St. John's Law Review

Volume 58, Winter 1984, Number 2 Article 12

CPL § 50.20: Transactional Immunity Should Not Be Granted to a Witness Without Conformance to the Procedures Mandated Under the Statute Providing the Immunity

Lawrence Mahon

CRIMINAL PROCEDURE LAW

CPL § 50.20: Transactional immunity should not be granted to a witness without conformance to the procedures mandated under the statute providing the immunity

In order to elicit testimony from a witness who refuses to testify by invoking his fifth amendment privilege against self-incrimination,[58] a prosecutor may request that a "competent authority"[59]

---

reviewed on appeal, that plaintiff's claim is groundless. The basis for the asserted contention against each defendant is the same. It would indeed be a travesty of justice were plaintiff to be allowed to satisfy a substantial claim of this nature against one defendant when the courts of the State have gone to no small pains to reach a deliberate determination that the claim is without merit. Appellate courts of this State, in line with those of many others, have recognized the responsibility of appellate review as including a requirement that the ultimate disposition of a case be just, not only as to parties directly before the reviewing court but also as to others who will perforce be affected by the action of the court.

60 N.J. at 164-65, 286 A.2d at 709.

[58] U.S. CONST. amend. V. The fifth amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." *Id.* The New York State Constitution also prohibits compelled testimonial self-incrimination. N.Y. CONST. art. 1, § 6. Historically, the privilege against self-incrimination grew out of opposition to practices such as those of the Star Chamber of several centuries ago, which often compelled subjects to admit guilt. *See* Michigan v. Tucker, 417 U.S. 433, 440 (1974). The fifth amendment embodies, among other things, "our fear that self-incriminating statements will be elicited by inhumane treatment and abuses." Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). Although protection of the individual is a compelling reason for this privilege, the primary policy behind it is the preservation of the integrity of a judicial system based on innocence. Tehan v. United States, 382 U.S. 406, 415 (1966).

A witness asserts the privilege by refusing to answer specific questions while on the stand. *See* United States v. Monia, 317 U.S. 424, 427 (1943); People v. Ianniello, 21 N.Y.2d 418, 427, 235 N.E.2d 439, 444, 288 N.Y.S.2d 462, 470, *cert. denied*, 393 U.S. 827 (1968). A defendant, however, waives the privilege against self-incrimination if he takes the stand. *See* 3 C. TORCIA, WHARTON'S CRIMINAL PROCEDURE § 401, at 61 (12th ed. 1975). When a claim of privilege is made by a witness, three requirements must be satisfied. First, the testimony must be compelled. *See, e.g.*, United States v. De Lorenzo, 151 F.2d 122, 124 (2d Cir. 1945). A voluntary offer of testimony is construed as a waiver and will not be privileged. *See id.* at 124-25. Second, the evidence must be testimonial. *See, e.g.*, Schmerber v. California, 384 U.S. 757, 761 (1966). Third, the evidence must be incriminating, *see, e.g.*, Hoffman v. United States, 341 U.S. 479, 486 (1951), and the witness must reasonably suspect that his answer will incriminate him before he asserts the privilege, *id.*; *see* Commission of Social Servs. v. Charles A.C., 72 App. Div. 2d 770, 770, 421 N.Y.S.2d 394, 395 (2d Dep't 1979). Thus, the fifth amendment privilege against self-incrimination does not extend to testimony that merely impairs the witness' reputation; the testimony must tend to expose him to criminal prosecution. *See id.*; R. MCNAMARA, CONSTITUTIONAL LIMITATIONS ON CRIMINAL PROCEDURE § 13.11, at 209 (1982). Nevertheless, mere implication of injurious effects on a witness' criminal liability from the response is all that the trial judge need find to uphold the privilege. *See Hoffman*, 341 U.S. at 486-87.

[59] *See* CPL § 50.30 (1981). A request by the district attorney that the court confer

compel the witness to testify in return for witness immunity.[60] In New York, a witness who is compelled to testify in this manner receives full transactional immunity.[61] To ensure that immunity is

---

immunity on a witness testifying in a criminal case renders the court a competent authority. *Id.* The district attorney is justified in making such a request because the "government is entitled to the testimony of her citizens." Note, *Compulsory Self-Incrimination and Statutory Immunity*, 33 ST. JOHN'S L. REV. 330, 332 (1959).

[60] CPL § 50.10 (1981). Section 50.10 provides:

> A person who has been a witness in a legal proceeding, and who cannot . . . be convicted of any offense or subjected 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.

Id. The authority to grant immunity is contained in CPL § 50.20 (1981), which provides in pertinent part:

> [A] witness may be compelled to give evidence in such a proceeding notwithstanding an assertion of his 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 witnesses therein; and
> (b) Such competent authority (i) orders such witness to give the requested evidence notwithstanding his assertion of his privilege against self-incrimination, and (ii) advises him that upon so doing he will receive immunity.

Id. § 50.20(2). The purpose of immunity is to obtain privileged testimony when it would be beneficial to the state. *See* Note, *Required Information and the Privilege Against Self-Incrimination*, 65 COLUM. L. REV. 681, 683 (1965). Because there is no inherent right vested in the prosecutor to grant immunity, the state must provide for immunity grants through statutory enactment. *See, e.g., In re* Doyle, 257 N.Y. 244, 260, 177 N.E. 489, 495 (1931). All 50 states and the United States have statutes entitling the prosecutor to compel testimony by grants of immunity. *See* Note, *"The Public Has a Claim to Every Man's Evidence": The Defendant's Constitutional Right to Witness Immunity*, 30 STAN. L. REV. 1211, 1211 (1978).

[61] *See* CPL § 50.20(3) (1981). Transactional immunity precludes the witness from being prosecuted for any offense related to the "transaction, matter or thing concerning which he gave evidence therein." *Id.* § 50.10(1). For example, a witness' admission before a grand jury concerning a meeting with a police officer would create immunity only for any transactions about which the witness was questioned. *See* 1 R. CIPES, CRIMINAL DEFENSE TECHNIQUES § 6.09, at 6-37 (1983); Barker, *Evidentiary Aspects of the New York Criminal Procedure Law*, 38 BROOKLYN L. REV. 327, 329 (1971). In contrast, use immunity prohibits the subsequent use against the witness of his own compelled testimony and any evidence derived directly or indirectly therefrom. *See* 18 U.S.C. § 6002 (1982). In addition, unlike transactional immunity, use immunity does not preclude future prosecution. *See* Kastigar v. United States, 406 U.S. 441, 453 (1972). Use immunity is the minimum standard acceptable under the United States Constitution. *See id.*; United States v. Pellon, 475 F. Supp. 467, 479 (S.D.N.Y. 1979), *aff'd*, 620 F.2d 286 (2d Cir.), *cert. denied*, 446 U.S. 983 (1980); Barker, *supra*, at 329.

The prosecutor generally enjoys the right to grant immunity for any crime, *see* 1 R. CIPES, *supra*, § 6.09[1], at 6-38, but perjurious and contemptuous testimony cannot be covered by a grant of immunity, *see* People v. Ianniello, 21 N.Y.2d 418, 422-23, 235 N.E.2d 439, 442, 288 N.Y.S.2d 462, 466, *cert. denied*, 393 U.S. 827 (1968); People v. Tomasello, 21 N.Y.2d 143, 149-50, 234 N.E.2d 190, 192, 287 N.Y.S.2d 1, 5 (1967); People v. Ward, 37 App. Div. 2d 174, 177, 323 N.Y.S.2d 316, 319 (1st Dep't 1971). The refusal to grant immunity for these crimes is justified because the prosecution has not used the witness' testimony to prove a criminal act; rather, the testimony itself is a criminal act. *See Ianniello*, 21 N.Y.2d

granted only to the extent necessary for the prosecution at hand, the legislature has prescribed a specific statutory procedure to be followed in order for immunity to be granted:[62] the witness must claim his fifth amendment privilege in response to an incriminating question;[63] the prosecutor must ask the court to grant immunity to the witness;[64] and the court must instruct the witness that immunity has been granted before directing the witness to answer the question.[65] Recently, however, in *Brockway v. Monroe*,[66] the New York Court of Appeals held that a witness may obtain transactional immunity on the basis of an agreement between the court and the principals at trial that does not conform to the statutory

---

at 423, 235 N.E.2d at 442, 288 N.Y.S.2d at 466.

[62] *See* CPL § 50.20 (1981). In 1942, the New York Law Revision Commission, recognizing that automatic immunity was being abused by witnesses, recommended that the immunity statutes be revised to provide immunity only when the witness claimed his privilege and was then forced to testify. *See* Recommendation of the Law Revision Committee to the Legislature Relating to Immunity from Prosecution Secured in Exchange for Self-Incriminating Evidence in a Civil Action, Proceeding or Investigation, [1942] N.Y. LAW REV. COMM'N REP. 353, 353-54 [hereinafter cited as Recommendations Relating to Immunity]. No action was taken with regard to these recommendations until 1953 when the New York State Crime Commission adopted them, Third Report of New York State Crime Commission, 1953 N.Y. Leg. Doc. No. 68, at 15-16, and section 2447 of the Penal Law was passed, *see* ch. 891, § 1, [1953] N.Y. Laws 2453-54. In 1967, section 2447 was reenacted as section 619-c of the Code of Criminal Procedure. *See* ch. 681, § 78, [1967] N.Y. Laws 1618-19. In 1970, the legislature enacted the Criminal Procedure Law which, with minor exceptions, provided automatic immunity for grand jury witnesses, *see* ch. 996, § 190.40, [1970] N.Y. Laws 3187 (codified as amended at CPL § 190.40 (1982)), but continued to require other witnesses to invoke their fifth amendment privilege, *see* ch. 996, § 50.20, [1970] N.Y. Laws 3136 (codified as amended at CPL § 50.20 (1981)).

[63] CPL § 50.20(1) (1981). The witness must assert his privilege because the test of whether testimony is being compelled is not based on the witness' state of mind but on the actions and words of the witness as observed by the court. *See* 8 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2269, at 399 (3d ed. 1940). The privilege must be clearly asserted, but there is no precise formula detailing what must be done to make the claim. *See* H. ROTHBLATT, HANDBOOK OF EVIDENCE FOR CRIMINAL TRIALS 228 (1965). Although the question of self-incrimination initially falls on the witness, *see, e.g.*, Hoffman v. United States, 341 U.S. 479, 486 (1951); *In re* Doyle, 257 N.Y. 244, 250-51, 177 N.E. 489, 491 (1931); Note, *supra* note 59, at 331-32, it is ultimately the decision of the court whether or not the witness is in danger of self-incrimination, *see, e.g.*, Rogers v. United States, 340 U.S. 367, 374 (1951); R. MCNAMARA, *supra* note 58, § 13.11, at 209; 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 407, at 448 (1982); *supra* note 58.

[64] CPL § 50.30 (1981).

[65] *Id.* § 50.20(2)(b). *See* People v. Longo, 68 Misc. 2d 741, 742, 327 N.Y.S.2d 818, 819 (Sup. Ct. Jefferson County 1971). Before ordering a witness to testify, the court must ensure that the witness properly understands the scope and effect of his immunity. *See infra* note 99.

[66] 59 N.Y.2d 179, 451 N.E.2d 168, 464 N.Y.S.2d 410 (1983).

process.[67]

In *Brockway*, the petitioner, who was under indictment for the illegal sale of cocaine,[68] was subpoenaed to testify at a murder trial.[69] Upon indication that petitioner would invoke his fifth amendment privilege, the prosecutor, the defendant's attorney, the witness' attorney, and the court agreed to abandon the question-by-question procedure of section 50.20 in favor of a blanket form of transactional immunity.[70] Under the agreement, the prosecutor could object to questions of a collateral nature; upon determination that a question was collateral, the court could rule that immunity would not extend to the answer.[71] During cross-examination, defense counsel asked Brockway if he "undert[ook] to sell that cocaine," referring to the cocaine used to incriminate the defendants.[72] Brockway responded, "I didn't sell this cocaine. I sold cocaine earlier."[73] When asked to whom he sold the cocaine, the witness testified to the earlier drug sale for which he had been indicted.[74] At this point, the prosecutor objected that the prior answer, "I sold cocaine earlier," as not responsive to the question.[75] The court agreed and struck the exchange from the record.[76]

Two months later, Brockway moved to dismiss the indictment

---

[67] *Id.* at 188-89, 451 N.E.2d at 172-73, 464 N.Y.S.2d at 414-15.

[68] *Id.* at 181, 451 N.E.2d at 169, 464 N.Y.S.2d at 411.

[69] *Id.* at 181-84, 451 N.E.2d at 169-70, 464 N.Y.S.2d at 411-12. The defendants were being tried on charges of murder and attempted murder of state police officers involved in the investigation of cocaine sales. *Id.* at 181-82, 451 N.E.2d at 169, 464 N.Y.S.2d at 411.

[70] *Id.* at 182, 451 N.E.2d at 169, 464 N.Y.S.2d at 411.

[71] *Id.* at 182-83, 451 N.E.2d at 169, 464 N.Y.S.2d at 411.

[72] *Id.* at 183, 451 N.E.2d at 170, 464 N.Y.S.2d at 412.

[73] *Id.* at 184, 451 N.E.2d at 170, 464 N.Y.S.2d at 412.

[74] *Id.* After Brockway admitted the prior cocaine sale, the following exchange occurred:

Question: "To whom [did you sell cocaine]?"

Answer: "Camille Comfort."

Question: "When was that?"

Answer: "Around the first of November."

Id. It is suggested that the prosecutor should have objected to these questions as soon as they were asked because they appeared to be collateral in nature. Since he failed to object, the inquiry shifted to the responsiveness of the answers. *See* 1 J. WIGMORE, *supra* note 63, § 18, at 323.

[75] 59 N.Y.2d at 184, 451 N.E.2d at 170, 464 N.Y.S.2d at 412.

[76] *Id.* Neither the Court of Appeals majority nor the appellate division majority found it significant that all three questions and answers were struck from the record. *Id.* Justice Levine's dissent to the appellate division's opinion, however, asserted that since immunity cannot attach to matters not of record, the witness cannot claim immunity. Brockway v. Monroe, 89 App. Div. 2d 771, 773, 453 N.Y.S.2d 925, 928 (3d Dep't 1982) (mem.) (Levine, J., dissenting).

for the sale of cocaine, claiming he had gained transactional immunity due to his testimony at the trial.[77] After the motion was denied, the petitioner commenced an article 78 proceeding in the Appellate Division, Third Department.[78] The appellate division ordered the indictment dismissed on the ground that the answers were responsive to the questions and were, therefore, within the ambit of the immunity granted.[79]

On appeal, the Court of Appeals affirmed.[80] Judge Jones, writing for the majority, began the analysis with an examination of the procedures outlined in CPL section 50.20 and strongly advocated their use.[81] Nevertheless, the majority found that immunity could be conferred pursuant to an agreement among the parties, notwithstanding their failure to comply with the statute.[82] Since the prosecutor had not objected to the questions before the witness answered them and because the answers were responsive to the questions, the Court concluded that transactional immunity had been conferred upon the witness pursuant to the agreement.[83]

Dissenting, Judge Jasen urged that the majority's liberal construction of section 50.20 was impermissible.[84] Transactional immunity, the dissent argued, is a privilege created by statute and thus cannot be granted to the witness by means other than those specified by the legislature.[85] Judge Jasen asserted that the losses

---

[77] 59 N.Y.2d at 184, 451 N.E.2d at 170, 464 N.Y.S.2d at 412.

[78] *Id.*; Brockway v. Monroe, 89 App. Div. 2d 771, 771, 453 N.Y.S.2d 925, 926 (3d Dep't 1982) (mem.); *see* CPLR 7801-7806 (1978 & Supp. 1983-1984). Actions previously taken by a writ of prohibition against a body or officer are now taken under article 78 of the CPLR. *Id.* 7801. Where a court acts or attempts to act without jurisdiction, the writ may be invoked. *See* Proskin v. County Court, 30 N.Y.2d 15, 18, 280 N.E.2d 875, 875, 330 N.Y.S.2d 44, 45 (1972) (quoting Lee v. County Court, 27 N.Y.2d 432, 436-37, 267 N.E.2d 452, 454, 318 N.Y.S.2d 705, 708, *cert. denied*, 404 U.S. 823 (1971)); *see also* Carey v. Kitson, 93 App. Div. 2d 50, 57, 461 N.Y.S.2d 876, 880 (2d Dep't 1983) (assertion of transactional immunity an appropriate claim under article 78).

[79] 89 App. Div. 2d at 773, 453 N.Y.S.2d at 928. The court found that the witness' responses were reasonable, that there was no showing of bad faith and that nothing suggested that the responses could not have been anticipated. *Id.* The dissent argued, however, that it is not responsiveness but rather collateral content that requires withholding of immunity. *Id.* (Levine, J., dissenting). Since the evidence in question was collateral, Levine suggested immunity should not have been granted. *Id.* (Levine, J., dissenting).

[80] 59 N.Y.2d at 189-90, 451 N.E.2d at 173, 464 N.Y.S.2d at 415.

[81] *Id.* at 186-88, 451 N.E.2d at 171-72, 464 N.Y.S.2d at 413-14; *see supra* notes 62-65 and accompanying text.

[82] 59 N.Y.2d at 188, 451 N.E.2d at 173, 464 N.Y.S.2d at 415.

[83] *Id.* at 189, 451 N.E.2d at 173, 464 N.Y.S.2d at 415.

[84] *Id.* at 193-94, 451 N.E.2d at 175, 464 N.Y.S.2d at 417 (Jasen, J., dissenting).

[85] *See id.* (Jasen, J., dissenting). The power of a court to grant immunity is not inher-

caused by the failure to follow the proper procedure should be borne by the witness, who had failed to assert his privilege after each question.[86] Thus, the dissent concluded, since Brockway lacked transactional immunity, his petition for prohibition should have been denied.[87]

By approving the grant of immunity on the basis of an independent agreement among the principals, it is submitted, the Court of Appeals may have unnecessarily frustrated the legislative mandate that immunity be granted only in accordance with the enumerated procedures. Although CPL section 50.20 arguably is ambiguous,[88] the legislative history of section 50.20 clearly indicates an intent to establish a comprehensive process to serve as the exclusive method of conferring immunity.[89]

Prior to the enactment of section 2447 of the Penal Law,[90] the predecessor to CPL section 50.20, witness immunity was automatically conveyed.[91] Witnesses, however, often were able to manipu-

---

ent; that power may only be exercised under statutory authority. *Accord* United States *ex rel.* Berberian v. Cliff, 300 F. Supp. 8, 13 (E.D. Pa. 1969) (interpreting Pennsylvania case law); *see In re* Doyle, 257 N.Y. 244, 260, 177 N.E. 489, 495 (1931) (Cardozo, J.); 3 C. TORCIA, *supra* note 58, § 409, at 93-94.

[86] 59 N.Y.2d at 192, 451 N.E.2d at 174, 464 N.Y.S.2d at 416 (Jasen, J., dissenting).

[87] *Id.* at 194, 451 N.E.2d at 176, 464 N.Y.S.2d at 418 (Jasen, J., dissenting).

[88] *See* CPL § 50.20 (1981). The statute provides that the witness "may refuse to give evidence," *id.* § 50.20(1), or "may be compelled to give evidence," *id.* § 50.20(2). The term "evidence," however, is not defined. *See id.* § 50.10. Thus, the question arises: is each response "evidence" under the statute, or may the responses to an entire line of questioning on one issue be considered cumulatively as "evidence." *Cf.* 1 J. WIGMORE, *supra* note 63, § 17(a)(2) at 313 (an offer of evidence may comprise a single fact or a multitude of facts pertaining to one situation). Since article 50 lacks a specific definition of evidence, section 50.20 could conceivably be read as merely enumerating the required steps, without directing that these steps be taken for each question.

[89] *See infra* notes 90-98 and accompanying text. *See also* CPL § 50.20, commentary at 316 (1981). Completion of the procedural requirements generally has been considered a condition precedent to any grant of immunity. *See* People v. Laino, 10 N.Y.2d 161, 172-74, 176 N.E.2d 571, 578-79, 218 N.Y.S.2d 647, 656-58 (1961), *cert. denied*, 374 U.S. 104 (1963); People v. Williams, 81 App. Div. 2d 418, 422, 440 N.Y.S.2d 935, 938 (2d Dep't 1981), *aff'd mem.*, 56 N.Y.2d 916, 438 N.E.2d 1146, 453 N.Y.S.2d 430 (1982); People v. Caruso, 100 Misc. 2d 601, 604, 419 N.Y.S.2d 854, 856 (Sup. Ct. Kings County 1979); *see also* Birzon & Gerard, *The Prospective Defendant Rule and the Privilege Against Self-Incrimination in New York*, 15 BUFFALO L. REV. 595, 603 (1965).

[90] Ch. 891, § 1, [1953] N.Y. Laws 2453-54 (originally codified as N.Y. PENAL LAW § 2447 (McKinney 1953)).

[91] *Id. See* People v. Laino, 10 N.Y.2d 161, 172, 176 N.E.2d 571, 578, 218 N.Y.S.2d 647, 656-57 (1961), *cert. denied*, 374 U.S. 104 (1963); CPL § 190.40, commentary at 244 (1982); Birzon & Gerard, *supra* note 89, at 603 & n. 68-69; *see also supra* note 62. Although the law of witness immunity was in flux for many years, decisions since Kastigar v. United States, 406 U.S. 441 (1972), have been more consistent, *see* 1 R. CIPES, *supra* note 61, §§ 6.09[1]-

late this system to obtain "immunity baths" for unrelated offenses.[92] In an attempt to alleviate this problem, the legislature enacted a comprehensive statute that provided for question-by-question grants of immunity.[93] Under this procedure, the prosecutor can weigh the importance of present prosecution against the importance of future prosecution each time the witness invokes the fifth amendment.[94] The witness, the court and the prosecutor are continually made aware of the scope and effect of the immunity before them, and the prosecutor thereby avoids extending immunity beyond the extent necessary to expedite the prosecution's case.[95]

Allowing the parties to adopt their own procedure ignores these intended benefits and revives the dangers of uncontrolled immunity that the legislature sought to eliminate.[96] Furthermore, since immunity is a creation of statute, it is anomalous to allow a grant of immunity to be made without reference to the precepts of the statute.[97] Thus, it is suggested that the *Brockway* Court im-

---

6.09[3], at 6-37 to 6-43.

[92] *See* O'Neil v. Kasler, 53 App. Div. 2d 310, 317-18, 385 N.Y.S.2d 684, 689 (4th Dep't 1976) (quoting Recommendations Relating to Immunity, *supra* note 62, at 353-54). Automatic immunity provided an incentive for collusion and encouraged individuals to obtain immunity for their collusive partners. Recommendation Relating to Immunity, *supra* note 62, at 353. "A typical instance of such self-immunization is a collusive agreement between a judgment debtor and a judgment creditor whereby the former would be called upon to testify in a proceeding supplementary to judgment, and by disclosing a crime committed by him would gain immunity." *Id.*

[93] *See supra* note 90 and accompanying text; *supra* note 60.

[94] *See* O'Neil v. Kasler, 53 App. Div. 2d 310, 318, 385 N.Y.S.2d 684, 689 (4th Dep't 1976) (quoting Recommendation Relating to Immunity, *supra* note 62, at 355). The advantage over the prior system of automatic immunity is that the prosecutor is forewarned by the witness himself when an answer will be incriminating. *See Brockway*, 59 N.Y.2d at 192, 451 N.E.2d at 174-75, 464 N.Y.S.2d at 416-17 (Jasen, J., dissenting); *Kasler*, 53 App. Div. 2d at 317-19, 385 N.Y.S.2d at 689-90; *supra* note 63. In *Brockway*, the agreement to abrogate the question-by-question procedure clearly sacrificed these benefits for the convenience of a general immunity grant. *See* 59 N.Y.2d at 183, 451 N.E.2d at 170, 464 N.Y.S.2d at 412. Indeed, the prosecutor initially suggested that an on-the-record refusal to answer was required, although he failed to insist on this position. *Id.*

[95] *See* 59 N.Y.2d at 187, 451 N.E.2d at 172, 464 N.Y.S.2d at 414. Despite the adoption of these strict procedures, the problem of uncertain immunity continues, largely as a result of the use of abbreviated procedures, such as "handshake" grants of immunity. *See, e.g.*, People v. Caruso, 100 Misc. 2d 601, 603, 419 N.Y.S.2d 854, 856 (Sup. Ct. Kings County 1979) (immunity granted by non-statutory agreement between defense counsel and the prosecutor made over the phone).

[96] *See supra* notes 92-95 and accompanying text.

[97] *See* 59 N.Y.2d at 190, 451 N.E.2d at 173-74, 464 N.Y.S.2d at 415-16 (Jasen, J., dissenting). A comparison of the broad grant of immunity for grand jury witnesses under CPL § 190.40 (1982), and the specific, multi-step procedure of CPL § 50.20 (1981) indicates by

properly permitted the lower court to circumvent the legislatively established process for the conferral of transactional immunity.[98]

Although transactional immunity was not validly conferred pursuant to section 50.20, it is submitted that the *Brockway* prosecutor should be considered estopped from prosecuting the petitioner for the transactions covered by responsive testimony because the failure to follow and obtain the protection of the required procedures was induced by the prosecutor's agreement with the witness.[99] Absent waiver by the witness,[100] the privilege

---

negative implication that the legislature intended that general witness immunity be conferred only in accordance with the statutory process. *See* CPL § 190.40 (1982). Section 190.40 provides in pertinent part:

> 2. A witness who gives evidence in a grand jury proceeding receives immunity unless: (a) He has effectively waived such immunity . . .
>
> (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.

Id. This expansive, express grant of automatic immunity provides significant support for Judge Jasen's argument that, if the legislature intended the courts to have power to adopt procedures other than those in the statute, such power would have been expressly bestowed upon them. *See* 59 N.Y.2d at 190, 451 N.E.2d at 173-74, 464 N.Y.S.2d at 415-16 (Jasen, J., dissenting) There is some authority, however, that substantial compliance with the requirement that the court "order" the witness to testify under section 50.20 may satisfy the statutory mandate. *See* O'Neil v. Kasler, 53 App. Div. 2d 310, 322, 385 N.Y.S.2d 684, 692 (4th Dep't 1976). Such substantial compliance must be determined in view of the intended purpose of the statute; that is, if a deviation is consistent with the purpose of the statute, the court may allow it. *See id.* at 317, 385 N.Y.S.2d at 689.

[98] Where a statute does not violate constitutional limitations, the court may not question the directive of the legislature, *see* N.Y. STAT. LAW § 73 (McKinney 1971), and must construe a statute as it is, not as the court believes it ought to be. *See* People v. Kupprat, 6 N.Y.2d 88, 90, 160 N.E.2d 38, 40, 188 N.Y.S.2d 483, 485 (1959); People v. Olah, 300 N.Y. 96, 102, 89 N.E.2d 329, 332 (1949). The lower court in *Brockway*, therefore, had an obligation to follow the specified procedures. *See* 59 N.Y.2d at 191, 451 N.E.2d at 174, 464 N.Y.S.2d at 416 (Jasen, J., dissenting).

Under certain circumstances, a court may imply a provision not expressly contained in the language of the statute, provided that the surrounding circumstances clearly indicate that the provision was intended. N.Y. STAT. LAW § 74 (McKinney 1971). The language and history of section 50.20 do not, however, suggest that a grant of discretionary powers was intended by the legislature. *See supra* notes 60-62 and accompanying text. To the contrary, uncontrolled grants of immunity were to be eliminated. *See* Birzon & Gerard, *supra* note 89, at 603.

[99] *See* People v. Tenaglia, 30 Misc. 2d 1013, 1017-18, 220 N.Y.S.2d 203, 208-09 (Sup. Ct. Queens County 1961). The *Tenaglia* court declared its willingness to estop the prosecutor from asserting that a witness was not granted immunity if the prosecutor's actions and statements had led the witness to believe that he was receiving immunity. *See id.* at 1018, 220 N.Y.S.2d at 209 (dictum). Brockway, like the defendant in *Tenaglia*, justifiably believed that full transactional immunity was being granted. *See* 59 N.Y.2d at 189, 451 N.E.2d at 173, 464 N.Y.S.2d at 415. Under these circumstances the prosecutor should not be entitled to claim that no transactional immunity was conveyed. *Cf.* People v. Defeo, 308 N.Y. 595, 605, 127 N.E.2d 592, 597 (1955) (grand jury witness entitled to claim detrimental reliance on

against self-incrimination can only be relinquished in a fair exchange.[101] Indeed, once a witness has asserted his privilege, it is the duty of the prosecutor and the court to ensure that the witness is properly informed concerning the scope of his immunity.[102]

---

immunity grant by grand jury foreman although the grant of immunity was not within the statute). Although Tenaglia was without counsel and Brockway was represented, this fact should not be considered relevant to the issue of detrimental reliance; the Court of Appeals has previously declared that the fact that a witness has counsel will not lessen the prosecutor's burden not to mislead the witness as to the scope of his immunity. *See* People v. Masiello, 28 N.Y.2d 287, 293, 270 N.E.2d 305, 309, 321 N.Y.S.2d 577, 583 (1971). It is submitted that leading the witness into believing that he was entitled to full transactional immunity and subsequently claiming that only use immunity was conveyed violates the district attorney's duty to provide a fair trial for all parties involved. *See* Brady v. Maryland, 373 U.S. 83, 87-88 (1963); Berger v. United States, 295 U.S. 78, 84 (1935); People v. Lombard, 4 App. Div. 2d 666, 671, 168 N.Y.S.2d 419, 424 (1st Dep't 1957), *appeal dismissed*, 10 App. Div. 2d 846, 203 N.Y.S.2d 996 (1st Dep't 1960).

[100] A witness may relinquish the privilege against self-incrimination only by a knowing and voluntary waiver. Gardner v. Broderick, 392 U.S. 273, 276 (1968). Indeed, any waiver of a fundamental right must be intentional, *see* Harty v. Fay, 10 N.Y.2d 374, 377, 179 N.E.2d 483, 484, 223 N.Y.S.2d 468, 470 (1961), and may not be coerced, *see Gardner*, 392 U.S. at 276. Such a waiver may be made in either of two ways: "(a) [b]y contract, or other binding pledge, before trial; [or] (b) [b]y voluntarily testifying in the case." 8 J. WIGMORE, *supra* note 63, § 2275, at 435. Generally, a waiver may result from a voluntary response to an incriminating question. *See* B. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 239 (1969); 3 C. TORCIA, *supra* note 58, § 402, at 63. Thus, although Brockway asserted his privilege, *see* 59 N.Y.2d at 183, 451 N.E.2d at 170, 464 N.Y.S.2d at 412, he appeared to have waived it, since in reliance on the immunity granted by the agreement he answered questions without reasserting his privilege for each question. *See id.* at 183-84, 451 N.E.2d at 170, 464 N.Y.S.2d at 412. It is submitted, however, that no waiver results in the absence of intention to make a waiver on the part of the witness and belief on the part of the prosecutor that a waiver was intended. In *Brockway*, the witness not only communicated his denial of waiver, but also made clear that he would not testify unless he received full transactional immunity. *See* 59 N.Y.2d at 182-83, 451 N.E.2d at 170, 464 N.Y.S.2d at 412. The argument that the prosecutor believed the witness had waived his privilege, therefore, is patently untenable.

[101] *See* People v. Williams, 81 App. Div. 2d 418, 422, 440 N.Y.S.2d 935, 938 (2d Dep't 1981) (extent of immunity offered must correspond to degree of risk to which testimony exposes witness) (citing *In re* Doyle, 257 N.Y. 244, 254, 177 N.E. 489, 491 (1931)), *aff'd*, 56 N.Y.2d 916, 438 N.E.2d 1146, 453 N.Y.S.2d 430 (1982). In *Williams*, the defendant asserted immunity predicated on his prior testimony before the grand jury. 81 App. Div. 2d at 418, 440 N.Y.S.2d at 936. The court agreed that the defendant could not be prosecuted on that testimony, declaring that immunity had to be "coterminous with what otherwise would have been the privilege of the person concerned." *Id.* at 422, 440 N.Y.S.2d at 938 (quoting Heike v. United States, 227 U.S. 131, 142 (1913)). In 1972, the Supreme Court determined that use immunity was the minimal fair exchange for the fifth amendment privilege against self-incrimination. *See* Kastigar v. United States, 406 U.S. 441, 453 (1972).

[102] *See* People v. Tenaglia, 30 Misc. 2d 1013, 1017-18, 220 N.Y.S.2d 203, 209 (Sup. Ct. Queens County 1961). In *Tenaglia*, a former police officer was called to appear as a witness before the grand jury. *Id.* at 1014, 220 N.Y.S.2d at 205. Upon taking the stand, the witness asserted his fifth amendment privilege against self-incrimination and refused to answer the questions put to him. *Id.* at 1015, 220 N.Y.S.2d at 205. In order to elicit testimony, the

Although the distinction between a grant of immunity and estoppel of the prosecutor may appear academic, it is submitted that a rationale based on estoppel would have the advantage of avoiding an unwarranted grant of immunity under the statute. It is hoped that courts and prosecutors will heed the Court of Appeals' forceful encouragement of strict adherence to statutory procedure and thereby avoid the need to wrestle with this distinction.

Lawrence Mahon

---

prosecutor told the witness "*that I am going to ask the Foreman of the jury to give you Immunity from prosecution and then after they have decided to give you Immunity, I will then put certain questions to you and compel you to answer, do you understand that?*" *Id.* at 1016, 220 N.Y.S.2d at 207 (emphasis in original). After making this statement, the prosecutor requested that the witness be excused and asked him to step out of the courtroom. *Id.* On the same day, the witness was recalled. *Id.* While on the stand this second time, he answered the questions put to him by the prosecutor. *Id.* Upon subsequent prosecution for conspiracy and extortion, the witness claimed that he received immunity when he was called to the stand the second time. *Id.* at 1014, 220 N.Y.S.2d at 205. Although the court did not have to reach the issue of whether immunity had been conveyed to the witness, it stated in dicta that the District Attorney has an obligation "to see that a witness is not misled or deceived." *Id.* at 1017, 220 N.Y.S.2d at 209. In *Tenaglia*, the witness was entitled to believe that immunity had been granted while he was out of court. *Id.* Any misconception concerning the grant of immunity was not the fault of the witness, but of the prosecutor. *See id.*

A line of cases involving contempt charges against witnesses who do not testify despite apparent or actual grants of immunity further supports the position that a prosecutor must be certain that the witness is not misinformed concerning his immunity. *See, e.g.*, People v. Masiello, 28 N.Y.2d 287, 291-92, 270 N.E.2d 305, 308, 321 N.Y.S.2d 577, 581-82 (1971). In *Masiello*, the defendant was subpoenaed to testify in an organized crime investigation. *Id.* at 288, 270 N.E.2d at 306, 321 N.Y.S.2d at 579. He was charged with 91 counts of contempt for his refusal to answer 91 questions. *Id.* The prosecutor attempted to grant immunity pursuant to section 619-c of the Code of Criminal Procedure in order to compel the witness' testimony. *Id.* at 289, 270 N.E.2d at 306-07, 321 N.Y.S.2d at 579-80. Although section 619-c provided witnesses with full transactional immunity, the prosecutor in *Masiello* told the witness that he would receive only use immunity. *Id.* Recognizing that the witness was misled as to the scope of his immunity, the Court stated that "the statute cannot be read to provide an immunity greater than that of which the witness has been advised." *Id.* at 290, 270 N.E.2d at 307, 321 N.Y.S.2d at 580-81. The Court held that fundamental fairness required that, if the scope of immunity is presented to the witness in any fashion, it is the duty of the prosecution and the court to see that he is not misinformed. *Id.* at 291, 270 N.E.2d at 308, 321 N.Y.S.2d at 581. Similarly, in People v. Tramunti, 29 N.Y.2d 28, 272 N.E.2d 66, 323 N.Y.S.2d 687 (1971), the Court found that instructions describing a grant of use immunity provided inadequate notice to the witness that he was receiving full transactional immunity under the statute. *Id.* at 29, 272 N.E.2d at 67, 323 N.Y.S. 2d at 688. The witness was, therefore, entitled to stand upon his privilege against self-incrimination and refuse to answer the prosecutor's questions. *Id.*; *see* Stevens v. Marks, 383 U.S. 234, 246 (1966).