

# The Burger Court Opinion Writing Database

*Zicarelli v. New Jersey Commission of Investigation*

406 U.S. 472 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



6  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

May 9, 1972

No. 69-4 -- Zicarelli v. N. J. State

Dear Lewis:

Please join me.

Regards,

W. B.

Mr. Justice Powell

Copies to Conference

May 12, 1972

Dear Lewis:

In No. 69-4 - Zicarelli v. The  
com  
-mrg  
pov  
page  
New Jersey State Commission, would  
you be so kind as to add at the end  
of your opinion the following:

Mr. Justice Douglas dissents  
for the reasons stated in his  
dissenting opinion in Kastigar, ante \_\_\_\_.

William O. Douglas

Mr. Justice Powell

CC: The Conference

Oct 71  
Wm Douglas

B

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

CHAMBERS OF  
JUSTICE POTTER STEWART

April 24, 1972

69-4, Zicarelli v. Investigation Comm'n

Dear Lewis,

I am glad to join your opinion for the  
Court in this case.

Sincerely yours,

P. S.

Mr. Justice Powell

Copies to the Conference

B

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

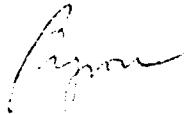
April 26, 1972

Re: No. 69-4 - Zicarelli v. The New Jersey  
State Commission of Investigation

Dear Lewis:

Please join me in your opinion in this  
case.

Sincerely,



Mr. Justice Powell

Copies to Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 27, 1972

Re: No. 69-4 - Zicarelli v. N. J. State Commission

Dear Lewis:

Please add at the foot of your  
opinion the following:

Mr. Justice Marshall dissents for  
the reasons stated in his dissenting  
opinion in Kastigar, ante \_\_\_\_.

4/1  
T.M.

Mr. Justice Powell

cc: Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 28, 1972

Re: No. 69-4 - Zicarelli v. New Jersey State  
Commission of Investigation

Dear Lewis:

Please join me.

Sincerely,

*H. A. B.*

Mr. Justice Powell

cc: The Conference

Bo

To: The Chief Justice  
Mr. Justice Doug.  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist

1st DRAFT

From: Powell, J.

SUPREME COURT OF THE UNITED STATES

Circulated: APR 24 1972

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

No. 69-4

Joseph Arthur Zicarelli,  
Appellant,  
v.  
The New Jersey State Commission of Investigation.

On Appeal from the Supreme Court of New Jersey.

[May —, 1972]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case, like *Kastigar v. United States*, *ante*, p. —, raises questions concerning the conditions under which testimony can be compelled from an unwilling witness who invokes the Fifth Amendment privilege against compulsory self-incrimination.

Appellant was subpoenaed to appear before the New Jersey State Commission of Investigation<sup>1</sup> on July 8, 1969, to testify concerning organized crime, racketeering, and political corruption in Long Branch, New Jersey.<sup>2</sup> In the course of several appearances before the Commission, he invoked his privilege against self-incrimination and refused to answer a series of 100 questions.

<sup>1</sup> The Commission was created by the New Jersey legislature primarily to investigate organized crime, racketeering, and political corruption in New Jersey. N. J. Rev. Stat. §§ 52:9M-1 and 52:9M-2 (Supp. 1970).

<sup>2</sup> The New Jersey Code of Fair Procedure requires that persons summoned to testify before the Commission be served prior to the time they are required to appear with a statement of the subject of the investigation. N. J. Rev. Stat. § 52:13E-2 (Supp. 1970). This statement was contained in the subpoena served on appellant. Joint Appendix 3a.

*Stylistic Changes Throughout*

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

2nd DRAFT

From: Powell, J.

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 69-4

Recirculated. MAY 15 1972

Joseph Arthur Zicarelli,  
Appellant,  
v.  
The New Jersey State Commission of Investigation.

On Appeal from the Supreme Court of New Jersey.

[May —, 1972]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case, like *Kastigar v. United States*, *ante*, p. —, raises questions concerning the conditions under which testimony can be compelled from an unwilling witness who invokes the Fifth Amendment privilege against compulsory self-incrimination.

The New Jersey State Commission of Investigation<sup>1</sup> subpoenaed appellant to appear on July 8, 1969, to testify concerning organized crime, racketeering, and political corruption in Long Branch, New Jersey.<sup>2</sup> In the course of several appearances before the Commission, he invoked his privilege against self-incrimination and refused to answer a series of 100 questions. The

<sup>1</sup> The New Jersey legislature created the Commission primarily to investigate organized crime, racketeering, and political corruption in New Jersey. N. J. Rev. Stat. §§ 52:9M-1 and 52:9M-2 (Supp. 1970).

<sup>2</sup> The New Jersey Code of Fair Procedure requires that persons summoned to testify before the Commission be served prior to the time they are required to appear with a statement of the subject of the investigation. N. J. Rev. Stat. § 52:13E-2 (Supp. 1970). The subpoena served on appellant contained this statement. Joint Appendix 3a.

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 21, 1972

MEMORANDUM TO THE CONFERENCE

I have gone over the nine cases held for decision in No. 69-4, Zicarelli v. New Jersey State Comm'n of Investigation, No. 70-7, Sarno v. Illinois Crime Investigating Comm'n, and No. 70-117, Kastigar v. United States. These cases will appear on the Conference List for May 29.

Three cases involve the New Jersey State Commission of Investigation and its immunity statute, N. J. Rev. Stat. § 52:9M-17. These cases appear to be controlled squarely by the decision in No. 69-4, Zicarelli v. New Jersey State Comm'n of Investigation.

In No. 70-84, Catena v. New Jersey State Comm'n of Investigation, and in No. 71-318, Annaloro v. New Jersey State Comm'n of Investigation, the Supreme Court of New Jersey held that the immunity provided by N. J. Rev. Stat. § 52:9M-17 was sufficient to supplant the privilege and compel testimony. I would affirm both cases.

In No. 71-377, Elias v. Catena, the Court of Appeals for the Third Circuit held that the immunity provided by N. J. Rev. Stat. § 52:9M-17 was not sufficient to supplant the privilege and compel testimony. I would grant certiorari and reverse.

Four cases involve 18 U. S. C. 6002, the federal witness immunity statute. These cases appear to be controlled squarely by the decision in No. 70-117, Kastigar v. United States.

In No. 70-303, United States v. Korman, the Court of Appeals for the Seventh Circuit held that the immunity provided by 18 U. S. C. 6002 was not sufficient to supplant the privilege and compel testimony. I would grant certiorari and reverse.

In No. 71-114, Bowden v. United States, and in No. 71-473, Weg v. United States, the Court of Appeals for the Ninth Circuit held that the immunity provided by 18 U. S. C. 6002 was sufficient to supplant the privilege and compel testimony. I would deny certiorari in both cases.

In No. 71-775, United States v. Cropper, the Court of Appeals for the Fifth Circuit held that the immunity provided by 18 U. S. C. 6002 was not sufficient to supplant the privilege and compel testimony. I would grant certiorari and reverse.

No. 69-6, Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, involves the discharge of public employees, and grows out of proceedings following an earlier reversal in this Court, 392 U. S. 280 (1968). The individual petitioners were summoned in 1966 to appear before the Commissioner of Investigation of New York City to testify with respect to their official conduct. Each was advised that in accordance with § 1123 of the New York City Charter he would be discharged if he refused to testify on the grounds of self-incrimination. Each was also advised that his testimony could be used against him in subsequent criminal proceedings. They were subsequently discharged for invoking and refusing to waive their constitutional privilege against compulsory self-incrimination. The discharges were upheld by CA 2, and this Court reversed, holding that under Garrity v. New Jersey, 385 U. S. 493 (1967), testimony cannot be compelled by threat of discharge from public employment unless the compelled testimony cannot be used in a subsequent criminal prosecution of the witness. After the decision in this Court, petitioners were reinstated. They were then called to appear at an inquiry before the Deputy Administrator of the Environmental Protection Administration concerning the performance of their duties as employees of the City of New York. They were again advised that they would be subject to

disciplinary action by failure to answer material and relevant questions relating to the performance of their official duties. This time, however, they were advised that:

". . . the answers you may give to the questions propounded to you at this proceeding, or any information or evidence which is gained by reason of your answers, may not be used against you in a criminal proceeding . . ."

CA 2 (Lumbard, Friendly and Feinberg) held that the discharges following petitioners' refusals to testify under the grants of immunity were proper. This immunity is sufficient under our decision in No. 70-117, Kastigar v. United States. I would deny certiorari.

No. 71-5327, Keilly v. United States, involves a federal prosecution of a witness who testified before a New York grand jury under a grant of transactional immunity. The factual situation is a close parallel to that in Murphy v. Waterfront Comm'n, 378 U. S. 52 (1964). Petitioner's only substantial claim relating to immunity is that the United States did not carry its burden of showing convincingly that the evidence used against petitioner had a legitimate source completely independent of petitioner's testimony before the state grand jury. CA 2 (Kaufman, Anderson and Mansfield) rejected petitioner's contention, noting (1) that defense counsel never objected

to admission of evidence on this ground, (2) that the doctrine of plain error was not applicable because the circumstances surrounding the acquisition and introduction of the evidence indicated that either there was a legitimate independent source or that petitioner had waived any claim of immunity, and (3) that petitioner himself used at trial much of the documentary evidence to which he now objects. The legal framework from which the CA 2 approached the issue is consistent fully with the standards we set forth in No. 70-117, Kastigar v. United States. I would deny certiorari.

L. F. P., Jr.