In the

Supreme Court of the United States

JOSEPH ARTHUR ZICARELLI,

Appellant,

vs.

THE NEW JERSEY STATE COMMISSION OF INVESTIGATION,

Appellee.

No. 69-4

Washington, D. C.
January 11, 1972

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v.	:	No. 69-4
THE NEW JERSEY STATE COMMISSION OF INVESTIGATION, Appellee	:	

Washington, D. C.

Tuesday, January 11, 1972

The above-entitled matter came on for argument at 10:10 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, Associate Justice

APPEARANCES:

MICHAEL A. QUERQUES, ESQ., 501 Central Avenue, Orange, New Jersey 07050, for the Appellant.

ANDREW F. PHELAN, ESQ., 28 West State Street, Trenton, New Jersey 08608, for the Appellee.

GEORGE F. KUGLER, JR., Attorney General of New Jersey, State House Annex, Trenton, New Jersey 08625, Attorney for Amicus Curiae

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first today in Number 69-4, Zicarelli against the New Jersey State Commission of Investigation.

Mr. Querques, you may proceed whenever you are ready.

ORAL ARGUMENT OF MICHAEL A. QUERQUES, ESQ.

COUNSEL FOR THE APPELLANT, MR. JOSEPH A. ZICARELLI

MR. QUERQUES: Mr. Chief Justice, and may it please the Court:

The facts of this particular matter, sparse as they are, warrant some little attention here this morning. Sometime in 1969, Mr. Zicarelli was served with a subpoena to appear before a new Commission in New Jersey which is called the State Commission of Investigation. The State Commission of Investigation was operating under something else which was new in New Jersey and that is a so-called "use immunity" or "testimonial immunity" statute.

Consequently, as the result of being asked questions and being offered the immunity which was provided for by this statute, Mr. Zicarelli chose to invoke his privilege under the Fifth Amendment not to testify on the grounds the "use immunity," so-called, was not sufficient. He was not upheld in that argument and ultimately was held in contempt and appeal was taken to the New Jersey Supreme Court and, again, his claim of privilege under the Fifth was denied.

As a result of which, under the statute in New

Jersey, the somewhat peculiar statute, Mr. Zicarelli was confined to an institution in Yardville, New Jersey, presumably for the rest of his life because the statute in New Jersey provides for no particular period of confinement and it was a civil contempt, civil confinement and as I say, no particular period of cut-off.

Q Well, if he had answered the questions, would he have been released?

MR. QUERQUES: Yes, Your Honor, he would have been released.

Q But he did, as in most civil contempts, he carried the case to jail in his own pocket.

MR. QUERQUES: That is accurate, Your Honor, yes.

So we are faced then in this case with the ultimate issue as to whether or not the so-called "use" or "testimonial immunity" is consistent with the Fifth Amendment and this ultimate issue, as far as I could make it out from all of the cases that I have read depends upon the particular answer that you give to the one single test, and that is whether or not the Witness is in the same position after he has testified as though he had not testified and therefore, I would like to try this morning to persuade this Court that a witness such as Mr. Zicarelli would be in a far worse position after he testified than if he had not testified under this use immunity statute.

Q You are speaking now of his worsening situation solely purely in terms of exposure to possible prosecution?

MR. QUERQUES: Yes, Your Honor. There may be some other considerations --

Q In state or federal courts?

MR. QUERQUES: In both, Your Honor.

There is a case out of the Third Circuit, Catena, involving another individual who had exactly the same problem and I think that the opinion by Chief Judge Seitz in that case is certainly applicable here. Chief Judge Seitz says that the defendant is in a worse position or, stated differently, he is not in the same position as though he had not testified because once the District Attorney would have that compelled testimony, the District Attorney would be able to use that compelled testimony in cross examination. And Chief Judge Seitz says, even if there were no overt reference to the compelled testimony, the questions could be phrased in such a way that the use of the compelled testimony would necessarily impeach and damage the defendant.

Q Judge Seitz was speaking of his posture if he were called as a witness in a subsequent trial, was he not?

MR. QUERQUES: Yes, yes, Chief Justice.

Q Is there anything about the use immunity granted before the Grand Jury or investigative body that would prevent him from claiming his Fifth Amendment privileges anew on any

new matter when he was called as a witness in the trial or subjected to cross examination?

MR. QUERQUES: I'm not certain that I understand the question, but if I do, as I understand the use immunity, it would be of no avail to the defendant facing the prosecution to raise it all over again because it could be used.

Q That is not quite my question. When he is in the courtroom for the trial of some case subsequent to his Grand Jury appearance, or in your case, appearance before the Commission, is there anything that prevents him from using the Fifth Amendment if he is subjected to a question which he thinks in and of itself will incriminate him?

MR. QUERQUES: Well, I think that question is also answered by Judge Seitz and that argument goes along these lines, that the defendant, even if assured that the answers he gave in the compelled testimony before the Grand Jury or before a Commission would not be used, nonetheless, it would bear on his mind and he would therefore be influenced to forego and give up or to forsake that right that he would have to defend himself, and I think that is a very crucial consideration.

Leaving that answer and going to the next one that I have in mind, and that is the one by Justice Brennan in the Piccirillo Decision, the dissent, and that would be that the uncertainties of the fact-finding process and the hazards to the witness argue very strongly against use immunity. I don't

think that anyone could argue against the fact that the government would have all of the relevant evidence and any others who have had experience with the government know that there are files and then there are confidential files. Many, many times, if not indeed all the time, the young district attorney trying the case in the federal court is completely unaware of so-called "confidential information" resting in the confidential file of the Secret Service or Immigration Authorities or the FBI offices and consequently he is not in a position, so the burden would be on the government to show that the prosecution is untainted. He would be in no position to rebut the evidence offered by the government.

In addition to that, the best defense for a person placed in the situation where he has to testify under use immunity could never establish if there was, for example, an accidental or an unrecorded exchange of information which somehow tainted his indictment.

There would be no way of showing that poor memory was attendant to the situation in order to show the taint. Many times, and I think this Court has seen it recently, proofs are lost through either death, resignation, through disability, or through retirement. The case that I am thinking about is the recent case out of New York of Santobello where one prosecutor made a so-called "arrangement" with the defendant and then, as a result of leaving his position, another District

Attorney came in and would not honor the arrangement previously made. You could have exactly the same situation here. One District Attorney could leave his office or would die or retire and something that was left behind could be used by someone else and the Defendant could never establish it because of that situation.

Q Santobello did.

MR. QUERQUES: Yes, he did, Your Honor, but I think --

Q Isn't this a bit similar?

MR. QUERQUES: Yes, sir, but I think in this situation I would ask you to understand that it gets more difficult. We have a situation here where the years may go by and in Santobello you have a direct appeal immediately following the so-called "reneging on the bargain" and he could do it with a great deal more expedition than could a man in this particular situation.

Q Do you have the name of that case that you referred to in which Judge Seitz for the Third Circuit?

MR. QUERQUES: Yes, Your Honor.

Q I don't seem to find it in your brief.

MR. QUERQUES: It's not in the brief, Your Honor, because it was decided after we filed the brief. The name of the case is Catena, C-a-t-e-n-a, against the very same Commission involved in this case.

I'm sorry, I understand now that it is captioned in

the name of the award and of the institution, whose name would be Albert Alias, so it is Catena against Alias.

Q Have you got a citation?

MR. QUERQUES: It is decided, if Your Honor pleases, on September 2, 1971.

Q Third Circuit.

MR. QUERQUES: Third Circuit.

Q Have we stated a judgment?

MR. QUERQUES: I'm sorry, Mr. Justice White?

Q Did we state a judgment in that case?

MR. QUERQUES: Yes, pending the outcome of this case.

While none of the cases refer to the next point I would like to make, to me, as I review the matter, it seems to be of great importance, and that is this:

A Defendant placed in this situation could never rebut the government's assertion that his prosecution is untainted if indeed there was some collusion or some chicanery between one jurisdiction and another or between one particular District Attorney and another.

Professor Mansfield points up another reason for indicating that a witness would be much worse off, and that is this argument:

That upon disclosure by a person that he or she committed a particular offense, the District Attorney, once knowing of the commission of that offense by this particular

individual, I would feel would be compelled or forced, to go out and make the case, albeit he would try to make it independently. So you therefore have an individual who, before he gave the testimony, compelled as it is, would be able to go to sleep at night knowing that there was no concerted effort to have him indicted, whereas once he gave the compelled testimony, he'd have to go to sleep each and every night knowing that that District Attorney had sent his investigators out into the field to make a case and not to rest until they made a case.

Q Do you think that's -- of course, we're speculating, but you are giving us that speculative hypothesis in a case where the person has been affirmatively granted immunity from prosecution. Do you still think that a District Attorney would be so obsessed with making a case after having entered an affirmative grant of immunity against prosecution?

MR. QUERQUES: I'm sorry, Mr. Justice Stewart, I'm arguing against use immunity.

Q Yes, I know. Use and fruits, you referred to it.

MR. QUERQUES: If he were given immunity from prosecution, I wouldn't make the argument, because then the District Attorney would be wasting his time by still trying to go out there and make a case. If the man had immunity from prosecution --

Q Well, I understand that.

MR. QUERQUES: -- he would know he could not prosecute.

Q I understand your argument, if there were transactional immunity, he would be wasting his time.

MR. QUERQUES: Yes.

Q But your point is that with what you call "use immunity," and it is a little more than use immunity, as I read the statute. It is use of the answer or evidence, or evidence derived therefrom --

MR. QUERQUES: Yes.

Q Use and fruits, as it is generally put, but my question is just this, to your speculative argument, that a prosecuting attorney, after a person had been affirmatively given this immunity, that he would be obsessively motivated to go out and make a case against the man?

MR. QUERQUES: I think he would, yes. I think he would. And if you look at it in this fashion, there may be more light on it. Take the situation where the prosecutor is asking the question in a case where he anticipates only one defendant. Let's take, for example, a rape case with only one defendant. If there is only one defendant, what possible reason would he have, under a use immunity statute plus fruits, to interrogate that individual if he did not want to use the answers somehow to the benefit of he, himself, the prosecutor?

Q Of course, generally, one does not find the

immunity statutes used in that type of criminal activity. Isn't that true? So this Commission, this State Commission, was not set up to investigate or deal with individual crimes of violence, was it?

MR. QUERQUES: No.

Q It was set up to deal with organized crimes.

MR. QUERQUES: No, that's correct, but when we are talking about use immunity statutes, I think that we have to include the individual cases as well as the so-called conspiracy or multiple-defendant cases because in my honest judgment such a statute will be used in both kinds of cases.

Q Is it used when there is only one accused person involved or is it used where there are multiple persons?

MR. QUERQUES: I think it would more often be used, Mr. Chief Justice, in the multiple-defendant type case, but I also believe that it would also be used in the individual defendant.

Q Can you give us an illustration of an individual crime in which they would have any occasion to use this?

MR. QUERQUES: Yes, I think in the rape that I have mentioned that if there were a robbery which was carried off by a single individual, if there were a murder that was perpetrated by a single individual --

Q What would be the point of giving him any kind of immunity?

MR. QUERQUES: That's exactly my point, that if he called him in under a use immunity statute and he interrogated him, he wouldn't be giving him anything, because he could still prosecute the individual. Therefore, if he called him in, he must have had some evil motive on his mind vis a vis that particular defendant. If he knew that only one man committed the crime and he called in a single individual and questioned him under use immunity, that prosecutor knows if he ultimately came into independent evidence, he could indict the individual, whereas he wouldn't do it if he had the transactional type immunity.

Q Do you think prosecutors are ever moved to investigate when someone takes the Fifth Amendment?

MR. QUERQUES: I certainly do. Yes, sir.

Q Do you think if you call someone before a Grand Jury and ask him a question and he rightfully claims the Fifth Amendment as he is wholly entitled to do, the prosecutor might be stimulated into launching an investigation about it?

MR. QUERQUES: That would depend upon the facts, but if there is stimulation, and I would concede that there would be some depending upon the personality of the particular District Attorney, the stimulation in such a case would be much, much more mild than the kind of stimulation that would occur if, under one of those use immunity statutes --

Q It depends a lot on the prosecutor, doesn't it?

MR. QUERQUES: -- the prosecutor ended up with a confession.

I would think, Mr. Justice White, that any prosecutor under a use immunity statute who had, in effect, a confession from the witness that he called in, would be obliged to go out and try to make a case. I can't imagine him sitting back and saying, "I have a transcript wherein A admits murder and, yet, I'm not going to do anything about it by making an independent case." And so A is much worse off.

We came to another consideration which I think probably is the most crucial of all. It is the one that disturbs me as a lawyer the most, and that is subjecting a witness to this cruel trilemma, referred to by Justice Brennan, of perjury, self-accusation, or contempt, and I have analyzed the situation and come to this conclusion: That if a person --

Q That goes to the Constitutionality of immunity statutes at all, doesn't it?

MR. QUERQUES: Mr. Justice White, I am sorry. I did not hear the question.

Q That goes to the Constitutionality of any immunity statute, doesn't it?

MR. QUERQUES: Yes. Yes, except that here there is a particular flavor to it because of this trilemma that is forced by the witness. I would think that the self-accusation or confession situation is the least likely to occur because I

think that that is the one that the witness would want to avoid the most, confessing to the crime. I would think, on the other hand, that the one most likely to occur would be that he would elect, because he is forced to testify, to commit perjury. I can concede he may give a false alibi or some other story, if it is a white collar crime, say he did not have criminal knowledge or wilful intent sufficient to satisfy the statutes. I could even concede that he might plead entrapment. But in any event, I see that he would set up some perjurious story so that he would not have to confess and at the same time he would not have to go to jail for contempt.

I think it is fairly likely that the person who wouldn't want to accuse himself and at the same time wouldn't want to run the risk of perjury would do this: He would say, for example, there are two years or maybe three years left before the statute of limitations expires, and so I will take the contempt and have myself incarcerated and wait out the statute of limitations because it is easier to wait out a two or three year balance on the statute of limitations than it would be to face the indictment and prosecution and then, perhaps, do 10, 20, or 30 years in jail.

Now, because that situation will occur and it will occur in every single case where use immunity is used, the witness will have to make a choice of one of those three -- there is no other choice -- I say, most respectfully, that the

state, the Federal Government, whoever it may be, is doing something very, very distasteful and something very, very contrary to the American concept of justice because it is actually inducing or coercing a crime to take place which has not yet taken place, to wit, the crime of perjury. If that isn't the result, the result is that the man goes to jail for contempt. That is also foreign to our system of justice because you call in a suspect, he refuses to answer the questions, and he ends up in jail for contempt whereas he should have ended up in jail only if the state, in shouldering its responsibility, made an accusation by way of indictment and produced evidence in court beyond a reasonable doubt.

I also wonder as to what role we lawyers would play in such a situation, and I think, most respectfully, that lawyers would be compelled almost to abandon a client. I can't imagine that a lawyer would feel at all comfortable with a witness facing this trilemma. Speaking for myself, and many others like me, you would be most uncomfortable sitting next to a client knowing that that client has confessed.

There is one case in this Court that, in essence, says a lawyer who tells his client to cooperate and give up all his rights isn't worth his salt. I wouldn't feel like I were worth my salt if I told a man to give a confession rather than require the state to prove its case.

The witness sitting in that chair under use immunity

is sitting in -- let me call it -- a "warm chair." The chair next to him occupied by the lawyer is just as warm for the lawyer. Indeed, it might be very, very warm. It might be hot. Because the lawyer would have to be concerned that if his client took the second choice, to wit, perjury, the lawyer might ultimately be accused of suborning that perjury.

And if we get down to the third possiblility, and that is contempt, the lawyer then really is useless to the client, because if the client says to the lawyer, "Under this situation, I'm going to go do some time in jail until the statute of limitations runs out," there isn't anything that the lawyer can do for him. So I say for these reasons and many others which I don't have time to elucidate on, and hopefully, some of the other lawyers who appear in the other two cases will, that transactional immunity as it presently stands should remain; that use immunity is very, very foreign to our system of justice and will work such hazards and will work such injustices as time will prove if it ever comes to be. Thank you.

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

Mr. Phelan.

ORAL ARGUMENT OF ANDREW F. PHELAN, ESQ., ON BEHALF OF THE APPELLE, NEW JERSEY STATE COMMISSION OF INVESTIGATION

MR. PHELAN: Mr. Chief Justice, and may it please the Court:

It is the Appellant's contention here this

morning that he has been incarcerated under the New Jersey State Commission of Investigation immunity statute and he has been incarcerated under a provision which is unconstitutional.

A long line of cases in this Court have held that an immunity statute may be valid. I submit to you, my for the record will state, that the Commission statute is and was designed to be, a use plus fruits statute. It was so designed to attempt to reach a particular problem that existed in the State of New Jersey in the period of the spring of 1968. It was so found to exist by a joint legislative committee of the Assembly of that state.

Now, the statute itself recognizes that in order for the immunity statute to supplant the privilege under the Fifth Amendment that it must be co-extensive with the privilege which it seeks to supplant. It must never put the individual in a situation in which he would be in a worse position than had he exercised his privilege or been allowed to exercise his privilege.

Now, we contend that this statute does just that. The Fifth Amendment says, "No man shall be compelled in a criminal case to be a witness against himself." Our statute provides, after appropriate steps of due process within the Commission and within the state process that an individual shall not have any of the testimony or evidence or evidence derived therefrom used against him in any criminal prosecution. We submit that

under these circumstances the individual is in exactly the same position as he was had he not been granted the immunity following his claim of the privilege.

Now, since of course Counselman in 1892 was considered a pure use statute, I for the record, and the Commission for the record and, I feel, the state, would certainly admit that a pure use statute alone which did not protect against the use of derivative evidence must be unconstitutional. It completely challenges logic and reason to be able to say that you could compel a man to answer and then go out and secure evidence on the basis of that answer and use that against him.

By the same token, in the Brown Decision some four years later, the transactional immunity statute, or the absolute immunity statute, which I believe flowed from Counselman and perhaps at a time when we were not considering the middle ground, that absolute immunity statute was upheld and that granted, I submit, a much broader immunity than that which the Fifth Amendment does require.

I submit also that it, when utilized, it grants a gratuity to the criminal upon whom it seeks to exercise it. I further suggest that it does an injustice to the best interests of the people themselves.

Now, in that middle ground, then, we come to the point of just what is it that the Fifth Amendment will require of an immunity statute in order for it to be constitutional? And I

suggest that that is a use plus fruits, an absolute situation whereby, once you compel a man to testify, you may, under no circumstances, use anything -- and I use that term with great consideration -- anything whatsoever that flows therefrom, for if we have compelled him to give up a very sacred right, self-incrimination, against self-incrimination, that then the government must bear the burden and must bear the duty, and a very heavy duty perhaps it should be, to show that nothing has ever been used against that individual in connection with any future prosecution.

Now, I submit that under such a rule of law, with a use plus fruits statute, tied in with a heavy burden being placed upon the government, that was noted in note 18, the Murphy Decision, that the burden was placed upon the government to establish independent source of evidence, that the individual may very well be in a better position than he is today under a transactional statute, and I say that for this reason:

That under the old Heike Decision in 1913, that the individual must prove as an affirmative defense that that transactional immunity statute has protected him against subsequent indictment.

I would submit that under a use immunity or a use immunity plus fruits statute, that the burden here would be on the government.

Now, since the Murphy Decision --

Q Tell me, why doesn't New Jersey grant absolute immunity? Why doesn't New Jersey have a kind of a statute that does grant transactional immunity?

MR. PHELAN: The use plus fruits --

Q You say it's an extravagant -- on the one hand that it is an extravagant application of this amendment, but on the other hand you seem to say that use immunity is even more extravagant.

MR. PHELAN: I believe, Mr. Justice White, that use immunity alone, which would allow the government or the people thereafter to go out and secure evidence based upon the testimony compelled, must be unconstitutional.

Q I agree, yes.

MR. PHELAN: I further argue that a transactional or an absolute immunity is too broad, is that it gives too great a gratuity to the individual who seeks to utilize that privilege and then forces the people to secure to him absolute --

Q Well, you're suggesting that New Jersey limit its statute to use immunity because it can conceive of situations where it would like to be able to prosecute the gentleman they have had before the Grand Jury for the very crime about which he testified.

MR. PHELAN: I don't suggest, sir, that they would like to prosecute in our situation --

Q Well, isn't that the only thing you are protecting

the only state interest you are protecting, the right to prosecute again or the right to prosecute at some time in some circumstances for the very crime about which you have asked him questions?

MR. PHELAN: In the first instance, I would say that you were seeking to protect the individual and his constitutional rights. In the second instance, I would say that you were protecting the public interest in their right to be able to get at, perhaps, the area of crimes involving involved conspiracies or subversive activities.

Q With an absolute immunity statute, you can get your evidence of the crimes that you want to prosecute for, but you want to retain the right to prosecute this man for the very crime about which you have asked him questions.

MR. PHELAN: If such evidence of an independent nature should be developed, either in a different jurisdiction or at a later date, and if --

Q And you think that that possibility is significant enough to warrant coming clear to this Court arguing for its retention?

MR. PHELAN: Absolutely, sir.

Q So it is a real possibility that he may be prosecuted for the very crime about which he has been interrogated?

MR. PHELAN: I would have to say that there certainly

is a real possibility of that occurrence.

Q It is substantial enough, anyway, for New Jersey to have made this choice and to defend it in this Court.

MR. PHELAN: Well, if I may just draw this distinction, Mr. Justice White, ours is the State Commission of Investigation. We are purely an investigative body. We have actually no prosecutory responsibilities. We have no criminal jurisdiction whatsoever. Our function as conceived by the New Jersey Legislature was, with a broad area of responsibility, to determine facts which would then allow us to make recommendations to the Legislature for perhaps the enactment of legislation to correct the problem as it was seen to exist in the spring of 1968.

Q Well, in some situations, if I understand you correctly, New Jersey would be better off with an absolute immunity statute than with the use immunity statute. That is what I gathered you said, that the -- a moment ago -- that the gentleman being interrogated might even be -- the use immunity would be advantageous to him as compared with transactional immunity.

MR. PHELAN: I suggested that perhaps the individual might be in a better position because with the use plus fruits the burden of establishing the relationship would be on the government and on the people that return the indictment. There is now, as is my understanding of the law, that with a

transactional grant of immunity, should he later be indicted, that he must prove that as an affirmative defense in the defense of his case. That was my sole position in suggesting that he might be in a better position.

Certainly I think that if our statute were transactional or were considered to be such, or absolute, we would not be here today.

Q Well, I'm just -- the real purpose of my question is really to inquire about what New Jersey's estimate is of the actual importance of this issue in terms of how often will it come up. Do you think it really makes a difference to New Jersey, to the interests of the State of New Jersey in just lots of instances?

MR. PHELAN: I think it makes a very substantial difference, Your Honor.

Q So really you are saying that there is a substantial enough chance you would want to prosecute, say, Mr. Zicarelli, for the crime about which you have been asking him questions?

MR. PHELAN: No, no, I'm not suggesting that at all, sir. What I am suggesting is that I believe that, under the circumstances that existed in New Jersey in 1968, that there was a sufficiently severe problem to warrant the enactment of this statute in order for us, as a fact-finding body, to secure information which could give rise to testimony, not --

Q Well, I know, but you could have done that with a transactional immunity sanction.

MR. PHELAN: But at the same time, we would then have been granting a cloak of immunity to Mr. Zicarelli.

Q Right. So again I say, you want to retain the possibility of being able to prosecute Mr. Zicarelli on independent evidence.

MR. PHELAN: Correct, sir, with the burden of proof being placed upon the government should any indictment ever be forthcoming. Now, then --

Q How much weight do you put on this extraordinary situation in 1968 just by this statute?

MR. PHELAN: The "extraordinary situation," well --

Q Well, let me ask this: Is it still in effect, the statute?

MR. PHELAN: The statute is still in effect, it's just --

Q I kind of got the idea that you had an emergency situation in 1968.

MR. PHELAN: In the spring of 1968 there was convened in New Jersey a special legislative committee which found that at that time a serious organized crime problem did exist within the state.

Q Well, do you still have the Commission?

MR. PHELAN: The Commission is still in effect.

Q And the statute is still in effect?

MR. PHELAN: Yes, sir, it is.

Q Well, my whole point is, what is the great value of what happened in 1968? To me, I would consider the statute as of right now.

MR. PHELAN: Well, we hope that to some extent the problem has diminished. We do recognize that --

Q Well, when the problem disappears, will the statute be repealed?

MR. PHELAN: I would frankly hope not, sir, because if the statute, if the use plus fruits immunity statute --

Q Well, then, I'm right. You say it's a good statute now and it's good as long as you care to use it.

MR. PHELAN: That is my position, sir.

Q I thought that was your position.

MR. PHELAN: Yes, sir.

Now, in terms of the protection of the individual, since 1892 to the present time, which has been some 80 years, there has been developed in this Court a rule of law and a body of law which did not exist at that time, and to that I am referring to the exclusionary rule of law that has been utilized in connection with the Fourth Amendment cases, under unreasonable search and seizures, under electronic eavesdropping, under the Sixth Amendment, under the right to counsel and coerced confessions. Now, this body of law did not exist

and was not available for the Court's consideration under Counselman, nor was it available under Brown, and I submit that this Court has now developed a new body of law which is capable and is absolutely certain of protecting the rights of individuals should they be found to be abridged under the Fifth Amendment privilege. And I suggest that, in terms of the fact that the information and the protection which might be secured to the individual, of course, that information is always in the hands of the government.

It was in the hands of the police department in the Miranda Decision. It has always been in the hands of the government in the electronics eavesdropping cases, or the hands of somebody else, and still, our courts and the judiciary throughout this country has found it capable to be able to protect the rights of each and every individual.

Now, there are, I submit to the Court, a number of advantages, certainly, to a use plus fruits immunity. These, I believe, in terms of being able get at involved conspiracy cases where you are granting solely a use plus fruits immunity to an individual, will allow us a great opportunity to inquire and to determine the extent of activities in which this individual has been involved, while at the same time, protecting the interests of the state, perhaps, in a future prosecution should that information develop at a later date or in another jurisdiction.

Now, for instance, within the State of New Jersey, we have 21 counties. Where we are investigating a certain issue in the southern part of New Jersey, and we seek to secure immunity to an individual, it may very well be that under a transactional statute or an absolute statute, we may be granting an individual immunity and granting him absolute protection in the future, whereas, at the same time, and completely unbeknownst to us, Mr. Hogan in New York may be conducting investigation or the District Attorney and Mr. Swetzer in Philadelphia may be conducting investigation relating to the same individual.

We have absolutely no way of knowing exactly what these individuals are doing, recognizing the entire spread of the conspiracy of organized crime, recognizing that it knows no county lines, or international lines, for that matter.

Q Or the Federal Government may be investigating it.

MR. PHELAN: Or the Federal Government itself may be investigating, yes, sir, the United States Attorney's Office.

Q In which event you couldn't grant absolute immunity.

MR. PHELAN: Unless this Court should adopt, Your Honor, a use and fruits.

Q Unless we overrule Murphy against Waterfront.

MR. PHELAN: Unless we recognize a limitation, I believe, which was in -- suggested or implied in Counselman,

and recognize that a use plus fruits immunity, which was suggested in Murphy, is a constitutional and a viable standard.

Now, if I may just add one thing, I think that under a use plus fruits statute, we may very well be for the first time protecting the Defendant who is entitled under the Sixth Amendment to compulsory process and confrontation of witnesses.

I suggest this because formerly, as a United States Attorney, I found that when a person is called as a witness by the Defense, and that individual elects to claim his privilege, the government is effectively precluded from securing that evidence because the only thing we could grant him would be absolute or transactional immunity. That fact deprives that Defendant of the right to confront that Witness and the right to at least examine, on the basis of what he contends is his defense. Now, that situation can be corrected with a use plus fruits immunity and we will agree for the first time, realistically, extending to the Defendant his right of compulsory self process and confrontation, and we'll be doing that because then the United States Attorney cannot contend, nor can any other prosecutor contend realistically that we can't grant him transactional immunity because of the fact that we will be giving him an absolute protection in the future, and I submit to you that this in itself may be the most important issue that we have under the use plus fruits. Thank you, sir.

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

Mr. Kugler.

ORAL ARGUMENT OF GEORGE F. KUGLER, JR., ESQ.,

APPEARING AS AMICUS CURIAE

MR. KUGLER: Mr. Chief Justice, and may it please the Court:

I appear here as Amicus to support the position of the Appellee, the State Crime Investigation Commission of New Jersey, and the 24 states that join in the views expressed in our Brief.

It should be noted that the states still bear the primary responsibility for enforcement of the criminal law. Most crimes are certainly matters of local concern. These immunity statutes have been an extremely important part of our arsenal in fighting crime, particularly organized crime and official corruption. One of the most important powers of any government in preventing the infiltration of crime in that government is the power to compel citizens to testify in court before Grand Juries or agencies such as the State Crime Investigation Commission.

On the other hand, we recognize that one of the most important privileges of any citizen is the Fifth Amendment privilege against self-incrimination. Obviously, there must be a balance struck between the power on the one hand to compel a witness to testify in court and the privilege on the other that anything he says may not be used against him.

It seems to me that the -- of course, it all started in Counselman, and whether you read that case as I do, merely holding that the statute in that case was defective because it didn't provide fruits immunity in addition to use immunity, certainly it must be said in all candor that, as a result of the equivocal language in that case, and the decision of Brown versus Walker right after it in which there are four Justices dissenting and indeed said that no immunity statutes are constitutional, there arose in the law and in the cases from this Court, many statements to the effect that transactional immunity was the only viable way to compel a witness to testify.

I think the first crack in the dike, if I may respectfully suggest it, came in the three cases of Garrity, Gardner, and the Sanitation Workers Case, and those cases have been tremendously helpful to the states in official corruption and, indeed, in calling before official bodies or just the boss himself, in a particular community and requiring public officials, under duress of losing their jobs, explaining any particular criminal conduct that might come to the attention of the authorities. This Court has held, I believe, and has stated that only use plus fruits immunity is necessary as a result of any testimony they give and, indeed, if they refuse to explain their activities, they may be fired.

The next crack in the dike, if the Court please, I would say was the unanimous decision of Murphy versus the

Waterfront Commission. Personally, I fail to take the intellectual step of differentiating the rule in Murphy which applies interjurisdictionally and differentiate that from those cases which would indicate a different rule is required intrajurisdictionally. That is, in the case where the compelling state also is the prosecuting state.

To answer the question of Mr. Justice White, I think there are very practical considerations that the states are faced with, and this very case of Zicarelli, we had at least five indictments and maybe six, I'm not sure, and three of them have been already tried and he has been convicted. At the time, the SCI brought him before them, and I have no doubt that the SCI would have gone into the matters contained in those indictments. We had clearly independent evidence. We were not worried about prosecuting Zicarelli on those cases. We thought that under any test we could prove that our evidence was independent.

However, we would have felt much more comforted if it had been -- if we were sure of our position that use plus fruits is being constitutional, as the statute provides. I have to say to the Court that even though we have had a use plus fruits immunity statute for some time now, in several sectors in New Jersey, we have used it gingerly for the reason that we certainly weren't sure of what the constitutional ramifications were.

Under the scheme of things, the Legislature has ordained that there shall be a State Crime Investigation Commission. In my opinion, it was absolutely necessary. They did not make the Attorney General counsel to that Commission. They said, in fact, the State Crime Investigation Commission can go out and get, compel testimony by a court order without the permission of the Attorney General. To be sure, they must give me 24 hours notice and, indeed, in a very relevant investigation of theirs, they could conceivably destroy an already-made prosecution of ours.

In New Jersey, the witness immunity statute inter-jurisdictionally, that is, the people versus the state, has been extremely effective and in many cases in which the Federal Government has recently gotten indictments. Unfortunately we have run afoul of each other in several instances and some of the cases that we have ready to go to trial may have been affected by their prosecution.

Now, I suggest to you that most all of the states have little systems of federalism, if you will, with the exception of Rhode Island and Delaware, where all the prosecution is done at one level. Certainly New Jersey has 20 county prosecutors, the Attorney General's Office and the SCI and also the cities are empowered to conduct investigations. With 450-some police forces, it is very difficult to keep from stepping on each other's toes with all kinds of cooperation, and therefore,

if, indeed, use plus fruits immunity is constitutionally sound, then it seems to me that's the practical way to have the states and local government retain their respective rights to use this very, very powerful weapon of witness immunity.

There seems to be a feeling that the states can't handle this immunity statute, that it is too rich for their blood, that inadvertently your deliberately compelled testimony will be misused in some way because of the close cooperation among the various law enforcement agencies in the state.

I say to this Court that I believe the states can use it effectively and constitutionally. I think the -- for instance, the Piccirillo Case is a splendid example of effective use of the witness immunity statute. In that case, as the Court knows, the individual had pled guilty to beating somebody with a tire iron. The prosecution authorities wanted to find out where he was hired to do so and they called him in before that court having already sufficient independent evidence tp prosecute him -- as a matter of fact, he had pled guilty -- and they did so, and he did indicate that he had been hired. Unfortunately, he did not disclose the individual that hired him, but he could have, and it would have been effective use and there is no reason under the Constitution that he should not have been prosecuted.

I believe that a simple test in handling this weapon, in this day when everyone indeed has counsel, unlike in the

days of Counselman, and the liberal discovery rules in all jurisdictions, either Constitutionally required or by rule of court, I believe that the defense counsel, and with a clear record of what's been compelled, can sort out whether or not you are convicting a man from his own lips or the fruits thereof.

I believe that the test should be the burden be on the state and that the test should be that if the defendant had remained silent, he would not have been indicted or not have been convicted, as the case may be. This test was originally suggested in council, and I believe it is a sound test and I believe the courts can handle it without violating anybody's Constitutional rights.

I urge this Court to overrule Counselman if necessary and to stick with the doctrine of the Murphy Case and apply it interjurisdictionally and I think in that way we will have much more effective law enforcement and, indeed, Constitutional law enforcement. Thank you.

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

Mr. Querques, do you have anything further?

REBUTTAL ARGUMENT OF MICHAEL A. QUERQUES, ESQ.,
ON BEHALF OF APPELLANT, JOSEPH ARTHUR ZICARELLI

MR. QUERQUES: Mr. Chief Justice, I would like to respond, just for a few moments, since I have them left, to a few things that Mr. Phelan said.

Mr. Justice White asked Mr. Phelan whether or not indeed the State of New Jersey wanted to retain the right to prosecute the man who was called about the very matters about which he was questioned, and Mr. Phelan said to the Court that his Commission had no prosecutorial responsibilities. While that is true, it is also true under their statute that they are obliged to disseminate the information which they obtain from questioning to the local prosecutors who are 21 in number, to the State Attorney General's Office and to the federal authorities. In short, anybody who might be able to use it.

Mr. Phelan indicated that this statute comes in handy in discovering evidence with respect to large-scale conspiracies. Assume that to be true, I don't believe that it is asking for anything to give a man immunity from prosecution if he helps you to solve a large-scale conspiracy case and gives testimony against 7, 8, 9, 10 or more co-defendants. It is done every day. Prosecutors like to do it and it would just actually be a continuation of that situation.

Q If that came to pass, Mr. Querques, the prosecution, whether federal or state, making use of it would have the burden of proving an independent source, is that correct?

MR. QUERQUES: That would be correct, Mr. Chief Justice.

Q If they had an independent source that was prior

to the inquiry under which testimony was compelled, why should they not be able to use the testimony from that independent source?

MR. QUERQUES: That is a very rare situation and I would think --

Q Then let's assume one.

MR. QUERQUES: -- I would think --

Q Let's assume one.

MR. QUERQUES: -- that they would be foolhardy indeed, assuming that they had an independent case, then to call in the witness whom they want to prosecute.

Q I'm speaking of another jurisdiction. Take the hypothetical that someone, I believe Mr. Justice White suggested, or someone did in response to his question, that Mr. Frank Hogan in New York is deeply involved in investigation that's being carried on with great secrecy, as some of these investigations are, and unknown to him, a witness is granted immunity over in New Jersey or down in Pennsylvania. If he can show, Mr. Hogan can show that he had this information long before the investigation in New Jersey or Pennsylvania, can you suggest any reason why he should not be permitted to use it if he can carry that burden?

MR. QUERQUES: He should be permitted to use it. I have no objection to that, but I quickly point out for the Court that he can use it under transactional immunity, too,

because under Murphy, Mr. Hogan is only barred from using the fruits. If he has an independent case, whether it be transactional immunity or use immunity, Mr. Hogan can proceed with his case.

Q Well, this Court isn't in a position to make a choice between two different kinds of immunity, one of which is more desirable than another, Mr. Querques. We are only required to make a decision whether the Constitution forbids the particular one which is before us today.

MR. QUERQUES: Yes, I quite understand that and, for the reasons I've indicated, I think, with respect to the questioning jurisdiction, the Constitutional standard is only met when the questioning jurisdiction gives prosecutional immunity or absolute immunity.

Q Why should New Jersey treat -- or why should the Constitution treat Mr. Hogan differently, say, than a prosecutor in some other county in New Jersey?

MR. QUERQUES: Well, Mr. Justice White, I --

Q Just because it happens to be part of the same state, is that it?

MR. QUERQUES: Well, because Mr. Hogan is not bringing in that witness. He's not making a decision.

Q Neither is the prosecutor in the other county.

MR. QUERQUES: Well, if I understood your question, it assumed that, for example, a New Jersey prosecutor would bring

in a witness and question him.

Q Well, you're saying that if the District Attorney in San Francisco calls a witness before a Grand Jury and asks him some questions, that if he gives him immunity, that immunity must be absolute --

MR. QUERQUES: Yes.

Q -- transactional immunity and that a prosecutor in Los Angeles who is, in great secrecy, also developing a case and has a case against the gentleman who is being questioned in San Francisco may not go forward with his independent case -- the prosecutor in Los Angeles may not, although the prosecutor in Las Vegas or the prosecutor in Washington may go forward with it as long as he can prove an independent source.

MR. QUERQUES: Yes, because he is not from the questioning jurisdiction.

Q Well, so your answer is yes.

MR. QUERQUES: He hasn't upset -- he hasn't upset the balance.

Q We should treat the prosecutor in Los Angeles differently than the prosecutor in Las Vegas --

MR. QUERQUES: No, I don't think --

Q -- or Washington?

MR. QUERQUES: Excuse me, sir. I don't think you are treating them differently. You are analyzing the situation

to determine whether or not that questioning prosecutor, number one, knows what he is doing and you are telling him in advance that if you call in Mr. X, and you question him, you'd better be prepared to give him transactional immunity, because we can bind you in that way under the United States Constitution.

On the other hand, Mr. Prosecutor in New York, we can't bind you under the Constitution to giving prosecutional immunity because you didn't call in that man; you didn't make a decision. So we can't bind your hands. We can't tell you what to do, other than to say, you can't use the fruits of what the prosecutor in San Francisco did.

Q Neither did the prosecutor in Los Angeles call him in, in my example.

MR. QUERQUES: I'll make it just as clear as I can. A prosecutor who does not call in the witness should not be bound to the same standard as the prosecutor who has plenty of time to think about what he is doing and calls in the individual.

Q All right, then, let's say the prosecutor in San Francisco would be bound, but what about the prosecutor in Los Angeles?

MR. QUERQUES: Not bound, sir.

Q Okay.

MR. QUERQUES: San Francisco-Los Angeles, both in California, would be bound, sir.

Q So you say, both are in the same state, even -- though both are in the same state --

MR. QUERQUES: He'd be bound.

Q Oh, he is bound, you say.

MR. QUERQUES: Yes, I would say he is bound, because they are working under one sovereign.

Q He's a different prosecutor.

MR. QUERQUES: But he's working in the state -- he's working within the same framework.

Q Well, but in the --

MR. QUERQUES: He's working under the same state.

Q -- state where a District Attorney is elected in each district, the sovereign of that District Attorney is not the state. The sovereign are the voters who elected him. Isn't that true?

MR. QUERQUES: Well --

Q In that district, not in others.

MR. QUERQUES: Mr. Chief Justice, that is one way to look at it. I can't look at it that way.

Q You were emphasizing earlier, Mr. Querques, something you called a trilemma. You seemed to suggest that the law has some kind of duty to spare a man from the temptation or, as you put it, the pressure to commit perjury in order to save himself.

MR. QUERQUES: I don't say it should spare him, I

say it shouldn't induce him to do it.

Q Well, what about the man who takes the stand in a criminal case in his own defense and testifies? On direct examination, of course, his counsel is going to be quite cautious about what he asks him. I would assume you would concede that?

MR. QUERQUES: Yes, sir.

Q Does not the broad power of cross examination put that witness, the defendant, under a great temptation or pressure, if you want to use that term, to perjury in order to avoid unpleasant answers?

MR. QUERQUES: I would say yes, it does, to you, but it does it in a -- it does it in a different framework, and don't lose sight of the fact, please, that the defendant in the given case, when he takes the stand, he takes it knowing that he has waived his right under the Fifth Amendment, whereas the fellow who is sitting home having dinner one evening and receives a subpoena, he hasn't elected to take the stand. He is compelled to take the witness chair, whether it be Grand Jury, SCI, or anything else, there is that crucial difference.

Q I was focusing just on the pressure. You had suggested that it was unfair to put a man under pressure to commit perjury in order to save his neck --

MR. QUERQUES: Yes.

Q -- as you put it. But the pressure is the same

kind of pressure by way of cross examination in that sense, is it not?

MR. QUERQUES: I would concede to you that once the defendant in a trial elects to take the stand, he, yes, is under pressure. But the pressure to begin with is a lot less and it is a pressure he is willing to take as against a pressure against which he has no Constitutional guarantee. He has waived that Constitutional guarantee by walking into the chair. The man we're talking about hasn't waived anything. They have forced him into the chair. And in forcing him into the chair, they force him into that trilemmic situation, which he can't live with, his lawyer can't live with, and I say that this society shouldn't live with it.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Querques, thank you.

And thank you, gentlemen.

The case is submitted.

(Thereupon, at 11:10 a.m., the case was submitted.)