ORIGINAL

In the

Supreme Court of the United States

STATE OF NEW JERSEY,

PETITIONER,

V.

JOSEPH S. PORTASH,

RESPONDENT.

No. 77-1489

Washington, D. C.
December 5, 1978

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STATE OF NEW JERSEY,	:	
Petitioner,	:	
v.	:	No. 77-1489
JOSEPH S. PORTASH,	:	
Respondent.	:	

Washington, D.C.

Tuesday, December 5, 1978

The above-entitled matter came on for argument at 11:06 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

EDWIN H. STIER, Assistant Attorney General of New Jersey, State House Annex, Trenton, New Jersey 08625; on behalf of the Petitioner.

MICHAEL E. WILBERT, ESQ., Wilbert, Clyne & Montenegro, P.A., 531 Burnt Tavern Road, Bridge Avenue Extension, Brick Town, New Jersey 08723; on behalf of the Respondent.

C O N T E N T S

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PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-1489, New Jersey against Portash.

Mr. Stier, I think you may proceed when you're ready.

ORAL ARGUMENT OF EDWIN H. STIER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. STIER: Mr. Chief Justice, and may it please the Court:

The respondent in this matter was indicted by a New Jersey state grand jury on two counts: the first count for misuse of his public offices for the benefit of a private developer; and the second count for obtaining, fraudulently, $31,000 from that developer through a conduit corporation to which he was not entitled as a public official.

After a jury trial, the respondent was convicted on count two and acquitted on count one.

The matter was appealed to the appellate division of the Superior Court of New Jersey, which reversed the conviction on one ground, and that was that in the course of the trial, the trial court had ruled in such a way as to deprive the respondent of his Fifth Amendment privilege, thereby causing him not to testify; thereby depriving the petit jury of evidence that it would otherwise have received.

The state appealed to the New Jersey Supreme Court,

which denied the state's appeal and denied a petition for certification.

There are two issues which have been raised before this Court. One is whether the Fifth Amendment privilege was properly asserted by the respondent at trial, and the second was whether the Harris case, or the rationale of the Harris case, was properly applied to the facts of this case by the appellate division of the Superior Court of New Jersey.

The issues in this case arise out of a series of in camera discussions which took place among counsel and the court. During the course of those in camera discussions, a number of issues were discussed, including the scope of cross-examination of the respondent in the event that the respondent would testify and whether the state would be permitted to use any of the respondent's pre-trial statements, which were obtained under various circumstances under -- over an extended period of time for the purpose of cross-examination of the respondent.

At the conclusion of the in camera discussions, respondent's attorney announced that in reliance upon what he believed to be the court's ruling, his client was not going to testify.

QUESTION: Is the case, in its present posture, in your view, any different from what it would be if he had not made this inquiry, but had taken the stand, testified and been

impeached on the Harris rationale?

MR. STIER: Absolutely, Your Honor.

QUESTION: No difference?

MR. STIER: Oh -- there would be a significant difference --

QUESTION: Well --

MR. STIER: -- which I'm about to get to.

QUESTION: Oh.

MR. STIER: That difference is this: During the course of the in camera proceeding, the trial court, on at least 14 separate occasions that I have counted in going through the record, said that he would not rule generally on whether the state could use, or under what circumstances the state could use, prior statements for the purpose of cross-examination.

The court indicated that he was bound by a New Jersey law which requires him to rule on a question by question basis.

Because of the fact that no specific ruling was permitted on a proffer of proof by the state for cross-examination purposes, we don't know specifically what circumstances would have been raised in this case.

QUESTION: Would these -- question by question be in front of the jury?

MR. STIER: No, Your Honor. There was a --

QUESTION: Is that in the in camera discussion?

MR. STIER: Your Honor, there was a procedure that was established by the court and agreed to by the prosecution and the defense during the course of the in camera discussion which would require the state, in the event that the state wanted to use a pre-trial statement against the respondent, to ask for a side bar conference before the question was asked in the presence of the jury.

QUESTION: Of each question?

MR. STIER: Each question based on a prior statement --

QUESTION: I didn't see that. Is that in the appendix?

MR. STIER: Yes, Your Honor, it is in the appendix. It's in the appendix in several places, and it was agreed to by the defense early on in the discussions.

Now that specific procedure was established by the court so that in the event that the court decided that the questions based on prior statements could not be properly used, the import of the information would not be conveyed to the jury.

QUESTION: Mr. Stier, I'm trying to think through whether this argument you're making is a question of state procedure or a federal question.

Are you -- because I gather the state supreme court considered for its purposes the question was adequately raised to address the merits of it?

MR. STIER: Yes, Your Honor.

QUESTION: And you're saying that as a matter of

federal law, a state may not permit this issue to be raised and preserved in this way, is that --

MR. STIER: Yes, Your Honor. Our position is that as a matter of federal law, in order to receive the benefit of the Fifth Amendment protection, a respondent is required to assert the Fifth Amendment.

Our position is that in this case he did not assert the Fifth Amendment because he did not take the stand under the procedure that had been established by the trial court for his protection; permit the issue to be framed in such a way that it could be resolved on a constitutional basis.

QUESTION: What if the New Jersey court, the appellate division here, had said it was wrong for the trial judge to refuse to make this kind of general ruling, and refused to follow the question by question approach that you say New Jersey law requires?

Would we then have a federal question before us?

MR. STIER: I think it would be a more difficult federal question, because of the fact that the state court's ruling would have been based on state court procedure.

But on the other hand, in this case, there was no discussion of state court procedure. This case was decided by the appellate division squarely on constitutional grounds.

QUESTION: You say -- just to be sure I have it clear -- that in the bench conference, when this subject was discussed,

the judge made it clear that he would not make anticipatory rulings, but would require them to submit the question at the bench conference when and if he took the stand?

MR. STIER: That's correct, Your Honor.

As a matter of fact, the trial court, when the respondent's attorney announced that his client was not going to take the stand, expressed surprise at that conclusion.

It indicated that the respondent had made a tactical judgment, not in reliance on his rulings with respect to the use of prior statement, but a tactical judgment not to testify, and was simply using this as an excuse to surround his tactical judgment with some constitutional implications.

In the course of the in camera discussions, the issue that was faced and resolved squarely by the court was the scope of permissible cross-examination of the defendant; that is, the defendant argued that the scope of cross-examination should be narrowed to the scope of direct examination, intended to use only a very narrow area on cross-examination, and asked the court to restrict the court in its cross-examination only to those factual issues raised.

The prosecution objected very strongly to that, and took the position that the scope of cross-examination should be as broad as all the evidence which it had put in in its case in chief, none of which, by the way, have been alleged by the respondent to have resulted from tainted -- tainted

statements.

There is no element in this case concerning the way in which the prosecution had acquired all the evidence which it put in in its case in chief.

The trial court ruled, then, that the prosecution would be permitted to broaden its cross-examination to the scope of its evidence which it had -- which had put in in its case in chief as testimonial and documentary evidence, and that in the event that further cross-examination or requests by the state in which any of the respondent's prior statements would be used, the government -- the prosecution then would have to approach the bench and raise the question at that time with the court.

It was after the ruling on the scope of cross-examination that the respondent indicated that he was not going to testify and at that point the court expressed surprise, as I indicated before, and indicated that, in effect, the respondent had made a tactical judgment.

Had he --

QUESTION: What if he -- what if he had never -- there had never been any immunized testimony at all, and the defendant was going to take the -- it was anticipated the defendant was going to take the stand, and then the prosecutor made this motion at the close of its case, or before the defendant started his case.

What is the rule in New Jersey? There is no such restriction on cross-examination.

MR. STIER: That's correct, Your Honor. The trial court's decision on the scope of cross-examination was based on New Jersey case law which makes it clear that when a defendant takes the stand, he takes the stand as any other witness, and subjects himself --

QUESTION: Well, I take it then the prosecutor thought that if he asked a -- that by asking a question broader than the defendant's direct, he perhaps could confirm some of the -- of the state's case in chief.

MR. STIER: That's correct, Your Honor.

QUESTION: He would ask him -- he would ask him whether or not a certain fact is true.

MR. STIER: That's correct, Your Honor.

QUESTION: That you had already put in the case.

MR. STIER: That's correct.

QUESTION: And you anticipated that if he didn't -- that apparently -- apparently the reason he wanted to ask that was that there must have been something in his grand jury testimony that gave you that clue.

MR. STIER: No, Your Honor. The position of the state is that the evidence that was obtained, put in in the case in chief, and the respondent never disputed that, was all based on independent sources.

And it was that evidence that the prosecution intended to use for the purpose of cross-examination within the scope that the court --

QUESTION: You may have obtained it from independent sources, but there might be something in the grand jury testimony that would -- that would be relevant to or confirm one or more facts in the state's case in chief.

MR. STIER: It's conceivable that that might have occurred.

QUESTION: Well, it would have to be, or you wouldn't want to -- you would never get around to wanting to impeach him with it.

MR. STIER: I think that there is evidence that was clearly outside the scope of his prior statements, which may have been outside the scope of direct examination, which the prosecution would want to use for purposes of cross-examination.

Had we -- had the respondent testified, and had the prosecutor approached that bench with a specific piece of prior statement that it intended to use for cross-examination, we would know the answer to your question, Your Honor.

We would know.--

QUESTION: Well, your position then -- your position must be, then, that the existence of this prior testimony couldn't possibly have -- or didn't exert any pressure whatsoever not to take the stand.

MR. STIER: No, that may have been a factor; that may have been a factor.

QUESTION: Well, how could it have been in the way you just answered me?

MR. STIER: It's possible, and the defendant hypothesized --

QUESTION: You ask him a question outside the scope of his direct, which is relevant to your direct case, and you want to confirm part of your direct case by his testimony. Say he answers it a certain way, and then you want to impeach him with something he said in his grand jury testimony.

That has to mean, then, that there's something in his grand jury testimony that supports your case in chief.

MR. STIER: Oh, that's true, Your Honor. I didn't mean to -- I didn't mean to indicate that there was nothing in his grand jury testimony that wasn't relevant to the case in chief.

QUESTION: Not only relevant, but it supports your case in chief.

MR. STIER: That's correct, Your Honor.

QUESTION: Well, isn't it your position thatyou have no way of knowing until he was asked specific questions on the stand whether you would want to use that grand jury testimony or perhaps some other independently acquired evidence to impeach him?

MR. STIER: Yes. That's precisely the state's position.

We don't know which statements, if any, the state might have intended to use. We don't know whether the state would have taken the position that it would concede the truthfulness of the prior statements, or claim that it was false.

We don't know whether -- what purpose the state would offer the statement for. We don't know whether the statement would have been claimed by the state to have been outside the scope of the grant of immunity.

We don't know whether there would have been a direct contradiction between what he had said previously and what he was testifying to at trial.

QUESTION: But Mr. Stier, isn't the view of the law that the New Jersey Supreme Court expressed, if that should happen to be correct, there wouldn't have been any purpose in all these preliminary questions, would there?

In other words, if he had an absolute right not to be impeached -- to be free of impeachment with the grand jury testimony -- there wouldn't have been any need for all this.

MR. STIER: There --

QUESTION: Which leads me to ask you: In order to raise the question of law that you are ultimately going to get to, why do we have to decide -- why do we have to bother with this?

Because they did adequately preserve that issue, didn't they?

MR. STIER: I don't believe that's the case, Your Honor.

There -- even if the law is as the New Jersey appellate division applied it --

QUESTION: Right.

MR. STIER: -- there are still possible circumstances that could have occurred at the trial which would have fallen clearly outside the Hockenberry case, which is the case on which the appellate division relied.

For example, if the particular piece of statement that the prosecution intended to offer could have been demonstrated to be false, or could have been demonstrated to have fallen outside of the scope of the grant of immunity, then it would have fallen outside of the Hockenberry case, and outside of the law as the appellate division applied it.

We don't know that, because we don't know specifically what purpose the state might have offered it for, or what the circumstances would be surrounding the --

QUESTION: No, but the other side of the coin is, that if he'd been told by the trial judge that, well, I know the appellate division views the grand jury testimony as not usable, he would have decided to get on the witness stand. You wouldn't have needed all that. If we can take people as what

they represent to us, anyway.

MR. STIER: If his representations are correct, then he might have gotten on the stand and testified had the ruling been as broad as -- as the appellate division conceived it.

However, he still might have been faced, even under --

QUESTION: Supposing we hadn't granted certiorari in this case but waited for the next case. And at a second trial under this, being the law of New Jersey.

Would you still say as a matter of New Jersey law you ought to go through all of that procedure?

MR. STIER: Yes, Your Honor. Yes.

Because there are situations in which I would argue we don't -- we're not bound by the Hockenberry decision. We're not bound by its scope.

I think it's important for me to take a moment to discuss the circumstances under which the statements were obtained from the respondent.

The respondent provided information on basically three occasions: twice in the state grand jury, and once in a statement under oath outside of the grand jury several months later.

During the first appearance in the grand jury, the purpose for his testimony was simply to identify certain records which were not covered by the Fifth Amendment.

There had been a hearing by the trial court prior to

his first appearance, and he was ordered to produce certain records before the grand jury and to simply identify what those records were.

He appeared shortly after that time in the state grand jury under the protection of the state's Public Official Immunity Law, which is a self-executing -- or was at that time -- a self-executing use plus derivative use immunity statute, which covered public officials testifying about conduct in their public offices.

Several months later, as a result of a series of discussions between counsel representing the respondent at that time and the prosecution, a statement was taken from the respondent under oath outside of the grand jury for the purpose of defining the testimony that was required for a case in which it was contemplated that the respondent would ultimately be a witness.

It was a related case. It was an indictment that was about to be returned concerning the individuals who operated the development company and the conduit corporation through which the respondent had receive the approximately $31,000.

Ultimately, that indictment was returned.

It's interesting, and I think instructive, to look at the change of position which the respondent has taken between the beginning of the trial and this point.

His original argument, prior to going to trial, was that the indictment should be dismissed because he, in effect, had made a deal with the state in return for his cooperation believe that the state had entered into a contract which should have barred the state from returning an indictment.

Although it's clear from the record that his cooperation, his testimony in the grand jury, was a result of a desire to strike a bargain with the state, the trial court at that time found that no such contract had been entered into, and held that the indictment should not be dismissed.

But it is clear in this case that we're not dealing with a defendant who has been brought into a grand jury asserting his Fifth Amendment privilege and refusing to testify. There is more of a willingness demonstrated on the part of this respondent to supply information, although he asked for and received immunity protection, but a willingness to disclose that information, because that disclosure was to be in his best interests in disposing ultimately of the criminal charges that faced him.

QUESTION: Nevertheless, on that -- when he was subpoened on November 14th, 1974, the immunity was certainly made express, was it not?

MR. STIER: Yes, Your Honor; there's no question about that.

QUESTION: And he was asked if he -- he was asked if

he understood that, I take it?

MR. STIER: Yes, Your Honor.

QUESTION: And -- so there's no equivocation on what the limits of the immunity were, or what the extent of it was, I guess.

MR. STIER: No, there is not.

QUESTION: Well, I take it you're going to get to --

MR. STIER: I'm about to.

QUESTION: -- why you have exceeded the limits of your promise.

MR. STIER: I'm about to.

The appellate division of the superior court has relied on what is probably the leading authority in the circuits on this question, and that is U.S. v. Hockenberry, at 474 F.2d.

There have been only a very few cases decided on this question. Hockenberry has been relied on in each of those cases.

Hockenberry, the state contends, is wrong in one respect, and certainly distinguishable in another significant respect.

I realize that the Hockenberry case has only limited precedential value here, but I think that the distinction between the facts of the Hockenberry case and this case are extremely important, and I want to take one moment to address that.

In the Hockenberry case, the defendant had been subpoened to a grand jury, and had testified truthfully about having perjured himself previously and testified falsely in another respect unrelated to the first.

He was indicted for the perjury. At his trial, when he testified, the prosecution used his truthful testimony indicating that he had previously committed perjury for the purpose of impeaching his credibility.

Clearly, the purpose was not to demonstrate a conflict between his trial testimony and his grand jury testimony. The purpose was to permit the jury to infer from the truth of what he had said in the grand jury, having admitted committing perjury previously, to infer from the truth of what he said that he was an habitual liar.

That is not the situation here. No matter how you construe the decision made by the trial court in this case, it was clearly not so broad as to permit the jury to infer from the truth of what would have been offered from his prior statements any fact, but simply to demonstrate that there was an inconsistency between what he had said previously under oath and what he was saying now.

Most importantly, I think that the Hockenberry case and the appellate division of this case misconstrued the import of the Harris case. It had to distinguish Harris v. New York in order to get around the implications of that case.

The Harris case, of course, dealt with a Miranda

situation: a statement obtained in violation of the Miranda rules.

In the appellate division and in Hockenberry, the court described a Miranda confession as a voluntary confession, and said that this was an immunity situation, the statement was taken involuntarily.

I dispute that characterization of Miranda. The Miranda case clearly deals with statements which are compelled, which are involuntarily --

QUESTION: Have you read Michigan against Tucker?

MR. STIER: Pardon?

QUESTION: Have you read the opinion of this Court in Michigan against Tucker?

MR. STIER: I'm sorry --

QUESTION: Well, in that opinion, if I have the -- I think I have the right one, the Court says specifically that violation of the Miranda rules, interrogation, doesn't mean that the response to the interrogation was involuntary.

MR. STIER: Your Honor, I think that the term voluntariness has been used in different contexts --

QUESTION: Right.

MR. STIER: -- to mean different things.

QUESTION: And wasn't it pretty clear in the Harris case itself that the statement was not an involuntary statement but one only -- but a statement that had been taken in violation

of the Miranda -- the so-called Miranda rule.

MR. STIER: I think that a statement taken in an immunity situation is no more involuntary --

QUESTION: Well, except you're --

MR. STIER: -- than a statement made in violation of Miranda.

QUESTION: Pardon? I'm sorry.

QUESTION: The witness is guilty of contempt if he doesn't answer, isn't he?

MR. STIER: That's correct.

QUESTION: That's generally been considered involuntary.

MR. STIER: And the Court in Miranda described the coercive atmosphere of the police station --

QUESTION: Yes.

MR. STIER: -- as one in which the responses were compelled, and described the statement taken under those circumstances as an involuntary statement, and indeed, compared the compulsion of the police station to the compulsion of a court proceeding.

QUESTION: Well, two years ago, in Oregon against Matthieson? we held that testimony given in a police station by someone who was not under arrest did not violate Miranda.

MR. SITER: That's correct. And I --

QUESTION: Well, how does that -- how can that be reconciled with the statement you just made?

MR. STIER: The -- when the compelling atmosphere is created in the police station which forces the individual in that -- in those circumstances to give up his inclination to remain silent, that is the threshold which I believe is reached in a grand jury when immunity is granted and when court compulsion, legal compulsion, is exerted to force the witness to testify.

Certainly, under the facts of this case, I believe there would be a -- less compulsion under the facts of this case than in circumstances were a -- some circumstances in the back room of a police station, where the compelling atmosphere can be very coercive.

QUESTION: Well, but you're talking about rubber hoses.

MR. STIER: No, Your Honor, that raises a different question. Those are the due process cases which I think can be distinguished. That's the other context in which involuntary is used, where the conduct of the police itself has fallen into question.

Where the policy is different -- policy there is to deter unlawfulness in the obtaining of a confession.

That element is not present in a grand jury. And I think that the due process cases can be distinguished from the Miranda cases, and the immunity is more closely analogous to the Miranda-type situation, the compulsion in the backroom of a

police station, where it is my contention defendant should receive no less protection than a witness sitting in a grand jury.

I'm not here to urge a ruling by this Court which would permit a prosecutor to depose a potential defendant. That is not the case here.

In Oregon v. Hass, the Court, when faced with a question of potential abuse, said, we'll deal with that problem when the facts of the case indicate an abuse. I believe it can and could be dealt with under the due process clause.

But the due process clause does not apply here. This is strictly a Fifth Amendment case.

QUESTION: Mr. Stier, I noticed that the opinion of the appellate division refers to the privilege -- the constitutional protection afforded by the Fifth Amendment, and the cognate state constitutional guarantees.

We don't have any constitutional guarantee, do we?

MR. STIER: That's right. There are no state constitutional guarantees.

QUESTION: They're statutory. They're statutory, entirely.

MR. STIER: There is a rule of evidence which creates a privilege against --

QUESTION: Yes, but I mean it's not -- we don't have any privilege in the state constitution.

MR. STIER: That's correct. There is no privilege --

QUESTION: It's only statutory.

MR. STIER: That's correct.

QUESTION: Well, what if your respondent -- I know your time is running -- your respondent argues that really this appellate division opinion is simply a matter of construction of the state statutes, the immunity statute and the privilege statute; and that therefore the -- even though it draws on federal cases, to inform the interpretation of those two statutes -- the whole decision rests on the state statutes, and therefore on adequate state grounds, and therefore there's nothing here for us to decide.

MR. STIER: I don't think that's what the appellate division said, Your Honor.

I think the appellate division rested its holding squarely on the Fifth Amendment, squarely on the Hockenberry case, in defining the permissible limits of --

QUESTION: Well, I gather your adversary's argument is, sure, appellate division did all of that, but only to inform the content of the state statutes.

And that -- well what we have here is an interpretation of state statutes.

MR. STIER: Well, Your Honor, I think that had the Hockenberry case gone the other way, I think that the state statute would have been construed the other way by the appellate division.

That seems to be clearly what the appellate division is saying in its opinion, that it's bound by the scope of permissible use of immunizedtestimony as defined by the Hockenberry case, relying strictly on --

QUESTION: But as a matter of construction of the state statutes does that make a difference?

MR. STIER: I don't believe that they're construing the state statute, because the state statute has been held in a number of New Jersey cases to be as broad as the federal constitution permits.

QUESTION: Well, I remember writing a memo, which I guess I wrote when I was on the New Jersey supreme court, and I thought we made quite a point that the state statute was informed not primarily by constitutional interpretation, but by common law interpretation of the privilege.

Is that case still law?

MR. STIER: That case was -- that was decided before this statute was enacted in response to -- to this Court's holding in the cases which apply the Fifth Amendment to the state and which have restricted the state in --

QUESTION: Is the current statute very different from the one dealt with in Pillow?

MR. STIER: Yes, it is, Your Honor. I believe that it is different in the sense that it was drawn specifically from this Court's holding, which were decided subsequently.

QUESTION: But it's still a statute?

MR. STIER: Yes, Your Honor. It still is a statute.

QUESTION: Mr. Stier, suppose in granting the immunity the state had said, we will not use anything you say here except in perjury, false swearing, or whatever the language was. And we just want you to know we will not use it in -- for impeachment or for cross-examination in any subsequent trial of you.

And suppose then the state wanted to do what it wanted to do here. Would that violate the Fifth Amendment of the constitution of the United States?

MR. STIER: No, I believe that it would -- it might violate the due process clause of the Fourteenth Amendment. But I think you would still have the same issue, what the scope of protection of the Fifth Amendment is going to be.

QUESTION: Okay.

MR. CHIEF JUSTICE BURGER: Well, your time is up. But I'd like to try to clarify one thing.

Had this man taken the stand, and the prosecutor in the impeachment confronted him with his grand jury statement that was given under the grant of immunity, and no other impeachment, what would have been the court's ruling, in your view, if you care to speculate about that?

MR. STIER: If he had been confronted strictly with the --

QUESTION: Just what he said in the grand jury under

the immunity grants. Not some of the things he said at some other time under oath.

MR. STIER: My argument would still be the same; that the use ofhis grand jury testimony taken under a grant of immunity for that limited purpose --not to infer the truthfulness of what he said in the grand jury, but simply to show the conflict between two statements under oath, would have been permissible under the rationale of Harris, and not precluded by the scope of protection afforded by the Fifth Amendment.

QUESTION: I take it from some of the other things you've said that the constitution had material to use to impeach him that was not included in the grand jury testimony.

MR. STIER: Absolutely. I think the record is clear on that, and it indicates a substantial amount of information which it intended to use which fell outside of the scope of his grand jury statements, or any other statements that he gave.

QUESTION: And you say that neither the prosecution or the court has any obligation to a defendant to tell them in advance how the rulings -- what the prosecution is going to do, and how the court's going to rule, until and unless he takes the stand and is confronted with it?

MR. STIER: That's correct.

I believe that the procedure that was established by the trial court to keep this information away from the jury was fair, and is all that the defendant was entitled to.

MR. CHIEF JUSTICE BURGER: Very well.

MR. STIER: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Wilbert.

ORAL ARGUMENT OF MICHAEL E. WILBERT, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. WILBERT: Thank you, Mr. Chief Justice, and may it please the Court:

The facts of this case are that the respondent did go before the grand jury after advising the prosecutor that he wished to have his Fifth Amendment rights protected.

It was only at that time, after insisting on his Fifth Amendment protection and privilege, that he was offered the grant of immunity under the New Jersey Public Employees Immunity statute.

So the willingness was compelled. It was not him coming forward and volunteering and saying, oh, by the way, do I also have immunity.

He refused to testify. Sought and obtained immunity from the court. And the language of the immunity grant is explicit, as set out in our brief, Mr. Luciani also advising him that, you know that what we obtain here today will not be used against you personally in any subsequent criminal proceedings.

Thereafter, and as a direct result of the immunity that he obtained, he gave grand jury testimony and he also gave other statements to the prosecutor.

I submit that all of that testimony that he gave, and all of those statements, are obtained by the state as a direct result of his immunized grand jury testimony, and therefore under Kastigar, clearly are precluded from use, as are the grand jury statements.

QUESTION: Well, do you mean that the prosecutor could not impeach or undertake to impeach by use of statements other than those in the grand jury if he had independent contradictory statements?

MR. WILBERT: If he had independent, I submit, Mr Chief Justice, that he could. But he had no independent statements.

QUESTION: You say they're all dependent on the grant of immunity.

MR. WILBERT: Yes. There was no speaking to Mr. -- to the respondent in this case until after he had obtained the immunity. It was only at that time that he was willing to speak to them. And --

QUESTION: Doesn't the grant of immunity relate only to the testimony given in the grand jury?

MR. WILBERT: I submit that it does not.

QUESTION: Is there some New Jersey law on that that's different from all the other 49 states and the federal?

MR. WILBERT: Mr. Chief Justice, I submit that under Kastigar, any evidence that flows directly from the immunized

grand jury testimony is immunized to the same extent as the immunized testimony itself.

And I think that under Kastigar in New Jersey, at least, and I think in all the states --

QUESTION: What if he happened to be, beside the other things he did, supposed he happened to have been an alcoholic and went to Alcoholics Anonymous, and got up and made a -- made a lot of these statements.

Could he be impeached on the basis of that? Or do you say that that also --

MR. WILBERT: If it were the prosecutors who caused him to be intoxicated and took him to the Alcoholics Anonymous meeting, I think that --

QUESTION: Well, you're adding some facts now. Usually people aren't intoxicated at AA meetings, so I'm told.

Now,he's there, not intoxicated; or anywhere else, the Chamber of Commerce, or wherever you want him to be, and he makes these statements.

You mean that all those statements are protected by the grant of immunity from the grand jury?

MR. WILBERT: No, I think the state could make an argument, and possibly make a showing, that it was independent. And if they carried their burden -- if they carried their burden in a Kastigar hearing that it was independently obtained, not through the grand jury testimony of the defendant,

then they could use that. They can use that in the state of New Jersey in any event.

However, the situation here was that after they took his grand jury testimony they then called him back in on February 5th, 1975, is the date that's quoted, called him back in and took another statement under oath from him, on the basis of the testimony that they obtained from him in the prior grand jury proceeding.

They had none ofthis information that they examined him on prior to the time --

QUESTION: What compelled him to answer these questions in the --

MR. WILBERT: What compelled him was that he felt he had the same immunity that flowed from the prior grand jury testimony that he gave.

He was advised that he would not be indicted if he gave grand jury testimony. He did give the grand jury testimony and he gave the subsequent statement that they called for.

They called him into Freehold, New Jersey courthouse, with a court reporter, and asked him to sit down and under oath give them further information that they didn't have.

QUESTION: You say that was compelled?

MR. WILBERT: I submit -- that's compelled just as though he were still in the grand jury.

QUESTION: Well, what if he refused to come there?

Was there any process or any contempt power that could have forced him to go?

MR. WILBERT: I think the state would have immediately called him before the grand jury and said, you've already given testimony under immunity. You're now required to continue that testimony.

They called him back twice to the grand jury. I don't think there would be any limitation on the number of times they'd call him back.

QUESTION: But you're telling us that when he went to the prosecutor's office, in response to an invitation, and answered questions under oath, he was compelled to do that by something?

MR. WILBERT: Yes, sir, I submit he was without question, Mr. Chief Justice. After he had given testimony under oath; he had given testimony in November and then in February he was called back to give further testimony. As a result of the evidence they had obtained from his grand jury testimony.

It flows directly under Kastigar, I submit, and there's no question -- in my mind, I would submit, there can't be a question as to its direct consequence from the immunized grand jury testimony.

The defendant then -- the respondent then had telephone calls with the prosecutor when they called him, and other information was obtained; some other information was

obtained.

He then was indicted, and he went to trial. At the end of the state's case -- pardon me. Prior to trial, there was a hearing wherein the judge -- the trial judge ruled that statements given under the grant of immunity could be used to impeach the respondent if he were materially inconsistent in his trial testimony.

The argument made by the attorney general that he never -- that the court never made a ruling is fallacious. At page 151 he makes a ruling, in the appendix. At page 204 he makes a ruling.

He makes all of these preliminary rulings under what he conceives to be the fact situation that Harris applied. And he made the ruling that if the defendant took the stand in his own defense he could be impeached by immunized testimony or inconsistencies.

QUESTION: You have -- don't you have to argue there that kind of a dry run of that sort is a federal constitutional right that attaches along with the Miranda right?

MR. WILBERT: I don't believe that I do, Mr. Justice Rehnquist, because I believe that the state found that the court had made the ruling -- the state of New Jersey found that the court had ruled that the testimony could be used to impeach; that that ruling was improper; and that the state statute required that no use be made of the immunized

testimony with the exception of perjury and false swearing. They are exceptions that are built into the statute, and which are still viable to the state in the event he testifies at a subsequent trial.

Without the use of impeachment, he can be charged and indicted and tried for perjury.

QUESTION: But what if the state court had simply said, we're not going to have any elimine motions in this case. If you want to test my ruling, you get on the stand and start answering questions?

MR. WILBERT: I think that may have been a situation that violated Brooks v. Tennessee; your Court's ruling in Brooks v. Tennessee was that the defendant who was required to take the stand first in his own defense or not at all was placed in the position, when he did not take the stand, that his Fifth Amendment privilege was violated.

QUESTION: Well, then --

MR. WILBERT: Not that he took the stand.

QUESTION: Then you do have to say that a defendant in make -- before he makes his choice as to whether to take the stand or not is entitled as a matter of federal constitutional law to obtain from the judge some sort of ruling as to whether particular objections made to particular questions will be sustained or not.

MR. WILBERT: I don't submit that I do in this particular case, because I believe that the appellate division, ruling on

the substantive state legislative enactment, determined that no use could be made of the testimony in the manner attempted by the prosecutor, and that therefore the -- and the court had ruled that it could be used -- and therefore the court had ruled erroneously and had violated the statute.

I submit that we can be on completely adequate independent grounds in this case, that the petition could be dismissed.

QUESTION: Why did the appellate division spend so much time on Harris v. New York?

MR. WILBERT: I think they were drawing the distinction that your Honors obtained in Mincey v. Arizona just the past term in June, that we're talking about compulsion when we're talking about obtaining testimony under immunity.

And in talking about compulsion, we're not in a Harris situation. Judge Garth, in U.S. v. Frimento?, as I've outlined, draws the distinction between Harris, and limits -- and indicates how your -- how the Court has limited Harris to situations where no compulsion, where there was no involuntary -- subsequent to that time the Court has found in Mincey v. Arizona --

QUESTION: Mr. Wilbert --

MR. WILBERT: -- that when a question is compelled --

QUESTION: -- you've mentioned that you thought the code of the appellate division rested this questions and the construction, scope of the -- what? both the immunity statute

and the privilege statute?

MR. WILBERT: The immunity statute --

QUESTION: On both? Or which?

MR. WILBERT: -- Mr. Justice Brennan, is the privilege statute. It was strictly a public employee immunity statute that they had under determination here, 2A:81-17 --

QUESTION: Oh, isn't there a separate --

MR. WILBERT: No, Mr. Justice Brennan.

QUESTION: Oh, there's not; I see.

MR. WILBERT: Not in New Jersey. There is one -- there is a public employee immunity statute that they relied upon. And they were addressing themselves to that issue because this man was a mayor --

QUESTION: Oh.

MR. WILBERT: -- and freehold director.

QUESTION: Then your argument is that this whole case involves only a construction of 17.2a2; is that it?

MR. WILBERT: Yes, sir.

QUESTION: That's the immunity statute?

MR. WILBERT: That's the immunity statute for public employees which he fit that category --

QUESTION: Well, how do you answer my brother Rehnquist's question? Why so much attention to federal cases in the appellate division?

MR. WILBERT: I think they were -- drawing an

analogy and construction of their statute, and they were utilizing the law that they had available to them.

Hockenberry was available at that time, and Hockenberry drew the distinction in Harris.

QUESTION: Well, Hockenberry was a constitutional decision, federal constitutional decision.

MR. WILBERT: It was.

QUESTION: Well, let me ask you this.

Say in an ordinary criminal case the state purports to call the defendant to the stand on their side of the case; they just want to cross-examine the defendant.

Isn't there some New Jersey law of some kind -- forget the federal law -- isn't there a New Jersey -- isn't there at least a statutory provision that would prevent the state from doing that?

MR. WILBERT: Yes, Mr. Justice White. What is relied upon by the Supreme Court in New Jersey is the common law of -- and I believe it's called the general clause of --

QUESTION: But there's no general --

MR. WILBERT: -- of the constitution.

QUESTION: -- there's no general -- there's no New Jersey statute that generally grants the privilege not to testify against yourself?

MR. WILBERT: No, there's not a statute, statutory enactment. There is a general proceedings of the --

QUESTION: What happened to the statute that we dealt with in Pillow? Was that -- that's been succeeded by another statute, independently of this immunity statute.

MR. WILBERT: That may have been a witness immunity statute. The general witness immunity statute under 2A17.3 New Jersey --

QUESTION: The one I'm talking about --

MR. WILBERT: Well, you don't need --

QUESTION: It's 25 years ago since I wrote that opinion, but what we dealt with was a statutory provision which declared a privilege against self-incrimination, a general privilege.

QUESTION: Then what do you need an immunity statute if there's no privilege not to testify?

MR. WILBERT: There is a privilege not to testify --

QUESTION: Where does it come from?

MR. WILBERT: -- but it's found from the New Jersey constitution, the general provisions under 1:8, according to the New Jersey Supreme Court now.

It's --

QUESTION: A privilege is now constitutional in New Jersey?

MR. WILBERT: Yes. It is constitutional under the general provisions of the constitution. There is no specific --

QUESTION: Well, now, general provisions -- can you

read it to us?

MR. WILBERT: I cannot, Mr. Chief Justice, because it does not speak --

QUESTION: Is the constitution any different now than it was when I sat on the New Jersey Supreme Court 25 years ago?

MR. WILBERT: Mr. Justice Brennan it's still the 1947 constitution.

QUESTION: Well, there was no privilege in that constitution; that's why we had to deal with a statutory privilege.

MR. WILBERT: There was no privilege specifically stated in that. It's now been interpreted to be part of the general language of the constitution.

QUESTION: Oh, another --

MR. WILBERT: At 1:8. Mr. Justice Pashman's dissent in Miller.

QUESTION: Well, I'm not interested in a dissent. Is there an opinion of the New Jersey Supreme Court that now reads a privilege into the New Jersey constitution?

MR. WILBERT: The point was not a majority.

QUESTION: Well, is there? Is there?

MR. WILBERT: There's not a majority case that I know of, but the dissent was not dissented to on that basis. He stated -- and I believe that's where it's found --

QUESTION: Yes, I know. Mr. Justice Pashman is an inveterate dissenter, I know. But it doesn't follow, does it, that his colleagues have agreed with him?

MR. WILBERT: I don't know that we need to reach that aspect of it, though, because we did have a valid public employees immunity statute that was not self-executing in this case.

He asked for the immunity. He obtained the immunity.

It is now not self-executing; excuse me. It was self-executing then. But he sought and obtained immunity under that statute.

The construction of the statute by the appellate division was that the court had ruled, and in ruling had violated that statute. And that a retrial, a remand for a retrial should be had.

The state in its brief totally misconstrues the state appellate division rule. The ruling was not that the testimony could not be used in a subsequent perjury charge; the ruling, as a matter of fact, states at page 207 of that opinion, that that's not here pertinent, because there was no allegation of perjury.

But I'm quite certain there was extensive oral argument -- I attended oral argument on this in the appellate division -- could we say that you could not use it even for a

perjury charge?

No. And it was conceded that at a subsequent trial for perjury, it could be used.

QUESTION: Well, was your original motion that if you took -- that if your client took the stand, that the cross-examination be limited to the subject matter of his own statement?

MR. WILBERT: My first request was that the court, because I was alerted to this by the prosecutor raising it initially, that they were going to use the immunized testimony to impeach, I asked that the court rule that they could not use the immunized testimony to impeach.

QUESTION: No, that isn't what I asked you. Did you rule -- ask that the cross-examination be limited to the scope of the direct testimony of your client if he took the stand?

MR. WILBERT: I did not actually articulate that. What I was attempting to do was to say that the immunity statute could not be used to impeach.

What -- it was construed to be that I was trying to limit the direct -- scope of the direct and also then limit the scope of cross.

I did not attempt to do that. The court pointed out that the -- and I submit that the United States has the same situation under Raffel and under the numerous cases, the Johnson case, that once a --

QUESTION: I take it then your position is that if you

had -- if nothing like this had come up in advance, and your client had taken the stand, and he testified to a fact, made an assertion, your position would be that the state could not then resort to the grand jury testimony in an attempt to impeach that statement.

MR. WILBERT: Absolutely.

QUESTION: But you also go beyond that and say that the not only is the grand jury testimony immunized, but everything he said after that is immunized.

MR. WILBERT: Everything that flows directly from that grand jury testimony is as immunized under Kastigar -- I think to have the Fifth Amendment privilege co-extensive, as Kastigar indicates it must be; as Mr. Justice Powell indicated in that -- in his decision. There can be no use made of that immunized testimony.

QUESTION: Kastigar wasn't addressed to statements made long after -- substantially after the grand jury was--

MR. WILBERT: The test, I don't believe, is the distance between --

QUESTION: Well, was it or wasn't it?

MR. WILBERT: Pardon, Mr. Justice -- Mr. Chief Justice.

QUESTION: Did Kastigar deal with testimony given outside the grand jury room after the grand jury hearing?

MR. WILBERT: I don't believe it did.

QUESTION: No.

MR. WILBERT: But Kastigar ruled that any evidence that flowed directly or indirectly from that grand jury testimony was immunized.

QUESTION: What about testimony that had been given before the grand jury testimony, or statements made in an outside-of-court context?

MR. WILBERT: At the grand jury or prior?

QUESTION: Prior.

MR. WILBERT: Before the grand jury meeting, prior to it, I would say that the testimony is not immunized --

QUESTION: It could be used by the state?

MR. WILBERT: Yes. And as a matter of fact the state did use the testimony of a witness, a Constance Kopinsky, whose testimony they had obtained prior to -- they had obtained it after the respondent had taken the stand under immunity, but they had the information that she was to testify to beforehand.

QUESTION: How about the statement of the defendant made prior to the grand jury?

MR. WILBERT: There was no statement of --

QUESTION: Well, what if there had been?

MR. WILBERT: If there had been, I believe it would not be immunized, because he has to seek immunity and obtain immunity for his Fifth Amendment rights to flow.

If he goes and testifies of his own will, I think that there's no Fifth Amendment privilege there. I think the Court has found that.

QUESTION: And the mere fact that he has made statements before ever going before a grand jury, then goes before a grand jury and claims immunity, doesn't mean that the statements he made prior to going before the grand jury can't be used against him if he chooses to take the stand.

MR. WILBERT: The statements that he gives to the grand jury under immunity, I would submit, cannot be because they're compelled.

QUESTION: Yes. But the statements made before -- I mean in time, prior in time.

MR. WILBERT: I don't recall the case, but it may be U.S. v. Knopf? that says that: statements made by a gambler on his income tax prior to any requests for immunity could be utilized against him. I believe that that's the case.

I know that that is the rule of law that Your Honors have imposed; I don't recall the particular case.

I submit there was absolutely no waiver in this case of his right to testify. He was faced with the choice of paying the price: Either testify and be a subject to the improper use of the grand jury testimony, the immunized grand jury testimony, or don't take the stand at all.

I think Brooks v. Tennessee is analogous on that

point, and I think Mr. Justice Marshall's opinion in Wardius v. Oregon is the same.

He had a right to rely on the statute.

MR. CHIEF JUSTICE BURGER: We'll resume there at 1:00 o'clock, counsel.

[Whereupon, at 12:00 o'clock, noon, a recess was taken.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: You may resume, counsel.

MR. WILBERT: Thank you, Mr. Chief Justice.

The policy that the petitioner urges in this case will, in effect, lead to a civil deposition, discovery procedure, notwithstanding his oral argument, because the prosecutor then will, in his discretion, be able to gather the facts of his case, and after having gathered the facts of his case, will be able to place a defendant in a situation where he had to obtain immunity --

QUESTION: I'm not sure I follow you. Your client didn't -- when the prosecutor invited him down for a little tete-a-tete, he didn't have to go, did he?

MR. WILBERT: He did under the public employees immunity statute.

QUESTION: Well --

MR. WILBERT: If he did not go, he was subject to the penalties of forfeiture of public office and possible incarceration for his contempt.

QUESTION: Contempt of whom? Contempt of the prosecutor?

MR. WILBERT: Contempt of the court because --

QUESTION: Was there any court order directing him to go to the prosecutor's here?

MR. WILBERT: Yes, there was, Mr. Chief Justice. In

New Jersey the procedure is that he was taken before Judge Shock in Trenton, and was advised that he -- they sought his testimony under the public employees immunity statute, and it was obtained through that court order.

QUESTION: Are you speaking now of his going to the grand jury or going to the prosecutor?

MR. WILBERT: Going to the grand jury.

QUESTION: Well, I was talking about the prosecutor.

MR. WILBERT: He made no statement whatsoever prior --

QUESTION: Was there an order compelling him to go to the prosecutor?

MR. WILBERT: Only the previous order of the court that he had to give testimony and that he had immunity from the testimony that he gave. That was still in effect.

QUESTION: And he gave the testimony at the grand jury, didn't he?

MR. WILBERT: He did.

QUESTION: Was there any force in that order after he had given the testimony to the grand jury which compelled him to go and talk to the prosecutor?

MR. WILBERT: I submit that it was a continuing order. It would have been no problem whatsoever, for the prosecutor, if he refused in February to go back and say, he's not cooperating with us and not giving us further testimony.

So that the civil deposition procedure could be used, in the prosecutor's discretion, after he gained the facts of his case, and placed the defendant in a position of immunity, and then compelled him to testify to use that testimony to impeach his credibility.

QUESTION: Your position, your constitutional-- is based solely on the privilege against compelled self-incrimination?

MR. WILBERT: It is the constitutional reliance --

QUESTION: Insofar as it rests on a constitutional claim, it's just a Fifth Amendment -- Fifth and Fourteenth Amendment?

MR. WILBERT: Well, I believe that also there is a due process to be made, because --

QUESTION: Well, did you ever make that to anybody?

MR. WILBERT: I was under the impression that it was subsumed, once the testimony was found to be compelled that there was no question there was a due process argument.

I'm referring to Mincey v. Arizona, where the question is: If it's compelled testimony, it violated due process to use it in any regard against the defendant, whether to impeach his credibility or not, in the trial, carving out the exception that the public employees immunity statute has carved.

But it can be used in a subsequent perjury charge. But I submit that it is a due process question also under the

Fifth Amendment.

QUESTION: But there's no due process -- was there a due process argument submitted to the New Jersey courts or not?

MR. WILBERT: There was not a due process argument submitted to the New Jersey, no, Mr. Justice White.

The mischief that the prosecutor attempts to impose on the Court, though, with regard to the Fifth Amendment will serve no constructive purposes to prosecutors in general, because the defendant, with the choice of either having the immunity granted, knowing that it can be used to impeach his credibility if your Honors so find, I submit in many instances will opt the later, and will not testify, and preserving his rights at trial to take the stand, free from the use of impeached testimony.

And as Mr. Justice White said in Murphy v. Waterfront Commission, for a hundred years immunity statutes have been used to ferret out crime that is otherwise impractical of discovery: conspiracy and various forms of racketeering.

QUESTION: Well, suppose the New Jersey statute, though, had immunity statute -- the public employees immunity statute -- had promised the defendant not to use the compelled statements or the statement that he would -- his testimony -- in circumstances in which the -- against which the Fifth Amendment -- Fifth and Fourteenth Amendments did not protect

the defendant.

Suppose New Jersey had gone farther than it was required constitutionally to do. And then it tried -- it purported to violate its agreement or its promise.

Would that be a federal constitutional issue there?

MR. WILBERT: I think that would be strictly straight interpretation of a state statute.

QUESTION: It would present no federal constitutional issue?

MR. WILBERT: I submit it would not. I don't think the state of New Jersey -- I don't think there is a federal question if we merely limit this to the construction of the state statute. The state has the right to interpret its statute under substantive interpretation of its own legislation.

There was, by the way, Mr. Justice White, an oral agreement made in this case. Mr. Luciani indicating that you understand, Mr. Respondent, that none of this testimony --

QUESTION: I've read -- that's what's in the -- I've read that.

MR. WILBERT: It was implied.

QUESTION: BUt it was no different from the statute.

MR. WILBERT: It really wasn't -- it was no different from the statute.

QUESTION: It was almost in the terms of the statute.

MR. WILBERT: Except for the use of the word, personally.

But it did comply with the public employees immunity statute, that no use could be made.

I don't think there is any question that the testimony was compelled in this case under the grant of immunity, and once compelled, it cannot be used for any purpose and -- except for the perjury charge, the subsequent perjury charge.

That's all that we're asking, that not -- compelled testimony not be used to impeach his credibility.

QUESTION: Could you be indicted under New Jersey law now for perjury?

MR. WILBERT: Yes, he could. The appellate division made that clear in oral argument that they were reserving the right to -- and under the statute it's clear. The statute says, it cannot be used in any subsequent rial against the defendant with the exception of perjury or false swearing.

At the time of this statute, it was merely perjury. But they have changed the statute to make it non-self-executing and include false swearing.

QUESTION: But your position is, I take it, on perjury, is that if he had taken the stand at the trial and testified, and he was either convicted or acquitted, as would be the case, then his statements on the stand -- his statements at the grand jury hearing, his previous statements could not be

used to convict him ofperjury at the trial.

MR. WILBERT: The -- I submit the appellate division found that they could be used.

QUESTION: Well, I know, but your position is -- your position is that his grand jury statements cannot be used to convict him of perjury in his testimony at the trial?

MR. WILBERT: That's not my contention. I submit that he is -- he is exposed to a charge of perjury if he testifies, and testifies untruthfully at trial, the statute --

QUESTION: Would --

MR. WILBERT: -- permits the charge of perjury and allows the statement made at the grand jury to be laid side by side with his testimony at trial.

QUESTION: Well, I thought your position was -- I thought your position was that the only perjury that he could be convicted of would be perjury at the grand jury stage.

MR. WILBERT: That was not my position, Mr. Justice White.

I believe that the statute is broad enough in New Jersey, under the statutory interpretation, to charge him with perjury in a subsequent trial and to utilize the statements that he gave against him to show the perjury to a jury.

That is really the problem that we have here. The -- it does not amount to perjury. His testimony --

QUESTION: Well, then I don't -- I'm sorry. I just

don't understand why you think it's even -- that it's any more a violation of the statute to use his grand jury testimony at the trial to show that he is lying.

Because a day -- if a day later in a perjury prosecution related to what he testified to at trial, you could introduce his prior grand jury testimony.

MR. WILBERT: That's the real problem in this case, because there was no contention that he had perjured himself at the grand jury. It was conceded that his testimony was trustworthy and truthful.

And I submit the use of the testimony at the trial was not going to go to perjury, but was merely going to go to the vagaries of memory between the time elapsed, and other inconsistencies that might in the jury's mind indicate that this man was being less than credible; without even reaching the question of perjury they were attempting to use it.

And that's the real problem that we have in the case. They were violating his rights to take the stand, to use to impeach, without even -- I contend -- hoping to obtain perjury.

I have no other points, unless there are any other questions.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:09 o'clock, p.m., the case in the above-entitled matter was submitted.]