ORIGINAL

In the

# Supreme Court of the United States

ROBERT DUNN,

Petitioner,

v. No. 77-6949

UNITED STATES OF AMERICA,

Respondent.

Washington, D. C.
March 28, 1979

Pages 1 thru 49



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Wednesday, March 28, 1979

The above-entitled matter came on for argument at 11:45 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

DANIEL J. SEARS, ESQ., Federal Public Defender, District of Colorado, 263 Federal Office Building, 1961 Stout Street, Denver, Colorado 80294; on behalf of the Petitioner

ANDREW L. FREY, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C., on behalf of the Respondent

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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 77-6949, Dunn v. United States.

Mr. Sears, I guess you may proceed whenever you are ready.

ORAL ARGUMENT OF DANIEL J. SEARS, ESQ.,

ON BEHALF OF THE PETITIONER

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

The petitioner is before the Court today to present three primary questions, whether a sworn statement taken in a private attorney's office may be deemed a proceeding ancillary to a U.S. court or grand jury violation of 18 U.S.C., section 1623, can immunized testimony be used against a witness to establish the corpus delicti in an inconsistent declarations prosecution without proof that the witness testified falsely under immunity, and if the appellate court in this case can adopt a proper theory in sustaining a conviction of Mr. Dunn.

Your Honors, petitioner submits that all three issues must be resolved against him before the conviction can stand. The underlying case proceeded as follows: Mr. Dunn appeared before a federal grand jury in Denver, Colorado, on June 16, 1976. He claimed his right to remain silent and subsequently was ordered to appear before a United States District Judge whereupon he was granted immunity under 18 U.S.C., section 6002.

He thereafter reappeared and testified to certain drug activities at the Colorado State Penitentiary, implicating one Phillip Musgrave and several other co-defendants. As a result, an indictment was returned against Musgrave and three of the co-defendants.

On September 30, 1976, he appeared in the office of Musgrave's attorney, Michael Canges, and proceeded to recant his grand jury testimony. Present was a notary public who administered the oath and recorded Mr. Dunn's statement by virtue of a tape recorder. It was subsequently reduced to writing and tendered to the U.S. District Court --

QUESTION: I take it he didn't just wander into the attorney's office?

MR. SEARS: Your Honor, although the record is silent as to this, I believe the evidence would indicate that Mr. Dunn and Mr. Musgrave proceeded to strike a deal and he subsequently wound up in his attorney's office, Mr. Musgrave's attorney's office and recanted what he had told to the grand jury.

The statement was reduced to writing and tendered to the court as an exhibit in support of a motion to dismiss the indictment against Musgrave. On October 21, 1976, the hearing on that motion was held in United States District Court, Dunn was called as a witness and once again reaffirmed the affidavit, even though he had indicated he had not totally reviewed it.

The charges against Musgrave were subsequently reduced.

QUESTION: Well, when he reaffirmed the affidavit. Would you enlarge on it? He was under oath before a grand jury, was he?

MR. SEARS: He was under oath before a U.S. District judge, Your Honor.

QUESTION: A district judge.

MR. SEARS: Yes.

QUESTION: And did he simply say we reaffirm it in a conclusory way or did he restate the same facts?

MR. SEARS: Your Honor, I believe the nature of the testimony was that he was asked to identify the affidavit, did identify it, asked him if it was the truth, he said yes, it was, and he says is it all the truth, and he said possibly ten percent, each declaration that he made before the grand jury was not proceeded through and it was only the conclusory remark that 90 percent of it was false which --

QUESTION: When you say 90 percent false, that was directed at what, at the original grand jury testimony or at the affidavit?

MR. SEARS: No, Your Honor, it was directed at the original grand jury testimony. Now, that is one of our basic contentions in this case, that the October 21st proceeding in the U.S. District Court was not alleged to be an ancillary

proceeding in this inconsistent declarations prosection. And even though the Appellate Court affirmed the conviction by looking to that proceeding and indicating that Dunn, by adopting that statement, had somehow turned the September 30th proceeding into an ancillary proceeding, we submit that was outside the indictment and the proper amendment or prejudicial variance from the indictment.

QUESTION: How did it prejudice you?

MR. SEARS: Your Honor, prejudice in our preparation for the case in that we were preparing to go to trial contesting the ancillariness of the September 30th proceeding rather than the October 21st proceeding. The October 21st proceeding was not mentioned in the indictment whatsoever.

QUESTION: Well, you knew it had taken place?

MR. SEARS: Pardon?

QUESTION: You knew it had taken place.

MR. SEARS: We did know it had taken place, Your Honor, but as the Assistant United States Attorney conceded prior to the introduction of that transcript and as we indicated to the Court, we had not been provided with a copy of that transcript under rule 16, and the government attorney conceded that he did not contemplate this evidence in the case in chief. There was no mention of the October 21st proceeding in the indictment whatsoever.

QUESTION: Well, how factually were you prejudiced?

MR. SEARS: Your Honor, we were prejudiced on the basis that our defense had been prepared to challenge the ancillariness of the September 30th proceeding and not the October 21st --

QUESTION: So you couldn't use it, but how were you disadvantaged by your inability you had to challenge the October proceeding?

MR. SEARS: Your Honor, the only way I can respond to His Honor's question is that we did not have sufficient notice to prepare a theory in that regard and we were not expecting that we were going to have to meet that evidence as a basis for an ancillary proceeding as the court subsequently ruled.

QUESTION: Do you regard this situation as a prosecution blunder?

MR. SEARS: Quite candidly, Your Honor, yes.

Your Honor, as a result of the --

QUESTION: Mr. Sears, you don't disagree with the fact that the October 21st proceeding was a proceeding in the meaning of the statute, do you?

MR. SEARS: I don't challenge that in the least regard. The only thing I would question, Your Honor, is whether that proceeding -- whether a prosecution could be made out of that proceeding as well, based upon our same objection that the immunized testimony could not be used. Yes, it was a

proceeding before the court under 1623.

QUESTION: As I remember the Solicitor General's brief, he agrees with you that they must establish that the September 30th affidavit was a proceeding in order to sustain the process --

MR. SEARS: That's right.

QUESTION: He agrees to that.

MR. SEARS: Yes, with our position.

QUESTION: The S.G. does it in one way in contrast with the way the Tenth Circuit did.

MR. SEARS: I believe that was part of our suggestion.

Your Honors, on December 15, 1976, Dunn was subsequently indicted on five counts of false declarations before a grand jury in violation of section 1623. Paragraph one of each count alleged that Dunn had made false declarations before the grand jury on June 16, 1976. And paragraph four of each respective counts, they set out the specific declarations relied upon. Paragraph five of each count charged that Dunn knowingly made declarations on September 30, 1976, and then the sixth paragraph indicated that the declarations that had been made in the September 30th proceeding in Canges' office and the June 16th proceeding were inconsistent to the degree that one of them was necessarily false.

Due to the confusion from the first paragraph, the charge that he had testified falsely before the grand jury on June 16th, and the fourth and fifth paragraphs which indicated

that he had testified falsely in the September 30th proceeding, we passed them a bill of particulars to seek out the government theory in which they were relying to prove this case, whether they were intending to use the September 30th statement as an admission that his declarations before the grand jury were false or, conversely, whether they were relying on the subsection (c) theory of inconsistent declarations, in other words, submitting that the declarations were so inherently inconsistent that one of them had to be false.

QUESTION: Well, isn't a bill of particulars to provide facts?

MR. SEARS: Yes, Your Honor, and --

QUESTION: If the government states facts in an indictment or information which show that a crime has been committed, it doesn't have to tell you its legal theory, does it?

MR. SEARS: No, it doesn't have to state the legal theory, Your Honor, insofar as it need not further explain the indictment or the defense which the defense must meet. My understanding of the bill of particulars has always been twofold, to more adequately explain the charge and to protect against a double jeopardy claim. So that by considering the charge in the record, a similar charge could not be made, and I wubmit that is exactly what we have in this case, by looking at not only at the September 30th but the October 21st for the ancillariness.

QUESTION: And you received an answer?

MR. SEARS: Pardon?

QUESTION: You received an answer?

MR. SEARS: Not in the way of a form of a bill of particulars, but the government did respond that it was going to rely on the 1623(c) inconsistent declarations theory, and that theory was submitted throughout the course of the case.

QUESTION: And that was the submission to the jury?

MR. SEARS: That is correct, and the court so instructed the jury that the government need not prove which of the declarations was false.

At trial, the September 30th transcription of Dunn's statement, which I will refer to as the canned statement, was introduced and conferred to the District Court and testified that they received it as an exhibit on October 12, 1976 in the Musgrave case. On cross-examination, the clerk was asked to identify the immunity order and application identified as Defendant's Exhibits F-1 and F-2 entered prior to Dunn's appearance and testimony before the grand jury. The notary public was then called to the stand and asked to identify the September 30th canned statement which had been rendered on September 30, 1976. He indicated, however, on cross-examination that Dunn did not have counsel of his own choosing in the office of Musgrave's attorney, he was not familiar with the criminal deposition procedures under 18 U.S.C., section 3503,

no court order had been obtained for the taking of this deposition, and there was no indication that Dunn would be unavailable for trial, which we submit are necessary requirements for this document to qualify as a deposition under 3505.

Finally, the government offered the Canges statement, the defense objected that it did not qualify as proceedings ancillary or before the U.S. Court or a grand jury. The government next introduced Dunn's grand jury testimony through the Assistant United States Attorney who conducted the Musgrave grand jury investigation. On cross-examination, however, the Assistant United States Attorney admitted that there was no independent evidence but for Dunn's recantations of September 30th and October 21st to disbelieve the grand jury testimony, and that there was much evidence to corroborate the truth of it.

The defense objected to the use of the grand jury testimony on the basis that it was in violation of his immunity order. Both of those objections were overruled and both exhibits were admitted into evidence.

Then the government further offered a transcript of the October 21, 1976 evidentiary hearing in U.S. District Court. The defense objected that these declarations were not outlined in the allegations of the indictment, that it was beyond the proper scope of the indictment. The government did concede that prior to trial, this evidence had not been

submitted to the defense and was not intended as evidence in the case in chief. His response was, since we had cross-examined the Assistant U.S. Attorney as to the truthfulness of the grand jury testimony, he wanted to offset that testimony by the use of the subsequent reaffirmation to lend credence to the September 30th statement. The government rested and Dunn did not have to testify.

The defense then moved for a judgment of acquittal on two bases, that the immunized grand jury testimony could not be used against him to establish the corpus delicti and an inconsistent declarations prosecution, and that the Canges statement was not an ancillary proceeding under section 1623. The trial court ruled that the Canges statement, if not originally ancillary, "channeled its way into being an ancillary proceeding" on the confirmation in the U.S. District Court on October 21st. However, the United States Circuit Court of Appeals agreed with Dunn's position and said that the September 30th statement was not an ancillary proceeding as the statute requires. The court, however, found that the October 21st proceeding was ancillary and affirmed the conviction on that basis, even though that proceeding had not been set out in the indictment.

The court found, "It was a proceeding ancillary to the grand jury because of Dunn's subsequent reaffirmation and adoption of the earlier statement on October 21st," in other

words, look to the October 21st proceeding as an affirmation of the earlier September 30th proceeding. The court held that its admission of the October 21st statement into evidence was not a prejudicial variance because the defense could have contemplated it.

Now, Your Honors, we submit that since the indictment charged the June 16th and the September 30th statements as being proceedings ancillary -- either before or ancillary to a U.S. court or a grand jury and set out the declarations in each of those two proceedings which were alleged to be consistent, the only question for the jury was were the declarations in those three separate proceedings so inherently inconsistent that one of them had to be false. We submit that the October 21st proceeding had no proper purpose in this hearing. The Solicitor General argues that it could have offset any contention that the statements were a matter of mistake or inadvertence. Well, we submit that the only issue to the jury was whether the separately alleged declarations in the two separate proceedings charged in the indictment were so inherently inconsistent --

QUESTION: Well, we are not back to Chile on pleadings, are we? I mean, you've got to show prejudice, not just some technical defect in the indictment.

MR. SEARS: Your Honor, I submit that due to the peculiar nature of proof under section 1623(c) theory,

that is only the declarations that are specifically set out in the two proceedings that can be at issue before either the trial court or jury.

QUESTION: And the government agrees with you on that here in this Court?

MR. SEARS: Yes. And I would submit that the only question of prejudice would come if the October 21 -- if we were considering whether the October 21st admissions were improperly introduced into evidence. Other than that, we would submit they had no proper bearing on the case, and whether or not --

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

MR. SEARS: Thank you, Your Honors.

(Whereupon, at 12:00 o'clock, noon, the Court was recessed until 1:00 o'clock p.m.)

AFTERNOON SESSION 1:00 P.M.

MR. CHIEF JUSTICE BURGER: You may continue, Mr. Sears.

MR. SEARS: Thank you, Your Honor. Mr. Chief Justice, and may it please the Court:

Your Honors, if I might address further in response to His Honor, Mr. Justice Rehnquist's question with regard to whether or not the defendant Dunn was prejudice by the government's action in this case, I would submit that if the Court finds a constructive amendment to the indictment in this case under the reasoning of Stirone v. United States, prejudice need not be found. Or if the Court feels that the proceedings in which the government introduced evidence against Mr. Dunn, particularly the October 21st proceedings were at variance in pleading a proof, then we would submit that prejudice would have to be found under that reasoning.

Your Honors, with regard to the Stirone case, I would submit that the prejudice against Dunn may be more grievous than Mr. Stirone realized under the facts underlying that case. The Court will recall in Stirone that the defendant was charged with a Hobbs Act violation, and the specific allegation in the indictment was the interstate commerce particular portion of the allegation which concerned shipping sand into the State of Pennsylvania to construct a steel plant, or the trial, the government instead proved that

steel was going to be shipped out of Pennsylvania and that was the interstate element that the jury should look to, and this Honorable Court in that particular proceeding found that while there was a variance in the sense of a variation between pleading and proof, the variation here destroyed the defendant's substantial right to be tried only on those charges presented in an indictment returned by a grand jury. Or further stated, deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. I would submit that the Stirone case has been popularly referred to as a constructive amendment, even though I would interpret the Court's language to proceed on a prejudicial variance basis.

Your Honors, the Tenth Circuit also determined, aside from the ancillary issue, that Dunn's immunized testimony could be used against him in an inconsistent declaration, prosecution because his subsequent affirmation, first of all, his recantation in the September 30th proceeding and his subsequent affirmation in the October 20th proceeding, contained the admission by him that his grand jury testimony was false. And it was due to this possible conclusion that the defense on cross-examination of the Assistant United States Attorney at trial established that there was independent evidence to believe the truthfulness of the grand jury testimony, even though Dunn had subsequently recanted, and that

there was reason to believe the subsequent recantations may in fact be false.

However, the theory throughout this case inconsistent declarations and the government never attempted to prove that his grand jury testimony was false, only that 1623 --

QUESTION: In your view, did the government need to?

MR. SEARS: Your Honor, we would submit they would need to in order to get around the protection that Dunn was afforded by the immunity order.

QUESTION: But under their theory of the case, they didn't need to? The way it was submitted to the jury, they didn't need to prove which one was true or false.

MR. SEARS: That is correct, Your Honor. Your Honor, the argument in the brief may be somewhat unclear. We do not contend false declarations under 1623 is not an exception to 6002. We do argue, however, that the inconsistent declarations method of proof is precluded when part of the declarations relied upon are under an ordered immunity under 6002. The government's method of proof of inconsistent declarations in this case without proving that Dunn had violated his immunity order was excepted from use by the government.

QUESTION: Counsel, you mentioned the Bain case. Hasn't that case been primarily notable for the fact that almost every court that has to consider it in the last ten or fifteen years has distinguished it? I mean isn't it pretty

much passe?

MR. SEARS: Your Honor, I don't recall the specific holding in the Bain case, but as I recall that case stood for the proposition that -- well, I would have to confess, I just don't recall the holding in Bain. I would call the Court's attention, however, to -- this Honorable Court's holding in Kastigar and Murphy, which I think are quite crucial to the consideration of the issues here, and more recently in New Jersey v. Port Ash, which was decided on March 20th, and that is that when an individual's immunized testimony cannot be used against him in Port Ash for impeachment purposes, it is compelled testimony, and in Kastigar, deciding the extent of 6002 immunity, the implication was there that it could not be used for any purpose, that the witness who had testified under immunity was in substantially the same position if he had --

QUESTION: Was that rather broad statement necessary to the holding?

MR. SEARS: Your Honor, I believe it was, particularly in view of the Court's recent statement in Port Ash.

QUESTION: Was it necessary in Port Ash?

MR. SEARS: I believe it was, Your Honor, if we are to maintain the holding that when a witness is compelled to testify, it completely displaces his Fifth Amendment privilege.

QUESTION: Yes, but his privilege is not to incriminate himself.

MR. SEARS: His privilege is not to incriminate himself --

QUESTION: Not to be compelled to incriminate himself.

MR. SEARS: That's correct, Your Honor, plus not to have any evidence that is forced from his lips to either use against him in any criminal proceeding.

QUESTION: Well, that solves your case, that is the issue in the case. That is really the issue in the case. But in terms of any past crime, certainly the use that was made here didn't incriminate him. Using his grand jury testimony to prove that he might have told a lie in the future wasn't used.

MR. SEARS: Your Honor, it didn't directly incriminate him, but it certainly furnished derivative evidence which the government relied upon to subsequently convict him. It produced evidence which the government used to establish the corpus delicti of a crime.

QUESTION: Future crime, that's right.

MR. SEARS: Well, Your Honor, it really wasn't future crime because it was testimony under -- in response to the ordered immunity. The government didn't prove that he lied in the October 21st proceeding, nor even the September 21st proceeding. It proved that he went before the --

QUESTION: Suppose the prosecution at this later

appearance in court, this later appearance in court, suppose the prosecution was that he perjured himself there, suppose that was the charge, they didn't take the approach if inconsistent statements but they were trying to prove that he perjured himself later. Could they use his grand jury testimony then as evidence to show that he later perjured himself?

MR. SEARS: Your Honor, I submit that they could not.

QUESTION: Well, you have to say that, or do you?

MR. SEARS: Your Honor, I believe I have to say that to be consistent with Port Ash and to be consistent with the statements and the reasons behind the statements in Hockenberry and some other --

QUESTION: Yes, but you also have to say it to maintain your position with respect to the inconsistent --

MR. SEARS: No question about it.

QUESTION: You concede that if the prosecution had been for perjury before the grand jury in his immunized testimony, that would have been valid?

MR. SEARS: Clearly. I would submit it would fall within the exception to the immunity.

QUESTION: And which you accept?

MR. SEARS: Yes. Your Honor, what I would submit to the Court is that when he was ordered to testify, the government in its allegation to the court, and the court in its order upon that application promised that his testimony would

not be used against him directly or indirectly in any criminal proceedings against him. That is in essence what happened. It was used directly. And the testimony was used directly against -- this Court decided that it could not be used for impeachment purposes in the Port Ash case.

QUESTION: Would that apply to a crime not yet committed, actions not yet committed?

MR. SEARS: Your Honor, I submit that is where the government is confusing transactional immunity and use immunity, and I would submit that in the Kastigar ruling if a witness testifies before a grand jury on certain subject matters and then later goes out and commits a crime which may pertain to that subject matter, transactional immunity would not protect him. I would submit that that would be a broader protection than the Fifth Amendment should offer him.

However, when the very testimony that is compelled from his lips is used to prove a crime against him, is part of the corpus delicti of that crime, then we must examine whether that testimony falls within the exception to the immunity. Unless he has violated his bargain with the government and the courts by testifying falsely or otherwise failing to comply with that order, failing to testify and committing contempt, then I submit that he must be protected by that immunity. And I would submit the reasoning of that must be consistent with the government's positions in several

other cases that have come up, one which is before the Court and which the Court has recently granted cert, in Apfelbaum, but more particularly in Patrick and Housand and the Berardelli line of reasoning. If the courts are going to continue to compel witnesses to testify under an order of immunity, on the promise that it will not be used against them in an inconsistent declarations prosecution, regardless of whether it is prior to or subsequent to, as long as it is part of that corpus delicti of inconsistent prosecution, you cannot subsequently use that testimony in convicting someone without establishing that he has violated his immunity bargain, and we submit that it cannot be used against Mr. Dunn in this proceeding.

QUESTION: But you agree, I take it, that immunity needn't be no broader than a privilege?

MR. SEARS: Absolutely. I submit that it is no broader by protecting Mr. Dunn from the use of his very possibly enlightened truth testimony when he did testify in compliance with the court's order.

QUESTION: Well, suppose later some other person was charged with a murder or a robbery or something and also your client was charged with that later robbery also and it is claimed that both of them committed the robbery, and he says I was never there, I don't even know that fellow, but it just turns out that in his grand jury testimony that we are talking

about, where he was given immunity, in the course of his testimony it was prefectly clear that he knew this fellow and had had a lot of dealings with him in the past.

MR. SEARS: I submit that points out the very difference between --

QUESTION: And do you say that his grand jury testimony then would not be admissible against him in the later prosecution?

MR. SEARS: I would say that the grand jury testimony could not be used against him, but had he had transactional immunity it would have protected him if the government could establish by extraneous evidence the crime, he is not protected from prosecution --

QUESTION: No, I understand, but you say that in his prosecution for the later robbery along with somebody else, his grand jury testimony cannot be used against him.

MR. SEARS: That's correct, Your Honor, as long as it was truthful and as long as the government cannot prove that it was false or that he had otherwise violated his immunity.

Your Honor, the few remaining moments I have I would like to reserve for rebuttal. Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Frey, you may proceed.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE RESPONDENT

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

This is a case in which it is clear that the petitioner lied either in his grand jury testimony or in his subsequent sworn refutation of that testimony. This is also a case in which it is clear that the false swearing by the petitioner adversely affected the administration of justice either by causing Mr. Musgrave to be wrongfully indicted of a felony or by forcing the government to drop the felony charges against Mr. Musgrave although they were well-founded.

The question before this Court is whether the petitioner's perjury, palpable on its face with the comparison of the contradictory statements, may be proved by placing those statements before the jury or whether the immunity granted in connection with the first of those statements precludes such a course from occurring.

The case also involves an issue of balance, of whether the September 30th statement in Musgrave's lawyer's office was a proceeding ancillary to a court, and if not, whether that is fatal to the prosecution in this case. I intend to rely on our brief on this point unless the Court has any questions and move on to the more important constitutional immunity point.

QUESTION: You concede that unless the transaction in the lawyer's office was under the statute, then this condition cannot stand?

MR. FREY: We do, but we say that it was ancillary to a court. I might point out in that connection that if the Court were to hold that this kind of proceeding which is essentially in preparation of an affidavit for submission to the court, it is not ancillary to a court. It would have consequences beyond the rather unusual circumstances of this case because it would affect similar litigation where it is common place to submit affidavits in connection with opposition to summary judgments and motions and trial, and after having forced to trial the testimony might be proved as contradictory --

QUESTION: Where would a pretrial deposition come in this?

MR. FREY: It would also be ancillary to a court if it is taken for use in a judicial proceeding.

QUESTION: I think the petitioner concedes that.

MR. FREY: He concedes it as to a deposition. We don't contend that this was a deposition.

QUESTION: No, I know that. This was an affidavit prepared in a lawyer's office.

MR. FREY: This is an affidavit and we say it is like the affidavit that would be prepared for a summary judgment and

also in connection with a 2255 proceeding motion.

QUESTION: Just one other point on that, Mr. Frey. If instead of using the affidavit in the October 21st hearing, they merely put the man on the stand and had the affidavit there in order -- as you have often with an affidavit, have an affidavit with which you could impeach him if necessary, do you still say it was a proceeding?

MR. FREY: Well, we are not saying -- this is not the October 21st --

QUESTION: Are you still saying the September 30th in the --

MR. FREY: We are -- our position is that the September 30th proceeding -- when these statements are then admitted as a proceeding ancillary --

QUESTION: And you would take the same position even if there had never been a proceeding on October 21st?

MR. FREY: We take that position, but we have the alternative argument, that if the court is not satisfied with that, that at least the affidavit was in fact submitted to the court --

QUESTION: And have the effect of making it --

MR. FREY: If he gives sworn testimony that he knows is used in connection with the federal court case, I don't think he can be heard to complain later on that it was submitted to the court and he didn't expect it. I think he takes

his chances that he --

QUESTION: Sure, he took the chance that you could have indicted him on the October 21st proceeding also, couldn't he?

MR. FREY: Well, I think it is clear that we could have indicted him for the October 21st proceeding, I don't think that is really disputed.

QUESTION: I would think your affidavit by itself contention is a good deal weaker than your deposition type of contention because of the word "proceeding" in the statute. I think it is a common practice for people just to be handed affidavits and, sure, they are told they have to swear to them and there is a notary in the room, but they may not read every word of it. That is not to say that false statements may not be punishable. But it is kind of hard to envision the signing of an affidavit as a proceeding.

MR. FREY: Well, that, it seems to me, goes -- the kind of concern that we are addressing is an issue for the jury as to his intent and knowledge in making the statements.

QUESTION: Well, the formality of the situation --

MR. FREY: Well, I am not suggesting that this is in fact a deposition. We are suggesting that he knew that it was for use in a court proceeding and that indeed he later on participated in its presentation in a court proceeding.

QUESTION: You are really saying that it is the

functional equivalent, to use that phrase, of a deposition, aren't you?

MR. FREY: Well, in some respects, but counsel for both parties to the case were not present and since it is in connection with the criminal case there are restrictions on depositions that don't exist in civil cases.

QUESTION: There is no hostility between the person who signed the affidavit and the person who presumably prepared it here, is there?

MR. FREY: In this case -- well, I can't say whether there was hostility or not, but they were both on the same side in the case, whether there were motivations or feelings or not --

QUESTION: At the time it was prepared and signed, they all thought they were on the same high road presumably.

MR. FREY: I gather the petitioner felt he had better help his administrative --

QUESTION: Well, does that cut in favor or against you, really, because the proceeding concept to me suggests a criminal type of situation where you could have perhaps adversary parties and that sort of thing.

MR. FREY: Well, I think our view is that this is a proceeding ancillary to the court. I agree that it is not as formal as many proceedings ancillary to the court would be. I think if the Court determines that it is not a proceeding

ancillary to a court, even though it was thereafter submitted to the court, as I say, it will create a significant gap in the coveted 1623, which was designed to protect judicial proceedings basically and to give added protection of the further statute 1621 which covers all --

QUESTION: Well, what if it was thereafter submitted to the court, what if it was simply a naked affidavit?

MR. FREY: Well, I would say that if he simply prepared an affidavit and put it in the mail to Musgrave's lawyer, that would be a much more difficult case and I am not clear that we would contend that that was a proceeding.

QUESTION: Or if the affidavit had -- this was filed in the court, wasn't it?

MR. FREY: Indeed, it was. He testified in the court that the statements that he had made were totally true and that his grand jury testimony --

QUESTION: But the affidavit itself was filed and it was the basis for a motion, wasn't it?

MR. FREY: I think so.

QUESTION: On which there was a hearing, is that correct?

MR. FREY: That's right.

QUESTION: So to that extent it was quite similar to an affidavit filed in support or in opposition to a motion for summary judgment in a civil case?

MR. FREY: It is very similar.

QUESTION: As I understand your position, just to be sure I am right, you would take the same position if instead of it happening in the lawyer's office, the lawyer had sent an investigator out to his house, for example, and got him to sign the affidavit and then they never even filed the affidavit in court, you would still say the same thing?

MR. FREY: I suggest that I would have a lot more difficulty with that.

QUESTION: Right. What is the difference between that and --

MR. FREY: Well, because if it wasn't even filed in court, I think it would depend on the facts. If he said we will make a statement in connection with a judicial proceeding which --

QUESTION: Right, which is tried against Mr. Musgrave.

MR. FREY: -- that that would be ancillary to the court.

QUESTION: Your argument is that it is exactly the same, if I read your brief correctly.

MR. FREY: Well --

QUESTION: Because you don't require that it actually be filed under your theory.

MR. FREY: We do not, that's right, it does not depend on --

QUESTION: Because you don't require it to be actually filed, under your theory.

MR. FREY: That's right, we do not.

QUESTION: And I don't think it makes any difference that it is in the lawyer's office. It is a sworn statement for use in connection with litigation.

MR. FREY: That's correct.

QUESTION: I am worried about the trappings -- I use that as a-- for example, suppose the guy went to a bar and grill and got it --

MR. FREY: You mean he made a sworn which was made before a --

QUESTION: -- and he was called into court.

MR. FREY: Well, I am afraid our position would still be as Mr. Justice Stevens suggested, that that would be ancillary to a court. There might be questions if it was in a bar, whether he was drunk and knew what he was doing, but not --

QUESTION: Well, what is it that makes it "ancillary" to the court?

MR. FREY: That it was used in connection with a judicial proceeding in a federal court and given under oath.

QUESTION: And knowingly given for that purpose.

MR. FREY: Knowingly given as a requirement of the --

QUESTION: In the same sense as you suggested as an

affidavit on summary judgment.

MR. FREY: Yes, I think it is very similar.

I would like to turn, if I may, to what we view as the more important --

QUESTION: Mr. Frey, before you get to that, though, if you lose this first issue, we have to meet the second one?

MR. FREY: Well, I don't think you have to meet the second issue, but we suggest that you should meet the second issue because what will happen in all likelihood is that we will go back and reindict Mr. Dunn on either of two theories, either we could use a 1621 indictment, that is a straight perjury indictment showing that his testimony in the lawyer's office was false and using his grand jury testimony as evidence in that, or more likely we will charge an inconsistency between the grand jury testimony and the October 21st court testimony which concededly was a proceeding before a court. So the same issue --

QUESTION: You will do what you should have done in the first place.

MR. FREY: Well, I think it would have been better had I done it in the first place, although not --

QUESTION: Well, I was just wondering if in your theory if you lose the first issue we wouldn't be rendering an advisory opinion.

MR. FREY: Well, I don't believe you would because

it is an issue that will arise in the further litigation of this case and it will be back before the court shortly because --

QUESTION: Well, that is no answer that it wouldn't be advisory.

QUESTION: Well, there isn't any second indictment yet.

MR. FREY: Well, there is not yet a second indictment --

QUESTION: And until there is --

MR. FREY: -- but I think the Court has two -- there are two independent issues, the court has the choice of starting with one issue or the other and --

QUESTION: It can start with the constitutional issue or the statutory issue. Which do we start with?

MR. FREY: Well, the --

QUESTION: Your position is that the immunity statute is coextensive with the constitutional privilege, so that is really a constitutional issue.

MR. FREY: It is a constitutional issue, but there is the statutory aspect of the issue.

QUESTION: Yes, but don't we normally start with the statutory issue?

MR. FREY: I am not suggesting by any means that you are required to reach the other issue, if you decide the

ancillary proceeding issue, you are just suggesting that it would be proper for you to do so in view of the likelihood that the issue will persist in this same litigation, not technically the same because it will be --

QUESTION: But if there is an acquittal, it is all over and there would be no appeal and nothing.

MR. FREY: Yes, I understand that. I understand that. It is not necessary to dispose of this case.

QUESTION: The question then --

MR. FREY: I think it is a prudential question of --

QUESTION: -- is whether it is desirable or wise or even proper.

MR. FREY: Yes.

QUESTION: Of course, we don't need to agree with you that we are not entitled to look at the court's statement either.

MR. FREY: You don't need to agree --

QUESTION: The Court of Appeals might be right.

MR. FREY: They might be right.

QUESTION: In which event we reach the other.

MR. FREY: You would. On turning to that issue, our position on the constitutionality of the use that we made of petitioner's immunized grand jury testimony in this case is the product of two propositions, both of which we believe to be reasonably well settled. The first proposition is that the

immunity that must be granted to displace a valid claim of privilege against self-incrimination has to be coextensive with but need not be any broader than the scope of the privilege which was available to the witness at the time he invoked it.

In other words, when the government seeks to make some use of compelled testimony against the witness who gave that testimony, the permissibility of making that use can be ascertained by asking yourself the question could he have invoked the privilege against compulsory self-incrimination to refuse to answer to guard against this prospective use of his testimony.

Now, the second proposition on which we rest is that at the time the petitioner was called to testify before the grand jury and invoked his privilege, he could not have validly invoked his privilege on the grounds that later on he might choose to give contradictory testimony and he did not want to create evidence now that could be used to show the falsity of subsequent non-immunized testimony.

Now, if those two propositions are accepted, I think we win the case, and I don't understand the petitioner to contest the second of those, that is that he could not have invoked the privilege solely on the ground of a possible future perjury. He does, however, stoutly maintain that his immunity is sweeping regardless of the scope of his privilege at the

time he acquired the immunity. In other words, he said he validly invoked the privilege with regard to his drug dealings at the Colorado State Penitentiary, something which we don't dispute. Consequently, he says the government may not make any use of his immunized testimony but must leave him in the same position as if he had not been compelled to testify.

So the question before the Court is whether a valid claim of the privilege is an immunity bath as to any criminal case is of immunized testimony or, as we argue, does it only provide immunity coextensive with the privilege.

Now, the Court's prior decisions look our way on this issue. Nearly seventy years ago, in Glickstein and in Heike, the Court stated the basic principle that is central to our constitutional analysis. For instance, in Glickstein, the Court said that the immunity is required to be complete. That is to say in all respects commensurate with the protection guaranteed by the constitutional limitation, according to the privilege against self-incrimination.

In Heike, the Court said that in order to avoid giving what is called a gratuity to crime, the immunity ordered under the statute that was there in question should be construed "as coterminous with what otherwise would have been the privilege of the persons concerned."

Now, the same theme is central between the privilege and the immunity and also underlays this Court's decisions in

Murphy v. Waterfront Commission and in Kastigar. It is clear from those decisions that the Court has held that what the Constitution requires in the way of immunity is defined by the privilege that the witness has.

QUESTION: And the privilege, of course, was not to testify at all.

MR. FREY: Well, I understand that, but let me point out the fallacy in his position that he must be left in the same position as if he had not testified at all. The first --

QUESTION: You would agree that that would be the consequence of the exercise of the privilege, would be not to testify at all?

MR. FREY: Yes, and he would save himself a lot of inconvenience and he would save himself possibly losing his job, he would save himself public oblique, he would save himself many inconveniences, but the fact is that he is not left in the same position when he is compelled to testify as he would have been had the --

QUESTION: Mr. Frey, could I interrupt you for a moment. Are you speaking in response to Justice Stewart's question of the privilege of a defendant in a criminal case not to take the stand?

MR. FREY: No. I am speaking of a witness who refuses to answer questions that are --

QUESTION: That is another privilege, not to testify

at all, as I understand it, it is a privilege not to compulsorily incriminate himself.

MR. FREY: I agree, although as to the particular questions that were asked here, he had a right not to answer those questions because his answer would have been self-incriminatory.

QUESTION: Even in a trial court, the privilege is not absolute just by its assertion, is it?

MR. FREY: That's true, it is not --

QUESTION: There can be inquiry by the court to determine whether it is validly asserted.

MR. FREY: A privilege exists only in the areas where he has a risk of current self-incrimination, which of course is the point that we are saying here, that he doesn't have.

Now, the fallacy in the notion that he should be in the same position as if he had been allowed to remain silent is illustrated by the fact that he can be prosecuted for perjury in making those statements. He clearly is not in the same position as if he had remained silent.

And looking one step beyond that, why is it that he can be prosecuted for perjury? Well, I think the reason why he can be prosecuted for perjury is that his privilege did not entitle him to commit perjury. He couldn't invoke the privilege on the grounds that his statements might be false and

be used against him in a perjury trial.

We say the very same thing is true here. He could not invoke his privilege to guard against the use that we have made of his testimony in this case, so therefore I don't think this argument is right.

Now, we also illustrate our point by looking at the situation with transactional immunity. I think it was clear in Kastigar and the cases before Kastigar that transactional immunity satisfied the requirements of privilege against self-incrimination. The statute no longer allows it, but if the petitioner had been given transactional immunity as once was permitted, his statements could have been used against him to prove subsequent perjury because the transactional immunity would have been with regard to the offenses about which he was being compelled to testify.

Now, his answer to this analysis is to invoke certain language in Kastigar and in Portash, but we don't think that that language was addressed to the problems we have in this case at all. The Court was not examining in that case the question of whether the immunity must exceed the scope of the privilege. In both cases, what the Court was talking about was the uses, that the witness would have been privileged to resist at the time the testimony was compelled. In Kastigar, the Court was concerned with whether the use and derivative use immunity was sufficient to displace the

privilege, and in that respect the Court was comparing it transactional immunity and the Court was saying that use and derivative use immunity, since it protects use in any respect of his evidence, is sufficient. Clearly they were focusing on use to prove the crime about which he was required to testify.

Portash is exactly the same situation. It is clear from the Court's holding that Portash had a right to invoke his privilege against self-incrimination to guard against the use of compelled testimony, to impeach him should he be prosecuted for the crimes about which he testified.

So this case is completely different and you can't simply lift that language out of the cases and in effect either automatically or unthinkingly apply it to this quite different situation.

Now, even if the Constitution permits the kind of use of immunized testimony that was made in the present case, there does remain a question of whether such use is bothered by the immunity statute, section 6002, and we, of course, contend that the statute does not bar its use.

On the exclusive inclusion in the last clause of section 6002 are flase statement prosecutions, but there is a more fundamental point that shows that the statute is no bar to the kind of use made here so long as that use is constitutional and permissible. This Court has construed immunity

provisions like that in 6002 in a number of prior cases.

In Glickstein, for instance, it was confronted with a statute which barred use of immunized testimony in any proceeding and it held that that statute did not bar use in a perjury prosecution. And in Bryan, the Court held that a statute which barred any use "except in a prosecution for perjury" did not bar use in a contempt case.

Now, in both of these cases the Court recognized that the kind of language that we are dealing with in the immunity statute here refers to use in connection with a prosecution for the offense that is disclosed by the testimony itself, and not for future offenses such as contempt or perjury as to which the privilege was unavailable at the time of the compelled testimony.

Now, the Court in this case should analysis the proviso to section 6002 in precisely the same manner. And if it does so, it will be giving to that statute the meaning that Congress intended. The immunity statute was based closely on the report of the National Commission on Reform of Federal Criminal Laws. That commission proposed that "the immunity conferred would be confined to the scope required by the Fifth Amendment."

In both the House and Senate reports, it is stated explicitly, "This statutory immunity is intended to be as broad as but no broader than the privilege against

self-incrimination."

Now, the last clause in section 6002 which specifically lists perjury, false statements and the third clause which I think basically they had in mind was contempt cases, was added not as a limitation on the use that could be made of immunized testimony but out of an abundance of caution to make sure that no court would prohibit as long as the Constitution allowed it, that no court would prohibit the use in a perjury case or a false statement case or a contempt case.

Now, the same policy concerns that led the Court in Glickstein and in Bryan to refuse to read the limitation into the immunity statutes in those cases are also operative here. In effect, what the Court said in Glickstein and in Bryan is that Congress can't really have meant, we can't believe that Congress meant to protect the defendant or the witness against a perjury or a contempt prosecution even though the Constitution doesn't require it, because that would defeat in large part the purpose of giving him the immunity.

Now, the same thing is true in this case. He is given immunity, he is compelled to testify, and then he walks out of the grand jury and a couple of weeks later he encounters the defendant who is now indicted and the defendant apparently by whatever means persuades him to recant his testimony. The recantation has totally destroyed the value of the immunity

that this witness was given. It is on the usefulness of the statutory scheme that Congress created it, and I think it would be very unfortunate and certainly not what Congress would have wanted if in the future when situations like this arise, an indicted defendant can say to a witness who gave immunized testimony, well, you can recant it, don't worry, look at Dunn v. United States, they can't use your grand jury testimony to show that you are lying the second time around.

So in sum we suggest that neither the Constitution nor the statute bars the use that we made of the immunized testimony in this case and accordingly the judgment of the Court of Appeals should be affirmed.

QUESTION: You are really suggesting that the agreement on the immunity should be ignored for failure of consideration in effect?

MR. FREY: Well, that is a secondary argument. My first argument is that the agreement never encompassed a promise not to make the kind of use that the government made in this case, that the Constitution doesn't require that kind of a promise, that it would be foolish for us,as Justice White said in his concurrence in Murphy v. Waterfront Commission, that it would be harmfully and wastefully broad construction of the --

QUESTION: Wasn't this even more specifically said by my Brother Brennan in the Freed case in this --

MR. FREY: Yes. I think the Freed case, of course, is a case on which we quite strongly rely and is a case in which -- it didn't deal with an immunity statute that was subject to the construction that there was a statutory bar to a particular use, and I think that is what I was trying to address in answering the Chief Justice's question. On the constitutional point, Freed is very strong support for us because, of course, in Freed there was a statute that gave only contemporaneous past offense immunity and not future offense immunity and the Court unanimously held, both the Court's opinion and Justice Brennan emphasized that he couldn't complain that his statement might be used against him in connection with a future offense. We have relied heavily in our brief on that point.

But there is an argument here that the Constitution may allow the government to do it, but the statute doesn't allow it, and it is to that argument that I was addressing the Chief Justice's question, and I was saying that first of all there was no bargain with him that we wouldn't make the kind of use that we made. And secondly, I think the Chief Justice is right in suggesting that from a policy standpoint he has robbed us of what we were entitled to, but once he got that immunity we were entitled to his truthful testimony and he has undone, taken away the value of that by going out and giving sworn recantation of that testimony which destroyed the

prosecution.

QUESTION: Mr. Frey, this is really an answer, if I understand you correctly, to the statutory argument based on the words "or otherwise," because you are in effect saying that by recanting he breached the substance of the order just as much as if he had given false testimony in the first place.

MR. FREY: Well, I am saying that and it is -- obviously, the problem only arises because the otherwise language is susceptible to the limiting construction.

QUESTION: But even if you give it the limiting construction, it seems to me you've made an answer in the sense that just as he had an obligation to tell the truth, he also implicitly has agreed not to recant.

MR. FREY: Well, I suggest that and I suggest that a contrary construction of the construction adverse to our position would not comport with what Congress must have intended.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Sears?

ORAL ARGUMENT OF DANIEL J. SEARS, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. SEARS: Mr. Chief Justice, if I may just have a few concluding remarks.

Your Honors, respondent's argument has proceeded on

the basis that if this Court rules that immunized testimony cannot be used in establishing the corpus delicti of an inconsistent declarations prosecution, that that means anybody has a free license to commit perjury. That is not what we are contending in this case.

We are merely contending that the government is obliged once it offers immunity to prove that a man has perjured himself under testimony. That was not established in this case. To the contrary, the evidence in the record was that there was much to believe the truthfulness of Dunn's grand jury testimony under compulsion.

QUESTION: Do you think the government got what it bargained for?

MR. SEARS: Your Honor, I have to concede that what Mr. Dunn did is repugnant to every moral obligation, but I submit that it was not a violation of section 1623 and that section 1623(c) was not a proper method of proof.

QUESTION: But he is still claiming all the benefits of that bargain, isn't he?

MR. SEARS: Your Honor, he has a right to claim the benefits of that bargain and, yes, he is.

QUESTION: Without any adjustment in price?

MR. SEARS: YOur Honor, I submit that the government had its options available. It had the option of taking the September 30th transcript as extrinsic evidence and proving

that he lied before the grand jury. Of course, then the defense would have the right to defend his grand jury declarations were truthful. That was never a theory in the case. If the government --

QUESTION: Is there any right of the government to rely on the witness' testimony that he will not recant it? And isn't that the reason for putting him under oath?

MR. SEARS: Absolutely, Your Honor, but I submit that --

QUESTION: But you would take that away.

MR. SEARS: No, Your Honor, that is not what we are asking. We are asking that when there is reason to believe that the testimony is truthful under immunity, that it not be subsequently used against him in a criminal proceeding, which we submit is the very ruling of --

QUESTION: Also it might be believed that he shall not recant?

MR. SEARS: Your Honor, I would submit that there would certainly be the --

QUESTION: Well, isn't that the reason you put him under oath?

MR. SEARS: Yes.

QUESTION: So that if he does repeat --

MR. SEARS: Well, Your Honor, if he recants --

QUESTION: You don't want to cut that out, do you?

MR. SEARS: Your Honor, only if he recants in another ancillary proceeding, but that is not what happened in this case. And unless the government is going to go that one additional step and provide extrinsic evidence to prove that one of his declarations was false under 1623, then no violation ensues. And simply because he testifies inconsistently, and it seems to me this was a proceeding under which Hockenberry and Somento and some of the other cases proceeded, which this Court need not accept and I think which was alluded to in the Court ruling last week, is that if he does testify truthfully it should not be used against him for impeachment or in any criminal proceedings whatsoever, and that is what we ask the Court to do.

Thank you.

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

(Whereupon, at 1:45 o'clock p.m., the case in the above-entitled matter was submitted.)

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