In the

Supreme Court of the United States

United States,

Petitioner

V.

Roy Mandujano

No. 74-754

Washington, D. C.
November 5, 1975

Pages 1 thru 44

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner	:	
v.	:	No. 74-754
ROY MANDUJANO	:	

Washington, D. C.

Wednesday, November 5, 1975

The above-entitled matter came on for argument at 10:02 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:

ANDREW L. FREY, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530
For Petitioner

MICHAEL ALLEN PETERS, ESQ., 1217 Calhoun, Houston, Texas 77002 Appointed by the Court pro hac vice

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 first this morning in No. 74-754, United States against Mandujano.

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

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.

ON BEHALF OF PETITIONER

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

This case is here on petition for writ of certiorari for the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of the United States District Court suppressing for use in evidence in Respondent's perjury prosecution the testimony that he gave before a Grand Jury.

In March of 1973, Officer Cavalier, a San Antonio policeman who was assigned to undercover narcotics duties, heard that Respondent was involved in heroin transactions and on the afternoon of March 29th, he went to the bar at which Respondent was employed and attempted to purchase heroin from Respondent.

Respondent made several phone calls to try to locate some heroin, apparently unsuccessfully, and then suggested that the officer give him $650 and he would go out and attempt to procure an ounce of heroin.

About an hour later, Respondent returned to the bar,

said he had been unable to procure the heroin, returned the money but said that his regular connection would be by later in the day and that if the officer called back later that evening, he would be able to get some heroin.

The officer did call that evening but Respondent was out. He was unable to reach him and he thereupon dropped the matter at that time.

During the month of April, a Grand Jury was being planned to investigate into narcotics traffic in the San Antonio area and in connection with the planning for that Grand Jury, Officer Cavalier was asked for any suggestions for witnesses who might be called before the Grand Jury.

Cavalier told the prosecutor about his aborted heroin transaction with Respondent, noted that he believed that Respondent had a regular source for heroin and that Respondent was apparently aware of several other sources whom he had attempted to call.

Accordingly, the prosecutor determined that Respondent might be able to provide the Grand Jury with valuable information about local narcotics traffic.

As the prosecutor later testified without contradiction at the hearing in the District Court, he had no intention whatsoever at that time of indicting Respondent for any narcotics offenses, at least in part because he didn't realize that Respondent had committed any offenses.

Respondent was subpoenaed and appeared before the Grand Jury on May 2nd, 1973. At the outset of his appearance, there was a colloquy between the Prosecutor who was conducting the Grand Jury and Respondent, in the course of which Respondent was three times advised that he was not required to answer questions that would tend to incriminate him.

Page 6 of the Appendix, for example, the prosecutor said, "You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully and of course, if you do not answer those truthfully, in other words, if you lie about certain questions, you could possibly be charged with perjury. Do you understand that?"

And Respondent said he did understand.

Then the subject of a lawyer came up and that matter was summarized by the prosecutor to Respondent essentially as follows, "If you would like to have a lawyer--" this is again at page 6 of the Appendix"-- he cannot be inside this room. He can only be outside. You would be free to consult with him if you so chose.

"Now, if, during the course of this investigation, the questions that we ask you, if you feel you would like to have a lawyer outside to talk to, let me know."

"Yes, sir," said Respondent.

"Is that clear?"

And Respondent nodded affirmatively.

Now, in order to lay a foundation for broader questions designed to elicit the names of drug traffickers in the San Antonio area with whom Respondent may have had dealings and to gage the truthfulness of subsequent responses to those questions, the prosecutor asked a number of questions covering in part ground already known, including the incident with Officer Cavalier.

Respondent, while admitting some use of heroin, denied knowing the names of any local heroin traffickers except someone whose first name only he could supply --

QUESTION: Mr. Frey?

MR. FREY: Yes?

QUESTION: You mentioned, I think, that he had been advised of his privilege on more than one occasion?

MR. FREY: Yes, it is at page 5 -- the bottom of page 5, the top of page 6.

QUESTION: The reason I ask, I gather the Court of Appeals, at page 11a, the warnings that were given were not adequate advisement, even though the Appelle's Fifth Amendment right against self-incrimination?

MR. FREY: Well, that, of course, is a matter of debate. For purposes of the statement I read to you what was said.

QUESTION: Yes, I see, but/we have an issue whether they were or were not adequate?

MR. FREY: Well, it is a subsidiary issue if you get past the question of whether any warning is required, it would be a question as to the adequacy of the warnings that were given.

QUESTION: Yes.

QUESTION: Mr. Frey, is there any question that he didn't understand what was asked and which he answered?

MR. FREY: Well, it's --

QUESTION: As I read the testimony, he sounds perfectly capable of speaking English and he did have a 10th grade education.

MR. FREY: Well, Mr. Justice Blackmun, when he was first told that -- you are required to answer all the questions I ask you except for the ones you feel would tend to incriminate you. Do you understand that? He said, "Do I answer all the questions you ask?"

The prosecutor said, "You have to answer all the questions except for those you think will incriminate you in the commission of a crime."

I think there is no basis for concluding that he did not understand, although it is a matter of speculation what exactly he thought that meant since he, himself, didn't say back to the prosecutor what he understood it to mean.

QUESTION: But I take it he -- well, am I correct in my impression that he had no struggle with the English language despite his Spanish surname?

MR. FREY: Not -- I think that the Appendix doesn't reveal any substantial difficulty in understanding, although, of course, under our argument even if he did not understand, that would not be critical to the voluntariness of the testimony that he gave.

In any event, Respondent admitted some past use of heroin but he denied having discussed with anyone the past year the procurement of heroin or having taken any money for the purpose of attempting to procure some.

QUESTION: And had Cavalier -- I believe that is his name -- appeared before this Grand Jury?

MR. FREY: I believe he had not at that point.

QUESTION: What did you say the purpose was of asking him questions the answers to which the prosecutor already knew?

MR. FREY: The prosecutor explained that and it is at page 45 of the Appendix. He was asked why he did that and his answer, at the bottom of page 45, "I don't believe we subpoenaed any witness that didn't have an existing body of knowledge about it and in virtually every case we would ask questions about the facts that we did have."

That was, number one, a method to gage the

truthfulness of the person's testimony and number two, it was in the nature of a natural progression to result in answers to the ultimate question.

A simple example of that might be if a person is a heroin addict, he obviously has to have a source of supply and you would say, "Are you an addict?" and his answer might be "Yes," and the natural question to follow that would be, "Who do you purchase heroin from?"

It seems to me quite logical to establish a foundation for the Grand Jury's crediting his testimony to cover the background and show the nature of his contacts and his dealings in the transaction and, of course, we think it is clear that he would not have been indicted, although one may say that that is speculative, had he cooperated with the Grand Jury because the Grand Jury was looking at major traffickers, the people who were his connections, his sources.

In any event, he denied, both having talked about the procurement of heroin and having taken any money for the purposes of attempting to get heroin and the prosecutor warned him that according to the information the prosecutor had, he could tell the Grand Jury more than he was telling them. Respondent denied having any further knowledge in this area.

Prosecutor then was preparing a perjury indictment against Respondent and in the course of that he was unclear

whether -- according to his testimony again -- whether they should be returned in one count or three since there were three false answers.

He discussed that with another attorney in the United States Attorney's office who pointed out to him that Respondent's actions might also constitute an attempt, under the narcotics statute and the prosecutor decided at that time, according to his testimony, to add the attempt charge to the indictment and that was done.

The District Court granted Respondent's motion to suppress his Grand Jury testimony, found that Respondent had been a putative defendant at the time he was called to appear before the Grand Jury and that, as such, his questioning before the Grand Jury must be deemed custodial interrogation.

Therefore, the District Court concluded, he was entitled to full Miranda warnings. Since he did not receive the full warnings, the questioning was improper and his answer should be suppressed from any use including, as here, from forming the basis of a perjury charge.

The Court of Appeals affirmed. It adopted the finding of the District Court that the Respondent was a putative defendant and that therefore his interrogation was custodial and he was entitled to full Miranda warnings.

The opinion for the Court of Appeals reflects what we view as a rather disturbing approach toward the function

of the Grand Jury and one that we think is quite inconsistent with the views expressed on numerous occasions by this Court.

While the requirement imposed is simply the giving of Miranda warnings, the opinion reflects a basic hostility to the practice of calling as a Grand Jury witness persons who, according to information in the Government's possession, have some involvement in the activities under investigation.

For instance, if you look at the Appendix at page 15a, the Court says -- this is toward the top --

QUESTION: This is the Appendix to your certiorari --

MR. FREY: To the certiorari petition, that is correct, I'm sorry. "In order to deter the prosecuting officers from bringing a putative or virtual defendant before the Grand Jury for the purpose of obtaining incriminating or perjurous testimony, the accused must be adequately apprised of his rights or all of his testimony, incriminating and perjurous will be suppressed," and at page 19a, "The entire proceedings here which led up to Mandujuano's indictment for perjury were, as we have noted repeatedly, beyond the pale of permissible prosecutorial conduct. We conclude that the entire proceeding was a violation of Mandujano's due process rights under the Fifth Amendment."

The same theme is echoed in the United States against Wong, which is the Ninth Circuit decision in which there is a pending certiorari petition.

Now, ostensibly, the Court of Appeals is talking about cases in which a witness is called for the purpose of getting him to incriminate himself or perjure himself but the application of the strong language to the facts of this case reflect how far its holding really goes in practical application.

Now, we submit that the approach of the Court of Appeals strikes at the heart of the effective functioning of the investigative Grand Jury.

That body is, in that capacity, attempting to ferret out secret crime. How can it do this without obtaining the cooperation of those persons who have at least some peripheral involvement in the criminal activity under investigation?

In the San Francisco investigation of police corruption, a person such as Rose Wong, who was involved, apparently involved in gambling activities and thought to have made pay-offs to police is the very kind of person whose cooperation is absolutely essential to the Grand Jury.

Here, a person like Mandujano, who is tied in to major heroin dealings in the San Antonio area, is a person whose cooperation is vital to the success of the Grand Jury's undertaking. It should be encouraging rather than discouraging the voluntary cooperation of witnesses such as these.

Now, we advance in this case what are, in effect, five independent grounds for reversal of the judgment of the Court of Appeals. The resolution of any one of these in our favor -- and we believe we are clearly correct on all five -- necessitates a reversal.

These grounds briefly summarized are as follows:

First, we say the Constitution is not violated by eliciting voluntary Grand Jury testimony of any person, ordinary witness or putative defendant, without warnings of any kind.

Second, we say if some kind of warning is required, Respondent received an adequate warning in this case.

Third, we say, Respondent was not, in fact, a putative defendant and the Court of Appeals and the District Court applied an erroneous standard which would be very damaging if the putative defendant notion were allowed to enter the law of this area.

Fourth, we say, even if the questioning was improper, Respondent could not answer perjuriously and he therefore has no remedy in a perjury prosecution.

And fifth, the related contention, this is, in any event, not an appropriate occasion for application of an exclusionary rule. There is no demonstrated basis for believing that if the court announces a standards for prosecutors in this area, those standards would not be

followed in virtually every case.

Because these points cover a great deal of ground and because very little time is available for me to cover them all, I invite the Court to feel free to interrupt at any time with questions about any aspect of the case that may be of particular interest or concern.

If there aren't any questions at this point, I'll begin with the --

QUESTION: I got the first three and I was not attentive to your remaining two.

MR. FREY: The other two points relate to the perjury aspect of the case and our contention that even if the testimony might be suppressible for use in a substantive prosecution, its perjurious nature means that he is not entitled to any remedy under the Knox case and Bryson and so on.

QUESTION: Yes, that is number four.

MR. FREY: And number five is that because any rule that the Court announces would likely be followed by prosecutors because we don't have the danger of persistent prevalent abuses in this area, there is no occasion to apply an exclusionary rule in this instance where what was done, if wrong, had never yet been declared wrong by an appellate court prior to the interrogation of Respondent before the Grand Jury.

QUESTION: Mr. Frey, as long as you are inviting questions, let me ask you one. In your brief on page 19 you say it is common practice for Government attorneys to consider such warnings to Grand Jury witnesses who are suspected of involvement in the criminal activity.

If this Court were to require, then, a simple warning, I take it it would not disrupt Governmental practice today.

MR. FREY: No, I don't believe it would disrupt it and my argument here is that this is the Supreme Court and your duty is to apply the Constitution and it is not clear to me as to the extent of your power to require such a warning under the Fifth Amendment privilege.

Congress could certainly do it and I don't think that if it were done that it would seriously disrupt Grand Jury functioning.

QUESTION: But the Government does it, not because it feels compelled by any judicial decision or constitutional rule, but just as a matter of comity or whatever you want to call it.

MR. FREY: Well, either that or out of an abundance of caution for fear that if they failed to do it there might be some adverse consequences such as here occurred.

QUESTION: Is there any rule as to when such

warning is omitted?

MR. FREY: I am not aware. I don't believe there is any consistent practice and this varies from district to district depending on the United States Attorney's office involved. Some give target warnings. Some will tell the target that he is the target of the Grand Jury.

Of course, that kind of thing wouldn't do any good in a case like this because we weren't aware until the District Court and the Court of Appeals told us that Mr. Manduhano was the target -- or a putative defendant.

QUESTION: The warning of which you speak is not a Miranda warning.

MR. FREY: Well, that is a point that I would come to. We think a Miranda warning would be incorrect.

QUESTION: Well, my question is a factual one. The warning of which you speak that is often given or sometimes given is a warning that he may refuse to answer questions if he thinks they may incriminate him. Is that it?

MR. FREY: Well, I think that is normally the case but in the Gregory Washington case in which there is a pending petition before the Court, apparently four Miranda warnings were given. The Court still found that unsatisfactory because he was not told --

QUESTION: Including the right to have a lawyer present --

MR. FREY: Including the right to have a lawyer present.

QUESTION: -- at his side during the interrogation because that is contrary.

MR. FREY: Well, but Miranda doesn't say he has a right to have a lawyer at his side. The Miranda warning doesn't say he has a right to have a lawyer at his side during the interrogation. It simply says you have a right to consult with a lawyer --

QUESTION: Yes.

MR. FREY: -- before answering questions.

QUESTION: But the combination of Escobedo and Miranda would mean that if he had a lawyer in a Miranda situation, doesn't that imply that it is a right to have him by his side during the interrogation --

MR. FREY: Well --

QUESTION: Which would not be true in a Grand Jury, as Justice Stewart suggested.

MR. FREY: Well, I believe, Mr. Chief Justice, that the practice is not to have attorneys in the Grand Jury and I think that is a fairly uniform practice. The practice is, when someone has an attorney, to allow him outside and to allow him to consult with him.

QUESTION: Is this an absolutely uniform practice in the federal system?

MR. FREY: As far as I know, although there have been some Law Review articles that have suggested that people should have their attorneys in with them in the Grand Jury. There are problems of Grand Jury secrecy and there are problems under the rules of criminal procedure about allowing that.

Now, I think the main constitutional point in this case is the proposition that any Grand Jury witness, whether or not he is a putative defendant, is not entitled to any advice of rights under the Constitution and he is certainly not entitled to four Miranda warnings which would, we say, entail a significant misstatement of his rights.

The opinion of the Court of Appeals is hazy as to whether its contrary conclusion is rooted in the self-incrimination provision or the due process clause of the Fifth Amendment.

However, because of the substantial congruity of its approach with Miranda, it seems most useful here to treat it as resting principally on self-incrimination as far as the need for warnings themselves is concerned.

In determining whether what transpired in this case infringed Respondent's self-incrimination rights, it seems to me useful to begin with something the Court of Appeals overlooked, the language of the constitutional provision itself.

"No person shall be compelled in any criminal case to be a witness against himself."

We were accused by one of the amicus briefs of ignoring Johnson against Zerbst standard of knowing and deliberate waiver and addressing ourself to compulsion only. It is they, however, not we, who have put the cart before the constitutional horse for if there is no compulsion there can be no violation of the privilege.

This Court has spoken on several occasions about Grand Jury testimony and compulsion. For instance, in the Monia case in 317 U.S. it said a grand jury witness must claim the privilege or he will not be considered to have been compelled within the meaning of the amendment and there are a number of other cases to that effect.

We submit that this proposition does not alter simply because the witness is a putative defendant. Indeed, in the Dionisio case, this Court recognized that the obligation to appear before the Grand Jury, which is the one element of compulsion to which Respondent was subject, is no different for a person who may be himself be the subject of the Grand Jury's inquiry than for any other witness.

The Court of Appeals analogy to Miranda is in error. You cannot equate incommunicado custodial police interrogation with Grand Jury questioning.

I hardly need rehearse the litany of concerns

expressed in Miranda that are simply inapplicable to Grand Jury questioning before 23 fellow citizens who, whatever else they may be, are surely not so compliant to the prosecutor's wishes that they would countenance the kinds of interrogative practices catalogued in Miranda as means of overcoming the arrested individual's will in extracting a statement from him.

Moreover, because you have these citizen witnesses to what transpired and because in many cases including this you have a transcript of proceedings, you do not have the problem or reconstructing what happened, the problem of being unable to establish the kinds of improper techniques that may have been used.

Moreover, the putative defendant notion is not useful in making the critical constitutional inquiry into compulsion. The presence or absence of impermissible compulsion is a determination that turns on the state of mind of the individual upon the question whether, in the circumstances, it is likely that his will was overborne.

If Grand Jury questioning is to be equated with incommunicado police interrogation as inherently cohersive, it is difficult to see why it is more cohersive of putative defendants than of other witnesses.

Indeed, the putative defense concept really has no application in Miranda, either, certainly, if you or I

were arrested and taken down to the back room of the station house, even if the police had no reason whatsoever for doing it or simple harassment and weren't planning to charge us, we would be entitled to Miranda warnings.

Now, let's suppose for a minute that some kind of warning is deemed appropriate. Should it be full Miranda warnings?

We think certainly not. Our most substantial objection to the Miranda warnings in the area where we feel it most significantly misstates what the witness' rights are is the absolute right to silence which is suggested in Miranda.

Now, analytically, it is not clear where the right to silence comes from. It is clear, however, that the police have no power to compel any one to speak. They are not the people in our legal system who are vested with that power and therefore, in a correlative sense, the arrested person has an absolute right to speak since there is no lawful -- an absolute right to remain silent, excuse me, since there is no lawful power to compel him to speak.

QUESTION: Well, posed in Hofeldian terms, which, you know, are kind of out of date, it would be a privilege of silence rather than a right, wouldn't it?

MR. FREY: Well, I --

QUESTION: Privilege of silence which would

correlatively be no right on the part of the interrogating police officer as to a requirement to speak.

MR. FREY: I think that is right, but I think the Court's concern in Miranda is in stating that there was a right to silence was a more practical concern which was to tell the arrested person in clear and unequivocal terms --

QUESTION: That he need not answer the questions.

MR. FREY: -- that he could understand that he didn't have to answer.

QUESTION: He need not answer the questions, though.

MR. FREY: Now, that is not the case with the Grand Jury and Branzburg, Callandra, many cases of this Court clearly indicate that you do have an obligation to answer questions before a Grand Jury. It is the Grand Jury which is the instrument in our legal system for securing information regarding the commission of crimes.

Now, of course you have your privilege. We are not suggesting that you don't have it. We are not taking it away from anyone in this case. It hasn't been taken away from Respondent.

Therefore, if anything is to be required, it would be an explanation -- and here it was given, I think, in clear terms, that you needn't answer questions where the answers may tend to incriminate you.

QUESTION: Would you have the same position if

with respect to a person who had been arrested and was in jail or out on bail and he was called before the Grand Jury?

MR. FREY: Well, that poses an interesting question and there are some -- I think I would have the same position, yes. I mean, let's --

QUESTION: You almost must.

MR. FREY: -- take an example. Suppose that a person who has been arrested for some offense also happened to be in a bank when a robbery took place having nothing to do with his offense. Such a person has no right of silence before the Grand Jury, in my view.

QUESTION: Well, you changed my facts a little, but --

MR. FREY: Well --

QUESTION: -- say you just wanted to -- say you had just arrested him for a bank robbery and you had to get him indicted but you didn't want to indite the wrong fellow, either so you called him before the Grand Jury and just asked him whether he might -- you would want to be fair to him and you called him before the Grand Jury.

MR. FREY: Well, I think it would not be as irrational to make a distinction in that area as it is to make the distinction the Court of Appeals made on the basis of a putative defendant.

After all, Kirby, for instance, recognizes that

the right to counsel has attached for an actual defendant.

But I think our position would be that he is not compelled and he does not have to be given the Miranda warnings because the Miranda warnings were designed to neutralize a particular concern and a particular environment.

QUESTION: What do you think the rule -- the explanation for the rule at the trial that you may not call the defendant to the stand at all is?

MR. FREY: Well, I think there are several explanations. One that seems to me most obvious is that the prosecution as a adversary to the defense could have no purpose in calling the defendant to the stand other than to incriminate him so that its purpose is inherently incriminatory when it calls him but beyond that there is the problem that the jury sitting there is the finder of facts in the criminal trial, the one that will pass on guilt or innocence.

QUESTION: But Mr. Frey, suppose you have someone actually the subject of a formal criminal complaint -- a formal criminal complaint and he/is brought before the Grand Jury and questions are put to him about the specific charges that are made in that complaint without giving him any advance warning of self-incrimination or otherwise?

MR. FREY: Well, such an individual would have an attorney at that point.

QUESTION: That's right.

QUESTION: At the Grand Jury?

MR. FREY: Well, he would have had an attorney appointed for him. People are subpoenaed before the Grand Jury. They are not pulled out of their houses in the middle of the night and brought unexpectedly to the Grand Jury so I wouldn't be very concerned in that context by the --

QUESTION: Because you mean as a practical matter, having an attorney, he would have been advised that he has the privilege and noone else need to advise him and he would assert it. Is that it?

MR. FREY: He might assert it or he might not assert it. That, of course, would depend on the individual case. But, actually, my argument doesn't depend on that. The prohibition is against compelling him to speak.

Now, unless some other provision than the self-incrimination provision comes into play, perhaps the due process provision and that gets into an area where it is harder to engage in the kind of rigorous analysis that you can with self-incrimination, I don't see any self-incrimination objection to calling him before the Grand Jury and asking him in a polite and straightforward manner.

QUESTION: Without giving him any warnings.

MR. FREY: Without giving him the warnings.

QUESTION: Even though it is about the very charge -- he is questioned about the very charge which he

he has already --

MR. FREY: As far as the self-incrimination provision is concerned, his only right under the Constitution is not to be compelled to incriminate himself. If he is not being compelled, then our position would be, as a matter of self-incrimination analysis, that that question is permissible.

QUESTION: Is it possible that in the situation that Justice Brennan has hypothesized to you, that they might be inquiring of him about other potential co-defendants, others who were involved in the criminal act?

MR. FREY: Well, now, there might be. Now, it is very likely insofar as the questioning concerns the crime and others that he would have available his privilege but I don't see that our system should be offended by the idea that if that man comes in and is asked in a perfectly straightforward way questions that would yield information about his or others' involvement in criminal activity, I don't think our system should recoil in any way at that practice or at using the results of such questions.

QUESTION: Now, are you suggesting that there is no compulsion if he is summoned to appear before the Grand Jury?

MR. FREY: He is compelled to appear. But the critical compulsion purposes of this analysis would be the

compulsion to answer and he is not compelled --

QUESTION: Well, would you tell him that if he doesn't answer he is going to be held in contempt?

MR. FREY: Well, now, that would pose a different problem. If they said to him, if you don't asnwer this question about where you were on the evening of June 10th you are going to be held in contempt, then arguably his answer would be compelled in those circumstances. But if they say nothing to him except where were you on the evening of June 10th --

QUESTION: But for the average citizen that is called into a Grand Jury, doesn't he feel a compulsion to answer?

MR. FREY: Well, he may feel an inner compulsion to answer.

QUESTION: Yes.

MR. FREY: Indeed, the average person who if the prosecutor called him on the telephone and said I'd like to know --

QUESTION: But that is not the compulsion you are talking about.

MR. FREY: No, that is not the constitutional compulsion.

I'd like to save, if I have a minute or two, the balance of my time.

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

Mr. Peters.

ORAL ARGUMENT OF MICHAEL ALLEN PETERS, ESQ.

ON BEHALF OF RESPONDENT

MR. PETERS: Mr. Chief Justice, and members of the Supreme Court,

I would just like to first of all direct the Court's attention to the question raised by the Fifth Amendment due process and that is the compulsion whether or not in this case Roy Mandujano can be a witness against himself and in this case I feel that he was.

The question that underrides the whole issue before the Court is whether or not a Grand Jury is inherently coersive and if we look at the facts of this case, we'll find that Roy Mandujano was subpoenaed, compelled against his will to appear before the Grand Jury to ask -- to answer specific questions about that which the Government already had enough information on which to base an indictment.

Number two, when Mr. Mandujano appeared before the Grand Jury, the special prosecutor informed Mr. Mandujano that this was a special Grand Jury and the attention that the Grand Jury was covering was limited to narcotic traffic, IRS evasions and violations of the gun law and if the Court will note the Appendix, before they even approached the

subject matter of the gun or IRS violations, they had pretty well run Mr. Mandujano through the gamut of questioning through some 15 pages prior to even going into the information upon which they already had enough evidence to indict Mr. Mandujano.

Mr. Mandujano, indeed, when he appeared, clearly the Escobedo rule, which is incorporated in the Miranda, the whole focus of the investigation was upon Mr. Mandujano and the warnings that are recorded in the Appendix clearly are insufficient in any way, shape or form as Miranda applies and I would even urge that in addition to the regular Miranda warnings that Mr. Mandujano should have been informed that he was, indeed, himself the focus of a specific investigation and on which they already had sufficient evidence to indict him.

QUESTION: What provision of the Constitution do you think requires that?

MR. PETERS: Well, Mr. Justice Rehnquist, I believe that the Fifth Amendment against the compulsion -- against testifying against one's self incorporates that aspect.

QUESTION: Well, what do you do with our Monia case? Where we say that if you want to claim the Fifth Amendment you have to do it before the Grand Jury, that if you voluntarily answer it is not compelled.

MR. PETERS: Well, I would say that Monia applies to the normal Grand Jury witness whereas here we have a special creature, the putative defendant concept.

QUESTION: Why is that different for purposes of the Fifth Amendment?

MR. PERTERS: Well, here a normal, ordinary Grand Jury witness, when he is subpoenaed to appear -- and I would say/even that a putative defendant who is subpoenaed to appear is not entitled to any kind of prewarning until the special prosecutor or the Grand Jury specifically go into the actual evidence which they have on that individual and at that time, then, in this case, Mr. Mandujano will be moved from the ordinary Grand Jury witness role and placed in a special category and Monia directs itself to the ordinary Grand Jury witness and in this case Mr. Mandujano, as the Appendix points out, and I attempted to clarify in my brief, he did not know exactly, you know, what his rights were.

He did not understand. He had an obvious language problem.

QUESTION: Is there any indication in Monia that the witness there was warned or that he had a particularly clear understanding?

MR. PETERS: I really don't recall the facts of Monia that clearly, Mr. Justice Rehnquist.

QUESTION: You have just made a statement that he

had an obvious language problem. Can you explain that one to me? How does the Appendix show that?

MR. PETERS: I direct --

QUESTION: He had been in trouble with the law a number of times. He had a tenth grade education as I understand it.

MR. PETERS: Yes, your Honor.

QUESTION: And that means through the second year or into the second year of high school. He should be able to read and write and -- well, go ahead. You tell me.

MR. PETERS: Well, based on Mr. Mandujano's -- the school systems these days, Justice Blackmun, are, you know, lack a lot to be desired. However, I think it is clear from some of the excerpts which I have quoted on page 18 of Respondent's brief, in addition to which the warnings and his apparent lack of understanding indicate that he obviously had a problem with understanding the spoken and I would assume the written English language from page 18 through page 20 of my brief.

I point out that --

QUESTION: Well, he certainly speaks very well. He doesn't speak haltingly. He doesn't misuse words, does he?

MR. PETERS: Well, he -- it is not the misuse of the word it is the -- I think it is the apparent lack of

understanding, as I attempted to point out to this Court.

QUESTION: Well, take a look at the middle of page 15 where they were cross-examining or examining him about whether he bought heroin and he answered,"No, sir, I used to shoplift all the time," having denied that he bought or sold heroin ever. That certainly suggests a pretty good understanding of what was going on, doesn't it?

MR. PETERS: Well, I would say that the --

QUESTION: Just below mid-page, "No, sir, I used to shoplift all the time."

And then, "When was the last time you sold heroin?"

"I haven't sold any since I got caught."

Are we talking about the same man, now?

MR. PETERS: Indeed we are, Mr. Chief Justice but I would point out that, you know, here he may have a partial understanding of some of the questions and some of the word association but, indeed, when he is asked a simple thing like, what is the address that he is living, you know, the special -- or he said, "2217" and the special prosecutor retorted "2270" and my client answered "Yes."

And the whole testimony, even though there are some -- and obviously that he had to understand some English, use of the English language, but I would say his total awareness and understanding meets a 10th grade-educated

Latin American and sure, his association, I would say, with use of the English language is probably very limited and his understanding of some words indeed are apparent from the --

QUESTION: Are you familiar with San Antonio?

MR. PETERS: I have been there on a couple of occasions, Justice.

QUESTION: It has a very good school system. It is one of the best in Texas.

MR. PETERS: Well, I would just make a presumption that --

QUESTION: And the presumption is that a 10th grade -- a person with a 10th grade education understands English. Now, how are you going to upset that presumption? By taking a word here and a word there?

MR. PETERS: I would say --

QUESTION: How are you going to get over it?

MR. PETERS: Well, Mr. Justice Marshall, I would say that my limited experience of understanding the school system, my wife being a school teacher herself, sometimes they are put in a position where they pass an individual just to get him out of their personal classroom and just advancing him even if he doesn't grasp or have an understanding of such as the English language.

QUESTION: Well, are you a better judge of a person's reading ability than the school officials?

MR. PETERS: Possibly not, no, I --

QUESTION: Possibly?

MR. PETERS: No, Mr. Justice Marshall.

QUESTION: Well, they said he has got a 10th grade education and you are going to get by that by saying that, in your opinion he has not got a 10th grade education.

MR. PETERS: Yes, Justice Marshall.

Now, when Mr. Mandujano was compelled to appear before the Grand Jury, based upon all the previous, the special prosecutor put Mandujano in a -- the Murphy Waterfront trilemna of either invoking his Fifth Amendment right, which he clearly was not informed of and at least from the Appendix it is clear that he didn't undertstand any of the warnings.

QUESTION: Mr. Peters?

MR. PETERS: Yes, Justice.

QUESTION: Would your position be the same if the Respondent had been a Ph.D?

MR. PETERS: I would say yes, my position would be the same in that here they, as in the instance of the Ph.D., if they ask the Ph.D. specific questions about a specific involvement in a crime, whether or not -- and Miranda addresses itself to this, whether or not you have the Ph.D. or 10th grade education, before proceeding on with the questioning, they must administer warnings, Miranda

warnings and that man must understand and knowingly and understandably waive those warnings, if he so desires.

QUESTION: So your argument about the 10th grade education and the possible limitations of Respondent's capacity to understand English are peripheral to your central position here?

MR. PETERS: I would say, Mr. Justice Powell, that that is true but the overall argument and the final result of the Fifth Circuit decision show -- and I intend to show -- that this whole atmosphere before the Grand Jury on Mr. Mandujano was overwhelming and his 10th grade education is just one aspect of his whole presence and understanding.

QUESTION: Would your position require us to examine the facts in each case to determine whether or not the atmosphere was coercive?

MR. PETERS: Mr. Justice Powell, I would say that it would not be on a basis of a case-to-case examination of the individual facts. I would submit that -- and make it a requirement under the Fifth Amendment that a prosecutor who intends to ask specific questions about the specific crime in which they could have easily indicted Mr. Mandujano as well as they did of making him appear under compulsion of the subpoena and answer those questions.

I would say that under those circumstances in which they are going to ask any witness questions of the

crime itself, that at that point in time he no longed is an ordinary Grand Jury witness and must be afforded the Fifth Amendment rights.

QUESTION: Is it only the perjury count here? I mean, this case concerns only the suppression with respect to the perjury count?

MR. PETERS: Mr. Justice White, I am not sure that I understand your question.

QUESTION: Well, did the case -- he was indicted on two counts, was he?

MR. PETERS: Yes, one for the substantive count of attempted distribution of one ounce of heroin --

QUESTION: Now, he has been convicted on that, hasn't he?

MR. PETERS: Yes, he has, your Honor.

QUESTION: Without the benefit of the Grand Jury testimony.

MR. PETERS: That is correct, your Honor.

QUESTION: And so if we were to decide that even if Miranda warnings should have been given and weren't, nevertheless his answers were admissible in a perjury prosecution. We don't need to deal with these other questions.

MR. PETERS: I would say that --

QUESTION: Is that right or not?

MR. PETERS: Mr. Justice White, I would say no, that each one of these elements, the coerciveness of appearing before the Grand Jury, the fact that Mr. Mandujano was not an ordinary Grand Jury witness and --

QUESTION: The Court of Appeals said normally answers are, even if you should not have been asked a question, you are supposed not -- you are not supposed to lie if you answer them anyway. That is the usual rule.

MR. PETERS: Yes, Mr. Justice White.

QUESTION: And the Court of Appeals says we'll make a slight inroads on that rule for this case.

Now, let's suppose we reverse them on that slight inroad and say there should not have been a lsight inroad.

MR. PETERS: Apparently I did not understand your question, Mr. Justice White. I think that, yes, that under --

QUESTION: That would finish this case, wouldn't it?

That would finish this case, wouldn't it?

MR. PETERS: If you -- if you --

QUESTION: We wouldn't have to talk about whether -- about warnings or anything else, would we?

MR. PETERS: That is correct but the end result of the Fifth Circuit's holding, Mr. Justice White, is based upon the prior concepts of having this individual who is in the class of a quasi-defendant and --

QUESTION: There is no doubt about that but if we were to say, at least to the extent he perjured himself, it is all immaterial --

MR. PETERS: That is correct.

QUESTION: If we were to say that, then we would reverse and we wouldn't have to reach any of the rest of the questions, would we?

MR. PETERS: Yes, Mr. Justice Brennan.

But as the Fifth Circuit pointed out, the totality of all the circumstances showed that Mr. Mandujano was definitely -- it was just so totally unfair, the whole procedure, that Mr. Mandujano was involved in that the Fifth Circuit as well as the District Court felt that the Fifth Amendment should apply and there should be this one exception to that rule and if this Court -- and I feel that this Court should consider affirming the lower court's decision, that the incidence in putting individuals in the position of Mr. Mandujano, that there should be some sort of restraint upon the Government in their use and in this case, I feel it was a blatant misuse of a proceeding, just another device in which they can put an individual in an unfair and certainly a very uncertain position.

QUESTION: But even if you are right about the warnings, that it is unfair of the Government to call someone whom, as you describe and the Fifth Circuit describes,

is a putative defendant, that doesn't give the man called a license to perjure himself, does it?

MR. PETERS: Well, that would apply in all other cases except the case before the Bar and as the lower courts have held that there must be some exceptions, consider the analogy of Miranda. If there is failure to give Miranda warnings at the time of arrest, statements will be suppressed and we are asking for the same remedy to compensate and counter this totally unfair proceeding in which my client participated in.

QUESTION: Well, but suppose you suppress statements where he might have claimed the Fifth Amendment but did not because you say he didn't get a warning. That still does not go to the questions of whether he -- it wasn't a question of his refusing to claim the Fifth Amendment. It was a question of his lying.

MR. PETERS: Well, he was put in a position where, and the Government readily concedes in a companion case arising out of the Western District of Texas, Rangel, they felt that, indeed, warnings were to be given and they did not petition this Court to consider that question because they felt that Mr. Rangel, because of the implications of the so-called warning given, that he was compelled and given the Murphy Waterfront trilemma --

QUESTION: Well, was he convicted of perjury, too?

MR. PETERS: They did not proceed in either the substantive nor the perjury count in Mr. Rangel's case. I would say further that, addressing the Court's attention to the committing the perjury with impunity concept that a Grand Jury, as in this case, cannot use the fruits of only [owning?] illegalities and the -- as the Fifth Circuit says, the bringing and asking of these questions upon which they already knew the answers to just asked for too much on the part of the credible people to believe that, and I would point out that the Grand Jury testimony indicates that throughout the first 15 questions they had sufficient evidence and they had sufficient background knowledge to gage the truthfulness of Mr. Mandujano's answers but they knew what they were bringing therefore. They had sufficient evidence to indict him and as I pointed out earlier, it doesn't occur until page 15 where they even begin to -- and this is after they exhausted all the normal questions that the prosecutor normally questions any Grand Jury witness to establish whether or not he is telling the truth and the special prosecutor himself indicated in the Grand Jury -- or in the Appendix that the reason he asked these questions was to gage the truthfulness and that in itself shows you that they have some sort of -- it is not entrapment per se but it certainly smacks of it, as the Fifth Circuit indicated in the District Court.

I would say that, further, that since the focus of the investigation was on Mr. Mandujano and as Miranda should apply, under the due process clause of the Fifth Amendment, that Mr. Mandujano certainly didn't knowingly and understandingly waive any of his rights and that the --

QUESTION: Please let me interrupt you. I just want to be sure as a matter of terminology. You make constance references to the Miranda warnings and that Miranda should apply. Do I understand you think the four aspects of the Miranda rule should apply here or just something comparable to it, laundered, so to speak, to fit this situation?

MR. PETERS: Well, Mr. Justice Blackmun, I think that, indeed, the Miranda warnings as they have been established by this Court should apply but I think also that --

QUESTION: Including right to counsel?

MR. PETERS: Including right to counsel.

QUESTION: Where? Where would he be, in the Grand Jury room?

MR. PETERS: I would say that if he weren't in the Grand Jury room and I know this is not practiced in the federal court, but if he were not in the Grand Jury room that the Grand Jury itself might think that every departure to confer with his counsel would obviously indicate --

QUESTION: Who, on that approach, appoints, if he is an indigent -- as a witness is an indigent and has no counsel? He can't afford to hire one. Who appoints counsel for him?

MR. PETERS: That would be the presiding judge of the Grand Jury.

QUESTION: You mentioned the Federal Grand Jury. Under Texas State procedure, is counsel allowed in the Grand Jury room?

MR. PETERS: No, your Honor, but I would point out that in reading the Post this morning that Illinois has adopted a state proceeding wherein they have incorporated the basis of the Respondent position in this case and including having the presence of counsel seated in a Grand Jury room with his client during the entire proceedings and they have incorporated this under Illinois law.

QUESTION: Well, of course, the state may do anything it wants within federal constitutional limits or its own state constitution.

MR. PETERS: Yes, Mr. Chief Justice.

And I would say that Mr. Mandujano, as a putative defendant, who was not given his Miranda warnings, which he is entitled to, that in this limited case, due to the fundamental unfairness of the entire proceedings, can commit perjury with impunity and this Court is not

sanctioning perjury and I am not asking it to sanction perjury, but I am asking this Court to affirm the court's opinions below based upon the limited instance where the proceeding is so totally unfair and the focus of the whole investigation is upon that individual and that upon that individual that they have more than qualified whether or not he was, indeed, telling the truth or not but yet go beyond that and ask him specific questions about the crime itself which they knew they had complete evidence sufficient enough to indict him.

I would just point out to the Court that if they had not gone beyond this specific aspect of going into the crime itself, that then Mr. Mandujano, if he committed perjury as to the general information, then I would say that he would then be in the status of the ordinary Grand Jury witness who is not entitled to specific Miranda warnings.

QUESTION: But when they ask him about the crime itself, he may not only claim the Fifth Amendment but he may perjure himself, according to your submission.

MR. PETERS: Yes, Mr. Justice Rehnquist. That is my position.

QUESTION: And with impunity?

MR. PETERS: And with impunity in this limited instance. It is a countermeasure of the fundamentally unfair proceeding and I would ask this Court to adopt the

Betts versus Brady decision which the Fifth Circuit relies on and that is, if it is so totally, fundamentally unfair that the individual, in this limited instance, the statements must be suppressed. And I would ask this Court to suppress and affirm the court decisions below.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

Your time has expired, Mr. Frey.

The case is submitted.

[Whereupon, at 10:58 o'clock a.m., the case was submitted.]