ORIGINAL

In the

Supreme Court of the United States

UNITED STATES OF AMERICA,	)	
	)	
PETITIONER,	)	
	)	
V.	)	
	)	
ESTELLE JACOBS, A/K/A/ " MRS. KRAMER"	)	No. 76-1193
	)	
	)	
RESPONDENT.	)	
	)	

Washington, D. C.
December 7, 1977

Pages 1 thru 47

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v. No. 76-1193

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

Respondent.

Wednesday, December 7, 1977

Washington, D.C.

The above-entitled matter came on for argument at 1:44 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

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

IRVING P. SEIDMAN, ESQ., Rubin, Seidman and Dochter, 425 Park Avenue, New York City, N.Y. 10022
For 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 No. 76-1193, United States against Estelle Jacobs, also known as "Mrs. Kramer."

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

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.

ON BEHALF OF PETITIONER

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

This case is here on the Court's grant of the Government's petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, suppressing Respondent's Grand Jury testimony as evidenced in the trial of a two-count indictment charging her with transmitting a threat in interstate commerce and with perjury before the Grand Jury.

Respondent was employed as a skip tracer by several bill collection agencies that subsequently became a focus of Grand Jury investigation.

On one occasion she called the brother of an individual who had incurred gambling debts on a junket to Puerto Rico and had not paid them. In this call which, unbeknownst to her, the brother recorded, she threatened the debtor's life if the debt were not promptly paid.

In June, 1974, Respondent was subpoenaed to

appear and did appear before a Grand Jury being conducted by an attorney from the Department of Justice Strike Force who was specially assigned from Washington for the purpose of conducting an investigation that encompassed Respondent's activities.

Respondent, when she appeared, was given advice of her privilege against self-incrimination and was also advised that she could consult with an attorney if she felt the need to do so at any time and was warned about the seriousness of the offense of perjury and the penalties therefor.

She was not expressly told that she was a target of the Grand Jury's investigation.

Now, during the course of the questioning of Respondent about her employer's business and her own activities therein, the Government attorney read to her from a transcript of the threatening conversations had with the debtor's brother and she unequivocally denied having made any of the statements contained therein.

She was not told of the existence of the recording of this conversation.

Respondent was thereafter indicted for the substantive threat and for the false testimony to the Grand Jury denying the threatening conversation. She moved the District Court to suppress her Grand Jury testimony, relying on the

lower court decisions in United States against Mandujano and United States against Washington, which in one instance had suppressed Grand Jury testimony for failure to give full Miranda warnings and in another, for failure to give target warnings to a putative defendant.

The Government appealed and the Court of Appeals affirmed the suppression ruling although on grounds of supervisory power rather than on the basis of any finding of constitutional violation.

In reaching its decision, the Court followed a rather unusual practice of making written inquiries of all United States attorneys in the circuit to learn their policies with regard to the administration of target warnings and having been advised that it was their policy to administer such warnings, the Court upheld suppression for the stated reason of achieving uniformity in the criminal procedure in this circuit.

The United States petitioned this Court for a writ of certiorari, which was granted and the case was remanded to the Court of Appeals for reconsideration in light of this Court's reversal in Mandujano.

On remand, the Court of Appeals adhered to its decision. It found an occasion to depart from its prior ruling because of this Court's decision in Mandujano since the suppression ruling in that case had been predicated on a

supposed violation of the Defendant's constitutional rights; whereas here, the Court found that none of Respondent's rights had been violated.

The Court thought its suppression order was justified as a remedy to ensure that various prosecutors follow uniform practices.

In a striking self-contradiction, the Court stated that its remedy was a one-time ad hoc sanction intended to let our citizens know that equal justice is available to all.

The Court indicated that it felt comfortable in pursuing its didactic purpose of teaching the prosecutor a lesson in this case because, in its view, the prosecutor was not entitled to the luxury of a perjury count, as to which the Court was effectively pardoning Respondent, when there remained the substantive count upon which prosecution of Respondent was still possible.

QUESTION: What does the word "didactic" mean?

MR. FREY: I assume it means educational teaching.

QUESTION: Thank you.

MR. FREY: I'll mention that the substantive prosecution was impaired, although to a far-lesser degree, by the suppression of Respondent's --

QUESTION: Was this the educational function of the Court of Appeals as distinguished from its supervisory function?

MR. FREY: I suppose I view the two as being combined.

QUESTION: Perhaps the two conjoin at times.

QUESTION: If they had used the word "supervisor" instead of that, you still would be here.

MR. FREY: We would be here.

QUESTION: That is right.

MR. FREY: Of course.

The focal question in this case is the power of the Court of Appeals to apply the remedy of suppression to a defendant's Grand Jury testimony as a means of teaching the Executive Branch the lesson that it must achieve uniformity of prosecutorial practices and secondly, assuming some such power exists, the soundness of the Court's exercise of that power in the circumstances of this case.

I think it is best if I begin by making clear what we are not contending and what the Court need not decide in this case.

First, we are not contending that uniformity of presecutorial practice is undesirable. It is the hope of the Department fo Justice that similarly-situated persons will be to the extent feasible, similarly treated by federal prosecutors although I think it must be recognized that there are so many different individual prosecutors handling so many different matters of such somplexity that actually

uniformity in practice necessarily remains a goal.

QUESTION: Especially when a man from Washington comes into it.

MR. FREY: That, the Court of Appeals was disturbed by that aspect of the case. That is true.

Second, we are not here today to argue that target warnings are undesirable as a matter of policy. Indeed, the Court of appeals itself did not assert in this case that target warnings should be given. It said that the Department of Justice would be equally free to require target warnings or to prohibit them if it wished to, as long as the practice followed is uniform.

Thirdly, this Court need not decide whether the courts generally would have the power to adopt the rule prospectively, which would require the administration of any particular kind of warnings in the Grand Jury.

While I have serious doubts that such rules would be properly promulgated by a panel of the Court of Appeals, the issue here is not the power to establish such rules as a part of the Court's control over the Grand Jury.

QUESTION: Of course, Mr. Frey, there is quite an oversupply of former U.S. Attorneys on the Second Circuit. Do you know how many there are there?

MR. FREY: I am not sure how many there are, at the moment.

QUESTION: Well, there are quite a few. I mean, they are not dealing in something they do not know about.

MR. FREY: I do not believe that the three judges on this panel included any former United States Attorneys.

QUESTION: I am talking about the whole Court.

MR. FREY: Well, I am not -- I will get to some things that I think they did not understand a little later in my argument about the prosecutorial practices.

In any event, I was trying to make the point that the Court does not have to decide here the question of the existence of power as an aspect of the power of the Court over the Grand Jury. Rather, the question here is the power of the Court to impose the remedy of suppression in the absence of any court-made or statutory rule that the prosecutor has violated.

The suppression of Respondent's Grand Jury testimony in this case represents, I submit, a wholly unprecedented exercise of judicial supervisory power and we have educed in our brief a number of independent grounds for concluding that this exercise of supervisory power was erroneous.

Now, first of all, no one disputes that the judicial supervisory power may be circumscribed by Congress. I do not think the Court disputed that.

In part one of our brief we have argued that two

statutes, Rule 402 of the Federal Rules of Evidence and 18 USC 3501 deprive the courts of the remedy of suppressing relevant evidence, especially if the evidence consists of a statement by the defendant.

I intend to rely on our brief with regard to these points and pass on here to our argument that, apart from any statutory restrictions on the supervisory power, the Court of Appeals' exercise of it was improper.

Now, first we can compare, I think, what the Court of Appeals did here with any other past exercise of supervisory power by this Court or, indeed, by other federal courts of appeals and we can see that there are some striking differences.

The cases on which Respondent relies and on which the Court relied by and large involve the exercise of supervisory power over the conduct of the trial itself. That is with regard to such matters as voire dire questioning of prospective jurors, conformity to rules of evidence proceedings, regularity in sentencing practice, rules of evidence, rules regarding instruction of juries, the Allen charge, those kinds of matters.

We do not for a moment question that these kinds of rules are inherently necessary as a part of the supervisory powers of the Appellate Court over the conduct of the District Court and except, of course, to the extent any statute

imposes restrictions.

We do not think that helps to justify the result that the Court of Appeals reached here.

The only significant case, it seems to me, which involves something outside of the trial context itself is the McNabb case which, of course, is the famous instance in which the police violated the defendants' rights for a prompt presentation to the magistrate and the court found that that violation justified the application of an exclusionary rule excluding the defendants confession.

Now, there are a couple of important differences between McNabb and the present case. The first and most significant is that the probable basis for the Court's power in McNabb, which was the power to make common-law rules of evidence in accordance with reason and which was codified in former Rule 26 of the Federal Rules of Criminal Procedure, has been abolished with the adoption of the Federal Rules of evidence which is a fresh codification and which I think takes away the supervisory power over evidence that may previously have existed.

The second distinction between McNabb and the present case is that in McNabb there was a flagrant violation of an existing statutory right of the defendant and it was as a means of enforcing this right of the Defendant that the Court acted.

Now, here there was no right. The Respondent had no right to a target warning according to the Court of Appeals. There was simply an irregularity in the practice, a departure from an informal departmental or U.S. Attorney policy involved. We think that is a very substantial difference from McNabb.

Now, I respectfully suggest that the assertion of supervisory power here over prosecutorial conduct that did not violate Respondent's constitutional or statutory rights is undisciplined and is intrusive on the proper allocation of judicial and executive responsibilities.

What the Court of Appeals was doing here was, in fact, exercising a Chancellor's foot veto over law enforcement practices of which it disapproved, something that this Court, in turn, specifically disapproves of.

QUESTION: Do you include in that, Mr. Frey, that it trespasses on the rule-making power of this Court through the judicial conference processes?

MR. FREY: Well --

QUESTION: In other words, would such a rule be an appropriate rule as part of the Federal Rules of Criminal Procedure?

MR. FREY: Well, the rule that target warnings must be administered, if that were the rule, would be a perfectly appropriate rule, preferably adopted by Act of

Congress or by amendment to the rules of criminal procedure, which involves this Court, the Advisory Committee and the concurrence of Congress.

The rule that prosecutors must act uniformly, we don't care how as long as it is uniform, seems to me would be difficult to include in the rules of criminal procedure.

QUESTION: No, I am speaking of the specific rule that was laid down by the supervisory power here. Is that within the rule-making power of this Court through the judicial conference under the statute?

MR. FREY: Yes. Well, I have no difficulty, if such a statute were adopted through the rule-making power of this Court, I would have no difficulty with adherence to that statute although it would still be a question as to the proper remedy for a violation.

QUESTION: It would have to be a statute.

MR. FREY: Well, I am not insisting here that there would have to be a statute. I think it is possible that the District Court even could adopt a rule with regard to the administration of the Grand Jury.

QUESTION: I wonder if you are giving up too much? You are not going to give up prosecutorial discretion, are you?

MR. FREY: Well, there are many areas in which prosecutorial discretion is circumscribed by the rules, the

Brady rules, --

QUESTION: I am talking about --

MR. FREY: -- the Jenks Act.

QUESTION: Yes, but not by the Court without the benefit of rule or statute. You wouldn't want to give that up, would you?

MR. FREY: Well, I am not sure. For purposes of this case certainly I am prepared -- I do not think the Court need decide whether, let's say, the District Court could adopt such a rule or even the judicial council of the Circuit, acting under Section 332D could adopt such a rule, as has been done in connection with speedy trial rules.

These are, I think, difficult philosophical questions but are not at all necessary to get into to resolve this case.

QUESTION: But Mr. Frey, are we talking about a rule requiring the giving of target warnings or a rule requiring that evidence be excluded if target warnings are not given? I think you are talking about --

MR. FREY: I think that is a very pertinent distinction. As I suggested in response to the Chief Justice, even if there were such a rule, it would not follow that the remedy would be exclusion.

QUESTION: And your view, as I understand your brief, is that the Court would not have the power to exclude

the evidence, even if it adopted such a rule. It could not enforce the rule by using the exclusion power to exclude evidence under your reading of the rule of evidence.

MR. FREY: Well, our brief is essentially premised on the non-existence of any such rule outside of whatever rule one might discern in prosecutorial practices. We would have a different case if there were a rule adopted either in the rules of criminal procedure or adopted by a particular district court.

QUESTION: I just want to be sure I understood your brief. Even assume that a district court or a court of appeals or this court adopted a rule saying prosecutors must give target warnings . It would not follow from that that we could adopt a further rule saying that if target warnings are not given, evidence may be excluded.

MR. FREY: That would not necessarily follow, Your Honor.

QUESTION: In fact, your position is that we could not adopt an exclusionary rule to enforce such a prosecutorial---

MR. FREY: Well, I am not sure that we suggest that it could not be done. We suggest --

QUESTION: But your argument is that all relevant evidence is admissible.

MR. FREY: Oh, you mean under the statutory --

QUESTION: Yes.

MR. FREY: Yes, I'm sorry, I was --

QUESTION: Your argument on the statute is we could not police the rule in effect, even though we could adopt it.

MR. FREY: Well, if it were adopted by the mechanism suggested by the Chief Justice, it would be by statute or by rule adopted under statutory authority which is what --

QUESTION: Yes, but if the rule adopted is merely one saying that the prosecutor must give target warnings, that still would not enable the court to include evidence obtained by failing to give target warning.

MR. FREY: Well, I think that insofar as the rule is based on our statutory arguments, or the issue here is based on our statutory arguments, you would have to find a rule that was violated and we are not suggesting that if a constitutional right or a statutory rule or a rule adopted by this Court pursuant to statutory authority had been violated, the Court would necessarily be without the power, as in McNabb, to adopt some kind of an exclusionary rule.

We think it should not even then because --

QUESTION: Well, how could we have the power if the statute means what you say it means? As I read your brief, you are saying Rule 402 now deprives all federal courts of any power to adopt a rule excluding relevant evidence unless the evidentiary rule is compelled by statute

or the Constitution.

Maybe I misread your brief, but I think that is what you have argued.

If that is not your argument, I do not understand your Rule 402 argument and I hope you will explain it to me.

MR. FREY: Well, I think you are probably right that that is our argument. We have a number of steps, however. My point is that even if you were to disagree with the conclusions that Rule 402 is an absolute bar, it seems to me that Rule 402 requires the admission of evidence unless there is an underlying violation of Constitutional statute.

In other words, Rule 402 does not, I think, overrule the Weeks-Mapp exclusionary rule. I am not suggesting that it does that. I do not know that Congress does.

QUESTION: One further question because I really want to be sure I understand it. Assume an identification problem in say, those cases where there is a question of whether evidence should be excluded because identification procedure in the station was improper -- a line-up case.

Now, is it the Government's view that that evidence could not be -- the federal courts could not adopt an exclusionary rule for the federal system that is different from a constitutional rule they might impose upon the states?

I do not know if I make my question clear.

MR. FREY: Well, I think that is right. Of course,

there is a specific statute covering line-up identification, so I assume you are not --

QUESTION: Well, I am just thinking of any example. Does the Court have any discretion with respect to supervising federal courts that is different in terms of admissibility of evidence that is different from its power over state courts?

MR. FREY: You mean, apart from all the discretion that is provided in other parts of the Federal Rules of Evidence such as the discretion to weigh prejudicial effect against probitive value in the discretion and the hearsay exception? I mean, there is much discretion which is vested by the evidentiary code in courts to make evidentiary rulings. We don't question the existence of that discretion.

QUESTION: This does not include the power to exclude because it wants to, in effect, require the police to follow a certain practice or something like that.

MR. FREY: No, I don't think it does. Unless Congress could not constitutionally abolish it.

QUESTION: If we read 402 literally, the power to enforce exclusion rests exclusively in the Constitution or the Congress. Or through the rule-making power and no individual judge and no collection of individual judges could impose such a rule, unless that 402 does not mean what it says.

MR. FREY: I think that is right. You would have to find that the exclusionary rule was derived either expressly or by implication from the Constitution, from the statute or from the rule of procedure.

QUESTION: Well, all the rules of evidence that the courts have developed down through the years prior to the codification of the rules have been replaced.

MR. FREY: I think that is right, by the federal, by the code.

QUESTION: No court is any longer free to follow a rule that it used to follow if it is inconsistent with the federal rules.

MR. FREY: If it is inconsistent with the rules of evidence. I think that is right and in fact, the rules of evidence abolished the part of Rule 26 or the rules of criminal procedure that previously had conferred that power on the courts so I do not see that that is a serious problem.

QUESTION: Then, why does not 402 then invalidate the rule of Weeks against the United States?

MR. FREY: Well, my suggestion is that if a rule is constitutionally compelled and I assume that the rule of Weeks against the United States must be constitutionally compelled today in light of Mapp --

QUESTION: But not in light of Weeks.

MR. FREY: I understand that.

QUESTION: Or in light of Elkins.

MR. FREY: I think Elkins is overruled by the rules of evidence.

QUESTION: McNabb?

MR. FREY: I think McNabb is overruled. It is separately overruled by 3501.

QUESTION: 3501 overrules --

MR. FREY: But I mean, we are relying on two statutes, each of which we suggest independently takes away the power the Court might previously have had prior to the enactment of those statutes.

In any event, to return to the question apart from the statutes of what is a proper exercise of judicial supervisory power, I suggest that the Chancellor's foot veto that was condemned in Russell is even more inappropriate in the case of supervising a prosecutor's conduct than it is in supervising police conduct in entrapment situations.

Now, in this connection the words of the Chief Justice as a circuit judge in Newman against the United States are singularly apposite and I think worth quoting here:

The Chief Justice said, "An attorney for the United States, as any other attorney, appears in a dual role. He is at once an officer of the court and the agent and attorney for a client.

"In the first capacity, he is responsible to the

court for the manner of his conduct of the case. That is, his demeanor, deportment and ethical conduct.

"But in his second capacity as an agent and attorney for the executive, he is responsible to his principle and the courts have no power over the exercise of his discretion or his motives as they relate to the execution of his duties within the framework of his professional employment.

"To say that every United States Attorney must literally treat every offense and every offender alike is to delegate him an impossible task. Of course, this concept would negate discretion."

And now, this is an important point.

"It is assumed that the United States Attorney will perform his duties and exercise his 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."

Now, in this case I want to reiterate that there is no suggestion here of any deliberate impropriety by the Strike Force Attorney or any departure from a statute or rule or even a published policy or policy of general application.

This was, at most, a negligent mistake on his part.

And now I would like to come back to a point that

I mentioned earlier in connection with the wisdom of the courts attempting to enforce upon the prosecutors policies and that is, that courts can often make mistakes, that perhaps the Executive Branch with regard to its own pplicy would not make.

On page 5a of the Appendix to the petition in the Court of Appeals second opinion in this case, they relied upon the guidelines involving the relationship between the Strike Force and the United States Attorney and they invoked the guideline that says, "When a specific investigation has progressed to the point where there is to be a presentation for an indictment, the chief of the Strike Force shall then for this purpose operate under the direction of the United States Attorney who shall oversee the judicial phase of the case."

Now, my understanding is, contrary to the Court of Appeals understanding, that what that means is that the Srike Force attorney is on his own until he is ready to present the case for an indictment and that the conduct of the investigation in the Grand Jury is not under the direct control of the United States Attorney in this sense. It is only when he decides to indict that he comes to the United States Attorney for the authority and the United States Attorney takes over.

Now, I do not rely on that point for anything more

than to show that when courts get outside what seems to me to be their legitimate domain, they are in danger of making mistakes.

QUESTION: Well, what is that statement about not forgetting what you know as men?

MR. FREY: Excuse me?

QUESTION: Not forgetting what you know as men, even though you are a judge.

MR. FREY: Yes.

QUESTION: You remember Lane against Wilson?

MR. FREY: Yes.

QUESTION: Justice Frankfurter. Well, I am saying, these former prosecutors know and you and I know that there has always been some tension between Strike Forces in Washington and government lawyers --

MR. FREY: Well, quite obviously the court did not like the idea of --

QUESTION: I do not think you should press your point at all. I think you should recognize it.

MR. FREY: Oh, no, I -- I, of course, understand that.

Now, in terms of the didactic effect on future prosecutorial conduct, I suggest that what the Court has done here may have exactly the reverse of what was intended because what they have done is, they have discouraged -- to

the extent they were relying on what they perceived to be a uniform prosecutorial rule or practice and punishing us for a departure from that practice, they are encouraging us not to adopt such practices since what is implicit in the decision of the Executive Branch to adopt a practice like this is the Executive Branch's expectation that it could enforce the practice. It can decide how important that practice is and what sanctions are appropriate.

QUESTION: Is there anything to prevent the Attorney General of the United States from repealing and revoking that practice in the Second Circuit or any other U. S. Attorney's office tomorrow?

MR. FREY: No. He, of course, could do so but I think it is more likely that he would do just the opposite and possibly require target warnings as a matter of practice but not with the intention that the courts can --

QUESTION: And then, I was thinking purely of power.

MR. FREY: He has the power and the Court of Appeals did not contest that power.

QUESTION: And he allows -- the Attorney General has traditionally allowed variations in practices among various districts in order to encourage experimentation. Is that not so?

MR. FREY: That is so and it seems to me that is

one permissible approach, that this is not a matter in which there is any external requirement that there be a uniform rule or that it is so important that the courts are justified in stepping in and saying there has to be one.

QUESTION: The Second Circuit, at least at one time or perhaps the Southern District exhibits all Grand Jury evidence which very few, if any other districts do.

Is that still so?

MR. FREY: I am not --

QUESTION: It is not that material but I merely suggest that -- that variations --

MR. FREY: There are. There are variations. I wanted to make two more points very briefly if I may, before my time expires.

One is that to compare the exclusionary rule which the Court has, in effect, applied in this case with the Fourth Amendment Exclusionary Rule and to point out that there are some significant differences here.

The most important is that in Mapp against Ohio, the Court said, in effect, "We have no way to control the conduct of the police. The only way we can make the police respect the peoples' constitutional rights is by imposing the sanction that we have at hand and that sanction is exclusion of evidence and we hope by the employment of that sanction that we will accomplish the salutary objectives of conformity

of police conduct to the requirements of the law.

Now, in this case we are dealing with prosecutors. If the Court announces a rule that target warnings should be given if it feels that appropriate -- and let's assume it has the power, what reason is there to suppose that prosecutors will deliberately violate that rule with such consistency that exclusion of evidence is necessary or that if they do violate that rule, the Court does not have in its hands a simple remedy of direct discipline against the prosecutor?

So the situation is very different.

Now, in closing, let me point to what seems to me to be the quintessential irony of the Court of Appeals' ruling here. In its zeal to insure uniformity of prosecutorial practice, the Court has indicated that it will engage in apparently sporadic, haphazard imposition of penalties on prosecutors; not in all cases under some identifiable standards but from time to time when it feels it necessary to teach the prosecutor a lesson.

They have sought to arm themselves with the Sword of Damocles to wield as they wish from time to time. In effect, equal justice in the courts is foresworn in favor of supervision over the prosecutor's activities, a supervision that ought, in principle, to be exercised by the Executive Branch itself.

QUESTION: Mr. Frey, may I ask one question before

you sit down? I understand, of course, you challenge the exercise of discretion in this case and you rely on Rule 402 of the Federal Rules of Evidence in Section 3501 on admissibility. If we were to assume for the moment that 402 and 3501, neither of those was controlling, would you concede that apart from those restrictions, the Court of Appeals had the power to do what it did in this case?

MR. FREY: Well, I -- let me put it this way: The Court of Appeals, whether it had the power is a matter for review by this Court. This Court can -- I don't know, I mean, as a philosophical matter, if this Court says it is improper to apply the remedy of suppression under these circumstances, I do not know whether the Court of Appeals has the power in some sense to do that or not.

QUESTION: In other words, whatever their supervisory power may be, it is subject to the supervisory power of this Court?

MR. FREY: Definitely. And if you say they cannot do it, then, in a sense, they do not have the power.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Seidman.

ORAL ARGUMENT OF IRVING P. SEIDMAN, ESQ.

ON BEHALF OF RESPONDENT

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

Mr. Frey has most reasonably stated the underlying factual pattern in this case. However, whether it be from the standpoint of the legal issues or the philosophy underlying the legal issues, I believe that the thrust of the argument 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 warning.

I believe what the Court of Appeals was concerned about and what I was initially concerned about as the defense counsel in this matter who brings ten years of having been 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 wit, the Grand Jury.

I heard many questions of Mr. Frey which seemed to address the problem as to whether or not this was a chancellor's veto of the Executive Branch of Government concerning what was or was not to be said to a witness who is a prospective defendant before a Grand Jury.

I submit to you that that is not the question, that is not the thrust of the Court of Appeals decision in

this case. I believe what the Court was concerned about and is concerned with and properly concerned with is that the Grand Jury, which is an arm of the Court and not of the Executive Branch of Government, was being used in a manner that it determined required its action within the scope of its supervisory power.

And again I wish to reiterate that the Court in its second opinion as well as in its first opinion indicated that the prosecutor could adopt any policy he wished concerning the granting of any warning to any prospective defendant so therefore, to seek to have this case revolve around a contest between the exercise of executive power and the exercise of judicial power, I believe begs the question and fails to identify it properly.

QUESTION: But however you define it, it constitutes a command to the United States Attorney and all the United States Attorneys in the Second Circuit, does it not?

MR. SEIDMAN: I respectfully believe that it does not. Number one, Your Honor, this Court --

QUESTION: Well, it imposes a sanction if he does not comply with the order, does it not?

MR. SEIDMAN: It only imposes sanction in this case, Your Honor. I believe the Court was explicit in its articulation of the legal principle concerning the exercise of its supervisory power that A, this was not a general

principle to be applied in all cases, that it had considered particularly this fact pattern which involved the situation of the court's Grand Jury -- the people's Grand Jury, not the prosecutor's Grand Jury and what takes place before it and Mr. Justice Marshall indicated that many members of the bench that relate to this problem may be gentlemen who have prosecutorial background and I believe that if that is the case, that it was important to the consideration of this case because any jurist, I submit most respectfully, who has not logged time in a Grand Jury as a prosecutor does not know the omnipotent power that the prosecutor has in that room concerning the witness and what takes place to it.

I submit to this Court that as a practical matter the Grand Jury is a non-functioning body which constitutes a rubber stamp for the prosecutor.

Therefore, what control, if any, can the Court have over the conduct of prosecutors before Grand Juries when the Court is not there? The only one who is before the Grand Jury happens to be the 23 jurors who are fundamentally mute in the process that ultimately evolves, other than determining, hopefully, whether an indictment is warranted, the prosecutor and the witness.

As a matter of fact, I do not believe that there is even a statutory requirement that all of the colloquy that takes place in a Grand Jury be transcribed and therefore very

often, as may be the case in this case, the colloquy that does take place is selected, assumed for good reason by the prosecutor and thus what appears before the Court --

QUESTION: Are notes taken of everything?

Whether they are transcribed or not.

MR. SEIDMAN: I believe not, Your Honor.

QUESTION: Is this the Southern District?

MR. SEIDMAN: No, no, I am not suggesting -- in the Southern District there is a transcription but that transcription begins and ends -- this is the Eastern District. That transcription begins and ends when at the direction of the prosecutor there is that direction but I believe that is a side issue in this merely to give the Court the background if it needs this as to what does and does not take place in the Grand Jury.

The question here is as to what motivated this Court to exercise its supervisory power.

QUESTION: Does it really have anything to do with the Court's concern about possible prosecutorial abuse of the Grand Jury since, as I read Judge Gurfein's opinion, so long as they do the same thing in every district, it does not make any difference what they do?

MR. SEIDMAN: Well, within certain confines, Mr. Justice Rehnquist, I would agree with that statement.

QUESTION: Then the reversal here was not based on

the Court of Appeals determination that this particular thing done by the U.S. Attorney was improper, had it been done uniformly.

MR. SEIDMAN: What the Court did say, sir, is that if the United States Attorneys in this circuit or the Attorney General of the United States wished to adopt a rule that no target warnings were to be given, that since there is no constitutional or statutory requirement, that it would be possible for them not to give that type of warning.

QUESTION: So it seems to me hard to support the Court of Appeals decision on the concern you expressed for abuses that go on in the Grand Jury room since the Court of Appeals said to the U.S. Attorney, "Take your choice, but just make one choice or the other and apply it uniformly."

MR. SEIDMAN: I would disagree with that statement for the following reasons, Your Honor. I think what the Court was seeking to do was to insure to the citizen who is called before the Grand Jury, since I submit to the Court that fundamentally that is a coercive and custodial situation, although this Court has previously ruled under Mandujano and its progenitors that there is no constitutional safeguards similar to Miranda that apply, that there are and there is a situation here to be dealt with and what the Court was concerned about is that given the large activity in this circuit by the Strike Force attorneys and the need that the

application of the law or the application of the Grand Jury to a witness might vary depending upon the personality of the prosecutor, that there should be an adherence by the Strike Force attorney to the universal concept of giving target warnings in the Second Circuit and the Court cited back to a decision written by Judge Medina in U. S. v. Scully some 23 years ago.

QUESTION: But the Court of Appeals' opinion was not based on the requirement that target warnings be given but on the basis that whether they be given or not, the practice ought to be uniform.

MR. SEIDMAN: There might have been another vehicle which would have caused the Court to come down with a similar-type decision in a different set of facts, if that is what the Court is asking me, where there is a dichotomy within the same circuit as to what prosecutors are doing.

QUESTION: Do you suggest that uniformity was not the fulcrum of Judge Gurfein's decision here? The Second Circuit decision?

MR. SIEDMAN: Uniformity was not the sole issue here. I believe that in addition --

QUESTION: You do not agree --

MR. SEIDMAN: -- in addition, I believe the language of the decision seems to concern itself with the aspect of fairness.

QUESTION: Well, let me read just one paragraph, then.

MR. SEIDMAN: Sure.

QUESTION: "In the interest of uniformity in criminal prosecutions within the circuit, which is fundamental to the administration of criminal justice, we affirm the dismissal on count two pursuant to our supervisory function." Now, is that not the basis on which the Second Circuit decided the case?

MR. SEIDMAN: That is the basis under which the Second Circuit decided the case excepting there is other language in the case that would indicate that it was not uniformity limited to the issue of target warnings.

It was seeking to make sure that all witnesses who appear before a Grand Jury receive equal treatment and that the public be aware of that, Your Honor.

QUESTION: Let me test this out on you, then. Do you agree with Mr. Frey's response to a question from the bench that the Attorney General of the United States could tomorrow instruct all U.S. Attorneys in the Second Circuit to go back to the general usual practice of giving no target warnings?

MR. SEIDMAN: If reading the Gurfein opinion in the second decision, I would say yes.

QUESTION: That he can.

MR. SEIDMAN: That the Attorney General or the United States Attorneys in the Second Circuit could uniformly change the warnings that would be given to targets that they presently adhere to. Whether that could be attacked for other reasons, I don't believe is a matter before this Court at the moment.

QUESTION: And that the conviction would be valid?

MR. SEIDMAN: Well, as I --

QUESTION: Because -- do not answer that because if you do, I am going to say, will you then release this woman? Or retry her?

MR. SEIDMAN: Well, Your Honor, if I understand Mandujano and its progeny --

QUESTION: I do not understand that the Court of Appeals of the Second Circuit said that this rule could be changed tomorrow morning.

MR. SEIDMAN: Provided you accept the concept that Mandujano avoided the requirement of constitutional giving of this type of warning and there is no statute that requires it. If there is no constitutional requirement, there is no statutory requirement, Your Honor, then the only source of the target warning in the Second Circuit is a matter of practice adopted within that circuit.

QUESTION: Then I have a grave problem. Then this just involves one person and no presidential value at all?

MR. SEIDMAN: I would say that this case involves one person, Your Honor and I believe the Court of Appeals had a problem with that and also seemed to indicate -- seemed to, in response to Mr. Justice Stevens' concurring opinion the first time this matter was here it clearly stated that this is not a general exclusionary rule and to talk about this decision in general exclusionary rule terms does not clearly identify what it said in the circuit opinion.

I think what is being argued here is whether or not, A, does the Court have this type of supervisory power and B, assuming the statutory and rule arguments aside, whether or not the sanction which was imposed here was an appropriate one, I would submit to the Court that this Court should not interfere with the supervisory power of the Circuit Court, which deals in the everyday problems within the circuit and I am sure that when it considered this case involving Strike Force Attorneys who come into the circuit and identifies a prior case where it concerned itself in depth with the relationship of Strike Force Attorneys to the United States Attorney -- and that was in the Persico case that the Court of Appeals must have had good reason to feel that in this particular case, Mr. Justice Marshall, it would apply the sanction of suppression using the lack of uniform application of warnings under the exercise of its supervisory power.

And it may well be that this is not a rule -- and I submit that it is not -- that establishes from this time on any misstatement by a prosecutor or failure to state something that is customary or habitual, assuming it does not raise to constitutional or statutory level, will be stepped upon by the exercise of supervisory power.

I think the Court went to great length in an attempt to assuage this Court by its language that it was limiting this opinion to this particular case and getting back to the didactic, it may have felt that this case warranted this action, given the urban environment of this circuit.

QUESTION: Are you suggesting that if precisely the same thing happened next week that the Second Circuit would not exclude the evidence?

MR. SEIDMAN: I cannot speak for the Second Circuit, Mr. Justice. Why? I do not know.

I know what the Second Circuit said in this case and what it said was that it was not establishing an inexorable rule to be applied in each and every case, nor was it suggesting that every time a prosecutor made a mistake concerning accepted practice that it would utilize its supervisory power and impose a sanction of suppression which ultimately results in the dismissal of a count in an indictment.

QUESTION: Well, suppose that it had made such a

rule and just announced that you either do it this way or the evidence will be excluded and said, this rule is made under our supervisory power.

And you say that situation is not here. Of course, somebody might disagree with you and think that it is. What would you say about that?

MR. SEIDMAN: I would compliment the Court and suggest that --

QUESTION: You do not think that it would be forbidden by the Federal Rules of Evidence?

MR. SEIDMAN: I believe that the argument posed concerning 3501 has no application to this case, that the argument proposed by the Government with respect to Rule 402 has no application to this case; 3501 has no application because this is a denial of guilt.

Therefore, through whatever attenuated concept, I do not believe that that constitutes a confession.

The Court did not deal with voluntariness in this opinion. Further, as to Rule 402, there is no doubt, as the Court acknowledged, that all relevant testimony, evidence, et cetera is applicable to a case but if you continue to read on into the Rules of Evidence and if you take a look at the Constitution of the United States out of which flows the inherent power of this Court and the other federal court I would assume that the Federal Rules of Evidence do not

remove from the judges who sit in a courtroom or rule on motions, from their discretion.

QUESTION: You say the Constitution of the United States from which flow the inherent powers of this Court. Do you think that before Congress provided for appeals in criminal cases from the district courts in 1889 or whenever it was that --

MR. SEIDMAN: 1789.

QUESTION: Well, no, I mean 1889.

MR. SEIDMAN: Oh, right. That's right.

QUESTION: For a hundred years there was no right of appeal from a criminal sentence in the District Courts to this Court. Do you think there was some sort of an inherent authority in this Court to review on appeal those kind of criminal judgments?

MR. SEIDMAN: Well, I do know that the Constitution states that Congress establishes the jurisdiction of the federal courts and I am aware of that statute.

However, knowing the creativeness of the mind, I would assume that possibly, in answer to your question, that some learned legal scholars might have developed a theory under our Constitution that might have permitted that type of approach by Appellate Courts to criminal law matters.

QUESTION: None surfaced in the 19th century, at any rate.

MR. SEIDMAN: Well, our concept of justice did not change a great deal until 1954, Your Honor, so that may well be true until then.

However, I am responding to your question most respectfully and seriously when I state that and I am aware of the fact that the jurisdiction of the district courts is created by Acts of Congress.

QUESTION: Mr. Seidman, could I ask you a question, please? Do you think -- assume we are persuaded by Mr. Frey that interest in uniformity within the circuit is not a sufficient justification for exercising the Court of Appeals supervisory power, whatever it may be.

Do you think the court -- this Court now, in this case has presented the question whether its supervisory power would justify -- apart from the Constitution -- would justify a rule such as the American Bar Association Standards recommend, namely, that target warnings always be given and that, therefore, we could affirm on the basis that a general rule applicable to the entire federal system would be appropriate to implement that kind of policy?

MR. SEIDMAN: I believe you could, Your Honor and I would applaud it, if that is important.

QUESTION: Well, do you think --

MR. SEIDMAN: I believe it became extra important that this Court through its rule-making and supervisory power

deal with the Grand Jury in view of its decisions in Manduano, Washington and Wong and I do not stand here to suggest that I condone perjury in this argument. I do not believe that the Court of Appeals condones it and the sole issue before this Court is the exercise of supervisory power in the context of what takes place before a Grand Jury.

QUESTION: Mr. Seidman, if I understand you correctly, we could issue a rule that there must be uniformity among all of the prosecuting attorneys in what they present to the Grand Jury. Is that right?

MR. SEIDMAN: I believe that --

QUESTION: Then should we not also say that the judges should be uniform in their sentences? I mean, while we are at it.

MR. SEIDMAN: Well, I think you are asking too much of me and --

QUESTION: Well, once you get into that, it follows.

MR. SEIDMAN: But however, I think getting back to Justice Steven's suggestion which I believe is a manageable one and that is, given the fact that the American Bar Association has done an extensive study in the criminal justice area -- if I understood Mr. Justice Stevens -- he was asking whether or not the Supreme Court of the United States should adopt the recommendations of the ABA as is recited in the Jacobs opinion and possibly the Court of Appeals may have been

hopeful that the Supreme Court, taking a look at that where it says, if the prosecutor believes that a witness is a potential defendant, he should not seek to compel his testimony before the Grand Jury without informing him that he may be charged and that he should seek independent legal advice concerning his rights. That is a recommendation by the American Bar Association.

QUESTION: Yes, well, you may not be aware of it but I was the author of that report and that did not mean we were writing a rule of constitutional dimensions or that we were undertaking to suggest clothing the courts with some kind of supervisory power to impose uniformity.

These reports of the American Bar Association are a statement of what a great number of lawyers and judges thought would be the right way to do it.

MR. SEIDMAN: I agree with the Court and I am not suggesting that I assume that the entire standards as finally adopted should become necessarily the --

QUESTION: We are talking here about the power of the Court of Appeals, not the wisdom of this rule.

MR. SEIDMAN: Well, getting back to the heart of this case, Your Honor, I believe that the Court of Appeals exercised supervisory power not in conflict with Section 3501 or with Rule 402 and the best thinking of the Court as to why it was doing it, I believe is the quote given in the opinion

where the Court quoted from Judge Friendly in U.S. v. Estepa and it stated, "A reversal with instructions to dismiss the indictment may help to translate the assurances of United States Attorneys into consistent performance by their assistants."

Again, this is the sole, limited, narrow issue that is before this Court and it does not particularly have relationship solely with respect to target warnings. It might well be that the Court of Appeals, as stated by Mr. Frey may in some future matter unforeseen seek to exercise its supervisory power and I cannot believe that this Court, given the long line of cases, some of which Your Honor has written -- Mr. Chief Justice Burger has written opinions on and has identified and recognized the supervisory powers of the Court of Appeals to deal with matters within the circuit and if I may respectfully relate to Mr. Justice Marshall's dissenting opinion in the first Jacobs case, the cases cited therein, the Cupp v. Naughten case, Barker v. Wingo , the United States versus Thomas, Ristiano versus Ross and Murphy versus Florida, some of which bear opinions from Mr. Chief Justice Burger, clearly acknowledge the existence and propriety of exercise of supervisory powers and at times the opinions seek to avoid the exercise of federal supervisory power in state criminal cases but use affirmative language which clearly states that had this been a federal court matter, that the United States

Supreme Court in these instances would have recommended the utilization of supervisory power to justify whatever court's concept of fair and equal application of the law to all people.

I submit to the Court that the sanction therein, given the argument of the Court of Appeals which I am limited to, is that the defendant in this case is not escaping justice so therefore, I do not know that the sanction part of this case is that troublesome.

The only issue that I could conceive of as being important and crucial to this is whether or not this was a reasonable application of the supervisory power and again, I wish to reiterate in my closing argument that this is not a trial proper that is before the Court.

What is before this Court is the conduct and management of the Grand Jury which is an arm of the judiciary and not an arm of the Executive Branch of Government and I believe it was in this context that the Court of Appeals sought to apply its supervisory power, not of the prosecutor which is the effect of what has happened here, but rather as to what takes place before the Court's Grand Jury before which the prosecutor practices as a part of the Executive Branch of Government.

And in response to Mr. Justice Stevens' question, in his concurring opinion in the first case, it is clear to

me that this is not an inexorable rule to be applied in all instances and this Court need not be fearful that with each slip of the tongue in any particular criminal law prosecution that there will be a dismissal for suppression which would result in non-prosecutorial happenings with respect to people who should be prosecuted and the Court of Appeals clearly stated that in deciding this case, it abhorred perjury but it felt that given the fact that there was another portion of the case to be tried that it could take this largesse, so to speak, if the Court wanted it pictured as such and employ the sanction of suppression and therefore, the dismissal of the indictment which flowed therefrom.

I might add, getting back to what Mr. Chief Justice Burger stated, that given -- in closing, given the fact that the citizen's rights before the Grand Jury have been limited by Mandujano, Wong and Washington, that consistent with what Mr. Justice Stevens suggested, that possibly and humbly this Court might consider the ABA standards as to what should be the procedure before the Grand Juries which represent throughout the United States all of the people.

I thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Frey?

MR. FREY: Just two short points if I may, Mr. Chief Justice.

REBUTTAL ARGUMENT OF ANDREW L. FREY, ESQ.

I think in response to Mr. Justice Stevens' questions about whether there is any difference between the Court of Appeals' supervisory power and this Court's supervisory power, in the context of deciding a case, I do not believe there is any difference.

Either the Court of Appeals has it and you have oversight of that power or, I believe neither of you have it. Now, you do have the power in the context of passing a rule of criminal procedure, as the Chief Justice suggested earlier but that is a totally different procedure and one to which we would not take exception.

QUESTION: You do not contend our supervisory power is limited to rule-making, as I understand it.

MR. FREY: No, not at all.

QUESTION: You do not take issue with the basic theory of the McNabb rule, for example? I mean, you might not approve of the exclusion of the confession but that the Court had the power to adopt such a rule pursuant to its supervisory power in deciding a case.

MR. FREY: It did have it previously, yes. But we think that --

QUESTION: That was basically a rule of evidence, was it not?

MR. FREY: It was a rule of evidence and it was a

rule that was predicated on an antecedent violation of another rule established by statute or constitution. Here we have no antecedent violation, indeed, no rule to be violated.

There is not any rule. We can do what we want and that brings me to the point, to the extent the Court of Appeals may have been hopeful that this would encourage us to adopt the ABA standards, this may very well have had exactly the opposite effect by the punishment that was administered in this case because I understand in the Southern District of New York they now have stopped giving target warnings in order -- they no longer have a policy of giving target warnings so that they cannot be accused of violating their policy in having suppression administered on that basis.

Thank you very much.

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

[Whereupon, at 2:46 o'clock p.m., the case was submitted and the Court was adjourned.]