Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

Docket No. 97

RALPH PICCIRILLO,	:
Petitioner,	:
vs.	:
STATE OF NEW YORK,	:
Respondent.	:

Place Washington, D. C.

Date November 9, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

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C O N T E N T S

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Respondent.

Washington, D. C.,

Monday, November 9, 1970.

The above-entitled matter came on for argument at 2:00 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

MALVINE NATHANSON, ESQ.,
The Legal Aid Society
119 Fifth Avenue, New York City
Counsel for Petitioner

STANLEY M. MEYER, ESQ.,
Assistant District Attorney, New York
Counsel for Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 97, Piccirillo vs. State of New York.

Miss Nathanson, you may proceed whenever you're ready.

ARGUMENT OF MALVINE NATHANSON, ESQ.,

ON BEHALF OF PETITIONER

MISS NATHANSON: Thank you, Mr. Chief Justice, and may it please the Court. This case presents a question of the application of the Fifth Amendment to a witness before a grand jury proceeding.

The petitioner contends that the bribery conviction which is presently being appealed was obtained in violation of his privilege against self-incrimination and further in violation of his right to counsel under the federal Constitution.

In about March of 1964, the petitioner, with another person, was arrested for an assault for which crime they were subsequently convicted. On the same day that they were arraigned for this assault charge, they allegedly offered a bribe to the arresting police officer, to induce the officer to dispose of the weapons in the case or to change his testimony, to reveal the names of other witnesses, and so on. This bribe offer was fully reported to the District Attorney in March of '64, they obtained a miniphone tape recording of a conversation between the petitioner and the police officer,

and all of this was in the hands of the District Attorney in March of '64.

In March of '65, one year later, while petitioner was serving his sentence under this assault conviction for which he had pleaded guilty, he was called before a grand jury which was purportedly investigating the assault that had been committed by the petitioner and the conspiracies arising therefrom.

His co-defendant in the assault case was called first, pleaded the Fifth Amendment, was granted it and he didn't testify. The petitioner never had a chance to plead the Fifth but was immediately offered immunity, was voted immunity.

Immediately prior to his actual testimony, he requested to see his lawyer and he was assured by the District Attorney conducting the investigation that he had nothing to worry about, he was being fully protected, he didn't need a lawyer at all. And so he testified.

Four days later the District Attorney had the police officer to whom the bribe was offered come in and testify before the grand jury and several months later the petitioner, who had been told that he was being fully protected, was indicted for bribery. The bribery conviction is the case that is presently on appeal.

And during the course of petitioner's grand jury

testimony, which as I stated was given under a grant of immunity, he was asked to testify about the particular facts surrounding the assault itself, what weapons were used, where the assault took place. They were interested in who had hired him; petitioner could only give a name and a vaque description.

As I said, he was asked about the weapons that were used, he was asked where the assault took place and so on. There was, I might point out, no eye-witness to this assault. The only diret evidence of the assault itself would have to come either from the victim of the assault or from the petitioner and his co-defendant.

The police officer was also asked about the assault and was particularly asked about what petitioner had told him about the facts of the assault, and the police officer's version of what the petitioner told him jibed very, very closely with what the petitioner had testified to. Now, as it turns out, the petitioner had described all of these events to the police officer during the course of making the bribe offer for which the petitioner was indicted.

Now, it is our position that force of the grand jury actually relied upon or probably relied upon the petitioner's testimony when they decided to indict him for bribery. It is secondly our position that the petitioner should have been protected from indictment for bribery because under the

Constitution, since he had been compelled to testify to matters relevant to bribery, he had to be given protection from such a prosecution, and it is further our position that the petitioner was deprived of his right to consult with an attorney before he testified and as a result the indictment that was obtained must be dismissed.

We submit that the grand jury in fact actually relied upon the petitioner's testimony, used the petitioner's testimony as a basis for indicting in several respects. First of all, the petitioner's testimony supplied the grand jury with the motive for the bribe offer to which the officer would later testify. And, although as we have stated in our brief, motive may not be a necessary element of the crime of bribery, it certainly is easier to get a conviction, and we submit easier to get an indictment if the prosecuting agency is aware of the existence of a motive. And so that the petitioner's admission that he had committed the assault and that he had committed the assault with the weapons that the police officer later said he was supposed to dispose of in some way, we think was crucial in this case and there was a strong likelihood that the decision whether or not to indict was in fact based upon the grand jury's knowledge that there was a strong motive for bribery in this case.

It is further our position that the fact that the petitioner's testimony jibed so closely with the police

officer's version of what the petitioner told him made the police officer more credible to the grand jury. They didn't have to believe the police officer. He hadn't seen the assault and so all that he could testify to really was what the petitioner told him, and it wasn't necessary that they believe the police officer, and we think the fact that the petitioner's testimony supported the police officer's testimony in many respects, they also led to the grand jury decision that in fact the petitioner was guilty of bribery and should be indicted therefore.

In addition, there is always the possibility that the grand jury saw the petitioner, made an evaluation of his character, of his demeanor, of his honesty of his forthrightness, and in view of their evaluation of his character determined that he had committed the bribery and therefore should be indicted for it.

Q Well, how do you escape that? How do you escape the grand jury, if they do engage in that exercise, of evaluating a man by looking at him, how do --

A It is our position that a person who has been forced to appear before the grand jury and forced to give up his privilege against self-incrimination should not be indicted by that same grand jury, particularly not in a case like this, where the subject matter of his testimony and a subject matter of the indictment are so close.

Q Well, what if he appears and claims the privilege?

A Well, this certainly is a problem and it may very well be that a grand jury will take a claim of privilege as being some sort of an admission of guilt. The several cases which we rely upon which establish that -- which stated that a grand jury may be affected by the considerations I have mentioned points this out as well.

This is a chance that a man must take if he wishes to assert his privilege, but we do not believe that once he has been -- his privilege has been taken away from him and he has been told he would be protected, the grand jury should be entitled to rely upon these factors.

Q Miss Nathanson, of course, you would not be here had he been indicted by another grand jury?

A On point one I would not be here. Certainly, however, the remainder of my arguments would be equally valid, but I certainly agree that if it hadn't been a different grand jury, then the problem I raise in the first point of my brief would not exist. But in fact he was indicted by this very same grand jury.

Q How long a period of time was it?

A Between -- I'm sorry, between what?

Q Between the time when he first went there -- well, I mean --

A And the indictment?

Q Right.

A Well, he appeared in March of '65 and he was indicted in July of '65, as a criminal matter.

Q Of course, the same people weren't there both times?

A Your Honor, there is no --

Q Don't you know that --

A -- there is certainly no way of defense counsel to be aware of the names of who appeared in a grand jury. There is, however, the statutory framework in New York would require that there at least be seven people there at the same time.

Q Well, that is what I am saying. Couldn't there have been seven people at one and --

A No, let me make myself clear. The grand jury system provides that there are 23 people, 16 to 23 people on a grand jury. The 16 are necessary for a quorum, so there must be 16 of 23 present on each occasion. In addition, there can be no indictment except by the concurrence of 12 of those minimum 16, and if you work out the numbers, at least seven people must be identical at any two sittings of the grand jury. There would be no way of having it be a completely different group of people.

Q Seven is not close to a majority.

A Seven is a majority of 12, which is what is required --

Q I mean, the grand jury was 23.

A 23 maximum, 16 for a quorum, and 12 to indict.

Q Well, you know, there are two days in a row that you have all 23 is the day that it snows in sunlight.

A We just don't know what happened in this case, and this information is not available, but there were certainly many people who heard both testimony. That testimony was four days apart over a weekend, the police officer and the petitioner.

Q Is it your position that the immunity granting grand jury is unable to indict the witness for anything at all?

A No, Your Honor, but where the witness' testimony has some relevance so that their evaluation of this witness would directly bear upon the subsequent indictment, then they can't.

Q You will bring in the element of relevance in drawing the line?

A Well, so far as this case is concerned, Your Honor, I would -- I am saying that if that is one of the factors which not only in this case was the defendant in fact, the petitioner in fact testified to the same matter that the patrolman later testified to and that formed the subject matter of the indictment, but in addition the grand jury may have

evaluated his demeanor and so on. This is not -- I am not saying this would be a sufficient ground for dismissal of an indictment, but I believe it is another factor in the context of this case which should be considered.

Q Now, one last question. If this case were being decided today by the New York Court of Appeals, do you think it would be decided the same way, in view of --

A The result would be the same. The New York Court of Appeals at that time, seven months after their decision in this case, overruled this case insofar as it has set down certain general legal principles. However, they stated that they had taken another look at the record; what they said was this is not to say we have decided Piccirillo incorrectly, because in fact in Piccirillo the legal test that we are setting down now would not absolve him of this conviction.

There certainly is no question but that there would be -- that this Court of Appeals has in fact considered Piccirillo in light of its subsequent decision in Matter of Gold vs. Menna, which I assume you were alluding to, and has reaffirmed its decision in Piccirillo as to the results. They have again found that Mr. Piccirillo's rights under the Fifth Amendment were not violated.

Now, it is our position that the subsequent decision by the Court of Appeals which purports to adopt what we say is federal constitutional rule, really does not more than pay

lip service to that federal constitutional rule. I think this is demonstrated by the way they apply that rule in this case. The spirit with which they apply the federal constitutional rule does not give it its full effect, the effect that we believe it should have, with regard to the second point of my brief. This is the transaction immunity rule that we assert is required under the Fifth Amendment, that is that a witness who is compelled to give up his privilege against self-incrimination must be guaranteed that he will be immune from prosecution by the compelling jurisdiction as to any transaction relevant to his testimony. This is commonly known as the transaction immunity rule.

It is our position that this is the rule that first was enunciated in the first case in this Court to deal with the question of immunity and the abrogation of the Fifth Amendment privilege in Counselman vs. Hitchcock. It has been constantly reiterated in numerous decisions of this Court, and we believe it is a very sound rule.

The rationale for the rule, I think, is quite simple. The Fifth Amendment states very explicitly no person shall be compelled to incriminate himself. There is no if's, and's, but's, no qualifications. Only if the incriminatory aspect of his testimony can be removed, if in fact as he testifies he is not subject to any criminal prosecution that could be based on his testimony, only then can you say that the Fifth

Amendment no longer applies and he may be forced to testify. We submit that this can only be done by granting him immunity as to any crime which could be related to his testimony and which could be proved through his testimony. I don't believe that the exclusionary rule, which the District Attorney contends is the sufficient rule under the Constitution, is in fact a sufficient rule.

Q Suppose after the event, after these two things, the assault and bribery, and after he testified before the grand jury the first time, then he decided to telephone the policeman's wife and threaten her over the telephone, that he would do something to the children if he got into any difficulties, do you think that would be part of the same transaction?

A No, no. Immunity would only protect somebody up to the point of --

Q But you think the transactional immunity here covers both the assault on one man and the effort to bribe another?

A Yes, I do.

Q Then why isn't the effort to intimate the policeman after the bribery --

A I'm sorry, I misunderstood your question.

Q I am talking about his efforts subsequently to intimidate the same policeman.

A Subsequent to the bribe but not subsequent to his testimony, that is what I misunderstood. I'm sorry.

Q Put it either way.

A Well, certainly not subsequent to his testimony because his immunity at the time of his testimony would only cover what had happened before.

Q Let's take it before his testimony then. He has now tried to intimidate the policeman by threatening his children through his wife that if the policeman doesn't remain quiet something is going to happen. Is that part of the transaction?

A On the basis of your question, without having a chance to sit down and analyze the facts, yes, I think that would be covered by the transactional immunity.

Q Then if he carried out his threat -- why don't you take it another step -- carried out his threat and kidnapped the children, are you going to carry the transactional immunity ad infinitum?

A In New York, I believe, kidnapping is not covered by immunity, nobody would have power to grant him immunity in an investigation of that sort.

Q Well, let's just say he beat the children up, then, on their way home from school, instead of kidnapping them. Are you going to stretch this transaction to cover that?

A Without a chance to actually analyze the testimony, because I think it all depends on exactly what it is he testifies to and is it substantially related to the crime for which he is being prosecuted, and to be perfectly honest I would have to sit down, read his testimony, take a look at the facts of the crime and determine whether or not there is a substantial relation in these hypotheticals I haven't previously considered. But this would be the test, and if after analysis it would be determine that the testimony that he gave was substantially related to the beating up of the children, then it certainly would be covered.

Q Pretty substantially related, isn't it, if it has the same objective and the same motivation as the bribery.

A That's right.

Q He is doing it for the same purpose. The bribery didn't work so he tries another one.

A But the test is not whether there might be a similar motivation between the two crimes or anything like that. The test is his testimony itself, what he said in the grand jury, the words that he utters substantially related to the subsequent crime, and if in fact they are substantially related then under this Court's holding in Heike, he would be covered under the transactional immunity standard.

I would hesitate at this moment to make that evaluation of a hypothetical, you know, that I have not had a

chance to evaluate. It is our position too in this case that there is no question, thought, that there was a substantial relationship between the testimony before the grand jury and the bribery prosecution that was subsequently commenced. For the same reasons that we feel that the testimony could, in fact, have been relied upon by the grand jury in indicting, kind of creates the same kind of relevancy. The testimony established the motive for the bribe offer. It was in fact about the same tire irons that had been used during the assault and that were the subject matter of this briber offer. So we feel that there was no question but that there was a substantial relationship and that under the transactional immunity test, which we contend is a federal constitutional test, and as it has been explained by this Court in Heike and applied in other cases, the bribery indictment must be found to have been covered by the transaction immunity to which this petitioner was entitled.

It is finally our contention that the petitioner's right to counsel was very seriously abrogated in this case. As I mentioned before, prior to his giving any testimony, he asked if he could speak to his lawyer, and he was told by the -- he stated that he would like to speak to his lawyer first -- and he was told by the District Attorney, who was in charge of the case, that this would not be necessary.

In effect, what Mr. Panzarella told him after he

asked for his lawyer, he said under these circumstances you are not a defendant, you are a witness -- this is at page 7 of my brief -- you have been given immunity. That means you cannot be prosecuted. Your rights are fully protected and there is no reason for your conferring with your attorney.

Now, of course, as I pointed out, the man was indicted by the same grand jury several months later, and I think there is at least a very serious question whether some of his rights were being affected during this grand jury proceeding and perhaps the advice of counsel might have been helpful to him.

At the very least, counsel might have clarified for him what this immunity they were talking about was about. As the question Mr. Blackmun, Mr. Justice Blackmun points out, there is somewhat of a problem or has been somewhat of a problem in New York State as to what the immunity standards should be.

To compare this case with the subsequently decided case of Matter of Gold vs. Menna, the advice given by the District Attorney himself, his definition of what the immunity would be kind of veers between a testimonial standard and the transactional immunity standard.

We also submit that counsel could have been important perhaps even in negotiating an additional amount of immunity for his client, which is certainly a perfectly

appropriate role of counsel, if counsel can accomplish this sort of thing. Counsel could at least have made clear to petitioner what was being covered and what was not being covered.

Now, all the parties in this proceeding knew about the bribery. The D.A. had had information about this bribery at least a year before, when it first occurred. He had the miniphone, he had the testimony of the police officer, the statements of the police officer, the lawyer for the petitioner knew about the bribe offer and obviously petitioner knew about the briber offer. Certainly the parties involved could have clarified whether or not the District Attorney thought that this bribe offer was being covered by this offer of immunity. And if in fact it was not being covered, petitioner may just not want to have given up his privilege. He may have rather subjected himself to a contempt prosecution, which I submit is his perfect right to do.

Even with a grant of immunity, there is no reason why a man can't elect to go to jail for contempt rather than perhaps get into worse trouble by being indicted for a substantive crime. And so we think that there are a lot of things that counsel could have done during these proceedings to advise the petitioner, to assist him, to discuss the matter with the District Attorney, and to enable the petitioner to make a considered, reasoned, well informed decision as to

exactly what he wanted to do when he was called before the grand jury.

And the District Attorney's cavalier dismissal of his request to talk to his lawyer with the assurances that he had nothing to worry about and he was being fully protected, this points up the need that this petitioner had for a lawyer to advise him.

And so it is our position that for the three reasons, the fact that his testimony, his compelled testimony, in fact, was used in obtaining an indictment, the fact that he should have been given an immunity that would cover the bribery prosecution under the transactional immunity standard, the fact that he was deprived of his right to counse, all require that the conviction in this case be reversed.

May it please the Court, I would like to reserve whatever remaining time I have for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Miss Nathanson.

Mr. Meyer?

ARGUMENT OF STANLEY M. MEYER, ESQ.,

ON BEHALF OF RESPONDENT

MR. MEYER: If the Court please, Mr. Chief Justice, I would just like to mention two things before I actually get into the discussion of the law.

First, in answer to Mr. Justice Marshall's question, I think it is safe to assume that the grand jury that voted

the indictment in this case was the same jury that did hear the defendant's testimony. I believe this was an extended grand jury. Normally in Kings County the grand jury sits for periods of thirty or sixty days. I believe this jury sat for an extended period, something like a year or so.

Q Well, the problem is whether you had more than one grand jury sitting at the same time?

A I believe it was the jury with the same people that heard the testimony.

Q You do have more than one grand jury sitting at the same time.

A That's true.

Q Well, wouldn't you be in better shape if this had been presented to one of the other ones?

A Your Honor, there is no doubt about that and, looking at it from the standpoint of hindsight, practically speaking, that would have been a better procedure. However, the question here is whether the procedure violated the constitutional requirements and, with Your Honor's permission, I would prefer to wait and discuss that point after the first point.

Second, I think it is important to place the facts of what happened here in their proper perspective. And what I am going to discuss now is in the record, it was mentioned on sentence, and so you can see for yourselves that these are

not things that are not in this case.

This case led to a scandal basically in New York County involving rigged paint bids, involving the New York Housing Authority. Now, apparently the victim in this case, the person by the name of Jack Graham, was employed by the Housing Authority, and apparently there was something about him revealing some of the things that had been going on, and he had been apparently talking to the police or the District Attorney. And the petitioner here and a co-defendant, who is no longer alive, were hired to beat this fellow up, and they met him one night in the parking lot of his home, they assaulted him, they hit him with tire irons. This occurred in March of 1964.

Now, the very next day, when he was being arraigned in the criminal court, the bribe offer was made to the patrolman. The patrolman advised us about it, we advised him to meet the petitioner at a different time. He did, and we had miniphone equipment.

Eventually the petitioner pleaded guilty and was convicted of assault and he was sentenced to a term of imprisonment. Now, approximately a year later, while he was serving this sentence, he was called to the grand jury. He had not been arrested or in any way -- there had been no proceedings instituted regarding the bribery conviction.

Now, when the grand jury called him in, they weren't

interested in prosecuting this man for bribery at all. They were interested in finding out who paid him to commit the assault and to get into the background of this whole thing. They wanted names, they wanted to know when the meeting took place, and so forth, and this is how this case arose. And so in March 1965 the witness was called back and was given immunity.

Now, New York has a use-plus transactional immunity statute. The statutes are reprinted in both petitioner's and respondent's briefs. That statute protects the witness from the use of his testimony, plus leads and the statute also gives him transactional immunity regarding any matter or thing concerning which he testifies.

Now, that is clear. The Court of Appeals in this case decided if analying Counselman vs. Hitchcok, the Murphy case, and all of the other relevant decisions, that the only thing that the Constitution requires is that a witness be given use-plus fruits immunity, and that the transactional portion of the New York statute was not mandated by the federal Constitution.

Then the court concluded that the New York statute was passed because of the dicta in Counselman and that it really was the intention of the legislature to give a witness no more than the Constitution would require it go give any witness. And so the court held that the New York statute only

prevented the use of his testimony plus fruits or leaves. Then seven months later the court overruled this case, but only to the extent of its interpretation of the second portion of the New York statute.

In other words, it said we were right, we still believe that the Constitution only requires a use plus fruits immunity, however the New York statute is clear and there really has never been any doubt, and we must interpret the statute according to its plain language. And so we hold that the New York statute does give transactional immunity although it is not required by the federal Constitution.

Now, this is important --

Q What do you think prompted the New York court to change its mind? There wasn't very much of a change in its personnel, was there?

A No, I don't believe there was any change. It is very interesting. I believe Judge Keating, who wrote the majority opinion, had left the court though. When we argued this case in the New York Court of Appeals, we really didn't even argue this point, and so we were quite surprised when the court decided that the New York statute as a matter of state law was not an immunity statute. Apparently they just felt that they had misinterpreted the statute. I think it is clear, from reading Gold vs. Menna and nothing more.

Q Do I understand you, when you argued Piccirillo's

case, this point was not argued before the state court?

A That's right, because we all assumed that the New York statute granted transactional immunity as a matter of state law. Now, I think that is very important, and it is important for this reason: If transactional immunity -- well, first let me say this:

Thenhe was brought in to the grand jurh in '65 and questioned about the events leading up to the assault, and there is a lot of testimony. He was asked many, many questions. But as a matter of introduction, of course, the testimony started off by the prosecutor saying to him, now, you have been convicted of assault and you are serving a sentence for it, and isn't it true that this assault occurred on such and such a date where you hit this man with a tire iron, and the words "tire iron" were mentioned.

Now, it was argued that by use of the word "tire iron" that the defendant got immunity from prosecution for the bribery because when he made the bribe offer to the officer he said -- he offered him money in exchange for changing his testimony and losing the tire iron. And so the argument was made that because the phrase or the two words "tire iron" was used in the grand jury, that this meant that the defendant testified to a thing or matter as set forth in the New York statute.

Now, if transactional immunity is required by --

and, incidentally, the court below, all the way down the line, held as a matter of fact that this was not a thing testified to and that the testimony he gave had no relation as a matter of fact to the testimony which supported the indictment. This is important because if transactional immunity is required by the federal Constitution, then the decision of the Court of Appeals that this was or wasn't a thing as specified in the New York State statute, is a matter of federal importance, and it is to be decided by a uniform standard.

On the other hand, if the only thing that the Constitution requires is a use plus fruits immunity, then when New York decided whether this crime, this bribery was one of the things testified to in the grand jury, becomes strictly a matter of the state interpretation of its own statute, and there is no federal constitutional question involved.

And so it is necessary to decide whether transactional immunity is required by the federal Constitution. Now, the petitioner relies a great deal on the case of Counselman vs. Hitchcock. Now, it is our position that Counselman vs. Hitchcock is not the law any more, that it has been overruled, or if it hasn't, it should be, and that the consequences of the holding in Counselman are much greater and dangerous today than they were in the days when it was decided.

We also take the position that the Murphy vs. Waterfront Commission case and Malloy vs. Hogan have closed

this question and that this Court has made it clear that the Constitution only requires a witness to be put in the same position as if he had pleaded his privilege or as if he had never testified. In other words, he is to get only that protection that the Constitution gives him. And to protect the use by any government of the testimony he gives and the leads obtained from or the fruits of that testimony would do that. To give him transactional protection is to give him a benefit not required by the Constitution, and it is a benefit which each and every state should have the right to decide for themselves, that is whether they want to give it to him or not.

Now, this is really the key issue in this case, and I think that there really is not much doubt about the law in this area. This Court, in Murphy, said that we hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with the criminal prosecution against him.

We conclude moreover that in order to implement this constitutional rule and accommodate the interests of the state and federal governments in investigating and prosecuting crime, the federal government must be prohibited from making any such use of compelled testimony and its fruits.

This exclusionary rule, while permitting the states

to secure information necessary for effective law enforcement, leaves the witness and the federal government in substantially the same position as if the witness had claimed his privilege in the absence of the state granted immunity.

And then footnote 18 in that decision made it clear as far as the rationale was concerned that this Court was only saying that use plus fruits was required. And the footnote indicates that once a defendant had been granted immunity and compelled to testify in a state proceeding, and then he was later indicted in the federal jurisdiction, that it would be up to the federal government to show that the source of the evidence used against him was untainted and did not in any way stem from the evidence he gave before a state grand jury, which indicated that each government would be free to prosecute or obtain indictments against a witness provided they were totally, completely independent.

And this I submit would be the same situation that a witness would find himself in if he never were a witness, if he were never compelled to testify. He was sort of saying to a witness, tell us things, give us information which we intend to use against other people, sort of off the record, we are not going to use it against you, use it in any way to obtain evidence against you -- but, on the other hand, if something comes up, clearly from an independent source, we do not want to be prohibited from doing what we normally could do.

Now, the statement in Counselman which caused all the problems was dicta in that decision. Now that case declared a federal statute unconstitutional because in that case, as a matter of fact, that statute only gave use immunity and did not protect Mr. Counselman from the federal government's using the fruits of his testimony or obtaining leads from his testimony, and for that reason, and that reason alone, the statute was unconstitutional.

The statement which has been discussed very often came later on in the opinion and was not necessary to its decision. Now, this was pointed out in the Murphy case, in this case, in the Court of Appeals opinion, and in the Supreme Court of the State of New Jersey's opinion in the Zicarelli case, which I submit is highly persuasive.

Also I would like to point out that the effect of the decision in Counselman was not very great because you had the two sovereignties doctrine, and it really made no difference what the court said in that case because the Fifth Amendment could not be pleaded in a state prosecution and, vice versa, the opposite was true.

However, since this Court's decision in Malloy vs. Hogan, applying this amendment to the states, the Fifth Amendment, has come down, a holding such as petitioner suggests, requires -- Counselman requires, would have disastrous effects on law enforcement throughout the United States. And

I suggest that if the bases for Counselman and the conditions under which it was decided no longer exist, then Counselman should be reevaluated.

Now, many courts have considered this problem and have taken the position that this Court has overruled Counselman, even though it didn't specifically say so in the Murphy decision. For instance, in New Jersey, in the Zicarelli case, the Supreme Court said -- and incidentally New Jersey enacted a statute which only gave use plus fruits immunity, this statute was enacted after Murphy was decided, and so the legislature took the position that this Court had overruled Counselman and the state was now free to take away the transactional portion of the protection it had previously afforded witnesses.

And so it passed a new statute, and the statute was tested and it went to the Supreme Court in the State of New Jersey -- I understand the case is here on a cert application at this time -- and the court said we heretofore deemed the Constitution to require immunity against use of testimony rather than immunity from prosecution. And recently our legislature, in adopting the model state immunity act, substituted an immunity from use for an immunity from prosecution, which I have justreferred to.

There is a difference in that Murphy dealt with a federal-state setting, whereas we are here dealing with the

claim that our state does not protect the witness from prosecution under state law. But the question in both is the same. In other words, what immunity the Fifth Amendment requires in exchange for compulsion to answer, the values involved are the same. We see no sensible basis for a different answer.

Gardner vs. Broderick treated the issue as one in the same, citing both Counselman and Murphy. Murphy held, and Gardner repeated, that the Fifth Amendment requires protection only from the use of the compelled testimony and the leads it furnishes, and that protection our statute expressly provides.

So you have New Jersey taking that view. You have New York, of course, taking that view in this case and in the Menna case. The U.S. Court of Appeals for the Second Circuit, Judge Friendly writing for the majority, in the Uniform Sanitation case, takes the same view. And the District Court, the Southern District, in two cases, also took the same view. Also California, in interpreting Murphy, agreed that complete immunity such as was discussed in Counselman, was not required by the Constitution and that answers could be compelled as long as there was immunity from federal and state use of the testimony and its fruits.

I also point out that Maine has taken the same view and Kansas in dicta has also agreed.

Now, appellant cites, petitioner cites statutes in a very impressive compilation at the end of her brief or in the appendix of all of the fifty states in which it is clear that most of the states have adopted transactional immunity statutes, and apparently this is done to argue that if the states felt it was necessary to give that type of protection, then it ought to be persuasive and this Court ought to be persuaded that it too should take the same position.

I would like to point out, as I point out in my brief, that prior to Counselman the situation was just the opposite. Most every state had only a use plus fruits statute, but because of the dicta in Counselman it was thought that transactional immunity was now required as a federal proposition and all of the states amended their statutes.

And so the state statutes were only changed because of Counselman, it seems to me that to argue that these statutes are themselves persuasive is truly putting the cart before the horse. Also the practical effect of the contrary rule, or the rule as petitioner argues, is quite important.

Now, Mr. Justice White pointed out in Murphy, in his concurring opinion, that if this Court adopts a transactional rule that will in effect be abrogating the immunity statutes in every single state, because a state cannot give federal transactional immunity. It is beyond its power. But since because of Malloy a witness can now plead his federal

privilege in a state proceeding, he can successfuly thwart an attempt of any state to give him immunity and secure his answers. And the Court, and Mr. Justice White said, the -- that this would invalidate the immunity statutes of the fifty states since the states are without authority to confirm immunity from federal prosecutions, and would thereby cut deeply and significantly into traditional and important areas of state authority and responsibility in our federal system.

Of course, the converse should be looked at also. If it could be said -- and I don't urge it -- that a state did have the power to grant federal transactional immunity in a state proceeding, and that if the state in granting immunity, transactional immunity, bound the federal government, then the effect is even worse because if that were true a state, of course, without consultation with the federal government or without the government's knowledge, could sterilize the federal government in every proceeding against an individual, and the examples of course comes to mind of the situation where the government may have a case prepared against a particular individual, the case may be either in the grand jury or be ready to go to a grand jury, when all of a sudden it is discovered that this witness, in a state prosecution which may not have been very important, admitted in responsive answers to relevant questions said he had committed various federal crimes which were then under investigation in the federal

jurisdiction, so that for all practical purposes the witness would gain a federal immunity and would prevent the federal government from taking any sort of action.

Now, the only argument is made that we used the testimony of this witness against him on the Broderick case, and that the grand jury heard him testify and that he furnished the background and the motive for their action.

Now the record, I think, dispels that argument. First, it is conceded that motive under New York law is not an element of the crime, but the Court of Appeals decided, as did the original Supreme Court in New York, that the testimony of Patrolman Sewell was complete in and of itself, that any testimony given by this witness was insubstantial and played no part in the subsequent indictment.

Now, of course, the only thing that this witness said was that he had used the tire iron, but that was repeated by Sewell in the grand jury who testified that when the bribe offer was made to him the witness admitted the assault, admitted using the tire iron and admitted many things, and this is in the appendix.

So that the testimony of this witness was totally unnecessary to support the indictment which was obtained. I think that merely using the same grand jury does not in and of itself violate anyone's rights. Now, let me point out that it is common practice in the Southern District of New York to

present a case against a man, have all the evidence completed, and then subpoena him to testify before the grand jury. When he testifies and pleads the privilege of self-incrimination and then leaves the grand jury room, it is very common for that grand jury that just heard him plead that privilege to indict him.

Incidentally, such a procedure would be illegal in New York and this type of situation has been upheld many, many times. I think it is far more questionable than what happened here because here truly the grand jury and the District Attorney did not call this man in order to have him say anything that would be used against him in a bribery case. They weren't interested in bribery. They would have foregone for all times any bribery prosecution. They were only interested in learning about the background of the assault and getting into this area involving so to speak bigger and better things.

And I think that this must be kept in mind, and I just would say one word about this business of counsel. Now, it is true, this is what happened -- he was explained the meaning of immunity and he went outside, presumably his attorney was with him in the corridor, and then the grand jury came back and granted him immunity. It was explained to him again and the witness said, well, okay, I am going to answer the questions but can I just talk to my lawyer for a second. And the prosecutor said, well, no, you don't really have to

because you have immunity.

Now the Court of Appeals --

Q What did he mean by that statement?

A Your Honor, I have no idea. Of course, it would have been much better to let the man go outside. It wouldn't have changed anything because presumably --

Q Couldn't he assume that as of that moment he was immune from any prosecution of any kind prior to that moment?

A Well --

Q Couldn't he have thought that is what he meant?

A Well, Your Honor, he was unaware that there was any type of bribery proceeding pending, so he couldn't have --

Q He didn't say partial immunity, limited immunity, or absolute immunity?

A Well, that's true, we concede that.

Q He just said immunity.

A We offered him complete immunity, transactional immunity, but transactional immunity is a matter of state law and we contend that this was not a transactional --

Q Did he know what transactional immunity was?

A It was explained to him and he had an attorney there --

Q Explained by whom?

A By the prosecutor in the grand jury -- and he had a lawyer presumably outside to start with.

Q But he wanted to go back and make a final check with his lawyer for some reason.

A Well, in answer to that, the Court of Appeals considered that problem --

Q Yes.

A -- and let me just read you their answer. In Gold vs. Menna, when they reconsidered this situation, they said since Piccirillo's answers did not form the basis of the present indictment, his claim that his constitutional right to counsel was violated because he was not permitted to confer with his attorney is without merit. Of course, his answers weren't used. No prejudice did or could result for the attorney could have done nothing more for Piccirillo than to assure that he was given the immunity which in fact he did receive. So he got it anyway.

Piccirillo's situation is to be distinguished from that of a witness who denied permission to confer with his attorney, refuses to answer and is held in contempt. Such a witness might properly claim that had he been given an opportunity to obtain advice from his lawyer, he undoubtedly would have testified and thereby been spared the prosecution on a contempt charge.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Meyer.

Miss Nathanson.

ARGUMENT OF MALVINE NATHANSON, ESQ.,

ON BEHALF OF PETITIONER -- REBUTTAL

MISS NATHANSON: On this question of the effect of the rule that we state is constitutionally required upon criminal prosecutions throughout the entire country, first I believe the District Attorney has misinterpreted what we state is constitutionally required.

The Counselman rule, as we have discussed it in our brief, refers to the requirement that the compelling jurisdiction -- the compelling jurisdiction grants transactional immunity to the witness. In the Murphy situation, of course, it was a case where the compelling jurisdiction in the using jurisdiction, of potentially using jurisdiction, were two different places. That is not the situation in this case, but that distinction is very important.

We have not --

Q How is it important to the use factor? Would you spell that out?

A Well, we have not proposed that a jurisdiction other than the one which has compelled the testimony be bound by the transactional immunity rule, so we have not proposed this parade of horrors that the District Attorney refers to when some small state prosecution will insulate a witness

from large important federal prosecutions. This is not what we are saying at all. It is our position that the jurisdiction which makes the decision whether or not to compel the testimony and presumably evaluates so far as its own jurisdiction is concerned how important the testimony is or how important that prosecution against that witness would be. That jurisdiction which makes a definite decision to grant immunity should be bound by that decision.

Q And must grant transactional immunity from any prosecutions by that jurisdiction?

A By that jurisdiction. But the jurisdiction which has not participated in this decision would not be bound to that extent as to that jurisdiction in the Murphy rule, which says protection against from using fruits would be the proper rule to apply.

Q Why does it need to go beyond use? Let's lay aside Counselman and the others, what is your rationale for it?

A It is our position that -- well, a man who has in fact been forced to testify can never be placed in the exact same spot as though he had never testified, and this is a fact that has occurred and there is no way of pretending that it never happened. But to get him as close as possible to that point in time when he was not compelled to testify, we submit that the only thing you can do is give him full

protection for this reason:

If he is only given protection against the use of his testimony or his fruits -- first of all, this involves very, very difficult factual evidentiary kind of a hearing -- even assuming that the burden would be on the prosecuting agency, as it was mentioned, it would be in Murphy, it is still a difficult factual question because it almost involves the exploration into the thought process of the prosecuting agency, and we are assuming that this is the same agency that has compelled the jurisdiction. We can further assume that they are aware of the compelled testify.

You would have to go into their minds and find out whether their testimony set off any trains of thought, gave them any ideas, gave them any hunches that they acted upon. These are very, very difficult things to trace, and I don't believe that you could ever have assurance that there would be full protection.

Q All of those factors are still there when you have the federal-state situation, on the fruits problem.

A Well --

Q What you are arguing against is the fruits problems.

A This is true except for the fact that you are dealing with two different jurisdictions, and the likelihood -- well, for example, in this case, there is very little

chance that the District Attorney of Kings County was not aware of the petitioner's testimony. If there was federal prosecution, it would not be as likely that the federal authorities would know what he had said, and so you wouldn't have this difficult problem of determining how the other state, how his investigation or procedure may have been somehow determined by what he heard, because it is not so clear that he was privy to the compelled testimony.

Certainly within a jurisdiction this is a much, much greater problem, and we concede that because of certain practical considerations involved in our federal system, it may be that the rule would have to be different between the two jurisdictions, although it is not easy to formulate the rationale apart from just saying that without some kind of differing standards the problems the District Attorney has presented might in fact come into being.

We do live in a federal system and, as Murphy recognized, we have to make accommodations between federal and state interests, and we submit that this is the best way of doing it within the framework of the Constitution.

It is interesting that in Murphy they stated that the witness who was being protected from use of his testimony was being placed in substantially the same position, substantially as though he had not testified, which is something different from what Counselman said, which is that he must be in

exactly the same position as though he had not testified. I think this is a recognition that this isn't really completely as the Constitution would require, but because it is not the compelling jurisdiction and because of our federal system this would be a proper rule under the Constitution.

If I could just make one more comment, I would like to point out that these questions do not appear in this case. I again stress that we are dealing with the compelling jurisdiction being the very same one that has embarked upon the prosecution and so under the transactional immunity test, as we believe it is evident from the decisions of this Court and the Constitution, the indictment in this case must necessarily be dismissed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Miss Nathanson.

Thank you, Mr. Meyer.

The case is submitted.

(Whereupon, at 3:00 o'clock p.m., argument in the above-entitled matter was concluded.)

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