

# The Burger Court Opinion Writing Database

## *Kimmelman v. Morrison*

477 U.S. 365 (1986)

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

June 20, 1986

Re: 84-1661 - Irwin I. Kimmelman, Attorney General of  
New Jersey, et al., v. Neil Morrison

Dear Lewis,

I join your concurring opinion.

Regards,

A handwritten signature in black ink, appearing to be 'WEP', written in a cursive style.

Justice Powell

Copies to the Conference



To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

Circulated: MAY 22 1985

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

REVISIONS CHANGES THROUGHOUT  
SEE PAGES

*enb*  
1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1661

IRWIN I. KIMMELMAN, ATTORNEY GENERAL OF  
NEW JERSEY, ET AL., PETITIONERS *v.*  
NEIL MORRISON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT

[May —, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

The question we address in this case is whether the restrictions on federal habeas review of Fourth Amendment claims announced in *Stone v. Powell*, 428 U. S. 465 (1976), should be extended to Sixth Amendment claims of ineffective assistance of counsel where the principal allegation and manifestation of inadequate representation is counsel's failure to file a timely motion to suppress evidence allegedly obtained in violation of the Fourth Amendment.

### I

Respondent, Neil Morrison, was convicted by the State of New Jersey of raping a 15-year-old girl. The case presented by the State at respondent's bench trial consisted of scientific evidence and of the testimony of the victim, her mother, and the police officers who handled the victim's complaint.

The victim testified that Morrison, who was her employer, had taken her to his apartment, where he forced her onto his bed and raped her. Upon returning home, the girl related the incident to her mother, who, after first summoning Morrison and asking for his account of events, phoned the police. The police came to the victim's home and transported her to the hospital, where she was examined and tested for indicia of a sexual assault.

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

May 27, 1986

No. 84-1661, Kimmelman v. Morrison

Dear Sandra,

I am delighted that you may be able to join my opinion. I would be happy to make all of the changes you suggest, with one suggested modification. You propose that I delete the last three sentences of Part II-B and insert two other sentences. It seems to me that we are saying much the same thing. I would prefer to retain my present language, which to my mind merely states explicitly the uncontroversial proposition that the Sixth Amendment right to counsel is not conditioned upon a showing of innocence. I would, however, be happy to add your proposed language, prefaced by a "furthermore," to the end of the paragraph in question. Would that modification satisfy your concerns?

Sincerely,



Justice O'Connor

7, 8, 13-16, 19, 20, 24

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

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3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1661

IRWIN I. KIMMELMAN, ATTORNEY GENERAL OF  
NEW JERSEY, ET AL., PETITIONERS *v.*  
NEIL MORRISON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT

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### I

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 26, 1986

84-1661 - Kimmelman v. Morrison

Dear Bill,

Please join me.

Sincerely yours,



Justice Brennan

Copies to the Conference



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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 20, 1986

Re: No. 84-1661-Kimmelman v. Morrison

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

4

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 27, 1986

Re: No. 84-1661, Kimmelman v. Morrison

Dear Bill:

Please join me.

Sincerely,



A handwritten signature in cursive script, appearing to read "Larry", with a horizontal line underneath it.

Justice Brennan

cc: The Conference

June 13, 1986

84-1661 Kimmelson v. Morrison

Dear Chief and Bill:

I am writing a brief opinion concurring only in the judgment, but suggesting a basis for analysis that may be helpful.

You may want to consider what I suggest.

Sincerely,

The Chief Justice

Justice Rehnquist

LFP/vde

To: The Chief Justice  
 Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: Justice Powell

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1661

IRWIN I. KIMMELMAN, ATTORNEY GENERAL OF  
 NEW JERSEY, ET AL., PETITIONERS *v.*  
 NEIL MORRISON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE THIRD CIRCUIT

[June —, 1986]

JUSTICE POWELL, concurring in the judgment.

I agree that *Stone v. Powell*, 428 U. S. 465 (1976), does not bar consideration of respondent's ineffective assistance of counsel claim on federal habeas corpus. That conclusion flows logically from *Stone* and from *Strickland v. Washington*, 466 U. S. 668 (1984). The more difficult question is whether the admission of illegally seized but reliable evidence can ever constitute "prejudice" under *Strickland*. There is a strong argument that it cannot. But that argument has neither been raised by the parties nor discussed by the various courts involved in this case. Consequently, the proper course is to reject petitioners' *Stone v. Powell* argument and go no farther. Though the Court appears to take this course, it employs unnecessarily broad language that may suggest that we have considered and resolved the broader *Strickland* issue in this case. *E. g., ante*, at 13-14. I write separately because that suggestion is mistaken, and also to express my view of the relationship between *Stone* and the Sixth Amendment right to the effective assistance of counsel.

I

Respondent's ineffective assistance claim is uncomplicated. Respondent argues that his trial counsel incompetently failed to conduct any pretrial discovery. Had counsel conducted

06/20

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Powell**

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Stylistic Changes Throughout + pp. 1, 3

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1661

IRWIN I. KIMMELMAN, ATTORNEY GENERAL OF  
NEW JERSEY, ET AL., PETITIONERS *v.*  
NEIL MORRISON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT

[June —, 1986]

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins,  
concurring in the judgment.

I agree that *Stone v. Powell*, 428 U. S. 465 (1976), does not bar consideration of respondent's ineffective assistance of counsel claim on federal habeas corpus. That conclusion flows logically from *Stone* and from *Strickland v. Washington*, 466 U. S. 668 (1984). The more difficult question is whether the admission of illegally seized but reliable evidence can ever constitute "prejudice" under *Strickland*. There is a strong argument that it cannot. But that argument has neither been raised by the parties nor discussed by the various courts involved in this case. Consequently, the proper course is to reject petitioners' *Stone v. Powell* argument and go no farther. Though the Court appears to take this course, it employs unnecessarily broad language that may suggest that we have considered and resolved the broader *Strickland* issue in this case. *E. g., ante*, at 13-14. I write separately because that suggestion is mistaken, and also to express my view of the relationship between *Stone* and the Sixth Amendment right to the effective assistance of counsel.

I

Respondent's ineffective assistance claim is uncomplicated. Respondent argues that his trial counsel incompetently failed

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p. 1

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

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Recirculated: JUN 24 1986

## SUPREME COURT OF THE UNITED STATES

No. 84-1661

IRWIN I. KIMMELMAN, ATTORNEY GENERAL OF  
NEW JERSEY, ET AL., PETITIONERS *v.*  
NEIL MORRISON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT

[June 26, 1986]

JUSTICE POWELL, with whom THE CHIEF JUSTICE and  
JUSTICE REHNQUIST join, concurring in the judgment.

I agree that *Stone v. Powell*, 428 U. S. 465 (1976), does not bar consideration of respondent's ineffective assistance of counsel claim on federal habeas corpus. That conclusion flows logically from *Stone* and from *Strickland v. Washington*, 466 U. S. 668 (1984). The more difficult question is whether the admission of illegally seized but reliable evidence can ever constitute "prejudice" under *Strickland*. There is a strong argument that it cannot. But that argument has neither been raised by the parties nor discussed by the various courts involved in this case. Consequently, the proper course is to reject petitioners' *Stone v. Powell* argument and go no farther. Though the Court appears to take this course, it employs unnecessarily broad language that may suggest that we have considered and resolved the broader *Strickland* issue in this case. *E. g.*, *ante*, at 13-14. I write separately because that suggestion is mistaken, and also to express my view of the relationship between *Stone* and the Sixth Amendment right to the effective assistance of counsel.

I

Respondent's ineffective assistance claim is uncomplicated. Respondent argues that his trial counsel incompetently failed

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 20, 1986

Re: No. 84-1661 Kimmelman v. Morrison

Dear Lewis,

Please join me in your opinion concurring in the judgment.

Sincerely,



Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 22, 1986

Re: 84-1661 - Kimmelman v. Morrison

Dear Bill:

Please join me.

Respectfully,



Justice Brennan

Copies to the Conference

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

May 23, 1986

No. 84-1661 Kimmelman v. Morrison

Dear Bill,

Although I voted at Conference to vacate the judgment below and remand, you have written a persuasive opinion. I have some concerns about a few points in it, however, particularly with regard to the articulation of the Strickland standard. If you were willing to consider some changes along the following lines, I would be happy to join your opinion.

On page 7, n. 1, I suggest deletion of the final sentence. I am not sure Strickland dealt with state preclusion rules.

On page 8, at the end of the penultimate sentence of Part II-A, I suggest adding the following before "in order to demonstrate actual prejudice": "and that there is a reasonable probability that the verdict would have been different absent the excludable evidence".

On page 13, would you consider deleting the last three sentences of Part II-B and inserting the following: "Petitioners do not suggest that an ineffective assistance claim asserted on direct review would fail for want of actual prejudice whenever counsel's primary error is failure to make a meritorious objection to the admission of reliable evidence whose exclusion might have affected the outcome of the proceeding. We decline to hold that the scope of the right to effective assistance of counsel is altered in this manner simply because the right is asserted on federal habeas review rather than on direct review."

On page 14 in the first full paragraph, I suggest substitution of "there is a strong presumption that counsel's performance falls within the 'wide range of professional assistance', id., at 689"; for "counsel's competence is presumed." And at the end of the sentence, "The reasonableness of counsel's performance . . .", add ", and the standard of review is highly deferential."

On page 15, line 9, I suggest deleting the word "injured" and substituting "denied a fair trial".

On page 15, lines 16-17 of footnote 7, I suggest deleting the words "have this Court directly review an erroneous state court ruling" and substituting "obtain direct review".

On page 18, I suggest inserting after the last sentence: "Strickland requires a reviewing court to 'determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.' 466 U.S., at 690. It will generally be appropriate for a reviewing court to assess counsel's overall performance throughout the case in order to determine whether the "identified acts or omissions" overcome the presumption that a counsel rendered reasonable professional assistance. Since '[t]here are countless ways to provide effective assistance in any given case,' Strickland, supra, at 689, unless consideration is given to counsel's overall performance, before and at trial, it will be 'all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was reasonable.' Strickland, supra, at 689.

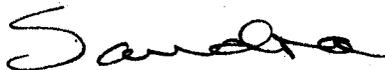
"In this case, however, we deal with a total failure to conduct pre-trial discovery, and one as to which counsel offered only implausible explanations. Counsel's performance at trial, while generally creditable enough, suggests no better explanation for this apparent and pervasive failure to 'make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' Strickland, supra, at 691. Under these circumstances, although the failure of the District Court and the Court of Appeals to examine counsel's overall performance was inadvisable, we think this omission did not affect the soundness of the conclusion both courts reached--that counsel's performance fell below the level of reasonable professional assistance in the respects alleged.

"Moreover, petitioners' analysis is flawed by their use of hindsight ...[continue on p. 19 of Circulating Draft]."

On page 23, line 8, would you consider inserting after "searches": "Even if not, respondent may be unable to show that absent the evidence concerning the bedsheet there is a reasonable probability that the trial judge would have had a reasonable doubt as to his guilt. If respondent could not make this showing, a matter on which we express no view, there would of course be no need to hold an evidentiary hearing on his Fourth Amendment claim."

Thank you for considering these suggestions. I am particularly concerned that the Court not retreat from the Strickland standards when it is in no way necessary to the result you reach in this case.

Sincerely,



Justice Brennan

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

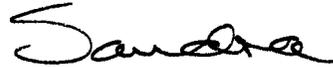
May 27, 1986

Re: 84-1661, Kimmelman v. Morrison

Dear Bill,

I will be happy to join your recirculation with the suggested changes and will do so with your language retained in the last part of Part IIB, adding on my suggested additions. Thank you very much for making the changes. It is an important case.

Sincerely,



Justice Brennan



CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

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

May 28, 1986

No. 84-1661 Kimmelman v. Morrison

Dear Bill,

Please join me.

Sincerely,

Justice Brennan

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