

***NIX v. WILLIAMS* AND THE INEVITABLE DISCOVERY  
EXCEPTION: CREATION OF A LEGAL SAFETY NET**

TOM N. McINNIS\*

INTRODUCTION

Imagine a legal system in which during a suppression hearing a prosecutor argued: “Your Honor, I am sorry to say that our police are so unprofessional that they did indeed knowingly and purposely violate the defendant’s constitutional rights. Despite this fact, this same police force is just professional enough that clearly if the officers had not violated the defendant’s constitutional rights, members of the force would have found the same evidence through legal means, so it should be admitted.” In her desire to get the judge to rule in favor of admitting the evidence, the prosecutor continued and explained, “Furthermore, your Honor, due to the freezing temperatures that existed in between the time that the evidence was illegally found and when it would have been eventually legally found, the evidence would have been in the same condition when it was legally discovered.” Imagine the prosecutor then, after having convinced the judge to allow use of the evidence, reversing her position at trial by arguing and introducing evidence to demonstrate that the same freezing temperatures would have destroyed, not preserved, the crucial admitted evidence. The 1984 case of *Nix v. Williams*<sup>1</sup> gave credence to the scenario that has just been described. In that case, the Supreme Court first gave its support to the inevitable discovery exception to the exclusionary rule.<sup>2</sup> This exception allows the prosecution to make use of evidence that was illegally gathered when a judge can be convinced by a preponderance of the evidence at a suppression hearing that the evidence would have been found through alternative legal means.<sup>3</sup>

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\* B.A. 1980 Chadron State College, M.A. 1986 University of Missouri-Columbia, Ph.D. 1989 University of Missouri-Columbia. I would like to thank the editors and staff members of the Saint Louis University School of Law *Public Law Review* for their dedicated work in bringing this article and edition to fruit. Thanks also go out to Jim Hawk for providing insight for most of my life and Jan, as always, for hanging with me.

1. *Nix v. Williams*, 467 U.S. 431 (1984).

2. *Id.* at 444.

3. *Id.*

*Nix v. Williams* was the last time the Supreme Court provided any explanation of the inevitable discovery exception. In the twenty-five years since *Nix* was decided, a pattern has developed in which every few years, legal scholars try to determine whether the inevitable discovery exception should apply to new factual scenarios. In these articles the authors analyze the *Nix* decision, apply its principles and logic to recommend a course of action, and end with a call for the Supreme Court to provide clarity.<sup>4</sup> While these analyses are well-intentioned and demonstrate a desire to make the application of the inevitable discovery exception to the exclusionary rule principled, they lack an understanding of how the complexity of the *Nix* case helps to reveal the underlying reason behind the Court's adoption of the exception. This is not surprising because the appellate record of the case fails to adequately demonstrate the twists and turns of the *Williams* case.<sup>5</sup> A review of the appellate record of the case makes it seem that *Nix v. Williams* was a perfect case for the Court to adopt the inevitable discovery exception. That is because the case involved a person who all members of the Court thought to be guilty of a horrendous crime and that no one wanted to see released.<sup>6</sup> The facts in the record also seem to have left no doubt that the evidence in question would

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4. See, e.g., Jessica Forbes, Note, *The Inevitable Discovery Exception, Primary Evidence, and the Emasculation of the Fourth Amendment*, 55 FORDHAM L. REV. 1221 (1987) (arguing for clarification regarding whether the exception applied to primary evidence); Troy E. Golden, Note, *The Inevitable Discovery Doctrine Today: The Demands of the Fourth Amendment, Nix, and Murray, and the Disagreement Among the Federal Circuits*, 13 BYU J. PUB. L. 97 (1998) (arguing that for clarification of the primary evidence debate, the warrant requirement debate, and the active pursuit debate); Stephen E. Hessler, Note, *Establishing Inevitability Without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule*, 99 MICH. L. REV. 238 (2000) (arguing for clarification as to whether an active alternative method of discovery is necessary); R. Bradley Lamberth, Comment, *The Inevitable Discovery Doctrine: Procedural Safeguards to Ensure Inevitability*, 40 BAYLOR L. REV. 129 (1988) (arguing for clarification regarding cases where police have bypassed probable cause and warrant requirements); Jason Liljestrom, Note, *Lawful to the World: Protecting the Integrity of the Inevitable Discovery Doctrine*, 58 HASTINGS L.J. 177 (2006) (arguing for clarification of the lawful means requirement); David A. Stuart, Note, *A Sign-Post Without Any Sense of Direction: The Supreme Court's Dance Around the Inevitable Discovery Doctrine and the Exclusionary Rule in Hudson v. Michigan*, 27 PACE. L. REV. 503 (2007) (arguing for clarification of warrantless searches).

5. Robert Williams was twice convicted of first degree murder. The first time the conviction was overturned due to a violation of the Sixth Amendment right to counsel in *Brewer v. Williams*, 430 U.S. 387 (1977). His second conviction was upheld in *Nix*, 467 U.S. at 437–40. For a more complete history of the *Williams* case, see generally THOMAS N. MCINNIS, *THE CHRISTIAN BURIAL CASE: AN INTRODUCTION TO CRIMINAL AND JUDICIAL PROCEDURE* (2001).

6. See *infra* pp. 281–86.

have been found legally had it not first been found through a violation of Williams's constitutional rights.<sup>7</sup>

The purpose of this article is to document the crime and trials of Robert Anthony Williams to illustrate the issues leading to the Court's adoption of the inevitable discovery exception to the exclusionary rule. An examination of the entire *Williams* case demonstrates that in its exuberance to create an exception to the exclusionary rule, the Court either misunderstood the complexities of the case or ignored them. A full examination of the record helps to reveal that the Court adopted and made use of the inevitable discovery exception as a legal safety net to insure that individuals like Robert Anthony Williams would not be released due to the application of the exclusionary rule. Understanding that the creation of a legal safety net was the ultimate purpose behind the adoption of the exclusionary rule also helps to explain why the Court has been hesitant to clarify the parameters of the inevitable discovery exception.

This article is divided into four sections. Section I explains the crime which Robert Anthony Williams was convicted of committing. Section II examines the first trial and appeals process. Section III examines Williams's second trial and appeals process. Finally, Section IV concludes that, despite calls for action, the Court is not likely to provide clarification of the inevitable discovery exception. This is because the Court's purpose was to create a legal safety net to insure that criminals who commit heinous crimes do not go free due to the operation of the exclusionary rule.

## I. THE CRIME

On December 24, 1968, the Powers family, consisting of Mr. and Mrs. Merlin Powers, their fifteen-year-old daughter, Vickie, fourteen-year-old son, Mark, and ten-year-old daughter, Pamela, went to a wrestling tournament on the second floor of the Y.M.C.A. building at 101 Locust Street in Des Moines, Iowa.<sup>8</sup> The family was there to cheer on Mark, who was participating in the tournament.<sup>9</sup> While there, Pamela received permission to go wash her hands before eating a candy bar.<sup>10</sup> After five minutes, Mr. and Mrs. Powers checked on Pamela. When Pamela could not be found in the washroom, they looked elsewhere. According to Mr. Powers, they "started looking everywhere,

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7. No court throughout the trial or appeals process ruled that the evidence would not have been lawfully discovered had it not been first discovered through a constitutional violation.

8. Nick Lamberto, 'Y' Aides Try to Stop Man with Bundle, DES MOINES REG., Dec. 25, 1968, at 1.

9. Transcript of Trial at 24, *Iowa v. Williams*, No. CR 55805 (Iowa Dist. Ct. Polk County 1977) [hereinafter Trial Transcript].

10. *Id.* at 25–26.

knocking on doors, yelling her name.”<sup>11</sup> The family continued its search for about twenty minutes and then called the police.<sup>12</sup>

Shortly before 1:30 p.m., while Mr. and Mrs. Powers continued searching for Pamela, John Knapp, a security officer who worked for the Y.M.C.A., observed a resident of the Y.M.C.A. walk into the lobby carrying a blanket wrapped around something.<sup>13</sup> Knapp, who didn’t know that Pamela Powers was missing, thought that the man was trying to skip out without paying rent, and asked him what he was carrying.<sup>14</sup> The man answered a mannequin.<sup>15</sup> Knapp, together with Don Hanna, the physical education director at the Y.M.C.A., followed the man to the outside door.<sup>16</sup> Knapp and Hanna failed to catch up with the man because Kevin Sanders, a fourteen-year-old boy, opened the door to let the man leave the Y.M.C.A.<sup>17</sup> Sanders also opened the door to a car that was waiting at the curb. Sanders later told police that when the man set the bundle in the car the blanket was pulled back and it exposed “skinny white legs.”<sup>18</sup> Williams then drove off.

When police arrived to investigate Pamela’s disappearance, she was described as being four feet, nine inches tall, weighing sixty-three pounds, with blonde hair, and blue eyes.<sup>19</sup> She had been wearing an orange, striped blouse and orange slacks.<sup>20</sup> As a result of John Knapp’s information, suspicion soon focused on Robert Anthony Williams, who Knapp identified as the man who had suspiciously left the Y.M.C.A.<sup>21</sup> Williams had been living at the Y.M.C.A. since October 26, 1968.<sup>22</sup> The case was then assigned to Captain Cleatus Leaming. Leaming was Chief of Detectives and a nineteen-year veteran of the Des Moines Police Department.<sup>23</sup> Leaming instructed the police to search the entire Y.M.C.A., giving special attention to the room of Robert Williams, the primary suspect.<sup>24</sup> The police were unsuccessful in their attempt to locate Pamela Powers in the Y.M.C.A. There was no indication that a struggle had taken place in Williams’s room, but they had removed Williams’s

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11. Lamberto, *supra* note 8, at 3.

12. *Id.*

13. Trial Transcript, *supra* note 9, at 135–38.

14. Lamberto, *supra* note 8, at 3.

15. Trial Transcript, *supra* note 9, at 140.

16. *Id.*

17. *Id.* at 140–41.

18. *Id.* at 34.

19. Jerry Knight & James Ney, *Search For Suspect At Davenport*, DES MOINES REG., Dec. 26, 1968, at 1.

20. Trial Transcript, *supra* note 9, at 25

21. Lamberto, *supra* note 8, at 3.

22. *Id.*

23. *Id.*

24. *Id.*

clothes and personal property. Detective Leaming reported that it could not be determined whether Pamela Powers had been taken to Williams's room.<sup>25</sup>

On December 24, 1968, an arrest warrant was issued for Robert Williams on the charge of child stealing.<sup>26</sup> On Christmas Day, Williams's car was found in Davenport, Iowa.<sup>27</sup> Davenport, Iowa is 160 miles east of Des Moines on Interstate 80.<sup>28</sup> That same day at a rest stop on Interstate 80 near Grinnell, about forty miles east of Des Moines, a maintenance man found in a garbage can a pair of orange stretch slacks, which were later identified as Pamela's, a white bobby sock, a man's shirt, a pair of men's trousers with the name "Anthony" sewn on the inside, a handkerchief, and a Y.M.C.A. blanket.<sup>29</sup> The Iowa Highway Patrol searched along the interstate checking all the rest stops, culverts, overpasses, bridges and ditches.<sup>30</sup> The search of the interstate was complicated by weather conditions, which included falling snow, blowing snow, and near-zero temperatures.<sup>31</sup> The highway patrol confirmed, "We're looking for the girl's body."<sup>32</sup>

As the search for Pamela Powers and Robert Williams continued, police began to investigate Williams's background. They learned that Williams, who was twenty-four years old, was from Kansas City, Missouri, and had at least fourteen different arrests under a half-dozen aliases.<sup>33</sup> His police record included auto theft, writing bogus checks, molestation, attempted rape, and statutory rape involving several underage girls.<sup>34</sup> Police further discovered that Williams was an escapee from the Fulton State Hospital in Fulton, Missouri.<sup>35</sup> He had been committed to that facility after being declared guilty by reason of insanity in the rape of two Kansas City, Missouri girls who were ages eight and six.<sup>36</sup> Williams had escaped from the facility in July of 1968.<sup>37</sup>

Des Moines police also familiarized themselves with Williams's activities after arriving in Des Moines.<sup>38</sup> They discovered that he was a licensed minister at the Maple Street Baptist Church, which he had joined in late July. Rev. G.H. Parrish, who was the ordained minister at the church, licensed

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25. *Id.* at 1.

26. Lamberto, *supra* note 8, at 3.

27. Appendix at 24, *Brewer v. Williams*, 430 U.S. 387 (1977) (No. 74-1263) [hereinafter Appendix].

28. *Id.*

29. Knight & Ney, *supra* note 19.

30. *Id.*

31. *Id.* at 7.

32. *Id.* at 1.

33. *Id.*

34. Knight & Ney, *supra* note 19, at 1, 7.

35. *Id.*

36. *Id.* at 7.

37. *Id.*

38. *Id.*

Williams as a preacher in August.<sup>39</sup> Rev. Parrish explained that Williams assisted around the church by playing the piano and organ for the junior and senior choirs, reading devotions during services, shoveling snow, and preaching three or four times.<sup>40</sup>

When Williams arrived in Davenport on Christmas Eve, he went to the home of an old friend, Mrs. Sadie Wakefield Cade, who was unaware of the manhunt.<sup>41</sup> On the morning of December 26, Williams, who was then in Rock Island, Illinois, called Henry McKnight, a Des Moines attorney.<sup>42</sup> Williams knew McKnight from church related activities and asked McKnight for help. McKnight replied that he would help if Williams gave himself up.<sup>43</sup> McKnight made one other condition. He told Williams, "You must give me the facts about the girl when you get here."<sup>44</sup> McKnight advised Williams to return to Iowa and give himself up. McKnight then called the police department at Davenport to inform them of Williams's intention to surrender.<sup>45</sup> Williams arrived at the Davenport Police Station at about 8:40 a.m., December 26, 1968.<sup>46</sup>

After talking to Williams, McKnight went to the Des Moines Police Department to discuss William's transportation back to Des Moines. After his arrest, Williams called McKnight at the Des Moines Police Department.<sup>47</sup> McKnight took the call in the presence of Chief of Police Wendell Nichols and Detective Cleatus Leaming. During the call, McKnight explained that Williams would be picked up in Davenport by the Des Moines police and transported to Des Moines.<sup>48</sup> McKnight also stated that during the trip Williams would not be mistreated or grilled, and that he should make no statement until he reached Des Moines and they had a chance to consult.<sup>49</sup>

After surrendering, Williams was booked and given his *Miranda* warnings.<sup>50</sup> During Williams's initial appearance, a state court judge notified him of the charges against him and again gave him his *Miranda* warnings.<sup>51</sup> While at the courtroom, Williams conferred with Thomas Kelly, a Davenport

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39. Knight & Ney, *supra* note 19, at 7.

40. *Id.*

41. David Eastman, *Tells of Visit by Williams in Davenport*, DES MOINES REG., Dec. 27, 1968, at 3.

42. Nick Lamberto, *Open Charge of Murder Filed Here*, DES MOINES REG., Dec. 27, 1968, at 1.

43. *Id.*

44. *Id.*

45. *Id.* at 8.

46. *Id.*

47. Lamberto, *supra* note 42, at 8.

48. Appendix, *supra* note 27, at 38.

49. *Id.* at 36-38.

50. *Id.* at 49.

51. *Id.* at 50.

attorney, who advised him to say nothing until he had a chance to consult with McKnight upon return to Des Moines.<sup>52</sup>

After the discussion between McKnight and the Des Moines police, Detective Leaming and Detective Arthur Nelson, a fifteen-year police veteran, drove to Davenport to pick up Williams.<sup>53</sup> Around 1:00 p.m. they had a conversation with Thomas Kelly and Williams. Detective Leaming again gave Williams his *Miranda* warnings and explained that the two of them would be “visiting” on the way back to Des Moines.<sup>54</sup>

Kelly, acting as Williams’s attorney, conferred privately with Williams.<sup>55</sup> Kelly and Leaming then had a discussion, the results of which were a point of disagreement at trial. The first point of disagreement was that Kelly believed he had received assurances from Leaming that Williams was not to be questioned until after he was returned to Des Moines and had the chance to consult with McKnight.<sup>56</sup> Kelly also claimed that he was denied permission to ride along with Williams and the detectives in the police car to Des Moines.<sup>57</sup> The two detectives placed Williams in the backseat of the car and left on the 160-mile trip to Des Moines.<sup>58</sup> Williams never expressed a willingness to be interrogated during the trip. In fact, he told Detective Leaming that he would talk after they returned to Des Moines and he consulted with McKnight.<sup>59</sup>

On the way back Leaming engaged Williams in a number of conversations on topics including religion, Williams’s reputation, his minister, and police procedures.<sup>60</sup> Leaming told Williams that he himself had religious training as a child and was more likely to pray for Williams than abuse him or strike him.<sup>61</sup> In an effort to obtain statements from Williams concerning the missing girl, Leaming later testified that he addressed Williams as “Reverend” and went into what has become known as the “Christian burial speech.”<sup>62</sup> The speech goes as follows:

I want to give you something to think about while we’re traveling down the road. . . . Number one, I want you to observe the weather conditions, it’s raining, it’s sleeting, it’s freezing, driving is very treacherous, visibility is poor, it’s going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows

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52. *Id.* at 50–52.

53. Appendix, *supra* note 27, at 54–55.

54. *Id.* at 75.

55. *Id.* at 75–76.

56. *Id.* at 91.

57. *Id.* at 107–08.

58. Appendix, *supra* note 27, at 77.

59. *Brewer v. Williams*, 430 U.S. 387, 392 (1977).

60. Appendix, *supra* note 27, at 81.

61. *Id.* at 80.

62. *Brewer*, 430 U.S. at 392.

where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.<sup>63</sup>

Williams asked Detective Leaming why he believed that they were going to go past the body.<sup>64</sup> In an attempt to induce Williams to divulge the location of the body Leaming falsely told him that he knew it was somewhere near Mitchellville.<sup>65</sup>

While Williams was being arrested, making his initial appearance, and readied for transport, the police had begun a more intensive search for the body of Pamela Powers. The focus of the new search was based on the discovery of Williams's car in Davenport and the clothing belonging to Williams and the victim found at the rest stop on Interstate 80 near Grinnell, Iowa.<sup>66</sup> The police had concluded that the body of Pamela Powers would probably be found near the interstate between Des Moines and Grinnell.<sup>67</sup>

Thomas Ruxlow of the Iowa Bureau of Criminal Investigation was in charge of the search, which was conducted by about 200 persons.<sup>68</sup> The first step of the search involved obtaining maps of Jasper and Poweshiek Counties, which are east of Polk County where Des Moines is located. These two counties are divided in half by Interstate 80, so the decision was made to search an area from roughly seven miles north of the interstate to seven miles south of the interstate. The section to be searched was divided into grids with responsibility for each grid placed on teams containing between four to six volunteers.<sup>69</sup> The searchers were instructed to check all roads and ditches from the roadbed. When the searchers came upon culverts, they were told to get out of their vehicle and check the insides. Searchers were also instructed to examine abandoned farm buildings and any other places where a small child could be hidden.<sup>70</sup> The search began at the eastern border of Poweshiek County and moved west.<sup>71</sup>

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63. *Id.* at 392–93.

64. Appendix, *supra* note 27, at 81.

65. *Id.*

66. Transcript of Motions to Suppress Evidence at 35, *Iowa v. Williams*, No. CR 55805 (Iowa Dist. Ct. Polk County 1977) [hereinafter *Suppression Hearing*].

67. *Id.*

68. *Id.* at 33–34.

69. *Id.* at 34.

70. *Id.* at 35.

71. *Suppression Hearing*, *supra* note 66, at 36.



As Williams and his escorts neared Grinnell, Iowa, Williams asked if the victim's shoes had been found.<sup>72</sup> Without reminding Williams of his rights, Detective Leaming told Williams what evidence had been found. Williams then stated that he would show the detectives where he had hidden the shoes but, upon stopping at the gas station, no shoes could be located.<sup>73</sup> After further discussion, Williams offered to lead the detectives to a blanket at a rest stop but, when they stopped, they found out that it had already been discovered.<sup>74</sup>

As they continued toward Des Moines, there were further discussions about people, religion, intelligence, and what people thought about Williams. While they were still some distance east of Mitchellville, Williams told the detectives that he would show them where the body was located.<sup>75</sup> When it was clear that Williams seemed to be cooperating, the search for Pamela Powers was called off at 3:00 p.m. on December 26.<sup>76</sup> During the period in which the search was active, it had covered all of Jasper and Poweshiek Counties, and had made it to the Jasper-Polk County line.<sup>77</sup> The search was never resumed because at about 5:45 p.m., Williams led the police to the body, which was located in Polk County, two and a half miles west of the Jasper County line. The location was on a gravel road two miles south of Interstate 80. It took officers five minutes to discover the body once Williams led them to the site, but they did find it.<sup>78</sup> The body was dressed in an orange and white striped blouse, which is what first attracted the attention of the officers searching. From the waist down, the body had no clothes. It was partially covered with snow, with the left leg frozen in midair and the back resting against a cement culvert.<sup>79</sup> One officer on the scene said that due to the recent snow it would have taken a "long time" to find the body without Williams's cooperation.<sup>80</sup>

Williams then arrived in Des Moines at about 7:30 p.m.<sup>81</sup> McKnight, who was at the station, stated that the Des Moines police "really double-crossed me. They violated all the gentlemen's agreements we had."<sup>82</sup> McKnight also said that, according to Williams, the officers on the trip back kept questioning him

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72. Appendix, *supra* note 27, at 81.

73. *Id.*, at 82–83.

74. *Id.* at 83–84.

75. *Id.* at 84.

76. Suppression Hearing, *supra* note 66, at 36.

77. *Id.*

78. State v. Williams (*Williams II*), 285 N.W.2d 248, 261–62 (Iowa 1979).

79. Suppression Hearing, *supra* note 66, at 22–23.

80. Lamberto, *supra* note 42, at 8.

81. *Id.* at 3.

82. Williams 'Voluntarily Told' Where Body Was: Police, DES MOINES REG., Dec. 28, 1968, at 5 [hereinafter *Voluntarily Told*].

as to the location of the body until he cooperated.<sup>83</sup> Police Chief Nichols, however, stood up for his officers, stating that, “The two officers who brought Williams back from Davenport deliberately refrained from asking him for details of the abduction and slaying.”<sup>84</sup>

## II. THE FIRST TRIAL AND APPEALS

### A. *Pretrial Hearing*

Prior to trial, a motion was filed on March 25, 1969, to suppress evidence.<sup>85</sup> The motion asked Judge James Denato to “suppress the State’s evidence offered by all witnesses as to admissions against interest, statements, demonstrations and confessions made by him [Williams] while in police custody on an automobile trip from Davenport to Des Moines, Iowa, on December 26, 1968.”<sup>86</sup> The motion also requested that all the State’s evidence that was linked to those violations be suppressed. This evidence would include the body and all physical evidence found at the site where the body was located. The motion argued that the evidence should be suppressed because it was gathered in violation of the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel as made applicable to the states under the Fourteenth Amendment’s Due Process Clause.<sup>87</sup>

Judge Denato held a suppression hearing on April 2, 1969.<sup>88</sup> In making his decision, Judge Denato had to decide whether there had been agreement not to question Williams on the trip from Davenport back to Des Moines between McKnight and Detective Leaming. He also had to determine if Detective Leaming had intermittently questioned Williams about the location of the body on the trip back to Des Moines, which Detective Leaming denied. Finally, Judge Denato had to determine whether Leaming had denied Kelly permission to ride with Williams to Des Moines.<sup>89</sup>

Judge Denato ruled that the trip from Davenport to Des Moines was a critical stage in the proceedings against Williams which required, if requested, the presence of counsel in order for the evidence gained to be admissible.<sup>90</sup> Judge Denato also ruled that the facts showed that there was an agreement

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83. Appendix, *supra* note 27, at 48.

84. *Voluntarily Told*, *supra* note 82, at 1.

85. Appendix, *supra* note 27, at 1.

86. *State v. Williams (Williams I)*, 182 N.W.2d 396, 398–99 (1970); Appendix, *supra* note 27, at 1.

87. Appendix, *supra* note 27, at 2–3.

88. *Id.* at 1–2.

89. *Id.*

90. *Id.* at 1.

between McKnight and the Des Moines police that Williams would not talk to the police until after he had consulted with McKnight.<sup>91</sup> Judge Denato then ruled that regardless of any agreement, no evidence resulting from the trip would be suppressed. Judge Denato believed that Williams had been adequately informed of his rights, understood them and voluntarily gave information to the police after waiving his right to have an attorney present. In the words of Judge Denato:

The time element involved on the trip, the general circumstances of it, and more importantly the absence on the Defendant's part of any assertion of his right or desire not to give information absent the presence of his attorney, are the main foundations for the Court's conclusion that he voluntarily waived such right.<sup>92</sup>

Although Judge Denato did not decide either of the two remaining factual questions because they were made irrelevant by the ruling that Williams had waived his rights, Judge Denato did shed some light on what he believed to be an accurate reflection of one of the issues by stating, "the Court is not entirely convinced that Chief of Detectives Leaming testified with complete candor at this hearing, regarding the 'agreement' with Defendant's attorney."<sup>93</sup> Judge Denato added that all of his findings were made "beyond a reasonable doubt."<sup>94</sup> The effect of Judge Denato's ruling was that it allowed all the evidence in question to be admissible.

### B. *The Trial*

The first trial of Robert Williams began on April 30, 1969. In making the case for the prosecution, assistant Polk County Attorney, Vincent Hanrahan, used nine witnesses to create an historical storyline to explain the sequence of events surrounding the disappearance of Pamela Powers.<sup>95</sup> Those called to testify either had direct knowledge of Pamela's disappearance or Williams's flight.<sup>96</sup> Because the defense did not dispute the prosecution's version of these events, McKnight did not cross-examine the witnesses. Another group of prosecution witnesses included several of the police officers involved in the case.<sup>97</sup> The most important witness for the State was Detective Cleatus Leaming. Detective Leaming testified about the long sequence of events involving him and Williams, which took place on December 26, 1968.<sup>98</sup>

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91. *Id.* at 1.

92. Appendix, *supra* note 27, at 1.

93. *Id.* at 2.

94. *Id.*

95. Jon Van, 'Pamela Never . . . Came Back', DES MOINES REG., May 1, 1969, at 1, 5.

96. *Id.* at 5.

97. *Id.*

98. Appendix, *supra* note 27, at 73-97.

Detective Leaming again repeated the Christian burial speech that he believed caused Williams to lead him to places where evidence had been disposed and eventually, the body.<sup>99</sup> The final witness called by the State was Dr. Leo Luka, the Polk County Medical Examiner.<sup>100</sup> Dr. Luka testified that the autopsy revealed that Pamela had been subject to a sexual assault and that she had been smothered to death.<sup>101</sup> This piece of information was crucial to the State's ability to prove the elements of first degree murder. The State then rested its case.

The defense, presented by Henry McKnight, involved the testimony of three witnesses. It lasted one hour and ten minutes.<sup>102</sup> The only witness that was called to provide exculpatory testimony was Dorothy Brown, a maid at the Y.M.C.A. She testified that she saw Williams and Arthur Bowers, a Y.M.C.A. janitor, get on the seventh floor elevator at about 1:45 on the afternoon of December 24.<sup>103</sup> This was a full fifteen minutes to half hour after the prosecution's witness had placed Williams as leaving the Y.M.C.A.<sup>104</sup> She also stated that Williams was not carrying a bundle in a blanket.<sup>105</sup>

The other witnesses were used to illustrate the extent to which Williams's rights to counsel and against self-incrimination had been violated on the drive between Davenport and Des Moines.<sup>106</sup> McKnight called Thomas Kelly, the attorney who had counseled Williams in Davenport. McKnight also called Des Moines Police Chief Wendell Nichols. Chief Nichols testified that both he and Detective Leaming were in Leaming's office with McKnight on December 26 when McKnight received a call from Williams.<sup>107</sup>

In his closing argument, Vincent Hanrahan said, "All I'm going to talk about is the first degree because I see nothing else in this case."<sup>108</sup> Hanrahan explained that this was the only possible verdict because it was first degree murder when an individual was killed during the act of rape.<sup>109</sup> He noted that according to the testimony of Polk County Medical Examiner, Dr. Leo Luka,

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99. *Id.* at 81. Yale Kamisar has pointed out that this speech is different than the one given at the suppression hearing in substantial ways. For his analysis of the difference, see Yale Kamisar, *Foreword: Brewer v. Williams—A Hard Look at a Discomforting Record*, 66 GEO. L.J. 209 (1977).

100. Jon Van, *Only an Hour of Testimony By Defense in Williams Trial*, DES MOINES REG., May 6, 1969, at 3.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. Van, *supra* note 100.

106. *Id.*

107. *Id.*

108. William T. Kong, *Williams Case to Polk Jury*, DES MOINES TRIB., May 6, 1969, at 1.

109. *Id.*

Pamela had been violated.<sup>110</sup> Hanrahan reviewed the events, which showed that Williams was seen carrying a body out of the Y.M.C.A.<sup>111</sup> He also reminded the jury that only the murderer would have known where the body was located, and that the evidence showed Williams himself had led police to the body.<sup>112</sup>

McKnight reminded the jurors that Williams was an escapee from a mental hospital at the time when the events occurred. McKnight explained that this might have caused Williams to carry Pamela's body out of the Y.M.C.A. rather than report the killing.<sup>113</sup> He told the jurors that Williams's actions did not prove he committed the murder. McKnight implied that the evidence not presented at the trial might be as important as that which was presented. In particular, some witnesses, like Albert Bowers, who had seen Williams the day of the crime were not called by the prosecution.<sup>114</sup> McKnight wondered why the police questioned Bowers and then let him leave the State without getting any address where he could be located for the purpose of the trial.<sup>115</sup> McKnight also questioned why the prosecutor had failed to mention any of the laboratory tests that were done on Pamela's clothing and the items found in the Grinnell rest stop.<sup>116</sup> He also questioned why police had not entered into evidence hairs that were taken from Williams for the purpose of comparison to "foreign" hairs that were found on Pamela's body.<sup>117</sup>

In the case of *Iowa v. Williams*, the verdict was announced in open court on May 6, 1969. The jury did not spend much time deliberating the case. They began their deliberation at noon. While they deliberated, the jurors elected Norbert Moreland as their foreman and ordered and ate lunch. It returned with a verdict at 1:40 p.m.<sup>118</sup> The verdict was guilty of first degree murder.

### C. *The First Appeals Process*

After Williams's conviction, Henry T. McKnight filed an appeal on behalf of Williams before the Iowa Supreme Court. In his brief, he argued that Williams's conviction should be reversed due to violations of *Miranda v. Arizona*<sup>119</sup> and because the trial court had erred in overruling his motion to suppress the evidence resulting from the automobile trip between Davenport

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110. *Id.*

111. *Id.*

112. *Id.*

113. Kong, *supra* 108, at 11.

114. *Id.*

115. *Id.*

116. *Id.*

117. Jon Van, *Faces Life in the Death of Powers Girl*, DES MOINES REG., May 7, 1969, at 5.

118. *Id.*

119. *Miranda v. Arizona*, 384 U.S. 436 (1966).

and Des Moines while Williams was in police custody.<sup>120</sup> On December 15, 1970, the Iowa Supreme Court issued its opinion in the case of *Iowa v. Williams*.<sup>121</sup> The court upheld the conviction of Williams in a 5-4 decision. In his majority opinion, Justice Larson first pointed out that almost all protections of the Constitution, including the right to counsel and the privilege against self-incrimination, may be waived by a citizen. After warned of his rights, a person may waive those rights when he is not in the presence of an attorney.<sup>122</sup> The court then indicated that it could determine if there was a waiver by examining the totality of the circumstances.<sup>123</sup> In examining the totality of the circumstances from the record, the court ruled that Williams had effectively waived his rights and volunteered statements concerning the whereabouts of the victim's body.<sup>124</sup>

On October 12, 1972, Williams filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Iowa, against Lou Brewer, the warden of the Iowa State Penitentiary at Fort Madison, where he was imprisoned.<sup>125</sup> The case of *Williams v. Brewer* was heard by district court Judge William C. Hanson.<sup>126</sup> Judge Hanson ruled that Williams's statements were not voluntary,<sup>127</sup> that he had not properly waived his Fifth Amendment rights as required in *Miranda*,<sup>128</sup> and that there was a further violation of Sixth Amendment rights by interrogating him without his counsel after judicial proceedings had already begun.<sup>129</sup> As a result, Judge Hanson ruled that Williams's statements should not have been admitted into evidence at trial where they were prejudicial against Williams.<sup>130</sup> The State then appealed to the Eighth Circuit.<sup>131</sup>

On December 31, 1974, the Eighth Circuit reached a decision in *Williams v. Brewer*.<sup>132</sup> The decision was split 2-1.<sup>133</sup> In resolving the legal issues Judge Vogel, speaking for the panel, affirmed the district court's decision.<sup>134</sup> Judge Vogel ruled that there was no waiver because only after the subtle form of

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120. *Iowa v. Williams*, 182 N.W.2d 396, 398-99 (Iowa 1971).

121. *Id.* at 396.

122. *Id.* at 400.

123. *Id.* at 401.

124. *Id.* at 405.

125. Appendix, *supra* note 27, at 18.

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

127. *Id.* at 185.

128. *Id.* at 181-82.

129. *Id.* at 178.

130. *Id.* at 185.

131. Appendix, *supra* note 27, at 21.

132. *Williams v. Brewer*, 509 F.2d 227 (8th Cir. 1975).

133. *Id.*

134. *Id.* at 228.

interrogation, through the Christian burial speech, was the State capable of eliciting from Williams's statements after he had asserted his rights.<sup>135</sup>

On December 15, 1975, the Supreme Court voted to grant the State's request for certiorari.<sup>136</sup> In its brief, the State, along with twenty-one other states acting as amici curiae, urged the Court to re-examine and overrule *Miranda v. Arizona*.<sup>137</sup> On March 23, 1977, the Supreme Court handed down its decision in *Brewer v. Williams*.<sup>138</sup> In a 5-4 decision, the Court upheld the district court's grant of habeas corpus to Williams.<sup>139</sup> Justice Potter Stewart wrote the majority opinion.<sup>140</sup> Justice Stewart declared that the central issue was whether Williams's Sixth Amendment right to counsel as applied to the states through the Due Process Clause of the Fourteenth Amendment had been violated.<sup>141</sup> The Court found that Williams's rights had been violated because it was clear that judicial proceedings had begun against Williams prior to the trip from Davenport to Des Moines.<sup>142</sup> As a result, Justice Stewart believed that *Massiah v. United States*<sup>143</sup> was the applicable precedent.<sup>144</sup> Williams was therefore entitled to the assistance of counsel during the trip.<sup>145</sup> Justice Stewart rejected the totality of circumstances standard applied by the Iowa Supreme Court to demonstrate waiver.<sup>146</sup> He stated that *Johnson v. Zerbst*<sup>147</sup> was the standard to judge if a waiver existed, so the State had to prove "an intentional relinquishment or abandonment of a known right or privilege," which the State was unable to establish in Williams's situation.<sup>148</sup>

Justice Stewart's opinion also included a footnote, which is indicative of the Court's likely displeasure with the social costs of the application of the exclusionary rule in this case. In the footnote, Justice Stewart indicated the Court's willingness for the State to test the development of a new exception to the exclusionary rule by stating:

While neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was

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135. *Id.* at 234.

136. *Brewer v. Williams*, 423 U.S. 1031 (1975).

137. *Miranda v. Arizona*, 384 U.S. 436 (1966).

138. *Brewer*, 430 U.S. 387.

139. *Id.*

140. *Id.* at 388.

141. *Id.* at 388, 398.

142. *Id.* at 399.

143. *Massiah v. United States*, 377 U.S. 201 (1964).

144. *Brewer*, 430 U.S. at 400.

145. *Id.* at 402.

146. *Id.* at 439-40.

147. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

148. *Brewer*, 430 U.S. at 404 (quoting *Johnson*, 304 U.S. at 464).

found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams. . . . 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.<sup>149</sup>

Through this footnote and an unwillingness to directly discuss which evidence should have been suppressed due to the violation of Williams's Sixth Amendment rights, the Supreme Court put into motion a sequence of events that would delay the final resolution of the *Williams* case for seven more years.

Justice Powell wrote a concurring opinion in which he explained that although he generally shared "the view that the *per se* application of the exclusionary rule has little to commend it," he thought it should be applied in this case because Officer Leaming had purposely violated Williams's rights.<sup>150</sup>

Chief Justice Burger wrote a dissenting opinion, the tone of which was set by the first few sentences.<sup>151</sup> Chief Justice Burger complained that Williams was undoubtedly guilty of a horrendous crime, and that no member of the Court suggested he was not.<sup>152</sup> The bulk of Chief Justice Burger's dissent was then directed at discrediting the Court's application of the exclusionary rule.<sup>153</sup> He argued that rather than automatically exclude evidence, the Court should have balanced the harm exclusion does to the truth seeking process of a trial with the imperative to safeguard constitutional rights.<sup>154</sup>

### III. THE SECOND TRIAL AND APPEALS

#### A. *Pretrial Hearing*

Prior to his second trial, again presided over by Judge Denato, Williams's attorneys made several motions to suppress evidence. The most important of the suppression motions was the desire to suppress all of Williams's statements during the trip between Davenport and Des Moines, which the Supreme Court had ruled resulted from a violation of his Sixth Amendment right to counsel. Included in this motion was a request to suppress all evidence gathered as a result of the tainted statements, including "articles of clothing, and

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149. *Id.* at 406 n.12.

150. *Id.* at 414 n.2 (Powell, J., concurring).

151. *Id.* at 415–16 (Burger, C.J., dissenting) ("The result in this case ought to be intolerable in any society which purports to call itself an organized society. It continues the Court . . . on the much criticized course of punishing the public for the mistakes and misdeeds of law enforcement officers, instead of punishing the officer directly, if in fact he is guilty of wrongdoing. It mechanically and blindly keeps reliable evidence from juries whether the claimed constitutional violation involves gross police misconduct or honest human error.").

152. *Id.* at 416.

153. *Brewer*, 430 U.S. at 421–29 (Burger, C.J., dissenting).

154. *Id.* at 426.



photographs of articles of clothing, found on the body, evidence concerning the condition of the body, and the results of medical, chemical, or pathological tests performed on the body.”<sup>155</sup> The defense also sought to suppress hair samples that had been taken from Williams while he was being held at the Polk County Jail.<sup>156</sup>

The suppression hearing was held on May 31, 1977, before Judge Denato.<sup>157</sup> Both sides had specific things they were hoping to prove to the judge’s satisfaction in the hearing. On the first issue, admission of the body and related evidence, the prosecution had two related goals. They were to present credible evidence that, despite the constitutional violation, the body of Pamela Powers would have inevitably been found by lawful means and that the body would have been in a condition similar to that in which it was actually found.<sup>158</sup> The defense team wanted to demonstrate just the opposite.

The State first marked its exhibit consisting of photographs and maps of the location where the body was found and two photographs taken of the body at the time of the discovery.<sup>159</sup> These exhibits were introduced to help demonstrate that if the police search had continued, the body would have been discovered. The State’s witnesses testified that these photographs demonstrated the body was not hidden by snow before it was disturbed.<sup>160</sup>

John Jutte, a special agent for the Iowa Bureau of Criminal Investigation, was the first witness called by the prosecution.<sup>161</sup> Jutte testified that he was one of the people who had first found Pamela Powers’s body.<sup>162</sup> Judge Denato sought and received a stipulation that the body was found through the actions of Detective Leaming and Williams.<sup>163</sup> Jutte went on and described the bright clothes that first caught his attention upon locating the body.<sup>164</sup> He also testified that the face was partially exposed and had not been covered by snow.<sup>165</sup>

Carroll Dawson, who was in the Des Moines Police Department on the night that the body was located, was next called.<sup>166</sup> He testified that he helped

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155. Williams v. Nix, 700 F.2d 1164, 1168 (8th Cir. 1983).

156. Joint Appendix at 92, Nix v. Williams, 467 U.S. 431 (1984) (No. 82-1651) [hereinafter Joint Appendix].

157. Suppression Hearing, *supra* note 66, at 3.

158. While there is no precise statement of the State’s intent, it is implied through State actions. *Id.* at 1–90.

159. *Id.* at 3.

160. *Id.* at 22, 42.

161. *Id.* at 4.

162. Suppression Hearing, *supra* note 66, at 4.

163. *Id.* at 15.

164. *Id.* at 19.

165. *Id.* at 19.

166. *Id.* at 21.

to remove the body from the crime scene.<sup>167</sup> He stated that Pamela was originally partially covered with snow which was brushed off after a picture was taken.<sup>168</sup> He identified a picture presented by the prosecutor as accurately showing the body as he initially saw it.<sup>169</sup> Upon cross-examination, Officer Dawson admitted that he did not know whether anyone other than himself may have cleared snow from the body prior to pictures being taken.<sup>170</sup> Hoping to clarify the situation Judge Denato asked about the snow on the body.<sup>171</sup> Officer Dawson told him that he had to brush snow off to be able to completely see the body, but he did not remember anyone else doing so.<sup>172</sup>

The State then called Dr. Jack Hatchitt, who in 1968 had been a Des Moines Police Department Medical Examiner and had helped to carry the body out of the culvert.<sup>173</sup> Dr. Hatchitt testified that when found, the body was completely frozen.<sup>174</sup> His testimony also revealed that at the time the body was found it was getting dark and snowing.<sup>175</sup> The State then introduced two exhibits, which were climatological charts, which showed the temperatures for the Des Moines area for the months of December 1968 and January 1969.<sup>176</sup>

Thomas Ruxlow of the Iowa Bureau of Criminal Investigation testified that he was in charge of the search operation, which began on December 26, 1968. He explained that a search party composed of around 200 individuals had been assembled. He said that the search concentrated on Jasper and Poweshiek Counties because articles of clothing had been found at the Grinnell rest area on Interstate 80. The search first started in Poweshiek County and moved westward into Jasper County. Agent Ruxlow explained that the search was systematic.<sup>177</sup> After getting maps of Poweshiek and Jasper Counties, they were marked off in grid fashion with an area roughly seven miles north and south of Interstate 80 being searched.<sup>178</sup> The volunteers were split into teams of four to six people and assigned specific grids to be searched. The instructions given to the volunteers when they began the search at 10:00 a.m. were:

When searching, to check all the roads, the ditches, any culverts; they were instructed to get down and look into any culverts. If they came upon any abandoned farm buildings, they were instructed to go onto the property and

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167. Suppression Hearing, *supra* note 66, at 22.

168. *Id.*

169. *Id.* at 22.

170. *Id.* at 24.

171. *Id.*

172. Suppression Hearing, *supra* note 66, at 24.

173. *Id.* at 27.

174. *Id.* at 28.

175. *Id.* at 29.

176. *Id.* at 31.

177. Suppression Hearing, *supra* note 66, at 33–34.

178. *Id.* at 35.

search those abandoned farm buildings or any other places where a small child could be secreted.<sup>179</sup>

Ruxlow told the court that all of the sections of Poweshiek and Jasper Counties had been searched by the time the body was found. He explained that Polk County would have been searched in the same grid technique and estimated that the body would have been located in an additional three to five hours.<sup>180</sup> Agent Ruxlow explained that the search was suspended at 3:00 p.m. when it was apparent that Williams was taking Detective Leaming to the body's location.<sup>181</sup> When pressed, he testified that he did not know when the search would have been resumed had the body not been found.<sup>182</sup>

The next witness that the State called was Dr. Earl Rose, a physician who specialized in pathology. Dr. Rose testified that freezing temperatures stopped decomposition of human bodies by stopping enzymatic actions. When questioned as to whether three to five hours of additional of freezing temperatures would affect the decomposition of a body he answered, "No." He added that a body kept in continual freezing temperatures would be preserved for a postmortem autopsy until it thawed.<sup>183</sup> He added that according to temperature charts for the time in question the body would not have thawed until April of 1969.<sup>184</sup>

In response to a defense question, Dr. Rose testified that fluid samples which Dr. Luka had taken from the mouth, rectal, and vaginal areas of the body, that tested positive for acid phosphatases would also have been preserved due to the freezing temperatures.<sup>185</sup> He noted that the positive acid phosphatase test was an indication that seminal fluid was present, even if there was no presence of spermatozoa.<sup>186</sup> Dr. Rose also admitted that Dr. Luka's original report on the condition of the body indicated that the face had been disturbed by some sort of animal and that it was not uncommon in rural areas for a body to be subject to such abuse by animals.<sup>187</sup>

The defense introduced two items to demonstrate that the body would not have inevitably been found without a violation of Williams's rights. Both were attempts to show that it was getting dark and snowing which made discovery of the body less likely. The first was a chart giving the time of sunrise and sunset for Des Moines, Iowa.<sup>188</sup> The second was a transcript of the testimony

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179. *Id.* at 35.

180. *Id.* at 41.

181. *Id.* at 61.

182. Suppression Hearing, *supra* note 66, at 56–57.

183. *Id.* at 64–65.

184. *Id.* at 68.

185. *Id.* at 73.

186. *Id.* at 72–73.

187. Suppression Hearing, *supra* note 66, at 81–82.

188. *Id.* at 88.

of Detective Leaming from the first trial relating to the weather conditions at the time when the body was found and the fact that it still took the police five minutes to discover the body, even when they had been led to its location.<sup>189</sup>

Judge Denato moved on to consider the admissibility of hairs which had been gathered from Williams while he was in custody. The State called Officer Carroll Dawson of the Des Moines Police Department. He testified that on December 27, 1968, while Williams was being held at the Polk County Jail, he requested some hair samples from Williams, who willingly gave them.<sup>190</sup> During cross-examination Officer Dawson admitted that he had known of Williams's mental history, but had not informed him of his *Miranda* rights prior to requesting the hair samples.<sup>191</sup>

The defense then called Williams. Williams testified that he feared for himself when the officers asked him for hair samples and that it would be more accurate to say that the officers took hair samples from him.<sup>192</sup> He went on to state that he allowed the hairs to be taken because he believed that they had gotten his attorney's permission. He said that he could not believe that after Detective Leaming had already broken one agreement with McKnight that the police would do anything else to him without consulting his attorney.<sup>193</sup> Williams admitted on cross-examination that when the hair samples were taken the police had not threatened him or promised him anything in return for the samples.<sup>194</sup>

Judge Denato ruled on the suppression motions on June 1, 1977.<sup>195</sup> Judge Denato disallowed use of Williams's statements during the trip between Davenport and Des Moines, but allowed use of the body and all of the physical evidence associated with its discovery due to an inevitable discovery exception to the exclusionary rule. Judge Denato stated that guidance for his decision was found in the footnote of Justice Stewart's majority opinion in *Brewer v. Williams*.<sup>196</sup> He also noted that the burden of proof that the prosecution had to meet was a preponderance of the evidence.<sup>197</sup> Judge Denato's ruling stated:

The Court concludes that the searchers would have arrived at the site of the body within a short time of its actual finding, had they continued the search after dark. The culvert in question was itself uncovered and readily visible and in getting down to look into it as the searchers were doing the depression on either side of it would have been obvious—the body was in one of these

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189. *Id.* at 88–89.

190. *Id.* at 121.

191. *Id.* at 122–23.

192. *Suppression Hearing, supra* note 66, at 136.

193. *Id.* at 136–37.

194. *Id.* at 138.

195. Joint Appendix, *supra* note 156, at 83.

196. *Id.* at 83–88.

197. *Id.* at 84.

depressions. Had the searchers stopped due to the snow and the dark the next day was a Friday and a weekend was upcoming—the search would clearly have been taken up again where it left off, given the extreme circumstances of this case and the body would have been found in short order. . . . In any case the frozen body would have stayed frozen and deterioration suspended, into April according to Dr. Rose. . . . Accordingly, the Court concludes that the body of Pamela Powers would have been found in any event even had the incriminating statements not been elicited from the defendant and that decomposition would not have taken place so as to alter the medical examination findings of Dr. Luka and thus there held admissible in evidence.<sup>198</sup>

Judge Denato also allowed the samples of body hairs taken from Williams to be used because Williams had consented, because there had been no compulsion, and Williams had knowingly waived his constitutional rights.<sup>199</sup> Judge Denato then granted a defense request to have Williams tested at Mercy Hospital to determine if he had the ability to produce sperm.

#### B. *The Trial*

As the date for trial drew closer, both parties to the case continued to maneuver to advance strategies that would benefit their view of the case at trial. Since the first trial, new rules governing discovery had been established by the Iowa Supreme Court. The new rules gave the defense access to all police files and reports regardless of whether the prosecution would rely on them at trial.<sup>200</sup> As trial grew closer, the defense began a search for alternative suspects because a police report, made available to them through the broadened discovery process, showed that the police once theorized that Williams was sterile. The defense also gained access to a prosecution report which showed that, according to the autopsy report, there were no spermatozoa found in the semen taken from the body of Pamela Powers.<sup>201</sup>

Since a sterility test showed that Williams was not sterile, the defense believed that someone other than Williams was responsible for the attack on Pamela. The suspect that the defense had in mind was Albert Bowers, who, it claimed, had a history of child molestation. Bowers, like Williams, was a black male who lived in the Y.M.C.A., and was employed there to clean washrooms at the time of Pamela's disappearance.<sup>202</sup> Defense lawyers contended that a towel covered with human blood had been found in Bowers's

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198. *Id.* at 86–88.

199. *Id.* at 92.

200. David Yepsen, 'Lost' Williams Case File Found in Basement Box, DES MOINES REG., June 24, 1977, at 5A.

201. Paul Leavitt, *Exhume Body, Williams' Lawyers Ask*, DES MOINES REG., June 10, 1977, at 1A.

202. *Id.* at 7A.

room the day after the crime.<sup>203</sup> They also claimed that despite requests by police that he remain in town, Bowers left Des Moines shortly after Williams was arrested.<sup>204</sup> The defense thought that some of the pubic hairs discovered in the investigation could have come from Bowers. Bowers, however, had died in 1971.<sup>205</sup> Due to these facts, the defense was granted an order to exhume the body. After the body was exhumed on June 24, 1977, an autopsy was performed.<sup>206</sup> Because the results were positive for spermatozoa the defense never made mention of Albert Bowers as a possible suspect during the trial process.<sup>207</sup>

Prior to trial, the prosecutors informed the court that it could not produce any of the records of the medical tests that had been conducted on the fluids taken from Pamela Powers's body. The court was told that these tests, which had been stored at Wilden Hospital in Des Moines, were destroyed when the basement flooded.<sup>208</sup> Due to this, the prosecutors motioned for a ruling that the defense could not make mention at trial that even though acid phosphatase was found on the body, there was no sign of sperm. The prosecutors argued that since Dr. Luka, who had performed the autopsy, had not been present when the fluids were tested, he could not testify as to what particular tests were performed or the competency of the individual who conducted the tests.<sup>209</sup> Judge Denato denied this motion and allowed both sides to work off the record in regard to the test results.<sup>210</sup>

On July 7, 1977, the State, represented by lead counsel Robert Blink and co-counsel Rodney Ryan, began to present its case, which would take two and a half days, the calling of eighteen witnesses, and the presentment of forty-one exhibits.<sup>211</sup> Robert Blink's opening statement provided a narrative of the events involved in the case which the jurors would learn about.<sup>212</sup>

The defense's opening statement began by telling the courtroom that Williams had indeed carried Pamela Powers out of the Y.M.C.A. on December 24, 1968, and disposed of her in a rural area.<sup>213</sup> The defense went on to explain Williams did not, however, kill the girl. Instead, Williams had found

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203. *Id.*

204. *Id.* at 1A.

205. *Id.* at 1A, 6A.

206. Paul Leavitt, *Surprises in Defense In Williams Trial*, DES MOINES REG., July 10, 1977, at 2A.

207. Brief of the Respondent at 42, *Nix v. Williams*, 467 U.S. 431 (1984) (No. 82-1651) [hereinafter Brief of the Respondent].

208. Leavitt, *supra* note 201, at 7A.

209. *Id.*

210. *Id.* at 6A.

211. Trial Transcript, *supra* note 9, at 1-3.

212. *Id.* at 3-6.

213. *Id.* at 8.

the body in his seventh floor room at the Y.M.C.A., panicked and removed it hoping not to be implicated in the crime.<sup>214</sup> The defense said that Williams did this due to the facts and circumstances which existed in his life at the time, but did not explain that at the time of the crime Williams was an escapee from a mental hospital where he had been sent for statutory rape.<sup>215</sup> The defense went on to explain its theory that the crime had been committed by a sterile man, which excluded Williams as a suspect since he was not sterile.<sup>216</sup>

At trial the State's first witnesses, which included Nelda Powers, Merlin Powers, Kevin Sanders and Donald Hanna, provided the same testimony that they had at Williams's first trial. They described Pamela's disappearance followed by Williams's flight.<sup>217</sup> The defense did not cross-examine any of these witnesses.<sup>218</sup>

The State also brought forward a group of witnesses to demonstrate Williams's efforts to dispose of evidence of the crime. Merle Killinger testified that on December 25, 1968, he found a number of items in the men's restroom at the rest stop near Grinnell, Iowa.<sup>219</sup> These items, which included a blanket, a man's suit jacket, a man's suit trousers, a man's yellow shirt, a man's light jacket, a man's handkerchief, a girl's sweater type blouse, a Y.M.C.A. towel, a pair of girl's socks, and a pair of girl's slacks, were presented as Exhibits 1 through 10 for the prosecution.<sup>220</sup> The last two items were positively identified as belonging to Pamela Powers. Mr. Killinger then revealed that he had taken all of the items, bagged them together, and given them to Officer Gates of the Grinnell Police Department.<sup>221</sup>

Andrew Newquist, who worked as a special agent for the Iowa Highway Department in 1968, testified that he had been present when Williams's car was searched.<sup>222</sup> He identified the State's Exhibits 19 and 20 as photos of Williams's car.<sup>223</sup> Officer Newquist then testified about State Exhibits 13 through 17 as items which had been gathered when the car was searched. These items included a necktie, a pair of slacks, a rear seat floor mat, rear seat covers, and a rug from the front seat area.<sup>224</sup> Officer Newquist identified all of the items except for the necktie and pair of socks, neither of which carried his

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214. *Id.* at 9.

215. *Id.*

216. Trial Transcript, *supra* note 9, at 9.

217. *Id.* at 23–45.

218. *Id.*

219. *Id.* at 53–58.

220. *Id.*

221. Trial Transcript, *supra* note 9, at 60.

222. *Id.* at 70.

223. *Id.* at 60.

224. *Id.* at 71–73.

identification mark.<sup>225</sup> Officer Newquist explained that these items were turned over to Chief Wendell Nichols of the Des Moines Police Department on December 27, 1968.<sup>226</sup>

The State then called Thomas Ruxlow of the Iowa Bureau of Criminal Investigation. Agent Ruxlow testified that on December 26, 1968, he had observed the body of Pamela Powers where it was found.<sup>227</sup> Agent Ruxlow was then taken through a series of aerial photographs which were marked State Exhibits 27 through 41. He testified that the photos clearly depicted the roads which connected the Y.M.C.A. to the location where the body was discovered.<sup>228</sup> The next two witnesses were called to demonstrate a clear chain of custody for some of the exhibits which were used as evidence.<sup>229</sup> To help demonstrate Williams's eastern flight, the State next called Mark Cupples. Cupples testified that on Christmas Eve 1968, Williams stopped at the gas station he worked at and bought two dollars worth of gas.<sup>230</sup>

The State called Cornelius McWright, who was an FBI laboratory technician from Washington, D.C. McWright told the court that the FBI received a package of evidence from the Des Moines Police Department, which they tested for the presence of semen.<sup>231</sup> After explaining how such tests were done, he gave the results. McWright stated that both the man's shirt and pants, which had been found at the Interstate 80 rest stop, revealed signs of semen, but no sperm.<sup>232</sup> McWright also testified that he had tested several items for blood typing. These included the man's shirt and a towel found at the rest stop on Interstate 80, which both proved to contain type O blood, the same type as Pamela Powers.<sup>233</sup> A child's undershirt also found at the rest stop had blood stains, but the type could not be determined.<sup>234</sup>

During cross-examination, McWright testified that he had tested a sock and tie, which had been found inside of the glove box of Williams's car. The test indicated the presence of traces of sperm.<sup>235</sup> McWright was then asked if the presence of sperm on some of the articles tested, but only semen on others would indicate that the samples came from different persons. When pressed, McWright admitted that one conclusion that could be drawn from the lack of sperm in some semen stains, but not in others, was the possibility that the two

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225. *Id.* at 71–74.

226. Trial Transcript, *supra* note 9, at 73–74.

227. *Id.* at 75.

228. *Id.* at 77–84.

229. *Id.* at 89–93.

230. *Id.* at 93–95.

231. Trial Transcript, *supra* note 9, at 100, 102.

232. *Id.* at 104–05.

233. *Id.* at 104–05.

234. *Id.* at 102–03.

235. *Id.* at 106–07.



semen samples came from different sources.<sup>236</sup> McWright informed the court that the bedspread taken from Williams's room had blood, but not semen or any other type of biological stains.<sup>237</sup>

Dr. Leo Luka, who was the Polk County Medical Examiner that performed the autopsy on the body of Pamela Powers, testified next. Dr. Luka testified that the external examination of the body showed numerous abrasions and lacerations on the head, face, and legs.<sup>238</sup> The face was cyanotic and it looked like part of the nose had been chewed off by a small animal. The probable cause of death given by Dr. Luka was asphyxiation, most likely from being smothered.<sup>239</sup> He also testified that there were signs of sexual abuse at or shortly after the time of death due to disturbances of the rectum, mouth, and vagina, but there had been no penetration.<sup>240</sup> The rectum was dilated and the vagina was separated in an unnatural position, but the hymen was intact.<sup>241</sup> Dr. Luka went on to explain that fluid taken from the rectum, vagina, and the mouth had tested positive for acid phosphatase indicating the presence of semen, but that no traces of sperm were found.<sup>242</sup>

On cross-examination, Dr. Luka said he believed that the sexual molestation had taken place after death.<sup>243</sup> He said that there was no sign of bleeding in either the rectum or vagina.<sup>244</sup> He was then asked about the effect that freezing would have on any sperm which may have been present in the fluids found on the body. He answered that the lack of sperm could be explained by the freezing temperatures, which would destroy any sperm that was present.<sup>245</sup> The defense reminded him of a deposition he had given on June 7, 1977, when he said that under the freezing conditions the body was subjected to, one would expect to see sperm in seminal fluid.<sup>246</sup> Despite this reminder, Dr. Luka stuck to his statement that freezing could cause the breakdown of spermatozoa in seminal fluid.<sup>247</sup>

The final witness was Morris Clark, a special agent of the FBI who in 1969 was the chief of the Microscopic Analysis Unit.<sup>248</sup> Agent Clark established his credentials as an expert in identifying hair samples. Agent Clark testified that

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236. Trial Transcript, *supra* note 9, at 111.

237. *Id.* at 112.

238. *Id.* at 118–20.

239. *Id.* at 121–23.

240. *Id.* at 120–21.

241. Trial Transcript, *supra* note 9, at 120–21.

242. *Id.* at 122.

243. *Id.* at 124.

244. *Id.*

245. *Id.* at 128.

246. Trial Transcript, *supra* note 9, at 130–31.

247. *Id.* at 130–33.

248. *Id.* at 168–69.

several pieces of evidence contained hairs that were similar to samples of hair from both Williams and Pamela Powers.<sup>249</sup> On the various pieces of evidence found at the rest stop on Interstate 80 the tests revealed that there were both negroid head and pubic hairs, which were all microscopically similar to the sample hairs provided by Williams.<sup>250</sup> Some of the evidence also contained head hairs similar to those of Pamela.<sup>251</sup> Also found attached to the evidence were “negroid body hairs,” which were not similar to Williams’s; a few white hairs, the race of which could not be determined; and two pubic hairs, the race of which could not be determined.<sup>252</sup> Agent Clark then went on to discuss his findings on the evidence gathered from the search of Williams’s car. The rear floor mat contained a few hairs that matched Pamela Powers; it also contained a “negroid head hair” which was not like Williams’s and a few caucasian pubic hairs that did not match any samples.<sup>253</sup> The rear seat cover and the left front floor mat only contained hairs that could be matched with the defendant and victim.<sup>254</sup> The final hairs, which were examined by Agent Clark, had been taken from the body of Pamela Powers. He said that of the two hairs that were found, one head and one pubic, both were similar to those of Williams.<sup>255</sup>

On cross-examination, Agent Clark was pushed to admit that even though some of the hairs were similar to Williams’s it was only a probability that they had actually come from him.<sup>256</sup> When questioned about the bedspread which had been taken from Williams’s room at the Y.M.C.A., he testified that he found two “negroid pubic hairs,” which were not comparable to Williams’s.<sup>257</sup> The next information elicited in cross-examination was an indication of the relative ease by which hairs fall off the human body and are transferred from one article to another. Agent Clark then admitted that if all of the items found at the rest stop on Interstate 80 were mingled together in one bag, hairs “very well could be” be transferred from one item to another.<sup>258</sup> Agent Clark also admitted that this was true for all of the items found in Williams’s car.<sup>259</sup> A final defense line of cross-examination concerned the unidentified hairs that were found. Agent Clark told the court there were ten hairs that remained unidentified.<sup>260</sup> When asked he stated that he had not examined any of the

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249. *Id.* at 177–84.

250. *Id.* at 177–83.

251. Trial Transcript, *supra* note 9, at 177–82.

252. *Id.*

253. *Id.* at 181–82.

254. *Id.* at 181–83.

255. *Id.* at 184.

256. Trial Transcript, *supra* note 9, at 186.

257. *Id.* at 188.

258. *Id.* at 190–92.

259. *Id.* at 192.

260. *Id.* at 193.

unidentified hairs to determine if they had come from a common source.<sup>261</sup> In a brief redirect examination, Robert Blink elicited a response that it was not unusual to have hairs from a crime scene that remained unidentified.<sup>262</sup>

The primary defense strategy during the trial was to deny any greater role in the crime than the admission of Williams's disposal of the body of Pamela Powers. The defense claimed that someone, who was not named at trial, had killed Pamela Powers and placed her body in Williams's room in the Y.M.C.A. The defense argued that upon discovery of the body Williams panicked, carried the body out of the Y.M.C.A., disposed of it by the road side, finally realized the gravity of his actions two days later and gave himself up. In presenting its view of the case, the defense called four witnesses.

To support the defense's theory, it used part of the prosecution's theory of how the crime happened to its advantage. This was because the prosecution claimed that Pamela had been murdered while she was being sexually molested. To prove this the prosecution had tests conducted to determine if spermatozoa could be found on Pamela's body or on her clothing. These tests revealed that while acid phosphatases, a component of semen, were found in the body and the clothes, there were no traces of spermatozoa found. The defense used this information to put forward the theory that whoever had attacked Pamela was sterile, which removed Williams from suspicion since he was not sterile.

The key to the defense's case then became its claim that a sterile man committed the crime. To win the case the defense view that freezing preserved, rather than destroyed sperm cells, would have to be accepted by the jury. One problem that the defense faced at the beginning of its case was Dr. Luka's testimony that the freezing temperatures the body was subject to would have destroyed any sperm which had been present in the body. This testimony contradicted the prosecution's own position at the suppression hearing when it argued in favor of applying the inevitable discovery exception. At that time the prosecution argued that the condition of the body was unaffected by the weather because it was preserved due to the freezing temperatures. The defense also believed that Dr. Luka had changed his earlier testimony that freezing would not affect the composition of spermatozoa once he found out that Williams was not sterile. As a result, at the start of its own case in an attempt to impeach the testimony of Dr. Luka the defense called Officer Don Knox of the Des Moines Police Department.

The testimony of Officer Knox was heard without the jury being present in order to give Judge Denato a chance to rule on its admissibility without the possibility of tainting the jury's deliberating process. Officer Knox testified that in either December 1968 or January 1969, Dr. Luka informed him of the

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261. Trial Transcript, *supra* note 9, at 193-94.

262. *Id.* at 194.

autopsy results which were negative for sperm.<sup>263</sup> When asked, Knox told the court that the sterility theory of crime had been his and not Dr. Luka's.<sup>264</sup> He then examined two defense exhibits which were police memos indicating that the police were trying to determine if Williams ever had a vasectomy.<sup>265</sup> In reply to a question, he then admitted that the police probably would not have followed up on their sterility theory if Dr. Luka had told them that freezing destroyed signs of sperm.<sup>266</sup>

The prosecution objected to Officer Knox's testimony on the grounds of relevancy and Officer Knox's lack of qualification as an expert witness in the field of male reproductive systems or cell decomposition.<sup>267</sup> The defense replied that they were not suggesting that Officer Knox was an expert in the field, but that he could shed light on the veracity of Dr. Luka's testimony that freezing destroyed sperm.<sup>268</sup> Judge Denato ruled that Officer Knox's testimony could not be put before the jury.<sup>269</sup> He said that the defense had interpreted Dr. Luka's testimony too narrowly because Luka had stated that freezing was only one possibility to explain the absence of spermatozoa.<sup>270</sup> Furthermore, Officer Knox demonstrated that the sterility theory had not originated with Dr. Luka.<sup>271</sup>

With the jury seated, the defense called its first witness Dr. Earl Rose, a pathologist, as an expert witness. Dr. Rose had testified at the suppression hearing that freezing under the conditions in which the body was found would not have an effect on any sperm that may have been present.<sup>272</sup> Dr. Rose testified that based on temperatures when the body was being sought, the cold would have stopped any decomposition of sperm cells.<sup>273</sup> He explained that the time in between the abduction and the discarding of the body would not have been enough to destroy any sperm cells which may have been present.<sup>274</sup> Dr. Rose also testified that it would not be uncommon considering the conditions under which Pamela Powers had died for the body to empty the contents of its bladder.<sup>275</sup> Dr. Rose next testified that in 1968 it was possible to do a blood test on semen stains, thus allowing you to know the blood type of

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263. *Id.* at 197.

264. *Id.* at 196–98.

265. *Id.* at 198–200.

266. Trial Transcript, *supra* note 9, at 200–02.

267. *Id.* at 203.

268. *Id.*

269. *Id.* at 205.

270. *Id.* at 204–05.

271. Trial Transcript, *supra* note 9, at 204–05.

272. *Id.* at 218.

273. *Id.* at 218–19.

274. *Id.*

275. *Id.* at 214.

the individual from whom the semen came.<sup>276</sup> The last piece of information elicited from Dr. Rose was an admission that he had previously testified in this case as a witness for the State and that his current testimony was unchanged from his original.<sup>277</sup> Upon cross-examination Dr. Rose informed the court that he had no personal knowledge of the autopsy of Pamela Powers.<sup>278</sup>

The defense's second witness was Dr. Dennis Boatman, a urologist who specialized in the male reproductive system. Dr. Boatman was asked about Defense Exhibit H, a report on a semen analysis done on Williams.<sup>279</sup> He explained that it showed that Williams was not sterile and was within the normal range of sperm production with a sperm count of 26 million per cc.<sup>280</sup> Dr. Boatman was then asked to comment on various explanations that might allow an individual who was sterile at one time to later have a normal sperm count.<sup>281</sup> He answered that one would be if they had a vasectomy reversed, but an examination of Williams revealed that this procedure had not been performed.<sup>282</sup> He explained that seminal fluid only contained two percent sperm.<sup>283</sup> That was true, he told the court, whether it was a man's first ejaculation in one day or his tenth.<sup>284</sup> Regardless of the number of ejaculations, one would expect to find two percent sperm in the seminal fluid, although there would be less seminal fluid with each new ejaculation. You would, however, expect to find the sperm count still in the millions he added.<sup>285</sup>

The defense next called Clarence Yeager, who had been a Davenport police officer in 1968. He informed the court that he was responsible for keeping Williams's car under observation after it was discovered in Davenport.<sup>286</sup> He testified that the car stayed outside in the cold until 5:30 p.m. on December 25, 1968, when the car was seized and the warrant served.<sup>287</sup> It was at that time that the necktie and sock were found in the car.<sup>288</sup> When Clarence Yeager was done testifying the defense requested that a climatological chart for Davenport showing the high temperature on December 25, 1968 as fifteen degrees Fahrenheit and a low of three degrees be stipulated

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276. Trial Transcript, *supra* note 9, at 215.

277. *Id.* at 220.

278. *Id.* at 222.

279. *Id.* at 233.

280. *Id.* at 233–34.

281. Trial Transcript, *supra* note 9, at 235.

282. *Id.* at 236.

283. *Id.* at 238–39.

284. *Id.* at 239.

285. *Id.* at 237.

286. Trial Transcript, *supra* note 9, at 243–44.

287. *Id.* at 247.

288. *Id.* at 246.

to and offered as evidence.<sup>289</sup> The request was granted. The defense then moved to offer its other exhibits into evidence. These included a number of things from Williams's room including a bedspread, a pillowcase, and a set of sheets.<sup>290</sup> There was no objection from the prosecution.<sup>291</sup> The defense then received a stipulation that if Jack Sullivan, the chief security officer for Northwestern Bell Telephone of Des Moines, was called he would testify that phone records indicated that on December 24, 1968, a Reverend Robert Anthony at the Des Moines Y.M.C.A. received a call from Mount Pleasant, Iowa at 12:28 p.m. and that the call lasted until 12:40 p.m.<sup>292</sup>

The final defense witness was Dr. Garry Peterson, a forensic pathologist. Dr. Peterson stated that in his position in the Medical Examiner's Office of Hennepin County, Minnesota, he reviewed approximately 1,500 sexual assault cases a year and that he normally testified for law enforcement in such cases.<sup>293</sup> He also told the court that he had experience with detecting sperm in the bodies of women that had been frozen. He testified that after normal intercourse sperm was detectable for between twelve to twenty-four hours.<sup>294</sup> If a person died after intercourse, the sperm would be detectable for a longer period of time.<sup>295</sup> The reason was that the secretions of the female reproductive system would cease and the body temperature would lower stopping enzymes from causing decomposition of the sperm.<sup>296</sup> He added, the freezing of a body at the time of or shortly after death would preserve any sperm indefinitely until the body was thawed. Dr. Peterson was then asked if a girl died under the same conditions as Pamela Powers and her body was frozen within the same time span as hers, whether he believed any sperm present would have been preserved. He answered that he believed it would.<sup>297</sup> After being questioned, Dr. Peterson told the court that he had reviewed Dr. Luka's autopsy report and that he believed that because the hymen was intact even though the lips of the vulva area had been spread and the lack of any internal or external trauma to the vaginal area, showed that there had been no attempt to insert a penis into the vagina.<sup>298</sup>

The prosecution called one rebuttal witness to try to strengthen its argument that freezing would destroy rather than preserve any sperm cells which may have been present on Pamela Powers's body. The witness was Dr.

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289. *Id.* at 248–49.

290. *Id.* at 249.

291. Trial Transcript, *supra* note 9, at 248–49.

292. *Id.* at 250.

293. *Id.* at 260–61.

294. *Id.* at 262–63.

295. *Id.* at 264.

296. Trial Transcript, *supra* note 9, at 264.

297. *Id.* at 264–66.

298. *Id.* at 266–68.

David Culp, a urologist. Dr. Culp was a specialist in the reproductive system and had done research involving freezing sperm cells for later insemination. In the most technical testimony of the trial Dr. Culp tried to explain the difference between slow freezing, such as would have happened to Pamela Powers's body, and quick freezing, which takes place at much colder temperatures, and their effects on sperm. He told the court that slow freezing tends to kill live sperm cells and may cause them to be destroyed.<sup>299</sup> He also testified that certain diseases such as chicken pox, mononucleosis, and herpes could cause a man to be temporarily sterile for a period of time. Drug usage could also have the same effect. He pointed out that continual ejaculations could deplete a man of enough sperm to make them almost undetectable.<sup>300</sup> Dr. Culp could not provide an answer when asked if one would expect to find signs of sperm under the conditions in which Pamela Powers met her death and her body was then discovered.<sup>301</sup> Instead, he said there were too many unknown variables to be able to give a definitive answer.<sup>302</sup> Upon cross-examination Dr. Culp admitted that he had never performed an autopsy in a sexual assault case and that he had never had the opportunity to observe sperm that was found inside a dead woman's body.<sup>303</sup>

In the closing arguments both sides presented a dramatic appeal as they conveyed their theories of the crime. Robert Blink, the prosecutor, placed all blame for the murder of Pamela Powers on Robert Williams.<sup>304</sup> After explaining the law of first degree murder to the jury, he next told them that it was their duty to determine the facts of the case.<sup>305</sup> He then walked them through what he considered to be the facts of the case. He reviewed the testimony of the witnesses and the exhibits which were introduced Williams's flight, dumping of evidence and surrender.<sup>306</sup>

Blink then summarized the case against Williams. After telling the jury that Williams had killed Pamela Powers during an attempted rape, Blink continued:

The problem then becomes to get rid of the evidence. Now, why, why, if Mr. Williams did not in fact kill her, did he go to such an extensive means to as much as possible ensure that he would not be connected with the crime? He went to those extensive means because he knew that he had to get rid of the evidence. It pointed at him. And rightfully so, for it is absolutely consistent with the acts of a man who committed murder and it is no way inconsistent

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299. *Id.* at 275–84.

300. *Id.* at 284–86.

301. Trial Transcript, *supra* note 9, 287–89.

302. *Id.* at 288–89.

303. *Id.* at 301–02.

304. *Id.* 330–31.

305. *Id.* at 330–35.

306. Trial Transcript, *supra* note 9, at 335–43.

with the acts of a man who did not commit murder. Now, we don't have an eye witness, Pamela Powers is dead. But I think Pamela Powers speaks to us in a certain respect. She tells us about what happened. She tells us through the clothing, through the bloodstained towel, the post-mortem examination. And I submit to you that the muffled cries of Pamela Powers in Room 724 of the YMCA in Des Moines, Iowa on Christmas Eve of 1968, which were but a whimper and whisper at that time are reverberating in these halls. And they speak to you, and they speak to all of us. And they say that "I was killed, my life was taken into the adult world, something I didn't even understand—I couldn't comprehend, only to leave it in a violent fashion." Who took out the body? He did. Who dumped the body? He did. Who disposed of the clothing? He did. Who ran away? He did. Who killed the girl? He did.<sup>307</sup>

In its closing argument the defense again admitted that Williams had disposed of the body of Pamela Powers, but denied any involvement in the murder. Gerald Crawford told the jury that in order to find Mr. Williams guilty of first degree murder the jury had to answer "yes" to one of two questions.<sup>308</sup> The first question was whether "Anthony Williams wilfully killed Pamela Powers, with malice aforethought, with deliberation, with premeditation and with the specific intent to kill."<sup>309</sup> He believed that after hearing all the evidence the State had failed to demonstrate this. Therefore, a guilty verdict was dependant on a second question. That being whether Anthony Williams killed Pamela Powers in attempting or perpetrating a sexual assault. Gerald Crawford then told the jury, "The evidence is clear. Pamela Powers, at the time of her death or shortly thereafter, was sexually assaulted by a sterile male."<sup>310</sup> He added that the killing and molestation happened before Pamela's body was ever removed from the Y.M.C.A.<sup>311</sup> He noted that all of the facts of the prosecution's case were consistent with this conclusion.<sup>312</sup>

Crawford raised questions about whether Williams had enough time to commit the murder. He told the jury:

The evidence also shows that from 12:28 until 12:40 Mr. Williams was on the telephone and you have that evidence before you. They have seen him leaving at 1 o'clock. He was on the telephone until 12:40 and ask yourself, in 20 minutes does a man go from the 7th floor of the YMCA downstairs, spot a little girl and abduct her, go back upstairs with her to Room 724, suffocate her and sexually assault her three times, put a bundle together around her, put

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307. *Id.* at 345–46.

308. *Id.* at 348.

309. *Id.*

310. *Id.* at 349.

311. Trial Transcript, *supra* note 9, at 349.

312. *Id.* at 374.



some clothes on top of the bundle and carry the bundle downstairs to the main floor and out the lobby in 20 minutes?<sup>313</sup>

Crawford then attacked the prosecution's case calling everything beyond what the defense itself stipulated as a fact to be circumstantial.<sup>314</sup> He went on to explain the weaknesses in the prosecution's case. He first pointed out the difficulties in believing the prosecution's position that the freezing of the body would have destroyed any signs of sperm cells that may have been present in the seminal fluid taken off the body. In doing so, he noted out that Williams's car was also subject to freezing temperatures before it was seized and searched. He went on to say that the socks and necktie which were found in the car were not tested by the FBI for signs of sperm until almost an additional month had gone by.<sup>315</sup> He found it curious that despite the freezing temperatures and delay in time, those sperm cells had not been destroyed.<sup>316</sup> He also found it odd, in light of the testimony that no urine stain had been found on Williams's sheets if the crime had taken place in his room as the prosecution contended.<sup>317</sup> He told the jury to consider if a struggle had taken place in Williams's room, why was there not at least a partial fingerprint of Pamela Powers's to be found.<sup>318</sup> All indications were that she had been attacked somewhere else and placed in Williams's room after she was dead.<sup>319</sup> He next attacked the prosecution's hair evidence reminding the jury that all of the items found at the rest stop had been placed in a common bag and that some of Williams's hairs may have easily been transferred from his articles to hers.<sup>320</sup> He said what he found informative was that a total of twelve hairs were of unknown origin including two pubic hairs that were found on the little girl's slacks. He also expressed disappointment that the prosecution had not thought to compare these unidentified hairs to see if they could have come from the same person.<sup>321</sup>

Gerald Crawford explained that he believed that the crime was committed by a sterile man and that they had presented adequate evidence to show that Williams was not sterile.<sup>322</sup> The jurors were told they would have to sort through the testimony given by all of the doctors as to the effects that freezing would have upon the decomposition of sperm cells. To help them with this process, he went over the inconsistencies in Dr. Luka's testimony reading from

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313. *Id.* at 356.

314. *Id.* at 356–63.

315. *Id.* at 358.

316. Trial Transcript, *supra* note 9, at 358.

317. *Id.* at 359.

318. *Id.* at 360.

319. *Id.*

320. *Id.*

321. Trial Transcript, *supra* note 9, at 361–62.

322. *Id.* at 362–63.

the depositions in which he had gone on record to say that freezing would preserve sperm cells and comparing that to his comments at trial that it would destroy them.<sup>323</sup> He told the jurors to use their own common sense as to what effect freezing has in the preservation of something.<sup>324</sup> He reminded the jurors that the State's other witness on the matter, Dr. Culp, worked with living sperm in the area of artificial insemination and had never examined a dead female for traces of sperm.<sup>325</sup> Next, he drew the jurors's attention to Dr. Rose who had testified that freezing would preserve any sperm present. He pointed out that Dr. Rose had entered the case as a witness for the prosecution, but was uncalled by the State when it was realized that Williams was not sterile and his testimony was no longer helpful.<sup>326</sup> He also reminded the jurors that Dr. Rose had told the court that you could distinguish a person's blood type from a sample of seminal fluid. He stated that if such a test had been done it could have conclusively shown that the seminal fluid had not come from Williams, but the State had failed to conduct such a test.<sup>327</sup> Finally, he reminded the jurors that Dr. Peterson, who was a specialist in sexual assaults, also testified that freezing would preserve, not destroy, any sperm which had been present.<sup>328</sup> Due to all of the problems which existed in the State's case, Gerald Crawford suggested that there was enough doubt for Williams to be found not guilty.<sup>329</sup>

Roger Owens then took over the defense's closing argument. He explained to the jurors that other than the defense's own admission that Williams had disposed of the body, the prosecution's case was based upon circumstantial evidence.<sup>330</sup> He said that in a circumstantial case such as this, all of the evidence must be consistent in order for the jury to convict. It was not consistent in this case because Williams was not sterile.<sup>331</sup> He told the jurors that they had taken an oath to uphold the law. Then he threw a law book twenty feet across the courtroom.<sup>332</sup> He then said that the book was worthless when the laws were not upheld.<sup>333</sup> He ended the closing arguments stating "And by God, now, everyone at this table wants you to uphold that law. Not just [defense counsel] Mr. Crawford, Mr. Wellman and Mr. Williams, but

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323. *Id.* at 365–67.

324. *Id.* at 367–68.

325. *Id.* at 368.

326. Trial Transcript, *supra* note 9, at 369.

327. *Id.* at 371.

328. *Id.* at 373.

329. *Id.* at 373–75.

330. *Id.* at 378–86.

331. Trial Transcript, *supra* note 9, at 378–80.

332. Paul Leavitt, *Final Arguments Heard in Retrial of Williams*, DES MOINES REG., July 13, 1977, at 16A.

333. Trial Transcript, *supra* note 9, at 388.

[prosecutors] Mr. Blink and Mr. Ryan also, and so do I . . . I think you will find Mr. Williams not guilty.”<sup>334</sup>

The prosecution was then given the last word in the trial. Robert Blink said the defense theory that Williams could not have committed the crime since he was not sterile was much ado about nothing. He said that all of the expert witnesses were dealing in theories and that their conclusions were influenced by a wide variety of variables.<sup>335</sup> The variable that could not be explained away was that the semen on the body and the pants found at the rest stop on Interstate 80 were similar.<sup>336</sup> For dramatic effect Blink then wrote the word “body” on the courtroom chalk board followed by the word “pants.” He then emphasized the point by holding up a pair of pants with the name “Anthony” on them and saying what was on the girl was on these pants.<sup>337</sup> Blink told the jury that the link between the pants and the semen could not be denied and that this perhaps more than any other piece of evidence haunted Williams.<sup>338</sup>

He warned the jury about falling into the situation which the defense desired. That being, speculating about what may have happened rather than concentrating on what the evidence actually showed. Blink explained, “I think they want you to speculate. I think they want you to guess. I think they want you to imagine.”<sup>339</sup> An example, he believed, was the defenses attempt to make a big deal out of the lack of a urine stain on the sheets from Williams’s room. Blink told the jurors that rather than speculating on why, they should remember that Pamela had originally shown up missing when she left to go to the wash room which provides its own explanation.<sup>340</sup> Robert Blink ended his summation by asking for the jury to bring in a verdict of guilty and added, “It is your common sense that must lead to your conclusions.”<sup>341</sup>

After receiving its instructions, the jury retired for its deliberations at 9:17 a.m. on July 13, 1977.<sup>342</sup> Jury deliberations went much slower than in the first trial where the jury both ate lunch and convicted Williams in only 100 minutes.<sup>343</sup> Deliberations continued for seven hours until the jury quit for the

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334. *Id.* at 389–90.

335. *Id.* at 391.

336. Leavitt, *supra* note 332.

337. *Id.*

338. Trial Transcript, *supra* note 9, at 394–95.

339. *Id.* at 398.

340. *Id.* at 400.

341. *Id.* at 401.

342. Paul Leavitt, *Williams Jury Deliberates; No Verdict Yet*, DES MOINES REG., July 14, 1977, at 3A.

343. Van, *supra* note 117.

day.<sup>344</sup> On July 14, 1977, the second day of jury deliberations, the jury requested the testimony of two witnesses, Dr. Luka and Dr. Peterson, to be read back to them.<sup>345</sup> The attorneys were informed of the request. In a meeting in Judge Denato's chambers, Robert Blink objected to allowing the testimony to be read. He argued that it unduly emphasized particular evidence and might possibly cause the jury to ignore the body of other evidence in the case which would not be in the best interest of the State.<sup>346</sup> The defense counsel indicated that they had discussed the request with Williams and that they had no objections.<sup>347</sup> Judge Denato decided to allow the request.<sup>348</sup>

It is interesting that the indication from the jury deliberations was that the verdict in the case may have hinged upon whether freezing temperatures would have impacted the condition of the evidence. This is ironic, because in the suppression hearing involving the inevitable discovery of the body, both parties to the case had made arguments in favor of the opposite conclusions they sought at trial. At that hearing, the State which sought admission of the body and related evidence argued that even if it would have been found at a later point in time it would have been in the same condition due to the freezing temperatures.<sup>349</sup> The defense, on the other hand, had argued that the body would not have been in the same condition if discovered later, and therefore, should not be allowed as evidence. The argument which the State had made at the suppression hearing, but which it repudiated at trial, had been central to Judge Denato's ruling that the body would have been inevitably discovered in the same condition.

On July 15, 1977, at 10:02 a.m. the jury, after deliberating for thirteen and one-half hours, returned a verdict of guilty of first degree murder against Robert Williams.<sup>350</sup> The jurors had taken six or seven ballots by late in the afternoon of July 14 and believed at that point that they were close to an agreement and considered coming back at 7:00 p.m. to try to reach a decision. Instead, they decided to take the night off in order to think over their positions. When they returned on the morning of July 15 they were able to reach a consensus.<sup>351</sup> The jurors who spoke said that there was no animosity between the jurors over the verdict and one said that they were "glad it's over" since

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344. See Leavitt, *supra* note 342; Paul Leavitt, *Williams Found Guilty in Retrial; Plans Appeal*, DES MOINES REG., July 16, 1977, at 1A [hereinafter *Williams Found Guilty*].

345. Trial Transcript, *supra* note 9, at 402-03.

346. *Id.* at 403.

347. *Id.* at 403-04.

348. *Id.* at 404.

349. See *supra* text accompanying 157-99.

350. *Williams Found Guilty*, *supra* note 344, at 6A. See also Trial Transcript, *supra* note 9, at 404.

351. *Williams Found Guilty*, *supra* note 344, at 6A.

they “just want to forget about it.”<sup>352</sup> The jurors did not explain what facts were most influential in reaching their verdict.

### C. *The Second Appeals Process*

After his conviction Williams first pursued an appeal before the Iowa Supreme Court. In *State v. Williams*,<sup>353</sup> Williams’s attorneys argued that there were a variety of reasons why the conviction should be overturned, but the one with the most traction was that there was no inevitable discovery exception to the exclusionary rule. The court unanimously ruled that the inevitable discovery exception was a constitutionally sound exception to the exclusionary rule. It explained that under the exception:

After the defendant has shown unlawful conduct on the part of the police, the State has the burden to show by a preponderance of the evidence that (1) the police did not act in bad faith for the purpose of hastening discovery of the evidence in question, and (2) that the evidence in question would have been discovered by lawful means.<sup>354</sup>

After accepting the inevitable discovery exception, the court applied its rule to the particular facts of the case and found that the conditions imposed on the State to have been met.<sup>355</sup> In its reasoning to support inevitable discovery the court relied on the prosecution’s arguments from the suppression hearing that, due to the freezing temperatures, the body would have remained preserved, despite the fact that the State had argued the opposite at trial.

Williams next pursued habeas relief in *Williams v. Nix*.<sup>356</sup> The habeas corpus proceeding was presided over by Judge Viotor. Judge Viotor reviewed the evidence by studying the record and held an evidentiary hearing on August 2, 1981, where most of the arguments and evidence presented were repetitious of those made before the Iowa Supreme Court. There were, however, several new pieces of evidence which were considered by Judge Viotor.<sup>357</sup> Despite the

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352. *Id.*

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

354. *Id.* at 260.

355. *Id.* at 262.

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

357. The evidence included newly discovered photos of Pamela’s body with more snow covering it than had been available at trial, photos which demonstrated that the culvert where the body was hidden was not discernible from the road, Iowa Bureau of Criminal Investigation reports that showed that there had been no discussion of extending the search party into Polk County, a deposition from Thomas Ruxlow that he knew the purpose of the suppression hearing when he testified and that the picture he identified of Pamela at it was taken only after snow had been brushed off the body, and a deposition from Richard Boucher, who had been a resident of the Y.M.C.A. on the day of the crime. Boucher testified that at about the same time as the crime, he had heard suspicious and belligerent noises coming from the room next to his and identified the voice as Albert Bowers, a Y.M.C.A. custodian. He then saw Bowers taking suitcases into his

new evidence and all the arguments made in the briefs and at oral argument, Judge Viotor's resolution of the issues closely followed the same line of argument as that of the Iowa Supreme Court. As a result, he ruled that there were no errors made by the trial court.<sup>358</sup>

On appeal to the Eighth Circuit, Williams was more successful.<sup>359</sup> The Eighth Circuit decided that it was not necessary to determine whether the inevitable discovery exception to the exclusionary rule could withstand constitutional scrutiny. Instead, it assumed *arguendo* that the exception did exist and that the Iowa Supreme Court had correctly established the rules for its application.<sup>360</sup> Based upon all the available information, the Eighth Circuit then ruled that the police had not acted in good faith when they violated Williams's right to counsel so the inevitable discovery exception as formulated by the Iowa Supreme Court could not be applied to Williams's case.<sup>361</sup> As a result, Pamela Powers's body and all the evidence gained at the scene should not have been admitted at trial.

Iowa sought review in the Supreme Court. According to the Court it:

granted certiorari to consider whether, at respondent Williams's second murder trial in state court, evidence pertaining to the discovery and condition of the victim's body was properly admitted on the ground that it would ultimately or inevitably have been discovered even if no violation of any constitutional or statutory provision had taken place.<sup>362</sup>

Iowa's brief drew distinctions between the different types of factual scenarios in which the inevitable discovery exception could be applied.<sup>363</sup> The first of these scenarios was referred to as "independent inevitable discovery."<sup>364</sup> Iowa argued the *Williams* case represented an example of "independent inevitable discovery." In this scenario, which Iowa argued as the strongest case for use of the inevitable discovery exception, law enforcement officials are aggressively pursuing lawful means of discovering the evidence while simultaneously finding it through illegal conduct. In effect, both

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room and heard him packing. At the time Boucher informed the police about his concerns he and a police officer then went to Bowers's room and asked him not to leave. He replied that he was not going anywhere. Shortly afterwards, however, Bowers left the building. Boucher also said that he then found a towel in Bowers's room which looked like it had bloodstains. Brief of the Respondent, *supra* note 207, at 42 n.33.

358. *Nix*, 528 F. Supp. at 675.

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

360. *Id.* at 1169.

361. *Id.* at 1166.

362. *Nix v. Williams*, 467 U.S. 431, 434 (1984).

363. For an extended discussion of Iowa's position by its primary author, see Brent R. Appel, *The Inevitable Discovery Exception to the Exclusionary Rule*, 21 CRIM. L. BULL. 101 (1985).

364. Brief of the Petitioner at 11, *Nix v. Williams*, 467 U.S. 431 (1984) (No. 82-1651) [hereinafter Brief of the Petitioner].

methods would have been successful so the police should not be penalized for the illegal method when the legal method would have accomplished the same thing at a later point in time.<sup>365</sup> In these cases, the inevitable discovery exception really represented a variation of the well-accepted independent source rule.<sup>366</sup>

Iowa argued that while application of the inevitable discovery exception had been controversial in the courts of appeals, it was due to it being applied in different factual situations. Iowa referred to one of these situations as “hypothetical independent source.”<sup>367</sup> In cases of this type, courts must engage in far reaching speculation as to whether the questioned evidence would have been found through alternative legal methods. This was because at the time the evidence was discovered no alternative legal method of discovering the evidence was being pursued. As a result, a court would be forced to guess as to how law enforcement officials would have behaved if the evidence was not found illegally. Often, as in cases involving standard operating procedures, such as checking a driver’s license, the guess would not be too speculative, but other situations would result in much more speculation.<sup>368</sup>

An even more controversial application of the inevitable discovery exception resulted in cases labeled “dependent inevitable discovery.”<sup>369</sup> In such cases, there is no actual or hypothetical lawful means of discovery being pursued at the time of the legal violation. In these cases, application of the inevitable discovery exception is an effort to salvage unlawful conduct as an afterthought. An example provided in the brief was allowing evidence gathered through a warrantless search because the government had the probable cause necessary to obtain a warrant, but it never attempted to do so.<sup>370</sup> Iowa warned that if the exclusionary rule was ignored in such cases, the need to get warrants prior to searches would be virtually erased and the State did not support application of the inevitable discovery exception under these circumstances.<sup>371</sup>

Because the facts of this particular case provided an example of “independent inevitable discovery,” Iowa argued that the Court should overrule the Eighth Circuit. Iowa also argued that the exception should not include a good faith requirement.<sup>372</sup> Even if the Court were to accept the inevitable discovery exception with a good faith requirement, Iowa believed that Detective Leaming’s actions did not violate this principle. Iowa stated that

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365. *Id.* at 11.

366. *Id.* at 13.

367. *Id.*

368. *Id.* at 14.

369. Brief of the Petitioner, *supra* note 364, at 15.

370. *Id.*

371. *Id.* at 16.

372. *Id.* at 17.

the record supported its position that Detective Leaming had not acted in bad faith in trying to elicit information from Williams.<sup>373</sup>

In an amicus brief filed by the United States, the Solicitor General's office presented a different view of the appropriate parameters of the inevitable discovery exception. The United States argued that the inevitable discovery exception should be adopted by the Court as a logical extension of both the independent source and attenuation exceptions to the exclusionary rule.<sup>374</sup> Despite its stated desire to limit judicial speculation regarding whether evidence would be admissible, the U.S. position would allow considerably more latitude for evidence to be admitted under the exception than Iowa's. The reason was that Iowa argued only for admission of evidence when the factual record could demonstrate that police already had in place a line of lawful investigation that would have led to discovery of the questioned evidence. The U.S. position, on the other hand, would allow admission of evidence under that circumstance, and when predictable investigative practices would have led to discovery even when the police had not initiated it at the time of the violation.<sup>375</sup> This position would also allow admission when a private individual provided the information necessary to lead police to the evidence.<sup>376</sup> The United States also argued that just as there was no linkage between good faith and admission of evidence in the independent source or attenuation exceptions there should not be one in the inevitable discovery exception.<sup>377</sup>

As a result of the briefs submitted by Iowa and the United States, the Supreme Court had been made aware that there were a variety of approaches to inevitable discovery which, if desired, it could endorse. The majority opinion in *Nix v. Williams* was written by Chief Justice Warren Burger and joined by Justices Byron White, Harry Blackmun, Lewis Powell, William Rehnquist, and Sandra Day O'Connor. It started with a review of the facts of the case and its history.<sup>378</sup> Before examining the constitutional soundness of the inevitable discovery exception, Chief Justice Burger noted that "the 'vast majority' of all courts, both state and federal" recognized the exception.<sup>379</sup> Chief Justice Burger then discussed the heart of the case, the role of the exclusionary rule in the American legal system.<sup>380</sup> The Court's review of the history of the exclusionary rule found that its only function was to deter future police

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373. *Id.* at 23–32.

374. Brief for the U.S. as Amicus Curiae Supporting Reversal at 11–14, *Nix v. Williams*, 467 U.S. 431 (1984) (No. 82-1651) [hereinafter Brief for the U.S. as Amicus Curiae].

375. *Id.* at 15.

376. *Id.*

377. *Id.* at 19.

378. *Nix v. Williams*, 467 U.S. 431, 434–40 (1984).

379. *Id.* at 440.

380. *Id.* at 440–48.



violations of constitutionally protected rights. While this interpretation of the reasons behind the exclusionary rule demonstrates a selective reading of its entire history, it was consistent with how the Burger Court had interpreted the rule. Thus, in its reading of *Silverthorne Lumber Co. v. United States*<sup>381</sup> the lesson to be learned was not that derivative evidence would also be excluded from trial when its discovery was the result of illegal behavior. Instead, the point which the Court emphasized from *Silverthorne* was that such information did not become “sacred and inaccessible” due to the independent source exception.<sup>382</sup> *Wong Sun v. United States*<sup>383</sup> provided a similar lesson about the attenuation exception which explained that illegally seized evidence did not have to be suppressed if it “has [also] been come at by . . . means sufficiently distinguishable to be purged of the primary taint.”<sup>384</sup>

The central point in the majority opinion’s reading of the history of the exclusionary rule was that our judicial system has accepted the exclusionary rule due to its deterrent effect despite its high social cost of, at times, letting the guilty go free.<sup>385</sup> Despite these costs, exclusion is necessary because the “prosecution is not to be put in a better position than it would have been in if no illegality had transpired.”<sup>386</sup> An examination of the way that derivative evidence had been treated by the Court revealed, however, “that the prosecution is not put in a *worse* position simply because of some earlier police error or misconduct.”<sup>387</sup> As a result, even though there was a difference between the independent source and inevitable discovery exceptions to the exclusionary rule the Court believed there was “a functional similarity between these two doctrines in that exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place.”<sup>388</sup> After an examination of the history of the exclusionary rule, the Court found the inevitable discovery exception to be compatible with the Constitution.<sup>389</sup>

Having accepted the inevitable discovery exception to the exclusionary rule into our body of law, the Court set some standards for its application. In doing so, the Court stated that tainted evidence would be admissible if the prosecution could prove by a preponderance of the evidence that the

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

382. *Nix*, 467 U.S. at 441 (citing *Silverthorne Lumber Co.*, 251 U.S. at 392).

383. *Wong Sun v. United States*, 371 U.S. 471 (1963).

384. *Nix*, 467 U.S. at 442 (citing *Wong Sun*, 371 U.S. at 487).

385. *Id.* at 443.

386. *Id.*

387. *Id.* (emphasis in original).

388. *Id.* at 444.

389. *Nix*, 467 U.S. at 444.

information would have been found inevitably by lawful means.<sup>390</sup> When such a situation exists, “then the deterrence rationale has so little basis that the evidence should be received.”<sup>391</sup> The Court also held that in meeting its burden the prosecution did not have to show that the police acted in good faith.<sup>392</sup> This was because such a showing would place courts in the position of withholding truthful evidence from juries which would place the “police in a worse position than they would have been if no unlawful conduct had transpired.”<sup>393</sup> This, the Court believed, would have placed too high of a societal cost on our system of justice and its search for truth. Furthermore, the Court believed that a showing of good faith on the part of police would not affect future deterrence because “when an officer is aware that the evidence will inevitably be discovered, he will try to avoid engaging in any questionable practice” to ensure the evidence’s admissibility.<sup>394</sup>

Overall, the Court believed that integrity and fairness required that evidence which would inevitably have been discovered should be admitted at trial even in the case of Sixth Amendment right to counsel violations. The Court noted that the purpose of the right to counsel was to promote fairness through the adversary process by allowing cross-examination to test the reliability of evidence.<sup>395</sup> Furthermore, the presence of counsel during the trip from Davenport to Des Moines would have had no “bearing on the reliability of the body as evidence.”<sup>396</sup> Fairness is assured only when the State and accused stand in the same position that they would be in had there been no illegalities, and “when, as here, the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible.”<sup>397</sup>

In *Nix*, the Court was persuaded that the discovery of the body of Pamela Powers and related physical evidence was inevitable. This was largely due to the testimony at the suppression hearing of Agent Ruxlow of the Iowa Bureau of Criminal Investigation who organized a search party of around 200 volunteers and testified that had Williams not led the police to the body the search would have been resumed and discovered the body in an additional three to five hours. The Court therefore believed that it was clear that the body and additional evidence would have inevitably been discovered by lawful means and overturned the Eighth Circuit.<sup>398</sup>

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390. *Id.*

391. *Id.*

392. *Id.* at 445.

393. *Id.*

394. *Nix*, 467 U.S. at 445–46.

395. *Id.* at 446.

396. *Id.* at 446–47.

397. *Id.* at 447–48.

398. *Id.* at 449–50.

Justice William Brennan wrote a short dissenting opinion in which he was joined by Justice Thurgood Marshall. Justice Brennan noted that he agreed that due to the similarities between the independent source and inevitable discovery exceptions that he thought the inevitable discovery exception was supported by the Constitution.<sup>399</sup> He believed, however, that in its efforts to weaken the exclusionary rule the Court had lost sight of one crucial difference between the two exceptions. That difference being evidence found through the inevitable discovery exception was only hypothetically found through alternative legal methods. Due to this difference he believed that the Court should raise the burden of proof in inevitable discovery cases from a preponderance of the evidence to clear and convincing evidence.<sup>400</sup>

#### IV. A LEGAL SAFETY NET

While the Court embraced the inevitable discovery exception in *Nix* and made it clear that the burden of proof was a preponderance of the evidence and that there was no good faith requirement, it failed to explain what form of the exception it was adopting. Failure to do so may seem surprising given the broad discussion of this issue in the briefs put forward by Iowa and the United States.<sup>401</sup> The Court gave no real indication as to whether it believed that only instances of what Iowa had called in its brief “independent inevitable discovery” should be allowed or whether it would accept a broader application such as the United States had urged in its brief. The unwillingness of the Court to clearly explain what form of inevitable discovery it was adopting left the lower courts in a position in which they reserved for themselves the right to fill in the details. This is illustrated by the Eleventh Circuit which wrote that *Nix* was “silent as to what constitutes ‘inevitable’ discovery under the doctrine.”<sup>402</sup> The inability of the Court to clarify exactly what the inevitable discovery exception would entail has created problems for its uniform application throughout the federal system.

Within a year of the decision, *Nix v. Williams* had received mixed reviews from legal commentators.<sup>403</sup> In the twenty-five years since the *Nix* decision

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399. *Nix*, 467 U.S. at 459 (Brennan, J., dissenting).

400. *Id.*

401. See *supra* notes 224–237.

402. *United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984). See also *United States v. Cherry*, 759 F.2d 1196, 1204 (5th Cir. 1985).

403. In the wake of *Nix* there were a number of observations made by legal commentators. Some expressed support for the inevitable discovery exception, but believed that it would cause erosion in the deterrent effect of the exclusionary rule. See Appel, *supra* note 363, at 101; James Andrew Fishkin, Comment, *Nix v. Williams: An Analysis of the Preponderance Standard for the Inevitable Discovery Exception*, 70 IOWA L. REV. 1369 (1985). Others believed that it placed the courts in the position of facilitating violations of the law. See Leslie-Ann Marshall & Shelby Webb, Jr., Case Note, *Constitutional Law—The Burger Court’s Warm Embrace of an*

there has been a series of complaints made regarding the inevitable discovery exception. These complaints have ranged from its utilization to avoid the warrant requirement of the Fourth Amendment,<sup>404</sup> its discouragement of improvements in law enforcement training,<sup>405</sup> its invitation for future abuse of constitutional rights,<sup>406</sup> its use in treating both primary and derivative evidence the same,<sup>407</sup> and its creation of a “chaotic state of affairs” resulting in different application of the exception in different circuits.<sup>408</sup> More recently, commentators have focused on whether there is a need for an active pursuit of an alternative legal method of discovery<sup>409</sup> and whether the exception applies to evidence which was illegally gathered from a third party.<sup>410</sup> While examining a variety of different problems which involve the inevitable discovery exception, many articles use a similar formula. First, they identify a problem in the application of the exception. Next, they present a well-reasoned solution to the problem. Finally, they end with a call to action on the part of the Supreme Court to clarify the inevitable discovery exception’s application.<sup>411</sup>

Despite these well-intentioned and sincere pleas for the Court to provide clarity in this area of law, the Court is silent. What is missing from most of these analyses despite a clear pattern of behavior is a sense of reality concerning the Court’s view of the exclusionary rule and its social costs. Simply put, the Court dislikes the rule because of what it sees as its high social costs. These costs include interfering in the truth finding function of trials, creating disrespect for the law, and, most importantly, possibly causing the release of individuals who have committed crimes.<sup>412</sup> The Court’s dislike of the exclusionary rule is not a new revelation and has been a consistency in a

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*Impermissibly Designed Interference with the Sixth Amendment Right to the Assistance of Counsel—The Adoption of the Inevitable Discovery Exception to the Exclusionary Rule: Nix v. Williams*, 28 HOW. L.J. 945 (1985).

404. Robert M. Bloom, *Inevitable Discovery: An Exception Beyond the Fruits*, 20 AM. J. CRIM. L. 79, 81 (1992).

405. John E. Fennelly, *Refinement of the Inevitable Discovery Exception: The Need for a Good Faith Requirement*, 17 WM. MITCHELL L. REV. 1085, 1190 (1991).

406. Steven P. Grossman, *The Doctrine of Inevitable Discovery: A Plea for Reasonable Limitations*, 92 DICK. L. REV. 313, 314 (1988).

407. Forbes, *supra* note 4, at 1221.

408. Lamberth, *supra* note 4, at 137–38.

409. Eugene L. Shapiro, *Active Pursuit, Inevitable Discovery, and the Federal Circuits: The Search for Manageable Limitations Upon an Expansive Doctrine*, 39 GONZ. L. REV. 295, 296 (2006); Hessler, *supra* note 4, at 244.

410. Julie M. Giddings, Note, *The Interaction of the Standing and Inevitable Discovery Doctrines of the Exclusionary Rule: Use of Evidence Illegally Obtained from the Defendant and a Third Party*, 91 IOWA L. REV. 1063 (2006).

411. See generally, e.g., Hessler, *supra* note 4.

412. *United States v. Leon*, 468 U.S. 897, 907–08 (1984).

string of cases beginning with *Calandra v. United States* and continuing today.<sup>413</sup> Throughout the *Calandra* era, scholars have noted the Court's discomfort with the exclusionary rule.<sup>414</sup>

In trying to determine why the Court has not provided clarity as to the proper application of the inevitable discovery exception, it may be time to stop being so logical and be realists. When it comes to explaining the Court's unwillingness to reexamine the parameters of the inevitable discovery doctrine, most of the legal scholarship has missed the mark by trying to influence the Court to act through persuasive legal arguments. The reality is that this is an area where the Court is predisposed not to provide clarity. What was true twenty-five years ago when *Nix* was decided remains true today. The majority of the Court had a dislike of the exclusionary rule in 1984 and still does today. As a result, the Court continues to take moves to avoid applying it.<sup>415</sup> The 1984 Term which gave rise to the inevitable discovery and the good faith exceptions to the exclusionary rule cannot be seen as an isolated event

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413. The Court in *United States v. Calandra*, 414 U.S. 338 (1974), re-examined the exclusionary rule and found that rather than having a constitutional basis rooted in the Fourth or other amendments, it was a judicially created remedy for the sole purpose of deterring the government from violating the Constitution. In all of the following cases the Court ruled that under the circumstances involved the use of the exclusionary rule was inappropriate. For example, in *Michigan v. Tucker*, 417 U.S. 433 (1974), the Court held that even though the defendant's statements were inadmissible due to violations of the rights against self-incrimination and to counsel, evidence which was discovered as a result of the statements was admissible. In *Illinois v. Krull*, 480 U.S. 340 (1987), the Court stated that when a search was conducted pursuant to a statute which was later found unconstitutional, any evidence gained through the search was admissible. In *United States v. Janis*, 428 U.S. 433 (1976), the Court held that evidence which was illegally obtained by state police was admissible in a federal civil tax proceeding because the police had acted in good faith when they obtained the evidence. Also, in 1976, the Court ruled in *Stone v. Powell*, 428 U.S. 465 (1976), that in habeas corpus proceedings, Fourth Amendment claims, including claims that the exclusionary rule was not properly applied, would no longer be reviewed. In 1980, the Court ruled in *United States v. Havens*, 446 U.S. 620 (1980), that illegally gained evidence which is inadmissible in the prosecution's case-in-chief can be used to impeach the defendant at a criminal trial. In all of the above cases the Court found that the application of the exclusionary rule would contribute too little in the way of an added future deterrent in relation to its cost of freeing the guilty.

414. Robert M. Bloom, *The Supreme Court and its Purported Preference for Search Warrants*, 50 TENN. L. REV. 231, 239-40 (1983); Craig M. Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquist Begun?*, 62 IND. L.J. 273, 285 (1989); John D. Castiglione, Hudson and Samson: *The Roberts Court Confronts Privacy, Dignity, and the Fourth Amendment*, 68 LA. L. REV. 63, 105-06 (2007); Sharon L. Davies & Anna B. Scanlon, *Katz in the Age of Hudson v. Michigan: Some Thoughts on "Suppression as a Last Resort"*, 41 U.C. DAVIS L. REV. 1035, 1042-55 (2008); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 259 (1984).

415. A recent example is *Hudson v. Michigan*, 547 U.S. 586 (2006), where the Court ruled that the exclusionary rule did not apply to violations of the knock and announce rule when police have a valid warrant.

regarding the Court's attitude toward the exclusionary rule.<sup>416</sup> Instead, it must be examined as one year in a long term assault on the exclusionary rule. In a series of cases running from *Calandra* through *Hudson v. Michigan*, the Court has made it clear that it dislikes the exclusionary rule and will seize opportunities to limit its use.

It is helpful to remember that *Nix v. Williams* was preceded by *Brewer v. Williams*. Every member of the Court was bothered by the result in *Brewer* and feared that the decision of the Court had the potential to cause the release of Robert Anthony Williams, who the Court was convinced had committed a heinous crime. It did not matter if the justice was in the majority or the dissent, they all believed the facts to clearly be against Williams and that the evidence pointed to his guilt. Justice Stewart called Williams's crime "senseless and brutal," but thought that the constitutional violation was too blatant to ignore.<sup>417</sup> Justice Marshall, despite seeing a clear violation of the law, called Williams a "dangerous criminal."<sup>418</sup> Justice Stevens also made note of Williams's probable guilt.<sup>419</sup> Chief Justice Burger's statement that "Williams is guilty of the savage murder of a small child; no member of the Court contends he is not . . ." was unchallenged by the other members of the Court.<sup>420</sup> Justice White added that Williams was "[a] mentally disturbed killer whose guilt was not in question."<sup>421</sup> Finally, Justice Blackmun added that, "The evidence of Williams's guilt is overwhelming."<sup>422</sup> This frustration over what the majority saw as a clear violation of Williams's Sixth Amendment right to counsel and the prospect that he may eventually be released helps to explain why Justice Stewart's opinion suggested that Iowa proceed with the case against Robert Williams and make use of the inevitable discovery exception.<sup>423</sup> Despite Chief Justice Burger discounting the likelihood of a successful retrial of Williams calling inevitable discovery an "unlikely theory,"<sup>424</sup> Judge Denato noted the encouragement Justice Stewart had given the State to proceed in its second trial when he ruled that the body of Pamela Powers and the tests run on it could be used as evidence.<sup>425</sup> When given the opportunity to weaken the exclusionary rule through adoption of what he had

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416. *United States v. Leon*, 468 U.S. 897 (1984) (providing constitutional support for the good faith exception to the exclusionary rule).

417. *Brewer v. Williams*, 430 U.S. 387, 406 (1977).

418. *Id.* at 408 (Marshall, J., concurring).

419. *Id.* at 415 (Stevens, J., concurring).

420. *Id.* at 416 (Burger, C.J., dissenting).

421. *Id.* at 437 (White, J., dissenting).

422. *Brewer*, 430 U.S. at 441 (Blackmun, J., dissenting).

423. *Id.* at 406 n.2.

424. *Id.* at 416 n.1 (Burger, C.J., dissenting).

425. Joint Appendix, *supra* note 156, at 83–84.

called the unlikely theory of the inevitable discovery exception, Chief Justice Burger jumped at the chance.

When *Nix* came to the Court, Justice Stewart had been replaced by Justice O'Connor, but all the other justices were there when *Brewer* was decided. For these justices the only real questions they were prepared to answer were if the inevitable discovery exception could be supported by the Constitution and if the body of Pamela Powers would have been found by legal methods. No other questions had to be answered because the real attractiveness of the inevitable discovery exception to members of the Court since its inception in *Nix* has been its flexibility to fit a wide variety of changing scenarios. This flexibility creates a legal safety net by which evidence that was gathered through a legal violation can still be used at trial thus avoiding the social costs which the Court continues to believe are too high. This legal safety net allows people who commit crimes to more successfully be prosecuted. That, after all, was the real purpose behind the Burger Court's exclusionary rule cases. Chief Justice Burger's opinion in *Nix* put it about as bluntly as he could when he stated: "The purpose of the inevitable discovery rule is to block setting aside convictions that would have been obtained without misconduct."<sup>426</sup>

The desire for a flexible safety net is illustrated by the Court ignoring the issue as to whether hypothetically discovered evidence needed to be in the same condition as when it was actually found. At no place in its ruling in *Nix* did the Court make mention of a need for the body to have been inevitably found in the same condition as it was actually found. Following the lead of Judge Denato that the freezing temperatures would have preserved the body and other evidence, every court which had ruled in favor of allowing the disputed evidence had ruled that it would have been found in essentially the same condition. The Court was repeatedly made aware of this fact in the record and Chief Justice Burger mentioned in his majority opinion that the trial court, the Iowa Supreme Court, and the district court on habeas, had all ruled that the body would have been legally found in essentially the same condition had the constitutional violation not occurred.<sup>427</sup>

The problem with an honest reliance on this finding was that Iowa had argued just the opposite at trial. To be fair, it is true that the defense also changed its position regarding the impact that freezing temperatures had on the preservation of evidence at trial. The change in positions did not play an important role in the appellate process, but the Court was made aware of it. The Respondent's Brief made mention of both positions the State took regarding freezing temperatures and destruction of evidence when it discussed the failure of defense attorneys to call Richard Boucher as a witness at trial. Richard Boucher had claimed that he heard Albert Bowers's voice and

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426. *Nix v. Williams*, 467 U.S. 431, 443 n.4 (1984).

427. *Id.* at 438-39.

suspicious noises coming from Bowers's room in the Y.M.C.A. at the time of the crime and later found a bloody towel in the room after Bowers had fled. The Respondent's Brief noted:

Incredibly, the Boucher testimony was not offered at trial. . . . Bowers' apparent nonsterility does not affect the relevance of the Boucher testimony. Of course, if the jury concluded that the perpetrator was sterile, the Boucher testimony would have been of relatively little value—but then the respondent could not have been found guilty. On the other hand, if the jury accepted the prosecution's position at trial that the absence of sperm in the semen found on the body was explainable by the annihilation of the sperm by the effects of freezing temperatures—even though the position was inconsistent with its position at the motion to suppress (App. 58–74)—the Boucher testimony would have been powerfully supportive of the respondent's defense.<sup>428</sup>

The Court's unwillingness to address whether the inevitable discovery exception requires evidence to be in the same condition at the point of its hypothetical finding versus when it was actually illegally found demonstrates that the Court either misunderstood the complexities of the case or ignored them for the purpose of creating a more flexible safety net which could be used to gain convictions rather than having to apply the exclusionary rule. Because this decision fits a larger pattern of behavior it is more likely that the Court's intent was to create a flexible safety net that could allow more evidence to be used at trial.

Another example of the Court's eagerness to adopt the inevitable discovery exception and create a legal safety net is that the Court failed to explain whether there must be an active alternative method in place that would have lawfully led to discovery of evidence at the time of the illegality. Every court that ruled on the issue in the *Williams* case had found that there was an active lawful method of finding the body, the search party. A close examination of the record reveals, however, that the search party had completed its planned search of Powesheik and Jasper Counties by 3:00 p.m. and had stopped at the Jasper-Polk County line. At that time, the search was suspended. The body was not located in Polk County until 5:30 p.m. It is true that Agent Ruxlow testified at the suppression hearing that he would have reassembled the search party and continued the search into the Polk County if necessary,<sup>429</sup> but it is also true that he knew the reason behind his testimony was to help convince Judge Denato that the body would have been found through legal methods.<sup>430</sup> Perhaps the knowledge that at the time that *Williams* actually led the police to the body there was no active lawful alternative in place caused the Court to couch its finding in terms which did not necessarily require an active

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428. Brief of the Respondent, *supra* note 207, at 42 n.33.

429. Suppression Hearing, *supra* note 66, at 41.

430. Brief of the Respondent, *supra* note 207, at 27 n.14.



alternative to be in place in that time of the constitutional violation. As Chief Justice Burger put it, “we are satisfied . . . that the volunteer search teams *would have* resumed the search had Williams not earlier led the police to the body and the body inevitably would have been found.”<sup>431</sup> By not specifically stating whether it was a necessity for an alternative method to be active at the time of the constitutional infraction, the Court created flexibility in the application of the inevitable discovery exception which would make it easier in future cases to allow use of the exception to gain convictions.

If the legal safety net created by the inevitable discovery exception helps to ensure that the guilty will be removed from the streets and punished, the Court seems little bothered by the government’s violations of the law. Its decision not to require a good faith element in the inevitable discovery exception tells trial courts not to examine the facts behind the constitutional infraction. In the Court’s view, the violation of the Constitution is not what is important. The important thing it is limiting the costs placed on society by the exclusionary rule and boosting the government’s ability to gain a conviction. The same thing can be said by the Court’s silence as to whether the exception applies to primary or derivative evidence. To the Court it does not matter whether the evidence is primary or derivative, it is the ability to use the illegally gained evidence that matters. In regards to the inevitable discovery exception to the exclusionary rule, it is time for legal scholars to look beyond the need for consistency in legal doctrine and give attention to the consistency of result. An examination which focuses on result, rather than reasoning helps to explain why, despite a number of opportunities, the Court has repeatedly decided not to clarify the exception.<sup>432</sup> The Court has preferred to leave the inevitable

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431. *Nix*, 467 U.S. at 449–50 (emphasis added).

432. The Court has denied certiorari in the following types of cases which would have allowed it to review when it is appropriate to apply the inevitable discovery exception: (1) the admission of primary evidence versus derivative evidence (*see, e.g.*, *United States v. Arango*, 879 F.2d 1501 (7th Cir. 1989), *cert. denied*, 493 U.S. 1069 (1990)); *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985); *United States v. Apker*, 705 F.2d 293 (8th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984); (2) the need for an ongoing investigation (*see, e.g.*, *United States v. Larsen*, 127 F.3d 984 (10th Cir. 1997), *cert. denied*, 522 U.S. 1140 (1998); *United States v. Ramirez-Sandoval*, 872 F.2d 1392 (9th Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988)); (3) warrant requirements (*see, e.g.*, *United States v. Merriweather*, 777 F.2d 503 (9th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986)); and (4) the appropriateness of using routine police procedures to facilitate inevitable discovery (*see, e.g.*, *United States v. Toledo*, 139 F.3d 913, (10th Cir. 1998), *cert. denied*, 524 U.S. 932 (1998); *United States v. Gravens*, 129 F.3d 974 (7th Cir. 1997), *cert. denied*, 523 U.S. 1035 (1998)). Only once since *Nix* has the inevitable discovery exception been properly before the Court. The Court was directly asked by the petitioner in *Hudson v. Michigan*, 547 U.S. 586 (2006), “Does the inevitable discovery doctrine create a per se exception to the exclusionary rule for evidence seized and a Fourth Amendment ‘knock and announce’ violation?” Brief for the Petitioner at i, *Hudson v. Michigan*, 547 U.S. 586

discovery exception flexible so that it can continue to serve as a legal safety net to ensure that people who seem factually guilty are convicted. We should expect no changes in this approach until such time that we see changes in the personnel on the Court who believe that the government's adherence to the law is as important as the adherence of its citizens to the laws.

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(2006) (No. 04-1360). Rather than using the inevitable discovery exception to resolve the issue, the Court created a new exception to the exclusionary rule.