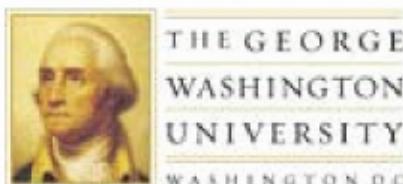


The Burger Court Opinion Writing Database

New Jersey v. Portash
440 U.S. 450 (1979)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

March 13, 1979

Re: 77-1489 - New Jersey v. Portash

Dear Harry:

I join your dissent.

Regards,

A handwritten signature in black ink, appearing to read "W. B. B." or "WB".

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20542

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

January 11, 1979

RE: No. 77-1489 New Jersey v. Portash

Dear Potter:

I am very persuaded by your opinion and join it despite my reservations that the Appellate Division decision may well rest on independent and adequate state grounds. I'll file a concurrence suggesting why I think this may be.

Sincerely,



Mr. Justice Stewart

cc: The Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 12 JAN 1979

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1489

State of New Jersey, Petitioner, | On Writ of Certiorari to the
v. | Superior Court of New
Joseph S. Portash. | Jersey, Appellate Division.

[January —, 1979]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring.

I join the Court's opinion affirming the judgment in this case, despite my reservations that the decision of the Superior Court of New Jersey, Appellate Division, 151 N. J. Super. 200, 376 A. 2d 950 (1977), cert. denied, 75 N. J. 597, 384 A. 2d 827 (1978), may well rest on independent and adequate state grounds.

The privilege against self-incrimination is not set out in the New Jersey Constitution. Its origins are instead to be found in the common law, see *New Jersey v. Fary*, 19 N. J. 431, 434-435, 117 A. 2d 499, 501-502 (1955), and in statute. See N. J. S. A. 2A: 84A-19. Although New Jersey Courts have looked to constructions of the Fifth Amendment of the Federal Constitution as a source of illumination for the interpretation of the state privilege, see *In re Pillo*, 11 N. J. 8, 15-17, 93 A. 2d 176, 179-180 (1952), they have also held that the interpretation of that privilege is "a matter of state law and policy, as to which [New Jersey] may impose standards more strict than required by the federal Constitution, which standards will control regardless of the final outcome of the question in the federal sphere." *New Jersey v. Deatore*, 70 N. J. 100, 112, 358 A. 2d 163, 170 (1976). Cf. *New Jersey v. Johnson*, 68 N. J. 348, 353, 346 A. 2d 66, 67-68 (1975).

In this context the Appellate Division's decision appears to rest on the independent and adequate state ground of

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart
5 JAN 1979

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1489

State of New Jersey, Petitioner, | On Writ of Certiorari to the
v. | Superior Court of New
Joseph S. Portash. | Jersey, Appellate Division.

[January —, 1979]

MR. JUSTICE STEWART delivered the opinion of the Court. This case involves the scope of the privilege against compulsory self-incrimination, grounded in the Fifth Amendment and made binding against the States by the Fourteenth. The precise question is whether, despite this constitutional privilege, a prosecutor may use a person's legislatively immunized grand jury testimony to impeach his credibility as a testifying defendant in a criminal trial.

I

In the early 1970's Joseph Portash was mayor of Manchester Township, executive director of the Pinelands Environmental Council, and a member of both the Ocean County Board of Freeholders and the Manchester Municipal Utilities Authority in New Jersey. In November of 1974, after a lengthy investigation, a state grand jury subpoenaed Portash. He expressed an intention to claim his privilege against compulsory self-incrimination. The prosecutors and Portash's lawyers then agreed that, if Portash testified before the grand jury, neither his statements nor any evidence derived from them could, under New Jersey law, be used in subsequent criminal proceedings (except in prosecutions for perjury or false swearing).¹ After Portash's testimony, the parties tried

¹ At that time a New Jersey statute provided as follows:

"If any public employee testifies before any court, grand jury or the

178

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated:

2nd DRAFT

Recirculated: 9 JAN 1979

SUPREME COURT OF THE UNITED STATES

No. 77-1489

State of New Jersey, Petitioner, } On Writ of Certiorari to the
v. } Superior Court of New
Joseph S. Portash. } Jersey, Appellate Division.

[January —, 1979]

MR. JUSTICE STEWART delivered the opinion of the Court.

This case involves the scope of the privilege against compulsory self-incrimination, grounded in the Fifth Amendment and made binding against the States by the Fourteenth. The precise question is whether, despite this constitutional privilege, a prosecutor may use a person's legislatively immunized grand jury testimony to impeach his credibility as a testifying defendant in a criminal trial.

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¹ At that time a New Jersey statute provided as follows:

"If any public employee testifies before any court, grand jury or the

35,6,9

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 16 JAN 1979

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1489

State of New Jersey, Petitioner, | On Writ of Certiorari to the
v. | Superior Court of New
Joseph S. Portash. | Jersey, Appellate Division.

[January —, 1979]

MR. JUSTICE STEWART delivered the opinion of the Court.

This case involves the scope of the privilege against compulsory self-incrimination, grounded in the Fifth Amendment and made binding against the States by the Fourteenth. The precise question is whether, despite this constitutional privilege, a prosecutor may use a person's legislatively immunized grand jury testimony to impeach his credibility as a testifying defendant in a criminal trial.

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"If any public employee testifies before any court, grand jury or the

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 5, 1979

Re: No. 77-1489 - New Jersey v. Portash

Dear Potter,

Please join me.

Sincerely yours,



Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 15, 1979

Re: No. 77-1489 - New Jersey v. Portash

Dear Potter:

I shall undertake a brief dissent in this case in due course.

Sincerely,

Harry

/

Mr. Justice Stewart

cc: The Conference

February 9, 1979

Re: No. 77-1489 - New Jersey v. Portash

Dear Potter:

Our discomfort of the past month has delayed me in getting out anything in this case. I do not mean to hold you up and shall endeavor to get something to you very soon.

Sincerely,

HAB

Mr. Justice Stewart

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 15 FEB 1979

Recirculated: _____

No. 77-1489 - New Jersey v. Portash

Mr. JUSTICE BLACKMUN, dissenting.

The Court in this case reaches out to decide an important constitutional question even though that question is presented in the context of an abstract dispute over a hypothetical ruling of the trial court. For me, the facts present too remote and speculative an injury to federally-protected rights to support the exercise of jurisdiction by this Court. Indeed, examination of the record reveals for

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

Printed
1st DRAFT

From: Mr. Justice Blackmun

Circulated: _____

No. 77-1489

Recirculated: 16 FEB

79

SUPREME COURT OF THE UNITED STATES

State of New Jersey, Petitioner, } On Writ of Certiorari to the
v. } Superior Court of New
Joseph S. Portash. } Jersey, Appellate Division.

[February —, 1979]

MR. JUSTICE BLACKMUN, dissenting.

The Court in this case reaches out to decide an important constitutional question even though that question is presented in the context of an abstract dispute over a hypothetical ruling of the trial court. For me, the facts present too remote and speculative an injury to federally protected rights to support the exercise of jurisdiction by this Court. Indeed, examination of the record reveals for me that the Court decides today a question different from the one the trial court considered. This demonstrates how far afield we range when we cut loose from the requirement that only concrete disputes may be decided by this Court. Because I believe the Court is without authority to engage in this type of abstract adjudication of constitutional rights in a factual vacuum, I dissent.

Prior to trial, and again at the close of the State's evidence, respondent Portash attempted to obtain an advance evidentiary ruling from the trial court. Though the precise nature of the ruling respondent sought is a matter of dispute, it related generally to whether and to what extent the State would be permitted to use, during cross-examination of respondent and in the rebuttal phase of its own case, information supplied by respondent under the statutory grant of immunity. When respondent failed to obtain a ruling he considered satisfactory, he refrained from testifying in his own behalf. Accordingly, he did not take the stand at the trial. He was not cross-examined. He gave no answer de-

Supreme Court of the United States
Washington, D. C. 20542

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 8, 1979

No. 77-1489 New Jersey v. Portash

Dear Potter:

Please join me.

I may add a few words in a brief concurrence, but
in any event they will not be many words.

Sincerely,



Mr. Justice Stewart

Copies to the Conference

LFP/lab

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

From: Mr. Justice Powell

Circulated: 18 JAN 1979

1st DRAFT Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 77-1489

State of New Jersey, Petitioner, | On Writ of Certiorari to the
v. | Superior Court of New
Joseph S. Portash. | Jersey, Appellate Division.

[January —, 1979]

MR. JUSTICE POWELL, concurring.

I concur in the Court's opinion, and add these comments.

As stated by the Court, New Jersey makes two arguments in support of its request for reversal. First, it insists that, because Portash did not take the witness stand, his immunized testimony was not used against him and he therefore cannot complain of a violation of his Fifth Amendment privilege. I agree with the Court that the preferred method for raising claims such as Portash's would be for the defendant to take the stand and appeal a subsequent conviction, if—following a claim of immunity—the prosecutor was allowed to use immunized testimony for impeachment. Only in this way may the claim be presented to a reviewing court in a concrete factual context. Moreover, requiring that the claim be presented only by those who have taken the stand will prevent defendants with no real intention of testifying from creating artificial constitutional challenges to their convictions.*

This is a state case, however, in which the New Jersey Supreme Court apparently accepted the procedure followed by the trial court and treated the constitutional question as having been properly presented. This procedural question was within the authority of the state court to decide.

*Criminal defendants, as an aid to determining trial strategy, no doubt would prefer to be told in advance of trial whether prior testimony may be used to impeach if they take the stand. But there is no constitutional requirement that defendants be given such a ruling at a time when only a hypothetical question can be presented.

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

From: Mr. Justice Powell

Circulated: _____

2nd DRAFT

Recirculated: 22 JAN 1979

SUPREME COURT OF THE UNITED STATES

No. 77-1489

State of New Jersey, Petitioner, v. Joseph S. Portash.	On Writ of Certiorari to the Superior Court of New Jersey, Appellate Division.
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[January —, 1979]

MR. JUSTICE POWELL, concurring.

I concur in the Court's opinion, and add these comments.

As stated by the Court, New Jersey makes two arguments in support of its request for reversal. First, it insists that, because Portash did not take the witness stand, his immunized testimony was not used against him and he therefore cannot complain of a violation of his Fifth Amendment privilege. The preferred method for raising claims such as Portash's would be for the defendant to take the stand and appeal a subsequent conviction, if—following a claim of immunity—the prosecutor was allowed to use immunized testimony for impeachment. Only in this way may the claim be presented to a reviewing court in a concrete factual context. Moreover, requiring that the claim be presented only by those who have taken the stand will prevent defendants with no real intention of testifying from creating artificial constitutional challenges to their convictions.*

This is a state case, however, in which the New Jersey Appellate Division apparently accepted the procedure followed by the trial court and treated the constitutional question as having been properly presented. I agree with the Court that

*Criminal defendants, as an aid to determining trial strategy, no doubt would prefer to be told in advance of trial whether prior testimony may be used to impeach if they take the stand. But there is no constitutional requirement that defendants be given such a ruling at a time when only a hypothetical question can be presented.

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

From: Mr. Justice Powell

Circulated: _____

3rd DRAFT

Recirculated: 24 JAN 1979

SUPREME COURT OF THE UNITED STATES

No. 77-1489

State of New Jersey, Petitioner, | On Writ of Certiorari to the
v. | Superior Court of New
Joseph S. Portash. | Jersey, Appellate Division.

[January —, 1979]

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, concurring.

I concur in the Court's opinion, and add these comments. As stated by the Court, New Jersey makes two arguments in support of its request for reversal. First, it insists that, because Portash did not take the witness stand, his immunized testimony was not used against him and he therefore cannot complain of a violation of his Fifth Amendment privilege. The preferred method for raising claims such as Portash's would be for the defendant to take the stand and appeal a subsequent conviction, if—following a claim of immunity—the prosecutor was allowed to use immunized testimony for impeachment. Only in this way may the claim be presented to a reviewing court in a concrete factual context. Moreover, requiring that the claim be presented only by those who have taken the stand will prevent defendants with no real intention of testifying from creating artificial constitutional challenges to their convictions.¹

This is a state case, however, in which the New Jersey Appellate Division apparently accepted the procedure followed by the trial court and treated the constitutional question as having been properly presented. I agree with the Court that

¹ Criminal defendants, as an aid to determining trial strategy, no doubt would prefer to be told in advance of trial whether prior testimony may be used to impeach if they take the stand. But there is no constitutional requirement that defendants be given such a ruling at a time when only a hypothetical question can be presented.

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 11, 1979

Re: No. 77-1489 New Jersey v. Portash

Dear Potter:

Now that Bill has joined your opinion, I realize that my "bargaining power" is considerably less, but since I did talk to you about possible suggestions in this case which would permit me to join it, I am submitting them nonetheless. Since Harry and I also discussed the possibility of a dissent on the bench (sotto voce, I hope) I am sending a copy of this letter to him. I have no reason to think, from anything that he told me, that he is of the same view that I am.

My difficulties with the opinion as written strike me as minor. I am willing to concede that Brooks v. Tennessee, at least the part which you joined, is the law, but am unwilling to extend any further notion of "chilling effect" or "burden" than that case requires. I also think that, in addition to the fact that the New Jersey courts decided the federal question, there must be an Article III case or controversy present in the case in order for us to pass on that federal question; I have no doubt that there is such a controversy present here, but ✓ would like to see something in the opinion specifying that as an additional requirement. My impression of the briefs is that New Jersey also sought to use statements made by the respondent in the course of plea bargaining to impeach him, and your opinion as I read it does not deal with that issue at all; I do not see why statements such as those could be thought to be remotely the product of "compulsory self-incrimination", and would like to see some reservation made as to the opinion's inapplicability to them. The following suggestions embody these points.

(1) At page 5, delete the last two full sentences on this page. You have already said that the New Jersey court in

effect ruled against the defendant's claims of privilege in the pre-trial discussion, the Supreme Court of New Jersey said this was sufficient under state practice to raise the compulsory self-incrimination point, and you go on in the sentence beginning at the bottom of page 5 and ending on page 6 to say that there is nothing in the federal Constitution to prevent New Jersey from reaching such a conclusion. The two sentences which I would like to see deleted cut in an opposite direction: They suggest that even if New Jersey had not reached these conclusion there might be some principle of federal constitutional law which would permit Portash to raise his claim here without ever having taken the stand, even though the New Jersey courts had required, as a matter of state law, that he take the stand and await a ruling by the trial court on his various claims of privilege. I will at any rate write separately saying that I do not think there is any such federal principle, but for your purposes you obviously do not need to decide the point one way or the other. Taking out the implication, if I am right that this implication flows from these two sentences, would simply leave the matter undecided.

(2) In the first full sentence on page 5, beginning with the word "Moreover", could you change the period to a comma and add the phrase: "so long as the 'case or controversy' requirement of Article III is met".

(3) I am not sufficiently confident of the state of the record to make any precise suggestion as to the right of the state to use respondent's statements made while plea bargaining in order to impeach him if he takes the stand in his own defense I will certainly abide your judgment if you think that question is not properly raised by the State; if it is, I do not understand your opinion to rule out its use, and I would think a footnote to that effect might be desirable.

Sincerely,



Mr. Justice Stewart

Copy to Mr. Justice Blackmun

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 16, 1979

Re: No. 77-1489 New Jersey v. Portash

Dear Potter:

Please join me in your third draft circulated this morning. I may write separately or join what Lewis has to say in writing separately.

Sincerely,



Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 23, 1979

Re: No. 77-1489 New Jersey v. Portash

Dear Lewis:

The views you express in your concurring opinion in this case very closely parallel mine, and I am determined not to add to the number of separate opinions that have already been written. My one difficulty with joining yours is that it is a little less explicit than I would like to be in intimating that if this case had come up in a federal court, we would be free to, and very likely would, insist that the question be raised in what you describe as the "preferred method" in the first paragraph of your concurrence. If you would be willing to add a new footnote following the sentence which begins on the last line of page 1 and continues over to page 2 expressing substantially this view, I would like to join your concurrence rather than simply remain silent:

2/

"Accordingly, the Court need not and, as I read its opinion, does not decide whether it would regard the constitutional issue as having been properly presented if this case had arisen in a federal court."

Sincerely,



Mr. Justice Powell

77-1489

Supreme Court of the United States
Memorandum 2, 24 79

Honorable, 19

Do you think your
proposed WJS's Year
is comparable to any
joining PSR Portals?
Sincerely

LOH

1

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

RECEIVED
S. C. JOHN PAUL STEVENS

January 9, 1979

Re: 77-1489 - New Jersey v. Portash

Dear Potter:

Please join me.

Respectfully,



Mr. Justice Stewart

Copies to the Conference