St. John's Law Review

Volume 49, Winter 1975, Number 2 Article 10

Immunized Testimony Admissable in Subsequent Prosecution (United States v. Tramunti)

Stephen Fox

IMMUNIZED TESTIMONY ADMISSIBLE IN SUBSEQUENT PROSECUTION

United States v. Tramunti

The fifth amendment privilege against self-incrimination[1] has long posed an obstacle to prosecutors seeking to elicit testimony from prospective witnesses. In an attempt to alleviate this difficulty, Congress enacted various immunity statutes,[2] under which a federal witness can be compelled to testify in return for a guarantee that his testimony cannot be used against him in future criminal prosecutions.[3] However, the immunity conferred on the witness is not an absolute shield against criminal liability. The immunity statute itself may subject a witness to prosecution for perjury in the event he testifies falsely.[4] Similarly, a failure to answer questions may result in punishment for contempt.[5] Furthermore, the Second Circuit, in *United States v. Tramunti*,[6] recently held that in a subsequent prosecution for perjury unrelated to immunized testimony, prior false and evasive testimony taken under a

1 "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. Although the language of the amendment refers to "any criminal case," availability of the privilege is not limited to criminal prosecutions. *See, e.g.*, McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (privilege extends to civil proceedings); Counselman v. Hitchcock, 142 U.S. 547, 562 (1892) (privilege extends to grand jury proceedings). In *Counselman* the Court stated that "[t]he privilege is limited to criminal matters, but it is as broad as the mischief which it seeks to guard." *Id.* at 562.

2 *See, e.g.*, 18 U.S.C. § 6002 (1970), which was enacted as part of the Organized Crime Control Act of 1970, Act of Oct. 15, 1970, Pub. L. No. 91-452, § 201, 84 Stat. 926.

Many previous immunity statutes were enacted as part of the enabling acts of various federal agencies. *See, e.g.*, National Labor Relations Act, ch. 372, § 11(3), 49 Stat. 455 (1935); Communications Act, ch. 652, tit. IV, § 9(i), 48 Stat. 1097 (1934). These, as well as other similar provisions, were repealed when § 6002 was enacted to cover proceedings before a court, grand jury, or agency of the United States, or Congress. *See* Act of Oct. 15, 1970, Pub. L. No. 91-452, §§ 234, 242, 84 Stat. 930. For a detailed discussion of the history and development of federal immunity statutes, see Lavine, *Immunity Legislation: Making Better Use of a Valuable Law Enforcement Tool*, 9 COLUM. J.L. & SOC. PROB. 197 (1973).

3 18 U.S.C. § 6002 (1970). There are two basic types of immunity. Transactional immunity operates to preclude future prosecutions against the witness for any matter concerning which he is compelled to testify. Use and derivative use immunity guarantees a witness only that his direct testimony and any investigational fruits therefrom, will not be used against him. However, should the prosecutor develop evidence independent from the compelled testimony, the witness may subsequently be prosecuted for crimes related to his testimony. *See* Piccirillo v. New York, 400 U.S. 548, 562-63 (1971) (Brennan, J., dissenting).

The Supreme Court has held that use and derivative use immunity, as provided in § 6002, are sufficient to supplant the witness' fifth amendment privilege and enable the Government to compel testimony. Kastigar v. United States, 406 U.S. 441, 452-53 (1972). *Compare* § 6002 *with* N.Y. CRIM. PRO. L. § 50.10 (McKinney 1971). The former provides for the less extensive use immunity, while New York requires full transactional immunity.

4 *See* 18 U.S.C. § 6002 (1970), which provides in pertinent part:

> [N]o testimony or other information compelled under the order . . . may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

5 *Id.*

6 500 F.2d 1334 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3349 (U.S. Dec. 17, 1974).

grant of immunity can be introduced to impeach the defendant's credibility and to prove prior similar acts.[7]

In 1966, Carmine Tramunti, having been subpoenaed by a grand jury, refused to answer questions fearing self-incrimination. After receiving a grant of immunity, however, he proceeded to testify.[8] Before the grand jury, Tramunti claimed he was unable to remember what his own occupation had been for the previous years and that he did not know the occupation of John Dioguardi, his friend for over 20 years.[9] In 1971, Tramunti was prosecuted for conspiracy, mail fraud, and stock fraud.[10] In testifying on his own behalf, he denied knowing or meeting with a number of the alleged co-conspirators. These denials constituted the bases of the instant perjury prosecution.[11]

At the perjury trial, Tramunti testified as to his own and Dioguardi's occupations. He recalled Dioguardi's association with a company but claimed he had acquired this knowledge between 1966 and 1971.[12] On cross-examination, the Government introduced the 1966 grand jury testimony for the purpose of impeaching Tramunti's cred-

---

7 *Id.* at 1345-46.

8 *Id.* at 1338-39. Tramunti was granted immunity under 18 U.S.C. § 1406 (1958), which authorized such grants where the court or grand jury was concerned with a violation of one of several enumerated offenses. Procedurally, the United States Attorney, with the approval of the Attorney General, applied to the court for an order compelling the testimony. However, the statute provided:

> [N]o such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled . . . to testify . . . nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

Id.

Section 1406, the predecessor of 18 U.S.C. § 6002 (1970), *see* notes 2-4 *supra*, was repealed when § 6002 was enacted. However, Congress provided that repeal would not "affect any immunity to which any individual [was] entitled under [a repealed] provision by reason of any testimony or other information given" before repeal. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 260, 84 Stat. 932 (1970). Therefore, Tramunti was still entitled to whatever immunity he had received under § 1406. *See* 500 F.2d at 1338-39 n.1.

9 There is no doubt that under § 1406 Tramunti could have been prosecuted for perjury in giving this initial testimony. Since District Judge Bauman found the falsity of this testimony to have been established by compelling evidence, *see* 500 F.2d at 1345-46, it is unclear why the Government never prosecuted.

10 *Id.* at 1337. Tramunti was acquitted of all charges.

11 Tramunti was indicted on six counts of giving false testimony under oath in violation of 18 U.S.C. § 1623 (1970):

> Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Id.

12 500 F.2d at 1339.

ibility as a witness and as evidence of prior similar acts of perjury in order to establish intent in the instant situation.[13] After his conviction,[14] Tramunti moved for a new trial,[15] claiming that the 1966 grand jury testimony was inadmissible since it was given under a grant of immunity and thus could not be used against him.[16] District Judge Bauman denied the motion, refusing to consider the alleged error since a timely objection was not made at trial.[17] On appeal, the Second Circuit affirmed, albeit on different grounds, ruling that the utilization of the grand jury testimony was proper and that Tramunti was not entitled to a new trial.[18]

---

13 *Id.* More specifically, the prosecution sought to demonstrate Tramunti's ability to recall facts in 1971 which he could not remember in 1966. Secondly, the Government wanted to prove that Tramunti's alleged perjury in 1971 was preceded by perjurious testimony given in 1966. *Id.*

14 *Id.* Tramunti was convicted on all six counts of perjury. Five counts were based on his denials of having known or met five of the alleged co-conspirators. The sixth was his denial that he had met with the five co-conspirators at a restaurant where the stock fraud was discussed. Tramunti was sentenced to concurrent terms of five years imprisonment on each count. *Id.* at 1337.

15 The defendant moved for a new trial pursuant to rule 33 of the Federal Rules of Criminal Procedure, which allows "the court on motion of a defendant [to] grant a new trial . . . required in the interest of justice." FED. R. CRIM. P. 33.

16 Clearly, Tramunti was claiming use immunity only. Transactional immunity is irrelevant since the perjury charges were unrelated to Tramunti's 1966 grand jury testimony. The only issue was whether the testimony could be used against him. *See* notes 3 & 8 *supra.*

17 500 F.2d at 1339.

18 *Id.* at 1344-45. The Second Circuit panel consisted of Judge Mulligan, Chief Judge Kaufman and Judge Mansfield. Judge Mulligan authored the court's unanimous decision.

The defendant presented three additional claims which the court had little trouble rejecting. Initially, Tramunti contended that the indictment should be dismissed on the basis of collateral estoppel. The court recognized that under the double jeopardy clause of the fifth amendment, a "defendant in a criminal case cannot be convicted on the basis of an issue of ultimate fact which has been determined in the defendant's favor in a prior criminal proceeding involving the same parties." *Id.* at 1346, *citing* Ashe v. Swenson, 397 U.S. 436 (1970). However, the burden is on the defendant to show that the previous verdict "*necessarily* decided the issues now in litigation." *Id.* (emphasis in original). The proper test is whether "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Ashe v. Swenson, 397 U.S. 436, 444 (1970), *quoting* Mayers & Yarbrough, Bis Vexari: *New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 39 (1960).

Tramunti argued that the general verdict of acquittal in the stock fraud prosecution, *see* note 10 and accompanying text *supra*, was insufficient to meet this test. However, the Second Circuit disagreed. It was possible for the jury in the prior action to believe that Tramunti did indeed know and meet with co-conspirators, but that he was not a member of the conspiracy. The jury had been instructed that mere association or knowledge that another is doing something illegal is not enough to impose criminal liability for conspiracy. 500 F.2d at 1347. Therefore, the court concluded that the acquittal did not necessarily determine the issue of Tramunti's association with or knowledge of the co-conspirators and did not bar the present prosecution. *Id.* at 1349.

Secondly, the defendant argued that the Government had failed to disclose evidence favorable to him, thereby denying him due process. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963), wherein the Court held that, after request, suppression of material evidence favorable to the accused violates due process, irrespective of the good or bad faith of the

Initially, the court was called upon to resolve whether the district court erred in refusing to consider the defendant's immunity objection. The Government contended that the doctrine espoused by the Second Circuit in *United States v. Indiviglio*[19] militated against sustaining the defendant's position in the present instance. In *Indiviglio*, the defendant, after jumping bail and fleeing the country, was arrested by local Brazilian authorities and returned to the United States. Upon his return, he was advised of his rights to counsel and to remain silent. Nevertheless, the defendant subsequently made incriminating statements which were admitted at trial over the objection of counsel that the arrest was illegal.[20] On appeal, the defendant for the first time relied upon two Supreme Court decisions which had been handed down shortly before trial in support of his claim that the right to counsel had been violated.[21] In refusing to review this alleged error, Judge Hays, writing for the court en banc, stated that an experienced trial attorney should have been aware of these decisions and should have raised the specific issue at trial.[22]

---

prosecutor. At his perjury trial, Tramunti was identified by a witness named Dragani, who had recognized him from photographs as being present at a 1970 stock closing. 500 F.2d at 1349. Tramunti claimed that the prosecutor had failed to disclose that two other individuals, also present at the closing, could not identify him from the same photographs. He further contended that such failure to disclose prevented him from impeaching Dragani's credibility. Nevertheless, the Second Circuit refused to apply *Brady* on the ground that this evidence was immaterial. Dragani's identification was relevant to only one count, and sufficient independent evidence existed to link Tramunti to the co-conspirator named therein. *Id.* at 1349-50.

Additionally, Tramunti asserted that the evidence adduced to support one of the six counts was legally insufficient to warrant conviction. The court, however, held that the Government had, in fact, produced sufficient evidence. *Id.* at 1338.

19 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966). The basic thrust of the *Indiviglio* rule is that objections should be raised at trial, or they will be lost on appeal. Moreover, in order to preserve the objection on appeal, the objector at trial must state the ground of inadmissibility with a reasonable degree of specificity. *Id.* at 279. A general objection which is overruled is insufficient on appeal and "'a specific objection *overruled* will be effective only to the extent of the grounds specified, and no further.'" *Id.*, *quoting* 1 WIGMORE, EVIDENCE § 18, at 339 (3d ed. 1940) (emphasis in original). *See* United States v. Bryant, 480 F.2d 785 (2d Cir. 1973), which followed *Indiviglio* in refusing to review defendant's objection based on her privilege against self-incrimination because she had failed at trial to raise the objection with a reasonable degree of specificity. *Id.* at 792.

20 352 F.2d at 277-78.

21 *Id.* at 279. Defendant sought reversal on the basis of Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964) (when police investigation has begun to focus on a particular suspect in police custody, he must be allowed to consult with counsel and be warned of his constitutional right to remain silent) and Massiah v. United States, 377 U.S. 201, 206 (1964) (incriminating statements deliberately elicited from defendant in absence of his attorney are inadmissible against him at trial).

22 352 F.2d at 279. The court stated that

> [t]he reason for requiring that specific objection be made is, of course, to give the judge an opportunity to correct the error and thus to avoid the necessity of further proceedings, possibly including a new trial.

Id. at 280.

Relying upon *Indiviglio*, the district court in *Tramunti* held that, since defense counsel failed to timely object to the use of the testimony on the ground of immunity, judicial review of possible error was foreclosed.[23] The Second Circuit rejected this reasoning, indicating that *Indiviglio* embodied a concept of waiver which was absent from the present case.[24] In so holding, the court properly distinguished the factual settings involved in *Indiviglio* and *Tramunti*. In *Tramunti*, prior to the completion of the trial, defense counsel neither knew nor, in the employment of due care, should have known that the grand jury testimony had been immunized.[25] Accordingly, it would have been impossible to raise such an objection at trial. Moreover, the negligence, if any, in counsel's failing to know of the immunity rested with the Government, not the defendant.[26] Under these circumstances, it appears proper to conclude that the defendant had not waived his right to assert objections based on the immune nature of the testimony offered at trial.

Nevertheless, the Government maintained that the "plain error" rule prevented review on the merits.[27] Pursuant to the rule, only plain errors affecting substantial rights can be reviewed despite the absence of objections at trial.[28] In this instance, the prosecution argued that the *Indiviglio* court recognized that, during the course of a criminal trial, counsel for both sides will inevitably "innocently overlook important questions"[29] or fail to investigate potentially significant lines of inquiry.[30] Deeming the lapse of defense counsel to lie within these categories, the prosecution claimed that no injustice warranting application

---

23 500 F.2d at 1339.

24 *Id.* at 1340.

25 Judge Bauman found that neither defense counsel nor the prosecution knew that the grand jury testimony was immunized. In fact, Tramunti's trial counsel had not previously represented him and thus could not have known the circumstances under which the grand jury testimony was given. Accordingly, Judge Mulligan ruled that a defense attorney could not be penalized for failing to raise an issue of which he had no knowledge. *Id.* at 1341 n.3.

Additionally, the court rejected the Government's argument that Tramunti himself should have known that his testimony was "immune." It refused to attribute to the defendant the legal sophistication necessary to realize the circumstances surrounding or significance of testimony given seven years ago. *Id.* at 1340, *citing* United States *ex rel.* Raymond v. Illinois, 455 F.2d 62, 67 (7th Cir. 1971), *cert. denied*, 404 U.S. 885 (1972) (information known to defendant not chargeable to his counsel). Moreover, Tramunti might not have been able to identify the source of the information in light of the pressures of a vigorous cross-examination. *Id.* at 1340.

26 *Id.* at 1341.

27 *Id.* at 1340.

28 The plain error rule states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." FED. R. CRIM. P. 52(b).

29 Brief for Appellees at 35.

30 *Id.*

of the plain error rule was present.[31] Moreover, the Government argued that any error in *Tramunti* was not "plain" since the immunity question involved was "close."[32] Again, the Second Circuit refused to acquiesce in the Government's contentions, noting that Tramunti claimed "a serious infringement of fifth amendment and statutory rights."[33] Additionally, the court recognized that the "close question" approach should not be utilized since no showing of neglect on the part of defendant's trial counsel had been established. The defense had raised the fifth amendment issue at the earliest possible time and "simple justice" required the court to consider the question raised by Tramunti.[34]

This conclusion appears to be proper both in terms of policy and case law. Whether the error is "plain" or not, the defendant should have an opportunity to raise it at some point during the litigation. If the basis for the objection is unknown or unavailable at trial for reasons other than neglect, it should be heard at post-trial proceedings.[35] Significantly, the court's view finds support in prior case law. In decisions wherein the "close question" rule was applied, some aspect of waiver by the defendant was present.[36] Utilization of the plain error doctrine was considered only after such a finding was made.

Having determined that the objection was properly raised, the court addressed itself to the crucial issue whether defendant's constitutional or statutory rights had been violated.[37] In rejecting Tramunti's claim that the use made of his testimony was constitutionally pro-

---

31 This view was shared by District Judge Bauman. 500 F.2d at 1340.

32 *Id.* If the question is close, the court may not recognize it on its own in the absence of timely presentation. *See* United States v. Jacquillon, 469 F.2d 380, 386 (5th Cir. 1972), *cert. denied*, 410 U.S. 938 (1973).

33 500 F.2d at 1342.

34 *Id.*

35 It is best to view the "plain error" rule as supplementary to *Indiviglio*, rather than controlling. Should defendant's counsel negligently fail to make timely objection, as was the case in *Indiviglio*, the court may take notice of the error if it affects substantial rights. Indeed, the *Indiviglio* court specifically recognized that the court may, in its discretion, notice errors. 352 F.2d at 280. This is wholly different from requiring the defendant to rely on the court's discretion when the failure to object at trial is in no way his fault.

The purpose of the *Indiviglio* rule is to allow the judge to correct errors at trial. This avoids the necessity for further proceedings, including a new trial. *Id.* While this goal may be achieved in a literal sense by applying *Indiviglio* to a *Tramunti*-type situation, it would work a substantial injustice to do so. The interests of efficiency and speed should not be allowed to outweigh those of a full and fair defense.

36 *See, e.g.*, United States v. Brawer, 482 F.2d 117, 130 n.18 (2d Cir. 1973); United States v. Wright, 466 F.2d 1256, 1259 (2d Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); United States v. Manning, 448 F.2d 992, 1000 (2d Cir.) (en banc), *cert. denied*, 404 U.S. 995 (1971).

37 500 F.2d at 1342.

hibited, Judge Mulligan drew upon earlier Supreme Court decisions[38] and noted that the fifth amendment protects only the incriminating truth[39] and is applicable only to past criminal conduct.[40] Accordingly, where the defendant, as here, "thwarts the inquiry by evasion or falsehood . . . such conduct is not entitled to immunity."[41]

The court first viewed immunity grants as striking a bargain for truth between the witness and the Government. In order to secure otherwise unavailable evidence, the Government agrees to refrain from using the evidence against the witness despite the fact he may be guilty of criminal conduct.[42] The witness, on the other hand, surrenders his

---

38 United States v. Bryan, 339 U.S. 323 (1950); Glickstein v. United States, 222 U.S. 139 (1911).

39 500 F.2d at 1342. In Glickstein v. United States, 222 U.S. 139 (1911), the defendant perjured himself while testifying under a grant of immunity. The Supreme Court upheld the perjury conviction despite the fact that the compelled testimony was used to prove the corpus delicti. Chief Justice White stated that the grant of immunity cannot be interpreted as a license to commit perjury. Moreover, it was considered unreasonable to admit that Congress has the power to compel testimony and then deny to it the power to compel such testimony to be truthful. *Id.* at 142.

This view is supported by more recent authority. In Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972), the Court examined the constitutionality of that state's immunity statute, N.J. REV. STAT. § 52:9M-17(b) (1970). The statute provided that the witness would be "immune from having such *responsive* answer given by him . . . or evidence derived therefrom used to expose him to criminal prosecution . . . ." *Id.* (emphasis added). The Court held that the statute was no different in scope from the use and derivative use immunity held to be constitutional in Kastigar v. United States, 406 U.S. 441 (1972). Thus, the use of nonresponsive answers is not constitutionally prohibited.

The Third Circuit recently applied this rule in United States v. Hockenberry, 474 F.2d 247 (3d Cir. 1973). There, the defendant's immune grand jury testimony was introduced to prove perjury. The conviction was set aside on the ground that the testimony was true and therefore inadmissible to discredit the defendant. *Id.* at 249-50. The court, in interpreting the grant of immunity, stated:

> But quite apart from any question of self-incrimination, a witness who testifies before a grand jury is required and sworn to tell the truth. The grant of immunity is superimposed upon that requirement. Protection is granted against future injurious use of the incriminating truth that the witness is required to speak, not against prosecution for or the use of any exculpatory falsehood that he may utter to avoid the required admission of wrongdoing.

Id. at 249. *See also* Heike v. United States, 227 U.S. 131, 141 (1913); United States v. Pappadio, 346 F.2d 5, 8 n.3 (2d Cir. 1965), *vacated on other grounds*, 384 U.S. 364 (1966).

40 500 F.2d at 1343-44.

41 *Id.*

42 *Id.* at 1342.

In order for the Government to compel constitutionally protected testimony, the immunity statute must be "coextensive with the constitutional privilege" it attempts to supplant. Counselman v. Hitchcock, 147 U.S. 547, 565 (1892). Accordingly, the statute need not provide absolute immunity from prosecution, but must insure that compelled testimony may not be used against the witness in future prosecutions. *See* Kastigar v. United States, 406 U.S. 441 (1972), wherein Justice Powell stated:

> [I]mmunity 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 privilege.

Id. at 453.

right to remain silent and must reveal incriminatory facts. Should the witness perjure himself, however, he reneges on his part of the exchange, and immunity will not attach. Moreover, if the evidence is other than incriminating truth, it constitutes "evidence" which was always available to the Government and therefore not within the protection of the fifth amendment.[43] Secondly, the Supreme Court recognized in *United States v. Bryan*[44] that the Constitution requires only that immunity extend "to *past* criminal acts concerning which the witness should be called to testify."[45] When the witness perjures himself or refuses to answer, he commits a new crime, and utilization of the false testimony or silence is not constitutionally barred. Thus, the *Tramunti* court properly concluded that constitutional immunity does not extend *in futuro* and that the commission of perjury by the defendant constituted an independent crime which was not entitled to the protection of immunity.[46]

Nevertheless, Tramunti argued that even if constitutionally permissible, the use made of his grand jury testimony was barred by the immunity statute itself.[47] The statute in question provided that the testimony elicited from a witness could not be used against him in any

---

[43] Judge Mulligan stated the rule as follows:

> [T]he bargain struck is conditional upon the witness who is under oath telling the truth. If he gives false testimony, it is not compelled at all. In that case, the testimony given not only violates his oath, but is not the incriminatory truth which the Constitution was intended to protect. Thus, the agreement is breached and the testimony falls outside the constitutional privilege. Moreover, by perjuring himself the witness commits a new crime beyond the scope of the immunity which was designed to protect him against his past indiscretions.

500 F.2d at 1342.

[44] 339 U.S. 323 (1950). In *Bryan*, the defendant was required to produce records and answer questions at a congressional hearing. Despite an automatic grant of immunity, she refused to comply and was convicted of contempt of Congress. *Id.* at 326-27. The Supreme Court rejected the claim that the grant of immunity barred the use of defendant's statements in a later prosecution for contempt for failure to comply with the subpoena. *Id.* at 335. The Court recognized that

> [t]here is, in our jurisprudence, no doctrine of "anticipatory contempt." While the witness' testimony may show that he has elected to perjure himself or commit contempt, he does not thereby admit his guilt of some past crime about which he has been summoned for questioning but commits the criminal act then and there.

Id. at 341. *See* Lefkowitz v. Turley, 414 U.S. 70 (1973), wherein the Court noted that "[t]he object of the [fifth] amendment 'was to insure that a person should not be compelled . . . to give testimony which might tend to show that he himself *had committed* a crime.'" *Id.* at 77, *quoting* Counselman v. Hitchcock, 142 U.S. 547, 562 (1892) (emphasis added). The indication is that the fifth amendment will apply only to crimes committed before the testimony is given. *See also* United States v. Glasco, 488 F.2d 1068, 1069 (5th Cir. 1974), *quoting* Glickstein v. United States, 222 U.S. 139, 142 (1911); Robinson v. United States, 401 F.2d 248, 251 (9th Cir. 1968).

[45] 339 U.S. at 340 (emphasis in original).

[46] 500 F.2d at 1344.

[47] The court conceded that this issue represented a closer question than did the constitutional claim. *Id.* at 1345.

court except in a prosecution for perjury or contempt arising out of the immunized testimony.[48] It was contended that since the statute specifically authorized only these two exceptions, Congress intended that the use of compelled testimony be limited exclusively to prosecutions based on the original perjurious statements.[49] The Second Circuit disagreed, observing that "the listing of exceptions in immunity statutes . . . is not intended to be an exclusive enumeration."[50] Accordingly, the court ruled that Congress, by failing to specifically authorize the use of false testimony to attack credibility or to show intent at a subsequent trial for a crime unrelated to the immunized testimony, did not necessarily intend to bar such use.[51] Moreover, the statute protects only "compelled testimony," a category which does not include perjured statements. Consequently, an interpretation other than that adopted by the court "would . . . frustrate the purpose which this statute was designed to achieve."[52]

In refuting Tramunti's view of legislative intent, the court relied upon *Glickstein v. United States*[53] and *United States v. Bryan*.[54] In *Glickstein*, the relevant immunity statute provided that "no testimony given by [a witness] shall be offered in evidence against him in any criminal proceeding."[55] Despite the clear import of this language, the Supreme Court held that Congress did not intend to exclude prosecutions for perjury committed while the defendant was "immune" and that the false statements themselves were admissible to prove such perjury.[56] The statute was designed to compel the giving of otherwise unobtainable testimony and not to confer a license to commit perjury. Any inclusion of a specific perjury exception in later statutes "was but the manifestation of abundant caution.[57] In *Bryan*, the statute under consideration included an exception for perjury but did not authorize a prosecution for contempt.[58] As in *Glickstein*, the Court refused to accept a literal interpretation of the statutory language,[59] believing the effectiveness of the statute would be destroyed if a witness could

48 *See* note 8 *supra*.
49 500 F.2d at 1344-45.
50 *Id.* at 1345.
51 *Id.*
52 *Id.*
53 222 U.S. 139 (1911). *See* note 39 *supra*.
54 339 U.S. 323 (1950). *See* note 44 *supra*.
55 222 U.S. at 140-41.
56 *Id.* at 143-44.
57 *Id.* at 144.
58 339 U.S. at 335.
59 *Id.*

refuse to answer questions and still escape the imposition of sanctions for his contempt.[60]

While at first blush the Second Circuit's analysis may seem accurate, it is submitted that the court's reliance on *Glickstein* and *Bryan* as dispositive is not entirely convincing.[61] The perjury and contempt exceptions "implied" in those cases were necessary to give effect to the statute itself. Without them, a witness could lie or refuse to answer with impunity, thereby nullifying the statute as an efficient tool in acquiring needed evidence. However, the use of perjured testimony as a means of impeaching credibility or as demonstrative of intent in future prosecutions is not necessary for the successful implementation of the statute. The cooperation of recalcitrant witnesses can be adequately assured by the perjury and contempt exceptions.

Although the Second Circuit correctly decided to review the defendant's immunity objection, its determination that a new exception should be judicially engrafted upon the immunity statute adds little in the way of deterrence and should not be attributed to Congress without a clearer showing of legislative intent.[62] The courts should interpret "statutes on the basis of what Congress has written, not what Congress might have written."[63] Instead, the Second Circuit appears to have construed the statute broadly in order to obtain the fullest possible benefit from immunized testimony, a result Congress may not have intended.[64]

Stephen Fox

---

60 Chief Justice Vinson stated that "[a] contrary view would simply encourage the refusal of witnesses to answer questions or produce papers, quite contrary to the purpose of the statute." *Id.* at 342-43. The fact that Congress expressly included the perjury exception "was . . . only from superfluous caution and throws no light on construction." *Id.* at 342, *quoting* Heike v. United States, 227 U.S. 131, 141 (1913). *Accord,* Glickstein v. United States, 222 U.S. 139, 144 (1911).

61 The court recognized that the use of Tramunti's grand jury testimony was one step removed from the *Glickstein* and *Bryan* situations. Yet, it felt that the rationales expressed therein were dispositive in the present case. 500 F.2d at 1345.

62 The language of the present statute is copied from the Immunity Act of 1954, ch. 769, 68 Stat. 745, *repealed,* Pub. L. No. 91-452, tit. II, § 228(a), 84 Stat. 930 (1970). The legislative history of the old statute shows that Congress considered only the two exceptions specifically included. *See* S. REP. No. 153, 83d Cong., 1st Sess. (1953); H.R. REP. No. 2606, 83d Cong., 2d Sess. (1954).

63 United States v. Great Northern R.R., 343 U.S. 562, 575 (1952).

64 Although courts may interpret statutes to avoid absurd results, United States v. Katz, 271 U.S. 354, 357 (1926), the language should not be extended merely to make the statute more effective. *See* Addison v. Holly Hill Fruit Prod., Inc., 322 U.S. 607 (1944) wherein the Court stated:

> Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive.

Id. at 617.