

The Burger Court Opinion Writing Database

Washington v. United States

402 U.S. 978 (May 7, 1971)

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan ✓
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

October Term, 1970

OTHELLO WASHINGTON ET UX. v.
UNITED STATES

Author: Douglas, J.

Dated: 4717/71

Dated: _____

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11. Decided April —, 1971

MR. JUSTICE DOUGLAS.

Petitioner was convicted of engaging in the wagering business without payment of the special occupational tax. This took place prior to our decision in *Grosso v. United States*, 390 U. S. 62, holding unconstitutional against a claim of self-incrimination a conviction under the same statute. In the course of that prosecution a search warrant was obtained and evidence was obtained on the basis of which the present civil suit for excise taxes, fraud penalties, and interest was brought.

The central question is whether the evidence obtained by a warrant in the criminal case, which retrospectively contained the constitutional infirmity noted in *Grosso*, may be used in this civil case.

Since, as we held in *United States v. Coin & Currency*, — U. S. —, our decision in *Grosso* (and its companion *Marchetti v. United States*, 390 U. S. 39), are retroactive, I do not see how evidence obtained by use of a search warrant issued under the old regime which *Grosso* and *Marchetti* put into the discard, can do service for process in this new and wholly different civil proceeding.

There are means of discovery provided by the Rules of Civil Procedure* and a special procedure, 26 U. S. C. § 7602, applicable to civil suits to collect federal taxes. The United States would never dare ask for a search warrant to ferret out the facts necessary for its civil suit.

*Rules of Civil Procedure, Rules 26-38.

Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

3rd DRAFT

From: Douglas, J.

SUPREME COURT OF THE UNITED STATES

Filed: 4-28

October Term, 1970

Recirculated: _____

OTHELLO WASHINGTON ET UX. v.
UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11. Decided May 3, 1971

MR. JUSTICE DOUGLAS.

Petitioner was convicted of engaging in the wagering business without payment of the special occupational tax. This took place prior to our decision in *Grosso v. United States*, 390 U. S. 62, holding unconstitutional against a claim of self-incrimination a conviction under the same statute. In the course of that prosecution a search warrant was obtained and evidence was obtained on the basis of which the present civil suit for excise taxes, fraud penalties, and interest was brought.

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*Rules of Civil Procedure, Rules 26-38.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan ✓
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES

October Term, 1970

From: Brennan, J.

OTHELLO WASHINGTON ET UX. v.
UNITED STATES

Circulated: 5-3-71

Recirculated: _____

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11. Decided May —, 1971

MR. JUSTICE BRENNAN.

The courts below have ordered a sale of petitioner's farm to satisfy a tax lien. The extent of petitioner's liability was determined on the basis of evidence seized by Internal Revenue agents under a search warrant grounded upon the determination that there was probable cause to believe that petitioner was engaged in the wagering business without having registered and paid the required occupational tax. We subsequently held that the Fifth Amendment prohibits the Government from requiring such registration of a gambler who justifiably fears that he will thereby incriminate himself, and who does not waive his privilege against self-incrimination. *Marchetti v. United States*, 390 U. S. 39 (1968). And we have just this Term held that prohibition applicable whether the failure to register took place before or after *Marchetti* was decided. *United States v. United States Coin & Currency*, 40— U. S. — (1971).

Under these cases, therefore, there is substantial doubt whether the Government could constitutionally punish petitioner for his failure to register.¹ By the same token, I think there is a substantial question whether the affidavits supporting the search warrant were sufficient to

¹ The Government does not dispute that petitioner's gambling activities were illegal under state law, and points to nothing in the record that would indicate petitioner would intelligently and knowingly waive his right against self-incrimination.