Supreme Court of the United States

OCTOBER TERM, 197)

In the Matter of:

UNITED STATES OF AMERICA,

Petitioner,

v s.

UNITED STATES COIN AND CURRENCEY IN THE AMOUNT OF $8,674, DONALD ANGELINA,

Claimant-Respondent.

Docket No. 5

Place Washington, D. C.

Date October 20, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

UNITED STATES OF AMERICA, Petitioner, v. UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674, DONALD ANGELINI, Claimant-Respondent.	No. 5

Washington, D. C.,
Tuesday, October 20, 1970.

The above-entitled matter came on for reargument at 2:00 o'clock p. 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:

JEROME M. FEIT, ESQ.,
Office of the Solicitor-General, U. S. Department of Justice, Washington, D. C.,
Counsel for the Petitioner.

MISS ANNA R. LAVIN, ESQ., 53 W. Jackson Blvd., Chicago, Illinois, 60604,
Counsel for the Claimant-Respondent.

C O N T E N T S

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: Next is a case of the United States versus the United States Coin and Currency, Et Cetera.

Mr. Feit you may proceed.

REARGUMENT OF JEROME M. FEIT, ESQ.

ON BEHALF OF PETITIONER

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

This is a statutory forfeiture case under the Internal Revenue laws which is here on Writ of Certiorari issued at the Government's behalf seeking review of the decision of the Seventh Circuit which had held forfeiture of property is in violation of the wagering tax laws is precluded by the privilege of self-incrimination under this Court's decisions in Marchetti and Grosso.

This case was originally argued in the 1968 term, February 1969 and is here on reargument.

The relevance--

Q The same Brief that you have that in, or a new Brief?

A No, it is on the same Brief, Your Honor.

The relevant factual background may be briefly stated. During August '63, investigation by FBI and Alcohol Tax agents at a race track in Cicero, Illinois revealed that

Angelini and others were engaged in unlawful bookmaking activities at the track. The surveillance spanned a course of some three weeks.

On August 24, 1963, Mr. Angelini and his confederates were arrested at the race track pursuant to an arrest warrant. A search of his person subsequently revealed that he was in possession of $8,674 in currency.

In 1964, Mr. Angelini was criminally convicted of wilful failure to register under Sec. 4412 of Title 26 and to pay the annual $50 occupational tax under Sec. 4411. He was sentenced to 60 days in prison, fined $2500 and placed on probation for three years.

The Court of Appeals confirmed his conviction in 1965. And this Court denied certiorari.

Meanwhile, an entirely separate proceeding in February '64 was instituted in libel in rem against Respondent money which had been seized at the race track. The libel alleged that the money was forfeited to the Government by virtue of its use and its intent for use in violation of the Internal Revenue laws, Sec. 7302 which is set forth at page 3 of our Brief.

Claimant Angelini intervened asserting the property belonged to him. A trial was thereafter held by the court, and in June--in June of '65, approximately 12 Federal agents testified to their observations of the 1963 bookmaking operations

at the race track, and there was also evidence that the Respondent money was used in the business as ready cash to pay off bettors.

And it was also stipulated at this trial that although Claimant Angelini had registered and paid the occupational tax in 1957 and 1958, he had not done so for the period covering '63.

The District Court found in its findings as set forth at pages 9 and 10 of the Appendix--there was no jury trial, none having been demanded in forfeiture proceedings--but a bookmaking business had been conducted at the race track from August 1 to August 24, 1963 without payment of the required taxes, that the Respondent money quoted integral part of this operation and therefore it was forfeited to the United States.

The Court of Appeals thereafter affirmed on the basis of Kahriger and Lewis and Claimant filed a Petition for Certiorari. The case was pending here on that petition when this Court decided Marchetti-Grosso and some five weeks after that decision remanded this case to the Seventh Circuit for reconsideration in light of the Marchetti-Grosso ruling.

Q Do you know what happened to the other case that were remanded at the same time, other cases?

A My understanding of the other cases were that several of them were remanded , were criminal cases which involved convictions under 7203 for failing to file the appro-

priate forms. Those cases were remanded to the courts of appeal and my understanding is they were--the convictions were dismissed based on the evidence.

Q The only forfeiture case in the group?

A This--no, What happened was this: there were sev--many forfeiture cases pending in the District Courts at the time. When this case was remanded they were, in a sense frozen. At the present time, my--excuse me. At the present time there are 20 forfeiture cases pending on appeal in the Courts of Appeal. There are some 200 cases pending in the District Courts, awaiting decision in this Seventh Circuit case. There is on Certiorari, another case--two other cases. The Dean case, which involved $300,000 and 455 this term which, yes, a Sixth Circuit case which the Sixth Circuit affirmed on the authority of its Dean ruling.

I am also informed that, involved in those cases presently pending, are approximately $200 million--excuse me, approximately $2-1/4 million primarily automobiles and cash.

But those cases have--have just been awaiting this Court's decision in Angelini. There has been no--there has been--I shouldn't say no--there have been perhaps 1 or 2 forfeiture proceedings instituted subsequent to the remand of Angelini.

Q But none of the cases remanded with Angelini under the title of Stone against the United States--

A That is correct.

Q --involve forfeiture--

A That is--

Q --other than Angelini?

A That is my understanding.

Q While I have you interrupted, do I correctly assume that the Seventh Circuit assumed in this case, took it for granted, the retroactivity of Marchetti-Grosso?

A I would assume that the Second Ci--the Seventh Circuit assumed in this case that Marchetti-Grosso was retroactive to the extent that applied to all cases within its reach pending on appeal when Marchetti-Grosso was decided.

Q And is it on that comment that you just made that one may resolve any seeming inconsistency with the Seventh Circuit's decision in Mackey? Maybe they are not inconsistent.

A Well, Mackey involved a non-gambling offense which is one basic distinction. It is on habeas on 2255 in collateral attack involved a final conviction. I think the basic thing here was that the Seventh Circuit assumed that Marchetti-Grosso applied to all cases pending on appeal by virtue of Stone, and that this case was simply a Marchetti-Grosso case.

And it is our position that the Seventh Circuit erred in that conclusion, that neither the letter nor the spirit of

the Fifth Amendment privilege nor its application in Marchetti-Grosso support the determination of the Seventh Circuit in this case.

Q Just one last question--

A Yes, sir.

Q --and I will stop interrupting you. I take it you sense no--no inconsistency between the Seventh Circuit's decision in this case and in Mackey?

A Well,--

Q They are different panels except for one judge.

A --that is right. They tend to distinguish. I think there have been--have been inconsistencies primarily and difficulties in courts of appeals in applying the principles of Marchetti-Grosso in these myriad of situations because it is not being clear, the issue of retroactivity has not been focused on by this Court in Marchetti and Grosso at all. The assumption has been by virtue of Grosso and by virtue of Stone that all cases pending on appeal, criminal cases involving Marchetti-Grosso violations, is subject to its turn. We think that Mackey can be distinguished from this case in terms of--the fact that it is an income tax case and that it is on-collateral tax, it is not within the prenumber of the wagering tax scheme, and--but, I would like to focus, if I may, on this particular case which, as I say, our starting point is Marchetti and Grosso, to determine what it did and what it did not hold

for the purposes of this case.

In Marchetti-Grosso this Court determined that if a gambler failed to register and pay the occupational tax he was subject to criminal prosecution. On the other hand, if he did register he faced the real danger in the information that he had provided, would subject him to prosecution under a network of Federal or State provisions making gambling a crime.

Marchetti and Grosso, as we read the opinion, freed the gambler from this dilemma by holding that the comprehensive scheme could not be employed "to punish criminally a gambler who defends a failure to apply with the assertion of the privilege against self-incrimination."

Q May I ask you if the Government has filed any Brief any later than the Brief of January 2, 1969--

A In this case?

Q Yes.

A No, it has not, Your Honor.

We have filed following this case, there are questions of retroactivity different in context than the problem focused upon here, which will follow the next three cases which the Government has developed in some detail its general positions on the retroactivity question in different context. Mackey, of course, does involve a conviction allegedly in violation of Marchetti-Grosso and that was filed last time. The next two cases involve a full development in the Fourth Amendment context

on the retroactivity issue. But in this case, no further Brief has been filed.

It seems to us that in Marchetti and Grosso the Court repeatedly made clear that the wagering tax scheme was being left intact, that neither the occupational or excise tax provisions were invalid or that civil liability was in any way being extinguished.

That in short, as the Court pointed out in Mr. Justice Harlan's opinion, its holding was not meant to prevent either the taxation or regulation by Congress of activities otherwise made unlawful by Federal or State laws or statutes.

The erosion of the privilege in that setting thus was that the compulsion was directed at an individual who, if he failed to succum had to pay the price of criminal punishment.

As Mr. Justice Brennan put it in his concurrent opinion in Grosso, that scheme was designed primarily for an utilized appeal--and any of its citizens engaged in criminal activities.

We think that the root falacy of the decision of the Seventh Circuit is its equation of statutory forfeiture with the criminal punishment dealt with in Marchetti-Grosso. It misapprehends the continued existence of the wagering tax scheme and in our judgment overlooks wholly the fact that the statutory forfeiture from the time of Blackstone and before was recognized as a remedial revealed measure to en-

force its tax still entirely valid.

I mean it is quite important on this aspect of my argument to emphasize that this distinction between criminal or common law forfeiture and statutory forfeiture.

In criminal forfeiture it is necessary to prove the guilt of the owner, in order to forfeit property, whether or not the owner himself is convicted. In statutory forfeiture the guilt or innocense of the owner of the property is irrelevant. It is the illegal use or intent to us--or intention to use the property in violation of law which is the material consideration.

These cases are set out in our Brief, Goldsmith-Grant, the most perhaps the best illustration was during the period of prohibition.

Q How does these---do these regulations in the last argument--I may be wrong--hasn't the administration of this statute--hasn't the Government remitted these forfeitures or refused to reject them where there has been found no guilty participation by the owner of the properties?

A In this particular wagering scheme--

Q Not in this case, but--

A No, no, I know what you mean. Within the gambling --

Q Yes.

A --tax scheme.

Not that I know of. As I indicated that is precisely

that is a remission proceeding which may or may not be available, but as far as I know, the cases have not been remitted--there have been no remission proceedings and the money has not been turned over, presumably to the better. As I had indicated before, the District Court has some 200 cases presently pending and that there were 20 cases pending on appeal in this area.

Q What about the old liquor cases?

A Excuse me, I am sorry.

Q The old liquor cases?

A Ah,--

Q Did they--

A The old liquor cases quite clearly recognized this distinction, Your Honor.

Q No, but I mean if a man was eventually acquitted--I am not talking about the liquor, I am talking about the whiskey.

A Oh, the whiskey, it--it--the whiskey was, in a sense, contraband--

Q Right.

A --and was forfeited.

Q Right. How about the money?

A The money was not contraband in the traditional sense of the term. But we are dealing with the use in an Internal Revenue statute.

Q How about the automobile?

A The automobile was forfeited.

Q Even if the man was found not guilty?

A Well, there were two--there were separate provisions. And that is why I would like to talk about perhaps the Prohibition Act to give you an illustration of what I meant.

One provision of the Prohibition Act, Section 26, provided for a criminal prosecution and the traditional theory of criminal, a common law forfeiture, that upon such conviction the property used would be forfeited.

And there is another provision which was in the revised statutes and which was the predecessor of the instant provision, which didn't focus upon the owner or the individu--owner. In other words, it focused on the use.

And the question arose as to whether they were inconsistent as to whether you had to use one or the other provision. And this Court made it clear in One Ford Coupe, which is 272 United States, that these provisions were not inconsistent, that if the Government used the Internal Revenue provisions rather than the precise criminal forfeiture--the criminal provision which entails forfeiture--that the innocense or guilt of the owner was wholly irrelevant. And this seems to me to be the very essence of Boyd, upon which Claimant will ride and upon which the Court of Appeals rested its decision. Namely, in Boyd what the Court was dealing with was this criminal forfeiture provision. So that we, of course, do not request

this Court to retreat one inch from Boyd in this case. Our position is, as Mr. Justice Brandies made clear in Helvering against Mitchell, that Boyd is not applicable here and Boyd itself recognized.

Indeed, the quote in Supplemental Brief filed by the Claimant at page 11, in the--stemming from Boyd, makes it quite clear that they were talking about punishment of the individual. That was the essence of criminal forfeiture, the essence of statutory forfeiture, the kind that is here involved is to have used property which has been used in violation of law. The basic purpose of that is that the property cannot be so used again. It is a remedial--traditionally and historically a remedial function.

If there is any privilege in these circumstances it is that of the property, not that--those who have put the property to illegal use.

For example, relevant here, I think, is this Court's decision in the Campbell Painting Corporation at 392 U. S. where the president of the corporation could not complain because he suffered economic loss of self-compulsion because of his refusal under a claim of privilege to testify before a grand jury which resulted in termination of his corporation's contract.

His privilege did not enter into the matter at all. So here, neither does the privilege of Mr. Angelini or anyone

else who engage in the gambling business. That protection has already been afforded, no gambler, if I understand the decision of this Court, can be prosecuted criminally for failing to file the requisite form. As this Court points out in Knox, the converse would be true. If one filed under the compulsion of the statutory scheme, which led to conviction for a gambling offense,--led to prosecution for a gambling offense--as Mr. Justice Harlan pointed out in Knox, then the claim of privilege would be available. This would be the other side of the coin. And that was the previous case which this Court referred to in the Knox appearances.

It is our alternative position in this respect that even if the privilege of forfeiture should be deemed a penalty it is not every degree of compulsion or every type of penalty which the privilege bars. Here the penalty is attenuated and the closest anology I have noted is the Campbell Painting Corporation case, and also Gardner and Broderick uniform sanitation men which was cited in our brief.

In those cases, it was recognized that public employes could be discharged from public employment for failure to provide information to the State relating directly and narrowly to the performance of their official duties so long as the discharge was not based upon the invocation of privilege and where the invocation could not be used against any later criminal prosecution.

Here it seems to us whatever penalty, and this is our alternative argument, that even assuming that I am wrong, that these are not penalties, whatever penalties may be said to have attached to the gambler are even more remote in collateral. He had the protection of the privilege from criminal prosecution and it seems to us it would be straining Grosso and Marchetti quite clearly beyond their holdings if, in addition, he may retain property which may or may not be his.

For example, in Buick Sedan, this Court--District Court, concluded that $300,000 there seized could not belong to the Claimants. And there is nothing to indicate here except the claim of Claimant that the $8,000 fees belong to him. The District Court made no such finding at all.

The gambler, it seems to us, would be in no preferred position. The privilege, we think not, should be convered to a license to seize property in violation of valid subsistence tax provisions.

If the Court is of the view that the principles, however, of Marchetti and Grosso are applicable in this civil context, then a question of retroactivity emerges. This takes on perhaps several forms.

First, it seems to us it would have to be decided that Marchetti and Grosso itself, the straight Marchetti-Grosso situation, was fully retroactive. And then, if so, whether this case would fall within those principles.

Our basic position is that Marchetti and Grosso is not retroactive in the criminal context under the gambling statutes where relief on its terms is sought on post-conviction review under the three-prong standard of privilege, reliance, and effect upon the administration of justice.

We would certainly argue that while this case technically is on direct review, that it is also collateral in the sense that we are not here dealing with criminal convictions; we are dealing with the issue of alleged interest in property used in gambling. Property, in fact, which was seized in August 1963, two years before this Court decided Albertson, I might point out, and five years before it decided Marchetti-Grosso.

If this were not at all comparable, we think to cases on direct appeal in the criminal context. We think that the purpose and effect upon the administration of justice also counsel persuasively against retroactivity. At the time of the seizures Kahriger and Lewis with a new auto, and the seizing officers could legitimately rely on those decisions.

Even more significant is the disruptive effect upon the administration of justice in applying Marchetti retroactively in this privilege of context. I indicated the extent of the cases presently pending and the money involved in these various forfeitures.

We are further advised by the Internal Revenue Service that since 1951 when these gambling statutes were enacted and I

use their phrase, literally thousands of items used in gambling--automobiles and money--have been forfeit under the wagering stat--the tax statutes. We--except for some of these figures--

Q Well, I gathered so much -- what you are urging on the retroactivity, a prospectivity only if the seizure is after January 29, 1968. You are not urging that on us as to--with respect to criminal convictions which haven't yet become finalized?

A The reason I cannot--in the Marchetti-Grosso context--

Q Yes.

A --The reason I think that I cannot urge that is twofold. One, this Court does with Grosso which involves a claim other than--a claim in addition to the claim there made--the claim of Marchetti-Grosso and remanded it, supporting Stone since remanded all the cases pending on appeal when Marchetti-Grosso was decided.

And while the Court would not focus upon the reasons for it, it is plain that the Court has concluded that cases pending upon appeal--

Q Have we ever said that?

A You have not said that and regar--as I say, the Court has not spoken on the matter at all.

Q Well, why would you assume--why would you assume that we have decided the retroactivity question in spite of

the mandate? It might be that you remanded to have the matter first considered by a Court of Appeals.

A It might be, and if--if that is true, then it seems to us the counsels favorably as to the retroactivity on collateral attack.

Q Well, this is--let us assume for the moment that you are wrong in saying that door is closed. What is the Government's position on it--the retroactivity in Marchetti-Grosso, as if it were an open matter?

A Right.

The Government's position on, as if it were an open matter in that supposition, is that Marchetti-Grosso is to apply prospectively.

Q That is--

A Under the--

Q --the events, similar events which are after that decision on--

A January 29, 1968.

Q Stovall--

A Stovall-Johnson Desist, approach.

All I was suggesting was that even if the Court deems that what it had done following Marchetti-Grosso doesn't require it to do the same thing because it is pending on collateral facts.

But as to answer your precise question, Mr. Justice

White, our view would be prospectivity, if that question is open.

I would like to save what remaining time I have, for rebuttal.

ARGUMENT OF MISS ANNA R. LAVIN, ESQ.,

ON BEHALF OF CLAIMANT-RESPONDENT

MISS LAVIN: If it please the Court, I doubt very-- aside from the statement I don't know that it has any real significance, but I think we may as well dispose of it, so we will at least recognize that there is no Fourth Amendment question in this case.

Counsel stated that a search was made of Mr. Angelini's person at the time of his arrest. It developed that there was some $8600 on his person. Actually the money was revealed at the time he went through the ordinary processing at the United States Marshal's office on a request to empty his pockets. All persons taken into custody are. The money was not seized at the race track as counsel indicated.

As I say, I don't think it is a matter of great consequence one way or another.

Mr. Justice Blackman asked about cases remanded at the same time as was this case and I point out that not one to my knowledge, in not one has the Government requested a Certiorari where the--we got a criminal matter involved.

They, however, made a distinction in this case because

it concerns forfeiture.

I think that there is no distinction between a criminal conviction and a forfeiture proceeding. I think that Marchetti and Grosso apply equally to both.

The announced object of this Court in deciding Marchetti and Grosso was the protest--or, rather, the protection of the individual against self-incrimination under the comprehensive system of Federal and State prohibitions against wagering activities.

In Malloy versus Hogan, this Court said in part that the Fifth Amendment secures the right to a person to remain silent unless he wishes to speak in the unfettered exercise of his own will and to suffer no penalties.

In Spevack versus Klein again, this Court emphasized that penalties used in the context with the Malloy case is not restricted to fine or imprisonment, that it means any sanction that makes assertion of the privilege is, in the words of this Court, is costly.

And we have with Spevack, disbarment; Garrity lost his job; the young lady who lost her position as a teacher whose name I don't now remember.

So I suggest to the Court, if Marchetti and Grosso has retroactive effect, a question that has not until right now to my knowledge, been brought up as far as criminality is concerned, then it has retroactive effect so far as forfeiture

proceedings are concerned.

I would like to address myself just in passing to the Mackey case because that was also a product of questioning by the Court. The Seventh Circuit stated there is distinction between Mackey and the earlier case of La Critis, which was remanded by this Court, a criminal gambling prosecution under 1952, the distinction is made was that Mackey did not involve gambling offenses, it being an income tax evasion case.

Later the Second Circuit--I mean the Seventh Circuit--in even a more recent case decided September 9, 1970, Desil (?) v. U. S., in reversing Desil said we distinguish this from Mackey because Mackey did not come within the object of the Supreme Court when they said they wanted to protect the privilege against self-incrimination where local and state gambling statutes were concerned.

Thus, the distinction the Seventh Circuit makes, and I submit to this Court that it is a valid one.

Now, counsel here has indicated that this Court has recognized under certain instances Boyd is not a deterrent to the, well, to interpretation of constitutional rights. I might say that when any--whenever this Court has spoken it has spoken in regard to Sixth Amendment rights and has expressly omitted from consideration any Fifth Amendment rights which they--which it has always considered evasive.

The Government, opines here before this Court, said

Marchetti-Grosso applied prospectively. I assume that the Government uses the standards that this Court has set up in its several cases of which I think Linkletter was thought to be the lead.

As a matter of fact, several times in its submissions to this Court by argument, it has said that there are three governing principles on prospective and retrospective applications.

The first principle, it says, the purpose to be served by the new constitutional rule.

The second purpose, government reliance on the prior rule.

And, the third, the effect on the administration of justice.

We suggest to this Court that none of those has any validity in the right of the rationale of the Marchetti-Grosso decision. This is dictated by a basic consideration. The basic consideration is that before the utilization of those three standards the Government meets an insurmountable barrier. That barrier is that those three standards do not even come into operation where the new constitutional rule, so-called, bears on the integrity of the guilt-determining factor. Here the decision of Marchetti versus Grosso does bear on the guilt-determining process. As a matter of fact, the rule is the heart and soul of the process.

The only act of the Claimant here which has intended to have made his property subject to this forfeiture is his refusal to waive his Fifth Amendment rights. If that aspect is removed from the case as constitutionally unimportant, there is no basis for a finding of guilt.

Q In this hearing there was evidence put on that he was gambling and that this money was used in gambling.

A Such as--

Q And this amounts to the bulk of the hearing.

A Yes, sir.

Q Well, that has nothing to do with Marchetti-Grosso, does it?

A I don't think that has anything to do with the basis for Marchetti-and-Grosso or how it affects this case. Notwithstanding whatever I consider as Mr. Angelini's lawyer a long-time authority and in some occasions the proof.

We must remember that there is no Federal violation in carrying $8674. Nor is there any Federal violation in using $8674 in gambling activities. Maybe a State violation, but not a Federal violation.

The only act necessary to the Government's proof, not to the way it presumes its evidence, not the way it enforces its search warrants, but the thing necessary to its basic proof--the only act of censure to that guilt-finding process is first at 4411--Sec. 4411 of Title 26, the payment of the $50 occupa-

tional tax had not been complied with. And second, that the registration form, Sec. 4412, had not been filled out and submitted to the Government.

Now this Court in Marchetti versus Grosso makes it clear that those two statutes are interdependent, because as it found in the decisions in those cases you couldn't pay the occupational tax without filing the registration, and, obviously if you file the registration your privilege against self-incrimination has been greatly--well, I--enfringed upon.

You were about to say something?

Q Well, the judgment the District Court made on register's neither document mentions the wagering tax.

A Well, yes, I think--

Q Was it in the record itself?

A Oh, yes. You will find that in the libel--libel for forfeiture. As a matter of fact, you will find that in the finding.

Q I didn't--

A And if I may refer, Your Honor to the Appendix, page 9, signing of receipt.

Q Yes.

A And also in the first paragraph of the libel at page 5. 4401, 4411, 4412.

Q Yes, that satisfies my question.

A All right.

The thing I am trying to point out, and I hope I have done it, is the only act that would make this forfeiture valid under Federal law is proof of the failure to comply with 4411 and 4412.

The only basis upon which guilt could be found is the refusal to waive constitutional rights under the Fifth Amendment.

So actually, if I suggest to the Court, this new constitutional so-called rule goes to the guilt-finding process. And the three considerations for which the Government--on which the Government suggests that you waive retroactivity in prospective application, do not actually come into play here because this is beyond the consideration, the entertainment of those considerations.

But, if this Court disagrees and--I submit I don't see that it can because it is obvious that the only thing that will prove a forfeiture is the failure to waive the Fifth Amendment right.

If you do not agree with me, let us go then to the purpose to be served by this new rule. A big change--lesson to be learned from Marchetti and Grosso is that you may not compel a person to pay a tax and file a return in the manner required by 4411 and 4412 unless we give him full immunity.

The next question urged by the Government is: Would that immunity require immunity just from criminal prosecution

or also from civil forfeiture, a pure penalty here? Without relation to any $50 excise tax.

It seems that the Government's interpretation of the so-called new rule, that a congressional grant of pervasive criminal immunity did not extend to these penalty forfeitures.

We submit, and we have submitted, on the basis of the many immunity Acts passed by the Congress, that the Congress recognizes the to give full immunity you must not only give immunity from criminal statutes but also the immunity must extend to forfeitures.

Without unduly burdening this Court, I would refer Your Honors to the Digest and the wording of the immunity grants that we have set out at pages 6 and 7 of our original Brief, that is the Brief of the Claimant-Respondent.

From seven attempts, 16 statutes and all of them substantially the same--

Q What page are you on?

A Page 6, Your Honor. This is not the Supplemental Brief, but the original one.

"No individual shall be prosecuted or subjected to any penalty or forfeiture of or on account of any transaction" . . .and every one of those statutes relating to the giving of immunity, and I think that is what this Court suggested to cure the infirmity found in 4411 and 4412 incorporates immunity from any forfeiture proceedings.

I say that diligent effort has been extended to this point and we found none that excepted forfeiture from the first step of the immunity.

Now the second consideration that has been developed under the Linkletter line of cases concerns the extent of the rights of law-enforcement authorities on the old standards, which would be the standards under Kahriger and Lewis.

But this question, I submit, goes directly to the major prohibition against the application of the Government's consideration.

Now in a situation where limitation has been made to prospective application, there has never been concern with a guilt-finding process. It has always been directed to evidentiary blankets.

I would like to refer the Court to a very simple statement made by the Amicus in this case and I think he has developed it well.

He said in his Brief--if Miranda had been on the books --warnings could have been given--if Griffin had been on the books prosecutors could have avoided comment. If Lee had been on the books state prosecutors could have avoided offering evidence of violation of 605--

Q What are you reading from?

A I am reading from the Brief of the Amicus, because I thought we detailed these so concisely and understandably.

It is on page 6.

And he continues through--in contempt cases.

In no instance if this so-called new rule had been applied would there have been no guilt at all in any of those cases where we have had prospective application. Here if the new rule is applied there is just not a basis for guilt.

Now we come to the Government's full consideration. One is the effect on the administration of justice. But it isn't clear to us just how the Government thinks that there is going to be an effect on the administration of justice. A rather impressive figure was offered this afternoon of some $2-1/2 million involved here. Even more impressive figures were suggested in the Government's Brief about some $7 million in money and property having been appropriated.

Now I suggest that, should it be necessary for the Government to give back any of this money or property, that the simple expedience of writing a check is the answer to it and there will be no interference with the administration of justice.

In the meantime, I would submit that the Government has been recompensed to the extent of probably 80 to 90 percent of the money and property it appropriated.

Counsel has indicated in his Argument that this is purely a remedial statute, the statute calling for forfeiture. When this case was argued the first time, that argument was also

made with a special reliance being made on Helvering versus Mitchell. The essence of that argument was that this forfeiture applying the rationale of the Helvering case did not constitute a penalty. It did not constitute a penalty in addition to the criminal sanctions but rather compensated the Government for its actual loss.

This Court knows that Helvering was a tax assessment case and concerned a 50 per cent fraud penalty. There there was a direct relationship to the outstanding tax; here no outstanding tax exists. I think it should be indicated parenthetically although it is indicated in the Brief that Mr. Angelini has been assessed for the $50 occupational tax, he has been assessed for the amount that the Government assumes he made over 10 per cent under 4401. These have been paid. There is no relationship in this forfeiture to the assessment that the Government intended on account of these activities.

So--

Q That is no where in the record, is it?

A This--there is no question about that, sir. The Defendants have the record. Angelini has paid income taxes for I don't know how many years, and there has never been any question about the validity of--

Q The Mitchell case involved, as I remember it, the 50 per cent fraud penalty on ordinary income tax case, didn't it?

A Yes, sir. Helvering versus Mitchell, and--with direct relation to the outstanding tax application.

Q Under the ordinary income tax?

A Under the ordinary income tax. But that doesn't enter this case. We have no ascertainable tax outstanding. Well, we just don't have any outstanding. Whatever has been assessed has been paid without application of any of these moneys twoards--towards alleviating that tax in any manner.

So I say it is--a pure penalty and it is remedial of nothing. There was no difficulty of investigation such as we talk about in Helvering in determining how much Mr. Mitchell owed the United States. I--

Q Who did the money--was the money--who did the money belong to in this case?

A Mr. Angelini made claim upon that money. I find it surprising that the Government here says there was no finding that Mr. Angelini was not the owner of that money. He and he alone made claim it was taken from his person. The Government did not contest it on trial that he was in fact the rightful claimant and rightful owner. I do believe that is long down the drain.

I think I have addressed myself to every question or matter brought up by the Solicitor-General. If there are no other questions, I would respectfully submit this course and this decision.

MR. CHIEF JUSTICE BURGER: Thank you, and I think your time is exhausted, Mr. Feit. Thank you. The case is submitted.

(Whereupon, at 3:00 o'clock p. m. the reargument in the above-entitled matter was concluded.)

#####