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TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

JOHN GIGLIO,

Petitioner,

vs. No. 70-29

UNITED STATES OF AMERICA,

Respondent.

Washington, D.C.
October 12, 1971

Pages 1 thru 43

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IN THE SUPREME COURT OF THE UNITED STATES

JOHN GIGLIO, Petitioner, vs. UNITED STATES OF AMERICA Respondent	No. 70-29

Washington, D. C.

Tuesday, October 12, 1971

The above-entitled matter came on for argument at 10:00 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

JAMES M. LA ROSSA, ESQ., 115 Broadway, New York, New York 10006, for the Petitioner

HARRY R. SACHSE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C., for the Respondent

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Today's orders of the Court have been duly entered and certified and filed with the Clerk and will not otherwise be orally announced.

Mr. Clerk, the Court will entertain motions for admission to the bar at this time.

(Motions for admission to the bar.)

CHIEF JUSTICE BURGER: We will hear arguments in No. 70-29, Giglio v. The United States. Mr. LaRossa and Mr. Sachse.

Very well, Mr. LaRossa, you may proceed.

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

May I introduce Gerald Shargel of New York City, who assisted me on brief.

Petitioner Giglio was convicted in the Eastern District of New York of two counts of violating Title 18, Section 2314 and one count of conspiracy in violation of Title 18, Section 371. That conviction was affirmed by the United States Court of Appeals for the 2nd Circuit.

Thereafter, a motion was filed in the District Court under Rule 33 of the Federal Rules of Criminal Procedure. That motion's denial and its affirmance by the 2nd Circuit Court is the subject of the petition before this honorable Court.

The facts, briefly stated, are that, one, Robert Taliento, employed by the Manufacturer's Hanover Trust Company in New York City as a cashier, removed the signature cards of a depositor of the bank, one George Cohen, and on three separate occasions deposited stolen checks, money orders, into that account and withdrew the proceeds of the money with respect to those three checks.

Mr. Taliento was apprehended by the Federal Bureau of Investigation.

Thereafter, he made an appointment with the petitioner Giglio and met the petitioner Giglio who was arrested by the Federal Bureau of Investigation.

A grand jury thereafter indicted Mr. Giglio and named Mr. Taliento as a co-conspirator but not a defendant. Mr. Taliento testified at that grand jury.

At the petitioner's trial Mr. Taliento was the main witness against the petitioner and, frankly, without his testimony, the petitioner could not be convicted. He was the only witness to describe in any detail the petitioner's acts since the petitioner was never observed at the bank nor did the Government ever allege that.

Mr. Taliento was the main focus of the crime since he withdrew the money and allegedly gave the proceeds of these checks to the petitioner Giglio. So, without his testimony, the Government could not have proceeded against Mr.

Giglio.

As a matter of fact, referring you to the Government's affidavit in opposition to this motion, which is found at page 130 of the appendix, the Government states "Taliento was the only witness to Giglio's acts," the petitioner's acts.

QUESTION: Mr. LaRossa, I have not yet looked at the original transcript but could you tell me whether, on the whole record, it shows that the jury was fully aware that the witness was named as a co-conspirator in the indictment?

MR. LaROSSA: Yes, sir.

QUESTION: Is it the practice in New York to send the indictment into the jury?

MR. LaROSSA: The practice in the Eastern District of New York, Mr. Chief Justice, is to read the indictment to the jury so I must, although not being trial counsel, assume the indictment was read to the jury and they were aware he was a co-conspirator, not a defendant.

I also should add that trial counsel for the defendant, petitioner, argued to the jury that he was named as a co-conspirator and not a defendant in the case, so the jury was certainly aware of that fact, sir.

Petitioner's trial counsel at that time attempted to show Mr. Taliento's interest in this proceeding, that he was an interested party, that he had bias and prejudice as such a witness. He tried to elicit the fact that Taliento

had an express agreement with the Government. Taliento denied this again and again.

Referring you to page 4 of the petitioner's brief, just making short reference to some of the questions and answers that were given, the questions read basically as follows -- this is Taliento on cross-examination:

"Q Did anybody tell you at any time that if you implicated somebody in this case that you yourself would not be prosecuted?

"A Nobody told me I wouldn't be prosecuted.

"Q They told you you might not be prosecuted?

"A I believe I still could be prosecuted.

"Q You were told, were you not, that you could be prosecuted in this case, is that correct?

"A Yes.

"Q Were you told that you would not be prosecuted if you testified against somebody else?

"A Not that I wouldn't be prosecuted.

"Q What were you told?

"A That there is still a chance I could

be prosecuted."

When asked about his grand jury testimony, he was asked the following questions, which appear at page 45 of the petitioner's appendix:

"Q When you went to the grand jury, you went there to help yourself, isn't that right?

"A I was just advised that I was supposed to be before the grand jury.

"Q I can't hear you.

"A I don't know if I was helping myself or not.

"Q Did anybody ask you while you were at the grand jury if you wanted to help yourself?

"A Not that I recall.

"Q Were you there in effect to help yourself?

"A The only reason I went to the grand jury is because I was subpoenaed."

QUESTION: I am not sure I get all the inferences that perhaps you want to leave with us on that answer.

MR. LaROSSA: Mr. Chief Justice, I am going to get to the point of showing you that an Assistant United States Attorney at the time that Mr. Taliento testified before that grand jury gave he and his counsel an absolute assurance of immunity.

QUESTION: I am well aware of that but I am going to the response that you seem to emphasize that he said he was there because he had been subpoenaed.

MR. LaROSSA: "I was there merely because I was subpoenaed." That was the only reason that he left with that jury, that he was not there to help himself and he was not there based upon any agreement with the Government that he wouldn't be prosecuted, Mr. Chief Justice. He was there because he honored a subpoena that was served on him. That is basically the premise I am trying to bring to this Court and I think is the absolute suggestion that the witness' testimony gave to the jury on that particular occasion.

But if Mr. Taliento's testimony did not leave an absolute impression upon that jury that he still could be prosecuted, then we need only look to the Government's closing arguments. At page 119 of the appendix, the Assistant United States Attorney in closing to the jury said he, referring to Taliento, received no promises that he would not be indicted.

I most respectfully submit that the impression that was given to that jury on both the Government's direct case and the cross-examination by petitioner's counsel was that the witness was taking his chances in coming before that court and testifying, that he still could be indicted, that he still could be prosecuted, that he had no assurances from

anyone, "anyone" particularly meaning any member of the Government.

QUESTION: Are you suggesting the presence of any perjury here at all?

MR. LaROSSA: Yes, sir; I am. I am stating that there is absolute perjury with respect to this witness' testimony and that is borne out by the Government's affidavit in opposition.

QUESTION: Well, you characterized it as perjury rather than misunderstanding on Taliento's part.

MR. LaROSSA: That is correct, sir.

QUESTION: Need you go so far?

MR. LaROSSA: No, I don't believe I do, Mr. Justice Blackmun. I don't think I have to. I think whether he misunderstood or not, certainly the Assistant United States Attorney in that courtroom had no right to misunderstand and as I will get to further in my argument, he should have had an absolute knowledge that the witness, Taliento, was testifying before that jury with an absolute grant of immunity given to him by an Assistant United States Attorney.

QUESTION: To carry that a little beyond, if, in fact, the Assistant United States Attorney did not know and was making the argument in good faith, then is it not true that that weakens your position?

MR. LaROSSA: No, sir, I don't believe so. I

think that if our foundation of constitutional safeguards has to depend upon the fortuitousness of the fact that the Assistant United States Attorney trying the case, and the Assistant United States Attorney who makes the assurances to a particular witness is one and the same, then we are on rather weak ice. I refer to Judge Palmeri's decision, a District Court decision in the Southern District of New York, in application of Kopotas where he said referring to the Napue decision, "I do not think that an accused's right as defined by Napue should depend on a fortuitous circumstance that the District Attorney who conducts the prosecution and the investigation be one and the same."

Since I am referring to that, Mr. Chief Justice, may I also bring to the Court's attention the Hawkins decision from the 5th Circuit which clearly states basically the same thing, and the Circuit Court there at that time in 1963 decided at that time these witnesses so estified the Government must be charged with the knowledge that their testimony was false.

There is another factor here, too. If we carefully read the Assistant United States Attorney's affidavit wherein he tells us that he made a grant of immunity he tells us that it was agreed upon between Taliento, his attorney and he, the Assistant United States Attorney. It was understood and he also tells us that this was after a conference with

the Federal Bureau of Investigation.

Now, those of us who have had some experience in the Federal Court know that the Federal Bureau of Investigation and the case agent who handles a particular case -- and in this particular case it happened to be Agent Axton -- who was a witness at this trial, would be the one to receive this information, so not only does the Assistant United States Attorney who gave the grant of immunity at the grand jury know about this but we must assume that Agent Axton and the FBI had the same knowledge.

QUESTION: Did any record show the power of an Assistant United States Attorney to grant immunity?

MR. LaROSSA: Well, the affidavits in opposition, Mr. Justice Marshall, state that an Assistant United States Attorney has no authority to grant immunity and an affidavit from Mr. Hoey suggests that this can't be done. Judge Ryo's decision was based in part of the fact that an Assistant United States Attorney has no right to grant immunity but I respectfully submit to this Court that if a hearing was held at that time, I, as a former Assistant United States Attorney in that district, could have testified, as could any assistant in that office, that grants of immunity were made as a regular course to get a witness to cooperate with the Government. It was a known fact.

QUESTION: And the United States Attorney didn't

even know about it?

MR. LaROSSA: At times he did, sir, if it was important.

QUESTION: I am saying you mean a United States Attorney can grant immunity to a man charged with treason and nobody has to know about it and it is effective?

MR. LaROSSA: Well, Mr. Justice Marshall, I say yes, it is.

QUESTION: It is?

MR. LaROSSA: Yes, sir.

Further than that, if that man under that grant of immunity testified before that grand jury and then that testimony was introduced against himself, would this Court uphold that?

QUESTION: I am not talking about the grand jury. I am talking about prosecution.

MR. LaROSSA: Yes, sir, I understand your point.

QUESTION: You say that Assistant United States Attorney can say that you are charged with treason but I grant you immunity and you will not be prosecuted.

MR. LaROSSA: Well, Mr. Justice Marshall --

QUESTION: Let me ask you this --

MR. LaROSSA: I don't know whether there is any particular regulation on treason --

QUESTION: If an Assistant United States Attorney

told this man that you won't be prosecuted, could Mr. Hoey prosecute him?

MR. LaROSSA: I don't believe so, no, sir. In fact --

QUESTION: Could the Attorney General order him prosecuted? Could the President of the United States order him prosecuted?

MR. LaROSSA: I don't believe so.

QUESTION: You don't believe it.

MR. LaROSSA: I think this Court would prohibit his prosecution.

QUESTION: What ground do you have for that?

MR. LaROSSA: I may add the Solicitor General, in his brief --

QUESTION: What ground do you have for that?

MR. LaROSSA: Due process and fair play, may it please the Court. One who gets the assurance of an Assistant United States Attorney acting on behalf of the Justice Department in that district, he should be allowed to rely upon any promise that is made to him by any member of that staff.

I respectfully submit to this Court that that office is one entity and that any assistant acting under the authority of the United States Attorney who acts under the authority of the Attorney General --

QUESTION: You and I know that the Eastern District is not -- how many Assistant United States Attorneys do you have in the Southern District?

MR. LaROSSA: I would guess 75 or 80.

QUESTION: And any one of those 80 on a well built-up case that the Government worked on for ten years could just on his own say I guarantee you won't be prosecuted.

MR. LaROSSA: If that particular witness acts upon that belief and understands it --

QUESTION: My point is: Can't he grant him effective immunity from prosecution? You know what effective means.

MR. LaROSSA: Yes, I do, and I do believe he can and so does the Solicitor General, because in his brief he only states, Mr. Justice Marshall, that if an Assistant United States Attorney did give such a grant of immunity the Government would honor such a grant.

QUESTION: Was Taliento prosecuted?

MR. LaROSSA: No, sir, he was not.

QUESTION: Is it too late to prosecute him?

MR. LaROSSA: Yes, sir, I believe it is.

QUESTION: Is there any reason why he wasn't prosecuted?

MR. LaROSSA: Yes, sir. In the affidavit in opposition to the motion, the Assistant United States Attorney

states "I gave him immunity."

QUESTION: That is the reason?

MR. LaROSSA: I assume that is. We never had a hearing on this. A hearing has been denied throughout on the issue of whether or not an actual immunity was given or not, but I take the affidavit of the Government in opposition, when an Assistant United States Attorney -- and still an Assistant United States Attorney at the time of the motion, I might add -- states unequivocally "I gave him immunity," it was understood and agreed by the parties, including Mr. Taliento, that Mr. Taliento's counsel would not let him testify unless he did get such a grant of immunity and the fulfillment of the agreement according to that affidavit, Mr. Justice Brennan, is that the witness Taliento would then testify at the trial.

When Mr. Taliento testified at the petitioner's trial, he completed the agreement. There was nothing left for him to do.

QUESTION: Mr. LaRossa, let's assume that the promise was made in the first place as you describe by the Assistant United States Attorney, and then in further conferences the United States Attorney said, "I understand that there have been promises made to you but I want you to know that there was no authority to do it and I do not affirm that and I want to let you know that you will be prosecuted

or that you may be prosecuted, you have to take your chances," and that is the end of the conversation. Then how should the witness testify at the trial when he is asked these questions?

MR. LaROSSA: He should testify at the trial truthfully. However --

QUESTION: He was made a promise but it was purportedly revoked.

MR. LaROSSA: Exactly.

QUESTION: Let's assume that he didn't. Let's assume that he testified exactly as he did here but nevertheless at the time of the trial he thought he could be prosecuted.

MR. LaROSSA: Then, Mr. Justice White, he should testify --

QUESTION: He should have told the facts.

MR. LaROSSA: He should have stated exactly what he did and the Assistant United States Attorney should have corrected the entire problem.

QUESTION: The important fact for the jury, I suppose, is whether or not he thought he could be prosecuted at the time.

MR. LaROSSA: Yes, sir.

QUESTION: Is that the important fact?

MR. LaROSSA: Two things. Whether or not he could be prosecuted --

QUESTION: I agree there is wholly another question of whether he told the exact truth or not, but in terms of the impact on the jury the question is whether or not he thought he could be prosecuted at that time in terms of the impact of his testimony.

MR. LaROSSA: Yes, sir. I have a tendency to agree with you.

However, I do believe that the defendant would have had the right to rebut this understanding that he had even though it was -- assumed that it was --

QUESTION: Oh, it might have come up sometime if they prosecuted him, whether or not the first promise was binding.

MR. LaROSSA: Mr. Justice White, that is not what I am referring to. What I am suggesting is assume, as you stated, that the witness had the understanding that he might be prosecuted whereas in fact the truth is he couldn't have been prosecuted. Then that fact should have been made known to the defendant and his counsel for whatever use they so chose because I respectfully submit this had to be a close issue. It was a one-witness case and the witness' credibility is the only important thing in the petitioner's trial.

QUESTION: I don't know how you tie that up with credibility if he thought he could be prosecuted and still testified. It might have a lot to do with whether or not he

would testify.

MR. LaROSSA: That is correct. Mr. Justice White, we are assuming that what he says has to be accepted as a truism even though in fact there is no truth to it.

I submit to you that if he got up on the stand and made any kind of a false erroneous statement whether it was in truth something he believed to be true or not the Assistant United States Attorney prosecuting that case would have the duty to come forward and correct that false impression.

I refer very quickly to someone who makes a mistake about testifying before the grand jury. If a witness stood before the court and when asked did you ever testify before a grand jury answered honestly no because he forgot that he testified before that grand jury, then I respectfully submit, Mr. Justice White, that the Assistant United States Attorney must come forward and say the witness is in error, he did testify before the grand jury.

Here whatever the witness believed to be true, the United States Attorney and the Government had the duty to come forward and say here he did have a grant of immunity.

QUESTION: Regardless, your argument is regardless of its impact regardless of its significance in terms of the credibility of the witness.

MR. LaROSSA: Yes, sir. I do believe that the truth of the transaction would be extremely important. I

believe so as a trial advocate, if for no other reason. I think that a jury seeing a witness testifying whether or not he believed he had an absolute grant of immunity but that that jury knew he had an absolute grant of immunity and further that the agreement went one step beyond and said you must testify at the petitioner Giglio's trial and then they would have the right to believe that he was a biased interested witness and they would have the right to look at his testimony again and to determine whether or not they should closely scrutinize it.

QUESTION: Mr. LaRossa, had there been no reference at all on this subject in the closing argument of the prosecution, would your position be the same as it is now?

MR. LaROSSA: Mr. Chief Justice, I don't believe it would be as strong, quite frankly.

QUESTION: Just a difference in the strength.

MR. LaROSSA: Yes, sir. I think the fact that the Assistant United States Attorney uses this in his closing argument, that fact alone gives it such a greater amount of credibility to the jury because now the Assistant United States Attorney is making the same statement that he did to the jury, and we must assume that it is an unsophisticated jury because under this Court's rulings with respect to jury selection now we are getting unsophisticated juries, we are not getting juries that had 5 and 6 times been jurors in the

past but we are getting jurors now that have only sat on one occasion, so when the witness says I don't know whether I still could be prosecuted, and I think I may still be able to be prosecuted, and then someone representing the United States Government stands before that jury and emphasizes the very same fact, then the degree of truth I think is enlarged, so I do believe, Mr. Chief Justice, that the fact that the Assistant United States Attorney in his closing statement mentioned this and accentuated it to the jury makes it a much stronger situation than it would be otherwise.

QUESTION: Was the United States Attorney who first made the promise, if one was made, still with the Government when the petitioner was tried?

MR. LaROSSA: Yes, sir. More than that, Mr. Chief Justice, he was still with the Government when he submitted the affidavit, which was long after all the appellant process. He was still with the Government up to a few months ago. He was an Assistant United States Attorney, I do believe, this year. Sometime this year, he left that office. But when he made that affidavit stating -- this is why I am puzzled at the Solicitor General's question of the truth of the affidavit, because it is an affidavit submitted by the Government in opposition to the petitioner's motion for a new trial where they state in that affidavit, one, that he is an Assistant United States Attorney at the present time, Mr.

Justice White, and two, that the acts that he refers to were done at a time when he was an Assistant United States Attorney.

Mr. Justice Marshall asked me the size of the office of the Southern District in New York. I think the size of the office in the Eastern District of New York might become more important because at the time this case was tried I don't believe there were more than ten Assistant United States Attorneys in the Criminal Division and Carl Golden, the Assistant United States Attorney who tried the case, was in a Civil Division and was brought over specifically to try this case. I have no absolute proof to give to this Court that Mr. Golden knew of the existence of this agreement or did not know of it. I am in no position to dispute his affidavit, quite frankly. But it the petitioner's position with respect to that that he should have known about it, that he has an absolute duty to inquire, that if Mr. DiPaola, the Assistant United States Attorney who granted this immunity, decided not to tell him or forgot it or in any way made a mistake here, this Court cannot pass that burden on to the petitioner.

QUESTION: Mr. LaRossa, in at least part of the appendix that I have before me there is a gap that perhaps you can refresh me on.

MR. LaROSSA: Yes, sir.

QUESTION: You will recall when there was examination,

cross-examination by defense counsel about Taliento's appearance before the grand jury, wherein he was trying to elicit from him the response that he went there to help himself, he answered "I was just advised that I was supposed to be before the grand jury," and then there is a break at this point and the witness' memory was refreshed as to the testimony he gave to the grand jury and the Court asked "Does that refresh your recollection"? Can you complete the gap?

MR. LaROSSA: Yes, sir, I can.

QUESTION: What was said to him?

MR. LaROSSA: What they did was show the witness' grand jury minutes where he testified at the grand jury, Mr. Chief Justice, that he was at the grand jury to help himself. The question was asked: "Did you tell the grand jury at that time, or does this refresh your recollection that you told the grand jury at that time that you were there to help yourself"?

He said: "Yes, it does refresh my recollection that I told the grand jury that I was there to help myself."

That question and answer was given during the trial.

QUESTION: Mr. LaRossa, it is of no significance, I suppose, but where is the petitioner now? Is he still incarcerated?

MR. LaROSSA: No, sir. Mr. Justice Holland released him on bail after this Court granted the petition.

QUESTION: He has served some part of his sentence?

MR. LaROSSA: He has. This was the first time he had ever been involved with the law, I might add, and bail was refused on the Circuit Court level.

QUESTION: Mr. LaRossa, how do you deal with the meeting between Taliento and the other Assistant United States Attorney shortly before the trial of this case in which the affidavit shows that whatever might have been said at the time of the grand jury testimony, at this later meeting the affidavit shows that no assurances were given either to Taliento's lawyer or to the Taliento's, father and son, except that they would have to rely on the good judgment and conscience of the Government.

MR. LaROSSA: I do believe, Mr. Justice Stewart, that this Court should ignore those affidavits completely. They were submitted in opposition to the defendant's motion without the right of confrontation under Pointer v. Texas and we do not know whether these actually did occur but let's assume that they did occur. Let's assume Mr. Hoey said you have no grant of immunity, you must go in there and testify. But then, when the witness does testify, at the point of that meeting he still has not completed his immunity. That is the petitioner's point with respect to this.

QUESTION: Quid pro quo was for him to testify against your client.

MR. LaROSSA: Exactly. But the day he was sworn in at the trial and testifies, then we go back to Mr. DiPaola, the Assistant United States Attorney who granted him the immunity, and we examine all of the conditions that he put forth in that and we find that Mr. Taliento has complied completely with them and therefore his grant of immunity is whole, secure and should have been made known in that courtroom. Whatever occurred with respect to Mr. Hoey at that meeting -- and we don't know what happened because we were never given the opportunity to ask anyone --

QUESTION: We do have sworn affidavits.

MR. LaROSSA: We do have sworn affidavits.

OUESTION: And that is the same quantity and quality of proof upon which you rely as to the earlier meeting, the sworn affidavits.

MR. LaROSSA: But my sworn affidavit comes from the Government's affidavits in opposition, not from mine, Mr. Justice Stewart.

As a matter of fact, the Solicitor General, interestingly enough, disputes the fact that this meeting ever occurred and puts forth untested affidavits as truth with respect to the Hoey meeting subsequent to the grand jury. I submit that an affidavit of an Assistant United States Attorney at the time an Assistant United States Attorney and under the pressures that he must have been under

when he did prepare this affidavit and submitted it to the Court must be considered by this Court to be true. Why else would it be given? Why was he retained as an Assistant United States Attorney months and years after this occurred?

But again, I have never had the opportunity to ask anyone these questions. The hearing has been denied throughout. But I submit that going back to the affidavit of Mr. DiPaola -- and I only have a few moments left -- where he is very specific about this, I assume that this affidavit was read and reread and everybody must have had a voice in it. Mr. Hoey was a very competent and good United States Attorney and I am sure everybody sat down and read this and just didn't submit it, but he talks about Taliento and Giglio being arrested and arraigned before the United States Commissioner. Then he says in the last paragraph of the first page subsequent thereto and after conferences with Special Agent Alberto Axton of the FBI, the case agent at the trial and a witness for the Government at the trial, your deponent conferred with the counsel for the witness Taliento. Present at the conference was the attorney for the witness and the witness and Mr. DiPaola. It was agreed that Robert Edward Taliento would testify before the grand jury as a witness for the Government, that he would be named as a co-conspirator and would not be indicted. His attorney would not permit Robert Edward Taliento to testify before the grand

jury if he was going to be indicted.

This is written by a lawyer, may it please the Court.

It was further agreed and understood, and I submit that those words become very important, that he, Robert Edward Taliento, would sign a waiver of immunity from prosecution before the grand jury and that if he eventually testified as a witness for the Government at the trial of the defendant Giglio he would not be prosecuted. That is not an unequivocal statement.

QUESTION: This case comes here originated in a motion --

MR. LaROSSA: For a new trial.

QUESTION: -- for a new trial on the basis of newly discovered evidence.

MR. LaROSSA: That is correct.

QUESTION: Was there a hearing?

MR. LaROSSA: No, sir, it was denied.

QUESTION: Just on affidavits.

MR. LaROSSA: That is correct.

QUESTION: Was there any findings?

MR. LaROSSA: Yes.

QUESTION: I mean other than just a denial of the motion.

MR. LaROSSA: Judge Ryo filed that, No. 1, the

United States Attorney was the only one who could give such an immunity. I could question that.

QUESTION: Well, there are some square conflicts between the affidavits, aren't there?

MR. LaROSSA: With respect to what?

QUESTION: As to the fact.

MR. LaROSSA: No, sir. Our facts were --

QUESTION: How about Mr. Golden's affidavit?

MR. LaROSSA: Mr. Golden's affidavit has conflict with Mr. DiPaola's affidavit, another Assistant United States Attorney.

QUESTION: There is a conflict between the two, isn't there?

MR. LaROSSA: No, sir. Mr. Golden says he was never told this by Mr. --

QUESTION: He says DiPaola said he had never granted him immunity.

MR. LaROSSA: He said Mr. DiPaola said if he didn't testify, indict him. Basically, those kinds of words.

QUESTION: Well, as I read his affidavit, he said Mr. DiPaola said he had never granted him immunity. Mr. DiPaola further advised that Mr. Taliento had not been granted immunity. Page 139-A.

MR. LaROSSA: I beg your pardon. You are correct. There is an absolute conflict in fact.

QUESTION: I take it, Mr. LaRossa, that the essence of your argument is that whatever understandings and agreements and discussions there are about not indicting or indicting must be disclosed.

MR. LaROSSA: Yes, sir.

QUESTION: Whether there is in fact a binding grant of immunity or whether there is not. If there have been discussions that would lead a reasonable man to believe that the prosecution was not going to be pursued, even if it could legally be pursued, that circumstance must be disclosed to the jury.

MR. LaROSSA: As this Court held in Mathew, yes, may it please the Court.

Mr. Chief Justice, in Mathew this Court said just the fact that consideration may be given to this man -- and there was a question about that, too, but in Mathew this Court held that that should have been made known to the Court and jury. We go a lot further --

QUESTION: I didn't understand you to be asserting here because you don't need to that the prosecution has a duty on its own motion to disclose it to the jury but only that upon cross-examination if the witness doesn't tell the truth in response to questions in that area then it is a denial of due process.

MR. LaROSSA: That is correct, Mr. Justice Stewart.

At that point, the Government must come forward.

QUESTION: You don't assert that the prosecution has an absolute right on its own motion to disclose all this.

MR. LaROSSA: Absolutely not. If the witness had admitted that he had immunity, I think that would be the end of it and the Government would have no burden and the jury would be able to assess the witness' credibility with respect to that.

I see both my lights are on. Thank you very much.

CHIEF JUSTICE BURGER: Thank you, Mr. LaRossa.

Mr. Solicitor General.

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

I think the petitioner began by giving very selective views of the facts of this case, though I think that now most of the facts are out on the table. I would like to take the petitioner's contentions in this order:

First, the petitioner contends that the Government witness, Taliento, lied. That is really what it is. He didn't tell the truth in court that the Government, knowing that he didn't tell the truth, failed to correct him and the petitioner also urges that the case was in some way shaky any way because Taliento was the only witness for the Government. I want to start with that second point first.

I think it should already be clear to the Court

that Taliento did not lie in this trial. I think when the Court granted certiorari in this case it may have been under the opinion on the basis of the facts that had been presented to it in the petition and brief that there had actually been perjury committed in this case and the Government had failed to correct it. If there had been perjury in this case on a substantial issue and the Government had failed to correct it, I don't think we would be here, but there was no perjury in this case.

What happened was this: The grand jury hearing was two years ago. A week before the case comes up for trial, Mr. Golden begins his preparation for trial. The United States Attorney. He contacts the United States Attorney who handled the case and the grand jury asks that United States Attorney whether any immunity or promises had been given to Mr. Taliento and was informed that Taliento had not been indicted because he was a young man, he was 19 at the time that this happened, and the Government felt that he had been over-reached by the older man, Giglio, who really -- I could get into this later -- set up the whole transaction.

QUESTION: How old was Giglio?

MR. SACHSE: Giglio was about 26 or 27 at the time.

QUESTION: What you are reciting now is what the trial assistant attributed in his affidavit, are you not?

MR. SACHSE: That is correct. This is for Mr. Golden's affidavit.

However, it was also made clear to Mr. Golden that it was understood that Taliento would be a witness for the prosecution and that that was also a reason that he had not been indicted.

Now, with this in mind, Mr. Golden contacted Mr. Taliento, the witness. Mr. Taliento told Mr. Golden that he would not testify. Now, if there had been any agreement beforehand -- and we only know of that from an affidavit two and a half years after the event -- but if there was any agreement beforehand when Mr. Taliento said he wouldn't testify that agreement was over.

Now, Mr. Golden asked Mr.Taliento if he would come into his office and talk to him. Mr. Taliento came in and he came in with his father. Mr. Taliento's father said, "I would rather have my son alive than have him testify and he is not going to testify in this case." Mr. Golden then set up a meeting with Mr. Darienzo -- who had been Taliento's lawyer at the time of the grand jury proceeding and who was still Taliento's lawyer -- Mr. Darienzo, Taliento's father and asked Mr. Hoey, the United States Attorney himself, to come to the meeting. They had several meetings discussing this point with the lawyer and with everyone involved. The result of these meetings was that whatever had been done

before, it was made perfectly clear to Mr. Taliento that if he did not testify he could still be indicted and prosecuted. Mr. Hoey said to him that he should have been and could still be prosecuted if he wouldn't testify. It was also made clear to him in the presence of his lawyer that if he did testify -- and here I think I would like to quote Mr. Hoey's affidavit, page 144-A, which said that Mr. Darienzo did not claim that his client Robert Taliento received immunity or was made any promises. No assurances were given to Mr. Darienzo or to the Taliento's except that they would have to rely on the good judgment and conscience of the Government.

So here is Mr. Taliento, the witness for the Government, going into the trial. It was perfectly obvious to everyone he had not yet been indicted.

QUESTION: What is your construction of the good judgment and conscience of the Government?

MR. SACHSE: I think the Government was holding over Mr. Taliento's head the possibility that he could still be indicted if he didn't testify or if he got up and instead of testifying the same way he had in previous times changed his testimony to make it more favorable to the defense.

QUESTION: Couldn't Taliento construe judgment and good conscience that if he was at least an extremely good witness he wouldn't be prosecuted?

MR. SACHSE: I think he probably did construe it

that way.

QUESTION: Is that a promise?

MR. SACHSE: I think what it was was something less than a promise but certainly an indication to him that if he testified the likelihood was that he would not be prosecuted.

Mr. Taliento testified that way. He was questioned as to whether anyone had made an absolute promise to him that he wouldn't be prosecuted. He said "No."

If you read his testimony, he made it pretty clear that he understood that he would likely not be prosecuted but no one had pinned it down tight for him.

You know, this was not an SEC registration. This was a scared witness testifying in a trial being cross-examined. I submit that if the Court knows about the meetings that took place before this trial and then reads Mr. Taliento's testimony all Mr. Taliento was doing was reflecting what Mr. Hoey had said to him.

QUESTION: What bothers me is a matter of the facts, and that is what you are now discussing, that the witness Taliento, on cross-examination, said this: He said nobody told me I wouldn't be prosecuted. Then you look at Mr. DiPaoli's affidavit and he said if he eventually testified as a witness for the Government at the trial of the defendant Giglio he would not be prosecuted.

Now, you say there was no perjury in this case

but those are just two statements 180 degrees apart.

MR. SACHSE: I don't think they are as far apart as they seem if you keep in mind --

QUESTION: -- quid pro quo, but he already delivered the quid pro quo. He already testified on direct examination for the Government against Giglio.

MR. SACHSE: No. What I was suggesting, Your Honors, is that in the context of his testimony he is there on trial being cross-examined.

QUESTION: Yes, after his direct testimony.

MR. SACHSE: He may well have understood this to be questioning as to whether he has a deal with the Government. There are four or five pages about whether he had a deal with the Government. He did not try to deny that he expected that --

QUESTION: Well, his words were "Nobody told me I wouldn't be prosecuted." Then you have an affidavit from an Assistant United States Attorney saying that he had told him that he wouldn't be prosecuted.

MR. SACHSE: But he also had within the week before his testimony the explanation from the United States Attorney that no promise had been made and Taliento may have interpreted whatever had been said to him 2-1/2 years before differently than Mr. DiPaola interpreted that.

QUESTION: The word "nobody" has a meaning in the

English language, doesn't it?

MR. SACHSE: Yes.

QUESTION: And DiPaola states under oath that he did tell him that he wouldn't be prosecuted.

MR. SACHSE: That is correct.

QUESTION: The witness says "Nobody told me I wouldn't be prosecuted." You can't rely on that record and say there could be no finding of perjury here, can you?

MR. SACHSE: It seems to me that it is less than perjury when the witness has spent a week with the Federal attorneys just before this testimony in which they have made it perfectly clear to him that he could still be prosecuted and he apparently --

QUESTION: If he didn't testify. But by this time, he had testified the way the Government wanted him to, so he delivered his part of the bargain.

MR. SACHSE: Mr. Hoey had also apparently made it clear to him that even if he did testify he would simply have to rely on the good faith and judgment of the Government.

What I have in mind is that it could be that Taliento at one time thought he had an absolute promise, but that after this week of discussions with the Federal attorney he would no longer think he had an absolute promise because they told him he didn't have it.

QUESTION: Has the conflict which Justice White

focused on between the affidavit of the trial assistant and the affidavit of the man who prepared the case for trial, DiPaola, ever been resolved by the District Court?

MR. SACHSE: I don't think the District Court saw it as a necessary conflict.

QUESTION: Don't you agree that there is a conflict as Justice White pointed out?

MR. SACHSE: I really think there is a conflict, that DiPaola apparently told Golden that he had made no promise, and that in his own affidavit he says he had made a promise.

Now, whether this means that he had forgotten it and remembered it again, or whether it means that he is trying to give more definiteness 2-1/2 years later than he gave at the time of the trial to whatever statements he made --

QUESTION: What if on a hearing before the District Court judge now Mr. DiPaola retracted his affidavit and said that he had never given any such assurances for whatever reasons we need not be concerned now. Wouldn't that have a lot to do with the ultimate resolution of this issue?

MR. SACHSE: I really don't think so, Your Honor, because I think even if we take this case at the worst for the Government where you would have an absolute promise of immunity made to the witness, no knowledge of that by the Government lawyers at the time of the trial, the witness

assured that he had no immunity, the witness forgetting or thinking that his prior grant was no longer operative and stating that he has no immunity, though making it clear he hopes that he has not been prosecuted, that he hopes he wouldn't be prosecuted --

QUESTION: I don't buy your suggestion that the hypothetical situation I posed wouldn't alter it. Suppose, to be more specific, the hearing was held and DiPaola was called and took the stand and admitted that his affidavit submitted in this case was false and that he had made it out of sympathy for this petitioner and out of an old friendship with their family. This is purely hypothetical.

MR. SACHSE: I agree in that situation the case would be over. There would be no question at all.

QUESTION: It wouldn't be over. You would have to decide at which time he was not telling the truth, wouldn't you?

MR. SACHSE: That is right.

QUESTION: You would have to make a finding on that.

MR. SACHSE: But what I am saying is even if DiPaola's affidavit is accepted as absolutely true, I don't think that there was any perjury -- perhaps Justice Stewart sees this one question as a possibility, as perhaps perjury. I think in the context of this witness testifying in that trial with

what had been told him the week before at worst it was an incomplete answer.

QUESTION: As a representative of the United States Government, which one of these three statements from another member of the United States Government should we take? He signs it the Assistant United States Attorney. He doesn't sign as an individual.

MR. SACHSE: I think this Court should, unless it wants to send the case back for an evidentiary hearing, I think this Court should accept Mr. DiPaola's statement as true that --

QUESTION: Which one?

MR. SACHSE: His affidavit as true, that he did tell Taliento that he would not prosecute him if he testified in the trial.

QUESTION: What about his statement to Mr. Golden that he didn't?

MR. SACHSE: I think that should be accepted as true, too. When he spoke to Mr. Golden, he didn't tell Mr. Golden this.

QUESTION: One of the two times he wasn't telling the truth.

MR. SACHSE: He may not have told the whole truth.

QUESTION: Should that not be resolved by a finding of fact explicitly by the District Court?

MR. SACHSE: I can't argue strongly against a remand for finding of fact in this case, but I do believe that even if we take these statements at their worst against the Government, what we are presented with is a case where the Government had overwhelming evidence against Mr. Giglio, a case in which if there was any perjury at all -- it is doubtful but -- I think there was no perjury -- a case in which if there was any Government misrepresentation, it was honest and not in bad faith, a case in which the likelihood that if this case were tried over on the merits the results would come out any different way is almost nil.

There are two facts of the case that I haven't talked about that I think I should mention. First is that Mr. Taliento gave a full confession when he was caught by the bank officials and told the whole story. All of these checks went through his window. The checks had been supplied to him by Mr. Giglio. It was not a very clever scheme. He was cashing these forged travelers checks. A computer in the bank in California where the checks had to be honored kicked them all out as stolen checks. He was confronted with this within days. He gave the whole story to the bank officials before anyone from the Government talked to him or gave him any promises. Then the bank officials that very night called in the FBI. He gave the same story to the FBI, told the FBI also that he had a part of the money still

due to him from Giglio. He told the FBI where Giglio could be found. He went with the FBI and they found Giglio with the money in his pocket, $550 in large bills, which was approximately the amount that was to be given to Taliento.

There is no real risk that any promises of immunity one way or the other would have affected the substance of this testimony in chief because it was all fixed before any of this happened.

QUESTION: This is a harmless error argument, is that it?

MR. SACHSE: Yes.

The second point on that is this jury knew -- and this is what the District Court found and I think the District Court opinion is a wise opinion -- this jury knew the whole time that Taliento was the Government's witness, that two years had passed and that he had not been indicted, that if he testified properly he probably never would be indicted. The defense lawyer spent almost his whole argument on the fact that Taliento was a biased witness. There is nothing that would be added by the fact that the Government had at one time promised immunity and then taken that promise back.

QUESTION: Something would have been subtracted if the United States Attorney had not put in his argument that statement.

MR. SACHSE: That is true, that is true, but whether

that -- this was argument and -- this was not evidence, but argument.

QUESTION: What other testimony was in the record that tied Giglio to all of this other than that one witness?

MR. SACHSE: Other than Taliento, the fact that the FBI went out and found Giglio where he was supposed to be, found him with this money in his pocket, and that Giglio presented no defense at all, introduced no witnesses, did not take the stand himself.

QUESTION: There is some suggestion here about entrapment. What evidence as distinguished from argument was introduced of entrapment?

MR. SACHSE: There is no evidence of entrapment, Your Honor. No evidence at all.

QUESTION: Was it just argument to the jury?

MR. SACHSE: It was just a wholly unfounded argument that Taliento, to get himself off the hook, would try to bring Giglio in. There is no evidence of that. There is no reason, just reading what happened, to suspect that. The evidence is all the other way around. It was Giglio's idea. He set it up. It wasn't a very bright idea and they got caught. Then Taliento, instead of being a good solid crook and keeping it all to himself, talked.

The problem with a retrial in this case, if it ever came to that, is that Taliento was a reluctant witness

to begin with and he testified and there is no evidence that he testified any way other than truthfully. The thing that would be bad is if somehow the pressure got to him and he wouldn't testify again. Instead of being able to get testimony that did correspond with the statements he made when it was at a time, at an auspicious time, we have testimony that would be altered to now try to help his friend Giglio.

QUESTION: What is there to prevent him being confronted with his testimony as a hostile witness if what you suggest developed?

MR. SACHSE: Unless he disappeared, that could be done, yes. Unless he disappeared. But I think the crux of the case -- and I will say this and sit down unless there is some further question -- is that the jury knew this was the Government's witness. They knew everything they could know to know that the Government still had a weight hanging over his head. If the Government had no weight handing over his head he would have been a freer witness than he was as things turned out.

Further, his testimony was within what can be expected of a co-conspirator in a criminal trial on his testimony as to what he had been promised and what he had not been promised. There is simply nothing in this case that raises it to the level of cases like Brady v. Maryland and Mathew v. Illinois, where there was real evidence that

might have changed the outcome of his case and where a prosecutor had suppressed it or where there was no perjury that he didn't correct. This is a kind of case that I believe in which the District Court and the Court of Appeals should have a certain amount of discretion and in which this Court should be reluctant to undo what both the District Court and the Court of Appeals, who to some extent were closer to the case, have both found was correct.

CHIEF JUSTICE BURGER: Thank you.

Thank you, Mr. LaRossa.

The case is submitted.

(Whereupon, at 11:00 o'clock, a.m., the arguments in the above-entitled matter were concluded.)

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