BREWER v. WILLIAMS, 430 U.S. 387 (1977)*

Police Interrogation, Appeals to Conscience and the 6th Amendment Right to Counsel

INTRODUCTION:
Williams was arrested, arraigned, and committed to jail in Davenport, Iowa, for the murder of a 10-year-old girl in Des Moines, Iowa. Both his Des Moines lawyer and his lawyer at the Davenport arraignment advised respondent not to make any statements until after consulting with the Des Moines lawyer upon being returned to Des Moines, and the police officers who were to accompany him on the automobile drive back to Des Moines agreed not to question him during the trip. During the trip, he expressed no willingness to be interrogated in the absence of an attorney but instead stated several times that he would tell the whole story after seeing his Des Moines lawyer. However, one of the police officers, who knew that Williams was a former mental patient and was deeply religious, delivered what has become known 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. . . 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… 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.”

Williams eventually directed the police to the girl's body. He was tried and convicted of murder, over objections to the admission of evidence resulting from the automobile ride. The Iowa Supreme Court affirmed, holding, as did the trial court, that he had waived his constitutional right to the assistance of counsel. The Federal District Court held that the evidence in question had been wrongly admitted at Williams’ trial on the ground because he had not waived his constitutional right to the assistance of counsel. The Court of Appeals affirmed.

Is the detective’s speech good police work, or was it a violation of the agreement and thus due process – including 6th Amendment right to counsel -- that he would not take advantage of his time alone with the former mental patient to question him?

The reading by Skolnick and Leo that is in *Criminal Justice Ethics* -- "The Ethics of Deceptive Interrogation” -- does note that appeals to conscience are legitimate. But, the context there is an otherwise appropriate interrogation, not one where the police have isolated the defendant by denying counsel access and promised not to interrogate the defendant.

More generally, Skolnick and Leo note three "sometimes competing principles that underlie the law of confessions: first, the truth finding rationale, which serves the goal of *reliability* (convicting an innocent person is worse than letting a guilty one go free; second, the substantive due process or *fairness* rationale, which promotes the goal of the system's integrity; and third, the related *deterrence* principle, which proscribes offensive or lawless police conduct" (p 253, emphasis original).

These principles show why *Brewer* is so controversial. The burial speech lead to reliable evidence and advanced truth finding. Yet the method of not alloying the defense counsel on the ride and violating the promise not to use the time alone with the defendant (a former mental patient especially susceptible to manipulation) to get evidence violates the fairness rational; it does not promote the system's integrity. Finally, what is the proper remedy to deter police misconduct - throw out the evidence? Is there a better way to motivate police to help uphold the integrity of the system? (See also the debate between Cochran and Amar, "Do Criminal Defendants Have Too Many Rights?" p 345-61).

MR. JUSTICE STEWART delivered the opinion of the Court, in which Brennan, Marshall, Powell, and Stevens joined.

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. She failed to return from a trip to the washroom. 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. 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 lawyer named McKnight went to the Des Moines police station and informed the officers present that he had just received a call from Williams, and that he had advised Williams to turn himself in to the Davenport police. Williams did surrender to the police in Davenport, and they gave him the warnings required by *Miranda v. Arizona*. The Davenport police then telephoned Des Moines to inform them that Williams had surrendered. 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.

When Detective Leaming and his fellow officer arrived in Davenport they met with Williams and Kelly, who was acting as Williams' lawyer. Detective Leaming repeated the Miranda warnings, and told 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."

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. 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. Kelly was denied permission to ride in the police car back to Des Moines with Williams and the two officers.

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. Not long after leaving Davenport, Detective Leaming delivered what has been referred to 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 [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." Leaming then stated: "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road."

The car continued towards Des Moines, 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. Counsel moved to suppress all evidence relating to the automobile ride from Davenport to Des Moines. The trial judge 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," and that the evidence had been elicited 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."

The jury found Williams guilty of murder, and the conviction was affirmed by the Iowa Supreme Court, a bare majority of whose members agreed that Williams had "waived his right to the presence of his counsel". The dissenting justices argued 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."

There is no need to review *Miranda v. Arizona*, a doctrine designed to secure the constitutional privilege against compulsory self-incrimination. It is clear that the judgment before us must in any event be affirmed upon the ground that Williams was denied 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, "[D]uring perhaps the most critical period of the proceedings against these defendants, 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." Whatever else it may mean, the right to counsel 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."

There can be no doubt that judicial proceedings had been initiated against Williams before the start of the automobile ride. A warrant had been issued for his arrest, he had been arraigned on that warrant before a judge, and he had been confine[d to] 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 that Williams was being represented by attornies. 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 [sic] hoping to get all the information you could before Williams got back to McKnight, weren't you?

"A. Yes, sir."

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. Yet no such constitutional protection would have come into play if there had been no interrogation. The circumstances of this case are thus constitutionally indistinguishable from those presented in *Massiah v. United States*. 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. This Court held "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 elicited from him after he had been indicted and in the absence of his counsel."

That the incriminating statements were elicited surreptitiously in the Massiah case, and otherwise here, is constitutionally irrelevant. 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.

The Iowa courts recognized that Williams had been denied the constitutional right to the assistance of counsel. 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."

In the federal 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. The court held "that it is the government which bears a heavy burden . . . but that is the burden which explicitly was placed on [Williams] by the state courts." 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 [Williams'] `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, it cannot be said that the State has met its `heavy burden' of showing a knowing and intelligent waiver of . . . Sixth Amendment rights."

The Court of Appeals approved the reasoning of the District Court. Both Courts were 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." 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, and that courts indulge in every reasonable presumption against waiver.

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 petitioner'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.

Despite Williams' express and implicit assertions of his right to counsel, Detective Leaming proceeded to elicit incriminating statements from Williams. Leaming 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.

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." 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 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.

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 commands 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 (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. Leaming surely understood, because he had overheard 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 Powers 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 (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 bloodcurdling 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.

I think it appropriate here to recall the closing words of Mr. Justice Brandeis' great dissent in Olmstead v. United States (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."

JUSTICE POWELL, concurring.

As the dissenting opinion of The Chief Justice sharply illustrates, resolution of the issues in this case turns primarily on one's perception of the facts. There is little difference of opinion, among the several courts and numerous judges who have reviewed the case, as to the relevant constitutional principles: (i) Williams had the right to assistance of counsel; (ii) once that right attached (it is conceded that it had in this case), the State could not properly interrogate Williams in the absence of counsel unless he voluntarily and knowingly waived the right; and (iii) the burden was on the State to show that Williams in fact had waived the right before the police interrogated him.

The critical factual issue is whether there had been a voluntary waiver, and this turns in large part upon whether there was interrogation. The incriminating statements were made by Williams during the long ride while in the custody of two police officers, and in the absence of his retained counsel. The dissent of The Chief Justice concludes that prior to these statements, Williams had "made a valid waiver" of his right to have counsel present. This view disregards the record evidence clearly indicating that the police engaged in interrogation of Williams. For example, the District Court noted: "According to Detective Leaming's own testimony, the specific purpose of this conversation [which was initiated by Leaming and which preceded Williams' confession] was to obtain statements and information from [Williams] concerning the missing girl."

After finding, upon a full review of the facts, that there had been "interrogation," the District Court addressed the ultimate issue of "waiver" and concluded not only that the State had failed to carry its burden but also that "there is nothing in the record to indicate that [Williams] waived his Fifth and Sixth Amendment rights except the fact that statements eventually were obtained." The Court of Appeals stated affirmatively that "the facts as found by the District Court had substantial basis in the record."

I join the opinion of the Court which also finds that the efforts of Detective Leaming "to elicit information from Williams," as conceded by counsel for petitioner at oral argument were a skillful and effective form of interrogation. Moreover, the entire setting was conducive to the psychological coercion that was successfully exploited. Williams was known by the police to be a young man with quixotic religious convictions and a history of mental disorders. The date was the day after Christmas, the weather was ominous, and the setting appropriate for Detective Leaming's talk of snow concealing the body and preventing a "Christian burial." Williams was alone in the automobile with two police officers for several hours. It is clear from the record, as both of the federal courts below found, that there was no evidence of a knowing and voluntary waiver of the right to have counsel present beyond the fact that Williams ultimately confessed. It is settled law that an inferred waiver of a constitutional right is disfavored. I find no basis in the record of this case - or in the dissenting opinions - for disagreeing with the conclusion of the District Court that "the State has produced no affirmative evidence whatsoever to support its claim of waiver."

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." I find no justification for this view. On the contrary, the opinion of the Court is explicitly clear that the right to assistance of counsel may be waived, after it has attached, without notice to or consultation with counsel. We would have such a case here if petitioner had proved that the police officers refrained from coercion and interrogation, as they had agreed, and that Williams freely on his own initiative had confessed the crime.

Before concluding that the police had engaged in interrogation, the District Court summarized the factual background: "Detective Leaming obtained statements from Petitioner in the absence of counsel (1) after making, and then breaking, an agreement with Mr. McKnight that Petitioner would not be questioned until he arrived in Des Moines and saw Mr. McKnight; (2) after being told by both Mr. McKnight and Mr. Kelly that Petitioner was not to be questioned until he reached Des Moines; (3) after refusing to allow Mr. Kelly, whom Detective Leaming himself regarded as Petitioner's co-counsel, to ride to Des Moines with Petitioner; and (4) after being told by Petitioner that he would talk after he reached Des Moines and Mr. McKnight. By violating or ignoring these several, clear indications that Petitioner was to have counsel during interrogation, Detective Leaming deprived Petitioner of his right to counsel in a way similar to, if not more objectionable than, that utilized against the defendant in Massiah."

I tend generally to share the view that the per se application of an exclusionary rule has little to commend it except ease of application. All too often applying the rule in this fashion results in freeing the guilty without any offsetting enhancement of the rights of all citizens. Moreover, rigid adherence to the exclusionary rule in many circumstances imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes. I therefore have indicated, at least with respect to Fourth Amendment violations, that a distinction should be made between flagrant violations by the police, on the one hand, and technical, trivial, or inadvertent violations, on the other. Here, we have a Sixth Amendment case and also one in which the police deliberately took advantage of an inherently coercive setting in the absence of counsel, contrary to their express agreement. Police are to be commended for diligent efforts to ascertain the truth, but the police conduct in this case plainly violated respondent's constitutional rights.

MR. JUSTICE STEVENS, concurring.

Mr. Justice Stewart, in his opinion for the Court which I join, Mr. Justice Powell, and Mr. Justice Marshall have accurately explained the reasons why the law requires the result we reach today.

Nevertheless, 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 lawyer.

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.

MR. CHIEF JUSTICE BURGER, dissenting.

The result in this case ought to be intolerable in any society which purports to call itself an organized society. It continues the Court - by the narrowest margin - on the much-criticized course of punishing the public for the mistakes and misdeeds of law enforcement officers, instead of punishing the officer directly, if in fact he is guilty of wrongdoing. It mechanically and blindly keeps reliable evidence from juries whether the claimed constitutional violation involves gross police misconduct or honest human error.

Williams is guilty of the savage murder of a small child; no member of the Court contends he is not. While in custody, and after no fewer than five warnings of his rights to silence and to counsel, he led police to the concealed body of his victim. The Court concedes Williams was not threatened or coerced and that he spoke and acted voluntarily and with full awareness of his constitutional rights. In the face of all this, the Court now holds that because Williams was prompted by the detective's statement - not interrogation but a statement - the jury must not be told how the police found the body.

Today's holding fulfills Judge (later Mr. Justice) Cardozo's grim prophecy that someday some court might carry the exclusionary rule to the absurd extent that its operative effect would exclude evidence relating to the body of a murder victim because of the means by which it was found. In so ruling the Court regresses to playing a grisly game of "hide and seek," once more exalting the sporting theory of criminal justice which has been experiencing a decline in our jurisprudence. With Justices White, Blackmun, and Rehnquist, I categorically reject the remarkable 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.

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. 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 (1938). The Court assumes, without deciding, that Williams' conduct and statements were voluntary. It concedes, as it must, that Williams had been informed of and fully understood his constitutional rights and the consequences of their waiver. Then, having either assumed or found every element necessary to make out a valid waiver under its own test, the Court reaches the astonishing conclusion that no valid waiver has been demonstrated.

This remarkable result is compounded by the Court's failure to define what evidentiary showing the State failed to make. Only recently, in *Schneckloth v. Bustamonte* (1973), the Court analyzed the distinction between a voluntary act and the waiver of a right; there Mr. Justice Stewart stated for the Court: "[T]he question whether a person has acted `voluntarily' is quite distinct from the question whether he has 'waived' a trial right. The former question can be answered only by examining all the relevant circumstances to determine if he has been coerced. The latter question turns on the extent of his knowledge." We recently said that since a guilty plea constituted a waiver of a host of constitutional rights, "it must be an intelligent act `done with sufficient awareness of the relevant circumstances and likely consequences.'" If the Court today applied these standards it could not reach the result now announced.

The evidence is uncontradicted that Williams had abundant knowledge of his right to have counsel present and of his right to silence. Since the Court does not question his mental competence, it boggles the mind to suggest that Williams could not understand that leading police to the child's body would have other than the most serious consequences. All of the elements necessary to make out a valid waiver are shown by the record and acknowledged by the Court.

One plausible but unarticulated basis for the result reached is that once a suspect has asserted his right not to talk without the presence of an attorney, it becomes legally impossible for him to waive that right until he has seen an attorney. But constitutional rights are personal, and an otherwise valid waiver should not be brushed aside by judges simply because an attorney was not present. The Court's holding operates to "imprison a man in his privileges"; it conclusively presumes a suspect is legally incompetent to change his mind and tell the truth until an attorney is present. It denigrates an individual to a nonperson whose free will has become hostage to a lawyer so that until the lawyer consents, the suspect is deprived of any legal right or power to decide for himself that he wishes to make a disclosure. It denies that the rights to counsel and silence are personal, nondelegable, and subject to a waiver only by that individual. The opinions in support of the Court's judgment do not enlighten us as to why police conduct - whether good or bad - should operate to suspend Williams' right to change his mind and "tell all" at once rather than waiting until he reached Des Moines.

In his concurring opinion Mr. Justice Powell suggests that the result in this case turns on whether Detective Leaming's remarks constituted "interrogation," as he views them, or whether they were "statements" intended to prick the conscience of the accused. I find it most remarkable that a murder case should turn on judicial interpretation that a statement becomes a question simply because it is followed by an incriminating disclosure from the suspect. The Court seems to be saying that since Williams said he would "tell the whole story" at Des Moines, the police should have been content and waited; of course, that would have been the wiser course, especially in light of the nuances of constitutional jurisprudence applied by the Court, but a murder case ought not turn on such tenuous strands.

In any case, the Court assures us, this is not at all what it intends, and that a valid waiver was possible in these circumstances, but was not quite made. Here, of course, Williams did not confess to the murder in so many words; it was his conduct in guiding police to the body, not his words, which incriminated him. And the record is replete with evidence that Williams knew precisely what he was doing when he guided police to the body. The human urge to confess wrongdoing is, of course, normal in all save hardened, professional criminals, as psychiatrists and analysts have demonstrated.

Even if there was no waiver, and assuming a technical violation occurred, the Court errs gravely in mechanically applying the exclusionary rule without considering whether that Draconian judicial doctrine should be invoked in these circumstances, or indeed whether any of its conceivable goals will be furthered by its application here.

The obvious flaws of the exclusionary rule as a judicial remedy are familiar. Today's holding interrupts what has been a more rational perception of the constitutional and social utility of excluding reliable evidence from the truth-seeking process. In its Fourth Amendment context, we have now recognized that the exclusionary rule is in no sense a personal constitutional right, but a judicially conceived remedial device designed to safeguard and effectuate guaranteed legal rights generally. We have repeatedly emphasized that deterrence of unconstitutional or otherwise unlawful police conduct is the only valid justification for excluding reliable and probative evidence from the criminal factfinding process.

Accordingly, unlawfully obtained evidence is not automatically excluded from the factfinding process in all circumstances. In a variety of contexts we inquire whether application of the rule will promote its objectives sufficiently to justify the enormous cost it imposes on society. This is, of course, the familiar balancing process applicable to cases in which important competing interests are at stake. It is a recognition, albeit belated, that "the policies behind the exclusionary rule are not absolute." It acknowledges that so serious an infringement of the crucial truth-seeking function of a criminal prosecution should be allowed only when imperative to safeguard constitutional rights. An important factor in this amalgam is whether the violation at issue may properly be classed as "egregious." The Court understandably does not try to characterize the police actions here as "egregious."

Against this background, it is striking that the Court fails even to consider whether the benefits secured by application of the exclusionary rule in this case outweigh its obvious social costs. Involuntary and coerced admissions are suppressed because of the inherent unreliability of a confession wrung from an unwilling suspect by threats, brutality, or other coercion. We can all agree on "`[t]he abhorrence of society to the use of involuntary confessions,"' and the need to preserve the integrity of the human personality and individual free will.

But use of Williams' disclosures and their fruits carries no risk whatever of unreliability, for the body was found where he said it would be found. Moreover, since the Court makes no issue of voluntariness, no dangers are posed to individual dignity or free will. We [must] weigh the deterrent effect on unlawful police conduct, together with the normative Fifth Amendment justifications for suppression, against "the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce. . . . We also `must consider society's interest in the effective prosecution of criminals . . . .'" This individualized consideration or balancing process with respect to the exclusionary sanction is possible in this case, as in others, because Williams' incriminating disclosures are not infected with any element of compulsion the Fifth Amendment forbids; nor, as noted earlier, does this evidence

pose any danger of unreliability to the factfinding process. In short, there is no reason to exclude this evidence.

Similarly, the exclusionary rule is not uniformly implicated in the Sixth Amendment, particularly its pretrial aspects. We have held that "the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." Thus, the right to counsel is fundamentally a "trial" right necessitated by the legal complexities of a criminal prosecution and the need to offset, to the trier of fact, the power of the State as prosecutor. It is now thought that modern law enforcement involves pretrial confrontations at which the defendant's fate might effectively be sealed before the right of counsel could attach. In order to make meaningful the defendant's opportunity to a fair trial and to assistance of counsel at that trial - the core purposes of the counsel guarantee - the Court formulated a per se rule guaranteeing counsel at what it has characterized as "critical" pretrial proceedings where substantial rights might be endangered.

The test, in short, is the reliability of the evidence. So, too, in the Sixth Amendment sphere failure to have counsel in a pretrial setting should not lead to the "knee-jerk" suppression of relevant and reliable evidence. Just as even uncounseled "critical" pretrial confrontations may often be conducted fairly and not in derogation of Sixth Amendment values, evidence obtained in such proceedings should be suppressed only when its use would imperil the core values the Amendment was written to protect. Having extended Sixth Amendment concepts originally thought to relate to the trial itself to earlier periods when a criminal investigation is focused on a suspect, application of the drastic bar of exclusion should be approached with caution.

In any event, the fundamental purpose of the Sixth Amendment is to safeguard the fairness of the trial and the integrity of the factfinding process. In this case, where the evidence of how the child's body was found is of unquestioned reliability, and since the Court accepts Williams' disclosures as voluntary and uncoerced, there is no issue either of fairness or evidentiary reliability to justify suppression of truth. It appears suppression is mandated here for no other reason than the Court's general impression that it may have a beneficial effect on future police conduct; indeed, the Court fails to say even that much in defense of its holding.

MR. JUSTICE WHITE, with whom Mr. Justice Blackmun and Mr. Justice Rehnquist join, dissenting.

The respondent in this case killed a 10-year-old child. The majority sets aside his conviction, holding that certain statements of unquestioned reliability were unconstitutionally obtained from him, and under the circumstances probably makes it impossible to retry him. Because there is nothing in the Constitution or in our previous cases which requires the Court's action, I dissent.

The issue in this case is whether respondent - who was entitled not to make any statements to the police without consultation with and/or presence of counsel - validly waived those rights [to counsel]. [After the 'Christian Burial Speech'], respondent asked Detective Leaming why he thought their route 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. Leaming then stated: "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road." On several occasions during the trip, respondent told the officers that he would tell them the whole story when he got to Des Moines and saw Mr. McKnight - an

indication that he knew he was entitled to wait until his counsel was present before talking to the police.

Some considerable time thereafter, without any prompting on the part of any state official so far as the record reveals, respondent asked whether the police had found the victim's shoes. The subject of the victim's clothing had never been broached by the police nor suggested by anything the police had said. So far as the record reveals, the subject was suggested to respondent solely by the fact that the police car was then about to pass the gas station where respondent had hidden the shoes. When the police said they were unsure whether they had found the shoes, respondent directed them to the gas station. When the car continued on its way to Des Moines, responded asked whether the blanket had been found. Once again this subject had not previously been broached. Respondent directed the officers to a rest area where he had left the blanket. When the car again continued, respondent said that he would direct the officers to the victim's body, and he did so.

The strictest test of waiver which might be applied to this case is that set forth in *Johnson v. Zerbst* (1938), and quoted by the majority. In order to show that a right has been waived under this test, the State must prove "an intentional relinquishment or abandonment of a known right or privilege." The majority creates no new rule preventing an accused who has retained a lawyer from waiving his right to the lawyer's presence during questioning. The majority simply finds that no waiver was proved in this case. I disagree. That respondent knew of his right not to say anything to the officers without advice and presence of counsel is established on this record to a moral certainty. He was advised of the right by three officials of the State - telling at least one that he understood the right - and by two lawyers. Finally, he further demonstrated his knowledge of the right by informing the police that he would tell them the story in the presence of McKnight when they arrived in Des Moines. The issue in this case, then, is whether respondent relinquished that right intentionally.

Respondent relinquished his right not to talk to the police about his crime when the car approached the place where he had hidden the victim's clothes. Men usually intend to do what they do, and there is nothing in the record to support the proposition that respondent's decision to talk was anything but an exercise of his own free will. Apparently, without any prodding from the officers, respondent - who had earlier said that he would tell the whole story when he arrived in Des Moines - spontaneously changed his mind about the timing of his disclosures when the car approached the places where he had hidden the evidence. However, even if his statements were influenced by Detective Leaming's above-quoted statement, respondent's decision to talk in the absence of counsel can hardly be viewed as the product of an overborne will. The statement by Leaming was not coercive; it was accompanied by a request that respondent not respond to it; and it was delivered hours before respondent decided to make any statement. Respondent's waiver was thus knowing and intentional.

The majority's contrary conclusion seems to rest on the fact that respondent "asserted" his right to counsel by retaining and consulting with one lawyer and by consulting with another. How this supports the conclusion that respondent's later relinquishment of his right not to talk in the absence of counsel was unintentional is a mystery. The fact that respondent consulted with counsel on the question whether he should talk to the police in counsel's absence makes his later decision to talk in counsel's absence better informed and, if anything, more intelligent.

The majority recognizes that even after this "assertion" of his right to counsel, it would have found that respondent waived his right not to talk in counsel's absence if his waiver had been express - i. e., if the officers had asked him in the car whether he would be willing to answer

questions in counsel's absence and if he had answered "yes." . But waiver is not a formalistic concept. Waiver is shown whenever the facts establish that an accused knew of a right and intended to relinquish it. Such waiver, even if not express, was plainly shown here. The only other conceivable basis for the majority's holding is the implicit suggestion that the right involved in *Massiah v. United States*, as distinguished from the right involved in *Miranda v. Arizona*, is a right not to be asked any questions in counsel's absence rather than a right not to answer any questions in counsel's absence, and that the right not to be asked questions must be waived before the questions are asked. Such wafer thin distinctions cannot determine whether a guilty murderer should go free. The only conceivable purpose for the presence of counsel during questioning is to protect an accused from making incriminating answers. Questions, unanswered, have no significance at all. Absent coercion - no matter how the right involved is defined - an accused is amply protected by a rule requiring waiver before or simultaneously with the giving by him of an answer or the making by him of a statement.

The consequence of the majority's decision is, as the majority recognizes, extremely serious. A mentally disturbed killer whose guilt is not in question may be released. Why? Apparently the answer is that the majority believes that the law enforcement officers acted in a way which involves some risk of injury to society and that such conduct should be deterred. However, the officers' conduct did not, and was not likely to, jeopardize the fairness of respondent's trial or in any way risk the conviction of an innocent man - the risk against which the Sixth Amendment guarantee of assistance of counsel is designed to protect.

The police did nothing "wrong," let alone anything "unconstitutional." The majority's protest that the result in this case is justified by a "clear violation" of the Sixth and Fourteenth Amendments has a distressing hollow ring. I respectfully dissent.

MR. JUSTICE BLACKMUN, with whom Mr. Justice White and Mr. Justice Rehnquist join, dissenting.

What the Court chooses to do here, and with which I disagree, is to hold that respondent Williams' situation was in the mold of *Massiah v. United States*, that is, that it was dominated by a denial to Williams of his Sixth Amendment right to counsel after criminal proceedings had been instituted against him. The Court rules that the Sixth Amendment was violated because Detective Leaming "purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible." I cannot regard that as unconstitutional per se.

First, the police did not deliberately seek to isolate Williams from his lawyers so as to deprive him of the assistance of counsel. The isolation in this case was a necessary incident of transporting Williams to the county where the crime was committed. Second, Leaming's purpose was not solely to obtain incriminating evidence. The victim had been missing for only two days, and the police could not be certain that she was dead. Leaming, of course, and in accord with his duty, was "hoping to find out where that little girl was," but such motivation does not equate with an intention to evade the Sixth Amendment. Moreover, the Court seems to place an undue emphasis, and aspersion on what it and the lower courts have chosen to call the "Christian burial speech," and on Williams' "deeply religious" convictions.

Third, not every attempt to elicit information should be regarded as "tantamount to interrogation." I am not persuaded that Leaming's observations and comments, made as the police car traversed the snowy and slippery miles between Davenport and Des Moines that winter afternoon, were an interrogation, direct or subtle, of Williams. Contrary to this Court's statement,

the Iowa Supreme Court appears to me to have thought and held otherwise, and I agree. Williams, after all, was counseled by lawyers, and warned by the arraigning judge in Davenport and by the police, and yet it was he who started the travel conversations and brought up the subject of the criminal investigation. Without further reviewing the circumstances of the trip, I would say it is clear there was no interrogation.

In summary, it seems to me that the Court is holding that Massiah is violated whenever police engage in any conduct, in the absence of counsel, with the subjective desire to obtain information from a suspect after arraignment. Such a rule is far too broad. Persons in custody frequently volunteer statements in response to stimuli other than interrogation. When there is no interrogation, such statements should be admissible as long as they are truly voluntary. I would remand the case for consideration of the issue of voluntariness, in the constitutional sense, of Williams' statements.

One final word: This was a brutal, tragic, and heinous crime inflicted upon a young girl on the afternoon of the day before Christmas. With the exclusionary rule operating as the Court effectuates it, the decision today probably means that, as a practical matter, no new trial will be possible at this date eight years after the crime, and that this respondent necessarily will go free. That, of course, is not the standard by which a case of this kind strictly is to be judged. But, as Judge Webster in dissent below observed, placing the case in sensible and proper perspective: "The evidence of Williams' guilt was overwhelming. No challenge is made to the reliability of the fact-finding process." I am in full agreement with that observation.