

# The Burger Court Opinion Writing Database

*Corbett v. New Jersey*

439 U.S. 212 (1978)

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

December 1, 1978

Re: 77-5903 - Corbitt v. New Jersey

Dear Byron:

I join.

Regards,

WSB

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

October 11, 1978

RE: No. 77-5903 Corbitt v. New Jersey

Dear John:

You, Thurgood and I are in dissent in the above.  
Would you care to undertake the dissent?

Sincerely,

Mr. Justice Stevens

cc: Mr. Justice Marshall

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

November 16, 1978

RE: No. 77-5903 Corbitt v. New Jersey

Dear John:

Please join me.

Sincerely,

*Bill*

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

November 15, 1978

Re: No. 77-5903, Corbitt v. New Jersey

Dear Byron,

I voted at the Conference to affirm the judgment in this case, and that remains my view, subject to being persuaded otherwise by what may be written in dissent. I do not agree, however, with that part of your proposed opinion that equates this case with Bordenkircher v. Hayes.

The opinion you have circulated states on page 8: "There is no difference of constitutional significance between Bordenkircher and this case." I disagree. Bordenkircher involved plea negotiations between the prosecutor and defense counsel in the context of an adversary system of criminal justice. It seems to me that there is a vast difference between the settlement of litigation through negotiations between the parties and the state statute involved in the present case. I would not, in short, equate the prosecuting attorney with the state legislature, any more than I would equate the prosecuting attorney with the trial judge. (See Ramsey v. New York, in which we have granted certiorari.)

Could a state legislature provide that the maximum penalty for every criminal offense to which a defendant pleads guilty shall be one-half the maximum penalty that may be imposed upon a defendant convicted after a not guilty plea? I think not. Yet the reasoning of your proposed opinion would seem clearly to validate this hypothetical legislation.

If your present circulation becomes the opinion of the Court, I shall probably write a brief concurring opinion.

Sincerely yours,

Mr. Justice White

Copies to the Conference

PS  
1

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

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

From: Mr. Justice Stewart

No. 77-5903

Circulated: 05 DEC 197

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

McArthur Corbitt, Appellant,  
v.  
State of New Jersey. | On Appeal from the Supreme  
Court of New Jersey.

[December —, 1978]

MR. JUSTICE STEWART, concurring.

I agree with the Court that *United States v. Jackson*, 390 U. S. 570, is not controlling in this case. In the *Jackson* case, a convicted defendant could be sentenced to death if he had requested a jury trial but could be sentenced to no more than a life sentence if he either had pleaded guilty or had pleaded not guilty and waived a jury trial. Under these circumstances, the Court held that this part of the federal statute was unconstitutional because it "impose[d] an impermissible burden on the exercise of a constitutional right." 390 U. S., at 572.

Under the New Jersey statutory scheme, by contrast, no such impermissible burden is present. Unlike the statute at issue in the *Jackson* case, the death penalty is not involved here, and a convicted defendant can be sentenced to the maximum penalty of life imprisonment whether he pleads *non-vult* or goes to trial. Moreover, because in New Jersey a defendant pleads *non-vult* to a general indictment of murder, he can be sentenced to the maximum sentence even though the underlying facts would have supported no more than a second-degree murder conviction if the defendant had gone to trial and been found guilty by a jury. Since the latter offense cannot be punished by life imprisonment, a defendant who is guilty of second-degree murder is subject to a greater penalty if he pleads *non-vult* than if he pleads not guilty and is convicted of that offense after a jury trial. Finally, a defendant

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

From: Mr. Justice White

Circulated: 15 NOV 1978

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

**1st DRAFT**

**SUPREME COURT OF THE UNITED STATES**

No. 77-5903

McArthur Corbitt, Appellant,  
 v.  
 State of New Jersey. | On Appeal from the Supreme  
 Court of New Jersey.

[November —, 1978]

MR. JUSTICE WHITE delivered the opinion of the Court.

Under the New Jersey homicide statutes,<sup>1</sup> some murders are of the first degree; the rest are of the second degree. Juries

<sup>1</sup> The relevant statutes are 2A N. J. Stat. Ann. §§ 113-1, 113-2, 113-3, and 113-4 (West):

“2A:113-1. Murder

“If any person, in committing or attempting to commit arson, burglary, kidnapping, rape, robbery, sodomy or any unlawful act against the peace of this state, of which the probable consequences may be bloodshed, kills another, or if the death of anyone ensues from the committing or attempting to commit any such crime or act; or if any person kills a judge, magistrate, sheriff, coroner, constable or other officer of justice, either civil or criminal, of this state, or a marshal or other officer of justice, either civil or criminal, of the United States, in the execution of his office or duty, or kills any of his assistants, whether specially called to his aid or not, endeavoring to preserve the peace or apprehend a criminal, knowing the authority of such assistant, or kills a private person endeavoring to suppress an affray, or to apprehend a criminal, knowing the intention with which such private person interposes, then such person so killing is guilty of murder.

“2A:113-2. Degrees of murder; designation in verdict

“Murder which is perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which is committed in perpetrating or attempting to perpetrate arson, burglary, kidnapping, rape, robbery or sodomy, or which is perpetrated in the course or for the purpose of resisting, avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody,

To: The Chief Justice  
 Mr. Justice BREWSTER  
 Mr. Justice Stewart  
 ✓Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice REHNQUIST  
 Mr. Justice Stevens

PP. 7-12

From: Mr. Justice White

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

2nd DRAFT

Recirculated: 27 NOV 1978

## SUPREME COURT OF THE UNITED STATES

No. 77-5903

McArthur Corbitt, Appellant,  
 v.  
 State of New Jersey. | On Appeal from the Supreme  
 Court of New Jersey.

[November —, 1978]

MR. JUSTICE WHITE delivered the opinion of the Court.

Under the New Jersey homicide statutes,<sup>1</sup> some murders are of the first degree; the rest are of the second degree. Juries

<sup>1</sup> The relevant statutes are 2A N. J. Stat. Ann. §§ 113-1, 113-2, 113-3, and 113-4 (West):

"2A:113-1. Murder

"If any person, in committing or attempting to commit arson, burglary, kidnapping, rape, robbery, sodomy or any unlawful act against the peace of this state, of which the probable consequences may be bloodshed, kills another, or if the death of anyone ensues from the committing or attempting to commit any such crime or act; or if any person kills a judge, magistrate, sheriff, coroner, constable or other officer of justice, either civil or criminal, of this state, or a marshal or other officer of justice, either civil or criminal, of the United States, in the execution of his office or duty, or kills any of his assistants, whether specially called to his aid or not, endeavoring to preserve the peace or apprehend a criminal, knowing the authority of such assistant, or kills a private person endeavoring to suppress an affray, or to apprehend a criminal, knowing the intention with which such private person interposes, then such person so killing is guilty of murder.

"2A:113-2. Degrees of murder; designation in verdict

"Murder which is perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which is committed in perpetrating or attempting to perpetrate arson, burglary, kidnapping, rape, robbery or sodomy, or which is perpetrated in the course or for the purpose of resisting, avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody,

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

November 30, 1978

Re: No. 77-5903 - Corbitt v. N. J.

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Dear Harry,

Thank you for your note. As I understood Potter's letter, he did not intend to write out his views unless my circulation commanded a majority. It has not yet done so, but if it does and Potter circulates, I shall certainly study his views with some care and would hope to accommodate them if I can.

Sincerely yours,

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 29, 1978

MEMORANDUM TO THE CONFERENCE

Re: Case held for No. 77-5903 — Corbitt v. New Jersey

One case, Bhillips v. Pennsylvania, No. 77-6300, has been held for Corbitt.

Bhillips was convicted in a bench trial of first degree murder and other crimes. He was sentenced to life imprisonment. On appeal from the murder conviction he argued that the Pennsylvania Sentencing Code provisions for first degree murder were unconstitutional because they distinguished between jury convictions and bench convictions or guilty pleas. Only in the former case was a death sentence possible, and Bhillips argued that the distinction impermissibly burdened his right to a jury trial, relying on United States v. Jackson, 390 U.S. 570 (1968).

The Pennsylvania Supreme Court rejected his attacks on the Sentencing Code. The court found Brady v. United States, 397 U.S. 742 (1970), and North Carolina v. Alford, 400 U.S. 25 (1970), controlling. Bhillips had not shown that his waiver of his right to a jury trial was unknowing or involuntary; therefore, the conviction should stand.

It seems to me that the Pennsylvania Supreme Court is correct and that this case falls squarely under Brady. Here, as in Brady, the petitioner waited until after conviction to make his constitutional attack. Here, as in Brady, there is no indication that petitioner was not well-c counseled, or that his decision to have a bench trial was involuntary or coerced. Therefore, I believe certiorari should be denied.

Moreover, there have been significant developments in Pennsylvania law since Bhillips' conviction that drain the case of any real significance. First, the death penalty

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 16, 1978

Re: No. 77-5903 - Corbitt v. New Jersey

Dear John:

Please join me in your dissent.

Sincerely,

  
T.M.

Mr. Justice Stevens

CC: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

November 30, 1978

Re: No. 77-5903 - Corbitt v. New Jersey

Dear Byron:

I can, and hereby do, join your recirculation of November 27. I held my vote because I wondered whether you would be able to accommodate Potter's concern as expressed in his letter of November 15. I would not mind your effecting that accommodation if you see your way clear to do so.

Sincerely,

*Harry*

Mr. Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

November 27, 1978

No. 77-5903 Corbitt v. New Jersey

Dear Byron:

Please join me.

Sincerely,

*Lewis*

Mr. Justice White

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

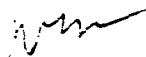
November 21, 1978

Re: No. 77-5903 Corbitt v. New Jersey

Dear Byron:

Please join me.

Sincerely,



Mr. Justice White

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

October 11, 1978

Re: 77-5903 - Corbitt v. New Jersey

Dear Bill:

Thanks for inviting me to undertake the dissent. I will be happy to do so.

Respectfully,



Mr. Justice Brennan

cc: Mr. Justice Marshall

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

From: Mr. Justice Stevens

Circulated: NOV 15 1978

1st DRAFT

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

## SUPREME COURT OF THE UNITED STATES

No. 77-5903

McArthur Corbitt, Appellant,  
 v.  
 State of New Jersey. | On Appeal from the Supreme  
 Court of New Jersey.

[November —, 1978]

MR. JUSTICE STEVENS, dissenting.

The concept of a "false" not guilty plea has no place in our jurisprudence.<sup>1</sup> A defendant has a constitutional right to require the State to support its accusation with evidence.<sup>2</sup> He

<sup>1</sup> "[T]he plea is not evidence. Nor is it testimonial. It is not under oath. Nor is it subject to cross-examination. When it is 'not guilty,' it has no effect as testimony or evidence . . . . The function of that plea is to put the Government to its proof and to preserve the right to defend. . . .

"If the plea were testimonial, the court would have no power to demand it. But, if having used its power to extract the plea for its proper purpose it can go further and over the defendant's objection convert or pervert it into evidence, in substance if not in form, it compels the defendant to testify in his own case. This it has no power to do." *Wood v. United States*, — U. S. App. D. C. —, 128 F. 2d 265, 273 (1942) (Rutledge, J.).

See also *Sorrells v. United States*, 287 U. S. 435, 452 (not guilty plea is not inconsistent with entrapment defense even though latter implies admission that the offense was committed); *State v. Valentina*, 71 N. J. L. 552, 556, 60 A. 177, 179 (1905) (not guilty plea and confession of guilt are not inconsistent).

<sup>2</sup> Among the implications of the Fifth Amendment privilege against self-incrimination is that "[g]overnments, state and federal, [may be] constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." *Malloy v. Hogan*, 378 U. S. 1, 7-8. As expressed by Dean Wigmore, the Fifth Amendment gives the individual the right to "require[e] the government in its contest with the individual to shoulder the entire load." 8 Wigmore, Evidence (McNaughten rev., 1960), 317, quoted in *Murphy v. Waterfront Comm'n*, 378 U. S. 52, 55.

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

From: Mr. Justice Stevens

Circulated: NOV 16 1978

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

**2nd DRAFT**

**SUPREME COURT OF THE UNITED STATES**

No. 77-5903

McArthur Corbitt, Appellant.  
 v.  
 State of New Jersey. | On Appeal from the Supreme  
 Court of New Jersey.

[November —, 1978]

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The concept of a "false" not guilty plea has no place in our jurisprudence.<sup>1</sup> A defendant has a constitutional right to require the State to support its accusation with evidence.<sup>2</sup> He

<sup>1</sup> "[T]he plea is not evidence. Nor is it testimonial. It is not under oath. Nor is it subject to cross-examination. When it is 'not guilty,' it has no effect as testimony or evidence . . . . The function of that plea is to put the Government to its proof and to preserve the right to defend. . . .

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See also *Sorrells v. United States*, 287 U. S. 435, 452 (not guilty plea is not inconsistent with entrapment defense even though latter implies admission that the offense was committed); *State v. Valentina*, 71 N. J. L. 552, 556, 60 A. 177, 179 (1905) (not guilty plea and confession of guilt are not inconsistent).

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