In the

Supreme Court of the United States

Lou V. Brewer, Warden,

Petitioner,

v.

Robert Anthony Williams aka Anthony Erthel Williams,

Respondent.

No. 74-1263

Washington, D. C.
October 4, 1976

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IN THE SUPREME COURT OF THE UNITED STATES

LOU V. BREWER, WARDEN, Petitioner,	
v.	No. 74-1263
ROBERT ANTHONY WILLIAMS aka ANTHONY ERTHEL WILLIAMS, Respondent.	

Washington, D. C.,

Monday, October 4, 1976.

The above-entitled matter came on for argument at 11:04 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

RICHARD N. WINDERS, ESQ., Assistant Attorney General of Iowa, Des Moines, Iowa; on behalf of Petitioner.

RICHARD C. TURNER, ESQ., Attorney General of Iowa, Des Moines, Iowa; on behalf of Petitioner.

ROBERT D. BARTELS, ESQ., University of Iowa Law School, Iowa City, Iowa; on behalf of Respondent.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 74-1263, Lou V. Brewer, Warden, against Robert Anthony Williams.

Mr. Winders, you may proceed whenever you are ready.

ORAL ARGUMENT OF RICHARD N. WINDERS, ESQ.,

ON BEHALF OF THE PETITIONER

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

My name is Richard Winders, and I am an Assistant Attorney General of the State of Iowa. This case involves the kidnap and rape and murder of a ten-year old girl in Des Moines, Iowa. The questions that will be presented concern whether or not the respondent Williams was deprived of his constitutional rights when he was transported by police officers from Davenport, Iowa to Des Moines, Iowa.

During that trip, Williams made self-incriminating statements and ultimately led the police to the body of the little girl. Williams was convicted of first degree murder by jury verdict in Polk County, Iowa. His conviction was affirmed by the Iowa Supreme Court in a five-to-four decision.

Williams petitioned for a writ of habeas corpus in the Federal District Court of Iowa. That petition was sustained by the Federal District Court Judge Hanson. We

appealed to the Eighth Circuit and, in a two-to-one decision, Justice Webster dissenting, Judge Hanson's opinion was affirmed. Our petition for rehearing en banc was denied, although three justices voted to hear it.

In 1968, on the day before Christmas, Pamela Powers accompanied her mother to the YMCA in Des Moines to watch her brother participate in a wrestling match. They arrived about noon. Pamela got some candy and then remembered that she should wash her hands and asked her mother if she could go to the wash room. Her mother gave her that permission. Pamela left and she never returned and was never seen alive again.

The respondent Williams was a resident of the YMCA and at about 1:00 or 1:30 he was seen hurrying through the lobby of the Y carrying a large bundle wrapped in a blanket. He got outside and asked a young boy if the boy would open the car door for him. The boy did, Williams threw the bundle inside, and the boy testified at trial that there were two skinny white legs in it. YMCA personnel tried to stop Williams, but he pushed them aside and locked the doors of the car and drove away.

Two days later, on the morning of the 26th of December, Henry McKnight, a lawyer in Des Moines, came to the Des Moines police station and advised officers there that Mr. Williams had phoned him from Moline, Illinois, and

Mr. McKnight said he advised Williams to surrender in Davenport, Iowa, which is just across the river.

Williams did surrender in Davenport at approximately 9:00 o'clock. He was arrested and given his Miranda warnings by a Lt. Ackerman. He telephone McKnight, who was in the Des Moines police station, and McKnight's end of the conversation with Williams was overheard by Chief of Police Nichols and also Officer Cleatus Leaming.

McKnight told Williams, among other things, that Des Moines police officers would come and pick him up, they wouldn't grill him, they would be nice to him, and they would let no harm come to him, and that they would talk it over in Des Moines.

He further told Williams that "you have to tell the police where the body is, you are going to have to tell them." He ended this conversation by saying, "Well, it makes no difference, you come back to Des Moines, tell me, I will tell them, I am going to tell them the whole story."

Judge Denato, of the Polk County District Court, in a suppression hearing, found that, from that conversation, that there was an agreement existing between the police and Mr. McKnight that no questions would be asked Williams on his way back to Des Moines. He found this, even though both Chief of Police Nichols and Officer Leaming denied the existence of the agreement.

Leaming and Officer Nelson went to Davenport to pick up Williams. They arrived around noon. In the meantime, Williams had been taken before a municipal court judge, arraigned on a fugitive warrant, and for the second time given the Miranda warnings by the judge. He was also granted a private conversation with the judge in chambers. As he was leaving, he noticed an individual in the court room and asked if the man was a lawyer. It was a Thomas Kelly, from Davenport, and Williams was allowed to talk to him in private for about forty minutes.

Leaming first saw Williams at approximately 1:00 o'clock on that day. He for the third and last time gave Williams the Miranda warnings. He also stated to Williams, "Now, I want you to understand that you're represented by Mr. Kelly here in Davenport and by Mr. McKnight in Des Moines." Williams acknowledged that he understood that.

Leaming further stated that, "I want you to remember what I've told you here, because we will be visiting on the way back to Des Moines." They left about 2:00 o'clock.

Leaming testified both at the suppression hearing and at the trial that shortly after they left, Williams started asking him questions. He asked about the police procedures, whether they had searched for fingerprints in his room, whether they had searched friends of his. They

also had further discussions pertaining to religion, church groups, singing, and that type of thing.

Leaming testified further that he made a statement to Williams shortly after they got on the freeway outside of Des Moines. He stated to him, "I want you to observe the weather conditions. It's raining, freezing, it is going to snow tonight. You yourself are the only person that knows where this little girl's body is, and you've only been there once. I think we will be going right by the area where the body is. I feel that we should stop and locate the body on the way to Des Moines, rather than waiting and coming back, because you may not be able to find it. The parents of this little girl deserve a Christian burial for the girl that was snatched away from them."

Williams asked him why he felt they would be going by the area, and Leaming replied to him, "I know it is in the Mitchellville area. I don't know where, but I know it is there."

Leaming ended this conversation by telling Williams, "I don't want you to answer me. I don't want to discuss it any further. Just think about it as we are riding down the road."

Williams further stated to Leaming, according to Leaming, that -- also for the first time, shortly after leaving Davenport on the freeway, that Williams told him,

"When I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." They proceeded on the interstate and, shortly before they got to the Grinnell exit, Williams spontaneously volunteered a question to Leaming, "Where did you find the little girl's shoes?"

QUESTION: Mr. Winders, how far is it from Davenport to Des Moines?

MR. WINDERS: Your Honor, it is approximately 163 miles.

QUESTION: How far to the Grinnell exit?

MR. WINDERS: Grinnell is approximately 60 miles from Des Moines, so it would be roughly 100 to 110, 120 miles.

QUESTION: Mr. Winders, is it correct that Mr. Leaming's statement that he knew the body was in the area, whatever it was, was a false statement?

MR. WINDERS: Your Honor, the testimony is conflicting. Williams -- Leaming stated that he had a theory that the body was in the Mitchellville area, and Williams at the suppression hearing also stated that he had been told by Leaming that they speculated that the body was in the Mitchellville area. So it wasn't exactly a lie, it was more of a theory.

QUESTION: Well, it was incorrect that he knew?

MR. WINDERS: He didn't absolutely know, no. Only

Williams knew that.

QUESTION: So that was a false statement?

MR. WINDERS: Well, he didn't know for sure, absolutely. It was his theory, Your Honor.

QUESTION: What is the state's position as to why he made this statement, if it was not for the purpose of trying to in effect interrogate the defendant?

MR. WINDERS: Well, Your Honor, we wouldn't call it interrogation, but we do concede, and the testimony is fairly certain, that Leaming wanted to find and locate the little girl before they got to Des Moines, and he stated that.

QUESTION: More narrowly, would it be correct to say that he wanted the defendant to reveal the whereabouts of the child?

MR. WINDERS: I think you could say that. It is the same thing, I think, Your Honor.

After they searched for the shoes --

QUESTION: The seven minutes that you indicated you wished has been consumed, so you are on your own.

MR. WINDERS: All right, Your Honor. Thank you. I will then surrender my position to the Attorney General of the State of Iowa, Mr. Richard C. Turner.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Attorney General.

ORAL ARGUMENT OF RICHARD C. TURNER, ESQ.,

ON BEHALF OF THE PETITIONER

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

If it would be helpful to the Court, I could pass up to the Court some official Iowa road maps, which might illuminate the distances, and I have some extra copies here.

QUESTION: I think we have atlases available if we need to check that, counsel.

MR. TURNER: All right. It is about --

QUESTION: You could give one to me, if you would like.

MR. TURNER: All right, I sure will.

QUESTION: Just leave them at the table and we will get them later.

MR. TURNER: Very well, sir.

When I found out we had only a half hour to argue this, I felt like the poor guy that sat down one night near income tax time to do his income tax return and read in the instructions that it would only take the average taxpayer a half hour and he said to himself, "My gosh, it will take me longer than that to find my wife's social security number."

But the facts in this case are very important, of course, and I think perhaps we should examine them further. Mr. Winders said it was shortly out of Des Moines that he

made this Christian burial statement. Actually, I think he misspoke. It was shortly after leaving Davenport, entering onto the highway.

Now, the highway was icy. Even the defendant testified to this. It was sleeting, it was cold, and the predictions for that night were for snow. And he did tell this man, to induce him, and knowing I think that he was a religious man, and he even called him -- in the suppression hearing he called him reverend. He did, he wanted to induce the man to tell him where Pamela Powers' body was. In fact, he didn't really know that it was in Mitchellville, and he didn't for that matter really know that she was dead, for a fact. There wasn't anything really in the record at that stage, but he suspected that she was. And I don't think it is a fair characterization to say that he really lied, but he told him right then, "I don't want to discuss it further, I don't want you to answer me."

Now, as they rode down the highway, it was nearly -- it was 120 miles from Davenport to Grinnell. I think that will show on these maps. It is on Interstate 80, right through Iowa, and Grinnell is a turn-off, a few miles. And when they reached that intersection, at that point Mr. Williams voluntarily and spontaneously, volunteered "Did you find her shoes?" Well, he said he knew, the officer knew they had found the little girl's clothing, but he didn't

know, he hadn't seen it, he didn't know what it consisted of, and he said, "If the shoes were with the clothing, why, we found them." He said, "Well, pull in here," and he indicated and they went into a gas station and they looked behind the gasoline station into a box where he said he had disposed of a pair of brown boots, and they didn't find them. They were never found.

They drove on then, continued on the highway, after having a cup of coffee there, I think. They drove on and a few miles further they came to a rest stop, and he said, "Did you find the blanket?" And he said, "Well, if it was with the clothes, we found it." And he said, "Well, pull of here, I disposed of the blanket at a different place than I put the clothes." So they drove in there and they looked for the blanket, but the blanket had been found, and the clothes had been found.

They drove on and, as they got to Mitchellville, which is one of the very first exits outside of Des Moines -- and I think this led to Officer Leaming's theory, he theorized I think, he inferred that he would -- the murderer would want to dispose of the body as quickly as possible, and that he would turn off as soon as he could. It wasn't the very first intersection or place he could have turned off. That was really in Des Moines. But this was the very first place outside of Des Moines.

As they approached this place, he said, "Turn off here, I will show you where the body is." And they did turn off and he took them up the wrong road at first, he was a mile off on that. But after a couple of tries, they went and located the body, right where he said it would be. And he asked the officer about the little girl's face and some things like that, that are in the record.

The girl's body was clad only in a T-shirt, otherwise she was naked. She had been sexually ravaged. Semen was found in her vagina, rectum and mouth, and she had died of strangulation, according to the reports.

Now, of course, when they got back to Des Moines, then Mr. McKnight was quite angry, the lawyer who was waiting there. And indeed while it was found by the trial court in the suppression hearing by Judge Denato, who tried this case as the judge, that there was an agreement.

I submit to you that you will find, on careful examination of the record, that Leaming -- neither Leaming nor Nichols nor any other officer agreed to anything.

QUESTION: Is that sort of agreement enforceable, as if it were a contract under Iowa law?

MR. TURNER: I should think not, Your Honor. Assuming that there was an agreement, it wouldn't to me be enforceable. It would violate the person's sense of fair play, but I don't --

QUESTION: It could raise constitutional overtones, but I would be surprised if any state, as a matter of public policy, would say you treat it just like you would a contract to buy some potatoes.

MR. TURNER: And I think, too, Your Honor, that you wouldn't treat it the same way that you would treat an agreement between defense counsel and the prosecuting attorney. I think there those kinds of agreements should be honored.

But assuming that Leaming agreed -- which we don't and we say --

QUESTION: Well, I thought we had to accept that there was an agreement. Now, whatever that means, as my Brother Rehnquist suggests, might not be --

MR. TURNER: Yes, sir, he raised that in the previous case and perhaps --

QUESTION: Well, let me just ask you this question. Am I mistaken in believing that the trial judge in your state found that there was an agreement?

MR. TURNER: He did.

QUESTION: And on habeas corpus and federal habeas corpus, this was submitted by stipulation between the parties on the trial record, and that the District Court accepted the fact that there was an agreement, and therefore we have to accept that as a fact in this case. Am I mistaken about

that?

MR. TURNER: Well, Your Honor, I know the rule on that, but actually --

QUESTION: That question should be answered yes or no, I think.

MR. TURNER: No, I don't think you absolutely need to accept it. If the record is complete -- and I think it is -- and if there is absolutely no evidence that Leaming or Nichols or anyone agreed to anything -- they heard this conversation, certainly they heard this one-sided -- now, from that, he found that there was an agreement.

QUESTION: And so did the District Court, the Federal District Court, didn't it?

MR. TURNER: Well, the Federal District Court did so on the basis that it was bound by the findings of the trial court.

QUESTION: Which you stipulated it should make its findings on, didn't you?

MR. TURNER: Yes, sir.

QUESTION: How did the Supreme Court of Iowa treat that point?

MR. TURNER: They found that there was an agreement, I believe.

QUESTION: So as it stands now, everybody agrees there was an agreement but you?

MR. TURNER: Well, Your Honor --

QUESTION: Is that right?

MR. TURNER: That's correct, but I stand here --

QUESTION: That is what I thought.

MR. TURNER: I plead with the Court to consider the record itself on this point, and I think that section 2254 has authority in there for this Court to do that, where there is an absence of this.

QUESTION: Mr. Attorney General, if we are bound by the finding that there was an agreement, what is your view as to whether or not it was broken by the questions that were asked by Officer Leaming?

MR. TURNER: Well, Your Honor, Officer Leaming testified, and he was uncontradicted, that he did not really ask any questions. He made this Christian burial statement, and he said "I don't want you to answer me." Now, that may be considered to be -- that is going to be a question for this Court to decide, whether that constituted interrogation or a psychological ploy.

QUESTION: I think you indicated earlier that the officer was anxious by the questions he asked to lead Williams into stating where the body was located, did you not?

MR. TURNER: Yes, he was and he made the statement for that purpose.

QUESTION: Would you regard that as interrogation?

MR. TURNER: Well, it wasn't interrogation in the customary sense of thinking of interrogation as being questioning.

QUESTION: You mean he hadn't been put under oath at that time?

MR. TURNER: Well, he hadn't asked him a question. He simply stated a fact. He said "I want you to observe the weather conditions. I want you to notice that it is snowing, that it's sleeting, that the roads are icy," and so on. And he said "Even if the snow covers her body, you won't be able to find her body, and her parents deserve a good Christian burial." Now --

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

MR. TURNER: Yes, sir.

QUESTION: -- by whatever techniques he used, I would suppose a lawyer would consider that he were pursuing interrogation.

MR. TURNER: It is, but it was very brief. We claim there was no agreement not to do it, but even if there was, he wasn't bound by any such agreement, really, as an officer of the law, as a police officer anyway, and that this was volunteered two hours later.

QUESTION: Don't you concede though, Mr. Turner, that if it had been a prosecuting attorney who made -- assuming that there was an agreement, that he would be bound? I think you conceded that earlier.

MR. TURNER: As a matter of ethics, he would be, Your Honor. I don't know that --

QUESTION: Well, as a matter of ethics, I suppose the police officer was bound. But what significance do we attach to ethics in this?

MR. TURNER: Well, I think the court attach --

QUESTION: Let me rephrase the question. Would it make any difference in the outcome of the case if (a) there had been an agreement undoubted, and (b) that it had been made by the prosecuting attorney, rather than a police officer?

MR. TURNER: Perhaps, because, yes --

QUESTION: Does your position depend on the fact that it is a police officer rather than a prosecuting attorney, is what I am trying to find out.

MR. TURNER: In a plea bargain, for example, the courts have held that the prosecuting attorney is bound and later can't set aside his agreement. And I think, yes, but the law is never extended to a police officer in this regard.

QUESTION: What is the sense of having a lawyer if you can't have the lawyer to make an agreement to protect

you?

MR. TURNER: Well, I haven't conceded there was an agreement, but even though you have a lawyer --

QUESTION: You say that --

QUESTION: -- even at trial, the court has held that in the Faretta case, he could later waive his right. He had --

QUESTION: When did he waive his right to a lawyer? You've got him waiving everything else, did he waive that, too?

MR. TURNER: I think he did.

QUESTION: When?

MR. TURNER: As he drove down the -- as he approached Grinnell.

QUESTION: Did he say anything about a lawyer or waive?

MR. TURNER: Well, in the first place, he told Mr. McKnight he --

QUESTION: But did he say anything about waive?

MR. TURNER: No, but that is not required under the cases. There is no requirement of an extress waiver. I think the Brown --

QUESTION: Hre is a man going from one lawyer, and he asks the lawyer to go along with him, he is on his way to another lawyer, and in between the two laywers he

waives his lawyer?

MR. TURNER: Well, there is another disputed fact as to whether Mr. Kelly asked --

QUESTION: Well, I don't assume that this is disputed.

MR. TURNER: It is disputed, Your Honor.

QUESTION: It is disputed?

MR. TURNER: It is disputed by --

QUESTION: He did not waive --

MR. TURNER: And the trial judge did not make any finding on that point. The trial judge didn't find, Judge Denato didn't find --

QUESTION: He didn't need to because he found that there had been an agreement.

MR. TURNER: You mean to go along, to ride along in the car?

QUESTION: Yes.

MR. TURNER: There hadn't been any agreement that he ride along in the car.

QUESTION: He said he couldn't. The police said he could not.

MR. TURNER: Well, it is dispute whether he was ever asked even to ride along -- whether he asked to ride along in the car.

QUESTION: Mr. Attorney General, I think few of us

know that you are not allowed to rise in a police car with a prisoner.

MR. TURNER: Yes, sir.

QUESTION: Then why argue that point?

MR. TURNER: Well, Judge Hanson placed great emphasis on the fact that Kelly asked to ride along and wasn't allowed to do so.

QUESTION: Yes, but when did he waive his lawyer? I want that part of the record, where he waived.

MR. TURNER: He never said --

QUESTION: Well, where did he say --

MR. TURNER: -- expressly said "I waive." He merely volunteered --

QUESTION: Give me anything he said that anybody can interpret as a waiver.

MR. TURNER: "Did you find her shoes?"

QUESTION: And what did he say?

MR. TURNER: He --

QUESTION: He said, "Did you find her shoes?" That is waive of his lawyer?

MR. TURNER: Yes, I think it is. And it is a waiver of his Fifth Amendment rights, as well, and --

QUESTION: I assume if he had asked for a cup of coffee, that would have been a waiver?

MR. TURNER: When he directed --

QUESTION: Wouldn't it?

MR. TURNER: When he directed the officers to go to look for the shoes, he waived his right to counsel while going to look for the shoes. And he did the same thing when he went to look for the blanket and again when he went to look for the body.

QUESTION: And then when did he get his lawyer back?

MR. TURNER: When he got to Des Moines.

QUESTION: I see.

MR. TURNER: You see, when he started off --

QUESTION: It was one of these off and on things?

MR. TURNER: -- he knew his rights.

QUESTION: It was one of these off and on things?

MR. TURNER: Perhaps. He knew his rights. He called his lawyer to start with, and he also sought out and got Mr. Kelly, and he had a lawyer. In fact, he didn't talk to Mr. Kelly once, but he talked to him twice. And both of his lawyers warned him, "Do not talk to the officers, do not tell them anything." There is no dispute about that. But nevertheless he did, and I say that he had that right, and he didn't have to stop and say, "Now, there is something I want you gentlemen to know. I am going to temporarily waive my right to counsel." That is absurd. He doesn't have to do that.

QUESTION: He does it by talking, is that what you are telling us? He waives the advice of counsel by what he says on the substantive aspects of the crime?

MR. TURNER: Yes, I think he does. In fact, I think the cases hold that no express statement of the waiver is required, that he can simply waive it by proceeding without his counsel. A waiver is simply a knowledgeable relinquishment of a known right. That has been held by this Court, and that is what he did. He had a right to counsel, and he knew that right, and he waived that right.

Well, of course, I am unable --

QUESTION: Would it not be more accurate to say in this context that he knew he had a right not to speak, not to speak to the officers about anything relating to the crime, and he had been told that by several police officers and several lawyers, and that is the known right that he waived, the right not to speak?

MR. TURNER: I think he waived that.

QUESTION: And he waived that by speaking?

MR. TURNER: I think he waived both at that point, because he had already had a lawyer. He waived both his right not to speak and his right to counsel, both of which rights he knew. There is no question about it. He admitted that he knew them.

QUESTION: Mr. Attorney General, how do you

distinguish the Escobedo case, on which Judge Hanson relied so heavily, why wouldn't your argument equally apply to just Escobedo, going ahead and talking after his lawyer was unable to be present with him?

MR. TURNER: Well, in Escobedo, in the first place, I think there were no warnings, he wasn't -- Escobedo was asking to see his lawyer and was denied the right to see his lawyer.

QUESTION: But that is what Judge Hanson found happened here, too.

MR. TURNER: But in this case he --

QUESTION: Is it the distinction that you disagree with the finding or -- let me ask it this way: Assume that Finding No. 11 is correct, that the lawyer in Davenport asked to ride along but was refused permission.

MR. TURNER: The finding was that he had said that he would tell him the whole story when he got to Des Moines and talk to his lawyer.

QUESTION: Let me make sure you understand my question. The finding that I am referring to reads as follows: "Before Det. Leaming left for Des Moines with the Petitioner, Mr. Kelly asked Det. Leaming that he be permitted to ride along in the police car to Des Moines. This request was refused by Det. Leaming."

Now, assuming that is a correct finding, and I

understand you don't accept it, because it was not made by the state trial judge, assuming that is a correct finding, how do you differentiate the Escobedo case, or can you?

MR. TURNER: Well, I think I can, yes, because in the Escobedo case even, or in any case, the lawyer has no right to ride along or to get into the jail cell or anything. The client has a right at appropriate times to talk to his lawyer, but that doesn't mean the lawyer has to live with him. And in this case, it doesn't mean, when he said, "When I get to Des Moines I will tell you the whole story," that he wouldn't talk in absence of his attorney. That is what Judge Hanson, the federal court, determined, that he merely -- that by saying that, he wouldn't talk in absence of his attorney. But that isn't what he said. He said, "When I get to Des Moines, I will tell you the whole story."

Well, I would like to --

QUESTION: Mr. Turner, may I ask you a question? Your brief, of course, was filed in February, before our decision in Stone v. Powell came down. This is a habeas action, as it comes here. Have you given any consideration as to whether the underlying philosophy of Stone v. Powell would have application here?

MR. TURNER: Yes, sir, I think it would. In Stone v. Powell, you have -- that was a Fourth Amendment case, and I think Mr. Chief Justice Burger noted that there there was

a strong circumstancial probability of reliability, when you find the goods or the body or something in a search. And here there is a strong circumstancial probability of reliability in his statement, and the honesty and truth of his statement, when he took the police to the body. And I think here, where there has been a full hearing and these rights have been adjudicated by the trial court, that the trial court and the Supreme Court of Iowa are at least in as good a position to make the decision, as would be Judge Hanson or would be the Federal Circuit Court of Appeals, and that therefore Stone v. Powell should be extended here, and that this case should be denied on that ground alone. But then, of course, we ask here that the Court overturn its decisions in the Miranda case, that you can't use psychological ploys or subtle interrogation or cajolary. We would think that the historical basis of the Miranda case, of the Fifth Amendment privilege against self-incrimination was not that type of conduct.

Thank you.

QUESTION: General Turner, before you sit down, may I ask you this: As you know, the very threshold point that your adversary makes is that there was a finding in this case that the respondent's statement was, as a matter of fact and a matter of law, involuntary, and that finding has not been challenged, and if that is true, then all this

talk of Miranda, Escobedo and everything else is wholly irrelevant because that would decide this case, and that was a factual finding, it was affirmed on appeal, and it has not been challenged by you in this Court.

Now, I read your reply brief but, frankly, have you got anything else to say in answer to that basic proposition beyond what you said in your --

MR. TURNER: No, I think our reply brief answers that.

QUESTION: All right.

MR. TURNER: That is a big "if" that you put. And, further, he didn't raise that in challenging the petition for writ of certiorari or resisting it in any way.

QUESTION: No, it is you who petitioned this Court to upset the judgment of the Court of Appeals.

MR. TURNER: Yes, sir, and we claim that he waived --

QUESTION: And if that judgment rests upon a claim, rests upon a foundation that you have not challenged, then it should be affirmed on that foundation.

MR. TURNER: We contend that we have challenged it, Your Honor, on the -- throughout our argument on Miranda and throughout --

QUESTION: No, Miranda doesn't have anything to do with voluntariness at all.

MR. TURNER: Well, we contend --

QUESTION: In fact, that as the voluntariness in fact --

MR. TURNER: In our argument, we say that his statements were voluntary. There is no evidence to the contrary.

QUESTION: You say so, but there has been a finding to the contrary, that your opponent says you have never attacked.

MR. TURNER: Well, Your Honor, this Court can, in that type of situation, where these questions are the very foundation of the whole matter, consider those things, even though they weren't specifically raised. And we have cases cited in our brief to that effect.

QUESTION: And you have nothing to say beyond what you said in your reply brief to that on this question?

MR. TURNER: Not at the moment, but I think we have fully answered it on three different aspects.

QUESTION: All right. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

Mr. Bartels.

ORAL ARGUMENT OF ROBERT D. BARTELS, ESQ.,

ON BEHALF OF RESPONDENT

MR. BARTELS: Mr. Chief Justice, and may it please

the Court:

As the briefs in this case indicate, there are a number of constitutional problems that are raised by the record, and I would like to focus on what is the central and most serious problem, and I think the one the Court has been dealing with so far primarily. And that is the deliberate and repeated efforts by Des Moines police officers to deprive the defendant of the assistance of his counsel during an interrogation about the crime, the very crime with which he has been charged, formally charged.

Now, this interrogation took place, as Mr. Turner and Mr. Winders have indicated, on the automobile trip from Davenport to Des Moines. I think perhaps I ought to come back and emphasize certain facts that existed and that everyone knew before the automobile trip began and before the interrogation took place.

First, the police clearly knew that the defendant had retained an attorney, Mr. McKnight, to represent him with regard to the charges he was facing. And indeed, Mr. McKnight himself arranged to have the defendant surrender in Davenport.

Secondly, the police had been informed through counsel that the defendant did not wish to be questioned or to provide any information during the return trip to Des Moines.

Third --

QUESTION: And do you say that is forever irrevocable?

MR. BARTELS: No, Your Honor, I can conceive of circumstances in which the defendant could clearly state that he had changed his mind about that or that he was rejecting his attorney's advice about that. But there is nothing even remotely resembling that in this case.

QUESTION: In other words, the rights are the rights of the defendant and not the rights of the lawyer?

MR. BARTELS: That is correct, Your Honor. I guess that brings me to the agreement.

QUESTION: The what?

MR. BARTELS: The agreement that the state trial court and Judge Hanson both found existed between the defense counsel, Mr. McKnight, and the police, to the effect that the defendant would not be questioned during this return trip to Des Moines.

There is clearly a considerable amount of support in the record for the trial court's findings, particularly on pages 38 and 39 of the Appendix. The testimony of Chief Nichols, who virtually concedes that there was an agreement. At one point, on page 39, Mr. McKnight says, "Now, didn't you say, when we found out that they had stopped to find the body, that you hoped that they hadn't questioned him and

hadn't stopped to find the body because we agreed that that would not be done?" And Chief Nichols said, "I may have said that."

And Det. Leaming denies the agreement, but there, Your Honor, the trial court specifically expressed doubts about Det. Leaming's candor with regard to the agreement, and I think it is important here to remember that the state trial court got to see the demeanor both of the witnesses and Mr. McKnight, who was in kind of a peculiar position.

QUESTION: Let me ask you a question about the treatment of the Supreme Court of Iowa of the Polk County District Court's finding on that point. The Supreme Court, at Syllabus, paragraph 10, refers to it as an alleged agreement, and I suppose that there was no occasion for the state to challenge the finding in the Supreme Court of Iowa, since the District Judge ultimately sustained a guilty verdict. But you don't contend, do you, that the Supreme Court of Iowa upheld the finding that there was an agreement?

MR. BARTELS: No, Your Honor, I don't think the Supreme Court of Iowa really made any finding either way on that, really relying on the finding of the state trial court, which I think is the finding really that is referred to in section 2254(d). That is the finding on the merits of factual dispute that has the initial presumption of correctness under 2254(d).

QUESTION: Let's accept that presumption of correctness and the existence of something called an agreement by all the courts and by the parties. In the relationship between the attorney and the client, who is the master and who is the servant?

MR. BARTELS: Well, Your Honor, clearly at least my view is that the client is the mater and that the attorney is the servant.

QUESTION: So --

MR. BARTELS: But here, Your Honor, the defendant has retained counsel to represent him and to assist him in dealing with the police, and there is no contention here that this was a commercial contract, there is no issue of --

QUESTION: It has been argued to some extent as though it were. Now, taking it for as much as it has been called an agreement or understanding -- understanding might perhaps be a better term, would you agree?

MR. BARTELS: Your Honor, I think it is not perfectly clear what Judge Denato meant by an agreement. I think he at least meant a mutual understanding between the parties and that they mutually understood that the other party was essentially agreeing to this, that there was no questioning.

QUESTION: Your client, Williams, the defendant in the case, you have agreed, is the master or the principal.

He can change agreements made by his agent, can he not, by saying "I now want to talk"?

MR. BARTELS: Well, he could have done that, Your Honor, but he clearly --

QUESTION: Hypothetically.

MR. BARTELS: Hypothetically, Your Honor.

QUESTION: But I am not assuming that he did.

MR. BARTLES: What could have happened, Your Honor, in this trip is that the defendant could have said, "Mr. Leaming, I want to reject everything my lawyer has done, I want to reject that agreement, I want to give up assistance of counsel, I want to talk to you." And nothing even remotely resembling that happened in this case.

QUESTION: But suppose he had said, instead of that, without anything at all, he said, "I want to tell you where the body is, because I killed her." There is nothing wrong with that, is there?

MR. BARTELS: Your Honor, if that had taken place before what has been referred to as the Christian burial speech and the priest, then I think there still would be no problem in this case, except perhaps the fact that Mr. Kelly was denied permission to go along in the squad car. And I think that was probably proper also, as long as the police were not going to interrogate while Mr. Kelly was not in the police car.

QUESTION: Well, I take it had they ridden 120 miles in complete silence and suddenly the defendant had said, "Mr. Leaming, I want to tell you, I know where the body is, I am going to show you, I killed her," you wouldn't be here, would you?

MR. BARTELS: I assume I would not, Your Honor, no. I don't think there is any problem with that.

QUESTION: I gather, then, what you emphasize is that Leaming, what he had to say all along, which led finally to the defendant saying what he did?

MR. BARTELS: Yes, Your Honor. The most important piece of interrogation here was the Christian burial speech, and I think Mr. Turner has conceded really that this was just an obvious attempt to induce the defendant to provide this information. And it is also quite clear from the record that I guess the reason we are here is that it succeeded. The information that was requested was in fact given, the delay which the Attorney General tries to make something of was exactly what Det. Leaming asked for. There was no information given before the Christian burial speech, despite all the other conversations referred to, no information given after the defendant returns to Des Moines and sees Mr. McKnight.

QUESTION: Then what is the objection that you see to the Christian burial speech?

MR. BARTELS: In other words, for one thing, it is interrogation. And beyond being interrogation, Your Honor, I think it was particularly offensive and coercive type of interrogation, because obviously the references to the Christian burial were designed to play on the defendant's known religious background and his history of mental illness.

QUESTION: Well, what is the matter with that?

MR. BARTELS: With playing on it?

QUESTION: Yes. Presumably, there is a privilege against compulsory self-incrimination, but certainly the law does not frown on incrimination that comes voluntarily. If a man confesses a crime, you certainly don't hold it against him.

MR. BARTELS: No, Your Honor. But I think the point is that what Det. Leaming did and the way in which he made that Christian burial speech was psychologically coercive, and this Court has recognized in the past that there --

QUESTION: How does it coerce somebody?

MR. BARTELS: Your Honor, I think that Det. Leaming was trying to play on the defendant's psychological weaknesses, to make him do something that he would not have done under any just ordinary question and answer in the case, and that to play on those kinds of weaknesses amounts to psychological coercion. If there is anything besides physical coercion,

Your Honor, I think this is the case.

QUESTION: Given the record as it now is, Mr. Bartels, if the only evidence introduced against your client, the defendant, at trial was his statement "Did you find the shoes?" -- let's assume nothing else beyond that -- would you say that should have been excluded under the exclusionary rule?

MR. BARTELS: Your Honor, I doubt it. I think there might have had to be some further inquiry than by the trial courts, both Federal and State, in terms of whether that question was somehow connected to the Christian burial speech. But I think on this record we really don't know that, and I am perfectly willing to concede that that statement alone could have been admissible. That is not what we are talking about here. We are talking about the other information that was provided as a result of the Christian burial speech and the other questioning that took place.

QUESTION: Do you think it would not be incriminating evidence to have that introduced?

MR. BARTELS: Your Honor, I think that would have been probably admissible as barely relevant on the issue of whether --

QUESTION: Well, was it incriminating?

MR. BARTELS: Well, Your Honor, I think if it weren't incriminating, it wouldn't be relevant, so my anwwer

is, yes, I think it might be regarded as somewhat incriminating.

QUESTION: Now, I am assuming that the situation would prevail that he would not take the stand, do you suggest that the prosecutor couldn't make a great deal of capital out of that in his closing arguments, along with all the other circumstances, the evidence at the YMCA, the man was seen carrying a bundle with the legs of a small child, the feet with shoes on?

MR. BARTELS: Your Honor, I think someone might make something out of this question about the shoes. On the other hand, there were a number of -- well, I think that can also be explained as curiosity and wanting to know what evidence has been found.

Now, admittedly, Your Honor, I think it would be relevant and it would be something that the prosecutor could use. I can only say, as a prosecutor, that I would far rather have the fact that the defendant showed the location of the body and knew the location of the shoes and so forth.

QUESTION: Yes, that is conclusive. That is conclusive.

MR. BARTELS: And I think the question here is whether -- than whether the admission of the other statements about the location of the body was harmless beyond reasonable doubt.

QUESTION: How about the search for the clothing and the blanket, do you think that would have been admissible?

MR. BARTELS: Your Honor, I doubt that. One thing that happened that tends to get lost in the Attorney General's description of that is that there was questioning about that. It wasn't simply a conversation and a statement. After the initial question about the shoes, Det. Leming and Det. Nelson, who was the other individual in the car, made some statements how they didn't know whether the shoes had been found, that some evidence had been found, but they didn't know exactly what, and then they said, "Did you put the shoes with the other stuff?" And he said, no, he put them at a gas station. And then they asked, "What kind of shoes were they? Were they go-go boots?" And, again, there was response.

QUESTION: And you think all of that would necessarily be barred along with the body of the victim?

MR. BARTELS: Your Honor, I think that is further interrogation, yes.

Your Honor, in addition to this agreement -- perhaps I ought to clarify some more --

QUESTION: Let me ask you one question about the agreement, if I may, Mr. Bartels, along the line I asked the Attorney General about your theory. Suppose I am defense

counsel and you are a prosecuting attorney, and I come to you and I say I know you've got my client under suspicion, here is a thousand dollars, you promise not to interrogate him for the next ten days. Now, you take the thousand dollars and you call him before a grand jury five days later, do you think that is an enforceable agreement?

MR. BARTELS: Your Honor, I think it is, and not because of the thousand dollars. I think what is crucial about the agreement here, Your Honor, is that Mr. McKnight was mislead into not doing other things he could have done to further protect the defendant's rights, like asked to go along in the police car, like inform the defendant in much more detail about his rights and about the crucial importance in terms of the admissibility of evidence at trial that he not disclose the body or the location of the body directly to the police officers, rather than through counsel, which was obviously Mr. McKnight's intent.

QUESTION: You think then that an agreement between parties like this is enforceable just as if it were a contract?

MR. BARTELS: Your Honor, let me clarify it. I think it is enforceable on behalf of the defendant, that if any interrogation takes place during that time, that it is improper, that is in violation of the right to counsel. The thousand dollars is clearly improper, but it has no bearing

on this case.

QUESTION: When what you are saying is that it is improper because it is a violation of the constitutional right, not because of Iowa contract law?

MR. BARTELS: That's right, Your Honor. The defendant has the right to the assistance of counsel, and one of the kinds of assistance that counsel can give is to make agreements of this sort with the prosecutor, and this type of agreement is likely to change the course of conduct by the defense counsel in terms of what else he would have done to protect those rights in the absence of the agreement.

QUESTION: But the agreement itself isn't separately enforceable to bar the evidence, it is simply a factor to be taken into consideration to see whether the defendant's constitutional rights have been violated?

MR. BARTELS: I think that is a true characterization, Your Honor.

QUESTION: Mr. Bartels, you keep raising the point about not letting him ride in the car. Wasn't he told that it was against police regulations, it was impossible?

MR. BARTELS: He was told it was impossible, Your Honor, and I --

QUESTION: Isn't that true?

MR. BARTELS: Your Honor, I don't know. There is nothing in the record to suggest that. I am not quite sure,

in these circumstances --

QUESTION: Well, any police regulations you read will tell you that lawyers can't ride in cars with their clients.

MR. BARTELS: We are not again saying that Mr. Kelly had an enforceable right to be in the car.

QUESTION: I was saying I thought you put too much emphasis on it, that's all.

MR. BARTELS: I think the point of it, Your Honor, is that when the police were going to have the defendant isolated from his counsel in that way, for whatever reasons, that they were then required not to question, not only because of the agreement but because of the other indications, that the defendant should not be questioned or provide information in the absence of his attorney.

Your Honor, we could pretend that Mr. Kelly didn't even exist and the case would have to go the same way. It is simply a factor.

Now, any of these factors I guess I have neglected to talk about, although the Attorney General has. The several statements by the defendant that he would tell the whole story after, and Mr. Turner I think inadvertently left after he saw Mr. McKnight in Des Moines, not after he got back to Des Moines. It was clearly a reference to counsel in those statements in Det. Leaming's testimony.

Now, any of the facts that I have discussed so far taken individually would have constitutionally precluded Det. Leaming from engaging in the interrogation that took place here. And in the face of all of them, he did engage in these efforts to obtain information and specifically for the purpose of getting it before the defendant could reach McKnight. He concedes that that was his purpose.

Now, that kind of purposeful attempt to obtain information, given all of this background about the agreement, the other indications that there should be no questioning, the fact that defendant had counsel with regard to a crime with which he had been charged, that purposeful interrogation in light of all those facts, clearly is a violation of the defendant's right to counsel under the Sixth and Fourteenth Amendments. And that is quite apart from any considerations of Miranda v. Arizona here; even if that case didn't exist, we would still have the same result.

Now, at the same time, it is true that Miranda provides an alternative basis --

QUESTION: Well, it is the only basis that the Eighth Circuit rested on, isn't it?

MR. BARTELS: No, Your Honor, I think that the Eighth Circuit's decision also rested on the Sixth Amendment's right to counsel, if I recall it correctly.

QUESTION: You think so?

MR. BARTELS: Yes, Your Honor. I think clearly the District Court's decision rested on several grounds. The Eighth Circuit did not deal with the voluntariness issue, Your Honor.

QUESTION: It didn't touch it at all, did it?

MR. BARTELS: No, Your Honor. It simply affirmed and its discussion of the grounds for affirmance did not include any discussion of voluntariness. But I think the meaning of that is that the District Court's decision on that stood, and still stands.

QUESTION: Well, if the District Court's decision on that stood in the view of the Eighth Circuit, why would it have been necessary to get into issues like Miranda and the right of counsel? Why wouldn't it simply have affirmed on the involuntariness point?

MR. BARTELS: Well, Your Honor, I think the Eighth Circuit was faced with a choice of several equal theories, any one or two or three of which it could have discussed, and there was really nothing about any of them that said that this issue or that should issue should be the one that you rely on primarily. I think the Court of Appeals went primarily on the Sixth Amendment and Miranda grounds, and I gather simply decided that it wasn't really necessary to also make the alternative finding of voluntariness.

QUESTION: If we should, if this Court should reject

the Miranda and the Sixth Amendment grounds and be unwilling to pass upon the involuntariness grounds, I suppose that the case should be sent back to the Eighth Circuit so that it could consider whatever the state had to say about the involuntariness finding being clearly erroneous?

MR. BARTELS: No, Your Honor, I don't think so. The Eighth Circuit, the voluntariness issue was clearly presented to the Eighth Circuit and was litigated there, and I think the affirmance of the lower court opinion means that the lower court decision was --

QUESTION: Well, the first sentence in the Eighth Circuit's opinion refers to voluntariness.

MR. BARTELS: That's correct, Your Honor.

QUESTION: Except in the dissent.

MR. BARTELS: In the dissent, Your Honor, it was raised and challenged at that point, and I think that reflects the fact that it was litigated and considered.

Now, under the Miranda case -- and I touch on this very briefly -- there is also clearly --

QUESTION: Up to now your argument hasn't relied on the Miranda case, am I correct in that?

MR. BARTELS: No, Your Honor. I think --

QUESTION: You relied rather on what Massiah and Escobedo and basically on the --

MR. BARTELS: That's right.

QUESTION: -- Sixth and Fourteenth Amendments?

MR. BARTELS: That's right, Your Honor. Everything I said I think about the facts also relates to the Miranda claim, but clearly there is a violation here quite apart from Miranda or Escobedo.

Under Miranda, again, there is this alternative ground, and I think in fact there are two ways of looking at it under Miranda. Probably the most important way here is that since the defendant himself and through counsel indicated rather clearly that he did not wish to make any statements in the absence of counsel, Miranda says interrogation must cease, period. I think this Court's opinions in Michigan v. Mosley clarified that and reaffirmed that distinction between indications of a desire to have a lawyer and indications of the right to remain silent. So that there is no question here about some time passing after that and being able to re-interrogate after a certain point in time.

Even under the right to remain silent rubric, as I read Mosley, Your Honor, there was a clear length of time during which the right to remain silent had been invoked. It was about the same crime, and the Mosley analysis on that point also wouldn't apply to this case. But the counsel point is still much clearer.

Your Honor, I think also ought to make some statements about waiver here. I think the state's primary

defense really here is that somehow there was a waiver. And what Mr. Turner hasn't relied upon here first of all is the question "Did you find the shoes?" and secondly the fact that the defendant provided information. Your Honor, neither of those statements in any way can be said to be an indication of "I want to waive my lawyer." There is not even an inference to be drawn there from the statement.

QUESTION: Is there not another question, the question of waiving the right to remain silent on this very crucial subject?

MR. BARTELS: Your Honor --

QUESTION: I think there is a different question from waiving the right to a lawyer, is it not?

MR. BARTELS: That's right, Your Honor. I think the second problem with the state's view here is that both of these statements come after the defendant's right not to be questioned in the absence of his lawyer has already occurred. And surely, Your Honor, the waiver has to precede the violation in order to take care of it.

QUESTION: That right stems from Miranda that you are arguing now, does it not?

MR. BARTELS: Your Honor, I think it stems both from Miranda and from the Sixth Amendment right to have the Sixth and Fourteenth Amendment right to have assistance of counsel during this kind of critical stage after a charge

has been filed.

MR. CHIEF JUSTICE BURGER: We will resume there after lunch, if you have anything further.

[Whereupon, at 12:00 o'clock noon, the Court was recessed until 1:00 o'clock p.m.]

AFTERNOON SESSION - 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Mr. Bartels, you may resume your argument.

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

In the few minutes I have left, I thought I perhaps should address a question that was raised by Mr. Justice Blackmun earlier in my opponents' argument, and that is the applicability of the Stone and Rice cases to this particular case.

I think the simplest answer to the question is that issue has never been raised here. It was never raised below. It was not presented in the petition for certiorari. It was not address in the petitioner's brief on the merits, and it was not even --

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

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

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

MR. BARTELS: No, Your Honor.

QUESTION: Tell us why.

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

Your Honor, what the state basically asks this Court to do in this particular case is to hold that law enforcement officers may do virtually anything short of physical violence or threats of physical violence to obtain information from persons formally charged with crime during interrogation processes. And a reversal of the Court of Appeals and the District Court opinions in this case would mean, among other things, that the police would be completely free to ignore the existence of counsel in a criminal case; and, indeed, it would go further than that, and to evade counsel through what the state itself has termed trickery and

deceit. Your Honor, that result would be contrary to the precedents of this Court, it would emasculate the Fifth and Sixth and Fourteenth Amendments in this kind of situation, and it would also make it virtually impossible for defense counsel to operate in a sensible way in dealing with clients and police in criminal cases.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. I think the state has used its time. The case is submitted.

[Whereupon, at 1:05 o'clock p.m., the case in the above-entitled matter was submitted.]

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