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State v. Belanger and New Mexico's Lone Stance on Allowing Defense Witness Immunity

Andy Scholl

STATE V. BELANGER AND NEW MEXICO'S LONE STANCE ON ALLOWING DEFENSE WITNESS IMMUNITY

ANDY SCHOLL*

INTRODUCTION

In 2009, the New Mexico Supreme Court decided *State v. Belanger*[1] and New Mexico became the only jurisdiction in the United States to affirmatively give courts the unilateral power to grant defense witness immunity. The idea of defense witness immunity is nothing new, as there has long been discussion of it. Despite this, no courts have fashioned a rule that does not require either prosecutorial misconduct or clearly exculpatory evidence from the witness for whom immunity is sought. Past defense witness immunity discussions have focused almost exclusively on the constitutional rights of the accused to present evidence. Instead of entering this constitutional debate, however, the New Mexico Supreme Court drew on its "superintending powers" under the New Mexico Constitution to regulate practice and proceeding and changed its stance on use immunity.[2] In doing so, it became the only jurisdiction in the United States to hold that, under limited circumstances, trial courts have the inherent power to unilaterally grant defense witness immunity, even without a showing of prosecutorial misconduct or clearly exculpatory evidence.

In Part I, this note shows the historical development, and eventual tension, between a witness's Fifth Amendment privilege against self-incrimination, and a defendant's constitutional rights to confrontation, compulsory process, and due process. Part I.A discusses how immunity statutes are being used as the only way to moderate both the witness's and the accused's constitutional rights. In doing so, it explores the history and early rationale of immunity statutes in the United States, and the gradual departure from the position that under no circumstances should a witness be forced to give testimony that, without the grant of immunity, would be self-incriminating. Part I.B introduces New Mexico's reliance on federal precedent to form its own use immunity jurisprudence and its early unwillingness to immunize defense witnesses. Part I.C touches briefly on the difference between substantive and procedural law: a key distinction drawn by the *Belanger* court. Part II of the note discusses New Mexico's recent expansion of use immunity to defense witnesses in *Belanger* and New Mexico trial courts' new ability to unilaterally grant use immunity. In Part III, the note discusses the policy implications of *Belanger*, including separation of powers issues as to both the legislative and executive branches. It concludes with predictions of how *Belanger* will impact criminal pro-

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1. 2009-NMSC-025, 210 P.3d 783.

2. Use and derivative use immunity prohibits the government from using in any manner compelled testimony or its fruits in any future prosecution of that witness. Kastigar v. United States, 406 U.S. 441, 453 (1972).

ceedings in the future. Finally, Part IV offers suggestions to attorneys on how to best argue, and to judges on how best to interpret and apply *Belanger*.

To start, it is helpful to understand two common scenarios dealing with use immunity: the first deals with prosecution witnesses, the second with defense witnesses. In the first scenario, the prosecution (P) is charging defendant (D) with a crime. One of P's witnesses (W) is called on to testify, but W asserts her Fifth Amendment privilege against self-incrimination and refuses to testify. Pursuant to either a federal or state statute, P can apply to the court for a grant of immunity.[3] Because the immunity grant prohibits W's testimony from later being used against her in a future prosecution, the court can order W to testify, notwithstanding W's Fifth Amendment claim.[4] This is a common and easy example of how prosecution witnesses are given immunity and, because their testimony cannot incriminate them, their Fifth Amendment privilege is not implicated. It also represents how almost all jurisdictions approach use immunity: as a tool available only to the prosecution.

On the other hand, suppose D seeks to interview her own witness (W2).[5] As was the situation with W1, W2, out of fear that she will be incriminated for the contents of what she says, asserts her Fifth Amendment privilege.[6] Historically, defendants have not been successful in requesting immunity for their own witnesses. Instead, almost all courts, both state and federal, have held that the prosecution must request immunity for it to be granted. Not surprisingly, this rarely happens, and the defendant is unable to compel the witness to testify. This note deals with the second situation and the New Mexico Supreme Court's recent decision in *Belanger* that allows trial courts to intervene and unilaterally grant defense witness immunity in certain limited circumstances.

I. HISTORICAL FRAMEWORK AND CONSTITUTIONAL ISSUES AT HAND

Part I.A discusses the Fifth Amendment's prohibition against self-incrimination and how it conflicts with both the government's need to obtain information and a criminal defendant's constitutional rights to present a defense. It also traces early federal immunity statutes and the development of U.S. Supreme Court precedent

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3. The federal use immunity statute is 18 U.S.C. §§ 6001–6005 (2006). For an example of a state use immunity statute, see Colorado Revised Statutes, Section 13-90-118 (2004).

4. Kastigar v. United States, 406 U.S. 441, 453 (1972) (holding that because the testimony cannot be used against her, the witness has not lost her Fifth Amendment privilege against self-incrimination).

5. At times, defense attorneys have called witnesses to the stand for the sole purpose of eliciting the assertion of the privilege in the presence of the jury. While some courts have allowed this, *see* Brink's Inc. v. New York, 717 F.2d 700, 710 (2d Cir. 1983), New Mexico has expressly forbidden inferences from being drawn from a witness's claim of privilege, Rule 11-513(A) NMRA; State v. Saiz, 2008-NMSC-048, ¶ 45, 191 P.3d 521, 533, *abrogated on other grounds by* State v. Belanger, 2009-NMSC-025, 210 P.3d 783.

6. It is a different scenario when defense witnesses assert the Fifth Amendment privilege only upon cross-examination. In such a circumstance, the court considers whether the witness's testimony is on a collateral or non-collateral matter. When the defense witness has asserted the Fifth Amendment privilege on a non-collateral issue, the court may strike the witness's testimony given on direct examination. United States v. Esparsen, 930 F.2d 1461, 1469–70 (10th Cir. 1991). However, when the witness asserts the privilege on a collateral issue relating to credibility, courts have held that they cannot strike the witness's direct examination testimony without violating the defendant's compulsory process rights. *See* Wisconsin *ex. rel.* Monsoor v. Gagnon, 497 F.2d 1126, 1129–30 (7th Cir. 1974). This note focuses on situations in which a defense witness refuses to testify at all by asserting his Fifth Amendment privilege.

on the issue of the Fifth Amendment privilege. The note continues in Part I.B by analyzing New Mexico's reliance on federal caselaw in forming its own use immunity jurisprudence prior to 2009. Lastly, Part I.C explains the difference between substantive and procedural law in New Mexico and the New Mexico Supreme Court's inherent power to change procedural rules.

A. The Fifth Amendment Privilege Against Self-Incrimination and Early Federal Immunity Statutes

The Fifth Amendment states, "No person . . . shall be compelled in any criminal case to be a witness against himself."[7] To be protected by the Fifth Amendment, a statement must be testimonial, incriminating, and compelled.[8] Thus, self-incriminating statements that were made privately or without compulsion from the government are not protected.[9] Further, communications that are not "testimonial in nature" are not protected.[10] To be testimonial, "an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information."[11] Further, the communication must be incriminating, meaning the speaker must "reasonably believe[ ] [the statement] could be used in a criminal prosecution or could lead to other evidence that might be so used."[12] It is the judge who decides whether the testimony is protected and, if not, can require the witness to answer questions.[13]

The Fifth Amendment's protection against self-incrimination has its roots in the English Courts of Chancery.[14] An early example is *Brownsword v. Edwards*, where the defendant refused to respond to discovery requests that asked whether she was married.[15] The Lord Chancellor said, "[t]his appears a very plain case, in which defendant may protect herself from making a discovery of her marriage . . . [t]he

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7. U.S. CONST. amend. V. In addition to allowing witnesses or criminal defendants "to refuse to testify against himself at a criminal trial in which he is a defendant," the Fifth Amendment also protects all persons from "answer[ing] official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." Allen v. Illinois, 478 U.S. 364, 368 (1986) (quoting Minnesota v. Murphy, 465 U.S. 420, 426 (1984)); *see also* McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).

8. Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177, 189 (2004).

9. Fisher v. United States, 425 U.S. 391, 401 (1976).

10. United States v. Hubbell, 530 U.S. 27, 34 (2000).

11. Doe v. United States, 487 U.S. 201, 210 (1988).

12. Kastigar v. United States, 406 U.S. 441, 445 (1972). For a thorough analysis of the Fifth Amendment, see STEVEN M. SALKY, THE PRIVILEGE OF SILENCE: FIFTH AMENDMENT PROTECTIONS AGAINST SELF-INCRIMINATION (2009).

13. Hoffman v. United States, 341 U.S. 479, 486 (1951).

14. For a history of the privilege in common law England, see 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 114 (6th ed. 2006). McCormick argues that the emerging policy to be gleaned from the early English cases,

> seems to be based upon a perception that compelling an individual to provide the basis for his own penal liability should be limited because the position in which it places the individual, making a choice between violating a solemn oath and incurring penal liability, weighs against important policies of individual freedom and dignity.

Additionally, for an excellent synopsis of English and American cases involving the Fifth Amendment privilege, see *Murphy v. Waterfront Commission*, 378 U.S. 52, 58–77 (1964).

15. (1751) 28 Eng.Rep. 157 (Ch.). Though marriage was legal at common law, allegations of incest would have subjected her to prosecution in the ecclesiastical court. *Id.* at 157.

general rule is, that no one is bound to answer so as to subject himself to punishment."[16]

The U.S. Supreme Court first analyzed the scope and purpose of the Fifth Amendment in *United States v. Saline Bank of Virginia*.[17] The plaintiffs in *Saline Bank* were creditors of an unincorporated bank who filed a bill against the stockholders of a bank for discovery and relief.[18] The defendants refused, claiming that their answers would subject them to penalties under Virginia law, which prohibited unincorporated banks.[19] Chief Justice Marshall wrote, "It is apparent that . . . the facts required to be discovered . . . would expose the parties to danger. The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties. . . ."[20]

Though such holdings establish a constitutional right to refuse to provide self-incriminating testimony, both the government and criminal defendants have significant interests in compelling witnesses to testify. The Sixth Amendment to the U.S. Constitution guarantees that an accused "shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor. . . ."[21] Additionally, the U.S. Supreme Court has held "[a]mong the necessary and most important of the powers of . . . Government . . . is the broad power to compel residents to testify in court or before grand juries or agencies . . . [S]uch testimony constitutes one of the Government's primary sources of information."[22]

With a constitutional protection guaranteeing the right of a witness to refuse to give self-incriminating testimony, and the need for the government to obtain information during criminal investigations, legislatures soon realized that something must be done. Immunity statutes became commonplace as they were the only way to protect both a witness's Fifth Amendment privilege and obtain necessary information for the government.[23] Further, they were a theoretical way[24] to protect a defendant's rights to compulsory process[25] and due process.[26] As immunity statutes

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16. *Id.* at 158.

17. 26 U.S. 100 (1828).

18. *Id.* at 100.

19. *Id.* at 102–103.

20. *Id.* at 104.

21. U.S. CONST. amend. VI. The Sixth Amendment to the Federal Constitution is similar to article II, section 14 of the New Mexico Constitution, which reads, "In all criminal prosecutions, the accused shall have the right . . . to be confronted with the witnesses against him . . . [and] to have compulsory process to compel the attendance of necessary witnesses in his behalf." N.M. CONST. art. II, § 14.

22. Murphy v. Waterfront Comm'n, 378 U.S. 52, 93 (1964) (White, J., concurring) (internal citation omitted). This note focuses on the accused's constitutional rights at issue and not on the government's interest in granting immunity.

23. *See* Roderick R. Ingram, *A Clash of Fundamental Rights: Conflicts Between the Fifth and Sixth Amendments in Criminal Trials*, 5 WM. & MARY BILL RTS. J. 299, 306 (1996). For more on the history and policy behind early state and federal immunity statutes, see 8 JOHN HENRY WIGMORE, EVIDENCE §§ 2250–51 (John T. McNaughton rev. ed. 1961 & Supp. 1991).

24. The term "theoretical" is used because almost all immunity statutes are available only to the prosecution's witnesses. Thus, though immunity statutes available to both the prosecution and the defense would balance the Fifth and Sixth Amendments, the fact that immunity is rarely available for defense witnesses has led academics to argue that the Sixth Amendment is violated when a witness refuses to testify at the request of the defendant. *See* Roderick R. Ingram, *A Clash of Fundamental Rights: Conflicts Between the Fifth and Sixth Amendments in Criminal Trials*, 5 WM. & MARY BILL RTS. J. 299, 306–08 (1996).

25. Some have argued that the Compulsory Process Clause of the Sixth Amendment is the proper basis for a grant of immunity. *See id.* at 319. Mr. Ingram also argues that due process demands defense witness

began to emerge and get challenged in courts, the scope of the Fifth Amendment protections had to be determined so that those protections could be supplanted by a grant of immunity.

The U.S. Supreme Court's first opinion on an immunity statute was *Counselman v. Hitchcock*.[27] In that case, the Court invalidated a use immunity statute, though not yet called as such, because it "could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him. . . ."[28] Because the immunity statute did not provide a "complete protection from all the perils against which the constitutional prohibition was designed to guard, [it is] not a full substitute for that prohibition."[29] To be valid, the *Counselman* Court held, an immunity statute "must afford absolute immunity against future prosecution for the offense. . . ."[30]

Congress reacted to the *Counselman* opinion by passing the 1893 Immunity Act, which is an early example of transactional immunity.[31] The statute, which became the model for many subsequent immunity statutes,[32] provided that no individual would be excused from testifying about certain events, but that the government could not prosecute her on account of anything about which she testified.[33] Soon after its passing, the Court, in *Brown v. Walker* revisited the constitutionality of requiring an individual to give otherwise self-incriminating testimony.[34] In *Brown*, the Court abandoned the notion that the Fifth Amendment gave an absolute "right to silence," as many people, including the dissenting Justice Field, believed.[35] Instead, the Court held that the Fifth Amendment only guarantees that a witness

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immunity because defendants must have the same tools as the prosecution when trying a case. However, by grounding defense witness immunity in the compulsory process clause instead of due process, Mr. Ingram argues that the legislature could not simply remove the inequities that violate due process (that only the prosecutor may request immunity) and deny grants of immunity to all witnesses. *Id.*

26. *See* United States v. Dolah, 245 F.3d 98, 106 (2d Cir. 2001), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004) (analyzing the due process right to defense witness immunity).

27. 142 U.S. 547 (1892), *overruled by* Kastigar v. United States, 406 U.S. 441, 449 (1972).

28. *Id.* at 198–99. The statute in *Counselman* read, "evidence obtained from . . . any party . . . shall [not] be given in evidence, or in any manner used against [him] . . . in any criminal proceeding. . . ." *Id.* at 197.

29. *Id.* at 206.

30. *Id.* The *Counselman* Court's requirement of "absolute immunity" has been considered the case's central holding. Adams v. Maryland, 347 U.S. 179, 185 (1954); United States v. Murdock, 284 U.S. 141, 149 (1931), *overruled in part* by Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964). However, the Court in *Kastigar v. United States* held that the requirement of "absolute immunity" is found in dictum and is not binding. The *Kastigar* Court contended that the *Counselman* Court did not invalidate the statute at issue because it did not provide absolute immunity, but rather because it did not forbid the prosecution from using knowledge gained from a witness's compelled testimony to assist them in future prosecutions of that witness. Kastigar v. United States, 406 U.S. 441, 454 (1972).

31. Transactional immunity gives a witness full immunity for the actions about which she is compelled to testify. *Kastigar*, 406 U.S. at 453. This is a more thorough protection than use immunity, which only guarantees that the compelled testimony cannot be used in a future prosecution of that witness. *Id.* at 454.

32. Until the 1970s, all of the immunity statutes that the U.S. Supreme Court examined provided for transactional immunity. Not until *Kastigar v. United States* did the Court examine and uphold a use immunity statute. In that case, the Court declared the 1893 Immunity Act to be the paradigm from which all immunity statutes of the early twentieth century were modeled. *Id.* at 447 n.21.

33. 1893 Immunity Act, Pub. L. No. 2-83, 27 Stat. 443.

34. 161 U.S. 591, 610 (1896).

35. *See id.* at 630–31 (Field, J., dissenting). It was argued, unsuccessfully, that the Fifth Amendment's aim was to represent an absolute "right to silence" that protected not only the right against self-incrimination, but also protected the declarant's right to be free from embarrassment and from other social consequences that come with being forced to testify against her criminal interest. *Id.* at 605–606.

cannot be prosecuted based on the content of her compelled testimony.[36] Further, the Court held that once there is no longer the danger that the witness will be prosecuted for the content of her testimony, her Fifth Amendment privilege also vanishes.[37]

Transactional immunity jurisprudence continued to take shape throughout the first half of the twentieth century and in *Ullmann v. United States*, the Court shed more light on the policies behind the Fifth Amendment privilege.[38] Justice Frankfurter held that immunity statutes had become "part of our Constitutional fabric,"[39] thus dispelling the viewpoint of the minority that all immunity statutes are unconstitutional.[40] Also of note in *Ullmann* is the Court's discussion of the competing interests at stake regarding the Fifth Amendment privilege—specifically the tension between the state's responsibility to prosecute crimes and the accused's Fifth Amendment right.[41] The Court held that an individual's right to refuse to give self-incriminating statements is fundamental in our law, and that we as a nation should be willing to forego an occasional conviction for the protections that the amendment was designed to uphold.[42] "The privilege against self-incrimination serves as a protection to the innocent as well as to the guilty, and we have been admonished that it should be given a liberal application."[43] Despite the strong rhetoric for the need to protect the Fifth Amendment privilege, the Court held that the amendment cannot be read literally.[44] Instead, the Fifth Amendment protects a witness from being prosecuted on account of the content of her forced statements.[45] Relying heavily on *Brown v. Walker*, the Court reaffirmed that the privilege only applies when the danger of prosecution exists, and that once that danger is gone, so too is the privilege.[46]

A decade later, in *Murphy v. Waterfront Commission*, the Court returned to an immunity question.[47] The *Murphy* Court held that a witness who was immune from prosecution under state law was also immune from federal prosecution.[48] The Court also elaborated on the policies set forth in *Ullmann*, and held that the Fifth

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36. *Id.* at 604.

37. *Id.*

38. 350 U.S. 422 (1956).

39. *Id.* at 438.

40. In a strongly written dissent, Justice Douglas argued that the Fifth Amendment privilege is absolute and is beyond the reach of Congress. Though the majority never adopted this position, Justice Douglas and Justice Black sided with the minority in *Brown v. Walker* that the privilege should never be encroached upon and that doing so is an unconstitutional congressional act. *Id.* at 440–55 (Douglas, J., dissenting). Justice Douglas wrote similar dissents in *Kastigar v. United States*, 406 U.S. 441, 462–67 (1972) (Douglas, J., dissenting) and *Piccirillo v. New York*, 400 U.S. 548, 549–74 (1971) (Douglas, J., dissenting).

41. *Ullmann*, 350 U.S. at 427.

42. *Id.*

43. *Id.* (quoting Maffie v. United States, 209 F.2d 225, 227 (1954)). The Court held the privilege was "aimed at a more far-reaching evil—a recurrence of the Inquisition and the Star Chamber. . . . Prevention of the greater evil was deemed of more importance than occurrence of the lesser evil." *Id.* at 428.

44. *Id.* at 438.

45. *Id.* at 439.

46. *Id*. (relying on *Brown v. Walker*, 161 U.S. 591 (1896). Again, in *United States v. Mandujano*, 425 U.S. 564, 576 (1976), the Court held, "when granted immunity, a witness once again owes . . . the duty to give testimony since—immunity substitutes for the privilege."

47. 378 U.S. 52 (1964).

48. *Murphy*, 378 U.S. at 77–78. On the same day it decided *Murphy*, the Court, in *Malloy v. Hogan*, 378 U.S. 1, 6 (1964), held that the Fifth Amendment, through the Fourteenth Amendment, applied to state governments as well as the federal government.

Amendment represents an unwillingness to subject the criminally accused to the "cruel trilemma of self-accusation, perjury or contempt."[49] Further, the protection that the privilege provides to the innocent, coupled with the danger that self-incriminating statements might be elicited through abusive or inhumane treatment, overshadowed the court's concern that the privilege establishes a "shelter for the guilty."[50]

Finally, in *Kastigar v. United States* the Court was presented with the question of whether the federal use immunity statute was constitutional.[51] After holding that a properly drafted immunity statute may be constitutional,[52] the *Kastigar* Court turned to the question of the scope of the privilege, and whether a grant of use immunity supplants that privilege.[53] Before answering that question, the Court held that the Fifth Amendment's "sole concern is to afford protection against being forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts."[54] As such, any grant of immunity must provide, at a minimum, as much protection as the amendment requires.[55] The Court held that because transactional immunity is a guarantee that the witness will not be prosecuted about anything to which she testifies, it provides a broader protection than what is necessary under the Fifth Amendment.[56] With transactional immunity providing the accused with more protection than what is constitutionally necessary, the Court held use and derivative use immunity to be the minimum amount of protection required by the Constitution.[57] In other words, use immunity successfully protects the purpose of the Fifth Amendment: that no witness's compelled testimony can make the case against her.

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49. *Id.* at 55.

50. *Id.* (quoting Quinn v. United States, 349 U.S. 155, 162 (1955)).

51. 406 U.S. at 453 (considering U.S.C. § 6002 (2006) ("[T]he witness may not refuse to [testify] . . . on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case. . . ."). The 1970 Immunity Act was an attempt to consolidate immunity statutes from various governmental agencies into one statutory scheme. *See id.* at 446–47. Up until *Kastigar*, the Court had not been confronted with the constitutionality of a use-immunity statute, because all post-*Counselman* appeals either dealt with transactional immunity, or did not forbid use of the evidence derived from compelled testimony, thus making them unconstitutional under *Counselman*. *Id.* at 457–58. Although the *Murphy* Court essentially answered the question of whether, and to what extent, use immunity is constitutional, the question before that Court dealt with the overlap between federal and state immunity. In dicta, the Court stated that the government "must be prohibited from making any such use of compelled testimony and its fruits." Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

52. Petitioners urged the Court to overturn its holding in *Brown v. Murphy* and declare that any grant of immunity violates of the Fifth Amendment. The Court dismissed this argument and continued to the question of whether use immunity is coextensive with the Fifth Amendment privilege. *Kastigar*, 406 U.S. at 448.

53. *Id.* at 448–49.

54. *Id.* at 453 (internal citations and quotation marks omitted).

55. *Id.*

56. *Id.*

57. *Kastigar*, 406 U.S. at 453. The Court stated, "We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of privilege." *Id.* The Court also dismissed the petitioners' argument, which rested heavily on language from *Counselman*, that the Fifth Amendment required absolute immunity. The *Kastigar* Court held the *Counselman* language cited by petitioners to be dictum, and not what led to that statute's invalidation. *Id.* at 454–55. Rather, the *Kastigar* Court held the statute in *Counselman* failed because it did not prohibit derivative use of the witness's compelled testimony, not because it did not provide absolute immunity. *Id.*

The *Kastigar* Court also addressed policy issues regarding the position in which both the witness and the state are left after a grant of use immunity. With use immunity, all that is lost by the prosecution is testimony that it otherwise would not have had. Additionally, the accused suffers no detriment because her testimony shall not be used against her. As such, use immunity leaves both the accused and the prosecution in "substantially the same position as if the witness had claimed the . . . privilege" and refused to testify.[58] Because the federal immunity statute at issue provided the constitutionally required protections, the Court dismissed the petitioners' challenges to the statute.[59]

The *Kastigar* Court also set forth the procedural requirements for a grant of use immunity. The federal statute requires use immunity to be granted upon application by the prosecution.[60] It also set forth the test proposed by the *Murphy* Court in dicta, which states that upon a defendant's showing that she has testified under a grant of use immunity, the burden shifts to the government to prove that "their evidence is not tainted by establishing that they had an independent, legitimate source of the disputed evidence."[61]

Because the federal use immunity statute authorizes immunity "upon the request of the United States attorney,"[62] the question soon surfaced as to whether the court or defense may request a grant of immunity. The Third Circuit, in *United States v. Morrison*, explored the possibility of defense witness immunity upon a showing of prosecutorial misconduct.[63] Later, in *United States v. Herman*, the court found two instances in which the Due Process Clause requires that a defense witness be granted use immunity.[64] First, and building on *Morrison*, defense witness immunity is appropriate if a prosecutor has denied a grant of use immunity with the "deliberate intention of distorting the judicial fact finding process."[65] Second, the court may have "inherent authority to effectuate the defendant's compulsory process right by conferring a judicially fashioned immunity upon a witness whose testimony is essential to an effective defense."[66] Thus, though the facts of *Herman* did not warrant a grant of defense witness immunity, the framework had been established.

In *Government of Virgin Islands v. Smith*, the Third Circuit revisited the possibility of defense witness immunity, but this time with facts that fit both tests set forth in *Herman*.[67] The court in *Virgin Islands* remanded the case for an eviden-

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58. *Id.* at 462.

59. *Id.* at 458–59.

60. 18 U.S.C. § 6003 (2006) ("[T]he United States district court . . . *shall* issue . . . upon the request of the United States attorney for such district. . . .") (emphasis added). The fact that federal district courts are required to grant immunity when the U.S. attorney requests it is a characteristic that the *Belanger* court relied upon to distinguish the New Mexico Supreme Court's role in its grants of use immunity. Further, the *Belanger* court used this as an explanation as to why no federal decisions support the proposition that courts may, at their own discretion, grant use immunity. State v. Belanger, 2009-NMSC-025, ¶ 27, 210 P.3d 783, 790.

61. *Kastigar*, 406 U.S. at 460 (using the test put forth in *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 n.18 (1964)).

62. 18 U.S.C. § 6003(a).

63. 535 F.2d 223, 229 (3d Cir. 1976). The court in *Morrison* gave the prosecution an ultimatum: it could either request use immunity for the defense witness or suffer a judgment of acquittal. *Id.*

64. 589 F.2d 1191, 1204 (3d Cir. 1978).

65. *Id.*

66. *Id.*

67. 615 F.2d 964 (3d Cir. 1980).

tiary hearing to determine whether the potentially immunized testimony would be relevant to the defense of the accused, and also whether the prosecution had the deliberate intention of distorting the judicial fact finding process.[68] Upon an affirmative showing of both, the *Virgin Islands* court ordered the district court to enter a judgment of acquittal against the accused unless the government requested use immunity.[69]

The *Virgin Islands* court continued by addressing the inherent power of the judiciary to grant use immunity. Unlike statutory immunity, the court held that a grant of judicial immunity is triggered not by prosecutorial misconduct, but rather when the defendant is unable to present essential or exculpatory evidence.[70] The court held that due process requires "clearly exculpatory evidence [to be] presented to the jury, at least when there is no strong countervailing systemic interest which justifies its exclusion. . . ."[71] The court "recognize[d] that the essential task of a criminal trial is to search for truth, and that this search is not furthered by rules which turn the trial into a mere 'poker game' to be won by the most skilled tactician."[72] In recognizing a judicial power to grant defense witness immunity, the *Virgin Islands* court held that it did not create a new constitutional right, but rather fashioned "a new remedy to protect an established right."[73] Lastly, to stave off the separation of powers concern, the court worked in several procedural requirements before a judicial grant of defense witness immunity could be granted.[74]

Almost all of the federal circuit courts have recognized defense witness immunity at some level. These courts have not held that there is a constitutional right to defense witness immunity per se,[75] but rather have found a due process or a compulsory process right to it under certain circumstances.[76] These courts have relied upon two theories when justifying defense witness immunity. The first theory allows defense witness immunity only when there has been prosecutorial misconduct.[77] The other theory allows it only when the witness's testimony is clearly exculpatory to the defense of the accused.[78] Though it is clear that most circuits

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68. *Id.* at 969. This is the *Herman* standard, discussed *supra* in text accompanying note 64.

69. *Id.* This is the *Morrison* ultimatum discussed *supra* note 63.

70. *Id.*

71. *Id.* at 970 (quoting United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978)). This is sometimes referred to as the "effective defense theory." *See* United States v. Castro, 129 F.3d 226, 232 (1st Cir. 1997).

72. *Gov't of Virgin Islands*, 615 F.2d at 971. In recognizing this, the *Virgin Islands* court cited a string of U.S. Supreme Court decisions that stand for the proposition that the Due Process Clause does not tolerate formulaic adherence to procedural or evidentiary rules that prohibit criminal defendants from presenting exculpatory evidence. *Id.* at 970–71 (citing Chambers v. Mississippi, 410 U.S. 284 (1973); Gideon v. Wainwright, 372 U.S. 335 (1963); Roviaro v. United States, 353 U.S. 53 (1957)).

73. *Id.* at 971.

74. The court held that the "immunity must be properly sought in district court; the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity." *Id.* at 972.

75. *See* United States v. Washington, 398 F.3d 306, 310 (4th Cir. 2005).

76. The First Circuit found the "effective defense" theory to derive from the compulsory process clause, while the "prosecutorial misconduct" theory derived from the due process clause. United States v. Castro, 129 F.3d 226, 232 (1st Cir. 1997).

77. United States v. LaHue, 261 F.3d 993, 1014 (10th Cir. 2001); United States v. Whitehead, 200 F.3d 634, 640 (9th Cir. 2000); *Castro*, 129 F.3d at 232 (1st Cir. 1997); United States v. Bustamante, 45 F.3d 933, 943 (5th Cir. 1995).

78. *See* United States v. Bordeaux, 436 F.3d 900, 905 (8th Cir. 2006); United States v. Thomas, 357 F.3d 357, 365 (3d Cir. 2004).

have rejected the exculpatory theory in favor of the prosecutorial misconduct theory, others have determined that the two are not mutually exclusive. Instead, a defense witness may be immunized upon a showing of either.[79] Further, yet another circuit sees the two not as competing theories but as elements that must both be shown in order for defense witness immunity to be granted.[80]

*B. Pre-*Belanger *Use Immunity in New Mexico*

Very few state courts have upheld a court's ability to unilaterally grant use immunity to defense witnesses and currently New Mexico is the only state with such a rule.[81] Similar to the Federal Constitution, the New Mexico Constitution provides, "[n]o person shall be compelled to testify against himself in a criminal proceeding."[82] In New Mexico, in the event that a witness is compelled to testify, she is provided with immunity.[83] Though the original rule provided transactional immunity, the current rule prohibits only the use of such compelled testimony against the person in a later criminal case.[84]

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79. *Compare* United States v. Angiulo, 897 F.2d 1169, 1190–91 (1st Cir. 1989) (expressing "substantial reservations about the effective defense theory"), *with* United States v. Washington, 398 F.3d 306, 310 (4th Cir. 2005) *and* United States v. Emuegbunam, 268 F.3d 377, 401 (6th Cir. 2001).

80. United States v. Dolah, 245 F.3d 98, 105 (2d Cir. 2001), *overruled on other grounds by* Crawford v. Washington, 541 U.S. 36, 64 (2004).

81. A number of states have held that immunity statutes that provide anything less than transactional immunity are unconstitutional. *See* State v. Gonzalez, 853 P.2d 526, 533 (Alaska 1993); State v. Miyasaki, 614 P.2d 915, 924 (Haw. 1980); Dutton v. District Court, 518 P.2d 1182, 1184–86 (Idaho 1974); Attorney Gen. v. Colleton, 444 N.E.2d 915, 921 (Mass. 1982); People v. Schmidt, 455 N.W.2d 430, 434 (Mich. Ct. App. 1990); Wright v. McAdory, 536 So. 2d 897, 903–904 (Miss. 1988); State v. Soriano, 693 P.2d 26, 26 (Or. 1984); State v. Paquette, 369 A.2d 1096, 1099 (R.I. 1977); State v. Thrift, 440 S.E.2d 341, 351 (S.C. 1994); State v. MacQueen, 285 S.E.2d 486, 490 (W. Va. 1981); State v. McCullough, 744 P.2d 641, 642 (Wash. Ct. App. 1987).

Other states have followed *Kastigar* and held that use immunity sufficiently supplants the Fifth Amendment privilege. *See* Patchell v. State, 711 P.2d 647, 649 (Ariz. Ct. App. 1985); State v. Hanson, 342 A.2d 300, 304 (Me. 1975); People v. Johnson, 507 N.Y.S.2d 791, 793 (Sup. Ct. 1986); *Ex parte* Shorthouse, 640 S.W.2d 924, 928 (Tex. Crim. App. 1982); State v. Ely, 708 A.2d 1332, 1337–38 (Vt. 1997). For a compendium showing how state courts have been reluctant to grant defense witness immunity, see Robert M. Schoenhaus, Annotation, *Right of Defendant in Criminal Proceeding to Have Immunity from Prosecution Granted to Defense Witness*, 4 A.L.R. 4th 617 § 3(a)–(b). *Contra id.* § 5 (recognizing that some federal and state courts have held that under certain circumstances, mainly under either the "prosecutorial misconduct" or "effective defense" theory, defense witness immunity may be proper).

82. *Compare* U.S. CONST. amend. V., *with* N.M. CONST. art. II, § 15. Though this privilege is not found in a New Mexico constitutional amendment, this note will refer to the privilege against self-incrimination, in both federal and state cases, as the "Fifth Amendment privilege."

83. Rule 5-116 states,

> If a person has been or may be called to testify or to produce a record, document, or other object in an official proceeding conducted under the authority of a court or grand jury, the district court for the judicial district in which the official proceeding is or may be held may, upon written application of the prosecuting attorney, issue a written order requiring the person to testify or to produce the record, document or other object notwithstanding his privilege against self-incrimination.

Rule 11-412 NMRA states,

> Evidence compelled under an order requiring testimony or the production of a record, document or other object notwithstanding a privilege against self-incrimination, or any information directly or indirectly derived from such evidence, may not be used against the person compelled to testify or produce in any criminal case, except a prosecution for perjury committed in the course of the testimony or in a contempt proceeding for failure to comply with the order.

84. *Compare* N.M. R. Crim. P. 58, NMSA 1978 (1980 Repl. Pamp.) *with* Rule 11-412 NMRA.

For over twenty years, the New Mexico Supreme Court held firmly that courts had no power to unilaterally grant defense witness immunity. In *State v. Sanchez*, the court rejected the defendant's claim that the court's refusal to grant defense witness immunity violated his due process rights.[85] In *Sanchez*, the defense called a witness who had admitted to committing the crime for which Mr. Sanchez was being charged.[86] The witness, after taking the stand, asserted his Fifth Amendment right against self-incrimination.[87] In response, the defense requested a grant of immunity for the witness in order for the jury to hear the exculpatory testimony.[88] The defendant, relying on *Virgin Islands* and *Herman*, argued that a refusal to allow exculpatory testimony would violate an "integral aspect of due process" and that the court has an inherent power to grant defense witness immunity.[89]

The supreme court in *Sanchez* considered the rationale used in *Virgin Islands* but rejected its holding that courts have an inherent power to grant use immunity.[90] Because the New Mexico rule only allowed the court to grant use immunity upon the prosecutor's request, the court rejected Mr. Sanchez's claim.[91]

Also, the court held that the Sixth Amendment does not trump a witness's Fifth Amendment privilege.[92] It did so by citing *United States v. Alessio*, which held "[t]o interpret the Fifth and Sixth Amendments as conferring on the defendant the power to demand immunity for co-defendants, potential co-defendants, or others whom the government might in its discretion wish to prosecute would unacceptably alter the historic role of the [e]xecutive [b]ranch in criminal prosecutions."[93] The *Sanchez* court continued by citing *In re J.W.Y.*, which held, "where [a defendant's Sixth Amendment due process] right and the Fifth Amendment privilege of the witness against self-incrimination collide, the latter must prevail."[94] In doing so, the *Sanchez* court foreclosed the argument that a defendant had a Sixth Amendment right to defense witness immunity.

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85. 98 N.M. 428, 431, 649 P.2d 496, 499 (Ct. App. 1982), *overruled by* State v. Belanger, 2009-NMSC-025, 210 P.3d 783. The defendant claimed that his constitutional rights under the Fifth, Sixth, and Fourteenth amendments of the U.S. Constitution, and their counterparts found in sections fourteen and eighteen of the New Mexico Constitution had been violated by the court's refusal to grant immunity to witnesses who would provide exculpatory testimony. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Sanchez*, 98 N.M. at 431, 649 P.2d at 499 (relying on Gov't of Virgin Islands v. Smith, 615 F.2d 964 (3rd Cir. 1980) and United States v. Herman, 535 F.2d 223, 229 (3rd Cir. 1976)).

90. The *Sanchez* court followed *United States v. Hunter*, 672 F.2d 815 (10th Cir. 1982), *overruled on other grounds by United States v. Call*, 129 F.3d 1402, 1404 n.2 (10th Cir. 1997), which, following the majority of circuits, held that courts have no such "inherent power" to grant use immunity. *Sanchez*, 98 N.M. at 432–33, 649 P.2d at 500–501.

91. *Sanchez*, 98 N.M. at 431, 649 P.2d at 499 (1982) (citing N.M. R. Crim. P. 58, NMSA 1978 (1980 Repl. Pamp.)). The rules committee notes state, and the *Sanchez* court declared, that the New Mexico use immunity rule is derived from the federal statute. N.M. R. Crim. P. 58, NMSA 1978 (1980 Repl. Pamp.). Later, in *Belanger*, the court justified its departure from precedent by distinguishing the New Mexico and federal statutes: "[T]he federal approach . . . is not at all parallel to our own state rules." State v. Belanger, 2009-NMSC-025, ¶ 21, 210 P.3d 783, 789. While this is true with regards to the statute, which in New Mexico only applies in grand jury settings, the committee notes and the *Sanchez* court both compared the New Mexico rule, and not the New Mexico statute, to the federal statute.

92. *Id.* at 432–33, 649 P.2d at 502–503.

93. 528 F.2d 1079, 1082 (9th Cir. 1976).

94. *Sanchez*, 98 N.M. at 433, 649 P.2d at 503 (quoting *In re J.W.Y*, 363 A.2d 674, 682–83 (D.C. 1976), *overruled by* Carter v. United States, 684 A.2d 331 (D.C. 1996)).

The next year, in *State v. Cheadle*, the court upheld *Sanchez* and held that the court has no authority to grant defense witness immunity.[95] Though Mr. Cheadle cited *Virgin Islands* in arguing that the court had the power to grant defense witness immunity, the court held true to the plain language of Rule 58, which required "written application by the district attorney."[96] Interestingly, although the court dismissed the reasoning in *Virgin Islands*, it proceeded to apply that case's test to the facts of *Cheadle*.[97] The *Cheadle* court held that, even under *Virgin Islands*, the witness's testimony would have been inadmissible, because it was not clearly exculpatory.[98]

In *State v. Brown* the New Mexico Supreme Court upheld the constitutionality of a judicial grant of use immunity.[99] The challengers in *Brown* argued that separation of powers precluded a court from granting immunity at all.[100] As to the legislative challenge, the *Brown* court held that while grants of transactional immunity are "clearly within the province of the [l]egislature," grants of use immunity are within the power of the judiciary.[101] The court held that grants of use immunity function by: "(1) compelling a reluctant witness to testify in furtherance of the application of criminal law; and (2) protecting the witness's constitutional privilege against self-incrimination by precluding the use of particular evidence in future proceedings . . . [B]oth of these functions . . . inhere in the judiciary."[102] Further, because the rule required the prosecution to apply for the grant of immunity, the court dismissed the separation of powers challenge on behalf of the executive branch.[103] The court held that the New Mexico immunity statutes offered the federal Fifth Amendment protection required by *Kastigar* and also that "the judicial branch is a proper arm of government under the New Mexico Constitution to establish and administer use immunity."[104]

In *State v. Vallejos*, the court outlined the measures that prosecutors must take in order to preserve their ability to later prosecute a witness who was previously granted use immunity.[105] Following *Kastigar*, the court held that an immunized witness must only show that she was granted use immunity.[106] In what is referred to as a *Kastigar* hearing, the burden then shifts to the government to affirmatively show "that their evidence is not tainted by exposure to prior immunized testimony by establishing that they had an independent, legitimate source for the disputed evi-

95. State v. Cheadle, 101 N.M. 282, 287, 681 P.2d 708, 713 (1983), *overruled by* State v. Belanger, 2009-NMSC-025, 210 P.3d 783.

96. *Id.* (citing N.M. R. Crim. P. 58, NMSA 1978 (1980 Repl. Pamp.)).

97. *Id.* at 287, 681 P.2d at 713.

98. *Id.*

99. *See* State v. Brown, 1998-NMSC-037, ¶ 23, 969 P.2d 313, 321.

100. *Id.* ¶ 57, 969 P.2d at 329. The issue in this regard is twofold, with challenges from the perspective of both the legislature and the executive branch.

101. *Id.* ¶¶ 59–60, 969 P.2d at 329. The *Brown* court held that because transactional immunity "represents the Legislature's decision to suspend the application of its laws against particular classes of individuals . . . transactional immunity clearly falls within the Legislature's amnesty power." *Id.* ¶ 59, 969 P.2d at 330.

102. *Id.*

103. *Id.* ¶ 64, 969 P.2d at 332.

104. *Id.* ¶ 67, 969 P.2d at 333.

105. 118 N.M. 572, 579–80, 883 P.2d 1269, 1276–77 (1994).

106. *Id.* at 576, 883 P.2d at 1273.

dence."[107] During a *Kastigar* hearing, the prosecution must show that it derived all of its evidence from an independent source, and also that it has not used the immunized testimony in forming any strategic plan of prosecution.[108]

Given the burdens imposed on the prosecution by *Kastigar*, the *Vallejos* court cautioned the prosecution to exercise prudence when granting immunity. "It is the government's heavy burden to prove . . . that none of its evidence suffers from taint. . . . The government must . . . recognize that it, in its sole discretion, determines to whom it will grant immunity in order to convict others."[109] Further, the court warned of the "grave risk" that it runs in granting immunity, and "that any future prosecution of such an immunized witness . . . may, as a practical matter, be impossible."[110]

In these pre-*Belanger* cases, New Mexico appellate courts unequivocally held that: (1) though the trial court could not unilaterally grant use immunity, it had the authority to grant it upon application by the prosecutor; (2) the plain language of the New Mexico rule on use immunity did not allow immunity to defense witnesses; (3) defendants had no constitutional right to defense witness immunity; and (4) use immunity imposed significant burdens on the prosecution and their decision to apply for it should not be taken lightly.

C. The Distinction Between Substantive and Procedural Law in New Mexico

There has been long-standing friction between the New Mexico courts and the legislature when it comes to procedural and substantive laws.[111] The New Mexico Constitution and two New Mexico statutes give the court power to regulate practice and procedure.[112] On the other hand, the legislature has full power to determine substantive laws. Since the distinction between the two is often unclear, the court has held that "substantive law creates, defines or regulates rights while procedural law outlines the means for enforcing those rights."[113]

Though it was long-held that the court had the exclusive power to promulgate rules of practice and procedure,[114] the court has recently departed from such an absolute interpretation. In *Albuquerque Rape Crisis Center v. Blackmer*, the court

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107. *Id.* (quoting State v. Munoz, 103 N.M. 40, 42, 702 P.2d 985, 987 (1985)).

108. *Id.* at 577, 883 P.2d at 1274. The standard in a *Kastigar* hearing is preponderance of the evidence. *Id.* at 577, 883 P.2d at 1274; United States v. Schmidgall, 25 F.3d 1523, 1528 (11th Cir. 1994).

Some states require a higher burden of proof than what was required in *Kastigar*. For example, in Pennsylvania, prosecutors must prove by clear and convincing evidence that the evidence it seeks to introduce "arose *wholly* from independent sources" and not from the compelled testimony of the immunized witness. Commonwealth v. Swinehart, 664 A.2d 957, 969 (Pa. 1995).

109. *Id.* at 573, 883 P.2d at 1270 (quoting *Munoz*, 130 N.M. at 45, 702 P.2d at 990).

110. *Id.* (quoting *Munoz*, 130 N.M. at 45, 702 P.2d at 990).

111. For a comprehensive and often-cited history of this friction, see Michael B. Browde & M.E. Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M. L. REV. 407 (1985).

112. N.M. CONST. art. VI, § 3 ("The supreme court . . . shall have superintending control over all inferior courts. . . ."); NMSA 1978 § 38-1-1(A) (1933, as amended through 1966) ("The supreme court of New Mexico shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts of New Mexico for the purpose of simplifying and promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant.").

113. State v. Valles, 2004-NMCA-118, ¶ 14, 143 P.3d 496, 501.

114. *See* Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976).

held that while the court has the ultimate authority to promulgate rules of practice and procedure, that power is not exclusive.[115] Thus, while it is not unconstitutional for the legislature to pass a procedural law, if that statute comes in conflict with the rule adopted by the Supreme Court, the statute will be invalidated.[116] Most recently, the New Mexico Court of Appeals held that when both the legislature and the court have enacted a rule that affects "arguably the same subject matter," the court must determine "whether the purpose of the Legislature's rule is consistent with the Supreme Court rule. If it is, both may be given effect absent a fatal conflict."[117]

II. *STATE V. BELANGER* AND CURRENT NEW MEXICO DEFENSE WITNESS IMMUNITY

In 2009, when the New Mexico Supreme Court decided *State v. Belanger*, use immunity law in New Mexico took a major departure from precedent. The court amended the use immunity rule and held that, under certain circumstances, trial courts have the unilateral and inherent power to grant defense witness immunity with or without the concurrence of the prosecution.[118]

On August 31, 2004, twenty-eight-year-old Isaac Belanger was indicted on nine criminal counts[119] involving two alleged victims.[120] The indictment included one count of criminal sexual penetration of a minor (CSPM), two counts of attempted CSPM, two counts of bribery of a witness, one count of kidnapping, and three counts of battery.[121] S.S., Mr. Belanger's twelve-year-old niece, was one of the alleged victims.[122] She accused him of forcing her against the bathroom wall of her grandfather's house (Belanger's father), forcing his hand down her pants and digitally penetrating her vagina.[123] Nobody else witnessed the alleged incident; no physical evidence was found.[124]

Before his trial, Mr. Belanger learned that S.S. had made similar accusations against D.P., a minor.[125] These charges were dropped by the district attorney after, Mr. Belanger contended, it became evident that S.S. had contrived her claims against D.P.[126] Though the State denied that S.S. fabricated her claim against D.P., it admitted that the charges against D.P. had been dismissed and that it had no intention of bringing new charges against him.[127]

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115. 2005-NMSC-032, ¶ 5, 120 P.3d 820, 822.
116. *Id.*
117. Grassie v. Roswell Hosp. Group, 2008-NMCA-076, ¶ 10, 185 P.3d 1091, 1094 (citing Albuquerque Rape Crisis Ctr. v. Blackmer, 2005-NMSC-032, 120 P.3d 820).
118. State v. Belanger, 2009-NMSC-025, ¶¶ 35–38, 210 P.3d 783, 792–93.
119. *Id.* ¶ 3, 210 P.3d at 785.
120. State v. Belanger, 2007-NMCA-143, ¶ 2, 170 P.3d 530, 531, *overruled by Belanger*, 2009-NMSC-025, 170 P.3d 530.
121. *Belanger*, 2009-NMSC-025, ¶ 3, 210 P.3d at 785.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* ¶ 4, 210 P.3d at 786.
126. *Id.*
127. *Id.*

Mr. Belanger sought to interview D.P., who refused to speak about his involvement with S.S.[128] After D.P. invoked his Fifth Amendment right against self-incrimination, Mr. Belanger asked the prosecutor to apply to the court for an order of use immunity for D.P.[129] Mr. Belanger argued that with use immunity, D.P. could testify in Mr. Belanger's case without the fear of being criminally charged based on the contents his statements.[130] After the prosecutors turned down Mr. Belanger's request, he applied for relief from the district court.[131]

Mr. Belanger filed two motions with the district court. The first requested that the court compel production of the police report involving the alleged incident between D.P. and S.S.[132] The other requested that use immunity be granted so that D.P. could speak freely with Mr. Belanger.[133] The district court denied Mr. Belanger's use immunity request after applying Rule 5-116 NMRA, which, at the time, allowed immunity only upon request of the prosecutor.[134] Despite this, given the conflict between D.P.'s Fifth Amendment right against self-incrimination and Mr. Belanger's Sixth Amendment right[135] to confrontation and Fourteenth Amendment right to a fair trial,[136] the court apprised the State that if it did not request use immunity for D.P. within one week, the court would dismiss the charges against Mr. Belanger.[137]

The State took no action. Instead, it claimed that because the charges against D.P. had been dropped, he had no Fifth Amendment concern and thus no need for a grant of use immunity.[138] The district court found otherwise and dismissed the charges against Mr. Belanger.[139]

Although the New Mexico Court of Appeals recognized that the trial court correctly refused to grant D.P. use immunity,[140] it found error in dismissing the charges against Mr. Belanger.[141] Though the court noted the trial court's "lauda-

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128. *Id.* ¶ 4, 210 P.3d at 785–86.

129. *Id.* ¶ 5, 210 P.3d at 786.

130. *Id.*

131. *Id.* ¶¶ 5–6, 210 P.3d at 786.

132. State v. Belanger, 2007-NMCA-143, ¶ 2, 170 P.3d 530, 531.

133. *Id.*

134. *Id.* ¶ 6, 170 P.3d at 531.

135. Though the New Mexico Constitution's guarantee of compulsory and confrontation rights is found in article II, section 14, this note will refer to the rights generally, as "Sixth Amendment rights," as they are found in the Federal Constitution.

136. *Belanger*, 2007-NMCA-143, ¶ 7, 170 P.3d at 532.

137. State v. Belanger, 2009-NMSC-025, ¶ 6, 210 P.3d 783, 786. Note the similarity to the *Morrison* ultimatum discussed *supra* note 63.

138. *Belanger*, 2009-NMSC-025, ¶ 7, 210 P.3d at 736. The State claimed "the likelihood of further charges being lodged [against D.P. was] 'so remote as to be inconsequential' . . . [and] [b]ecause D.P. was 'no longer exposed to any jeopardy from the events that formed the basis of the previous prosecution,' . . . immunity [was] inappropriate." *Id.* The court of appeals was not persuaded and instead held "the Fifth Amendment right against self-incrimination does not vanish merely because the prosecution claims it will not prosecute. . . . 'Once the court determines that the answers requested would tend to incriminate the witness, it should not attempt to speculate whether the witness will in fact be prosecuted.'" *Id.* ¶ 43, 210 P.3d at 794 (citing United States v. Jones, 703 F.2d 473, 478 (10th Cir. 1983)). Further, the U.S. Supreme Court has held that courts have the ultimate authority in determining whether a witness's testimony is self-incriminating. ("[I]t is for the court to say whether his silence is justified and [if not] require him to answer.") Hoffman v. United States, 341 U.S. 479, 486 (1951).

139. *Belanger*, 2007-NMCA-143, ¶ 7, 170 P.3d at 532.

140. *Id.*

141. *Id.* ¶ 1, 170 P.3d at 530.

ble" intentions of recognizing the parties' conflicting constitutional rights, the appeals court held that *State v. Sanchez* was controlling.[142] Applying *Sanchez*, the court of appeals found error in the trial court's dismissal of the indictment against Mr. Belanger.[143] The court held, "where a defendant's Sixth and Fourteenth Amendment rights to compulsory process and due process collide with a witness' Fifth Amendment privilege against self-incrimination, 'the latter must prevail.'"[144]

The court further held that absent a "clear showing of prosecutorial misconduct, use-immunity can only be sought by the prosecution."[145] The court cited a number of New Mexico appellate decisions, and a rule, that stood for this specific principle.[146] Lastly, in dicta, the court recognized Mr. Belanger's desire for the court to reconsider the holding in *Sanchez*. After recognizing that other jurisdictions have considered a court's ability to grant use immunity, the court of appeals stated, "[that argument] has been specifically and repeatedly rejected by the New Mexico Supreme Court."[147]

The supreme court took Mr. Belanger's invitation to reconsider defense witness immunity and overruled its "repeated" stance that courts could not unilaterally grant it. In a unanimous opinion written by Justice Bosson, the New Mexico Supreme Court held that trial courts, under limited circumstances, and with or without the concurrence of the prosecutor, have the authority to grant use immunity.[148] In doing so, the supreme court overruled not only *Sanchez*, but all of the other cases that the court of appeals relied upon when it reversed the trial court's dismissal of Mr. Belanger's indictment.[149]

In coming to its conclusion, the supreme court first discussed the difference between use immunity and transactional immunity. Transactional immunity, the court held, is a promise by the prosecutors to a witness that the witness will not be

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142. *Id.* ¶¶ 7–8, 170 P.3d at 532 (citing 98 N.M. 428, 649 P.2d 496 (Ct. App. 1982), *overruled by* State v. Belanger, 2009-NMSC-025). The trial court judge's order read, "D.P. has an absolute Fifth Amendment right to remain silent. . . ." Order at RP0185, ¶ 1, State v. Belanger, No. CR 2004-3490 (N.M. Dist. Ct. May 5, 2006). Also, "[Mr. Belanger] has a right to interview D.P. pursuant to Defendant's state and federal constitutional rights to confrontation, due process, and a fair trial." *Id.* ¶ 2. Therefore, the court found "D.P.'s constitutional rights and Defendant's constitutional rights are in conflict." *Id.* ¶ 3.

143. *Id.*

144. *Belanger*, 2007-NMCA-143, ¶ 8, 170 P.3d at 532 (citing *Sanchez*, 98 N.M. at 435, 649 P.2d at 503).

145. *Id.* ¶ 6, 170 P.3d at 531 (quoting State v. Baca, 1997-NMSC-045, & 39, 946 P.2d 1066, 1074)).

146. Id. (citing Rule 5-116(A) NMRA; State v. Brown, 1998-NMSC-037, ¶¶ 63–64, 969 P.2d 313; State v. Baca, 1997-NMSC-045, ¶ 37, 124 N.M. 55, 946 P.2d 1066 ("[B]arring a clear showing of prosecutorial misconduct, use-immunity can only be sought by the prosecution.") *overruled by* State v. Belanger, 2009-NMSC-025; State v. Cheadle, 101 N.M. 282, 286, 681 P.2d 708, 712 (1983), *overruled by Belanger*, 2009-NMSC-025, 210 P.3d 783; State v. Crislip, 110 N.M. 412, 415, 796 P.2d 1108, 1111 (Ct. App. 1990), *overruled on other grounds by* Santillanes v. State, 115 N.M. 215, 225, n.7 849 P.2d 358, 368 n.7 (1993) ("The grant of immunity to a witness is, absent prosecutorial misconduct in deliberately intending to disrupt the fact-finding process, within the sole control of the prosecution."); State v. Sanchez, 98 N.M. 428, 432–33, 649 P.2d 496, 500–501 (Ct. App. 1982), *overruled by Belanger*, 2009-NMSC-025, 210 P.3d 783 ("[C]ourts have no power to independently fashion witness use immunity under the guise of due process.")).

147. *Belanger*, 2007-NMCA-143, ¶ 10, 170 P.3d at 532.

148. State v. Belanger, 2009-NMSC-025, ¶ 2, 210 P.3d 783, 785.

149. *Id.* ¶ 60, 210 P.3d at 797 (overruling or abrogating the following cases the court of appeals had relied upon: State v. Saiz, 2008-NMSC-048, 191 P.3d 521; State v. Baca, 1997-NMSC-045, 946 P.2d 1066; State v. Saavedra, 103 N.M. 282, 705 P.2d 1133 (1985); State v. Cheadle, 101 N.M. 282, 681 P.2d 708 (1983); State v. Crislip, 110 N.M. 412, 796 P.2d 1108 (Ct. App. 1990); State v. Sanchez, 98 N.M. 428, 649 P.2d 496 (Ct. App. 1982)).

charged for anything for which the witness testifies.[150] The court held that transactional immunity is a legislative prerogative, as it is "a decision by the people to exclude an entire class of individuals from application of the state's criminal laws."[151] The court held transactional immunity to be a form of amnesty.[152] As such, transactional immunity is "substantive law" under *Albuquerque Rape Crisis Center*, and the courts cannot promulgate rules authorizing it.[153]

The court held that use immunity has a different scope, function, and source of implementation than transactional immunity. Use immunity is simply a promise by the prosecutor to the witness that the prosecutor cannot use the witness's testimony in the case at hand in any future prosecution of that witness.[154] Additionally, the prosecutor cannot use any "evidence derived from the protected testimony" in any future claims against that witness.[155] With use immunity, the witness may still be charged for activities to which she testifies, but the prosecutor may not use or rely on the witness's testimony to prove its case.[156] In pointing out that the implementation of use immunity leaves both parties in the same position they would have been in had the witness claimed her Fifth Amendment right and never testified, the court held, "All the State surrenders is the ability to use testimony which it otherwise never would have had."[157]

The primary question in *Belanger* was whether the judiciary had a role in granting use immunity.[158] With the then-current rule stating that use immunity was available "upon request of the prosecutor," the *Belanger* court had to first determine whether the rule could be changed. To answer that question, the court examined the difference between transactional and use immunity: a distinction that the court felt previous New Mexico decisions had blurred. This confusion, according to the *Belanger* court, explained the court's earlier position that the courts had no role in granting use immunity.[159] The court pointed to *State v. Brown*, which

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150. *Id.* ¶ 11, 210 P.3d at 787.

151. *Id.* ¶ 13, 210 P.3d at 787.

152. *Id.*

153. *See supra* notes 115–16 and accompanying text.

154. *Belanger*, 2009-NMSC-025, ¶ 11, 210 P.3d at 787.

155. *Id.*

156. *Id.*

157. *Id.* ¶ 12, 210 P.3d at 787 ("With use immunity, both the prosecution and the witness are left in essentially the same position . . . The witness is not exposed to criminal liability for testimony given, and the prosecution loses little with respect to its ability to prosecute.").

158. The New Mexico rule on use immunity is found in Rule 11-412 NMRA, Rule 5-116 NMRA, and NMSA 1978, Section 31-6-15 (1979).

159. *Belanger*, 2009-NMSC-025, ¶ 13, 210 P.3d at 787 (citing State v. Cheadle, 101 N.M. 282, 286, 681 P.2d 708, 712 (1983)). In *Cheadle*, the defendant requested immunity after he made an offer of proof to the court as to the substance of the testimony of a witness he wished to call. *Cheadle*, 101 N.M. at 286, 681 P.2d at 712. The court denied Mr. Cheadle's request after reviewing NMSA 1978, Section 31-3A-1, which discusses use immunity, and NMSA 1978, Criminal Procedure Rule 58, which stated that "upon written application of the prosecuting attorney" a court may issue an order requiring the witness to testify. *Id.* At this point, the court was seemingly analyzing use immunity. However, the court continued by holding, "[t]his order must also contain a specific condition that New Mexico will forego the prosecution of the person for criminal conduct about which he is question and testifies." *Id.* This language seems like transactional immunity, as the state would have to agree to never bring charges against the witness.

Further, the court in *Belanger* pointed out that the *Apodaca v. Viramontes* court "assumed, incorrectly, that the immunity *rules* (as opposed to the statute) derived their authority from a legislative grant of power." *Belanger* 2009-NMSC-025, ¶ 16, 210 P.3d at 788 (citing Apodaca v. Viramontes, 53 N.M. 514, 517–18, 212 P.2d 425, 427 (1949)).

clarified that transactional immunity is a form of amnesty and is therefore a legislative prerogative. Use immunity, on the other hand, is a "creature of the courts, and therefore amenable to judicial change."[160] With the distinction made, the court was able to change the use immunity rule by exercising its "superintending power" to regulate practice and procedure under *Ammerman* and *Albuquerque Rape Crisis Center*.[161] The court held that use immunity is housed in the New Mexico rules of criminal procedure, and it is within its "inherent rule-making power . . . to create rules of criminal procedure, evidence and other matters that fall within the realm of pleading, practice and procedure."[162] Using this "inherent rule-making power" granted by the New Mexico Constitution, the court simply changed the rule to include a judicial power to grant defense use immunity.[163]

In support of its contention that there is a judicial power to create rules, the court pointed to the evolution of use immunity in New Mexico jurisprudence. Specifically, the court traced the evolution of Rule 58, an earlier version of Rule 5-116 NMRA, and noted the role that the criminal procedure committee's commentary played in shaping the modern rule.[164] Originally, this rule provided for transactional immunity.[165] The committee later amended the rule by removing the rule's reference to "transactional immunity;" thus making it a rule regarding use immunity.[166] Further, the committee commentary was later amended to specify that only the state could apply for use immunity.[167] Lastly, committee commentary suggested that a defendant may be entitled to use immunity under the Fifth and Sixth Amendments of the U.S. Constitution.[168] The *Belanger* court concluded that the committee's hand in shaping use immunity demonstrated the supreme court's ability to change rules of procedure in New Mexico.[169]

The *Belanger* court looked at the federal use immunity statute and distinguished the role that federal district courts play in a grant of immunity from that of New Mexico courts.[170] The *Belanger* court pointed out that the federal rule is "legislatively based," meaning all federal rules of practice and evidence derive from Congress and not the courts.[171] Further, the federal statute requires application by the

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160. *Belanger*, 2009-NMSC-025, ¶ 35, 310 P.3d at 792.

161. *Id.* (citing Albuquerque Rape Crisis Ctr. v. Blackmer, 2005-NMSC-032, 120 P.3d 820; Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976)).

162. *Id.* ¶ 17, 210 P.3d at 788.

163. *Id.* ¶ 18, 210 P.3d at 788. The New Mexico Constitution, article VI, section 3, grants the New Mexico Supreme Court "superintending control of all inferior courts." It should be noted, however, that the New Mexico Constitution does not give the supreme court an "inherent rule-making power." That language comes from *State v. Brown*, 1998-NMSC-037, ¶ 61, 969 P.2d 313, 330.

164. *Belanger*, 2009-NMSC-025, ¶ 18, 210 P.3d at 789 (citing Rule 5-116 NMRA committee commentary).

165. *Id.* (citing Rule 5-116 NMRA committee commentary).

166. *Id.* ¶ 19, 210 P.3d at 789. In New Mexico, the evidence committee and a criminal procedure committee is made up of members of the legal community and not the legislature. The committees draft, revise and change court rules, largely by studying New Mexico precedents, as well as rulings in other jurisdictions, including the federal courts and Congress.

167. *Id.* (citing Rule 5-116 NMRA committee commentary).

168. *Id.* ¶ 20, 210 P.3d at 789 (citing Rule 58 NMRA Final Draft, committee commentary, 4/1982).

169. *Id.* ¶ 21, 210 P.3d at 789.

170. *Id.* ¶ 22, 210 P.3d at 789 (considering 18 U.S.C. §§ 6001–6005 (2006)).

171. *See id.* ¶ 27, 210 P.3d at 790; *see also* Mistretta v. United States, 488 U.S. 361, 385–88 (1989) (recognizing Congress's power under the U.S. Constitution to control rules and procedure of the federal courts).

prosecuting attorney before a grant of use immunity.[172] It is only when the court makes a finding of prosecutorial misconduct that federal courts take any part, other than merely a ministerial function, in granting use immunity.[173] The *Belanger* court pointed out that unless this one exception for prosecutorial misconduct is met, a federal court is merely a cog in the U.S. Attorney's act of granting witness immunity.[174] Unlike federal use immunity, which is driven by statute, New Mexico's use immunity is driven by court rule.[175] Further, because a grant of use immunity is a procedural matter, a judge may grant immunity under the court's inherent power and "ultimate rule-making authority" over pleading and procedure.[176]

After holding that the supreme court has the authority to change New Mexico's position on use immunity, the *Belanger* court next held that trial courts have the authority to grant use immunity over an objection of the prosecution.[177] The court proposed a balancing test, with the initial burden on the defendant to show that the testimony sought is admissible, relevant, and material to her defense, and that without the testimony, her "ability to fairly present a defense will suffer to a significant degree."[178] Once the defendant makes a sufficient showing, the government must "demonstrate a persuasive reason that immunity would harm a significant governmental interest."[179] Thus, the district court must balance the defendant's need to examine the witness with the state's interest in opposing immunity and "exercise its informed discretion to grant use immunity."[180]

In dicta, the *Belanger* court roughly outlined issues that the district court should take into consideration on remand. It did not, however, apply its new test to determine whether Mr. Belanger should be entitled to examine D.P.

The court recognized that its holding inevitably begged criticism under separation of powers. The first concern was whether the court was invading the scope of the legislature by assuming sole power to change the rule on use immunity.[181] In dealing with such criticism, the court first made clear that grants of transactional immunity are clearly and exclusively a legislative prerogative and not within the

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172. *Belanger*, 2009-NMSC-025, ¶ 23, 210 P.3d at 789. 18 U.S.C. § 6003(a) provides that a district court "shall issue . . . upon the request of the United States attorney for such district, an order requiring such individual to give testimony."

173. *Belanger*, 2009-NMSC-025, ¶ 24, 210 P.3d at 789. Though several courts have recognized a hypothetical circumstance in which courts may have power to grant use immunity, the Third Circuit, in *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980), is the only federal court to have found an inherent judicial power outside of 18 U.S.C. §§ 6001–6005 (2006) to grant defense witness immunity. New Mexico has long recognized the ability of a court to grant defense witness immunity upon a showing of prosecutorial misconduct. However, given the "defendant['s] difficult burden to show prejudice" as a result of the misconduct, it is seldom granted. *See* State v. Velasquez, 99 N.M. 109, 112, 654 P.2d 562, 565 (Ct. App. 1982).

174. 2009-NMSC-025, ¶ 27, 210 P.3d at 790. In *United States v. Lenz*, 616 F.2d 960, 962–63 (6th Cir. 1980), the court held, "[w]hile use immunity for defense witnesses may well be desirable, its proponents must address their arguments to Congress, not the courts."

175. *Belanger*, 2009-NMSC-025, ¶ 35, 210 P.3d at 792. The court continued, "use immunity rules flow[ ] naturally from the well-accepted proposition that New Mexico courts control issues of evidence and testimony." *Id.* ¶ 33, 210 P.3d at 791.

176. *Id.* (quoting Albuquerque Rape Crisis Ctr. v. Blackmer, 2005-NMSC-032, ¶ 5, 120 P.3d 820, 822).

177. *Id.* ¶ 36, 210 P.3d at 792.

178. *Id.* ¶ 38, 210 P.3d at 793.

179. *Id.*

180. *Id.* The standard of review for such a decision is abuse of discretion. *Id.*

181. *Id.* ¶ 50, 210 P.3d at 795.

power of the judiciary.[182] Use immunity, on the other hand, was deemed procedural and the court held that there is no separation of powers argument when the court makes a procedural rule.[183]

The second separation of powers concern that the court addressed was that defense witness immunity strips the executive branch of the ability to prosecute its case as it sees fit.[184] Specifically, the court recognized the inherent difficulty that prosecutors will have in proving that their evidence was obtained from a source outside of the immunized testimony.[185] Also problematic to a prosecuting attorney is the need to manage two cases in one. The court recognized that the prosecution may intentionally cut short its cross-examination of an immunized witness in one trial for the sole purpose of preserving its ability to prosecute that witness in a different trial.[186] Once an immunized witness has divulged incriminating details on the stand, if the state later attempts to try the witness for those acts, the witness could force the state to prove that its evidence of guilt came from an independent source other than the immunized trial testimony.[187]

Though the court acknowledged that these complications "may, as a practical matter, [make future prosecution] impossible,"[188] the court nonetheless found that the prosecution is well-equipped to deal with such difficulties.[189] The court found the prosecutor's protection to be in the trial court's discretion when performing the balancing test.[190]

The court also addressed additional policy concerns regarding its holding. While the state argued that a judicial power to grant use immunity would bog down the courts, it held that administrative concerns do not outweigh defendants' constitutional rights to confrontation and fair trials.[191] Additionally, the court dismissed the concern recognized by some courts that witnesses may lie in order to receive immunity.[192] Though this is a "legitimate" concern, the *Belanger* court held that with use immunity, the witness has nothing to gain by lying.[193] Further, the court pointed out, use immunity does not protect the witness from prosecution for perjury.[194]

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182. *Id.*

183. *Id.* ¶ 33, 210 P.3d at 791.

184. *Id.* ¶ 53, 210 P.3d at 795.

185. *Id.* ¶ 53, 210 P.3d at 795–96 (citing Kastigar v. United States, 406 U.S. 441, 461 (1972) (recognizing the "heavy burden" that the government has in showing that their case against an immunized witness is not derived from the immunized testimony)).

186. *Id.* ¶ 53, 210 P.3d at 796.

187. *Id.*

188. *Id.* (citing State v. Vallejos, 118 N.M. 572, 580, 883 P.2d 1269, 1279 (1994)).

189. *Id.* ¶ 54, 210 P.3d at 796.

190. *Id.*

191. *Id.* ¶ 55, 210 P.3d at 796.

192. *Id.* ¶ 56–57, 210 P.3d at 796–97 (dismissing the concern raised in cases such as *In re Kilgo*, 484 F.2d 1215, 1222 (4th Cir. 1973)). The problem of such "immunity baths" is demonstrated in the example provided by the *Belanger* court. "For example, a friend of the accused may testify falsely under an immunity grant, stating that he, and not the accused, is guilty of the crime. Confused thereby, the jury may be unable to decide to convict beyond a reasonable doubt. . . . [T]he prosecution may be left without a case, and the real perpetrator . . . is never held accountable." *Id.* ¶ 56, 210 P.3d at 796–97.

193. *Id.* ¶ 57, 210 P.3d at 797.

194. *Id.*

Despite these concerns on behalf of both the executive and legislative branches, the *Belanger* court found that the benefits of defense witness immunity outweigh any potential criticisms.[195]

III. LEGISLATIVE AND PROSECUTORIAL CONSIDERATIONS WITH THE *BELANGER* DECISION

Section A of this part addresses separation of powers concerns with regards to the legislative branch. Section B continues with a discussion of the burdens and protections that the *Belanger* test provides the prosecution.

A. The Threat of Legislative Usurpation by Branding Doctrines "Procedural"

The *Belanger* court correctly distinguished the New Mexico rule from the federal use immunity statute, and further highlighted the different roles each leaves for their respective courts. The *Belanger* court held, "the federal approach [to the mechanics of use immunity] is not at all parallel to our own state rules."[196] Later, the court stated, "We . . . comfortably conclude that the federal immunity rule is quite unlike our own rule."[197] At first glance, these statements seem to contradict precedent and the committee commentary's statement that New Mexico use immunity was derived from the federal model.[198] Upon closer scrutiny, however, the court's reasoning is sound. Under the federal constitution, Congress has the ultimate power to draft and implement rules of procedure and evidence.[199] Thus, the scope of the federal use immunity statute is within the sole discretion of Congress, and federal courts cannot change the rule. Yet, because the New Mexico use immunity rule is found in rules of criminal procedure, the court is able to exercise its inherent power to change the rule.[200] That change would be no different from when the court changes rules regulating page limitations, font size, dress code, or other rules of the court.

Regardless of what the legislature does in response to *Belanger*, the court's new expansion of use immunity will go unaffected. In *Belanger*, the court pointed out the legislative silence on use immunity at trial. Given this silence, the court exercised its "ultimate rulemaking authority" over pleading and procedure and created judicial immunity.[201] Though it would appear that the court changed the rule, at least in part, due to the legislature's silence, given the court's position in *Brown* that use immunity is a procedural matter, the court will always dictate the direction of use immunity. Even if the legislature had enacted or does enact a new substantive statute that only allows use immunity upon the application of the prosecution, the statute will be invalidated under *Albuquerque Rape Crisis Center*.[202] This is based on the court's determination in *Brown*, and affirmed in *Belanger*, that use

195. *Id.*
196. *Id.* ¶ 21, 210 P.3d at 789.
197. *Id.* ¶ 32, 210 P.3d at 791.
198. *See supra* note 91.
199. *See* Mistretta v. United States, 488 U.S. 361, 385–88 (1989) (recognizing Congress's power under the U.S. Constitution to control rules and procedure of the federal courts).
200. *See supra* notes 112–17 and accompanying text.
201. *See supra* note 112 and accompanying text.
202. *See supra* note 116 and accompanying text.

immunity is procedural, and thus within the court's inherent power to regulate. Alternatively, the court could hold that there is in fact a constitutional right to defense witness immunity. If it does, any new statute to the contrary would be unconstitutional.[203] It is clear that the court, either through its power to regulate procedure or as the ultimate authority for constitutional protections, will have the ultimate say in how, when, and under what circumstances defense witness immunity is appropriate. In other words, defense witness immunity is here to stay.[204]

An obvious concern with *Belanger* is the court's ability to usurp the legislative process by branding use immunity, or any legal doctrine, as a procedural issue. Assuming use immunity, as a legal doctrine, is procedural, complications arise within its confines. After all, use immunity itself has both substantive and procedural elements.[205] As to the immunized witness, the former prohibits a prosecutor from using testimony or any of its fruits against her, while the latter governs the mechanics by which use immunity is granted. As to the defendant, however, the focus is primarily on her substantive constitutional rights to a fair trial. Though the supreme court is the final authority on the substantive rights granted in the New Mexico Constitution, an interesting interplay exists when the court extends a defendant's substantive rights in the process of regulating a rule it considers procedural.[206]

The ability to split use immunity into its substantive and procedural components may not change the court's reasoning that it is a procedural matter. Yet, its binary nature shows the futile attempt to try to peg a legal doctrine, here use immunity, as purely procedural or purely substantive. Because this distinction is so elusive, the court's straight-line approach in defining use immunity as "procedural" warrants scrutiny—particularly because in doing so, it prevents other branches of government, or the people of New Mexico, from challenging the issue. Further, by not declaring a constitutional right, the court is free to return to the issue in the future and simply change the rule, as it unexpectedly did in *Belanger*.

B. Prosecutorial Concerns with Belanger

As stated, what is most troubling about the *Belanger* decision is the court's ability to expand its power, without oversight, at the expense of the prosecution. Historically, courts dismissed complaints about the burdens that immunity poses for the prosecution. As the New Mexico Supreme Court pointed out in *Vallejos*, the prosecution "chose to run this grave risk by compelling [the witness] to testify," and it should therefore be forced to live with the consequences.[207] However, after *Belanger*, it is no longer the prosecution that "chose" to pursue immunity, and therefore, the "you made your own bed" reasoning that justified the burdens on a prosecutor is no longer valid. The *Belanger* court recognized that use immunity

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203. *See* Dillon v. King, 87 N.M. 79, 85, 529 P.2d 745, 751 (1974) ("It is . . . our function and duty to say what the law is and what the Constitution means.").

204. That is, at least as long as the New Mexico Supreme Court wants it to stay.

205. For the distinction between substantive and procedural law, see *supra* note 113 and accompanying text.

206. Further, by distinguishing New Mexico courts' roles during a grant of use immunity from federal courts' (which are more ministerial, mandatory, and perhaps more "procedural"), an interesting question is whether the *Belanger* court pushed use immunity closer to the realm of substantive law.

207. State v. Vallejos, 118 N.M. 572, 573, 883 P.2d 1269, 1270 (1994).

"pos[es] significant challenges to the prosecution," and that prosecution after a grant of use immunity "may, as a practical matter, be impossible."[208] This conflicts with the *Kastigar* court's justification, also adopted by the *Belanger* court, that a grant of use immunity "leaves the witness and the government in substantially the same position as if the witness had claimed his privilege in the absence of a grant of immunity."[209] Though the prosecution may still bring charges against the immunized witness, the burden that was once self-imposed can now be imposed by the courts.

Further, the court may well have underestimated a witness's incentive to falsely incriminate herself in exchange for use immunity. For example, assume a guilty defendant calls a friendly witness who, though she had nothing to do with the crime, will admit to the crime to which the defendant is charged. Given the confession, at trial, the jury acquits the defendant. Because of use immunity, though the witness may be prosecuted for the crime to which she has confessed in court, that confession cannot be used. As is likely the case, the prosecution will not have any other evidence that incriminates that witness. Thus, though the witness may still be prosecuted, the only link to the crime is the unusable confession under a grant of immunity at trial. Such witnesses could play a spoiler role in the prosecution of the state's primary suspect by getting that defendant off the hook. The prosecution is then left with an anonymous witness whose guilt is otherwise unsubstantiated, an acquitted accused, and a crime left unpunished.

Given this threat, courts should give prosecutors wide latitude during cross-examination of immunized defense witnesses to explore any bias or motive she may have in incriminating herself.[210] Used effectively, cross-examination is the prosecution's best tool to combat any misuse by friendly defense witnesses.[211] For instance, a friendly defense witness should be questioned on the existence of her immunity deal, whether there is any other evidence besides her self-incriminating testimony that might link her to the crime, or any relationship she may have with the defendant.

Despite the threat of a false confession, the protections to the criminally accused, and thus to society as a whole, outweigh the possibility that a shrewd witness will frustrate the prosecutor's role in enforcing the law. To be sure, the U.S. Supreme Court's opinion in *Murphy* sheds light on a similar argument that the Fifth Amendment provides an undesirable "shelter for the guilty."[212] Though *Belanger* deals with such a shelter being potentially constructed by a cooperative defense witness posing as a stool pigeon, this is the lesser evil that we as a society should accept in exchange for the protections that *Belanger*'s holding provides. Not only is it unlikely that such a scheme could be orchestrated without defense

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208. State v. Belanger, 2009-NMSC-025, ¶ 53, 210 P.3d 783, 795–96. (quoting Vallejos, 118 N.M. at 580, 883 P.2d at 1277).

209. *Id.* ¶ 12, 210 P.3d at 787 (quoting State v. Sanchez, 98 N.M. 428, 433–34, 649 P.2d 496, 501–502 (1982)).

210. *See* United States v. Abel, 469 U.S. 45 (1984).

211. *See* 5 JOHN HENRY WIGMORE, EVIDENCE §§ 2250–51 (John T. McNaughton rev. ed. 1961 & Supp. 1991) § 1367 ("[Cross examination] is the greatest legal engine ever invented for the discovery of truth."); Davis v. Alaska, 415 U.S. 308, 316 (1974) (pointing out that "Cross-examination is the principal means by which the believability of a witness and the truth of his memory are tested").

212. *See supra* note 50 and accompanying text.

counsel's knowledge, but the demanding hurdles that must be cleared under the new *Belanger* test likely make such a "shelter" concern more academic than real.[213] The test required under *Belanger* not only requires a demanding showing to justify a grant of defense witness immunity, but also allows the government to overcome that showing with a persuasive reason for opposing it.[214] Thus, though this test has not been implemented, it is likely to be, as the *Belanger* court predicted, an extraordinary remedy.

Another burden on the prosecution is a prosecutor's inability to participate in the future prosecution of an immunized witness. Prosecutors that have been exposed to immunized testimony cannot participate in any way in the future trial of the witness.[215] Similarly, state's witnesses, such as police officers who are present when immunized testimony is given, are not able to testify or participate in any further investigation of the witness.[216] While in a city like Albuquerque or Santa Fe, it will be less of a challenge to find prosecutors and officers who have not been exposed to the immunized testimony, the same cannot be said for the less-populated areas of New Mexico.[217]

Despite these burdens, the *Belanger* opinion provides significant protections for the prosecution. Foremost is the discretion that the trial court has in granting defense witness immunity. This is embodied in the *Belanger* court's balancing test between the defendant's need in having the witness testify and the state's interest in not granting immunity. Though the court's requirement that the government show a "persuasive reason that immunity would harm a significant government interest" offers little guidance as to its substance, the *Belanger* court was clear that defense witness immunity is an extraordinary remedy, and one that should not be granted lightly.[218] Further, if a defense witness is granted immunity for the purposes of an in camera review to determine the substance of her testimony, that does not mean that she will be immunized at trial. Because "[t]he two decisions are separate [and] [i]mmunity for one purpose does not equate to immunity for the other," the court still has the discretion to deny the defendant's request that the immunized witness be granted immunity at trial.[219] Lastly, though successful prosecutions are undoubtedly important, the state's difficulty in prosecuting an immunized defense witness in a subsequent trial should not overcome the defendant's need for the "material" evidence at her own trial.[220]

Further outweighing any criticisms are the protections that *Belanger* provides for the criminally accused. Again, the U.S. Supreme Court's reasoning is helpful;

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213. Not only would a criminal defendant have to know about and understand *Belanger*, but she would need to find a friendly witness who is willing to go to a court of law, take an oath to tell the truth, and falsely incriminate herself on the stand—all the while keeping it a secret from defense counsel.

214. *See supra* notes 178–79 and accompanying text.

215. State v. Munoz, 103 N.M. 40, 44, 702 P.2d 985, 989 (1985).

216. *Id.*

217. Almost forty percent of New Mexico's nearly two million inhabitants live in Bernalillo and Santa Fe counties. *See* New Mexico Census Data, http://quickfacts.census.gov/qfd/states/35000.html (follow "Select a County" drop down box and view information on "Bernalillo County" and "Santa Fe County") (last visited Apr. 15, 2010) (stating that Bernalillo County's population is 635,139, while 143,937 people live in Santa Fe County). The total population of New Mexico is 1,984,356. *Id.*

218. State v. Belanger, 2009-NMSC-025, ¶ 38, 210 P.3d 783, 793.

219. *See id.* ¶ 39, 210 P.3d at 793.

220. *See* Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 170 (1974).

this time in *Ullmann*.[221] The *Ullmann* Court upheld grants of immunity despite the fact that, after a grant of immunity, it may be difficult to later prosecute that witness.[222] In *Ullmann*, the Court held that the lesser evil, forfeiting a prosecution, should be accepted in fear that the greater evil, convicting innocent people, will prevail.[223] Despite the different context, the *Ullmann* court's reasoning is equally valid here. Specifically, it is much better to have separation of powers issues, with branches of government arguing over whose power was encroached upon, than to allow the government to overstep the rights of the people. This undoubtedly poses a lesser evil/greater evil scenario. This is equally true with regard to any argument that the courts will be clogged with grants of defense witness immunity. The *Belanger* court incorporated some of this reasoning when it noted "[a] desire for judicial expediency provides no excuse to short-change a defendant in his quest for constitutional protection."[224]

Lastly, it cannot be forgotten that the prosecutor's ultimate goal is to search for the truth, and that the stakes at play in a criminal prosecution could not be higher for the defendant. As the *Virgin Islands* court correctly pointed out, criminal trials are not "poker game[s] to be won by the most skilled tactician," but rather a "search for truth."[225]

Further, regarding the burdens that the prosecution will occasionally feel, one court has reminded us that "[d]ifficulty, effort and, indeed, sacrifice have always been considered a reasonable price to pay for personal rights."[226] Affording a criminal defendant an equal footing to present key testimony is worth any extra effort now required by the prosecutor under *Belanger*. After all, "[i]f convicting the guilty justifies immunity for government witnesses, exonerating the innocent should justify immunity for defense witnesses."[227]

IV. *BELANGER* IN ACTION

A. *The New* Belanger *Test for Defense Witness Immunity*

The *Belanger* test puts the initial burden on the accused to show that the sought after testimony is admissible under the rules of evidence. If it is, the defense must show that the testimony is "material to the defense" and that "without it, [the

221. Ullmann v. United States, 350 U.S. 422, 428 (1954).

222. *See supra* notes 42–43 and accompanying text.

223. Ullmann, 350 U.S. at 428.

224. *Belanger*, 2009-NMSC-025, ¶ 55, 210 P.3d at 796.

225. Gov't of Virgin Islands v. Smith, 615 F.2d 964, 971 (3d Cir. 1980). Though this often-cited case claims that the Sixth Amendment demands trials to be a "search for the truth," another author has argued that the Sixth Amendment represents the criminally accused's right to be put on an equal footing with the prosecution: a right that calls for the defendant to have all of the tools available to the prosecution, regardless of the "truth" of what they might disclose. *See* Janet C. Hoeffel, *The Sixth Amendment's Lost Clause: Unearthing Compulsory Process*, 2002 WIS. L. REV. 1275, 1283 n.35 (2002).

226. State v. Summers, 485 A.2d 335, 537 (N.J. Super. Ct. Law Div. 1984). Though the court in *Summers* granted defense witness immunity, subsequent decisions in New Jersey make it clear that courts do not have the inherent power to grant it. *See* State v. Feaster, 877 A.2d 229 (N.J. 2005) (relying on federal caselaw that allows defense witness immunity upon a showing of prosecutorial misconduct); State v. Cito, 517 A.2d 174 (N.J. Super. Ct. App. Div. 1986) (rejecting the minority view that defense witnesses are entitled to a grant of immunity); State v. Jordan, 485 A.2d 323, 330 n.5 (N.J. Super. Ct. App. Div. 1984) (rejecting the *Summers* court's holding).

227. Westen, *supra* note 220, at 170.

defendant's] ability to fairly present a defense will suffer to a significant degree."[228] With no caselaw establishing what this standard means exactly, we can glean guidance from federal courts that have recognized their power to grant use immunity under the "clearly exculpatory" standard.[229]

It is important to keep in mind that the standard required under *Belanger* is less stringent than many of the "clearly exculpatory" requirements set forth in *Virgin Islands*. In *Virgin Islands*, the court required the sought-after testimony under a grant of judicial immunity to be unambiguous and properly sought after at trial.[230] Further, "the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity."[231] The *Belanger* standard, on the other hand, does not require the testimony to be "clearly exculpatory" but rather only "material to the defense" and "without it, [the] ability to present a defense will suffer to a significant degree."[232] Despite this difference, because the federal approach is more demanding, any grant of immunity under the *Virgin Islands* test should warrant immunity under the *Belanger* test. Further, any circumstances that did not warrant defense witness immunity under *Virgin Islands* are distinguishable due to the stricter standard. For instance, the court in *United States v. Thomas* rejected a defendant's request for defense witness immunity when the testimony was considered "at best speculative."[233] Because *Belanger* immunity during an in camera review does not necessitate immunity at trial, courts may be willing to immunize witnesses whose testimony may be speculative, but will only be known definitively after an in camera interview with her. For these reasons, defense counsel will likely have the upper hand in arguing federal caselaw to New Mexico courts in seeking immunity grants under *Belanger*.

B. Framing Constitutional Arguments After Belanger

Though language in *Belanger* shows the court's concern with the accused's constitutional rights, it did not root defense witness immunity in the New Mexico Constitution. The court held, "the fundamental problem with the current rule" is that the prosecution has autonomy over use immunity, and thus over the accused's constitutional rights.[234] Further, though the court seemed to be concerned with the "erosion of important constitutional rights of the accused" it did not answer the question of whether, "D.P.'s constitutional rights, if any, may be imperiled."[235] Rather, the court "le[ft] it to the district court to consider . . . whether it is the Sixth Amendment rights of confrontation or compulsory process, or simply the

228. *Belanger*, 2009-NMSC-025, ¶ 38, 210 P.3d at 793.
229. *See supra* note 78 and accompanying text.
230. Gov't of Virgin Islands, 615 F.2d at 972.
231. *Id.*
232. *See supra* note 178 and accompanying text.
233. 357 F.3d 357, 365 (3d Cir. 2004) (citing United States v. Ammar, 714 F.2d 238, 251 n.8 (3d Cir. 1983)).
234. State v. Belanger, 2009-NMSC-025, ¶ 44, 210 P.3d 783, 794.
235. *Id.* ¶ 2, 210 P.3d at 785. Though the court references D.P.'s constitutional rights, it seems to be refering instead to Mr. Belanger, as D.P. had no confrontation, compulsory process, or due process concern when *Belanger* was decided.

broader Fourteenth Amendment right to a fair trial [that is violated]."[236] While the supreme court may never need to declare a constitutional right to defense witness immunity, it certainly invited argument in favor of expanding the constitutional rights of the criminally accused.

Along with their arguments under the *Belanger* test, defense attorneys should argue that defense witness immunity is a constitutional guarantee. Though the *Belanger* court held that use immunity was found in the rules of practice and procedure, and thus within its inherit power to regulate, the opinion shows the court's obvious concern with the defendant's constitutional rights to compel witnesses and to have a fair trial.[237] Further, the test that was promulgated, including its initial burden on the accused and the burden shift to the government to show "a persuasive reason that immunity would harm a significant governmental interest," suggests a constitutional rights balancing test.[238]

1. New Mexico's Interstitial Approach and Ability to Broaden Constitutional Rights

Despite federal courts' unwillingness to allow an accused's Federal Sixth Amendment right to trump a witness's Fifth Amendment right, the New Mexico court may apply its "interstitial approach" in broadening state constitutional rights of the criminally accused.[239] Though the court has not yet determined defense witness immunity to be constitutionally protected, the court in *State v. Gomez* made clear that litigants who intend to argue the interstitial power of the court to expand a yet-to-be-declared right must preserve the issue at trial.[240] *Gomez* and Justice Bosson's concurrence in *Garcia* make it evident that the court has multiple interpretations of preservation of rights for appeal.[241] Nonetheless, to preserve the con-

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236. *Id.* ¶ 39, 210 P.3d at 793.

237. At the risk of overstating the obvious, one need not look further than Justice Bosson's language that "important constitutional rights of the accused" were at issue in *Belanger*. *Id.* ¶ 2, 210 P.3d at 785.

The New Mexico Supreme Court has the authority to determine rights under the New Mexico Constitution. Dillon v. King, 87 N.M. 79, 85, 529 P.2d 745, 751 (1974) ("It is . . . our function and duty to say what the law is and what the Constitution means.").

238. *See, e.g.,* Wagner v. AGW Consultants, 2005-NMSC-016, ¶ 56, 114 P.3d 1050, 1066.

239. In *State v. Gomez*, 1997-NMSC-006, ¶¶ 19–20, 932 P.2d 1, 7, the court held that New Mexico courts may depart from federal interpretation of constitutional provisions if any one of the following three provisions is met: "flawed federal analysis; structural differences between state and federal government; or distinctive state characteristics." Because the *Belanger* court clearly established that the federal and state authority to grant use immunity is different, it would easily fit into the second provision that warrants expansion of New Mexico constitutional rights under the interstitial approach set forth in *Gomez*. *See also Michael B. Browde*, Gomez *Redux, Procedural and Substantive Developments Twelve Years On,* 40 N.M. L. REV. 179 (2010).

240. The *Gomez* court held that when existing "precedent construes the [state] provision to provide more protection than its federal counterpart, the claim is preserved by (1) asserting the constitutional principle that provides the protection sought under the New Mexico Constitution, and (2) showing the factual basis needed for the trial court to rule on the issue." 1997-NMSC-006, ¶ 22, 932 P.2d at 8.

On the other hand, to preserve the constitutional issue when no precedent interprets the state constitution different than the federal constitution, a higher burden must be met. If there is no precedent on point, *Gomez* requires that the party assert at the trial court "that the state constitutional provision at issue should be interpreted more expansively than the federal counterpart *and* provide reasons" for the different interpretation. *Id.* ¶¶ 22–23, 932 P.2d at 8.

241. While *Gomez* provided a specific two-part test for preserving constitutional claims, *see supra* note 240, Justice Bosson criticized burdensome preservation requirements in *Garcia*:

> We cannot allow the development of our state Constitution to be retarded by overly burdensome, hyper-technical, and impractical preservation requirements. As New Mexico's

stitutional argument on appeal, practitioners should argue at trial that defense witness immunity is a constitutional guarantee.[242]

Based on the language in *Belanger* and the potential rights at issue, courts will apply intermediate scrutiny to constitutional challenges of a court's refusal to immunize defense witnesses. In New Mexico, three levels of scrutiny are applied when analyzing constitutional rights.[243] Of the three, Justice Bosson's reference to the "important constitutional rights" at issue in *Belanger* fits squarely within the court's scope of intermediate scrutiny, as defined in *Wagner v. AGW Consultants*.[244]

2. Due Process Arguments For and Against Defense Witness Immunity

Though *Belanger* left unanswered whether the denial of defense witness immunity is a due process violation, federal precedent is helpful. The test set forth in *Belanger*, specifically the burden on the defense to show that the sought after testimony is "material," supports the due process argument for the defense. As to whether the testimony is "material," the court of appeals' analysis in *State v. Balenquah* is instructive, though there the court was analyzing the constitutionality of suppressed evidence under the due process clause.[245] In *Balenquah*, the court analyzed New Mexico's interpretation of *Brady v. Maryland*, which required three elements for a showing of prosecutorial misconduct and thus a due process violation.[246] "First, the evidence must have been 'suppressed' by the prosecution. Second, the evidence must have been favorable to the defendant. And third, the evidence must have been material to the defense."[247] In order to be material, the *Balenquah* court held "there must be 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

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> highest court, it is our duty and privilege to interpret and develop the New Mexico Constitution. In a government of dual sovereigns, it is imperative that our state Constitution develop to its full potential and protect the rights of our citizens where we deem federal law lacking. A heightened preservation requirement for the state Constitution would impede us from addressing legitimate state constitutional concerns. We should reject any "super preservation requirement" or highly technical construction that would, in effect, hold our state Constitution hostage to the vagaries of trial counsel competency.

State v. Garcia, 2009-NMSC-046, ¶ 57, 217 P.3d 1032, 1046 (Bosson, J., concurring) (citations omitted).

242. For strategies as to how to effectively argue for the expansion of constitutional rights in New Mexico, see J. Thomas Sullivan, *Developing a State Constitutional Law Strategy in New Mexico Criminal Prosecutions*, 39 N.M. L. REV. 407, 451–60 (2009) (setting forth seven different grounds for interpreting state constitutions broader than the federal constitution).

243. Recently, the court held

> [S]o long as such legislation does not impact important rights or protected classes, it is upheld unless the challenger can show the provision at issue is not rationally related to a legitimate government purpose. If legislation impacts important but not fundamental rights, or sensitive but not suspect classifications, intermediate scrutiny is warranted and we require the State to demonstrate that the law is substantially related to an important government purpose. If a law draws suspect classifications or impacts fundamental rights, we apply strict scrutiny and require the State to demonstrate that the provision at issue is closely tailored to a compelling government purpose.

Wagner v. AGW Consultants, 2005-NMSC-016, ¶ 12, 114 P.3d 1050, 1055–56 (citations omitted).

244. *Id.*

245. 2009-NMCA-055, 208 P.3d 912.

246. *Id.* (considering Brady v. Maryland, 373 U.S. 83 (1963)).

247. *Id.* ¶ 12, 208 P.3d at 915.

different.'"[248] This analysis takes a holistic look at the record to determine the significance of the evidence in relation to other available evidence and methods of proof.[249] Thus, the import that certain evidence has on whether it is material "can lose its potency when weighed and measured with . . . other evidence, both inculpatory and exculpatory."[250] Though *Balenquah* was decided on different grounds, the court's analysis of what constitutes "material" evidence under *Brady* will likely affect its analysis of "material" evidence under *Belanger*.

If the court adopts the "material" definition from *Balenquah* and *Brady*, it sets itself up for due process challenges if a trial court does not grant defense witness immunity. Under *Brady* and *Balenquah*, not disclosing "material" evidence is a due process violation.[251] *Belanger* also requires a showing that the immunized testimony is "material" to the defense.[252] However, under *Belanger*, otherwise "material" evidence may still be excluded if the "[s]tate . . . demonstrate[s] a persuasive reason that immunity would harm a significant governmental interest."[253] Therefore, if "material" is interpreted the same as *Brady* and *Balenquah*, a defendant's inability to present "material" evidence to the jury through an immunized witness might violate due process. Thus, prosecutors should caution courts to not interpret "material" under *Belanger* in the same manner as "material" under *Brady* and *Balenquah*, as doing so could establish a due process right to the introduction of defense witness testimony. If this became the case, the state would then lose its protections under the second half of the *Belanger* test.

Despite these arguments, the law in New Mexico is that there is no due process right to defense witness immunity. Though the *Belanger* court overruled *State v. Sanchez*, it did so on the limited question of whether New Mexico courts have the power to change the rule on use immunity, and thus grant it unilaterally.[254] There is still good law in *Sanchez*, specifically that:

> [e]xcept where coupled with a showing of prosecutorial misconduct, refusal . . . to seek a grant of use witness immunity for a defense witness or refusal of the trial court to fashion a remedy to extend use immunity to a

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248. *Id.* ¶ 13, 208 P.3d at 915 (quoting State v. Trujillo, 2002-NMSC-005, ¶ 50, 42 P.3d 814, 831); State v. Brown, 1998-NMSC-037, ¶ 15, 969 P.2d 313, 319.

249. *Balenquah*, 2009-NMCA-055, ¶ 13, 208 P.3d at 915.

250. *Id.* (quoting State v. Baca, 115 N.M. 536, 541, 854 P.2d 363, 368 (Ct. App. 1993)).

251. In New Mexico, prosecutors must disclose "any material evidence favorable to the defendant which the state is required to produce under the due process clause of the United States Constitution." Rule 5-501(A)(6) NMRA. The committee commentary makes clear that this rule requires discovery of anything required under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giles v. Maryland*, 386 U.S. 66 (1967).

In both *Brady* and *Balenquah*, the government was aware of the substance of the "material" evidence, but failed to disclose it to the defendant. In contrast, in defense witness immunity situations, it is the prosecutor who is unlikely to know the substance of the witness's testimony, because it is the defendant who is wishing to call the witness. This distinction, however, is of limited significance, as the defense attorney's ultimate concern is with getting "material" evidence to the jury; not who was unaware of the testimony prior to trial.

Another issue is whether the evidence must be admissible under the Federal Rules of Evidence in order to be considered *Brady* evidence. *See* Ellsworth v. Warden, 333 F.3d 1, 5 (1st Cir. 2003); United States v. Gil, 297 F.3d 93, 104 (2d Cir. 2002).

252. State v. Belanger, 2009-NMSC-025, ¶ 38, 210 P.3d 783, 793.

253. *Id.*

254. In *Belanger* the court stated, "The *Sanchez* court . . . continued to honor the prosecutor's control over the immunity process . . . we overrule *Sanchez* as to its ultimate conclusion." *Id.* ¶ 37, 210 P.3d at 792–93.

> defense witness, does not constitute a denial of due process to the defendant.[255]

Thus, while strong arguments can be made in favor of finding a due process right to defense witness immunity, existing authority in New Mexico holds otherwise.

3. Sixth Amendment Arguments For and Against Defense Witness Immunity

As an alternative to arguing due process, it has been suggested that the most effective approach to accomplishing defense witness immunity is by taking a step back from the immunity question and by focusing on the right to produce favorable evidence under the Sixth Amendment. At least one author has suggested that, "[t]he proper solution demands recasting the issue not as the defendant's right to immunize witnesses, but as the defendant's constitutional right to *obtain favorable evidence*."[256] By phrasing the question as a constitutional right to favorable evidence, a defense attorney is more likely to gain support from the judge who, after *Belanger*, can use defense witnesses as a procedural tool for satisfying the defendant's constitutional right under both federal and state law.[257] Further, commentators have argued that judges should err on the side of admissibility when they are unsure as to whether criminal defendants should be allowed to present favorable evidence: "Doubts or borderline cases should be resolved in the accused's favor. When the call is a close one, the judge should admit the defense evidence."[258]

As to whether a denial of defense witness immunity violates New Mexico's counterpart to the Federal Sixth Amendment, analysis of both clauses of the amendment is necessary.[259] The New Mexico Constitution states, "In all criminal prosecutions, the accused shall have the right . . . to be confronted with the witnesses against him . . . [and] to have compulsory process to compel the attendance of necessary witnesses in his behalf."[260] These two clauses, the compulsory process clause and the confrontation clause, were both argued in *Belanger*, but as mentioned above, were not the basis for the court's decision.[261] The confrontation clause ensures that a defendant is able to cross-examine witnesses who testify against her.[262] Though this author believes that the stronger argument for defense

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255. State v. Sanchez, 98 N.M. 428, 435, 649 P.2d 496, 503 (Ct. App. 1982), *overruled by Belanger*, 2009-NMSC-025, 210 P.3d 783.

256. Donald Koblitz, *"The Public Has a Claim to Every Man's Evidence": The Defendant's Constitutional Right to Witness Immunity,* 30 STAN. L. REV. 1211, 1213 (1978).

257. *See* State v. Dorsey, 87 N.M. 323, 325, 532 P.2d 912, 914 (Ct. App. 1975) ("The right of an accused . . . to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf [are] essential to due process.") (citing Chambers v. Mississippi, 410 U.S. 284, 294 (1973)).

258. EDWARD J. IMWINKELRIED & NORMAN M. GARLAND, EXCULPATORY EVIDENCE § 2-6, at 79 (3d ed. 2004) (internal citations and quotation marks omitted).

259. Article II, § 14 of the New Mexico Constitution is similar to the Sixth Amendment of the U.S. Constitution. *Compare* N.M. CONST. art. 2, § 14, *with* U.S. CONST. amend. VI.

260. N.M. CONST. art. II, § 14.

261. *See supra* note 236 and accompanying text.

262. Crawford v. Washington, 541 U.S. 36 (2004); State v. Johnson, 2004-NMSC-029, 98 P.3d 998.

witness immunity is not grounded on confrontation grounds, there is authority suggesting otherwise.[263]

Alternatively, the compulsory process clause may be violated if a court refuses to grant defense witness immunity.[264] The compulsory process clause has been interpreted to guarantee a defendant the right to information that the prosecutor possesses, but will not share with the defense. A leading compulsory process clause case out of the U.S. Supreme Court is *United States v. Valenzuela-Bernal*.[265] In *Valenzuela-Bernal*, the Court held that a defendant cannot establish a violation of the compulsory process clause by simply showing that a government action deprived the defendant of testimony.[266] Instead, there must be "some plausible showing of how their testimony would have been both material and favorable to his defense."[267] In *United States v. Hoffman*, the First Circuit elaborated on *Valenzuela-Bernal*'s requirement of a causal link between the government's action and the effect to the defendant. The Hoffman court asserted that "[t]here can be no violation of the defense's right to present evidence . . . unless some contested act or omission (1) can be attributed to the sovereign and (2) causes the loss or erosion of testimony which is both (3) material to the case and (4) favorable to the accused."[268]

Compulsory process claims after *Belanger* will be forced to draw on state and federal compulsory process precedents to argue that a denial of defense witness immunity violates compulsory process.[269] Though compulsory process often deals with the prosecution actively blocking information getting to the defense, cases addressing compulsory process are still helpful in the context of use immunity for two reasons.[270] First, the *Belanger* court remanded the case to the trial court to determine "whether it is the Sixth Amendment rights of confrontation or compulsory process" that would be violated without a grant of defense witness immunity.[271] This language by Justice Bosson shows that the New Mexico Supreme Court has not closed the door on valid Sixth Amendment claims in the context of defense witness immunity. Further, though *Sanchez* still arguably holds that there

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263. For arguments as to how *Belanger* strengthened the confrontation clause, see J. Thomas Sullivan, *Developing a State Constitutional Strategy in New Mexico Criminal Prosecutions*, 39 N.M. L. Rev. 407, 477.

> *Belanger* . . . strengthens the Confrontation right . . . in two different ways. First, it affords the defense a powerful tool . . . for presenting evidence . . . because it affords the defendant the option for requiring testimony from reluctant witnesses. And second, it suggests that the prosecution must use the immunity power to present hearsay declarants whose statements may [not] be subject to the direct command of *Crawford* [*v. Washington*, 541 U.S. 36 (2004)] for live testimony subject to cross-examination.

264. *See* Roderick R. Ingram, *A Clash of Fundamental Rights: Conflicts Between the Fifth and Sixth Amendments in Criminal Trials,* 5 Wm. & Mary Bill Rts. J. 299, 319 (1996).

265. 458 U.S. 858 (1982).

266. *Id.* at 867.

267. *Id.* (citing Washington v. Texas, 338 U.S. 14 (1967)).

268. United States v. Hoffman, 832 F.2d 1299, 1303 (1st Cir. 1987).

269. For a more in-depth analysis of state and federal approaches to compulsory process, see Joseph G. Cook, Constitutional Rights of the Accused § 22.2 (3d ed. 1996).

270. The problem is that compulsory process often deals with intentional and inappropriate acts by the prosecutor, which would already require defense witness immunity under the "prosecutorial misconduct" theory discussed in *State v. Baca*. 1997-NMSC-045, ¶ 39, 946 P.2d 1066, 1074.

271. State v. Belanger, 2009-NMSC-025, ¶ 39, 210 P.3d 783, 793.

is no compulsory process right to defense witness immunity,[272] the court's willingness to entertain Sixth Amendment argument calls *Sanchez* into doubt.

Second, though there is no caselaw to support defense witness immunity under compulsory process analysis, the existing requirement for use immunity under *Belanger*[273] is very similar to the compulsory process test articulated in *Hoffman*. Specifically, both look at the government's interference with information available to the defense. In the context of witness immunity, the act "attributed to the sovereign" may be targeted at either the judicial or the executive branch. The act under the compulsory process analysis will be the denial of immunity to a defense witness who has crucial evidence for the defense. Also, both require the evidence be "material" to the defense's case. Given the similarities, New Mexico courts may be persuaded that a showing for defense witness immunity under *Belanger* is a showing of a compulsory process violation under *Hoffman*. At first blush, this point appears moot because a successful showing under either test could presumably warrant the sought after immunity. It appears, however, that unlike the current *Belanger* test for use immunity, there is no government interest that overcomes a compulsory process violation. Therefore, if a defense attorney establishes a compulsory process right to defense immunity under *Hoffman* and *Valenzuela-Bernal*, the state cannot overcome the constitutional violation by pointing to the government's interest in not immunizing the witness. In other words, the second half of the *Belanger* test, which is the state's last resort to prevent defense witness immunity, is lost.

Nonetheless, as is the case with due process, the *Sanchez* court's ruling that a defendant's compulsory process right does not overcome a witness's Fifth Amendment privilege is still good law. Post-*Belanger* cases pose a bit different question, however, as the question is now whether a court's refusal to grant defense witness immunity violates the compulsory process guarantee of the New Mexico Constitution. While *Sanchez* arguably still answers the question as to whether a witness's Fifth Amendment right can overcome a compulsory process claim, post-*Belanger* courts that deny defense witness immunity may be challenged as unconstitutional. However, given the *Sanchez* court's reasoning, and the discretion that *Belanger* gives the trial courts, it is questionable whether such a challenge will be upheld.

4. Judicial Guidance for Assessing Post-*Belanger* Immunity Requests

New Mexico trial judges are now faced with the difficult task of applying a test with no state or national precedent for guidance. With its broad test and the underdeveloped constitutional caselaw on the Sixth Amendment, it is difficult to predict the effect of *Belanger*'s holding. As the court pointed out, "[b]ecause of the fact-intensive and case-specific analysis which the district court must carry out in determining whether to grant defense witness immunity, it is of course impossible to anticipate how the principles announced today will play out in any given set of

272. *See supra* note 255 and accompanying text.

273. The defense must show that the testimony is admissible, material, and that without it, it inhibits the defense's ability to "fairly present" its case. *Baca*, 1997-NMSC-045, ¶ 38, 210 P.3d at 793.

facts."[274] Keeping in mind the constitutional implications of the accused, courts must also consider the public interest in prosecuting crimes.

One commentator has urged courts to look at two factors when determining whether to grant judicial immunity. First, a court should consider the gravity of the charge against the witness.[275] The stronger the public policy for not immunizing the witness, the less likely a judge should be in granting that witness immunity. Second, the court should consider the effect that the immunity will have on the future prosecution of that witness.[276] This is consistent with the New Mexico court's warning in *Vallejos*, and reiterated in *Belanger*, that future prosecution "may, as a practical matter, be impossible."[277]

When courts are in doubt as to whether the witness should be immunized, it should at least grant immunity for an in camera interview with the witness. It is not until this in camera review that the court will fully understand the importance of the witness's testimony, and whether the defense can meet its burden under *Belanger*. Upon a sufficient showing by the defense, and absent a persuasive reason by the government, immunity at trial is warranted. If, however during the in camera review, the court is unsatisfied, then the defendant's request for witness immunity should be denied. In this scenario, there is nothing lost—besides time—by the court's interview of the witness. The *Belanger* court invited just this approach, as it pointed out, a "court's decision to grant immunity for the purpose of understanding what the witness's testimony at trial will be, does not bind that court to a grant of immunity at trial. The two decisions are separate."[278]

V. CONCLUSION

Belanger represents a significant first step towards defense witness immunity. Time will tell whether the legislature will react with a statute re-defining use immunity as a substantive issue. If it does, the court's previous ruling in *Brown*, affirmed in *Belanger*, will likely invalidate the statute under *Albuquerque Rape Crisis Center*. In the event that the court declares a constitutional right to defense witness immunity, any statute requiring a prosecutorial request would be invalidated as being unconstitutional. Until this happens, defense attorneys should look for guidance in the stricter federal caselaw for justifications of defense witness immunity. As a backup, defense attorneys should stress the constitutional implications that a denial of immunity might have on their client's ability to present an effective defense.

As for prosecutors, *Belanger* imposes new burdens, but it appears that they are here to stay. Despite these burdens, there are significant safeguards found in the test promulgated, as well as the trial court's discretion in granting immunity. Further, many parts of *State v. Sanchez* are still good law, and the court has not overruled any precedent that holds firm that there is no constitutional right to defense witness immunity. As courts toil with interpreting the meaning of "material" evi-

274. *Belanger*, 2009-NMSC-025, ¶ 47 n.3, 210 P.3d at 795.

275. EDWARD J. IMWINKELRIED, EXCULPATORY EVIDENCE § 11-4.b.2, at 432 (3d ed. 2004).

276. *Id.*

277. *Belanger*, 2009-NMSC-025, ¶ 53, 210 P.3d at 796 (quoting State v. Vallejos, 118 N.M. 572, 580, 883 P.2d 1269, 1277).

278. *Id.* ¶ 39, 210 P.3d at 793.

dence, "persuasive reasons," and "significant government interests," the New Mexico Supreme Court will likely be called upon for more guidance, particularly on the issue of whether there is a constitutional right to defense witness immunity.

With all of the unknowns in post-*Belanger* criminal litigation, the biggest question comes in the form of how trial judges should rule on requests for defense witness immunity. While the test undoubtedly calls for a case-by-case approach, defense attorneys will likely advocate for new and creative ways to address the constitutional question. With enough rulings at the trial level, appellate courts will be forced to step in and offer more guidance. Given these unknowns, while it appears that the court intends for defense witness immunity to stay, its contours are yet to be determined.