

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1989-012631

12/18/2013

HON. ROSA MROZ

CLERK OF THE COURT
J. Matlack
Deputy

STATE OF ARIZONA

VINCE H IMBORDINO

v.

DEBRA JEAN MILKE (A)

MICHAEL D KIMERER
LORI L VOEPEL
LARRY L DEBUS

CAPITAL CASE MANAGER

UNDER ADVISEMENT RULING

The Court has considered the following: (1) State's Memorandum Regarding Witness Invocation of Fifth Amendment Privilege and Request for Hearing; (2) Defendant's Preliminary Response to State's Memo to Correct Record re: Saldate's Expressed Intent to Invoke 5th Amendment Privilege and Consult with Counsel; (3) State's Reply to the Defendant's Preliminary Response; (4) Defendant's Responsive Memo re: Witness Invocation of 5th Amendment Privilege and Request for Hearing; (5) Saldate's Response to State's Motion re: Saldate's Right to Invoke His 5th Amendment Privilege; (6) State's (Second) Memorandum re: Witness Invocation of 5th Amendment; (7) Defendant's Response to State's (Second) Memorandum regarding Witness Invocation of Fifth Amendment Privilege; (8) Saldate's Supplemental Response to State's Motion re: Saldate's Right to Invoke his 5th Amendment Privilege; (9) Supplement to Defendant's Response to State's (Second) Memorandum regarding Witness Invocation of Fifth Amendment Privilege; (10) the Ninth Circuit opinion in *Milke v. Ryan*¹; (11) State's Notice of United States Department of Justice Decision; (12) Notice of Letter from United States Attorney's Office, and (12) oral arguments made.

¹ 711 F.3d 998 (9th Cir. 2013)
Docket Code 926

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Preliminary Matters

First, the Court wants to address the State's contention that this Court should not have asked whether Detective Saldate ("Saldate") needed a lawyer before he testifies in this case. The Court agrees with the State that courts do not generally inquire if witnesses need lawyers to protect their rights when a conviction is overturned and a new trial is ordered. However, this is not a normal case. The Ninth Circuit specifically referred Saldate "to the United States Attorney for the District of Arizona and to the Assistant United States Attorney General of the Civil Rights Division, for possible investigation into whether Saldate's conduct, . . . , amounts to a pattern of violating the federally protected rights of Arizona residents."² This Court would be remiss in its duties were it to ignore such an obvious issue.

Second, the parties have asked this Court to address whether the Ninth Circuit's interpretation of the eight cases cited in the Opinion can be challenged, or are subject to "law of the case" or "collateral estoppel" determinations. This issue is the subject of a separate motion filed by the defense and will be decided at a later date. The Court reviewed the information about these eight cases at this time only for the purposes of determining the legitimacy of Saldate's invocation of his Fifth Amendment rights. While this Court does not fully agree with the conclusions reached by the Ninth Circuit in every case, the Court finds that Saldate does have a legitimate reason to fear prosecution arising out of his conduct in these cases.

Invocation of Fifth Amendment Privilege

At the December 13, 2013 hearing, Saldate confirmed that he is asserting his privilege against self-incrimination. He further stated that if ordered to testify, he will testify consistent with his previous testimony.

The court must assess the legitimacy of any claim of privilege.³ In assessing the claim of privilege, the court considers whether the witness has provided a factual predicate sufficient for the court to evaluate the claim of privilege,⁴ and whether the witness has demonstrated a reasonable apprehension of danger.⁵

² *Id.* at 1019-20.

³ See *State v. McDaniel*, 136 Ariz. 188, 193-195, 665 P.2d 70 (1983); *State v. Cornejo*, 139 Ariz. 204, 677 P. 2d 1312 (App. 1983); *State v. Maldonado*, 181 Ariz. 208, 211, 889 P.2d 1, 4 (App. 1 1994).

⁴ *State v. Rosas-Hernandez*, 202 Ariz. 212, ¶17, 42 P.3d 1177 (App. Div.1 2002)).

⁵ *Flagler v. Derickson*, 134 Ariz. 229, 231, 655 P. 2d 349, 352 (1982)("witness must apprehend a real and appreciable danger of prosecution"); *United States v. Vavages*, 151 F.3d 1185, 1192 (9th Cir. 1998)(privilege justified on showing of "substantial and real, and not merely trifling or imaginary, hazards of incrimination").

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Factual Predicate:

Saldate was the main witness at the Defendant's 1990 trial, at the Rule 32 hearing, and at the federal *habeas* proceeding in 2010. The Court has reviewed the trial, the Rule 32/post-conviction and the *habeas* proceedings and is familiar with the questions asked of Saldate. The State confirmed that the relevant questions to be asked of Saldate by the State in any future court hearings would be substantially similar to those previously asked. Additionally, the Court anticipates questions from the Defendant related to the impeachment materials described in the Ninth Circuit opinion.

THE COURT FINDS that Saldate has provided a factual predicate sufficient for the court to evaluate the claim of privilege.

Reasonable Apprehension of Danger:

The Ninth Circuit opinion makes it clear that the court believed that Saldate lied under oath or disregarded suspects' constitutional rights and the court referred Saldate "to the United States Attorney for the District of Arizona and to the Assistant United States Attorney General of the Civil Rights Division, for possible investigation into whether Saldate's conduct, ..., amounts to a pattern of violating the federally protected rights of Arizona residents."⁶ As stated *supra*, while this Court does not fully agree with the conclusions reached by the Ninth Circuit in every case, the Court does find that Saldate has a legitimate reason to fear prosecution arising out of his conduct in the cases cited by the Ninth Circuit. Furthermore, the Ninth Circuit concluded, in advance, that if Saldate testifies consistently with his previous testimonies, he would expose himself to a perjury prosecution.⁷

The State argues that Saldate does not have a reasonable apprehension of danger because federal authorities declined to prosecute Saldate and the Maricopa County Attorney's Office does not intend to prosecute Saldate for any past testimony.

A. U.S. Attorney's Letter

On August 30, 2013, the U.S. Attorney for the District of Arizona wrote a letter indicating that it received an Order from the Ninth Circuit for a possible investigation of whether

⁶ *Milke*, 711 F.3d at 1019-20.

⁷ The Court is aware that a witness may not invoke the Fifth Amendment privilege in connection with the potential for perjury charges related to future truthful testimony. *United States v. Vavages*, 151 F.3d 1185, 1192 (9th Cir. 1998) (fear of perjury prosecution as result of future truthful testimony insufficient to support claim of privilege; "shield against self-incrimination...is to testify truthfully, not to refuse to testify on basis witness may face prosecution for lie not yet told.").

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Saldate's conduct as identified in the *Milke* opinion constituted viable civil rights violations. It concluded that "any criminal prosecution would be barred by the applicable federal statute of limitations period. As a result, this office declines to pursue charges for the referred conduct."⁸

Although the U.S. Attorney appears to have declined criminal charges, the declination is very limited:

1. The U.S. Attorney only addressed "viable civil rights violations" and did not address any possible federal perjury charges arising from any of Saldate's testimony.
2. The U.S. Attorney declined prosecution on the basis of "applicable federal statute of limitations period." The applicable federal statute of limitations period is 5 years.⁹ While the statute of limitations may have run in reference to Saldate's 1990 testimony, the statute of limitations has not expired for Saldate's 2010 testimony.
3. If Saldate testifies consistently with his prior testimonies in future court proceedings, he may be subject to prosecution under a theory of continuing conspiracy to violation of civil rights because some of the defendants in the eight cases mentioned in the *Milke* opinion are still serving sentences, and some are still in the process of appealing their conviction.¹⁰ The statute of limitations does not begin to run until the last overt act leading to accomplishment of the conspiracy was committed.¹¹ Furthermore, as to the Defendant specifically, each time Saldate testifies against her could be deemed a re-violation of her civil rights which would allow the statute of limitations to begin anew.
4. This U.S. Attorney did not grant immunity for past acts or future testimony to Saldate.
5. The U.S. Attorney specified that he "cannot speak for any other prosecution agency that may have, or have had, jurisdiction over Mr. Saldate's conduct."

⁸ August 30, 2013 letter from Monica Klapper, Assistant United States Attorney, to Vince Imbordino, Deputy County Attorney, attached to the Notice of Letter from United States Attorney's Office.

⁹ 18 U.S.C., Chapter § 213.

¹⁰ Exhibit A of the Supplement to Defendant's Response to State's (Second) Memorandum Regarding Witness Invocation of Fifth Amendment Privilege.

¹¹ *Culp v. United States*, 131 F.2d 93, 100 (8th Cir. 1942).

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B. DOJ Letter

On December 6, 2013, the Civil Rights Division of the U.S. Department of Justice wrote a letter stating:

“The Criminal Section of the Civil Rights Division...specifically reviewed whether the facts and circumstances surrounding Saldate’s conduct in the State v. Milke prosecution and subsequent habeas proceedings supported a prosecutable violation of the federal criminal civil rights statutes. ...we have reviewed the available evidence in this matter...and concluded that the evidence does not support a prosecutable violation of the applicable federal criminal civil rights statutes. Accordingly, the Criminal Section declines prosecution in this matter.”¹²

Similar to the U.S. Attorney’s letter, DOJ’s letter declining to prosecute Saldate is limited:

1. The Ninth Circuit specifically asked DOJ to investigate whether “Saldate’s conduct, and that of his supervisors and other state and local officials, amounts to a pattern of violating the federally protected rights of Arizona residents.” (Emphasis added). Instead, the DOJ only declined prosecution related to “the facts and circumstances surrounding Saldate’s conduct *in the State v. Milke prosecution and subsequent habeas proceedings*”. (Emphasis added). The DOJ’s letter did not make any references to Saldate’s conduct in the eight other cases that the Ninth Circuit found problematic nor did it make any references to the 2009 allegations involving Belinda Reynolds. It is important to note that Saldate was not cross-examined about these cases at the previous trial. The defense has already indicated that Saldate will be cross-examined about them in any future proceedings in this case. Depending on how Saldate answers those questions, his testimony could be used against him to support any potential federal criminal civil rights charges from these eight cases and the Reynolds case.
2. DOJ did not decline to prosecute any perjury charges arising from any of Saldate’s testimony.
3. DOJ did not grant immunity for past acts or future testimony to Saldate.

¹² December 6, 2013 letter from Robert Moossy, Jr., Chief of the Criminal Section of the Civil Rights Division, to Bill Montgomery, Maricopa County Attorney, attached to the Notice of United States Department of Justice Decision.

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C. Perjury Charge

Mr. Imbordino, the representative of the current Maricopa County Attorney, Bill Montgomery, orally confirmed that his office does not intend to prosecute Saldate for any past testimony. The Court notes, however, that MCAO did not provide Saldate with a written letter guaranteeing him that he is free from prosecution now and in the future.¹³ The Court simply notes that under Arizona law, perjury is a class 4 felony.¹⁴ The statute of limitations on a class 4 felony is seven years.¹⁵

Furthermore, MCAO has no jurisdiction over any federal perjury charges arising from Saldate's 2010 testimony, and cannot assure Saldate that he will not be prosecuted in federal court.

Based on the foregoing,

THE COURT FINDS that Saldate has demonstrated a reasonable apprehension of danger that, if compelled to answer, he would face criminal charges based on his past testimony and/or present disclosures, and that the Fifth Amendment affords protection.

Blanket Assertion of Privilege:

Generally, a blanket privilege cannot be asserted. The claim of privilege may be raised as to specific relevant questions; each question must clearly seek testimony incriminating to the witness.¹⁶ However, if a judge determines that a witness could legitimately refuse to answer essentially all relevant questions, then that witness may be totally excused without violating the witness's Sixth Amendment right to compulsory process.¹⁷ "...[T]his exception is a narrow one. It is only applicable when the trial judge has extensive knowledge of the case and rules that the Fifth Amendment would be properly invoked in response to all relevant questions that the party calling the witness plans on asking."¹⁸

The Court has extensive knowledge about this case because it has reviewed most of the transcripts from the trial, transcripts and exhibits from the 2010 federal court hearing, the Ninth

¹³ The Court does not know if an oral confirmation would suffice to bind future Maricopa County attorneys from prosecuting Saldate.

¹⁴ A.R.S. § 13-2702(B).

¹⁵ A.R.S. § 13-107(B)(1).

¹⁶ *State v. McDaniel*, 136 Ariz. 188, 665 P.2d 70 (1983), abrogated on other grounds by *State v. Walton*, 159 Ariz. 571, 769 P.2d 1017 (1989); see *State v. Maldonado*, 181 Ariz. 208, 211, 889 P.2d 1, 4 (App. 1 1994).

¹⁷ *McDaniel*, 136 Ariz. at 194, 665 P.2d at 76.

¹⁸ *Id.*

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Circuit Opinion and records from the eight cases cited in the Ninth Circuit Opinion, as well as a number of exhibits submitted by the State and the defense. The State has confirmed that the relevant questions to be asked to Saldate in future proceedings will be substantially similar to those asked of Saldate previously. The defense has confirmed that it will impeach Saldate with the information from the cases mentioned in the Ninth Circuit opinion.

THE COURT FINDS that Saldate may make a blanket assertion of privilege.

Conclusion

A judge may deny the claim of privilege only where it is “‘perfectly clear’ from a careful consideration of all the circumstances in the case, that the witness is mistaken and that the answer cannot possibly have such tendency to incriminate.”¹⁹ This places a heavy burden on the judge who decides to compel testimony over a Fifth Amendment claim.

After careful consideration of the totality of the circumstances, the Court finds that it is **not** “‘perfectly clear” that Saldate is mistaken and that his testimony could not possibly have the tendency to incriminate him. Accordingly,

IT IS ORDERED denying the State’s request to compel Saldate to testify over Saldate’s Fifth Amendment claim.

IT IS FURTHER ORDERED setting a Status Conference on **January 17, 2014 at 2:00 p.m.** to discuss what issues remain given the Court’s decision.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

¹⁹ *Malloy v. Hogan*, 378 U.S. 1, 12 (1964), citing *Hoffman v. United States*, 341 U.S. 479, 488 (1951).
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