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Prosecutorial Immunity: Through The Looking Glass

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Prosecutorial Immunity: Through The Looking Glass

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"[M]ore mischief has come to good men by these kind of approvements by false accusations of desperate villians than of benefit to the public of the discovery and convicting of real offenders."

Sir Mathew Hale (1609-1676)

History of the Pleas of the Crown, P. 226 (1778 Ed.)

► While the grant of immunity in the course of criminal trials has concerned the judiciary since the time of Mathew Hale, it has now captured public attention with the granting of immunity by prosecutors in connection with the recent trials of once highly respected political figures. Typically a prosecutor offers immunity to one or more potential defendants, (hereinafter referred to as the "Witness Defendants"), in order to obtain their testimony against another defendant, (hereinafter referred to as the "Target Defendant"). While there has been much commentary on the implications of immunity for the Witness Defendant, this article focuses on the implications of such grants of immunity for the Target Defendant.*

These implications manifest themselves in two significant instances. First, assume A and B are indicted for a crime which A and C committed and A has agreed to testify against B in return for immunity. Although C can establish B's innocence by testifying that C and A committed the crime, he refuses to do so unless he can obtain immunity. It has generally been held, as discussed below, that B may not grant C immunity*, and therefore, B may not obtain C's testimony. This situation raises the question whether B's right to due process is vio-

lated because of the possibility of his conviction resulting from the inability of bringing forth exculpatory testimony from C. Second, as discussed below, prosecutorial immunity is a creature of statute. Where no statute exists, a prosecutor has no authority to grant immunity. Often, where no immunity statute exists, a prosecutor enters an agreement not to prosecute a Witness Defendant in exchange for inculpatory testimony against a Target Defendant. This accomplishes the same result as a formal grant of immunity and imposes upon the target defendant such burdens as does the formal grant of immunity.

The exchange of immunity raises the threshold question of whether selectivity in prosecution is consistent with equal protection. While this argument has been advanced, it has uniformly been held that a difference in treatment by the government in the prosecution of a case is not necessarily a violation of equal protection.*

It is the thesis of this article that where the prosecutor has a statutory right to grant immunity the defense should have a comparable right and that prosecution should not be permitted to be based on testimony obtained by non-statutory grants of immunity. First, however, we turn to the origin of immunity and briefly trace it from its common law beginnings to its modern usage to set the perspective of this article.

► Approvement was one of the earliest incentives devised by English Common Law to elicit the testimony of an offender against his accomplices. Under early common law an individual indicted and in custody of the sheriff could confess and accuse his accomplices. The court, in its discretion, could accept the confession and permit the individual confessing guilt to be an "approver"; in such a case the accomplice, not the approver, was tried. Variations in the institutions of approvement permitted the approver to challenge the accomplice to trial by battle. If the accomplice were found guilty, the approver was pardoned; if the accomplice were found not guilty, the approver was hanged.* The practice of approvement "with its conditions that the

appellee could claim a trial by battle and that grace to the approver should be dependent on his conviction of his associate in crime, was plainly at variance with modern sentiments and habits, and the consequence was that it passed out of use."* However, other incentives were devised to obtain the testimony of an offender against his accomplices. Lord Mansfield noted the existence of rewards, statutory pardons, and the concept of an equitable claim for mercy by one who gave evidence against an accomplice.*

If Prosecutorial Immunity is to be justified as an outgrowth of these institutions, it must be recognized that the organizational structure of criminal prosecution in England is notably different from that in the United States. A distinguishing feature of prosecution in England is private prosecution: if the English attorney general declines to initiate a prosecution, the victim of the alleged crime has the right to do so.* Thus, although the English attorney general could order a *Nolle Prosequi* of a prosecution, his decision not to prosecute does not confer immunity as it would in the United States. In fact, the great majority of prosecutions are presented by police officers rather than the attorney general, whose main function is to prosecute certain serious crimes and certain cases referred to him by government departments and local authorities. Glanville Williams suggests that one reason for the wide discretion within the office of the Common Law Prosecutors is this feature of private prosecution.*

► The concept of a public official as the prime prosecutor of criminal cases was a creation of the American judicial system. Connecticut is recorded to have created the first public prosecutor as early as 1704.* The Judiciary Act of 1789, Section 30 provided that the United States would be represented by a U.S. Attorney, later the Attorney General. (See *State v. Hunter*, 10 Md. App. 300 (1970), for a history of prosecutorial developments in the State of Maryland. The Court pointed out that the office of the State's Attorney was carved from the Common Law Office of Attorney General, but numerous legisla-

tive enactments defined the position.)

The United States Attorney first began to control local district attorneys at the time of the American Civil War. Several factors might have contributed to the failure of the American Legal System to adopt a Common Law System of private prosecution. First, the American prosecutor is depicted as a combination of the powers and duties of the English Attorney General and the French Procureur Du Roi. Second, it was felt that the office of the prosecutor must be fair and independent, which a private person could not be. (E.g. *Bienel v. State*, 71 Wis. 444, 37 N.W. 244 (1888), wherein the Court commented that the public prosecutor could never be promoted by the conviction of the innocent, and that the duty of the prosecutor could never be fulfilled by the conduct of prosecution by paid attorneys of parties who, for passion, prejudice or even honest belief in the guilt of the accused would be desirous of procuring his prosecution.) A third factor might be the exasperation of the American Common Law with the result of irresponsible practice of law by Court officials and "pettifoggers." (This very interesting epoch in the development of American law is described by Roscoe Pound in, *The Lawyer From Antiquity to Modern Times*, West Publishing Co. (1953), p. 135. Dean Pound pointed out that the pettifogger stage followed "an attempt to get on without lawyers" by the colonists.)

The need for Prosecutorial Immunity in the United States emerged not as a matter of royal grace, but rather as an outgrowth of the Fifth Amendment provision of the United States Constitution that "no person shall be compelled in any criminal case to be a witness against himself." An accomplice could not be compelled to testify against his cohorts if in so doing he might incriminate himself.

Prosecutors seeking testimony against a Target Defendant attempted to satisfy the Fifth Amendment right of the testifying witness by agreeing not to prosecute him. It was argued that this removed the risk of self-incrimination and, therefore, permitted compulsion of testimony. Nevertheless, the Supreme Court held that the prosecutor had no inherent au-

thority to bestow immunity and, therefore, a witness could refuse to testify regardless of such an agreement.* With the emergence of immunity statutes, the Fifth Amendment right of the testifying witness could be overcome. These statutes supplied the prosecutor with authority to grant immunity. A testifying witness could be compelled to give inculpatory evidence against a Target Defendant if he were first guaranteed that no self-incriminating use would be made of his testimony.

The scope of immunity constitutionally required to satisfy the Fifth Amendment has had an interesting development. (For a detailed discussion, see Shapiro, *Adequacy Under Federal Constitution of Immunity Granted in Lieu of Privilege Against Self-Incrimination*, 32 L.Ed. 2d 869. Annotation). In *Counselman v. Hitchcock* (142 U.S. 547, 1892) the United States Supreme Court invalidated an early immunity statute which only gave an accused "use immunity." This type of immunity prohibits the use of the testimony itself (although it does not prohibit the use of testimony derived from the compelled testimony) in a subsequent prosecution. In *Ullman v. United States** the United States Supreme Court upheld the constitutionality of a statute which provided for "transactional immunity." This type of immunity prohibits the prosecution of the witness for any transaction as to which he is testifying under compulsion. Finally, in *Kastigar v. United States* (406 U.S. 441, 1972) the United States Supreme Court upheld the constitutionality of a much narrower form of immunity than transactional immunity: "use and derivative use immunity." This type of immunity prohibits not only the direct use of the testimony, as prohibited in the statute invalidated by *Counselman v. Hitchcock*, but also prohibits the use of any testimony derived from the compelled testimony.

Following the decision in *Kastigar*, Congress enacted 18 U.S.C.A. Section 6001-6005, which repealed prior immunity statutes and substituted in their place a general "use and derivative use" immunity statute. This statute covers all proceedings before courts, federal agen-

cies, and congressional committees, and prohibits a witness' refusal to testify on the basis of his privilege and includes a prohibition of the use of testimony which he has furnished under compulsion against the witness in any criminal case. The general procedure for compelling testimony under this action is that a U. S. Attorney, with the approval of the Attorney General, makes application to a federal judge for the grant of immunity to a witness who "has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination." Once the order is issued by the judge the witness may not refuse to testify, under penalty of being in contempt of court.

► Unlike the federal statutes, the Maryland immunity statutes are not found in one central location; rather, they are scattered throughout the *Maryland Code* and arranged according to the substantive aspect of law to which the statute applies. A proposed general immunity statute (House Bill 541) was rejected by the General Assembly in 1972. The Maryland immunity statutes include granting immunity to witnesses for testimony in prosecutions for the following:

- a) bribery of public officials (Article 27, Section 23)
- b) bribery in athletic contests (Article 27, Section 24)
- c) conspiracy to bribe (Article 27, Section 39)
- d) gambling (Article 27, Section 262)
- e) obtaining liquor by a minor (Article 27, Section 400)
- f) sabotage (Article 27, Section 540)
- g) violation of fair election practices (Article 33, Section 26)
- h) control of dangerous substances (Article 27, Section 298)
- i) violations of insurance law (Article 48A, Section 28)
- j) violation of unemployment insurance law (Article 95A, Section 12J)

- k) violation of workmen's compensation law (Article 101, Section 8)
- l) violation of Retail Sales Tax Act (Article 81, Section 359)

and for testimony in certain supplementary or discovery proceedings (*Courts and Judicial Proceedings*, § 9-119).

A review of the Maryland immunity statutes reveals that there is no uniformity as to the type of immunity to be granted under these statutes. For example, Article 27, Section 540; Article 40A, Section 359; Article 95A, Section 12J; and Article 101, Section 8, appear to grant "transactional immunity" while Article 81, Section 359 and Article 75, Section 74 appear to grant simply "use immunity". Although there appear to have been no challenges to these statutes' constitutionality, the decision in *Counselman v. Hitchcock* seems to suggest that the latter statutes are constitutionally insufficient. (Immunity does not violate the Maryland Declaration of Rights. However State immunity statutes must comply with the Fifth Amendment privilege against self-incrimination. *Murphy v. Waterfront Commission* 378 U.S. 52). The decision in *Kastigar v. United States* seems to indicate that the former statutes grant broader immunity than constitutionally necessary.

Like the federal immunity statutes, most of the Maryland statutes require an application by the prosecutor to the court for the granting of immunity. However, immunity granted pursuant to Article 27, Section 298, sub-section C, the Controlled Dangerous Substance Act, does not require the prosecutor to obtain an order of court. This section has been interpreted as being self-executing. (*Roll v. State*, 15 Md. App. 31, As to the special problems of such "automatic immunity" statute, See McCormick, Evidences § 143 footnote 14.)

► While statutory immunity may be considered the only legitimate form of immunity, the same result is often accomplished through a prosecutor's agreement not to institute criminal proceedings. Such non-statutory immunity, may take the form of the prosecutor entering a *Nolle Prosequi*, accomplished

with the consent of the court or an acceptance of a guilty plea to a lesser offense.* From the viewpoint of a Target Defendant, it is irrelevant whether the Testifying Witness has been granted immunity or given an agreement not to prosecute; the effect is the same. Even absent statutory authority, the witness has an equitable claim to immunity from prosecution, similar to the eighteenth century equity claim commented upon by Lord Mansfield in *Rex v. Rudd*.* While this non-statutory* claim does not bar prosecution as an automatic right, as a practical matter an accomplice who has testified pursuant to an agreement with the prosecutor will generally go unprosecuted.*

Non-statutory immunity is sometimes justified as being an outgrowth of prosecutorial discretion, derived from the discretionary powers inherited from the English Attorney General. In the United States, unlike in Great Britain, if a prosecutor decides not to prosecute, the private citizen generally has no further recourse.* Discretion is so established in the U.S. that if two individuals are equally deserving of prosecution, the prosecutor can determine to prosecute one and not the other even if the motivation for the distinction stems from considerations extraneous to justice, such as personal dislike of an individual or political advantage.* If the prosecutor declines to prosecute the courts have no power to compel initiation of criminal proceedings.* This lack of power to compel initiation of proceedings results in the de facto power of the prosecutor to grant immunity even absent statutory authorization.

► It has been held that Statutory Immunity per se does not violate the Due Process clause of the U.S. Constitution.* However, testimony obtained in exchange for immunity should be viewed with distrust.* In the ordinary case of a witness testifying, the testimony serves an informative purpose only and the witness' interest is in whether the trier of fact believes his testimony. However, in the case of a Witness Defendant, the testimony serves a dual purpose. Not only does it inform the trier of fact as to the issues in the instant case, but it also sets

the limits of the witness' benefit: the more he tells, the broader is his immunity. Thus, the witness' interest is not only in the truth of his testimony, but also in the breadth of his immunity. As long as the witness remains silent, discovery of independent evidence may result in his prosecution. But to the extent he testifies under a grant of "transactional immunity," he insulates himself, and even where he only obtains "use and derivative use immunity," he places a burden upon the prosecutor to establish the independent source of inculpatory testimony in a subsequent prosecution. Under these circumstances, it is arguable that the temptation to commit perjury may be so strong as to require special treatment, much as exclusion of the suspect testimony; or, if the inherent suspicion of the testimony of self-interested witnesses is viewed as going only to the weight of evidence, an instruction to the jury as to the circumstances surrounding such testimony should suffice.*

Apart from the untrustworthiness of immunized testimony, there is a more serious due process issue. Consider again the hypothetical situation set forth in the introduction: A and B are indicted for a crime which A and C committed and A has agreed, pursuant to statute, to testify against B in return for immunity. Although C can establish B's innocence by testifying that C and A committed the crime, he refuses to do so unless he can obtain immunity. If B cannot grant C immunity and therefore cannot obtain C's exculpatory testimony, B's right to due process is denied because he is denied effective confrontation, effective compulsory process, the right to obtain exculpatory evidence, and the right to a presumption of innocence.

In *Chambers v. Mississippi*,* the U.S. Supreme Court held that a defendant was denied a fair trial when he was denied the opportunity under the hearsay rule to introduce evidence that another had admitted committing the crime as well as the opportunity to cross-examine the alleged perpetrator of the crime. Effective confrontation of witnesses involves more than the right to ask questions on cross-examination. It is suggested that it must include the right to

produce independent testimony bearing on the credibility of direct testimony.* In our assumed factual situation, A has committed a crime. It cannot be assumed that he would shrink from perjury in order to save himself from prosecution. The temptation to commit perjury is all the greater if A knows that the only person who can contradict him, C, will be unable to testify for fear of his own prosecution. Thus, B should be permitted to call C and introduce testimony in contradiction to A's testimony, because there is no other meaningful way to confront A.

The Sixth Amendment to the U.S. Constitution provides that the accused shall have compulsory process for obtaining witnesses in his favor. That clause provides for more than the right of a defendant to have a witness brought into the courtroom. In *Washington v. Texas*,* a state statute permitted co-participants in a crime to testify for the prosecution but not for one another. The U.S. Supreme Court held this statute unconstitutional despite the state's argument that it had not refused the right to confrontation. The Court focused on the question of admissibility and held that the Sixth Amendment right is at least broad enough to put a witness on the stand. In *Bray v. Peyton*,* the U.S. Court of Appeals for the Fourth Circuit, relying on *Washington v. Texas*, reversed a defendant's conviction when the government incarcerated an indicted defense witness, thereby depriving the accused of the benefit of what he claimed was exculpatory testimony. In *Bray*, the defendant was on trial for statutory rape, and intended to call a witness who would testify to the witness' prior illicit relations with the victim to establish that the victim was a consenting lewd female. The witness attended the trial and was arrested and charged with assault upon the victim and thus was prevented from giving exculpatory testimony.

The question then is whether the constitutional guarantee of the right of confrontation is cognizable only when denied explicitly, as in *Washington v. Texas*; or whether an equally effective indirect means of denying the defense

the right to put a witness on the stand is also unconstitutional. Under the latter interpretation, refusal to grant immunity to witnesses favorable to the defense would be unconstitutional. It is unreasonable to expect that a defense witness would willingly testify if such testimony would cost his freedom. The threat of criminal prosecution is an equally effective method of blocking the admission of favorable testimony as the statute held unconstitutional in *Washington v. Texas*.

Refusal to permit the defendant to obtain testimony by granting immunity further collides with the constitutional rights of the Target Defendant by creating a situation which tolerates the suppression of exculpatory evidence. It is settled that a prosecutor may not knowingly permit a witness to testify falsely, *Alcorta v. Texas*,* even when the falsity of the testimony goes only to the credibility of the witness.* Moreover, the prosecutor may not suppress facts favoring the accused, *Brady v. Maryland** and *Giles v. Maryland*.*

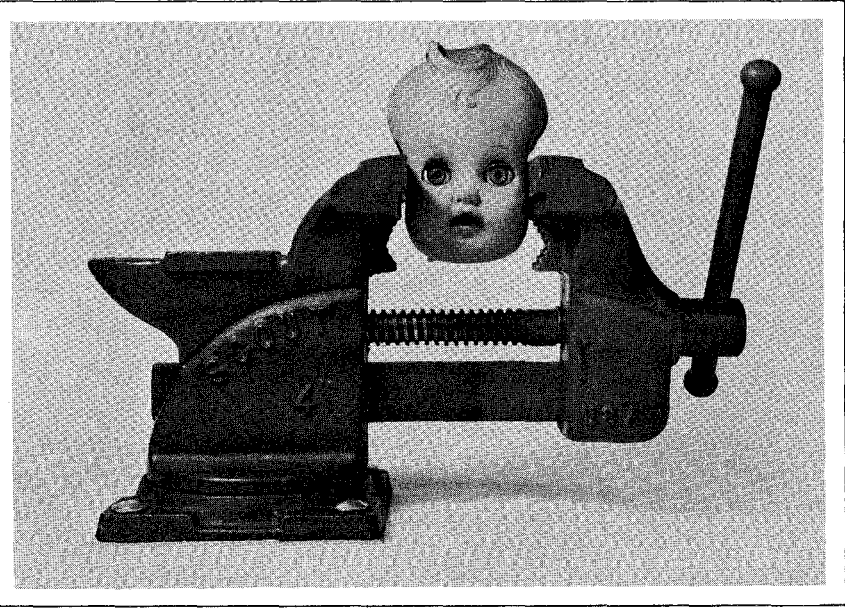
In *Brady*, the Court stated "...we now hold that the suppression by the prosecution of evidence favorable to an accused upon request violated due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."* Denying the Target Defendant the right to grant immunity allows the

prosecutor to suppress potentially exculpatory evidence, the result condemned in *Brady*.

The underlying assumption in an adversary system is that when both sides of a controversy are fully presented to an impartial trier of fact, a just result will be reached. In *Dennis v. United States** the U.S. Supreme Court stated:

"...it is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked. In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a store house of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations."

No court has yet faced the issue of whether due process requires the state to permit a Target Defendant the right to grant immunity to a witness in the situation where the government grants its witnesses immunity. That problem did arise in *Gregorio v. United States*.* During the course of the trial the government granted immunity to one of its witnesses and defense counsel had called to the stand a witness who invoked the fifth amendment. Subsequently, the defense counsel inquired of the witness whether he would testify if granted immunity, even though the government had made



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known its refusal to grant immunity. Defense counsel did not pursue the request for immunity and withdrew his witness. The Fourth Circuit Court of Appeals, however, refused to consider the question, resting instead on the technical ground that the defendant failed properly to raise the argument at trial and did not preserve the record for appeal.

It is suggested that defense counsel did establish a sufficient record in *Gregorio* for appellate review.* However, to avoid the problem, counsel should file a pre-trial motion to compel the state to grant immunity to the defendant's witness. This motion should include a request to suppress the testimony of the government's witness if the government does not grant the immunity requested for the defense witness.*

A problem could arise if a defense witness, who cooperated prior to trial, suddenly balks when called to the stand and claims the fifth amendment privilege. The question arises whether defense counsel could confer immunity on the recalcitrant witness at that point. Certainly the defense is in a much weaker posture, because the remedy of suppression is unavailable; although, the power of the court to declare a mistrial or the court's contempt power might be utilized. Whenever defense counsel intends to examine a witness who might claim the fifth amendment, the appropriate motion to compel immunity should be filed prior to trial; this would protect counsel from the last minute change of heart.

Likewise, the defense has a more difficult burden in insisting on a grant of immunity where the prosecution has not done so. There is an appealing symmetry to the proposition that whatever tool the prosecution may use should also be available to the defense; where the prosecution has not used that tool, the symmetry argument works against the defense. For example, in *Earl v. United States** the defendant asked that immunity be granted to his witness, although the government had not offered immunity to any witness. The court held that it lacked the power to compel the prosecutor, who was an agent of the Executive Branch of the government, to exercise

his power to grant immunity.

Judge Leventhal, writing a dissenting opinion to the court's decision denying a rehearing *en banc*, stated that perhaps the problem posed by the inability of the defendant to compel testimony could be solved by a charge bringing to the attention of the jury the fact that the government had refused to grant immunity to a witness who the defendant claimed could exonerate him. This solution falls short of solving the problem, because it still deprives the Target Defendant of the right to put forth all the relevant evidence in his defense. The jury should not be allowed to speculate as to what evidence the missing witness would proffer; in fact, it would be improper for the jury to do so. See *Bruton v. United States*,* wherein the United States Supreme Court indicated that jury instructions cannot always be employed to correct a flaw in procedure that affects constitutional rights. Furthermore, the jury instruction suggestion improperly shifts the resolution of the dilemma to the shoulders of the defendant. The initial burden is on the government to demonstrate clear and compelling considerations for depriving the Target Defendant of his right to unlock the doors of truth, *Dennis v. United States*.*

"The naive assumption that prejudicial effects can be overcome by instructions to the jury...all practicing lawyers know to be unmitigated fiction..." If the defense cannot compel exculpatory testimony because it cannot confer immunity, a jury instruction would require consideration of testimony that was not produced and would force the jury into unpermitted speculation on matters that have not been introduced into evidence. At least in cases where there is statutory authorization for prosecutorial immunity, it is arguable that the defense should be afforded a comparable right to immunize witnesses even if the prosecution has not exercised its right to do so. Rights rather than the exercise of those rights should be equivalent. The mere fact that the prosecutor chooses not to exercise his right should not force the defense to forego its right any more than the defense could preclude the prosecutor from cross-examining the de-

fendant on the grounds that the defense had not cross-examined any prosecution witnesses.

Two arguments might be advanced as "compelling considerations" to justify denying the Target Defendant the right to compel testimony on his behalf: the spectre of the immunity bath and the threat of perjury. The immunity bath problem would have been more troubling prior to *Kastigar v. United States*.* Prior cases had indicated that in order to overcome the fifth amendment privilege against self-incrimination, it was constitutionally necessary to grant "transactional immunity," that is, to insulate the witness against prosecution for any transaction as to which he testified. Thus there was a real danger that a defendant could grant blanket immunity to anyone he chose and that the Target Defendant could permit a co-defendant to testify and thus preclude a prosecution of the co-defendant. Under *Kastigar*, the standard for overcoming the fifth amendment privilege is "use and derivative use immunity," thus limiting the witness' immunity to the prevention of the use of any of his testimony or its fruits in a subsequent prosecution. The post-*Kastigar* federal statute provides for "use and derivative use immunity."

Thus the government is still free to prosecute a witness if it can affirmatively establish an independent basis for its information. It should be apparent that the prosecution is not prejudiced by the defense's grant of "use and derivative use immunity" since the only restriction on future prosecution is that the government may not use, directly or indirectly, the testimony of the witness against himself. This is precisely the same restriction that would apply in prosecution of the witness in any event; the fifth amendment would, even absent the grant of immunity, deprive the government of precisely the evidence which the defense grant of immunity does.

The perjury problem involves the fear that a Target Defendant will enlist the support of a co-conspirator to testify falsely on his behalf. The risk of false testimony from a prosecution witness is at least as great since he is, by definition, vulnerable to indictment. Judge Leven-

thal in *Earl v. United States** suggested that the solution to that problem is an appropriate instruction advising the jury that in considering the credibility of the prosecution witness' testimony, it may consider the fact that the witness has been granted immunity for his testimony. Presumably this solution could also be applied to an immunized defense witness. The underlying reasoning which leads to the suspicion that the defendant will solicit perjured testimony appears to be based on the notion that the accused is suspect and therefore testimony in his behalf is suspect. The defendant is presumed innocent and therefore testimony on his behalf should not be presumed entitled to less respect than testimony offered by the prosecution.

► A prosecutor's offer of immunity without statutory authority violates due process when the fruits of that offer are used to convict a Target Defendant. Due process is violated not because the prosecutor's offer of immunity to the Witness Defendant is itself unlawful,* but because the prosecutor thus unlawfully obtains evidence against the Target Defendant. As set forth above, a prosecutor has no inherent authority to grant immunity. The legislature has defined those certain areas in which the prosecutor may not only voluntarily limit his own actions, but also may absolutely foreclose future prosecution by coordinate and successor prosecutors.* When a prosecutor goes beyond those bounds, he is intruding upon a field pre-empted by the legislature.

Justice Field in a concurring opinion in *U.S. V. San Jacinto Tin Co.** remarked: "I do not recognize the doctrine that the Attorney General takes any power by virtue of his office except what the Constitution and the laws confer. The powers of the executives of England are not invested in the executive officers of the United States."*

When the prosecutor goes beyond legislatively-approved areas and the Target Defendant is convicted as a result of the unauthorized agreement not to prosecute, evidence is unlawfully obtained and there is a violation of the Target Defendant's right to due process of law. In several analogous cases, to

prevent incriminating evidence from being obtained by unlawful means, the courts have adopted a policy of excluding such evidence and the fruits thereof.* To prevent a prosecutor from offering immunity without statutory authority and proceeding against the Target Defendant, a similar exclusionary rule should be applied. The defense attorney should raise this procedural point by an appropriate motion to suppress or a motion *in limine*. If the trial court rules adversely on the motion, the argument will be preserved for appeal.*

► *A program for Maryland: Prosecutorial Immunity*, as presently employed, raises serious questions and poses significant challenges not only to the constitutional framework of our legal system, but also to the basic philosophy of its application. Ours is an accusatorial system. A presumably innocent person is charged with a crime and, upon being charged, is cloaked with a variety of protective rights. It is inconsistent with this protection that he does not have the right to compel exculpatory testimony by granting immunity, when the prosecutor has the right to compel inculpatory testimony by granting immunity. The denial of this right violates his right to due process.

Although the spectre of the immunity bath and the threat of perjury are advanced as reasons for denying the accused the right to grant immunity, these reasons do not withstand scrutiny. *Kastigar* and its progeny of "use and derivative use" immunity statutes undermine the immunity bath argument, and the threat of perjury by defense-immunized witnesses cannot be demonstrated to be greater than that of prosecution-immunized witnesses.

In light of the weaknesses of the present system of immunity, changes are in order. Grants of immunity absent statutory authorization are, under present Maryland law, unlawful. They must be discontinued. The Maryland immunity statutes are neither uniform nor in conformity with present constitutional standards. They should be revised to recognize *Kastigar* and *Counselman*. In the process, the advisability of a general immunity statute should be considered.

Although there do not appear to have been any attempts to so utilize them, several of the Maryland immunity statutes may be broad enough to confer immunity-granting power on defendants. However, the majority of the statutes clearly grant such power to prosecutors only. There does not appear to be any justification for the differences in statutory language on this point. The statutes should be uniform and should either grant the defendant the right to grant immunity or should deny the right to both defendant and prosecution.

1. Immunity Granted without Statutory Authorization

Maryland law is clear that the prosecutor has no inherent authority to grant immunity. However, as noted above, it is impossible to prevent a prosecutor from refusing to initiate a criminal proceeding for whatever reason. Part of the solution must be a change in the philosophy of individual prosecutors. However, it is suggested that more aggressive investigation of the circumstances surrounding prosecution testimony may provide defense attorneys with an avenue for suppressing such unauthorized immunized testimony.

2. Breadth of Immunity

As set forth above, the Maryland immunity statutes provide for varying types of immunity: "use," "use and derivative use," and "transactional." "Use" immunity is, under *Counselman*, constitutionally insufficient; "use" immunity statutes should therefore be revised rather than waiting for a court challenge to their validity. "Transactional" immunity is, under *Ullman*, constitutional, but *Kastigar* indicates that a lesser grant will suffice. The immunity bath has been raised as an argument against the defendant's granting immunity, but it has never been carried to its logical conclusion: the risk is present in prosecutorial grants of immunity as well. There is a risk of immunity baths whenever "transactional" immunity is granted. Therefore, unless there is a compelling reason to retain "transactional" immunity, these statutes should be revised to provide only "use and derivative use" immunity.

3. The Defendant's Right to Grant



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Immunity

There are two solutions to the due process problems raised above: deny the right to grant immunity to both sides or grant it to both sides. Simply abolishing immunity is an unsatisfactory solution for other reasons, though. As pointed out above, it is impossible to entirely prevent the prosecutor from granting the functional equivalent of immunity because of his unreviewable discretion in initiating prosecutions. The best that can be done is to prevent him from absolutely barring other prosecutors from doing so. Furthermore, it is arguable that even where the prosecutor has no right to grant immunity, the defendant's rights of confrontation and compulsory process require that he have the right to do so.

The language of some Maryland immunity statutes may, in fact, be broad enough to afford the defendant the power to confer immunity. For example, in the Prohibited Election Practices immunity section (Art. 33 § 26-16(a) a witness "in any criminal prosecution" may obtain "transactional" immunity. In the sale of liquor to minors section (Art 27 § 400) "use" immunity may be conferred

on any minor furnishing testimony "...in the prosecution of any person for selling liquor to minors." While it may seem apparent that the intent was to use the word "prosecution" to mean the prosecutor's side of the case, it is arguable that "prosecution" means the entire case. This argument is reinforced by the fact that the legislature, in other sections of the Code, is explicit in limiting the right to grant immunity to the prosecutor. For Example, the Controlled Dangerous Substance Immunity section (Art 27 § 298 and the Conspiracy to Bribe section (Art 27 § 39) provide immunity only for those who testify on behalf of the state. The Bribery in Athletic Contests section (Art 27 § 25) provides immunity only for those compelled to "testify against" the defendant. The Sabotage immunity section (Art 27 § 540) provides immunity for those testimony is "required of him by the State."

The fact that it is arguable that the right to compel testimony by granting immunity may exist for defendants in certain prosecutions is hardly the solution to the due process problem, though. It merely emphasizes (if it does exist) the irrationality of the present immunity system in Maryland. Why should prohibited election practices and furnishing liquor to minors merit special treatment?

The right of a criminal defendant to confer immunity when necessary to compel exculpatory testimony should be recognized as a general principal of law. Safeguards (such as limiting the scope of immunity to "relevant" or "necessary" testimony) may be appropriate, but the need for safeguards should not preclude the recognition of the right.

(Footnotes available from authors upon request.)

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METHOD MATTERS

The key to Maryland Bar Review Course, Inc. students' success rate is the way the materials to be reviewed are presented in our classes. Our method is based on a very basic principle, that the direct approach is the best approach. Since our aim is students passing the bar exam, the direct approach means studying for it by using actual and hypothetical bar exam questions.

That means that in the course of discussing the questions all the necessary black letter law is reviewed. The student learns how the theory fits the facts, why one concept is correct, another incorrect. He learns how to read bar exam questions, how to analyse them, how to formulate a correct answer. And he learns what issues are important and recurrent on the bar exam. All in the course of discussing and analysing bar exam type questions.

We use a similar approach for the Multistate Exam preparation. Maryland Bar Review Course, Inc. presents the most coherent and direct preparation for the Maryland State Bar Exam available. That's why we can say we offer the best review program in Maryland. It works. Our students have proved it.

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