

# The Burger Court Opinion Writing Database

## *Piccirillo v. New York*

400 U.S. 548 (1971)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



To: The Chief Justice

October 6, 1970

From: Tim Baker

Re: Piccirillo v. New York (No. 97)<sup>1/</sup>

Recommendation: Dismiss the writ as improvidently granted or remand for reconsideration in light of intervening state decisions.

Facts: Petr was arrested for assault. He attempted to bribe the arresting officer. Thereafter he pleaded guilty to the assault. Two months later petr was called before a grand jury empaneled to investigate intimidation of witnesses. He was granted immunity and answered questions about the assault. He did not mention the attempted bribe. Four days later the arresting officer testified about the arrest for assault and the attempted bribe. Petr was indicted for bribery.

On appeal the NY Ct App affirmed 4-3 (Keating). The court construed the NY immunity statute not to confer a transactional immunity but only to bar the use by the state of petr's testimony or the fruits thereof. The court also upheld the constitutionality of the statute as construed, reasoning that the broad dictum in Counselman v. Hitchcock about "absolute immunity" had been undermined by Murphy v. Waterfront Comm'n. Finally the court held that the indictment was not the product of petr's grand jury testimony, "even if it be assumed that . . . [petr's] testimony was related to the bribery . . . ."

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<sup>1/</sup> The case is scheduled for argument during the week of October 19th.

- 2 -

Seven months later the NY Ct App expressly and unanimously overruled this interpretation of the NY immunity statute in Gold v. Menna, an unrelated case. (Jasen). The court held that the NY immunity statute conferred a transactional immunity. The court stated, however, that petr's case had nevertheless been correctly decided because the decision there rested on the fact that petr's grand jury testimony was unrelated to the offense of bribery.

Discussion: Cert was granted in this case to reconsider the statement in Counselman v. Hitchcock that the 5th Amendment required immunity from prosecution for any matter or transaction to which the compelled testimony related. The NY Ct App has now construed the NY immunity statute to confer this broad transactional immunity. This issue is therefore moot.

Although the case is not moot, it now presents two issues which are not cert worthy: (1) whether petr's grand jury testimony was sufficiently related to his subsequent bribery indictment to require 5th Amendment protection; and (2) whether petr should have been allowed to speak with his lawyer at the grand jury hearing. It should be noted that it would be possible to reach the Counselman issue in deciding the first of these two remaining questions; it would be possible to proceed by first determining whether a transactional immunity was constitutionally required at all. Although this would settle the debate over Counselman's continued validity, it would do so somewhat unnecessarily in view of the fact that NY grants complete immunity by statute.

Although the case is no longer cert worthy, perhaps it would be advisable to remand for clarification and/or reconsideration in light of Gold. For the rationale which the Gold court attributed to the decision in petr's case was not the rationale which Judge Keating actually employed. In Gold Judge Jasen stated that petr's grand jury testimony was unrelated to the bribery charge. Therefore, his indictment for bribery was not barred by the transactional immunity. Judge Keating, on the other hand, held that the NY statute and the 5th Amendment only imposed a use restriction and that the bribery indictment was not the product of petr's grand jury testimony or the fruits thereof.

In view of the confusion that the NY opinions have engendered, I would remand to give the court an opportunity to reconsider in light of its new construction of the NY statute. In any event there is now no warrant for consideration or oral argument here.

10/6/70

DK

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

CHAMBERS OF  
THE CHIEF JUSTICE

December 2, 1970

Re: No. 97 - Piccirillo v. New York

MEMORANDUM TO THE CONFERENCE:

To save all the writing in the above case I think I will "abstain" and we will then affirm by an equally divided Court. I see no utility in writing when nothing is resolved.

Regards,

WED

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

CHAMBERS OF  
THE CHIEF JUSTICE

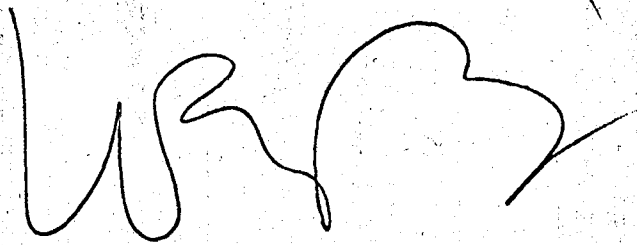
December 3, 1970

Re: No. 97 - Piccirillo v. New York

MEMORANDUM TO THE CONFERENCE:

Justice Harlan's proposed disposition is,  
for me, a very satisfactory way out of a very unsatisfactory  
situation and I am prepared to join in it.

Regards,

A handwritten signature in dark ink, appearing to be "WR", is written below the typed word "Regards,". The signature is fluid and stylized, with a long horizontal stroke at the end.

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

CHAMBERS OF  
THE CHIEF JUSTICE

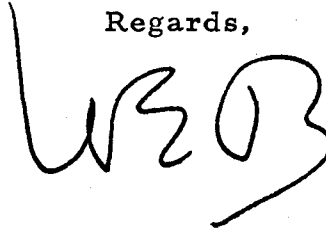
January 12, 1971

Re: No. 97 - Piccirillo v. New York

Dear John:

Please join me in your per curiam.

Regards,

A handwritten signature in dark ink, appearing to be 'W.B.O.' with a large, sweeping flourish at the end.

Mr. Justice Harlan

cc: The Conference

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

CHAMBERS OF  
JUSTICE HUGO L. BLACK


November 19, 1970

No. 97 - O. T. 1970  
Ralph Piccirillo v. State of New York

Dear Bill:

Please note at the end of your memorandum  
the following:

"MR. JUSTICE BLACK dissents from the  
dismissal of this petition as improvidently  
granted. He would vacate the judgment below  
and remand the case to the New York Court of  
Appeals for reconsideration in light of its later  
opinion in Matter of Gold v. Menna, 25 N. Y.  
2d 475."

Sincerely,  
  
H. L. B.

Mr. Justice Douglas



File  
Cir 11/19/70

## SUPREME COURT OF THE UNITED STATES

No. 97.—OCTOBER TERM, 1970

Ralph Piccirillo, Petitioner, v. State of New York.	}	On Writ of Certiorari to the Court of Appeals of New York.
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[November —, 1970]

Memorandum from MR. JUSTICE DOUGLAS.

I do not approve a dismissal of this petition as improvidently granted.

Petitioner was indicted for assault committed by the use of tire irons. He pleaded guilty and was sentenced to imprisonment. Shortly thereafter a grand jury was impanelled to investigate the assault on the victim and the conspiracies arising in connection with it. Petitioner, while still serving the sentence on the assault conviction, was called to testify before the grand jury.

After refusing to testify, petitioner was granted immunity. He then testified to the assault which he had perpetrated by the use of tire irons. Four days later a police officer testified before the grand jury that after a chase, he had arrested petitioner and another, and thereupon had taken the tire irons from him. The officer also testified that following petitioner's arrest petitioner had offered the officer a bribe to change his testimony. Petitioner was subsequently indicted by the grand jury and following an unsuccessful motion to dismiss based on the grant of immunity he pleaded guilty to attempted bribery. The New York Court of Appeals held four-to-three that the New York immunity statute only prohibited use of testimony and the fruits of the testimony in a subsequent criminal proceeding and that the police

W10

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

2

SUPREME COURT OF THE UNITED STATES

No. 97.—OCTOBER TERM, 1970 Douglas, J.

Ralph Piccirillo,  
Petitioner,  
v.  
State of New York. } On Writ of Certiorari to the  
Court of Appeals of New York.

11/19/70

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

3

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 97.—OCTOBER TERM, 1970 Circulated: \_\_\_\_\_

Revised Date: 11/20/70

Ralph Piccirillo,  
 Petitioner,  
 v.  
 State of New York. } On Writ of Certiorari to the  
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[November —, 1970]

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

4

SUPREME COURT OF THE UNITED STATES

No. 97.—OCTOBER TERM, 1970

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

Recirculated: 11-21

Ralph Piccirillo,  
Petitioner,  
v.  
State of New York. } On Writ of Certiorari to the  
Court of Appeals of New York.

[November —, 1970]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL concurs, dissenting.

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

CHAMBERS OF  
JUSTICE JOHN M. HARLAN

December 3, 1970

MEMORANDUM TO THE CONFERENCE

Re: No. 97 - Piccirillo v. New York

Dear Brethren:

In an effort to break the deadlock that seems to divide us as to the disposition of this case, I submit for your consideration the attached per curiam.

Sincerely,

*JMH*  
J.M.H.

PER CURIAM.

The occasion for granting the writ in this case was to resolve the important question as to whether the according of "transactional" immunity, see Counselman v. Hitchcock, 142 U.S. 547 (1892), is necessary to compel a witness to give testimony before a state grand jury over his claim of the privilege against self-incrimination, or whether mere "use" immunity suffices to that end. See, e.g., Murphy v. Waterfront Commission, 378 U.S. 52 (1964); Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation of the City of New York, et al., 426 F. 2d 619 (CA 2 1970).

After considering the briefs and oral arguments of the parties on this writ, we have reached the conclusion that the decision of the New York Court of Appeals in Gold v. Menna, 25 N.Y. 2d 415 (1969), which makes clear that transactional immunity is required in New York, and also indicates that such court's earlier decision in the case before us, People v. LaBello and Piccirillo, 24 N.Y. 2d 595 (1969), may have rested on that premise, makes this case an inappropriate vehicle for deciding a question of such far-reaching importance. Accordingly, the writ of certiorari is dismissed as improvidently granted.

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Brennan ✓  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

1

# SUPREME COURT OF THE UNITED STATES

From: Harlan, J.

October Term, 1970

PICCIRILLO v. NEW YORK

Circulated: \_\_\_\_\_  
Recirculated: **JAN 10 1971**

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF  
NEW YORK

No. 97. Decided January —, 1971

PER CURIAM.

The occasion for granting the writ in this case was to resolve the important question whether it is necessary to accord "transactional" immunity, see *Counselman v. Hitchcock*, 142 U. S. 547 (1892), to compel a witness to give testimony before a state grand jury over his claim of the privilege against self-incrimination, or whether mere "use" immunity suffices to that end, see, e. g., *Murphy v. Waterfront Commission*, 378 U. S. 52 (1964); *Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation of the City of New York et al.*, 426 F. 2d 619 (CA2 1970).

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With the intervening decision in *Gold*, no controversy any longer exists between the parties as to the question which impelled us to grant the writ: whether, in the circumstances involved in this case, Piccirillo was entitled to "use" or "transactional" immunity. While it is true that, technically speaking, issues remain in the case con-

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas ✓  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

2

# SUPREME COURT OF THE UNITED STATES

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October Term, 1970

PICCIRILLO v. NEW YORK

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WB



December 2, 1970

MEMORANDUM TO THE CONFERENCE

RE: No. 97 - Piccirillo v. New York

I am writing a dissent to the dismissal of this case as improvidently granted. I hope to have it in circulation some time next week.

W.J.B. Jr.

Not Circulated

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SUPREME COURT OF THE UNITED STATES

No. 97.—OCTOBER TERM, 1970

Ralph Piccirillo, Petitioner, v. State of New York.	}	On Writ of Certiorari to the Court of Appeals of New York.
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[January —, 1970]

MR. JUSTICE BRENNAN, dissenting.

This case presents the question of the limitations required by the Fifth Amendment's Self-Incrimination Clause upon subsequent state prosecutions of an individual compelled by the State to answer incriminating questions. Since, in my view, this case presents a record which compels us to decide that question, I cannot agree that the Court may dismiss the writ of certiorari as improvidently granted. I therefore reach the merits and would reverse the judgment of conviction and remand the case with directions to dismiss the indictment.

I

Petitioner and a codefendant were arrested on March 19, 1964, by a New York police officer, William Sewell, for assaulting one Graham, a housing contractor. Patrolman Sewell recovered the tire irons used in the assault from petitioner and the codefendant at the time of the arrest. The following day, the two defendants were arraigned and released on bond. But before leaving the courthouse, they approached Patrolman Sewell and offered him \$1,000 or \$1,500 to dispose of the seized weapons. The honest Sewell refused the offer and immediately notified the district attorney of the bribe attempt. At the request of the prosecutor, Sewell later attended a meeting with petitioner to confirm the bribe offer. The

SUPREME COURT OF THE UNITED STATES

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5th DRAFT

SUPREME COURT OF THE UNITED STATES

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Ralph Piccirillo, Petitioner, v. State of New York.	}	On Writ of Certiorari to the Court of Appeals of New York.
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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

December 3, 1970

No. 97 - Piccirillo v. New York

Dear John,

I could gladly join the suggested  
Per Curiam circulated by you today.

Sincerely yours,

P.S.

Mr. Justice Harlan

Copies to the Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

January 12, 1971

No. 97 -- Piccirillo v. New York

Dear John,

I am glad to join the Per Curiam you have prepared in this case, as re-circulated January 10. I suggest that you might add "under state law" after the word "entitled" at the end of the 6th line from the bottom of page 2. I further suggest that the word "constitutional" be substituted for "fundamental" in the following line.

Sincerely yours,

P.S.

Mr. Justice Harlan

Copies to the Conference



January 11, 1971

Re: No. 97 - Piccirillo v. New York

Dear John:

Please join me.

Sincerely,

B.R.W.

Mr. Justice Harlan

cc: The Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 20, 1970

Re: No. 97 - Piccirillo v. New York

Dear Bill:

I agree with your memorandum of  
November 19, 1970.

Sincerely,

  
T.M.

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 7, 1971

Re: 97 - Piccirillo v. New York

Dear Bill:

I have already joined Bill Douglas' dissent. I will be happy to join yours as well if permitted to do so.

Sincerely,

  
T.M.

Mr. Justice Brennan

cc: The Conference

January 13, 1971

Re: No. 97 - Piccirillo v. New York

Dear John:

Please join me.

Sincerely,

H.A.B.

Mr. Justice Harlan

cc: The Conference