Note

THE CONSTITUTIONAL BASIS FOR REQUIRING CONTINUING IMMUNITY FOR WITNESSES IMMUNIZED BEFORE THE GRAND JURY

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I. INTRODUCTION

In United States v. Salerno, seven defendants were indicted on various RICO charges.[1] One of the central issues in the case was interference with unions at a particular construction firm. In the course of the grand jury

[1] *United States v. Salerno*, 505 U.S. 317, 317–20 (1992).

investigation to obtain these indictments, AUSAs from the Southern District of New York called two owners of the firm to talk with them about the defendants' involvement and any illegal activity they or their firm might have been involved with. Both owners testified before the grand jury under a grant of immunity. However, the testimony, despite being elicited by the prosecution, was exculpatory in nature for the defendants. When it came time for trial, the defendants attempted to call the two owners to give the exculpatory evidence on their behalf. However, the prosecution did not extend the owners' immunity to trial. And so, when called, both witnesses invoked their Fifth Amendment right against self-incrimination and refused to testify. Defendants attempted to introduce the grand jury testimony, but the Supreme Court ultimately held that the testimony did not meet a hearsay exception to render it admissible.

However, the issue that was not raised and therefore not addressed by the Supreme Court was the constitutionality of the prosecution's decision not to extend the witnesses' immunity through trial or otherwise allow the defendants to introduce testimony the witnesses gave before the grand jury.[2] The Second Circuit itself, before the case went up to the Supreme Court on certiorari, considered the *Brady* implications of *Salerno*, noting that the practice of withholding exculpatory evidence from the defendant "was not true to the letter or spirit of *Brady*."[3] The court did not give a thorough analysis of the Fifth Amendment issues at play because of the doctrine of constitutional avoidance.[4] But it did conclude that denying the defendants access to exculpatory power that was within the government's possession would be "nothing more than a semantic somersault."[5] Before being reversed by the Supreme Court, the Second Circuit utilized a hearsay analysis to avoid reaching the constitutional claims.[6] The case was remanded to the Second Circuit to comply with the Supreme Court's opinion, and went through a series of opinions, but the Constitutional questions were not revisited.[7]

When the Supreme Court struck down the Second Circuit's alternate basis for allowing the defendant to utilize grand jury testimony, all that was left were the constitutional arguments. [8]The doctrine of constitutional avoidance was embraced partly as a method to avoid broad judicial overreach into areas that are better addressed through democratic processes and public

[2] *See Salerno,* 505 U.S. at 317–20; see also *United States v. Salerno*, 937 F.2d 797, 807–08 (2nd Cir. 1991) *rev'd*, 505 U.S. 317 (1992).

[3] *Salerno*, 937 F.2d at 807 (2nd Cir. before Supreme Court).

[4] *Id.* ("However, we rest our decision on our interpretation and application of Fed. R. Evid. 804(b)(1), and not *Brady v. Maryland*, keeping in mind the time-honored rule that we should not reach constitutional issues unless absolutely necessary.").

[5] *Id.*

[6] *Id.*

[7] *See United States v. DiNapoli*, 8 F.3d 909 (2nd Cir. 1993).

[8] *See Salerno*, 937 F.2d at 808 (2nc Cir. before Supreme Court).

discussion.[9] The most influential articulation of the doctrine is in Justice Brandeis's concurrence in *Ashwinder v. Tennessee Valley Authority*, where he lays out seven rules the Court has used to avoid answering constitutional questions.[10] The most applicable of the seven rules to this case is the Last Resort Rule, or the rule that "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."[11] When there is an alternative basis for the Court to grant relief, then it should rely on that ground.[12] However, when that ground has been removed as a basis for the Court to grant relief, then it has no alternative to rely on to avoid the constitutional issues.[13] Therefore, the defendants were entitled to have their constitutional claims addressed. So, the question must be answered: do defendants' constitutional rights to compulsory process, confrontation, and due process entitle them to either continued immunity for witnesses already immunized by the police or access to grand jury testimony? Yes, they do.

II. ARGUMENT

A. History of Immunity

The practice of granting immunity to certain witnesses was formalized under 18 U.S.C. §6001–03 in 1970. At its inception, and even in its current iteration, granting immunity has been the sole power of the Executive Branch, meaning that it is largely up to the discretion of the prosecution whether to offer a witness immunity from prosecution in exchange for testimony. Historically, there have been two different types of immunity: use immunity and transactional immunity.[14] Transactional immunity "protects the witness from prosecution for the offense or offenses involved, whereas use immunity only protects the witness against the government's use of his or her immunized testimony in a prosecution of the witness."[15] Essentially, the government can choose either to agree never to charge a witness with any crimes she testifies about or it can choose to reserve the right to prosecute her later if it manages to overcome the necessary hurdles.[16]

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[9] See Andrew Nolan, *The Doctrine of Constitutional Avoidance: A Legal Overview*, CONGRESSIONAL RESEARCH SERVICE, 8 (2014).

[10] *Id.* at 8–10.

[11] *Id*. at 10 (citing *Ashwander v. TVA*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring)).

[12] *Id.* at 16 (citing *Bond v. United States* 572 U.S. 844 (2014)).

[13] *See id*.

[14] Andrew Nolan, *The Doctrine of Constitutional Avoidance: A Legal Overview*, CONGRESSIONAL RESEARCH SERVICE, 8 (2014).

[15] DEPT. OF JUST., CRIM. RESOURCE MANUAL 717 TRANSACTIONAL IMMUNITY DISTINGUISHED (https://www.justice.gov/jm/criminal-resource-manual-717-transactional-immunity-distinguished).

[16] This is a difficult standard to overcome but it can be done: the government must show that it did not obtain any information against the immunized witness through her testimony, but rather through another source. The prosecution can accomplish this, but it requires additional resources and difficulty. *United*

This statutory ability to grant use immunity allows the government to overcome a witness's invocation of her Fifth Amendment right against self-incrimination and compel her to testify.[17] In *Kastigar v. United States*, the Supreme Court held that use immunity is coextensive with the protections of the Fifth Amendment and therefore enough to compel the witness to testify at the behest of the government.[18] Use immunity has allowed the government to carry out its "prosecutorial and investigatory functions" without conflicting with witnesses' rights against self-incrimination, given that it would be the government who would ultimately be prosecuting any crimes the witnesses admitted to.[19]

Historically, the ability to grant immunity has always rested with the government.[20] However, this can create a great imbalance between the prosecution's ability to present a case and the defendant's ability to present a case.[21] Granting immunity to a defense witness at the defendant's request seems to have been considered for the first time, in a reported decision, by Chief Justice Burger, then a Circuit Judge, as dicta in *Earl v. United States*.[22] While the *Earl* court ultimately held that due process does not inherently require a defendant to have her witness immunized, in a footnote the court outlined a situation in which a prosecution's use of immunity for its witnesses and not for the defendant's witnesses could constitute a constitutional violation.[23] Since that time, a criminal defendant's use of immunity has arisen under various constitutional doctrines.

III. CONSTITUTION

Courts and critics have analyzed issues surrounding immunity under both the Fifth and Sixth Amendments.[24] These considerations have largely been about a defendant's independent attempt to give a previously un-immunized witness immunity, rather than the situation at hand—where the defendant seeks continuing immunity for witnesses to whom the prosecution has already granted immunity. No court has held that there is no circumstance in which a defendant's witness would not be entitled to immunity, much less

States v. Turkish, 623 F.2d 769, 775 (1980 2nd Cir.) (citing *Kastigar v. United States*, 406 U.S. 441 (1972)).

[17] Quinn, *supra* note 13.

[18] Kastigar v. United States, 406 U.S. 441, 462 (1972).

[19] Quinn, *supra* note 13.

[20] *Kastigar*, 406 U.S. at 466–47.

[21] *See Turkish*, 623 F.2d at 774; Ellen Sheriff, *Defense Witness Immunity: Constitutional Demands and Statutory Change*, 72 J. Crim. L. & Criminology 1026, 1032–33 (1981).

[22] *See Turkish*, 623 F.2d at 772.

[23] 361 F.2d 531, 534 n.1 (D.C. Cir. 1966).

[24] Howard Schwartz, *Selective Use of the Executive Immunity Power: A Denial of Due Process?*, 8 FORDHAM URB. L. J. 879, 880 (1980).

continuing immunity.[25] Some circuits, like the Third and Ninth Circuits, have established tests to determine when immunity is necessary to vindicate a defendant's constitutional rights.[26] The Third Circuit even went so far at one point as to allow judges to grant defense witnesses immunity,[27] though it has since overturned that practice.[28] Even the Second Circuit, which has arguably the harshest jurisprudence on immunity for defendants, has not categorically rejected the idea that, in some circumstances, the Constitution requires a defense witness to be immunized.[29] Given that courts generally find that the Constitution mandates the government take the affirmative step of immunizing the defendant's witness, the decision to simply extend immunity from grand jury to trial when discussing the same or substantially similar topics is a lesser-included mandate.

A. Sixth Amendment

Under the Sixth Amendment, a defendant's lack of immunity for her witnesses can implicate both the Confrontation Clause[30] and the Compulsory Process Clause.[31] Both Clauses describe rights that belong specifically to criminal defendants against the government and can only be waived or exercised by the defendant.[32] While the Confrontation Clause serves as a shield for the defendant to guard against the government's improper use of evidence, the Compulsory Process Clause encompasses the defendant's affirmative right to procure useful testimony.[33] Improper failure to extend immunity through trial for a witness for the defendant's use can violate the defendant's defensive right against improper government conduct and her offensive right to present testimony in her favor.

1. Compulsory Process

Historically, the Compulsory Process Clause has been used by defendants to secure the testimony of a witness whose testimony the defendant had a right to use.[34] Essentially, it guarantees the defendant the

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[25] *E.g.*, United States v. Quinn, 728 F. 3d 243 (3rd Cir. 2013); United States v. Straub, 538 F.3d 1147, 1166 (9th Cir. 2008); United States v. Lenz, 616 F.2d 960 (6th Cir. 1979); United States v. Chagra, 669 F.2d 241, 258 (5th Cir. 1982); *Turkish*, 623 F.2d.

[26] *See Quinn*, 728 F.3d 243; *Straub*, 538 F. 3d.

[27] Government of Virgin Islands v. Smith, 615 F.2d 964, 972 (3rd Cir. 1980).

[28] *Quinn*, 728 F.3d at 257.

[29] *Turkish*, 623 F.2d at 777.

[30] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" U.S. CONST. amend. VI, § 2.

[31] "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor" U.S. CONST. amend. VI, § 3.

[32] John W. Weihmuller, *Admissibility of an Unavailable Witness' Grand Jury Testimony: Upholding the Purposes Behind the Confrontation Clause*, 18 VAL. UNIV. L. REV. 965, 965 (1984); *Quinn*, *supra* note 13, at 252.

[33] Quinn, *supra* note 13, at 240.

[34] *Id.* (citing *Washington v. Texas*, 388 U.S. 14, 19 (1967)).

right to present a defense, including access to material, exculpatory testimony.[35] In *Washington v. Texas*, the Supreme Court construed the Compulsory Process Clause to preserve a defendant's right to "present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies."[36] It further forbade the state from placing arbitrary obstacles in the way of a defendant's access to exculpatory evidence.[37]

The language of both the opinion and the Compulsory Process Clause implies an affirmative right for the defendant to attempt to present her version of the truth to the jury.[38] While the Compulsory Process Clause does include giving the defendant access to the government's subpoena power, this truth-telling right extends beyond merely bringing a witness to court.[39] Instead, it exists to ensure that the prosecution does not "monopolize its means of compelling testimony to the detriment of the defendant."[40]

The defendant's affirmative right to use government resources to procure exculpatory testimony takes many forms, from subpoena powers to holding noncooperative witnesses in contempt.[41] Critics and scholars have argued that these affirmative rights should extend to granting defense witnesses immunity.[42] These critics often analogize from other compulsory process rights such as those mentioned before: the subpoena power and the power to punish a witness.[43] This argument stems from the practical consideration that, if a defendant can go so far as to compel a witness to appear before the court, and can use the court's powers to punish her, it would all be in vain if the

[35] Quinn, *supra* note 13, at 251.

[36] *Washington*, 388 U.S. at 19.

[37] Donald Koblitz, *"The Public Has a Claim to Every Man's Evidence": The Defendant's Constitutional Right to Witness Immunity*, 30 STAN. L. REV. 1211, 1227 (1978).

[38] *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 HARV. L. REV. 1266, 1267 (1978) [hereinafter *Sixth Amendment Right*].

[39] *Id.*

[40] *Id.* at 1269.

[41] *Sixth Amendment Right*, *supra* note 37, at 1267, 1270.

[42] Koblitz, *supra* note 36, at 1233–34 ("[T]he Court has overturned state rules of evidence that either arbitrarily deny defendants access to evidence or are based on legitimate state policies which nevertheless are outweighed by defendants' need for evidence. In all these cases, the primary issue has been whether evidence that the defense seeks and that is within the prosecution's power to produce is both reliable and material. Once a defendant's claim for material and reliable evidence falls within the scope of the right-to evidence cases, the Constitution now guarantees that the defendant cannot be convicted without access to the evidence. The state therefore has the choice of granting the defense this access or dropping the charges."); *Sixth Amendment Right*, *supra* note 37, at 1266 (This Note first demonstrates that the compulsory process clause requires the state to provide use immunity to defense witnesses unless it can justify its denial to do so. It then reaches the same conclusion through a compatible alternative analysis based on the conflict of two constitutional rights. Finally, the note examines those situations in which the state's refusal to grant use immunity to a defense witness cannot be justified by the state's interests, and therefore violates the defendant's sixth amendment rights."); Quinn, *supra* note 13, at 246 (Constitutionally, the defendant cannot arbitrarily be denied relevant, material, or exculpatory evidence by the government in a criminal prosecution. . . . Compulsory process could be interpreted to give the defendant the right to such evidence through a grant of use immunity.").

[43] *Sixth Amendment Right*, *supra* note 37.

witness can evade all these measures by invoking her right against self-incrimination.[44] The prosecution is also entitled to the above steps, but can go further by using immunity to compelling the witness to testify. Critics argue that it would be an arbitrary interpretation of the Constitution to secure "the attendance of witnesses whose testimony the defendant cannot in any meaningful sense compel."[45]

Most courts, however, have rejected the argument for outright immunizing a defense witness under the compulsory process clause.[46] However, the rationale behind this jurisprudence has largely been that the compulsory process clause forbids the government from acting "to prevent an otherwise willing defendant from testifying."[47] When the government does revoke immunity from a witness that it had previously used to attempt to indict the defendant, then it is preventing the defendant from accessing the same witness that it previously had access to. Given that compulsory process is designed to prevent government interference and give a defendant access to the tools necessary to tell the truth, even if an outright grant of immunity does not fall under the Compulsory Process Clause, situations where the prosecution makes use of a witness under immunity and does not allow the defendant access to the same witness's testimony do.

2. Confrontation Clause

The Confrontation Clause provides defendants with a more defensive right against government conduct. Rather than requiring the government to immunize a witness, it prevents the government from improperly revoking immunity. The Confrontation Clause guarantees a defendant the right to confront—or cross examine—the witnesses brought against her.[48] Confrontation Clause jurisprudence has evolved from the time when statutory immunity was first introduced.[49] Witnesses "brought against" the defendant has been taken to mean a witness who has given "testimonial evidence" or formalized statements made mainly for the purpose of being used in a prosecution.[50] If a person's statements were made and used in the process of prosecuting a defendant, then that defendant should have the right to cross examine that person.

Grand juries are not adversarial proceedings, meaning that the defendant is not able to cross examine the witness.[51] Grand jury testimony itself is not subject to the confrontation right; however, there are circumstances when the

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[44] *Id.*

[45] *Id.*

[46] Quinn, *supra* note 13, at 247.

[47] *Lenz*, 616 F.2d at 962.

[48] Patrick S. Casey, *The Admissibility of Grand Jury Testimony under804(b)(5): A Two-Test Proposal*, 74 J. OF CRIM. L AND CRIMINOLOGY 1446, 1448 (1983).

[49] See *id.* at 1448 n.16.

[50] *Crawford v Washington*, 541 U.S. 36, 51 (2004); *Davis v Washington*, 547 U.S. 813, 822 (2006).

[51] Casey, *supra* note 47, at 1451.

testimony is necessary for trial.[52] Often, witnesses who testified before the grand jury are again brought at trial to recount similar testimony, by either the prosecution or the defense.[53] The testimony given before a grand jury is part of the process used to convict the defendant, and if necessary to the defense, the defendant can access that testimony and see what was said against her.[54] In combination with her compulsory process rights, the defendant would generally be able to call that witness as a witness at trial to either benefit from or challenge the testimony given before the grand jury.

In the case of a witness immunized before the grand jury and not for trial, the prosecution is essentially using a witness for its own benefit and denying the defendant the opportunity to challenge that witness. Rather than a case where the prosecution refuses to offer immunity to a witness it had not previously immunized, in this circumstance, it is outright benefiting from testimony it compelled from a witness while denying the defendant the same right. It can be analogized to a situation where the prosecution calls a witness at trial, but the witness invokes her right against self-incrimination when questioned by the defense.[55] In both of these situations, the prosecution has already had the benefit of a witness's testimony and the same benefit is being denied to the defendant; however, in the situation of refusing a continued grant of immunity, the prosecution has benefitted not from voluntary but compelled testimony and is deliberately denying the defendant that same benefit, rather than an incidental benefit. In those cases, the general solution is either to strike the witness's testimony or to order a mistrial.[56] However, critics have argued that a grant of immunity in these cases would better vindicate both constitutional rights and judicial efficiency.[57] Even if immunity was not the chosen remedy, withholding—deliberately or indirectly—the ability of the defendant to confront someone who has given formal testimony used in her prosecution is still a violation of the Confrontation Clause.[58]

B. Fifth Amendment Due Process and Basic Fairness

Due process rights for criminal defendants also cover a wide area, including a right to "fundamental fairness, that the government produce exculpatory evidence on behalf of the defendant, reciprocity of discovery rights between the prosecution and the defense, and the reversal of convictions when courts find prosecutorial misconduct."[59] Many of the

[52] *Id. at 1452.*

[53] *See Comment, The Rights of a Witness Before a Grand Jury*, 1967 DUKE L. J. 97, 112 (1967).

[54] *See* United States v. Proctor & Gamble Co., 356 U.S. 677 (1958).

[55] Koblitz, *supra* note 36, at 1228 (citing *Davis v Alaska*, 415 U.S. 308 (1974).

[56] *Id*.

[57] *Id.* at 1230

[58] *Id.*

[59] Sheriff, *supra* note 20, at 1031.

concerns raised by courts under Fifth Amendment due process and basic fairness are that the government will unfairly tip the scales by immunizing its own witnesses and refusing to immunize the defendant's witnesses without a compelling reason, beyond preventing the defendant from benefiting from that testimony.[60] Even the same courts that have rejected defense witness immunity under the Sixth Amendment have been more willing to find a right under the Fifth Amendment.[61] It was under the Fifth Amendment that the *Earl* court first considered how the use or withholding of immunity has the potential to deny a defendant due process and basic fairness.[62]

Often this Fifth Amendment analysis is conducted when the prosecution utilizes immunization for its own witnesses but refuses it for the defendant's witnesses without a good reason.[63] In *United States v DePalma*, the defendant attempted to compel testimony from a witness who had given testimony against him before the grand jury.[64] The witness gave notice that he would be invoking his right against self-incrimination and the prosecution refused to immunize him, but its case relied heavily on immunized witnesses.[65] Rather than analyzing the grand jury testimony and the issues specifically arising from that context, the court instead focused on the prosecution's use of immunity, and it found that the remedy for a constitutional violation was either for the prosecution to immunize the defendant's motion, or to forego use of its own immunized witnesses.[66] However, the defendant's access to exculpatory evidence should not be premised on the government's actions; just like the defendant's ability to subpoena a witness should not depend on whether the prosecution subpoenas any witnesses and how many it does, the defendant's ability to receive immunity for her witnesses should not be dependent on how many witnesses the prosecution immunizes.

For courts, another one of the main categories that necessitate immunity for a defense witness is prosecutorial misconduct.[67] Prosecutorial misconduct can encompass both the arbitrary denial of immunity to a witness the government has no interest in prosecuting[68] to the singling out of witnesses in a way that makes them invoke their right against self-incrimination.[69] Some courts do not distinguish between general interference with a witness and the refusal to immunize a witness.[70] Misconduct does not necessarily

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[60] *See* Quinn, *supra* note 13, at 256.

[61] *Lenz*, 616 F.2d at 963.

[62] *Earl*, 361 F.2d at 534 n.1.

[63] *See Chagra,* 669 F.2d at 259–60; *Earl*, 361 F.2d at 534 n.1.

[64] Schwartz, *supra* note 23, at 900.

[65] *Id.* at 901.

[66] *Id.* at 904.

[67] *Quinn*, 728 F.3d at 247.

[68] *Government of Virgin Islands*, 615 F.2d at 974.

[69] United States v. Morrison, 535 F.2d 223, 229 (3rd Cir. 1976).

[70] *Quinn*, 728 F.3d at 259 ("*Blissett v. Lefevre*, 924 F.2d 434, 442 (2d Cir. 1991) ("Prosecutorial overreaching may also involve deliberate denial of immunity for the purpose of withholding exculpatory evidence and gaining a tactical advantage through such manipulation."); United States v. Angiulo, 897

require an intent to distort the fact-finding process or deny the defendant access to exculpatory evidence as long as it has the effect in actuality of distorting the fact-finding process.[71] Some courts conflate this misconduct approach with the lopsided granting of immunity to prosecution witnesses;[72] however, this approach still leaves unsolved the problem of when the prosecution arbitrarily denies the defense witness immunity—in a way that distorts the fact-finding process—while not relying on immunized testimony to support its own case. The distortion analysis used by some courts strongly supports the continuation of immunity for previous witnesses, given that the prosecution is aware of the exculpatory nature of the testimony these witnesses have, have already granted these witnesses immunity and must find another source of information with which to prosecute them, and is denying them immunity in a way that knowingly distorts the fact-finding process.

Many commentators have analogized refusals to grant defense witnesses immunity to *Brady* violations.[73] In both situations, prosecutors deliberately withhold exculpatory evidence from the defendant when it is within the government's power to give the defendant access.[74] Courts, too, have considered the *Brady* implications of withholding exculpatory information in the form of refusing to extend immunity to defense witnesses. While the *Earl* court expressly held that refusal to grant immunity was not a *Brady* violation, it did so because it deferred to prosecutorial discretion and did not apply a due process analysis to the question.[75] In a limited opinion, the court considered not the due process issue relating to defense witness immunity, but rather the lack of statutory scheme to provide defense witness immunity.[76] However, four judges on the D.C. Circuit argued that the case should have been heard *en banc* considering the undecided *Brady* issues.[77]

Part of the problem lies with the fact that the prosecution might not always know that the witness possesses exculpatory testimony.[78] Even so, when there appeared to be no countervailing governmental interest, the dissenters noted that there was at least a question about whether the prosecution was withholding exculpatory evidence from the defense.[79] In

F.2d 1169, 1192 (1st Cir. 1990) ("[T]he government could intentionally distort the fact-finding process by deliberately withholding immunity from certain prospective defense witnesses for the purpose of keeping exculpatory evidence from the jury."); United States v. Hooks, 848 F.2d 785, 802 (7th Cir. 1988) (considering whether "the government's withholding of immunity distorted the fact-finding process by keeping exculpatory evidence from the jury"); United States v. Frans, 697 F.2d 188, 191 (7th Cir. 1983) (requiring a defendant to show "that the government intended to distort the judicial fact-finding process" by refusing to immunize a defense witness after immunizing a prosecution witness").

[71] *Straub*, 538 F. 3d. at 1158.

[72] *Id.*

[73] *E.g.*, Koblitz, *supra* note 36, at 1225; Sheriff, *supra* note 20, at 1041.

[74] Sheriff, *supra* note 20, at 1041.

[75] *Earl*, 361 F.2d at 534.

[76] *Id.*

[77] *Earl v. United States*, 364 F.2d 666 (1966) (denying rehearing *en banc*).

[78] Koblitz, *supra* note 36, at 1225 n.62; Schwartz, *supra* note 23, at 897.

[79] *Earl*, 364 F.2d at 666 (denying rehearing *en banc*).

cases like this, where the prosecution knows what the witness will say, the government has no countervailing interest against granting the witness immunity, given that it has done so once before for the same subject matter.

IV. TRADITIONAL PROBLEMS WITH DEFENSE WITNESS IMMUNITY

In determining whether to grant a defendant's witness immunity, the interest of the defendant is weighed against the problems immunity will create for the government. Given this, it is difficult for a defendant to raise a sufficient argument to tip the scales in her favor.[80] However, the concerns that weigh against outright granting a defense witness immunity are inapplicable in the context of continuing immunization for a witness who has *already been granted* immunity before the grand jury. The first traditional issue with allowing a defendant to immunize her own witnesses is that the decision to grant immunity is inherently one of prosecutorial discretion, and the prosecution should not be forced to decide or reveal who it intends to prosecute in the future and for what.[81]

A. Prosecutorial Discretion

Immunity decisions rest within the government's broad discretion to decide who to prosecute and for what crimes, using what means.[82] Part of the reason for this discretion is that the government will have to worry about overcoming the "heavy burden" set by *Kastigar v. United States* if it is forced to immunize a person it already has an interest in prosecuting.[83] This would include the additional expenditure of resources, personnel, time, and coordination effort.[84] Courts generally hold that decisions about prosecutions and allocation of resources is one best managed by the government, rather than by the courts and the defendant.[85] Even those courts that are most deferential to the government hold that, to deny a defense witness immunity, the prosecution need only write an affidavit or otherwise assert the basis for belief that the potential witness is a target for future prosecution.[86] While this is an extremely high bar to meet, in these specific circumstances, the worry of future prosecution is rebutted by the fact that the government has already granted these witnesses immunity relating to the subjects of trial.

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[80] *Quinn*, 728 F.3d at 253 ("Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.") (citing *Wayte v. United States,* 470 U.S. 598, 607 (1985)).

[81] *Turkish*, 623 F.2d at 776–77.

[82] *Quinn*, 728 F.3d at 253.

[83] *Kastigar*, 406 U.S. at 468.

[84] *See Quinn*, 728 F. 3d at 254.

[85] *See id.*

[86] *See Turkish*, 623 F.2d at 778.

The calculus of immunity is no doubt difficult for the government to make, and the government has wide latitude to grant immunity to the witnesses that it does. However, when it has *already* calculated the benefits and risks of granting immunity, these concerns no longer apply. If the government is worried that it will not be able to effectively cross examine for fear that it will grant the witness more immunity than it had planned, the prosecution can take care to limit the scope of the immunity that it grants. Just as the prosecution can sterilize and isolate those investigating the witness from those conducting the grand jury, it can do the same with the members of the prosecution conducting the trial.[87] The burden of *Kastigar v. United States* does not become heavier when the witness is immunized at trial than if she were immunized before the grand jury.[88] Therefore, once the government has already made the independent decision to shoulder the heavy burden of granting immunity, it can limit any further risk to a future investigation.

B. Perjury

Another problem that frequently arises in the context of granting a defense witness immunity is a worry both that the witness might commit perjury and that a perjury charge would still be substantially less significant than the substantive offence the defendants are seeking to evade.[89] This is part of the difficult calculus the government must conduct when determining whether to grant a witness immunity: whether the possibility of gaining beneficial evidence outweighs the risk that the witness will use the opportunity to escape from more stringent punishment. This balancing is not unique to defense witness immunity; the prosecution must also consider it when deciding to immunize one of its own witnesses as well. In fact, in the circumstances this paper is focused on, the prosecution already *has* made this decision when deciding whether it would immunize a witness for its own benefit. As such, the prosecution has time beforehand to make the necessary preparations in case the witness attempts to lie; the government can preemptively prepare a sterilized investigation or isolate the members involved in trial from the rest of the office if it believes the witness it has immunized is likely to commit perjury. Perjury is a problem that exists in every criminal trial and the courts are "well-equipped to handle" it.[90] The immunity statute also specifically carves out an exception where immunized testimony can be used in a later perjury prosecution as if it had never been immunized at all.[91] Further, jurors have the ability to be skeptical of any

[87] *Quinn*, 728 F.3d at 254.

[88] *See Kastigar* (describing testimony as a whole, rather than classes of testimony).

[89] *Turkish*, 623 F.2d at 775.

[90] Quinn, *supra* note 13, at 257.

[91] 18 U.S.C. § 6002 (1970); *id.*

witness granted immunity, whether the witness is testifying at the behest of the government or the defendant.[92]

Much like the problem of perjury, there is a concern about "immunity baths," or a defendant deliberately revealing more details than necessary about a crime or talking about unrelated crimes to make it more difficult for the prosecution to find an independent source of information for a future investigation.[93] However, this is more a problem when a defendant is granted transactional immunity rather than use immunity.[94] There are inherent procedures within use immunity that protect against this kind of behavior.[95] Given that use immunity is not an all-encompassing protection from prosecution and does not cover testimony nonresponsive to the question posed, continued application of use immunity poses no more danger than the original grant.[96]

The worry about the potential perjury or oversharing by a defense witness dovetails with the apprehension that coconspirators, or other compatriots, would work together to have one immunized witness take the blame for all the crimes committed and help the others be acquitted.[97] However, this concern, much like the others, is ameliorated by the fact that the government has already selected which coconspirators, or others potentially involved in the criminal enterprise, it has chosen to grant immunity to. This has likely followed an investigation process that lessens the likelihood of an inside agent being selected to acquit the other codefendants. Moreover, during this investigation process, it is likely that the government has already collected information on the witness independent of the testimony that will be given at trial.[98]

C. Uncertainty About What Will Be Said

A problem separate from the witnesses themselves is that often neither the defendant nor the prosecution is sure about exactly what testimony the witness will offer.[99] The prosecution has already had the opportunity in cases where it has immunized the witness before the grand jury to elicit whatever kinds of testimony it chooses, leaving much less mystery about what the witness will testify. Given the amount of power the government has at the grand jury stage, it will have at least the basic contours of what information the witness will testify about, more information than it would likely have

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[92] Quinn, *supra* note 13, at 258.

[93] Schwartz, *supra* note 23, at 882–83.

[94] *Turkish*, 623 F.2d at 775.

[95] Koblitz, *supra* note 36, at 1237.

[96] *Id.*

[97] *Lenz*, 616 F.2d at 962.

[98] Koblitz, *supra* note 36, at 1237.

[99] *See Lenz*, 616 F.2d at 964 ("At no time did counsel describe the substance of Mooneyham's expected testimony nor even intimate that he knew what it would be.").

about non-immunized defense witnesses who were not called before the grand jury.

D. Exculpatory Nature of the Offered Testimony

A related concern about the lack of knowledge about what the witness will say is the problem that the evidence will not be properly exculpatory in nature.[100] The underlying Fifth Amendment issue in *Brady* is that the government will withhold exculpatory evidence from the defendant when it is within the government's power to turn it over.[101] The testimony the defendant wishes to compel must actually be exculpatory in nature and many courts have rejected defendants' claims for witness immunity because the defendant could not prove that the testimony would rise to that level.[102] Because the witness has already given testimony in this case, if there is a question about whether it rises to the level of exculpatory necessary to require immunity under the Constitution, the judge will be able to review grand jury testimony from the witness, though the traditional tools of an *in camera* review or general description by the defendant of expected testimony are also available.

V. IN THE ALTERNATIVE: ALLOW THE DEFENDANT TO INTRODUCE THE GRAND JURY TESTIMONY

As was the actual situation in *Salerno*, in the face of a witness's invocation of the Fifth Amendment right against self-incrimination, the defendant could also attempt to introduce the prior testimony the witness gave before the grand jury. If one of the problems of extending witness immunity from grand jury through trial is that it encroaches on the Executive Branch's prosecutorial discretion,[103] then allowing the witness to present the testimony—and only the testimony—that the government has already procured ameliorates this worry. Introducing only the previous testimony also does not grant authority for the defendant's constitutional rights to override the witness's right against self-incrimination in the same way the government is able to. This approach also addresses the mystery about exactly what the witness will testify about, how exculpatory that information would be, and whether the witness would use the opportunity like an "immunity bath" and include information outside the scope of exculpatory evidence she possesses.

[100] *See Turkish*, 623 F.2d at 775.

[101] *Id.* (citing *Brady v. Maryland*, 373 U.S. 83 (1963)).

[102] Schwartz, *supra* note 23, at 898.

[103] *Turkish*, 623 F.2d at 776–77.

A. Constitutional Basis

Many of the same Constitutional arguments apply to allowing a defendant to access grand jury testimony and continuing immunization of a prosecution grand jury witness. *Salerno* itself dealt with the admission of the grand jury testimony, rather than with immunizing a witness.[104] In that circumstance, the court considered the Fifth Amendment due process implications, specifically in relation to the mandate under *Brady* that the prosecution may not suppress evidence favorable to the accused.[105]

B. Hearsay Exception

The challenged hearsay rules in *Salerno* were in the Federal Rules of Evidence,[106] so this paper focuses its analysis on the relationship between the Constitution and federal evidentiary law, though a majority of the states have adopted the Uniform Rules of Evidence which tracks the Federal Rules of Evidence.[107] Defendants attempted to admit the hearsay testimony under FRE 804(b)(1) or the former testimony exception.[108] In order for former testimony to be admissible, the exception requires that the testimony from an unavailable witness:

> (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and (B) is now offered against a party who had —or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.[109]

Witnesses who invoke their Fifth Amendment right against self-incrimination are unavailable for purposes of the hearsay exception[110] and that grand jury testimony qualifies as former testimony under 804(b)(1)(A).[111] In finding that the grand jury testimony qualifies, the Supreme Court held that the critical component was whether the prosecution had a "similar motive" in developing the grand jury testimony.[112]

In the case of grand jury testimony, the question of "similar motive" is a fact-specific inquiry, rather than a categorical question of law and remanded

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[104] *Salerno*, 937 F.2d at 804 (2nd Cir. before Supreme Court).

[105] *Id.* at 807 ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (quoting Brady v. Maryland)).

[106] *See Salerno*, 505 U.S. 317.

[107] *Uniform Rules of Evidence*, LEGAL INFO. INST., https://www.law.cornell.edu/uniform/evidence (last visited Apr. 28, 2019).

[108] *Salerno*, 505 U.S. at 321.

[109] FED. R. EVID. 804(b)(1)

[110] FED. R. EVID. 804(a)(1); *see Salerno*, 505 U.S. at 321.

[111] FED. R. EVID. 804(b)(1)(A); *see Salerno*, 505 U.S. at 321.

[112] *See Salerno*, 505 U.S. at 321.

back to the Second Circuit to determine whether or not the prosecution had a similar motive.[113] While the initial panel held that the prosecution did have a motive similar enough to allow for the introduction of the testimony, the court on rehearing *en banc* vacated and held that the prosecution did not have a similar enough motive.[114] It based its analysis on the following standard:

> whether the party resisting the offered testimony at a pending proceeding had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue. The nature of the two proceedings—both what is at stake and the applicable burden of proof—and, to a lesser extent, the cross-examination at the prior proceeding—both what was undertaken and what was available but forgone—will be relevant though not conclusive on the ultimate issue of similarity of motive.[115]

Since *Salerno*, various circuits have applied the similar motive test for determining whether to admit grand jury testimony against the government.[116] Some, like the First and Second Circuits, have interpreted this standard narrowly, conflating "similar motive" with a nearly identical motive.[117]

These tests fail to consider the historical interests and motivating the hearsay exceptions. The Federal Rules of Evidence have evolved to be read liberally, including the exceptions to the rule against hearsay evidence.[118] The advisory committee notes elaborate on the preference for evidence to be admitted, even less-than-ideal evidence, over a lack of evidence.[119] The committee notes emphasize an interest in the reliability of testimony as a primary motivator for admissibility, historically supported by presence before a factfinder, an oath, and the ability to cross examine, though these are not necessary conditions.[120] Grand jury testimony meets two of the three indicators of reliability, and is developed in opposition to a defendant's interests, therefore mitigating the risk that the evidence is unreliably biased against the party it is being offered against.

Another animating motivation behind hearsay exceptions, especially during the common law before the rules were enacted, was fairness and the

[113] *Id.* at 325.

[114] *DiNapoli*, 8 F.3d at 916.

[115] *Id. at 914–15.*

[116] *See* Brandon Berkowski, *Federal Rule of Evidence 804(b)(1)'s "Similar Motive" Test and the Admissibility of Grand Jury Testimony Against the Government*, 79 FORD. L. REV. 1213, 1258 (2011).

[117] *Id.* at 1260.

[118] John G. Douglass, *Balancing Hearsay and Criminal Discovery,* 68 FORD. L. REV. 2097, 2103 (2000).

[119] Berkowski, *supra* note 115, at 1227 (citing FED. R. EVID. art. VIII advisory committee's note).

[120] *Id.*

desirability of having all relevant evidence admitted.[121] This original model of fairness was one that favored admissibility if the evidence had been procured by either party, but the rule was narrowed in its final iteration to focus specifically on an "adversarial model of fairness."[122] The argument against blanket admission of grand jury testimony against the government based on the hearsay rule is that, at the grand jury, the prosecutor might not have an incentive to challenge or impeach the witness, either because she feels she does not need to do so to meet the standard of proof necessary or because this might reveal information about strategic decisions.[123] But these are strategic decisions that take place at every level of the trial process; a prosecutor could make the strategic decision not to impeach a witness because that witness also has a crucial piece of information, or may choose to question a witness as toughly to avoid alienating the jury. These strategy decisions that occur at all levels of trial should not serve as the basis for the admissibility of evidence so critical to the defendant.[124]

Other circuits, like the D.C. Circuit, the Sixth Circuit, and the Ninth Circuit, have adopted a broader test based on several factors, creating a presumption in favor of admissibility of grand jury testimony against the government.[125] These tests are better able to vindicate the underlying motivations behind the liberalized rules of evidence, though the categorical approach to evidence still fails to properly weigh the defendant's baseline constitutional rights.

C. Reconciling Conflicts Between the Rules of Evidence and the Constitution

Even if, under the factual circumstances of a particular case, the defendant cannot satisfy a hearsay exception, she should still be allowed to submit the hearsay evidence based on her constitutional rights. The Supreme Court is generally reluctant to interfere with established bodies of evidence law, given that issues of specific pieces of trial evidence rarely rise to the Supreme Court, making it difficult to establish a coherent jurisprudence from cases.[126] Lower courts, where evidentiary issues arise with more frequency, cannot avoid making these determinations about the relationship between the constitution and established evidentiary rules.[127] Nevertheless, in situations implicating "fundamental unfairness," and rules of evidence squarely conflict

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[121] *Id.*

[122] *Id.* (citing David Robinson, *Jr., From Fat Tony and Matty the Horse to the Sad Case of A.T.: Defensive and Offensive Use of Hearsay Evidence in Criminal Cases*, 32 HOUS. L. REV. 895, 897–99 (1995)).

[123] *See DiNapoli*, 8 F.3d at 913.

[124] Berkowski, *supra* not 115, at 1245 (citing *Salerno*, 505 U.S. at 329 (Stevens, J., dissenting)).

[125] *Id.* at 1261.

[126] Brandon L. Garrett, *Constitutional Law and the Law of Evidence*, 101 CORNELL L. REV. 57, 59 (2015).

[127] *Id.* at 60

with the Constitution, the Supreme Court has been willing to step in and overturn evidentiary rules or hold them inapplicable.[128]

For instance, this Court did this in the context of hearsay with the Confrontation Clause.[129] In shifting from *Ohio v Roberts* to *Crawford v Washington*, the Court abandoned the traditional model of basing its decisions on traditional evidentiary concerns of reliability because the constitution is not limited to "the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"[130] The Fifth Amendment right against self-incrimination is another that defeats any traditional evidence law.[131] Even when the Constitution does not explicitly proscribe a right that overrides evidence rules, the Court has found that Constitutional rights defeats the rules of evidence, like with the exclusionary rule.[132] The exclusionary rule is based on an interpretation of the Fourth Amendment that seeks to exclude from a criminal trial otherwise relevant, reliable, and probative evidence because of a need to "[maintain] the integrity of individual rights."[133] Evidentiary rules designed to aid in the prosecution of criminal activity do not override the Constitution as the "fundamental law of the land."[134] Rather than balancing evidentiary interests, when Constitutional rights are at play, the Court has held such rights to override the rules of evidence.[135] Therefore, even if the Federal Rules of Evidence do not support admission of the witness's grand jury testimony, the defendant's constitutional right to exculpatory evidence within the prosecution's control would still warrant its admission.

VI. PROPOSED SOLUTION

As noted in *Quinn*, a court is not authorized to grant witnesses immunity of its own power[136]—the Third Circuit previously being the only Circuit to allow district judges to grant immunity defense witnesses upon a finding of a constitutional violation. [137] In light of the judiciary's inability to immunize witnesses, courts should instead follow a modified version of the Third Circuit's approach and require that the prosecution either immunize the witness through trial, allow the defendant to introduce grand jury testimony, or dismiss the charges against the defendant until such time as it is ready to

[128] *Id.* at 62
[129] *Id.* at 69
[130] *Id.* at 69–70 (citing *Crawford*, 541 U.S. at 61).
[131] *Id.* at 75.
[132] *Id.* at 72.
[133] *Mapp v. Ohio*, 367 U.S. 643, 647 (1961).
[134] *See id*. at 648.
[135] Garrett, *supra* note 125, at 61.
[136] *Quinn*, 728 F.3d at 257.
[137] *Turkish*, 623 F.2d at 773.

grant her one of the two options.[138] Rather than compelling the prosecution to exercise its discretion in a particular way, this solution instead merely requires the government to organize its priorities—it can either decide that the witness's lack of immunity takes higher priority for strategic reasons, but must then adhere to this decision.[139] This solution allows for the vindication of the defendant's right to a constitutional trial while also not encroaching on the complex calculus that goes into either a grant of immunity or allowing certain testimony from the grand jury to be made public.

VII. CONCLUSION

Extending immunity through trial for witnesses who were immunized before the grand jury but not when called by defense witnesses at trial is a problem that arises at the nexus of two tracks of problems: the problem of granting immunity to defense witnesses generally and the problem of introducing grand jury testimony against the government. This particular intersection of problems has not been addressed in light of the constitutional issues that it raises. Namely, courts have not analyzed the refusal to either extend immunity through trial or otherwise allow the introduction of exculpatory grand jury testimony notwithstanding the hearsay rules. Either one of these options would serve to vindicate a defendant's right to confrontation, compulsory process, and due process under the law, which are otherwise violated by the practice of denying immunity and barring the admission of transcripts. In this particular circumstance, the government has both knowledge of the existence of exculpatory evidence and the sole power to allow a defendant to utilize that evidence. As such, courts should utilize a version of the standard administered by the Third Circuit: courts should either require the government to continue immunity for the witness through trial, allow the defendant to introduce exculpatory grand jury testimony without objection, or dismiss charges against the defendant until such time as it is ready to do one of the following.

[138] *See Quinn*, 728 F.3d at 260–61.

[139] *Id. at 260.*