ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1651

TITLE CRISPUS NIX, WARDEN, Petitioner v. ROBERT ANTHONY WILLIAMS

PLACE Washington, D. C.

DATE January 18, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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CRISPUS NIX, WARDEN, :

Petitioner :

v. : No. 82-1651

ROBERT ANTHONY WILLIAMS :

- -x

Washington, D.C.

Wednesday, January 18, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:11 p.m.

APPEARANCES:

BRENT R. APPEL, ESQ., Des Moines, Iowa;
on behalf of Petitioner.

KATHRYN A. OBERLY, ESQ., Washington, D.C.;
on behalf of the United States as amicus curiae supporting Petitioner.

ROBERT BARTELS, ESQ., Tempe, Arizona;
on behalf of Respondent.

C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Appel, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF BRENT R. APPEL, ESQ.,

ON BEHALF OF PETITIONER

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

This is the second time this case has been here, and so the Court is fully familiar with the underlying facts. But this time it comes here in a very different analytical posture. In the first case, as you recall, highly probative testimony about the fact that the witness in the back seat of a car made incriminating statements that ultimately led police to the body of a murder victim was suppressed on the ground that the Respondent's Sixth Amendment right to counsel was violated.

After this Court set aside the first conviction, Respondent was retried and this time medical testimony about the fact of the body's discovery, the fact that the body was dead, and the fact that the body showed evidence of sexual abuse, and the fact that the body appeared to have been suffocated was introduced in the record on an inevitable discovery theory.

And the State believes that in this particular

case if the Court keeps focus on the fact that this is an independent source case with a twist, the twist of inevitable discovery, it's readily disposed of in favor of the Petitioner. It is not an attenuation case. It is not a good faith exception to the exclusionary rule. And it is emphatically not an attempt to relitigate Williams I.

Let's review the facts on Williams II. Inevitable discovery is the exception used to admit the evidence. 200 volunteers were sweeping across an area in central Iowa, looking in ditches along Interstate 80 for the body of the murder victim. It's in the record under Detective Ruxlow's testimony exactly what the contours of this search were. But the volunteers were expressly directed to look in hidden parts of ditches for the body.

QUESTION: Is it true, as the Respondent states, that the scope of the search was to stop at the county line?

MR. APPEL: The testimony in the record is flatly to the contrary. Detective Ruxlow, who was in charge of the search, stated that the search was going to continue into Polk County. And that makes logical sense. If the body had not been discovered and the search had already continued for a period of 60 miles, 7

miles north and 7 miles south of the interstate, they surely would have continued the search on into the YMCA, which is where the abduction ultimately occurred.

The trial court --

QUESTION: The Court of Appeals didn't disagree with that, did it?

MR. APPEL: The Court of Appeals did not --

QUESTION: He found on another theory.

MR. APPEL: The Court of Appeals introduced an absence of bad faith theory into the case and reversed on that ground.

QUESTION: Yes.

MR. APPEL: And Mr. Justice White, I submit --

QUESTION: And it assumed that even if it would have been found, it was inadmissible because of the faith, bad faith.

MR. APPEL: The Court of Appeals said that because the State failed to --

QUESTION: Isn't that all that's in issue before us, or not?

MR. APPEL: That's correct. And I submit to you, because this is an independent source case, that good faith is not an issue. In fact, this search is analytically entirely distinct from the conduct that

occurred in the automobile as the Respondent was transported from Davenport to Des Moines.

Now, we've had suggestions in Respondent's brief that a Sixth Amendment claim is involved here. Let me point out to you that the ability of the Respondent to cross-examine the witnesses at trial who testified with respect to the medical condition of the body was fully protected.

In fact, if you glance at the trial record you'll see not only was there rigorous cross-examination of the coroner who testified about the condition of the body, but the defense introduced three medical witnesses to attempt to build a case in a different direction from that of the State.

And to show that there is no Sixth Amendment violation independently here in the admission of medical testimony, I submit to you the following hypothetical. Supposing an attorney was traveling in the car with Respondent and fully protecting his rights under Miranda, Fifth Amendment rights and so forth. It would not have made any difference.

Three courts that have considered the matter -- the state trial court, the Iowa Supreme Court, which reviews constitutional issues de novo, and the federal district court -- have said that the body would have

been discovered in any event. Indeed, if Respondent was still at large the body would have been discovered in any event, according to the findings of the three courts that have considered the matter.

And so I submit to you that the right to counsel has been fully protected in this case, and that the only rationale for exclusion of this highly probative and reliable evidence must be found really elsewhere; perhaps some generalized notion of protection of the adversary process.

QUESTION: What specific right of the Respondent did the Eighth Circuit find was violated?

MR. APPEL: The Eighth Circuit opinion basically says, if I can characterize it correctly, that in order to invoke inevitable discovery the State has the burden of showing absence of bad faith. Then the Eighth Circuit said: Look, in Massiah, in the Massiah analysis, we look to the subjective intent of the officer, and that is whether the officer intended to elicit information in the absence of counsel, and therefore we must reverse.

It was almost a collateral estoppel theory, Justice Rehnquist.

QUESTION: But did they say what right of the Respondent, what constitutional right had been

violated?

MR. APPEL: I don't believe so. I think the implication is it was a Sixth Amendment right, because the first, the original case was --

QUESTION: Well, they certainly did spell it out, did they?

MR. APPEL: That's correct, Justice Rehnquist.

Let me point out that the inevitable discovery exception to the exclusionary rule -- when there is an independent ongoing investigation substantial in character that's on the verge of the discovery of the body, good faith is irrelevant. Let me suggest to you, for instance, the --

QUESTION: May I ask, what was the evidence upon which it was said that discovery was inevitable here?

MR. APPEL: I think the key testimony in the record is from Detective Ruxlow.

QUESTION: May I ask, you mentioned that all three courts below, the federal court and the two state courts, had found that. Were there findings? Are there findings?

MR. APPEL: There's an express factual finding that the body would have been discovered in any event.

QUESTION: Well, that's the conclusion.

MR. APPEL: Yes.

QUESTION: What's the evidence upon which that conclusion was based?

MR. APPEL: That a search had been initiated, that it involved some 200 volunteers, that the search method was traveling along Interstate 80 7 miles north and south of Interstate 80, looking in the ditches, looking at places where "a body might be secreted". The searchers were traveling in automobiles and snowmobiles, with specific direction to go down and look in ditches or any area that might be weeded, and so forth.

The body in fact was found about two and a half miles in front of the search where the search had been discontinued.

QUESTION: After he pointed out where it was.

MR. APPEL: That's correct yes.

QUESTION: I gather your point is that the evidence said they were patrolling that whole area; they'd have come upon this particular spot where the body was, is that it?

MR. APPEL: That's correct.

Now, admittedly we can't tell this with mathematical precision because we can't remake history, but that's not unusual in the decisions of this Court.

For instance, take the Wade-Gilbert-Stovall trilogy. A pretrial identification has occurred and there's nothing we can do to back up and undo the transaction. But instead, we allow independent testimony in court not based on the tainted identification. There's no psychological laser that can beam that out of the mind of the witness.

Similarly in the Franks v. Delaware context, where we allow -- we examine a search warrant where there's been perjured or false information in a search warrant. We attempt to -- we can't reconstruct the transaction. We can't tell for sure whether a federal magistrate would have issued a warrant with the faulty material excised. But we make a judgment.

And I think it's very clear in this Court's precedents that the mere fact you can't show mathematical certainty ought not defeat the position of the State.

I want to contrast this case sharply with the Dunaway type situation. In Dunaway, as you recall, you have a situation where there's no probable cause to arrest, admittedly. The police say they don't. They pick up a person suspected of a robbery and murder, read that person Miranda rights in the hope to cleanse the transaction, to see what might drop out. The Court in

Dunaway pointed out that this was a specific bootstrap, that they went out, they arrested the person without probable cause with a view to trying to cleanse the transaction with Miranda and seeing if evidence could be garnered.

That is emphatically not the case here. In Dunaway there's a possibility of an inducement for illegal conduct because, number one, all of the variables of the transaction are within the control of the infracting officer, and that is not what we have here.

Here we have an independent source. It's a question of timing.

QUESTION: Well, are you arguing or are you suggesting or conceding, then, that good faith really after all is a factor in inevitability?

MR. APPEL: Not where there is an independent ongoing investigation, as there was in this case, that is analytically distinct from the underlying infraction. Again, at the risk of repetition, no matter what happened in that car, even if the most able legal strategist had been traveling in the car from Davenport, Davenport to Des Moines, Iowa, the body would have been discovered in any event.

That is not and the Dunaway case is the heads

we tie, tails we tie -- or heads we win, tails we tie, proposition that the Respondent suggests; the police will not be worse off for it.

QUESTION: Going back to the inevitability of the discovery of this child's body, would you say that - you've already said that this doesn't require mathematical or scientific certainty. Would you say that the standard is something like one used in other areas, that it's reasonable probability based on common human experience?

MR. APPEL: I think we go further than that in this particular case. The reason I say that is that here you have an actual substantial ongoing investigation that's on the verge of recovering the body. It is not really a hypothetical.

QUESTION: That assumes the conclusion, when you say it's "on the verge".

MR. APPEL: Right, it does assume the conclusion. But I want to contrast this to one of those hypothetical routine police investigations where there is no independent ongoing investigation. We don't have to prove that there would have been a search for Pamela Powers. So it's not quite the same as routinely projecting hypothetical, well, the police would have investigated because police are generally thorough, and

so forth and so on. This is far less speculative than that context.

QUESTION: Well, how about that standard, reasonable probability based on common human experience?

MR. APPEL: Well, I think the State should have the burden of showing by a preponderance of evidence that the body would have been found in any event.

QUESTION: Reasonable probability would --

MR. APPEL: That would be more than enough.

What are the consequences in this particular transaction, looking at the burden of proof? Supposing we err -- just thinking abstractly, supposing you err in the determination of whether the body would have been inevitably discovered and you exclude evidence that in fact would have been found by police, though we can't prove it. That amounts to a penalty on law enforcement.

All the Petitioner asks here is to put law enforcement back in the status quo before the unconstitutional violation occurred. This Court has never applied the exclusionary rule, to the best of my knowledge, in a context that in fact puts law enforcement in a position that's worse off.

And it seems to me that Michigan v. Tucker is entirely instructive in that particular point. In Michigan and Tucker, as you know, there was a Miranda warning that was defective. It was defective in the sense that the accused was not informed of the right to counsel should he be indigent, and various incriminating statements were obtained from the accused.

In that case this Court held, number one, the right to counsel was not infracted. Why? Because when Hennessey appeared in a court of law his attorney was able to fully cross-examine the derivative evidence. Number two, in Michigan v. Tucker it was said, since the direct evidence was suppressed, i.e. the fact that the witness made the statements, that was sufficient deterrence. The marginal deterrence that might have been obtained was certainly not worth the candle.

In this particular case, evidence of the most highly probative character, the fact that the Respondent actually led police to the body and therefore knew personally of the whereabouts, has already been suppressed. No additional Sixth Amendment right to counsel has been infracted.

This is not an attenuation case. We hear in the Respondent's brief citations to Brown v. Illinois and to Dunaway. Again, this is an independent source

case, with a bit of a twist. This Court has not yet had the opportunity to hold that inevitable discovery applies in a context where an independent investigation is on the verge of discovery, though in Crews v. United States, part D of the opinion, that three Justices signed, we come very close where the three Justices note that, notwithstanding the fact that the identification of the accused was made through an illegal arrest, there was already an ongoing investigation and it had focused on the suspect, who was down at the Washington Monument, and the evidence was within the grasp of police.

In the attenuation cases it's like dominoes. There is causation. There's no independent ongoing investigation. And at some stage we say, hey, there's too many dominoes, 50 dominoes, 100 dominoes, and it gets too far down the line to say that the evidence was obtained at exploitation of the underlying conduct. And probably where there's a live witness involved that counts for 50 dominoes.

But in this particular case, once again, law enforcement does not have the ability to manipulate the variables like you might in an attenuation case, like in Dunaway. It would be an odd rule of law that said, well, go ahead and arrest without probable cause, cleanse it with Miranda and then see what drops out.

That might be an incentive for unlawful conduct. But that is emphatically not the case here.

One other case that this is not.

QUESTION: In other words, you're saying that because nothing in the directions for the search or the scope of it was based on any response that the Respondent made during the interrogation, it's just not -- there's just no causal connection?

MR. APPEL: Precisely, and that should be the end of -- that's the end of it. This is an independent source rule case.

QUESTION: Well, I'm not -- you could still decide that you've launched all this search ahead of time and the search wasn't designed based on anything that he might have said, but nevertheless the search would never have found him.

MR. APPEL: And that is a matter for the trial court to find, much as in an independent source case, much as in a Kastigar type case, where use immunity has been conferred and then the prosecution comes in and proves in a court of law the independent character of the evidence.

So I think it's very clear, as we focus on this particular case, that what occurred in Williams I is not relevant. It has nothing to do with the

independent source here.

Now, I want to contrast once again our setting with another setting that may be causing the Justices some difficulty, and that's Griffin v. United States, the Circuit Court case cited in the brief. What basically Griffin is concerned about is a search warrant setting, where an officer is at the door without a warrant, no exigent circumstances are present justifying immediate entry, and says: Aha, we need to get a warrant. I've got probable cause, I know I've got probable cause.

If the rule of law was that I could break in and enter this establishment without a warrant and then later come into a court in a bootstrap fashion and say, hey, we had probable cause, it would have been inevitably discovered, once again that would threaten to eviscerate the Fourth Amendment warrant requirements. But in that particular case there is no independent aveneue of discovery of the evidence and all the variables are within the control of the officer on site. And so I would sharply distinguish both Dunaway and the Griffin type situation from the present case at bar.

Now, I think it's clear that there is a sense that the courts, the trial courts, are going to have to

make a factual determination here. Once again, that is not unusual. Since the very days of the independent source rule, since Silverthorne, courts have time in and time out been making the determination of independent source. And I might add, in Silverthorne, the search there was made without apparent authority, and I would substitute a word for that: flagrant. It was wrong. We don't have much of the facts of Silverthorne admittedly, but Justice Holmes simply says it was without apparent authority. And it seems to me clear that good faith is not relevant in that setting.

Another case that I want to cite -- this is -- what I'm asking for is simply weaving together the traditional strands of this Court's precedents. Though the Court hasn't had an opportunity to expressly embrace inevitable discovery, it's entirely consistent.

QUESTION: Maybe we just needed leadership.

(Laughter.)

MR. APPEL: Hopefully today we get some.

Ceccolini. The search is blatantly unconstitutional. Recall, Patrolman Burrow just happens to be in the flower shop and is waiting for a friend and is fiddling around and opens up an envelope and there are policy slips in it. Clearly no constitutional justification.

But there was no intent in Ceccolini to circumvent the law in a Michigan-Tucker-like setting: Oh, we'll go out and pick him up without probable cause, read him Miranda and cleanse the transaction. Nor was it a setting like in the search and seizure context, where we might say, well, we're going to break in anyway and then we're later going to say, well, we could have had probable cause.

It seems to me clear that in fact, analytically speaking, the conduct in the car could have been very flagrant indeed and it would not be relevant.

Mr. Chief Justice and members of the Court, unless there's further questions I would reserve time for rebuttal and introduce the Solicitor General.

CHIEF JUSTICE BURGER: Very well.

Ms. Oberly.

ORAL ARGUMENT OF KATHRYN A. OBERLY, ESQ.,
ON BEHALF OF THE UNITED STATES AS
AMICUS SUPPORTING PETITIONER

MS. OBERLY: Mr. Chief Justice and may it please the Court:

The inevitable discovery doctrine, as Mr. Appel has pointed out, balances the same competing interests that this Court's independent source doctrine

has served for years. On the one hand, it's the Court's duty to make sure that the police don't benefit from illegal conduct; and on the other hand, it's also the Court's duty to make sure that society's interest in convicting guilty defendants isn't frustrated by keeping reliable and untained evidence from a jury.

The inevitable discovery doctrine accomplishes both of these purposes, as it has in this case. Evidence that's been obtained only as a result of the Sixth Amendment violation has been suppressed from the retrial in this case. But evidence that the police would have found anyway, as three courts have found in this case, is properly admitted because the competing policy interests that I've mentioned are fully served by putting the police and the Defendant back in the position they would have occupied had there been no illegality.

I'd like to address -- add to one point that Mr. Appel made about the fact that this started off as a Sixth Amendment case. The Respondent's argument in his brief seems to be that because this is the Sixth Amendment rather than the Fourth Amendment, that the inevitable discovery doctrine can never apply to this situation.

What he really seems to be arguing is that

there's no cure for the violation this Court found in Brewer versus Williams and that because he won that case he should automatically win this case. But I would point out that this Court's decision in United States versus Morrison established that victims of Sixth Amendment violations are no more entitled to automatic remedies than victims of Fourth Amendment violations.

The Court's language in Morrison was to note that its task is to identify and neutralize the taint and limit the remedy to making sure that the Government is deprived of the fruits of its transgression, and that's exactly what was done in the retrial of this case, when all trades of the Sixth Amendment violation in Brewer versus Williams were purged from the second trial and the second trial proceeded as essentially an entirely different case.

I'd like to address the two major objections that are most often voiced at the inevitable discovery doctrine. The first is that it undermines the deterrent rationale for the exclusionary rule and the second is that it forces courts to engage in too much speculation.

Concern about the deterrent effect of the exclusionary rule was what led the Court of Appeals to impose a good faith requirement, or what it called the

absence of bad faith, as an element of the inevitable discovery doctrine. But from a practical standpoint the deterrence rationale and the absence of bad faith simply doesn't bear, in our view, any logical relationship to the inevitable discovery doctrine.

The argument seems to be that if there's no good faith requirement then the police would be encouraged to commit constitutional violations by taking shortcuts that would save them time and money, on the theory that they would know there'd be no penalty attached to it because later the prosecution could get the evidence in under inevitable discovery.

That seems to us not very logical thinking to assume that a policeman would engage in, and in fact it seems to us that his thinking would be just the opposite. The more likely a policeman is certain that the evidence he wants can be obtained lawfully, the less incentive there is for him to commit a deliberate constitutional violation, because if he does so he knows that he's risking the prosecution, he's risking personal liability, disciplinary actions or civil damages suits against him, and he knows that there's no need to do it because he's convinced that the evidence he wants can be obtained through lawful means.

Now, on the other hand, if he's not certain

that the evidence he wants can be obtained lawfully, then again there's no incentive for him to resort to illegal conduct because he'll have no confidence, no reason for confidence, that the prosecution would be able to successfully make use of the inevitable discovery doctrine.

So in either event we think it's just not a rational prediction of how policemen would think to assume that if the inevitable discovery doctrine is embraced by this Court it would encourage police to take unconstitutional shortcuts.

I also agree fully with Mr. Appel that from an analytical perspective good faith is completely irrelevant to the inevitable discovery doctrine. The whole premise of the doctrine is that the initial taint, whether Sixth Amendment or Fourth Amendment violation, has been purged and the evidence in the retrial is admitted --

QUESTION: What do you think we ought to do if we agree with you? Just say the theory of the Court of Appeals was wrong and remand? We don't have to -- do we have to say that -- do we have to say there was inevitable discovery?

MS. OBERLY: You could do either, Your Honor. I think that you could say their theory was wrong and

remand for them to consider the facts. On the other hand, I think that's probably unnecessary in this case.

QUESTION: Well, they didn't review the facts.

MS. OBERLY: They didn't, but three courts have independently, as was pointed out in the case before.

QUESTION: Well, if it's so obvious maybe we ought to remand.

MS. OBERLY: This case has been around for 15 years. The Government would not object to a remand and I don't think I would either, if the Court thought it was necessary.

QUESTION: Another five years.

MS. OBERLY: 15.

QUESTION: But another five wouldn't make any difference?

MS. OBERLY: It's not unacceptable to the Government or to Iowa for there to be a remand. But three courts have independently reviewed the facts in this case de novo, including the Iowa Supreme Court, which has a rule of de novo review of factual questions in constitutional cases, and they have all come to the same conclusion, that discovery was inevitable. And I think that it's certainly possible for this Court to

reach the same conclusion without -- on the basis of the record before it.

The final point I would like to make is the standard that the Chief Justice alluded to. We certainly endorse the preponderance --

QUESTION: Is this a -- do you think this good faith point that the Court of Appeals seized on is a question of fact?

MS. OBERLY: If good faith is an element at all, we would have it be an objective inquiry, which would basically be a question of law: whether the officer knew or should have known that he was not complying --

QUESTION: It's not like intent? There's nothing subjective about it?

MS. OBERLY: Nothing subjective at all. In fact, a subjective inquiry is completely unproductive.

QUESTION: So you don't think the Court of Appeals used the wrong standard in disagreeing with the Iowa Supreme Court?

MS. OBERLY: The Court of Appeals we think used completely the wrong standard. It used a subjective standard. The Iowa Supreme Court used the correct -- if there's to be good faith at all, the Iowa Supreme Court properly used an objective test.

QUESTION: Well, good faith is an element of inevitable discovery in Iowa?

MS. OBERLY: Well, the Iowa --

QUESTION: Is that right?

MS. OBERLY: The Iowa Supreme Court --

QUESTION: Is that right?

MS. OBERLY: -- said it is.

QUESTION: Yes.

MS. OBERLY: But that's equally wrong. But if it's defeated --

QUESTION: Well, it isn't wrong under Iowa law.

MS. OBERLY: No, Iowa can clearly make it an element of its test.

QUESTION: The Eighth Circuit doesn't review Iowa law and we don't review Iowa law.

MS. OBERLY: That's correct.

QUESTION: I think that's what the -- you think that the -- well, what standard, what erroneous standard did the Court of Appeals use?

MS. OBERLY: The Court of Appeals said in explicit words that the test for good faith is subjective, and they used as an example, I think, something that points out how erroneous their test is. They said, we don't even have in this record a

self-serving statement from Detective Leaming that he didn't intend to violate --

QUESTION: So they're doubly wrong. If good faith is an element they used the wrong standard, but the fact is it isn't an element at all?

MS. OBERLY: It shouldn't be an element and it certainly shouldn't be a subjective test.

QUESTION: The State argued, at least here, the Stone, the extension of Stone versus Powell. Your office takes no position?

MS. OBERLY: We didn't address that because the federal interest in that question seemed less clear, but we fully support the State's argument on that issue.

The final point I'd like to make relates to the standard of proof. We think that the lower courts all properly applied a preponderance of the evidence standard of proof. That's the standard that this Court has used for determining such things as the voluntariness of a confession in the Lego case or consent to a search in the Matlock case. And basically what the preponderance standard means is that if it's more probable than not that the evidence would have been discovered, then the jury should have the benefit of that evidence.

We think the clear and convincing standard that Respondent is arguing for gives insufficient weight to society's quite compelling interest in having all relevant evidence before a jury. If the Government's able to show that the evidence more probably than not would have been found, then the jury should have that evidence before it, and there's nothing unfair to the Defendant in applying that standard.

Thank you.

CHIEF JUSTICE BURGER: Mr. Bartels.

ORAL ARGUMENT OF ROBERT BARTELS, ESQ.,

ON BEHALF OF RESPONDENT

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

In light of the arguments that the Court has heard the past couple of days and in light of the argument by the Petitioners here today, I think I should start by saying this is not a Fourth Amendment case, nor is it a prophylactic rule case in the Fifth and Sixth Amendment area, such as Miranda or Wade.

QUESTION: What is your position, that it was a Sixth Amendment violation?

MR. BARTELS: That's right, Your Honor. It's a particular kind of Sixth Amendment violation as well.

QUESTION: Well, may I ask, is it on that

ground, that it was a Sixth Amendment violation, therefore this is not a remedy problem, that the very introduction of the evidence was itself a violation of the Sixth Amendment?

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

QUESTION: Well, Mr. Bartels, the Massiah type of Sixth Amendment violation produces a different result, doesn't it, than almost any other type of Sixth Amendment violation? The typical right to counsel violation occurs at trial or has something to do with what's produced for a trial, but Massiah results in discovering of evidence that the state wouldn't have had if it hadn't been for the violation.

Why shouldn't that be treated the same way that other violations of constitutional rights which produce evidence that the prosecution wouldn't have had be treated, such as the Fourth Amendment or Miranda?

MR. BARTELS: Well, Your Honor, in all of these cases I don't think it's clear that the state would not have had the statute otherwise, and the Court has never looked at the problem in that way before, at least.

We're talking, in this case there is no question that in fact the evidence that's at issue here was obtained as a direct result of the violation of the

Respondent's Sixth Amendment rights during an interrogation. Detective Leaming pursued this interrogation which this Court has previously held violated his Sixth Amendment rights, and the Government, the State, conceded even at the motion to suppress that, following Mr. Williams directions after that interrogation, the police uncovered the body.

QUESTION: Well, what if, Mr. Bartels, the same confession or testimony, if you want to have it that way, had been elicited from Mr. Williams that had been elicited, but maybe half an hour after the testimony was elicited but before they returned to Des Moines, Williams and the officer, the body was found by the searching party?

Now, your case, even under your theory, would be quite different then?

MR. BARTELS: It would be quite different, Your Honor, because in that situation the violation of the Sixth Amendment rights would not be the cause --

QUESTION: And yet, it's exactly the same violation.

MR. BARTELS: No, Your Honor, in fact it's not. There is -- and I've been speaking a little bit loosely when I say that there's been a Sixth Amendment violation during interrogation. As this Court has held

in Weatherford versus Bursey, there is no completed violation of the Sixth Amendment rights until the evidence is introduced at trial.

Now, what that means is that the very core purpose of the Sixth Amendment right to counsel during interrogation is to prevent the use at trial of evidence that has been obtained in the absence of counsel.

QUESTION: Can you find that compulsion to exclude at trial in the language of the Sixth Amendment itself?

MR. BARTELS: Your Honor, there's nothing about -- the word "exclusion" is not in there.

QUESTION: Where do you find it?

MR. BARTELS: Your Honor --

QUESTION: Because I gather your argument is if there's been a Sixth Amendment violation which resulted in obtaining of the evidence, that the Sixth Amendment itself compels the exclusion of the evidence. Isn't that your position?

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

QUESTION: Well now, where do you find that in the --

MR. BARTELS: Well, Your Honor, the language of the Sixth Amendment is that the accused shall enjoy the right to the assistance of counsel to his defense.

The theory that this Court has used in looking at Massiah, Brewer itself, and, I think perhaps most significantly in terms of what the Sixth Amendment right to counsel means in this context, Weatherford versus Bursey, has said that what it means in this context when we're talking about a pretrial interference with the relationship between attorney and client --

QUESTION: Do you agree --

MR. BARTELS: -- is that the violation occurs when the evidence --

QUESTION: Is admitted.

MR. BARTELS: -- comes in.

QUESTION: Do you agree with Ms. Oberly's argument that Morrison has at least some language contrary to that position?

MR. BARTELS: Well, Your Honor, I have not had a chance to look at Morrison, which wasn't cited in any of the briefs, and so I can only speak from my recollection. But my recollection of Morrison was that the issue was whether an interference with communications and relationship between attorney and the accused was going to result in dismissal of the indictment, and what this Court said was that sanction was not necessary.

Now, that's completely consistent with the

view that what the right to counsel at the pretrial stages is all about is to protect the defendant from having the state elicit from him for use at trial some evidence without his having the assistance of a lawyer who can advise him about the consequences of giving that kind of information and his rights with regard to giving that kind of information.

And it's the use at trial that constitutes the completion, at least, of that Sixth Amendment violation, and inherently therefore this Sixth Amendment right to counsel includes an exclusionary rule. It's the very purpose of it.

Now, a consequence of that is that the primary purpose of the Sixth Amendment right to counsel at interrogation is not to deter police misconduct in the future. This Court indicated in Massiah and in Weatherford that there's really no constitutional violation if the police sit the defendant down and interrogate him without counsel. That's fine, as long as they don't use it against him at trial.

So there's no deterrent purpose, at least in a primary sense, and consequently the deterrence analysis on which the State seeks to justify the hypothetical probable discovery doctrine here is really beside the point.

QUESTION: May I ask what decisions of ours you rely on primarily for your Sixth Amendment argument?

MR. BARTELS: Massiah, Brewer, Estelle versus Smith, United States versus Henry, and Weatherford versus Bursey.

QUESTION: Mr. Bartels, as you have mentioned Estelle against Smith, you have filed two supplemental briefs in this case.

MR. BARTELS: I apologize for that, Your Honor.

QUESTION: And frankly, I've never seen that many since I've been here.

MR. BARTELS: I'm sorry to set that particular record.

QUESTION: The first one says that the purpose of it is to discuss Estelle against Smith, which should have been included in the brief of the Respondent. Is that in line with our rules?

MR. BARTELS: Your Honor, I don't think that really fits under Rule 35.5. I filed that brief because, out of inadvertence and my, as it turned out, overblown concern with the page limitation, I forgot to add a paragraph or actually two paragraphs about Estelle versus Smith. I thought it was preferable --

QUESTION: So this is one way of getting around the page limitation. And I just wondered, can this go on forever?

MR. BARTELS: No, Your Honor, I'm sorry. That's not the case. I was well, as it turned out, well under the page limitation on the brief in the merits. My feeling was that it did not make sense for me to wait 'til oral argument to bring up a case that I believed was really central in terms of the precedents of this Court.

I apologize if I misinterpreted the rules or made the wrong choice in that regard.

The position that the Respondent takes means that the facts in this case that matter are very simple. The evidence was in fact obtained as a result of the Sixth Amendment violation and therefore has to be excluded, given the core purpose of the Sixth Amendment right to counsel at interrogation.

However, I'd like to make a couple of comments about the facts, which are much more complicated, concerning the hypothetical question of whether the body would have been discovered if Detective Leaming had not engaged in this conduct that violated the Respondent's Sixth Amendment rights.

However one might want to resolve the disputes

between the Petitioner and the Respondent about what the record shows with regard to probable or inevitable discovery, it does seem clear that this question or this record raises many, many difficult questions, and they are questions which can in the end only be resolved by resorting to surmise and to the post hoc rationalizations of the police officers.

And if I may speak to the issue that came up during my opponent's argument about the scope of the search. The only evidence that we have that the search would have continued into Polk County is the testimony of Agent Ruxlow, who was in charge of the search. Now, inherently when he comes into court some years later and says that, we already have his ability, at least, to say what is necessary.

QUESTION: Under what heading do you argue this, Mr. Bartels? You didn't cross-petition for certiorari.

MR. BARTELS: No, Your Honor.

QUESTION: Do you think that if we disagreed with the factual conclusion of the courts other than the Eighth Circuit that discovery would have been inevitable here, the judgment -- but held for you on the rest -- rather, held against you, do you think the same judgment of the Eighth Circuit -- we wouldn't affirm the judgment

of the Eighth Circuit.

MR. BARTELS: Your Honor, I think you'd have two choices. One, this Court can look at the facts itself if it decides to adopt a hypothetical probable discovery doctrine and if it gets passed the good faith-bad faith issue. It could then go to the facts and resolve them.

On the other hand, I certainly agree with the Government that a remand to the Eighth Circuit would also be appropriate to resolve those factual questions, and perhaps it would be more appropriate in light of the fact that the Eighth Circuit did not address those factual issues because of its disposition and because it also has pending seven or eight other issues that may also determine the outcome of this case.

I think it's within this Court's power to uphold the judgment of the Eighth Circuit on any ground that's been discussed and litigated.

QUESTION: But do you think it's actually likely -- and of course, you're as able to predict the reactions of me and my colleagues as I am, I suppose -- that the Court would uphold the judgment of the Eighth Circuit on the grounds that -- on an issue on which the Eighth Circuit didn't pass, the inevitability of the discovery, on which other lower courts have found

discovery would have been inevitable, we would make our own findings of fact and say, no, discovery would not be inevitable?

MR. BARTELS: Well, Your Honor, let me comment about at least the state court findings of fact, which normally would be afforded a presumption of correctness under Section 2254(d). In this case one thing that's quite clear is that the state courts relied very heavily on their findings with regard to the visibility of the culvert and the visibility of the body on Exhibit D, which is in the appendix, as I recall at page 108. It's a picture of the body.

Detective or Agent Ruxlow testified that that picture showed the body as it was found, and it's clear from the opinions of both state courts that they accepted that testimony as such and relied on it. At the habeas hearing, the attorneys representing the Petitioner discovered another photograph which showed beyond any doubt -- this is Exhibit 1 -- that Exhibit D did not show the body as it was found and that Agent Ruxlow had testified falsely, and Agent Ruxlow admitted in his deposition that Exhibit D did not show the body as it was found.

QUESTION: Well, do you think the habeas court was entitled to have a hearing and redetermine that

question of fact?

MR. BARTELS: Yes, Your Honor, because --

QUESTION: Under what provision?

MR. BARTELS: Your Honor, under Section 2254(d)(3) and (6).

QUESTION: (3) and (6).

MR. BARTELS: There was not an adequate development of the factual matter.

QUESTION: As soon as you discover a piece of evidence, relevant piece of evidence, you have a new hearing?

MR. BARTELS: Your Honor, if that relevant piece of evidence discloses not just something new, but that the state court relied on an inaccurate and misleading version of the facts presented by the state, that would seem classically a case where the Petitioner did not have a full and fair opportunity to litigate that factual issue in the state court.

And I would note that the State has made no argument here, at least in its briefs, that the presumption under 2254(d) applies in this case to the --

QUESTION: Well, in any event what did the habeas court conclude?

MR. BARTELS: Your Honor, the habeas court

concluded, without much explanation, that the new evidence added little and detracted little from what was before the state courts.

QUESTION: So it was a fair conclusion in the state court, anyway?

MR. BARTELS: No, Your Honor, because I think that the district court's treatment of that --

QUESTION: Well, it was a right conclusion.

MR. BARTELS: Only if the district court's conclusion was correct, Your Honor. And that's what we would be asking --

QUESTION: Yes.

MR. BARTELS: -- either this Court or the Eighth Circuit to review.

QUESTION: Right.

MR. BARTELS: Now, if I may return to the scope of the search. We have Ruxlow's testimony, Ruxlow that was told what this hearing was about before he testified. He was told they needed his testimony to show that his search would have produced the body. He testified falsely about Exhibit D, and his testimony that the search would have continued into Polk County is inconsistent with all of the historical facts that we have about what happened.

Agent Ruxlow's report about his search effort

says that he was to search Poweshiek and Jasper Counties. It never even mentions Polk County. The search proceeded exactly to the Jasper-Polk County border and then Ruxlcw abandoned it, with three hours of daylight left, with all of the searchers assembled, he admitted for no purpose known to him except to follow Detective Leaming and, as he finally admitted, well befcre Mr. Williams indicated that he would take the police tc the body.

If he planned to go into Polk County with this search, why not at 3:00 o'clock in the afternoon on December 26th when all of the searchers were assembled? Now, my point is that there are serious questions raised about this, and it illustrates one of the difficulties, one of the practical, pragmatic difficulties with the so-called inevitable discovery doctrine, and that is that one ends up having to resolve hypothetical disputes on the basis of post hcc rationalizatien and when the state can effectively call an officer in and have him say what would have happened because by and large historical facts don't stand in the way.

That brings me, unless there are other questions on the merits, to the Stone versus Powell issue. Again, the Sixth Amendment nature of this case provides the clearest, most efficient route to a

decision in that area.

Stone versus Powell was a Fourth Amendment decision and the analysis of the Court in that case was based entirely on the deterrent effect, the deterrent function I should say, of the Fourth Amendment exclusionary rule. The Court made it clear that it was not a decision that had anything to do with the scope of habeas corpus generally.

QUESTION: Well, but in Stone versus Powell the Court also said that it was concerned that very probative, trustworthy evidence was being excluded as a result of the invocation of the exclusionary rule. Certainly that part would carry over to this case, would it not?

MR. BARTELS: No, Your Honor. That discussion about the probative value was really part of the discussion of the social cost of excluding evidence, which is a part of a balancing analysis that one gets into in the Fourth Amendment area, where we're talking about the degree of deterrence that we'll get as opposed to social costs.

It doesn't become relevant when we're dealing with --

QUESTION: Why isn't social cost always relevant when we're talking about what remedy we assign

for a constitutional violation?

MR. BARTELS: Your Honor, in this case it's because, at least as this Court has interpreted the Sixth Amendment right to counsel in past cases, the framers of the Constitution already made -- did that balancing.

QUESTION: How were we able to figure that out?

MR. BARTELS: Well, Your Honor, I think if one looks at what the function of the right to counsel would be in an interrogation context, it would be to prevent the police from accomplishing what they are after, which is to elicit information and then use it at trial, without interposing --

QUESTION: Doesn't this get back, Mr. Bartels, to what I think you said to me earlier, that really your major argument here today is that the very admission of this evidence violated the Sixth Amendment?

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

QUESTION: And that the only way you can correct that is simply not allow it to be admitted?

MR. BARTELS: That's correct.

QUESTION: It doesn't get into any balancing or anything else; isn't that your --

MR. BARTELS: That's right, Your Honor, and

because there is no balancing in this particular area of the Sixth Amendment, not only do we not have a hypothetical probable discovery doctrine, but Stone versus Powell doesn't apply.

QUESTION: Even if it was bound to be discovered, the inevitable discovery concept?

MR. BARTELS: Well, Your Honor, I'm not sure what we would mean by "bound to be discovered".

QUESTION: Well, inevitably, inevitable discovery. That ought to be familiar.

MR. BARTELS: If we're talking about a hypothetical situation, we can never know for sure. Now, we might know --

QUESTION: Well, let me really put it up to you to see if you really mean it. Suppose that they ask him, where is the body, and he tells them, and it just turns out they've already found it and the officers just didn't know it.

MR. BARTELS: Your Honor, in that case they have actually found the body --

QUESTION: Yes.

MR. BARTELS: -- by legal means.

QUESTION: Yes. They've also violated his right to counsel.

MR. BARTELS: Not yet, Your Honor, because

they haven't --

QUESTION: Well, your right to counsel is don't interrogate him without counsel.

MR. BARTELS: Your Honor --

QUESTION: Excluding the evidence is only a remedy.

MR. BARTELS: Your Honor, if that were the case this Court would have decided Weatherford versus Bursey differently. The completed violation doesn't occur until the evidence is introduced at trial.

QUESTION: Well, I thought you've been saying to me, Mr. Bartels, this isn't a remedy case, that exclusion of the evidence is not as a remedy for the Sixth Amendment violation; it is itself -- the admission of the evidence is itself --

MR. BARTELS: That's exactly what I'm trying to say, Your Honor.

QUESTION: I thought you were.

QUESTION: Well, Mr. Bartels --

(Laughter.)

QUESTION: -- I suppose we couldn't have imposed the exclusionary rule on the states in Mapp against Ohio for Fourth Amendment violations unless you could say, perhaps somewhat free of phrase, the act, the introduction of that evidence itself violates the Fourth

Amendment. Why does the fact that the introduction of evidence introduced in violation of the Sixth Amendment constitutes a violation of the Amendment, why is that any different than the Fourth Amendment?

MR. BARTELS: Well, Your Honor, in the Fourth Amendment I don't think we do have a situation where the admission of the evidence is the violation itself. The Fourth Amendment is designed to protect rights of privacy wholly outside the judicial process and, at least as this Court has interpreted and defended the Fourth Amendment exclusionary rule in recent cases, including Stone versus Powell, the sole justification for that sanction, for that exclusionary rule, has nothing to do with the fairness or integrity of the trial. It has solely to do with deterring future police misconduct outside the trial process, in people's homes.

On the other hand, the Sixth Amendment right to counsel is precisely designed to protect rights of defendants at trial and at the critical stages of the process leading up to trial, but everything focusing on what's going to happen at the trial, whether it's going to be fair. And even though we may be dealing with probative evidence that's being kept out, one of our fundamental principles is that the defendant has a right

to the assistance of counsel to make the adversary process fair so that he is not put at an unfair advantage as opposed to the prosecution.

QUESTION: Mr. Bartels, I'm afraid I don't really understand your Sixth Amendment argument. Assuming, as counsel on the other side have argued, that there was an independent source that was found to have existed by three courts, as is argued, in what respect would the right to counsel be violated on the basis of that assumption?

MR. BARTELS: Your Honor, the problem with characterizing this as an independent source case is that there is no independent source, and that's why --

QUESTION: Isn't that a factual issue?

MR. BARTELS: Well, Your Honor, I don't think that there's any real dispute about that in this case. The reason why the State comes to this Court and asks for an inevitable discovery exception is that the independent source exception doesn't work.

With an independent source, you actually have an independent source which brought about in fact the evidence in question. That's unquestionably not the case here. The Ruxlow search, whatever might have happened, in fact did not produce that evidence. There is no independent actual lawful source for that

evidence.

QUESTION: If you change my terminology to "inevitable discovery", doesn't that in itself result in an issue of fact only, so far as --

MR. BARTELS: Your Honor, I don't have any questions but what if there is going to be a hypothetical probable discovery or inevitable discovery doctrine, that we're dealing with a question that is not -- certainly not one of law. It's perhaps one of fact. It's kind of funny fact, because we're talking about by definition facts that have never occurred and that we --

QUESTION: Well, Mr. Bartels, courts traditionally are called upon to make factual determinations, for instance in setting damages in civil cases, that require you to make hypothetical projections. This isn't something unknown to triers of fact.

MR. BARTELS: Your Honor, it is, these sorts of questions are unknown, when we're talking about the concept of causation in terms of the causal connection between the violation and the evidence in question. At least in situations like this when we're dealing with one actual cause and one merely potential that didn't actually happen, the but-for cause doesn't work, and for

that reason the law of torts and criminal law both have adopted a different test, and that is the material element and substantial factor test.

QUESTION: That's the same as an attenuation inquiry, isn't it?

QUESTION: Ceccolini or Wong Sun.

MR. BARTELS: Inevitable discovery, Your Honor?

QUESTION: No. The substantial factor. You can say --

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

QUESTION: -- but for, it was caused, but still it's not enough cause.

MR. BARTELS: That's right, Your Honor. The attenuation doctrine, although it has by and large been defended on deterrence grounds, I think fits the standard notion of --

QUESTION: Well, Mr. Bartels, suppose that Williams was asked, where's the body, and he tells them, the officer, and they drive over to this place and they see some searchers walking up the bar pit 500 yards away from the culvert. And they yell at the fellow and say: Don't mind going on; it's right up there at the culvert. So it's absolutely a lead pipe cinch that the body would have been found.

You still would be making your same argument, I take it?

MR. BARTELS: Your Honor, I don't think we have a lead pipe cinch even in that situation. And I would say, that's a far different case from this one.

QUESTION: Well, I'll just go on until we get to facts so that it is a lead pipe cinch. And you would still make that argument?

MR. BARTELS: That's right, Your Honor, because of the nature of the Sixth Amendment right involved.

QUESTION: Mr. Bartels, either you or someone, perhaps several, have referred to the social costs that are involved in these areas with respect to one side. Here is a case which has been going on for how many years now, 14, 10?

MR. BARTELS: Fourteen.

QUESTION: Fourteen years. I am not aware -- and we have of course all followed it closely -- of a single one of the 35, some 35 to 50 judges who've dealt with it, or indeed any of the lawyers, who have ever seriously thought there was any question about guilt.

MR. BARTELS: Your Honor, that's a point that was raised by one of the amicus briefs.

QUESTION: Yes.

MR. BARTELS: And I address that point --

QUESTION: Well now, is there a social -- let's assume -- it isn't critical to my hypothetical or to the question I'm putting to you. That being true, is there not a social cost, a significant social cost if, after all this massive amount of judicial procedure and legal work, it should be determined that this plainly guilty Defendant should go free from this grisly murder?

MR. BARTELS: Your Honor, I think that at this point --

QUESTION: Is there a social cost on that side of it?

MR. BARTELS: Your Honor, there would be, but that assumes that the question of guilt and innocence is so clear. I think the last time around --

QUESTION: Is there any doubt about it?

MR. BARTELS: Absolutely, Your Honor, and I address that point at the end --

QUESTION: No judge that's ever touched the case that I am aware of has even seriously --

MR. BARTELS: Well, Your Honor, the Eighth Circuit explicitly discussed some of the evidence that pointed toward the innocence of Mr. Williams, and I have discussed some more of it at the end of Respondent's

brief in response to one of the amicus briefs.

This time arcund, Your Honor -- the last time the defense didn't have some of the evidence that existed in the police files. This time around they got it.

QUESTION: Well, it's all based on the -- all of that theory is based on the idea that he was more or less entrapped, that he found the body of this dead girl and wrapped it up in a blanket and took it out of the YMCA building and took it out in the country and buried it. That's --

MR. BARTELS: That's correct, Your Honor, and that thecry is supported by some evidence that Mr. Williams has no control over.

QUESTION: But would you admit that, with this kind of a picture, there is a social cost the other way?

MR. BARTELS: Your Honor, there is always a social cost, and believe me, I know about it. Fifteen years I have been on the same case.

(Laughter.)

MR. BARTELS: A private cost as well.

But certainly the first several years of those costs are attributable to the fact that the State introduced this evidence in violation of the Defendant's

Sixth Amendment rights. And if it had not done so, and if this Court were to decide --

QUESTION: Well, we haven't decided that yet, have we?

MR. BARTELS: Not this time, Your Honor. But if this Court were to decide the merits in that way, then I think we'd have the same argument.

QUESTION: Mr. Bartels, is there any similarity between your Sixth Amendment argument and the good faith argument?

MR. BARTELS: I'm sorry, Your Honor?

QUESTION: The good faith argument was advanced and relied on by the Eighth Circuit Court of Appeals, an absence of good faith.

MR. BARTELS: Well, Your Honor, if this Court were to adopt my Sixth Amendment theory, as it should, the Court of Appeals analysis is really unnecessary. The Court of Appeals was trying to avoid --

QUESTION: What is the basic difference between the two so far as results go? Of course, one is tied to a constitutional provision. But in terms of the ultimate question, don't you have to look to the evidence?

MS. OBERLY: Your Honor, the Eighth Circuit's decision turns on one's conclusion about whether

Detective Leaming was acting in good faith. The Sixth Amendment analysis that's outlined in pages 4 through 8 of the Respondent's brief does not address that question. The only question is was this evidence obtained as a result of a violation of the Sixth Amendment rights.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further? You have two minutes remaining.

REBUTTAL ARGUMENT OF BRENT R. APPEL, ESQ.

ON BEHALF OF PETITIONER

MR. APPEL: Mr. Chief Justice:

It seems to me clear that we would have to rewrite a number of the cases in order to sustain Petitioner's position. Michigan v. Tucker, where it was held that the testimony from the additional witness found did not violate Sixth Amendment rights because of the full possibility to cross-examine, is a case involved.

The Court would do well to recognize Justice Frankfurter's admonition that facts do not become sacred and inaccessible simply because of underlying conduct. There is no Sixth Amendment violation here from the introduction of the evidence where the Respondent's counsel's role as legal strategist, as discussed in the

Ashe case, is fully preserved, as it has been here, and as a result the admission of testimony about the body was a hard blow, but not a constitutionally foul one.

And in closing, this is not the kind of case where a police officer can manipulate the law, i.e., cleanse an illegal transaction with Miranda in order to obtain some kind of collateral purpose. And I submit to you that this is not the kind of case, if you sustain the Petitioner's position, that will provide some kind of inducement for law enforcement to substitute brawn for brains as a key instrumentality of crime detection.

For the above reasons, I respectfully submit that the decision must be reversed.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:13 p.m., the oral argument in the above-entitled case was submitted.)

* * *

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-1651 - CRISPUS NIX, WARDEN, Petitioner v. ROBERT ANTHONY WILLIAMS

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BY _____

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