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Equal Access to Evidence: The Case for the Defense Use of Immunity for Essential Witnesses

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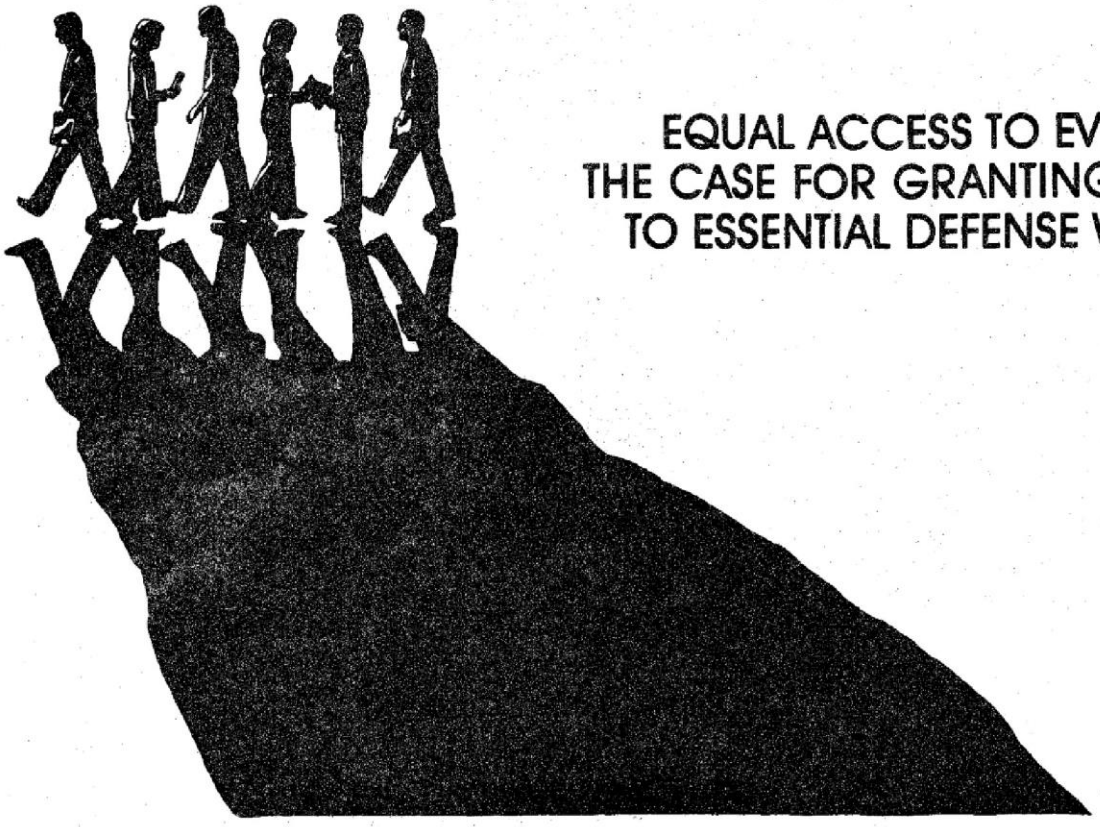

EQUAL ACCESS TO EVIDENCE: THE CASE FOR GRANTING IMMUNITY TO ESSENTIAL DEFENSE WITNESSES

Andrea D. Lyon*

INTRODUCTION

In *Kastigar v. United States,*[1] the United States Supreme Court recognized the need for the prosecutor's use of immunity as a means of enforcement. When the question is whether to "let everyone go" or to let one person go, the court clearly felt that it was better, balancing the interests, to allow the prosecution to apply for and receive immunity for an essential witness. This executive tool has been codified in the United States Code[2] and in most states. Use of immunity by the executive branch, is thus recognized as necessary in most forums.

All evidentiary rulings encompass a balancing of interests; the probative value of the evidence versus its prejudice, or (as in the case of granting a prosecution witness immunity) its cost. Many examples of balancing come to mind, including the many hearsay exceptions and the exclusionary rule.

The federal circuits are divided on whether, under any circumstances, a defense request of immunity should be granted.

The premise of this article, therefore, is that trial judges should grant immunity to essential defense witnesses.

FEDERAL CASE LAW

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may determine where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. *Washington v. Texas.*[3]

This fundamental element of due process is meaningless without access to those witnesses, thus "...the Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided with the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury."[4] It is the combination of this right to compulsory due process and the concept of fundamental fairness that led the United States Supreme Court to rule that the prosecution must disclose exculpatory evidence to the defense. *Brady v. Maryland*[5]

Since the trier of fact must be apprised of all exculpating as well as inculpating evidence in order to

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insure a just result, the defense should be given the tools with which to insure that this is done. This cannot, however, be done where the only means of obtaining the exculpatory evidence is through a witness who invokes his/her right to remain silent under the Fifth Amendent.

Although the United States Supreme Court has thus far denied certiorari, the issue of immunized defense witnesses has been raised and discussed by some United States Circuit Courts and several state courts. The federal circuits are divided on whether, under any circumstances, a defense request of immunity should be granted. The Third Circuit and the D.C. Circuit have ruled against such a grant, and the Ninth has ruled both ways. However, only once has the denial of the immunity grant to the defense witness warranted a reversal, and this was in the context of prosecutorial misconduct.

In *United States v. Morrison* [6] the Third Circuit reversed Nick Boscia's convictions for conspiracy to distribute and distribution of hashish and remanded for a new trial. The trial court was directed to enter a judgment of acquittal if defense witness Bell was called to testify, invoked her Fifth Amendment right not to testify and the Government failed to request use of immunity for her testimony.

Ms. Bell, who at the time of the indictment was under 18, had originally been charged, but the charges were subsequently dropped. Mr. Boscia's defense centered around her proposed testimony that she was involved and he was not. Defense counsel requested the trial judge to either grant her immunity or to appoint her a lawyer. The prosecutor objected and said he did not intend to call her, and should the defense do so, the trial court could apprise her of her rights at that time. Thereafter, the prosecutor sent her three messages to the effect that if she testified she would be prosecuted.

It was the combination of Mr. Boscia's right to present witnesses and compel their attendance and the prosecutor's improper behavior that caused the court to hold that "(t)here are circumstances under which it appears due process may demand that the Government request use immunity for a defense witness."[7]

Two years later, in *U.S. v. Herman,*[8] the Third Circuit again addressed the problem of when to grant immunity to a defense witness. Herman and co-defendant McGann were former state court magistrates convicted for violating the Racketeer Influenced and Corrupt Organizations Act. Levitt, who pled guilty, testified to 50 percent kickbacks to magistrates who referred bonds to his new bail bond agency, was granted immunity and corroborated Hubert. Hubert, formerly Levitt's secretary, did the same also under a grant of immunity. Herman wished to call McHugh and three other constables who would testify that certain payments from Levitt's company went to them and not to Herman. All four invoked the privilege against self-incrimination, Herman asked the trial court to grant them immunity or, in the alternative, to dismiss the indictment.

The Third Circuit affirmed Herman's conviction holding that the federal immunity statute does not allow judicial review of prosecution's decision not to immunize a defense witness, in the absence of misconduct by the prosecution. Also, there was no abuse of prosecutorial discretion despite use of immunized prosecution witnesses.

However, the Court also held that the trial court should consider immunizing defense witnesses. "But while we think that the Court has no power to order a remedial grant of a statutory immunity to a defense witness absent of showing of unconstitutional abuse, a case might be made that the court has inherent authority to effectuate the defendant's compulsory due process right by confirming a judicially fashioned immunity upon a witness whose testimony is essential to an effective defense." The Supreme Court has authorized such grants in suppression hearings where the defendant's testimony is necessary in order to determine whether a violation of his fourth amendment rights has occurred. *Simmons v. U.S.,* 390 U.S. 377, 88 S.Ct. 967. The Court has applied the rationale of *Simmons,* where necessary, to vindicate both a double jeopardy claim, *U.S. v. Linmon,* 568 F.2d 320 (3rd Cir. 1977), and an assertion of privilege under the Speech of Debate Clause, *In Re Grand Jury Investigation,* 587 F.2d 589 (3rd Cir. 1978). "A case in which clearly exculpatory testimony would be excluded because of a witness's assertion of the Fifth Amendment privilege would present an even more compelling justification for such a grant than that accepted in *Simmons* itself."[9]

In *U.S. v. Allessio*[10] the Ninth Circuit considered for the second time the question of granting immunity for defense witnesses. The previous year, in *U.S. v. Bautista,*[11] the Ninth Circuit rejected a defense claim of error for the trial court's failure to compel immunity for the informer. The Court rejected Bautista's argument because, unlike the possible exception for due process reasons noted in *Earl v. U.S.,*[12] no immunity had been granted to any prosecution witness.

However, in *Allesio,* a bribery case, one of the prosecution witnesses had been immunized. Allessio requested that the trial court immunize three potential defense witnesses. In affirming Allessio's conviction, the Court stated that the testimony sought through these potential witnesses was cumulative of evidence actually presented at trial and, therefore, Allessio had not been denied a fair trial. *Allessio* also held, however, that "whatever power the government possesses may not be exercised in a manner which denies the defendant the due process guaranteed under the Fifth Amendment."[13]

The Seventh Circuit rejected the argument in *U.S. v. Ramsey*[14] in which no grant of immunity was made

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to a prosecution witness.

> The only support for appellant's argument is found in a footnote to an opinion holding that Congress has not delegated unlimited power to the judiciary to grant immunity. *Earl v. U.S.*, 124 U.S. App. D.C. 77, 361 F.2d 531, 534 (1966). The footnote which suggests that a serious problem might exist if, in the same case, the government obtained critically favorable testimony by granting immunity but refused the same assistance to a defendant, is inapplicable here because in the case before us, the prosecution did not secure any of its evidence by means of an immunity grant.[15]

Similarly, *U.S. v. Lenz*[16] rejected the claim that immunity should have been granted a defense witness where there was no showing of active interference by the Government to prevent an otherwise willing witness from testifying. The Court here ruled that there is no compulsory due process requirement of conferring immunity on a defense witness. (See also *U.S. v. Wright*[17] and *U.S. v. Standeter*[18]).

Morrison is the only federal case to date which has actually reversed a conviction and required that immunity be given a defense witness, although both *Herman* and *Allessio* indicate approval of the practice. It should be noted, therefore, that in *Morrison,* not only was the witness essential to the defense, there was also the element of prosecutoral interference with subpoena power. Thus, *Morrison* does not indicate a reversal is mandated simply by a trial judge's refusal to grant immunity.

STATE CASE LAW

In *Commonwealth v. Lowry,*[19] Lowry's convictions for possession of a controlled substance and possession of a firearm were affirmed. He claimed that the police action in warning a potential defense witness that he would be prosecuted constituted prosecutoral abuse and should have been objected to by his trial counsel (whose alleged ineffectiveness was the major appellate issue). The court rejected this argument. Another Pennsylvania case, however, was reversed for this kind of interference.

But is it any less logical to assume that prosecutorial witnesses also perjure themselves to gain favor?

In *Commonwealth v. Jennings,*[20] the appellant called Vecchione as a defense witness at his trial on assault charges. The district attorney, however, informed the court that there was an unexecuted complaint against Vecchione and that the complaint would probably be served if he testified. Vecchione subsequently refused to testify because he was "intimidated" and "scared of" the prosecutor. The court reversed the conviction and granted a new trial, finding that prosecutor's conduct amounted to coercion and duress against the witness and constituted an abuse of the prosecutor's discretion. See *Brady v. Maryland,*[21]and *Pyle v. Kansas.*[22]

In *People v. Pantoja*[23], the Illinois Appellate Court rejected a claim that defense witness Diaz should have been granted immunity. When Diaz indicated that he sold heroin to the complainant the day of the armed robbery, the trial judge interrupted the proceedings and informed Diaz of his Fifth Amendment privilege and appointed a Public Defender to represent him. Diaz refused to testify further, forcing Pantoja's lawyer to withdraw him as a witness. The prosecutor never interviewed Diaz. The court rejected Pantoja's argument for immunity saying there was neither interference by the State nor any constitutional right to compel defense testimony through a grant of immuity relying on *Ramsey, supra.*[24]

Although these three cases are from different jurisdictions, the key in both the federal and state cases seems to be whether there is some kind of police or prosecutor interference with the defense witness.

CONCLUSION

Although at least one legal scholar has advocated the need for use of immunity grants to defense witnesses as a right consistent with the Sixth Amendment right of compulsory due process[25], it should be noted that access to the immunity tool can also be viewed as an equal protection right. Some suggest that by granting a defense witness immunity, a court may be encouraging perjurious testimony. But is it any less logical to assume that prosecutorial witnesses also perjure themselves to gain favor?

A simple set of rules may be employed to decide when a defense witness should be granted immunity. First, defense counsel should request immunity for the particular witness and demonstrate to the trial judge that the witness's evidence is essential to the defense. Second, an affidavit or offer of proof should be tendered to the trial court so that it can decide if the proffered evidence is in fact essential to the defense. The prosecution should then be allowed to present its argument. This process will give the trial court adequate information in order to make a just ruling.

In this manner, reasonable access to immunized testimony is available to the defense as well as the prosecution without having to wait until a prosecutor interferes directly with a defense witness (as in *Morrison* and *Jennings, supra*). Since a trial is a truth-seeking process and immunity is conceived of as a reasonable tool thereof for the prosecution, then surely it has the same qualities for the defense.

FOOTNOTES

1 406 U.S. 441 (1972).
2 18 U.S.C. 6002.
3 388 U.S. 14 (1967) at p. 19.
4 *Id.*
5 373 U.S. 83 (1963).
6 535 F.2d 223 (1976).
7 *Id.* at p. 229.
8 589 F.2d 1191 (1978).
9 Id. at p. 1204.
10 528 F.2d 1079 (1976).
11 509 F.2d 675 (1975).
12 361 F.2d 531 (1966).
13 528 F.2d at p. 1082.
14 503 F.2d 524 (1974).
15 *Id.* at p. 53.
16 Sixth Circuit Slip Op. 79-5076, March 10, 1979.
17 588 F.2d 31 (1978).
18 452 F. Supp. 1178 (1978).
19 394 A.2d 1015 (1978).
20 311 A.2d 720 (1973).
21 317 U.S. 213 (1948).
22 373 U.S. 478 (1964).
23 342 N.E.2d 110 (1976).
24 The issue will be reviewed again by the Illinois Appellate Court in *People v. Slaughter*, No. 79-2234, which appeal is pending.
25 "The Sixth Amendment Right to have Use Immunity Granted to Defense Witnesses" 91 Harv. L. Rev., 1266.