The Burger Court Opinion Writing Database

United States v. Mandujano

425 U.S. 564 (1976)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall,
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: JAN 1 1976

1st DRAFT Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 74-754

United States, Petitioner, v. Roy Mandujano. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1976]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case presents the question whether the warnings called for by *Miranda* v. *United States,* 384 U. S. 436 (1966), must be given to a grand jury witness who is called to testify about criminal activities in which he may have been personally involved; and whether, absent such warnings, false statements made to the grand jury must be suppressed in a prosecution for perjury based on those statements.

(1)

During the course of a grand jury investigation into narcotics traffic in San Antonio, Tex., federal prosecutors assigned to the Drug Enforcement Administration Task Force learned of an undercover narcotics officer's encounter with respondent in March 1973. At that time, the agent had received information that respondent, who was employed as a bartender at a local tavern, was dealing in narcotics. The agent, accompanied by an informant, met respondent at the tavern and talked for several hours. During the meeting, respondent agreed to obtain heroin for the agent, and to that end placed several phone calls from the bar. He also requested and received $650 from the agent to make the purchase. Respondent left the tavern with the money

STYLISTIC CHANGES THROUGHOUT

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: APR 6 1976

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-754

United States, Petitioner, *v.* Roy Mandujano.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April —, 1976]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case presents the question whether the warnings called for by *Miranda* v. *United States,* 384 U. S. 436 (1966), must be given to a grand jury witness who is called to testify about criminal activities in which he may have been personally involved; and, whether absent such warnings, false statements made to the grand jury must be suppressed in a prosecution for perjury based on those statements.

(1)

During the course of a grand jury investigation into narcotics traffic in San Antonio, Tex., federal prosecutors assigned to the Drug Enforcement Administration Task Force learned of an undercover narcotics officer's encounter with respondent in March 1973. At that time, the agent had received information that respondent, who was employed as a bartender at a local tavern, was dealing in narcotics. The agent, accompanied by an informant, met respondent at the tavern and talked for several hours. During the meeting, respondent agreed to obtain heroin for the agent, and to that end placed several phone calls from the bar. He also requested and received $650 from the agent to make the purchase. Respondent left the tavern with the money

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 13, 1976

PERSONAL

Re: No. 74-754 - United States v. Mandujano

Dear Harry:

Since Potter's concurrence gives no inkling why he does not join the opinion, I would appreciate your comments -- informally if you wish -- on the subject.

We granted cert to decide whether Miranda applies to grand jury witnesses. In parts (1), (2) and (3), that is all we deal with. Part (4), p. 16, does no more than restate the essence of what you wrote in Oregon v. Hass and our holding earlier in Harris v. New York.

The Solicitor General urged us to decide what warning, if any, need be given a grand jury witness.

If I read Potter correctly, he believes that absent any warning whatever the perjury conviction would stand. If that is your view, I could happily drop part (4). Alternatively, is there anything in parts (1), (2) and (3) that gives you trouble?

Let's discuss. This should not be a plurality opinion when the issue is so clear.

Regards,

WEB

Mr. Justice Blackmun

P.S. A note to P.S. & the Conference follows.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 13, 1976

Re: No. 74-754 - United States v. Mandujano

Dear Potter:

I have your concurring opinion in this case and I am not clear as to precisely what troubles you. We granted cert because both the District Court and the Court of Appeals held Miranda warnings essential as a predicate to convict a grand jury witness for perjury. Thus it seems to me that the Miranda issue is properly reached in this case. Both the proposed opinion and Bill Brennan's concurring opinion recognize that attacks upon perjury convictions may be appropriate or, at the very least, that such attacks have succeeded in the past. My opinion, for example, notes: "[N]othing remotely akin to 'entrapment' or abuse of process is suggested by what occurred here." Bill's opinion makes an analogous point:

> "Further, the record satisfies me that the respondent's false answers were not induced by governmental tactics or procecures so inherently unfair under all the circumstances as to constitute . . . a violation of the Due Process Clause . . . ."

These views have found expression in both the district courts and the courts of appeals. See, e.g., United States v. Thayer, 214 F.Supp. 929 (D.Colo. 1963). See also United States v. Wong, No. 74-635, which is being held for Mandujano. Other courts faced with perjury convictions have embarked upon searching jurisdictional inquiries to determine whether the questions propounded to the witness exceeded the investigatory body's authority. See, e.g., Brown v. United States, 245 F.2d 549 (CA 8 1957); Masinia v. United States, 296 F.2d 871 (CA 8 1961).

Consequently, there is a body of law to the effect that a perjury conviction can be overturned under certain circumstances, albeit very limited. Indeed, I would presume that, whatever the outcome in

Mandujano, it would remain open for a defendant to attack a perjury charge on the ground that an overbearing prosecutor coerced him to answer even after a valid claim of the Fifth Amendment privilege. If a witness validly interposes the privilege, then the Government is powerless to order the person to answer without a grant of immunity. If the prosecutor thus were to exceed his power and extract an answer potentially inculpatory (after assertion of the privilege and without providing immunity), would we automatically assume that the witness had no defense whatever to a perjury charge? That would give me pause.

If perjury may at times be "condoned," as it in fact has in the cases cited at p. 18, the issue before us then becomes whether, under the particular circumstances of this case, the offense of perjury may be excused because the Miranda warning was not given. The Fifth Circuit was of the view that failure to give Miranda warnings provided a sufficient reason to excuse perjury. We all seem to agree that the Miranda warning need not be given. The fulcrum at both courts was consideration of the Miranda issue.

I am therefore at a loss as to how we can justify not treating the "gut" issue presented to us.

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 12, 1976

Re: 74-754 - U. S. v. Mandujano

MEMORANDUM TO THE CONFERENCE:

Potter's concurring opinion prompts me to add the enclosed insert at page 17, at the end of footnote 7.

Regards,

WEB

United States v. Mandujano

No. 74-754

INSERT - P. 17

INSERT - P. 17, fn. 7 (add at end of footnote)

The concurring opinion of Mr. Justice Stewart suggests that an unwarned grand jury witness who perjure himself has no claim by reason of the absence of warnings. Under that rationale, a witness, under oath to tell the truth, but not specifically warned that he can refuse to answer a potentially inculpatory question, can properly be convicted of perjury. Whatever the merits o the Miranda doctrine as originally conceived, the policy consideration underlying that holding was the desire to secure the Fifth Amendment privilege in circumstances where, without warnings, a person in police custody migh not have the ability to choose freely to remain silent. Cf. Garner v. United States, 424 U.S. ___, ___ (1976).

Such considerations, among others, led the Court of Appeals in the present case to conclude that a perjury conviction could not stand if the witness had not been affirmatively or specifically alerted to the need for exercising the privilege. By refraining to suggest that Miranda does not apply and at the same time indicating that/the absence of any warnings affords no defense in any perjury case, the concurring opinion would resolve an issue not before us and thus more appropriately left to another day: whether a witness, without any warning of the privilege, when put to the choice (as he perceives it) of either incrimi-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 14, 1976

Re: 74-754 - United States v. Mandujano

MEMORANDUM TO THE CONFERENCE:

Some reactions to my memorandum of May 12, proposing a possible expansion of note 7, page 17, persuade me that, given the "May-June syndrome," it is better to leave the situation substantially as it was prior to my memorandum of May 12.

I will therefore plan on having the opinion ready for announcement next Wednesday in the form of the circulation dated April 6, except that the final sentence of note 7, page 17, will be omitted and the final sentence, note 9, page 19, will be omitted to avoid repetition.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 25, 1976

Re: 74-635 - United States v. Wong
74-735 - Nickels v. United States
(74-1106 - United States v. Washington
(74-6579 - Washington v. United States
75-1013 - Broncucia v. Colorado
(Hertofore held for 74-754 - United States v. Mandujano)

MEMORANDUM TO THE CONFERENCE:

No. 74-635 - United States v. Wong

Respondent, an alleged "putative" defendant (not related to our Wong!), was called before the grand jury. Prior to testifying, she was expressly warned of the privilege against compelled self-incrimination, that any answer could be used against her in a subsequent prosecution, that if she could not afford an attorney one would be provided, and that a false answer would subject her to a perjury prosecution. Respondent stated that she understood the warnings. However, in a subsequent perjury prosecution, the District Court suppressed respondent's false testimony because respondent, who uses English only as a second language, had not understood the portion of the prosecutor's warning informing her of her right to remain silent.

CA 9 affirmed, expressly relying on the Due Process Clause. The court concluded that calling a "putative" defendant before the grand jury was so inherently fraught with dangers of compulsion that a witness must be given an effective warning of the right to remain silent. Since the warning in this case was ineffective, because not understood, the court reasoned that the "unfairness of the [grand jury] procedure remained undissipated...." Accordingly, respondent, although not shielded by the Fifth Amendment from a perjury prosecution, was nonetheless protected by the Due Process Clause.

On appeal, petitioner's perjury conviction was reversed on state law grounds, viz. that the perjury charge failed to set forth the false statements with sufficient particularity. His conviction for conspiracy to commit perjury, however, was affirmed. The Colorado Supreme Court did not discuss the Miranda issue.

Petitioner seeks certiorari, claiming that his conspiracy conviction must fall since he was neither warned that he was a putative defendant nor given full Miranda warnings.

As in No. 74-1106, the instant petition involves the requirement of warnings in connection with a substantive conviction, an issue not settled by Mandujano. Although I am of the view that the Colorado courts reached the correct result (as Colorado lawyers always do!) and would therefore be inclined to deny certiorari, a different disposition may be in order if the Court decides to grant the petition in No. 74-1106. In that event, I think that a hold of Broncucia would be appropriate.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 21, 1976

MEMORANDUM TO THE CONFERENCE

RE: No. 74-754 - United States v. Mandjuano

I shall be writing a separate opinion in due course. I think the circulated opinion addresses constitutional questions not necessary for decision in the case.

W.J.B. Jr.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

Mr. Justice Brennan

Circulated: 3/29/76

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-754

United States, Petitioner, *v.* Roy Mandujano.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1976]

MR. JUSTICE BRENNAN, concurring in the judgment.

I concur in the result reached by the Court, for "even when the privilege against self-incrimination permits an individual to refuse to answer questions asked by the Government, if false answers are given the individual may be prosecuted for making false statements." *Mackey* v. *United States*, 401 U. S. 667, 705 (1971) (BRENNAN, J., concurring in the judgment). Although the Fifth Amendment guaranteed respondent the right to refuse to answer the potentially [redacted] incriminating questions put to him before the grand jury, in answering falsely he took "a course that the Fifth Amendment gave him no privilege to take." *United States* v. *Knox*, 396 U. S. 77, 82 (1969). "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." *Bryson* v. *United States*, 396 U. S. 64, 72 (1969). See also *Glickstein* v. *United States*, 222 U. S. 139, 142 (1911). Further, the record satisfies me that the respondent's false answers were not induced by governmental tactics or procedures so inherently unfair under all the circumstances as to constitute a prosecution for perjury a violation of the Due Process Clause of the Fifth Amendment.[1]

[1] Of course whether the allegations concerning prosecutorial misconduct complained of by respondent in his motion to suppress contain "the seeds of a 'duress' defense, or perhaps whether his

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 4/1/76

STYLISTIC CHANGES and pp. 10, 14-16, 18, 23

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-754

United States, Petitioner, *v.* Roy Mandujano.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1976]

MR. JUSTICE BRENNAN, concurring in the judgment.

I concur in the result reached by the Court, for "even when the privilege against self-incrimination permits an individual to refuse to answer questions asked by the Government, if false answers are given the individual may be prosecuted for making false statements." *Mackey* v. *United States*, 401 U. S. 667, 705 (1971) (BRENNAN, J., concurring in the judgment). Although the Fifth Amendment guaranteed respondent the right to refuse to answer the potentially incriminating questions put to him before the grand jury, in answering falsely he took "a course that the Fifth Amendment gave him no privilege to take." *United States* v. *Knox*, 396 U. S. 77, 82 (1969). "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." *Bryson* v. *United States*, 396 U. S. 64, 72 (1969). See also *Glickstein* v. *United States*, 222 U. S. 139, 142 (1911). Further, the record satisfies me that the respondent's false answers were not induced by governmental tactics or procedures so inherently unfair under all the circumstances as to constitute a prosecution for perjury a violation of the Due Process Clause of the Fifth Amendment.[1]

[1] Of course whether the allegations concerning prosecutorial misconduct complained of by respondent in his motion to suppress contain "the seeds of a 'duress' defense, or perhaps whether his

STYLISTIC CHANGES and p.p. 1, 2, 18, 22, 24

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated:

Recirculated: 4/13/76

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-754

United States, Petitioner, v. Roy Mandujano. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1976]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in the judgment.

I concur in the result reached by the Court, for "even when the privilege against self-incrimination permits an individual to refuse to answer questions asked by the Government, if false answers are given the individual may be prosecuted for making false statements." *Mackey* v. *United States*, 401 U. S. 667, 705 (1971) (BRENNAN, J., concurring in the judgment). Although the Fifth Amendment guaranteed respondent the right to refuse to answer the potentially incriminating questions put to him before the grand jury, in answering falsely he took "a course that the Fifth Amendment gave him no privilege to take." *United States* v. *Knox*, 396 U. S. 77, 82 (1969). "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." *Bryson* v. *United States*, 396 U. S. 64, 72 (1969). See also *Glickstein* v. *United States*, 222 U. S. 139, 142 (1911). Further, the record satisfies me that the respondent's false answers were not induced by governmental tactics or procedures so inherently unfair under all the circumstances as to constitute a prosecution for perjury a violation of the Due Process Clause of the Fifth Amendment.[1]

[1] Of course whether the allegations concerning prosecutorial misconduct complained of by respondent in his motion to suppress contain "the seeds of a 'duress' defense, or perhaps whether his

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: APR 7 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–754

United States, Petitioner, *v.* Roy Mandujano.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April —, 1976]

MR. JUSTICE STEWART, concurring in the judgment.

The Fifth Amendment provides no protection for the commission of perjury. "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." *Bryson* v. *United States*, 396 U. S. 64, 72 (footnote omitted). See *United States* v. *Knox*, 396 U. S. 77, 82; *Glickstein* v. *United States*, 222 U. S. 139, 142. The respondent's grand jury testimony is relevant only to his prosecution for perjury and was not introduced in the prosecution for distribution of heroin. I would, therefore, reverse the judgment without reaching the other issues explored by the Court and by MR. JUSTICE BRENNAN in his separate opinion,

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

Recirculated: APR 8

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–754

United States, Petitioner, *v.* Roy Mandujano.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April —, 1976]

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACKMUN joins, concurring in the judgment.

The Fifth Amendment provides no protection for the commission of perjury. "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." *Bryson* v. *United States*, 396 U. S. 64, 72 (footnote omitted). See *United States* v. *Knox*, 396 U. S. 77, 82; *Glickstein* v. *United States*, 222 U. S. 139, 142. The respondent's grand jury testimony is relevant only to his prosecution for perjury and was not introduced in the prosecution for attempting to distribute heroin. I would, therefore, reverse the judgment without reaching the other issues explored in THE CHIEF JUSTICE's opinion and by MR. JUSTICE BRENNAN in his separate opinion.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 15, 1976

Re: NO. 74-754, UNITED STATES v. MANDUJANO

Dear Chief,

This is in response to your letter of April 13. It is my understanding that the precise issue presented in this case and the cases that are being held from the CA 9 and CA 7 is whether the failure to give Miranda warnings requires the suppression of grand jury testimony in connection with a prosecution for perjury based on that testimony. I agree with you and Bill Brennan that on the record in this case there is no basis for concluding that the perjury prosecution must be barred because of outrageous prosecutorial conduct amounting to a denial of due process.

That being so, the issue becomes whether the Fifth Amendment privilege against compulsory self-incrimination requires suppression of Mandujano's false testimony. I believe that our prior cases make clear that, even assuming that Miranda warnings, or some kind of warnings, are required to safeguard the witness's Fifth Amendment rights, the failure to provide warnings does not preclude use of false testimony in a perjury prosecution. Accordingly, I concluded that it is not necessary to consider in this case whether the failure to give Miranda warnings or any warnings at all would warrant the suppression of truthful grand jury testimony of a "putative defendant" in connection with his prosecution for a substantive crime.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

Recirculated: APR 16 1976

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-754

United States, Petitioner, v. Roy Mandujano. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April —, 1976]

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACKMUN joins, concurring in the judgment.

The Fifth Amendment privilege against compulsory self-incrimination provides no protection for the commission of perjury. "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." *Bryson* v. *United States,* 396 U. S. 64, 72 (footnote omitted). See *United States* v. *Knox,* 396 U. S. 77, 82; *Glickstein* v. *United States,* 222 U. S. 139, 142. The respondent's grand jury testimony is relevant only to his prosecution for perjury and was not introduced in the prosecution for attempting to distribute heroin. Since this is not a case where it could plausibly be argued that the perjury prosecution must be barred because of prosecutorial conduct amounting to a denial of due process,* I would reverse the judgment without reaching the other issues explored in THE CHIEF JUSTICE's opinion and by MR. JUSTICE BRENNAN in his separate opinion.

*Cf. *Brown* v. *United States,* 245 F. 2d 549 (CA8).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R WHITE

January 28, 1976

Re: No. 74-754 - United States v. Mandujano

Dear Chief:

Please join me.

Sincerely,

Byron

The Chief Justice

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 1, 1976

Re: No. 74-754 -- United States v. Roy Mandujano

Dear Bill:

Please join me in your concurring opinion.

Sincerely,

T. M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 12, 1976

Re: No. 74-754 - United States v. Mandujano

Dear Potter:

Will you please join me in your separate concurring opinion.

Sincerely,

Harry

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 12, 1976

Re: No. 74-754 - United States v. Mandujano

Dear Potter:

Will you please join me in your separate concurring opinion.

Sincerely,

Harry

Mr. Justice Stewart

cc: The Conference

[Note to Justice Stewart only]

Dear Potter:

I suppose this means that, in the next to the last line of your one-paragraph opinion, the word "Court" should be changed to "Chief Justice."

H. A. B.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 30, 1976

No. 74-754 United States v. Mandujano

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

CC: The Conference

April 6, 1976

Dear Chief:

74-754

I have no problem with Mandujano. I have joined your opinion, and am with you all the way.

74-676

You may be thinking of Estelle, in which I have now had an opportunity to put my ideas in the enclosed concurrence - which I will circulate tomorrow.

As you will see, I concur in your opinion for the Court, and write to identify what seems to me to be the two separate lines of analysis followed by you and Bill Brennan, resulting - to some extent - in no real joinder of issue between the two of you. Bill views Estelle as presenting a Zerbst situation, and I view it primarily as a failure of counsel to object at a time when the problem could have been cured.

I view my little concurrence as supportive of your opinion.

Changing the subject, I do wish you well at the "Pound Conference". Having looked at some of the papers prepared for the Conference, and the list of some of the participants, it is certain to be an event of importance to our profession and the country. I certainly commend you on the concept, planning and your own personal leadership.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 4, 1976

Re: No. 74-754 - United States v. Mandujano

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

Copies to the Conference