The Burger Court Opinion Writing Database

Coleman v. Alabama

399 U.S. 1 (1970)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

January 9, 1970

MEMORANDUM TO THE CONFERENCE:

Re: No. 72 - Coleman and Stephens v. Alabama

I may add a concurring comment along the following lines:

I have difficulty understanding how we could read in the Constitution that a preliminary hearing or other such form of inquest was "a criminal prosecution". I find no such language, nor even a hint, that the authors thought they were commanding counsel at the preliminary hearing proceedings conducted to determine whether a criminal prosecution was to be considered by a Grand Jury. A preliminary hearing, which is confined to the narrow question whether a person is to be held for further inquiry, simply is not "a criminal prosecution" under the Constitution. By legislation or rulemaking counsel could be required, but to embrace it under the 6th Amendment requires us to amend that Amendment. Counsel is not even permitted at the Grand Jury stage which comes later.

Thus, accepting the "literal language" as a guide I find it does not lead me where it leads Justice Black. The wisdom or policy concerning counsel at every stage is another matter. On that I am on record as one of the authors of several published ABA Reports which call for it. I think legislatures should provide for counsel at the preliminary hearing but I cannot find that the Constitution commanded it and, of course, no one thought so until quite recently.

WEB

W.E.B.

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

CHAMBERS OF
THE CHIEF JUSTICE

January 23, 1970

Re: No. 72 - Coleman v. Alabama

Dear Bill:

I join in your opinion.

W. E. B.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

April 16, 1970

MEMORANDUM TO THE CONFERENCE

Re: No. 72 - Coleman v. Alabama

Part I - Line-up Claim

Record me as joining Justice Black's view that incorrect identification can never be excluded because of some concept of "taint." (Taint should be attacked by cross-examination and impeachment, not exclusion of what a witness states he saw.)

Part II - Right to Counsel at Preliminary Hearing

I will join Justice Stewart's position, having been unable to find anything in the Constitution calling for counsel at a preliminary hearing. (Hugo, please note and tell me ~~what Article or Amendment covers this~~!)

Part III - Disposition

I would affirm.

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

April 22, 1970

No. 72 - Coleman v. Alabama

Dear Hugo:

Just to give your biographers some "fodder", I'll respond to your April 17 note.

Indeed you quote the Constitution faithfully but our point of departure is that a preliminary hearing is not a prosecution but an inquiry to determine whether an inquiry into a possible future prosecution is warranted. The tentative and preliminary character of the hearing is emphasized by the fact that the Grand Jury -- to which the person may be bound, comes later and is in itself not a prosecution under the 5th Amendment. No accused taken before a Grand Jury for inquiry may have a lawyer there, although what takes place there leads to an indictment, as no preliminary hearing can. If an accused must have counsel as a constitutional matter at the Preliminary Hearing, why not at the latter and more serious stage?

Now,on the desirability of a lawyer at the hearing, we are one. In the ABA Project I chaired we recommended that Counsel be provided at every stage, either by statute or rule. But I cannot accept the idea that the Constitution commands it. Where have we been for 183 years!?

Now let those biographers chew this over.

Warm regards,

WEB

Mr. Justice Black

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

CHAMBERS OF
THE CHIEF JUSTICE

April 28, 1970

Re: No. 72 - Coleman v. Alabama

Dear Hugo:

A release following a preliminary hearing is not an "acquittal" of a criminal charge since he can be charged thereafter or indicted by a grand jury. There is no "verdict" by a magistrate. Nor have I ever heard of any state where it is called a "preliminary trial" -- Alabama may be the exception. Nor is it "the beginning of a criminal prosecution" but an exploration to determine that question.

I agree, however, that a man should have counsel and states are now moving to provide it by statute or rules of Court as my ABA Committee urged. My sole point is that The Constitution does not direct it and no one has seriously thought so since 1789. We should, of course, always be ready to correct old errors but that is a long time to take to find this idea in the words.

W. E. B.

More fodder for your biographer unless you burn all such!

Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

From: The Chief Justice

Circulated: 5/18/70

Recirculated: _____

No. 72 - Coleman v. Alabama

MR. CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

I agree that as a matter of sound policy counsel should be made available to all persons subjected to a preliminary hearing and that this should be provided either by statute or by the rule-making process. However, I cannot accept the notion that the Constitution commands it because it is a "criminal prosecution."[1/]

I concur in the holding that due process was not violated by the identification procedures employed here. Although Mr. Justice Stewart, whose opinion I join, and Mr. Justice Harlan and Mr. Justice White have each noted some of the difficulties, both on constitutional and practical grounds, with today's holding, I separately set forth additional reasons for my dissent.

Certainly, as Mr. Justice Harlan and Mr. Justice White suggest in their opinions, not a word in the Constitution itself either requires or contemplates the result reached; unlike them, however, I do not acquiesce in prior holdings which purportedly, but nonetheless erroneously,

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1/ The pertinent language is "In all criminal prosecutions the accused shall enjoy . . . the Assistance of Counsel for his defense."

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

CHAMBERS OF
JUSTICE HUGO L. BLACK

December 31, 1969

Dear Bill,

Re: No. 72- Coleman v. Alabama

I regret that I cannot join the opinion you have circulated in this case, and I shall be circulating a dissenting opinion shortly.

Sincerely,

Hugo

Mr. Justice Brennan

cc: Members of the Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

From: Black, J.

Circulated: 1-5-70

No. 72.—October Term, 1969

Recirculated: _____

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama. | On Writ of Certiorari to the Court of Appeals of Alabama.

[January —, 1970]

Mr. Justice Black, dissenting.

After a jury trial, petitioners Coleman and Stephens were found guilty under Alabama law of assault with intent to murder and were each sentenced to 20 years in prison. Petitioners contend that the Alabama proceedings against them violated their constitutional rights in two respects. First, petitioners claim that the station-house lineup in which they were identified as the assailants by the victim of the assault was so unduly suggestive as fatally to taint the victim's courtroom identification of them, citing *Stovall* v. *Denno*, 388 U. S. 293 (1967). Second, petitioners, concededly indigents, claim that by not providing state-appointed counsel at their preliminary hearing Alabama deprived them of their right to counsel guaranteed by the Sixth and Fourteenth Amendments. In Part I of its opinion, the Court rejects the argument that the right to counsel applies at Alabama's preliminary hearing, and in Part II the constitutional attack on the pretrial lineup is also rejected. For the reasons stated here, I dissent from the Court's holding in Part I of its opinion but concur in the result reached in Part II.

SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.	On Writ of Certiorari to the Court of Appeals of Alabama.

[January —, 1970]

Mr. Justice Black, dissenting.

After a jury trial, petitioners Coleman and Stephens were found guilty under Alabama law of assault with intent to murder and were each sentenced to 20 years in prison. Petitioners contend that the Alabama proceedings against them violated their constitutional rights in two respects. First, petitioners claim that the station-house lineup in which they were identified as the assailants by the victim of the assault was so unduly suggestive as fatally to taint the victim's courtroom identification of them, citing *Stovall* v. *Denno*, 388 U. S. 293 (1967). Second, petitioners, concededly indigents, claim that by not providing state-appointed counsel at their preliminary hearing Alabama deprived them of their right to counsel guaranteed by the Sixth and Fourteenth Amendments. In Part I of its opinion, the Court rejects the argument that the right to counsel applies at Alabama's preliminary hearing, and in Part II the constitutional attack on the pretrial lineup is also rejected. For the reasons stated here, I dissent from the Court's holding in Part I of its opinion but concur in the result reached in Part II.

To: The [illegible]
Mr. Justice [illegible]
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

From: Black, J.

Circulated: 2-11-7

Recirculated: _____

No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.

On Writ of Certiorari to the Court of Appeals of Alabama.

[January —, 1970]

Mr. Justice Black, concurring.

I join in the Court's holding in Part II of its opinion that the preliminary hearing which Alabama grants criminal defendants in that State is a stage of the prosecution at which the Sixth Amendment requires that the defendant be granted the right to counsel. But, here as ~~I said in my concurring opinion~~ in *United States* v. *Wade,* 388 U. S. 218, 246 (1967), I can agree with the Court that counsel's presence is necessary to protect the accused's right to a "fair trial" *only* if by "fair trial" the Court means a trial fully consistent with the "law of the land," that is, the Constitution and valid laws passed pursuant to it. *Id.,* at 246. I fear that the Court's opinion seems at times to proceed on the premise that the constitutional principle ultimately at stake here is a defendant's right to a "fair trial" as conceived by judges. While that phrase is an appealing one, neither the Bill of Rights nor any other part of the Constitution contains it. The pragmatic, government-fearing authors of our Constitution and Bill of Rights did not, and I think wisely did not, use any such vague, indefinite, and elastic language. Instead, they provided the defendant with clear, emphatic guarantees: counsel for his defense, a speedy trial, trial by jury, confrontation with the witnesses against him, and other such unequivocal and

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1969

From: Black, J.

Circulated: 3-10-70

Recirculated: 3-10-70

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.

On Writ of Certiorari to the Court of Appeals of Alabama.

[March —, 1970]

Mr. Justice Black, concurring.

I wholeheartedly agree with the Court's holding in Part II of its opinion that an accused has a constitutional right to the assistance of counsel at the preliminary hearing which Alabama grants criminal defendants. The purpose of the preliminary hearing in Alabama is to determine whether an offense has been committed and, if so, whether there is probable cause for charging the defendant with that offense. If the magistrate finds that there is probable cause for charging the defendant ~~with the offense, the defendant must, under Alabama~~ law, be either incarcerated or admitted to bail. In the absence of such a finding of probable cause, the defendant must be released from custody. Ala. Code, Tit. 15, §§ 139–140. The preliminary hearing is therefore a definite part or stage of a criminal prosecution in Alabama, and the plain language of the Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Moreover, every attorney with experience in representing criminal defendants in a State which has a preliminary hearing similar to Alabama's knows—sometimes from sad experience—that adequate representation requires that counsel be present at the

April 17, 1970

Dear Chief,

Re: No. 72 - Coleman v. Alabama

Amendment VI provides that:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of counsel for his defense."

This, of course, does not divide up into details the prosecution against the defendant but simply says he "shall have the Assistance of counsel". It would disregard reality to say that a preliminary trial in Alabama is not an important part of a prosecution under which the State is preparing to punish a man either by taking his life or his liberty away from him. Consequently I would ask where is there anything in the Constitution which says that although a man shall have the help of counsel in criminal prosecutions, he cannot claim that help the first time he needs counsel?

Sincerely,

H. L. B.

The Chief Justice

HLB:fl

April 24, 1970

Dear Chief:

Re: No. 72 - Coleman v. Alabama

If not a "criminal prosecution", what is it when a person is taken before a judge in a state court on the charge that he has committed a murder at which trial he can be acquitted or he can be held over for further action leading to a final verdict? Although a grand jury consideration of his case can be held behind closed doors, as such investigations have always been held, the fact that the defendant is not allowed before that grand jury is no argument in favor of his being denied a lawyer in the first proceeding brought against him by the Government in what is called a preliminary trial. What is called a "preliminary trial" is no more than a beginning of the "criminal prosecution" in which a defendant desperately needs the "Assistance of counsel for his defense" which the Sixth Amendment guarantees. At least that is the way I read the actual, literal language of the Constitution itself.

Sincerely,

Hugo L. Black

The Chief Justice

HLB:fl

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

1

From: Douglas, J.

6/26/70

Circulated:

Recirculated:

SUPREME COURT OF THE UNITED STATES

October Term, 1969

MEMORANDUM.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, being of the view that No. 72, *Coleman* v. *Alabama,* 397 U. S. —, should be retroactive in all cases (see *Desist* v. *United States,* 394 U. S. 244, 255, dissenting opinion), would grant, vacate, and remand for reconsideration in light of *Coleman:* No. 105, Misc., *Jackson* v. *Georgia;* No. 219, Misc., *Turley* v. *Missouri;* No. 509, Misc., *Wetzel* v. *North Carolina.*

F

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

From: Harlan, J.

FEB 12 1970

Circulated:

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.

On Writ of Certiorari to the Court of Appeals of Alabama.

[February —, 1970]

Mr. Justice Harlan, concurring in part and dissenting in part.

Were I free to consider this case upon a clean slate I should have voted to affirm these convictions. From the standpoint of Fourteenth Amendment due process, which is the way in which I think state cases of this kind should be judged (see, *e. g.*, my concurring opinion in *Gideon* v. *Wainwright,* 372 U. S. 335, 349 (1963)), I could not have said that the denial of appointed counsel at a preliminary hearing, carrying no consequences beyond those involved in the Alabama procedure, is offensive to the concept of "fundamental fairness" embodied in the Due Process Clause. The case would, of course, be different if the State were permitted to introduce at trial evidence collected and presented at the preliminary hearing. *A fortiori,* I would not have thought that the lack of counsel at a police "line-up" is a denial of due process. Even from the standpoint of the Sixth Amendment, I would have found it difficult to say that the language, "In all criminal *prosecutions* the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense" (emphasis supplied), was intended to reach such preindictment events. But in light of the lengths to which the right to appointed counsel has been carried in recent decisions of this Court, by which

SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.	On Writ of Certiorari to the Court of Appeals of Alabama.

[January —, 1970]

Mr. Justice Brennan delivered the opinion of the Court.

Petitioners were convicted in an Alabama Circuit Court of assault with intent to murder in the shooting of one Reynolds after he and his wife parked their car on an Alabama highway to change a flat tire. The Alabama Court of Appeals affirmed, 211 So. 2d 917 (1968), and the Alabama Supreme Court denied review, 211 So. 2d 927 (1968). We granted certiorari, 394 U. S. 916 (1969). We affirm.

Petitioners make two claims in this Court. First, they argue that the preliminary hearing prior to their indictment was a "critical stage" of the prosecution and that Alabama's failure to provide them with appointed counsel at the hearing therefore denied them their Sixth and Fourteenth Amendment right to the assistance of counsel. Second, they argue that they were subjected to a lineup in circumstances so unduly prejudicial and conducive to irreparable misidentification as fatally to taint Reynolds' in-court identifications of them at the trial.

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

January eighth
1970

Dear Bill:

In No. 72 -- Coleman v. Alabama, I sent you a return some weeks back joining your opinion.

I have been greatly troubled by the right to counsel point and after some indecision, I have finally decided to go with Hugo's views on that question. Accordingly, I wonder if you would append at the end of your opinion the following:

"Mr. Justice Douglas dissents on the right to counsel at the preliminary hearing for the reasons stated by Mr. Justice Black."

WOD

William O. Douglas

Mr. Justice Brennan

B

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

From: Brennan, J.

Circulated: 2/9/70

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.	On Writ of Certiorari to the Court of Appeals of Alabama.

[January —, 1970]

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Petitioners make two claims in this Court. First, they argue that they were subjected to a station-house lineup in circumstances so unduly prejudicial and conducive to irreparable misidentification as fatally to taint Reynolds' in-court identifications of them at the trial. Second, they argue that the preliminary hearing prior to their indictment was a "critical stage" of the prosecution and that Alabama's failure to provide them with appointed counsel at the hearing therefore denied them their Sixth and Fourteenth Amendment right to the assistance of counsel.

9 agree EW

SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.

On Writ of Certiorari to the Court of Appeals of Alabama.

[June —, 1970]

Mr. Justice Douglas.

While I have joined Mr. Justice Brennan's opinion, I add a word as to why I think that a strict construction of the Constitution requires the result reached.

The critical words are "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." As Mr. Justice Black states, a preliminary hearing is "a definite part or stage of a criminal prosecution in Alabama." A "criminal prosecution" certainly does not start only when the trial starts. If the commencement of the trial were the start of the "criminal prosecution" in the constitutional sense, then indigents would likely go to trial without effective representation by counsel. Lawyers for the defense need time to prepare a defense. The prosecution needs time for investigations and procedures to make that investigation timely and telling. As a shorthand expression we have used the words "critical stage" to describe whether the preliminary phase of a criminal trial was part of the "criminal prosecution" as used in the Sixth Amendment. But it is the Sixth Amendment that controls, not our own ideas as to what an efficient criminal code should provide. It did not take 200 years of doubt to decide whether Alabama's preliminary hearing is a part of the "criminal prosecution" within the

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

SUPREME COURT OF THE UNITED STATES

Douglas, J.

No. 72.—October Term, 1969

Circulated: 6/6/70

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.	On Writ of Certiorari to the Court of Appeals of Alabama.

[June —, 1970]

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

3, 4

From: Douglas, J.

Circulated:

Recirculated: 6-10

SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama. | On Writ of Certiorari to the Court of Appeals of Alabama.

[June —, 1970]

Mr. Justice Douglas.

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

3, 4

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 72.—October Term, 1969

Circulated:

Recirculated: 6-16

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama. | On Writ of Certiorari to the Court of Appeals of Alabama.

[June —, 1970]

Mr. Justice Douglas.

While I have joined Mr. Justice Brennan's opinion, I add a word as to why I think that a strict construction of the Constitution requires the result reached.

The critical words are "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defence." As Mr. Justice Black states, a preliminary hearing is "a definite part or stage of a criminal prosecution in Alabama." A "criminal prosecution" certainly does not start only when the trial starts. If the commencement of the trial were the ~~start of the "criminal prosecution" in the constitutional~~ sense, then indigents would likely go to trial without effective representation by counsel. Lawyers for the defense need time to prepare a defense. The prosecution needs time for investigations and procedures to make that investigation timely and telling. As a shorthand expression we have used the words "critical stage" to describe whether the preliminary phase of a criminal trial was part of the "criminal prosecution" as used in the Sixth Amendment. But it is the Sixth Amendment that controls, not our own ideas as to what an efficient criminal code should provide. It did not take nearly 200 years of doubt to decide whether Alabama's preliminary

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

CHAMBERS OF
JUSTICE JOHN M. HARLAN

January 6, 1970

Re: No. 72 - Coleman v. Alabama

Dear Bill:

Like Justice Black, I still find myself in dissent from your holding that petitioner was not entitled to have counsel appointed for him at the preliminary hearing. However, as I am not able to subscribe to Hugo's reasoning, I intend in due course to circulate a separate dissent on the merits of the case.

With respect to your holding on the identification point, which I agree with your result, I may have something to say in my opinion on that score too.

Sincerely,

J.M.H.

Mr. Justice Brennan

CC: The Conference

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

SUPREME COURT OF THE UNITED STATES

From: Harlan, J.

No. 72.—October Term, 1969

FEB 6 1970

Circulated:

Recirculated:

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.

On Writ of Certiorari to the Court of Appeals of Alabama.

[February —, 1970]

Mr. Justice Harlan, dissenting.

I do not see how this conviction can be affirmed consistently with this Court's recent decisions respecting the right to counsel and with the proper functioning of the judicial process, even though from my constitutional standpoint I would have voted to affirm were I free to write upon a clean slate.[1]

I

The constitutional right to appointed counsel has traveled a long distance since *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). Thus, for example, in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the right was extended

[1] From the standpoint of due process, which is the way in which I think state cases of this kind should be judged (see my concurring opinion in *Gideon* v. *Wainwright*, 372 U. S. 335, 349 (1963)), I could not have said that the denial of appointed counsel at a preliminary hearing, carrying no consequences beyond those involved in the Alabama procedure, is offensive to the concept of "fundamental fairness" embodied in the Due Process Clause. The case would, of course, be different if the State were permitted to introduce evidence collected and presented at the preliminary hearing. Even from the standpoint of the Sixth Amendment, I would have found it difficult to say that the language, "In all criminal *prosecutions* the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense" (emphasis supplied), was intended to reach such preindictment events.

SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.

On Writ of Certiorari to the Court of Appeals of Alabama.

[February —, 1970]

Mr. Justice Harlan, concurring in part and dissenting in part.

Were I free to consider this case upon a clean slate I would have voted to affirm these convictions.* But in light of the lengths to which the right to appointed counsel has been carried in recent decisions of this Court, by which I consider myself bound—See *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Wade* v. *United States*, 388 U. S. 226 (1967); *Gilbert* v. *California*, 388 U. S. 263 (1967);

*From the standpoint of Fourteenth Amendment due process, which is the way in which I think state cases of this kind should be judged (see, *e. g.*, my concurring opinion in *Gideon* v. *Wainwright*, 372 U. S. 335, 349 (1963)), I could not have said that the denial of appointed counsel at a preliminary hearing, carrying no consequences beyond those involved in the Alabama procedure, is offensive to the concept of "fundamental fairness" embodied in the Due Process Clause. The case would, of course, be different if the State were permitted to introduce at trial evidence collected and presented at the preliminary hearing. *A fortiori*, I would not have thought that the lack of counsel at a police "line-up" is, as held in *Wade* v. *United States*, 388 U. S. 226 (1967), a denial of due process such as to require reversal. Even from the standpoint of the Sixth Amendment, I would have found it difficult to say that the language, "In all criminal *prosecutions* the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense" (emphasis supplied), was intended to reach such preindictment events.

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

CHAMBERS OF
JUSTICE JOHN M. HARLAN

April 15, 1970

Re: No. 72 - Coleman v. Alabama

Dear Bill:

The scoreboard set forth in your memorandum of April 15 seems right to me.

Sincerely,

J.M.H.

J. M. H.

Mr. Justice Brennan

CC: The Conference

P 1, 2, 3

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

SUPREME COURT OF THE UNITED STATES

From: Harlan, J.

Circulated:

Recirculated: APR 25 1970

No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.	On Writ of Certiorari to the Court of Appeals of Alabama.

[May —, 1970]

Mr. Justice Harlan, concurring in part and dissenting in part.

Were I free to consider this case upon a clean slate I would have voted to affirm these convictions.* But in light of the lengths to which the right to appointed counsel has been carried in recent decisions of this Court. See *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Wade* v. *United States*, 388 U. S. 226 (1967); *Gilbert* v. *California*, 388 U. S. U. S. 263 (1967); *Mathis* v. *United States*, 391

omission

*From the standpoint of Fourteenth Amendment due process, which is the way in which I think state cases of this kind should be judged (see, *e. g.*, my concurring opinion in *Gideon* v. *Wainwright*, 372 U. S. 335, 349 (1963)), I could not have said that the denial of appointed counsel at a preliminary hearing, carrying no consequences beyond those involved in the Alabama procedure, is offensive to the concept of "fundamental fairness" embodied in the Due Process Clause. The case would, of course, be different if the State were permitted to introduce at trial evidence collected and presented at the preliminary hearing. *A fortiori*, I would not have thought that the lack of counsel at a police "line-up" is, as held in *Wade* v. *United States*, 388 U. S. 226 (1967), a denial of due process such as to require reversal. Even from the standpoint of the Sixth Amendment, I would have found it difficult to say that the language, "In all criminal *prosecutions* the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense" (emphasis supplied), was intended to reach such preindictment events.

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 2, 3

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

SUPREME COURT OF THE UNITED STATES

From: Harlan, J.

Circulated:

Recirculated: APR 29 1

No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama. | On Writ of Certiorari to the Court of Appeals of Alabama.

[May —, 1970]

Mr. Justice Harlan, concurring in part and dissenting in part.

Were I free to consider this case upon a clean slate I would have voted to affirm these convictions.* But in light of the lengths to which the right to appointed counsel has been carried in recent decisions of this Court, see *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Wade* v. *United States*, 388 U. S. 226 (1967); *Gilbert* v. *California*, 388 U. S. U. S. 263 (1967); *Mathis* v. *United States*, 391

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— p. 1, 2

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

From: Harlan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: MAY 21 19

No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.	On Writ of Certiorari to the Court of Appeals of Alabama.

[May —, 1970]

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*From the standpoint of Fourteenth Amendment due process, which is the way in which I think state cases of this kind should be judged (see, *e. g.*, my concurring opinion in *Gideon* v. *Wainwright*, 372 U. S. 335, 349 (1963)), I could not have said that the denial of appointed counsel at a preliminary hearing, carrying no consequences beyond those involved in the Alabama procedure, is offensive to the concept of "fundamental fairness" embodied in the Due Process Clause. The case would, of course, be different if the State were permitted to introduce at trial evidence collected and presented at the preliminary hearing. *A fortiori*, I would not have thought that the lack of counsel at a police "line-up" is, as held in *Wade* v. *United States*, 388 U. S. 226 (1967), a denial of due process such as to require reversal. Even from the standpoint of the Sixth Amendment, I would have found it difficult to say that the language, "In all criminal *prosecutions* the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense" (emphasis supplied), was intended to reach such preindictment events. Cf. *Sanders* v. *United States*, 373 U. S. 1, 23 (1963).

SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.	On Writ of Certiorari to the Court of Appeals of Alabama.

[January —, 1970]

Mr. Justice Brennan delivered the opinion of the Court.

Petitioners were convicted in an Alabama Circuit Court of assault with intent to murder in the shooting of one Reynolds after he and his wife parked their car on an Alabama highway to change a flat tire. The Alabama Court of Appeals affirmed, 211 So. 2d 917 (1968), and the Alabama Supreme Court denied review, 211 So. 2d 927 (1968). We granted certiorari, 394 U. S. 916 (1969). We affirm.

Petitioners make two claims in this Court. First, they argue that the preliminary hearing prior to their indictment was a "critical stage" of the prosecution and that Alabama's failure to provide them with appointed counsel at the hearing therefore denied them their Sixth and Fourteenth Amendment right to the assistance of counsel. Second, they argue that they were subjected to a lineup in circumstances so unduly prejudicial and conducive to irreparable misidentification as fatally to taint Reynolds' in-court identifications of them at the trial.

Circulated

1-5-70

SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.	On Writ of Certiorari to the Court of Appeals of Alabama.

[January —, 1970]

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February 9, 1970

MEMORANDUM TO THE CONFERENCE

RE: No. 72 - Coleman v. Alabama

I have been persuaded by Hugo's and John's dissenting opinions that I was wrong in voting that the Alabama preliminary hearing was not a "critical stage" of the State's criminal process. I would therefore join Hugo and John in remanding to the Alabama courts for a determination whether the denial of counsel at the preliminary hearing was prejudicial, and am taking the liberty of circulating the enclosed opinion expressing that view. I do not agree, however, with John's method for determining prejudice. I agree rather with Hugo that the test must be whether the denial of counsel at the preliminary hearing was harmless error under Chapman v. California, 386 U.S. 18. That was the test we adopted in Gilbert v. California, 388 U.S., 263, 274, for the determination whether admission at a state trial of a lineup identification conducted in the absence of counsel was prejudicial, and I see no justification for a different test in this case.

W.J.B. Jr.

Circulated
2-9-70

SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.	On Writ of Certiorari to the Court of Appeals of Alabama.

[January —, 1970]

Mr. Justice Brennan delivered the opinion of the Court.

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Petitioners make two claims in this Court. First, they argue that they were subjected to a station-house lineup in circumstances so unduly prejudicial and conducive to irreparable misidentification as fatally to taint Reynolds' in-court identifications of them at the trial. Second, they argue that the preliminary hearing prior to their indictment was a "critical stage" of the prosecution and that Alabama's failure to provide them with appointed counsel at the hearing therefore denied them their Sixth and Fourteenth Amendment right to the assistance of counsel.

Coleman No. 72

1. When Justice Black's opinion circulated, the Justice indicated that though he still preferred his own position he would not be averse to seeing the Ct adopt Justice Black's position. He said he'd wait to see how the other members of the Ct would line up.

2. We had the votes of Stewart, White & Burger. Douglas joined Black. Marshall was known to be wavering. Harlan, then, became the critical vote. He circulated an opinion on Feb 6, in effect taking Justice Black's position, but differing from him on what was to be determined on remand.

3. Justice Harlan's opinion was very persuasive to Justice Brennan. He determined to study it over the weekend to decide whether to change his own vote & opinion. On Monday Feb 10 he informed us that he had decided to adopt Justice Black's view. We changed our opinion & recirculated on ~~Monday.~~ (#4) Presumably, Black, Douglas, Harlan & Marshall would join us on the rt to counsel, though we expected some disagreement over the remand. Our opinion cited Gilbert as pointing the way. We hoped this would persuade Harlan to join us. But Black, who opposed what was done in Gilbert, might refuse to join in a remand. We could only wait & see.

4. For a long time after our circulation of print #4 it seemed likely that diversity of views would prevent the formation of a Court for disposition of the case. First, The Chief, Stewart & White apparently were in favor of affirmance; Harlan was for vacating, but thought that on remand petr should have the burden of showing prejudice from the denial of counsel. ~~Appxxxxxky~~ Our Justice, and apparently Black, Douglas & Marshall were for vacating & remanding ~~for a finding under the Chapman harmless-error~~ standing. But this line-up was unstable. Justice White broke the logjam on March 5 by circulating an opinion in which he opted for the harmless-error standard on remand, but indicated that he expected that the error would be found harmless. ~~Thus the case was discussed~~ ~~Conference on March~~ Our circulation 5 was divided into 3 parts--I Lineup, II Prelim Hearing, III Remand. The expected positions were

I: Joining Concurring opinion Dissenting(?)
WJB HLB- see Wade WOD- Wade retroactive
TM WEB- same JMH- direct rev; Wade ap
BRW ~~PS~~ PS- no reason

II: Joining Dissenting
WJB WEB
TM PS
~~JMH~~ (holding)
BRW
WOD
~~HLB~~ (holding)

Dissenting
JMH- prejudice standard; leave trial judge could
WEB
PS > would affirm effect of Wade

Criminal
3.6.70

SUPREME COURT OF THE UNITED STATES

No. 72.—OCTOBER TERM, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.	On Writ of Certiorari to the Court of Appeals of Alabama.

[March —, 1970]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioners were convicted in an Alabama Circuit Court of assault with intent to murder in the shooting of one Reynolds after he and his wife parked their car on an Alabama highway to change a flat tire. The Alabama Court of Appeals affirmed, 211 So. 2d 917 (1968), and the Alabama Supreme Court denied review, 211 So. 2d 927 (1968). We granted certiorari, 394 U. S. 916 (1969). We vacate and remand.

Petitioners make two claims in this Court. First, they argue that they were subjected to a station-house lineup in circumstances so unduly prejudicial and conducive to irreparable misidentification as fatally to taint Reynolds' in-court identifications of them at the trial. Second, they argue that the preliminary hearing prior to their indictment was a "critical stage" of the prosecution and that Alabama's failure to provide them with appointed counsel at the hearing therefore denied them their Sixth and Fourteenth Amendment right to the assistance of counsel.

April 15, 1970

MEMORANDUM TO THE CONFERENCE

RE: No. 72 - Coleman v. Alabama

There are five opinions in the above and according to my records the score card looks as follows:

Part I - Line-up Claim

There is a judgment for affirmance. My records show that Thurgood, Bill Douglas and Byron join my opinion; that Hugo would affirm on his view that, though Wade is retroactive, in-court identification evidence is admissible without regard to line-up taint; John would reverse and remand for a hearing to determine whether in-court identification was tainted because in his view Wade applies retroactively; Potter concurs in result; I have no report of the view of the Chief Justice.

Part II - Right to Counsel at Preliminary Hearing

There is a court for a judgment of reversal. My records show that Thurgood, Bill Douglas and Byron join my opinion; Hugo and John "join the holding" of this part but have written separately; Potter dissents; I have no report of the view of the Chief Justice.

Part III - Disposition

Apparently there is a court for both what I've written and for a judgment of remand for consideration whether the denial of counsel at the preliminary hearing was harmless error under Chapman. My records show that Thurgood, Bill Douglas, Byron, Hugo and I agree on this disposition; John would remand on a different formula; Potter would affirm; again I have no view of the Chief Justice.

Is this the way the score card looks to the Conference? If so, appropriate footnotes should appear in my opinion indicating so.

W.J.B. Jr.

Concurring and Dissenting by the Chief Justice

Circulated
4-20-70

SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.	On Writ of Certiorari to the Court of Appeals of Alabama.

[April —, 1970]

Mr. Justice Brennan announced the judgment of the Court and delivered the following opinion.

Petitioners were convicted in an Alabama Circuit Court of assault with intent to murder in the shooting of one Reynolds after he and his wife parked their car on an Alabama highway to change a flat tire. The Alabama Court of Appeals affirmed, 211 So. 2d 917 (1968), and the Alabama Supreme Court denied review, 211 So. 2d 927 (1968). We granted certiorari, 394 U. S. 916 (1969). We vacate and remand.

Petitioners make two claims in this Court. First, they argue that they were subjected to a station-house lineup in circumstances so unduly prejudicial and conducive to irreparable misidentification as fatally to taint Reynolds' in-court identifications of them at the trial. Second, they argue that the preliminary hearing prior to their indictment was a "critical stage" of the prosecution and that Alabama's failure to provide them with appointed counsel at the hearing therefore unconstitutionally denied them the assistance of counsel.

Circulated
4-23-70

SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.	On Writ of Certiorari to the Court of Appeals of Alabama.

[April —, 1970]

Mr. Justice Brennan announced the judgment of the Court and delivered the following opinion.

Petitioners were convicted in an Alabama Circuit Court of assault with intent to murder in the shooting of one Reynolds after he and his wife parked their car on an Alabama highway to change a flat tire. The Alabama Court of Appeals affirmed, 44 Ala. App. 429, 211 So. 2d 917 (1968), and the Alabama Supreme Court denied review, 282 Ala. 725, 211 So. 2d 927 (1968). We granted certiorari, 394 U. S. 916 (1969). We vacate and remand.

Petitioners make two claims in this Court. First, they argue that they were subjected to a station-house lineup in circumstances so unduly prejudicial and conducive to irreparable misidentification as fatally to taint Reynolds' in-court identifications of them at the trial. Second, they argue that the preliminary hearing prior to their indictment was a "critical stage" of the prosecution and that Alabama's failure to provide them with appointed counsel at the hearing therefore unconstitutionally denied them the assistance of counsel.

Circulated
5-22-70

SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.	On Writ of Certiorari to the Court of Appeals of Alabama.

[April —, 1970]

Mr. Justice Brennan announced the judgment of the Court and delivered the following opinion.

Petitioners were convicted in an Alabama Circuit Court of assault with intent to murder in the shooting of one Reynolds after he and his wife parked their car on an Alabama highway to change a flat tire. The Alabama Court of Appeals affirmed, 44 Ala. App. 429, 211 So. 2d 917 (1968), and the Alabama Supreme Court denied review, 282 Ala. 725, 211 So. 2d 927 (1968). We granted certiorari, 394 U. S. 916 (1969). We vacate and remand.

Petitioners make two claims in this Court. First, they argue that they were subjected to a station-house lineup in circumstances so unduly prejudicial and conducive to irreparable misidentification as fatally to taint Reynolds' in-court identifications of them at the trial. Second, they argue that the preliminary hearing prior to their indictment was a "critical stage" of the prosecution and that Alabama's failure to provide them with appointed counsel at the hearing therefore unconstitutionally denied them the assistance of counsel.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 24, 1970

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Coleman v. Alabama, No. 72

In all of these cases the preliminary hearing was held prior to the date of our decision in Coleman, June 22, 1970. The question arises whether Coleman is to be given retrospective effect making it applicable to any or all of these cases. Nos. 105 Misc., 219 Misc., 373 Misc., and 382 Misc. are here on direct review from state courts. Nos. 509 Misc. and 1693 Misc. are here on collateral review from federal courts. In my view, Coleman should be given prospective effect only, and thus it would not be directly applicable to any of these cases. Cf. Stovall v. Denno, 388 U.S. 293, 296-301 (1967). However, relief should be available in any case where it appears from the record that, in fact, the absence of counsel at the preliminary hearing did create such prejudice as to deny the petr a fair trial. Cf. Stovall v. Denno, supra, at 301-302.

No. 105 Misc., Jackson v. Georgia. In this case petr was not afforded counsel at his preliminary hearing. He alleges generally that the absence of counsel hindered his discovery efforts, but he does not allege any specific prejudice. Recommendation: Deny.

No. 219 Misc., Turley v. Missouri. Petr, an indigent, was denied counsel at his preliminary hearing. The court below held, erroneously, that there is no right to counsel at a preliminary hearing. However, the court also found that petr was not prejudiced in any specific way by the absence of counsel. Recommendation: Deny.

No. 373 Misc., Pitts v. Ohio. Petr, an indigent, did not have counsel at his preliminary hearing. The court did ask him at the hearing whether he had a lawyer and whether he intended to get a lawyer, and to each question petr answered "No." However, petr was not informed that if he was indigent he could have counsel appointed for him. Accordingly,

I do not think there was a valid waiver. At the preliminary hearing, petr was informed that he did not have to testify, that anything he said might be used against him, and that no testimony would prevent the court from binding him over to the grand jury. Nevertheless, petr testified, and his statement was introduced against him at trial for purposes of impeachment. Thus, the preliminary hearing would seem to have been critical in petr's case. However, the court below found that any error committed at the hearing was harmless in view of the three eye-witness identifications made of petr at the trial. Therefore, a remand would seem superfluous. Recommendation: Deny.

No. 382 Misc., Tyler v. Maryland. Petr was denied his request for counsel at his preliminary hearing. He asserts that he had no notice of the hearing and suggests that with notice he might have been able to borrow funds to pay a lawyer. This latter contention is not governed by Coleman, and possibly was not raised below. At the hearing, petr was identified by the robbery victim, who also identified him at trial. However, petr does not contend that the identification was the product of unduly suggestive circumstances. Recommendation: Deny.

No. 509 Misc., Wetzel v. North Carolina. Petr did not have counsel at his preliminary hearing. There is no allegation of specific prejudice. Recommendation: Deny.

No. 1693 Misc., Baker v. Brierly. Petr did not have counsel at his preliminary hearing, but the district court on habeas found no prejudice. Recommendation: Deny.

W.J.B. Jr.

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

CHAMBERS OF
JUSTICE POTTER STEWART

December 29, 1969

No. 72, Coleman v. Alabama

Dear Bill,

I am glad to join the opinion you have written for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.

On Writ of Certiorari to the Court of Appeals of Alabama.

[April —, 1970]

Mr. Justice Stewart, dissenting.

On a July night in 1966 Casey Reynolds and his wife stopped their car on Green Springs Highway in Birmingham, Alabama, in order to change a flat tire. They were soon accosted by three men whose evident purpose was armed robbery and rape. The assailants shot Reynolds twice before they were frightened away by the lights of a passing automobile. Some two months later the petitioners were arrested, and later identified by Reynolds as two of the three men who had assaulted him and his wife.

A few days later the petitioners were granted a preliminary hearing before a county judge. At this hearing the petitioners were neither required nor permitted to enter any plea. The sole purpose of such a hearing in Alabama is to determine whether there is sufficient evidence against the accused to warrant presenting the case to a grand jury, and, if so, to fix bail if the offense is bailable.[1] At the conclusion of the hearing the petitioners were bound over to the grand jury, and their bond was set at $10,000. No record or transcript of any kind was made of the hearing.

[1] Ala. Code Tit. 15, §§ 133–140.

Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

Circulated: _____

Recirculated: APR 21 1970

No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.	On Writ of Certiorari to the Court of Appeals of Alabama.

[April —, 1970]

Mr. Justice Stewart, dissenting.

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Memberships pp 2, 3

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

Circulated: APR 24 19

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No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.	On Writ of Certiorari to the Court of Appeals of Alabama.

[April —, 1970]

Mr. Justice Stewart, dissenting.

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

5

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 72.—October Term, 1969

Recirculated: APR 28 1970

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.	On Writ of Certiorari to the Court of Appeals of Alabama.

[April —, 1970]

Mr. Justice Stewart, dissenting.

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[1] Ala. Code Tit. 15, §§ 133–140.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 8, 1970

Re: No. 72 - Coleman v. Alabama

Dear Bill:

Please join me in your opinion in this case.

Sincerely,

B.R.W.

Mr. Justice Brennan

cc: The Conference

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

Mr. Justice White, J.

Circulated: 3-5-70

Recirculated:

No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama.	On Writ of Certiorari to the Court of Appeals of Alabama.

[March —, 1970]

Mr. Justice White, concurring.

I agree with Mr. Justice Harlan that recent cases defining the critical stages in a criminal proceeding furnish ample ground for holding the preliminary hearing a critical event in the progress of a criminal case. I therefore join the opinion of the Court, but with some hesitation since requiring the appointment of counsel may result in fewer preliminary hearings where the prosecutor is free to avoid them by taking the case directly to the grand jury. It may also invite eliminating the preliminary hearing system entirely.

I would expect the application of the harmless-error standard on remand to produce results approximating those contemplated by Mr. Justice Harlan's separately stated views. Whether denying petitioner counsel at the preliminary hearing was harmless beyond a reasonable doubt depends upon those considerations which made the denial error. But that assessment cannot ignore the fact that petitioner has been tried and found guilty by a jury.

The possibility that counsel would have detected preclusive flaws in the State's probable cause showing is for all practical purposes mooted by the trial where the State produced evidence satisfying the jury beyond a reasonable doubt. Also, it would be wholly speculative

SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1969

John Henry Coleman and Otis Stephens, Petitioners, *v.* State of Alabama. | On Writ of Certiorari to the Court of Appeals of Alabama.

[May —, 1970]

Mr. Justice White, concurring.

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I would expect the application of the harmless-error standard on remand to produce results approximating those contemplated by Mr. Justice Harlan's separately stated views. Whether denying petitioner counsel at the preliminary hearing was harmless beyond a reasonable doubt depends upon those considerations which made the denial error. But that assessment cannot ignore the fact that petitioner has been tried and found guilty by a jury.

The possibility that counsel would have detected preclusive flaws in the State's probable cause showing is for all practical purposes mooted by the trial where the State produced evidence satisfying the jury beyond a reasonable doubt. Also, it would be wholly speculative in this case to assume either (1) that the State's wit-

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 11, 1970

Re: No. 72 - Coleman v. Alabama

Dear Bill:

Having been persuaded by your opinion and that of John Harlan's I now change my vote and join your opinion.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference