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A Critical Analysis of the Third Circuit's Test for Due Process Violations in Denials of Defense Witness Immunity Requests

APPROVED BY
SUPERVISING COMMITTEE:

Supervisor:

John Deigh

Graham Strong

A Critical Analysis of the Third Circuit's Test for Due Process Violations in Denials of Defense Witness Immunity Requests

by

Samuel Fox Krauss, A.B.

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Dedication

For my grandmothers, Helen Fox and Alisa Krauss, women of valor.

אֵשֶׁת חַיִל מִי יִמְצָא וְרָחֹק מִפְּנִינִים מִכְרָהּ.

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Abstract

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Samuel Fox Krauss, MA

The University of Texas at Austin, 2014

Supervisor: John Deigh

Several Supreme Court cases in the latter half of the 20th Century established a criminal defendant's due process right to put forward an effective defense. To put forward an effective defense, one must be able to introduce exculpatory evidence on one's behalf.

A defendant's witness may claim the right against self-incrimination, in which case the defendant may request immunity for the witness so that he will testify. If that request is denied, a defendant's due process right to put forward an effective defense may be implicated. The refusal to grant defense witness immunity is one instance of suppression of evidence. In a string of cases in the Third Circuit, the courts have implemented a test for determining under what conditions a due process violation occurs in this situation. But, there is significant reason to believe that in implementing the test the court has relied on incorrect assumptions.

This paper discusses how the court has relied on unwarranted assumptions to make due process determinations, and concludes that in so doing it has imposed too high a

standard for a due process violation. First, the court interprets the test as a test *for* a due process violation, when there is reason to believe that the court articulating the test meant it to be a test for the appropriateness of judicially created immunity as the remedy for an existing due process violation. Second, the court makes an unwarranted assumption that *any* strong governmental interest countervails against a grant of witness immunity. Third, the court imposes too high a standard for determining what counts as a *strong* governmental interest because it does not give sufficient weight the context of the determination. These three unwarranted assumptions suggest that the court has imposed too high a standard for determining due process violations.

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Introduction

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A defendant's witness may claim the right against self-incrimination, in which case the defendant may request immunity for the witness so that he will testify. If that request is denied, a defendant's due process right to put forward an effective defense may be implicated. The refusal to grant defense witness immunity is one instance of suppression of evidence. In a string of cases in the Third Circuit, the courts have implemented a test for determining under what conditions a due process violation occurs in this situation. But, there is significant reason to believe that in implementing the test the court has relied on incorrect assumptions.

This paper discusses how the court has relied on unwarranted assumptions to make due process determinations, and concludes that in so doing it has imposed too high a standard for a due process violation. First, the court interprets the test as a test *for* a due process violation, when there is reason to believe that the court articulating the test meant it to be a test for the appropriateness of judicially created immunity as the remedy for an existing due process violation. Second, the court makes an unwarranted assumption that *any* strong governmental interest countervails against a grant of witness immunity. Third, the court imposes too high a standard for determining what counts as a *strong* governmental interest because it does not give sufficient weight the context of the determination. These

three unwarranted assumptions suggest that the court has imposed too high a standard for determining due process violations.

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Right to an Effective Defense

In *Roviaro v. United States*[1], a government informant, John Doe, was the sole material witness to Roviaro's alleged illegal transportation of heroine. Upon request, the Government refused to disclose the identity of John Doe by invoking its privilege to withhold the identity of government informants. Roviaro was only able to cross-examine government witnesses who had spoken with Doe, but not Doe himself. The court held that the Government's refusal to disclose Doe's identity was reversible error. "Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way."[2] In this case, because Doe was the only one with Roviaro at the time he allegedly committed the crime, "Doe's possible testimony was highly relevant and might have been helpful to the defense."[3] In holding that the government had erred by refusing to allow Roviaro to confront Doe, it vindicated his due process right to put forward an effective defense. The court remanded the case to the district court.

In *Brady v. Maryland*[4], petitioner Brady and an accomplice, Boblit, were convicted of first degree murder and sentenced to death. Brady's counsel requested from the prosecution any statements made by Boblit out of court. The prosecution withheld one of those statements, in which Boblit confessed to the actual killing. The Court of Appeals held, and the Supreme Court affirmed, that the prosecution's refusal to disclose Boblit's statement was a violation of Brady's due process right. The court held that "the suppression by the

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[1] *Roviaro v. United States*, 353 U.S. 53 (1957)
[2] *Roviaro*, *supra* note 1, at 628
[3] *Id*, at 629
[4] *Brady v. Maryland*, 373 U.S. 83, 87 (1963)

prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[5] The court's holding does not require that the prosecutor act willfully to distort the fact-finding process in order for the failure to disclose exculpatory evidence to constitute a due process violation.

In *Chambers v. Mississippi*[6], Chambers appealed a conviction of murder. Before Chambers' trial, McDonald had made a written confession of the murder, as well as oral confessions to friends, but had repudiated his statement. Because of a Mississippi rule preventing criminal defendants from cross-examining their own witnesses as adverse, and because the trial court found that McDonald was not "adverse" in the technical sense required, the court denied Chambers' motion to cross-examine McDonald as an adverse witness. The Supreme Court held that the trial court's refusal to allow Chambers to present McDonald as an adverse witness was a constitutional violation. "Few rights are more fundamental than that of an accused to present witnesses in his own defense."[7] The case was remanded.

Just because the right to present witnesses in one's defense is a fundamental right, however, does not entail that there is a due process violation any time a criminal defendant is prevented from doing so. The court in *Chambers* includes the caveat that one is not always entitled to cross-examine a witness: "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the

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[5] *Id*, at 87
[6] *Chambers v. Mississippi.*, 410 U.S. 284 (1973)
[7] *Id*, at 312

criminal trial process."[8] In its discussion of *Chambers*, the Third Circuit in *United States v. Herman*[9] writes "we find hints of a due process right to have clearly exculpatory evidence presented to the jury, at least when there is no strong countervailing systemic interest that justifies its exclusion."[10]

The Court uses similar language in *Roviaro*. There, the court did not find that the Government's refusal to disclose its informant's identity was *per se* reversible error. Rather,

> "[t]he problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."[11]

In *Roviaro, Brady* and *Chambers*, the defendant was denied the opportunity to present exculpatory evidence at trial, and in each case, the court held that this denial was sufficient for a due process violation. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."[12] The relevant inquiry, then, is under what conditions is the government's suppression of evidence a due process violation, and when it is, what is the appropriate remedy?

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[8] *Id*,, at 309
[9] *United States v. Herman*, 589 F.2d 1191, 1204 (3rd Cir. 1978)
[10] *Id*, at 1204
[11] *Roviaro*, *supra* note 1, at 628-9
[12] *Chambers*, *supra* note 6, at 308

The Third Circuit

In 1978, four young men assaulted Roy Phipps and stole $25. Glen Smith, Elton Rieara, Roland Georges and Elvis Smith were indicted. In a statement to the police, Ernesto Sanchez, another young man, implicated himself and three others, including Elvis Smith, but not including Glen Smith, Elton Rieara, or Roland Georges, in the assault. The defendants called Sanchez as a defense witness, but he refused to speak, claiming his right against self-incrimination. His testimony would have been exculpatory for Glen Smith, Rieara, and Georges. After an unsuccessful attempt to admit his prior statement through an exception to the hearsay rule, the defense requested that the Attorney General's office grant Sanchez use immunity. The Attorney General's office agreed to grant use immunity to Sanchez, conditional on the United States Attorney's consent. The U.S. Attorney never granted consent, Sanchez was not granted immunity, he did not testify, and the four men were convicted of robbery.

On appeal, the Third Circuit in *Government of The Virgin Islands v. Smith*[13] remanded the case for an evidentiary hearing to determine whether the Government's failure to immunize Sanchez resulted in a due process violation for the three defendants for whom Sanchez' testimony would have been exculpatory. The court held that if the district court finds, on remand, that the Government's denial of a grant of immunity resulted from its "deliberate intention [to distort] the fact-finding process" then the court should acquit the defendants unless the Government grants use immunity, in which case the defendants would

[13] *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3rd Cir. 1980)

have a new trial.[14] Here, the court relied on its decision in *United States v. Morrison*[15], in which the Third Circuit held that the prosecution's repeated intimidation of a defense witness[16] violated Morrison's right to have witnesses give evidence in his favor. [17] The court's remedy in *Morrison* was to order a new trial, and if the witness invoked her right against self-incrimination, the Government must offer immunity or else the court would acquit Morrison.

The *Smith* court, however, was not satisfied with the remedy of remanding the case for a determination of whether the prosecutor acted with the intent of distorting the fact-finding process, in which case the court would acquit Smith et al unless the government offered Sanchez immunity. *Herman* and *Morrison* required that only if a prosecutor denied immunity to a defense witness in order to distort the fact-finding process could there be a due process violation. On remand, if the district court in *Smith* made that finding, then that would be sufficient for requiring the government to immunize the witness in order to proceed with the trial.

But, the court in *Smith* argues that a defendant's due process right to present an effective defense can be violated *whether or not* the prosecutor refused to immunize the defense witness *with the intention of* distorting the fact-finding process. The court writes that the right of the defendant to present an effective defense, implicated in *Brady*, *Chambers* and

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[14] *Id*, at 969

[15] *United States v. Morrison*, 535 F.2d 233 (3rd Cir. 1976)

[16] In *Morrison,* the prosecutor repeatedly "reminded" the witness, by sending messages and by issuing a subpoena for her to appear in his office, that she had the right not to testify, and that if she were to falsely testify she could be charged with perjury. *Morrison* at 225-6

[17] " 'The right to offer the testimony of witnesses…is in plain terms the right to present a defense.'" *Id*, at 226, citing *Washington v. Texas* 388 U.S. 14, 19

Roviaro, is "not different in substance" than the right implicated in the *Smith* case.[18] In those cases, the due process violation occurred not because the Government had acted with bad faith, but because the actions of the Government were such that the defendant was denied the opportunity to present an effective defense.[19] There was a due process violation without prosecutorial bad faith.

Thus, the *Smith* court argued that where a defendant is prevented from putting forward an effective defense by a prosecutor's decision to refuse to immunize his witness, even where there is no bad, the due process right to present an effective defense is not honored. The court argued that there needed to be a new remedy to protect this right. This new remedy was judicial use immunity.

In *Herman*, the court held that because there was no intention to distort the fact-finding process on behalf of the government the court could not compel the government to offer immunity as a condition of trying the case. In cases where the Government *did* act *in order to* prevent the witness from presenting exculpatory testimony on the defendant's behalf, "the court has inherent remedial power to require that the distortion be redressed by requiring a grant of use immunity to defense witnesses as an alternative to dismissal."[20] However, where there is not a "distortion" by the government, the *Herman* court argues that the *court* could confer immunity on a witness to testify on the defendant's behalf. The court mentions the due process right to present an effective defense, articulated in *Chambers*, and

[18] *Smith*, *supra* note 13, at 970
[19] *Id*, at 971
[20] *Herman*, *supra* note 9, at 1204

argues that this right, coupled with a court's power to grant use immunity[21], could "provide the basis for a grant of [judicial] immunity in the proper circumstances."[22]

Like the cases that established a defendant's right to have witnesses testify in his favor, *Smith* does not require that the due process violation arises because of bad faith on behalf of the prosecutor. Bad faith is required, however, in order to impose the *remedy* that the defendant be acquitted unless the prosecutor grants witness use immunity. The court in *Smith*, thus, does not establish "a new or unique constitutional right, but rather…the prescription of a new remedy."[23] A due process violation, for the *Smith* court, obtains under certain conditions when the defendant's witness is denied immunity. Under one set of conditions, where the denial is a willful distortion of the fact-finding process, one remedy is called for. But, where there is not willful distortion, there may yet be a due process violation. In this case, under certain conditions, the remedy of *judicial* use immunity is appropriate. But, it is not the case that in *any* instance of a due process violation the court can offer judicial use immunity.

The *Smith* court found that the due process right is no less implicated in the immunity context than in the *Brady* or *Chambers* context.[24] But, this does not mean that the immunity *remedy* is always applicable. That is to say, the mere fact that there is a due process violation, of the same sort as in the *Brady* or *Chambers* or *Roviaro* cases, does not mean that the judicial immunity remedy is applicable. In describing the possibility of the judicial use

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[21] "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." *Id*, at 1204, citing *United States v. Simmons* 390 U.S. 377

[22] *Herman*, *supra* note 9, at 1204

[23] *Smith*, *supra* note 13, at 971

[24] *Smith*, *supra* note 13, at 972

immunity remedy, the *Herman* court writes: "[i]t may be, for example, that such grants of immunity would on some occasions unduly interfere with important interests of the prosecution."[25] Where grants of immunity do interfere with important interests of the prosecution, the court would overstep its bounds to impose them. But, this does not necessarily mean that no due process violation has occurred; it just means that this remedy is not applicable.

The *Smith* court recognizes that because of the "unique and affirmative nature of the immunity remedy and fundamental considerations of separation of powers, grants of immunity to defense witnesses must be bounded by special safeguards and special conditions."[26] The court continues, "Chambers and Herman both dictate that the opportunities for judicial use of this immunity power must be clearly limited," and then enumerates five conditions which must obtain in order for the court to grant immunity:

1. "immunity must be properly sought in the district court;
2. the defense witness must be available to testify;
3. the proffered testimony must be clearly exculpatory;
4. the testimony must be essential;
5. and there must be no strong governmental interests which countervail against a grant of immunity."[27]

The court vacated the sentences and remanded to the district court. It instructed the court to use its five-part test to determine whether judicial immunity is required. In that case, the court would immunize the defendant and there would be a new trial. The Third Circuit ordered the district court to determine whether the prosecutor engaged in bad faith

[25] *Herman*, *supra* note 9, at, 1204
[26] *Smith*, *supra* note 13, at 971
[27] *Id*, at 972

misconduct, in which case the court would acquit unless the prosecutor granted the witness use immunity. If the district court found neither judicial nor statutory immunity required, the judgment was to be reinstated.

It seems that these are *not* the conditions for there to *be* a due process violation. These are the conditions the court imposed in order for the a court to grant use immunity as a remedy *for* a due process violation. Close attention to the language of the court seems to shows this:

> "While the constitutional violation in this case is the same as the violation found in the Chambers and Brady genre of cases i.e., depriving a defendant of clearly exculpatory evidence necessary to present an effective defense…" "That compulsion can only be accomplished in the context of a case such as the instant one, by granting immunity to a defense witness, once it is established, however, that the conditions for such a remedy have been satisfied."[28]

Note that in the first sentence above the court writes, "the constitutional violation in this case[.]" This is just to say that *there is* a constitutional violation in the *Smith* case. The court continues that, even though there is a violation, the remedy can only be implemented if five particular conditions obtain. In *Bazzano*, Judge Garth describes the test *he wrote* in *Smith*: "we set out the requirements for invoking judicially fashioned defense witness immunity."[29] But, there is some reason to think that this is analysis is not correct.

There is some reason to think that the court *does* mean to say that, in the absence of willful distortion by the prosecution, these five conditions need to obtain in order for a due process violation to exist. At the end of the opinion, in its instructions to the lower court, it seems as though this is what the court meant. If there is a due process violation, there must

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[28] *Id*, at 971 [emphasis added]

[29] *United States v. Bazzano*, 712 F.2d 826, 840 (3rd Cir. 1983)

be some remedy. And, just because one remedy is not appropriate does not mean that there is no *other* remedy for a due process violation. But, the court here instructs the district court, that if the case does not meet the five-part test for judicial immunity, and there was not prosecutorial distortion requiring statutory immunity, then there is no other remedy and the judgments stand. This suggests that there is no due process violation. There seems to be compelling reasons to think that the five-part test is a necessary condition for there *to be* a due process violation in the absence of prosecutorial bad faith, *and* compelling reasons to think that there can be a due process violation *even if* the five conditions of the *Smith* test are not met. Because there is evidence to support contradictory conclusions, adopting one conclusion in particular, without further evidence, is imprudent.

In August, 2013, in a unanimous *en banc* decision, the court in *Quinn* held that the judiciary does not have the power to immunize witnesses, abrogating *Smith*.[30] But, it retained the effective defense argument from *Smith* and its progeny.[31] In addition to retaining the due process argument from *Smith*, it also retained *Smith's* test with its five necessary conditions. The court, drawing from *Straub*[32], writes that intent on the part of the prosecutor to distort the fact-finding process is not a necessary condition for a due process violation.[33] Rather, the court is concerned only "with the effect of the prosecutor's actions on the process afforded to the defendant."[34] In testing for a due process violation, the court retained *Smith's* test,

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[30] *United States v. Quinn*, 728 F.3d 243, 254 (3rd. Cir 2013)
[31] *Id*, at 253.
[32] *United States v. Straub*, 538 F.3d 1147, 1152 (9th Cir. 2008)
[33] "'The good faith of the [prosecutor] would be relevant if he were charged with violation of 18 U.S.C. § 1503[,] which makes the intimidation of a federal witness a criminal offense. It is not, however, relevant to an inquiry into whether a *defendant* was denied his constitutional right.' (emphasis in original.)" *Quinn*, *supra* note 30, at 260, citing *Morrison*, *supra* note 15, at 227
[34] *Quinn*, *supra* note 30, at 260.

changing only the remedy, which is to offer the government another chance to immunize the defense witness as a condition on trying the case.[35] This is also a departure from Third Circuit precedent about when the Government is required to offer the defendant's witness immunity. Before *Quinn*, judicial use immunity was the remedy when the defendant had been deprived of his due process right because of something other than prosecutorial misconduct. Before *Quinn*, requiring the Government to immunize the defendant's witness as a condition of trying the case was a remedy *only* when the prosecutor had engaged in misconduct. After *Quinn*, requiring the Government to offer immunity to the defendant's witness is the remedy to a due process violation that occurs with, or without, misconduct.

One might believe that for the court to dismiss the case unless the government immunizes the defense witness is the same thing as for the court to grant immunity itself. However, the court's remedy here deftly avoids overstepping its bounds. The court writes that, after it has determined, using the *Smith* test, that the government has erred by failing to immunize the defense witness, it does not violate separation of powers doctrine. The court rejects the contention that its new remedy is to "compel" the government to offer defense witness immunity. After finding that the defendant's due process rights have been violated by the government's initial refusal to immunize defense witness, the government may grant immunity,

> "or it may decide that denying the witness immunity is more important to its goals than seeking that conviction. But the remedy does not compel the

[35] "Once *Smith's* five-part test is understood as a gauge of prosecutorial misconduct, the remedy for such a finding follows easily. It is vacating the conviction and allowing a new trial where the Government can elect to exercise its statutory authority to obtain a grant of immunity for the witness." *Id* at 259. "If the Government refuses to immunize the witness in violation of the defendant's due process right, the trial court can dismiss the charge against the defendant." *Id* at 260.

> Government to do anything. It simply prevents prosecutors from obtaining a conviction through a process that lacks the fairness afforded by due process."[36]

While there is compelling reason to think that *Smith* intended the test only to be used to determine whether a particular remedy *to* a due process violation was appropriate, the *Quinn* court reads the five-part test from the *Smith* court as a test *for* due process violation. The *Quinn* court writes, "[t]hus in *Smith* we also created a new five-factor test that focused on whether the defendant 'is prevented from presenting exculpatory evidence which is crucial to his case.'"[37] But, the court in *Quinn* might be misrepresenting the context in which it cites *Smith*. For context, it is necessary to examine the full quotation from which the court selects:

> "[T]he need for 'judicial' immunity is triggered, not by prosecutorial misconduct or intentional distortion of the trial process, but by the fact that the defendant is prevented from presenting exculpatory evidence which is crucial to his case."[38]

It is one thing for a test to determine *whether* a defendant's due process right has been violated and another for a test to be "triggered…by" the due process violation. If the correct reading is the former, then any time the five-part test is not met, there is no due process violation. If the latter, then we cannot infer that there is no due process violation from a failure to pass the test. But it does follow from failing the *Smith* test that a particular remedy is not warranted. Indeed, the *Smith* court suggests that the test is merely for determining whether the remedy of judicial immunity is warranted. Either way, *Smith*'s progeny, including

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[36] *Id.*
[37] *Quinn*, *supra* note 30, at 258, citing *Smith*, *supra* note 13 at 969
[38] *Smith*, *supra* note 13, at *969*

Quinn, regards the five-part test as a test *for* due process. The court in *Quinn* writes, at different points:

> "Although we characterized this test as distinct from an inquiry in to prosecutorial misconduct, it is nonetheless about the Government's trial decisions."[39]
> "The five-factor test aids this inquiry for prosecutorial misconduct, and we continue its use today."[40]
> "But we keep the test we created in [*Smith*], *which we now recognize* as supplementing our deliberate distortion test for prosecutorial misconduct."[41]

But, there's good reason to think that this it not how the *Smith* court intended the test to be used. If it didn't, then there is reason to think that the Third Circuit has imposed too high a standard for determining whether a due process violation has occurred by assuming that the test for granting use immunity is the same as the test for due process.

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[39] *Quinn*, *supra* note 30, at 258
[40] *Smith*, *supra* note 13, at 259
[41] *Id*, at 261 [emphasis added]

History

To ensure that a subpoenaed witness who threatens to invoke his Fifth Amendment right will testify, the Government has historically offered immunity against future prosecution in exchange for testimony.[42] The Government also offers witnesses powerful incentives, including lighter sentences for their own convictions, in exchange for testimony.[43] But, offering immunity imposes a cost. If a witness is granted *transactional* (or "blanket" immunity), which was the only immunity available before 1970, he cannot be prosecuted for crimes *related* to his testimony. Government witness are often implicated in the crime (or a related crime) about which they are to testify, and so the cost of immunizing them is high.[44] Insofar as the government can offer immunity only if it is in the public interest to do so,[45] the government has to weigh the cost of forfeiting the ability to prosecute the witness altogether to obtain testimony against the value of prosecuting the defendant.

Recognizing this problem, Congress in 1970 passed the Federal Immunity of Witnesses Act, codified at 18 U.S.C. § 6001-05. This statute requires the prosecutor to

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[42] This dates back, at least, to 18th Century common law countries. Leonard N. Sosnov. *Separation of Powers Shell Game: The Federal Witness Immunity Act*. 73 Temp. L. Rev. 171, 176 (2000).

[43] In *Straub*, the court found that the defendant's due process right was violated when the government immunized eleven of twelve of its own witnesses but refused to immunize even one of the defendant's. Some of the government's witnesses received downward departure of three to five years in exchange for their testimony. *Straub*, *supra* note 32, at 1152. Professor H. Richard Uviller argues that if downward departure is available for the prosecution to offer to witnesses, this option should also be available to the defendant. Uviller writes, "there is no reason I can think of why a downward departure in sentence should be justified exclusively on the report of aid to the prosecution. Surely credible assistance to the defense in promoting the acquittal of an innocent person is as worthy a service as credible assistance to the prosecutor in securing the conviction of a guilty person." H. Richard Uviller. "Symposium: Perspectives on the Role of Cooperators and Informants: No Sauce for the Gander: Valuable Consideration for Helpful Testimony from Tainted Witnesses in Criminal Cases." 23 Cardozo L. Rev. 771, 788. (2002)

[44] Koblitz, Donald. "Note: 'The Public Has a Claim to Every Man's Evidence': The Defendant's Constitutional Right to Witness Immunity." 30 Stan. L. Rev. 1211, 1230. (1978)

[45] Sosnov, *supra* note 42, at 182

request immunity through the Attorney General's office;[46] he can only make such a request when the testimony is "necessary to the public interest;[47] he can only make such a request when the intended witness has invoked his right against self-incrimination;[48] and, the witness must testify, having been so-ordered.[49] But most important is the provision permitting *use* immunity: "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case" except for perjury.[50]

Pursuant to *Kastigar*,[51] the court can compel witnesses who have been granted immunity to testify, even if they plead the Fifth.[52] In light of *Kastigar*, the prosecutor has an increased incentive to grant immunity to witnesses; the prosecutor knows that if he grants immunity, the witness can be made to testify. But, the witness is not granted immunity from all further prosecution; the statute merely requires that any testimony presented while immunized be excluded at future trials where the witness is the defendant.[53][54]

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46 18 U.S.C § 6003

47 *Id.*

48 18 U.S.C § 6002 & 6003

49 It's not clear whether the court in *Kastigar*, infra note 25, would have ruled the way it did had Congress not passed this law. One might stipulate that the law saying that the right against self-incrimination is not absolute spurred the Supreme Court to hold as it did. But, this is mere speculation.

50 18 U.S.C § 6002

51 *Kastigar v. United States* 406, U.S. 441 (1972)

52 *Id*, at 453 (holding that "immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege.")

53 There is a high bar for the prosecution to show that none of the evidence in subsequent trials presented against the witness was derived from his immunized testimony. In *Kastigar*, the court writes that a defendant who was given use immunity and testified at a previous trial "need only show that he testified under a grant of immunity in order to shift to the government the *heavy burden* of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *Kastigar*, *supra* note 51, at 461 [emphasis added]. In *Bazzano*, the court writes "[Granting] the probationer immunity would require the state to prove that evidence it seeks to use against a probationer in a subsequent criminal trial is derived from a source wholly independent of his previously immunized testimony." The court continues: "If the state cannot meet its burden in such a case, the result will be the loss of potentially crucial evidence. *Bazzano*, *supra* note 29, at 845

From 1980 until 2013, when the court in *Quinn*[55] struck down judicial authority to grant use immunity, the Third Circuit considered the merits of appeals for the district court's failure to grant use immunity to defense witnesses.[56] In doing so, it considered the merits of the appeal according to the enumerated standards put forward in *Smith*. Even though the court in *Quinn* overturned a crucial holding in *Smith*, that courts could grant judicial witness immunity, it kept the five-part test. That is, even though the court in *Quinn* held (with virtually every other court[57]) that the judiciary lacks the authority to grant use immunity, it retained all of Smith's (and the Third Circuit's subsequent) reasoning that a defendant's due process right is violated when the five conditions are met and his witnesses are not immunized. The crucial distinction between the two rulings is the remedy. In *Smith*, the remedy was for the court to immunize defense witnesses. But, in *Quinn*, the remedy was for the judge to order a new trial to give the government another opportunity to extend use immunity to defense witness; if it refuses, then the court dismisses the charges against the

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[54] In much of the scholarly literature and *dicta*, this burden on the prosecution is mentioned as a cost to the government and a reason not to grant use immunity to defense witnesses. Richard L. Stone. "Note: The Case Against a Right to Defense Witness Immunity." 83 *Colum. L. Rev. 139*, n4. (1983). (adding that in order to shield the witness's proffered testimony from being used against him at his own trial, "the prosecutors most knowledgeable about an investigation may in some circumstances be obliged to forgo any further contact with the witness and arrange for a new team of investigators and prosecutors to pursue the case against him." The author uses this as an example of potential significant costs to granting use immunity. Note well that these issues do not arise in cases where the government grants transactional immunity because the witness is immunized from prosecution of any crime related to the one he testified about.

[55] *Quinn*, *supra* note 30

[56] A survey of requests and grants for defense witness immunity found that the Third Circuit granted the highest percent of requests of any circuit: 5/46, and that nine of twelve circuits have never granted defense witness immunity. (The other two circuits to do so are the Second [1/59] and the Ninth [6/97]. See Nathaniel Lipanovich. "Note: Resolving the Circuit Split on Defense Witness Immunity: How the Prosecutorial Misconduct Test Has Failed Defendants and What the Supreme Court Should Do About it." 91 Tex. L. Rev. 175, 178 (2012).

[57] All other courts that is, except for the New Mexico Supreme Court, in *State v. Belanger* 146 N.M. 357 (2009) (holding that trial courts have authority to grant use immunity.) See Andy Scholl. "Note and Comment: State v. Belanger and New Mexico's Lone Stance on Allowing Defense Witness Immunity." 40 N.M.L. Rev. 421. (2010).

defendant.[58] Also, the *Quinn* court treats the five-part test as offering five necessary conditions on a due process violation in the absence of willful prosecutorial misconduct. There is reason to think that the *Smith* court did not employ the test for the same purpose.

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[58] *Quinn*, *supra* note 30 at 259-60

Questions Surrounding *Smith*

Even before *Smith*, some commentators argued for such a defendant's right to have witnesses granted judicial use immunity. Some argued that this right follows from a due process right to a fair trial.[59] Others argued that the right to judicial use immunity follows from the Sixth Amendment's Compulsory Process Clause, reasoning that in its very wording the Compulsory Process Clause "places upon the state certain *affirmative* duties in securing the testimony of witnesses in [sic] the defendant's behalf."[60]

Since *Smith*, commentators and judges have addressed many questions in addition to questions about what the Due Process and Compulsory Process Clauses require. They have addressed whether the judiciary has the authority to grant immunity, as the Third Circuit said it does. With the exception of a few commentators, judges outside the Third Circuit have answered with a resounding "no."[61] Other pertinent domains of inquiry have been the exact

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[59] "The proper solution demands recasting the issue not as the defendant's right to immunize witnesses, but as the defendant's constitutional right to *obtain favorable evidence*." [emphasis in the original] Koblitz, *supra* note 44, at 1213.

[60] The state can usually satisfy its duty by issuing subpoenas and then punishing witnesses who are non-compliant. However, the subpoena and threat of punishment are not available when the witness will not testify for reasons of self-incrimination. Just as the courts have a duty to compel testimony by subpoena, when that is not available, they have a duty to compel testimony by immunity.
"Note: The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses." 91 Harv. L. Rev. 1266, 1267-8 (1978) [emphasis in the original][NB: this is an unsigned note.]

[61] In most cases on this topic, the opinion lists the most recent case in each non-Third Circuit circuit to reject the Third Circuit's reasoning in *Smith*. In Third Circuit cases, the judge acknowledges that the Third Circuit stands alone and offers a similar list. I will not recreate such an exhaustive list of every circuit's most recent decision rejecting *Smith*. However, here is a representative sample; some judges are quite harsh. "Notwithstanding the Third Circuit's pronouncement, the effective defense theory has been roundly rejected by other courts, most of which have agreed that the power to grant immunity properly belongs to the Executive Branch." *Curtis v. Duval*, 124 F.3d 1, 9 (9th Cir. 1997). "Every court of appeals which has considered the question has rejected the Third Circuits*Smith* [*sic*] holding as being a violation of the separation of powers." *U.S. . Capozzi*, 883 F.2d 608, 614 (8th Cir. 1989). "[While] the Third Circuit's desire to insure [*sic*] that criminal defendants will have every opportunity to present exculpatory evidence is admirable, the federal courts simply lack the power to effectuate that aim by immunizing witnesses." *United States v. Pennell*, 737 F.2d 521, 527 (6th Cir. 1984). "Virtually all jurisdictions recognize that use immunity is a creature of statute which can be conferred only by the Executive Branch of government. However, the Third Circuit held otherwise in *Smith*."

nature of the separation of powers doctrine[62] and discussions about what the exact costs to the government are when it grants immunity. One such cost that has received a great amount of attention is the worry that establishing a due process right to defense witness immunity confers on the defendant the ability to give an "immunity bath" to his compatriots: his friends testify for the defense at his trial and in their own trials it is much more difficult to convict them because much of the inculpatory evidence is excluded.[63] The court in *Turkish* raised a related worry: "cooperative perjury."[64] But, the remainder of the paper will address two of the requirements of the *Smith* test.

- "[T]he proffered testimony must be clearly exculpatory."
- "[T]here must be no strong governmental interests which countervail against a grant of immunity."[65]

In general, the courts have required too high a showing in order to meet the standards. The standards for a finding of a violation of due process ought to be lower than they are. In part, this follows from a belief that the original *Smith* test was meant to be a test for the

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[list of supporting cases omitted] *United States v. Hunter* 672 F.2d 815, 818 (10th Cir. 1982). "We need not dwell on the late, unlamented effective defense theory….[recognizing] that the power to direct witness immunity customarily is reserved to the Executive Branch, we recently interred the effective defense theory. It is not good law in this circuit and the appellant cannot profit by it." *Castro*, 129 f.3d 226, 232 (1st Cir.1997).

[62] See *United States v. Santtini*, 963 F.2d 585, Fn 7 (3rd Cir. 1992), in which the court argues that because it only has the authority to grant immunity "when the interests of the executive branch would not be harmed by the judiciary's exercise of power," it has accommodated the separation of powers concerns raised by other circuits. In *Quinn*, the court addresses this concern and reverses its thought on the separation of powers. (Finding that "judicial use immunity impinges on the separation of powers between the Executive and Judicial Branches of our Federal Government.") *supra* note 11, at 260.

[63] "Note," *supra* note 60, at 1273, citing the court in *In re* Kilgo, 484 f.2d 1215, 1222 (4th Cir. 1973).

[64] "Co-defendants could secure use immunity for each other, and each immunized witness could exonerate his co-defendant at a separate trial by falsely accepting sole responsibility for the crime, secure in the knowledge that his admission could not be used at his own trial for the substantive offense. The threat of a perjury conviction, with penalties frequently far below substantive offenses, could not be relied upon to prevent such tactics. Moreover, this maneuver would substantially undermine the opportunity for joint trials, with consequent expense, delay, and burden upon disinterested witnesses and the judicial system." *United States v. Turkish*, 623 F.2d 769, 775-6 (2nd Cir. 1980).

[65] *Smit*h, *supra* note 13 at 972.

remedy to a due process violation, not the due process violation itself. This may be incorrect. If it is, and the test *is* properly regarded as a test for a due process violation, then it is still the case that the due process rights of a defendant require the standards to be lower than they are.

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Clearly Exculpatory

The Third Circuit does not define precisely what it means by "clearly exculpatory." Since *Smith*, the court has, at times, clarified the requirement by providing a positive account of what it is, but more frequently, by giving examples of what does not constitute clearly exculpatory testimony.

The principle linking *United States v. Perez*[66] and *United States v. Whiteford*[67] is that testimony is not clearly exculpatory when it is directly contradicted by the witness's own prior statements. In *Perez*, the court writes "because any exculpatory testimony that [the witness] might offer on behalf of Perez would be severely impeached by his prior inculpatory statement against her, Perez could not establish that the proffered testimony was 'clearly exculpatory.'"[68] In a similar vein, the court in *Whiteford* writes "The court's determination that [the witness'] testimony would not be 'clearly exculpatory' for [the codefendant] was not an abuse of discretion, because in multiple portions of [the witness'] statements to the police, she inculpated [the codefendant]."[69]

In *United States v. Thomas*[70] and *United States v. Mike*[71], the court argues that testimony that serves *only* to call into question the truth of the government's witness is not clearly exculpatory. In *Thomas*, two of the government's witnesses refuted what the defense witness would have said. Thus, the jury would have had to make a credibility determination to decide which witnesses were more reliable. Because of this, the testimony was "at best speculative"

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66 *United States v. Perez*, 280 F.3d 318, 348 (3rd Cir. 2002)
67 *United States v. Whiteford*, 676 F.3d 348, 363-4 (3rd Cir. 2012)
68 *Perez*, *supra* note 66, at 348
69 *Whiteford*, *supra* note 68, at 363-4
70 *United States v. Thomas*, 357 F.3d 357, 365-6 (3rd Cir. 2004)
71 *United States v. Mike*, 655 F.3d 167, 173 (3rd Cir. 2001)

and not clearly exculpatory.[72] The court in *Mike* agrees with *Thomas*, but adds that *Thomas* properly denied the immunity grant, not just because the proffered testimony would have refuted a government witness, but because the government's case was sufficiently strong without his testimony. But, the court cautions that evidence that a government's witness is unreliable *can* be clearly exculpatory testimony. The court writes: "[n]othing in these cases [*Thomas, Ammar*[73]*, Smith*] rules out the possibility that a defense witness's testimony can be clearly exculpatory when it helps to establish, *among other things*, that a government witness's testimony is not credible."[74] Other Circuits have made similar statements about what *does not* count as exculpatory, but they have been less forthcoming with positive accounts.[75]

The Third Circuit offers some affirmative thoughts on what constitutes clearly exculpatory evidence. In *United States v. Lowell*[76], the court upheld the district court's refusal to grant immunity, contrasting the facts of the case with those of *Smith*. In *Smith* "the court was faced with a probable certainty[77] that [the witness'] testimony would exonerate three of the convicted felons." But, in *Lowell* "[the witness'] testimony, even if believed, would not in itself exonerate Lowell; apparently, [*Smith* witness'] testimony alone, if believed, would have

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[72] *Thomas*, *supra* note 70, at 365-6

[73] *United States v. Ammar*, 714 F.2d 238 (3rd Cir. 1983)

[74] *Mike*, *supra* note 71, at 173 [emphasis added]

[75] Testimony is not clearly exculpatory and is "obviously without merit" when all other facts in the case suggest that the witness is lying. *United States v. Flaherty* 668 F.2d 566, 579 (1st Cir. 1981); Testimony is not clearly exculpatory when "[the] proffered testimony of the two witnesses merely established incriminating evidence of a third party, but in no way exonerated the defendant here." *United States v. Hardrich*, 707 F.2d 992, 994 (8th Cir. 1983); (Evidence was not clearly exculpatory because the "testimony would have been marginally exculpatory at best," but not explaining what the difference between *marginally* exculpatory and *clearly* exculpatory is. *Pennell*, *supra* note 31 at 529; Testimony is not clearly exculpatory when the witness "had no favorable testimony to offer on behalf of the defense." *United States v. Robaina*, 39 F.3d 858, Fn4 (8th Cir. 1994)

[76] *United States v. Lowell*, 649 F.2d 950 (3rd Cir. 1981)

[77] The court does not explain what "probable certainty" means.

required acquittal."[78] The court in *Lowell* believes that the expected testimony can satisfy the clearly exculpatory standard only if presenting the testimony would result in exoneration.

The court in *Quinn* seems to have not such a high standard in mind, however. The court discusses the clearly exculpatory standard in light of Quinn's request for it to be "less exacting" in the standard, and for the court to read it to mean "materially favorable to the defense on the issue of guilt" or when it "could contribute substantially to raising a reasonable doubt."[79] In response, however, the court rejects the defendant's suggestion:

> "[the] existence of conflicting evidence does not affect, however, whether the defense evidence is exculpatory, though it may affect its weight. Thus, though exculpatory on its own, defense evidence that is *overwhelmingly* undercut or undermined by substantial prosecution evidence in the record becomes so lacking in credibility that it cannot be *clearly* exculpatory."[80][81]

In *United States v. Steele*, the court upheld the district court's decision to deny use immunity.[82] In doing so, it contrasted "relevant" evidence with "clearly exculpatory" evidence." "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'"[83] *Quinn* rejects merely *material* evidence as clearly exculpatory in the same way that *Steele* rejects merely *relevant* evidence. The best account of *clearly exculpatory*, according to the courts, is the following: testimony that, if

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[78] *Lowell*, *supra* note 76, at 965

[79] *Quinn*, *supra* note 30, at 262

[80] *Id*, at 263 [emphasis in the original]

[81] Even after 33 years, the court does not do a great job of clearing up this ambiguity. The purpose of the paragraph from which this is drawn is to "clarify" the clearly exculpatory standard. However, they explain the standard by saying that evidence is not *clearly* exculpatory when it is *overwhelmingly* undercut or undermined by *substantial* prosecution evidence. But, if the goal was to understand the use of the word *clearly*, one might think the job is not done by reference to the words *overwhelmingly* and *substantial*.

[82] *United States v. Steele*, 685 F.2d 793 (3rd Cir. 1982)

[83] *Id*, at 808, citing Fed.R.Evid., at 401.

admitted, would compel a not-guilty verdict. There is precedent for this reasoning. The court in *United States v. Agurs*, one of *Brady*'s progeny, writes, "[t]he mere possibility that an item of undisclosed information *might* have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."[84]

The courts have interpreted this standard too strictly. *Perez* and *Whiteford* found that a witness' testimony is not clearly exculpatory when he contradicts his own prior statements. *Thomas* and *Mike* found that a witness' testimony is not clearly exculpatory when the testimony functions solely to contradict the government's statement. But, it seems like these cases could cause a reasonable doubt in the minds of the jurors. If this is the case, then the evidence is clearly exculpatory.[85] A witness' contradiction of a government witness will likely not carry much weight in the courtroom. But, because of the exacting standard of proof in criminal trials, the jurors do not need to be convinced of the defendant's innocence to render a not-guilty verdict. The mere contradiction of a government witness could be sufficient to cause a reasonable doubt for the jury, and thus, the evidence would be clearly exculpatory.

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[84] *United States v. Agurs*, 427 U.S. 97, 109-10 (1976) [emphasis added]

[85] "It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, a constitutional error has been committed." *Id*, at 113

Countervailing Interests

Smith requires, *inter alia*, that for a grant of immunity to be constitutionally required, "[t]here must be no strong governmental interests which countervail against a grant of immunity." *Quinn* rejects the "inherent authority" of a court to immunize witnesses for the defense but retains the *Smith* test as a test for a violation of due process. There is a substantive question whether *Smith* intended the test to be *for* a due process determination or a test for whether the judicial immunity remedy is called for. If the former, there is reason to view the requirements of the test as less strict than one ought to if it were the latter. Whatever the *Smith* court intended, the *Quinn* court has adopted it as a test for due process, and thus, one must be sure that the interpretation and implementation comports with due process.

The test involves the no countervailing interests test, and for this reason it is important to understand and implement the requirement correctly. Although in many of its decisions the Third Circuit gives a thoughtful account of the weighing of interests, in interpreting and implementing this requirement the Third Circuit repeatedly makes two assumptions without sufficient warrant. First, the court assumes without sufficient warrant that *any* strong governmental interest is sufficient to countervail against a grant of immunity. Second, even if the court's first assumption is correct, it imposes too high a standard for something to be a strong governmental interest.

The First Problem

In interpreting the *Smith* test's fifth necessary condition: that "there must be no strong governmental interests which countervail against a grant of immunity[,]" the Third

Circuit assumes that *any* strong governmental interest countervails. But, there is reason to question this assumption; the *Smith* court might have meant that only *some* strong governmental interests countervail, and when there are none of *those* interests, notwithstanding the presence of strong governmental interests that do not countervail, the fifth condition of the *Smith* test is met. One must determine whether the clause "which countervail against a grant of immunity" is a restrictive or nonrestrictive clause. Because there are are indicia of both kinds of clauses, it is not clear what kind of clause it is.

"For relative pronouns referring to anything other than people, use *that* to introduce a restrictive clause and *which* (after a comma) to introduce a nonrestrictive clause."[86] So for example, if one wanted to indicate that cacti were prohibited from the party, he would say:

A. "There must be no cacti, which are plants, at the party."

In Sentence A, "which are plants" is a nonrestrictive clause. To remove it from the sentence would not change the meaning of the sentence. To include it in the sentence perhaps tells the audience something about cacti, and perhaps the reason he has made the policy, but, it does not restrict the kinds cacti excluded from the party; all cacti are excluded. But, if the party planner loved cacti as long as they have not bloomed with flowers, he might say:

B. "There must be no cacti that have bloomed at the party.

In Sentence B, "that have bloomed" is a restrictive clause. To remove it from the sentence *would* change the meaning of the sentence. To include the restrictive clause is to say that cacti of a particular type are prohibited.

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86 Garner, Bryan. *The Redbook*: *A Manual on Legal Style*. West Publishing Co.: St. Paul, 2006, at 156.

It is clear what kind of clause occurs in each of the above sentences, both because of usage and context. Restrictive clauses are introduced by *that*, and nonrestrictive clauses by *which*. Restrictive clauses are not set off from the rest of the sentence by commas, whereas nonrestrictive clauses are.[87] Also, the context of the clauses tells the audience what kind of clause they (likely) are. Cacti are necessarily plants, and so it does not make sense to put "which are plants" in a restrictive clause. One could construct a grammatical sentence in which "that are plants" follows "cacti" in a restrictive clause, but it would not thereby restrict the set of cacti because all cacti are plants. Similarly, one could construct a grammatical sentence in which "which have blossomed" follows "cacti" in a nonrestrictive clause, but the sentence would generate a false implication: that all cacti have blossomed. So, one can look to usage or to context for help in determining whether a clause is restrictive or nonrestrictive.

In evaluating the fifth condition of the *Smith* test, neither usage nor context is helpful. If "which countervail against a grant of immunity" is a restrictive clause, then the court meant to refer only to the strong governmental interests that countervail, out of a set of all of the strong countervailing interests, some of which countervail, and some of which might not. If it is a nonrestrictive clause, then the court is just informing the reader about a characteristic of strong governmental interests (that they countervail).

The Third Circuit, since *Smith*, has interpreted the clause as nonrestrictive. But, there is reason to doubt this assumption. Although the clause is introduced by "which," which is an indication that the clause is nonrestrictive, no commas separate it from the rest of the

[87] They can also be offset by parentheses or dashes.

sentence, which is an indication that the clause is restrictive. So, the clause has indicia of both restrictive and nonrestrictive clauses, and to the extent that the use of "that" or "which" is as telling as the presence or absence of commas, there is no reason from usage to think one way or the other. But, there is some reason to think that the evidence weighs in favor of its being a restrictive clause.

While a nonrestrictive clause must be set off from the rest of the sentence and a restrictive clause must not be, there is less firm a rule about which relative pronoun to use in a restrictive clause. "By rule, *that* is used to introduce a restrictive clause only; it is always an error to use *that* to introduce a nonrestrictive clause." But, "[i]t's not an outright blunder to use *which* to introduce a restrictive clause."[88] So, which relative pronoun the court used cannot be controlling here, because on the pain of "slight pomposity," according to Bryan Garner, the court *could* have used "which" to introduce a restrictive clause, thereby breaking a convention, but not a rule. But, in order not to ascribe pomposity to the court, the clause has equal indicia of both nonrestrictive and restrictive clauses.

In the absence of dispositive evidence from usage, one might turn to context for guidance. In Sentences A and B, the audience's knowledge of cacti together with the context of utterance (proscribing certain things from a party) can determine whether the clause is restrictive or nonrestrictive. But, in the cacti case, the use of context relied on the audience's knowledge of the properties of the plant and of the party planner's purpose in making the pronouncement, in the absence of indicia from usage, to determine whether the clause was restrictive or nonrestrictive. But in the *Smith* clause, the purpose of determining what kind of

[88] Garner, *supra* note 86, at 157

clause it is *is* to determine how we should understand the court's intent. Thus, we cannot rely on our antecedent knowledge of whether all strong governmental interests countervail to determine whether the court meant to say that all strong governmental interests countervail.

Instead of looking at usage or context of utterance, one can look to how the courts after *Smith* interpreted the test. This might be a solution. Indeed, it is clear from *Smith*'s progeny that the courts believed that *any* strong governmental interests does countervail—that the clause at issue was nonrestrictive. But, there is reason to be wary of this.

There is reason to think that the *Quinn* court changed the way the test operated. The *Quinn* treats the test as a test for a due process violation, whereas there is substantial reason to think that the court in *Smith* uses it only to determine whether judicial use immunity is the appropriate remedy for an existing due process violation. If this is the case, then the standards of the test might need to be adjusted in order to comport with due process. Even if *Smith* meant that *any* strong governmental interest countervails against a grant of immunity, this may only be relevant for determining whether the court can offer witness immunity. Understood, in 2013, as a test for the due process violation, faithfully adapting the *Smith* standard requires the court to apply a less exacting standard, and this less exacting standard may be interpreting the fifth condition of the *Smith* test as a restrictive clause.

If the Third Circuit has erred in in its interpretation of the *Smith* test, then there is reason to doubt whether its holdings on due process violations have been correct.

In *United States v. Santtini*, the court cites *United States v. Sampson*, 661 F. Supp. 514, 520 (W.D.Pa.1987) which held that

> "Smith does not require a court, which has identified a 'strong governmental interest,' to weigh that interest against the defendant's need for testimony;

> instead, 'the existence of a strong opposing governmental interest that cannot be accommodated forbids any weighing and any judicial immunity.' We conclude that where <u>*a*</u> compelling government interest exists, a court simply may not invoke its 'inherent' authority to [grant immunity to defense witnesses]."[89]

The court continues this line of reasoning in a footnote:

> "[the no countervailing interests] requirement also seeks to accommodate separation of powers concerns in that it provides for the possibility of 'judicial immunity' only when the interests of the executive branch would not be harmed by the judiciary's exercise of power." [fn7]

In *United States v. Cohen*[90], the court makes two claims:

C. "A potential prosecution of the prospective witness is a sufficient governmental interest to countervail against a grant of immunity."[91]

D. "Therefore, because the Government had a strong interest in not immunizing Lipoff, the district court correctly denied judicial immunity."[92]

Claim C makes a substantive claim that a particular kind of interest countervails against a grant of immunity—that the government might want to prosecute the witness in the future. Claim D states that *because* the government had *a* strong interest in not immunizing the witness, immunity was properly denied. One might argue that Claim C is false, (and there is reason to support this contention,) but it makes a substantive point about what *kinds* of interests countervail. Claim D does not. According to Claim D, the government's *having* a "strong interest" is sufficient for denying immunity.

If there is reason to doubt that the *Smith* court meant the clause at issue as a nonrestrictive clause, then there is reason to doubt whether the courts in *Santtini* and *Cohen* are applying the test correctly.

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[89] *United States v. Santtini*, 963 F.2d 585, 599 (3rd Cir. 1992) [emphasis added]
[90] *United States v. Cohen*, 171 F.3d 796 (3rd. Cir 1999)
[91] *Id*, at 802
[92] *Id.*

The Second Problem

Even if the court in *Smith* meant the test's countervailing interest requirement to mean that *any* strong governmental interest in fact countervails against a grant of immunity, there remains a substantial question: what counts as a *strong* governmental interest? Since *Lowell*, the courts have interpreted the *strong governmental interest* requirement to be satisfied when the government has a possible future interest in prosecuting the witness. While this *may* be what the *Smith* court intended, the courts justify this position with an improper attribution to *Lowell*, the first judicial witness immunity case, to follow *Smith*.

Lowell held that the testimony the witness would have given failed the clearly exculpatory test and therefore affirmed the district court's denial of a grant of immunity for a defense witness.[93] The court wrote that the facts were sufficiently different from those in *Smith* to warrant different rulings. In *Lowell,* "[the witness'] testimony, even if believed, would not in itself exonerate Lowell; apparently, [Smith's witness'] testimony alone, if believed, would have required acquittal."[94] So, the court in *Lowell* distinguishes its facts from those in *Smith* by saying that, whereas in *Smith* the testimony was clearly exculpatory, in *Lowell*, the testimony was not. So, the defendant in *Lowell* was not entitled to judicial use immunity for his witnesses.

One other way the facts in *Lowell* are different from the facts in *Smith* is in the governmental interests implicated. In *Smith,* the government gave no reason, (and it appears

[93] *Lowell*, *supra* note 76
[94] *Id*, at 965

there was none to be given),[95] why the witness had been refused immunity. But in *Lowell*, the court points out that that "the prosecution does have an arguable reason for denying immunity. For it may yet prosecute [the witness]."[96]

It is not at first apparent why the court included this last sentence here; indeed, it is easy to mistake its purpose in so doing. From its analysis of the probative value of the witness's testimony (low), it reasoned that the clearly exculpatory standard was not met, and therefore it followed that *Lowell* did not meet *all* five of *Smith's* necessary conditions.

Why, then, did it bother discussing the governmental interest? Is it to show that, in addition to the clearly exculpatory standard not being met, the countervailing interest standard was also not met? The court does not say whether, were the evidence clearly exculpatory, the governmental interest would have been sufficient to satisfy due process.

There is reason to think that the court did not intend this passage to support the conclusion that this governmental interest in fact countervailed against a grant of immunity is the context. In addition to the *Smith* test for granting immunity, there is another test for determining a due process violation: if the prosecutor acted intentionally to distort the fact-finding process. The court in *Lowell* held that no such violation occurred. As evidence of this, it says that one possible reason that the prosecution withheld immunity was because it may yet prosecute the witness.

> "Here…the prosecutor's conduct evinced no 'deliberate intention of distorting the factfinding [*sic*] process.' And we note *in support of that conclusion* that the prosecution

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[95] "The record reveals that Mr. Leonard Francis of [the Virgin Island Attorney General's office] had offered to grant Sanchez use immunity on the condition, promoted only out of prosecutorial courtesy, that the United States Attorney consent. *For reasons which were unexplained at trial and which the United States Attorney did not explain to this court at oral argument*, this consent was never granted." *Smith*, *supra* note 13, at 967 [emphasis added]

[96] *Lowell*, *supra* note 76, at 965

> does have an arguable reason for denying immunity. For it may yet prosecute Montalbano."[97]

Note that the court points out this reason to show that the prosecution acted without the *intent* of distorting the fact-finding process. However, in the Third Circuit, that the prosecution acted *with the intent* of distorting the fact-finding process is not necessary to find that the district court erred in denying the defense witness immunity. Since *Smith*, the due process violation occurs when the government intentionally distorts the fact-finding process *or* the five conditions set by *Smith* are met. The court in *Lowell* notes the prosecution's reason for denying immunity not to show that the *Smith* test is not satisfied, but to show that that the prosecutor was not intentionally distorting the fact-finding process and therefore *that* did not cause the due process violation. Subsequent courts have missed the limited scope of this comment in Judge Rosenn's subtle opinion.

Since *Lowell*, the courts have inferred from the government's possible interest in prosecuting the defense's witness to a countervailing *strong* governmental interest. They cite precedent in *Lowell*, but for reasons described above, this is an improper inference.

In *Bazzano*, Chief Judge Seitz writes "that a defense witness may be subject to future prosecution is a legitimate reason for denying him immunity."[98] C.J. Seitz relies on *Lowell*, where the court explains that the difference between it and *Smith* lies partly in that, in *Smith*, the prosecutor had no reason for denying immunity, whereas in *Lowell*, it did. But, in *Lowell* the court argues that the proffered evidence is not clearly exculpatory, and *that* is sufficient for affirming the district court's decision to withhold immunity. It is true, as Seitz cites

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[97] *Id* [emphasis added]
[98] *Bazzano*, *supra* note 29, at 845

Lowell, that the court in Lowell writes that the possible future prosecution of Montalbano is *a* reason for denying immunity, but it never indicates that it is sufficient. It mentions it only to show that the prosecutor did not engage in misconduct by refusing to grant immunity in order to gain a tactical advantage. C.J. Seitz's conclusion that the court in *Lowell* "held that the possibility that a defense witness may be subject to future prosecution is a legitimate reason for denying him immunity"[99] is wrong. This was not the holding in *Lowell*. C.J. Seitz reads *Smith's* no countervailing strong interest test to mean *any* interest in future prosecution. The *actual* reasoning in *Lowell* does not support this and neither does *Smith*.

All three of the judges who sat on *Smith* sat on *Bazzano*, which the Third Circuit heard *en banc*. In *Bazzano*, the court held *per curiam* that the district court had not erred by refusing to grant immunity to the defendant's witnesses.[100] But, in the divided opinion, Judge Garth, the author of *Smith*, wrote a minority opinion on behalf of all of the judges who sat for *Smith*, (as well as one other judge).[101] Judge Garth writes that defendant's contention that the district court erred in not granting the witness use immunity to his two witnesses failed. But, he argues that it fails the *Smith* test because it was not properly sought in the district court and because it was not clearly exculpatory.[102] He makes no mention of countervailing interests. It is Chief Judge Seitz, who writes for the majority, who says that "the possibility that a defense witness may be subject to future prosecution is a legitimate reason for denying

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[99] *Id*, at 841

[100] *Id*, at 829

[101] *Id*, at 836

[102] "At no time during the revocation hearing did [the co-defendant] tell the district court what testimony either Stagno or Fimmano would give were they to be provided with immunity. The belated affidavit of [the co-defendant's] counsel, asserting that Fimmano would have exculpated [the co-defendant] had Fimmano been given immunity and testified, cannot cure the fact that no such representation was made to the district court at the hearing. Furthermore, there has never been any representation as to how Stagno's testimony would have exculpated [the defendant]." *Id*, at 840

him immunity."[103] The three judges who heard *Smith* say nothing about the strength of the government's interest in denying witness use immunity; they argue that it fails the *Smith* test for two other reasons.

This suggests that the judge who wrote the opinion in *Smith*, and the two judges who heard the case with him, did not believe that, in *Lowell*, there was no strong governmental interest. To fail the test, only one condition of the five-part test need not obtain. In *Lowell,* the minority mentions two conditions that fail even though one alone would have been sufficient. If the minority had believed that the petitioner's due process claim failed because there was a strong governmental interest against granting immunity, presumably they would have mentioned it. This is not dispositive, however, because while the minority does not include the existence of a strong governmental interest, neither do they state explicitly that the majority has got things wrong on this count. But, all of the *Smith* judges fail to mention the existence of a strong governmental interest in their (minority) reasoning to withhold immunity. This provides a reason to believe that subsequent courts have imposed too high a burden for a defendant to meet the *Smith* test.

In applying the no countervailing strong interests test, the courts have held that the prosecutor's possible future desire to prosecute the witness is a strong governmental interest, such that it countervails against a grant of immunity.[104] But, there is reason to put pressure on the claim that the *Smith* test is not satisfied when the government might prosecute the witness for whom use immunity is sought.

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[103] *Id*, at 845.

[104] Assuming that *all* strong governmental interests countervail against grants of immunity.

Quinn treats *Smith*'s five-part test as a test for a due process violation when the prosecutor has refused to request witness immunity for the defense and where there is no prosecutorial misconduct. The question is then, what counts as a *strong* governmental interest not to grant immunity? As the courts have interpreted the five-part test, it is not necessary that the strong interest *outweigh* the claim for defense witness immunity, but merely count against it in a strong way.[105] That is, the governmental interest need not be weight*ier* than the reasons for granting immunity, but they must be weighty.

In all cases of granting immunity, whether for the defense or the prosecution, the cost is the same: a guilty party is less likely to be convicted of his crime. The relevant inquiry for the prosecutor, in determining whether to seek immunity for his own witness, is whether there are sufficient reasons for society to bear the cost. 18 U.S.C. § 6003 allows a prosecutor to seek witness use immunity only when the testimony "may be necessary to the public

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[105] One reason the court might have thought that the prosecutor's possible future interest in prosecuting the witness is sufficient for countervailing against a grant of immunity" is from a particular use of the word "countervail." If all "countervail" means is to *weigh against*, then any reason, even the smallest reason, would "countervail." On this interpretation of "countervail," then, it makes sense that the court in *Smith* included the word "strong." The *Smith* court, in interpreting "countervail" to mean "weigh against" did not want just any interest to be sufficient for the due process claim to be without merit. But, there might be a better way to understand "countervail." According to the leading legal dictionary available to the court in *Smith*, "countervail" means "1. to counterbalance; 2. to avail against with equal force or virtue; 3. to compensate for, or serve as an equivalent or substitute for." *Black's Law Dictionary*. West Publishing Co.: St. Paul, 1979, at 508. The most recent *Black's* has omitted the entry for "countervailing." It does, however, include entries for "countervailing duty": "A tax imposed on manufacturers of imported goods to protect domestic industry by offsetting subsidies given by foreign governments to those manufacturers." It defines "Offset" as "To balance or calculate against; to compensate for, the gains offset the loss[.]" It defines "Balance" as "To equalize in number, force, or effect; to bring into proportion[.]" Garner, Bryan. *Black's Law Dictionary*. West Publishing Co.: St. Paul, 2009, at 581, 1195, 163, respectively. The most recent *Oxford English Dictionary* defines "countervail" similarly: "To be of equal force or weight on the contrary side; to avail *against*…" J. A. Simpson & E.S.C. Weiner. *The Oxford English Dictionary*. Clarendon Press: Oxford, 1989. [1039] Indeed, in all versions of the definition in the *OED*, the requirement is that the force be equal, and not merely present, in order to countervail.

The government's potential interest in prosecuting the witness surely is *an* interest. It surely *weighs against* a grant of immunity. But, it seems if one goes by the leading lay and legal dictionaries, in order for something to *countervail* it must be of *equal* weight and not merely *some weight*.

interest." The *United States Attorneys' Manual*, published by the Justice Department, is not instructive in its evaluation of decisions to offer immunity to the defense's witness.

> "As a matter of policy, 18 U.S.C. § 6002 will not be used to compel the production of testimony or other information on behalf of a defendant except in extraordinary circumstances where the defendant plainly would be deprived of a fair trial without such testimony or other information."[106]

If one turns to the *Manual* to determine under what conditions a prosecutor must seek defense witness immunity in order not to cause a due process violation, one learns little with the instruction that a prosecutor should do this *when to do otherwise would be a due process violation.*

After exhausting all other available options, the U.S. Attorney may request witness use immunity for his own witness but must determine whether doing so is necessary to the public interest, as required by statute. The *Manual* does provides guidelines for U.S. Attorneys confronted with a recalcitrant witness.

The prosecutor should consider, among other reasons:

1. "[t]he importance of the investigation or prosecution to an effective program of law enforcement"'
2. "[t]he value of the person's cooperation to the investigation or prosecution[.]"[107]

If the witness' testimony would not contribute much to the prosecution, then the government lacks sufficient reason to offer immunity at the cost of the ability to easily prosecute the witness in the future. If the person to be immunized could be prosecuted for a

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106 *United States Attorneys' Manual.* <http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html> 9-23.214.

107 *Id*, at *9*-27.620. This language is nearly identical to that in 9-23.210. There, the first consideration is construed as "The importance of the investigation or prosecution to effective enforcement of the criminal laws."

more serious crime than the person against whom he would testify, the government may lack sufficient reason to offer immunity to the defendant.

In some cases, it might be that the government has a strong interest against granting immunity, but that this interest, though strong, is outweighed by considerations in *favor* of granting immunity. While the prosecutor must conduct a balancing test in order to determine whether granting use immunity is necessary to the public interest, the court will not do such a balancing test for defense witness immunity. But, to determine a due process violation it is necessary to determine whether the government has a *strong* interest in not granting immunity.

The strength of an interest against doing something is relative to the costs and benefits associated with the result of doing that thing. Strength is context dependent.[108] In this case, while the costs are fixed, the benefits are not. Imagine that a prosecutor is trying two cases, one against a mob boss, Boss, and one against a mob underling, Underling. In each case, he has a different witness whom he would like to present inculpatory testimony against the defendant, at trial: Witness A and Witness B. Witness A and Witness B have both been indicted for the same crime, and both have claimed the right against self-incrimination and have refused to testify. In each case, the prosecutor is considering requesting use immunity for the witness. In each case, the *cost* of granting immunity is the same, as far as the public interest is concerned. In each case, the public has an interest in the state prosecuting criminals, and in each case a criminal would be much less likely to be prosecuted

[108] For example, one might say that an ant is strong, compared to other insects, but it is not strong compared to humans.

successfully if granted use immunity. Thus, in each case there is a governmental interest against a grant of immunity.

But, even thought the *cost* of granting each of the witnesses immunity is the same, the prosecutor's *interest* in not granting them immunity is not. He has a stronger interest in not granting immunity to Witness B, to testify against Underling, than he does in not granting immunity to Witness A, to testify against Boss. The magnitude of the interest in not doing two actions, where the cost is fixed, varies according to the benefit. The prosecutor has a less strong interest in not granting immunity to Witness A because the benefit of prosecuting Boss is so high. The enormous benefit of a successful prosecution of Boss dwarfs the interest in not granting immunity to Witness A. The minor benefit of a successful prosecution of Underling does not dwarf the interest in not granting immunity to Witness B, even if it still outweighs it. Thus, while there might be a strong governmental interest in not prosecuting Witness B, there is *not* a strong governmental interest in not prosecuting Witness A.

Where the cost of doing two different actions is fixed, in order for the government's interest against doing those two things to be different the benefits of doing each must be different. This is what happens in the case of granting use immunity to witnesses for the defense.

Because the benefits of granting a defense's witness use immunity are much higher than the benefits of granting a Government's witness use immunity, what counts as a strong governmental interest against granting a prosecutor's witness immunity does not count as a strong governmental interest against granting a defense witness immunity.

When the Government considers granting use immunity to its own witness, it sacrifices the ability to convict the witness in exchange for (what it hopes) is the ability to convict the defendant. If their crimes are equal, and the Government thinks its chance of convicting either party is the same, then it seems like the cost is roughly the same as the benefit. But, when the Government considers granting use immunity to the defendant's witness at the sacrifice of the ability to convict the witness in a future prosecution, all else equal, the benefit is far greater than the cost. The Government's interest in not granting a defense witness immunity is far less strong than its interest in not granting its own witness immunity.

Attorneys regularly remark, a la Blackstone, that it is better to let ten guilty men go free than to convict one innocent man. The criminal standard of proof is evidence of the United State's fidelity to the Blackstone ratio. The beyond a reasonable doubt standard creates a high false negative error rate. But, this is what the Government has deemed an appropriate distribution of error. So, a judge does not need to look far, and does not need to step outside the boundary of the judiciary to determine that the Government's interest in convicting a guilty man is substantially smaller—perhaps by an order of magnitude, than its interest in exonerating an innocent man.

In order to determine whether there is a *strong* governmental interest, which countervails against a grant of immunity, the court needs to consider the context of the Government's interest. If the potential benefit of a Government's decision to immunize a witness is that a criminal will be convicted, then the cost of granting immunity to the witness might be low and still count as serving a strong governmental interest not to grant immunity,

because the benefit is also relatively low. But, if the potential benefit of a Government's decision to immunize a witness is that a defendant's due process right to put forward an effective defense is realized, then the cost of granting immunity to the witness must be very high in order to count as serving a strong governmental interest against granting immunity.

There is another reason to think that the benefit of granting use immunity to a defense witness is much higher than it is to granting it to a Government witness. Even if the benefits of a true conviction and a true acquittal were the same (which they are not), because of the high standard of proof in criminal trials the testimony of the Government's witnesses is less weighty than the defense's witnesses, all else equal. In *Steele*, the court explains that merely relevant evidence *does not* suffice for clearly exculpatory evidence. "'Relevant evidence,'" it writes, is "'evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'"[109]

But, the defendant need only convince the trier of fact that there is a reasonable doubt that he committed the crime. Two witnesses giving testimony of the same probative value, one as a defense witness and one as the Government witness, on average, will have much different effects on the outcome of the trial. A defense witness' testimony that makes the jury just slightly less confident will require acquittal, whereas a Government witness' testimony that makes the jury slightly more confident will often not result in a conviction. For this reason as well, the benefit of granting the defense witness use immunity, all else equal, is higher than the benefit of granting the Government's witness use immunity, and

[109] *Steele*, *supra* note 82, at 808, citing the Fed.R.Evid. at 401

thus the cost associated with granting immunity must be much higher in order for the interest *against* granting immunity to be "strong."

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Conclusion

The Third Circuit has made a number of unwarranted assumptions. It has taken a test originally intended to determine whether a remedy for a due process violation is appropriate and used it to determine whether the due process violation has occurred. It has assumed that all strong governmental interests in fact countervail against grants of immunity. In applying the *Smith* test, the court has imposed too high a showing for "clearly exculpatory" evidence and too high a standard for a governmental interest to suffice as "strong." In order to ensure that the defendant's due process right to put forward an effective defense, as established in *Brady*, *Roviaro*, *Chambers*, and other cases, is secured, the Third Circuit ought to revisit its analysis of the *Smith* test. It is necessary to the public interest that a defendant is able to present an effective defense. *This* is a strong governmental interest.

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