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Criminal Procedure—Immunity: Fifth Amendment Privilege Against Self-Incrimination Eclipsed by Use Immunity—Kastigar v. United States, 406 U.S. 441 (1972)

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CRIMINAL PROCEDURE—IMMUNITY: FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION ECLIPSED BY USE IMMUNITY—*Kastigar v. United States*, 406 U.S. 441 (1972).

Kastigar refused to answer questions during federal grand jury proceedings despite an order[1] commanding him to answer and granting him use and derivative use immunity, protecting him from the use of his testimony or any evidence derived from it.[2] Kastigar's refusal to testify was premised on the theory that the grant of immunity extended to him was constitutionally deficient and that only transactional immunity[3] could supplant his fifth amendment privilege. The trial court found Kastigar in civil contempt and ordered him confined pursuant to section 301(a) of the Organized Crime Control Act of 1970.[4] The United States Court of Appeals for the Ninth Circuit sustained the contempt conviction, holding that the immunity statute was constitutional.[5] In the Supreme Court, Kastigar argued that under the fifth amendment no immunity statute, however drawn, could be constitutional, further contending that even if a constitutional immunity statute could be drafted, no immunity less comprehensive than transactional immunity could supplant the fifth amendment privilege against self-incrimination. Affirming Kastigar's contempt conviction, the Supreme Court held that since "use and derivative use" immunity leaves the witness in substantially the same position as if he had

1. The order was issued pursuant to 18 U.S.C. § 6002 (1970), which provides that when a witness is compelled by district court order to testify over a claim of the privilege:

> [T]he witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

2. Use and derivative use immunity allows subsequent prosecution for the offense to which the compelled testimony relates. However, in theory, neither the testimony nor fruits thereof are admissible as evidence in the subsequent prosecution.

3. Transactional immunity proscribes prosecution for any "transaction, matter or thing" to which the compelled testimony relates. This language was used in the first immunity statute which the Court allowed to stand: Act of February 11, 1893, 27 Stat. 443 (repealed by the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 245, 84 Stat. 931).

4. 28 U.S.C. § 1826 (1970), entitled "Recalcitrant Witnesses."

5. Stewart v. United States, 440 F.2d 954 (9th Cir. 1971), *cert. granted sub nom.* Kastigar v. United States, 402 U.S. 971 (1971).

claimed the fifth amendment privilege, it suffices to supplant that privilege. *Kastigar v. United States,* 406 U.S. 441 (1972).[6]

The Court's opinion in *Kastigar* is regrettable for three reasons. First, the *Kastigar* rationale is supported neither in logic nor by controlling precedent. Second, the statute approved by the Court will not, in practice, afford a witness protections coextensive with the fifth amendment privilege. Finally, by approving this lesser degree of immunity, the Court may have lessened the value of immunity statutes in combatting organized crime.

I. THE JUDICIAL BASIS OF IMMUNITY STATUTES

An important tool of effective law enforcement has been the prosecutor's statutory authority[7] to grant a witness immunity in order to compel his testimony over a claim of the fifth amendment privilege. This technique has proven to be the only lawful way in which a prosecutor may circumvent the witness' privilege against self-incrimination. Traditionally it was thought that nothing short of complete immunity from prosecution was constitutionally permissible, and thus most of the immunity statutes granted transactional immunity.[8] As a result of *Kastigar's* ill-reasoned approval of a lesser degree of immunity, it can now be anticipated that immunity legislation will provide for "use and derivative use" immunity. *Kastigar* is the fifth principal case in which the Court has developed and expanded the immunity principle, and the decision relies primarily, and in some instances unjustifiably, on the previous four.[9]

The Court's first test of the immunity principle was in *Counselman*

6. Two dissenting opinions were filed, and Justices Brennan and Rehnquist took no part in consideration or decision. Mr. Justice Douglas, in dissent, argued that the precedents relied upon by the Court were misconstrued and improperly applied, and that the intent of the framers of the fifth amendment was to "put it beyond the power of Congress to *compel* anyone to confess his crimes." 406 U.S. at 467. Dissenting, Justice Marshall argued that nothing less than transactional immunity would leave the witness in "precisely the same position, vis-à-vis the government . . . as he would have been in had he remained silent in reliance on the privilege," because the "safeguards" associated with lesser degrees of immunity are, in practice, ineffective. *Id.* at 468.

7. For a history of the various federal immunity statutes, *see* Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope,* 72 YALE L.J. 1568 (1963).

8. *See* note 3 *supra. See also* Immunity Act of 1954, 68 Stat. 745, 18 U.S.C. § 3486 (Supp. II 1970), pertinent portions of which appear in Ullmann v. United States, 350 U.S. 422, 423-24 (1956), discussed in text accompanying note 19 *infra.*

9. *See* notes 47-55 and accompanying text *infra.*

v. Hitchcock.[10] There the Court examined an immunity statute which proscribed only the direct use of the compelled testimony in a subsequent criminal prosecution with no proscription on utilization of the fruits of that testimony.[11] The Court found this "bare use" statute to be unconstitutional because the "protection of . . . [the statute] is not coextensive with the privilege [against self-incrimination]."[12] The opinion included dicta that an immunity statute which grants absolute immunity from prosecution for the offense to which the compelled testimony relates would be coextensive with the fifth amendment privilege.[13] Within weeks of the opinion, a statute affording transactional immunity was before Congress, and in *Brown v. Walker*[14] the Court in dictum sustained the constitutionality of the statute, while resting its holding on the narrow ground that the fifth amendment privilege operates only to protect one from self-incrimination in a criminal sense, providing no protection from exposure to social disgrace, dishonor or obloquy.[15] The decision turned principally on the Court's judgment that Brown was unlikely to be prosecuted for the transactions about which he testified, even had he been granted no immunity,[16] which led the Court to conclude that Brown could not be considered to be a witness against himself.[17] The *Brown* opinion thus did not explicitly consider the proposition that transactional immunity is coextensive with the fifth amendment privilege and may supplant it. However, the fact that *Brown* did not strike down the statute has led the courts to cite *Brown* in support of this proposition.[18] This reading of *Brown* was not seriously challenged for sixty years.

In *Ullmann v. United States*[19] the petitioner had been granted

10. 142 U.S. 547 (1892).
11. This type of immunity will be designated herein as "bare use" immunity.
12. 142 U.S. at 565.
13. *Id.* at 586.
14. 161 U.S. 591 (1896).
15. Brown, the auditor of a railway company, was subpoenaed before a grand jury to testify concerning the company's alleged violations of the Interstate Commerce Act. He refused to answer questions concerning rebates on the basis of his fifth amendment privilege, despite the fact that transactional immunity was afforded him pursuant to the Act of Feb. 11, 1893, 27 Stat. 443. Brown was adjudged in contempt. On appeal the Supreme Court upheld his contempt conviction, noting that Brown was not the principal, or even a substantial offender, and implying that the privilege had been invoked to protect the railway company and its officers.
16. 161 U.S. at 609.
17. *Id.* at 604.
18. *See, e.g.*, Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52 (1964); Ullmann v. United States, 350 U.S. 422 (1956).
19. 350 U.S. 422 (1956).

transactional immunity but refused to testify before a grand jury. Ullmann contested the constitutionality of immunity statutes in general and sought to distinguish his case from *Brown* by pointing out that, although he would not be subject to criminal penalties as a result of his testimony, his admission of his Communist affiliations would lead to actual penalties "such as loss of job, explusion from labor unions, state registration and investigation statutes, passport eligibility . . . ."[20] The *Ullmann* Court disposed of the issue by reaffirming *Brown,* refusing to consider the distinctions Ullmann raised.[21] Thus *Ullmann* has been cited for reaffirming the proposition that immunity coextensive with the fifth amendment privilege can supplant the privilege.[22]

Until 1964 there was little doubt that constitutionally permissible immunity statutes must afford absolute immunity from prosecution,[23] since neither *Brown* nor *Ullmann* even hinted that some degree of immunity less than transactional immunity also might be sufficient. However, in that year the Court rendered its decision in *Murphy v. Waterfront Commission of New York Harbor,*[24] which some courts believed held use and derivative use immunity to be a constitutionally permissible alternative to transactional immunity.[25]

Murphy was decided in a different jurisdictional context than either

20. *Id.* at 430.
21. *Id.* at 431, 438-39.
22. *See, e.g.,* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52 (1964), discussed at note 24 and accompanying text *infra.*
23. *But see* Adams v. Maryland, 347 U.S. 179 (1954) where the Court allowed a bare use immunity statute to stand. The Court felt that to hold the statute unconstitutional would allow the state to convict Adams solely on the basis of his federally compelled testimony since Adams had not invoked his fifth amendment privilege in the federal proceeding. The Court reasoned:

> [A] witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute. Consequently, the construction of . . . [the statute] here urged would limit its protection to that already afforded by the Fifth Amendment, leaving the Section with no effect whatever. We reject the contention that Adams' failure to claim a constitutional privilege deprived him of the statutory protection of . . . [the statute].

347 U.S. at 181. The Court thus did not have to determine whether the failure of the statute to afford complete transactional immunity was fatal.
24. 378 U.S. 52 (1964). Murphy and others had refused to testify before the Waterfront Commission of New York Harbor which was investigating work stoppages. The Commission then granted *transactional immunity* under state laws, but Murphy again refused to testify on the grounds that his testimony would tend to incriminate him under federal law, and that state immunity laws would not protect him from federal prosecution.
25. *See* note 35 *infra.*

Brown or *Ullmann*. Murphy had been granted transactional immunity under state laws but refused to testify on the grounds that his testimony would tend to incriminate him under federal law, claiming that state immunity laws would not protect him from federal prosecution.[26] The Court first recognized that prior to *Murphy's* companion case, *Malloy v. Hogan*,[27] the Constitution was interpreted to allow the admission of *state* compelled testimony as evidence in *federal* courts.[28] However, since *Malloy* had made the fifth amendment uniformly applicable to both federal and state jurisdictions, the Court felt that a rule which allowed "whipsawing" a witness between jurisdictions in order to defeat his fifth amendment privilege should be reconsidered.[29] After examining the policies and purposes underlying the privilege against self-incrimination, the Court rejected the existing rule, holding that the witness must be assured of protection under both federal and state jurisdictions before his testimony can be compelled.[30]

The Court previously had noted the effect which the supremacy clause had upon a state law:[31]

> No one would suggest that state law could prevent a proper federal investigation; the Court . . . [has] already held that the Federal Government could, under the Supremacy Clause, grant immunity from state prosecution, and that, accordingly, state law could not prevent a proper investigation.

Thus it was clear that the Court need not analyze the effect which a grant of immunity under federal law would have upon the states; it would bind them. However, it was equally clear that a grant of transactional immunity under a state law could not absolutely bar federal prosecution, and in the words of the Court, "We must now decide what effect this holding has on existing state immunity legislation."[32] Since a state grant of transactional immunity could not under the supremacy

26. 378 U.S. at 53-54.
27. 378 U.S. 1 (1964).
28. The Court noted:
Knapp v. Schweitzer, 357 U.S. 371, held that a State could compel a witness to give testimony which might incriminate him under federal law; and Feldman v. United States, 233 U.S. 487, held that testimony thus compelled by a State could be introduced into evidence in the federal courts.
378 U.S. at 57.
29. *Id.*
30. *Id.* at 77-78.
31. *Id.* at 71.
32. *Id.* at 78.

clause bind the federal government to that degree of immunity, the Court determined that the federal government at least must be bound by use and derivative use immunity to enable a state constitutionally to compel testimony over a claim of the privilege:[33]

> [A] state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him.

In arriving at this holding, the *Murphy* Court quoted selected dicta from *Counselman* apparently supporting the inference that use and derivative use immunity is constitutionally sufficient for any jurisdiction to compel testimony over a claim of the fifth amendment privilege.[34] This has led several courts to express the opinion that *Murphy* overruled the *Counselman* transactional formula *sub silentio*.[35] In the context of the entire *Murphy* opinion, however, the better interpretation is that the Court intended that there be a dichotomy of standards between federal and state jurisdictions when the testimony was compelled under state law.[36]

In October of 1970 Congress enacted the Organized Crime Control Act,[37] designed to stem the growing impact of organized crime. In

33. *Id.* at 79.

34. In describing its concept of use and derivative use immunity, the *Murphy* Court quoted dicta from *Counselman* which pointed out one shortcoming in the bare use immunity statute:

> [It] could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court . . . . 142 U.S. at 564.

Id. at 78.

35. *See* Byers v. Justice Court, 71 Cal. 2d 1039, 458 P.2d 465, 80 Cal. Rptr. 553 (1969); Zicarelli v. New Jersey State Comm'n of Investigation, 55 N.J. 249, 261 A.2d 129 (1970), *aff'd*, 406 U.S. 472 (1972) (companion case to *Kastigar*); People v. La Bello, 24 N.Y.2d 598, 249 N.E.2d 412, 301 N.Y.S.2d 544 (1969). *But see* United States v. Blue, 384 U.S. 251 (1966); Steven v. Marks, 383 U.S. 234 (1966); Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965); *In re* Kinoy, 326 F. Supp. 407 (S.D.N.Y. 1971).

36. This dichotomy of standards, whereby the state is required to grant transactional immunity in order to compel testimony while the federal authorities need only grant use and derivative use immunity to state compelled testimony, is a necessary corrollary to the supremacy clause. In the interjurisdictional situation, if the federal government were required to grant federal transactional immunity to a state witness while leaving the state in control of the taking of testimony, the scope of the questions might exceed federal expectations, permitting the state to grant the state witness a greater federal immunity than otherwise desired by the federal government, clearly in contravention of the supremacy clause. *See* note 31 and accompanying text *supra*.

37. Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified in scattered sections of 18 U.S.C.).

this act, upon the recommendations of the National Commission on Reform of Federal Criminal Laws,[38] Congress abandoned the "transactional" standard of immunity in favor of a "use and derivative use" standard.[39] This new standard was approved by the Court in *Kastigar*.

II. THE *KASTIGAR* RATIONALE

Reasoning from the major premise that statutory immunity of a scope coextensive with the fifth amendment privilege may supplant the privilege[40] and the minor premise that use and derivative use immunity is coextensive with the fifth amendment privilege,[41] the *Kastigar* Court concluded that a statute providing use-derivative use immunity may supplant the fifth amendment privilege.[42]

The Court quickly dispensed with its major premise by reaffirming *Brown* and *Ullmann*.[43] The Court also quoted *Counselman* dicta to support *Kastigar's* major premise,[44] briefly alluding to the necessity of allowing immunity statutes to supplant the fifth amendment privilege.[45] Although *Brown* does not specifically support the premise that statutory immunity coextensive with the fifth amendment privilege may supplant it[46] the premise is basically a sound one and was approved in *Ullmann*. For the purposes of this note, *Kastigar's* major premise will be considered valid.

In support of its minor premise that use and derivative use immunity is coextensive with the fifth amendment privilege, the Court relies primarily on *Murphy*:[47]

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38. *See* NAT'L COMM. ON REFORM OF FED. CRIM. LAWS, WORKING PAPERS 1405-48 [hereinafter cited as WORKING PAPERS].

39. 18 U.S.C. § 6002 (1970), the text of which is quoted in note 1 *supra*.

40. The *Kastigar* Court stated:

> [U]nder the principle that a grant of immunity cannot supplant the privilege, and is not sufficient to compel testimony over a claim of the privilege, unless the scope of the grant of immunity is coextensive with the scope of the privilege . . . .

406 U.S. at 450.

41. The Court stated: "We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination . . . ." *Id.* at 453.

42. The opinion concluded: "The immunity therefore is coextensive with the privilege and suffices to supplant it." *Id.* at 462.

43. *Id.* at 448.

44. *Id.* at 450 n.30.

45. *Id.* at 446-47.

46. *See* notes 14-18 and accompanying text *supra*.

47. 406 U.S. at 458. For additional support Mr. Justice Powell relied on *Counselman* and WORKING PAPERS, *supra* note 38. These Working Papers, which the Court referred to only in a footnote (*Id.* at 452 n.36), were prepared as support for the recom-

> [B]oth the reasoning of the Court in *Murphy* and the result reached compel the conclusion that use and derivative use immunity is constitutionally sufficient to compel testimony over a claim of the privilege.

However, a careful reading of the *Murphy* opinion reveals that *Murphy* does not bear out the Court's conclusion. Unlike the *Murphy* Court, the *Kastigar* Court was not dealing with a conflict between the supremacy clause and the fifth amendment privilege but with the constitutional sufficiency of use and derivative use immunity granted by the jurisdiction compelling the testimony. *Murphy* had announced that when a *state* compels testimony in exchange for a grant of transactional immunity, *federal* prosecutorial authorities are proscribed from using the testimony or fruits thereof in a subsequent criminal prosecution.[48] In support of this holding, *Murphy* relied solely on selected dicta from *Counselman,*[49] completely ignoring other *Counselman* dicta which indicate that a higher form of immunity is required.[50] This was necessary for the *Murphy* Court because the supremacy clause would not permit subscription to a higher degree of immunity in the state-federal interjurisdictional situation.[51] Since the *Murphy* result is distinguishable from *Kastigar* and the *Murphy* Court used *Counselman* as its only authority, *Counselman* must be the real authority upon which *Kastigar* is predicated.[52]

From its analysis of *Counselman,* the *Kastigar* Court concluded that an immunity statute providing for use and derivative use immunity is constitutional, based upon a negative inference drawn from a statement that an immunity statute lacking derivative use immunity is unconstitutional. However, the logic of that analysis is flawed by its assumption that in *Counselman* the lack of derivative use immunity was the only constitutional objection to that statute. On the contrary, the Court in *Counselman* objected to the immunity statute before it principally because:[53]

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mended model legislation submitted to Congress. The recommendation served as a model for the Federal Witness Immunity Statute, 18 U.S.C. § 6002 (1970), which was at issue in *Kastigar.*

48. *See* note 33 and accompanying text *supra.*

49. 378 U.S. at 78-79. For a sample of the *Counselman* language upon which *Murphy* relied, *see* text accompanying note 54 *infra.*

50. *See* text accompanying note 53 *infra.*

51. *See* note 31 and accompanying text *supra; see also* note 36 *supra.*

52. *Kastigar* does place some reliance on selected *Counselman* dicta, but looks to *Murphy* for its primary support.

53. 142 U.S. at 585.

> [N]o statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States.

The *Counselman* opinion included in the same paragraph the dicta which the Court in *Kastigar* relied upon as its "conceptual basis":[54]

> [The statute], moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party.

Thus the Court in *Kastigar* incorrectly inferred from *Counselman* that the addition of a derivative use immunity provision would have saved that statute from fifth amendment objection. The Court apparently recognized the logical invalidity of reliance on *Counselman* and sought to overcome this by placing principal reliance on *Murphy*,[55] further obscuring the weakness of the argument by labeling selected dicta from *Counselman* as the "conceptual basis"[56] of the *Counselman* decision.

Thus the *Kastigar* opinion stands on shaky analytical ground. The minor premise upon which its holding rests is supported neither by logical analysis nor controlling precedent. However, the Supreme Court is bound by neither logic nor precedent, and *Kastigar* is now the law. Thus, it is important to examine the wisdom and efficacy of the Court's holding.

III. THE SHIFTING BURDEN OF PROOF— A SUBSTANTIAL PROTECTION?

The Court in *Kastigar* held that a defendant who raises a claim of immunity establishes a prima facie case for excluding the government's evidence upon showing that he has previously testified under a grant of immunity.[57] Such a showing raises a rebuttable presumption in favor of the defendant and shifts the burden to the government to

54. *Id.* at 586.
55. *See* note 47 and accompanying text *supra*.
56. "Our holding is consistent with the conceptual basis of *Counselman*." 406 U.S. at 453.
57. *Id.* at 460.

prove that all evidence it intends to introduce was obtained from legitimate sources unrelated to the prior immunized testimony of the defendant.[58] This use and derivative use immunity sanctioned by the Court in *Kastigar*, though much narrower in scope than the transactional immunity approved in *Brown*, was deemed "substantial protection"[59] for the criminal defendant's fifth amendment rights. Analysis does not confirm the Court's conclusion.

Oliver Wendell Holmes once observed, "The life of the law has not been logic: it has been experience."[60] The Court's experience with the exclusionary rule in fourth amendment wiretapping cases [61] provides a valuable analogy to the exclusionary features of the use immunity statute approved in *Kastigar*. These fourth amendment cases contain all of the elements likely to appear in prosecutions subsequent to grants of use and derivative use immunity: an exclusionary rule, a "taint" determination, and a shifting of the burden of persuasion. All of the problems associated with the application of the fourth amendment exclusionary rule are certain to arise in immunity cases, and the analogy unfortunately shows that the exclusionary rule offers little viable protection to the accused.

In *Alderman v. United States*[62] the Court delineated the scope of the procedural safeguards associated with the exclusionary rule where fourth amendment rights had been infringed.[63] After his conspiracy conviction, Alderman had learned that illegally obtained electronic surveillance transcripts may have provided the government with leads for gaining evidence used in his prosecution. The government admitted having the ill-gotten transcripts but denied using this inadmissible evidence either directly or indirectly in Alderman's prosecution. The Court concluded that when some of the government's evidence may be subject to exclusion as "fruit of the poisonous tree," the defendant is entitled to disclosure of its source if he can demonstrate

58. *Id.* at 461-62.
59. *Id.* at 461.
60. O.W. HOLMES, THE COMMON LAW 5 (M. Howe ed. 1963).
61. *See, e.g.*, Karabian, *The Case Against Wiretapping*, 1 PAC. L.J. 133 (1970); Little, *The Exclusionary Rule of Evidence as a Means of Enforcing Fourth Amendment Morality on Police*, 3 IND. LEGAL F. 375 (1970).
62. 394 U.S. 165 (1969).
63. "The exclusionary rule . . . excludes from a criminal trial any evidence seized from the defendant in violation of his Fourth Amendment rights. Fruits of such evidence are excluded as well." 394 U.S. at 171. In immunity cases the exclusionary rule will apply to the "compelled testimony and its fruits." *Murphy*, 378 U.S. at 79.

standing. The defendant then "must go forward with specific evidence demonstrating taint,"[64] after which the burden shifts to the government to show *either:* (1) that the evidence was derived from totally independent sources, or (2) that although *dependent* sources were involved, the connection between the evidence and the compelled testimony has "become so attenuated as to dissipate the taint."[65]

The problem facing the defendant is one of establishing the relationship between his overheard conversations and the government's probative evidence. The present rules of criminal discovery do not entitle the defendant to examine the government's investigative files, thereby prohibiting examination of the one source most likely to reveal whether or not the evidence is "tainted."[66] Hence, the accused in wiretapping cases is faced with the almost impossible task of discovering leads from the surveillance transcripts which might have been used in building a case against him, without the benefit of examining the government's investigative files. On the other hand, the government has total access to the ill-gotten electronic surveillance and its own investigative files. Where testimony is compelled under use immunity statutes, standing to object to the evidence introduced in any subsequent prosecution will be conferred when the defendant shows he has testified concerning the offense under a grant of immunity.[67] Only then will the defendant be entitled to disclosure of his compelled testimony, and in an adversary hearing the government will have the burden of proving that the evidence is not subject to the exclusionary rule. However, as Mr. Justice Marshall observed, dissenting in *Kastigar*,[68]

64. 394 U.S. at 183.

65. The doctrine of attenuation was developed in Nardone v. United States, 308 U.S. 338 (1939). In the words of the Court:

> Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.

Id. at 341. The attenuation determination is left to the sole discretion of the trial judge.

66. Even in federal courts where liberal discovery is generally allowed, the defendant is unable to discover investigative files. *See, e.g.*, the limiting language in FED. R. CRIM. P. 16(b):

> [T]his rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than defendant) to agents of the government.

67. 406 U.S. at 461-62.

68. *Id.* at 469 (Marshall, J., dissenting).

> [T]hough the Court puts the burden of proof on the government, the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence.

The defendant subject to the immunity statute will encounter the same monumental task as the defendant in the wiretap cases, for he will be armed only with the transcript of his compelled testimony.[69] In cross-examining government investigators, the defendant will be forced to undertake what is likely to be an unsuccessful fishing expedition in the hope of establishing a relationship between the government's probative evidence and his own compelled testimony. If the defendant makes no specific allegations concerning portions of the government's evidence, the government need merely assert that those portions were independently obtained. For those pieces of evidence about which the defendant makes specific allegations, the government may either show an independent source or argue that the relationship is so slight that the attenuation doctrine allows their admissibility.[70] Without access to the government's investigative files, the defendant cannot hope to overcome the prosecution's arguments. Thus as Justice Marshall aptly points out in dissent:[71]

> The Court today sets out a loose net to trap tainted evidence and prevent its use against the witness, but it accepts an intolerably great risk that tainted evidence will in fact slip through that net.

The rule advanced in *Kastigar* cannot begin to leave the witness and the prosecutorial authorities in the same position as if the witness had invoked his fifth amendment privilege. Unless the Court allows the defendant full discovery of government investigative files and totally eliminates the "attenuation doctrine," a witness whose testimony is compelled under a grant of "use and derivative use" immunity may well be convicting himself in a subsequent criminal prosecution.

IV. A QUESTION OF EFFICACY

Pragmatically, the Court should have considered whether the gen-

69. Neither the *Kastigar* opinion nor 18 U.S.C. §§ 6001-6005 (1970) provides for more liberal discovery in immunity cases. The defendant will be subject to FED. R. CRIM. P. 16(b), *supra* note 66.

70. The doctrine of attenuation applies to all exclusionary rules. For the current status of this doctrine, *see generally* Wong Sun v. United States, 371 U.S. 471 (1963).

71. 406 U.S. at 469 (Marshall, J., dissenting).

eral purpose of immunity statutes would be enhanced by a change from "transactional" to "derivative use" immunity. In *Kastigar* the Court implies[72] that the purpose of an immunity statute is to obtain information needed to arrest criminal activity which is unlikely to be obtained by other means. However, the replacement of "transactional" immunity with "derivative use" immunity may vitiate the utility of the immunity device. Ironically, the more heinous the type of crime investigated, the more likely that a contempt citation or a perjury conviction would seem preferable to a guilty witness when compared with the possibility of a subsequent prosecution for serious crimes closely related to those adverted to in the compelled testimony.[73] If such a witness does testify, his testimony is likely to add up to "I don't know anything" if there is a possibility the evidence may be used in a related prosecution. On the other hand, transactional immunity is more likely to produce the desired information because the witness may rest assured that he will not be prosecuted for crimes in any way related to those about which he testifies.

Substituting derivative use immunity for transactional immunity is likely to cause less information to be gained and correspondingly fewer central figures in organized crime to be convicted. This loss will be poorly compensated by a probable increase in prosecutions of the more visible participants in organized crime, since many of the prosecutions will be for perjury or contempt rather than for substantive criminal offenses.

CONCLUSION

The Court, speaking through Mr. Justice Powell, has rendered an unfortunate opinion in *Kastigar*. First, justification for *Kastigar's* rationale is grounded in prior Supreme Court opinions which on close analysis do not sustain the Court's interpretation of them. Second, the operative effect of the use and derivative use immunity statute approved in *Kastigar* will result in an erosion of the fifth amendment privilege against self-incrimination, particularly since present rules for discovery in the Federal Rules of Criminal Procedure deny an objecting defendant access to the prosecutor's investigatory files, thereby

72. *Id.* at 466-67.
73. With particular reference to organized crime, the witness already has enough to fear in underworld retaliation.

eliminating the only realistic opportunity to contest the government's assertion that its evidence was gained without taint.

Finally, even law enforcement seems poorly served by *Kastigar*. The probable consequence of replacing the broader transactional immunity with use and derivative use immunity will be to encourage perjury or outright refusal to testify, with this tendency increasing in proportion to the seriousness of the crimes investigated. Where undetectable but effective derivative use of compelled testimony is a distinct possibility, the risk of a contempt or perjury conviction may appear a better gamble than the risk of conviction for a much more serious substantive criminal offense. By not forcing the witness to encounter this concern, transactional immunity makes him more likely to testify truthfully.

Regrettably the *Kastigar* Court's narrowing of the scope of immunity required to compel testimony over a claim of the fifth amendment privilege has both eroded the privilege against self-incrimination and weakened the value of immunity statutes as tools in the fight against serious crime.

W.J.M.