

## Is The DOJ Violating Cooperators' Rights?

Law360, New York (April 7, 2011) -- Elementary school children frequently make promises on the playground, but their peers know that all bets are off if the promisor had his fingers crossed behind his back. The criminal defendant understandably expects more transparency from a prosecutor, but his expectations will be severely dashed when a prosecutor's promise of immunity suddenly disappears at the sentencing stage — arguably the stage that matters most to the guilty defendant.

Often, after promising immunity to the criminal defendant, a prosecutor interviews the defendant, learns previously unknown facts about the extent of the defendant's criminal behavior, freely discusses that information internally with others in the U.S. attorneys' office, and then uses, either consciously or unconsciously, that same information when determining the sentence the prosecutor will recommend to the judge, even though the prosecutor has not legitimately derived that information from an independent source.

Consider the perhaps not-so-hypothetical situation where a defendant agrees to plead guilty to a tax offense, receives use and derivative use immunity as part of a cooperation agreement, and then confesses to a public corruption offense that previously was wholly unknown to the government.

If the government considers that corruption offense when deciding what sentence to recommend as part of a substantial assistance motion, then the government has "used" the defendant's immunized statements against him.

Certainly, a prosecutor will tend to recommend different sentences for the defendant who commits five counts of mail fraud versus the defendant who commits five counts of mail fraud and admits to bribery of a public official. This disparity in sentencing recommendations — resulting entirely from the immunized statements — is unconstitutional.

Under the Federal Immunity Statute,[1] any witness who refuses to testify or provide other information, on the basis of the Fifth Amendment privilege against self-incrimination, may be compelled to do so provided that the compelled testimony or other information "(or any information directly or indirectly derived from such testimony or other information)" is not used against the witness in any criminal case, other than a prosecution for perjury or contempt of an order to testify.[2]

The government nevertheless may still prosecute the witness for crimes revealed in his immunized testimony if the government can prove that the evidence against him was "derived from a legitimate source wholly independent of the compelled testimony." [3]

The Supreme Court in *Kastigar v. United States*,<sup>[4]</sup> held that the scope of the use and derivative use immunity afforded by this statute is “coextensive” with the scope of the Fifth Amendment privilege against self-incrimination. That privilege is “as broad as the mischief against which it seeks to guard.”<sup>[5]</sup>

Thus, immunity under the statute is intended to “leave the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege.”<sup>[6]</sup>

If a prosecutor uses a defendant’s immunized admissions of wrongdoing for sentencing purposes, however, that defendant is not in substantially the same position as the defendant who remains silent. The *Kastigar* court prohibited such prosecutorial mischief when it emphasized that the immunity statute “provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom.”<sup>[7]</sup>

Undoubtedly, the Supreme Court intended this sweeping proscription to apply to sentencing because it is well-settled that the Fifth Amendment privilege — with which the granted immunity is coextensive — applies equally during both the liability and penalty phases of a criminal case.<sup>[8]</sup>

But federal prosecutors arguably violate cooperating defendants’ Fifth Amendment rights with regularity. Some offices take from the line assistant U.S. attorney the power to decide what sentence to recommend for a cooperating defendant. This would seem a good first step toward protecting the immunized information that line assistant U.S. attorneys may have heard.

Moreover, committees of assistant U.S. attorneys designed to decide what sentence will be recommended for cooperating defendants arguably promote consistency. But they operate unconstitutionally when they consider immunized information as part of the package of information they receive from the line prosecutor.

U.S. attorneys’ offices follow this unconstitutional practice even in the face of court opinions explicitly forbidding both the government and the courts from using immunized statements at the sentencing stage<sup>[9]</sup> as well as opinions recognizing the difficulties jurors, prosecutors and judges would have in ignoring the immunized statements when returning indictments, investigating a case, prosecuting a case, accepting a plea bargain or imposing sentences.<sup>[10]</sup>

Also, surprisingly, the practice continues despite the fact that it is proscribed by the procedures supposedly followed by the U.S. Department of Justice, as outlined in the *United States Attorneys’ Manual*.<sup>[11]</sup>

After inducing a defendant to divulge information in exchange for a promise that the information will not be used against him, the prosecutor undeniably commits a very serious breach of that immunity agreement by using the very same information to influence the sentence ultimately recommended to the judge.

As a result, the prosecutor violates a defendant’s due process rights. This is true because, by entering into a plea agreement containing immunity provisions, the defendant forgoes his constitutional right to a jury trial; similarly, by testifying under a grant of immunity, he forgoes his Fifth Amendment privilege.<sup>[12]</sup>

When a promise of immunity induces a defendant to waive his constitutional rights, “due process requires that the prosecutor’s promise be fulfilled.”<sup>[13]</sup> The due process violation is complete regardless of whether the judge even considers the prosecutor’s recommendation or otherwise factors it into the ultimate sentencing decision.<sup>[14]</sup>

Aside from these constitutional implications, the mischief practiced by U.S. attorneys' offices must be stopped, as it has the effect of undermining the plea bargaining process, which is widely recognized as an "essential component of the administration of justice."<sup>[15]</sup> When a prosecutor's promise carries no more weight than the promise of a child with his fingers crossed, the public loses confidence in the fair administration of justice.

U.S. attorneys' offices should erect internal barriers preventing a defendant's immunized admissions of wrongdoing from being communicated to the prosecutor or prosecutors ultimately responsible for deciding the sentencing recommendation for that defendant. Such simple barriers would guard against the ongoing utilization of this unconstitutional practice.

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[1] 18 U.S.C. § 6001 et seq.

[2] 18 U.S.C. § 6002.

[3] *Kastigar v. United States*, 406 U.S. 441, 460 (1972).

[4] *Id.* at 453.

[5] *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892).

[6] *Kastigar*, 406 U.S. at 462.

[7] *Id.* at 460. The court added that the protection afforded by the statute assures that the immunized information "can in no way lead to the infliction of criminal penalties." *Id.* at 461.

[8] *Estelle v. Smith*, 451 U.S. 454, 462-463 (1981) ("We can discern no basis to distinguish between the guilt and penalty phases ... so far as the protection of the Fifth Amendment privilege is concerned. Given the gravity of the decision to be made at the penalty phase, the state is not relieved of the obligation to observe fundamental constitutional guarantees."); *Mitchell v. United States*, 526 U.S. 314, 328 (1999) ("A sentencing hearing is part of the criminal case — the explicit concern of the self-incrimination privilege"); see also *United States v. Lee*, 867 F.2d 206, 208 (4th Cir. 1989) ("The words 'criminal case' in the immunity statute clearly contemplate the process of sentencing. If they did not, the grant of immunity would be of dubious benefit to a prospective government witness.").

[9] *United States v. Underwood*, 880 F.2d 612, 616 (1st Cir. 1989) (“Thus, insofar as the Fifth Amendment bars the prosecutor from using [defendant’s] testimony against him, and ... bars judge from basing plea-acceptance and sentencing decisions on [defendant’s] compelled testimony, the immunity statute likewise protects [defendant] from any such use.”); *United States v. Abanatha*, 999 F.2d 1246, 1249 (8th Cir. 1993) (immunized testimony “may not be used to affect a subsequent sentence of the testifier (or allowed to affect conditions and terms of confinement)”); see also *Lee*, 867 F.2d at 207 (noting that trial judge vacated sentence of criminal defendant in *United States v. Corvette*, No. 3:85-CV-00010-CES (D.S.C. 1985) where the sentencing judge took into account statements made under a promise of immunity).

[10] *Goldberg v. United States*, 472 F.2d 513, 516 (2d Cir. 1973) (casting doubt on ability of same grand jury that heard compelled testimony to return indictment because “it would be well nigh impossible for the grand jurors to put [the immunized witness’] answers out of their minds”); *United States v. North*, 910 F.2d 843, 861 (D.C.Cir. 1990) (prohibiting use of immunized testimony to refresh recollection of a grand jury witness); *Kastigar*, 406 U.S. at 460 (barring use of compelled testimony as an “investigatory lead” or to focus an investigation on a particular witness); *United States v. McDaniel*, 482 F.2d 305, 311-12 (8th Cir. 1973) (holding it impossible for the government to prove that prosecution did not improperly use immunized testimony to focus the investigation, decide to initiate prosecution, refuse to plea bargain, interpret evidence, and plan cross-examination and other trial strategy); *United States v. Semkiw*, 712 F.2d 891, 893 (3rd Cir. 1983) (suggesting that government should have assigned an attorney to try the case who had not studied the immunized testimony); *United States v. Wilson*, 488 F.2d 1231, 1233 (2d Cir. 1973) (noting that witness who had pled guilty and was awaiting sentencing could have testified under immunity at intervening trial of codefendant and then requested a different judge for sentencing or moved to seal the record), reversed on other grounds, 421 U.S. 309 (1975).

[11] Criminal Resources Manual 725, *United States Attorneys’ Manual*, 9-23.130.

[12] *United States v. Harvey*, 869 F.2d 1439, 1443-1444 (11th Cir. 1989).

[13] *Rowe v. Griffin*, 676 F.2d 524, 528 (11th Cir. 1982); *United States v. Santobello*, 404 U.S. 257, 262 (1971) (“[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.”); *United States v. Pelletier*, 898 F.2d 297, 302 (2d Cir. 1990) (“Unlike the normal commercial contract, however, due process requires that the government adhere to the terms of any ... immunity agreement it makes.”); *United States v. Macchia*, 861 F. Supp. 182, 190 (E.D.N.Y. 1994) (quoting the same); *United States v. Weiss*, 599 F.2d 730, 737 (5th Cir. 1979) (“To protect the voluntariness of a waiver of Fifth Amendment rights, where a plea, confession or admission is based on a promise of a plea bargain or immunity, the government must keep its promise.”).

[14] *Santobello*, 404 U.S. at 262-63.

[15] *Id.* at 260; *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972).