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8  
9 UNITED STATES DISTRICT COURT  
10 DISTRICT OF ARIZONA

11 United States of America,  
12  
13 Plaintiff,

14 v.

15 James R. Parker,  
16 Defendant.

**CR 10-0757-01-PHX-ROS**

**GOVERNMENT'S RESPONSE TO  
DEFENDANT JAMES PARKER'S  
MOTION FOR IMMUNITY FOR CO-  
DEFENDANT JACQUELINE PARKER**

17 **1. Overview.**

18 In a remarkably sparse pleading, devoid of any facts or law, containing an issue raised  
19 for the first time in his pleading, defendant James Parker incredibly moved to compel the  
20 government to grant use immunity to his co-defendant wife, Jacqueline Parker, so that she can  
21 testify on his behalf about unspecified subjects at his upcoming trial. There are no facts to  
22 support this ill-timed and unusual request, and the law compels a summary denial of the motion.

23 **2. Factual Background.**

24 James and Jacqueline Parker were indicted on June 8, 2010. (CR 1.) Defendant James  
25 Parker was indicted in Counts 1-4 with tax evasion in violation of 26 U.S.C. § 7201, and in  
26 Counts 5-8 with false statements in violation of 26 U.S.C. § 7206(1). Defendant Jacqueline  
27 Parker was jointly charged with the false statements in Counts 7-8. In essence, defendants  
28 avoided the payment of several million dollars in taxes, interest and penalties to the IRS by

1 initially shifting their income stream and major assets to nominee entities they still controlled,  
2 and later lying to the IRS about their net worth in several attempts to fraudulently settle their  
3 growing tax liabilities, all the while living in luxurious homes in Arizona and Texas, and driving  
4 between their homes in a \$300,000 Rolls Royce.

5 The government incorporates herein by reference its statement of facts contained in its  
6 Motion in Limine Regarding Defendant's Advice of Counsel Defense. (CR 118.) Defendant  
7 Jacqueline Parker was severed by the Court and is set for trial on July 17, 2012.

8 **3. Legal Standards.**

9 **a. "Use" Immunity.**

10 Under 18 U.S.C. §§ 6002-6003, the United States may secure immunity for a witness  
11 whose testimony "may be necessary to the public interest." This immunity is referred to as "use  
12 immunity." *United States v. Lord*, 711 F.2d 887, 889-890 (9<sup>th</sup> Cir. 1983). "Use immunity  
13 means that while the government may prosecute the witness for an offense related to the subject  
14 matter of the witness's testimony, the testimony itself and any 'fruits' thereof may not be used  
15 against the witness in any criminal case except a prosecution for perjury arising out of the  
16 testimony." *Id.*

17 Use immunity is generally used only for government witnesses. *Id.*; *United States v.*  
18 *Westerdahl*, 945 F.2d 1083, 1086 (9<sup>th</sup> Cir. 1991). It is particularly rare in cases when the defense  
19 witness has been indicted or is the subject/target of a criminal investigation. *Williams v.*  
20 *Woodford*, 306 F.3d 665, 700 (9<sup>th</sup> Cir. 2002); *United States v. Croft*, 124 F.3d 1109, 1117 (9<sup>th</sup>  
21 Cir. 1997); *United States v. Condo*, 741 F.2d 238, 239 (9<sup>th</sup> Cir. 1984) (*citing to United States*  
22 *v. Turkish*, 623 F.2d 769, 778 (2<sup>nd</sup> Cir. 1980) – "In fact, we think trial judges should summarily  
23 reject claims for defense witness immunity whenever the witness for whom immunity is sought  
24 is an actual or potential target of prosecution").

1           **b. Prosecutorial Misconduct Exception.**

2           The only exception to this rule is when the fact-finding process is intentionally distorted  
3 by prosecutorial conduct, and the defendant is denied a fair trial. *Westerdahl*, 945 F.2d at 1086;  
4 *Lord*, 771 F.2d at 892. To prove prosecutorial misconduct in this setting, a defendant must show  
5 that the evidence sought from the non-immunized witness was (1) relevant, and (2) that the  
6 government distorted the judicial fact-finding process by denying immunity to the potential  
7 witness. *Id.*

8                   **1. Relevance.**

9           To satisfy the first prong of the test, a defendant need not show that the testimony sought  
10 was either “clearly exculpatory” or “essential to the defense.” *United States v. Whitehead*, 200  
11 F.3d 634, 640 (9<sup>th</sup> Cir. 2000). The testimony need only be relevant. *Westerdahl*, 945 F.2d at  
12 1086. The relevance prong requires the defendant to offer proof of the substance of a defense  
13 witness’s testimony beyond the defendant’s or defense counsel’s unsupported assertions.  
14 *Woodford*, 306 F.2d at 699; *Westerdahl*, 945 F.2d at 1086.

15                   **2. Misconduct.**

16           Most of the reported Ninth Circuit decisions required a finding that the government took  
17 affirmative actions to prevent a defense witness from testifying. *See Westerdahl*, 945 F.2d at  
18 1086 (summarizing several Ninth Circuit decisions in which the Court did not find affirmative  
19 misconduct). Undue prosecutorial interference arises when the prosecution intimidates or  
20 harasses the witness to discourage the witness from testifying. *Woodford*, 306 F.2d at 699.  
21 Ordinarily, the prosecution’s conduct must amount to a substantial interference with the defense  
22 witness’s free and unhampered determination to testify before the conduct violates the  
23 defendant’s right to due process. *Id.* at 700.<sup>1</sup>

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25                   <sup>1</sup> In *Westerdahl*, a further refinement to the misconduct prong, not present here, was created in  
26 a situation in which two or more witnesses tell conflicting stories, and only the witness testifying for  
27 the government was granted immunity. *Westerdahl*, 945 F.2d at 1087 (*citing to United States v.*  
*Brutzman*, 731 F.2d 1449, 1452 (9<sup>th</sup> Cir. 1984)). This exception appears to arise only if the defense  
28

(continued...)

1 **4. Argument.**

2 Jacqueline Parker is an indicted co-defendant in this case. Therefore, defendant's request  
3 is nonsensical in this context. The narrow exception to this universally recognized standard is  
4 not remotely applicable, and clearly has not been met.

5 First, defendant must show that the testimony sought to be immunized is relevant. No  
6 showing was made. In the nine sentences that make up defendant's entire motion, the closest  
7 sentence to asserting any fact is the one that reads "Jacqueline Parker's testimony is crucial in  
8 the defense of James Parker." That clearly does not set forth any facts from which a Court can  
9 determine whether her testimony would be relevant. Second, defendant must establish that the  
10 government did something improper to discourage the witness from testifying. No showing of  
11 any sort was done in that regard either. Thus, there are no facts whatsoever that would support  
12 this rare exception to general rule.

13 **5. Conclusion.**

14 This motion should not have been filed, and should be summarily denied by the Court.

15 Respectfully submitted this 24<sup>th</sup> day of April, 2012.

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17 Acting United States Attorney  
18 District of Arizona

19 /s Peter Sexton

20 PETER SEXTON  
21 WALTER PERKEL  
22 Assistant U.S. Attorneys

23 I hereby certify that on this date, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF  
24 system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants: Michael Minns, Ashley  
25 Arnett, Michael Kimerer, John McBee, and Joy Bertrand

26 \_\_\_\_\_  
27 <sup>1</sup> (...continued)

28 witness "directly contradict[ed]" the government witness who was given some form of immunity. *Id.*  
In that very limited factual situation, the Ninth Circuit held this also might distort the fact-finding  
process. *Id.*