Supreme Court of the United States

OCTOBER TERM 1970

In the Matter of:

FRED T. MACKEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Docket No. 36

Place Washington, D. C.

Date October 21, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

IN THE SUPREME COURT OF THE UNITED STATES

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FRED T. MACKEY,

Petitioner,

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Respondent.

Washington, D. C.,

Wednesday, October 21, 1970.

The above-entitled matter came on for argument at 10:02 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

WILLIAM M. WARD, ESQ.,
39 S. LaSalle Street, Chicago, Illinois
Counsel for Petitioner

MATTHEW J. ZINN, ESQ.,
Assistant to the Solicitor General
Department of Justice

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PROCEEDINGS

MR. CHIEF JUSTICE BURGER: The first case on for argument this morning is Mackey vs. United States, No. 36.

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

ARGUMENT OF WILLIAM M. WARD, ESQ.

ON BEHALF OF THE PETITIONER

MR. WARD: Mr. Chief Justice, may it please the Court, this matter comes before you this morning in a write of certiorari to the United States Court of Appeals for the Seventh Circuit. It was commends in the United States District Court for the Northern District of Indiana, Hammond Division, within approximately two weeks of this Court's decisions in the Marchetti and Grosso cases.

The petition was brought under 28 U.S.C. 2255 by Mr. Mackey, requesting a new trial from a conviction of willful evasion of income taxes. The gravamen of the petition was that during the course of the income tax evasion trial, the government had admitted into evidence 60 wagering tax returns which under the Marchetti-Grosso decisions were coerced, taken from the defendant, in violation of his privilege against self-incrimination.

The petition was pending for approximately eight months. No answerewas filed by the government nor did the court require an answer to the petition. Briefs were submitted. In August of 1968, the District Court denied the

petition for relief under 2255, and appeal followed to the United States Court of Appeals, which affirmed and petition for certiorari was granted on August 29, 1969 by this court.

The facts, insofar as they bear upon this appeal in the evasion case, are as follows:

Mr. Mackey was indicted for willful evasion of taxes for the years 1956 through 1960, inclusive. The trial, under the theory of the government in the evasion case, was a pure net worth case. In other words, there were no specific items of unreported income shown by the government. This type of case has been given the imprimatur by this Court in the Holland and Friedberg decisions.

During the course of this trial, the government offered into evidence 60 wagering tax returns which had been filed by Mr. Mackey monthly during the years in question. At the time that these returns were offered in evidence, the District Court trying the case decided that they were prejudicial. Objection was made to their admission on the grounds that they would be prejudicial, that Mr. Mackey was not on trial for being a gambler. The court upheld admitting the exhibits into evidence until at a future time, when offered again, upon the submission by the government that these were needed to show the gross income from gambling during the years in question. They were then admitted by the court below.

At the close of the government's case, Mr. Mackey

moved for acquittal, which was denied. Mackey then rested. The case was given to the jury. The jury then considered the case for approximately 43 hours, over the period of five days, brought in a judgment of conviction, which was affirmed by the Seventh Circuit Court of Appeals and a petition for writ of certiorari thereto was denied by this court.

This case offers, we think, two major issues to the Court at this time. They are:

Will its decisions in Marchetti-Grosso be retroactively applied to criminal cases which were tried and finalized prior to the date of these decisions; and, secondly -- and I think personally more importantly -- what is the thrust of the privilege against self-incrimination. Is it a transactional privilege or is it a testimonial privilege, and does the privilege, as specifically written into the Fifth Amendment, mean exactly what it says?

Now, as far as the retroactivity part of this case is concerned, I even question the accuracy of the word "retroactivity." Marchetti-Grosso were decisions of this Court which I feel righted a wrong in the Kahriger-Lewis decisions. Marchetti-Grosso did not break any new ground. Marchetti-Grosso said, and I think reaffirmed and reaffirmed as it should have reaffirmed, that the government, the national government, as same as the state government, has no power to compel testimony or compel evidence out of the mouth of a

citizen if the purpose of this compulsion is to provide evidence to be used against him in criminal prosecution.

This Court, I think universally and constantly, has held in any retroactivity case before it relative to state matters that where the element of compulsion is present, where statements or where confessions are taken from a defendant through compulsion and used against him in a criminal proceeding, at any time he may thereafter move for a new trial or take whatever steps are necessary to afford him a new trial.

I think what is before the Court this morning is this, is the standard which this Court has imposed upon the states to be imposed upon the national government and, quite frankly, upon this Court. I think if this matter would have arisen in the state or in a state court relative to state legislation, I don't think there would be any problem in the court saying that once you find compulsion -- and I may use one of Mr. Justice Stewart's phrases in dissent -- compulsion is the focus of the inquiry -- once you find compulsion, once you find a compelled statement being used against the person in a criminal trial, then retroactivity or a new trial automatically follow.

Q Would you clarify for me here just what the compulsion, what compulsion are you referring to, compulsion on whom to produce what consequence?

A If Mr. Mackey had not filed these returns, he

could have been indicted for failure to file the returns and could have been sentenced to the penitentiary for five years and could have been fined $1,000 for each offense.

Q That is true of all of us, isn't it, if we don't file tax returns?

A That is correct. That is correct. And that is the difference actually between the Sullivan case and between this case. In the Sullivan case, the Court specifically held that a return which is required from all of the people for the purposes of raising revenue certainly was not sheltered by the privilege of self-incrimination. Justice Holmes then, however, suggested that if any particular part of that return, any particular question in that return would tend to violate the privilege, then of course the privilege could be claimed in the return. The differences in the Marchetti-Grosso situation, at least as I read the two decisions and as the lower courts who seem to be following it, as I suggested read the decisions, the court held specifically that these returns were not required from a general class of people for general governmental purposes. I think this Court held specifically that these returns were required from gamblers in order to provide evidence to prosecute gamblers. That I think is the gravamen of the case.

Q I know this is going over old ground, perhaps, but it is a point that might help me. What about applications

for passports, statement and application for a passport? Now, no one is required to file for a passport, but in order to get a passport you must file an application. Would you think that statements made in the application for a passport, for example, or any one of many other similar optional areas would be covered by this same -- protected by this same shield of the Fifth Amendment?

A In the first instance, no. If the law requiring the passport or if the law requiring the filing of some other hypothetical document is directed towards the populace of the citizens at large, a legitimate government purpose -- in other words, there is no finding that the purpose of this legislation was specifically to obtain evidence to be used against a narrow class of people in criminal prosecution. But if it were, as passport laws are, directed to the public at large, certainly, I think, you would be required to file an application for a passport. Now, if there was something in that passport application which may tend to incriminate you, then I think, yes, you have a probably serious constitutional question. You have got the problem of whether in asking for a passport the government can either compel you to waive your privilege against self-incrimination or make the claiming of the privilege costly, and I think on that basis you might have to take it on a case by case basis.

Q Then what about the application for government

employment, which requires many, many answers, and that is accompanied by a statute making it a felony to give a false answer?

A Well --

Q Are you saying that that statute in some way violates the Fifth Amendment?

A Of course, if you file a false answer, I think, the Court has decided that just last month in the -- I mean last fall in the cases that is right in this area that we are in -- the privilege against self-incrimination certainly does not protect you against filing a false document, this Court has so held.

Q It is never right to file a false document at any time, is there?

A Not if it is a felony to so file it, no. I think this Court so held that --

Q Absent the statutes, is there an inherent right to file --

A A false document?

Q -- to make a false answer?

A Inherent right to file a false answer?

Q Yes.

A I would say no. I would say no. You have got 18101 staring you in the face any time you file a document with the national government. It is just a felony to

file a false document with the national government. I think, as a practical matter, any time you file a false document with any agency of the federal government that you have got a felony staring you in the face.

But to the extent, getting back to the employment provisions, to the extent that an employment application, again, is a document which is directed at all people, which is directed toward everyone, you don't at the threshold meet the problem that you meet in Marchetti-Grosso. This would not be violative of the privilege against self-incrimination, to the extent that anything was in there, any question or answer which was required which may incriminate you, then you get into this question of do you have a right to federal employment and can they compel you to waive the privilege -- again, you may have a problem. I don't profess to be able to specifically answer, but you may have a problem on the facts. But I think this Marchetti-Grosso situation goes one step further, we have a specific, direct finding by this Court that the statutes themselves were aimed at a small class of people for the purposes of getting information to prosecute the small class of people.

I think that is settled by Marchetti-Grosso, and I think the lower courts have so held. For example, the Fifth Circuit Court of Appeals, in the Newco case vacated a conviction upon a plea of guilty on the grounds of protecting the

integrity of the privilege against self-incrimination.

The Southern Circuit Court of Appeals has done the same thing last month. They upheld Marchetti-Grosso retroactive. They have held that the harmless error rule doesn't apply. They attempted to distinguish the Mackey case but they have also held that to protect the integrity of the privilege against self-incrimination prosecutions under the statute and the basic thrust of it is the rationale of Marchetti-Grosso as found in those decisions from this Court.

Q Mr. Ward, what was used here, as I understand it, was the excise tax returns and not the gambling stamp statute?

A That is correct. That is correct. In order to pay the tax, the tax is paid monthly upon gross receipts, not an income tax, it is an excise tax. In order to pay the tax you have to file a return monthly.

Q Monthly?

A Right. Now, the reasons for putting these in were two-fold: One, and I think this is admitted by the government, was ultimately admitted by the government, to show that he was a gambler. They had to show that he was a gambler. They had to show that he had a likely source of unreported income.

Q Because it was a net worth prosecution?

A Precisely. And this Court has held both in

Friedberg and Holland that this is an absolute necessity in such a case, because they are purely, totally, solely circumstantial evidence cases.

Now, the prosecutor then went on to say he needed it for another reason. He needed those figures, he had to show that those figures, he had to get those figures in evidence. And right after these returns were put into evidence, Mr. Harrington then testified from one of his graphs, Exhibit 765, showing the total gross receipts in gambling.

Now, the reason that those total -- the reason the prosecutor said he needed those total gross receipts from gambling was to show that he had a greater income from gambling than is shown in his Schedule C return. In other words, in evidence in this case were Schedule C returns that showed income from "policy," and I think one return said "policy wheel." The man paid his income tax on his wagering income, but the government argued "I have got show that he had a greater income from gambling than shown on Schedule C, so I not only need those wagering tax returns to show that he was a gambler, I need them for the figures," and he so argued to the jury. He so argued to the jury on four different occasions.

As far as the importance of these returns are concerned to the government, I think the prosecutor's summing up argument is almost a key here. This was a long trial. All

net worth trials are long trials. I think there were over 800 exhibits, pieces of paper, put into evidence in this trial. The reason being was that the key testimony in a net worth trial is the government's expert. He has the expert exhibit and, of course, a foundation has to be laid to support everything in the exhibits.

In spite of the fact that there were 800 exhibits or in excess of 800 exhibits, and that the key exhibit in the net worth case is the final net worth summary by the prosecutor, that was mentioned to the jury six times, and rightfully so. You would expect it.

The next amount of time, as far as any exhibits were mentioned to the jury, was his wagering tax return. Four different times the prosecutor came back to these wagering tax returns, and one of them, in effect, was very interesting. It was almost a Griffin type case, and these are set out in our reply brief.

He said to the jury, "If these wagering tax returns are accurate, if they truly reflect the ins and the outs, then they are okay. But there is only one man that can tell us that, Mr. Mackey. Come up, waive your privilege against self-incrimination and explain this."

Q That was the government's theory, that the monthly wagering tax returns were accurate and that they were inconsistent with his income tax return, or that they were

inaccurate and so was his income tax reutrn?

A The government never took that position --

Q What position did it take?

A I don't know. I don't know. Implicit in the jury's verdict, it had to be one of two things, that they didn't believe the wagering tax returns, because the net worth bulge was larger than the wagering tax return. Implicit in the jury's verdict was confusion, confusion that those wagering tax returns represented taxable income.

Q As gross receipts?

A Right. But, not taking the stand, Mr. Mackey didn't have the chance of explaining this. We don't know for a fact that the jury knew these were gross receipts. In other words, if you add up the wagering tax returns, as Exhibit 765 did, you find an enormously greater figure of income from wagering than you did on Schedule C, upon which taxes were paid. It is within the realm of possibility, and quite frankly I personally believe that that is what the jury found.

Q If you are in a long trial with a good defense, you have got it before the jury that gross receipts is not the same thing as net income, didn't you?

A We hope we did. But after 43 hours, we have no idea exactly what the jury ultimately did find.

Q So far as his occupation went, that is that he

was a gambler by profession or vocation or avocation, what did he put down on his income tax return with respect to his occupation?

A In that particular area?

Q Yes.

A Quite frankly, Mr. Justice, I don't know what else he put on but I do know that on income, one place he had in four years just the word "policy," and then the fifth year he had the words "policy wheel," plus other --

Q As his source of income?

A One of his sources of income, yes.

Q Isn't there a place on the income tax return where you put down -- well, you put down your employer, if any --

A Yes.

Q -- and don't you put down your occupation, if any, or am I mistaken?

A To my knowledge -- and I know I am correct in this -- he never used the word "gambler." He never used the word "gambler."

Q Do you remember what he did say?

A As far as his occupation is concerned?

Q Yes.

A It could have been insurance. He was the President of two insurance companies and the M.W.E. & S.

Investment Company -- I can argue inferentially that he never did, because the argument made by the prosecutor to the jury to show that he was a gambler and the argument made to the Seventh Circuit Court of Appeals, in the appeal of the original case -- the government had admitted here that the only evidence of gambling are the wagering tax returns and to some extent the words "policy" or "policy wheel" in the income tax return, but, again, as to the weight given to that, in the argument to the jury the prosecutor never argued that you could find that this man was a gambler because of what he put in his Schedule C.

Four times the prosecutor argued to the jury, this man is a gambler because of the wagering tax returns, and they so argued that in the Seventh Circuit Court of Appeals. So it seems a bit of a late date to come in here and try in a sense to change the facts. And, of course, to me the key aspect of that is the district judge, in the 2255 proceeding -- the district judge in the 2255 proceeding tried this case, and when this petition was filed, in his opinion, he said this represents a new and serious question. He specifically said in his memorandum opinion that these returns were put in to show a likely source of unreported income, and I think that, to me, is practically decisive as far as how important these returns were to the government on trial. The district judge in these proceedings considered them extremely important, and

his memorandum decision and his decision in this case was on the law, not on the facts but on the law.

Q Do you have any constitutional objection to the use of the section C information?

A No, I think under the Sullivan case, Mr. Justice, in candor, I think under the Sullivan case, having put something into Schedule C waives the privilege as far as Schedule C is concerned.

Q You say the government -- Schedule C usually requires a person to report his business income, doesn't it?

A Yes, plus the source.

Q Yes, plus the source, and there he can claim any deductions and --

A Yes, sir.

Q Did he?

A The ins and outs situation, no, sir. As far as my recollection is concerned, all he did was --

Q Take a net figure?

A A net figure, the taxable income figure.

Q But you say the government may require in the income tax form -- at least he didn't object to the use of that Schedule C information?

A No.

Q You waived your privilege, if you had one?

A Well, the Sullivan case pretty much teaches

you that. The Sullivan case says that the income tax return must be filed, and if there is anything specific within the return that would --

Q Do you think Marchetti-Grosso eats into that or not?

A No. No, sir, because I think that there was a particular finding here, and this case mentions Sullivan as distinguished in Marchetti-Grosso --

Q So the government may still, in the regular income tax form, demand that a person state his business and the source of income?

A Except in --

Q Even if it is gambling?

A They can demand the source of income -- they can demand the income figures, yes. Sullivan specifically holds, and I think Sullivan is still the law, that if any source of income information would in any way incriminate you, you can claim the privilege.

Q But you didn't?

A In the income tax returns, no, sir. But there is no -- as I say, the income tax returns, there is no statement that he was a gambler. There was "policy" and "policy wheel." But, again, as I pointed out in the reply, if this were enough to go to the jury -- and I personally don't think it would be fair comment to go to the jury with these

Schedule C's and say this shows the man as a gambler and has a likely source of unreported income. There are two big insurance companies involved.

Q But he could have gone and said there is a likely source of other income from whatever Schedule C business is.

A But he didn't. He could have but he didn't.

Q Yes.

A Four times he went back to the jury and he said here is your likely source of unreported income. Mr. Donnelly wants a likely source of unreported income, here it is. On another occasion, he said one of the witnesses testified that Mr. Mackey never had that kind of money -- never had that kind of money. Do you want to see where he had that kind of money? Take a look at the schedule of the wagering tax. Four times he went back to those -- four times. I think they were extremely important to the prosecutor and, being extremely important to the prosecutor, they were extremely important to the case. He fought something like two weeks to get these into evidence. And then when the judge, on an evidentiary objection, said they were somewhat inflammatory, he didn't want to leave them in, and then decided to leave them in, not so much on the issue of gambling but they contained figures that the government said were absolutely necessary to their case, the gross income figures as to

gambling.

Now, if they were important, then the Accardo case would have taken over. There is a specific ruling in the Seventh Circuit Court of Appeals that returns that characterize the man as a gambler but not relevant to the case are prejudicial and reversible error. So I just don't think the government can have it two ways, to at one point convince the judge at the trial level that these are relevant and extremely important and must go in, and then on the appeal level say they weren't very important and weren't very relevant and "we didn't really need them," because if that were the case, this case should have been reversed the first time around on the issue of Accardo.

Then we get into the nature of the privilege itself, the transactional testimonial. The government has argued that because Marchetti-Grosso specifically talks about gamblers, that this is not a gambling prosecution and therefore the thrust of the decision should not go to this type of situation.

I think the privilege itself, no person in a criminal prosecution should be a witness against himself answers the question. I think once the privilege is violated, and this Court has specifically ruled that the privilege was violated in the Marchetti-Grosso situation, once the privilege is violated, that taints the evidence. I can't conceive of it

being used in another prosecution. I can't conceive of this Court holding or stating that the privilege against self-incrimination can be violated, and there are some circumstances in which the evidence could be used in a criminal prosecution against the witness. That to me, in any event, is the beginning of the end of the privilege against self-incrimination.

If you go back to the Silverthorn Lumber case, this Court held that the essence of a provision which prohibits the acquisition of evidence is not only that the evidence not be used in court but that it not be used at all. And you get into the Murphy vs. Waterfront Commission, a silver platter sort of thing where the court held that if evidence be taken on a state level in violation of the witness' privilege against self-incrimination, it may not be used in any manner -- in any manner, these are the words of this Court -- in a criminal prosecution by the federal government against the witness.

The Gardner case reaffirms, I think maybe a year or two ago, reaffirmed the Murphy vs. Waterfront Commission in that situation. I would like to spend a second with the Gardner case, because I think it has some relevance to this case.

The Gardner case was a police officer who lost his job because he refused to surrender his privilege against self-incrimination, he wouldn't sign a waiver of immunity. A year and a half later this Court decided the Garrity vs.

New Jersey case, so they couldn't do that to him, couldn't make the imposition of a penalty costly. He then filed a petition of reinstatement of his job, which was denied, and the case worked itself up and this Court ultimately decided that he should get his job back, that his privilege was violated.

In other words, in a civil matter this Court had no problem with making Garrity retroactive to a set of facts that happened a year and a half before, where a man had lost his property, his job, if you will, because of a violation of his privilege. It just seems to me in a criminal matter, in a criminal case, where a man has been convicted and a very important link to the chain of evidence needed to convict is a part of the conviction process that he has a right to a new trial on the same basis that Garrity had a right to -- that Gardner had a right to his job.

So as far as this Court I think consistently and continuously held that once the privilege has been violated, that the evidence cannot be used in any manner against the witness. It has always held this, at least the way I read the cases, as far as state prosecutions are concerned. And it has always been extremely careful, in talking, particularly in retroactivity cases, in talking, for example, that the Miranda Rule should be prospectively applied, that the Escobedo Rule should be applied. It has always been extremely careful to iterate and reiterate and continually to carve out this

exception, that where it is shown that a statement is taken from a witness involuntarily and is used against him, then he still has the right at any time to avail himself of any state or federal machinery for bringing this to the attention of the court and getting appropriate relief, which is exactly what we have done here.

I believe I have about four minutes, Mr. Chief Justice. I would like to save them, if I may.

MR.CHIEF JUSTICE BURGER: Mr. Zinn?

ARGUMENT OF MATTHEW J. ZINN, ESQ.,

ON BEHALF OF RESPONDENTS

MR. ZINN: Mr. Chief Justice, may it please the Court, I should like first to set out some additional facts relating to petitioner's conviction which we believe are essential to this Court's resolution of the case.

As has been noted, the government proceeded on the net worth method of proof. Under the government's proof, petitioner's net worth increase during the prosecution years by more than a million dollars, while he and his wife reported taxable income during those years totaling $143,000.

Q How many years are involved?

A Five years, 1956 through '60, inclusive.

Q About $28,000 a year was what he was reporting, but he came out to a million dollars at the end?

A Well, he started out with roughly $360,000 and,

according to the government's computation, had over $1.5 million of assets at the end of the prosecution years. But in terms of taxable income that he reported, it was $143,000.

The principal issue at the trial did not have to do with gambling, the issue was whether the government was justified in including in petitioner's net worth certain assets which petitioner acquired in the names of corporations which he controlled, in the names of friends, relatives, and even fictitious persons. It was a long trial, and more than 80 witnesses testified, and the bulk of the testimony showed that petitioner had furnished the funds for the purchase of assets consisting of securities, real estate, loans and mortgages, paying for these assets either in currency or with cashier's checks.

The largest transaction, which is typical, except for the dollars involved related to petitioner's acquisition of stock in a fire insurance company. He first paid $50,000 in currency, with instructions that the stock be issued in the name of one of the corporations which he controlled. Later he paid an additional $98,000 in currency for the purchase of additional shares in the name of a second company that he controlled. And still later he paid $15,000 in currency for additional shares.

While this was the largest investment he made during the prosecution years, the government's proof showed that on

literally dozens of occasions he purchased assets using cash or cashier's checks. The largest of the companies which petitioner controlled was the Gibraltar Industrial Life Insurance Company, of which he was Chairman of the Board.

Petitioner's basic contention at the trial in this case was that the assets he purchased, and in most instances had registered in the name of Gibraltar, actually were the property of Gibraltar and therefore could not be included in his net worth. But the income tax returns that Gibraltar filed showed that the corporation operated at a loss during the prosecution years and did not have sufficient capital to acquire the assets which petitioner paid for during those years.

Petitioner's sister was Gibraltar's Treasurer. She testified on direct examination by the government that Gibraltar's books and records reflected all receipts of that company. On cross-examination by defense counsel, she changed her testimony and explained that not all receipts had been recorded. Additional cash was available to Gibraltar, she said, because insurance premiums paid in cash by policyholders were not taxable and therefore were not recorded.

While this might explain why the receipts were not included on Gibraltar's income tax returns, it could not explain the absence of a showing of these receipts on the books and records of Gibraltar and on the reports which Gibraltar was required to file annually with the Department of Insurance

of the State of Indiana. And in this connection I would like to stress one point, that while the investments, which petitioner said belonged to Gibraltar but which were unrecorded on its books and records were paid for either in currency or cashier's checks, that corporation's expenses were with rare exception paid for by regular bank check. This, then, in brief compass was the government's proof that petitioner's net worth had increased during the prosecution years by substantially more than can be accounted for by the taxable income reported on his returns.

In addition, it was the government's obligation under the net worth method to show a likely source of additional taxable income that could account for the net worth increase. To this end, the government introduced into evidence petitioner's income tax returns for 1956 to 1960, which showed that certain of his income came from being a "policy operator" and in one instance, from a "policy wheel."

I would like to correct one factual statement that Mr. Ward made, and that was that defense counsel did not object to the introduction into evidence of the Schedule C form. He did object upon the grounds of prejudice and the objection was overruled and the income tax returns were admitted.

A second point omitted from Mr. Ward's statement was that in addition to the Schedule C forms which indicated that petitioner was in the policy business, there was the

testimony of an Internal Revenue Service agent that in the course of his investigation petitioner admitted that he was in the gambling business. The government also sought to introduce petitioner's wagering tax forms for the 60-month period covered by the indictment. Defense counsel objected -- and, again, this is most important -- the objection, according to Mr. Ward, was based on the ground that the wagering tax forms were prejudicial. But it was also based on the ground that the information disclosed in the forms could be computed by reference to the income tax return, that is that they showed nothing more than the income tax returns themselves.

The government attempted to introduce the wagering tax forms first during the course of the testimony of the first witness, who had prepared petitioner's income tax returns. These forms were not mentioned again until more than 60 witnesses had testified regarding petitioner's cash transactions, and this was during the course of testimony of petitioner's secretary.

On both occasions, the court reserved ruling on the ground that the government had not shown that the forms were not merely cumulative of the information that appeared in the income tax returns. Not until the government's last witness testified was there further mention of the wagering tax forms. Defense counsel again objected to admission of the forms on the ground both that they were prejudicial and cumulative of

what was in the income tax returns.

Now, the forms, which are reproduced in the Appendix which is on file with this Court, show -- have an entry -- I am reading from page 41 of the Appendix -- the gross amount of wagers accepted during the month -- page 41, Mr. Justice --

Q Yes, including layoffs --

A That's right, they were involved here though, so far as I know, while we don't have all the forms reproduced here, I am not aware of any layoffs or that that was in issue in the case.

So those figures, if you add up -- if you take twelve month's wagering tax forms and add up the gross receipt figures on those twelve forms, presumably that should be the figure that should go into gross receipts on Schedule C of the income tax return, those gross receipts, and that is the -- the line reads "gross receipts" on Schedule C.

Q Schedule C is what?

A Income from a business or profession. It is filed by an individual proprietor.

Q A self-employed person?

A Yes, someone who is employed wouldn't have to bother with that form.

Q Mr. Ward, I thought I heard him say that this form that you are referring to now, the tax on wagering, is a scheme of the federal government with the sole purpose of

forcing people to disclose illegal activities. Did I hear him correctly?

A I believe you did, Mr. Chief Justice, and I hope to --

Q Well, the tax is 10 percent of the gross, isn't it?

A Yes, sir. This is the point I am trying to make --

Q This is something -- this looks something like a revenue measure, I would think.

A The court said in Machetti and Grosso that this was a revenue measure but that because of the interrelationship of the wagering tax information that had to be furnished and the comprehensive scheme of federal and state statutes prohibiting gambling and gambling related activities, that the privilege would be a complete defense if the forms were not filed.

I would like, though, to make the point, because I don't think it is clear as to what the income tax return showed, because I think that this is critical to this case.

If I were preparing an income tax return and I had the wagering tax forms in front of me, I would take the twelve forms and I would add up the figures from each one and put it down in the gross receipts line on the income tax return. That is not what was done here. The figure that appears on

the income tax return is substantially smaller, the gross receipts figure, that is, substantially smaller than the sum of any twelve month's wagering tax forms.

But the reason for defense counsel's objection was not only the prejudice, it was that it was cumulative, and the reason for this is that on the income tax return, in addition to the gross receipts figure, there is a space for deductions and one of the deductions that petitioner claimed was a deduction for the excise taxes paid. In other words, the sum of the excise taxes paid for the twelve-month period appeared as a deduction on the income tax return, and basically the argument that was made by petitioner's counsel at the trial was, well, the jury can compute thit itself. All it has to do is to take the excise tax deduction, again which is on this form if you add up twelve forms, add up the deductions that show on twelve forms, which is 10 percent of the gross, that figure appeared on the income tax return as a deduction.

The defense counsel's argument as to -- that it didn't show anything more was let the jury multiply the excise tax deduction by ten and then they themselves can see what the gross --

Q Is this deductible?

A Yes, it is.

Q The 10 percent excise tax on gambling is deductible from your income in computing your income tax?

A Yes, it is. It is a cost of doing business, and it is deductible and it was claimed. And so it wasn't only the prejudice ground that counsel objected on. He said it was cumulative, let the jury multiply by ten and then they will know that the gross receipts figure, which was only a fraction of the total gross receipts shown on the wagering tax forms, was substantially larger.

Q Could you have made your case if you had merely cofused on the deduction taken in the general tax return?

A I think, very frankly, Mr. Chief Justice -- I am speaking as a matter of hindsight -- I think that the summary forms to which Mr. Ward referred earlier, this Form 765, which is a summary exhibit of all the wagering tax forms, could have been computed by reference to the income tax returns alone.

Q His orindary, his regular -- when you speak of income tax returns, you are distinguishing it from the wagering --

A From the wagering tax form, the Schedule C. And we have asked the government prosecutor why did you push to put this in, and he said why shouldn't I push, Lewis and Kahriger were on the books and this was good evidence and it highlighted the opportunities that a gambler has, since he is always dealing in cash, to hide income.

But we had here evidence that he was a gambler from

the income tax returns, the evidence of the revenue agent and also the fact that this could have been computed, admittedly not as vividly for the jury, by reference to the income tax returns. That is one of the grounds on which defense counsel objected to admission of the evidence --

Q And it could have been computed by multiplying by ten the deduction for each of them?

A By multiplying by ten and subtracting from the product of that multiplication the figure that was shown as gross receipts on the income tax return.

Q Yes.

A But that wouldn't have accounted for all the income that was missing. A question was asked of Mr. Ward, is it the government's position that the wagering tax forms are right or wrong. We really don't know whether they were right or wrong. They didn't account for $4,000 a week of cash, which is about what it works out that was missing from petitioner's income tax returns, roughly $200,000 a year. We don't know if the net figure was right or not, but we didn't have to prove whether it was right. All we had to show was the likely source of income.

Q Right or wrong, however, what you are telling us is that the wagering tax returns do show a much higher annual gross receipts than he reported, his total gross annual receipts for any one of these taxable years, is that it?

A That's right, but --

Q So you did use this or at least it was usable as part of your substantive case?

A That's right.

Q Much more than just showing his profession as a gambler?

A Yes, but the fact is, Mr. Justice Stewart, that defense counsel had a point in saying this could have been computed by multiplying the excise tax deduction, which was also on the income tax returns, by ten, and you would have again had this inflated gross receipts figure. The two just weren't consistent, and there were other deductions claimed on the income tax returns. I have examined those.

Mr. Justice White, I believe you asked the question regarding that -- he claims deductions for costs of supplies and other deductions, but he only showed the net figure in the gross receipts column on Schedule C.

Q Supposing Marchetti and Grosso had been on the books at the time of this prosecution, what would your position be?

A I think we would still be here, Mr. Justice Harlan. Our position is that at the time that these wagering tax forms were filed, there was no certainty that they would prove a significant link in the chain of evidence tending to convict the petitioner of income tax evasion. And we say

this -- Mr. Ward has referred to the Murphy vs. Waterfront Commission case, and the very broad language that was used in that case regarding any use of testimony compelled in violation of the privilege, and I would like to put a hypothetical to the Court regarding Murphy vs. Waterfront Commission which shows, we think, despite the broad language, that there are some limits.

Let's suppose that a commission is convened to examine bribery by public officials, and I am called to testify before this commission today, October 21, and I testify that, after invoking my privilege and having my claim rejected and so forth, that on March 15 of this year I accepted a $5,000 bribe for engaging in some nefarious activity in connection with my employment.

Now, next April 15 comes and I have to file my income tax return, if I don't include that $5,000 in income, I would suggest that Murphy vs. Waterfront Commission doesn't necessarily resolve the question whether the privilege in that case would bar the introduction of my prior testimony, because the theme running through this Court's decisions in the self-incrimination area has been that unless it will surely prove a significant link in the chain of evidence tending to convict, the privilege shall not apply.

And so we say that even in the case you posited, Mr. Justice, we think we would be here. I would like at this

time --

Q In other words, this became self-incriminatory only because of a later, separate wrongful act?

A That is correct. We couldn't have gotten these in under Accardo if the gross receipts figures and the tax deduction figures tied in with the income tax returns, because then I think the argument as to prejudice -- and, again, this would be in the discretion of the trial judge, he has to weigh the possible effect on the jury of the exposure of gambling against the additional contribution that the evidence might make.

So I think we would have had a very difficult time getting in the wagering tax forms had they been consistent with the later filed income tax returns. It was only the later act of showing a smaller gross receipts figure on the income tax returns that made the wagering tax forms at all relevant in this trial.

Q But, Mr. Zinn, if he hadn't filed those he would never have put on his income tax -- he would never have claimed the tax he paid on his income tax.

A If he hadn't filed the wagering tax forms at all?

Q Yes.

A I am not sure I understand the point of the question.

Q I understand that on his income tax he claimed deductions --

A Yes.

Q -- for the wagering tax he paid.

A That's right.

Q Well, I would assume if he had not filed and paid the wagering tax he would not have made that deduction. I think that is obvious, isn't it?

A Right. I assume he wouldn't have claimed the deduction.

Q Well, can you go along with the thought and stretch it that far, that it was all triggered by the wagering tax?

A I don't think that is right, Mr. Justice. It seems to me that nothing was triggered by the wagering tax forms. The last one that was filed for any given year, let's say 1956, on January 31, 1957, on or before that date, and his income tax return was not filed until later. And I don't think at that point that they triggered anything.

Looking at it on January 31 of any given year with respect to the prior year, I don't think they triggered anything.

Q Well, assume he didn't take the deduction, which I think is an assumption against fact, but assuming he didn't, would you then have been able to put the wagering tax

in?

A That he did not claim a deduction?

Q Yes.

A I think in that case, I think -- first of all, let me just say I think that is extremely unlikely as an hypothetical --

Q Well, I mean isn't the answer that you still would need it for the gross receipts?

A For the gross receipts, if he didn't claim this deduction?

Q Yes.

A Yes, but that is not this case.

Q Don't get too far in getting these two tangled up together. That is what I am worried about.

A Well, we don't think --

Q Making them one and the same piece, I think, if there is anything in Marchetti and Gross on the wagering thing and you drag it over into the income tax, you might be getting some fruits.

A I would say on that issue, Mr. Justice Marshall, that what the Court was concerned about in Marchetti and Grosso was the comprehensive scheme of federal and state gambling statutes, anti-gambling statutes, and the fact that possible disclosures of merely this form, showing gross receipts and a deduction, would be enough to incriminate

somebody for violations of some of these statutes. But that is not this case.

These forms could not incriminate anybody of income tax evasion unless they were not consistent with the later filed income tax returns. And I think the proper way to look at it is to say what was the situation on January 31 of any years.

Q Mr. Zinn, let me sure I got one of your responses to Justice Marshall clear. If he had not filed the wagering tax return, could he have taken the deduction of that 10 percent each year?

A Of course not. Of course not.

Q So he got a very substantial benefit out of filing this wagering tax return?

A In terms of income tax deduction, he did. I suppose he would argue that he subjected himself to self-incrimination for federal and state anti-gambling statutes, but that is not this case, Mr. Chief Justice.

In the few minutes I have remaining I would like to turn briefly --

Q Are you challenging the holding in these two cases?

A In Marchetti and Grosso?

Q Yes.

A No, Mr. Justice, we are not. We are saying

that it simply doesn't extent to this case that the premises upon which Marchetti-Gross were decided was this conflict between the privilege against self-incrimination on the one hand and the comprehensive scheme of federal and state anti-gambling statutes on the other hand. And we are not involved with this comprehensive scheme in this case. We are involved with income tax evasion, and we say that Marchetti-Gross's rationale does not extend to this case because at the time the wagering tax corms were filed it could not be said, as it could be said in Marchetti and Gross, that they would surely prove a significant link in the chain of evidence tending to convict petitioner of income tax evasion. It was only the later act of filing an inconsistent income tax return that made these forms at all relevant in this prosecution.

And we say, despite the broad language in Murphy vs. Waterfront Commission regarding any use of compelled testimony, that that question is an open one and warrants serious consideration by this Court.

Q Putting it another way, what you are saying is that the retroactivity of Marchetti and Grosso is not involved in this case?

A That is one of our arguments, Mr. Justice Harlan --

Q You are saying, this branch of the argument, assuming that they are retroactive, still they are inapplicable

to this case?

A Yes, that is correct.

Now, I would like to spend my last five minutes on the retroactive aspects, and I would like to turn first, if I may, to the test that was proposed by Mr. Justice Harlan in his dissenting opinion in the Desist case, and we submit that under that test there would be no basis for retroactivity in this case.

We say first, since this is a collateral proceeding under section 2255, the first inquiry that must be made is whether this rule of Marchetti-Grosso is one that improves the fact-finding process. And it seems clear to us under Mr. Justice Harlan's test that it does quite the contrary. It worsens the fact-finding process because it excludes evidence that is plainly trustworthy and plainly reliable.

Second, Mr. Justice Harlan would ask, is this a new rule or an old rule, and we think, contrary to what Mr. Ward has said earlier, that it is clearly a new rule. There was a time when Lewis and Kahriger were on the books when this case would not be here, because it would be clear that the wagering tax forms were admissible.

Finally, Mr. Justice Harlan would say we have to look at the law that existed at the time the conviction became final in this case, and the conviction became final in this case on October 11, 1965, when this Court denied

petitioner's petition for certiorari on direct appeal. No petition for rehearing was filed from that denial and Albertson was not decided until November 15, 1965, so that even if one could argue that the viability of Lewis and Kahriger was placed in question by Albertson, petitioner would not be entitled to the benefit of Machetti-Grosso under Mr. Justice Harlan's analysis.

Q You are talking about Desist?

A Yes, sir, I am.

Q Yes.

A And under your analysis --

Q My analysis?

A Yes, sir.

Q Nobody else joined me.

A Yes, sir.

Q And I didn't decide anything there, did I?

A No, sir, but I applied the test that you say you would apply if you had more than one vote and under that test it seems clear to us that Marchetti-Grosso would not be retroactive.

That is only preliminary. I might add that we think the results are the same under the three factor test which this Court has followed, beginning with the Linkletter case. The purpose of Marchetti-Grosso is to protect the constitutional privilege against the statutory system

jeopardizing it. That statutory system is not involved in this case. Petitioner has not been prosecuted for any violations of a federal or state anti-gambling statute.

Q What did you say -- I missed it -- what the purpose was? To protect something.

A The constitutional privilege against a statutory system that jeopardizes it, and that statutory system is not involved in this case.

Q You are referring to the requirement, for example, for registering a gun or registering --

A Right.

Q -- as one case --

A In this case, the comprehensive federal and state anti-gambling provisions are just not involved.

Q I see.

A And furthermore to the extent that the privilege against self-incrimination rests on notions of an individual's right of privacy, the invasion of that privacy cannot now be restroed by according Marchetti-Grosso retroactive effect.

Finally, and most important, in terms of the purpose criterion, which this Court expressed, the Marchetti-Grosso rule does not go to the integrity of the fact-finding process. We think the evidence here is far more reliable than the evidence involved in Johnson vs. New Jersey, which

held that Miranda was not retoractive. The plain fact is that nobody files the wagering tax forms who doesn't have to file them, and nobody puts a figure down on a wagering tax form for gross receipts higher than it has to be.

We think it is clear that at the very minimum petitioner had gross receipts from wagering as shown on his wagering tax forms. We would suggest to the Court that the trustworthiness and reliability of the evidence here is almost as great as it was in Linkletter and Desist.

Petitioner attempts to avoid the rule of the Johnson case, which we think is controlling, and that of Tehan vs. Shott on the ground that he comes within the holding of Johnson and Denno, in short that this is a coerced confession case. We think this argument was adequately answered by the court below. I would like to quote briefly from the first full paragraph on page 53 of the Appendix:

"Defendant contends, however, that the watering tax returns constitute coerced confessions, since they were filed under the compulsion of a legal command, and that retroactivity follows automatically once the question is so characterized. But the compulsion which turns interrogation into a violation of the privilege against self-incrimination is not the same as the coercion and intimidation which makes a confession involuntary and a denial of due process."

And at this point the court cited Davis vs. North

Carolina, which was decided on the same day as Johnson and shows precisely what the court was pointing out, that not every self-incrimination case is a coerced confession case, and this is not a coerced confession case under any standards this Court has applied.

Q Putting the retroactivity question aside for a moment, what is your argument on the merits, so to speak, is this is a Sullivan and not Marchetti and Grosso, really, isn't it?

A I am not sure I follow --

Q The use of this evidence is governed by the Sullivan rationale rather than Marchetti and Grosso?

A I would like to say that completely, Mr. Justice Harlan. I don't quite think I can, except to the extent that I can show that the gross receipts figure on the -- could have been computed, the gross receipts figure from wages could have been computed by reference to the income tax return.

Q Yes.

A To that extent, Sullivan is --

Q Well, is that part of the harmless error?

A Yes, it is, Mr. Chief Justice.

Q Independent of Sullivan?

A Yes. We are arguing harmless error here, and at least that the Court should set the standard for harmless

error, if it doesn't decide the case on one of the other two grounds that we have urged in our brief.

If I may, and if the Court will indulge me for one more minute, I would like to finish on retroactivity.

MR. CHIEF JUSTICE BURGER: Go ahead. We will allow you a minute.

MR. ZINN: As far as the second factor reliance, it seems to us clear that the government could reasonably have relied on Lewis and Kahriger. They were still on the books when petitioner was tried and Albertson was decided almost two years after the trial ended.

In fact, petitioner can't make too much of an argument regarding reliance because he himself relies on Lewis and Kahriger to avoid the claim of waiver in this case. He says he didn't raise privilege against self-incrimination because he did not know that he had it. And so there can't be any serious question about the reliance prong of the three-factor test.

Finally, with regard to the burden on the administration of justice, it must be considered, if Marchetti-Grosso is held retroactive, that collateral of tax may be brought not only with respect to convictions for failing to file wagering tax forms, not only with respect to convictions of income tax evasion by petitioner's conviction, in which wagering tax forms were introduced into evidence, but also as to convictions

under the comprehensive prohibitory scheme, both federal and state, outlawing gambling and gambling related activities which this Court described in Marchetti-Grosso. And it seems to us that in Mr. Justice Harlan's opinion, one of the reasons that he rejected the restriction on use test which the government urged in Marchetti-Grosso was the difficulty that states would have in showing that prosecutions under federal and state law for gambling, that the states and the federal government would have, would be -- they could not show that they were untainted because of the filing of the wagering tax forms.

Here if this Court holds Marchetti-Grosso retroactive, that issue will be raised with respect to every conviction for violation of federal and state gambling statutes going all the way back to 1951, in cases in which wagering tax forms were filed. We urge therefore that the judgment of the Court of Appeals be affirmed.

Q In this case, how much of the sentence has been served? Has it been served?

A Yes, Mr. Justice, it has been served and he is out on parole at this point. But I think your question points up merely another aspect of the retroactivity of Marchetti-Grosso, because one of the issues that is involved in this case was Mr. Mackey's civil income tax liability. And if this Court were to reaffirm the judgment below under settled

principles of collateral estoppel, Mr. Mackey would be liable for tax, penalties and interest amounting to about $1.5 million.

MR. CHIEF JUSTICE BURGER: Your time is now enlarged to five minutes.

REBUTTAL ARGUMENT OF WILLIAM M. WARD, ESQ.,
ON BEHALF OF THE PETITIONER

MR. WARD: Mr. Chief Justice, in many occasions the Assistant Solicitor General said that is not the case, and that is quite true. The case he argued on the facts is not the case that existed in the criminal trial.

His argument basically is that we should have won. He is arguing that the court was wrong, that this evidence shouldn't come in, that our objections to the evidence at the time we made it were proper and correct. And, of course, I agree with him. The problem is we lost the argument and the evidence was admitted against us, and it was used against us.

And I think to the effect that it was used against us, I refer the Court to page 16 and 17 of our reply, the prosecutor, having gotten that evidence in, relied on it immensely before the jury. It was the second most important part of his argument to the jury.

This is what we are talking about, how did this affect the jury, out 43 hours for five days. That is exactly what we are talking about.

Q You have mentioned that, I think, three times now. Is there anything remarkable about taking that many days to review a case that has 865 exhibits?

A I think so, yes, sir. I think that is a long time for a jury to be out, yes, sir. I think it is a very long time for a jury to be out.

Q You could hardly read all that material in much less time.

A Well, I question how much they -- they might have read it. Quite a lot of it was foundation evidence, evidence they didn't necessarily have to read but had to be in for the purpose of providing the foundation for the exhibit evidence. So I think that is a long time to be out, yes, sir.

As far as the million dollar net worth case, I am not too sure it is before this Court, but I would like to refer in the large Appendix that was filed, Government's Exhibit 800, "Property held in the name of Gibraltar Industrial Life Insurance Company" -- in other words, so I don't take too much time on this -- approximately $1 million in assets held in the names of regulated insurance companies, under the control of the Director of Insurance of the State of Indiana, makes up that bulge. That is one of the big arguments in the case, but that was an argument in the case of the original level and would be on retrial. It certainly has nothing to do with the privilege against self-incrimination, which is before this

Court right now.

On the harmless error doctrine, I do want to make this point and I want to make it strongly, the Constitution says, the Fifth Amendment says no person shall be a witness against himself in a criminal prosecution. It does not say that no person shall be a witness against himself in a criminal prosecution except he can be compelled to have testimony admitted against him that later was found to be harmless error.

The harmless error constitutional rulings, the Harrington and the Chapman situations, usually, at least as I read them, come up on Fourth Amendment situations or confrontation situations. The Constitution does not prohibit searches and seizures. It prohibits unreasonable searches and seizures, and the Constitution requires confrontation, but it doesn't necessarily specifically prohibit evidence which will go in in a trial without confrontation. These rules of exclusion the judge made rules, and I think there can be a furather argument on these of harmless error, but the Constitution specifically says no person shall be a witness against himself in a criminal proceeding, and Mr. Mackey was a witness against himself in a criminal proceeding.

Q Mr. Ward, what about the claim of deduction, that was in legitimately in evidence, right?

A Well, that was the claim, I believe, of Mr. Mackey's defense lawyer at trial, that all of the evidence --

Q No, I mean he made a specific -- in his return he says --

A Are you talking about the wagering tax return, Mr. Justice or the --

Q The income tax return.

A The income tax return.

Q He said I paid a tax for wager.

A Right.

Q And all you have to do is multiply that by ten and you have got the figure.

A That is what the defense lawyer argued.

Q Well, do you find any fault with that?

A I think he should have won it at the time, yes, but having lost it, having lost the argument --

Q No, I am not saying lost, but if you pay a ten percent -- if one dollar is ten percent of ten dollars, then if I pay one dollar or a ten percent tax, I earned ten dollars. So once he put that in his tax return, there was no coercion there, was there?

A His wagering tax return?

Q No, sir.

A In the income tax return. No, there was no coercion there.

Q There was no coercion there?

A That is correct.

Q And wouldn't it be proper for the prosecutor to argue to the jury, quote the statute, this is what it means, and we multiply it by ten and we have got that much of admitted gross income.

A He could have, yes, but he didn't. That is what I say. The case as it existed below --

Q I am just on this harmless error point, which you said is nothing to it.

A No, I think not, because I think that you cannot have a person testify against himself. The only thing I can rely on, Mr. Justice, is the prosecutor's action in the court below. He denied that argument. He told the judge that that was not a valid argument. He told the judge he absolutely needed these figures from these returns, and the judge agreed with him. The judge agreed with him, he said these returns must go in and then he argued to the jury from these returns.

I can only argue the case as it happened below. These were used and they were used very violently against the petitioner.

Q But at that time you did not -- there was no objection made to the introduction of the wagering tax forms on Fifth Amendment grounds, is that correct?

A That is correct, Your Honor. I think the Solicitor General's point, as I understand, has abandoned this

point now. They haven't raised the question of waiver. They raised it in the Seventh Circuit but they necessarily haven't raised it here. Of course, our position is that we have no privilege. Kahriger and Lewis have taken the privilege away. Itwa sn't a question of something we didn't know. It wasn't a question of something that it was a mistake -- we had no privilege.

Q But you have one now, you think?

A Yes, yes. Again, I go back to the fact that I think Machetti-Grosso righted a wrong. Kahriger and Lewis were bad law, and Marchetti and Grosso so held.

Q Are the summations printed in the record, Mr. Ward?

A Yes, sir. Yes, they are. And the part that I thought was important are in the reply, are set out in verbatim in the reply. The total, full summations will be found in Volume 4 of the Appellate Appendix in the original trial, which was filed in this Court when I filed on write of certiorari.

Thank you.

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

(Whereupon, at 11:10 o'clock a.m., the argument in the above-entitled case was concluded.)

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