

A grand jury was investigating the murder of a local businessman. The prosecutor suspected that the businessman's partner may have been involved, but had no concrete evidence implicating him as the murderer. The partner was subpoenaed to testify before the grand jury. The partner invoked his Fifth Amendment privilege against self-incrimination and refused to answer any questions, so the prosecutor granted the partner use and derivative use immunity for his testimony. The partner testified that he and his associate killed the businessman in order to assume full control of the company.

Both the partner and his associate were indicted for murder. The associate entered a plea to manslaughter on the condition that he testify against the partner. His testimony and the partner's grand jury testimony are the only evidence of who committed the murder.

The partner has objected to the admission of the associate's testimony at trial.

How should the court rule on the partner's objection?

- A. Overrule the objection, because the associate's testimony was obtained by the prosecution in exchange for a plea bargain.
- B. Overrule the objection, because the partner was a suspect before he was subpoenaed to testify before the grand jury.
- C. Sustain the objection, because the associate's testimony is derivative of the partner's grand jury testimony.
- D. Sustain the objection, because the constitutional rights of one codefendant cannot be bargained away in a deal with another.

### **Explanation:**

A person subpoenaed to testify before a grand jury can invoke the **Fifth Amendment privilege against self-incrimination** and refuse to testify. However, that person can be **compelled to testify** during this (or any other) proceeding if he/she is granted either:

transactional immunity – protects a person from being prosecuted for any crimes associated with his/her testimony *or*

**use and derivative use immunity** – prevents a person's testimony, and any evidence derived from it, from being used against him/her in any way that could lead to a criminal prosecution.

If the government prosecutes a person who was granted use and derivative use immunity, it can only **use evidence obtained from an independent source**. It cannot use any evidence derived from the defendant's immunized testimony.

Here, the partner was granted use and derivative use immunity before testifying that he and the associate committed the murder. The grand jury then indicted them both. The prosecutor later sought to have the associate testify against the partner. But the associate's testimony was derived from the partner's immunized testimony—not an independent source. Therefore, the court should *sustain* the partner's objection and prohibit the associate's testimony.

**(Choice A)** The associate agreed to testify in exchange for a reduced charge of manslaughter. But since the associate's testimony derived from the partner's immunized testimony, it is inadmissible.

**(Choice B)** Although the prosecutor suspected that the partner was involved in the businessman's murder before the grand jury proceeding, he did not know of the associate's involvement until the partner testified. Therefore, the associate's testimony derives from the partner's immunized testimony and is inadmissible.

**(Choice D)** The constitutional rights of one codefendant cannot be bargained away in a deal with another—but this is not the dispositive issue. It is that the prosecution would improperly use the partner's immunized grand jury testimony if the associate's derivative testimony were presented against the partner at trial.

### **Educational objective:**

Use and derivative use immunity precludes the use of a person's testimony—and any evidence derived from it—against him/her in a criminal proceeding. However, evidence obtained from an independent source can be used.

### **References**

U.S. Const. amend. V (privilege against self-incrimination).

Kastigar v. United States, 406 U.S. 441, 453 (1972) (explaining that use and derivative use immunity precludes the use of the suspect's testimony or any evidence derived from it against the suspect in a criminal prosecution).

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