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Georgia's Witness Immunity Statute: Explication and Recommendations for Judicial Development

By Roald Mykkeltvedt*

In 1975 the Georgia General Assembly enacted a comprehensive witness immunity statute[1] providing for a procedure to obtain the testimony of persons who refuse to testify on self-incrimination grounds. That procedure is summarized in the following excerpt from the act:

> Whenever in the judgment of the Attorney General or any district attorney, the testimony of any person or the production of evidence of any kind by any person in any criminal proceeding before a court or grand jury is necessary to the public interest, then the Attorney General or the district attorney may request the superior court, in writing, to so order that person to testify or produce the evidence. Upon order of the court that person shall not be excused from testifying or producing any evidence required, on the basis of his privilege against self-incrimination, but no testimony or other evidence required under the order or any information directly or indirectly derived from such testimony or evidence may be used against the person in any proceedings or prosecution for a crime or offense concerning which he testified or produced evidence under court order.[2]

The state is not obliged to extend transactional immunity to witnesses testifying under a compulsion order issued in pursuance of this law. As stated by the Georgia Supreme Court, "[T]he Act authorizes only a grant of use and derivative use immunity."[3] Thus, the state may not use the

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1. GA. CODE ANN. §§ 38-1715 to 1716 (Supp. 1980).
2. *Id.* § 38-1715.
3. Corson v. Hames, 239 Ga. 534, 238 S.E.2d 75 (1977).

witness' testimony, or any investigatorial leads derived from that testimony to develop a criminal case against him. If the prosecution can prove that its case was developed totally independently from the compelled testimony, however, it may proceed against the witness without violating his fifth amendment right to be protected against compulsory self-incrimination. Furthermore, the witness immunity act does not proscribe the prosecution of an immunized witness for perjury committed while testifying under a compulsion order. Finally, any witness who defies a court order to testify after being accorded use and derivative use immunity by a superior court judge "may be adjudged in contempt and committed to the county jail until such time as he purges himself of contempt by testifying as ordered."[4]

The Georgia witness immunity law was enacted just three years after the United States Supreme Court held, in *Kastigar v. United States*,[5] that a federal use and derivative use immunity provision included in the Organized Crime Control Act of 1970[6] afforded adequate protection for the fifth amendment guarantee against compulsory self-incrimination. Prior to *Kastigar*, the Supreme Court had rather consistently maintained the position that nothing less than a grant of transactional immunity would suffice to supplant the great right of the fifth amendment. In the leading case of *Counselman v. Hitchcock*,[7] the Court unequivocally stipulated:

> We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the (fifth amendment) privilege conferred by the Constitution of the United States. . . . In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates.[8]

This exegesis of the scope of the fifth amendment right was repeatedly reaffirmed by the Supreme Court until 1964. In that year, however, the Court initiated a gradual movement away from its established position by its rulings in two profoundly significant cases relating to the question of witness immunity grants. First, in the case of *Malloy v. Hogan*,[9] the Court ruled that the fifth amendment privilege against compulsory self-incrimination was fully applicable to the states through the fourteenth

4. GA. CODE ANN. § 38-1715.
5. 406 U.S. 441 (1972).
6. 18 U.S.C.A. §§ 6002 to 6003 (Supp. 1980).
7. 142 U.S. 547 (1892).
8. *Id.* at 585-86.
9. 378 U.S. 1 (1964).

amendment due process clause. Applying the doctrine of selective incorporation, a five member Court majority agreed that the fifth amendment guarantee was one of those fundamental rights essential to a scheme of ordered liberty and, therefore, must be protected against state abridgment by the fourteenth amendment as rigorously as the right was protected against federal violation by the fifth amendment. Justice Brennan, for the Court, averred that

> it would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.[10]

Thus, whatever rules and procedures might be adopted to protect the right in federal courts would henceforth be required in state courts as well.

Since transactional immunity had been established as the *sine qua non* to justify a compulson order to secure the testimony of obdurate witnesses in federal cases, it might be assumed that states, under the *Malloy* ruling, would be obliged to adopt the same practice in order to comply with the Court's interpretation of the fourteenth amendment's due process clause. However, in *Murphy v. Waterfront Commission*,[11] decided on the same day as *Malloy*, the Court injected an element of confusion into the issue while apparently attempting simply to promote national-state comity.

Under our federal system, a single act, such as robbing a nationally-insured bank, may constitute a violation of state as well as national law. Thus, a person granted immunity by one sovereign (*e.g.*, a state government) in return for his testimony, had found, on occasion, that his compelled testimony could be used by the other sovereign (the national government) to develop a criminal case against him—an altogether shameful and ignoble arrangement. In a series of cases beginning in 1931, the Court had developed the constitutional rule governing grants of immunity in such "two sovereignties" cases. Justice Arthur Goldberg succinctly summarized the constitutional law relevant to this matter in the following excerpt from his opinion for the Court in *Murphy*:

> This "rule" has three decisional facets: *United States v. Murdock*, 284 U.S. 141, held that the Federal Government could compel a witness to give testimony which might incriminate him under state law; *Knapp v. Schweitzer*, 357 U.S. 371, held that a State could compel a witness to

10. *Id.* at 11.
11. 378 U.S. 52 (1964).

> give testimony which might incriminate him under federal law; and *Feldman v. United States*, 322 U.S. 487, held that testimony thus compelled by a State could be introduced into evidence in the federal courts.[12]

After an exhaustive survey of the history of the right against compulsory self-incrimination as revealed in the earlier decisions of English and American courts, Goldberg concluded that the rule described in the preceding passage markedly deviated from well established principles of law and equity. On the basis of his evaluation of pre-existing case law and out of concern to promote fundamental fairness in "two sovereignties" cases, Goldberg, joined by a unanimous Court, promulgated a new rule applicable ostensibly only to such cases:

> [W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled [State] testimony and its fruits.[13]

It may be true, as some observers have argued, that the Warren Court had no intention of disturbing the *Counselman* ruling by its decision in *Murphy*. According to the proponents of this position, *Murphy* applied only to "two sovereignties" cases and represented an attempt to accommodate federal-state interests. By holding that each sovereign must accord use and derivative use immunity to testimony compelled by the other sovereign, the Court had adopted a compromise solution to a vexing problem. Witnesses who might have to testify to violations of both federal and state laws were to be granted only use-plus-fruits immunity by the non-compelling sovereign, thus assuring that prosecution by that sovereign could not be totally foreclosed by the compelling sovereign. Transactional immunity, according to this interpretation of *Murphy*, must be extended to the witness by the government issuing the compulsion order. The other level of government in our federal system, however, could nonetheless prosecute the witness providing it could demonstrate convincingly that its case was developed entirely independently of the witness' compelled testimony.[14]

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12. *Id.* at 57.

13. *Id.* at 79.

14. Professor Leonard Levy, for example, has argued that the *Murphy* decision represented only a "technical exception" to the *Counselman* rule, and was intended to be applied only in "two sovereignties" cases. *See* L. LEVY, AGAINST THE LAW: THE NIXON COURT AND

In the course of his opinion for the Court, however, Justice Goldberg included a dictum which the Burger Court was subsequently to use as the authority for effectively overturning *Counselman*. Emphasizing the scope of the protection accorded witnesses in "two sovereignties" cases, Goldberg rather off-handedly commented that a use-plus-fruits immunity grant would place a witness "in substantially the same position as if the witness had claimed his [fifth amendment] privilege in the absence of a . . . grant of immunity."[15] Seizing on this dictum, Justice Powell, speaking for the Court in *Kastigar v. United States*, argued that whatever the *obiter dicta* of the *Counselman* opinion might suggest, the actual ruling in that case was that a grant of immunity must afford protection "commensurate with that resulting from invoking the [fifth amendment] privilege itself."[16] The Court in *Counselman* had invalidated a simple use immunity law which would have proscribed prosecutorial use of a witness' compelled testimony only, while allowing authorities to obtain evidence through investigatorial leads derived from that testimony. *Kastigar*, however, involved the question of the constitutionality of a use and derivative use statute which prohibited a witness' compelled testimony from being used against him in any way. The witness immunity provision of the Crime Control Act, Justice Powell reasoned, "like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources."[17]

Transactional immunity provided an overly-broad and wasteful degree of protection for the fifth amendment privilege, as Powell evaluated the matter. The fifth amendment, he noted, had been held to preclude use of coerced confessions in *Miranda v. Arizona*.[18] "A coerced confession," Powell observed, "as revealing of leads as testimony given in exchange for immunity, is inadmissible in a criminal trial, but it does not bar prosecution."[19] The two situations were analagous to Powell. The Court had consistently ruled coerced confessions inadmissible in the government's case-in-chief, but had never ruled that one who had been coerced into confessing to a crime must invariably be set free. Furthermore, a defendant who

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CRIMINAL JUSTICE 177 (1974). Justice Douglas, dissenting in *Kastigar v. United States*, asserted that *Murphy* "overruled not *Counselman*, but *Feldman v. United States* . . . which had held 'that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction. . . .'" 406 U.S. 441, 463 (Douglas, J., dissenting), *quoting* Murphy v. Waterfront Comm'n, 378 U.S. 52, 77 (1964).

15. 378 U.S. at 79.
16. 406 U.S. at 461.
17. *Id.*
18. 384 U.S. 436 (1966).
19. 406 U.S. at 461.

claimed that he had been compelled to confess to a crime or to make incriminatory statements had to prove at a pre-trial taint hearing that such statements were the products of governmental coercion. On the other hand, as Powell asserted, "One raising a claim under this statute [Organized Crime Control Act of 1970] need only show that he testified under a grant of immunity in order to shift to the government the *heavy burden* of proving that all of the evidence it proposes to use was derived from legitimate independent sources."[20] Thus, the federal use and deriviative use immunity law was even more protective of a witness' fifth amendment privilege than the Court's ruling in *Miranda* — a ruling generally regarded as manifesting an extraordinarily latitudinarian interpretation of that constitutional guarantee.

For all practical purposes the *Kastigar* decision not only affirmed the constitutionality of the federal witness immunity law, but validated *a priori* any properly drafted state use and derivative use immunity statute. In *Malloy v. Hogan*, it will be recalled, the Court stipulated that the fifth amendment's guarantee against compulsory self-incrimination was to be protected against state abridgments by the fourteenth amendment's due process clause to the same extent and according to the same standards which were applied to protect that right against federal abridgment. On the same day *Kastigar* was decided, however, the Court terminated any further speculation on this matter by explicitly upholding a state witness immunity statute modeled after its federal counterpart.[21] That decision provided the direct constitutional authority for the implementation of the new Georgia Witness Immunity Act.

The Georgia immunity statute contains no reporting requirement; therefore, it is not possible to determine precisely the number of times it has been utilized since its inception. It appears, however, that Georgia prosecutors have not inundated superior court judges with requests for compulsion orders. This conclusion is based on two less than rigorously precise means of assessment. First, informal interviews with several prosecutors and superior court judges revealed that at least within their jurisdictions the act has rarely, if ever, been invoked. Instead, the prosecutors have been able to encourage reluctant witnesses (frequently potential co-defendants) to testify by promising them de facto transactional immunity or a reduction of charges.[22] Second, the paucity of cases involving the

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20. *Id.* at 461-62 (emphasis added).

21. Zicarelli v. New Jersey Investigation Comm'n, 406 U.S. 472 (1972).

22. Only a few of the superior court judges, district attorneys, and assistant district attorneys interviewed indicated that they were more than dimly aware of the state immunity statute. Whether or not the prosecutors questioned were entirely familiar with the act, however, virtually all of them professed to be opposed to the concept of securing testimony through compulsion orders based on grants of immunity. The most commonly expressed

immunity statute reaching the Georgia Court of Appeals and the Georgia Supreme Court further supports the suspicion that the Act has not been extensively applied in criminal cases in the trial courts. The immunity statute is hardly a model of clarity, and consequently, if it had been used to compel testimony from recalcitrant witnesses in a large number of cases, one could reasonably assume that a substantially large number of appeals based on the alleged unconstitutionality or misapplication of the act would have been forthcoming.

In *Powell v. Allen*,[23] one of the first cases involving a challenge to the constitutionality of the new immunity statute, the Georgia Court of Appeals determined that the Act was in violation of the fourteenth amendment due process clause on the grounds that it did not afford a grant of "immunity that is as extensive in scope as the [fifth amendment] privilege it replaces."[24] As the appeals court interpreted it, the provision of the Act which authorized superior court judges to compel witnesses to testify in exchange for grants of immunity would not completely preclude a witness' compelled testimony from being used against him. According to Judge Clark, writing for the court, a grant of immunity extended by one superior court would not be effective in any other jurisdiction. "In this

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viewpoint was that juries would tend to discount the credibility of a witness obliged to testify after being accorded immunity. Federal prosecutors, however, clearly reject this assumption, as evidenced by Justice Department records which show that United States Attorneys rely heavily on immunized testimony. *See* Mykkeltvedt, *To Supplant The Fifth Amendment's Right Against Compulsory Self-Incrimination: The Supreme Court and Federal Grants of Witness Immunity*, 30 MERCER L. REV. 633, 655-56 (1979). Indeed, an Illinois state trial court judge, Warren D. Wolfson, who has conducted exhaustive research into the application of federal and state witness immunity laws, is convinced that juries will tend to believe some immunized witnesses even more readily than witnesses who testify voluntarily, providing the prosecution introduces the immunized witnesses effectively. Judge Wolfson describes the standard approach used by clever federal prosecutors in presenting such witnesses to jurors in one of his numerous articles on immunity. *See* Wolfson, *Immunity — How It Works in Real Life*, 67 J. CRIM. L. & CRIMINOLOGY 167, 171 (1976) [hereinafter cited as Wolfson]. Essentially, United States Attorneys proceed immediately to inform the jury that the witness is testifying under a compulsion order. After establishing that fact, the federal prosecutor solemnly asks the witness if he fully understands the significance of that order. The carefully coached witness responds that he does — that he has been told that as long as he tells the whole truth he will be protected, but that if he lies he will be subject to prosecution for perjury. This colloquy presumably tends to persuade the jurors that the witness has a potent incentive to be truthful. Furthermore, the federal prosecutors are careful to inform the jurors that an impartial federal judge issued the compulsion order, thereby implanting the suggestion that the judge was satisfied that the witness' testimony would be truthful. Thus, Wolfson maintains that federal prosecutors on occasion actually choose to obtain a compulsion order against a witness who would have testified voluntarily simply because they are convinced that juries will be more inclined to believe some witnesses, at least, if they are immunized. *See* Wolfson at 171.

23. 140 Ga. App. 186, 230 S.E.2d 343 (1976).

24. *Id.*, 230 S.E.2d at 344.

respect," Clark concluded, "it is obvious that the Georgia Witness Immunity Statute is defective and of no use if any other court in this or any other state or any federal court could have jurisdiction of the subject matter."[25] Subsequently, in *Corson v. Hames*,[26] the appeals court reversed itself, citing the federal case of *Murphy v. Waterfront Commission*[27] as its authority. In *Murphy*, the Supreme Court had referred to a grant of immunity extended by a New York Court as an act of the state and not the court. Similarly, under the Georgia law, "the district attorney and the [superior] court represent the state and are merely carrying out what the state authorizes them to do on its behalf. The state, not the court, is granting immunity. The court is the agent of the state speaking and acting on its behalf."[28] The Georgia Supreme Court endorsed this construction of the act when it reviewed the case of *Corson* on certiorari in 1977.[29]

The supreme court's opinion in *Corson* contains the most comprehensive exegesis of the state's witness immunity statute to date. In addition to upholding the constitutionality of the law, the court acted to clarify the scope of the immunity which the statute authorized. The caption of that section of the Code containing the witness immunity provision reads: "Immunity from prosecution for persons ordered to testify or produce evidence in criminal prosecutions."[30] The court held that this description of the law was misleading because it implied that testimony could only be compelled if absolute or transactional immunity were granted. As the justices unanimously construed the wording of the Act, however, it implicated a clear legislative intent to authorize the issuance of compulsion orders based on grants of use-plus-fruits immunity.[31]

The court further held that the new immunity Act required at minimum that "the state must grant unconditional use and derivative use immunity to a witness in order to remove [his or] her privilege not to testify in a self-incriminating manner."[32] In the *Corson* case, the superior court judge, acting on the recommendation of the district attorney, had ordered a witness to testify after extending a conditional grant of transactional immunity. The witness was assured that she would not be prosecuted for any criminal act to which she might testify, on the condition that her testimony proved to be complete and truthful "in every particular."[33] The

25. *Id.* at 187, 230 S.E.2d at 345.
26. 141 Ga. App. 751, 234 S.E.2d 412 (1977).
27. 378 U.S. 52 (1964).
28. 141 Ga. App. at 753, 234 S.E.2d at 414.
29. Corson v. Hames, 239 Ga. 534, 238 S.E.2d 75 (1977).
30. GA. CODE ANN. § 38-1715 (Supp. 1980).
31. 239 Ga. at 534, 238 S.E.2d at 76.
32. *Id.* at 535, 238 S.E.2d at 76.
33. *Id.* at 534, 238 S.E.2d at 76.

inference appeared to be that if she failed to provide such perfect testimony she would be subject to prosecution not only for any perjury she might commit, but for her participation in criminal acts which she might reveal in the truthful portions of her testimony. The supreme court rejected the state's argument that an unconditional grant of use and derivative use immunity was implicit in the superior court judge's compulsion order — that by offering the witness a conditional grant of transactional immunity he was, in effect, telling her that her fifth amendment right would be protected even more fully than required by the Georgia law providing that her testimony was complete and truthful. As the supreme court evaluated the matter, "The trial court's interpretation of the immunity given [the] applicant was contradictory and ambiguous, and most likely left her with the understanding that she was given no more than the conditional immunity described in the document approved by the court."[34] The court concluded that under the law, a witness who refuses to testify on self-incrimination grounds must be explicitly informed that he or she has unconditional use and derivative use immunity "as broad in scope as the privilege it replaces"[35] before that witness can be compelled to testify.

The supreme court refused formally to rule on the question of "[w]hether or not [an unconditional] grant of transactional immunity given by the prosecutor and approved by the court would be valid absent statutory authorization. . . ."[36] By affirming the court of appeals rationale upholding the constitutionality of the new witness immunity statute, however, the supreme court certainly cast doubt on the constitutionality of any grant of immunity extended by a superior court which does not conform to the letter of the state statute. It should be recalled that the court of appeals held that a grant of immunity extended under the terms of the witness immunity statute by a superior court judge was an act of the state, not the court. The state acts through the judge to extend use and derivative use immunity from prosecution in all state courts in exchange for a witness' testimony. A grant of transactional immunity informally promised by a prosecutor, even if ratified by a superior court judge, conceivably would not suffice to displace the fifth amendment's privilege unless the superior court judge also formally invoked the Georgia immunity statute and clearly apprised the witness that he or she would have unconditional use and derivative use immunity as well. If the latter condition were not met, the grant of transactional immunity would presumably not be valid outside the jurisdiction of the court compelling testi-

34. *Id.* at 536, 238 S.E.2d at 77.
35. *Id.*
36. *Id.* at 534, 238 S.E.2d at 76.

mony, since the immunity grant would have been authorized by the court and not the state.

While conceding that the fifth amendment itself (actually the fourteenth amendment due process clause which makes the fifth amendment right applicable to the states) would have prohibited the use or derivative use of the appellant's testimony had she testified (regardless of the validity of the immunity grant), the Georgia Supreme Court held that this fact was irrelevant.[37] A superior court is not justified in violating state law simply because such a violation, if noted and used as the basis for an appeal, would be corrected by the invocation of the federal constitution. Rather, "*[t]he state* must grant a valid immunity *under state law* as broad in scope as the privilege it replaces, and demonstrate the applicability of that state immunity to the witness, before ordering her to testify."[38] The rationale of the court's position appears to be that since the general assembly enacted a statute which provides for a form of immunity coterminous with the privilege against compulsory self-incrimination, that statute must be applied by the trial courts as the only basis for issuing compulsion orders. Apparently a prosecutor may continue to bargain with prospective witnesses in order to obtain their testimony — to offer transactional immunity, for example, in exchange for their testimony. Witnesses may not be compelled to testify by judicial order, however, solely on the basis of a district attorney's promise not to prosecute. Furthermore, if testimony so compelled is used in a criminal prosecution it might well constitute a reversible error on appeal, so vigorously did the supreme court support the proposition that the state immunity statute is the only constitutional means of obtaining compelled testimony.

A question of considerable import not presented to the court in *Corson* is whether or not the state immunity statute *requires* superior court judges to issue compulsion orders when requested to do so by the prosecution in a state criminal case. The law stipulates that "the Attorney General or the district attorney may request the superior court, in writing, to so order [a witness] to testify."[39] "[U]pon order of the court," the act continues, "that person [the prospective witness] shall not be excused from testifying . . . on the basis of his privilege against self-incrimination."[40] The wording of the Act thus suggests that a judicial compulsion order will be forthcoming following submission of an appropriately worded request. Nevertheless, the fact that there is no clearly stated requirement that superior court judges issue such orders affords the supreme court an opportunity, through statutory interpretation, to read ju-

37. *Id.* at 536, 238 S.E.2d at 77.
38. *Id.* (emphasis added).
39. GA. CODE ANN. § 38-1715 (Supp. 1980).
40. *Id.*

dicial discretion into the Act. The federal witness immunity statute, which was extant at the time the Georgia statute was drafted and which, in effect, had been commended to the states as a model law by the United States Supreme Court in *Kastigar*, contained a proviso specifically obligating federal judges to issue compulsion orders when asked to do so by the prosecution.[41] Therefore, it could be argued that the omission of a similar provision from the Georgia statute was reflective of a legislative intent to accord Georgia's superior court judges the authority to evaluate the desirability of compelling testimony, given the totality of circumstances of each criminal case.

Relatively recent federal cases indicate that Georgia courts would be on firm ground constitutionally to claim substantial control over the issuance of compulsion orders. The application of the federal immunity statute as a prosecutorial weapon exclusively has been challenged persuasively on due process grounds. There are now indications that federal courts are no longer going to acquiesce automatically to every government request for compulsion orders, despite the wording of the federal immunity statute. Federal appellate courts, as early as 1966, had adopted the position that it would be a denial of the fundamental fairness required by due process of law if government were to use the immunity procedure to compel testimony from prosecution witnesses while refusing to apply for grants of immunity for important defense witnesses who might have refused to testify on self-incrimination grounds.[42] In the leading case of *United States v. Alessio*,[43] the United States Court of Appeals for the Ninth Circuit finally ruled that such a denial of reciprocity by the government *would* violate the fifth amendment's due process clause.

The *Alessio* opinion furthermore advanced the following principles relative to the application of the federal immunity statute: 1) the executive branch of government "has exclusive authority and absolute descretion to decide whether to prosecute a case"[44] and consequently cannot be compelled by the courts to extend immunity to a prospective defense witness whom it may wish to prosecute; 2) the executive may not use this exclusive authority, however, in a manner which denies the defendant the due process guaranteed by the fifth amendment; and, 3) in each case, therefore, courts must determine "whether the [defendant would be] denied a fair trial because of the government's refusal to seek immunity for defense witnesses."[45]

By adopting this set of principles the Ninth Circuit Court of Appeals

41. 18 U.S.C. § 6003 (1976).
42. Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966).
43. 528 F.2d 1079 (9th Cir. 1976).
44. *Id.* at 1081.
45. *Id.* at 1081-82.

implicitly claimed for the judiciary the constitutional authority to exercise complete control over the issuance of compulsion orders. Although the federal immunity statute obligates federal judges to grant use and derivative use immunity to prosecution witnesses when requested to do so by the executive, the higher law of the Constitution proscribes such action if it would mean a denial of the defendant's right to due process of law. And while only the executive branch can request grants of immunity for key defense witnesses, the higher law of the Constitution could be used to support a judicial ruling that unless such a request were forthcoming the case against a defendant would be dismissed on due process grounds.

The *Alessio* opinion presents a cogent rationale in support of judicial control over the issuance of compulsion orders — a rationale which it is hoped will not be overlooked by Georgia courts as they proceed to develop the state's immunity statute. To vest control over the granting of witness immunity exclusively in the prosecution would most certainly be contrary to the adversary ideal of two evenly-matched contestants engaged in refereed combat to determine truth and achieve justice. The power to compel witnesses to testify in exchange for use and derivative use immunity is one which should be exercised with the utmost caution, indeed, only as a last resort, in order to protect the right of prospective witnesses against compulsory self-incrimination and the right of defendants to due process of law.

It should be recalled that the United States Supreme Court has repeatedly held that in order to displace the fifth amendment's guarantee against compulsory self-incrimination a grant of immunity must leave the witness "in substantially the same position as if [he] had claimed his [fifth amendment] privilege in the absence of a state grant of immunity."[46] Even a grant of transactional immunity, however, does not fully meet this standard. At best, a grant of immunity will prevent the government from prosecuting a witness compelled to testify to involvement in a criminal activity. It will not protect him from a variety of informal social reprisals and penalties such as public obloquy, loss of job, and even dissolution of family ties. Furthermore, it does not extend to civil proceedings which might be initiated on the basis of information contained in compelled testimony. As a result of being forced to reveal damaging information about his activities, a witness may find that the judgments rendered in such civil proceedings can be as damaging to his interests as a conviction for a criminal transaction.[47]

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46. Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

47. Note, for example, the case of Patrick v. United States, 524 F.2d 1109 (7th Cir. 1975). While testifying under a federal use-plus-fruits grant of immunity, Patrick revealed information which enabled the Internal Revenue Service to sustain a jeopardy assessment

There is substantial evidence to support the thesis that, because of concern to protect persons from such noncriminal penalties, the framers of the fifth amendment intended to establish an absolute right to silence by including the proviso that "no person . . . shall be compelled in any criminal case to be a witness against himself."[48] The Supreme Court ultimately rejected this interpretation of the scope of the guarantee by the narrowest margin in *Brown v. Walker*,[49] and reluctantly concluded that some means of compelling persons to testify in criminal cases is essential to the effective enforcement of criminal law. Even while upholding the constitutionality of a governmental grant of immunity as a trade-off for a witness' fifth amendment privilege, the United States Supreme Court has on occasion indicated that it is not entirely comfortable with the practice. Justice Frankfurter, for example, speaking for the Court in the case of *Ullman v. United States*[50] expressed this underlying discomfiture in the following dictum:

> They [the Framers of the Bill of Rights] made a judgment and expressed it in our fundamental law, that it were better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures. . . . The privilege against self-incrimination serves as a protection to the innocent as well as to the guilty, and we have been admonished that it should be given a liberal application.[51]

Apart from concern that the indiscriminate, wholesale use of immunity grants by the prosecution could result in substantial harm to immunized witnesses contrary to the spirit of the fifth amendment privilege, such a

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(totaling $900,000) against him for unpaid gambling taxes. Responding to Patrick's contention that this action violated the fifth amendment requirement that no person be compelled to witness against himself, the court observed:

> Patrick's Fifth Amendment privilege against being compelled to be a witness against himself in any criminal case does not afford him protection against giving testimony that will disclose his civil liability unless, of course, that testimony may subject him to criminal prosecution. The grant of immunity removed his only legitimate objection to giving the government an honest and complete statement, even if compelled, of the facts which may give rise to gambling tax liability. *Unlike a forfeiture or the imposition of a fine, the jeopardy assessment is merely a method of enforcing a civil obligation, rather than a form of punishment. Id.* at 1118-19. (emphasis added).

48. U.S. CONST. amend. V. For the most complete history of the development of the fifth amendment right, *See* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST COMPULSORY SELF-INCRIMINATION (1968). Professor Levy reports that "[t]he state courts of the framers' generation followed the extension of the right to cover self-infamy as well as self-incrimination." *Id.* at 429.

49. 161 U.S. 591 (1896).

50. 350 U.S. 422 (1956).

51. *Id.* at 427, *quoting* Maffie v. United States, 209 F.2d 225, 227 (1st Cir. 1954).

practice could also deprive defendants, against whom compelled testimony is directed, of their right to a fair trial. Critics of the practice contend quite plausibly that immunized testimony is inherently unreliable and therefore likely to result in grotesque caricatures of the due process model. One of the more outspoken opponents of continued prosecutorial control over the issuance of immunity grants is Judge Warren D. Wolfson of the Circuit Court of Cook County, Illinois, an official who has had the opportunity directly to observe and evaluate the practice over an extended period of time. He succinctly summarized his conclusions in the following passage from one of his recent articles:

> The testimony, in effect, is purchased. The government gives a reward, a very great reward. The seller-witness knows that. He usually is smart enough to know what is expected of him, especially after conversations with an agent or a prosecutor. So he tailors his story to fit the expectations. He is believed and accepted.[52]

The prospect of being prosecuted for perjury, Judge Wolfson implies, does not sufficiently deter witnesses, anxious to earn their reward of immunity, from shading the truth to please the government attorneys. One rarely hears of a perjury case brought against a cooperative witness, regardless of the most persuasive evidence that such a crime occurred. Thus, prosecutorial control over the issuance of immunity grants, it can be argued, may present an irresistible temptation to the seller-witness and the prosecution alike to vitiate the defendant's right to a fair trial.[53]

Not only may the constitutional rights of witnesses and defendants alike be jeopardized by prosecutorial control over the granting of immunity in criminal cases, but the public's interest in being protected from criminals could be significantly and adversely affected. Persons who are accorded immunity are ordinarily participants in the criminal transaction about which they are ordered to testify. Ostensibly, they are granted immunity on the basis of a prosecutorial judgment that their testimony is essential to convict the more important participants in such transactions. Although such judgments might be valid in some instances, it is conceivable, at least, that immunity might be granted unnecessarily by prosecutors anxious to establish an impressive record of obtaining convictions. Overly-ambitious or, conversely, indolent prosecutors could well be tempted not to wait for the completion of the investigatorial phase of a criminal proceeding, or to exert the effort necessary to conduct a thorough investigation if they conclude that quick and easy convictions could be obtained by compelling some potential defendants to testify against

52. Wolfson, *Immunity, Right or Wrong? Wrong!* 20 TRIAL L. GUIDE 65, 73 (1976).
53. *Id.* at 67-68.

others through the application of the immunity mechanism. To the extent that prosecutors succumb to such temptations, the public interest in securing the conviction of all persons involved in criminal activities is attenuated.

On the basis of such considerations, it appears absolutely essential that Georgia courts construe the state's immunity statute as vesting control over the issuance of immunity grants in the judiciary. Furthermore, in exercising such control, the courts should be fully as receptive to requests from defense counsel to obtain vital testimony through compulsion orders as to similar requests from prosecutors. Fundamental fairness, as required by due process of law, clearly dictates this sort of balanced approach to the application of the immunity statute. The immunity statute, of course, stipulates that only the state prosecutors may request compulsion orders based on immunity grants. Georgia's courts, however, could virtually require prosecutors to intiate such requests for defense witnesses whose testimony might appear to be essential by invoking a variety of sanctions, from threatening to dismiss a criminal case altogether to instructing the jury to consider the prosecutor's refusal to apply for an immunity grant for an important defense witness as indicative of prosecutorial concern that the prospective witness' testimony would prove to be exculpatory and most persuasive.

While adopting this sort of an even-handed approach to the granting of immunity, superior court judges would be well advised to issue compulsion orders only on a showing that such action is absolutely essential to the ends of justice. A conservative and skeptical approach to the application of the immunity procedure is necessary to afford protection from the real and potential abuses of that procedure which have troubled thoughtful critics over the years. Testimony purchased with an immunity grant ought to be regarded as suspect; hence, courts should require that the counsel requesting such a grant demonstrate the essentiality of a compulsion order and allay doubts as to the credibility of the prospective witness for whom immunity is being sought. Courts should be especially wary in evaluating prosecutorial requests for immunity for potential codefendants. The government ought to be required to demonstrate beyond any reasonable doubt that it is not merely seeking a short cut to conviction — that it has, on the contrary, conducted an exhaustive investigation of the criminal transaction at issue only to conclude that without the compelled testimony of persons involved in that transaction no conviction would be forthcoming.

Finally, Georgia courts should attempt to establish that a witness' compelled testimony can not be used against him in a civil action. As matters stand now, testimony compelled under a grant of immunity may be used in subsequent civil proceedings. It is quite simply impossible to rationalize this position with the general rule that persons forced to testify under

a compulsion order should be left "in substantially the same position as if [they] had claimed [their fifth amendment] privilege in the absence of a . . . grant of immunity."[54] There is nothing to prevent Georgia courts (or the general assembly) from acting to discard this ignoble and indefensible ruling by adopting a more enlightened and liberal construction of the fifth amendment privilege than that currently held by the United States Supreme Court. Until the extant rule has been changed to afford the full measure of protection that the fifth amendment guarantee requires, however, Georgia courts should be especially reluctant to issue compulsion orders if there is any indication that a civil action against the witness, based in whole or in part on his compelled testimony in a criminal proceeding, is probable.

CONCLUSION

The fifth amendment provision that no person be compelled to be a witness against himself in any criminal proceeding is the linchpin of our accusatorial system. While it is axiomatic that no constitutional right is absolute, the great right of the fifth amendment merits a degree of protection comparable to the fundamental guarantees of the first amendment. Therefore, Georgia's courts ought to be extraordinarily cautious in determining whether or not to displace that right by compelling witnesses to testify in criminal proceedings — to confess to participation in criminal transactions in exchange for use and derivative use immunity from prosecution. Even a grant of transactional immunity would not leave a witness, compelled to testify to criminal involvement, in the same position as if he had successfully invoked his fifth amendment guarantee since, although he could not be prosecuted for transactions about which he testified, he would very likely be subject to informal social reprisals and possibly become vulnerable to civil law suits as well. Consequently, it would be most appropriate for Georgia courts to apply a preferred status doctrine, similar to that utilized by federal and state courts to protect first amendment freedoms, in evaluating requests for compulsion orders.[55] In essence, this would mean that all requests for grants of immunity to

54. 378 U.S. 52, 79 (1964).

55. In United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), Justice Harlan Fiske Stone suggested that the presumption of constitutionality which the Court accords to state and national legislation should not apply to laws which, on their face, abridge the fundamental rights protected by the first amendment. Any attempt to restrict those freedoms, he inferred, ought to be presumed unconstitutional. Several years later, in the case of Thomas v. Collins, 323 U.S. 516 (1945), Justice Rutledge, for the Court, ruled that the government must justify such legislation by a clear showing of imminent danger to the general public. As Rutledge phrased this doctrine, "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Id.* at 530.

secure compelled testimony, whether emanating from the prosecution or the defense, would be presumed violative of the fifth amendment's right to silence. Under this doctrine, only the most cogent and persuasive arguments that a compulsion order is essential to the public interest or to prevent a gross injustice from being inflicted on a defendant would suffice to sustain a petition for witness immunity.

Judicial control over the issuance of compulsion orders and the principle that such orders based on grants of immunity must be made available equally to the defense and prosecution appear tentatively to have been read into the due process clauses of the fifth and fourteenth amendments by federal courts. Although the United States Supreme Court has not formally affirmed the Ninth Circuit Court's ruling in *Alessio*, the fact that the nation's highest court has allowed that ruling to stand implies endorsement. Georgia courts, therefore, would have ample grounds for asserting judicial control over the issuance of compulsion orders. Furthermore, by exercising that authority in a manner consistent with the preferred status doctrine suggested above, Georgia courts could challenge the nation to move toward a more demanding standard of due process. Historically, the United States Supreme Court has assumed the role of guardian of our basic constitutional guarantees, protecting them against the seemingly omnipresent threat of attenuation by state governments. That, at least, has been the impression created by the case law developing the fourteenth amendment's due process clause as it applies to state criminal cases. While state courts are obligated to apply due process norms established by the United States Supreme Court as the *minimal* definition of fundamental fairness in criminal cases, there is nothing in the federal constitution which precludes state courts from establishing due process norms even more protective of the defendant's right than those required by the Supreme Court. By applying a preferred status doctrine in cases involving the guarantee against compulsory self-incrimination, Georgia courts could demonstrate that the United States Supreme Court is not alone in its efforts to elevate the standards of due process. Concomitantly, Georgia courts could thereby promote the public interest by encouraging the prosecution and punishment of all persons involved in criminal transactions.