

P R O C E E D I N G S

1
2 THE COURT: Mr. Shay, would you come directly into
3 the witness box, please, after you have been unhitched.

4 (Pause.)

5 THE COURT: Mr. Shay, as I understand it, the
6 government wishes to call you as witness in the case against
7 Mr. Trenkler.

8 Your lawyer has filed a motion to quash that
9 subpoena. That is, to have me order that you may not be
10 called as a witness on a variety of legal grounds, I've
11 overruled your lawyer's motion. The government has also filed
12 an application for immunity. That is, you have a right not to
13 testify so long as your testimony could be used against you in
14 any criminal proceeding; do you understand that?

15 THE WITNESS: Yes, your Honor.

16 THE COURT: I have signed an immunity order, and what
17 that means is you no longer have the right to refuse to
18 testify because your testimony could be used against you,
19 because now it cannot be used against you.

20 Do you understand that much?

21 THE WITNESS: Yes, your Honor.

22 THE COURT: That is, no matter what happens
23 hereafter, if any other jurisdiction or the federal government
24 were to charge you again with respect to any offenses arising
25 out of this series of events or anything else that you might

1 admit in the course of testifying, whatever you say is forever
2 forbidden from being used against you,.

3 Do you understand that?

4 THE WITNESS: No, I do not.

5 MS. BARON-EVANS: Your Honor, may I confer?

6 (Pause.)

7 THE WITNESS: Yes, I understand.

8 THE COURT: Are you sure you understand it?

9 You don't want me to explain it to you again?

10 THE WITNESS: No.

11 THE COURT: Since it is now the case that no
12 jurisdiction can use against you anything you might say, you
13 no longer have any reason why you can refuse to testify.

14 Do you understand that?

15 You can no longer refuse on the grounds that you
16 might incriminate yourself.

17 Do you understand?

18 You can no longer refuse to testify because whatever
19 you might say could be used against you in some other
20 proceeding, some mythical proceeding that may or may not take
21 place.

22 Assume for the moment you were to testify and you
23 were to admit, let's just assume that you smoked marijuana
24 yesterday, the government, no government can use that
25 testimony against you in any proceeding arising -- that says

1 you smoked marijuana and that is illegal.

2 Ms. Gertner disagrees; however, that's the case.

3 THE COURT: Do you understand that if you were to
4 admit that you committed a crime if you were to testify, then
5 the government may not in any proceeding in which it charges
6 you with that crime, use what you said about that offense; do
7 you understand that much?

8 THE WITNESS: Yes.

9 THE COURT: If you do testify, then, the only risk
10 you run is that if you do not tell the truth and you know that
11 you are not telling the truth, the government may charge you
12 with perjury; do you understand that?

13 THE WITNESS: I understand that but on earlier dates
14 if I lied, then it is going to veto anything if I tell the
15 truth now, it is going to make me look like a liar anyway, so.

16 Do you understand?

17 THE COURT: But that is no risk to you. The risk
18 risk to you is that the government may say: Well, you were
19 telling the truth earlier, and you're lying now; and
20 therefore, we will charge you with perjury.

21 THE WITNESS: That's what I'm saying.

22 THE COURT: That is a risk that you run.

23 MS. BARON-EVANS: Your Honor, may I be heard? He can
24 also be prosecuted for earlier false statements, according to
25 the Immunity Statute.

1 THE COURT: That's true.

2 MR. KELLY: I don't think that is true. There are no
3 earlier sworn statements.

4 THE COURT: Well, that's true. He didn't, he didn't
5 swear.

6 To the extent that you made statements earlier under
7 oath, the government may charge you with perjury if it decides
8 that you were not telling truth then.

9 MS. BARON-EVANS: Your Honor, I believe that he has
10 given statements in the context of proffered statements and
11 retractions, several of them, and those are statements in the
12 context of an investigation, and I believe that he could be
13 prosecuted.

14 THE COURT: For obstruction of justice?

15 MS. BARON-EVANS: For obstruction of justice or for
16 giving a false statement; and in fact, that was a term of the
17 proffer agreement.

18 THE COURT: I don't know about that. I mean, I have
19 no knowledge of what the proffer agreement was, or anything of
20 that --

21 MR. KELLY: Your Honor, the United States' clear
22 understanding is that the immunity order of this Court
23 protects him from any prior statements. In other words, so
24 long as he does not testify untruthfully, once sworn before
25 this judge and before this Court, he is not subject to the

1 prosecution for the earlier statements. That is our position
2 with respect to this order, that he is not prosecutable by the
3 United States for these prior statements. However, should he
4 speak untruthfully, once sworn, today or in this proceeding,
5 he would be subjecting himself to possible prosecution of
6 perjury.

7 THE COURT: Is that in the nature of a promise by the
8 government?

9 MR. KELLY: If you want to determine it that way for
10 the record, your Honor, I will make it such.

11 MS. BARON-EVANS: Your Honor, that would still be
12 inadequate because the perjury -- Tom Shay would still be
13 subject to a perjury prosecution, unless he follows the script
14 that the government wants him to follow. He's given
15 conflicting statements on every issue in this case. For every
16 statement yes, there is a statement no.

17 THE COURT: Well, but it is a correct statement of
18 the law, that Mr. Shay is subject to a perjury prosecution
19 with respect to any statements he make today. That is, if the
20 government decides that he is not telling the truth, once he
21 has been sworn, then, the government may charge him with
22 perjury.

23 To the extent that the government says: Well, you're
24 saying something different today from what you said before;
25 and therefore, you are not telling the truth today, he runs

1 that risk. He does not run a risk, in light of the
2 stipulation by the government, of being charged with having
3 made false statements on an earlier occasion.

4 Correct?

5 MR. KELLY: That's correct, your Honor.

6 THE COURT: That's the government's stipulation on
7 the record.

8 MR. KELLY: That's correct. Just so the record is
9 clear, Ms. Baron-Evans makes reference to some script. There
10 is no script, and we have not talked to Mr. Shay. We simply
11 wish to ask questions and hear his truthful answers.

12 THE COURT: Well, do you understand the risk you
13 run? The risk is, the only risk is that the government may
14 decide that once you have taken the oath and you do testify,
15 that you haven't told the truth, and it will then -- it may
16 then charge you with perjury with respect to what you said
17 today.

18 Do you understand that? That's the risk you run.

19 THE WITNESS: I understand.

20 Do you wish to talk with him?

21 (Pause.)

22 THE COURT: Can I explain one other thing to
23 Mr. Shay, that risk, that the government may charge you with
24 perjury, is not a risk that permits you to decline to answer.

25 Do you understand that?

1 That is, it is assumed that you will tell the truth.
2 And you may not refuse to answer because you're afraid that
3 the government will charge you with perjury.

4 Do you understand that?

5 Talk to Ms. Baron-Evans and then let her explain.

6 (Pause.)

7 THE COURT: I need to explain one other thing to you,
8 and that is, now that you have been ordered to testify, that
9 is, now that you can no longer refuse to testify, and I will,
10 therefore, order you to testify, if you decline to testify, I
11 will have no choice but to hold you in contempt of Court.
12 Because once you violate a court order, that's what you are,
13 you are in contempt of Court.

14 Now, do you wish to add anything?

15 MS. BARON-EVANS: Yes, your Honor, I believe that Tom
16 Shay has just and substantial reasons to refuse to testify,
17 and that is his belief, too. If he were to refuse to testify
18 it wouldn't be out of any disrespect to the Court. It is
19 because he's in an untenable position. Even if the
20 government's psychiatrist has conceded that his statements are
21 unreliable, given his --

22 MR. KELLY: I would object to legal argument. Can we
23 make inquiry of Mr. Shay? I don't think this is the time for
24 legal argument.

25 THE COURT: Mr. Shay, will you testify or not?

1 THE WITNESS: Your Honor, I have to refuse on advice
2 of counsel.

3 THE COURT: That's where we are.

4 MR. KELLY: Your Honor, can we swear the witness,
5 he's not been sworn. And just so the record is clear, have
6 you make the advice and get his acknowledgement under oath
7 that it is his decision, after having been advised by the
8 Court, accordingly, that he's refusing the face of the Court's
9 lawful order to testify.

10 THE COURT: I don't understand why we need him under
11 oath for that.

12 MR. KELLY: Well, just so the record is clear, your
13 Honor.

14 THE COURT: I mean, I purposely didn't swear him
15 because there is nothing he has to tell me under oath until he
16 testifies. I don't understand why I need to swear him for
17 that. I understand that he has stated that he refuses to
18 testify on the advice of counsel.

19 [Conference at the bench, as follows:

20 THE COURT: Is there no way you can work this out?
21 He's afraid of being charged with perjury.

22 MR. KELLY: For anything he says today.

23 THE COURT: Yes. The issue is given conflicting
24 statements all over the place, that's the question. And I
25 don't know, the government has previously indicated that it

1 doesn't wish to give any kind of assurances; I understand
2 that. But I don't know what, if anything, can be worked out
3 with Mr. Shay. He clearly is afraid of being charged with
4 perjury. That's what he's telling us.

5 MR. KELLY: If his fear is based upon statements he
6 has made in the past, we have stated on record, and will state
7 again, the United States will not prosecute this gentleman for
8 anything that he has said in the past that may prove to be
9 untruthful.

10 THE COURT: That's not what he's saying. What he's
11 saying is because he has said it was dark in the past, and he
12 may now say it was light, he thinks that because it is
13 different from the past, you will believe the past and you
14 will now charge him with perjury for saying under oath.
15 That's his fear.

16 MR. KELLY: If he's charged with perjury, he clearly
17 has the rights that any defendant has, the right to defend
18 himself.

19 THE COURT: But, you know, he says, he says he would
20 rather take the contempt than run the risk of, yet, another
21 prosecution. And he's also a saying, as I understand the
22 papers, given the government's severe dissatisfaction with the
23 sentence he received in the main charge, he is afraid that the
24 government will want to pile it on by using perjury. That's
25 his fear.

1 MR. KELLY: I don't think, in all due respect, I
2 don't think it can be worked out. I mean, I think that we're
3 trying to treat him as we would any defendant in this same
4 context.

5 I would just ask the Court, if I would just make sure
6 the witness has seen the actual order of the Court,
7 acknowledges it, have it noted for the record. And if it is
8 his continued view that he refuses to testify, in the face of
9 the Court's order, then we would ask the Court to find him in
10 contempt and schedule it for hearing, perhaps at the
11 conclusion of this trial.

12 THE COURT: Why do I have to do that? I'll just hold
13 him in contempt right now for failing to testify, and his
14 contempt will then end at the end of the trial.

15 MR. KELLY: That', I'm sure that's the government's
16 view of the law, your Honor. As I understand it, the Court
17 has certain options if a finding of contempt follows under
18 Rule 42.

19 THE COURT: Are you suggesting criminal contempt for
20 a recalcitrant witness?

21 MS. BARON-EVANS: Criminal contempt is only
22 appropriate if it amounts to obstruction of justice. That's
23 clearly not his purpose.

24 THE COURT: He's a recalcitrant witness; it is a
25 civil contempt issue.

1 MR. KELLY: Your Honor --

2 MS. BARON-EVANS: He is unlike the typical defendant
3 who has not given conflicting statements all over the place
4 and does not have his particular mental problems that bear
5 directly on his ability to relate things.

6 MR. KELLY: Well, your Honor, we have looked at the
7 law on this, and I have a grave difference with counsel as to
8 the applicability of criminal contempt. I think it absolutely
9 does apply in this context. We have looked at a number of
10 cases which say, essentially, the Court has two options
11 available to it when a witness, in the face of an immunity
12 order, refuses to testify as a trial witness. Either the
13 Court can summarily -- find him in contempt summarily, and
14 sentence up to six months; or it can schedule a hearing at
15 some later time when he has an opportunity to prepare his
16 defense and have counsel, at which time he can take up the
17 matter of disposition.

18 THE COURT: On civil contempt, I can only sentence
19 him for the duration OF the proceeding.

20 MR. KELLY: This is a clear instance where criminal
21 contempt is applicable, where, in view of the immunity order,
22 a witness knowingly decides that he is going to violate the
23 order.

24 THE COURT: How is it any different from a grand jury
25 witness?

1 MR. KELLY: In the grand jury witness --

2 THE COURT: Gets an immunity order and refuses to
3 testify, and it's held pending the conclusion of the grand
4 jury's term.

5 MR. KELLY: Your Honor, I did not bring the cases
6 with me. What I would ask, at a minimum, since we looked at
7 this extensively, is to have the opportunity to prepare and
8 file for the Court, perhaps by tomorrow, a memorandum
9 outlining for Court that, in fact, criminal contempt under
10 Rule 42 is appropriate here, and under 18 U.S. Code,
11 Section 401. So I, what I would ask your Honor is that after
12 the after the Court enters a finding of contempt, we simply
13 schedule another hearing early next week and discuss the
14 matter of whether it is civil or criminal.

15 THE COURT: If it is criminal, how can I do it just
16 by finding it now?

17 MS. BARON-EVANS: May I be heard.

18 Under Rule 42(a), there is, some summary criminal
19 contempt which only should apply in the case that a witness's
20 refusal amounts to obstruction of justice, which this does
21 not. He has just and substantial reasons not to testify.

22 THE COURT: But that may not. But that doesn't say
23 that it's not an obstruction of justice. The government is
24 having some serious problems in the case. And to the extent
25 he doesn't testify, the government may not have a witness to

1 testify on these issues. That's the problem.

2 MS. BARON-EVANS: Any testimony Tom Shay could give
3 couldn't be reliable, anyway.

4 THE COURT: That's a separate issue, and he's subject
5 to cross-examination. The problem is that the government
6 can't have cross-examination of statements through other
7 witnesses; that's the difficulty.

8 MR. KELLY: The cases are clear, refusal of a witness
9 to testify at trial, in the face of an order, is, in fact,
10 obstruction of justice. Clearly, under the rule 42(a), and we
11 have a whole litany of cases --

12 THE COURT: There can be an indictment for
13 obstruction of justice for refusing to testify?

14 MR. KELLY: No, because the Statute 401(3)
15 specifically exempts contempts committed in the presence of
16 the Court from being an indictable offense. The only options
17 available are 42(a), summary contempt, criminal, up to six
18 months, or summary -- criminal contempt where disposition is
19 deferred.

20 THE COURT: Why is this any different from the grand
21 jury witness?

22 MR. KELLY: Well, your Honor, again, I would say like
23 to be able to, I'm speaking without having the authorities
24 before me, and I really don't want to talk out of turn. There
25 is a distinction here. The cases are very clear that this is

1 a classic instance where Rule 42 applies with criminal
2 contempt.

3 THE COURT: I would just ask the Court, a way to
4 handle it is to give the government an opportunity to inform
5 the Court of our position, is to enter the finding. If the
6 Court's uncomfortable with making a finding, because it has to
7 determine whether it's civil or criminal, then I will ask we
8 continue the matter entirely. On the other hand, since we
9 believe firmly that it is criminal contempt, we would ask you
10 make the finding and then conduct another hearing on this
11 matter early next week, in the afternoon perhaps.

12 MS. BARON-EVANS: Civil contempt is appropriate
13 here. Whether it is civil or criminal it is going to
14 continue. Tom Shay is not disrupting the proceeding or shown
15 disrespect to the Court. He has just reasons for refusing. I
16 think that the government's desire to put this off for a
17 hearing and to tack on extra time, shows what it is up to in
18 this situation. Once he refuses to testify, they are not
19 going to get his testimony, anyway, except under possibly
20 civil contempt, because the civil contempt is imposed to
21 coerce the witness to change his mind. He'll get six extra
22 months tacked on to his sentence. The purpose of this --

23 THE COURT: The purpose of it is to get him to
24 testify. They want him to testify which is why they are
25 threatening him.

1 ~~MS. GERTNER~~ ^{THE COURT}: I think there is a range of options.
2 The degree to the which the proceedings are disrupted and the
3 degree to which he's acting in bad faith, that pushes this to
4 the criminal side, as opposed to civil side. I think -- I
5 need to decide this in a deliberate way. If I decide that it
6 is civil contempt, it seems to me that we need to agree that
7 the civil contempt starts today.

8 MS. GERTNER: Yes.

9 THE COURT: So that whatever additional time he
10 serves would start today, if it were a civil contempt. On the
11 other hand, I think the government is entitled to try to
12 persuade me that it is something else. So, we will have a
13 hearing on some other day --

14 Mr. Shay wants to talk to his counsel.

15 [Pause.]

16 THE COURT: Any change?

17 MS. GERTNER: No.

18 THE COURT: Do you have the copy of the immunity
19 order?

20 MR. KELLY: Yes, I do.

21 THE COURT: Can you show it to Mr. Shay, please.

22 Mr. Shay, Ms. Gertner is showing you the immunity
23 order that, that I had previously signed. It is the document
24 that says you may not be prosecuted for anything you say,
25 except for perjury. Please have a look at it, read it, and

1 then we will proceed.

2 (Pause.)

3 THE COURT: Have you read the order?

4 THE WITNESS: Yes, I did, your Honor.

5 THE COURT: Do you understand it?

6 THE WITNESS: Yes, I do.

7 THE COURT: Are you prepared to testify?

8 THE WITNESS: No, I'm not.

9 THE COURT: In that case, I will hold you in
10 contempt. I will not now decide whether it is civil or
11 criminal contempt. We will have a hearing on that, in due
12 course, after everybody has a chance to tell me what the law
13 is, and you are now excused.

14 This may be filed. Thank you.

15 We will take a recess.

16 Five minutes, I take it all the jurors are here, and
17 then we'll proceed.

18 [Recess.]

19 THE COURT: What do we need to do beyond what we did
20 yesterday?

21 MR. LIBBY: Respectfully, your Honor, there are a
22 couple of issues with respect to Miller Thomas, part one,
23 statements where you mentioned that you didn't have the
24 context, you were unable to pass --

25 THE COURT: Right, only one, item three in your memo.