

# The Burger Court Opinion Writing Database

*Milton v. Wainwright*

407 U.S. 371 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



CHAMBERS OF  
THE CHIEF JUSTICE

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

April 5, 1972

PERSONAL

Re: No. 70-5012 -- Milton v. Wainwright

Dear Lewis:

I have been struggling with the above and it is very difficult to spell out a reversal without making Massiah retroactive for all practical purposes. The theory I hoped to develop just will not "wash."

There are three to affirm who could probably be persuaded to go along with a remand for a hearing on harmless error. Here are some factors:

- (1) - The harmless error rule needs some recognition as a viable doctrine.
- (2) - The Petitioners gave several devastating confessions not challenged on this appeal. They would doubtless convict him on re-trial.
- (3) - A remand would call on the court to evaluate the harmless error aspect in light of the unchallenged confessions that were before the jury.

Query: Would such a remand, acknowledging the impermissibility of the police conduct and condemning it, appeal to you? If it would, I'll determine if Byron, Harry, and Bill R., the "affirm" votes, would go along.

6  
Regards,  
BEN

Mr. Justice Powell

→ P.S. (We would also declare Massiah non-retroactive.)

B  
|  
CHAMBERS OF  
THE CHIEF JUSTICE

Supreme Court of the United States  
Washington, D. C. 20543  
May 11, 1972

No. 70-5012 -- Milton v. Wainwright

MEMORANDUM TO THE CONFERENCE:

I took this case on the assumption that I could work out a basis for reversal without making Massiah retroactive. I find it will not "wash." If we reverse, Massiah is retroactive no matter how we "gild" it.

To place the case in focus I set forth my conclusion to affirm and in these circumstances request that it be re-assigned unless a majority agrees that on the peculiar facts of this case any error was harmless.

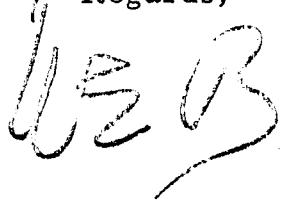
\* \* \* \*

Petitioner Milton is presently serving a life sentence imposed in 1958 upon his conviction by the State of Florida for the first degree murder of the woman with whom Milton was living at the time. Within a day after the woman's death, Milton was arrested and confined in the Miami jail; nine days later, having been advised of his right to remain silent, he

I would therefore dispose of the case with a holding that assuming,   
pendo, the confession made by Milton to officer Langford was inadmissible   
the trial in 1958, its admission in evidence was, beyond reasonable doubt,   
harmless in light of the overwhelming evidence against Milton. I would,   
therefore, not reach the question of the retroactivity of Massiah. Alternatively   
I would dismiss the writ as improvidently granted.

As it appears to stand, the foregoing would be my dissent.

Regards,

A handwritten signature in black ink, appearing to read "JEB".

1  
B  
CHAMBERS OF  
THE CHIEF JUSTICE

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

June 13, 1972

No. 70-5012 -- Milton v. Wainwright

MEMORANDUM TO THE CONFERENCE:

It appears that there is a court for disposing of the case on a "harmless error" basis. I could affirm as well as DIG.

Regards,

WSB

No. 70-5012 -- Milton v. Wainwright

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

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ on claims under the Fifth and Sixth Amendment arising out of the use of one of a number of confessions, all of which were received in evidence over objection. The confession challenged here was obtained by a police officer posing as an accused person confined in the cell with petitioner.

Petitioner Milton is presently serving a life sentence imposed in 1958 upon his conviction of first degree murder following a jury trial in Dade County, Florida. During that trial, the State called as a witness a police officer who, at a time when petitioner had already been indicted and was represented by counsel, posed as a fellow prisoner and spent almost two full days sharing a cell with petitioner. The officer testified to incriminating statements made to him by petitioner during this period. Contending that the statements he made to the officer were involuntary under Fifth Amendment standards and were obtained in violation of his Sixth Amendment rights as subsequently interpreted in *Massiah v. United*

B  
Changes on pages 2 and 8.

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

No. 70-5012 -- Milton v. Wainwright

From: The Chief Justice

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

Recirculated: JUN 16 1972

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

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*p 3*  
*ju*

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

From: The Chief Justice

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

Recirculated: *June 2*

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

70-5012

George William Milton.

Petitioner.

v.

Louie L. Wainwright, Director,  
Florida Divisions of  
Corrections.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Fifth Circuit.

[June 22, 1972]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ on claims under the Fifth and Sixth Amendments arising out of the use of one of a number of confessions, all of which were received in evidence over objection. The confession challenged here was obtained by a police officer posing as an accused person confined in the cell with petitioner.

Petitioner Milton is presently serving a life sentence imposed in 1958 upon his conviction of first degree murder following a jury trial in Dade County, Florida. During that trial, the State called as a witness a police officer who, at a time when petitioner had already been indicted and was represented by counsel, posed as a fellow prisoner and spent almost two full days sharing a cell with petitioner. The officer testified to incriminating statements made to him by petitioner during this period. Contending that the statements he made to the officer were involuntary under Fifth Amendment standards and were obtained in violation of his Sixth Amendment rights as subsequently interpreted in *Massiah v. United States*, 377 U. S. 201 (1964), petitioner initiated the present habeas

*W. J. B.*  
*On Writ*

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLASS

May 15, 1972

PS  
to

Dear Potter:

In No. 70-5012 - Milton v. Wainwright,  
please join me in your memorandum of May 15. (to reverse)

W. O. D.

Mr. Justice Stewart

TM

cc: Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 15, 1972

MEMORANDUM TO THE CONFERENCE

RE: No. 70-5012 - Milton v. Wainwright

I also would reverse the judgment for the  
reasons expressed in Potter's Memorandum.

W. J. B. Jr.

2/14

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

CHAMBERS OF  
JUSTICE POTTER STEWART

January 12, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 70-5012, Milton v. Wainwright

Last Term I wrote a proposed opinion in this case which would have disposed of it without argument. Five of us were in favor of that result (although Hugo Black would have joined only in the judgment). A copy of my proposed opinion is herewith attached.

P.S.

Chief is writing.  
You voted to reverse, as did  
P. D., L. B., W. P., Chief + B. R. C.  
To affirm: J. P., H. A. B., B. R. C.

4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

October Term, 1970

**GEORGE WILLIAM MILTON v. LOUIE L. WAIN-WRIGHT, FLORIDA DIVISIONS OF CORRECTIONS**

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

No. 5712. Decided May —, 1971

Opinion of MR. JUSTICE DOUGLAS, MR. JUSTICE STEWART, MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL.

In June, 1958, petitioner Milton was indicted by a grand jury in Miami, Florida, for the crime of first-degree murder, carrying a possible death sentence. He was held in jail pending trial. He had a lawyer, who told him not to answer any questions. He was advised of his constitutional right to silence but made a confession of the crime which was tape recorded. Several weeks later, perhaps because of doubts as to the admissibility of the first confession, a police officer was placed in his two-man cell with instructions to tell Milton that he was a fellow prisoner being held for investigation of a murder charge. The officer remained in the cell one night, the following day, another night, and part of a second day. During that time, Milton was not told of his cellmate's connection with the police force. Under instructions from his superiors, the officer questioned Milton as opportunities presented themselves in an effort to elicit a confession. Milton eventually made an oral confession to the officer, and this was admitted in evidence at the trial. Milton's counsel objected that the confession was involuntary, but after a careful hearing out of the presence of the jury the trial judge ruled against him. The jury returned a verdict of guilty with recom-

*25*  
**Supreme Court of the United States**

**Washington, D. C. 20543**

CHAMBERS OF  
JUSTICE POTTER STEWART

May 11, 1972

**MEMORANDUM TO THE CONFERENCE**

**No. 70-5012 - Milton v. Wainwright**

In due course, I expect to circulate a memorandum in this case setting out the reasons why I think the judgment should be reversed.

*P.S.*

**P.S.**

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

From: Stewart, J.

1st DRAFT

Circulated: MAY 15 1972

**SUPREME COURT OF THE UNITED STATES**

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

70-5012

George William Milton,  
Petitioner, } On Writ of Certiorari  
v. } to the United States  
Louie L. Wainwright, Director, } Court of Appeals for  
Florida Divisions of } the Fifth Circuit.  
Corrections.

[May —, 1972]

Memorandum to the Conference.

In 1958 a Florida grand jury indicted the petitioner, George Milton, for first degree murder. This was an offense punishable by death under Florida law. After he had been indicted, Milton was remanded to the Dade County jail to await trial. He had retained a lawyer, who had advised him not to talk about his case with anyone.

Some two weeks later the State directed a police officer named Langford to enter Milton's cell, posing as a fellow prisoner also under indictment for murder, in order to "seek information" from Milton. Langford entered the cell on a Friday evening. That night he "tried to open him [Milton] up," but Milton refused to talk about his case. The next day Langford devoted his efforts to gaining Milton's confidence. He shared his breakfast with Milton and gave him candy. He talked convincingly about his own purported crime. He tried to steer the conversation to the charge against Milton, but Milton repeatedly said he did not want to talk about it, and had been told not to talk about it by his lawyer. Finally, sometime between midnight and

*OKAY*

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

2nd DRAFT

From: Stewart, J.

**SUPREME COURT OF THE UNITED STATES**

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

70-5012

Recirculated: JUN 20 1972

George William Milton,  
 Petitioner, } On Writ of Certiorari  
 v. } to the United States  
 Louie L. Wainwright, Director, } Court of Appeals for  
 Florida Divisions of } the Fifth Circuit.  
 Corrections.

[June —, 1972]

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

Under the guise of finding "harmless error," the Court today turns its back on a landmark constitutional precedent established 40 years ago. That precedent, which clearly controls this case, is *Powell v. Alabama*, 287 U. S. 45. I respectfully dissent.

In 1958 a Florida grand jury indicted the petitioner, George Milton, for first degree murder. This was an offense punishable by death under Florida law. After he had been indicted, Milton was remanded to the Dade County jail to await trial. He had retained a lawyer, who had advised him not to talk about his case with anyone.

Some two weeks later the State directed a police officer named Langford to enter Milton's cell, posing as a fellow prisoner also under indictment for murder, in order to "seek information" from Milton. Langford entered the cell on a Friday evening. That night he "tried to open him [Milton] up," but Milton refused to talk about his case. The next day Langford devoted his efforts to gaining Milton's confidence. He shared his breakfast with Milton and gave him candy. He

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 9, 1972

Re: No. 70-5012 - Milton v. Wainwright

Dear Chief:

I agree with your memorandum in this case.

Sincerely,



The Chief Justice

Copies to Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 14, 1972

Re: No. 70-5012 - Milton v.  
Wainwright

Dear Chief:

Please join me, although I  
would rather affirm.

Sincerely,

*Byron*

The Chief Justice

Copies to Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 17, 1972

Re: No. 70-5012 - Milton v. Wainwright

Dear Potter:

Please join me in your memorandum of  
May 15.

Sincerely,

  
T.M.

Mr. Justice Stewart

cc: Conference

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Supreme Court of the United States  
Washington, D. C. 20530

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 12, 1972

Re: No. 70-5012 - Milton v. Wainwright

Dear Chief:

I find myself in accord with the conclusions expressed in your memorandum dated May 11, and I would join an opinion framed along the lines of that memorandum.

Sincerely,

*H. A. B.*

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 14, 1972

Re: No. 70-5012 - Milton v. Wainwright

Dear Chief:

I am glad to join your circulation of June 13 either in the submitted form or on the basis of an affirmation.

Sincerely,

*H.A.B.*

The Chief Justice

cc: The Conference

April 6, 1972

Re: 70-5012 Milton v. Wainwright

Dear Chief:

I will join you in an opinion along the lines you suggest.

Sincerely,

The Chief Justice

lfp/ss



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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 14, 1972

Re: No. 70-5012 Milton v. Wainwright

Dear Chief:

This will confirm that I join in your opinion.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 15, 1972

Re: No. 70-5012 - Milton v. Wainwright

Dear Chief:

Please join me.

Sincerely,

W.H.R.

Mr. Chief Justice

Copies to the Conference