

[CAPTION]

MOTION TO COMPEL GRANT OF IMMUNITY

The Defendant, by counsel, respectfully requests this Court to compel the State to grant use and derivative immunity to the following witnesses for purpose of Defendant's depositions and all other compelled testimony in this cause: [insert witnesses]. In support of this motion, Defendant offers the following analysis:

1. The Defendant is innocent of all charges levied against him. Defendant's trial defense will be that another individual with access to [decedent / victim] perpetrated the injuries upon the victim.

2. Defendant has served subpoenas upon each of these witnesses for purpose of oral deposition on [insert date].

3. The Defendant has been notified by counsel for [insert witness] that [insert witness] intends to invoke her Fifth Amendment privileges at this deposition.

4. Defendant believes that [insert witnesses] ought to invoke their Fifth Amendment privileges as well and if they do so, both of these witness should be conveyed use and derivative immunity.

5. Undersigned counsel has attempted informally get the prosecutor to convey immunity upon these witnesses and he has taken the position that immunity will not be conveyed.

6. While Defendant does not have a general due process right to compel immunization of defense witnesses, the State cannot be allowed to use its power to interfere with the defense's presentation of its case or to prevent defense witnesses from testifying. See Bubb v. State, 434 N.E.2d 120, 124 (Ind.Ct.App. 1982) (citing Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351 (1972); Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920); Moore v. State, 655 N.E.2d 1251 (Ind.Ct.App. 1995).

7. It should be noted that the State took formal statements from all of these witnesses in conducting its investigation of this case. Each of the statements contains material and exculpatory information in favor of Defendant's case. It is the Defendant's position that the State is resisting the conveyance of immunity upon these witnesses purely to gain an unfair tactical advantage because Defendant shall prove his innocence through the cross-examination of these witnesses.

8. It should further be noted that the State relied upon the statements of these witnesses, in addition to the acts and conduct of these witnesses in securing a grand jury indictment against Defendant. Defendant has had no opportunity to cross-examine these witnesses and to expose them as culpable persons in this crime or otherwise exculpatory witnesses. Defendant has at all times cooperated with the authorities in this matter, as he has nothing to hide. Defendant can only demonstrate his innocence through the cross examination of these witnesses. To allow these witnesses, whom most likely are murderers and/or accomplices after-the-fact, immunity, is a most extreme injustice.

9. The grand jury process which led to Defendant's indictment was based upon perjured testimony, an abuse of process, and manipulated evidence. (Defendant intends to file a motion to dismiss the indictment). The State's only hope of securing a conviction against Defendant is to further manipulate the process by denying immunity to those who are culpable in offense. The State cannot articulate good faith for failing to confer immunity. The grant of immunity would in no way preclude the State from subsequently indicting by information or otherwise these individuals. That the State chose to rely upon a tainted grand jury process, which led to the erroneously indictment of an innocent man, is no excuse for furthering the injustice.

10. Neither will these witnesses be adversely affected through a compulsion to testify. Where grant of immunity is coextensive with constitutional privilege against self-incrimination, a witness can be forced to testify; witness' right against self-incrimination is not violated where grant of immunity leaves witness in substantially same position as if privilege to remain silent had been properly exercised. Furrer

v. State, 709 N.E.2d 744 (Ind.Ct.App. 1999). Use immunity and derivative use immunity, granted in conjunction, leave witness in substantially the same position as if the witness had claimed the privilege and thus do not violate witness' right against self-incrimination. Matter of Contempt of Steelman, 648 N.E.2d 366 (Ind.Ct.App. 1995)

11. None of these witnesses' pre-trial statements can be used as substantive evidence against Defendant unless Defendant has the opportunity to cross-examine the witnesses. See e.g., Lee v. Illinois, 476 U.S. 503, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986); Crawford v. Washington, 124 S.Ct. 1354 (2004).

12. The court's refusal to compel these depositions denies Defendant his Sixth Amendment right of confrontation. A similar right is guaranteed by Article 1, Section 13 of the Indiana Constitution.

13. The issue is whether the State's refusal to immunize these witnesses improperly interferes with the Defendant's case and violates the Due Process Clause. The Court of Appeals, borrowing language from the Third Circuit, outlined a strict test:

[T]he evidentiary showing required to justify reversal on [whether or not the Due Process Clause was violated] must be a substantial one. The defendant must be prepared to show that the government's decisions were made with the deliberate intention of distorting the judicial fact-finding process. Where such a showing is made, the court has inherent remedial power to require that the distortion be redressed by requiring a grant of use immunity to defense witnesses as an alternative to dismissal. Moore v. State, 655 N.E.2d 1251, 1253 (Ind.Ct.App. 1995) (quoting United States v. Herman, 589 F.2d 1191, 1204 (3d Cir.1978)); accord United States v. Schweihs, 971 F.2d 1302, 1315 (7th Cir. 1992).

Interference with the Defendant's case or "[d]istortion of the fact-finding process may be established by showing: (1) that prosecutorial overreaching, through threats, harassment, or other forms of intimidation, has effectively forced the witness to invoke the Fifth Amendment, or the prosecutor has engaged in discriminatory use of immunity grants to gain a tactical advantage; (2) the witness' testimony is material, exculpatory, and not cumulative; and (3) the defendant has no other way to obtain the evidence." Baxter v. State, 727 N.E.2d 429, 433 (Ind. 2000) (citing Goudy v. State, 689 N.E.2d 686, 696 (Ind.1997) (citations omitted)); Moore v. State, 655 N.E.2d 1251, 1253 (Ind.Ct.App.1995) (quoting Blissett v. Lefevre, 924 F.2d 434, 442 (2d Cir.1991)).

14. Because the State can offer no explanation for its failure to convey immunity, there is a presumption that the State is motivated only by an effort to gain improper tactical advantage. Reed v. State, 748 N.E.2d 381 (Ind. 2001).


15. The right to cross-examine witnesses is guaranteed by the Sixth Amendment to the United States Constitution. It is "one of the fundamental rights of our criminal justice system." Pigg v. State, 603 N.E.2d 154, 155 (Ind. 1992). To be sure, "this right is subject to reasonable limitations placed at the discretion of the trial judge." McQuay v. State, 566 N.E.2d 542, 543 (Ind.1991); accord Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). "[T]rial judges retain wide latitude ... to impose reasonable limits ... based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Van Arsdall, 475 U.S. at 679, 106 S.Ct. 1431.


WHEREFORE, Defendant requests that this Court compel immunity.


(Signature)


CASE LAW


CASEBANK O.5.c


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

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

Moore v. State, [655 N.E.2d 1251](#)  (Ind.Ct.App. 1995) (the trial court's refusal to compel State to grant use immunity to a defense witness did not deny the Defendant due process).

Bubb v. State, [434 N.E.2d 120, 124](#)  (Ind.Ct.App. 1982) (court has inherent remedial power to require distortion of fact finding be redressed by requiring grant of use immunity to defense witnesses).

Bussberg v. State, [827 N.E.2d 37](#)  (Ind.Ct.App. 2005) (at probation revocation hearing, State requested and trial court granted use immunity to Defendant so that an affirmative answer regarding drug use could not be used against him in a future prosecution; Fifth Amendment could only be invoked if probationer were exposed to future prosecution and not if the answer simply related to alleged probation violation).

J.J. v. State, [858 N.E.2d 244](#)  (Ind.Ct.App. 2006) (Defendant received ineffective assistance of counsel when counsel failed to inform jury that state's witness, who was co-defendant, was granted use immunity; jury should have before it all the relevant circumstances which cause or induce the witness to testify including rewards for such testimony and any promised by the state or prosecuting attorney to grant immunity).