Stacking the Deck Against Defendants in Conspiracy Cases?

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Are prosecutors stacking the deck against defendants in conspiracy cases? A case now on appeal in the Second Circuit is posing that interesting question.

On appeal from his conviction in a fake reinsurance deal scheme, former General Re Corporation assistant general counsel Robert Graham is arguing that the government denied him a fair trial by preventing a key witness from testifying.

By amending the original complaint to name the corporation's former general counsel, Timothy McCaffrey, as an unindicted co-conspirator, the prosecution effectively ensured that McCaffrey would assert his Fifth Amendment privilege and decline to testify at trial. Graham asserts that McCaffrey would have provided material, exculpatory testimony for Graham if he had taken the witness stand.

When subpoenaed by a defendant to testify during trial, unindicted co-conspirators almost always invoke the Fifth because they do not want to incriminate themselves as potential targets of prosecution. This practically inevitable series of events provides prosecutors with the opportunity to make the strategic decision to name individuals in the complaint that they otherwise might not, in order to prevent a defendant from access to potentially exculpatory testimony. The defendant may ask the prosecution to seek immunity in order to get the unindicted co-conspirator onto the stand, but in the interest of preserving the option to prosecute, prosecutors rarely grant such requests.

This tactical selection of unindicted co-conspirators gives the prosecution a distinct advantage by denying defendants the opportunity to present a complete defense. While in some cases this type of witness manipulation might border on prosecutorial abuse, courts have little power to force the government to grant witness immunity. Some courts suggest that a prosecutor need only make an ex parte declaration that a witness is a potential target of prosecution in order to defeat a motion for immunity.

Judges are now beginning, however, to take corrective action when they see the government granting immunity to prosecution witnesses but not to defense witnesses. In 2008, U.S. District Judge Justin Quackenbush sought to rectify this situation by dismissing a Las Vegas doctor-lawyer fraud case against Noel Gage when the prosecution refused to grant limited immunity to a defense witness. On appeal, however, the Ninth Circuit sided with the government in finding that due process compels immunity "only for defense witnesses who will offer testimony that directly contradicts the testimony of a government witness" who has been given immunity. The Ninth Circuit declined to rule on the larger issue of whether a trial court can force the government to grant immunity to the target of an investigation. This leaves open the possibility of judges taking up this issue again in the future.

Although the Department of Justice's United States Attorney's Manual specifically states that "it is not desirable for United States Attorneys to identify unindicted co-conspirators in conspiracy indictments," prosecutors have employed this tactic frequently in recent white-collar cases. In the trial of WorldCom Inc.'s chief executive Bernard Ebbers, prosecutors prevented three former executives from testifying for the defense by naming them as targets of a criminal investigation. Similarly, in the trials of Enron executives Kenneth Lay and Jeffrey Skilling, the government named approximately 100 unindicted co-conspirators who were effectively prevented from testifying for the defense.

Graham's case is one of many recent examples of the ways in which prosecutors unfairly and improperly attempt to prevent defendants from getting exculpatory information before the jury.

As Graham argued in his appeal, "The government's decision to label McCaffrey an unindicted coconspirator was plainly motivated by nothing more than a desire for tactical advantage — the advantage of not having to contest McCaffrey's anticipated testimony vindicating Graham." Naming unindicted co-conspirators for tactical reasons unjustly denies defendants like Graham a fair trial. In the interest of justice, the use of this tool should be limited or counterbalanced by a greater opportunity to obtain defense witness immunity.

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