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CRIMINAL PROCEDURE—GAMBLER'S CLAIM OF SELF-INCRIMINATION PROVIDES COMPLETE DEFENSE TO PROSECUTIONS FOR VIOLATION OF FEDERAL WAGERING TAX STATUTES. *Marchetti v. United States* (U.S. 1968).

Petitioner was convicted in a United States district court on two indictments charging wagering tax violations. The first indictment charged petitioner with a conspiracy to evade payment of the annual occupational tax imposed by Section 4411 of the Internal Revenue Code of 1954.¹ The second indictment alleged willful failure to pay the special occupational tax prior to entering the business of accepting wagers and the willful failure to register prior to engaging in the wagering business as required by the Internal Revenue Code of 1954, Section 4412.² Petitioner moved to arrest judgment on the ground that the statutory obligation to pay the special occupational tax and to register violated his fifth amendment privilege against self-incrimination. The Second Circuit Court of Appeals affirmed;³ however, on certiorari to the Supreme Court,⁴ *held*, reversed: Those who assert a valid fifth amendment privilege to the wagering tax statutes may not be criminally punished for failure to comply with them. *Marchetti v. United States*, 38 S.Ct. 697 (1968).⁵

¹ INT. REV. CODE of 1954, § 4411. *Imposition of tax.*

There shall be imposed a special tax of \$50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

² INT. REV. CODE of 1954, § 4412. *Registration.*

(a) *Requirement.*

Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

³ *United States v. Costello*, 352 F.2d 848 (2d Cir. 1965). The original case bore Costello's name, however he died in December 1966.

⁴ Certiorari was initially granted in *Costello v. United States*, 383 U.S. 942 (1966), but upon Costello's death the Court granted certiorari to *Marchetti*, 385 U.S. 100 (1967). Certiorari was limited to the following questions: (1) Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the fifth amendment? (2) Should the Supreme Court, in view of its recent decision in *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965), overrule *United States v. Kahriger*, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955)?

⁵ *Grosso v. United States* was argued with *Marchetti*. *Grosso* was charged with violation of the 10 percent excise tax placed upon gamblers. The issues and holdings are similar in the two cases, therefore they have been combined and discussed together for simplification.

Prior to *Marchetti* only two Supreme Court cases, *United States v. Kabrigger*⁶ and *Lewis v. United States*,⁷ questioned the validity of the gambler's registration and tax statutes. In *Kabrigger* the charge was failure to pay the occupational tax and failure to register, whereas in *Lewis* the charge was only violation of the occupational tax. In both cases the Supreme Court concluded that the privilege against self-incrimination could not be asserted to defeat the taxing and registration statutes.

The *Kabrigger-Lewis* rationale had rested primarily on a theory of waiver and the determination that the fifth amendment privilege only applied to past acts completed. In advancement of the waiver theory, the *Kabrigger* Court held that the defendant lost his right to the protection of the fifth amendment when he failed to make a return. The Court stated that he could have raised any objection in the return, but failure to file a return waived any objection he might have otherwise had.⁸ The Supreme Court in *Marchetti* was unwilling to accept this reasoning and held that Marchetti's claiming of the privilege at and after the trial was a substantial effort to invoke the fifth amendment.⁹ To hold contrary "one would be required to prove guilt to avoid admitting it."¹⁰ The *Marchetti* Court ruled that it would violate the privilege if the individual must first incriminate himself in his return in order to claim the protection of the fifth amendment.

A variation of the waiver theory, expressed in *Lewis*, evolves from the reasoning that the occupational tax requirements do not compel self-incrimination, but merely impose on the gambler the initial choice of whether he wishes, at the cost of his constitutional privilege, to commence wagering activities. The *Lewis* Court stated there is neither a constitutional right to gamble, nor a compulsion to engage in the wagering business. Therefore, any individual who chooses to enter wagering activities is clearly warned in advance that he will be required to provide information which he might otherwise prefer to

⁶ 345 U.S. 22 (1953).

⁷ 348 U.S. 419 (1955).

⁸ 345 U.S. at 32. The *Kabrigger* Court relied on *United States v. Sullivan*, 274 U.S. 259 (1927). In *Sullivan* the taxpayer, who made his money through dealings in the illicit traffic of liquors, abstained from making a tax return. His conviction, for failure to make a return of his net income, was upheld over his claim of fifth amendment protection.

⁹ 88 S. Ct. 697, 704 (1968).

¹⁰ 345 U.S. at 34 (concurring opinion) Justice Jackson concurred reluctantly only because the minority could not agree upon a single dissenting opinion.

withhold.¹¹ The *Marchetti* Court held that this line of reasoning was erroneous: "The question is not whether petitioner holds a right to violate state law, but, whether having done so, he may be compelled to give evidence against himself."¹² The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; thus one who has violated the law may not be forced to give evidence against himself.¹³

The second major premise of *Kabriger* and *Lewis* was that the privilege extended only to past acts completed and not to future acts.¹⁴ The *Marchetti* Court found this holding to be without precedent and based solely upon a generalization by Professor Wigmore to the effect that the fifth amendment did not apply to a restricted class of prospective acts.¹⁵ The principal reason for not following the *Kabriger* and *Lewis* holdings was that they overlooked the risk of incrimination to past and present acts which might result from an investigation prompted by the disclosure of an intent to gamble in the future.

One standard for the application of the privilege is whether the claimant is confronted with a real and substantial danger—not merely trifling or imaginary hazards of incrimination.¹⁶ In the instant case petitioner's apprehension of danger was greatly enhanced by Section 6107 of the Internal Revenue Code of 1954,¹⁷ which provides that

¹¹ 348 U.S. at 423-24. Disclosures, often highly detailed, are required under federal law of those who choose to engage in many occupations. See 15 U.S.C. § 80b (1940) (investment advisers); 47 U.S.C. § 301 (1934) (radio stations); 49 U.S.C. § 1371 (1962) (air carriers); 2 U.S.C. § 267 (1946) (lobbyists); 29 U.S.C. § 432 (1959) (officers and employees of labor organizations).

¹² 88 S. Ct. at 704.

¹³ *Id.*

¹⁴ On the form now in use, Form 11C, adopted subsequent to the decisions in *Kabriger* and *Lewis*, the questions are phrased in the alternative, *e.g.*, "Do you receive or will you be receiving wagers on behalf of or as agent for some other person or persons?"

¹⁵ 8 J. WIGMORE, EVIDENCE § 2259c (3d ed. 1940). "[T]here is no compulsory self-incrimination in a rule of law which merely requires beforehand a future report on a class of future acts among which a particular one may or may not in the future be criminal at the choice of the party reporting." This generalization was last reported in Wigmore's 1940 edition and was dropped in subsequent revisions.

¹⁶ *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Rogers v. United States*, 340 U.S. 367, 372 (1951); *Heike v. United States*, 227 U.S. 131, 144 (1913); *Brown v. Walker*, 161 U.S. 591, 599 (1896); *United States v. Costello*, 222 F.2d 656, 661 (1955); *United States v. Doto*, 205 F.2d 416, 417 (1953); *Kiewel v. United States*, 204 F.2d 1, 4 (1953).

¹⁷ INT. REV. CODE OF 1954, § 6107. *List of special taxpayers for public inspection.*

In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes Such list . . . shall contain the time,

the names of those who comply with the wagering tax statutes shall be made available to interested prosecuting authorities. Petitioner's claim was asserted in an area permeated with criminal statutes where response to any of the questions on the form might subject him to criminal prosecution.¹⁸ Surely, Marchetti's claim of privilege was made in the face of a substantial danger of incrimination.

Another standard for determining when the privilege attaches is where the required information furnishes a link in the chain of evidence needed to prosecute.¹⁹

The privilege against self-incrimination not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.²⁰

From Chief Justice John Marshall's first influential interpretation of the privilege in *United States v. Burr*²¹ to the Supreme Court's most recent pronouncement in *Albertson v. Subversive Activities Control Board*,²² the link-in-the-evidentiary-chain doctrine has been firmly fixed. The *Kabriger-Lewis* rationale that representations of intent to engage in criminal activity do not incriminate is contrary to the link-in-the-chain principle so well established in constitutional doctrine. Assuming the questions on the registration form pertain to future intent only,²³ the disclosed intent certainly qualifies as at least an investigatory guide that could lead to prosecutions for both federal and state crimes. In *United States v. Zizzo*,²⁴ the defendant was charged with traveling in interstate commerce with the intent to

place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any state, county, or municipality there shall be furnished to him a certified copy thereof

¹⁸ Form 11C asks the name and address of the individual, if the individual plans to carry on gambling activities, who works for and accepts bets for the individual and the addresses of the individual's employees.

Connecticut, the state in which Marchetti was indicted, punishes under CONN. GEN. STAT. REV. § 53-295 (1958) any person, whether as principal, agent, or servant, who owns, possesses, keeps, manages, maintains or occupies premises employed for purposes of wagering or pool selling. See § 53-298 which punishes any person who becomes the custodian of books, property, appliances, or apparatus employed for wagering activities. See also §§ 53-293, 54-197, 53-295, 53-298.

¹⁹ *Emspak v. United States*, 349 U.S. 190, 200 (1954); *Blau v. United States*, 340 U.S. 159, 161 (1950).

²⁰ *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

²¹ 25 F. Cas. (No. 14692e) (C.C.D. Va. 1807).

²² 382 U.S. at 78.

²³ See note 14 *supra*.

²⁴ 338 F.2d 577, 580 (1964).

engage in gambling activities in violation of federal law. His conviction was based partly upon evidence of compliance with the same statutes as those involved in *Marchetti*. Similar evidence was used in *Irvine v. California*²⁵ to convict the defendant of violating a California gambling statute.²⁶

The overruling of *Kabriger* and *Lewis* was thus largely attributable to the *Marchetti* Court's realization that a gambler may face a real and substantial danger by compliance with the wagering statutes, and furthermore, that compliance with these statutes could be a major "link" in the chain of evidence for both federal and state convictions.

After invalidating the *Kabriger-Lewis* holdings the Court considered the applicability of the "required records" doctrine of *Shapiro v. United States*,²⁷ which rejected the privilege against self-incrimination as a basis for refusing disclosure of records deemed public. In *Shapiro*, the defendant was required to keep various records pursuant to a regulation issued under the authority of the Emergency Price Control Act. When later directed by an administrative subpoena to produce these records Shapiro complied, but asserted his constitutional privilege. On certiorari the Supreme Court held that Shapiro could not claim the protection of the privilege as to records which he was required to maintain by administrative regulation. To qualify as "required records" three elements must be present: 1) they must be documents which the defendant was required to keep; 2) they must not be for private use, but rather for the benefit of the public; and 3) the records must be open to public inspection.²⁸ There are significant differences between *Shapiro* and *Marchetti* which preclude the application of the "required records" doctrine to the latter. *Marchetti* was not required to keep and preserve records but simply to provide information about his wagering activities. Also, there were no public aspects to the information demanded from *Marchetti*, and the government's anxiety to acquire information known to a private individual does not, without more, render that information public. Further, the requirements imposed in *Shapiro* were in an essentially non-criminal area of inquiry while those in *Marchetti* were directed at a selective group inherently suspect of criminal activities.

²⁵ 347 U.S. 128 (1954).

²⁶ See *Grigsby v. Mitchum*, 191 Kan. 293, 380 P.2d 363 (1963); *State v. Forsyth*, 229 La. 690, 86 So. 2d 536 (1956); *State v. Reinhardt*, 229 La. 674, 86 So. 2d 530 (1956); *State v. Mills*, 229 La. 758, 86 So. 2d 895 (1956); *State v. Curry*, 92 Ohio App. 1, 109 N.E.2d 298 (1952); *Commonwealth v. Fiorini*, 202 Pa. Super. 88, 195 A.2d 119 (1963); *McClary v. State*, 211 Tenn. 46, 362 S.W.2d 450 (1962).

²⁷ 335 U.S. 1 (1948).

²⁸ *Id.* at 17.

The Government argued and Chief Justice Warren in dissent took the view, that if the Court should find the *Kabriger-Lewis* rational no longer valid, the remedy would be to uphold the wagering and registration statutes but bar further criminal use of the information obtained. By invalidating section 6107 and adopting an exclusionary rule there no longer would be any danger of self-incrimination in complying with the statutes and the privilege would not be applicable.²⁹ This line of argument was based on the rationale of *Murphy v. Waterfront Commission*³⁰ where witnesses were subpoenaed to testify at a hearing conducted by the Waterfront Commission of New York concerning a work stoppage. The witnesses refused to respond to certain questions about the stoppage on the ground that the answers might tend to incriminate them. The Court granted them immunity from future prosecution based on the elicited information, thereby holding the witnesses compellable to answer. However, the *Marchetti* Court held that an exclusionary rule similar to that in *Murphy* could not be adopted in the instant situation, because it would contradict the controlling intent of Congress in passing the wagering tax laws.³¹ The *Marchetti* Court concluded that the primary intent of Congress was to provide prosecuting authorities with information obtained through compliance with the tax statutes.³² Chief Justice Warren took particular issue with this point arguing that Congress had not one, but two major goals in enacting the statutes: to aid prosecuting authorities and to raise revenue.³³ As the majority ruled, both purposes of the taxing system were destroyed.

The *Marchetti* Court emphasized that they did not hold the wagering tax provisions constitutionally impermissible, but only that those who properly assert the fifth amendment privilege may not be criminally punished for failure to comply with their requirements. Thus, the tax statutes remain constitutional; yet, the majority of those at whom the tax is aimed need not comply.

DONALD ERNEST WRIGHTON

²⁹ "Once the reason for the privilege ceases, the privilege ceases." *Ullman v. United States*, 350 U.S. 422, 439 (1956).

³⁰ 378 U.S. 52 (1964).

³¹ 88 S. Ct. at 708.

³² Mr. Justice Brennan laid additional emphasis upon this aspect in his concurring opinion. "Whatever else Congress may have meant to achieve, an obvious purpose of this statutory system clearly was to coerce evidence from persons engaged in illegal activities for use in their prosecution." 88 S. Ct. at 717.

³³ *Id.* at 721.