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IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN
MARIANA ISLANDS,

Plaintiff,

v.

ANTONIO TENORIO BENAVENTE, et al.

Defendants.

CRIMINAL CASE NO. 02-0042

**ORDER DENYING
THE COMMONWEALTH'S
REQUEST FOR IMMUNITY
FOR FRANCES DUENES SALAS
AND JAMES P. DELEON
GUERRERO**

**I.
INTRODUCTION**

This matter came before the Court for the Commonwealth's *Request for Immunity for Frances Duenas Salas and James P. Deleon Guerrero* and was heard at a subsequent hearing on January 7, 2003. The Commonwealth was represented by Clyde Lemons, Jr. The defendants were represented by Brien Sers Nicholas and Perry B. Inos. Pedro Atalig, attorney for defendants Ivan Patrick Igitol and Marie Salas Igitol, was off island and excused by the Court. This matter is set for trial on January 13, 2003 at 9 a.m.

1 **II.**

2 **FACTUAL BACKGROUND**

3 The Commonwealth charged seven defendants with various crimes. All seven defendants are
4 scheduled to be tried together by one jury. The Commonwealth seeks to have this Court order two of the
5 defendants, James Deleon Guerrero and Frances Duenas Salas, to testify during this trial under the
6 Commonwealth's witness immunity statute, 6 CMC § 6502.

7 **III.**

8 **DISCUSSION**

9 This case presents a unique circumstance, one for which neither this Court, nor the parties have
10 found applicable precedent. This case is unique because the witnesses which would be subject to the
11 immunity order are also defendants. The Commonwealth wants this Court to force these defendants to
12 testify in their own trial under the authority of the use-immunity statute. However, this Court must also
13 consider the implications of this compulsory testimony during their trial against their privilege against self
14 incrimination.

15 A. The immunity statute.

16 Under the Commonwealth's use-immunity statute, a witness may be compelled to testify so long
17 as the compelled testimony, or information derived from the compelled testimony, is not used against the
18 witness in any criminal case, except a prosecution for perjury, giving false testimony or other otherwise
19 failing to comply with the order to testify. The use-immunity statute provides:

20
21 (b) Whenever a witness refuses, on the basis of the privilege
22 against self-incrimination, to testify or provide other information in a
23 proceeding before or ancillary to a court of the Commonwealth and the
24 judge presiding over the proceeding communicates to the witness an order
25 issued under this section, the witness may not refuse to comply with the
26 order on the basis of the privilege against self-incrimination; but no
27 testimony or other information compelled under the order (or any
28 information directly or indirectly derived from the testimony or other
information) may be used against the witness in any criminal case, except
a prosecution for perjury, giving a false statement, or otherwise failing to
comply with the order.

(c) (1) In the case of any individual who has been or may be

1 called to testify or provide other information at any proceeding
2 before or ancillary to a court of the Commonwealth, the court
3 shall issue, in accordance with subsection (b) of this section, upon
4 the request of the Attorney General or an assistant attorney
5 general acting for him or her, an order requiring the individual to
6 give testimony or provide other information which the witness
7 refuses to give or provide on the basis of the privilege against
8 self-incrimination.

9 (2) The Attorney General or assistant attorney general
10 may request an order under subsection (b) of this section when,
11 in his or her judgment:

12 (i) The testimony or other information from
13 the individual may be necessary to the public interest;
14 and

15 (ii) The individual has refused or is likely to
16 refuse to testify or provide other information on the
17 basis of the privilege against self incrimination.

18 6 CMC § 6502.

19 Since the Commonwealth's statute on witness immunity is almost identical to its federal counterpart,
20 18 U.S.C. §§ 6002-6003 (2002), and since there is no case law discussion on this point in the
21 Commonwealth, it is appropriate to use federal case law for guidance.

22 1. The Fifth Amendment privilege against self incrimination and witness immunity.

23 The Fifth Amendment protects against compulsory self incrimination. "No person . . . shall be
24 compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V; *see also*
25 N.M.I. Const. art. I, § 4(c). The privilege's sole concern "is to afford protection against being forced to
26 give testimony leading to the infliction of penalties affixed to . . . criminal acts." *Kastigar v. United States*,
27 406 U.S. 441, 453, 92 S. Ct. 1653, 1661, 32 L. Ed.2d 212, 222 (1972) (*citing Ullmann v. United*
28 *States*, 350 U.S. 422, 438-39, 76 S. Ct. 497, 507, 100 L. Ed. 511, 514 (1956)) (internal quotations
omitted).

In spite of this privilege, courts may force a witness to testify under immunity. "[I]mmunity from
use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore
is sufficient to compel testimony over a claim of the privilege." *Id.* The relationship between this privilege
and the grant of immunity is constitutional, so long as the immunity granted is as comprehensive as the
protection afforded by the privilege against self incrimination. *Id.* The "grant of immunity must afford

1 protection commensurate with that afforded by the privilege, it need not be broader.” *Id.*

2 In this case, the Court finds that the grant of immunity would not afford protection commensurate
3 with the privilege against self incrimination. Rather, the grant of immunity in this case would be inconsistent
4 with the privilege.

5 Immunity from the use of compelled testimony “prohibits the prosecutorial authorities from using
6 the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the
7 infliction of criminal penalties on the witness.” *Kastigar*, 406 U. S. at 453, 92 S. Ct. at 1661, 32 L. Ed.
8 2d at 222. However, if the Court were to entertain the Commonwealth’s request, the defendant-witnesses
9 would be forced to testify before the same jury who would determine their guilt or innocence. It would be
10 impossible to identify the consequences of using such compelled testimony from the potential infliction of
11 criminal guilt against these defendants during their own trial.

12 2. The court’s discretion to issue the use immunity order.

13 There remains the issue of whether the Court may deny a use immunity order under 6 CMC § 6502
14 when the Commonwealth has submitted a proper request. There is no dispute that the Commonwealth
15 properly requested the immunity order. However, the language of the statute provides that the court *shall*
16 issue the use immunity order if the Commonwealth properly requested such an order.

17 However, a court may exercise discretion to decline to issue an immunity order if the witness’s
18 constitutional rights will be violated. *See In re Baldinger*, 356 F. Supp. 153, 170-71 (C.D. Cal. 1973).

19 The basis for denying this immunity order has nothing to do with the Commonwealth’s discretion in
20 determining whether the testimony is necessary to the public interest. Rather, as discussed above, the Court
21 finds that granting the immunity order to the witness-defendants would violate their privilege against self-
22 incrimination.

23 Finally, the Court would like to address the Commonwealth’s request to have the witness-
24 defendants’ trials severed from the current trial so the Commonwealth may take advantage of their
25 testimony. The Court will not entertain this request. Had the Commonwealth anticipated this remedy at
26 an earlier time, the Court might have entertained such a request, through appropriate pre-trial motions.

1 IV.

2 CONCLUSION

3 For these reasons, the Commonwealth's *Request for Immunity for Frances Duenas Salas*
4 *and James P. Deleon Guerrero* is **DENIED**.

5
6 **SO ORDERED** this 10th day of January 2003.

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9 /s/
10 David A. Wiseman
11 Associate Judge
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