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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

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naming as targets of the WorldCom criminal investigation three former executives, thereby preventing these individuals from testifying on behalf of the defense.[1]

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."[2]

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.[3]

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."[4] 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.[5] However, there is no express authority granting a grand jury the power to accuse an individual of criminal behavior without indicting him.[6]

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.[7]

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.[8]

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."[9] The only support offered by the government to sustain its contention that a federal grand jury is empowered to accuse a private person were older cases in which common-law grand juries issued nonindicting "reports" with such accusations. Although the offending document in the *Briggs* case was an indictment, rather than a report, the court examined those cases discussing such grand jury reports finding that they were consistent with its conclusion regarding indictments.

Noting that authorities are divided on the issue of whether a federal grand jury has authority to issue a report of any kind, the court observed that even those jurisdictions that permit grand juries to render reports usually limit them to "public affairs as opposed to public persons, or if permitted to extend to named public officials they usually may comment only upon their conduct of affairs short of crime." In any event, the court found no "substantial authority," permitting a federal grand jury to issue a report accusing named private persons of criminal conduct and, accordingly, did not perceive any persuasive reason why the federal grand jury should be permitted to do so by indictment. "Indeed, if a choice of evils was necessary, accusation by indictment, a legal tool more familiar to the public at large and also more precisely targeted, would seem to be the more objectionable."[10]

Likening public accusation of misconduct through a non-indicting indictment to "subjecting a person to the torture of public condemnation, loss of reputation, and blacklisting in their 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 is not a party to the criminal trial and has no right to intervene. Accordingly, the court found that in this case, the grand jury exceeded its powers and violated due process by naming petitioners as unindicted co-conspirators. The case was reversed and remanded to the district court with instructions to expunge from the indictment all references to petitioners.[11]

Other courts in the U.S. Court of Appeals for the Second, Third and Fourth circuits also have held that a grand jury has no authority to accuse persons of a crime without indicting them regardless of whether such accusations are made in a report or indictment.[12] There are, however, a handful of cases that have allowed a grand jury to accuse individuals of misconduct without indicting them. Such censuring power by a grand jury has been supported by arguments that the grand jury has investigative powers that no other agency has and is best equipped to uncover wrongdoing and focus public attention on such issues, while the court's power of expunction can remedy the few instances of injustice that might occur.[13]

Danger of Being Targeted

Once indicted, the Constitution confers numerous protections on an individual. The Fifth Amendment provides for the privilege against self-incrimination, protects from being placed in double jeopardy, and guarantees due process. The Sixth Amendment guarantees a speedy trial by a public jury. Moreover, a criminal defendant is presumed innocent until proved guilty. Unindicted co-conspirators and individuals identified as subjects or targets of a government investigation have none of these protections. Rather, these individuals either are identified as wrongdoers or as potential wrongdoers 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."[14]

During the 1970s, there was lengthy debate about the purpose of grand juries and the 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.[15] 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.[16] 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 try the individual before a military tribunal; or (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 by 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.[17]

Some have suggested that prosecutors may use the ability to name someone as an unindicted co-conspirator as a tool to gain cooperation from an otherwise reluctant individual or to "punish" individuals who invoke their Fifth Amendment right not to testify before the grand jury.[18] 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 government not to the defense, but also raises ethical concerns.[19]

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. Stating that there usually is no legitimate prosecutorial interest or duty in so naming a person, the manual concludes that "[i]n the absence of some sound reason (e.g., where the fact of the person's conspiratorial involvement is a matter of public record or knowledge), it is not desirable for United States Attorneys to identify unindicted co-conspirators in conspiracy indictments."[20]

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 not only those on trial, but the non-defendants as well.

1. See Mark Hamblett, "Witnesses Discouraged, Ebbers Argues in Appeal," New York Law Journal, Jan. 31, 2006; Brooke A. Masters, "Ebbers's Prosecutors Questioned on Tactics," Washington Post, Jan. 31, 2006. See also Elkan Abramowitz and Barry A. Bohrer, "Defense Witness Immunity—Toward a More-Level Playing Field," New York Law Journal, April 29, 2005 (discussing Ebbers' motion to trial court seeking immunity for these individuals).
2. Mary Flood, "The Enron Trial: Only Two Defendants, but Many Accused," Houston Chronicle, Jan. 27, 2006.
3. See Ira P. Robbins, "Guilty Without Charge: Assessing the Due Process Rights of Unindicted Co-Conspirators," 2004 Fed. Cts. L. Rev. 1 (January 2004).
4. Impeachment or Indictment: Is a Sitting President Subject to the Compulsory Criminal Process?: Hearing Before the Subcomm. on the Constitution, Federalism, and Prop. Rights of the Sen. Comm. on the Judiciary, 105th Cong. 225 (1998) (statement of Peter F. Rient, attorney and partner in Gainer, Rient and Hotis).
5. *United States v. Briggs*, 514 F.2d 794, 800 (5th Cir. 1975).
6. See Phillip E. Hassman, Authority of Federal Grand Jury to Issue Indictment or Report Charging Unindicted Person with Crime or Misconduct, 28 A.L.R.Fed. 851.
7. *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975).
8. Id. at 799-800.
9. Id. at 800-801.
10. Id. at 801-802.
11. Id. at 803-808.
12. See *Application of American Soc. for Testing & Materials*, 231 F. Supp. 686 (DC Pa 1964); *Re Petition for Disclosure of Evidence, etc.*, 184 F. Supp. 38 (DC Va 1960); *Application of United Electrical, etc. Workers*, 111 F. Supp. 858 (DC NY 1953).
13. See *Hassman*, 28 A.L.R.Fed. 851 § 2[a].
14. 514 F.2d at 803.
15. *Robbins*, 2004 Fed. Cts. L. Rev. 1 at III.B.3.
16. See *Robbins*, 2004 Fed. Cts. L. Rev. 1 at III.A.
17. U.S. Attorneys' Manual 9-11.130 (Limitation on Naming Persons as Unindicted Co-Conspirators).
18. See id. at fn. 112 (quoting Marvin E. Frankel & Gary P. Naftalis, The Grand Jury at p. 93 (1977); Naftali Bindavid, "Lindsey's Status: Common Controversial Prosecutor's Tool Takes Political Toll" Legal Times, June 24, 1996).
19. See *United States v. Long*, 449 F.2d 288 (8th Cir. 1971); *United States v. Carrigan*, 804 F.2d 599 (9th Cir. 1986); ABA Standards for Criminal Justice §3-3.01(c); Model Rules of Professional Conduct Rule 3.4(f)
20. U.S. Attys.' Man. 9-11.130.