

I Object!

– James Eckert, Esq.

Waivers of Immunity at Grand Jury

"Daddy, will you tell us a bedtime story about waivers of immunity at the grand jury?" "No, you'll be up all night having nightmares. Here, read Twilight instead. It's about Forks, Washington." Criminal Procedure Law 190.50 gives the defendant, upon proper notice, the right to testify before the grand jury "upon signing and submitting to the grand jury a waiver of immunity pursuant to section 190.45." CPL 190.45 says that a waiver "is a written instrument subscribed by a person ... stipulating that he waives his privilege against self-incrimination and any possible or prospective immunity to which he would otherwise become entitled..." So, the defendant has the right to testify before the grand jury, but only if he agrees that such testimony will not grant him the immunity which other witnesses receive by testifying.

The ADA must inform witnesses called by the people, whom the people ask to waive immunity, that they have a right to confer with counsel and so on (CPL 190.45[3]). This does not, by its terms, apply to the defendant, but the provision also provides that "any waiver obtained ... in violation of this subdivision is invalid, incontinent and ineffective" (CPL 190.45[3][incontinece supplied]). So, we can expect the DA to be concerned about the terms of this subdivision, even though the defendant is not "a person who is called by the people as a witness". If immunity were the prize, I suppose I'd be happy to argue that the defendant was called by the prosecution if, e.g. the DA called the client's name while he waited outside.

CPL 190.45 offers us more still, subdivision 4 says that if a witness agrees to immunity "upon a written agreement with the district attorney" that the questions will be limited to certain topics, and the ADA proceeds to other topics, the witness "receives immunity with respect to any further testimony which he may give concerning such other subject" (CPL 190.45[4]). This strikes me as extraneous to a defendant testifying, I don't think the waiver instrument constitutes a "written agreement" that questions will be limited, but what do I know.

A defendant's right to testify before the grand jury "encompasses those matters relevant to the case before the grand jury" (*People v Edwards*, 240 AD2d 427 [2d Dept 1997]; CPL 190.50[5][b]), "however, the defendant is subject to examination by the people" (*Edwards*). So while the defendant can testify, as of right, to facts relevant to the potential indictment, he is also to be examined by the ADA. This can be limited (*see People v Smith*, 87 NY2d 715 [1996]), but the fact that the limit to cross-examination in *Smith* pertains to pending cases indicates that, absent a present prosecution on other bad acts, the defendant is subject to cross-examination about them. In other words, the "defendant's right to testify before the grand jury is an absolute right" (*People v Trammel*, 178 Misc 2nd 753 [NY Co Ct 1998]) as to the subject matter before the grand jury, but the scope of cross-

examination is not limited in the same way.

There are limits, and *People v Smith* (87 NY2d 715 [1996]) has an excellent discussion of the right, for example, to get pre-testimony rulings. However, there is cross-examination, with all the pitfalls associated with an ADA, a friendly jury/audience, no judge, and a defense attorney whose taser must be left outside.