In the

Supreme Court of the United States

GEORGE F. KUGLER, JR., ETC., ET AL.,
Petitioners
v.
EDWIN H. HELFANT:
and
EDWIN H. HELFANT,
Petitioner
v.
GEORGE F. KUGLER, JR. ETC. ET AL

No. 74-80

No 74-277

Washington, D. C.
March 25, 1975

Pages 1 thru 44

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v.	No. 74-277
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Washington, D. C.

Tuesday, March 25, 1975

The above-described matters were consolidated and came on for argument at 10:40 o'clock a.m.

BEFORE:

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

APPEARANCES:

DAVIS S. BAIME, ESQ., Deputy Attorney General, chief,

[Continued ....]

Appellate Section, Division of Criminal Justice,
7 Glenwood Avenue, East Orange, New Jersey 07017
[for Kugler et al]

MARVIN D. PERSKIE, ESQ., 3311 New Jersey Avenue,
Wildwood, New Jersey 08260
[For Helfant]

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 74-80, Kugler against Helfant consolidated with 74-277, Helfant against Kugler.

Mr. Baime, you may proceed whenever your are ready.

ORAL ARGUMENT OF DAVID S. BAIME, ESQ.

ON BEHALF OF PETITIONERS

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

This case comes before this Court on a petition and cross-petition for certiorari to review a judgment tendered by the Court of Appeals for the Third Circuit sitting en banc. That judgment reversed an order entered by the United States District Court dismissing Respondent's complaint pursuant to Rule 12 (b)(6) and denying his application for preliminary injunctive relief.

At issue here is the propriety of federal intervention in an ongoing state criminal prosecution.

More specifically, the question to be resolved is whether the New Jersey Supreme Court's conference with the Respondent, which allegedly had the effect of coercing him to testify before the State Grand Jury, constituted such extraordinary circumstances as to compel federal intervention and a resulting disruption of legitimate state criminal

processes.

For the purpose of this argument, the material facts are not in dispute and are essentially a matter of public record.

Respondent, a member of the New Jersey bar and a former municipal court judge, alleged in a verified complaint filed under the Civil Rights Act, that he had been subponaed to appear before the State Grand Jury on October 18, 1972.

Pursuant to that subpoena, Respondent appeared and was then advised that he was the target of the Grand Jury's investigation. Armed with that information, he being fully apprised of his Fifth and Sixth Amendment rights, the Respondent refused to enter the Grand Jury room.

He was then brought before a Superior Court judge who, following argument in open court, ordered him to appear in the Grand Jury room and to assert his Fifth Amendment privilege, if that was his desire.

The Respondent then entered the Grand Jury room and refused to testify. This matter then came to the attention of the Supreme Court of New Jersey.

In the interim, however, it had become apparent that the Grand Jury's inquiries concerned other matters in which the Respondent was allegedly involved.

He was therefore resubponaed to appear before the Grand Jury on November 8, 1972. The Supreme Court of New

Jersey, having scheduled oral arguments on that date, requested the presence of Judge Helfant and Judge Moore, who was also implicated in the criminal scheme, at its private conference room.

The object of that conference was to determine whether removal or disciplinary proceedings were to be commenced against either or both judges. Both Judge Moore --

QUESTION: They were municipal judges?

MR. BAIME: Yes, your Honor. I should say, however, that the Grand Jury's investigation involved as well an Atlantic County court judge.

QUESTION: And these municipal judges were in Atlantic County?

MR. BAIME: Yes.

QUESTION: And in New Jersey a municipal judge can be a part-time judge, can he not --

MR. BAIME: Yes.

QUESTION: -- and practice law so long as he doesn't practice in what, criminal courts?

MR. BAIME: He may not practice in criminal courts or have anything to do with the penal law. That includes disorderly persons violations, et cetera.

QUESTION: Was the Grand Jury sitting in Trenton?

MR. BAIME: I' m sorry --?

QUESTION: Was the Grand Jury sitting in Trenton?

MR. BAIME: Yes, it was. The Grand Jury was located on the same floor as the conference room of the Supreme Court. Now, both Judge Moore --

QUESTION: Does the subpoena power of the Grand Jury sitting in Trenton extend over to Atlantic County?

MR. BAIME: Oh, yes. This was a state grand jury which has state laws of jurisdiction.

QUESTION: I see.

MR. BAIME: Both Judge Moore, who had previously waived his Fifth Amendment privilege and had testified previously before the Grand Jury and Judge Helfant who, as I have noted, had refused -- appeared as requested.

Both judges agreed not to sit pending resolution of the Grand Jury's investigation.

Respondent's complaint alleged that the effect of this conference on him was to coerce him to testify before the State Grand Jury. All parties agree that his testimony was wholly exculpatory.

Nevertheless, the Grand Jury returned an indictment charging him with substantive offenses and with four counts of false swearing.

Based upon these allegations, Respondent sought an injunction in the United States District Court enjoining prosecution of the state charges.

Following an evidentiary hearing, the District Court dismissed Respondent's complaint, pursuant to the rule 12(b)(6) and denied his application for a preliminary injunction.

Specifically, the Court concluded that the complaint was barren if anything, which would indicate bad faith or harrassment on the part of New Jersey's prosecutorial authorities.

So, too, the District Court was unwilling to presume that the entire state judicial system would be infected nocuously affected by virtue of the Supreme Court's involvement in the upper facts of the case.

A three-judge panel of the Court of Appeal subsequently reversed. Following reargument, the Court of Appeals, in an en banc decision, ordered an evidentiary hearing to determine whether Respondent's will not to testify had been overborne and further ordered findings of fact and conclusions in the form of a declaratory judgment.

We submit that the Court of Appeals en banc decision calling for a declaratory relief ignored time-honored principles of federalism and comedy as enunciated by this Court in Younger against Harris and Samuels against Mackell.

We recognize, of course, at the outset that for the purpose of this argument, all reasonable and legitimate

inferences must be assumed in favor of the Respondent.

QUESTION: Mr. Baime, may I ask -- I notice that the Respondents and cross-Respondents -- Chief Justice Weintraub, he is no longer Chief Justice.

MR. BAIME: That is true.

QUESTION: Associate Justice Nathan L. Jacobs, he is retired.

MR. BAIME: Yes, sir.

QUESTION: Associate Justice Hayden Proctor, he is retired.

MR. BAIME: True.

QUESTION: Associate Justice Frederick W. Hall. Has he retired?

MR. BAIME: He has retired. He has two decisions which will be issued in about eight days, but he no longer will be sitting in cases in the Supreme Court.

QUESTION: Now, the others are Justice Worral F. Mountain and Justice Mark A. Sullivan. They are still in action.

MR. BAIME: They presently serve in their official capacities in the State of New Jersey.

QUESTION: Well, do those changes bear on the issue here?

MR. BAIME: Well, as we note in our brief -- and I think it is made clear by the decision in Spomer against

Littleton, the case with respect to seven, or perhaps six of the main defendants surely is moot.

These individuals were sued, not in their official capacities but by virtue of a conclusionary allegation of personal vindictiveness on their part and as noted in Stromberg against Littleton, those allegations must die along with the resignation of those public officials.

Therefore, only two of the Defendants presently serve in New Jersey and, of course, according to the allegations in the complaint, only one of the two in any way actively participated in this conference.

We submitted in our brief that under these circumstances --

QUESTION: Well, do you understand that Judge Helfant's whole case turns on that conference in the Supreme Court conference room?

MR. BAIME: Yes.

I shouldn't say his whole case because we also argue that the corecion issue is wholly irrelevant to the validity of the State Court indictment.

By that I mean, finding of coercion would in no way vitiate the false swearing charges.

QUESTION: Well, you suggested earlier that the allegations of bad faith and harrassment were against the

prosecutorial official.

MR. BAIME: That is the way we understand the Respondent's complaint.

QUESTION: Well, that is more than just harrassment and consequence of this meeting with the Supreme Court, isn't it?

MR. BAIME: Yes, but I should point out that in New Jersey, not only has the composition of the Supreme Court changed, but we have a new attorney general as well.

Former Attorney General Kugler has since resigned and so has Deputy Attorney General Hayden.

I might point out at this point that the purpose of an injunction and, indeed, declaratory relief as well is to prevent a future violation of the law, not to rectify a wrong already done.

We submit that under the facts that presently exist, Respondent's complaint simply does not satisfy the great intermediate harm requirement enunciated by this Court in Younger against Harris. When viewed within the factual context as it presently exists, it is quite clear that Respondent's allegations amount to nothing more than a mere academic exercise and a conceivable.

Plainly, there was nothing ominous in the Supreme Court's conference with Judge Helfant.

As we pointed out in our brief, it is incumbent

upon the Supreme Court of New Jersey to initiate disciplinary and removal proceedings and as the Court of Appeals for the Third Circuit has itself acknowledge in De Vita against Sills, that significant Constitutional obligation cannot ordinarily await the conclusion of belated criminal charges pending against a judge or lawyer.

Rather, that Constitutional obligation of the Supreme Court is to insure both the appearance and fact of judicial integrity.

QUESTION: As a matter of fact, Mr. BAime, even as to the sitting justices, Mountain and Sullivan, they could be replaced by Superior Court judges in any matter growing out of this, couldn't they?

MR. BAIME: Yes, your Honor. Yes, we pointed that out in our briefs as well.

I might point out further that the Court of Appeals' opinion is premised upon the conclusion that those judges or justices who might in some way be unable to remain impartial by virtue of their official involvement in this case -- under New Jersey law must accuse themselves.

QUESTION: Incidentally, conferences of this kind, are they unusual?

MR. BAIME: No, they are not unusual. They occur on the average of -- this isn't in the record, your Honor. It is from reviewing the files of the Supreme

Court but --

QUESTION: Well, when I sat on the New Jersey Supreme Court we had such conferences.

MR. BAIME: I believe Chief Justice Vanderbilt was chief justice at that time and that is true. This is not an unusual practice.

The obligation of the Supreme Court to initiate disciplinary proceedings certainly cannot be handled in a conjectural way. Rather, the Supreme Court should make some initial finding that at least proceedings are warranted.

As I have noted in the brief, here the Respondents' agreement not to sit pending resolution of the Grand Jury charges obviated the need to determine whether removal or suspension proceedings were to be commenced.

For that reason, there is no order to show cause in this case, nor was there ever a hearing with respect to suspension or removal.

QUESTION: Mr. Baime, when did the alleged false swearing occur?

MR. BAIME: The false swearing occurred in the Grand Jury room.

QUESTION: At the first Grand Jury hearing.

MR. BAIME: I'm sorry, I don't understand you.

QUESTION: There were two Grand Jury hearings, weren't there?

MR. BAIME: Yes. In the first Grand Jury hearing on October 18th, 1972, the Respondent refused to testify.

At the second hearing, he testified with respect to three unrelated transactions, after being apprised on each occasion that he was the target of Grand Jury inquiry and advised further as to the scope of what that investigation was.

On the second occasion, he testified in a manner which we submit constitutes false swearing which is similar to perjury.

QUESTION: That was the second hearing, then.

MR. BAIME: Yes.

QUESTION: That's right.

MR. BAIME: With regard to that, we would point out that the coercion issue is, again, wholly irrelevant to the criminal proceedings pending against Respondent.

Simply stated, there is no reason to assume, even giving the fact that there is wholesale contamination in the state judiciary that any member of that state judicial system will ever be confronted with the issue of having to determine whether the Supreme Court in fact coerced this Respondent.

The reason, I think, is quite obvious.

With respect to the false swearing charges, it is clear that Fifth Amendment privilege does not endow a

witness who is compelled to testify with a license to commit perjury with impunity. Rather, this Court has repeatedly construed the Fifth Amendment as applying only to evidence of past criminal transgressions, beginning with such cases as Glickstein against the United States and going through Dennis against the United States, Bryson against United States, and only recently, United States against Knox.

This Court has made it abundantly clear that a witness, even if compelled to testify, may not take the law in his own hands and violate his oath with impunity and that is what we allege this witness did.

Therefore, the question of coercion is wholly irrelevant, even assuming coercion to false swearing charges would not be vitiated. The same principles apply with equal force when you are considering the efficacy of that part of the indictment charging the Respondent with the substantive crimes.

I should point out that those crimes for conspiracy to obstruct justice, obstruction of justice and compounding a felony, this Court has often upheld the principle that reception before a Grand Jury of even unconstitutionally-obtained evidence does not serve to vitiate substantive charges but rather, the remedy under those circumstances is to suppress the use and fruits of that testimony so that the testimony may not be used at the Defendants' criminal trial.

Again, I submit that United States against Blue is directly dispositive of the issue there. Specifically, the injunction -- rather, the indictment with regard to the substantive counts is insulated from attack upon the ground that Respondent's Grand Jury testimony was unconstitutionally obtained and therefore it is quite clear that an injunction which would be tantamount to dismissal of these charges would be most inappropriate.

Rather, the only fear that Respondent has is that at some future point, based on a hypothetical series of events which in all likelihood would occur, the state, for some reasons I cannot fathom, will utilize this Grand Jury testimony against him.

Now, we have pointed out that his Grand Jury testimony, being wholly exculpatory, would not serve as a declaration against penal interest under New Jersey's evidentiary law. Nor would it serve as admission against interest and I refer also to the fact that we made a binding stipulation before the Court of Appeals for the Third Circuit that we do not intend to introduce the Respondent's Grand Jury testimony against him, other than, of course, with respect to crime of false swearing.

Again, I pointed out in my brief, that concession or that stipulation is not engendered by an overwhelming feeling of actualism. The point I am making, again, is that

the Respondent's Grand Jury testimony in this case is wholly exculpatory.

Therefore, the prospect that there will be constitutional injury in this case is based on pure speculation. It is wholly conjectural and certainly, under these circumstances, Respondent's complaint does not satisfy the great and immediate harm requirement set forth in Younger and Harris.

QUESTION: Mr. Baime, you earlier referred to the Third Circuit as having provided for a declaratory judgment but they also preliminarily enjoined the prosecution of the state proceedings pending that determination, didn't they?

MR. BAIME: That is true. I would point out further that here a declaratory judgment would certainly be as abrasive as an injunction for the reasons pointed out in Steffel against Thompson, Samuels against Mackell and Mr. Justice Brennan's concurring -- or I should say, separate opinion in Perez against Ledesma.

Firstly, there is a question under Section 2102 whether an injunction could be issued to enforce declaratory judgment. I know your own views on that issue.

Of course, there is some disagreement.

Secondly, a declaratory judgment might well have some res adjudicata effect, some binding effect upon the state courts.

Thirdly, assuming that the declaratory judgment

would not be binding upon the state courts, that solely means that a declaratory judgment here would encourage duplication of legal proceedings.

QUESTION: Why do we need to wrestle with the refinements of the declaratory judgment aspect of this since the Third Circuit actually directed the issuance of an injunction?

MR. BAIME: That is true. I don't think we have to. I just -- I do think that judges, lawyers and prosecutors are guided not only by the letter of the law as enunciated by this Court and the Court of Appeals but the spirit as well and again, we submitted that Younger's interjection is based on something more than a technical rule. It is based on hundreds of years of federalism in common and those principles have been reaffirmed time and time again by this Court only recently.

This Court had occasion, I believe it was last week, to come down with the Huffman against Pursue decision which, again, alludes to the fact that we simply cannot assume that members of a state judicial system will fail or refuse to obey the law they are bound to enforce.

That is the presumption upon which Respondent's complaint rests and we submit that it is wholly conjectural and incorrect.

In conclusion, I would point out that the issue

here is not whether a citizen is to be denied access to the federal courts for disposition of its constitutional claims.

We have maintained throughout these proceedings that habeas corpus and certiorari proceedings provide a litigant with proper remedies for significant constitutional violations. Those remedies do not call for massive disruption and dislocation of legitimate state criminal processes.

At issue here, rather, is the state sovereign power and right to try and accuse without delay.

We contend that a balancing of competing values in this case clearly calls for the application of the abstention doctrine.

We therefore, accordingly, urge the reversal of the Court of Appeals' opnion.

Thank you.

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

Mr. Perskie.

ORAL ARGUMENT OF MARVIN D. PERSKIE, ESQ.

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

I think initially I should point out the procedural context in which this case comes before the Court.

In the Federal District Court, the New Jersey Supreme Court and the Attorney General and the Deputy Attorney General, whom I'll label as the Defendants, were

successful in making a motion under federal rule 12(b)(6) and obtained a dismissal of a complaint for failure to state a cause for which relief could be granted and also at the same time were able to block the application for preliminary restraint.

With this juncture, the procedure, the Plaintiff is entitled -- the Plaintiff Judge Helfant is entitled to have all the facts that he has established regarded as true together with the reasonable inferences that flow therefrom.

Now, the Defendants in this case had not answered the complaint. They had not filed an affidavit. They have not introduced one iota of testimony before the federal court and their defense in this case is essentially ingenious argument which is not based on the record and dealing with the record, we contend that the facts that have been established in that record meet the requisites of equity intervention in a pending state criminal proceeding, that there is a reputable damage that is great and immediate, that this case falls within the extraordinary circumstances doctrine of Younger vs. Harris, the unusual circumstances doctrine of Steffel versus Thompson, the extremely rare case referred to by Chief Justice Burger in his concurring opinion in Allee versus Medrano and that it meets the bad faith and harassment requirements so that

right across the board, the Plaintiff is entitled to injunctive relief in this pending state criminal proceeding.

Now, the facts, as I heard them from my opponent, are not the facts -- the complete facts that are in the record.

Initially to start with, when the Plaintiff was called before the State Grand Jury, he not only refused to go before the State Grand Jury, but he had a hearing before a trial court which ordered him to appear before the State Grand Jury.

He then attempted to appeal and, over the telephone, actually appealed this decision to the Appellate Division, which is the immediate appeals tribunal in the State of New Jersey. He was unsuccessful in that joint telephone call with the Attorney General and he attempted to contact the Supreme Court and he was unable to do so and he finally had to go before the Grand Jury.

In other words, he did everything humanly possible to resort to his Fifth Amendment privilege and to keep from testifying.

QUESTION: But I understand that they told him he could go before the Grand Jury and plead the Fifth Amendment.

MR. PERSKIE: He did and he went before the Grand Jury --

QUESTION: Is all of this, he just objected to

going in the door?

MR. PERSKIE: He objected to testifying before the Grand Jury.

QUESTION: To going in the room.

MR. PERSKIE: Yes, sir.

QUESTION: And he went all the way up to the Supreme Court to find out whether he had to go in the room or not.

MR. PERSKIE: Yes, and he found out he had to go in the room, Mr. Justice and --

QUESTION: But he could, once he got there, have refused to say a single word, could he not, except to claim the Fifth Amendment.

MR. PERSKIE: Yes, and that is exactly what he did, Mr. Chief Justice. He resorted completely to his privilege on that occasion and he was again subpoenaed to reappear before this Grand Jury and there is in the record a letter from one of his counsel to cocounsel indicating that his intention was still to resort to the Fifth Amendment.

Now, we must watch the time context here because I think this is important.

In the late afternoon about 3:30 of November the 6th -- and our court system closes at 4:00 o'clock in the afternoon -- he received a call from the administrative

director of the courts.

The next day, and I think the Court can take judicial notice and I think it is in the brief as an election day that all the official activities in the State of New Jersey were closed down -- so at 3:30, on November the 6th, he was impelled to appear before the Supreme Court in private session.

He says "Why? Why are you calling me?" And no answer was given. He was just told to be there.

A call was not made to counsel. The call was made directly to the Plaintiff in this case.

He then appeared at 10 minutes of 10:00 before the Supreme Court and now, after a great deal of exchanging of briefs, the state has finally admitted that not only did the Supreme Court question the Plaintiff, but it had before it the raw Grand Jury testimony, the actual testimony of an incomplete criminal investigation.

They had obtained that from the Attorney General in violation of their own rules which calls for the secrecy of Grand Jury proceedings.

QUESTION: When you say appeared before the Court, the fact is he appeared before the members of the Court in a private room.

MR. PERSKIE: That is correct, your Honor, in their private chamber and there is one other thing that I should

state at this time and I have heard it where the Attorney General was arguing this case with me.

Seated in that private chamber at that time were two judges of the Appellate Division which again points out the power and the integratability of the New Jersey court system.

There was a Judge Comford who was a member of the Appellate Division who was actually temporarily assigned to the Supreme Court and Justice Sullivan who had not yet been elevated to the Supreme Court who was also a member of the Appellate Division and they were filling in for other justices who were either -- had resigned or were absent so that there were two judges of the intermediate appeals court sitting in that room when the Plaintiff entered the room.

QUESTION: They were filling in, not specifically for the purposes of this interview but were generally there from the --

MR. PERSKIE: Yes, sir, they were there in connection with their regular duties.

QUESTION: To be members of the Court for the Court's regular duties.

MR. PERSKIE: Yes, sir. Yes, your Honor and I apologize for that not being in the brief. With all the briefing we did, that should have been in there.

QUESTION: So how many judges or temporary judges of the Supreme Court were in the room when --

MR. PERSKIE: They were one short. There were six. I believe there was one that was missing. Judge Proctor was not actually in at that time.

QUESTION: Fine. This was about 10:00 o'clock in the morning on the --

MR. PERSKIE: He got there about 10 minutes to 10:00.

QUESTION: The day after Election Day.

MR. PERSKIE: The meeting before the Grand Jury was at 10:00 o'clock and when he said to the Administrative Director who called him,"I have to be before the State Grand Jury at 10:00 o'clock," he said, "We know all about it."

So for this statutory, for this constitutional, mandated inquiry that my opponent speaks of that allow themselves 10 minutes, 10 minutes of time and they had the raw Grand Jury testimony before them.

QUESTION: I am still confused, as I think Justice Stewart was. What day was this? Was this Election Day or the following?

MR. PERSKIE: No, this was the day following. This was Wednesday. He appeared before the State Grand Jury and nothing was done on Election Day, which was a Tuesday. He appeared before them 10 minutes of 10:00 on a Wednesday.

And then the questioning started and the questioning was not directed to whether you intend to resign, whether you are fit to hold your job as a judge -- and he did not offer his resignation at this meeting. That was done at some subsequent time.

The questioning was as to his philosophy on the Fifth Amendment, whether he believed the judge should resort to the Fifth Amendment.

QUESTION: Well, does that strike you as an unreasonable inquiry under these circumstances on the part of the Justices of the Supreme Court of New Jersey?

MR. PERSKIE: It certainly does, your Honor, particularly 10 minutes before the time he is to go into a Grand Jury where he has already resorted to the Fifth Amendment.

QUESTION: You say that a Chief Justice of the Supreme Court of New Jersey charged with disciplinary and administrative responsibilities for an entire court system can't ask a judge who has claimed the Fifth Amendment whether he thinks it is consistent with his judicial role?

MR. PERSKIE: There is a time and place for that inquiry to be made and it certainly in my opinion is not 10 minutes before you are about to go before a Grand Jury whereyou are accompanied by counsel and where there are rules.

There is a Due Process established where the disciplining of courts, which calls for notice, which calls for a hearing, which calls for representation by counsel and to get a man who is about to go before a State Grand Jury who knows -- and this is another important factor -- who knows the makeup of the Grand Jury and the fact that three convicts have been brought by the Attorney General before that Grand Jury with promises of leniency who have testified against him, who are aware of this testimony -- and with all this on his back, to be called 10 minutes before he is to enter into that pit by the Supreme Court without the presence of counsel, without any notice of why he is being there, it was not the time and place to do it.

Now, there is a time and place to do it and the Supreme Court certainly has the power with the -- one of the points of our brief is that we have --

QUESTION: That doesn't agree with what you said. You said he said what the witnesses had testified to before the Grand Jury?

MR. PERSKIE: He knew what three of them had. They were convicts.

QUESTION: I thought you said a minute ago that the Supreme Court should not have known what went on in the Grand Jury?

MR. PERSKIE: They should not have. They should

not have.

QUESTION: Well, then, why should he know if the Supreme Court shouldn't know?

MR. PERSKIE: Well, he was told by a representative of the New Jersey State Police. That is what appears that he shouldn't have been told, but he was and that is part of the --

QUESTION: Well, evidently the Grand Jury Minutes of New Jersey aren't so secret.

MR. PERSKIE: Well, that's --

QUESTION: If someone is just walking around talking about it.

MR. PERSKIE: Well, that is one of the points we are making here, that there was a complete collapse of dur process, that the Attorney General should have never turned those Grand Jury minutes over to the Chief Justice and, what is more, he should have never told his detectives what was going on in that Grand Jury.

QUESTION: The state trooper should not have told.

MR. PERSKIE: No, the Attorney General who was conducting the investigation, Mr. Justice, was absolutely the source of the --

QUESTION: The state trooper shouldn't have told your client, either.

MR. PERSKIE: He certainly shouldn't have. He

certainly shouldn't have.

QUESTION: Did I misunderstand you -- I thought I heard you say that his attorney would be with him before the Grand Jury. Is that true in --

MR. PERSKIE: In New Jersey you are not allowed to bring your attorney into a Grand Jury. You can have him standing outside and you can consult with him.

QUESTION: That is, in general, the traditional patter.

MR. PERSKIE: Yes. But there was no attorney with him before the Supreme Court. The attorneys were not invited.

QUESTION: Well, when you suggested that he did not know why he was being called to the conference with the members of the Supreme Court, do your pleadings allege that he did not know?

MR. PERSKIE: Absolutely, absolutely. It is in the verified complaint.

QUESTION: Is that a credible allegation?

MR. PERSKIE: Well, he asked --

QUESTION: That as a judge, he did not know what he was being called there for?

MR. PERSKIE: Well, in view of what happened, I think it is a very credible situation because they did not do what you would think they would do; say look, for the

benefit of the court system, step aside while this is going on. But that isn't what they did. They just tried to frighten him out of resorting to the Fifth Amendment.

In fact, the very last words, when he left the chambers, Mr. Justice Weintraub inquired, "What do you intend to do today?" And he said, "I am going to testify."

And when he got outside the Grand Jury chambers, he was met by counsel and his counsel said, "You must resort to the Fifth Amendment." He says, "I can't do it. It is my ticket --" quote "It's my ticket," which was his right to practice law. He was so frightened, he was afraid he was going to be disbarred if he didn't resort to the -- if he resorted to the Fifth Amendment and there is another very important factor here.

There was a codefendant, Samuel Moore, who has since died. He was called before the Supreme Court at the same time.

If you recall his affidavit, he had appeared before the Grand Jury twice. They made him wait four hours each time and after each session they asked him if he could deliver Helfant, whether he could deliver any information on Helfant and he says, "You want me to lie?" and they said, "No, just tell the truth."

Well, he was called before the Supreme Court and he was asked to bring the criminal complaint, which is the

gravamen of the substantive charge against him.

He was charged with unlawfully compounding a felony, obtaining the dismissal of a criminal complaint. That complaint was spread on the table before the members of the Supreme Court and they discussed the genuineness of the Plaintiff's signature on that complaint. And that was one of the central questions in the criminal charge against him, that he, in effect, signed the dismissal of that complaint and he was asked -- they discussed this, "Is this your signature?"

And the Chief Justice turned to Mr. Moore and asked him if he called the state trooper who had been releasing this information on obscenity and he said that he had.

He was also asked as to the reliability of certain law firms.

Well, this just was not a -- this was a hodgepodge affair. It wasn't a real inquiry into the merits.

QUESTION: These facts are covered in affidavits, are they?

MR. PERSKIE: Yes, sir, that is the affidavit of Samuel Moore that is in the Appendix and I might say that the only affidavits in this case are ours and every fact that I have alluded to is in the Appendix and is supported by Affidavit.

QUESTION: Well, is your fundamental claim that he

was coerced into testifying and waiving his Fifth Amendment rights?

MR. PERSKIE: Yes, Mr. Justice.

QUESTION: Well, now, he said that -- in his affidavit, I cannot say that the Supreme Court in any way directed me to testify nor did they in way indicate to me what the consequences would be if I continued to stand by the Fifth Amendment.

MR. PERSKIE: Yes, but they are -- the very next sentence --

QUESTION: Well, now, where did the coercion come from?

MR. PERSKIE: Well, if you will follow that through, the very next sentence is, "But I was under the impression that if I didn't, something would be done to me." That is --

QUESTION: Well, that was his impression, yes.

MR. PERSKIE: Yes. Well, the facts -- let's look at the facts. He did everything in his power to avoid testifying. He resorted to the Fifth Amendment. His lawyer says and he so testified and so wrote and it's in the record that he was going to use the Fifth Amendment again. He went there determined to use the Fifth Amendment. This is the record.

And when he came out of that Supreme Court chamber, that determination and his resolve had been shattered and when his lawyer tried to get through to him, he says, "I couldn't get through to him. I just couldn't reach him. He was beyond reach. He was emotionally shattered."

QUESTION: Another question, is coercion -- is coerced testimony a defense to a false swearing count?

MR. PERSKIE: This again, I certainly think it is and using the cases that were cited by my opponent, United States versus Knox --

QUESTION: Is it in New Jersey?

MR. PERSKIE: In New Jersey that question is not completely resolved.

QUESTION: Well, it isn't in the federal system, is it?

MR. PERSKIE: I believe it is because in the case of the United States versus Knox, there is the language that duress is a traditional defense to a criminal act and in every case cited by my opponent where he attempted to distinguish false swearing from the substantive charges, there had been a conviction of perjury or there had been testimony given in a proceeding which was then valid and legal.

It is our contention that this proceeding was

tainted and that there is a defense of duress and that that defense would have to be raised in the state courts as a defense for the criminal charge.

Now, if the remedy is tainted, if the remedy is perverted, and this is the whole meaning of justice because if the extraordinary circumstances docket means anything, it means an intact state remedy where you can vindicate a constitutional right.

Now, if that remedy is tainted, Mr. Justice, it is just as tainted for the perjury charge or the false swearing charge as it is for the false substance of the facts.

QUESTION: Well, now, why shouldn't you have to present any defense as you have in the state criminal prosecution?

MR. PERSKIE: Because --

QUESTION: Including any federal constitutional claims.

MR. PERSKIE: Because traditionally -- and I cite the case of the United States versus McCord and there are other cases that where there is prosecutorial misconduct, the remedy is not to go through the trial but a dismissal of the indictment and where there is judicial misconduct -- and, after all, the standard of conduct of a Supreme Court is the most --

QUESTION: Well, that isn't the court that would try

your client?

MR. PERSKIE: Well, the New Jersey system is an integrated system. There is absolute power.

QUESTION: Well, that may be but the Supreme Court wouldn't be trying your client.

MR. PERSKIE: No, but the rights of appeal would go through the Supreme Court and there are judges of the Appellate Division as to whom he would have an appeal of right who have already sat on this matter that were in this conference, the two judges that we referred to. One of them is still -- Judge Comfert is still on the Appellate Division.

QUESTION: Are there not other judges that could be substituted if he took that route?

MR. PERSKIE: Your Honor, we could go over a full resurrection or remanufacture the court system in the State of New Jersey --

QUESTION: Well, I'd like an answer to that question.

MR. PERSKIE: The answer I don't think -- the answer I think is no because like in the conflict of interest cases --

QUESTION: You meant that no other judge would be available to sit in place by special designation?

MR. PERSKIE: There would be many judges who

would be able to be replaced by the Chief Justice to sit but whether that in any way changes his remedy or the adequacy of his remedy, I don't think it would and I say because of this, if there was a municipal council or a zoning board of adjustment where there is one man that has a conflict of interest, that taints the action of that entire board and I say that as long as there are any judges or ever if all the judges have gone, the impact and influence of what the Supreme Court did will trickle down on all the trial courts and --

QUESTION: Well, are you saying then that they can't ever try him in the State of New Jersey?

MR. PERSKIE: Absolutely, sir. I don't think it is possible for this man to get a fair trial in the State of New Jersey. Now, if he were converted into a modern-day Diogenes and went from one end of the state to another to look for a court that would give him a fair trial, with a computer it is possible that he could find one.

But that isn't the way it works. So then you -- this case was laid in Mercer County. The judge would be selected or can be selected by the assignment judge of Mercer County who, in turn, is selected by the chief justice.

The Plaintiff will have absolutely no way of determining who sits in his case.

QUESTION: You mean, by the new chief justice, who

is former Governor Hughes, now, isn't he?

MR. PERSKIE: Yes. Yes, the chief justice is gone but the influence will linger.

QUESTION: Well, apparently about everyone who participated in that conference except Judge Sullivan has gone, hasn't he?

MR. PERSKIE: Well, Justice Sullivan is still there. Justice Mountain is still there. Judge Confort is still sitting on the Appellate Division.

QUESTION: And all of them, under New Jersey system, can be replaced by other judges?

MR. PERSKIE: They can be replaced and I don't think due process contemplates that if you search the four corners of the state you can finally find somebody that can hear it. I think that the system is essentially tainted and perverted and that there will be no adequate remedy --

QUESTION: You mean, if the whole Supreme Court in New Jersey changes, you still couldn't try him?

MR. PERSKIE: No, sir, because I think that what happened --

QUESTION: Now, what theory do you possibly have that under?

MR. PERSKIE: Because, again, as the influence lingers, the personnel may change but this is an action done by the court and you are asking a trial judge --

QUESTION: Did you say it was done by the court? I thought it was done in a private room.

MR. PERSKIE: It was done by the court in a private room.

QUESTION: Is there any record of it?

MR. PERSKIE: There is no record of it.

QUESTION: Well, then, it is not court action. It is done by individual people.

MR. PERSKIE: It is done by --

QUESTION: And those individual people are gone but the memory lingers on.

MR. PERSKIE: That is correct. That is correct, your Honor.

QUESTION: And the memory is good enough so that New Jersey can never try this man, this one man. Is there anybody else in the world in that fine position that he can't be tried?

MR. PERSKIE: Well, I am not concerned with them, with all due candor. I am concerned with this Plaintiff and I might say this, we have had a bite of the apple.

We have made application for leave to appeal to the Appellate Division on these very facts. It has been rejected.

We have made application for leave to appeal and for a petition for certiorari to the Supreme Court of the

State of New Jersey to allow a review of this action and it has been rejected and it has been rejected over the signature of Chief Justice Weintraub who is the man that we say is responsible for this meeting that was participated in by all members of the Supreme Court so to the extent possible we tried to exhaust our administrative remedies.

We went all the way up to the Supreme Court and they wouldn't even countenance an inquiry into this matter.

Now, I say this. I certainly feel that we should be allowed to build a full record before the Federal District Court to determine whether this is an extraordinary situation, whether there is adequacy of remedy, whether there is irreparable harm because to say that a new court can be substituted -- the harm has been done. The harm has been done. He has been deprived and coerced out of a constitutional right with certain consequences.

Now to say, now you can give him a free trial after you have broken his back, you have taken away a substantial constitutional right, now you are going to give him a fair trial after you've crippled him, I don't think that that gives a man a fair trial.

Once you have turned your lethal weapons on him and to say you are going to treat him nice afterwards is not an answer to a deprivation of the constitutional right.

It has already occurred. It has happened and I

don't think it can be undone and it certainly cannot be undone in the State of New Jersey.

I feel also that the Circuit Court which remanded this case solely to have a declaratory judgment on the issue of coercion is too limited an approach.

QUESTION: And they meanwhile enjoined the prosecution by the state?

MR. PERSKIE: Yes. But what they are in effect saying is, to the Federal District Court, you give a declaratory judgment on the issue of coercion. After you have determined whether or not there is coercion, then the Supreme Court will be reliever of that embarrassment and we can then send this case back to the New Jersey court system to complete the criminal proceedings and I don't think a piecemeal approach -- and there are other issues in this case besides coercion -- there are issues of bad faith.

There are issues of whether or not this is an extraordinary case, an extremely rare case. There are issues of -- and I don't think the section we are concerned with, if this Court please, is an extremely narrow one.

We don't have to be concerned about the precedential aspect of it. Our research has failed to disclose where anything like this has ever happened before and certainly if this Court acts with vigor and acts the way we respectfully ask it to act, it will never happen again and

that the rights of litigants in state criminal courts will be beyond reproach not only by errant prosecutors, not only by overzealous law enforcement officers but by Supreme Court judges who can also err.

And I might say this, that if I seem too brash, I would like to say this, that my father was a member of this Court and my brother was a member of the court system of the State of New Jersey and it has been reluctantly and slowly I have come to the conclusions I have come to.

I was brought up to respect and revere the court system of the State of New Jersey.

In this instance, I have had to allow my better judgment to overcome my emotion and I have been involved in this case and I know by the feel that this man will not -- will never get a fair trial in the State of New Jersey.

I am the one who has made these actions before the trial court, before the Appellate Division, before the Supreme Court. We have attempted to exhaust the remedies there and I think that this is a traditional case and that there can be no distinguishment between the false swearing and the substantive charges because we are right back again to the remedy and just as a for instance, one of the false swearing charges was whether he signed the dismissal.

Now, the Supreme Court has already examined that complaint. They have had a rump session. They have had an

evidential hearing as to whether or not his signature was genuine.

QUESTION: But isn't it pretty clear that that body of men is not ever going to hear any appeal on this -- on your client through the New Jersey state system?

Isn't that clear? That there will be substitute judges.

MR. PERSKIE: I don't know. There haven't been substitute judges in the application we made for temporary [inaudible] appeal.

QUESTION: Does not the system provide for that process?

MR. PERSKIE: It provides for it but it did not occur up until now. As I said, we have made two appeals.

QUESTION: You have taken a number of steps that have retarded the state proceedings, have you not? And quite successfully.

MR. PERSKIE: Well, the -- all the retardation of the criminal proceedings has been caused by the state since we have gotten the first effective order in our behalf in the Circuit Court of Appeals. All the petitions for recall of mandate, for certiorari, were initiated by the State of New Jersey but they have allowed the evidential hearing to go through that was originally scheduled over a year ago -- this matter has now been resolved and they are the ones that

have taken the appeal.

It depends whose ox is being gored. When we are losing, they appeal and when they are losing, we are appealing and this is the nature of the beast.

But what is important is that there be a limitation of a substantial constitutional right in the state court and up to now we have not been able to vindicate that right. We have not even been able to gain a hearing, not even an inquiry. The courts have even refused to give us an inquiry and if this is not extraordinary circumstances, as the Circuit Court of Appeals has stated, it is hard to conceive where there would be an extraordinary situation or an extremely rare case. This is it and it is because it involves the coalescing, the working together of two of the highest branches of government, the Supreme Court of the State and the Attorney General's office to deprive, coerce and duress and illegally take away from a man a valid constitutional right.

This has never happened anywhere else and I say again, if we are successful here, I am sure it will never happen anywhere again.

But it has happened and to say that we can replace everybody in the court system is like replacing all the blood in your body and once you have a disease, just putting in new blood doesn't cure the disease when the harm

has already been done.

I thank you.

MR. CHIEF JUSTICE BURGER: Mr. Baime, do you have anything further?

REBUTTAL ARGUMENT OF DAVIS S. BAIME, ESQ.

MR. BAIME: I'd like to answer at least one question that was propounded.

In the State of New Jersey, the State Supreme Court in State against Falco specifically has held that a coercion defense is not available with respect to the charge of false swearing. Specifically I refer the Court to State against Falco which is cited at page 53 and 56 of my brief.

Secondly, I would just like to reaffirm the principle that what Respondent seeks here is immunity. He can vindicate his rights if there was a constitutional violation by an action for damages under the Civil Rights Act.

There are other remedies available as well, as was pointed out in O'Shea against Littleton specifically. There are even criminal penalties which apply where there has been gross misconduct of a judge or a prosecutor.

Rather, the Respondent here is seeking an injunction which looks to the future and again we submit that the prospect of harm occurring or even assuming the truth of the allegations in the complaint and the inferences we feel

cannot be drawn, there is no likelihood of recurrence or a repeat of this type of situation in the future.

Again we submit that Respondent's allegations, as set forth in the complaint are nothing more than a mere academic exercise in the conceivable and that the state should be permitted to try the case, that Respondent's remedy, assuming conviction, is based on certiorari to this court or habeas corpus.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:27 o'clock a.m., the case was submitted.]