In the

Supreme Court of the United States

UNITED STATES OF AMERICA

Petitioner,

v. No. 74-635

ROSE WONG,

Respondent.

Washington, D. C.
December 6, 1976

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UNITED STATES OF AMERICA, Petitioner,	:	
v.	:	No. 74-635
ROSE WONG, Respondent.	:	

Washington, D. C.

Monday, December 6, 1976

The above-entitled matter came on for argument at 11:36 o'clock, a.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, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C., 20530, for the Petitioner.

ALLAN BROTSKY, ESQ., 1256 Market Street, San Francisco, California, 94102, 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 74-635, United States against Rose Wong.

Mr. Sheehan.

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 United States Court of Appeals of the Ninth Circuit. That court affirmed the order of the United States District Court suppressing, for use in evidence in Respondent's perjury prosecution, the testimony that she previously gave before a grand jury.

This case and the next one following it both involve the broad question whether the Constitution requires that the Government give any sort of warnings to grand jury witnesses when the Government has reason to believe that the witness may be indicted on the basis of the testimony that it sought from him.

This case, however, can be decided, and indeed we think that it should be decided on a more narrow ground. For this is a perjury case and there are special policies applicable in such cases, as this Court recognized last term in United States v. Mandujano.

Those policies, in our view, apply here and they warrant a reversal, without consideration of whether warnings are required.

The facts are these. On September 7, 1973, the Respondent Rose Wong, appeared pursuant to a subpoena before a grand jury in the Northern District of California. She was called to testify as part of the Government's investigation into gambling and bribery in the Chinatown section of San Francisco.

The Government already had evidence that she had paid bribes to certain police officers who were cooperating with the FBI. It was thought that she or other persons unknown to the grand jury might also have paid bribes to other police officers who were not cooperating with the Government, and it was, in part, to learn the identify of these other officers that she was called to testify.

When she appeared before the grand jury, the grand jury foreman administered the oath and right after that the Government attorney told her what the nature of the grand jury investigation was and what its purpose was, that it was investigating bribery and gambling in Chinatown.

She was told that she had been called because it was thought that she had information that might be helpful to the Government's investigation.

At that point, the Government attorney gave her a

series of warnings. She was never told that she was required to answer all the questions that were put to her. She was told, instead, that she could refuse to answer any question that she felt might tend to incriminate her. This advice was repeated twice. She was told this was a constitutional privilege of hers. She was asked if she understood and she said that she did.

She was then told that anything that she said could be used against her in a subsequent prosecution and she said she understood.

She was told that she had the right to consult with an attorney before answering any questions. She said she understood. She was asked if she had already consulted with a lawyer. She said she had not. She was told that she could stop the questioning at any time that she felt was necessary to do so. She said she understood that --

QUESTION: Mr. Sheehan, I am just wondering why you are going through these facts. Didn't the lower court find, specifically, that she did not understand, and don't we have to accept that as a finding for purposes of appeal?

MR. SHEEHAN: The lower court found, specifically, that she did not understand the warnings regarding the privilege. The lower court found that she did understand the warnings regarding purjury, which I was about to say that she did receive. That was explained to her, that she would be

liable to a prosecution for perjury, and that she understood --

QUESTION: Does the case involve any issue with respect to the adequacy of the warnings pertaining to perjury?

MR. SHEEHAN: No, it does not. I go through this recitation principally because there is a due process claim here that in some manner the Government's conduct in this particular case was offensive to notions of due process, and it seems to me important that the Court --

QUESTION: Do you think it is important as to whether or not the prosecutor deliberately misled her or simply that she was misled? Is that critical to the due process argument?

MR. SHEEHAN: We think that the problem --

QUESTION: She did not understand is the point, I guess, rather --

MR. SHEEHAN: We think that the proper analysis is under the Self-incrimination Clause, as I will come to.

I think the Government's conduct here is really beyond reproach. In fact, her attorney at the hearing on her motion to suppress said that he was not calling the Government's conduct into question in this case.

The District Court found that the Government's conduct was not to be criticized in this case, the conduct of the Government attorney. And, indeed, the Court of Appeals found that the Government had acted in good faith.

QUESTION: I just didn't quite understand the relevance of the details of the testimony, that's all, when we have two very simple, clear-cut findings, as I understood the record.

QUESTION: Isn't it true, Mr. Sheehan, that in view of the District Courts findings that she didn't understand these warnings, that analysis in this case has to proceed upon the premise that the situation here was tantamount to the situation that would exist if no warnings had been given?

MR. SHEEHAN: Yes. That is correct. We do not contend otherwise.

QUESTION: And that is -- So you accept that premise.

MR. SHEEHAN: Yes. We do not contend -- We do not contest the finding of the District Court that she was unable to understand the warnings regarding the privilege, and she was then, in effect, in the position of one who had received no warnings.

QUESTION: Is that the predicate for your suggestion that the case could be decided on a narrow ground?

MR. SHEEHAN: The predicate for our suggestion that the case can be decided on a narrow ground is because we think that it does not matter whether or not she had received warnings, effective or otherwise.

We think that this case is controlled entirely by

United States v. Mandujano which was decided last term. In that case, as in this case, the Court of Appeals had held that the Government's failure to advise a potential defendant of the privilege against self-incrimination was a bar to the use of the witness' testimony in the subsequent prosecution for perjury.

This Court reversed, although there were several opinions. All of the justices who participated agreed that, whether or not warnings were required, a witness could not commit perjury and thereafter claim that the privilege against self-incrimination was a protection from prosecution for perjury.

Indeed, all of the justices were in agreement that on the facts of the case in Mandujano there was no due process violation.

The facts here are in all relevant respects the same and we believe the results should be, as well.

Now, although the Court of Appeals ruled that its result could not be sustained under the Self-Incrimination Clause, Respondent has argued that, indeed, her position is supported by the Self-Incrimination Clause.

Accordingly, I will take that matter up first.

It is well settled that that constitutional provision does not protect against the crime of perjury. The opinions in Mandujano to that effect did not state a new

doctrine.

In the Glickstein case and the Knox case and the Bryson case, this Court said that coercion may not be avoided by perjury. One central rationale behind those cases applies squarely here.

In making the statements that are the subject of the indictment in this case, the Respondent was not, indeed, incriminating herself in regard to a past crime. She was, instead, committing a new crime.

However broad the protection afforded by the privilege, it is not a license to commit perjury.

The Respondent argues that this case is not the same as Mandujano and that the use of her testimony in a prosecution for perjury would violate her privilege.

She says that it was important to the result in Mandujano that in that case the witness had received warnings and understood warnings, apparently, and that she, not having understood them and having been in the position, therefore, of one who had not received warnings, was somehow compelled against her will to lie in response to the questions put by the Government attorney.

In our view, it was entirely irrelevant, in Mandujano, that the witness there had received warnings. And the reason that it was irrelevant is because even if the witness had been compelled to testify in Mandujano, that would not have

protected him from a prosecution for perjury.

In support of this proposition, I rely upon the cases that the Court in Mandujano relied upon. The first of those was the Glickstein case. There the defendant testified under the compulsion of a statute that granted him immunity.

This Court said that, as a constitutional matter, the privilege against self-incrimination could be overborne and the Government could compel testimony, even incriminating testimony, provided that it granted an immunity coextensive with the privilege.

The Court then said that as a corollary to the Government's power to compel testimony it must also have the power to assure that whatever testimony is given in response to that compulsion would be truthful.

In that case, the statute in question, was held to confer an immunity no broader than the Constitution and the use of the defendant's testimony was upheld, notwithstanding that he had given it under compulsion.

The Knox case and the Bryson case are both much the same. In Knox, a Federal statute made it criminal for certain persons to fail to file a certain form. In response to this compulsion, Knox filed a form that contained falsehoods and he was then prosecuted under another statute forbidding false statements.

Even though, under Marchetti and Grosso, under those

subsequent cases, Knox would have been protected by his privilege from filing any form at all, his filing of the false form was held unprotected.

The Court noted that the prosecution was not based on any incriminatory information that was given in submission to compulsion.

Neither was the prosecution in Mandujano, neither is the prosecution here.

When each of these witnesses responded to any pressure that they may have felt that they were under by giving false testimony, that, as the Court said in Knox, was simply not testimonial compulsion.

In Bryson, the Court put the matter quite simply, "There is no privilege to answer fraudulently a question that the Government should not have asked."

There is, therefore, no meaningful difference between this case and Knox and Bryson and Glickstein. Whether or not they knew that they had a privilege was not important since they could not realistically have exercised it anyway.

Whether or not the Respondent here knew she had a privilege also did not matter.

Even assuming then that somehow her failure to know of her privilege resulted in a situation where the Government was compelling her to give answers against her will, there is nothing in the Self-Incrimination Clause that requires that her

false testimony be suppressed in a prosecution for perjury.

We turn now to the Due Process Clause which was relied upon by the Court below.

QUESTION: May I just ask you this before you proceed to that point.

Am I correct in my recollection that in the Mandujano case Mr. Mandujano was advised and informed of his constitutional privilege against compulsory self-incrimination?

MR. SHEEHAN: You are correct.

QUESTION: That is correct and that is the --

MR. SHEEHAN: That is correct.

QUESTION: And here, we proceed on the premise that Mrs. Wong was not.

MR. SHEEHAN: That's correct. Our position is that even though the defendant in Mandujano received warnings, whether he understood them or not, whether he received the warnings or not, was entirely irrelevant to that decision which was another in a long line of cases in this Court saying that a response to compulsion by perjury is not protected by a privilege.

Now, the Court of Appeals, I think, agreed pretty much with so much of what I have just said. And they rested their result, instead, on the Due Process Clause.

We think that the due process analysis adds very little to the problem. To the degree that any constitutional

policies would appear to be implicated in questioning witnesses in circumstances like those here, those policies, in our view, are fully accounted for by the privilege.

Indeed, the court below did acknowledge as much when it said that the procedure followed here by the Government was unfair because of what the court perceived as "the threats that it poses to the values protected by the privilege."

That's a quotation from the court's opinion at page 2A of our Appendix.

Since there have been no values protected by the privilege that have been violated here, in our view that should end the case.

But, assuming that there are some values having nothing to do with the Self-Incrimination Clause, but are somehow implicated in this case, we submit that the Government's conduct did not violate the Due Process Clause.

We think it is not automatically unfair to call before the grand jury a witness whom the Government has reason to believe is involved in the crime under investigation.

As this Court said in Michigan v. Tucker, subject to applicable constitutional limitations, the court is not forbidden all resort to the defendant to make out its case, and, indeed, we find support for that proposition in the Schmerber case and the handwriting and voice exemplar cases.

Is is important to the grand jury's task to be able to call before it witnesses who have some knowledge of the crime. The facts in this case are illustrative. When the grand jury called the Respondent to testify, so far as it knew, it was facing a widespread system of police corruption in San Francisco.

In fulfilling its responsibilities of determining whether crimes had been committed and, if so, by whom, the testimony of witnesses like Respondent who, by virtue of their involvement in the crime or in a position to know something about it, is essential to the grand jury's task.

Thus, we say that without more it could not have been a violation of due process simply to call the witness in front of the grand jury. Once she appeared, as I pointed out earlier, the Government's conduct was beyond reproach.

Her counsel said, at the hearing on the motion to suppress, "I want to make it clear that no criticism is intended here of the prosecutor who appeared before the grand jury."

QUESTION: What page of the Appendix is that on?

MR. SHEEHAN: That was page 9, Mr. Chief Justice.

On the following page, the District Court said there couldn't possibly be any question as far as the conduct of the United States Attorney is concerned. And, indeed, the Court of Appeals said that there was no question as to the good faith of the Government.

The facts here, then, are quite similar to those in United States v. Mandujano. In that case, all of the Justices were agreed that the Government's conduct had not violated the Due Process Clause.

We think, here, the Government's conduct has not violated the Due Process Clause.

Mr. Chief Justice, I'll reserve any time I may have remaining.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Brotsky.

ORAL ARGUMENT OF ALLAN BROTSKY, ESQ.

ON BEHALF OF THE RESPONDENT

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

I would assume from the argument of the Government that the Government would concede that effective warnings concerning the Fifth Amendment privilege must be given to a putative defendant grand jury witness.

Although this Court reserved that question, specifically, in Mondujano, I think it has to meet that issue squarely here.

I think that after cases like Beckwith and Garner, last term, there can hardly be any doubt that the Fifth Amendment requires that an uninformed, ignorant witness -- that is ignorant of the Fifth Amendment privilege -- be effectively

informed of his rights to decline to answer questions, the answers to which would incriminate him, or else the Fifth Amendment would virtually be rendered meaningless before grand juries.

QUESTION: Isn't that the issue in the next case?

MR. BROTSKY: I believe it is, but I think before we can complain of what happened to Mrs. Wong it has to be held that she had a right to be warned.

Now, whether you consider that a formula to insure the effective enforcement of the Fifth Amendment or a right compelled by the Fifth Amendment, I think it must be clear to this Court, by now, that such effective information to an ignorant witness subpoenaed before a grand jury is necessary in order that the Fifth Amendment have any meaning.

Now, that being the case, I think it is also imporant for this Court to understand that we also rely on the due process here for our contention that the Court of Appeals was correct in affirming the order of the District Court suppressing her testimony.

Our position is that Mrs. Wong was placed in a "cruel trilemma," to use the language of Murphy v. Waterfront and other cases, without knowing that she had a right to decline to answer, she had the option only of incriminating herself or of perjuring herself.

What the Court of Appeals for the Ninth Circuit said

and what the Government, I think, fails to understand, is that very trilemma or dilemma, as it has been called, is so unfair, is so essentially wrong, that it, in and of itself, violates due process.

This is true whether the dilemma that the witness faces is created by intentional activity on the part of the Government, declining to inform the witness of the privilege, or whether, in this case, it comes about despite what I felt was a good faith effort to do so.

In short, the dilemma, the cruelty, the unfairness, does not depend on Government misconduct, and I think the Government misconceives the meaning of due process when it says that an essential ingredient of a violation of due process is that there must be some affirmative misconduct on the part of the Government.

QUESTION: Isn't there, possibly, another choice, even given all of your predicates, namely, to decline to answer, to decline to answer without attributing any reason for it, to decline to answer as an alternative to lying under oath?

MR. BROTSKY: That is available to a witness that knows that that can be done, but when the prosecutor in this case asked Mrs. Wong -- rather when he was asked at the hearing on the motion to suppress what the situation was in that regard, and when she was asked, and he asked her, she said she thought

that she had to answer every question.

I would agree with you, sir, that if she had done that, ignorant as she was, that a chain of events would have been set in sequence that might well have resulted in her becoming educated because she would then have been subjected to the contempt power of the court. In exerting that contempt power, the court would have appointed counsel to represent her and counsel could then have effectively informed her of her privilege.

She didn't know she had that alternative, Mr. Chief Justice. She answered Mr. Ward when he asked her at the hearing, to the effect that, "I thought I had to answer every question."

So, in that respect, I think she had the alternative but she did not exercise it.

QUESTION: When the District Court elected to accept her understanding, at that stage, as against her understanding in the questions that appear earlier before the grand jury.

MR. BROTSKY: Her understanding at what stage, sir?

QUESTION: The scope of understanding -- That is, he relied on her, without an interpreter at the second stage -- Had an interpreter?

MR. BROTSKY: Oh, yes, there was an interpreter in the hearing before the District Court, clearly there was.

And her answers were given through the interpreter as well as the questions put to her through the interpreter.

QUESTION: But your position is that the questions and answers set forth on pages 3-4 of the Appendix are now all foreclosed because the District Court has made a finding which has been confirmed by the Court of Appeals.

MR. BROTSKY: Yes. I believe the cases uphold us in that position.

Now, if it is true that the violation is one of due process, and it seems to me clear that the testimony whether it is exculpatory, as was the case here, or inculpatory, that is, self-incriminatory, must be suppressed.

The reson for that, I think, stems from cases like Lisenba v. California where the court pointed out that the aim of the requirement of due process is not to exclude presumptively false evidence but to prevent fundamental unfairness in the use of evidence, whether true or false.

In short, to vindicate the violation of the Due Process Amendment which occurred here, to correct it, to deter future instances, it is essential that whether the testimony given as the result of this dilemma of this unfair position in which the witness is placed be suppressed whether it exculpates or inculpates the witness.

Now, in that respect, I think that there is no question that the reason --

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

(Whereupon, at 12:00 o'clock noon, the Court recessed to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

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

ORAL ARGUMENT OF ALLAN BROTSKY, ESQ.(Cont'd)

ON BEHALF OF THE RESPONDENT

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

A few words, I think, are in order concerning the critical distinction between this case and the Mandujano case. I think a distinction that Your Honors have recognized by denying the Government's motion for summary disposition of this case following the Mandujano opinion.

Mandujano was aware of his privilege. He could have claimed his privilege, as the Chief Justice pointed out in the plurality opinion. Having that ability, he did not do so.

QUESTION: But we had no occasion to decide in that case whether any warning was required, did we?

MR. BROTSKY: That's correct.

QUESTION: Because it was clearly given on the record.

MR. BROTSKY: Correct.

So, in Mandujano there was no either dilemma or trilemma. There was no subjecting of the witness to this unfair, cruel, if you will, situation.

QUESTION: Mr. Brotsky, in connection with your

due process argument, would you think that a warning as to other privileges, other than the self-incrimination privilege, might be required, say, such as the attorney-client privilege?

MR. BROTSKY: I, personally, think that such a warning is equally, perhaps not equally, but it is essential, as well. I think that if you warn of the -- or advise of the -- Fifth Amendment privilege, because of the intricacies of the privilege, it would be appropriate and consistent with the purposes of the amendment, and particularly to avoid distinction between those who can afford counsel and those who cannot.

QUESTION: If your due process argument stands on a separate ground from the privilege, it pretty well has to include any privilege that might be availed of, doesn't it?

MR. BROTSKY: I think so.

I think, however, that I should say this. This is an illustration of how one violation is inextricably linked with another. The right to be advised of the privilege flows from the self-incrimination aspect of the Fifth Amendment, but it is the failure to advise that brings into play the due process violation. Because only where there is a failure to advise do you have this dilemma.

So, I would say, then, that when a witness, a putative defendant witness, comes before a grand jury and is not advised, effectively informed of the privilege, you have

a violation of the Fifth Amendment self-incrimination right. That violation, once you ask a question and subject the witness to the dilemma, or trilemma, that we are talking about, then becomes a violation of due process.

QUESTION: Do you think the same analysis would apply to a witness the Government does not expect that it might indict?

MR. BROTSKY: No. I think there is --

QUESTION: Why not? I thought you said you really weren't relying on the conduct of the Government.

MR. BROTSKY: I think I am distinguishing, Mr. Justice White, between the conduct of the Government and the objective reality which the Government has before it.

In this case, --

QUESTION: Well, what about the ordinary witness that the Government doesn't really know about? They just call him as a witness, but, as a matter of fact, he does have some problems about self-incrimination. He is not advised or warned and he is asked some questions. In his own mind, his choice is either to refuse to answer, to incriminate himself or to perjure himself.

That's the way it is, as a matter of fact.

MR. BROTSKY: I think that I would have to answer you with what Mr. Justice Brennan said in the Mandujano case: "That presents the most difficult situation."

But I don't think we have to reach that here at all. I think we can define what we mean by a putative defendant in terms of what the Government knows when it calls the witness.

QUESTION: So, you think there is a substantial dimension to your case, based on the Government's conduct, namely, its knowledge and its calling him as a witness and not informing him clearly?

MR. BROTSKY: Yes. I think that is an ingredient, essential ingredient, of our case.

QUESTION: Mr. Brotsky, precisely, what do you think the witness should have been told? What was the information that the witness should have been --

MR. BROTSKY: I think she should have been told, either through an interpreter or in language that would have effectively told her, that she had a right to decline to answer questions, based on her Fifth Amendment privilege.

QUESTION: Nothing more than that? In other words, you do not suggest that she should have been told that there "may be a possibility that this grand jury is going to indict you."

MR. BROTSKY: Let me leave that to the case that follows, Mr. Justice Brennan.

I don't think I have to reach it in this case. I'd rather not be philosophical. I am concerned about Rose Wong.

As a matter of academic interest, yes, I believe that more than that is required. As a matter of fact, I, personally, believe and concur with your position that a knowing and intelligent waiver of an informed -- by an informed defendant -- is essential if we are to preserve Fifth Amendment values. But that doesn't arise in this case.

QUESTION: I take it then, you are equating this as a parallel to the Miranda type of situation.

MR. BROTSKY: Only in this respect, Mr. Chief Justice.

I agree completely that the grand jury setting is different, wholly different, from the custodial interrogation in --

QUESTION: I didn't mean as to the setting. I mean as to the concept of the right and the waiver aspect.

MR. BROTSKY: Yes, I think that, without reaching the waiver problem because it isn't presented here, I think that the coercion inherent in custodial interrogation which compels the suspect to talk is assumed before the grand jury. When you are subpoenaed before the grand jury, you must talk. You've got to answer every question, as Mandujano makes very plain and as it reminds us. This has been the rule since the Republic was founded.

QUESTION: But Mandujano also said -- the Court said in Mandujano that the oath, itself, is a warning. Did the Court

not say that?

MR. BROTSKY: Yes, and, frankly --

QUESTION: Now, in the Miranda setting, there is no oath and there is no anticipation one way or the other that the subject will tell the truth or tell falsehoods, is there?

MR. BROTSKY: And the person in the Miranda setting could tell falsehoods without, perhaps, becoming incriminated, certainly not in a perjury sense, could they?

MR. BROTSKY: That's right.

But Miranda also teaches, Mr. Chief Justice, that whether the statements made, following the failure to observe the Miranda ritual, whether exculpatory or inculpatory, may not be used.

Now, I would agree with you that the oath makes a substantial difference in the sense that the witness -- had the witness been informed -- would know that perjury was -- The oath, itself, is adequate warning that they must tell the truth.

But the difference between Mrs. Wong's situation and Mandujano's situation was that he knew that he could decline to answer. She did not. She had no other alternative than to either incriminate herself or perjure herself, either exculpate or inculpate herself.

QUESTION: Mr. Brotsky, is she a pauper?

MR. BROTSKY: She is not a pauper.

QUESTION: She wasn't when she was called?

MR. BROTSKY: Well, I can't say that. She did not have an attorney when she was called and when she retained me she paid a modest fee.

QUESTION: What significance if a person who is not a pauper does not have a lawyer?

MR. BROTSKY: I think that --

QUESTION: What is the significance?

MR. BROTSKY: The significance --

QUESTION: If a person can hire a lawyer and doesn't hire one, then who is to be blamed for that?

MR. BROTSKY: I think that may well be true. On the other hand, as I said, until you are informed of your privilege under the Fifth Amendment, you are in a position of having to answer incriminatory questions. And that is the situation of Mrs. Wong.

QUESTION: But you could get the advice of counsel.

MR. BROTSKY: You could. There is no doubt.

QUESTION: If you had money enough.

MR. BROTSKY: That's right. And, perhaps, it could be said that she could be criticized for not having consulted an attorney before going to the grand jury.

QUESTION: Is there anything to be said, at all, Mr. Brotsky, for the notion that any citizen, any person, called before an official body, even without understanding, as

you argue, there was a lack of understanding here, should understand that they must tell the truth, in terms of whatever they tell.

MR. BROTSKY: No question about that.

The thing that I think this Court has to confront is whether, when the choice is between the truth or incriminating oneself, or as in this case since she did come from Chinatown and since there is a tradition in Chinatown that informers are physically retaliated against, she had even more of a subjective reason to fear inculpatory statements. She feared physical harm to herself or her family.

There is no question, Mr. Chief Justice, that it is essential that people tell the truth. But I don't think that our Constitution fails to distinguish between those who, knowing of their rights, knowing they can keep quiet, then deliberately tell falsehoods, and those who have no such option. I think there is a real distinction.

QUESTION: That argument would carry greater weight, perhaps, if you were talking about the person testifying in public in the trial of a case. Here, the testimony was in the secrecy of the grand jury room which is protected.

MR. BROTSKY: Of course, had she told the prosecuting attorney what he wanted to hear, she would inevitably been called. His purpose was to find out what she knew so that he could utilize her testimony in a trial against the officers

that he claimed were --

QUESTION: When you say what the prosecutor wanted to hear, you mean that he was seeking to have her say that she had, indeed, bribed the policeman?

MR. BROTSKY: That's correct. That's what he wanted --

QUESTION: And that that would expose her to retaliation. Is that your suggestion?

MR. BROTSKY: I think that this was a subjective factor, but I don't think it is necessary to the decision in this case. I think the dilemma posed, simply, by incriminating one's self, versus perjuring one's self, is a sufficiently unfair dilemma to call into play the due process guarantee.

Now, I just want to make a few more points.

As I say, there is this connection between the Fifth Amendment privilege against self-incrimination and the due process violation.

When the witness is effectively not informed and you have both violations, then the question arises: What is the remedy?

I think the remedy -- and here, again, you have a distinction between the situation posed by Knox, by Bryson, where you did not have this dilemma, in the same sense.

Where, in Bryson's case, he could have resigned as an officer or declined to answer -- He knew of his privilege.

Mrs. Wong did not know hers.

I think the appropriate remedy is to restore the witness to the position the witness would have been in had the witness known of the privilege and exercised it, namely, to suppress all the testimony, whether it's exculpatory --

QUESTION: Again, these arguments go to almost any witness, other than just one who is a putative defendant.

MR. BROTSKY: I don't think so, Mr. Justice White.

QUESTION: It does because, as a matter of fact, the answers might incriminate.

MR. BROTSKY: If the answers might incriminate, then I think you are reaching the point where that is true, but --

QUESTION: Whether the Government knows it or not.

MR. BROTSKY: All right. I agree you are posing the most difficult question, administratively and philosophically. But that's not the problem we have in this case --

QUESTION: Put this to an ordinary witness called in an ordinary, in any lawsuit or in any criminal case, in an open courtroom.

MR. BROTSKY: No doubt about it, but I know that, as a practical matter, and in real life things don't happen that way.

The U. S. attorney generally knows whether the witness that he is calling, generally knows --

QUESTION: He hopes he does.

MR. BROTSKY: All right. I agree. But I think that this is not the situation we have here, nor is it necessary to decide that question because you have clearly here a putative defendant. The finding was to that effect and certainly the Government has not denied it.

QUESTION: Going back to Justice White's illustration which, I think, is alluded to in the Mandujano opinion, you are not suggesting that a warning is required if a person is called in out of the cold to come into a courtroom and testify.

MR. BROTSKY: No.

QUESTION: Civil case, criminal case, whatever.

MR. BROTSKY: I am not.

QUESTION: Are they not confronted often with precisely the same dilemma or trilemma that you mentioned here, the retaliation, indictment, whatnot?

MR. BROTSKY: No, I don't think so. I think --

QUESTION: They could not be?

MR. BROTSKY: It's possible, but we are talking probabilities now.

QUESTION: We are only dealing with the rare cases. Those are the only ones that come up here. You've got the rare case.

QUESTION: What about the Government who thinks that a co-conspirator is going to testify against somebody who is on trial? And they call him and put him on the stand.

MR. BROTSKY: Usually that person has an attorney to represent them or the attorney for the defendant will make sure they do.

QUESTION: All I am asking is whether you think the Government has to warn him?

MR. BROTSKY: I would say that --

QUESTION: They know he is implicated.

MR. BROTSKY: I would say wherever there is ignorance, wherever there is reasonable ground --

QUESTION: So your answer is yes the same rule would apply as you are urging in this case.

MR. BROTSKY: No, it is not yes. It is only if the situation is one in which the Government knows there is ignorance or has reasonable cause to believe there is ignorance.

For example, if the person shows up with an attorney, obviously, there is no cause to believe that the witness is ignorant.

We are talking about ignorance here. That's really what I think we are addressing ourself to, because while --

QUESTION: If you put it on a Government ignorance, they were ignorant here of the fact that she didn't understand the warning.

MR. BROTSKY: I understand that.

QUESTION: Well, then, haven't you given your case away?

MR. BROTSKY: No. I am talking about ignorance on the part of the witness. If you have a situation where the witness is, in fact, ignorant.

Now, when must the Government do it? I think if you think of the situation here, clearly the Government has to do it here, where they know that the witness, according to police officers, has offered bribes, paid bribes, is implicated in the gambling establishment, and where they call her, precisely, to implicate herself and others. Clearly, then, it seems to me, you have to have a warning to that kind of witness.

Now, these other cases are harder. There is no question about that. But in this case, you don't have those difficult problems.

QUESTION: But, Mr. Justice White was asking: Suppose you had the same facts about Mrs. Wong and she were called in a trial of Mr. X. --

MR. BROTSKY: Oh, I think --

QUESTION: -- Why isn't it the same situation?

MR. BROTSKY: If that's what Mr. Justice White meant, then I misunderstood.

If the Government has no knowledge that the witness is involved --

QUESTION: No, no, no.

MR. BROTSKY: I think that the Government would have to. Yes. I think the Government would have to advise --

QUESTION: Even though she is not a putative defendant?

MR. BROTSKY: That's right.

QUESTION: Every time the Government calls a co-conspirator or someone on their side of the case to prove a case against a defendant, they must give him the warning?

MR. BROTSKY: Well.

QUESTION: The Government is frequently surprised. They think they are going to get some testimony out of somebody, a certain line, and it turns out they don't get it.

And let's assume they then prosecute him for perjury. Do you think just because they thought and suspected or thought they knew he was implicated in the crime that they had to give him warnings, and that they cannot prosecute him for perjury?

MR. BROTSKY: No, I don't think so. I think that had they given him -- First, my reply would be what harm does it do the Government to give the warnings?

QUESTION: Yes, but the question is whether it is constitutionally required.

MR. BROTSKY: I understand. I think the Government is giving the very warnings here that we are talking about. They haven't told us why they do it, but they uniformly do it. I think it is because they recognize that it is essentially unfair not to.

Now, if you have the situation you postulated, then

I think the Government has an equal duty. Where the Government knows that the person is implicated and calls that person with the intent and design to extract incriminatory information, then I think the Government should advise that person of the person's rights.

Now, in the minute or two that I have left, I do want to say something about the perjury question.

I think this Court does have and must have a legitimate concern that perjury violations be punished. But, I think, again, here there is a difference between the kind of perjury you have where one is aware of the privilege and instead of exercising it remains silent, affirmatively misstates or lies to suppress false testimony that is induced by a cruel dilemma -- and that's what I think happened here -- is not to license perjury.

QUESTION: We are just talking about suppressing false testimony. You are talking about washing out what would otherwise be a perjury trial, aren't you?

MR. BROTSKY: That's right, but I am saying you are merely restoring that person to the position they would be in had they known of the privilege.

QUESTION: Before they lied.

MR. BROTSKY: That's right, because had Mrs. Wong -- I can assure this Court -- that had Mrs. Wong known of her privilege she would have exercised it. She would have given

no answers to the questions which are the subject of the perjury prosecution.

What I am saying, therefore, is that if that is the case and if she faced the dilemma she did, I think this Court's legitimate concern for perjury is not appropriately addressed to her situation.

I think, as the Court of Appeals said, to suppress testimony, which in this case exculpated her and which the prosecutor, thereby, then promptly indicted her for perjury because it was contrary to information he had -- For her to do that --

QUESTION: How can you be so positive that she would not have committed perjury if she knew of a privilege? Lots of people know the privilege and still decide it would be better not to act guilty by claiming the privilege then it would to try and get away with a false story. How do we know she didn't simply do that?

MR. BROTSKY: Mr. Justice Stevens, if you knew Rose Wong, you would be as sure as I am.

QUESTION: Well, we only have the record to deal with, but there is no reason on the record to believe that's the fact, is there? To say it positively.

MR. BROTSKY: On the record, I don't see how there could be. As a matter of fact, in the hearing there was a question that the judge raised. Now, the final question would

be: If she had known of her privilege, would she have claimed it?

And he didn't ask it because I think he assumed, after seeing Mrs. Wong, that she would have exercised it.

QUESTION: If she had been called to the regular trial of these policemen and asked those questions, would somebody have had to advise her of her rights?

MR. BROTSKY: I think so.

QUESTION: Why?

MR. BROTSKY: Because I think the Government, knowing that it is eliciting from her, by its questions, incriminatory answers, is thwarting the purposes of the Fifth Amendment and is taking our system of justice and ignoring the mandate of the Fifth Amendment when one does so. I think that --

QUESTION: I thought the Fifth Amendment was something you had to claim.

MR. BROTSKY: If you know about it. If you know about it. I think ignorance of the Fifth Amendment, which is the situation here, presents an entirely --

QUESTION: You think the court would have to appoint a lawyer for her?

MR. BROTSKY: I didn't hear you.

QUESTION: You think the court would have to appoint a lawyer to advise her?

MR. BROTSKY: I think if the Government knew that the

questions were --

QUESTION: Yes, yes. Even if she had a million dollars. She wasn't an indigent. She said she wasn't.

MR. BROTSKY: No. Well, I am saying that they have to advise her. I am not saying that they --

QUESTION: Why would they have to advise a person capable of hiring a lawyer to advise them of their rights?

MR. BROTSKY: Because I don't think that the fact that she was an indigent really is relevant here since when she appeared she was given the option of having an attorney.

QUESTION: She could have then said, "I'd like to get one."

MR. BROTSKY: I suppose that's true, but, in any event what happened --

QUESTION: Well, did she understand that question?

MR. BROTSKY: The judge indicated she did not.

Judge Zerpoli said -- found, in effect, that she did not understand.

QUESTION: Didn't understand any of it?

MR. BROTSKY: None advising her of her rights, except the perjury.

QUESTION: Now that we are on the Court's time, let me ask you one question. Try to give a brief answer.

What was there at the second hearing, at the suppression hearing, which alerted someone to the idea that she

did not understand English, in the face of the perfectly clear, unequivocal answers which she gave before the grand jury? What was the change? Was there a long lapse of time, that her English became a little fuzzy, or what?

MR. BROTSKY: Mr. Chief Justice, I think you may have misconceived what happened at the second hearing.

We made a motion to suppress based on the claim that she did not understand the warning.

QUESTION: Everyone concedes that there was nothing to have alerted the grand jury foreman or the United States Attorney to the notion that she did not understand the questions when she gave the rather clear answers which appear in the record on pages 3 and 4.

Now, what alerted someone between that time and the hearing on the suppression motion to the idea that she did not understand English very well?

MR. BROTSKY: Well, when she came to me and talked to me, I could see that she did not understand English very well.

I had a different view than the United States Attorney. I immediately -- I had more familiarity with Chinatown, San Francisco, than he did. And he admitted in the record that he had no such familiarity.

The judge pointed out at the hearing that there were several times when she answered questions that might well

have alerted him that she needed an interpreter.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Thank you.

Do you have anything further, Mr. Sheehan?

MR. SHEEHAN: I do not, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:25 o'clock, p.m., the case in the above-entitled matter was submitted.)