The Burger Court Opinion Writing Database

Brewer v. Williams

430 U.S. 387 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States

Memorandum

74-1263

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ISSENT (B)

. WILLIAMS

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

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

am, at present,
I'm not in a
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make suggestions
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RBG

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

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The Court Concedes Williams' Disclosures Were Voluntary

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

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Cont'd Revised p. 2, dissent Regards WEB

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

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

CHAMBERS OF
THE CHIEF JUSTICE

December 16, 1976

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

MEMORANDUM TO THE CONFERENCE:

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

Regards,

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

December 29, 1976

Re: 74-1263 - Brewer v. Williams

MEMORANDUM TO THE CONFERENCE:

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

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

Regards,

WEB

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

From: The Chief Justice

Circulated: JAN 26 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1263

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

[January —, 1977]

MR. CHIEF JUSTICE BURGER, dissenting.

The result in this case ought to be intolerable in any rational society. Respondent is guilty of the savage murder of a small child; no one contends he is not. While in custody, and after no less than five warnings of his rights to silence and counsel, he made inculpatory statements of unquestioned reliability, then led police to the concealed body of his victim. The Court appears to concede respondent's statements and actions were voluntary and made with full awareness of his constitutional rights. Nevertheless, the Court now holds that because respondent's admissions were prompted by the detective's statement—not interrogation but a statement—his disclosure of the facts as to where he buried the child's body cannot be given to the jury.

The effect of this is to fulfill Justice Cardozo's grim prophecy that someday some court might carry the exclusionary rule to the absurd extent that its operative effect would exclude evidence relating to the body of a murder victim because of the means by which it was found.[1] I agree fully

[1] *People* v. *Defore*, 242 N. Y. 13, 21, 23-24, 150 N. E. 585, 587, 588 (1926). The Court protests, *ante*, at 18 n. 12, that its holding excludes only respondent's incriminating admissions. But even if the *corpus delicti* may be used to establish the fact and manner of the victim's death—and this is far from certain under *Wong Sun* v. *United States*,

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

CHAMBERS OF
THE CHIEF JUSTICE

February 10, 1977

Re: 74-1263 - Brewer v. Williams

PERSONAL

Dear Lewis:

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

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

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

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

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

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

Regards,

WEB

Mr. Justice Powell

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SUBSTANTIAL [illegible] UGHOUT

To: Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]

From: The [illegible]

2nd DRAFT

Circulated: _____

Recirculated: FEB 25 1977

SUPREME COURT OF THE UNITED STATES

No. 74-1263

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

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

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The Court concedes Williams was not threatened or coerced and that he acted voluntarily and with full awareness of his constitutional rights when he guided police to the body. In the face of all this, the Court now holds that because Williams was prompted by the detective's statement—not interrogation but a statement—his disclosure cannot be given to the jury.

The effect of this is to fulfill Justice Cardozo's grim prophecy that someday some court might carry the exclusionary rule to the absurd extent that its operative effect would exclude evidence relating to the body of a murder victim because of the means by which it was found.[1] With Jus-

[1] "The criminal is to go free because the constable has blundered. . . . A room is searched against the law, and the body of a murdered man is found . . . . The privacy of the home has been infringed, and the mur-

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5/3/77

Cony Revised p. 2, dissent Regards WEB

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

From: The Chief Justice

1, 2, 14

3rd DRAFT: MAR 2 1 1977

SUPREME COURT OF THE UNITED STATES

No. 74-1263

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

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

[January —, 1977]

MR. CHIEF JUSTICE BURGER, dissenting.

The result reached by the Court in this case ought to be intolerable in any society which purports to call itself an organized society. It continues the court—by the narrowest margin—on the much criticized course of punishing the public for the mistakes and misdeeds of law enforcement officers, instead of punishing the officer directly, ~~as~~ if in fact he is guilty of wrongdoing. It mechanically and blindly keeps reliable evidence from juries whether the claimed constitutional violation involves gross police misconduct or honest human error. Williams is guilty of the savage murder of a small child; no Member of the Court contends he is not. While in custody, and after no fewer than *five* warnings of his rights to silence and to counsel, he led police to the place where he had buried the body of his victim. The Court now holds the jury must not be told how the police found the body.

The Court concedes Williams was not threatened or coerced and that he acted voluntarily and with full awareness of his constitutional rights when he guided police to the body. In the face of all this, the Court now holds that because Williams was prompted by the detective's statement—not interrogation but a statement—his disclosure cannot be given to the jury.

The effect of this is to fulfill Justice Cardozo's grim prophecy that someday some court might carry the exclusionary

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 7, 1976

RE: No. 74-1263 Brewer v. Williams

Dear Chief:

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

Sincerely,

Bill

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 29, 1976

RE: No. 74-1263 Brewer v. Williams, etc., et al.

Dear Potter:

Please join me.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

From: Mr. Justice Stewart

Circulated: NOV 22 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–1263

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

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

[November —, 1976]

MR. JUSTICE STEWART delivered the opinion of the Court.

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

I

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

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

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Stylistic and technical changes throughout pp. 2, 7, 10-11, 14, 15, 16, 17

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

From: Mr. Justice Stewart

Circulated: _____

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–1263

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

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 30, 1976

No. 74-1263, Brewer v. Williams

Dear Lewis,

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

Sincerely yours,

P.S.

Mr. Justice Powell

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

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

From: Mr. Justice Stewart

Circulated: _____

Recirculated DEC 2 1976

pp. 12-13, 16, 17

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–1263

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

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[November —, 1976]

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 3, 1977

No. 76-1263, Brewer v. Williams

Dear Lewis,

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

Sincerely yours,

P.S.

Mr. Justice Powell

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

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

From: Mr. Justice Stewart

Circulated: _____

Recirculated: JAN 4 1977

p. 18

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–1263

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

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

[November —, 1976]

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P. 18

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

From: Mr. Justice Stewart

Circulated: _____

Recirculated: MAR 11 1977

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1263

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 18, 1977

MEMORANDUM TO THE CONFERENCE

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

I am not entirely certain of the "line-up" in this case. My understanding is as follows. Unless I hear to the contrary by Monday, I shall assume it is correct.

P.S.

P. S.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined. MARSHALL, POWELL, and STEVENS, JJ., filed concurring opinions. BURGER, C. J., filed a dissenting opinion. WHITE, J., filed a dissenting opinion, in which BLACKMUN and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which WHITE and REHNQUIST, JJ., joined.

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

74-1263

CHAMBERS OF
JUSTICE POTTER STEWART

March 29, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-370, Garrison v. Strickland, previously held for No. 74-1263, Brewer v. Williams

This petition for certiorari raises a single question concerning the waiver of Miranda rights by a suspect under arrest and in custody, but against whom formal proceedings had not yet been commenced.

The respondent was arrested on the morning of March 14, 1973. At 9:00 a.m., he was informed of his Miranda rights and asked by Agent Terry if he wanted to make a statement. He reflected for a few minutes, said he knew nothing about the break-in for which he had been arrested, and said he wished to see a lawyer. The interrogation stopped. At noon, the respondent was transferred to a different jail. At 3:00 p.m. the same day, Agent Terry again spoke with the respondent, warned him of his rights, and asked him if he desired to make a statement. The respondent stated that he understood his rights, and then confessed.

The Court of Appeals for the Fourth Circuit unanimously ruled that the police conduct here deprived the respondent of his Miranda rights, and that those rights had not been waived. The Court of Appeals relied on three opinions in this Court: (1) the Court opinion in Miranda itself, which stated "If the

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 9, 1976

Re: No. 74-1263 — Brewer v. Williams

Dear Potter:

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

Sincerely yours,

Mr. Justice Stewart

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

From: Mr. Justice White

Circulated: 12-22-76

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–1263

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

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

[January —, 1977]

MR. JUSTICE WHITE, dissenting.

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

I

The victim in this case disappeared from a YMCA building in Des Moines, Iowa, on Christmas Eve in 1968. Respondent was seen shortly thereafter carrying a bundle wrapped in a blanket from the YMCA to his car. His car was found in Davenport, Iowa, 160 miles away on Christmas Day. A warrant was then issued for his arrest. On the day after Christmas respondent surrendered himself voluntarily to local police in Davenport where he was arraigned. The Des Moines police, in turn, drove to Davenport, picked respondent up and drove him back to Des Moines. During the trip back to Des Moines respondent made statements evidencing his knowledge of the whereabouts of the victim's clothing and body and leading the police to the body. The

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 13, 1977

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

Dear Harry:

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

Sincerely,

Byron

Mr. Justice Blackmun

Copies to Conference

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PP 1-8-9

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

2nd DRAFT

From: Mr. Justice White

Circulated: _____

Recirculated: 1-4-77

SUPREME COURT OF THE UNITED STATES

No. 74–1263

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

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

[January —, 1977]

with whom Mr. Justice Blackmun and Mr. Justice Rehnquist join,

MR. JUSTICE WHITE, dissenting.

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

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 24, 1976

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

Dear Potter:

Please join me.

Sincerely,

TM.
T. M.

Mr. Justice Stewart

cc: The Conference

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MAR 2 1977

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–1263

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

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

[March —, 1977]

MR. JUSTICE MARSHALL, concurring.

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

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

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p. 3

MAR 21 1977

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–1263

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

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

[March —, 1977]

MR. JUSTICE MARSHALL, concurring.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 30, 1976

MEMORANDUM TO THE CONFERENCE

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

I shall try a dissent in this case.

HAB.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

From: Mr. Justice Blackmun

Circulated: 12/2/76

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1263

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

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

[December —, 1976]

MR. JUSTICE BLACKMUN, dissenting.

The State of Iowa, 21 States, and others, as *amici curiae*, strongly urge that this Court's procedural (as distinguished from constitutional) ruling in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), be re-examined and overruled. I, however, agree with the Court, *ante*, at 9, that this is not now the case in which that issue need be considered.

What the Court chooses to do here, and with which I disagree, is to hold that respondent Williams' situation was in the mold of *Massiah* v. *United States*, 377 U. S. 201 (1964), that is, that it was dominated by a denial to Williams of his Sixth Amendment right to counsel after criminal proceedings had been instituted against him. The Court rules that the Sixth Amendment was violated because Detective Leaming "purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible." *Ante*, at 10–11. I cannot regard that as unconstitutional *per se*.

First, the police did not deliberately seek to isolate Williams from his lawyers so as to deprive him of the asssistance of counsel. Cf. *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). The isolation in this case was a necessary in-

HAB

January 6, 1977

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

Dear Byron:

You have written a good strong dissent. I could and would join you except that, for the moment, I am uncertain about being with you in the last paragraph of footnote 6 and the reference thereto on page 9. [I am assuming that page 9's reference to n. 5 should be to n. 6.]

Sincerely,

HAB

Mr. Justice White

cc: The Chief Justice
Mr. Justice Rehnquist

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

pp. 1, 2

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

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 1/10/77

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1263

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

[December —, 1976]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, dissenting.

The State of Iowa, and 21 States and others, as *amici curiae*, strongly urge that this Court's procedural (as distinguished from constitutional) ruling in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), be re-examined and overruled. I, however, agree with the Court, *ante*, at 9, that this is not now the case in which that issue need be considered.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 13, 1977

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

Dear Byron:

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

Sincerely,

Harry

Mr. Justice White

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

pp. 1, 2, 4

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

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 2/8/77

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1263

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

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

[December —, 1976]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST join, dissenting.

The State of Iowa, and 21 States and others, as *amici curiae,* strongly urge that this Court's procedural (as distinguished from constitutional) ruling in *Miranda* v. *Arizona,* 384 U. S. 436 (1966), be re-examined and overruled. I, however, agree with the Court, *ante,* at 9, that this is not now the case in which that issue need be considered.

What the Court chooses to do here, and with which I disagree, is to hold that respondent Williams' situation was in the mold of *Massiah* v. *United States,* 377 U. S. 201 (1964), that is, that it was dominated by a denial to Williams of his Sixth Amendment right to counsel after criminal proceedings had been instituted against him. The Court rules that the Sixth Amendment was violated because Detective Leaming "purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible." *Ante,* at 10–11, and POWELL, J., concurring, *ante,* at 2–4. I cannot regard that as unconstitutional *per se.*

First, the police did not deliberately seek to isolate Williams from his lawyers so as to deprive him of the asssistance of counsel. Cf. *Escobedo* v. *Illinois,* 378 U. S. 478 (1964). The isolation in this case was a necessary in-

February 22, 1977

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

Dear John:

That is just the point. If you now delete, I shall reinstate.

Sincerely,

HAB

Mr. Justice Stevens

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 22, 1977

MEMORANDUM TO THE CONFERENCE

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

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

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

H. A. B.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 2/25/77

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1263

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

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

[December —, 1976]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST join, dissenting.

The State of Iowa, and 21 States and others, as *amici curiae,* strongly urge that this Court's procedural (as distinguished from constitutional) ruling in *Miranda* v. *Arizona,* 384 U. S. 436 (1966), be re-examined and overruled. I, however, agree with the Court, *ante,* at 9, that this is not now the case in which that issue need be considered.

What the Court chooses to do here, and with which I disagree, is to hold that respondent Williams' situation was in the mold of *Massiah* v. *United States,* 377 U. S. 201 (1964), that is, that it was dominated by a denial to Williams of his Sixth Amendment right to counsel after criminal proceedings had been instituted against him. The Court rules that the Sixth Amendment was violated because Detective Leaming "purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible." *Ante,* at 10–11, and POWELL, J., concurring, *ante,* at 2–4. I cannot regard that as unconstitutional *per se.*

First, the police did not deliberately seek to isolate Williams from his lawyers so as to deprive him of the asssistance of counsel. Cf. *Escobedo* v. *Illinois,* 378 U. S. 478 (1964). The isolation in this case was a necessary in-

December 1, 1976

No. 74-1263 Brewer v. Williams

Dear Potter:

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

Many thanks.

Sincerely,

Mr. Justice Stewart

lfp/ss

bc: Gene

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

L.F.P., Jr.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 3, 1976

No. 74-1263 Brewer v. Williams

Dear Potter:

Please join me.

Sincerely,

Lewis

Mr. Justice Stewart

lfp/ss

cc: The Conference

January 6, 1977

No. 74-1263 Brewer v. Williams

Dear Potter:

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

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

In any event, I would welcome your views.

Sincerely,

Mr. Justice Stewart

LFP/lab

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 31, 1977

No. 74-1263 Brewer v. Williams

Dear Potter:

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

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

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

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

Sincerely,

L F P

Mr. Justice Stewart

lfp/ss

bc: Mr. Gene Comey

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

From: Mr. Justice Powell

Circulated: FEB 4 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1263

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

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

[January —, 1977]

MR. JUSTICE POWELL, concurring.

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

The critical factual issue is whether there had been a voluntary waiver, and this turns in large part upon whether there was interrogation. As my dissenting Brothers view the facts so differently from my own perception of them, I will repeat briefly the background, setting, and factual predicate to the incriminating statements by Williams—even though the opinion of the Court sets forth all of this quite accurately.

I

Prior to the automobile trip from Davenport to Des

February 11, 1977

PERSONAL

No. 74-1263 Brewer v. Williams

Dear Chief:

Thank you for your thoughtful letter of February 10.

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

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

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

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

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

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

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

Sincerely,

The Chief Justice

lfp/ss

March 1, 1977

No. 74-1263 Brewer v. Williams

Dear Chief:

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

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

On the other hand, as I have noted before, we expressly reserved - in the Stone opinion - the applicability of that decision to the Fifth and Sixth Amendment. My own tentative view is that Stone may well apply to some, but notall, Fifth and Sixth Amendment situations.

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

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

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

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

Sincerely,

The Chief Justice

lfp/ss

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pp. 2, 4, 5, 6

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

From: Mr. Justice Powell

Circulated: _____

Recirculated MAR 2 1977

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1263

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

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

[January —, 1977]

MR. JUSTICE POWELL, concurring.

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

The critical factual issue is whether there had been a voluntary waiver, and this turns in large part upon whether there was interrogation. As my dissenting Brothers view the facts so differently from my own perception of them, I will repeat briefly the background, setting, and factual predicate to the incriminating statements by Williams—even though the opinion of the Court sets forth all of this quite accurately.

I

Prior to the automobile trip from Davenport to Des

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 2, 1976

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

Dear Harry:

Please join me in your dissenting opinion in this case.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 13, 1977

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

Dear Byron:

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

Sincerely,

WHR

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 29, 1976

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

Dear Potter:

Please join me.

Respectfully,

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

PERSONAL

February 22, 1977

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

Dear Harry:

If the Chief follows your suggestion, I will delete the Bumble reference from my opinion too. Frankly, I think all three opinions will be improved by omitting the colloquialism.

Respectfully,

Mr. Justice Blackmun

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

From: Mr. Justice Stevens

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1263

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

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

[March —, 1977]

MR. JUSTICE STEVENS, concurring.

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

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

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

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pp. 1-2

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

From: Mr. Justice Stevens

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1263

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

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

[March —, 1977]

MR. JUSTICE STEVENS, concurring.

MR. JUSTICE STEWART, in his opinion for the Court which I join, MR. JUSTICE POWELL and MR. JUSTICE MARSHALL have accurately explained the reasons why the law requires the result we reach today. Nevertheless, the strong language in the dissenting opinions prompts me to add this brief comment about the Court's function in a case such as this.

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

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