SUPERIOR COURT
OF THE
STATE OF DELAWARE

JOSEPH R. SLIGHTS, III
JUDGE

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Re: ***State v. Kelly Gibbs*, I.D. No. 0809009947**
***State v. Keith Gibson*, I.D. No. 08090009946**

Dear Counsel:

As you know, the Court held a proof positive hearing in the above referenced matters on July 13, 2009. At this hearing, the State offered one witness, Detective Steven Legenstein. Following the State's presentation, Defendant Gibbs

attempted to call James Hinson ("Hinson") as a witness. Hinson previously entered a guilty plea to charges relating to the death of Stanley Jones and is now awaiting sentencing. In part, Hinson's plea agreement requires him to testify truthfully at the trials of Gibbs and Gibson. Upon advice of his counsel, Hinson took the stand at the proof positive hearing and declined to testify after asserting his 5th Amendment privilege against self-incrimination.

Gibbs and Gibson argued that Hinson's plea agreement equated to a waiver of his 5th Amendment privilege against self-incrimination and, therefore, urged the Court to require him to testify at the proof positive hearing. The State and Hinson (through his attorney) opposed. In the absence of any supporting authority presented by the parties during the hearing, the Court declined to make that determination.

At the conclusion of the hearing, the Court found that the State had sustained its initial burden of establishing "proof positive or presumption great," meaning "a fair likelihood of convicting the accused," as mandated by the Delaware Constitution.[1] The burden then shifted to the defendants, who desired to rebut the State's evidence with Hinson's testimony.[2] The Court denied bail, but left open the question of whether Hinson should be compelled to testify. The Court directed the parties to provide written submissions in support of their positions, and advised that it would re-open the proof positive hearing if it was satisfied that it was appropriate to do so.

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[1] *In re Steigler*, 250 A.2d 379, 383 (Del. 1969). *See also* DEL. CONST. ART. I, § 12 ("A]ll prisoners shall be bailable by sufficient sureties, unless for capital offenses where proof is positive or the presumption great."); 11 DEL. C. § 2103(a) (stating that "[a] capital crime shall not be bailable…except as provided in subsection (b)").

[2] 11 DEL. C. § 2103(b) (A defendant charged with a capital crime may be bailable "if, after full inquiry, the Superior Court shall determine that there is good ground to doubt the truth of the accusation, and the burden of demonstrating such doubt shall be on the accused.").

The Court has since received supplemental letter memoranda from the parties on both sides of the 5th Amendment issue. Gibson no longer joins Gibbs' motion to reconvene the proof positive hearing to compel testimony from Hinson and, in fact, now opposes it.[3] For his part, Gibbs now concedes that Hinson retains his 5th Amendment privilege against self-incrimination prior to being sentenced for charges to which he has entered a plea agreement with the State.[4] Gibbs argues, however, that Hinson's blanket assertion of his 5th Amendment privilege is insufficient to demonstrate his desire not to incriminate himself. Rather, Gibbs contends that Hinson must be compelled to take the stand and assert his 5th Amendment privilege in response to each individual question that might be posed to him. Gibbs would have the Court function as a gatekeeper, allowing Gibbs to invoke his 5th Amendment privilege only where there is a reasonable danger of incrimination. In addition, Gibbs points to the proffer made by Hinson at his plea hearing regarding his involvement in the death of Stanley Jones and argues that this proffer constitutes a waiver of his 5th Amendment privilege under *Rogers v. United States*.[5]

The Court declines to undertake the futile exercise suggested by Gibbs for several reasons. First, Hinson's criminal culpability stems from accomplice liability. Therefore, any testimony he gives during the proof positive hearing could be used against him in a subsequent prosecution if the Court rescinds the plea. Hinson, therefore, has reasonable grounds for fear of self-incrimination in all aspects of his testimony.

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[3] In short, Gibson raises a legitimate tactical concern that the testimony of Hinson preserved at the proof positive hearing might be used by the State against him later should Hinson for any reason become unavailable to testify at trial.

[4] *See Brown v. State*, 729 A.2d 259 (Del. 1999); *Zebroski v. State*, 729 A2d 75 (Del. 1998).

[5] 179 F.2d 559 (10th Cir.1950).

Furthermore, Gibbs' argument that Hinson's proffer constitutes a waiver of his 5th Amendment privilege is misplaced. The case upon which he principally relies for this proposition, *Rogers v. United States*, concerned witnesses who had provided Grand Jury testimony on the record concerning their involvement in the Communist Party and subsequently attempted to invoke their 5th Amendment privilege against self-incrimination at the same proceeding as a basis to refuse to answer any further questions. The Court determined that because each of the witnesses had, "without objections, answered at least one question showing their connection with the Communist Party, they thereby waived their privilege under the Constitution and were thereafter required to answer the questions propounded to them."[6] *Rogers* is not on point. Unlike the witnesses' inculpatory admissions in *Rogers*, Hinson's admissions cannot be used against him at a subsequent trial because Hinson made his proffer off the record directly to the State as part of plea negotiations. Therefore, the statement would be inadmissible against him at trial under Delaware Rule of Evidence 410.[7]

Finally, Gibbs cites *State v. Swanson*[8] and *United States v. Gibbs*[9] for the proposition that Hinson cannot "simply [make] a blanket assertion of the privilege . . . ."[10] The Court in *Gibbs*, however, recognized instances in which "a particularized inquiry by the court would [be] futile,"[11] finding that a blanket

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[6] *Id.* at 564.

[7] DEL. R. EVID. 410. ("[E]vidence of a plea of guilty later withdrawn with court permission . . . or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.").

[8] 956 A.2d 1242 (Del. 2008)

[9] 82 F.3d 408 (6th Cir. 1999).

[10] *Swanson*, 956 A.2d at 1245 (citing *Gibbs*, 182 F.3d at 431).

[11] *Gibbs*, 182 F.3d at 431 (citing *United States v. Medina*, 992 F.2d 573, 587 (6th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994) (noting that the court stated a more detailed inquiry would have been preferred in this case because counsel (not the witness) asserted the right for the witness, nonetheless it still could have been "futile")).

privilege asserted by the witness could be "acceptable once [the witness] took the stand."[12] In this case, a particularized inquiry would be futile given the breadth of the factual scenarios under which Hinson might be found criminally culpable based on an accomplice liability theory. Even the most seemingly benign testimony from Hinson relating to the charges at issue might fit into a theory of liability that would work against him at a trial. Based on the specific facts of this case and the procedural posture, Hinson would be well-advised to stick to his broad assertion of 5th Amendment privilege, and the Court would be hard-pressed to find a basis to compel him to do otherwise. Accordingly, any further inquiry would waste the Court's resources and would amount to nothing more than fishing for information without a lure or bait.

The exercise Gibbs has proposed - - allowing his counsel to pose questions to Hinson as Hinson determined whether *vel non* to assert his 5th Amendment privilege - - might be more palatable if the proof positive hearing, by design, also served as an appropriate discovery device. It is quite plausible that Gibbs could pose questions to Hinson that would touch on relevant background or contextual information without implicating Hinson's 5th Amendment privilege. Yet this information would not meaningfully inform the Court's proof positive inquiry, and would offer no "good grounds to doubt the truth of the accusation."[13] "[P]retrial detention hearings [are] not intended to serve as a vehicle for discovery from the Government."[14] As "[t]here is no reason to believe [Hinson] would give evidence

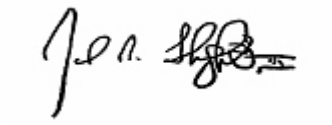
[12] *Gibbs*, 182 F.3d at 431. *See also United States v. Highgate*, 521 F.3d 590, 594 (6th Cir. 2008) (recognizing "as a practical matter" a particularized inquiry can be futile).
[13] 11 *Del C.* § 2103(b).
[14] *United States v. Suppa*, 799 F.2d 115, 120 (3d Cir. 1986).

favorable to [defendants] or would retract information harmful to them," the Court is satisfied that there is no basis to reopen the proof positive hearing record.[15]

Based on the foregoing, Defendant Gibb's motion to compel Hinson's testimony must be **DENIED.**

IT IS SO ORDERED.

Very truly yours,



Joseph R. Slights, III

JRS, III/sb
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[15] *United States v. Accetturo*, 783 F.2d. 382, 388 (3d Cir. 1986) (upholding trial court's decision not to compel the testimony of a witness whose proffer was relied upon in a bail hearing despite the fact the defense "tendered specific evidence tending to show unreliability.").