10-1976

Brewer v. Williams

Lewis F. Powell Jr.

Resp. Received

Held for Mitchell v Mosley

Resp., escapee from mental institution, molested & murdered 10 year old girl.

Resp.'s confession was held to have been taken in violation of Miranda & in absence of counsel whom Resp had requested.

DISCUSS

Preliminary Memo

May 23, 1975 Conference
List 1, Sheet 2

No. 74-1263 Timely

Hold for Mosley 74-653 DB

BREWER [Warden] Cert to CA8 (Vogel, Ross, Webster, dissenting)

v.

WILLIAMS [Prisoner] Federal/Civil (§ 2254)

1. Resp was convicted in Iowa State court of murder and was sentenced to life imprisonment. By a 5-4 decision, the Iowa Supreme Ct affirmed. 182 N.W. 2d 396 (1971). The USDC (SD Iowa) (Hanson) issued a writ of habeas corpus on grounds that statements made by resp to police and other evidence derived from the statements should have been suppressed as a result of violations of resp's Fifth, Sixth, and Fourteenth Amendment rights. CA8, with one judge

dissenting, affirmed. The State petitions this Court to reverse that decision on grounds that the DC did not give the state-court findings the required presumption of correctness under 28 U.S.C. § 2254(d), that an accused can waive a personal constitutional right in the absence of counsel, that under the facts in the record, the State met its burden in showing that there had been such a waiver, and that a more flexible standard be adopted in replace of the rules of Miranda v. Arizona, 384 U.S. 436 (L966).

2. FACTS: Most of the facts are undisputed. On Christmas Eve, 1968, the Powers family was attending a wrestling tournament at the YMCA in Des Moines, Iowa. When 10-year-old Pamela Powers did not return from a trip to the restroom, a search was begun. The police could not locate her within the building. Resp Williams, who had a room on the seventh floor of the building, was seen coming from the elevator into the lobby carrying a bundle wrapped in a blanket. He spoke to several persons and explained that he was carrying a mannequin. He asked for the help of a 14-year-old boy who opened the door of resp's car which was parked at the curb. That boy later testified that when resp put the bundle in the passenger's seat he saw "two legs in it and they were skinny and white." YMCA personnel attempted to see the bundle, but resp closed and locked the car doors and drove away. The next day, his car was found in Davenport, about 160 miles east of Des Moines. At that point an arrest warrant was issued for resp's arrest.

On December 26, 1968, resp placed a call from Rock Island, Illinois, to his attorney, McKnight, in Des Moines. McKnight advised resp to surrender to Davenport police, which resp did. McKnight then proceeded to the Des Moines police station. He was again called by resp, then in police custody in Davenport. In the presence of the chief of police and Detective Leaming, the attorney told resp that he would be transported from Davenport to Des Moines by Des Moines police, that he would not be mistreated or grilled, that they would talk the situation over in Des Moines, and that resp should make no statement until he reached Des Moines. It was agreed that Leaming and another officer would go to Davenport to transport resp back, and that McKnight would not go with them. McKnight and the police agreed that resp would not be questioned until he was back in Des Moines and had consulted with McKnight.

While in custody in Davenport, resp, at his request, had consulted with a local attorney, Kelly. Kelly advised resp to remain silent until he was back in Des Moines and had consulted with McKnight. Upon arriving in Davenport, Leaming gave resp Miranda warnings, which were not repeated during the trip to Des Moines.

During that trip, Leaming and resp sat in the back seat. They engaged in conversation about religion, resp's reputation, his friends, police procedures, aspects of the investigation of the crime in question, and other topics. At that

time Leaming knew that resp had been a patient in the Mo. State mental hospital for a period of three years and was an escapee from that institution. On several occasions during the trip, resp told Leaming that he would tell him the whole story once he had consulted with McKnight. Leaming himself testified that the purpose of his conversation was to obtain information about the girl before resp could talk to McKnight. Leaming at one point said the following to resp:

> "Eventually, as we were traveling along there, I said to Mr. Williams that, 'I want to give you something to think about while we're traveling down the road.' I said, 'Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way to Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."

Resp asked why the police thought they would be passing near the body, and Leaming said that they knew that the body was somewhere in the vicinity of Mitchellville. Leaming then told resp that he did not want him to answer but wanted him to think about it. Leaming in fact did not know that the body was near Mitchellville. Some time later, resp asked if the police had found the girl's shoes. Leaming then discussed

with resp the evidence that had been found, the location where resp had hidden the shoes, and what the shoes had looked like. A stop at a service station where resp said he had put the shoes did not lead to their discovery. There was then some further discussion of the blanket. A stop at a rest area disclosed that the blanket had already been found. After that stop, the discussion of religion, resp's friends, and other topics resumed. At a point near Mitchellville, resp told the police that he wanted to show them where the girl's body was. The body was then located. Leaming's car did not have a two-way radio, but a police car following it did have such a radio. That radio was used to communicate with the chief of police in Des Moines during the trip. Examination of the body revealed that the girl had been sexually abused and strangled.

The State had disputed two facts. First, it contended that no agreement not to question resp had been entered into. But the trial court found explicitly that such an agreement had been made with McKnight. The DC accepted that finding. Second, the State contended that Kelly, the counsel in Davenport, had not made a request that he be allowed to travel with resp to Des Moines. The trial court made no finding on this issue, but the DC ruled that such a request had been made. The DC also ruled that Kelly had told Leaming that resp was not to talk until reaching Des Moines.

The Iowa Supreme Court (Larson, Moore, LeGrand, Rees, Uhlenhopp; Stuart, dissenting; Rawlings, Mason, Becker, dissenting), in affirming the conviction, held that resp had been adequately advised of his rights and had understood them. Under all the facts, the trial court had been correct in finding a valid, voluntary waiver of his rights in making the statements during the car trip to Des Moines. The SC pointed out that it appeared that "Williams had been told by his attorney something to the effect that he would have to tell the officers where the body was." After a court-ordered examination, resp had been found not to be incompetent or insane. The trial court had considered all relevant evidence, and substantial evidence supported its finding of a waiver. It could not say as a matter of law that the suggestion given resp by Leaming was so improper as to make the statements afterward inadmissible. Nor would it hold that there could be no valid waiver of rights without the presence of counsel. The dissents argued that the State had not met its burden of showing that the statements had resulted from a knowing and intelligent waiver of resp's rights against self-incrimination and to counsel. As Justice Stuart put it, "the only reasonable conclusion is that Captain Leaming embarked on a psychological campaign to obtain as much information from this mentally weak defendant as possible before letting him talk to his counsel."

Correct on this point, at least as a general proposition. There would seem to be a factual question about such a waiver here, however.

In the DC, counsel for the State and resp had agreed that the case would be submitted upon the trial record without the taking of further testimony. The DC proceeded to make findings, which it viewed as not conflicting with anything found by the trial court. The question then was whether the state courts had correctly applied the law. It found a violation of resp's right to counsel under Massiah v. United States, 377 U.S. 201 (1964). Under the factual context of this case, indeed, there could have been no effective waiver of counsel in the absence of counsel. See McLeod v. Ohio, 381 U.S. 356 (1965); Mathies v. United States, 374 F. 2d 312 (CA DC 1967) (opinion of Burger, J.). There was also a violation of Miranda in that after resp had been given the warnings he had expressed the wish not to answer any question until talking with McKnight in Des Moines. He was interrogated, however, on the trip to Des Moines. See also United States v. Neilson, 392 F. 2d 849 (CA7 1968); Mathies, supra. The DC refused to agree with the state courts' decision on waiver. It gave great deference to the findings of fact of the trial court, but waiver was a question of law, the constitutional significance of the facts. Those courts had applied a standard conflicting with Miranda in that the only evidence supporting the finding of waiver was the fact that statements were given. It appeared that in truth the burden had been placed upon resp. Indeed, there was no evidence supporting waiver. Finally, the State had not met its burden of showing

that the statements had been voluntarily made. See Spano v. New York, 360 U.S. 315 (1959). The DC did note that the record was not entirely clear as to the timing of the incriminating statements.

CA8 affirmed. It ruled that the DC had correctly applied § 2254(d) to this situation. With respect to the disputed facts (that Kelly requested that he be allowed to accompany resp and that Leaming knew that resp was a deeply religious person and that he used that fact to elicit incriminating statements from resp), the state court had not made findings; neither side had requested an evidentiary hearing in the DC; and substantial evidence supported the DC's findings. The question of waiver was one of "ultimate fact" and a federal question. The DC had been correct in finding that the state courts had applied an incorrect standard to the facts in finding a waiver of resp's constitutional rights. The DC was correct, therefore, in finding a denial of the right to counsel which had not been validly waived. The key facts were as follows:

> "(1) The appellee was an escapee from a mental institution wherein he had been confined for approximately three years, (2) appellee asked for and obtained an attorney to represent him at each end of the trip between Davenport and Des Moines; (3) Mr. Kelly, appellee's Davenport attorney, had asked permission to accompany the appellee on the trip from Davenport to Des Moines, which permission was denied by the police; (4) both attorneys had advised appellee not to make any statements until after arriving in Des Moines and consulting with Attorney McKnight; (5) appellee gave several indications that he did not want to talk about the case until after he arrived in Des Moines; (6)

> appellee stated a number of times that he would talk about the case after he had seen Attorney McKnight in Des Moines; (7) by subtle interrogation Detective Leaming got the appellee to make incriminating statements used to convict him; (8) the police violated an agreement they had with Attorney McKnight that the appellee was not to be questioned before consultation with Mr. McKnight in Des Moines."

Judge Webster dissented. Under the facts in the record, the state courts' conclusion that the statements were the product of a voluntary waiver of resp's rights was correct. The record indicated that the statement that resp would show the police where the body was had been volunteered and not elicited through questions. Massiah could be distinguished since here resp had known that police were noting his statements and that they could be used against him. The statements were also voluntary. Leaming had planted a thought, but had not coerced resp into talking. In addition, since the statements were volunteered, there was no violation of Miranda. The broken promise was at the bottom of the result reached, and the consequence was the application of the exclusionary rule to a state case to improve future police methods.

Rehearing en banc was denied, with Judges Gibson, Stephenson, and Webster voting to grant the petn.

3. CONTENTIONS: a. Petr argues that the courts below did not give the requisite presumption of correctness to the state court findings as to waiver. As to issues not resolved by the record, an evidentiary hearing should have been held.

b. Petr argues that the decisions below have in effect adopted a rule that an accused cannot effectively waive his

right to counsel at interrogation absent the presence of counsel. In his view, the CA's that have addressed this question conflict. See petn, at 10-11.

c. There are facts which support the finding of waiver. Resp asked for and received the assistance of counsel, and counsel told him to refrain from making statements. He was given Miranda warnings three times. Resp initiated conversations with Leaming. Resp's incriminating statements occurred spontaneously and not in response to interrogation. Leaming's comment about the weather took place about two hours before the incriminating statements.

d. Petr asks that the Court withdraw the rules of Miranda in favor of the approach Congress adopted in 18 U.S.C. § 3501. A more flexible system is necessary. Criminal justice personnel are better trained and more responsible now, and can be better trusted to apply a more flexible standard responsibly.

4. DISCUSSION: The § 2254(d) contention appears to be an attempt by the State to break its stipulation to try the DC case on the basis of the record in the state proceedings. The State apparently did not foresee that certain factual issues not resolved by the state court would assume importance in the federal proceedings. Although the DC did make findings which the trial court had not made, the disagreement between the state and federal courts seems to be more in in the nature of different weights given to the undisputed facts in answering the question of waiver.

The DC accepted a rule that under the facts presented that there could not have been a valid waiver in the absence of counsel. The CA did not even purport to adopt such a limited principle. There is no square conflict on this point. See Moore v. Wolff, 495 F. 2d 35, 36-37 (CA8 1974). United States v. Durham, 475 F. 2d 208 (CA7 1973), is not to the contrary.

Although there is a Massiah aspect to this case, its essence remains one of the question of waiver under Miranda. It sufficiently resembles Michigan v. Mosley, No. 74-653, to be held for that case after a response is received.

There is no response.

5/13/75 Malysiak DC op in supp. brief; CA op in petn appx

jp

Conference 5-23-75

Court CA - 8 ..... Voted on ....., 19...

Argued ....., 19... Assigned ....., 19... No. 74-1263

Submitted ....., 19... Announced ....., 19...

LOU V. BREWER, WARDEN, Petitioner

vs.

ROBERT ANTHONY WILLIAMS, a/k/a ANTHONY ERTHEL WILLIAMS

4/5/75 Cert. filed.

Hold for Mitchell ✓ Moseley } 74-653

(to be argued next fall)

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
Rehnquist, J.			Hold		for		Mitchell		✓ Moseley					
Powell, J.			"		"		"		"					
Blackmun, J.			Hold		for		"		"					
Marshall, J.			✓											
White, J.			✓											
Stewart, J.			✓											
Brennan, J.			✓											
Douglas, J.		✓										"		
Burger, Ch. J.		✓	✓		Hold		"							

Conference 12-12-75

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 74-1263

Brewer
vs.
Williams

Held for
74-653
Michigan v. Mosley

Stewart says
there is not a
4th Amend case not
4th Amend. case.
It is a 5th Amend. case.
was decided on 6th Amend.
Not controlled by Mosley.
Does not involve the Exclusionary
Rule.

Granted

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING	
Rehnquist, J.		✓												
Powell, J.					Join 3									
Blackmun, J.		✓												
Marshall, J.			✓											
White, J.		✓												
Stewart, J.			✓											
Brennan, J.			✓											
Douglas, J.		✓												
Burger, Ch. J.		✓												

gc/ss 9/2/76

BENCH MEMO

TO: Mr. Justice Powell DATE: Sept. 2, 1976

FROM: Gene Comey

No. 74-1263 Brewer v. Williams

I. INTRODUCTION

This case presents primarily two issues. First, should this Court's landmark decision in Miranda v. Arizona be modified or overruled. The second issue is whether on the facts of this case the defendant waived his right to counsel. Your "aid to memory" memorandum indicates that you are not interested in modifying or overruling Miranda v. Arizona, and for that reason I have devoted no attention to the contentions of the parties on that question. The second issue is fact-specific, and from the split among the judges in both the state and federal courts one would get the impression that it is a close question. Fourteen judges have thus far ruled on the waiver issue, and they have split seven to seven. Two federal appellate judges, one federal DC judge, and four state supreme court judges have concluded that the defendant did not waive his right to counsel. One federal appellate judge, five state supreme court judges, and one state trial judge have reached the opposite conclusion.

4 1 2 5 12

With respect to the issue of waiver, your memorandum expressed an interest in whether the federal courts reached different findings of fact than had the state courts in violation of 28 U.S.C. 2254. Section II* of this memorandum addresses the

* The federal DC's findings of fact are reproduced in full in Section II. They have been underlined to set them off from my own discussion.

factual issues of the case. That section focuses on the DC's findings of fact, indicating those findings as to which there is no dispute and identifying the extent of the dispute over other factual issues. With that factual background in mind the federal issue of waiver can be determined. Before turning to a discussion of the legal issue of waiver, however, Section III briefly examines the state's claim that the federal DC erred in failing to hold an evidentiary hearing to resolve some of the factual issues in this case.

II. FACTUAL ISSUES

1. On December 24, 1968, a family by the name of Powers attended a wrestling tournament in the YMCA building in Des Moines, Iowa. When Pamela Powers, aged ten, failed to return from a trip to the restroom, a search was instituted, but she could not be found. YMCA personnel subsequently called the police. [Citations to record and Iowa Supreme Court opinion omitted in this and all other District Court findings of fact.] This finding of fact is undisputed.

2. Suspicion rather quickly focused on the [defendant] who had left the YMCA in his automobile shortly after Pamela Powers' disappearance. On December 25, 1968, [defendant's] car was found in Davenport, Iowa, approximately 160 miles east of Des Moines, and a search was instituted for him in the Davenport area by the Davenport and Des Moines police and by the Iowa Bureau of Criminal Investigation. At about this time, a warrant for [defendant's] arrest, on a charge of child-stealing, was issued and filed in Polk County. This finding of fact is undisputed.

3. On the morning of December 26, 1968, [defendant] called his Des Moines attorney, Mr. Henry McKnight, from Rock Island, Illinois. Mr. McKnight advised [defendant] to surrender himself to the Davenport police. This finding of fact is undisputed.

4. At approximately 8:40 a.m. on December 26, 1968, [defendant] did surrender himself to the Davenport police. He was placed under arrest and booked by the Davenport police. at 11:00 a.m. on the same day, [defendant] was arraigned before a state court judge in Davenport as a fugitive to be held on the Polk County warrant, and notified of the charges against him.

This finding of fact is undisputed. Moreover, the record shows, and no one disputes, that the defendant was given Miranda warnings at the time of his arrest by the Davenport police and at the time of arraignment by the state court judge.

5. Following his telephone conversation with [defendant] on December 26, 1968, Mr. McKnight proceeded to the Des Moines Police Department, where he talked to various officials including Detective Leaming, about the [defendant's] proposed surrender and his subsequent transportation to Des Moines. While Mr. McKnight was at the Des Moines Police Department, he received a long distance telephone call from [defendant], who at that time was in custody in Davenport. Mr. McKnight told [defendant] that he would be picked up in Davenport, that he would not be mistreated or grilled, that they would talk it over in Des Moines, and that [defendant] should make no statement until he reached Des Moines. Mr. McKnight's portion of this conversation

was carried on in the presence of Chief of Police Wendell Nichols and Detective Leaming.

Although there is testimony in the trial transcript which would indicate that Captain Leaming did not hear attorney McKnight advise defendant to say nothing until his return to Des Moines, that point seems no longer to be in dispute. See Petitioner's Brief at 40. Moreover, the majority opinion for the Iowa Supreme Court noted that it was undisputed that both McKnight and Kelly had told defendant not to talk until he was in McKnight's presence in Des Moines. App. at 9.

Although not mentioned in this finding by the DC, Leaming testified at trial that he had heard McKnight tell the defendant over the phone that "You [the defendant] have to tell the officers where the body is . . . When you get back here, you tell me and I'll tell them." App. at 96. Leaming also testified that after the phone call with defendant, McKnight told Leaming that the defendant had told McKnight that the girl was dead. App. at 96-97. Police Chief Nichols, who also overheard that phone conversation, testified that he could not recall McKnight's saying that the defendant had told McKnight that the girl was dead, and his recollection was that they were all "speculating" that the girl was dead. App. at 108-09.

6. As a result of these conversations, it was agreed that Detective Leaming would go to Davenport to pick up [defendant] without McKnight, and bring him directly back to Des Moines.

At this time there also was an agreement between Mr. McKnight and the police that the [defendant] would not be questioned until after he had returned to Des Moines and consulted with Mr. McKnight.

- The state attempts to challenge the finding that there was an agreement between attorney McKnight and the Des Moines police. The state notes that the "facts are certainly not clear." Petr's Brief at 39-40. But this is one disputed issue as to which the state trial court made an express finding of fact in ruling on the motion to suppress, and the finding was that the police had entered into that agreement with McKnight. App. at 1.

Police agreed not to question defendant

7. On December 26, 1968, Detective Leaming drove from Des Moines to Davenport to pick up the [defendant]; Detective Leaming was accompanied by Detective Arthur Nelson. This finding of fact is undisputed.

8. While he was in Davenport, the [defendant] consulted with a local attorney, Mr. Thomas Kelly, about his situation. [Defendant] had asked to talk with Mr. Kelly, and their conversations were carried on in the context of an attorney-client relationship. While [defendant] was in Davenport, Mr. Kelly in effect acted as his attorney. Mr. Kelly advised [defendant] to remain silent until he got to Des Moines and talked with Mr. McKnight. This finding of fact is undisputed.

- Although not noted by the DC in this finding, there is a conflict in the record over whether the Davenport police had informed the Des Moines police by phone that the defendant

did not want to talk until he met with his attorney in Des Moines. Ackerman, of the Davenport police, testified that he so informed the Des Moines police, App. at 43; Leaming of the Des Moines police, denied being so informed, App. at 88-89.

9. Detectives Leaming and Nelson arrived in Davenport at about noon on December 26. After meeting Mr. Kelly and being informed that [defendant] was eating lunch, Leaming and Nelson went to lunch. When they returned at approximately 1:00 p.m., they had some conversation with Mr. Kelly and defendant. At this time Detective Leaming gave [defendant] his Miranda warnings; these warnings were not repeated during the trip to Des Moines. When Detective Leaming gave these Miranda warnings, he told [defendant] that they would be "visiting" during the trip to Des Moines.

- This finding of fact is really undisputed. The defendant testified at the suppression hearing that he couldn't remember whether Detective Leaming had read him his Miranda warnings. But the defendant did remember that he had been read Miranda warnings by the Davenport police and at the arraignment, and that he had fully understood his rights at those points in time. Defendant does not challenge at this stage the finding that Leaming read defendant his Miranda rights.

understood rights

10. After the Miranda warnings referred to in the preceding paragraph were given [defendant] again conferred privately with Mr. Kelly, whom Detective Leaming understood to be acting as [defendant's] attorney (in addition to Mr. McKnight). After

this conference, Mr. Kelly again spoke with Detective Leaming. Mr. Kelly told Detective Leaming that it was his understanding that [defendant] was not to be questioned until he got to Des Moines; when Detective Leaming expressed some reservations, Mr. Kelly stated that that understanding should be carried out.

- There is a dispute with respect to this finding of fact. Kelly testified at trial that he had discussed with Leaming the agreement between the Des Moines police and attorney McKnight that the police would not question the defendant until the defendant could confer with attorney McKnight in Des Moines. Kelly testified that he discussed that agreement with Leaming before Leaming went to lunch in Davenport, and immediately before Leaming and the defendant departed for Des Moines. According to Kelly, Leaming said: "This isn't quite the way I understand it." Kelly responded: "Well, this is the way I understand it [and] I think it should be carried through." App. at 107-08. Leaming on the other hand, testified that Kelly never told him that the defendant was not to be questioned until the defendant had an opportunity to confer with attorney McKnight. App. at 78.

The state trial judge did not resolve the merits of this factual dispute. Neither the majority nor the dissenting opinions in the Iowa Supreme Court mention this factual issue. The DC resolved the discrepancy in favor of Kelly's testimony after reviewing the testimony in light of the transcript as a whole, and after discounting Leaming's testimony "for the most part"

in light of his self-interest. [I would note parenthetically at this point that the state trial judge expressly found that Leaming testified with "less than complete candor" regarding the agreement between McKnight and the Des Moines police, discussed under ¶6 supra. App. at 2.] Noting that the state courts had not resolved this factual issue, and that the case was submitted to the DC on the basis of the record and proceedings in the state court, the CA8 majority concluded that the DC correctly resolved the disputed evidentiary facts. Petn for cert. at A9.

11. Before Detective Leaming left for Des Moines with the [defendant], Mr. Kelly asked Detective Leaming that he be permitted to ride along in the police car to Des Moines. This request was refused by Detective Leaming.

- There is also a dispute with respect to this finding of fact. Kelly testified at trial that, at about the same time that Leaming indicated that he did not agree with Kelly's interpretation of the agreement between the Des Moines police and attorney McKnight, Kelly offered to ride back to Des Moines with the defendant to make sure that the defendant's rights were protected. App. at 107-08. Leaming testified at the suppression hearing that Kelly did not make that offer. App. at 55. The state trial judge did not make a finding on this issue, nor did the Iowa Supreme Court indicate its view of the evidence. The four dissenters on the Iowa Supreme Court concluded that Kelly had been denied permission to accompany the defendant to Des Moines. App. at 14. As with ¶ 10 supra, the CA8 majority concluded that the DC had properly resolved the dispute.

12. On several occasions during the trip to Des Moines, and after the aforementioned Miranda warnings were given in Davenport, [defendant] told Detective Leaming that he would talk to him after he returned to Des Moines and consulted with his attorney, Mr. McKnight. The Miranda warnings were never repeated during the trip itself.

- There is really no dispute with respect to this finding. There is uncontradicted testimony in the record that on a number of occasions during the trip from Davenport to Des Moines the defendant told Leaming the following: "When I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." There are a number of aspects of that statement to keep in mind. First, the cited statement is Leaming's testimony as to what the defendant told Leaming; consequently, we have no assurance that those were the defendant's exact words. Second, the context in which Leaming gave that testimony is quite significant. Leaming was asked by defense counsel whether the defendant at any time in the car said that he wanted to have an attorney present before he talked with Leaming. App. at 58. Leaming responded: "Not in that particular manner, no sir." Defense counsel then asked: "Well, tell us in what manner, Captain." And at that point Leaming gave the statement quoted above: "That would be the closest he would have come to it." App. at 58. There is thus something to be said for defendant's argument in this Court that Leaming for one construed those words to be in some manner or other a request to speak with counsel prior to speaking with the police. Finally,

it appears from Leaming's testimony that the defendant first made that statement shortly after they "gassed up" at Davenport and got on the freeway toward Des Moines. App. at 65.

One of the factors relied on by the state trial judge in denying the motion to suppress was the "absence on the Defendant's part of any assertion of his right or desire not to give information absent the presence of an attorney. . . ." App. at 1. The state now argues that the state trial judge found as a matter of historical fact that the defendant did not express a desire to see counsel before speaking with the police. Petitioner's Brief at 59-61. I think the state is wrong. It seems to me that the state trial judge merely interpreted the defendant's statement to be something other than an expression of a desire to see counsel. Whether those words constitute "in some manner" a request to meet with counsel is a federal question, just as is the issue of voluntariness. The fact is that the statements were made, and the DC and CA8 were free to give them a different interpretation than did the state judge. On the other hand, if one reads the state's argument to be that the finding of the state trial judge was that the defendant never made those statements, the finding would be "not fairly supported by the record," 28 U.S.C. 2254(d)(8), and hence not entitled to a presumption of correctness under § 2254. The fact that the defendant made the statements was uncontradicted; indeed, it was police testimony that established that the statements were made.

[Defendant] also was a person of a deeply religious nature.

The majority opinion for the Iowa Supreme Court also refers to the absence of a request to consult with counsel during the car trip; my comments with respect to the state trial judge's interpretation of the statement apply with equal force to the "interpretation" of the Iowa Supreme Court.

13. The [defendant] had been a patient at the State Mental Hospital at Fulton, Missouri for three years prior to his escape on July 6, 1968. These facts were known to the Des Moines police, including Detective Leaming, at the time the [defendant] returned to Des Moines from Davenport with Detective Leaming.

Police knew Δ was escapee from mental institution

- There is no dispute over the fact that defendant was an escapee from a mental institution, and that Leaming was aware of that fact. Although not mentioned in the findings of fact by the DC, the state trial court had ordered an examination at the Iowa Mental Health Institute, and that examination did not show defendant to be incompetent or insane at that time. Of course, competency to stand trial does not mean that the DC was not free to consider as part of the totality of the circumstances the fact that defendant had been in a mental institution for three years prior to the commission of the crime.

- The state contends that there was no basis for the DC's finding that Leaming knew that the defendant was a "deeply religious" person. Petitioner's Brief at 65-66. The DC may have erred when it used the adjective "deeply", but the record makes it clear that Leaming considered defendant to be a religious person. Leaming testified that when speaking with

the defendant he (Leaming) referred to the defendant as "Reverend", App. at 63; Leaming also testified that he had quite a discussion with defendant concerning religion, App. at 56. And Leaming testified that he advised the defendant that he (Leaming) himself had religious training and a religious background. App. at 80.

14. Following the giving of Miranda warnings by Detective Leaming, [defendant] did not state that he wished to waive his Miranda rights. In fact, as noted in Paragraph 12, supra, [defendant] indicated that he did not wish to talk on the trip by stating that he would talk after he got to Des Moines and spoke with Mr. McKnight. Nevertheless, while Detective Nelson drove, Detective Leaming carried on a conversation with [defendant] during the trip concerning religion, [defendant's] reputation, and various other topics, including [defendant's] friends, Reverend, A Mr. Searcy, whether the police had checked for fingerprints in [defendant's] room, the intelligence of other people, police procedures, organized youth groups, singing, playing a piano, playing an organ, "and this sort of thing." At about this time, Detective Leaming also testified that he told defendant that he did not hate him or wish to kill him; that "I myself had had religious training and background as a child, and that I would probably come more near praying for him than I would to abuse him or strike him;" and that he was a good police officer and would protect [defendant] and not allow anyone to molest or abuse him.

Conversation concerning religion

- There is really no dispute over this finding of fact. Although not noted by the DC, it is worth mentioning that Leaming testified that one of the first questions the defendant asked Leaming in the car was whether Leaming hated the defendant and wanted to kill the defendant. Leaming's testimony also indicates that the defendant was concerned that the state police officers following in a second patrol car were hoping that defendant would "jump out [of the car] and run so they could shoot me [the defendant.]" App. at 94-95.

15. According to Detective Leaming's own testimony, the specific purpose of this conversation was to obtain statements and information from the [defendant] concerning the missing girl. In this regard, the following testimony by Detective Leaming on cross-examination during pretrial proceedings in the Polk County District Court is particularly relevant:

> Q. [by McKnight]: Now, when you left, just before you left, do you remember we had parted greetings and didn't you say, "I'll go get him and bring him right back here to Des Moines"? A. Yes sir.
>
> Q. You said that to me didn't you? A. Yes, sir.
>
> Q. Knowing that you were dealing with a person from a mental hospital, did you say to him you don't have to tell me this information, did you say that to him out there on the highway? A. What information?
>
> Q. The information that he gave you, the defendant gave you, you didn't say that to him, did you? A. No, sir.

> Q. In fact, Captain, whether he was a mental patient or not, you were trying to get all the information you could before he got to his lawyer, weren't you? A. I was sure hoping to find out where that little girl was, yes, sir.
>
> * * *
>
> Q. Well, I'll put it this way: You were hoping to get all the information you could before Williams got back to McKnight, weren't you? A. Yes, sir.

- This finding of fact is apparently undisputed. Note that the DC's finding does not state that this was "interrogation," but rather that the purpose of Leaming's conversation with the defendant was to get as much information as possible from the defendant before the defendant could confer with McKnight. The state's argument is apparently that Leaming did not "interrogate" defendant in the car; but that contention does not call into dispute the uncontradicted testimony - indeed the admission by Leaming - that Leaming was trying to get information from the defendant.

16. Detective Leaming specifically appealed to [defendant's] known /religious nature in order to obtain statements from him concerning thw whereabouts of the missing girl. The following testimony by Detective Leaming himself, describing what he said to the [defendant], clearly sets out the approach, which he used:

> Eventually, as we were traveling along there, I said to Mr. Williams that 'I want to give you something to think about while we're traveling down the road.' I said, 'Number one, I want you to observe the weather conditions; it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight,

> and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.'

- There is no dispute that Leaming made this statement to the defendant in the car on the way to Des Moines. See App. at 81. Leaming also testified with respect to this statement at the suppression hearing. App. at 63. In the version summarized at the suppression hearing Leaming addresses the defendant as "Reverend." App. at 63.

- There is a dispute over the point in time at which Leaming made the "Christian burial" statement to the defendant. The state contends that it is impossible to tell whether Leaming made that statement before or after the defendant stated that he would tell the whole story when he saw attorney McKnight. See finding 12 supra. Petitioner's Brief at 44. Counsel for the defendant notes that there are indications in the record which would lead one to conclude that Leaming's "Christian burial" statement came after the defendant made the statement which the DC considered to be an expression of a desire to see counsel. Respondent's Brief at 17 n. 9. To the extent that the relative timing may be important, see Section IV.C infra,

I think the inferences to be drawn from the record favor defendant's interpretation.

17. Following this statement [defendant] asked why Detective Leaming felt that they were going past the body; and Detective Leaming told [defendant] that he knew the body was somewhere in the area of Mitchellville, a town near Interstate 80. Detective Leaming then stated, "I do not want you to answer me. I don't want to discuss it further. Just think about it as we're riding down the road."

- This finding of fact is undisputed.

18. In fact, Detective Leaming did not know that the body was near Mitchellville, and he made the statement to defendant specifically to induce [defendant] to tell him where the body was.

- This finding of fact is undisputed. It is quite clear that Leaming did not know where the body was. Moreover, Leaming admitted at trial that his statements to the defendant with respect to the location of the body were not "one thousand percent" correct. App. at 93-94. The DC's finding with respect to Leaming's intent to induce the defendant to tell the police about the location of the body is clearly correct. McKnight asked Leaming at trial whether he made those statements to induce the defendant to tell Leaming where the body was located. Leaming responded: I made it hoping that he would." App. at 94.

19. At some point east of Grinnell, Iowa, and after the conversation outlined in Paragraphs 14 and 17, supra, [defendant]

asked if the police had found the victim's shows. Without any further constitutional warnings, Detective Leaming discussed with [defendant] what evidence had been found, where [defendant] had put the shoes, and what the shoes looked like. A stop at a gas station where the shoes were supposed to be produced no results.

- This finding of fact is undisputed.

20. Following this incident, there was some further discussion of a blanket; a stop at a rest area disclosed that the blanket already had been found.

- This finding of fact is undisputed.

21. After the stop at the rest area, there was further discussion about "people and religion and intelligence and friends of [defendant's] and what people's opinion was of him and so forth." Then, "some distance still east of the Mitchellville turnoff," [defendant] stated that he would show the detectives where the body was.

- This finding of fact is undisputed.

22. Following [defendant's] statement, the police, including Detective Leaming, drove to a place indicated by [defendant], where they located the body of Pamela Powers.

- This finding of fact is undisputed.

23. Although Leaming's automobile was not equipped with a radio capable of reaching Des Moines during most of the trip, a state car which was following at all times was equipped with such a radio. The radio was in fact utilized to keep in touch

with Chief Nichols. Chief Nichols was informed of the side trip to Mitchellville, but did not relay this information to Mr. McKnight.

- This finding of fact is undisputed.

24. As noted above [defendant's] statements of December 26, 1968, to Detective Leaming were admitted into evidence at [defendant's] trial, along with other evidence obtained pursuant to these statements, all over [defendant's] objections.

- This finding of fact is undisputed.

CA8 divided the "historical facts" in this case into two groups: challenged and unchallenged evidentiary facts. After reading the briefs, the transcripts reproduced in the appendix, and the various state and federal court opinions, I have concluded that CA8's summary of the "unchallenged facts" (see petn at A2-A6) is completely accurate. Most of that summary concerns facts as to which there was uncontradicted testimony in the state proceedings. As to the agreement between McKnight and the Des Moines police, there was testimony going both ways, but the state trial court found that the agreement existed. That finding was accepted by the DC and by CA8.

CA8's summary accurate as to "unchallenged" facts.

With respect to the second category of "challenged evidentiary" facts, CA8 noted that the state challenged a number of the DC's findings of fact on the ground that they were contrary to the findings of the state trial court and thus violated 28 U.S.C.

2254(d). Those facts were: (1) that Kelly advised Leaming prior to Leaming's departure for Des Moines that the defendant was not to be questioned until McKnight could meet with the defendant in Des Moines; (2) that Kelly asked to be permitted to accompany defendant to Des Moines and that Leaming denied the request; (3) that Leaming knew that the defendant was a deeply religious person and that Leaming used that knowledge to elicit incriminating statements from the defendant; and (4) that Leaming's misstatement that he knew the location of the body had a compelling influence on the defendant to make incriminating statements. CA8 expressly noted that there were discrepancies between the testimony of Kelly and Leaming, and that there were some ambiguities in the testimony on which the DC based its findings. CA8 noted that the state court had not resolved the merits of these factual disputes, 28 U.S.C. 2254 (d)(1), that both parties waived an evidentiary hearing in the DC, and that there was a substantial basis in the record for the findings of the DC.

With respect to facts (1) and (2), Kelly and Leaming gave markedly different versions of the events, and there is simply no way to determine what really happened. The state court did not resolve the dispute; the DC resolved it, but did so without hearing live testimony and thus without being able to judge credibility as well as it could have. With respect to fact (3), I refer you to my discussion under ¶ 13 supra. As I said there, I think the DC erred in using the adverbve "deeply" (which

in itself is ambiguous), but that the DC was correct in noting that Leaming knew that the defendant was a "religious type" and tried to use that to get information. With respect to point (4), my own view is that this is not an "historical fact" but rather an inference to be drawn from the totality of the circumstances. Whether Leaming's "religious" references, when combined with the other "historical facts" in this case had a compelling influence on the defendant is the legal question in the case.

You indicated in your "aid to memory" memorandum that if the facts were as summarized by CA8 in the petn at A14, you might be more willing to affirm that if the facts were actually otherwise. I would note that points (1), (2), (4), (6) and (8) of that summary on page A14 are undisputed. Point (3) concerns the request by Kelly to accompany the defendant to Des Moines, and that was resolved against the state by the DC. See ¶ 11 supra. There is no real "evidence" to support point (5); CA8's conclusion that the defendant gave several indications that he did not want to talk about the case until after he met with McKnight is actually an inference based on point (6). As my discussion in ¶ 12 supra indicates, it is undisputed that defendant made statements to the effect that he would talk after he met with McKnight; thus point (6) in CA8's summary is undisputed. The state trial court concluded that those statements were not expressions of a desire to meet with counsel before talking; the DC and CA8 concluded otherwise. I think there is much to be said for the DC's finding. Finally as with

point (5), point (7) is not an "historical fact" either. Actually, the question in this case is whether by subtle interrogation Leaming was able to get the defendant to talk without first having voluntarily waived counsel.

Where then does dissenting Judge Webster part company with the CA8 majority. I can find two major areas of disagreement. First, as to some of the undisputed facts in the case, Judge Webster simply draws different inferences and conclusions. For example, CA8 took the defendant's statements that he would talk after he saw his attorney in Des Moines to be an expression of a desire to refrain from giving information until that time. Judge Webster concludes otherwise. Second, Judge Webster objects to the fact that the DC decided issues of credibility from a bare record without holding an evidentiary hearing. I discuss that aspect of the case in the next section but suffice it to say here that the parties waived their rights to an evidentiary hearing, and I do not think Judge Webster is on strong ground in faulting the DC in this regard.

III. THE FAILURE OF THE DC TO HOLD AN EVIDENTIARY HEARING

The state suggests that one of the questions raised by this case is whether the DC should have conducted an evidentiary hearing. Petitioner's Brief at 61-65. Given the fact that the state court failed to resolve "the merits of [certain] factual disputes," 28 U.S.C. 2254(d)(1), the state argues that the DC was obligated under Townsend to conduct an evidentiary hearing before resolving the merits of those disputes. I think the

state is wrong.

At the outset, it is worth noting that the state raises this point for the first time in this Court. The state specifically stipulated below that the DC should resolve the issues on the basis of the state court record without additional evidentiary hearings. The state did not ask for reconsideration or additional evidentiary hearings after the DC filed its memorandum and order granting the writ. Nor did the state complain to CA8 about the failure of the DC to hold an evidentiary hearing. A petition filed with this Court is not the appropriate time to raise such an issue.

In any event, there is no substantive merit to the state's contention. Both the state and the defendant were provided with an opportunity for an evidentiary hearing, and both declined to make use of that option. I do not think Townsend can be read to require a federal DC to hold a hearing to resolve disputed issues of fact despite the stipulation of the parties that such a hearing is unnecessary. It seems to me that the state is simply trying to get out of its initial stipulation that an evidentiary hearing was unnecessary.

Good lack of merit

There is, of course, some merit to the state's point that it is difficult for a federal DC to reach findings of fact when it is faced with directly contradictory testimony and is deprived of the opportunity to observe the witnesses. But the state carries the burden of showing that the defendant waived his right to counsel, and the state must therefore bear

State, with burden of proof, waived hearing

the cost of its decision to forego an evidentiary hearing--it must run the risk that the federal DC will resolve the factual dispute in favor of the defendant. Indeed, it is precisely because the state bears the burden, and a heavy one at that, that the DC properly, in my view, resolved the dispute in favor of the defendant. */

I would note as a concluding factor that the failure of the DC to hold an evidentiary hearing on certain disputed issues of fact may be an irrelevant issue. To the extent that the waiver question can be decided on most of the undisputed facts in the case, a possibility which I discuss in Section IV, the failure to hold an evidentiary hearing on the disputed facts is irrelevant.

IV. AN ANALYSIS OF THE FACTS UNDER THE GUIDELINES ESTABLISHED IN MIRANDA

Just this past Term this Court summarized its holding in Miranda in these terms: "In the Miranda case this Court promulgated a set of safeguards to protect the delineated constitutional rights of persons subjected to custodial police interrogation. In sum, the Court held in that case that unless law enforcement officers give certain specified warnings before questioning a person in custody, and follow certain specified procedures during the course of any subsequent interrogation, any statement made by the person in custody cannot over his objection be admitted against him as a defendant at trial, even though the statement may in fact be wholly voluntary."

*/ [This footnote is on the next page.]

* / As the textual discussion indicates, my view is that it was not reversible error for the DC to fail to hold an evidentiary hearing on the facts of this case. That conclusion does not mean that this Court must review the DC's findings of fact under the "clearly erroneous" standard. As you noted for the Court in Neil v. Biggers, 409 U.S. 188, 193 n.3: "This is a habeas corpus case in which the facts are contained primarily in the state court record (equally available to us as to the federal courts below) . . . ." A number of federal courts have concluded, as did dissenting Judge Webster in the case sub judice, that in circumstances such as those presented by this case the clearly erroneous standard does not apply. See, e.g., United States ex rel. Gonzales v. Zelker, 477 F.2d 797, 800 (CA2 1973); Ward v. Wainright, 450 F.2d 409, 412 (CA5 1971).

Michigan v. Moseley, 96 S.Ct. 321, 324 (1976) (emphasis added). The procedures to be followed when a person in custody asks to consult with a lawyer - which is what this case is all about - were detailed in Miranda and cited in Michigan v. Mosley: "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." Miranda v. Arizona, 384 U.S., at 474, cited in Michigan v. Mosley, 96 S.Ct., at 325 n. 7.

The highlighted language details two important aspects of the Miranda procedures which are relevant to this case. First, the passage indicates when and under what circumstances a resumption of questioning is permissible. This stands in contradiction to the language of Miranda that was at issue in Michigan v. Mosley, which the court expressly noted did not indicate the circumstances under which questioning could be resumed. Indeed, it was in that context that Justice Stewart dropped a footnote to indicate that the Mosley case did not involve the language of Miranda that is at issue in the case sub judice. Second, Miranda indicates that the individual must have the opportunity to have counsel present during any subsequent questioning. It does not state that he has to have an attorney present; but it does state that he must have the opportunity to have counsel present. Moreover, the highlighted language notes that that opportunity must be made available

Questions to be answered:

during any subsequent questioning; it does not imply that opportunity to consult with counsel must be made available only for initial questioning. Miranda itself put that contention to rest.

With those procedures in mind, disposition of this case requires analysis of these questions: first, after receiving Miranda warnings, did the defendant state that he wanted an attorney; second, did the police engage in subsequent interrogation without the defendant having an opportunity to have counsel present; and third, can a defendant waive his right to counsel during subsequent interrogation without consulting an attorney on the waiver issue, and if so, was there a waiver of the right to counsel on the facts of this case?

yes

yes

yes, but probably not on facts of this case.

A. Did the defendant state that he wanted to have an attorney?

It is undisputed that the defendant was given his Miranda warnings on three occasions: when he was first arrested, when he was arraigned, and when officer Leaming arrived at Davenport to transport him to Des Moines. See ¶¶ 4, 9, supra. Immediately after he was arrested by the Davenport police and given his Miranda warnings, the defendant spoke by telephone with attorney McKnight. At that point in time several things should have been clear to the Des Moines police. They were informed that attorney McKnight was acting in a representative capacity for the defendant. The state trial court found as a factual matter that McKnight informed the police that the defendant was not to be questioned until the defendant could consult personally with

McKnight in Des Moines. The state court's finding of fact went even further: it found as fact that the police had entered into an "agreement" with attorney McKnight that the defendant would not be questioned until after his return to Des Moines.

A great deal of attention is devoted in the briefs to the relevancy of this agreement. I don't think the agreement itself has any relevancy in a contractual sense - i.e., whether the police were bound by the agreement and whether the defendant had certain rights based on violation of a binding agreement. The most important aspect of the state court's finding of fact is that for purposes of examining the applicability of Miranda procedures the defendant did ask to consult with an attorney, did retain an attorney, and through that attorney did notify the police officers that he desired not to be interrogated until he had met with his attorney in Des Moines. Based on that finding of fact by the state trial court, and accepted by the DC, the appropriate Miranda procedures were triggered: interrogation was to cease until counsel was present.

There is considerable discussion in the briefs as to whether the defendant's statements in the car that he would tell his story after meeting with McKnight in Des Moines were actually assertions of the right not to give any information until his attorney was present. Given my analysis of the "agreement" as found by the trial court, I don't think it is necessary for the Court to resolve that issue. Whether or not the defendant asserted that right in the car on the trip to Des Moines, he had asserted it earlier through retained counsel

acting as his agent. And his assertion of that right was made perfectly clear to the same police officers who transported him from Davenport to Des Moines. Since the state trial court made an explicit finding on the first request not to be interrogated until counsel was present, I see no need to get involved in resolving the ambiguities of a possible reassertion of that right.

If you disagree with my analysis of the first assertion of that right through counsel, then the ambiguity concerning the statements in the car must be resolved. As I noted earlier, I think the DC properly interpreted that statement as an assertion of the right not to be interrogated without the presence of counsel. See ¶ 12, supra. The state trial court's conclusion that the defendant did not assert that the right is not binding on the federal courts since it was not a finding with respect to an "historical fact." It is undisputed that the defendant made the statement that he would talk to the police after he met with counsel in Des Moines; the legal significance of that fact is to be finally determined by the federal, not the state, courts. Brown v. Allen, 344 U.S. 347, 507. Why would anyone inform the police that he would talk to them after meeting with counsel if he also intended to talk to them before meeting with counsel? In any event, to the extent that there is some ambiguity in the statement, I see no reason to upset the considered judgment of three federal judges below that the statement was an assertion of the right not to speak until counsel was present. Finally, as I noted

in my discussion of ¶ 12, supra, it is impossible to tell with certainty whether the defendant's statements were made prior to Leaming's "Christian burial" statement. But after having read the entire record it is my impression that the defendant's brief correctly concludes that in all likelihood the "Christian burial" statement was made after the defendant asserted his right not to be questioned without having counsel present.

It is my view that the "agreement" between McKnight and the Des Moines police triggered the applicable Miranda procedures. If it is necessary to reach the issue I would find that the defendant's statements in the car also triggered the applicable procedures. And I would note that the fact that the defendant saw attorney Kelly in the period intervening between his assertion of his rights through attorney McKnight and his possible interrogation in the car has no bearing on determining whether the Miranda procedures were followed. Once the defendant asserted his right, the police were required to provide him with the opportunity to have counsel present during any subsequent questioning.

B. Was the defendant subjected to "questioning" within the meaning of Miranda?

The state argues that the defendant was not questioned; after all, officer Leaming merely made a statement about the weather and about the value of a "Christian burial". Oddly enough, however, the state concedes that Leaming wanted to find out where the body was. Petitioner's Brief at 54. The state's willingness to concede that point is understandable

in light of Leaming's admissions at trial that he made his statement about the weather and about the value of a Christian burial hoping that the defendant would respond and tell him where the body was. Indeed, Leaming admitted at the suppression hearing and at trial that he was hoping to get as much information as possible from the defendant before the defendant could meet with attorney McKnight in Des Moines. App. at 60, 92-95.

This was Leaming's "hope" - indeed a central part of his agt. with counsel to confess

Apparently realizing that it would be difficult to win the "no interrogation" argument, the state relies on a second argument: Leaming's "psychological interrogation" is not the type of interrogation which this Court has condemned. According to the state, Miranda has never been construed to proscribe a play upon a murder suspect's religious conscience. Petitioner's Brief at 54, citing 3 Wigmore, Evidence, § 840, p. 840 (Chadbourn Revision 1970), which in turn cites Joy, Confession 51 (1842). In one of the most incredible contentions I have ever encountered, the state argues that "of all things that can never be held coercive, 'subtle interrogation' must surely lead the list. For if it is subtle enough, the interrogated doesn't feel any coercion or compulsion at all." Petitioner's Brief at 55.

It seems to me that Leaming's statement about the weather, despite the disclaimed that he wanted the defendant to think about it and did not want the defendant to answer him, almost surely qualifies as interrogation or questioning for Miranda purposes. Though I won't attempt to formulate specific guidelines in this memo, as a general rule I would be willing to conclude

that police behavior which admittedly is designed to elicit incriminating information from a defendant in custody qualifies as "questioning." Moreover, I think there is absolutely no merit in the state's argument that "subtle interrogation" is somehow immunized from the reach of Miranda. Indeed, before reaching its explicit holding with respect to warnings and procedures, the Miranda opinion delineated a number of then existing police techniques designed to elicit incriminating information, a number which certainly qualify for the label "subtle". Furthermore, if counsel is needed to protect the accused's interests when he faces fairly straightforward police questioning, the argument for the presence of counsel during "subtle interrogation" is even stronger.

C. The issue of waiver.

This is perhaps the most complicated issue in the case - can a suspect who has retained counsel be questioned in the absence of counsel so long as he is given Miranda warnings and waives his rights? The answer to that question involves a determination as to the scope of the interplay between Miranda and Massiah v. United States, 377 U.S. 201 (defendant deprived of Sixth Amendment rights when there was used against him at his trial evidence of his own incriminating words obtained from him after he had retained counsel and had been released on bail, which federal agents had deliberately elicited from him by means of his codefendant who, cooperating with the police, engaged defendant in conversation in the presence of a hidden radio

transmitter after he had been indicted and in the absence of his counsel). Most courts have taken the position that the police may question a suspect known to be represented by counsel without notifying his lawyer of their purpose so long as the prisoner is advised of, and waives, his right to counsel. Few courts have trouble upholding the admissibility of statements when the person represented by counsel initiates the conversation or requests an interview with a particular police officer.

The state contends that CA8 adopted the following per se rule in the instant case: "Once an accused has counsel, he cannot effectively waive his right to counsel for purposes of interrogation, absent presence of (or notice to) counsel." Petitioner's Brief at 35. The state is patently wrong. CA8's opinion makes it clear that the rule in that Circuit is that a prisoner can waive the right to counsel in the absence of counsel. App. at A12, citing Moore v. Wolff, 495 F.2d 35 (CA8 1974). Rather than pursuing a per se approach, CA8 simply determined that on the basis of all the facts of this case the state had failed to establish that the waiver was knowingly, intelligently, and voluntarily made. App. at A12-A15.

This Court has not expressly ruled on that aspect of the waiver question. In the course of oral argument in Miranda, Mr. Justice Stewart asked the question whether a defendant needed a lawyer before he could waive his right to a lawyer; and the brief for the ACLU in that case pressed heavily for a per se rule against waiver in the absence of counsel. But Miranda did not expressly adopt that position.

In order to be meaningful, discussion of "waiver" in this context must focus on the precise question at issue. The petition claims to present for review a rather broad question: "Can an accused waive his Sixth Amendment right to counsel in absence of counsel previously retained who advised the accused to remain silent?" The answer to that question, it seems to me, is quite clear: in some circumstances, yes. For example, a suspect who has retained counsel and been advised to remain silent, but who nevertheless decides to "get everything off his chest", is free to turn himself in to the police, and, after receiving Miranda warnings, proceed to give a voluntary incriminating statement. Or a suspect in custody who has already consulted with counsel may notify police that he is prepared to give a statement, and, after again receiving Miranda warnings, may give a voluntary statement. I would be hard pressed to argue persuasively that such statements should be inadmissible merely because the police allowed the defendant to give a statement in the absence of counsel. At least where the accused initiates the contact, waiver is a relevant question and is to be determined under Johnson v. Zerbst.

But that is not this case. The question in the instant case is whether the waiver concept is applicable once the police violate Miranda by refusing to respect the suspect's request not to be interrogated until he had had an opportunity to have counsel present. The defendant in this case retained counsel, notified the Des Moines police (through his agent - attorney McKnight) that he wished to remain silent until he

could have his attorney present, and refused to speak with the Davenport police. As I read Miranda, the applicable guidelines required cessation of questioning until counsel was present. On the facts of this case, those guidelines were violated: questioning did not cease "until an attorney [was] present."

So analyzed, this case does not present a question of waiver of Miranda rights and subsequent interrogation. To the contrary, this case involves a violation of Miranda procedures and an alleged subsequent waiver. In that respect Michigan v. Mosley teaches that under Miranda "any statement made by the person in custody cannot over his objection be admitted against him as a defendant at trial, even though the statement may in fact be wholly voluntary" where, as here, the police fail to follow the prescribed procedures. 96 S.Ct., at 324. For that reason, the defendant's statement is inadmissible.

I should note, however, that if you disagree with my analysis in Section IV.A concerning assertion of the right to counsel through attorney McKnight, and conclude instead that the defendant first asserted that right in the car, then the relative timing of the "Christian burial" statement and the defendant's assertion of the right to counsel in the car could prove to be crucial.

E.C.

ss

10/2/76

SUPPLEMENTAL MEMO----------BREWER V. WILLIAMS--------OCTOBER SITTING

I. THE VOLUNTARINESS ISSUE

The defendant won this case in the District Court on two different theories. The (1) first theory was that there had been no valid waiver of constitutional rights. The (2) second theory was that the statement had been given involuntarily. The District Court disposed of the case on BOTH theories.

The state appealed the case to CA8, and challenged the District Court's rulings on waiver and voluntariness. Since the CA8 majority disposed of the case on the ground that there had been no valid waiver, it was unnecessary for them to reach the voluntariness issue. Note, however, that Judge Webster in dissent had to reach the voluntariness question since he concluded that there had been a valid waiver.

In its petition to this court, the state challenged the ruling of CA8 with respect to waiver. The state did not argue in its "questions presented" that the confession had been voluntarily given. The defendant now asserts that the state "failed to raise" the voluntariness issue, and that there is thus an unchallenged independent ground on which to affirm the CA8 ruling. It seems to me that this all boils down to the following: CA8 reached its decision on the ground of waiver; the defendant (respondent) is now free to assert any theory which would support CA8's disposition of the case; thus, defendant (respondent) is free to argue that the confession was given involuntarily. It doesn't matter that the state failed to challenge in its "questions presented" every theory which might support

CA8's disposition of [redacted] the case. Finally, I think this all washes out in the end insofar as I do not think there is much to the District Court's involuntariness finding. See pages A27-A29.

If the Court agrees with CA8 on the waiver issue, there is no need to go into the voluntariness question. If the Court disagrees with CA8 on the ~~voluntariness~~ waiver question, then we are free to consider the voluntariness issue. If that is the case, it seems to me that it is completely unnecessary for the Court to remand the [redacted] case to CA8 for its views on voluntariness; the Court can simply note that on these facts there is nothing to the involuntariness issue.

II. THE SANTOBELLO APPROACH [404 U.S. 257 (1971)]

The Santobello case involved a broken promise concerning [redacted] a plea bargain. After negotiations with the prosecutor, the defendant withdrew his previous not-guilty plea and pleaded guilty to a lesser-included offense, the prosecution having agreed to make no recommendation as to sentence. At defendant's appearance for sentencing several [redacted] months later, a new prosecutor recommended the maximum sentence, which the judge imposed. The [redacted] defendant then attempted unsuccessfully to withdraw his guilty plea, and his conviction was affirmed on appeal. This Court held that the interests of justice and proper recognition of the [redacted] prosecution's duties in relation to promises made in connection with plea bargaining required that the judgment of conviction be vacated. */

* / The case was remanded to the state court to determine the ultimate relief to which the [redacted] defendant was entitled.

It is possible to make a "Santobello-type" argument in the instant case. Here, the state court found as a factual matter that the police had entered into an agreement with the defendant's attorney not to question the [redacted] defendant until he had an opportunity to consult with attorney McKnight in Des Moines. The agreement was clearly and intentionally broken. One could argue that due process considerations justify [redacted] suppression of evidence [redacted] obtained [redacted] as a result of an explicit refusal [redacted] by the police to honor an agreement they had with defense counsel with respect to protection of the defendant's constitutional rights. The case could thus be disposed of on a due process approach. [See, for example, the attached copy of a brief dissent that Justice Stevens wrote for a panel on CA7. That case is much less "appealing" on its facts in that there was no agreement between the police and defense counsel. Justice Stevens nevertheless found a [redacted] due process violation.]

[redacted]

There are a number of problems with this Santobello-type argument. First, Santobello itself is not at all clear as to the legal basis for the decision. Second, in Santobello the prosecution [redacted] agreed [redacted] to make no [redacted] recommendation [redacted] as to sentencing in exhange for a guilty plea. [redacted] It is at least arguable that on the facts of this case there was no "consideration" given by McKnight in exchange for the promise of the [redacted] police. Perhaps McKnight, in the absence of that promise, would [redacted] have [redacted] gone on his own to Davenport to counsel the defendant [redacted] in person. But it is not at all clear

whether that is sufficient. Third, it may well be that "consideration," at least in a contractual sense, is unnecessary for utilization of a [redacted] Santobello-type argument.

The final problem with the Santobello-type argument is [redacted] This Santobello-type approach to the instant case is somewhat attractive; it is an approach by which the Court can avoid some difficult waiver questions in a case which is very fact specific. On the other hand, the CA9 opinion which Tyler wrote indicates that there is some concern in the lower courts as to what type of waiver analysis is required, and this may be a good opportunity to provide that guidance.

III. ASSERTION OF MIRANDA RIGHTS

I noted on page 26 of the bench memo that "through his attorney [the defendant] did notify the police officers that he desired not to be interrogated until he had met with his attorney in Des Moines." Memo at 26 (emphasis added). A number of clerks have raised the question whether the defendant asserted his rights, or whether they were asserted by his attorney with no evidence in the record that it was the defendant's desire to [redacted] avoid interrogation until his attorney was present. To the extent that it may be necessary to find some evidence in the record that the defendant was asserting his rights through his attorney I would note that while in the custody of the Davenport police the defendant refused to answer any questions. See Appendix at 43 (police officer Ackerman of the Davenport police testifies that

he had been informed by the defendant that "he didn't wish to say anything because--until he talked to his attorney in Des Moines.") That testimony was not summarized in the District Court's findings of fact, but it is undisputed that Ackerman was so informed.

STEVENS, Circuit Judge (dissenting).

After counsel had been appointed to represent him, and while he was in custody, the defendant was visited by two agents of the prosecutor.[1] Defense counsel was not present and received no advance notice of their proposed visit. The sole purpose of the visit was to obtain evidence for use at the trial. Accepting the prosecutor's evidence as true, defendant's participation in the crime had already been established and, therefore, no further investigation was necessary. The work of the agents was trial preparation, pure and simple.

In a civil context I would consider this behavior unethical and unfair.[2] In a criminal context I regard it as such a departure from "procedural regularity" as to violate the due process clause of the Fifth Amendment.[3] If the evidence of guilt is as strong as the prosecutor contends, such direct communication is all the more offensive because it was unnecessary. If there is doubt about defendant's guilt, it should not be overcome by a procedure such as this.

I respectfully dissent.

10/4/76

Brewer v Williams 76-1263

Three questions: (See p 25 Gene's memo)

1. Did Δ, after receiving Miranda warnings, make clear to police that he wanted an attorney?

Yes. This is clear from Record. Indeed, state court found as fact that police in Des Moines had "agreed" with McKnight (Δ's atty) not to question Δ until he was returned to Des Moines

2. Did police, while in car on trip back to Des Moines, interrogate Δ?

Yes. Police concede their talk about "weather" (possibly of snow covering body of murdered girl) and the value of a "Christian burial". Police knew Δ was an escapee from mental institution & also a bit of a "religious nut". This was tantamount to interrogation & also in violation of agt. with police that there would be no interrogation.

John Stevens noted that Wms atty asked permission for Wms to ride to Des Moines. This was denied. John Stevens thinks this makes it probable

3. Can a Δ, after warnings & after requesting counsel, waive right to counsel during subsequent interrogation?

1. Did Δ, after receiving Miranda warnings, make clear to police that he wanted an attorney?

Yes. This is clear from Record. Indeed, state court found as fact that police in Des Moines had "agreed" with McKnight (Δ's atty) not to question Δ until he was returned to Des Moines.

2. Did police, while in car on trip back to Des Moines, interrogate Δ?

Yes. Police concede their talk about "weather" (possibly of snow covering body of murdered girl) and the value of a "Christian burial". Police knew Δ was an escapee from mental institution & also a bit of a "religious nut". This was tantamount to interrogation & also in violation of agt. with police that there would be no interrogation.

John Stevens noted that Wms. after asked permission to ride to Des Moines. This was denied. John Stevens thinks this makes Estabrook relevant

3. Can a Δ, after warnings & after requesting counsel, waive right to counsel during subsequent interrogation?

Yes. But this depends on facts. Altho I think Δ here came close to a knowing waiver, I doubt that State carried its burden of proving this. See U.S. v Pheaster (CA 9- 7/6/76 for good op. by Renfrew holding Δ may waived but ev. of knowing waiver must be clear;

74-1263 BREWER v. WILLIAMS Argued 10/4/76

Cert to [redacted] CA 8 (H/C)

Affirm but write narrowly.

10/4

Turner (AG of Iowa)

J Stewart raised point that ~~the~~ trial court found the statements were involuntary, & the Pet. for Cert does not assign this as error. If involuntary, we need not reach the waiver of right to have counsel present issue.

(See Iowa's Reply Brief on this issue)

Officer Leaming was "purposefully" endeavoring to obtain evidence prior to reaching Des Moines where counsel awaited Williams.

The "voluntariness issue" was clearly presented & litigated in CA8. It was, however, mentioned only by Webster in dissent.

Quite apart from Miranda there were Escobedo & Massiah violations.

Bartels (appointed counsel for Resp)

~~Does not~~ Doesn't argue for per se rule.

Some waiver issue is central Q in this case.

Record supports existence of agreement not to interrogate & DC found at fact that there was agt.

If Wms. had voluntarily announced his guilty ~~[illegible]~~ - prior to any police interrogation — there would be no quest. of waiver.

The "Christian burial" line of conversation was critical - it was "interrogation" & particularly offensive. It was psychologically coercive

ec/ec 10/6/76

BREWER V. WILLIAMS

Justice Powell-

I have reexamined the notes that I took while reading the various transcripts in this case.

---I have been unable to find any reference to the amount of time it took the police to travel from Davenport to the Mitchelville area (where the body was located). Nor have I been able to find any time references as to the amount of time that elapsed between other crucial events, such as the giving of the Christian burial statement and the defendant's statement that he would indicate the location of the body.

---I mentioned to you the other day that I was quite sure that the Christian burial statement was made ~~while the~~ shortly after they filled the squad car up with gas in Davenport. Testimony at page 81 of the Appendix ~~suggest~~ suggests that I was wrong. Leaming [suggesting an extended conversation], there summarizes various topics of conversation that he and the defendant pursued, and then notes that "eventually, as we were traveling along there," he gave his Christian burial statement. On rereading my notes, it appears that the statement that was made "not too long after [they] got on the freeway, after [they] had gassed up and started," was the defendant's statement that he would tell the whole story when he got back to Des Moines and spoke with Mr. McKnight. See Appendix at 65.

---As to statements made by Leaming concerning the crime, the record is clear that he made the Christian burial statement, and that he told the defendant that he "knew" the body was in the Mitchelville area. There are no other [specific] references in the transcript to statements by Leaming concerning the crime. Leaming did speak with the

defendant about the shoes and the blanket when they left the highway to look for those items. It is also clear that Leaming and the defendant did a great deal of talking during the trip. For example, Leaming testified that they had "quite a discussion relative to religion". Appendix at 56. According to Leaming, there was "a great deal of conversation not related to the case and some conversation related to the case." Id.

One final observation. At the end of the Christian burial statement Leaming tells the defendant "Now I just want you to think about that when we are driving down the road." The state seems to think that this final statement takes the punch out of the whole Christian burial statement in that Leaming was telling the defendant not to answer him. You can make a strong argument that the final statement cuts the other way. Leaming is in effect telling this "religious" person to ponder this Christian burial point all the way to Des Moines.

No. 74-1263, Brewer v. Williams — Conf. 10/6/76

Affirmed 5-4

The Chief Justice Reverse

State court's finding that statements were voluntary merits respect. The Fed D.C. reversed on record w/out a hearing.

Resp. waived her right not to speak.

Also would decide ? case on Stone v Powell

Would not overrule Miranda & don't favor over-ruling.

Douglas, J. Affirm

In view of assurances as to non-interrogation, then in case in which police acted badly.

Brennan, J. Affirm

Stone v Powell did not repeal Fay v Noia and H/C statute (But see Bill's dissent).

There was violation of Miranda.

Stewart, J. Affirm

Miranda controls

White, J.

~~Affirm~~ Reverse
Not a Miranda case. The warnings were given.
But Massiah probably controls
X X X
After discussion, By vote changed vote.

Marshall, J.

Affirm
On Massiah

Reverse
Blackmun, J. ~~Remand for further~~ proceedings on voluntariness
Close case.
There were 3 warnings.
No need to overrule Miranda
Wms. did not waive her right to be free of interrogation. But this was

Powell, J. Affirm
See my notes on yellow paper.
I ~~voted~~ to join 3 because CA 8's op seemed to lay down a per se rule as to waiver.
On facts in this case, I ~~do~~ think there was no waiver.
Massiah + Escobedo both relevant.
Stone v Powell limited to 4th Amend.
No thought of reversing Miranda

Rehnquist, J. Rev. + Remand
for further proceedings on voluntariness.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 7, 1976

RE: No. 74-1263 Brewer v. Williams

Dear Chief:

I have asked Potter to accept the assignment of the opinion for the Court in the above.

Sincerely,

Bill

The Chief Justice

cc: The Conference

74 1263

Brewer v Williams

PRE-INDICTMENT

Miranda Analysis: You are given your warnings. You assert the right to counsel. Miranda is clear: Interrogation must cease until your attorney is present (unless, you and I would add, there has been a waiver prior to interrogation--for example, the suspect is sitting in the cell awaiting his attorney and asks to make a statement to get the whole thing off his chest).. LFP

Massiah Analysis: There is no applicable analysis. Massiah is post-indictment.

Post-INDICTMENT

Miranda Analysis: Same as above. Post-indictment makes no difference.

Masshiah Analysis: SITUATION NUMBER ONE--YOU ASSERT YOUR RIGHT TO COUNSEL. That is the instant case. Williams clearly asserted his right to counsel, and the police interrogated him knowing that he had asserted that right. This violated his 6th Amendment right to counsel, since there was no showing of waiver prior to interrogation,

even tho the right is not asserted

SITUATION NUMBER TWO: You have not ASSERTED YOUR GITH RIGHT TO COUNSEL. That question is not presented on the facts of this case. But on a reading of pages sixteen to seventeen of the current draft, one would conclude that you still have after Massiah a right not to be interrogated until counsel is present, that you have to have affirmative evidence that you waived that right, and absent such evidenc state ents h after interrogation are inadmissible. This differs from Miranda, where you have to assert your githt to counsel.

I am bothered by as a matter of policy with situation number two, but it is impossible I think to reconcile it with Ma the opposite result with Massiah. I think we should dodge it in this case.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 30, 1976

MEMORANDUM TO THE CONFERENCE

Re: No. 74-1263 - Brewer v. Williams

I shall try a dissent in this case.

HAB.

MEMORANDUM

TO: Mr. Justice Powell DATE: November 30, 1976

FROM: Gene Comey

As I indicated yesterday, I ~~had~~ have two major concerns with the opinion in Brewer v. Williams. First, I believe the draft places undue emphasis on the existence of the agreement. It should be sufficient that Williams asserted his right to counsel, and I would not want the lower courts to think that the agreement was dispositive. Second, I believe that the draft might be read to indicate a view of the circumstances necessary to show waiver in a post-indictment case where there had been no assertion of counsel. I, for one, would prefer to leave final resolution of that issue to another case. I have therefore drafted some proposed changes on page 12, 17. I am not particularly wedded to the language, and if you agree with the changes, both you and Justice Stewart might wish to tinker with the wording. I could find no less delicate way to alter page 12.

G.C.

ss

As I indicated yesterday, I had two major concerns with the opinion in Brewer v. Williams. First, I believe the draft places undue emphasis on the existence of the agreement. It should be sufficient that Williams asserted his right to counsel, and I would not want the lower courts to think that the agreement was dispositive. Second, I believe that the draft might be read to indicate a view of the circumstances necessary to show waiver in a post-indictment case where there had been no assertion of counsel. I, for one, would prefer to leave final resolution of that issue to another case. I have therefore drafted some proposed changes on page 12, 17. I am not particularly wedded to the language, and if you agree with the changes, both you and Justice Stewart might wish to tinker with the wording. I could find no less delicate way to alter page 12.

G.C.

ss

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 30, 1976

No. 74-1263, Brewer v. Williams

Dear Lewis,

The changes indicated on pages 12, 16, and 17 are in response to your suggestions. Please let me know at your convenience if they satisfactorily meet your concerns. If so, I shall recirculate the opinion with these changes made by the printer with the hope that those who have already joined the opinion will find the changes acceptable.

Sincerely yours,

P.S.

Mr. Justice Powell

The changes accompanying your note of 11/30 do meet my concerns.
Many thanks.

December 1, 1976

No. 74-1263 Brewer v. Williams

Dear Potter:

The changes accompanying your note of 11/30 do meet my concerns.

Many thanks.

Sincerely,

Mr. Justice Stewart

lfp/ss

bc: Gene

Please check the changes in the next draft and I will do a join note.

L.F.P., Jr.

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

From: Mr. Justice Stewart

Circulated: _____

Recirculated: DEC 2 1976

pp. 12-13, 16-17

There are changes requested by J.F.P.

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–1263

Lou V. Brewer, Warden, Petitioner, *v.* Robert Anthony Williams, aka Anthony Erthel Williams.

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

[November —, 1976]

MR. JUSTICE STEWART delivered the opinion of the Court.

An Iowa trial jury found the respondent, Robert Williams, guilty of murder. The judgment of conviction was affirmed in the Iowa Supreme Court by a closely divided vote. In a subsequent habeas corpus proceeding a federal district court ruled that under the United States Constitution Williams is entitled to a new trial, and a divided Court of Appeals for the Eighth Circuit agreed. The question before us is whether the District Court and the Court of Appeals were wrong.

I

On the afternoon of December 24, 1968, a 10-year-old girl named Pamela Powers went with her family to the YMCA in Des Moines, Iowa, to watch a wrestling tournament in which her brother was participating. When she failed to return from a trip to the washroom, a search for her began. The search was unsuccessful.

Robert Williams, who had recently escaped from a mental hospital, was a resident of the YMCA. Soon after the girl's disappearance Williams was seen in the YMCA lobby carrying some clothing and a large bundle wrapped

in a blanket. He obtained help from a 14-year-old boy in opening the street door of the YMCA and the door to his automobile parked outside. When Williams placed the bundle in the front seat of his car the boy "saw two legs in it and they were skinny and white." Before anyone could see what was in the bundle Williams drove away. His abandoned car was found the following day in Davenport, Iowa, roughly 160 miles east of Des Moines. A warrant was then issued in Des Moines for his arrest on a charge of abduction.

On the morning of December 26, a Des Moines lawyer named Henry McKnight went to the Des Moines police station and informed the officers present that he had just received a long distance call from Williams, and that he had advised Williams to turn himself in to the Davenport police. Williams did surrender that morning to the police in Davenport, and they booked him on the charge specified in the arrest warrant and gave him the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436. The Davenport police then telephoned their counterparts in Des Moines to inform them that Williams had surrendered. McKnight, the lawyer, was still at the Des Moines police headquarters, and Williams conversed with McKnight on the telephone. In the presence of the Des Moines Chief of Police and a Police Detective named Leaming, McKnight advised Williams that Des Moines police officers would be driving to Davenport to pick him up, that the officers would not interrogate him or mistreat him, and that Williams was not to talk to the officers about Pamela Powers until after consulting with McKnight upon his return to Des Moines. As a result of these conversations, it was agreed between McKnight and the Des Moines police officials that Detective Leaming and a fellow officer would drive to Davenport to pick up Williams, that they would bring him directly back to Des Moines, and that they would not question him during the trip.

In the meantime Williams was arraigned before a judge in Davenport on the outstanding arrest warrant. The judge advised him of his *Miranda* rights and committed him to jail. Before leaving the courtroom, Williams conferred with a lawyer named Kelly, who advised him not to make any statements until consulting with McKnight back in Des Moines.

Detective Leaming and his fellow officer arrived in Davenport about noon to pick up Williams and return him to Des Moines. Soon after their arrival they met with Williams and Kelly, who, they understood, was acting as Williams' lawyer. Detective Leaming repeated the *Miranda* warnings, and told Williams:

> ". . . we both know that you're being represented here by Mr. Kelly and you're being represented by Mr. McKnight in Des Moines, and . . . I want you to remember this because we'll be visiting between here and Des Moines."

Williams then conferred again with Kelly alone, and after this conference Kelly reiterated to Detective Leaming that Williams was not to be questioned about the disappearance of Pamela Powers until after he had consulted with McKnight back in Des Moines. When Leaming expressed some reservations, Kelly firmly stated that the agreement with McKnight was to be carried out—that there was to be no interrogation of Williams during the automobile journey to Des Moines. Kelly was denied permission to ride in the police car back to Des Moines with Williams and the two officers.

The two Detectives, with Williams in their charge, then set out on the 160-mile drive. At no time during the trip did Williams express a willingness to be interrogated in the absence of an attorney. Instead, he stated several times that "[w]hen I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." Detective Leaming

knew that Williams was a former mental patient, and knew also that he was deeply religious.

The Detective and his prisoner soon embarked on a wide-ranging conversation covering a variety of topics, including the subject of religion. Then, not long after leaving Davenport and reaching the interstate highway, Detective Leaming delivered what has been referred to in the briefs and oral arguments as the "Christian burial speech." Addressing Williams as "Reverend," the Detective said:

> "I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."

Williams asked Detective Leaming why he thought their route to Des Moines would be taking them past the girl's body, and Leaming responded that he knew the body was in the area of Mitchellville—a town they would be passing on the way to Des Moines.[1] Leaming then stated: "I do

[1] The fact of the matter, of course, was that Detective Leaming possessed no such knowledge.

not want you to answer me. I don't want to discuss it further. Just think about it as we're riding down the road."

As the car approached Grinnell, a town approximately 100 miles west of Davenport, Williams asked whether the police had found the victim's shoes. When Detective Leaming replied that he was unsure, Williams directed the officers to a service station where he said he had left the shoes; a search for them proved unsuccessful. As they continued towards Des Moines, Williams asked whether the police had found the blanket, and directed the officers to a rest area where he said he had disposed of the blanket. Nothing was found. The car continued towards Des Moines, and as it approached Mitchellville, Williams said that he would show the officers where the body was. He then directed the police to the body of Pamela Powers.

Williams was indicted for first-degree murder. Before trial, his counsel moved to suppress all evidence relating to or resulting from any statements Williams had made during the automobile ride from Davenport to Des Moines. After an evidentiary hearing the trial judge denied the motion. He found that "an agreement was made between defense counsel and the police officials to the effect that the Defendant was not to be questioned on the return trip to Des Moines," and that the evidence in question had been elicited from Williams during "a critical stage in the proceedings requiring the presence of counsel on his request." The judge ruled, however, that Williams had "waived his right to have an attorney present during the giving of such information." [2]

The evidence in question was introduced over counsel's continuing objection at the subsequent trial. The jury found Williams guilty of murder, and the judgment of conviction was affirmed by the Iowa Supreme Court, a bare majority

[2] The opinion of the trial court denying Williams' motion to suppress is unreported.

of whose members agreed with the trial court that Williams had "waived his right to the presence of his counsel" on the automobile ride from Davenport to Des Moines. *State* v. *Williams,* 182 N. W. 2d 396, 402. The four dissenting justices expressed the view that "when counsel and police have agreed defendant is not to be questioned until counsel is present and defendant has been advised not to talk and repeatedly has stated he will tell the whole story after he talks with counsel, the state should be required to make a stronger showing of intentional voluntary waiver than was made here." *Id.*, at 408.

Williams then petitioned for a writ of habeas corpus in the United States District Court for the Southern District of Iowa. Counsel for the State and for Williams stipulated "that the case would be submitted on the record of facts and proceedings in the trial court, without taking of further testimony." The District Court made findings of fact as summarized above, and concluded as a matter of law that the evidence in question had been wrongly admitted at Williams' trial. This conclusion was based on three alternative and independent grounds: (1) that Williams had been denied his constitutional right to the assistance of counsel; (2) that he had been denied the constitutional protections defined by this Court's decisions in *Escobedo* v. *Illinois,* 378 U. S. 478, and *Miranda* v. *Arizona,* 384 U. S. 436; and (3) that in any event, his self-incriminatory statements on the automobile trip from Davenport to Des Moines had been involuntarily made. Further, the District Court ruled that there had been no waiver by Williams of the constitutional protections in question. *Williams* v. *Brewer,* 375 F. Supp. 174.

The Court of Appeals for the Eighth Circuit, with one judge dissenting, affirmed this judgment, 509 F. 2d 227, and denied a petition for rehearing en banc. We granted certiorari to consider the constitutional issues presented. 423 U. S. 1031.

II

A

Before turning to those issues, we must consider the petitioner's threshold claim that the District Court disregarded the provisions of 28 U. S. C. § 2254 (d) in making its findings of fact in this case. That statute, which codifies most of the criteria set out in *Townsend* v. *Sain*, 372 U. S. 293, provides that, subject to enumerated exceptions, federal habeas corpus courts shall accept as correct the factual determinations made by the courts of the States.[3]

---

[3] Title 28, United States Code, § 2254 (d) provides:

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual

We conclude that there was no disregard of § 2254 (d) in this case. Although either of the parties might well have requested an evidentiary hearing in the federal habeas corpus proceedings, *Townsend* v. *Sain*, *supra*, at 322, they both instead voluntarily agreed in advance that the federal court should decide the case on the record made in the courts of the State. In so proceeding, the District Court made no findings of fact in conflict with those of the Iowa courts. The District Court did make some additional findings of fact based upon its examination of the state court record, among them the findings that Kelly, the Davenport lawyer, had requested permission to ride in the police car from Davenport to Des Moines and that Detective Leaming had refused this request. But the additional findings were conscientiously and carefully explained by the District Court, 375 F. Supp., at 175–176, and were reviewed and approved by the Court of Appeals, which expressly held that "the District Court correctly applied 28 U. S. C. § 2254 in its resolution of the disputed evidentiary facts, and that the facts as found by the District Court had substantial basis in the record, 509 F. 2d, at 230–231. The strictures of 28 U. S. C. § 2254 (d) require no more.[4]

---

determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

[4] Whether Williams waived his constitutional rights was not, of course, a question of fact, but an issue of federal law. See discussion, at pp. 13–15 of text, *infra*.

B

As stated above, the District Court based its judgment in this case on three independent grounds. The Court of Appeals appears to have affirmed the judgment on two of those grounds.[5] We have concluded that only one of them need be considered here.

Specifically, there is no need to review in this case the doctrine of *Miranda* v. *Arizona, supra,* a doctrine designed to secure the constitutional privilege against compulsory self-incrimination, *Michigan* v. *Tucker,* 417 U. S. 433, 438–439. It is equally unnecessary to evaluate the ruling of the District Court that Williams' self-incriminating statements were, indeed, involuntarily made. Cf. *Spano* v. *New York,* 360 U. S. 315. For it is clear that the judgment before us must in any event be affirmed upon the ground that Williams was deprived of a different constitutional right—the right to the assistance of counsel.

This right, guaranteed by the Sixth and Fourteenth Amendments, is indispensable to the fair administration of our adversary system of criminal justice. Its vital need at the pretrial stage has perhaps nowhere been more succinctly explained than in Mr. Justice Sutherland's memorable words for the Court 44 years ago in *Powell* v. *Alabama,* 287 U. S. 45, 57:

> "[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."

[5] The Court of Appeals did not address the District Court's ruling that Williams' statements had been made involuntarily.

There has occasionally been a difference of opinion within the Court as to the peripheral scope of this constitutional right. See *Kirby* v. *Illinois,* 406 U. S. 682; *Coleman* v. *Alabama,* 399 U. S. 1. But its basic contours, which are identical in state and federal contexts, *Gideon* v. *Wainwright,* 372 U. S. 335; *Argersinger* v. *Hamlin,* 407 U. S. 25, are too well established to require extensive elaboration here. Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—"whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby* v. *Illinois, supra,* at 689. See *Powell* v. *Alabama,* 287 U. S. 45; *Johnson* v. *Zerbst,* 304 U. S. 458; *Hamilton* v. *Alabama,* 368 U. S. 52; *Gideon* v. *Wainwright, supra; White* v. *Maryland,* 373 U. S. 59; *Massiah* v. *United States,* 377 U. S. 201; *United States* v. *Wade,* 388 U. S. 218; *Gilbert* v. *California,* 388 U. S. 263; *Coleman* v. *Alabama, supra.*

There can be no doubt in the present case that judicial proceedings had been initiated against Williams before the start of the automobile ride from Davenport to Des Moines. A warrant had been issued for his arrest, he had been arraigned on that warrant before a judge in a Davenport courtroom, and he had been committed by the court to confinement in jail. The State does not contend otherwise.

There can be no serious doubt, either, that Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him. Detective Leaming was fully aware before departing for Des Moines that Williams was being represented in Davenport by Kelly and in Des Moines by McKnight. Yet he purposely sought during Williams' isolation from his lawyers to

obtain as much incriminating information as possible. Indeed, Detective Leaming conceded as much when he testified at Williams' trial:

> "Q. In fact, Captain, whether he was a mental patient or not, you were trying to get all the information you could before he got to his lawyer, weren't you?
>
> "A. I was sure hoping to find out where that little girl was, yes, sir.
>
> . . . . .
>
> "Q. Well, I'll put it this way: You was hoping to get all the information you could before Williams got back to McKnight, weren't you?
>
> "A. Yes, sir." [6]

The state courts clearly proceeded upon the hypothesis that Detective Leaming's "Christian burial speech" had been tantamount to interrogation. Both courts recognized that Williams had been entitled to the assistance of counsel at the time he made the incriminating statements.[7] Yet no such constitutional protection would have come into play if there had been no interrogation.

The circumstances of this case are thus constitutionally

---

[6] Counsel for the State, in the course of oral argument in this Court, acknowledged that the "Christian burial speech" was tantamount to interrogation:

"Q: But isn't the point, Mr. Attorney General, what you indicated earlier, and that is that the officer wanted to elicit information from Williams—

"A: Yes, sir.

"Q: —by whatever techniques he used, I would suppose a lawyer would consider that he were pursuing interrogation.

"A: It is, but it was very brief."

[7] The Iowa trial court expressly acknowledged Williams' "right to have an attorney present during the giving of such information." See p. 5, *supra*. The Iowa Supreme Court also expressly acknowledged Williams' right to the presence of his counsel." See pp. 5–6, *supra*.

indistinguishable from those presented in *Massiah* v. *United States, supra.* The petitioner in that case was indicted for violating the federal narcotics law. He retained a lawyer, pleaded not guilty, and was released on bail. While he was free on bail a federal agent succeeded by surreptitious means in listening to incriminating statements made by him. Evidence of these statements was introduced against the petitioner at his trial, and he was convicted. This Court reversed the conviction, holding "that the petitioner was denied the basic protections of that guarantee [the right to counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately solicited from him after he had been indicted and in the absence of his counsel." 377 U. S., at 206.

That the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is constitutionally irrelevant. See *ibid.*; *McLeod* v. *Ohio,* 381 U. S. 356; *United States* v. *Crisp,* 435 F. 2d 354, 358 (CA7); *United States ex rel. O'Connor* v. *New Jersey,* 405 F. 2d 632, 636 (CA3); *Hancock* v. *White,* 378 F. 2d 479 (CA1).

Rather, the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him.[8] It thus requires no wooden or technical ap-

[8] The only other significant factual difference between the present case and *Massiah* is that here the police had *agreed* that they would not interrogate Williams in the absence of his counsel. This circumstance plainly provides the State with no argument for distinguishing away the protection afforded by *Massiah.*

It is argued that this agreement may not have been an enforceable one. But we deal here not with notions of offer, acceptance, consideration, or other concepts of the law of contracts. We deal with constitutional law. And every court that has looked at this case has found an "agreement" in the sense of a commitment made by the Des Moines police officers that Williams would not be questioned about Pamela Powers in the absence of his counsel.

plication of the *Massiah* doctrine to conclude that Williams was entitled to the assistance of counsel guaranteed to him by the Sixth and Fourteenth Amendments.

III

The Iowa courts recognized that Williams had been denied the constitutional right to the assistance of counsel.[9] They held, however, that he had waived that right during the course of the automobile trip from Davenport to Des Moines. The state trial court explained its determination of waiver as follows:

> "The time element involved on the trip, the general circumstances of it, and more importantly the absence on the Defendant's part of any assertion of his right or desire not to give information absent the presence of his attorney, are the main foundations for the Court's conclusion that he voluntarily waived such right."

In its lengthy opinion affirming this determination, the Iowa Supreme Court applied "the totality-of-circumstances test for a showing of waiver of constitutionally-protected rights in the absence of an express waiver," and concluded "that evidence of the time element involved on the trip, the general circumstances of it, and the absence of any request or expressed desire for the aid of counsel before or at the time of giving information, were sufficient to sustain a conclusion that defendant did waive his constitutional rights as alleged." 182 N. W. 2d, at 402.

In the federal habeas corpus proceeding the District Court, believing that the issue of waiver was not one of fact but of federal law, held that the Iowa courts had "applied the wrong constitutional standards" in ruling that Williams had waived the protections that were his under the Constitution. 375 F. Supp., at 182. The court held "that it is the *gov-*

[9] See n. 7, *supra*.

ernment which bears a heavy burden . . . but that is the burden which explicitly was placed on [Williams] by the state courts." *Ibid.* (emphasis in original). After carefully reviewing the evidence, the District Court concluded:

> "[U]nder the proper standards for determining waiver, there simply is no evidence to support a waiver. . . . [T]here is no affirmative indication . . . that [Williams] did waive his rights. . . . [T]he state courts' emphasis on the absence of a demand for counsel was not only legally inappropriate, but factually unsupportable as well, since Detective Leaming himself testified that [Williams], on several occasions during the trip, indicated that he would talk *after* he saw Mr. McKnight. Both these statements and Mr. Kelly's statement to Detective Leaming that [Williams] would talk only after seeing Mr. McKnight in Des Moines certainly were assertions of [William's] 'right or desire not to give information absent the presence of his attorney . . . .' Moreover, the statements were obtained only after Detective Leaming's use of psychology on a person whom he knew to be deeply religious and an escapee from a mental hospital—with the specific intent to elicit incriminating statements. In the face of this evidence, the State has produced no affirmative evidence whatsoever to support its claim of waiver, and, a fortiori, it cannot be said that the State has met its 'heavy burden' of showing a knowing and intelligent waiver of . . . Sixth Amendment rights." 375 F. Supp., at 182–183 (emphasis in original).

The Court of Appeals approved the reasoning of the District Court:

> "A review of the record here . . . discloses no facts to support the conclusion of the state court that [Williams] had waived his constitutional rights other than that [he] had made incriminating statements . . . .

> The District Court here properly concluded that an incorrect constitutional standard had been applied by the state court in determining the issue of waiver. . . .
>
> . . . . . .
>
> "[T]his court recently held that an accused can voluntarily, knowingly and intelligently waive his right to have counsel present at an interrogation after counsel has been appointed. . . . The prosecution, however, has the weighty obligation to show that the waiver was knowingly and intelligently made. We quite agree with Judge Hanson that the state here failed to so show." 509 F. 2d, at 233.

The District Court and the Court of Appeals were correct in the view that the question of waiver was not a question of historical fact, but one which, in the words of Mr. Justice Frankfurter, requires "application of constitutional principles to the facts as found . . . ." *Brown* v. *Allen*, 344 U. S. 443, 507 (separate opinion). See *Townsend* v. *Sain*, *supra*, at 309 n. 6, 318; *Brookhart* v. *Janis*, 384 U. S. 1, 4.

The District Court and the Court of Appeals were also correct in their understanding of the proper standard to be applied in determining the question of waiver as a matter of federal constitutional law—that it was incumbent upon the State to prove "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, *supra*, at 464. That standard has been reiterated in many cases. We have said that the right to counsel does not depend upon a request by the defendant, *Carnley* v. *Cochran*, 369 U. S. 506, 513; cf. *Miranda* v. *Arizona*, *supra*, at 471, and that courts indulge in every reasonable presumption against waiver, *e. g.*, *Brookhart* v. *Janis*, *supra*, at 4; *Glasser* v. *United States*, 315 U. S. 60, 70. This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings.

Schneckloth v. *Bustamonte*, 412 U. S. 218, 238–240; *United States* v. *Wade*, 388 U. S. 218, 237.

We conclude, finally, that the Court of Appeals was correct in holding that, judged by these standards, the record in this case falls far short of sustaining the State's burden. It is true that Williams had been informed of and appeared to understand his right to counsel. But waiver requires not merely comprehension but relinquishment, and Williams' consistent reliance upon the advice of counsel in dealing with the authorities refutes any suggestion that he waived that right. He consulted McKnight by long distance telephone before turning himself in. He spoke with McKnight by telephone again shortly after being booked. After he was arraigned, Williams sought out and obtained legal advice from Kelly. Williams again consulted with Kelly after Detective Leaming and his fellow officer arrived in Davenport. Throughout, Williams was advised not to make any statements before seeing McKnight in Des Moines, and was assured that the police had agreed not to question him. His statements while in the car that he would tell the whole story *after* seeing McKnight in Des Moines were the clearest expressions by Williams himself that he desired the presence of an attorney before any interrogation took place. But even before making these statements, Williams had effectively asserted his right to counsel by having secured attorneys at both ends of the automobile trip, both of whom, acting as his agents, had made clear to the police that no interrogation was to occur during the journey. Williams knew of that agreement and, particularly in view of his consistent reliance on counsel, there is no basis for concluding that he disavowed it.[10]

Omission

[10] Cf. *Michigan* v. *Mosely*, 423 U. S. 96, 110 n. 2 (WHITE, J., concurring in result):

". . . the reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make

Despite Williams' express and implicit assertions of his right to counsel, Detective Learning proceeded to elicit incriminating statements from Williams. Learning did not preface this effort by telling Williams that he had a right to the presence of a lawyer, and made no effort at all to ascertain whether Williams wished to relinquish that right. The circumstances of record in this case thus provide no reasonable basis for finding that Williams waived his right to the assistance of counsel.

Omission

The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams *could not,* without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments.[11] It only held, as do we, that he did not.

IV

The crime of which Williams was convicted was senseless and brutal, calling for swift and energetic action by the police to apprehend the perpetrator and gather evidence with which he could be convicted. No mission of law enforcement officials is more important. Yet "[d]isinterested zeal for the public good does not assure either wisdom or right in the methods it pursues." *Haley* v. *Ohio,* 332 U. S. 596, 605

---

his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism."

[11] Compare, *e. g., United States* v. *Springer,* 460 F. 2d 1344, 1350 (CA7); *Wilson* v. *United States,* 398 F. 2d 331 (CA5); *Coughlan* v. *United States,* 391 F. 2d 371 (CA9), with, *e. g., United States* v. *Thomas,* 474 F. 2d 110, 112 (CA10); *United States* v. *Springer, supra,* at 1354–1355 (STEVENS, J., dissenting); *United States ex rel. Magoon* v. *Reincke,* 416 F. 2d 69, aff'g 304 F. Supp. 1014 (Conn.). Cf. *United States* v. *Pheaster,* — F. 2d — (CA9).

(Frankfurter, J., concurring in the judgment). Although we do not lightly affirm the issuance of a writ of habeas corpus in this case, so clear a violation of the Sixth and Fourteenth Amendments as here occurred cannot be condoned. The pressures on state executive and judicial officers charged with the administration of the criminal law are great, especially when the crime is murder and the victim a small child. But it is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all.

The judgment is

*Affirmed.**

*The Court of Appeals suspended the issuance of the writ of habeas corpus for 60 days to allow an opportunity for a new trial, and further suspended its issuance pending disposition of the State's petition for a writ of certiorari in this Court. In affirming the judgment of the Court of Appeals, we further suspend the issuance of the writ of release from custody for 60 days from this date to allow the State of Iowa an opportunity to initiate a new trial; and judgment will be entered accordingly.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 2, 1976

Re: No. 74-1263 - Brewer v. Williams

Dear Harry:

Please join me in your dissenting opinion in this case.

Sincerely,

WHR

Mr. Justice Blackmun

Copies to the Conference

December 3, 1976

No. 74-1263 Brewer v. Williams

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 9, 1976

Re: No. 74-1263 — Brewer v. Williams

Dear Potter:

I am in the process of writing separately in this case.

Sincerely yours,

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

December 16, 1976

Re: 74-1263 Lou V. Brewer v. Robert Anthony Williams

MEMORANDUM TO THE CONFERENCE:

I will await Byron's "separate" writing before I come to rest.

Regards,

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

December 29, 1976

Re: 74-1263 - Brewer v. Williams

MEMORANDUM TO THE CONFERENCE:

I will, of course, join both Byron's and Harry's dissents. I will probably write separately focusing on the utter irrationality of fulfilling Cardozo's half-century old prophecy -- which he really made in jest -- that some day some court would carry the Suppression Rule to the absurd extent of suppressing evidence of a murder victim's body.

That is what is being done here -- at least as of now. My thrust will be that even accepting the view of the present majority -- which I do not -- it is indeed irrational for the Court to extend the Suppression Rule to exclude evidence of the body. This means I would move toward the English Judges' Rules reserving exclusion for egregious police misconduct. I am sure no one would be so bold as to say the police conduct here was "egregious."

Regards,

WEB

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 3, 1977

No. 76-1263, Brewer v. Williams

Dear Lewis,

I have in mind adding the enclosed footnote at an appropriate place in this opinion. Before sending it to the printer, however, I would be interested in your views.

Sincerely yours,

P.S.

Mr. Justice Powell

The District Court stated that its decision "does not touch upon the issue of what evidence, if any, beyond the incriminating statements themselves must be excluded as 'fruit of the poisonous tree.' " 375 F. Supp., at 185. We too have no occasion to address this issue, and in the present posture of the case there is no basis for the view of our dissenting Brethren, post, at _____ (WHITE, J., dissenting); id., at _____ (BLACKMUN, J., dissenting), that any attempt to retry the respondent would probably be futile. In the event that a retrial is instituted, it will be for the state courts in the first instance to determine whether particular items of evidence may be admitted. Cf. Killough v. United States, 336 F. 2d 929.

January 6, 1977

No. 74-1263 Brewer v. Williams

Dear Potter:

Here is a first draft of a possible concurring opinion, written on the assumption that the Chief Justice writes a dissent along the lines of his recent discussion with me.

If the Chief Justice does not bring Stone v. Powell into this case, I would consider omitting the last paragraph of this draft.

In any event, I would welcome your views.

Sincerely,

Mr. Justice Stewart

LFP/lab

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 13, 1977

Re: No. 74-1263 - Brewer v. Williams

Dear Byron:

Please add my name to your dissent in this case, revised as indicated by your letter of January 13th.

Sincerely,

WHR

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 13, 1977

Re: No. 74-1263 - Brewer v. Williams

Dear Byron:

Please add my name to your dissent revised as indicated in your letter to me of today.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 13, 1977

Re: No. 74-1263 - Brewer v. Williams

Dear Harry:

I am eliminating the last paragraph of footnote 6 on page 8 and making an appropriate change on page 9. With that, I wish you would add my name to your dissent.

Sincerely,

Byron

Mr. Justice Blackmun

Copies to Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 31, 1977

No. 74-1263 Brewer v. Williams

Dear Potter:

As I hope to be away (in Williamsburg) for most of this week, I am asking my Chambers to deliver to you a draft of my concurring opinion in which I have made some changes in view of the Chief Justice's dissent.

It seems to me that the Chief takes a good deal of "poetic license", both with the record in this case and your opinion. I assume that you will wish to respond, at least to some of what he has written.

As anticipated from what the Chief had said to me in several conversations, he has relied rather heavily on Stone v. Powell. He also construes the "facts" in a way that would make a good deal of what I said in Stone appear to be relevant to this case. For these reasons, I think it necessary - at least appropriate - for me to file a concurring opinion, even though I think your opinion covers the situation very well indeed.

I will welcome, of course, any suggestions you care to make. I would like to recirculate substantially simultaneously with your recirculation. Accordingly, you could convey any suggestions to Gene Comey who will be in touch with me daily.

Sincerely,

L.F.P.

Mr. Justice Stewart

lfp/ss

bc: Mr. Gene Comey

January 30, 1977

No. 74-1263 Brewer v. Williams

Dear Potter:

As I hope to be away (in Williamsburg) for most of this week, I am asking my Chambers to deliver to you a draft of my concurring opinion in which I have made some changes in view of the Chief Justice's dissent.

It seems to me that the Chief takes a good deal of "poetic license", both with the record in this case and your opinion. I assume that you will wish to respond, at least to some of what he has written.

As anticipated from what the Chief had said to me in several conversations, he has relied rather heavily on Stone v. Powell. He also construes the "facts" in a way that would make a good deal of what I said in Stone appear to be relevant to this case. For these reasons, I think it necessary - at least appropriate - for me to file a concurring opinion, even though I think your opinion covers the situation very well indeed.

I will welcome, of course, any suggestions you care to make. I would like to recirculate substantially simultaneously with your recirculation. Accordingly, you could convey any suggestions to Gene Comey who will be in touch with me daily.

Sincerely,

Mr. Justice Stewart

lfp/ss

bc: Mr. Gene Comey

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

file

CHAMBERS OF
THE CHIEF JUSTICE

February 10, 1977

Re: 74-1263 - Brewer v. Williams

PERSONAL

Dear Lewis:

I have your concurring opinion and am happy to see that our views on the exclusionary rule mesh so closely.

Of course the parties could not have invoked Stone v. Powell, the State did directly attack the applicability of the exclusionary rule in this case, Brief for Petitioner, at 31-32, and invoked principles of comity and federalism in arguing against federal habeas relief. Id., at 69-73. Moreover, at oral argument Petitioner argued that Stone should be extended to this case, just as Respondent argued that it should not. Transcript of Oral Argument, at 26-27; 49-50. Consequently, the exclusionary rule issue is unquestionably before the Court.

I agree that "[m]any Fifth and Sixth Amendment claims arise in the context of challenges to the fairness of a trial or to the integrity of the factfinding process." As I pointed out in footnote 8, suppression of evidence will be entirely appropriate in such cases for those very reasons. But this is not such a case, and we can hardly justify exclusion of this evidence on any such basis. Nor can we blink the fact that the evidence sought to be suppressed in this case seems to me to fit hand in glove with your own description of why exclusion of evidence would not be appropriate here were this a Fourth Amendment case. This evidence is at once the most reliable and most probative we could conceivably have bearing on Respondent's guilt or innocence. It is far more probative than a confession due to the objective facts disclosed.

In any event, if, as you say, our intervening decision in Stone v. Powell makes application of the exclusionary rule in this case an open question which "should be resolved only after the implications of such a ruling have been fully explored," why isn't the proper course to vacate the judgment of the Court of Appeals and remand the case for reconsideration in light of Stone? This is consistent with our longstanding practice in such cases and is a disposition which I would happily support.

In your Arlington Heights opinion we decided a constitutional question which was controlled by our intervening decision in Washington v. Davis without a remand to give the Court of Appeals an opportunity to reconsider their constitutional holding. Byron took us all to task for our precipitous action and "failure to follow our usual practice in this situation of vacating the judgment below and remanding in order to permit the lower court to reconsider its ruling in light of our intervening decision." Thus, in Arlington Heights we applied an intervening decision without hesitation to reach a correct result in the case before us. In the present case you propose not even to consider application of an intervening case which you seem to concede may well be controlling. As of now we will reach what you almost concede may prove to be an incorrect result in light of existing law.

As you know, Byron, Harry and Bill Rehnquist are on record as favoring a remand for reconsideration in light of the voluntariness issue, which the Court of Appeals did not reach. Your concurrence prompts me to say that if five would agree, we ought to dispose of the case with a per curiam order vacating the judgment below and remanding the case for reconsideration both of the voluntariness issue and the Stone v. Powell exclusionary question. For me that would be infinitely preferable to the present proposed disposition of the case, which is inconclusive.

Regards,

WEB

Mr. Justice Powell

February 11, 1977

PERSONAL

No. 74-1263 Brewer v. Williams

Dear Chief:

Thank you for your thoughtful letter of February 10.

Although there may well be merit to your suggestion, on balance I doubt the wisdom of remanding this case for reconsideration. I think the "voluntariness issue" is before us, as it was before the courts below. I agree with you that we could - if we wished - remand in view of Stone v. Powell on the exclusionary rule issue. But this seems unwise to me for reasons that I now indicate only in summary form.

It took us, as you will recall, some three years to identify and bring to the Court just the right case to decide the issue presented in Stone v. Powell. My concurring opinion in Bustamonte, which you joined, did not command a Court although it precisely foreshadowed our decision in Stone.

In order to hold a Court in Stone, I wrote it sharply focused on the Fourth Amendment and the limit of a Federal court's proper review on habeas corpus of a Fourth Amendment claim. I do not think a majority of the Court is willing at this time to extend the Stone line of analysis indiscriminately. I have misgivings, myself, as to its applicability to the Sixth Amendment right to counsel. As noted in my concurring opinion in Brewer, I am inclined to think the answer will turn on the circumstances in which the right to counsel is implicated.

Stone v. Powell was essentially a "habeas corpus" case rather than an exclusionary rule case. You may recall that Byron was willing to decide the case favorably to the

prosecution (the state) on the exclusionary rule issue. That is, he expressed support for the substance of the ALI modification of the exclusionary rule. Under this modification, the rule would be applied in light of the facts and circumstances. The question asked, usually, would be whether the police conduct fairly could be characterized as outrageous or intentionally violative of constitutional rights as contrasted with the typical situation of an inadvertent or good faith violation of the rule. As indicated in my concurring opinion in Brown v. Illinois (and in my current opinioniin Brewer), I would join in this type of modification of the exclusionary rule. This would be applicable to the original trial, and would not be limited - as Stone was - to habeas corpus review.

But Brewer v. Williams, at least as I view it, is a poor vehicle for modifying the exclusionary rule. I would have difficulty defending the police conduct, although I appreciate that you and others have a different view.

I would let Brewer v. Williams come down as written, with the various concurring and dissenting opinions. As my concurrence makes clear, the case is highly fact specific. There is little difference among us as to the applicable principle. It will not foreclose our considering a modification of the exclusionary rule in a more appropriate case. When such a case arises, I think you will find me a congenial spirit.

Sincerely,

The Chief Justice

lfp/ss

gc/lab 2/17/77

File

To: Mr. Justice Powell

From: Gene Comey

Re: No. 74-1263 Brewer v. Williams

I have checked the transcript of oral argument to see whether there was any extended discussion of the applicability of the Stone v. Powell rationale to this case. The relevant transcript pages were cited in the Chief Justice's most recent letter to you in this case, and I think it fair to say that the issue was not "argued" in any meaningful sense.

To begin with, the issue was raised by Justice Blackmun:

> QUESTION: Mr. Turner, may I ask you a question? Your brief, of course, was filed in February, before our decision in Stone v. Powell came down. This is a habeas action, as it comes here. Have you given any consideration as to whether the underlying philosophy of Stone v. Powell would have application here?
>
> MR. TURNER: Yes, sir, I think it would. In Stone v. Powell, you have -- that was a Fourth Amendment case, and I think Mr. Chief Justice Burger noted that there there was a strong circumstancial probability of reliability, when you find the goods or the body or something in a search. And here there is a strong circumstancial probability of reliability in his statement, and the honesty and truth of his statement, when he took the police to the body. And I think here, where

> there has been a full hearing and these rights have been adjudicated by the trial court, that the trial court and the Supreme Court of Iowa are at least in as good a position to make the decision, as would be Judge Hanson or would be the Federal Circuit Court of Appeals, and that therefore Stone v. Powell should be extended here, and that this case should be denied on that ground alone. But then, of course, we ask here that the Court overturn its decisions in the Miranda case, that you can't use psychological ploys or subtle interrogation or cajolery. We would think that the historical basis of the Miranda case, of the Fifth Amendment privilege against self-incrimination was not that type of conduct.
>
> Thank you.

I can hardly find the state's answer to Mr. Justice Blackmun's q
Blackmun's question of much help in determining the full implications of an extension of the Stone rationale.

The Chief Justice also cites a portion of the transcript at which counsel for Williams discusses the Stone issue:

> MR. BARTELS: In the few minutes I have left, I thought I perhaps should address a question that was raised by Mr. Justice Blackmun earlier in my opponents' argument, and that is the applicability of the Stone and Rice cases to this particular case.
>
> I think the simplest answer to the question is that issue has never been raised here. It was never raised below. It was not presented in the petition for certiorari. It was not addressed in the petitioner's brief on the merits, and it was not even --

QUESTION: It might be because Stone comes down too strong on --

MR. BARTELS: Your Honor, I think the issue could have been raised, as it was by the litigants in the Stone case. But more significantly, I think, Your Honor, even in the reply brief that was filed last week, there was certainly no mention of this issue by the state.

QUESTION: What would you have to say about Stone v. Powell? Would you think that would control here?

MR. BARTELS: No, Your Honor.

QUESTION: Tell us why.

MR. BARTELS: Well, Your Honor, I think that the rationale in those cases was pretty carefully limited to the purposes of the Fourth Amendment exclusionary rule, and I think this Court has recognized that there are rather different purposes behind that exclusionary rule than, for example, the protection of the right to counsel that is involved in this case. For the Court to apply Stone and Rice in this case would be a tremendous expansion of the Stone and Rice, well beyond the rationale I think that the Court offered in that case, which basically related to the purely rationale of the Fourth Amendment, and I don't think we have that here, particularly with regard to the Sixth Amendment undertones of the case.

Again, the "argument" is not at all helpful.

I suggest that we add, if necessary, a footnote along the following lines at that point of your opinion which states that the issue was neither briefed nor argued:

[1] The state's reply brief, which was filed on September 29, 1976 -- several months after our decision in Stone was announced -- makes no mention of the possible applicability of the Stone rationale to this case. Moreover, at oral argument counsel for the state addressed the Stone issue only after being asked whether he had given any consideration to the matter. Tr. of Oral Arg., at 26-27. The essence of his brief reply was that Stone "should be extended here," id., at 27, an answer which obviously indicates an awareness that Stone is technically not dispositive of this case. The only other discussion of the issue at oral argument came when counsel for Williams addressed the question that had been raised earlier during the state's presentation. Again, counsel's consideration of the issue was brief, noting primarily that application of Stone to this case would be a "tremendous expansion" and "well beyond the rationale" offered in Stone.

In sum, there is no meaningful sense in which it can be said that the issue was "argued" in this case.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 22, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 74-1263 - Brewer v. Williams

First in time [Brewer], first in right would be my disposition.

In view of John's utilization of the Charles Dickens' reference (Mathews v. Goldfarb, concurring opinion, p. 7, n. 9), I see no purpose in its double use in substantially contemporaneous cases. Therefore, I am eliminating the very last sentence of my dissenting opinion in Brewer v. Williams and, as well, footnote 4 on page 4.

The Chief Justice, accordingly, may wish to change his reference to me in the final sentence of his own dissenting opinion in Brewer.

H. A. B.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 22, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 74-1263 - Brewer v. Williams

In view of John's utilization of the Charles Dickens' reference (Mathews v. Goldfarb, concurring opinion, p. 7, n. 9), I see no purpose in its double use in substantially contemporaneous cases. Therefore, I am eliminating the very last sentence of my dissenting opinion in Brewer v. Williams and, as well, footnote 4 on page 4.

The Chief Justice, accordingly, may wish to change his reference to me in the final sentence of his own dissenting opinion in Brewer.

H. A. B.

The dissenting opinion of the Chief Justice states that the Court's holding today "conclusively presumes a suspect is legally incompetent to change his mind and tell the truth until an attorney is present." Post, at 4. I find no justification for this view. On the contrary, the opinion of the Court is explicitly clear that the right to assit-

Proposed change: only if we do not change Castaneda.

II

In discussing the exclusionary rule, the dissenting opinion of The Chief Justice refers to Stone v. Powell, ____ U. S. ____, decided last Term. In that case, we held that a federal court need not apply the exclusionary rule on habeas corpus review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review.[2/] We emphasized that Fourth Amendment claims do not "impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable," and we expressly recognized that Fourth Amendment violations thus "differ in kind from denials of Fifth or Sixth Amendment rights." Id., at ____. The applicability of the rationale of Stone in the Fifth and Sixth Amendment context raises a number of unresolved issues, since many Fifth and Sixth Amendment claims arise in the context of challenges to the fairness of a trial or to the integrity of the fact-finding process. Whether the

2/ [See current fn #2]

3/ Claims of grand jury discrimination are a different matter. See Casteneda v. Partida, No. 75-1552, decided _____. In my view such claims are clearly controlled by the rationale of Stone. Like challenges to the validity of arrests or pre-trial detention, complaints about the composition of the grand jury can have no bearing on the integrity of the subsequent determination of guilt at trial.

[C. MARCH 2, 1977]

Supreme Court of the United States

Memorandum

----------, 19----

Jeuris

There has been no reaction from Potter on the note marked (Pg 2)

Did you think the arrangement of the opinion ought to be cleared up? NO

Sincerely

am not going to
join not in a
position to
make suggestions
to the author.

RBG

March 1, 1977

No. 74-1263 Brewer v. Williams

Dear Chief:

As you will note, I have eliminated Part I from my dissenting opinion in Castaneda. One of my objectives (though by no means the only one) is to avoid the tension that you perceive between my suggestion of a remand in that case, and my lack of enthusiasm for a remand in Brewer.

Despite some surface similarity between the two situations, I have felt no tension between my positions. When the issue is properly before us, I am confident that a majority of the Court will agree that recourse to federal habeas corpus in the Castaneda situation cannot be allowed in view of Stone v. Powell.

On the other hand, as I have noted before, we expressly reserved - in the Stone opinion - the applicability of that decision to the Fifth and Sixth Amendment. My own tentative view is that Stone may well apply to some, but not all, Fifth and Sixth Amendment situations.

If one wishes to extend Stone to the Sixth Amendment, I doubt that Brewer is the case to make that effort. While the facts (as you forcefully argue) are most persuasive in terms of the crime and the finding of the body, these may well be counterbalanced by the agreement made by the police that they violated. I would have some difficulty concluding that the police conduct in Brewer came within the formulation I outlined in Brown v. Illinois.

In short, I am confident that Stone v. Powell would be viewed as a controlling precedent with respect to Castaneda. I have no such confidence - even as to myself - with respect to Brewer. In these circumstances, I would prefer to await

a more favorable setting for testing the applicability of Stone to the Sixth Amendment.

In saying all of this, I quite understand - and respect - your views to the contrary.

Sincerely,

The Chief Justice

lfp/ss

TICES WHITE and BLACKMUN, I categorically reject the absurd notion that the police in this case were guilty of unconstitutional misconduct, or any conduct justifying the bizarre result reached by the Court. Apart from a brief comment on the merits, however, I wish to focus on the irrationality of applying the increasingly discredited exclusionary rule to this case.

(1)

The Court Concedes Williams' Disclosures Were Voluntary

Under well-settled precedents which the Court freely acknowledges, it is very clear that Williams had made a valid waiver of his Fifth Amendment right to silence and his Sixth Amendment right to counsel when he led police to the child's body. Indeed, even under the Court's analysis I do not understand how a contrary conclusion is possible.

The Court purports to apply as the appropriate constitutional waiver standard the familiar "intentional relinquishment or abandonment of a known right or privilege" test of *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). *Ante*, at 15. The Court assumes, without deciding, that Williams' conduct and statements were voluntary. *Ante*, at 9. It concedes,

---

derer goes free." *People* v. *Defore*, 242 N. Y. 13, 21, 23–24, 150 N. E. 585, 587, 588 (1926).

Perhaps one of the most extraordinary aspects of this extraordinary holding is *ante*, at 18 n. 12. There the Court states that it "'does not touch upon the issue of what evidence, if any, beyond the incriminating statements themselves must be excluded as "fruit of the poisonous tree."'" Unless the Court explicitly states otherwise I would read the Court's opinion—and I submit the state courts are free to read it—as permitting Detective Learning to explain how the body was found so long as he does not repeat any "incriminating *statements*" made by Williams. To send this case back with intimations that a new trial is a realistic possibility without clarifying this point ~~would be preposterous~~ is a grave failure to perform our function to give guidance to the courts whose holdings we review.

The Court purports to leave open whether even the coroner's autopsy report is to be excluded as being "fruit of the poisonous tree." Presumably the Court is alluding in n. 12 to *Wong Sun* v. *United States*, 371 U. S. 471 (1963), but the opinion does not say so.

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

From: Mr. Justice Marshall

Circulated: MAR 2 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–1263

Lou V. Brewer, Warden, Petitioner, *v.* Robert Anthony Williams, aka Anthony Erthel Williams.

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

[March —, 1977]

MR. JUSTICE MARSHALL, concurring.

I concur wholeheartedly in my Brother STEWART's opinion for the Court, but add these words in light of the dissenting opinions filed today. The dissenters have, I believe, lost sight of the fundamental constitutional backbone of our criminal law. They seem to think that Detective Leaming's actions were perfectly proper, indeed laudable, examples of "good police work." In my view, good police work is something far *different from* catching the criminal at any price. It is equally important that the police, as guardians of the law, fulfill their responsibility to obey its command scrupulously. For "in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano* v. *New York*, 360 U. S. 315, 320–321 (1959).

In this case, there can be no doubt that Detective Leaming consciously and knowingly set out to violate Williams' Sixth Amendment right to counsel and his Fifth Amendment privilege against self-incrimination, as Leaming himself understood those rights. Leaming knew that Williams had been advised by two lawyers not to make any statements to police until he conferred in Des Moines with his attorney there, Mr. McKnight. Leaming surely understood, because he had over-

heard McKnight tell Williams as much, that the location of the body would be revealed to police. Undoubtedly Leaming realized the way in which that information would be conveyed to the police: McKnight would learn it from his client and then he would lead police to the body. Williams would thereby be protected by the attorney-client privilege from incriminating himself by directly demonstrating his knowledge of the body's location, and the unfortunate Davis child could be given a "Christian burial."

Of course, this scenario would accomplish all that Leaming sought from his investigation except that it would not produce incriminating statements or actions from Williams. Accordingly, Leaming undertook his charade to pry such evidence from Williams. After invoking the no-passengers rule to prevent attorney Kelly from accompanying the prisoner, Leaming had Williams at his mercy: during the three- or four-hour trip he could do anything he wished to elicit a confession. The detective demonstrated once again "that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of 'persuasion.'" *Blackburn* v. *Alabama*, 361 U. S. 199, 206 (1960).

Leaming knowingly isolated Williams from the protection of his lawyers and during that period he intentionally "persuaded" him to give incriminating evidence. It is this intentional police misconduct—not good police practice—that the Court rightly condemns. The heinous nature of the crime is no excuse, as the dissenters would have it, for condoning knowing and intentional police transgression of the constitutional rights of a defendant. If Williams is to go free—and given the ingenuity of Iowa prosecutors on retrial or in a civil commitment proceeding, I doubt very much that there is any chance a dangerous criminal will be loosed on the streets, the blood-curdling cries of the dissents notwithstanding—it will hardly be because he deserves it. It will be because Detective Leaming, knowing full well that he risked reversal of Williams'

conviction, intentionally denied Williams the right of *every* American under the Sixth Amendment to have the protective shield of a lawyer between himself and the awesome power of the State.

And if we are to indulge in quotations from our distinguished predecessors, I would choose not the rhetoric of Justice Cardozo in the *Defore* case, see opinion of the Chief Justice, *post,* at 1, and n. 1, but rather the closing words of Justice Brandeis' great dissent in *Olmstead* v. *United States,* 277 U. S. 438, 471, 485 (1928):

> "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

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

From: Mr. Justice Marshall

Circulated: MAR 2 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–1263

Lou V. Brewer, Warden, Petitioner, *v.* Robert Anthony Williams, aka Anthony Erthel Williams.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[March —, 1977]

MR. JUSTICE MARSHALL, concurring.

I concur wholeheartedly in my Brother STEWART's opinion for the Court, but add these words in light of the dissenting opinions filed today. The dissenters have, I believe, lost sight of the fundamental constitutional backbone of our criminal law. They seem to think that Detective Leaming's actions were perfectly proper, indeed laudable, examples of "good police work." In my view, good police work is something far different from catching the criminal at any price. It is equally important that the police, as guardians of the law, fulfill their responsibility to obey its command scrupulously. For "in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano* v. *New York*, 360 U. S. 315, 320–321 (1959).

In this case, there can be no doubt that Detective Leaming consciously and knowingly set out to violate Williams' Sixth Amendment right to counsel and his Fifth Amendment privilege against self-incrimination, as Leaming himself understood those rights. Leaming knew that Williams had been advised by two lawyers not to make any statements to police until he conferred in Des Moines with his attorney there, Mr. McKnight. Leaming surely understood, because he had over-

heard McKnight tell Williams as much, that the location of the body would be revealed to police. Undoubtedly Leaming realized the way in which that information would be conveyed to the police: McKnight would learn it from his client and then he would lead police to the body. Williams would thereby be protected by the attorney-client privilege from incriminating himself by directly demonstrating his knowledge of the body's location, and the unfortunate Davis child could be given a "Christian burial."

Of course, this scenario would accomplish all that Leaming sought from his investigation except that it would not produce incriminating statements or actions from Williams. Accordingly, Leaming undertook his charade to pry such evidence from Williams. After invoking the no-passengers rule to prevent attorney Kelly from accompanying the prisoner, Leaming had Williams at his mercy: during the three- or four-hour trip he could do anything he wished to elicit a confession. The detective demonstrated once again "that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of 'persuasion.'" *Blackburn* v. *Alabama*, 361 U. S. 199, 206 (1960).

Leaming knowingly isolated Williams from the protection of his lawyers and during that period he intentionally "persuaded" him to give incriminating evidence. It is this intentional police misconduct—not good police practice—that the Court rightly condemns. The heinous nature of the crime is no excuse, as the dissenters would have it, for condoning knowing and intentional police transgression of the constitutional rights of a defendant. If Williams is to go free—and given the ingenuity of Iowa prosecutors on retrial or in a civil commitment proceeding, I doubt very much that there is any chance a dangerous criminal will be loosed on the streets, the blood-curdling cries of the dissents notwithstanding—it will hardly be because he deserves it. It will be because Detective Leaming, knowing full well that he risked reversal of Williams'

conviction, intentionally denied Williams the right of *every* American under the Sixth Amendment to have the protective shield of a lawyer between himself and the awesome power of the State.

And if we are to indulge in quotations from our distinguished predecessors, I would choose not the rhetoric of Justice Cardozo in the *Defore* case, see opinion of the Chief Justice, *post,* at 1, and n. 1, but rather the closing words of Justice Brandeis' great dissent in *Olmstead* v. *United States,* 277 U. S. 438, 471, 485 (1928):

> "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

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

From: Mr. Justice Stevens

Circulated: 3/2/77

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1263

Lou V. Brewer, Warden, Petitioner, *v.* Robert Anthony Williams, aka Anthony Erthel Williams.

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

[March —, 1977]

MR. JUSTICE STEVENS, concurring.

The reasons why the law requires the result we reach today are accurately explained by MR. JUSTICE STEWART for the Court and by MR. JUSTICE POWELL. The strong language in the dissenting opinions prompts me to add this brief comment about the Court's function in a case such as this.

Nothing that we write, no matter how well reasoned or forcefully expressed, can bring back the victim of this tragedy or undo the consequences of the official neglect which led to the respondent's escape from a State mental institution. The emotional aspects of the case make it difficult to decide dispassionately, but do not qualify our obligation to apply the law with an eye to the future as well as with concern for the result in the particular case before us.

Underlying the surface issues in this case is the question whether a fugitive from justice can rely on his lawyer's advice given in connection with a decision to surrender voluntarily. The defendant placed his trust in an experienced Iowa trial lawyer who in turn trusted the Iowa law enforcement authorities to honor a commitment made during negotiations which led to the apprehension of a potentially dangerous person. Under any analysis, this was a critical stage of the proceeding in which the participation of an independent professional was

of vital importance to the accused and to society. At this stage—as in countless others in which the law profoundly affects the life of the individual—the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen. If, in the long run, we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise to this barrister.*

*The importance of this point is emphasized by the State's refusal to permit counsel to accompany his client on the trip from Davenport to Des Moines.

Cont Revised p. 2, dissent 3/8/77 Regards WEB

TICES WHITE and BLACKMUN, I categorically reject the absurd notion that the police in this case were guilty of unconstitutional *misconduct*, or any conduct justifying the bizarre result reached by the Court. Apart from a brief comment on the merits, however, I wish to focus on the irrationality of applying the increasingly discredited exclusionary rule to this case.

(1)

The Court Concedes Williams' Disclosures Were Voluntary

Under well-settled precedents which the Court freely acknowledges, it is very clear that Williams had made a valid waiver of his Fifth Amendment right to silence and his Sixth Amendment right to counsel when he led police to the child's body. Indeed, even under the Court's analysis I do not understand how a contrary conclusion is possible.

The Court purports to apply as the appropriate constitutional waiver standard the familiar "intentional relinquishment or abandonment of a known right or privilege" test of *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). *Ante*, at 15. The Court assumes, without deciding, that Williams' conduct and statements were voluntary. *Ante*, at 9. It concedes,

---

derer goes free." *People* v. *Defore*, 242 N. Y. 13, 21, 23–24, 150 N. E. 585, 587, 588 (1926).

Perhaps one of the most extraordinary aspects of this extraordinary holding is *ante*, at 18 n. 12. There the Court states that it "'does not touch upon the issue of what evidence, if any, beyond the incriminating statements themselves must be excluded as "fruit of the poisonous tree."'" Unless the Court explicitly states otherwise I would read the Court's opinion—and I submit the state courts are free to read it—as permitting Detective Learning to explain how the body was found so long as he does not repeat any "incriminating *statements*" made by Williams. ¶

¶ Absent further explication by the Court, today's opinion may be fairly read as applying the exclusionary rule to no evidence "beyond the incriminating statements themselves", presumably because those statements are held to be "fruit of the poisonous tree." Since this ambiguous expression in the Court's opinion is followed by the Court's observation challenging Mr. Justice Blackmun's comment that retrial will be futile, the State courts will be fully justified in reading today's holding as requiring exclusion of nothing except Williams' "statements themselves." An explanation by Detective Learning that Williams guided them to the body is apparently admissible so long as Williams' statements are not repeated. It is of course common for witnesses to describe conduct of an accused without repeating any conversation.

March 23, 1977

No. 74-1263 Brewer v. Williams

Justice Powell--

We vote unanimously that you showed considerable restraint given the Chief's "performance." We have sent out for a bushel of rotten tomatoes.

Spencer
Sally
Linda
Charlie
Tyler
Gene
David

lfp/ss 3/28/77

File

MEMORANDUM

TO: Gene Comey DATE: March 28, 1977

FROM: Lewis F. Powell, Jr.

Brewer v. Williams

Columnist George Will (Sunday's Post) did not seem terribly enthusiastic about the majority opinion in the above case.

He even suggested, as I read him, that I did not know the difference between the day before and the day after Christmas. Although there is often some truth to this, I would like to correct my opinion if it errs in this respect.

L.F.P., Jr.

ss

lfp/ss 3/28/77

MEMORANDUM

TO: Gene Comey DATE: March 28, 1977

FROM: Lewis F. Powell, Jr.

Brewer v. Williams

Columnist George Will (Sunday's Post) did not seem terribly enthusiastic about the majority opinion in the above case.

He even suggested, as I read him, that I did not know the difference between the day before and the day after Christmas. Although there is often some truth to this, I would like to correct my opinion if it errs in this respect.

L.F.P., Jr.

ss

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
		10/7/76						
await dissent 12/16/76 1st draft	~~1st draft~~ ~~Concurring~~ ~~dissenting~~	1st draft 11/24/76	join PS 11/29/76	join PS 11/24/76	will dissent 11/30/76	join PS 12/3/76	join HAB 12/2/76	join PS 11/29/76
1/26/77 2nd draft 2/25/77		2nd draft 11/29/76 3rd draft	will write separately 12/9/76	concurring opinion 1st Draft 3/2/77	~~1st draft~~ 12/2/76 2nd draft	Concurring opinion 3/4/77 1st draft	join BRW 1/13/77	concurring opinion 1st Draft 3/2/77
Revised p. 2 of 2nd draft 3/3/77 3rd Draft 3/21/77		12/2/76 4th draft 1/4/77	dissent 1st draft 12/28/76	2nd draft 3/21/77	1/10/77 join BRW			2nd draft 3/4/77
		5th draft 3/11/77	join HAB 1/13/77 2nd draft 1/14/77		1/13/77 3rd draft 2/8/77			
					74-1263 Brewer v. Williams			

The Georgetown Law Journal
Volume 66 Number 2 December 1977

NOTE

THE UNITED STATES COURTS OF APPEALS:
1976-1977 TERM CRIMINAL LAW AND PROCEDURE

FOREWORD: *BREWER V. WILLIAMS*—A HARD LOOK AT A DISCOMFITING RECORD

BY YALE KAMISAR

For Justice Powell,
with warm regard
and best wishes,
Yale

What really happened
on the long drive back
to Des Moines?