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Sixth Amendment--Inevitable Discovery: A Valuable but Easily Abused Exception to the Exclusionary Rule

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SIXTH AMENDMENT—INEVITABLE DISCOVERY: A VALUABLE BUT EASILY ABUSED EXCEPTION TO THE EXCLUSIONARY RULE

Nix v. Williams, 104 S. Ct. 2501 (1984).

I. INTRODUCTION

In *Brewer v. Williams* [*Williams I*],[1] the United States Supreme Court set aside the murder conviction of Robert Anthony Williams and concluded that the defendant's statements that had led the police to the body of Williams' victim had been obtained from Williams in violation of his sixth and fourteenth amendment rights to counsel. In an oft-cited footnote, however, the Court remarked that evidence of the location of the body and its condition "might well be admissible [on retrial] on the theory that the body would have been discovered in any event, even had [Williams'] incriminating statements not been elicited."[2] Dismissed by the dissent in *Williams I* as a "remarkable statement" and as an "unlikely theory" for reprosecution, this footnote served as the catalyst for the Court's recent recognition of an important exception to the exclusionary rule.[3]

On retrial, the Court in *Nix v. Williams* [*Williams II*][4] held that evidence pertaining to the discovery and condition of the victim's body properly could be admitted under the "inevitable discovery" rule. Inevitable discovery means that courts need not suppress evidence tainted by an illegality where the prosecution establishes that the evidence would have been discovered anyway by lawful means.[5] The exception purports to block the setting aside of convictions that

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1 430 U.S. 387 (1977) [hereinafter cited as *Williams I*].

2 *Id.* at 407 n.12. Justice Stewart, author of the *Williams I* opinion, added that "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." *Id.*

3 *Id.* at 416-17 n.1 (Burger, C.J., dissenting). The Chief Justice ironically labeled the theory "unlikely" in *Williams I*; in *Williams II*, Burger recognized inevitable discovery as a constitutional principle. *See* Nix v. Williams, 104 S. Ct. 2501 (1984).

4 104 S. Ct. 2501 (1984) [hereinafter cited as *Williams II*].

5 LaCount & Girese, *The "Inevitable Discovery" Rule, An Evolving Exception to the Constitutional Exclusionary Rule*, 40 ALB. L. REV. 483 (1976).

otherwise would have been obtained without police misconduct.[6] In *Williams II*, the Court permitted the prosecution to remove the taint of the unlawful discovery of the body by establishing that the body eventually would have been found through legal investigative procedures.[7]

The doctrine of inevitable discovery significantly diminishes the force of the exclusionary rule, which prohibits the use in court of evidence procured by law enforcement officers in violation of the constitutionally protected rights of the accused.[8] The Court's recognition of inevitable discovery in *Williams II* reflects the steady erosion of the exclusionary rule under the gavel of the Burger Court.[9] Although the inevitable discovery exception to the exclusionary rule can be a valuable and logical addition to the criminal justice system, the integrity of the adversary process demands that it be applied with caution and discretion. The casual treatment that the Court afforded to inevitable discovery in *Williams II* raises important questions about the doctrine's practical application and forewarns of a time when the exception will swallow the rule.

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6 *Williams II*, 104 S. Ct. at 2511.

7 *Id.* at 2512.

8 The Supreme Court first invoked the exclusionary rule in Weeks v. United States, 232 U.S. 383 (1914). In *Weeks*, the Court excluded from trial evidence seized in violation of the defendant's fourth amendment rights. In Mapp v. Ohio, 367 U.S. 643 (1961), the Court used the fourteenth amendment to apply the exclusionary rule prohibiting unlawful searches and seizures to the States.

In Escobedo v. Illinois, 378 U.S. 478 (1964), and in United States v. Wade, 388 U.S. 218 (1967), the Court applied the exclusionary rule to evidence obtained in violation of the sixth amendment right to counsel. In Miranda v. Arizona, 384 U.S. 436 (1966), the Court invoked the rule and excluded a confession that the police had obtained in violation of the accused's fifth amendment right against self-incrimination. *See* T. ABBOTT, J. CRATSLEY, S. ENGELBERG, D. GROVE, P. MANAHAN & B. SAYPOL, LAW AND TACTICS IN EXCLUSIONARY HEARINGS (1969); S. SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE I (1977) (discussions of how courts have applied the exclusionary rule to prohibit the introduction of illegally obtained evidence).

9 The Supreme Court has recently reduced the strength of the exclusionary rule in the fourth and fifth amendment contexts as well. In United States v. Leon, 104 S. Ct. 3405 (1984), the Court held that the fourth amendment exclusionary rule does not bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant ultimately found to be invalid. Similarly, in Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984), the Court held that the fourth amendment exclusionary rule does not require exclusion of evidence seized by police officers pursuant to a warrant subsequently invalidated because of a technical error on the part of the issuing judge.

In New York v. Quarles, 104 S. Ct. 2626 (1984), the Court created a public safety exception to the fifth amendment exclusionary rule holding that police officers need not administer *Miranda* warnings prior to asking suspects questions that are "reasonably prompted by a concern for public safety." *Id.* at 2632.

II. ORIGINS AND DEVELOPMENT OF THE INEVITABLE DISCOVERY RULE

The purpose of the exclusionary rule is "to deter unlawful police practices by depriving law enforcement officials of any benefit derived from such practices."[10] One commentator has observed that "[t]he presence of the rule induces a degree of caution and care in preparing the case that might otherwise be lacking."[11] Although the exclusionary rule may be effective in curbing police misconduct, application of the exclusion doctrine too often results in the suppression of highly incriminating physical evidence from the trier of fact.[12]

This conflict of social interests places any court that faces a motion for exclusion of evidence on the "horns of a dilemma" and forces the court to choose between the lesser of two evils: admitting the controversial evidence and condoning police misconduct, or excluding the evidence and permitting a guilty person to go unpunished.[13] If courts approach this dilemma from a cost-benefit analysis, they properly will apply the exclusionary rule only to the point where the benefits that accrue to society from deterrence of unlawful police conduct exceed the costs that are borne by society from the release of criminals.[14] When the social utility derived from deterrence of police misconduct is considered by society to be outweighed by the potential danger of freeing a criminal, courts have enacted, and have applied, exceptions to the rule and have admitted the tainted evidence.[15]

The exclusionary rule had its genesis in *Silverthorne Lumber Co. v. United States*.[16] In *Silverthorne,* the Supreme Court held that in addition to excluding the illegally obtained primary evidence, a court

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[10] Note, *Fruit of the Poisonous Tree—A Plea for Relevant Criteria*, 115 U. PA. L. REV. 1136, 1136 (1967) [hereinafter cited as Note, *Fruit of the Poisonous Tree*]. *See* Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 388-89 (1964); Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 307 (1964), *cited in* LaCount & Girese, *supra* note 5, at 484; Note, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules*, 74 COLUM. L. REV. 88 (1974) [hereinafter cited as Note, *The Inevitable Discovery*].

[11] Pitler, *"Fruit of the Poisonous Tree," Revisited and Shepardized*, 56 CALIF. L. REV. 579, 586 (1968) (quoting Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 Sup. Ct. Rev. 1, 39).

[12] *See, e.g.*, Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 A.B.F. REF. J. 611-90.

[13] Note, *Fruit of the Poisonous Tree, supra* note 10, at 1137.

[14] Amsterdam, *supra* note 10, at 390. Professor Amsterdam calls this "the point of diminishing returns of the deterrence principle." *Id.*

[15] *See id.*

[16] 251 U.S. 385 (1920).

also must suppress any evidence derived from the primary evidence.[17] Although the Court stated that "knowledge gained by the Government's own wrong cannot be used by it,"[18] it limited its holding and declared, "[o]f course this does not mean that facts thus obtained become *sacred and inaccessible.* If knowledge of them is gained from an *independent source* they may be proved like any others . . . ."[19]

Twenty years later, in *Nardone v. United States*,[20] Justice Frankfurter reaffirmed the "independent source" doctrine of *Silverthorne*, coined the phrase "fruit of the poisonous tree," and established the doctrine of attenuation.[21] "Attenuation" permits the prosecution to prove that the connection between the initial illegality and the derived evidence has become "so attenuated as to dissipate the taint."[22]

In *Wong Sun v. United States*,[23] the Court combined and restated the independent source and attenuation tests and articulated the following standard:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality the evidence to which instant objection is made has been come at by the exploitation of that illegality *or instead by means sufficiently distinguishable to be purged of the primary taint.*"[24]

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17 *Id.* at 392.

18 *Id.*

19 *Id.* (emphasis added).

20 308 U.S. 338 (1939).

21 *Id.* at 341. In *Nardone*, a wiretapping case, the court considered whether the defendant could ask the prosecution about the use to which it had put illegally obtained evidence. Justice Frankfurter explained that once the accused had established that the wiretapping was unlawfully employed, he must be allowed the opportunity "to prove that a substantial portion of the case against him was a fruit of the poisonous tree." *Id.* The doctrine of "fruit of the poisonous tree" is a response to the realization that if police officers are permitted to use knowledge gained from illegally obtained evidence in the course of their investigations, an incentive to commit such unlawful practices exists. Note, *Fruit of the Poisonous Tree*, *supra* note 10, at 1138.

22 *Nardone*, 308 U.S. at 341.

23 371 U.S. 471 (1963).

24 *Id.* at 487-88 (quoting J. MAGUIRE, EVIDENCE OF GUILT: RESTRICTIONS UPON ITS DISCOVERY OR COMPULSORY DISCLOSURE 221 (1959)) (emphasis added). Although *Silverthorne*, *Nardone*, and *Wong Sun* involved violations of the fourth amendment, the Supreme Court has extended the "fruit of the poisonous tree" doctrine to situations other than those that involve illegal searches and seizures. The Court in Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52 (1964), applied the doctrine to violations of the fifth amendment, and in United States v. Wade, 388 U.S. 218 (1967), to sixth amendment violations.

In *Murphy*, the Court held that "a state witness may not be compelled to give testi-

The inevitable discovery doctrine extends the *Silverthorne* independent source rule and encompasses a hypothetical independent source.[25] Both exceptions rest on the absence of a sufficiently close connection between the state's wrongdoing and the discovery of the evidence in question.[26] To utilize the inevitable discovery rule, the prosecution must show that absent the police misconduct, the evidence in controversy would have been discovered by lawful means.[27] Before a court will invoke the rule, the prosecution must establish that the police would have used lawful and predictable investigative procedures and that those procedures would have resulted in the discovery of the disputed evidence.[28]

The conceptual and practical problems inherent in the rule have created diverse reactions from courts and commentators:

> On the one hand, it is said that it "is a valuable, logical and constitutional principle," the continued application of which will not "emasculate or blunt the force of the exclusionary rule." So the argument goes, the "inevitable discovery" test, "if properly administered, serves well the *raison d'etre* of the exclusionary rule by denying to the government the use of evidence 'come at by the exploitation of . . . illegality' and at the same time minimizes the opportunity for the defendant to receive an undeserved and socially undesirable bonanza." Others object that it is "based on conjecture" and "can only encourage police

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mony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." 378 U.S. at 79. In Kastigar v. United States, 406 U.S. 441, 460-61 (1972), the Supreme Court reaffirmed the application of the independent source doctrine in fifth amendment cases.

In *Wade*, the Court applied the exclusionary rule to the sixth amendment and excluded evidence of a witness' pretrial identification of an accused in a lineup because the accused had not received counsel. The Court simultaneously applied the rule to the states. *See* Gilbert v. California, 388 U.S. 263 (1967).

[25] The first clear application of inevitable discovery is found in Somer v. United States, 138 F.2d 790 (2d Cir. 1943). Federal agents made an illegal search of Somer's apartment and found a still in operation. *Id.* at 791. Mrs. Somer, when asked where her husband was, answered that he was out delivering the "stuff . . . [and] that he would be back shortly." *Id.* The agents then waited on the street and arrested Mr. Somer when he came home twenty minutes later. When the agents detected the odor of alcohol, they searched Mr. Somer's car and found illegal liquor. *Id.*

Although Judge Learned Hand found that the illicit liquor had been illegally obtained, he stated that the prosecution could remove this taint from the subsequent arrest if it could

> show that, quite independently of [the illegally procured information], the officers would have gone to the street, have waited for [the defendant] and have arrested him, exactly as they did. If they can satisfy the court of this, so that it appears that they did not need the information, the seizure may have been lawful.

Id. at 792.

[26] LaCount & Girese, *supra* note 5, at 491.

[27] *Id.*

[28] *Id.*

> shortcuts whenever evidence may be more readily obtained by illegal than by legal means," and thus "collides with the fundamental purpose of the exclusionary rule."[29]

Despite the controversy generated by inevitable discovery, the majority of courts now recognize the doctrine as an exception to the exclusionary rule.[30]

III. FACTS OF *WILLIAMS I* AND *WILLIAMS II*

On Christmas Eve, 1968, ten-year-old Pamela Powers disappeared from the YMCA in Des Moines, Iowa, where she and her family were watching an athletic contest.[31] Shortly after she disappeared, a fourteen-year-old boy saw Robert Williams, a resident of the YMCA, carrying a bundle in a blanket to his car.[32] The boy reported that he had seen "two legs in [the bundle] and they were skinny and white."[33]

On the morning of December 25, Williams' abandoned car was found 160 miles east of Des Moines in Davenport, Iowa.[34] Williams, an escapee from a mental institution and "a young man with quixotic religious convictions,"[35] was immediately suspected of abduc-

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29 3 W. LAFAVE, SEARCH AND SEIZURE § 11.4, at 623 (1978) (quoting LaCount & Girese, *supra* note 5, at 509, 511); *see* Maguire, *supra* note 10, at 317; Pitler, *supra* note 11, at 630; Note, *The Inevitable Discovery*, *supra* note 10, at 99; Comment, *Fruit of the Poisonous Tree: Recent Developments as Viewed Through its Exceptions*, 31 U. MIAMI L. REV. 615, 627 (1977).

30 *Williams II*, 104 S. Ct. at 2507. Every federal court of appeals has endorsed the exception. *See* United States v. Apker, 705 F.2d 293, 306-07 (8th Cir. 1983); United States v. Fisher, 700 F.2d 780, 784 (2d Cir. 1983); United States v. Romero, 692 F.2d 699, 704 (10th Cir. 1982); United States v. Roper, 681 F.2d 1354, 1358 (11th Cir. 1982); Papp v. Jago, 656 F.2d 221, 222 (6th Cir. 1981); United States v. Bienvenue, 632 F.2d 910, 914 (lst Cir. 1980); United States v. Brookins, 614 F.2d 1037, 1042, 1044 (5th Cir. 1980); United States v. Schmidt, 573 F.2d 1057, 1065-66 n.9 (9th Cir.), *cert. denied*, 439 U.S. 881 (1978); United States *ex rel.* Owens v. Twomey, 508 F.2d 858, 865-66 (7th Cir. 1974); Government of Virgin Islands v. Gereau, 502 F.2d 914, 927-28 (3d Cir. 1974); United States v. Seohnlein, 423 F.2d 1051, 1053 (4th Cir.), *cert. denied*, 399 U.S. 913 (1970); Wayne v. United States, 318 F.2d 205, 209 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963).

31 *Williams II*, 104 S. Ct. at 2504.

32 *Id.*

33 *Id.*

34 *Williams II*, 104 S. Ct. at 2504-05. Later that day, several items of clothing that belonged to the child, some of Williams' clothing, and an army blanket similar to the blanket that the witness at the YMCA had described were found at a rest stop on Interstate 80 between Des Moines and Davenport. Police believed that the girl's body was between Des Moines and Grinnell and organized a search party of two hundred volunteers to search the area 21 miles east of Grinnell, an area several miles to the north and south of the interstate. The teams moved westward and the searchers were instructed to check all roads, ditches, culverts, and any other place in which the body of a small child might be hidden.

35 *Williams I*, 430 U.S. at 412 (Powell, J., concurring).

tion and a warrant was issued for his arrest.[36] The next morning, Williams telephoned a Des Moines attorney and, on the lawyer's advice, surrendered to the police in Davenport.[37] He promptly was arraigned before a judge in Davenport on the charge of abduction.[38] Two Des Moines detectives arranged to drive to Davenport, pick up Williams, and to return him directly to Des Moines.[39] The detectives promised Williams' lawyer that they would not question the accused about his role in the girl's abduction during the trip.[40]

Detective Leaming, one of these detectives, however, began a conversation with Williams soon after they had departed Davenport.[41] Addressing him as "Reverend,"[42] the detective said:

> I want to give you something to think about while we're travelling down the road . . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly

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36 *Id.* at 390. Suspicion focused on Williams because he was seen leaving the YMCA carrying a blanket or bundle at the same time that the young girl had disappeared.

37 *Id.*

38 *Id.*

39 *Williams II*, 104 S. Ct. at 2505.

40 *Id.* Williams was advised of his Miranda rights by the judge who arraigned him and by a Davenport lawyer named Kelly. Kelly advised Williams not to make any statements until he consulted with McKnight, Williams' attorney in Des Moines. The two policemen met with Williams upon their arrival in Davenport. One of them, Detective Leaming, repeated the Miranda warnings, and told Williams: "[W]e both know that you're being represented here by Mr. Kelly and you're being represented by Mr. McKnight in Des Moines, and . . . I want you to remember this because *we'll be visiting* between here and Des Moines." *Williams I*, 430 U.S. at 391 (emphasis added). Kelly then reminded Leaming of his promise not to question Williams during the automobile journey to Des Moines. Leaming denied Kelly's request to accompany Williams on the trip. *Id.* at 391-92.

41 *Williams I*, 430 U.S. at 392. During the trip, Williams never expressed any desire to be interrogated in the absence of an attorney. Instead, he stated several times that "[w]hen I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." *Id.*

42 *Id.* Detective Leaming knew that Williams was deeply religious and that he was a former mental patient. It appeared that the detective used this knowledge to solicit incriminating statements from Williams during the journey.

not being able to find it at all.[43]

Leaming told Williams that he knew that the body was in the area of Mitchellville, a town that they would pass on the way to Des Moines.[44] Leaming then stated, "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road."[45]

Williams later directed the detectives to the places where he said that he had hidden the victim's shoes and the blanket that he had wrapped around her body; neither of the articles were found at those locations.[46] As Williams and the detectives approached Mitchellville, Williams voluntarily directed the police to the body of Pamela Powers.[47]

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[43] *Id.* at 392-93. For an excellent analysis of the psychological coercion behind the "Christian burial" speech, and for a discussion of a record "contradictory, bewildering and at times nothing less than flabbergasting," see Kamisar, *Foreword:* Brewer v. Williams—*A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209 (1977).

[44] This was pure conjecture; Detective Leaming did not possess this knowledge. *Williams I*, 430 U.S. at 393 n.1.

[45] *Id.* at 393.

[46] *Williams II*, 104 S. Ct. at 2505. These items already had been discovered by investigators.

[47] *Id.* Investigators suspended the search after Williams cooperated with the police and attempted to locate the shoes and the blanket. *Id.* At the time the search was called off, one search team was only two and one-half miles from the location of the body. *Id.* "The child's body was found next to a culvert in a ditch beside a gravel road in Polk County, about two miles south of Interstate 80, and *essentially within the area to be searched.*" *Id.* (emphasis added).

Whether one accepts the application of the inevitable discovery rule in *Williams II* depends largely on whether one accepts the notion that Pamela Powers' body *would have* been discovered by the searchers had the search continued. This question of inevitable discovery can be divided further into two subquestions: would the area where the body was found have been searched and, if so, would searchers have found the body? *See infra* notes 116-126 and accompanying text.

At the suppression hearing that preceded Williams' second trial, the prosecution offered the testimony of Agent Ruxlow of the Iowa Bureau of Criminal Investigation (BCI). *Williams II*, 104 S. Ct. at 2511. Ruxlow testified that he had marked off highway maps of Poweshiek and Jasper Counties in grid fashion, divided the volunteers into teams of four to six persons, and had assigned each team to a specific grid area. *Id.* at 2512 (citing Tr. of Hearings on Motion to Suppress, State v. Williams, No. CR 55805 at 34 (May 31, 1977)). Ruxlow also testified that if the search had not been suspended because of Williams' cooperation, the police *would have* continued the search into Polk County, where the body was found, and *would have* used the same grid system. *Id.* (citing Tr. of Hearings at 36, 39-40). Although he had previously marked off grids only on the maps of Poweshiek and Jasper Counties, Ruxlow said he would have marked off a map of Polk County in a similar manner had the search not been suspended. *Id.* (citing Tr. of Hearings at 39).

The Brief for Respondent, submitted before the United States Supreme Court in *Williams II*, stated that the record "flatly contradicts" this statement and called Ruxlow's testimony a *"post hoc* rationalization." Brief for Respondent at 18, Nix v. Williams, 104 S. Ct. 2501 (1984). The defendants argued that neither of the reports filed by the Iowa BCI agents had made any mention of Polk County and that the agents had made prepa-

An Iowa court tried and convicted Williams of deliberate, premeditated murder.[48] The Supreme Court of Iowa affirmed his conviction and admitted the evidence that had resulted from Williams' statements to the detectives on the ground that he had waived his right to counsel by volunteering the statements to Detective Leaming.[49] Williams then sought and received his release on habeas corpus from the United States District Court for the Southern District of Iowa on the ground that the evidence in question had been improperly admitted at trial.[50] A divided panel of the Court of Appeals for the Eighth Circuit affirmed the district court's ruling.[51] The United States Supreme Court granted certiorari.[52] In a 5-4 decision, the Court held that although statements that the police had obtained in violation of Williams' right to counsel were inadmissible, evidence of the body's location and condition might be admissible on the theory that the body would have been discovered by lawful means anyway.[53]

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rations to search only Jasper and Poweshiek Counties. *Id.* at 19. The "spot" that the BCI search had reached—two and one-half miles from the body—was the Jasper/Polk County border—"i.e., the end of the precise area that Ruxlow had planned and prepared to search." *Id.*

If Ruxlow had intended to continue the search into Polk County, the brief argues, it would not have made sense for him to abandon the search as he did and to follow Leaming *before* Williams indicated that he would point out the body, especially when two hours of daylight still remained. *Id.* at 32. Finally, the brief states that the Iowa Supreme Court had relied entirely on Agent Ruxlow's testimony and was unaware that the prosecution had told Ruxlow that the purpose of his testimony was to demonstrate that the body would have been discovered. *Id.* If that court had known of the prosecution's instructions to Ruxlow, perhaps it would have required more compelling evidence before concluding that the discovery of the body was inevitable.

Ruxlow testified that the searchers were instructed "to check all the roads, the ditches, any culverts . . . any abandoned farm buildings . . . or any other places where a small child could be secreted." *Williams II*, 104 S. Ct. at 2512 (citing Tr. of Hearings at 35). The Court was satisfied that the child's body, which lay near a culvert, would have been spotted according to these instructions. *Id.* at 2512.

The Brief for Respondent takes the position that even had the search extended into Polk County and had the searchers left their vehicles to search on foot, they would not have seen the body, which was completely hidden under a cover of brush and snow. Brief for Respondent at 32, *Williams II*. Moreover, evidence introduced in the district court by the respondent established "beyond question" that Ruxlow conceded that a highly material photograph, relied upon by the Iowa Supreme Court as showing the body as it was found, was taken after the snow and brush had been cleared from the body. *Id.* at 33. The difficulty that the police had in locating Pamela Powers' body even after Williams had led them to the area further supports the concluson that they would not have found the body. *Id.* at 32.

48 *Williams I*, 104 S. Ct. at 2505.

49 State v. Williams, 182 N.W.2d 396 (Iowa 1970).

50 Williams v. Brewer, 375 F. Supp. 170 (D. Iowa 1974).

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

52 423 U.S. 1031 (1975).

53 *Williams I*, 430 U.S. at 407, 408 n.12.

The United States Supreme Court remanded the case; at Williams' second trial in the Iowa court, the prosecution did not offer Williams' statements into evidence, although it did seek to admit evidence of the location of the body and its condition.[54] The court admitted this evidence and concluded that the State had proved that even if Williams had not led the police to the victim, her body still "would have been discovered 'within a short time' in essentially the same condition as it was actually found."[55]

In reaching this conclusion, the Iowa court relied heavily on the testimony of Agent Ruxlow of the Iowa Bureau of Criminal Investigation, which the prosecution had provided at the suppression hearing that preceded Williams' second trial.[56] The prosecution offered Ruxlow's testimony after informing him that the purpose of his testimony was to demonstrate that the body of Pamela Powers would have been found eventually through lawful investigative procedures.[57] Ruxlow testified that search teams would have inevitablv discovered the victim's body if the search had not been suspended in anticipation of Williams' cooperation.[58] Ruxlow stated that he had intended to mark off the map of Polk County, where the child's body lay, into a grid fashion, as he had done earlier with the maps of two other counties that were searched.[59] He had planned to search Polk County in accord with the grid plan until the body was found.[60]

Williams challenged the findings of the Iowa court and asserted that the record contained only the *"post hoc* rationalization" that the search efforts would have continued into Polk County.[61] He also protested that even if the search had proceeded into Polk County, searchers would not have seen the body, which lay well-hidden near a gravel road and beneath a cover of snow and brush in a ditch beside a culvert.[62]

On Williams' appeal, the Supreme Court of Iowa affirmed the decision of the lower Iowa court and held that the "hypothetical independent source" exception to the exclusionary rule allowed admission of the evidence:

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54 *See Williams II*, 104 S. Ct. at 2506.

55 *Id.*

56 *Id.* at 2511. *See supra* note 47 and accompanying text.

57 Brief for Respondent at 32, *Williams II*. *See supra* note 47 and accompanying text.

58 *Williams II*, 104 S. Ct. at 2512.

59 *Id.* (citing Tr. of Hearings on Motion to Suppress, State v. Williams, No. CR 55805 at 36, 39-40 (May 31, 1977)). *See supra* note 47 and accompanying text.

60 *Id.*

61 *Williams II*, 104 S. Ct. at 2511 (citing Brief for Respondent at 18). *See supra* note 47 and accompanying text.

62 Brief for Respondent at 32, *Williams II*. *See supra* note 47 and accompanying text.

> 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.[63]

The Iowa court then reviewed the evidence *de novo*[64] and again concluded that the State had shown by a preponderance of the evidence that even if Williams had not led police to the girl's body, it would have been found inevitably by the legal procedures of the search party before its condition had materially changed.[65]

In 1980, Williams again sought a writ of habeas corpus.[66] Although the district court denied his petition on the ground of "inevitable discovery,"[67] the Court of Appeals for the Eighth Circuit reversed and granted the petition.[68] The Court of Appeals held that assuming there is an "inevitable discovery" exception to the exclusionary rule, the state trial court had not met the first requirement of the exception: proving absence of bad faith by the police.[69] The government then petitioned for certiorari to the United States Supreme Court.[70]

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63 State v. Williams, 285 N.W.2d at 260. The state court adopted the position espoused by Professor LaFave because this position conforms to the mandates of the federal Constitution. *Id.* at 258; *see* 3 W. LAFAVE, *supra* note 29, at 620-28. In applying LaFave's two-part test to determine inevitable discovery, the court stressed that courts should use extreme caution and avoid adoption of the rule on the basis of hunch or speculation. *Id.* The court added that it was adopting the LaFave test "because it fits with the rationale of the two better established exceptions to the exclusionary rule [independent source and attenuation] and because it meets the two most substantial complaints which are generally made by opponents of the inevitable discovery doctrine." *Id.*

The Iowa Supreme Court applied the two-tier test to the facts of the *Williams* case and stated:

> The issue of the propriety of the police conduct in this case, as noted earlier in this opinion, has caused the closest possible division of views in every appellate court which has considered the question. In light of the legitimate disagreement among individuals well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith.

Id. at 260-61.

64 "Iowa law provides for *de novo* appellate review of factual as well as legal determinations in cases raising constitutional challenges." *Williams II*, 104 S. Ct. at 2506 n.1; *see, e.g.*, Armento v. Baughman, 290 N.W.2d 11, 15 (Iowa 1980); State v. Ege, 274 N.W.2d 350, 352 (Iowa 1979).

65 *Williams II*, 104 S. Ct. at 2506-07.

66 *Id.* at 2507.

67 Williams v. Nix, 528 F. Supp. 664 (D. Iowa 1981).

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

69 *Id.*

70 461 U.S. 214 (1983).

IV. OPINIONS

The United States Supreme Court granted the State's petition for certiorari and reversed and remanded the judgment of the Court of Appeals for the Eighth Circuit.[71] In a 7-2 decision, the Court held that the Iowa trial court had properly admitted evidence pertaining to the discovery and condition of the victim's body on the ground that it would have been discovered inevitably, even if the police had not obtained the evidence from a violation of Williams' sixth amendment rights.[72]

The Court admitted evidence of the "condition of [the child's] body as it was found, articles and photographs of her clothing, and the results of postmortem medical and chemical tests on the body,"[73] and evinced the rationale that it had developed in *Silverthorne* and in *Wong Sun*: "[W]hen, 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."[74] Because discovery was hypothetical and not actual in *Williams II*, the independent source exception did not justify admission of the evidence, yet the Court found the logic of the independent source doctrine "wholly consistent" with the inevitable discovery rule and justified its adoption as an exception to the exclusionary rule.[75]

The Court implied that an inevitable discovery exception balances the social costs born by society in letting criminals go unpunished against the benefits that accrue to society from deterring

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71 *Williams II*, 104 S. Ct. at 2512.

72 *Id.*

73 *Id.* at 2506.

74 *Id.* at 2511.

75 *Id.* at 2509. The Court explained:

> When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation. There is 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.

Id.

The Court further observed that the inevitable discovery exception is similar in purpose to the harmless constitutional error rule of Chapman v. California, 386 U.S. 18, 22 (1967). The harmless error rule "serve[s] a very useful purpose insofar as [it] block[s] setting aside convictions for *small errors* or defects that have little, if any, likelihood of having changed the result of the trial." *Williams II*, 104 S. Ct. at 2509 n.4 (quoting *Chapman*, 386 U.S. at 22) (emphasis added). The purpose of the inevitable discovery doctrine is similar: to block the setting aside of convictions that would have been obtained absent any police misconduct. *Id.* at 2509. In analogizing inevitable discovery to the harmless constitutional error rule, the Court apparently considered the constitutional violation of Williams' right to counsel to be a "small error."

unlawful police activity and the violations of constitutional rights that may accompany such activity.[76] The Court ruled that the interest of society in deterring police misconduct and the social interests in admitting all probative evidence of a crime are balanced properly when courts put the police in an equivalent, not in a worse, position than the one in which they would have been had no police error occurred.[77] Once the prosecution had demonstrated that the search teams would have discovered the body of Pamela Powers even without Williams' unconstitutionally solicited assistance, the application of the exclusionary rule would result only in the suppression of evidence that search teams eventually would have discovered lawfully.[78] The application of the doctrine of exclusion here would impact adversely on both the adversary process and society: the government would be placed in a worse position than if no illegality had occurred and society would be punished through the release of criminals to the public.[79] The Court, therefore, found that where, as here, the discovery of evidence was "inevitable," the deterrence rationale of exclusion had little basis and "would reject logic, experience and common sense."[80]

To purge the taint of evidence discovered unlawfully, the Court in *Williams II* required the State to prove by a preponderance of the evidence that a legally obtained discovery of the body would have ensued.[81] This quantum of proof, which the Court already had established as the proper standard for suppression hearings,[82] reflected the Court's hesitation to impose additional burdens on the already difficult task of proving guilt in criminal cases.[83]

The Court rejected the Court of Appeals' requirement that the prosecution prove that the police misconduct was undertaken in good faith.[84] If courts conditioned the application of inevitable discovery on the police's good faith conduct, the courts would withhold evidence from the jury that would have been available in the absence of police illegality.[85] For example, a court would hold the body of a murdered child as inadmissible evidence only because a

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76 *Williams II*, 104 S. Ct. at 2509.

77 *Id.*

78 *Id.*

79 *Id.* at 2511.

80 *Id.* at 2509.

81 *Id.*

82 In United States v. Matlock, 415 U.S. 164, 178 n.14 (1974), the Court stated that "the controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence."

83 *Williams II*, 104 S. Ct. at 2509 n.5.

84 *See supra* note 69 and accompanying text.

85 *Williams II*, 104 S. Ct. at 2510.

detective had acted in bad faith in interrogating the accused, even though that interrogation had no relation to the "inevitable" discovery of the body. The Court, therefore, found that a good faith requirement would put the government in a worse position than it would have been in if no unlawful conduct had occurred.[86] Further, such a requirement fails to take into account "the enormous societal cost of excluding truth in the search for truth in the administration of justice."[87] As a result, the Court in *Williams II* refused to follow this "formalistic, pointless, and punitive approach,"[88] and disregarded the supposed bad faith conduct of Detective Leaming when it considered the applicability of the inevitable discovery rule.[89]

The Court did not believe that rejection of the bad faith requirement either would increase sixth amendment violations by police or would reduce the deterrent effect of the exclusionary rule.[90] It explained that a police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would be discovered inevitably.[91] When an officer is aware that the evidence that he seeks will be found inevitably, he is unlikely to attempt any "dubious 'shortcuts' " to secure the evidence.[92] Disincentives to misconduct, such as departmental discipline and civil liability, also lessen the likelihood that the inevitable discovery exception will promote misconduct.[93]

The Court found that exclusion of physical evidence that would have been discovered inevitably adds nothing to either the integrity or fairness of a criminal trial.[94] Detective Leaming's conduct did nothing to impugn the reliability of the evidence in question: the body of the girl and its condition at the time of discovery, articles of clothing found on the body, and the autopsy.[95] The Court re-

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86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id. But see, e.g.*, Pitler, *supra* note 11, at 630. For Pitler, the exclusionary rule is useless if the police may unlawfully invade a man's home, illegally seize evidence and then claim "we would have seized it anyway." The ability of police scientists, laboratory technicians, and investigators to discover, analyze, and develop substantial leads from minute materials appears to make even the most implausible discovery virtually inevitable. The exclusionary rule is designed to encourage the development of such methods, not make their theoretical availability a reason for admitting illegally-seized evidence.

Id.

93 Pitler, *supra* note 11, at 630; *see* Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 397 (1971).

94 *Williams II*, 104 S. Ct. at 2510.

95 *Id.* at 2511.

marked that "[n]o one would seriously contend that the presence of counsel in the police car when Leaming appealed to Williams' decent human instincts would have had any bearing on the reliability of the body as evidence."[96] Suppression of the evidence in *Williams* would do little to promote the integrity of a trial, but would inflict an unacceptable burden on the criminal justice system— the exclusion of probative evidence from trials and the release into society of criminals who otherwise would be imprisoned.[97]

The Court was convinced by a preponderance of the evidence that the body of Pamela Powers would have been discovered by the search teams if the search had not been suspended.[98] The Court believed that the search would have continued into Polk County, as Agent Ruxlow had testified, and that the searchers would have left their vehicles to inspect all ditches and culverts on foot, as they had been instructed to do.[99] The Court therefore concluded that discovery of the body was "inevitable," and denied Williams habeas relief.[100]

Justice Stevens concurred in the judgment but refused to join in the Court's opinion because he felt it did not discuss adequately the constitutional violation that took place[101] or the societal costs incurred by overzealous police work.[102] The sixth amendment guarantees that the conviction of an accused will result from the trial process, rather than from the one-sided investigation of the prosecutor.[103] Justice Stevens remarked that *Williams I* grew out of a line of cases "in which this Court made it clear that the adversarial process protected by the sixth amendment may not be undermined by the strategems of the police."[104] In *Williams I*, the Court held that

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96 *Id.*

97 *Id.*

98 *Id.* at 2512.

99 *Id. But see supra* note 47 and accompanying text.

100 *Williams II*, 104 S. Ct. at 2512.

101 *Id.* at 2514 (Stevens, J., concurring). "The constitutional violation that gave rise to the decision in *Williams I* is neither acknowledged nor fairly explained in the Court's opinion. Yet the propriety of admitting evidence relating to the victim's body can only be evaluated if that constitutional violation is properly identified." *Id.*

102 *See infra* note 115 and accompanying text.

103 *Williams II*, 104 S. Ct. at 2514 (Stevens, J., concurring).

104 *Id.* In Spano v. New York, 360 U.S. 315 (1959), the Court considered the confession of a defendant who was interrogated, without counsel, after his indictment for murder. Four Justices indicated that the questioning violated the sixth amendment:

> Our Constitution guarantees the assistance of counsel to a man on trial for his life in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law. Surely a Constitution which promises that much can vouchsafe no less to the same man under midnight inquisition in the squad room of a police station.

Id. at 327 (Stewart, J., concurring, joined by Douglas & Brennan, JJ.). Justice Douglas

Detective Leaming had violated the accused's constitutional right to counsel by "deliberately eliciting incriminating statements from [Williams] during the pendency of the adversarial process."[105] Stevens found that Leaming's "Christian Burial Speech" was nothing but "an attempt to substitute an *ex parte*, inquisitorial process for the clash of adversaries commanded by the Constitution."[106]

Justice Stevens reasoned that "once the constitutional violation is properly identified, the answers to the questions presented in this case follow readily."[107] Admission of the victim's body, if it would have been discovered anyway, meant that the trial in *Williams II* was not the result of an inquisitorial process.[108] The inevitable discovery of the body purged the evidence that Detective Leaming had elicited of its taint; thus, the trial Williams had received was a fair one.[109] Whether the detective had acted in good or in bad faith, therefore, simply was irrelevant—"if the trial process was not tainted as a result of [Detective Leaming's] conduct, this defendant received the type of trial that the Sixth Amendment envisions."[110]

According to Stevens, the prosecution's burden of proving "inevitable" discovery forced the State to assume the risk that the body of Pamela Powers would not have been found without the police misconduct.[111] The necessity of producing proof sufficient to discharge the State's burden, and the difficulty in predicting whether such proof would be available, meant that the inevitable discovery rule did not permit the prosecution to avoid the uncertainty it would have faced without the violation of the individual's rights.[112] *Williams*, then, was not a case in which the prosecution was able to escape responsibility through speculation: to the extent the constitutional violation created uncertainty, the prosecution had to resolve that uncertainty through proof.[113]

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asked: "[What] use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses?" *Id.* at 326 (Douglas, J., concurring, joined by Black & Brennan, JJ.). The Court in Massiah v. United States, 377 U.S. 201 (1964) developed this view: "We hold that the petitioner was denied the basic protections of [the sixth amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel." *Id.* at 206.

105 *Williams II*, 104 S. Ct. at 2515 (Stevens, J., concurring).

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.* at 2516 (Stevens, J., concurring).

112 *Id.*

113 *Id.*

In Justice Stevens' view, the costs that society incurs in an exclusionary rule case such as *Williams II* extend beyond the suppression of probative evidence:[114]

> [T]he more relevant cost is that imposed on society by police officers who decide to take procedural shortcuts instead of complying with the law. What is the consequence of the shortcut that Detective Leaming took when he decided to question Williams in this case and not to wait an hour or so until he arrived in Des Moines? The answer is years and years of unnecessary but costly litigation. Instead of having a 1969 conviction affirmed in routine fashion, the case is still alive 15 years later. Thanks to Detective Leaming, the State of Iowa has expended vast sums of money and countless hours of professional labor in his defense. That expenditure surely provides an adequate deterrent to similar violations; the responsibility for that expenditure lies not with the Constitution, but rather with the constable.[115]

Justice Brennan dissented in *Williams II*; Justice Marshall joined him.[116] Brennan agreed with the Court that the circumstances of the case warranted the application of the inevitable discovery rule, and that the inevitable discovery exception to the exclusionary rule was consistent with the requirements of the Constitution.[117] He dissented, however, from the Court's opinion and from its judgment because the Court did not impose on the prosecution the requirement of proof of the body's inevitable discovery by clear and convincing evidence.[118]

Brennan believed that the Court, "in its zealous efforts to emasculate the exclusionary rule,"[119] lost sight of the crucial difference between the inevitable discovery doctrine and the independent source exception from which it derived.[120] The independent source exception permits the prosecution to use evidence only if the evidence, in fact, was obtained through fully lawful procedures.[121] The inevitable discovery rule, however, is applied when the evidence that the prosecution seeks to introduce at trial was not actually obtained from an independent source, but rather would have been discovered as a matter of course if independent investigations had been allowed to continue.[122]

In Brennan's view, the distinction between "actual discovery"

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114 *Id.*
115 *Id.* at 2516-17 (Stevens, J., concurring).
116 *Id.* at 2517 (Brennan, J., dissenting).
117 *Id.*
118 *Id.* at 2517-18 (Brennan, J., dissenting).
119 *Id.* at 2517 (Brennan, J., dissenting).
120 *Id.*
121 *Id.*
122 *Id.*

in the independent source exception, and "hypothetical discovery" in the inevitable discovery exception, justifies a heightened burden of proof for the prosecution in inevitable discovery cases.[123] Increasing the burden of proof, in Brennan's opinion, would impress the factfinder with the importance of the decision and would reduce the risk that illegally obtained evidence will be admitted.[124] Brennan posited:

> To ensure that this hypothetical finding is narrowly confined to circumstances that are functionally equivalent to an independent source, and to protect fully the fundamental rights served by the exclusionary rule, I would require *clear and convincing evidence* before concluding that the government had met its burden of proof on this issue.[125]

Justice Brennan stated that he would have remanded the case for application of this heightened burden of proof by the lower courts.[126]

V. Analysis

Although the purpose of the exclusionary rule is to deter unlawful police practices, the Supreme Court in *Williams II* held that the rule is inapplicable where no significant causal connection exists between the police misconduct and the discovery of the evidence that the defense seeks to exclude.[127] The Court reasoned that "if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury."[128]

The principle of inevitable discovery, therefore, is based upon logic. The illegality is not the cause of discovery at all, for "[c]onduct is not a legal cause of an event if the event would have occurred without it."[129] In *Williams II*, the prosecution proved that

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123 *Id.*

124 *Id.* at 2517-18 (Brennan, J., dissenting).

125 *Id.* at 2517 (Brennan, J., dissenting) (emphasis added).

126 *Id.* at 2518 (Brennan, J., dissenting).

127 104 S. Ct. at 2511.

128 *Id.*

129 United States v. Cole, 463 F.2d 163, 173 (2d Cir.), *cert. denied*, 409 U.S. 942 (1972) (citing W. Prosser, Handbook of the Law of Torts §41, at 239 (4th ed. 1971)). One commentator has explained:

> If the prosecution can establish that the illegal act merely contributed to the discovery of the allegedly tainted information and that such information would have been acquired lawfully even if the illegal act had never transpired, the presumptive taint is removed, and the apparently poisoned fruit is made whole. In other words, if the government establishes that the illegal act was not an indispensable cause of the discovery of the proffered evidence, the exclusionary rule does not apply.

Maguire, *supra* note 10, at 313.

the search teams would have located the body of Pamela Powers, even if no police misconduct had occurred. Through the application of the inevitable discovery doctrine, the prosecution was able to demonstrate that the investigative procedures of the Iowa Bureau of Criminal Investigations, not the unlawful conduct of Detective Leaming, were the cause of the discovery of Pamela Powers' body.

An understanding of the logic that validates the inevitable discovery rule, however, depends upon a court's thorough examination of the facts of the case. Courts that apply inevitable discovery in a loose fashion, without caution or discretion, ignore the logic of the rule and enable the prosecution to use inevitable discovery as another device with which to convict criminals. The flaws of the Court's decision in *Williams II* stem from the Court's careless and inexact application of the facts to the rule.[130]

In *Williams I*, the Court held that the statements that had led police to the discovery of the child's body were obtained in violation of the accused's right to counsel and were therefore inadmissible.[131] In *Williams II*, the Court failed to acknowledge that this constitutional violation took place. As Justice Stevens observed in his concurrence, however, "the propriety of admitting evidence relating to the victim's body can only be evaluated if that constitutional violation is properly identified."[132] More importantly, the Court in *Williams II* failed to explain that by admitting evidence of the location of the body and its condition, the Court did not disturb its earlier holding in *Williams I*. The application of the inevitable discovery rule to the facts of this case is not the result of the Court's approval of a constitutional violation but of its recognition that this violation is, in itself, insufficient to bar a trial to determine the accused's guilt or innocence.

The sixth amendment guarantees that "[i]n all prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[133] The Supreme Court has clarified that a defendant is entitled to his representation.[134] In *Massiah v. United*

130 Apparently, the Court's interpretation of facts in *Williams I* was also a matter of controversy. Professor Kamisar addressed that issue and remarked, "the various opinions in *Williams* totter on an incomplete, contradictory, and recalcitrant record. The Supreme Court—and all our courts— deserve better and should demand more." Kamisar, *supra* note 43, at 233.

131 430 U.S. at 387.

132 104 S. Ct. at 2514 (Stevens, J., concurring).

133 U.S. CONST. amend. VI.

134 *See* Coleman v. Alabama, 399 U.S. 1 (1969); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967).

States,[135] the Court held that once adversary proceedings have commenced against an individual, that person has a right to legal representation when the government interrogates him.

In *Williams I*, the Court held that Detective Leaming had violated the "clear rule of *Massiah*" by deliberately eliciting incriminating statements from the accused during the pretrial stage.[136] The detective had aggravated this violation when he breached his promise to Williams' counsel that he would not question his prisoner on the way to Des Moines.[137] The police, therefore, in the absence of Williams' counsel and contrary to their express agreement,[138] deliberately took advantage of an inherently coercive setting. Detective Leaming aptly demonstrated "that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more so-

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135 377 U.S. 201 (1964). In *Massiah*, the petitioner was indicted for violation of the federal narcotics law. He retained a lawyer, pleaded not guilty, and was released on bail. While he was free on bail, a federal agent surreptitiously listened to incriminating statements made by the petitioner. In reversing the petitioner's conviction, the United States Supreme Court held "that the petitioner was denied the basic protections of that guarantee [the right to counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel." *Id.* at 206. The clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, that individual has a right to legal representation when the government interrogates him. *Williams I*, 430 U.S. at 401. *See supra* note 105 and accompanying text.

136 430 U.S. at 401. As Justice Stewart remarked, "It thus requires no wooden or technical application of the Massiah doctrine to conclude that Williams was entitled to the assistance of counsel guaranteed to him by the Sixth and Fourteenth Amendments." *Id.*

137 *Williams II*, 104 S. Ct. at 2515 (Stevens, J., concurring). In *Williams I*, Justice Stevens discussed the high regard that the law has for this promise:

> The defendant placed his trust in an experienced Iowa trial lawyer who in turn trusted the Iowa law enforcement authorities to honor a commitment made during negotiations which led to the apprehension of a potentially dangerous person. Under any analysis, this was a critical stage of the proceeding in which the participation of an independent professional was of vital importance to the accused and to society. At this stage the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizens. If, in the long run, we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise to this lawyer.

430 U.S. at 415 (Stevens, J., concurring).

138 430 U.S. at 414 n.2 (Stevens, J., concurring). Detective Leaming conceded when he testified at Williams' trial that he had intended to coerce information from his prisoner:

> Q: In fact, Captain, whether he was a mental patient or not, you were trying to get all the information you could before he got to his lawyer, weren't you?
>
> A: I was sure hoping to find out where that little girl was, yes sir.
>
> Q: Well, I'll put it this way: You was [sic] hoping to get all the information you could before Williams got back to McKnight, weren't you?
>
> A: Yes, sir.

Id. at 399.

phisticated modes of 'persuasion.' "[139] In holding that the respondent's conviction was unconstitutional, the Court's decision in *Williams I* demonstrated that although the character of a crime may unavoidably influence a court's decisionmaking process, it does not permit a court to condone a violation of constitutional rights.[140]

Only after a court properly identifies the constitutional violation that occurred in a particular case can it perceive the logic of the inevitable discovery rule.[141] The invasion of Williams' rights was not the cause of the discovery of the body of Pamela Powers; the search teams would have found her body regardless of Williams' confession.[142] Admission of the body as evidence, if it would have been discovered anyway, meant that neither the discovery process nor the trial were the products of Detective Leaming's charade. The prosecution could not escape responsibility for a constitutional violation through speculation; to the extent that police misconduct created uncertainty, the prosecution had to resolve that uncertainty through proof.[143]

The Court was correct to dismiss the Court of Appeals' "bad faith" requirement[144] as "pointless" and "punitive"[145] because this requirement rejects the logic on which the inevitable discovery rule is based. Proof of inevitable discovery severs any causal connection between the misconduct and the discovery of the challenged evidence.[146] It therefore makes no sense to invoke a good or a bad faith test because the *mens rea* of the offending officer is irrelevant to the question of causation. When no causal connection exists between the police illegality and the evidence in question, the bad faith of the offending officer will not provide one.[147]

In *Williams II*, the Court was concerned that imposition of a "bad faith" requirement would result in the unjust suppression of probative evidence from the trial process.[148] The exclusion of such

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139 *Id.* at 408 (quoting Blackburn v. Alabama, 361 U.S. 199, 206 (1960)).

140 *Williams II*, 104 S. Ct. at 2513 (Stevens, J., concurring). In *Williams I*, Stevens wrote, "The emotional aspects of the case make it difficult to decide dispassionately, but do not qualify our obligation to apply the law with an eye to the future as well as with concern for the result in the particular case before us." 430 U.S. at 415 (Stevens, J., concurring).

141 *Williams II*, 104 S. Ct. at 2515 (Stevens, J., concurring).

142 *Id.* at 2512. *But see supra* note 47 and accompanying text.

143 104 S. Ct. at 2515 (Stevens, J., concurring).

144 *See supra* note 69 and accompanying text.

145 *Williams II*, 104 S. Ct. at 2510.

146 Brief for the United States as Amicus Curiae Supporting Reversal at 19, Nix v. Williams, 104 S. Ct. 2501 (1984).

147 *Id.* at 19-20.

148 104 S. Ct. at 2510.

evidence would place the prosecution in a worse position than the one in which it would have been had no police misconduct occurred.[149] The Court, however, failed to discuss adequately the deleterious effects that this requirement also would have on society. A "good faith" test would force society to pay for the mistakes of its law enforcement officials; because of police infractions, courts would exclude evidence that would have been discovered through lawful means, and potentially dangerous criminals would escape conviction with impunity. The exclusion of "inevitable" evidence that has no causal connection to the violation of the defendant's sixth amendment rights, therefore, would go far beyond the appropriate confines of the deterrent function of the exclusionary rule.[150]

The good or bad faith conduct of the police, like the constitutional violation, does not determine the accused's fate. In *Williams II*, the lack of a causal connection between the police illegality and the discovery of the body meant that the trial process was not tainted by Leaming's conduct and that the defendant received the type of trial envisioned by the sixth amendment.[151]

Justice Burger, in his dissent in *Williams I*, objected to the "tenuous strands" on which the murder case turned.[152] In *Williams II*, however, the Chief Justice convicted the accused on evidence that was no less tenuous.[153] In any case in which the inevitable discovery rule is applicable, the court must examine thoroughly the facts of the case before the rule is introduced, in order to determine if the evidence indeed would have been discovered regardless of the police's misconduct. A spotty and imprecise treatment of the facts, such as that undertaken by the Court in *Williams II*, leads to a mechanical application of the rule and detracts from the logic that determines its validity.

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149 *Id.*

150 *Id.* Another brief written in support of reversal of the judgment of the Court of Appeals for the Eighth Circuit stated that the exclusion of inevitable evidence would, in fact, deter good police work: "The inevitable discovery doctrine, here, was based upon scientific and diligent, indeed exceptionally methodical, efforts by searching officers to find Pamela Powers' body, and such efforts should not be discouraged." Brief of Amici Curiae, The Legal Foundation of America and Americans for Effective Law Enforcement at 5-6, Nix v. Williams, 104 S. Ct. 2501 (1984) (footnote omitted). *But see* Brief for Respondent at 18, *Williams II* (the record "flatly contradicts" the impression that the body would have been found).

151 104 S. Ct. at 2515 (Stevens, J., concurring).

152 430 U.S. at 420 (Burger, C.J., dissenting). Burger objected to the tenuous grounds on which the Court rested its determination that Detective Leaming's remarks to Williams constituted "interrogation" rather than mere "statements" intended to "prick the conscience of the accused." *Id.* at 419.

153 *See, e.g.*, 104 S. Ct. at 2511-12.

Contrary to the Court's decision, the record does not show clearly that "the body would inevitably have been found."[154] Would the search for the body have continued into Polk County, as Agent Ruxlow alleged?[155] If so, why had the investigator failed to mark off the map of Polk County into a grid pattern, as he had done earlier with the maps of Jasper and Poweshiek Counties?[156]

Even if the search had continued, would the searchers have found the victim's body? Would they have left their cars and traveled on foot to the area in which the body lay? If so, would they have seen the body, which, from a close inspection of the record, lay partially hidden by brush and snow?[157] If so, how can the police's difficulty in locating the body even after Williams led them to it be explained?[158]

Faced with these unanswerable questions, Chief Justice Burger's statement that "inevitable discovery involves no speculative elements,"[159] provokes questions of its own. Did the Court carefully and objectively examine the record to see whether the facts merited the application of the inevitable discovery rule? Or did the Court selectively weed through the facts and seize those that would best serve its purpose? Was the Court convinced, by a preponderance of the evidence, that the search teams would have discovered the body of Pamela Powers, which lay in a ditch near a culvert two and one-half miles from the spot where the search was suspended?[160] Or was the Court willing to settle for a lesser standard of proof in light of the brutality of the crime?

The dissent correctly observed that the Court, in its eagerness to emasculate the exclusionary rule, lost sight of the "crucial difference" between the inevitable discovery doctrine and the independent source exception from which it derived.[161] Although the independent source exception allows the prosecution to use the evidence that the police obtained independently by lawful means, inevitable discovery permits the prosecution to use evidence that would

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154 *Id.* at 2512.

155 *See supra* note 47 and accompanying text.

156 *Williams II*, 104 S. Ct. at 2512.

157 *Id.* In light of this information, the Court easily could have argued that "the evidence asserted by Williams as newly discovered, i.e., certain photographs of the body and the deposition testimony of Agent Ruxlow . . . does not demonstrate that the material facts were inadequately developed." *Id.*

158 *See* Brief for Respondent at 32, *Williams II*.

159 *Williams II*, 104 S. Ct. at 2510 n.5.

160 *Id.* at 2512.

161 *Id.* at 2517 (Brennan, J., dissenting).

have been discovered if the investigation had continued.[162] Inevitable discovery, therefore, is based on a certain degree of speculation and conjecture.

This distinction, as the dissent pointed out, should require that the prosecution satisfy a heightened burden of proof before it may use such evidence.[163] An increased burden of proof would serve to confine the use of this hypothetical discovery to circumstances that are functionally equivalent to an independent source, and would reduce the chance that a court will admit illegally obtained evidence, the discovery of which was not inevitable.[164] Requiring the prosecution to present clear and convincing evidence of inevitable discovery before concluding that the prosecution has met its burden of proof would deter judicial abuse of a valuable exception to the exclusionary rule and would protect the fundamental rights that the rule guarantees.[165]

Moreover, the integrity of the inevitable discovery doctrine demands that courts apply the rule in a consistent and neutral fashion, regardless of the facts of a case. Although the character of a crime has some impact on the decision process, the heinous nature of a crime does not permit a court to condone a constitutional violation.[166] Justice Stewart, in holding that Williams' first conviction had been obtained unconstitutionally, correctly observed:

> The crime of which Williams was convicted was senseless and brutal, calling for swift and energetic action by the police to apprehend the perpetrator and gather evidence with which he could be convicted . . . . Yet "[d]isinterested zeal for the public good does not assure either wisdom or right in the methods it pursues." . . . The pressures on state executive and judicial officers charged with the administration of the criminal law are great, especially when the crime is murder and the victim a small child. But it is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all.[167]

When a court permits the degree of a crime to dictate the requisite burden of proof, as the Supreme Court did in *Williams II*, the court strips the inevitable discovery doctrine of its strength and severely

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162 *Id.*

163 *Id.*

164 *Id.*

165 The Supreme Court applied the "clear and convincing" standard in United States v. Wade, 388 U.S. 218 (1967), an earlier sixth amendment case. In *Wade*, the Court required clear and convincing evidence of an independent source of an in-court identification, where the accused did not have the benefit of counsel. *Id.* at 240.

166 *Williams II*, 104 S. Ct. at 2513 (Stevens, J., concurring).

167 *Williams I*, 430 U.S. at 406 (quoting Haley v. Ohio, 332 U.S. 596, 605 (1948) (Frankfurter, J., concurring)).

undermines the doctrine's value as an exception to the exclusionary rule.[168]

VI. CONCLUSION

The fundamental purpose of the exclusionary rule is to deter unlawful police practices.[169] The price of such deterrence is great; application of the exclusionary rule results in harm to the adversary process through the suppression of probative evidence from trials, and harm to society in general through the release of criminals into the social mainstream.[170] The exclusionary rule, therefore, has generated well-deserved criticism because it punishes the public for the mistakes and misdeeds of law enforcement officers, instead of punishing the officers directly.[171] Although exclusion deters unlawful activity by the police, the rule is a

> needed, but grudgingly taken medicament; no more should be swallowed than is needed to combat the disease. Granted that so many criminals must go free as will deter the constables from blundering, pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest . . . .[172]

Exceptions to exclusion are useful means of avoiding the perversion, by the release of criminals into society, of a rule designed to protect society.[173] Properly applied, exceptions serve to balance the

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168 In invoking the inevitable discovery on such tenuous grounds, the Court in *Williams II* appeared to follow the lead of the District of Columbia Circuit. In both Wayne v. United States, 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963), and Killough v. United States, 336 F.2d 929 (D.C. Cir. 1964), the circuit court was satisfied that the evidence would have been discovered by considerably lesser showings of inevitability than in other applications of the exception. *See* Note, *The Inevitable Discovery*, *supra* note 10, at 96. It is no mere coincidence that both *Wayne* and *Killough* were cases involving the "inevitable" discovery of dead bodies.

169 Note, *Fruit of the Poisonous Tree*, *supra* note 10, at 1136.

170 Amsterdam, *supra* note 10, at 389 & n.151.

171 *Williams I*, 430 U.S. at 416 (Burger, C.J., dissenting).

172 Amsterdam, *supra* note 10, at 389. Chief Judge Miller addressed the great cost of the exclusionary rule in *Killough v. United States* and stated:

> Under our system of criminal law, the legal rights of a defendant must be protected even if the result is prejudice to the public. But justice does not require that those rights be exaggerated so as to protect the defendant against the consequences of his criminal act in a factual situation where he is not entitled to protection. That would be more than justice to the defendant, and unjustifiable prejudice to the public. In our concern for criminals, we should not forget that nice people have some rights too.

Killough v. United States, 315 F.2d 241, 265 (D.C. Cir. 1962) (Miller, C.J., dissenting).

173 Exclusion is not intended to redress a wrong to the defendant by releasing him, but is designed only to curb undesirable police conduct. Granting complete immunity to the defendant goes beyond the purpose of the exclusionary rule: "It is one thing to say that officers shall gain no advantage from violating the individual's rights; it is quite another to declare that such a violation shall put him beyond the law's reach even if his

costs born by society from the release of criminals against the benefits that society derives from deterrence of police misconduct.[174] The inevitable discovery exception to the exclusionary rule is a logical extension of the doctrines of independent source and attenuation and can be a valuable addition to the criminal justice system. Courts can apply it in a way that protects the law enforcement interests of society, and also provides substantial deterrence of unlawful police activity and protection of the rights of criminal suspects.[175] Inevitable discovery, however, must be applied with caution and discretion. A mechanical application of the doctrine will encourage unconstitutional shortcuts such as those taken by the Court in *Williams II*. The effectiveness and validity of the inevitable discovery doctrine as an exception to the exclusionary rule depends upon courts applying it in the future with greater care and in a more neutral fashion than courts have applied it in the past: "In carving out the inevitable discovery exception to the taint doctrine, courts must use a surgeon's scalpel and not a meat axe."[176]

WILLIAM M. COHN

guilt can be proved by evidence that has been obtained lawfully." Sutton v. United States, 267 F.2d 271, 272 (4th Cir. 1959).

174 Amsterdam, *supra* note 10, at 390.

175 Note, *The Inevitable Discovery*, *supra* note 10, at 103.

176 W. LAFAVE, *supra* note 29, at 624.