In the

Supreme Court of the United States

UNITED STATES OF AMERICA,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 72-734
	)	
JOHN P. CALANDRA,	)	
	)	
Respondent.	)	

October 11, 1973

Pages 1 thru 44

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA Petitioner, v. JOHN P. CALANDRA, Respondent	:	No. 72-734

Washington, D.C.

Thursday, October 11, 1973

The above-entitled matter came on for argument at 11:23 o'clock a.m.

BEFORE:

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

APPEARANCES:

LOUIS F. CLAIBORNE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.
for the Petitioner

ROBERT J. ROTATORI, ESQ., 1100 Investment Plaza, Cleveland, Ohio 44114
for the Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in docket No. 72-734, United States of America against John P. Calandra.

Mr. Claiborne, you may proceed when you are ready.

ORAL ARGUMENT OF

LOUIS F. CLAIBORNE, ESQ.

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

The facts in this case are simple and very few. The reason they are very few is that the case was not allowed to proceed through the Grand Jury stage.

A search warrant was issued supported by detailed affidavit which, however, was found insufficient by the courts below and the insufficiency of which we do not challenge in this Court.

Pursuant to that search warrant, federal agents searched the business premise of the Respondent, looking for gambling paraphernalia. They found no gambling paraphernalia to speak of, but they did come upon records which suggested the Respondent's involvement in loan sharking activities. These records they seized.

Some time later, a special Grand Jury was

approximately eight months after the original seizure, the Respondent was called before the Grand Jury to testify. He was asked questions which were prompted by the Government's knowledge gained from the records it had seized.

The Respondent refused to answer those questions, invoking his privilege under the Fifth Amendment, the privilege against self-incrimination.

Whereupon, the Government sought for him, and filed an application with the Court, to grant him transactional immunity. Respondent asked for some delay, which was granted, and then, rather than oppose the application for immunity, asked the judge to grant a hearing to determine the legality of the search and seizure, suppress the evidence seized during that search and to forbid the Government from asking any derivative questions.

Such a hearing was granted, and the order requested was entered. The Government appealed from that ruling, to the Sixth Circuit, which affirmed the ruling of the District Court. Rehearing was denied. A petition of Certiorari was filed here and, in due course, granted.

Now, the issue, as the case is presented in this Court, is not the legality of the search or seizure. The Government has not brought that issue before the Court. Nor is it whether the order for the return of the seized records was properly entered.

The only issue here is the propriety of the order which forbids the Government from asking any questions of this witness before the Grand Jury which are derived or prompted by the knowledge gained by the Government through what must be treated in this Court as an illegal search and seizure, even though the Respondent has been granted immunity and, therefore, cannot be harmed by the use of these records or his testimony against others than himself, he having been wholly immunized from prosecution on account of this transaction.

Q When you say "Wholly immunized from prosecution," are you suggesting that he was given something more than use immunity?

MR. CLAIBORNE: Yes, transactional immunity.

We would make the same argument, I must say, Mr. Justice Stewart.

Q With or without immunity, or even if use immunity, wouldn't you say?

MR. CLAIBORNE: Even if use immunity, yes.

Q And you would be here even without any immunity, wouldn't you?

MR. CLAIBORNE: We would, though we have two arguments, one of which depends on the grant of use immunity --

Q Yes.

other of which does not.

Q Right.

MR. CLAIBORNE: Now, at that stage, let me say what those two arguments are. The first and the broader one, which, as Mr. Justice Stewart suggested, does not depend on the immunized status of the Respondent, is simply the proposition that the Fourth Amendment exclusionary rule, including the fruit-of-the-poisonous-tree doctrine, has no application to Grand Jury proceedings.

The second argument, and a narrow one, is answering the question whether a witness who is not a prospective defendant, especially one who has been immunized, can properly object to the use against others -- by definition, only against others -- of evidence illegally seized from him or of testimony which would derive from an illegal seizure.

On the broader and first argument, we must be careful not to be saying that personal privileges against testifying have no application for Grand Juries. That is not our position. We, of course, recognize that the Fifth Amendment privilege, the lawyer-client privilege, the doctor-patient privilege and any privilege immediately derived from the Fourth Amendment would be applicable in defending against either subpoenas or questions asked by GRand Jurors.

We find it hard to imagine a case in which the

Fourth Amendment would present a proper defense, either to a subpoena or, especially, to questions. However, this Court has held, in Hale versus Henkel, that a subpoena can be so overbroad, so sweeping, that the Fourth Amendment stands as a defense.

We have no quarrel with that proposition. We are simply saying that the prophylactic exclusionary rule ought not be applicable in Grand Jury proceedings.

Q What if he attempts, in this case, no defense to a contempt proceeding at all?

MR. CLAIBORNE: We don't have that situation, but I think that would follow from our position.

The reason why we take this view, the non-applicability of the exclusionary rule for Grand Juries, is that it seems to us inconsistent with the proposition that Grand Juries are entitled to all probity of evidence and are entitled to get on with their business expeditiously. To allow proceedings on an exclusionary rule to be had before a Grand Jury would deprive them of evidence which is uncontrovertibly relevant to the case before you and it would seriously interrupt their proceedings as this very case now, finally,in this Court two years after the event, amply demonstrates.

The hearing on a motion to suppress would,

Jury and the only possible justification for it is the small added deterrent effect that invoking the rule there as well as a trial might have.

It seems to us that in the balance which must be struck we ought not give way to the exclusionary rule. We ought not view the deterrent effect, small as it is, as sufficient. If the deterrent effect were always reason for applying exclusionary rules, they would apply so as to bar prosecution at all of any victim of a Fourth Amendment violation.

They would apply as against nonvictims.

Here, it seems to us sufficient to have a return of the property, which we don't challenge, and, of course, to allow the victim to bring an action for damages against those guilty.

We also point out that in this instance, we are dealing with a warrant. We are dealing with officers who acted pursuant to a warrant in good faith, though the affidavit supporting that warrant was ultimately found insufficient. It is hard to see the deterrent effect in a situation such as this one.

We recognize some difficulty with the Silverthorne case. First, let me say that the Silverthorne case, of course, does not apply, does not have any effect on our second argument for there, there was no immunized defendant.

Also, there was no interruption of the Grand Jury proceedings, the indictment having already been returned before the subpoena was issued.

But, most important, while it was a Grand Jury subpoena that was held barred by the Fourth Amendment, the indictment having already been returned, it is hard to see why the Grand Jury needed the records.

Viewing the case realistically, Silverthorne seems to be one in which suppression was allowed because the purpose of retrieving the records was not to present them to the Grand Jury, which had already seen them and inspected them, which had already returned its indictment, but, rather, to prevent their future use at trial.

Procedurally, the case was wrongly handled. The subpoena should have been allowed and the records then suppressed when sought to be introduced at trial. But the same result would have followed and this was done just somewhat prematurely. But, in realistic sense, it is not a Grand Jury case at all, it is a trial case.

Now, let me return to the alternative argument we make. It is, in effect, that a person in the posture of respondent has no standing to object to the use against others of either the records seized from him by hypothesis, illegally, or to further testimony from him derived indirectly from that illegal seizure.

As we see it, this follows from the Alderman decision and others like it, which hold that only a victim of a Fourth Amendment violation and one against whom the evidence illegally obtained is sought to be used, has standing to object. We are, of course, here dealing with the victim but we are not dealing with one against whom the evidence is sought to be used. Having been immunized, he cannot be harmed by the use of this evidence against others.

It seems to us that it would be extravagant to interpose the exclusionary rule in this situation.

Q Mr. Claiborne, you would say that for a trial proceeding under 41(e) that a movement couldn't come in and say that he wanted the property returned, even though there were no prospect of its being used against him?

MR. CLAIBORNE: We do not take that view, Mr. Justice Rehnquist, with respect to the return of the property seized. We would take that view as to the testimony of the witness at trial in the same way that if he was immunized or if, for other reasons, he were not a defendant or a prospective defendant.

The immunity situation is simply the most clear one in which the evidence is not sought to be used against him.

The other rule would result in the seeming anomaly that a non-witness before a Grand Jury but whose records were

being submitted to it would have standing to object.

There wouldn't be any question of testimony, of course, or he would be a witness. It would also mean that a non-party -- this is Mr. Justice Rehnquist's idea, really -- a non-party in a criminal trial would have standing to object so long as he were the victim.

It seems to us that the exclusionary rule need not be pressed so far and that it would be striking the wrong balance to view the small deterrent effect which concededly would be served by that as against the important value to the public of using evidence, the importance, reliability of which is not in doubt.

And this is specially so when we are dealing with a case in which the officers acted in good faith, pursuant to a warrant which only subsequently was found to be supported by somewhat insufficient affidavit.

Q What do you say to the argument, either at the trial or at the Grand Jury that even a non-party or a non-witness has an interest in not having his private papers disclosed to the public?

MR. CLAIBORNE: Because --

Q He can get them back, you say he can get them back all right, but then there is going to be testimony as to their contents and he may have no criminal liability. He may be open to no criminal problem at all or, even if he is, he

may be immunized but there is a separate interest of just not having his affairs disclosed.

MR. CLAIBORNE: Well, Mr. Justice White, we have to assume that these are matters not so confidential that but for the previous illegal search, they wouldn't be required to be disclosed. Of course, every person has an interest in keeping private what he would rather not say publicly.

Q Well, you say that if the Government is prosecuting a man, prosecuting a man, they can subpoena a third party and tell him to bring his private correspondence and if they contain relevant evidence to this criminal prosecution, unless he asserts some Fifth Amendment privilege, he has got to bring them.

MR. CLAIBORNE: Well, there may be, Mr. Justice White, an area where the Fourth Amendment will protect a witness quite independently of any prior impropriety --

Q I understand. I understand.

MR. CLAIBORNE: -- against disclosure of his most private diaries or papers. If that were the case, then that would be a defense here. Here, of course, we are dealing with very nonprivate business records, nothing like a diary or personal letters. The respondent did not even seek their return until he was called as a witness and this case is not about those papers, it is about further testimony that would

normally be available from him, testimony with respect to criminal activities, which no man has a right to withhold.

The only claim here is that he is in the odd position here of being able to withhold it because at some previous time he was the victim of an illegal search.

Q Are these papers of a character that would be subject to examination by Internal Revenue agents?

MR. CLAIBORNE: I would certainly think so, Mr. Chief Justice.

Q And at this stage of this proceeding, is there any problem about their becoming public as distinguished from merely being disclosed to the Grand Jury in the privacy and secrecy of their sessions?

MR. CLAIBORNE: Mr. Chief Justice, there is no claim that these papers are confidential in any such sense. There is a claim that the testimony which is sought to be compelled from the witness, will be embarrassing, presumably criminal. It won't affect the defendant in a criminal sense because he has received immunity but he obviously would prefer not to confess his involvement in the loan sharking activity. That, indeed, is what would come out, which we must suppose from his having pled the privilege against self-incrimination.

But there is no question of confidentiality. Were it not for the prior illegal seizure, there could be no

question as to the propriety of subpoenaing either the records or compelling the testimony.

Q But the testimony is going to -- it is not just the records that are going to be disclosed. There is going to be further disclosure. I mean, there are going to be questions about them that don't appear on the face of the records.

MR. CLAIBORNE: Quite true, Mr. Justice White, but should the question of the disclosure of those embarrassing bits of information be determined by the fact that there has been a prior illegal search?

Q He should wait until those questions are asked and then there will be a specific ruling on it then. It wouldn't be just because it has been an illegal prior search.

MR. CLAIBORNE: He doesn't suggest, Mr. Justice White, any other ground for objecting to these questions, nor can we conceive that there would be. With the privilege against self-incrimination having been overcome, no question of privacy is seriously involved. The only possible basis for declining to answer would be the exclusionary rule of the Fourth Amendment and that is --

Q Well, I know, but he just isn't wasting his time. Why doesn't he want to answer?

MR. CLAIBORNE: Because he would rather keep --

Q Because he doesn't want to waste his time or

because he doesn't want to talk about the papers?

MR. CLAIBORNE: Of course, Mr. Justice White, I assume that he would prefer not to bear his involvement in loan sharking activities to the world and that is reason enough for him to be reluctant. It is not reason enough for the Government to be deprived of his relevant evidence.

Q You say, "To the world." At this stage, I repeat again, is there any question of there being disclosed to the world or only to the members of the Grand Jury the pledge to secrecy?

MR. CLAIBORNE: Well, quite true, Mr. Chief Justice. I must say that he would take the same view --

Q When it came to the trial court.

MR. CLAIBORNE: When it came to the trial court.

Q But we aren't there yet.

MR. CLAIBORNE: Yes, quite right, Mr. Chief Justice.

Q So we don't have to cross that bridge.

MR. CLAIBORNE: If I may, I'll reserve the few minutes remaining for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

You may proceed, Counsel.

REBUTTAL ARGUMENT OF

ROBERT J. ROTATORI, ESQ.

MR. ROTATORI: Mr. Chief Justice, and may it please

the Court:

I think what we need first of all is to clarify in what position the Respondent stood before the Grand Jury and came before this Court in review of the issues.

Respondent stood in the position of a witness before the Grand Jury. Respondent, as a witness, as a citzen witness, had certain rights. Included among those rights were the right not to incriminate himself, the Fifth Amendment right which --

Q Is that still a question, Mr. Rotatori?

MR. ROTATORI: No. That Fifth Amendment right which was invoked was satisfied, in effect, by the Governmental offer of complete transactional immunity. I agree with Mr. Justice Stewart that it would make no difference if it was testimonial or use immunity only.

Or, if there were no immunity grant the issue would be the same and we would be before this Court.

Q Well, one of the Government's arguments would still be made and one wouldn't, I gather.

MR. ROTATORI: Yes, their second argument would not be made, the moral argument as phrased by Government Counsel.

Q Right.

MR. ROTATORI: I think what we must first establish is, is there a Fourth Amendment right before the

Grand Jury?

And I think, clearly, this Court has held in the past that there is a Fourth Amendment right. The Government acknowledges the fact here in Oral Argument that there is, "Immediate Fourth Amendment rights before the Grand Jury."

Perhaps this is a difference without a distinction. I believe what the Government has reference to is the fact that "Immediate Fourth Amendment right" being if a subpoena is issued which, in the terms of Hale versus Henkel violates the Fourth Amendment because of the nature of its scope and by virtue of the subpoena on its face that there is an immediate violation of the Fourth Amendment.

I submit to the Court that each question asked of the Respondent before the Grand Jury, which question was only asked because of a past violation of the Fourth Amendment, amongst a new, immediate violation of the Fourth Amendment just as if a subpoena were issued for that material based upon a past violation of the Fourth Amendment, a question derived from a past violation, a question into the privacy of the witness amounts to another intrusion in violation of the Fourth Amendment.

Now, the first argument regarding the question of the propriety of anyone raising the Fourth Amendment privilege before the Grand Jury either must go by the wayside, particularly when considering the policy that the

Government argues, that this is going to cause a disruption of the Grand Jury proceedings. I think we recognize -- this Court has recognized -- many disruptions of the Grand Jury proceedings with regard to privileges, common law privileges, husband and wife privilege; a witness citizen has a right to refuse to answer a question of the Grand Jury, of the prosecutor, with regard to communications during the period of the marriage between he or she and his spouse.

Q But you don't have that where there is immunity.

MR ROTATORI: I don't believe, your Honor -- we don't have the Fifth Amendment privilege where there is --

Q I mean, you don't interrupt the Grand Jury proceedings once you grant immunity. You answer the questions then, don't you?

MR. ROTATORI: You answer the questions unless the question violates another privilege that you have as a witness.

Q No, I mean, the only point was, you say that we, as of now, we constantly disrupt Grand Jury proceedings. I am saying that you don't disrupt Grand Jury proceedings today, once the witness is granted full immunity.

Am I right or wrong?

MR. ROTATORI: Well, it would depend upon what occurs after the grant of immunity, Mr. Justice Marshall. I can see situations where a Grand Jury would be disrupted.

For example --

Q I could conceive of a Grand Jury being disrupted by a man blowing the building up, but I mean, I am just talking normally. In this case he did get full immunity.

MR. ROTATORI: Yes, that's right.

Q You don't complain about that at all.

MR. ROTATORI: No complaint, no.

Q And now you are going to explain to us how he is damaged --

MR. ROTATORI: Yes.

Q -- by these questions. That is what you are going to explain to us.

MR. ROTATORI: That is correct, your Honor. I feel he is damaged by virtue of the fact that, in a nutshell, each question amounts to an intrusion into his Fourth Amendment rights, that by answering the question or being forced to answer the question, that he, in effect, aids in a violation of his own rights.

We start from the premise that no citizen need aid law enforcement officials in violating his own Constitutional rights. We have a right to resist an unreasonable search and seizure. We have a right to resist an unlawful arrest and in that sense, refusing to answer a question in which the question conceivably is derived from a past violation of the Fourth Amendment, gives rise to an additional or new Fourth

Amendment right to resist answering that question because the question itself becomes an additional intrusion, just as if it were another physical search, because the privacy, the right to remain free and to feel secure, in the terms of Boyd, is violated by the question.

Regarding other intrusions upon the Grand Jury which have been recognized as justified because of a higher policy reason, we have, of course, the conditions laid down by this Court in Branzburg, the conditions laid down by this Court in Gravel.

There are situations where the Grand Jury will be interrupted because of certain Constitutional rights and privileges that rise above the expeditious handling of the Grand Jury.

Q Are you talking about the Court's opinion in Branzburg or the dissent?

MR. ROTATORI: The dissent, primarily. The Court's opinion does recognize areas, though, where its decision could perhaps be different and I feel that once we recognize the fact that Grand Juries can be interrupted -- and I think at this point we have to recognize that we are not really talking about the interruption of a Grand Jury, we are talking about the interruption and disruption of a prosecutor's plan.

Grand Juries no longer are the bulwark standing

between the overzealous prosecutor and our citizenry. Grand Juries are no more and no less than a tool of the prosecutor and sometimes used by prosecutors as a scapegoat for certain decisions that they have arrived at.

Q What is your authority for that statement? I know it is one that has been made repeatedly.

MR. ROTATORI: I have -- I don't believe there is any decision of this Court that states it in those terms, but I think this Court has recognized in Dionisio the fact that the original concept of the Grand Jury changed from common law days to today. There is language in that opinion to that effect and I guess my opinion is from my own experience. My authority for that position is my own experience.

Q And what may be true in Cleveland, Ohio may not be true somewhere else.

MR. ROTATORI: My experience goes beyond Cleveland, Ohio, Mr. Justice Stewart and certainly, in any regard, it is outside the record and perhaps should not have been made.

Q Well, this Grand Jury has been interrupted now for two years, has it not? And, of course, the original Grand Jury is no longer in existence, I take it?

MR. ROTATORI: I assume -- the record isn't clear, Mr. Chief Justice, but I assume that that original Grand Jury's term has expired.

Q It would be a rare thing for a Grand Jury life to go that period of time, would it not?

MR. ROTATORI: Well, I believe under the law now, a Grand Jury's initial life is for 18 months and can be extended for an additional 18 months.

Q But it doesn't often happen.

MR. ROTATORI: It does not often happen, no; certainly. I haven't experienced that situation. But it seems to me that there is no question there was a disruption. The question is, is whether the policy considerations for the disruption override the disruption itself.

Q You haven't talked yet, and I assume you will, about the reasoning behind the idea of the exclusionary doctrine as applied in the trial of a case as compared with the application of it to a Grand Jury situation, in terms of the purposes of the exclusionary rule.

MR. ROTATORI: Yes. If it please the Court, I will address myself to that point right now.

First of all, we must recognize that generally the exclusionary rule was formulated and applies in a situation where you have a defendant availing himself to the benefits of that rule. This is not that situation. The exclusionary rule, in effect, being a right to suppress evidence in the possession of another, generally the Government or the state, comes into play when the violation

of the Fourth Amendment right is complete and you are, in effect, intruding into the truth-seeking process because of higher policy considerations that, primarily being that if you don't, you are not going to detour future violations and that will detour [deter?] future violations because law enforcement officials will not violate the Fourth Amendment if they know that the fruits of the violation can't be used in the trial.

Q How close is the deterrent / effect in this particular case, Mr. Rotatori, that Mr. Claiborne was commenting on, where the officers did go and get a warrant and, presumably, thought they were doing the best they could, acting in good faith? How much of a deterrent effect is the suppression of that type of evidence going to have?

MR. ROTATORI: Well, I think that it will have an excellent deterrent effect in the sense that when the Government concedes, which it has, in effect, done in this case, that we have conducted an illegal search, they will stop. They will acknowledge that fact, admit it to the Court and not attempt to continue that Fourth Amendment violation or aggravate it by asking questions.

Q But what we are talking about is deterring police conduct, in the first instance, I suppose, rather than stopping a Grand Jury proceedings at that stage.

I mean, how is suppressing this kind of evidence

going to mold police conduct where here the people did go and get a warrant and presumed if they went and got a warrant, they thought they were submitting a sufficient affidavit, even though it were ultimately determined that they didn't.

MR. ROTATORI: Well, I think the deterrence that you will have is that in the future, they will not apply for a warrant for an individual's place of business unless they meet the standards of probable cause to apply for that warrant and they would benefit, the attorneys drafting the affidavit on behalf of the law enforcement officials, will benefit by a court decision with regard to what constitutes sufficient grounds.

Q Do you really think so?

MR. ROTATORI: Yes, I really do.

Q Well, in that sense, we are not dealing with the exclusionary rule as such, are we?

MR. ROTATORI: Unfortunately, Mr. Justice Stewart, the District Court talked in terms of the exclusionary rule.

Q Yes, but, Mr. Claiborne, here, said at the outset, he said that they are conceding the illegality of the search and they are not questioning the propriety of returning the evidence that was presumptively wrongfully seized. So that is evidence that what was wrongfully seized, that evidence has not been sought to be introduced before the Grand Jury. This is not an exclusionary rule case as such, is it?

MR. ROTATORI: No. I agree.

Q And I thought you made the very point that the interrogation and, indeed, as you put it, each question is an additional and continued violation of the Fourth Amendment.

MR. ROTATORI: That is correct. That is our position.

Q This is not an exclusionary rule case. It is more subtle than that, and more complex, is it not?

MR. ROTATORI: I believe so. I was responding to questions from the bench --

Q Yes, I know you were.

MR. ROTATORI: -- with regard to the application of the exclusionary rule and I didn't want to say in my opinion it doesn't apply and let it go at that.

Q Fine.

MR. ROTATORI: Certainly, the District Court consideration of this case, and the Court of Appeals consideration of this case as one in which the exclusionary rule would result in the decision reached is one I cannot completely quarrel with.

However, I do accede to Mr. Justice Stewart's comment that this, in effect, is more subtle than that. It is deeper than that, more fundamental than that. Each question is an additional intrusion into the protected area of the Fourth Amendment.

Now, I think what effect does that decision have on the operation of the Grand Jury is a policy decision and there are certain factors which are present in this record which I believe correctly led the Court of Appeals and the District Court to decide that whatever disruption existed was justified.

We have a case here where the issue of the validity of the search was a question of law which was decided on the face of the moving papers, in effect. It was an issue in effect then which could be resolved quickly without a full-blown suppression hearing. It was an issue which could be decided solely on the basis of legal argument in effect, and was so decided, and quickly and expeditiously by the court.

The hearing was not protracted, as I have mentioned. It was limited to arguments of law. The Government conceded, and for this they must be applauded, to the District Court that every question it was going to ask of Respondent was derived from evidence obtained in that search, which was at issue.

This allowed the Court to proceed expeditiously and is another factor to be taken into consideration. Now, certainly, I think it is a requirement upon the Government to make that admission when that is, in fact, the case. The delay between the appearance at the Grand Jury and the

hearing and resolution by the Court was really not attributable to the witness' motion but, rather, to the fact that there was -- no notice requirement was given to the witness concerning the fact that immunity was going to be applied for and I think that is necessary because it gives the witness -- that notice would give the witness time to consult counsel to determine whether or not there are rights which he can avail himself to.

I think -- I believe the red light is on --

MR. CHIEF JUSTICE BURGER: We'll resume there right after lunch.

[Whereupon, a recess was taken for luncheon from 12:00 o'clock noon until 1:00 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Mr. Rotatori, you may continue.

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

I think I should digress for a moment and speak briefly about the fundamental difference in the Fourth Amendment versus the Fifth Amendment reaching so as to ultimately reach the question of whether or not the grant of immunity in the facts of this case resolves to a great extent a great part of the case.

Of course, I don't believe that it does.

The Fifth Amendment, fundamentally and briefly in effect states that an individual shall not be forced to be a witness against himself. If he is not going to be prosecuted, if the soverign says to the witness, we are not going to prosecute you for anything about which you testify, then there is no possibility that that individual can be a witness against himself. Therefore, he must answer the questions. On the other hand, the Fourth Amendment protects privacy, the right to personal security, in effect, and the Fourth Amendment right of privacy applies regardless of whether you are in a criminal setting, whether there is a possibility of criminal prosecution, or whether there is a possibility of self-incrimination. That is irrelevant. I

I think that is the teaching of this Court in Camara where we are dealing with health inspection ordinances and the Court says it is anomalous for us to say that Fourth Amendment rights depend upon prospective criminal proceedings or the possibility of self-incrimination. So, therefore --

Q Mr. Rotatori, we are quite a ways down the road from violation of privacy by the time you get to where this problem arose.

MR. ROTATORI: In this case, Mr. Chief Justice?

Q Yes.

MR. ROTATORI: Well, I guess that is what the Government means when they talk about immediacy of the Fourth Amendment violation. Timewise, from the original violation of the facts in this case, we are some months away but the question asked in the Grand Jury, albeit some months away from the original intrusion, concededly Fourth Amendment violation, is, in itself, according to Respondent, as separate and distinct violation of the Fourth Amendment which springs from another Fourth Amendment violation which occurred months prior.

Q This is something like, I suppose, the concept of exclusion by the way of the fruits doctrine, is it not?

MR. ROTATORI: Well, I'd prefer not to get into the question of whether this is an exclusionary rule concept or not. I really --

Q But that is the question raised by the petition for certiorari. So we have to get into it.

MR. ROTATORI: Right, that is what the Government has framed this case and they would like the Court to believe that we are talking about a furtherance of the exclusionary rule, but the Respondent does not agree.

First of all, it is Respondent's position that we are talking about additional violations of the Fourth Amendment or new violations springing from prior violations but not necessarily exclusion. What the Court is doing --

Q Well, of course, it has nouances, as Justice Stewart suggested, nuances which perhaps is also true of the fruit doctrine, is it not so?

MR. ROTATORI: Yes, it does. You can view it -- it depends upon whether you look at exclusion -- I look at exclusion as a remedy, as opposed to a right and I believe that we are all involved in here in the prevention of a right violation --

Q What case of this Court describes the exclusionary rule as a remedy in the sense you are using it, a remedy for the party?

MR. ROTATORI: I think the entire Mapp versus Ohio really talks about how do we restore this individual or how do we restore this individual to a point where the violation is remedied?

Q I don't recall any case in which the Court has ever discussed any concept except that the broad range of keeping the system, the integrity of the system protected from the use of illegally acquired evidence, not as any benefit for the individual, but for the benefit of the system. Isn't that the rationale underlying the exclusionary doctrine?

MR. ROTATORI: Yes, certainly that is the basic rationale.

Q We don't do it because of any right on the part of the defendant who is asserting it.

MR. ROTATORI: Yes, they do it in the sense that what is involved, if the evidence is allowed to be introduced in the criminal proceeding is we bring about, in effect, a combination of Fourth and Fifth Amendment violations which, in effect, bring about a disruption of the system, an infection of the legal system.

Q Haven't some of the cases simply said that the defendant in a case where the exclusionary doctrine is applied is merely an incidental and, often, an undeserving beneficiary?

MR. ROTATORI: Yes.

Q Language something to that effect.

MR. ROTATORI: There has been language to that effect, Mr. Chief Justice and certainly it is on the basis that this would deter further violations.

Q Can you think of any case in which a defendant who succeeded in suppressing evidence was a deserving in the sense that he had earned it in some way?

MR. ROTATORI: Well, I think if we talk in terms of Silverthorne, certainly --

Q Papers, as distinguished from heroin, for example.

MR. ROTATORI: I really don't think we can -- we can't place a condition on the Fourth Amendment depending upon the subject matter of the search which is in question.

Q Well, you wouldn't suggest that a man who is found with 10,000 pounds or whatever it may be of heroin concealed in the back of a truck deserves anything from society or from the courts?

MR. ROTATORI: I think he deserves the full protection of the Constitution.

Q Well, deserving in the sense that he, personally, deserves what flows from the exclusionary doctrine. Isn't it the system that the courts are trying to protect?

MR. ROTATORI: Yes. The integrity of the system, the integrity of the truth-seeking process.

Q Yes.

MR. ROTATORI: And, also, to deter future violations.

Q Yes, the deterrence was a very major factor, wasn't it?

MR. ROTATORI: But we are not involved in that type of situation here. We are talking about here the District Court initially deciding whether or not it is going to protect or prevent ongoing immediate violations of the Fourth Amendment by the questions and the Court has a right to do that because we have circuit court opinions that tell us that an individual who can prove that Fourth Amendment or Fifth Amendment violations are ongoing and continuing has a right to get them enjoined by the federal court.

Q The Fifth Amendment is not in this case.

MR. ROTATORI: No, it is not in this case, Mr. Justice Marshall.

Q I have great problems on the Fourth Amendment in this context without the Fifth, as I mentioned this morning.

MR. ROTATORI: Yes, I know and that is why I started out my arguing -- my argument after the luncheon recess by getting back to the fundamental differences. I think, for example, if we look at Camara, the health inspection ordinance situation, if the state in Camara told Camara that "You are not going to be prosecuted at all and nothing we find will be used against you but just let us come in and inspect your building," this Court would arrive at the same decision that it arrived at because we are talking about his right to be free from that intrusion and

there is no possibility of self-incrimination. There is no possibility of criminal prosecution but yet there is the Fourth Amendment right to be secure in his privacy and I think that is the fundamental interest that the District Court wanted to prevent a violation of when it ordered the prosecutor not to ask any questions.

Q Once again, is there any distinction between a trial and the Grand Jury on that point?

MR. ROTATORI: In this situation, no. Respondent would have to take the position that if these facts are rules of trial, the decision must be the same.

Q Well, your cart and my horse are in different -- my point was, assuming that it would be wrong at a trial, is it necessarily wrong in the Grand Jury?

MR. ROTATORI: Well, yes and no. If we think in terms of the exclusionary rule, we know a defendant himself, a prospective defendant, a person that the Grand Jury is going to indict, does not have a right to suppress that evidence in the Grand Jury--

Q But this is before us now.

MR. ROTATORI: But he would have the right to raise it at trial, of course.

Q This man is not going to be indicted.

MR. ROTATORI: No. No, he isn't.

Q And you don't see any difference?

MR. ROTATORI: No, I don't, because whether the question is asked of him in the Grand Jury or whether the questions are asked of him in the trial, in either sitting they amount to an intrusion into his privacy, an area protected by the Fourth Amendment.

Q And if the prosecutor should ask him in his office, it would be the same thing, wouldn't it?

MR. ROTATORI: Yes, that is correct.

Q That is your theory.

MR. ROTATORI: Yes.

Q Umn hmn. I have great trouble with the case that says that. Silverthorne didn't say that. Silverthorne --

MR. ROTATORI: Well, I don't think there has been any case that says it directly --

Q Yes.

MR. ROTATORI: But, certainly -- pardon me?

Q The Court of Appeals in this case said it.

MR. ROTATORI: The Court of Appeals in this case said it and I think that Mr. Justice Douglas said it in Gelbard, in effect.

Q This case was, I see, decided before this Court's decision in Gelbard, was it not? I know that the opinion of the Court of Appeals --

MR. ROTATORI: The Court of Appeals decision?

Q Yes, it cites Gelbard and its companion cases

indicating that certiorari was granted and so on.

MR. ROTATORI: Yes, it was. That is correct and the, I believe the Government , after Gelbard petitioned for reconsideration by the Sixth Circuit and the Sixth Circuit denied reconsideration in view of Gelbard.

I think a moment must be given to the policy consideration of a rule to the contrary of the rule announced in this case by the Sixth Circuit in the District Court and I think that brings right to the fore Mr. Douglas'-- Mr. Justice Douglas' comments in Gelbard and also the chief judge of the District Court's comment in this case in the Sixth Circuit's comment and that is a rule different from the result below in this case which supplied police with an added incentive to violate the rights of suspected co-conspirators in order to marshal evidence against alleged ringleaders.

Now, before that statement, which is a paraphrase of Mr. Justice Douglas' statement in Gelbard, that this chief judge of the District Court said, in effect, the same thing and the Circuit Court of Appeals unanimously made the same observation and for those reasons we respectfully request that this Court affirm the Sixth Circuit and the District Court's opinion.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Rotatori.

Mr. Claiborne.

REBUTTAL ARGUMENT OF

LOUIS F. CLAIBORNE, ESQ.

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

In light of some of the questions explored by the Chief Justice and Mr. Justice Stewart and Justice White, I think it would be useful to make a further comment on the proposition that each question of this witness is a further separate distinct invasion of his right of privacy guaranteed by the Fourth Amendment.

I find it extraordinary that that should be treated as the stronger side of Respondent's case. If he were arguing that the very records seized illegally ought not be used even before the Grand Jury, Silverthorne might give him some support.

Here, we are well beyond that. We are not talking about the exclusion of the seized records. We are talking about the fruit of the poisoned tree attenuated further down the line. We are talking about material that wasn't obtained directly by any illegal action on the part of the Government. We are talking about evidence that would normally be available to the Government; however intrusive it might be on the witness, however unpleasant it might be for him to testify, his normal obligation as a witness before a Grand

Jury or a trial would be to divulge this relevant information which the Government is seeking of him.

Q Well, would they have known about it had they not carried out the illegal search?

MR. CLAIBORNE: It is conceded, Mr. Justice White, that they would not have known about it.

But, at least, we are not talking about the very immediate fruit.

Q Well, isn't that normally what we would talk about a fruit? If you happened to learn something from an illegal search, that is fruits even though if you had known about it before, you might have been able to get a warrant.

MR. CLAIBORNE: I am not suggesting, Mr. Justice White, that this isn't covered by the fruit of poisonous tree doctrine.

I am suggesting that there is no further separate distinct invasion of Fourth Amendment rights if the exclusionary rule as applied to poisonous fruits were to bar the use of this evidence because it is derivative from an illegal act.

Q Yes, but you are going to get additional information.

MR. CLAIBORNE: Yes, but only the prophylactic deterrent value of the exclusionary rule would justify depriving the public at trial of --

Q What if one of the questions was now,"We learned from these papers we seized that you have another paper at home?

"Now, just, please turn that over."

MR. CLAIBORNE: I would have supposed that insofar as we are talking about either an immunized witness at trial or a proceedings before a Grand Jury, the Government would be free to subpoena that additional paper.

Q Yes, although there is a further invasion there of the same kind.

MR. CLAIBORNE: But that subpoena is not an invasion of the Fourth Amendment in itself.

Q Well --

MR. CLAIBORNE: That subpoena would have been wholly proper.

Q Your argument would be very interesting and very persuasive were it not for the Silverthorne case.

MR. CLAIBORNE: Well, Mr. Justice Stewart, I have attempted to distinguish the Silverthorne case. I think it is fair to say that the Silverthorne case, because it arose after the man had been indicted and, therefore, is really an effort to exclude from trial, not from the Grand Jury, evidence which would have been useful.

The Grand Jury had already seen these records seized in Silverthorne. The man had already been indicted.

They used the Grand Jury process to obtain the same records to subpoena. However, it wasn't to produce them before the Grand Jury, it was obviously to produce them at trial.

Q There was a contempt.

MR. CLAIBORNE: Well, the contempt, it should have been done under Rule 17.

Q Silverthorne wasn't a reversal of any conviction. There hadn't been any trial.

MR. CLAIBORNE: Quite right, Mr. Justice Stewart, but it was a block to an attempt to use records for a forthcoming trial. It was a premature attempt.

Q You concede everything Silverthorne held by conceding that they could have the records back and keep them.

Q In this case.

Q In this case.

MR. CLAIBORNE: That is correct. But, beyond that, I must say that if -- there may have been a question in Silverthorne and one doesn't know how broad the ruling was as to whether the photographs of the records would have been usable at trial.

Q That wasn't held, was it?

Q No.

MR. CLAIBORNE: Well, the opinion, as we know, contains language so broad that it would seem to bar --

Q That is sort of the issue here.

MR. CLAIBORNE: But this Court has long since repudiated the broad dictum of Silverthorne, if only in Alderman, by saying the Fourth Amendment does not mean that illegally-seized evidence may not be used at all. On the contrary, it may be used against someone not the victim.

For instance, it may be used by way of impeachment.

Now, those would be, seemingly, barred uses under the broadest interpretation of Silverthorne.

Q Under Silverthorne, isn't the potential for disruption of an ongoing Grand Jury investigation more limited than would be involved here, too, since there had already been a separate determination of illegality.

MR. CLAIBORNE: Quite true, and, also, Mr. Justice Rehnquist, since the indictment had already been returned, there was no disruption of the Grand Jury proceeding; the Grand Jury had finished its work. We were simply prematurely barring evidence from trial, or the court was. It should have been done when it was sought to be introduced rather than when a subpoena was served, but that is, as the Court viewed it, a difference without Constitutional importance.

But it was plainly barring the Government from using the illegally-seized evidence at trial and to that extent is, of course, and has always been invoked by this Court as the first extension of weeks of the exclusionary

rule to reach a second attempt or a derivative attempt to exploit an illegal activity.

As I repeat, here, the nexis between the illegality and the testimony sought to be obtained is remote. It is therefore less offensive, less of a violation of the exclusionary rule than it would be if the very records involved were sought to be used.

Q What is the difference between putting in a record which shows that I loan-sharked you, Joe Doakes, out of $100 and asking you, "Isn't it true that you loan-sharked Joe out of $100?" The difference is what?

MR. CLAIBORNE: I would suppose, Mr. Justice Marshall,that in the second case, if the answer were yes there could be no argument about it, whereas the record might be ambiguous or it might supply something which the paper itself did not. This may not be that situation, but we must assume that the Government was seeking to get more than it already had through the records.

Q Well, assuming that you can't put in the record, then you can answer the question -- you can ask the question. But if the question is exactly what is in the record, what is the difference as to that man's rights?

MR. CLAIBORNE: Well, I may have mislead the Court womewhat by conceding that a motion to return the property would be available. It doesn't follow, in my view,

that the Government would not be free to use copies before the Grand Jury.

The reason for the rule of return is that a man is entitled -- if it is lawful property and not contraband -- to its return when it has been obtained in an improper way.

It doesn't either follow that a subsequent subpoena wouldn't reach it, though Silverthorne says no. But, again, not in the context, really, of the GRand Jury proceedings but rather in the context of a forthcoming trial.

We would, if pushed, take the position that it would be proper to obtain at least copies of the material itself if it had been improperly seized in the first instance. The invasion having been not in reaching that material, which was in no sense privileged, but in the way in which it was obtained by an intrusive search -- or so the court held -- without justification, without sufficient probable cause.

But the material isn't privileged. It is very unlike the Presidential tapes with respect to which a privilege may exist in no matter what custody, in no matter what method is attempted to be used to obtain them; or a lawyer's work papers or a doctor's records of his patients which can't be reached either by a search or by subpoena.

Here we are talking about material that is not privileged that could be reached by subpoena. The only flaw was that it was reached at the first time by a procedure

which was unduly intrusive but it was that intrusion that violated the Fourth Amendment, not the obtaining of the paper which could legitimately be obtained and the obtaining of which would in no conceivable way violate the Fourth Amendment had it been done by subpoena.

Q You submit in your reply brief that Silverthorne was wrongly decided.

MR. CLAIBORNE: We say, Mr. Justice Stewart, that if the distinctions we attempted to draw are not accepted and if pushed that far, we would take that view, understanding it only as holding that subpoena couldn't reach these papers on the ground that they cannot be immunized because at one time they had been wrongly seized.

With that submission, we pray that the judgment below be reversed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Claiborne.

Thank you, Mr. Rotatori, the case is submitted.

(Whereupon, at 1:22 o'clock p.m., the case was submitted.)