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The Prosecutor's Obligation to Grant Defense Witness Immunity

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The author enumerates the three most common situations in which the courts have required the prosecutor to offer immunity to defense witnesses: (1) to safeguard the defendant's right to essential exculpatory testimony; (2) where the use of the prosecutor's powers to grant immunity causes such distortion in the fact-finding process as to require granting immunity to defense witnesses; and (3) where immunity is required to remedy prosecutory misconduct such as the intimidation of witnesses. The use of the "missing witness" instruction to avoid reaching the constitutional issue is also discussed.

The recent trial of Bernhard Goetz, the subway gunman, focused attention on a recurring conflict in criminal justice between a defendant's right to a fair trial, and the enormous discretion of the prosecutor in deciding whom to prosecute and whom to absolve from criminal liability. Specifically, the case raised the question of the prosecutor's obligation, if any, to grant defense witness immunity. In *Goetz*,[1] the prosecutor immunized two of the four victims, who testified against Goetz. The defense sought the testimony of a third victim, Barry Allen, but he refused to testify unless granted immunity. The prosecutor refused to grant Allen immunity as a matter of "trial strategy." Assuming that such refusal was arbitrary and impaired the defendant's ability to mount a complete defense, what remedies are available, if any, to repair the harm?

Authority of Prosecutor

As a general rule, the prosecutor has exclusive statutory authority to grant immunity to potential witnesses, and his discretion in using this important law enforcement tool is vir-

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[1] People v. Goetz, 516 N.Y.S.2d 1007 (Sup. Ct. 1987).

tually unfettered.[2] Occasions may arise, however, when, as in the *Goetz* case, the defense seeks to have a reluctant witness granted immunity, as for example, when a particular witness can give favorable testimony for the defendant but refuses to testify on grounds of self-incrimination. Can the defendant in such circumstances require the prosecutor to grant defense witness immunity?[3] And if the prosecutor refuses, does the court have inherent power to confer immunity?

The problem has constitutional overtones. The prosecutor's refusal to grant defense witness immunity can deprive the defendant of his due process right to a fair trial,[4] as well as his Sixth Amendment right to use compulsory process to obtain favorable witnesses.[5] Some courts draw an analogy between the prosecutor's refusal to grant defense witness immunity and his failure to disclose exculpatory evidence as required under *Brady v. Maryland,*[6] for both actions can violate a similar right of the defendant by depriving him of exculpatory evidence, which is necessary to present an effective defense.

Although the Supreme Court has not decided this issue, lower courts have confronted the problem in different ways depending on the circumstances giving rise to a defense request for immunity. The courts generally agree that prosecutors can-

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[2] See 18 U.S.C. §§ 6002, 6003 (1970); N.Y. Crim. Proc. Law §§ 50.20, 50.30 (McKinney 1967); United States v. Chagra, 669 F.2d 241 (5th Cir. 1982); United States v. Rocco, 587 F.2d 144 (3d Cir. 1978).

[3] An important distinction should be made between granting transactional immunity, which protects the witness from prosecution for the substantive matters about which he gives evidence (see N.Y. Crim. Proc. Law § 50.20 (McKinney 1967), providing transactional immunity), and use immunity, which protects the witness only from having his testimony and derivative information used against him. See 18 U.S.C. § 6002 (providing use and derivative use immunity). To pass constitutional muster, an immunity statute need confer only use immunity. Kastigar v. United States, 406 U.S. 441 (1972). In considering defense witness immunity, the scope of the immunity is clearly a relevant concern. Compare Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967) (transactional immunity) with United States v. Herman, 589 F.2d 1191 (3d Cir. 1978) (use immunity).

[4] United States v. Herman, 589 F.2d 1191 (3d Cir. 1978).

[5] See Western, "The Compulsory Process Clause," 73 Mich. L. Rev. 71, 166-170 (1974).

[6] 373 U.S. 83 (1963); see United States v. Klauber, 611 F.2d 512, 515-516 (4th Cir. 1979); United States v. Leonard, 494 F.2d 955, 985 n.79 (D.C. Cir. 1974); see also Note, "Right of Criminal Defendant to Compelled Testimony of Witness," 67 Colum. L. Rev. 953, 958 (1967).

not be required to grant witnesses statutory immunity.[7] Most courts further refuse to confer judicial immunity upon witnesses even when the witness can provide essential exculpatory information available from no other source.[8] These courts reason that first, such immunity decisions would carry the judiciary into policy assessments that are the traditional domain of the executive branch[9] and second, immunity would be subject to abuse by the defense.[10]

To be sure, the opportunities for abuse by the defendant of immunity are considerable. It is not difficult to imagine that many more defendants would produce witnesses willing to give exculpatory testimony but only if they were granted immunity. Improper collusive arrangements would be encouraged to the prosecutor's detriment. Defendants would obtain the benefit of possibly fabricated evidence and the source of that evidence might escape prosecution by virtue of immunity. Even limiting the immunity granted these witnesses to use immunity would still make the prosecutor's task difficult. If the prosecutor was required to dispense even limited-use immunity to such witnesses, the prosecutor, if he subsequently chose to prosecute that witness, would have the burden of showing that his evidence did not derive from the immunized testimony.[11]

On the other hand, some courts have invoked their inherent authority to dispense immunity in special circumstances, most notably when the witness can offer crucial exculpatory tes-

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[7] United States v. Turkish, 623 F.2d 769 (2d Cir. 1980), *cert. denied,* 449 U.S. 1077 (1981); United States v. Bowling, 666 F.2d 1052, 1055 (6th Cir. 1981).

[8] Mattheson v. King, 751 F.2d 1432 (5th Cir. 1985); United States v. Thevis, 665 F.2d 616, 639 (5th Cir. 1982); *In re* Daley, 549 F.2d 469, 479 (7th Cir. 1976), *cert. denied,* 434 U.S. 829 (1977); United States v. Graham, 548 F.2d 1302, 1315 (8th Cir. 1976); Earl v. United States, 361 F.2d 531, 534-535 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967).

[9] United States v. Turkish, 623 F.2d 769, 776 (2d Cir. 1980), *cert. denied,* 449 U.S. 1077 (1981) ("confronting the prosecutor with a choice between terminating prosecution of the defendant or jeopardizing prosecution of the witness is not a task congenial to the judicial function").

[10] *In re* Kilgo, 484 F.2d 1215, 1222 (4th Cir. 1973) ("a person suspected of a crime should not be empowered to give his confederates an immunity bath").

[11] Kastigar v. United States, 406 U.S. 441 (1972). By similar reasoning, Federal Rule of Evidence 804(b)(3), distrusting declarations against penal interest used to exonerate a defendant, requires corroboration before such statements may be introduced.

timony[12]; when the prosecutor one-sidedly immunizes certain witnesses who testify for the government but refuses to grant reciprocal immunity to other witnesses who can give helpful testimony for the defendant[13]; and when the prosecutor, by threats or other misconduct, intimidates defense witnesses into refusing to testify.[14]

Immunity for Essential Exculpatory Testimony

Several courts have held that due process requires granting immunity to defense witnesses to safeguard the defendant's right to essential exculpatory testimony and compulsory process.[15] In *Virgin Islands v. Smith,*[16] the defendant requested immunity for an exculpatory witness who was under the jurisdiction of the juvenile authorities of the Virgin Islands attorney general. That office offered the witness immunity on the condition (prompted by prosecutorial courtesy) that the U.S. attorney consent. For unexplained reasons, the consent was refused. The Third Circuit held that judicial immunity was available when (1) immunity was properly sought in the district court, (2) the witness was available to testify, (3) the proffered testimony was both essential and clearly exculpatory, and (4) no strong governmental interests countervailed against an immunity grant.[17]

Several circuits have disagreed with the Third Circuit's approach.[18] Other courts, while denying immunity in the cases

[12] Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980); People v. Owens, 97 A.D.2d 855, 469 N.Y.S.2d 249 (3d Dep't 1983), *rev'd,* 63 N.Y.2d 824, 472 N.E.2d 26, 482 N.Y.S.2d 250 (1984); State v. Broady, 41 Ohio App. 2d 17, 321 N.E.2d 890 (1974).

[13] United States v. Saettele, 585 F.2d 307 (8th Cir. 1978) (dissenting opinion); United States v. DePalma, 476 F. Supp. 775 (S.D.N.Y. 1979); People v. Chin, 67 N.Y.2d 22, 490 N.E.2d 505, 499 N.Y.S.2d 638 (1986); People v. Adams, 53 N.Y.2d 241, 423 N.E.2d 379, 440 N.Y.S.2d 902 (1981).

[14] United States v. Morrison, 535 F.2d 223 (3d Cir. 1976); People v. Shapiro, 50 N.Y.2d 747, N.E.2d 897, 431 N.Y.S.2d 422, 409 (1980).

[15] United States v. Chitty, 760 F.2d 425 (2d Cir. 1985); Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980); United States v. Herman, 589 F.2d 1191 (3d Cir. 1978); People v. Owens, 97 A.D.2d 855, 469 N.Y.S.2d 249 (3d Dep't 1983), *rev'd,* 63 N.Y.2d 824, 472 N.E.2d 26, 482 N.Y.S.2d 250 (1984).

[16] 615 F.2d 964 (3d Cir. 1980).

[17] *Id.* at 972.

[18] See cases cited at note 7 *supra.*

before them, have left open the possibility that immunity could be granted in a particular case if the defendant's interest outweighed any legitimate prosecution interest.[19] The Second Circuit, in *United States v. Turkish,*[20] set forth its own balancing test, as follows:

> No duty is imposed upon the prosecutor; he simply has an option to rely upon the witness' status as an actual or potential target of prosecution to foreclose any inquiry concerning immunity for that witness. If a case should arise where the witness is not an indicted defendant and the prosecutor cannot or prefers not to present any claim that the witness is a potential defendant, and if the defendant on trial demonstrated that the witness' testimony will clearly be material, exculpatory, and not cumulative, it will be time enough to decide whether in those circumstances a court has any proper role with respect to defense witness immunity.[21]

Reciprocal Immunity

The prosecutor's uneven and discriminatory use of his powers to grant immunity might so distort the fact-finding process as to require granting immunity to defense witnesses.[22] This suggestion of a reciprocal immunity rule originated in *Earl v. United States,*[23] in a decision by former Chief Justice (then circuit judge) Burger. In *Earl,* the Court of Appeals for the District of Columbia held that the government's refusal to grant immunity to a discharged co-defendant and require him to testify did not deprive the defendant of a fair trial. The court, however, noted that a defendant in some circumstances could be deprived of a fair trial by the prosecutor's uneven use of his immunity-granting powers:

> We might have quite different, and more difficult, problems had the Government in this case secured testimony from one eyewitness by

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[19] United States v. Klauber, 611 F.2d 512, 517-520 (4th Cir. 1979), *cert. denied,* 446 U.S. 908 (1980); United States v. Alessio, 528 F.2d 1079, 1081-1082 (9th Cir.), *cert. denied,* 426 U.S. 948 (1976); People v. Sapia, 41 N.Y.2d 160, 359 N.E.2d 688, 391 N.Y.S.2d 93 (1976), *cert. denied,* 434 U.S. 823 (1977).

[20] 623 F.2d 769 (2d Cir. 1980), *cert. denied,* 449 U.S. 1077 (1981).

[21] *Id.* at 778-779; see also United States v. Chitty, 760 F.2d 425, 429 (2d Cir. 1985).

[22] United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978) (prosecutor withholds immunity with "deliberate intention of distorting the judicial fact-finding process"); see also United States v. D'Antonio, 801 F.2d 979 (7th Cir. 1986).

[23] 361 F.2d 531 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967).

> granting him immunity while declining to seek an immunity grant for Scott to free him from possible incrimination to testify for Earl. That situation would vividly dramatize an argument on behalf of Earl that the statute *as applied* denied him due process. Arguments could be advanced that in a particular case the Government could not use the immunity statute for its advantage unless Congress made the same mechanism available to the accused.[24]

This suggestion in *Earl* was applied in a decision in the Southern District of New York in *United States v. DePalma.*[25] There, the prosecutor gave immunity to certain individuals involved in a racketeering scheme but refused to grant immunity to other participants. The court specifically held, as follows:

> Where the foundation of the government's case against Horowitz [the defendant] was built by means of a farreaching immunity grant, and where the evidence sought by the defendant is affected by the government's continuing investigation of the potential defense witnesses, the denial of limited use immunity resulted in an unfair trial.[26]

The court concluded that the appropriate relief would be not to dismiss the indictment but rather to grant a retrial wherein the government witnesses' testimony would be excluded unless required-use immunity was granted to potential defense witnesses.[27]

Immunity to Remedy Prosecutorial Misconduct, Such as Intimidation of Witnesses

As noted previously, courts have recognized the potential for prosecutorial abuse in the uneven granting of, or refusal to grant, witness immunity with the deliberate intention of distorting the fact-finding process.[28] A flagrant example of such misconduct is forcing a defense witness into silence by threatening prosecution if the witness chooses to testify. Courts have rem-

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[24] *Id.* at 534 n.1 (emphasis in original).

[25] 476 F. Supp. 775 (S.D.N.Y. 1979).

[26] *Id.* at 781.

[27] See also United States v. Saettele, 585 F.2d 307, 310-314 (8th Cir. 1978).

[28] See also United States v. LaCoste, 721 F.2d 984 (5th Cir. 1983) (prosecutor's refusal to stipulate to conversation with witnesses who refused to testify "reprehensible conduct").

edied such abuses by requiring that the witness be granted immunity as a condition to subjecting the defendant to trial. In *United States v. Morrison,*[29] for example, the prosecutor improperly caused the defendant's principal witness to withhold her testimony out of fear of self-incrimination. The prosecutor repeatedly warned the witness of the possibility of a federal perjury charge if she testified and conducted a highly intimidating personal interview with the witness prior to trial. To cure such misconduct, the court ordered a new trial, stating that "in the event the defendant calls Sally Bell as a witness, if she invokes her fifth amendment right not to testify, a judgment of acquittal shall be entered unless the Government, pursuant to 18 U.S.C. 6002, 6003, requests use immunity for her testimony."[30]

Similarly, in *People v. Shapiro,*[31] the prosecutor repeatedly threatened several important defense witnesses with perjury charges if they gave testimony for the defendant that differed from testimony they had previously given. The witnesses refused to testify unless granted immunity, and the defendant was convicted. The New York Court of Appeals reversed the conviction and authorized a new trial only if the prosecutor extended immunity to these witnesses. A prosecutor's warning to potential witnesses of their possible liability for false statements, said the court, "must not be emphasized to the point where they are transformed instead into instruments of intimidation." The prosecutor's refusal to grant immunity, couched in such "menacing terms," served no purpose other than to bind the witnesses irretrievably to their previous sworn statements, accurate or not. "By doing this, it impermissibly affected their meaningful exercise of their Fifth Amendment rights and insured their unavailability as witnesses for the defendant."[32]

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[29] 535 F.2d 223 (3d Cir. 1976).

[30] *Id.* at 229. Other courts have acknowledged the role of use immunity as a remedy for this type of prosecutorial behavior. See United States v. Lord, 711 F.2d 887 (9th Cir. 1983); United States v. Davis, 623 F.2d 188 (1st Cir. 1980).

[31] 50 N.Y.2d 747, 409 N.E.2d 897, 431 N.Y.S.2d 422 (1980).

[32] *Id.* at 761, 409 N.E.2d at 904, 431 N.Y.S.2d at 429.

The "Missing Witness" Instruction

There are circumstances in which a court may provide an effective remedy against the prosecutor's refusal to grant a witness immunity without reaching the constitutional issue by means of the so-called missing witness inference. A good illustration is found in the *Goetz* case itself.[33]

In that case, the prosecution called one witness, Barry Allen, on its direct case. Allen invoked his Fifth Amendment privilege and the prosecution refused to offer him immunity. The People had already immunized two other witnesses to the events on which the defendant was indicted for attempted murder and other felonies. As mentioned earlier,[34] it was acknowledged by the prosecution that immunity was being withheld from Allen as a matter of trial strategy and that the prosecution had no interest in pressing criminal charges against Allen.[35]

Defendant then sought a "missing witness" charge to the jury that "they may infer if they wish, that the testimony of Barry Allen would not have been favorable to the People."[36] Such a charge is appropriate when "there is an available, uncalled witness in a position to give material evidence that is not simply cumulative and that would naturally be expected to be favorable to the party who has failed to call him."[37]

The court considered the elements of the missing witness charge and concluded that Allen qualified as such a witness and that defendant had established a right to the charge. At this point, the court explained, "the burden shift[ed] to the prosecutor to account for the absence of the witness or to demonstrate that the charge would be inappropriate."[38]

While conceding that a witness who invokes his privilege against self-incrimination *is* unavailable for many purposes,[39]

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[33] People v. Goetz, 516 N.Y.S.2d 1007 (S. Ct. 1987).

[34] See text at p. 14 *supra*.

[35] Goetz, N.Y.S.2d at 1008.

[36] *Id.* at 1010. The case, according to the opinion, presented the question for the first time in New York State.

[37] *Id.* at 1008 (citing J. Richardson, *Evidence* § 92, at 66 (10th ed. Prince 1970)).

[38] Goetz, N.Y.S.2d at 1009.

[39] See, e.g., People v. Brown, 26 N.Y.2d 88, 94, 308 N.Y.S.2d 825, 257 N.E.2d 16 (admission against penal interest); *Richardson on Evidence* §§ 258, 260; Fed. R.

this factor will enable a prosecutor to escape a missing witness inference only if he furnishes a reasonable explanation for his failure to offer immunity.[40]

At this point, the assistant district attorney argued that the People need not offer any explanation for its failure to confer immunity since this matter was one of prosecutorial discretion. While conceding that the discretion was broad, the court found it was reviewable for abuse. It said: "Contrasting any reasonable grounds for withholding immunity, the case at bar exhibits selectivity among the shooting victims [in the granting of immunity] that goes without explanation other than trial strategy. This is insufficient to carry the People's burden of demonstrating that the missing witness charge is inappropriate. To countenance such a strategy would rouse profound constitutional questions of the defendant's right to confront the witnesses against him under the Sixth Amendment to the Constitution of the United States and to his right to due process under the Fourteenth Amendment."[41]

When, as in the *Goetz* case, a "missing witness" instruction is given, the instruction may be of far greater benefit to the defense than the witness's testimony. The instruction not only suggested that Allen's testimony would have been unfavorable to the defense, but also permitted the jury to speculate on the prosecutor's motive in not calling the witness.

Conclusion

The judiciary's somewhat tentative response to the prosecutor's refusal to grant defense witness immunity reflects a more general reluctance by the courts to interfere with the prosecutor's exercise of discretion absent a showing of misconduct or abuse. This reluctance is noticeable in other important areas of prosecutor decision making such as charging, plea bargaining, and dismissals. The courts' deference is accountable, in part, to the theory of separation of powers and also the fear of abuses of the immunity laws. When, however, the prosecutor uses his

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Evid. 804 (admissibility of former testimony, of statement against interest and of statements of personal or family history).

[40] State v. Dachtler, 318 N.W.2d 769, 774 (N.D. 1982) (dictum).

[41] Goetz, N.Y.S.2d at 1010.

immunity-granting powers to distort the fact-finding process, a court may invoke due process to repair the damage. This distortion may occur, for example, when he builds a case by immunizing several government witnesses and refuses to immunize other participants, or threatens potential defense witnesses with prosecution if they testify.

Accommodating the interests of a reluctant witness who refuses to give evidence on grounds of self-incrimination and the defendant's interest in a fair trial may ultimately require legislation. A statute could be enacted providing for limited-use immunity under the kinds of circumstances described in this article and authorizing the trial judge to dispense immunity after certain statutory preconditions have been met, namely, a showing of what the witness's testimony would be, his refusal to testify after properly asserting a privilege, and the reasons for the prosecutor's refusal to grant immunity. If the prosecutor does not provide satisfactory reasons for withholding immunity, the trial judge should be empowered to confer it.