

# Defense Witness Immunity in New York

Thomas D. Dinackus

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Thomas D. Dinackus, *Defense Witness Immunity in New York*, 71 Cornell L. Rev. 890 (1986)  
Available at: <http://scholarship.law.cornell.edu/clr/vol71/iss4/5>

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

## NOTES

### DEFENSE WITNESS IMMUNITY IN NEW YORK

#### INTRODUCTION

A criminal defendant's right to exculpatory evidence<sup>1</sup> and compulsory process<sup>2</sup> are two critical components of due process.<sup>3</sup> These rights are not absolute, however. When they conflict with a witness's testimonial privilege<sup>4</sup> or when exculpatory evidence is otherwise unavailable through no fault of the prosecution,<sup>5</sup> the defendant has traditionally been required to prepare his defense without such evidence.<sup>6</sup> Some defendants have successfully challenged their convictions when a deprivation of exculpatory evidence results

---

<sup>1</sup> The right to exculpatory evidence is an implied element of due process. See *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (defendant's right to present exculpatory witnesses is fundamental element of due process); *Washington v. Texas*, 388 U.S. 14, 19 (1967) (same); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (prosecution's suppression of exculpatory evidence violates due process); *Roviaro v. United States*, 353 U.S. 53, 60-61, 65 (1957) (prosecutor's refusal to disclose identity of government informer may violate due process when it denies defendant material exculpatory evidence). For arguments that these cases support a right to defense witness immunity, see, e.g., Note, *The Due Process Right to the Immunization of Defense Witnesses*, 22 B.C.L. REV. 299, 302-06 (1981) [hereinafter cited as Note, *The Due Process Right*]; Note, *The Constitutional Right to Defense Witness Immunity*, 57 N.D.L. REV. 187, 213-16 (1981) [hereinafter cited as Note, *The Constitutional Right*]; Comment, *A Right to Testimony of Immunized Defense Witnesses*, 12 U. BALT. L. REV. 294, 304-08 (1983). But see Note, *The Case Against a Right to Defense Witness Immunity*, 83 COLUM. L. REV. 139, 146-48 (1983) (arguing that *Chambers*, *Brady*, and *Roviaro* do not support a right to defense witness immunity) [hereinafter cited as Note, *The Case Against*].

<sup>2</sup> The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall . . . have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI.

<sup>3</sup> The fourteenth amendment provides that states shall not deprive persons "of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

<sup>4</sup> The Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. States have created other testimonial privileges by statute. For a discussion of the testimonial privileges available in New York, see 2 M. WAXNER, *NEW YORK CRIMINAL PRACTICE* ¶ 15.11 (1985); 5 J. ZETT, *NEW YORK CRIMINAL PRACTICE* ch. 35 (1985).

<sup>5</sup> For example, exculpatory evidence will be unavailable when a defense witness has died, cannot be located, or has refused to testify after a grant of immunity. See Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 597 (1978). For a discussion of New York law concerning contempt proceedings against a witness who improperly refuses to testify after receiving immunity, see 2 M. WAXNER, *supra* note 4, ¶ 15.10.

<sup>6</sup> See *United States v. Turkish*, 623 F.2d 769, 775 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981). See also Hill, *Testimonial Privilege And Fair Trial*, 80 COLUM. L. REV. 1173, 1181 (1980).

from a prosecutor's refusal to grant immunity for a defense witness.<sup>7</sup> These cases arise when a witness, fearing prosecution for a crime his testimony will reveal, invokes his fifth amendment privilege against self-incrimination and refuses to testify. Courts that accept the defendant's argument require the prosecutor to immunize the defense witness as a condition to the defendant's prosecution.

Defense witness immunity cases require courts to balance carefully the rights of the defendant and the witness, and the responsibilities of the state. On the one hand, defense witness immunity should be freely granted because the prosecutor, although an actor in an adversarial system, has an ethical duty to ensure that justice is done.<sup>8</sup> Immunizing a key defense witness ensures that the jury receives all probative exculpatory evidence. On the other hand, immunity was not created for this altruistic purpose, but rather was designed as a prosecutorial tool to facilitate convictions by immunizing prosecution witnesses.<sup>9</sup> Moreover, a forced conferral of immu-

---

<sup>7</sup> See *United States v. Lord*, 711 F.2d 887, 891-92 (9th Cir. 1983) (defendant's conviction vacated and case remanded for determination whether prosecutor coerced defense witness to invoke privilege); *Virgin Islands v. Smith*, 615 F.2d 964, 973-74 (3d Cir. 1980) (defendant's conviction vacated because prosecutor's unjustified refusal of immunity deprived defendant of essential exculpatory evidence); *United States v. Morrison*, 535 F.2d 223, 227-29 (3d Cir. 1976) (conviction reversed because prosecutor caused defense witness to refuse to testify by aggressively threatening him with prosecution for perjury); *United States v. De Palma*, 476 F. Supp. 775, 776, 779-82 (S.D.N.Y. 1979) (defendant's conviction reversed because prosecutor selectively immunized witnesses), *remanded for reconsideration sub nom.* *United States v. Horwitz*, 622 F.2d 1101, 1105-06 (2d Cir. 1980), *cert. denied*, 449 U.S. 1076 (1981).

Only one state court outside of New York has reversed a conviction on defense witness immunity grounds. See *State v. Broady*, 41 Ohio App. 2d 17, 22, 24, 321 N.E.2d 890, 894, 896 (1974) (conviction reversed because trial court, statutorily authorized to grant immunity, refused immunity where testimony was vital and exculpatory and there was no indication that immunity grant would interfere with prosecution of witness). Several other state courts, however, have stated in dicta that a right to defense witness immunity exists. *E.g.*, *State v. Montgomery*, 467 So. 2d 387, 390-96 (Fla. Dist. Ct. App. 1985) (dictum) (if prosecutorial misconduct violates defendant's compulsory process and due process rights, trial may proceed only if prosecution grants immunity to defense witness); *State v. Summers*, 197 N.J. Super. 510, 514-18, 485 A.2d 335, 336-38 (Super. Ct. Law Div. 1984) (dictum) (judiciary has inherent power to protect defendant's due process rights by grant of immunity to defense witness).

<sup>8</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935) (prosecutor must strive to accomplish impartial justice); N.Y. JUD. LAW app. EC 7-13 (McKinney 1975) (Code of Professional Responsibility) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.") (footnote omitted); STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE § 1.1(c) (1979) (same) [hereinafter cited as STANDARDS]. For a general discussion of the ethical principles governing prosecuting attorneys, see R. McNAMARA, CONSTITUTIONAL LIMITATIONS ON CRIMINAL PROCEDURE ch. 9 (1982 & Supp. 1983).

<sup>9</sup> See *Kastigar v. United States*, 406 U.S. 441, 446-47 (1972); see also Mykkeltvedt, *United States v. Alessio—Due Process of Law and Federal Grants of Witness Immunity for Defense Witnesses*, 31 MERCER L. REV. 689, 691-92 (1980); Note, *Defense Witness Immunity*, 9 HASTINGS CONST. L.Q. 199, 202-03, 205-06 & n.45 (1981). *Contra* Note, *Balancing the Interests Involved in Granting Defense Witness Immunity*, 45 ALB. L. REV. 801, 805 & n.23

nity interferes with the subsequent prosecution of the immunized witness and hence restricts the discretion traditionally accorded prosecutors in deciding whom to prosecute.<sup>10</sup> Finally, in deciding these cases courts must protect the constitutional rights of witnesses and consider what their proper role is under the doctrine of separation of powers.<sup>11</sup>

Defense witness immunity has been an especially dynamic issue in the federal courts. All of the circuit courts of appeals have considered the subject during the last ten years, and although the defendants have rarely prevailed on the defense witness immunity issue, none of the courts has rejected the contention that under some circumstances a prosecutor's refusal of immunity for a defense witness might be reversible error.<sup>12</sup> Although a defendant's right to

---

(1981) [hereinafter cited as Note, *Balancing the Interests*] ("[Some] courts have held that the underlying purpose of immunity statutes is to provide an opportunity to uncover all pertinent evidence that would assist a finder of fact in determining guilt or innocence.").

<sup>10</sup> See *United States v. Batchelder*, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file . . . are decisions that generally rest in the prosecutor's discretion."); *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (prosecutors generally accorded broad discretion); *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); *People v. DiFalco*, 44 N.Y.2d 482, 486, 377 N.E.2d 732, 735, 406 N.Y.S.2d 279, 282 (1978) (per curiam) ("District Attorney has broad discretion in determining when and in what manner to prosecute a suspected offender"). See generally D. JONES, *THE LAW OF CRIMINAL PROCEDURE* 282-88 (1981); 2 W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* ch. 13 (1984).

<sup>11</sup> Some commentators have argued that any judicial interference with the prosecution's use of immunity violates the doctrine of separation of powers because the legislature created immunity to enable an agency of the executive branch to perform its role. These commentators assert that judicial noninterference is mandated because the judiciary lacks the experience and expertise to decide when a prospective witness should be prosecuted or granted immunity. E.g., Flanagan, *Compelled Immunity for Defense Witnesses: Hidden Costs and Questions*, 56 NOTRE DAME LAW. 447, 463-72 (1981); Note, *The Case Against*, *supra* note 1, at 151, 153-57; Comment, *supra* note 1, at 302-03. Other commentators, however, argue that courts do not violate separation of powers by reviewing a prosecutor's refusal of immunity. See Note, *Balancing the Interests*, *supra* note 9, at 807-08; Note, *Judicial Immunity for Criminal Defense Witnesses: A Safeguard for the Defendant's Sixth Amendment Right to Compulsory Process*, 16 NEW ENG. L. REV. 481, 503-04 (1981). Several commentators have adopted a median position, arguing that a compelled grant of use/derived use immunity is constitutional but that forced conferral of transactional immunity violates separation of powers because it bars any subsequent prosecution of the witness for crimes revealed. E.g., Note, *The Constitutional Right*, *supra* note 1, at 204-06; Comment, *Current Controversies Concerning Witness Immunity in the Federal Courts*, 27 VILL. L. REV. 123, 145 n.120 (1981). Finally, one individual has suggested that although courts violate the separation of powers doctrine when they require a prosecutor to confer immunity under an immunity statute, no constitutional violation occurs when a court confers immunity using its inherent powers. See Note, *Defense Witness Immunity*, *supra* note 9, at 208-12, 224-26.

<sup>12</sup> Except for the Third Circuit, see *supra* note 7, no circuit court has accepted the argument that a grant of defense witness immunity might be constitutionally required absent prosecutorial misconduct. Five circuit courts have stated explicitly that prosecutorial misconduct requires either dismissal of the charges against the defendant

witness immunity in the federal courts is still very much in question, the New York Court of Appeals has established the right to defense witness immunity in certain cases.

This Note analyzes the development of defense witness immunity in New York and evaluates the current status of defense witness immunity in the state. The Note criticizes the New York Court of Appeals's analytical approach to defense witness immunity as well as certain ambiguities in the court's opinions. The Note then provides recommendations for judicial and legislative reforms that will protect the witness's rights and the prosecutor's discretion while increasing defendants' access to exculpatory testimony.

---

or a grant of defense witness immunity in at least some cases. See *United States v. Burns*, 684 F.2d 1066, 1077 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983); *United States v. Bazzano*, 712 F.2d 826, 839-40 (3d Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984); *United States v. Wilson*, 715 F.2d 1164, 1173 (7th Cir. 1983), *cert. denied*, 464 U.S. 1049 (1984); *United States v. Lord*, 711 F.2d 887, 890-92 (9th Cir. 1983); *United States v. Gottesman*, 724 F.2d 1517, 1524 & n.9 (11th Cir. 1984).

Four other circuit courts have suggested that immunity might be constitutionally required when prosecutorial misconduct occurs and the prosecutor does not dismiss the charges against the defendant. See *United States v. Klauber*, 611 F.2d 512, 517-20 (4th Cir. 1979); *United States v. Thevis*, 665 F.2d 616, 640-41 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982); *McGee v. Crist*, 739 F.2d 505, 509 (10th Cir. 1984); *United States v. Heldt*, 668 F.2d 1238, 1282-83 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982). Two appellate courts have distinguished prosecutorial misconduct situations from other defense witness immunity cases but have reserved the question whether a court may grant judicial relief. See *United States v. Davis*, 623 F.2d 188, 192-93 (1st Cir. 1980); *United States v. Pennell*, 737 F.2d 521, 526-29 (6th Cir. 1984), *cert. denied*, 105 S.Ct. 906 (1985). Finally, the Eighth Circuit has yet to address the prosecutorial misconduct question. See *United States v. Hardrich*, 707 F.2d 992, 993-94 (8th Cir.), *cert. denied*, 464 U.S. 991 (1983).

The Supreme Court has consistently denied certiorari on defense witness immunity cases. See *Pillsbury Co. v. Conboy*, 459 U.S. 248, 270 n.4 (1983) (Marshall, J., concurring). For an analysis that concludes that the Court will establish at least a limited right to defense witness immunity, see Mykkeltvedt, *supra* note 9, at 704-05 n.70 (dictum in *United States v. Nixon*, 418 U.S. 683 (1974), indicates Court may endorse defense witness immunity); Note, *Defense Witness Immunity*, *supra* note 9, at 219-20 (Court's analysis in *Washington* and *Brady* points to right to defense witness immunity); Note, *The Constitutional Right*, *supra* note 1, at 211 & n.164 (Court may endorse right to defense witness immunity based on *Nixon* and *Simmons v. United States*, 390 U.S. 377, 394 (1968)).

The rationale behind the Court's efforts to restrict the fourth amendment exclusionary rule also supports the right to defense witness immunity. See, e.g., *United States v. Ceccolini*, 435 U.S. 268, 285 (1978) (Burger, C.J., concurring) ("Any rule of law which operates to keep an eyewitness to a crime . . . from telling the jury what that person saw has a rational basis roughly comparable to the primitive rituals of human sacrifice.").

For an analysis that generally supports a right to defense witness immunity, see, e.g., Comment, *Defense Witness Immunity: Constitutional Demands and Statutory Change*, 72 J. CRIM. L. & CRIMINOLOGY 1026 (1981); Note, *The Constitutional Right*, *supra* note 1; Note, *Witness for the Defense: A Right to Immunity*, 34 VAND. L. REV. 1665 (1981) [hereinafter cited as Note, *Witness for the Defense*]. For an analysis that is generally critical of defense witness immunity, see, e.g., Flanagan, *supra* note 11; Note, *The Case Against*, *supra* note 1.

## I

## THE NEW YORK IMMUNITY STATUTE

Article 50 of the New York Criminal Procedure Law describes the immunity available to a witness in a criminal trial.<sup>13</sup> The statute specifies that a witness who invokes his fifth amendment privilege against self-incrimination can be compelled to testify only when granted immunity.<sup>14</sup> Although the judge confers immunity, the prosecution actually controls this tool because a court may grant immunity "only when expressly requested by the district attorney."<sup>15</sup> New York utilizes the broad "transactional immunity" that

---

<sup>13</sup> Section 50.20 provides in relevant part:

1. Any witness in a legal proceeding, other than a grand jury proceeding, may refuse to give evidence requested of him on the ground that it may tend to incriminate him and he may not, except as provided in subdivision two, be compelled to give such evidence.

2. Such a witness may be compelled to give evidence in such a proceeding notwithstanding an assertion of his privilege against self-incrimination if:

(a) The proceeding is one in which, by express provision of statute, a person conducting or connected therewith is declared a competent authority to confer immunity upon witnesses therein; and

(b) Such competent authority (i) orders such witness to give the requested evidence notwithstanding his assertion of his privilege against self-incrimination, and (ii) advises him that upon so doing he will receive immunity.

N.Y. CRIM. PROC. LAW § 50.20 (McKinney 1981).

Immunity before a grand jury, a subject beyond the scope of this Note, is governed by § 190.40 of the New York Criminal Procedure Code. See N.Y. CRIM. PROC. LAW § 190.40 (McKinney 1982). See generally C. BROWNELL, CRIMINAL PROCEDURE IN NEW YORK pt. 1, ch. 14 (rev. ed. 1985); 1 M. WAXNER, *supra* note 4, ¶ 8.15-16.

<sup>14</sup> N.Y. CRIM. PROC. LAW § 50.20. A witness must formally invoke the fifth amendment before immunity can be granted. *Id.* Invocation of the fifth amendment is subject to judicial review to ensure that the witness is not attempting to avoid testifying for an improper reason, such as to avoid mere social stigma. See 2 M. WAXNER, *supra* note 4, ¶ 15.2[2]. New York courts, however, will force a witness to testify only when he "contumaciously refuses, or when it is perfectly clear and plain that he is mistaken, and that the answer cannot possibly injure him, or tend in any degree to subject him to the peril of prosecution." *People ex rel. Taylor v. Forbes*, 143 N.Y. 219, 231, 38 N.E. 303, 306 (1894). See also *In re Gwydir*, 91 A.D.2d 995, 995-96, 457 N.Y.S.2d 856, 857 (2d Dep't 1983) (mem. op.). For a detailed discussion of the invocation of the privilege against self-incrimination, see 2 M. WAXNER, *supra* note 4, ¶ 15.2[2]; Note, *The Fifth Amendment Testimonial Privilege as an Impediment to the Defense When Invoked by a Potential Exculpatory Witness*, 42 ALB. L. REV. 482, 485-90 (1978).

<sup>15</sup> N.Y. CRIM. PROC. LAW § 50.30 (McKinney 1981). Section 50.30 states: "In any criminal proceeding, other than a grand jury proceeding, the court is a competent authority to confer immunity in accordance with the provisions of section 50.20, but only when expressly requested by the district attorney to do so." *Id.* The trial judge apparently has discretion to deny the prosecution's request, although no criteria are specified in the statute. H. ROTHBLATT, CRIMINAL LAW OF NEW YORK: THE CRIMINAL PROCEDURE LAW § 93 (1971); 2 M. WAXNER, *supra* note 4, ¶ 15.2[4][a]. See *Brockway v. Monroe*, 59 N.Y.2d 179, 191, 451 N.E.2d 168, 174, 464 N.Y.S.2d 410, 416 (1983) (Jasen, J., dissenting) (court exercises discretion when granting immunity); *People v. Mordino*, 83 A.D.2d 775, 776, 443 N.Y.S.2d 469, 470 (4th Dep't) (mem. op.) (trial court might not have

prohibits prosecution of the immunized witness for "any transaction, matter or thing" revealed by the testimony.<sup>16</sup> Prosecution is still possible, however, when the witness commits perjury while tes-

---

granted immunity even if requested by prosecution), *appeal denied*, 54 N.Y.2d 1030, 430 N.E.2d 1326, 446 N.Y.S.2d 1031 (1981).

<sup>16</sup> N.Y. CRIM. PROC. LAW § 50.10(1) (McKinney 1981). Traditionally, immunity statutes have provided for one of three basic types of immunity: transactional, use, and use/derived use. Transactional immunity provides the greatest protection for the witness because "it prohibits a subsequent prosecution of the immune witness which is based upon a transaction, matter or occurrence about which he testified or produced evidence." Comment, *supra* note 11, at 127. Use immunity provides the least protection for the witness because the prosecution is prohibited only from using the witness's testimony itself in a subsequent prosecution. *Id.* Under use immunity, the prosecution is free to utilize the testimony to discover other admissible evidence of guilt. Use/derived use, also known as testimonial immunity, prohibits the prosecution from using the witness's testimony and any evidence derived from it in a case against the witness. *Id.* This form of immunity allows the district attorney to prosecute the witness if the evidence used was obtained from sources wholly independent of the witness's testimony. For a discussion of the distinctions and relative merits of these types of immunity, see 1 W. LAFAVE & J. ISRAEL, *supra* note 10, § 8.11, at 688-90; Carlson, *Witness Immunity in Modern Trials: Observations on the Uniform Rule of Criminal Procedure*, 67 J. CRIM. L. & CRIMINOLOGY 131, 135-37 & nn.34 & 38 (1976); Thornburgh, *Reconciling Effective Federal Prosecution and the Fifth Amendment: "Criminal Coddling," "The New Torture" or "A Rational Accommodation?"*, 67 J. CRIM. L. & CRIMINOLOGY 155, 156-58 (1976).

The Supreme Court originally suggested in *Counselman v. Hitchcock*, 142 U.S. 547, 585-86 (1892), that only transactional immunity could be used to compel a witness's testimony over his fifth amendment privilege to avoid self-incrimination. Congress responded by adopting a transactional immunity statute, which the Court upheld in *Brown v. Walker*, 161 U.S. 591 (1896). Under this statute, however, federal prosecutors hesitated in granting immunity because it could give witnesses complete immunity for serious crimes their testimony revealed. Keeney & Walsh, *The American Bar Association's Grand Jury Principles: A Critique from a Federal Criminal Justice Perspective*, 14 IDAHO L. REV. 545, 584 (1978); Note, *Witness for the Defense*, *supra* note 12, at 1686 & n.152. Congress addressed this problem by enacting the Federal Immunity of Witnesses Act as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 201(a), 84 Stat. 922, 926-28 (codified at 18 U.S.C. §§ 6001-6005 (1982)), which provided for use/derived use immunity.

The Supreme Court upheld the constitutionality of this statute in *Kastigar v. United States*, 406 U.S. 441, 453 (1972), concluding that the protection conferred in use/derived use immunity is coextensive with a witness's fifth amendment privilege. The *Kastigar* court, however, held that use immunity is unconstitutional. *Id.* at 460-62. Consequently, no state uses traditional "use immunity," and modern commentators often refer to "use/derived use immunity" as "use immunity." This Note employs the traditional labels for clarity.

Paralleling the federal Constitution, New York's constitution requires only use/derived use immunity. N.Y. CONST. art. I, § 6. *United States ex rel. Gasparino v. Butler*, 398 F. Supp. 127, 129 (S.D.N.Y. 1974); 2 M. WAXNER, *supra* note 4, ¶ 15.2[3][b]. See *People v. La Bello*, 24 N.Y.2d 598, 601-03, 249 N.E.2d 412, 413-15, 301 N.Y.S.2d 544, 546-49, *cert. dismissed sub nom. Piccirillo v. New York*, 400 U.S. 548 (1971); *Gold v. Menna*, 25 N.Y.2d 475, 481, 255 N.E.2d 235, 238, 387 N.Y.S.2d 33, 38 (1969), *cert. dismissed*, 400 U.S. 548 (1971) (*per curiam*). Although the federal system has adopted use/derived use immunity, the majority of states, including New York, continue to use the broader transactional immunity by statute. 1 W. LAFAVE & J. ISRAEL, *supra* note 10, § 8.11, at 688 & n.17. For a survey of the immunity statutes currently in force in all 50 states, see NATIONAL ASS'N OF ATTORNEYS GENERAL, ORGANIZED CRIME CONTROL LEGISLATION 140-48, 150-55 (1975).

tifying under immunity<sup>17</sup> or the witness's answers are unresponsive to the questions posed.<sup>18</sup>

## II

### DEVELOPMENT OF NEW YORK CASE LAW

#### A. *People v. Sapia*

The New York Court of Appeals first addressed the defense witness immunity issue in 1976. In *People v. Sapia*<sup>19</sup> the court faced the question whether the prosecutor's refusal to immunize a witness who refused to testify on fifth amendment grounds violated the defendant's due process and fair trial rights when the defendant was deprived of exculpatory testimony. *Sapia* involved a classic defense witness immunity scenario: a witness, who had previously lied under oath to federal authorities, was concerned that truthful testimony would lead to prosecution for perjury. The trial court concluded that the witness's testimony was material and exculpatory and urged the prosecution to grant immunity. The prosecutor refused and the defendant was subsequently convicted.<sup>20</sup> The appellate division affirmed in a split decision,<sup>21</sup> and the defendant appealed.

The court of appeals affirmed the conviction, concluding that the prosecutor's refusal to grant immunity did not violate the defendant's compulsory process or due process rights. The court summarily rejected the defendant's compulsory process argument, stating that the sixth amendment right "exists only to the extent that witnesses may otherwise be compelled to attend and to testify; the

<sup>17</sup> N.Y. CRIM. PROC. LAW § 50.10(1) (McKinney 1981); *People v. Shapiro*, 50 N.Y.2d 747, 760, 409 N.E.2d 897, 904-05, 431 N.Y.S.2d 422, 429 (1980) (dictum). See also *United States v. Apfelbaum*, 445 U.S. 115, 131-32 (1980); 1 W. LAFAVE & J. ISRAEL, *supra* note 10, § 8.11, at 685. For a detailed discussion of New York perjury law, see 2 M. WAXNER, *supra* note 4, ¶ 15.9.

<sup>18</sup> *Brockway v. Monroe*, 59 N.Y.2d 179, 189, 451 N.E.2d 168, 173, 464 N.Y.S.2d 410, 415 (1983). See also 1 W. LAFAVE & J. ISRAEL, *supra* note 10, § 8.11, at 685-86.

<sup>19</sup> 41 N.Y.2d 160, 359 N.E.2d 688, 391 N.Y.S.2d 93 (1976), *cert. denied*, 434 U.S. 823 (1977). In *Sapia*, the defendant was charged with selling narcotics to an undercover police officer and sought to prove entrapment using the testimony of the witness/police informant. *Id.* at 162, 359 N.E.2d at 689-90, 391 N.Y.S.2d at 94-95.

<sup>20</sup> *Id.* at 162-64, 359 N.E.2d at 690-91, 391 N.Y.S.2d at 95-96.

<sup>21</sup> *People v. Sapia*, 48 A.D.2d 524, 370 N.Y.S.2d 604 (1st Dep't 1975). The majority refused to compel immunity for the defense because of the overwhelming evidence against the defendant and uncertainty concerning the probative value of the prospective witness's testimony. *Id.* at 529, 370 N.Y.S.2d at 608. The dissent noted, however, that the trial court had concluded that the witness's testimony would exculpate the defendant and reasoned that the defendant's compulsory process right should override the prosecutor's interest in retaining the discretion to prosecute the witness, at least when the district attorney had no reason to believe the witness's testimony would reveal any previously unknown crimes. *Id.* at 530-31, 370 N.Y.S.2d at 610-11 (Murphy, J., dissenting).

Constitution mandates no more.”<sup>22</sup> The court analogized the *Sapia* case to one in which exculpatory testimony is unavailable because a witness is absent, invokes a recognized testimonial privilege, or improperly refuses to testify and risks being held in contempt. The court of appeals reasoned that because a defendant’s sixth amendment rights are not violated in these situations, no constitutional violation occurs when the prosecution refuses immunity for a defense witness.<sup>23</sup>

The court of appeals found the defendant’s due process argument far more convincing. The court noted that suppression of material evidence clearly violates due process.<sup>24</sup> The court reasoned, however, that the events in *Sapia* did not constitute suppression because the prosecution had allowed the defense full access to the witness.<sup>25</sup> The court of appeals then considered whether the defendant’s fair trial right could require the prosecution to take affirmative steps to enable a witness to testify. The court decided no such requirement existed in *Sapia*. Although the witness had been instrumental in arranging the narcotics transactions which led to the defendant’s arrest, the witness had not directly participated in the crimes.<sup>26</sup>

The *Sapia* court stated in dictum that the prosecution might violate a defendant’s fair trial right if it refused immunity to a witness/informant who had actively participated in the crime as an agent of the police.<sup>27</sup> In such a case, the court reasoned that it would be unfair for the prosecution to rely on its discretion and deny immunity, thereby suppressing exculpatory evidence, when the police had created the problem by utilizing the witness as an informant.<sup>28</sup> The court concluded that in this situation the district attorney either must grant immunity or forego prosecution, but added that “[t]he delineation of the obligations of the prosecution and of the rights of the defendant in such a situation . . . must await another day.”<sup>29</sup>

---

<sup>22</sup> 41 N.Y.2d at 164, 359 N.E.2d at 691, 391 N.Y.S.2d at 96.

<sup>23</sup> *Id.* at 164-65, 359 N.E.2d at 691, 391 N.Y.S.2d at 96.

<sup>24</sup> *Id.* at 165, 359 N.E.2d at 691, 391 N.Y.S.2d at 96-97 (citing *Brady v. Maryland*, 373 U.S. 83 (1963)).

<sup>25</sup> *Id.* at 165-66, 359 N.E.2d at 691-92, 391 N.Y.S.2d at 97.

<sup>26</sup> *Id.* at 162, 165-66, 359 N.E.2d at 689, 691-92, 391 N.Y.S.2d at 94-95, 97. The witness was apparently an eyewitness to at least one of the transactions, however. *Id.*

<sup>27</sup> *Id.* at 166, 359 N.E.2d at 692, 391 N.Y.S.2d at 97 (dictum).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* The court of appeals decided another defense immunity case on the same day as *Sapia*. In *People v. Tyler*, 40 N.Y.2d 1065, 1066, 360 N.E.2d 928, 929, 392 N.Y.S.2d 250, 250-51 (1976) (mem. op.), the court merely indicated in dictum that failure to immunize may violate due process if the defendant is deprived of exculpatory evidence.

### B. *People v. Shapiro*

During the three and a half years following *Sapia*, New York's appellate courts decided three cases involving defense witness immunity. In each case the court affirmed the defendant's conviction using the *Sapia* analysis. These decisions, however, provided only minimal analysis and added little clarity to the law.<sup>30</sup>

In 1980 the court of appeals held for the first time that a prosecutor's refusal to immunize a witness could, in at least some cases, violate the defendant's constitutional rights and require a reversal of the defendant's conviction. In *People v. Shapiro*<sup>31</sup> the defendant was convicted of sodomy, promoting prostitution, and endangering the welfare of a child. The appellate division affirmed without addressing the defense witness immunity issue,<sup>32</sup> and the defendant appealed.

In *Shapiro* the defendant's prospective witnesses wanted to give truthful testimony but were concerned about prosecution for perjured testimony given during earlier proceedings. The district attorney threatened to prosecute the witnesses for perjury if their testimony differed even slightly from that given earlier. Faced with possible criminal prosecution, these individuals invoked the fifth

---

<sup>30</sup> In *People v. Aquarian Age 2000, Inc.*, 58 A.D.2d 838, 396 N.Y.S.2d 330 (2d Dep't) (mem. op.), *appeal denied*, 42 N.Y.2d 999, 368 N.E.2d 48, 398 N.Y.S.2d 1042 (1977), the appellate division affirmed the defendant's conviction by merely citing *Sapia* without discussing the issues involved. *Id.* at 838, 396 N.Y.S.2d at 330.

In *People v. Heffron*, 59 A.D.2d 263, 399 N.Y.S.2d 501 (4th Dep't 1977), the defendant alleged that his right to exculpatory testimony was violated by the prosecution's refusal to immunize a prospective defense witness who invoked the fifth amendment. The appellate division noted that the witness was neither a police informer nor a participant in the crime and that the trial record did not indicate that the witness's testimony would be exculpatory. The court thus concluded that the defendant's rights to due process and a fair trial were not violated because the facts in *Heffron* were "notably less compelling for reversal than those in *Sapia*." *Id.* at 267, 399 N.Y.S.2d at 504. The court did not discuss the sixth amendment compulsory process issue, apparently because the defendant did not raise it.

The court of appeals returned to the defense witness immunity issue in *People v. Arroyo*, 46 N.Y.2d 928, 388 N.E.2d 342, 415 N.Y.S.2d 205 (1979) (mem. op.). In a cursory opinion the court of appeals concluded that the refusal of immunity for a prospective defense witness did not violate the defendant's due process and fair trial rights. The court stated: "It suffices for present purposes to note that the witness here was not an agent of the law enforcement authorities or otherwise in any way a part of the prosecutorial apparatus." *Id.* at 931, 388 N.E.2d at 343, 415 N.Y.S.2d at 206. The court ignored the appellate division dissent's point that the witness could shed light on the credibility of the prosecution's informer/witness and that the testimony would have exculpated the defendant. *See People v. Arroyo*, 60 A.D.2d 914, 916-17, 402 N.Y.S.2d 177, 180-81 (2d Dep't 1978) (Titone, J., dissenting).

<sup>31</sup> 50 N.Y.2d 747, 409 N.E.2d 897, 431 N.Y.S.2d 422 (1980).

<sup>32</sup> *People v. Shapiro*, 67 A.D.2d 958, 412 N.Y.S.2d 1018 (2d Dep't 1979) (mem. op.). The court modified the trial result by reducing the sentence. *Id.* at 958, 412 N.Y.S.2d at 1019.

amendment at trial. The court of appeals noted that the witnesses' testimony would have been exculpatory, that the trial court repeatedly urged the prosecutor to immunize the witnesses, and that the refusal of immunity deprived the defendant of all direct witnesses.<sup>33</sup> The court also noted that the only direct testimony the jury heard came from a prosecution witness who could not be prosecuted because of his age and an earlier immunity grant.<sup>34</sup> Based on these facts, the court of appeals reversed the conviction in a split decision, concluding that the denial of immunity violated the defendant's due process and compulsory process rights.<sup>35</sup>

Although the *Shapiro* court relied substantially on *Sapia*, the *Shapiro* analysis differed from *Sapia* in two significant ways. First, the *Sapia* court had concluded that only a violation of due process could justify a forced conferral of immunity to a defense witness.<sup>36</sup> In *Shapiro* the court overturned the defendant's conviction on both due process and compulsory process grounds.<sup>37</sup> Second, the *Sapia* court had indicated that only a refusal to immunize, coupled with affirmative prosecutorial action that violated the defendant's rights, could justify the reversal of a defendant's conviction.<sup>38</sup> Although the *Shapiro* court continued to emphasize the prosecutor's actions in determining the propriety of the defendant's conviction,<sup>39</sup> the court appeared to establish a second avenue for defendants. The court

---

<sup>33</sup> 50 N.Y.2d at 759-60, 409 N.E.2d at 904, 431 N.Y.S.2d at 428-29. Evidence can be classified as either "direct" or "circumstantial." "Direct evidence is evidence which, if believed, resolves a matter in issue. [With circumstantial evidence, however,] even if the circumstances depicted are accepted as true, additional reasoning is required to reach the proposition to which it is directed." MCCORMICK ON EVIDENCE § 185, at 543 (E. Cleary 3d ed. 1984).

The court also stated the prosecutor had "disregard[ed] his professional obligation, if not his ethical duty," by communicating his threats concerning prosecution for perjury directly to the witnesses, thereby precluding them from conferring with counsel prior to making the decision whether to testify. 50 N.Y.2d at 759, 409 N.E.2d at 903-04, 431 N.Y.S.2d at 428.

<sup>34</sup> *Id.* at 759, 409 N.E.2d at 904, 431 N.Y.S.2d at 429.

<sup>35</sup> The court also reversed the defendant's conviction on two other unrelated grounds. The court, however, left no doubt that the immunity issue was dispositive, stating that "[w]e find merit in each of [defendant's] contentions" and conditioning retrial on a grant of immunity for the witness. *Id.* at 752, 762, 409 N.E.2d at 899, 906, 431 N.Y.S.2d at 424, 430.

<sup>36</sup> 41 N.Y.2d at 164-65, 359 N.E.2d at 691, 391 N.Y.S.2d at 96. See *supra* notes 22-29 and accompanying text.

<sup>37</sup> 50 N.Y.2d at 760-62, 409 N.E.2d at 904-05, 431 N.Y.S.2d at 429-30.

<sup>38</sup> 41 N.Y.2d at 165-66, 359 N.E.2d at 691-92, 391 N.Y.S.2d at 97. See *supra* notes 24-29 and accompanying text.

<sup>39</sup> In *Shapiro* the court identified selective immunization of prosecution witnesses as one example of a prosecutorial violation of a defendant's due process rights. 50 N.Y.2d at 760, 409 N.E.2d at 904, 431 N.Y.S.2d at 429. The *Shapiro* facts provide a second example: a prosecutor caused a defense witness to refuse to testify by aggressively threatening the prospective witness with prosecution for perjury. *Id.* at 760-61, 409 N.E.2d at 905, 431 N.Y.S.2d at 429-30.

stated that the prosecution may violate a defendant's due process rights even without any affirmative action "where the failure to grant immunity deprives the defendant of vital exculpatory testimony."<sup>40</sup> The court, however, did not define "vital exculpatory testimony" or explain whether legitimate prosecution interests would affect this right.

Two judges on the court of appeals dissented in *Shapiro* and voted to affirm the defendant's conviction.<sup>41</sup> The dissent differed from the majority both in its analytical approach to the problem and in the interpretation of a key factual issue. The dissent rejected the majority's position that a refusal of immunity could violate a defendant's compulsory process rights. They asserted that only due process could compel a prosecutor to immunize a prospective witness.<sup>42</sup> Furthermore, the dissent squarely rejected the majority's contention that a denial of vital exculpatory evidence, absent any affirmative prosecutorial action, could require the immunization of a defense witness.<sup>43</sup> Finally, the dissent concluded that the majority's characterization of the district attorney's actions as "threatening" and "menacing" was "patently unwarranted" and that the prosecution's warnings to the witnesses were in no way improper.<sup>44</sup> The dissent concluded its discussion of defense witness immunity by warning:

Unless we are prepared to hold that the People have an absolute obligation to confer immunity and to forswear any possibility of future prosecution for prior perjury whenever a material defense witness asserts his Fifth Amendment privilege against self incrimi-

---

<sup>40</sup> *Id.* at 760, 409 N.E.2d at 904, 431 N.Y.S.2d at 429 (dictum).

<sup>41</sup> *Id.* at 779, 409 N.E.2d at 917, 431 N.Y.S.2d at 442 (Gabrielli, J., dissenting). Judge Jasen concurred with the dissent.

<sup>42</sup> *Id.* at 771, 774 & n.6, 409 N.E.2d at 911, 913-14 & n.6, 431 N.Y.S.2d at 436, 438-39 & n.6.

<sup>43</sup> *Id.* at 774, 409 N.E.2d at 913-14, 431 N.Y.S.2d at 438-39. The dissent maintained that it did not matter that the prosecution's refusal to immunize deprived the defendant of all direct witnesses. *Id.* at 775, 409 N.E.2d at 914, 431 N.Y.S.2d at 439.

<sup>44</sup> *Id.* at 774-75, 409 N.E.2d at 914, 431 N.Y.S.2d at 439-40. The dissent argued that the witnesses' refusal to testify did not violate the defendant's rights because the immunity issue was raised by the witnesses when they asked the prosecutor for immunity. The dissent therefore concluded that this case fell within the general rule that the compulsory process clause does not forbid prosecution of a defendant whose witnesses are unavailable for reasons beyond the control of the prosecution. "[T]he underlying source of the deprivation was the voluntary decisions by the witnesses to refrain from testifying. . . ." *Id.* at 774, 409 N.E.2d at 913, 431 N.Y.S.2d at 439. The dissent, however, failed to explain why the origin of the immunity request should affect the constitutionality of the prosecutor's refusal to grant immunity. Any competent attorney would recognize the potential danger if his client testified about a past crime without immunity and would request immunity to protect his client. Given the dissent's analysis, a prosecutor could defeat an otherwise valid claim for defense witness immunity merely by refusing to raise the immunity issue and thereby forcing the witness to initiate the request.

nation, I cannot see how we can conclude upon the facts in this case that defendant has a constitutional right to have his witnesses immunized as a condition to retrial.<sup>45</sup>

### C. Post-*Shapiro* Developments

Since 1980 New York courts have sought to identify the limits of the *Shapiro* doctrine. In *People v. Adams*<sup>46</sup> the defendant was convicted of robbery, and the appellate division affirmed without addressing the defense witness immunity issue.<sup>47</sup> The defendant appealed to the court of appeals, arguing that the prosecution's refusal to immunize a prospective defense witness violated both his due process right to exculpatory testimony and his sixth amendment right to compulsory process. The defendant contended that the prosecution had no legitimate reason to withhold immunity because no charges were pending against the prospective witness at the time of trial.<sup>48</sup>

The court of appeals rejected the defendant's analysis and affirmed the conviction, emphasizing the broad discretion accorded the prosecution in making immunity determinations. The court stated that if the prospective witness had been indicted for the same crime as the defendant, the court would not even have reviewed the prosecution's decision to refuse immunity.<sup>49</sup> The court concluded:

Neither, in our view, can the prosecutor be said to have acted in bad faith whenever he refuses to grant absolution to a participant in the crime who has thus far eluded prosecution. Indeed to permit a defendant to override the prosecutor's discretion under those circumstances could itself lead to abuses of the immunity statute.<sup>50</sup>

The court did not explicitly address *Shapiro*'s "vital exculpatory testimony" prong. The court noted, however, that the prosecutor's refusal of immunity only deprived the defendant of cumulative

<sup>45</sup> *Id.* at 775, 409 N.E.2d at 914, 431 N.Y.S.2d at 439-40.

<sup>46</sup> 53 N.Y.2d 241, 423 N.E.2d 379, 440 N.Y.S.2d 902 (1981).

<sup>47</sup> *People v. Adams*, 70 A.D.2d 825, 417 N.Y.S.2d 868 (1st Dep't 1979) (mem. op.).

<sup>48</sup> 53 N.Y.2d at 243, 247, 423 N.E.2d at 379, 381, 440 N.Y.S.2d at 902, 904. The prospective witness had been arrested for the crime, but the state dropped the charges after an eyewitness failed to identify him as the perpetrator. *Id.* at 247, 423 N.E.2d at 381, 440 N.Y.S.2d at 904. The witness presumably would have admitted the commission of the crime and supported the defendant's alibi. *Id.* at 247-48, 423 N.E.2d at 381-82, 440 N.Y.S.2d at 904-05. *Adams* was the first significant New York case in which the witness sought immunity not for prior perjury, but solely to protect himself from prosecution for substantive crimes his testimony would reveal. The court of appeals did not discuss whether this fact played any part in its analysis, nor is it clear whether the peculiar facts in *Adams* influenced the court's attitude toward the defendant's request.

<sup>49</sup> *Id.* at 247-48, 423 N.E.2d at 382, 440 N.Y.S.2d at 904.

<sup>50</sup> *Id.*, 423 N.E.2d at 381-82, 440 N.Y.S.2d at 904.

evidence, suggesting that the case could not meet the vital exculpatory testimony standard.<sup>51</sup>

During the next two and a half years New York appellate courts decided three cases involving defense witness immunity. In each instance the court affirmed the defendant's conviction using the standards developed in *Sapia*, *Shapiro*, and *Adams*.<sup>52</sup> The courts'

---

<sup>51</sup> *Id.* at 248, 423 N.E.2d at 382, 440 N.Y.S.2d at 904-05. Evidence may be excluded as cumulative if it duplicates other evidence already introduced. No set formula determines how repetitive the evidence must be to justify exclusion. The trial court must weigh the advantages and disadvantages on a case by case basis. MCCORMICK ON EVIDENCE, *supra* note 33, § 185, at 545-57 & n.35.

<sup>52</sup> *People v. Mordino*, 83 A.D.2d 775, 443 N.Y.S.2d 469 (4th Dep't) (mem. op.), *appeal denied*, 54 N.Y.2d 1030, 430 N.E.2d 1326, 446 N.Y.S.2d 1031 (1981), involved a felony-murder conviction which the appellate division affirmed. The appellate division concluded the facts fell short of the prosecutorial misconduct standard because the prospective witness was not a law enforcement agent. *Id.* at 776, 443 N.Y.S.2d at 470. Furthermore, the defendant had failed to request immunity at trial, and the record indicated the trial court might not have granted immunity even if requested by the prosecution. The court did not discuss the vital exculpatory testimony standard. *Id.* at 776, 443 N.Y.S.2d at 470.

*People v. Osorio*, 86 A.D.2d 233, 449 N.Y.S.2d 968 (1st Dep't), *appeal dismissed*, 57 N.Y.2d 671, 439 N.E.2d 886, 454 N.Y.S.2d 77 (1982), involved a gangland murder. Following the conviction of the defendants, a key prosecution witness recanted his trial testimony. The witness refused to testify at a hearing concerning his recantation without a grant of full transactional immunity. *Id.* at 235-37, 449 N.Y.S.2d at 969-71. The prosecution was concerned that the witness, whom the court described as an "extremely disreputable individual with a significant criminal history," would gain immunity for other significant crimes revealed during his testimony. The prosecutor therefore offered a limited immunity that would protect the witness from prosecution only for his prior perjured testimony. The trial court initially endorsed this offer of limited immunity. The witness, however, refused to testify without transactional immunity, and the court eventually supported the witness's position. On motion after the verdict, the trial court vacated the defendants' convictions because their due process rights had been violated under the prosecutorial misconduct analysis. The court noted that the prosecution had performed numerous unfair acts, such as withholding exculpatory evidence and conducting an aggressive scheme of plea bargaining with the witness, who was a defendant in another case, to secure his testimony in *Osorio*. *Id.* at 237-38, 449 N.Y.S.2d at 970-71.

The prosecution appealed, and the appellate division reinstated the defendants' convictions. The appellate division concluded that the prosecutor's refusal of immunity was not done in bad faith and thus did not constitute prosecutorial misconduct as discussed in *Sapia*, *Shapiro*, and *Adams*. The court identified three salient factors: first, the district attorney's legitimate concern that transactional immunity would allow the witness to evade prosecution for other serious crimes; second, collateral circumstances that made the witness's change of mind "a classic illustration of an unreliable recantation;" and third, the prosecution's offer of "perjury only" immunity. *Id.* at 239-40, 449 N.Y.S.2d at 971-72. Finally, the court noted that the exculpatory evidence withheld by the prosecution was merely cumulative. *Id.* at 240, 449 N.Y.S.2d at 972.

The court of appeals returned to the defense witness immunity controversy in *People v. Lee*, 58 N.Y.2d 773, 445 N.E.2d 195, 459 N.Y.S.2d 19 (1982) (mem. op.). In *Lee* a witness was willing to provide exculpatory testimony until the trial court warned him that his testimony could be self-incriminating. The witness invoked his fifth amendment privilege, and the defendant contended that his due process rights were violated when the prosecution refused immunity. *Id.* at 773-75, 445 N.E.2d at 195, 459 N.Y.S.2d at 19.

The court of appeals rejected the defendant's contention and affirmed the convic-

decisions, however, relied almost exclusively on the prosecutorial misconduct analysis, ignoring *Shapiro's* vital exculpatory testimony prong.

Finally, in 1984 the cases of *People v. Owens*<sup>53</sup> and *People v. Priester*<sup>54</sup> provided the New York Court of Appeals with an opportunity to clarify defense witness immunity in New York. *Owens* was the first defense witness immunity case after *Shapiro* in which the appellate division reversed a defendant's conviction. In *Owens* the defendant was charged with rape and wanted to introduce the testimony of an individual who claimed to have had consensual intercourse with the victim before the alleged rape. This testimony would have provided an explanation for the physical evidence of sexual activity introduced at trial.<sup>55</sup> Because the victim was an underage female, the prospective witness was concerned that his testimony would be self-incriminating.<sup>56</sup> When the potential witness invoked his fifth amendment privilege, the trial court urged the prosecution to confer immunity. The prosecution, however, refused to immunize the witness, and the defendant was convicted.<sup>57</sup>

The appellate division reversed the defendant's conviction and conditioned a new trial on a grant of immunity to the defense witness. The court implied that reversal was required under either the prosecutorial misconduct or vital exculpatory testimony standards. The court noted that although the record disclosed no explicit attempt by the prosecution to influence the witness's testimonial choice, the evidence indicated that the prosecutor may have coerced

---

tion. Although the court noted that the trial justice's warning to the witness was more forcefully worded than necessary, the court concluded that it was not stated "in terms so intimidating as to interfere with his choice whether to testify." *Id.* at 775, 445 N.E.2d at 195-96, 459 N.Y.S.2d at 19-20. Consistent with other post-*Shapiro* decisions, the court based its holding strictly on the prosecutorial misconduct analysis and ignored the vital exculpatory testimony standard.

<sup>53</sup> 97 A.D.2d 855, 469 N.Y.S.2d 249 (3d Dep't 1983) (mem. op.).

<sup>54</sup> 98 A.D.2d 820, 470 N.Y.S.2d 478 (3d Dep't 1983) (mem. op.), *appeal denied*, 61 N.Y.2d 911, 462 N.E.2d 1212, 474 N.Y.S.2d 1034 (1984).

<sup>55</sup> 97 A.D.2d at 855, 469 N.Y.S.2d at 249.

<sup>56</sup> *Id.* Sexual relations with a minor female is punishable as sexual misconduct under § 130.20 of the New York penal code. N.Y. PENAL LAW § 130.20 (McKinney 1975). Interestingly, the appellate division failed to note: (1) that the witness had indicated to the grand jury that he had not had intercourse with the victim, Record at 964, 996, *People v. Owens*, No. 80-37 (Tompkins County Ct. Oct. 26, 1981); (2) that the prosecutor indicated a strong interest in prosecuting the witness for perjury if he testified, *id.* at 994-97, 1001, 1008-10; and (3) that the witness did not reveal whether he invoked his fifth amendment privilege to avoid prosecution for perjury or for sexual misconduct. *Id.* at 1008-10.

<sup>57</sup> 97 A.D.2d at 855, 469 N.Y.S.2d at 249-50. The appellate division failed to specify that it was the trial court that requested the grant of immunity. *See id.*; Record at 994, 1000-03.

the witness into not testifying.<sup>58</sup> The prosecutor knew the witness was represented by counsel and that his attorney had requested that no contact occur between the prosecution and the witness without counsel present. Nevertheless, the prosecutor met separately with the prospective witness and discussed the witness's participation in the *Owens* case.<sup>59</sup> Although the trial record did not reveal what was discussed in this conversation, the appellate court noted that it did show the witness and prosecutor disagreed concerning its content. Regardless of the actual content, the appellate division concluded that "[t]he opportunity such a meeting presented for impermissible coercion . . . cannot be denied."<sup>60</sup>

The *Owens* panel found that the prosecution's refusal of immunity to the prospective witness cost the defendant "testimony [that] was important to [his] defense."<sup>61</sup> The court then noted that the prosecution had not stated that the witness would be prosecuted for sexual misconduct should he testify without immunity.<sup>62</sup> The court therefore reasoned that the prosecution could properly be required to immunize the prospective witness or forego prosecuting the de-

<sup>58</sup> 97 A.D.2d at 856, 469 N.Y.S.2d at 250.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* This action violated the American Bar Association's ethical standards for prosecutors, see STANDARDS, *supra* note 8, § 3-3.1(f) & comment (1979) ("prosecutor should avoid interviewing a prospective witness except in the presence of a third person"), and New York's ethical code for lawyers, see N.Y. JUD. LAW app. DR 7-104(A)(1) (McKinney 1975) (Code of Professional Responsibility) ("A lawyer shall not . . . [c]ommunicate . . . on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party . . .") (footnotes omitted). The district attorney violated DR 7-104 because she interrogated the prospective witness after indicating a strong interest in prosecuting the witness for perjury. See *United States v. Jamil*, 546 F. Supp. 646, 651-54, 658 (E.D.N.Y. 1982) (New York prohibits contact between prosecution and individual who "is being investigated as a possible defendant in a potential criminal proceeding" once prosecution knows that individual is represented by counsel), *rev'd on other grounds*, 707 F.2d 638 (2d Cir. 1983). Moreover, the prosecutor's actions violated the constitutional rights of the witness. See *People v. Skinner*, 52 N.Y.2d 24, 31-32, 417 N.E.2d 501, 503-04, 436 N.Y.S.2d 207, 209-10 (1980) (questioning of individual who has retained counsel without counsel's presence violates constitutional right to counsel even where no formal criminal action has commenced).

The possibility that impermissible coercion occurred in *Owens* is increased because the witness was a defendant in other pending criminal cases being prosecuted by the same district attorney. Record at 964, *Owens*. The appellate division failed to note this fact in its opinion. The appellate division also failed to address a factor that indicated that coercion of the witness may have been the prosecutor's goal. The prosecutor apparently made a special effort to accost the witness during one short period when the witness's attorney was absent. She led the witness to an empty room and conversed with him, thereby ensuring no third party could testify concerning the conversation. *Id.* at 996-97. See also N.Y. JUD. LAW app. Canon 9 (McKinney 1975) (Code of Professional Responsibility) ("A Lawyer Should Avoid Even The Appearance Of Professional Impropriety").

<sup>61</sup> 97 A.D.2d at 855, 469 N.Y.S.2d at 249-50.

<sup>62</sup> *Id.* at 855, 469 N.Y.S.2d at 250.

fendant because no conflict existed between the defendant's need for exculpatory testimony and the prosecution's legitimate interest in prosecuting a prospective witness.<sup>63</sup> This analysis broke with the court of appeals's strong endorsement of prosecutorial discretion in *Adams*. The *Adams* court indicated that the prosecution was under no obligation to demonstrate an intent to prosecute a prospective defense witness to justify denying that witness immunity.<sup>64</sup>

Two of the five appellate justices who heard the *Owens* case dissented. The dissent ignored the majority's reasoning and the "vital exculpatory testimony" analysis of *Shapiro*, merely stating that judicial review of the prosecutor's immunity decision is proper only where "there has been an abuse of . . . discretion through the District Attorney's bad faith or conduct which violates a defendant's due process right to a fair trial."<sup>65</sup> The dissent concluded that "[t]he instant case presents no example, or even a claim, of either prosecutorial abuse or misconduct."<sup>66</sup>

*People v. Priester*<sup>67</sup> was the second case in which the appellate division reversed the defendant's conviction on defense witness immunity grounds. *Priester* was a manslaughter case in which a prosecution witness provided key testimony concerning the defendant's intent and then wanted to recant her testimony. After the trial court warned the witness concerning the possibility of prosecution for perjury, she elected to exercise her fifth amendment privilege. The prosecution refused to immunize the witness, and consequently the jury never heard the recantation testimony.<sup>68</sup>

Although the appellate division did not explicitly identify the basis of its holding, the court apparently relied on the vital exculpatory testimony analysis. The court noted that the witness's testimony was "crucial to [the] defendant,"<sup>69</sup> and although the court did not specifically evaluate the prosecution's conduct, the prosecutor's actions did not approach the level of misconduct that occurred in *Shapiro* or *Owens*. In *Priester* the district attorney had no influence on the witness's refusal to recant her testimony. Moreover, the evidence did not indicate that the prosecutor procured the witness's original testimony in bad faith.<sup>70</sup> The district attorney, however, did

---

<sup>63</sup> *Id.* at 855-56, 469 N.Y.S.2d at 250.

<sup>64</sup> See *supra* notes 48-50 and accompanying text.

<sup>65</sup> 97 A.D.2d at 857, 469 N.Y.S.2d at 251 (Casey, J., dissenting).

<sup>66</sup> *Id.*

<sup>67</sup> 98 A.D.2d 820, 470 N.Y.S.2d 478 (3d Dep't 1983) (mem. op.), *appeal denied*, 61 N.Y.2d 911, 462 N.E.2d 1212, 474 N.Y.S.2d 1034 (1984). Although the same department of the appellate division decided both the *Owens* and *Priester* cases, the justices on each panel differed.

<sup>68</sup> *Id.*, 470 N.Y.S.2d at 478-79.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 820-21, 470 N.Y.S.2d at 479-80.

“rely heavily” on the witness’s testimony in his summation.<sup>71</sup> Finally, the court noted that the witness had sought immunity only for the perjury she had committed, rather than for other substantive crimes, and identified this as a significant factor in its decision overturning the conviction.<sup>72</sup>

In both *Owens* and *Priester* the prosecution tried to appeal to the court of appeals. New York law provides two routes from the appellate division to the court of appeals. Application for leave to appeal may be made directly to any appellate division justice who heard the case or to the court of appeals itself. When this second alternative is used, the application is assigned to one of the court of appeals judges at random.<sup>73</sup> In *Owens* one of the appellate division dissenters granted leave to appeal, thereby forcing the high court to hear the case.<sup>74</sup> In *Priester* the prosecution applied to the court of appeals because no judge dissented at the appellate division. A grant of leave to appeal in *Priester* would have allowed the court to address the defense witness immunity issue using two analytically different cases involving both the prosecutorial misconduct and vital exculpatory testimony prongs of *Shapiro*. Instead, the court of appeals denied leave to appeal in *Priester* only three weeks after leave was granted in *Owens*.<sup>75</sup>

Although the denial of leave in *Priester* suggested that the court of appeals would affirm the appellate division’s reversal of the defendant’s conviction in *Owens*, the court summarily rejected the appellate division’s conclusions and reinstated the defendant’s conviction in a memorandum opinion.<sup>76</sup> The court found that the

<sup>71</sup> *Id.* at 821, 470 N.Y.S.2d at 479.

<sup>72</sup> *Id.*, 470 N.Y.S.2d at 480.

<sup>73</sup> N.Y. CRIM. PROC. LAW § 460.20(b) (McKinney 1983). *See also id.* §§ 450.90, 460.10, 470.05, 470.35 (detailing procedural aspects of appeals to New York Court of Appeals).

<sup>74</sup> Order of Casey, J. (granting leave to appeal to court of appeals) (Jan. 20, 1984). *See* N.Y. CRIM. PROC. LAW § 450.90 (McKinney 1983) (court of appeals must review case certified by appropriate justice of appellate division if case presents issue of law or mixed law and fact).

<sup>75</sup> The court of appeals was or should have been aware that the *Owens* appeal was pending when it denied leave in *Priester*. *See id.* § 460.20(5) (requiring appellate division justice granting leave to immediately file copy of appeal certificate with clerk of court of appeals); N.Y. CT. APPEALS R. 500.2 (requiring appellate counsel to file jurisdictional statement within 10 days of grant of leave to appeal).

<sup>76</sup> *People v. Owens*, 63 N.Y.2d 824, 472 N.E.2d 26, 482 N.Y.S.2d 250 (1984) (mem. op.). The court of appeals remitted the case to the appellate division for consideration of nondefense witness immunity issues that the defendant had previously raised but the appellate division had not decided. The appellate division affirmed the defendant’s conviction. *People v. Owens*, 108 A.D.2d 1014, 1014-15, 485 N.Y.S.2d 584, 585 (3d Dep’t 1985).

New York appellate courts differentiate between full opinion decisions and “memorandum decisions” which include only a short opinion. The court of appeals in *Owens*

prosecutor's contact with the witness outside the presence of his attorney was improper<sup>77</sup> but refused to "presume overreaching," stating that "the only record of the content of the conversation indicates no intimidation or coercion."<sup>78</sup> Thus, the court reasoned that the facts in *Owens* did not constitute prosecutorial misconduct as defined in *Sapia*, *Shapiro*, and *Adams*. The court also reinforced *Adams* by concluding that the lack of charges pending against the witness did not establish that the prosecutor's refusal of immunity was in bad faith.<sup>79</sup> Finally, the court did not address *Shapiro's* vital exculpatory testimony prong.

### III

#### EVALUATION OF CURRENT NEW YORK LAW

Although the New York Court of Appeals has never overruled or even explicitly questioned its holding or reasoning in *People v. Shapiro*,<sup>80</sup> its recent decisions demonstrate that a defense attorney is unlikely to succeed in obtaining immunity for a defense witness.<sup>81</sup> The court acknowledged in *Shapiro* that a judge would rarely compel a grant of immunity for a defense witness; however, the opinion's language implies that courts should be sensitive to violations of a defendant's due process and compulsory process rights. The *Shapiro* court identified two situations in which a compelled grant of immunity for a defense witness would be proper. First, if a prosecutor engaged in unfair actions that tended to mold the evidence available at trial, the court reasoned it was fair to expect the prosecutor

---

devoted less than one half page to its analysis of the defense witness immunity issue. *Id.* at 825-26, 472 N.E.2d at 27, 482 N.Y.S.2d at 251. This Note uses "(mem. op. )" to designate short opinion decisions.

<sup>77</sup> *Id.* at 826, 472 N.E.2d at 27, 482 N.Y.S.2d at 251.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> 50 N.Y.2d 747, 409 N.E.2d 897, 431 N.Y.S.2d 422 (1980). See *supra* notes 31-45 and accompanying text. But see *Owens*, 63 N.Y.2d at 825-26, 472 N.E.2d at 27, 482 N.Y.S.2d at 251 (1984) (mem. op.), where the court cites primarily to *Sapia* and *Adams* and only mentions *Shapiro* with a "see also" reference. *Id.*

<sup>81</sup> Determining how often defendants raise the defense witness immunity issue is difficult because most New York trial decisions are unreported. Two reported cases that did not reach New York's appellate courts discuss defense witness immunity. See *People v. Gonzalez*, 120 Misc. 2d 62, 465 N.Y.S.2d 471 (Sup. Ct. Crim. Term Kings County 1983) (prospective witness willing to exculpate defendant by testifying to commission of crime; transactional immunity denial upheld because (1) prosecution willing to grant use/derived use immunity, (2) witness desired immunity for substantive crime, not just prior perjury, and (3) defendant had other witnesses to support alibi); *In re Noel N.*, 120 Misc. 2d 380, 465 N.Y.S.2d 1008 (Fam. Ct. Kings County 1983) (immunity refused in delinquency proceeding because (1) defendant's constitutional rights not violated and (2) family court not so authorized). But see *In re Barry M.*, 93 Misc. 2d 882, 883, 886, 403 N.Y.S.2d 979, 979, 981 (Fam. Ct. Queens County 1978) (New York's immunity statute is applicable to family court delinquency proceedings).

to yield his discretion to grant immunity.<sup>82</sup> Second, the prosecutor's discretion might have to yield, even though no unfair affirmative actions had occurred, if the failure to grant immunity would deprive the defendant of "vital exculpatory testimony."<sup>83</sup>

The opinions in *Sapia*, *Shapiro*, and *Adams* describe three situations in which a prosecutor's affirmative actions would require a grant of defense witness immunity: first, when the witness is an agent of the law enforcement authorities and actually participates in the crime;<sup>84</sup> second, when the prosecution aggressively threatens the witness with prosecution for perjury if the witness's current testimony differs from prior testimony;<sup>85</sup> and third, when a prosecutor immunizes his witness but refuses immunity for a defendant's witness.<sup>86</sup> Although the court has identified these three examples, it has not eliminated the possibility that other prosecutorial actions could require a grant of immunity for a defense witness.

The court's opinions in *Adams* and *Owens* demonstrate that district attorneys generally will be accorded great discretion in making immunity decisions. In both cases the argument in favor of defense witness immunity was strong, yet the court upheld the prosecution's refusal to grant immunity. In *Adams* the court rejected the defendant's contention that the district attorney should be required to demonstrate a legitimate interest in prosecuting a prospective witness to justify denying immunity.<sup>87</sup> Because there was no practical possibility of prosecuting the witness in *Adams*, the prosecutor could not reasonably argue that a grant of defense witness immunity would interfere with his discretion to initiate a later prosecution of the witness. The district attorney's refusal to immunize was there-

<sup>82</sup> 50 N.Y.2d at 760, 409 N.E.2d at 904, 431 N.Y.S.2d at 429. See *supra* notes 38-39 and accompanying text.

<sup>83</sup> 50 N.Y.2d at 760, 409 N.E.2d at 904, 431 N.Y.S.2d at 429. See *supra* notes 39-40 and accompanying text.

<sup>84</sup> See *People v. Sapia*, 41 N.Y.2d 160, 166, 359 N.E.2d 688, 692, 391 N.Y.S.2d 93, 97 (1976) (dictum), *cert. denied*, 434 U.S. 823 (1977). See also *People v. Arroyo*, 46 N.Y.2d 928, 930, 388 N.E.2d 342, 343, 415 N.Y.S.2d 205, 206 (1979) (mem. op.); *People v. Osorio*, 86 A.D.2d 233, 239, 449 N.Y.S.2d 968, 971 (1st Dep't), *appeal dismissed*, 57 N.Y.2d 671, 439 N.E.2d 886, 454 N.Y.S.2d 77 (1982); *People v. Mordino*, 83 A.D.2d 775, 776, 443 N.Y.S.2d 469, 470 (4th Dep't), *appeal denied*, 54 N.Y.2d 1030, 430 N.E.2d 1326, 446 N.Y.S.2d 1031 (1981); *People v. Heffron*, 59 A.D.2d 263, 267, 399 N.Y.S.2d 501, 504-05 (4th Dep't 1977).

<sup>85</sup> See *People v. Adams*, 53 N.Y.2d at 247, 423 N.E.2d at 381, 440 N.Y.S.2d at 904; *Shapiro*, 50 N.Y.2d at 761, 409 N.E.2d at 905, 431 N.Y.S.2d at 429-30; see also *People v. Lee*, 58 N.Y.2d 773, 775, 445 N.E.2d 195, 195, 459 N.Y.S.2d 19, 19 (1982) (mem. op.); *Osorio*, 86 A.D.2d at 239, 449 N.Y.S.2d at 971.

<sup>86</sup> See *Adams*, 53 N.Y.2d at 247, 423 N.E.2d at 381, 440 N.Y.S.2d at 904; *Shapiro*, 50 N.Y.2d at 760, 409 N.E.2d at 904, 431 N.Y.S.2d at 429; see also *Osorio*, 86 A.D.2d at 239, 449 N.Y.S.2d at 971.

<sup>87</sup> See *supra* notes 48-50 and accompanying text.

fore probably a bad faith attempt to restrict the evidence available at the defendant's trial.

In *Owens* the evidence strongly suggested that the prosecution purposefully engaged in improper actions resulting in the impermissible molding of the evidence.<sup>88</sup> Indeed, short of a *Shapiro* situation where the coercion occurred at trial and on the record, a more compelling scenario for defense witness immunity is difficult to envision.<sup>89</sup> Certainly the prosecution's conversation with the witness, which the appellate division characterized as an "inexcusable violation of [the witness's] right to counsel,"<sup>90</sup> meets the *Sapia* standard "that the People had placed themselves on the horns of a dilemma and must either grant effective immunity . . . or, alternatively, accept a dismissal of the prosecution."<sup>91</sup> Instead, the court of appeals refused to "presume overreaching,"<sup>92</sup> thus demonstrating the high burden of proof a defendant must meet to prevail on the defense witness immunity question.

One major question concerning the prosecutorial misconduct prong remains unanswered. Presumably a court will grant defense witness immunity only when a witness exercises his fifth amendment privilege,<sup>93</sup> thereby depriving the defendant of relevant exculpatory evidence.<sup>94</sup> The court of appeals, however, has never defined how probative the evidence must be to warrant immunity when prosecutorial misconduct has occurred. In fact, the court has yet to identify what role, if any, the importance of the evidence denied to the defendant plays in the court's prosecutorial misconduct analysis. Because the *Shapiro* court drew a line between the prosecutorial misconduct and the vital exculpatory testimony standards, the misconduct prong can apparently be satisfied by something less than vital exculpatory evidence. Whether such evidence must be noncumula-

---

<sup>88</sup> See *supra* notes 58-60 and accompanying text.

<sup>89</sup> Arguably, the facts in *Owens* point more directly to the conclusion that the prosecutor purposefully acted to control what evidence would be admitted at trial than do the facts in *Shapiro*. In *Shapiro* a sudden change in the prospective witnesses' proposed testimony surprised the prosecutor during the trial. His threat of prosecution for perjury, although improper, was apparently a spontaneous reaction. In *Owens*, however, the events strongly suggest that the prosecutor acted purposefully to deny the defendant critical testimony. See *supra* notes 55-63 and accompanying text. Nevertheless, the court of appeals reversed the conviction in *Shapiro* and affirmed the conviction in *Owens*.

<sup>90</sup> *Owens*, 63 N.Y.2d at 826, 472 N.E.2d at 27, 482 N.Y.S.2d at 251.

<sup>91</sup> *Sapia*, 41 N.Y.2d at 166, 359 N.E.2d at 692, 391 N.Y.S.2d at 97 (dictum).

<sup>92</sup> *Owens*, 63 N.Y.2d at 826, 472 N.E.2d at 27, 482 N.Y.S.2d at 251.

<sup>93</sup> The witness must formally invoke the fifth amendment, and the court must satisfy itself that the invocation is proper. See *supra* note 14. These requirements also apply to a defense witness immunity request under the vital exculpatory testimony prong.

<sup>94</sup> To be relevant, evidence must be both probative and material. Evidence is probative if it tends to establish the proposition for which it is offered. Evidence is material if the proposition for which it is offered is a matter in issue in the case. McCORMICK ON EVIDENCE, *supra* note 33, § 185, at 541.

tive<sup>95</sup> remains unknown.

The court of appeals's analysis of defense witness immunity has concentrated almost exclusively on *Shapiro's* prosecutorial misconduct prong. None of the subsequent cases, in either the appellate division or the court of appeals, has explicitly addressed what circumstances require a grant of immunity based on *Shapiro's* vital exculpatory testimony prong. *Adams* implicitly requires that the testimony be noncumulative.<sup>96</sup> The dearth of discussion on this issue, coupled with the courts' reluctance to reverse convictions on defense witness immunity grounds, implies that New York courts will override the prosecution's discretion because of a denial of vital exculpatory testimony only in extraordinary circumstances.

*Priester*<sup>97</sup> does not easily fit into this analytical framework. In *Priester* the prosecutor committed no significant improper act, and hence the appellate division must have based its reversal on the deprivation of noncumulative, critically important testimony.<sup>98</sup> If the court of appeals sought to validate the vital exculpatory testimony analysis in its denial of leave to appeal,<sup>99</sup> it should have done so explicitly. The court's denial of leave to appeal was especially troublesome in light of the decision in *Owens*, a far more compelling case for reversal, which arrived at the court contemporaneously with *Priester*.

#### IV

#### PROPOSALS

##### A. Parameters of the Problem

Any reform in the defense witness immunity area must account for the conflicting interests involved. A defendant has rights under the sixth and fourteenth amendments to compulsory process and exculpatory evidence.<sup>100</sup> A witness, however, is privileged under the fifth amendment to refrain from self-incrimination.<sup>101</sup> Finally, the legislature created immunity as a prosecutorial tool to facilitate

<sup>95</sup> See *supra* note 51.

<sup>96</sup> The court firmly rejected the defendant's contention that prosecutorial misconduct had occurred. See *supra* notes 49-50 and accompanying text. The court then noted that the prosecutor's refusal of immunity only deprived the defendant of cumulative evidence. 53 N.Y.2d at 248, 423 N.E.2d at 382, 440 N.Y.S.2d at 904-05. The court therefore apparently used this rationale to deny the defense witness immunity request under the vital exculpatory testimony prong. See *supra* note 51 and accompanying text.

<sup>97</sup> *People v. Priester*, 98 A.D.2d 820, 270 N.Y.S.2d 478 (3d Dep't 1983) (mem. op.), *appeal denied*, 61 N.Y.2d 911, 462 N.E.2d 1212, 474 N.Y.S.2d 1034 (1984).

<sup>98</sup> *Id.* at 820-21, 470 N.Y.S.2d at 479-80. See *supra* notes 68-72 and accompanying text.

<sup>99</sup> *Priester*, 61 N.Y.2d 911, 462 N.E.2d 1212, 474 N.Y.S.2d 1034 (1984).

<sup>100</sup> See *supra* notes 1-3 and accompanying text.

<sup>101</sup> See *supra* note 4 and accompanying text.

combatting crime, not as a device to protect defendants' rights or to ensure that all relevant testimony reaches the jury.<sup>102</sup> A forced grant of immunity may significantly restrict the prosecution's discretion to decide whom to prosecute, especially in a jurisdiction that utilizes transactional immunity.<sup>103</sup>

## B. Judicial Reform

The New York Court of Appeals can significantly increase the protection of defendants' rights by implementing several moderate reforms. First, the court should identify the threshold requirements that a defendant must satisfy before the judiciary will consider whether a prosecutor's actions require a grant of defense witness immunity under the prosecutorial misconduct prong. Specifically, the court of appeals must decide whether a deprivation of cumulative and/or less than critically important evidence may support a defense witness immunity request, and if so, what analysis a court should use to evaluate the importance of the evidence to the defendant.<sup>104</sup>

Second, the court should re-examine the prosecutorial misconduct analysis as applied in *Owens*<sup>105</sup> and require the prosecution to grant immunity for a defense witness or forego prosecuting the defendant when the evidence indicates a strong possibility that the prosecutor coerced the witness to keep him silent. Granting defense witness immunity only in the most flagrant incidents of prosecutorial misconduct ignores the prosecution's obligation to maintain high ethical standards in its pursuit of justice.<sup>106</sup> The court's decision in *Owens* is especially difficult to justify because it was only the prosecutor's improper private contact with the witness

<sup>102</sup> See *supra* note 9 and accompanying text.

<sup>103</sup> See *supra* notes 10, 16 and accompanying text.

<sup>104</sup> In *Adams* the New York Court of Appeals implied that the evidence must be noncumulative to support a defense witness immunity request. See *supra* note 96 and accompanying text. The court's opinion in *Sapia* may imply that the evidence must be highly probative. See *supra* notes 26-29 and accompanying text.

Most courts and commentators consider a deprivation of noncumulative, clearly exculpatory evidence a prerequisite for a grant of defense witness immunity. See, e.g., *United States v. Thevis*, 665 F.2d 616, 639-41 (5th Cir.) (dictum), cert. denied, 459 U.S. 825 (1982); *United States v. Turkish*, 623 F.2d 769, 778 (2d Cir. 1980) (dictum), cert. denied, 449 U.S. 1077 (1981); Note, *Balancing the Interests*, *supra* note 9, at 818; Note, *The Due Process Right*, *supra* note 1, at 325. But see *United States v. Lord*, 711 F.2d 887, 891-92 (9th Cir. 1983) (evidence must merely be relevant); Comment, *Defense Witness Immunity and the Right to a Fair Trial*, 129 U. PA. L. Rev. 377, 409-10 (1980) (arguing that immunity may be appropriate when otherwise defendant would be deprived of noncumulative relevant evidence that is not "clearly exculpatory").

<sup>105</sup> *People v. Owens*, 63 N.Y.2d 824, 472 N.E.2d 26, 482 N.Y.S.2d 250 (1984) (mem. op.). See *supra* notes 76-79 and accompanying text.

<sup>106</sup> See *supra* note 8 and accompanying text.

that created the uncertainty whether coercion had occurred.<sup>107</sup> The different results in *Shapiro* and *Owens* can only encourage improper covert behavior by prosecuting attorneys because the decisions suggest that the outcome of a case will be governed not by the propriety of the prosecutor's actions, but by whether the causal link between those actions and the witness's refusal to testify is demonstrated beyond *any* doubt.

Third, the court should revive *Shapiro's* vital exculpatory testimony prong.<sup>108</sup> The court's meager discussion of this standard in both *Shapiro* and subsequent cases has generated few criteria for determining when a defendant's need for testimony should override the prosecutor's discretion in conferring immunity. The court should identify what specific factors a trial court should consider when faced with an immunity request based on the vital exculpatory testimony prong.

Apparently a threshold requirement is that the witness's invocation of the fifth amendment deprives the defendant of noncumulative, clearly exculpatory evidence.<sup>109</sup> Once this requirement is met, the court should balance the defendant's need for the evidence against the district attorney's interest in prosecuting the witness. The trial court should compare the magnitude of the defendant's and witness's crimes<sup>110</sup> and consider whether the prosecutor's refusal to confer immunity is motivated by actual intent and ability to prosecute the prospective witness. This approach would require New York courts to critically analyze the prosecution's interest in prosecuting a prospective witness. It would not, however, overrule the court's decision in *Adams*. In that case the court merely rejected the defendant's contention that the prosecution's refusal of defense witness immunity was per se unreasonable whenever the witness was not currently under indictment.<sup>111</sup> Under the proposed analysis a court could deny a defense witness immunity request when the prosecution is conducting an investigation with a reasonable likelihood of future prosecution.<sup>112</sup>

---

<sup>107</sup> See *supra* notes 58-60 and accompanying text.

<sup>108</sup> See *supra* note 40 and accompanying text.

<sup>109</sup> In *Adams* the court of appeals implied that the exculpatory evidence must be noncumulative; see *supra* note 96 and accompanying text.

<sup>110</sup> Because prosecution of the defendant who allegedly committed the most serious crime would presumably serve the public interest, courts should hesitate to grant defense witness immunity requests when the witness would receive immunity for a crime that is significantly more serious than the crime the defendant is accused of.

<sup>111</sup> See *supra* notes 48-50 and accompanying text.

<sup>112</sup> A court should not consider whether the prosecutor attempted to induce the witness to testify by an informal promise of immunity. These "informal immunity grants" are private agreements between prosecutors and witnesses and fall outside the statutory immunity structure. Although this technique provides the greatest flexibility

In evaluating the magnitude of a prospective witness's crime, courts should differentiate between a witness seeking immunity for prior perjury and one seeking immunity for other substantive crimes that his testimony might reveal. A court generally should be more willing to grant immunity for prior perjury than for other substantive crimes because perjury will probably be a less serious offense. Furthermore, perjury convictions are difficult to achieve, and hence it is unlikely an immunity grant for prior perjury will interfere with a subsequent prosecution of the witness.<sup>113</sup> Although the court of ap-

---

for the prosecution by enabling the district attorney to fashion the grant to the facts of the particular case, it also violates the spirit, if not the letter, of New York's immunity statute. Informal agreements allow prosecutors to evade the legislature's intent that immunity in New York be the broader transactional variety. See *supra* note 16 and accompanying text.

Moreover, the New York Court of Appeals recently held that a prosecutor's informal promise of immunity does not activate the immunity statute and could, at most, entitle the witness to suppression of any incriminating testimony given. *People v. Dunbar*, 53 N.Y.2d 868, 870, 423 N.E.2d 36, 37, 440 N.Y.S.2d 613, 614 (1981) (mem. op.). See N.Y. CRIM. PROC. LAW § 60.45(1), (2)(b)(i) (McKinney 1981) (confession must be suppressed if it is product of promise by law enforcement official and promise "creates a substantial risk that the defendant might falsely incriminate himself"). But see *People v. Gonzalez*, 120 Misc. 2d 62, 64, 465 N.Y.S.2d 471, 472 (Sup. Ct. Crim. Term Kings County 1983) (dictum) (informal promise of immunity binding on prosecution if placed on record at trial). Because informal grants typically will be unenforceable against the prosecution, a witness cannot be compelled to testify when offered only an informal promise of immunity. An opposite conclusion would violate both New York's immunity statute, see *supra* notes 13-14 and accompanying text, and the fifth amendment, see *infra* note 124. Given the discretionary nature of the witness's decision whether to testify under an informal grant, the judiciary should not consider a prospective defense witness's refusal to testify without formal statutory immunity when evaluating the defense witness immunity request.

Informal immunity grants have arisen in two New York defense witness immunity cases: *People v. Osorio*, 86 A.D.2d 233, 449 N.Y.S.2d 968 (1st Dep't), *appeal dismissed*, 57 N.Y.2d 671, 439 N.E.2d 886, 454 N.Y.S.2d 77 (1982) (discussed *supra* note 52), and *Gonzalez*, 120 Misc. 2d 62, 465 N.Y.S.2d 471 (discussed *supra* note 81). Neither court questioned the validity of the informal, nontransactional immunity that was offered, and both courts' denial of defense witness immunity was influenced by the offers of limited immunity that the defendants declined to accept; in *Gonzalez*, this offer of informal immunity "weighed heavily" in the court's decision to refuse defense witness immunity. *Gonzalez*, 120 Misc. 2d at 67, 465 N.Y.S.2d at 474. See also *Osorio*, 86 A.D.2d at 239-40, 449 N.Y.S.2d at 972.

<sup>113</sup> Although frequently described as "one of the most odious crimes in our law," Gershman, *The "Perjury Trap,"* 129 U. PA. L. REV. 624, 636 (1981), perjury frequently entails a penalty "far below substantive offenses." *United States v. Turkish*, 623 F.2d 769, 775 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981). See also Gershman, *supra*, at 626 n.5.

In New York a perjury conviction cannot be based on the uncorroborated testimony of a single witness. N.Y. PENAL LAW § 210.50 (McKinney 1975). A similar "two witness" rule led to "much lower conviction rates for perjury than for other crimes" in federal courts. See PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 201 (1967). New York adopted this rule specifically "to make convictions for perjury more difficult to obtain than in the case of most other crimes." *People v. Gleason*, 285 A.D. 278, 286, 136 N.Y.S.2d 220, 228 (1st Dep't 1954) (citations omitted).

peals has never directly addressed this issue, *Shapiro* implies that a defense witness immunity grant for past perjury is more acceptable than one covering a substantive crime.<sup>114</sup>

Fourth, the court of appeals should adopt a specific procedure for evaluating defense witness immunity requests using a structured *in camera* hearing.<sup>115</sup> This procedure would ensure the maximum protection for the rights of the defendant and the witness while providing maximum flexibility for the prosecution.<sup>116</sup> Once a defendant demonstrates that a defense witness will refuse to testify without immunity, the court should hold a two-stage *in camera* hearing.

When the immunity request is based on alleged prosecutorial misconduct, the judge would first examine the witness using the questions the defense attorney intends to ask at trial. During this stage, only the judge, court recorder, witness, and witness's attorney would be present. The defense attorney, however, should have an opportunity to present oral argument concerning the importance of the witness's testimony.

If the judge concludes that the value of the witness's testimony warrants consideration of a grant of defense witness immunity, the judge would proceed to the second stage of the hearing. The defense and prosecuting attorneys would present witnesses and any other evidence relevant to the claim of prosecutorial misconduct. Finally, the court would hear argument from the defense and prosecution concerning the magnitude of the alleged misconduct and would then rule on the immunity request. This two-step procedure will allow the court to decide the issue without compromising the witness's right against self-incrimination or revealing the defend-

---

<sup>114</sup> In *Shapiro* the court stated: "[T]he protection the witnesses sought was not from disclosure of any past criminal activities but solely from the possibility that any testimony they would give . . . would precipitate their prosecution for perjury." 50 N.Y.2d at 758, 409 N.E.2d at 903, 431 N.Y.S.2d at 428. The court failed to elaborate on this point, however, and it is uncertain what role it played in the decision. New York courts have cited *Shapiro* as support for this perjury/substantive crime dichotomy. See *Priester*, 98 A.D.2d at 821, 470 N.Y.S.2d at 480; *Gonzalez*, 120 Misc. 2d at 66, 465 N.Y.S.2d at 474.

<sup>115</sup> In both *People v. Sapia*, 41 N.Y.2d at 162, 359 N.E.2d at 690, 391 N.Y.S.2d at 95, and *People v. Shapiro*, 50 N.Y.2d at 759, 409 N.E.2d at 903-04, 431 N.Y.S.2d at 427-28, the trial court used an *in camera* hearing to evaluate the immunity request. Neither court, however, was able to resolve the controversy, apparently at least in part because of the lack of a well-designed procedure.

<sup>116</sup> Commentators generally endorse the use of an *in camera* hearing for immunity requests. See, e.g., Note, *Balancing the Interests*, *supra* note 9, at 815-17; Comment, *supra* note 104, at 411-14. But see Note, *The Constitutional Right*, *supra* note 1, at 237-38 (*in camera* hearing will not generate sufficient information for court to evaluate adequately government's interest in refusing immunity). Cf. Bauer, *Reflections on the Role of Statutory Immunity in the Criminal Justice System*, 67 J. CRIM. L. & CRIMINOLOGY 143, 149-50 (1976) (opposing *in camera* hearing to evaluate request for immunity for prosecution witnesses).

ant's strategy before trial. Moreover, the jury will not hear irrelevant allegations of prosecutorial improprieties.

When an alleged deprivation of vital exculpatory testimony is the basis for the defense witness immunity request, the first stage of the *in camera* hearing would proceed as detailed above. The second stage, however, would consist of argument from the district attorney concerning his interest in prosecuting the prospective witness. During this stage only the judge, court recorder, and district attorney would be present.<sup>117</sup> The judge would rule on the defense witness immunity request after balancing the defendant's need for the evidence against the state's interest in prosecuting the witness.<sup>118</sup> This procedure will generate the most complete body of data possible for the court's evaluation and yet protect the witness from self-incrimination. Furthermore, it will shield sensitive information of both the prosecution and the defense by excluding the opposition when each side presents its position to the court.

Finally, the judiciary should not grant immunity to a defense witness absent a request from the prosecution. Although "judicially conferred immunity" may be the most direct and effective way to protect a defendant's rights, it violates the New York immunity statute<sup>119</sup> and interferes with a district attorney's discretion in determining whom to prosecute.<sup>120</sup> Under the current system, once the

<sup>117</sup> The *ex parte* nature of this stage of the hearing does not violate the defendant's due process rights. See *United States v. Turkish*, 623 F.2d 769, 778 (2d Cir. 1980) (suggesting that trial courts should consider defense witness immunity requests using *ex parte* affidavits from prosecution), *cert. denied*, 449 U.S. 1077 (1981). See also Flanagan, *supra* note 11, at 465-66 (hearing to consider prosecution's interest in witness should be *ex parte*; defendant has no right to attend).

<sup>118</sup> See *supra* notes 110-14 and accompanying text.

<sup>119</sup> N.Y. CRIM. PROC. LAW § 50.30 (McKinney 1981). See *supra* note 15 and accompanying text.

<sup>120</sup> See *supra* note 10 and accompanying text.

New York courts have given scant attention to "judicially conferred immunity," probably because of the clear statutory rejection of that approach. See *Shapiro*, 50 N.Y.2d at 773 n.5, 409 N.E.2d at 913 n.5, 431 N.Y.S.2d at 438 n.5 (Gabrielli, J., dissenting) (legislature's delegation of immunity power to prosecution precludes judicial intrusion); *Brockway*, 59 N.Y.2d at 190-91, 451 N.E.2d at 173-74, 464 N.Y.S.2d at 415-16 (Jasen, J., dissenting) (courts should strictly adhere to provisions of immunity statute). *But see* *People v. Osorio*, 108 Misc. 2d 100, 106, 436 N.Y.S.2d 958, 962 (Sup. Ct. N.Y. County 1981) (dictum) (interpreting *Shapiro* to authorize direct judicial grant of immunity), *rev'd on other grounds*, 86 A.D.2d 233, 449 N.Y.S.2d 968 (1st Dep't), *appeal dismissed*, 57 N.Y.2d 671, 439 N.E.2d 886, 454 N.Y.S.2d 77 (1982).

In the federal courts, only one circuit court has endorsed judicially conferred immunity. See *Virgin Islands v. Smith*, 615 F.2d 964, 973-74 (3d Cir. 1980) (alternative holding) (discussed *supra* note 7). The Supreme Court has held that the federal immunity statute does not authorize the judiciary to grant immunity on its own initiative. *United States v. Doe*, 465 U.S. 605, 616 (1984); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 253-54 & n.11, 261 (1983). The *Virgin Islands* court, however, predicated its judicially conferred immunity on inherent judicial powers arising under the fifth amendment. *Virgin Islands*, 615 F.2d at 969-70.

court determines that defense witness immunity is warranted, the prosecution must either request immunity for the prospective witness or forego prosecution of the current defendant. This approach preserves both the defendant's rights and the prosecution's discretion, and precludes a court from deciding an issue in which it has little expertise.<sup>121</sup>

### C. Statutory Reform

The New York legislature should amend the state's immunity statute to require the *in camera* hearing detailed above. Legislative adoption of a uniform procedure would ensure that New York courts consider all relevant factors when evaluating a defense witness immunity request.<sup>122</sup>

The New York legislature should also amend the immunity statute to create a limited immunity protecting the witness only from prosecution for prior perjured testimony.<sup>123</sup> Testifying under this form of immunity, however, should be discretionary with the witness. Forcing an individual to testify without protection from prosecution for substantive crimes revealed probably violates the fifth amendment proscription against compelled self-incrimination.<sup>124</sup> Although most witnesses probably would refuse to testify without a

---

<sup>121</sup> See *supra* note 11 and accompanying text.

<sup>122</sup> See *supra* note 115.

<sup>123</sup> New York courts generally have rejected the validity of immunity grants that provide less protection than the full transactional immunity prescribed by statute. See, e.g., *People v. McFarlan*, 42 N.Y.2d 896, 897, 366 N.E.2d 1357, 1357, 397 N.Y.S.2d 1003, 1003 (1977) (prosecutor's grant of limited immunity covering criminal acts performed only during specified period of time held to be grant of full transactional immunity); *People v. Masiello*, 28 N.Y.2d 287, 289-90, 270 N.E.2d 305, 306-07, 321 N.Y.S.2d 577, 579-80 (1971) (grant of use/derived use immunity insufficient to satisfy immunity statute; witness's contempt conviction for refusing to testify reversed); *Felder v. Supreme Court*, 44 A.D.2d 1, 2-4, 7, 352 N.Y.S.2d 706, 707-09, 712 (4th Dep't 1974) (witness's contempt conviction for refusing to testify reversed because immunity was limited to specified criminal acts). But see *Osorio*, 86 A.D.2d at 239, 449 N.Y.S.2d at 972, *appeal dismissed*, 57 N.Y.2d 671, 439 N.E.2d 886, 454 N.Y.S.2d 77 (1982) (trial court erroneously stated that limited "perjury only" immunity is available in New York; appellate division reversed without addressing propriety of limited immunity). For a discussion of *Osorio*, see *supra* note 52. The arrangement in *Osorio* probably would have been valid if done as a noncoerced, informal agreement between the prosecution and the witness, and not as a formal grant of immunity. See *supra* note 112 for a discussion of informal immunity grants.

<sup>124</sup> In *Kastigar v. United States*, 406 U.S. 441 (1972), the Supreme Court held that use/derived use immunity was constitutional because the protection granted was coextensive with the witness's invocation of his constitutional rights. After testifying under a grant of use/derived use immunity, the witness was no worse off than he was prior to testifying. *Id.* at 453. For further discussion of this case, see *supra* note 16. Compelling a witness to testify after receiving "perjury only" immunity would encounter substantial constitutional problems if the witness revealed participation in other substantive crimes. In such a case the grant of immunity would not be coextensive with the witness's invoca-

grant of transactional immunity,<sup>125</sup> this reform provides an easy solution when a witness is willing to testify with "perjury only" immunity. If the witness is willing to testify with this limited immunity, the court should accord less weight to the prosecution's opposition to the immunity grant because the state may still prosecute the witness for any substantive crimes revealed. Courts should therefore require a grant of such immunity even when the prospective testimony is relevant but only cumulative, unless the prosecution demonstrates a legitimate intent and ability to prosecute the witness for earlier perjury.<sup>126</sup>

---

tion of his fifth amendment privilege because the witness would be significantly worse off after receiving immunity and testifying than he was prior to testifying.

Compelling testimony under "perjury only" immunity could arguably be constitutional if the witness was allowed to invoke the fifth amendment prior to incriminating himself in any nonperjury crimes. This would merely require the witness to realize that he was about to incriminate himself for crimes not covered by his immunity grant. Constitutional problems would clearly arise, however, when the past perjury and substantive crime were closely related. This could occur when the defendant was accused of substantive crime *X* and the witness had formerly testified that he had not committed crime *X*, but now wanted to assist the defendant by admitting both the commission of the substantive crime and his past perjury about the incident.

<sup>125</sup> See, e.g., *Osorio*, 86 A.D.2d at 237, 449 N.Y.S.2d at 970-71 (witness demanded full transactional immunity).

<sup>126</sup> A third reform the legislature should consider is replacing transactional immunity with use/derived use immunity. For a discussion of these types of immunity, see *supra* note 16. Some commentators argue that a forced conferral of use/derived use immunity restricts the prosecution's discretion less than a compelled transactional immunity grant does. E.g., Note, "The Public Has a Claim to Every Man's Evidence":<sup>4</sup> *The Defendant's Constitutional Right to Witness Immunity*, 30 STAN. L. REV. 1211, 1216-18 (1978); Note, *Witness for the Defense*, *supra* note 12, at 1715. Under use/derived use immunity the district attorney retains some ability to prosecute the witness, whereas a transactional immunity grant eliminates the possibility of future prosecution. Other commentators contend, however, that little practical difference exists between transactional and use/derived use immunity. Carlson, *supra* note 16, at 134, 136; Flanagan, *supra* note 11, at 461; Mykkeltvedt, *supra* note 9, at 690-91. Thus, a change from transactional to use/derived use immunity might have little effect. Finally, abandonment of transactional immunity might frustrate the purpose of the immunity statute. Some authorities believe that transactional immunity is more effective than use/derived use immunity in motivating recalcitrant witnesses to testify fully. See 1 W. LAFAVE & J. ISRAEL, *supra* note 10, § 8.11, at 689 (proponents of transactional immunity argue that some witnesses hesitate to testify fully under use/derived use immunity because some possibility of prosecution remains).

Adoption of use/derived use immunity may be warranted, however, because of the New York Court of Appeals's demonstrated reluctance to restrict prosecutorial discretion by a grant of transactional defense witness immunity. The admittedly small change that would result from adopting use/derived use immunity might enable the courts to grant defense witness immunity in close cases such as *Sapia*, *Adams*, and *Owens*. In considering whether to adopt use/derived use immunity, the New York legislature must consider how this reform would affect both prosecution and defense witness immunity grants. This evaluation is beyond the scope of this Note.

## CONCLUSION

In *People v. Shapiro* the New York Court of Appeals adopted a position protecting defendants' rights through defense witness immunity. The court went beyond the analysis of its earlier opinion in *People v. Sapia* and concluded that a defendant's due process and compulsory process rights may require a grant of immunity for a defense witness where either prosecutorial misconduct affects the evidence available at trial or a denial of immunity otherwise deprives the defendant of vital exculpatory testimony. Although *Shapiro* was strongly supportive of defendants' rights, the court's subsequent decisions in *People v. Adams* and *People v. Owens* demonstrate that defendants in New York will encounter substantial difficulties in overriding the prosecution's discretion in conferring immunity.

Although the court of appeals's position on defense witness immunity provides less protection for a defendant's rights than might be optimal, the real shortcoming of the court's approach to immunity is the current uncertainty of the law that the *Owens* decision and the denial of leave to appeal in *People v. Priester* have generated. The court of appeals should alleviate this confusion in the next defense witness immunity case by providing a detailed discussion of a defendant's rights to immunized testimony. Finally, the judiciary should utilize a two-stage *in camera* hearing procedure for evaluating defense witness immunity requests because it will best protect the interests of the defendant, witness, and prosecution.

Furthermore, the New York legislature should act to solve the defense witness immunity dilemma. Adoption of the two-stage *in camera* hearing procedure will ensure uniform consideration of all relevant factors. Limited "perjury only" immunity will provide an easy solution when a witness is willing to testify with this lower level of protection. Implementation of these proposals will increase the protection accorded a defendant's due process and compulsory process rights and still preserve the witness's fifth amendment privilege and the prosecutor's discretion. The New York experience could serve as a model solution to the defense witness immunity problem for the federal and other state jurisdictions.

Thomas D. Dinackus