

# CHAPTER 9

## IMMUNITY

### Table of Contents

<b>I. PRACTICE TIPS .....</b>	<b>1</b>
A. ONLY PROSECUTORS ASK COURT TO GRANT IMMUNITY .....	1
B. INFORMAL, “POCKET”, OR “LETTER” GRANTS OF IMMUNITY .....	1
C. WHEN NEGOTIATING .....	1
1. Try for broad coverage .....	1
2. Anticipate consequences .....	1
D. HOW TO OBTAIN IMMUNITY .....	1
1. Good ideas .....	1
2. Questions to ask .....	1
<b>II. TYPES OF IMMUNITY .....</b>	<b>2</b>
A. FORMAL IMMUNITY – THREE TYPES .....	2
1. Use and derivative use authorized in Indiana .....	2
(a) Use immunity – cannot use testimony to begin prosecution, but does not proscribe future prosecution .....	2
(b) Ind. Evid. R. 410 applies use immunity to statements made during plea negotiations .....	2
(c) Derivative use – cannot use immunized testimony to get additional incriminating evidence .....	2
(d) Shortfalls of both .....	3
2. Transactional –complete pardon for offenses disclosed by testimony .....	3
(a) Not authorized under Indiana’s immunity statute .....	3
(b) Other states require transactional immunity as matter of state constitutional law .....	3
3. Immunity applies to criminal proceedings in any court .....	3
B. INFORMAL IMMUNITY .....	4
1. How to obtain – Practice tips: avoiding trouble .....	4
2. Letter or pocket immunity .....	4
3. Advantages .....	4
(a) To prospective defendant .....	4
(b) To prosecution .....	4
4. Protections .....	4
5. Enforceability .....	5
(a) Due process protections .....	5
(b) Application of contract law .....	5
(c) Public policy arguments .....	5
<b>III. PROCEDURE FOR GRANT OF IMMUNITY .....</b>	<b>6</b>
A. PROSECUTOR MAY GRANT WITH COURT APPROVAL .....	6
B. WITNESS MUST REFUSE TO TESTIFY OR PRODUCE ITEM .....	6
1. May obtain immunity prospectively .....	6
2. May not obtain before indictment or filing of charges if witness invokes Fifth Amendment .....	6
C. HEARING OUTSIDE PRESENCE OF JURY TO DETERMINE PRIVILEGE .....	7
D. IMMUNITY MUST BE GRANTED UPON REQUEST IF PRIVILEGE APPLIES .....	7
E. COURT MUST INSTRUCT WITNESS AS TO EFFECT OF GRANT OF IMMUNITY .....	7
F. REFUSAL TO GIVE EVIDENCE – SUBJECT TO CONTEMPT .....	7
G. PROSECUTOR CANNOT RETRACT IMMUNITY WITHOUT GOOD CAUSE .....	7
1. May limit to certain stages of proceeding .....	7

<b>IV. CHALLENGING STATE’S USE OF IMMUNIZED TESTIMONY .....</b>	<b>8</b>
A. STATE USES COMPELLED TESTIMONY AGAINST IMMUNIZED WITNESS .....	8
1. Prohibited from using compelled testimony in any criminal proceeding.....	8
(a) Prohibition includes use in sentencing.....	8
(b) Exceptions.....	8
2. Procedure to challenge compliance .....	8
(a) State must actually use evidence against defendant.....	8
(b) Raise claim in pre-trial hearing .....	8
(c) If at trial, make objection.....	9
(d) Defendant must show he testified under grant of immunity .....	9
(e) State must affirmatively show independent source of evidence .....	9
3. Remedies .....	10
B. OTHER FORBIDDEN USES OF IMMUNIZED TESTIMONY .....	10
1. Investigatory leads.....	10
2. Impeachment in subsequent trial .....	10
3. Prosecution for perjury in prior appearances.....	10
4. Inter-jurisdictional use.....	10
(a) Federal government cannot use State-immunized testimony under Fourteenth Amendment.....	10
5. Non-evidentiary use of immunized testimony .....	11
(a) Prohibited.....	11
(b) Allowed.....	11
C. USE OF CHILD’S STATEMENT TO MENTAL HEALTH EVALUATOR .....	11
<b>V. HOW TO GET IMMUNITY FOR DEFENSE WITNESSES.....</b>	<b>11</b>
A. ASK PROSECUTOR FOR INFORMAL IMMUNITY .....	11
B. REQUEST JUDICIAL IMMUNITY .....	12
1. Inherent powers of trial court to protect defendant’s right to present exculpatory evidence ..	12
(a) Indiana Supreme Court has not addressed .....	12
(b) Indiana Court of Appeals reluctant to grant.....	12
2. Interference with defendant’s case or distortion of fact finding.....	12
(a) Showing .....	13
(b) Distortion of fact-finding process by discriminatory use of immunity-granting powers..	13
(c) Interfere with defendant’s case by intimidating witnesses .....	13

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## CHAPTER 9

### IMMUNITY

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#### I. PRACTICE TIPS

##### A. ONLY PROSECUTORS ASK COURT TO GRANT IMMUNITY

Only prosecutors grant immunity with court approval. The procedures for obtaining a grant are outlined in IPDC Trial Manual, Chapter 9 § III. *below*.

##### B. INFORMAL, “POCKET”, OR “LETTER” GRANTS OF IMMUNITY

Commonly utilized by the prosecution to obtain cooperation and/or otherwise unavailable information. See IPDC Trial Manual, Chapter 9 § II.B. *below*.

##### C. WHEN NEGOTIATING

In negotiating immunity for a client, counsel must try to anticipate the legal consequences of a failure of either side to keep the immunity bargain, and to prevent avoidable ambiguities from becoming pitfalls for client.

###### 1. Try for broad coverage

When consulting with a client who is a prospective witness at a later trial, be certain as to what stages of criminal proceedings immunity is being granted.

###### 2. Anticipate consequences

**Practice Pointer:** In order to properly advise a client who wishes to obtain immunity or wishes to resist efforts to compel his or her testimony, counsel must be aware of the essentials of a grant of immunity constitutionally sufficient to overcome the privilege against self-incrimination in different situations.

##### D. HOW TO OBTAIN IMMUNITY

###### 1. Good ideas

- (1) strive to make protections explicit in agreement;
- (2) exercise care in drafting immunity agreement;
- (3) make sure client understands limitations of protection afforded by agreement; and
- (4) get agreement in writing.

###### 2. Questions to ask

- (1) Is use immunity being offered, or promise not to prosecute?
- (2) If promise not to prosecute offered, what transactions are covered?
- (3) Is promise of immunity in exchange for responses to only specific questions asked, whole topic of questioning, or all knowledge of client?
- (4) What settings are covered – testimony at interview, deposition, pre-trial hearing, or trial?
- (5) What independent sources does government possess? (this will enable counsel to segregate evidence which government might claim as emanating from independent sources in a later prosecution of client).

See BNA, *Criminal Practice Manual*, 89:3 (2008).

## II. TYPES OF IMMUNITY

### A. FORMAL IMMUNITY – THREE TYPES

Formal immunity statutes, like Ind. Code § 35-37-3 *et al.*, involve fairly strict procedures, requiring prosecutorial and judicial approval. Contingent on assertion of Fifth Amendment privilege.

Use immunity is all that is constitutionally required. Kastigar v. United States, 406 U.S. 441, 453, 92 S.Ct. 1653 (1972).

Three types of formal immunity may be granted in exchange for witness' testimony:

- (1) use;
- (2) derivative use; and
- (3) transactional.

#### 1. Use and derivative use authorized in Indiana

Ind. Code § 35-37-3-3(a) has been interpreted as providing use and derivative-use immunity. See In re Caito, 459 N.E.2d 1179 (Ind. 1984).

##### (a) Use immunity – cannot use testimony to begin prosecution, but does not proscribe future prosecution

Prohibits prosecution from using compelled testimony to initiate or facilitate prosecution but does not proscribe future prosecutions. In re Caito, 459 N.E.2d 1179 (Ind. 1984).

Kastigar v. United States, 406 U.S. 441, 453, 92 S.Ct. 1653 (1972) HN 5 (use immunity all that Fifth Amendment requires).

United States v. Hubbell, 530 U.S. 27, 120 S.Ct. 2037 (2000) (a subject may not be compelled to either testify or perform a testimonial act (e.g. production of documents), through the use of limited use immunity; the immunity granted must include “derivative use” of the produced evidence).

Furrer v. State, 709 N.E.2d 744 (Ind. Ct. App. 1999) (grant of use immunity requires that a witness testify truthfully under the grant of immunity but protects that witness from prosecution for past perjurious statements thereby revealed).

##### (1) Prosecutor may limit to certain proceedings

Within prosecutor's discretion to request use immunity be limited to certain proceedings such as deposition or pre-trial hearing, and not trial. Lucas v. State, 499 N.E.2d 1090 (Ind. 1986).

##### (b) Ind. Evid. R. 410 applies use immunity to statements made during plea negotiations

Indiana Rule of Evidence 410 and Ind. Code § 35-35-3-4 provide that statements made in connection with a contemplated plea agreement may not be used against a defendant if the agreement is not finalized. Reed v. State, 748 N.E.2d 381, 389 (Ind. 2001).

##### (c) Derivative use – cannot use immunized testimony to get additional incriminating evidence

Derivative use immunity prevents State from using, directly or indirectly, immunized testimony to ferret out additional incriminating evidence to facilitate prosecution against

witness. Cliff v. Ind. Dep't of State Revenue, 641 N.E.2d 682, 689 n.6 (Ind. Tax Ct. 1994), *affirmed at* 610 N.E.2d 310, 317 (Ind. 1995).

**(d) Shortfalls of both**

- (1) do not protect person from foreign prosecutions;
- (2) do not protect person from civil litigation that could not have been brought except for testimony;
- (3) test the government must overcome for prosecuting an immunized witness can be self-fulfilling and impossible to challenge (e.g. government prosecutes for tax evasion and claims anonymous source reported large cash purchases).

For discussion of shortfalls of use/derivative use immunity, see dissenting opinion in Ullman v. United States, 350 U.S. 422, 76 S.Ct. 497 (1956). See also dissent in Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653 (1972).

**2. Transactional –complete pardon for offenses disclosed by testimony**

Transactional immunity prohibits State from criminally prosecuting witness for any transaction concerning which witness testifies. Secures witness from any future indictment or conviction for offenses to which his compelled testimony relates. In re Contempt Findings Against Schultz, 428 N.E.2d 1284 (Ind. Ct. App. 1981).

Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967) (transactional immunity grants same degree of protection to citizen ordered to testify as though he had not testified at all; operates as complete pardon for offenses disclosed by witness' testimony).

**(a) Not authorized under Indiana's immunity statute**

Ind. Code § 35-37-3-1 does not authorize grant of transactional immunity for compelled testimony. See Abner v. State, 479 N.E.2d 1254 (Ind. 1985).

Wilson v. State, 988 N.E.2d 1211 (Ind. Ct. App. 2013) (Indiana constitutional privilege against self-incrimination does not require transactional immunity in order to compel witness to testify; use and derivative use immunity were sufficient protection).

**(b) Other states require transactional immunity as matter of state constitutional law**

State v. Miyasaki, 614 P.2d 915 (Haw. 1980) (Hawaii's Constitution, which has language similar to Fifth Amendment, requires transactional immunity).

Attorney General v. Colleton, 444 N.E.2d 915, 918 (Mass. 1982) (Art. 12 of Mass. Const. requires transactional immunity to displace privilege against self-incrimination).

See also Wright v. McAdory, 536 So.2d 897 (Miss. 1988) and Oregon v. Soriano, 693 P.2d 26 (Ore. 1984).

**3. Immunity applies to criminal proceedings in any court**

Plain reading of statute leads to conclusion that use immunity applies to any county and to federal courts. In re Finding of Contempt Against Cudworth, 815 N.E.2d 1019 (Ind. Ct. App. 2004) and Murphy v. Waterfront Comm'n of New York Harbor, 378 N.E.2d 52, 79-80 (Mass. 1964).

In re Finding of Contempt Against Cudworth, 815 N.E.2d 1019 (Ind. Ct. App. 2004) (Tippecanoe Superior Court has jurisdiction to grant use immunity for a Clinton County trial).

## B. INFORMAL IMMUNITY

### 1. How to obtain – Practice tips: avoiding trouble

See Practice Tips: How to obtain immunity, IPDC Trial Manual, Chapter 9 § I.D., *above*.

### 2. Letter or pocket immunity

Common for prosecutors and defense counsel to negotiate “informal” immunity agreements (also referred to as “letter” or “pocket” immunity) rather than follow more time-consuming procedure of obtaining formal immunity. See IPDC Motions, Fair Trial Motions, Immunity Agreement.

Often possible to negotiate informal immunity agreement providing same or superior protection to that afforded by “formal” immunity.

### 3. Advantages

#### (a) To prospective defendant

- (1) possibility of saving time by circumventing procedural requirements of immunity statute;
- (2) ability to get witness greater protection in cases such as those with documentary evidence that strengthens State’s case against witness in addition to oral testimony;
- (3) scope of informal agreements is not limited by Fifth Amendment but rather depends on the agreement; United States v. Harvey, 869 F.2d 1439, 1451 (11th Cir. 1989); and
- (4) informal immunity may be granted even if significant question as to legitimacy of witness’s Fifth Amendment claim.
- (5) may provide for transactional immunity.

See *BNA Criminal Practice Manual*, 89:15 (The Bureau of National Affairs, Inc. 2008), citing Thompson and Sumner, *Structuring Informal Immunity*, 8 CRIM. JUSTICE 16, 20-21.

#### (b) To prosecution

Depending on circumstances, may be necessary to draw prosecutor’s attention to following possible benefits:

- (1) if grant of immunity made in trial or hearing, potentially important element of secrecy shattered.
- (2) formal immunity can only immunize witness as to use of testimony and its fruits; it cannot expressly compel subject to submit to interviews, debriefings or to work undercover.
- (3) narrow protection of use/derivative-use immunity may be insufficient inducement to secure full cooperation from witness and greater security of transactional immunity may be necessary.

### 4. Protections

Depending on terms of agreement, grant of informal immunity may give prosecutor broader “out” than formal immunity.

- (1) if witness fails to fulfill terms of agreement, e.g., by testifying falsely or withholding information, abrogation of informal immunity agreement might be available. Abner v. State, 479 N.E.2d 1254 (Ind. 1985).

- (2) prosecutors may offer informal immunity agreements with explicit qualifying language providing agreement null and void if defendant fails to provide “complete, truthful, and accurate information and testimony.” See, e.g., United States v. Skalsky, 857 F.2d 172, 174 n.1 (3rd Cir. 1988).

**Practice Pointer:** Counsel must be aware of essentials of a grant of immunity constitutionally sufficient to overcome privilege against self-incrimination, in order to properly advise client who wishes to obtain immunity or wishes to resist efforts to compel testimony. In negotiating immunity for client, counsel must try to anticipate legal consequences of failure of either side to keep immunity bargain, and to prevent avoidable ambiguities from becoming pitfalls for client.

## 5. Enforceability

Most federal courts and many state courts have recognized in some fashion that informal immunity agreements are enforceable.

### (a) Due process protections

To protect voluntariness of a waiver of Fifth Amendment rights, where a plea, confession, or admission is based on a promise of a plea bargain or immunity, government must keep its promise. Santobello v. New York, 404 U.S. 257, 262 (1972) and United States v. Weiss, 599 F.2d 730, 737 (5th Cir. 1979).

United States v. Harvey, 869 F.2d 1439, 1443 (11th Cir. 1989) (due process requires government to adhere to terms of any immunity agreement it makes). See also Plaster v. United States, 789 F.2d 289 (4th Cir. 1986).

### (b) Application of contract law

Informal immunity agreements are contractual in nature and should be interpreted according to their terms. Abner v. State, 479 N.E.2d 1254, 1259 (Ind. 1985); United States v. Pelletier, 898 F.2d 297, 301 (2d Cir. 1990); and United States v. Crisp, 817 F.2d 256, 258 (4th Cir. 1987).

Bowers v. State, 500 N.E.2d 203 (Ind. 1986) (court used principles of equity and contract to enforce prosecutor’s promise not to prosecute suspect arrested for burglary if he would supply information for search warrant aimed at another suspect).

Sweeney v. State, 704 N.E.2d 86 (Ind. 1998) (three factors apply to trial court’s determination of whether to enforce immunity agreement: (1) involvement of prosecutor; (2) at least nominal approval by court; and (3) some detriment to defendant resulting from State’s failure to abide by its bargain).

### (c) Public policy arguments

#### (1) Reliability and usefulness as prosecutorial tool

Public benefit from enforcement of such agreements.

Bowers v. State, 500 N.E.2d 203, 204 (Ind. 1986) (“The public may benefit substantially from a prosecutor’s decision to withhold prosecution of one individual in exchange for information leading to the arrest and conviction of a person deemed more dangerous to the public welfare. The availability and usefulness of this strategy could be substantially neutralized if the prosecutor’s promise is perceived to be unreliable. Substantial harm could result from a decision which removes this weapon from the prosecution’s arsenal.”).

Enforceability of informal grants of immunity tends to encourage cooperation in prosecuting more culpable suspects:

- (1) informal grants of immunity allow immunity for statements made in prosecutorial interviews, debriefings, or work undercover; and
- (2) narrow protection of use immunity may be insufficient inducement to secure full cooperation in order to obtain additional evidence.

See Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND.L.REV. 1, 5 (1992).

## **(2) Integrity and credibility of criminal justice system**

Allowing the State to renege on its agreement would tend to undermine integrity and credibility of criminal justice system. Promise of prosecutor, a State official, in his public capacity is pledge of public faith. Public justifiably expects State, above all others, to keep its bond. Bowers v. State, 500 N.E.2d 203, 204 (Ind. 1986).

# **III. PROCEDURE FOR GRANT OF IMMUNITY**

Frequently, prosecutors offer immunity to secure testimony of 'less culpable' persons in order to obtain conviction of more culpable persons. Walters v. State, 394 N.E.2d 154, 157 (Ind. 1979); Moore v. State, 655 N.E.2d 1251 (Ind. Ct. App. 1995); United States v. Palumbo, 897 F.2d 245 (7th Cir. 1990); and Arkebauer v. Kiley, 985 F.2d 1351, 1355 (7th Cir. 1993).

## **A. PROSECUTOR MAY GRANT WITH COURT APPROVAL**

Prosecutors have authority to grant use immunity to witnesses with court approval. Sweeney v. State, 704 N.E.2d 86 (Ind. 1998); Bubb v. State, 434 N.E.2d 120 (Ind. Ct. App. 1982); and Resnover v. Pearson, 965 F.2d 1453 (7th Cir. 1992).

Law does not authorize defense lawyers to grant immunity. Crafton v. State, 450 N.E.2d 1042 (Ind. Ct. App. 1984) HN 4.

Arnold v. State, 460 N.E.2d 494 (Ind. Ct. App. 1984) (trial court order requiring witness to testify after State had offered witness use immunity did not deny defendant due process on ground State could grant immunity to witness but defendant could not).

## **B. WITNESS MUST REFUSE TO TESTIFY OR PRODUCE ITEM**

Immunity becomes applicable after witness, in any hearing or trial occurring after an indictment or information has been filed, refuses to answer any question or produce any item during trial. Ind. Code § 35-37-3-1.

### **1. May obtain immunity prospectively**

Immunity order may be obtained prospectively by prosecutor before witness actually refuses to testify if he "has reason to believe" witness will assert rights. Ind. Code § 35-37-3-1(b) and Chanley v. State, 550 N.E.2d 764 (Ind. Ct. App. 1990).

### **2. May not obtain before indictment or filing of charges if witness invokes Fifth Amendment**

Where a prosecutor has neither filed a charge nor initiated a grand jury proceeding, she may not petition trial court to compel a party to testify under a grant of use immunity, when that party is the primary target of the investigation and has asserted the constitutional privilege against self-incrimination.



In re S.H., 984 N.E.2d 630 (Ind. 2013) (prosecutor's pre-charge subpoena authority granted by Ind. Code § 33-39-1-4 does not extend to a request for a grant of use immunity).

### **C. HEARING OUTSIDE PRESENCE OF JURY TO DETERMINE PRIVILEGE**

Upon refusal or likely refusal to testify, court must:

- (1) conduct hearing outside presence of jury; and
- (2) determine whether witness, based solely on his privilege against self-incrimination, may properly refuse to answer question or produce an item.

See Ind. Code § 35-37-3-1.

### **D. IMMUNITY MUST BE GRANTED UPON REQUEST IF PRIVILEGE APPLIES**

Once court determines testimony or documents sought are protected by Fifth Amendment, prosecution can either forego question or request immunity. Ind. Code § 35-37-3-2.

Use immunity *must* be granted to witness by court upon request of prosecutor. Ind. Code § 35-37-3-3(a).

### **E. COURT MUST INSTRUCT WITNESS AS TO EFFECT OF GRANT OF IMMUNITY**

Court shall instruct witness, by written order or in open court, that any evidence the witness gives, or evidence derived from that evidence, may not be used in any criminal proceeding against that witness, unless the evidence is volunteered by the witness or is not responsive to a question by the prosecuting attorney. The court shall instruct the witness that the witness must answer the questions asked and produce the items requested. Ind. Code § 35-37-3-3(a).

This is sufficient to compel the witness' testimony over a claim of Fifth Amendment privilege against self-incrimination. Wilson v. State, 988 N.E.2d 1211 (Ind. Ct. App. 2013).

### **F. REFUSAL TO GIVE EVIDENCE – SUBJECT TO CONTEMPT**

Court may find witness in contempt for refusal to give evidence after use immunity has been granted. Ind. Code § 35-37-3-3(c).

- (1) Witness held in indirect contempt based upon refusal to testify. See Jackson v. State, 644 N.E.2d 607 (Ind. Ct. App. 1994).
- (2) Witness found in direct criminal contempt. See Chanley v. State, 550 N.E.2d 764 (Ind. Ct. App. 1990); In re Craig, 552 N.E.2d 53 (Ind. Ct. App. 1990); and Tunis v. State, 129 N.E.3d 258 (Ind. Ct. App. 2019).

If a witness refuses to testify in the presence of the jury despite a grant of immunity, the defendant should request that the jury be admonished to disregard the failure to testify as bearing on defendant's guilt. See Aubrey v. State, 310 N.E.2d 556 (Ind. 1974).

### **G. PROSECUTOR CANNOT RETRACT IMMUNITY WITHOUT GOOD CAUSE**

Prosecutor, without demonstrating good cause, may not retract granting of unlimited statutory immunity once immunity has attached during trial. It makes no difference that particular witness had completed his testimony on behalf of State and was subsequently called by defense. Crafton v. State, 450 N.E.2d 1042 (Ind. Ct. App. 1983).

#### **1. May limit to certain stages of proceeding**

Prosecutor may request that use immunity be limited to certain proceedings such as deposition or pre-trial hearing, and not trial. Lucas v. State, 499 N.E.2d 1090 (Ind. 1986).

## IV. CHALLENGING STATE'S USE OF IMMUNIZED TESTIMONY

### A. STATE USES COMPELLED TESTIMONY AGAINST IMMUNIZED WITNESS

#### 1. Prohibited from using compelled testimony in any criminal proceeding

Ind. Code § 35-37-3-3(a) prohibits State from using compelled testimony in any respect and ensures testimony cannot lead to infliction of criminal penalties on witness. Brown v. State, 725 N.E.2d 823 (Ind. 2000) (citing In re Caito, 459 N.E.2d 1179 (Ind. 1984)).

Bussberg v. State, 827 N.E.2d 37 (Ind. Ct. App. 2005) (a probationer may be forced to give testimony when immunity is given at probation hearing; this testimony does not run afoul of Ind. Code § 35-37-3-3, the immunity statute, which states any evidence given “may not be used in any criminal proceeding against that witness” as a probation revocation hearing is not a criminal proceeding).

Grant of immunity must leave witness in substantially same position as if he had properly exercised his privilege to remain silent. Furrer v. State, 709 N.E.2d 744 (Ind. Ct. App. 1999) (citing Matter of Contempt Against Steelman, 648 N.E.2d 366 (Ind. Ct. App. 1995)).

#### (a) Prohibition includes use in sentencing

Statute protects witness against use of testimony in any criminal proceeding, which includes sentencing hearing. Nybo v. State, 799 N.E.2d 1146, 1151 (Ind. Ct. App. 2003) and Neff v. State, 832 N.E.2d 1006 (Ind. Ct. App. 2005), *sum. aff'd*, 849 N.E.2d 556 (Ind. 2006).

Nybo v. State, *supra* (improper for trial court to consider any part of witness' testimony given under immunity in other trial in making sentencing decision; trial court cannot accept plea agreement and then punish defendant for State's perceived leniency based on immune testimony).

#### (b) Exceptions

##### (1) Giving false testimony under grant of immunity

Immunized witness may be prosecuted for perjury and making false statements. Ind. Code § 35-37-3-3(b). See United States v. Mandujano, 425 U.S. 564, 581, 96 S.Ct. 1768, 1779 (1976) and In Re Caito, 459 N.E.2d 1179 (Ind. 1984).

##### (2) Unresponsive answers/volunteered information

Use/derivative-use immunity does not cover spontaneous statements volunteered by immunized witness or unresponsive answers. Ind. Code § 35-37-3-3(a). Matter of Contempt Against Steelman, 648 N.E.2d 366 (Ind. Ct. App. 1995).

#### 2. Procedure to challenge compliance

##### (a) State must actually use evidence against defendant

Witness has no claim to deprivation of constitutional right until State actually uses evidence against her. Matter of Contempt of Steelman, 648 N.E.2d 366 (Ind. Ct. App. 1995) and Jackson v. State, 644 N.E.2d 607 (Ind. Ct. App. 1994).

##### (b) Raise claim in pre-trial hearing

Once State initiates prosecution against immunized witness, pretrial evidentiary hearing proper manner for challenging compliance with immunity grant. Matter of Contempt of Steelman, 648 N.E.2d 366 (Ind. Ct. App. 1995).

**(c) If at trial, make objection**

Hearing may occur during trial. If State seeks to admit witness's immunized testimony at trial against witness, make contemporaneous objection. Failure to object waives error unless fundamental error. Jorgensen v. State, 567 N.E.2d 113 (Ind. Ct. App. 1991), *aff'd in part, vacated in part*, 574 N.E.2d 915 (Ind. 1991).

Borkholder v. State, 544 N.E.2d 571, 575 (Ind. Ct. App. 1989) (citing Bruce v. State, 375 N.E.2d 1042, 1062 (Ind. 1978)) ("Erroneous admission of evidence without objection is not ordinarily the type of error to which the doctrine of fundamental error applies.").

**(d) Defendant must show he testified under grant of immunity**

Defendant has initial burden of showing he testified under grant of immunity to matters related to prosecution. State v. Peters, 637 N.E.2d 145 (Ind. Ct. App. 1994) and Matter of Contempt of Steelman, 648 N.E.2d 366 (Ind. Ct. App. 1995).

**(e) State must affirmatively show independent source of evidence**

If evidence revealed under grant of immunity, prosecution in related matters "bears the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." In Re Caito, 459 N.E.2d 1179, 1184 (Ind. 1984) (quoting Kastigar v. United States, 406 U.S. 441, 460, 92 S.Ct. 1653, 1665 (1972)); See also United States v. Hubbell, 530 U.S. 27, 120 S.Ct. 2037 (2000).

Affirmative duty requires more than generalized arguments about the sources of State's evidence. State v. Peters, 637 N.E.2d 145 (Ind. Ct. App. 1994).

State v. Peters, 637 N.E.2d 145 (Ind. Ct. App. 1994) (burden of proof not limited to negation of taint, it imposes affirmative duty to prove evidence it proposes to use derived from legitimate source wholly independent of compelled testimony).

United States v. Poindexter, 951 F.2d 369, 375 (D.C. Cir. 1991) and United States v. North, 910 F.2d 843, 872-73 (D.C. Cir. 1990) *modified on reh'g*, 920 F.2d 940 (convictions reversed on grounds prosecutor did not prove evidence used against them wholly independent of immunized testimony where defendants had been granted use/derivative-use immunity to testify in Iran-Contra affair and were subsequently charged and convicted of various crimes).

**(1) Evidentiary hearing should be held**

Oral argument by counsel is insufficient to establish that evidence used against defendant was obtained wholly through independent sources, not through any of immunized testimony. Evidentiary hearing should be held. Brown v. State, 725 N.E.2d 823 (Ind. 2000).

Criswell v. State, 45 N.E.3d 46 (Ind. Ct. App. 2015) (remand required for hearing to determine if any evidence that State sought to admit was derived from suppressed statement that defendant, who was a police officer, gave to internal affairs after receiving Garrity notice).

**(2) Evidentiary hearing not required if immunized testimony is already in public domain**

Full evidentiary hearing is not required where immunized testimony is already in the public domain (for example because defendant already made statement to police that

was substantially the same as immunized testimony). Brown v. State, 725 N.E.2d 823 (Ind. 2000).

Brown v. State, 725 N.E.2d 823 (Ind. 2000) (where defendant admitted that testimony given at trial was substantively the same as a statement given to police prior to granting of immunity, no need for a full hearing).

### 3. Remedies

If the State breaches an immunity order or informal immunity agreement in obtaining indictment or warrant, remedy ordinarily:

- (1) dismissal (see Ind. Code § 35-34-1-4(a)(6), providing for dismissal if defendant has immunity with respect to the crimes at issue);
- (2) suppression of testimonial evidence; or
- (3) granting of a new trial.

See BNA Criminal Practice Manual, 89:30.

Fox v. State, 997 N.E.2d 384 (Ind. Ct. App. 2013) (trial court did not abuse its discretion by denying defendant's motion to dismiss based on his immunity agreement with prosecutor, where defendant did not keep his end of the bargain by being untruthful and State did not materially benefit from agreement because it believed information defendant gave was false and of no value; defendant did not rely on the agreement to his detriment because he already admitted his involvement in murder and robbery before the agreement was reached).

## B. OTHER FORBIDDEN USES OF IMMUNIZED TESTIMONY

### 1. Investigatory leads

Immunized testimony may not be used for investigatory leads that later are basis for indictment against defendant. Kastigar v. United States, 406 U.S. 441, 460, 92 S.Ct. 1653, 1665 (1972).

### 2. Impeachment in subsequent trial

Immunized testimony before grand jury may not be used to impeach immunized witness's testimony in subsequent proceeding. New Jersey v. Portash, 440 U.S. 450, 99 S.Ct. 1292 (1979).

### 3. Prosecution for perjury in prior appearances

Ind. Code § 35-37-3-3 permits use of immunized testimony in prosecutions for perjury. However, it only applies to future false statements, future failure to comply with the immunity order, not for past acts.

Immunized testimony cannot be used to prosecute witness for giving false testimony in prior appearance. United States v. Doe, 819 F.2d 11 (1st Cir. 1987) and In re Grand Jury Proceedings, 819 F.2d 981, 983 (11th Cir. 1987).

### 4. Inter-jurisdictional use

#### (a) Federal government cannot use State-immunized testimony under Fourteenth Amendment.

Murphy v. Waterfront Commission, 378 U.S. 52, 77-79, 84 S.Ct. 1594, 1609 (1964); Cliff v. Ind. Dep't of State Revenue, 641 N.E.2d 682, 689 n.6 (Ind. Tax Ct. 1994), *affirmed at* 610 N.E.2d 310, 317 (Ind. 1995).

State cannot use federally immunized testimony or testimony obtained by another State through grant of immunity to prosecute immunized witness. Murphy v. Waterfront Commission, *supra*.

## 5. Non-evidentiary use of immunized testimony

### (a) Prohibited

Impermissible, non-evidentiary uses include:

- (1) focusing the investigation;
- (2) deciding to initiate prosecution;
- (3) refusing to plea bargain;
- (4) interpreting evidence;
- (5) planning cross-examination; and
- (6) otherwise planning trial strategy.

United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973).

**Caveat:** Uncertain under Indiana immunity law, extent to which prosecutors or prosecution witnesses may be exposed to immunized testimony without impermissibly tainting prosecution.

### (b) Allowed

Other courts have allowed non-evidentiary use of immunized testimony. See United States v. Serrano, 870 F.2d 1 (1st Cir. 1989) and United States v. Mariani, 851 F.2d 595 (2nd Cir. 1988).

United States v. Crowson, 828 F.2d 1427 (9th Cir. 1987) (Kastigar v. United States, 406 U.S. 441, 460, 92 S.Ct. 1653, 1665 (1972) does not prohibit non-evidentiary use of compelled testimony).

## C. USE OF CHILD'S STATEMENT TO MENTAL HEALTH EVALUATOR

Juvenile Mental Health Statute, Ind. Code § 31-32-2-2.5(b), bars a child's statement to a mental health evaluator from being admitted into evidence to prove delinquency, except for purposes of a probation revocation proceeding or a modification of disposition decree. Any evidence derived from the child's statements is likewise protected by use immunity and derivative use immunity to encourage the child to participate "openly in treatment to reduce [his] likelihood of reoffending."

State v. I.T., 4 N.E.3d 1139 (Ind. 2013) (trial court properly granted I.T.'s motion to dismiss State's new delinquency petition based on his admissions during course of treatment ordered as a condition of probation).

## V. HOW TO GET IMMUNITY FOR DEFENSE WITNESSES

### A. ASK PROSECUTOR FOR INFORMAL IMMUNITY

Ask prosecutor to seek immunity for defense witness who asserts Fifth Amendment privilege, particularly if likelihood of prosecution of witness is slight. Remind prosecutors that they have responsibility of "a minister of justice and not simply that of an advocate." See *Comment [1]*, Indiana Rules of Professional Conduct, Rule 3.8.

## B. REQUEST JUDICIAL IMMUNITY

Indiana courts have authority to grant judicial immunity, requiring prosecution to grant immunity to defense witnesses. Moore v. State, 655 N.E.2d 1251 (Ind. Ct. App. 1995). See *IPDC Motions Manual*, Chapter 8, Fair Trial, Motion to Compel Grant of Immunity.

### 1. Inherent powers of trial court to protect defendant's right to present exculpatory evidence

Trial court has inherent authority to protect right to present exculpatory and essential defense evidence by conferring use immunity. Due process requires granting of immunity to defense witnesses to safeguard defendant's right to essential exculpatory testimony. United States v. Chitty, 760 F.2d 425 (2d Cir. 1985) and Virgin Islands v. Smith, 615 F.2d 964 (3rd Cir. 1980).

But see

United State v. Lenz, 616 F.2d 960, 962 (6th Cir. 1980) (rejects existence of court's inherent authority to grant immunity based on right to present evidence).

United States v. Campbell, 410 F.3d 456 (8th Cir. 2005) (court is not required to grant judicial immunity to a person who remembers almost nothing about the incident underlying the charges against defendant and made inconsistent statements to law enforcement).

#### (a) Indiana Supreme Court has not addressed

While not expressly dealing with trial court's inherent authority to grant immunity to defense witness based on defendant's right to present exculpatory evidence, Indiana Supreme Court held trial court did not error in denying defendant's request for immunity for witnesses with evidence alleged to be newly discovered at post-conviction hearing because out-of-court statements of witnesses were before trial court in form of exhibits, and because potential testimony was known to defendants prior to trial and could not be basis of granting of new trial. Dean v. State, 433 N.E.2d 1172, 1182 (Ind. 1982).

#### (b) Indiana Court of Appeals reluctant to grant

Indiana Court of Appeals reluctant to grant such relief. They have either declined to recognize courts have such inherent power or found facts of particular case did not justify application of such an extraordinary remedy.

Bubb v. State, 434 N.E.2d 120, 125 (Ind. Ct. App. 1982) (defendant failed to show he was denied access to exculpatory information, only that he merely could not use it at trial).

Moore v. State, 655 N.E.2d 1251 (Ind. Ct. App. 1995) (trial court's refusal to compel State to grant immunity to defense witness, an unnamed drug supplier who allegedly would have testified as to type of drug defendant was allegedly taking on night of murder, did not deny defendant due process; defendant failed to show his drug supplier refused to testify because of threats by prosecutor, defendant failed to show supplier would have refused to testify without immunity, and he failed to show supplier's testimony would have been exculpatory or led to exculpatory evidence).

### 2. Interference with defendant's case or distortion of fact finding

Court has inherent remedial power to require distortion be redressed by requiring grant of use immunity to defense witnesses as alternative to dismissal. Bubb v. State, 434 N.E.2d 120,

124 (Ind. Ct. App. 1982) (citing United States v. Herman 589 F.2d 1191, 1204 (3d Cir. 1978)) and United States v. Schweih, 971 F.2d 1302 (7th Cir. 1992).

Reed v. State, 748 N.E.2d 381 (Ind. 2001) (in murder prosecution, Defendant was denied his Sixth Amendment right of confrontation when trial court refused to compel a deposition of the prosecution witness; witness's credibility was critical and his testimony was cornerstone of prosecution's case against Defendant; the State's continued and vigorous opposition to Defendant's efforts to depose the witness and its refusal to grant use immunity until moments before Defendant took the stand at trial constituted interference with Defendant's case).

**(a) Showing**

Interference with defendant's case or distortion of fact-finding process may be established by showing:

- (1) prosecutorial overreaching, through threats, harassment, or other forms of intimidation, has effectively forced witness to invoke Fifth Amendment, or prosecutor has engaged in discriminatory use of immunity grants to gain tactical advantage;
- (2) witness's testimony also material, exculpatory, and not cumulative; and
- (3) defendant has no other way to obtain evidence.

Goudy v. State, 689 N.E.2d 686, 696 (Ind. 1997); Moore v. State, 655 N.E.2d 1251 (Ind. Ct. App. 1995) (quoting Blissett v. Lefevre, 924 F.2d 434, 442 (2d Cir. 1991)).

Carter v. United States, 684 A.2d 331 (D.C. Ct. App. 1996) (where defendant shows that a witness' privileged testimony is material, exculpatory, not cumulative, and unobtainable from another source, the government must have a legitimate reason for not granting the witness immunity; this stems from the Government's constitutional duty to disclose exculpatory evidence; in order to determine whether a legitimate reason for withholding immunity exists, the government may have to afford limited immunity for purposes of "debriefing" to determine possibility of perjury, future prosecution, and other matters).

**(b) Distortion of fact-finding process by discriminatory use of immunity-granting powers**

Prosecutor's uneven and discriminatory use of powers to grant witnesses immunity might so distort fact-finding process as to require trial court to grant immunity to defense witnesses. United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978) and United States v. D'Antonio, 801 F.2d 979 (7th Cir. 1986).

Potential for abuse in uneven granting or refusal to grant witness immunity with deliberate intention of distorting fact-finding process.

United States v. De Palma, 476 F.Supp. 775, 781 (S.D.N.Y. 1979) (denial of limited use immunity resulted in unfair trial where foundation of government's case against defendant built by means of far-reaching immunity grant, and evidence sought by defendant affected by government's continuing investigation of potential defense witnesses).

**(c) Interfere with defendant's case by intimidating witnesses**

Although a defendant has no due process right to compel immunization of defense witnesses, the State may not use that power to interfere with the defense's presentation of

its case or to prevent its witnesses from testifying. Bubb v. State, 434 N.E.2d 120, 124 (Ind. 1982) (citing Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351 (1972)); Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920 (1967).

To justify reversal on ground prosecutor used authority and discretion to request immunity, must show that the State's decisions made with the deliberate intention of distorting the judicial fact-finding process. Moore v. State, 655 N.E.2d 1251, 1253 (Ind. Ct. App. 1995).

Hughes v. State, 153 N.E.3d 354 (Ind. Ct. App. 2020) (although prosecutor apparently procured a witness's deposition testimony with an oral promise as opposed to statutory compliance, defendant failed to show that he was deprived of due process because although the prosecutor manipulated the immunity power to gain a tactical advantage, the remaining Goudy criteria (outlined above) were unmet, as the witness claimed to have very limited knowledge of the shooting, defendant did not explain what material or exculpatory evidence was excluded by the refusal to grant use immunity to the witness at trial, and defendant did not claim that he lacked the means to learn what testimony the witness could have been expected to offer; in the absence of demonstrated prejudice, no reversible error was found).

Walters v. State, 271 Ind. 598, 394 N.E.2d 154 (1979) (prosecutor need not grant immunity to defense witness merely because failure to do so possibly tarnishes credibility of witness).

Ritchie v. State, 809 N.E.2d 258 (Ind. 2004) (mere fact that State charged accomplice after defendant listed him as a witness does not establish that State purposely did this to distort fact-finding in defendant's case).