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IMMUNITY CASE DISTURBS MANY

Prosecutors Anxiously Await
Decision on New Law

By ARNOLD H. LUBASCH

Prosecutors are anxiously waiting for the Supreme Court to settle a constitutional controversy over recent laws designed to compel witnesses to testify by granting them limited immunity from prosecution.

The issue was highlighted last week when an appeals court struck down the limited immunity law in New Jersey and ordered the release of Gerardo (Jerry) Catena, a reputed Mafia chief, who was jailed 18 months ago for refusing to tell a state commission what he knew about organized crime.

Complete immunity from prosecution has been granted to many witnesses over the years to prevent them from invoking the Fifth Amendment and refusing to testify on the ground of possible self-incrimination.

Witnesses who refused to testify under immunity could be jailed for contempt of court, as Catena was jailed in New Jersey. Those who did testify could provide prosecutors with information needed to use against others.

The Organized Crime Control Act passed by Congress in 1970, as well as some state laws—including the one in New Jersey—provided a new kind of immunity that prosecutors hoped could compel testimony without necessarily preventing the future prosecution of the witness as a defendant.

Under these limited immunity laws, which prosecutors regarded as a significant means of obtaining information in investigations, witnesses were still granted immunity from prosecution, but the immunity applied only to the use of the witness's own testimony.

This meant that a witness could be prosecuted for the crime he testified about, if the evidence against him came from independent "untainted" sources, even though his own

testimony could never be used against him.

Transactional Immunity

If a person received immunity to answer questions about a bank robbery, for instance, he could still be prosecuted for that robbery if the authorities found evidence that was not derived from his own testimony.

Under the broader immunity that prevailed in the past, the same person could be questioned about the bank robbery and he could never be prosecuted for it, no matter what other evidence might be found.

The old immunity was referred to as transactional, because it provided immunity from prosecution for the crime or transaction that the witness testified about. The new kind is called use immunity, because it is limited to the use of the witness's own testimony against him.

Constitutional challenges were raised against the limited form of immunity on the ground that it failed to provide the full protection against self-incrimination that was guaranteed by the Fifth Amendment.

U.S. Law Voided

The limited immunity provision of the 1970 Federal law was declared unconstitutional by Judge Constance Baker Motley in Federal District Court here early this year in the case of Arthur Kinoy, Rutgers law professor, and his daughter, Joanne, who refused to testify before a grand jury seeking evidence about other persons accused of harboring fugitives.

Peter L. Truebner, the Federal prosecutor who argued for the Government in the Kinoy case, said that Judge Motley's decision was not appealed because the Supreme Court had already agreed to consider the immunity issue in a similar case in California, where a Federal court upheld its constitutionality.

The Supreme Court is scheduled to consider the California appeal this fall, along with the appeal of Joseph Zicarelli, reputed to be a major gambling figure in New Jersey. Zicarelli went to jail for refusing to testify under the same law that resulted in the jailing of Catena.

However, Zicarelli was convicted on other criminal charges while being held for his refusal to testify under limited immunity, so his release was not involved in the decision that struck down the New Jersey law.

The decision, by the United States Court of Appeals for the Third Circuit, declared that the

New Jersey law had violated Catena's constitutional rights against self-incrimination.

New York State laws provide for transactional immunity, rather than the more limited use immunity, so the issue will not have an impact in state courts here, according to Michael R. Juviler, assistant district attorney in charge of the appeals bureau in Manhattan.

Transactional immunity prevents a witness from being prosecuted for any crime, except perjury, in connection with his testimony under the grant of immunity.

It has become more difficult to grant transactional immunity in Federal Courts because the Organized Crime Control Act of 1970 repealed many previous immunity provisions and provided for granting complete immunity only in cases involving murder, kidnapping, extortion, narcotics and other specified serious crimes.