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In the

Supreme Court of the United States

UNITED STATES,

PETITIONER,

V.

STANLEY APFELBAUM,

RESPONDENT.

No. 78-972

Washington, D. C.
December 3, 1979

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Petitioner,

v. No. 78-972

STANLEY APFELBAUM,

Respondent.

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December 3, 1979

The above-entitled matter came on for argument at 2:04 o'clock p.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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES

WILLIAM C. BRYSON, ESQ., Chief, Appellate Section, Criminal Division, Department of Justice, Washington, D.C.; on behalf of the petitioner.

JOEL HARVEY SLOMSKY, ESQ., 2400 Two Girard Plaza, Philadelphia, Pennsylvania 19102; on behalf of the respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-972, United States against Apfelbaum.

Mr. Bryson?

ORAL ARGUMENT OF WILLIAM C. BRYSON, ESQ.

ON BEHALF OF THE PETITIONER

MR. BRYSON: Thank you. Mr. Chief Justice, and may it please the Court:

This case is here on writ of certiorari to the United States Court of Appeals for the Third Circuit. The issue in the case is the extent to which the Government can make evidentiary use of immunized testimony in a prosecution for perjury committed in the course of that testimony.

Respondent was called to testify before a Grand Jury in the Eastern District of Pennsylvania. He testified -- initially when he appeared before the Grand Jury, he declined to testify, relying on his Fifth Amendment privilege against compulsory self-incrimination. The Government then sought and obtained an immunity order under the Federal immunity statute to compel his testimony. And he then testified, and in the course of his testimony he made several false statements that form the basis for the perjury charges against him.

Now, after a jury trial, respondent was convicted on two counts of perjury. In the course of the trial, the

Government introduced not only the charged false statements themselves, but also other portions of his immunized testimony, to show that those false statements were in fact false and that the falsehoods were made knowingly, and that the inquiries and the responses were material to the Grand Jury's inquiry.

On appeal, the Court of Appeals reversed. It held that the only portions of respondent's Grand Jury testimony that could permissibly be used against him, were those portions that were specifically charged as false, what the Court called the corpus delicti of the offense. Now the Court defined the corpus delicti as follows: to include the false charged statements themselves, plus those portions of his Grand Jury testimony that were absolutely essential to convey the context within which the false statements were made. The Court held that the use of any other portions of his Grand Jury testimony, even if relevant and material to prove the charges against him, was error.

QUESTION: Mr. Bryson, you are assuming, I take it, that perjury is prosecutable even after immunity --

MR. BRYSON: Absolutely.

QUESTION: As a matter of -- if the matter were res nova, what would be the basis for that assumption?

MR. BRYSON: Well, there are basically two ways

to approach the question, Mr. Justice Rehnquist. One is to say that, as a practical matter, if the Government grants immunity to a witness and the immunity grant, which is intended to confer a protection on the witness in exchange for something useful to the Government -- if the immunity grant does not insure to some extent at least that the Government will get truthful testimony, that if it doesn't give the Government some means of getting truthful testimony, then the immunity grant is, in effect, no grant at all. It gives the Government nothing in exchange for the immunity that is given to the witness. So it is necessary as a matter of the grant of immunity that the Government have some right to protect itself against perjury in the course of that immunized testimony.

The other approach is to say that, in fact, perjury is a crime which has not yet occurred at the time the individual pleads his Fifth Amendment privilege. It is not a crime as to which he has a privilege at the time he invokes his privilege, and therefore he gets no protection under the grant of immunity.

QUESTION: But if you take the language from Kastigar and from Portash, that the grant of immunity must be just as broad as the privilege against self-incrimination, it seems to me there is not a very -- that is not very logical, if the matter were res nova, because if a man had

claimed his privilege against self-incrimination, the Government never would have been able to ask him any questions, and there never would have been any possibility of perjury.

MR. BRYSON: Well, except, Your Honor, that if he had invoked his privilege -- let's take an example: Suppose that an individual had committed a bank robbery, or was under investigation for a bank robbery that had occurred 10 years ago, and the statute of limitations had run. He came before the Grand Jury, and was questioned about the bank robbery, and he invoked his privilege. If he went before a Court, the Court would say, "You can't claim your privilege with respect to the bank robbery. You have no privilege with respect to that offense. Why are you claiming a privilege?"

He would say, "Because I may commit perjury in the course of my testimony, and I don't want to be prosecuted for it." The Court would say, "You don't have a privilege with respect to that," and therefore he would be compelled to testify.

So the language in Kastigar that suggests that the immunity must be as broad as the privilege is consistent with our position here, which is that the --

QUESTION: But that assumes that the Government isn't willing to force the Fifth Amendment issue right at the time; that rather than tell the man, "We don't think you have a Fifth Amendment privilege. Go before the judge and

have him decide it," because of some cases decided by this Court in the early '50s. It is just a much easier thing to do, to give this man immunity and convict some of the higher-ups, rather than fight it out on the Fifth Amendment basis.

MR. BRYSON: That is true, but the question is, what is the scope of the immunity that he is granted, whether or not the Government contests the scope or the propriety of the claim of the immunity at the time it is granted.

Clearly, from this Court's cases, it is established that the immunity doesn't protect against, for example, uses against the witness in civil proceedings, uses, specifically here for perjury, to show the actual perjured statements. It does have its limits. It doesn't put the individual in the same position that he would be in, if he had simply remained silent. The question is --

QUESTION: Do I understand the center of your argument is that the immunity can not give him protection for a crime not yet committed?

MR. BRYSON: That is correct, Your Honor. That is the basic theoretical posture on which we proceed. If an individual comes before a Court and says, "I may commit a crime next week. If I testify today, I may give evidence that will be useful in prosecution of me in connection with that crime," then the privilege does not protect that individual against the future crime.

And an example of this would be, suppose the individual were to come before a Grand Jury in an investigation, say, of his possession of firearms, and he were to say before the Grand Jury, "I intend to kill the President next week." Well, it can't be, and I don't think that this Court under this Court's decisions, or even as res nova, could -- would hold that this individual uould have a privilege not to testify because he believes that he could be prosecuted for this future crime. And by the same token he does not have immunity with respect to any statements he may make that are used in connection with a future offense, his prosecution for a future offense.

QUESTION: Mr. Bryson, I want to be sure, you outlined two prongs to your argument a little while ago. Do you rely on both of them or on -- if not, on which?

MR. BRYSON: We think, Mr. Justice Blackmun, that the theoretical basis for both really is found in the second prong, but I think we can rely on both --

QUESTION: There certainly is Court of Appeals authority based on the first prong.

MR. BRYSON: That is correct. There is.

QUESTION: You cite the cases, but you don't rely on the theory, as I read your brief.

MR. BRYSON: We don't specifically rely on that theory, Your Honor --

QUESTION: Why not?

MR. BRYSON: -- because, well, because we think that the reason that perjury is really -- the reason that perjury is an offense as to -- future perjury is an offense as to which there is no privilege, is because it is a future offense, not so much because it is perjury, although we do rely on the general notion -- which I think is an important notion, and it is one that has been recognized by this Court before -- that the grant of immunity has no value if in fact it confers with it an immunity from prosecution for perjury which is committed in the course of that immunized testimony.

QUESTION: Let me ask this one: Suppose, during the Grand Jury testimony after the grant of immunity, the witness truthfully stated that he had committed perjury on a prior occasion. Does the grant of immunity prevent the Government from prosecuting him for that perjury?

MR. BRYSON: If he were granted immunity, that is correct, he would have protection against the use of his statements because he had -- he is testifying with respect to a former crime, just as if he was testifying with respect to a former bank robbery. He would be protected. In this case, however, his claim would have to be that he fears that he may incriminate himself with respect to perjury that he may commit before the Grand Jury.

QUESTION: So that you are really relying on that

one prong, and not on the other one.

MR. BRYSON: Well, we are relying on that as a theoretical basis, but I don't want to abandon the very important notion which underlies the first prong, which is that the Government must be entitled in granting immunity, to protection against perjury in the course of that immunity.

QUESTION: But the scenario which you outlined a minute ago, seems to me to be the reverse of what usually happens. Your scenario indicates that first immunity is granted, and then the witness testifies without anything happening first. As I understand it, what first happens is, the witness says in response to a question from the prosecutor, "I claim my privilege against self-incrimination," and the Government says, "All right. We will immunize you." Whereas it could have opted for the alternate course of saying, "We challenge your claim for -- that an answer to that testimony would incriminate you, and let's go up before the judge and have a hearing on contempt for failure to answer the question."

MR. BRYSON: Well, ordinarily it is pretty clear what the basis for the claim of privilege is; if the witness is being called in to testify with respect to an investigation of a bank robbery, and he takes the Fifth, it is pretty clear that he fears incrimination with respect to the bank robbery and possibly other related offenses, or related instances

that could lead to his incrimination. But the Government, it is our submission, does not have to go before the Court and make sure that everyone understands that he can not claim the privilege with respect to the risk of future perjury, because in our view that is the rule, that he can't and that he should understand that, and that there is --

QUESTION: Mr. Bryson, suppose on the first day of the Grand Jury he answers a question a certain way, and then the Government cross examines him, and the next day you show him some document and he finally says -- well, he answers the same question another way, and he says, "I have just lied yesterday. I thought I could get away, but I can't." Now, if the Government prosecuted him for perjury, your position is, you could use both -- the answers to both questions?

MR. BRYSON: That is correct, unless he --

QUESTION: And that isn't any different than what you are saying now.

MR. BRYSON: That is correct, and unless he had invoked -- having made his initial false statement --

QUESTION: Yes.

MR. BRYSON: -- unless he invoked his privilege --

QUESTION: But he didn't?

MR. BRYSON: No. If he did not, he could be --

QUESTION: But your immunity wouldn't cover that --

MR. BRYSON: That is correct, because the false

statement, the perjury there, would have occurred after the initial grant of immunity, and as of the time of the initial grant of immunity, that statement would not have been protected by the privilege.

Now I would like to say --

QUESTION: Just, before you go on, maybe I am wasting even more time, but am I incorrect in my assumption, my understanding that this basic question isn't in issue in this case? Doesn't the respondent concede that--

MR. BRYSON: Well --

QUESTION: -- there can be a prosecution for perjury --

MR. BRYSON: The question of whether there can be a prosecution for perjury is not in issue; the question is --

QUESTION: That is what I thought.

MR. BRYSON: -- how much.

QUESTION: Well, then don't let me waste any more of your time.

MR. BRYSON: Well, that -- there is no question as to the basic question of whether there is a prosecution.

But I would like to, in light of that issue, I would like to point out just why it is that it is so important that this kind of evidence be admissible. It may not seem so at first blush, but in fact, in many perjury prosecutions this is the best evidence, and sometimes the only evidence that

can be adduced to show that the statements were in fact perjurious.

Now to take an example, many times perjury comes not in the form of a flat false statement, that is to say, that "X" didn't happen, but rather that the witness will simply say, "I don't recall," some event which, in the view of the Government and what we believe the proof will show, he clearly must recall. The best way to prove that, and again often the only way to prove that that is a false statement, that he in fact does recall, is to show what he was saying in the course of his Grand Jury testimony leading up to that statement and after that statement.

For example, suppose the Grand Jury is investigating a particular instance that occurred a year ago, and they ask the witness a series of questions about that incident; and he remembers what he was wearing on that day, what he had for breakfast, who he was with, what the weather was like, and then he is asked the critical question, "Did you give Mr. X $10,000," and he says, "I don't recall." Well, the fact that he says at that point, "I don't recall," is, in context with those other questions, highly incredible; but if you take that statement out of context and simply have the one statement admissible at trial, "I don't recall," in response to the question, "Did you, six months ago or a year ago, take $10,000 from Mr. X," it is very hard to prove that is false,

that in fact he does recall. So it is, in effect --

QUESTION: Could we go back for just a moment to the two alternative bases for the Government's position, and is it your view that testimony about future crimes is simply not protected by the privilege against self-incrimination, as a constitutional matter? Forget the statute.

MR. BRYSON: That is correct, Your Honor.

QUESTION: The Grand Jury calls the witness in and says, "We want to ask you about this bank robbery that you are planning for next week" --

MR. BRYSON: That is correct.

QUESTION: -- and he claimed a privilege, you would say he had no privilege.

MR. BRYSON: Absolutely. That is a risk which is, as a general matter, too speculative and remote to entitled to the protection or the privilege.

Now in the case that I put, if we bring a prosecution, of course, we can practically not prove that the statement, "I don't recall" -- which in fact was the statement that was made in this case, with respect to one of the counts -- we are practically disabled from proving that that was not true, and in effect, this rule, for which respondent contends and which the Third Circuit adopted, undercuts the whole premise of Glickstein, the Supreme Court's decision back in 1911, in which it held that when the Government grants immunity

it retains unfettered power to prosecute the witness if the witness abuses the grant of immunity by lying under oath.

So in effect, the Third Circuit and respondent have argued for a partial immunity from perjury. Now, as I say, it is our position that neither the Federal immunity statute nor the Fifth Amendment prohibits the use of all relevant portions of the witness's Grand Jury testimony to prove that he committed perjury under the grant of immunity.

And first I would like to discuss the Fifth Amendment problem a bit. I would like to touch on the statutory point. The Federal immunity statute, which both respondent and Court Appeals, although briefly, rely on to support their position, the Federal immunity statute provides that immunized testimony can be used, and I quote, "in a prosecution for perjury." There is nothing in the language of the statute or its legislation history that suggests that that broad language was intended to have any narrower, more restrictive meaning. It does not say, "in a prosecution for perjury, but only to the extent that the false statement constitutes the corpus delicti of the offense," or "only to the extent that the immunized testimony is false."

It is a basic rule that where there is a prosecution under the grant of immunity, the immunity does not apply, and the legislative history of this statute supports this. The -- again and again, the legislative history reflects that

Congress intended the immunity statute to go to the constitutional limits, which we, as we argue here, believe permit any legitimate use of the immunized testimony.

QUESTION: Mr. Bryson, the statute clearly goes beyond what was required by the Constitution under your future offense theory, because he could not be prosecuted for any future offense except perjury. Isn't that true?

MR. BRYSON: Well, Your Honor, we believe that the statute is not -- the three exceptions in the statute are not the only exceptions to the use of immunized testimony, but they are clearly-stated exceptions, so that those exceptions do --

QUESTION: Well, you mean to say the statute should be read to say it doesn't apply to these three exceptions, or to anything else the Constitution would tolerate?

MR. BRYSON: It is our position, Your Honor, which we argued in the Dunn case last year -- that point is not necessary, of course, to resolve this case -- but in the Dunn case that was argued last year, we argued, and we have made the same argument, I think, in a footnote in our brief in this case, that the constitutional limits is what Congress had in mind; that Congress intended the immunity statute to be read to include anything that the Constitution would permit.

An example where I think that would be necessary,

as a construction, would be my example of a threat against the President. If the witness goes in under a grant of immunity and makes a threat against the President inside the Grand Jury, even though he is testifying under a grant of immunity, we believe that the Federal immunity statute would permit his prosecution for threatening the President. And similarly, if he tried to bribe the grand jurists, to take an example, but it isn't necessary to reach that point in this case because this is perjury.

The -- well, I see that my time is growing short. I would like to reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Slomsky?

ORAL ARGUMENT OF JOEL HARVEY SLOMSKY, ESQ.,

ON BEHALF OF THE RESPONDENT

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

If I may just go back to the facts of this case, to a certain extent, Mr. Apfelbaum was charged with two counts of making false statements before the United States Grand Jury. Count one charged that he was not truthful when he denied trying to attempting to locate an individual by the name of Harry Brown in Florida in December of 1975. Count two charged that Mr. Apfelbaum was not truthful when he denied in the Grand Jury that he told two F.B.I. agents that -- who had interviewed him, that he had lent Mr. Brown

$10,000.

In addition to -- these are the Grand -- these are the statements made in the Grand Jury that constituted the corpus delicti of the flase swearing offenses. The Government proved with extrinsic evidence, apart from the Grand Jury testimony, what is probably the falsity of these two Grand Jury statements. Number one, they had six or seven witnesses who -- independent witnesses, who showed that Mr. Apfelbaum did in fact attempt to locate Mr. Brown in Florida in December, 1955. They were essentially school teachers, and nonbiased, nontainted witnesses of good credibility.

With respect to the Count two, the two F.B.I. agents testified, Agents Dennis and Perry, that on -- I believe the date was March 16, 1976 -- they appeared at the District Attorney's office in Philadelphia, introduced themselves to Mr. Apfelbaum, and he told them that -- among other things that they testified to -- that Mr. Apfelbaum said he lent Harry Brown $10,000.

Now the Government, at the trial, introduced not only this extrinsic evidence but they attempted to introduce truthful, immunized testimony to prove, as they said, that -- and argued to the jury that the truthful, immunized testimony somehow, in some way, was relevant to the charges. Now I --

QUESTION: Mr. Slomsky, how about my question to counsel. Suppose on day one he answered A and the next day

B, in flat contradiction, and conceded that he just lied yesterday --

MR. SLOMSKY: If he --

QUESTION: -- and the Government prosecuted him for perjury?

MR. SLOMSKY: If the witness conceded that the testimony on the prior occasion was false --

QUESTION: Yes?

MR. SLOMSKY: -- there is now evidence of falsity in the record --

QUESTION: Right.

MR. SLOMSKY: -- the prior testimony is no longer truthful --

QUESTION: Right.

MR. SLOMSKY: -- and that is the Dunn case, I would agree that --

QUESTION: Right. Well, then, I know, but you are still using so-called "immunized" testimony to prove perjury.

MR. SLOMSKY: But there is now --

QUESTION: Besides the corpus delicti, the false testimony is on day one, but on day two he says something that -- and on this occasion, he says that that was false. So you are using a -- some immunized testimony to prove that he testified on day one falsely.

MR. SLOMSKY: The distinction I am drawing is this:

that the immunized testimony you are using on day one is now concededly false immunized testimony --

QUESTION: Yes, but how do you prove that?

MR. SLOMSKY: The Government will prove it with the second appearance of the witness before the Grand Jury.

QUESTION: So you are using it by other testimony before the same Grand Jury?

MR. SLOMSKY: Assuming that the second testimony before the Grand Jury is truthful, but there is now an acknowledgement that the first testimony is false.

QUESTION: I know, but you are still using his acknowledgement before the Grand Jury.

MR. SLOMSKY: Well, I understand that. In contrast to that case, in this case --

QUESTION: Well, would you say that would be proper?

MR. SLOMSKY: That the -- I would agree it is proper only because there is now in the record an acknowledgement of false immunized testimony.

QUESTION: Yes, but -- so you would say the Government could use his testimony on day two to prove that his testimony on day one was false?

MR. SLOMSKY: Well, my answer is, yes.

QUESTION: At least if it is in form of an acknowledgement of falsity?

MR. SLOMSKY: That is right. Now, in contrast to

the --

QUESTION: That doesn't really lead to a very principled distinction, does it, once we get to the use of immunized testimony to prove perjury?

MR. SLOMSKY: Well, I agree with that. My claim here is, number one, there was absolutely no concession that Mr. Apfelbaum's immunized Grand Jury testimony was false, in contrast to the situation that was just raised. We don't concede for one minute that what Mr. Apfelbaum was required to do under the grant of immunity, and the compulsion which was -- he didn't want to do it, against his will -- and that is, he was required to testify truthfully in the Grand Jury.

Now, when he did that, it apaears that he exposed himself to having his truthful immunized testimony used against him in the perjury prosecution. In other cases, in the Hockenberry case in the Third Circuit, there was a prosecution for perjury given during the course of immunized testimony. The defendant took the witness stand and testified, and the Court held that even in the prosecution for perjury, the incriminating truth could not be used against the defendant in the criminal -- in the perjury prosecution.

The same thing is the rule in the Second Circuit. Hockenberry was a Third Circuit case.

QUESTION: But how do -- all of those lead to very ad hoc distinctions, don't they? Once you concede that you

can be prosecuted for perjury on the basis of immunized testimony, and yet you say that you have limits such as the Third Circuit imposed, you are going to have a -- very much of a case-by-case analysis as to how much of the immunized testimony you can use, and that sort of thing.

MR. SLOMSKY: Well, that is a distinct possibility. The only way to overcome it is for the Court to announce a rule which would protect the incriminating truth, but still permit the Government to prosecute a person who -- for perjury who perjures himself during the course of his testimony.

I might say that --

QUESTION: Let me go back to Justice White's question to you. This is hypothetical. On day one, he testifies to some facts. On day two, he does not admit that those previous statements were false, but the Government introduces a sworn statement of his that is just to the contrary. Now that is extrinsic evidence, not out of his own mouth at the time. What would you say about that?

MR. SLOMSKY: I would -- in other words --

QUESTION: And then he is later prosecuted for perjury before the Grand Jury.

MR. SLOMSKY: Is --

QUESTION: Would you say the immunity protects him?

MR. SLOMSKY: Is Your Honor saying that apart from the two appearances before the Grand Jury, there is a sworn

statement in which he is admitting that his testimony was false, on the outside?

QUESTION: Not admitting it, it is just totally contrary, just totally contrary, showing that his testimony on day one was false by the piece of paper which the Government introduces on day two, which shows that it was false.

MR. SLOMSKY: My position is, under those circumstances, that the -- there could be -- that the truthful admissions made in the Grand Jury on one of the two occasions, that is, there being two apparent inconsistencies, could not be used against the witness for a prosecution for perjury, because in fact the Government would be using against him, truthful immunized testimony, and there would be nothing in the record other than the inconsistencies, to show the false statements.

QUESTION: Well, haven't we said in several opinions that a grant of immunity does not confer a privilege to lie? Isn't that almost verbatim out of one of our opinions?

MR. SLOMSKY: That is correct, and I have absolutely no problem with that concept. I am saying, if a witness lies, prosecute him for perjury. Prosecute him for false swearing. That is not what I am arguing here today, that no possible prosecution for those things could occur.

My argument is that, in the course of the testimony, when the witness gives truthful incriminating admissions and

those admissions -- which are compelled admissions, he is giving them involuntarily -- when those admissions are later used against him in the perjury prosecution, then there is a definite violation of the Fifth Amendment.

QUESTION: You have altered my hypothesis. My hypothesis is that they are untruthful statements to the Grand Jury, which is demonstrated by extrinsic evidence.

MR. SLOMSKY: Well, the Courts of Appeals have held that under the inconsistent declaration provision of 18 U.S.C. 1623, that a prosecution could not lie under that situation. The only exception that I know of, and that has been the uniform holding of the Court of Appeals, the only exception I know of in that regard is the Dunn case, and that is only because the defendant admitted that he testified falsely on a different occasion.

I might say that the -- in New Jersey v. Portash, which was decided by this Court last March -- the defendant in that case, who agreeably was not charged with perjury, took the witness stand, or would have taken the witness stand and testified to events A. His legislatively-immunized Grand Jury testimony was absolutely inconsistent with his testimony that would have been given, had he testified at the trial for his misconduct.

This Court held that the legislatively-immunized Grand Jury testimony could not be used, even though it was

inconsistent, could not be used against him; and I believe it was a 7-2 opinion, and even the dissents in the opinion did not disagree with the majority. It was basically a jurisdictional argument on dissent.

QUESTION: What case were you referring to, now?

MR. SLOMSKY: The Portash v. New Jersey, that the inconsistent, immunized testimony could not be used against Mr. Portash in that prosecution. There you have concededly false --

QUESTION: That was not a perjury prosecution.

MR. SLOMSKY: It was not a perjury prosecution.

Now, I might say that in the Tramunti case, in the Second Circuit, there was a perjury prosecution. In that case the defendant did testify and conceded that his immunized -- his prior immunized testimony was false. The Court said that under that circumstance, the rule in the Second Circuit is that the defendant could be impeached with false immunized testimony, because the false testimony has absolutely no constitutional protection.

There are instances where -- as I have indicated, where the Courts have uniformly excluded the use of truthful immunized testimony in the perjury prosecution. There is no case that I know of, in which the --

QUESTION: What is the reason for that?

MR. SLOMSKY: The reason is that the immunity grant

must be coextensive with the Fifth Amendment privilege it displaces. But for the grant of immunity, the Government wouldn't have possession of the truthful immunized testimony to use against the defendant.

QUESTION: But for the grant of immunity, the Government never would have been able to ask the defendant any question, and there never would have been any possibility of perjury.

MR. SLOMSKY: Well, I agree with that. Really, the issue comes down to, is when the Government has extrinsic evidence of perjury against a defendant who testifies repeatedly in front of the Grand Jury, but does the defendant in being compelled to testify, forfeit all his Fifth Amendment rights with respect to his truthful testimony?

In this case, Mr. Apfelbaum was subpoenaed before the Grand Jury after being granted immunity, on two occasions, December 13, 1976, and January 3, 1977. In effect, the Government, the second time he appeared, had the transcript of his prior immunized testimony. In effect, they went over a second time what he testified to on the first occasion before the Grand Jury. They could have subpoenaed him a third time, and a fourth time, and now they are arguing that testimony that is contemporaneously given, even if truthful, could be used against the defendant for -- in a prosecution for perjury.

Doesn't this expose the defendant to claims of perjury in different, noncontemporaneous Grand Jury proceedings, based upon different aspects of the Government's investigation. I can foresee a perjury indictment containing six different appearances before the Grand Jury, and the Government claiming that the six are unrelated but all the truthful testimony given during each session of the Grand Jury has forfeited its Fifth Amendment privilege, because he lied in one or two respects, and therefore we can use against you in the perjury prosecution the balance of the immunized -- truthful immunized testimony, only because it relates to the particular perjury given during the Grand Jury.

It could result in a very heinous situation, when in fact the defendant is in a situation where, on an involuntary basis, he is being forced to testify. Concededly, in part, he is doing the very thing that the immunity grant forces him to do, and that is to testify truthfully. The --

QUESTION: Well, you wouldn't contend, I suppose, that if in the Grand Jury room he picked up a chair and hit the prosecutor over the head, that he was immune from prosecution for that act on the ground that but for the grant of immunity he wouldn't even have been there, would you? Would you make that kind of an argument?

MR. SLOMSKY: I wouldn't make that argument, but

with respect to the Government's example of, in the Grand Jury, a threat against the President, isn't that a present crime being committed during the course of the immunized Grand Jury testimony?

QUESTION: Well, isn't perjury before the Grand Jury a present crime committed before the Grand Jury?

MR. SLOMSKY: Well, that is the reason why the future -- the claim of the Government that future Grand Jury testimony -- that the immunity grant doesn't protect future crimes or future perjury, must fail, because the defendant is committing a present crime and the statute is permitting the prosecution for perjury.

This might be a hypertechnical distinction, but the statute only says that the immunized testimony may be used -- it gives an exception. It says, "except a prosecution for perjury, etcetera." It doesn't say, "except in a prosecution for perjury." My argument really is the absence of that minute word "in" doesn't really mean that the Government has the wholesale right, because -- to use the immunized Grand Jury testimony that is truthful.

The statute really, concededly, is unclear in covering the issue that I raised in the Third Circuit, where I won before its unanimous three-judge panel, or the issue raised by the Government here.

QUESTION: Well, why not issue a rule that he

doesn't have to take the oath?

MR. SLOMSKY: Well, Mr. Justice Marshall, my experience has been that --

QUESTION: I am getting around to the fact that, why is he the only one that has -- is permitted to lie?

MR. SLOMSKY: Well, he is not being permitted to lie. He is sworn to tell the truth in the Grand Jury. The oath compels him to tell the truth. It is the --

QUESTION: Well, if this Court says that he can't be prosecuted for perjury, then he is going to tell the truth?

MR. SLOMSKY: Well, I am not --

QUESTION: Then he is going to tell the truth?

MR. SLOMSKY: I am not asking the Court to hold that Mr. Apfelbaum could not be prosecuted for perjury. What I am asking the Court to do, is to restrict the use that the Government could make of truthful immunized testimony, because the oath itself requires him to tell the truth. The immunity grant requires him to tell the truth. He has been instructed by the District Court under 18 U.S.C. 6002 that he must tell the truth in the Grand Jury, and now, once he tells the truth in certain parts, the Government is turning around and saying, "We are going to use the truth against you as substantive evidence in our case in chief, to prove the perjury."

QUESTION: And you could do it for any other witness?

MR. SLOMSKY: Uh --

QUESTION: You could do it for any other witness?

MR. SLOMSKY: Assuming the --

QUESTION: You could do it for any other witness; do you agree on that?

MR. SLOMSKY: Mr. Justice Marshall, when you say you can do it with any other witness, I must admit I am unclear in what respect Your Honor means that.

QUESTION: Well, you said that they used the truthful statements of his, and that is what you were complaining about.

MR. SLOMSKY: Yes, sir.

QUESTION: Well, could they use the truthful statements of a witness that didn't have immunity?

MR. SLOMSKY: Yes, sir. That is a vastly different situation from a person who is involuntarily in the Grand Jury, forced to testify --

QUESTION: And what is the difference, except the immunity?

MR. SLOMSKY: That is the distinction --

QUESTION: That is the "vast" part --

MR. SLOMSKY: -- and I consider it to be --

QUESTION: That is the "vast" part --

MR. SLOMSKY: -- a very vast distinction. I am not claiming that, if there was no immunity grant here, that the truthful immunized testimony could not be used against him. If a person goes into a Grand Jury voluntarily, and testifies, so be it. The Government is in a very enviable situation in that regard, but here there is a vast difference, is the grant of immunity which the witness didn't want in the first place. In fact, Mr. Apfelbaum did six days for contempt of court before he agreed to testify in the Grand Jury, and thereafter when he went into the Grand Jury, the incriminating truth on a later occasion was used against him.

Kastigar is very broad in saying that the truth -- immunized testimony -- I think really this and the Dunn case is the first time where this Court has faced the issue of truthful versus false -- the use of truthful versus false compelled testimony, but Kastigar said that the immunized testimony can not be used in any respect save the exceptions in the statute, and I would agree that it could be used in a variety of civil matters as the Courts have so held, but that is not this situation, and the new --

QUESTION: Mr. Slomsky, on that point on the wording of the exception, you indicated that you thought there was some significance to the word "in" being omitted, but I am not sure it really is omitted. It says, "no testimony," and so forth, "may be used against a witness in any criminal

case except a prosecution for perjury." How could you have the "in" more plainly in the statute?

MR. SLOMSKY: Well, it didn't say,"in a prosecution for perjury." It just says, "except a prosecution for perjury."

QUESTION: And that is an exception from the category in any criminal case.

MR. SLOMSKY: Well, I --

QUESTION: The universe is all criminal cases, with one exception.

MR. SLOMSKY: Well, I would agree to that. I am just drawing the distinction because the prosecution for perjury is a criminal case like any other criminal case, and when a defendant finds himself in a situation where the incriminating truth is being used against him, and the Government wouldn't have the evidence but for the grant of immunity, the statute really doesn't say the extent to which the truthful immunized testimony can be used.

My argument is that it can't be used at all against a defendant in these prosecutions. Certainly it couldn't be used in the Portash case, if --

QUESTION: But that wasn't --

MR. SLOMSKY: It couldn't be used in the Portash case, in the Government's case in chief, and I am claiming here it can't be used in the Government's case in chief also.

QUESTION: Well, what about -- go back to my example, as I was mooting with you, testimony: day one, testimony A, day two, testimony B, and they are flatly in conflict, and the second time he says, "I lied the first time." Now, do you say that testimony B can't be used?

MR. SLOMSKY: Testimony B --

QUESTION: On the second day, and it is flatly inconsistent with testimony A on the first day.

MR. SLOMSKY: And the witness has conceded that that --

QUESTION: And he says -- he says -- and the prosecutor says, "Well, didn't you testify just to the contrary yesterday." He says, "Yes." "Well, which one is true?" And he says, "The one today."

MR. SLOMSKY: So in other words, he is conceding that the one on the first occasion is false?

QUESTION: Right. Now, may you use the answer, the answer to the question on the second day?

MR. SLOMSKY: The -- only because --

QUESTION: Well, yes, you say --

MR. SLOMSKY: My answer is "yes," but only because --

QUESTION: Well, then you do say --

MR. SLOMSKY: -- only because of that concession.

QUESTION: -- then you do say that you may use some truthful testimony?

MR. SLOMSKY: If the Court has before it evidence of falsity on the prior occasion, then that can be used, but --

QUESTION: Well, they -- you do. You do. He says that he -- he testifies flatly to the contrary, and says that "I am speaking truthfully today."

MR. SLOMSKY: Well, Justice White, I take that position because I think it is the correct position, and because I know that it was the position taken in the Dunn case. If a person admits his perjury, why should he escape the --

QUESTION: But you can use not only his admission, but his contrary answer?

MR. SLOMSKY: Well, the contrary -- the admission -- the contrary answer would be the corpus delicti of the offense, but that is concededly false, and the Government has to prove it is false, and there is a concession of falsity there.

QUESTION: Well, but you could use his answer, his contrary answer on the second day, which was true --

MR. SLOMSKY: I am --

QUESTION: "Were you there?" "Were you there," and he says, "Yes, I was there," on the second day. He had said, "No, I wasn't there," on the first day. And the prosecutor says, "Well, did you lie yesterday?" And he says, "Yes."

MR. SLOMSKY: Again, that is a concession I am

making, but that is a vastly different factual situation from the case here. In the case here, number one, there is no concession that the testimony was truthful. Number two, there is absolutely no inconsistency between the testimony that is contained as the corpus delicti of the offense and the balance of the truthful testimony.

QUESTION: What if on the first day he said -- he was asked, "Were you there?" -- and he says, "Yes." On the day he is asked, "Were you there?" And he says, "No." Can the Government use both of those statements in the prosecution?

MR. SLOMSKY: I would answer that the answer is "no".

QUESTION: Why not?

MR. SLOMSKY: Because there is no evidence or no concession from the witness of falsity. That is a decision that will have to be made by a jury on a later occasion. That is the very situation in the inconsistent declarations situation, that the Courts have said is tantamount to a violation of the Fifth Amendment, because you are using against the witness truthful immunized testimony.

I draw the very -- the only distinction I make between that situation and Justice White, is that there is a concession by the witness that he lied.

QUESTION: But that is just a "but for" test which would exclude a perjury prosecution.

MR. SLOMSKY: Well, I -- it has been the holding

of the Court of Appeals in the Dunn case, that there could be a perjury prosecution under that circumstance. I don't consider it to be an exception to what I am advocating here, which is that truthful immunized testimony could never be used against a defendant.

The Court of Appeals, in the Court below, was quite clear in the Frumento case, that was an en banc Court, that truthful immunized testimony could not be used even in the -- even when there is an inconsistency. The -- Justice White's example is an unusual one, in that there is a concession of falsity. If there was no concession of falsity, I would say that the truthful immunized testimony could not be used, but in any event, that is the 18 U.S.C. 1623 situation. It is vastly different, I would say, from the situation in which Mr. Apfelbaum found himself, in which testimony that wasn't inconsistent with the two claimed instances of flasity in the indictment charged against him, was being used against him to prove that he lied. He didn't --

QUESTION: But then you are in a really ad hoc area, when you start arguing about, was it inconsistent or was it not inconsistent.

MR. SLOMSKY: Yes, sir.

QUESTION: That may not be an argument against you or your suggestion, but it is going to mean a very difficult development in perjured reports --

MR. SLOMSKY: Yes, sir. I consider the inconsistent declaration situation to be a very novel exception that really has to be decided as -- more or less as an exception to the general rule, if that kind of prosecution is going to be permitted.

In my situation, it could happen far more frequently than that one, where a witness during the course of his Grand Jury testimony which is immunized, finds himself giving truthful admissions of prior wrongdoing, and finding that the Government now is permitted to use those truthful admissions of wrongdoing against him in a perjury prosecution. That is a much broader, and I think a much more heinous situation than the situation involving the inconsistent declarations.

The only other fact I would like to say is that, as the Second Circuit and the Third Circuit and even the other Circuits have recognized, the Court should be vigorous to permit a perjury prosecution when a person lies, but also equally vigorous in protecting the other interest here which is so vital, and that is, protecting the incriminating truth. I would submit to the Court that one doesn't forfeit his Fifth Amendment rights that are set forth in the Constitution when he is granted immunity, and that if the incriminating truth is permitted to be used against him, then it would be a violation of the Fifth Amendment.

Thank you.

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

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

I have nothing further unless the Court has any questions.

MR. CHIEF JUSTICE BURGER: Apparently not.

Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:55 p.m., the case in the above-entitled matter was submitted.)

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