The Burger Court Opinion Writing Database

Moore v. Illinois

434 U.S. 220 (1977)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

September 21, 1977

Dear Bill:

Re: No. 76-5344 - Moore v. Illinois

Now that I have had a chance to reflect on Byron's and your September memoranda, I think your position satisfies me.

Regards,

WEB

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

December 1, 1977

Personal

Dear Lewis:

Re: 76-5344 Moore v. State of Illinois

I am sorry to be so late with a suggestion, but it is one that is critical for me. At page 3 you discuss the theory of the defendant's case; if this is to be in, it is essential for me that we take note of something along these lines:

> "Inherent in the verdict of the jury is that it believed the victim and disbelieved the petitioner, thus rejecting his speculative theories along with his alibi testimony."

Regards,

WEB

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

December 8, 1977

Dear Lewis:

Re: 76-5344 Moore v. Illinois

Your change in the December 2 draft did not catch my eye until today in recapping all outstanding cases.

Your change on page 3 - 4 satisfies my problem. I join.

Regards,

WEB

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 16, 1977

RE: No. 76-5344 Moore v. Illinois

Dear Lewis:

I agree.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

September 15, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-5344, Moore v. Illinois

It seems to me a little late in the day to ask for supplemental briefs in this case. I would be strongly in favor, however, of asking counsel to direct their attention at oral argument to the question stated in the final paragraph of Bill Rhenquist's memorandum of September 13.

P.S.

P. S.

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 15, 1977

No. 76-5344, Moore v. Illinois

Dear Lewis,

Upon the premise that you can see your way clear to adding the phrase "and Fourteenth" after "Sixth" in the third line from the bottom of the text on page 11, I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

September 15, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-5344 - Moore v. Illinois

I have no strong objection to Bill Rehnquist's suggestion that the parties be asked to address the exhaustion issue. I do have the following comments, however.

It appears that Moore did present to the Illinois Supreme Court the question of whether he had a right to counsel at the identification procedure conducted at his preliminary hearing. The Illinois Supreme Court described Moore's contention as follows (App. 6):

> "that the identification of defendant is the product of a 'suggestive photographic identification procedure and a suggestive corporeal identification procedure.' In support of this contention defendant argues that the identification of the defendant by the complainant is based upon an improperly suggestive procedure employed in the course of the complainant's examination of photographs furnished by the police and in the manner of her viewing the defendant at the preliminary hearings." [Emphasis added.]

After examining the evidence concerning the victim's opportunity to observe her assailant at the time of her rape and her statement to police following the assault but preceding the identification that she saw her assailant at a restaurant near her apartment on the evening before the attack, the court concluded that (App. 7-8):

> "the fact that she was permitted to see the defendant at the preliminary hearing does not, under the circumstances shown, taint her identification. The record

> shows a sufficient basis for an identification wholly independent of the viewing of the photographs and her seeing the defendant in person at the preliminary hearing is shown to have merely confirmed her identification from the photograph." [Emphasis added.]

It is clear from the foregoing that the court was addressing itself to a claim under Gilbert v. California, 388 U.S. 263, 272 (1967), and United States v. Wade, 388 U.S. 218, 239-243 (1967), which set forth the standard for determining whether the absence of counsel at a pre-trial identification proceeding requires the exclusion of an in-court identification. Both Gilbert and Wade stated the relevant inquiry to be whether the in-court identification was "tainted" by the illegal lineup or was of "independent" origin. Gilbert, 388 U.S., at 272; Wade 388 U.S., at 242. This is precisely the inquiry undertaken by the Illinois Supreme Court, and the premise of the Wade-Gilbert claim adjudicated was the right to counsel at the preliminary hearing. The Illinois court did not specifically discuss the counsel question, but it would have had no occasion for considering the question of independent source if it had not first concluded or assumed that Moore had a constitutional right to the presence of counsel at the preliminary hearing identification. In any event, it appears that the counsel claim was presented for adjudication.

Following the District Court's dismissal of Moore's habeas petition for failure to exhaust, the Court of Appeals reversed on the ground that his allegation concerning his identification was identical to that considered by the Illinois Supreme Court (App. 21):

> "whether his identification was 'the product of a suggestive photographic identification procedure and a suggestive corporeal identification procedure?'"

On remand, the District Court recognized the presence of the right to counsel claim, and on appeal the Court of Appeals rejected that claim.

That the counsel issue is properly here is supported by the fact that following the decision of the Court of Appeals remanding the matter to the District Court for a decision on the merits, the State

never contended and does not now contend that Moore failed to exhaust his remedies as to his right to counsel claim.* Moreover, there is strong authority for the proposition that the failure of a State to raise the failure to exhaust as a defense before the District Court constitutes a waiver of the exhaustion requirement. See West v. Louisiana, 478 F.2d 1026, aff'd en banc, 510 F.2d 363 (CA 5 1975); Tolg v. Grimes, 355 F.2d 92 (CA 1966); Jenkins v. Fitzberger, 440 F.2d 1188 (CA 3 1967); Howard v. Sigler, 325 F. Supp. 278 (D. Neb. 1971), rev'd on other grounds, 454 F.2d 115 (CA 8 1972); but see United States ex rel. Sostre v. Festa, 513 F.2d 1313, 1314 n. 1 (CA 2 1975). This view is supported by our statement in Fay v. Noia, 372 U.S. 391, 420 (1963), that "[t]he rule of exhaustion 'is not one defining power but one which relates to the appropriate exercise of power.'" (Quoting from Bowen v. Johnston, 306 U.S. 19, 27.) See Wainwright v. Sykes, 45 U.S.L.W. 4807, 4810 (June 23, 1977). By failing to raise the question of exhaustion below or here, the State of Illinois has "acknowledged the insubstantiality of its interest in further adjudicating [Moore's] claim." West, supra, 478 F.2d, at 1034-1035. Furthermore, given the State's concession in its brief that Moore was deprived of his Sixth Amendment right to counsel at the preliminary hearing identification, it appears unlikely that, as Justice Rehnquist suggested in his memorandum, "prior treatment by a state court of the issue might shed some light on the proper resolution of the federal constitutional question . . . ."

Under all of these circumstances, I could forego inviting the State to raise the question of exhaustion for the first time at this stage of the proceedings.

B.R.W.

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*It also appears that the District Court's earlier dismissal for failure to exhaust was sua sponte rather than at the urging of the State. The District Court's dismissal seems to have been based on its view that a habeas petitioner must first present his claims to the state court in a post-conviction proceeding even if he has already done so on direct appeal.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 16, 1977

Re: No. 76-5344 - Moore v. Illinois

Dear Lewis:

Please join me.

Sincerely,

Byron

Mr. Justice Powell

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

September 22, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-5344, Moore v. Illinois

I find myself in agreement with Byron on this matter.

T. M.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 16, 1977

Re: No. 76-5344, Moore v. Illinois

Dear Lewis:

Please join me.

Sincerely,

TM

T. M.

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

September 22, 1977

Re: No. 76-5344 - Moore v. Illinois

Dear Bill:

I belatedly respond to your memorandum of September 13.

I, too, am content to defer to the oral argument any inquiry about exhaustion. I would have no objection to the filing of post-argument briefs if the parties desire and the Court is willing.

Perhaps I should state that the filing of the supplemental brief by the State of Illinois was due to my noting in August the factual misstatement on page 9 of the State's original brief on the merits. I asked Mr. Rodak to make inquiry of counsel by telephone as to this.

It seems to me that the State's concessions that a Wade-Gilbert violation occurred at the December 21, 1967 hearing, and that there was error in not providing a transcript, may well make the case a different one than we thought it was at the time we voted on the petition for certiorari.

Sincerely,

H.A.B.

Mr. Justice Rehnquist

cc: The Conference

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

From: Mr. Justice Blackmun

Circulated: 12/2/77

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-5344

James Raymond Moore, Petitioner, *v.* State of Illinois. } On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[December —, 1977]

MR. JUSTICE BLACKMUN, concurring.

I concur in the result and I join the Court in remanding the case for a determination as to whether the adjudged error was harmless. On the record of this case, the conclusion that it was harmless seems to me to be almost inevitable; that, however, is for the courts below to decide in the first instance.

I feel, furthermore, that the Court in its opinion has made more out of this case than its facts warrant. As the Court points out, *ante*, p. 8, the State of Illinois has conceded, Brief for Respondent 8, and n. 1; Tr. of Oral Arg. 32, 34, that the so-called preliminary hearing on December 21, 1967, at which the victim testified, was the initiation of adversary judicial criminal proceedings against petitioner. At trial, the victim testified that at that hearing she had identified petitioner as her assailant. This being so, the ban of *Gilbert* v. *California*, 388 U. S. 263 (1967), applies in full force and in itself would require the remand the Court orders. With the State's concession, I see no need to wrestle with the issue whether what took place on December 21 marked the initiation of formal proceedings against petitioner in the sense of *Kirby* v. *Illinois*, 406 U. S. 682 (1972), and thereby possibly to become entangled with the ghost, unmentioned by the Court, of the holding in *Coleman* v. *Alabama*, 399 U. S. 1 (1970), determined not to be retroactive in *Adams* v. *Illinois*, 405 U. S. 278 (1972).

One last word: I disassociate myself from the implication—

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

September 14, 1977

MEMORANDUM TO THE CONFERENCE:

No. 76-5344 Moore v. Illinois

I concur in Bill Rehnquist's suggestion (his memo of September 13), that additional briefing by the parties be requested.

L.F.P.

L.F.P., Jr.

ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 14, 1977

No. 76-5344 Moore v. Illinois

MEMORANDUM TO THE CONFERENCE:

I am circulating herewith a first draft of an opinion for the Court in the above case.

There is one possible omission that I call to your attention.

Coleman v. Alabama, 399 U.S. 1 (1970), held that an accused is entitled to the assistance of counsel at a preliminary hearing held to determine whether there is probable cause to bind the accused over to the grand jury if the hearing is adversarial in nature. Adams v. Illinois, 405 U.S. 278 (1972), affirmed a decision of the Illinois Supreme Court which held that under Coleman an accused is entitled to the assistance of counsel at a preliminary hearing conducted under Illinois procedure, but that Coleman would not be applied retroactively.

Wade and Gilbert were decided in June 1967. The identification in the instant case took place at a preliminary hearing held on December 21, 1967. Thus, the hearing was after Wade and Gilbert but before Coleman. It has been suggested by one of my resourceful law clerks that it could be argued that the holding of nonretroactivity of Coleman may apply to this case. The argument would be that because the preliminary hearing in this case took place before Coleman, the state was not required by Coleman to provide petitioner with counsel. To hold now that counsel was required simply because an identification was performed, would undercut Adams' holding that Coleman was not retroactive. An element in this argument is that some sort of identification procedure is fairly normal at preliminary hearings.

I see no merit to this argument. Wade and Gilbert addressed fundamentally different concerns from those before

the Court in Coleman. They focused on suggestive identification procedures at any critical time in the process. The result in this case certainly would be the same if the suggestive identification had occurred the day after the preliminary hearing. Wade and Gilbert were the law at the time the identification challenged in this case occurred. I view Adams as irrelevant.

As no claim has been made that Adams applies to the present case, I propose to make no mention of this possible argument unless I am so instructed by my Brothers.

L.F.P.

L.F.P., Jr.

ss

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

1st DRAFT

From: Mr. Justice Powell

SUPREME COURT OF THE UNITED STATES

Circulated: NOV 14 1977

No. 76-5344

Recirculated: _____

James Raymond Moore, Petitioner, v. State of Illinois. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[November —, 1977]

MR. JUSTICE POWELL delivered the opinion of the Court.

Petitioner was convicted of rape and related offenses. At trial the complaining witness testified on direct examination by the prosecution that she had identified petitioner at a preliminary hearing at which he was not represented by counsel. The state supreme court affirmed petitioner's convictions, and the Federal District Court and Court of Appeals denied habeas corpus relief. We granted certiorari because of an apparent conflict between the decisions below and our holdings with respect to the right to counsel at corporeal identifications in *Wade* v. *United States*, 388 U. S. 218 (1967), *Gilbert* v. *California*, 388 U. S. 263 (1967), and *Kirby* v. *Illinois*, 406 U. S. 682 (1972). We reverse.

I

The victim of the offenses in question lived in an apartment on the south side of Chicago. Shortly after noon on December 14, 1967, she awakened from a nap to find a man standing in the doorway to her bedroom holding a knife. The man entered the bedroom, threw her face down on the bed, and choked her until he was quiet. After covering his face with a bandana, the intruder partially undressed the victim, forced her to commit oral sodomy, and raped her. Then he left, taking a guitar and a flute from the apartment.

Pp. 1, 11

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: NOV 21 1977

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-5344

James Raymond Moore, Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[November —, 1977]

MR. JUSTICE POWELL delivered the opinion of the Court.

Petitioner was convicted of rape and related offenses. At trial the complaining witness testified on direct examination by the prosecution that she had identified petitioner at a preliminary hearing at which he was not represented by counsel. The state supreme court affirmed petitioner's convictions, and the Federal District Court and Court of Appeals denied habeas corpus relief. We granted certiorari because of an apparent conflict between the decisions below and our holdings with respect to the right to counsel at corporeal identifications in *Wade* v. *United States*, 388 U. S. 218 (1967), *Gilbert* v. *California*, 388 U. S. 263 (1967), and *Kirby* v. *Illinois*, 406 U. S. 682 (1972). We reverse.

I

The victim of the offenses in question lived in an apartment on the south side of Chicago. Shortly after noon on December 14, 1967, she awakened from a nap to find a man standing in the doorway to her bedroom holding a knife. The man entered the bedroom, threw her face down on the bed, and choked her until she was quiet. After covering his face with a bandana, the intruder partially undressed the victim, forced her to commit oral sodomy, and raped her. Then he left, taking a guitar and a flute from the apartment.

P. 12

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-5344

James Raymond Moore, Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[December —, 1977]

MR. JUSTICE POWELL delivered the opinion of the Court.

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: DEC 2 1977

pp. 3-4

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-5344

James Raymond Moore, Petitioner, v. State of Illinois. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[December —, 1977]

MR. JUSTICE POWELL delivered the opinion of the Court.

Petitioner was convicted of rape and related offenses. At trial the complaining witness testified on direct examination by the prosecution that she had identified petitioner at a preliminary hearing at which he was not represented by counsel. The state supreme court affirmed petitioner's convictions, and the Federal District Court and Court of Appeals denied habeas corpus relief. We granted certiorari because of an apparent conflict between the decisions below and our holdings with respect to the right to counsel at corporeal identifications in *Wade* v. *United States*, 388 U. S. 218 (1967), *Gilbert* v. *California*, 388 U. S. 263 (1967), and *Kirby* v. *Illinois*, 406 U. S. 682 (1972). We reverse.

I

The victim of the offenses in question lived in an apartment on the south side of Chicago. Shortly after noon on December 14, 1967, she awakened from a nap to find a man standing in the doorway to her bedroom holding a knife. The man entered the bedroom, threw her face down on the bed, and choked her until she was quiet. After covering his face with a bandana, the intruder partially undressed the victim, forced her to commit oral sodomy, and raped her. Then he left, taking a guitar and a flute from the apartment.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

September 13, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-5344 - Moore v. Illinois

This is the first case set for argument at the October Session, and the petitioner was an unsuccessful applicant for federal habeas in the District Court and in the Court of Appeals for the Seventh Circuit. In reading the briefs in preparation for the argument, I come away with the distinct impression that question No. 1 presented by the petition, which was the subject of Byron's memorandum to the Conference last year of January 13, was never presented to the Supreme Court of Illinois. That question is:

> "Whether the petitioner was entitled to have counsel appointed and present at a pre-trial confrontation with the sole eye witness, which took place after the formal judicial proceedings had begun."

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

September 16, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-5344 - Moore v. Illinois

In the light of Potter's observation as to the time constraints involved, I am quite willing to modify my suggestion regarding briefs; requesting counsel to address the exhaustion questions at oral argument will suffice. I take it this would not preclude the submission of supplemental briefs if the parties desire to do so on their own initiative.

Sincerely,

WHR

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnqu

Circulated: NOV 2 9 15

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-5344

James Raymond Moore, Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[December —, 1977]

MR. JUSTICE REHNQUIST, concurring.

In 1964, this Court held that in certain limited circumstances a statement given to police after persistent questioning would be suppressed at trial if the suspect had repeatedly requested, and been denied, an opportunity to consult with his attorney. *Escobedo* v. *Illinois*, 378 U. S. 478, 490–491 (1964). At the time, there were intimations that this ruling rested largely on the Sixth Amendment guaranty of right to counsel at critical stages of the criminal proceeding. *Id.*, at 484–485, 486. Shortly thereafter, however, the Court perceived "that the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination. . . .' *Johnson* v. *New Jersey*, 384 U. S. 719, 729." *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (STEWART, J.). Cf. *Darwin* v. *Connecticut*, 391 U. S. 346, 349 (1968). Accordingly, *Escobedo* was largely limited to its facts. See *Johnson* v. *New Jersey*, *supra*, at 733–734; *Kirby* v. *Illinois*, *supra*; *Frazier* v. *Cupp*, 394 U. S. 731, 739 (1969); *Michigan* v. *Tucker*, 417 U. S. 433, 438 (1974). This, of course, left open the possibility of examining the voluntariness of a confession under a more appropriate standard—the totality of the circumstances. Cf. *Clewis* v. *Texas*, 386 U. S. 707 (1967).

I believe the time will come when the Court will have to

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

September 12, 1977

Re: 76-5344 - Moore v. Illinois

Dear Chief:

Although I did not realize it at the time we acted on the certiorari petition, I now find that I was a member of a Seventh Circuit panel that entered an order in this case on June 25, 1974. See Appendix, page 20. I shall, therefore, not participate further in the case.

Respectfully,

JPS

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 15, 1977

Re: 76-5344 - Moore v. Illinois

Dear Lewis:

Please show me as not participating in this case.

Respectfully,

Mr. Justice Powell

Copies to the Conference