

FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION

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“No person...shall be compelled in any criminal case to be a witness against himself...” U.S. Const. Amend. V

I. TESTIMONIAL PRIVILEGE

To invoke this privilege, a person must show that the government is seeking (i) to compel him (ii) to give testimony (iii) that would incriminate him.

A. Scope

1. “Despite its cherished position, the Fifth Amendment addresses only a relatively narrow scope of inquiries.” It only applies to testimony “that will subject its giver to *criminal* liability.” *Garner v. United States*, 96 S.Ct. 1178, 1183 (1976).

a. The United States Supreme Court has limited the scope of the Fifth Amendment privilege to answers that would support a criminal conviction or which would furnish a link in the chain of evidence needed to prosecute the witness. *See Hoffman v. United States*, 71 S.Ct. 814, 818 (1951).

b. The possibility of criminal prosecution based on the testimony must be “substantial and real, and not merely trifling or imaginary....” *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980).

c. The privilege of a witness against self-incrimination does *not* extend to facts within his knowledge the divulgence of which have no rational tendency to connect him with the commission of a crime.

d. The Court presiding over the proceeding in which a Fifth Amendment privilege is claimed has a duty to scrutinize a witness’ invocation of the privilege. “[T]he witness is not exonerated from answering merely because he declares that in doing so he would incriminate himself-- his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified.” *Hoffman*, 71

S.Ct. at 818.

2. Nevertheless, a witness is not required to incriminate himself in order to assert the privilege. “To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer...or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.” *Hoffman*, 71 S.Ct. at 818.

a. “The privilege must be sustained if it is not ‘perfectly clear’ that the witness's answers ‘cannot possibly’ have a tendency to incriminate.” *United States v. D’Apice*, 664 F.2d 75, 77 (5th Cir. 1981).

b. Moreover, simply because a witness asserts her innocence regarding a crime does not mean that she has no Fifth Amendment privilege with regard to answering questions about the crime. In *Ohio v. Reiner*, 532 U.S. 17 (2001), a babysitter testified at Reiner’s trial, under a grant of transactional immunity, that she had nothing to do with a baby’s death. Reiner contended that the babysitter did not have a privilege against self-incrimination because she denied committing the crime, therefore, the grant of immunity was improper. The Supreme Court held that the babysitter's expression of innocence did *not*, by itself, eliminate the babysitter's Fifth Amendment privileges.

3. A witness in federal court can invoke the privilege if his testimony could incriminate him in a state court proceeding and vice versa. *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

a. Nevertheless, a witness cannot claim the privilege simply because it might expose him to prosecution in a foreign country. *United States v. Balsys*, 524 U.S. 666 (1998).

4. Fear that the government will prosecute a witness for perjury or not offer the witness a favorable plea agreement if she testifies for another defendant at trial is not sufficient to invoke Fifth Amendment protections.

a. In *United States v. Vavages*, 151 F.3d 1185 (9th Cir. 1998), the defendant, Garbriel Vavages, wanted to call Rose Manuel as an alibi witness. However, Manuel, was awaiting sentencing in an unrelated case and had entered into a plea agreement with the government. Manuel was concerned that the government would prosecute her for perjury and/or withdraw from the plea agreement if she testified for Vavages. The District Court allowed Manuel to invoke the Fifth Amendment and refuse to testify based upon these concerns. The United States Court of Appeals for the Ninth Circuit reversed Vavages' conviction:

Manuels' only stated basis for her blanket invocation of the Fifth Amendment privilege was her belief that her alibi testimony, even if truthful, would subject her to a perjury prosecution. The district court accepted this bases for invoking the Fifth Amendment and ruled that Manuel 'ha[d] every right to not testify. The district court was mistaken. The government cites no cases for the proposition that fear of a perjury prosecution as a result of truthful testimony is a sufficient basis for invoking the Fifth Amendment privilege. And even if Manuel's alibi testimony was false, the fear of a legitimate perjury prosecution still would not support her invocation of the privilege:

“A witness may not claim the privilege of the [F]ifth

[A]mendment out of fear that he will be prosecuted for perjury for what he is about to say. The shield against self-incrimination in such a situation is to testify truthfully, not to refuse to testify on the basis that the witness may be prosecuted for a lie not yet told.”

Id., quoting, *United States v. Whittington*, 783 F.2d 1210, 1218 (5th Cir. 1986).

5. A claim of privilege asserted in connection with a civil proceeding can, as an evidentiary matter, be used against the witness in both federal and state courts. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Tex. Dep't of Pub. Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 760 (Tex. 1995).

1. Nevertheless, a claim of privilege cannot be used against a person in a regulatory proceeding. *Spevack v. Klein*, 385 U.S. 511 (1967) (Privilege can't be used against lawyer in a disbarment proceeding because it would have the effect of making the exercise of the privilege “too costly.”)

B. Non-Testimonial Evidence

1. The Fifth Amendment does not apply to requiring a person to:
 - a. Provide physical samples such as hair or blood. *Pennsylvania v. Muniz*, 496 U.S. 582 (1990);
 - b. Submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk or to make a particular gesture. *Schmerber v. California*, 384 U.S. 757 (1966); or

- c. Provide voice exemplars. *United States v. Dionisio*, 410 U.S. 1 (1973).
2. The privilege only prohibits extorting information from someone by forcing him “to disclose the contents of his own mind.” *Curci v. United States*, 354 U.S. 118, 128 (1967).
3. A defendant can claim a Fifth Amendment right not to answer questions in a psychiatric evaluation. *Estell v. Smith*, 451 U.S. 454 (1981). Nevertheless, the Texas Court of Criminal Appeals has employed a self-described “legal fiction” to find a “limited waiver” in cases in which a defendant intends to introduce his own psychiatric testimony. *Lagrone v. State*, 942 S.W.2d 602, 611-12 (Tex. Crim. App. 1997). *See also, Brewer v. Quaterman*, 475, F.3d 253, 256-57 (5th Cir. 2006) (Agreeing with the reasoning in *Lagrone*).
4. Dictating information for a witness to write down in order to learn how the witness spells certain words constitutes “testimony” and, therefore, is protected by the Fifth Amendment. *United States v. Campbell*, 732 F.2d 1017 (1st Cir. 1984); *United States v. Matos*, 990 F.Supp. 141 (E.D.N.Y. 1998).

C. Procedure at Trial

1. If a witness intends to assert a Fifth Amendment privilege in order not to testify at trial, the trial judge must make an inquiry (this can be done *in camera*) into the legitimacy and scope of the witness' assertion of his privilege. A blanket assertion of the privilege without inquiry by the court, is not acceptable. Therefore, in cases in which a trial judge excuses a witness without inquiry about the validity or scope of the witness' privilege claim, the case will be reversed for further findings. *United States v. Goodwin*, 625 F.2d 693, 701 (5th Cir. 1980).
2. The right to compulsory process does not afford a defendant,

in either federal or state court, the right to require a witness who is going to assert his Fifth Amendment privileges do so in the presence of the jury. *United States v. Griffin*, 66 F.3d 68 (5th Cir. 1995); *Ellis v. State*, 683 S.W.2d 379 (1984).

a. It appears too that a defendant may object to a prosecution witnesses being allowed to take the Fifth before the jury. *United States v. Lacouture*, 495 F.2d 1237, 1240 (5th Cir. 1974) (“[N]either side has the right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege either alone or in conjunction with questions that have been put to him.”). See also *Washburn v. State*, 299 S.W.2d 706 (Tex.Crim.App. 1957)

1. Nevertheless, the prosecution may be allowed to call a witness before the jury knowing the witness will take the Fifth when "the prosecutor's case would be seriously prejudiced by a failure to offer him as a witness." *United States v. Kilpatrick*, 477 F.2d 357 (6th Cir. 1973).

2. Likewise, the prosecution may be allowed to call a witness before the jury knowing the witness will take the Fifth when the witnesses has been given immunity but still refuses to testify. See *Coffey v. State*, 796 S.W.2d 175 (Tex. Crim. App. 1990).

D. Waiver

1. Generally, “[a] witness who fails to invoke the Fifth Amendment against questions as to which he could have claimed it is deemed to have waived his privilege respecting all questions on the same subject matter.” *United States v. O’Henry’s Film Works, Inc.*, 598 F.2d. 313 (2d Cir. 1979), citing, *Rogers v.*

United States, 340 U.S. 367 (1951).

2. “An individual under compulsion to make disclosures as a witness who revealed information instead of claiming the privilege [loses] the benefit of the privilege.” *Garner*, 96 S.Ct. at 1182. In other words, the witness must “make a timely assertion of the privilege” or he loses the privilege. *Id.* at 1183. Moreover, the Supreme Court has “made clear that an individual may lose the benefit of the privilege *without* a knowing and intelligent waiver.” *Id.* at 1182, n.9.

3. In sum, if a witness answers a question on a particular topic there is an implicit waiver on other questions related to that topic unless that answers to the additional question on the issue would “further incriminate” the witness. *Rogers v. United States*, 340 U.S. 367 (1951).

a. Therefore, a witness must claim the privilege as to each question asked. For example, if a witness claims the privilege in the grand jury in response to one question, the grand jury can continue to question him about the same or related topics and if he does not assert the privilege in response to the additional questions, the privilege is waived. *Quinn v. United States*, 349 U.S. 155 (1955). *But see, Hicks v. State*, 860 S.W.2d 419, 430 (Tex. Crim. App. 1993) (Suggesting that continued questioning “on the merits” of a grand jury witness once he exercised his privilege against self incrimination, itself constitutes a violation of the privilege.).

b. Nevertheless, *Rogers* has been limited. For example, courts have held that when a witness’ initial admission relates to only one element of an offense, he does not waive the privilege against answering questions related

to other elements of the offense. *See., e.g. Hashagen v. United States*, 283 F.2d 345 (9th Cir. 1960); *United States v. Courtney*, 236 F.2d 921 (2d Cir. 1956).

4. In any event, a waiver of the privilege is not “to be lightly inferred,” and courts should indulge every reasonable presumption against finding a waiver. *Emspak v. United States*, 349 U.S. 190, 196 (1955).

5. Waiver of the privilege is limited to proceeding in which the waiver was explicitly or implicitly made. *See, e.g., In re Morganroth*, 718 F.2d 161 (6th Cir. 1983); *Matter of Berry*, 680 F.2d 705 (10th Cir. 1982); *Tucker v. Francis*, 723 F.2d 1504 (11th Cir. 1994).

a. For example, if a witness waives the privilege before a grand jury, he can still invoke the privilege at a trial on the merits. *See., e.g., United States v. Licavoli*, 604 F.2d 613 (9th Cir. 1979); *United States v. Housand*, 550 F.2d 818 (2d Cir. 1997).

b. Likewise, if a witness waives the privilege in a civil trial, he can still invoke the privilege in a criminal trial.

6. A defendant may remain silent at his sentencing hearing and his silence cannot be used against him even though he pleaded guilty and engaged in a plea colloquy admitting to the offense because the sentencing hearing is considered a separate proceeding. *Mitchall v. United States*, 526 U.S. 314 (1999).

7. As set forth by the Supreme Court in *Garrity v. New Jersey*, 385 U.S. 493 (1967), if a government employee (such as a police officer) is required to give a statement in order to preserve his job, that statement cannot then be used against the employee to support a criminal conviction. This is known as the *Garrity Doctrine*.

E. Other Issues

1. “[I]t is clear that a witness who is unavailable because he has invoked the Fifth Amendment privilege against self-incrimination is unavailable under the terms of [Fed. R. Evid.] 804(a)(1).” *United States v. Thomas*, 571 F.2d 285, 288 (5th Cir. 1978). *See also, United States v. Young Bros., Inc.* 728 F.2d. 682, 690 (5th Cir. 1984); *United States v. Williams*, 927 F.2d 95, 98-99 (2d. Cir. 1991).

a. Thus, to the extent a witness has a sustainable Fifth Amendment Privilege, if he has previously given a statement on the subject that is against his “pecuniary or proprietary interest” or subjects him “to civil or criminal liability” the statement is admissible at trial under Fed. R. Evid. 804(b)(3). Likewise, if it was given under oath, it is admissible under Fed. R. Evid. 804(b)(1). Of course, if the statement was made by the defendant, it is likely admissible under Fed. R. Evid. 801(d)(2)(A) in any event.

2. As a practical matter, a grand jury may properly subpoena a subject or a target of the investigation and question the target about his or her involvement in the crime under investigation. *See United States v. Wong*, 431 U.S. 174, 179 n.8 (1977); *United States v. Washington*, 431 U.S. 181, 190 n.6 (1977); *United States v. Mandujano*, 425 U.S. 564, 573-75 and 584 n.9 (1976); *United States v. Dionisio*, 410 U.S. 1, 10 n.8 (1973).

a. Nevertheless, with regard to federal grand juries, the United States Attorneys’ Manual provides that, if a target and his attorney state in writing, signed by both, that the target will assert his Fifth Amendment rights before the grand jury, “the witness ordinarily should be excused” although the grand jury and/or the United States Attorney may, nevertheless, insist upon the

appearance. *See* USAO Manual at § 9-11.154

3. A prosecutor may not intimidate a witness into asserting his Fifth Amendment rights in order to interfere with a criminal defendant's right to compulsory process. *Brown v. Cain*, 104 F.3d 744, 749 (5th Cir. 1997); *United States v. Vavages*, 151 F.3d 1185 (9th Cir. 1998).

4. A criminal defendant should seek a stay of any related civil lawsuit if he may be called upon to assert his Fifth Amendment rights in that civil lawsuit. *See, e.g., SEC v. First Financial Group, Inc.* 659 F.2d 660, 667-69 (5th Cir. 1981)

II. PRODUCTION OF DOCUMENTS

Recently the United States Supreme Court, in *United States v. Hubbell*, 530 U.S. 27 (2000), discussed at length the “act of production” privilege under the Fifth Amendment which applies when, by producing documents in compliance with a subpoena, a witness would admit that the documents existed, were in his possession or control, or were authentic. It is not the contents of voluntarily created documents that are privileged but the “testimony” inherent in the fact that a witness is compelled to produce the documents. *United States v. Doe*, 465 U.S. 605 (1984). **YOU MUST READ AND REREAD *Doe* and *Hubbell* IF YOU REPRESENT A WITNESS WHO IS COMPELLED TO PRODUCE DOCUMENTS TO A GRAND JURY OR AT TRIAL.**

Also, as explained in Part III(c)(4) of this paper, any immunity given in connection with the act of production of documents covers “derivative use” of the documents which *may* then include making use of the contents of the documents even though the contents of the documents are not otherwise privileged.

Finally, even in cases in which an act of production privilege does not exist, it should be noted that in *Hubbell*, Justice Thomas, joined by Justice Scalia, suggested that the Fifth Amendment should cover not only situations where the compelled production of documents has a testimonial component but should also protect a person from producing incriminating documents regardless of whether the compelled production has a testimonial component. *Hubbell*, 530 U.S. at 49 (Thomas, J., concurring) (“I would be willing to reconsider the scope and meaning of the Self-Incrimination Clause.”). **Therefore, even if the act of production privilege does not apply, you may seek to use Thomas’ concurrence to resist production of documents.**

A. Who Can Claim the Act of Production Privilege?

1. The act of production privilege applies to sole proprietorships. *United States v. Doe*, 465 U.S. 605 (1984). *See also Braswell v. United States*, 487 U.S. 99 (1988) (“If petitioner had conducted his business as a sole proprietorship, *United States v. Doe*, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552, would require that he be provided the opportunity to show that his act of

production would entail testimonial self-incrimination as to admissions that the records existed, were in his possession, and were authentic.”).

2. The act of production privilege does *not* apply to “collective entities.” *Braswell v. United States*, 487 U.S. 99 (1988).

a. However, it does apply if the government seeks to prosecute an individual records custodian who produces the records. *Braswell*, 487 U.S. 99, 118 (1988) (“For example, in a criminal prosecution against the custodian, the Government may not introduce into evidence before the jury the fact that the subpoena was served upon and the corporation's documents were delivered by one particular individual, the custodian. The Government has the right, however, to use the corporation's act of production against the custodian. The Government may offer testimony -- for example, from the process server who delivered the subpoena and from the individual who received the records -- establishing that the corporation produced the records subpoenaed.”)

3. There is as to question whether the act of production privilege applies to closed partnerships. For example, in *Bellis v. United States*, 417 U.S. 85 (1974), the United States Supreme Court held that the privilege did not apply to the production of documents of a law partnership. Nevertheless, the Supreme Court noted in *Bellis* that it was not addressing the question of “a small family partnership” or a case where “there was some other pre-existing relationship of confidentiality among the partners.” On that basis, at least one court has held that the husband in a husband/wife partnership *could* assert a Fifth Amendment privilege with regard to a subpoena served on the partnership. *In re Grand Jury Subpoena Duces Tecum*, 605 F. Supp. 174 (N.D.N.Y. 1985).

B. What Does the Act of Production Privilege Cover?

1. The act of producing evidence is protected under the Fifth Amendment if the production of documents (i) admits the existence of the thing sought by subpoena; (ii) admits that the witness has possession or control of the thing sought by the subpoena; **or** (iii) authenticates the thing produced by admitting that the witness believes that the thing is covered by the subpoena.

a. There is a “foregone conclusion” exception to the act of production privilege when it is already known that the documents requested exist and these documents are requested with particularity. In that case, the witness is not “telling” anything that is not already known.

1. The government must demonstrate that it knows of the existence and location of subpoenaed documents for this exception to the act of production privilege to exist. For example, in *In re Grand Jury Subpoena Duces Tecum Dated Oct. 29, 1992*, 1 F.3d 87 (2d Cir. 1993) the “foregone conclusion” exception applied to documents that the witness had previously produced to the SEC.

2. It is not enough to show that it is a “foregone conclusion” that businesses in general keep particular types of records or that a specific type of business keep particular types of records. The government must establish what it knows about the particular entity’s record-keeping practices.” *Hubbell*, 530 U.S. at 44-45; *United States v. Fox*, 721 F.2d 31 (2d Cir. 1983).

2. The act of production privilege also covers the absence of documents. For example, if the absence of records will establish fraud on the part of the witness, the act of production privilege applies. *See Steinbrecher v. Commissioner*, 712 F.2d 195, 199

(5th Cir. 1983); *Sinclair v. Savings & Loan Comm'r*, 696 S.W.2d 142, 154 (Tex. Ct. App.--Dallas 1985)

3. The act of production privilege does not apply to regulatory type records that are required to be kept by law or items analogous to a "required record." *Baltimore City Dept. of Social Services v. Bouknight*, 493 U.S. 549 (1990).

a. This exception, however has limits and will not extend to regulations that have no statutory purpose independent of a desire to "ferret out illegal activities." *See, e.g., Bionic Auto Parts and Sales, Inc. v. Fahner*, 721 F.2d 1072 (7th Cir. 1983) (Required records or trial exception did not apply to auto dealers required to keep a report of altered serial numbers); *Marchetti v. United States*, 390 U.S. 39 (1968) (Required records exception did not apply to persons required to keep records of gambling activities when gambling was illegal).

III. CONTEMPT/ IMMUNITY

A. Contempt

1. If a prosecutor believes that a witness impermissibly invoked the Fifth Amendment before a grand jury, he can request the judge overseeing the grand jury or trial to require the witness answer the question. If the witness refuses, he can be held in contempt.
2. Likewise, if a witness has been given *statutory* immunity as described below and he refuses to testify, he can be held in contempt.
 - a. A witness cannot be held in contempt simply because he has been offered *informal immunity* by the prosecution. *Taylor v. Singletary*, 148 F.3d 1276, 1283 n.7 (11th Cir. 1998).
3. While the contempt can be civil or criminal contempt, the witness, especially in the case of a grand jury witness, will generally be held in civil contempt in order to compel the testimony. In civil contempt, the person in contempt ‘holds the keys to his own cell.’ Civil contempt should be considered by the courts before resorting to criminal contempt. *United States v. DiMauro*, 441 F.2d 428 (8th Cir. 1971).
4. A contempt judgment is appealable. *In re Ryan*, 538 F.2d 435 (D.C. Cir. 1976).
5. A witness receiving a subpoena can also file a motion to quash the subpoena. If the subpoena is quashed, the government can file an appeal from the decision quashing the subpoena. Nevertheless, if the motion is denied, the witness must be held in contempt before he can appeal. *United States v. Ryan*, 402 U.S. 530, 532-33 (1971).

a. A person filing a motion to quash a subpoena on a third-party can take an immediate appeal of a denial of a motion to quash since a third party cannot be expected to risk a contempt citation to protect another person's interests.

B. Perjury

1. If a witness is given immunity and then testifies falsely, he can be prosecuted for perjury and the immunized testimony used against him in the perjury prosecution. *United States v. Apfelbaum*, 445 U.S. 115 (1980).

C. Federal Court Immunity

1. There are three types of immunity

a. Transaction Immunity is the most broad- under which the person cannot be prosecuted for the transaction being investigated.

b. Use and Derivative Use Immunity- under which nothing the person says can be used against him and no evidence derived as a result of his statements can be used against him.

c. Use immunity which is the most narrow- under which a person is only protected against having his own statements used against him.

2. Immunity can be granted informally by a prosecutor either in writing or orally. Such immunity is often referred to as "informal immunity," "pocket immunity," or "letter immunity." It is binding on the government and is as broad or narrow as provided for by the terms of the agreement. *United States v. Turner*, 936 F.2d 221 (6th Cir. 1991); *United States v. Quam*, 367

F.3d 1006, 1008 n.2 (8th Cir. 2004).

a. Because informal immunity does not have Fifth Amendment limitations, it can cover transactional immunity, use and derivative use immunity or only use immunity depending on the agreement.

1. Such agreements are contracts and all ambiguities will be resolved against the government. *United State v. Dudden*, 65 F.3d 1461 (9th Cir. 1995).

b. Keep in mind, however, that informal immunity offered by a prosecutor in one district may not cover other districts. *United States v. Turner*, 936 F.2d 221 (6th Cir. 1991).

3. Statutory immunity for federal court and federal grand jury proceedings is provided for under 18 U.S.C. §§ 6002 and 6003.

a. 18 U.S.C. § 6003 provides that the United States Attorney may, “with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General or Deputy Attorney General” request a witness be provided immunity.

1. The request must be signed by the United States Attorney for the district or by an Assistant United States Attorney designated to act *on immunity issues* for the United States Attorney during her absence or unavailability. *In re Grand Jury Proceedings*, 882 F.Supp. 1165 (D.Mass. 1995).

b. 18 U.S.C. § 6003 also requires the United States Attorney or his designee to believe (1) that “the testimony or other information from such individual [is]

necessary to the public interest and (2) that the individual has refused or is likely to refuse to testify or provide information by invoking the Fifth Amendment.

1. In evaluating whether immunity is in the public's interest, the United States Attorneys' Manual suggests that the following factors be considered: (i) the importance of the investigation or prosecution to effective enforcement of the criminal laws; (ii) the value of the person's testimony or information to the investigation or prosecution; (iii) the likelihood of prompt and full compliance with a compulsion order, and the effectiveness of available sanctions if there is no such compliance; (iv) the person's relative culpability in connection with the offense or offenses being investigated or prosecuted, and his or her criminal history; (v) the possibility of successfully prosecuting the person prior to compelling his or her testimony; and (vi) the likelihood of adverse collateral consequences to the person if he or she testifies under a compulsion order. *See* U.S.A.O. Manual at § 9.-23.210.

2. The United States Attorneys' Manual also provides that "absent specific justification, the Department will ordinarily avoid seeking to compel the testimony of a witness who is a close family relative of the defendant on trial or of the person upon whose conduct grand jury scrutiny is focusing." *See* U.S.A.O. Manual at § 9.-23.211.

3. Finally, United States Attorneys' Manual provides that immunity will not be used to compel the production of testimony or other

information on behalf of a defendant except in extraordinary circumstances.” See U.S.A.O. Manual at § 9.-23.214.

4. The Fifth Circuit had held that a defendant may not complain of a failure of the Department of Justice to follow its own guidelines in seeking immunity orders. *In re Tierney*, 465 F.2d 806, 813 (5th Cir. 1992)

c. If an immunity request is made by the government, as provided for under statute, it is then submitted to the overseeing Court (usually *ex parte*) and the Court “shall” grant the witness immunity. See, e.g., *In re Kilgo*, 484 F.2d 115, 1219 (4th Cir. 1973) (Court has no discretion to question whether testimony is needed in the “public interest.”).

d. Statutory immunity confers both use and derivative use immunity. It does *not* provide transactional immunity.

1. If a defendant believes that the government is relying upon evidence derived from immunized testimony, he has a right to a *Kastigar* hearing. *Kastigar*, 406 U.S. 441, 460 (1972) (“Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.’ This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to

use is derived from a legitimate source wholly independent of the compelled testimony. This is very substantial protection.”)

2. For example, if a murder suspect who has been granted immunity is called before a grand jury and asked whether he committed a murder and where the murder weapon is, his testimony may not be used against him in a criminal trial. In addition, the government may not use his testimony to retrieve the weapon for use against the witness at trial. Even if the government introduced the weapon without indicating that it learned of its location from the defendant's immunized grand jury testimony, only using fingerprints or DNA testing to link the weapon to the defendant, the weapon would still be barred because it was "directly or indirectly derived from" compelled testimony. If the police simply happened upon the weapon through an ongoing investigation, however, the weapon could be used against the witness because it was "derived from a legitimate source wholly independent of the compelled testimony.” *United States v. Ponds*, 454 F.3d 313, 321 (D.C. Cir. 2006)

e. Statutory immunity binds all federal and state prosecuting authorities. *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

f. Separate immunity orders are needed for grand jury testimony and trial testimony.

4. The government can also give immunity for the act of production of documents. *United States v. Doe*, 465 U.S. 605 (1984). See also, USAO Manual at § 9-23.250. The immunity

also protects a person against derivative use of the “testimonial aspects” of producing the documents. *Hubbell*, 530 U.S. 277.

a. The best discussion of *Hubbell*'s scope regarding “derivative use” of documents produced under an act of production immunity is contained in the opinion of the United States Court of Appeals for the District of Columbia in *United States v. Ponds*, 454 F.3d 313 (D.C. Cir. 2006). First, *Ponds* makes clear that the contents of the documents are not ordinarily privileged and, therefore, the contents of the documents are irrelevant for purposes of determining whether an act of production privilege applies:

It is true that in *Hubbell* the Supreme Court drew a distinction between protected testimony as to the existence, location, and authenticity of documents inherent in the act of production and the unprotected contents of the documents themselves. *See Hubbell*, 530 U.S. at 37. This distinction, however, is only relevant in the context of determining whether an act of production implicates the Fifth Amendment. In that context, the contents of the documents are irrelevant for constitutional purposes because their preparation was not “compelled.” *See Fisher*, 425 U.S. at 409-10; *Doe*, 465 U.S. at 610-11. Therefore, to determine whether an act of production implicates the Fifth Amendment, the court looks only to the communicative aspects of the act of production itself and to whether those tacit averments as to the existence and location of the documents add anything significant “to the sum total of the Government's information.” *Fisher*, 425 U.S. at 411.

Id. at 323.

Nevertheless, *Ponds* next makes clear that once it is determined that the production was covered, under an act of production privilege, any immunity covers the use of the *contents* of the documents under the “derivative use” prong to the immunity. *Id.* (“When the government does not have reasonably particular knowledge of the existence or location of a document, and the existence or location of the document is communicated through immunized testimony, the contents of the document are derived from that immunized testimony, and therefore are off-limits to the government.”). The *Ponds* court noted:

With act-of-production immunity, the key question is whether, despite the compelled testimony implicit in the production, the government remains free to use the contents of the (non-testimonial) produced documents. In *Hubbell*, the Supreme Court rejected the “manna from heaven” theory¹ by holding the use of the contents of produced documents to be a barred derivative use of the compelled testimonial act of production. The Court did so by stating that it “cannot accept the Government’s submission that [Hubbell’s] immunity did not preclude its derivative use of the *produced documents*” as it “was only through [Hubbell]’s truthful reply to the subpoena that the Government received the incriminating documents of which it made

¹The “mantra from heaven” theory states that “the act of production shields the witness from the use of any information (resulting from his subpoena response) beyond what the prosecution would receive if the documents appeared in the grand jury room or in his office unsolicited and unmarked, like manna from heaven.” *Id.* (citation omitted)

'substantial use . . . in the investigation that led to the indictment.'" *Hubbell*, 530 US. at 42-43 (emphasis added). In context, these statements indicate that the Supreme Court understands the contents of the documents to be off-limits because they are a derivative use of the compelled testimony regarding the existence, location, and possession of the documents.

Id. at 321.

The *Ponds* Court recognized the Catch-22 that the act of production privilege places the prosecution in when it cannot make "derivative use" of the documents produced by using their contents. *Id.* at 322 ("Taken together, the bar on the use of information derived from a testimonial act of production by a witness with § 6002 immunity and the breadth of that bar create real risks for prosecutors planning on prosecuting those whom they subpoena.").

5. Federal judges are powerless to offer immunity on their own without agreement by the government. *See. e.g., United States v. Serrano*, 406 F.3d 1208 (10th Cir. 2005).

6. Likewise, the government cannot be forced to offer defense witnesses immunity. *See. e.g. United States v. Beasley*, 550 F.2d 261 (5th Cir. 1977)

D. State Court Immunity

1. A state's grant of immunity binds federal authorities. *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

2. Except as noted below with regard to the crime of engaging in organized criminal activity, "a procedure for the granting of immunity has not been expressly provided by the Legislature of

this State.” *Graham v. State*, 994 S.W.2d 651, 655 (Tex. Crim. App.) 1999.

3. The prosecutor can offer “contractual immunity” against use and derivative use of information provided by a witness without intervention of the court and this immunity also applies to authorities in counties other than the one offering the “contractual immunity”. *Id.*

4. Nevertheless, transactional immunity requires approval by the court. *Id.*

5. The general rule is that a trial court has no power to grant immunity without approval by the state. *Fuentes v. State*, 622 S.W.2d 19 (Tex. App.--Houst. [1st] 1983).

a. Nevertheless, it appears (although there are no cases on point) that, in state court prosecutions for engaging in organized criminal activity, *either* side may request that the judge give use and derivative use immunity to a party to the offense in order to compel the person to give evidence *or* testify about the offense. *See* Tex. Penal Code § 71.04. Thus, arguably the defense can request immunity for another party to the alleged offense in order to compel the person to provide evidence to the defense or to testify for the defense.

6. The initial burden is on a defendant to show the existence of an immunity agreement by a preponderance of the evidence. The burden then shifts to the state to show, beyond a reasonable doubt, why the immunity agreement is invalid or why prosecution should be allowed despite the agreement. *Zani v. State*, 701 S.W.2d 249 (Tex. Crim. App. 1985).

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