White-Collar Crime

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Unindicted Co-Conspirators, Due Process, and Government Targets

There is a recurring theme in recent high-profile white-collar cases regarding the government’s manipulation of potentially exculpatory witness testimony through the practice of naming such witnesses as unindicted co-conspirators or identifying them as targets of a criminal investigation.

While these cases focus on the effect of the government’s actions on the named defendants, there is little discussion of the impact on the so-called co-conspirators or targets themselves. Accused of criminal behavior without being brought to trial and provided a chance to clear their name, these individuals likely suffer reputational injury and incur costly legal expenses.

The question arises whether this government practice violates the Fifth Amendment guarantee that “[n]o person shall...be deprived of life, liberty, or property, without due process of law.” Despite Department of Justice policy discouraging the practice, recent cases reveal its frequent use by federal prosecutors.

Recent High-Profile Cases

Recent cases demonstrate that where individuals are identified as unindicted co-conspirators or identified as targets of a government investigation, they elect to assert their Fifth Amendment privilege against self-incrimination and decline to testify during trial. Accordingly, any exculpatory evidence these witnesses have to offer may be excluded at great cost to the named defendants. However, where the out-of-court statements of an unindicted co-conspirator or target support the government’s case, they may be admitted by the government through use of the hearsay exception for co-conspirator statements.

Most recently, this subject arose as a central issue in the U.S. Court of Appeals for the Second Circuit’s consideration of WorldCom Inc. chief executive Bernard Ebbers’ appeal of his conviction and sentence. Specifically, during oral argument, lawyers for Mr. Ebbers argued that the government deliberately “put very important evidence beyond [the defense’s] reach” by naming as targets of the WorldCom criminal investigation three former executives, thereby preventing these individuals from testifying on behalf of the defense.

In addition, this practice has arisen as a key evidentiary issue in the trial of top Enron executives, Ken Lay and Jeff Skilling. In that case, the government has named approximately 100 unindicted co-conspirators. While this technique effectively precludes the presentation of favorable defense testimony from these individuals, the government still may seek the admission of testimony regarding out-of-court statements made by the alleged co-conspirators via an evidentiary exception to the hearsay rule. This creates the likelihood that the jury will hear testimony about out-of-court statements made by these individuals without the defense ever having an opportunity to cross-examine the persons who made the alleged statements. As noted by an attorney for some of the Enron defendants, “Naming unindicted co-conspirators is done in virtually every conspiracy case. It’s a great tool for the government, and it’s part of the hell of being in a conspiracy case for the defendants.”

Historical Basis

The American public has become familiar with the concept of unindicted co-conspirators through highly publicized cases such as these. First, in 1974, President Richard Nixon, was named as an unindicted co-conspirator in the indictment of seven individuals in the Watergate case. During the Whitewater investigation in 1996, President Bill Clinton and White House adviser Bruce Lindsay were identified as the unindicted co-conspirators of certain Arkansas bankers charged with wrongdoing. Most recently, Osama bin Laden and the dead hijackers were named as unindicted co-conspirators in the 2001 indictment of Zacarias Moussaoui in connection with the attacks on the World Trade Center.

Simply put, an unindicted co-conspirator is someone alleged to have “agreed with others to violate the law but who is not being charged with an offense and, who, consequently, will not be tried or sentenced for his criminal conduct.” Sometimes unindicted co-conspirators are identified in indictments, by name or by a descriptive title—as in the recent congressional lobbyist scandal, “Representative No. 1.”

Defendants generally seek from the government a list of all unindicted co-conspirators, even those not specifically identified in the indictment. Historically, grand juries have been recognized as serving the dual function of: 1) investigating and accusing those believed to have engaged in criminal wrongdoing, and 2) protecting citizens from arbitrary and oppressive governmental action. However, there is no express authority granting a grand jury the power to accuse an individual of criminal behavior without indicting him.

Indeed, the majority of courts that have considered the issue have held that a federal grand jury possesses no authority to issue an indictment, presentment or report accusing an unindicted person of a crime. In United States v. Briggs, the U.S. Court of Appeals for the Fifth Circuit held that the grand jury exceeded its power and authority in naming as unindicted co-conspirators three individuals alleged to have participated in a conspiracy to cause riots and violence during the 1972 Republican Party National Convention in Miami, Fla. The indictment, which received a lot of press attention, identified 20 alleged conspirators, 10 of whom were named and 10 of whom were not. Of the 10 named, only seven were charged with criminal behavior. The three unindicted co-conspirators petitioned the trial court for an order expunging references to them in the indictment. The district court denied the petition and petitioners appealed. The first appellate court to consider this issue, the Fifth Circuit vacated and remanded.

Addressing the threshold issue of whether there was an actual case or controversy, the court rejected the government’s assertion that “one’s interests are not adversely affected to any extent by being publicly branded as a felon so long as he is not named as a defendant for trial.” In seeking to have their names expunged from the indictment, petitioners complained of injury to their reputations and an inability to obtain employment directly impacting their economic interests. The court found that these injuries were not cured by “innocence by association” and the fact that the seven named defendants were acquitted.

Turning to the merits of the case, the court set forth the historical roots of the grand jury and its

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dual accusative and shielding functions. Stating that an indictment serves the investigatory accusatory function, the court noted the threefold purpose of an indictment: notice to the defendant, pleading in the litigation and the basis for determination of guilty or innocence. “None of these functions encompasses public accusations directed at persons not named as defendants.” The only support offered by the court was that such accusations “may cause” non-defendants to suffer “loss of reputation, and blacklisting in the individual’s chosen profession,” leaving the individual “as defenseless as the medieval prisoner and the victim of the lynch mob,” the court found that an unindicted co-conspirator is afforded less due process rights than the named defendant because he has not been afforded the criminal trial and has no right to intervene. Accordingly, the court found that in this case, the grand jury exceeded its authority, permitting a federal grand jury to accuse persons without being afforded the opportunity to clear their name. As set forth by the Fifth Circuit in Briggs, “[t]he grand jury that returns an indictment naming a person an unindicted co-conspirator does not perform its shielding function but does exactly the reverse. If the charges are baseless, the named person should not be subjected to public branding, and if supported by probable cause, he should not be denied a forum.”

During the 1970’s, there was lengthy debate about the purpose of grand juries and their performance of their duties. In response, the American Bar Association issued a statement finding that indictments naming individuals as unindicted co-conspirators “stain[] the reputation of the person without providing any means for the person to show his innocence.” The ABA concluded that the damage suffered by the individual was often “incalculable” resulting in public embarrassment, private humiliation and frequently lost employment. Whether named as an unindicted co-conspirator or left in legal limbo by being the ongoing target of government investigation, the consequences reputationally and financially can be severe.

**Government Methods**

There have been a number of reasons identified by commentators and attorneys for the naming of unindicted co-conspirators. Certain justifications are procedurally based: (i) where the unindicted co-conspirator already has been charged in another case with conduct arising from the same conspiracy; (ii) where the individual is deceased (as in the World Trade Center case); (iii) where the government wishes to benefit from the hearsay rule regarding the unindicted co-conspirator already has been charged in another case with conduct arising from the same conspiracy; (iii) where the government wishes to benefit from the hearsay rule regarding the unindicted co-conspirator already has been charged in another case with conduct arising from the same conspiracy; (iii) where the government wishes to benefit from the hearsay rule regarding the unindicted co-conspirator already has been charged in another case with conduct arising from the same conspiracy; (iv) where the statute of limitations has expired. Other reasons for naming individuals as conspirators without indicting them are less innocuous, however. For instance, as discussed in connection with the WorldCom case, the government might name an individual in order to benefit from the hearsay rule regarding statements made to co-conspirators. However, as expressly acknowledged in the United States Attorneys’ Manual, a person’s identity and status as a co-conspirator can be established through evidence at trial to invoke the hearsay exception.

Some have suggested that prosecutors may use the ability to name someone as an unindicted co-conspirator to “hold them hostage” or to “punish” individuals who invoke their Fifth Amendment right not to testify before the grand jury. Finally, as alleged in the Ebbers’ appeal, a person may be named the target of investigation to hamper a defendant from access to the individual’s potentially exculpatory testimony. These non-procedural justifications cause concern in that they lend themselves to abuse by prosecutors.

The potential manipulation of witnesses in this manner is not only contrary to well-recognized case law that a witness belongs neither to the defense nor to the government, but also raises ethical concerns. The Department of Justice’s United States Attorney’s Manual notes that the practice of naming individuals as unindicted co-conspirators has been “severely criticized” in the Briggs decision.

**Conclusion**

Despite this policy, the issues presented in the Enron and WorldCom cases demonstrate that the techniques of publicly identifying unindicted co-conspirators or identifying an individual as the target of an investigation are ever present in modern criminal practice. Counsel should continue to raise flags regarding the use of these tactics and their impact on trial not only those on trial, but the non-defendants as well.

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**Footnotes**


7. Id. at 799-800.

8. Id. at 800-801.

9. Id. at 801-802.

10. Id. at 803-808.


14. Id. at 799-800.


17. U.S. Attorneys' Manual 9-11.130 (Limitation on Naming Persons as Unindicted Co-Conspirators)


20. United States v. Carrigan, 804 F.2d 599 (9th Cir. 1986); ABA Standards for Criminal Justice 83-320(c); Model Rules of Professional Conduct Rule 3.15; 20 U.S. Attys., 9-11.130.

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