The Burger Court Opinion Writing Database

Mackey v. United States

401 U.S. 667 (April 5, 1971)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

March 25, 1971

No. 36 -- Mackay v. United States

Dear Byron:

Please join and excuse my not writing a separate opinion!

Regards,

WEB

Mr. Justice White

cc: The Conference

WE

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

CHAMBERS OF
JUSTICE HUGO L. BLACK

January 4, 1971

Dear Bill,

Re: No. 36 - Mackey v. United States.

Please join me.

Sincerely,

H. L. B.

Mr. Justice Douglas

WD

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

SUPREME COURT OF THE UNITED STATES

Douglas, J.

No. 36.—October Term, 1970

Circulated: 1-2-29

Recirculated:

Fred T. Mackey, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January —, 1971]

Mr. Justice Douglas, dissenting.

I had assumed that all criminal and civil decisions involving constitutional defenses which go in favor of the defendant were necessarily retroactive. That is to say, the Constitution has from Chief Justice Marshall's first decision been retroactive, for there were no decisions on this point prior thereto. *Marchetti* v. *United States,* 390 U. S. 39, and *Grosso* v. *United States,* 390 U. S. 62, exonerated defendants who when they did these acts were not by reason of *United States* v. *Kohmyer,* 345 U. S. 22, entitled to a constitutional immunity. Why *Marchetti* and *Grosso* are entitled to relief and *Mackey* is not, is a mystery. It is said that Mackey's gambling return, "like physical evidence seized in violation of a new interpretation of the Fifth Amendment, is concededly relevant and probative even though obtained by the Government through means since defined by this Court as constitutionally objectionable." The same could be said of *Marchetti* and *Grosso.* Yet they won a new trial.

I could understand today's decision if *Marchetti* and *Grosso* had announced only a prospective rule applicable to all like defendants. But when they are given the benefit of a new constitutional rule forged by the Court,

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

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 36.—October Term, 1970

Circulated: _____

Recirculated: 12-31

Fred T. Mackey, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January —, 1971]

Mr. Justice Douglas, dissenting.

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SUPREME COURT OF THE UNITED STATES

No. 36.—October Term, 1970

Fred T. Mackey, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January —, 1971]

Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissenting.

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To: The Chief Justice
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice

4th DRAFT

From: Douglas, J.

Circulated:

Recirculated: 5/31/71

SUPREME COURT OF THE UNITED STATES

No. 36.—October Term, 1970

Fred T. Mackey, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April —, 1971]

Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissenting.

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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

5th DRAFT

From: Douglas, J.

Circulated: _____

Recirculated: 4-1

SUPREME COURT OF THE UNITED STATES

No. 36.—October Term, 1970

Fred T. Mackey, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April —, 1971]

Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissenting.

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WB

February 5, 1971

Dear Byron:

You know the problem I've had with the issue in Coin & Currency, No. 5. I've finally come down on the side that if the Constitution denied Government the power to punish the conduct, then a decision here holding this necessarily has to be retroactive, thus the form of the enclosed opinion coming out to Affirm.

Mackey, No. 36, concurs in the judgment you reach but on the quite different ground that the use of the wagering reports in the income tax evasion prosecution is not within the reach of the principle of Marchetti and Grosso.

I come closest to agreement with you in Williams and Elkanich, Nos. 81 and 82. I decided I had to write separately because I think you and I do not agree that, as I strongly feel, the exclusionary rule was not fashioned merely as a deterrent against improper police conduct but is actually an essential element of the protection of privacy secured by the Fourth Amendment.

The best I can make out of the "scorecard" is that my differences with you in Mackey and Williams still leave you with a vote for the judgment. As to Coin and Currency, I don't know what the situation is. I gather it all depends on what Thurgood does.

I am not going to circulate these to the Conference until I've had your reaction.

Sincerely,

Mr. Justice White

Circulated
2-5-71

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No 36.—OCTOBER TERM, 1970

Fred T. Mackey, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February —, 1971]

MR. JUSTICE BRENNAN, concurring in the judgment.

Three years ago we held that the federal wagering tax statutes, 26 U. S. C. § 4101 *et seq.*, subjected those to whom they applied to such a real and substantial danger of self-incrimination that those statutes could "not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination." *Marchetti* v. *United States,* 390 U. S. 39, 42 (1968); *Grosso* v. *United States,* 390 U. S. 62 (1968). This case presents the question what, if any, use the Government is entitled to make of wagering excise tax returns, filed pursuant to the statutory scheme, in a prosecution for income tax evasion. Since I believe the Fifth Amendment does not prevent the use of such returns to show a likely source of unreported income in a criminal prosecution for income tax evasion, I concur in the judgment of the Court.[1]

I

The relevant facts may be briefly stated. As required by statute, petitioner from 1956 through 1960 filed monthly wagering excise tax returns showing his name,

[1] This view of the case makes it unnecessary for me to decide whether petitioner's conviction should be examined without regard to the standards embodied in *Marchetti* and *Grosso*.

Circulate
2-8-71

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No 36.—October Term, 1970

Fred T. Mackey, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February —, 1971]

Mr. Justice Brennan, concurring in the judgment.

Three years ago we held that the federal wagering tax statutes, 26 U. S. C. § 4101 *et seq.*, subjected those to whom they applied to such a real and substantial danger of self-incrimination that those statutes could "not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination." *Marchetti* v. *United States*, 390 U. S. 39, 42 (1968); *Grosso* v. *United States*, 390 U. S. 62 (1968). This case presents the question what, if any, use the Government is entitled to make of wagering excise tax returns, filed pursuant to the statutory scheme, in a prosecution for income tax evasion. Since I believe the Fifth Amendment does not prevent the use of such returns to show a likely source of unreported income in a criminal prosecution for income tax evasion, I concur in the judgment of the Court.[1]

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Circulated
2-22-71

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No 36.—OCTOBER TERM, 1970

Fred T. Mackey, Petitioner, v. United States. } On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February —, 1971]

MR. JUSTICE BRENNAN, concurring in the judgment.

Three years ago we held that the federal wagering tax statutes, 26 U. S. C. § 4101 *et seq.*, subjected those to whom they applied to such a real and substantial danger of self-incrimination that those statutes could "not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination." *Marchetti* v. *United States*, 390 U. S. 39, 42 (1968); *Grosso* v. *United States*, 390 U. S. 62 (1968). This case presents the question what, if any, use the Government is entitled to make of wagering excise tax returns, filed pursuant to the statutory scheme, in a prosecution for income tax evasion. Since I believe the Fifth Amendment does not prevent the use of such returns to show a likely source of unreported income in a criminal prosecution for income tax evasion, I concur in the judgment of the Court.[1]

I

The relevant facts may be briefly stated. As required by statute, petitioner from 1956 through 1960 filed monthly wagering excise tax returns showing his name, address, and the gross amount of wagers accepted by

[1] This view of the case makes it unnecessary for me to decide whether petitioner's conviction should be examined without regard to the standards embodied in *Marchetti* and *Grosso*.

Circulated
3-23-71

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No 36.—OCTOBER TERM, 1970

Fred T. Mackey, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[March —, 1971]

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

Three years ago we held that the federal wagering tax statutes, 26 U. S. C. § 4101 *et seq.*, subjected those to whom they applied to such a real and substantial danger of self-incrimination that those statutes could "not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination." *Marchetti* v. *United States,* 390 U. S. 39, 42 (1968); *Grosso* v. *United States,* 390 U. S. 62 (1968). This case presents the question what, if any, use the Government is entitled to make of wagering excise tax returns, filed pursuant to the statutory scheme, in a prosecution for income tax evasion. Since I believe the Fifth Amendment does not prevent the use of such returns to show a likely source of unreported income in a criminal prosecution for income tax evasion, I concur in the judgment of the Court.[1]

[1] This view of the case makes it unnecessary for me to decide whether petitioner's conviction should be examined without regard to the standards embodied in *Marchetti* and *Grosso*. The balance of this opinion is written on the assumption that *Marchetti* and *Grosso* are applicable.

SUPREME COURT OF THE UNITED STATES

No 36.—October Term, 1970

Fred T. Mackey, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 5, 1971]

Mr. Justice Brennan, with whom Mr. Justice Marshall joins, concurring in the judgment.

Three years ago we held that the federal wagering tax statutes, 26 U. S. C. § 4401 *et seq.*, subjected those to whom they applied to such a real and substantial danger of self-incrimination that those statutes could "not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination." *Marchetti* v. *United States*, 390 U. S. 39, 42 (1968); *Grosso* v. *United States*, 390 U. S. 62 (1968). This case presents the question what, if any, use the Government is entitled to make of wagering excise tax returns, filed pursuant to the statutory scheme, in a prosecution for income tax evasion. Since I believe the Fifth Amendment does not prevent the use of such returns to show a likely source of unreported income in a criminal prosecution for income tax evasion, I concur in the judgment of the Court.[1]

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

CHAMBERS OF
JUSTICE POTTER STEWART

December 30, 1970

36 - Mackey v. United States

Dear Byron,

I am glad to join the opinion you have written for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

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

SUPREME COURT OF THE UNITED STATES

From: White, J.

No. 36.—October Term, 1970

Circulated: DEC 17 1970

Recirculated:

Fred T. Mackey, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January —, 1971]

Mr. Justice White delivered the opinion of the Court.

An indictment was returned in March 1963 charging petitioner Fred T. Mackey in five counts of evading payment of income taxes by willfully preparing and causing to be prepared false and fraudulent tax returns for the years 1956 through 1960, in violation of 26 U. S. C. § 7201. On January 21, 1964, a jury in the District Court for the Northern District of Indiana found Mackey guilty on all five counts.[1] The conviction was affirmed on appeal by the Court of Appeals for the Seventh Circuit in the spring of 1965. 345 F. 2d 499 (CA7), cert. denied 382 U. S. 824 (1965).

At petitioner's trial, the Government used the net-worth method to prove evasion of income taxes.[2] As part of its case, it introduced 60 wagering excise tax returns—one for every month of each of the five years covered by the indictment—filed by petitioner pursuant

[1] Petitioner received a sentence of five years' imprisonment and a fine of $10,000 on each count, the prison terms to be served concurrently.

[2] This method of prosecution is discussed and approved in *Holland* v. *United States*, 348 U. S. 121 (1954); *Friedberg* v. *United States*, 348 U. S. 142 (1954); *Smith* v. *United States*, 348 U. S. 147 (1954); *United States* v. *Calderon*, 348 U. S. 160 (1954).

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

1, 5, 7

2nd DRAFT

From: White, J.

Circulated: _____

Recirculated: 3-27-71

SUPREME COURT OF THE UNITED STATES

No. 36.—OCTOBER TERM, 1970

Fred T. Mackey, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[March —, 1971]

MR. JUSTICE WHITE announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN join.

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minor stylistic changes

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

From: White, J.

3rd DRAFT

Circulated: _____

Recirculated: 3-31-71

SUPREME COURT OF THE UNITED STATES

No. 36.—OCTOBER TERM, 1970

Fred T. Mackey, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 22, 1971

Re: No. 36 - Mackey v. United States

Dear Bill:

Please join me in your opinion concurring in the judgment.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

February 11, 1971

Re: No. 36 - Mackey v. United States

Dear Byron:

Please join me.

Sincerely,

H. A. B.

Mr. Justice White

cc: The Conference