

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-825  
TITLE THE PILLSBURY COMPANY ET AL., Petitioners  
v.  
JOHN CONBOY  
PLACE Washington, D. C.  
DATE October 6, 1982  
PAGES 1 thru 54



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1           BEFORE THE SUPREME COURT OF THE UNITED STATES

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3 THE PILLSBURY COMPANY ET AL.,           :

4                           Petitioners           :

5                           v.                               No. 81-825

6 JOHN CONBOY                               :

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8   Washington, D.C.

9   Wednesday, October 6, 1982

10                   The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States

12 at 1:45 o'clock p.m.

13 APPEARANCES:

14 FRANCIS J. MC CONNELL, ESQ., of Chicago, Illinois; on

15       behalf of the Petitioners.

16 MICHAEL W. COFFIELD, ESQ., of Chicago, Illinois; on

17       behalf of the Respondent.

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1

P R O C E E D I N G S

2

CHIEF JUSTICE BURGER: We will hear arguments  
3 next in the Pillsbury Company against Conboy.

4

Mr. McConnell, you may proceed whenever you  
5 are ready.

6

ORAL ARGUMENT OF FRANCIS J. McCONNELL, ESQ.

7

ON BEHALF OF THE PETITIONERS

8

MR. MC CONNELL: Mr. Chief Justice, may it  
9 please the Court, this case involves the scope of  
10 protection under the immunity statute.

11

As Your Honors well know, that statute  
12 provides that no use or derivative use may be made of  
13 compelled testimony. The issue presented by the  
14 petition is whether Mr. Conboy's deposition testimony,  
15 which repeats verbatim or closely tracks his immunized  
16 grand jury testimony, can be used against him in a  
17 subsequent criminal prosecution.

18

This case arises out of the corrugated  
19 antitrust litigation. In 1978, indictments were brought  
20 against a number of major paper companies, alleging a  
21 price-fixing conspiracy in violation of the anti-trust  
22 laws in the corrugated container industry. Mr. Conboy  
23 is a former employee of the Weyerhaeuser Company, one of  
24 the defendants in that action, and the petitioners in  
25 this case are purchasers of corrugated containers who



1 opted out of the class action.

2           Now following the indictments in 1978 there  
3 were a series of class and civil actions filed in  
4 various district courts throughout the land. Those  
5 actions were consolidated in the Southern District of  
6 Texas before Judge Singleton. In the course of  
7 discovery in the class litigation the District Judge, on  
8 motion and the necessary showing of compelling and  
9 particularized need, released certain grand jury  
10 transcripts, including that of Mr. Conboy.

11           Later, in May of 1981, Petitioners, pursuant  
12 to subpoena, in Chicago took the deposition or attempted  
13 to take the deposition of Mr. Conboy. We had his grand  
14 jury transcript. Mr. Conboy had a copy of the  
15 transcript. His lawyer had a copy of the transcript.  
16 And the examination took the following format.

17           He had testified before the grand jury under  
18 immunity that he had exchanged prices with Dick Herman  
19 of Alton Boxboard. The first question: Mr. Conboy,  
20 with whom at Alton Boxboard did you exchange prices? He  
21 evoked the Fifth Amendment.

22           Next question: Is it not a fact that you  
23 exchanged prices with Dick Herman of Alton Boxboard?  
24 Again, the witness invoked the Fifth Amendment. Third  
25 question: Did you not so testify in January of 1978?

1 Again the witness --

2 QUESTION: You used the phrase "so  
3 testified". What's the frame of reference there?

4 MR. MC CONNELL: The reference back to the  
5 prior question, that you had fixed prices or you  
6 exchanged prices with Dick Herman.

7 QUESTION: Well, are we to understand that the  
8 examiner was -- had the transcript of the grand jury  
9 testimony in front of him?

10 MR. MC CONNELL: Yes. I was the examiner. I  
11 had the transcript. I'm reading verbatim questions --

12 QUESTION: It's perhaps of some importance  
13 whether it was directly from that transcript or whether  
14 it was from some other information, is it not?

15 MR. MC CONNELL: Excuse me, Your Honor. I  
16 thought I mentioned that we all had copies of the grand  
17 jury transcript.

18 QUESTION: But having copies two weeks before  
19 and having copies right in front of you at the time is  
20 perhaps -- perhaps -- different, but you say the  
21 examination was conducted with the transcript in the  
22 hands of the examiner.

23 MR. MC CONNELL: In my hands, Your Honor.

24 QUESTION: But you were asking him -- you may  
25 have been reading the questions from the grand jury

1 transcript, which I take it you were.

2 MR. MC CONNELL: Yes.

3 QUESTION: But you were asking him for his  
4 recollection at the time you were examining him.

5 MR. MC CONNELL: Yes, of course.

6 QUESTION: Did he have a copy of the  
7 transcript?

8 MR. MC CONNELL: He had a copy of the  
9 transcript; his lawyer had a copy of the transcript.

10 QUESTION: But you weren't asking him whether  
11 that was his recollection then. You were asking him  
12 now, then, what his recollection was about the  
13 price-fixing.

14 MR. MC CONNELL: That would be the first  
15 question. Yes. The first question: With whom at Alton  
16 Boxboard did you have price conversations?

17 QUESTION: Suppose you hadn't had the  
18 transcript at all and had never had it and you asked him  
19 this question and he took the Fifth Amendment?

20 MR. MC CONNELL: That's a more difficult  
21 question.

22 QUESTION: Well, more difficult. It isn't  
23 difficult at all, is it? He would be entitled to take  
24 it if there was a realistic threat of criminal  
25 prosecution.

1           MR. MC CONNELL: Not according to the Eighth  
2 Circuit in the Borden case. The Eighth Circuit says --  
3 let's take your situation, Mr. Justice White. In the  
4 Borden case -- not Starkey -- Starkey is Eighth Circuit  
5 also, but Borden follows Starkey also in the Eighth  
6 Circuit -- there were two witnesses. The examiner did  
7 not have a copy of the grand jury transcript. He asked  
8 a series of questions which presumably were areas that  
9 were covered in the grand jury testimony.

10           The witness took the Fifth to those series of  
11 questions. A motion to compel was made. The Court then  
12 reviewed the grand jury transcript in camera and he said  
13 these questions are within the confines of the prior  
14 immunized grand jury testimony. These questions are  
15 not. Answer the questions that are within the  
16 confines. You don't have to answer the questions that  
17 are outside.

18           QUESTION: So it really didn't make any  
19 difference that you were reading from the transcript?

20           MR. MC CONNELL: Well, if you go as far as the  
21 Borden case, it doesn't make any difference, but if you  
22 limit yourself to Fleischacker and the panel decision  
23 below, it is important that you have the transcript.

24           QUESTION: Now along that same line, let me  
25 see if I can get clearly what you're saying. If you had



1 never seen the transcript in your life but were simply  
2 aware that he had been before a grand jury at some time,  
3 would you have asked these questions?

4 QUESTION: Well, if you were suing for  
5 price-fixing you would.

6 MR. MC CONNELL: Your Honor --

7 QUESTION: That's what you'd be probing for,  
8 wouldn't you?

9 MR. MC CONNELL: Exactly.

10 QUESTION: Even if you didn't know that he'd  
11 ever been before a grand jury.

12 MR. MC CONNELL: Exactly. We know that the  
13 grand jury investigation involved price-fixing in the  
14 corrugated box industry. We know that this man was a  
15 key employee dealing with other corrugated box  
16 manufacturers involving major accounts. The  
17 probabilities were that he had exchanged prices. So  
18 yes, I think I would have asked many of the same  
19 questions.

20 But that doesn't answer the problem yet  
21 because I did -- in your hypothetical I didn't have a  
22 copy of the transcript and --

23 QUESTION: To go beyond that, in the  
24 hypothetical the questions would not have been derived  
25 from immunized testimony.

1 MR. MC CONNELL: Well, certainly not my  
2 questions. But --

3 QUESTION: If you didn't know what the  
4 immunized testimony was, how could you have been using  
5 it? Here you know what it was.

6 MR. MC CONNELL: Here I know what it was and  
7 clearly, to the extent I asked question verbatim or  
8 closely tracking, it's derived. In the other case, I'm  
9 presuming what was asked, but I don't know that and it's  
10 not directly derived from the transcript.

11 But when the witness refuses to answer on  
12 Fifth Amendment grounds and then the Court reviews in  
13 camera the transcript and says these are areas which  
14 were examined on before the grand jury and you must  
15 answer these questions, then it seems to me that that is  
16 a compelled repetition of immunized grand jury  
17 testimony..

18 QUESTION: But it's in a civil action.

19 MR. MC CONNELL: It is in a civil action.

20 QUESTION: And since the grant of protection  
21 of the immunity statute is limited to a criminal action,  
22 why does the immunity statute have anything to do with a  
23 civil action?

24 MR. MC CONNELL: The Fifth Amendment and the  
25 co-extensive use immunity protection protects you

1 against use of that testimony only in a criminal action,  
2 but you can invoke the Fifth Amendment in any action --  
3 civil or criminal.

4           QUESTION: Certainly. But conceding that, why  
5 does the use of the immunity statute play any part in  
6 your argument with respect to testimony adduced in a  
7 civil case?

8           MR. MC CONNELL: Because the respondent's  
9 position is that a prosecutor may get hold of this  
10 deposition where he has repeated his same immunized  
11 grand jury testimony and use that as a wholly  
12 independent source.

13           QUESTION: In a later criminal case.

14           MR. MC CONNELL: In a later criminal case.

15           QUESTION: It is just as though there never  
16 had been any grand jury testimony or anything else and  
17 that you have him on the witness stand in a civil case  
18 and you ask him a question that may incriminate him in  
19 some future criminal case, so he can take the Fifth  
20 Amendment.

21           MR. MC CONNELL: That's right, if he doesn't  
22 have immunity.

23           QUESTION: Yes.

24           QUESTION: If you try to use it in a criminal  
25 case, that's the time to stop it.

1 MR. MC CONNELL: No, I don't think so, Your  
2 Honor.

3 QUESTION: Well, if an objection was made,  
4 could it be used in a subsequent criminal case?

5 MR. MC CONNELL: No, absolutely not.

6 QUESTION: So that's --

7 MR. MC CONNELL: The question is could this  
8 Court make the determination prospectively that that  
9 evidence would be tainted, and we say clearly it could  
10 and we also rely on the dicta in Patrick in the Seventh  
11 Circuit.

12 QUESTION: Well, suppose there is no  
13 subsequent criminal prosecution?

14 MR. MC CONNELL: I'm sorry. I missed your  
15 question.

16 QUESTION: If there is no subsequent criminal  
17 prosecution, it couldn't be used.

18 MR. MC CONNELL: If there's no subsequent  
19 criminal prosecution, it can't be used.

20 QUESTION: But how does the harm come ahead of  
21 the criminal prosecution?

22 MR. MC CONNELL: Because the question is  
23 whether the witness can be compelled to testify over his  
24 Fifth Amendment assertion and the Court said -- the  
25 Court said you can be compelled because you have compete



1 protection because no use can be made of this civil  
2 deposition testimony. Where you confine the examination  
3 to the four corners of the grand jury immunized  
4 testimony, where you repeat verbatim or you closely  
5 track, you are protected.

6 And we can make that determination today.

7 QUESTION: Following up on Justice Rehnquist's  
8 point about the civil action, the interesting thing  
9 about the way this arises is that if this man were to  
10 answer the questions, he is now arguing that they are  
11 not protected. But then if he were later indicted he  
12 would then take the exact opposite position and argue  
13 they were protected, I would assume.

14 QUESTION: That's right.

15 MR. MC CONNELL: I would think so.

16 QUESTION: So his interests change in the  
17 different proceedings.

18 QUESTION: Well, the whole problem could be  
19 solved by just not giving out grand jury testimony, I  
20 would think.

21 MR. MC CONNELL: Well --

22 QUESTION: You know, to plaintiffs.

23 MR. MC CONNELL: Well, we wouldn't have the  
24 transcript if the transcript hadn't been released,  
25 that's true.

1 QUESTION: Well, and all you're doing is  
2 making it available to civil plaintiffs really.

3 MR. MC CONNELL: I don't think that's true.

4 QUESTION: As a discovery tool.

5 MR. MC CONNELL: Justice Rehnquist, we are not  
6 suggesting that the test announced by this Court in  
7 Douglas Oil be in any way relaxed. The Plaintiff still  
8 has the burden or the party seeking release of grand  
9 jury transcripts still has the burden of meeting the  
10 compelling and particularized need test, and that's a  
11 balancing test, balancing the need for disclosure  
12 against the continuing need for secrecy.

13 We are not suggesting that that test be  
14 relaxed in any way. That test was meant here -- the  
15 transcripts were released, and now the question is what  
16 use we can make of those transcripts. Yes, sir.

17 QUESTION: Well, all you -- I suppose the only  
18 showing you made is that you wanted some testimony. You  
19 wanted some basis -- you said you brought a civil suit  
20 and this would be useful in the civil suit.

21 MR. MC CONNELL: Well, I don't think it's that  
22 simple. What happened --

23 QUESTION: What else could you say?

24 MR. MC CONNELL: Well, the showing that was  
25 made before Judge Singleton -- and this goes back to

1 January of 1980 -- was that there had been a massive  
2 invocation of the Fifth Amendment and that meaningful  
3 discovery had been blocked by reason of the Fifth  
4 Amendment assertions in this litigation, and the judge  
5 issued a memorandum order.

6 QUESTION: Well, if we affirm, then you'd  
7 never be able to get the grand jury minutes then again  
8 on that basis because it wouldn't do you any good to  
9 have them. You could still take the Fifth Amendment.

10 MR. MC CONNELL: If you affirm, whether we  
11 have the grand jury minutes or not is not going to do us  
12 any good because we can't compel his testimony.

13 QUESTION: Exactly.

14 MR. MC CONNELL: That's why I want you to  
15 reverse.

16 QUESTION: Exactly. But if we affirmed, you  
17 wouldn't be able to get any more grand jury minutes by  
18 saying everybody's taking the Fifth Amendment.

19 QUESTION: I thought that's what you had  
20 responded to in response to my questions, that even if  
21 you had never known about this, didn't have a copy of  
22 the transcript, the questions you would put to this  
23 witness would likely be parallel to those presented to a  
24 grand jury, but he would still have the protection of  
25 the Fifth Amendment, wouldn't he?

1           MR. MC CONNELL: He would have the protection  
2 of the Fifth Amendment in that situation. But what the  
3 Borden court said was that if he invokes the Fifth  
4 Amendment to the question or series of questions and the  
5 Court, on in camera inspection of the grand jury  
6 transcript not released to the parties, determines that  
7 these questions were in fact touched upon in the grand  
8 jury examination, that he then can be compelled to  
9 answer over his Fifth Amendment objection.

10           And they say in that situation he is protected.

11           QUESTION: I suppose we can also have the  
12 situation where the testimony is originally elicited at  
13 a grand jury investigation and use immunity is granted  
14 by the government to the witness and then the witness  
15 testifies within the use immunity at the criminal trial  
16 and you still have the question of trying to use it in  
17 the civil case.

18           Now there it's not a question of getting the  
19 grand jury testimony at all, but don't you have the same  
20 problem?

21           MR. MC CONNELL: Yes.

22           QUESTION: And did that happen here?

23           MR. MC CONNELL: No.

24           QUESTION: Mr. McConnell, in any of these  
25 cases that you referred to has the government taken a



1 position on the issue? It is interesting. They don't  
2 file any kind of an amicus brief.

3 MR. MC CONNELL: No, they have not.

4 QUESTION: Could the government come in in the  
5 civil proceeding and grant use immunity again, although  
6 the government's not involved?

7 MR. MC CONNELL: Well, they could, but they  
8 have not, and they have declined to. There is no  
9 companion civil suit by the government here.

10 In the Folding Carton Litigation which  
11 preceded the Corrugated Litigation, the government did  
12 do that. They had a companion civil suit and they did  
13 grant immunity in connection with the discovery  
14 depositions in the class actions which were consolidated  
15 with the government's civil action. There was no --

16 QUESTION: As I understand it, the government  
17 makes the practice under this use immunity statute of  
18 going in every time the witness appears any place and  
19 getting another use immunity grant, isn't that right?

20 MR. MC CONNELL: Well, that's one of the  
21 arguments of the respondent, that the fact that the  
22 government granted separate immunity both in the  
23 interview statement and later when the witness appeared  
24 before the grand jury and in the case of witnesses who  
25 appeared in the criminal trial, again they granted it.

1           And I think there's two very -- first of all,  
2 obviously I don't know what was in the mind of the  
3 government, but I think there are two very practical  
4 answers or reasons for that having been done. One,  
5 defense counsel, out of an abundance of caution,  
6 demanded and said if you want testimony from my witness  
7 you are going to have to grant him immunity.

8           Secondly, if the government wanted to go  
9 beyond the confines of the earlier examination, then  
10 they would want the witness immunized again.

11           QUESTION: Well, Mr. McConnell, I gather what  
12 you want us to say is the use immunity which he received  
13 in connection with the grand jury testimony carries over  
14 to this deposition in the civil case.

15           MR. MC CONNELL: Yes, provided --

16           QUESTION: But is there anything at all in the  
17 legislative history to suggest that Congress intended  
18 that statute to apply to civil as well as criminal cases  
19 or appearances before the grand jury?

20           MR. MC CONNELL: I think the legislative  
21 history indicates -- and this Court's decision in  
22 Kastigar indicates -- that that statute was to be  
23 construed as broadly, as sweepingly as possible.  
24 Indeed, this Court in Kastigar said it provides a  
25 sweeping protection against any use or derivative use of

1 compelled testimony.

2 QUESTION: So you read "sweeping" as carrying  
3 all through subsequent civil proceedings and such?

4 MR. MC CONNELL: So long as the subsequent  
5 civil proceedings are confined to the four corners of  
6 the --

7 QUESTION: Of the transcript.

8 QUESTION: Well, that would just read out the  
9 word in any criminal case from the use statute.

10 MR. MC CONNELL: No. What we're saying is --

11 QUESTION: Well, the position you've just  
12 taken would weed out that language, wouldn't it?

13 MR. MC CONNELL: I don't think so, Mr. Justice  
14 Rehnquist. What I'm saying is if we produce a carbon  
15 copy of the grand jury testimony on civil deposition,  
16 can the government use that civil deposition in a  
17 subsequent criminal proceeding against the witness. And  
18 that's what we say the statute prohibits. It would be  
19 the derived or derivative use of the original immunized  
20 testimony in a down-the-pipe subsequent criminal  
21 proceeding.

22 QUESTION: That conforms with the language of  
23 the statute, but I thought you were trying to apply it  
24 here to --

25 MR. MC CONNELL: No, no. All we're saying is

1 that the testimony is protected against use against  
2 Conboy in a subsequent criminal proceeding.

3 QUESTION: Because he has no danger of  
4 incriminating himself in some criminal case because this  
5 testimony in the civil case won't be admissible.

6 MR. MC CONNELL: Exactly. That's it.

7 QUESTION: That's what you're saying.

8 MR. MC CONNELL: That's what I'm saying. If I  
9 didn't say it before, that's for sure what I'm saying  
10 now.

11 QUESTION: What happens if the criminal case  
12 judge seals the testimony, the deposition, and refuses  
13 to release it? Then what position do you take?

14 MR. MC CONNELL: Well, I don't know how --

15 QUESTION: You don't know how a judge can seal  
16 testimony?

17 MR. MC CONNELL: Well, yes, I do not know  
18 people get -- I mean, a lot of times seals don't do any  
19 good. But assuming that it is sealed sealed, and nobody  
20 gets access to it, then it seems to me in that situation  
21 the prosecutor in a subsequent criminal proceeding  
22 against Mr. Conboy would have a chance of showing that  
23 his evidence was obtained from a wholly independent  
24 source. If he neither saw the grand jury testimony nor  
25 saw or had access to the deposition testimony which



1 repeated --

2 QUESTION: Well, how could he get access to  
3 sealed testimony?

4 MR. MC CONNELL: I don't think he can.

5 QUESTION: Well, then he wouldn't have it.

6 MR. MC CONNELL: That's it. And what I'm  
7 saying --

8 QUESTION: Therefore, he couldn't use it.

9 MR. MC CONNELL: That's right, and maybe --

10 QUESTION: Your point is he might get it from  
11 an independent source, in which event he could use it.

12 MR. MC CONNELL: In that situation he might be  
13 able to get it from an independent source and he could  
14 establish his Kastigar burden.

15 QUESTION: He could use this testimony from  
16 the grand jury in a subsequent criminal prosecution in  
17 spite of the statute. Is that your position?

18 MR. MC CONNELL: No. No way.

19 QUESTION: Well, that's the way you are.

20 MR. MC CONNELL: I don't believe so, Justice  
21 Marshall. The statute and this Court's holding in  
22 Kastigar say that a prosecutor in a subsequent criminal  
23 prosecution against Mr. Conboy, one, cannot use the  
24 immunized testimony itself, nor can they base their case  
25 on any evidence or fruits derived from that immunized

1 testimony, nor -- to carry it a step further -- can they  
2 base their prosecution on the deposition which just  
3 repeated that testimony.

4           QUESTION: My only trouble with you is when  
5 you say you can't use the fruit does not say the fruit  
6 can't grow.

7           MR. MC CONNELL: Well, I think this Court's  
8 decision --

9           QUESTION: Or the fruit can't exist. All the  
10 statute says is it can't be used.

11           MR. MC CONNELL: Exactly, Your Honor. It is  
12 not transactional immunity. Mr. Conboy always remains  
13 theoretically subject to prosecution, assuming that the  
14 prosecutor can show that his evidence came from a wholly  
15 independent, legitimate source -- not from this  
16 deposition and not from the grand jury testimony.

17           All right.

18           QUESTION: Mr. McConnell, I think what  
19 concerns me most about this -- about your position -- is  
20 that probably the use immunity statute that was passed  
21 by Congress was passed by Congress in an effort to help  
22 the government lawyers -- the prosecutors -- to avoid  
23 having them lose other means of going after somebody in  
24 a criminal case just because of an overbrick of the  
25 transactional immunity that has been used.

1 MR. MC CONNELL: I agree with that.

2 QUESTION: And I doubt if Congress was  
3 thinking of benefitting civil litigants when it passed  
4 that statute. Now the danger of letting you use it, it  
5 seems to me, is that in the process of using it,  
6 although the government prosecutors are not involved,  
7 somehow that use immunity will get widened, although the  
8 government wouldn't like that because the witness is in  
9 a bad position.

10 The witness presumably has to be  
11 cross-examined and maybe it gets wider and wider and  
12 wider, and all of a sudden the government is losing the  
13 benefit of some testimony that it didn't want to lose.  
14 Now how do you respond to that?

15 MR. MC CONNELL: Well, the answer to that, I  
16 think, is that so long as the deposition examination is  
17 confined to the four corners of the grand jury immunized  
18 examination, there is no expansion.

19 QUESTION: Okay, but how do you do that within  
20 the framework of giving cross examination? Otherwise,  
21 presumably the evidence can't come in anyway.

22 MR. MC CONNELL: I understand. There is  
23 nothing which prevents the defendants in this situation  
24 from cross examining as to details of the direct  
25 examination. We are assuming here that the scope of the

1 direct examination is confined and limited to the scope  
2 of the immunized examination. In turn, there is no  
3 reason why defendants cannot conduct meaningful cross  
4 examination within the confines of the direct  
5 examination.

6           They can ask details -- who, where, when, how  
7 many times. They can ask exculpatory testimony. Well,  
8 now, you said you had this price-fixing conversation  
9 with Dick Herman where you agreed that you would both  
10 raise your prices. But isn't it a fact that you cut  
11 your prices? You said you were both going to honor each  
12 other's prices. Isn't it a fact that both of you cut  
13 each other's prices? That's cross examination. That's  
14 meaningful cross examination, but that's clearly within  
15 the scope and confines of the direct examination and  
16 does not expand the immunity grant, which --

17           QUESTION: No, but I suppose, Mr. McConnell,  
18 that in such a cross examination question it would be  
19 possible that the cross examiner would bring out  
20 information that could not reasonably have been derived  
21 from the confines of the original testimony and,  
22 therefore, that broadened examination might go beyond  
23 the scope of the use immunity.

24           MR. MC CONNELL: Well, if the examination goes  
25 beyond the confines and the answer is potentially



1 incriminating --

2           QUESTION: Then he would have to claim the  
3 Fifth.

4           MR. MC CONNELL: Then he would have to claim  
5 the Fifth.

6           QUESTION: So he's really faced with a choice  
7 in the case of every single question that deviates even  
8 a little bit from the transcript as to -- he'll need a  
9 lawyer standing right there beside him to decide whether  
10 he should claim the Fifth or not.

11           MR. MC CONNELL: I don't think it's that  
12 difficult, but we've gotten rulings from the Court in  
13 this case before and there's no reason that we couldn't  
14 get rulings again, and, as a matter of fact, in this  
15 very case, Fleischacker is Second Circuit. After the  
16 Fleischacker case came down, the opinion came down, we  
17 went back and we took Fleischacker's deposition and I  
18 used the same procedure or format that I attempted to  
19 use with Mr. Conboy -- asked him questions verbatim from  
20 the grand jury testimony.

21           On cross examination, Mr. Fleischacker  
22 asserted the Fifth Amendment. No attempt was made to  
23 compel answers over his Fifth Amendment assertion, and  
24 in a motion in limine in this litigation the defendants  
25 moved to strike the Fleischacker deposition on the

1 ground that they'd been denied meaningful cross  
2 examination.

3           Judge Singleton ruled in pretrial order  
4 PTO-69 -- pre-trial order 69, which we have supplemented  
5 the record with -- he ruled that the defendants were  
6 entitled to cross examine as to details, that the  
7 appropriate procedure was a motion to compel, and had  
8 they done that they could have had meaningful cross  
9 examination.

10           On the other hand, if the cross examination  
11 clearly goes beyond the scope of the direct and the  
12 immunized and is collateral to, that is not a denial of  
13 meaningful cross examination, and that is not grounds  
14 for striking his direct examination and we cite the  
15 Court to Cardilla -- U.S. versus Cardilla -- on that  
16 point.

17           QUESTION: In the posture of this case or this  
18 type of case, isn't your examination of someone who has  
19 appeared before the grand jury generally a cross  
20 examination -- really, although you are the first to  
21 question, it's really an adverse witness.

22           MR. MC CONNELL: It is. He is a price-fixer,  
23 and I am trying to get him to admit it, yes.

24           I would like to reserve my remaining time.

25           QUESTION: Well, Mr. Coffield.

1 ORAL ARGUMENT OF MICHAEL W. COFFIELD, ESQ.

2 ON BEHALF OF THE RESPONDENT

3 MR. COFFIELD: Mr. Chief Justice, may it  
4 please the Court, although I am here today on behalf of  
5 John Conboy, in fact I think, Your Honors, that really  
6 Mr. Conboy is a representative almost in a class sense  
7 of many, many deponents and witnesses before not only  
8 this antitrust grand jury that started back in 1976 and  
9 resulted in one criminal case, one civil class action  
10 case, and this opt-out case, but he is representative of  
11 witnesses throughout the country in multi-defendant and  
12 large investigative cases, and I have represented many  
13 of them and, as Mr. McConnell has himself, these  
14 depositions have taken all sizes, all forms and all  
15 shapes.

16 The panel majority, it seems to me, says, as  
17 it does precisely at the conclusion of its opinion, the  
18 thing that Mr. McConnell throughout his briefs and his  
19 argument I would, with all due respect submit, has never  
20 answered, and that is the Court says there are just too  
21 many uncertainties.

22 If Kastigar reads the use immunity statute and  
23 supports it as a constitutional statute, and as we have  
24 applied Kastigar and defense counsel for all these  
25 witnesses who are individual counsel for these

1 witnesses, represent to them that what Kastigar means,  
2 as this Court has said, is that yes. While we think  
3 that the Fifth Amendment and the use immunity must be of  
4 the same scope and we should read it broadly, the fact  
5 is that it is use immunity and it is not transactional.

6           And, therefore, the source, if it is a  
7 separate source, if it is an independent source, may  
8 well be the source of new information, testimony that  
9 would be incriminating. And if you look at it on the  
10 scope, at one end of the spectrum you have Mr. Conboy's  
11 concern that if one has to wait to the application of an  
12 exclusionary rule down the line, as this Court has  
13 frequently said, that is not the same as the Fifth  
14 Amendment to simply apply an exclusionary rule.

15           If one has to look down the line to the  
16 judgment of the discretion of a prosecutor -- will he or  
17 will he not, in the State of Ohio, for example, decide  
18 because of an unlimited statute of limitations he is  
19 going to have his own antitrust investigation, his own  
20 possible indictment of Mr. Conboy and others, because  
21 Mr. Conboy did business down there, or will some judge  
22 that's not any longer Judge Singleton but some other  
23 District Judge, in reading the spectrum of questions  
24 that go beyond the actual immunized testimony, say I  
25 will cut it here. I think at this point he may have



1 waived or at this point it may be beyond the derivative  
2 use concept.

3           So that our submission really is very clear  
4 and very simple, and that is that for Mr. Conboy to be  
5 certain of the scope of his Fifth Amendment rights and  
6 for a reaffirmation of Kastigar, which we think the  
7 panel majority clearly did, and that in conjunction with  
8 the way the government does this every time, that each  
9 testimonial situation -- be it civil or criminal, be it  
10 interview, grand jury, criminal trial, civil deposition  
11 or civil trial or next grand jury -- Mr. Conboy and all  
12 of those witnesses that he represents are entitled to  
13 claim their Fifth Amendment right because the source not  
14 of the questions, as we point out in our brief and the  
15 panel majority indicated, not of the questions -- the  
16 source is not the questions.

17           The source is the answers and, therefore, for  
18 certainty and in the ability of the witness to know the  
19 scope of his Fifth Amendment and to keep the scope of  
20 the Fifth Amendment and the statute the same, as the  
21 Court has indicated it must be, each time he testifies,  
22 he is entitled to claim it because each testimonial  
23 situation might be a new use.

24           Now you take the one end of the spectrum.  
25 What Mr. McConnell wants to do is to say I bring out the

1 transcript and I give it to you, Mr. Conboy -- as he did  
2 on the day of his deposition -- and this is now the  
3 grand jury transcript and I have got it and you have got  
4 it, and now I am going to read to you. Did you say  
5 this; did you say that?

6           And to make that one relatively simple, he  
7 could say in one question if I were to read you all of  
8 the questions and all of the answers in your grand jury  
9 transcript, would your answers today be the same to  
10 those questions, and Mr. Conboy could theoretically say  
11 yes, Mr. McConnell, despite the fact that Judge  
12 Singleton in this new pretrial order 69 has said I am  
13 not going to allow in grand jury transcript to be read  
14 into this trial except for cross examination of actual  
15 witnesses.

16           But all of a sudden Mr. McConnell is going to  
17 have us transfer what is impermissible under the Federal  
18 Rules of Evidence and Judge Singleton has already said  
19 I'm not going to let that in, by Mr. Conboy answering  
20 the question yes, it all of a sudden becomes now more  
21 verifiable, somehow a better class of testimony, and he  
22 is going to let it in.

23           Now the tough question for me at that point  
24 is, and Justice Marshall suggested this, can anyone  
25 seriously claim that Mr. Conboy's one answer "yes" might

1 somehow be -- subject him to criminal prosecution later  
2 on. And I would submit to Your Honors that given the  
3 fact that criminal prosecution is still possible and  
4 there's been no real argument in this case that it is  
5 still theoretically possible --

6 QUESTION: The issue really isn't whether  
7 another criminal prosecution is possible. Let's assume  
8 it is.

9 MR. COFFIELD: Right.

10 QUESTION: The question is whether the answer  
11 "yes" in your example would fall within the statutory  
12 language of being information directly or indirectly  
13 derived from such testimony. Isn't that the issue?

14 MR. COFFIELD: That's right.

15 QUESTION: Your submission is that the  
16 question that your opponent asked of him was derived  
17 from it, but the answer was not even indirectly derived  
18 from the grand jury transcript -- the information  
19 contained in the transcript.

20 MR. COFFIELD: I would say, Your Honor, that  
21 clearly -- and I'm trying to give myself the hardest  
22 case, clearly -- that it is difficult for me to argue  
23 that is isn't indirectly, but there are a number of  
24 differences.

25 QUESTION: Why is it hard to do that? They

1 are asking him for his present recollection.

2 MR. COFFIELD: That's right. That's my point.

3 QUESTION: You are not asking him for what  
4 your recollection was then. You are saying what is it  
5 not, and that certainly isn't derived from his grand  
6 jury testimony.

7 MR. COFFIELD: And that's not. Exactly,  
8 Justice White. What I am saying is --

9 QUESTION: Well, but let's not leave that  
10 quite so fast. Is it not true that it's indirectly  
11 derived from the other testimony, even though it isn't  
12 what he testified to before? You found out about it  
13 indirectly by knowing what he testified to before.

14 MR. COFFIELD: No, I submit not.

15 QUESTION: And if you were defending him in a  
16 criminal case you would not be willing to argue that  
17 that testimony was the fruit of the grand jury testimony?

18 MR. COFFIELD: Ah, well, as you pointed out  
19 before, that's the connundrum and the Catch-22, if you  
20 will, that Mr. Conboy's going to be put in unless this  
21 Court affirms, because Mr. Conboy in fact, yes, will  
22 have to say that he is entitled to his Fifth Amendment  
23 right because it's a new source -- a new answer, a  
24 present recollection of something that happened four  
25 years ago -- and then, if he is compelled and he does



1 say yes and some prosecutor down the line says but I  
2 have an independent source -- it's a new yes and it's  
3 today's yes -- and I'm going to bring an indictment, I'm  
4 going to have to turn around, and so does Mr. Conboy,  
5 and say well, now, since it is in fact going to be held  
6 either to be excluded under the exclusionary rules or  
7 it's going to be held to be indirect, I now am going to  
8 take your position.

9 QUESTION: So it's a fruit of the poison tree.

10 MR. COFFIELD: Exactly.

11 QUESTION: Supposing you had a coerced  
12 confession case where Mr. Conroy had been hauled in by  
13 the police and subjected to brutality and he gave a  
14 transcript that confessed to a crime. Then later on he  
15 was asked again did you so confess -- the same questions  
16 you've got here -- and he's say well, my present  
17 recollection is such and such. And you say the present  
18 recollection has not been indirectly derived from the  
19 earlier testimony? You say that's not a fruit of the  
20 earlier confession?

21 MR. COFFIELD: It is not, because --

22 QUESTION: Because it's his present  
23 recollection rather than what he testified.

24 MR. COFFIELD: It is not only present  
25 recollection but the problem with it is that in addition

1 to it being present recollection, the moment you add  
2 anything else to my spectrum or to the level of  
3 questions --

4 QUESTION: It is not an indirect fruit.

5 MR. COFFIELD: You are in an area where who  
6 knows where you are going to stop. And without meaning  
7 this disrespectfully, from the point of view of Mr.  
8 Conboy, we don't care how Your Honors decide this,  
9 because if you tell us on the one -- what we want is  
10 certainty. So if you tell me on the one hand, all  
11 right, Kastigar means every time you are entitled to  
12 use, at that point Mr. Conboy and every other witness  
13 will do it the way we do it with the government every  
14 time, and Mr. McConnell is going to have to look to his  
15 own presentation of his case, however he may find it.

16 On the other hand, if Your Honors say well,  
17 we'll go all the way -- and effectively I would submit  
18 that goes back to Justice Marshall's dissent in  
19 Kastigar, which was effectively to say once you give up  
20 the transactional concept you found yourself in this  
21 hornet's nest -- go all the way and say everything that  
22 relates to the corrugated container industry from the  
23 years X to Y is going to be seen, and this Court will so  
24 say, as derivatively and indirectly related to the  
25 questions of this testimony, as far as I am concerned

1 that's fine too, because then we'll sit down and go for  
2 five days.

3           QUESTION: But you pose two possible decisions  
4 of this Court, but those two aren't the only ones. You  
5 could get a decision somewhere in the middle, which I  
6 suppose wouldn't please you so much.

7           MR. COFFIELD: Well, I submit, Your Honor,  
8 that if Your Honors come down somewhere in the middle it  
9 is fraught with uncertainty and it is fraught with  
10 constitutional concern, and the reason it is is because  
11 what you would effectively be doing, it seems to me, if  
12 you come down anywhere in the middle, is going against  
13 cases like Manusk, against cases like Murphy v.  
14 Waterfront -- against the cases which have said the  
15 exclusionary rule remedy is not the same as the  
16 constitutional privilege and the statutory immunity  
17 that's related to it.

18           The exclusionary rule remedy is to clean it  
19 up -- de facto immunity -- some judge later saying well,  
20 all right, Mr. Conboy went this far and now I've got to  
21 look at it --

22           QUESTION: Well, what if you just had a rule.  
23 It might not make a lot of sense, but at least it might  
24 be clear that as long as you are reading a question from  
25 the grand jury testimony and he gives the same answer

1 and the judge is following it, that there is -- that he  
2 must answer that question, because there's immunity.  
3 But if you stray a word from the grand jury testimony,  
4 then you can take the Fifth.

5 MR. COFFIELD: Well, I would pick up on Your  
6 Honor's statement of that. I think that --

7 QUESTION: That's the equivalent of your  
8 hardest case.

9 MR. COFFIELD: That's my hardest case, but it  
10 seems to me the problem with that hardest case is that  
11 while the courts have made it clear that the immunity  
12 does not protect you from perjury, there is a question  
13 with respect to whether or not your present recollection  
14 on these case-by-case questions is the same.

15 QUESTION: Well, you might be perjuring  
16 yourself again because you'd answer --

17 MR. COFFIELD: That's right, and he is  
18 entitled, I would submit, Your Honor, he is entitled not  
19 to perjure himself again and to take the Fifth Amendment  
20 with respect to that.

21 QUESTION: Well, I didn't know immunity  
22 protected you against perjury.

23 MR. COFFIELD: It doesn't. The case is where  
24 you in fact by giving an answer, a new answer, would be  
25 indicating that a past answer was perhaps perjury, that



1 you are protected against doing, as you are from making  
2 any statement that would in any way incriminate you.

3           So while -- if you perjure yourself within --  
4 once you've been given immunity, you are not protected  
5 from prosecution.

6           QUESTION: You say the second testimony the  
7 guy has a right to claim the privilege against  
8 self-incrimination if the answer would tend to indicate  
9 that he perjured himself in an early -- the first time.

10           MR. COFFIELD: That's correct.

11           QUESTION: Or if he said I refuse -- I will  
12 not answer to the same jury.

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1                   QUESTION: If he said, I'm taking the Fifth  
2 Amendment because I refuse to answer, I will not answer  
3 that question the same as I did at the grand jury?

4                   MR. COFFIELD: Well I think if he even says  
5 that much then you may have a court that comes down and  
6 says, well, you waived at least the concept that your  
7 answer would be the same, and now we're going to say  
8 that you've waived to the extent that now you have to  
9 answer.

10                  My point in all of these examples, Your Honor,  
11 is that -- and this is something that the class  
12 Plaintiffs can't do in any form in which they've tried  
13 this. Mr. McConnell told Your Honors what happened with  
14 Mr. Fleischacker, and there was the one where the Second  
15 Circuit said, oh, it's okay, go ahead.

16                  Well, he did, and what happened? The moment  
17 he got past the actual questions and actual answers, Mr.  
18 Fleischacker's counsel, as the Maness case indicates,  
19 being conservative and concerned with the Constitution,  
20 stands up and says: That's it. No more. He is now  
21 taking his Fifth Amendment. At which point all of the  
22 cross-examination and all of the things that would make  
23 the testimony viable, usable, and in the context of the  
24 Defendants in those civil cases --

25                  QUESTION: You don't represent them.

1           MR. COFFIELD: I don't represent them. But  
2 the point is that from the standpoint of the witness,  
3 it's cut off. And as Judge Singleton recognizes himself  
4 in his new order, he is going to cut off and not admit  
5 anything that is grand jury testimony on its own. And  
6 so I would submit that, whether Mr. Fleischacker's  
7 deposition or Mr. Conboy's, if he answers yes doesn't  
8 get more credibility, more viability as valid testimony  
9 by the mere answer yes than it did -- and I would submit  
10 --

11           QUESTION: Mr. Coffield, the only interest you  
12 have in representing a number of these people is  
13 protecting your client from criminal prosecution,  
14 really. That's your ultimate goal.

15           MR. COFFIELD: That's correct.

16           QUESTION: But is it not true -- and you did  
17 indicate it depends on the proceeding, and I of course  
18 recognize you've got to fight each battle as it arises.  
19 But is it not true that generally the class of persons  
20 you represent would benefit from a holding that gives  
21 broad interpretation to the words "indirect use",  
22 because then they would have broad protection against  
23 subsequent criminal prosecution?

24           MR. COFFIELD: Well, as I indicated earlier,  
25 Justice Stevens, I think either way would benefit them.

1                   QUESTION: As long as you know where you  
2 stand. If we were to say, for example, that we apply  
3 the same test we do in the fruits of an illegal search  
4 or seizure, the fruits of an illegal confession, the  
5 same broad scope of protection applies to this immunity  
6 statute, that would be very beneficial to your client,  
7 wouldn't it?

8                   MR. COFFIELD: Well, it would be beneficial  
9 --

10                  QUESTION: In the sense of avoiding future  
11 prosecution.

12                  MR. COFFIELD: Yes, but it would not be as  
13 beneficial as the affirmance of the panel below, because  
14 once I leave here today and Mr. McConnell and I go back  
15 in the trenches, we are out there in a world of  
16 prosecutors all over the place making discretionary --

17                  QUESTION: Well, let me ask you, let me give  
18 you this hypothetical. Supposing the Ohio Attorney  
19 General that you're concerned about gets his hands on  
20 this transcript and he calls the witness in and wants to  
21 use the information in the transcript, but not ask him  
22 any questions about it.

23                  You then I think would be taking the position  
24 that he is using information that was indirectly derived  
25 from a grand jury transcript, wouldn't you?



1 MR. COFFIELD: You bet I would, and that by a  
2 Court's ruling that does not affirm this panel below is  
3 the Catch-22 that Mr. Conboy's put in. He's got to then  
4 be on both sides of this question, depending on who's  
5 doing the asking.

6 QUESTION: Let me put the question to you that  
7 I put to your friend. Mr. McConnell has no transcript.  
8 No transcript was issued in a jurisdiction, in a circuit  
9 where it is not allowed.

10 MR. COFFIELD: Yes.

11 QUESTION: But if he's an experienced lawyer,  
12 as he is, he's going to ask. He's going to be able to  
13 surmise what the testimony was.

14 MR. COFFIELD: He's going to come pretty  
15 close, sure.

16 QUESTION: Now, then he puts the questions to  
17 the witness which very closely track the testimony he  
18 gave before the grand jury. And what does your witness  
19 do?

20 MR. COFFIELD: Well, he does the same thing.  
21 He takes the Fifth Amendment. The irony of that is that  
22 if you take Mr. McConnell's argument that it doesn't  
23 depend on, as I think must be implied in what he's  
24 saying, it doesn't depend on what comes out of Mr.  
25 Conboy's mouth, then you have the reverse situation.

1           Even if Mr. McConnell just fortuitously asks  
2 the same questions in the same order, even though he  
3 never had a copy of the transcript, in fact under his  
4 theory it might also be derivative use, it might also be  
5 protected. But I think that would be a ludicrous  
6 result, because in the cases like Kuehn, in the cases  
7 like Brown, the lower -- the Court of Appeals who have  
8 looked at it clearly have indicated that a new source, a  
9 new statement, is a new entitlement to claiming the  
10 privilege, because that otherwise might be used and the  
11 use would then subject him.

12           So that in fact what would happen is that Mr.  
13 Conboy would continue to claim his Fifth Amendment  
14 right, and the mere fact that he happened to have the  
15 transcript in front of him, or Mr. Conboy happened to  
16 have the transcript in front of him, shouldn't make a  
17 difference.

18           And we submit that because it is current  
19 recollection, because it is in fact within the very  
20 statements made by Kastigar, it's the effort to say that  
21 the scope of the immunity is the same as the scope of  
22 the Fifth Amendment privilege and that in any  
23 circumstance in which there might be an extension of  
24 that the use is not use by civil attorneys, it is the  
25 use by the prosecuting attorneys of the information

1 gained from the immunized testimony. And so the --

2 QUESTION: That just is a contradiction in  
3 terms, because at the point that the privilege is  
4 claimed in the civil deposition there isn't yet any use  
5 by any future criminal prosecutors.

6 MR. COFFIELD: Well, we don't know that, Your  
7 Honor.

8 QUESTION: Well, you certainly don't know one  
9 way or the other.

10 MR. COFFIELD: We don't know one way or the  
11 other. But the fact of the matter is that, now that the  
12 grand jury transcript is out -- and that of course is  
13 the subject of all kinds of other appeals and other  
14 issues, the secrecy of the grand jury -- once the grand  
15 jury transcript is out, there may be people and there  
16 may be prosecutors who look at that transcript. And now  
17 they are looking at an immunized transcript and there is  
18 no use they can make of that because so far there's been  
19 no extension of it.

20 QUESTION: What safeguards are put on these  
21 grand jury transcripts? It seems to me that's the root  
22 of the problem here.

23 MR. COFFIELD: I would submit, at least in the  
24 experience I've had before Judge Singleton -- and I  
25 think Mr. McConnell would agree with this -- that the

1 court there and the court in other cases I've been  
2 involved in try very hard, both through security in  
3 offices and checkout systems and what have you, to make  
4 sure that only the parties, be it the counsel or in  
5 certain cases counsel and an expert witness or counsel  
6 and one representative of the client -- that there is  
7 very limited access. And I think the courts have in  
8 fact been fairly careful about it.

9           The whole question of whether or not there is  
10 an effect on Mr. Conboy, Your Honors will recall Mr.  
11 Conboy was joining an appeal made to this Court for  
12 certiorari that was denied because we did take the  
13 position that had our transcript not been turned over we  
14 wouldn't even be here. And we thought it was improper  
15 at the time. We objected at the time, and it came up  
16 through the Fifth Circuit on that issue and then cert  
17 was denied.

18           But certainly this goes to your question, Mr.  
19 Chief Justice, that the fact of the turning over of  
20 these transcripts -- Mr. McConnell says he doesn't make  
21 much use of them. I would submit that there's a great  
22 deal of use of them made other than the need, as he  
23 claims, to get them in somehow into the courtroom in the  
24 trial.

25           But with respect to the interest of Mr. Conboy



1 and all these other witnesses, the principal use that is  
2 made of them are these series of depositions, which we  
3 submit are going to extend and subject him to  
4 substantial risk. And it is not just frivolous and it  
5 is not just a mere possibility. It is a situation where  
6 any movement down that road, any answers that go beyond  
7 that immunized transcript, even the affirmation, put Mr.  
8 Conboy at risk or put the courts in the position of  
9 trying now to flesh out the breadth and scope of the use  
10 immunity statute and the Fifth Amendment by exclusionary  
11 rules, which this Court has said is not the proper way  
12 to handle it, or analyses by other judges and other  
13 prosecutors of what is indirect.

14           And I would submit that that whole series of  
15 questions leaves Mr. Conboy, who is the one that started  
16 out here with this constitutional right, in tremendous  
17 uncertainty. And counsel like myself cannot say to Mr.  
18 Conboy, well, yes, as the Supreme Court said, Kastigar  
19 says the use immunity statute and your constitutional  
20 rights are the same.

21           His question to me is: Well, Mr. Coffield,  
22 that sounds good, but what happens if the prosecutor  
23 decides that he's going to file an indictment and he's  
24 got a grand jury that'll do it for him? And what  
25 happens if Judge Singleton isn't on that bench and Judge

1 Smith is, and Judge Smith thinks that now I've waived  
2 it? Or Judge Jones thinks that in fact, yes, he's going  
3 to apply an exclusionary rule when the prosecutor comes  
4 --

5           QUESTION: You're not expecting us to give an  
6 opinion that will allow antitrust lawyers to give a  
7 definitive opinion on anything?

8           MR. COFFIELD: Yes.

9           QUESTION: Are you?

10          (Laughter.)

11          MR. COFFIELD: With all due respect, I think  
12 you can. And the reason I think you can, Your Honor, is  
13 because of the exact thrust of your dissent in Kastigar  
14 itself.

15          QUESTION: Why, that proves it. It was a  
16 dissent.

17          MR. COFFIELD: Well, that's right. But now is  
18 the chance, Your Honor, because if this Court reaffirms  
19 Kastigar -- and Your Honor, with all due respect, can  
20 see that if Kastigar is affirmed, and the Government's  
21 been living by it and we've been living by it as defense  
22 counsel or witness counsel, that each testimonial  
23 situation is entitled to separate protection. If we get  
24 that separate protection, we'll testify until Mr.  
25 McConnell is all through.

1           The Government, it's clear in all the cases,  
2 the Government is the one that has the discretion to  
3 come in there and decide. And if the Government wanted  
4 to get beyond that criminal trial and made a  
5 determination it was in the public interest to have Mr.  
6 Conboy testify, I believe we'd find the Government in  
7 there saying, okay, I'll go down to Judge Singleton and  
8 I'll give him a petition. And I am sure Judge Singleton  
9 would sign that order as fast as the ink would dry, and  
10 we'd be down there --

11           QUESTION: Well, is there statutory authority  
12 for the Government to give immunity to a witness to  
13 testify in a private case?

14           MR. COFFIELD: I think there is. The  
15 application's been made in a number of cases. It's made  
16 administratively here in town all the time. It's done  
17 --

18           QUESTION: Has that been the subject of  
19 litigation?

20           MR. COFFIELD: I think it will be, but I don't  
21 know that it has been.

22           QUESTION: Well, there may be a lot of  
23 applications. Have they been granted?

24           MR. COFFIELD: I don't know of any case that  
25 we've studied where, in our research, where the

1 Government, when asked, has gone ahead and done it.

2 Now, the other areas --

3 QUESTION: They've been asked, yes.

4 MR. COFFIELD: The other area, of course, is  
5 when --

6 QUESTION: It'd be a change in policy. The  
7 Division didn't use to just hand out stuff to private  
8 litigants, did it?

9 MR. COFFIELD: I'm sorry, Your Honor?

10 QUESTION: Did the Antitrust Division just  
11 hand out information to private litigants as a result of  
12 their investigation? I mean, I think this would be a  
13 change in policy, wouldn't it?

14 MR. COFFIELD: No, the Government, with  
15 respect to the release of grand jury information and so  
16 forth, I think the Government has, with all due respect  
17 to the Government, been on both sides of that fence. I  
18 mean, sometimes they see it's of some benefit, they've  
19 got private treble damage claims; and sometimes they  
20 have other fish to fry and so they don't want to do it.  
21 So it seems to me they change.

22 One of the areas, though, that is suggested by  
23 the Court's questions is -- and this is going to come up  
24 as a constitutional question -- if Mr. Conboy were a  
25 defendant in the criminal case down the road, and now



1 Mr. Conboy says, and I want Joe Gluntz, who you've not  
2 given immunity to, to be given immunity, because under  
3 Brady he's got all kinds of exculpatory information, and  
4 the Government says, no, I'm not going to give him  
5 immunity.

6           So far the court has said that's still a  
7 Government discretionary policy. But from the  
8 standpoint of witnesses, it is not wholly unlike the  
9 proble with respect to defendants, that we have to look  
10 to the Government, and if they're not here I submit Mr.  
11 McConnell's got to live with that as much as I do.

12           QUESTION: I get a feeling in this colloquy  
13 and the one that preceded it that we sometimes meet  
14 ourselves coming back. Let me put a relatively simple  
15 hypothetical to you.

16           MR. COFFIELD: Okay.

17           QUESTION: Your witness is on the stand. Make  
18 it this witness, Mr. Conboy. Mr. McConnell asks him a  
19 question which is by coincidence, not by use of any  
20 transcript, the same kind of questions he answered  
21 before the grand jury and for which he had immunity.  
22 Now, he declines to answer. He asserts his Fifth  
23 Amendment. You have told him in advance that that's the  
24 thing to do.

25           MR. COFFIELD: Right.

1           QUESTION: Judge Singleton orders him to  
2 answer under pain of contempt.

3           MR. COFFIELD: As he did.

4           QUESTION: And he answers. And he answers.

5           MR. COFFIELD: Okay.

6           QUESTION: Is that or is that not immune? Is  
7 that compelled testimony?

8           MR. COFFIELD: That's my Catch-22. At that  
9 point, Your Honor, I have to take the position that if  
10 he answered that it is, as Justice Stevens suggests.  
11 I've got to then say it's indirect and it's derivative.  
12 I don't think it is, but I would then --

13           QUESTION: My question is a simpler one. My  
14 question is, Judge Singleton orders him to answer and  
15 says, if you don't answer I'm going to hold you in  
16 contempt. So he says, under that compulsion, Your Honor  
17 --

18           MR. COFFIELD: I will answer.

19           QUESTION: -- I answer, and then he answers.

20           MR. COFFIELD: Right.

21           QUESTION: Is that or is that not compelled  
22 testimony?

23           MR. COFFIELD: Oh, it certainly is compelled.

24           QUESTION: Well, it would never be admissible  
25 in a criminal proceeding.

1 QUESTION: No.

2 MR. COFFIELD: Well, I would submit to Your  
3 Honor that I'm comfortable when you say that.

4 QUESTION: Any more than a compelled  
5 confession.

6 MR. COFFIELD: I am comfortable hearing you  
7 say that, Your Honor. I am not as comfortable when, if  
8 you just stretch this out a little bit more and you get  
9 a few more questions than, Mr. Chief Justice, you  
10 posed. You then have a judge or a prosecutor who says:  
11 Well now, wait a minute; somewhere along that line we  
12 think the subject got a little bit away from the  
13 container industry and we think you've waived it. And  
14 under Rogers, he's stuck with that.

15 Or he says, we don't --

16 QUESTION: He could solve that by asserting  
17 the Fifth Amendment on every question that's put, and go  
18 through the same.

19 QUESTION: And he can order -- let the judge  
20 order him.

21 MR. COFFIELD: Well, if the judge sits there,  
22 I would submit, Your Honors, and makes a determination  
23 on a case by case basis, I might feel more comfortable  
24 in terms of what's going to happen with Mr. Conboy's  
25 uncertainties. I don't feel a whole lot more

1 constitutionally comfortable, if you'll permit me, but  
2 at least no one else is going to be able to second-guess  
3 that down the road, as we can if we simply go forward in  
4 this deposition.

5 I think when we go back to the beginnings of  
6 this, and even under the Immunity Act of 1954, the  
7 Allman case, Judge Frankfurter I think said it best and  
8 adopted language in Mathie of Judge Magruder and said:  
9 "If it be thought that the privilege is outmoded in the  
10 conditions of this modern age" -- as Mr. McConnell is  
11 really suggesting to us -- "then the thing to do is take  
12 it out of the Constitution, not to whittle it down by  
13 the subtle encroachments of judicial opinion."

14 And I suggest that Starkey is a subtle  
15 encroachment, and Fleischacker's a subtle encroachment,  
16 and that the panel majority said: No, Mr. Conboy and  
17 others like him are entitled to certainty, and the  
18 certainty can only be the reaffirmation by this Court of  
19 Kastigar and the affirmance of the panel below.

20 Thank you, Your Honors.

21 CHIEF JUSTICE BURGER: You have two minutes  
22 remaining, Mr. McConnell.

23 REBUTTAL ARGUMENT OF FRANCIS J. McCONNELL, ESQ.

24 ON BEHALF OF PETITIONERS

25 MR. McCONNELL: Mr. Chief Justice, members of



1 the Court:

2           The fact is that the Government would not give  
3 immunity in this case. It's my understanding that that  
4 is their overall policy. They will not grant immunity  
5 in private civil suits. So unless we're able to compel  
6 --

7           QUESTION: How could the Government give  
8 immunity in a private civil suit?

9           MR. McCONNELL: I don't know how they can.

10          QUESTION: Well, I thought you were  
11 challenging their failure to give it. They have no  
12 authority to give it. If Judge Singleton in that  
13 hypothetical compels the witness to answer the question,  
14 can that -- in your view, can that answer be used  
15 against him in any subsequent criminal proceeding?

16          MR. McCONNELL: No. Compelled repetition of  
17 immunized testimony cannot be used against a witness in  
18 any subsequent criminal proceeding.

19          QUESTION: I'm not talking about immunized.  
20 Compelled testimony.

21          MR. McCONNELL: Compelled testimony over a  
22 Fifth Amendment assertion, the answer, cannot be used  
23 against that witness in a subsequent criminal  
24 proceeding.

25          QUESTION: That doesn't mean you're supposed

1 to compel him.

2 QUESTION: That's too general a statement.

3 QUESTION: That doesn't mean that it's right  
4 for the judge to compel him, just because --

5 MR. McCONNELL: That's right.

6 QUESTION: Otherwise, the Fifth Amendment  
7 privilege would never exist. The judge would always  
8 just order him to answer.

9 MR. McCONNELL: It is too general a  
10 statement.

11 QUESTION: It's too general. If a witness  
12 wrongly claims a Fifth Amendment privilege --

13 MR. McCONNELL: Exactly.

14 QUESTION: -- the judge overrules it, the  
15 witness' answer is compelled; that can be introduced  
16 against him in another criminal proceeding.

17 MR. McCONNELL: Exactly. And to bring both  
18 your points, what we're saying here is that the  
19 determination that was made by the court was, the  
20 witness had no legitimate Fifth Amendment privilege to  
21 assert because that privilege had been supplanted by the  
22 use immunity statute, which gave him full protection  
23 against both direct and derivative use of his  
24 testimony.

25 We've got a simple case here. When you've got

1 the grand jury transcript and you take the question from  
2 the grand jury transcript, the answer necessarily  
3 derives from that transcript and is protected.

4 Thank you.

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

7 (Whereupon, at 2:46 p.m., the case in the  
8 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

The Pillsbury Company Et Al., Petitioners v. John Conboy  
No. 81-825

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and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY Pine Hammond  
(REPORTER)