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A Clash of Fundamental Rights: Conflicts Between the Fifth and Sixth Amendments in Criminal Trials

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A CLASH OF FUNDAMENTAL RIGHTS: CONFLICTS BETWEEN THE FIFTH AND SIXTH AMENDMENTS IN CRIMINAL TRIALS

The United States Constitution's Fifth and Sixth Amendments protect the rights of criminal defendants and witnesses. The Fifth Amendment's privilege against self-incrimination protects witnesses from forced self-incrimination, and the Sixth Amendment provides criminal defendants with the right to cross-examine prosecution witnesses and to have compulsory process for obtaining witnesses. These fundamental rights conflict when a prosecution witness invokes the Fifth Amendment privilege on cross-examination or when a defense witness invokes the privilege on direct-examination. A grant of either use or transactional immunity would remove the potential for self-incrimination, but courts are split on whether they possess the authority to grant such immunity to defense witnesses. This Note examines the judicial approaches to resolving the conflicts between the Fifth and Sixth Amendment, and it analyzes the factors that favor and those that oppose a grant of immunity to defense witnesses. This Note concludes that defense witnesses should be granted use immunity whenever their testimony might be exculpatory.

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INTRODUCTION

The Fifth and Sixth Amendments of the United States Constitution provide a criminal defendant's most fundamental rights. The Fifth Amendment states, in pertinent part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself,"[1] and the Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor."[2]

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[1] U.S. CONST. amend. V. The Supreme Court held in *Malloy v. Hogan*, 378 U.S. 1, 6 (1964), that the Fifth Amendment's self-incrimination privilege applies to the states through the Fourteenth Amendment.

[2] U.S. CONST. amend. VI. The Supreme Court held in *Washington v. Texas*, 388 U.S. 14, 17-19 (1967), that the Sixth Amendment's Compulsory Process Clause applies to the states through the Fourteenth Amendment; in *Pointer v. Texas*, 380 U.S. 400, 403 (1965), it found that the Confrontation Clause applies to the states through the Four-

Although these amendments provide for the preeminent protections afforded criminal defendants in the United States, a witness's invocation of the Fifth Amendment right against self-incrimination can impede a defendant's presentation of evidence.[3] For example, a witness testifying against a defendant may invoke the privilege upon cross-examination by the defense, thereby denying the defense the right to effective cross-examination.[4] Further, a witness who might provide exculpatory testimony may invoke the privilege, thereby denying the defendant the ability to present evidence in her defense.

This Note examines the various judicial approaches to the problems that arise when Fifth and Sixth Amendment protections conflict in criminal trials. Part I.A addresses the scope of the Fifth Amendment privilege, including the circumstances under which the privilege may be available and the two types of immunity—use and transactional—that may be granted to prevent invocation of the privilege. Part I.B analyzes the scope of the Sixth Amendment's Confrontation and Compulsory Process Clauses.

Part II examines conflicts between the guarantees the two amendments provide. Generally, only prosecutors have been able to request grants of immunity.[5] Some courts, however, have identified a Sixth Amendment right under which, given certain circumstances, a defense witness may be immu-

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teenth Amendment.

[3] "An accused may for all practical purposes be denied the right to compulsory process by virtue of the countervailing impact of the privilege against self-incrimination. Where the two rights are in conflict, the privilege against self-incrimination has prevailed." 3 JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 18.3 (2d ed. 1986 & Supp. 1995).

[4] The most recent famous occurrence of this conflict occurred in September 1995 in the double-murder trial of football star O.J. Simpson. People v. Simpson, 1995 WL 704381 (L.A. Super. Ct. Oct. 3, 1995). In March 1995, the prosecution in the Simpson trial called former police detective Mark Fuhrman to testify against Simpson. William Claiborne, *Ito Orders Rebuttal Before Defense Rests; Photos of Simpson in Gloves Shown; Cochran Awaits Fuhrman Appeal Ruling*, WASH. POST, Sept. 12, 1995, at A3. Fuhrman linked Simpson to the murder scene by testifying that he had found a bloody glove at Simpson's Brentwood estate. *Id.* Fuhrman also testified that he had not used racial epithets and had never planted evidence. *Id.* Defense attorneys later discovered a set of tapes in which Fuhrman used racial epithets and spoke of planting evidence. *Id.* When the defense attempted to cross-examine Fuhrman regarding his earlier testimony, including the manufacture and planting of evidence, Fuhrman invoked the privilege against self-incrimination. *Id.* Defense attorney Gerald Uelmen argued that by allowing Fuhrman to invoke the privilege, Judge Lance A. Ito had deprived Simpson of his Sixth Amendment right to cross-examine the former detective. Nevertheless, Judge Ito rejected the defense's requests that the court either (a) strike all references to the glove from the record, (b) grant Fuhrman prosecutorial immunity, or (c) tell the jury that Fuhrman refused to testify. *Id.* The California Second District Court of Appeal and the California Supreme Court upheld Judge Ito's decision. *See id.*

[5] For a discussion of immunity grants, see *infra* Part I.A.3.

nized.[6] Part II discusses the policy arguments regarding immunity grants and concludes that use immunity best preserves the rights of witnesses, defendants, and the prosecution, as well as the state's interest in prosecuting those criminals who may serve as witnesses in trials held prior to their own. Part III concludes by recommending that defense witnesses be granted use immunity whenever their testimony might be exculpatory.

I. CONSTITUTIONAL GUARANTEES TO DEFENDANTS AND WITNESSES

A. *The Scope of the Fifth Amendment Privilege*

1. *The Availability of the Privilege*

The Fifth Amendment's self-incrimination privilege protects a defendant from becoming a witness against himself in any criminal prosecution.[7] Various policy considerations support the privilege, including the basic tenet that defendants are presumed innocent and thus are not required to prove their innocence by testifying on their own behalf.[8]

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[6] *See infra* Part II.A.

[7] Thus, a non-defendant witness may invoke the privilege if she justifiably fears subsequent prosecution. The Supreme Court has held that a witness asserting the privilege against self-incrimination must be "confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." Rogers v. United States, 340 U.S. 367, 374 (1951); *see* United States v. Apfelbaum, 445 U.S. 115, 128 (1980); Marchetti v. United States, 390 U.S. 39, 53 (1968).

A witness may invoke the privilege even if the feared potential prosecution is in a jurisdiction other than the one in which she is called to testify. Examples include prosecution under the laws of a foreign country, under the laws of another state, under state laws if the witness is testifying in a federal court, or under federal laws if the witness is testifying in a state court. 1 CHARLES T. MCCORMICK ET AL., MCCORMICK ON EVIDENCE § 123 (John William Strong ed., 4th ed. 1992).

[8] Several additional justifications have been offered for the privilege. Wigmore's treatise on evidence lists twelve:

> (1) It protects the innocent defendant from convicting himself by a bad performance on the witness stand. (2) It avoids burdening the courts with false testimony. (3) It encourages third-party witnesses to appear and testify by removing the fear that they might be compelled to incriminate themselves. . . . (4) The privilege is a recognition of the practical limits of governmental power; truthful self-incriminating answers cannot be compelled, so why try. . . . (5) The privilege prevents procedures of the kinds used by the infamous courts of Star Chamber, High Commission and Inquisition. (6) It is justified by history, whose tests it has stood; the tradition which it has created is a satisfactory one. . . . (7) The privilege preserves respect for the legal process by avoiding situations which are likely to degenerate into undignified, uncivilized and regrettable scenes. (8) It spurs the prosecutor to do a complete and competent independent investigation. . . . (9) The

Because the privilege protects its holders only against the risk of criminal liability, upon removal of the liability risk, the privilege no longer exists.[9] Thus, a witness who has been pardoned, acquitted, or granted immunity no longer may invoke the privilege as to questions concerning the given act.[10] Similarly, if the statute (or period) of limitations has lapsed, the witness no longer possesses the privilege regarding that act.[11]

Difficulties arise when a witness invokes the privilege after her conviction. The Supreme Court held in *Estelle v. Smith*[12] that a convicted witness may invoke the Fifth Amendment privilege when she fears that her testimony may increase her risk of receiving a death sentence.[13] Lower courts generally have held that the privilege protects a convicted defendant against compelled disclosures that may increase the severity of a sentence, regardless of whether the death penalty is a potential sentence.[14]

Furthermore, courts have recognized that if a direct appeal from a conviction is pending or remains available, any disclosure a defendant might make could incriminate her upon retrial.[15] For this reason, courts typically have held that defendants retain the right to invoke the privilege until they exhaust their appeals or the time for appeal expires.[16]

> privilege aids in the frustration of "bad laws" and "bad procedures," especially in the area of political and religious belief. . . . [(10)] The privilege, together with the requirement of probable cause prior to prosecution, protects the individual from being prosecuted for crimes of insufficient notoriety or seriousness to be of real concern to society. . . . (11) The privilege prevents torture and other inhumane treatment. . . . (12) The privilege contributes toward a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load.

8 JOHN H. WIGMORE, EVIDENCE § 2251 (McNaughton rev. 1961 & Supp. 1995) (citations omitted).

[9] MCCORMICK, *supra* note 7, § 121.

[10] *Id.*; *see infra* Part I.A.3 (discussing immunity in detail).

[11] MCCORMICK, *supra* note 7, § 121.

[12] 451 U.S. 454 (1981).

[13] *Id.* at 462.

[14] *See* United States v. Paris, 827 F.2d 395, 399 (9th Cir. 1987) (citing United States v. Miller, 771 F.2d 1219, 1235 (9th Cir. 1985)); United States v. Trejo-Zambrano, 582 F.2d 460, 464 (9th Cir.), *cert. denied*, 439 U.S. 1005 (1978); *accord.* United States v. De La Cruz, 996 F.2d 1307, 1313 (1st Cir.), *cert. denied*, 510 U.S. 936 (1993).

[15] *See, e.g.*, United States v. Warfield, 97 F.3d 1014, 1020 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1119 (1997); United States v. Argomaniz, 925 F.2d 1349, 1352 (11th Cir. 1991).

[16] MCCORMICK, *supra* note 7, § 121; *see, e.g.*, Ellison v. State, 528 A.2d 1271, 1278 (Md. 1987) (noting that although the statistical likelihood of a successful appeal is low, the possibility of a retrial being granted is not so remote as to constitute a negligible risk); *accord.* State v. Rucas, 734 P.2d 673, 676 (Kan. 1987); Adkins v. State, 557 A.2d 203, 207 (Md. 1989).

2. *Invocation of the Privilege and Waiver*

Non-defendant witnesses, unlike defendants, do not have a right to refuse to testify. As *McCormick on Evidence* notes, "Non-defendant witnesses are privileged only to decline to respond to inquiries, not to be free from those inquiries designed to elicit responses self-incriminatory in nature."[17] Thus, a witness must invoke the privilege in response to each question that could yield a self-incriminatory answer.

The trial judge, not the witness, determines the merits of a privilege claim by determining whether the witness is subject to criminal liability.[18] For this reason, witnesses must invoke the privilege to specific questions; they may not assert a "blanket" privilege. The judge then looks to whether the questions asked justified invocation.[19] Because compelled testimony could force a potential criminal defendant to testify against himself, appellate courts usually grant trial judges substantial latitude in permitting invocation of the privilege. As the Seventh Circuit recognized, a trial court may allow a witness to invoke the privilege "[u]nless it is perfectly clear from the proof that the testimony cannot possibly have a tendency to incriminate the witness."[20]

A witness may testify to certain facts and then invoke the privilege

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[17] MCCORMICK, *supra* note 7, § 137.

[18] *See* Hoffman v. United States, 341 U.S. 479, 486 (1951) (holding that the court determines whether a witness may invoke the privilege against self-incrimination).

[19] As a general rule, such a determination "ordinarily requires that a particularized inquiry into the reasons for the assertion of the privilege be made." United States v. Pratt, 913 F.2d 982, 990 (1st Cir. 1990) (citing United States v. Pierce, 561 F.2d 735, 741 (9th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978)), *cert. denied*, 498 U.S. 1028 (1991); *see* North River Ins. Co. v. Stefanou, 831 F.2d 484, 487 (4th Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988)). Furthermore, in determining the reasonableness of a privilege claim, a judge may take into account facts that are not in evidence. Hoffman v. United States, 341 U.S. 479, 487 (1951).

[20] Gleason v. Welborn, 42 F.3d 1107, 1109 (7th Cir. 1994) (citing *Hoffman*, 341 U.S. at 488), *cert. denied*, 115 S. Ct. 1961 (1995).

Judicial concern for preventing a witness from incriminating herself can result in a judge warning a witness that her testimony could lead to criminal prosecution. A judge may also choose to halt the trial and appoint counsel to the witness to explain to her the implications of her testimony and her constitutional rights. Judges must be especially cautious in such circumstances, however, for, as the Supreme Court noted in *Webb v. Texas*, 409 U.S. 95, 98 (1972), a trial judge's efforts to protect a defense witness—in this case, from prosecution for perjury—may impermissibly intrude upon a defendant's right to produce evidence. *See* 3 COOK, *supra* note 3, § 18.2 (discussing *Webb* and its effects). For a discussion of a judge's options when a witness appears to be in jeopardy of incriminating herself, see MCCORMICK, *supra* note 7, § 138, and WIGMORE, *supra* note 8, § 2269.

against self-incrimination in response to subsequent questions.[21] In *Rogers v. United States*,[22] however, the Supreme Court held that a witness who voluntarily reveals self-incriminatory facts without invoking the privilege forfeits the right to invoke the privilege when later confronted with questions regarding details of her incriminating testimony.[23] Nevertheless, most lower courts allow invocation of the privilege when an answer would *increase* the risk of incrimination.[24] Thus, a witness's potentially incriminating testimony does not result in a waiver of the privilege against self-incrimination on matters relating solely to credibility, such as the commission of other unrelated crimes.[25]

3. *Grants of Immunity*

A witness who receives immunity may not invoke the privilege against self-incrimination. Immunity generally is made available for prosecutorial use through statutory provisions.[26] A witness may be granted one of two

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[21] This option generally is not available to defendants. Unlike a non-defendant witness, a defendant may refuse to be subjected to questioning. For this reason, once a defendant agrees to testify, to a large extent she forfeits her Fifth Amendment privilege. MCCORMICK, *supra* note 7, § 140.

[22] 340 U.S. 367 (1951).

[23] *Id.* at 373. The decision leaves unclear whether the witness's waiver must be made knowingly, as is often the requirement for forfeiture of a constitutional right. For a discussion of this aspect of the decision, see MCCORMICK, *supra* note 7, § 140.

[24] *See, e.g.*, *In re* Seper, 705 F.2d 1499, 1501 (9th Cir. 1983) (holding that although a witness had disclosed information that would incriminate him, disclosure of additional information would "further incriminate" him by providing links in the essential chain of proof should the government choose to prosecute him). The Ninth Circuit based this holding on its previous analysis of *Rogers* in *Hashagen v. United States*, 283 F.2d 345 (9th Cir. 1960), in which it concluded that "'an admission of a criminating fact may waive the privilege as to the details of that fact so long as they do not further incriminate, but where those details would so incriminate, the privilege is not waived.'" *Seper*, 705 F.2d at 1501 (quoting *Hashagen*, 283 F.2d at 352).

[25] *See, e.g.*, FED. R. EVID. 608(b) (providing that "[t]he giving of testimony . . . does not operate as a waiver of the . . . privilege against self-incrimination when examined with respect to matters which relate only to credibility").

[26] Examples of several hundred state and federal immunity statutes may be found in Wigmore's treatise on Evidence. WIGMORE, *supra* note 8, § 2281 n.11.

Like most of the state statutes, the federal immunity statute requires that the prosecutor (here, a United States Attorney) assert in a written application to the court that the witness's testimony may be "necessary to the public interest" and that the witness is otherwise likely to invoke the privilege against self-incrimination. 18 U.S.C. § 6003 (1994). A perfunctory hearing is then held at which the court will routinely grant the application for immunity. HENRY I. SUBIN ET AL., FEDERAL CRIMINAL PRACTICE: PROSECUTION AND DEFENSE § 12.7 (1992).

Judicially granted immunity, which is recognized by courts only in limited circum-

types of immunity—use or transactional. Transactional immunity provides that the government may not prosecute a witness for any transactions about which she testifies.[27] In 1896, the Supreme Court upheld transactional immunity as an adequate protection of a witness's Fifth Amendment self-incrimination interest.[28]

Use immunity, which the Supreme Court upheld in 1972 in *Kastigar v. United States*,[29] protects a witness against only use of compelled testimony and against admission of evidence obtained through a lead the testimony provided. Use immunity does not prevent subsequent prosecution for an offense if the prosecutor utilizes evidence obtained independently of the testimony, such as evidence acquired prior to the testimony or evidence that is otherwise wholly independent from that produced in the witness's testimony.[30] The prosecution bears the burden of proving that any evidence offered against a defendant who was previously granted use immunity was obtained independently of the former witness's compelled testimony.[31]

Use immunity most commonly is granted in federal trials because federal legislation grants such immunity.[32] Several state court decisions, however, have held that use immunity provides insufficient protections to witnesses.[33] These courts believe that only transactional immunity can truly protect a witness's Fifth Amendment right to avoid self-incrimination. State courts that have rejected use immunity have expressed a fear that "in prac-

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stances, if at all, is discussed at *infra* Part II.A.2.

[27] For a discussion of the Supreme Court's initial treatment of transactional immunity statutes, see R. Erik Lillquist, Note, *Constitutional Rights at the Junction: the Emergence of the Privilege Against Self-Incrimination and the Interstate Commerce Act*, 81 VA. L. REV. 1989, 2032-36 (1995).

[28] Brown v. Walker, 161 U.S. 591, 610 (1896).

[29] 406 U.S. 441, 453 (1972).

[30] Erwin N. Griswald, *Fifth Amendment*, *in* THE OXFORD COMPANION TO THE SUPREME COURT, 293, 295 (Kermit L. Hall ed., 1992); *see, e.g.*, United States v. Poindexter, 698 F. Supp. 300 (D.D.C. 1988) (holding that the independent counsel prosecuting the case against the defendants, including Lt. Col. Oliver North, met the heavy burden of demonstrating that it obtained the evidence offered against the defendants independently of their compelled, immunized congressional testimony).

[31] *Kastigar*, 406 U.S. at 460. Nevertheless, most courts hold that the prosecution's "mere assertion" that it obtained the offered evidence independently is sufficient to meet this burden. MCCORMICK, *supra* note 7, § 143.

[32] *See* 18 U.S.C. §§ 6002-6003 (1994) (granting United States attorneys the authority to seek use immunity for witnesses). In passing this statute in 1970, Congress repealed earlier immunity provisions, including those providing transactional immunity. 18 U.S.C. § 6001 (1994).

[33] *See* MCCORMICK, *supra* note 7, § 143; *see, e.g.*, State v. Gonzalez, 853 P.2d 526, 530 (Alaska 1993); State v. Miyasaki, 614 P.2d 915, 923 (Haw. 1980); Attorney General v. Colleton, 444 N.E.2d 915, 920-21 (Mass. 1982); State v. Soriano, 693 P.2d 26 (Or. 1984).

tice there is insufficient assurance that a prosecution permitted under *Kastigar* will in fact be based upon actually independent evidence."[34]

B. *The Scope of the Sixth Amendment Guarantees*

1. *Confrontation Clause*

The primary purpose of the Sixth Amendment's Confrontation Clause is "to secure for the opponent the opportunity of cross-examination."[35] Cross-examination allows a defendant to cast doubts upon the testimony offered against her by allowing the defense to probe the witness to determine bias, dishonesty, and basis of knowledge.[36] The Supreme Court has held not only that the Sixth Amendment right of confrontation is fundamental to a defendant's right to due process and a fair trial[37] but also that "[c]ross-examination of a witness is a matter of right."[38]

2. *Compulsory Process Clause*

The Sixth Amendment's guarantee of compulsory process ideally should give a defendant, who is presumed innocent until proven guilty, at least as much access to governmental means for obtaining testimony as the prosecution possesses.[39] Thus, several commentators and a few courts have argued that compulsory process should allow defendants access to the key prosecutorial tool for obtaining the self-incriminating, and perhaps exculpatory, testimony of witnesses—witness immunity.[40] The next section addresses these arguments as well as judicial approaches to the conflicts between a witness's Fifth Amendment privilege and a defendant's Sixth Amendment guarantees.

II. CONFLICTS BETWEEN THE FIFTH AND SIXTH AMENDMENTS IN CRIMINAL TRIALS

According to Professor Cook's treatise on the constitutional rights of defendants, "An accused may for all practical purposes be denied the right to compulsory process by virtue of the countervailing impact of the privi-

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[34] MCCORMICK, *supra* note 7, § 143.

[35] WIGMORE, *supra* note 8, § 1395.

[36] *See* COOK, *supra* note 3, § 18.10 (discussing the scope of cross-examination).

[37] *See, e.g.*, Chambers v. Mississippi, 410 U.S. 284, 294-95 (1973).

[38] Alford v. United States, 282 U.S. 687, 691 (1931).

[39] Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 168 (1974).

[40] *See infra* Part II.A.1.

lege against self-incrimination. Where the two rights are in conflict, the privilege against self-incrimination has prevailed."[41] Courts that have addressed this conflict agree.[42] In *Kastigar*, the Supreme Court offered justifications for this preference:

> The power to compel testimony is not absolute. There are a number of exemptions from the testimonial duty, the most important of which is the Fifth Amendment privilege against compulsory self-incrimination. The privilege reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty.[43]

Although a witness's Fifth Amendment privilege generally outweighs a defendant's Sixth Amendment privilege, certain judicial remedies may preserve an accused's Sixth Amendment rights. The available remedies differ depending on whether a defense witness or a prosecution witness subject to cross-examination invokes the privilege.

A. *Invocation of the Self-Incrimination Privilege by a Defense Witness*

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[41] 3 COOK, *supra* note 3, § 18.3.

[42] The Ninth Circuit held that "[t]he Sixth Amendment right of an accused to compulsory process to secure the attendance of a witness does not include the right to compel the witness to waive his Fifth Amendment privilege." United States v. Trejo-Zambrano, 582 F.2d 460, 464 (9th Cir.) (citing United States v. Gay, 567 F.2d 916 (9th Cir.), *cert. denied*, 435 U.S. 999 (1978)), *cert. denied*, 439 U.S. 1005 (1978); *see, e.g.*, United States v. Robaina, 39 F.3d 858, 862 (8th Cir. 1994) (holding that a "defendant's right to compulsory process does not include the right to compel a witness to waive his or her Fifth Amendment privilege against self incrimination") (citing Kastigar v. United States, 406 U.S. 441, 444 (1972)); United States v. Boyett, 923 F.2d 378, 379 (5th Cir.) ("When the [Fifth Amendment right of a witness and the Sixth Amendment rights of a defendant] are in conflict, we have stated that 'an accused's right to compulsory process must give way to the witness'[s] Fifth Amendment privilege not to give testimony that would tend to incriminate him.'") (quoting United States v. Khan, 728 F.2d 676, 678 (5th Cir. 1984)), *cert. denied*, 502 U.S. 809 (1991); United States v. Thornton, 733 F.2d 121, 125 (D.C. Cir. 1984) (citing United States v. Reese, 561 F.2d 894, 899-900 (D.C. Cir. 1977)); Johnson v. Johnson, 375 F. Supp. 872 (W.D. Mich. 1974); Commonwealth v. Francis, 375 N.E.2d. 1221 (Mass.), *cert. denied*, 439 U.S. 872 (1978).

[43] *Kastigar*, 406 U.S. at 444-45 (citing Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); Ullmann v. United States, 350 U.S. 422, 426 (1956); Blair v. United States, 250 U.S. 273, 281 (1919); ERWIN N. GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955); 8 WIGMORE, *supra* note 8, §§ 2192, 2197). In *Kastigar*, the Court noted that it "has been zealous to safeguard the values that underlie the privilege [against compulsory self-incrimination]." *Kastigar*, 406 U.S. at 445 (citing Miranda v. Arizona, 384 U.S. 436, 443-44 (1966); Boyd v. United States, 116 U.S. 616, 635 (1886)).

The sole remedy to preserve both a witness's Fifth Amendment privilege against self-incrimination and a defendant's compulsory process right to obtain witnesses in her favor is to grant immunity to the witness.[44] Policy arguments in favor of such grants are compelling, but given the lack of statutory provisions for such a grant, courts have been reluctant to recognize the right based "merely" on Sixth Amendment grounds.[45]

1. *Grants of Immunity for Defense Witnesses*

Defense witnesses may invoke the Fifth Amendment privilege against self-incrimination if they justifiably fear that their testimony will be self-incriminating.[46] If a prosecutor desires to present a witness's potentially self-incriminating testimony in order to help prove a defendant's guilt, she generally has the statutory power to receive immunity for the witness and to compel the witness to testify.[47] Defense attorneys lack such statutory power.[48] Some commentators, however, have argued vigorously that compulsory process requires that defense attorneys be given equal access to this tool for gaining important evidence.

As one commentator noted,

> The constitutional right of the accused to obtain immunity for his witnesses falls squarely within the language and purpose of the compulsory process clause. . . . [The clause] was adopted to give the defendant at least as much access as that of the prosecution to governmental devices for obtaining testimony. . . . [T]he defendant has a presumptive right to obtain immunity for his witnesses on an equal basis with the prosecution. . . . The public interest in each case is to determine the truth, and the standard for granting use immunity in each case should be the same, namely, whether it is 'necessary to the public interest.' [quoting 18 U.S.C. § 6003(b)(1)

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[44] For a discussion of immunity, see *supra* Part I.A.3.

[45] *See infra* Part II.A.2; *see also infra* note 48 and accompanying text (discussing the lack of statutorily provided immunity for defense witnesses).

[46] *See supra* note 7 and accompanying text.

[47] All 50 states, as well as the District of Columbia and Puerto Rico, have statutes allowing prosecutors in certain circumstances to seek immunity for witnesses. For a list of these statutes, see WIGMORE, *supra* note 8, § 2281 n.11. Federal law also provides for prosecutorially requested immunity. 18 U.S.C. §§ 6002-6003 (1996); *see supra* note 26. Additionally, some courts have found inherent power in prosecutors to grant immunity. MCCORMICK, *supra* note 7, § 143.

[48] Neither Congress nor the state legislatures have enacted statutes permitting defense attorneys to seek immunity for their clients' witnesses. *See* MCCORMICK, *supra* note 7, § 143.

(1970) (amended 1996)]. Once the state makes immunity available to the prosecution it should not be permitted arbitrarily to withhold it from the defense.[49]

These arguments are particularly persuasive when there is a substantial likelihood that a potential witness might provide exculpatory testimony. Without defense witness immunity, a witness who might exonerate an innocent defendant may refuse to answer the necessary incriminating questions and thus allow the conviction of an innocent defendant.

Several arguments, however, support the denial of equal access to grants of immunity. As the Fourth Circuit noted, "A person suspected of crime should not be empowered to give his confederates an immunity bath."[50] Permitting defendants to call their friends and/or co-conspirators as witnesses and then forcing the court or the prosecution to immunize them could lead to great injustices. For example, a friend, as an immunized witness, could help a guilty defendant go free by implicating herself in the crime. If the witness had been granted use immunity and was tried later for the offense, the former defendant could reciprocate by implicating herself in her friend's trial.[51] Because of the double jeopardy rule, the former defendant could do so without fear of further prosecution.[52]

The safeguard preventing such miscarriages of justice is the jury's role in weighing the evidence and in determining whether to believe the witness.[53] Defense witnesses are subject to vigorous cross-examination by the prosecutor, who will likely attempt to show the witness's bias or lack of honesty.

Furthermore, if a witness receives only use immunity, she may still be prosecuted for the crime about which she testified. Use immunity prohibits the prosecution only from introducing the immunized testimony into evidence or from presenting any evidence obtained through a lead provided by the testimony.[54] When the prosecution grants use immunity, it loses nothing; the incriminating statements that it cannot use against an immunized witness are statements that, absent immunity, the witness would never have made because she otherwise would have invoked her Fifth Amendment

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[49] Westen, *supra* note 39, at 168-70 (citations omitted).

[50] *In re* Kilgo, 484 F.2d 1215, 1222 (4th Cir. 1973).

[51] If the witness was granted transactional immunity, she could not be tried for the admitted crime at all. *See supra* Part II.A.2.

[52] The Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. For an explanation of the double jeopardy protection, see *Greene v. United States*, 355 U.S. 184, 185 (1957).

[53] As fact finders, juries (or the trial court in non-jury trials) determine the credibility of witnesses and, subsequently, the weight that their testimony should be given.

[54] *See supra* notes 29-30 and accompanying text.

privilege. Indeed, in *Kastigar*, the Supreme Court concluded that "[use] immunity . . . leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege."[55] Thus, witnesses would be disinclined to lie in order to help a friend if they were aware that they could be prosecuted for the crime.

Granting defense witnesses use immunity may inconvenience prosecutors. For example, if a prosecutor intends to prosecute a witness later, she may need to gather evidence against the witness and to certify it under seal so as to fulfill the requirement that evidence be obtained independently.[56] Nevertheless, as noted earlier, prosecutors generally need only assert that they obtained the evidence independently to fulfill the Supreme Court's requirement of independence.[57]

In jurisdictions that currently recognize only transactional immunity, however, a prosecutor loses the ability to prosecute a witness who received immunity.[58] A weak response to this problem is that prosecutors may simply decide that a given defendant or a given witness is more "worthy" of prosecution.[59] If the prosecutor believes she would have a stronger case against the witness, she may dismiss the charges against the defendant and prosecute the witness. Similarly, if it is "better" to prosecute the defendant, the prosecutor may pursue the case against the defendant and sacrifice the ability to prosecute the witness.

2. *Judicially Ordered or Granted Immunity*

Several courts have held that defendants have no right to obtain either type of immunity for their wintesses.[60] Furthermore, courts that recognize judicially granted immunity generally have held that only transactional immunity may be granted because the statutory language of use immunity provisions provides only for prosecutorial requests for such immunity.[61]

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[55] Kastigar v. United States, 406 U.S. 441, 462 (1972); *see* Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

[56] The prosecutor may always seek a postponement of the current trial in order to obtain evidence against a particular witness. *See* Westen, *supra* note 39, at 169.

[57] *See supra* note 31 and accompanying text.

[58] *See supra* text accompanying note 27.

[59] *See* Westen, *supra* note 39, at 170 n.477.

[60] *See, e.g.*, United States v. Robaina, 39 F.3d 858, 863 (8th Cir. 1994) (noting that "'[j]udicial' immunity has not been recognized in this Circuit"); United States v. Allstate Mortgage Corp., 507 F.2d 492, 495 (7th Cir. 1974) (holding that regardless of whether use or transactional immunity is sought, only United States attorneys may seek orders granting immunity in federal courts), *cert. denied*, 421 U.S. 999 (1975). Nevertheless, the Eighth Circuit suggested in *United States v. Hardrich*, 707 F.2d 992, 993-94 (8th Cir.), *cert. denied*, 464 U.S. 991 (1983), that judicial immunity may be appropriate if the proffered testimony is clearly exculpatory.

[61] *See, e.g.*, *Robaina*, 39 F.3d at 863 (concluding that "[t]he Supreme Court has held

Judicially ordered immunity, whereby a judge orders a prosecutor to request immunity for a defense witness, has met similar resistance. The Ninth Circuit, for example, held that "an accused [is not] entitled to compel a prosecutor to grant immunity to a potential defense witness to get him to testify."[62]

Five circuits recognize judicially ordered or granted immunity.[63] The Third Circuit acknowledged judicially granted and judicially ordered transac-

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that statutory immunization of a witness, or use immunity, can only be granted upon the request of the Attorney General.") (citing United States v. Doe, 465 U.S. 605, 616 (1984)). The Eighth Circuit quoted the Supreme Court's decision in *Doe*: "'We decline to extend the jurisdiction of courts to include the prospective grant of use immunity in the absence of the formal request that the statute requires.'" *Id.* (quoting *Doe*, 465 U.S. at 616); *accord.* United States v. Doddington, 822 F.2d 818, 821 (8th Cir. 1987) (citing *Doe*, 465 U.S. at 616).

[62] United States v. Paris, 827 F.2d 395, 399 (9th Cir. 1987) (citing United States v. Trejo-Zambrano, 582 F.2d 460, 464 (9th Cir.) (citing United States v. Alessio, 528 F.2d 1079, 1081 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976)), *cert. denied*, 439 U.S. 1005 (1978)).

[63] The First, Second, Third, Fourth, and Ninth Circuits recognize immunity for defense witnesses. *See* United States v. Pratt, 913 F.2d 982, 991 (1st Cir. 1990); United States v. Todaro, 744 F.2d 5, 9 (2d Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985); Virgin Islands v. Smith, 615 F.2d 964, 970 (3d Cir. 1980); United States v. Klauber, 611 F.2d 512, 517-19 (4th Cir. 1979), *cert. denied*, 446 U.S. 908 (1980); *Alessio*, 528 F.2d at 1080-82.

Six of the federal circuits have refused to recognize judicial authority to grant defense witness immunity. *See* United States v. Cuthel, 903 F.2d 1381, 1384 (11th Cir. 1990); United States v. Pennell, 737 F.2d 521, 526 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985); United States v. Thevis, 665 F.2d 616, 638-39 (5th Cir. Unit B), *cert. denied*, 465 U.S. 1008 (1982); *In re* Daley, 549 F.2d 469, 478-79 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977); United States v. Graham, 548 F.2d 1302, 1315 (8th Cir. 1977); Earl v. United States, 361 F.2d 531, 534 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

The Tenth Circuit has not yet recognized immunity for defense witnesses, but in *United States v. Chalan*, 812 F.2d 1302, 1310 (10th Cir. 1987), the court left open "the possibility that 'where the prosecutor's denial of immunity is a deliberate attempt to distort the fact finding process, a court could force the government to choose between conferring immunity or suffering acquittal.'" (quoting *Smith*, 615 F.2d at 968).

For an argument that courts are the logical source of the immunity grant, see Jana Winograde, Comment, *Jailhouse Informants and the Need for Judicial Use Immunity in Habeas Corpus Proceedings*, 78 CAL. L. REV. 755, 777-79 (1990).

Several state courts have recognized a right to defense witness immunity. *See* State v. Montgomery, 467 So. 2d 387, 390-96 (Fla. Dist. Ct. App. 1985); State v. Summers, 485 A.2d 335, 336-38 (N.J. Super. Ct. Law Div. 1984); People v. Shapiro, 409 N.E.2d 897, 904-05 (N.Y. 1980); State v. Broady, 321 N.E.2d 890, 894-96 (Ohio Ct. App. 1974). For an analysis of one state's approach to defense witness immunity, see Thomas D. Dinackus, Comment, *Defense Witness Immunity in New York*, 71 CORNELL L. REV. 890 (1986).

tional immunity in *Virgin Islands v. Smith*.[64] In *Smith*, the court held that a defense witness should have been granted immunity by the trial court.[65] Previously, in *United States v. Herman*,[66] the Third Circuit recognized the possibility of such an immunity grant but had not ordered one. The court in *Herman* recognized two situations in which the Due Process Clause might compel a grant of immunity to defense witnesses.[67]

The first situation involves government actions taken to deny use immunity to defendants with "the deliberate intention of distorting the judicial fact finding process."[68] In such a case, a court has the remedial power to force the prosecutor to request immunity for the witness by threatening to order an acquittal, even if the testimony is neither exculpatory nor otherwise essential to the defendant's case.[69] The Third Circuit reaffirmed this right in *Smith* and reiterated that the defendant bears the burden of proving such misconduct.[70]

The second situation that the Third Circuit recognized in *Herman* and reaffirmed in *Smith* as justifying defense witness immunity occurs when a witness's "'testimony is essential to an effective defense.'"[71] The court held that under such circumstances, a defendant's compulsory process right requires a grant of judicially fashioned immunity.[72] This immunity differs from the compelled grant of immunity in the above prosecutorial misconduct situation. Although a court may "twist the prosecutor's hand" by forcing her to choose between accepting an acquittal or requesting immunity for a defense witness, a court faced with a witness who possesses "testimony [that] is essential to an effective defense" has the power to decree immunity itself.[73] The Third Circuit held that unlike prosecutorially requested immunity, which is authorized by statutes, the Sixth Amendment's Compulsory Process Clause authorizes judicially decreed immunity.[74]

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[64] 615 F.2d 964 (3d Cir. 1980).

[65] *Id.* at 974.

[66] 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979).

[67] *Id.* at 1204.

[68] *Id.*

[69] *Smith*, 615 F.2d at 964, 969 n.7.

[70] The Third Circuit held that "'the evidentiary showing required to justify reversal on that ground must be a substantial one. The defendant must be prepared to show that the government's decisions were made with the deliberate intention of distorting the judicial fact finding process.'" *Id.* at 968 (quoting *Herman*, 589 F.2d at 1204).

[71] *Id.* at 969 (quoting *Herman*, 589 F.2d at 1204). The Circuit did not supply criteria for determining what type of testimony qualifies as "essential." *Id.* For an examination of the narrow interpretation of "essential" utilized by the First Circuit, see *infra* notes 77-84 and accompanying text.

[72] *Id.*

[73] *Id.*

[74] *Id.*

The First Circuit in *United States v. Pratt*[75] also recognized that defendants are entitled to a grant of immunity for a witness if the judge finds prosecutorial misconduct or believes a witness's testimony is essential to an effective defense.[76] The First Circuit, however, appears to have a narrow view of when a defendant can seek witness immunity under either theory.

In *United States v. De La Cruz*,[77] a post-*Pratt* case, the First Circuit upheld a trial court's decision to allow a co-conspirator to invoke his Fifth Amendment privilege to avoid testifying as a witness for the defense despite the fact that he had already been convicted and was merely awaiting sentencing,[78] and, more importantly, despite the fact that the appellate court recognized that "it [was] surely possible that [the witness] would have exculpated [the defendant] entirely."[79] The First Circuit concluded that although "the direct testimony of [the witness] . . . might have been important, even decisive[,] . . . whatever the cost to [the defendant], . . . [the witness] was entitled to invoke his Fifth Amendment privilege if testifying might incriminate him."[80]

The First Circuit never directly addressed the "effective defense" theory. The court noted that the defendant could have testified to the same exculpatory facts that he sought to introduce through the witness. Thus, the court likely believed that the existence of this alternative rendered the witness's testimony "non-essential." This "alternative," however, is undesirable because ultimately it might force a defendant to testify against herself or to invoke her Fifth Amendment privilege in the presence of the jury. This "alternative" thus runs counter to the Fifth Amendment principle against compelling a witness—here, the defendant—to testify against herself.

Furthermore, although in dictum the First Circuit recognized the availability of immunity for defense witnesses based on "prosecutorial misconduct,"[81] it noted that only in "rare cases [will] the denial of immunity comprise a miscarriage of justice."[82] Because prosecutors are likely to avoid actions that place them in such a position, few if any instances will likely arise in which courts will grant immunity under this provision. As a result,

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[75] 913 F.2d 982 (1st Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

[76] *Id.* at 991 (citing United States v. Angiulo, 897 F.2d 1169, 1190-93 (1st Cir.), *cert. denied*, 498 U.S. 845 (1990); Virgin Islands v. Smith, 615 F.2d 964, 969 (3d Cir. 1980); United States v. Morrison, 535 F.2d 223, 229 (3d Cir. 1976)).

[77] 996 F.2d 1307 (1st Cir.), *cert. denied*, 510 U.S. 936 (1993).

[78] *Id.* at 1312.

[79] *Id.*

[80] *Id.*

[81] Under the First Circuit's scheme, a prosecutor's gratuitous threats to prosecute a witness if she testified would qualify as misconduct warranting a grant of immunity. *Id.* at 1313. Given the First Circuit's high threshold for defense immunity grants, however, it seems unlikely that less egregious misconduct would warrant an immunity grant.

[82] *Id.* at 1313-14.

given the First Circuit's construction of when testimony is "essential," it appears that grants of immunity to defense witnesses under any circumstances will be rare. If all the circuits adopt the First Circuit's narrow constraints, the remedy will be available so rarely that its existence may be almost irrelevant.

3. *Continuances*

Under limited circumstances, a continuance may preserve a witness's Fifth Amendment privilege against self-incrimination and a defendant's Sixth Amendment compulsory process rights.[83] As noted earlier, a witness may invoke the privilege only so long as there exists a potential for criminal liability.[84] Because there is no potential for criminal liability, for example, for an acquitted witness or for one who has exhausted her appeals, a delay in a defendant's trial may permit compelled testimony from a witness who previously invoked the Fifth Amendment privilege.[85] A defendant in such circumstances could then request a continuance and obtain the testimony of the witness.

Circumstances in which a continuance would prove valuable seem to be limited. Although a defendant may request a continuance until the witness has been tried, the judicial process is slow, and the witness might not be tried for months or even years.[86] Furthermore, courts have held that a convicted witness retains the right to invoke the privilege not only until after sentencing but also until she exhausts all of her appeals.[87] Similarly, if a witness has not been prosecuted, a continuance potentially would be required to last until the statute of limitations on the crime has lapsed. Thus, continuances are impractical, and a court would not likely grant a continuance in such circumstances.[88]

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[83] *See, e.g.*, Wehling v. Columbia Broadcasting Sys., 608 F.2d 1084, 1086-89 (5th Cir. 1979).

[84] *See supra* note 9 and accompanying text.

[85] *See supra* note 10 and accompanying text.

[86] *See, e.g.*, United States v. Barnett, 330 F.2d 369, 425 (5th Cir. 1963) (noting the slowness of the judicial process).

[87] *See supra* notes 12-16 and accompanying text.

[88] In any event, when immunity is not granted, and a continuance would allow a witness awaiting sentencing to testify after sentencing, a court is not required, sua sponte, to grant a continuance. *See, e.g.*, United States v. Paris, 827 F.2d 395, 399 (9th Cir. 1987) ("To obtain a continuance a defendant must move for one.") (citing United States v. Steffen, 641 F.2d 591, 595 (8th Cir.), *cert. denied*, 452 U.S. 943 (1981)).

4. *Allowing the Defense To Call a Witness Who Will Invoke the Privilege Against Self-Incrimination*

a. *Invocation During Initial Direct Examination*

One final conflict involving a witness's Fifth Amendment privilege and a defendant's Sixth Amendment right to compulsory process occurs when a defendant is either denied immunity for a defense witness or does not seek a grant or order of immunity. Defense counsel may want to call a witness it realizes will invoke the privilege solely to compel the assertion of the privilege in the jury's presence.[89] A court that is aware of such a plan need not allow the witness to make the invocation in the jury's presence.[90] Courts base this decision on the generally accepted principle that juries may not draw inferences from the fact that a witness invokes the privilege against self-incrimination.[91] Courts may avoid invocation of the privilege in the jury's presence by holding in camera proceedings to determine whether a witness intends to invoke the privilege. If the witness indicates that intention, the judge may request that the witness invoke the privilege at that time, outside the jury's presence.[92]

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[89] *See* Michael Cook, Comment, *Denying a Criminal Defendant the Opportunity to Call a Witness Who Will Invoke His Fifth Amendment Privilege Against Self-Incrimination*, 54 DENV. L.J. 205 (1977) (arguing that a defendant's attempt to raise inferences in her own favor by calling witnesses she knows will invoke the Fifth Amendment privilege does not present evidentiary problems and that such attempts should be allowed if they are offered to help establish the defendant's innocence).

[90] 3 COOK, *supra* note 3, § 18.3; *see, e.g.*, United States v. Vigil, 561 F.2d 1316 (9th Cir. 1977); United States v. Harris, 542 F.2d 1283 (7th Cir. 1976), *cert. denied*, 430 U.S. 934 (1977); United States v. Lacouture, 495 F.2d 1237 (5th Cir.), *cert. denied*, 419 U.S. 1053 (1974).

[91] Although commentators have argued that defense counsel should be allowed to call such witnesses to the stand because the judge, not the witness, is the final arbiter of when a response falls within the scope of the privilege, courts have addressed this argument by holding hearings outside the presence of the jury for the purpose of determining the witness's ability to invoke the privilege. WIGMORE, *supra* note 8, § 2272.

Some jurisdictions, however, allow such inferences. For example, in *Brink's Inc. v. New York*, 717 F.2d 700 (2d Cir. 1983), the Second Circuit held that a trial judge may instruct jurors that they may draw inferences based on a witness's assertion of the privilege. *See also* Cook, *supra* note 89, at 210-19 (arguing in favor of such inferences).

[92] *See* Cook, *supra* note 89, at 211. Cook also noted that requiring a witness to take the stand and assert the privilege serves the additional purpose of testing the witness's resolve to stand on the privilege. *Id.* at 211 n.36.

b. *Invocation During Cross-Examination*

A witness may testify for the defense without asserting the privilege on direct but then invoke the privilege upon cross-examination. The Fourth Circuit's approach to such actions is typical:

> The defendant's right to present witnesses in his own defense . . . does not carry with it the right to immunize the witness from reasonable and appropriate cross-examination. Neither a defendant's right of confrontation nor his right to present witnesses in his own defense is so absolute as to require a subversion of even more fundamental principles that animate our adversary system.[93]

Testimony may not be stricken, however, if a witness asserts the privilege solely on matters relating to credibility.[94] If a witness invokes the privilege as to non-collateral matters, most courts suggest that striking only portions of the testimony is "the more reasonable remedy," but they acknowledge that striking all of the testimony is "the only appropriate remedy when refusal to answer the questions of the cross-examiner frustrates the purpose of the process."[95]

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[93] Lawson v. Murray, 837 F.2d 653, 655-56 (4th Cir.), *cert. denied*, 488 U.S. 831 (1988). The Tenth Circuit also has held that striking such testimony does not violate the defendant's Fifth Amendment right to due process. United States v. Esparsen, 930 F.2d 1461, 1469 (10th Cir. 1991) (holding that "[a] defendant cannot invoke due process or compulsory process rights to immunize his witnesses from cross-examination on issues relevant to the truth of the direct testimony") (citing United States v. Doddington, 822 F.2d 818, 822 (8th Cir. 1987)), *cert. denied*, 502 U.S. 1036 (1992). The Tenth Circuit quoted the Supreme Court, noting that the Sixth Amendment "'does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth.'" *Id.* at 1469 (quoting Taylor v. Illinois, 484 U.S. 400, 412-13 (1988) (citing United States v. Nobles, 422 U.S. 225, 241 (1975))); *see Doddington*, 822 F.2d at 821.

[94] If a defense witness invokes the privilege on cross-examination as to questions solely relating to credibility, the defendant's right of compulsory process will be violated if the court strikes the witness's direct testimony. 3 COOK, *supra* note 3, § 18.3. For example, the Seventh Circuit held that "it is constitutionally impermissible to strike relevant and competent direct examination testimony where a defense witness on cross-examination invokes the privilege against self-incrimination with respect to collateral questions which relate only to his credibility and do not concern the subject matter of his direct examination." Wisconsin *ex rel.* Monsoor v. Gagnon, 497 F.2d 1126, 1129-30 (7th Cir. 1974); *see Lawson*, 837 F.2d at 656.

[95] *Lawson*, 837 F.2d at 656 (citing United States v. Lord, 711 F.2d 887, 892 (9th Cir. 1983)). The Fourth Circuit noted that "the purpose of cross-examination is to test

B. *Invocation of the Self-Incrimination Privilege by a Prosecution Witness*

If a prosecution witness invokes the Fifth Amendment privilege against self-incrimination on cross-examination, a court may strike her direct testimony if the cross-examination questions go to the substance of the direct testimony.[96] Prosecution witnesses, however, rarely invoke the Fifth Amendment privilege—prosecutors are able to predict which witnesses might invoke the privilege and tend to call only those witnesses who will not invoke it. The prosecution either obtains immunity for these witnesses or determines that their testimony will not likely be incriminating.[97] Additionally, once a witness answers questions in a certain subject area on direct examination, that witness waives the privilege unless additional questions would further incriminate her by substantially increasing the risk of incrimination or by venturing into a new subject area.[98]

Thus, a prosecutor generally only need be certain that the witness cannot invoke the privilege in response to questions regarding the actions the prosecutor will address on direct examination.[99] Defense counsel may question a prosecution witness regarding crimes unrelated to the subject of her testimony in order to cast doubt on her credibility.[100] Most courts have held, however, that when a witness invokes the Fifth Amendment privilege in response to questions relating solely to credibility, the defense does not possess the right to have her direct testimony stricken.[101]

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the credibility of the witness and the truthfulness of his earlier testimony." *Id.* The Fourth Circuit did not provide specific examples of instances in which refusal to answer would "frustrate" this purpose. *See id.* Presumably, the purpose of cross-examination would be frustrated whenever a witness refuses to answer questions that could serve to cast doubt on her credibility or truthfulness.

[96] 3 COOK, *supra* note 3, § 18.3.

[97] Presumably, prosecutors interview their witnesses before calling them to testify. During these interviews, prosecutors can determine if the information sought on direct examination might incriminate the witness. Competent prosecutors will also anticipate cross-examination questions that may incriminate the witness in ways not related to the direct testimony, such as previous unrelated dishonest acts. Nevertheless, witnesses generally are allowed to invoke the Fifth Amendment privilege in response to such questions without jeopardizing the admittance of direct testimony. *See supra* note 94 and accompanying text.

[98] Rogers v. United States, 340 U.S. 367, 373 (1951). Waiver of the privilege is not limited to prosecution witnesses but applies to all witnesses. *See supra* notes 20-24 and accompanying text.

[99] The defense council generally will be able to question a witness only on matters testified to on the direct examination. *See, e.g.*, FED. R. EVID. 611(b).

[100] *Id.*

[101] 3 COOK, *supra* note 3, § 18.3; *see, e.g.*, United States v. Yip, 930 F.2d 142, 147 (2d Cir.) (holding that a defendant's Sixth Amendment right to confrontation is not

III. RECOMMENDATIONS

Both a witness's Fifth Amendment privilege against self-incrimination and a defendant's Sixth Amendment rights to confrontation and compulsory process are vital to the American system of justice. When the two conflict, efforts should be taken to preserve each right to the fullest extent possible. In resolving the conflict, the societal interest in prosecuting all criminals, including those who are called as witnesses in other trials, should be considered.

A. *Defense Witness Immunity*

With these ideals in mind, when a defense witness justifiably fears self-incrimination but could offer potentially exculpatory testimony, the witness should be granted immunity. The decision to grant immunity should be made by the trial court, which should hold an evidentiary hearing to determine the validity of the asserted privilege as well as the probable existence of exculpatory testimony.[102] In determining the exculpatory nature of the testimony, a judge should view the testimony in the light most favorable to the defendant because it is the jury's role to determine the credibility of witnesses' testimony.[103]

The decision to grant immunity to a defense witness should be based on the defendant's need for the testimony, not prosecutorial concerns.[104] Prosecutors make strategic decisions in determining whether to prosecute a defendant.[105] The prosecution is never forced to allow a potential witness to be immunized; it may drop the charges against the defendant and prosecute the potential witness.[106] Although this may not be the most attractive alternative, the rights of a potentially innocent defendant must be given precedence over the prosecution's desire to prosecute a witness.

Granting defense witnesses use immunity may avoid this infringement on prosecutorial discretion.[107] A grant of use immunity preserves the defendant's Sixth Amendment rights—the witness can testify on the

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abridged when a trial court refuses to strike the witness's testimony after the witness has invoked the Fifth Amendment privilege on a collateral matter bearing solely on the witness's credibility) (citing United States v. Cardillo, 316 F.2d 606, 611 (2d Cir.), *cert. denied*, 375 U.S. 822 (1963)), *cert. denied*, 502 U.S. 868 (1991).

[102] *See supra* note 18 and accompanying text; *see also* MCCORMICK, *supra* note 7, § 139.

[103] *See supra* note 53 and accompanying text.

[104] For a discussion of these concerns, see *supra* notes 54-59 and accompanying text.

[105] *See* Elizabeth A. Parsons, Note, *Shifting the Balance of Power: Prosecutorial Discretion Under the Federal Sentencing Guidelines*, 29 VAL. U. L. REV. 417 (1994).

[106] *See* Westen, *supra* note 39, at 170 n.477.

[107] *See supra* notes 26-30 and accompanying text.

defendant's behalf—and preserves the witness's Fifth Amendment right—the prosecution may not use the witness's testimony against her. Additionally, granting use immunity preserves society's interests because the government can still prosecute the witness for crimes to which she testifies.

Denying the defense the ability to immunize witnesses who could provide exculpatory testimony would constitute a denial of the defendant's constitutional rights. Due process concerns weigh against this denial: because the prosecution has the ability to immunize its witnesses, the defendant also should be able to seek immunity for its witnesses.[108] Nevertheless, courts should base defense witness immunity grants on Sixth Amendment grounds. The Sixth Amendment provides for compulsory process to present witnesses in an accused's defense. Therefore, the ability to seek defense witness immunity need not rest on equitable due process rights that are based on the principle of supplying a defendant with the tools available to the prosecution.

A compulsory process basis for defense witness immunity would also preserve immunization against potential legislative attacks.[109] For example, if defense witness immunity were based on due process equity grounds, the legislature could remove the potential for inequity by denying prosecutors the right to seek grants of immunity. A ban on prosecutorial immunity would collapse the equitable foundation for defense witness immunity. Basing defense witness immunity on Sixth Amendment grounds avoids the potential elimination of defense witness immunity, a mechanism that will be necessary so long as the potential for incrimination exists.

B. *Striking the Relevant Testimony of Witnesses Who Invoke the Privilege on Cross-Examination*

Courts should strike the relevant parts of direct testimony of prosecution or defense witnesses who invoke the Fifth Amendment privilege upon cross-examination if the invocation is to a non-collateral matter. The right to cross-examine is fundamental to a fair trial.[110] Requiring courts to strike

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[108] Peter Westen argued for a due process basis for defense witness immunity: "If convicting the guilty justifies immunity for government witnesses, exonerating the innocent should justify immunity for defense witnesses . . . . Once the state makes immunity available to the prosecution it should not be permitted arbitrarily to withhold it from the defense." Westen, *supra* note 38, at 170.

[109] *See supra* note 25 and accompanying text (noting the statutory basis for state and federal grants of immunity).

[110] The Supreme Court has affirmed the importance of the right to cross-examine:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we

direct testimony upon invocation of the privilege against self-incrimination is a necessary remedy whenever a witness invokes the privilege on cross-examination regarding material facts elicited on direct examination.[111]

Although this principle is generally well-accepted, without defense witness immunity such strikes could unfairly tip the scales of justice in favor of the prosecution. The prosecution could avoid the striking of its witness's testimony by seeking a grant of immunity, but defendants would lack the same ability and disproportionately lose key evidence. Thus, the practice of striking testimony further supports grants of defense immunity.[112]

C. *Calling Witnesses Who Will Invoke the Privilege*

Parties should not call witnesses simply to have them invoke their Fifth Amendment privilege in the jury's presence.[113] Invocation of the Fifth Amendment is not the equivalent of admitting guilt, but jurors may believe otherwise.[114] Because the purpose of a trial is to seek the truth, calling a witness solely to invoke the privilege wastes time and permits improper inferences and therefore should be prohibited. If a witness invokes the privilege against self-incrimination on a collateral matter, however, inferences are permissible because they help the jury assess the witness's credibility.[115]

CONCLUSION

The United States Constitution protects the rights of criminal defendants, both actual and potential, by providing actual and potential defendants the Fifth Amendment right against self-incrimination and by providing actual

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> have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.

Pointer v. Texas, 380 U.S. 400, 405 (1965).

[111] *See generally* 3 COOK, *supra* note 3, § 18.3 (addressing the potential for testimony to be stricken).

[112] This basis by its nature rests on due process grounds.

[113] *But see* Cook, *supra* note 87, at 210-19 (arguing in favor of allowing defense witnesses to be called simply to invoke the privilege against self-incrimination).

[114] *See* WIGMORE, *supra* note 8, § 2272; Charles H. Rabon, Jr., Note, *Evening the Odds in Civil Litigation: A Proposed Methodology for Using Adverse Inferences When Nonparty Witnesses Invoke the Fifth Amendment*, 42 VAND. L. REV. 507 (1989).

[115] Thus, juries should be allowed to learn of invocations of the privilege only if they can use that knowledge in determining the credibility of the witness's testimony. To allow juror knowledge of the invocation of the privilege by those who have not provided other testimony under the guise that the jury may draw inferences that it could use in determining the credibility of other witness's testimony would be too speculative and unrelated a goal to justify the potential for improper inferences. *See* WIGMORE, *supra* note 8, § 2272.

defendants with the Sixth Amendment rights of confrontation and compulsory process. When these two fundamental rights conflict, courts should preserve *both* rights to the greatest extent possible. Granting defense witnesses use immunity when the witnesses's testimony is potentially exculpatory serves the interests that both amendments seek to protect. Further, that grant serves the public interest in allowing the prosecution of all criminals, including those called as witnesses in other trials.

Moreover, because cross-examination is essential to the judicial process, testimony that is not subject to cross-examination should be stricken regardless of whether the testimony is that of a defense witness or a prosecution witness.

Providing grants of immunity to certain defense witnesses will help ensure that prosecutors cannot prevent the trier of fact from hearing exculpatory testimony. Because the federal circuits are split regarding defense witness immunity, this issue is ripe for Supreme Court review. In order to ensure lasting protection of defendant's rights, the Court, and the lower courts that address the issue, should base defense witness immunity on Sixth Amendment compulsory process grounds. This grant could help prevent the tragedy that may exist in those jurisdictions not recognizing defense witness immunity—the tragedy of punishing unjustly accused defendants for crimes that they did not commit.

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