In the

Supreme Court of the United States

UNITED STATES,)
)
Petitioner,)
)
v.) No. 71-229
)
ANTONIO DIONISIO)

Washington, D. C.
November 6, 1972

Pages 1 thru 44

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,

Petitioner,

v. : No. 71-229

ANTONIO DIONISIO

Washington, D. C.

Monday, November 6, 1972

The above-entitled matter came on for argument at 10:05 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
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

PHILIP A. LACOVARA, ESQ., Attorney, Department of Justice, Washington, D. C. 20530 for the Petitioner

JOHN POWERS CROWLEY, ESQ., 105 West Adams Street, Chicago, Illinois 60603 for the Respondent

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument first in No. 71-229, United States against Dionisio.

Mr. Lacovara, you may proceed.

ORAL ARGUMENT OF PHILIP A. LACOVARA, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case, United States against Dionisio and the next case on the Court's calendar this morning, United States against Mara, both raise important questions about the ability of federal grand juries to obtain exemplar evidence from recalcitrant witnesses.

Both cases are here on writs of certiorari applied for by the United States to the United States Court of Appeals for the Seventh Circuit.

In this case, the proceedings began when a special federal grand jury sitting in the northern district of Illinois, the special February, 1971 grand jury, supoenaed Mr. Dionisio and approximately 20 others in a gambling investigation that the special grand jury was conducting. Mr. Dionisio and others were ordered by the grand jury to submit to them what would be the reading of a transcript over a telephone connected to a recording device.

Mr. Dionisio refused to give the exemplars as

directed by the grand jury foreman, as did other grand jury witnesses, and the government thereafter filed petitions to obtain court orders to compel the furnishing of the voice exemplar.

The government's petition against Mr. Dionisio alleged that the special grand jury was investigating violations of federal criminal statutes, that the grand jury thought it necessary and essential to obtain a voice exemplar of Mr. Dionisio's voice on the telephone for the sole purpose of comparing his voice as recorded with voices intercepted pursuant to court orders issued by the federal district court.

The government also alleged that the transcript that Mr. Dionision had been asked to read was special grand jury exhibit 13, which the petition stated consisted of names, numbers and races, names of horses, numbers of horses and races and certain other informaton.

The hearing on the petition in this matter as well as petitions with respect to the other 20 or so recalcitrant witnesses was held before Chief Judge Robson of the district court and at that hearing it was brought out that what the government was seeking was compliance with what was termed a "reasonable order" of the grand jury and this was explained to mean that if an exemar that was clear was given, only one exemplar would be necessary but on the basis of similar

requests several days earlier, exemplars had been given by other witnesses and the time consumed had been no more than 10 or 20 minutes that the government would preserve any and all original examplars for subsequent comparison and expert analysis, including by the defense and that counsel could be present during the taking of the exemplars because the expected procedure would be that the exemplar would be given before a specially designated agent of the grand jury outside the grand jury room.

Chief Judge Robson entered orders directing each of the witnesses including Mr. Dionisio to provide the exemplars. Nineteen of the 21 witnesses did provide the exemplars under court order. Mr. Dionisio and one other witness whose petition was ultimately dismissed by the government refused to give the exemplars, asserting fourth and fifth amendment defenses.

The court entered an opinion which is reprinted in the appendix to our certiorari petition in which both the fourth amendment and the fifth amendment claims were rejected. On the fourth amendment issue, Chief Judge Robson held that since the grand jury subpoenas were lawful, the witnesses were properly subject to these directions, were not in unlawful detention within the meaning of this court's position in Davis against Mississippi and relying on this court's decisions in Gilbert, Wade and other cases, held that

no fifth amendment values are impinged upon by requiring a person to give exemplars.

When Mr. Dionisio refused in open court to give the exemplars, he was committed for contempt until he complied with the order or until the expiration of 18 months which was the maximum statutory imprisonment for civil contempt.

On appeal after Mr. Dionision had been released on bond by the seventh circuit, the court of appeals rejected fifth amendment claims as well as any possible sixth amendment claim but found that the fourth amendment defense was a valid one.

The court ruled that before a grand jury may compel a witness before it to give exemplars of his voice the government must make an affirmative factual showing that this request is reasonable. The court apparently believed that the petition and the hearing that was held on the government petition did not satisfy that reasonableness request and the court reversed the contempt judgment.

The ground for decision by the Seventh Circuit was essentially that exemplars may be covered by the fourth amendment, relying here on the same case that the district court had found not applicable, Davis against Mississippi and also that the fourth amendment applies to grand jury proceedings and the court relied on one or two decisions

in this court in which the court stated that grand jury supoenas for the production of documents might be so broad and ill-defined as to constitute an unreasonable search.

The government petitioned for rehearing en banc and that was denied by a five to three vote and in August of 1971 we filed a petition for certiorari. In May of 1972, after we had filed a supplemental memorandum calling to the court's attention an intervening decision by Chief Judge Friendly of the Second Circuit which had explicitly rejected the rationale in the Dionisio case, the court granted certiorari.

The issue, then, in this first case is whether, when a grand jury witness has been properly called before an investigating grand jury, the fourth amendment requires that before a witness can be compelled to give exemplars of his voice or, as in Mara, exemplars of his handwriting, the government must make an affirmative, factual showing that this request is reasonable.

It is the government's petition -- position-- that no such requirement of affirmative, factual showing of reasonableness is necessary under the fourth amendment and that the decision below constitutes a departure from settled principles of grand jury practice and settled principles of the application of the fourth amendment.

We think the appropriate place to start in this

case -- as Chief Judge Friendly in the Schwartz case has done -- is with the nature of the grand jury itself. There is not need, I think, for us to rehearse at any great length the principles governing grand jury investigations, since only last term the court had a number of such cases before it.

But, briefly, the relevant context here is this: A grand jury is a touchstone of the criminal process under the federal system since only a grand jury can initiate felony prosecutions. The grand jury, for several hundred years, has had the completely undisputed right to compulsory process. This court has explained that complusory process involves not only the justifiable demand that every witness appear before the grand jury, but that every witness, unless his testimony is privileged, must testify before the grand jury in its search for truth.

Now, last term, in a decision which has been rendered by this court since the Seventh Circuit's decision in the two cases before the court this morning, the court rejected the very kind of preliminary showing that the Seventh Circuit has imposed in these cases. In Branzburg, Caldwell and Pappas it will be recalled, where important first amendment rights were unquestionably involved, as none of the justices of the court disputed, the court nevertheless said that in light of the historic function of the grand jury, even where it was possible that there might be some

collateral impact on first amendment values, nevertheless a newsman subpoenaed before a grand jury had an obligation to appear and had an obligation to testify and in rendering that decision the court explicitly rejected the suggestion that even in order to protect these first amendment rights some preliminary showing should be made before the newsman was compelled to respond to the subpoena.

The showing that was suggested by the lower courts and by the dissent in Branzburg was remarkably similar to the showing of reasonableness that the Seventh Circuit has imposed in these cases and it is our position that a showing in this context was no more justified than in the Branzburg, Caldwell and Pappas context.

Q Well, that's a -- if there is no invasion of either the fourth or fifth amendment, you don't even get to this question of what kind of a proceeding is appropriate.

MR. LACOVARA: Yes, sir. The second case this morning involves the follow-up decision by the Seventh Circuit of the nature of the proceeding that must be held to demonstrate reasonableness and the substantive content of the reasonableness. But if this court decides that the Seventh Circuit erred in Dionisio in saying that there is this kind of constitutional requirement, the second case, in our judgment, becomes academic.

The contention by Seventh Circuit, which is, of

course, defended by respondents in these cases is that compelling a witness to provide this kind of exemplar evidence is covered by the fourth amendment, even though, as the Seventh Circuit itself has conceded, the fourth amendment, governing unreasonable seizures of persons, does not apply to summoning a witness before a grand jury. It has never been held and no court that I am aware of has ever suggested that as a general principle the government or the grand jury must make a preliminary showing of reasonableness before a witness can be compelled to appear and to testify before a grand jury.

Q But this is not testimony, is it?

MR. LACOVARA: Well, it is. It is the giving of evidence. It is not testimonial. Pardon?

Q I thought you said this was to be done outside of the grand jury room by an agent of the grand jury?

MR. LACOVARA: That was the prodedure that was contemplated. The order -- the petition --

Q Well, Is that testimony?

MR. LACOVARA: Yes, sir. This is the giving of evidence before the grand jury, at the grand jury's direction.

Q I thought the provision you were talking about that had never been disputed and all was testimony before a grand jury. Isn't it?

MR. LACOVARA: Well, I can answer that question by saying that the petition that the government filed and the order that was entered in both of these cases did not require that the evidence, the testimony, if you will, be given outside the grand jury room. This was the procedure that the government proposed so that counsel could be present during the taking of the exemplar. This was thought to be a benefit for the respondents.

Q Has the man ever refused to testify in the grand jury room pursuant to subpoena by the grand jury?

MR. LACOVARA: He was asked if he would give exemplars and he refused on fourth and fifth amendment grounds.

Q I think you understand what I am talking about. Did he ever refuse to testify before the grand jury pursuant to a grand jury subpoena?

MR. LACOVARA: My answer to that question, and I don't think it is evasive, is that, yes, what he was ordered to do by the district court, and that is what is on challenge here, was to provide exemplars as deemed necessary by the grand jury, either before --

Q An exemplar is testimony.

MR. LACOVARA: Well, it is testimony in the sense --

Q Is it or is it not?

MR. LACOVARA: Well, I can't answer yes or no and

be fair to the court. It is testimony in the sense that it is what he -- it is evidence that he is obliged to give in the presence of the grand jury pursuant to the grand jury subpoena.

Q In the presence of the grand jury?

MR. LACOVARA: Yes. It --

Q Well, what did he refuse to do in the presence of the grand jury?

MR. LACOVARA: He can refuse --

Q What did this man refuse to do?

MR. LACOVARA: He refused to give an exemplar.

Q In the presence of the grand jury?

MR. LACOVARA: Yes, sir. The order that has been entered.

Q Well, what did the grand jury -- how did this come up? Did the grand jury call him in and say, "We want you to testify"?

MR. LACOVARA: The grand jury called him, explained that he was a potential defendant and that he had fifth and sixth amendment rights and asked him whether he would give a voice exemplar if ordered to give one. It was explained to him,and I understand the thrust of your question, that the procedure that was contemplated was that the telephone into which he was being directed to speak was in another office on that same floor. He did not object on that ground in the

district court, I must say, either before the grand jury or in court, and I think the order that has been entered against him on the government's petition would be satisfied if Mr. Dionisio had said, "I will give this testimony in the grand jury room but not outside."

Q Suppose the grand jury said, "Mr. Dionisio, or whatever your name is, we order you to go into the other room and give a statement to an FBI agent." Would that come under the same rule?

MR. LACOVARA: Well, there we have a fifth amendment problem. We are talking here --

Q What is the difference between that and this?

MR. LACOVARA: Well, we are talking here about evidence which I believe the grand jury was entitled lawfully to compel Mr. Dionisio to give in the grand jury room and the fact that --

Q But I still -- we keep -- you say "in the grand jury room."

MR. LACOVARA: The alternative procedure that was set up here was not a condition on the government's part. It made no difference to the government.

Q Well, did he at any time refuse to make these statements in the grand jury room?

MR. LACOVARA: He was asked to refer to the grand jury testimony. He was asked whether he would give voice

exemplars and he said no and he claimed a fourth and fifth amendment --

Q Was that in the grand jury room?

MR. LACOVARA: After he was told what the procedure was, he was asked whether he --

Q Well, then he never refused to testify in the grand jury room?

MR. LACOVARA: No, sir. No, because --

Q Did he ever refuse to make -- to read these figures and numbers and horses' names in the grand jury room?

MR. LACOVARA: Yes, sir. I think the reading of the transcript of the hearing before Chief Judge Robson will show that the orders that were being entered were to direct the witnesses to give these exemplars and at the time they were being entered and argued on the merits, it was not clear to Judge Robson that the procedure that was expected for purposes of defense counsel being in attendance was to have them given before a specially designated agent of the grand jury outside the grand jury room but what Judge Robson asked counsel and the respondent in each of these cases was, "Will you give the exemplars?" It was not, "Will you give them outside the grand jury room?" And as I say, the order that was entered was not limited to giving them outside the grand jury room and there would have been no contempt here.

Q Well, what -- he didn't refuse to answer any

questions in the grand jury room, did he?

MR. LACOVARA: Well, he refused, while in the grand jury room, to give exemplars.

Q Did he refuse any questions? No.

MR. LACOVARA: The only evidence that he was asked to give in the grand jury room by the grand jury was the exemplar evidence.

On this point, I reiterate that the order that was entered by Chief Judge Robson and the order that was asked for by the government provided for the giving of exemplars, either before and to the grand jury or to a specially designated agent of the grand jury who had been sworn by the grand jury previously to receive this evidence so that, as I say, there was also no objection on the ground that this was beyond the power of the grand jury to do and we suggested the case of O'Brien against the United States in 339U.S. as dispositive of this point since this objection was not made by the witness. This was not the basis for his objection and if that objection had been made, the government, of course, would have been quite willing to receive the exemplars in the grand jury room/ But as the transcript of the hearing makes clear, Mr. Justice Marshall, the government counsel said that the procedure that was contemplated was outside the grand jury room so that respondent's counsel could be present at the taking of these exemplars and that, in fact, is the procedure that was

followed, I am told, by the 19 witnesses who did provide the exemplars.

Q As a matter of fact, the witnesses don't affect this case at all, do they?

MR. LACOVARA: No, sir, but I am trying to set the context in which this came up to show that it was not thought material to the obligation or lack of obligation of Mr. Dionisio to give these exemplars that the grand jury, for other purposes, directed him to provide the exemplars to its agent down the hall. That was not an --

Q Who was the agent?

MR. LACOVARA: He was an agent of the FBI sworn by the grand jury to receive these exemplars and then testify what further processing they received.

Q So it is like my hypothetical. You go down the hall and talk to an FBI agent.

MR. LACOVARA: No, sir, we have a fifth amendment problem there.

Q What is the difference?

MR. LACOVARA: We are talking about evidence that the grand jury -- putting aside the location, or the giving of the testimony -- that we think there is no fifth or fourth amendment obstacle to the order that was entered here.

Q Would you turn your attention at least to the bottom of page 9 of the appendix where Mr. Dionisio, after

being asked a question, said, "I refuse to give any voice exemplar based on the rights guaranteed me under the fourth and fifth amendments." Now, was that inside the grand jury room or outside?

MR. LACOVARA: That was inside the grand jury room and that is the thrust of my position that his refusal was categorical, just like the refusal in the Bryan case, which was also a contempt case and there was never at any time any objection based on the locale for the giving of the exemplar and the government would have been quite willing, as the court order itself reflects, to receive the exemplar in the grand jury room if the witness did not want counsel present outside the grand jury room.

Q Where is that in the record?

MR. LACOVARA: That appears in the transcript. It is not printed in the appendix but the transcript, I believe, is before the court and the --

Q Mr. Lacovara, the Chief Justice was reading on page nine and then again on page 10 the answer, "I refuse to give a voice exemplar based on the rights guaranteed me under the fourth and fifth amendments."

MR. LACOVARA: Yes, sir.

Q No qualification whatsoever.

MR. LACOVARA: Absolutely none.

I might say that on page 21 of the transcript of

the hearing before Chief Judge Robson on February 19th, a government counsel brought out that this was after one counsel for another respondent had asked for permission to be present in the grand jury room when his witness gave the exemplar under compulsion, and Chief Judge Robson denied that motion saying that counsel are not allowed in the grand jury room and government counsel said, "Your Honor, we've anticipated that problem and that is why we have set up a procedure to allow these exemplars to be taken outside of the grand jury room so that counsel can be present." That appears on page 21 of the transcript of the February 19th hearing and it appears later on that counsel were actually present.

The context that we find ourselves in, then, is one in which a witness lawfully before the grand jury has been ordered to give evidence which is essentially evidence that he carries with him. This is not even a subpoena duces tecum to bring in his person effects from somewhere else. This is evidence, evidence of his own physical characteristics -- identifying characteristics that he has been ordered to provide to the grand jury which is no different, we submit, for fourth amendment purposes than would be compelling him to give testimonial evidence again assuming no fifth amendment problem.

The witness, under what we believe to be settled principles, is obliged to cooperate in the grand jury's

investigation in its search for truth by providing whatever information or evidence he can provide at that time. In typical grand jury proceedings, that involves his formulation of an answer to a particular question that calls for information that he has within himself.

In this context, what the witness is asked for is to give information, evidence, that is similarly important to the grand jury for its investigation as the petition alleged and this is also evidence that he has with him at the time. It is evidence about his own physical characteristics. Now, Chief Judge Friendly in the Schwartz case, which rejects the rationale of the Seventh Circuit here, says that this does not implicate any fourth amendment rights at all because these identifying physical characteristics voice or, in Mara, handwriting, are not characteristics as to which any person has a reasonable expectation of privacy and for this reason in Judge Friendly's analysis, we are not even talking about a search or a seizure within fourth amendment terms.

This is simply the requirement of giving a testimony or evidence which is no different from the formulation of oral responses by a grand jury witness lawfully before the grand jury.

Q Do you suppose the grand jury could tell a man to go over to that table and put your fingerprints on that ink pad and get a fingerprint of every one of your fingers?

Q Well, we'd have a slightly different analysis because of the reasonable expectation of privacy but I would be prepared to say the grand jury could insist on that, too and I think that that brings us right to Davis against Mississippi which is perhaps the heart of the case.

The Seventh Circuit, I think, misunderstood that and I happy to be able to rely on Chief Judge Friendly as having correctly, in our view, understood Davis. In Davis, the court's analysis was not whether finger prints abstractly considered are protected by the fourth amendment, whether there is a right to privacy in a man's fingerprints. The analysis there was, as the court formulated the question, can fingerprints taken in the course of an unlawful police detention be used against a 14-year-old black to convict him of rape?

We do not have that problem here. The witness was lawfully before the grand jury. Chief Judge Robson recognized that that was the determinative factor. Chief Judge Friendly has said the same thing and I think the court's own explanation in Davis, that there is no prying into private thoughts or personal information when fingerprints are obtained supports Judge Friendly's analysis that this really is not a search or seizure problem, assuming that the police -- that the government citizen contact itself is lawful, as we submit it is under the fourth amendment when a

grand jury process is being used, not a street confrontation between police and citizens.

Q It is your submission, as I understand it, that the compulsory giving of fingerprints is not of itself a violation of either the fourth or the fifth amendment.

MR. LACOVARA: Not of itself.

Q And that the rationale of Davis was that this was done during an unlawful detention which violated the fourth amendment.

MR. LACOVARA: Yes, sir. We regard Davis as a taint case, a Wong Sun kind of case; whatever evidence he had given would have been inadmissable --

Q And then here there is no unlawful detention, there is merely a summoning of a person before the grand jury. That is your argument, as I understand it.

MR. LACOVARA: That is our position, sir.

If there are no further questions, I should like to reserve any further time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Lacovara.

Mr. Crowley.

ORAL ARGUMENT OF JOHN POWERS CROWLEY, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The statement of facts as given by the Solicitor is

generally sufficient. I would like to add one further thing which I think adds some dimension to the problem he had presented.

The witness, Dionisio, refused to give voice exemplars. A witness, Charles Bishop Smith, during the same investigation, also refused to give voice exemplars. Mr. Smith, after being held in contempt and after the Seventh Circuit had reversed his contempt in the same opinion as here below, Mr. Smith was indicted by the special February 1971 grand jury and after the government's petition for certiorari had been filed in this case Mr. Smith was indicted by this grand jury for alleged violations of the federal laws prohibiting gambling. And the Solicitor sought leave of court and obtained pursuant to rule 60 the dismissal of the petition against Mr. Smith on the grounds that his voice exemplar was no longer desired since he had been indicted.

The wiretap evidence which formed the basis for Mr. Smith's indictment and presumably formed the basis for the request for the grand jury exemplars was found by the United States District Court for the Northern District of Illinois in United States versus Smith et al to have been unlawfully obtained and improperly authorized. That decision, the government has sought appeal from that decision.

If that decision is affirmed by the Seventh Circuit,

of course, then Mr. Dionisio would have an additional reason for refusal to furnish the exemplars under the principles set forth in this case and by this court in Gelbard versus the United States.

It is the basis of the respondent's argument. It is in the Seventh Circuit. Briefs are filed. It has not been set for argument. It is anticipated, Mr. Justice Brennan, that that case will be argued in January, in the January session of the court.

Q At the risk of repeating, would you summarize again what happened with this other man?

MR. CROWLEY: Yes, Mr. Justice, I most certainly will. Mr. Charles Bishop Smith appeared before the grand jury with Mr. Dionisio. Mr. Smith refused to give voice exemplars. He was held in contempt. His contempt was reversed by the Seventh Circuit in the same opinion.

Subsequent to the filing of the petition for certiorari, Mr. Smith along with approximately 18 or 19 others was indicted by this special February 1971 grand jury.

Subsequent to that indictment, the Solicitor sought and obtained leave of this court pursuant to Rule 60 to dismiss the petition for certiorari so Mr. Smith's counsel and other counsel in the case filed motions to suppress the wiretap evidence which formed the basis for Mr. Smith's indictment and formed the basis for the grand jury inquiry

in this case originally.

The district court granted those motions to suppress on the basis that the orders authorizing the wiretaps were not lawfully obtained.

Unless your Honor wants me to, I won't go into the merits of that decision. I don't think that is properly before the court, but the --

Q Well, was Mr. Dionisio --

MR. CROWLEY: Mr. Dionisio was never indicted by the special February --

Q Oh, I see, so only those who had been indicted made this motion. Is that it?

MR. CROWLEY: That is correct. That is correct.

Q Those were motions to suppress and they were upheld by the district court.

MR. CROWLEY: Motions to suppress -- by the district court. After indictment.

Q Right. And then, the government appealed that?

MR. CROWLEY: The government appealed that --

Q And it is now pending in the court of appeals?

MR. CROWLEY: It is pending in the Seventh Circuit Court of Appeals and it is reflected in -- that is reflected in my brief under the statement on page 3 that is, pending in the court of appeals --

Q So far, I gather, Mr. Dionisio has never

raised this point.

MR. CROWLEY: No, he has not. Well, he was not given -- No, he has not raised the point. Assuming, just for the purposes of argument that this court holds that Mr. Dionisio was not protected under the fourth amendment just to give voice exemplars per se, I believe that under this court's opinin in Gelbard, that Mr. Dionisio would have a right to refuse to give the voice exemplars alleging that the evidence upon which the grand jury sought the exemplars was unconstitutionally obtained. At least it might constitute just cause for refusal to answer.

Q Well, if this court sustains his contempt conviction, how does he do that?

MR. CROWLEY: No, your Honor, if it reverses the Seventh Circuit, Mr. Dionisio would then, I assume, be given an opportunity to appear again in the district court in which he could raise the issue that the evidence which the grand jury sought to compare had -- and sought to compare his compelled exemplar, had been unconstitutionally obtained and would appear to be just cause for --

Q If this court refuses the Seventh Circuit will that not reinstate the judgment, the contempt conviction?

MR. CROWLEY: I think it would, your Honor, but I think then Mr. Dionisio would have other collateral proceedings available to him.

Q You mean he could go to the grand jury --

MR. CROWLEY: Go to the grand jury and again refuse to give the exemplars. I think he would have to do that on other grounds -- on other grounds.

Q You say that he would give them save for the unconstitutional obtaining of the evidence?

MR. CROWLEY: Without binding your Honor again, without looking into the future as to what I would do or what his counsel at that time would do, I would assume that a procedure similar to that would have to be followed in order to protect his record, yes, and to comply with the order of this court.

Q Mr. Crowley, are you saying that this issue that you have been discussing is before the court on the present record?

MR. CROWLEY: No, I am not. No, I am not, your Honor. No, I am not.

It is the position of the respondent here that the decision of the Seventh Circuit does not, as contended by the government, present a novel issue. It has been law since Hale versus Henkel that the fourth amendment applies to grand jury proceedings. In Hale versus Henkel, this court held or struck a subpoena requiring the production of documentary evidence before a grand jury as being overbroad in violation of the fourth amendment.

It is also interesting to note that this court's decision in Hale versus Henkel, as did the decision of the Seventh Circuit below, this court indicated in Hale versus Henkel that it might very well appear at some future time in the grand jury proceedings that the request for this over-broad production of documentary evidence might very well be a reasonable request and therefore, reasonable within the meaning of the fourth amendment and that the person then could be compelled to produce the papers.

What the government would ask this court to hold is that the fourth amendment's application to grand jury proceedings applies solely to the production of documentary evidence. We submit that to place this limitation upon the fourth amendment is to give an unduly restrictive meaning to the fourth amendment.

What the government, if their position is sustained here, what they would then allow the grand jury to do would be to do, under the aegis of a simple grand jury subpoena, to violate the fourth amendment where normal investigative procedures of law enforcement agenices could not do.

Q Haven't the grand jury powers traditionally been one of the broadest powers that are possessed by government?

MR. CROWLEY: Mr. Chief Justice, they have been and in the sense of their -- of the broadness of the scope

of the investigation, the admissibility before the grand jury of hearsay evidence, as indicated by this court in Costello and many other cases that the grand jury may -- its investigation may take many, many different channels and go in many, many different areas but still, the grand jury must -- the grand jury in its investigation cannot because it wishes to investigate, cannot violate the privileges under the fourth amendment if --

Q Doesn't the Davis case turn on the fact that Davis' fingerprints were taken when he was in custody illegally and here is it not a distinction unless you claim that he is illegally before the grand jury?

MR. CROWLEY: Mr. Chief Justice, I think it is a distinction without a difference. Yes, in Davis --

Q The Davis case turned on that distinction so how can you say this is without a difference?

MR. CROWLEY: No, but I think that in this case, if this court -- if we take that analogy then all that would have been required in Davis to legalize the grand jury or the fingerprint -- if the situation had been reversed, rather than the dragnet detention in Davis where the police went up and took into custody many, many young blacks in the community, what if they did, instead of doing that, cause subpoenas, grand jury subpoenas, to be served on every young black in the community, called him before the grand jury and

forced him to give his fingerprints before the grand jury I submit that the invidious nature would still be present and that the grand jury would be violating the individual's fourth amendment rights just as much as the unlawful police detention in which the fingerprinting was a product of that unlawful detention, because it is true that the grand jury can issue a subpoena to compel the appearance of anyone before it. However, the grand jury cannot issue a subpoena to compel the production of things before it without regard to the fourth amendment.

And I think by analogy, proposed Rule 41 in the new federal rules of criminal procedure provide that applications can be made to magistrates to compel individuals to submit to identification procedures such as suggested here, such as voice prints, fingerprints and et cetera.

However, in applying to a magistrate for such an order the agency or the government applying to the magistrate must submit papers to show probable cause and reasonable grounds before the magistrate will issue such an order.

Now, grand juries, I think, are subject, generally, to the jurisdiction of the district court and to say that the grand jury that would have greater subpoena power than the district court I think is to ignore the function of the grand jury. We can compel, for example, the attendance of witnesses before any district court in the United States by

proper service of a subpoena but we could not compel that person -- compel him to appear before the district court in a case on trial and I don't think they could compel him to give voice identification, handwriting exemplars or whatever other physical characteristics be required. I think that -- yes, Mr. Justice Rehnquist?

Q Mr. Crowley, I take it you wouldn't say that probable cause is required for either a grand jury or counsel in trying a case before a petty jury to follow a particular line of inquiry with a witness where all that is being sought is ordinary oral question-answer testimony?

MR. CROWLEY: No, it is not probable cause, your Honor, but it must be questions that are relevant in material to the inquiry and there must be some showing of relevancy and materiality to the issues at trial before the court will allow counsel to question into an area that does not have immediate appearance of relevance.

Q How about before a grand jury? Simply oral questions and answers without any voice print problem involved?

MR. CROWLEY: I think there, your Honor, we are seeking solely testimony and absent a fifth amendment I don't think we have the same principles we have involved here.

Q Your argument, then, turns on the difference between a voice print and ordinary question and answer

testimony.

MR. CROWLEY: I think there is a substantial difference.

Q Is it critical to the case you are making?

MR. CROWLEY: Yes, it is.

Q Well, assuming that the testimony before the grand jury is taken down on the tape and then tested, what would you do then?

MR. CROWLEY: Then there is another problem that may be a violation of the fourth amendment if the grand jury -- if it can be established, I think, that we have here that there was no reasonable grounds to bring this man before the grand jury and he was only called before the grand jury, not asked any substantive questions in regard to their investigation, but merely as a ruse --

Q Do you have a right to challenge the reason a person is brought before the grand jury?

MR. CROWLEY: Not eliminate, no, you do not. Once a grand jury subpoena calling for the attendance of a person before the grand jury, which is all these subpoenas call for -- the government speaks in terms of these subpoenas were narrowly drawn in calling for --

Q Well, I asked a question that is very simple, which I would like an answer to.

MR. CROWLEY: I'm sorry, Mr. Justice Marshall.

Q If you are subpoenaed before a grand jury, do you have any redress other than to appear?

MR. CROWLEY: I do not believe you do, your Honor.

Q And when you appear, they ask you your name and address and that is taken down on tape and examined. What is your complaint?

MR. CROWLEY: Your Honor, I do not believe that we would be faced here with the voice print type of identification because my understanding of voice print is that this would -- taking your voice down on tape -- would not give the necessary fidelity that would allow comparison to the other --

Q My assumption was it could be done. What would your complaint be?

MR. CROWLEY: I think the complaint would be similar to the complaint here that if the witness --

Q You'd move to strike the grand jury summoning him?

MR. CROWLEY: No, I couldn't do anything then, your Honor, but if I were subsequently indicted and this evidence that I gave before the grand jury was sought to be used against me for the purposes of that identification rather than used against me as is common for the purposes of --

Q Would you move to quash the indictment?

MR. CROWLEY: I don't think I could move to quash the indictment, your Honor. I think I could move to suppress

the evidence that had been obtained.

Q So the only difference between this case and the hypothetical is that they asked him to go outside and do it?

MR. CROWLEY: No, your Honor. No, your Honor, it is not.

Q What is the other difference?

MR. CROWLEY: It is not. We have a completely different situation here. This man is being compelled under threat of imprisonment to give voice exemplars. In the other case he is not being compelled under threat of imprisonment, he is being ordered before the grand jury to answer questions. If he were just tobe called before the grand jury --

Q Well, in my case, if he didn't answer the questions, what would happen to him?

MR. CROWLEY: In this -- in your case?

Q Yes.

MR. CROWLEY: He could take the fifth amendment and I don't think there would be a -- I think it would be a perfectly valid claim of the fifth amendment privilege.

Q Well, you are adding things. If he did not answer the question, he would go to jail.

MR. CROWLEY: In this case he would, not in your hypothetical though, your Honor.

Q That is right. So I can't see the difference.

I just don't see the fourth amendment point here.

MR. CROWLEY: Well, your Honor, I think, under the fourth amendment, that the physical identifying characteristics such as in Schmerber versus California recognized, that the taking of the blood sample was protected under the fourth amendment. If we take Dionisio and Dionisio and 20 others are compelled to appear before the grand jury, properly compelled before the grand jury and then compelled under threat of contempt to furnish blood, we have the Schmerber case before us.

They could similarly be called under the government's theory -- if the government has prevailed in this case -- dragnet subpoenas could constantly be used to bring people before the grand jury to compel them to give blood, to compel them to give hair samples, to compel them to give semen, to comple them to give voice prints, handwriting, as the case in Mara and what you are then authorizing the grand jury to do is allow the government, through the vehicle of the grand jury, and in violation of Rule 41 of the federal rules equivalent procedure, just to bypass the magistrate and not ask the magistrate for the order because there they must show probable cause and it is recognized under the rule that that probably cause for that type of compulsive testimonial identification must -- that the compulsion for testimonial identification must be supported by probable cause but then,

to allow the grand jury to turn around and do exactly the same thing, we submit, is just as much protected by the fourth amendment as it would be protected in an application to a magistrate.

We submit that these, for example, the voice exemplar or the person's voice, as is his handwriting -- which will be covered, of course, by counsel for the Respondent, Mara -- are not those types of physical characteristics which are necessarily exposed to plain view, such as person's stature or his facial characteristics. A person can choose to speak or not to speak and to do that requires a conscious act of will, something that he possesses within himself and requires his act of will to expose to the general public, whereas his facial characteristics are exposed to the general public and to everyone concerned without any act of will on his part unless he were to become a hermit and that is --

Q Mr. Crowley?

MR. CROWLEY: Yes?

Q What if the grand jury asked a witness appearing before it to roll up his sleeves so they could see whether or not he had a tatoo on his upper arm?

MR. CROWLEY: I think that would be the physical characteristics, just as his face.

Q That would require an act of will.

MR. CROWLEY: Well, that would be such as the

person putting on a coat to see if the coat fits him, which has been approved by this court. But I think, your Honor, that they go to things such as that -- go to a mere physical characteristics of a person. For example --

Q Could they ask him to strip down to his shorts to see if he had something on his back or chest?

MR. CROWLEY: This could possibly be done, yes. Because if a -- within reasonable limitations of decency, I would suppose, yes.

Q Well, I said "strip down to his shorts."

MR. CROWLEY: Right. But to -- I think that if a man, for example, refused -- when I talk about the "act of will " -- if a man refused to exhibit his arms to see if there were a tatoo, his coat or his shirt could be removed from him by someone else. He could not, by his own acts, completely hide from anyone else what appeared tatooed on his arm because others could take his coat off and the tatoo would then become visible. But no act of anyone else could force a man to speak and I think that there is a valid distinction there.

Yes, Mr. Justice Rehnquist?

Q Mr. Crowley, perhaps I am pursuing into an area where neither you nor I -- at least, certainly, I don't know very much, but certainly one technique of narcosynthesis in psychotherapy is administration of pentothal or something

like that to get a man to speak where he does not, in fact, want to and where his unconscious takes over. If you rigorously pursue that distinction between will and not, I am not so sure which side of the thing the speaking comes out on.

MR. CROWLEY: Mr. Justice Rehnquist, I -- this is certainly an area beyond my expertise, but it is my understanding just generally that the speaking there is a speaking with a release of all inhibitions and to speak what is in the subconscious, to answer questions the answers to which are in the subconscious and that the man, in answering the questions will not color his answer and theoretically will speak the truth to the question put, I don't know if those drugs -- I just don't know if those drugs administered to a person overcome his entire will so that he speaks against his will. I don't believe they do. I believe that the answer may not have the inhibitions given by the conscious mind but -- and be free of that conscious mind and be dictated solely by the subconscious but I don't think that the administration of the drugs themselves, a fortiorari, just brings forth a vocal response and I think that in -- if we were to take that position, if persons were dragnetted -- and I think here the evidence shows that there is a dragnet similar to that in Davis, that 20 people were called before the grand jury and there is absolutely no showing whatsoever as to the

reasonableness of their being called before the grand jury but I don't think the grand jury has to show that but the reasonableness of the grand jury asking for their voice exemplar.

Q Do you make any point of the fact that the grand jury had directed the exercise to be carried outside of the court room?

MR. CROWLEY: No, I don't. No, I don't, your Honor.

Q He had refused while he was in the grand jury room and the refusal outside was merely a repetition, was it not?

MR. CROWLEY: I think the record here is, as the Solicitor points out, would indicate the witness, when he appeared before the grand jury, refused to testify in the grand jury. I mean -- not in -- he was never requested to give the exemplars in front of the grand jury per se, but I think that the Solicitor's interpretation of the record here is reasonably correct and we did not raise that issue below. The Seventh Circuit mentioned it in a footnote primarily in relation to the authority of the grand jury to appoint agents to hear testimony but that is not raised in the district court. It was not raised in the district court and it was not raised in the court of appeals by the respondent, Dionisio.

Q Well, your whole point is that he will talk to the grand jury. He will say anything and answer any questions but he will not give an exemplar?

MR. CROWLEY: No, no --

Q Before the grand jury?

Is that your point?

MR. CROWLEY: No. No, your Honor, that is not --

Q Well, what is your point?

MR. CROWLEY: That is pure --

Q Will you please tell me what your point is?

MR. CROWLEY: The point is this, that the compelling of a witness before the grand jury -- is the position of this respondent -- to give identifying characteristics which are normally not exposed to public view -- is protected by the fourth amendment.

Q The exemplifying characteristic is his talking.

MR. CROWLEY: His voice, that is correct.

Q His voice, which he has been using in the grand jury.

MR. CROWLEY: He has been using it in the grand jury but just --

Q He has been using it in the grand jury but he does not allow the grand jury to make an exemplar of it.

MR. CROWLEY: Just as he --

Q Is that your point?

MR. CROWLEY: Just as he is bringing his fingerprints into the grand jury also, but without having placed the fingerprints on an ink pad and then transferred them to another pad for purposes of expert comparison, that no comparison can be made and the same is true with the voice. Unless, as I understand the procedure, to obtain voice exemplars for any comparison to be made in whether -- and we don't raise the question here of the validity of such experiments, but for the only way that any comparison can be made is if one speaks into a specific type of device which records the vibrations and the tonal effects of the voice and that they can then be compared to other unknown samples. The mere talking before the grand jury would not allow the grand jury, as I understand the procedure in voice exemplars, to make a comparison to an unknown sample.

Q You don't know.

MR. CROWLEY: I -- I don't. It is beyond my expertise.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Crowley. Mr. Lacovara, you have four minutes. Do you have anything further?

MR. LACOVARA: Yes, two points, Mr. Chief Justice.

REBUTTAL ARGUMENT OF PHILIP A LACOVARA, ESQ.,

ON BEHALF OF THE PETITIONER

MR. LACOVARA: First of all, on the question of what the government's contentions are in this case, I should point out that we are not here pressing the notion that nothing that a grand jury might demand would be covered by the fourth amendment. We do not have a case where the grand jury was demanding that a person strip down to his shorts or beyond. We do not have a grand jury demand for semen, do not have a grand jury demand that someone bring in a gun from his home.

We simply have a grand jury demand that a witness properly before the grand jury make available to the grand jury those identifying physical characteristics as to which there is no reasonable expectation of privacy. Here, voice and in the Mara case, handwriting. That is as far as we are going in these cases and I think that is as far as we need to go.

Q That can be done in the grand jury room?

MR. LACOVARA: Yes, sir.

Q Or outside the grand jury room depending on whether or not the witness wants a lawyer present?

MR. LACOVARA: Yes, sir. That is the limit of all we have urged through all the lower courts and here.

Secondly, on the question of the so-called "dragnet,"

while it is not clear that a grand jury has to believe that every person that it calls before it has relevant evidence -- in fact I think the law is to the contrary -- here the record will show that each of the witnesses who was called and was asked for an exemplar was asked to read a different transcript, a different grand jury exhibit, so we don't have even the case of 20 different people being asked to read the same transcript to see which of those 20 might have been the voice intercepted in giving that transcript.

Also, related to that is the reference that counsel for the respondent has mentioned about the subsequent indictment returned by this grand jury and the subsequent suppression. Twenty of the 21 people who were called before the grand jury -- all but Mr. Dionisio -- have been indicted and that also, I think, undercuts the dragnet possibility. On the Gelbard problem we should point out that the district judge that suppressed the evidence here did not rule that there was no probable cause or that the search, the interceptions, were unconstitutional.

In fact, the sufficiency of the indictments has been upheld. The evidence the interceptions have been suppressed because the district judge believes the justice department filed improper internal procedures in securing approval for applying to the court for the interceptions. That issue is before this court in the Piscicano case. It is

No. 71-1410. The Second Circuit, again speaking through Judge Friendly, has explicitly upheld the validity of the procedure that the department followed in applying for these wiretaps.

The Eighth Circuit has apparently also upheld it. The issue is pending en banc in the Third and the Fifth Circuits and I believe has been argued in the Fourth and the Ninth, but, essentially, the presentation here is that the evidence that was to be used as the basis for the exemplars has not been suppressed on any constitutional or lack of probable cause grounds, but simply on what the district judge thought was the improper internal procedure in applying for the court orders.

Q In that sense, violating the statute?

MR. LACOVARA: In that sense, as the district courts found, it violates the statute.

Q Well, suppose that should ultimately prevail, what happens to this case?

MR. LACOVARA: I think counsel's argument is a very reasonable one, that if the district court is ultimately sustained in suppressing the evidence, the 2515 would preclude the use by the government of this evidence before the grand jury.

Thank you.

MR. CHIEF JUSTICE BURGER. Thank you,

Mr. Lacovara.

The case is submitted.

(Whereupon, at 11:07 o'clock a.m., the case was submitted.)