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In the

Supreme Court of the United States

ALBERT SARNO, et al.,

Petitioners,

vs. No. 70-7

ILLINOIS CRIME INVESTIGATING COMMISSION,

Respondent.

Washington, D. C.
January 11, 1972

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HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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v.	:	No. 70-7
ILLINOIS CRIME INVESTIGATING COMMISSION, Respondent	:	

Washington, D. C.

Wednesday, January 11, 1972

The above-entitled matter came on for argument at 11:10 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, JR., Associate Justice

APPEARANCES:

FRANK G. WHALEN, ESQ., 111 West Washington Street, Chicago, Illinois 60602, for the Petitioners

JOEL M. FLAUM, ESQ., First Assistant Attorney General, 188 West Randolph Street, Suite 2200, Chicago, Illinois 60601, for the Respondent

C O N T E N T S

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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. 70-7, Sarno against the Illinois Crime Investigating Commission.

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

ORAL ARGUMENT OF FRANK G. WHALEN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. WHALEN: Mr. Chief Justice, and may it please this Court:

Two questions are presented here for this Court's consideration. The first question is, considering the implication of the questions, the circumstances, and setting under which they were asked, were the Petitioners justified in pleading the Fifth Amendment under a state immunity statute purporting to afford transactional immunity?

And the second question, must the state affirmatively demonstrate to respondents, when testifying pursuant to the Illinois Immunity Act, that an immunity as broad in scope as the Fifth Amendment Privilege is available and applicable to them?

In 1963, the Illinois Legislature created the Illinois Crime Investigating Commission, the sole purpose of which was to investigate organized crime in the State of Illinois.

In 1968, the Petitioners, Sarno and Cardi were

ordered to appear and give testimony before this Commission. They appeared and refused to testify, pleading the Fifth Amendment.

Now, as to the circumstances and the setting that were found at the time they appeared, the first would be that Illinois at this time had a double standard of Immunity Act. There was the Grand Jury Act, which applied to proceedings before Grand Juries and before trial courts. Under this, the Grand Jury Act, a witness was given immunity from prosecution for any offense shown in full or in part by such testimony. Further, this Act, the Grand Jury Act, had been interpreted by the Illinois State Supreme Court in People v. Walker, 28 Ill. 2d 585, and there the Supreme Court, in very strong language upheld the constitutionality of that Act. In fact, the Court there said that the statute eliminates the constitutional privilege against self-incrimination.

Now, the State of Illinois Immunity Act, which we are concerned here with, provided that a witness "shall not be prosecuted for or on account of any transaction, matter, or thing concerning which he gave answer." The Act further contained this provision, "The Court shall not order any such person to testify or produce evidence if it reasonably appear to the Court that such testimony or evidence would subject such witness to an indictment, information, or prosecution under the laws of another state or of the United States."

This statute had never been interpreted by the State Supreme Court and was first interpreted on this instant appeal.

This was a public hearing without the privacy which attends a Grand Jury proceeding and it became obvious to the Petitioners that the questions asked were based upon records that had been at a prior time illegally seized from the home of the Petitioner Cardi.

Q Is this Commission a legislative commission, Mr. Whalen?

MR. WHALEN: Yes, it is, sir -- Mr. Chief Justice, yes.

Q It is much like, I suppose -- or is it, I'll put it, is it much like a Congressional Committee conducting an inquiry into its particular subject?

MR. WHALEN: I would liken it to that, sir.

Q What are its duties; in the event it does have some witnesses before it who do answer questions, what does it do with them?

MR. WHALEN: Aaah -- well, I -- uh, I can only assume, Mr. Justice, that it is to report this to the various prosecuting agencies.

Q Not just to the State Legislature?

MR. WHALEN: No. And I'm -- I am really not sure of my answer. But it is my understanding that that would be

the function.

Q So if you are correct in your understanding, this agency is akin to the New Jersey Commission from which we have just heard?

MR. WHALEN: Oh, I believe very much so.

Q Rather than just a legislative --

MR. WHALEN: Yes, yes, indeed.

Q -- adjunct?

MR. WHALEN: That is my understanding, sir.

Q Of course there is nothing to prevent a committee of the Congress, when it conducts an investigation, it's traditional, is it not, that all of those reports are made available to the Attorney General of the United States if they seem to disclose violations of law?

MR. WHALEN: I believe so.

Q As a routine?

MR. WHALEN: Yes, sir. Yes, Mr. Chief Justice.

Q In the first instance, does this Commission report back to the Legislature, do you know?

MR. WHALEN: Aaaah, it is my understanding that it does, for the purpose of the Legislature enacting further laws.

Q Is its report made public?

MR. WHALEN: Its report is made public. Its hearings are public, in every sense of the word public. In fact, it has been advertised, in other words. It is a very public

proceeding. And under these conditions, the Petitioners, it became apparent that the questions were based upon records that had been illegally seized from the home of the Petitioner Cardi on a previous occasion.

These records had been ordered suppressed in the Trial Court and returned to the Petitioners. However, they later, at this time, found themselves confronted with them.

Further, at this time, Illinois had six statutes that carried immunity provisions and contained the phrase, "or subjected to penalty or forfeiture." The State of Illinois at this time had a "malice is the gist of the action" statute providing a six-months imprisonment in the county jail and had at this time enacted a law making criminal usury a felony.

Further, as to the setting and circumstances, the State of Illinois at this time had no provision for discovery in criminal cases.

In this setting and under these circumstances, then, the Petitioners were examined concerning more than 200 transactions and it was apparent that in the event of future prosecutions it would be impossible to ascertain whether or not the prosecution was based upon evidence independently obtained or upon the "fruit" or the "links" of the compelled testimony.

The questions that were posed to the Petitioners fell

sic) into five separate categories. They have been abstract and they are briefed. And I would refer to one, the question at abstract 42, question 12 and ask, supposing the Petitioners had been asked only this question? The question:

"At what places in Cook County have your juice customers met you to make their weekly payments?"

And Petitioners gave answers to the question.

Assume, then that the state went to these places, interviewed all those found there and learned from them that Petitioners had committed any one of the offenses punishable under the criminal code, whether committed against the particular persons that they interviewed or against some persons known to them.

Well, Petitioners would then be in a position where they had not been asked to give answer to any act of violence. Nevertheless, the answer to the question would be the link necessary to prosecute them for an offense of violence.

They further believe that the Illinois State Legislature, when creating this Commission, did not intend to afford or did not intend for it to afford an immunity as broad in scope as the Fifth Amendment privilege, because two years after the opinion of the Illinois Supreme Court in People v. Walker, in which they upheld the constitutionality of the Grand Jury Act, this Immunity Act was amended, but the pertinent language to which I have referred remained untouched

which indicates to me, certainly, and to the Petitioners, that the Legislature, under this Immunity Act, did not intend -- certainly, they did not afford an immunity as broad but the Petitioners believe that it was not even intended.

Q Well, what has the Supreme Court of Illinois held with respect to whether this statute is co-extensive with the Fifth Amendment?

MR. WHALEN: It was first interpreted on this instant appeal and there the Supreme Court held that, under this statute, the Court did not have power to grant express immunity but that Murphy v. Waterfront supplied the necessary element and held it constitutional. Now --

Q Held it co-extensive with the Fifth Amendment?

MR. WHALEN: Co -- yes.

Q Well, then, let's pursue the particular case. You're concerned about this client that you represent here. Suppose he should be prosecuted in the future, assuming hypothetically this Court were to affirm -- take the same position as the Supreme Court of Illinois -- and then he were prosecuted for something and you claimed that it was derivative from the questions and answers in that inquiry. Would not the Supreme Court of Illinois be bound under its holding to afford him whatever protection the Fifth Amendment would have afforded him?

MR. WHALEN: Provided, Mr. Chief Justice, that he

could establish that that evidence was independently obtained.

I do not believe that it was intended, nor do I believe that under the language of the statute this Fifth Amendment privilege was extended, certainly not an immunity as broad as the privilege.

Q The Supreme Court of the State of Illinois treating the question has said that it is co-extensive with the Fifth Amendment. Now, that's clear, isn't it?

MR. WHALEN: Yes. Well, what they -- oh, sorry --

Q Well, in reviewing any future conviction, would they not be bound to see to it that he got that degree of protection? By whatever steps --

MR. WHALEN: Illinois has never decided that the burden is upon the prosecution or on whom the burden is placed. I could only answer that there would be no way for the Petitioner to bring it to the attention, because he couldn't tell. He couldn't tell because, you see, they are only asked -- they are referring to any answer to any question that he gave answer, and it leads, leads, and leads to others that he did not give answer. I cannot conceive, Mr. Chief Justice how, as a Defense Attorney, how the Petitioners in a subsequent prosecution could ever determine whether or not this prosecution was based on independently obtained evidence or was the fruit of the links. And, in addition, Illinois at that time, we do now have, by rule of

the Supreme Court, not by a statute, not by any act, we do have a limited discovery, but at this time there was no discovery in the State of Illinois criminal cases and I don't know how counsel could be of assistance to a petitioner faced with a subsequent prosecution in ascertaining that fact.

Q Did you present to the Supreme Court of Illinois the issue or the claim that this statute was unconstitutional because it didn't grant absolute immunity but only use immunity?

MR. WHALEN: I did, Mr. Justice White.

Q And it decided that the statute granted as much as Murphy required and that that was enough?

MR. WHALEN: Asah -- we were concerned there with the provision that -- where the court -- the reason we appeared in the court --

Q I understand that. That's a different issue.

MR. WHALEN: Yes.

Q That's a different issue --

MR. WHALEN: Yes.

Q -- and I asked you did you also present the issue of absolute as against use immunity to the Supreme Court of Illinois?

MR. WHALEN: No, it wasn't raised in that manner, Mr. Justice White.

Q And the Supreme Court of Illinois didn't pass

on it, did it?

MR. WHALEN: I'd say they did not.

Q Well, what's the issue doing here?

MR. WHALEN: Aaah -- whether or not the statute affords an immunity as broad as the Fifth does?

Q Yes.

MR. WHALEN: It is our contention that under these circumstances, it does not, and that it was not intended to.

Q You disagree with the Supreme Court of Illinois, then.

MR. WHALEN: I certainly do, Mr. Chief Justice.

Q Well, would that -- and I repeat -- would that Court not be bound, in a future case against your particular client, which you claimed was derivative from this investigation, would they not be bound to give him all the protection that the Fifth Amendment gives him, as construed in Klein and Murphy, among other cases?

MR. WHALEN: Yes, sir, provided -- provided, Mr. Chief Justice, that he could establish that this was the fruit or the link, and he alleges that under these circumstances he could not. And, of course, you say Klein and Murphy --

Q You say, I take it, that they must grant absolute immunity?

Q Transactional immunity.

Q Transactional immunity?

MR. WHALEN: Yes, I say that, while this statute purports to grant transactional immunity, it does not.

Q Well, the Illinois Supreme Court did not hold one way or the other on that question, as I read their Brief.

MR. WHALEN: It did not, sir.

Q You say, constitutionally, you are entitled to transactional immunity, your clients are.

MR. WHALEN: Yes, Mr. Justice.

Q And I would suggest, off-hand, that just a mechanical reading of the first part of 203-14 seems to grant your client transactional immunity, does it not? It uses the very word "transactional."

MR. WHALEN: It does use the word "transactional." But it also uses the language, "to which he gave answer," and we do not believe that that affords him transactional immunity.

Q "To which he gave answer or produced evidence."

MR. WHALEN: Yes, because, as the example that I have given, and which is abstracted, the question, "Where in Cook County do your customers meet you to make your juice payments?" Now, he's not asked about anything -- any question -- he gives no answer regarding any claim of violence. However, if he answers this question and the state authorities go to these places and interview whoever is there and learn of a

crime of violence, he would be absolutely unable. In other words, what we believe is that if this statute be only designed to represent an exchange for the privilege, it is a poor exchange, because the petitioner winds up much the worse for it.

Q Well, the fact is that the Illinois Supreme Court really hasn't been construed as acting very helpfully in that.

MR. WHALEN: That is true, Mr. Justice.

Q I had the idea you were also objecting in this case to the second part of 203-14, that part of it that purports to give some kind of immunity, or at least directs the Commission not to require a witness to answer with respect to prosecution -- if it could lead to the danger of prosecution in another jurisdiction. Are you objecting to that or not?

MR. WHALEN: I am objecting to that, sir. It not -- it directs the Commission -- it directs the court, which was the order -- the section you are referring to --

Q Right -- 203-14 --

MR. WHALEN: Not to grant immunity if it reasonably appears to that court that the answer could involve prosecution in another state or under the laws --

Q Right.

MR. WHALEN: And we say that a witness confronted

with this situation is misled, or at least he doesn't know. There'll be doubt in his mind because he cannot tell -- he cannot tell, under those circumstances just the extent of the immunity he is being granted, and -- which leads to the -- ah -- which leads to the second question -- ah --

Q Well, he really isn't being granted any immunity, is he, in the second part of it, against prosecution by another sovereign because it is just a direction to the court --

MR. WHALEN: It is a direction to the court.

Q -- and if the court tells them to answer, that's it, isn't it?

MR. WHALEN: Aaaah -- yes, except that the petitioner faced with this statute doesn't know. Certainly, he could not be in contempt for refusing to obey a void order, and he does not know, now, under these circumstances, under these questions that have been asked, whether or not it should reasonably appear to the judge that the answers might involve him in a prosecution in another state or --

Q Of course, that's something that he can test on a Tenth Citation for refusal to answer --

MR. WHALEN: Yes, sir.

Q Can't he?

MR. WHALEN: Yes, he can do that, but he does that at his peril.

Q Mr. Whalen, way back, you said that these questions came from material that was illegally seized from -- of a Defendant, right?

MR. WHALEN: Yes, Mr. Justice.

Q And if the government used that information to go to each one of these juice joints, what would you do about that?

MR. WHALEN: This, of course, was a -- at the time that these were seized, this was at the indictment level. They were suppressed and ordered returned in the trial court. Now, had the government -- the Petitioners here would have no way of knowing. They would assume and believe that the local officials did go to the places.

Q What's the difference?

MR. WHALEN: What would be the difference? Only, sir, that if they faced a future prosecution, they wouldn't know, and, certainly, there --

Q Yes, but --

MR. WHALEN: -- the difference is that they were not granted any immunity. There wasn't even any question about immunity being granted. This was strictly a Fourth Amendment question.

Q I still don't understand why they had asked them the questions if they already had the information.

MR. WHALEN: Perhaps I don't make myself clear.

Mr. Justice, these records were seized by the City of Chicago Police Department. Now, this is prior to this Commission hearing. Those orders were ordered -- those records were ordered -- were suppressed at trial and ordered to be returned and were returned. We assume, of course, that they were photostated, or one jurisdiction gave them to the inquiring Commission. We can't prove that, but it is the only logical conclusion. In fact, this has never been denied by the state in any of the proceedings.

Q I want to get clear, if I can, your view of what the Illinois Supreme Court held. In your brief you say, "The Illinois Supreme Court held, with certain omissions, that the immunity referred to in Section 203-14 was co-extensive with the Fifth Amendment."

MR. WHALEN: Yes.

Q That's your position as to what Illinois has held?

MR. WHALEN: Yes. And Illinois then referred to -- the Illinois Supreme Court then referred to Murphy v. Waterfront Commission, but it is our position that that applies only where, in a state proceeding, a state witness fears federal prosecution and here we are talking about further state prosecution.

It isn't argued by the petitioners here that the Fifth Amendment privilege embraces civil suits or punitive

damages, but in conjunction with a "malice is the gist of the" statute, where they can be imprisoned for six months on a great number of judgments, then it becomes penal in nature and penal in character.

What they are simply contending here is that, under these circumstances and this setting, the State of Illinois denied them their federal privilege, the federal privilege being that they should have received an immunity. In exchange for their testimony, they should have received an immunity as broad in scope as the privilege that it supplanted. They did not.

Q How do you really test that in a case like this, Mr. Whalen? That's my problem. Don't you have to test the scope of this immunity by a prosecution for a subsequent crime in light of the Illinois Supreme Court's view of the matter?

MR. WHALEN: I would say, Mr. Chief Justice, that it would be impossible to do so, even at a trial about a subsequent crime. I know of no manner in which it could be tested.

Q Well, first, you have a number of alternatives. He may never be prosecuted, in which case there'd be no problem, that is, assuming he went back and answered; or if he is prosecuted, you could assert that the Supreme Court of Illinois had said that his immunity, his freedom from

prosecution was co-extensive with Fifth Amendment protection, and that issue would be presented by that case, would it not?

MR. WHALEN: Except that the -- he would still be -- and I don't know how to answer otherwise -- he would still be absolutely unable to ascertain this or to establish this fact.

Q Well, what if, hypothetically, the burden made is on the prosecution to establish that the case rested on information from independent sources? Would that give you the protection that you think you need?

MR. WHALEN: No, Mr. Chief Justice, it would not. While that burden -- while that burden would be upon the prosecution to show that it was independently obtained, I know of no manner in which the Petitioners could controvert it because they have not an immunity as to the subsequent -- as to the fruits under this act.

Q As I understand your argument, it is simply this, Mr. Whalen, that your client is entitled, under the Fifth and Fourteenth Amendments, to continue to refuse to answer these questions until or unless the state makes clear to him that he is given transactional immunity --

MR. WHALEN: The state affirmatively --

Q -- and that you are testing that right here in this case --

MR. WHALEN: Yes, sir.

Q And so far, the state has not told you the

answer.

MR. WHALEN: Yes, sir, I believe that and I believe that the state must -- the duty is upon the state to affirmatively demonstrate at the time of the petitioner's hearing that that --

Q Well, if the Supreme Court of Illinois had said in this litigation that this immunity statute extends transactional immunity to your client, Counselman against Hitchcock immunity, you would be satisfied. You would have won your case. You would concede then that your clients should indeed answer the questions, wouldn't you?

MR. WHALEN: Certainly, Mr. Justice. However, of course, as I say, this was interpreted on this appeal for the first time, that we didn't have the benefit of any such holding at the time.

Q Well, the answer -- the Illinois Supreme Court didn't give you an answer.

MR. WHALEN: That's right, sir.

Q You still haven't had an answer. You still haven't had an assurance of transactional immunity, and it is your point that the Constitution accords you that.

MR. WHALEN: Yes, sir.

Q In exchange for the answers to the questions asked of your client. Isn't that your point?

MR. WHALEN: That is exactly the point, Mr. Justice.

We believe that the -- that any act that supplants the privilege, or abridges the privilege, must give -- and that can't -- it must give an immunity then that is as broad as the privilege taken. That's our --

Q Yes, but for a court to say the immunity given is as broad as the constitutional protection is double-talk, isn't it?

MR. WHALEN: I believe so. I believe so, Mr. Justice.

Q You've got to say what the immunity is. I mean, you are entitled to an answer to the issue you present, isn't that your point?

MR. WHALEN: That is our point.

Going to the point of whether a state must affirmatively demonstrate to the respondents when testifying, we have a situation here now that -- where an immunity act contains the provision that the court shall not grant immunity if it reasonably appears that the witness may fear prosecution by another state or the United States where you come to the situation where it's somewhat like the situation in Raley v. Ohio, where a witness may be misled.

We have the language used by the Court in Stevens v. Marks, in which they said, "Until and such time the witness has a right to stand on his Fifth Amendment privilege."

Sir, in this instance, it was never demonstrated.

How can the State of Illinois argue that they ever demonstrated to the Petitioners that a privilege was available to them where they engaged in -- where part of the very act contained the language complained of.

This is no longer in the Illinois Immunity Act. This has been amended and has been removed. However, at that time, it was a pertinent part of it.

Q This Act before us now has now been amended?

MR. WHALEN: Yes, Mr. Justice.

Q In what respect?

MR. WHALEN: The provision that -- the provision that the court -- as it reasonably appeared to the court that --

Q That part of it?

MR. WHALEN: That has been eliminated, sir.

Q Eliminated entirely?

MR. WHALEN: Eliminated, yes, sir.

Q Not substituted?

MR. WHALEN: No. I believe they would say that it would -- well, it would be repugnant to the decisions in the later cases.

What we urge the Court to consider is that when a witness appears before and investigating committee under such an immunity act, there should be no doubt in the mind of the witness as to what immunity he is getting. We believe that the State of Illinois has that duty. We believe the State

failed. Throughout their brief in all these proceedings and here in this Court, the state argues that they manifested, the state manifested its intent not to prosecute further. And we don't believe that answer suffices. It is not the intent, the present intent of the state not to prosecute further. The assurance that a petitioner should receive and which is guaranteed by the Federal Constitution is that the state be unable to prosecute further. Thank you.

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

Mr. Flaum.

ORAL ARGUMENT OF JOEL M. FLAUM, ESQ.,

ON BEHALF OF THE RESPONDENT

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

There is no double standard in Illinois. Illinois is a transactional state. It has been so for at least a half a century in some of the strongest language contained in some of the state court cases.

Q Would you characterize the Illinois Supreme Court's Opinion in this case as being -- containing either strong or unambiguous language?

MR. FLAUM: Mr. Justice --

Q With respect to the question of whether or not this statute is transactional in nature?

MR. FLAUM: Frankly, Mr. Justice Stewart, it is not

as strong as some of the language contained in the cases preceding.

Q Well, it doesn't even address itself to the question, does it?

MR. FLAUM: Well, I would submit, Mr. Justice Stewart, that it does say -- that section, speaking of the specific section involved here, grants immunity to defendants from further prosecution.

Q Well, that doesn't answer the question.

MR. FLAUM: No, I appreciate it doesn't carry that kind of language. Let me -- If I might just amplify on it a little bit.

Illinois, in cases starting in 1924, right up until 1963, constantly referred to federal precedent, Counselman cases, the Brown cases. It spoke in terms of complete substitute protection against all future prosecutions. Our state has never had a history of a use statute -- use immunity --

Q That was under a different statute.

MR. FLAUM: Yes.

Q And that was at a time when it was not clear that the Federal Constitution's guarantee against compulsory self-incrimination was applicable to the states, because it was prior to Malloy against Hogan.

MR. FLAUM: Well, Your Honor, in 1953, the Illinois Supreme Court had occasion to consider the identical language

in the Cigarette Tax Act, the Immunity Section of it, the identical language. As has this Court, in Ullmann and in Brown, in 1956 and in 1959, the language in the 1953 case from Illinois, Halpin v. Scotti in 415 Illinois says, and this is identical statutory language, "In order to hold valid a statute requiring a person to give evidence which might tend to incriminate him, the immunity afforded must be broad enough to protect him against all future punishment for any offenses to which the evidence relates." That is in identical language. I wish it were found --

Q That was identical language, statutory language, you mean?

MR. FLAUM: Statutory language, interpreting statutory language.

Q Not the same statute?

MR. FLAUM: Not the same statute, Mr. Justice --

Q But some other statute from which this statute borrowed the language?

MR. FLAUM: Exact language, and I just would reiterate again this language is found in the Immunity Act of 1954 which this Court upheld as granting complete immunity. I -- excuse me --

Q Are you talking about 1953, 1954? That was prior to Malloy against Hogan. It wasn't any business of this Court, was it, what kind of --

MR. FLAUM: Well --

Q -- immunity Illinois gave, because Illinois didn't have any Federal Constitutional obligation to --

MR. FLAUM: No, but we --

Q --protection against compulsory self-incrimination, because that was the regime of Twining against New Jersey, wasn't it?

MR. FLAUM: Right, but we followed, Mr. Justice Stewart, all the federal precedent. It is interwoven. While it was not binding prior to 1964, it is found -- our language speaks about it being complete as to the type of immunity granted within --

Q Well, don't you have a provision in your own Constitution?

MR. FLAUM: Yes, we do, yes, we do.

Q Sure.

MR. FLAUM: It's identical, in effect, to the United States Constitution.

I might just make one mention, with regard to the structure of the Illinois Crime Investigating Commission. At the time of its creation and at the time when these questions went on, it was a mixed Commission. It had four from the House, four from the Senate and four private members appointed by the Governor. It is now totally a Legislative Commission and reports directly to that body. But that was a question I

was asked as to its composition.

Q But everything that is done, this is open to the news media and, therefore, to all prosecutors?

MR. FLAUM: Yes, it is. Yes, it is.

Q So there are no secrets in the reports here.

MR. FLAUM: No. No, there are not. In fact, it is required, Mr. Chief Justice, to submit any report to the State Legislature and that is reported in public. However, if our argument prevails that we have full transactional immunity, the Fifth Amendment was never aimed at avoiding social opprobrium or the acknowledgement of the error of one's ways. It just is to guarantee that no criminal process will be brought against him, and in the State of Illinois we so ensure, we believe.

Q Well, I think your argument based on Illinois precedent would be rather compelling except for the fact that the court in this case did cite Murphy against Waterfront and said that the immunity statute grants all that Murphy against Waterfront requires, which is use immunity.

MR. FLAUM: Mr. Justice White, I would suggest that upon a reading of the cases prior to Sarno and Cardi in the Illinois Supreme Court, that if a meaningful deviation were to occur --

Q It would never occur like this.

MR. FLAUM: Never occur like this. I --

Q All right.

MR. FLAUM: Its language -- um -- it is not as expansive as I would like it to be here, but I -- I frankly think any deviation from a history that we have had would have been much more significant.

Speaking specifically of that language, I don't want to dwell on it, that "for" and "account of" we feel there should be no question on. It's if -- this Court would have to forget about how Illinois has interpreted it, just change its mind on its --

Q Well, on its face, it seems to be a transactional statute.

MR. FLAUM: That's our position, sir.

On the affirmative showing:

Frankly, we feel a complete affirmative showing may be a practical impossibility short of appellate review of every time a grant of immunity is conferred. However, the references in the Petitioners' Brief to Marks and Raley have no analogy to this case at all. There is absolutely no evidence of intentionally misleading any citizen when called before our Commission. The requirement, as we read in Raley, is that the affirmative showing in the state may not mislead the witness as to the consequences of his answer or his refusal to answer. The state cannot be required to meet a possible substantive argument which later may be promulgated

by the witness' own appeal from a contempt conviction which we feel is the case here.

The only way we met that test that we feel in this case was the -- unlike Marks, for example, Petitioners were represented at all times by counsel. After the first refusal, the Commission -- the first refusal to testify by the Petitioners -- the Commission filed verbatim transcripts with the court requesting an order granting immunity. Both men filed responsive pleadings and I might point out to the Court, if I may, that at no time, really, has this act ever been challenged as being a "use plus fruits." It has just been charged with being a "defective transaction." There was always an acknowledgement by the Petitioners below that the state was attempting to confer transactional immunity, only that it had a defective statute with which it was working.

Both men filed responsive pleadings and accepted that basic premise. After they gave immunity, both men again appeared and refused to testify.

Thirdly, or really, fourthly, after the second questioning of both parties, Counsel for the Commission read the order of immunity, gave an opportunity, a third opportunity, spelled out specifically what the Counsel would do if -- and by that, I mean recommending to the Commission that he go to court and seek contempt -- so that if this does

not constitute the affirmative showing, the willingness to confer transactional immunity is spoken from both the order of the court, which granted the immunity, and the Counsel for the Commission. Frankly, I see no collateral remedy that would suffice short of an instant review and appeal and then a return to that.

We feel that this is not at all a case with any misleading. There was suggestion in the opinions in Raley and Marks that the defendants didn't even know of the existence of the immunity statutes. That just didn't occur here. This has been a contested, with-counsel type litigation for several years.

I can only say that there is no evidence on any statute in the State of Illinois where there has been a subsequent prosecution which would lead one to believe that a -- there has been an attempt to use a "use plus fruits" approach with any of the immunity statutes in our state, and we feel that clearly a reading of the Illinois history would indicate that that is the case.

Q You says yours was a Piccirillo case, that even though it may be determined in the companion cases that the Constitution of the United States does not require the State of Illinois to grant transactional immunity, that, nonetheless, you do so?

MR. PLAUM: Yes. I -- the State of Illinois has

opted for that higher standard. If this Court sees fit to adopt the "use plus fruits," Illinois apparently --

Q May reconsider its position?

MR. FLAUM: May reconsider, but now it has committed itself to transactional. If this statute falls, it falls because of its defectiveness in its structuring. It doesn't fall for the intent, we believe, of the Legislature.

MR. CHIEF JUSTICE BURGER: I think your time is up, Mr. Whelan.

MR. WHELAN: Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

(Whereupon, at 11:51 a.m., the case was submitted.)