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The Right to Counsel and the Strict Waiver Standard: *Brewer v. Williams*, 430 U.S. 387 (1977)

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Note

The Right to Counsel And the Strict Waiver Standard

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

I. INTRODUCTION

Almost fifty years ago Justice Brandeis in a dissenting opinion stated that

> [i]f the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.[1]

However, it is also appropriate to recall the words of Justice Cardozo and the serious effect of allowing "the criminal . . . to go free because the constable has blundered."[2] These opposing views characterize the dilemma inherent in a system based upon a government of laws. If the government itself does not observe the law then the protections afforded each individual are jeopardized. Alternatively, when there is no question as to the guilt of the accused and yet he is allowed to go free, society begins to question the effectiveness of the legal system. It is essential, then, that a government of laws does not become a government of men, but the line between the two is not easily drawn and represents a dilemma with which the legal system has had to deal continually.

That this dilemma is still a source of disagreement is evidenced in the case of *Brewer v. Williams*.[3] *Brewer* required the United States Supreme Court to determine if indeed the government had become a lawbreaker, or more specifically, whether the police had deprived Williams of his constitutional right to counsel. The emotional aspects of the case were obvious, for if Williams had been denied his right to counsel and had not waived that right he would

1. Olmstead v. United States, 277 U.S. 438, 485 (1928).
2. People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).
3. 430 U.S. 387 (1977).

probably go free.[4] If not, his conviction for the brutal murder of a ten-year-old girl would be affirmed. In a five to four decision delivered by Mr. Justice Stewart,[5] the Supreme Court held that Williams was deprived of his right to counsel and that he had not waived that right.[6] This note will examine the Court's resolution of the issues before it and will explore the shortcomings of the decision in light of the Court's failure to enunciate a clearer standard of waiver.

II. THE FACTS OF THE CASE

On December 24, 1968, a ten-year-old girl went with her family to a wrestling tournament at the YMCA in Des Moines, Iowa. After she failed to return from a trip to the washroom, a search began but was unsuccessful.

Shortly after the girl disappeared, Robert Williams, a recent escapee from a mental hospital, was seen in the lobby of the YMCA carrying a large bundle. A young boy helped Williams open the door of his car, which was parked outside the door of the YMCA, and Williams placed the bundle in his car. The boy stated that

4. "[T]he decision today probably means that, as a practical matter, no new trial will be possible at this date eight years after the crime, and that this respondent necessarily will go free." *Id.* at 441 (Blackmun, J., dissenting). However, Williams was found guilty of murder in the first degree and was sentenced to life imprisonment. State v. Williams, Doc. 94, No. 55805 (Polk County Iowa Dist. Ct. July 15, 1977).
5. Brennan, Marshall, Powell, and Stevens, JJ., joined in the opinion.
6. It would appear that the majority held fast to the view expressed by Justice Brandeis by determining that protection of an individual's constitutional rights is to be valued over securing the conviction of a criminal by illegal means. The dissenting justices strongly disagreed and characterized the decision as punishing the public since the police were not guilty of any unconstitutional misconduct. Particularly, Mr. Chief Justice Burger criticized the majority for excluding Williams' disclosures from the fact-finding process since the only valid justification for excluding reliable evidence is to deter unlawful police conduct. The Chief Justice insisted that a balancing approach should have been used wherein the court would "consider whether the benefits secured by application of the exclusionary rule in this case outweigh its obvious social costs." 430 U.S. at 422. Under this approach one would consider the seriousness of the police misconduct and weigh it against the strong interest of effective prosecution of criminals. Chief Justice Burger found that the balancing method was possible in *Brewer* "because Williams' incriminating disclosures [were] not infected with any element of compulsion the Fifth Amendment forbids; nor . . . does this evidence pose any danger of unreliability to the factfinding process." *Id.* at 424. However, the Chief Justice's analysis points out the weaknesses of the balancing approach since the result largely depends on what particular interests are balanced against each other.

he "saw two legs in it and they were skinny and white."[7] Williams then drove away. His abandoned car was found in Davenport, Iowa, and a warrant was then issued in Des Moines for his arrest.

It is ironic, although not unusual, that the determination of a constitutional question should depend on a majority of the justices viewing the facts in a similar manner. As Mr. Justice Powell stated in his concurring opinion, "resolution of the issues in this case turns primarily on one's perception of the facts."[8] Accordingly, what happened on December 26 is crucial to an understanding of the decision in *Brewer*.

On the morning of December 26, Henry McKnight, a Des Moines attorney, informed the Des Moines police that he had received a call from Williams and had advised him to surrender to police in Davenport. Williams did so and the Davenport police booked him and gave him the warnings required by *Miranda v. Arizona*.[9] Williams and McKnight then conversed on the telephone and in the presence of the Des Moines Chief of Police and Detective Leaming, McKnight explained to Williams that Des Moines police officers would pick him up in Davenport, that they would not interrogate him, and that he was not to talk to the officers about the girl until he had consulted with McKnight. As a result, McKnight reached an agreement with the police that they would bring Williams directly back to Des Moines and would not question him during the trip.

In Davenport, Williams had been arraigned before a judge who had advised him of his *Miranda* rights. In the courtroom, Williams had conferred with a lawyer named Kelly. The two then met with Detective Leaming and a fellow officer and Williams was again advised of his *Miranda* rights. Kelly then reiterated that there was to be no interrogation of Williams during the trip to Des Moines. Additionally, Kelly asked Leaming that he be permitted to ride along in the police car to Des Moines, but this request was refused.

During the 160-mile ride to Des Moines, Williams and Leaming

Obviously, the majority would not have reached the Chief Justice's result because they would have balanced Williams' constitutional right to counsel against the need to secure convictions of criminals. Therefore, the Chief Justice's suggestion of employing a balancing approach is neither desirable nor feasible and would probably lead to chaos similar to that already existing in the first amendment area. An approach which depends on balancing away constitutional rights is a repugnant solution.

7. *Id.* at 390.
8. *Id.* at 409.
9. 384 U.S. 436 (1966). *Miranda* requires that the suspect be informed that he may remain silent, that if he gives up that right anything he

engaged in a conversation in which Williams stated several times that "[w]hen I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story."[10] Shortly after leaving Davenport, Detective Leaming gave his "Christian burial speech."

> 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 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 to 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 Eve and murdered. And I feel we should stop and locate it on the way 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.[11]

At a point fifteen miles from Des Moines, Williams stated he would show the officers where they could find the body. He then directed them to the location.

Williams was indicted for first-degree murder. His attorney moved to suppress all evidence relating to the statements Williams made during the trip, but the trial court denied the motion and the evidence was introduced at trial. The jury found Williams guilty of murder and the Iowa Supreme Court affirmed the conviction.[12] Williams then petitioned for a writ of habeas corpus in the United States District Court for the Southern District of Iowa. The district court held that the evidence in question had been wrongly

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says can be used against him in court, that he has the right to counsel, and that if he is not financially able to hire an attorney, the court will appoint one.

10. 430 U.S. at 390.
11. *Id.* at 392-93.
12. State v. Williams, 182 N.W.2d 396 (Iowa 1970). The majority of the Iowa Supreme Court agreed with the trial court that Williams had "waived his right to the presence of his counsel" on the automobile ride from Davenport to Des Moines. *Id.* at 402. The dissenting justices expressed the view that

> when counsel and police have agreed defendant is not to be questioned until counsel is present and defendant has been advised not to talk and repeatedly has stated he will tell the whole story after he talks with counsel, the state should be required to make a stronger showing of intentional voluntary waiver than was made here.

Id. at 408.

admitted at trial on the ground that Williams had been denied his constitutional right to counsel and further ruled that he had not waived that right.[13] The Court of Appeals for the Eighth Circuit affirmed.[14]

III. THE ISSUES

The district court based its conclusion on three independent grounds: (1) Williams had been denied his constitutional right to counsel; (2) he had been denied his constitutional protections as defined in *Escobedo v. Illinois*[15] and *Miranda v. Arizona*[16] and (3) his self-incriminating statements during the trip from Davenport to Des Moines had been made involuntarily. The Supreme Court, however, determined that it need only review the question of whether Williams was deprived of his constitutional right to the assistance of counsel[17] as guaranteed by the sixth[18] and fourteenth amendments.[19]

A. The Right to Counsel During Interrogation

The contours of the sixth amendment right had been well established in earlier decisions by the Supreme Court.[20] It had been defined as entitling a person to the help of a lawyer at or after

13. Williams v. Brewer, 375 F. Supp. 170 (S.D. Iowa 1974) (Williams' incriminating statements obtained in violation of his right to counsel and privilege against self-incrimination, and not voluntarily made).
14. Williams v. Brewer, 509 F.2d 227 (8th Cir. 1974). Williams' privilege against self-incrimination and right to assistance of counsel during interrogation were violated when police engaged in conversation with him and by "a subtle form of interrogation" obtained incriminating statements and evidence from him. *Id.* at 234.
15. 378 U.S. 478 (1964) (accused in a criminal prosecution may be entitled to counsel prior to indictment).
16. 384 U.S. 436 (1966).
17. The Court had been urged by several states as amici curiae to overrule the procedural ruling in *Miranda*. However, it was apparent that the Court did not want to undertake the massive task of reexamining *Miranda* on the facts presented in *Brewer*. But because the Court has had such a difficult time in developing a standard for waiver, and because the decision in *Brewer* did not clear up the confusion, it is likely that the *Miranda* decision will be closely scrutinized in the future. *Cf.* Note, *The Right to Counsel: An Alternative to* Miranda, 38 La. L. Rev. 239 (1977) (the Court may prefer to "sidestep" the issue of overruling *Miranda* by basing decisions on the sixth amendment).
18. U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." *Id.*
19. The sixth amendment had been applied to the states through the fourteenth amendment in Gideon v. Wainwright, 372 U.S. 335 (1963).
20. *See* Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade,

the time that judicial proceedings had been initiated against him "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[21] In *Brewer*, the Court found that several factors indicated that judicial proceedings had been initiated before the trip from Davenport to Des Moines: (1) an arrest warant had been issued; (2) Williams had been arraigned on that warrant; and (3) he had been committed to jail. Thus, under *Kirby v. Illinois*[22] it was clear that Williams was entitled to the assistance of counsel during the trip from Davenport to Des Moines.[23]

The Court went on to find that the doctrine of *Massiah v. United States*[24] was also applicable in determining Williams' right to counsel. As explained by the Court, "the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."[25] The Court then found itself thrust into the maze of defining "interrogation" in an attempt to answer the argument that Detective Leaming's "Christian burial speech" did not amount to interrogation.[26]

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388 U.S. 218 (1967); White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45 (1932).

21. Kirby v. Illinois, 406 U.S. 682, 689 (1972).
22. 406 U.S. 682 (1972).
23. *See also* United States v. Ash, 413 U.S. 300 (1973) (pretrial event "critical stage" at which accused has a right to counsel when aid required in coping with legal problems or in meeting adversary in confrontation).
24. 377 U.S. 201 (1964). In *Massiah*, the defendant had been indicted and was represented by counsel. In order to obtain incriminating statements from the defendant, the police arranged for an alleged accomplice of the defendant to meet with the defendant in the accomplice's car. The car was equipped with a radio transmitter which enabled a government agent to hear incriminating statements made by the defendant to the alleged accomplice; these statements were introduced at trial over the defendant's objections. The 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 his counsel.

    Id. at 206.
25. 430 U.S. at 401.
26. This argument stemmed from Detective Leaming's testimony in the state court record, *see* 182 N.W.2d at 403 and note 27 *infra*, and was adopted by the dissenting justices, *see* note 45 *infra*. It appears that Justice Stewart was attempting to convince the dissent that the speech had to be interrogation since all the justices agreed that Williams was entitled to counsel. 430 U.S. at 400.

The majority reasoned that Detective Leaming deliberately set out to elicit information from Williams just as effectively as if there had been a formal interrogation. Leaming knew that Williams was represented by counsel but purposely sought to obtain as much incriminating information as possible during Williams' isolation from his lawyers.[27] Finally, the Court noted that the speech must have been "tantamount to interrogation" since the state courts recognized that Williams was entitled to the assistance of counsel "[y]et no such constitutional protection would have come into play if there had been no interrogation."[28] This rationale is indeed perplexing because on the surface it would appear to be nothing more than a circular definition, *i.e.*, Williams was entitled to the right to counsel and, therefore, the "speech" must have been interrogation; because it was interrogation, Williams was entitled to the guaranty of the right to counsel. It is, therefore, not clear whether application of the *Massiah* doctrine is anything more than superfluous. If it were a settled constitutional doctrine under *Kirby*[29] that prior to the automobile trip and thereafter Williams had the right to assistance of counsel, it should make no difference whether the "Christian burial speech" was interrogation or not.

One plausible interpretation[30] is that the Court was stating nothing more than "(i) Williams had the right to assistance of counsel; (ii) once that right attached . . . , the State could not properly

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27. Cross-examination of Detective Leaming elicited the following testimony during pre-trial proceedings in the Polk County District Court:

> Q. Now, when you left, just before you left, do you remember we had parted greetings and didn't you say, "I'll go get him and bring him right back here to Des Moines?" A. Yes, sir.
>
> Q. You said that to me, didn't you? A. Yes, sir.
>
> Q. Knowing that you were dealing with a person from a mental hospital, did you say to him, you don't have to tell me this information, did you say that to him out there on the highway? A. What information?
>
> Q. The information that he gave you, the defendant gave you, you didn't say that to him, did you? A. No, sir.
>
> 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.
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> * * * * * *
>
> Q. Well, I'll put it this way: You were hoping to get all the information you could before Williams got back to McKnight, weren't you? A. Yes, sir.

375 F. Supp. at 174.

28. 430 U.S. at 400.
29. 406 U.S. 682. *See* note 21 and accompanying text *supra.*
30. Further interpretations are discussed elsewhere in this note. *See* notes 47 and 48 and accompanying text *infra.*

interrogate [him] in the absence of counsel unless he voluntarily and knowingly waived the right . . . ."[31] In this respect, the question of interrogation becomes vitally important, not as a means of determining whether Williams was entitled to counsel (as the opinion misleadingly suggests), but as a means of determining whether that right was violated. This notion is further supported by the Court's conclusion that "[t]he circumstances of this case are thus constitutionally indistinguishable from those presented in *Massiah v. United States* . . . . That the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is constitutionally irrelevant."[32] Although it was not clearly stated, the Court appeared to hold that the "statements" by Detective Leaming were as much interrogation as the methods used in *Massiah*[33] and that such interrogation is not constitutionally permissible in the absence of counsel unless the right is waived.[34] However, difficulty still arises in determining what is constitutionally impermissible interrogation as the decision fails to set out definite criteria for making such a determination.[35]

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31. 430 U.S. at 409-10 (Powell, J., concurring).
32. *Id.* at 400.
33. *See* note 24 *supra.*
34. At least two circuit courts of appeal have found sixth amendment violations in similar situations in which government authorities have ignored demands by counsel that interrogation take place only in their presence. *See* Taylor v. Elliott, 458 F.2d 979 (5th Cir. 1972) (interrogation in the face of officer's knowledge that defendant had counsel who was absent but who had instructed him not to make any statement violated defendant's sixth amendment rights); United States *ex rel.* Magoon v. Reincke, 416 F.2d 69 (2d Cir. 1969) (defendant's constitutional right violated when statements were obtained by interrogation in the absence of counsel after counsel had informed police that the accused was not to be interrogated further). The Nebraska Supreme Court appears to be in accord. *See* State v. Johns, 185 Neb. 590, 177 N.W.2d 580 (1970).
35. It is doubtful that there is any validity to Justice Blackmun's concern "that *Massiah* is violated whenever police engage in any conduct, in the absence of counsel, with the subjective desire to obtain information from a suspect after arraignment." 430 U.S. at 440. However, one can only hypothesize as to what is and what is not interrogation: it need not be in the form of a question, it might involve the use of psychology, and it is used with the intent to produce incriminating responses. Under these criteria a variety of statements might be considered interrogation, but without further guidelines from the Supreme Court the situation in *Brewer* might well be repeated in the future. State courts such as those in Iowa could determine that certain statements were tantamount to interrogation only to find the Supreme Court holding that they were not.

B. Waiver

Having found that Williams was entitled to the constitutional right to counsel during interrogation, the Court then turned to consider whether Williams had waived that right.

The Iowa Supreme Court, applying the totality-of-circumstances test, had affirmed the trial court's determination that Williams had voluntarily waived his right to counsel.[36] The district court held that the Iowa courts had applied the wrong constitutional standard[37] and concluded that under the proper standard there was simply no evidence to support a waiver.[38] The court of appeals approved the reasoning of the district court.[39]

The Supreme Court ruled that the district court and the court of appeals were correct in their understanding of the proper standard to be applied in determining the question of waiver.[40] That standard imposes upon the state the burden of proving "an intentional relinquishment or abandonment of a known right or privilege."[41] The fact that this strict standard applies to an alleged waiver of

36. The Iowa Supreme Court concluded:

> [E]vidence of the time element involved on the trip, the general circumstances of it, and the absence of any request or expressed desire for the aid of counsel before or at the time of giving information, were sufficient to sustain a conclusion that defendant did waive his constitutional rights as alleged.

182 N.W.2d at 402.

37. 375 F. Supp. at 182.

38. The court explained:

> [I]t is the *government* which bears a heavy burden . . . but that is the burden which explicitly was placed on [Williams] by the courts. . . .
>
> . . . [T]here is no affirmative indication . . . that [Williams] did waive his rights . . . . [T]he state courts' emphasis on the absence of a demand for counsel was not only legally inappropriate, but factually unsupportable as well, since Detective Leaming himself testified that [Williams] would talk *after* he saw Mr. McKnight. Both these statements and Mr. Kelly's statement to Detective Leaming that [Williams] would talk only after seeing Mr. McKnight in Des Moines certainly were assertions of [Williams'] "right or desire not to give information absent the presence of his attorney . . . ." Moreover, the statements were obtained only after Detective Leaming's use of psychology on a person whom he knew to be deeply religious and an escapee from a mental hospital—with the specific intent to elicit incriminating statements. In the face of this evidence, the State has produced no affirmative evidence whatsoever to support its claim of waiver, and, a fortiori, it cannot be said that the State has met its "heavy burden" of showing a knowing and intelligent waiver of . . . Sixth Amendment rights.

Id. at 182-83.

39. 509 F.2d at 233.

40. 430 U.S. at 402-04.

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

the right to counsel whether at trial or at a critical stage of pretrial proceedings had been firmly established in earlier Supreme Court decisions.[42]

In applying this standard, the majority found that there was no reasonable basis for concluding that Williams had waived his right and concluded that the state had failed to meet its burden of demonstrating a valid waiver. The Court offered several justifications for this holding. First, waiver requires relinquishment and not merely comprehension—Williams' consistent reliance on the advice of counsel contradicted a suggestion that he had waived his right. Second, his statements in the car that he would tell the whole story after seeing McKnight were a clear expression of his intent to have his lawyer present during interrogation. Third, by having attorneys in both Davenport and Des Moines he had effectively asserted his right to counsel. Finally, Williams knew of the agreement that he was not to be interrogated and since he had continually relied on the advice of his counsel, there was no reason to believe that he had changed that agreement.

However, Justice White in his dissent[43] argued that these facts plainly showed that Williams had knowingly and intentionally relinquished his right to counsel. According to Justice White,

> [r]espondent relinquished his right not to talk to the police about his crime when the car approached the place where he had hidden the victim's clothes. Men usually intend to do what they do and there is nothing in the record to support the proposition that respondent's decision to talk was anything but an exercise of his own free will. Apparently, without any prodding from the officers, respondent—who had earlier said that he would tell the whole story when he arrived in Des Moines—spontaneously changed his mind about the timing of his disclosures when the car approached the places where he had hidden the evidence.[44]

These contrasting views can be reconciled when one considers the real source of disagreement. The majority had found that Leaming's "Christian burial speech" amounted to interrogation whereas the dissenting justices did not agree with that conclusion.[45]

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42. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973); United States v. Wade, 388 U.S. 218 (1967).
43. 430 U.S. at 429. Blackmun and Rehnquist, JJ., joined the dissenting opinion.
44. *Id.* at 434.
45. The dissenting justices appeared to take the view that Leaming's statements were nothing more than conversation. When Williams decided to reveal where he had hidden the body it was not because of any coercive interrogation by Leaming. Rather it was a clear indication

The underlying rationale appears to be that in the absence of interrogation, Williams' incriminating statements and conduct, if made on his own initiative, would have been a waiver of his right to counsel.[46]

In this respect several other interpretations of the *Massiah* doctrine are suggested. The majority would appear to be stating:

1. *Massiah* is merely an expansion of the contours of the sixth amendment, namely that an accused has the right to counsel when he is being interrogated;[47] or
2. During interrogation an accused cannot effectively waive his right to counsel in the absence of that counsel;[48] or
3. Absence of counsel during interrogation carries with it a presumption that there has been no valid waiver.

The difficulty lies in the fact that the decision is not clear as to the effect the *Massiah* doctrine had in *Brewer*. The majority simply indicated that the state had not met its burden of showing waiver and did not further explain what the state failed to show. The Court has thus left open the possibility that what it meant

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that although he knew he had the right not to say anything in the absence of counsel he had intentionally relinquished that right.

46. A question that lingers is whether Williams would have revealed the body's location if Detective Leaming had not given his "Christian burial speech." It is interesting to note that during oral argument Robert Bartels, counsel for Williams, explained that the "speech" was the turning point for Williams since before that monologue he had given little or no information. It was pointed out that "[t]he reference to a 'Christian burial' was obviously designed to play on Williams' strong religious feelings." [1976] 20 Crim. L. Rep. (BNA) 4033, 4034. This thesis is supported by John Rogge. He notes that one of the reasons the communist inquisitors were so successful in their brainwashing and interrogating techniques was that they focused on the four factors of guilt feelings, inner rebellion, lack of love, and the need for punishment. J. ROGGE, WHY MEN CONFESS 209-22 (1959). It could be said that Leaming's speech was designed to elicit guilt feelings and a need for punishment especially in light of Williams' strong religious convictions. There was also further discussion of "what people's opinion was of him," 182 N.W.2d at 407, indicating an appeal to Williams' feelings of lack of love. Under Rogge's analysis this would at the least be a form of subtle interrogation. Under these circumstances, the fact that statements were eventually obtained sheds further doubt on the argument that Williams waived his right intentionally.

47. *See* note 31 and accompanying text *supra*.

48. This proposition is questionable since the Court specifically noted that it did not hold that under the circumstances of this case Williams *could not*, without notice to counsel, have waived his rights under the sixth and fourteenth amendments. 430 U.S. at 405-06.

was that the absence of counsel during interrogation is subject to the presumption that the accused did not validly waive his sixth amendment right.

IV. CONCLUSION

In *Brewer* the Supreme Court reaffirmed the notion that the government may not use unlawful means to secure the conviction of a criminal. In holding that Williams' right to counsel was violated by Detective Leaming's interrogation, the Court failed to define with any certainty what is and what is not interrogation. There is an indication that it involves more than a subjective intent to obtain information, but until a more specific test is announced the likelihood of any consistency on this determination will be remote.

The question of what satisfies the strict waiver standard is also unanswered. The Court held that the state had failed to sustain its burden of showing waiver. But without further guidelines, one is left to speculate that if counsel is not present during interrogation it will be difficult if not impossible to prove that an accused waived his sixth amendment right.

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