

The Burger Court Opinion Writing Database

United States v. Dionisio

410 U.S. 1 (1973)

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

December 30, 1972

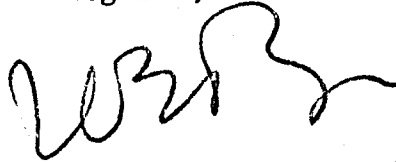
Re: No. 71-229 - U. S. v. Dionisio

Dear Potter:

Please join me.

I would be much more comfortable -- and I submit we would be more accurate -- to alter the top line on page 16 by substituting for "be wholly realistic" the following, "perform the same protective function as originally contemplated".

Regards,



Mr. Justice Stewart

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

U.S. DEPARTMENT OF JUSTICE

Stuart

?

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

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 71-229 AND 71-850

From: _____

Circulated: DEC 29 1972

Recirculated: _____

United States, Petitioner,
71-229 v.
Antonio Dionisio et al.
United States, Petitioner,
71-850 v.
Richard J. Mara aka Rich-
ard J. Marasovich.

On Writs of Certiorari to the
United States Court of
Appeals for the Seventh
Circuit.

[December —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

Judge William Campbell, who has been on the Dis-
trict Court in Chicago for over 32 years, recently made
the following indictment against the grand jury: ¹

"This great institution of the past has long
ceased to be the guardian of the people for which
purpose it was created at Runnymede. Today it
is but a convenient tool for the prosecutor—too
often used solely for publicity. Any experienced
prosecutor will admit that he can indict anybody
at any time for almost anything before any grand
jury."

It is indeed common knowledge that the grand jury,
having been conceived as a bulwark ~~against~~ the citizen
and the Government, is now a tool of the Executive.
The concession by the Court that the grand jury is no
longer in a realistic sense "a protective bulwark standing
solidly between the ordinary citizen and over-zealous
prosecutor" is reason enough to affirm these judgments.

between

It is not uncommon for witnesses summoned to appear

¹ 55 Fed. Rules Dec. 229, 253 (1972).

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

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 71-229 AND 71-850

From: Douglas, J.

Circulated: _____

Recirculated: 1-19-73

United States, Petitioner,
 71-229 v.
 Antonio Dionisio et al.
 United States, Petitioner,
 71-850 v.
 Richard J. Mara aka Rich-
 ard J. Marasovich.

On Writs of Certiorari to the
 United States Court of
 Appeals for the Seventh
 Circuit.

[December —, 1972]

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It is indeed common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive. The concession by the Court that the grand jury is no longer in a realistic sense "a protective bulwark standing solidly between the ordinary citizen and over-zealous prosecutor" is reason enough to affirm these judgments.

It is not uncommon for witnesses summoned to appear

¹ 55 Fed. Rules Dec. 229, 253 (1972).

MP. 1, 9

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 18, 1973

ATES

RE: No. 71-229 United States v. Dionisio
No. 71-850 United States v. Mara

Dear Potter:

After studying Thurgood's dissent I have decided to file the attached statement of my own. It has gone down to the printer but I am circulating in this xerox form in the hope that I won't hold you up getting the case down on Monday.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

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From him, I conclude,

substantially in agreement with Part II of my Brother Marshall's dissent, that the reasonableness under the Fourth Amendment of such a seizure cannot simply be presumed. I would there-

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U.S. DEPARTMENT OF JUSTICE

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U.S. DEPARTMENT OF JUSTICE

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 71-229 AND 71-850

United States, Petitioner,
71-228 v.

Antonio Dionisio et al.

United States, Petitioner,
71-850 v.

Richard J. Mara aka Richard J. Marasovich.

On Writs of Certiorari to the
United States Court of
Appeals for the Seventh
Circuit.

[January —, 1973]

MR. JUSTICE BRENNAN, concurring in part and dissenting in part.

I agree, for the reasons stated by the Court, that petitioners' Fifth Amendment claims are without merit. I dissent, however, from the Court's rejection of petitioners' Fourth Amendment claims as also without merit. I agree that no unreasonable search and seizure in violation of the Fourth Amendment is effected by a grand jury subpoena limited to requiring the appearance of a suspect to testify. But insofar as the subpoena requires a suspect's appearance in order to obtain his voice or handwriting exemplars from him, I conclude, substantially in agreement with Part II of my Brother Marshall's dissent, that the reasonableness under the Fourth Amendment of such a seizure cannot simply be presumed. I would there-

fore affirm the judgments of the Court of Appeals reversing the contempt convictions and remand with directions to the District Court to afford the Government the opportunity to prove reasonableness under the standard fashioned by the Court of Appeals.

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

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Justice: Brennan, J.

Nos. 71-229 AND 71-850

Circulated: 1/19/72

Recirculated:

United States, Petitioner,
 71-228 v.

Antonio Dionisio.

United States, Petitioner,
 71-850 v.

Richard J. Mara aka Rich-
 ard J. Marasovich.

On Writs of Certiorari to the
 United States Court of
 Appeals for the Seventh
 Circuit.

[February —, 1973]

MR. JUSTICE BRENNAN, concurring in part and dis-
 senting in part.

I agree, for the reasons stated by the Court, that peti-
 tioners' Fifth Amendment claims are without merit. I
 dissent, however, from the Court's rejection of peti-
 tioners' Fourth Amendment claims as also without merit.
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 suspect to *testify*. But insofar as the subpoena requires
 a suspect's appearance in order to obtain his voice or
 handwriting exemplars from him, I conclude, substan-
 tially in agreement with Part II of my Brother MAR-
 SHALL's dissent, that the reasonableness under the Fourth
 Amendment of such a seizure cannot simply be presumed.
 I would therefore affirm the judgments of the Court of
 Appeals reversing the contempt convictions and remand
 with directions to the District Court to afford the Gov-
 ernment the opportunity to prove reasonableness under
 the standard fashioned by the Court of Appeals.

3
M —

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

From: Stewart, J.

2nd DRAFT

Circulated: DEC 27 1972

SUPREME COURT OF THE UNITED STATES

recirculated: _____

No. 71-229

United States, Petitioner, } On Writ of Certiorari to the
v. } United States Court of
Antonio Dionisio et al. } Appeals for the Seventh
Circuit.

[January —, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

A special grand jury was convened in the Northern District of Illinois in February 1971, to investigate possible violations of federal criminal statutes relating to gambling. In the course of its investigation the grand jury received in evidence certain voice recordings that had been obtained pursuant to court orders.¹

The grand jury subpoenaed approximately 20 persons, including the respondent Dionisio, seeking to obtain from them voice exemplars for comparison with the re-

¹ The court orders were issued pursuant to 18 U. S. C. § 2518, a statute authorizing the interception of wire communications upon a judicial determination that "(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter [including the transmission of wagering information]; (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception; (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; (d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person."

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

4th DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: **JAN 3 1973**

No. 71-229

United States, Petitioner,	} On Writ of Certiorari to the	
v.		United States Court of
Antonio Dionisio et al.		Appeals for the Seventh
		Circuit.

[January —, 1973]

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

5th DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

No. 71-229

Recirculated: JAN 19 1973

United States, Petitioner, } On Writ of Certiorari to the
v. } United States Court of
Antonio Dionisio. } Appeals for the Seventh
Circuit.

[January —, 1973]

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 4, 1973

Re: No. 71-229 - United States v. Dionisio

Dear Potter:

Please join me.

Sincerely,

Byron

Mr. Justice Stewart

Copies to Conference

To: The Chief Justice
 Mr. Justice Douglas
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES: Marshall, J.

Nos. 71-229 AND 71-850

Circulated: JAN 18 1973

Recirculated: _____

United States, Petitioner,
 71-228 v.

Antonio Dionisio et al.

United States, Petitioner,
 71-850 v.

Richard J. Mara aka Rich-
 ard J. Marasovich.

On Writs of Certiorari to the
 United States Court of
 Appeals for the Seventh
 Circuit.

[January —, 1973]

MR. JUSTICE MARSHALL, dissenting.

I

The Court considers *United States v. Wade*, 388 U. S. 218, 221-223 (1967), and *Gilbert v. California*, 388 U. S. 263, 265-267 (1967), dispositive of respondent Dionisio's contention that compelled production of a voice exemplar would violate his Fifth Amendment privilege against compulsory self-incrimination. Respondent Mara also argued below that compelled production of the handwriting and printing exemplars sought from him would violate his Fifth Amendment privilege. I assume the Court would consider *Wade* and *Gilbert* to be dispositive of that claim as well.¹ The Court reads those cases as holding that voice and handwriting exemplars may be sought for the exclusive purpose of measuring "the physi-

¹ Before this Court respondent Mara has argued only that the Government may be seeking the handwriting exemplars to obtain not merely identification evidence, but incriminating "testimonial" evidence. I certainly agree with the Court that if respondent's contention proves correct, he will be entitled to assert his Fifth Amendment privilege.

WD

4, 13, 15, 16, 17, 18, 19

To: The Chief Justice
 Mr. Justice Douglas
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES Marshall, J.

Nos. 71-229 AND 71-850

Circulated: _____

Recirculated: JAN 19 1973

United States, Petitioner,
 71-228 v.

Antonio Dionisio.

United States, Petitioner,
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On Writs of Certiorari to the
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[January —, 1973]

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WD

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 11, 1973

Re: No. 71-229 - United States v. Dionisio

Dear Potter:

Please join me.

Sincerely,

H.A.B.

Mr. Justice Stewart

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

U.S. SUPREME COURT RECORDS

December 28, 1972

Re: No. 71-239 U.S. v. Dionisio

Dear Potter:

Please join me.

Sincerely,

L. F. P.

Mr. Justice Stewart

cc: The Conference

3 *W*

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 28, 1972

Re: No. 71-229 - United States v. Dionisio

Dear Potter:

Please join me.

Sincerely,
WHR

Mr. Justice Stewart

Copies to the Conference

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U.S. DEPARTMENT OF JUSTICE
LIBRARY OF CONGRESS