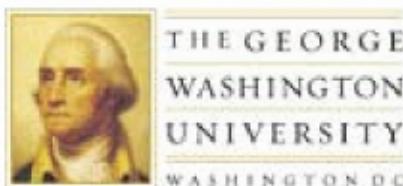


The Burger Court Opinion Writing Database

DeMarco v. United States

415 U.S. 449 (1974)

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



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

CHAMBERS OF
THE CHIEF JUSTICE

March 15, 1974

Re: 73-5684 - DeMarco v. U. S.

Dear Bill:

Please join me in your dissent.

Regards,

WJ

Mr. Justice Rehnquist

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

March 7, 1974

HOOVER INSTITUTION
ON WAR, REVOLUTION AND PEACE
Sanford, California 94305-6000



Dear Byron:

Please join me in your per curiam
in 73-5684, DeMarco v. United States.

WILLIAM O. Douglas

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

March 19, 1974

W

Dear Byron:

Please join me in your recirculation
of 3-15-74 in 73-5684, DeMarco v. United States.

W
William O. Douglas

Mr. Justice White

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20530

CHAMBERS OF
JUSTICE POTTER STEWART

March 6, 1974

Re: No. 73-5684, DeMarco v. United States

Dear Byron,

I agree with the per curiam you have circulated in this case.

Sincerely yours,

Mr. Justice White

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p. 2
WVN

2nd DRAFT

Place: United, J.

Enclosed:

SUPREME COURT OF THE UNITED STATES

JOSEPH DeMARCO v. UNITED STATES *Reconciled: 3-15-*

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

No. 73-5684. Decided March —, 1974

PER CURIAM.

At petitioner's trial, a Government witness who had been indicted with petitioner, testified that the Government had made no promises to him with respect to the disposition of his case. Petitioner was convicted and he appealed. Meanwhile, the witness had pleaded to a milder charge contained in a superseding indictment; and at his sentencing hearing, the United States Attorney made certain statements that petitioner interpreted as proving that promises had been made to the witness prior to his testimony and that the witness had testified falsely at petitioner's trial. Without presenting the matter to the District Court, petitioner pressed the question in the Court of Appeals. That court accepted the tendered issue, examined the transcript of the hearing at which the witness was sentenced, considered the Government's response in the Court of Appeals and, although the prosecutor's remarks were deemed ambiguous and the question thought to be a "close" one, concluded that no promises had been made to the witness prior to the witness' testimony at petitioner's trial.

Unquestionably, had there been a promise to the witness prior to his testimony, *Giglio v. United States*, 405 U. S. 150 (1972), and *Napue v. Illinois*, 360 U. S. 264 (1959), would require reversal of petitioner's conviction. It is also clear that there was a plea bargain between the witness and the Government at some point, the question being whether it was made after or before petitioner's

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 7, 1974

SN
Re: No. 73-5684 -- DeMarco v. United States

Dear Byron:

I agree with your Per Curiam.

Sincerely,

T.M.
T. M.

Mr. Justice White

cc: The Conference

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Sanford, California 94305-6000



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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 14, 1974

No. 73-5684 DeMARCO v. UNITED STATES

Dear Bill:

Please join me in your dissent.

Sincerely,

Lewis

Mr. Justice Rehnquist

CC: The Conference

LFP/gg

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SUPREME COURT OF THE UNITED STATES

JOSEPH DEMARCO v. UNITED STATES

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

No. 73-5684. Decided March —, 1974

3/7/74

MR. JUSTICE REHNQUIST, dissenting.

Petitioner was convicted in the District Court of trafficking in illegal narcotics in violation of the provisions of 21 U. S. C. § 174. The Court of Appeals summarily rejected petitioner's attacks on the sufficiency of the evidence to convict him, and dealt in detail only with the *Giglio* issue upon which this Court decides to vacate and remand for consideration by the District Court. As the Court notes, this was a "factual issue," *ante*, p. 2, and raises no question whatever of general importance in the law. Commonly I would expect this petition to be denied for those reasons.

entitled

The Solicitor General, however, has filed a response in this Court which, though "Memorandum in Opposition," incorporates in a footnote a backhanded invitation to the Court to follow the course which it has now taken. It is well established that this Court does not, or at least should not, respond in Pavlovian fashion to confessions of error by the Solicitor General. See, *e. g.*, *Young v. United States*, 315 U. S. 257 (1942); *Gibson v. United States*, 329 U. S. 338, 344 n. 9 (1946). I believe there could not be a plainer case than this one for the invocation of the doctrine of invited error. For whatever may be the proper allocation of factfinding responsibilities between the Court of Appeals and the District Court, petitioner deliberately chose to raise this largely factual issue for the first time in the Court of Appeals and to seek decision upon it there. That the Court of Appeals responded to the invitation is scarcely grounds for any claim of error here. I would deny certiorari.