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### **Criminal Procedure - Witness Immunity - The Story of a County Attorney Who Said I Think I Can, I Think I Can and the Brave Little Conscience That Couldn't Be Shocked - Gale v. State**

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**CRIMINAL PROCEDURE—WITNESS IMMUNITY—The Story of a County Attorney Who Said, “I Think I Can, I Think I Can,” and the Brave Little Conscience that Couldn’t be Shocked. *Gale v. State*, 792 P.2d 570 (Wyo. 1990).**

In May of 1987, following a trial in Gillette, Wyoming, the jury found Richard K. Gale, D.D.S. guilty on three counts of taking indecent liberties with a minor.<sup>1</sup> The judge sentenced Dr. Gale to serve two to five years in the Wyoming State Penitentiary on each charge, the sentences to run concurrently.<sup>2</sup> Dr. Gale began serving his sentence on July 4, 1990.

At Dr. Gale’s trial, family members of the alleged victims provided the testimony that convicted him.<sup>3</sup> Prior to the case against Dr. Gale, local juvenile authorities launched an investigation against Gene Rounsaville, the father of the children, for suspicion of sexual and physical abuse of his family and at least two other girls.<sup>4</sup> Sometime after Gene Rounsaville became aware of the investigation against him, Dr. Gale was accused of molesting the three oldest Rounsaville girls.<sup>5</sup> The county attorney had evidence that Gene Rounsaville had repeatedly abused and molested his wife and children for a period of several years.<sup>6</sup> The county attorney also had information that Linda Roun-

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1. *Gale v. State*, 792 P.2d 570, 572 (Wyo. 1990).

2. *Id.* at 574.

3. *Id.*

4. *Id.* at 591 (Urbigkit, J., dissenting). Most of the detailed facts about this case cannot be found in the majority’s opinion. Facts will be cited to the majority opinion when appropriate; however, the dissenting opinion and Appellant’s Brief will of necessity be cited extensively. The names of the parents were disclosed in the dissenting opinion; their names will be used in this casenote as well. The names of the children will not be used in this casenote. Instead, the children will be identified by their age at the time of the trial, as they were in the dissenting opinion. The oldest daughter, D-17, was actually Linda Rounsaville’s daughter by a previous marriage. The other children were issue of Gene and Linda’s marriage and will be identified as follows: one son, age eleven (S-11); four daughters, ages ten (D-10), seven (D-7), and twins age three (D1-3 and D2-3). *Id.*

5. *Id.* at 592 (Urbigkit, J., dissenting). The first accusation against Dr. Gale came from D-10 during an interview with a social worker from the Department of Public Assistance and Social Services (D-PASS). Brief for Appellant at 4, *Gale v. State*, 792 P.2d 570 (Wyo. 1990) (No. 87-192) [hereinafter Appellant’s Brief, *Gale* (No. 87-192)]. This interview was conducted seventeen days after the Rounsaville family became aware that Gene Rounsaville was under investigation for allegations of sexually abusing his daughters. *Id.* at 7.

6. *Gale*, 792 P.2d at 591 (Urbigkit, J., dissenting). D-PASS records indicated that D-PASS first became aware of Gene Rounsaville’s misconduct in July of 1979. These records contained the following allegations against Gene Rounsaville: 1) possible molestation of two other girls during a slumber party at the Rounsaville home; 2) beating his wife and D-17 with a coat hanger, belt and strap; 3) locking the family out of the house; 4) pointing a gun at his wife and D-17, shooting a gun in the house, pointing the gun at his wife’s head; 5) molesting D-17 beginning when she was eight years old, the molestations occurring at night in D-17’s bedroom, sometimes as many as four times in one night; 6) molesting D-7; 7) attempting to molest a friend of D-7’s; 8) taking nude photographs of D-17; and 9) attempting to induce D-17 to have sex with a dog. Appellant’s Brief at 3, *Gale* (No. 87-192).

saville knew of the sexual misconduct of her husband and did nothing to stop it.<sup>7</sup> Gene Rounsaville could have been charged with several separate offenses, but he was only charged with one offense against D-7.<sup>8</sup> A preliminary hearing against Gene Rounsaville was held, but he was not bound over for trial.<sup>9</sup> The county attorney made a decision not to file charges against Gene Rounsaville on any of the other offenses committed against the Rounsaville family, even though none were barred by statutes of limitation.<sup>10</sup> The county attorney then entered into written immunity agreements with the parents, Gene and Linda Rounsaville, in return for their testimony concerning Dr. Gale's actions.<sup>11</sup>

On appeal, Dr. Gale challenged the propriety of the testimony that the State obtained with the immunity agreements and, as an underlying corollary, the authority of the county attorney to enter into such immunity agreements.<sup>12</sup> This casenote examines the authority of a Wyoming county attorney to grant immunity to a potential witness and criticizes the Wyoming Supreme Court's failure to adequately address this issue in the absence of action by the Wyoming State Legislature.

#### BACKGROUND

Witness immunity, in general terms, is a mechanism which allows a court to compel testimony which might otherwise violate the witness' right against self-incrimination.<sup>13</sup> Some of the primary areas of controversy regarding the use of witness immunity include: 1) the source of the power to grant immunity; 2) the Constitutionally required scope of the immunity; 3) the evidentiary standard for immunized testimony; and 4) sanctions against a witness who fails to comply with the immunity agreement.<sup>14</sup> The discussion of witness immunity in this casenote will generally be limited to the source of

7. *Gale*, 792 P.2d at 592 (Urbigkit, J., dissenting).

8. Appellant's Brief at 4, *Gale* (No. 87-192). Though D-17 or D-9 would have made better witnesses due to their ages, Gene Rounsaville was not charged with any of the reported offenses against them. *Id.* at 5. The single offense committed against D-7 was charged as a violation of § 16-4-402 of the Wyoming Statutes which carried a maximum sentence of five years. *Id.*

9. *Gale*, 792 P.2d at 572. At Dr. Gale's trial, Gene Rounsaville admitted that he was guilty of sexually assaulting D-7 but was not bound over for trial because D-7 "had the incident correct but the place was wrong." Appellant's Brief at 13, *Gale* (No. 87-192).

10. Appellant's Brief at 5, *Gale* (No. 87-192).

11. *Gale*, 792 P.2d at 594 (Urbigkit, J., dissenting).

12. Appellant's Brief at 61, *Gale*, (No. 87-192).

13. See U.S. CONST. amend. V. "No person shall be . . . compelled in any criminal case to be a witness against himself, . . ."; See also WYO. CONST. art. 1, § 11. "No person shall be compelled to testify against himself in any criminal case, . . ."

14. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 8.11 (student ed. 1985).

the authority to grant immunity to a witness and the scope of the immunity that is granted.

### *Immunity in Wyoming*

Wyoming has adopted English common law as a rule of decision to the extent that it is "not inconsistent with [Wyoming laws]."<sup>15</sup> English common law did not recognize a prosecutor's general authority to grant immunity to a witness.<sup>16</sup> In Wyoming, there has been no legislative enactment or judicial adoption which would preempt the common law and give the prosecutor a general power to grant witness immunity.<sup>17</sup>

Wyoming has enacted two statutes dealing with witness immunity; however, their use is specifically limited to enforcement of controlled substance<sup>18</sup> and insurance statutes.<sup>19</sup> Both statutes have definitive procedures that must be followed in order to grant immunity. The controlled substance statute provides that consent for the grant of immunity is required from the "district judge in the district wherein prosecution is to take place."<sup>20</sup> The insurance statute calls for a directive from both the state insurance commissioner and the attorney general compelling the witness to testify.<sup>21</sup> Under the controlled substance statute, the grant of immunity is only available if the "testimony is necessary to secure a conviction."<sup>22</sup> Under the insurance statute, the witness must first ask "to be excused from attending or testifying . . . on the ground that the testimony or evidence required of him may tend to incriminate him . . . ."<sup>23</sup>

These are the only statutes in Wyoming dealing with witness immunity. They do not confer upon an attorney the unilateral power to

15. WYO. STAT. § 8-1-101 (1989). It is commonly accepted that Wyoming adopted the common law as it existed in 1607. See *In re Smith's Estate*, 97 P.2d 677 (Wyo. 1940).

16. *Hennigan v. State*, 746 P.2d 360, 412 (Wyo. 1987) (Urbigkit, J., dissenting) (prosecutor had no authority under the common law to grant immunity). Indeed, as the English common law existed in 1607, it was not clear that a witness even had a duty to answer a question if he did not so desire. See 8 JOHN H. WIGMORE, EVIDENCE § 2190, n.21 (JOHN T. McNAUGHTON ed. 1961) (witness could be compelled to attend a trial, but could not be compelled to answer a question).

17. *Hennigan*, 746 P.2d at 415 (Urbigkit, J., dissenting).

Any basis for the prosecutor to accord to himself the power to grant immunity is certainly not justified by Wyoming case law, statute, or constitution. As a matter of fact, under the present circumstances, the right where no statute exists to "waive prosecution" by a grant of immunity and require testimony, lacks determinate validity. Attention by the legislature or by this court by rule, or both, would not be inappropriate.

*Id.*

18. WYO. STAT. § 35-7-1043 (1988).

19. WYO. STAT. § 26-2-124 (1991).

20. WYO. STAT. § 35-7-1043.

21. WYO. STAT. § 26-2-124.

22. WYO. STAT. § 35-7-1043.

23. WYO. STAT. § 26-2-124.

bind the State of Wyoming, and thus other jurisdictions in the United States,<sup>24</sup> against any future criminal prosecution of the witness. Both statutes have built-in safeguards which require the concurrence of another individual.

### *Immunity in the Federal System*

Historical information dealing with witness immunity in the federal system is extensive. Judicial discussions of the various federal witness immunity acts provide useful insight into how a state might choose to structure similar provisions. Three basic forms of immunity have been enacted in the history of federal witness immunity; only two have survived constitutional scrutiny. The unconstitutional form is called "use" immunity.<sup>25</sup>

Use immunity was the first form of statutory immunity to be enacted by Congress.<sup>26</sup> This form of immunity was struck down by the Supreme Court in *Counselman v. Hitchcock*.<sup>27</sup> Use immunity fails to pass constitutional scrutiny because it does not grant immunity which is co-extensive with the scope of the witness' Fifth Amendment privilege.<sup>28</sup> The witness is inadequately protected because information revealed in his testimony can be used to find other incriminating evidence.<sup>29</sup> Since this derivative evidence would not have been found absent the witness' testimony, use immunity exposes the witness to prosecution as a result of his testimony.<sup>30</sup>

The first form of immunity to pass Constitutional scrutiny has been termed "transactional" immunity.<sup>31</sup> This form of immunity is very far-reaching in its application and has been called an "immunity bath."<sup>32</sup> Under transactional immunity, the witness is essentially for-

24. See *In re Bianchi*, 542 F.2d 98, 101 (1st Cir. 1978) (every sovereign, state or federal, must recognize immunity granted by another sovereign). See also *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (in order for a grant of immunity to pass Constitutional scrutiny, it must also protect the witness against prosecution in other jurisdictions).

25. Use immunity covers only the testimony itself but allows that testimony to be used to discover other evidence. LAFAVE & ISRAEL, *supra* note 14, § 8.11(b).

26. The first immunity statute enacted by Congress was passed in 1857, but it dealt only with testimony before Congress and did not extend to judicial proceedings. Congress later enacted 15 Stat. 37 (1868) which extended to judicial proceedings as well. Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1571 (1963).

27. 142 U.S. 547 (1892).

28. *Id.* at 565. If the witness had said nothing, there would be neither his direct incriminating testimony nor any information revealed which could subsequently lead to incriminating evidence. *Id.* at 564.

29. "Derivative use" is the term of art for the act of using evidence revealed by compelled testimony to find other incriminating evidence.

30. *Counselman*, 142 U.S. at 564.

31. The transactional immunity statute was 27 Stat. 443 (1893), and was passed in response to the decision in *Counselman*. Transactional immunity was first upheld in *Brown v. Walker*, 161 U.S. 591 (1896).

32. David Sugar, Note, *Federal Witness Immunity Problems and Practices*

given for his involvement in any crime that he is compelled to discuss in his testimony.<sup>33</sup>

The second form of immunity which has been upheld by the United States Supreme Court is technically termed "use/derivative use" immunity.<sup>34</sup> With this form of immunity, the witness is left in essentially the same position, in terms of due process, that he would have been had he not testified at all.<sup>35</sup> Stated more simply, the prosecution is barred from ever using the witness' testimony or any information derived from that testimony as evidence against the witness.<sup>36</sup> As a result, the witness is still subject to prosecution for his actions if the government can prove his guilt from another source.<sup>37</sup> In a case involving use/derivative use immunity, the witness need only show the existence of such an agreement, and the government then has the burden of proving that the evidence was not derived from the protected testimony.<sup>38</sup> To state it concisely, transactional immunity protects the witness from his illegal acts, whereas use/derivative use immunity only protects the witness from his testimony about those acts.

Debate between the proponents of the two Constitutional types of immunity has tended to focus on these three issues: 1) the adequacy of taint hearings in preventing derivative use of immunized testimony;<sup>39</sup> 2) the comparative effectiveness of the two types of immunity in achieving witness cooperation; and 3) the practical significance of the prosecutor's ability to bring a subsequent prosecution under use/derivative use immunity.<sup>40</sup>

Prosecutors in the federal system generally prefer use/derivative use immunity over transactional immunity.<sup>41</sup> More grants of immunity were made in the first ten months after enactment of the current

*Under 18 U.S.C. §§ 6002-6003, 14 AM. CRIM. L. REV. 275, 277 (1976). [Hereinafter Note, Federal Witness Immunity Problems].*

33. *Id.* There are limits to the scope of the witness' testimony, however. If the witness begins to reveal crimes that are unrelated to the subject matter of the compelled testimony, he does so at his own peril. Such ancillary confessions may be unprotected. LAFAVE & ISRAEL, *supra* note 14, § 8.11(b).

34. This form of immunity was first upheld in *Kastigar v. United States*, 406 U.S. 441 (1972). The term "use/derivative use immunity" is a bit cumbersome and has generally been shortened to "use immunity." "Use/derivative use" will be retained for the remainder of this casenote for purposes of clarity.

35. *Id.* at 453. "[S]uch 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 the privilege." *Id.*

36. LAFAVE & ISRAEL, *supra* note 14, § 8.11(b).

37. *Id.*

38. *Id.*

39. At taint hearings, the State must prove the evidence that it wishes to use was obtained from a legitimate non-derivative source.

40. LAFAVE & ISRAEL, *supra* note 14, § 8.11(b).

41. Note, *Federal Witness Immunity Problems*, *supra* note 32, at 278. The type of immunity outlined in Wyoming Statutes §§ 35-7-1043 and 26-2-124 is transactional immunity. See text accompanying *supra* notes 18 and 19. This casenote will not examine the merits of adopting transactional or use/derivative use immunity in these specific statutes.

federal use/derivative use immunity statutes<sup>42</sup> than had been made in the previous fifty years under the transactional immunity statute.<sup>43</sup> This form of immunity is less intrusive into the realm of justice in that if the prosecutor later finds other evidence that could be used to convict the witness, the prosecutor is still able to bring charges against that witness.<sup>44</sup> If the witness receives transactional immunity, his testimony has essentially bought his freedom from ever being charged with an offense related to anything that he did in the transaction for which he was granted immunity.<sup>45</sup>

### *Authority to Grant Immunity*

Under the existing federal witness immunity statutes, a prosecuting attorney has no authority to unilaterally grant immunity. The attorney must receive approval from a higher ranking attorney within the department before he can request a court order for immunity.<sup>46</sup> The grant of immunity, then, comes from the judiciary, but the court order cannot issue unless first sought by the prosecution.<sup>47</sup> The district court is compelled to grant the immunity only when the United States attorney has complied with the statute.<sup>48</sup>

Before the United States attorney requests a grant of immunity, he must believe that the following two conditions exist: 1) that the testimony or other information sought "may be necessary to the public interest;"<sup>49</sup> and 2) that the witness must have "refused or [be] likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination."<sup>50</sup> Both criteria must be met before the attorney can request that the court issue the order granting the witness immunity from any self-incrimination.<sup>51</sup>

Of the nineteen states which were examined for this casenote,<sup>52</sup>

42. 18 U.S.C. §§ 6001-6005 (1970).

43. Note, *Federal Witness Immunity Problems*, *supra* note 32, at 278, n.18.

44. *Id.* at 279.

45. *Id.*

46. 18 U.S.C. § 6003(b) (1970). The individuals who can approve the request for immunity are enumerated as "the Attorney General, the Deputy Attorney General, the Associate Attorney General or any designated Assistant Attorney General or Deputy Assistant Attorney General." *Id.*

47. 18 U.S.C. § 6003 (1970).

48. 18 U.S.C. § 6003(a) (1970). The role of the court in this process is largely ministerial. If the attorney has the approval of a higher ranking official, as enumerated in *supra* note 46, the court is obligated to issue the order. *See* U.S. v. Leyva, 513 F.2d 774, 776 (5th Cir. 1975) (the discretionary function in the federal system lies with the executive branch).

49. 18 U.S.C. § 6003(b)(1) (1970).

50. 18 U.S.C. § 6003(b)(2) (1970).

51. 18 U.S.C. § 6003(b) (1970).

52. The research of various state witness immunity statutes for this casenote was limited to the following western states: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

only Wyoming and Texas are without statutory guidance for a general power to grant witness immunity.<sup>53</sup> The general statutory scheme among these states requires that: 1) the witness must first refuse to testify or must be expected to refuse when called;<sup>54</sup> 2) the attorney general, district attorney, county attorney, or prosecuting attorney must request that the court order the witness to testify;<sup>55</sup> 3) the court has varying degrees of discretion in granting the motion to compel the witness to testify;<sup>56</sup> and 4) the witness must testify or produce the evidence required.<sup>57</sup> The scope of immunity granted by statute in these states is evenly split between transactional and use/derivative use immunity.<sup>58</sup>

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53. The statutes and other relevant authority, upon which this analysis relies, are as follows: ALASKA STAT. § 12.50.101 (1990); ARIZ. REV. STAT. ANN. § 13-4064 (1989); CAL. PENAL CODE § 1324 (West 1982); COLO. REV. STAT. ANN. § 13-90-118 (West 1989); HAW. REV. STAT. §§ 621C-1 to -4 (1988); IDAHO CODE §§ 19-1114, 1115 (1987); KAN. STAT. ANN. § 22-3415 (1988); MONT. CODE ANN. § 46-4-305 (1991); NEB. REV. STAT. §§ 29-2011.02, .03 (1989 & Supp. 1990); NEV. REV. STAT. §§ 178.572-578 (1986); N.M. R. CRIM. PROC. 5-116, N.M. R. EVID. 11-412; N.D. CENT. CODE § 31-01-09 (Supp. 1991); OKLA. CONST. art. II, § 27, *see also* *Coleman v. State*, 104 P.2d 1004 (Okla. Crim. 1940) (immunity is secured by testifying under an agreement which was made with the prosecuting attorney and approved of by the court); OR. REV. STAT. §§ 136.617, .619 (1989); S.D. CODIFIED LAWS ANN. § 23A-14-29 (1988); UTAH CODE ANN. § 77-22-3 (1990); WASH. REV. CODE ANN. § 10.52.090 (West 1990)).

54. Montana specifically allows the prosecutor to grant transactional immunity when, in his sole discretion, "the best interest of justice would be served." No court involvement is required for this action. MONT. CODE ANN. § 46-4-305(3) (1991). South Dakota allows the attorney general or a prosecuting attorney to grant immunity at will. S.D. CODIFIED LAWS ANN. § 23A-14-29 (1988). The Utah statute, which states in part, "the attorney general and any county attorney may grant transactional immunity . . ." indicates that both attorneys must agree to the grant. UTAH CODE ANN. § 77-22-3(1) (1990).

55. South Dakota allows the judge to compel testimony without the concurrence of the prosecutor. S.D. CODIFIED LAWS ANN. § 23A-14-29 (1988).

56. This discretion ranges from the court having no discretion in the matter, *see e.g.* ALASKA STAT. § 12.50.101 (1990) (upon application by the attorney for an order to compel testimony, the court "shall issue" the order), to the court having wide discretion, *see, e.g.*, NEV. REV. STAT. § 178.572 (1986) (the court "may order" the witness to testify). *See also* *McCabe v. State*, 655 P.2d 536 (Nev. 1982) (granting of immunity is in the discretion of the court, but only upon a motion by the prosecutor). In several states, the court's discretionary refusal for the grant of immunity is limited to finding that the grant of immunity would be "clearly contrary to the public interest." *See, e.g.*, CAL. PENAL CODE § 1324 (West 1982), IDAHO CODE §§ 19-1114, 1115 (1987), OR. REV. STAT. § 136.617 (1989), UTAH CODE ANN. § 77-22-3 (1990).

57. Virtually all states analyzed in this casenote provide for some form of recourse if the witness fails to testify after being granted immunity. Montana does not specifically state that failure to testify is an offense, but merely says that "no person may be excused from testifying on the grounds that the testimony may be personally incriminating." MONT. CODE ANN. § 46-4-305(4) (1991). Nevada's more direct approach clearly states that a witness who refuses to testify after being granted immunity "is in contempt of court." NEV. REV. STAT. § 178.576 (1986).

58. The states authorizing a grant of transactional immunity are: California, Idaho, Kansas, North Dakota, Oklahoma, Oregon, Utah, and Washington. Use/derivative use immunity is available in Alaska, Arizona, Colorado, Montana, Nebraska, Nevada, New Mexico, and South Dakota. Hawaii allows the attorney to choose either form of immunity by making an application to the court under a transactional immunity statute, or a use/derivative use immunity statute. *See supra* note 53.



The scheme proposed by the writers of the Uniform Laws is set forth as a rule of criminal procedure.<sup>59</sup> In that rule, the prosecuting attorney must make a written request to the court to order the witness to testify. The court must comply with the request unless it "finds that to do so would not further the administration of justice."<sup>60</sup> The Uniform Rule grants transactional immunity.<sup>61</sup>

#### PRINCIPAL CASE

In *Gale*, Dr. Gale's motion to dismiss the case, or to suppress the Rounsaville testimony was denied.<sup>62</sup> The Wyoming Supreme Court identified eight issues that were raised by Dr. Gale on appeal.<sup>63</sup> Seven issues dealt with the trial court's denial of Dr. Gale's various motions for discovery and defense.<sup>64</sup> The remaining issue related to Dr. Gale's motion regarding the immunity agreements and is the focus of this discussion.<sup>65</sup>

Dr. Gale's argument concerning immunity was summarized by the majority as follows: 1) the *substance* of the agreements with the Rounsavilles violated Dr. Gale's right to due process; and 2) the *effect* of the agreements on the testimony of the Rounsavilles violated Dr. Gale's right to due process.<sup>66</sup> The test proposed by Dr. Gale for determining when due process has been offended is that "evidence obtained by 'conduct that shocks the conscience' is inadmissible as a violation of due process."<sup>67</sup>

59. UNIF. R. CRIM. PRO. 732, 10 Sp. Pamph. U.L.A. 161 (1987).

60. *Id.* at 732(a).

61. *Id.* at 732(b).

62. On appeal, Dr. Gale described the motion to dismiss in this manner:

The motion argued that the actions of the prosecution in this case were an abuse of prosecutorial discretion in selecting whom to file charges against, in selecting who should receive immunity from prosecution and in plea bargaining. The prosecutor's actions violated the Sixth Amendment of the United States Constitution ensuring the fairness of criminal proceedings and the due process clause of the Fourteenth Amendment and Article 1, Sections 6 and 10 of the Wyoming State Constitution. Furthermore, the agreements were such that they created an intolerable incentive to commit perjury to an extent that could not be rectified by cross-examination or appropriate jury instructions. Finally, the agreement undermined the integrity of our judicial system.

Appellant's Brief at 58, *Gale* (No. 87-192).

63. The appeals were enumerated as "[w]hether the trial court erred . . ." 1) "in denying Dr. Gale's motion for psychiatric evaluation;" 2) "when it denied Dr. Gale's motion for discovery of summaries of the substance of the expected trial testimony of the prosecution's expert witness;" 3) "in failing to order disclosure of the psychological and/or psychiatric records of the R children;" 4) "in failing to disclose the social services files;" 5) "in denying the motion (sic) disclosure of the tape recordings;" 6) "in denying the motion for disclosure of school records;" 7) "in denying the motion to dismiss or in the alternative suppress testimony of the R family;" and 8) "in denying the Motion to Dismiss or in the Alternative Suppress Testimony for failure to preserve evidence." *Gale*, 792 P.2d at 571.

64. *Id.*

65. See *supra* note 63, number 7.

66. *Gale*, 792 P.2d at 586.

67. Appellant's Brief at 60, *Gale* (No. 87-192).

The majority accepted this test and then reviewed the case law cited by Dr. Gale in support of this claim. It noted that all of the cases cited by Dr. Gale involved contingency agreements.<sup>68</sup> Since the agreements with the Rounsavilles were not contingent upon Dr. Gale's conviction, the majority found this argument to be unpersuasive.<sup>69</sup> The majority's discussion of the immunity issue was brief, and the court did not address the validity of unauthorized grants of immunity or the possible existence of any other type of immunity agreement that might "shock the conscience." In deciding this portion of the appeal, the majority stated that "[t]his type of agreement between the prosecution and the parents of admittedly abused children is not one that shocks the conscience of this court."<sup>70</sup>

The majority, in analyzing the effect of the immunity agreements on Dr. Gale's ability to defend, noted that since the substance of the agreements did not violate due process, neither did their existence.<sup>71</sup> The majority stated that Dr. Gale's theory that the immunity agreements were an incentive for the Rounsavilles to lie was a "bald assertion" and was not supported by "record evidence."<sup>72</sup> The majority held that the trial court was correct in denying Dr. Gale's motion to dismiss the case or to suppress the Rounsaville's testimony.<sup>73</sup>

Justice Thomas, in a concurring opinion joined by then Chief Justice Cardine,<sup>74</sup> expressed concern that a trial court should not be "vested with discretion to order a psychiatric or psychological evaluation of a victim witness."<sup>75</sup> Justice Thomas made no reference to the issue of witness immunity, but argued that the dissenting opinion was "essentially a call for reform of the rules of discovery that pertain in a criminal case."<sup>76</sup> Justice Thomas believed that the majority opinion had resolved the issues actually presented in this case by a "correct application of the applicable principles of law."<sup>77</sup>

In dissent, Justice Urbigkit introduced Dr. Gale as the victim of a

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68. *Gale*, 792 P.2d at 587. Contingency agreements are immunity agreements which are conditioned upon the successful prosecution of the defendant. If the defendant is not convicted, the witness does not receive immunity. *Id.*

69. *Id.*

70. *Id.* In dissent, Justice Urbigkit stated: "Differing from the majority, my conscience is shocked by this saga of family incest and the public official's failure to effectively act to protect the children from their father except by an immunity agreement for the father and mother. This is perjury, bought and paid for." *Id.* at 627 (Urbigkit, J., dissenting). See also *infra* note 98.

71. *Gale*, 792 P.2d at 587.

72. *Id.* Justice Urbigkit felt that there was record evidence to support Dr. Gale's claim. See *infra* text accompanying note 84.

73. *Gale*, 792 P.2d at 587.

74. *Id.* at 588 (Thomas, J., concurring specially).

75. *Id.* at 589.

76. *Id.* Justice Thomas observed that the dissenting opinion's "prescience for this call [was] obtained through a walk in the 'watered garden of academia.'" *Id.* He went on to state that a "garden depends on fertilizer as much as water." *Id.*

77. *Id.* at 590. Justice Thomas concluded by saying that he was "pleased to join in the disposition of this case." *Id.*

“tragedy.”<sup>78</sup> The dissent characterized this case as “an ironic situation where a prosecutor agreed not to prosecute the father of sexually molesting his children in return for his testimony regarding one questionable event with Dr. Gale.”<sup>79</sup>

Unlike the majority opinion, the dissent questioned and criticized the actions of the county attorney.<sup>80</sup> In a footnote, Justice Urbigkit mentioned that “[t]he legal basis for the entry of this immunity from prosecution is not established nor discussed.”<sup>81</sup> Justice Urbigkit expressed the opinion that “[f]airness, due process and equal protection seem[ed] faintly present as a symptom but not the substance of justice.”<sup>82</sup>

In his analysis of the motion to dismiss the case or to suppress the testimony of the Rounsavilles,<sup>83</sup> Justice Urbigkit described the testimony of the Rounsaville family as “unrequited perjury.”<sup>84</sup> He noted that “one critical facet could not have happened - the morning after conference, which was intrinsic to the testimony of all of the [Rounsavilles].”<sup>85</sup> Justice Urbigkit found that the immunity agreements were “[i]ntrinsic to the status of anticipated perjurious testimony at trial” and concluded by stating that the events relating to this portion of the appeal “[did] not meet a due process test.”<sup>86</sup>

#### ANALYSIS

The *Gale* case presents some very curious facts. It appears that the county attorney had substantial evidence indicating that Gene Rounsaville had been engaged in sexual molestation, child abuse and

78. *Id.* at 590 (Urbigkit, J., dissenting). The “tragedy,” to which the dissenting opinion referred, was Dr. Gale’s trial. *Id.*

79. *Id.*

80. “The case must be summarized in exercised discretion of the prosecutor that conviction of one dentist was better than two parents.” *Id.* at 595.

81. *Id.* at 592, n.1.

82. *Id.* at 591.

83. *See supra* note 63, number 7.

84. *Gale*, 792 P.2d at 628 (Urbigkit, J., dissenting). “The prosecution . . . knew or should have known that both Gene and Linda Rounsaville never testified truthfully about the seven year scope of incest occurrences.” *Id.*

85. *Id.* The meeting to which the dissent referred was described by the Rounsavilles as having occurred the morning after the alleged assault by Dr. Gale. *Id.* at 596. Justice Urbigkit provided a synopsis of relevant testimony, which included that of the Rounsavilles, Dr. Gale, and the employee relations manager for the coal mine at which Gene Rounsaville was employed. *Id.* Justice Urbigkit observed several inconsistencies among the various testimonies and concluded that:

If the meeting did happen as testified, Gene Rounsaville had the capacity to be working at the mine while at the same time drinking in town and to then return to his residence to be present for an unscheduled meeting with Dr. Gale who happened to return to retrieve his hat.

*Id.* at 597, n.3.

86. *Id.* at 628. Justice Urbigkit was also concerned about the prosecution’s minimal production of records and the fact that the records were not available to Dr. Gale during his trial. *Id.*

wife abuse for "most of a decade."<sup>87</sup> The information provided in the facts of the case suggests that Gene Rounsaville had been engaged in criminal conduct for which he could have been fully prosecuted. Some time after the prosecution of Gene Rounsaville began, Dr. Gale's name was mentioned.<sup>88</sup> At the point in the county attorney's investigation when Dr. Gale was implicated, the search for substantial justice seems to vanish. The prosecutor forever closed the opportunity for the State to seek prosecution of that entire course of undesirable conduct and went whole-heartedly after Dr. Gale.<sup>89</sup> Assuming, for the sake of argument, that Dr. Gale was guilty as charged,<sup>90</sup> the county attorney may have still owed a duty to members of the Rounsaville family and to the citizens of Wyoming to pursue the case against Gene Rounsaville.<sup>91</sup>

The underlying public policy for granting immunity to a witness is to aid in the endeavor to achieve an ordered system of equal justice.<sup>92</sup> The granting of immunity, by its very definition, eliminates the potential existence of equal justice. The person who receives the immunity will not be prosecuted for his actions. A balancing of the interests is needed in making a determination of when and how to utilize a grant of immunity. In the presence of some statutory authority to grant immunity, this would be a legitimate exercise of discretion.<sup>93</sup>

87. *Id.* at 590. See also *supra* note 6.

88. *Id.* at 592.

89. If Gene and Linda Rounsaville did in fact testify completely and truthfully, their prosecution is forever barred. Even in the absence of a written condition to testify truthfully, it is widely accepted that failure to testify completely and truthfully is grounds for prosecution as if there were no immunity agreement. See UNIF. R. CRIM. PRO. 732(c) (Comment), *supra* note 59.

90. See *Gale*, 792 P.2d at 628 n.28 (Urbigkit, J., dissenting). "I do not find reasonable doubt, I find probable innocence." *Id.*

91. See *Petition of Padget*, 678 P.2d 870, 872 (Wyo. 1984). "[T]he initial question as to whether or not charges should be brought in a criminal action must be answered by the executive branch of the state, whose duty it is to see that the laws of the state are 'faithfully executed.'" *Id.* The court in *Padget* stated that even if available evidence might support a conviction, the prosecutor could be justified in declining to prosecute. *Id.* at 873. Such a decision, however, is conditioned on being "consistent with the public interest." *Id.* It is difficult to believe that this condition was met regarding the case against Gene Rounsaville.

92. See *State v. Ward*, 571 P.2d 1343, 1345 (Utah 1977). "Sometimes practical exigencies make it necessary and expedient to make what is intended to be a minor sacrifice of the [principle of equal and exact] justice to achieve a greater good. That seems to be the justification for the immunity statute's departure from the equal justice ideal." *Id.*

93. *Id.* at 1346. In *Ward*, the Utah Supreme Court said "it is our opinion that the power to grant immunity is of such character that it should not be extended by implication or otherwise beyond the express terms of the statute." *Id.* In *Ward*, immunity had been granted by two deputy county attorneys, but the applicable Utah statute only allowed for the attorney general or a district or county attorney to make such a grant. The Utah Supreme Court held the grant of immunity by the deputy county attorneys to be invalid because they did not have statutory authority to make such a grant. *Id.* See also *People ex rel. Kunce v. Hogan*, 346 N.E.2d 456, 462 (Ill. App. Ct. 1976) (there is no power to grant immunity unless provided for by legislation). *But see Surina v. Buckalew*, 629 P.2d 969, 973 (Alaska 1981) (the result is the same if the immunity is granted under statutory authority or through an informal procedure).

If the possibility of convicting the person suspected of committing the worse crime is very remote, it may indeed be proper for the attorney to grant immunity to obtain information which will likely convict the other suspect.<sup>94</sup> In the interest of equal justice, however, the balance tips away from granting immunity to a person against whom a strong case already exists. If that person has first been fully prosecuted, his testimony about alleged events is no longer incriminating and can be compelled.<sup>95</sup> Any incentive that the person may have once had to fabricate a story which could be traded for immunity will no longer exist because that person will have already been prosecuted. If the State can convict two people who are guilty of crimes rather than forgiving one as a mere expense of convicting the other, it is reasonable to expect the State to attempt to convict both. The *Gale* case exemplifies how far an attorney can stray in his zeal to convict a defendant. Leaving the power to grant immunity within the sole discretion of a county attorney may lead to similar disturbing results in future Wyoming cases.

In *Gale*, it is not clear why the Rounsavilles were given immunity. The testimony given by Gene Rounsaville was not eye-witness testimony. The only things to which he testified concerning the night of the alleged offense were that Dr. Gale was present in his house and that Dr. Gale was in his daughter's room. Such an observation does not appear to be terribly incriminating.<sup>96</sup> Linda Rounsaville received immunity for testimony that she was in a deep sleep brought on by prescription drugs and that she was not even aware of Dr. Gale's presence in her home on the night of the alleged event.<sup>97</sup>

The immunity granted to the Rounsavilles covered much more than what was needed to protect them from self-incrimination. They were given transactional immunity for acts and omissions which were

94. *Ward*, 571 P.2d at 1345.

95. *Reina v. U.S.*, 364 U.S. 507 (1960). Some criminals might be so uncooperative that they could never be compelled to testify. If the only possible method of extracting that testimony is to provide them with a quid pro quo in the form of immunity, then such a decision is properly left to the discretion of the prosecutor when the authority to make such a grant is vested by statute. See *Ward*, 571 P.2d at 1345 (sometimes as a practical matter, it may be necessary to make a minor concession to achieve a better over-all result). See also *id.* at 1346 (the power to grant immunity should be used with great caution and only in strict compliance with the statute).

96. It is possible that Gene Rounsaville could have been charged as an accomplice to the felony for which Dr. Gale was convicted, or that he could have been charged with a violation of § 14-3-205 of the Wyoming Statutes for failing to report the felony. Against both of these specific charges, he could have been provided immunity. This would have protected him from incrimination by the testimony that he provided against Dr. Gale. Having protected only the information necessary to aid in the prosecution of Dr. Gale, the testimony could have been compelled and Gene Rounsaville could still be prosecuted for his other myriad of offenses against his family.

97. See *supra* note 96. For similar reasons, Linda Rounsaville could have been charged with a violation of § 14-3-205 of the Wyoming Statutes. For the same reasons, she could have been granted immunity which was narrowly tailored to compel only the needed testimony.

in no way related to the case against Dr. Gale.<sup>98</sup> The crimes with which Gene and Linda Rounsaville could have been charged could have all been brought separately. That is to say, one act of sexual assault is separate and distinct from another, and the proof of one does not necessarily prove the other. In proving its case against Dr. Gale, all previous unrelated criminal acts of Gene and Linda Rounsaville were not truly relevant. The only relevant and incriminating information provided by the Rounsavilles in the case against Dr. Gale concerned their knowledge about the night of the alleged sexual assault involving Dr. Gale. The immunity which was granted extended back to the time that the Rounsavilles moved to Wyoming and covered all offenses which were committed against the family for a period of several years.<sup>99</sup>

Any attempt to show how the case against Dr. Gale might have concluded absent the broad immunity granted to the Rounsavilles would be mere speculation.<sup>100</sup> It is not speculation, however, to state that the granting of such immunity was done with only minimally colorable legal authority.<sup>101</sup> Neither is it speculation to suggest that the result of this offer could easily operate to entice such witnesses into concocting a story which could be traded for absolute freedom.<sup>102</sup>

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98. One might wonder if the conscience of the Wyoming Supreme Court would have been shocked had the prosecutor offered the Rounsavilles narrowly tailored immunity which covered only the testimony needed in the trial against Dr. Gale, and then also granted them immunity from prosecution for an unrelated speeding ticket as an incentive to "testify truthfully;" immunity from prosecution for an unrelated burglary as an incentive to "testify truthfully;" immunity from prosecution for an unrelated murder as an incentive to "testify truthfully." Would the court disregard any immunity-related incentive to "testify truthfully" and focus only on whether the witness was protected from self-incrimination? Such a result would be consistent with the court's analysis in *Gale*. See *supra* text accompanying note 70.

99. *Gale*, 792 P.2d at 594 (Urbigkit, J., dissenting). Compare *State v. Brown*, 321 A.2d 478, 484 (Me. 1974) (county attorney granted transactional immunity to a witness for all criminal activity in the state, much of which was unrelated to the case in question). The Maine Supreme Court said "a power to suspend the criminal law by tender of immunity is not an implied or inherent incident of a power to investigate." *Id.*

100. Due to the curious nature of the conflicting testimony provided by the Rounsavilles, one might query whether such a series of events would have even been offered as "the truth" if the Rounsaville family did not stand to gain such a handsome reward, for example complete forgiveness for all past wrongs. At Dr. Gale's trial, Gene Rounsaville admitted that "[i]t was at least 'partially true' that when he was approached by authorities he tried everything to exonerate himself and make a case against Dr. Gale." Appellant's Brief at 16, *Gale* (No. 87-192). See Christine J. Saverda, Note, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L. J. 785, 786 (1990) (the witness' immunity may depend on the self-serving nature of his story and he may tend to implicate another person in order to exonerate himself).

101. As has already been discussed in this casenote, there was no basis in the common law for granting immunity and Wyoming statutes are silent on the general power to grant immunity. The strongest argument that can be made for a legal basis to grant such immunity is that the majority of the Wyoming Supreme Court has not condemned such extra-statutorial activity and that silence on the part of the Wyoming Supreme Court is the equivalent of endorsement. Even if there had been a clear legal basis by which the county attorney could grant immunity, the merit of granting these immunity agreements in this situation seems arguable at best.

102. "This is perjury, bought and paid for." *Gale*, 792 P.2d at 627 (Urbigkit, J.,

In *Gale*, the State observed that “[t]he decision to prosecute or not to prosecute is committed to the executive branch; [which in Wyoming includes] the county attorney . . . .”<sup>103</sup> The State went on to say that “[a] prosecutor’s discretion in charging, deferring or requesting dismissal is limited by pragmatic factors, but not by judicial intervention.”<sup>104</sup> It then argued that “agreements granting government favors to a prosecution witness in return for truthful testimony about others are not improper.”<sup>105</sup> The State offered no authority to support its claim that an agreement, made with only a colorable legal basis, between a suspected criminal and a county attorney,<sup>106</sup> constituted a mere exercise of discretion and should be compared with simply choosing to not prosecute the suspected felon.<sup>107</sup> Such an agreement is less like a discretionary refusal to prosecute and more like a pardon,<sup>108</sup> which in Wyoming is a power reserved to the governor alone.<sup>109</sup>

In a case pending before the Wyoming Supreme Court, the State is advancing different theory from the one it embraced in *Gale*. In its brief, the State concedes that “[t]he granting of immunity to a criminal defendant, and whether it is a proper exercise of prosecutorial power and discretion under existing Wyoming law is an important and troubling area of criminal procedure in our state.”<sup>110</sup> The State admits

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dissenting). From the perspective of Gene Rounsaville, having the opportunity to trade his potential criminal liability for a story about the acts of another person could understandably act as an incentive to find a story, even if one did not exist. Gene Rounsaville had previously been a police officer, *Id.* at 590, and may have had an understanding of how to negotiate a grant of immunity. From the perspective of the children involved, the enticement for providing such a story could be that they would neither have to live with foster parents while their mother and father were in prison, nor would they have to endure the stigma that might attach to them as children of two convicted criminals.

103. Brief of Appellee at 60, *Gale v. State*, 792 P.2d 570 (Wyo. 1990) (No. 87-192).

104. *Id.*

105. *Id.*

106. This was an agreement in which the attorney essentially forgave the suspect for several years’ worth of offenses.

107. As a rebuttal to the test of “shocks the conscience,” the State offered *Hoffa v. U.S.*, 385 U.S. 293 (1966). The use of government informers was the constitutional issue in *Hoffa*. The Supreme Court held that “the use of secret informers is not *per se* unconstitutional.” *Id.* at 311. The argument in *Gale* went a bit deeper than merely using immunized testimony which was obtained under the guidelines of a statute which authorized such a grant of immunity. In *Gale*, the grant of immunity was made in the absence of any statutory authority, and was so incredibly over-broad that the incentive to lie that was created by the offer was the misconduct that might have “shocked the conscience.” As such, the application of the shocked conscience test was narrowly construed to extend only to the act of using non-statutorily immunized testimony rather than as it might have been applied: to encompass the overall effect that such an overwhelming incentive to lie would have on the defendant’s ability to defend.

108. In *State v. Ward*, the Utah Supreme Court said “[t]he granting of immunity is tantamount to granting absolution for crime. This is an awesome power and responsibility which has been considered as belonging only to the king, or the sovereign.” *State v. Ward*, 571 P.2d 1343, 1345 (Utah 1977).

109. Wyo. STAT. § 7-13-803 (1987).

110. Brief of Respondent at 14, *Hall v. State*, (Wyo. 1990) (No. 89-212) [hereinafter Respondent’s Brief, *Hall* (No. 89-212)]. Compare this statement with the State’s argument in *Gale* that “agreements granting government favors to a prosecution wit-

that the legal basis for the granting of such immunity is questionable.<sup>111</sup> The State correctly observes that once the immunity is granted to the witness and the witness has relied on that grant of immunity, equity demands that the agreement be honored.<sup>112</sup>

The results in *Gale* support the theory that juries place great weight in the testimony provided by immunized witnesses.<sup>113</sup> Though the proper evidentiary standard of immunized testimony is beyond the scope of this casenote, it is an issue which naturally flows from such a grant. When Wyoming finally addresses the issue of witness immunity, it should not ignore the standard to which such testimony should be held.

The ability to obtain evidence through the granting of witness immunity is a valuable prosecutorial tool. Prosecutors should have at their disposal every reasonable tool that will aid them in convicting criminals. Their ability to utilize those tools should not be unnecessarily encumbered. What should be controlled, however, is the potential abuse of this prosecutorial tool in a blind attempt to convict a suspected criminal.

#### CONCLUSION

Wyoming would benefit from definitive guidelines for the power to grant witness immunity.<sup>114</sup> The State of Wyoming needs to directly address this issue. It is not in the state's best interest to have county attorneys granting immunity without any guidance. Though the State now recognizes that this is a "troubling area of criminal procedure" in Wyoming,<sup>115</sup> county attorneys are still unrestricted in exercising a power which has no basis in positive law.<sup>116</sup>

ness in return for truthful testimony about others are not improper." See *supra* text accompanying note 105.

111. In *Hall*, the State says "[t]here is, however, authority that suggests that prosecutors do not in fact enjoy discretion in the institution of an immunity agreement, lacking specific statutory authority." Respondent's Brief at 16, *Hall* (No. 89-212). The State goes on to point out that "Wyoming statutes do not give a prosecutor the power to grant immunity in all criminal cases." *Id.* at 18.

112. *Id.* at 17.

113. *Gale*, 792 P.2d at 597 (Urbigkit, J., dissenting). "Observedly, the jury accepted the testimony of the Rounsaville family and rejected that provided by the Gale family. Consequently, credibility was absolutely controlling in their decision." *Id.* See Saverda, *supra* note 100, at 787, which states in part: "Thus [the immunized witness'] testimony proposes a unique danger: the increased probability that a jury will, unquestioningly and with little scrutiny, accept his story as true because of its inherent 'believability.'"

114. Chief Justice Urbigkit called for action on this issue several years ago. See *Hennigan v. State*, 746 P.2d 360, 415 (Wyo. 1987) (Urbigkit, J., dissenting). Consider also that the time that lapsed between the filing of the State's briefs for *Gale* and *Hall* was slightly more than one and one-half years. In that brief period of time, the State changed its position on the same question, see *supra* note 110 and accompanying text. If definitive statutes or rules are enacted, such confusion will be relieved.

115. See *supra* text accompanying note 110.

116. *Hennigan*, 746 P.2d at 415 (Urbigkit, J., dissenting).



The requirements of Section 35-7-1043 of the Wyoming Statutes<sup>117</sup> are consistent with the general immunity statutes of many of Wyoming's sister-states.<sup>118</sup> The Wyoming State Legislature could easily adopt similar language in drafting a general witness immunity statute. In the absence of action by the State Legislature, the Wyoming Supreme Court should extend the guidelines set forth in Section 35-7-1043 to regulate and authorize the general use of witness immunity by county attorneys.

When this issue is ultimately resolved, the paramount objective of any legislation or rules should be to ensure that substantial justice is served. The impact of the immunity granted to Gene and Linda Rounsaville clearly had a detrimental effect on Dr. Gale's right to a fair trial.<sup>119</sup> In order to avoid similar abuses in the future, Wyoming needs to adopt, either legislatively or judicially, administrative procedures to control the use of witness immunity.

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Any basis for the prosecutor to accord to himself the power to grant immunity is certainly not justified by Wyoming case law, statute, or constitution. As a matter of fact, under the present circumstances, the right where no statute exists to "waive prosecution" by a grant of immunity and require testimony, lacks determinate validity.

*Id.* See also *supra* note 101.

117. WYO. STAT. § 35-7-1043 (1988).

118. See *supra* text accompanying notes 20 and 22. See also *supra* notes 54 through 57, and accompanying text.

119. "Due process, equal protection and fairness have not been served in this proceeding which ended with conviction." *Gale v. State*, 792 P.2d 570, 629 (Wyo. 1990) (Urbigkit, J., dissenting).