WALK THE LINE: CHILLING WITNESSES, THE FIFTH AMENDMENT AND DEFENDANT'S DUE PROCESS RIGHTS

The court and prosecutors must tread carefully when apprising witnesses of their Fifth Amendment rights to avoid violating a defendant's due process rights. "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, 388 U.S. 14, 19 (1967). Courts and prosecutors may violate a defendant's due process rights if they engage in conduct which improperly chills witnesses from testifying.

I. A court violates a defendant's due process rights when it admonishes a witness in a way that prevents the witness from voluntarily exercising her Fifth Amendment rights.

In Webb v. Texas, a trial judge admonished the defendant's only witness by stating:

> "Now you have been called down as a witness in this case by the Defendant. It is the Court's duty to admonish you that you don't have to testify, that anything you say can and will be used against you. If you take the witness stand and lie under oath, the Court will personally see that your case goes to the grand jury and you will be indicted for perjury and the liklihood [sic] is that you would get convicted of perjury and that it would be stacked onto what you have already got, so that is the matter you have got to make up your mind on. If you get on the witness stand and lie, it is probably going to mean several years and at least more time that you are going to have to serve. It will also be held against you in the penitentiary when you're up for parole and the Court wants you to thoroughly understand the chances you're taking by getting on that witness stand under oath. You may tell the truth and if you do, that is all right, but if you lie you can get into real trouble. The court wants you to know that. You don't owe anybody anything

> to testify and it must be done freely and voluntarily and with the thorough understanding that you know the hazard you are taking." 409 U.S. 95-95 (1972).

The trial court did not admonish any of the State's witnesses. The U.S. Supreme Court observed that the trial court's admonition did not merely stop at warning the witness of his right to refuse to testify, but implied that the court expected the witness "to lie, and went on to assure him that if he lied, he would be prosecuted and probably convicted for perjury, that the sentence for that conviction would be added on to his present sentence, and that the result would be to impair his chances for parole." Id. at 97.

The U.S. Supreme Court found that this admonition violated the defendant's due process rights under the Fourteenth Amendment. The Court reasoned that that "the judge's threatening remarks, directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment." Webb, 409 U.S. at 98.

A similar violation was found in People v. King, in which defendant Arthur King was being tried for armed robbery. 154 Ill. 2d 217 (1993). The defendant intended to call a witness, Mr. Cheers, who had pleaded guilty to charges arising from his role in the armed robbery but had not yet been sentenced. At the witness's plea, he stated "[y]es sir, but that would make me, me and Arthur King, we ain't connected with nothing." Id.

During the King trial, but before the witness testified, the judge engaged in the following colloquy:

THE COURT: Let me just advise you of this, Mr. Cheers. When you entered a plea of guilty, the state read certain facts into the record. And your attorney agreed, at that time, that those facts would be the facts that would take place at any trial. And among those facts, as I remember and my notes indicate, is that when you committed this offense for which you entered a plea of guilty, you committed it with -- Mr. King.

MR. CHEERS: No.

THE COURT: Okay. Wait a second, I'm just telling you what my memory of the plea was. Under those circumstances, that was the understanding that I had at the time that the pleas was given. And at the time that I offered you 8 years.

Now, I'm not telling you what to do and I'm not advising you what to do. I just wanted you to know that if you do testify and you testify in a manner that I believe is perjurious, which would be not the truth, I would, on my own motion, vacate the plea of guilty. You'd then be as if the plea had never taken place. And we'd probably have to have a trial in connection with that matter.

However, if you testified in this matter and testify in what I believe is a truthful manner, I would not vacate that plea and I would allow you then to be sentenced to the 8 years that we previously agreed upon.

Now, I'm just -- I want to know that when you pled guilty, the facts that were referred to in front of me, and which you listened to after which you heard those facts, you agreed to pled [sic] guilty, those facts included the fact that you committed the crime with Mr. King.

* * *

MR. CHEERS: To my knowledge, that I was pleading guilty to the crime, true enough. I understand that. But I had stipulated that it was -- King have nothing to do with me.

THE COURT: I didn't hear any such stipulation. If there was such a stipulation, I didn't hear it. But I just wanted to let you know just what the facts are as far as I can see it. Whether or not in your mind you had a different thought, I don't know, because I can't read your mind. I'm

> just telling you what I know and what the facts are as far as I can remember.
>
> Now, we can always verify that because I'm going to order a transcript of the plea that you entered and the facts that where recited into the record at the time of the plea on the 15 of September.
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> Mr. Kload is going to call you as a witness on behalf of the -- of the defendant. You have a right to testify if you wish to. You also have a right, because you still are in jeopardy, so to speak, some things can happen to you which could effect [sic] your freedom, et.cetera [sic], because you have not been convicted. You have a right to exercise your Fifty [sic] Amendment right and not testify for fear that what ever you might testify to could be used against you. I have to tell you that.
>
> And I also would like to know if you're going to testify on behalf of Mr. King or are you going to assert your right as your counsel has advised you to?
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> MR. HELIS: Judge, before he answers that question may I consult with Mr. Cheers?
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> THE COURT: Sure. Absolutely.
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> * * *
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> THE COURT: I'm going to ask you now, Mr. Cheers, are you going to testify in this matter?
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> MR. CHEERS: No. I plead the Fifth. Id. at 220-222.

The Illinois Supreme Court found that the judge's misstatements about the witness's plea stipulations and threat to revoke his plea made the admonition improper and could have caused the witness to invoke his Fifth Amendment rights. Relying upon Webb v. Texas, the Illinois Supreme Court found that the trial court's improper admonition, combined with the prejudice it had upon the defendant's case,

violated the defendant's due process rights under the fourteenth amendment. Id. at 225-226.[1]

An admonition is also improper if the trial court "actively encourages a witness not to testify or badgers a witness into remaining silent." United State v. Arthur, 949 F.2d 211, 216 (6th Circuit 1991). In Arthur, a defendant was on trial for robbing a bank and had called a witness to testify. After the witness had testified about casing the bank with the defendant but before he had begun testifying about robbing the bank, the prosecution asked the court to inform the witness of his rights. Id. at 215. At this point the trial court engaged in the following colloquy:

> [The Court] Q. Mr. Fields, do you have a lawyer?
>
> A. Yes, your Honor, but I'm not going to confess to actually robbing any, anything.
>
> . . . .
>
> Q. Well, here's the thing about it. You, You've got a right to remain silent here, and anything you say here would be, could be used against you, whether you say you confess or not.
>
> . . . .
>
> A. But I - I understand what's going on, it's - I'm being put in a position I don't like. I mean, I know there's an innocent person trying to get convicted of a bank robbery he didn't do.

The colloquy continued with the witness stating that he wanted to testify. The trial court repeatedly warned the defendant about the consequences of testifying. The colloquy concluded when the trial court stated:

[1] The State did not argue that the defendant had not been prejudiced by the invocation.

> "I think it's not in your best interest to testify because anything you say may be held against you in another prosecution against you for bank robbery, could and would be used against you. Knowing that, do you still want to testify or do you want not to testify?" Id.

The witness then refused to testify further.

The Sixth Circuit held that the trial court's admonitions improperly induced the witness to exercise his Fifth Amendment right. The witness "was represented by counsel and stated to the district court that he wanted to testify after he had been informed by the court of his right to remain silent. The district court repeatedly informed the [witness] of his right to remain silent and stated to the [witness] that to testify was against his interest." Id. at 216. Relying upon Webb, the court of appeals found that the trial court had violated the defendant's due process rights. Arthur, 949 F.2d at 216.

Not all admonishments will violate the defendant's due process rights. The admonishment must be somehow improper. Thus, a trial court does not violate a defendant's due process rights by merely informing a witness of the risk of incrimination and appointing counsel to advise the witness. U.S. v. Santiago-Becerril, 130 F.3d 11, 23-24 (1st Circuit 1997).

In Santiago-Becerril, a defendant was on trial for taking a motor vehicle by force and violence with death resulting, and for the knowing use of a firearm in relation to a crime of violence. Id. at 14. During the trial, the defendant called his stepmother, Wanda Caceres, to the witness stand. Before she could testify, the trial court stated:

-- Caceres, I want to advise you -- and listen to me carefully because this may have serious -- I would say severe consequences for you. Listen to this, what I'm going to tell you.

If you're going to testify what Mr. Arroyo said you would, then I have to warn you that you will be incriminating yourself and you will be violating two statutes: One will be accessory after the fact, and I'm going to read to you. It says: Whoever, knowing that an offense against the U.S. has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment is an accessory after the fact.

And listen to this carefully, listen to the penalty. I'm going to read to you the pertinent provision. In this case the maximum possible penalty is life for the defendant, life imprisonment, and the . . . statute says that whoever is an accessory after the fact exposes himself or herself as follows: If the principal is punishable by life imprisonment or death, the accessory -- that means you -- shall be imprisoned not more than 15 years.

. . .

So that's one of the offenses that you will be committing if you testify -if -- I mean that can be charged against you by incriminating yourself.

Second, there's another offense. A mis -- there's -- there's a misprision of a felony, and I'm going to read it to you. Whoever, having knowledge of the actual commission of a felony, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fine [sic] under this title or imprisoned not more than three years or both. It seems to me that it is my duty as a judicial officer to advise you, to warn you, that if you testify pursuant to what Mr. Arroyo said -- and that's your decision -- you will be incriminating yourself under oath in a record, and you may be exposed to 15 years in prison up to the maximum and also three years but [sic] misprision of a felony which might be served concurrently. But with your testimony on the record, that will be enough to take it to a grand jury to obtain an indictment against you, and you will be a defendant in this court. And under the

> sentencing guidelines you will most probably have to do time, serve time in jail. And there is no parole, no probation.
> . . . .
>
> So I want to warn you again for the last time so that if you do this you will do this knowingly and willfully and after having been advised about your -- your right not to be incriminated [sic] against yourself, but of course that is your decision. My duty is to advise you, to forewarn you about it. If you want to talk to your lawyer, I will give you an opportunity to talk to him."
> . . . .
>
> But -- let me put on the record again it is your own decision. I'm not coercing you into not testifying. I'm telling you may [sic] testify if you wish. If you wish to testify that's fine. You just go ahead and testify. I'm simply telling you the consequences that might ensue, and I underline the word "might," not that they "shall." Id. at 23-24.

The trial court then appointed counsel to advise the witness regarding her rights. The witness consulted with the witness and then decided not to testify for the defendant. The 1st Circuit observed that while the "court's admonition to the witness... was relatively detailed and strongly stated..." it did not come "even close to exerting 'such duress on the witness's mind as to preclude [her] from making a free and voluntary choice whether or not to testify." Id. at 25 (quoting Webb 409 U.S. at 98). The court of appeals further observed that the trial court was careful in its language, and that there was no repetition of warnings nor a recommendation not to testify. Id. at 26. The court therefore concluded that the witness's decision not to testify was voluntary and the trial judge's language did not "badger" her into not testifying. Id.

II. The State violates a defendant's due process rights when it engages in conduct which prevents a witness from voluntarily exercising her Fifth Amendment rights.

The State violates a defendant's due process rights by intentionally attempting to distort the fact-finding process. U.S. v. Angiulo, 897 F.2d. 1169, 1191-92 (1st Circuit 1990). Such distortion can occur in two ways: (1) "the government could intimidate or harass potential witnesses to discourage them from testifying" or (2) "by deliberately withholding immunity from certain perspective defense witnesses for the purpose of keeping exculpatory evidence from the jury." Id. at 1192.

An example of the State violating a defendant's due process rights by intimidating a witness such that the witness refrains from testifying is found in the D.C. Circuit's opinion in U.S. v. Smith, 478 F.2d 976 (D.C. Circuit 1973). In Smith, the defendant was alleged to have shot and killed a person with a pistol. Id. at 977. On the second day of trial, the defendant's attorney told the trial court that one of the defendant's witnesses, Mr. Twitty, was refusing to testify following a conversation between the witness and the prosecutor handling the case. The following exchange occurred in chambers:

> "BY [COUNSEL]:
>
> Q. Mr. Twitty, do you remember speaking to me yesterday afternoon at the conclusion of the day in Court?
>
> A. Yes, sir.
>
> Q. Do you remember the conversation that we had?
>
> A. Yes, sir.

> Q. Do you remember telling me, sir, that you had been told by the Assistant United States Attorney * * * in this matter, that if you testified, you were told this yesterday, that if you testified in this case you would be charged with CDW, obstruction of justice, and as a principal in a murder?
>
> A. You're right.
>
> THE COURT: Did he say you could be or would be?
>
> THE WITNESS: Would be.
>
> * * *
>
> CROSS-EXAMINATION
>
> BY [THE PROSECUTOR]:
>
> Q. Mr. Twitty, what did I tell you? Be honest now, what did I tell you?
>
> A. You asked me did I want to talk to you. I said I didn't have anything to say to you.
>
> Then you asked me did I have a lawyer. Then I told you that I did have a lawyer.
>
> Q. Did I tell you to see a lawyer before you testified?
>
> A. You said this also.
>
> [Prosecutor]: That's all I have.
>
> THE COURT: Thank you, Mr. Twitty. You may step down." Id. at 978.

The D.C. Circuit found that the prosecutor's "warning was plainly a threat that resulted in depriving the defendants of Twitty's testimony." Id. at 979. Even if the prosecutor's motives to apprise a witness of his Fifth Amendment rights were impeccable, "the implication of what he said was calculated to transform Twitty from

a willing witness to one who would refuse to testify, and that in fact was the result." Id. If the prosecutor believed that the witness should be advised of his rights, he should have had the Court handle it. Then the witness would have been apprised without risk of threat or implications of retaliation. Id.

Under a different set of facts, another court found that the defendant's rights had not been violated by an agent of the government admonishing a witness. In U.S. v. Combs, the defendant was accused of being a felon in possession of a firearm and ammunition. 555 F3d 60 (1st Circuit 2009). Four days prior to trial, a federal agent approached one of the defendant's witnesses and asked her a series of questions about the defendant's arrest. At trial, that witness testified that the agent had called her a liar and told her that she could be charged with perjury. The witness testified that she felt threated and that the agent was trying to stop her from testifying.

Claiming that his due process rights had been violated, the defendant requested a jury instruction that would permit a finding of reasonable doubt based on the government's allegedly improper conduct. The proposed instruction was:

> "If you find that ATF Special Agent Lisa Rudnicki attempted to prevent Somia Hicks from testifying by threats or intimidation, you may draw an inference adverse to the prosecution. Such an adverse inference may be sufficient by itself to raise a reasonable doubt as to the defendant's guilt in this case." Id. at 62.

The trial court declined to present the instruction, stating that even though the agent's conduct may have been improper, the witness did in fact testify. The 1st Circuit affirmed, finding that there was no due process violation because there had

been no showing that "some contested act or omission (1) can be attributed to the sovereign and (2) causes the loss or erosion or testimony which is both (3) material to the case and (4) favorable to the accused." Id. at 64 (quoting U.S. v. Hoffman, 832 F.2d 1299, 1303 (1st Circuit 1987). The 1st Circuit did observe in a footnote that there is authority in other circuits that government intimidation of a witness, even absent a showing of prejudice, can amount to a due process violation. See id. at 64, fn. 3.

CONCLUSION

When the State has concerns about a witness's Fifth Amendment rights, it best protects a defendant's due process rights by bringing those concerns to the attention of the trial court. This minimizes the risk of intimidation that a witness will be intimated or fear reprisal. But, in discussing the Fifth Amendment with the witness, the Court is wise to only inform the witness of the right, appoint counsel, and permit the witness time to consult with the counsel before she makes a decision whether or not to testify.