In the

Supreme Court of the United States

UNITED STATES,
Petitioner,

v.

ESTELLE JACOBS,
A/K/A " MRS. KRAMER ",
Respondent.

No. 76-1193

Washington, D.C.
March 20, 1978

Pages 1 thru 40

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UNITED STATES, Petitioner,	:	
v.	:	No. 76-1193
ESTELLE JACOBS, A/K/A "MRS. KRAMER", Respondent.	:	

Washington, D. C.

Monday, March 20, 1978

The above-entitled matter came on for argument at 2:12 o'clock, p.m.

BEFORE:

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

APPEARANCES:

ANDREW L. FREY, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Petitioner.

IRVING P. SEIDMAN, ESQ., Rubin, Seidman & Dochter, 485 Lexington Avenue, New York, New York 10017, 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 76-1193, United States against Jacobs.

Mr. Frey.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit holding that Respondent's grand jury testimony was properly suppressed in the exercise of that court's supervisory powers. This case arose when Respondent was called to appear before a special organized crime grand jury in the Eastern District of New York investigating extortion and debt collection activities.

The grand jury was being conducted by a strike force attorney from Washington who had been specially assigned by the Assistant Attorney General for the purpose of conducting the investigation.

The Government had evidence that Respondent, while employed as a skip tracer by one Frankie Provenzano, had uttered threats against the life of a gambling debtor to that debtor's brother. When Respondent appeared before the grand jury, she was given careful explanation of her right not to

answer potentially self-incriminating questions and of her right to the assistance of counsel who could be available to her outside the grand jury room. She was also told about the perjury laws. She was not told that she was a target of the investigation. And, during the interrogation, she was not told that the Government possessed evidence directly contradicting her testimony. In the course of her testimony, she flatly denied the conversation involving the threat to the debtor's brother.

The grand jury indicted Respondent both for the substantive offense of transmitting a threat and for perjury in denying the existence of the conversation. The District Court suppressed Respondent's grand jury testimony on grounds subsequently invalidated by this Court in United States v. Mandujano and United States v. Washington. The Court of Appeals upheld the District Court's action, not on the constitutional ground, but on the basis of its supervisory powers. It exercised these powers in response not to any violation of Mrs. Jacobs' rights, but to the irregularity it perceived in the failure of the Strike Force attorney to follow what the court understood to be the uniform practice of the U.S. Attorney's office in that district and in the circuit generally to advise prospective defendants of their status as grand jury targets when they were called to appear before the grand jury.

The Court of Appeals stated that the exclusion of

evidence in this case was a one-time sanction which it said it was imposing for didactic purposes. I might say parenthetically that the lesson that it meant to teach the Government is not altogether clear to us from its opinion. It explicitly disavows any intent to require the giving of target warnings. And while it speaks broadly at some points of uniformity in prosecutorial practice and making equal justice available to all -- both commendable goals and with which we wholeheartedly concur -- at other points its opinion seems quite explicitly to limit its concern to uniformity within a single district and even more specifically to conformity of Strike Force practice to the practice of the United States Attorney's office.

QUESTION: It would not apply in the Eastern District, only in the Southern?

MR. FREY: Well, this was in the Eastern District.

QUESTION: Then it would not apply in the Southern?

MR. FREY: As far as I can tell from the opinion, the Eastern District and the Southern District would not have to follow the same practice. Indeed, I don't think two U.S. attorneys would have to follow the same practice. What would be required, it isn't clear, but what they expressly state is that the Strike Force attorney must follow the practice of the United States attorney.

QUESTION: Wasn't the didacticism -- if that's a

word -- implied? Doesn't the record hint rather strongly of that?

MR. FREY: Well, the opinion suggests that what they were concerned about was the intrusion of alien Strike Force attorneys from Washington into New York to conduct business that I think the court felt might have been better conducted by the United States Attorney's office.

QUESTION: And in conducting that business to deviate from the established practice of the U.S. Attorney's office in that district.

MR. FREY: That was what the court was concerned about.

QUESTION: So that is what the opinion is about, rightly or wrongly, isn't it?

MR. FREY: Well, there are other intimations of broader principles of uniformity in prosecutorial practice, generally, so that I am not clear. I assume, at a minimum, we can distill the lesson that the Strike Force attorneys ought to follow ground rules of U.S. Attorneys.

Now, whatever the lesson that they meant to teach, the questions that this Court must decide are essentially two. The first is whether the Federal courts possess, as part of their supervisory powers, the power to exclude evidence as a remedy for pretrial prosecutorial conduct that the court finds distasteful but that does not violate the defendant's

constitutional or statutory rights.

The second is, assuming that such power exists in at least some cases, was it appropriately exercised in this case?

We submit that the proper answer to both questions is no, and we have advanced several arguments in our brief any one of which, if accepted, would compel reversal of the decision of the Court of Appeals.

Before turning to the arguments, I want to inform the Court of a recent development that has at least background interest for this case. On December 16, 1977, the Department of Justice issued significant amendments to the United States Attorneys Manual on the subject of Grand Jury practice. Under these procedures, grand jury witnesses are now receiving with the subpoena a printed advice of rights form which briefly states the nature of the grand jury's inquiry and advises them of their self-incrimination and counsel rights. The content of this advice is essentially what was told to Mrs. Jacobs when she was in the grand jury in this case.

In addition, the new internal guidelines direct that targets of the grand jury's inquiry be advised that their conduct is being investigated for possible violation of Federal law. A target is defined in the new manual provision as, quote, "a person as to whom the prosecutor has substantial evidence linking him to the commission of a crime and who, in

the judgment of the prosecutor, is a putative defendant." These new manual provisions represent an effort by the Department to achieve greater uniformity of prosecutorial practice in the conduct of grand juries, the same goal the Court of Appeals sought to foster by suppressing Respondent's testimony.

Now, the fact that the Department has instituted these procedures makes this case, if anything, more important than before, in our view. If the judicial supervisory power is held to extend to suppression of evidence, related to prosecutorial departure from uniform practice, there will be a new category of suppression hearings to which criminal defendants will be entitled.

In addition to Miranda claims, Fourth Amendment exclusionary rule claims, Wade-Stovall claims, and the like, the courts will have to entertain Jacobs suppression motion based upon allegations that internal guidelines relating to prosecutorial practices or that consistent informal prosecutorial practices have been violated.

These inquiries will not always be easy, since there are innumerable areas of prosecutorial activities in which standard practices have developed informally or are called for by the United States Attorneys Manual.

Looking just as the aspect involved in this case, the concept of a grand jury target is a slippery one, especially in the context of an investigatory grand jury. Often a witness,

and Mandujano or Wang or Mrs. Jacobs are all examples, will be someone who could be indicted but who the grand jury is really more interested in as a source of information leading to higher ups. In other words, there will be room for considerable controversy in interpreting these prosecutorial guidelines and the courts will be shouldering a significant added burden in undertaking to supervise prosecutorial conduct by determining --

QUESTION: Which courts are you talking about?

MR. FREY: Federal courts.

QUESTION: The Second Circuit set the rule up. They aren't complaining about it, are they?

MR. FREY: I'm not sure which rule they --

QUESTION: The rule in this case. The Court of Appeals involved in this case is not complaining about --

MR. FREY: Well, I think the Court of Appeals, perhaps, didn't fully consider in this case what the effect would be of a rule that says whenever the --

QUESTION: I assume you know more about the business of the Second Circuit than the Second Circuit does.

MR. FREY: I don't assert that.

QUESTION: How many districts are there in the Second Circuit?

MR. FREY: I believe there are six.

QUESTION: The action of the Court of Appeals is to make all of them conform to one of them, is that it?

MR. FREY: It's not clear. I mean there is going to have to be a lot of further litigation as to what degree of conformity is required and what kinds of departures from norms of prosecutorial behavior would justify a remedy such as Mrs. Jacobs got in this case. I mean I think it will be a fertile field for further litigation.

But I do want to say that wholly apart from considerations of increased judicial workload that would result from adding Jacobs-type suppression motions, there is a serious question of the legitimacy and of the efficacy of judicial efforts to enforce nonstatutory and nonconstitutional standards of prosecutorial conduct.

Inherent in the voluntary adoption by the Executive Branch of such practices, is the expectation that the interpretation and the enforcement of these practices will be for the Executive Branch. If judicial sanctions are going to be imposed for violations of voluntarily adopted internal prosecutorial practices, the wisdom of adopting such standards in the first place will have to be re-examined.

QUESTION: Would this mean that if in one district -- in one circuit with a great many districts one district decided, or the Attorney General decided that in one district they would conduct a pilot program to give the full target warnings, the most that has been asked by anyone, that that would mean under this approach all would have to comply with it,

forthwith?

MR. FREY: I think that at this stage that would remain a speculative matter and I am not prepared to characterize the Court of Appeals decision as going that far. It might be construed to go that far. It's the first step toward a policy of uniform national prosecutorial practice. But, however small the first step may be that the Court is taking in this case, I don't think it should be taking that step at all. And in this connection, I refer to your statement on Court of Appeals in the Newman case which dealt with the question of the legitimacy of judicial inquiry into whether prosecutors have conformed to their own standards of behavior. This is set forth at page 28 of our brief.

You said there, and I quote, "It is assumed that the United States Attorney will perform its duties and exercise its powers consistent with his oaths. And while this discretion is subject to abuse or misuse, just as is judicial discretion, deviations from his duty as an agent of the Executive are to be dealt with by his superiors."

That seems to me to be a powerful consideration that the Court of Appeals has not given due regard to.

In any event, pragmatic considerations aside, we do contest the power of the courts to apply the sanction of evidentiary exclusion under their supervisory power in cases such as this.

Before discussing our arguments --

QUESTION: You say "in cases such as this." If you left those words out, would you say there is no power in the Court of Appeals, in the exercise of its supervisory power, ever to order the exclusion of evidence, except on one of the grounds already recognized, such as a Fourth Amendment violation or a coerced confession or a Wade violation, whatever the list would be? It can never order exclusion of evidence?

MR. FREY: I think I ought to divide my response into the different headings, because,as I indicated, we have several quite different and independent arguments.

Under Rule 402, I think that the supervisory power to exclude evidence has been taken away, but that does not, it seems to me -- It doesn't in any way undermine the result in Weeks and in the constitutional exclusionary rule cases.

QUESTION: No, but I was saying is your submission that a Court of Appeals may never go beyond what is now the law with respect to exclusion of evidence, it could never find an action by a Strike Force lawyer coming into a district which violated a lot of local rules never a basis for suppressing evidence? Evidence which is relevant, of course.

MR. FREY: I don't think that that's our position. First of all, if the action violates a statute, a rule or the Constitution, then I think there may be room under Section 402 for the application of Rule 402 for the application of an

exclusionary rule.

As far as inherent supervisory power is concerned -- that is assuming you reject our argument under Rule 402 and under Section 3501, I don't suggest that there is no power at all to exclude evidence. I do suggest that this category of cases that the Court has before it today is one in which such power never existed and in which the Court does not have power, that is the power has to be linked to a violation of a constitutional or statutory right, or else to the supervision of the judicial proceeding, that is --

QUESTION: It never could, for example, be based on a Strike Force lawyer coming in and saying, "I am not going to follow the U.S. Attorney's manual or what you describe to us. I have a better way of getting evidence. I'll go out and beat somebody up," or something like that. They could never, never -- and a third party so the witness, himself, isn't the defendant. The Court could never exclude such evidence?

MR. FREY: I think that would be right.

QUESTION: Was there a manual ever issued from the Department of Justice dictating the result that this --

MR. FREY: At the time that this took place, what we were dealing with was a purely informal practice within the U.S. Attorney's district and there was no provision in the manual requiring the giving of target warnings.

Indeed, the Court of Appeals when it made its inquiry

the first time the appeal was before it asked the wrong question, because they asked what the practice was at the time they were hearing the first appeal. And they didn't even ask whether at the time Mrs. Jacobs testified there was any practice in the Eastern District to give target warnings.

In any event, let me try -- In my first argument, I focused largely on the point that even assuming that there is some supervisory power in this area, it was improperly exercised by the Court of Appeals in the circumstances of this case.

Today, I'd like to focus a bit more on our arguments regarding the various limitations on the reach of the judicial supervisory power, which we believe entirely foreclosed the use of a remedy of evidentiary exclusion in a case such as this, if I may use that term. I will elaborate a little more as I go along.

I'll begin with Rule 402 of the Federal Rules of Evidence. I think it is undisputed by anyone that the supervisory power of the courts is subject to statutory restriction. And we submit that Rule 402 does eliminate whatever power the courts previously enjoyed to apply the remedy of evidentiary suppression, except in the circumstances specified by the rule.

Now, the rule begins by saying all relevant evidence is admissible. If this were all it said, the Court of Appeals might have been correct in concluding that the rule was not designed to and did not circumscribe pre-existing inherent

supervisory powers. However, the rule says more. It explicitly delineates the exceptions to the general requirement of admissibility that the court's are empowered to recognize.

The rule is set forth at several places in our brief. I am looking at page 14 of our brief. It says, "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules"-- that is the Rules of Evidence -- "or by other rules proscribed by the Supreme Court pursuant to statutory authority."

Moreoever, the adoption of Rule 402 was accompanied by an amendment to Rule 26 of the Federal Rules of Criminal Procedure which eliminated the provision which had been relied on in Elkins, for example, as conferring upon the courts a general, in a sense, common law power to formulate rules of evidence under their inherent supervisory powers.

QUESTION: Mr. Frey, when you say inherent supervisory power, do you mean anything more than the authority of any appellate court to reverse a trial court on a basis not other -- on the basis that doesn't depend on the statute or Constitution?

MR. FREY: Well, I would distinguish, I think, two categories of cases, and I intend, after discussing Rule 402, to turn to the question of, apart from the statutory arguments, what I do think are the limitations on the supervisory power. So, perhaps, I could defer it to that point.

I want to be sure that the limitations of our argument about Rule 402 are understood. We are not calling into question in any way the power of the Federal courts to apply the remedy of evidentiary exclusion when that remedy is necessary to protect constitutional rights. The Weeks decision stands unimpaired, in our view.

The more difficult question is when we come to violations of statutory rights or of rules. Now, it is clear from the rule that if a statute or a rule listed in Rule 402 explicitly provides a remedy of evidentiary exclusion, of course, that remedy may be enforced by the courts agreeably to Rule 402. And an example of that is the wiretap statute which contains various exclusionary principles some of which are not constitutionally required. But if the statute or rule does not specify exclusion of evidence as a remedy, then there is a close issue.

The rule on its face would appear to foreclose exclusion in such circumstances, since admissibility must, according to the language, be provided by the Constitution, statute or rule. But, in any event, whether the court has the power in enforcing a statute or rule listed in Rule 402 to exclude evidence ancillary to that finding of a violation, there is no way, it seems to us, that its power under Rule 402 continues, if it ever did, to reach out where there is no constitutional violation, no statute --

QUESTION: What about a Miranda case, where there is no constitutional violation, just a failure to give the warning as specified?

MR. FREY: Well, I think that Miranda and Mapp stand on essentially the same footing, that is the court. What the court determines is that there has been a constitutional violation and that --

QUESTION: I thought there was a case written later that said -- a Michigan case -- that said it wasn't constitutionally mandated.

MR.FREY: It said the remedy is a prophylactic remedy that extends, perhaps, beyond the --

QUESTION: Where there is no constitutional violation at all, just --

MR. FREY: We are getting onto very slippery ground, but since it is clear that this rule is applicable against the States, it must have a constitutional footing. Now, it seems to me that what the court has done -- and let's take Mapp as an example because, of course, prior to Mapp it wasn't clear that the exclusionary remedy was available against the State's for Fourth Amendment violations.

What the Court must be saying is that there has been a violation of constitutional rights or conduct of such a nature in the Miranda case that we can't distinguish it from a violation of constitutional rights. We are going to treat it

presumptively as a violation of constitutional rights. And the only way we know to enforce those rights, the only remedy that's available to us, is the exclusionary principle.

QUESTION: Supposing the McNabb case were to arise today as a case of first impression, it hadn't been decided before. We would have to admit that confession, I suppose.

MR. FREY: Well, you would certainly have to under Section 3501, but if Section 3501 did not excist -- That's the issue that I am saying is a difficult issue. I could see an argument which would say -- and I would probably be on the other side of it -- but I could see an argument which would say that just as the exclusionary rule is necessary to enforce Fourth Amendment rights even though the Fourth Amendment doesn't explicitly contain an exclusionary rule, so the McNabb-Mallory rule is the only way of enforcing the rights that are protected by that particular statute.

QUESTION: So are McNabb and Mallory Constitution or Rule 5(a)?

MR. FREY: That was a Rule 5(a) or, in effect, the statutory provision.

QUESTION: So you had a built in exclusion by the will of Congress?

MR. FREY: No, I don't think Rule 5(a) contained any exclusionary dictate from Congress. It was a judicial creation.

QUESTION: Are you sure in both McNabb and Mallory

that that's the case?

MR. FREY: I think that that's the case, and I think that Congress has now passed a statute which expressly deals with the question of exclusion in relation to violations of the prompt presentation to a magistrate requirement.

QUESTION: It is statutory now clearly, is it not?

MR. FREY: Yes.

QUESTION: Not constitutional?

MR. FREY: It is not constitutional, but I was responding to what I understood to be a question from Mr. Justice Stevens that what would happen in the McNabb-Mallory situation under Rule 402, and I was saying that I think it would be arguable and, indeed, if you look at the advisory committee notes in connection with the adoption of Rule 402, they seem to contemplate that a McNabb-Mallory kind of exclusionary rule would survive. So you would have to balance the language of the rule against the contemplation that where it's used to enforce a statutory right, such as in McNabb-Mallory it may still exist. But that's neither here nor there for purposes of your problem today. Nobody has pointed me to a constitutional provision, a statute, a rule of the kind listed in Rule 402 on which the Second Circuit could predicate its decision.

Now, leaving our statutory argument and turning to the question of inherent power, assuming there were no statute, I want to preface my remarks on this point by stating that we

don't for one minute deny the existence of substantial supervisory powers in the Federal courts. The cases cited by Justice Marshall in his dissent from the initial remand in this case unquestionably established that such powers exist. What is at issue here is the nature and extent of those powers. And I suggest, without substantial fear of contradiction, that the Court of Appeals' exercise of these powers in the present case is unprecedented and is qualitatively different from the past exercises of supervisory power in decisions of this Court or of other courts of appeal.

Now, the supervisory powers of the Federal courts must be something more than a mere rubric to be invoked to justify any action that the courts wish to take. The fact that some supervisory powers undeniably exist does not, if I may borrow the words of Justice Stevens in his dissent in the Telephone Company case, "give Federal judges the wide-ranging powers of an ombudsman."

Indeed, in the specific area of supervising police and prosecutorial practices, this Court has specifically stated that the Federal judiciary does not sit to exercise a chanceless foot veto over law enforcement practices of which it does not approve -- that's in the entrapment cases -- and last term in Lovasco in talking about due process in a very related context the Court said, "Judges are not free in defining due process to impose on law enforcement officials our personal and private

notions of fairness and to disregard the limits that bind judges in their judicial functions."

QUESTION: But that was in defining due process which is a constitutional standard. Isn't -- to echo my brother Rehnquist's question -- supervisory power to reverse the judgment of conviction is no more than the power of any reviewing court to reverse the judgment of conviction which it finds for one reason or another erroneous on some basis other than the Constitution or a statute.

Is there anything wrong, for example, with a particular court of appeals in a particular circuit saying, "In this circuit we are not going to approve the Allen charge to the jury."

MR. FREY: No.

QUESTION: "It is not constitutionally required to disapprove it, but we are not, as a matter of X circuit law, going to have Allen charges in this circuit."

MR. FREY: I think that's precisely the point that I am trying to make. I don't question that that power exists. I think all of the cases in which supervisory power has been exercised can be divided into two categories. The first category, which encompasses the vast majority of cases, includes matters such as the proper voir dire of jurors, steps to be taken to avoid prejudicial publicity, proper jury instructions, such as the Allen charge. The legitimacy of these powers is beyond question, but they are far removed in kind. They are

supervision of the trial itself, of what goes on in the trial and the court does not need a statute or a constitutional provision in order to exercise that kind of supervision. That is far removed from what the Court of Appeals was doing in this case.

QUESTION: Mr. Frey, I assume you are going to draw the line between out of court and in court.

MR. FREY: I am.

QUESTION: Where are you going to put the grand jury?

MR. FREY: Well, let me pass on to that. I have very little time left, so I just want to say that I think the McNabb and Elkins cases are different from the Allen charge cases. They come closer but the point I wanted to make about those was that the Court has never exercised its supervisory power without finding a violation of the defendant's rights in the McNabb-Elkins kind of case.

Let me respond to your point. The grand jury is in significant respects an arm of the court. Federal courts have a legitimate and substantial interest in overseeing grand jury proceedings. Now, we think they have to be circumspect about keeping a line between what is intruding on Executive Branch functions and what is proper judicial functions, but it is not necessary to our argument today to say that the courts don't have supervisory power to promulgate a rule to give target warnings in the grand jury. In other words, we can concede that

the courts could adopt such a rule. They could say, henceforth, you will record all proceedings before the grand jury and transcribe them. Henceforth, you will give certain warnings to witnesses. Henceforth, you will not call targets. But these are prospects of rules. They are not a retrospective reaching out on a selective ad hoc basis to pick a single past instance of a practice which the court had never indicated before was inappropriate and imposing a sanction of suppression.

The question, Mr. Justice Marshall, is remedy. It is not the power to make the rule, it is the power to impose the particular remedy which the court selected in this case of suppression.

And I might say that we are dealing here with standards of conduct for prosecutors. In Mapp v. Ohio, the court found itself confronted with policemen over whom it had very little power, with respect to whom it had very little ability to discipline them and it was in a sense compelled, if it was going to do anything about what it viewed as a rash of otherwise uncontrollable Fourth Amendment violations, to use a remedy of evidentiary exclusion.

Here we are dealing with prosecutors. There is no reason to suppose that they won't obey a rule that's announced by the courts and there is no reason to suppose that there are isolated instances of disobedience, that it isn't sufficient to deal with them by disciplining the disobedient lawyer directly

rather than --

QUESTION: Mr. Frey, of course, you are dealing with Strike Force prosecutors coming into the district not those who are regularly before the court, aren't you? Isn't that a special problem for the circuit?

MR. FREY: I am reluctant to encourage the Court to get into the matter of allocating functions between Strike Force and U.S. Attorneys, because I think that really is principally the job of the Department of Justice. But if it were to see fit to do so, it has the power of contempt over these people, if they come in. It seems to me, it has the same control as over any lawyer who appears before them.

QUESTION: And hasn't that type of power traditionally, in most cases, been exercised prospectively?

MR. FREY: Oh, yes. I think -- Well, not the contempt power. It requires an order which is violated.

QUESTION: I am talking about power over a practice which the court disapproves and says, "Hereafter, the United States Attorney will do thus and so."

MR. FREY: I think that's precisely so.

QUESTION: Do you know of any case where a Federal judge held the U.S. Attorney in contempt?

MR. FREY: Chandler did that in Oklahoma.

QUESTION: God, what happened to him?

MR. FREY: We got it overturned pretty rapidly.

QUESTION: And another judge held the present Judge Timbers in contempt, before he was a judge.

MR. FREY: But I think before you go to what is clearly a drastic remedy of taking a defendant who has committed an offense, serious offense of perjury in this case and, in effect, pardoning that defendant as a means of disciplining the U.S. Attorney, I think you have to be persuaded that that really --

QUESTION: I am afraid this might not have been the right case.

QUESTION: Let's try one other example. We had some case in the Seventh Circuit where there was a claim made that the Government had abused its immunity powers, granted immunity in much too liberal terms to get a witness to testify against an accomplice. Supposing the court were persuaded that the immunity was almost like a bribe and that it made the witnesses' testimony so inherently incredible that it should be suppressed, would the court have power to do that, do you think?

MR. FREY: I think Rule 402 would say not, but if you take the Fong-Foo situation, I was thinking about, where Judge Wyzanski disapproved of the consultation between the U.S. Attorney and the witness, I don't think he would have the power to say, "Well, I am not going to let you put on that witness."

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

Mr. Seidman.

ORAL ARGUMENT OF IRVING P. SEIDMAN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I appreciate the fact that we are here a second time, but I respectfully submit to the Court that Mr. Frey has used his first argument on the second occasion.

QUESTION: Has anything changed since then?

MR. SEIDMAN: I would have hoped that he would have considered my argument more fully, Your Honor.

QUESTION: Do you really mean that you appreciate the fact that you are here a second time?

MR. SEIDMAN: For a humble lawyer, it is always an honor to appear before the Supreme Court of the United State, Mr. Justice Rehnquist.

MR. CHIEF JUSTICE BURGER: We will accept that.

MR. SEIDMAN: Mr. Frey has most reasonably stated the underlying factual pattern in this case, except that I would wish to inform the Court that the defendant in this matter is a housewife who had part-time employment. And, for whatever it is worth, my law firm represents this defendant with respect to the appellate part of this case in a pro bono public help position. I think that's important to indicate that this defendant doesn't appear here represented by a high-priced attorney, nor is she a seasoned witness represented by counsel

when she appeared before the grand jury.

QUESTION: When the charge is perjury on a specific day and hour before a grand jury, how are any of those factors relevant?

MR. SEIDMAN: I just mention it to the Court for background, Your Honor. I wish to get into the case as to the law.

However, whether it is from the standpoint of the legal issues or the philosophy underlying the legal issues, I believe that the thrust of the argument by Mr. Frey has failed to address the problem.

I do not believe this case involves an instance where the appellate court seeks to direct the prosecutor in what he must or must not say. And I believe the underlying opinion of the Court of Appeals expressly states that if the prosecutor wishes or the Attorney General wishes they need not, as the law is presently constituted, give any type of target warning.

And, as time has indicated, the Attorney General of the United States has deemed it appropriate to adopt the requirement of target warnings as a uniform practice outside the scope of constitutional and statutory requirements in the United States of America, effective, I believe, February 15, 1978, or thereabouts.

I believe what the Court of Appeals was concerned about, and what I was initially concerned about as defense

counsel in this matter, who brings approximately 10 years as a prosecutor as a background to this type of case, was the conduct that would be taking place before an arm of the court, to whit, a grand jury.

I submit to the Court that this is not an issue of an appellate court seeking to exercise its chanceless veto of Executive Branch practice. I submit to the Court that since the Court's constitutional rulings in Mandujano and its progeny, that absent the exercise of supervisory power over grand juries by appellate and district courts, this Court has left bare the protection and requirements inherent in the exercise of equal and fair justice, any concept of protection to any witness who appears before the grand jury. For the Court has clearly stated that there is no requirement for Miranda warning, target warning of any type in that type of setting.

I believe what the court was concerned about and is concerned with and properly concerned with is the grand jury which is an arm of the court and not the Executive Branch of Government.

And, again, I wish to reiterate that the court in its second opinion, as well as its first opinion, indicated that the prosecutor could adopt any policy concerning this matter.

The question really is, Your Honor, whether or not any witness who appears before a grand jury should expect uniform application, from the standpoint of fairness and from the

standpoint of what is the accepted practice within that circuit which is an urban circuit, consisting of six different districts, or whether or not the application of practice --

QUESTION: Wait a minute, you've got six --

MR. SEIDMAN: Six districts.

QUESTION: Well, two of those in New York are not urban, the Western and the Northern. The Northern is consisting of six penitentiaries, for the most part. And Vermont is not urban.

MR. SEIDMAN: I stand corrected, Your Honor, to the extend that that geographic and population finding is correct. However, the entire district and the workload of the Second Circuit certainly is a most responsible one. And I believe what the court was seeking to do is not retrospectively, but rather prospectively and currently dealing with a situation which it faced in that circuit. And as is cited in our brief, the Second Circuit had previously admonished and warned the Strike Force attorneys appearing before it and in its circuit in the Persico case that they had an obligation to identify with, become informed with and follow the guidelines, not only of their work in the circuit, but their requirement that they operate with and in conjunction with and under the direction of the United States Attorney in the particular district involved.

For Mr. Frey to suggest that this was a retrospective application, is incorrect, in view of the Persico case where the

court not only issued a formal opinion but annexed thereto a copy of the appropriate guidelines that were involved.

I submit to the Court that there is probably no more important aspect of the criminal justice process than the grand jury, because it is before the grand jury that supposedly the determination is made whether one becomes a defendant or is determined not to be formally charged.

QUESTION: Do you mean to suggest that most of the people who are charged do go before a grand jury?

MR. SEIDMAN: Well, ultimately, in the process, in the Federal process, I would say that a good number, if not half of the cases, are of grand jury origin, Your Honor, rather than summary arrests situations.

QUESTION: Yes, but the particular defendant, is the particular defendant a witness before the grand jury in half of the cases, or anywhere near half of the cases?

MR. SEIDMAN: Well, in the Second Circuit, and particularly in the Southern District and in the Eastern District of that circuit, Your Honor, I believe it is the practice, and was the practice, and this is what disturbed the court in this instance. After having given fair warning to the Strike Force attorney, to notify defendants that there is a matter pending before the grand jury and should they wish to appear before the grand jury, although they are targeted, that they have that right to do so. And that is the accepted practice and,

apparently, that now is the accepted practice in the United States of America, pursuant to the guidelines now issued by the Attorney General of the United States.

I might further submit to the Court that the issue of sanction in this case really does not present any problem unless one determines that this Court does not have the inherent power to supervise the conduct of prosecutors before an arm of the court, which is the grand jury.

QUESTION: Does it have supervisory power to supervise the conduct of judges?

MR. SEIDMAN: Within its circuit? Yes, Your Honor.

QUESTION: This Court have supervisory power over judges?

MR. SEIDMAN: I believe you do, sir. And I believe there have been instances of its application. And I would assume that that did not emanate out of any constitutional or statutory scheme. And as was cited in the dissenting opinion of Mr. Justice Marshall in the remand portion of this case, "this Court and the Chief Judge has acknowledged the existence of the supervisory power and enumerated cases therein and has acknowledged the effective and proper utilization of sanction by way of suppression as a means of fulfilling that supervisory power."

QUESTION: According to the Solicitor General, under the supervisory, or whatever power you have, the Second Circuit

said what it said, the Attorney General has issued an order, a manual to all the prosecutors, not only in the Eastern District, not only in the Second Circuit, but all over the country. So you have accomplished what you wanted. Now the only other thing is whether you turn loose a perjurer.

MR. SEIDMAN: I submit that that is not the issue, Mr. Justice Marshall.

QUESTION: I thought that was the Government's position.

MR. SEIDMAN: That may well be the Government's position, but I think this Court, in its seasoned and reasoned judgment, would see beyond myoptic approach to what's at foot here.

What the Government really is seeking to state and propose is that pursuant to Rule 402 that appellate courts do not have the supervision, or even the district courts, as to what evidence or what conduct goes before those areas that are within its domain, which includes the trial court and the grand jury.

And I might submit to the Court that Rule 402, in its wording, merely states that relevant evidence is admissible.

QUESTION: Mr. Seidman, doesn't this Court have the same sort of supervisory power over the Court of Appeals as the Court of Appeals has over U.S. Attorneys of the District Court, just by virtue of our power to grant certiorari?

MR. SEIDMAN: There is no doubt in my mind that this Court has supervisory power over the conduct of affairs of the

judiciary in the United States of America, which would include the Second Circuit.

QUESTION: In other words, if the Second Circuit decides there is going to be no more Allen charge, as my brother Stewart gave an hypothesis to your colleague, Mr. Frey, and reverses a conviction, the Government can petition here and we, in turn, would be called upon to decide whether the Allen charge was to be a matter of national uniformity or that it's up to each circuit, but at any rate, we would have a right to review the Second Circuit's determination?

MR. SEIDMAN: I believe so, and I have not suggested anything to the contrary. However, the analogy of the Allen charge and the diversity of practice within the circuit, and the fact that that does exist, and the fact that this Court has not chosen to apply a uniform standard, or universal standard, here in the United States, if anything, buttresses my position that the Second Circuit, with respect to its jurisdiction, could certainly adopt a procedure or a concept of what should take place before its grand juries that have reasonableness. And nobody has contended that the suggestion that the requirement of a target warning be given is unreasonable. And, if anything, the fact that the Attorney General has adopted that practice adds weight to the significance of this case and the requirement in acknowledging the existence of the supervisory power of the circuit court, when reasonably exercised. And, in

this case, adoption by the Attorney General would show some type of reasonableness as to the concept that supervisory power is what is at issue here and not whether or not my client who faces prosecution on another aspect of this charge has, or has not, committed perjury.

I don't stand before this Court to condone perjury and it has never been my argument. However, I don't believe, and the circuit court stated that this Court has adopted a rule or principle of law that in any perjury indictment that, per se, there is no concept of suppression or the sanction of suppression. And, as a matter of fact, even in the Mandujano case, which was a plurality opinion, I believe that there was an acknowledgment that there might be some situations in which,even given a perjury, that the sanction of suppression would be applicable.

I might add that there has not been a trial of this matter, and all that the indictment really is, hopefully, is an allegation. The posture of this case is one of accusation. The posture of this case, after the consideration of the point of law or principle of law involved herein, is what took place before that grand jury, and whether or not the circuit or the district court could apply its supervisory power, which obviously was not arbitrary or capricious, given the adoption of the same principle of law by the Attorney General of the United States, And what is at issue here is can this Court, or should this Court, in essence, interfere with the reasoned judgment of a circuit court

that had previously warned prosecutors that given Strike Force failure to adhere to certain standards, that it was giving them fair warning that the next time it would apply sanctions.

I might add that if this Court interferes with this supervisory application of circuit court power, then it would be adopting the suggestion of Mr. Frey which I believe this Court could not reasonably entertain. There is no way that a circuit court nor a defense counsel can supervise each and every prosecutor as to what he or she does. Just as it would be impossible for this Court to supervise each and every judge within its jurisdiction as to what he or she does.

And, therefore, the essence of the supervisory power is to permit the court to guide, in general terms, the conduct of those who are responsible in the performance of their duties within its jurisdiction. In this instance, the jurisdiction is not the Executive Branch of Government. The jurisdiction is the grand jury. There is no argument and case lore and statute are clear that the grand jury is an arm of the court. That means that it is created by the court, it is supervised by the court, the grand jury reports back to the court, and, if need be, the prosecutor can be excluded from appearing before that arm of the court.

For Mr. Frey to suggest that the grand jury, in some way, is a part of the Executive Branch of the Government, I believe, is the sanction -- is the cause of the sanction in this

QUESTION: Mr. Frey did not say that. He said that the U.S. Attorney was. He said, specifically, that the grand jury was a part of the judicial system.

MR. SEIDMAN: Well, I take that back, but it was my impression that what he is saying is that the application of a sanction in this case is an interference with the Executive Branch of Government.

QUESTION: Well, the grand jury wasn't required to warn the witness. The U.S. Attorney was required.

MR. SEIDMAN: However, just as what I say before this Court --

QUESTION: Because the grand jury didn't know about the rule.

MR. SEIDMAN: Well, that may be the weakness.

QUESTION: Well, you said you are a former U.S. Attorney, so you know.

MR. SEIDMAN: I am a former State prosecutor, but -- and I do understand what takes place before grand juries and I would hope that this Court would reconsider some of its constitutional rulings in this area, but this is not the time or place to deal in this matter.

But, again, getting back to the point that I was seeking to make, and that is that there is no way that a supervisory court can exercise supervisory power unless, as a concomitant of that power, it had an ability to apply sanction. And I submit

to the Court that in this instance sanction that was imposed here, which results in the dismissal of the perjuring indictment, related not to the perjury count, but rather to the conduct of the prosecutor in failing to adhere to a prior written formal warning to Strike Force attorneys.

I would hope that the Court would not remove from the circuit courts its wisdom in determining when it should apply sanctions of this type. I don't believe this Court should be led to believe, as Mr. Frey seemed to indicate, that there would be a new onslaught of litigation in this matter, involving failure to comply with internal guidelines.

This circuit was clear in stating that they were not creating any general exclusionary rule, nor were they in any way suggesting that in each and every time that the prosecutor failed to dot an "i" or cross a "t" that there would be the sanction of suppression and the failure of an indictment.

To the contrary, the court clearly stated that this was an ad hoc, one-time, sanction, falling within its desire to inform Strike Force attorneys that failure to apply to the circuit court's practices before grand juries has to result in this sanction.

QUESTION: That would mean, I take it, from your point of view, that if the Attorney General, personally, went into court, as at least newspaper accounts indicated he did last week, in one case, or within the last two weeks, that the local

rule and the local court of appeals can instruct the Attorney General of the United States, personally, on how he must function. That's the consequence of it, isn't it?

MR. SEIDMAN: Only as to how he can function as he practices law before the grand jury and before that court. The court does not seek to tell the Attorney General who he is to investigate, how he is --

QUESTION: No, narrowing it down to the process that we are talking about. You are saying that the Third Circuit can tell the Attorney General of the United States, when he personally presents himself before a grand jury to present an important case, how he is to do it.

MR. SEIDMAN: I believe that that's absolutely so, Your Honor. And by that, I assume that the court is not telling him what facts or how to investigate, but within its concept of fair play in the application of equal justice, as citizens of the United States should expect to receive, I believe that the court can, within that -- in that circuit so instruct him, sir. And I don't believe that that would in any way and does in any way interfere with his exercise of his executive power. There are concepts or principles that fall within the sole and exclusive province of the court. And I've sought to state to the Court that the conduct of the grand jury is, in the sense of what it listens to and how witnesses are treated there, is something that should be and is within the province of the court, and

not within the province of any particular prosecutor depending on how he wakes up in the morning and determines he is going to treat a witness before that grand jury.

In closing, I submit to the Court that the suggestion by Mr. Frey that the failure of the prosecutor in this case to adhere to internal guidelines is not the sole and total issue here. The question really is whether or not the Second Circuit can, from the standpoint of fairness and the expectation of equal treatment by its citizens, require that once the Government has chosen a line of approach, that singular or particular prosecutors not have their own personal predelictions apply with respect to the application of that particular principle.

And, as Judge Friendly stated in the Estepa case, which, again, was a recognition of the court's supervisory power, also involving a perjury case, that he stated, "We had hoped that with the clear warning we have given to prosecutors and the assurances given by United States Attorneys, a reversal for improper use of hearsay before the grand jury would not be required."

Here, the Assistant United States Attorney, whether wittingly or unwittingly -- we prefer to think the latter -- clearly violated the first of these provisos. We cannot, with proper respect to the discharge of our duties, content ourselves with yet another admonition. A reversal with instructions to dismiss the indictment may help to translate the

assurances of the United States Attorneys into the consistent performance by their assistants. I think, really, that is what is at the heart of this particular case in a singular application to the facts of this case.

And if the Court recognized the existence of such supervisory power in Estepa, I see no distinction between this case and the Estepa case. The fact that the Attorney General has adopted these new guidelines which seem to adopt what was at issue here, I believe, do not deal with the essence of this case, and there should be an affirmance of the circuit court's opinion to sustain its authority to supervise the conduct of its affairs before that court.

Mr. Frey, I would assume, or the Government, would seek to inform this Court, "Well, what Mrs. Jacobs wanted, now Mrs. Jacobs has gotten." But that really is not the issue in this case. The issue in this case is the power of the court, the inherent power of the court, to supervise the conduct.

I won't keep the Court any longer, and I thank you for your indulgence.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 3:12 o'clock, p.m., the case in the above-entitled matter was submitted.)