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Expert Analysis

Defense Witness Immunity: The Time Has Come in the 9th Circuit — Will It Catch On?

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Prosecutors possess virtually unfettered authority to decide whether to obtain immunity for witnesses in criminal prosecu-tions, and courts generally defer to this prosecutorial discretion. Prosecutors object to judicial involvement in their decisions on immunity requests, citing separation-of-powers issues, among other reasons. Although the law provides that, in certain circumstances, courts may compel the prosecution to grant immunity to a defense witness, the defense faces difficulty satisfying the strict requirements for obtaining such an order.

There is an emerging trend, however, for granting defense witness immunity in the 9th U.S. Circuit Court of Appeals, where the standard is lower than that of other circuits. Several recent decisions have granted applications for defense witness immunity over the government's objection. Unlike the majority of circuits, which require the defense to meet the high standard that the government's refusal to immunize a defense witness was purposefully made in bad faith to distort the fact-finding process, these decisions focus on whether the refusal to immunize had that effect, a much lower standard.

This commentary will examine those decisions and analyze the different standards for obtaining a court order to compel immunity in the 9th Circuit and other circuits, and the implications of the 9th Circuit's increasing rejection of an intent requirement for compelling immunity. The question for the future is whether other circuits will follow suit or whether the U.S. Supreme Court will resolve the circuit split.

The Defense Witness Immunity Standard In the Majority of Circuits

Nearly every circuit follows the same standard for obtaining an order compelling defense witness immunity. These courts generally require a showing that:

- The witness's testimony is material, exculpatory, not cumulative and not obtainable from any other source; and

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- The government's decision to deny immunity was made with the "deliberate intention of distorting the fact-finding process."[1]

In satisfying the second prong of this standard, the defendant must show that the government used immunity in a discriminatory way, forced a potential witness to invoke the Fifth Amendment through prosecutorial "overreaching," or deliberately denied immunity "for the purpose of withholding exculpatory evidence and gaining a tactical advantage through such manipulation." Prosecutorial "overreaching" can be shown through the use of threats, harassment or other forms of intimidation that effectively forced the witness to invoke the Fifth Amendment.[2] This standard for obtaining compelled defense witness immunity is considerably higher than that of the 9th Circuit.

The 2nd Circuit, for example, has reaffirmed its two-pronged test for determining when a court may compel the prosecution to grant a defense witness immunity and has rejected the argument that a discrimina-tory grant of immunity could mean nothing more than a decision to confer immunity on some witnesses, and not on others. This standard is more rigorous than the 9th Circuit's effects test for determining when distortion of the fact-finding process suffices for an order granting immunity. In *United States v. Ebbers*, Bernard J. Ebbers, the former CEO of WorldCom Inc., appealed his jury conviction on nine counts of conspiracy, securities fraud and related crimes and his 25-year jail sentence for devising a scheme to disguise WorldCom's declining operating performance by falsifying financial reports.[3] Ebbers alleged that he was denied a fair trial because the government granted immunity only to witnesses whose testimony inculpated him and not to witnesses whose testimony he claimed would have exculpated him had immunity been granted.

The 2nd Circuit affirmed the District Court's refusal to compel immunity because there was no evidence of "overreaching" or manipulation of the immunity process expressly for tactical reasons. Three of the prosecution's six immunized witnesses pleaded guilty, and although the other witnesses were useful, none were critical to the government's case or central participants in the criminal scheme. The court found that the three witnesses Ebbers sought to immunize were legitimate targets of the investigation. Therefore, Ebbers' argument for compelling immunity relied on the claim that "discriminatory use" of immunity can constitute a decision to confer immunity on some witnesses, and not on others. The 2nd Circuit noted that it previously acknowledged that selective grants of immunity might constitute "discriminatory use" of immunity but clarified that immunity decisions may be "so obviously based on legitimate law enforcement concerns" that a court could not "intervene without hampering the administration of justice."[4] The 2nd Circuit ultimately refrained from resolving the issue, concluding that Ebbers failed to satisfy the second prong of the test because none of the defense witnesses would have provided testimony helpful to Ebbers.

The 2nd Circuit consistently has rejected the "equalizing" argument that immunity must be granted to defense witnesses in order to redress a government advantage over the defense.[5] In contrast to the 9th Circuit, the 2nd Circuit refuses to consider an imbalance in the number of immunized witnesses as sufficient to meet any prong of its test for compelling immunity. Under the 2nd Circuit's reasoning, criminal proceedings need not be symmetrical to be fair. Only when the government abuses its power to grant immunity by using it in a discriminatory fashion for the purpose of gaining a tactical advantage does due process require a grant of immunity.

Aside from the 9th Circuit, only the 3rd Circuit has adopted a standard lower than and contradictory to that of the majority. In extraordinarily rare circumstances, the 3rd Circuit will compel the prosecution to grant a defense witness immunity if the court finds either that:

- The government deliberately intended to disrupt the fact-finding process; or
- A potential defense witness has test-imony that is clearly exculpatory and essential to the defense case, and the government has no strong interest in withholding use immunity.[6]

The 3rd Circuit's "effective defense" theory has been viewed as having limited application.[7]

United States v. Nicholas

In stark contrast to the standard applicable in the majority of circuits, 9th Circuit law permits a federal judge to order immunity for a defense witness without any showing of the government's intent. There, courts will compel a grant of immunity as long as the defendant shows that the testimony is relevant and that a denial of immunity would "have the effect of distorting the fact-finding process."[8] The recent order in *United States v. Nicholas* granting defense witness immunity highlights the emerging trend within the 9th Circuit

to compel the prosecution to grant immunity even without any showing of prosecutorial intent.

Henry Nicholas, former CEO of Broadcom Corp., and William Ruehle, former CFO of Broadcom, were indicted for alleged stock option backdating at Broadcom. During Ruehle's trial, the government relied on the testimony of Nancy Tullos, Broadcom's former vice president of human resources, whom the government agreed not to prosecute for securities fraud and other offenses in exchange for her guilty plea to a single count of obstruction and agreement to cooperate against Ruehle.

Ruehle requested that the government grant use immunity pursuant to 18 U.S.C. § 6001 for David Dull,[9] Broadcom's former general counsel, and Henry Samueli, Broadcom's co-founder, two witnesses whose testimony could contradict Tullos', according to the defense.

The government refused. Ruehle subsequently moved for an order compelling the government to grant Dull and Samueli immunity. Relying on an emerging trend in 9th Circuit law, Ruehle argued that the testimony of Dull and Samueli was relevant and that the government distorted the judicial fact-finding process by denying them immunity.

U.S. District Judge Cormac J. Carney of the Central District of California granted the motion as to both Dull and Samueli and ordered that immunity be granted "to avoid distorting the fact-finding process and to protect Mr. Ruehle's due-process rights."[10] In delivering this ruling, Judge Carney first emphasized that he did not find that the government had intentionally distorted the fact-finding process. He concluded that there was a fundamental unfairness in permitting the jury to hear the testimony of Tullos without also hearing the testimony of Dull and Samueli, which he found directly contradicted Tullos' testimony.[11]

Evolution of the 9th Circuit Standard

In his motions Ruehle relied on 9th Circuit law in arguing that he was not required to prove the government's bad intent in order to prevail. In 2008, in *United States v. Straub*, the 9th Circuit addressed for the first time the issue of whether a defendant seeking an immunity order must prove that the prosecution's *purpose* in denying immunity to a defense witness was to distort the fact-finding process or merely that the prosecution's selective denial of immunity had the *effect* of distorting the fact-finding process.

The prosecution in *Straub* relied heavily on the testimony of a key witness for whom it had obtained an immunity order relating to various crimes. The defendant sought to introduce the immunized testimony of another witness who would directly contradict the prosecution's key witness. The defendant requested that the court compel the prosecution to grant immunity to the defense witness, conceding that the prosecution did not act with the purpose of distorting the fact-finding process and arguing that he was entitled to immunity because the government's conduct had the *effect* of distorting the fact-finding process.

In reversing the District Court's refusal to compel immunity, the 9th Circuit in *Straub* held that, for a defendant to obtain an immunity order for a witness, the defendant must show that:

- The witness's testimony was relevant; and
- Either the prosecution intentionally caused the witness to invoke the Fifth Amendment right against self-incrimination with the purpose of distorting the fact-finding process or the prosecution granted immunity to a government witness but denied immunity to a defense witness who directly contradicted the government witness, and this denial had the effect of distorting the fact-finding process.[12]

Although the 9th Circuit's prior decisions held that these two methods of demonstrating a distortion of the fact-finding process were sufficient to compel immunity, the court never faced the "purpose/effect" issue it confronted in *Straub*. In *Straub* the 9th Circuit clarified any ambiguity in its prior decisions and confirmed that *no showing* of the government's intent is required for a defendant to compel immunity. Instead, "a showing that the selective denial of immunity had the effect of distorting the fact-finding process is sufficient." The 9th Circuit remanded the case to the District Court with instructions to enter a judgment of acquittal on two counts unless the govern-ment retried the case and either granted immunity to the defense witness or did not present the witness testimony that would have been directly contradicted by the testimony of the non-immunized defense witness.

Implications and Considerations

In the *Straub* and *Nicholas* decisions, a trend has emerged in the 9th Circuit allowing federal judges to grant defense witness immunity when the prosecution engages in selective denial of immunity that has the effect of distorting the judicial fact-finding process.

This trend deepens the circuit split on the appropriate standard for compelling immunity. The fundamental fairness considerations underpinning the *Straub* and *Nicholas* cases are markedly different from the standard in the 2nd Circuit, for example, which rejects any notion of granting immunity because it "seems fair."

The 9th Circuit's growing reliance on the effects prong of its test might persuade the Supreme Court to grant a writ of *certiorari* to clarify the circuit conflict even though it has previously denied writs on this issue,[13] or it might influence other circuits to soften their standards for compelling immunity. Until the circuit split is resolved, counsel should be cognizant of the different standards, alert to any developments in the majority of circuits and the potential grant of a writ of *certiorari*, and take advantage of the lower standard applicable for seeking defense witness immunity in the 9th Circuit.

Notes

1 *United States v. Turkish,* 623 F.2d 769, 776 (2d Cir. 1980).

2 *United States v. Ebbers,* 458 F.3d 110, 119 (2d Cir. 2006). *See also United States v. Guzman,* 332 Fed. Appx. 665, 667 (2d Cir. 2009); *United States v. Triumph Capital Group,* 237 Fed. Appx. 625, 629-30 (2d Cir. 2007).

3 While employed at the U.S. attorney's office for the Southern District of New York, author William F. Johnson represented the government in *United States v. Ebbers*.

4 *Ebbers,* 458 F.3d at 119-20.

5 *See United States v. Forbes,* 249 Fed. Appx. 233, 236 (2d Cir. 2007); *Triumph Capital Group,* 237 Fed. Appx. at 630; *United States v. Rodriguez,* 187 Fed. Appx. 30, 34 (2d Cir. 2006); *United States v. Sanchez,* 38 Fed. Appx. 42, 45 (2d Cir. 2002); *United States v. Diaz,* 176 F.3d 52, 115 (2d Cir. 1999); *Blissett v. Lefevre,* 924 F.2d 434, 442 (2d Cir. 1991); *United States v. Todaro,* 744 F.2d 5, 10 (2d Cir. 1984); *United States v. Turkish,* 623 F.2d 769, 774 (2d Cir. 1980).

6 *Government of Virgin Islands v. Smith,* 615 F.2d 964, 968 (3d Cir. 1980). *See also United States v. Gaudelli,* 134 Fed. Appx. 565, 569 (3d Cir. 2005).

7 *See United States v. Santtini,* 963 F.2d 585, 597-98 (3d Cir. 1992); *United States v. Payment Processing Ctr.,* No. 06-00725 (E.D. Pa. 2006).

8 *United States v. Straub,* 538 F.3d 1147, 1158 (9th Cir. 2008).

9 Fried, Frank, Harris, Shriver & Jacobson represents David Dull, the former general counsel of Broadcom.

10 Order Granting Dull Use Immunity, *United States v. Nicholas,* No. SACR 08-139-CJC (C.D. Ca. Dec. 2, 2009).

11 Transcript of Proceedings at 6, 7, 11-12, 45, *United States v. Nicholas,* No. SACR 08-139-CJC (C.D. Cal. Nov. 30, 2009). Later, in December 2009, after conducting evidentiary hearings, Judge Carney found that "the government has intimidated and improperly influenced the three witnesses critical to Mr. Ruehle's defense [Tullos, Samueli and Dull]. The cumulative effect of that misconduct has distorted the truth-finding process and compromised the integrity of the trial." The judge then dismissed the indictment against Ruehle with prejudice. He also dismissed the indictment against Nicholas with prejudice. Transcript of Proceedings at 5195-5202, *United States v. Nicholas,* No. SACR 08-139-CJC (C.D. Cal. Dec. 15, 2009). Judge Carney also later permitted Tullos and Samueli to withdraw their guilty pleas. Transcript of Proceedings at 8-10, *United States v. Nicholas,* Nos. SACR 08-00140-CJC, SACV 07-00773-CJC, SACV 08-00995-CJC, SACR 07-00274-CJC, SACV 08-00539-CJC and SACR 07-00263-CJC (C.D. Cal. Jan. 28, 2010); Findings and Order to Dismiss the Information with Prejudice, *United States v. Samueli,* No. SACR 08-156-CJC (C.D. Cal. Jan. 12, 2010).

12 *Straub,* 538 F.3d at 1162.

13 *See, e.g., petition for cert., United States v. Ebbers,* 2006 WL 3064695 (U.S. Oct. 26, 2006) (No. 06-590), *cert. denied,* 549 U.S. 1274 (U.S. Mar. 5, 2007) (No. 06-590); *petition for cert., People v. Ko,* 2005 WL 2901814 (U.S. Oct. 31, 2005) (No. 05-562), *cert. denied,* 546 U.S. 1093 (U.S. Jan. 9, 2006) (No. 05-562); *petition for cert., United States v. Whittington,* 1986 WL 766826 (U.S. May 30, 1986) (No. 85-1974), *cert. denied,* 479 U.S. 882 (U.S. Oct. 14, 1986) (No. 85-1974).

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