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Essay

Substantial Government Interference with Prosecution Witnesses: The Ninth Circuit's Decision in *United States v. Juan*

Ruth A. Moyer[†]

On January 7, 2013, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit issued its decision in *United States v. Juan*.[1] As a matter of first impression, the Ninth Circuit held that the constitutional proscription on substantial governmental interference with defense witnesses also applies to prosecution witnesses.[2] Thus, the *Juan* decision instructs that a prosecutor's or trial court's "substantial interference" with a prosecution witness's testimony may violate a defendant's right to a fair trial.

By extending the "substantial interference" rule to prosecution witnesses, *Juan* fundamentally, albeit implicitly, recognized a Sixth Amendment Confrontation Clause aspect of the "substantial interference" rule. Moreover, future application of *Juan* may require that courts consider the propriety of a factfinder receiving evidence about any governmental actions that potentially caused a prosecution witness to "alter" his or her testimony.

I. OVERVIEW OF PRIOR LAW

The Fifth and Fourteenth Amendments of the U.S. Constitution ensure that no person shall be deprived "of life, liberty, or property, without due process of law."[3] Furthermore, the "Compulsory Process Clause" of the Sixth Amendment of the U.S. Constitution provides, "In all criminal prosecutions, the

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1. 704 F.3d 1137 (9th Cir. 2013).
2. *Id.* at 1142.
3. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."[4] Consequently, the right to due process in a criminal prosecution includes the right to present witness testimony "to the jury so it may decide where the truth lies."[5]

Citing due process protections and the right to compulsory process, the U.S. Supreme Court has proscribed judicial interference with a defendant's ability to present a witness in his or her defense. In its 1972 decision in *Webb v. Texas,* the Court held that where a trial court threatened a prospective defense witness about the risks of a perjury prosecution if he testified, the judge's remarks caused the witness to refuse to testify and violated the defendant's due process rights.[6] Importantly, the *Webb* trial court did not merely warn the witness that he had the right to decline to testify and that his testimony must be truthful; instead, the trial court indicated that it expected the defense witness "to lie, and went on to assure him that if he lied he would be prosecuted and probably convicted for perjury."[7] The Supreme Court concluded that the judge's remarks "effectively drove" the defense witness "off the stand, and thus deprived the [defendant] of due process of law."[8]

A defendant's due process protections and right to compulsory process also prohibit interference by *the prosecution* with defense witnesses. Many courts have subsequently held that the "conduct of prosecutors, like the conduct of judges, is unquestionably governed by *Webb*."[9] In short, it is well established that "substantial government interference" by a trial judge or a prosecutor with a *defense* witness's decision to testify in a criminal prosecution "amounts to a violation of due process" and deprives a criminal defendant of his Sixth Amend-

4. U.S. CONST. amend. VI; United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982) (noting that the Sixth Amendment provides defendants with a "compulsory process for obtaining witnesses in his favor").

5. Webb v. Texas, 409 U.S. 95, 98 (1972) (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)).

6. *Id.* at 353–54.

7. *Id.* at 353.

8. *Id.*

9. United States v. Vavages, 151 F.3d 1185, 1189 (9th Cir. 1998) (noting that a "number of post-*Webb* cases reveal that the trial judge is not the only person whose admonitions against perjury can deprive a criminal defendant of his right to compulsory process"); *see also, e.g.,* United States v. Hooks, 848 F.2d 785, 799–800 (7th Cir. 1988); United States v. Viera, 819 F.2d 498, 502–03 (5th Cir. 1987); United States v. Blackwell, 694 F.2d 1325, 1334 (D.C. Cir. 1982).

ment right to compulsory process for obtaining witnesses in his favor.[10]

Not all perjury warnings will constitute "substantial interference." As the Ninth Circuit explained in *United States v. Vavages,* the substantial interference test is "extremely fact specific"; in assessing the "coercive impact of perjury warnings," courts should consider factors such as "the manner in which the prosecutor or judge raises the issue, the language of the warnings, and the prosecutor's or judge's basis in the record for believing the witness might lie."[11] A warning may be less coercive where the court or the witness's counsel relays the message.[12] "[P]erjury warnings are not improper *per se*"; instead, a "defendant's constitutional rights are implicated only where the prosecutor or trial judge employs coercive or intimidating language or tactics that substantially interfere with a defense witness'[s] decision whether to testify."[13]

Critically, the Ninth Circuit *Vavages* decision noted, in passing, the issue of "[w]hether or not [the] *Webb* [prohibition] applies" to substantial governmental interference with "*prosecution witnesses*."[14] More than a decade later, the Ninth Circuit has finally resolved this question.

II. THE 2013 NINTH CIRCUIT DECISION IN *UNITED STATES V. JUAN*

During a heated argument, Jarvis Juan kicked and punched his wife, "C.J.," and ran over her with the couple's SUV.[15] While she was in a hospital recovering from her inju-

10. *Vavages*, 151 F.3d at 1188. A defendant bears the burden of demonstrating substantial interference by a preponderance of the evidence. *Id.*

11. *Id.* at 1190.

12. *See id.* at 1191 ("[A] defendant may not be prejudiced by a prosecutor's improper warnings where counsel for a witness strips the warnings of their coercive force.").

13. *Id.* at 1189; *see also* United States v. Jaeger, 538 F.3d 1227, 1232 (9th Cir. 2008) (approving of a court's warnings to a prospective defense witness that do not "impose a decision" for a witness and that do not convey "an assumption that perjury would occur" or a "threat of prosecution for perjury").

14. *Vavages*, 151 F.3d at 1191 n.1 (emphasis added). In *United States v. Williams*, the defendant alleged that the prosecutor had "inappropriately intimidated [a] government witness . . . with a perjury warning." 375 Fed. App'x. 682, 687 (9th Cir. 2010). However, it was unnecessary for the Ninth Circuit to reach this issue because, despite the warnings, the witness testified "at length and[] regardless of her alleged fears," recanting her previous testimony that had implicated the defendant. *Id.*

15. United States v. Juan, 704 F.3d 1137, 1139 (9th Cir. 2013).

ries, C.J. gave a tape-recorded interview with the police in which she stated that Juan had beaten her and had run over her.[16] The government indicted Juan in the U.S. District Court for the District of Arizona on charges of assault with a dangerous weapon in violation of 18 U.S.C. § 1153 and § 113(a)(3) and assault resulting in serious bodily injury in violation of 18 U.S.C. § 1153 and § 113(a)(6).[17]

At trial, the prosecution called C.J. as a witness.[18] On direct examination by the prosecution, C.J. testified that she had accidentally fallen behind the SUV and that Juan had never hit her.[19] The trial court denied the government's motion to introduce as evidence C.J.'s earlier statements to the police.[20] Out of the presence of C.J. and the jury, the government asserted to the trial court that C.J. "needs a lawyer appointed because I believe she's committed perjury and [sic] after looking at jail calls between her and her husband I actually believe she's committed perjury."[21] Agreeing with the government's contention, the trial court appointed counsel for C.J.[22] After C.J. consulted with her court-appointed attorney, the government recalled C.J. to the stand.[23] At that point, C.J. testified that Juan had hit her and had run over her with the SUV.[24] Juan was convicted of all counts and sentenced to thirty-seven months of imprisonment.[25]

On appeal to the U.S. Court of Appeals for the Ninth Circuit, Juan contended that his constitutional right to a fair trial was violated where the government "threatened" his wife with perjury charges and thus coerced her into giving incriminating testimony against him.[26] The Ninth Circuit observed, "What is not unquestionably governed by *Webb* is whether the government's substantial interference with the testimony *of its own witness* can ever violate a defendant's due-process rights."[27] The court stated, "[T]o our knowledge, no court applying *Webb* has ever extended its principles to prosecution witnesses. Similarly

16. *Id.*
17. *Id.* at 1139–40.
18. *Id.* at 1140.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 1141.

no court applying *Webb* has ever extended it to situations, like this one, where the allegedly threatened witness continued to testify after the alleged threat. Instead, the prototypical *Webb* challenge involves conduct so threatening as to 'effectively drive [the] witness off the stand.'"[28]

First, the Ninth Circuit concluded that "*Webb* and its progeny should apply to all witnesses."[29] Noting that prosecutors and other officials should "'maintain a posture of strict neutrality when advising witness of their duties and rights,'" the *Juan* court reasoned that "[v]iolating this duty by bullying a prosecution witness away from testimony that could undermine the government's case is no less distortive of the judicial fact-finding process than improperly meddling with the testimony of a defense witness."[30] The Ninth Circuit asserted, "Regardless of whose witness is interfered with, the constitutional harm to the defendant is the same—the inability to mount a fair and complete defense. We see no reason to doubt that the government's substantial interference with the testimony of its own witnesses can violate the Due Process Clause."[31]

Second, the Ninth Circuit concluded that "the substantial and wrongful interference with a prosecution or defense witness that does not 'drive the witness off the stand,' but instead leads the witness to materially change his or her prior trial testimony can, in certain circumstances, violate due process."[32] The Ninth Circuit reasoned that "such violations have the potential to work even greater harm than those that simply result in a blanket refusal to testify."[33] Where the government "coerce[s]" a witness "into recanting testimony that was favorable to the defendant, the harm to the defense involves not merely the *prevention* of prospective testimony that *might* have bolstered its case, but the *retraction* of testimony that *did* bolster its case."[34]

Nonetheless, the Ninth Circuit determined that Juan was not entitled to relief because he did not offer any evidence demonstrating that the "allegedly threatening statements . . .

28. *Id.* (citing United States v. Jaeger, 538 F.3d 1227, 1231 (9th Cir. 2008)) (alteration in original).

29. *Id.* at 1141.

30. *Id.* at 1142.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* (citing United States v. Valenzuela-Bernal, 458 U.S. 858, 872 (1982)).

were ever communicated to C.J."[35] Absent evidence that C.J. had heard the prosecutor's remarks or that her lawyer relayed those remarks to her, Juan failed to "establish the necessary causal link between the prosecutor's 'threats' and C.J.'s changed testimony."[36] The Ninth Circuit therefore affirmed his conviction.

III. THE SIGNIFICANCE OF *UNITED STATES V. JUAN*

The Ninth Circuit decision in *Juan* marked a significant expansion of the prohibition on substantial government interference. It extended *Webb* to all witnesses, including government witnesses. Furthermore, *Juan* instructs that *Webb*'s applicability is not limited to instances in which the witness is "driven off the stand." Instead, *Webb* also applies where the witness testifies, but, in response to governmental "warnings," fails to provide exculpatory evidence in his or her trial testimony. To that extent, *Juan* implicitly, albeit fundamentally, added a Sixth Amendment Confrontation Clause basis for the "substantial interference" doctrine.

The watershed *Juan* decision provides critical guidance for other courts in cases where a criminal defendant alleges substantial government interference with a prosecution witness's testimony. Problematically, prosecution witnesses often decline to provide truthful inculpatory testimony against defendants because they fear retribution as a result of their testimony. *Juan* meaningfully aids prosecutors and trial courts in determining how to properly warn these "difficult" witnesses about the consequences of providing potentially false "exculpatory" testimony.

Concomitantly, however, the practical implications of the rule announced in *Juan* will necessitate further consideration by courts. Courts will likely need to address whether (and to what extent) the presentation of evidence to the factfinder about the government's "warnings" to a prosecution witness can ameliorate the potential prejudice caused in *Juan*-type situations. Similarly, warnings "not on the record" will necessitate further analysis by courts.

35. *Id.*
36. *Id.*

A. "NON-GOVERNMENTAL" INTIMIDATION OF PROSECUTION WITNESSES HEIGHTENS IMPORTANCE OF THE *JUAN* DECISION

The widespread problem of unlawful, "non-governmental" intimidation against prosecution witnesses suggests that the *Juan* rule may become increasingly important to courts, defendants, and prosecutors. Law enforcement and prosecutors "describe chronic difficulties" with witnesses who "refuse to step forward" or who decide "at the last minute" to recant their prior accusatory testimony against the defendant.[37] In some cases, the defendant or third parties threaten the witness in order to prevent the witness from testifying as a prosecution witness. In other instances, the defendant or third parties "encourage" the witness to "create" testimony that exculpates the defendant. Given these realities, it is easy to conceive of situations in which a prosecutor or trial judge encounters a prosecution witness who insists on providing "exculpatory testimony" that the prosecutor or trial judge, acting in good-faith, believes to be false. The *Juan* rule will provide much-needed guidance to prosecutors and judges concerning the manner in which they may warn recalcitrant prosecution witnesses about potential perjury charges.

B. ADDITION OF CONFRONTATION CLAUSE PREMISE TO "SUBSTANTIAL INTERFERENCE" FRAMEWORK

Dealing exclusively with "substantial interference" with *defense* witnesses, *Webb* and its progeny were premised on general Fifth and Fourteenth Amendment due process protections as well as the Sixth Amendment "compulsory process" right. Critically, however, the Ninth Circuit's extension of *Webb* to prosecution witnesses also implicitly relies upon the Sixth Amendment right to confront adverse witnesses.

Under the Sixth Amendment Confrontation Clause, a criminal defendant "shall enjoy the right . . . to be confronted with the witnesses against him."[38] As the U.S. Supreme Court has noted, the Confrontation Clause "provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-

37. Brendan O'Flaherty & Rajiv Sethi, *Witness Intimidation,* 39 J. LEGAL STUD. 399, 400 (2010); *see also, e.g.*, David Kocieniewski, *Scared Silent—In Prosecution of Gang, A Chilling Adversary: The Code of the Streets*, N.Y. TIMES, Sept. 19, 2007, http://www.nytimes.com/2007/09/19/nyregion/19gangs.html?pagewanted=all&_r=0.

38. U.S. CONST. amend. VI.

examination."[39] A criminal defendant's "right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable."[40] Courts have therefore instructed that a "defendant's right to elicit exculpatory defense evidence through cross-examination falls within the ambit" of fundamental due process.[41]

The *Juan* decision correctly recognizes that situations may arise in which a prosecution witness available to testify at trial may provide exculpatory evidence—on either direct examination or cross-examination. To illustrate, even if a prosecution witness provides inculpatory evidence on direct examination, he or she may also possess exculpatory information that a criminal defendant wishes to elicit during cross-examination. In short, the Ninth Circuit's decision in *Juan* fundamentally protects a defendant's Sixth Amendment right to elicit exculpatory evidence from an "adverse" government witness.

The Supreme Court has instructed, "Whether rooted directly in the Due Process Clause . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[42] The confrontation values that the *Juan* decision incorporated into the "substantial interference" doctrine comport with this right to "present a complete defense."

C. THE ROLE OF THE FACT-FINDER AND THE IMPORTANCE OF CROSS-EXAMINING A PROSECUTION WITNESS CONCERNING POSSIBLE "SUBSTANTIAL INTERFERENCE" BY THE PROSECUTOR

Not only does the *Juan* rule implicitly safeguard a defendant's confrontation rights, but confrontation rights may help minimize any harm caused by a prosecutor's "substantial interference" with a prosecution witness' exculpatory testimony. *Juan* cogently noted that the effect of a prosecutor's coercion of a witness "into recanting testimony that was favorable to the defendant" has "the potential to work even greater harm than [warnings] that simply result in a blanket refusal to testify."[43] As a result, the Sixth Amendment right to confrontation is

39. Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987).

40. *Id.* at 51–52.

41. Brown v. Ruane, 630 F.3d 62, 72 (1st Cir. 2011) (citing Chambers v. Mississippi, 410 U.S. 284, 302 (1973)).

42. Crane v. Kentucky, 476 U.S. 683, 690 (1986).

43. United States v. Juan, 704 F.3d 1137, 1142 (9th Cir. 2013).

uniquely critical within *Juan*-type situations in order to challenge the testimony of a prosecution witness who *is* present in court.

Cross-examination "affords a defendant 'a meaningful opportunity to cross-examine witnesses against him in order to show bias or improper motive for their testimony.'"[44] In short, a jury should be given "sufficient information" to make a "discriminating appraisal" of a witness's motives and biases.[45] These principles equally justify the conclusion that defendants should be permitted to cross-examine prosecution witnesses about any "perjury threats" that the prosecution or the trial court may have conveyed to them.

Notably, many courts have held that a prosecutor may present evidence that third parties have threatened a prosecution witness in order to explain the witness's inconsistent statements. As the Seventh Circuit has stated, "the evidence of threats is necessary to account for the specific behavior of a witness that, if unexplained, could damage a party's case."[46] For example, in order to explain a prosecution witness's inconsistent statements, a prosecutor may properly elicit evidence regarding threats that the witness had received from gang members in retaliation for his testimony against the defendant.[47] Extending the rule to encompass *Juan*-like scenarios, even where a prosecutor makes a "perjury warning" with completely legitimate intentions, this warning may be relevant to a factfinder's assessment of a witness's credibility and the reasons for his or her inconsistent testimony.

Critically, however, the ability of a defendant to cross-examine a prosecution witness concerning any "perjury threats" should *not* foreclose the defendant from raising a separate substantial interference claim—at trial as well as during post-trial review proceedings. Cross-examination of a witness merely provides a means to lessen the unfair prejudice result-

44. Corby v. Artus, 699 F.3d 159, 166 (2d Cir. 2012) (quoting Brinson v. Walker, 547 F.3d 387, 392 (2d Cir. 2008)). To illustrate, a defendant has "the right to cross-examine an accomplice regarding the nature of and benefits, including unprosecuted crimes, afforded under the plea agreement." United States v. Mulinelli-Navas, 111 F.3d 983, 987 (1st Cir. 1997).

45. *Mulinelli-Navas,* 111 F.3d at 987 (citations omitted).

46. United States v. Thomas, 86 F.3d 647, 654 (7th Cir. 1996).

47. *See, e.g.,* United States v. Doddles, 539 F.3d 1291, 1295–96 (10th Cir. 2008) (noting that evidence that witness "experienced negative consequences" for his testimony and that he was reluctant to testify at trial was relevant to rebut defense counsel's attempts to impeach his testimony).

ing from substantial interference with a testifying prosecution witness in *Juan*-type situations. In some cases, however, even effective cross-examination may fail to sufficiently remedy the due process violation created by the government's substantial interference with its own witness. Therefore, courts will likely need to address the extent to which evidence presented to the factfinder concerning the government's warnings can effectively mitigate any prejudice caused by the government's substantial interference.

D. DISCOVERABILITY OF WARNINGS "NOT ON THE RECORD"

Application of the *Juan* rule may be problematic where the prosecutor's perjury warnings to the prosecution witness do not appear on the record. To illustrate, a prosecutor may advise a prosecution witness during a pre-trial "prep session" that if the witness falsely testifies in an exculpatory fashion at trial, he or she will face a perjury prosecution. Depending on "the manner in which the prosecutor . . . raises the issue, the language of the warnings, and the prosecutor's . . . basis in the record for believing the witness might lie," the prosecutor's warning may be proper.[48]

In these "non-record" situations, it is likely advisable for the government to notify defense counsel about any warnings given to prosecution witnesses.[49] Furthermore, the presence of a third party when the prosecutor conveys the warnings may be helpful in the event that the prosecutor's warnings become an issue at trial or on post-trial review.[50]

As in *Juan,* another difficult situation may arise in which (1) the prosecutor or trial court conveys the "threat of perjury" to the witness's counsel—but not to the witness directly—and (2) there is no available evidence establishing whether the wit-

48. United States v. Vavages, 151 F.3d 1185, 1190 (9th Cir. 1998).

49. Constitutional due process protections mandate "that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987) (citing United States v. Agurs, 427 U.S. 97 (1976)); *see also* Brady v. Maryland, 373 U.S. 83, 87 (1963).

50. "Unless a prosecutor is prepared to forgo impeachment of a witness by the prosecutor's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present the impeaching testimony, a prosecutor should avoid interviewing a prospective witness except in the presence of a third person." AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 3-3.1(g) (3d ed. 1993), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_toc.html.

ness's counsel conveyed the warning to the witness. To illustrate, Juan was not entitled to relief because he did not demonstrate that the "allegedly threatening statements . . . were ever communicated to C.J."[51] Without evidence that C.J.'s attorney had relayed to her the prosecutor's remarks, Juan failed to "establish the necessary causal link between the prosecutor's 'threats' and C.J.'s changed testimony."[52] In this situation, the defendant should have the right to cross-examine the prosecution witness about whether his or her attorney conveyed any "perjury warnings" from the prosecution or trial court. Citing attorney-client privilege, the witness may decline to answer the question.[53] Nonetheless, as the Ninth Circuit has persuasively noted, a perjury warning is generally less coercive where it is the *witness's* counsel that relays it to the witness.[54] Thus, the best strategy may be for prosecutors and judges to avoid communicating perjury warnings directly to the witness; instead the witness's counsel should convey "indirect warnings" to his or her client-witness.

CONCLUSION

The *Juan* rule effectively balances the government's legitimate interest in preventing a government witness from providing false "exculpatory" testimony with a defendant's fundamental right to elicit exculpatory evidence from a government witness. Thus, the rule implicates not only a defendant's rights to due process and compulsory process, but also, by implication, a defendant's right to confront adverse witnesses. The Ninth Circuit's sound reasoning in *Juan* provides much-needed guidance for prosecutors, defense attorneys, and courts that must confront the applicability of *Webb* in the context of prosecution witnesses. Nonetheless, despite the Ninth Circuit's substantive directive, future courts will likely be tasked with determining how best to apply the *Juan* rule. Ultimately, given the strong potential of *Juan*-type situations to occur in future prosecutions, courts will have ample opportunity to further analyze

51. United States v. Juan, 704 F.3d 1137, 1142 (9th Cir. 2013).

52. *Id.*

53. Under the attorney-client privilege, communications between an attorney and a client for the purpose of obtaining legal advice are confidential. Confidential Informant 59-05071 v. United States, 108 Fed. Cl. 121, 129 (Fed. Cl. 2012) (noting that the privilege includes attorney's "thought processes and legal recommendations" (quoting Zenith Radio Corp. v. United States, 764 F.2d 1577, 1580 (Fed. Cir. 1985))).

54. United States v. Vavages, 151 F.3d 1185, 1191 (9th Cir. 1998).

and refine the *Juan* rule's prohibition on substantial governmental interference with prosecution witnesses.