Notes

1. *Rogers v. Richmond*, 365 U.S. 534, 541 (1961).
2. *United States v. Apfelbaum*, 445 U.S. 115, 131 (1980).
3. *United States v. North*, 910 F.2d 843, 861 (D.C. Cir. 1990) ("Yet the very purpose of the Fifth Amendment under these circumstances is to prevent the prosecutor from transmogrifying into the inquisitor, complete with that officers' most pernicious tool—the power of the state to force a person to incriminate himself."), *opinion withdrawn and superseded in part on rehearing by United States v. North*, 920 F.2d 940 (D.C. Cir. 1990).
4. U.S. Const. amend. V.
5. Pa. Const. art. 1, § 9.
6. *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892); *see also Hoffman v. United States*, 341 U.S. 479, 486 (1951) (Fifth Amendment privilege extends to those statements "which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime . . . .").
7. *Counselman*, 142 U.S. at 560.
8. *Id.* at 548.
9. *Id.* at 548-50.
10. *Id.* at 586.
11. *Kastigar v. United States*, 406 U.S. 441, 452 (1972); *see also D'Elia v. Pennsylvania Crime Comm*'n, 555 A.2d 864, 869 (Pa. 1989) ("For approximately eighty years, *Counselman* was understandably read to prohibit, as a matter of federal constitutional law, a grant of immunity as a means of compelling testimony unless it was complete transactional immunity, i.e., immunity from prosecution for any offense related to the subject matter of the immunized testimony.").
12. *Id.* at 453.
13. *Id.* at 448-49.
14. *Id.* at 460.
15. *Id.* at 453.
16. *Id.* at 460.
17. *Kastigar*, 406 U.S. at 453 ("Transactional immunity . . . accords full immunity from prosecution for the offense to which the compelled testimony relates . . . ."); *United States v. Quatermain*, 613 F.2d 38, 40 (3d Cir. 1980) (*citing Kastigar*), *cert. denied*, 446 U.S. 954 (1980); *Commonwealth v. Swinehart*, 664 A.2d 957, 960 n.5 (Pa. 1995) ("'Transactional immunity' is the most expansive, as it in essence provides complete amnesty to the witness for any transactions which are revealed in the course of the compelled testimony.").
18. *United States v. Skalsky*, 857 F.2d 172, 176 (3d Cir. 1988) ("The most common type of an agreement not to prosecute is one in which the government promises not to prosecute an individual for any matters about which he testifies, provided the witness testifies truthfully and completely."). An example of a non-prosecution agreement in the state system is *Commonwealth of Pennsylvania v. Tyron B. Ali*, Nos. CP-22-CR-0004784-2009, CP-22-CR-0004785-2009, CP-22-CR-0004786-2009, CP-22-CR-0005898-2009 (Dauphin County Court of Common Pleas).
19. *Kastigar*, 406 U.S. at 449 (recognizing "distinction between statutes that provide transactional immunity and those that provide . . . immunity from use and derivative use"); *Quatermain*, 613 F.2d at 40 ("Use and derivative use immunity prohibits the use of compelled testimony or any evidence derived from that testimony against the witness in a criminal prosecution."); *Swinehart*, 664 A.2d at 960 n.5 ("'Use and derivative use' immunity enlarges the scope of the grant [of immunity] to cover any information or leads that were derived from the actual testimony given under compulsion.").
20. U.S. Attorneys' Manual, Criminal Resource Manual § 719; *see also United States v. Plummer*, 941 F.2d 799, 805 (9th Cir. 1991) ("We hold that use immunity presumptively includes derivative use immunity, unless the government can demonstrate in a given case that, at the time the agreement was made, it expressly clarified that only direct use immunity was offered.").
21. U.S. Attorneys' Manual, Criminal Resource Manual § 719; *see also United States v. Lyons*, 670 F.2d 77, 80 (7th Cir. 1982), *cert. denied*, 457 U.S. 1136 (1982).
22. Naftalis, Benjamin A., "*Queen for a Day" Agreements and the Proper Scope of Permissible Waiver of the Federal Plea-Statement Rules,* 37 Colum. J.L. & Soc. Probs. 1, 2 n.4 (Fall 2003); (explaining that "Queen for a Day" derives from 1950s television show where female contestant "judged to be living the hardest life" was crowned "Queen for a Day" and rewarded with gifts).
23. *Skalsky*, 857 F.2d at 175 ("Although 18 U.S.C. § 6002 sets forth the procedure for granting a witness formal immunity, the Department of Justice and the federal courts have consistently approved the use of 'informal immunity' agreements.").
24. *United States v. Sellers*, 501 F. App'x 194, 199 (3d Cir. 2012) (holding that information disclosed during proffer session properly used to cross-examine defendant at trial where defendant knowingly and voluntarily agreed to waiver of protection in Fed. R. Evid. 410), *cert. denied*, 133 S. Ct. 1482 (2013).
25. *United States v. Quinn*, 728 F.3d 243, 247, 253 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1872 (2014).
26. *Id.* at 251, 259.
27. *Id.* at 260-61.
28. *Commonwealth v. Johnson*, 487 A.2d 1320 (Pa. 1985). Nor does a defendant in state court have standing to challenge the grant of immunity to a prosecution witness. *Commonwealth v. Schomaker*, 437 A.2d 999, 86 n.3 (Pa. Super. 1981), *rev'd on other grounds*, 461 A.2d 1220 (Pa. 1983).
29. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 53

(1964). *See also Petition of Specter (Riccobene Appeal)*, 268 A.2d 104, 111 (Pa. 1970) ("We agree with this view of *Murphy*. Thus, as the immunity granted [to the witness] covered both Pennsylvania, and, through *Murphy* . . . Federal prosecution, as well as prosecution in other States, it was coextensive with his privilege against self-incrimination and therefore Constitutional.").

30. *Murphy*, 378 U.S. at 53.
31. *Id.* at 53-54.
32. *Id.* at 79.
33. *Kastigar*, 406 U.S. at 456-57 (citing *Murphy* as support for the proposition that "the privilege protects state witnesses against incrimination under federal law as well as state law, and federal witnesses against incrimination under state as well as federal law").
34. *Sklar v. Ryan*, 952 F. Supp. 1252, 1263 (E.D. Pa. 1990) (defendant's statements to state investigators properly admitted notwithstanding federal immunity agreement), *aff'd*, 937 F.2d 599 (3d Cir. 1991); *see also* U.S. Attorneys' Manual, Criminal Resource Manual § 719.
35. *United States v. Balsys*, 524 U.S. 666, 669 (1998) (declining to recognize Fifth Amendment privilege for Nazi who illegally immigrated to U.S. and refused to answer to questions during DOJ investigation based on fear of prosecution in foreign nation and stating: "We hold that concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause.").
36. *Id.* at 671.
37. *Garrity v. New Jersey*, 385 U.S. 493 (1967). Interestingly, in his dissenting opinion in *Aguilera v. Baca*, 510 F.3d 1161 (9th Cir. 2007), *cert. denied*, 555 U.S. 993 (2008), the Chief Judge of the United States Court of Appeals for the Ninth Circuit observed: "We can't expect public employees who are pressured to give a statement to know that they have immunity. I, for example, had no idea, even though I have been a government employee involved in law-related activities for almost three decades." *Id.* at 1179.
38. *Id.* at 617.
39. *Id.* at 500.
40. *Id.* at 496, 497.
41. *See generally Lefkowitz v. Turley*, 414 U.S. 70 (1973) (independent contractor cannot be barred from future contracts with state for refusing to waive privilege against self-incrimination); *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation*, 392 U.S. 280 (1968) (city workers may not be discharged for refusing to sign waivers of immunity from prosecution based on compelled statements); *Gardner v. Broderick*, 392 U.S. 273 (1968) (police officer cannot be discharged for claiming Fifth Amendment privilege in grand jury investigation concerning his official duties); *Spevack v. Klein*, 385 U.S. 511 (1967) (disbarment of attorney following invocation of privilege against self-incrimination at disciplinary hearing too costly a sanction to be constitutionally permissible).
42. *See Slochower v. Bd. of Higher Educ.*, 350 U.S. 551 (1956) (punishing employee for exercising Fifth Amendment privilege in employment context violates substantive due process).
43. *Gardner*, 392 U.S. at 278.
44. *Compare Michigan State Police Troopers Ass'n v. Hough*, 872 F.2d 1026 (6th Cir. 1989) (police offers could be required to answer questions concerning off-duty conduct since "criminal conduct by police officers—whenever it occurs—tends to reduce public trust in the police") *and Erwin v. Price*, 778 F.2d 668, 670 (11th Cir. 1985) (police officer required to answer questions about incident in which he allegedly pointed gun at citizen while off duty) *and O'Brien v. DiGrazia*, 544 F.2d 543, 546 (1st Cir. 1976) (police officer required to answer questions concerning financial affairs designed to ferret out corruption), *cert. denied*, 431 U.S. 914 (1977) *with Shuman v. City of Philadelphia*, 470 F. Supp. 449, 459 (E.D. Pa. 1979) (police officer may not be fired for refusing to answer questions about his sexual activities).
45. *Compare Atwell v. Lisle Park Dist.*, 286 F.3d 987, 990 (7th Cir. 2002) (holding that government employer has affirmative duty to apprise employee of both application and consequences of *Garrity* immunity) *with Hester v. City of Milledgeville*, 777 F.2d 1492, 1496 (11th Cir. 1985) (holding that government employer has no duty to offer employee use immunity) *and Hill v. Johnson*, 160 F.3d 469, 471 (8th Cir. 1998) (same) *and Gulden v. McCorkle*, 680 F.2d 1070, 1075-76 (5th Cir. 1982) (declining to adopt rule requiring affirmative tender of immunity), *cert. denied*, 459 U.S. 1206 (1983). Where a public employee is represented by counsel, there appears to be no affirmative duty to provide notice. *See Sher v. U.S. Dep't of Veterans Affairs*, 488 F.3d 489, 505 (4th Cir. 2007) (noting that no circuit has held that employee represented by counsel is entitled to notice from employer that compelled statements may be subject to *Garrity* rule), *cert. denied*, 552 U.S. 1309 (2008).
46. *See United States v. Vangates*, 287 F.3d 1315, 1324 (11th Cir. 2002). There is also a split of authority as to whether the immunity afforded by *Garrity* applies at the grand jury stage. *Compare In re Grand Jury Subpoenas Dated Dec. 7 and 8*, 40 F.3d 1096, 1104 (10th Cir. 1094) (holding that motion to quash grand jury subpoena for internal affairs investigation report was properly denied since officers who provided statements would have opportunity to request *Kastigar* hearing and incriminating statements were required to be redacted from report), *cert. denied,* 514 U.S. 1107 (1995), *with In*

re Grand Jury, John Doe No. G.J. 2005-2, 478 F.3d 581 (2007) (affirming decision to quash grand jury subpoena for internal investigation report based on confidentiality and self-incrimination concerns).

47. *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983).
48. *Id.* at 250.
49. *Id.* at 250-51.
50. *Id.* at 263-64.
51. *United States v. Doe*, 465 U.S. 605 (1984).
52. *Id.* at 613, 617.
53. *United States v. Hubbell*, 530 U.S 27 (2000).
54. *Id.* at 30.
55. *Id.* at 30-31.
56. *Id.* at 31.
57. *Id.*
58. *Id.* at 31-32.
59. *Id.* at 40-41.
60. *Id.* at 41.
61. *Id.* at 43.
62. *Skalsky*, 857 F.2d at 175 ("Although 18 U.S.C. § 6002 sets forth the procedure for granting a witness formal immunity, the Department of Justice and the federal courts have consistently approved the use of 'informal immunity' agreements."). *But see Commonwealth v. Parker*, 611 A.2d 199, 200 n.1 (Pa. 1992) (stating that district attorney "had no authority to grant [defendant] immunity" but rather was required to pursue procedure for statutory immunity).
63. *Santobello v. New York*, 404 U.S. 257, 262 (1971) ("when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such a promise must be fulfilled"); *Plummer*, 941 F.2d at 802 1991) ("ordinary contract principles apply when interpreting informal immunity agreements"); *United States v. Moscahlaidis*, 868 F.2d 1357, 1361 (3d Cir. 1989) (plea agreements are interpreted based upon contract principles).
64. U.S.S.G. § 1B1.8(a) states: "Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guidelines range, except to the extent provided in the agreement."
65. *See generally United States v. Perry*, 640 F.3d 805, 813 (8th Cir. 2011) (ambiguous proffer agreement construed against government and did not allow use of information disclosed in proffer session in determining sentencing guidelines range); *United States v. Baird*, 218 F.3d 221, 229 (3d Cir. 2000) ("In view of the government's tremendous bargaining power, we will strictly construe the text [of a plea or cooperation agreement] against it when it has drafted the agreement."); *United States v. Shorteeth*, 887 F.2d 253, 256-57 (10th Cir. 1989) ("[T]he language and spirit of Guidelines § 1B1.8 require the agreement to specifically mention the court's ability to consider the defendant's disclosures during debriefing in calculating the appropriate sentencing range before the court may do so.")
66. *United States v. Floyd*, 428 F.3d 513 (3d Cir. 2005) (rejecting government's argument that it entered plea bargain with limited knowledge of potential guidelines range and therefore should not be bound by agreement to seek downward departure and remanding for evidentiary hearing on whether defendant's assistance was substantial enough to warrant downward departure).
67. *Kastigar*, 406 U.S. at 460-61.
68. *Id.* at 460.
69. *Id.; see also Commonwealth v. Handfield*, 34 A.3d 187, 189-204 (Pa. Super. 2011) (finding after lengthy *Kastigar* hearing that Commonwealth established that prosecution of defendant arose out of legitimate sources independent of defendant's immunized testimony), *appeal denied*, 54 A.3d 347 (Pa. 2012).
70. *United States v. Poindexter*, 951 F.2d 369, 377 (1991) ("[U]nless the IC [Independent Counsel] proves on remand that the evidence received by the grand jury was untainted, or that any taint was harmless beyond a reasonable doubt, the indictment must be dismissed."), *cert. denied*, 506 U.S. 1021 (1992); *North*, 910 F.2d at 873 ("If the government has in fact introduced trial evidence that fails the *Kastigar* analysis, then the defendant is entitled to a new trial. If the same is true as to grand jury evidence, then the indictment must be dismissed."); *United States v. Hampton*, 775 F.2d 1479, 1489 (11th Cir. 1985) ("*Kastigar* and its progeny require dismissal of an indictment of a previously immunized witness unless the government can demonstrate that '*none* of the evidence presented to the grand jury is derived, directly or indirectly, from the immunized testimony'") (citation omitted); *United States v. Pagnotti*, 507 F. Supp. 2d 494, 501-02 (M.D. Pa. 2007) (indictment against immunized witness dismissed where government was unable to show independent source for evidence presented to grand jury).
71. *North*, 910 F.2d at 861.
72. *Id.* at 857.
73. *United States v. Pantone*, 634 F.2d 716, 721 (3d Cir. 1980), citing *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973).
74. *Id.*
75. *North*, 910 F.2d at 860 ("the use of immunized testimony by witnesses to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements, constitutes *indirect evidentiary* not *nonevidentiary use*") (emphasis in original).

76. *Poindexter*, 951 F.2d at 373 (quoting *North*, 910 F.2d at 863).
77. *North*, 910 F.2d at 857.
78. *Id.*
79. *New Jersey v. Portash*, 440 U.S. 450, 459-460 (1979) ("[A] person's testimony before a grand jury under a grant of immunity cannot constitutionally be used to impeach him when he is a defendant in a later criminal trial."); *United States v. Frumento*, 552 F.2d 534, 543 (3d Cir. 1977) ("Were we to permit impeachment with immunized testimony, we would then be affording the immunized witness something less than his full Fifth Amendment protection.").
80. *North*, 910 F.2d at 857.
81. *United States v. Semkiw*, 712 F.2d 891, 895 (3d Cir. 1983) ("The possibility that the government compromised the defendant's immunity is heightened by the fact that it assigned the trial to an attorney who had 'access' to the compelled testimony. It is no answer for the prosecution to say, as it does on this appeal, that the defendant did not prove that the trial attorney learned his defense from the testimony. The burden of proof at the hearing on the issue rested with the government, not the defendant.").
82. *Hampton*, 775 F.2d at 1485 ("the government is only required to demonstrate by a preponderance of the evidence an independent source for all evidence introduced") (citation and internal quotation marks omitted).
83. *Swinehart*, 664 A.2d at 969.
84. *See*, *e.g.*, 18 U.S.C. § 6002; 18 Pa. C.S.A. § 5947(d)(1).
85. *Apfelbaum*, 445 U.S. at 122.
86. *Id.* at 130.
87. Fed. R. Evid. 410(a)(4); *Kercheval v. United States*, 274 U.S. 220, 224 (1927) (holding that withdrawn guilty plea may not be used against defendant because to rule otherwise would defeat purpose for allowing withdrawal). Rule 410 is cross-referenced in Rule 11(f) of the Federal Rules of Criminal Procedure.
88. *See United States v. Jones*, 32 F.3d 1512, 1517 (11th Cir. 1994) (exclusion rule does not extend to statements made to law enforcement agents as distinguished from government counsel); *United States v. Sebetich*, 776 F.2d 412, 421-22 (3d Cir. 1985) (defendant's inculpatory statements to police chief not made in course of plea discussions and therefore admissible against defendant), *cert. denied*, 484 U.S. 1017 (1988); *but see United States v. Serna*, 799 F.2d 842, 849 (2d Cir. 1986) (defendants' statements excluded under Rule 410 even though prosecutor was not present because agents were authorized to engage in plea discussions).
89. *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) ("We hold that absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable.").
90. Rule 410 of the Pennsylvania Rules of Evidence states in pertinent part: "In a . . . criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions: . . . a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later withdrawn guilty plea." Pa. R. Evid. 410(a)(4).
91. *Commonwealth v. Miller*, 568 A.2d 228, 230 (Pa. Super. 1990) (voluntary admission by defendant which subsequently led to plea negotiations not subject to exclusion), *appeal denied*, 581 A.2d 570 (Pa. 1990); *Commonwealth v. Calloway*, 459 A.2d 795, 800-01 (Pa. Super. 1983) ("Of primary importance in assessing an accused's subjective expectation of negotiating a plea is whether the Commonwealth showed an interest in participating in such discussions . . . .").
92. *Commonwealth v. Widmer*, 120 A.3d 1023, 1028 (Pa. Super. 2015) (prosecutor permitted to introduce defendant's admissions where defendant agreed that "anything said in conjunction with proffer would be used against him if he later decided not to go through with his plea . . .").