In The

SUPREME COURT OF THE UNITED STATES

October Term, 1960

JIMMY HOFFMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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WARD & PAUL

1760 PENNSYLVANIA AVE., N.W.
WASHINGTON, D. C.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1950

SAMUEL HOFFMAN, Petitioner, vs. UNITED STATES OF AMERICA, Respondent	No. 513

Washington, D. C.

Wednesday, April 25, 1951.

The above-entitled cause came on for oral argument at 2:35 p.m.

PRESENT:

The Chief Justice, Honorable Fred M. Vinson, and Associate Justices Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, and Minton.

APPEARANCES:

On behalf of the Petitioner:

WILLIAM A. GRAY, ESQ.

On behalf of the Respondent:

JOHN F. DAVIS, ESQ.

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PROCEEDINGS

The Chief Justice: Case No. 513, Samuel Hoffman versus United States of America.

The Clerk: Counsel are present.

ARGUMENT ON BEHALF OF PETITIONER

By Mr. Gray

Mr. Gray: May it please the Court, petitioner here was convicted of contempt of the District Court for the Eastern District of Pennsylvania in refusing to answer certain questions put to him by one of the deputy attorneys general conducting an investigating grand jury in that city. I shall come back to the questions in a moment.

After his conviction, he filed a petition for release upon bail, attaching thereto an affidavit of his and certain newspaper articles to which I shall call this Court's attention shortly. I want to give you the chronology.

An appeal was then taken to the Court of Appeals, the Third Circuit, and the Clerk of the District Court certified the entire record, including the petition for release on bail, and accompanying affidavit and exhibits to the Court of Appeals.

We were advanced in argument and ordered to furnish typewritten briefs and appendices; and we came to argument in less than thirty days after the notice of appeal was filed.

Three days before the argument, the Assistant Attorney

General, if I am giving his correct title, filed a petition to strike from the record the petition for admission to bail together with the accompanying affidavit and exhibits.

The Court of Appeals struck it from the record and in an opinion filed ultimately, written by Judge Hastie, the entire court concurred in sustaining the conviction, there being, however, two problems involved.

Judge Hastie, speaking for the entire court, said that the court was in agreement with respect to the second problem, the second group of questions, but he himself personally believed that there was ample evidence to justify refusal in the first group of questions and so stated in his opinion.

Now the questions themselves, which the Court will find on page -- the quickest way to get it -- on pages 3 and 4 of my brief, divided themselves -- and they are very short -- into two groups. One group is:

"Q. What do you do now, Mr. Hoffman?

"A. I refuse to answer.

"Q. Have you been in the same undertaking since the first of the year?

"A. I don't understand the question.

"Q. Have you been doing the same thing you are doing now since the first of the year?

"A. I refuse to answer."

The second group:

"Q. Do you know Mr. William Weisberg?

"A. I do.

"Q. How long have you known him?

"A. Practically twenty years, I guess.

"Q. When did you last see him?

"A. I refuse to answer.

"Q. Have you seen him this week?

"A. I refuse to answer.

"Q. Do you know that a subpoena has been issued for Mr. Weisberg?

"A. I heard about it in court.

"Q. Have you talked with him on the telephone this week?

"A. I refuse to answer.

"Q. Do you know where Mr. William Weisberg is now?

"A. I refuse to answer."

On the record it is shown that his refusal to answer was on the ground that it would incriminate him as to a Federal offense because it was a question when he was before the court of either sending him back for the purpose of adding that to his answers or agreeing that it should be made a part of the record, which was agreed to by the court and by the Assistant Attorney General; so we have got a record that reads as if he said, "I refuse to answer on the ground that it might incriminate me of a Federal offense."

Now, if the Court please, I should like to advert to

Judge Hastie's opinion in the affirmance in this case and also to the opinion of the court itself in connection with the the opinion will be found in the Appendix on page 22.

Justice Reed: Page 22 of the record?

Mr. Gray: That is right, sir, page 22 of the record. The court said -- if I may be pardoned if I read to the Court some part of the opinion on page 25:

"The first of two situations where dispute is likely to occur over the application of the Marshall rule is illustrated by the questions directed to appellant with regard to the whereabouts of William Weisberg. It is not claimed by the appellant that the answers to the questions will in themselves incriminate him, but only that they expose him to danger in that they, in conjunction with other information, may lead to revelation that appellant is guilty of a Federal offense. The reality of this danger is the matter in dispute upon which the privilege depends."

Then we come to page 26, and the court says:

"A more difficult problem arises in applying to the first group of questions concerning the business of the witness the accepted generality of the Marshall test. It is perfectly obvious that the questions here permit of direct answers which in themselves would be an admission of Federal crime. Appellent has invoked that possibility in his assertion that a statement of 'what he does' would tend to incriminate him

'on the ground that it would incriminate him of a Federal offense.' Since the question asked permits an answer admitting Federal crime, appellant urges that the Court must accept this general assertion of crimination and that further inquiry whether he is in fact engaged in such illegal business is foreclosed. Literally construed Marshall's dictum -- '....if a direct answer may criminate himself, then he must be the sole judge what his answer would be' -- suggests an unqualified privilege to refuse to answer such a question as this. But we think there is one qualification which consists with the privilege and at the same time provides a salutary protection of the public interest in facilitating official inquiries."

Now, Judge Hastie said with respect to this first group of questions -- and this is at the top of page 28 -- I am referring, if the Court pleases, to the matters that accompanied the petition for admission to bail. He must have referred to that, which of course was before the court and was stricken.

"It is now quite apparent that the appellant could have shown beyond question that the danger was not fanciful. At the time of appellant's sentence, the District Court was of the opinion that he was not entitled to bail pending appeal. Subsequently, on motion for reconsideration of the matter of bail, the applicant made allegations with respect to his reputation as a racketeer and notorious underworld figure in Philadelphia, and to newspaper articles which tended to

support his reputation both generally and by specific allegation of prior conviction under the narcotics laws together with a picture of appellant with a narcotics official. This, we think, would rather clearly be adequate to establish circumstantially the likelihood that appellant's assertion of fear of incrimination was not mere contumacy."

But going further in his opinion, starting at the bottom of page 28, the court said:

"So far the members of the court are in agreement. We divide in applying the discussion already had to the facts of this case. The view of the writer of this opinion is as follows: The court in this case knew the setting of the controversy. It was a grand jury investigation of racketeering and Federal crime in the vicinity. The court should have adverted to the fact of common knowledge that there exists a class of persons who live by activity prohibited by Federal criminal laws and that some of these persons would be summoned as witnesses in this grand jury investigation. These considerations indicate a sufficient likelihood of good faith in the claim of privilege to sustain it."

So that although Judge Hastie wrote the opinion of the court, he differed with them as to the application of the law to this first group of questions. Now, he speaks of the setting, and I need not quote Your Honors' authorities that are on our brief indicating that a setting in a situation is a

matter that has to be given consideration by the court before whom anybody appears upon a charge of contempt, but here was the setting in this case.

All of these matters which appeared in connection with the petition for admission to bail, which was not filed until about two weeks later, were contained in newspaper articles published prior to the hearing on the contempt and the punishment of this defendant, and they set forth the complete record of this man, not in detail, of course, but he had been an underworld character for twenty years, that he was a racketeer, that he had been once tried for murder and acquitted, and tried and found guilty and sentenced on a narcotics charge under Federal law, and that he was the man that had been brought before this grand jury..

The court's attention was called to the fact, upon the hearing for contempt, not these newspaper articles, but that this was the man's general reputation, and notwithstanding the fact that he was told, not as the Government says in its brief, in the matter of an argument, but told that as a fact this man was a racketeer and an underworld character, declined to give it consideration, treated him as being before him as if, to use his own statement, he was a judge on the bench or a member of the Bar, and considered only the bare question that was before him and as to whether or not this man should answer.

The Chief Justice. Judge Brady did not follow that line,

did he?

Mr. Gray: In the dissenting opinion of the Pierre case, Your Honor means?

The Chief Justice: No, I am speaking of his note here in this opinion.

Mr. Gray: Your Honor means Judge Hastie?

The Chief Justice: I mean Judge Hastie.

Mr. Gray: Yes, sir.

The Chief Justice: He did not follow that?

Mr. Gray: Well, if Your Honor please --

The Chief Justice: He says he got --

Mr. Gray: He says the setting was such that even without that -- and there is another matter I was about to call to the Court's attention -- even without that matter contained in the exhibits attached to the petition for admission to bail, there was enough in this case for the court to have known the situation. Now, in other words, there was this situation.

The court charged this grand jury and charged this grand jury that they were to listen to testimony running the full gamut of Federal crime with racketeering and specifically included in his charge to the jury, narcotics as well as other Federal offenses.

Now, Judge Ganey, the district judge, must have known, as all of the public knew, when he committed this man that he was an underworld character, that he was not a member of the Bar,

he was not a banker or a judge from the bench. He gave us the illustration that suppose he was before the grand jury and was asked what was his business, would he have the right to refuse to answer on the ground it would incriminate him?

Of course, I stated to him that was an entirely different situation and gave him certain facts in connection with this man's life.

Now, it is important, however, that the whole court -- Judge Hastie and the other members of the bench -- did say that if this matter that was in the petition to admit to bail was before the court upon the question of whether or not this man was in contempt, he definitely would be entitled -- I am not using his words, but his words mean that -- to be discharged.

Not only was that said by the entire court, speaking through Judge Hastie, but my friend in his brief on two places says on page 29 in discussing the question of whether or not there was proof available to the petitioner in this case, when he was first brought up for a hearing and ordered to answer questions which he did refuse to answer, he said:

"Actually, in the present case, the petitioner has himself given the answer as to how he could have shown additional circumstances which would have satisfied the court below as to the basis on which he was claiming the privilege."

Turning over to page 30, he then says in his brief:

"The point to make now" -- after he pointed what was in

these exhibits, this affidavit and the exhibits attached to the petition to admit to bail, then the Government says -- "The point we make now is that this particular witness, without endangering himself in any way, could have presented circumstance which the court below indicated would have satisfied it that he had real reason to fear incrimination."

The Chief Justice: Does it not boil down to whether the judge makes the determination on facts presented or whether the defendant may make the determination himself? And in connection with that should a judge presume that when a person is before him, he is a racketeer?

Mr. Gray: If Your Honor is through with his question, I shall answer it.

I do not say that he should presume he was a racketeer, but I say the setting in this case was such that he should have known he was a racketeer.

I say, on the other hand, that he should not presume that he is a man of high standing, either at the Bar or the Bench or in a bank or anything of the kind, and I say also -- and I call Your Honor's attention --

The Chief Justice: Why should the presumption be against a witness?

Mr. Gray: There should not be any presumption against him.

The Chief Justice: Well, now, you start with no presumption at all.

Mr. Gray: We start with no presumption at all, and I put in the facts that Judge Ganey must have known.

The Chief Justice: You start with no presumption at all and you agree, I take it, that the judge must make the determination.

Mr. Gray: I agree that the judge must make the determination up to a certain point. He has to make, of course, the final determination whether the man is in contempt, but on the question of whether or not this question put to the witness is one which he is privileged to refuse to answer, while the court makes the final determination in some instances, in other cases, for instance, under the Burr case, as Your Honor well knows -- and I have followed the principle of not quoting a lot of abstracts from cases on the brief that the Court is thoroughly familiar with -- then it is only for the man himself to say.

The Chief Justice: That is right.

Mr. Gray: Now, here is a man convicted of narcotics. I do not want to presume anything except to --

The Chief Justice: I do not think you can presume the judge knew that.

Mr. Gray: I beg your pardon?

The Chief Justice: You cannot presume the judge knew it.

Mr. Gray: I do not presume it, but it was broadcast, it was published long before he had opportunity --

The Chief Justice: A judge is assumed to know everything in the newspaper and the radio and everything of that kind?

Mr. Gray: Well, I cannot say he is presumed to know everything of that kind, no, sir; I cannot go along to that extent. I should say, however, if Your Honor pleases, that the judge in this case -- this is pure argument -- could not help but know the situation with respect to this particular man

He could not help but know this grand jury was calling before it potential defendants and practially only potential defendants, that they were calling people from the underworld.

Justice Reed: I do not see how he can know that.

Mr. Gray: Well, he knew the kind and the character of the men that were called before him, before the grand jury, if Your Honor pleases. He had enough of them before him.

Justice Reed: Why would he know that?

Mr. Gray: Well, he would have known it in this case, Justice Reed.

The Chief Justice: It seems to me if he did know it, there is no use for you to argue it.

Mr. Gray: Judge Hastie said he knew enough to have determined it the other way.

The Chief Justice: And the two other judges say they did not.

Mr. Gray: To the contrary, that is correct.

Justice Frankfurter: Mr. Gray, Justice Holmes told us all

that we judges are very naive people. Will you keep that in mind?

Mr. Gray: I believe almost everything Justice Holmes said, sir, if Your Honors please, but with respect to that I have my doubts.

Justice Frankfurter: Could we take judicial notice that Judge Ganey is a very naive person?

Mr. Gray: No, no, I do not think we could, and it is because he is not a very naive person that I think he does know and did know. I cannot, of course, speak of my personal knowledge. I have to speak from the record.

The Chief Justice: Of course, some people may think they are not naive and actually be naive.

Mr. Gray: Some people do not know anything about themselves, if Your Honor pleases; that is very true. We have run across instances of that type quite frequently. I mean to say that others may know more about them because of what they learn from the outside, that they know about or believe.

Justice Frankfurter: I gather it is your view that it is not an irrebuttable presumption that judges are naive.

Mr. Gray: Certainly not an irrebuttable presumption, but I would say it would not be even a presumption as far as I was concerned, sir.

The Chief Justice: At this time.

Mr. Gray: Of course, we are getting a little away from

the record. I wanted to call the Court's attention to another note.

Justice Minton: Suppose we conceded that, Mr. Gray, that he was entitled to claim his privilege against the first questions that were asked him -- "When did you last see him?" -- "I refuse to answer." -- "Have you seen him this week?" -- "I refuse to answer" -- what would you say as to the questions that went before that as to what his occupation was, and so on? We have got those. Then we come down and he refused to say whether or not he had talked to him in the last week and whether or not he had talked to him on the telephone.

Mr. Gray: Yes, sir.

Justice Minton: Would that be regarded as a contempt in itself if it was not justified privilege?

Mr. Gray: Well, I do not know whether I clearly understand, Your Honor, Justice Minton's question, but maybe I can answer it in this way.

Here is a man who refused to answer -- Your Honor is talking about the Weisberg matter now?

Justice Minton: Whether this racketeer knew Weisberg.

Mr. Gray: I have not touched on that yet.

Justice Minton: Does that put the Court on notice that it might be a crime to know Weisberg?

Mr. Gray: There was more than that in the Weisberg case, and if Your Honor will permit me to go back and answer the

other Justice's question in a moment and pass the subject, I will go right to Weisberg and come back to the other subject.

I want to say that the Government in its brief on page 29 and this with respect to the duty of Judge Ganey in this case to make inquiry -- and it might also answer the questions that have been asked me with respect to possible presumption -- the Government says:

"It would seem appropriate for trial judges to exercise initiative in exploring the grounds for the claim of privilege. Even though the witness or his counsel fail to suggest the circumstances on which the claim is based (perhaps in some cases because it is to their advantage not to do so), the trial judge can make general inquiries of the parties which will negative unsound grounds for the assertion of the privilege and aid him in determining whether there is an real basis on which it should be upheld. In appropriate cases he can also examine the grand jury minutes and, perhaps, even question the witness in his chambers."

Now, the Government says it is the duty of the court, eve if he gets no suggestion from counsel, to make an investigatio of his own to determine whether or not there is any situation extant that would justify this man in claiming the privilege or that would undermine his claim of privilege and show that it was unsound.

Judge Ganey had this man before him, and on the bare face

of the failure of this defendant to answer the question found him guilty and committed him.

Now, while I did not intend to go into this part of it unless some suggestion came from the Court or a question was asked me with reference to it, it has occurred to me -- and I want to meet it -- that the Court may wonder why I did not have sense enough to file a petition for reconsideration of Judge Ganey's action before I filed a notice of appeal and thus have upon the record his disposition of that situation.

Of course, we filed a notice of appeal immediately, and the man did go to jail because I could not get a hearing on the petition to fix bail until sometime later. But while I can only talk about the record, I want to show Your Honor Judge Ganey's attitude, having disposed of it on the bare question and not hearing anything else, showing you his attitude as to any reconsideration of that case as, according to his own words in connection with the hearing on admission to bail.

Now, Your Honors will not find this in any of this printed record. Your Honors know, of course, that the record is not printed by us, that it is printed by Your Honors' Clerk, and such matters as come from the Circuit Court of Appeals, and we only had, as Your Honor sees, a transcript, a typewritten transcript there, in the matter of the record, but I inquired of Your Honors' Clerk before I came into court this morning, and this is a matter of the typewritten record that has been

certified by the Clerk of the Court of Appeals to this Court.

I am quoting Judge Ganey on page 493 and 494 of that record, if Your Honors desire to make a note of it.

Justice Reed: Did the Clerk print what you asked him to?

Mr. Gray: If Your Honor pleases, we cannot ask the Clerk -- I am not quite sure of that, maybe I should not say it -- maybe if I had asked the Clerk to print this, we might have gotten it printed. We did not ask the Clerk to print it, I will put it that way, sir; and, of course, it is four volumes of closely typewritten pages, and there would be much in there that would have no application to this question.

Justice Reed: No stipulation that the record can be used.

Mr. Gray: There is no stipulation that the record be used, but the Clerk tells me this is a matter of record in this Court, and this is what Judge Ganey said:

"I do not want to go into the question of incrimination here at all. I am not in any wise, don't want to in any wise reflect on the merits of the judgment that has been made and that is the sole question."

Then turning over to page 494, he said:

"I don't want to go into the merits of the contempt ruling that I have made, and I am either right or wrong on that.

In other words, he would not allow that record to be disturbed under any circumstances.

Now, if the Court pleases -- and I will not overlook, Your

Honor, Justice Minton's matter --

Justice Minton: The only question I want to know is: If any one of these questions were proper, would he be in contempt?

Mr. Gray: I answer you, yes, sir; if any one of these questions were proper, he would be in contempt. The question of whether the Weisberg matter is important enough for him to be in prison for, I do not know if this Court should be considering, but I will give Your Honor a good reason why he should not be in contempt in the Weisberg case also.

But before I come to that, I want to say to this Court that here we have a petition for admission to bail, which according, not only to the Court itself, but to the Government in coming before this Court, is sufficient to clear this man of any contempt. Your Honors are certainly familiar, I know that, with the cases which indicate that in the matter of fundamental privilege or a privilege given to one that is fundamental under the Constitution, we strain to see that that privilege is protected and not to take it away from a man; and yet we filed a petition for rehearing in the Court of Appeals in which we suggested to the court that that ought to be remanded to Judge Ganey for consideration, and also raised some other questions about the fact that they did not consider certain matters that we put before them, but we asked for a remand.

The court, just in a word, denied our petition. I am suggesting to this Court -- and I think I have the right to

suggest it -- and, of course, Your Honors can dispose of it -- and that is that if you agree with the opinion of Judge Hastie with regard to this first group of questions that the setting was such that the court on just what it had before it should not have found that petitioner in contempt, then he would be entitled to his discharge by this Court with respect to this first group of questions alone.

If the Court pleases, if you agree not with Judge Hastie in that respect but with the entire court and with the Government that this man can with this testimony clear himself of any charge of contempt, then I suggest to this Court that it ought to be remanded and it has been done in other cases. I think the Weisman case and the Doran case -- the Doran case particularly I remember, which was a late case -- and as Your Honors know, in that case there was a remand for the purpose of considering proof that had been offered and rejected. That is not what was done in this case, of course.

The proof was not offered, but if it exists, this man ought not to go to jail for contempt when the court below, the Court of Appeals and the Government acknowledges that he can clear himself even though he did not do it at first, and whether counsel exercised proper judgment or not, is not a matter, of course, that this Court will consider in determining the situation.

Now, I want to go to the Weisberg case. Your Honor Justice

Minton called my attention to the questions involved, and I have, of course, read them to the Court. The Court had this before it with respect to Weisberg, and this is a matter of record.

Justice Frankfurter: Are you talking about Weisman or Weisberg?

Mr. Gray: Weisberg, the second group of questions, if Your Honor please.

Justice Frankfurter: I see, beg your pardon.

Mr. Gray: Shall I read them to you, sir?

Justice Frankfurter: No, thank you.

Mr. Gray: They appear at the middle of page 4 of the brief. Weisberg and all others that had subpoenas issued for them on September 14, 1950, this man Hoffman was called before the grand jury on October 3. Prior to the time that he was called before the grand jury and Hoffman was in court at that time, the Assistant Attorney General came into the court before His Honor, Judge Ganey, and asked for bench warrants for eight different people for whom subpoenas had been issued whom he charged with evading the subpoenas and asked that bench warrants be issued.

The matter was taken under advisement by His Honor, Judge Ganey, and among those eight was Weisberg.

Now, this man knew Weisberg. He testified that he knew Weisberg; he testified that he had known him for twenty

He refused to answer any questions further than that, as to whether he had seen him and whether he had talked to him and whether he knew where he was.

He did say when asked, "Do you know whether a subpoena has been issued for Mr. Weisberg," "I heard about it in court."

The only way, of course, he could have heard about it was in court, because the only court procedure upon it was the application for bench warrants for Weisberg among the total of eight men for whom bench warrants were asked.

He had good reason to believe that he might have been admitting that he had violated the Federal statute, either as obstructing public justice or conspiring to obstruct public justice. I do not need to refer this Court to those two statutes, and he had reason to believe because of the fact that Weisberg was one of those for whom a bench warrant was issued and the Government had alleged he was evading subpoena.

Now, you might say -- and I do not know whether this was in Your Honor, Justice Minton's mind -- that these questions look harmless on their face, but as was said in the Estes case, Estes against Potter, involving the question of some aliens -- yes, I think I have it here, I refer to it on page 13 of our brief, and I give you a quote, which is, of course, from the Fifth Circuit, as it is reported in 183 Federal 2nd:

"...it would be idle merely to ask the witness if he knew the aliens and, upon his answering yes, then to stop his

examination; and the law never requires the doing of an idle thing."

I do not think that any member of this Court would have any doubt that if he admitted he had seen Weisberg and talked to him within the week or talked to him over the telephone, the very next question would be, "What was your conversation?"

Now, then, that puts us in a dilemma. We have got to stop at a certain point. It is suggested by the Government in its brief that we could stop at any point. That is contrary to the ddcisions of this Court. This Court has said that if he answer a question which waives our right to claim the privilege we must continue to answer; and as three of the Justices of this Court said in a dissenting opinion in the Rogers case, we are certainly on the horns of a dilemma, and as that portion of the Court that were signers of that dissenting opinion said, there are problems that even lawyers find difficulty in determining, and yet they expect laymen to determine.

Yet it does seem to me that that would have formed -- and while I have decisions in the brief, I do not need to refer to them -- to have answered those questions it would have formed a link in the chain of evidence that could be used to indict and possibly convict, but we do not have to go that far, the indictment of this man for the obstruction of justice or at least the conspiracy to obstruct justice.

Now, that is our difficulty with respect to the Weisberg

situation, and while it is true that all of the Court of Appeals, including Judge Hastie, were of the opinion that what was said with respect to the first group of questions had no application to Weisberg, it does seem to me that we have the same situation.

In that case it is not a matter, while there was presented also in connection with the application for bail these newspaper articles that connect Weisberg with Hoffman -- they speak of them as underworld characters, and so on, although they give no criminal record of Weisberg -- now, it seems to me that if this Court believed that it ought to be sent back with respect to that first group of questions, it is enough to justify its being sent back for entire reconsideration.

There is one other fact. It is made a basis of an argument by the Government. The Government argues that all they were asking the questions for was for the purpose of identifying Weisberg, finding out where he was, so they could bring him in on a subpoena.

That may have been the purpose of the Government but it is not the purpose of the Government that we are concerned with. It is the position that it places us in. But the fact remains that if that was the purpose, the purpose has been served, because within a few days after this man was committed, Weisberg walked in to answer a subpoena.

Now, certainly that was after the commitment, I want to

Court to understand, before the argument in the Court of Appeals, and then I think I am justified in saying that the Government -- the Government's representative is here -- that after Mr. Weisberg surrendered himself, not one word was put in the brief and not one word of argument was made before the Court of Appeals that this man's conviction for contempt should stand because of refusal to answer questions in the Weisberg case.

The Government abandoned it entirely. And yet to take up the matter Your Honor Justice Minton put to me, that if he is not to be convicted on contempt under the first group of questions, it seems to me under those facts his conviction under the second group of questions should not stand.

Justice Minton: It is not to be determined by whether or not the contempt was committed when the questions were asked.

Mr. Gray: I agree with you, sir, that that is the rule of law. But when he answered that question, the situation was as to Weisberg and the bench warrant application I have talked about, and I think that is enough, together with his knowing Weisberg for twenty years, and the fact that this man was evading a subpoena to put him -- he does not have to put himself in the position plainly that he would be convicted of a crime, but if he puts himself in the position where he is furnishing a link in the chain of evidence that is to be used against him and indict him and convict him, that is all that

is necessary, according to a number of authorities.

Justice Minton: If you ask a witness whether he knows another person or has had contact with him in the last few days is that sufficient to put the court on notice that any crime you might conjure up he might be able to claim privilege on?

Mr. Gray: No, but if you take into consideration who that other person is and what the situation is and his situation with relation to the person that is being examined, then it may be sufficient, and I suggest in this case it is.

Your Honor is familiar with the Doran case, of course, and in that case the United States Attorney, the same United States Attorney -- and I am quoting from the decision of the Court of Appeals in that case:

"It appears that the United States Attorney has caused subpoenas and bench warrants to be issued for them."

Those are the people that were being asked about. They are the "Weisbergs" in that case. Continuing:

"The applications charged not only the sought-after witnesses with deliberate avoidance of service of subpoena, but also that various witnesses for whom subpoenas had issued have been following a common course of conduct in avoiding service and impeding the functioning of said Grand Jury. This plainly applied to (the missing witnesses) and with equal plainness charged a conspiracy to obstruct the administration of justice."

Justice Douglas: The Weisberg case where the witness had escaped jail or had fled?

Mr. Gray: Oh, I agree, if Your Honor pleases, that the situation with respect to the others about whom the questions were asked in the Doran case puts him in a little stronger situation, but the principle is there and in this case, as it would appear to me, I cannot apply my knowledge of the individual but as it appears from the record to me, with Weisberg even...

a subpoena issued on September 14 and --

Justice Minton: Does that appear of record?

Mr. Gray: It appears of record, yes, if Your Honor pleases.

Justice Minton: Does it not appear of record that they could not find him?

Mr. Gray: The record in the court shows, in the District Court -- I am trying hard not to go outside the record in any of these matters, for I know my position, if Your Honor please, with respect to it -- but the record shows that the Assistant United States Attorney came into court and said the same thing that was said in this case, that there were a number of witnesses that were evading process and obstructing the work of the Grand Jury and Weisberg was among them and he wanted a bench warrant for him and wanted a bench warrant for the others.

Now, Hoffman knew that. Hoffman was in court at the time.

Then he is asked about Weisberg, asked the question, and of course he advised with counsel about these things, and of course counsel would naturally advise him that if he answered any one of those questions, he is waiving his right to claim the privilege as to the subsequent questions, and that if he is then asked about the conversation he had with him, he would have to testify to it, that he would not be protected under the law.

Now, of course, I as other lawyers are in the situation

when we are asked about the matter -- of course, he was brought before Judge Ganey, he was given until the next day to consult with me about it, as to whether he would answer it -- I am in the position of having to say, "Well, I think you can claim your privilege as to that. Just claim your privilege, because if you do not claim your privilege, you are going to waive it, and the next questions are going to involve you and tie you up tight."

What are you going to do about it? That is what we had to do.

Justice Frankfurter: Doesn't the Fifth Amendment sharpen the mind on these problems?

Mr. Gray: Well, it should sharpen many of these defendants' minds, there is no doubt about that, sir, and it sharpens mine as I study the situation.

Mr. Schaffer, my associate, handed me our own brief and asked me to call your attention -- and I have a few minutes' time, and I will. I do not believe in reading all these things to the Court, a simple reference to the case of United States against Cusson in 132 Federal 2nd would be enough for this Court, but I do read it because it is Judge Learned Hand's opinion, he said, referring to the question in that case -- and the question was whether she, the person who had been convicted of contempt, had met "any of the Groveses" upon a visit to Philadelphia in 1941. Judge Hand says:

"The question was harmless enough on its face and an answer to it would become incriminating only by reason of some setting which made it a possible step in the disclosure of a crime. The issue on this appeal is whether the record contains enough evidence of such a setting. We think that it does....Her excuse for refusing to say whether she met and talked to 'the Groveses' was that it might serve as a link in establishing that they had told her to go to Mexico so as to avoid being called as a witness upon their trial and that this would tend to prove that she had conspired with them to obstruct justice."

I make a supposition, not a presumption, that suppose this man had admitted that he had met and talked with Weisberg and told him that he was wanted as a witness and suggested that he might avoid all the difficulties that would ensue if he appeared before the Grand Jury and might take a little trip down to Mexico. That is what the Court indicated with respect to this.

I have probably 15 minutes left, sir, and I will ask for it if it is necessary to answer my friend on the other side.

ARGUMENT ON BEHALF OF THE UNITED STATES

By Mr. Davis

Mr. Davis: If the Court please, before discussing the law I want to be sure that the facts are clear. The petitioner was called as a witness before a Grand Jury. He refused to

answer two questions relating to the nature of his occupation and four concerning the whereabouts of Weisberg, all on the grounds of self-incrimination.

He gave no explanation as to how his answers might tend to incriminate him, and even when the Court stated that it had no knowledge of the background circumstances, he elected to stand upon his naked claim of privilege rather than to provide any circumstances which would aid the Court in determining whether he was actually in danger.

The Chief Justice: Now, Mr. Davis, let's take the first question: "What do you do now, Mr. Hoffman?" You try to put yourself in Mr. Hoffman's place when that question was asked. What could you answer that would show that it would incriminate you without incriminating you?

Mr. Davis: What he has to show is without --

The Chief Justice: You are Mr. Hoffman now and you answer that question.

Mr. Davis: That is right.

The Chief Justice: Let us assume you are what he had the reputation of being, a racketeer, et cetera, et cetera. How are you going to answer it?

Mr. Davis: Looking at it perhaps from hindsight, I would bring in the newspaper articles in which it was shown that he had a reputation as a racketeer and a gambler and that he had a criminal record.

The Chief Justice: That was not brought in by either side and, of course, he has to justify to the satisfaction of the Court that he would be incriminated, and that might very well be sufficient to show it, but could he make any statement of his own -- that is the point I am putting to you -- that would show that his answer would be incriminating without incriminating himself?

Mr. Davis: He can do several things by his own statement. One, he can negative the basis for the claims which do not actually exist.

The Chief Justice: Well, now, wait a minute. Let's talk right on this thing here. The first question is: "What do you do now?"

Mr. Davis: I, being Mr. Hoffman, reply, "I refuse to answer that question on the ground of self-incrimination for a Federal offense."

The Chief Justice: All right.

Mr. Davis: And then when asked for explanation, I say --

The Chief Justice: But it was not asked. There was not any asked.

Mr. Davis: Oh, yes. He had an opportunity when the Judge found that he was -- after the argument before the Judge he was asked whether he still wanted to answer the question and he still said no.

I might point out --

The Chief Justice: What could he say now? I am afraid we will forget about it.

Mr. Davis: On his initial statement, presumably he does not come in prepared with briefs and newspaper articles; so in his initial statement perhaps all he needed to do at that time is refuse to answer on the ground of self-incrimination and then prepare his case with his attorney.

But when he comes in and makes a showing of good faith, whether it be at that time or at a later time when there is a trial on the contempt charge, then he can point out that his reputation in the community is such that he is afraid that this prosecution is trying to tie him up, is trying to catch him for a Federal crime.

The Chief Justice: You do not indict or you ought not to indict and convict people because their reputation is not good.

Mr. Davis: No, Your Honor, maybe that would not be a sufficient ground for not answering, I do not know. The Court of Appeals in the Third Circuit --

The Chief Justice: If the clippings would -- if he admitted his reputation was bad, it would, but it seems to me that is a link in the chain that could be used against him. If a man would admit in open court that his reputation for being a racketeer, a narcotics dealer, illegal narcotics dealer, and what not, that would incriminate him.

Justice Minton: Suppose he just admitted in court, "I live by violating the law" and he does not say what law, he does not incriminate himself as to any particular law. He just says, "I live by violating the law." That would be sufficient, would it not?

Mr. Davis. I think it might well be. He might have to answer as to whether he was violating a Federal law or a state law.

Justice Minton: That would be enough to --

Justice Frankfurter: Do you mean to say he could be compelled to say, "I live by violating the law"?

Mr. Davis: No, Your Honor, that was not my suggestion. I said that would be an indication. I think that is going too far. I do not think he ought to be forced to admit he has committed a crime.

Justice Frankfurter: Can he be forced to admit he is a disreputable character?

Mr. Davis: No, I do not think he has to do that. What he may admit is that he has been accused of violating the law. What he can point out is that the Federal agents are hot on his trail, that he is being investigated, if you wish.

He is not in danger here of alerting the Federal prosecution to come after him. His whole assumption is that the prosecutors are coming after him, and that is why he cannot answer.

Justice Frankfurter: He must take all those chances and then when he is indicted and goes on the witness stand, he must open the door to the kind of cross-examination that his admissions there involve.

Mr. Davis: Well, we have to be very careful, Your Honor, in this kind of case not to push the man so that he is actually testifying against himself; and we cannot ask him to admit Federal crimes or to go too far.

Justice Frankfurter: Or to come within a hazard of embarrassing himself by a future prosecution. The privilege is not against being convicted and put into jail; the privilege is against getting himself, having the chain get so there is some kind of scent and generally creating difficulties for a future prosecution. Is that a fair statement?

Mr. Davis: Giving facts, giving testimony, which can be used against him, that is right, either as a chain or proof of some of the acts that are involved in the crime.

Justice Frankfurter: And you think making an answer whereby he gets headlines in the press and all of that implies in prosecution is something you could exact from him?

Mr. Davis: Your Honor, there may well be cases where it is extremely difficult for a defendant to answer that kind of question. In this case we are not faced with that difficulty because we know precisely what he could do, what he actually did do later on in presenting the background which the Third

Circuit said was sufficient so that it felt that if it had bee made timely, he should not have been held in contempt so that there may be many difficulties --

Justice Frankfurter: How much time expired between his refusal and this background revelation?

Mr. Davis: Fifteen days -- no, eighteen days. You see, this is the time schedule.

On October 3rd he refused to testify before the Grand Jury; on October 4 the main argument was held before the Distr Court; on October 5 he was sentenced for contempt; fifteen da later he filed application for reconsideration of bail.

The data which was attached to the application for recon- sideration of bail was, however, all material which pre-dated the trial in the District Court.

Justice Frankfurter: What was the material?

Mr. Davis: It was newspaper articles.

Justice Frankfurter: Newspaper stuff?

Mr. Davis: Newspaper articles and his own affidavit.

Justice Frankfurter: I should think there is the ques of whether we should take judicial notice that Justice Holm did not read the paper. Does that apply?

Mr. Davis: I do not know, Your Honor. In this case we have to consider the --

Justice Frankfurter: This was not an obscure problem c which Judge Ganey did not know, was it?

Mr. Davis: Judge Ganey, when the argument was made before him, the argument was made, we consider this man may be a racketeer, and so counsel said -- Judge Ganey said, "Well, I don't know that."

Justice Frankfurter: He does not have to be a racketeer; he simply has to be generally involved within this net that is thrown out. Anybody who knows anything about Grand Jury proceedings knows they do not call in Judges to testify.

Mr. Davis: They call in a great many witnesses, and it does not by any means follow that because a man is called before the Grand Jury that he is a person under investigation. We do not have to guess about it in this case because Judge Ganey told the court he did not know about this man's reputation, he did not know about what was in the newspapers.

The Chief Justice: How is that?

Mr. Davis: Judge Ganey told counsel he did not know what was in the newspaper.

The Chief Justice: That is when it was brought up fifteen days later?

Mr. Davis: No, that was brought up October 4 when the argument was had before the Court.

Justice Frankfurter: Did he say he did not know what was in the newspapers?

Mr. Davis: I call Your Honor's attention to the record on page 18 and 19, the bottom of page 18.

Justice Clark: He said he did not see where he was counterfeiting. I think counsel used the example of whether he was counterfeiting.

Mr. Davis: He went further, Mr. Justice Clark, and said this is Mr. Gray speaking:

"Your illustration is not very good. It has been broadly published that this man has a police record --

"The Court: I don't know it.

"Mr. Gray: -- that he is not a character that belongs on the bench, or a character that belongs at the bar.

"The Court: That I really don't know."

Justice Clark: The Court knew it was a Grand Jury for the purpose of investigating racketeering, did he not?

Mr. Davis: That is right.

Justice Clark: He knew that people who refused to testify are not pastors or church members or people who are trying to clean up the city. They usually come in and want to testify. He must have had some idea of what type of person he was when he refused to testify.

Mr. Davis: No, I do not think the court could draw any assumption from that. It could have assumed, for example, that he did not want to testify because it would show a violation of some state law, which would involve him with the state authorities. It might be that it would get him into trouble

with other persons who might wreak vengeance on him. He might have been afraid to answer not because --

Justice Clark: He knew the Narcotics man was there?

Mr. Davis: I beg your pardon?

Justice Clark: The Narcotics Commissioner or agent was in the court room, was he not?

Mr. Davis: I do not know at this time. Before the Grand Jury their picture was taken together.

Justice Frankfurter: Mr. Davis, I suppose nobody will deny that this is a very ticklish problem of how you can lay the foundation for claiming privilege.

Mr. Davis: And the right to claim it.

Justice Frankfurter: Is there any reason why when the facts became known that the contempt that was found should not have been reconsidered?

Mr. Davis: I think there is very good reason, Your Honor.

Justice Frankfurter: You think there is? Will you give it?

Mr. Davis: Yes. That comes up in two ways, of course. It is first argued that this supplemental showing should have been considered by the Circuit Court in determining whether to affirm or disaffirm the judgment below. Now, I do not think it needs extended argument to persuade this Court, and as far as affirming or disaffirming the judgment below, the Court must rely on the record which was made below. It cannot rely on

something outside the record.

The most the Court could have done would have been to remand the case and tell the Court below to reconsider this issue and consider the additional evidence which was brought in.

The question is: Would that kind of procedure be a just procedure? And I submit to Your Honors that it would not, because this is not a question of some technical oversight. It is not a question of newly-discovered evidence.

This is a question where the Court below said, "I don't know what this man's reputation is" -- in fact, inviting counsel to bring it before him. Counsel, as a matter of choice, decided, "We will try this case on the strategy of making the naked claim, which raises difficult questions, and we will try to win it on that basis."

If the Court felt that it ought to send this case back on that basis, we do not know what would happen below. I mean it would be a wholly new trial. This showing would be made, the Government might withdraw the question, might ask new question, we just do not know what would happen.

Justice Frankfurter: What is the great calamity in that?

Mr. Davis: Well, I do not think a defendant in a case like this has a right to two fair trials. If he was given a fair trial --

Justice Frankfurter: What you say is that there is a complicated question and that counsel, when you say strategy,

is one thing to say, "Can I get by with this stategy, can I fool the jury, can I get by a Judge like Justice Frankfurter?" That I understand is called strategy, can fairly be called strategy, but when you say this is an honest-to-God serious question that really poses difficulties in counsel advising his client, then it is not of that order. It was not as though "I will try my luck on this" -- it is a troublesome question.

Mr. Davis: Now, Your Honor, in this setting, in this case, it was not so difficult because we have the argument before the Court where the Court says, "I don't know these facts, I don't know his public reputation, I don't know what is in the papers."

In effect, I think the Court in a case like this should probe carefully and try to find out whether it is a bona fide plea of privilege, and that is what Judge Ganey did, I think.

Justice Black: In that connection suppose the man has been charged with murder and his lawyer had known facts to prove he was innocent, that he was not there and did not have anything to do with it, he is tried and convicted; fifteen days later it came to the knowledge of the Court beyond any shadow of doubt that he is innocent, everybody knew he was innocent. Would you think that the Department of Justice should prosecute him knowing he is innocent in that case?

Mr. Davis: No, I do not think so, Your Honor.

Justice Black: Well, why here if these facts are true

and it is admitted that that is a sufficient excuse, why should the Fifth Amendment be so reprehensible in claiming it that you apply a different rule there when it is known that the man is innocent?

Mr. Davis: I do not think it is known, Your Honor. The situation is he was asked a question: "What is your business?" And he said, "I refuse to answer."

Justice Jackson: May I ask a question right there?

Mr. Davis: Certainly.

Justice Jackson: We held the other day at the urging of the Department of Justice in the Rogers case in substance that a witness has got to raise this question at the very threshold of the inquiry of the subject matter, he cannot take any chances fooling around and answering some and refusing others.

Isn't it a necessary corrolary of that rule that the witness must raise this the first time that he is aware that this thing is getting into dangerous territory?

Mr. Davis: I think you are right, Your Honor.

Justice Jackson: Therefore, when you say, "What do you do now?", it seems to me that is a question which is bound to call for an incriminating answer if the man is doing any incriminating thing.

I do not see why the Court needs any additional information to know that that may be incriminating, and it is for the witness

it is his constitutional right for him. He may be aware of a lot of deviltry he is up to that nobody else knows about, but he is not going to have to go all through the list of what he is doing now.

Mr. Davis: Your Honor's question raises two aspects: one, the question of waiver, and it is quite right that under the questions as to waiver it is necessary for a witness to claim his privilege at the first occasion where he feels he may be incriminated.

Once he has raised --

Justice Jackson: We should not force him to that and then commit him too lightly because he makes a misjudgment as to whether it was too --

Mr. Davis: But we go one step too far because when he has made the claim and the Court has told him that the claim is improperly raised, then there can be no waiver involved in his answering the question.

He should then answer the question because now his doubts as to whether he has gone too far have been put at rest. No one has claimed that he has waived when he has answered under the direction of the Court.

Justice Frankfurter: What has not been put at rest is the state of mind of a man who, as appears in this case from the record and the briefs and all that have been submitted, feels himself hemmed in by what he knows inside of himself as

to his association, and therefore his potential culpability if he says anything as to why it would tend to incriminate him.

Judge Ganey is quite right, if a Judge is on the stand, if somebody who cannot presumably be deemed to be in with a lot of crooks and narcotics dealers and gangsters, if Judge Jones or Judge Horace Stearn were on the witness stand and were asked "What is your occupation, what do you do", and he said, "I claim privilege", that would be silly and frivolous and you would have to explain why a Justice of the Supreme Court of Pennsylvania should claim a privilege, but when you have got a dubious character, you say he did not know that he was a dubious character?

Mr. Davis: That is right, Judge Ganey couldn't know he was a dubious character.

Justice Frankfurter: Why do you say he couldn't? Why make these people out innocent that live in Philadelphia?

Mr. Davis: I am reading out of his own --

Justice Frankfurter: He said, "I don't know", meaning I haven't got legal evidence. That is all that means to me.

Mr. Davis: It means to me something more. It means to me, "Counsel, if you have something which will inform me on this, please do so."

Justice Frankfurter: Why did he ask him whether he knows if the fellow is clearly suspect, whether he knows him? Respectable people, of course, do not know crooks and notorious

gangsters.

Mr. Davis: There is another assumption there, Your Honor. There is nothing in the record to show that Mr. Weisberg is a crook or anything else.

Justice Frankfurter: But a bench warrant is out for him.

Mr. Davis: There was a subpoena out for him. He may have been the keeper of a candy store whom they wanted to come in and give testimony.

Justice Frankfurter: Yes, he may. You are dealing with this privilege, the constitutional amendment, the way the seventeenth century judges deal with an indictment, in order to prevent a fellow from going to the gallows.

Mr. Davis: I hope not, Your Honor. I hope this is more realistic. We have had grand juries in which witness after witness after witness is called before the Grand Jury in order that information can be obtained.

I do not think that any judge can assume that the witnesses are called before the Grand Jury, many of them, all of them, any of them, as far as that goes --

Justice Frankfurter: I cannot deal with generalities, but this question is redolent of the fact that the fellow is in cahoots -- redolent.

Mr. Davis: But the Court expressedly said he did not know what he was doing, neither he nor Weisberg.

Justice Frankfurter: I understand that to mean that he

did not have legal evidence.

Mr. Davis: It would have been so simple for counsel to have come in with information, which was readily available, in order to convince the Court. It is not a technical thing, Your Honor.

Justice Frankfurter: But it is a difficulty that counsel has because if he says some of these things, you might easily get five members of this Court or five members of some court that I can think of saying, "Oh, well, he has opened the door, therefore he has to walk through."

Mr. Davis: After he has claimed privilege and it was denied, there would be no question of waiver, Your Honor.

Justice Frankfurter: Why not?

Mr. Davis: Because the Court has told him that is not incriminating, he would have to answer it.

Justice Minton: He would answer that under compulsion.

Mr. Davis: That is right.

Justice Minton: Not by reason of waiver.

Justice Frankfurter: It is waiver if he tells something. If the Court finds that he has already told something, he has got to go through the whole way, as I understand it.

Mr. Davis: That is right.

Justice Frankfurter: He takes two chances -- three chances. There is a problem of waiver because you are not timely, there is a problem of waiver because of disclosure,

and you want the witness on the witness stand to take all those chances and to make a decision at the risk of finding he has been --

Mr. Davis: We are not objecting to a witness claiming the privilege. If the witness felt that was the first step in incriminating himself, he should claim the privilege, and his counsel should have advised him to claim privilege in order that there should be no waiver; but once the claim has been passed on and the Court has told him, "You have not made a sufficient showing so that I can understand you are making this claim in good faith, you must answer the question" --

Justice Jackson: I do not see how the question, "What do you do now" -- that it would be necessary to make an explanation even if he is a judge on the bench. That question might be asked of me and I might be playing the numbers somewhere, and if I say to the Judge --

Justice Frankfurter: I told you I was naive.

Justice Jackson: You are not as naive as you appear at times.

If I say to that Court the answer to the question "What do you do now" may incriminate me, I do not see why I have got to go or how I can go and point out that it might incriminate me without furnishing, as has been said, the very evidence in proving that I have a constitutional right not to incriminate myself, I must first incriminate myself to establish my privi[illegible]

Now, that does not make sense. It may very well be that the forefathers made a bad mistake in putting that provision in the Constitution, but here it is. I do not see why we should unless we want to appeal it, try to whittle it down here to where it becomes this sort of thing.

Mr. Davis: I am not suggesting that it be whittled down. I am suggesting only that there be an inquiry made as to whether the claim is made in good faith. I think questions asked of witnesses in this respect can be divided into three classes.

Justice Jackson: People hesitate to make a claim of this kind. It is like a conscientious objector. It is the very objection that exposes him to a great deal of contempt, and a man hates to do it. I do not see why we should presume that a man, if he could go in and tell a clean-cut story and go out scot-free, is going to bring on himself the odium of saying, "It will incriminate me", which in everything except the Criminal Court is a plea, of course.

Mr. Davis: There are various reasons why he may wish to take that odium rather than answer the question. In only one of them, in only one of those reasons is the fact that it may incriminate him. I would divide questions asked witnesses which arise in this problem into three classes:

The first class is rather simple: "Did you shoot John Jones?"

That question contemplates two answers, one of which is

incriminating and the other is not. The question is almost an accusation. The Judge can pass upon that question merely on the basis of the question.

Then there is a second class of question where there are a great variety of answers, and only relatively few out of a large number will involve incrimination. They are such questions as, "What is your name" or "Where do you live?"

Justice Minton: How old are you? He knows he is old enough that he might be guilty of some crime at that age, you know.

Mr. Davis: As to those questions --

Justice Frankfurter: Take that question, Mr. Davis: How old are you? Suppose that may become the most vital question as to the time when a man arrived in this country or getting naturalization, and suppose he says, "Well, I can't tell you because that would show that I am trying to evade the draft." Must he say that? All he can say is, "Your Honor, if I answer that, I will get into trouble." He can say that.

Mr. Davis: Your Honor, this is not a new question before the courts. They have been faced up with this thing for years and years. Judge Learned Hand says that you must push the door ajar enough so that you know the claim is made in good faith. You cannot go much further. You cannot make the man prove a case. Otherwise you are making him hurt himself, but you do require enough so that you are convinced he is making the claim in good faith.

Otherwise it is like crossing his fingers and calling king's X or something. It does not mean anything. You have to satisfy yourself that this man is not tampering with justice.

Justice Frankfurter: You should not have a hostile attitude toward that --

Mr. Davis: No, the judge should patiently probe to discover

whether or not this man is refusing to answer because he is afraid of state prosecution, because he is trying to protect friends, and that is what this judge did in this case. He said, "I don't know these things you are telling me. Come forward and tell me."

Instead, the accused, the defendant, the witness in this case stood on his naked claim. The judge had nothing to sink his teeth into.

I think I can illustrate the problem by a second case that arose in the Third Circuit immediately following this one in the same grand jury. A witness by the name of Greenberg was called and a question very similar to the question asked here was asked him in a different form, but in effect it was, "What is your business?"

In answer to that he not only claimed his privilege, but it was probed into a little further, and it was indicated that what he felt he had to fear was that if he disclosed his business there might be a Federal prosecution against him for failing to withhold Federal income taxes on his employees and social security taxes because he was in business and he had employees and he should have done those things.

Well, in that case by pushing the witness a little further to find out what his basis was, the court had something to sink its teeth into. It could determine whether there was any real danger to him or whether there wasn't any real danger. In that

case they determined that there was not and required him to answer.

In that case there is a petition for certiorari pending before this Court now, and I do not know whether the answer is right or wrong, but in any event the court then had pushed the door open enough to tell what the real basis for the claim was, and then they could determine whether or not they should allow the claim or refuse it.

Justice Clark: The Government thought he was a bad actor, didn't they?

Mr. Davis: Which case? This case?

Justice Clark: Hoffman.

Mr. Davis: Hoffman? I do not know what the Government thought about him.

Justice Clark: They had background on him, I guess.

Mr. Davis: I have no knowledge of what the Government thinks of Hoffman. I know the newspapers called him a racketeer and refer to him as Cappy Hoffman, which may show he was in the racketeering business. But I do not know.

Justice Clark: What I was getting at is it looks to me as though the Government knew, perhaps they should have told the judge themselves that he had this background.

Mr. Davis: I think it would have been appropriate for the judge to have asked Government counsel.

Justice Clark: After all, the Government represents both

sides.

Mr. Davis: That is right. I think it would not be inappropriate.

Justice Clark: I am wondering whether you are not trying through a contempt proposition to visit a penalty on a man you cannot convict by prosecution under a statute. That is what I am getting at.

Mr. Davis: I think what we have is a perfectly clear case of the witness refusing to answer a question which he was directed to answer, and I do not think we ought to read anything more into it than just that.

Turning from the questions of the nature of the occupation to the questions with respect to the whereabouts of Weisberg, I might say that there would be no occasion for remand in this case to the court for retrial unless it is determined that he was not in contempt in any respect, because contempt in refusing to answer any one of these questions could not be excused because others might have been answered.

The Chief Justice: Do you assume that the court would have given him five months if it had just been one of the sets of questions that was involved?

Mr. Davis: No, I would not assume that, Your Honor.

The Chief Justice: Why?

Mr. Davis: Under the rules of criminal procedure, Rule 35, counsel can apply to the court for reduction of sentence if he

of the reason for it has been changed. That would be the proper remedy if part of the basis of this were washed out.

Justice Black: How would you know that he would have been convicted of contempt if he had only refused to answer half of the questions? How could you say that? It might be contempt.

Mr. Davis: All we can do, Your Honor, is to read the judge's criminal contempt order on pages 4 to 6 in which he finds in contempt for refusing to answer each of the six questions. The order says he was in contempt for each of them.

What his sentence would have been if it had been less than six, I do not know, but there is a specific finding that he was in contempt for refusing to answer each of them.

Justice Black: How do we know he would have sentenced him on each of them? Suppose he knew now that on five of them it was wrong. How we can we say in that instance he would have found that the sixth was a wilful disobedience?

Mr. Davis: Unless there is some connection between the questions, I do not think there is any reason to assume that there would be any difference in his judgment because he would have answered the other questions differently. He was dealing with the six separate questions and he found on all six of them, he should have answered all six of them.

Justice Black: Which he did.

Mr. Davis: He refused to answer all six of them. The sentence might have been different, but if we can read his

order on its face value, we find him in contempt for refusing to answer each one of them.

With respect to the whereabouts of Weisberg, I would like to point out also that here we have a singular lack of any circumstances laid before the District Court at the time it acted upon the citation for contempt. Counsel has presented arguments here about how this would have endangered him.

None of those facts were laid before the court. All the court knew was that Weisberg had been subpoenaed, but had not appeared, and that a bench warrant had been asked.

The court in that case, as in the case of the occupation, just had no basis to believe that the answers would in any way connect up the witness with any crime.

The courts have faced that kind of question time and time again. It was faced in the Rosen case when Rosen was asked did he buy a Ford car?

Now, the Second Circuit in that case said the question is innocent, there is no way you can tell by reading the question whether that is incriminating or not.

So in that case Rosen came forward with the circumstances under which he showed that he would be in danger. That burden was placed on him, and he showed that to testify with respect to the car might tie him up with an alleged conspiracy, espionage plot, and his plea of privilege was upheld.

Time and time again the courts have faced just that

problem of requiring the witness to come forward with something so that the court can determine whether or not the claim is made on a bona fide basis or whether it is just in order to avoid answering.

I do not think it can be said to be downgrading the privilege against self-incrimination to require someone to show a reason why he should be within it. After all, the right to compel testimony is an important part of our judicial system. It is a right which is important to the accused as well as to the Government.

Justice Reed: May the explanation be made by counsel?

Mr. Davis: Some of the courts have raised the question whether it can be made by counsel. It has been suggested that it should be made by the witness. I think that anyway it is brought to the attention of the court, and he believes it is bona fide, it should be enough.

Justice Reed: If the counsel were put under oath and called the attention of the court to the fact that the man had some reputation --

Mr. Davis: I think the court might well accept that as a showing.

Justice Reed: Then turn to the man and say, "Is that true?"

Mr. Davis: He could do that. He might feel the door was being pushed too far ajar and might refuse to answer. We are not requiring proof.

We are requiring some indication of bona fides, something that the court will believe that this man is really claiming it in good faith, and that is all that is necessary. That is precisely what was refused to be given in the present case.

REBUTTAL ARGUMENT ON BEHALF OF THE PETITIONER

By Mr. Gray

Mr. Gray: If the Court please, I shall take less than the time allotted me to just call to the Court's attention one or two things to which my attention has been called by the questions of this Court or by Mr. Davis's statement.

In the first place, taking up the question of whether counsel could inform the court with respect to the matter, I would agree that there is a decision, I think maybe it is the St. Pierre case, to the effect that counsel's argument would not be sufficient in connection with information given to the court, but I want to call the Court's attention to what appears on pages 18 and 19 of the Appendix, this is part of the record.

I had been discussing with His Honor, Judge Ganey, the reasons why this man could not incriminate himself when he was asked the question of what business he was in.

I avoided narcotics and used counterfeiting as an example, and he wanted to know if I meant he was in the counterfeiting business, and I said, no, but that led up to this.

Judge Ganey said -- and I am quoting, taking the last

statement of the court at the bottom of page 18:

"All right, let us take myself. Suppose I were summoned before the grand jury; they say, 'What is your business?' I say, I refuse to answer on the ground of self-incrimination."

Well, I wrongly maybe interrupted him, but he was evidently through, and I said, "Your illustration" -- and the court interrupting me, said, "I don't know. I don't know what Hoffa does."

I said, "Your illustration is not very good."

Now, what I was telling him was not only a statement of fact, but I was calling his attention to something which I knew and which I thought he must have known. I was simply calling it to his attention. I said this:

"It has been broadly published that this man has a police record."

He interrupted me, "I don't know it." I continued:

" -- that he is not a character that belongs on the bench or a character that belongs at the Bar."

He said, "That I really don't know."

I was telling him that was so. They have a habit up in New England of saying, "I don't know it." We say, "So what?" down in our section of the country. It does not mean they do not know it before you have told them. It means they are answering your question and acknowledging the knowledge you have

giving to them, but when the judge says, "I don't know," I was telling him the facts, and he could have and should have looked into the question of what those newspaper articles contained, even if he did not know it. Whether or not he reads the newspapers, I do not know. I said, "Wait; that is no answer to the fact that he may be in the counterfeiting business and being in the counterfeiting business, if he makes any other explanation than refusal to answer on the ground that it may incriminate him" -- then the court interrupted me again, "You say it is widely known -- has it been in the newspapers that he is in the counterfeiting business?" He picked that phrase up. I said, "No, sir."

Then he went right on and that was the end of it and he said, "I am going to sustain" -- and he did sustain.

All I asked was that these notes be put of record. So much for that.

Now, the question was asked, it was suggested, as a matter of fact, that when the court told him these answers did not incriminate him and he could not claim the privilege, that he could go back and answer that with impunity, he could not because the court could not protect him in that connection.

The question of compulsion might be important, and it might arise sometime in the future, but the court cannot give him immunity, and the court cannot substitute his direction to him for the right that he has under the Fifth Amendment.

I can express my own thought with respect to the purpose of these grand juries, but it is only my own thought, and it comes from nothing on this record, and that is that this grand jury was called for the purpose of putting people in jail either for contempt or for perjury, and now I have one other thing.

If Your Honors examine the Greenberg case, you will find the questions were entirely different. One thing I did not call to the Court's attention was an excerpt from the affirmance of the doctrine that they adopted in the Hoffman case itself, when the court said in the United States against Hoffman -- this is in the Greenberg opinion:

> "...the appellant sought, belatedly as we held, to meet this burden by allegations with respect to his reputation as a racketeer and notorious underworld figure and by references to newspaper articles which tended to support this reputation both generally and by specific allegation of prior conviction under the Federal narcotics laws. We held that this would have been sufficent, if it had been offered in time, to establish circumstantially the likelihood that appellant's assertion of fear of incrimination was not mere contumacy. In the present case, however, the appellant made no such showing. He did not offer any reasonable basis for inferring that the nature of his business, as distinguished from the fact that he was in

a business of some kind, might be a fact which, with other facts, would incriminate him of a violation of the Federal law."

So they again and again in the Greenberg case affirmed the proposition that if we had had this before the court, there would have been no question about it.

I think we have covered everything, if Your Honors please. Thank you.

(Whereupon, at 4:00 p.m., argument in the above-entitled matter was concluded.)