10-1971

Sarno v. Illinois Crime Investigating Commission

Lewis F. Powell Jr.

BENCH MEMO

No. 70-7 SARNO and CARDI v. ILLINOIS CRIME INVESTIGATING COMMISSION	Cert to Ill Sup Ct (Crebs for unanimous court) State immunity statutes	Floyd DISMISS AS IMPROVIDENTLY GRANTED OR AFFIRM

QUESTIONS PRESENTED

1. The questions specified by the Court are phrased as follows:

> "1. Must the State affirmatively demonstrate to respondents, when testifying pursuant to the Illinois Immunity Statute, that an immunity, as broad in scope as the Fifth Amendment, is available and applicable to them?

Controlling cases: Brown v. Walker, 161 U.S. 591 (1896); People v. Boyle, 312 Ill. 586 (1924); Halpin v. Scotti, 415 Ill. 104 (1953); Stevens v. Marks, 383 U.S. 234 (1966); Raley v. Ohio, 360 U.S. 423 (1959).

3. Assuming the immunity statute was not as broad as the Fifth Amendment, as far as future state prosecutions are concerned, may a person plead the Fifth Amendment when it is evident, from the implication of the questions in the setting in which they are asked, that responsive answers to the questions might be dangerous because injurious disclosure could result in future state prosecutions?"

2. In reality, I think that the questions are the following:

a) Whether the Illinois immunity statute in fact granted immunity as broad in scope as the 5th Amendment protection?

b) Whether, if it did, this fact was sufficiently apparent to petrs, who were represented by retained counsel, to justify forcing them to take the risk that it did by their refusal to answer the questions of respondent notwithstanding the grant of immunity?

STATUTES INVOLVED

1. 1967 Ill. Rev. Stat. § 203-1 describes the intent of the Ill legislature, in creating the Illinois Crime Investigating Commission, to be the provision of adequate facilities for the investigation of organized crime in the state, the evaluation of the scope of organized crime and the effectiveness of law enforcement agencies in dealing with it, ~~and the provision of facts and evaluation of the scope of organized crime and the effectiveness of law enforcement agencies in dealing with it,~~ and the provision of facts and evaluation to the legislative, executive, judicial, and administrative bodies of the state in order that they will be able to better perform their functions relating to public safety and welfare.

2. The particular immunity provision at issue reads as follows: (1967 Ill. Rev. Stat., ch. 38, § 203-14):

> 203.14. Refusal to answer or produce evidence -- Order of court -- Immunity.] § 14. In any examination by or hearing before the Commission, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and if the Chairman or the Executive Director, in writing, requests a circuit court of the State to order that person to answer the question or produce the evidence, the court shall so order unless it finds that to do so would be contrary to the public interest, and that person shall comply with the order. After complying, and if, but for this Section, he would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer or produced evidence. He may, nevertheless, be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order. The court shall not order any such person to testify or produce evidence if it reasonably appears to the court that such testimony or evidence, documentary or otherwise, would subject such witness to an indictment, information or prosecution (except for perjury committed in the giving of such testimony or the producing of such evidence) under the laws of another State or of the United States. As amended by act approved Aug. 24, 1965. L. 1965, p. 3459.

3. A separate immunity statute for Illinois grand jury proceedings provides that:

> (1967 Ill. Rev. Stat. Chapter 38)
>
> § 106-1. Granting of Immunity.) In any investigation before a Grand Jury, or trial in any court of record, the court on motion of the State may order

> that any material witness be released from all liability to be prosecuted or punished on account of any testimony or other evidence he may be required to produce.
>
> § 106-2. Effect of Immunity.) Such order of immunity shall forever be a bar to prosecution against the witness for any offense shown in whole or in part by such testimony or other evidence except for perjury committed in the giving of such testimony.

FACTS

In February 1968, petrs were called upon to testify before respondent Commission which, at the time, was engaged in an investigation of the "juice rackets" (loan sharking) in Illinois. They appeared, but invoked the 5th Amendment privilege as to all questions asked of them.

On March 21, the Commission moved the Circuit Court of Cook Co. to grant petrs immunity from all prosecution or punishment "on account of any matter to which he shall testify" before the Commission, and to order petrs to answer the questions put them by the Commission, invoking § 203-14, supra. On January 30, 1969, the Circuit Court ordered petrs to appear before the Commission and answer the questions they had previously been asked, and further ordered that "each of the said [petrs] be and he is hereby released from all liability to be prosecuted or punished on account of any matter to which he shall testify before the said Commission, except for perjury or contempt of Court."

On February 28, 1969, petrs appeared before the Commission (with counsel, according to respondent), and again refused to answer on 5th Amendment grounds. They were clearly advised that the Commission would ask the Circuit Court to hold them in contempt for their refusal.

On May 9, 1969, the Circuit Court held petrs in contempt for their refusal to answer, and sentenced them to six-months' imprisonment.

DECISIONS BELOW

On appeal from the contempt citation, the Ill Sup Ct (unanimous opinion by Crebs) affirmed. The court agreed with petrs that the Circuit Court was not empowered to itself grant immunity as it had purported to do, but thought that its order to appear and testify was valid. According to the opinion of the Ill Sup Ct, petrs argued that the immunity protection of 203-14, supra, was not as broad as the 5th Amendment, pointing to the last sentence of the section, supra, which prohibits an order to testify if it reasonably appears to the court that the testimony would subject the witness to prosecution "under the laws of another state or of the United States." In response to this argument, the Ill Sup Ct stated that the statute was valid under this Court's decision in Murphy v. Waterfront Commission, 378 U. S. 52 (1964).

Finally, petrs contended that the state did not affirmatively demonstrate to them that immunity from prosecution was available. The Ill Sup Ct said that it was clear that the order to testify was based on section 203-14.

> "That section grants immunity to the defendants from further prosecutions. That this immunity is co-extensive with the fifth amendment has been established by theholding of Murphy v. Waterfront Commission."

ARGUMENTS

QUESTION No. 1 -- Scope of Ill Immunity

Petrs' Arguments: Petr purports to address the second question specified by the Court ("Assuming the immunity statute was not as broad, etc. . . ."). In actuality, the argument seems to address the question whether the immunity statute was in fact sufficient under the 5th Amendment.

Petrs argue that the scope of immunity provided grand jury witnesses in Illinois (see statute, supra, -- immunity from prosecution "for any offense shown in whole or in part by such testimony") is broader than that accorded witnesses before the Investigating Commission under § 203-14. The grand jury statute was properly interpreted to accord with the 5th Amendment in People v. Walker, 28 Ill 2d 585 (1963); the narrower standard of § 203-14 is insufficient.

Section 203-14 provides only that a person shall not be prosecuted:

> "for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer." (Emphasis added.)

It therefore does not prevent Illinois from using the fruits of the answers given in a prosecution for a matter or thing regarding which the witness

was not requested to "give answer." Petrs were examined only with reference to a small number of specific transactions. In addition, they were asked concerning the geographic centers of their activities, their business acquaintances, the "higher ups" in the organization, and their personal background and criminal record. While the immunity statute is sufficient to supplant the privilege as to the specific transactions which were the subject of inquiry, it does not prevent using information derived from those answers, or from answers concerning "centers of activities" and so on to lead to other usury offenses or acts of violence connected with the collection of juice loans. For example, the "higher ups" in the organization are not "transactions, matters, or things," and yet they could furnish information necessary to prosecute petrs for crimes which were not the subject of specific inquiry by the Commission. Petrs give the following additional example of their objection: (p. 12)

> "Suppose petitioners had been asked only one question . . . "At what places in Cook County have your juice customers met you to make their weekly payments?" and petitioners "gave answers" to the questions. Assume then that the state went to these centers, interviewed the customers, learned from them that petitioners had committed any one of the offenses of violence punishable under the Criminal Code, whether committed against them or another customer known to them. Petitioners were not asked to give answer to an act of violence. Nevertheless, the answer to the question would be the "link" necessary to prosecute for an offense of violence, and the Immunity Act does not cover "links" or "fruits."

Petrs further contend that the statute is deficient because it would be impossible for them to prove that their subsequent prosecution was based on the fruits of their Crime Commission testimony. (This argument is somewhat inconsistent with their initial argument that fruits could be used; this is typical of a terrible brief.)

Petrs further contend that the immunity provision of section 203-14 is insufficient because it does not expressly prohibit imposition of "penalty or forfeitures" as well as criminal prosecution. In the circumstances of this case, for example, if petrs were guilty of criminal usury or violence in connection with loan transactions, they could be subjected to civil judgments including punitive damages, and to confinement for failure to pay such judgments.

Arguments of Respondent: The state says that petrs' argument is disposed of if the grant of immunity was as broad as the 5th Amendment. It was. The broad language of section 203-14 granted petrs immunity from future prosecution by the state for any criminal offense established by their answers to the Commission questions or for any criminal offense established through the use of their answers as an investigative tool. This was complete transactional immunity.

This interpretation is established by Illinois Supreme Court decisions interpreting identical or similar language in other immunity statutes. Thus, in People v. Boyle, 312 Ill. 586 (1924), interpreting a statute which provided that the witness was released "for all liability

to be prosecuted or punished on account of any matter to which he shall be required to testify . . . and if he shall be required to testify . . . and if he shall testify, such order shall forever after be a bar to any indictment, information or prosecution against him for such matter," the Ill Sup Ct, refering to state and federal cases, upheld the statute, stating: "if the legislature . . . has provided that the witness shall not be liable to criminal prosecution for any transaction necessarily disclosed by the testimony which he is required to give and for any transaction concerning which such testimony constitutes an essential link in a chain of evidence against him, the immunity afforded by the statute is thereby made coextensive with the protection afforded him by the Constitution." See also, People v. Rockola, 346 Ill 27; Halpin v. Scotti, 415 Ill. 104 (1953); People v. Walker, supra.

Petrs try to make something out of minor differences in language between the grand jury immunity statute upheld in Walker and section 203-14. However, this argument has no merit. In focusing on the "gave answer" part of the statute, petrs forget the "for or on account of" part of the statute. The "for" provision immunizes a witness from criminal prosecutions for offenses shown by his direct testimony, while the "on account of" language immunizes the witness for offenses which can only be established through the use of the direct testimony as an investigative tool.

This interpretation is supported not only by Illinois precedents, but by decisions of this Court sustaining "transactional" immunity statutes phrased in identical language. Brown v. Walker, 161 U. S. 591 (1896) (federal immunity statute providing that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence . . ."). To the same effect are Ullman v. United States, 350 U. S. 422 (1956); Brown v. United States, 359 U. S. 41 (1959).

The state argues that inasmuch as the Ill statute provides full transactional immunity, there is no need to argue about whether such immunity is constitutionally required, or whether "use" immunity is sufficient; however, the state goes on to argue that use immunity is sufficient (pp. 17-28).

The state says the omission of the words "penalty or forfeiture" from the statute isn't fatal. The statute would protect petrs from penalties or forfeitures which are criminal in nature.

QUESTION No. 2 -- Requirement that state affirmatively demonstrate scope of privilege to petrs

Petrs' arguments: Petrs say that under the circumstances, where the immunity act is insufficient on its face, where, at the time of the compelled testimony Illinois had not interpreted the statute, where the language of the grand jury immunity provision was different, where the state had not yet determined whether it could prosecute petrs

based on independent evidence, and where petrs might have been confined for failure to pay punitive damage judgments arising out of civil actions based on their testimony, "Illinois must affirmatively demonstrate to a person that an immunity as broad in scope as the Fifth Amendment is available and applicable to them." Stevens v. Marks, 383 U.S. 234 (1966).

Respondent's arguments: Respondent recognizes that in Stevens v. Marks, 383 U.S. 234 (1966), the Court stated that

> "A witness has, we think, a constitutional right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him."

However, Stevens was a situation in which a witness was held in contempt for asserting his privilege even though a waiver of the privilege which he had previously executed was invalid and the state had consistently maintained to him that no immunity was available. Moreover, Stevens relied on Raley v. Ohio, 360 U.S. 423 (1959) in which the Court held that a person could not be held in contempt for refusal to testify because of an "automatic" immunity provision, where the chairman of the Commission before which petr appeared had indicated to him that the privilege was available to him.

In this context, it is clear that Stevens means only that a state may not mislead a witness as to the consequences of his answer. In conferring immunity, the state must demonstrate clearly its intent

to immunize the witness and thus displace the 5th Amendment privilege. That was done in this case. The state is not required to meet possible substantive arguments over the scope of the immunity which petrs might later tender on appeal from a contempt conviction. This result would place an impossible burden on the state and would be contrary to past decisions of the Court.

AMICUS BRIEFS

The ACLU has submitted an amicus brief in which it confines itself to arguing that full "transactional" rather than "use" immunity is required, without saying how the argument affects this case.

DISCUSSION

I cannot understand why cert was granted in this case. It seems apparent to me from reading the Illinois cases cited by respondent that the immunity here prevents the state from using the fruits of petrs' testimony to prosecute them for an offense not specifically referred to in the questions of the investigating commission. I think that the state's emphasis on the "on account of" language is well placed.

In light of the fact that the Court long ago upheld the constitutional sufficiency of federal immunity statutes phrased in virtually identical language (see respondent's argument, supra), petrs' arguments seem utterly frivolous to me. In short, to me, the only reasonable conclusion to be drawn from the language of the statute and Illinois

case law is that petrs were given full "transactional" immunity clearly constitutionally sufficient under decisions of this Court. That being the case, the second question specified by the Court is meaningless.

As to the remaining question, the broad language of Stevens v Marks, quoted supra, might create some problems if a state enacted a truly ambiguous immunity statute and attempted to hold a person in contempt for refusal to answer based on uncertainty over the scope of the immunity prior to an authoritative construction of the statute (althoug the facts of Stevens are, as Illinois notes, distinguishable). That, however, is not this case, in my view. Petrs were represented by lawyers. They can read cases, including Illinois cases, and the past decisions of this Court. In my view, the only reasonable conclusion to be drawn from those cases is that the state has conferred full "transactional" immunity clearly sufficient under the 5th Amendment.

Accordingly, this is not a good case in which to consider refined applications of the Stevens dictum. (Although I note that I am in tentative agreement with the position of the state, which is that the witness should be forced to run the risk of a contempt citation if he believes that the immunity conferred is not of sufficiently broad scope. I am aware of no decision to the contrary.)

Finally, I note that petr's brief is terrible, and presume that oral argument will be also.

All things considered, I would dismiss this case because it does not present the issue the Court wanted to consider (assuming that the scope of Stevens v. Marks was what the Court was concerned about).

Alternatively, I would affirm.

DISMISS AS IM-PROVIDENTLY GRANTED OR AFFIRM

Floyd

Op Ill Sup Ct App p. 5

12/23/71

mlc

Sarno v. Ill. Crime Comm. - 70-7

(contempt for refusal to testify)

(There is a different case from Zicarelli)
See my notes next page

Mr. Whalen for Pett

Ill. had 2 statutes:
1. Grand Jury Act -
2. Statute here involved

A Legislative Commission was involved - similar to ~~Congressional~~ N. J. Comm. Hearings (unlike Grand Jury) are public.

Questions asked ~~of~~ were based on evidence seized previously.

Legislature did not intend to ~~of~~ authorize the granting of immunity coextensive with 5th Amend. (Ill. Ct. in this case held to contrary)

Ill. Ct. held (according to J. White) held that statute granted immunity compatible with Murphy

But see

Ill Ct. expressly held that transactional immunity was granted. (See p 6 of Respondent's Brief)

Mr. Whalen argues there is no immunity from prosecution ~~by~~ in another state

Whalen's position is that in fact the immunity granted was not coextensive with 5th Amend. Duty is upon State to make it clear that Petr. was granted "transactional immunity". He argues that Ill. Ct merely held that immunity granted was as broad as 5th Amend - which J. Stewart says is "double-talk": Ill Ct. should have specified exactly what type of immunity was granted (e.g. use & fruits or transactional)

Read Ill case

See back of this sheet.

Court	*Voted on*....., *19*...		
Argued 1/11/72....., *19*...	*Assigned* ....., *19*...	No. 70-7	
Submitted ....., *19*...	*Announced* ....., *19*...		

SARNO

vs.

ILL. CRIME COM.

Dismissed as Improvidently Granted

Transactional Immunity under Ill

	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
	G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Rehnquist, J.		Out										
Powell, J.	D.I.G.											
Blackmun, J.	D.I.G.											
Marshall, J.	D.I.G.											
White, J.	D.I.G.											
Stewart, J.	D.I.G.											
Brennan, J.												
Douglas, J.	Reverse											
Burger, Ch. J.	D.I.G.											

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 25, 1972

70-7, Sarno v. Illinois Crime
Investigating Comm'n

Dear Lewis,

I am glad to join your Per Curiam in this case.

Sincerely yours,

P.S.
1.S1

Mr. Justice Powell

Copies for the Court

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–7

Albert Sarno and Chris Cardi, Petitioners, *v.* Illinois Crime Investigating Commission.

On Writ of Certiorari to the Supreme Court of Illinois.

[May —, 1972]

PER CURIAM.

Petitioners were ordered to testify before the Illinois Crime Investigating Commission under a grant of immunity conferred pursuant to Ill. Rev. Stat. c. 38, § 203–214 (1969). The occasion for granting the writ in this case was to consider whether Illinois must demonstrate to petitioners, prior to an adjudication for contempt for refusal to answer the Commission's questions, that immunity as broad in scope as the protection of the privilege against self-incrimination is available and applicable to them. 401 U. S. 935 (1971). The writ was granted in light of petitioners' claim that the statute did not provide complete transactional immunity. On the same day that the writ was granted, probable jurisdiction was noted in *Zicarelli* v. *New Jersey State Commission of Investigation,* 401 U. S. 933 (1971), to resolve the question whether a State can compel testimony from an unwilling witness, who invokes the privilege against self-incrimination, by granting immunity from use and derivative use of the compelled testimony, or whether transactional immunity is required.

We held today in *Kastigar* v. *United States, ante,* —, and in *Zicarelli* v. *New Jersey State Commission of In-*

vestigation, ante, ——, that testimony may be compelled from an unwilling witness over a claim of the privilege against self-incrimination by a grant of use and derivative use immunity. The premise of petitioners' arguments is that transactional immunity is required. They say that Illinois failed to demonstrate satisfactorily that transactional immunity was provided, but they do not contend that the Illinois immunity statute affords protection less comprehensive than use and derivative use immunity. Respondent asserts that the statute affords complete transactional immunity, reflecting a long-standing Illinois policy of providing immunity greater than that required by the United States Constitution. Since neither party contends that the scope of the immunity provided by the Illinois statute falls below the constitutional requirement set forth in *Kastigar,* we conclude that any uncertainty regarding the scope of protection in excess of the constitutional requirement should best be left to the courts of Illinois. Accordingly, the writ of certiorari is dismissed as improvidently granted.

It is so ordered.

MR. JUSTICE BRENNAN and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated: _____

Recirculated: APR 26 1972

FILE COPY
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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–7

Albert Sarno and Chris Cardi, Petitioners, *v.* Illinois Crime Investigating Commission.	On Writ of Certiorari to the Supreme Court of Illinois.

[May —, 1972]

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We held today in *Kastigar* v. *United States, ante,* —, and in *Zicarelli* v. *New Jersey State Commission of In-*

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It is so ordered.

MR. JUSTICE BRENNAN and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS dissents for the reasons stated in his dissenting opinion in *Kastigar, ante,* ——.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated: _____

Recirculated: APR 27 1972

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–7

Albert Sarno and Chris Cardi, Petitioners, *v.* Illinois Crime Investigating Commission. } On Writ of Certiorari to the Supreme Court of Illinois.

[May —, 1972]

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It is so ordered.

MR. JUSTICE BRENNAN and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS dissents for the reasons stated in his dissenting opinion in *Kastigar, ante,* ——.

MR. JUSTICE MARSHALL dissents for the reasons stated in his dissenting opinion in *Kastigar, ante,* ——.

Supreme Court of the United States

Memorandum

April 26 72

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MEMORANDUM TO MR. JUSTICE POWELL:

This has been taken care of by circulating a third draft in Sarno.

CEP

e United States

C. 20543

il 26, 1972

o v. Illinois Crime, etc.

the foot of your Per

:

larshall dissents for the in his dissenting opinion te _____.

T.M.

Mr. Justice Powell

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 26, 1972

Re: No. 70-7 - Sarno v. Illinois Crime Investigating Commission

Dear Lewis:

Please join me in your per curiam opinion in this case.

Sincerely,

Byron

Mr. Justice Powell

Copies to Conference

Supreme Court of the United States

Memorandum

April 26, 1972

MEMORANDUM TO MR. JUSTICE POWELL:

This has been taken care of by circulating a second draft in Sarno.

CEP

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

April 26, 1972

Dear Lewis:

In No. 70-7 - Sarno v. Illinois Crime Investigating Commission, would you be so kind as to add at the end of your Per Curiam the following:

Mr. Justice Douglas dissents for the reasons stated in his dissenting opinion in Kastigar, ante _____.

W. O. D.

Mr. Justice Powell

cc: Conference

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-7

Albert Sarno and Chris Cardi, Petitioners, *v.* Illinois Crime Investigating Commission.	On Writ of Certiorari to the Supreme Court of Illinois.

[May —, 1972]

PER CURIAM.

Petitioners were ordered to testify before the Illinois Crime Investigating Commission under a grant of immunity conferred pursuant to Ill. Rev. Stat. c. 38, § 203—14 (1969). The occasion for granting the writ in this case was to consider whether Illinois must demonstrate to petitioners, prior to an adjudication for contempt for refusal to answer the Commission's questions, that immunity as broad in scope as the protection of the privilege against self-incrimination is available and applicable to them. 401 U. S. 935 (1971). The writ was granted in light of petitioners' claim that the statute did not provide complete transactional immunity. On the same day that the writ was granted, probable jurisdiction was noted in *Zicarelli* v. *New Jersey State Commission of Investigation,* 401 U. S. 933 (1971), to resolve the question whether a State can compel testimony from an unwilling witness, who invokes the privilege against self-incrimination, by granting immunity from use and derivative use of the compelled testimony, or whether transactional immunity is required.

We held today in *Kastigar* v. *United States, ante,* —, and in *Zicarelli* v. *New Jersey State Commission of In-*

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It is so ordered.

MR. JUSTICE BRENNAN and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS dissents for the reasons stated in his dissenting opinion in *Kastigar*, *ante*, ——.

MR. JUSTICE MARSHALL dissents for the reasons stated in his dissenting opinion in *Kastigar*, *ante*, ——.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 28, 1972

Re: No. 70-7 - Sarno, et al. v. Illinois Crime Investigating Commission

Dear Lewis:

Please join me in your proposed Per Curiam.

Sincerely,

H.A.B.

Mr. Justice Powell

cc: The Conference

May 1, 1972

Dear Mr. Putzel:

Re: 69-4 Zicarelli v. New Jersey State Commission of Investigation
70-7 Sarno and Cardi v. Illinois Crime Investigating Commission

Majority support for these opinions is reasonably assured. Mr. Justice Powell has asked me to send you two copies of each for advance headnoting.

Sincerely,

Covert E. Parnell, III
Law Clerk

Enclosures: 4

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 9, 1972

No. 70-7 -- Sarno v. Illinois Crime Inv. Comm.

Dear Lewis:

Please join me.

Regards,

WEB

Mr. Justice Powell

Copies to Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
	dissent				dissent		1/25/72	
join L+P 5/8/72	add note 4/26/72		join L+P 4/25/72	join L+P 4/28/72	add note 4/26/72	join L+P 4/28/72		
					70-7 Sarno v. Ill. Crime Invest. Com.			

SUPREME COURT OF THE UNITED STATES

No. 70–7

Albert Sarno and Chris Cardi, Petitioners, *v.* Illinois Crime Investigating Commission. | On Writ of Certiorari to the Supreme Court of Illinois.

[May 22, 1972]

PER CURIAM.

Petitioners were ordered to testify before the Illinois Crime Investigating Commission under a grant of immunity conferred pursuant to Ill. Rev. Stat. c. 38, § 203—14 (1969). The occasion for granting the writ in this case was to consider whether Illinois must demonstrate to petitioners, prior to an adjudication for contempt for refusal to answer the Commission's questions, that immunity as broad in scope as the protection of the privilege against self-incrimination is available and applicable to them. 401 U. S. 935 (1971). The writ was granted in light of petitioners' claim that the statute did not provide complete transactional immunity. On the same day that the writ was granted, probable jurisdiction was noted in *Zicarelli* v. *New Jersey State Commission of Investigation,* 401 U. S. 933 (1971), to resolve the question whether a State can compel testimony from an unwilling witness, who invokes the privilege against self-incrimination, by granting immunity from use and derivative use of the compelled testimony, or whether transactional immunity is required.

We held today in *Kastigar* v. *United States, ante,* —, and in *Zicarelli* v. *New Jersey State Commission of In-*

vestigation, ante, ——, that testimony may be compelled from an unwilling witness over a claim of the privilege against self-incrimination by a grant of use and derivative use immunity. The premise of petitioners' arguments is that transactional immunity is required. They say that Illinois failed to demonstrate satisfactorily that transactional immunity was provided, but they do not contend that the Illinois immunity statute affords protection less comprehensive than use and derivative use immunity. Respondent asserts that the statute affords complete transactional immunity, reflecting a long-standing Illinois policy of providing immunity greater than that required by the United States Constitution. Since neither party contends that the scope of the immunity provided by the Illinois statute falls below the constitutional requirement set forth in *Kastigar,* we conclude that any uncertainty regarding the scope of protection in excess of the constitutional requirement should best be left to the courts of Illinois. Accordingly, the writ of certiorari is dismissed as improvidently granted.

It is so ordered.

MR. JUSTICE BRENNAN and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS dissents for the reasons stated in his dissenting opinion in *Kastigar, ante,* ——.

MR. JUSTICE MARSHALL dissents for the reasons stated in his dissenting opinion in *Kastigar, ante,* ——.