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Immunity Issues in Federal and Pennsylvania Criminal Law and Practice

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ABSTRACT

This article discusses the legal standards for statutory immunity in federal and Pennsylvania courts. It addresses the pitfalls of contractual agreements granting limited immunity. The article provides practical examples of the many versions of "use" by the government which are violative of federal and state statutes establishing immunity protection. Finally, critical differences in burdens of proof and obligations to prove wholly independent sources are explained.

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When a client is called to testify before a grand jury, it is critical to consider specific protections to avoid harmful uses of the testimony.

I. THREE STAGES OF A CRIMINAL CASE

A criminal case can be divided into three stages: pretrial (stage 1), trial (stage 2), and post-trial (stage 3). Each stage of the criminal process has due process protections for the accused. Clients faced with the loss of personal freedom and financial loss reasonably seek strategies which will thoughtfully utilize the protections to favor a better outcome of the case.

A broad review of the three stages is useful early in the representation. The general principles defining the rules of each stage are known by the lawyer, but can be confusing to the client. Explaining the rules of discovery, search and seizure principles, jury instructions, sentencing guidelines, and appellate procedure can begin the process of building realistic expectations for the client. The rights and protections attached to the principal issues in a criminal case are relatively constant. It is within these three broad structures that, over the life of the case, the criminal defense lawyer focuses on specific rights, controlling decisions, and admissible testimony. This helps develop a refined analysis of the law and a strategy for the defense.

A. Stage 1: Pretrial

The pretrial stage can begin with an incident long before indictment. It could start with a grand jury subpoena for records, a notice of violation from a regulatory body, or a target letter. A debrief of the client ordinarily provides a general understanding of the facts of the case. This information could reveal whether the government executed search warrants, issued grand jury subpoenas, or interviewed the client. A simple checklist for Stage 1 evaluation arises naturally from the foundational constitutional protections: the Fourth Amendment (right not to be subject to unreasonable search and seizure), Fifth Amendment (right not to be compelled to be a witness against oneself), and Sixth Amendment (right to a jury trial, be informed of the nature of the accusation, subpoena witnesses, and obtain the assistance of counsel). The law governing the application of each of these rights provides a preliminary sense whether the government acted lawfully in its collection of evidence. Discussion of defense subpoenas can guide a pretrial defense investigation with the power of compelling testimony.

B. Stage 2: Trial

Trial is dynamic. Testimony comes from humans and is not very predictable. One critical component of trial is the court's instructions on the essential elements of the offense. Corralling the basic elements of proof can be time consuming. Knowing the specific instructions the court will give and the proof system the government must meet improves the focus of an investigation, lending a value system to the defense investigation and increasing the pro-

ductivity of meetings between the client and defense lawyer. For example, the client lived through the facts and may have had contact with the witnesses. Consequently, the client's understanding of the jury instructions can enhance the client's appreciation of the strength or weakness of the government's case. Jury instructions on potential defenses (e.g., good faith reliance) round out the analytical picture of the cycle of a trial. Stage 2 should also discuss the admissibility of, and defense challenges to, the prosecution's evidence by reference to the applicable rules of evidence such as Federal Rule of Evidence 404(b) (past bad acts), FRE 801 (hearsay), and FRE 702-704 (expert testimony).

C. Stage 3: Posttrial

The post-trial stage is the most difficult to discuss with a client. However, it gives critical balance to the prospects of contesting the case at trial. Sentencing forecasts are the known consequential risks of a conviction at trial. Unpleasant, but true. The sentencing process is steeped in laws. Statutory maximum penalties, mandatory minimums, and sentencing guideline estimates impact the likelihood of incarceration, the length of incarceration, fines, and restitution. Separate estimates can be made for sentencing after trial versus sentencing after a guilty plea. Sentencing projections give meaningful input to the process of weighing the risks and benefits of proceeding to trial or negotiating a guilty plea. Mitigation strategies can be identified (e.g., variance bases). Collateral consequences of conviction — particularly in white-collar cases — include the impact on professional licenses, pensions, and participation in federal or state programs. Collateral consequences can greatly impact the pretrial-stage evaluation of the decision to go to trial or plead guilty. Thus, early appreciation of what will provoke a collateral consequence empowers the client to place value on concessions that may avoid an undesirable collateral consequence.

II. GENERAL BACKGROUND ON IMMUNITY

Many European countries have "inquisitorial" systems of justice. Judges may ask the defendant questions, and, if the defendant refuses to speak, an inference of guilt may be drawn.

The American-style system is "accusatorial," not inquisitorial. The government must posit the allegation and prove it beyond a reasonable doubt. Prosecutors must prove the "act" (*actus reus*) and the "intent" (*mens rea*) to commit the criminal act.

Nemo tentur sepsum accusare, "no man is bound to accuse himself," is the cornerstone of the American system. The government's investigative and prosecutorial focus seeks evidence of the defendant's intent. Thus, the Fifth Amendment right not to be compelled to be a witness against oneself is the fulcrum of the criminal process. Its invocation or waiver is often a turning point. It is more than just a statement of the defendant. It is a statement on the

one proof requirement that is most critical: the intent of the defendant at the instant of the offense. Even if the government has strong evidence of intent, allowing the government to interview a client is a momentous strategic decision. The type of protection arranged can be meaningful, or ephemeral, depending on nuanced terms. An understanding of use and derivative use immunity is central to that process.

A. Prosecutorial Discretion

The exercise of prosecutorial discretion is an Executive Branch function.[2] The prosecution possesses the sole authority to decide whether to prosecute and what charges to bring.[3] Arising from that prosecutorial discretion is the authority to grant a person immunity, or to grant limited forms of immunity under certain conditions.

B. Compelled to Testify by Subpoena

Witnesses may be compelled by subpoena to testify before grand juries, petit juries, or agencies.[4] Among the necessary and most important of the powers of the states as well as the federal government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries.[5]

C. Fifth Amendment

The Fifth Amendment provides: "No person shall be ... compelled in any criminal case to be a witness against himself ...." U.S. Const. amend. V. Thus, when a witness is subpoenaed to testify in a proceeding, the Fifth Amendment right may be implicated. The Fifth Amendment "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory, and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."[6]

III. STATUTORY AUTHORITY

A. Federal Prosecutors

Federal prosecutors have statutory authority to compel the testimony in response to a witness's assertion of the Fifth Amendment. Pursuant to 18 U.S.C. § 6003, a federal prosecutor may request an order of court compelling the witness to testify. In exchange, the witness is cloaked with statutory immunity such that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other

2 Wayte v. United States, 470 U.S. 598, 607 (1985); United States v. Quinn, 728 F.3d 243, 252 (3d Cir. 2013); Commonwealth v. Cosby, 252 A.3d 1092, 1135 (Pa. 2021).

3 *Wayte*, 470 U.S. at 607.

4 Blair v. United States, 250 U.S. 273, 280-81 (1919).

5 *Id.*

6 Kastigar v. United States, 406 U.S. 441, 444-45 (1972). *Kastigar* will be discussed in more detail below.

information) may be used against the witness in any criminal case . . . ."[7]

B. State Prosecutors

Pennsylvania prosecutors have authority to request an immunity order to compel the testimony of a witness who refuses to testify on the basis of self-incrimination. "No testimony or other information compelled under an immunity order, or any information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case ...."[8]

If a witness has been compelled to testify pursuant to a court-ordered grant of immunity, the witness's testimony and information derived therefrom may not be used, directly or indirectly, against the witness in another jurisdiction.[9] In *Murphy v. Waterfront Comm'n* (1964), the Court held that the compelled testimony could not be used against the witness in a federal proceeding and explained that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him."[10]

IV. VULNERABILITIES WITH CONTRACTED IMMUNITY

The principles of federalism and the dual sovereignty doctrine present the concern that a contract of immunity binds only the sovereign exercising prosecutorial discretion.[11] Securing the ratification of the grant of immunity from the other sovereign during time sensitive negotiations may be impractical.

The United States Department of Justice Criminal Resource Manual states:

> An important difference between statutory/formal immunity and informal immunity is that the latter is not binding upon the States. This follows from the fact that the local prosecutor representing the State is normally not a party to the agreement between the witness and the Federal prosecutor, and thus cannot be contractually bound by the Federal prosecutor's agreements.[12]

An example of this issue is explained in *Taylor v. Singletary* (11th Cir. 1998).[13] In 1981, FBI agents asked James E. Taylor to testify before a federal grand jury about two particular drug smuggling organizations.[14] He informed the

7 18 U.S.C. §§ 6002-6003; *Kastigar*, 406 U.S. at 460.
8 42 Pa.C.S.A. § 5947.
9 Murphy v. Waterfront Comm'n, 378 U.S. 52, 53 (1964).
10 *Id.* at 79. *See also, Kastigar*, 406 U.S. 441, 456-457 (1972).
11 *See* Rinaldi v. United States, 434 U.S. 22, 27 (1977) (dual sovereignty doctrine citing the *Petite* policy).
12 *See* U.S. Department of Justice, Criminal Resource Manual §719 (2025).
13 148 F.3d 1276, 1277-78 (11th Cir. 1998).
14 *Id.* at 1278.

agents that if subpoenaed to appear before the grand jury, he would invoke his Fifth Amendment privilege against self-incrimination. In response, the agents told Taylor that they would seek a statutory grant of immunity to force him to testify and suggested that he find a lawyer to help him negotiate an immunity agreement. Defense counsel negotiated an informal immunity agreement with the United States Attorney's Office and signed a letter outlining an informal immunity agreement. The informal immunity agreement was limited to just the United States Attorney's Office for the Southern District of Florida and Taylor: "This agreement is limited to the United States Attorney's Office for the Southern District of Florida and cannot bind other federal, state of [sic] local prosecuting authorities."[15] Pursuant to the informal immunity agreement, Taylor testified before a grand jury, and testified at trial.[16]

Five years later Taylor was indicted by Florida state prosecutors for drug trafficking.[17] Taylor filed a motion to dismiss pursuant to *Kastigar*. The state court noted that the defendant was granted informal (or "pocket") immunity, and, therefore, the state court would hold a pre-*Kastigar* hearing to determine whether the defendant was even entitled to *Kastigar* protections. The state court granted a *Kastigar* hearing, but denied the motion to dismiss. Taylor went to trial on the state drug trafficking charges. He testified, and he did not assert his Fifth Amendment privilege. On cross-examination, the prosecutor attempted to impeach Taylor with his testimony in the federal case. Defense counsel objected, asserting *Kastigar*. The state court overruled the objection and allowed the state prosecutor to use Taylor's testimony to attack his credibility. Taylor was convicted, exhausted the state appeals, and filed a *habeas* in federal court.[18]

The federal district court hearing the *habeas* petition found that a defendant who voluntarily enters into an informal immunity agreement is only protected to the extent established in the agreement itself. The district court rejected the petition, finding that by the plain terms the agreement did not bind state prosecutors or state courts. The Eleventh Circuit affirmed the district court: "We hold that the agreement did not bind the state of Florida and therefore could not have required the [state trial court] to prevent the prosecutor from impeaching [the defendant] with his testimony in the federal case."[19] The circuit found that the "agreement did not on its face bind the state authorities."[20]

A solution to this conundrum is to negotiate a condition to the limited immunity agreement. The following sentence in a proffer agreement will effectively contractually expand protection to other jurisdictions which wish to

15 *Id.*
16 *Id.* at 1279.
17 *Id.*
18 *Id.* at 1280.
19 *Id.* at 1284.
20 *Id.*

use the information derived from the contractually granted limited immunity: "The prosecuting authority will not make available to any other prosecuting authority any testimony or other information provided by the witness unless that authority or agency agrees to be bound by the terms and conditions of this agreement."

A. Contract Principles

State and federal courts have historically applied contract principles to agreements between prosecutors and individual criminal defendants.[21] In *Commonwealth v. Cosby* (2021), the Pennsylvania Supreme Court noted that "the applicability of contract law principles to criminal negotiations is not limited to the plea bargain process."[22] "For instance, the United States Court of Appeals for the Third Circuit has explained that, like plea agreements, non-prosecution agreements are binding contracts that must be interpreted according to general principles of contract law, guided by 'special due process concerns.'"[23] In view of the government's tremendous bargaining power, the courts strictly construe the text against it when it has drafted the agreement.[24]

The Third Circuit has established that cooperation agreements are analyzed under contract principles.[25] The Third Circuit has stated: ". . . [W]e have cautioned that because a defendant gives up multiple constitutional rights by entering into a plea agreement, courts must carefully scrutinize the agreement to ensure that the government has fulfilled its promises."[26] Courts must determine whether the Government's conduct was consistent with what was reasonably understood by the defendant when he entered the plea of guilty.[27] The court is to apply the "plain meaning" of the language of the agreement.[28] When a defendant pleads guilty pursuant to a plea agreement, he gives up his rights to a fair trial, confrontation, and a potential acquittal by a jury; the Government, in return, secures its conviction without effort or risk.[29] The remedy, upon the finding of a breach, is specific performance or allowance of the party to withdraw from the agreement.[30]

B. Informal Contractual Immunity: Federal

Federal courts, including the Third Circuit, have long recognized the

21 *See* United States v. Baird, 218 F.3d 221, 229 (3d Cir. 2000); *Cosby*, 252 A.3d 1092, 1131 (Pa. 2021).
22 *Cosby,* 252 A.3d at 1131 (citation omitted).
23 *Id*. at 1133 (citation omitted).
24 United States v. Floyd, 428 F.3d 513 (3d Cir. 2005).
25 United States v. Williams, 510 F.3d 416, 422 (3d Cir. 2007); *Baird*, 218 F.3d at 229; United States v. Nolan-Cooper, 155 F.3d 221, 236 (3d Cir. 1998).
26 *Williams,* 510 F.3d at 422. *See also,* United States v. Rivera*,* 357 F.3d 290, 294-95 (3d Cir. 2004).
27 *Baird*, 218 F.3d at 229.
28 United States v. Cruz, 95 F. 4th 106, 111 (3d Cir. 2024); *see also, Floyd*, 428 F.3d 513, 517 (3d Cir. 2005) (plain language); United States v. Gebbie, 294 F.3d 540, 545 (3d Cir. 2002) (analysis begins with the text of the agreement); *Williams*, 510 F.3d at 425.
29 United States v. Isaac, 141 F.3d 477, 483 (3d Cir. 1998).
30 *Nolan-Cooper*, 155 F.3d at 241; *Rivera*, 357 F.3d at 297.

enforceability of informal immunity agreements.[31] A grant of informal contractual immunity will be presumptively interpreted as granting derivative use immunity.[32] However, limited immunity proffer agreements which clearly reserve derivative use to the government will be enforced by the courts.[33]

Proffer agreements are contractual limited immunity agreements. Historically, these agreements were referred to as "Queen-for-A-Day," and conferred only use immunity upon the accused. These agreements no longer fit a protype of rights and are dependent on the policies of individual jurisdictions. Proffer agreements commonly preserve to the government authority to use information disclosed in a proffer session to impeach the witness at trial if defense counsel make statements or elicit testimony that conflict with the proffer.[34]

C. Informal Contractual Immunity: Pennsylvania

Historically, Pennsylvania had not recognized "pocket" immunity. In 1988 in *Commonwealth v. Bernstein* the Superior Court said, "Thus, while the prosecutor makes the judgment that a conferral of immunity is necessary, and petitions the court for grant of immunity, only the court can issue the order."[35] The immunity landscape was redrawn, however, with the Pennsylvania Supreme Court's 2021 decision in *Cosby.*[36] In *Cosby*, the Montgomery County district attorney made a public statement declining to prosecute Bill Cosby with the expectation that Cosby would no longer enjoy the protection of the Fifth Amendment and Article I, Section 9, which provides constitutional protection against the government compelling an individual from becoming a witness against oneself.

The Pennsylvania Supreme Court found that Cosby relied upon the public non-prosecution announcement when he testified in depositions without invoking the privilege against self-incrimination.[37] The Court recognized that no formal statutory immunity was granted, no informal non-prosecution agreement was reached, and that there was no relationship between Cosby and the district attorney on which to premise a promise.[38] However, the Court found a "unilateral exercise of prosecutorial discretion."[39] The Court said, "We hold that, when a prosecutor makes an unconditional promise of non-prosecution, and when the defendant relies upon that guarantee to the detriment of his constitutional right not to testify, the principal of fundamental fairness that

31 United States v. Skalsky, 857 F.2d 172, 175 (3d Cir. 1988) ("Although 18 U.S.C. § 6002 sets forth the procedure for granting witness formal immunity, the Department of Justice and the federal courts have consistently approved the use of 'informal immunity' agreements"); *see also*, U.S. Dept. of Justice, Criminal Resource Manual, "719. Informal Immunity Distinguished From Formal Immunity."

32 United States v. Plummer, 941 F.2d 799, 805 (9th Cir. 1991).

33 United States v. Lyons, 670 F.2d 777, 80 (7th Cir. 1982), *cert. denied* 457 U.S. 1136 (1982); *see also*, *Immunity: An Overview*, For The Defense, Vol. 1, Issue 4, December 2016, p. 9.

34 United States v. Sellers, 501 F. App'x 194, 199 (3d Cir. 2012).

35 515 A.2d 54, 58 (Pa. Super. 1988).

36 *Cosby,* 252 A.3d 1092.

37 *Id.* at 1131.

38 *Id.* at 1129.

39 *Id.* at 1130.

undergirds due process of law in our criminal justice system demands that the promise be enforced."[40]

V. UNITED STATES SENTENCING GUIDELINE § 1B1.8

Section 1B1.8 of the federal sentencing guidelines reads as follows:

> (a) 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 guideline range, except to the extent provided in the agreement.*
>
> (b) The provisions of subsection (a) shall not be applied to restrict the use of information:
>
> (1) known to the government prior to entering into the cooperation agreement;
>
> (2) concerning the existence of prior convictions and sentences in determining §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender);
>
> (3) in a prosecution for perjury or giving a false statement;
>
> (4) in the event there is a breach of the cooperation agreement by the defendant; or
>
> (5) in determining whether, or to what extent, a downward departure from the guidelines is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities).[41]

The Department of Justice advises that "the prosecutor should ensure that the substance of the witness's compelled testimony is not disclosed to the sentencing judge unless the witness indicates that he or she does not object."[42]

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40 *Id.* at 1131.

41 USSG §1B1.8 (emphasis added). United States v. Mitchell, 636 Fed. Appx. 593, 596 (3d Cir. 2016) (Guidelines restrict use of self-incriminating information provided pursuant to a cooperation or proffer agreement); United States v. Taylor, 277 F.3d 721, 724-25 (5th Cir. 2001) (immunized information may not be used in determining the applicable guideline range); *Baird*, 218 F.3d at 231 (government may not evade U.S.S.G. § 1B1.8).

42 U.S. Department of Justice, Criminal Resource Manual § 725 (2025).

VI. IMMUNITY BURDENS AND STANDARDS OF PROOF

A. Federal

The United States Supreme Court has established a high standard of proof to overcome the allegation of improper use of immunized evidence: "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence."[43]

Immunity litigation can involve nuanced determinations of "use." There is no clear, comprehensive definition of "use." The most effective delineation of impermissible use is through the examination of cases.

***KASTIGAR v. UNITED STATES* (S. Ct. 1972):** Joseph Kastigar was subpoenaed to appear before a grand jury on February 4, 1971.[44] Prosecutors obtained an order compelling Kastigar to answer questions and produce evidence to the grand jury based upon a grant of immunity pursuant to 18 U.S.C. §§ 6002-6003. Kastigar refused to testify, asserting that the immunity statute was not coextensive with the scope of the Fifth Amendment privilege against self-incrimination.

The Supreme Court concluded that the statute "prohibits the prosecutorial authorities from using compelled testimony in any respect, and it therefore ensures that the testimony cannot lead to the infliction of criminal penalties on the witness."[45] The Court held 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."[46]

In order to implement this constitutional rule, the federal government "must be prohibited from making any such use of compelled testimony and its fruits."[47] The Court noted that the statute "provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom ...."[48] "This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of compelled disclosures."[49]

Once the defendant demonstrates that she or he has testified under a grant of immunity, the federal authorities have the heavy burden of showing that all of the evidence is not tainted by establishing that they had an independent,

43 *Kastigar*, 406 U.S. at 460 (*citing Murphy*, 378 U.S. at 79 n.18).
44 *Id.* at 442.
45 *Id.* at 453.
46 *Id.*
47 *Id.* at 456 (citing *Murphy*, 378 U.S. at 79).
48 *Id.* at 460.
49 *Id.*

legitimate source for the disputed evidence.[50] The government's burden is not limited to a negation of taint. The burden "imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."[51] The Court found that "[t]his is very substantial protection, commensurate with that resulting from invoking the privilege itself."[52]

***UNITED STATES v. NORTH* (D.C. Cir. 1990):** In 1987 Lieutenant Colonel Oliver L. North, a former member of the National Security Council, testified before the Iran/Contra congressional committees.[53] North invoked his Fifth Amendment right, and, in response, the government compelled his testimony by granting immunity pursuant to 18 U.S.C. § 6002.[54] North's six days of testimony were carried on national television. North was later indicted.[55] The defense filed motions seeking a *Kastigar* hearing and dismissal of the indictment based upon immunity violations. The district court held a "preliminary" *Kastigar* inquiry in which the court reviewed transcripts and exhibits, but took no live testimony.[56] The *Kastigar* motion was denied. North was convicted after trial, and an appeal was heard by the District of Columbia Circuit.

The circuit court was critical of the district court for its failure to hold a full hearing as required by *Kastigar* to ensure that the prosecution made no use of North's immunized congressional testimony.[57] The circuit noted that the defendant's "argument depends on the long-recognized principle that a predicate to liberal constitutional government is freedom of a citizen from compulsion to testify against himself."[58] In support, the circuit quoted the Supreme Court's 1886 opinion in *Boyd v. United States*:

> And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.[59]

Under *Kastigar*, a grant of use immunity under 18 U.S.C. § 6002 enables the

50 *Id.* at 460-61
51 *Id.*
52 *Id.* at 461.
53 United States v. North, 910 F.2d 843, 851 (D.C. Cir. 1990), opinion withdrawn and superseded in part on other grounds on reh'g, 920 F.2d 940 (D.C. Cir. 1990).
54 *North,* 910 F.2d at 851.
55 *Id.*
56 *Id.* at 855.
57 *Id*. at 852.
58 *Id.* at 853.
59 Boyd v. United States, 116 U.S. 616, 631-32 (1886).

government to legally compel a witness's self-incriminating testimony.[60] This is so because the statute prohibits the government both from using the immunized testimony itself and also from using any evidence derived directly or indirectly therefrom.[61]

The circuit noted that most courts "following *Kastigar* have imposed a 'preponderance of the evidence' evidentiary burden on the government."[62] The primary lesson is "that the government always bears the burden of proof and that we may not infer findings favorable to the government."[63]

The District of Columbia Circuit was unequivocal in remanding the *North* case for a *Kastigar* hearing: "On remand, if the prosecution is to continue, the District Court must hold a full *Kastigar* hearing that will inquire into the content as well as the sources of the grand jury and trial witnesses' testimony. That inquiry must proceed witness-by-witness; if necessary, it will proceed line-by-line and item-by-item."[64] The court continued, "For each grand jury and trial witness, the prosecution must show by a preponderance of the evidence that no use whatsoever was made of any of the immunized testimony either by the witness or by [the prosecution] in questioning the witness."[65] "Unless that District Court can make express findings that the government has carried this heavy burden as to the content of all of the testimony of each witness, that testimony cannot survive the *Kastigar* test."[66]

The D.C. Circuit also sent a message to the Government: "We remind the prosecution that the *Kastigar* burden is 'heavy' not because of the evidentiary standard, but because of the constitutional standard; the government has to meet its proof only by a preponderance of the evidence, but *any* failure to meet that standard must result in exclusion of the testimony."[67] The district court had reviewed witness interviews and grand jury testimony, but did not hold a factual hearing where testimony was taken. "Of course, this 'review' neatly avoided any cross-examination of witnesses who were admittedly exposed to immunized testimony ...."[68] The prosecution "obviously wished to avoid cross-examination of the exposed witnesses."[69]

"A trial court must normally hold a hearing (a '*Kastigar* hearing') for the purpose of allowing the government to demonstrate that it obtained all of the evidence it proposes to use from sources independent of the compelled testimony."[70] "A district court holding a *Kastigar* hearing 'must make specific

60 *North*, 910 F.2d at 854.
61 *Id.*
62 *Id.*
63 *Id.* at 867.
64 *Id.* at 872.
65 *Id.*
66 *Id.* at 873.
67 *Id.*
68 *North*, 920 F.2d at 944.
69 *Id.*
70 *Id.* at 854.

findings on the independent nature of the proposed [allegedly tainted] evidence.'"[71]

"It may be that it is possible in the present case to separate the wheat of the witnesses' unspoiled memory from the chaff of [the defendant's] immunized testimony, but it may not. There should at least be a *Kastigar* hearing and specific findings on that question. If it proves impossible to make such a separation, then it may well be the case that the prosecution cannot proceed."[72]

The circuit court identified several different types of improper "use." The use of immunized testimony by witnesses to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior contemporaneous statements, constitutes evidentiary use.[73] "If the government uses immunized testimony to refresh the recollection of a witness (or to sharpen his memory or focus his thought) when the witness testifies before a grand jury considering the indictment of a citizen for acts as to which the citizen was forced to testify, then the government clearly has *used* the immunized testimony."[74]

"The core purpose of the immunity statute, 18 U.S.C. §§ 6001-6005, is to allow the prosecution of an immunized witness while preventing use of his compelled testimony. One forbidden use of the immunized testimony is the identification of a witness, but other uses of a citizen's immunized testimony — as by presenting the testimony of grand jury or trial witnesses that has been derived from or influence by the immunized testimony — are equally forbidden."[75]

"When the government puts on witnesses who refresh, supplement, or modify that evidence with compelled testimony, the government uses the testimony to indict or convict. The fact that the government violates the Fifth Amendment in a circuitous or haphazard fashion is cold comfort to the citizen who has been forced to incriminate himself by threat of imprisonment for contempt."[76] The court found that "[t]his type of use by witnesses is not only evidentiary in any meaningful sense of the term; it is at the core of the criminal proceeding."[77] *Kastigar* "does not prohibit simply 'a whole lot of use,' or 'excessive use,' or 'primary use' of compelled testimony. It prohibits '*any* use' direct or indirect."[78]

Knowledge by prosecutors of immunized testimony can be deemed a violation of *Kastigar*. Immunized evidence in the hands of prosecutors may explain "evidence theretofore unintelligible, and it may expose as significant

71 *Id.* at 854-855, (*citing* United States v. Rinaldi, 808 F.2d 1579, 1584 (D.C. Cir. 1987)).
72 *Id.* at 862.
73 *North*, 910 F.2d at 856.
74 *Id*. at 861(emphasis in original).
75 *Id.* at 865.
76 *Id.* at 860.
77 *Id.*
78 *Id.* at 861 (emphasis in original).

facts once thought irrelevant (or vice versa). Compelled testimony could indicate which witnesses to call, and in what order. Compelled testimony may be helpful in developing opening and closing arguments."[79]

"From a prosecutor's standpoint, an unhappy byproduct of the Fifth Amendment is that *Kastigar* may very well require a trial within a trial (or a trial before, during, or after a trial) if such a proceeding is necessary for the court to determine whether or not the government has in any fashion used compelled testimony to indict or convict a defendant."[80]

"We readily understand how court and counsel might sigh prior to such an undertaking. Such a *Kastigar* proceeding could consume substantial amounts of time, personnel, and money, only to lead to the conclusion that a defendant — perhaps a guilty defendant — cannot be prosecuted."[81] "Yet the very purpose of the Fifth Amendment under these circumstances is to prevent the prosecutor from transmogrifying into the inquisitor, complete with that officer's most pernicious tool — the power of the state to force a person to incriminate himself."[82] "As between the clear constitutional command and the convenience of the government, our duty is to enforce the former and discount the latter."[83]

"The government must occasionally decide which it values more: immunization ... or prosecution. If the government chooses immunization, then it must understand that the Fifth Amendment and *Kastigar* mean that it is taking a great chance that the witness cannot constitutionally be indicted or prosecuted."[84]

"Here, what is prohibited and unconstitutional under the Fifth Amendment and *Kastigar* is *the very presentation of the immunized testimony*. Where immunized testimony is used before a grand jury, the prohibited act is simultaneous and coterminous with the presentation; indeed, they are one and the same. There is no independent violation that can be remedied by a device such as the exclusionary rule: the grand jury process itself is violated and corrupted, and the indictment becomes indistinguishable from the constitutional and statutory transgression."[85]

During a reconsideration of the appeal, the circuit vented its frustration with the Government's disregard of "the fundamental distinction between the presentation to the grand jury of evidence that has previously been unconstitutionally obtained and that of constitutionally-obtained evidence whose exposure to the grand jury amounts to a constitutional violation itself."[86]

79 *Id.* at 857-58.
80 *Id.* at 861.
81 *Id.*
82 *Id.*
83 *Id.*
84 *Id.* at 862.
85 *Id.* at 869 (emphasis in original).
86 *North*, 920 F.2d at 947.

Grand jury consideration of evidence already unconstitutionally compelled and grand jury consideration of immunized testimony "fall on different sides of this fence."[87] "By contrast, the grand jury and the grand jury process may never 'itself violate a valid privilege'; such action presents a question not of remedies but of *rights*."[88] *Kastigar* "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect."[89] "When the prosecution reneges on this constitutionally-mandated bargain and presents the immunized testimony to the grand jury, the constitutional violation is part and parcel of the grand jury process. The presentation — 'use'— of the testimony is precisely the prescribed act."[90] "Rather, the situation is no different than if the grand jury had itself forced the defendant to give incriminating answers and any indictment based upon immunized evidence is no less tainted."[91]

***UNITED STATES v. HUBBELL* (S. Ct. 2000):** The prosecution served Webster L. Hubbell with a grand jury subpoena *duces tecum* for the production of 11 categories of documents.[92] Hubbell appeared before the grand jury and invoked his Fifth Amendment privilege against self-incrimination.[93] In response to questioning by the prosecutor, Hubbell initially refused "to state whether there are documents within my possession, custody, or control responsive to the Subpoena."[94]

Thereafter the prosecutor produced an order, which had previously been obtained from the district court pursuant to 18 U.S.C. § 6003(a) directing Hubbell to respond to the subpoena and granting him immunity to the extent allowed by law. Hubbell produced 13,120 pages of documents and responded to a series of questions that established that those were all of the documents in his custody that were responsive to the subpoena. Subsequent to his testimony, Hubbell was indicted for various financial crimes. The district court dismissed the indictment finding that the prosecution relied in part on evidence derived directly or indirectly from the testimonial aspects of Hubbell's immunized act of producing documents.[95] After further proceedings below, the case was appealed to the United States Supreme Court.

The Court began, "We particularly emphasized [in *United States v. Kastigar*] the critical importance of protection against a future prosecution 'based on knowledge and sources of information obtained from the compelled testimony.'"[96] "We also rejected the petitioners' arguments that the derivative-use immunity under § 6002 would not obviate the risk that the prosecutor or other

87 *Id.* at 948.
88 *Id.* (emphasis in original) (citing United States v. Calandra, 414 US. 338, 346 (1974).)
89 *Id.* (emphasis in original) (*citing Kastigar*, 406 U.S. at 453 (emphasis in original)).
90 *Id.*
91 *Id.* at 948-49.
92 United States v. Hubbell, 530 U.S. 27, 31 (2000).
93 *Id.* at 31.
94 *Id.*
95 *Id.* at 32.
96 *Id.* at 38 (string cite omitted).

law enforcement officials may use compelled testimony to obtain leads, names of witnesses, or other information not otherwise available to support a prosecution."[97]

"The assembly of literally hundreds of pages of material in response to a request for 'any and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received by or provided to' an individual or members of his family during a 3-year period, [ ] is the functional equivalent of the preparation of an answer to either a detailed written interrogatory or a series of oral questions at a discovery deposition."[98] "It was unquestionably necessary for [Hubbell] to make extensive use of 'the contents of his own mind' in identifying the hundreds of documents responsive to the results of the subpoena."[99] "Entirely apart from the contents of the 13,120 pages of materials that [Hubbell] produced in this case, it is undeniable that providing a catalog of existing documents fitting within any of the 11 broadly worded subpoena categories could provide a prosecutor with a 'lead to incriminating evidence,' or 'a link in the chain of evidence needed to prosecute.'"[100] "In sum, we have no doubt that the constitutional privilege against self-incrimination protects the target of a grand jury investigation from being compelled to answer questions designed to elicit information about the existence of sources of potentially incriminating evidence."[101]

"... [W]e concluded that a person who is prosecuted for matters related to the testimony he gave under a grant of immunity does not have the burden of proving that his testimony was improperly used."[102] "Instead, we held that the statute imposes an affirmative duty on the prosecution, not merely to show that its evidence is not tainted by the prior testimony, but 'to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.' "[103] "*Kastigar* requires that [Hubbell's] motion to dismiss the indictment on immunity grounds be granted unless the Government proves that the evidence it used in obtaining the indictment and proposed to use at trial was derived from legitimate sources 'wholly independent' of the testimonial aspect of [Hubbell's] immunized conduct in assembling and producing the documents described in the subpoena."[104] The Court found that the prosecution committed an immunity violation in front of the grand jury and dismissed the indictment.[105]

Justice Clarence Thomas wrote in concurrence in *Hubbell* that a review

97 *Id.* at 39.
98 *Id.* at 41.
99 *Id.* at 43.
100 *Id.* at 41.
101 *Id.* at 43.
102 *Id.* at 39-40 (*citing Kastigar*, 406 U.S. at 460).
103 *Id.* at 40.
104 *Id.* at 45.
105 *Id.* at 46.

of the period of the Founders "reveals substantial support for the view that the term 'witness' meant a person who gives or furnishes evidence, a broader meaning than that which our case law ascribes to the term. If this is so, a person who responds to a subpoena *duces tecum* would be just as much a 'witness' as a person who responds to a subpoena *ad testificandum*."[106] Justice Thomas noted that in "a future case, I would be willing to reconsider the scope and meaning of the Self-Incrimination Clause."[107] The practical upshot of Justice Thomas' point is that a witness who is compelled to produce records would be entitled to Fifth Amendment protection without a prosecutor asking a question.

B. PENNSYLVANIA

Pennsylvania's current (1968) Constitution provides: "In all criminal prosecutions the accused ... cannot be compelled to give evidence against himself." Pa. Const. Art. I, § 9.[108] Thus, the protection against self-incriminatuion in Pennsylvania is broader than that in the federal constitution.

The Pennsylvania Supreme Court in 1995 moved from "transactional" immunity to "derivative use" immunity in *Commonwealth v. Swinehart.*[109] "Finally, in turning to policy matters, we find that use/derivative use immunity can best achieve the necessary balance between the right to protect a witness from giving evidence against himself and the right of the public to compel every person's answer."[110] The Court established that the government bore the burden to prove by "the heightened standard of clear and convincing evidence, that the evidence upon which a subsequent prosecution is brought arose *wholly* from independent sources."[111] This Pennsylvania standard is higher than federal court where the standard is a preponderance.[112] The "clear and convincing standard requires evidence that is so clear, direct, weighty, and convincing as to enable the [trier of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts [in] issue."[113] Derivative use is the highest level of protection provided by Pennsylvania jurisprudence short of a non-prosecution.[114]

VII. PRACTICAL OBSERVATIONS

The pre-indictment stage of a grand jury investigation generates subpoenas compelling witnesses to testify. The government engages in the process

106 *Id.* at 50
107 *Id*. at 49.
108 *See also*, Pennsylvania Declaration of Rights, Art. IX (1776).
109 Commonwealth v. Swinehart, 664 A.2d 957 (Pa. 1995).
110 *Id.* at 969.
111 *Id.* (emphasis in original).
112 *North*, 910 F.2d at 854 (most courts following *Kastigar* have imposed a preponderance of the evidence evidentiary burden on the government).
113 Commonwealth v. Hanfield, 34 A.3d 187, 204 (Pa. Super. 2011) (*citing* Commonwealth v. Morgan, 16 A.3d 1165, 1168 (Pa. Super. 2011)).
114 *See Cosby*, 252 A.3d at 1138-47.

of evaluating evidence and assessing criminal responsibility. Decisions of whether a person is a witness, subject, or target are analyzed. Discerning the defensibility of the potential criminal charges against the client who has been subpoenaed is important to the process of evaluating what level of immunity defense counsel should strive to obtain. For example, where the government has an overwhelming case (*e.g.*, recorded confession to the crime), limited immunity to bind the specifics of the terms of the plea agreement (and, thereby, mold the sentencing guideline calculations) makes sense. On the other hand, if the case is defensible the lawyer may wish to insist on statutory immunity and anticipate defending the case.

The trial stage presents witnesses for cross-examination who have immunity deals. Granting limited immunity to cooperating witnesses generates exculpatory evidence.[115] The limited immunity agreements provide physical evidence for cross examination on the basis of bias pursuant to FRE 607.[116]

The posttrial stage involves sentencing. Where a negotiated cooperation agreement assures protection under USSG § 1B1.8, assuring that the sentencing process does not allow self-incriminating statements to present greater jeopardy to the client can be a nuanced process.[117]

115 Giglio v. United States, 405 U.S. 150, 154 (1972).
116 *See also,* United States v. Abel, 469 U.S. 45, 50 (1984); Napue v. Illinois, 360 U.S. 264, 269 (1959).
117 *See Baird,* 218 F.3d at 231.