The Burger Court Opinion Writing Database

Kirby v. Illinois

406 U.S. 682 (1972)

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

November 15, 1971

Re: No. 70-5061 - Kirby v. Illinois

Dear Bill:

This was left more or less in a state of judicial equipoise with 3-3 and one doubtful.

I have no disposition to assign it twice since I believe this is one that ought to be re-argued, given its present posture.

Regards,

WEB

Mr. Justice Douglas

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

CHAMBERS OF
THE CHIEF JUSTICE

November 16, 1971

No. 70-5061 - Thomas Kirby, Etc., v. State of Illinois

Dear Bill:

I cannot join in the proposed opinion and will probably write unless someone else writes something I can join.

Regards,

WEB

Mr. Justice Brennan

cc: The Conference

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

January 17, 1972

CHAMBERS OF
THE CHIEF JUSTICE

MEMORANDUM TO THE CONFERENCE:

We have now set two cases for reargument and there are others that seem to me should be similarly treated.

The following are my "nominations" for reargument.

No. 70-5061 -- Kirby v. Illinois
No. 70-26 -- Gooding v. Wilson
No. 70-45 -- U.S. v. Brewster

I previously indicated my willingness to have S. & E. Contractors v. U.S., and Lego v. Twomey reargued. The former is now scheduled for reargument and the latter has come down. There may be others, and generally I will vote to reargue any 4-3 case unless it is a "JMH pewee."

To facilitate filing problems, I am sending individual memos on each of the above.

Regards,

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

January 17, 1972

MEMORANDUM TO THE CONFERENCE:

No. 70-5061 -- Kirby v. Illinois

To implement my general memo on cases for reargument, I propose that this case be set for reargument this Term.

I had been working on a dissent pursuing some of the same lines as are covered in Justice Stewart's circulation, but I see no point in circulating these views now. If the dissent circulated by Justice Stewart does not persuade any of the four who would reverse, my observations are not likely to achieve that objective.

Regards,

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

May 9, 1972

No. 70-5061 -- Kirby v. Illinois

Dear Potter:

Please join me with the following:

CHIEF JUSTICE BURGER, concurring.

Because I agree that the right to counsel attaches as soon as charges are made against an accused and he becomes the subject of a "criminal prosecution," I join in the Court's opinion and holding. See Coleman v. Alabama, 399 U.S. 1, 21 (dissenting opinion).

Regards,

WEB

Mr. Justice Stewart

Copies to Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

May 9, 1972

No. 70-5061 -- Kirby v. Illinois

Dear Potter:

Please join me with the following:

CHIEF JUSTICE BURGER, concurring.

Because I agree that the right to counsel attaches as soon as charges are made against an accused and he becomes the subject of a "criminal prosecution," I join in the Court's opinion and holding. See Coleman v. Alabama, 399 U.S. 1, 21 (dissenting opinion).

Regards,

WEB

Mr. Justice Stewart

Copies to Conference

Harry This is to preserve my reservations re the Coleman constitutional holding that Pre-Trial Hearing is a "Criminal prosecution"

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

CHAMBERS OF
THE CHIEF JUSTICE

May 9, 1972

No. 70-5061 -- Kirby v. Illinois

Dear Potter:

Please join me with the following:

CHIEF JUSTICE BURGER, concurring.

Because I agree that the right to counsel attaches as soon as charges are made against an accused and he becomes the subject of a "criminal prosecution," I join in the Court's opinion and holding. See Coleman v. Alabama, 399 U.S. 1, 21 (dissenting opinion).

Regards,

WEB

Mr. Justice Stewart

Copies to Conference

Bill This is to maintain my posture that preliminary proceedings before ~~charge~~ indictment are not a "criminal prosecution."

WEB

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

May 18, 1972

CHAMBERS OF
THE CHIEF JUSTICE

No. 70-5061 -- Kirby v. Illinois

Dear Potter:

Please amend my concurring statement to read as follows:

MR. CHIEF JUSTICE BURGER, concurring.

I agree that the right to counsel attaches as soon as criminal charges are formally made against an accused and he becomes the subject of a "criminal prosecution." Therefore I join in the Court's opinion and holding. Cf. Coleman v. Alabama, 399 U.S. 1, 21 (dissenting opinion).

Regards,

Mr. Justice Stewart

Copies to the Conference

November 15, 1971

Dear Chief:

You ask about No. 70-5061 - Kirby v. Illinois.

I suggest Bill Brennan write that. In fact, as I recall that seemed to be the consensus at Friday's Conference.

W. O. D.

The Chief Justice

cc: Mr. Justice Brennan

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

November 16, 1971

Dear Bill:

In No. 70-5061 - Kirby v. Illinois, I am happy to join your opinion.

William O. Douglas

Mr. Justice Brennan

CC: Conference

WHR & HAB have joined WOD.

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 8, 1972

Dear Bill:

In No. 70-5061 - Kirby v. Illinois, please join me in your dissent.

WOD

William O. Douglas

Mr. Justice Brennan

CC: The Conference

Circulated
11-16-71

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–5061

Thomas Kirby, Etc., Petitioner, *v.* State of Illinois. } On Writ of Certiorari to the Appellate Court of Illinois, First District.

[November —, 1971]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner and Ralph Bean were convicted in Illinois Circuit Court of robbing Willie Shard. Before they were indicted but after their arrest the Chicago police conducted a police station showup without advising them that they might have counsel present.[1] Shard testified at trial that he identified the pair at the showup. The question is whether under *Gilbert* v. *California*, 388 U. S. 263 (1967), the admission of testimony concerning identification at a preindictment showup was constitutional error. *Gilbert* held, in the context of a post-indictment lineup conducted without notice to counsel, that, unless harmless error, "[o]nly a *per se* exclusionary rule as to such testimony can be effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." *Id.*, at 273.

On February 21, 1968, Shard reported to the Chicago police that the previous day two men robbed him on a Chicago street of a wallet containing traveler's checks to his order and a social security card in his name. On February 22, Chicago police officers arrested petitioner

[1] Counsel was not appointed to represent petitioner until after the indictment was returned.

Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

From: Brennan, J.

Circulated: _____

Recirculated: 11/17/71

SUPREME COURT OF THE UNITED STATES

No. 70–5061

Thomas Kirby, Etc., Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois, First District.

[November —, 1971]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner and Ralph Bean were convicted in Illinois Circuit Court of robbing Willie Shard. Before they were indicted but after their arrest the Chicago police conducted a police station showup without advising them that they might have counsel present.[1] Shard testified at trial that he identified the pair at the showup. The question is whether under *Gilbert* v. *California*, 388 U. S. 263 (1967), the admission of testimony concerning identification at a preindictment showup was constitutional error. *Gilbert* held, in the context of a post-indictment lineup conducted without notice to counsel, that, unless harmless error, "[o]nly a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." *Id.*, at 273.

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[1] Counsel was not appointed to represent petitioner until after the indictment was returned.

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

3rd DRAFT

From: Brennan, J.

Circulated:

Recirculated: 11-4-71

SUPREME COURT OF THE UNITED STATES

No. 70-5061

Thomas Kirby, Etc., Petitioner, *v.* State of Illinois. } On Writ of Certiorari to the Appellate Court of Illinois, First District.

[November —, 1971]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner and Ralph Bean were convicted in Illinois Circuit Court of robbing Willie Shard. Before they were indicted but after their arrest the Chicago police conducted a police station showup without advising them that they might have counsel present.[1] Shard testified at trial that he identified the pair at the showup. The question is whether under *Gilbert* v. *California*, 388 U. S. 263 (1967), the admission of testimony concerning identification at a preindictment showup was constitutional error. *Gilbert* held, in the context of a post-indictment lineup conducted without notice to counsel, that, unless harmless error, "[o]nly a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." *Id.*, at 273.

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pp 1, 6

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

4th DRAFT

From: Brennan, J.

Circulated:

SUPREME COURT OF THE UNITED STATES

No. 70-5061

Thomas Kirby, Etc., Petitioner, *v.* State of Illinois. } On Writ of Certiorari to the Appellate Court of Illinois, First District.

12/10/71

[November —, 1971]

MR. JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion in which MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join.

Petitioner and Ralph Bean were convicted in Illinois Circuit Court of robbing Willie Shard. Before they were indicted but after their arrest the Chicago police conducted a police station showup without advising them that they might have counsel present.[1] Shard testified at trial that he identified the pair at the showup. The question is whether under *Gilbert* v. *California*, 388 U. S. 263 (1967), the admission of testimony concerning identification at a preindictment showup was constitutional error. *Gilbert* held, in the context of a post-indictment lineup conducted without notice to counsel, that, unless harmless error, "[o]nly a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." *Id.*, at 273.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 17, 1972

Dear Chief:

I have your memorandum suggesting reargument in No. 70-5061, Kirby v. Illinois, No. 70-26, Gooding v. Wilson and No. 70-45, United States v. Brewster.

You indicate that you thought the votes in each of these cases was 4 to 3. My record shows that Gooding v. Wilson was 5 to 2 to affirm. The votes to affirm were Thurgood, Byron, Potter, Bill Douglas and I. The votes to reverse were yours and Harry's. I've circulated a proposed opinion for the Court on that premise.

My records do show that the votes in Kirby and Brewster were both 4 to 3. In Kirby I've circulated an opinion which Bill Douglas and Thurgood have joined. Byron has filed a separate opinion concurring in the judgment.

In Brewster, my record indicates that Potter, Thurgood and Harry have joined your opinion and Bill Douglas has joined my dissent. Byron also voted to affirm.

You'll remember that my view on reargument of 4 to 3 cases is that this is a matter for conference discussion. Certainly, as in the case of S & E Contractors, if at least four of seven vote reargument then there should be reargument. I would suppose someone would have to make the motion and then a vote be taken as we did Friday in S & E Contractors. In any event, I see no reason for rearguing Gooding v. Wilson if the five who voted to affirm remain of that view and join my proposed opinion.

W.J.B. Jr.

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 2, 1972

RE: No. 70-5061 - Kirby v. Illinois

Dear Potter:

In due course I shall circulate a dissent in the above.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

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

2nd DRAFT

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 5-8-72

Recirculated: _____

No. 70–5061

Thomas Kirby, Etc., Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois, First District.

[May —, 1972]

MR. JUSTICE BRENNAN, dissenting.

After petitioner and Ralph Bean were arrested, police officers brought Willie Shard, the robbery victim, to a room in a police station where petitioner and Bean were seated at a table with two other police officers. Shard testified at trial that the officers who brought him to the room asked him if petitioner and Bean were the robbers and that he indicated they were. The prosecutor asked him, "And you positively identified them at the police station, is that correct?" Shard answered, "Yes." Consequently, the question in this case is whether, under *Gilbert* v. *California*, 388 U. S. 263 (1967), it was constitutional error to admit Shard's testimony that he identified petitioner at the pretrial police station showup when that showup was conducted by the police without advising petitioner that he might have counsel present. *Gilbert* held, in the context of a post-indictment lineup conducted without notice to counsel, that, unless harmless error, "[o]nly a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." *Id.*, at 273. I would apply *Gilbert*

1, 3, 10-13
+ style changes

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

From: Bre[illegible]

Circulated: _____

Recirculated: 5/11/72

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-5061

Thomas Kirby, Etc., Petitioner, *v.* State of Illinois. } On Writ of Certiorari to the Appellate Court of Illinois, First District.

[May —, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

After petitioner and Ralph Bean were arrested, police officers brought Willie Shard, the robbery victim, to a room in a police station where petitioner and Bean were seated at a table with two other police officers. Shard testified at trial that the officers who brought him to the room asked him if petitioner and Bean were the robbers and that he indicated they were. The prosecutor asked him, "And you positively identified them at the police station, is that correct?" Shard answered, "Yes." Consequently, the question in this case is whether, under *Gilbert* v. *California,* 388 U. S. 263 (1967), it was constitutional error to admit Shard's testimony that he identified petitioner at the pretrial station-house showup when that showup was conducted by the police without advising petitioner that he might have counsel present. *Gilbert* held, in the context of a post-indictment lineup conducted without notice to counsel, that, unless harmless error, "[o]nly a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." *Id.,* at 273. I would apply *Gilbert*

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–5061

Thomas Kirby, Etc., Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois, First District.

[May —, 1972]

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

After petitioner and Ralph Bean were arrested, police officers brought Willie Shard, the robbery victim, to a room in a police station where petitioner and Bean were seated at a table with two other police officers. Shard testified at trial that the officers who brought him to the room asked him if petitioner and Bean were the robbers and that he indicated they were. The prosecutor asked him, "And you positively identified them at the police station, is that correct?" Shard answered, "Yes." Consequently, the question in this case is whether, under *Gilbert* v. *California*, 388 U. S. 263 (1967), it was constitutional error to admit Shard's testimony that he identified petitioner at the pretrial station-house showup when that showup was conducted by the police without advising petitioner that he might have counsel present. *Gilbert* held, in the context of a post-indictment lineup conducted without notice to counsel, that, unless harmless error, "[o]nly a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." *Id.*, at 273. I would apply *Gilbert*

pp 14-15

Mr. Justice Powell
Mr. Justice Rehnquist

5th DRAFT

SUPREME COURT OF THE UNITED STATES

Mr. Justice Brennan, J.

No. 70–5061

Circulated: _____

Recirculated: 5/23/72

Thomas Kirby, Etc., Petitioner, *v.* State of Illinois. } On Writ of Certiorari to the Appellate Court of Illinois, First District.

[May —, 1972]

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

After petitioner and Ralph Bean were arrested, police officers brought Willie Shard, the robbery victim, to a room in a police station where petitioner and Bean were seated at a table with two other police officers. Shard testified at trial that the officers who brought him to the room asked him if petitioner and Bean were the robbers and that he indicated they were. The prosecutor asked him, "And you positively identified them at the police station, is that correct?" Shard answered, "Yes." Consequently, the question in this case is whether, under *Gilbert* v. *California,* 388 U. S. 263 (1967), it was constitutional error to admit Shard's testimony that he identified petitioner at the pretrial station-house showup when that showup was conducted by the police without advising petitioner that he might have counsel present. *Gilbert* held, in the context of a post-indictment lineup conducted without notice to counsel, that, unless harmless error, "[o]nly a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." *Id.,* at 273. I would apply *Gilbert*

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 16, 1971

MEMORANDUM TO THE CONFERENCE

Re: 70-5061 - Kirby v. Illinois

In due course, I expect to circulate a dissenting opinion in this case.

P.S.

P.S.

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

1st DRAFT

From: Stewart, J.

Circulated: 11/22/71

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 70-5061

Thomas Kirby, Etc., Petitioner, *v.* State of Illinois. } On Writ of Certiorari to the Appellate Court of Illinois, First District.

[November —, 1971]

MR. JUSTICE STEWART, dissenting.

In *United States* v. *Wade*, 388 U. S. 218, this Court held that the presence of counsel was required at lineups that took place after the suspect had been indicted. As the Court said in the companion case of *Gilbert* v. *California*, 388 U. S. 263:

> "We . . . held [in *Wade*] that a *post-indictment* pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution . . . ." *Id.*, at 272 (emphasis supplied).

The importance of the institution of a formal accusatory charge, for Sixth Amendment purposes, was established in *Powell* v. *Alabama*, 277 U. S. 45, the seminal case involving the constitutional right to counsel. There the Court said that the "most critical" period for criminal defendants was "from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important." *Id.*, at 57. See also *Gideon* v. *Wainwright*, 372 U. S. 335. Recent decisions have emphasized the need for counsel after indictment or at arraignment. *Hamilton* v. *Alabama*, 368 U. S. 52; *Massiah* v. *United States*, 377 U. S. 201. See also *Spano* v. *New York*, 360 U. S. 315 (concurring opinion).

B

Minor changes as indicated

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

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Stewart, J.

No. 70-5061

Circulated: _____

Recirculated: 11/23/71

Thomas Kirby, Etc., Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Appellate Court of Illinois, First District.

[November —, 1971]

MR. JUSTICE STEWART, dissenting.

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The significance of the moment when the suspect is formally charged stems from the nature of our criminal

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

1st DRAFT

From: Stewart, J. MAY 2 - 1972

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 70–5061

Recirculated: _____

Thomas Kirby, Etc., Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois, First District.

[May —, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

In *United States* v. *Wade*, 388 U. S. 218, and *Gilbert* v. *California*, 388 U. S. 263, this Court held "that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth [and Fourteenth] Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup." *Gilbert* v. *California, supra,* at 272. Those cases further held that no "in-court identifications" are admissible in evidence if their "source" is a lineup conducted in violation of this constitutional standard. "Only a *per se* exclusionary rule as to such testimony can be an effective sanction," the Court said, "to assure that law enforcement officers will respect the accused's constitutional right to the presence of his counsel at the critical lineup." *Gilbert* v. *California, supra,* at 273. In the present case we are asked to extend the *Wade-Gilbert per se* exclusionary rule to identification testimony based upon a police station showup that took place *before*

3

113-4, 9

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.

Circulated: MAY 10 1972

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 70–5061

Thomas Kirby, Etc., Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois, First District.

[May —, 1972]

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SUPREME COURT OF THE UNITED STATES

No. 70-5061

Thomas Kirby, Etc., Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois, First District.

[May —, 1972]

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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

4th DRAFT

Mr. Justice Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 70–5061

Recirculated: JUN 2 1972

Thomas Kirby, Etc., Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois, First District.

[May —, 1972]

MR. JUSTICE STEWART announced the judgment of the Court in an opinion in which THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join.

In *United States* v. *Wade,* 388 U. S. 218, and *Gilbert* v. *California,* 388 U. S. 263, this Court held "that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth [and Fourteenth] Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup." *Gilbert* v. *California, supra,* at 272. Those cases further held that no "in-court identifications" are admissible in evidence if their "source" is a lineup conducted in violation of this constitutional standard. "Only a *per se* exclusionary rule as to such testimony can be an effective sanction," the Court said, "to assure that law enforcement officers will respect the accused's constitutional right to the presence of his counsel at the critical lineup." *Gilbert* v. *California, supra,* at 273. In the present case we are asked to extend the *Wade-Gilbert per se* exclusionary rule to identification testimony based upon a police station showup that took place *before*

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

From: White, J.

Circulated: 12-9-71

Recirculated: _____

No. 70-5061 - Kirby v. Illinois

Mr. Justice White, concurring in the result.

United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), govern this case and compel reversal of the judgment of the Illinois Supreme Court. The State requests that we reconsider and overrule Wade and Gilbert. I am not at this time persuaded that those cases should be overruled, and I would prefer not to consider taking that step without reargument to a full Court.

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

1st DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 5-11-72

No. 70–5061

Recirculated: _____

Thomas Kirby, Etc., Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois, First District.

[May —, 1972]

MR. JUSTICE WHITE, dissenting.

United States v. *Wade,* 388 U. S. 218 (1967), and *Gilbert* v. *California,* 388 U. S. 263 (1967), govern this case and compel reversal of the judgment of the Illinois Supreme Court.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 16, 1971

Re: No. 70-5061 - Kirby v. Illinois

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 18, 1972

Re: No. 70-5061 - Kirby v. Illinois

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice Brennan

cc: Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 17, 1971

Re: No. 70-5061 - Kirby v. Illinois

Dear Bill:

I have difficulty with the proposed opinion and shall await Potter's dissent before taking a final position.

Sincerely,

H. A. B.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 23, 1971

Re: No. 70-5061 - Kirby v. Illinois

Dear Potter:

Please join me in your dissent for this case.

Sincerely,

H.A.B.

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 5, 1972

Re: No. 70-5061 - Kirby v. Illinois

Dear Potter:

Please join me.

Sincerely,

H. A. B.

Mr. Justice Stewart

cc: The Conference

B

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 5, 1972

Re: No. 70-5061 Kirby v. Illinois

Dear Potter:

The Reporter has suggested the following technical revision of my concurrence:

> "As I would not extend the Wade-Gilbert per se exclusionary rule, I concur in the result reached by the Court."

Please make this change, if this meets with your approval.

Sincerely,

Lewis

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 2, 1972

Re: 70-5061 - Kirby v. Illinois

Dear Potter:

Please join me in your opinion for the Court in this case.

Sincerely,

WHR

Mr. Justice Stewart

Copies to the Conference