IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAVID WILLIAMS,

Plaintiff,

v.

OFFICER ERIC BAKER, OFFICER BRENDAN NEE, OFFICER NATHAN AUVIL, and STEPHEN MATAKOVICH,

Defendants.

15cv0402
ELECTRONICALLY FILED

MEMORANDUM ORDER

Before the Court is Defendant Matakovich's Motion *in limine* filed by his criminal defense counsel, and new civil attorney in this civil case, Tina Miller. Doc. no. 227. The Court ordered that all Trial Counsel for Plaintiff and Defendants meet and confer with Defendant Matakovich's new civil attorney and attempt to resolve this matter on or before April 6, 2017, at 10:00 a.m. See Text Orders at doc. nos. 228 and 231. However, because no agreement was reached, Co-Defendants filed Response to the Motion (doc. no. 235) essentially joining in the Motion, and Plaintiff filed a Response in Opposition. Doc. no. 237.

I. Background

The basis for this Motion *in limine* is that Defendant Matakovich is currently facing criminal prosecution in federal and state courts, and has indicated that he will assert his Fifth Amendment privilege against self-incrimination when called to testify during the trial of this civil matter. The Court denied Defendants' previous Motion to Continue this trial (which was

also predicated upon the likelihood that Defendant Matakovich would assert his Fifth Amendment privilege during this civil trial), filed on behalf of all named Defendants.[1] See doc. no. 200, Defendants' Motion to Continue; and doc. no. 206, Memorandum Order denying Defendants' Motion to Continue.

In its Memorandum Order denying the Motion to Continue, the Court applied a six-factor test outlined in *Barker v. Kane*, 149 F. Supp. 3d 521, 525 (M.D. Pa. 2016), and concluded that "it would be an extraordinary measure to stay the trial in this case (which is already more than two years old, and had been trial-ready for its original trial date of April 18, 2016), and a measure that is not warranted here." Doc. no. 206, p. 2, 7. Nothing about the instant Motion *in limine* changes the outcome of the Court's Memorandum Order denying a trial continuance.

However, Defendant Matakovich's Motion *in limine* notes that at the time this Defendant was deposed in this case – on December 29, 2015 – he had "no notice or knowledge" that he was being investigated by federal authorities. Essentially, Defendant Matakovich is arguing that he could not waive his Fifth Amendment right at the time he gave his deposition in this civil case, because he did not know he was under criminal investigation, nor that he would be

[1] As noted by Defendant Matakovich in his Motion *in limine*, the Court noted in its Memorandum Order that Defendant Matakovich was deposed on December 29, 2016. This date was taken directly from Plaintiff's Response to the Motion to Continue. See doc. no. 203, p. 2-3 ("To the contrary, on December 29, 2016, Sergeant Matakovich, represented by counsel, appeared for the taking of his deposition, in which he testified under oath, without restriction, and without asserting any purported right against self-incrimination as a basis to refuse to answer any questions directed to him concerning the instant proceedings. The deposition spanned nearly 200 pages and lasted over 2 hours. In the course of the deposition, Defendant Matakovich only asserted his Fifth Amendment right against self-incrimination when he was asked about the pending state and federal criminal charges arising from the Heinz Field incident."). Defendant Matakovich, in fact, was deposed on December 29, 2015.

criminally prosecuted in both state and federal court.[2] In his Motion, Defendant Matakovich suggests that if this Court were to recognize "Sgt. Matakovich's right to assert his Fifth Amendment rights," and if the Court were to excuse his testimony during the trial of this civil matter, Plaintiff could introduce Defendant Matakovich's deposition testimony under Federal Rules of Evidence 801(d) and 804.

Defendant Matakovich claims that by asserting his Fifth Amendment privilege his testimony he becomes "unavailable" under Federal Rule of Evidence 804(a)(1). *See California v. Green*, 399 U.S. 149, 168 n.17 (1970) ("The hearsay exception itself has generally recognized that a witness is 'unavailable' for purposes of the exception where through lapse of memory or a plea of the Fifth Amendment privilege, the State cannot secure his live testimony"). Next, Defendant Matakovich suggests that due to his lack of availability, his deposition testimony in this case could be read to the jury under F.R.E. 801(d). Although Rule 801(d)(1) does not apply, but Rule 801(d)(2) reads in relevant part:

> (2) **An Opposing Party's Statement.** The statement is offered against an opposing party and:
>
> > (A) was made by the party in an individual or representative capacity . . . .

[2] On February 26, 2016, the District Attorney for Allegheny County filed a criminal complaint against Defendant Matakovich. The two state charges which are currently pending against Defendant Matakovich are simple assault and official oppression. See Allegheny County Court of Common Pleas docket no. CP-02-CR-0004578. These same two state charges (simple assault and official oppression) were originally brought against Defendant Matakovich on December 18, 2015, and were pending against him when Defendant Matakovich gave his deposition in this civil case. See docket no. MJ-05003-CR-0011080-2015. However the 2015 charges were dismissed at a preliminary hearing held on February 1, 2016. These charges were re-filed on February 26, 2016, as noted above, along with some additional charges.

In addition to the aforementioned state charges, on April 5, 2016, Defendant Matakovich was indicted by a federal grand jury. See United States Court for the Western District of Pennsylvania docket no. 2:16-cr-00073-CB. The two-count federal indictment alleges that Defendant Matakovich deprived "G.D." of his civil rights and that he included false and misleading statements in his police report and affidavit of probable cause relating to "G.D.'s" arrest. The state court charges also relate to Defendant Matakovich's interaction with "G.D."

F.R.E. 801(d)(2). Co-Defendants concur with the Court handling Defendant Matakovich's testimony in this fashion. See doc. no. 235.

On the other hand, Plaintiff claims that the Motion *in limine* should not be granted because: (1) the Court's Order denying the trial continuance constitutes "law of the case," and Defendant Matakovich has not advanced any reason which would warrant reconsideration of the Court's prior ruling; (2) the deadline for filing Motions *in limine* has long passed; and (3) there were criminal charges already pending against Defendant Matakovich at the time he was deposed – state court charges involving "G.D." (which, as noted in footnote 2, above, also relate to the federal prosecution).

II. Analysis

The Fifth Amendment right against self-incrimination can be invoked "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory[.]" *Kastigar v. United States*, 406 U.S. 441, 444, (1972). The right protects against disclosures "which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Id*. at 444–45, 92 S.Ct. 1653. *See also Maness v. Meyers* 419 U.S. 449, 461 (1975) (The protection does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution.)

The protection from self-incrimination applies where the individual demonstrates that there is a possibility that he will be criminally prosecuted based on his testimony. *Carter-Wallace, Inc. v. Hartz Mountain Industries*, 553 F. Supp. 45 (S.D.N.Y. 1982). However, it is equally clear that a party who has already testified to incriminating facts cannot refuse to answer further questions

which would not subject him to further incrimination. *Rogers v. United States*, 340 U.S. 367 (1951). Invocation of the privilege must be upheld unless it is "perfectly clear, from a careful consideration of all the circumstances of the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate." *Hoffman v. United States*, 341 U.S. 479, 488 (1951).

In *American Cyanamid Company v. Sharff*, 309 F.2d 790 (3d Cir.1962), the United States Court of Appeals for the Third Circuit utilized a two-step inquiry for assessing the validity of a witness' invocation of his or her right against self-incrimination. The first inquiry is to determine whether there appears to be a conceivable possibility that the witness could be linked to a crime. *Id*. at 794. If so, then the court must decide "whether the questions asked have a tendency to incriminate." *Id*.

As this Court has previously explained, Defendant Matakovich waived his Fifth Amendment privilege against self-incrimination when he provided his testimony to the matters relevant to this case, during his deposition – taken on December 29, 2015 – during the pendency of at least one (then pending) criminal case. Defendant Matakovich was fully aware of his Fifth Amendment rights during the deposition, as he invoked this privilege at least once during his deposition.

Using the two-step analysis provided by the Court of Appeals, the Court notes that Defendant Matakovich has already provided testimony <u>in this case</u> via a deposition. If there is "a conceivable possibility" that Defendant Matakovich's testimony in this case "could be linked to a crime," then the repetition of that testimony before a jury is of no moment. Simply put, Defendant Matakovich's testimony which could possibly be used against him in the criminal cases currently pending, already exists. His ability to assert his Fifth Amendment rights with respect to this testimony are gone.

Therefore, consistent with the Court's prior Order (doc. no. 206), the Court will permit the jury to hear testimony from Defendant Matakovich. However, as previously indicated in the Court's prior Order (doc. no. 206), in an effort to balance the remaining Fifth Amendment rights (if any) Defendant Matakovich may possess, this testimony will be strictly limited to his deposition testimony. To that end, the Court will permit Defendant Matakovich to take the stand and to testify strictly from his deposition. Plaintiff's counsel will read the deposition questions to him and he will read his previously given answer. The testimony is limited to the excerpts that Plaintiff's counsel designated at doc. no. 211, and the counter-designations Defendants' counsel designated at doc. no. 219. The Court will issue a separate Order on Defendants' Objections to the Plaintiff's designated excerpts with respect to Defendant Matakovich's deposition testimony (in accordance with its prior Order (doc. no. 206)), now that Defendant Matakovich's designated deposition excerpts and counter-designated excepts will be used at trial.

ORDER OF COURT

And now, this 6th day of April, 2017, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant Matakovich's Motion *in limine* (doc. no. 227). The Court will permit Defendant Matakovich to testify live before the jury; however, he will testify directly from his December 29, 2015 deposition transcript as described above.

/s/ Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: All ECF Counsel of Record