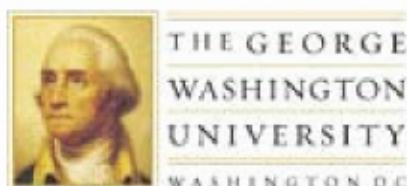


# The Burger Court Opinion Writing Database

*United States v. Washington*  
431 U.S. 181 (1977)

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



to: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice

Circulated: APR 22 1977

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 74-1106

United States, Petitioner, On Writ of Certiorari to the  
v. District of Columbia Court of  
Gregory V. Washington. Appeals.

[April —, 1977]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented in this case is whether testimony given by a grand jury witness suspected of wrongdoing may be used against him in a later prosecution for a substantive criminal offense when the witness was not informed that he is a potential defendant.<sup>1</sup>

(1)

The facts are not in dispute. Zimmerman and Woodard were driving respondent's van truck when a Washington, D. C., policeman stopped them for a traffic offense. Seeing a motorcycle in the rear of the van which he identified as stolen, the officer arrested both men and impounded respondent's vehicle. When respondent came to reclaim the van, he told police that Zimmerman and Woodard were friends who were driving the van with his permission.

He explained the presence of the stolen motorcycle by saying that while driving the van himself he had stopped to assist an unknown motorcyclist whose machine had broken down.

<sup>1</sup> With *United States v. Mandujano*, 425 U. S. 564 (1976), and *United States v. Wong*, — U. S. — (1977), we have settled that grand jury witnesses, including those already targeted for indictment, may be convicted of perjury on the basis of their false grand jury testimony even though they were not first advised of their Fifth Amendment privilege against compelled self-incrimination.

STYLISTIC CHANGES ONLY

and 5, 7-8, 9

To: Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice O'Connor  
 Mr. Justice Stevens

From: The Chief Justice

Circulated: \_\_\_\_\_

2nd DRAFT

Recirculated: MAY 17 1977

## SUPREME COURT OF THE UNITED STATES

No. 74-1106

United States, Petitioner, | On Writ of Certiorari to the  
 v. | District of Columbia Court of  
 Gregory V. Washington. | Appeals.

[April —, 1977]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented in this case is whether testimony given by a grand jury witness suspected of wrongdoing may be used against him in a later prosecution for a substantive criminal offense when the witness was not informed in advance of his testimony that he is a potential defendant in danger of indictment.<sup>1</sup>

(1)

The facts are not in dispute. Zimmerman and Woodard were driving respondent's van truck when a Washington, D. C., policeman stopped them for a traffic offense. Seeing a motorcycle in the rear of the van which he identified as stolen, the officer arrested both men and impounded respondent's vehicle. When respondent came to reclaim the van, he told police that Zimmerman and Woodard were friends who were driving the van with his permission.

He explained the presence of the stolen motorcycle by saying that while driving the van himself he had stopped to assist

<sup>1</sup> With *United States v. Mandujano*, 425 U. S. 564 (1976), and *United States v. Wong*, — U. S. — (1977), we have settled that grand jury witnesses, including those already targeted for indictment, may be convicted of perjury on the basis of their false grand jury testimony even though they were not first advised of their Fifth Amendment privilege against compelled self-incrimination.

To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Black  
Mr. Justice Harlan

THERMOPHILIC

**STYLING CHANGES ONLY**

## Classification

### 3rd DRAFT

Recirculated: MAY 19 1977

**SUPREME COURT OF THE UNITED STATES**

No. 74-1106

United States, Petitioner, | On Writ of Certiorari to the  
v. | District of Columbia Court of  
Gregory V. Washington. | Appeals.

[April —, 1977]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented in this case is whether testimony given by a grand jury witness suspected of wrongdoing may be used against him in a later prosecution for a substantive criminal offense when the witness was not informed in advance of his testimony that he is a potential defendant in danger of indictment.<sup>1</sup>

(1)

The facts are not in dispute. Zimmerman and Woodard were driving respondent's van truck when a Washington, D. C., policeman stopped them for a traffic offense. Seeing a motorcycle in the rear of the van which he identified as stolen, the officer arrested both men and impounded respondent's vehicle. When respondent came to reclaim the van, he told police that Zimmerman and Woodard were friends who were driving the van with his permission.

He explained the presence of the stolen motorcycle by saying that while driving the van himself he had stopped to assist

<sup>1</sup> With *United States v. Mandujano*, 425 U. S. 564 (1976), and *United States v. Wong*, — U. S. — (1977), we have settled that grand jury witnesses, including those already targeted for indictment, may be convicted of perjury on the basis of their false grand jury testimony even though they were not first advised of their Fifth Amendment privilege against compelled self-incrimination.

74-1106  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

May 24, 1977

MEMORANDUM TO THE CONFERENCE:

RE: 75-1013 - Broncucia v. Colorado heretofore held  
for decision in 74-1106 - U. S. v. Washington  
(I WILL VOTE TO DENY)  
*shall*

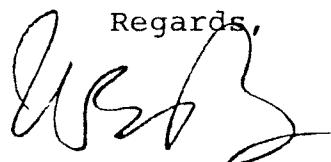
The only case held for Washington is Broncucia v. Colorado, 75-1013. In Broncucia, one Griswold was to be extradited to Nevada. At an extradition hearing, several of petitioner's co-conspirators perjured themselves to support Griswold's alibi claim. Griswold was later extradited, and the state began a grand jury investigation to determine whether perjury had been committed at the extradition hearing.

Petitioner was called before the grand jury and was given some warnings which approximated Miranda, though according to the trial court they were not "ideally consistent with the four corners of Miranda." Petitioner was then convicted of perjury before the grand jury and conspiracy to commit perjury at the extradition hearing.

The Colorado Supreme Court reversed the perjury conviction on state law grounds, but affirmed the conspiracy conviction over petitioner's contention that, though he was by then a putative defendant, he was not given his Miranda warnings when called before the grand jury.

Even assuming that petitioner's grand jury testimony was admitted against him on the conspiracy charge, as well as on the perjury charge, this case does not clearly present the issue which has survived Mandujano, Washington, and Wong: i.e. whether it is necessary to give any Fifth Amendment warnings whatever to grand jury witnesses who may also be putative defendants. Some warnings were given. Accordingly, I will vote to deny the petition.

Regards,



✓ ✓ ✓

5/4/77

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1106

United States, Petitioner, } On Writ of Certiorari to the  
v. } District of Columbia Court of  
Gregory V. Washington. } Appeals.

[May —, 1977]

MR. JUSTICE BRENNAN, dissenting.

The general rule that a witness must affirmatively claim the privilege against compulsory self-incrimination must in my view admit of an exception in the case of a grand jury witness whom the prosecutor interrogates with the express purpose of getting evidence upon which to base a criminal charge against him. In such circumstances, even warnings before interrogation of his right to silence do not suffice. The privilege is emptied of substance unless the witness is further advised by the prosecutor that he is a potential defendant. Only if the witness then nevertheless intentionally and intelligently waives his right to be free from compulsory self-incrimination and submits to further interrogation should use of his grand jury testimony against him be sanctioned. As I stated in dissent in *United States v. Mandujano*, 425 U. S., at 598-600:

"I would hold that, in the absence of an intentional and intelligent waiver by the individual of his known right to be free from compulsory self-incrimination, the Government may not call before a grand jury one whom it has probable cause—as measured by an objective standard—to suspect of committing a crime, and by use of judicial compulsion compel him to testify with regard to that crime. In the absence of such a waiver, the Fifth Amendment requires that any testimony obtained in this fashion be unavailable to the Government for use at trial. Such a waiver could readily be demonstrated by proof

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

RECORDED IN THE LIBRARY OF CONGRESS

SEARCHED INDEXED SERIALIZED FILED

2nd DRAFT

5/19/77

**SUPREME COURT OF THE UNITED STATES**

No. 74-1106

United States, Petitioner, | On Writ of Certiorari to the  
 v. | District of Columbia Court of  
 Gregory V. Washington. | Appeals.

[May —, 1977]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

The general rule that a witness must affirmatively claim the privilege against compulsory self-incrimination must in my view admit of an exception in the case of a grand jury witness whom the prosecutor interrogates with the express purpose of getting evidence upon which to base a criminal charge against him. In such circumstances, even warnings before interrogation of his right to silence do not suffice. The privilege is emptied of substance unless the witness is further advised by the prosecutor that he is a potential defendant. Only if the witness then nevertheless intentionally and intelligently waives his right to be free from compulsory self-incrimination and submits to further interrogation should use of his grand jury testimony against him be sanctioned. As I stated in dissent in *United States v. Mandujano*, 425 U. S., at 598-600:

"I would hold that, in the absence of an intentional and intelligent waiver by the individual of his known right to be free from compulsory self-incrimination, the Government may not call before a grand jury one whom it has probable cause—as measured by an objective standard—to suspect of committing a crime, and by use of judicial compulsion compel him to testify with regard to that crime. In the absence of such a waiver, the Fifth Amendment requires that any testimony obtained in this fashion be unavailable to the Government for use at trial.

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

CHAMBERS OF  
JUSTICE POTTER STEWART

April 25, 1977

Re: No. 74-1106, United States v. Washington

Dear Chief,

I am glad to join your opinion for the Court in this case. My only request is that you give hospitable consideration to the possibility of inserting the word "compulsory" before "self-incrimination" in the seventh line of footnote 6 on page 8.

Sincerely yours,

- P.S.  
V

The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

April 22, 1977

Re: No. 74-1106 - United States v. Washington

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 18, 1977

Re: No. 74-1106, U.S. v. Washington

Dear Bill:

Please join me in your dissent.

Sincerely,

*JM*  
T. M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 26, 1977

Re: No. 74-1106 - United States v. Washington

Dear Chief:

Please join me.

Sincerely,

*H. A. B.*

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

April 30, 1977

No. 74-1106 United States v. Washington

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

April 27, 1977

Re: No. 74-1106 - United States v. Washington

Dear Chief:

Please join me.

Sincerely,

### The Chief Justice

Copies to the Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 18, 1977

Re: 74-1106 - United States v. Washington

Dear Chief:

Please join me.

Respectfully,



The Chief Justice

Copies to the Conference