In the

Supreme Court of the United States

UNITED STATES,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 71-850
	)	
RICHARD J. MARA aka RICHARD J. MARASOVICH	)	

Washington, D. C.
November 6, 1972

Pages 1 thru 43

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner	:	
v.	:	No. 71-850
RICHARD J. MARA aka RICHARD J. MARASOVICH	:	

Washington, D. C.

Monday, November 6, 1972

The above-entitled matter came on for argument at 11:08 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., Office of the Solicitor General, Department of Justice, Washington, D.C. for the Petitioner.

ANGELO RUGGIERO, ESQ., 134 North LaSalle Street, Chicago, Illinois 60602 for the Respondent

MRS. PHYLIS SKLOOT BAMBERGER, New York City, for Federal Community Defender Organization of the Legal Aid Society of New York, as amicus curiae.

C O N T E N T S PAGE

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-850, United States against Mara.

Mr. Lacovara, you may proceed.

ORAL ARGUMENT OF PHILIP A. LACOVARA, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case, as I mentioned, is the follow-up, the sequel to United States against Dionisio. It is also here on writ of certiorari the the Seventh Circuit and in this case we have a slightly different factual setting. This was an investigation being pursued not by a special grand jury but by the regular September, 1971 grand jury and the grand jury was investigating a theft from interstate shipment and a conspiracy violation.

Mr. Mara was subpoenaed before the grand jury and was directed by the grand jury foreman to give exemplars of his handwriting and his printing and he refused on constitutional grounds, essentially fourth and fifth amendment grounds.

The government then filed a petition with the district court to comple Mr. Mara to give the handwriting and printing exemplars and in that petition, the government alleged the nature of the grand jury investigation which

was an investigation under Section 659, theft of interstate shipment and 371, conspiracy and it alleged that Mr. Mara had been asked for handwriting and printing exemplars which the grand jury considered essential and necessary solely for the purpose of comparing his handwriting to determine whether he was the author of certain writings that were before the grand jury.

The petition further alleged that Mr. Mara had refused to obey the foreman's direction and had refused to give the handwriting and printing exemplars.

The government also, in an attempt to comply with what it understood to be the requirement of United States v. Dionisio which we were nevertheless challenging before this court, submitted in camera to the district court an affidavit by an FBI agent who testified before the grand jury and in that affidavit, as the petition alleged, the court would determine that there were reasonable grounds, if reasonableness must be determined for the grand jury's demand for the handwriting exemplars.

That affidavit was before the district court at the hearing on the government petition. The respondent objected to the petition for the exemplar order, raising essentially two grounds.

First, the contention was that the government did not have probable cause to support the application, the

argument being that since the grand jury had not indicted him, it clearly did not yet have probable cause to think that he was somehow linked with the crime and, secondly, the objection was made that the government was trying to support the petition by a showing of reasonableness by submitting an affidavit that was not being made available.

The district judge ruled that an in camera submission was sufficient and it also ruled that probable cause was not the standard necessary, even under Dionisio to secure an exemplar order.

The respondent, Mr. Mara, was then ordered to provide such samples of his handwriting and his printing as the grand jury might deem necessary and in this case, Mr. Justice Marshall, the order explicitly did not make any reference, I believe, to the -- to any agents of the grand jury, it said, to provide the exemplars before and to the grand jury.

There has been no objection -- there was no objection at the hearing, either before the grand jury or at the original hearing on that ground. After the district court entered its order requiring the giving of the exemplars and Mr. Mara refused in open court to give the exemplars and was committed for contempt, Mr. Mara, through his counsel, submitted an application for a stay or for bond and in that application, as he has since then, has urged the

contention that it was improper to suggest or to direct that the handwriting exemplars be given to a sworn agent of the grand jury. The argument is made that this goes beyond the lawful province of the grand jury to anticipate. I say that the government's position on this is the same as it was on the prior case, that the refusal before the grand jury was a categorical one, based on constitutional grounds, not based on the locale of the giving of the exemplars and both the petition and the order call only for the giving of exemplars before the gran jury, if respondent is willing to comply with that.

After the district court denied bail or stay, the court of appeals sid release Mr. Mara on bond and when the case was argued, the court of appeals also asked that the FBI agent's affidavit be submitted to it in camera and that was subsequently done. The affidavit is now before this court as a sealed exhibit. It has never been seen, to the best of my knowledge, by respondent.

The Seventh Circuit reaffirmed its holding in Dionisio that the fourth amendment requires that the government on behalf of a grand jury must make affirmative showing of reasonableness before it can obtain an exemplar like this from a witness.

The court rejected fifth and sixth amendment privilege and counsel claims for essentially the same

reasons that it had in Dionisio but it held here that it would address itself to the procedures that the government had to avail itself of in order to show reasonableness and would also discuss the substantive content of that reasonableness showing.

On both points, the Seventh Circuit held that the government, on behalf of the grand jury, had been deficient.

On the question of the proper procedure the Seventh Circuit ruled that in order to demonstrate reasonableness the government must submit its affidavit or any other proof it wants to bring to the attention of the district court in an open and adversary hearing so the court of appeals said, the respondent can have an opportunity to litigate the sufficiency of the government showing.

The court ruled that grand jury secrecy is not a magical incantation and was not applicable in this kind of setting.

On the question of the substantive showing, the content of the reasonableness determination, the court imposed a number of factual requireents that must be affirmatively demonstrated by the government. These are set forth, of course, in the court's opinion which is printed as an appendix to the cert petition.

The court of appeals stated at the outset that the government must show that what is being conducted is a lawful

properly authorized grand jury investigation, that the investigation is probing some objective that Congress can permissively authorize. It must also show that what is being sought is relevant to the inquiry. That is exactly the kind of preliminary showing that this court in Branzburg, not to mention many other cases that are cited in the various briefs, has refused to require a grand jury to show before it can conduct its inquiry.

In addition to what it termed a showing of relevance to the inquiry, the Seventh Circuit insisted that the government must show that the grand jury process is not being abused and that the exemplars being sought are adequate but not excessive to its purpose.

Now, that rather ambiguous formulation was amplified by the Seventh Circuit which went on to say that this meant that the government had to show exactly, with more specific detail than the FBI agent's affidavit before it had shown what the purpose of the identification evidence was, what its connection was with the crime being investigated, what the witnesses connection is between the identification evidence and the crime might be.

The government also has to show, according to the Seventh Circuit, in order to obtain the exemplar, that the evidence, the identification evidence is not otherwise available, again, another test that the court explicitly

rejected in Branzburg in a first amendment context. And the court said that it would regard the grand jury process as being abused if the government failed to show that it was unable to obtain this material in any other way because the court said having a grand jury obtain evidence that investigators might otherwise be able to come upon is an abuse of process.

We think that is also an unsupportable position.

But in any event, the court found that the showing that the government had made in the affidavit submitted in camera did not rise to the level of showing these stringent standards, meeting these stringent standards of relevancy, non-abuse of grand jury process and direct link between the witness whose identification evidence was being sought and the other material before the grand jury.

The government promptly filed a petition to review that decision and in the interim, Judge Friendly had a virtually identical case before him in the Second Circuit, the case of the United States against Doe (Mr. Schwartz who was the real party in interest) and in that decision Judge Friendly, taking specific note of both Dionisio and Mara, ruled that reasonableness was not a standard that had to be met as an affirmative matter in obtaining this kind of exemplar, handwriting exemplar and that in any event, if there is to be some sort of preliminary showing of

reasonableness, the test certainly can't be as burdensome and as intense as the Seventh Circuit has suggested.

The bedrock position that we take in this case, of course, is identical to the one in Dionisio and that is that the grand jury witnesses lawfully before the grand jury, apart from a fifth amendment privilege against self-incrimination, the witness has the obligation that every other citizen has to appear and to give testimony to cooperate in the grand jury's investigation even if that means giving some physical, some noncommunicative or nontestimonial evidence that may be involved in / the grand jury's investigation of him. We think it is settled that the fifth amendment does not apply to this kind of inquiry as even the Seventh Circuit has held.

We also believe that, like a voice exemplar, handwriting is a kind of identifying physical characteristic that one does not have a reasonable expectation about. His handwriting is customarily made available in all sorts of casual contacts and that the grand jury is not usurping any untoward power. It is not impinging upon any privacy when it asks the witness to provide it with a sample of his handwriting.

Now, there is some argument in this case, as in the other, that giving of exemplar evidence is somehow different for fourth amendment purposes from the giving of oral testimony which all concede is not covered by the fourth amendment because giving of exemplar evidence involves

an act of the will. It involves an affirmative physical act to create, in the words of the legal aid agencies, to create the evidence that is being sought.

Well, in a sense, there is a creative process that is at work here. The witness/is being asked for a voice exemplar or for a handwriting exemplar must, as a matter of intellect and will, decide that he will cooperate. He must order his muscles, his diaphragm, his larynx or his hands in this case, to manifest the evidence but we cannot see that there is any constitutional difference between that kind of voluntary action, that kind of cooperation, and the kind of voluntary action or cooperation that an ordinary grand jury witness/is being asked for oral testimony must furnish.

He, too, when asked what do you know about the accident that occurred on 33rd street, or when asked what do you know about gambling in Cairo, Illinois must go through the same cognitive process of deciding whether he will voluntarily formulate a response, whether he will order his body to provide the evidence that that will be intelligible to the grand jury itself. He has to create the evidence that is to be laid before the grand jury.

We think that for fourth amendment purposes no less than for fifth amendment purposes there is no relevant constitutional distinction between the giving of oral testimony that is unprovileged and the giving of physical

exemplar evidence that is not itself subject to an expectation of privacy and that, we submit, is this case.

Now, moving along to the standards, and as Mr. Justice Stewart asked in the early case, if the court agrees with the second circuit and disagrees with the Seventh in the Dionisio decision and holds that there is no burden on the grand jury to show reasonableness before it can expect compliance with its orders, then the two issues that are before the court in this case become academic.

That is, the procedure to be followed showing reasonableness and the content of the reasonableness shown but, assuming the court decides that there is some obligation of this sort, we submit that in this kind of context a current, ongoing grand jury investigation, the procedure that was followed in this case is quite sufficient. That is, the submission of an in camera affidavit which the district judge can examine to determine whether it is sufficient.

We think that cases relied on by the Seventh Circuit are quite at odds with the customary obligations of adversary litigation and we also emphasize that we are talking here about a grand jury proceeding where there is a need for dispatch, there is a need for secrecy, there is a need for simplifying the proceedings, especially when, as we believe is the case, there are no major constitutional values implicated.

Now, the submission of an ex-party affidavit for the court to make some legal test of its sufficiency, is not at all unusual in this kind of setting. It is the traditional procedure with a search warrant and it has been thought necessary that the warrant can actually be issued, this is what actually happens. The warrent is issued. Whatever privacy is involved is already invaded pursuant to that warrant before there is any opportunity to test its sufficiency in an adversary proceeding.

But going beyond that, the cases relied on like Davis against the United States, the grand jury minutes case or Alderman, the illegal electronics surveillance case, talked about the necessity for an adversary hearing because the inquiry in that area was one of relevance and the relevance determination is one that turns on a lot of subtle factors which cannot always be recognized by a judge who is not as close to the evidence, to the investigation, to the background as the adverse party. But even in Alderman, the court said that there are related kinds of inquiries that can be made and made decisively and finally, ex party by the judge and in fact in subsequent cases also reported in the same volume of the U.S. Reports, Giordano and Taglianetti, the court explicitly affirmed that district judges acting in camera without an adversary hearing could decide such issues as whether a person had standing to complain about fourth

amendment violation and could even decide ex-party without any contest from an adverse litigant that, in particular, electronics surveillance was legal and that determination would not be subject to any adversarial litigation.

We consider this kind of case a fortiori because if a district judge can make a decisive and conclusive determination that an electronics surveillance is lawful and can make that without giving any opportunity to the other side to contest that determination, we think in a much more extreme posture of an ongoing grand jury investigation there is even less justification for demanding that the government's showing of reasonableness, if any, it must make must be subjected to full litigation and in this case I might point out that what we have is an order by the court of appeals that the respondent in an exemplar case must be given an opportunity to test the sufficiency of the government showing, and I think that clearly contemplates a full trial-type or hearing-type proceeding. That, I think, is --

Q Perhaps your summary of adversary hearings in the electronics surveillance case is a statement of a wish fulfillment of some kind because you go way beyond anything we have ever held.

MR. LACOVARA: Well, in the Taglianetti case which was in 394 U.S., the court summarily affirmed, granted cert and affirmed the judgment holding that the district judge had

acted properly in determining who had been overheard and who had not, even thought the defendant wanted to --

Q That is true, but the discussion in Alderman of the relevancy in the need for an adversary hearing was very explicit.

MR. LACOVARA: Yes, sir. We are not contesting that holding. What we are saying is that the kind of inquiry here is quite different from the relevancy determination in Alderman where we can see that it is difficult for a judge who is not familiar with the activities of the individuals --

Q Well, he doesn't know the case, he doesn't know the prosecution, he doesn't know the defense.

MR. LACOVARA: Pardon me? I am sorry.

Q A judge does not always know the whole pattern of the prosecution's case or the defense's case.

MR. LACOVARA: That is the underlying rationale for Alderman and, indeed, for Dennis. It is difficult to make a relevancy determination.

Q Yes.

MR. LACOVARA: Ex-party. We concede that. Here we are talking about not making a relevancy determination but determining whether the grand jury has a reasonable basis for asking a witness to provide an exemplar. We think that is the kind of determination that can be made ex-party on the basis of the submission by the government. This is the

kind of determination that a judge who is presented with an application for a search warrant customarily makes and he even has to make a higher standard of determination than in this case because the Seventh Circuit has not said that probable cause is the standard but we are content in our system to allow district judges to make ex-party determinations of probable cause and I think even though you are correct that the court hasn't completely ruled on all of these electronic surveillance issues, in Taglianetti, as I say, the court did affirm the ex-party procedure that was followed in determining who had been overheard and who had not and in Giordano, which was a master order of sending back for further proceedings a number of electronics surveillance cases, Mr. Justice Stewart explicitly stated in his concurring opinion that the court was in no way intimating that ex-party proceedings were not satisfactory to determine legality and that, in fact, has been the process that has been followed in lower courts.

So we think, then, that the rationale for the adversary hearing cases is inapplicable.

On the other side we have what is a legitimate value and that is the value of grand jury secrecy. We are not talking now about attempts to keep the minutes of grand jury proceedings secret so that they can't be used to impeach a witness when he testifies years afterwards. We are talking

about a requirement that the Seventh Circuit has imposed that the government make an open showing of the current status of a grand jury proceeding. We think that is probably as distant from the legitimate purposes of grand jury secrecy which were designed to provide the grand jury an opportunity to pursue its investigation without providing any tip-off, either to the witnesses or to other people who may not be called before the grand jury about the focus of the grand jury's investigation, its progress thus far, which witnesses may so far have been called before it or which witnesses may not have been. We think that balancing those two factors the lack of any substantial need for an adversary litigation of a showing of reasonableness against the very considerable interest of preserving the secrecy of an ongoing grand jury combined to render the Seventh Circuit's decision wrong.

The separate inquiry, of course, is the one of the standard of reasonableness of the Seventh Circuit in explaining what it meant in Dionisio by listing all of the criteria that must be met here, I think has gone far beyond what this court has ever intimated must be shown, certainly in any grand jury investigation.

The court imposes a very stringent obligation of showing relevancy which is perhaps even more intense than the similar suggestion that had been made and rejected in Bransburg and I think it is our position for much less

justifiable constitutional objective.

Furthermore, the requirement that the government, the grand jury must show that the evidence is not otherwise available, another criterion that was rejected in Branzburg as unwarranted, is somewhat unrealistic because at the one end, if the witness himself is agreeable to providing a handwriting exemplar, we don't have the litigation that we are confronted with today where the witness refuses on constitutional grounds to cooperate.

On the other hand, it is not difficult to see that using other investigative channels to secure handwriting exemplars may be even more intrusive on fourth amendment interests than is issuing court process asking a person to come to the United States court house where in secrecy he can provide an exemplar. It would be possible, presumably, for FBI agents to go to a person's bank or to a credit agency or to his employer and ask whehter they will supply exemplars of the would-be witnesses handwriting.

I don't think that the court should regard the lack of use of those alternatives as something the government must affirmatively apologize for before it asks a grand jury witness to provide exemplars.

The level of the showing that the Seventh Circuit has imposed in this decision I think can best be illustrated by a reading of the government's petition before the district

court which set out specifically the offense that was being investigated by the grand jury which set out specifically that the grand jury thought it necessary for this witness to provide handwriting and printing exemplars so that the grand jury could determine whether he was the author of particular writings already before the grand jury.

In that context, I think if that showing does not meet whatever reasonableness showing the constitution may call for -- of course, we argue that it calls for none -- the standard must be something quite close to probable cause which is an anamalous requirement since probable cause is the end of the grand jury's inquiry, not the beginning.

For that reason, we request that the judgment of the Seventh Circuit be reversed.

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

Mr. Ruggiero.

ORAL ARGUMENT OF ANGELO RUGGIERO, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I would like to start my argument before this court to get to certain aspects of the facts as they evolved in this Mara case. The government has just conceded the point that this was not a special grand jury that Mara was called before. It was just an ordinary grand jury. He

appeared in the U.S. Attorney's office in Chicago on two separate occasions. He was asked for his handwriting exemplars not by the grand jury or the foreman of the grand jury but by the U.S. Attorney. He was asked to return to the grand jury. He was asked again by the U.S. Attorney, the assistant in the grand jury room to supply these handwriting exemplars and upon his refusal to do so on constitutional grounds, the U.S. Attorney directed the foreman of the grand jury to direct the witness to supply the handwriting exemplars and that is how there came about the petition then before the district court Judge Robson in our district and the order, the petition which is set forth in the appendix asked for the giving of these handwriting exemplars.

To this day we do not know what is in that affidavit which was submitted in camera to Judge Robson, the first that the witness or his counsel knew of what -- some semblance of what was in that affidavit is what was set forth in the circuit court of appeals opinion wherein they stated that the contents of the affidavit were solely the work product of an FBI agent, the sole product of an FBI agent and that it was investigation which occurred outside the scope of a grand jury.

Mara was not afforded an opportunity of counsel, no kind of procedure was afforded him outside the grand jury

room wherein and whereby he would give exemplars to an FBI agent. We do not know whether or not the FBI agent was the duly designated authorized agent of a grand jury and in that posture, that is how that case came before the U.S. Court of Appeals and it is now presently before this court.

We do not, that is Mara, we do not concede that the exemplars sought by the government are non-testimonial or non-communicative because we just do not know.

We have no idea, as I have stated, as to what is in these affidavits. It well might be that what this grand jury or precisely what the government wanted was matter which was essentially germane to the government's case to prove a case against Mara because as they stated in their petition or order, he was a potential defendant in an investigation with reference to the statutes involved.

Q Mr. Ruggiero, I am not clear. Are you suggesting that perhaps the government is after something by way of communication of ideas and facts as distinguished from just a sample, a nutral sample of handwriting?

MR. RUGGIERO: I don't know. I don't know, Mr. Chief Justice. I just don't know. I operate here as I stand before this court in a vacuum. This is an affidavit and I repeat it for the third time and that has been the issue before the district court.

Q What if the grand jury furnished him with a

typewritten list of words, totally unconnected, no message at all, just a list of 40 words or 20 words and 20 names and asked him to write that down. Would your position be the same as it is now?

MR. RUGGIERO: My position would be that if what he is asked to write down is germane or essential to the government's case to prove its case, then I -- my position would be the same, yes.

Q So that then it does not go to the communication issue alone that you first suggested?

If it will help make a case against him, you say, it is prohibited?

MR. RUGGIERO: Yes, I do, your Honor. Firstly, it is a two-pronged argument there. Firstly, we don't know if if it -- first of all we don't know if it is testimonial or communicative and secondly, even if it were, it would apply if it is selectively germane to the government's case whereas they need that to make their case.

Q If it is testimony, the fifth amendment is available.

MR. RUGGIERO: This is what we are talking about, Mr. Justice Rehnquist. This is exactly what I am talking about, the fifth amendment.

Q But that is something you would have no way of knowing until you know what the -- until he actually goes

before the grand jury and gives whatever form of exemplar they want.

MR. RUGGIERO: That is correct. We did not get that far. We were asked to give -- he was asked to give an exemplar. In my recollection we were never told what it was and on that basis unpon refusal on the grounds, as I mentioned in our briefs, the fourth and fifth, we even raised the sixth amendment then the abuse of a grand jury as we did here. On that basis, the government went before the lower district court and in answer to the government's argument before Judge Robson, we never got an opportunity to argue other than the fourth amendment problem. That is, that affidavit because Judge Robson -- and it is in the appendix in the colloquy between Judge Robson and myself -- stated that it was his opinion that the constitutional grounds raised and because of that affidavit that he had to give; that is, Mara had to give the exemplars. We never got beyond that point. It is about a 10-page paragraph in the appendix. So we never got into the other issues as to the fifth, the sixth and the abuses of the grand jury. It was his opinion and that was it.

We do not, as I stated, concede that these are non-testimonial and non-communicative exemplars because we do not know. We also do not concede that Gilbert, I don't believe that Gilbert or Wade state that handwriting exemplars

do not fall within the purview of the fifth amendment because Gilbert did not raise the content of the exemplar. Gilbert only said that exemplars -- handwriting exemplars are not within the purview of the fifth amendment.

We do raise that question here before this court. We raise the content. We raise the testimonial and communicative nature of the exemplars before this court because if it is selectively germane to proving a government case, then the fifth amendment would apply and this, of course, would dovetail into the fourth amendment as it applies here because of the affidavit which was submitted in camera.

Q If the point you are trying to reserve is not that anything which contributes to the government's case, even a set of 20neutral words, as posited by the Chief Justice, but which you might be asked for before the grand jury is, you know, where were you on the night of January 20th? Isn't the way to preserve that to go before the grand jury and let them ask that question and then raise your fifth amendment point?

MR. RUGGIERO: I would agree, your Honor. That is true and that is what he should do. But he was asked for exemplars and as I stated, I don't know what he was asked to give. He was asked to give certain exemplars. He refused to do so based upon, as I stated, his constitutional rights.

Q Well, wasn't that, by its very nature, a neutral demand and not a demand for a communication?

Could he not, if they asked him the question then, write out telling us where you were at 9:00 o'clock on the night of January 21st? That would be the time to refuse on fifth amendment grounds. But if they gave him the list of neutral names and neutral words, you say you would still not do it?

MR. RUGGIERO: If it is something which, again, is selectively germane, it is essential to the government's proof in a case, then I say that the fifth amendment would apply because --

Q How can you know that until the case is tried?

MR. RUGGIERO: Well, I don't know. We don't know.

Q Well, then, in effect you are saying you don't have to give any handwriting for any purpose under any circumstances. That is the case you are putting to this court now.

MR. RUGGIERO: That is the case that is before this court.

Q So then all the discussion about communication is really irrelevant to the issue, isn't it?

MR. RUGGIERO: It is not irrelevant, Mr. Chief Justice, if, in the posture as it is put forth, if he is asked certain questions about, for instance, this case,

whether or not it is a hijack case or a conspiracy case and certain questions along that line and the posture in the case in the questions that may be asked may show that what they are asking for is that selectively germane thing that they want, the essential to prove their case.

Q Well, when you -- I am not sure I understand just what you mean --

MR. RUGGIERO: Sure.

Q -- Mr. Ruggiero, about "selectively germane." Would you consider a list of 20 names, surnames of people and a list of 20 words "selectively germane?"

MR. RUGGIERO: If -- if they are used to prove a forgery or perhaps in this case to prove a receipt -- the signing of a receipt.

Q Well, he signed gambling slips. That is what this whole thing is about, isn't it?

MR. RUGGIERO: No, it is not. Not this particular case.

Q This one?

MR. RUGGIERO: No, no, not this case, your Honor. This case has to do with, as I -- interstate shipping, commonly known as hijacking.

Q Well, then, signing invoices and --

MR. RUGGIERO: That's -- that --

Q Signing of invoices and related documents.

MR. RUGGIERO: That is the issue. If they need his signature or whatever it is that they are seeking to state that he is the individual that signed this invoice or this check or this receipt, then I think that is what I would call "selectively germane" to prove their case.

I don't think there is any doubt that if they came to Mara and asked him, "Did you sign this receipt?" that he could assert his privilege of the fifth amendment. I don't think there is any question about that.

Q What about if they went to the bank and subpoenaed all his records and used the handwriting there?

MR. RUGGIERO: That is another question which is something, incidentally, that the court of appeals suggested that they do do is to go and get their investigation which seems to be what they did in their affidavit.

Q But you say they could do that?

MR. RUGGIERO: They could do that. I would say that they could do that.

Q Notwithstanding the fact that a man's bank records are something in the nature of personal effects, are they not?

MR. RUGGIERO: But there is a question, Mr. Chief Justice, between asking a man to come in a grand jury room or the U.S. Attorney and asking him to write his name and going to a bank and getting his signature from a bank.

Q Even if they take the government to the same place in the long run, you think that difference is important?

MR. RUGGIERO: Yes, it is. To me, it is and it all, as I said, comes down to the fourth amendment questions in my argument as to probable cause because of the affidavit and the government seems to take the tack that there should be, at the least, as to a showing, as to a hearing, ex-party as there would be in search warrant. But I know of no case -- or an arrest warrant -- I know of no case that has been cited to me or that I have read or anybody has called to my attention where an individual in a search or an arrest warrant cannot see that affidavit in an effort to suppress it or to quash it. I know of no case. In this particular instance we have never been allowed to see that affidavit. We just -- we are here in limbo. We don't know what is involved. If that is the government's position, I should think that we would be entitled to look at that affidavit to see if there is anything in it which would be akin to probable cause.

Q What if, instead of an affidavit, a witness had appeared before the grand jury, just in advance of calling your client and the same information was submitted to the grand jury, not in writing but by oral testimony? Would you think you were entitled to have a transcript of that oral

testimony before you went ahead?

MR. RUGGIERO: No. No, your Honor.

Q What is the difference?

MR. RUGGIERO: The difference is that the witnesses have appeared before that court, excuse me, before the grand jury. They haven't here. No such thing occurred here. Nobody appeared before the --

Q Then why do you -- will you suggest why that becomes crucial? It is a difference, obviously, but, now, why is the difference crucial?

MR. RUGGIERO: The difference is because it is based upon a affidavit submitted by an FBI agent and we have rules of procedure in cases from this court which set forth the procedure within the limits of the fourth amendment that says that it either searches and seizures -- no unreasonable searches and seizures and no probable cause. There has to be probable cause, no search warrants without probable cause. That is the difference.

Q But isn't it true, Mr. Ruggiero, at least in connection with a search warrant or an arrest warrant that your normal motion to quash comes up after the search has been made or after the arrest has been made? And whereas at that time you may have a right to examine the affidavit, you don't have any right to insist that the magistrate give you a hearing before you are to be arrested or before you are to

be served.

MR. RUGGIERO: That is true. That is true.

The question as to the unreasonableness I will leave to my colleague on my left, as to the unreasonable in the fourth amendment questions.

The issue of the grand jury here and the abuse of the grand jury is one that I think that in the times today calls for an important wxpression by this court. You have here -- you have had in this situation, in the Mara situation, a United States Attorney who was directing what this grand jury was to do. All of the questions directed to the -- Mara, all of the information sought from him was asked for him not by the grnad jury but by a U.S. Attorney and what, in effect, has occurred in the Mara case exactly is that the grand jury has become an arm, investigative arm of the U.S. Government and I think that, in view of the cases that have come down and I take to heart the statement in the speech given by our Chief Judge Campbell -- who was then Chief Judge. He has since retired -- who gave a talk before the Federal Judicial Center. Chief Judge Campbell was a judge in our court for some 32 years. For many years he reigned as the Chief Judge. And he knew a little about grand juries and their operations and what occurred and it was his opinion in that speech that grand juries should be abolished because any U.S. Attorney who deems it necessary can indict anybody

for any reason whatsoever and that the grand jury does not function today as an arm to stand between the accused and the accuser and on that basis it should be abolished and I concur in that expression, especially in view of what has occurred in this case.

If this grand jury had been investigating solely on its own basis, had been directing questions and asking questions, was seeking information on its own, that would be one question. But it was not. This grand jury was acting under the authority of the Assistant U.S. Attorney in that courtroom and he was directing the operations in that courtroom. I think that it is time that we have some expression from this court as to what the function, again, of a grand jury should be relative to this kind of situation. The preliminary --

MR. CHIEF JUSTICE BURGER: Mr. Ruggiero, you are now impinging on Mrs. Bamberger's time.

MR. RUGGIERO: I'm sorry, I didn't see the white light. Thank you.

MR. CHIEF JUSTICE BURGER: Mrs. Bamberger.

ORAL ARGUMENT OF MRS. PHYLIS SKLOOT BAMBERGER

ON BEHALF OF THE RESPONDENT

MRS. BAMBERGER: Thank you. Mr. Chief Justice and may it please the Court:

It seems that there are two problems for consideration

by the Court. The first is whether nontestimonial characteristics are protected by the fourth amendment and the second is, assuming that they are, whether there are some fourth amendment limitations on the grand jury in their attempt to get such characteristics.

We believe that some characteristics are protected and that handwriting exemplars is one of the ones that is protected. The particular exemplar sought by any agency is not in plain view and that is the reason why the particular agency or the grandjury must seek it. Furthermore, the authorship of the exemplar which is already in the possession of either the investigating agency or the grand jury is unknown so that that factor is very private, just as is the fact of making the particular exemplar which is requested.

Q Would you take the same position with respect to fingerprints, Mrs. Bamberger?

MRS. BAMBERGER: I would take the same position with respect to fingerprints. I think that there is some distinction which was raised by the court before with respect to voice. The person coming before the grand jury generally responds with his voice and if the government can use that as a particular way of securing an exemplar, that is distinguished from the handwriting exemplar which is generally not used as a means of communication unless the defendant wishes to do it or unless the witness wishes to

do it that way. Also the question of the scar in a generally undisclosed place. I think that is protected. On the other hand, facial features or a scar on the face would not be protected. I think we have to look at the normal context of things, what is generally in open view and what is generally not in open view to be produced or created or performed by the individual in the context of the situation.

I think if we look at Schmerber and Davis we can come to the conclusion that handwriting exemplars are indeed protected by the fourth amendment. In Schmerber the question was whether the government has to get a warrant to get a blood sample after a person was properly arrested, based on probable cause and the holding there was that they did not have to get the warrant because there were exigent circumstances and there was probable cause for the arrest.

So we come to the particular circumstance that blood is protected.

If we look at Davis, this court is quite correct in stating that the holding in Davis does not say that fingerprinting is protected by the fourth amendment. They did not have to say it there because it was obtained in otherwise unconstitutional circumstances. But I think the inference from Davis is that indeed it is the fingerprint itself and not the context in which it was taken which controls because otherwise the court would not have had to have gone to such

great lengths to explain that fingerprints are reliable because they are unique because they could be obtained in a one-shot affair because it is not necessary to repeat because it is a simple procedure.

If we were talking about the means or the context in which the exemplar was taken, or the fingerprints were taken, that would be one thing, but the court went on to Davis to explain why a lower standard for obtaining fingerprints would be permissible. Looking at the characteristics of the fingerprints and not at the characteristics of the proceeding in which it was obtained, proposed Rule 41 one I think shares or draws from Davis this implication because under 41-one-H-six a person who is requested to give non-testimonial identification can come to the magistrate who issues the order and say, "Can this be taken at my home?" And, assuming that it can be taken in his home or not in a government agency or not in a courtroom, there is nothing inherently coercive. We are not talking about a custodial situation such as the police station.

I think that is where the Second Circuit's opinion in Schwartz is in error by combining the characteristic exemplar with the atmosphere in which it was taken.

If we look to the question of whether the fourth amendment should apply to the grand jury, the government keeps arguing -- as it has before -- that the grand jury's

powers are unlimited. They refer to Branzburg. They refer to Blair. But in every one of these cases the question which was raised was one of testimony which has been traditionally protected by the fifth amendment. Never, except in these recent series of cases, including another Second Circuit decision, U.S. against Doe Devlin, has the scope of the grand jury gone beyond testimonial items and I include within that context books and records and documents.

This is a new expansion, t appears, from the history of the grandjury process into areas not before covered by the grand jury process.

Now, I think that that distinguishes cases like Branzburg and Blair which deal with the traditional grand jury power to secure testimony subject to the fifth amendment protection and I think that the government, in explaining the scope of the grand jury power, forgets that even the power to get testimonial evidence is limited by the fifth amendment. So it seems that where the grand jury power is to go beyond its traditional scope of requesting testimonial evidence, including books and records, which is protected by the fifth amendment, to something non-testimonial, that the non-testimonial aspects should also be protected and the grand jury's power limited by an appropriate constitutional protection in that way.

Historically, I think the balance fits properly.

Historically, as I said, the fifth amendment protected against invasions of testimonial evidence. There was no need to apply the fourth amendment because the grand jury did not seek such evidence. With Wade and Gilbert this other evidence is now considered to be non-testimonial.

If the grand jury wishes to secure that evidence by not affording some protection against the request for it, the power of the grand jury is greatly broadened beyond what it has traditionally been. And I might add that the opinion in U.S. against Doe Schwartz refers to the fact that Rule 41- one refers to a preceding U.S./Circuit Second opinion, U.S. against Doe Devlin. But in Doe Devlin the fourth amendment issue was never raised. It was argued entirely on the fifth amendment and the issue in Doe Devlin was whether a person could be punished for contempt for refusing to give the requested exemplar when, if they had refused to give that same exemplar to a police officer coming for it, they could not be held in contempt and of course that is one of the problems we have which is posed here.

(If The individual refuses to give a policeman or an FBI agent or some other government agent an exemplar where they do not come with a court order, they cannot be punished for it. On the other hand, if they refuse to give that same exemplar to a grand jury that requests it, under the position taken by the government, they can be held in

contempt.

I think that the standard for determining if the fourth amendment applies, as we assert it does, the standard for determining when the government can secure this evidence, has been outlined in such cases as Camera and Terry, where the court is willing to say, "Let us balance, what are the needs on one side, what are the constitutional protections on the other side?" And I think that if we look at it in that context we can come out with a test that satisfies both requirements.

MR. CHIEF JUSTICE BURGER: We will pick up at that point after lunch, Mrs. Bamberger.

(Whereupon, at 12:00 o'clock noon, a recess was taken for luncheon.)

AFTERNOON SESSION 1:04 p.m.

MR. CHIEF JUSTICE BURGER: Mrs. Bamberger, you may continue.

MRS. BAMBERGER: Thank you, your Honor.

The government claims that the interruption of the grand jury process is a policy against permitting an adversary hearing in this context. The context here is one of a contempt proceeding. That has always been the exception under cases like Cobbledick and DiBella and Costello for a challenge to the grand jury process and traditionally an attack on the grand jury process in terms of a refusal to obey means that the case goes to a court for purposes of a contempt proceeding and it is in that context that it is appropriate that the witness in this context where he claims a fourth amendment privilege be permitted to challenge the subpoena of requiring production of the exemplar.

It is the court and not the grand jury that would make the determination as to whether the Constitution is a protection. There is no fact question involved in the ultimate sense. It is a constitutional question which must be resolved by the court.

If we look at the warrant situation as an analogy to this one, it is true that in a warrant it is obtained in an ex-party proceeding. However, usually, in a warrant context there is a need for speed to prevent the destruction

of evidence or to make sure that the defendant does not flee and then there is a suppression hearing if the defendant, the potential defendant, is indicted and if the search was unreasonable in the sense, for instance, if the warrant is refused and the defendant's house or office is torn apart there may be a civil damages action.

Here, in this context, as I said, there is no need for speed. The defendant is around, or the witness is around. He is unlikely to destroy his hand so that he will not give an exemplar or to cut off his hair so that he need not give a hair sample. In any case, the hair can grow back. And so we have a real difference in need in this situation and, just briefly, to summarize, there is an intrusion here.

The intrusion is not an invasion into the body as it is in the context of blood, but it is a compulsion by an order, to produce something and under this court's decision in Morton Salt we look at the way in which the item can be obtained to determine if there is an intrusion and here compulsion is equal to intrusion.

Q Do you have any other solution in this case, by way of procedure?

MR. BAMBERGER: By way of -- well --

Q Do you have a test?

MRS. BAMBERGER: I think the Seventh Circuit test is correct.

Q Is that the one you support?

MRS. BAMBERGER: Well, we would add one more thing to that and that is --

Q What about the relevancy factor?

MRS. BAMBERGER: Yes, I think that there should be a determination of relevancy based on a kind of reasonableness standard, not probable cause to believe that this exemplar is the same thing, not probable cause to believe that this witness will become a defendant but a standard of reasonableness, an explanation of how this particular piece of evidence, the exemplar, is relevant to the investigation and I don't think that that would reveal too much in terms of --

Q Well, would it be relevance in the same sense, for example, in discovery proceedings that the questions may be made relevant?

MRS. BAMBERGER: You mean in civil matters?

Q Yes.

MRS. BAMBERGER: A --

Q You have a rather broad test of relevancy when you are in discovery.

MRS. BAMBERGER: Yes, I understand that, your Honor and I think that perhaps in this case if we look at it, that it has to be -- that it should be a statement merely, or a factual statement that the --let me say this, it may not be as broad, but there must be some basis for concluding that the

testimony requested is relevant to the investigation going on at that time.

Q Relevant in the sense of aid the investigation to its objectives?

MRS. BAMBERGER: That it will aid the investigation, yes.

Thank you, your Honors.

Q How do you know that in a grand jury proceeding until you have finished?

MRS. BAMBERGER: Well, you do that, your Honor, in --

Q Isn't it quite different from the trial of a case, the relevancy factor?

MRS. BAMBERGER: Yes, it is, your Honor, but this is a -- this would be a proceeding which would occur in a court in a contempt proceedings. In other words, we are not urging an independent proceeding before the grand jury.

Q Well, Mrs. Bamberger you are putting to that court the problem of trying to determine the relevancy when perhaps the district judge would not be competent to determine relevancy to a grand jury proceeding concerning which he is not fully advised.

MRS. BAMBERGER: Well, it seems to me, your Honor, that the court could be fully advised and if the government believes in a particular case that advising the court to the extent that it need advise the court in order to advise him

as to what is going on --

Q Advise them ex-party --

MRS. BAMBERGER (Overriding): In a specific application so that each individual application can be determined on its own merits, not a general across the board application of the ex-party in camera proceeding in this context. The court does that in suppression hearings also when the informant's name must be kept secret for his protection. The government can go and request such an ex-party revelation of the informer's whereabouts and name.

The same thing can be applied here on a case by case basis.

Q Mrs. Bamberger, I think that one differing factor between your application of the deposition rules of relevancy in a grand jury proceedings is that in your civil proceeding your issues are pretty well delineated by your complaint and answer, whereas you don't have any similar format for the grand jury proceeding that would enable you to say is it or is it not within the limits framed by a particular set of documents.

MRS. BAMBERGER: Well, in the context of the grand jury proceedings -- what you say about the civil proceedings is correct and I would say that in the context of the grand jury proceedings, the usual way it comes up is that the government has collected some kind of case and has prepared an

indictment and it goes to the grand jury to present as evidence and it has a framework with which it could make a presentation to a district court in a contempt proceeding and it is not -- the government is not functioning in a vacuum. They have obviously done work on this.

Now, in the context of the grand jury doing its own investigation where there is no government presentation the grand jury, I think, in order to demand an exemplar must tell the district court, once again, that its investigation has led it to a certain point in which they believe that the exemplar would be relevant in the sense that it would be helpful in determining if this particular person was connected to the crime which it was investigating.

Of course, in that case I would assume also they would have to seek the aid of the U.S. Attorney in making the application to the court for a petition in case the witness refused to comply with the request of the grand jury.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Bamberger.

Mr. Lacovara, do you have anything further?

MR. LACOVARA: Unless the court has any further questions, the government will waive rebuttal.

MR. CHIEF JUSTICE BURGER: Apparently none. Thank you, the case is submitted.

(Whereupon, at 1:10 o'clock p.m. the case was submitted.)