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SUPREME COURT, U. S.

10/21/69

Supreme Court of the United States

OCTOBER TERM, 1969

Office-Supreme Court, U.S.
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 JOHN F. DAVIS, CLERK

In the Matter of:

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 THE UNITED STATES, :
 :
 Appellant :
 :
 VS. :
 :
 JAMES D. KNOX, :
 :
 Appellee :
 :
 ----- X

Docket No. 17

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Place Washington, D. C.

Date October 14, 1969

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C O N T E N T S

ORAL ARGUMENT OF:

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Mervyn Hamburg, Esquire,
on behalf of the Appellant

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J. Edwin Smith, Esquire
on behalf of Appellee

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REBUTTAL ARGUMENT OF:

Mervyn Hamburg, Esquire
on behalf of Appellant

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IN THE SUPREME COURT OF THE UNITED STATES

THE UNITED STATES,)

Appellant)

vs)

JAMES D. KNOX,)

Appellee)

No. 17

Washington, D. C.
October 14, 1969

The above-entitled matter came on for argument at
11:40 o'clock p.m.

BEFORE:

- WARREN E. BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice

APPEARANCES:

MERVYN HAMBURG, ESQ.
Criminal Division
Department of Justice
Washington, D. C.
Counsel for Appellant

J. EDWIN SMITH, ESQ.
Houston, Texas
Counsel for Appellee

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Hamburg, Number 17,
the United States against Knox; are you ready?

ORAL ARGUMENT BY MERVYN HAMBURG, ESQ.

ON BEHALF OF APPELLANT

MR. HAMBURG: Mr. Chief Justice, may it please the
Court, the issue involved in this case is related to the pre-
ceding one in that it involves a prosecution under 18 U.S.C.
1001, for making false statements and purported compliance with
other statutes.

In this case certain sections of the Internal Revenue
Code relating to wage-earned taxes. The precise issue here is
whether an individual may properly assert the privilege against
self-incrimination as a complete defense to a charge of making
false statement on wage income tax returns.

The District Court in the Western District of Texas
held that the privilege was such a defense and dismissed false
statement charges against the Appellee, James Knox. The case
is here on the Government's appeal of that dismissal.

The indictment was filed before this Court decided
the Marchetti and Grosso cases. This indictment charged the
Appellee with four counts of failing to file wage income tax
returns; that is Form 11-C, a copy of which we have included
in our appendix; and with failure to pay the special occupa-
tional tax covering periods prior to October 15, 1965.

1 The indictment also contained two counts: counts
2 five and six, which charged that the Appellee made false state-
3 ments on the returns which he did file on October 14, and on
4 October 15, 1965; the statements being that he declared under
5 penalties of perjury that the returns were, to the best of his
6 knowledge, true, correct and complete, whereas in truth, they
7 were not and that the number of employees he had claimed had
8 been understated and misrepresented.

9 Now, prior to trial the Court decided Marchetti
10 versus the United States and Grosso versus the United States
11 and in those cases this Court recognized that an individual
12 charged with failing to file wage-earned tax forms, which
13 invariably contained information incriminating him under other
14 laws, could properly assert that privilege -- the privilege
15 against self-incrimination as a complete defense. Thereafter,
16 moved to dismiss all of the charges against him, including
17 Counts 5 and 6, the false statement counts, alleging that
18 such a disposition was required as a result of the holding of
19 Marchetti and Grosso.

20 The Government responded that it intended to pursue
21 only Counts 5 and 6. And as to those counts, it argued, in
22 effect, that their validity had not been affected by Marchetti
23 and Grosso.

24 The District Court disagreed with the Government's
25 position and in a brief memorandum dated July 24, 1968, the

1 Court -- that Court held that the constitutional privilege
2 against self-incrimination prevents prosecution for failure to
3 answer the form in any respect. Judge Roberts relied upon
4 Grosso in particular, but charges conspiracy to evade payment
5 of the excise tax on wage-earnings, was dismissed, along with
6 the substantive charges of failing to pay the excise tax and
7 failing to pay the special occupational tax.

8 In the Government's view, Judge Roberts misinter-
9 preted and misapplied the Court's decision, particularly
10 Grosso. Thus, I believe it to be appropriate to begin with a
11 discussion of the difference between Grosso and this situation.

12 In Grosso the Court held that a conspiracy charge
13 had to fall with other counts, since it was bottomed(?) solely
14 on allegations of evasion of the excise and occupational taxes.
15 In the Court's words, the conspiracy raised: "questions
16 identical with those presented by the substantive counsel."

17 In contrast to Grosso, the Falst Statement counts
18 are not identical; they're not even similar to the charge of
19 failure to file wage earned income tax returns or pay the tax.
20 Now, we no longer contest the privilege against self-incrimina-
21 tion as an appropriate defense for one charged with failure to
22 file; we don't believe that that privilege protects an independ-
23 ent act of making a false statement on the form which the
24 Appellee did, in fact, file.

25 In other words, the problem of incrimination arises

1 at the threshold when one decides whether or not to file, and
2 if he files, perhaps he might face prosecution under some
3 state gambling laws or if he fails to file, prosecution under
4 a Federal Statute.

5 The Appellee here resolved this question of whether
6 to stands on his privilege or not. He didn't avail himself of
7 what we believe to be the customary means by which statutes
8 are challenged by noncompliance; instead, he purported to
9 comply, and in this purported compliance, he lied. He is now
10 charged with a substantive offense of making false statements
11 in violation of a statute having no connection with the Wage-
12 earned tax laws, except insofar as the tax laws form the frame-
13 work within which the Appellee committed violations of the
14 fully distinct criminal statute.

15 Thus, in our view, the Fifth Amendment privilege
16 should not have controlled the outcome of the case in the
17 District Court. Our stand is not novel, by any means; a
18 number of cases cited in the previous case argued here, begin-
19 ning with Kapp and Kay, also cited in our brief, have been
20 controlled by rationale similar to the one we urge here.

21 Q (Inaudible)

22 A If it did, Your Honor, it certainly didn't
23 mention it in its brief in any way in its opinion.

24 Q Do you know whether it was cited in the lower
25 court or not?

1 A As a matter of fact, it was not cited to the
2 lower court.

3 Q It had been decided, though, hadn't it?

4 A I believe so; yes. But I don't believe the
5 Government in its reply in the District Court cited any of the
6 cases here: Kapp or Kay or Dennis.

7 Q So, instead of being considered in the
8 District Court in the light of Dennis?

9 A Except insofar as Dennis has been decided, and
10 I assumed that the Court was aware of the holding of Dennis.
11 Moreover, certainly the same principles of Dennis had been
12 used and applied in Kapp and Kay, insofar as this situation is
13 concerned. These cases holding that the claim of the uncon-
14 stitutionality of the underlying statutes doesn't excuse a
15 calculated, deliberate course of perjury or fraud or deceit.

16 In this case, by the way, of course, we are not
17 dealing with a claim that the underlying statute is uncon-
18 stitutional; we're only dealing with a privilege against self-
19 incrimination. He could properly assert this privilege by
20 the lawful process -- time-test process of raising it when he
21 failed to comply and that defense is all that Marchetti and
22 Grosso established. But if an underlying statute can't be
23 attached on constitutional grounds, certainly an individual
24 shouldn't be heard to raise a constitutional privilege; a
25 situation where he purported to comply with the law.

1 Q Am I right in thinking that -- speaking from
2 recollection now -- am I right in thinking that the perjurious
3 statements that you complain of here; charge him with, concern
4 not merely a failure to fill out a blank -- a space in the
5 blank which called for the number of employees, but he offended
6 in the filling out of that blank with the wrong numbers?

7 A Yes, Your Honor.

8 Q No doubt about that?

9 A No doubt about it.

10 Q He failed to fill out the form in one case and
11 gave a wrong number in another, didn't he?

12 A Yes. We have, in fact, photocopied the
13 statements and put them in our appendix.

14 Q Now, the indictment itself is more than a
15 little ambiguous in that regard, isn't it?

16 A It might be quite awkward, Your Honor, but it
17 certainly is sufficient indicate --

18 Q This is an indictment that I remember when
19 one time this case we granted certiorari. The indictment
20 indicates that what he did was leave certain things blank. And
21 now you are trying to cure that ambiguity with a photostat of
22 what he apparently actually did, i.e., to write "none," the
23 first time and on the amended one to write the names and
24 addresses of two or three people and say there were more people
25 there.

1 A Yes, sir.

2 Q But was that exhibit appended to the original
3 indictment?

4 A I don't believe so.

5 Q How did it get here in the record?

6 A It was part of the prosecution file.

7 Q But is it in the record of this case anywhere?

8 A I really couldn't say whether it was, in
9 fact, in the record. I don't know that the Court below con-
10 sidered it.

11 Q The Court did not at all address itself to
12 this question, of whether or not to consider it; I understand
13 that. That is the question that, speaking for myself alone,
14 interested me, because the indictment seemed to indicate that
15 you were charging somebody with a false statement who hadn't
16 made any statement at all.

17 A Well, if the indictment is rather awkward, we
18 will be glad to furnish particulars on the appropriate
19 occasion to explain anything -- any situation of inartful draw-
20 ing, but we certainly believe that the indictment states an
21 offense that apprises the defendant with what he's charged
22 against and will protect him from double jeopardy problems.

23 Q So far as you're concerned, it could be that
24 this has just been put in the record?

25 A Yes, Mr. Justice.

1 Q Does that help you at all?

2 A It's just there for explanation. We're con-
3 cerned only at the indictment stage as to what the man has
4 been charged with.

5 Q Well, this isn't a part of what he's been
6 charged with.

7 A Yes. He's charged with making a false state-
8 ment and at a trial we are going to show what the false state-
9 ment is all about.

10 Q I have great difficulty with that. Both an
11 indictment with an exhibit nobody knew about until just now.

12 A Oh, I'm not sure that no one knew about it;
13 all I can tell you is that it isn't discussed by the District
14 Judge.

15 Q Because it wasn't before him; he never saw it.

16 A Well, he saw the indictment, yes.

17 Q But he never saw the exhibits that you have
18 back here.

19 A The chances are that he didn't; I really don't
20 know whether he did or did not.

21 Q The District Court didn't dismiss this case on
22 the grounds of failure to fill out a blank wasn't covered by
23 1001.

24 A No. He reached the constitutional issues.

25 Q He dismissed the case because the underlying

1 statute was unconstitutional, and that's the issue that's
2 here.

3 A That's correct, Mr. Justice.

4 Q And so we don't need this photostatic copy of
5 the tax return at all to decide this case?

6 A No; I don't think you do. WE just put it
7 there.

8 Q It is totally irrelevant.

9 A Irrelevant and there only for exemplary
10 purposes.

11 In view of the fact that we believe that the
12 principles here are similar to the principles just discussed,
13 for the reasons stated in our brief and reply brief on any
14 other matters, we submit that the District Court's judgment
15 should be reversed and Counts 5 and 6 ordered reinstated.

16 Q (Inaudible) here would be a
17 defensive matter on the merits in the District Court.

18 A That's correct, Mr. Justice.

19 Q And if the defendant asked for it he could get
20 it?

21 A Yes, sir.

22 MR. CHIEF JUSTICE BURGER: Mr. Smith?

23 ORAL ARGUMENT BY J. EDWIN SMITH, ESQ.,

24 ON BEHALF OF THE APPELLEES

25 MR. SMITH: Mr. Chief Justice, and may it please the

1 Court, to touch just briefly in the beginning on the point that
2 was discussed as to the contents of the indictment and to make
3 the specific that we submit that the defense is not charged
4 when you charge only that you failed to make or
5 something on one of the Government's forms; but it is not a
6 false statement just by omitting this particular question. And
7 a reading of the indictment will disclose that's all that the
8 Government charged. They didn't charge. They didn't charge that
9 he put "none," or he put "three" when he should have put
10 "five;" they just say that he didn't answer in the sense that
11 he didn't give their names and addresses, staff numbers and
12 so forth.

13 Q The District Court didn't decide that case on
14 that ground, though; did they?

15 A That one is affirmative -- ruling opinion;
16 no, sir. The point was raised in the motion to challenge the
17 indictment that the indictment did not state an offense, but
18 we urge in our brief here that two state authorities -- not any
19 Federal, but the only ones we could find-- that the charge is not
20 a false statement. And from that point we submit the indictment
21 itself. If you look at it, it does not cite any offense.

22 Q So, isn't our examination here on direct
23 appeal limited to decide the issue that the District Judge de-
24 cided. It's true, that if he had decided that the indictment
25 should have been dismissed because of construction of the

1 statute, maybe that issue could have come here too, but that
2 isn't what he decided.

3 A But that's why I would believe that any time
4 a criminal defendant can challenge the sufficiency of the
5 indictment. I may be wrong on my particular phase of the
6 rules, but I think that could be raised most any time.

7 Q No, but this was dismissed. The question of
8 our jurisdiction under the direct --

9 A That may be. I'll be frank with you. I
10 couldn't answer the question as to your jurisdiction.

11 Q I would think that's true, though.

12 A And if I may intone to the question of the
13 constitutionality problem involved here. And I think that the
14 Government in its position here has wholly failed to recognize
15 that if the statement made assuming he made a false statement
16 was made, it was made under the compulsion of criminal sanctions
17 if he didn't make a statement. And this Court has held that
18 the -- in Marchetti and Grosso that its tax statutes are uncon-
19 stitutional; that to require they file these stamp tax returns,
20 informational returns, is a violation of the Fifth Amendment
21 immunity against self incrimination.

22 Now, this poses a very fundamental point as to
23 whether the United States Government can, by use of an
24 constitutional statute which deprives a man of his Fifth
25 Amendment immunity when he -- in compelling him to do that under

1 the threat of criminal prosecution, then turn around and prose-
2 cute him under 1001 if he makes a false statement in that
3 coerced information.

4 I agree with Your Honor on that point, Mr. Justice,
5 and I have urged explicitly in my brief from the very beginning
6 that I think the Government in this situation comes before this
7 Court and this prosecution, with unclean hands.

8 Q Well, Mr. Smith, as a matter of coercion, he
9 had another problem. He could have gotten out of the gambling
10 business, couldn't he?

11 A * He could have done that; yes, sir, but the
12 constitution says even if you have committed a crime, a most
13 vile crime, you can't be compelled to give information intrin-
14 inating yourself.

15 Q But if he had stopped gambling, the Government
16 wouldn't have prosecuted, would they?

17 A You mean had he stopped gambling since he
18 filed that return?

19 Q Around about the same time.

20 A I doubt it. I doubt it. I don't know whether
21 he is still gambling or not. I don't know about that, Mr.
22 Justice.

23 Q What about this point about the Government's
24 position that the photostats here would clear up the indictment
25 and that if he goes back to trial they may be available to you

1 for whatever use and does that help the point about the indict-
2 ment not being quite crystal clear?

3 A I don't think that exhibit helps the indictment
4 because I think it you have got to look at the indictment on
5 what it says. And this is something that --

6 Q What the indictment says in the light of that.

7 A I would say this: that the indictment when it
8 says that he is guilty of 1001 because he failed to answer a
9 question doesn't charge a false statement. I don't think you
10 can be guilty of a false statement by not making an answer.

11 Q Has anybody brought that question up, sir?

12 A I raise it in my brief.

13 Q I know, but you can't raise it first in a
14 brief. It must be raised in accordance with the established
15 rules. You have a case here decided on a constitutional point,
16 not on the insufficiency of the indictment.

17 A As I believe Mr. Justice mentioned a while ago
18 and was making the point about the jurisdiction of the Court,
19 I was trying to answer this.

20 Q Well, shouldn't we be focusing on the constitu-
21 tional issue only here?

22 A This point of it not stating the offense was
23 raised in challenges to the indictment at the trial level.

24 But under the constitutional question I
25 emphasize here that there was a coercion statute here of the

1 Government, of this man being required to file this return or
2 if he didn't file it, be faced with prosecution, \$10,000 fine
3 and prison.

4 Here is the Government saying: you do this; you file
5 this thing; you give us the incriminating information or we'll
6 prosecute you for not giving it under 7203 and punish you
7 with a \$10,000 fine.

8 But if you come around and give us some incriminating
9 evidence, however, and it's quite true, we will then prosecute
10 you under 1001.

11 Q But, when did he file? When did he file?

12 A Oh, this was back in '64, I think.

13 Q Well, when the Government was putting that
14 kind of coercion on him, why, the obligation to file had been
15 upheld in this Court.

16 A This is correct.

17 Q So, the Government, did they have such dirty
18 hands at that time?

19 A Well, Mr. Justice I think that the situation
20 there was that the issue of compelling to give information
21 -- incriminating information was being held in the situation
22 of Kahriger and Lewis that this was one of the compulsive
23 points that his having to file -- it was the rule that bore
24 on his having to file or be prosecuted under 7203 for not
25 filing.

1 Q Marchetti and Grosso, do you think they are
2 retroactive?

3 A I don't think this is a question of retro-
4 activity, but in this particular case Knox has raised the issue
5 at the very moment at trial level that challenged the indict-
6 ment, and this Court has had in Grosso and in Covington, I
7 believe, in Leary, Marchetti, all of those, that this challenge
8 raised by motion to challenge the indictment is unquestionably
9 timely. I believe that's expressed time after time by the
10 authors of those opinions.

11 And as to coercion, I think that this appeal here
12 should be written, if I may so suggest, in the lines of Garrity
13 and the Spivak decisions.

14 Q Would you clarify this for me: what forced him
15 to file this return?

16 A I would suggest this, if it please the Court,
17 here is a man that has a situation if he doesn't file this
18 return he is threatened with criminal prosecution under
19 Article 26, Section 7203.

20 Q Well, isn't that coupled with something else
21 if he doesn't file it and does something else affirmatively?

22 A His willful failure to file is the offense.

23 Q Well, do filling station operators or grocers
24 have to file this kind of a return or this kind of a statement?

25 A This is applicable to^a specific, special class of

1 people here. The same group or class that was mentioned.

2 Q How many people are included in the class?

3 A Using the slang: bookies, gamblers under these
4 particular statutes.

5 Q So, he isn't forced. He's only forced to file
6 the affidavit if he wants to continue in unlawful activity. Is
7 that correct?

8 A I believe this Court rejected that concept in
9 overruling Kahriger and Lewis when it came with Marchetti and
10 Grosso.

11 Q I don't quite read those cases that way. You
12 go right ahead with your argument.

13 A But the point I am trying to make is this:
14 that under the rulings of Garrity and Spivak, he had the choice
15 here either to file or to be prosecuted and the Garrity case
16 I believe this Court held that where the situation was such that
17 you had the choice between losing your job or giving the in-
18 criminating information that that was coercion.

19 Q Oh, but he really had the third alternative
20 that you say was rejected by this Court but with which I don't
21 agree -- he had the alternative of going out of the illegal
22 gambling business, didn't he?

23 A Yes, he had the third alternative of going --
24 not to gamble, you know. And I can understand that in filing
25 this return, but at the same time in Garrity they held the

1 alternative of not continuing to be a policeman. In Spivak
2 he had the opportunity of not being to be a lawyer.

3 Q But those are honest activities; isn't that
4 a fact?

5 A But in some states gambling is a legal
6 activity, but in particular in the State of Texas, it was not.

7 Q My memory may be wrong, but as I recall there
8 was a vigorous dissent in Kahriger and the other case --

9 A I think, Mr. Justice, in Kahriger, you your-
10 self said that the Bill of Rights applied; that the gambler has
11 a right himself also to rely on the Bill of Rights. That's
12 almost what you said verbatim, in your dissent in Kahriger, I
13 believe, or maybe it was Mr. Justice -- but one of you all said
14 that.

15 Q That was in dissent, did you say?

16 A In dissent.

17 Q I didn't dissent.

18 A As to the coercion phase of these particular
19 statutes, if I recall Mr. Justice, in your concurring opinion in
20 Grosso and Marchetti, I believe you comment that the very pur-
21 pose of these statutes was to coerce evidence -- incriminating
22 evidence from these people who filed these statements.

23 Q We aren't having a reargument of Grosso and
24 Marchetti here, I wouldn't think. We're having a review of
25 something else.

1 A The point we're trying to make here is the
2 fact that the Grosso and Marchetti hold that the information
3 that he gave here was required by an unconstitutional statute.

4 Q What's --

5 A Assuming that the statute was unconstitutional
6 to file these returns.

7 Q And you say, therefore he should not be con-
8 victed under 1001?

9 A That's our argument; yes, sir. If the Govern-
10 ment compels him to do something by this unconstitutional
11 requirement --

12 Q Could you seriously suggest that we could hold
13 with you and not overrule Dennis?

14 A Yes.

15 Q How is that?

16 A That in Dennis, Kay and Kapp all of those were
17 where the individual voluntarily went there and filed applica-
18 tions for the specific purpose of obtaining benefits, like one
19 of them to get a home loan, I think it was, and another one to
20 make a false statement about his --

21 Q Are you suggesting -- you don't think it is
22 very coercive to say that unless you file you've got to lose
23 your job.

24 A The coercion here was that unless you file
25 you will be prosecuted under 26,7203, criminally prosecuted.

1 Q But the courts also held that a threat to
2 lose your job creates coercion, too. The labor union official
3 had to either file or he lost his job, also.

4 Q If I was coerced into amending it?

5 A This, Mr. Justice, I do not know because I
6 must submit that I did not have knowledge of these particular
7 forms the Government exhibits here in the appendix until --

8 Q Certainly not. But he was coerced into either
9 filing the amendment -- I mean, filing the return answering
10 the questions or stop gambling, as I originally asked you,
11 right? Do you still say --

12 A The thing is that in doing one or the other
13 he had to.

14 Q Well, let me make it a little more particular.
15 You say that he was coerced into committing perjury; is that
16 your position?

17 A I would say he was coerced into filing the
18 return. There is the element of coercion in requiring him to
19 file the informational return.

20 Q But where was he coerced to commit the crime
21 of perjury?

22 A He wasn't coerced to make the false statement,
23 assuming it was a false statement which --

24 Q Well, tell me, after he assumed the false
25 statement.

1 A Assuming it was a false statement.

2 Q Well, how is he coerced to do that?

3 A I would not say that he was coerced to -- I
4 do not make that statement.

5 Q Don't you have to in order to prevail here?

6 A No, sir, Mr. Justice.

7 Q Why not?

8 A I submit this, that when the Government re=
9 quires an act in violation of its own fundamental role, re-
10 quires you to file a return that violates the Government's own
11 constitution then then --

12 Q Then you are free to commit any you want
13 to, including perjury.

14 Q May I answer that by saying on your assumption
15 that you are free to commit any crime you want to, if you call
16 it a crime to take advantage of the Bill of Rights, and not
17 incriminate himself. not incriminate himself.

18 And if he either had to file this statement and
19 admit that he was-guilty or commit perjury, that's what the
20 Government said: if you are doing this you have got to report
21 it. And that, so far as I am concerned, is pretty good
22 coercion. And it may be that the Government has a right to
23 coerce him into doing it, but I don't see how it can be argued
24 they didn't coerce him into doing it.

25 A And then you see the coercion or the

1 informational return must be aligned along with 1091 to give
2 the information as to his incriminating activities. And I
3 might make this -- sort of emphasize here and it may be too
4 much, but I think it's mentioned in my brief: assuming that we
5 were coercing the man to make his statement and as this Court
6 did in Garrity, relate this to the physical torture for illus-
7 tration, and stretch him on the rack or you can put him down
8 with a thumb screw or something of that kind until he makes a
9 statement. You coerce it by physical torture. Then, in
10 trying to get relief from the physical torture, he makes some
11 false statements in the answer he gives to the police.

12 Now, in that analogy, I would ask the Government
13 would they prosecute him under those circumstances for the --
14 and I think this Court has pointed out in a number of opinions;
15 Garrity I believe, is the latest, that there is no objection to
16 physical torture but the refinement at times it affects. And
17 that when the individual citizen is faced with the issue of
18 whether or not he files one of these informational returns,
19 or as to run the gamble of being prosecuted by the United States
20 District Attorney for not filing it, and prior to Grosso and
21 Marchetti they were filed every day; every week, by the hundreds
22 over the months, sir. I think that gets into the question of
23 coercion.

24 And there is just as much coercion as there was in
25 Garrity; just as much coercion as there was in Spivak in this

1 situation.

2 Q Of course the Government's capacity, or at
3 least the Court hasn't said yet that the Government is not
4 entitled to collect the tax?

5 A No, I am not arguing that here, Mr. Justice.

6 Q Well, but he filed and said he had three
7 employees instead of five.

8 A But this Court held --

9 Q I mean, it may be that Government at least
10 claims that he had five employees instead of three. Now, I
11 suppose the Government would want to collect the tax from him,
12 might say, well, I guess he only owes for three --

13 A Let me make this point -- it may be related or
14 an answer to the issue you are raising. Assuming this case
15 came on for trial on the merits and these informational returns
16 that they brought up here and exhibited for the first time on
17 appeal, were offered in evidence and he raises the objections
18 here that they were not admissible but they were extracted from
19 me, or I filed them in violation of the Fifth Amendment.

20 And under the ruling that this Court has handed down
21 in Garrity, I submit would be legitimately authorized, in
22 excluding them from evidence. And, under those circumstances,
23 even those -- sir?

24 Q Even if we reverse the District Court here,
25 you haven't lost that defense.

1 A I was trying to present the technicality of
2 situation where, I believe it was pointed out in Grosso and I
3 believe in Covington that when they -- and maybe in Garrity
4 also, that when the evidence would not be available that you
5 could take it and deal with it on appeal here at this Court to
6 conclude it under the -- the substantial justice of the case.

7 And under that, of course, this is not a situation
8 at all that's involved in Bryson, the case that was argued just
9 before. This is not a matter of retroactivity. We have
10 raised this issue from the inception and we submit that it is
11 right for decision and that the --

12 This sort of also gets back in a way to this Court's
13 older opinion in Brown versus the United States, which is
14 reemphasized in Garrity and Spivak, of the situation where,
15 when the Government by unconstitutional means, causes a man to
16 do something or forces him to do something, they require him to
17 do this under criminal circumstances.

18 I think that distinguishes these from Dennis and Kay
19 and Kapp and that line of case, you see. Those cases did not
20 have the criminal sanction in saying that in the very inception
21 you have got to come do this.

22 And I think this Court could well affirm(?) and in
23 no way overrule Kapp, Dennis or -- because this man has standing
24 here in the sense that he has brought this issue from the in-
25 ception of the trial and all of the decisions this Court has

1 held that the issue is timely when raised as a challenge to the
2 indictment.

3 I might, just in concluding make one sort of
4 ancillary point: that this Court has repeatedly held that the
5 False Statement Statutes were enacted for the purpose of pro-
6 tecting the Government -- the authorized functions of Government.
7 I believe the way it is expressed -- I submit that that the ex-
8 traction of incriminating evidence from citizens is not an
9 authorized function of Government. And there are numbers of
10 cases by this Court where you have held that when the Govern-
11 mental official took an oath, or the tribunal requiring the
12 oath, was not authorized to require the oath, that you -- there
13 could be no charge of perjury, in cases such as Christoffel,
14 the Viereck case, United States against George, the United
15 States versus Williams and others.

16 Q Do you have those cases down in your brief?

17 A On Page 10 of Section 3. It is there.

18 The Internal Revenue Service was forbidden by the
19 Constitution to require this information. Now, the Fifth Amend-
20 ment was forbidden as you have held in Grosso and Marchetti,
21 consequently those cases of Christoffel versus the United States,
22 Viereck versus the United States and George versus the United
23 States, are applicable because if they had no constitutional
24 authority to require the information, that's stronger than if
25 they had no statutory authority to require it. At one time they

1 had purported statutory authority to require it but this could
2 have said the Constitution overrode and took away that juris-
3 diction from them. And it's settled law by this Court that
4 under circumstances where, like in the Christoffel case where
5 there was not a quorum at the time the man gave false testimony
6 before a constitutional -- Congressional Committee and there
7 was not a quorum existing at that time. They said false state-
8 ments made there cannot be the basis of perjury and we submit
9 that where there is a situation here where the Constitution
10 forbade the Internal Revenue Service to get this information,
11 that they had no authority to get it, just like in Christoffel
12 the Congressional Committee at that particular time there was
13 no quorum present, had no authority to get the information, that
14 there can be no basis of those circumstances that are charged
15 of perjury or false statements.

16 And unless this Court has another question, I submit
17 -- I believe my time is about up, isn't it?

18 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Smith.
19 Do you wish to be heard, Mr. Hamburg?

20 REBUTTAL ARGUMENT BY MERVYN HAMBURG, ESQ.

21 ON BEHALF OF APPELLANT

22 MR. HAMBURG: I'll be very brief, Your Honor, because
23 most of the matters which have been raised here were replied to
24 in our reply brief, particularly the question of the constitu-
25 tional nature of wage earning tax laws, as the Marchetti and

1 Grosso decisions themselves expressly state, the wagering tax
2 laws have not been held to be unconstitutional and therefore
3 there is still authority in the Government to require individuals
4 to submit wagering tax returns. Admittedly, they will in-
5 criminate the individual. He may respond to this requirement by
6 not complying and thereby be prosecuted, raising the privilege
7 against self-incrimination. But he has no constitutional license
8 to lie, if he purportedly complies with the wagering tax scheme.

9 Counsel has mentioned something about the differentia-
10 tion here between the case of Dennis on the matter of this defen-
11 dant not receiving any benefits on the wagering tax scheme. We
12 submit that first of all, receipt of benefits is not an element
13 for the False Statement Act; it hasn't been since 1934 when the
14 present wording was adopted and secondly, that we see some bene-
15 fit to be derived by understating the number of employees one
16 has in any event.

17 And finally, we submit, too, that requiring returns
18 is a definite function of the Internal Revenue Service. A
19 number of returns are required. This one is required by a par-
20 ticular statute which gives the Internal Revenue Service juris-
21 diction to require this particular return and once again,
22 whether or not this is so, the statute now before the Court is
23 the False Statement Statute, and whether this individual should
24 be prosecuted under the False Statement Statute.

25 MR. CHIEF JUSTICE BURGER: Thank you Mr. Hamburg.

1 The case is submitted and we thank you for your submissions,
2 Mr. Smith and Mr. Hamburg.

3 I think since we are so close, Mr. Clerk, we will
4 adjourn.

5 (Whereupon, at 2:20 o'clock p.m. the oral argument
6 was concluded)

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