The Burger Court Opinion Writing Database

Garner v. United States

424 U.S. 648 (1976)

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

February 27, 1976

Re: 74-100 - Garner v. U. S.

Dear Lewis:

I join your opinion dated January 19.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 28, 1976

RE: No. 74-100 Garner v. United States

Dear Lewis:

You may remember I passed at conference but I am now persuaded that we should Affirm. I have come to that conclusion after reading your opinion. There are, however, some comments that I would like to offer for your consideration.

1. At page 6, you opted for the analysis that the government has not "compelled" a witness under compulsion to testify who makes disclosures instead of claiming the privilege. Footnote 9 mentions various other analyses of earlier cases - "waiver", "voluntariness", etc. Do we really have to choose in this case from among these several theories? Would it not be sufficient to conclude the full paragraph with something like "he loses the protection of the privilege", rather than "the government has not 'compelled' him to incriminate himself." If it were, perhaps both footnotes 8 and 9 could be omitted. I may say also that Rogers v. United States, cited in both footnotes, has always struck me as very wrong and, of course, I was on the other side in Schneckloth cited in footnote 9.

2. I wonder if it is not time explicitly to say that the quote from Sullivan at the top of page 3 may now be regarded as a holding rather than mere dictum. Your treatment of Sullivan at page 14 particularly in footnote 15 implies as much.

3. Isn't there an inconsistency between the text at pages 16 and 17 and footnote 19 at page 17? The bottom three lines at page 16 indicate that in a prosecution under Sec. 7203 even a good faith belief in the validity of a timely claim of privilege would not be a defense unless the claim is in fact "valid." It would seem to me that the correct rule is that stated in your footnote 19 as recognized by the government, namely, "that a defendant could not properly be convicted for an erroneous claim of privilege asserted in good faith."

WR

I am also concerned with the intimation at page 16 that the Court has endorsed the proposition that a defendant generally is not entitled to the benefit of a preliminary judicial ruling on a claim of privilege. I agree that we might not see eye-to-eye to the answer of the question of the necessity for providing a preliminary ruling procedure where government seeks to impose strict liability for an erroneous assertion of the privilege. I don't think we need answer that question in this case and would think that it deserves no more than a footnote stating that because it isn't presented the question is left open.

I am overdoing the business of separate writing this Term and certainly would prefer joining your opinion in this case. I offer these suggestions with that hope because I agree with so much of what you've said.

Sincerely,

Bill

Mr. Justice Powell

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 23, 1976

RE: No. 74-100 Garner v. United States

Dear Thurgood:

Please join me.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

February 9, 1976

74-100 - Garner v. United States

Dear Lewis,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 28, 1976

Re: No. 74-100 - Garner v. United States

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Powell

Copies to Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnqu...
Mr. Justice Steven...

From: Mr. Justice Marsha...

Circulated: FEB 20 1...

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–100

Roy D. Garner, Petitioner, *v.* United States. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[February —, 1976]

MR. JUSTICE MARSHALL, concurring in the judgment.

I agree with the Court that petitioner, having made incriminating disclosures on his income tax returns rather than having claimed the privilege against self-incrimination, cannot thereafter assert the privilege to bar the introduction of his returns in a criminal prosecution. I disagree, however, with the Court's rationale, which is far broader than is either necessary or appropriate to dispose of this case.

This case ultimately turns on a simple question—whether the possibility of being prosecuted under 26 U. S. C. § 7203 for failure to make a return compels a taxpayer to make an incriminating disclosure rather than claim the privilege against self-incrimination on his return. In discussing this question, the Court notes that only a "willful" failure to make a return is punishable under § 7203, and that "a defendant could not properly be convicted for an erroneous claim of privilege asserted in good faith." *Ante*, at 17 n. 19. Since a good-faith erroneous assertion of the privilege does not expose a taxpayer to criminal liability, I would hold that the threat of prosecution does not compel incriminating disclosures in violation of the Fifth Amendment. The protection accorded a good-faith assertion of the privilege effectively preserves the taxpayer's freedom to choose be-

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

From: Mr. Justice Marshall

Circulated: _____

Recirculated: FEB 27

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-100

Roy D. Garner, Petitioner, v. United States. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[February —, 1976]

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

I agree with the Court that petitioner, having made incriminating disclosures on his income tax returns rather than having claimed the privilege against self-incrimination, cannot thereafter assert the privilege to bar the introduction of his returns in a criminal prosecution. I disagree, however, with the Court's rationale, which is far broader than is either necessary or appropriate to dispose of this case.

This case ultimately turns on a simple question—whether the possibility of being prosecuted under 26 U. S. C. § 7203 for failure to make a return compels a taxpayer to make an incriminating disclosure rather than claim the privilege against self-incrimination on his return. In discussing this question, the Court notes that only a "willful" failure to make a return is punishable under § 7203, and that "a defendant could not properly be convicted for an erroneous claim of privilege asserted in good faith." *Ante*, at 17 n. 19. Since a good-faith erroneous assertion of the privilege does not expose a taxpayer to criminal liability, I would hold that the threat of prosecution does not compel incriminating disclosures in violation of the Fifth Amendment. The protection accorded a good-faith assertion of the privilege

Supreme Court of the United States

Washington, D. C.

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

, 1976

Re: No. 74-100 [illegible] v. United States

Dear Potter:

Please join me.

Sincerely,

WOD

Mr. Justice Powell

cc: The Conference

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

From: Mr. Justice Powell

Circulated: JAN 19 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-100

Roy D. Garner, Petitioner, v. United States. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case involves a nontax criminal prosecution in which, over petitioner's Fifth Amendment objection, the Government was allowed to introduce his income tax returns to prove the offense against him. The question is whether the introduction of this evidence violated the privilege against self-incrimination when petitioner made the incriminating disclosures on his returns instead of then claiming the privilege.

I

Petitioner, Roy Garner, was indicted for a conspiracy involving the use of interstate transportation and communication facilities to "fix" sporting contests, to transmit bets and information assisting in the placing of bets, and to distribute the resultant illegal proceeds. 18 U. S. C §§ 371, 224, 1084, 1952.[1] The Government's case was that conspirators bet on horse races either having fixed them or while in possession of

[1] Garner was also indicted for aiding and abetting the violation of 18 U. S. C. § 1084, the substantive offense involving transmission of bets and betting information. The trial judge acquitted him on this count at the close of the Government's case.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 18, 1976

No. 74-100 Garner v. U.S.

Dear Bill:

I deliver herewith a copy of my circulation in Garner, on which I have indicated changes which I think will meet most of your suggestions.

If you would like for me to make these changes, I will incorporate them in a second draft, circulate it to the Conference, and see whether the changes are agreeable to our Brothers who have joined me.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

WB

Stylistic Changes Throughout.

1, 3, 6, 7, 8, 9, 13, 14, 15, 16, 17

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

From: Mr. Justice Powell

Circulated: _____

Recirculated MAR 17 1976

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–100

Roy D. Garner, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case involves a nontax criminal prosecution in which the Government introduced petitioner's income tax returns to prove the offense against him. The question is whether the introduction of this evidence, over petitioner's Fifth Amendment objection, violated the privilege against compulsory self-incrimination when petitioner made the incriminating disclosures on his returns instead of then claiming the privilege.

throughout

I

Petitioner, Roy Garner, was indicted for a conspiracy involving the use of interstate transportation and communication facilities to "fix" sporting contests, to transmit bets and information assisting in the placing of bets, and to distribute the resultant illegal proceeds. 18 U. S. C. §§ 371, 224, 1084, 1952.[1] The Government's case was that conspirators bet on horse races either having fixed them or while in possession of

[1] Garner was also indicted for aiding and abetting the violation of 18 U. S. C. § 1084, the substantive offense involving transmission of bets and betting information. The trial judge acquitted him on this count at the close of the Government's case.

√

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 28, 1976

Re: No. 74-100 - Garner v. United States

Dear Lewis:

Please join me.

Sincerely,

WER

Mr. Justice Powell

Copies to the Conference