

The Burger Court Opinion Writing Database

Moore v. Illinois

408 U.S. 786 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

June 19, 1972

Re: No. 69-5001 - Moore v. Illinois

Dear Harry:

Please join me.

Regards,

WEB

Mr. Justice Blackmun

cc: The Conference

6-21-72

Copy of handwritten note by WOD

Re: 69-5001 - Moore v. Illinois-
Dear Harry:

I think this suggested Part V as amended
by Potter is OK. Please join me.

I acquiesce in your Parts I & to IV.

(in answer to Blackmun's memo dated 6-14-72)

Oct 71 Wm. Dwyer

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 14, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 69-5001 - Moore v. Illinois

This case, I suppose, is to come down the same day the capital cases are decided. Part V perhaps should be made to read according to the disposition of those cases. If they go one way, the attached draft of Part V, which is based on Witherspoon, may be used. If the capital cases go the other way, then I suggest that Part V might well be changed to read as follows:

Dear Harry
I think
the suggested

"Inasmuch as the Court today has ruled that the imposition of the death penalty is violative of the Eighth Amendment, Furman v. Georgia, ante, p. ___, it is unnecessary for us to consider the claimed non-compliance with the Witherspoon standards. In Witherspoon, 391 U.S. 522 n. 21 at 523, the Court stated specifically, 'Nor, finally, does today's holding render invalid the conviction, as opposed to the sentence, in this or any other case' (emphasis in original).

"The judgment, insofar as it imposes the death sentence, is reversed and the case is remanded for further proceedings."

Sincerely,

H. A. B.

*Part V as
amended by
Cutter is OK.
Please for
me*

WW

I agree in four parts I to 10 *→ Douglas*
WW

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 22, 1972

Dear Thurgood:

Please join me in your dissent
in No. 69-5001 - Moore v. Illinois.

William O. Douglas

Mr. Justice Marshall

CC: The Conference

Dr
George
Thompson Jr

Painted

1st DRAFT

110: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Marshall, J.

SUPREME COURT OF THE UNITED STATES.

circulated;

No. 69-5001

Recirculated: JUN 20 1972

Lyman A. Moore, Petitioner, } On Writ of Certiorari to
v. } the Supreme Court of
State of Illinois. } Illinois.

[June —, 1972]

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

Petitioner was convicted of murder in the Illinois state courts and sentenced to death. The Supreme Court of Illinois affirmed the conviction and sentence by a divided court. 42 Ill. 2d 73, 246 N. E. 2d 299 (1969). This Court holds that the imposition of the death sentence violated the principle established today in *Furman v. Georgia*, and that the sentence must be vacated, but the Court upholds the underlying conviction. I agree with the majority that the sentence is invalid and join Part V of the opinion of the Court. I also agree that the introduction of the shotgun into evidence at petitioner's trial did not violate the Fourteenth Amendment.¹

¹ I find the constitutional question presented by the introduction of this evidence to be much harder than the majority seems to. It was uncontradicted at trial that the weapon introduced against petitioner had no bearing on the crime with which he was charged. It was, in fact, clear that the shotgun admitted into evidence was a .16 caliber gun, whereas the murder weapon was a .12 caliber gun. Despite the fact that the prosecution conceded this in a pre-trial Bill of Particulars, it did everything possible to obfuscate the fact that the weapon admitted into evidence was not the murder weapon. App. 82. This was highly improper. The record also indicates that the trial judge was confused as to why he thought the weapon should be admitted. At one point he said, "There was testimony here that this was a shotgun killing. And I can see nothing wrong if they say that this defendant, who will be identified by other people, was apprehended with this gun." App. 65. If the trial

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

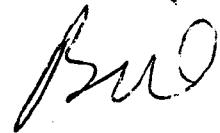
June 20, 1972

RE: No. 69-5001 - Moore v. Illinois

Dear Harry:

Please join me.

Sincerely,



Mr. Justice Blackmun

cc: The Conference

B
MS

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 15, 1972

69-5001 - Moore v. Illinois

Dear Harry,

I am not yet at rest on Parts I-IV of your opinion in this case. With respect to Part V, I agree that it should now be changed along the lines suggested in your covering memorandum. I should think, however, that the first sentence of your suggested paragraph might be modified somewhat as follows: "Inasmuch as the Court today has ruled that the imposition of the death penalty under statutes such as those of Illinois violative of the Eighth and Fourteenth Amendments, . . ." (new material underlined).

Sincerely yours,

P.S.
P.

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 22, 1972

69-5001, Moore v. Illinois

Dear Thurgood,

I am glad to join your dissenting opinion in this case, upon the understanding that you will delete the references to your dissenting opinion in Kastigar.

Sincerely yours,

W. J.
1.

Mr. Justice Marshall

Copies to the Conference

3
b
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 16, 1972

Re: No. 69-5001 - Moore v. Illinois

Dear Harry:

Assuming that Part V will appear in the alternative form (with the modification suggested by Brother Stewart), I join your memorandum in this case.

Sincerely,

Byron

Mr. Justice Blackmun

Copies to Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 69-5001

Lyman A. Moore, Petitioner, | On Writ of Certiorari to
v. | the Supreme Court of
State of Illinois. | Illinois.

[June —, 1972]

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

Petitioner was convicted of murder in the Illinois state courts and sentenced to death. The Supreme Court of Illinois affirmed the conviction and sentence by a divided court. 42 Ill. 2d 73, 246 N. E. 2d 299 (1969). This Court holds that the imposition of the death sentence violated the principle established today in *Furman v. Georgia*, and that the sentence must be vacated, but the Court upholds the underlying conviction. I agree with the majority that the sentence is invalid and join Part V of the opinion of the Court. I also agree that the introduction of the shotgun into evidence at petitioner's trial did not violate the Fourteenth Amendment.¹

¹ I find the constitutional question presented by the introduction of this evidence to be much harder than the majority seems to. It was uncontradicted at trial that the weapon introduced against petitioner had no bearing on the crime with which he was charged. It was, in fact, clear that the shotgun admitted into evidence was a .16 caliber gun, whereas the murder weapon was a .12 caliber gun. Despite the fact that the prosecution conceded this in a pre-trial Bill of Particulars, it did everything possible to obfuscate the fact that the weapon admitted into evidence was not the murder weapon. App. 82. This was highly improper. The record also indicates that the trial judge was confused as to why he thought the weapon should be admitted. At one point he said, "There was testimony here that this was a shotgun killing. And I can see nothing wrong if they say that this defendant, who will be identified by other people, was apprehended with this gun." App. 65. If the trial

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 69-5001

Lyman A. Moore, Petitioner, } On Writ of Certiorari to
v. } the Supreme Court of
State of Illinois. } Illinois.

[June —, 1972]

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 27, 1972

MEMORANDUM TO THE CONFERENCE
RE: No. 69-5001--Moore v. Illinois

In response to the changes in the opinion of the Court indicated today, I am making the following changes in my dissenting opinion:

1. On page 3, the last sentence of the first full paragraph will read: "This diagram was never made available to defense counsel."

2. On page 9, the second sentence in the second full paragraph will read: "At the post-conviction hearing, he testified that throughout the trial he was not only aware of Sanders' statement and Mayer's diagram, but also that he had them in his file."

3. Footnote 2 on page 3 will be expanded by adding the following paragraph:

"Footnote 6 of the Court's opinion implies that during the trial the prosecution turned over Mayer's diagram to defense counsel. But, there is absolutely no support for this implication in the record. While it is true that the diagram was drawn on the back of the original statement given by Mayer to the police, there is nothing to indicate that it was ever recopied and made a part of any reproductions of Mayer's statement. All indications are that it was not reproduced. At the post-conviction hearing the following testimony was adduced: the police officer who aided the prosecution at trial indicated that he had the original diagram in his file, Abs. 244-49; the two lawyers who had represented petitioner at trial both swore that they were given only Mayer's statement, not his diagram, Abs. 307, 328; and the prosecutor testified that he did not know for sure whether he gave the diagram to defense counsel, but that it was certain that he did not supply the diagram if it was not in his file. Abs. 324. Since the diagram was in the police officer's file, not the prosecutor's, it

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

2

is clear that it was never made available to defense counsel, even though the prosecutor was aware of its contents. See page ___ infra."

Sincerely,

T.M.

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 69-5001

Lyman A. Moore, Petitioner, | On Writ of Certiorari to
v. | the Supreme Court of
State of Illinois. | Illinois.

[June —, 1972]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE STEWART, and MR. JUSTICE POWELL join, concurring in part and dissenting in part.

Petitioner was convicted of murder in the Illinois state courts and sentenced to death. The Supreme Court of Illinois affirmed the conviction and sentence by a divided court. 42 Ill. 2d 73, 246 N. E. 2d 299 (1969). This Court holds that the imposition of the death sentence violated the principle established today in *Furman v. Georgia*, and that the sentence must be vacated, but the Court upholds the underlying conviction. I agree with the majority that the sentence is invalid and join Part V of the opinion of the Court. I also agree that the introduction of the shotgun into evidence at petitioner's trial did not violate the Fourteenth Amendment.¹

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

1st DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 6/14/72

No. 69-5001

Recirculated: _____

Lyman A. Moore, Petitioner, } On Writ of Certiorari to
v. } the Supreme Court of
State of Illinois. } Illinois.

[June —, 1972]

MR. JUSTICE BLACKMUN, memorandum.

This state murder case, with the death penalty imposed by a jury, comes here from the Supreme Court of Illinois. The grant of certiorari, 403 U. S. 953 (1971), was limited to three of four questions presented by the petition. These concern the nondisclosure to the defense of allegedly exculpatory evidence possessed by the prosecution or the police; the admission into evidence of a shotgun that was not the murder weapon; and the rejection of eight veniremen who had voiced general objections to capital punishment. The first and third issues respectively focus on the application of *Brady v. Maryland*, 373 U. S. 83 (1963), and *Witherspoon v. Illinois*, 391 U. S. 510 (1968).

I

Petitioner Lyman A. Moore was convicted in 1964 of the first degree murder of Bernard Zitek. Moore's appeal to the Supreme Court of Illinois was held in abeyance while he petitioned the trial court for post-conviction relief. After a hearing on January 1967, that petition was denied. Moore's appeal from the denial was consolidated with his appeal from the conviction and sentence. With one justice dissenting and another not

8/21
Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 14, 1972

MEMORANDUM TO THE CONFERENCE

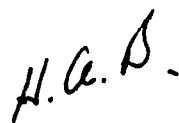
Re: No. 69-5001 - Moore v. Illinois

This case, I suppose, is to come down the same day the capital cases are decided. Part V perhaps should be made to read according to the disposition of those cases. If they go one way, the attached draft of Part V, which is based on Witherspoon, may be used. If the capital cases go the other way, then I suggest that Part V might well be changed to read as follows:

"Inasmuch as the Court today has ruled that the imposition of the death penalty is violative of the Eighth Amendment, Furman v. Georgia, ante, p. ___, it is unnecessary for us to consider the claimed non-compliance with the Witherspoon standards. In Witherspoon, 391 U.S. 522 n. 21 at 523, the Court stated specifically, 'Nor, finally, does today's holding render invalid the conviction, as opposed to the sentence, in this or any other case' (emphasis in original).

"The judgment, insofar as it imposes the death sentence, is reversed and the case is remanded for further proceedings."

Sincerely,



28
pp. 8, 11, 13 and
STYLISTIC CHANGES

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

From: Blackmun, J.

2nd DRAFT

Circulated: _____

Reprinted: 6/19/72

SUPREME COURT OF THE UNITED STATES

No. 69-5001

Lyman A. Moore, Petitioner, } On Writ of Certiorari to
v. { the Supreme Court of
State of Illinois. Illinois.

[June —, 1972]

MR. JUSTICE BLACKMUN, memorandum.

This state murder case, with the death penalty imposed by a jury, comes here from the Supreme Court of Illinois. The grant of certiorari, 403 U. S. 953 (1971), was limited to three of four questions presented by the petition. These concern the nondisclosure to the defense of allegedly exculpatory evidence possessed by the prosecution or the police; the admission into evidence of a shotgun that was not the murder weapon; and the rejection of eight veniremen who had voiced general objections to capital punishment. The first and third issues respectively focus on the application of *Brady v. Maryland*, 373 U. S. 83 (1963), and *Witherspoon v. Illinois*, 391 U. S. 510 (1968).

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 27, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 69-5001 - Moore v. Illinois

With the fourth draft circulation of the dissent, I am making the following changes in the opinion:

1. A new footnote will be added on page 9 following the copy attached.
2. The first full paragraph on page 10 will be eliminated and replaced (after the next full paragraph) with the insert material on the attached page.
3. Footnote 5 on page 10 will become footnote 6 and will be revised in line with the attached page.
4. The phrase "and Fair's testimony as to the admission made on that ride" will be added at the end of the sentence at the top of page 12.

Sincerely,

H. A. B.

1910.12
App.

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

3rd DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 69-5001

Recirculated: 6/28/72

Lyman A. Moore, Petitioner, On Writ of Certiorari to
v. } the Supreme Court of
State of Illinois. Illinois.

[June 29, 1972]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This state murder case, with the death penalty imposed by a jury, comes here from the Supreme Court of Illinois. The grant of certiorari, 403 U. S. 953 (1971), was limited to three of four questions presented by the petition. These concern the nondisclosure to the defense of allegedly exculpatory evidence possessed by the prosecution or the police; the admission into evidence of a shotgun that was not the murder weapon; and the rejection of eight veniremen who had voiced general objections to capital punishment. The first and third issues respectively focus on the application of *Brady v. Maryland*, 373 U. S. 83 (1963), and *Witherspoon v. Illinois*, 391 U. S. 510 (1968).

I

Petitioner Lyman A. Moore was convicted in 1964 of the first degree murder of Bernard Zitek. Moore's appeal to the Supreme Court of Illinois was held in abeyance while he petitioned the trial court for post-conviction relief. After a hearing on January 1967, that petition was denied. Moore's appeal from the denial was consolidated with his appeal from the conviction and sentence. With one justice dissenting and another not

B

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 17, 1972

Re: Capital Cases

Dear Harry:

I am not joining your opinion in the capital cases only because of its manifest personal character.

As you know, I have the greatest admiration for what you have said so eloquently.

Sincerely,

Lewis

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 27, 1972

Re: No. 69-5001 Moore v. Illinois

Dear Thurgood:

Please join me in your dissenting opinion.

Sincerely,

L. F. P.

Mr. Justice Marshall

cc: The Conference

Dear Thurgood: I greatly appreciate your making the changes which I suggested, and which enabled me to join your opinion which I think reaches the correct result. I expect the defendant is guilty as charged, but you have persuaded me that he did not receive a fair trial.

Lewis

5
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 19, 1972

Re: No. 69-5001 - Moore v. Illinois

Dear Harry:

Please join me.

Sincerely,

/s/ W.H.R.

Mr. Justice Blackmun

Copies to the Conference



June 19, 1972

Re: No. 69-5001 - Moore v. Illinois

Dear Harry:

Please join me.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

Dear Harry,

Mike Meehan, one of my law clerks, has made a suggestion as to a possible additional comment in the opinion which makes sense to me, although my joining you is in no sense conditioned upon your adopting it. He suggests that some additional stress on page 10 of your opinion, might be placed on the fact that each of the five items of evidence pertaining to "Slick" Watts could have been relevant only to Sanders' identification of Moore, and not to Sanders' testimony respecting Moore's admission. Since Fair and Joyce both gave undisputed testimony that placed Moore at the Ponderosa Tap, and incidentally provided testimony of another admission independent of that



- 2 -

recited by Sanders, only one of two admissions is actually involved. As you point out, these admissions themselves are merely corroborative of strong eye witness testimony identifying Moore as the culprit. If you feel that this degree of attenuation between the undisclosed facts and the issue of Moore's guilt is already fully spelled out, I defer to your judgment.

W.H.R.

[No copy of last note was made for Conference.]