

Federal Immunity of Witnesses Act (Goldberg v. United States)

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Since its decision in *Candella*, the Second Circuit has shown that it will not readily find that fourth amendment rights have been waived, and that it will require the prosecutor to satisfy his burden of proving that a voluntary waiver was made.³⁴ Hopefully, the *Candella* and *Rothberg* decisions are merely aberrations in a Second Circuit policy of carefully guarding fourth amendment rights.

FEDERAL IMMUNITY OF WITNESSES ACT

Goldberg v. United States

Under the Federal Immunity of Witnesses Act¹ the Government² may compel testimony considered "necessary to the public interest"³ from unwilling witnesses, in exchange for a grant of immunity.⁴ The grant is calculated to circumvent a witness' assertion of his fifth amendment privilege against self-incrimination⁵ and thus provide the prose-

Absent a legitimate prior intrusion, plain view of evidence cannot serve to justify its seizure.

473 F.2d at 1277.

³⁴ See *United States v. Mapp*, 476 F.2d 67 (2d Cir. 1973) wherein the Second Circuit reversed a district court denial of a motion to suppress evidence, holding that the defendant had not voluntarily consented to the search. The court indicated that the government must prove voluntary consent by "clear and convincing" evidence, *id.* at 78-79, and held that the consent was not "unequivocal, specific and intelligently given" because it was nothing more than "submission to official authority under circumstances pregnant with coercion." *Id.* at 77.

In *United States v. Ruiz-Estrella*, 481 F.2d 723 (2d Cir. 1973), the court, in reversing the denial of the motion to suppress, held that the Government had shown "no more than acquiescence to apparent lawful authority." *Id.* at 728. Judge Hays, dissenting, was of the opinion that the defendant had consented to the search. *Id.* at 730.

¹ Organized Crime Control Act of 1970, Title II, 18 U.S.C. § 6001-05 (1970).

² This act is applicable to proceedings before a federal court or grand jury, federal agency, and either house of Congress or its committees, 18 U.S.C. § 6002. For definitions of the above see *id.* § 6001. For the procedures used to obtain an immunity order see *id.* § 6003-05.

³ *Id.* at § 6003. This phrase incorporated the idea that Congress may now apply for the immunity procedure for any matter which is within its authority. Previous immunity applications were limited to "national security matters." *Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess., 292 (1960)* [hereinafter cited as *Measures Relating to Organized Crime*].

⁴ 18 U.S.C. § 6002.

⁵ "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V. A grand jury proceeding is a "criminal case" to which the fifth amendment privilege applies. *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). For discussions of the historical foundation of the fifth amendment see E. GRISWOLD, *THE FIFTH AMENDMENT TODAY* (1955); L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* (1968); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935).

Constitutional attacks on the practice of compelling testimony under immunity grants on any basis other than the fifth amendment have had little success. "Until now the only

cution with valuable information. Once immunity under this Act is conferred, the witness may not remain silent and must answer all questions or face civil contempt charges.⁶

Prior to the Federal Immunity of Witnesses Act, "transactional immunity" was regarded as the constitutionally required standard.⁷

testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination." *Branzburg v. Hayes*, 408 U.S. 665, 689-90 (1972). In *Branzburg*, newsmen were required to appear and testify before state or federal grand juries. It was held that compelling them to reveal their sources of information would not so chill the freedom of speech and press guaranteed by the first amendment as to override the state's compelling interest in obtaining such information.

A challenge based on the right to the free exercise of religion also was held inadequate in *Smilow v. United States*, 465 F.2d 802 (2d Cir. 1972), which affirmed a contempt citation for refusal to testify under an immunity grant. The appellant alleged that "as an observant and committed Jew he must refuse to answer the grand jury questions or else suffer Divine punishment and ostracism from the Jewish Community as an 'informer.'" *Id.* at 804. Smilow further contended that to compel him to answer the question would infringe his sixth amendment right to a fair trial and due process as he had been charged in the state courts with the crime the grand jury was investigating. The court rejected these arguments, stating that his "constitutional remedy lies in the fifth amendment privilege. . . ." *Id.* at 806.

In *Fraser v. United States*, 452 F.2d 616 (7th Cir. 1971), the Seventh Circuit rejected an argument that the fourth amendment requires a showing of probable cause or reasonableness before a witness may be compelled to testify before a grand jury. Despite the burgeoning area of the "right of privacy," see *Roe v. Wade*, 410 U.S. 113 (1973) (qualified right to abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to contraception), an argument that compulsory testimony would violate a constitutionally protected zone of private interest would probably prove futile. "A grand jury subpoena to testify is not that kind of governmental intrusion on privacy against which the Fourth Amendment affords protection, once the Fifth Amendment is satisfied." *Fraser v. United States*, 452 F.2d 616, 620 (7th Cir. 1971). Although the fourth amendment is not the only constitutional source for the right of privacy, *Roe v. Wade*, 410 U.S. 113 (1973), it has consistently been held that once the fifth amendment is satisfied, other arguments will not suffice to override the legitimate state interest in compelled testimony. See *Brown v. Walker*, 161 U.S. 591 (1896) (personal disgrace is not protected by the fifth amendment); accord, *Reina v. United States*, 364 U.S. 507 (1960); *Interstate Commerce Comm'n v. Baird*, 194 U.S. 25 (1904). See also *Piemonte v. United States*, 367 U.S. 556 (1961) (fear for the safety of one's person or family not sufficient); *Ullman v. United States*, 350 U.S. 422 (1956) (loss of jobs, expulsion from labor unions and other civil liabilities not protected).

⁶ Organized Crime Control Act of 1970, title III, 28 U.S.C. § 1826 (1970). This section authorizes civil contempt proceedings against "recalcitrant witnesses." If the defendant still refuses to cooperate despite a civil contempt citation, the court is also empowered to impose a criminal contempt citation after notice and a hearing. See FED. R. CRIM. P. 42(b).

The combination of these sanctions "enable[s] the court to achieve the dual ends of inducing a . . . witness to testify and of punishing his defiance of the court's order to do so." *United States v. Marra*, 482 F.2d 1196, 1202 (2d Cir. 1973). See *Shillitani v. United States*, 384 U.S. 364 (1966). However, the Second Circuit has recently announced that the use of summary criminal contempt, pursuant to rule 42(a), as opposed to rule 42(b) criminal contempt citation, is inappropriate where a witness has refused to testify despite a grant of immunity. See *United States v. Wilson*, No. 73-1574 (2d Cir., Nov. 28, 1973); *United States v. Marra*, *supra*.

⁷ The first federal immunity statute, Act of Jan. 24, 1857, ch. 19, 11 Stat. 155-56, provided for "transactional" immunity to anyone appearing before congressional investigatory committees. This was discredited for giving "immunity baths" to witnesses because the Government had no discretion to withhold the protection. The provision was rewritten

Under that approach, the witness was totally exempt from future prosecution for any criminal acts which he revealed during the grand jury inquiry.⁸ When the Federal Immunity of Witnesses Act was enacted it incorporated a "use plus derivative use" immunity provision.⁹ Thus, the admission of either the compelled testimony or evidence derived from "leads" provided by such testimony is prohibited in subsequent prosecutions against the witness.¹⁰ The adoption of this standard set off a series of constitutional attacks on the Act.¹¹ The Supreme Court,

in 1862 to provide "use" immunity. This was struck down by the Supreme Court in *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

⁸ In reaction to *Counselman*, Congress enacted a discretionary "transactional" immunity statute applicable to proceedings before the Interstate Commerce Commission. It also added the provision that the testimony must relate to the interrogatory. Act of February 11, 1893, ch. 83, 27 Stat. 443. "[A] statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." *Counselman v. Hitchcock*, 142 U.S. 547, 586 (1892) (emphasis added). Critics of this approach felt that transactional immunity was too far-reaching in that the fifth amendment did not prohibit future prosecution of witnesses. See, e.g., Hofstadter & Levittan, *Immunity and the Privilege Against Self-Incrimination—Too Little and Too Much*, 39 N.Y.S.B.J. 105, 219 (1967); Note, *Witness Immunity Statutes: The Constitutional and Functional Sufficiency of "Use Immunity"*, 51 B.U.L. REV. 616 (1971); Note, *The Scope of Testimonial Immunity Under the Fifth Amendment*, 67 Nw. U.L. REV. 106 (1972); Note, *Constitutional Law: Immunity, The Dilemma of "Transactional" Versus "Use"*, 25 OKLA. L. REV. 109 (1972).

⁹ 18 U.S.C. § 6002.

¹⁰ This concept is an offshoot of "use" immunity, which only prohibited a prosecutor from directly submitting a witness' actual immunized testimony as evidence in subsequent prosecutions against him. See *Counselman v. Hitchcock*, 142 U.S. 547, 564 (1892), where a "use" immunity statute was discredited because it afforded no practical protection against the indirect use of a witness' immunized testimony in subsequent prosecutions and was thereby insufficient to supplant the fifth amendment privilege. *Accord*, *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965).

The basis of the "use plus derivative use" standard was the language in *Counselman* that the defect of "use" immunity was that it failed to prevent the indirect use of compelled testimony such as obtaining leads to new evidence. 142 U.S. at 564. The first judicial sanction of this concept came in *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964), wherein the Court held that a state court may not compel a witness to implicate himself in federal crimes unless the federal government is prohibited from using the testimony or its "fruits" in subsequent prosecutions against the witness.

¹¹ See, e.g., *United States ex rel. Catena v. Elias*, 449 F.2d 40 (3d Cir. 1971); *In re Korman*, 449 F.2d 32 (7th Cir. 1971); *Stewart v. United States*, 440 F.2d 954 (9th Cir. 1971), (per curiam), *aff'd sub nom. Kastigar v. United States*, 406 U.S. 441 (1972).

The debate traditionally centered on whether the witness must be free from the threat of any future prosecution or whether some limitation on the use of his testimony was sufficient to comport with the protection of the fifth amendment. For the divergent opinions of the individual Justices see *Kastigar v. United States*, 406 U.S. 441, 462-67 (1972) (Douglas, J., dissenting); *Piccirillo v. New York*, 400 U.S. 548, 562 (1971) (Brennan, J., dissenting); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 92-93 (1964) (White & Stewart, JJ., concurring); *cf. Brown v. Walker*, 161 U.S. 591 (1896).

The circuits also reflected this dispute. The majority favored the transactional immunity standard. See, e.g., *United States v. Cropper*, 454 F.2d 215 (5th Cir. 1971); *United States ex rel. Catena v. Elias*, 449 F.2d 40 (3d Cir. 1971); *In re Korman*, 449 F.2d 32 (7th Cir. 1971). The Ninth Circuit, however, took the position that restrictions on use of the testimony were adequate. *Weg v. United States*, 450 F.2d 340 (9th Cir. 1971) (per curiam);

however, in *Kastigar v. United States*¹² resolved all then existing controversies. The Court held that application of "use plus derivative use" immunity was constitutionally sufficient in that it afforded protection to the witness co-extensive with that of the fifth amendment.

The Second Circuit in *Goldberg v. United States*¹³ considered the novel question of whether an actual defendant in a pending prosecution could constitutionally be compelled to testify before a federal grand jury under a grant of "use and derivative use" immunity.¹⁴ The court, per Chief Judge Friendly, held that Congress intended to include such a situation under the Federal Immunity of Witnesses Act¹⁵ and that *Kastigar* should be extended to hold that a *defendant's* protection under a grant of such immunity would equal that of any other witness.¹⁶

Samuel Goldberg, arrested and arraigned in June of 1972, was charged with possession of treasury bills "known to have been stolen from a bank in violation of 18 U.S.C. § 2113(c)."¹⁷ Six months later, he appeared under subpoena before a grand jury inquiring into "possible violations of federal law on that subject."¹⁸ Goldberg refused to testify, relying on his fifth amendment privilege. The court then granted Goldberg "use and derivative use" immunity and ordered him to testify. Again Goldberg declined to answer the questions before the grand jury and was subsequently adjudged in contempt of court.

On appeal, Goldberg argued that it was never the legislative intent of the Federal Immunity of Witnesses Act to compel an actual defendant to testify under the limited protection of "use plus derivative use" immunity before a grand jury investigating the very crimes with which he was charged.¹⁹ Furthermore, he contended, while such protection might be constitutionally sufficient for a mere *witness* as per *Kastigar*, it would be inadequate in his case because his status as a

Stewart v. United States, 440 F.2d 954 (9th Cir. 1971) (per curiam), *aff'd sub nom. Kastigar v. United States*, 406 U.S. 441 (1972).

¹² 406 U.S. 441 (1972). The petitioners, two witnesses not yet arrested or indicted, were subpoenaed to testify before a grand jury. They refused to testify despite a court order granting them "use and derivative use" immunity pursuant to the Federal Immunity of Witnesses Act, 18 U.S.C. §§ 6001-05, and were cited for contempt. They claimed that such immunity was unconstitutional because protection against the "fruits" of such testimony might prove illusory. For an exhaustive list of academic commentary on *Kastigar* see Note, *Kastigar v. United States: The Required Scope of Immunity*, 58 VA. L. REV. 1099 n.9 (1972).

¹³ 472 F.2d 513 (2d Cir. 1973).

¹⁴ *Id.* at 515.

¹⁵ *Id.*

¹⁶ *Id.* at 515-16.

¹⁷ *Id.* at 514.

¹⁸ *Id.*

¹⁹ *Id.* at 515.

defendant created a "more immediate and less theoretical"²⁰ risk that any compelled testimony would facilitate the prosecution currently against him.²¹

The court, however, refused to limit the application of the statute to witnesses in "pre-arrest and pre-arraignment situations."²² On review of the pertinent provisions²³ and their legislative background²⁴ it found nothing to justify such a narrow construction. Furthermore, since the Act had replaced some 50 transactional immunity statutes previously scattered throughout the criminal code,²⁵ the court reasoned that Congress intended "use plus derivative use" immunity to be the sole standard applicable to all witnesses.²⁶ Therefore, defendants "already the subject of a criminal complaint for the transaction into which the grand jury was inquiring"²⁷ are to be considered within the purview of the Federal Immunity of Witnesses Act.

The court also rejected appellant's contention that the *Goldberg* facts were distinguishable from *Kastigar*, and held that "use plus derivative use" immunity was co-extensive with the privilege against self-incrimination. Judge Friendly noted that although the appellant in *Kastigar* was not a defendant but merely a witness, the argument advanced was identical to that raised by *Goldberg*: "[H]e argued that use immunity was insufficient to supplant the privilege . . . because of the danger that his testimony might . . . be used against him . . ."²⁸ The statute, however, prohibits the use of such testimony "in any

²⁰ *Id.* at 516.

²¹ *Id.* at 515.

²² *Id.* See Memorandum of Appellant at 4.

²³ The sections of the statute refer to both a "witness," 18 U.S.C. § 6002, and "any individual," 18 U.S.C. §§ 6003-05.

²⁴ The court cited testimony by an Assistant Attorney General before the House Judiciary Committee which indicated that a typical situation for the grant of immunity would exist

where there is an employee who, as an agent of a principal, is familiar with the entire transaction and the investigation is directed at that particular agent and we decide as a matter of policy that it is more important to prosecute the principal than the agent.

472 F.2d at 515, citing *Hearings on H.R. 11157 and H.R. 12041 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. 42 (1970) [hereinafter cited as *Hearings on H.R. 11157*]. It was felt that such language indicated that the subpoena of agents "already . . . arrested or arraigned" was not precluded. 472 F.2d at 515.

For additional legislative discussion of the Federal Immunity of Witnesses Act see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS (1970); *Measures Relating to Organized Crime*, *supra* note 3.

²⁵ 472 F.2d at 515. See 18 U.S.C. § 6001 (1970). For a comprehensive list of the statutes see 116 CONG. REC. 577-78 (1970). See also *Measures Relating to Organized Crime*, *supra* note 3, at App. A.

²⁶ 472 F.2d at 515.

²⁷ *Id.*

²⁸ *Id.*

respect" and *Kastigar* imposed a "heavy burden on the prosecution 'to prove that the evidence it proposes to use . . . is derived from a legitimate source wholly independent of the compelled testimony.'"²⁹ As a result, the Second Circuit felt compelled to "accept the Court's confidence that use and derivative use immunity will in fact prove to be co-extensive with the privilege against self-incrimination,"³⁰ regardless of whether or not the witness was a defendant.³¹

This conclusion appears to be somewhat limited by the dicta which followed it. Chief Judge Friendly indicated that if the same grand jury which had heard the compelled testimony of the defendant subsequently were to indict him, the court "would have the most serious doubt about the validity of such an indictment."³² The court reasoned that it would be almost impossible for the grand jurors to put out of their minds the compelled testimony in considering whether the evidence presented was sufficient to support an indictment. There-

²⁹ *Id.*, quoting *Kastigar v. United States*, 406 U.S. 441, 460-61 (1972). As a way of meeting this burden of proof, the Second Circuit advised prosecutors to certify any evidence they have available before compelling testimony. 472 F.2d at 516 n.5. See Note, *Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli*, 82 YALE L.J. 171, 181-83 (1972). See also Comment, *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 181, 187-89 (1972).

³⁰ 472 F.2d at 516.

³¹ "Neither in logic nor in legislative history nor in practical effect, however, is there any legitimate distinction between a witness who has not yet been arrested and one who already has been." *Id.* (Oakes, J., concurring).

³² *Id.* The court analogized this situation to cases wherein testimony is obtained in violation of a defendant's constitutional rights. Even in this area there seems to be some dispute as to the proper remedy. There is strong precedent for the position that evidence derived in violation of an accused's constitutional rights is merely subject to exclusion in later prosecution. It has not heretofore formed the basis of quashing an indictment. See *United States v. Blue*, 384 U.S. 251, 255 & n.3 (1966); *Lawn v. United States*, 355 U.S. 339, 349-50 (1958); *Costello v. United States*, 350 U.S. 359 (1956); *United States v. Cleary*, 265 F.2d 459 (2d Cir. 1959); 8 J. WIGMORE, EVIDENCE § 2184a, at 40 (McNaughton rev. 1961).

The Second Circuit has taken the position that these cases do not foreclose a court from dismissing an indictment "if a defendant could establish that it was obtained on the basis of testimony compelled from him after a proper assertion of his privilege." 472 F.2d at 516 n.4. In support of this position the court cited *Jones v. United States*, 342 F.2d 863 (D.C. Cir. 1964), which held that "an indictment obtained in violation of federal constitutional rights must be dismissed . . ." 342 F.2d at 871-72 (footnotes omitted). *Jones* distinguished *Lawn* and *Costello* as not involving an abridgment of constitutional rights. The D.C. Circuit relied on *Cassell v. Texas*, 339 U.S. 282 (1950), wherein it was held that the indictment was subject to dismissal if returned by an unconstitutionally composed grand jury.

It is submitted that a dismissal of the indictment is the only effective and logical sanction where the same grand jury which heard the compelled testimony also indicts the accused. If, for example, the prosecution uses tainted evidence at the grand jury level but does not introduce such evidence at trial there is nothing to suppress. Even if such evidence is used before the grand jury and at trial, a suppression of evidence at the trial does not cure the violation which occurred when the grand jury considered such evidence or testimony. Thus, any violation of the accused's rights which occurs at the grand jury level can only be cured by dismissing the indictment.

fore, such testimony would be used in a manner prohibited by the statute and *Kastigar*. Accordingly, the court concluded that

there is no statutory or constitutional bar to prevent the United States Attorney from compelling a potential defendant in a related proceeding who has been granted immunity under 18 U.S.C. §§ 6002 and 6003 to testify before a grand jury *which is not being asked to indict him*.³³

Although this aspect of the decision imposes upon the prosecutorial authorities the additional burden of empaneling a special grand jury to hear the compelled testimony of an actual defendant, such a burden is outweighed by the need to protect the accused's rights. In addition, by extending the application of the Federal Immunity of Witnesses Act to defendants, the Second Circuit may have formulated a viable alternative to the much maligned practice of plea bargaining. Formerly, in order to elicit additional evidence, the prosecution could "bargain" with a defendant by agreeing to accept a plea of guilty to a lesser offense in return for information or testimony implicating higher-ups. Under *Goldberg*, once the prosecution has accumulated sufficient information against a particular individual that evidence may be certified³⁴ and the accused called before a grand jury. By granting the accused "use and derivative use" immunity the prosecution may require the accused to testify as to others under the threat of a contempt citation. The net result of this process is that rather than settle for a conviction of a lesser offense in order to prosecute a higher-up for the offense actually committed, the prosecution may convict both.

A question arises as to whether any of the participants' constitutional rights would be violated under this procedure. It is submitted that they would not. The accused would have been indicted anyway by virtue of the information certified against him prior to granting him immunity. Therefore he may not claim that his fifth amendment rights have been violated. Moreover, the principal may not claim that his fifth amendment rights have been violated because the accused has been compelled to talk under a threat of contempt. Clearly there is no constitutional protection against incrimination by third parties.³⁵ The most serious difficulty arises where the prosecution might be tempted to have the immunized party indicted by the grand jury before which he testified. It is submitted that such an indictment would

³³ 472 F.2d at 516 (emphasis added).

³⁴ See note 29 *supra*.

³⁵ See, e.g., *Couch v. United States*, 409 U.S. 322 (1973).

violate the fifth amendment. The dicta in the *Goldberg* decision acknowledged this possibility and cautioned that such a procedure probably would be invalid.³⁶

In conclusion, *Goldberg* is consistent with both *Kastigar* and the probable intent of Congress in enacting the Federal Immunity of Witnesses Act.³⁷ It may prove to be a valuable tool for the prosecution.

³⁶ 472 F.2d at 516.

³⁷ It should be noted that the *Goldberg* court relied on some rather weak language to support its finding of legislative intent. See note 24 *supra*. More persuasive is this statement:

Mr. Mikva: [T]he immunity from use would apply even if a prosecution were pending at the time. Is that the case?

Mr. Poff: The immunity from use would apply if a prosecution were pending at the time.

Hearings on H.R. 11157, supra note 24, at 34.