

## WHITE-COLLAR CRIME

BY ELKAN ABRAMOWITZ AND BARRY A. BOHRER

### *Defense Witness Immunity—Toward a More-Level Playing Field*

**T**he concept of “defense witness immunity” is not well-known to many criminal practitioners. When we think of immunity for witnesses, we think of the government granting immunity to its witnesses. But in theory, prosecution witnesses have no exclusive on grants of immunity; federal prosecutors also may grant immunity to witnesses for the defense.

Indeed, in a world where the government may confer upon its witnesses the protection of immunity, it is only fair that it should be required to do the same, in the appropriate case, for witnesses who can provide exculpatory testimony for a defendant.

In practice, however, defendants rarely receive this benefit for their witnesses, in large part because the government has made a practice of naming potentially relevant witnesses for the defense as subjects of the investigation or unindicted co-conspirators, declining to prosecute them sometimes for months on end, there-



Elkan Abramowitz

Barry A. Bohrer

by triggering those potential witnesses’ privilege to refuse to testify on Fifth Amendment self-incrimination grounds.

This sort of manipulation by prosecutors has led to situations where the government has an unfair advantage over the defendant’s ability to present a defense and, perhaps even more significantly, where trials are no longer the searches for the truth they are meant to be. As noted by one judge, “[c]entral to the issue...is the question of what obligation is placed upon the government in connection with the search for truth in a criminal proceeding.”<sup>1</sup>

### The Second Circuit

Courts cannot grant immunity to witnesses; only the government can initiate the process. The U.S. Court of Appeals for the Second Circuit “has followed the carrot-and-stick approach, leaving the immunity decision to the executive branch but interposing the judicial power to subject the government to certain choices of action.”<sup>2</sup> The Second Circuit has allowed that “extraordinary circumstances” might require the government to confer use

immunity<sup>3</sup> on a defense witness, “at the risk of dismissal of the indictment.”<sup>4</sup> To date, it has been presented with no such circumstances. With the appeal of Bernard Ebbers from his conviction, the court will be afforded another opportunity to consider the issue.

According to Second Circuit law, in order for a court to compel the government to immunize a defense witness, three requirements must be met under the criteria set forth in *United States v. Bahadar*. First, the court must find that “the government has engaged in discriminatory use of immunity to gain a tactical advantage or, through its own overreaching, has forced the witness to invoke the Fifth Amendment.” Second, the witness’s testimony must be “material, exculpatory, and not cumulative.” Third, the testimony “must not be obtainable from any other source.”<sup>5</sup>

The definition of “discriminatory use” is “not entirely clear;” it “arguabl[y]...means simply a decision by the [g]overnment to confer immunity on some witnesses and not on others.”<sup>6</sup>

At a minimum, however, the “overreaching” encompassed by the test has been held to include (1) conduct “which substantially interferes with the defense, or with a potential defense witness’s unfettered choice to testify,” or (2) “deliberate denial of immunity for the purpose of withholding exculpatory evidence and gaining a tactical advantage through such manipulation.”<sup>7</sup>

**Elkan Abramowitz** is a member of Morvillo, Abramowitz, Grand, Iason & Silberberg. He is a former chief of the criminal division in the U.S. Attorney’s Office for the Southern District of New York. **Barry A. Bohrer** is also a member of Morvillo, Abramowitz and was formerly chief appellate attorney and chief of the major crimes unit in the U.S. Attorney’s Office for the Southern District of New York. **Elizabeth J. Carroll**, an attorney, assisted in the preparation of this article.

## 'Extraordinary' Circumstances

The Second Circuit has declined to define precisely what circumstances would be "extraordinary," so as to warrant a grant of immunity. However, the court has recognized, in *Blissett v. Lefevre*,<sup>8</sup> that circumstances may exist "warranting a directive that the government grant immunity to a defense witness in the interest of fundamental fairness." The court also has noted, in *United States v. Dolah*,<sup>9</sup> that even if "no discriminatory use of immunity for [g]overnment witnesses has occurred; i.e., the [g]overnment has not immunized any of its own witnesses, we have explicitly left open the issue of whether under extraordinary circumstances, due process may require that the government confer use immunity on a witness for the defendant."<sup>10</sup>

While the Second Circuit's standard has been somewhat unclear, the court's 2001 decision in *Dolah*—its most recent opinion concerning defense witness immunity—illustrates the court's approach. The appellants there argued that the admission of out-of-court statements of recalcitrant witnesses, coupled with the prosecution's selective use of immunity, resulted in the denial of a fair trial. At trial, the government granted immunity to some former co-workers of the appellants and presented them as live witnesses but refused to grant use immunity to other former co-workers, instead offering their guilty plea allocutions as statements against penal interest (in a pre-*Crawford* era).<sup>11</sup> Therefore, the defendants could cross-examine only those witnesses considered so "entirely helpful to the prosecution that immunity was provided them," but could not cross-examine the other co-workers who were not immunized.

Although the court ultimately found that the error was harmless in that case, it noted that a proper balancing of interests would have been achieved had the government been required to choose

between immunizing all witnesses on both sides or immunizing some prosecution witnesses and forgoing offering out-of-court statements of other nonimmunized witnesses.

A notable case is *United States v. De Palma*,<sup>12</sup> a rare U.S. District Court for the Southern District of New York opinion vacating a conviction due to a lack of defense witness immunity. *De Palma* was a securities fraud case in which the government selectively exercised its statutory immunity power to grant immunity to two government witnesses—including

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*Reliance on immunized  
testimony without granting  
immunity to potential defense  
witnesses denied the  
defendant a fair trial.*  
—Judge Robert Sweet

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a "broad conferral of transactional immunity" on the defendant's alleged co-conspirator—while declining to grant immunity to two other witnesses, who had testified in the grand jury on "probative and not cumulative" matters that would have supported the defense.

Southern District Judge Robert W. Sweet vacated the defendant's conviction on due process grounds because the government's heavy reliance upon immunized testimony while refusing to grant immunity to potential defense witnesses denied the defendant a fair trial. As a remedy, the court ordered a retrial at which the government was compelled to choose between granting immunity to the defense witnesses at issue or proceeding without the testimony of the immunized government witnesses.

Unfortunately, *De Palma* is truly a rarity in this circuit where, despite the language in *Dolah* and *Blissett* suggesting it might one day do otherwise, the Court of Appeals has demonstrated a reluctance to take similar action.

## The 'Ebbers' Case

The defense witness immunity issue arose in the recent Southern District trial of former WorldCom Inc. president and CEO Bernard J. Ebbers. Mr. Ebbers was indicted for conspiracy and securities fraud in connection with his participation in an alleged scheme to inflate artificially the price of WorldCom stock. In March 2005, he was convicted on all counts. Attorneys for Mr. Ebbers made a pretrial motion for an order compelling the government to grant immunity to two defense witnesses—WorldCom's former COO Ronald Beaumont and former head of revenue accounting, Ronald Lomenzo—or face dismissal of the indictment. Alternatively, Mr. Ebbers sought an evidentiary hearing to determine whether the three requirements discussed in *Bahadar* had been met and therefore the relief sought would be appropriate.

Mr. Ebbers argued that the government had granted immunity to a number of prosecution witnesses through plea agreements and nonprosecution agreements with cooperation provisions, but refused to grant immunity to or decline prosecution of the similarly situated Messrs. Beaumont and Lomenzo, whom it had interviewed more than 18 months earlier. Mr. Ebbers further argued that it appeared that the two individuals would provide material and exculpatory testimony on a number of critical issues in the case, including: (1) whether Mr. Ebbers was aware of WorldCom's line cost capitalization or of the propriety of WorldCom's accounting decisions and (2) whether former WorldCom CFO Scott Sullivan was the ultimate decision-maker on the accounting decisions that underlay the charges in the indictment.

Mr. Ebbers' motion also accused the government of "declin[ing] to grant immunity to or decline prosecution of Messrs. Beaumont and Lomenzo in order to effectively force these witnesses to invoke

their [F]ifth [A]mendment privileges, thereby preventing Mr. Ebbers from eliciting exculpatory evidence at trial.”<sup>13</sup> The defense further pointed out that both witnesses already had invoked their Fifth Amendment privilege in depositions in the parallel civil securities litigation involving WorldCom, and one even had confirmed that he would invoke it again if called as a witness by Mr. Ebbers.

On Nov. 10, 2004, Southern District Judge Barbara S. Jones denied Mr. Ebbers’ motion, finding “none of the requisite tactical maneuvering by the [g]overnment to be present” in the *Ebbers* case, and disagreeing with Mr. Ebbers’ reading of *Dolah* and *De Palma*. Judge Jones also relied on an ex parte declaration of one of the prosecutors and on the government’s own explanation, in its brief, of its conduct that “it ha[d] made decisions on whether to grant immunity to witnesses based on the particular circumstances of those witnesses and not in a discriminatory fashion to gain any tactical advantage.”<sup>14</sup> Following the verdict, Mr. Ebbers moved for a new trial, arguing that the failure to grant defense witness immunity deprived him of a fair trial. That motion is currently pending, and will likely be an issue on appeal.

## D.C. Debriefing Approach

In a 1996 en banc opinion, the U.S. Court of Appeals for the District of Columbia Circuit endorsed a “worthwhile approach” to the issue of defense witness immunity proposed by then-U.S. Attorney Eric Holder. The court, in *Carter v. United States*,<sup>15</sup> outlined a procedure for instances where a defense witness possesses material, exculpatory and noncumulative evidence, unobtainable from any other source, and will invoke the Fifth Amendment privilege against self-incrimination unless granted use immunity.

The U.S. attorney proposed that the government could debrief such a witness, with limited immunity solely for the

debriefing. Following the debriefing, if the U.S. attorney were to have a “reasonable basis” for not granting use immunity, the refusal would not rise to the level of “prosecutorial misconduct.” If, however, the government could provide no justifiable reason for not granting use immunity, then the court could consider whether the government’s conduct would result in a distortion of the fact-finding process. If so, the court could find a denial of due process. In order to make this determination, the court would hold a summary hearing.

If, after the hearing, the court were to conclude that the defendant could not receive a fair trial without the testimony of a crucial defense witness and that the government failed to submit to the court a reasonable basis for not affording use immunity to that witness, then the court would be justified in putting a choice of remedy to the government. Thus, “[i]n an appropriate case the trial court may present the prosecution with the choice of either dismissal of the indictment (or some other commensurate remedy) or the grant of use immunity to the crucial defense witness...if the court concludes the prosecutor is distorting the fact-finding process in relation to the issue.” The D.C. court of appeals has upheld the validity of this sensible procedure in subsequent cases.<sup>16</sup>

## Conclusion

Before the government basks too long in the light of its “high profile victories line[d] up like trophies in the halls of the U.S. Department of Justice,”<sup>17</sup> it will have to convince the Second Circuit one more time in the *Ebbers* case that its parsimonious practice of doling out immunity only to those who may help its case comports with modern notions of due process. Just how long the government will be permitted to perform this high-wire act remains to be seen. Until then, fairness suggests that, at a minimum, a

procedure similar to that currently utilized in the District of Columbia should be implemented.



1. *United States v. De Palma*, 476 FSupp 775 (SDNY 1979).

2. *United States v. Bahadar*, 954 F2d 821 (2d Cir. 1992), cert. denied, 506 US 850 (1992). The Second Circuit, along with other courts, has disagreed with the Third Circuit’s conclusion that a court has inherent authority to immunize a witness capable of providing exculpatory evidence for a defendant. See *Government of Virgin Islands v. Smith*, 615 F2d 964 (3d Cir. 1980); see also *United States v. Morrison*, 535 F2d 223 (3d Cir. 1976).

3. “Use immunity” is defined in 18 USC §6002 as giving rise to a situation where “[n]o testimony or other information compelled... (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.”

4. *Bahadar*, 954 F2d 821; see also *United States v. Turkish*, 623 F2d 769 (2d Cir. 1980), cert. denied, 449 US 1077 (1981).

5. *Bahadar*, 954 F2d 821, citing *United States v. Burns*, 684 F2d 1066 (2d Cir. 1982), cert. denied, 459 US 1174 (1983).

6. *United States v. Dolah*, 245 F3d 98 (2d Cir. 2001) (abrogated on other grounds by *Crawford v. Washington*, 541 US 36 (2004)).

7. *Blissett v. Lefevre*, 924 F2d 434 (2d Cir.), cert. denied, 502 US 852 (1991).

8. 924 F2d 434.

9. *Dolah*, 245 F3d 98.

10. Internal citations and quotations omitted.

11. *Crawford v. Washington*, 541 US 36 (2004).

12. 476 FSupp 775 (SDNY 1979).

13. Memorandum of Law in Support of Defendant Bernard J. Ebbers’ Motion for Defense Witness Immunity or Dismissal of the Indictment, *United States v. Ebbers*, No. S3 02 Cr. 1144 (BSJ), Sept. 7, 2004.

14. Order Denying Defendant’s Motion for Defense Witness Immunity or Dismissal of the Indictment, *United States v. Ebbers*, No. S3 02 Cr. 1144 (BSJ), Nov. 10, 2004.

15. 684 A2d 331 (D.C. 1996) (en banc).

16. See, e.g., *Bouknight v. United States*, 867 A2d 245 (D.C. 2005); *Brown v. United States*, 864 A2d 996 (D.C. 2005); *Ginyard v. United States*, 816 A2d 21 (D.C.), cert. denied, 538 US 1066 (2003).

17. “U.S. Task Force Sets Sight on New Targets,” *New York Law Journal*, April 21, 2005, p. 5.

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