In the

Supreme Court of the United States

JOHN ADAMS,

Petitioner,

vs. No. 70-5038

THE STATE OF ILLINOIS,

Respondent.

Washington, D. C.
December 7, 1971

Pages 1 thru 40

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

JOHN ADAMS,

Petitioner,

v. No. 70-5038

THE STATE OF ILLINOIS,

Respondent.

Washington, D. C.,

Tuesday, December 7, 1971.

The above-entitled matter came on for argument at 1:44 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

EDWARD M. GENSON, ESQ., 134 North LaSalle Street, Suite 824, Chicago, Illinois 60602, for the Petitioner.

E. JAMES GILDEA, ESQ., Assistant Attorney General of Illinois, 188 West Randolph Street, Suite 2200, Chicago, Illinois 60601, for the Respondent.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 5038, Adams against Illinois.

Mr. Genson.

ORAL ARGUMENT OF EDWARD M. GENSON, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GENSON: Mr. Chief Justice, and may it please the Court:

The grant of certiorari in the instant case is limited to the single question of whether Coleman vs. Alabama is retroactive and applicable to the instant case where, prior to trial, the defendant objected to the failure to provide counsel at a preliminary hearing.

It is our position that the State does not have standing or right to argue reliance on non-retroactivity in a case where the error was pointed out to the State by the defendant prior to the trial of the cause, and the State ignored the plea, proceeding to trial.

The case of Linkletter vs. Walker established the criteria for determining whether a rule should be or should not be retroactive. The reasons and the criteria were the purposes to be served by the new rule, the reliance on the old rule, and the effect of the new rule, the retroactive application of the new rule on the administration of justice.

The purpose of the rule in Coleman, as I see it, is

to enhance the integrity of the fact-finding process, and doing this by providing a lawyer at the preliminary hearing which, in Illinois, is a very critical stage of the proceeding and a very vital stage of the proceeding in the prosecution of a defendant.

The value of counsel at a preliminary hearing in Illinois is immeasurable. The attorney, as pointed out in Coleman, can use the impeachment tool later at trial. He can fashion his tool, and this would be something that would be impossible to do without an attorney at the preliminary hearing.

As Justice Schaefer pointed out, in his dissent in Bonner, -- Bonner is one of the cases in Illinois that established the preliminary hearing not to be equivocal stage. In that case, where there was no counsel, the witness testified against the defendant in response to leading questions by the prosecutor in the court. He was not advised he might call witnesses in his own behalf; he did not testify. He was not advised that witnesses could be excluded or kept separate during examination.

He was not advised that the preliminary hearing in Illinois can be used to perpetuate testimony, which is specific in the statute.

I differ with the respondent's analogy of Stovall vs. Denno and Coleman, as I can contemplate a fair lineup without an attorney present. But how might a preliminary hearing be fair without an attorney? This is an adversary proceeding.

In this particular case, in the instant case, not one question was asked by the defendant, not one witness was called by the defendant. The insufficiencies, or whatever insufficiencies that there might have been in the case for the State, would have been -- were corrected by leading questions by the State's attorney. And I would submit that, unlike Stovall, where you can have a fair lineup without an attorney present, it is not possible to have a fair preliminary hearing or preliminary hearing which performs the function of a preliminary hearing in Illinois, without an attorney.

Q Well, let me test that for a moment. Suppose the acts were witnessed by a great many people, and at the preliminary hearing they bring in two witnesses that are said to be typical of nine others. Except for discovery purposes, what would be done at the preliminary hearing?

MR. GENSON: Mr. Chief Justice, at the preliminary hearing, those two witnesses would be cross-examined, their stories would be used to -- would be tested, there would be impeachment, perhaps, laid for further use at trial. At the preliminary --

Q No, that's discovery now; I said other than that.

MR. GENSON: No, for purposes -- excuse me, Mr. Chief Justice, for purposes of --

Q But you are using it to prepare for trial, you are using it for discovery.

MR. GENSON: Well, you are using it also, if it please the Court, for impeachment. Because those statements are used in fashioning an impeachment tool to be used later on.

Q Well, that's still discovery, isn't it? Preparing for trial.

MR. GENSON: Well, Coleman, in its determination of the values of preliminary hearing differs between the fashioning of impeachment tools through the use of prior -- through the use of the prior statements at trial, and discoveries.

Q Was the Illinois statute -- I'm not familiar with it in detail, or its history -- was that shaped as a discovery tool?

MR. GENSON: The Illinois statute relative to preliminary hearing? No.

The Illinois statute relative to preliminary hearing deals specifically with the holding of the preliminary hearing and the findings of probable cause. There is nothing in the statute in Illinois which -- that deals with preliminary hearing, which relates to the use of preliminary hearing for purposes of either discovery of impeachment.

Q May the prosecutor, under Illinois statutes, bypass the preliminary hearing by getting an indictment or issuing an Information, if you use that process?

MR. GENSON: It's an indictment procedure in Illinois,

Mr. Chief Justice, but at that time -- they no longer can -- but at that time, at the time of the preliminary hearing in Adams, the prosecutor would have had the option of going directly to the grand jury. Under the recent Constitution which came into effect July 1st, 1971, if an arrest is made and no indictment is pending, the prosecutor no longer has that option in Illinois.

Q He must go to preliminary hearing?

MR. GENSON: He must go to preliminary hearing before he can go to indictment.

Q If he gets an indictment before he arrests --

MR. GENSON: If he has an indictment before he arrests, he can bypass the preliminary hearing; but I would just like to point out that the vast majority of the arrests in cases contemplate or resolve from arrests at or around the time the offense is allegedly committed, and indictments are never -- are very rarely sought. Only in the exceptional cases do you have an indictment prior to arrest in Illinois.

Q You are speaking of cases where an arrest is made right on the scene --

MR. GENSON: Or an arrest is made sometimes a month or two later. It's an extremely rare situation. Only in, perhaps, certain financial crimes, or other crimes of that type in Illinois, have we seen indictments obtained before the arrest, sir.

In Illinois also, with reference to discovery, the witnesses can be -- the lawyer can get discovery from those witnesses at the preliminary hearing.

Now, under the rules as they were fashioned in Illinois at that time, the only items that the attorneys were entitled to were the witnesses -- the statements of the defendant and a list of witnesses. At the time of the trial and after testimony, then the statements of the various witnesses were available.

Now, if these witnesses testified at trial, of course, again, in addition to having those statements available for impeachment or possible impeachment later on, these statements would also be available for purposes of discovery; and these would be statements under the discovery rule at that time, which would not be available at the time of trial.

Under the new rules, these statements are available at the time or after the bringing of the indictment. But even then -- but even then -- under the new rules, the indictments in Illinois generally don't come until three or four months after the arrest.

The attorney in Illinois, in addition to the processes of getting discovery and providing impeachment tools, can expose weaknesses in the case which might eliminate an indictment. And this is very relevant, certainly, under the new rules in Illinois, because it is my contention that the

Illinois rules provide that once there has been a finding of no probable cause, that the only way that this can be brought again before the court system is for new evidence to be found, and it's brought again before the preliminary hearing judge.

The value of an attorney in Illinois goes to other aspects of it. The great majority of the cases brought in Illinois are disposed of in preliminary hearing, to a reduction of charges through an acceptance of a plea to a lesser charge, through an acceptance of a plea on an Information, which is filed right in the preliminary hearing courtroom. And, therefore, I don't think the respondent can contest the fact that the vast majority of cases, of cases in the State of Illinois, that are brought as felony complaints are disposed of at the preliminary hearing level.

And this is another value, at least in the State of Illinois, for the retroactive, or the application certainly of Coleman, and the retroactive application in this case; because a lawyer's presence at that preliminary hearing becomes immeasurable at that time.

Q At that hearing, at that preliminary hearing, can the sentencing process take place, too, in Illinois?

MR. GENSON: The procedure generally --

Q On just the plea?

MR. GENSON: The plea is not -- the preliminary hearing is brought by a felony complaint. The plea is not

entered at that time. After the preliminary hearing, the procedure usually follows that the prosecution, in the event of a weakness, perhaps, in their case, or because of whatever reason they feel is important, would reduce that charge to a misdemeanor.

The municipal court judge at that time has jurisdiction to receive a plea as to the misdemeanor equivalent, or the misdemeanor-included offense at that time. They also have in Illinois an Information process, wherein, just subsequent to the preliminary hearing the judge then -- or between conferences -- there is a conference that takes place between the judge, the State's attorney and the defense attorney, pursuant to a specific Supreme Court rule. And an Information is filed pursuant to a waiver of indictment, and plea negotiation takes place.

The pleas usually received at that preliminary hearing are generally quite a bit less, in the event that you do partake in those discussions, than those that might be taken after indictment.

Now, the other -- another advantage of an attorney at the preliminary hearing in Illinois is regarding psychiatric examination, notwithstanding the fact that there has been no case cited, and Mr. -- and the respondents make the point that there is no authority for psychiatric examination in the State of Illinois.

Notwithstanding that, there is a municipal court psychiatric clinic. And what this means is that a great number of cases are referred, when there is evidence of some sort of psychiatric disorder, to that psychiatric clinic at the preliminary hearing level.

Now, the value of an attorney in asking for that again becomes immeasurable, because certainly, if Your Honor please, the psychiatric examination takes place one, maybe a week or two weeks after the alleged commission --

Q Is the preliminary hearing, throughout the State, held in the municipal court?

MR. GENSON: The preliminary hearing in Cook County is held in municipal court.

Q And the psychiatric service you mentioned is available only in Cook County?

MR. GENSON: As far as I can determine, there is only this specific psychiatric service available in Cook County.

Q So as a value, it's a value only in Cook County?

MR. GENSON: In Cook County, yes, sir, Your Honor; but the fact of the matter is a good many, or I would imagine a good majority, the vast majority of the preliminary hearings held in the State of Illinois are held in Cook County. And therefore I think it's important to point out to Your Honor that the psychiatric examination might at this time be held one week, one week or two weeks, perhaps, after the alleged

commission of the offenses, a lot more value than having one ordered subsequent to indictment, which might be four or five months later.

Another added addition that a lawyer can perform at a preliminary hearing --

Q Well, you're arguing Cook County law to us now?

MR. GENSON: I'm arguing regarding that part of it, regarding the psychiatric examination in Cook County law. But there is nothing, Mr. Justice Blackmun, which prevents an attorney from requesting a psychiatric examination at the preliminary hearing level under Illinois law.

I am merely saying that the facilities are available in Cook County, a specific facility designed almost entirely for this purpose.

Q Well, we had a case up here a little while ago from Belleville, down in Saint Clair County. What would happen if he wanted a psychiatric examination?

MR. GENSON: He would have to make a request of the preliminary hearing judge, and the preliminary hearing judge would either not -- he would either order it or not order it. But there's no authority in Illinois allowing or not allowing him to order it.

And I think the value of a psychiatric examination is certainly immeasurable when one considers the fact that indictments generally follow the crime by about three or four

months. I know the prosecution often, in its indictment in defenses where insanity is raised, would raise the fact that the examination wasn't gotten until substantially after the offense.

Additionally --

Q Incidentally, what you're telling us about preliminary hearing practices, are these preliminary hearings before or after the constitutional rules?

MR. GENSON: The preliminary hearing practices that I speak to are before. But after the same rules apply, with the additional factor that under new Illinois -- under Illinois law subsequent to the Constitution, the preliminary hearing is required, as the Constitution reads, unless the person has been arrested, unless the person is arrested after the indictment.

Q Neither the practice nor function has changed with the new constitutional amendments?

MR. GENSON: The only function is that it has eliminated whatever direct indictments -- with reference to cases, specifically murder cases, and certain narcotic offenses, direct indictments were generally the only way it was proceeded. They would arrest them, hold the preliminary hearing, the State would continue the preliminary hearing for a month or whatever, and during that time they would proceed to indictment.

Again, in my experience again there is no law, and I

practice all through the State, in most other counties, most of the other counties forewent or did not practice the direct indictment procedure. Almost all the counties, even before, practiced a system wherein preliminary hearings were gained before indictments.

The other --

Q Do you have Informations in your State?

MR. GENSON: Yes.

Q Do you proceed to criminal trial on Informations in your State at all? Or is everything by indictment?

MR. GENSON: It can be proceeded if there is waiver. Generally, it's very rare that you see an Information unless it specifically waives; and it's generally only waived in cases of pleas of guilty.

The Information proceeding in the last three or four years is practiced extensively at this preliminary hearing level, because of a constitutional amendment passed about three years ago. While prior to that constitutional amendment, the municipal court judge did not have the power to take a plea on a felony, even by Information. Since that new, the new amendment, they've been allowed to do this, and therefore they have been proceeding on this Information at the preliminary hearing level in great amounts, since -- well, in the last two or three years.

Q And that's by waiver of the defendant?

MR. GENSON: Yes.

Q He has a State constitutional right to be indicted --

MR. GENSON: Yes, sir.

Q -- for a felony, does he not?

MR. GENSON: Yes.

The only additional factor that I'd like to point out is that even under the new Constitution the grand jury can be eliminated by simple vote of the Legislature. And this again, assuming that this might be done, would certainly put greater value on the preliminary hearing if this could be done, or were done.

Another function, a very important function of the lawyer or the attorney in Illinois at a preliminary hearing, is regarding the motion to suppress. The motion to suppress at the preliminary hearing in Illinois is binding and appealable.

Now, at the time the respondent filed their brief in the instant cause, legislation was passed by the State to by-pass this, and to allow the State to proceed to indictment even though the motion to suppress had been sustained by the preliminary hearing judge.

Since then, that law has been declared unconstitutional, and the state of the law in Illinois at this time and at the time of the instant cause, the Adams case, is that the preliminary hearing in court makes the final determination on

motions to suppress. The preliminary hearing, and this is a binding and appealable oder, and if not appealed by the State, the State can go no further relative to that evidence.

Q Why -- in Gilbert we said counsel at a lineup; those decisions, except Stovall, were not --

MR. GENSON: Yes, sir.

Q Why -- and those two could turn on harmless errors in the case of preliminary hearings. How do you distinguish -- why should this be retroactive, when the requirement of counsel at lineup was determined not to be?

MR. GENSON: Because, Mr. Justice, I feel that there is a difference. In determining retroactivity, the only test isn't whether there was counsel or wasn't; there are three tests.

But going back to the first test, the purpose of the rule, it would seem that an attorney at a preliminary hearing will invariably help the defendant in Illinois. It is not invariably in a lineup, as U. S. vs. Wade, that it would not help.

Q Yes, and we did say in Coleman, even if he doesn't have one at a lineup, if it is established that the absence of counsel is harmless error, then the absence of counsel at a preliminary hearing is different?

MR. GENSON: The point I am trying to make, Mr. Justice, is that a lineup can be held -- a lineup can be fair

without an attorney present. It is possible. A preliminary hearing, sir, it is my contention, cannot be fair.

Q I know, but when we said that it might be harmless error, isn't it implicit in that that a preliminary hearing also could be fair, even though there was no counsel present?

MR. GENSON: The logic -- the logic --

Q I mean, on your approach, wouldn't there be any room for harmless error?

MR. GENSON: In -- in --

Q In your approach.

MR. GENSON: In my approach, if Your Honor please, the logic of Brennan -- the logic, Mr. Justice Brennan, in Coleman would not allow for a harmless error remand; no, sir. And under my contention, I would think there should be a --

Q Yes, well, to that extent, wouldn't we have to modify or overrule what we said about harmless error in Coleman?

MR. GENSON: I think -- I think that, one, it is not necessary to conclude,because there was a harmless error remand, that the case should not be retroactive. I think the determination of whether or not a case should be retroactive revolves and relies on all three criteria.

Q Well, that may -- but isn't it rather inconsistent to say that it may be harmless error even in situations

respectively where Coleman is applied? And to say that Coleman, per se, has to be retroactive?

MR. GENSON: I'm not saying -- well, no, I don't think so.

Q You don't think so.

Q Mr. Genson, while we have you interrupted, was the Illinois court unanimous in its decision here?

MR. GENSON: The Illinois court, where there was no dissent.

Q All right.

MR. GENSON: I do point out, though, that there had been -- there had been one dissent in the initial finding, the finding of the People vs. Bonner; that was by Justice Schaefer.

Q But he went along in this case, I take it, or did he not dissent?

MR. GENSON: He didn't write a dissent. There was no dissent. It's not -- they don't record, as I understand it, the findings in Illinois if the judge doesn't write a dissent.

The second consideration, in Linkletter, is reliance of the law enforcement authorities on the old rule. It is our position that the State does not have standing to argue reliance in non-retroactivity and apply it to a case where that error was pointed out to them at trial.

It is further our consideration that we are dealing with different types of law enforcement authority. If by law

enforcement authorities we mean the police officers and police investigative techniques, certainly there was no reliance there. And I think there's a far greater argument for retroactivity, where police investigative techniques, as opposed court procedures, are involved.

Now, I'd like to point out there there is a differentitation in Stovall, because in Stovall we were dealing with various investigative techniques; that it was our view, at least, maybe that the police were depending on it at the time of the Wade decision.

In this particular case this doesn't reflect that; it reflects only the effect on the courts, and I think that's properly dealt with, the last point, the administration of justice.

Lastly, relative to the reliance point, I'd like to point out that the Coleman opinion, as pointed out by many of the opinions in the decision, was certainly foreshadowed by the decisions that preceded it, and perhaps not relied on by some of the State Courts; it should have been. Because of the different opinions by the Court relative to the right of counsel.

The third criteria that I'd like to point out, that Linkletter points out, is the effect of the new rule, and the retroactivity of the new rule on the administration of justice. The effect of this case, we feel, is negligible, because we are

asking that rule to be applied and limited to only those cases where it is raised at trial.

That is, if a man has counsel at trial, and if the counsel does not raise or make issue of the fact that he did not have an attorney at the preliminary hearing, we are asking that the Court -- that the Court deems this to be waived, and not apply retroactively as to those cases. Where it has been raised, as it has been raised in this case, we would ask that it be applied retroactively.

I think the effect on the administration of justice as to that type of application certainly would be negligible.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Genson.

Mr. Gildea.

ORAL ARGUMENT OF E. JAMES GILDEA, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GILDEA: Mr. Chief Justice, and may it please the Court:

Lest I forget to mention this, I would like to, first, deviate from my prepared text and in connection with the questions concerning the Bonner case, and Justice Schaefer's dissent, I would urge Your Honors to consider the fact that Justice Schaefer's dissent in that case did not address itself to the constitutional question. It addressed itself to a matter of statutory interpretation as construed by the majority

of the Court, statutory interpretation under the Illinois law.

We had a statute that provided that counsel was to be appointed at the preliminary hearing if a defendant was indigent.

We had another statute saying that at the point of arraignment no plea was to be taken without appointment of counsel.

The Bonner case construed the two statutes to be in pari materia, and held that the two provisions required only that counsel be appointed prior to any plea of wherever interposed, and Justice Schaefer took umbrage with that, and took exception, and it was his opinion that the Illinois statute provided otherwise.

However, he did not dissent on the basis of any constitutional question.

As to the factual background of those cases, Your Honor, this case charged the defendant with the sale of narcotics, and it was a, what we call a controlled sale, in that an informant was used in connection with two police officers.

The defendant was arrested immediately after the alleged incident, and he appeared in court the following day. The case was then held on call for one day and continued variously.

Subsequently there was a preliminary hearing, and we concede that counsel was not appointed by the judge at the

preliminary hearing. There was testimony adduced at that point from one witness, one of the officers, and upon the testimony of that officer the judge found probable cause and held the defendant to answer to the grand jury; and indictment was returned, and it was not until the day that the case was set for trial that counsel for the defendant filed his motion in connection with a claim for having his constitutional rights violated by failure to appoint counsel at the preliminary hearing.

In that connection, the motion that was filed was a motion to quash the indictment; it wasn't a motion asking for a preliminary hearing, and the defendant did not, in his motion, allege that he was in fact indigent and therefore required the appointment of counsel. And, furthermore, the defendant did not allege that he suffered any prejudice during the course of that preliminary hearing.

Now, addressing myself to the principal issues here. Since Linkletter vs. Walker, on down through the recent cases that the Court pronounced last year -- I'm speaking in terms of Williams and Hill and Elkanich -- the Court has applied a three-fold test in determining whether or not a new constitutional doctrine should be held retroactive.

In that connection, the Court has stated that in deciding that issue the Court will look, first of all, to the purpose of the new constitutional doctrine; secondly, to prior

reliance on previous standards; and, thirdly, to the effect on the administration of justice.

Addressing myself, first of all, to the purpose of the constitutional doctrine, as pronounced in Coleman vs. Alabama, the court stated that the purpose was to secure for a defendant advantages preparatory to trial, and in that connection the court mentioned six possible advantages.

The Court said that the presence of counsel at a preliminary hearing might be effective in preventing a possible bind-over to the grand jury by making effective arguments and cross-examination and what-not.

Secondly, he could perhaps secure a lower bail or bail initially, and he would have some bearing, or would have some influence on that determination.

Thirdly, by cross-examination he could perhaps create material for impeachment at trial. He could discover the -- some of the State's evidence that would be used at trial. He could perpetuate favorable testimony for a later date, and then he could secure an early psychiatric examination.

Now, with connection to the purpose aspect or the purpose criterion, the Court said that where the major purpose of a new constitutional doctrine is to overcome an aspect of the trial that substantially impairs the truth-finding process so as to create serious doubt as to the reliability of a guilty verdict in prior cases, this Court will hold the

doctrine retroactive.

In that connection we submit that the purposes espoused in Coleman for the appointment of counsel at a preliminary hearing do not go to that degree. We do not believe that the functions to be served by counsel at a preliminary hearing have any substantial effect on the truth-finding process at a subsequent trial.

And we do so for the following -- we make that assumption for the following reasons: Addressing ourselves point by point to the contended effects to be served by the presence of counsel at a preliminary hearing, we have, first, the prospect that the presence of counsel could prevent a bind-over to the grand jury by cross-examination and by argument.

And he could secure, perhaps, a lower bail.

Bearing in mind that the function of a preliminary hearing is only to establish probable cause, we submit that those two considerations would have no bearing on the subsequent trial, and would have nothing, no impact on the truth-finding process at a trial; in fact, would be mooted by a subsequent guilty verdict.

Since the standard proof at a trial is beyond a reasonable doubt, and standard of proof at a preliminary hearing is merely probable cause; we submit that, in effect, a jury finding would overcome any impediment in these two aspects

that would be suffered by the defendant by failure to have the appointment of counsel.

As to the possibility of securing an early psychiatric examination and perpetuating favorable testimony, we submit, first of all, that these two considerations would occur very rarely in the normal criminal process.

As to the perpetuation of favorable testimony, there is also this consideration, and that is this: Whether or not defense counsel would in fact want to do so, bearing in mind that by perpetuating favorable defense testimony he would have to, in effect, declare his defense prior to trial.

Now, first of all, preliminary hearings generally take place, and it is designed to take place, shortly after arrest. At that point the defense counsel has had little opportunity to investigate into the allegations of the State's case.

So, generally, he has insufficient knowledge to frame a defense, bearing in mind that he would want to frame his defense only after he's heard the State's case or has ascertained the State's case, to determine whether or not he in fact would want to declare and interpose a defense and bind himself at a subsequent trial.

Q Well, Mr. Gildea, aren't you arguing the Coleman case now? That's behind us.

MR. GILDEA: Yes, Your Honor, I am, but I am only

arguing it in the sense that I am addressing myself to whether or not the failure to have counsel at a preliminary hearing will create any substantial impairment of the truth-finding process at trial.

And that is why I address myself in that way; and perhaps I do not understand the Court's question.

Q I thought the issue in this case was just whether Coleman was to be retroactive.

MR. GILDEA: That is correct, Your Honor.

And in answering -- in attempting to answer that question, I proceed on the basis of whether or not the denial of counsel at the preliminary hearing will have any substantial effect and will resolve -- substantial effect on the truth-finding process at trial. And addressing myself to the functions of counsel, or the purposes or the advantages to be secured by counsel at a preliminary hearing, as espoused by the Court in Coleman, addressing myself to those specific remarks, I feel that in that connection, by not having counsel for that purpose, the defendant would not suffer any substantial impairment in the truth-finding functions at trial.

Q Since you say that nothing can be accomplished, why do lawyers, retained counsel, waste their time at preliminary hearings?

MR. GILDEA: Well, it wasn't my intention to say that nothing can be accomplished, I simply say that --

Q Well, if you admit that something could be accomplished, then where are you with Coleman?

MR. GILDEA: Well, something can be accomplished, but something could also have been accomplished in Miranda, something could also have been accomplished in Wade and Gilbert, and --

Q Well, we've only got Coleman here.

MR. GILDEA: That's correct. But I -- in the resolution of the -- whether or not this substantially affects subsequent trial, the same thing could be said in Wade and Stovall and Gilbert. Something could be accomplished, but does that mean, by mere virtue of the fact that something could be accomplished by the presence of counsel --

Q Well, wouldn't the presence of counsel increase the truth-finding process?

MR. GILDEA: That would be, I think, at the very least, a gratuitous speculation. I don't think that --

Q You don't think that defense counsel, through his cross-examination, could aid the truth-finding factor?

MR. GILDEA: I think there is the possibility he could. Again it's a matter of probabilities and degrees. Could we say, though, in all instances he would? On that I would say no.

But I would say he could also, to the same degree, aid the truth-finding process by attending a lineup.

Q Haven't you read Law Review articles of famous criminal lawyers who said they never waive a preliminary hearing under any circumstances? Do you think they're just nuts?

MR. GILDEA: Well, it's not a question of waiving a preliminary hearing, though, Your Honor. I would not waive a preliminary hearing. This is not a question of what --

Q Well, what's the difference between waiving a preliminary hearing and being there without counsel?

MR. GILDEA: The question is, what will counsel do at a preliminary hearing? Will he, in fact, do the things that he --

Q He will cross-examine, won't he?

MR. GILDEA: He will cross-examine, yes, Your Honor. I would think he would.

Q Because he hasn't got a thing in the world to lose.

MR. GILDEA: That's correct.

Q So he will cross-examine.

MR. GILDEA: That's correct.

Q Isn't that helpful to the truth-finding process?

MR. GILDEA: Yes, it is helpful, but is that -- are there alternatives? Because that also has to be considered. Could he, by discovery, ascertain the same things?

And in --

Q Well, could he, in Illinois?

MR. GILDEA: He has the right to interview witnesses, he gets -- he has the right, under his pretrial motions, to a list of witnesses; he can ascertain the identities of the witnesses, and he can talk to the witnesses.

Q Can he cross-examine them under oath?

MR. GILDEA: No, he can't, Your Honor.

But that need not be critical. However, he does have access to their testimony at the preliminary hearing; he does have access to their testimony before the grand jury. And he can frame questions during his cross-examination at trial in reference to their testimony at these preliminary stages.

I say these things because the Court has remarked, in Stovall and I believe in Johnson vs. New Jersey, that the question of -- there's the question of probabilities. And Mr. Justice Marshall's remarks are well taken, but I would say that, by the same degree, by the same token, that Griffin vs. California (sic) could have an effect on the truth-finding process.

In that connection I would say that Bloom vs. Illinois and Duncan vs. Louisiana could also have an effect on the truth-finding process at trial. And I would also say that Miranda and Gilbert and Wade could also have an effect on the truth-finding process. But could we say, simply by virtue of that fact, that it would have a substantial effect so as to require that in all cases the rule should be applied retro-

actively?

Judged by the standards that were employed in Gilbert and Wade and in Miranda, we submit that the defendant would suffer no greater adversity by the absence of counsel at a preliminary hearing than he would in most cases.

And, for that reason, that the rule should no more be applied retroactively here than it would in Gilbert, Wade, and Miranda.

Q Does Illinois concede the possibility, even if we agreed with you that there should not be retroactivity, of a due process exception as to cases preceding Coleman?

MR. GILDEA: I accede to -- I would agree with that, Your Honor. As a matter of fact, in Bonner and in the Illinois cases, the Court has held that where a defendant can show that he suffered prejudice or adversity by the failure to appoint counsel at the preliminary hearing, then that, in itself, will entitle him to relief.

Q Has that been the Illinois rule before Coleman?

MR. GILDEA: Yes, Your Honor, that has been.

Q I see.

MR. GILDEA: And that's been from the time of Morris -- at least until the time of Morris, on up to the present.

Q As far as rules, it was stated in the Bonner case, wasn't it?

MR. GILDEA: Yes, Your Honor.

Q At least according to the opinion in this case.

MR. GILDEA: Yes, Your Honor.

Q Was that based on the due process clause of the Fourteenth Amendment or just on Illinois law, or Illinois constitutional or common law?

MR. GILDEA: The due process clause, I think it has reference to, perhaps, White and Hamilton at the same time.

Q But it was based on the Federal Constitution and not just --

MR. GILDEA: That is correct, Your Honor.

Q -- the Illinois law?

MR. GILDEA: That is correct, Your Honor.

I might also say that the preliminary hearing in Illinois is not particularly suited for the utilization or the gaining of the benefits that were intended under the Coleman rule, because -- for example, that in the State of Illinois there is no requirement that the preliminary hearing be attended by a court reporter, or that a transcript be made of the testimony. The court is only required to hear so much evidence, as will give rise to conclusion in his mind that there is probable cause.

That is, that a crime was committed, and that this particular defendant before the bench committed it.

The presumption is, therefore, that the judge could hear just testimony from one witness and would not necessarily

have to hear defense testimony.

Furthermore, the testimony at a preliminary hearing may be based upon hearsay evidence only. And generally the rule is, or the practice is the same as with grand jury matters; and that is, that the State will only call one witness, generally a police officer, and he will relate what facts were revealed by the process of his investigation.

So, in reality, there is not that great of an opportunity to secure material for impeachment and to discover that much about the State's case.

As to the second criterion used by the -- or used by the Court in past practice, in determining whether or not a case should be held retroactive, that being the question of reliability, we submit that the State of Illinois did, in good faith, rely upon prior standards.

The only cases that were before the court concerning the question of appointment of counsel were, of course, Powell vs. Alabama, which concerned itself with the effect of assistance of counsel at trial, and I don't believe that that bears on the Coleman question.

Other than that we had Hamilton vs. Alabama and White vs. Maryland. Hamilton vs. Alabama was a question concerning the appointment of counsel at an arraignment.

Now, in Illinois, counsel is required to be appointed at arraignment. And under Hamilton, of course the arraignment

there differed, we believe, drastically from the preliminary hearing in Illinois in this respect: In Hamilton vs. Alabama, of course, the defendant had to assert rights there, such as a plea in abatement, a challenge to the composition of the grand jury and the petit jury, I assume, too; or, by not doing so, he would forever waive those rights.

Now, under Illinois law, as interpreted in People vs. Bonner, there was no binding effect that a defendant could suffer by not having or by not asserting any rights, or by not objecting to any evidence at the preliminary hearing. Indeed, if he testified, that testimony could not be used against him during a subsequent proceeding; and he was not bound by the failure to assert any defense.

And of course in White vs. Maryland, there there was a plea of guilty interposed by the defendant at the preliminary hearing, which was used at his trial. And that, ipso facto, did bear upon the truth-finding process at the trial, so that it was considered by the trial court.

Now, Illinois has relied on this distinction, as pointed out in the distinction of People vs. Bonner. In that connection I would call the Court's attention to the fact that we were not alone in doing so. There were some 33 other jurisdictions that also pointed to that fact, in distinguishing their preliminary hearings from those in White vs. Maryland and as against the arraignment proceedings in Hamilton vs. Alabama.

And as to -- amongst those 33 other jurisdictions, all of the Federal Courts of Appeals, subsequent to 1963, did themselves hold that where the preliminary hearing was not such as to bind the defendant at trial, that the requirement of counsel was not of constitutional dimension.

So we submit there was no clear foreshadowing of the Coleman doctrine prior to the pronouncement of Coleman, that the Illinois courts could be bound by.

As to the effect on the administration of justice, the appellant asserts that, it is his contention that this would not affect a great number of cases in Illinois, because of the fact -- or a great number of cases anywhere, because of the fact that it is his contention that the failure to interpose an objection on that basis must be considered a waiver.

And we believe that that is a misinterpretation of the law, as stated by this Court in O'Connor vs. Ohio, where it said that a defendant could not be deemed to waive an objection to a constitutional question that was subsequently pronounced, because it could be no more binding on him than it could be upon the State, who could not have anticipated such a ruling.

So I do not believe that he is correct in his say as to that point.

Q I gather your Bonner rule, it doesn't matter

whether the objection is made, does it?

MR. GILDEA: No, Your Honor. It does not matter.

Q Whether made or not, if that prejudice is shown, he's entitled to relief?

MR. GILDEA: Where there has been an error -- a question of substantial magnitude, constitutional magnitude, then the waiver doctrine does not preclude the defendant from making that assertion that, for the first time, on appeal or in a collateral proceeding.

As recently as 1965, some two-thirds of the States of this Union did not provide for the appointment of counsel at a preliminary hearing. It was not until 1964 that the Federal Courts adopted Section 3060 of Title 18, providing for the appointment of counsel in Federal cases. So that we submit that there is a vast number of cases, prior to 1964 and 1965, that would have to, perforce, be affected by any ruling by this Court holding the requirement of counsel at preliminary hearing retroactive.

Furthermore, since in Illinois, and I believe in many other States, a transcript of the preliminary hearing is not required, it becomes a very difficult question to determine how, if the case is to be remanded on the basis of Chapman vs. California, for a determination of whether or not there is harmless error, how could that be established where there was no transcript of the preliminary hearing from which anybody can

decide what in fact happened at the preliminary hearing?

Furthermore, what criteria would be used by the court to decide whether or not the failure to cross-examine, failure to object, would have any substantial effect on the truth-finding process of the trial? How could that determination be made?

We are dealing in a very nebulous area here. The problem of finding taint, there would be no standards, no guidelines that the court could use. And as to cases going far back, I question whether or not it could even be ascertained, at least from the State's point of view, whether or not the petitioner did have the benefits of counsel or not.

Q I gather that most of those municipal court proceedings, no transcripts were made, no record had been taken?

MR. GILDEA: That's correct, Your Honor. Correct.

Q What about today? Do you make records now?

MR. GILDEA: Well, the rule -- it's been changed drastically, because of the recent opinions; and now they are compelled to do so, for this very reason.

Also addressing myself to one or two of the remarks that were made by my colleague in his presentation, I might say that the failure to move to suppress any physical evidence preparatory to trial does not preclude the defendant from making such a motion at trial.

Thank Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you.

You have seven minutes left, counsel.

REBUTTAL ARGUMENT OF EDWARD M. GENSON, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GENSON: Just briefly speaking, may it please the Court, the -- Justice Schaefer, in his dissent in Bonner, did deal with constitutional issues. And, as a matter of fact, stated that if constitutional issues are to be considered -- in the last two paragraphs of his opinion -- the appropriate constitutional reference, in my opinion, is Escobedo vs. Illinois, in which it was held that a constitutional right of counsel was abrogated when the suspect was denied an opportunity to consult with his retained attorney.

Following that, he points out to -- he points out the different advantages a defendant would have were he to have had an attorney at trial. So Justice Schaefer did, in his concurring opinion -- or in his dissenting opinion in Bonner, did speak to the constitutional issue.

Further, I'd like to point this out: that relative to the motion to dismiss the indictment that was filed, the motion to dismiss indictment would, in Illinois, have had the same effect as a motion to request a preliminary hearing. The indictment would have been dismissed, the statute of limitations wouldn't have been posed; there would have been no difference.

Thirdly, I'd like to say this: whether, in fact, a harmless error could be shown would depend on, I think, the individual case, and therefore it would become relative whether the case was a strong or a weak one. In this case the testimony revolves around the uncorroborated statement, or substantially uncorroborated statement of an addict informer who allegedly purchased narcotics during substantial periods of time; both the policemen were not present, and a lot of things could have happened.

In Illinois, and on the basis of the different appellate opinions, a sale of narcotics to an addict informer which is substantially uncorroborated would merit reversal.

The Court has, in cases dealing with the right to counsel, that is in judicial proceedings, has held this to be retroactive in the past. We're contending and asking in the present case that this be done here too.

One more thing I'd like to point out. The due process exception in Bonner, alleged due process; there is nothing in Bonner which specifically states that a man has a remedy if he could show prejudice. And I think one of the differences, and perhaps if this Court in their opinion would point out the differenca, one of the differences between Coleman and Johnson -- or Stovall and Johnson and Coleman, is that in Stovall we specifically state that there is a due process stopgap, in the event -- because it's not being held

retroactive.

In Johnson, they specifically say there's a due process stopgap relative to the issue of voluntariness. The Bonner case in Illinois does not set out any test whatsoever as to whether or not something should devolve or be a violation of due process.

The only remark in either Bonner or Morris is that in this case no prejudice was shown. It does not state specifically that if prejudice would be shown, that there would be any opportunity for the defendant to raise this in any way. So I think this is another important difference between Stovall, between Johnson, and between Coleman, in that in Stovall and Johnson there is an express exception, a due process exception; there would be none under Illinois law specifically.

There is nothing in Illinois that leads to it.

The last point I would make is the analogy between -- or the analogies made between Bloom, Duncan, Griffin, relative to the effect on the fact-finding process.

Coleman, just as -- Coleman dealt with the Sixth Amendment right to counsel, just as Gideon dealt with the Sixth Amendment right to counsel; Bloom and Duncan, in order to assume a lack of fairness, would have had to assume that the judge that heard the case was prejudiced.

Griffin concluded that this was a Fifth Amendment protection.

In this case, Coleman is a Sixth Amendment protection, and a Sixth Amendment protection at a judicial proceeding; and this is -- and we feel that the exception is broad enough there to the other cases. The differences are clear enough as to warrant a claim of retroactivity.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:39 p.m., the case was submitted.)