

No. 09-1443

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 16, 2009
LEONARD GREEN, Clerk

In re: DAVID ASHENFELTER,)

Petitioner.)

ORDER

Before: SUHRHEINRICH, BATCHELDER, and SUTTON, Circuit Judges.

The petitioner, a reporter for the Detroit Free Press, has been subpoenaed as a nonparty witness in a Privacy Act lawsuit filed against the United States Department of Justice by former Assistant United States Attorney Richard Convertino. Ashenfelter is scheduled to be deposed on April 21, 2009. He now petitions for a writ of mandamus and requests that the deposition be stayed pending a ruling on his petition.

“In addition to the contempt route to review, we have allowed for a petition for writ of mandamus as a ‘means of immediate appellate review of orders compelling the disclosure of documents and information claimed to be protected from disclosure by privilege or other interests in confidentiality.’” *United States ex. rel. Pogue v. Diabetes Treatment Ctrs. of America, Inc.*, 444 F.3d 462, 472 (6th Cir. 2006) (quoting *In re Perrigo Co.*, 128 F.3d 430, 436 (6th Cir. 1997)). Mandamus is an extraordinary remedy generally reserved for questions of unusual importance or important issues of first impression. *Perrigo*, 128 F.2d at 435. “Indeed, for the writ to issue, petitioners must demonstrate a ‘clear abuse of discretion’ on the part of the district court.” *John B. v. Goetz*, 531 F.3d 448, 457 (6th Cir. 2008) (citing *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 309 (1989); *In re King World Prods., Inc.*, 898 F.2d 56, 58 (6th Cir. 1990)).

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Ashenfelter has been directed to appear at the April 21 deposition and assert his fifth amendment privilege with respect to particular questions and, in each instance, the district court will determine the propriety of his refusal to testify. Ashenfelter argues that his ex parte declaration filed under seal in the district court provides a sufficient basis for the district court to determine whether his silence is justified. Therefore, he concludes, he should not be required to submit to a deposition. The district court does not agree and views the declaration as one piece of evidence to be considered should Ashenfelter choose to pose a fifth amendment challenge to questions in his upcoming deposition. To facilitate the process, the district court intends to make itself available during the deposition to review and decide disputed objections. Ashenfelter has not demonstrated that the district court's decision to proceed in this manner constitutes a clear abuse of discretion. Having considered the relevant factors, *see In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 304 (6th Cir. 1984), we are not persuaded that a writ should issue at this point in the proceedings.

It is therefore **ORDERED** that the petition for a writ of mandamus is **DENIED**. The petitioner's request to stay his deposition is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Leonard Green
Clerk