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Abstract

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KEYWORDS: privilege, non-tax-related

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Roy Garner candidly reported substantial income from illicit wagering in his 1965, 1966, and 1967 federal income tax returns.[1] He reported his occupation as a "professional gambler" in the 1965 return.[2] Garner was subsequently prosecuted for conspiring to violate various federal gambling statutes.[3] At trial,[4] the government introduced into evidence the returns in question. Garner objected to the admission of the returns, asserting a violation of his Fifth Amendment privilege against compulsory self-incrimination.[5] The returns were admitted over Garner's objections, and the jury found him guilty of conspiring to violate the gambling statutes.

Garner's conviction was reversed in 1972 by the Court of Appeals for the Ninth Circuit.[6] Circuit Judge Koelsch, for the majority, held that the disclosures Garner made in his returns were statutorily compelled by Internal Revenue Code § 7203,[7] which makes it a crime to willfully

1. A taxpayer is required to report and pay tax on his illegally derived income. *See* note 16, *infra*. I.R.C. § 7203 makes it a crime for a taxpayer, who is required to make a return or pay a tax, to fail to do so. *See* note 7, *infra*.

2. Garner v. United States, 424 U.S. 648 at 649-50 (1976).

3. Garner's conspiracy indictment was under 18 U.S.C. § 224 (bribery in sporting contests effectuated through use of an interstate communication facility); § 371 (conspiracy to commit any offense against the United States); § 1084 (interstate transmission of wagering information by one engaged in the business of wagering); and § 1052 (use of an interstate facility to distribute proceeds of an unlawful activity). He was also indicted for the substantive offense of aiding and abetting the violation of § 1084, but he was acquitted on this count at the close of the government's case. 424 U.S. at 694 n.1.

4. Garner was tried by a jury in the District Court for the Central District of California.

5. U.S. CONST. amend. V provides, in part: "No person . shall be compelled in any criminal case to be a witness against himself. . "

6. 501 F.2d 228 (9th Cir. 1972).

7. I.R.C. § 7203 reads, in pertinent part: "Any person required under this title to pay any . tax to make a return . keep any records, or supply any informa-

fail to supply required information.[8] Such compelled disclosures were held to be inadmissible as evidence in a subsequent prosecution of gambling law violations because of Garner's privilege against self-incrimination.

On rehearing en banc two years later, the Court of Appeals reversed itself.[9] Circuit Judge Wallace, a dissenter in the 1972 opinion, now writing for the majority, concluded that the privilege could not be invoked at trial to protect one from disclosures voluntarily made in previously filed tax returns.[10] Thus, if Garner had wanted the protection of the privilege, he should have asserted it when the incriminating information was required to be filed.[11]

On certiorari,[12] the Supreme Court of the United States unanimously affirmed the en banc determination of the Court of Appeals,[13] and held that since Garner made the disclosures in his tax returns instead of claiming the privilege therein, they were not compelled and, therefore, not protected by the privilege.[14]

1. COMPULSION TO FILE A RETURN

It has been established since 1927, when the Supreme Court decided *United States v. Sullivan*,[15] that the Fifth Amendment privilege does not give a taxpayer the right to refuse to file a return because he has an illegal source of income.[16] In *Sullivan*, the defendant had been

tion, who willfully fails to pay such . . . tax, make such return, keep such records, or supply such information . . . shall . . . be guilty of a misdemeanor. . . ."

8. 501 F.2d at 232.

9. 501 F.2d 236 (9th Cir. 1974). Circuit Judge Wallace wrote the opinion for the majority, with Circuit Judge Koelsch dissenting.

10. *Id.* at 240.

11. *Id.*

12. Certiorari was granted at 420 U.S. 923 (1975).

13. Justice Powell wrote the opinion for the majority. Justices Brennan and Marshall concurred. Justice Stevens took no part in this case.

14. 424 U.S. at 665.

15. 274 U.S. 259 (1927).

16. The Internal Revenue Code of 1954 provides that a taxpayer must report and pay tax on illegally derived income. § 61(a) provides, in part, that "gross income means all income from whatever source derived. . . ." The Supreme Court has interpreted this section broadly, by including as gross income all income, whether legally or illegally derived. *See, e.g.*, James v. United States, 366 U.S. 213 (1961) (gross income includes embezzled funds); Rutkin v. United States, 343 U.S. 130 (1952) (extorted funds); United States v. Johnson, 319 U.S. 503 (1943) (gambling receipts); United States v. Sullivan, 274 U.S. 259 (1927) (income from illicit traffic in liquor).

engaged in an illicit liquor business in violation of the National Prohibition Act.[17] He was convicted of willful failure to file a federal tax return as required by the Revenue Act of 1921,[18] over his objection that, because of the illegal nature of his business, he would be compelled to incriminate himself if he were required to file a return. The Court held that the privilege did not protect him from the requirement of filing a return.[19] The Fifth Amendment might have protected him from answering incriminating questions asked in the return, but it did not give him the right to fail completely to file a return.[20] Although not presented with the question, the Court suggested that a taxpayer who wants the protection of the privilege should raise it in the return: "If the form of the return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all."[21]

In *Garner*,[22] the Court cited *Sullivan* as establishing that a taxpayer is compelled to file a return. Concluding that Garner was compelled to file a return did not, however, end the Fifth Amendment inquiry. The Court still had to determine whether Garner was compelled to incriminate himself when he could have claimed the privilege on the tax returns in lieu of disclosing the incriminating information.[23] In holding that he had not been compelled to incriminate himself, the Court established what had been suggested in *Sullivan:* Garner's failure to assert the privilege in the returns rendered the incriminating disclosures noncompulsory and, as such, not within the protection afforded by the Fifth Amendment.[24]

2. DISCLOSURE IN LIEU OF ASSERTION OF THE PRIVILEGE

The Court cited *United States v. Kordel*[25] as a holding squarely supporting its conclusion that Garner lost the benefit of the privilege by

17. Act of Oct. 28, 1919, ch. 85, 41 Stat. 305.
18. Act of Nov. 23, 1921, ch. 136, §§ 223(a), 253; 42 Stat. 227, 250, 268.
19. 274 U.S. at 263.
20. *Id.*
21. *Id.*
22. 424 U.S. at 652.
23. *Id.* at 653.
24. *Id.* at 665.
25. 397 U.S. 1 (1970).

revealing the incriminating information, and five other cases[26] as supporting this principle in dicta.[27] The Court determined that these cases stood for the proposition that "if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the Government has not 'compelled' him to incriminate himself."[28]

In *Kordel* the defendants, who were officers of a food corporation, were prosecuted for a violation of the Federal Food, Drug and Cosmetic Act.[29] Prior to the commencement of this prosecution, an *in rem* action had been filed against several of the defendants' corporate products. Pursuant to this civil action, extensive interrogatories were served on the corporation. During the *in rem* action, the defendants were informed by the government that it was contemplating a criminal prosecution against them for violations of the Act. Rather than claiming his privilege at this point, one of the defendants answered the interrogatories served by the government. In the later criminal prosecution the government introduced into evidence information obtained by the interrogatories. The defendants objected to the admission of this evidence and argued that the answers to the interrogatories had been compelled, and that their use would violate the defendants' privilege against self-incrimination. The Court held that the use of these answers did not violate the defendants' privilege, since they had been notified of the contemplated criminal prosecution and had disclosed the information instead of claiming the privilege. The Court, in *Garner*,[30] read *Kordel* as establishing the general rule that by volunteering information rather than asserting the privilege, one has not been compelled to answer.

In *United States v. Monia*[31] the defendants were charged with conspiring to fix prices in violation of the Sherman Act.[32] Each defendant appeared as a witness before the grand jury, giving testimony substantially connected with the transaction covered by the indictment

26. Maness v. Meyers, 419 U.S. 449, 466 (1975); Rogers v. United States, 340 U.S. 367, 370-71 (1951); Smith v. United States, 337 U.S. 137 (1949); United States v. Monia, 317 U.S. 424, 427 (1943); Vajtauer v. Comm'r of Immigration, 273 U.S. 103, 112-13 (1927), *construed* in *Garner*, *supra* note 2, at 653-54.

27. 424 U.S. at 653-54.

28. *Id.* at 654 (footnote omitted).

29. 21 U.S.C. §§ 301-92 (1938), *construed* in *Kordel*, *supra* note 25, at 2.

30. 424 U.S. at 654.

31. 317 U.S. 424 (1943). The Court cites *Monia* as supporting in dictum its holding in *Garner*. *See supra* note 26.

32. 15 U.S.C. 32 (1903), as amended by 15 U.S.C. 33 (1906), *construed* in *United States v. Monia*, *supra* note 26, at 425-426.

without claiming his privilege against self-incrimination or the immunity conferred by the Act.[33] The Court held that because of the immunity conferred by the Act, the defendants could not be prosecuted, regardless of whether they had claimed the privilege or the immunity.[34] Although the decision was based upon statutory immunity, the Court, in *Garner*, quoted dictum from *Monia* to support its conclusion that Garner was not compelled to incriminate himself:

> The [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been "compelled" within the meaning of the Amendment.[35]

The Court pointed out in *Garner*[36] that *Kordel* and the older witness cases,[37] which require that the privilege be asserted, accommodate the competing interests of the individual's right to remain silent on the one hand, and the government's right to everyone's testimony on the other hand. Since the witness is the only one who knows whether the government is compelling him to make incriminating disclosures, the burden is properly on him to make a timely assertion of the privilege:[38] "If, instead, he discloses the information sought, any incriminations properly are viewed as not compelled."[39]

3. CIRCUIT JUDGE KOELSCH AND "IMPLIED WAIVER"

Circuit Judge Koelsch, in his majority opinion following the first hearing in *Garner* by the Ninth Circuit, rejected the premise that the

33. The immunity from prosecution for witnesses testifying under the Sherman Act was conferred by the Act of Feb. 25, 1903, ch. 775, § 1, 32 Stat. 904, which reads, in part: "[N]o person shall be prosecuted or be subjected to any penalty of forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under [the Sherman Act]."

34. 317 U.S. at 430.

35. 424 U.S. at 654-55 (citation omitted).

36. *Id.* at 655.

37. *See* Mason v. United States, 244 U.S. 362, 364-65 (1917); Branzburg v. Hayes, 408 U.S. 665, 668 (1972); Kastigar v. United States, 406 U.S. 441, 443-45 (1972).

38. 424 U.S. at 655.

39. *Id.*

privilege was "impliedly waived" by Garner because he failed to assert it in the returns.[40] At the first hearing, the government relied on *Stillman v. United States*.[41] In that case Hyman Stillman and his partner, who were in the wholesale meat business, were convicted of violating the Emergency Price Control Act of 1942.[42] At their trial the government had introduced, over their Fifth Amendment objections, their individual and partnership income tax returns. The Court stated:

> If appellants believed that certain declarations in their tax returns might incriminate them they could have refrained from making the voluntary tax declarations here in evidence. However, they chose to report the illicit income rather than risk possible prosecution for making false or incomplete returns covering such income. The disclosures upon the tax returns must therefore be deemed to have been voluntarily entered upon a public record.[43]

Circuit Judge Koelsch interpreted the *Stillman* decision as based on an "implied waiver" of the privilege.[44] He cited *Marchetti v. United States*[45] as a "recent constitutional development" which had "eliminated the doctrinal keystone" of the *Stillman* decision.[46] In *Marchetti* the petitioner was convicted of failure to register as a gambler with the Internal Revenue Service, as required by I.R.C. § 4412,[47] and of conspiracy to evade payment of a gambler's occupational tax as required by I.R.C. § 4411.[48] He contended that these statutory requirements violated his privilege against self-incrimination, since his wagering activities were

40. The Supreme Court in the *Garner* opinion makes it clear that the term "waiver" should be limited to those cases where "one affirmatively renounces the protection of the privilege." While rejecting the concept of waiver in name, the Court, by its holding in *Garner*, extends the implied waiver reasoning to incriminating disclosures made in tax returns. 424 U.S. at 654 n.9.

41. 177 F.2d 607 (9th Cir. 1949).

42. Act of Jan. 30, 1942, ch. 26, 56 Stat. 23.

43. 177 F.2d at 618.

44. 501 F.2d at 231.

45. 390 U.S. 39 (1968).

46. 501 F.2d at 231.

47. I.R.C. § 4412 provides that: "Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district . . . his name and place of residence. . . ."

48. I.R.C. § 4411 reads, in part: "There shall be imposed a special tax of $50 per year to be paid by each person who is liable [to pay the excise tax on wagers as provided by § 4401]" (fine increased to $500 per year, *as amended* by Pub.L. No. 93-499, § 3(b), 88 Stat. 1550. *See* note 65, *infra*.

in violation of state and federal law. The Court held that the petitioner did not lose the protection of the privilege by his failure to assert it when the tax payments were due, and that he properly invoked the privilege at trial.[49] Circuit Judge Koelsch was apparently saying that *Marchetti* so eroded the concept of implied waiver of the privilege that *Stillman,* which he concluded was based on implied waiver, was no longer effective law. Since *Stillman* and implied waiver were no longer viable, he concluded that Garner did not lose the benefit of the privilege by disclosing the incriminating information.

In his opinion, Circuit Judge Koelsch overlooked two important aspects of the relation of *Marchetti* to the *Stillman* case and Garner's situation. First, the Court in *Marchetti* made clear that the status of the group with which the petitioner was identified was a major factor in the holding that the privilege was not waived by failure to invoke it. The Court found that "wagering is an area permeated with criminal statutes, and those engaged in wagering are a group inherently suspect of criminal activities."[50] Because petitioner, as a gambler, was a member of a "suspect group," any response he might make pursuant to I.R.C. §§ 4411 and 4412 would be self-incriminating. The Court distinguished the situation of the taxpayer, who is required to file tax returns, from that of a gambler, who is required to register, by concluding that "[u]nlike the income tax return . . . every portion of [the section 4411 and 4412] requirements had the direct and unmistakable consequence of incriminating petitioner. . . ."[51] The reasoning used in *Marchetti* to preclude an implied waiver of the privilege by gamblers does not apply to non-suspect groups such as taxpayers. So Circuit Judge Koelsch's reliance on *Marchetti* as eroding the doctrinal keystone of *Stillman,* viz., implied waiver, seems misplaced.

Second, in *Marchetti* the petitioner did not disclose any incriminating information, as did Garner and Stillman. Indeed, the holding of *Stillman* is based upon the fact that the information in question was disclosed in lieu of claiming the privilege. If Stillman had withheld the information, as did Marchetti, he might not have lost the benefit of the privilege.[52] This basic difference between the two fact patterns prevents

49. 390 U.S. at 50-51.

50. *Id.* at 47 (citation omitted).

51. *Id.* at 48-49.

52. Stillman, however, would have exposed himself to an I.R.C. § 7203 prosecution if he had failed to file a return or had withheld information. Marchetti, on the other hand, was allowed to exercise his privilege by simply failing to file, since he was the member of a group "inherently suspect of criminal activities."

Marchetti from supporting the conclusion that implied waiver has no place where the Fifth Amendment privilege is involved.

Circuit Judge Koelsch concluded by holding that I.R.C. § 7203[53] compelled Garner to make the disclosures in question, and that by submitting to such statutory compulsion, Garner did not waive his right to assert his privilege at trial.[54]

4. GARNER'S THREE ARGUMENTS

Garner resisted the application of the general rule that witnesses must claim the privilege, arguing that in the tax return context incriminating disclosures made in returns are "compelled."[55] He relied on three situations in which incriminating disclosures had been considered compelled despite a failure to claim the privilege.[56]

A. Coerced Confession Cases: Knowing and Intelligent Waiver

First, Garner argued that for one to lose the benefit of the privilege there must be a knowing and intelligent waiver, even though one did not claim the privilege prior to disclosure.[57] He relied on coerced confession cases, e.g., *Miranda v. Arizona*.[58] In *Miranda*, the defendant was taken into custody in connection with a kidnapping and rape. Without being informed of his Fifth Amendment privilege, Miranda was interrogated by the police for two hours in a special interrogation room. He signed a written confession which was admitted as evidence at his trial, and he was subsequently convicted. The Supreme Court reversed the conviction, holding that Miranda had not been effectively apprised of his privilege against self-incrimination, nor had he knowingly and intelligently waived it.

The Court, in *Garner*,[59] refused to extend the *Miranda* holding to disclosures made in tax returns. *Miranda* dealt with custodial interrogation, a situation necessarily fraught with compulsion to disclose incriminating information. These dangers are not present in the tax return

53. *See supra* note 7.
54. 501 F.2d at 232-33.
55. 424 U.S. at 656.
56. *Id.*
57. *Id.* at 657.
58. 384 U.S. 436 (1966).
59. 424 U.S. at 657-58.

context, and the extraordinary safeguard of requiring a knowing and intelligent waiver was not adopted. The Court stated:

> [N]othing in this case suggests the need for a similar presumption that a taxpayer makes disclosures on his return rather than claims the privilege because his will is overborne. In fact, a taxpayer, who can complete his return at leisure and with legal assistance, is even less subject to the psychological pressures at issue in *Miranda* than a witness who has been called to testify in judicial proceedings.[60]

B. Garner Argued Mackey v. United States

Second, Garner relied on *Mackey v. United States*,[61] *Marchetti v. United States*,[62] and *Grosso v. United States*.[63] In *Mackey*, the defendant was convicted in 1964 of evading payment of income taxes for the years 1956 through 1960.[64] At his trial the government introduced into evidence sixty wagering excise tax returns which he had filed pursuant to I.R.C. § 4401,[65] to prove that this was his actual income which he had reported during the years in question. Subsequent to Mackey's conviction the Supreme Court held, in *Marchetti* and *Grosso*, that the Fifth Amendment privilege was a valid defense for failure to comply with §§ 4401, 4411, and 4412,[66] which require a gambler to register and pay an occupational and excise tax. After *Marchetti* and *Grosso* were decided, Mackey filed a motion to set aside his conviction. The Court in *Mackey*[67] refused to apply *Marchetti* and *Grosso* retroactively to overturn Mackey's conviction. Garner argued that if Mackey had made the incriminating disclosures after the *Marchetti* and *Grosso* decisions, such disclosures could not have been used against him.[68] Garner further argued that since Mackey would have been privileged to file no return,

60. *Id.*
61. 401 U.S. 667 (1971).
62. 390 U.S. 39 (1968).
63. 390 U.S. 62 (1968).
64. Mackey was convicted of violating I.R.C. § 7201, which reads, in part: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony. . . ."
65. I.R.C. § 4401 reads, in pertinent part: "There shall be imposed on wagers . . . an excise tax equal to 10 percent of the amount thereof."
66. *See supra* notes 47, 48, and 65.
67. 401 U.S. at 674.
68. 424 U.S. at 659.

any disclosures made would have also been privileged.[69] He concluded that *Mackey* stood for the proposition that "an objection at trial always suffices to preserve the privilege even if disclosures have been made previously."[70] The Court did not find this reasoning compelling, and stated: "[I]t does not follow necessarily that a taxpayer would be immunized against use of disclosures made on gambling tax returns when the Fifth Amendment would have justified a failure to file at all."[71]

The Court did not find Garner in a situation similar to Marchetti and Grosso, even though all were gamblers required to file tax returns.[72] I.R.C. §§ 4401, 4411, and 4412 required Marchetti and Grosso to file tax returns which were for gamblers only. Since gamblers were members of a group "inherently suspect of criminal activities" any response by them would be self-incriminating.[73] The Court distinguished Garner's situation by pointing out that federal income tax returns are not directed at suspect groups.[74] The Court cited *Albertson v. Subversive Activities Control Board*[75] as authority for distinguishing federal income tax taxpayers from gamblers required to file tax returns under I.R.C. §§ 4401, 4411, and 4412. In *Albertson,* the petitioners, who were members of the Communist Party, were ordered by the Subversive Activities Control Board to register with the Attorney General, as required by the Subversive Activities Control Act of 1950.[76] Upon review of these orders, the Court held that, because petitioners were members of a "highly selective group inherently suspect of criminal activities" and were involved in an "area permeated with criminal statutes," any response they might make pursuant to the statute would be self-incriminating, and in violation of their privilege.[77] The Court, in *Albertson,* distinguished federal income tax returns from the Communist registration requirement by holding that tax returns are "neutral on their face and directed at the public at large."[78] The *Garner* Court used this reasoning to distinguish the gambler's tax return from income tax returns.[79] The Court concluded:

69. *Id.*
70. *Id.*
71. *Id.* n. 13.
72. *Id.* at 660.
73. *Id.*
74. *Id.*
75. 382 U.S. 70 (1965).
76. Acts of Sept. 23, 1950, ch. 1024, § 7, 64 Stat. 993; July 29, 1954, ch. 646, 68 Stat. 586, *amending* 50 U.S.C. § 786 (d).
77. 382 U.S. at 79.
78. *Id.*
79. 424 U.S. at 660-61.

"[T]he great majority of persons who file income tax returns do not incriminate themselves by disclosing their occupation. The requirement that such returns be completed and filed simply does not involve the compulsion considered in *Mackey*."[80]

C. Section 7203: Compulsion to Incriminate

Finally, Garner argued that a taxpayer who claims the privilege on his return is threatened with prosecution under I.R.C. § 7203 for failure to make a return or supply information,[81] and that this possibility of prosecution compelled him to make incriminating disclosures rather than claim the privilege.[82] To support his argument Garner relied on *Garrity v. New Jersey*,[83] in which the appellants, who were police officers, were questioned in connection with a state investigation of alleged traffic ticket fixing. Each was warned before questioning that if he refused to answer he would be subject to removal from office pursuant to a state statute.[84] The police officers answered the questions, and their answers were used against them in a subsequent prosecution for conspiring to obstruct the administration of traffic laws. The appellants objected to the use of their incriminating answers, claiming that they had been compelled to answer. The Court concluded that the appellants had been forced to choose between "self-incrimination or job forfeiture"[85] and held that statements coerced by threat of removal from office could not be used against the officers in a subsequent criminal proceeding.[86] Garner argued that the threat of an I.R.C. § 7203 prosecution, like the threat of removal from office in *Garrity*, compelled him to make incriminating disclosures instead of claiming the privilege.[87] But the Court distinguished *Garrity*, pointing out that Garrity was threatened with reprisal for a valid exercise of the privilege, while Garner was not so

80. *Id.* at 661 (footnote omitted).
81. *See supra* note 7.
82. 424 U.S. at 661.
83. 385 U.S. 493 (1967).
84. N.J. REV. STAT. § 2A:81-17.1 (Supp. 1965) provides, in part: "Any person holding . . . public office, position or empoyment . . . who refuses to testify upon matters relating to the office, position or employment in any criminal proceeding . . . upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself . . . shall be removed therefrom. . . ."
85. 385 U.S. at 496.
86. *Id.* at 500.
87. 424 U.S. at 661.

threatened, since "a § 7203 conviction cannot be based on a valid exercise of the privilege."[88] The Court expanded this holding in a footnote: "[B]ecause § 7203 proscribes 'willful' failures to make returns, a taxpayer is not at peril for every erroneous claim of privilege. The Government recognizes that a defendant could not properly be convicted for an erroneous claim of privilege asserted in good faith."[89]

The Court cited *United States v. Murdock*[90] (*Murdock I*) as establishing that a taxpayer, prosecuted for willful failure to supply information, is not entitled to a preliminary ruling on the validity of his claim of privilege,[91] and *United States v. Murdock*[92] (*Murdock II*) as supporting the conclusion that an erroneous, good faith claim of the privilege is a defense to a § 7203 prosecution.[93] In *Murdock I* the appellee claimed deductions for money paid to others in his 1927 and 1928 income tax returns. The Internal Revenue Service requested information concerning these deductions. Murdock refused to answer, claiming his privilege against self-incrimination. He was thereafter prosecuted for willful failure to supply information under the predecessor to § 7203.[94] The Court held that Murdock could be prosecuted for willful failure to supply information without prior determination as to whether his claim of privilege was valid.[95] Murdock was subsequently convicted for withholding information. In *Murdock II* the Court reversed the conviction, holding that a good faith misunderstanding[96] as to the applicability of

88. *Id.* at 662.

89. *Id.* at 663 n. 18. The Court's holding was apparently that a *valid* exercise of the privilege was a defense to a § 7203 prosecution. This would seem to imply that an *invalid* exercise of the privilege would not be a defense. But in n. 18 the Court pointed out, without so holding, the government's concession, that an invalid, *good faith* claim of privilege would preclude a § 7203 conviction. In a concurring opinion, discussed below, Justice Marshall argues that to satisfy the Fifth Amendment an erroneous, good faith claim of the privilege must be allowed as a defense.

90. 284 U.S. 141 (1931).

91. 424 U.S. at 664-65.

92. 290 U.S. 389 (1933).

93. 424 U.S. at 662-63 and n. 18.

94. Act of Feb. 26, 1926, ch. 27, § 1114(a), 44 Stat. 116. This section is essentially the same as § 7203. It provides, in pertinent part: "Any person required under this Act to pay any tax . . . to make a return, keep any records, or supply any information . . . who willfully fails to pay such tax, make such return, keep such records, or supply such information . . . shall . . . be guilty of a misdemeanor."

95. 284 U.S. at 148.

96. Murdock erroneously believed that the Fifth Amendment privilege protected him from making disclosures incriminating under state law when pressed for information in a federal forum. It was not established until *Murdock I*, that one being ques-

the privilege could not be the basis of a conviction for willfully failing to supply information.[97]

In *Garner,* the Court reaffirmed the decision of *Murdock II,* holding that a taxpayer cannot be convicted of a § 7203 violation if he makes a good faith, though erroneous, claim of privilege.[98] It also reaffirmed the holding of *Murdock I,*[99] stating: "a § 7203 prosecution . . may be brought without a preliminary judicial ruling on a claim of privilege that would allow a taxpayer to reconsider."[100]

Justice Marshall, troubled by the Court's reasoning, filed a concurring opinion, in which Justice Brennan joined. The majority had stated: "[S]ince a valid claim of privilege cannot be the basis for a § 7203 conviction, Garner can prevail only if the possibility that a claim made on the return will be tested in a criminal prosecution suffices in itself deny him freedom to claim the privilege."[101] The Court concluded:

> As long as a *valid* and timely claim of privilege is available as a defense to a taxpayer prosecuted for failure to make a return, the taxpayer has not been denied a free choice to remain silent merely because of the absence of a preliminary judicial ruling on his claim.[102]

The concurring Justices interpreted the majority opinion as holding that a valid claim of privileged defense, without more, satisfies the Constitution.[103] The Justices were adamant in their belief that only if a good faith, invalid assertion of the privilege entitles a taxpayer to acquittal under § 7203, then a threat of prosecution could not compel incriminating disclosures in violation of the Fifth Amendment.[104]

Although the concurring justices accepted the majority's holding that a preliminary ruling is not a prerequisite to a § 7203 prosecution, they believed that the absence of a preliminary ruling was important in determining whether Garner had been compelled.[105] They felt that a

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tioned in a federal forum could not refuse to answer because of possible incrimination under state law. The Court disapproved of this holding in Murphy v. Waterfront Commission, 378 U.S. 52 (1964).

97. 290 U.S. at 396.
98. 424 U.S. at 662-63 and n. 18.
99. *Id.* at 664-65.
100. *Id.* at 664.
101. *Id.* at 663.
102. *Id.* at 665 (emphasis added).
103. *Id.* at 666-67.
104. *Id.* at 666.
105. *Id.* at 667.

taxpayer must either be given a preliminary ruling or be allowed a defense of good faith assertion of the privilege. If the taxpayer was not afforded at least one of these safeguards, he would be denied the free choice to claim the privilege. Marshall concluded: "[O]nly because a good faith erroneous claim of privilege entitles a taxpayer to acquittal under § 7203 can I conclude that [Garner's] disclosures are admissible against him."[106]

5. CONCLUSION

Garner v. United States reaffirmed the rule of *Sullivan*, that a taxpayer must file a return, even though his income is derived from illegal activities. *Garner* reasserted the holding of *Marchetti*, that one who is the member of a group inherently suspect of criminal activities need not comply with a statutory requirement to disclose information relating to those activities. A federal income tax taxpayer is not in a suspect group and must file a return. If a question in the return requires an incriminating answer, the taxpayer must withhold the information and assert his privilege in the return to obtain its protection. If the taxpayer discloses the information instead of claiming the privilege, he has not been compelled to incriminate himself and the incriminating information may be used against him in a subsequent criminal prosecution of a non-tax-related offense. If the taxpayer asserts the privilege instead of disclosing the information, he can be prosecuted under I.R.C. § 7203 for failure to supply required information, and he will not be entitled to a preliminary ruling on whether his claim is valid. If the taxpayer's claim of privilege is asserted in good faith, it will be a defense to a § 7203 prosecution, even if his claim is invalid.

In *Garner*, the Supreme Court has moved toward allowing a penalty to be extracted for the exercising of one's privilege against self-incrimination. Under the *Garner* decision a taxpayer can be prosecuted for withholding incriminating information without a preliminary hearing on whether his claim of privilege is valid. A criminal prosecution for asserting one's privilege would seem to be the kind of reprisal condemned in *Garrity*. The trend of the Court is toward allowing the assertion of the privilege in a tax return context to become more perilous, in order to allow the government to proceed in its endless quest for more information concerning its citizens.

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106. *Id.* at 668.