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IMMUNITY: PROTECTION FROM PROSECUTION

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December 1st, 2021

INTRODUCTION:

While prosecutors are ethically bound to pursue justice rather than just seek criminal convictions, (e.g., dismissal of charges not supported by probable cause [RPC 3.8] or based solely on illegally obtained evidence), when they have a provable case, the chances that they will just allow a defendant to walk away unprosecuted are generally pretty slim unless less the accused has something to offer (e.g., testimony against a co-defendant) in exchange for a prosecutorial pass.

Just as prosecutors have the power to offer a reduced plea (or not), attach conditions to an offer (e.g., resign from employment, pay restitution up front), or require agreement to a particular sentence in exchange for the offer (People v Farrar, (52 NY2d 302 [1981]), they also hold the cards in a criminal proceeding (other than a grand jury), when it comes to asking a court to confer immunity upon a witness who otherwise refuses to testify on the grounds of self-incrimination. (CPL 50.30).

As noted by the Fourth Department in People v Cotton, 162 AD3d 1638 (4th Dep't 2018), the District Attorney has the SOLE DISCRETION to request immunity for a witness, and absent a showing of bad faith with the intent to deny the defendant a fair trial, such discretion will not be disturbed. (See also People v Bolling, 24 AD3d 1195 [4th Dep't 2005]: The defendant does NOT have a constitutional right to require that immunity be conferred upon a defense witness who refuses to testify without immunity and the court may grant immunity only upon express request of the prosecutor).

And see People v Owens, 63 NY2d 824 (1984): DA did NOT abuse discretion by refusing to immunize a witness whom the defense wanted to call to the stand in this pre-DNA rape case (to say that he had sex with the victim on or just before the crime date) ostensibly to account for the presence of semen in the victim's underwear.

But see People v Priester, 98 AD2d 820 (3d Dep't 1983) where the D.A. was found to have violated the defendant's right to a fair trial and improperly denied him use of critical exculpatory evidence by refusing to request immunity for a witness who previously testified and now wished to recant but only if granted immunity for perjury in connection with the former testimony but not for past crimes.

See also People v Shapiro, 50 NY2d 747 (1980) where the prosecutor was deemed to have overstepped the bounds of fair play by insisting that the witness testify at trial consistently with his prior testimony and refusing to permit immunity for any mistakes or inconsistencies between them (as opposed to falsehoods).

PRACTICE NOTE:

When prosecutors refuse to consent to immunity for a prospective defense witness who would exculpate the defendant by incriminating him/herself in the crime charged, defense counsel should carefully evaluate such statement to determine whether it can be admitted into evidence through a third party (to whom such statement was made) as a DECLARATION AGAINST PENAL INTEREST made by a witness who is UNAVAILABLE by virtue of his/her invocation of the Fifth Amendment privilege against self-incrimination. (See NY Evidence Advisory Committee Rule 8.1 (c), Statement Against Penal or Pecuniary Interest, nycourts.gov).

By way of foundation, counsel would have to show that the statement was against the declarant's penal interest when made, the declarant was aware of that fact, and there is independent evidence creating a reasonable possibility that such statement may be true. (See People v Settles, 46 NY2d 154 [1974], People v Soto, 26 NY3d 455 [2015]).

SOME DEFINITIONS: CPL 50.10

1. IMMUNITY: A person who has been a witness in a legal proceeding and who CANNOT (except as otherwise provided herein) BE CONVICTED OF ANY OFFENSE OR SUBJECT TO ANY PENALTY OR FORFEITURE for or on account of ANY TRANSACTION, MATTER OR THING concerning which he gave evidence therein, POSSESSES IMMUNITY FROM ANY SUCH CONVICTION, PENALTY OR FORFEITURE.

In a New York State prosecution, a witness who receives immunity receives TRANSACTIONAL IMMUNITY which protects him/her from prosecution for any criminal offense(s) about which he/she has testified. The prosecution cannot, therefore, use the witness' testimony or any evidence derived from it against him/her.

In a FEDERAL PROSECUTION, by contrast, the witness would only receive USE IMMUNITY which only prevents the use of the witness' testimony against him/her. (18 USC 6002).

NO ASK, NO GET:

In order to get immunity for trial testimony the witness must ASSERT THE PRIVILEGE otherwise it is waived. (CPL 50.20 [4], People v Flihan, 131 AD2d 269 [4th Dep't 1987]).

NO IMMUNITY FOR FALSE TESTIMONY AND CONSEQUENCES FOR CONTUMACIOUS REFUSAL TO TESTIFY AFTER IMMUNITY IS GRANTED:

CPL 50.10 (1) goes on to state that a person who possesses immunity may NEVERTHELESS BE CONVICTED OF PERJURY as a result of having given FALSE TESTIMONY in such proceeding and may be CONVICTED OF OR ADJUDGED IN CONTEMPT as a result of having CONTUMACIOUSLY REFUSED TO GIVE EVIDENCE THEREIN. (See Judiciary Law [JL] Art. 750 and PL 215.50[4]).

2. LEGAL PROCEEDING means a proceeding in or before ANY COURT OR GRAND JURY or before any body, agency or person authorized by law to conduct such proceeding and to administer (or cause to be administered) an oath.

3. GIVE EVIDENCE means to TESTIFY or PRODUCE PHYSICAL EVIDENCE.

CPL 50.20 COMPULSION OF EVIDENCE BY OFFER OF IMMUNITY:

PLEADING THE FIFTH:

1. Any witness in a legal proceeding (other than a grand jury) MAY REFUSE to give evidence required of him/her on the ground that it may tend to incriminate him/her, and he/she may not, except as provided below in subdivision two, be compelled to give such testimony.

2. Such a witness MAY BE COMPELLED to give evidence in such a proceeding notwithstanding the assertion of the privilege against self-incrimination if a. the proceeding is one in which, by express provision of statute, a person conducting or connected therewith is declared a competent authority to confer immunity upon the witness therein, and b. such competent authority i. ORDERS such witness to give the requested evidence/testimony notwithstanding the assertion of the privilege against self-incrimination and ii. ADVISES him/her that upon doing so, he/she will receive immunity.

3. A witness who is ordered to give evidence per subdivision two above and who COMPLIES with such order, RECEIVES IMMUNITY. Such witness is not deprived of immunity because the competent authority did not comply with statutory provisions requiring notice to a specified public servant of the intention to confer immunity.

4. A witness who, without asserting his/her privilege against self-incrimination, gives evidence in a legal proceeding (other than a grand jury proceeding), does NOT receive immunity.

5. The rules governing the circumstances in which witnesses may be compelled to give evidence and in which thy receive immunity therefor in a grand jury are governed by CPL190.40.

SOME CASES:

People v Dunbar, 53 NY2d 868 (1981): An informal promise of immunity does not give rise to actual immunity from prosecution.

People v Samuels 29 NY2d 252 (1971): VTL 600 (Leaving the Scene of an Accident) which requires a motorist to remain at the scene and report the accident to the police constitutes a valid exercise of state

police powers to regulate public safety and does not violate the motorist's privilege against self-incrimination.

Anonymous Attorneys v Bar Ass'n of Erie County, 41 NY2d 269 (1977): Incriminating testimony given by a lawyer upon a grant of immunity MAY BE USED AS EVIDENCE against the lawyer in DISCIPLINARY PROCEEDINGS.

CPL 50.30 COMPETENT AUTHORITY TO CONFER IMMUNITY IN CRIMINAL PROCEEDINGS:

In any criminal proceeding (other than a grand jury proceeding) the COURT is a competent authority to confer immunity per CPL 50.20 BUT ONLY WHEN REQUESTED BY THE D.A to do so. (See People v Singh, 47 AD3d [2d Dep't 2008]).

IMMUNITY IN THE GRAND JURY:

CPL 190.40

Unlike a trial witness, a witness who testifies in a grand jury AUTOMATICALLY RECEIVES TRANSACTIONAL IMMUNITY (but NOT for perjury) UNLESS he/she voluntarily agrees to WAIVE IMMUNITY UNDER OATH and IN WRITING BEFORE THE GRAND JURY. Such immunized witness who responds directly to relevant questions addressed to him/her CANNOT be prosecuted/convicted of an offense for ANY TRANSACTION about which he/she gave testimony. (People v Williams, 81 AD2d 418 [2d Dep't 2018]).

It is important to note, however, that a witness who testifies gratuitously (i.e., not in response to a specific question) about involvement in unrelated criminal activity will NOT receive immunity for such testimony which can be used against him/her in a subsequent prosecution. (See CPL 190.40 [2] below). However, if the testimony is elicited by the prosecutor (however inadvertently) and the answer is responsive to the question, the witness receives immunity for such testimony. (See CPL 190.45 [4] below).

Immunity extends to past criminal conduct (testified to in the grand jury) but not to criminal conduct that the witness may engage in AFTER testifying in the grand jury. (People v Lieberman, 94 Misc 2d 737 [Sup Ct Queens County 1978]). Any subsequent immunity would have to be requested of the prosecutor who would have to decide how much he/she really needs the testimony of a serial offender in order to obtain a conviction in the case in which the witness already testified.

The statute (CPL 190.40) states that:

1. Every witness in a grand jury proceeding must give any evidence legally requested of him/her regardless of any protest or belief on his/her part that it may tend to incriminate him/her.

2. A witness who gives evidence in a grand jury proceeding RECEIVES IMMUNITY UNLESS: a. he has EFFECTIVELY WAIVED SUCH IMMUNITY per CPL 190.45; or b. such evidence is NOT RESPONSIVE to any inquiry and is GRATUITOUSLY GIVEN OR VOLUNTEERED by the witness with KNOWLEDGE that it is not responsive. (See People v Breindel, 73 Misc 2d 734 [Sup Ct NY County 1973]).

SOME CASES:

People v O'Neal, 153 AD3d 1261 (2d Dep't 2017): Defendant's grand jury testimony (without a waiver of immunity) that she OWNED property conferred immunity upon her from prosecution for grand larceny of such property.

People v Bowers, 78 AD2d 190 (4th Dep't 1981): A witness must accept a grant of immunity and cannot offer to waive immunity just to have the benefit of counsel in the grand jury.

People v Perri, 72 AD2d 106 (2d Dep't 2008): The involuntary production of handwriting exemplars before the grand jury pursuant to a grand jury subpoena AD TESTIFICANDUM was enough to confer immunity upon the defendant per CPL 190.40.

REFUSAL TO TESTIFY OR GIVING EVASIVE ANSWERS:

An immunized witness who refuses to answer relevant questions or who gives intentionally unresponsive or evasive answers can, after sufficient warning from the prosecutor, be prosecuted for Criminal Contempt (PL 215.50 [4]) or in the case of false testimony, be prosecuted for perjury. (See People v Gottfried, 61 NY2d 617 [1983]): Criminal Contempt conviction affirmed where the defendant, after receiving transactional immunity before the grand jury, repeatedly testified upon reviewing entries in his "black book" that he "didn't remember" and that the money didn't go to anyone in particular.

See also People v Rappaport 47 NY2d 308 (1979): The statute requires that the witness BE INFORMED that he/she will not be immunized against perjury if he/she lies or protected from contempt prosecution if he/she refuses to testify or gives evasive answers.

In People v Breindel supra, the court held that the defendant's acknowledgment in the grand jury that he understood the concepts of immunity, perjury and contempt as well as the scope of his immunity was sufficient to overcome his later claim that the prosecutor's explanation in the grand jury was insufficient.

See also People v Gentile, 39 NY2d 779 (1976) where the defendant's refusal to answer grand jury questions (after receiving immunity) was based on his claimed privilege against self-incrimination, he could not claim on appeal of his criminal contempt conviction that the questions asked of him were based on information obtained from unauthorized electronic surveillance.

And see People v DeSalvo, 32 NY2d 12 (1974) where the defendant moved to quash the indictment on the ground that his appearance before the grand jury resulted from an illegal search of his car and person, he could not assert this claim after failing to raise it as a basis for refusing to testify (but rather, only asserted his privilege against self-incrimination).

WAIVER OF IMMUNITY IN THE GRAND JURY:

CPL 190.45

1. A waiver of immunity is a WRITTEN INSTUMENT subscribed by a person who is or is about to become a witness in a grand jury proceeding, STIPULATING that he WAIVES HIS PRIVILEGE AGAINST SELF-INCRIMINATION and any possible or prospective immunity to which he would otherwise become entitled per CPL 190.40 as a result of giving evidence in such proceeding.

2. A waiver of immunity is NOT EFFECTIVE unless and until it is SWORN TO BEFORE THE GRAND JURY conducting the proceeding in which the subscriber has been called as a witness.

BE ON THE LOOK-OUT FOR INEFFECTIVE WAIVER OF IMMUNITY:

If the waiver is not subscribed and sworn to by the witness (typically the defendant/target of the investigation), UNDER OATH in the grand jury, the waiver is NO GOOD and the witness will receive immunity for his/her testimony. (See CPL 190.45 [3]) below, People v Chapman, 69 NY2d 497 [1987]).

In People v Goldson, 145 AD2d 982 (4th Dep't 1988), the defendant in this sexual assault prosecution signed the waiver of immunity and acknowledged doing so BEFORE being sworn in and was not asked any more about it after taking the oath and then testifying about the incident under investigation. Consequently, since the waiver was defective, the defendant was inadvertently granted immunity and the indictment was dismissed. (See also People v Higley, 70 NY2d 624 [1987]).

In People v Stewart, 92 NY2d 965 (1998), the Court noted that subscribing and swearing to a waiver of immunity in the grand jury are two separate acts both of which must occur for the waiver to be valid.

In contrast, see People v Cole, 196 AD2d 634 (2d Dep't 1993) where the defendant acknowledged UNDER OATH that his was his signature on the waiver of immunity.

And see People v Lowery, 158 AD3d 1179 (4th Dep't 2018): Defendant's waiver of immunity was found to be valid where he signed the waiver form before the grand jury and acknowledged that it had been explained to him by the prosecutor and by counsel.

RIGHT TO COUNSEL WHEN WITNESS WAIVES IMMUNITY:

CPL 190.45

3. A person who is called by the People as a witness in the grand jury proceeding and requested by the DA to SUBSCRIBE AND SWEAR TO A WAIVER OF IMMUNITY before giving evidence has a RIGHT TO CONFER WITH COUNSEL BFORE DECIDING WHETHER HE/SHE WILL COMPLY WITH SUCH REQUEST, and if he/she desires to avail him/herself of such right, he/she must be accorded a REASONABLE TIME in which to obtain and confer with counsel for such purpose.

The DA must INFORM the witness of all such rights BEFORE obtaining his/her execution of the waiver of immunity. ANY WAIVER obtained, subscribed, or sworn to in violation of the provisions of this subdivision is INVALID AND INEFFECTIVE.

LIMITED WAIVER:

4. If a grand jury witness subscribes and swears to a waiver of immunity upon a WRITTEN AGREEMENT with the DA that the interrogation will be LIMITED to certain specified subjects, matters or areas of conduct, and if AFTER the commencement of his/her testimony he/she is INTERROGATED and TESTIFIES concerning ANOTHER SUBJECT, MATTER OR AREA OF CONDUCT NOT INCLUDED IN SUCH WRITTEN AGREEMENT, HE/SHE RECEIVES IMMUNITY WITH RESPECT TO ANY FURTHER TESTIMONY WHICH HE/SHE MAY GIVE CONCERNING SUCH OTHER SUBJECT, MATTER OR AREA OF CONDUCT and the waiver of immunity is to that extent INEFFECTIVE.

PRACTICE NOTE:

Counsel should keep in mind that the decision to testify before the grand jury is a STRATEGIC DECISION that ultimately BELONGS TO COUNSEL rather than the defendant. (See People v Hogan, 26 NY3d 779 [2016]). That is because the right to testify before a grand jury is STATUTORY (CPL 190.50), and while a defendant may be eager to tell his/her side of the story, counsel understands that while he/she may be present in the grand jury to advise the defendant, counsel CANNOT PROTECT THE DEFENDANT by objecting to questions posed by the prosecutor on cross examination (about the event, the defendant's criminal history and other matters affecting credibility). Of course, if the prosecutor goes overboard, counsel can bring a motion to dismiss the indictment if he/she can show that such questioning impaired the integrity of the grand jury proceedings, thus giving rise to possible prejudice to the defendant. (CPL 210.35).

Counsel also knows that by testifying, the defendant is not only limiting his/her defense strategies for trial, but he is giving the prosecutor a transcript of sworn testimony that can be affirmatively introduced in evidence against him/her or used to impeach his/her testimony. (Save for the rare case where the client comes across credibly and sympathetically, has no criminal record to speak of and offers a plausible innocent explanation for his/her conduct, it is generally a fool's errand to escort the defendant into the center ring with no whip or chair to keep the lions at a safe distance).

The decision whether to testify at trial, by contrast, is a fundamental one that belongs to the defendant. (See RPC 1.2[a]). So, even if counsel believes (and advises the client) that testifying is a bad idea, he/she must accede to the client's election to take the stand, take the oath, and tell his/her side of the story.

PREPARATION AND INITITIATIVE:

If the defendant does testify in the grand jury, he should, after waiving immunity, be afforded an opportunity to make a statement (in lieu of a direct examination which counsel is not at liberty to conduct) before being subject to cross examination. Counsel should spend time PREPARING the defendant for his initial statement (preferably it comes across as straight-forward, sincere, and not over-rehearsed), and for cross examination. (A practice run might be useful).

If counsel is concerned about how far the prosecutor intends to go with impeachment by PRIOR CONVICTIONS OR UNCHARGED CRIMES, it might be a good idea to make a motion before the judge who empaneled the grand jury to LIMIT THE SCOPE OF CROSS EXAMINATION. (People v Sandoval 34 NY2d 371 [1974]). If nothing else, it may caution the prosecutor to tread lightly and remember that sooner than later, the court will have a chance to REVIEW THE GRAND JURY MINUTES for legal sufficiency as well as to see whether the proceedings were impaired by prosecutorial overreach.

CPL 190.50 WHO MAY CALL WITNESSES:

Insofar as immunity and waivers of immunity are concerned, when the grand jury directs the DA to subpoena a witness not called by the People (subdivision three), the DA MAY DEMAND that any such witness sign a WAIVER OF IMMUNITY per CPL 190.45 before being sworn, and upon such demand, NO OATH may be administered to such witness UNLESS AND UNTIL HE/SHE COMPLIES THEREWITH.

Obviously, such witness can simply REFUSE to waive immunity (and not testify at all unless the DA has a change of heart) because a person cannot be compelled to incriminate himself. If he/she does decide to waive immunity, however, he/she is entitled to the consult with a lawyer (whether retained or assigned by the superior court that empaneled the grand jury), and counsel may be present if the witness testifies upon such waiver.

As stated in CPL 190.52 in pertinent part:

1. Any person who appears as a witness and has signed a waiver of immunity in a grand jury proceeding, has a RIGHT to an attorney.

2. The attorney for such witness may be present with the witness in the grand jury room. The attorney may ADVISE the witness, BUT MAY NOT OTHERWISE TAKE ANY PART IN THE PROCEEDING.

3. The empaneling court also has the authority to remove an attorney from the grand jury room as it would have to remove an attorney from the courtroom (e.g., for disruptive conduct or otherwise acting in a manner not permitted by the rules).

CRIMINAL CONTEMPT, CIVIL CONTEMPT AND DOUBLE JEOPARDY…OR NOT:

When a witness refuses to be sworn as a witness or to answer a legal and proper question after being sworn, he/or she may, depending in the context and circumstances, be held in contempt under the Judiciary Law (usually after a summary proceeding) and subject to possible incarceration (up to 30 days for criminal contempt and six months for civil contempt).

If the witness has not been found to have been criminally "punished" (i.e., sentenced) by a mandate of commitment, he/she is also subject to criminal prosecution under Penal Law PL 215.5 (4), a Class A misdemeanor punishable up to one year in jail for contumacious and unlawful refusal to be sworn as a witness in any court proceeding or, after being sworn, to answer any legal and proper interrogatory.

While the consequences for civil and criminal contempt may be similar, the statutory purposes are different. The purpose of the civil statute (JL 753-755) is to provide a remedy to a civil litigant who has been harmed by the contumacious conduct of the opposing party or to compel compliance with a court mandate (e.g., by incarceration until the party comes around), and the objective of the criminal statute (JL 750-753) is to vindicate the court's authority and promote respect for its rules. (See article: Judiciary Law Criminal Contempt, Why All the Confusion? by Hon. John J. Brunetti, NYS Bar Journal, May 2015, vol. 87, no 4, p.20, nysba.org).

In People v Sweat, 24 NY3d 348 (2014), the Court of Appeals held, contrary to the conclusions of Buffalo City Court and Erie County Court, that the criminal prosecution of the defendant for Criminal Contempt 2d degree (PL 215.50 [4]) was NOT barred by double jeopardy (CPL 40.20[1]) notwithstanding the fact that he had been incarcerated under the Judiciary Law by the court presiding over his brother's criminal trial at which the defendant repeatedly refused to testify.

When the defendant, after being assigned a lawyer, persisted in his refusal to take the oath, the prosecutor asked the court to cite the defendant for civil contempt (which only applies in civil cases), and hold him in custody until he agreed to testify (which he didn't). The prosecutor also announced that the People would be filing criminal charges.

After the charge was filed, City Court dismissed the charge on double jeopardy grounds. County Court affirmed, finding that while the trial court had not formally pronounced a sentence, its decision to remand the defendant to compel his testimony (a procedure only applicable in CIVIL contempt proceedings) was tantamount to a sentence of time served. (The defendant was released after the trial).

THE COURT OF APPEALS REVERSES AND BLENDS THE CRIMINAL AND CIVIL CONTEMPT RULES:

The Court held that the criminal prosecution was not barred by double jeopardy because the trial court did not formally pronounce a sentence upon the defendant by way of an order of commitment. The problem however, as noted in the Brunetti article, is that the Court relied upon JL 755, which, heretofore, had only been held to apply in CIVIL cases (and NOT in criminal cases).

In so doing, the Court, in the author's view, had introduced an entirely new notion of "conditional imprisonment" to compel testimony (a decidedly civil remedy) in a criminal proceeding. While the trial court could have summarily adjudicated the defendant for criminal contempt and sentenced him up to thirty days in jail, instead, it remanded him as a remedial measure which, up until this Court of Appeals decision, it had no authority to do in the context of a criminal case.

FINAL THOUGHT:

As noted at the outset, prosecutors wield a lot of power when it comes to deciding which witnesses will receive immunity from prosecution and which ones must roll the dice or invoke their privilege against self-incrimination. If they do, they can't be compelled to bear witness against themselves. In such case, the prosecutor must decide whether their testimony is important enough to the case to justify giving the witness a pass. (Of course, if the People have sufficient evidence to charge the witness with a crime, they may use that as leverage to obtain his/her testimony in exchange for a reduced plea).

Either way, such a witness is always fair game for impeachment on the dual grounds of criminal conduct and bias for providing state's evidence in expectation of a benefit. Counsel who represents a witness who faces criminal exposure on account of his/her testimony should make sure that the witness is protected, ideally by obtaining a grant of transactional immunity or, if the client has been or could be charged in the case, by obtaining the best possible plea deal (preferably with little or no prospect of incarceration). Assuming the witness does not perjure him/herself (for which there is no immunity), whether he/she is ultimately found by the factfinder to be credible, is neither counsel's nor the client's concern.