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

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

O R D E R

Before the court is the State of Alabama's Motion to Quash Subpoenas (Doc. #1925) and Robert R. Riley's Motion to Quash Subpoena (Doc. #1930). Because the arguments set forth in the Motions are essentially the same, the court will address them together. The Motions request that the subpoenas *ad testificandum*, issued to former Alabama Governor Robert R. Riley ("former Governor Riley") and former Public Safety Director Chris Murphy, be quashed, or in the alternative, the scope of their testimony be limited. The Motions raise two categories of arguments in support of quashing the subpoenas. First, Movants argue that the former officials have "no 'direct personal factual information' about any matter that is relevant or material to this case." Second, the Motions assert several privileges that would preclude the former officials' testimony.

A. Direct Personal Factual Information

Both the State of Alabama and former Governor Riley assert that the former officals have no direct personal factual information related to the case and, because they are former "high officials," they should not be called to testify absent extraordinary circumstances. Further, they argue that because they are former high officials they should not be called to

testify if the information is available through other sources. Defendant argues that the "high official" standard does not apply to former officials and that both witnesses have personal knowledge related to the case.

All sides point this court to *In re United States*, 985 F.2d 510 (11th Cir. 1993), in support of their arguments. Movants point to the United States Court of Appeals for the Eleventh Circuit's recognition that a higher standard should be imposed prior to allowing the testimony of a high official. *Id*. at 512. Defendant points to the reasoning behind the higher standard–greater duties and time constrains–as reason why the higher standard should not be applied to former high officials.

The Court of Appeals did apply the higher standard to the witness request in *In re United States*, and found that "the facts weigh against allowing the subpoena" against the sitting Commissioner of the FDA. However, those facts included the availability of the "former Director of the FDA's Office of Compliance" and that the sitting Commissioner "did not assume office until four years after the initial investigation and over two years after the case was sent to the Justice Department for further action." *Id*. at 512-13. In the present case, Defendant is attempting to subpoena *former* officials, officials who were in office at the time the investigation of this case took place. The time constraints and greater duties rationale does not apply in this case.

Movants also point this court to *Thomas v. Cate*, 715 F. Supp. 2d 1012 (E.D. Cal. 2010), in support of their argument that the high official standard should also apply to former

high officials. In that case, the court applied a test set forth for the deposition of high officials in civil cases, and denied the Petitioner's request, but allowed the petitioner to submit interrogatory requests to the former Governor through the court. *Id*. at 1049-50. In the present case, the court must evaluate the subpoenas request in a criminal matter, where Defendant has a Constitutional right to call witnesses to testify in his case.

Similarly, Movants' citations to *United States v. Wal-Mart Stores*, 2002 WL 562301, at *3 (D. Md. Mar. 29, 2002) and *United States v. Morgan,* 313 U.S. 409 (1941) are unavailing. At the hearing, counsel for Movants relied heavily on *Morgan*, even citing it as an example of a criminal case recognizing the "high official" burden and asking this court to rely on the rationale in *Morgan*. In actuality, "the *Morgan* doctrine arose in the context of a quasi-legislative proceeding where the Secretary of Agriculture issued an order setting rates for market agencies at the Kansas City Stockyards." *Wal-Mart Stores*, 2002 WL 562301, at *1. "*Morgan* stands for the principle that when the [Secretary of Agriculture's] duties take on a judicial quality there is no right to conduct a deposition of such a decision maker in the absence of extraordinary circumstances." *Id*.

Regardless of whether the high official standard could or should be applied to the former state officials, the court does find that Defendant has made a sufficient showing to support the subpoenas *ad testificandum*. At the hearing, Defendant proffered several bases for the subpoenas, including the specifics of conversations between former Governor Riley and at least one member of the alleged conspiracy related to an element of the conspiracy.

Defendant also cited to conversations between the two former officials.

Movants challenged the proffers made by Defendant, first, by arguing that some of the information cited by Defendant was garnered through unreliable sources, such as the Government's cooperating witnesses. Second, Movants insist that the information is available through other sources. For example, counsel for former Governor Riley suggested at the hearing that the codefendant who conversed with former Governor Riley could provide the contents of their conversation and unless and until the codefendant did not take the stand, Defendant is unable to show the information is not available from another source.

The ultimate reliability of the Government's cooperating witnesses is not for the undersigned to decide, and, Defendant must be able to counter assertions made against him at trial. Further, that Defendant is unable to compel the testimony of a codefendant at trial necessitates the subpoena. The purpose of these subpoenas is simply to secure the availability of the presence of the witnesses at trial.

Even applying a high official standard, the court finds that the proffers made by Defendant, especially related to conversations between the two officials and with other members of the alleged conspiracy, provide necessary materiality to compel their availability to testify. The undersigned does not make a determination regarding the relevancy of the possible testimony of the two witnesses. As the Supreme Court has stated, where a defendant does not have an opportunity to interview a witness, "it is of course not possible to make any avowal of *how* a witness may testify." *United States vs. Valenzuela-Beranl*, 458 U.S. 858,

871 (1982) (emphasis in original). Rather, Defendant has shown the events to which the witnesses might testify and "the relevance of those events to the crime charged," and thus, provided the court with the required materiality. *Id*.[1]

B. Privileges

As stated at the hearing, Movants' attempt to invoke any privilege for the preclusion or limitation of witness testimony is premature. The court is not in the position to suppose any and all questions to the witnesses, after presupposing the presentation of the evidence by the Government, envision which privilege might apply, and then deliberate as to whether the privilege would hold after performing an imaginary balancing test. Any privileges are properly asserted at trial. Accordingly, it is

ORDERED that the Motions (Doc. #1925) and (Doc. #1930) are DENIED.

Done this 28th day of November, 2011.

/s/ Wallace Capel, Jr.
WALLACE CAPEL, JR.
UNITED STATES MAGISTRATE JUDGE

[1] At the hearing, the State of Alabama conceded that if the court found that the possible witness testimony was material, then the subpoeans could be issued as to the former officials.