lewis's efforts to bring down Mr. McGregor, to defeat gaming legislation, and to enhance the political fortunes of one party over another. This conclusion is supported by the fact that, in response to a document subpoena, the current gubernatorial administration could find not a single record reflecting that former Governor Riley considered any potential candidate for the judgeship other than Rep. Lewis; there was no recorded discussion either of Rep. Lewis's qualifications or lack thereof, or any indication in the State's records that any other candidate was considered. This evidence will be relevant to Rep. Lewis's credibility as a primary Government witness. Again, the Government may argue at trial, and in context, that this evidence would not be admissible for some reason; but it would be premature to make a decision on that question under the Rules of Evidence at this time.

Governor Riley also very likely has relevant knowledge about the political context in which the battle over SB 380 was taking place, and about the ways in which the opponents of the bill were using PACs, other sources of campaign contributions, promises of campaign support, and other political carrots and sticks in order to persuade legislators. Governor Riley was personally involved in such efforts. The defense may well argue that such evidence is relevant in order to show the jury the understood and accepted customs and practices that surround both the legislative and the electoral processes in Alabama. The defense may well argue that such evidence is relevant to (among other things) the element of "corruptness" that the Government must prove in

order to obtain any conviction under 18 U.S.C. § 666; the defense may well argue that conduct which is consistent with established custom is not conduct that is “corrupt” in the legal sense. The Government may argue otherwise, of course; but the District Court will need to resolve that dispute if it arises, on the basis of the evidence already admitted at trial. This Court is not in a position to resolve it now.

Conclusion

For the reasons explained herein, the Court should recognize that questions of privilege, relevance, and other admissibility-related issues will need to be addressed at trial, in the context of the evidence as it stands when the issues are presented. For now, the proper course is to deny the motions to quash.

Respectfully submitted,

s/ Joe Espy, III
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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2011, I filed the foregoing with the Clerk of the Court using the CM/ECF filing system, and that a copy of same will be served on the below listed counsel of record via such system:

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