

Notes

Nonstatutory Witness Immunity: Evidentiary Consequences of a Defendant's Breach

I. INTRODUCTION

In developing the government's case, a prosecutor frequently uses a grant of immunity to obtain the testimony of a witness against his accomplices. When statutory¹ immunity is conferred on a witness and the witness fails to give the required testimony, the evidentiary consequences of the witness' bad faith are well established. Any statements or information the witness has already given cannot be used against him in any respect if he is later prosecuted.² When a witness enters into a nonstatutory³ immunity agreement, however, and subsequently breaches that agreement, several difficult issues arise concerning the use of any previously given statements in his later prosecution. Until recently, courts have applied a variety of rules ranging from per se admissibility⁴ to per se inadmissibility.⁵ The disparity, however, has given way in recent years to a more fact-sensitive approach. Courts now consider all the surrounding circumstances of the agreement in order to determine the voluntariness of the witness' statements.⁶ This Note will discuss the application of the modern fact-sensitive approach to determine the admissibility of a breaching witness' statements under a nonstatutory immunity agreement. It will also offer some alternatives for avoiding the evidentiary complications which arise when a witness breaches such an agreement.

II. ENFORCEMENT OF THE AGREEMENT

When a prosecutor promises⁷ immunity from prosecution to a witness in exchange for cooperation with the government, but does

¹*E.g.*, Organized Crime Control Act of 1970, 18 U.S.C. §§ 6001-6005 (1976); CAL. PENAL CODE § 1324 (West Supp. 1980); IND. CODE § 35-6-3-1 (1976). For a general discussion of statutory immunity, see C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 143 (2d ed. 1972).

²See text accompanying notes 56-60 *infra*.

³See text accompanying notes 9-10 *infra*.

⁴See text accompanying note 68 *infra*.

⁵See text accompanying notes 71-72 *infra*.

⁶See text accompanying notes 107-25 *infra*.

⁷Whether the prosecutor actually "promised" immunity is a factual issue. See *United States v. Weiss*, 599 F.2d 730 (5th Cir. 1979); *United States v. Rothman*, 567 F.2d 744 (7th Cir. 1977). The discussion in this Note assumes the existence of a recognizable promise.

so without express statutory authority, the binding effect of such an agreement is in doubt. Traditionally, prosecutorial promises of immunity were not enforceable unless made pursuant to express statutory authorization.⁸ Nevertheless, prosecutors frequently use immunity agreements, absent statutory authorization, to secure a witness' cooperation.⁹ Under such an agreement, a witness promises to cooperate with the government in exchange for the prosecutor's promise not to prosecute certain potential criminal charges, to dismiss certain charges, or not to use the statements or information against the witness.¹⁰ Several courts have held that even when a witness has fully performed his part of the bargain, such agreements are not binding on the prosecutor, thus leaving the witness with merely an equitable claim of immunity which does not bar subsequent prosecution.¹¹ Most of the courts that have adopted this approach, however, have not allowed prosecutors to benefit from lack of express authority; rather, these courts have granted defendants equitable relief when the defendant has fully performed his part of the agreement in good faith.¹² Equitable relief has been based on the public faith pledged by the prosecutor,¹³ on the integrity of the judicial

⁸United States v. Carter, 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1973); Hunter v. United States, 405 F.2d 1187 (9th Cir. 1969); United States v. Paiva, 294 F. Supp. 742 (D.D.C. 1969). When the witness testifies fully and in good faith under statutory immunity, he is absolutely entitled to the grant of immunity. United States v. Ford, 99 U.S. 594 (1878) (also known as the *Whiskey Cases*).

⁹See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 135 (1967); WORKING PAPER OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 1419-20 (1970). Several courts have specifically stated that even in the absence of, or lack of compliance with, statutory authority the government has the right to agree not to prosecute an accomplice who is cooperating in the conviction of others. See, e.g., United States v. Librach, 536 F.2d 1228 (8th Cir.), *cert. denied*, 429 U.S. 939 (1976); United States v. Levy, 153 F.2d 995 (3d Cir. 1946).

¹⁰See Thornburgh, *Reconciling Effective Federal Prosecution and the Fifth Amendment: "Criminal Coddling," "The New Torture" or "A Rational Accommodation?"*, 67 J. CRIM. L. & C. 155, 165 (1976).

¹¹United States v. Ford, 99 U.S. 594 (1878); United States v. Levy, 153 F.2d 995 (3d Cir. 1946); State v. Hargis, 328 So. 2d 479 (Fla. Dist. Ct. App. 1976); Lowe v. State, 111 Md. 1, 73 A. 637 (1909); Bowie v. State, 14 Md. App. 567, 287 A.2d 782 (1972); State v. Crow, 367 S.W.2d 601 (Mo. 1963); State v. Trocodaro, 36 Ohio App. 2d 1, 301 N.E.2d 898 (1973), *cert. denied*, 415 U.S. 993 (1974).

¹²E.g., Hammers v. State, 261 Ark. 585, 550 S.W.2d 432 (1977); Lowe v. State, 111 Md. 1, 73 A. 637 (1909); Bowie v. State, 14 Md. App. 567, 287 A.2d 782 (1972); State v. Trocodaro, 36 Ohio App. 2d 1, 301 N.E.2d 898 (1973), *cert. denied*, 415 U.S. 993 (1974).

¹³United States v. Goodrich, 493 F.2d 390 (9th Cir. 1974); Hammers v. State, 261 Ark. 585, 550 S.W.2d 432 (1977); Camron v. State, 32 Tex. Crim. 180, 22 S.W. 682 (1893).

system,¹⁴ and on the furtherance of justice.¹⁵ Other courts have used the contractual doctrine of detrimental reliance to enforce the agreement when the witness has performed his part of the bargain in reliance upon the prosecutor's promises.¹⁶

Finally, nonstatutory immunity agreements should be enforceable as analogous to plea bargains, which have been recognized by the Supreme Court as judicially enforceable.¹⁷ Courts and commentators have consistently treated these arrangements as similar for purposes of enforcement.¹⁸ In plea bargains, the most common forms of consideration given by the prosecutor are: (1) a promise to recommend a lesser sentence; (2) a promise to dismiss additional or potential charges; (3) acceptance of a plea of guilty to a lesser offense; and (4) a promise to press the case no further than prosecution of the offense (a promise not to make any particular recommendation for sentence).¹⁹ The defendant's consideration is usually a commitment to: (1) submit a plea of guilty or *nolo contendere*; (2) waive a constitutional or procedural safeguard; or (3) provide aid or information to the government.²⁰ The scenario of a prosecutor recommending the dismissal of additional or potential charges in exchange for aid or information on the part of the defendant is almost identical to that which occurs in a nonstatutory immunity agreement.²¹

Additionally, one commentator has noted that nonstatutory immunity agreements may be categorized into three groups: (1) those that are principally plea bargains, in which the defendant's promise to give information is, because of the plea agreement, no additional consideration; (2) those that are both a plea bargain and immunity agreement, in which the defendant's promise to give incriminating information is additional consideration; and (3) those that are strictly

¹⁴United States v. Paiva, 294 F. Supp. 742 (D.D.C. 1969); State v. Kuchenreuther, 218 N.W.2d 621 (Iowa 1974).

¹⁵*In re Doe*, 410 F. Supp. 1163 (E.D. Mich. 1976); Hammers v. State, 261 Ark. 585, 550 S.W.2d 432 (1977); State v. Reed, 127 Vt. 532, 253 A.2d 227 (1969).

¹⁶United States v. Carter, 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1973); United States v. Rand, 308 F. Supp. 1231 (N.D. Ohio 1970); People v. Brunner, 32 Cal. App. 3d 908, 108 Cal. Rptr. 501 (1973); People v. Caruso, 100 Misc. 2d 601, 419 N.Y.S.2d 854 (1979).

¹⁷Santobello v. New York, 404 U.S. 257, 260 (1971).

¹⁸See, e.g., United States v. Carter, 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1973); Hunter v. Swenson, 372 F. Supp. 287 (W.D. Mo.), *aff'd per curiam*, 504 F.2d 1104 (8th Cir. 1974), *cert. denied*, 420 U.S. 980 (1975).

¹⁹Note, *The Legitimation of Plea Bargaining: Remedies for Broken Promises*, 11 AM. CRIM. L. REV. 771, 772 (1973).

²⁰*Id.*

²¹See text accompanying note 10 *supra*.

agreements to provide information or incriminating statements.²² Several courts that have been faced with the hybrid form of agreement in the second category have enforced the immunity agreement as analogous to a plea bargaining agreement.²³ Thus, a nonstatutory immunity agreement is, arguably, enforceable as akin to a plea bargain.²⁴

III. THE WITNESS' REQUIRED PERFORMANCE

Although courts generally uphold nonstatutory immunity agreements, it is unclear how the courts will construe such agreements when a witness has not completely fulfilled his part of the agreement. One commentator has noted that by applying the doctrine of consideration, a witness' nonperformance is a failure of consideration.²⁵ The prosecutor, who is the aggrieved party, may repudiate the agreement and seek to be placed in his original position.²⁶ Similarly, several courts have held that when a defendant gives none of the bargained-for information or incriminating statements,²⁷ the prosecutor is not bound by his promise of immunity and may prosecute the defendant for the original crime.²⁸ When a defendant only partly performs, a court should utilize the contractual doctrine of substantial performance to determine whether the witness has breached the agreement. This approach was recently

²²See Thornburgh, *supra* note 10, at 165. The first type of agreement arises when the plea bargain is consummated and the defendant subsequently gives information that is not part of the consideration required by the plea bargain. The third type of agreement is the primary focus of this Note.

²³See, e.g., *United States v. Carter*, 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1973); *Hunter v. Swenson*, 372 F. Supp. 287 (W.D. Mo.), *aff'd per curiam*, 504 F.2d 1104 (8th Cir. 1974), *cert. denied*, 420 U.S. 980 (1975).

²⁴Note that the evidentiary consequences of a defendant's breach of nonstatutory immunity agreement may be different from the evidentiary consequences of a defendant's breach of a pure plea bargain. Generally, when the defendant breaches a pure plea bargaining agreement any statements he has already given are not admissible at his later trial. See FED. R. CRIM. P. 11(e)(6); FED. R. EVID. 410. See also *United States v. Robertson*, 582 F.2d 1356 (5th Cir. 1978). When a defendant breaches a nonstatutory immunity agreement, however, the admissibility of any previously given statements depends upon whether they were made "voluntarily." See text accompanying notes 62-64 *infra*.

²⁵See Note, *Judicial Supervision of Non-Statutory Immunity*, 65 J. CRIM. L. & C. 334, 342-43 (1974).

²⁶*Id.*

²⁷The situation in which a prosecutor bargains for information or statements implicating the defendant's accomplices should be distinguished from the situation in which a prosecutor bargains for a confession by the defendant. See text accompanying notes 98-105 *infra*.

²⁸*United States v. Ford*, 99 U.S. 594 (1878); *United States v. Ciotti*, 469 F.2d 1204 (3d Cir. 1972), *vacated on other grounds*, 414 U.S. 1151 (1974).

adopted by the California Court of Appeals in *People v. Brunner*.²⁹ In *Brunner*, the court determined that when the defendant gave promised testimony before a grand jury but later recanted her testimony and claimed her fifth amendment privilege against self-incrimination,³⁰ the prosecutor received "substantially what [he] bargained for."³¹ In determining whether the defendant had substantially performed, the court measured the witness' performance by the results the prosecutor reasonably expected from the witness' testimony.³² The court concluded that because the prosecutor received his hoped-for results by the conviction of the witness' accomplices, enough of the bargain had been kept to conclude that the witness had not breached the agreement.³³ Thus, the determination of whether a witness has substantially performed his part of the bargain appears to depend upon whether a prosecutor has made use of the partial testimony or information given by the witness and upon whether such evidence was effective in producing an outcome reasonably expected by the prosecutor. When these two requirements are met, a court should enforce the immunity agreement even though the witness has given only part of the bargained-for information.

IV. EVIDENTIARY USE OF THE WITNESS' STATEMENTS

If a court finds, based upon the *Brunner* test,³⁴ that a defendant has not substantially performed his part of the immunity agreement and the prosecutor consequently brings the original charges against him, several issues arise concerning the evidentiary use of any statements elicited from the witness prior to the breach. At this point, the distinction between statutory and nonstatutory immunity becomes crucial.

A. *Statutory Versus Nonstatutory Immunity*

The evidentiary protection afforded a witness under a statutory immunity grant is different from that which is afforded a witness under a nonstatutory immunity agreement. For purposes of discussing the evidentiary protection afforded a witness, there are basically two types of immunity: "transactional" and "use and derivative use."³⁵ "Transactional" immunity is absolute immunity from prosecu-

²⁹32 Cal. App. 3d 908, 108 Cal. Rptr. 501 (1973).

³⁰See Note, *supra* note 25, at 339. See also note 39 *infra*.

³¹32 Cal. App. 3d at 916, 108 Cal. Rptr. at 507.

³²*Id.*

³³*Id.*

³⁴See text accompanying notes 29-33 *supra*.

³⁵See *Kastigar v. United States*, 406 U.S. 441, 449-53 (1972). See also Note, *Im-*

tion for any crime about which a witness testifies.³⁶ "Use and derivative use" immunity does not bar prosecution of a witness; it does, however, prevent the use of the witness' incriminating statements and any evidence derived directly or indirectly from the statements, in any manner in the witness' prosecution.³⁷

The type of evidentiary limitations protecting a witness depends upon whether the witness was *compelled* to give incriminating statements under the immunity grant.³⁸ The presence or absence of compulsion is a critical factor because the fifth amendment³⁹ does not prohibit the admission of all promise-induced incriminating statements; that amendment excludes only statements that are *compelled* by promises of immunity.⁴⁰ Generally, testimony given under a statutory grant of immunity is compelled;⁴¹ statements given under a nonstatutory immunity agreement are not compelled.⁴²

1. *Fifth Amendment "Compulsion."*—A witness is "compelled" to testify when he is granted statutory immunity because once the witness has been granted immunity, he has no option to reject the offer; he must accept the immunity and testify or face a possible conviction for contempt.⁴³ In the words of the Supreme Court: "Testimony given in response to a grant of legislative immunity is the essence of coerced testimony. In such cases there is no question whether physical or psychological pressures overrode the defendant's will; the witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt."⁴⁴

A witness who enters into a nonstatutory immunity agreement, however, is not "compelled" to give incriminating statements or information. First, the initial choice of whether to enter into a nonstatutory agreement is freely made.⁴⁵ This is especially true

munity from Prosecution and the Fifth Amendment: An Analysis of Constitutional Standards, 25 VAND. L. REV. 1207 (1972).

³⁶See *United States v. Quatermain*, 613 F.2d 38, 40 (3d Cir.), *cert. denied*, 446 U.S. 954 (1980) (quoting *Kastigar v. United States*, 406 U.S. 441, 453 (1972)).

³⁷613 F.2d at 40 (citing 406 U.S. at 452-53).

³⁸See text accompanying notes 53-61 *infra*.

³⁹U.S. CONST. amend. V states in relevant part: "No person . . . shall be compelled in any criminal case to be witness against himself . . ." This privilege has been extended to the states through the fourteenth amendment. *Malloy v. Hogan*, 378 U.S. 1 (1964).

⁴⁰*New Jersey v. Portash*, 440 U.S. 450, 459 (1979); *Kastigar v. United States*, 406 U.S. 441, 461 (1972).

⁴¹See text accompanying notes 43-44 *infra*.

⁴²See text accompanying notes 45-52 *infra*.

⁴³*New Jersey v. Portash*, 440 U.S. at 459.

⁴⁴*Id.*

⁴⁵See Note, *Judicial Enforcement Of Nonstatutory "Immunity Grants": Abrogation By Analogy*, 25 HASTINGS L.J. 435, 461 n.154 (1974). See also *United States v. Pellon*, 475 F. Supp. 467 (S.D.N.Y. 1979), *aff'd*, 620 F.2d 286 (2d Cir. 1980).

when a witness has approached the government with the initial proposal for the agreement.⁴⁶ When a witness has solicited promises from the prosecutor, the witness is not the victim of the compelling influences that the fifth amendment was designed to prohibit.⁴⁷ Even when a defendant is not the initiator of the agreement, however, the consummation of the agreement is still the result of free choice: the defendant is free to choose whether to accept or reject the prosecutor's offer. His rejection of the offer will result only in his being prosecuted for the original crime.⁴⁸ Consequently, a rejection would put the defendant in no worse position than if he had never been offered immunity. This is not true when statutory immunity is conferred on a witness claiming his privilege against self-incrimination. Once statutory immunity is offered to a witness and his fifth amendment privilege is thereby supplanted, he has no option to decline the offer; he must accept the immunity or face a potential contempt charge.⁴⁹

The second reason that a witness is not "compelled" to give incriminating statements under a nonstatutory immunity agreement is that once he has accepted the offer and agreed to give statements, he still has a free choice of whether to make any statements. A refusal to give any statements will leave him in no worse position than if he had not originally entered into the agreement. If the witness has given no incriminating statements, the prosecution has gained nothing by the defendant's breach. The breach has merely put the parties in their original positions. The prosecutor may then simply bring the original charges against the defendant.⁵⁰ When a

⁴⁶United States v. Pellon, 475 F. Supp. 467 (S.D.N.Y. 1979), *aff'd*, 620 F.2d 286 (2d Cir. 1980); State v. Jordan, 114 Ariz. 452, 561 P.2d 1224 (1976), *vacated on other grounds*, 438 U.S. 911 (1978); Taylor v. Commonwealth, 461 S.W.2d 920 (Ky. 1970), *cert. denied*, 404 U.S. 837 (1971).

⁴⁷Taylor v. Commonwealth, 461 S.W.2d 920 (Ky. 1970), *cert. denied*, 404 U.S. 837 (1971). See Lederer, *The Law Of Confessions—The Voluntariness Doctrine*, 74 MIL. L. REV. 67, 82 (1976).

⁴⁸See text accompanying note 28 *supra*. The possibility of being prosecuted for the original charge is not compulsion to enter into the immunity agreement. In an analogous situation, the Supreme Court held "that an otherwise voluntary guilty plea is not rendered involuntary merely because it was entered to avoid a possible death penalty since the decision to plead guilty was an exercise of the defendant's free choice." Note, *supra* note 19, at 777 n.37 (discussing Brady v. United States, 397 U.S. 742 (1970)). *But see* Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 L. & Soc'y REV. 527 (1979).

⁴⁹New Jersey v. Portash, 440 U.S. at 459.

⁵⁰See text accompanying note 28 *supra*. The prosecution of the original charges after the witness breaches the agreement does not create a double jeopardy issue because jeopardy did not previously attach. "The [Supreme] Court has consistently adhered to the view that jeopardy does not attach, and the [double jeopardy clause of the fifth amendment has] no application, until a defendant is 'put to trial before the

witness has been conferred statutory immunity, however, he must testify fully and truthfully.⁵¹ Although, theoretically, the witness still has a "choice" of whether to testify, a failure to testify may result in a charge of contempt.⁵² That potential criminal charge subjects a witness to compulsion not present in nonstatutory immunity agreements.

2. *Evidentiary Significance of Compulsion.*—The Supreme Court stated, in *Kastigar v. United States*,⁵³ that when a defendant is compelled by a grant of statutory immunity to testify in place of his fifth amendment privilege against self-incrimination, he must be left in "substantially the same position as if [he] had claimed the Fifth Amendment privilege."⁵⁴ After determining that transactional immunity was broader than required by the fifth amendment, the Court held that immunity from use and derivative use of a defendant's statements was coextensive with the scope of the privilege against self-incrimination and therefore is sufficient to compel testimony over a claim of the privilege.⁵⁵

Relying on its decision in *Kastigar*, the Court has recently held that because statutory immunity requires use and derivative use protection, when a witness does not give all the required testimony under a statutory immunity grant, any statements he has given may be used against him only in a prosecution for perjury.⁵⁶ If the government wishes to prosecute the defendant for any criminal activity disclosed by his statements, the prosecutor may not use any evidence gained from the defendant either directly or derivatively⁵⁷ to convict him.⁵⁸ The prosecutor bears the burden to prove that the evidence it proposes to use against the defendant was "derived from a legitimate source wholly independent of the compelled

trier of facts" *Serfass v. United States*, 420 U.S. 377, 388 (1975) (quoting *United States v. Jorn*, 400 U.S. 470, 479 (1971)). "In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn." *Id.* (citation omitted). "In a nonjury trial, jeopardy attaches when the court begins to hear evidence." *Id.* (citation omitted). Thus, when the prosecutor brings the previously dismissed charges against the defendant, the fifth amendment's guarantee against double jeopardy is not violated.

⁵¹*Kastigar v. United States*, 406 U.S. 441 (1972); *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964).

⁵²See notes 43-44 *supra* and accompanying text.

⁵³406 U.S. 441 (1972).

⁵⁴*Id.* at 462.

⁵⁵*Id.*

⁵⁶*United States v. Apfelbaum*, 445 U.S. 115 (1980).

⁵⁷"Direct" use of evidence means the admission of that evidence at the defendant's trial. "Derivative" use of evidence means the use of that evidence to search out other evidence which is admitted at the defendant's trial. See 406 U.S. at 460.

⁵⁸*Id.* at 456-57; *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964).

testimony."⁵⁹ Additionally, no evidence gained from the defendant under the statutory immunity grant can be used to impeach the defendant's testimony at his trial.⁶⁰

The basis for all of these evidentiary limitations, however, lies in the principle that the compulsion inherent in statutory immunity grants requires use and derivative use protections.⁶¹ Because compulsion is absent in nonstatutory immunity agreements the evidentiary protections afforded a witness under statutory immunity are not necessary for nonstatutory immunity.

B. Application of the Voluntariness Standard

Because the evidentiary protections afforded a witness under a statutory immunity grant are not applicable to nonstatutory immunity agreements, some other test must be used to determine whether any statements a breaching defendant has made may be used against him at his later trial. In general, it has long been held that a confession, admission, or other incriminating statement⁶² by an accused must be voluntary⁶³ to be admissible at trial.⁶⁴ In *Bram v. United States*,⁶⁵ the United States Supreme Court held that for a statement to be admissible at trial it must be freely and voluntarily

⁵⁹406 U.S. at 460.

⁶⁰*New Jersey v. Portash*, 440 U.S. 450 (1979). See generally Hoffman, *The Privilege Against Self-Incrimination and Immunity Statutes: Permissible Uses of Immunized Testimony*, 16 CRIM. L. BULL. 421 (1980). Compare *Portash* with *Harris v. New York*, 401 U.S. 222 (1971), in which the Supreme Court held that incriminating statements that are inadmissible because they were obtained in violation of procedural safeguards required by *Miranda v. Arizona*, 384 U.S. 436 (1966), are admissible for impeachment purposes to attack the credibility of the defendant's testimony at trial. 401 U.S. at 226.

⁶¹See text accompanying notes 53-55 *supra*.

⁶²The Supreme Court has not distinguished between confessions, admissions, or other incriminating statements but, instead, has extended the privilege against self-incrimination to protect an individual from being compelled to incriminate himself in any manner. See *Miranda v. Arizona*, 384 U.S. 436, 476 (1966).

⁶³See, e.g., *Culombe v. Connecticut*, 367 U.S. 568 (1961). The Supreme Court has stated that a confession is involuntary if it is not "the product of an essentially free and unconstrained choice" or if the confessor's "will has been overborne and his capacity for self-determination critically impaired." *Id.* at 602. See generally Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CALIF. L. REV. 471, 478 (1978). The standard for voluntariness used in this Note is whether the witness' capacity for self-determination has been impaired.

⁶⁴Once the defendant's statements are deemed "voluntary," they are not only admissible in the prosecutor's case in chief, but may also be used for impeachment purposes to attack the defendant's trial testimony and may be used derivatively to gain other evidence to be admitted at trial. *Michigan v. Tucker*, 417 U.S. 433, 450 (1974) (derivative use); *Harris v. New York*, 401 U.S. 222, 224-26 (1971) (impeachment use).

⁶⁵168 U.S. 532 (1897).

given and cannot be "obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."⁶⁶ This rule has been reiterated by the Supreme Court in several later decisions.⁶⁷ Few jurisdictions, however, have applied the voluntariness test to determine whether a breaching witness' statements are admissible when given under a nonstatutory immunity agreement.

At common law, when a defendant promised to testify against his accomplices in exchange for immunity from prosecution, and thereafter refused to testify, or testified falsely, he could be convicted upon his own incriminating statements.⁶⁸ This rule did not depend on whether the defendant's incriminating statements were voluntary; the statements were per se admissible if he did not perform his part of the bargain.

The decisions of jurisdictions that have applied the voluntariness standard to statements made by a breaching defendant under nonstatutory immunity are in direct conflict with one another. For example, in *State v. Moran*,⁶⁹ the Oregon Supreme Court followed the common law rule, stating:

[W]e have not been unmindful of the great care and caution courts must always exercise in the admission of confessions of persons accused of crime, nor of the fact that they must have been freely and voluntarily made; but these considerations do not appear to be sufficient to exclude accusatory facts freely and voluntarily disclosed by an accomplice under an agreement made by the state, represented by its district attorney, that he will testify fully and truly against his associate in the crime, and who thereafter repudiates his agreement, and refuses to testify.⁷⁰

In *Lauderdale v. State*,⁷¹ however, the Texas Court of Criminal Appeals rejected this reasoning in favor of a rule that would make such statements per se inadmissible. After restating the requirement that all confessions must be freely and voluntarily made without compulsion or persuasion, the court held:

⁶⁶*Id.* at 542-43. For a detailed discussion of the voluntariness doctrine as applied to confessions, see Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979).

⁶⁷*E.g.*, *Hutto v. Ross*, 429 U.S. 28, 30 (1976) (per curiam); *Brady v. United States*, 397 U.S. 742, 753 (1970).

⁶⁸*Commonwealth v. Knapp*, 27 Mass. 486, 10 Pick. 477 (1830).

⁶⁹15 Or. 262, 14 P. 419 (1887).

⁷⁰*Id.* at 273, 14 P. at 425.

⁷¹31 Tex. Crim. 46, 19 S.W. 679 (1892).

If the party has been . . . persuaded into making [incriminating statements], in hope that he would be permitted to turn state's evidence, and thereby gain immunity from punishment, in *no event* could such confession be used against him, if he subsequently repudiated the agreement, and refused to testify as a witness for the state.⁷²

The courts in both cases, however, were concerned only with the issue of whether a defendant's breach alone would render his statements admissible or inadmissible. The modern voluntariness doctrine, on the other hand, is concerned with whether the governmental inducement always inherent in promises of leniency⁷³ will render involuntary the incriminating statements of an accused. The doctrine of voluntariness was developed to assure that the inherently coercive atmosphere of police interrogation⁷⁴ did not overbear a defendant's will to resist and thereby "bring about a confession not freely self-determined."⁷⁵ Although the voluntariness test has traditionally been applied to confessions in the context of police interrogation,⁷⁶ the Supreme Court, in *Shotwell Manufacturing Co. v. United States*,⁷⁷ extended this doctrine to a case involving a government promise of immunity in exchange for incriminating information. In *Shotwell*, the defendant took advantage of the immunity offered under the Treasury Department's "voluntary disclosure policy,"⁷⁸ which allowed delinquent taxpayers to "escape possible criminal prosecution by disclosing their derelictions to the taxing authorities before any investigation of them had commenced."⁷⁹

⁷²*Id.* at 50-51, 19 S.W. at 681 (quoting *Lopez v. State*, 12 Tex. Crim. 27, 29-30 (1882)) (emphasis added).

⁷³See text accompanying note 92 *infra*.

⁷⁴See *Miranda v. Arizona*, 384 U.S. 436, 445-55 (1966); *Culombe v. Connecticut*, 367 U.S. 568, 575 (1961).

⁷⁵*Rogers v. Richmond*, 365 U.S. 534, 544 (1961). The Supreme Court has consistently been concerned with preserving an individual's freedom of will in making confessions. See, e.g., *Greenwald v. Wisconsin*, 390 U.S. 519, 521 (1968) ("product of his free and rational choice"); *Haynes v. Washington*, 373 U.S. 503, 514 (1963) ("product of a free and unconstrained will"); *Blackburn v. Alabama*, 361 U.S. 199, 206-17 (1960) ("freedom of will").

⁷⁶See *United States v. Bennett*, 495 F.2d 943, 956-57 (D.C. Cir. 1974).

⁷⁷371 U.S. 341 (1963).

⁷⁸The voluntary disclosure policy declared that if the delinquent taxpayer confessed, before an investigation had begun, to willfully or negligently filing an insufficient return and then assisted the Treasury Department in computing the true tax liability, the Department would collect the tax and the penalty and forego criminal prosecution. This policy was never formalized by statute or regulation and was abandoned by the Treasury Department in 1952. See *Recent Decisions, Shotwell Mfg. Co. v. United States*, 27 ALB. L. REV. 300, 300-01 (1963); Note, *Governmental Promises of Immunity*, 11 U.C.L.A. L. REV. 302, 304 (1964).

⁷⁹371 U.S. at 344.

After the defendant had made fraudulent disclosures under the policy, the government attempted to admit those disclosures at his trial. The defendant moved to suppress the evidence on the grounds that its use would violate the self-incrimination clause of the fifth amendment.⁸⁰ The Court ultimately held that use of the evidence did not violate the defendant's privilege against self-incrimination for two reasons: (1) the governmental promise of immunity did not produce an involuntary confession; and (2) once there had been a deliberately fraudulent disclosure, the defendant must have recognized that the offer of immunity had in effect been withdrawn and therefore the defendant was no longer entitled to rely on it.⁸¹ On the basis of the *Bram* voluntariness test,⁸² the Court found that the confession was voluntary because the offer of immunity was not addressed to any particular known or suspected delinquent taxpayers but to the public in general.⁸³ In dicta, the Court discussed the situation in which an offer of immunity is directed to a particular suspect, stating:

Petitioners' position is not like that of a person, accused or suspected of crime, to whom a policeman, a prosecutor, or an investigating agency has made a promise of immunity or leniency in return for a statement. In those circumstances an inculpatory statement would be the product of inducement, and thus not an act of free will.⁸⁴

Similarly, in a footnote, the Court stated: "A quite different case would be presented if an offer of immunity had been specifically directed to petitioners in the context of an investigation, accusation, or prosecution. A disclosure made in such circumstances . . . would have been inadmissible in evidence under the *Bram* test."⁸⁵

One commentator has concluded, on the basis of this language, that when a witness breaches a nonstatutory immunity agreement his incriminating statements can never be used against him in a subsequent prosecution for the crime to which he testified.⁸⁶ That commentator assumed that the overall result of agreement and breach of the agreement was equivalent to initially granting a defendant use immunity.⁸⁷ By this interpretation, after a breach of the im-

⁸⁰*Id.* at 346.

⁸¹*Id.* at 349-50.

⁸²See notes 65-66 *supra* and accompanying text.

⁸³371 U.S. at 348.

⁸⁴*Id.*

⁸⁵*Id.* at 350 n.10.

⁸⁶See Note, *supra* note 25, at 343. See also *United States v. Weiss*, 599 F.2d 730, 737 (5th Cir. 1979).

⁸⁷See Note, *supra* note 25, at 343 n.71.

munity agreement a prosecutor would be unable to use any incriminating statements given by the witness either directly or derivatively at his later trial.⁸⁸ This interpretation effectively equates the evidentiary consequences of a defendant's breach of statutory and nonstatutory immunity grants.⁸⁹ Such a result, however, fails to take into account the essential difference between statutory and nonstatutory immunity; that is, the lack of compulsion in nonstatutory immunity agreements implies that the evidentiary protections afforded a witness under statutory immunity are not applicable to nonstatutory immunity.⁹⁰

The language⁹¹ in *Shotwell* also fails to distinguish between a defendant's confession induced by a prosecutor's promise of leniency and a defendant's failure to give bargained-for information under an immunity agreement. In every instance in which a prosecutor promises leniency in exchange for a defendant's statements, the defendant's execution of his part of the bargain is "induced" by the prosecutor's promises.⁹² Because inducement is always present in nonstatutory immunity agreements, the existence of governmental inducement should not be the determinative factor in ascertaining whether a defendant's statements were voluntary. To extend the *Shotwell* language⁹³ to mean that in *all* cases in which the government has made a promise of immunity or leniency to a witness, his statements are per se involuntary and therefore inadmissible, would create a rule that is overbroad and unwarranted.⁹⁴ Such a rule would create a "but for" test for voluntariness; that is, statements would be involuntary if they would not have been made "but for" the promise of immunity. The Supreme Court has stated, however, that causation in the "but for" sense has never been the test for determining the voluntariness of statements.⁹⁵ The mere fact that an admission or confession is induced in a "but for" sense by a promise of leniency does not necessarily imply that the promise was a compelling influence.⁹⁶

Finally, the Court in *Shotwell* failed to distinguish between a prosecutor offering leniency in exchange for a confession which will

⁸⁸See text accompanying notes 57-58 *supra*.

⁸⁹See text accompanying notes 56-60 *supra*.

⁹⁰See text accompanying notes 41-61 *supra*.

⁹¹See text accompanying notes 84-85 *supra*.

⁹²United States v. Davis, 617 F.2d 677, 686 (D.C. Cir. 1979).

⁹³See text accompanying notes 84-85 *supra*.

⁹⁴See United States v. Davis, 617 F.2d 677, 686 (D.C. Cir. 1979).

⁹⁵Hutto v. Ross, 429 U.S. 28, 30 (1976) (per curiam). See also Santobello v. New York, 404 U.S. 257, 261-62 (1971).

⁹⁶See Hunter v. Swenson, 372 F. Supp. 287, 300 (W.D. Mo.), *aff'd*, 504 F.2d 1104 (8th Cir. 1974), *cert. denied*, 420 U.S. 980 (1975).

be used to convict the person making the confession and the situation in which the prosecutor promises immunity from prosecution to a potential defendant in exchange for information to be used not against the testifying witness but against his accomplices. The former type of leniency proposal was the basis for the Supreme Court's holding in *Bram*⁹⁷ and its application of that rule in subsequent confession cases.⁹⁸ As the Supreme Court later explained in *Brady v. United States*:⁹⁹

Bram dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess.¹⁰⁰

This type of leniency proposal, termed "confession bargaining" by one commentator,¹⁰¹ has met with consistent disapproval by the courts.¹⁰²

In the latter type of leniency proposal, however, a prosecutor promises immunity in exchange for information not with the intent to use the statements against the defendant but against his accomplices. A testifying defendant under such an agreement has freely entered into the bargain¹⁰³ and has been promised complete immunity from prosecution. It is only when the defendant breaches the agreement that he is subject to the evidentiary use of his statements. In this way, a prosecutor is not "confession bargaining"; he is bargaining for performance of a contractual agreement with an assumption that upon complete performance by the witness the prosecutor will not have to use his statements against the witness.¹⁰⁴

For these reasons, the *Bram* rule that confessions are per se in-

⁹⁷See text accompanying notes 65-66 *supra*.

⁹⁸See, e.g., *Brady v. United States*, 397 U.S. 742 (1970); *Rogers v. Richmond*, 365 U.S. 534 (1961).

⁹⁹397 U.S. 742 (1970).

¹⁰⁰*Id.* at 754.

¹⁰¹See Note, *Comparing Confessions and Plea Bargains: United States v. Robertson and the Admissibility of a Defendant's Incriminating Statements*, 60 B.U.L. REV. 368 (1980).

¹⁰²See, e.g., *People v. Jimenez*, 21 Cal. 3d 595, 580 P.2d 672, 147 Cal. Rptr. 172 (1978); *Plummer v. State*, 365 So. 2d 1102 (Fla. Dist. Ct. App. 1979); *Fullard v. State*, 352 So. 2d 1271 (Fla. Dist. Ct. App. 1977), *overruled in part*, *Brown v. State*, 376 So. 2d 382 (Fla. 1979); *People v. Perez*, 72 Ill. App. 3d 790, 391 N.E.2d 456 (1979).

¹⁰³See text accompanying notes 45-49 *supra*.

¹⁰⁴See note 27 *supra*.

voluntary if they result from any direct or implied promises¹⁰⁵ should not be applied to nonstatutory immunity agreements.

C. Application of the "Totality of the Circumstances" Test

Rather than rely on a "per se involuntary" rule which depends on the presence or absence of inducement and promises, courts should use the "totality-of-the-circumstances"¹⁰⁶ test for voluntariness to determine the admissibility of a witness' statements when he breaches a nonstatutory immunity agreement.¹⁰⁷ The totality-of-the-circumstances test is a flexible approach because it considers a wide variety of factors surrounding the consummation of the agreement in order to determine voluntariness.¹⁰⁸ This approach was recently used by a federal district court in *United States v. Williams*.¹⁰⁹ In *Williams*, the defendant agreed to give statements concerning his involvement in a bank robbery in exchange for a reduction in bail and an indictment for a lesser offense.¹¹⁰ The defendant later moved to suppress his statements at trial on the grounds that his incriminating statements were "the product of direct or implied promises however slight"¹¹¹ and therefore were involuntary.¹¹² The district court rejected the per se rule developed in *Bram*;¹¹³ instead, it considered the totality of the circumstances surrounding the agreement to determine whether the defendant's statements were voluntary.¹¹⁴ The court set forth a list of factors to consider in applying that test, including whether:

- (1) defendant is in custody at the time of the statement . . . ;
- (2) defendant is alone and unrepresented by counsel . . . ; (3) the promise or inducement is initiated by prosecuting officials as opposed to defendant or someone acting on his behalf . . . ; (4) defendant is aware of his constitutional and other legal rights . . . ; (5) the potentially incriminating statement is part of an abortive plea bargain . . . ; (6) promises or inducements leading to the statement are fulfilled by pro-

¹⁰⁵See text accompanying note 66 *supra*.

¹⁰⁶See *Boulden v. Holman*, 394 U.S. 478, 480 (1969); *Haynes v. Washington*, 373 U.S. 503, 513-14 (1963); *Rogers v. Richmond*, 365 U.S. 534, 543-44 (1961).

¹⁰⁷See *United States v. Ferrara*, 377 F.2d 16, 17 (2d Cir.), *cert. denied*, 389 U.S. 908 (1967).

¹⁰⁸See, e.g., *Haynes v. Washington*, 373 U.S. 503, 514 (1963).

¹⁰⁹447 F. Supp. 631 (D. Del. 1978).

¹¹⁰*Id.* at 631-32.

¹¹¹*Id.* at 633 (citing *Bram v. United States*, 168 U.S. 532, 542-43 (1897)).

¹¹²447 F. Supp. at 633.

¹¹³See notes 65-66 *supra* and accompanying text.

¹¹⁴447 F. Supp. at 637.

secuting authorities . . . ; and (7) defendant is subjected to protracted interrogation or evidence appears on the record to show that coercion precludes the statement from being knowing and intelligent¹¹⁵

Applying these considerations to the facts of the case, the court held that the defendant's statements were voluntary because they were knowingly made, the defendant was aware of his constitutional rights, he was not in custody at the time he made the statements, there was no evidence of protracted interrogation, the prosecutor fulfilled all his promises, and those promises conferred a significant benefit upon the defendant.¹¹⁶

Similarly, a federal circuit court has recently held, in *United States v. Davis*,¹¹⁷ that statements resulting from a plea bargain are not involuntary per se, even though "induced" by the prosecutor's return promises.¹¹⁸ In *Davis*, the defendant entered into a plea agreement whereby he was to furnish testimony and cooperation in an investigation in exchange for a plea of guilty to one count of felony.¹¹⁹ After giving the promised testimony, the defendant withdrew his plea of guilty and later moved to suppress his statements, contending that they were involuntary under *Bram*.¹²⁰ The court rejected the appellant's motion to suppress, stating, "We cannot conclude that pleas and statements resulting from plea bargaining are *always* involuntary. Rather, the proper task is a case-by-case consideration of whether the defendant voluntarily entered into the plea agreement and whether he testified voluntarily, as revealed by an examination of the surrounding circumstances."¹²¹ The court considered the following facts important in determining that the defendant's statements were voluntary: "[The defendant] freely negotiated the plea agreement while represented by counsel. He appeared and testified before the grand jury without compulsion. . . . The Government's promises of leniency . . . were bargained-for terms of the agreement, not overbearing or improper inducements His testimony was a quid pro quo for the Government's promises."¹²²

Because nonstatutory immunity agreements are closely analogous to plea bargains¹²³ and the agreement in *Davis* was a

¹¹⁵*Id.* at 636-37 (footnote and citation omitted).

¹¹⁶*Id.* at 637-38.

¹¹⁷617 F.2d 677 (D.C. Cir. 1979).

¹¹⁸*Id.* at 686.

¹¹⁹*Id.* at 681.

¹²⁰*Id.* at 686. See notes 65-66 *supra* and accompanying text.

¹²¹617 F.2d at 686-87.

¹²²*Id.* at 687 (footnotes and citation omitted).

¹²³See text accompanying notes 17-24 *supra*.

hybrid form of plea bargain and nonstatutory immunity,¹²⁴ the factors set forth in *Davis* can arguably be utilized in conjunction with those enumerated in *Williams* to determine the voluntariness of the defendant's statements.

Of the factors considered in *Williams* and *Davis*, perhaps the singularly most important is whether the defendant was represented by counsel at the time he gave the statements under the immunity agreement. In *Hutto v. Ross*,¹²⁵ the Supreme Court recently indicated that the presence of counsel is a critical factor in determining whether a defendant voluntarily confessed under a plea bargaining agreement. In *Hutto*, the defendant entered into a plea agreement with the understanding that he would receive a recommended sentence.¹²⁶ The defendant gave statements concerning his actions in the crimes involved and subsequently withdrew his guilty plea.¹²⁷ The Supreme Court overturned the appellate court decision which had held that any statement made as a result of a plea bargain was inadmissible.¹²⁸ In determining that the defendant's statements were not per se involuntary, the Court stated:

The existence of the bargain may well have entered into respondent's decision to give a statement, but counsel made it clear to respondent that he could enforce the terms of the plea bargain whether or not he confessed. The confession thus does not appear to have been the result of "'any direct or implied promises'" or any coercion on the part of the prosecution, and was not involuntary.¹²⁹

Similarly, in another plea bargaining case, the Supreme Court stated, "*Bram* and its progeny did not hold that the possibly coercive impact of a promise of leniency could not be dissipated by the presence and advice of counsel"¹³⁰ It appears from these cases that the presence and advice of counsel at the time a witness gives his statements would assure that the other factors set forth in *Williams* and *Davis* are satisfied.

In essence, the factors enumerated in *Williams* and *Davis* represent a "fairness" approach¹³¹ to determining voluntariness. The

¹²⁴See text accompanying notes 22-23 *supra*.

¹²⁵429 U.S. 28 (1976) (per curiam).

¹²⁶*Id.* at 28.

¹²⁷*Id.* at 28-29.

¹²⁸*Id.* at 30.

¹²⁹*Id.* (quoting *Bram v. United States*, 168 U.S. 532, 542-43 (1897)).

¹³⁰*Brady v. United States*, 397 U.S. 742, 754 (1970).

¹³¹See generally Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979); Comment, *Remedies for Reneged Plea Bargains in California*, 16 SANTA CLARA L. REV. 103 (1975).

courts in those two cases did not apply a rigid absolute rule that whenever statements are "induced" by promises of leniency they are involuntary. Such a rule would not be conducive to the widely heterogenous fact situations present in nonstatutory immunity agreements. Instead, the courts in *Williams* and *Davis*, in utilizing the totality-of-the-circumstances test, looked to the overall fairness of the bargain to determine whether the statements were "freely self-determined."¹³²

This approach is widely used in plea bargaining situations¹³³ and could easily be adopted to nonstatutory immunity agreements. The Supreme Court has held that a guilty plea must be knowing, intelligent, and entered into with sufficient awareness of the relevant circumstances and likely consequences.¹³⁴ The Court has also stated that if the guilty plea is induced by promises, the "essence of those promises must in some way be made known."¹³⁵ Thus, the basic inquiries under the totality-of-the-circumstances approach would be whether the witness had a clear understanding of his alternatives when bargaining with the prosecutor and whether he gave information to the prosecutor on the basis of a knowing and intelligent choice.

V. SUGGESTED ALTERNATIVES

In light of the considerations¹³⁶ utilized in determining the voluntariness of a witness' statements, perhaps the best solution to resolve the question of voluntariness would be to utilize a formal, written agreement between the prosecutor and the witness. This solution has been commonly advocated to solve the problems of broken promises and misrepresentations in plea bargains.¹³⁷ One commentator has indicated that a written contract would provide a concrete, public testament of the agreement that could be incorporated at the trial level into the record.¹³⁸ Another commentator has noted that the United States Department of Justice requires, in departmental guidelines, that a nonstatutory immunity agreement be reduced to a written statement and signed by the witness or his

¹³²See note 75 *supra* and accompanying text.

¹³³See generally Note, *supra* note 19.

¹³⁴*Brady v. United States*, 397 U.S. 742, 748 (1970).

¹³⁵*Santobello v. New York*, 404 U.S. 257, 261-62 (1971).

¹³⁶See text accompanying notes 16-17 and 122 *supra*.

¹³⁷See Jones, *Negotiation, Ratification, and Rescission of the Guilty Plea Agreement: A Contractual Analysis and Typology*, 17 DUQ. L. REV. 591, 596-600 (1979); Note, *supra* note 19, at 795.

¹³⁸See Note, *supra* note 19, at 797.

counsel.¹³⁹ In this way, the agreement could be enforced by applying the large body of existing contract law.¹⁴⁰

The written contract could include the essential terms of the immunity agreement, including the consideration given by, and the exact performance required of, each party to the contract. The performance provisions would aid the court in determining whether the parties have "substantially performed"¹⁴¹ their part of the bargain under the *Brunner* test.¹⁴² The contract could also include a description of the circumstances surrounding the agreement, specifying the factual considerations enumerated in *Williams* and *Davis*.¹⁴³ Setting forth the facts surrounding the bargain, although not dispositive, would aid the court in determining whether the defendant's statements were "voluntary," and therefore admissible, under the "totality-of-the-circumstances" test.¹⁴⁴

Ideally, the contract would contain provisions that state the precise evidentiary consequences of a breach by either party. Such a clause could provide that in the event that the defendant fails to perform his part of the bargain any statements or information he has given prior to the breach will be deemed voluntary and will be used against him at his later trial. By simply enforcing the written terms of the contract, a court would not need to reach the issue of voluntariness to determine the admissibility of the breaching defendant's statements. A court might, however, still scrutinize the contract to assure that the agreement was not unconscionable and that the witness was represented by counsel in the bargaining process.

As a practical matter the inclusion of such a forfeiture clause might prevent the defendant's acceptance of the terms of the written agreement. On the other hand, if such a provision is accepted by the defendant, it would deter the witness from breaching the agreement.

VI. CONCLUSION

Although the rules set forth in *Bram*¹⁴⁵ and *Shotwell*¹⁴⁶ have not been specifically repudiated, they should be reserved for situations in which a defendant is induced to make a confession in the context of police interrogation or some other type of coercion or compulsion.

¹³⁹See Thornburgh, *supra* note 10, at 166.

¹⁴⁰*Id.* at 164-66.

¹⁴¹See note 31 *supra* and accompanying text.

¹⁴²See notes 29-33 *supra* and accompanying text.

¹⁴³See text accompanying notes 110-24 *supra*.

¹⁴⁴See text accompanying notes 107-08 *supra*.

¹⁴⁵See notes 65-66 *supra* and accompanying text.

¹⁴⁶See notes 77-85 *supra* and accompanying text.

If a witness knowingly and intelligently enters into an enforceable agreement with the prosecutor and later breaches that agreement, the courts should not resort to a rule that makes any statements given by the witness per se involuntary, and therefore per se inadmissible. Instead, the courts should determine the voluntariness of the witness' statements by examining all the circumstances surrounding the agreement. If the *Williams* and *Davis* factors¹⁴⁷ are satisfied, a defendant's statements should be considered voluntary and admissible.

Finally, much of the confusion and difficulty surrounding the determination of the admissibility of a breaching witness' statements could be alleviated by the use of a written contract enumerating all the essential terms of the nonstatutory immunity agreement and specifically setting forth the exact evidentiary consequences of a breach by the witness.

RAYMOND R. STOMMEL, JR.

¹⁴⁷See text accompanying notes 115-24 *supra*.