

FIFTH AMENDMENT PRIVILEGE AND GRANT OF IMMUNITY

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Contents

- I. Introduction..... 1
- II. The Fifth Amendment Privilege..... 1
 - A. Overview..... 1
 - B. Invoking the Privilege 2
 - C. Judge’s Warning of Right to Invoke the Privilege 3
 - D. Voir Dire Hearing 3
 - E. Deciding Validity of Invocation of Privilege 4
 - F. Witness’s Invocation of Privilege and Right to Cross-Examine Witnesses..... 5
 - G. Court’s Discretion to Allow Parties to Call Witness Before Jury to Invoke Privilege..... 6
 - H. Comment on Defendant’s Not Testifying; Jury Instructions 7
- III. Statutory Immunity..... 9
 - A. Introduction 9
 - B. District Attorney’s Application for Immunity 10
 - C. Hearing and Ruling on Application 10
 - D. The Judge’s Order 10
 - E. Appeal 11
 - F. Jury Instructions..... 11
 - G. Jury Argument and Introducing Evidence About Grant of Immunity 11
 - H. State’s Later Use of Witness’s Testimony Given With Immunity..... 11

I. Introduction. This outline discusses two separate but related topics: (1) a formal grant of immunity under Article 61 of Chapter 15A (G.S. 15A-1051 through 15A-1055) (hereafter, “statutory immunity”) to a witness who has invoked or is expected to invoke the Fifth Amendment privilege against self-incrimination (hereafter, “Fifth Amendment privilege” or “privilege”); and (2) issues that may arise when a witness invokes the privilege at a criminal court proceeding. Although the Fifth Amendment privilege may be invoked in any criminal or civil proceeding or during a criminal investigation, this outline primarily focuses on an invocation in a criminal court proceeding.

For a comprehensive discussion of the Fifth Amendment privilege, see 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE §§ 114-143 (7th ed. 2013) [hereinafter MCCORMICK]. See *a/so* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 126 (7th ed. 2011).

II. The Fifth Amendment Privilege.

A. Overview. The Fifth Amendment privilege protects a person against compelled self-incrimination. A similar privilege exists in section 23 of article I of the North Carolina Constitution; the state constitutional provision has not been interpreted more expansively than the Fifth Amendment, and for simplicity the term “Fifth Amendment privilege” will be used throughout this outline.

While the privilege protects a person against compelled testimony and similar communications, it does not protect against compelled nontestimonial acts such as submitting to fingerprints, photographs, and sobriety testing, speaking for identification, appearing in lineups, and giving blood samples. See *e.g.*, *Schmerber v. California*, 384 U.S. 757, 764-65 (1966) (withdrawal and

chemical analysis of blood did not implicate defendant's "testimonial capacities" and thus did not violate Fifth Amendment).

The privilege may be invoked in any proceeding, civil or criminal, including a criminal investigation. It protects against any compelled disclosures that a person reasonably believes could be used in a criminal prosecution or could lead to the discovery of other evidence that might be used in a prosecution. *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972). When a witness invokes the privilege, the trial court must determine whether it may be "reasonably inferred" that the answer may be incriminating, and the invocation should be "liberally construed." See Section II.E. below, discussing standards for deciding the validity of invocation of the privilege.

A criminal defendant has the right under the Fifth Amendment privilege to decline to take the stand. If a defendant decides not to testify, the State or a judge may not call the defendant to the stand, and a codefendant may not call the defendant to the stand at their joint trial. However, a defendant who voluntarily takes the stand and testifies in his or her own behalf cannot invoke the privilege on cross-examination concerning matters made relevant by direct examination. See Section II.B. below, discussing invoking the privilege.

A witness who is not a criminal defendant has the right under the Fifth Amendment privilege to refuse to answer a question if:

- the answer may tend to incriminate the witness (See Section II.E. below, discussing standards for deciding the validity of invoking the privilege),
- the witness is not immune from prosecution (See Section III. below, discussing statutory immunity), *and*
- the witness has timely invoked the privilege in response to a question (see *Minnesota v. Murphy*, 465 U.S. 420, 427-28 (1984)).

However, a witness who testified on direct examination cannot invoke the privilege on cross-examination concerning matters made relevant by direct examination. See Section II.B. below, discussing invoking the privilege.

A judge has the discretion whether to advise a witness of his or her right not to answer incriminating questions, see Section II.C. below, and to allow the State or the defendant to call a witness to invoke the privilege before the jury, see Section II.G. below.

B. Invoking the Privilege. A criminal defendant has a Fifth Amendment privilege to decline to testify at his or her trial. Whether the defendant will testify or not is typically determined after the State has presented its case. Sample colloquies that can be used for this purpose are provided in the section entitled "[Trying a Non-Capital Criminal Case—An Outline for the Trial Judge](#)" at p. 4 in this Benchbook.

A defendant who voluntarily takes the stand and wishes to invoke the privilege in response to a question must make the invocation himself or herself or through defense counsel. Note, however, that a defendant who voluntarily takes the stand and testifies in his or her own behalf cannot invoke the privilege on cross-examination concerning matters made relevant by direct examination. *Brown v. United States*, 356 U.S. 148, 155-56 (1958); *Rogers v. United States*, 340 U.S. 367, 374-75 (1951). For example, the defendant in *Brown* testified on direct examination that she had never taught or advocated the overthrow of

existing government or belonged to any organization that so advocated. *Brown*, 356 U.S. at 150. The Court held that she was properly held in contempt of court for refusing on cross-examination to answer whether she had been or was a member of the Communist Party and to answer other questions concerning her involvement in Communist activities. *Id.* at 155-56.

A defendant's plea of guilty and answers to a judge's questions at a plea colloquy do not bar a defendant from invoking the Fifth Amendment privilege at the defendant's sentencing hearing. *Mitchell v. United States*, 526 U.S. 314, 324-25 (1999).

A defendant or other witness may invoke the Fifth Amendment privilege after a conviction and sentencing if there is a pending appeal or there is a reasonable possibility of prosecution by another jurisdiction for similar misconduct (for example, a state defendant pleads guilty and a federal prosecution may be brought). See *State v. Eason*, 328 N.C. 409, 419 (1991) (witness could invoke privilege when asked questions about incident that led to her conviction in district court, and the case was still pending in superior court for trial de novo); *United States v. Kennedy*, 372 F.3d 686, 691-92 (4th Cir. 2004) (conviction pending appeal); *State v. Pickens*, 346 N.C. 628, 637-38 (1997) (sufficient fear of later federal prosecution); *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 77-78 (1964). However, the possibility of collateral attack on a conviction is insufficient to invoke the privilege. *MCCORMICK* at § 121.

A witness who is not a defendant generally must submit to questioning and invoke the Fifth Amendment privilege in response to each question, although sometimes a blanket invocation may be appropriate when it is clear that any question would be subject to the privilege. *MCCORMICK* at § 130. And the witness, like a defendant, may not invoke the privilege on cross-examination concerning matters made relevant on direct examination. *State v. Ray*, 336 N.C. 463, 469-70 (1994).

- C. Judge's Warning of Right to Invoke Privilege.** A judge has the discretion whether to advise a witness of his or her right not to answer incriminating questions. See *State v. Poindexter*, 69 N.C. App. 691, 694 (1984) (pro se defendant); *State v. Lashley*, 21 N.C. App. 83, 84-85 (1984) (same); *MCCORMICK* at § 131 ("trial judge who becomes aware that the questioning of a witness raises the risk that the witness by responding will incriminate himself . . . has substantial discretion as to whether and how to respond"). There is no statutory authorization for a judge to appoint counsel for a witness who is indigent, and thus the Office of Indigent Defense Services is not authorized to pay for such representation. However, the judge could give any witness, indigent or not, an opportunity to consult with counsel before answering questions. And an attorney could volunteer at a judge's request to represent an indigent witness for this limited purpose.
- D. Voir Dire Hearing.** Sometimes the issue of the invocation of the privilege will be raised before trial and can be decided then. If the issue arises during the trial, the judge's inquiry of a witness should be conducted outside the jury's presence. The judge may decide that the issue is clear, and a limited inquiry is sufficient to make a determination. However, a hearing often may be appropriate if the court needs additional evidence or information. See, e.g., *State v. Pickens*, 346 N.C. 628, 637-38 (1997). The court needs to be careful that its questioning, as well as any questions by counsel for the parties and the witness, do not require the

witness to reveal the very information that the Fifth Amendment is designed to protect.

- E. **Deciding Validity of Invocation of Privilege.** *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951), provides guidance to judges in deciding whether an invocation of the privilege should be upheld (the scope of the privilege is discussed above in Sections II.A. and II.B. and statutory immunity is discussed below in Section III). The Court stated:

The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a [crime]. But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer if it clearly appears to the court that he is mistaken. However, if the witness, upon [invoking the privilege], were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.

Hoffman v. United States, 341 U.S. 479, 486-87 (1951) (internal quotation and citation omitted).

North Carolina cases provide similar advice: When a witness invokes the Fifth Amendment privilege, the trial court must determine whether it may be “reasonably inferred” that the answer may be incriminating, and the invocation should be “liberally construed.” *State v. Pickens*, 346 N.C. 628, 637 (1997). The trial court must determine from the implications of the question and in the setting in which it is asked whether real danger exists and should deny the claim only if there is “no such possibility.” *Id.*

For sample cases when North Carolina appellate courts held that the trial court did not err by ruling that a witness had properly invoked the privilege, see *State v. Pickens*, 346 N.C. 628, 637-38 (1997) (trial court did not err in ruling that the witness, an accomplice of the defendant who the defendant intended to call on his behalf, had a right to invoke the Fifth Amendment privilege based on the possibility of a future federal prosecution, even though the witness had already pled guilty to the state charges and had served his prison sentence); *State v. Eason*, 328 N.C. 409, 418-19 (1990) (trial court did not err in allowing a witness to invoke the Fifth Amendment privilege when she was asked questions about an

incident that led to her conviction in district court, and the case was still pending in superior court for trial de novo); and *State v. Hatcher*, 156 N.C. App. 391, 396-97 (2003) (trial court did not err in allowing a witness to invoke the Fifth Amendment privilege when he was asked possibly incriminating details about a pending murder charge that was unrelated to the case being tried). For a case when the trial court erred by rejecting a witness's invocation of the privilege, see *In re Jones*, 116 N.C. App. 695, 700-01 (1994) (the trial court erred in not allowing a defense witness to invoke the Fifth Amendment privilege and also erred in finding the witness in criminal contempt for refusing to answer two questions by the prosecutor: (1) the answer to one question (did you owe people money for drugs?) would furnish a link in the chain of evidence to prosecute the witness for a pending murder charge, and (2) the answer to another question (do you have a reputation for robbing drug dealers?) could be used in a future criminal prosecution; the court noted that there should be a liberal construction of the Fifth Amendment privilege in deciding whether to uphold an invocation of the privilege).

F. Witness's Invocation of Privilege and Right to Cross-Examine Witness.

Sometimes a State's witness will testify on direction examination but on cross-examination will assert the privilege to one or more questions by defense counsel. In this context, the trial court must address three issues: (1) whether the privilege has been properly invoked, (2) if not properly invoked, should the trial court compel the witness to answer, and (3) if the witness refuses to answer, should all or part of the witness's testimony on direct examination be stricken. At least two North Carolina cases have dealt with these issues. In *State v. Ray*, 336 N.C. 463, 467-68 (1994), the defendant was on trial for a drug-related murder. The State's witness to the murder testified on direct examination about his observations of the defendant's acts in committing the murder and his own involvement in the drug trade. On cross-examination by defense counsel he refused under the Fifth Amendment to answer some drug-related questions. (Note: Whether the witness was properly allowed to invoke the privilege was not an issue in the defendant's appeal.)

The court noted that the issue of drug dealing among the State's witness, the victim, and the defendant was addressed during the State's direct examination of the witness. *Id.* at 472. Thus, the witness's invocation of the privilege during cross-examination by defense counsel did not merely preclude inquiry into collateral matters bearing only on the credibility of the witness. Rather, the invocation prevented the defendant from inquiring into matters about which the witness had testified on direct examination. *Id.* The witness attempted to "disclose part of the facts and withhold the rest," which he could not do. *Id.* (citation omitted). The court held that the trial court should have either required the witness to answer the defendant's questions or struck all or part of his direct testimony. *Id.* See also *State v. Perry*, 210 N.C. 796 (1936) (similar ruling). For additional analysis, see Jeffrey B. Welty, *Selective Assertion of the Fifth Amendment Privilege*, NORTH CAROLINA CRIMINAL LAW BLOG (UNC School of Government, June 4, 2009), <http://nccriminallaw.sog.unc.edu/?p=409>.

In *State v. Callicutt*, 157 N.C. App. 573, *1 (2003) (unpublished), a State's witness in a DWI suppression hearing was the investigating officer, although he was no longer employed as an officer when the hearing was held. On cross-examination, he admitted that he was no longer employed, but he invoked his Fifth Amendment privilege when asked why he had left that employment. The

trial court denied defendant's motion to strike the witness's entire testimony. *Id.* The court, relying on *State v. Ray* (discussed above) and its distinction between inquiry into direct testimony and collateral matters such as witness credibility, upheld the trial court's ruling. *Id.* at *2-3. The court noted that there was no indication that the witness's departure from the police department was in any way related to the DWI case. Instead, it was a collateral matter bearing only on his general credibility rather than the particular details of his direct testimony in this case. *Id.* See also N.C. R. EVID. 608(b) ("The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility").

- G. Trial Court's Discretion Whether to Allow Parties To Call Witness Before Jury To Invoke Privilege.** Suppose a party knows that its witness will invoke the Fifth Amendment privilege. May the trial court, at the party's request, require the witness to take the stand and invoke the privilege before the jury? The North Carolina case law—discussed immediately below—suggests that if a party seeks to call a witness whose testimony will consist solely of asserting the Fifth Amendment privilege, the trial court should conduct a voir dire if there is an objection to the proposed testimony by the non-calling party. The calling party should be required to show how its case would be seriously prejudiced if not allowed to call the witness. The court should balance the existence of serious prejudice against permitting the calling party to support its case through possible improper jury speculation or inference from the invoking the privilege. The trial court, in deciding how to exercise its discretion in ruling whether to allow the party to call the witness for this purpose, should consider the testimony already admitted in the trial and the theories on which the case is being tried.

Among the relevant cases on this issue is *State v. Pickens*, 346 N.C. 628, 638 (1997). In that case, the defendant was on trial for murder and intended to call his accomplice, who had already pled guilty and served his sentence, but the accomplice's attorney informed the court that his client desired to invoke his Fifth Amendment privilege based on the possibility of a federal prosecution. The defendant's purpose in calling the accomplice before the jury to invoke the privilege was to "raise the inference that someone else pled guilty to or was responsible for [the murder]," thereby bolstering the defendant's argument that he was not involved in the crime. *Id.* at 167. After a voir dire hearing, the trial court upheld the accomplice's invocation of the privilege, and denied the defendant's request to call the accomplice to invoke the privilege before the jury. The defendant argued that because *State v. Thompson*, 332 N.C. 204 (1992), had upheld the trial court's ruling permitting the prosecutor to call a witness knowing that he would invoke the privilege, the same rule should apply to the defendant. *Id.*

The *Pickens* court held the trial court did not abuse its discretion by denying the defendant's request to call the accomplice to invoke the privilege. *Id.* at 168-69. The decision whether to allow the calling of a witness involves balancing any serious prejudice to the calling party's case if not allowed to call the witness against permitting the calling party to support his or her case through a jury's improper speculation or inference drawn from the exercise of the privilege (and if the non-calling party is the defendant, impeding the constitutional right to confront a witness). The balancing of competing interests is left to the trial court's discretion under Rule 403.

The court had concluded in *Thompson* that the State's calling the witness to the stand to invoke the privilege was significantly probative in identifying the person the defendant had hired to kill the victim in a contract killing. 332 N.C. at 223. In *Pickens*, the probative value of the witness taking the stand was significantly less than in *Thompson* because defendant Pickens sought to have the witness take responsibility for firing the weapon that killed the victim, yet he was tried under the theory of acting in concert which made immaterial who fired the weapon. *Pickens*, 346 N.C. at 640. Moreover, the trial court in *Pickens* allowed the defendant to introduce a transcript of the witness's guilty plea to murder, "thereby enabling defendant to present the substance of his desired evidence and [do so] more effectively." *Id.* Requiring the witness to take the stand to invoke the privilege would have "injected the risk of the jury making erroneous inferences about the relative roles and degrees of culpability" of the witness and Pickens, an unnecessary risk given the admission of the guilty plea. *Id.*

In another case, *State v. Harris*, 139 N.C. App. 153, 156-57 (2000), both accomplices through counsel advised the State and the defendant that they would invoke their Fifth Amendment privilege. The trial court ruled that the defendant could not call the accomplices to invoke the privilege in the jury's presence. The court held that because the defendant failed to offer proof outside the jury's presence about the accomplices' proposed testimony or invocation of the privilege, it could not rule about the significance of the testimony in determining whether the trial court abused its discretion in not allowing defendant to call the accomplices to invoke the privilege in the jury's presence. *Id.* at 157-58.

And finally, in *State v. Stanfield*, 134 N.C. App. 685, 693 (1999), the court held that the trial court did not abuse its discretion in refusing to allow the defendant to call an accomplice to invoke the privilege in the jury's presence. The defendant failed to offer proof of the evidence he sought to elicit from the accomplice, leaving to speculation how it benefited defendant. In addition, as with the defendant in *Pickens* (discussed above), the defendant in this case was tried under acting in concert theory, and thus the accomplice's "admission of his own involvement would not exonerate the defendant." *Id.*

H. **Comment on Defendant's Not Testifying; Jury Instructions.**

1. **By Trial Court or Prosecution.** When a defendant exercises his or her Fifth Amendment privilege by not testifying at trial, any reference by the State or the trial court about the defendant's election not to testify violates the Fifth Amendment. *Griffin v. California*, 380 U.S. 609, 614 (1965) (trial court's and prosecutor's comments on the defendant's failure to testify violated Fifth Amendment; prosecutor stated that defendant certainly knows the details of the crime and he has "not seen fit to take the stand [to] deny or explain"); *State v. Mitchell*, 353 N.C. 309 (2001) (prosecutor's statement that may be interpreted as commenting on a defendant's election not to testify "is improper if the jury would naturally and necessarily understand the statement to be a comment on [defendant's election not to testify]"; appellate court must determine whether improper comment constituting constitutional error is harmless beyond a reasonable doubt).

G.S. 8-54 provides in pertinent part that a defendant's election not to testify "shall not create any presumption against him." N.C.P.I.—Crim.

101.30, which is based on the Fifth Amendment and G.S. 8-54, mentions the privilege, the statutory presumption, and instructs the jury that “the silence of the defendant is not to influence your decision in any way.”

Note: This outline does not discuss the evidentiary use of a defendant’s pre- and post-arrest silence involving the giving or absence of *Miranda* warnings, but see the cases summarized in ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA, 634-37 (4th ed. 2011).

For sample cases when North Carolina appellate courts have held that a prosecutor unconstitutionally commented on the defendant’s election not to testify, see *State v. Baymon*, 336 N.C. 748, 757-58 (1994) (prosecutor’s jury argument directly referred to the defendant’s failure to testify by stating that we don’t know how many times the defendant sexually assaulted the victim, but he knows and is not going to tell you); *State v. Reid*, 334 N.C. 551, 557 (1993) (prosecutor argued that the defendant had not testified, that he had that right, and jury was not to hold it against him; prosecutor may not refer to defendant’s election not to testify); *State v. Roberts*, 243 N.C. 619, 621 (1956) (prosecutor improperly stated during jury argument that he had not said a word about the defendants not testifying); *State v. Monk*, 286 N.C. 509, 516-17 (1975) (prosecutor improperly stated during jury argument that he cannot show defendant’s criminal record unless defendant testified). If a prosecutor makes an improper comment, the trial court should promptly give a specific instruction that the particular comment was improper and the jury must disregard it. In addition, the court then or later when instructing the jury at the close of the trial should give N.C.P.I. —Crim. 101.30 on the defendant’s election not to testify. See generally *State v. Skipper*, 337 N.C. 1, 29 (1994) (improper argument on defendant’s failure to testify was cured by court immediately telling jury to disregard the argument, striking it, and giving appropriate jury instructions).

For sample cases when North Carolina appellate courts have held that the prosecutor did not unconstitutionally comment on the defendant’s election not to testify, see *State v. Fletcher*, 348 N.C. 292, 322 (1998) (prosecutor is permitted to argue about defendant’s failure to offer evidence to rebut State’s case, as long as prosecutor does not mention defendant’s election not to testify); *State v. Ward*, 354 N.C. 231, 262 (2001) (prosecutor may state that defendant had power to subpoena witnesses); *State v. Sidden*, 347 N.C. 218, 228-29 (1997) (prosecutor may comment on defense failure to produce alibi witnesses); *State v. Brewer*, 325 N.C. 550, 568 (1989) (prosecutor may comment on defense failure to produce exculpatory evidence); *State v. Barnett*, 343 N.C. 164, 178 (1996) (prosecutor comments during jury argument about defendant’s demeanor during trial and defendant’s failure to present evidence that refuted State’s theory of case were not improper); *State v. Smith*, 290 N.C. 148, 168 (1976) (prosecutor’s statement during jury argument that evidence was uncontradicted was proper).

2. **Defense Counsel Comments.** Although defense counsel generally may not comment on or explain the defendant’s election not to testify, *State v. Bovender*, 233 N.C. 683, 689-90 (1951), defense counsel during jury argument may read statutes, constitutional provisions, and legal rules relevant to a case, which is different from a comment or explanation. For

example, in *State v. Banks*, 322 N.C. 753, 762-64 (1988), the court held that defense counsel should have been permitted to read to the jury the clause of the Fifth Amendment material to his election not to testify (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”) and “say simply that because of this provision, the jury must not consider defendant’s election not to testify adversely to him, or words to this effect.” The court stated that no additional comment or explanation of the election should be permitted. *Id.* at 764. During jury selection, a defendant may question the jurors about their ability to follow the law, including the defendant’s right not to testify. *State v. Blankenship*, 337 N.C. 543, 554-55 (1994), *overruled on other grounds by State v. Barnes*, 345 N.C. 184, 233 (1997).

3. **Jury Instruction on Defendant’s Election Not To Testify.** If the defendant requests a jury instruction on the election not to testify, the trial court is constitutionally required to give it. *Carter v. Kentucky*, 450 U.S. 288, 300 (1981). Absent a request, a trial court has discretion whether to instruct the jury, *State v. Bowman*, 349 N.C. 459, 472 (1998), although appellate courts have stated that it is better not to give the instruction. *State v. Rankin*, 282 N.C. 572, 575 (1973); *State v. Barbour*, 278 N.C. 449, 457 (1971). It is not a federal constitutional violation to give the instruction over the defendant’s objection, *Lakeside v. Oregon*, 435 U.S. 333, 341-42 (1978), but a trial court ordinarily should not do so.

III. Statutory Immunity

- A. **Introduction.** As noted in Section II.A. above, a witness who invokes the Fifth Amendment privilege against self-incrimination in any criminal or civil hearing or proceeding, including a grand jury, may be ordered to testify or produce other information when the witness has been granted immunity under Article 61 of Chapter 15A. Although an order granting immunity may be issued in any criminal or civil matter, only a district attorney is authorized to apply for an order. G.S. 15A-1052(a). Thus, almost all applications involve criminal proceedings.

North Carolina courts have not decided whether a trial court has the inherent authority to grant immunity to a witness on a defendant’s request. For a discussion of the conflicting case law in other jurisdictions on this issue, see MCCORMICK at § 135.

A superior court judge is the only judicial official who is authorized to issue an order granting immunity. G.S. 15A-1052(a). When a grant of immunity involves a grand jury witness, the order must be issued by the presiding or convening superior court judge. G.S. 15A-1053(a). (The chair of the North Carolina Innocence Commission, is authorized under G.S. 15A-1468(a1) to grant use immunity to a witness if he or she invokes the Fifth Amendment privilege.)

Note that there are two unusual aspects to the statutory framework involving a grant of immunity. First, because only a district attorney may apply for immunity, a party in a civil case who wants to seek immunity for a witness who has invoked the Fifth Amendment privilege must request a district attorney to apply for immunity. Second, because only a superior court judge can grant immunity, that judge must decide whether to grant immunity even when a case is pending in district court because the district court judge has no statutory authority to do so.

- B. District Attorney's Application for Immunity.** Before a district attorney applies to the superior court judge for an order granting immunity, he or she must inform the Attorney General or his or her designee (a deputy or assistant attorney general) of the circumstances surrounding the application and the intent to make an application. G.S. 15A-1052(b). This notice allows the Attorney General to advise the district attorney whether there is any reason why the witness should not be granted immunity. See Official Commentary to G.S. 15A-1052. However, the Attorney General's advice to the district attorney not to seek immunity would not prevent the district attorney from doing so.
- A district attorney may apply for an order before or after a witness invokes the Fifth Amendment privilege. However, the order is not effective until the witness invokes the privilege and the presiding judge communicates the order to the witness. G.S. 15A-1051(b).
- The district attorney's application to a superior court judge must be in writing and filed with the clerk, or if orally made in court, recorded and transcribed and filed with the clerk. G.S. 15A-1052(a). The standard for applying for an order is whether the witness's testimony or other information "is or will be necessary to the public interest." G.S. 15A-1052(b). The need for the testimony in a criminal prosecution or other proceeding would appear to satisfy this standard (there is no North Carolina case law on this issue).
- For the procedural and other requirements involving a grant of immunity to a witness in a drug trafficking or human trafficking investigative grand jury, see G.S. 15A-623(h). In sum, the prosecutor (a district attorney or assistant district attorney) has the authority to grant use immunity without the involvement of a judge. The grant of use immunity must be given to the witness in writing, signed by the prosecutor, and read into the record. For a regular grand jury, see G.S. 15A-1053, which requires an application for immunity by the district attorney to the presiding or convening superior court judge.
- C. Hearing and Ruling on Application.** There is no statutory or constitutional requirement for an adversary hearing concerning the district attorney's application for immunity. See *In re Grand Jury Investigation*, 657 F.2d 88, 91 (6th Cir. 1981) (due process does not require notice and a hearing before grant of use immunity under federal law). It appears that the review of the application involves only the district attorney and a superior court judge. The immunity statutes were patterned after federal law (18 U.S.C. § 6001 through 6003), and appear to contemplate that the judge will review the application, determine if it complies with statutory requirements, and absent extraordinary circumstances (e.g., a district attorney requests immunity for a witness for corrupt reasons), approve the application. See Official Commentary to G.S. 15A-1052; *United States v. Hollinger*, 553 F.2d 535, 548 (7th Cir. 1977) ("district judge has no discretion to deny a request by the United States Attorney that a witness be granted immunity, so long as the request is proper in form").
- D. The Judge's Order.** The judge should issue a written order granting or denying the district attorney's application for immunity. If the judge grants the application, the judge's immunity order should "spell out the exact questions or subject-matter area as to which the witness is compelled to testify." Official Commentary to G.S. 15A-1052. However, this is not a statutory requirement, and it would appear that a general description of the subject matter area is sufficient without setting out

the questions (e.g., the witness must answer questions about his role in the armed robbery in the trial against the defendant).

The immunity provided to a witness under G.S. 15A-1051 is commonly known as “use immunity,” which makes inadmissible at a later prosecution the compelled testimony or “other information” given under immunity, as well as evidence directly or indirectly derived from that testimony or information. G.S. 15A-1051(a). “Other information” is defined in G.S. 15A-1051(c) as any “book, paper, document, record, recordation, tangible object, or other material”—which may include relevant information in a white collar case, for example, when the witness created personal records that may incriminate the witness.

The testimony compelled under immunity may be introduced in a prosecution for perjury allegedly committed when giving the testimony or contempt of court based on a failure to comply with a court order (e.g., an order to testify). G.S. 15A-1051(a).

“Use immunity” was upheld as constitutional under *Kastigar v. United States*, 406 U.S. 441, 453 (1972). The *Kastigar* Court rejected the defense argument that the Fifth Amendment requires that a witness must be given broader immunity commonly known as “transactional immunity,” which bars the prosecution of offenses to which the compelled testimony relates. For an extensive discussion of the two forms of immunity, see MCCORMICK at § 143.

- E. Appeal.** A defendant does not have standing to challenge either the propriety or the effectiveness of a grant of immunity to a witness testifying against the defendant. *State v. Phillips*, 297 N.C. 600, 606 (1979). And the witness has no right to appeal a trial court’s grant or denial of immunity.
- F. Jury Instructions.** A presiding judge must inform the jury of the grant of immunity and the order to testify before the testimony is given by the immunized witness, G.S. 15A-1052(c), although the judge is not required to inform the jury immediately before the witness’s testimony or to give details of the grant. For example, it is not error to inform the jury earlier in the trial. *State v. Hardy*, 293 N.C. 105, 119-20 (1977) (no error when judge informed jury about grant of immunity before any witnesses had testified). There is no pattern jury instruction for the judge’s duty to inform the jury of the grant of immunity.
- During the jury charge, the judge must instruct the jury in the same manner as with an interested witness. G.S. 15A-1052(c). The judge should use N.C.P.I.—Criminal 104.21 (Testimony of Witness with Immunity or Quasi-Immunity).
- G. Jury Argument and Introducing Evidence about Grant of Immunity.** G.S. 15A-1055(a) provides that any party may examine an immunized witness about the grant of immunity. A party may also introduce evidence or examine other witnesses to corroborate or contradict testimony or evidence previously elicited by the party or another party concerning the grant of immunity.
- G.S. 15A-1055(b) provides that a party may argue to the jury concerning the impact of a grant of immunity on the witness’s credibility.
- H. State’s Later Use of Witness’s Testimony Given with Immunity.** As noted above, statutory immunity in North Carolina includes only “use immunity,” not transactional immunity. If the State later prosecutes the witness, it has the burden of proving at the later trial that its evidence was obtained completely

independent of the compelled testimony or information provided by the immunized witness. Although the standard of the burden of proof has not been decided by North Carolina appellate courts, they likely would follow federal law and require proof by a preponderance of evidence. *United States v. Slough*, 641 F.3d 544, 550 (D.C. Cir. 2011).

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