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## H.B. 491: Ohio's New Transactional Immunity Statute

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## H. B. 491: OHIO'S NEW TRANSACTIONAL IMMUNITY STATUTE

### I. INTRODUCTION

Governmental power to compel persons to testify in court is firmly established in American law.<sup>1</sup> Both the constitutions of the United States and Ohio, however, set forth a privilege against compulsory self-incrimination.<sup>2</sup> Statutes which empower a court to compel testimony over a claim of privilege against self-incrimination in return for protection against criminal punishment are called immunity statutes. Such statutes seek a rational accommodation between the constitutional imperatives of the privilege against self-incrimination and the governmental need for testimony.<sup>3</sup> The United States Supreme Court has characterized immunity statutes as essential to the efficient enforcement of certain criminal statutes.<sup>4</sup> Mr. Justice Frankfurter observed that immunity statutes have "become part of our constitutional fabric."<sup>5</sup>

In *Kastigar v. United States*,<sup>6</sup> the Supreme Court of the United States held that in order to compel testimony over a witness' claim of privilege against self-incrimination, a court must grant "use and derivative use" immunity to the witness. "Use and derivative use" immunity means that neither the actual compelled testimony nor information directly or indirectly derived from the compelled testimony may be used as evidence against the witness in any subsequent criminal action.<sup>7</sup>

Use and derivative use immunity has been criticized as inadequate because, as Mr. Justice Marshall concluded in his dissent in *Kastigar*, it fails to place the witness in the same position with the government as he would have been in had he not testified.<sup>8</sup> As a practical matter, it is very difficult to determine in a subsequent criminal proceeding whether the prosecution's evidence has been obtained independently of or derived from the compelled testimony.<sup>9</sup> Under use and derivative

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1. See *Ullman v. United States*, 350 U.S. 422, 439 n.15 (1956); *Blair v. United States*, 250 U.S. 273 (1919).

2. U.S. CONST. amend. V; OHIO CONST. art. I, § 10.

3. *Kastigar v. United States*, 406 U.S. 441, 446 (1972).

4. *Brown v. Walker*, 161 U.S. 591, 610 (1896).

5. 350 U.S. at 438.

6. 406 U.S. 441 (1972).

7. *Id.* at 448-49.

8. *Id.* at 468.

9. See Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103, 165; Note, *The Unconstitutionality of Use Immunity: Half a Loaf Is Not Enough*, 46 SO. CAL. L. REV. 202, 208 (1972).

use immunity, the government is not prevented from focusing an investigation on a witness as a result of compelled testimony in order to gain "independent" evidence which it might not otherwise have considered or pursued.<sup>10</sup> Furthermore, if the witness chooses to testify in his own behalf in a subsequent criminal proceeding, there is a real possibility that information obtained from the compelled testimony may be used for impeachment purposes without any direct reference to the source of the information.<sup>11</sup>

In 1978, the Ohio Legislature repealed the existing provision for grants of use and derivative use immunity and enacted a new section 2945.44, which is substantially identical to Rule 732 of the Uniform Rules of Criminal Procedure.<sup>12</sup> The Ohio Revised Code now provides that a witness compelled to testify over his claim of privilege against self-incrimination "shall not be prosecuted or subjected to any criminal penalty . . . for or on account of any transaction or matter concerning which . . . he gave an answer or produced any information."<sup>13</sup> This "transactional" immunity puts the compelled witness in at least as good a position as he would have been in had he not testified.<sup>14</sup> Thus, by providing for grants of transactional rather than use and derivative use immunity, Ohio has taken a step beyond the constitutional requirements set forth in *Kastigar* and should avoid the problems inherent in use and derivative use immunity.

## II. ANALYSIS

Protection against prosecution for any transaction about which the witness testifies is a broad grant of immunity, but there are limitations. Section 2945.44 provides that a witness will not be prosecuted for any transaction about which he testifies "in compliance with the order."<sup>15</sup> The comments to Rule 732 of the Uniform Rules of Criminal Procedure explain this language to mean that no immunity will attach to an answer or to information produced which is not responsive to the

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10. *United States v. Friedland*, 441 F.2d 855, 859-60 (2d Cir. 1971), *cert. denied*, 404 U.S. 867 (1971).

11. *Dershowitz & Ely, Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1223 (1971).

12. 1978 Ohio Legis. Bull. 140.

13. OHIO REV. CODE ANN. § 2945.44(B) (Page Supp. 1978).

14. 406 U.S. at 468-69 (Marshall, J., dissenting). The majority in *Kastigar* concluded that the transactional immunity affords broader protection than does the fifth amendment privilege against self-incrimination. *Id.* at 453. From that proposition, it follows that the majority in *Kastigar* might also conclude that transactional immunity places the witness in a better position than if he had not testified.

15. OHIO REV. CODE ANN. § 2945.44(B) (Page Supp. 1978).

question asked.<sup>16</sup> While Ohio did not adopt the comments to the uniform rule as law, they are nevertheless helpful in interpreting the language of section 2945.44. The "responsiveness" limitation is a brake against unnecessary grants of immunity<sup>17</sup> and is a barrier to the witness who would intentionally tender information not sought in an effort to insulate himself from subsequent criminal prosecution.<sup>18</sup> Section 2945.44 also provides that if, in fact, the witness had no privilege to withhold testimony or to refuse to produce information, then no immunity will attach to the testimony.<sup>19</sup> Again, unnecessary grants of immunity are to be avoided.<sup>20</sup>

One of the most significant aspects of the new immunity statute is that no grant of immunity may be made except on the prosecutor's written request to the court.<sup>21</sup> Under prior Ohio law, when a witness refused to testify, immunity could be granted to that witness upon the request of either the prosecutor or the defendant,<sup>22</sup> or upon the court's own initiative.<sup>23</sup> In refusing this power to the defendant and the trial judge, the comments to rule 732 state that "immunity is essentially a law enforcement instrument and the enforcement authorities constitute the proper agency to exercise the principal control over immunity grants."<sup>24</sup>

Even though section 2945.44 precludes the court from initiating immunity grants, the court retains some authority to prevent abuses. Section 2945.44 permits the court to refuse to grant immunity and thus to refuse to compel testimony if it finds that to grant immunity "would not further the administration of justice."<sup>25</sup> The comments to rule 732 conclude that this provision allows the court the authority to prevent abuses but provides no standard for determining when a grant of immunity would not further the administration of justice.<sup>26</sup> Because immunity is to be considered primarily a prosecutorial tool, the court

16. UNIFORM RULE OF CRIMINAL PROCEDURE 732(b), Comment D.

17. *Id.*

18. See *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 477 (1972) (dealing with the "responsiveness" limitation in N.J. REV. STAT. § 52:9M-17(b) (1970)).

19. "If, but for this section, the witness would have been privileged to withhold an answer or any information . . ." OHIO REV. CODE ANN. § 2945.44(B) (Page Supp. 1978).

20. UNIFORM RULE OF CRIMINAL PROCEDURE 732(b), Comment C.

21. OHIO REV. CODE ANN. § 2945.44(A)(1) (Page Supp. 1978).

22. *State v. Broady*, 41 Ohio App. 2d 17, 17, 321 N.E.2d 890, 892 (1974).

23. OHIO REV. CODE ANN. § 2945.44 (Page 1975) (repealed 1976); 1976 Ohio Laws 4-99 (amending § 2945.44) (repealed 1978).

24. UNIFORM RULE OF CRIMINAL PROCEDURE 732(a), Comment.

25. OHIO REV. CODE ANN. § 2945.44(A) (Page Supp. 1978).

26. UNIFORM RULE OF CRIMINAL PROCEDURE 732(a), Comment.

should exercise its discretion to deny immunity only where it is substantially clear that the testimony at issue is not necessary to maintain a prosecution or fully explore the alleged wrongdoing, or is otherwise irrelevant or immaterial.

Section 2945.44 also provides that a witness' claim of privilege against self-incrimination is necessary to trigger a request for and a grant of immunity.<sup>27</sup> The language of the prior immunity statute indicated that a limited grant of immunity was not precluded by a voluntary waiver of a witness' constitutional privilege.<sup>28</sup> This change reflects the belief that immunity should be used only when necessary to obtain evidence which is otherwise unavailable and is tied to the policy of avoiding gratuitous grants of immunity.<sup>29</sup> This requirement, by giving the prosecution notice of those matters which the witness deems incriminating, affords the prosecutor a better basis for considering the advisability of a grant of immunity in a given situation.<sup>30</sup>

Use and derivative use immunity does not protect a witness from prosecution for a crime or activity about which he testified;<sup>31</sup> rather, use and derivative use immunity means that neither the actual compelled testimony nor information directly or indirectly derived from the compelled testimony may be used as evidence against the witness in any subsequent criminal action.<sup>32</sup> Transactional immunity, on the other hand, does protect the witness from prosecution for any criminal act about which he testified.<sup>33</sup> Because transactional immunity provides greater protection for the compelled witness than does use and derivative use immunity, the witness is more likely to tell what he knows and to tell it truthfully.<sup>34</sup> Thus, transactional immunity offers greater bargaining power to the government to further its enforcement efforts.<sup>35</sup>

According to section 2945.44, the court must inform the witness that he will receive immunity under the statute prior to compelling testimony.<sup>36</sup> It is not clear whether the court need only inform the

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27. OHIO REV. CODE ANN. § 2945.44(A) (Page Supp. 1978).

28. 1976 Ohio Laws 4-99 (amending § 2945.44) (repealed 1978).

29. UNIFORM RULE OF CRIMINAL PROCEDURE 732(a), Comment.

30. *Id.*

31. *State v. Broady*, 41 Ohio App. 2d at 17, 321 N.E.2d at 892.

32. 406 U.S. at 448-49.

33. OHIO REV. CODE ANN. § 2945.44(B) (Page Supp. 1978).

34. UNIFORM RULE OF CRIMINAL PROCEDURE 732(b), Comment B(6).

35. Note, *Immunity From Prosecution and the Fifth Amendment: An Analysis of Constitutional Standards*, 25 VAND. L. REV. 1207, 1229 (1972).

36. OHIO REV. CODE ANN. § 2945.55(A)(2) (Page Supp. 1978). If "[t]he court of common pleas informs the witness that by answering, or producing the information he will receive immunity under division (B) of this section."

witness that he has immunity and therefore must testify, or whether the court must explain that he will be immune from prosecution for any matter about which he testifies. Because a witness who has transactional immunity is more likely to testify freely and truthfully, it would be in the best interests of justice to make sure that the witness understands the scope of his immunity. Therefore, this requirement should be interpreted to require the judge to briefly explain the scope of immunity under section 2945.44 prior to compelling testimony.

An important issue regarding a witness' privilege against self-incrimination is whether a state which has granted immunity under its laws may compel a witness to give testimony which would incriminate him in another jurisdiction. In *Murphy v. Waterfront Commission of New York Harbor*,<sup>37</sup> the United States Supreme Court concluded that "the constitutional privilege against self-incrimination protects a state witness against incrimination under federal law as well as state law and a federal witness against incrimination under state as well as federal law."<sup>38</sup> The Court held that where a witness is granted immunity under state law, the state can compel the testimony despite the risk of incrimination under federal law, but the federal court is prohibited from making any use of such compelled testimony or of its fruits.<sup>39</sup> The Court indicated that the result would be the same if the testimony is compelled by the federal court and used by the state.<sup>40</sup> Accordingly, it has been held that when one jurisdiction compels self-incriminating testimony under a grant of immunity, a second jurisdiction must respect that grant of immunity and refrain from the use of that compelled testimony or its fruits in any subsequent criminal action.<sup>41</sup>

It does not follow, however, that a grant of transactional immunity in one jurisdiction becomes transactional immunity in the second jurisdiction;<sup>42</sup> rather, a witness granted transactional immunity in Ohio may have use and derivative use immunity in the second jurisdiction. Thus, whenever testimony is compelled in Ohio under section 2945.44 and the incriminating nature of the testimony relates to other jurisdictions, the quality of the testimony may be affected by the witness' fear of future prosecutions in other jurisdictions.

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37. 378 U.S. 52 (1964).

38. *Id.* at 77-78.

39. *Id.* at 79.

40. *Id.* at 53 n.1.

41. *In re Bianchi*, 542 F.2d 98, 101 (1st Cir. 1976).

42. *See United States v. Anzalone*, 555 F.2d 317 (2d Cir. 1977), *rehearing denied*, 98 S.Ct. 732 (1978) (transactional immunity granted by New York, use immunity recognized by federal court); *People v. Lev*, 91 Misc. 2d 241, 398 N.Y.S.2d 593 (1977) (New York defendant with transactional immunity would receive use immunity in New Jersey court).

It also does not follow that a witness who incriminates himself under Ohio law while testifying under immunity in another jurisdiction will have transactional immunity in Ohio merely because section 2945.44 provides for transactional immunity. Rather, immunity is granted under section 2945.44 when a witness is compelled to testify "[i]n any criminal proceeding in this state."<sup>43</sup> Furthermore, under *Murphy*, it is not the second jurisdiction's immunity statute which forbids the use of the compelled testimony or its fruits; rather it is the witness' constitutional privilege against self-incrimination which demands that protection.<sup>44</sup>

Finally, it is important to note that section 2945.44 does not protect the compelled witness from prosecution and criminal penalties for any perjury, falsification, or tampering with evidence committed while testifying under a grant of immunity.<sup>45</sup>

### III. CONCLUSION

Section 2945.44 of the Ohio Revised Code provides that a witness compelled to testify over a claim of privilege against self-incrimination will be given transactional immunity. The statute also provides that no grant of immunity may be made except upon a written request by the prosecutor, and that a witness' initial refusal to answer upon a claim of privilege against self-incrimination is necessary to trigger the request for, and the grant of, immunity. Furthermore, the court must inform the witness that he will receive immunity under the statute prior to compelling the testimony. The transactional immunity granted under section 2945.44, however, will not necessarily extend into any other jurisdiction in which the witness' compelled testimony incriminates him; rather, the witness will usually be protected by use and derivative use in those other jurisdictions to which the incriminating testimony relates.

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Code Sections Affected: § 2945.44.

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Committee: Judiciary (H & S).

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43. OHIO REV. CODE ANN. § 2945.44(A) (Page Supp. 1978).

44. 378 U.S. at 77-78.

45. OHIO REV. CODE ANN. § 2945.44(C) (Page Supp. 1978).