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Advising a Witness To Exercise His Privilege Against Self-Incrimination When the Adviser's Motive Is To Protect Himself Is an Obstruction of Justice—*Cole v. United States**

Defendant, who had perjured himself before a federal grand jury, feared that the testimony of his former employee before the same body would reveal the perjury. Knowing that the employee had previously filed a false affidavit with the McClellan Committee,[1] defendant was able to persuade[2] him to invoke his constitutional privilege against self-incrimination. When the former employee later voluntarily made a full disclosure to government agents, defendant was indicted by a second grand jury and convicted of corruptly endeavoring to obstruct the administration of justice in violation of section 1503 of the Federal Criminal Code.[3] On appeal to the Court of Appeals for the Ninth Circuit, *held*, affirmed. One who, with a corrupt motive, advises a witness to exercise his constitutional privilege against self-incrimination obstructs the administration of justice.

In defining the defendant's conduct as criminal, the court of appeals refused to follow the somewhat similar federal district court case of *United States v. Herron*.[4] In *Herron*, defendant attorney had

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* 329 F.2d 437 (9th Cir.), *cert. denied*, 377 U.S. 954 (1964).

1. United States Senate Select Committee on Improper Activities in the Labor Management Field.

2. Although it might appear that defendant could have used this information to pressure the former employee into complying with his demands, defendant argued that he had merely advised the former employee to exercise his privilege against self-incrimination so that he would not be forced to disclose his previous filing of a false affidavit. Brief for Appellant, pp. 9-13.

3. 18 U.S.C. § 1503 (1958). The relevant portions of this section read as follows:

> "Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States . . . or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

A witness before a grand jury is a witness in a court of the United States within the meaning of this section. Wilson v. United States, 77 F.2d 236, 240 (8th Cir. 1935); Davey v. United States, 208 Fed. 237 (7th Cir.), *cert. denied*, 231 U.S. 747 (1913).

4. 28 F.2d 122 (N.D. Cal. 1928).

advised a witness to exercise his privilege against self-incrimination in order to shield others. The district court sustained the defendant's demurrer, holding that advising a witness to do that which was his legal right did not constitute a crime.[5] *Cole*, however, differs from *Herron* in three major aspects: the degree of persuasive influence brought to bear against the witness, the relationship of the parties, and the historical context in which the cases were decided.

In *Herron* the defendant's conduct was completely devoid of coercive overtones, while in *Cole* there was some evidence that the defendant may have coerced, forced, and threatened the witness in order to persuade him to invoke his fifth amendment privilege. If defendant's conviction in *Cole* had been based upon this evidence, the decision would clearly have been in accordance with well-established principles of law. In England, even the earliest legal writers considered coercion, force, and threats as grounds for a charge of interfering with witnesses.[6] In the United States, when there were overtones of duress, both the common-law cases[7] and those decided under state statutes[8] found an unlawful obstruction of justice. Moreover, section 1503 of the Federal Criminal Code specifically condemns influencing a witness by threats or force.[9] In *Cole*, however, the Court concluded that the defendant was guilty of obstructing justice even if the evidence was sufficient only for a finding that he had simply *advised* with a corrupt motive that the witness claim the privilege against self-incrimination. This conclusion would appear to be in accordance with legislative intent. Section 1503 is an outgrowth of popular recognition of the numerous methods by which the proper administration of justice may be thwarted.[10] Of primary concern is the problem of protecting the safety of witnesses, not only for humanitarian reasons, but also because their cooperation is essential to ensure the efficiency of the judicial process.[11] Recognizing these policy considerations, courts interpreting section 1503 have

5. The *Herron* court has been criticized for focusing upon the witness's reason for claiming his fifth amendment privilege rather than the defendant's motive in influencing the witness. 2 So. CAL. L. REV. 394 (1929).

6. See, *e.g.*, 2 ARCHBOLD, CRIMINAL PROCEDURE 907 (7th ed. 1860); 2 J. CHITTY, CRIMINAL LAW §§ 235-36 (1819); 1 HAWKINS, PLEAS OF THE CROWN 59 (1716).

7. See, *e.g.*, Commonwealth v. Berry, 141 Ky. 477, 133 S.W. 212 (1911); Commonwealth v. Reynolds, 80 Mass. (14 Gray) 87 (1859); State v. Carpenter, 20 Vt. 9, 12 (1847); State v. Keyes, 8 Vt. 57 (1836).

8. See, *e.g.*, Kilpatrick v. State, 72 Ga. App. 669, 34 S.E.2d 719 (1945); State v. Bringgold, 40 Wash. 12, 22, 82 Pac. 132, 136 (1905); State v. Lynch, 84 W. Va. 437, 100 S.E. 284 (1919).

9. See note 3 *supra*.

10. See Catrino v. United States, 176 F.2d 884, 887 (9th Cir. 1949).

11. See Catrino v. United States, *supra* note 10; Samples v. United States, 121 F.2d 263 (5th Cir.), *cert. denied*, 314 U.S. 662 (1941); Odom v United States, 116 F.2d 996 (5th Cir.), *rev'd on other grounds*, 313 U.S. 544 (1941); Kloss v. United States, 77 F.2d 462, 465 (8th Cir. 1935); Smith v. United States, 274 Fed. 351 (8th Cir. 1921).

generally been reluctant to limit its scope,[12] and it would seem clear that no meaningful distinction can be drawn between various methods of intentional interference with the cooperation of witnesses.

Second, the defendant in *Herron* was an attorney. However, although the court in *Cole* did not state whether the policy of the statute would support the conviction of an attorney, it appears likely from the emphasis placed upon the defendant's corrupt motive[13] that the court would not have allowed an attorney with the same motive to escape the provisions of section 1503. Certainly, the privilege for confidential attorney-client communications would be immaterial since the privilege is for the protection of the client and not the advising attorney.[14] Moreover, although a part of an attorney's professional responsibility is to advise clients of their constitutional rights,[15] an attorney motivated by a desire to protect himself as well as his client[16] loses his status as a detached legal adviser and is under a professional duty to withdraw from the case.[17]

Third, at the time of the *Herron* decision trial judges exercised a broader discretionary power to compel witnesses to answer questions which the judge considered not incriminatory.[18] Consequently, the *Herron* court was able to assume that the witness could not have

12. See, *e.g.*, United States v. Russell, 255 U.S. 138 (1921); United States v. Polakoff, 121 F.2d 333 (2d Cir.), *cert. denied*, 314 U.S. 626 (1941); Samples v. United States, *supra* note 11; Thomas v. United States, 15 F.2d 958 (8th Cir. 1926); Wilder v. United States, 143 Fed. 433 (4th Cir. 1906), *cert. denied*, 204 U.S. 674 (1907). *But see* Berra v. United States, 221 F.2d 590 (8th Cir. 1955); Rosner v. United States, 10 F.2d 675 (2d Cir. 1926); Harrington v. United States, 267 Fed. 97 (8th Cir. 1920).

13. Principal case at 440.

14. See generally 8 WIGMORE, EVIDENCE § 2291 (McNaughton rev. 1961); MCCORMICK, EVIDENCE 181 (1954); Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487 (1928). *Compare* Wade v. Ridley, 87 Me. 368, 373, 32 Atl. 975, 976 (1895) *and* Hatton v. Robinson, 31 Mass. (14 Pick.) 416, 422 (1833), *with* Bentham, *Rationale of Judicial Evidence*, in 7 THE WORKS OF JEREMY BENTHAM 473 (Bowring ed. 1842).

15. CANONS OF PROFESSIONAL ETHICS 15, 32.

16. *Cf.* Grunewald v. United States, 233 F.2d 556, 569 (2d Cir. 1956), *rev'd on other grounds*, 353 U.S. 391, 424 (1957). In *Grunewald* the defendant, an attorney, argued that he had been convicted, in effect, for advising witnesses that they had a right to plead the fifth amendment.

17. CANONS OF PROFESSIONAL ETHICS 6. See also ABA CANONS OF PROFESSIONAL AND JUDICIAL ETHICS ANN. Opinion 50 (1957).

18. See generally Falknor, *Self-Crimination Privilege—Links in the Chain*, 5 VAND. L. REV. 479 (1952); McNaughten, *The Privilege Against Self-Incrimination*, 51 J. CRIM. L., C. & P.S. 138 (1960); Wolfram, *Peril, Pursuit, and the Privilege Against Self-Incrimination—The Problem of the Apparently Innocuous Question*, 5 SYRACUSE L. REV. 127 (1954); Note, *The Privilege Against Self-Incrimination in the Federal Courts*, 70 HARV. L. REV. 1455 (1957). *Compare* Mason v. United States, 244 U.S. 362 (1917) *and* United States v. Cusson, 132 F.2d 413 (2d Cir. 1942) *and* United States v. Weisman, 111 F.2d 260 (2d Cir. 1940), *with* Singleton v. United States, 343 U.S. 944 (1952), *reversing per curiam* 193 F.2d 464 (3d Cir. 1952) *and* Hoffman v. United States, 341 U.S. 479 (1951) *and* Kiewel v. United States, 204 F.2d 1 (8th Cir. 1953) *and* United States v. Coffey, 198 F.2d 438 (3d Cir. 1952).

avoided answering a question merely by stating, without further showing, that his answer would tend to incriminate him. Recent federal cases, however, have been more reluctant to inquire into the actual incriminatory potential of the questions, and they have frequently allowed a claim of privilege even when the witness was not fearful that the question was incriminatory.[19] Hence, it has become common for witnesses to exercise their fifth amendment privilege in bad faith.[20] Although recognizing that these witnesses cannot be held criminally liable,[21] the *Cole* court reacted to continuing abuses of the fifth amendment by rejecting *Herron* and extending the definition of obstruction of justice to include those acting in an advisory capacity. Of course, the government must carry a heavy burden in proving the requisite corrupt motive. Nevertheless, it is possible that section 1503, as now interpreted by *Cole*, will provide law enforcement agencies with sufficient impetus to proceed against those who for years have been advising others to plead their fifth amendment privilege in bad faith.

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19. See, *e.g.*, United States v. Greenberg, 341 U.S. 944 (1951), *reversing per curiam* 187 F.2d 35 (3d Cir. 1951); United States v. Chase, 281 F.2d 225 (7th Cir. 1960); United States v. Courtney, 236 F.2d 921 (2d Cir. 1956); United States v. Gordon, 236 F.2d 916 (2d Cir. 1956).

20. For example, after giving his name and business address, the witness in the principal case declined to answer the following questions: "Were you ever an employee of a firm known as Cole, Fischer & Rogow? Have you ever seen an individual named Joseph Stacher? Is it your feeling that any question this grand jury might ask might have the tendency to incriminate you so that you will resort to the privilege?" Record, pp. 136-37. Of the 1,525 witnesses who appeared before the United States Senate Select Committee on Improper Activities in the Labor Management Field, 343 invoked their constitutional privilege against self-incrimination. See generally KENNEDY, THE ENEMY WITHIN (1960); MCCLELLAN, CRIME WITHOUT PUNISHMENT (1962).

21. Principal case at 439.