In the

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Supreme Court of the United States

UNITED STATES,

Petitioner,

Vs.

No. 76-1151

RALPH CECCOLINI,

Respondent.

Washington, D. C.
December 5, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner,	:	
v.	:	No. 76-1151
RALPH CECCOLINI, Respondent.	:	

Washington, D. C.

Monday, December 5, 1977

The above-entitled matter came on for argument at 10:03 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

RICHARD A. ALLEN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Petitioner.

LEON J. GREENSPAN, ESQ., Greenspan, Kanarek, Jaffe & Funk, 14 Mamaroneck Avenue, White Plains, New York 10601, 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 76-1151, United States against Ceccolini.

Mr. Allen.

ORAL ARGUMENT OF RICHARD A. ALLEN, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case presents two important issues concerning the scope of the exclusionary rule. The facts in the case are not complicated. Breifly, Respondent Mr. Ceccolini owned and operated a flower shop in Tarrytown, New York, where he conducted a gambling business by taking bets on numbers and sporting events from customers and turning over the proceeds to a man named Francis Millow. In 1973, the FBI conducted a visual surveillance of Respondent's flower shop and concluded that the shop was being used as a drop spot or a pickup spot for a numbers operation. In December 1973, however, the FBI surveillance was discontinued. A year later, in December 1974, a local policeman, Officer Ronald Biro, took a break from his school patrol duties and went into the shop for a cigarette break and went behind the counter and sat down and struck up a conversation with Lois Hennessey, a saleswoman who had been employed in the shop for about a year. Respondent was not in the shop at the time. While Officer Biro was sitting down,

taking his break and talking to Ms. Hennessey, he noticed on top of the cash register an envelope, an unsealed envelope that had some money sticking out of it. And, apparently, for no other reason than curiosity, he looked in the envelope and saw in the envelope money and what appeared to him to be gambling slips. And he closed the envelope and put it back on top of the cash register. Officer Biro did not tell Ms. Hennessey what he had seen in the envelope and she testified later that she didn't know what was in the envelope. He did, however, ask Ms. Hennessey who the envelope was for and she told him that Respondent had given it to her to give to somebody later that day, but she didn't say who and he didn't ask her.

Officer Biro was unaware at that time that Respondent had been under investigation for gambling activities. But the next day he did tell his fellow officers at the local police station what he had seen in the shop, and they in turn informed one of the FBI agents who had conducted the earlier surveillance that Officer Biro had seen some gambling slips in the shop and that apparently Ms. Hennessey appeared to know something about it. Four months later, in April 1975, the FBI agent interviewed Ms. Hennessey at her home and the record is quite clear that she freely and willingly undertook to disclose to the FBI agent her considerable knowledge about Respondent's gambling activities.

QUESTION: Does the record show what led them to interview her in her home?

MR. ALLEN: It is not entirely clear, Your Honor, but it would appear to be simply the course of the gambling investigation.

QUESTION: I thought it was conceded at least for purposes of this argument that what led the FBI agents to interview Ms. Hennessey in her home in the spring of 1975 was a chain of events that stemmed from the officer finding that envelope with the money and gambling slips in it during his cigarette break. Isn't that conceded arguendo?

MR. ALLEN: It is conceded in the sense that we would not contend that he would inevitably have interviewed her but for that incident.

QUESTION: In other words, the interrogation by the FBI agents was a fruit of the unlawful search of the officer and that the unlawfulness of the search is also a given in this case; isn't that right?

MR. ALLEN: That is right, Your Honor. It is a fruit of the search in the sense that it's reasonable to conclude that he wouldn't have interviewed her but for the fact that the search --

QUESTION: And that was conceded and that's not an issue in this case, is it?

MR. ALLEN: It is not an issue except that it is also

reasonable to conclude that he may have interviewed her later, and that that reasonable -- that conclusion seems to us to indicate that --

QUESTION: Even if the search had not taken place.

MR. ALLEN: That's right. He might have.

QUESTION: Well, that is one of your arguments, isn't it?

MR. ALLEN: Pardon me?

QUESTION: That he would have gotten around to her anyway.

MR. ALLEN: Well, we are not contending that he inevitably would have, but that he might have. It is not unreasonable to conclude that.

QUESTION: She was one of his employees.

MR. ALLEN: That is correct.

QUESTION: She was right in the store and there is the possibility that somebody might have asked her some questions.

MR. ALLEN: A very good possibility, Your Honor, but we can't prove it with certainty because we don't know what would have happened if some different chain of events had taken place.

QUESTION: And by the time of the interview, at least by the time of the grand jury appearance, she was a former employee, wasn't she?

MR. ALLEN: That's right. That is correct.

QUESTION: Did the FBI interview any other employees or any other former employees?

MR. ALLEN: After Respondent was indicted, but not before.

In May of 1974, a month later, Respondent was subpoenaed to appear before a grand jury and he unequivocally denied, under oath, that he had ever taken gambling bets from his customers, either for himself or for Mr. Millow or that he ever had discussed gambling operations with Mr. Millow. Respondent was then indicted for perjury before the grand jury and he waived his right to a jury trial and he was tried before Judge Gagliardi.

The Government's principal evidence in his perjury trial was the testimony of Lois Hennessey who testified in some detail about Respondent's gambling activities over the year of her employment with Mr. Millow. At the end of the trial, Judge Gagliardi entered a finding of guilt on one count of the perjury indictment against Mr. Coccolini. Judge Gagliardi then considered the Respondent's motion to suppress the testimony of Ms. Hennessey that Respondent had made at the outset of the trial but that the Judge, with Respondent's consent, had deferred pending the trial. The Judge then granted Respondent's suppression motion on the grounds that the testimony of Ms. Hennessey was the tainted fruit of Officer Biro's search.

And he then set aside his finding of guilt on the ground that without her testimony there was insufficient evidence to convict Respondent of perjury.

Although the court granted the Government's petition, waiving two exclusionary rule issues, the Respondent's principal argument is that the Government's appeal in this case was barred by the Double Jeopardy Clause.

We believe that that argument, that Respondent's double jeopardy argument is clearly foreclosed by the decisions of this Court in United States v. Wilson, United States v. Jenkins and United States v. Martin Linen which hold that the Double Jeopardy Clause is not implicated unless there is a possibility of a retrial on the general issue of guilt or innosence, and that possibility does not exist in this case. If the Government prevails, Judge Gagliardi's finding of guilt may simply be reinstated.

QUESTION: Mr. Allen, would the double jeopardy argument be the same if there were a possibility of a reversal for further findings, for example, to determine whether the trial judge had relied at all on the testimony about the illegal search itself, or something like that? Would the Double Jeopardy Clause present a problem then?

MR. ALLEN: I don't believe so, Your Honor. The trial judge in this case ruled that without the tainted evidence there was insufficient evidence of guilt. If --

QUESTION: What I am suggesting is: Supposing we agreed with him as to some of the evidence being tainted but not all that he excluded.

I can't give you -- For example, maybe the portions of her testimony that did not relate to the illegal search, itself. Perhaps that should be received but testimony pertaining to the illegal search should have been excluded. Maybe he relied on that, just to give an example. Would you then have a double jeopardy problem?

MR. ALLEN: It is difficult to visualize, Your Honor. I would not think so. I would think that if the court concluded that some of her testimony was admissible but some was not, I should think it would be open to the district court simply -- the directions to the district court simply to consider whether the admissible portion of her testimony, as well as the other testimony in the case, was sufficient to support a finding of guilt.

QUESTION: Would it be permissible, in your view, for them to make additional findings,as long as there were no more evidence to be heard?

MR. ALLEN: That is correct.

QUESTION: He has already won that once with respect to the exclusion of the evidence we have been talking about, hasn't he? Having made a decision, in general, then he re-examined it in light of the exclusion of part of the evidence,

he came to a different conclusion.

MR. ALLEN: That's right. He concluded that the evidence, without her testimony, was insufficient.

QUESTION: So that if the course that Justice Stevens was hypothesizing were followed for some reason, he would merely repeat that exercise, applying it to a different set of facts.

MR. ALLEN: That is right. It would be essentially a question of law for him. Though it is difficult for me to visualize what portion of her evidence might be admissible if some of it was not admissible, in any event.

QUESTION: So what did the trial judge, precisely, do? During the course of the trial, he apparently came to the conclusion that the evidence was inadmissible, but nonetheless the trial proceeded. And at the end he said, "I find you guilty on the basis of all the evidence," then he immediately thereafter said, "Some of the evidence should be excluded, and on the basis of the admissible evidence there is not evidence to prove you guilty beyond a reasonable doubt and, therefore I --" Do what? And what did he do?

QUESTION: He set aside the finding of guilt. But I think your recitation is somewhat inaccurate, Mr. Justice Stewart. What he did was at the beginning of the trial -- at the end, he indicated that at the beginning of the trial he had concluded that the search was unlawful.

QUESTION: Right.

MR. ALLEN: And that, therefore, the tangible evidence of the search, that is, the envelope and what it contained, would not be considered by him. But he made no ruling until after his finding with respect to whether Ms. Hennessey's testimony should be suppressed as the fruit.

QUESTION: After his ruling -- Now which ruling do you mean. Finding of guilt.

MR. ALLEN: After his finding of guilt.

QUESTION: But then he said, "However, Ms. Hennessey's" -- immediately thereafter or very soon thereafter -- "However, I find that Ms. Hennessey's testimony was inadmissible and on the basis alone of the admissible evidence I find there is insufficient evidence to sustain a verdict of guilt beyond a reasonable doubt and, I therefore" -- What?

MR. ALLEN: "I, therefore, set aside the finding of guilt."

QUESTION: He didn't enter a motion of acquittal.

MR. ALLEN: He did not enter a formal motion of -- judgment of acquittal. And, therefore, it would be inaccurate if Respondent tries to characterize it as a grant of a motion for judgment of acquittal. It seems to us that it is more equivalent to the procedure that was engaged in in United States v. Morrison, where the trial judge, after making a finding of guilt, then considered a suppression motion, granted

the suppression motion and said, "I am going to take appropriate action, depending on what the appellate courts do with my motion." The Supreme Court concluded that his granted suppression motion was error and he simply then reinstated his finding of guilt. In that case, it was not the judgment of acquittal. It seems to me that this case is somewhat analogous to that.

QUESTION: Where does the order appear in the Appendix?

MR. ALLEN: There is no order. It was --

QUESTION: Where is what he said? Does what he said appear in the Appendix?

MR. ALLEN: What he said appears in the Appendix to the petition.

QUESTION: Would it be fair to say that the judge was just doing his thinking out loud, his reasoning processes?

MR. ALLEN: That would be fair to say, Your Honor.

QUESTION: "With this evidence, I would find him guilty." "Without this evidence, I cannot find him guilty."

MR. ALLEN: That is correct, Your Honor.

QUESTION: But he did find him guilty at first.

MR. ALLEN: That is correct.

QUESTION: He didn't say, "I would," he did find him guilty, didn't he?

MR. ALLEN: That is correct.

QUESTION: Did he release the man?

MR. ALLEN: He did release the man.

On page 32A of the Appendix to our Petition, the judge says, "Although the corroborating evidence -- particularly the wiretapped conversation -- is strong when coupled with Lois Hennessey's testimony, standing by itself it is insufficient to prove Ceccolini's guilt beyond a reasonable doubt." And he goes on to say, "The foregoing constitute the Court's findings of fact and conclusions of law. Now, Mr. Ceccolini was released on his own recognizance."

QUESTION: But this is wiretap. Was Ms. Hennessey involved in this wiretap business?

MR. ALLEN: No, Your Honor.

QUESTION: Well, this is something different, isn't it?

MR. ALLEN: The wiretap, I believe, refers to a --

QUESTION: He says, "Particularly the wiretapped conversation."

MR. ALLEN: I believe that the wiretapped conversation refers to a conversation -- I may be wrong in this, Your Honor, but I believe it refers to a conversation between Mr. Ceccolini and Mr. Millow, in which Mr. Millow told Mr. Ceccolini that when he goes before the grand jury just say he doesn't remember anything. I may be incorrect on that though, Your Honor.

There was additional wiretap evidence in the case

which had nothing to do with Ms. Hennessey.

QUESTION: You say there is no order in this case?

MR. ALLEN: No, Your Honor, no formal written orders.

QUESTION: Why did the Appellate -- Court of Appeals have jurisdiction when there was no order by the District Court?

MR. ALLEN: There was a ruling by the District Court, a grant of a suppression motion that appears orally --

QUESTION: No order, no judgment. Courts of Appeals have jurisdiction to review judgments, orders, not just conversation by a district court.

QUESTION: Dismissal of indictment for there to be a proper appeal.

MR. ALLEN: Pardon me?

QUESTION: It's an order of dismissal of an indictment to be at the point, for there to be an appeal; isn't that right?

QUESTION: But there isn't any.

MR. ALLEN: Well, there is no formal piece of paper on which he enters a formal grant of a suppression motion or a motion for a judgment --

QUESTION: You've told the Chief Justice that all the judge was doing was, quote, "talking out loud." Is that what you said?

MR. ALLEN: Well, he reasoned out loud. More than that, Your Honor, he made a ruling.

QUESTION: Is that a judgment, thinking out loud?

MR. ALLEN: He made a ruling on the record.

QUESTION: Where is the ruling? That's what my brother, Stewart, is trying to find out.

MR. ALLEN: Apparently, Your Honor, there is no piece of paper.

QUESTION: Well, look at page 10 of the Appendix -- not the gray one the brown one -- which seems to me to be the closest thing. It looks like a minute order. "February 10, 1976 -- Court finds the defendant Guilty on count 1 and not guilty on count 2. The guilty verdict on count 1 is set aside. Bail exonerated. Gagliardi, J."

MR. ALLEN: Thank you, Mr. Justice Rehnquist. I think that is the piece of paper that the Government appeals. I apologize.

QUESTION: That's the piece of paper that implements his statement, I take it, on page 32A, "I find insufficient evidence to say beyond a reasonable doubt that Ceccolini was guilty of count 1."

MR. ALLEN: That is correct.

QUESTION: The first is his finding and on page 10 is something like a judgment, if not a judgment. Is a judgment.

MR. ALLEN: That is correct.

QUESTION: If it's not a judgment, you don't have a case.

MR. ALLEN: Well, there is no question in this case that Judge Gagliardi -- suppression motion and set aside --

QUESTION: But there is no judgment in the Court of Appeals in that jurisdiction or a ruling in that jurisdiction.

MR. ALLEN: Frankly, Your Honor, I have to confess ignorance that I don't know whether an appealable judgment requires a piece of paper. In an ordinary criminal case, the judgment is not entered until --

QUESTION: I have not once said "a piece of paper." I said a final judgment. I am still looking for the final judgment.

MR. ALLEN: There was a final judgment --

QUESTION: Was there any case that you have had that said a minute entry is a final judgment?

MR. ALLEN: Well, I may not be understanding, Your Honor, and I apologize, but there was clearly a final judgment on Respondent's suppression motion, granting that motion, and the consequence of that was setting aside the finding of guilt.

Now, it is my understanding that is an appealable ruling.

QUESTION: If the Court of Appeals thought so, did they make any reference to it?

MR. ALLEN: No, Your Honor, I don't believe they did.

They had no question that what the District Court did was properly appealable.

QUESTION: Or at least seemed to take it for granted.

MR. ALLEN: That is correct, Your Honor.

Unless the Court has any further questions on this matter to which I am afraid I cannot elucidate any further --

QUESTION: Just one factual question, Mr. Allen.

Is it correct that Ms. Hennessey's testimony included testimony describing what the court assumed to be an illegal search, itself? The testimony on the merits, that is.

MR. ALLEN: That is correct. It included testimony, I believe, about the events on December 18th, that is that there was an envelope that Mr. Ceccolini left for her to give to Mr. Millow, but it wasn't on the merits in the sense that she testified she didn't know what was in the envelope. So, it wasn't direct evidence of Respondent's gambling activities, perhaps inferential evidence. The thrust of her testimony --

QUESTION: How was it relevant, then? I mean what was the relevance of that evidence on the merits?

MR. ALLEN: It may not have been relevant. Arguably, it was relevant as creating an inference that it was simply an additional instance of Respondent's activities with Mr. Millow. The thrust of her testimony was about other events and other activities by Respondent.

QUESTION: Her testimony did include the particular -- Biro, of course, did not testify on the merits.

MR. ALLEN: No, Your Honor.

QUESTION: I note at page 21A, -- before we leave this subject -- 21A of the Appendix to your Petition for Cert, United States Court of Appeals has said, "decreed that the judgment of said District Court be and it hereby is affirmed." So the Second Circuit has said there is a judgment in this case.

MR. ALLEN: Apparently so, Your Honor. What, precisely, the judgment that they had in mind, I have to confess I don't know, because the judge never did enter a formal --

QUESTION: Mr. Allen, do you attach any significance to counsel's statement in his colloquoy with the trial judge at page 36A, in which he argued that what the judge had done, quote, "would provide my client with an acquittal on the merits, which would not be appealable, which would be, as a matter of double jeopardy law, final"?

MR. ALLEN: Do I attach significance to it, Your Honor? I understand there is argument, but I think it lacks merit, because it is quite clear and the judge deliberately indicated that the procedure he followed was to enter first a finding of guilt and then to set that aside. Even if what he did, setting aside of the finding of guilt, could be deemed to be an acquittal -- which I do not believe it is fair to characterize it -- even if that were true, the Double Jeopardy Clause would not preclude the Government's appeal.

QUESTION: Why?

MR. ALLEN: Because United States v. Martin Linen

and those cases have made quite clear that the Double Jeopardy Clause isn't even implicated unless there is a possibility of a retrial. And, I think, in United States v. Jenkins, the Court quite expressly said that when there is a verdict of guilt and after that there is a judgment of acquittal, the Government may appeal.

QUESTION: The other side, I suppose, Mr. Allen, is the Criminal Appeals Act provides if your appeal is from the order suppressing evidence, that has to be before trial, if that were the basis of appeal.

MR. ALLEN: I don't believe so, Your Honor. In United States v. Morrison, there was a motion -- granting of a suppression motion afterwards.

QUESTION: Yes, but the statute says "an appeal by the United States shall lie to a Court of Appeals from a decision or order with the District Court excluding or suppressing evidence, not made after the defendant has been put in jeopardy."

It isn't on that theory. Your theory is an appeal from a dismissal of an indictment. That's the statutory basis for the appeal.

MR. ALLEN: That is correct, Your Honor, although whether it may be deemed formally a dismissal of the indictment or not, I think the Court has made clear that the Criminal Appeals Act was designed to give the Government a right to

appeal in every case where the Double Jeopardy Clause is not permitted, regardless of the formalism of the judgments.

QUESTION: The Criminal Appeals Act doesn't go to that because there is just an ordinary general rule, quite apart from the Criminal Appeals Act, that the Court of Appeals has the jurisdiction to review a judgment or an order, a final order, decision, something that's entered and that's identifiable, and that's the problem here. But I think we have pretty well exhausted the subject.

MR. ALLEN: Thank you, Your Honor.

The first issue that our petition raises is whether the exclusionary rule requires a suppression of evidence in connection with crimes committed after the evidence is obtained. That issue is simply illustrated by the facts of this case. Officer Biro's excessive curiosity disclosed information about gambling activities incriminating to Mr. Ceccolini. That information was of two types. First, it was tangible evidence of gambling activities and, second, it was information that Ms. Hennessey appeared to know something about it. Now, there is no question in this case that the information, at least the tangible evidence that Officer Biro discovered, could not be admitted in any prosecution of Respondent for crimes committed before that search took place, either gambling offenses or other crimes. The only question in this case is whether the exclusionary rule requires the information that he discovered

to be suppressed in the prosecution of perjury that took place five months after his search took place. And our position, very simply, is that it does not. The purpose of the exclusionary rule is to deter police misconduct by taking away their incentives. It is very difficult to see how a policeman would have much incentive to search for evidence of a crime that hasn't yet taken place and may never take place. And even if a policeman did have much incentive in that respect, it is doubtful that the exclusionary rule would provide much significant deterrence. If a policeman is not going to be deterred from conducting an unlawful search by the prospect of jeopardizing the prosecution of a crime that has already been committed, it seems very unlikely that the prospect of supressing evidence of a future crime would make him behave any differently. And, in any event, it is clear from the facts of this case, we submit, that Officer Biro was not at all motivated by a desire to find evidence of a crime that had not yet taken place, or evidence of Respondent's perjury five months later. Officer Biro testified and there is no dispute that he was not even aware at that time that Respondent was engaged in any gambling activities.

We think the Court of Appeals erred in applying the exclusionary rule to a subsequently committed crime. The issue doesn't appear to have risen very frequently. We are aware of only three other cases, discussed in our brief, in which the

issue has arisen and in which in all of those decisions the courts held that the evidence was admissible.

The issue that arises far more frequently is the second issue presented in this case which is whether the trial testimony of Lois Hennessey should be considered to be the tainted fruit of Officer Biro's search. This Court has expressly reserved the live witness testimony question in previous decisions, and there has been considerable difference of opinion among the courts of appeals on the matter. That issue is separate and independent from the first subsequent crime issue. And if our position is sustained it would warrant reversal of this case, whatever the court decided on the subsequent crime issue.

In this case, it appears that as a result of the search of the envelope Officer Biro learned that Hennessey might know something about Respondent's gambling activities. He didn't find that out for certain and he didn't know what, if anything she would know, if she knew about it. But a follow-up interview, four months later, disclosed that she had considerable knowledge about the matter and was perfectly willing to cooperate and to testify about it. The question, very simply, is whether her testimony at trial about those matters is excludable as the fruit of Officer Biro's search.

Ever since Nardone v. United States, it has been accepted that at some point along the causal chain of evidence

originating from some illegality, the connection between the evidence developed and the original illegality becomes so attenuated as to dissipate the original taint. The attenuation doctrine is simply an application of the basis theory of the exclusionary rule. At some point, an item of evidence derived only remotely from the original illegality, the exclusion of that evidence is not going to significantly deter a policeman. So the question in each case is where in that causal chain the attenuation point occurs.

Mr. Justice Frankfurter in Nardone suggested that that question be left to the good sense of judges, but in close cases judges of equally good sense frequently disagree. So this Court has established a number of guidelines to guide Federal judges in that determination.

With respect to the question of verbal statements made after an arrest, for example, this Court in Wong Sun v. United States and Brown v. Illinois defined the inquiry as whether the statement is sufficiently a product of free will as to break the causal chain between that statement and the original illegality, and has defined as relevant to that inquiry a number of factors, including the temporal proximity between the arrest and the illegality, the presence of intervening circumstances, the degree to which the police exploited the original illegality, and, finally, the flagrancy of that illegality.

The trouble is that those considerations just don't apply very well in the case in considering whether the testimony of a witness should be deemed to be the fruit of an original illegality, or, if they did apply, they would lead to the conclusion in almost every case, we submit, that the testimony ought to be admitted.

Whether the testimony of a witness like Lois Hennessey is more proximately the result of Officer Biro's search or is more proximately the result of intervening acts of free will by herself or by the FBI agent who decided to interview her or by the prosecutor who decided to subpoena her, those are basically philosophical questions that are unresolvable and that have very little to do with the purpose of the exclusionary rule. They don't have much to do with the purpose of the exclusionary rule because essentially they focus on the witness' state of mind and the circumstances occurring after the police search took place, the police misconduct took place, rather than on those things that might have motivated the police to engage in that kind of conduct in the first place.

Furthermore, in almost every case, the decision of a witness to testify is based on a very large complex of motivations and circumstances. An analysis that requires a court to try to figure out the role that free will plays in that decision permits courts to come to almost any conclusion that they desire in any given case, as we think the opinions in the Court of

Appeals in this area indicate.

For those reasons, we think the live witness question ought to be decided as a policy matter, a policy matter that looks to the purposes of the exclusionary rule, and, very simply, a question which inquires whether the exclusion of a witness' trial testimony is likely to provide enough additional deterrence of police misconduct to outweigh the social costs of exclusion. Now, while there is not much empirical data on the matter, as there rarely is in exclusionary rule cases, we think it is reasonable to conclude that the police have significantly less incentive to engage in unconstitutional conduct to discover the name of a possibly potential witness than to obtain tangible evidence or verbal fruits.

QUESTION: Would you be making the same argument if Ms. Hennessey had told the officers about some tangible evidence, some other evidence that they went ahead and found and then introduced but never offered her testimony?

MR. ALLEN: No, Your Honor, we wouldn't.

QUESTION: You wouldn't? Why?

MR. ALLEN: Because what we are focusing on is --

QUESTION: Someone voluntarily told them about the evidence. The real question is whether they are permitted to use in any way the identity, the witness whose identity they have known from their illegal search.

MR. ALLEN: That is correct, but the attenuation

question is whether the evidence that we seek to introduce is sufficiently attenuated from the primary illegality.

QUESTION: Well, it's just as attenuated if instead of Ms. Hennessey testifying she voluntarily tells them about some physical evidence.

MR. ALLEN: No, there are many intervening circumstances that make a difference between her ultimate testimony at trial and whatever she may say to a policeman who comes to talk to her.

QUESTION: Would there not be a difference between the evidence that Mr. Justice White is speaking of if he had been charged with a substantive offense of gambling, and the evidence that she had pointed to, if I understand his hypothetical, was a lot of numbers slips. Here, you've made the point that the crime was a crime committed five months later, namely the crime of comm tting perjury before a grand jury --

MR. ALLEN: Well, that's correct.

QUESTION: -- and to which no tangible evidence has any relationship.

MR. ALLEN: Well, the tangible evidence could be used in proving that crime. If the gambling slips themselves were admissible, it would be relevant to proving that crime.

My point is that, apart from the question of whether the exclusionary rule ought to apply to subsequent crimes, it should not apply to exclude the testimony of a witness. And we

think the testimony of a witness differs for attenuation purposes significantly from either physical evidence or the example that Mr. Justice White posed, which is the statement of either the defendant or a witness made in the course of a police investigation. And the differences between -- The statement problem is a difficult problem and it may be that statements made by a witness that lead to further things that lead to further things, that those ultimate things would be attenuated under traditional attenuation analysis. But we think that there is a difference in kind between trial testimony and other kinds of evidence.

QUESTION: Including statements during interrogation.

MR. ALLEN: Including statements during interrogation.

QUESTION: Mr. Allen, on this argument, your argument would be the same if he had been indicted for the substantive offense of gambling and not perjury, wouldn't it?

MR. ALLEN: That is correct.

QUESTION: But the record doesn't tell us whether he was indicted for gambling, does it?

MR. ALLEN: I don't believe he was. In fact, I am fairly certain that he was not.

In summary, we contend that there are two separate and independent grounds warranting a reversal of the judgment below and a reinstatement of the District Court's finding of guilt.

First, we think the courts erred in applying the exclusionary rule to a crime committed five months after the search took place. Second, we believe that they erred in suppressing the trial testimony of a witness as the fruit of an illegal search.

I'd like to reserve whatever time remaining I have, Your Honor.

QUESTIONS: Those are two quite independent and almost unrelated arguments, aren't they?

MR. ALLEN: That is correct, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Greenspan.

ORAL ARGUMENT OF LEON J. GREENSPAN, ESQ.,

FOR THE RESPONDENT

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

We have before this Court probably one of the most perplexing and intriguing questions that it has been my privilege to ever come across. Unfortunately, like many simple things, they are very complex and like many complex things they are very simple. To me, it is simply illogical to differentiate between the fruit of the poison tree as being live witness testimony or being physical evidence or being documentary evidence. To me, the analysis is whether or not there was an intervening, superseding cause. If there was an intervening, superseding cause of some licit nature, then there is attenuation, then the

evidence, whether it be live witness testimony or whether it be documents or physical evidence they would, thus, be used.

QUESTION: Do you think there is any difference when with respect to the live witness, the live witness may not give any testimony at all even after taking the stand and taking the oath.

MR. ALLEN: No, Your Honor, it seems to me that every witness has an obligation to testify and the court is open to every man and every woman's testimony.

QUESTION: They may have an obligation to testify but they may take certain steps that will put an absolute barrier, namely, the Fifth Amendment.

MR. ALLEN: That would be the witness and that's where you differentiate, perhaps, Your Honor, between a witness whose testimony --

QUESTION: A package of heroin, for example.

MR. ALLEN: Of course, a package of heroin is before the court and it can be examined and whether it says what it says or it doesn't say anything is, of course, a matter of scientific determination. There is a question of compulsion and there is a question of volition when you have live witness testimony. But I think the only differentiation that can be made is the one that has been made by this Court --

QUESTION: Don't you think that Ms. Hennessey might conceivably have taken the Fifth Amendment here, as at least a

peripheral participant and aider and abetter in the case?

QUESTION: What matter then, Your Honor? That was a personal right that she had and had nothing to do with whether or not the evidence could or should be used against the witness, against the defendant, Your Honor.

My position, and I think the position this Court has taken and if it hasn't taken it should take, is simply that you can't have any type of an attenuation of a live witness testimony merely because that witness, as the Government would argue, volunteers after the discovery. Now, I don't believe that's a logical position, and if the Government argues it I should expect this Court to reject it out of hand.

I would like the Court to examine, if it will, what it started out in the beginning to examine, the question of the appealability of this so-called judgment or order. If this Court would please examine the question, I think that what the Second Circuit really had before it was the suppression order. There was no judgment entered. There was no order entered. There was merely a decision by the Court.

QUESTION: Mr. Greenspan, are you in any position to raise that question, not having cross-petitioned for certiorari?

MR. GREENSPAN: Yes, Mr. Justice, I believe I am able to raise it because I believe, as I've argued in our brief that the Government, under any event, should be estopped from even exercising this right of appeal because its own inequitable

conduct created this technical right.

QUESTION: We have fairly carefully set out rules as to when you have to cross-petition in order to raise a point. You conceivably can raise a jurisdictional point at any time, but ordinarily you can defend the result you obtained in the Court of Appeals on some other ground without cross-petitioning. But here if you were to prevail, the Court of Appeals, instead of affirming the judgment of the District Court, would have dismissed the appeal, which is not the same result.

MR. GREENSPAN: I would agree, Your Honor. However, I think the question of jurisdiction vel non is always before this Court, without any question of the cross-petition, just as the doctrine of inequitable conduct is always before this Court, or before any court.

QUESTION: Don't you have to attack the order that I have read to your friend before, on page 21A of the Appendix for the Petition for Cert, the order of the Court of Appeals: "It is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed." Now they said it's a judgment. Can you go behind that?

MR. GREENSPAN: I believe you can, Your Honor, if what they call a judgment was, in fact, not a judgment. But, even assuming it is a judgment, I would not really want this Court --

QUESTION: Mr. Greenspan, in the docket entry which

I see you have a copy of --

MR. GREENSPAN: Yes, I do, Your Honor.

QUESTION: -- on 181976, "filed Government's notice of appeal from decisions of Judge Gagliardi setting aside verdict on count 1."

MR. GREENSPAN: Yes, Your Honor, that's exactly what it says.

QUESTION: Is that a judgment, or not?

MR. GREENSPAN: No, sir.

QUESTION: Well, what is it? It's a docket entry.

MR. GREENSPAN: Yes, sir, but a docket entry is not a judgment. A judgment is a judgment, a finding --

QUESTION: When you file a judgment, don't you put that in the docket entry?

MR. GREENSPAN: Yes, you do, but you put it in as a judgment, you don't put it in as a decision.

QUESTION: It says "Counts 5. The defendant guilty of count 1, not guilty of verdict on count 2. Count 1 is set aside. Bail exonerated. Gagliardi, J."

QUESTION: Is that an order? Is that a minute order, or not?

MR. GREENSPAN: I'd say it is a decision, Your Honor.

QUESTION: You say it is a decision.

MR. GREENSPAN: I would say it is a decision.

QUESTION: You don't need a judgment. 1291 provides appeal from a final decision, not from a judgment.

MR. GREENSPAN: I would assume, Your Honor, that if you want to treat a final decision as a judgment, if you want to find or treat --

QUESTION: Well, you don't have to. The statute says decision.

QUESTION: But Section 1291 -- participation under the Criminal Appeals Act, isn't it? It has to be a dismissal of an indictment.

MR. GREENSPAN: I would say it has to be a dismissal of an indictment or an appeal from a judgment of acquittal entered after a setting aside of a guilty verdict and the entering of a --

QUESTION: That describes that second category he referred to.

MR. GREENSPAN: What I would like this Court to consider is the interesting problem that arises and I suppose it comes into a crossroads between the double jeopardy provisions, the statutory provisions for how a suppression motion should be handled and other constitutional questions. The simple answer to it is that this Court should take the position that Judge Gagliardi was under an obligation to decide the motion for suppression before he decided the guilt or innocence of the defendant. The practice requires it, Rule 12 requires it,

and only for good cause shown should he have permitted this question of the illegality of the search and seizure to come before him along with the trial.

QUESTION: He should have decided it during the trial or before the trial?

MR. GREENSPAN: I say first he should have decided it before the trial. If he did not do it before the trial, despite being urged to do so, he was obligated to find it before he made a finding of guilty.

QUESTION: Why would any judge, having read Jenkins and Wilson, decide that suppression motion during the trial which cuts off the Government's right to appeal? I would think he would decide either before the trial or after the trial, since the Government has a right to appeal in those cases and you would have a right to see whether the District Court was right on its decision.

MR. GREENSPAN: I don't find anything holy in the technical right of the Government to appeal, where the Government, itself, delays unduly giving the information to the defendant so he can comply with Rule 12, so he can make, in the normal course of things, a suppression motion. I think that if the Government does this, goes through this delay in order to give itself the technical right of appeal, and I think that if a District Court judge goes along with this, then you have inequitable conduct which should, in my judgment, estop

the Federal Government from exercising its technical right of appeal.

But, what's even more important is that there was a motion made to dismiss at the close of the prosecution's case. At that point, Judge Gagliardi, in my judgment, was under an obligation to determine what evidence licitly was before him. If he was going to determine then that the only licit evidence before him was insufficient to convict the defendant, then he should have, at that time, entered a judgment of acquittal. At that time jeopardy would have attached; at that time the Government would have had no right of appeal. By merely through a nicety or a technicality reserving this right, reserving it until after he has heard all of the evidence, reserving it until he has waived illegal evidence in determining a verdict of guilty, then determining to set it aside simply because --

QUESTION: This was a court trial without a jury.

MR. GREENSPAN: Yes, but that was unfortunately --

QUESTION: That has no significance to you at all?

MR. GREENSPAN: No, sir, because Judge Gagliardi --

QUESTION: You don't expect me to take the same position you do on that, do you?

MR. GREENSPAN: Excuse me, no, Your Honor.

QUESTION: I recognize the difference between a judge trial and a jury trial.

MR. GREENSPAN: But, Judge Gagliardi --

QUESTION: Permit me, if I may.

MR. GREENSPAN: I am sorry. Excuse me, Your Honor.

If Your Honor please, I would say this. Judge Gagliardi said he would have permitted the same illegal testimony to go to the jury, and then if the jury had convicted he then would have set it aside, simply because he wanted to create or to preserve a right of appeal in the Government, a right of appeal that the Government could have and should have exercised pre-trial, if it had done the right thing, the equitable thing, the fair thing. And that is to inform this defendant that there was a possibility of an illegal search and seizure so he could raise it before trial, so that the court could determine it before trial, so that the defendant would not be put in the position where he had to waive the jury trial because of the specter of having a lot of prejudicial evidence come before a jury before he would have had an opportunity to examine into the witnesses, before he would have had an opportunity to determine just how and in what manner he should properly defend this client.

Now, I don't believe that the Government should take advantage of its own wrongdoing. This Court has many times said that a wrongdoer should not profit by his wrongdoing. In this case, it is the Government who is the wrongdoer. In this case, it is the Government that seeks to profit by its

wrongdoing and it will if this Court will permit it.

Now, I'd like to ask this Court to consider another issue here, and that is the question of the other side of an attenuation. In other words, should an individual who finds himself in the position of knowing that the Government has illegally obtained evidence, should he be, with impunity, able to fly in the face of that evidence and commit subsequent crimes. I believe not and I don't intend to argue that point. What I would argue is simply this -- and I think all of the cases that have been considered have held this -- that where a defendant has no knowledge of the illegality and then he goes before a grand jury, and then the prosecutor doesn't tell him that he is a target, and then the prosecutor doesn't tell him that he has any kind of illegal evidence, then the defendant is not placed in the same position as an individual who is aware of the fact that there was an illegal search and seizure. Then, despite that, such as in the income tax cases, files a fraudulent return, or in the other fraud cases, commits a fraudulent act, relying, of course erroneously, on the fact that the Government can't use that testimony or that illegal evidence in order to convict him.

Here, you had a man who was ingenuously advised by the United States Attorney, against all the rules of the Second Circuit, that he was not a target when in fact he was. He was never told that they had seen Ms. Hennessey and had this illegal

evidence when, in fact, they had that illegal evidence.

QUESTION: Of course, he could have solved all of it by sealing up the envelope.

MR. GREENSPAN: Yes, Your Honor, they could have solved all of it by sealing up the evidence --

QUESTION: I mean he could have, your client.

MR. GREENSPAN: Your Honor, he could have solved it by not being involved in anything.

QUESTION: That's right.

MR. GREENSPAN: But the fact is he was.

QUESTION: Or by telling the truth.

MR. GREENSPAN: Or by telling the truth. But the fact is that he didn't tell the truth because the question is: what did he know or what didn't he know as to what the truth was or what the evidence was?

I am not trying to justify or excuse perjury. What I am saying is that there is a certain amount of due process, fair play and equity in our court procedures. And if the United States Attorney, who is not only the prosecutor but the protector of the innocent, doesn't follow the rules, then who will?

I believe that the Government is here to protect us from each other and the courts are here and should be here to protect us from the Government. And in this case, it is the defendant who needs protection from the Government because the

Government, in this case, has erred.

QUESTION: What rule did the prosecutor not follow?

MR. GREENSPAN: He didn't follow the time honored rule in the Second Circuit, which said that when an individual is called before a grand jury he is given the information as to whether or not he is a target.

QUESTION: But that's just a Second Circuit rule.

MR. GREENSPAN: This is the Second Circuit rule.

I am not saying it's a constitutional rule. I am saying that's the rule that was followed and has been time honored in the Second Circuit.

I know this Court has had a difficult time in its decision in Mandujano where as to whether or not these questions should rise to constitutional issues. I'm not reaching that point. I am merely saying that, as far as the rules that we were operating under, as far as the Second Circuit was concerned, that was their obligation. The Second Circuit recognizes in U.S. v. Jacobs -- and whatever this Court did or would do with that case I am not arguing is the law. I am merely arguing that there is a procedure that should be followed in order that the Government is just as fair as it possibly can be.

QUESTION: You refer to that as a time-honored rule. Is that a rule of the United States Attorney's office or a rule of the Court of Appeals, or what?

MR. GREENSPAN: I believe it is a rule of the United States Attorney's office which has been approved by the Second Circuit.

QUESTION: Why didn't the Court of Appeals go off on that ground here?

MR. GREENSPAN: Because I don't think it was even argued.

QUESTION: You didn't argue it?

MR. GREENSPAN: No, I didn't have the privilege of arguing that case.

QUESTION: Do you think you have the privilege of arguing it here then?

MR. GREENSPAN: I don't know, but I am going to argue it and if the Court will accept it then I have the privilege.

(laughter)

Now there are a couple of errors that my brother, the Solicitor General, made to this Court and I would like to point them out. First of all, Officer Biro did testify.

QUESTION: Did not the judge say he wasn't considering his testimony on the merits?

MR. GREENSPAN: No, he didn't say that at all. What he did say is that, "When you take away Lois Hennessey's testimony, Officer Biro's testimony coupled with all the other evidence" was insufficient to convict the defendant.

The other point I would like to bring out to the Court

is that there was a wiretap in this case and it was incorrectly pointed out to this Court by the Solicitor General -- I know it was innocently because he said he wasn't aware of it. The wiretap was one that was conducted by the Westchester County District Attorney's office, as a result of a wiretap order by the Honorable Isaac Rubin who is the Administrative Judge now in Westchester County. There was an intercepted conversation between Millow and Mr. Ceccolini concerning a conversation which could be and probably would be interpreted as inculpatory. However, that wiretap was not brought into the case before Mr. Justice Gagliardi or before the Second Circuit.

QUESTION: It was before Justice Gagliardi. Judge Gagliardi mentioned it in his order.

MR. GREENSPAN: He mentioned it, but I don't think he relied on that, sir.

QUESTION: How could he mention it if he didn't know about it?

MR. GREENSPAN: Excuse me. I didn't mean to imply he didn't know about it. I just didn't believe it was relevant in the issue.

Now, we turn to a question of double jeopardy. I heard the Solicitor General argue quite strenuously for the fact that you can at any time appeal from any type of an order the effect of which will be, if you win the appeal, merely to reinstate a guilty verdict. And he says that even if the court

would make further findings that still, that's all right because all you are going to do is reinstate a guilty verdict.

If that would be the rule that this Court sets, I would disagree with it wholeheartedly. I would argue and I would ask this Court to adopt the rule which says that if the court, whether it is this Court or the Second Circuit or the lower court, whoever is given the task of making further findings, is obligated to make factual determinations of any kind, then it offends the rule against double jeopardy. And I would not permit, if I had the power, to allow a court to make further findings.

I believe that the Solicitor General is accurate when he says that if all the court has to do without making any further findings of any kind is to reinstate a guilty verdict then, of course, that the order is appealable or the judgment is appealable without further ado, and this Court has said so. But if it is going to add on or melt away the question of "Do you," or "Should you make further findings?" then I would strenuously argue that it should not be permitted. No further findings, otherwise it's double jeopardy. I believe that's what the cases say.

I would like just a moment to address something which I don't believe has ever been fully argued before this Court, if it has been argued at all, and that is I believe this Court should adopt the doctrine of equitable estoppel. I believe that

the foundation of every exclusionary rule, the foundation of every rule which says evidence can or cannot be admitted, that one can or cannot exercise a privilege or a right, is based upon the doctrine of clean hands, that the wrongdoer shouldn't profit by his wrongdoing, that one should not walk into court with unclean hands.

I believe this Court in Harris v. New York, which was argued unsuccessfully, unfortunately, by my former partner and, as a matter of interest, argued successfully by the District Attorney who later became my partner, is simply that one who does come into court with unclean hands, that is one who is a perjurer, they can't take advantage of that perjury by getting on the stand and perjuring himself anew, that you can use illegal evidence to impeach him. If that be the case, I would argue most strenuously that where the Government is a wrongdoer, where the Government makes a mistake, where the Government does something to create something which it really has no right to, then under that set of circumstances, the Government should be estopped. The Government has been estopped in civil cases involving aliens and in tax cases and in other situations. I believe it to be the foundation of all of your doctrine of exclusionary rules, and I would ask this Court to adopt it in this case to prevent or estop the Government from exercising any technical right of appeal and saying that from this moment on the Government has to act as a civilized human being just as

everyone else.

QUESTION: If, after the officer had left the florist shop that day, Ms. Hennessey got a little bit nervous and thought she might be gone into this unlawful conduct of her boss, if then she had gone to the telephone and called the FBI and given them all the information that she gave the agent some months later, would you be making these arguments?

MR. GREENSPAN: I don't believe so, Your Honor, because I believe what that would be then is that she went there before the agent who discovered her went to the Government and reported her. I think then you would have, truly, your application of doctrine of an intervening, superseding cause, but otherwise I say no. It's a close question. I don't say that it isn't. I also believe it could be a factual question, and I don't think that there is any evidence on the record, at this point, either way.

QUESTION: Well, imagine, under your estoppel, that once the policeman went in there and looked at that envelope, your man could never be prosecuted by anybody for anything.

MR. GREENSPAN: No, sir.

QUESTION: I hope not.

MR. GREENSPAN: No, sir. I wouldn't even try to argue that, only for what the fruit of this illegal search would produce in the way of evidence. I don't say that he couldn't be prosecuted, only that what they discover couldn't

be used against him.

QUESTION: She was a science teacher, student, wasn't she, studying police work?

MR. GREENSPAN: After the fact, sir. I don't believe she was studying that while she was working for him. She went to study that after she left his employ.

QUESTION: But before she testified. Maybe that gave her the idea --

MR. GREENSPAN: That's correct.

QUESTION: -- that she was engaged in something that was bad and he was too. Could have been.

MR. GREENSPAN: Could have been, but they'd already reported her and the Government knew all about her before she had this change of heart.

QUESTION: What is there in the evidence to say the Government used that as the basis of talking to her?

MR. GREENSPAN: What, sir? The fact that Officer Biro reported that to the authorities.

QUESTION: What else?

MR. GREENSPAN: That's all, sir, that I know of.

QUESTION: And four months later they talked to her.

MR. GREENSPAN: Yes, sir.

QUESTION: And you draw the connection, four months.

MR. GREENSPAN: Yes, sir, because I think, under the silver platter doctrine, the left hand of the Government should

know what the right hand is doing. And if it doesn't, I don't think the defendant should suffer because of it.

It is not an easy decision.

QUESTION: Mr. Greenspan, you started out on the merits by suggesting that the only test should be an intervening cause kind of test. And in this case, the trial judge said that it was not only possible but even probable that the FBI would have interviewed Ms. Hennessey later in the course of the gambling investigation in any event.

Wouldn't probability that the evidence would have been disclosed anyway be a sufficient intervening cause?

MR. GREENSPAN: I would say not, Your Honor. I think that that doctrine has been rejected by courts before as being speculative. I don't think you can determine or go off on a hypothetical of whether they would have or they should have or they could have. The fact is that they didn't in this case. Besides, I believe the Solicitor General has retreated from the inevitable discovery argument and doesn't urge it to this Court. Of course, this Court isn't bound by the fact that the Solicitor General doesn't urge it, but as a matter of logic I just don't think it should be in this specific situation. Not that it isn't an argument that couldn't be raised in a proper case. I don't believe this is the proper case.

QUESTION: But if it isn't done in terms of degrees of probability, how would you phrase the intervening cause?

I mean, you suggest intervening cause should be the test, and I am just wondering if that's really any different than a kind of a, sort of a probability test.

MR. GREENSPAN: Well, I think the question of foreseeability, the famous case in New York decided many years ago in Fallstaff v. Long Island Railroad sets forth the question of foreseeability. If it is foreseeable, then there is liability. If it is unforeseeable, then there isn't any liability. I know it is an oversimplification, but I think you have to make an analysis as to whether or not what happens in the intervening time superseded what happened beforehand so as to be independent. I don't think that's what happens here. I am not saying it can't happen, or that you can't get a set of facts in which something like that will arise. I suppose if there is a close time element maybe that would be more persuasive, but we don't have this type of analysis in this case.

Thank you.

MR. CHIEF JUSTICE BURGER: You have just one minute left, Mr. Allen.

REBUTTAL ORAL ARGUMENT OF RICHARD A. ALLEN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ALLEN: Thank you, Your Honor.

I would like to address a point Mr. Justice Stevens made that I didn't answer very adequately with respect to the

right of the Government to appeal a suppression motion and the requirement that there be a judgment.

18 U.S.C., Section 3731, appears to me to permit a Government appeal from a decision granting a suppression motion even after a finding of guilt or a verdict of guilt has been entered. The statute says, "An appeal by the United States shall lie to a Court of Appeals from a decision or order of a District Court suppressing or excluding evidence," comma, "not made after a defendant has been put in jeopardy and before the verdict or finging on an indictment or information."

The language would seem to imply that if the suppression order is made after the verdict of finding of guilt, it may be appealed if the decision is made. There is not in the statute any requirement that that decision on a suppression motion be in the form of a judgment.

QUESTION: That's Section 3731 of Title 18?

MR. ALLEN: That's correct.

QUESTION: Your point being that if the Congress had intended only pre-trial motions prior to jeopardy could be appealable, they wouldn't have gone ahead and added the phrase "and before the verdict or finding of an indictment or ..."

MR. ALLEN: That's correct, Your Honor, and in Morrison, Kopp and Rose, I don't believe that there was what you would call a judgment in the case. There was simply a decision granting a suppression motion.

QUESTION: But you agree that here that minute entry was a judgment. I mean the second one where it said "that's what we are appealing from."

MR. ALLEN: Yes, Your Honor, I would argue that was.

QUESTION: Just so I am perfectly clear on the Government's theory. The theory then is that the appeal is taken pursuant to the second paragraph of 3731, rather than the first paragraph. It's the paragraph in which suppression motions are discussed, rather than dismissal and indictment.

MR. ALLEN: I wouldn't want to limit us to the second paragraph, Your Honor, because I think it could be argued that the effect -- If we needed to argue it, I think we could argue that the effect of Judge Gagliardi's decision was a dismissal of the indictment.

QUESTION: Oh, I understand you could, but then this language you read to me would not be relevant under that theory. You would not need to rely on that.

MR. ALLEN: Would not be necessary. I would rely primarily on the second paragraph and I believe the language clearly gives us a right to appeal.

QUESTION: But you don't abandon what the Court of Appeals said at 21(a) of the Appendix to your petition that this was a judgment.

MR. ALLEN: I do not abandon that, Your Honor. I think that they correctly determined that they were reviewing

a judgment.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:06 o'clock, a.m., the case in the above-entitled matter was submitted.)