ORIGINAL

In the

Supreme Court of the United States

UNITED STATES,

Petitioner

v. : No. 74-1106

GREGORY V. WASHINGTON,

Respondent

4

Washington, D. C.
December 6, 1976

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UNITED STATES, Petitioner	:	
v.	:	No. 74-1106
GREGORY V. WASHINGTON, Respondent	:	

Washington, D. C.

Monday, December 6, 1976

The above-entitled matter came on for argument at 1:25 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN P. STEVENS, Associate Justice

APPEARANCES:

WILLIAM F. SHEEHAN, III, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Petitioner.

FREDERICK H. WEISBERG, ESQ., Public Defender Service for the District of Columbia, 601 Indiana Ave., N. W., Washington, D. C., 20004, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 74-1106, United States against Gregory Washington.

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

ORAL ARGUMENT OF WILLIAM F. SHEEHAN, ESQ.

ON BEHALF OF THE PETITIONER

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

This case is here on a writ of certiorari to the District of Columbia Court of Appeals. That court affirmed the judgment of the superior court suppressing for use in evidence in Respondent's prosecution for grand larceny and for receipt of stolen property the testimony that Respondent had given earlier before a grand jury.

Unlike the one just heard, this case does not involve a prosecution for perjury and, accordingly, it poses squarely the question whether the Constitution requires the Government to warn grand jury witnesses of their privilege against self-incrimination when the Government has reason to believe that the witness may be indicted on the basis of the testimony that is sought.

I will state some of the facts quickly, since there is a claim that the Government's conduct in this case violated the Due Process Clause.

On the night of December 3, 1972, an officer of the

Metropolitan Police stopped a van-type automobile after watching it make a U-turn, and in the back of the van found a motorcycle that had recently been reported stolen.

The two occupants of the van were arrested. The police determined that the van belonged to the Respondent and they notified him that the van was in their possession.

Within the next several days, in an effort to retrieve the van, the Respondent went both to the police station and to the United States Attorney's office. On both occasions, he said that he did not wish to press charges against the two men found in the van who it had been thought might have stolen the van in addition to the motorcycle. He said they were his friends and had had his permission to use the van.

He also said that he, himself, had been driving the van on the evening in question -- earlier on the evening in question he had been driving the van -- and he explained the presence of the motorcycle in the van in a manner that both the policeman to whom he spoke and the Assistant United States Attorney to whom he spoke found unpersuasive. I will get to his explanation in just a moment.

The policeman, in fact, told the Respondent that he did not believe his story and that if Respondent were to testify to it in court it would be likely to get him into trouble.

The Assistant United States Attorney gave the Respondent back his van and gave the Respondent, also, a subpoena to appear before the grand jury investigating the crime. He did so because he was afraid Respondent would not appear voluntarily, either because Respondent would not want to testify against his friends or because he was, himself involved.

When the Respondent came before the grand jury, the Assistant United States Attorney in charge -- not the same one who had given him the subpoena -- was uncertain whether or not to seek an indictment. He was not sure what Respondent's testimony would be, or whether it would be believable, and, accordingly, he decided to leave the matter entirely to the grand jury, itself, after they had heard the testimony of Respondent.

Before the Respondent testified, he was given full Miranda warnings. He said that he understood them, that he wanted to answer questions regarding the theft of the motorcycle and that he did not want the services of a lawyer.

QUESTION: He had not had any Miranda warnings when he was talking with the Assistant U. S. Attorney, had he?

MR. SHEEHAN: He had not had Miranda warnings when he was talking to the Assistant, no.

He then gave testimony to the following effect. On the night in question, he said he had been driving the van

and had stopped to help a stranger whose motorcycle had broken down. The two of them put the motorcycle in the van, he said, and drove on looking for help and the van, itself, broke down. He then left the stranger with the motorcycle and the van, he said, and walked a block or two away to a gasoline station where he telephoned his two friends to come help him. He said he waited at the gas station for two hours and his friends did not appear. He said he then went back a block or two away to where the van had been left and found it was gone. He said that he did not report the disappearance of the van because he said he assumed his friends had come and fixed it and then driven it away. The stranger who owned the motorcycle, he said, was never heard from or seen again.

Following his testimony, in due course, the grand jury indicted him along with the other two men for grand larceny and receipt of stolen property.

The superior court then granted the Respondent's motion to suppress his testimony on the ground that it had been obtained in violation of his privilege against self-incrimination. The court held that the Assistant United States Attorney, conducting the grand jury, had not adequately inquired into the Respondent's ability to understand his rights. And, in addition, had failed to warn Respondent, on top of the warnings he had received, that his testimony could result in an indictment by the grand jury.

In affirming, the Court of Appeals said that the principal respect in which the full Miranda warnings which Respondent had received were deficient was that he had not -- was in that he had not been told that he was a potential defendant.

The upshot of the decision is that a potential defendant is entitled, in the Court of Appeals' view, under the Self-Incrimination Clause, both to Miranda-type warnings and to target warnings.

It seems appropriate to begin the analysis here with something that, in our view, the Court of Appeals gave too little attention to, the words of the constitutional provision themselves: "No person shall be compelled in any criminal case to be a witness against himself."

This Court, in Miranda v. Arizona, found that the procedures surrounding custodial interrogation by the police of a witness -- of a suspect -- were inherently coercive, and, accordingly, it held that a set of warnings was necessary in order to balance things out.

Without those warnings, it is now conclusively presumed that any statements given by the witness were compelled against the suspect's will.

The issue for decision today is whether questioning in front of a grand jury is also so inherently coercive that warnings are required before any testimony given by a witness

in response to questions by the Government, may be considered voluntary.

Our position is that there are many differences between the questioning of the suspect by the police in custody and the questioning of a witness in regular grand jury proceedings.

For the most part, we think that these differences are self-evident. They are also -- they are, in any event, set out at length in our brief. I will mention only two.

Before the decision in Miranda, the interrogation by the police occurred principally in private. In contrast, the questioning of a witness before the grand jury occurs before between sixteen and twenty-three private citizens who are not likely to be, in our view, so compliant to the prosecutor's wishes as to countenance the kind of abuses that were catalogued by this Court in Miranda.

Second, the question -- I might add that the view that I just expressed was, I think, stated also by Mr. Justice Black. In the Groban decision he said it would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury.

Moreover, the questioning in front of a grand jury is undertaken under the overall supervision of a District Court judge and frequently the questioning is transcribed and reported as it was here.

In short, the privacy that before Miranda allowed the abuses of custodial interrogation that were perceived to exist, does not exist in the grand jury setting and there is, accordingly --

QUESTION: If there is -- Your point is that this is not compulsion within the meaning of the Fifth Amendment, if I understand you correctly. If that is true, I would suppose it is not compulsion if he testified in a trial in an open court. It would be the same thing.

MR. SHEEHAN: If he testified as a witness in trial in open court.

Is your question, Mr. Justice, whether the Government has an obligation to warn a defendant --

QUESTION: No. As I understand your argument -- correct me if I am wrong. I am trying to get the thread of the argument. You say this situation is different from the police interrogation in a police station, where the man is in custody

MR. SHEEHAN: Yes, indeed.

QUESTION: -- with respect to the issue of whether or not there is compulsion.

MR. SHEEHAN: Yes, indeed.

QUESTION: And you say there is compulsion in the police station but there is not compulsion in the grand jury room because it is more public.

MR. SHEEHAN: For that reason and others.

QUESTION: And if that reason is valid, would it not also follow that testimony in open court, pursuant to a subpoena, would not be testimony pursuant -- would not be compelled testimony?

MR. SHEEHAN: Yes, it does, indeed follow that that, in fact, would be the position --

QUESTION: Well, then, to what does the Fifth Amendment ever apply?

MR. SHEEHAN: To testimony that is compelled. The subpoena does not compel testimony. The subpoena, Mr. Justice Stevens, compels only the appearance of the witness and once the witness does appear, in response to lawful process, it is open to the witness then to claim his privilege against self-incrimination, as to any questions that he fears may tend to incriminate him. He would be compelled, in this situation, only if in response to such a claim the District Court, perhaps upon a grant of immunity, would order him to testify.

The subpoena itself is simply legal process. There is no constitutional privilege to object to legal process. He has no Fifth Amendment privilege against self-incrimination.

QUESTION: Let me put this case to you. Suppose a defendant in a criminal trial decided to waive counsel and appear for himself, and a subpoena was served on him and he was called to the witness stand and a question was asked of him.

Would he be compelled to answer -- say he didn't know about the Fifth Amendment privilege -- Would that be compulsion?

MR. SHEEHAN: I think it would not be compulsion.

QUESTION: I see. In other words, compulsion is the failure to exercise the privilege.

MR. SHEEHAN: No, the compulsion is not the failure to exercise the privilege. The compulsion --

QUESTION: What is it?

MR. SHEEHAN: Compulsion occurs when, by the Government's affirmative conduct, it overbears the witness' will.

QUESTION: Well, then, in my hypothetical case, there would be no compulsion because he just didn't realize that he was --

MR. SHEEHAN: Not unless he was instructed by the Government, that he was compelled to answer questions, or that he was compelled to take the stand.

I suspect that probably the hypothetical would not occur. I suspect in a case like that the District Court in --

QUESTION: But under your position, there would be no duty to warn, no compulsion, there would be no Fifth Amendment issue.

QUESTION: You don't really mean that the trial judge could say, "Take the stand," to a defendant. That's compulsion, certainly.

MR. SHEEHAN: Oh, no. I think that might well be compulsion.

QUESTION: Well, that's what the question --

MR. SHEEHAN: No, the question to which I --

QUESTION: Well, if you do that to an ordinary witness -- an ordinary witness, not a defendant, must take the stand.

MR. SHEEHAN: That's correct.

QUESTION: And, it isn't deemed compulsion for Fifth Amendment purposes, unless he is ordered to answer over a claim of the privilege.

MR. SHEEHAN: That's correct.

Indeed, if the District Court just ordered a witness -- ordered the defendant to take the stand without more, that would not be compulsion. There would have to be an order to answer the questions that were put to him that would be compulsion.

QUESTION: But it is well settled that -- whatever the logic of it may be-- that it violates the Fifth Amendment even to call the defendant himself to the stand if the calling is done by the prosectuion. Is that correct?

The prosecution can't say to the defendant, "Now, you take the witness stand." That, itself, is a violation.

MR. SHEEHAN: Well, it would also be a violation of the Federal statute making the defendant competent to testify

in his own behalf.

QUESTION: Violation of the Constitution, for Heaven's sakes.

MR. SHEEHAN: I think it would be a violation of the Constitution in large measure because the Government could not oblige the defendant, in that case, to assert his privilege in front of the jury.

QUESTION: Doesn't it fall under the cases that simply say that there can be no reference to the failure of the defendant to testify, and that would be one way of calling attention to it?

MR. SHEEHAN: Yes. The situation is quite different, Mr. Chief Justice, in the setting of a grand jury.

QUESTION: Well, this rule long antedates the constitutional rule of comment on his failure to testify which came about only about ten or twelve years ago. This constitutional rule that it violates the Fifth Amendment for the prosecution to call the defendant to the witness stand is a couple of centuries old, at least, I think.

MR. SHEEHAN: I am not certain. If it is a couple of centuries old, I am prepared to --

QUESTION: Well, as long as -- I am not quite a couple of centuries old, but when I was in law school it was well established and the proposition that it violates the Constitution to comment on the defendant's failure to testify

is only about fifteen years old.

MR. SHEEHAN: I am prepared to concede, for purposes of argument today, that it is indeed settled today that it would violate the Constitution for the Government to call the defendant to the stand or in any way to comment upon his failure to take the --

QUESTION: Well, if you have conceded that it violates the Constitution, namely, the Fifth Amendment, to call the defendant to the witness stand, you must necessarily also concede that that is a form of compulsion within the meaning of the Self-incrimination Clause of the Fifth Amendment.

MR. SHEEHAN: Well, even if it is, my position is that the situation in the grand jury is entirely different. With the grand jury there is no rule --

QUESTION: There is less compulsion in the grand jury context than in the open court?

MR. SHEEHAN: Well, the grand --

QUESTION: Your argument before ran in just the opposite direction, that the greater the public character the lesser the degree of compulsion.

QUESTION: Well, isn't the vice of the first hypothetical calling him in the presence of the jury which is then made aware of his failure or his refusal to testify?

MR. SHEEHAN: Yes, indeed. The grand jury, it seems to me --

QUESTION: Can that apply at a bench trial as well as a jury trial?

MR. SHEEHAN: Well, I think the issue of whether the defendant can be called to the stand in a criminal case is not the issue posed here, in any event.

The grand jury is entitled, it would seem to me, to accord whatever weight it thought it warranted to a witness' refusal to make statements in the grand jury setting. So I think that is in contrast to the situation with the trial jury where they are not allowed to make any inferences whatsoever.

For example, if the witness in a grand jury setting decided that he was going to exercise his privilege and pursuaded the prosecutor then not to call him in front of the grand jury, the prosecutor would not be precluded from telling the grand jury, for example, in response to an inquiry by them, why that individual had not come to testify before them, that that individual was going to assert his privilege and so had not been called.

But the touchstone of our position is that for there to be a requirement of Miranda warnings in this case, this Court has got to find that the setting of the grand jury is as inherently coercive as is custodial interrogation.

For the reasons that I have stated in brief, we find that there is no reason, in this case, to reject the traditional

test for determining the voluntariness of a person's response.

QUESTION: Mr. Sheehan, I interrupted you and I really didn't mean to. You were going to give us two distinctions between the Miranda custodial interrogation and the grand jury, one being the public character and you didn't get to the second.

MR. SHEEHAN: They were both turns on the same point. The first was that it was public because it was in front of between sixteen to twenty-three citizens, and the second was it did have the protection of being under the overall supervision of the District Court and also there was the added safeguard of transcripts being made of the testimony in many cases, as it was here.

To this point, I have been talking only of the questioning of grand jury witnesses in general.

The court below did not hold that all grand jury witnesses were required to receive warnings. It held, instead, that only potential defendants were required to receive warnings.

It follows then that the court must have believed that the questioning of potential defendants is somehow more coercive than the questioning of ordinary witnesses.

QUESTION: Did the court say how it defined a potential defendant?

MR. SHEEHAN: It did not.

It would seem to us that under either of the tests for defining a potential defendant, either a subjective test going to what was in the prosecutor's mind or an objective test going to what was in the prosecutor's files, would be the likely candidates for determining who is a potential defendant.

We fail to see, however, how the content of the prosecutor's mind or of his files has any bearing on the question whether the setting in the grand jury is inherently coercive.

Certainly in the Miranda situation, this would be irrelevant. I take it the police would not be heard to say that warnings were not required when they questioned an individual in custody against whom they had no intention to press charges.

QUESTION: Except -- the only way -- The Miranda rule is an exclusionary rule, and the only time it arises is in a criminal trial and the interrogee by -- interrogatee, whatever the word is, the person who was questioned by definition by hypothesis, is now a criminal defendant. So, obviously, he was a potential defendant at the time he was being interrogated.

MR. SHEEHAN: He may not have been a potential defendant so far as the Government knew, though. He may not have been a potential defendant so far as the police knew when

they questioned him, but the police would, nonetheless, be obliged to give him warnings in the Miranda situation.

QUESTION: They are not really obliged -- You are not obliged to give anybody a warning. The Miranda rule is an exclusionary rule. It keeps evidence out of a criminal trial.

MR. SHEEHAN: Yes, that is true. You are not obliged to give warnings. If you don't give warnings and statements are made, they may not be used because they are deemed involuntary.

QUESTION: That's right.

MR. SHEEHAN: We think that as the Court recognized last term in the Beckwith case, the Miranda presumption of involuntariness and the Miranda-type safeguards should apply only when it can be said that the setting of the questioning is, indeed, inherently coercive, and that, in our view, has nothing to do with whether the Government thinks or knows this or that at the time of the questioning.

My opponent does not appear to argue that questioning before a grand jury is necessarily as coercive as custodial interrogation. Indeed, at page 23 of Respondent's brief, Note 11, it is said that the matter is open to some doubt. It is a matter of speculation, he says, as to our position that it is not as inherently coercive as custodial interrogation.

The argument, instead, appears to proceed upon the

assumption that, as was discussed earlier, the subpoena itself is a form of compulsion -- is a form of testimonial compulsion.

If that were the case, if the subpoena without more, amounted to compulsion to testify in contravention of the privilege against self-incrimination, then it seems to me that the many immunity statutes and the many -- and also the many decisions of this Court construing those statutes, would be very curious, indeed, if it was compulsion simply for the witness to walk into the grand jury in response to a subpoena commanding his appearance.

QUESTION: It is a compulsion to appear.

MR. SHEEHAN: It is, indeed, a compulsion to appear. It is not a compulsion to give testimony, since the witness, after he appears, is entitled to raise his privilege at any point that he thinks a question, if answered, would tend to incriminate him.

QUESTION: What if he refuses to answer before the grand jury and just says, "I won't answer," and they take him before the judge and the judge just orders him to answer? He never claims the privilege.

MR. SHEEHAN: I think in a situation like that, under the Cordell case, it might be too late for him to claim the privilege later on, if he --

QUESTION: He never claims the privilege at any point. You can't say that the compulsion doesn't arise.

QUESTION: It is a compulsion to appear and testify, is it not?

MR. SHEEHAN: It is compulsion to appear and testify but not to testify as to matters that fall within your privilege against self-incrimination.

QUESTION: Well, there is no privilege against self-incrimination. There is a privilege against compulsory self-incrimination.

MR. SHEEHAN: There is a privilege against compulsory self-incrimination. The subpoena's command to appear and testify, though, does not go so far as to command the testimony -- as to compel the testimony -- from a witness that the witness reasonably believes would tend to incriminate him.

QUESTION: I know but let's just suppose he never claims the privilege, never claims the privilege, just refuses to answer, and the judge orders him to answer.

MR. SHEEHAN: Yes, and then what?

QUESTION: And then he answers and he incriminates himself.

MR. SHEEHAN: And he incriminates himself. Well, in that case --

QUESTION: Do you say that is compelled?

MR. SHEEHAN: Oh, certainly. If the judge orders him to answer and he does --

QUESTION: I know, but he never claimed the privilege.

but he still is compelled to incriminate himself.

Now what gets the Government off the hook in that case? Why is the evidence admissible? With respect to a witness in an ordinary courtroom, it is because he didn't claim the privilege --

MR. SHEEHAN: I think the general rule --

QUESTION: -- and that compulsion only arises for purposes of the Fifth Amendment after you are compelled to answer after you have claimed the privilege.

MR. SHEEHAN: I think in that case -- The general rule stated in the case of United States v. Monia is that the witness has to claim his privilege in the grand jury setting or else it is going to be lost to him.

I think then that his failure to assert the privilege -- I think if he failed, in the face of the District Court order or in the face of the questions themselves, to assert the privilege under the general rule that it must be asserted, he would lose the privilege.

QUESTION: Yes, but waiving the privilege is quite a different thing from saying there was no compulsion at all. Which are you arguing?

MR. SHEEHAN: I don't --

QUESTION: Maybe I'm not -- Let me give you another case. Supposing a witness who is not even a defendant at all responds to a subpoena, gets on the witness stand and they say,

"Where were you on such and such a night?" And he says, "I'd rather not tell you. I was with a friend and I don't want to identify him because he's" -- some personal reason. And the prosecutor says to him, "Well, you must answer. You are under subpoena and you've got to answer the question."

Is he being compelled to answer, or not?

MR. SHEEHAN: I think in that case it would be incumbent upon him to, if he wanted to keep his testimony out of the subsequent prosecution, to say, "I don't want to testify because it would violate my privilege."

QUESTION: No, he is not claiming privilege at all, no self-incrimination. He just doesn't want to testify, doesn't like to talk about his friends.

Can he be compelled to answer those questions?

MR. SHEEHAN: Yes, I think he can be. I think --

QUESTION: Without going to the judge? Can't you just say --

MR. SHEEHAN: There is no question about it. He is not being --

QUESTION: So then, the compulsion arises without any reference to the judge or any reference to the privilege against self-incrimination. It arises solely from the subpoena and getting on the stand, obeying the law and answering questions.

MR. SHEEHAN: No, but the compulsion takes place when

he is compelled to incriminate himself, when he is called to testify and he says, "I don't want to testify because I don't want to get my friends into trouble." He is then stating, in open court, "I am not being compelled to testify in violation of my privilege against self-incrimination."

If it turns out later that, in fact, he was, that he had an ulterior reason, it seems to me not unfair to insist that he have stated his constitutional reason at the time he was compelled to answer.

QUESTION: Supposing a witness is asked a question by the prosecutor before the grand jury and he says, "I just won't answer that," perhaps for reasons like Justice Stevens suggested.

Now, can he, at that stage, be prosecuted for contempt or do you have to go before the District -- do you have to go before the judge and get an order compelling him to answer?

MR. SHEEHAN: That is my understanding. And he would not, in that case -- I think in that case, he would, indeed, be compelled to answer if -- because the only reason he could avoid it -- Well, I think, in that case, he would be ordered to answer by the District Court judge.

QUESTION: A short answer might be that there is a high price to protecting your friends in that setting. You might be in contempt of court or find yourself charged with perjury.

MR. SHEEHAN: Yes, I think that's right.

I turn now to the question whether the failure by the Government to give a target warning on top of the Miranda warnings that were given or, indeed, alone, automatically results in the coercion of the witness.

Certainly, if warnings regarding the privilege are not required, it seems to us that neither are target warnings because the witness cannot be more coerced by the failure to receive a target warning than he is by the failure to receive warnings regarding privilege.

Even if some warnings are required by the privilege, it does not follow, automatically, that a target warning is required in addition.

If warnings of the privilege are required to be given to a potential defendant, presumably the reason will be that they are necessary to overcome an inherently coercive atmosphere in the grand jury.

There is no reason to believe,we think, that such warnings would not, by themselves, be enough to dispel any inherent coerciveness that might be found to exist in the grand jury.

QUESTION: Mr. Sheehan, may I ask: Suppose this interrogation is not a grand jury interrogation, but by an FBI agent in a custodial context. I gather 1810O1 makes any willfully false statement, in that context, even though he's

had Miranda warnings, does it not, a crime punishable by $10,000 fine or not more than 5 years in prison? Under 18 USC 1001, isn't it?

The way it reads is: "Whoever in any matter within the jurisdiction of any department or agency of the United States willfully makes any false statement shall be fined not more than $10,000 or imprisoned not more than 5 years, or both."

That's what the statute says.

Now, in that context, is it enough to give them Miranda warnings, or do you have also to give them target warnings?

MR. SHEEHAN: Mr. Justice Brennan, I haven't thought about that. I am not sure that I can give an easy answer to it.

QUESTION: Well, there the hypothesis is that in its custodial interrogation of a suspect by an FBI agent who gives him Miranda warnings. Does he also have to tell him he is a suspect?

MR. SHEEHAN: I think he would not have to tell him he is a suspect, as well, in that case.

QUESTION: If then, notwithstanding his Miranda warning, he lies, he can be prosecuted under that statute.

MR. SHEEHAN: I think that's right.

QUESTION: What additional protection would it give him to tell him he was a suspect? Being a suspect doesn't

entitle you to commit perjury. And, on the other hand, even though you are not a suspect, you are protected against compulsory self-incrimination.

MR. SHEEHAN: Yes. The only additional help, it seems to me, that the target warning gives -- Well, it seems to me that it gives no help that warnings of the privilege don't already give to protect against self-incrimination.

The result is the same in respect of target warnings under the Due Process Clause. We think that, as I suggested in the argument just passed, that there is little to be gained by shifting the analysis from the Self-incrimination Clause to the Due Process Clause.

The target warning seems to us to be conceivably helpful to the witness only insofar as it aids in the decision-making process as to whether or not to invoke the privilege.

That process, it seems to us, is afforded all the protection to which it is entitled by the Self-incrimination Clause alone.

It must be assumed, therefore, that some values not associated with the privilege, not protected by the privilege, are protected by the Due Process Clause in the context of a case such as this. We can think of none.

In most cases, the witness already knows, in addition, whether or not he is a potential defendant. Indeed, he may know that far sooner than the Government will discover it.

That would make an additional putative defendant warning doubly unnecessary, as a matter of constitutional law.

In any event, the facts of this case certainly do not show a Due Process violation.

Before questioning the Respondent in this case, the grand jury -- in front of the grand jury -- the attorney gave him full Miranda warnings. The Respondent knew what crime was under investigation. The Respondent knew, in addition, that his connection with the crime was known to the authorities by virtue of his own statements made earlier to the police and the Assistant United States Attorney.

He also knew that the explanation of his invvolvement had not been believed by the policeman to whom he first told it.

In these circumstances, the prosecutor's failure to give him a target warnings, on top of full Miranda warnings, seems to us was not so fundamentally unfair as to deprive the Respondent of Due Process.

Indeed, we believe it was not unfair at all.

I will reserve whatever time I have left, Mr. Chief Justice.

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

Mr. Weisberg.

ORAL ARGUMENT OF FREDERICK H. WEISBERG, ESQ.

FOR THE RESPONDENTS

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

I am Frederick Weisberg. I am counsel for Gregory V. Washington, the Respondent in this case.

I would like to begin by setting out what Respondent's position is in this case, and in the course of that state as clearly as I can what our position is not.

And then I would like to discuss briefly what I understand to be the position of the Government and why we think that position is simply unsupportable under this Court's prior decisions.

Our position in this case is, simply put, that the Government may not compel an individual to incriminate himself by requiring him to testify under subpoena before a grand jury that has focused on him as a target for indictment, and then after he testifies and is indicted, use against him at his criminal trial the compelled self-incriminatory testimony without demonstrating that the defendant made a voluntary, knowing and intelligent waiver when he chose to testify before the grand jury.

The factual premises of that position in this case are the following: Both prosecutors testified below, in this case, in effect, that their purpose in subpoenaing

Mr. Washington to the grand jury was to enable the grand jury to determine, after hearing his testimony, whether or not he should be indicted for the offense under investigation.

What they gave him was a very official looking piece of paper that commanded him to appear before the grand jury. It was signed by the clerk of the court in the name of the Chief Judge of the Superior Court commanding him to appear before the grand jury and answer questions in connection with an investigation into a crime of which he was suspected of having committed.

QUESTION: Was it any different, in any way, from the usual subpoena to appear before a grand jury?

MR. WEISBERG: No, Your Honor. The practice in the District of Columbia in the Grand Jury Section of the United States Attorney's office is to have presigned subpoenas, a stack of them, and, as happened in this case when Mr. Washington came in and asked for his van back and the prosecutor decided this was someone he ought to put before the grand jury because he, himself, may be implicated in this offense, he handed him the subpoena, and it is presigned by the clerk of the court in the name of the chief judge.

QUESTION: Isn't this the practice in most every jurisdiction?

MR. WEISBERG: I am not familiar with other jurisdictions.

QUESTION: I wondered why you thought that was unusual.

MR. WEISBERG: It is not unusual, Mr. Chief Justice. The reason I mention it is not because it is unusual but because Mr. Washington, coming in without counsel, gets a piece of paper signed in the name of the chief judge of the court commanding him to appear and answer questions.

I state that only because it is a factual predicate for our position that there was compulsion in this case.

QUESTION: He would be given a similar piece of paper if he were called as a possible witness in an automobile accident case, would he not?

MR. WEISBERG: That's true, absolutely correct.

QUESTION: Was the subpoena returnable in the grand jury room itself or did he have to go to an assistant U. S. Attorney's office?

MR. WEISBERG: In the grand jury room, Your Honor.

Our position, very simply, is that Mr. Washington, as the Government concedes in this case, had an absolute constitutional right to refuse to answer every single one of the prosecutor's questions in the grand jury relating to the motorcycle found in his van.

He could waive that right, we readily concede, but this record does not support a finding that Mr. Washington voluntarily, knowingly and intelligently waived his privilege

against self-incrimination and two courts below have so found.

Having stated what our position is, I want to be quick to state what our position is not. The issue in this case, as we see it, is not whether grand jury target witnesses are entitled to Miranda warnings or, as the Government would prefer to put it, are entitled to certain warnings on top of Miranda warnings.

We are not asking this Court to extend the prophylactic rules of the Miranda case. We are not asking this Court in the case of grand jury target witnesses to manufacture a set of warnings, the failure to give any one of which automatically will result in the suppression of testimony.

What we are asking this Court to recognize, as it has recognized, in our view, throughout the history of the Fifth Amendment privilege, is that when the privilege applies -- and I will go on to indicate why we think it does apply in this case -- it must be waived. And the waiver must satisfy the requirements of a voluntary, knowing and intelligent waiver. And that does not exist in this case.

I might add, in that connection, that what the court below held, what Judge Nebeker writing for the Court of Appeals held, was not that Mr. Washington's testimony must be suppressed because the Government failed to give a particular warning that he thought was required by some sort of a prophylactic rule, an extension of the Miranda rule.

What the Court of Appeals, as they stated the issue at the outset of their opinion and that they held, Mr. Washington did not voluntarily, knowingly and intelligently waive his privilege for, among other reasons, the fact that he had no way of knowing, presumably, or was not, certainly not told that he, himself, was the target of the investigation when he testified before the grand jury.

QUESTION: How do you square the -- with your view the -- situation of the ordinary witness in a civil or a criminal case, where he gets on the stand and simply refuses to answer a question the judge orders him to answer? He never claims his privilege and he incriminates himself and that answer is offered later in the criminal case and he claims that it was coerced from him, that it was compelled. And his objection is overruled.

MR. WEISBERG: The way we answer that question, Your Honor, is simply this. It is essential to our position that at the time Mr. Washington was subpoenaed --

QUESTION: Let's talk about the witness I am talking about.

MR. WEISBERG: Okay.

QUESTION: Let's talk about him. Now, why doesn't he win with his Fifth Amendment claim?

MR. WEISBERG: Under certain circumstances, it's conceivable to me, given the purposes for which he was

subpoenaed and the Government's knowledge at the time, he would have a valid Fifth Amendment claim.

QUESTION: Let's take the ordinary civil case of an automobile accident and he is called as a witness and he is asked a question and he says, "I would prefer not to answer it," and the judge orders him to answer it and he incriminates himself.

MR. WEISBERG: The answer to that question, Your Honor, --

QUESTION: And his answer is later admissible, isn't it?

MR. WEISBERG: The answer to that question, it seems to me, Your Honor, is in the Garner opinion written by this Court last term, and we rely very heavily on the Garner opinion.

In our view, ordinary witnesses are different. I might add, in a trial --

QUESTION: Yes, but in terms of the Fifth Amendment, what is the explanation?

MR. WEISBERG: The explanation is that when the Government --

QUESTION: Because he didn't want to answer and the judge told him to answer, ordered him to answer, and the result was he incriminated himself.

MR. WEISBERG: The difference is, Your Honor, that

when the Government is seeking to avoid the burdens of the adversary system, the very thing protected by the Fifth Amendment privilege, by subpoenaing target witnesses, people who they expect to be indicted --

QUESTION: Let's talk about the witness I was talking about. Why isn't his Fifth Amendment right infringed in the example I gave you?

MR. WEISBERG: Because with respect to ordinary witnesses, Your Honor, with respect to whom the Government has no purpose to indict, cases from this Court have recognized, primarily in dictum but Cordell by holding, that the burden is on the witness to apprise the Government that they are encroaching on Fifth Amendment territory.

QUESTION: Whether anybody could sensibly say he knew of his right or not?

MR. WEISBERG: That's correct, Your Honor.

QUESTION: The classical definition of compelled self-incrimination is one who is ordered to answer a question over the claim of privilege.

MR. WEISBERG: I agree with you.

QUESTION: So, when you talk about the question of waiver, you are putting the cart before the horse.

MR. WEISBERG: We don't think so, Your Honor.

In the case --

QUESTION: What authority do you have from this Court

for your proposition that in this type of situation you have to show a knowing and intelligent waiver, rather than the claim of privilege being an element in the compulsion?

MR. WEISBERG: We think that the decision in Garner, which we set forth at great length in our brief, is exactly the authority for that, Your Honor.

When you are dealing with someone whom the Government knows will incriminate himself by giving answers and whom it compels, in this case, under subpoena, to give those answers, then the ordinary rule requiring a witness to put the Government on notice makes no sense.

The Government knows it's compelling incriminating --

QUESTION: That's sort of a Due Process not a Fifth Amendment argument.

MR. WEISBERG: We think this case could be decided under either provision, Your Honor, but I think it is part of the Self-Incrimination Clause.

We do not view the waiver requirement as simply a prophylactic rule. If someone is compelled to incriminate himself and is in a situation where the Government knows in advance that the answers are likely to incriminate him and sets out to get those answers by compelling him with a subpoena to give them, then we think that the burden is on the Government to show that he waived his privilege before he answered.

We don't think this is a Due Process case. The Government would prefer to see it as a Due Process case and if his testimony is voluntary, in traditional terms, then that ends the inquiry as far as the Government is concerned.

We don't think that is the case here.

The Government does not argue that Mr. Washington waived his privilege. In the face of two holdings by both courts below, the Government argues instead that he was not compelled to incriminate himself. Presumably, the argument is that he had -- even though he testified under subpoena -- he had the right not to incriminate himself by simply saying, "I refuse to answer on the grounds that the answer to that question may incriminate me."

I should point out here that in many cases like this, and certainly in this case, we are dealing with a witness subpoenaed to the grand jury without counsel, unable to afford counsel, who probably, at the risk of being glib, does not even know what the word "incriminate" means.

And the Government claims that what his burden is is to understand the in's and out's of the Fifth Amendment privilege, to know which questions to assert it to, which questions it doesn't apply to and to assert it when it applies. And we simply think that view ignores reality.

QUESTION: The description of his colloquoy with the police would indicate he was rather an adroit, innovative,

inventive kind of a fellow. Wouldn't you think so?

MR. WEISBERG: I must say, Mr. Chief Justice, that that --

QUESTION: You mean he didn't know that he was in some -- on the threshold, possibly, of some kind of trouble?

MR. WEISBERG: Well, I -- No. Simply, no. He knew that there was a stolen motorcycle. At that point, there was a stolen motorcycle found in the back of his van.

QUESTION: Which someone had just happened to place there.

MR. WEISBERG: He knew how it got there.

QUESTION: Did you ever hear that story in law school about, "How did you get that bag of diamonds? Oh, a guy came by and handed it to me"?

MR. WEISBERG: I've heard that story many times in case -- practice.

QUESTION: Is this one any different?

MR. WEISBERG: I don't know whether it is different or not, Your Honor. He was not indicted for perjury. Everybody that he told that story to had doubts about it, but he never wavered one fact from the way it happened.

QUESTION: Not even a --

MR. WEISBERG: To this day.

QUESTION: Well, when he gets out he will.

QUESTION: Mr. Weisberg.

MR. WEISBERG: Yes, sir.

QUESTION: I understand that you say you are not interested in Miranda warnings, that you want what has been called target warnings. Precisely what, in addition to warnings that were given in this case, do you think are required?

MR. WEISBERG: Mr. Justice Powell, in our view, the focus on what he was told or not told is the wrong focus. He needed to be put in a position where his decision to testify could satisfy a court as a voluntary, knowing and intelligent waiver of his privilege.

QUESTION: What, in addition, do you think the prosecutor should have asked him in this case?

MR. WEISBERG: Whether he understood that the body that he was appearing before might indict him for a criminal offense and he might be prosecuted.

QUESTION: Do you think that is materially different from telling him that whatever he said could be used against him?

MR. WEISBERG: Yes, Your Honor. There is every likelihood that Mr. Washington had no way of knowing what the Government meant when they said could be used against him. For all he knew, he would have to testify later as a witness and what he said was going to be used to try to twist his story then.

He was given a subpoena by a prosecutor who indicates in the record below that he may have told him that he was needed as a witness in connection with the on-going grand jury investigation.

For all Mr. Washington knew when he testified, he was appearing as a witness in connection with an investigation against two other people.

And I might say, that's not my own personal -- that is my own personal view, but it is not just my personal view. Both judges, both courts below, Judge Hannon on the Superior Court and Judge Nebeker for the Court of Appeals, thought that that warning was indispensible in this case to a voluntary, knowing and intelligent waiver, and both refused to find waiver on this record.

QUESTION: Suppose a prosecutor in this case did not know, personally, that Respondent was the target of the investigation but the files did show that Respondent may be a target. What would your view be as to the requirement of the Constitution?

MR. WEISBERG: It seems to me that there has to be some knowledge on the part of the Government that it is compelling potentially self-incriminatory testimony before our analysis is activated.

QUESTION: Does that mean the prosecutor would have to exercise due care to know what the Government might know

through the FBI or, perhaps other officials?

MR. WEISBERG: I would think at a minimum that is correct. And, as a practical matter, prosecutors, generally know at least the outlines --

QUESTION: Perhaps, not always.

MR. WEISBERG: It may be that they don't always and in such a case, if the Government can make a claim before a reviewing court that this was really an ordinary witness, that they had no basis for thinking that this person -- that they were not trying to avoid the burdens of the adversary system by building a case against this person out of his own mouth, then it seems to me our analysis might not apply.

But I hark back to the opinion you wrote last term in Garner, Your Honor, and it seems to me all the requirements of that opinion are met here. The Government knew exactly why it was subpoenaing Gregory Washington. It was subpoenaing because it didn't believe his story and it thought the grand jury might not believe his story, and if they didn't the grand jury would indict him and they could prosecute him and use his own testimony against him.

QUESTION: In Garner, the Court stated the general rule derived from Monia -- or however one pronounces that decision -- and it said there were three exceptions to it.

Which of those three do you think applies to this case?

MR. WEISBERG: In a sense, Your Honor, I think all three apply.

QUESTION: Which of the three is more relevant? You go ahead and answer it any way you wish.

MR. WEISBERG: It seems to me, starting with the one that seems least like this case, the difference between Garner's situation and Mr. Sullivan's situation and the situation of Marquetti and Grosso is that the Government when it compels Marquetti and Grosso to file a tax return, required only of gamblers, knows that when it gets that return it has incriminating evidence of gambling which it can then turn over to the states or the Federal Government for prosecution of gambling offenses.

Like the defendants in Marquetti and Grosso, Mr. Washington was subpoenaed because the Government knew what his story was likely to be and that it would be likely to make him a criminal defendant if he told it to the grand jury and they disbelieved it.

Like the situation in Miranda, although we don't rely on the prophylactic aspects of Miranda, what -- aside from the custody aspect of Miranda which I hope to get to in a minute because I think it has absolutely nothing to do with this case, the other half of the Miranda decision is the focus rationale, that when the police are questioning non-suspects in the fact-finding process, people on the street who might

know something about an offense, about whom they have no reason to think are guilty of any offense, there is no requirement to give warnings and there is no requirement to get a waiver, and if those persons happen to incriminate themselves, at some point there would be a burden to give warnings when they became a suspect, but at least the threshold statements would not be excluded under the Miranda rule.

So, too, here, if Mr. Washington was subpoenaed solely because he was someone who had seen the van drive away with a motorcycle, just an ordinary witness, and lo and behold, when he got in there the Government realized for the first time that this person may be implicated in the offense, we think any incriminating statements made, much like the ordinary witness at trial, would not be protected by our analysis.

Except that, it is our view, that when the person began to incriminate himself in the grand jury, testifying under compulsion of subpoena, the proceedings ought to stop and the prosecutor ought to then say, "You are getting yourself into trouble, perhaps you ought to consult with a lawyer."

And I am not sure what the third --

QUESTION: You mean if the Government has a man in the grand jury room and they say, "Did you steal this property?", they should stop and say, "By the way, if you answer that question the wrong way, you may be in trouble."

MR. WEISBERG: No, Your Honor. If the question --

If he is subpoenaed because he is suspected of having stolen the property, as was true here, then the Government has to do that before they even get him in the grand jury.

That's our view.

QUESTION: The fact is that in this case the prosecutor misinformed him as to his rights, didn't he? Told him that he had rights that he, in fact, didn't have. He said, "You have a right to remain silent. You are not required to say anything to us in this grand jury at any time or to answer any questions."

Now, that's just incorrect, wasn't it?

MR. WEISBERG: Your Honor --

QUESTION: He was required to answer any questions.

MR. WEISBERG: He was required to answer every question.

QUESTION: Every question. So he was misinformed. He was told that he had rights that, in fact, he did not possess, wasn't he?

MR. WEISBERG: We have not argued in this case because it is not necessary to our position that a putative defendant in the grand jury has, like a defendant in a trial, an absolute right to refuse to testify if he is, in fact, a putative defendant. That simply is not necessary to our position and so we haven't argued on it.

I think an argument can be made based, in some part,

on Mr. Justice Rehnquist's opinion in Michigan v. Tucker -- language in the opinion -- that just like the defendant in a trial, his right to remain silent at trial, could be practically nullified if you make him go into the grand jury without counsel and fend for himself and decide which questions he thinks might incriminate him and which might not.

QUESTION: But if this man were told that he had an absolute right not to answer any questions, a fortiori, he certainly had a right not to answer any questions that would incriminate him, didn't he? He was overwarned. He was over-advised. He was told he had rights that he didn't have, but certainly those rights could include rights that he did have.

MR. WEISBERG: If I understand, Your Honor's question, that's why I responded to Mr. Justice Powell by saying focusing on what he was told or what he was not told, it seems to me, is the wrong focus.

Two courts below viewed this record, viewed this defendant and heard arguments and held that this was not a voluntary, knowing and intelligent waiver, and they could not --

QUESTION: But he was advised he didn't have to answer any questions, wasn't he?

MR. WEISBERG: That's correct.

QUESTION: While that was incorrect advice, that was the information he was given.

MR. WEISBERG: The only thing I am quarreling with is

that means that he was overwarned.

We submit he was, notwithstanding that, under-warned, because he had no way of knowing why he shouldn't answer questions.

QUESTION: Well, he was told he didn't have to answer any.

MR. WEISBERG: That's correct.

QUESTION: He wouldn't have had to give any reason for not answering under the text of the prosecutor's warning.

MR. WEISBERG: I see what you are saying. If he had refused to answer the question, without claiming the privilege --

QUESTION: He was told he could. He had a right not to answer any questions.

MR. WEISBERG: Our view is that contempt proceedings would have begun very quickly and the prosecutor would have told him that he misspoke himself when he said he could remain silent.

QUESTION: Where is the compulsion?

I mean, the man says, "You don't have to answer any questions."

Now, where is the compulsion after he makes that statement?

MR. WEISBERG: Your Honor, the subpoena he gets tells, it commands him to testify and give answers. He is

then told by a prosecutor he doesn't have to give answers.

Not knowing, without a lawyer, why that advice makes any sense to him --

QUESTION: But did he understand it?

MR. WEISBERG: He may not have understood why it made any difference to him.

QUESTION: Did he understand it?

MR. WEISBERG: He may have understood that he --

QUESTION: He didn't have to answer any questions.

MR. WEISBERG: He may well have understood that, Your Honor.

QUESTION: And once he understands that, that's the end of the compulsion, is it not?

MR. WEISBERG: Not in our view.

QUESTION: Well, what is the compulsion after that?

MR. WEISBERG: When you are under subpoena, as a target --

QUESTION: After that.

MR. WEISBERG: When you are under subpoena as a target witness --

QUESTION: Oh, it carries over.

MR. WEISBERG: Our view is that the --

QUESTION: Three weeks, I guess, or four weeks.

MR. WEISBERG: It is not a temporal thing, Your Honor. Our view is that the compulsion ends when the voluntary,

knowing and intelligent waiver can be found. And two courts have found that it could not be found on this record.

QUESTION: Mr. Weisberg, in your view is the grand jury proceeding a criminal case, within the meaning of the Fifth Amendment?

MR. WEISBERG: The short answer to that question is yes. The long answer is that since Counselman v. Hitchcock this Court has consistently held, in probably a hundred --

QUESTION: Well, if that's your view, and if you say he is tantamount to a defendant when he is a putative defendant, do you still agree with Justice Stewart that he was overwarned?

MR. WEISBERG: I understand your question.

It is not a criminal case in the sense that a criminal trial is a criminal case. The grand jury proceeding is -- One of the problems in this case is that we think that the analogy to the criminal defendant is a very strong one. This guy -- if he answers the questions as he did he will be a criminal defendant the next day as soon as the grand jury hands up its indictment, and he is doing it without counsel.

QUESTION: I understood your theory to be that he was, in essence, the same as a defendant because the Government has already made up its mind to proceed against him. Therefore, his rights before the grand jury were tantamount to his rights in open court which would be the right to answer no questions

at all, which would mean that he was not subpoenaed. He had a right not to be subpoenaed.

MR. WEISBERG: I meant that as an argument by analogy, Your Honor, as the supporting basis for a holding that a putative defendant, true putative defendant before the grand jury, would have a right to silence.

We do not make that argument in this case because it is unnecessary to this case. We argue, only, that he has a right not to answer incriminating questions. Like an ordinary witness, except that unlike an ordinary witness, when he is subpoenaed because he is not an ordinary witness, because he is the target, the ordinary duty to inform the Government that they are subpoenaing self-incriminatory testimony is unnecessary because it makes no sense. They already know they are subpoenaing self-incriminating testimony. And what takes its place is that there be a voluntary, knowing and intelligent waiver of the privilege.

QUESTION: At the point that Justice Stewart took you and characterized it as an overwarning, he had already been told that he could have a lawyer outside the courtroom to help him, hadn't he?

Then, when that continues, you also have a right to stop answering at any time until you talk to a lawyer, which, again, is an overwarning. He didn't necessarily have that right.

Now, the prosecutor went on and said, "Do you want to answer questions in reference to the stolen motorcycle that was found in your truck?", and he said, "Yes, sir." And, "Do you want a lawyer, here or outside?" That's the third time, now, he is told about a lawyer.

"Do you want a lawyer, here or outside the grand jury room?"

"No, I don't think so," says he.

How do you say, again, that he hasn't been warned about his rights?

MR. WEISBERG: Your Honor, he was warned. We agree with that much of the plurality opinion, Mandujano, that says certain of the Miranda warnings are inapplicable in the grand jury context.

Our position is that Miranda fashioned warnings so that people would understand what they are giving up when they answer questions.

The warnings that are applicable in the police station are simply inapplicable in the grand jury. And what he needed to be told in the grand jury was, "By the way, Mr. Washington, this body whose questions you are about to answer, is going to indict you if you answer them a certain way and you don't have to. And if you want to remain silent, you have that right to do so, but you should know when you testify that if you don't remain silent you are targeted for

indictment."

QUESTION: I know that's the argument you make and I know that is one of the issues in this case, but certainly whether or not you are a target in an investigation doesn't either elevate or depress your constitutional right not to be compelled to testify against yourself. That's true whether you are a target or not a target.

MR. WEISBERG: I agree.

QUESTION: And neither truer nor less true whether or not you are.

MR. WEISBERG: I agree.

QUESTION: Is that correct?

MR. WEISBERG: I agree with that.

QUESTION: And whether you are a target or not a target you don't have any privilege to tell a lie under oath which, of course, is not involved here.

MR. WEISBERG: We agree.

QUESTION: So, why, what's the point? What's the purpose of telling somebody he is a target. His constitutional right is no greater and no less whether he is a target or isn't a target.

MR. WEISBERG: I would respond to that question, Mr. Justice Stewart, in two ways.

First, the difference between an ordinary witness and a target witness is that if the Government has no idea this

witness is in any jeopardy, that it is not compelling self-incrimination by subpoenaing him, then the cases have recognized that he has to tell the Government that it is compelling self-incrimination, that the subpoena that it issued him and the duty, his duty to testify, will force him to incriminate himself. That we take out of the Garner opinion.

QUESTION: So that's a question, it goes to compulsion, then, right?

QUESTION: Or does it go to waiver?

MR. WEISBERG: We think he is compelled by the subpoena, Your Honor, to answer. And if he is compelled and if he is in the category of suspects recognized in Garner as not being required to put the Government on notice simply because the Government is already on notice, then the compulsion of the subpoena is only undone by a voluntary, knowing and intelligent waiver.

And we think that that requirement is not merely a prophylactic rule. This is not a Due Process voluntariness case. This is a privilege against self-incrimination case. And when the privilege applies it's a constitutional right that has to be given up.

QUESTION: What's your definition of a target defendant?

MR. WEISBERG: We have, again in this case, not

defined that.

QUESTION: Well, it is quite important. And if we were to adopt the principle that you are advocating, prosecutors would have to know who were target defendants and who weren't.

MR. WEISBERG: I agree. The principle that we think is the one that emerges from the Garner opinion.

QUESTION: Well, how do you define it?

MR. WEISBERG: When the Government knows that the answers that it is compelling by subpoena may incriminate that witness, in the sense that the witness is a potential target for indictment.

And what the Government knew in this case is that the grand jury would either believe him or it wouldn't believe him.

QUESTION: When the Government knows that the answers it is compelling from the witness will incriminate him?

MR. WEISBERG: Will incriminate him not in the sense that he is definitely going to be disbelieved and definitely going to be indicted, but in the sense that if he is disbelieved he may well be indicted.

QUESTION: Well, that is true of any witness before a grand jury, isn't it? If he is disbelieved, he may be indicted, probably for perjury.

MR. WEISBERG: But in this case, Your Honor, the difference is that the Government knew when it subpoenaed him that one very likely possibility is that the grand jury would disbelieve him and indict him,and that's why they subpoenaed him.

QUESTION: What if I'm a prosecutor and I know that a potential grand jury witness is apt to lie before the grand jury. Do I have to warn him that he is a potential perjury defendant?

MR. WEISBERG: I think the answer to that question is no, in light of the Mandujano opinion, but that may be affected.

I have only one minute left and I would -- Do I have a minute left?

And I would like to comment very briefly on what the Government's argument really comes down to.

What it seems to me to be is that if they tell these witnesses what their constitutional rights are, some of them are going to exercise those rights and the Government is going to lose some testimony.

If what they are worried about is losing the testimony of the individual in a prosecution against that individual, our view is that that's exactly what the Fifth Amendment protects.

If what they are worried about is losing the

testimony of that individual against others whom he might know about in the world of crime, our view is that it loses nothing by giving warnings, because it tells the witness what -- effective warnings, or obtaining, as we would say, at a valid waiver.

QUESTION: The question isn't whether the Government loses something. The question is whether the Constitution requires --

MR. WEISBERG: That's our starting point, Your Honor.

QUESTION: -- We know whether it is a good idea to give them warnings.

MR. WEISBERG: I agree completely. Our starting point is not that the Constitution requires the warnings. The Constitution requires a waiver, and whatever warnings are given, a court has to be able to say that when that person decided to testify it was the product of a voluntary, knowing and intelligent waiver.

What I wanted to mention briefly is the immunity provisions which answer almost all of the Government's arguments about losing testimony against other people involved in crime.

If the person has to make a waiver and refuses to waive, the solution is simply, "I'm sorry, you can't refuse to waive. Here is an immunity statute that compels you to testify despite your unwillingness to waive."

And they can compel that testimony and the only thing they can't do is use that testimony against the individual whom they've compelled under a grant of immunity. They can still prosecute the individual under the ruling in Castigar.

QUESTION: But on your theory, then, the only way you can compel testimony before a grand jury is to grant immunity to people.

MR. WEISBERG: Not at all, Your Honor. They can obtain a voluntary, knowing and intelligent waiver.

QUESTION: Suppose that before every question they asked -- or after every question they ask to a witness for a grand jury, this witness, the prosecutor said, "Remember, you don't need to answer this question at all if you don't want to. And, furthermore, you don't need to answer if it tends to incriminate you."

Which warning would you rather have?

MR. WEISBERG: Of those two?

QUESTION: Yes. Which privilege would you rather have? Not to answer at all and not embarrass your wife, your friend, your neighbors, or the latter?

MR. WEISBERG: If I were a suspect, the right not to answer anything, regardless of incrimination.

QUESTION: Well, that's Justice Stewart's point, isn't it?

MR. WEISBERG: But two courts below, Your Honor, have said that, in this case, he didn't knowingly, intelligently waive his privilege because he didn't know --

QUESTION: Well, what if you were in the witness chair and the prosecutor gave you both of those, both of those suggestions. Now, remember you don't need to answer it at all.

Now, "Do you want to answer?" And you say yes.

How about that?

MR. WEISBERG: It seems to us, Your Honor, that unless this Court can conclude that that was a knowing and intelligent waiver, over the holdings of two courts below, that the holdings of the two courts below -- of the court below ought to be affirmed.

QUESTION: I agree with that, but what about you? What's the argument that it isn't a knowing and intelligent waiver?

MR. WEISBERG: That he had no basis of knowing why he shouldn't answer those questions.

Why shouldn't he answer them? He was in no jeopardy.

They want to know about the motorcycle found in his truck that was driven by two other people, "I'll tell them the story, because they are not interested in me."

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

Do you have anything further, Mr. Sheehan?

REBUTTAL ORAL ARGUMENT OF WILLIAM F. SHEEHAN, ESQ.

ON BEHALF OF THE PETITIONER

MR. SHEEHAN: I would like to add one point in conclusion.

We think the issue in this case is whether the statements were voluntary. Voluntary statements are admissible.

This testimony was not compelled against the privilege against self-incrimination by the issuance of the subpoena alone.

Now, that seems to me to be the first question the Court has to decide, whether the subpoena to appear coerces testimony in violation of the privilege.

If that does not, as we believe it does not, then the Court must decide whether or not this situation is one in which you can abandon the traditional test for voluntariness. Was the witness' will overborne by some sort of informal coercive practices, such as took place in the Miranda case.

QUESTION: Mr. Sheehan, may I just ask one question.

You know the overwarning part of the warnings were given, "You need not answer any questions at all."

I take it the Government does not, as a matter of routine, give all witnesses such advice, does it? That would mean nobody would ever have to answer any questions before

the grand jury.

MR. SHEEHAN: I think that is probably right.

QUESTION: Is it not a fair inference, then, that if a person like this is given such a warning the Government must have had some notion of intending to indict him?

MR. SHEEHAN: I think that there is no -- No. No. I don't think it is a fair inference.

QUESTION: Would there be any reason to give a warning this broad, unless the person were a likely defendant?

MR. SHEEHAN: I think that there is no question but that this person was a possible defendant. The Assistant United States Attorney who gave him these warnings had not decided in his own mind whether he would request an indictment from the grand jury in respect to the Respondent, or not.

I mean he was certainly aware there was a likelihood, fifty percent chance, as far as he knew, maybe more, that an indictment would follow following this Respondent's testimony.

QUESTION: Isn't it equally likely that this warning, overwarning, was simply an inadvertent mistake. This is not the standard warning given to witnesses, if they have a standard warning, is it?

MR. SHEEHAN: I think that is entirely correct, Mr. Chief Justice. I don't think that the Assistant United States Attorney, in this case, focused on this question to the extent that we ought to.

QUESTION: Did he testify at the hearing?

MR. SHEEHAN: I believe he did.

QUESTION: Was he asked why he gave that type of warning?

MR. SHEEHAN: No.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:29 o'clock, p.m., the case in the above-entitled matter was submitted.)