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John V. Boggins

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“INEVITABLE DISCOVERY” OR INEVITABLE DEMISE OF THE EXCLUSIONARY RULE?

NIX v. WILLIAMS

104 S. Ct. 2501 (1984)

On June 11, 1984 in the case of *Nix v. Williams*, the Supreme Court adopted a further exception to the exclusionary rule, the “inevitable discovery” doctrine.¹ The inevitable discovery doctrine permits the admission of evidence obtained in spite of a violation of a defendant’s constitutional rights, where the prosecution can convince the trier of fact by a preponderance that this evidence would have been discovered regardless of any such violation.²

The *Williams* case has a long and complicated history, having come to the Supreme Court on a previous occasion.³ A review of the factual background of the case is essential in order that it be fully understood.⁴

On December 24, 1968, a ten year old girl was abducted from the Des Moines, Iowa YMCA. Witnesses linked Williams, an escaped mental patient,⁵ to the girl’s disappearance.⁶ On Christmas Day the defendant’s car was found about one hundred sixty miles east of Des Moines in the town of Davenport, Iowa and a warrant for Williams’ arrest was issued soon thereafter.⁷ On the morning of the 26th Williams called Henry McKnight, his Des Moines attorney. Mr. McKnight advised the defendant to surrender and Williams did so to the Davenport police that same morning.⁸ Meanwhile, attorney McKnight had gone to the Des Moines Police Department to speak with the authorities about his client’s surrender and imminent return to Des Moines.⁹

While McKnight was still at the police station Williams called again. In

¹*Nix v. Williams*, 104 S. Ct. 2501 (1984). Burger, C.J., delivered the opinion of the Court, in which White, Blackmun, Powell, Rehnquist, and O’Connor, J.J., joined. White, J., filed a concurring opinion. Stevens, J., filed an opinion concurring in the judgment. Brennan, J., filed a dissenting opinion, in which Marshall, J., joined.

²*Id.* at 2510-11.

³*Brewer v. Williams*, 430 U.S. 387 (1977).

⁴Because the Court’s opinion does not adequately set forth all of the pertinent facts, some of them will be gleaned from the opinion and order of the United States District Court for the Southern District of Iowa, which granted Williams’ first petition for writ of habeas corpus. *Williams v. Brewer*, 375 F. Supp. 170 (S.D. Iowa 1974).

⁵*Id.* at 173-174.

⁶*Id.* at 172.

⁷*Id.*

⁸*Id.*

⁹*Id.* at 172-73.

the presence of one Detective Leaming and Police Chief Nichols, McKnight advised Williams not to speak to the police during the trip back to Des Moines and that Williams would not be interrogated during the trip.¹⁰ Arrangements were made whereby Detective Leaming was to pick up the prisoner in Davenport and return him to Des Moines. It was expressly agreed between Attorney McKnight and Detective Leaming that Williams would not be questioned about the crime during the trip so that the defendant could first consult with his attorney.¹¹

Prior to Leaming's arrival in Davenport, Williams also consulted with another attorney, Thomas Kelly who also advised the defendant to maintain silence.¹² After Leaming arrived, Kelly requested permission to accompany them on the return trip but was refused.¹³ Leaming though agreed with Kelly that the defendant would not be questioned during the return trip.¹⁴ Williams had been given *Miranda* warnings more than once¹⁵ before the start of the trip but not during the trip itself and he expressly told Leaming that he did not want to make any statements before talking to his attorney.¹⁶

Despite these statements by the defendant and in spite of two express agreements with both of Williams' attorneys, Leaming initiated a wide ranging conversation with Williams admittedly¹⁷ with the intention of gaining informa-

¹⁰*Id.* at 173.

¹¹*Id.*

¹²*Id.*

¹³*Id.*

¹⁴*Id.*

¹⁵*Miranda* warnings were given upon Williams' arrest at the Davenport police station, at his arraignment, and by Detective Leaming prior to the start of the return trip. *Brewer v. Williams*, 430 U.S. 387, 390-91 (1977).

¹⁶*Williams v. Brewer*, 375 F. Supp. 170, 173 (S.D. 1974). Detective Leaming acknowledged that the defendant was represented by counsel, and hinted at an ulterior purpose for the trip with the following statement to Williams: [W]e 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." *Brewer v. Williams*, 430 U.S. 387, 391 (1977).

¹⁷In testimony Leaming admitted his purpose was to elicit incriminating information from the prisoner:

Q. 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.

Williams v. Brewer, 375 F. Supp. 170, 174 (S.D. Iowa 1974).

tion about the location of the missing girl's body. The topics discussed included Williams deep religious convictions¹⁸ and that Leaming bore no ill will toward him and would protect him from others.¹⁹ The conversation culminated in the following "Christian Burial speech by Leaming:

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 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 [E]ve 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.²⁰

Leaming also stated that he "knew" the body was near Mitchellville when in reality Leaming possessed no such knowledge.²¹

Shortly after the "Christian Burial" speech Williams inquired whether the girl's shoes had been found.²² Leaming discussed this evidence with the defendant, who led the officers to a gas station where the shoes had been left but the officers failed to find them.²³ The detective and Williams then discussed a blanket used in the crime and went to a rest area where the blanket had been left but it too, was not found.²⁴ Leaming and Williams then continued the conversation about religion and Williams soon said he would show police where the body was.²⁵ At this point the volunteers who were searching for the body were called off²⁶ and Williams directed the police to the little girl's body.²⁷

Following the denial of a motion to suppress and over his counsel's objections,²⁸ all of Williams' statements and the evidence of the body were admitted into evidence at his trial. Williams was convicted of murder and on appeal the

¹⁸Leaming was aware that Williams was deeply religious. *Brewer v. Williams*, 430 U.S. 387, 392 (1977).

¹⁹*Williams v. Brewer*, 375 F. Supp. 170, 174-75 (S.D. Iowa 1974).

²⁰*Brewer v. Williams*, 430 U.S. 387, 392-93 (1977).

²¹*Nix v. Williams*, 104 S. Ct. 2501, 2505 (1984).

²²*Williams v. Brewer*, 375 F. Supp. 170, 175 (S.D. Iowa 1974).

²³*Id.*

²⁴*Id.*

²⁵*Id.*

²⁶*Nix v. Williams*, 104 S. Ct. at 2505 (1984).

²⁷*Williams v. Brewer*, 375 F. Supp. 170, 175 (S.D. Iowa 1974).

²⁸*Id.*

Iowa Supreme Court affirmed, finding that Williams had waived his constitutional rights before making his statements to Leaming and therefore the challenged evidence was admissible.²⁹

Williams then sought a writ of habeas corpus in Federal District Court for the Southern District of Iowa. The district court determined that Williams had not waived his rights.³⁰ The court also found that the Iowa courts had applied the wrong constitutional standard in their finding of waiver,³¹ and that Leaming's actions amounted to interrogation. Therefore, Williams' fifth amendment privilege against self-incrimination and his sixth amendment right to counsel were violated.³²

The United States Court of Appeals for the Eighth Circuit heard Iowa's appeal of the order granting the writ. It found that the district court was "eminently correct" in holding that the defendant's fifth and sixth amendment rights were violated by Leaming's actions and that he had not waived these rights.³³

Iowa again appealed, and the United States Supreme Court granted certiorari.³⁴ In this first appeal to the Supreme Court, (Williams I), the Court did not choose to review the case on the basis of *Miranda* violations, whether the defendant's statements were involuntarily made or whether his fifth amendment rights were violated.³⁵ The Court instead examined the question of whether Williams' sixth amendment right to counsel was violated.³⁶

In a five to four decision the Court answered this question in the affirmative, finding that Detective Leaming acted deliberately in eliciting information from Williams thus denying him his right to assistance of counsel.³⁷ The Court then reluctantly affirmed the judgments of the district court and the court of appeals³⁸ but in doing so set the stage for the retrial of Williams through the use of a footnote.³⁹

In this footnote the Court noted that the district court limited its decision

²⁹State v. Williams, 182 N.W.2d 396, 401-02 (Iowa 1971).

³⁰See, Williams v. Brewer, 375 F. Supp. 170, 181-82 (S.D. Iowa 1974). The district court noted that waiver was a question of law and not of fact, in its determination of the applicability of 28 U.S.C. §2254 (1977).

³¹*Id.* at 182.

³²*Id.* at 185.

³³See, Williams v. Brewer, 509 F.2d 227 (8th Cir. 1974). (The court of appeals did not reach the issue of whether Williams' statements were involuntarily made).

³⁴423 U.S. 1031 (1975).

³⁵Both the district court and the circuit court of appeals did make such findings. See, Williams v. Brewer, 375 F. Supp. 170 (S.D. Iowa 1974); Williams v. Brewer, 509 F.2d 227 (8th Cir. 1974).

³⁶Brewer v. Williams, 430 U.S. 387, 398, 400 (1977).

³⁷*Id.* at 397-400

³⁸*Id.* at 406.

³⁹*Id.* at 406-07 n.12.

to Williams' incriminating statements alone.⁴⁰ Here the Court then cryptically went on to mention that:

[w]hile neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams.⁴¹

Because the state courts had admitted Williams' incriminating statements, the state did not consider whether the physical evidence to which Williams had led the police might be admissible even if his statements were not. Even though this issue was not before the Supreme Court, through this footnote the Court implied that the state might re-try Williams using the physical evidence alone, without divulging its source. The Court left it to the state to determine whether this type of evidentiary use was proper but strongly indicated such use was permissible.⁴² Iowa responded in kind with a retrial.⁴³

At the second trial, Williams' incriminating statements to Leaming were not admitted into evidence due to the Supreme Court's holding in *Williams I.*⁴⁴ However, the trial court did admit the physical evidence discovered as a result of these statements, on the ground that this evidence would have inevitably been discovered by the search party.⁴⁵ Williams was again found guilty.

In an extensive opinion the Iowa Supreme Court affirmed the conviction.⁴⁶ Before proceeding to that court's ruling, it is necessary to first consider the nature of the central controversy in the instant case, the exclusionary rule and particularly the exceptions to it.

The rule, first promulgated by the Supreme Court in 1914,⁴⁷ renders evidence inadmissible when it is obtained in violation of the Constitution, statutes, or court rules.⁴⁸ It was made applicable to the states through the fourteenth amendment in 1961.⁴⁹ The rule is intended to discourage illegal government activity in gaining evidence by making that evidence unusable.⁵⁰ The rule

⁴⁰*Id.*

⁴¹*Id.*

⁴²*Id.*

⁴³Ironically, The Chief Justice found this a remote possibility at the time footnote 12 was written. *See Id.* at 416-417. n.1. (Burger, J., dissenting).

⁴⁴*Brewer v. Williams*, 430 U.S. 387 (1977).

⁴⁵*State v. Williams*, 285 N.W.2d 248, 262 (Iowa 1979).

⁴⁶*Id.*

⁴⁷*Weeks v. United States*, 232 U.S. 383 (1914).

⁴⁸Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

⁴⁹*Mapp v. Ohio*, 367 U.S. 643 (1961).

⁵⁰Maguire, *How To Unpoison The Fruit — The Fourth Amendment And The Exclusionary Rule*, 55 J. CRIM. L. & POLICE SCI. 307, 308 (1964).

has always been controversial because guilty persons occasionally go free, since evidence probative of truth is withheld from the fact-finder when the rule is applied. Therefore, the interest in deterring unlawful government activity conflicts with society's interests in being protected from and punishing criminals.⁵¹

There are two types of illegally obtained evidence, primary and derivative.⁵² Primary evidence is that which directly results from the illegality, such as material seized in an illegal search. Derivative evidence is that evidence obtained through the primary illegality such as the names of witnesses found in documents illegally seized.⁵³ When illegally obtained evidence is derivative in nature it is known as "the fruit of the poisonous tree," the primary evidence being the "tree" itself.⁵⁴ In deciding whether to apply the exclusionary rule courts generally examine how closely the acquisition of the evidence is connected to the illegal conduct of the authorities.⁵⁵

Because of the conflicting interests surrounding the application of the rule, exceptions to it have evolved. Since the exclusionary rule would be meaningless if primary evidence was admitted, the exceptions necessarily deal with the admission of derivative evidence, although it too often falls under the umbrella of the exclusionary rule.⁵⁶

Again, the exceptions to the rule revolve around the question of how closely related the constitutional violation is to the incriminating evidence.⁵⁷ Among these exceptions are the "independent source" and the "attenuated link" doctrines.⁵⁸

The attenuated link doctrine is attributed to the case of *Nardone v. United States*.⁵⁹ In *Nardone* the defendant was tried and convicted of tax fraud but his conviction was reversed by the Supreme Court⁶⁰ because the prosecution gained evidence through illegal wiretaps.⁶¹ The government retried Nardone. This time the conversations were not admitted but the trial court allowed the prosecution to use the knowledge gained from them. Nardone was again convicted and again the Supreme Court reversed, prohibiting such

⁵¹Note, *Fruit of the Poisonous Tree — A Plea for Relevant Criteria*, 115 U. PA. L. REV. 1136, 1137 (1967).

⁵²See, Annot., 43 A.L.R.3d 385, 390 (1972).

⁵³*Id.* at 390., Note, *Supra* note 51, at 1145.

⁵⁴Annot., 43 A.L.R.3d 385, 390 (1972). The phrase "fruit of the poisonous tree" is credited to Justice Frankfurter in *Nardone v. United States*, 308 U.S. 338, 341 (1939).

⁵⁵Annot., 43 A.L.R.3d 385, 390 (1972).

⁵⁶See, Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 CALIF. L. REV. 579 (1968).

⁵⁷*United States v. Brookins*, 614 F.2d 1037, 1041, (5th Cir. 1980).

⁵⁸*Id.*

⁵⁹308 U.S. 338 (1939).

⁶⁰*Nardone v. United States*, 302 U.S. 379 (1937).

⁶¹*Id.* at 339.

derivative use.⁶² Although the Court held that the knowledge illegally acquired could not be admitted, it went on to state that in a different case the "connection [between the illegality and the Government's proof] may have been so attenuated as to dissipate the taint."⁶³ Subsequently, such evidence has been admitted when the connection between the constitutional violation and the evidence itself is too remote to serve what are perceived as the deterrent purposes behind the exclusionary rule.⁶⁴ This doctrine was not examined by the Supreme Court in *Williams*, apparently because the evidence was directly obtained through violations of Williams' rights.⁶⁵

The independent source rule allows admission, because the evidence was not obtained as the result of a violation but through an unrelated source.⁶⁶ This doctrine evolved from the case of *Silverthorne Lumber Co. v. United States*.⁶⁷ In *Silverthorne* corporate documents were seized, photographed and copied in an illegal search of corporate offices by representatives of the Department of Justice, and the United States Marshall.⁶⁸ The government sought to use against the defendants the knowledge gained in the illegal search even though the documents themselves could not be used in court. In writing for the Court, Justice Holmes stated that:

The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.⁶⁹

The Supreme Court later hinted at yet another exception in the case of *Wong Sun v. United States*.⁷⁰ In that case several illegal arrests and searches were made leading to the discovery of narcotics. Over counsel's objections this evidence was admitted at trial.⁷¹ The prosecution acknowledged the evidence would not have been found absent the illegalities.⁷² In its holding, the Court rules that almost all of the evidence was improperly admitted as to all but one of the defendants.⁷³ In regard to the inadmissible evidence, the Court held that

⁶²*Id.* at 340-41.

⁶³*Id.* at 341.

⁶⁴*United States v. Brookins*, 614 F.2d 1037, 1043 (5th Cir. 1980).

⁶⁵*Nix v. Williams*, 104 S.Ct. 2501, 2509 (1984).

⁶⁶*Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

⁶⁷*Id.*

⁶⁸*Id.* at 390-91.

⁶⁹*Id.* at 392.

⁷⁰371 U.S. 471 (1963).

⁷¹*Id.* at 477.

⁷²*Id.* at 487.

⁷³*Id.* at 487, 491.

the attenuation and independent source doctrines were not applicable,⁷⁴ but qualified that remark by saying:

We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'⁷⁵

The Court did not clarify this statement nor explicitly create a new exception but only concluded that the challenged evidence was "come at by the exploitation of [the] illegality" and therefore inadmissible.⁷⁶ Nevertheless, these words later came to be regarded as allowing admission where the prosecution can prove that the evidence would "inevitably" discovered.⁷⁷

In evaluating the above criteria in the *Williams* case, the Iowa Supreme Court exhaustively considered relevant case law and comments.⁷⁸ It carefully qualified the words "inevitable discovery," finding them over extensive.⁷⁹ That court viewed the doctrine as adjunct to the independent source rule and preferred the term "hypothetical independent source."⁸⁰

The Iowa court came to the conclusion that a two part test was necessary in order to render this exception's application constitutional.⁸¹

First, use of the doctrine should be permitted only when the police have not acted in bad faith to accelerate the discovery of the evidence in question. Second, the State must prove that the evidence would have been found without the unlawful activity and how that discovery would have occurred.⁸²

The Iowa Supreme Court acknowledged the "competing interests"⁸³ of enforcing the law and protecting constitutional rights, these interests being balanced under the attenuation exception and felt these interests were also relevant to the application of the inevitable discovery exception.⁸⁴ It also recog-

⁷⁴*Id.* at 487.

⁷⁵*Id.* at 488 (quoting Maguire, *Evidence of Guilt* §5.07, at 221 (1959)).

⁷⁶*Wong Sun*, 371 U.S. at 488.

⁷⁷*See*, *Nix v. Williams*, 104 S. Ct. 2501 (1984); *United States v. Apker*, 705 F.2d 293 (8th Cir. 1983); *United States v. Brookins*, 614 F.2d 1037 (5th Cir. 1980); Pitler, *supra* note 56, at 579.

⁷⁸*State v. Williams*, 285 N.W.2d 248, 256-58 (Iowa 1979).

⁷⁹*Id.* at 256, n.3.

⁸⁰*Id.* at 256, 258.

⁸¹*Id.* at 258.

⁸²*Id.* (citing 3 LaFare, *Search and Seizure* §11.4, at 622 (1978)).

⁸³*State v. Williams*, 285 N.W.2d at 258.

⁸⁴*Id.*

nized the rationale behind the exclusionary rule; deterrence of misconduct, as well as protection of "judicial integrity."⁸⁵

The Iowa Supreme Court also intended that prosecutors prove an absence of bad faith on the part of the police, to fortify the deterrence purposes behind the exclusionary rule.⁸⁶ This was a response to criticism that without this requirement police would actively violate citizens' rights in order to precipitate the discovery of evidence.⁸⁷ As to criticism that the rule would be applied in a reckless manner,⁸⁸ the court required that the state prove that the evidence *would* have been discovered and not that it *might* have been discovered.⁸⁹ Furthermore, it insisted such a showing result from the record of each case under consideration and not by analogy to other cases of factual similarity.⁹⁰ Lastly, the Iowa Supreme Court noted that in Iowa added protection is offered the accused because where findings are challenged on appeal in that state, appellate courts review determinations of both law and fact *de novo*.⁹¹ The Iowa Supreme Court then went on to affirm Williams' second conviction, on the grounds that the body would have been discovered regardless of Leaming's unconstitutional actions and therefore the deterrence aspect of the exclusionary rule would serve no purpose.⁹²

Williams again sought a writ of habeas corpus in the Federal District Court for the Southern District of Iowa and again on the grounds that his fifth amendment privilege against self-incrimination and sixth amendment right to counsel were contravened by the admission of the evidence.⁹³ This time the district court denied the writ.⁹⁴ It agreed with the Iowa Supreme Court that the

⁸⁵*Id.* at 259.

⁸⁶*Id.*

⁸⁷The Iowa court realized that police "bad faith" was a highly nebulous concept:

Obviously, bad faith means something more than just acting unlawfully, for if the police action was unlawful the issue would never have arisen in the first place. And the question of bad faith may require different treatment, depending on the nature of the lawless action taken by the police. That is, the initial unlawful activity might, for example, be a violation of either the fourth, the fifth or the sixth amendments. Police action taken solely to avoid the warrant clause of the fourth amendment, might well provide a clear cut case for refusal to apply the inevitable discovery exception. In such a situation the application of inevitable discovery would result in the deletion of the warrant clause from the fourth amendment because that clause's sole purpose is to insert a magistrate between the proposed subject of the search and police officers who assert probable cause for the search. By this discussion we do not mean that violations of the fourth amendment will receive any greater or lesser scrutiny than violations of other constitutional safeguards. Rather, we intend only to illustrate what we mean when we refer to bad faith on the part of the police.

Id.

⁸⁸*Id.*

⁸⁹*Id.* at 260 (emphasis in original).

⁹⁰*Id.*

⁹¹*Id.*; *Armento v. Baughman*, 290 N.W.2d 11, 15 (Iowa 1980); *State v. Ege*, 274 N.W.2d 350, 352 (Iowa 1979).

⁹²*State v. Williams*, 285 N.W.2d at 262.

⁹³*Williams v. Nix*, 528 F. Supp. 664, 666 (S.D. Iowa 1981).

⁹⁴*Id.* at 675.

deterrence purposes of the exclusionary rule were preserved by the Iowa court's requirements that the prosecution prove discovery inevitable and that the police did not act in bad faith.⁹⁵

This denial was appealed to the United States Court of Appeals for the Eighth Circuit, which reversed the district court on the basis that Leaming violated Williams' sixth amendment right to counsel.⁹⁶ A rehearing *en banc* was denied.⁹⁷

Although the circuit court "assumed, without deciding, that there [was] an inevitable discovery exception to the Exclusionary Rule,"⁹⁸ it held that the good faith requirement imposed by the Iowa Supreme Court was not even considered by the trial court.⁹⁹ Nor did the circuit court consider whether the record supported the conclusion that the discovery of the body was inevitable or whether the preponderance standard was proper.¹⁰⁰

The case reached the Supreme Court for the second time as Iowa appealed the Eighth Circuit's ruling. The Supreme Court granted certiorari¹⁰¹ to consider whether admission of evidence under an inevitable discovery exception to the exclusionary rule is proper.¹⁰²

In this new decision the Court recognized and adopted the inevitable discovery doctrine¹⁰³ but explicitly negated the Iowa Supreme Court's good faith requirement¹⁰⁴ and accepted the preponderance standard.¹⁰⁵

After reviewing the facts, Chief Justice Burger recognized that *Silverthorne*¹⁰⁶ barred derivative as well as direct evidence when obtained in violation of the Constitution.¹⁰⁷ He went on to state that the exception delineated in *Wong Sun*¹⁰⁸ "pointedly negated the kind of good faith requirement advanced by the Court of Appeals in reviewing the District Court."¹⁰⁹

It is entirely unclear how the Court reached this conclusion. At no point in the *Wong Sun* opinion does that Court mention the good faith or the bad

⁹⁵*Id.* at 670.

⁹⁶*Williams v. Nix*, 700 F.2d 1164, 1173 (8th Cir. 1983).

⁹⁷*Id.* at 1175.

⁹⁸*Id.* at 1169.

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Cert. granted*, 103 S. Ct. 2427 (1983).

¹⁰²*Nix v. Williams*, 104 S. Ct. 2501, 2504 (1984).

¹⁰³*Id.* at 2509.

¹⁰⁴*Id.* at 2510.

¹⁰⁵*Id.* at 2509.

¹⁰⁶*Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

¹⁰⁷*Nix v. Williams*, 104 S. Ct. at 2508.

¹⁰⁸*Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

¹⁰⁹*Nix v. Williams*, 104 S. Ct. at 2508.

faith of the police officers involved. Indeed, though the *Wong Sun* Court did not expressly condemn the officers' conduct in that case, that opinion is replete with references to police misconduct and constitutional violations.¹¹⁰ The quote in *Wong Sun*, implying a third possible exception to the exclusionary rule¹¹¹ and referred to by the Chief Justice in the instant case,¹¹² does not address the good faith/bad faith issue but merely implies a further exception to the exclusionary rule without elaboration.

Next, the Court held that evidence derived from a violation of a suspect's rights was inadmissible in a sixth amendment context as well as in fourth and fifth amendment violations.¹¹³ In doing so the Court confirmed that the exclusionary rule was meant to protect rights guaranteed by the Constitution and to deter misconduct by preventing the state from using evidence if illegality obtained.¹¹⁴

The Court then went on to contrast the exclusionary rule to the "derivative evidence analysis," apparently referring to the attenuation and independent source rules.¹¹⁵ It is not clear what the Court meant in this comparison. The Court stated that "the derivative evidence analysis ensures that the prosecution is not put in a *worse* position simply because of some earlier police error or misconduct.¹¹⁶ Admittedly, the independent source exception to the rule which would allow use of derivative evidence had no application in the instant case because Williams' statements "indeed led police to the child's body . . ."¹¹⁷ However, the Chief Justice continued, stating:

The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position than they would have been if no police error or misconduct had occurred. See *Murphy v. Waterfront Comm'n of New York Harbor*; *Kastigar v. United States*.¹¹⁸

The two above cited cases deal with the privilege of the accused to avoid self incrimination under the fifth amendment. In *Murphy* the Court held that

¹¹⁰E.g., arrest without probable cause and without a warrant, unlawful entries into a house and bedroom, and unlawful search. *Wong Sun*, 371 U.S. at 479, 481, 484, 485.

¹¹¹*Id.* at 487-88.

¹¹²*Nix v. Williams*, 104 S. Ct. at 2508.

¹¹³*Id.* In the sixth amendment context the Court cited *United States v. Wade*, 388 U.S. 218 (1967). *Wade* dealt with an in-court identification in which a witness relied on an earlier out of court identification, impermissibly conducted in the absence of counsel.

¹¹⁴*Nix v. Williams*, 104 S. Ct. at 2508-09.

¹¹⁵*Id.* at 2509.

¹¹⁶*Id.* (emphasis in original).

¹¹⁷*Id.*

¹¹⁸*Id.* Citing, *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964) and *Kastigar v. United States*, 406 U.S. 441 (1972).

a witness in a state proceeding could not be compelled to testify if the testimony might be used against him in a later federal action.¹¹⁹ Also:

[I]n order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity.¹²⁰

The *Kastigar*¹²¹ Court considered the *scope* of such immunity in the context of the fifth amendment privilege citing the *Murphy* passage above, almost verbatim.¹²² Both Courts disallowed derivative use of incriminating evidence unless gained from an independent source.¹²³ *Neither* Court mandated that exclusion be orchestrated so as to avoid a disadvantage to the government. *A fortiori*, the application of the exclusionary rule places the state in a worse position and is not designed to *balance* competing interests but instead to castigate the state and its agents in order to prevent future wrongs.¹²⁴

Furthermore, in the case here under consideration, the Court did not feel that denial of admission would serve the purpose of deterrence. The Chief Justice stated that “[a] police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered.”¹²⁵ He continued, that “[on] the other hand, when an officer is aware that the evidence will inevitably be discovered, he will try to avoid engaging in a questionable practice. In that situation, there will be little to gain from taking any dubious ‘shortcuts’ to obtain the evidence.”¹²⁶

The argument that there is no deterrence where evidence will inevitably be discovered regardless of illegal actions on the part of the police is said to have “a certain appeal.”¹²⁷ However, new dangers are implicit in the assertion that the deterrence rationale will remain unaffected. Police may be encouraged to violate suspects’ rights in order to discover physical evidence. The prosecution could easily prove this evidence “would” have been discovered through

¹¹⁹*Murphy v. Water Comm’n of New York Harbor*, 378 U.S. 52 (1964).

¹²⁰*Id.* at 79.

¹²¹*Kastigar v. United States*, 406 U.S. 441 (1972).

¹²²*Id.* at 457. (emphasis added).

¹²³*Murphy* 378 U.S. at 79 n. 18; *Kastigar* 406 U.S. at 457.

¹²⁴*Cf. Wong Sun* 371 U.S. at 484-86.

¹²⁵*Nix v. Williams*, 104 S. Ct. at 2510.

¹²⁶*Id. Ct. United States v. Ceccolini*, 435 U.S. 268, 283 (1978) (Burger, C.J., concurring).

¹²⁷*Pitler, supra* note 51 at 630.

the use of sophisticated laboratory techniques.¹²⁸ Perhaps confessions will be forced, the police being aware that the incriminating statements are not admissible but that evidence derived therefrom will be,¹²⁹ as happened in the instant case. It is also likely that where police are quite confident evidence will be found they will be tempted to precipitate results saving themselves time, trouble and some uncertainty in the process.¹³⁰

In the instant case Detective Leaming knew that a massive search was being conducted but that Williams would only reveal the location of the body to his attorney.¹³¹ If Leaming was willing to risk exclusion under the sanctions then extant, why should another officer be less likely to act in a similar fashion now that the Court has adopted this exception?

The fact that some police officers do not respond to the past dictates of the Supreme Court seems little reason for a weakening of the exclusionary rule. Incongruity also appears in the words of the Court's rationale themselves. The Chief Justice first stated that an officer "rarely if ever" will know if evidence will be discovered, yet went on to state that this rare or never occurring event will deter misconduct.¹³² The Court also felt that civil actions and intra-department disciplinary proceedings against offending police officers would serve to deter. The failure of these remedies in the past though was one of the reasons for the Court's adoption of the exclusionary rule to begin with.¹³³

Justice Stevens was dissatisfied with the majority opinion.¹³⁴ He noted that the violation affected the adversarial process¹³⁵ but felt that by shifting to the state the burden of proving the discovery inevitable, the good or bad faith of the police is made irrelevant.¹³⁶ He spoke here of the violation as creating "uncertainty" in the adversarial process.¹³⁷ This then leads to the question of whether the exclusionary rule is meant to deter misconduct or meant merely to avoid "uncertainty." Uncertainty could also be avoided by giving the state license to proceed in disregard of constitutional guarantees but unfortunately such a concept is anathema to fundamental American jurisprudence.¹³⁸ Furthermore, in speaking of protecting this adversarial process, it must be noted that the process began when Williams took his attorneys' advice and voluntari-

¹²⁸*Id.*

¹²⁹*Id.* at 620.

¹³⁰State V. Williams, 285 N.W.2d 248, 259 (Iowa 1979).

¹³¹Brewer v. Williams, 430 U.S. 398, 408 (Marshall, J., concurring).

¹³²Nix v. Williams, 104 S. Ct. at 2510.

¹³³Maguire, *Supra* note 50 at 308.

¹³⁴Nix v. Williams, 104 S. Ct. at 2513. (Stevens, J. concurring).

¹³⁵*Id.* at 2514.

¹³⁶*Id.* at 2515.

¹³⁷*Id.* at 2516.

¹³⁸Williams, v. Nix, 700 F.2d 1164, 1173 (8th Cir. 1982).

ly surrendered.¹³⁹ Justice Stevens himself noted that Learning's action threatened the adversary process in *Williams I*.¹⁴⁰

In his dissent Justice Brennan, with whom Justice Marshall joined, was concerned about the employment of a preponderance standard instead of requiring the clear and convincing evidence standard.¹⁴¹ He noted that although the discovery of evidence under the independent source doctrine rests on fact, the inevitable discovery rule necessitates a hypothetical finding.¹⁴² Indeed, the record of the *Williams* case, though sparse in the various opinions, could justify such a clear and convincing evidence standard.

The search for the body was conducted by two hundred volunteers in the middle of winter.¹⁴³ At the suppression hearing prior to *Williams*' second trial, the agent in charge of the search testified that he had obtained maps of two counties, marked them off in grids and had assigned a team of four to six searchers to each grid.¹⁴⁴ The search was called off at approximately 3:00 p.m. of the same day after *Williams* was induced to cooperate.¹⁴⁵ The agent had not even marked the map of the county where the body was found but testified he would have done so if "necessary."¹⁴⁶ He also testified that it would have taken the searchers an added three to five hours to reach the point where the body was actually found.¹⁴⁷

Therefore, if the search was indeed called off at 3:00 p.m., an additional three to five hours of searching would necessarily mean that the body's location could not have been reached until long after dark. With the further impediment of "ominous weather"¹⁴⁸ the search would have been hampered even more. It should also be noted that this testimony was given approximately eight years after the events in question. Further inconsistencies in the physical

¹³⁹*Brewer v. Williams*, 430 U.S. at 390.

¹⁴⁰ 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 lawyer. *Id.* at 415 (Stevens, J., concurring).

¹⁴¹*Nix v. Williams*, 104 S. Ct. at 2517 (Brennan, J., dissenting).

¹⁴²*Id.*

¹⁴³*Nix v. Williams*, 104 S. Ct. at 2504.

¹⁴⁴*Id.* at 2512.

¹⁴⁵*Id.*

¹⁴⁶*Id.*

¹⁴⁷*Id.*

¹⁴⁸*Brewer v. Williams*, 430 U.S. 387, 412 (1977). (Powell, J., concurring).

evidence itself are discussed in the opinion of the United States Court of Appeals for the Eighth Circuit, in its reversal of the district court's refusal to grant the second writ of habeas corpus.¹⁴⁹ Nevertheless, three lower courts and the Supreme Court were "satisfied" that the body would have inevitably been discovered.¹⁵⁰ The adoption of this lowest of evidentiary standards is one of the most disconcerting aspects of the case. The Chief Justice was satisfied that injustice was avoided by placing the burden of proof on the state.¹⁵¹ However, in practice it is the defendant, faced with the enormous investigatory resources of the state, as well as its greater credibility, who must "show that the police officers would not have discovered the challenged evidence 'but for' the illegal . . . conduct."¹⁵²

Another disturbing aspect of the case is how broadly the Court's opinion can be read. While previous exceptions to the exclusionary rule focus on the admission of derivative evidence, the holding in the instant case could allow the admission of even *primary* evidence. Indeed, although the Court based its ruling on the sixth amendment violation,¹⁵³ the challenged evidence could only be considered derivative in that context. The evidence also results from a *primary* illegality in a fifth amendment context, in that Williams directed the police to the body.

If primary evidence will now be admitted under this doctrine, then "the inevitable discovery exception [may] swallow the exclusionary rule itself."¹⁵⁴ In the hope that lower courts will not be inclined to abrogate the exclusionary rule, the defense attorney faced with the application of this new doctrine should argue that the challenged evidence is primary in nature thus more properly subject to exclusion.¹⁵⁵ He should also vehemently question the state's assertions of the "inevitability" of the discovery.

In conclusion, the Court's ruling here endorses a further exception to the exclusionary rule. Even where police misconduct is intentional and drastically contravenes long established constitutional rights, the prosecution will be per-

¹⁴⁹Williams claimed that someone else killed the girl and left her body in his room to shift the blame to him. The circuit court of appeals said this "theory is not so far-fetched as it sounds." Even though the state claimed that the murder was sexually related, and that the cold preserved the evidence, no chemical components of spermatozoa were found. This implies that a sterile man attacked the girl. Williams was not sterile. The FBI said pubic hairs "like" Williams' were found on the body, but so were pubic hairs unlike both Williams' or the victim's. *Williams v. Nix*, 700 F.2d 1164, 1168 (8th Cir. 1982).

¹⁵⁰*Nix v. Williams*, 104 S. Ct. at 2511. Ironically, even a proponent of the inevitable discovery exception argues that it is imperative that the prosecution affirmatively prove the evidence would have been discovered, not only that it might have been discovered. Maguire, *Supra* note 50 at 315.

¹⁵¹*Nix v. Williams*, 104 S. Ct. at 2511.

¹⁵²Note, *Supra* note 51 at 1143.

¹⁵³*Nix v. Williams*, 104 S. Ct. 2510-11. It is not clear from the opinion whether or not Williams' counsel renewed his fifth amendment argument or whether the Court merely found its determination unnecessary.

¹⁵⁴Pitler, *Supra* note 56 at 650.

¹⁵⁵Annot., 43 A.L.R.3d 385, 390 (1972).

mitted to introduce evidence resulting directly from the violation, so long as it can convince the trier of fact that more likely than not, the evidence would have been uncovered without the improper actions of the police. Thus, the holding in the instant case rewards the state despite the illegal actions of its agents. Some might question whether law enforcement, indeed justice itself, might be harmed rather than enhanced by its result.

Opponents of the exclusionary rule are likely to view this decision as a triumph for law and order, one which will prevent guilty persons from escaping punishment. Supporters of the rule will, in contrast, be concerned with the possibility that incidents of serious police misconduct will increase and that the already considerable power of the state will be enlarged to the detriment of the innocent individual. Only time will tell to what extent the lower courts will apply the exception and under what circumstances. Until that time it will not be known to what degree the exclusionary rule, so hotly debated for so many years, has been undermined by this decision.

JOHN V. BOGGINS