Inanimate Listening Devices: A Violation of Sixth Amendment Right to Counsel

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INTRODUCTION

The sixth amendment to the United States Constitution provides “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.” 1 The full import of these words has been, and continues to be, the subject of frequent debate. Although facially the words apparently support a requirement that counsel be present at all stages in the state’s proceeding against the accused, the Supreme Court has not yet adopted that interpretation of the amendment. The Court does recognize, however, that the accused enters the adversarial criminal proceeding at a distinct disadvantage. 2 Thus, in an attempt to equalize this imbalance, the Court has held that the right to counsel belongs to the accused during certain critical confrontations other than trial. 3

In Massiah v. United States, 4 the Court ruled that the period following indictment, or the commencement of formal adversarial proceedings, is one of the critical stages when the right to counsel attaches. 5 Further, Massiah prohibited the deliberate elicitation of statements from an accused in the absence of counsel during that period. 6 Sixteen years later in United States v. Henry, 7 the Court expanded the meaning of deliberate elicitation by holding that a sixth amendment violation resulted “by intentionally creating a situation likely to induce” an incriminating statement from a defendant. 8

An issue that remains unresolved is whether the use of an inanimate listening device constitutes a violation of the sixth amendment right to counsel. In Henry, the Court declined to rule on the issue, distinguishing passive listening from deliberate eli-

1. U.S. Const. amend. VI.
2. See infra notes 27, 30.
3. See infra note 32 and accompanying text.
5. Id. at 206.
6. Id.
8. Id. at 274.
This note will explore whether, in light of sixth amendment policy and precedent, the use of electronic listening devices does indeed constitute a violation of the sixth amendment right to counsel. First, the role of counsel in pretrial confrontations will be examined, tracing its development from the Middle Ages to the present. Second, the note will discuss the evolution of sixth amendment interrogation principles in United States v. Massiah and its progeny. Finally, the note will conclude that, under the rule of Henry and in light of the articulated policy of the right to counsel cases, the use of electronic listening devices does breach the sixth amendment right to counsel. The theory will be illustrated through its application to the case of United States v. Hearst.

THE ROLE OF COUNSEL IN PRETRIAL CONFRONTATIONS

An Historical Perspective

The right to counsel in Anglo-American law originated in the Middle Ages. Persons fulfilling roles analogous to modern counsel were observed by the end of the thirteenth century. Defendants could avail themselves of several types of legal spokesmen, each having a separate and distinct function to serve at trial. By the mid-fifteenth century, an accused was allowed some type of counsel at the critical points of the criminal proceedings; the right to counsel had become a basic procedural right of the criminal defendant under the common law. Between the mid-fifteenth and sixteenth centuries, two developments in the English

9. Id. at 271 n.9. See also infra note 128.
10. 563 F.2d 1331 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978).
12. Id. at 1019. The three modes of legal representation were the pleader, the attornatus, and the advocatus. The professional pleader stood by the litigant's side and spoke on his behalf. The attornatus fulfilled the function by appearing in the client's stead as the client's authorized deputy. A third type of representative, the advocatus, appeared on his own behalf in the role of surety for the accused. Id. See also Note, Recruited Government Informants: When Does the Right to Counsel Attach?, 8 FLA. ST. U.L. REV. 797, 798 (1980) [hereinafter cited as Note, Recruited Government Informants]; Note, United States v. Henry: The Further Expansion of the Criminal Defendant's Right to Counsel During Interrogations, 8 PEPPERDINE L. REV. 451, 453 (1981) [hereinafter cited as Note, Further Expansion of Criminal Defendant's Right to Counsel].
13. Note, supra note 11, at 1033.
14. Id. at 1032.
law temporarily restricted expansion of the right to counsel doctrine.\textsuperscript{15} The first of these was the fact-law dichotomy, instituted to separate the technicalities of the law from the facts. Under this system, the defendant, presumably the person most familiar with his case, gave a factual presentation to the court, while his counsel informed the court of the applicable points of law.\textsuperscript{16} The second development restricting expansion was that only persons in civil cases and those accused of misdemeanors were entitled to the full benefits of counsel. Those charged with the more serious crimes of treason and felony were denied the aid of an attorney.\textsuperscript{17}

Despite these temporary setbacks, the right to counsel grew steadily over time. In 1695, Parliament passed an act\textsuperscript{18} which provided that an accused was to have counsel in cases of treason and misprison of treason\textsuperscript{19} for matters of both law and fact. It further provided for the appointment of counsel for indigent defendants.\textsuperscript{20} The eighteenth century witnessed an increase in the functions of counsel; a defendant could have the assistance of counsel during all parts of the trial except the presentation of evidence, a prerogative held only by the King's Counsel.\textsuperscript{21} Thus, the role of counsel in assisting the defendant at trial, the critical point of confrontation in the criminal process, became fixed.

Though the American colonists adopted the majority of the English common law in both its substantive and procedural

\begin{enumerate}
\item[15.] Note, \textit{Further Expansion of Criminal Defendant's Right to Counsel}, supra note 12, at 454. See Note, supra note 11, at 1022, 1032-33.
\item[18.] The act passed by Parliament regulating trials in cases of treason and misprison of treason was The Treason Act, 1695. See Note, supra note 11, at 1027 n.153.
\item[19.] “Misprison of treason” refers to the bare knowledge and concealment of an act of treason or treasonable plot by failing to disclose it to the appropriate officials; if participation or assent were involved, the individual would be a principal and, thus, the appropriate charge would be treason. \textit{Black's Law Dictionary} 903 (rev. 5th ed. 1979).
\item[20.] W. Beaney, \textit{The Right to Counsel in American Courts} 9 (1955). It was not until 1836 that all distinctions between facts and laws were abolished by statute and defendants accused of felonies were allowed a complete defense. English judges tended to permit counsel to argue points of law, however, and, by a generous interpretation of what constituted a legal question, broadened the rights of the accused in practice though in theory no such rights existed. \textit{Id.} at 9, 24.
\item[21.] \textit{Id.} at 10.
\end{enumerate}
aspects, the right to counsel in America deviated from its English counterpart in certain respects. Those colonies that recognized the right to counsel generally did so statutorily. Prior to the Revolution, four colonies recognized a right to counsel more extensive than that recognized in the mother country. In these colonies, not only did the accused enjoy a full right to retain counsel, he also enjoyed the right to have counsel appointed if he was either indigent or charged with a capital crime. By 1789, the year James Madison proposed the sixth amendment, most states had included a right-to-counsel clause in their constitutions; eleven states had abolished, either directly or impliedly, the fact-law distinction. The colonists thus recognized that counsel served not only as a source of technical aid for the accused but also as a buffer between the forces of the state and the accused at all critical points of confrontation.

Modern Posture

The modern conception of the right to counsel emerged in 1932, when the United States Supreme Court decided in Powell

22. Id. at 14-18.
23. Id. at 25.
24. Id. at 18. In Connecticut, the accused enjoyed a full right to retain counsel and to have counsel appointed if indigent. Pennsylvania, Delaware, and South Carolina allowed appointment of counsel where a capital crime was charged and the accused requested it. Id. It must be noted, however, that there is little historical data on the actual judicial practice that existed in the colonies at any time before or after the Revolution. Hence, historical evidence of a statutory provision extending the right of counsel may well indicate a technical advance rather than a practical one. Id. at 18-22.
25. Note, supra note 11, at 1030. Only two states lacked a provision regarding the right to counsel—Rhode Island and Georgia.
27. Note, supra note 11, at 1033-34. See United States v. Ash, 413 U.S. 300 (1973). The Court in Ash specifically cited the adoption of the institution of the public prosecutor as an additional motivation for the American extension of the right to counsel. In essence, the expansion of the right stemmed from "... a desire to minimize the imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official." Id. at 309.
28. From 1791 until 1932, the federal and state courts saw relatively few cases involving the right to counsel. One commentator has suggested that the increasing urbanization of American society contributed to the increase in the number of indigent, unrepresented defendants before the courts. In response, the state courts developed uniform policies to deal with the problem, which as a whole, were not designed to provide adequate representation to the indigent. Further, a public callousness to the defendant's right developed as a result of the increasing national awareness of crime in the twenties,
that the right to counsel in a capital case is a fundamental right guaranteed by the due process clause of the fourteenth amendment. The Court recognized that counsel should be present at any critical stage of the proceedings against the accused and held that the period from arraignment to trial is such a critical stage. Where the defendants are indigent, as was the case in Powell, counsel must be appointed to represent the defendants. The Powell decision initiated a series of rulings through which the Supreme Court, by its liberal interpretation of the term "critical stage," gradually widened the scope of the right to counsel.22

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29. 287 U.S. 45 (1932). Seven black defendants were accused of rape and pleaded not guilty. No inquiry was made into whether they had, or were able to employ, counsel. Id. at 49. The trial court appointed the entire membership of the local bar to represent them; one attorney definitely designated to defend them appeared the morning of the trial. Id. at 49, 53. The defendants were convicted and sentenced to death. Id. at 50. The Supreme Court reversed the conviction on the ground that the defendants had not been accorded their right to counsel. Id. at 58, 73.

30. Id. at 71. The rationale underlying the Powell decision is cited to support the need for appointment of counsel generally:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and the knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id. at 68-69.

31. Id. at 57, 71.

32. A number of cases decided by the Court amplified sixth amendment protection at trial. The first decision involving the right to appointed counsel in the federal courts was Johnson v. Zerbst, 304 U.S. 458 (1938). There, the Court held that an indigent was entitled to court-appointed counsel in a felony prosecution and that a federal conviction without counsel was subject to collateral attack in habeas corpus proceedings. Id. at 462.

This decision was reaffirmed in Betts v. Brady, 316 U.S. 455 (1942), when the Court held the appointment of counsel was not a fundamental right to a fair trial. Id. at 461-62. The failure of state courts to appoint counsel in non-capital cases was not a denial of due process under the fourteenth amendment. Id. at 473.

Almost two decades later, Betts was overruled by Gideon v. Wainwright, 372 U.S. 335 (1963). This decision, involving a felony prosecution, firmly established the full incorporation by the fourteenth amendment of the sixth amendment guarantee of counsel for indigent criminal defendants. Id. at 342-45. This notion was expanded in Argersinger v.
Of significance is the perceptible evolution of the role of counsel that has occurred over the time period in which these cases were decided. Traditionally, notions of justice dictated that an attorney should be present at trial to shield the accused from the forces of the state. These basic functions of counsel were circumscribed by the trial process itself; an attorney was needed to make legal arguments and to prepare or present evidence. More recently, the development of the formal office of public prosecutor and the emergence of the modern police force have increased the number of potential confrontations between an accused and

Hamlin, 407 U.S. 25 (1972), which held that no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless represented by counsel at trial. The Argersinger Court emphasized the rationales articulated in Powell and Gideon in recognizing the right to counsel in any criminal trial when a deprivation of liberty occurs. Id. at 31-33.

Other decisions of the Supreme Court extended the sixth amendment right to counsel to every potential critical stage in the criminal process. In Massiah v. United States, 377 U.S. 201 (1964), government agents obtained incriminating statements from the accused while he was free on bail by installing a radio transmitter in the car of a friend. The Court held that the use of incriminating statements made by a person who has been indicted, in the absence of his attorney, violates the sixth amendment right to counsel. Id. at 206.

Statements were obtained from the accused during interrogation in the absence of counsel in the case of Escobedo v. Illinois, 378 U.S. 478 (1964). The Escobedo Court stated that when one individual is the focus of an investigation by the police, he may not be denied access to his attorney. Id. at 490-91. Thus, Escobedo extended the right to counsel to stages before the levying of formal charges. However, the Escobedo holding was limited to its facts in Miranda v. Arizona, 384 U.S. 436 (1966). In Miranda, the Court announced the system of warnings to be employed before a defendant may be interrogated. Essential to this system was the presence of an attorney during questioning to effectuate the protection of the suspect's right at trial. Id. at 445-70.

The United States Supreme Court has deemed both the arraignment and the preliminary hearing critical stages. In Hamilton v. Alabama, 368 U.S. 52 (1961), the defendant was denied counsel during arraignment. The Court reasoned that the arraignment was a critical stage in the criminal process under Alabama law. Id. at 52. Certain defenses had to be pleaded and various motions had to be made only at this point in the proceeding. A failure to do either would affect the subsequent trial. Id. at 53-54. Similar reasoning was employed by the Court with regard to the preliminary hearing stage in Coleman v. Alabama, 399 U.S. 1 (1970). Although a preliminary hearing was not a required step in an Alabama prosecution, when held, the presence of an attorney was essential to protect the accused from an improper prosecution. Id. at 8-10.

The right to counsel has also been extended to post-indictment lineups in United States v. Wade, 388 U.S. 218 (1967). The majority of the Court held that, although the lineup did not violate the fifth amendment, it did represent a critical stage in a criminal proceeding and, therefore, the sixth amendment required the presence of counsel. Id. at 226, 236-39. Central to the sixth amendment holding was the Court's belief that the absence of counsel at the lineup would cause prejudice to the defendant, thus affecting the fairness of the subsequent trial. Id.

33. See supra text accompanying notes 21-27.
the state, thereby expanding the need for counsel at these events. Further, confrontations have begun to occur earlier in the criminal process; long before trial, such confrontations now take place at the pretrial and incarceration stages if not at the investigative or police stages. With regard to the “critical stage” analysis enunciated in Powell v. Alabama, the arena of action for counsel has slowly but steadily expanded to include pretrial confrontations.

The Supreme Court has set forth two criteria to be examined in making a determination of whether a stage in the criminal process is critical. First, the court must decide whether the confrontation, in the absence of counsel, creates the possibility of unfairness or prejudice that would manifest at trial. Second, the court must inquire whether the presence of counsel at the confrontation would help to avoid the prejudice. The Court’s use of this analytical framework reflects its concern for the preservation of counsel’s effectiveness at trial.

34. See Note, supra note 11, at 1040-42.
36. 287 U.S. 45 (1932). The Court stated: During perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

Id. at 57.
37. See supra note 32.
39. See Gilbert v. California, 388 U.S. 263 (1967) and Schmerber v. California, 384 U.S. 757 (1966) for situations not held to be critical stages. Gilbert established that no right to counsel attaches in taking handwriting exemplars. The Court held that a handwriting exemplar, in contrast to the context of what is written, is an identifying physical characteristic and outside the scope of fifth amendment protection. 388 U.S. at 266-67. Further, the taking of the exemplar was not a critical stage in the trial because there was minimal risk that the absence of counsel would derogate from the accused’s right to a fair trial. The accused had the opportunity to cross-examine the prosecution’s handwriting expert and to present the evidence of his own expert, thus preserving the right to a meaningful confrontation at trial. Id. at 267.

The Schmerber Court dealt with the issue of extraction of blood samples for analysis. The Court ruled that since the blood test evidence was neither a testimonial nor communicative act, it was not inadmissible on fifth amendment grounds. 384 U.S. at 765.
The role of the lawyer as spokesman for and adviser to the accused has remained essentially the same throughout the expansion of the sixth amendment guarantee of right to counsel. It has been enhanced, however, by the increasing number of pretrial situations in which the presence of counsel has been deemed crucial for the preservation of a fair trial. For example, in *Hamilton v. Alabama*, the Court envisioned the attorney as an indispensable source of advice if the defendant was to plead intelligently at the arraignment proceeding. In *Coleman v. Alabama*, the Supreme Court listed several functions of an attorney at a preliminary hearing held to determine whether there is probable cause to send a case to the grand jury. The enumerated functions include: 1) exposing fatal weaknesses in the prosecution's case; 2) preserving testimony favorable to the accused of a witness who does not appear at trial; 3) fashioning impeachment tools for use in cross-examination; 4) discovering the case of the prosecution; and 5) arranging for matters such as psychiatric examinations and information on bail.

The case of *United States v. Wade* established recognition of yet another pretrial critical stage wherein the presence of counsel

Further, since the accused had no right to refuse the test, the Court suggested that counsel could be of no help and therefore rejected the right to counsel claim. *Id.* at 765-66.

In *United States v. Ash*, 413 U.S. 300 (1973), however, the Court focused on whether counsel's presence would prevent prejudice at the event itself rather than focusing on whether counsel's presence would prevent prejudice at the defendant's trial. The Court ruled that an accused had no right to counsel while witnesses viewed pretrial photo displays for purposes of identification. *Id.* at 321. The Court reasoned that since the accused himself is not present at the time of the photographic display, no confrontation with the prosecutor occurs. *Id.* at 317. Absent a confrontation, the Court refused to consider the prejudice inherent in a photo display or the aid an attorney could render in helping to mitigate that danger. *Id.* at 317-21.


41. 368 U.S. 52 (1961). *See also* *White v. Maryland*, 373 U.S. 59 (1963) (defendant's plea of guilty at a preliminary hearing in absence of counsel was deemed violative of defendant's constitutional rights).

42. *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961). It was only at the arraignment proceeding that the defense of insanity could be pleaded and pleas in abatement or motions challenging grand jury composition be made. *Id.*


44. *Id.* at 9.

45. 388 U.S. 218 (1967). In *Kirby v. Illinois*, 406 U.S. 682 (1972), the Court refused to extend the protection of the sixth amendment to pre-indictment confrontation. Kirby was arrested and later identified while seated at a table at the police station. He had not been advised of his right to counsel nor was counsel present. The Court emphatically stated that adversary judicial criminal proceedings may be initiated "by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 689. However,
is necessary under sixth amendment standards. *Wade* involved post-indictment lineups. Because lineups are susceptible to rigging and other schemes that foster suggestibility, the Court found them "peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." Counsel was viewed by the Court as being more sensitive to improper influences than the accused himself and better able to effectively reconstruct the events at trial. The Court, therefore, required the presence of counsel at the lineup to insure a meaningful confrontation at the trial itself.

Finally, in *Massiah v. United States* the Court held that the sixth amendment precludes the surreptitious elicitation of incriminating statements from a defendant who has been indicted and who has retained a lawyer. *Massiah*'s greatest significance, however, lies in its establishment of the post-indictment period as a critical stage for interrogation. Once formal judicial proceedings are initiated by the defendant's appearance in court, *Massiah* allows no further interrogation of the defendant in the absence of counsel. The Court was silent on the specific role counsel would play in such a situation, but presumably it would be a protective or shielding function.

Thus, the dimensions of the right to counsel have extended beyond the traditional limits of the trial court into those areas of the criminal process deemed critical stages. The attorney serves as a shield against the unrestricted exercise of government power to maintain the fundamental fairness of the criminal process. The objective of this note is to explore the issue of whether

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47. Id. at 230-32.
48. Id. at 236.
50. 377 U.S. at 206.
51. Id.
52. Id.
the use of electronic listening devices impinges on any of the
designated critical stages, most specifically interrogation after
the commencement of formal judicial proceedings. A necessary
step in arriving at that answer is to examine Massiah and its
progeny in an effort to delineate sixth amendment policy on
interrogation of counsel-represented suspects.

EVOLUTION OF SIXTH AMENDMENT POLICY:
INTERROGATION OF COUNSEL-REPRESENTED SUSPECTS

United States v. Massiah

The first significant Supreme Court decision dealing with the
issue of interrogation of counsel-represented suspects is the 1964
case of United States v. Massiah. In Massiah, the accused and
an accomplice, a man named Colson, had been indicted for
smuggling narcotics into the country. Massiah retained a law-

der, pleaded not guilty and was released on bail. Subsequently,
and without informing Massiah, Colson agreed to assist the
prosecution. Colson arranged a meeting with Massiah during
which incriminating statements made by Massiah were trans-

mitted to a federal agent by means of a transmitter hidden in

Underlying the Law of Confession, 17 AM. CRIM. L. REV. 1, 10 (1979). Grano describes the
sixth amendment as having a "shielding" function against the unrestricted use of
government power. Since sixth amendment rights are based on the accusatorial nature of
the criminal justice system, they are inapplicable prior to the commencement of formal
judicial proceedings. Id. at 22-24.

54. 377 U.S. 201 (1964). The Supreme Court decision is discussed in: Enker & Elsen,
Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois, 49 MINN. L.
REV. 47 (1964); Kurland, The Supreme Court, 1963 Term, 78 HARV. L. REV. 179, 217 (1964);
Note, The Right to Counsel, 17 BAYLOR L. REV. 448 (1965); Note, Right to Counsel, 3 DUQ.
L. REV. 99 (1965); Note, The Coming of Massiah: A Demand for Absolute Right to Coun-
sel, 52 GEO. L.J. 825 (1964) [hereinafter cited as Note, The Coming of Massiah]; Note,
Sixth Amendment Right to Counsel, 48 MARQ. L. REV. 247 (1964); Note, The Admissibility
of Voluntary Statements Made in Absence of Counsel, 16 MERCER L. REV. 343 (1964);
Note, Interrogation in the Absence of Counsel, 19 SW. L.J. 384 (1965); Note, Admissibility
of Voluntary Statements Made by An Accused in the Absence of Counsel, 39 Tul. L. REV.
581 (1965). See also Robinson, Massiah, Escobedo, and Rationales for the Exclusion
of Confessions, 56 J. CRIM. L. CRIMINOLOGY & POLIC. SCI. 412 (1965) (criticizing trend of
excluding confessions).

55. Massiah had been arrested, arraigned, and indicted for possession of narcotics
aboard a United States vessel in April, 1958. 377 U.S. at 202. In July, 1958, a superseding
indictment was returned charging Massiah and Colson with the same offense, and, in
separate counts, charging Massiah, Colson and others with having conspired to possess
narcotics aboard a United States vessel, and to import, conceal, and facilitate the sale of
narcotics. Id.

56. Id.
Colson’s car.\textsuperscript{57} Massiah was convicted of several narcotics offenses; the convictions were affirmed by the court of appeals.\textsuperscript{58}

Though Massiah argued that his fourth amendment rights were violated by the use of the radio transmitter,\textsuperscript{59} the Court focused on the sixth amendment violation.\textsuperscript{60} The Court held that the use of incriminating statements made after indictment and in the absence of counsel violated the sixth amendment right to counsel.\textsuperscript{61} In arriving at its decision, the Court adopted the principle that the right to counsel attaches as soon as a person is formally charged with a crime or adversarial proceedings have

\begin{itemize}
\item \textsuperscript{57} Id. at 203.
\item \textsuperscript{58} United States v. Massiah, 307 F.2d 62 (2d Cir. 1962).
\item \textsuperscript{59} Prior cases with factual situations analogous to Massiah were decided on the fourth amendment guarantee against unreasonable search and seizure. In On Lee v. United States, 343 U.S 747 (1952), a government informer entered the defendant’s laundry and engaged him in a conversation involving the illegal sales of narcotics. Id. at 747-48. The informant was wired for sound to transmit the conversation to a federal narcotics agent who could see and hear the defendant talking. The Court held that there was no unreasonable search and seizure because no trespass was committed; the informant entered with the implied invitation of the accused. Id. at 751-52.
\item The trespass test was again used in Lopez v. United States, 373 U.S. 427 (1963). The admissibility of a recording of a conversation by an IRS agent through the use of a wire recorder was challenged as being in violation of the fourth amendment. The agent testified to the conversation regarding an alleged bribery. The Court held that “eavesdropping” was not involved because the recording device was used only to obtain the most reliable evidence of a conversation in which the agent was a participant and could disclose. Id. at 439. Further, there was no trespass since the agent was in the defendant’s office by consent. Id. at 438.
\item Electronic devices were concerns of Silverman v. United States, 365 U.S. 505 (1961) and Goldman v. United States, 316 U.S. 129 (1942). In Silverman, police officers pushed a “spike mike” into the home of the defendant. The Court refused to admit the evidence because the device touched the wall committing trespass. 365 U.S. at 512. In Goldman, federal agents surreptitiously entered into and concealed a dictaphone in the defendant’s office and also placed a detectaphone against the wall of an adjoining office. The dictaphone malfunctioned but the detectaphone worked and evidence obtained was admitted at trial. The Court held that the evidence was obtained from the detectaphone which did not come in contact with the defendant’s property. Therefore, the evidence was not obtained through trespass. 316 U.S. 134-35.
\item \textsuperscript{60} 377 U.S. at 204.
\item \textsuperscript{61} Id. at 206. It was not until Massiah that courts were able to exclude confessions under a sixth amendment analysis. It was a significant departure from the case-by-case voluntariness analysis under the due process clause of the fourteenth amendment. C. Whitebread, Criminal Procedure: An Analysis of Constitutional Cases and Concepts 290 (1980).
\end{itemize}

Drawing the line at indictment has elicited criticism both from members of the Supreme Court and from commentators. See Kirby v. Illinois, 406 U.S. 682, 699 (1972) (Brennan, J., dissenting); Escobedo v. Illinois, 378 U.S. 478, 488 (1964); Kamisar, Brewer v. Williams, Massiah, and Miranda: What is “Interrogation?” When does it Matter?, 67 Geo. L.J. 1, 81 (1978); White, Rhode Island v. Innis: The Significance of a Suspect’s Asser-
otherwise been initiated against him.\textsuperscript{62}

That there was an absence of interrogation in the traditional sense did not concern the Court.\textsuperscript{63} Rather, the Court focused on the intent of the government in attempting to elicit deliberately statements from the accused after indictment and in the absence of counsel.\textsuperscript{64} The Court, agreeing with the dissenting opinion of the court of appeals, stated that if the prohibition of interrogation after indictment is to "have any efficacy, it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse."\textsuperscript{65} The \textit{Massiah} Court thus sanctioned the characterization of deliberate elicitation as a form of interrogation.\textsuperscript{66}

\textbf{Brewer v. Williams}

Thirteen years later, in \textit{Brewer v. Williams},\textsuperscript{67} the relationship between interrogation and the sixth amendment was again the prominent issue addressed by the Court. In \textit{Brewer}, a warrant was issued for the arrest of Robert Williams, a mental hospital escapee, following the disappearance of a ten year-old girl in Des

\begin{footnotes}
\footnotetext{62}{377 U.S. at 204. This principle was first adopted by four concurring justices in Spano v. New York, 360 U.S. 315 (1959). \textit{Spano} was a traditional "coerced confession" case. The defendant, a 25 year-old immigrant with a high school education, surrendered to the police after he had been indicted for murder. \textit{Id.} at 317. After his attorney left the station, the defendant was questioned for eight straight hours. \textit{Id.} at 318-19. The defendant finally confessed when Bruno, a friend of Spano and also a rookie police officer, told Spano that he, Bruno, would lose his job unless Spano confessed. \textit{Id.} at 319. The Court excluded the confession on the ground that the confession was involuntary. \textit{Id.} at 323. The "indictment rule" was proposed by Justices Douglas and Stewart in their concurring opinions. Justices Black and Brennan joined in these opinions.}

\footnotetext{63}{377 U.S. at 206. One commentator has suggested that even had Massiah been less seriously imposed upon due to the lack of an inherently coercive atmosphere, his rights would have been more seriously violated because he did not know he was under interrogation by a government agent. Kamisar, supra note 61, at 39.}

\footnotetext{64}{377 U.S. at 206.}

\footnotetext{65}{United States v. Massiah, 307 F.2d 62, 72 (2d Cir. 1962).}

\footnotetext{66}{377 U.S. at 206.}

Moline, Iowa. After a telephone conversation with a Des Moines attorney, Williams surrendered to the Davenport police. In transporting Williams from Des Moines to Davenport following arraignment, a detective delivered the "Christian burial" speech. Shortly thereafter, Williams directed the police to the girl's body. The defendant then petitioned and was granted a writ of habeas corpus. The Eighth Circuit affirmed the judgment on fifth and sixth amendment grounds. The Supreme Court chose only to address the right to counsel under the sixth and fourteenth amendments.

In affirming the lower courts, the Supreme Court relied on three sixth amendment arguments. First, the Court stated that Williams was clearly entitled to the assistance of counsel. The Court pointed out that the issuance of an arrest warrant and the defendant's arraignment on that warrant signaled the initiation of judicial proceedings after which the right to counsel attached. That the defendant exercised the right was apparent by his employment of two attorneys prior to the trip to Des Moines. Second, the Court found that William's sixth amendment rights

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68. 430 U.S. at 390.
69. Id. That Williams was arrested pursuant to a warrant and arraigned before a judge in Davenport on the outstanding warrant were important factual distinctions. Id. at 391. The acts, all examples of judicial intervention and commitment to prosecute, clearly designated the case as one falling squarely within the rule established in Massiah that after formal adversarial proceedings have commenced against an accused, he is entitled to representation.
70. Id. at 392-93. Addressing the defendant as "Reverend," the police officer said:
   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 condition, it's raining, it's sleet ing, 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 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 that we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.
71. Id. at 393.
73. 509 F. 2d 227 (8th Cir. 1974).
75. Id. at 399.
76. Id. See supra note 69.
had been violated because he had been interrogated after the sixth amendment privilege had attached. The Court chose to classify the "Christian burial" speech as interrogation, even though no question in the traditional form had been posed.\(^7\) The \textit{Massiah} Court implicitly recognized deliberate elicitation as a form of interrogation; the \textit{Brewer} Court definitively stated that the two were synonymous. Finally, the Court held that the defendant had not waived his sixth amendment rights.\(^7\) The government failed to meet its burden of proving "an intentional relinquishment or abandonment of a known right or privilege."\(^7\)

\textit{United States v. Henry}

In 1980, the Supreme Court expanded the \textit{Massiah} holding in \textit{United States v. Henry}.\(^8\) Billy Gale Henry was arrested and indicted for armed bank robbery.\(^8\) While incarcerated and awaiting trial, Henry became acquainted with Edward Nichols, a paid government informant.\(^8\) An agent of the Federal Bureau of Investigation requested Nichols to be alerted to any statements made by federal prisoners, but not to initiate conversation with any of them.\(^8\) Subsequently, Nichols reported incriminating statements by Henry concerning the bank robbery and testified to

\(^{77}\) \textit{Id.} at 399-400 (emphasis added). "There can be no serious doubt, either, that Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him." \textit{Id.}

The issue of whether interrogation is possible without questions was also raised in \textit{Rhode Island v. Innis}, 446 U.S. 291 (1980), a fifth amendment case. The Court held that interrogation takes place whenever a person in custody is subjected to express questioning or its functional equivalent. \textit{Id.} at 300-01.

\(^{78}\) 403 U.S. at 404.

\(^{79}\) \textit{Id.} The "knowing" and "voluntary" waiver standard was first articulated by the Court in \textit{Johnson v. Zerbst}, 304 U.S. 458, 464 (1938).


\(^{81}\) 447 U.S. 264, 265 (1980).

\(^{82}\) \textit{Id.} at 266.

\(^{83}\) \textit{Id.} It is unclear who initiated the conversation. In an affidavit submitted to the trial court by the Federal Bureau of Investigation agent who contacted Nichols, the agent stated, "I recall telling Nichols not to initiate any conversation with Henry. . . ." \textit{Id.} at 268.
these statements at Henry's trial.\textsuperscript{84} Henry was convicted and sentenced to a twenty-five year prison term.\textsuperscript{85}

Writing for the majority, Chief Justice Burger framed the issue as whether, under the facts of the case, "a government agent 'deliberately elicited' incriminating statements within the meaning of \textit{Massiah}."\textsuperscript{86} The Court held that he did, explaining that where the government intentionally creates a \textit{situation} likely to induce the defendant to make incriminating statements without the assistance of counsel, it attempts to "deliberately" elicit statements from the defendant in violation of the sixth amendment right to counsel.\textsuperscript{87} In arriving at this conclusion, the Court found three factors to be critical. First, the informer was acting as a paid agent of the government.\textsuperscript{88} Such monetary compensation gave the agent incentive to be more than just a passive listener.\textsuperscript{89} Second, the informer was a fellow inmate.\textsuperscript{90} The Court

\textsuperscript{84} Id. at 267.

\textsuperscript{85} Id. Henry moved to vacate the sentence pursuant to 28 U.S.C. § 2255. He alleged that Nichols had deliberately been placed in his cell to secure information about the robbery and that this violated his sixth amendment right to assistance of counsel. The district court denied the motion. The Fourth Circuit reversed and remanded. The district court again denied the § 2255 motion, concluding that the testimony of Nichols at trial did not violate Henry's sixth amendment rights. The court of appeals reversed and remanded, holding that the actions of the government were an infringement of the defendant's sixth amendment right under \textit{Massiah}. The Supreme Court granted certiorari. Id. at 267-69.

\textsuperscript{86} Id. at 270. Chief Justice Burger delivered the opinion of the Court in which Justices Brennan, Stewart, Marshall, Powell and Stevens joined.

\textsuperscript{87} Id. at 274.

\textsuperscript{88} Id. at 270-72. The Court distinguished Henry from two other cases involving the use of government agents. United States v. White, 401 U.S. 745 (1971) (plurality opinion); Hoffa v. United States, 385 U.S. 293 (1966). Hoffa was overheard by a government agent while planning to bribe a juror. He argued that his right to counsel had attached, because under \textit{Escobedo}, he had become the focus of an investigation. Therefore, his statements were inadmissible under \textit{Massiah}. The Court rejected his claim. 385 U.S. at 309-10. In \textit{White}, a government informer, carrying a concealed radio transmitter, engaged the defendant in conversations that were electronically overheard by federal narcotics agents. The Court upheld the admissibility of the evidence despite a fourth amendment challenge. Both cases differ from Henry in that the right to counsel had not attached through the initiation of formal adversarial proceedings at the time the incriminating statements were made.

The dissenting justices in Henry relied upon Hoffa as support for the proposition that if a defendant voluntarily relinquishes his right by talking to authorities, or discloses information to someone who he mistakenly believes will not report it to the authorities, he is accountable for his actions. Both seem to gloss over the post-indictment factor. See United States v. Henry, 447 U.S. 264, 281 (1980) (Blackmun, J., dissenting); id. at 294 (Rehnquist, J., dissenting).

\textsuperscript{89} 447 U.S. at 270-71.

\textsuperscript{90} Id. at 273.
noted that such circumstances act to lull a defendant into a false sense of security and cause him to make statements he would not ordinarily make to a person he knew to be a government agent. Finally, the Court emphasized that the defendant was incarcerated at the time the conversation took place. The mere fact of confinement imposes pressures on the accused; confinement may bring into play subtle influences that would make a defendant particularly susceptible to the ploys of undercover agents.

Justice Blackmun wrote a strong and lengthy dissent in which Justice White joined. Their chief concern was what they considered to be an abandonment of the Massiah doctrine; they maintained that Henry, in substance, fashioned a new test. Justice Blackmun noted that the common element of the Massiah line of cases was "deliberate, designed and purposeful tactics" or specific intent to elicit information. Accordingly, the addition of the "likely to induce" element, substantially altered the Massiah rule. It created the possibility that the evidence gleaned from an otherwise proper interrogation could be excluded if a court, at trial, decided it likely that the policeman's actions would or could have induced the statements.

A Summary of Sixth Amendment Principles

The Massiah, Brewer and Henry cases, incongruous as they may seem, represent the Court's articulated sixth amendment policy involving interrogation of counsel-represented suspects. In Massiah, the Court held that the use of incriminating statements deliberately elicited after indictment and in the absence of counsel violated the sixth amendment. Though the Massiah test emphasizes the intent of the government in eliciting incriminating statements, it leaves open the possibility that such elicitation may take a form other than the agent directly and actively eliciting information from the accused. The government could intentionally create a situation by which an accused could be lulled

91. Id.
92. Id. at 273-74 (emphasis added).
93. Id. at 280 (Blackmun, J., dissenting).
94. Id.
95. Id.
97. See infra notes 131-45 and accompanying text.
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into making incriminating statements. 98

The Brewer opinion began to close the opening left by Massiah. There, the Court chose to characterize the "Christian burial" speech as a form of deliberate elicitation and as interrogation for sixth amendment purposes. 99 Again, as in Massiah, no emphasis was placed on the active, direct supplications of the police in eliciting the information from the suspect. Indeed, the Brewer scenario can be viewed as a situation intentionally structured by the police to obtain a desired end.

In Henry, the Court has closed further the opening left by Massiah. "Deliberate elicitation" takes on an entirely new form in Henry. There, the Court defines it as intentionally creating a situation likely to induce the defendant to make incriminating statements. 100 Emphasis swings from the intent of the government agents to the result of their efforts in structuring a situation to gain incriminating evidence. It is within this context that the use of electronic listening devices may result in a violation of the sixth amendment right to counsel.

INANIMATE ELECTRONIC DEVICES AS A VIOLATION OF SIXTH AMENDMENT RIGHT TO COUNSEL: A LOGICAL OUTGROWTH OF HENRY

The use of inanimate listening devices, 101 a form of electronic surveillance, 102 has traditionally been dealt with as a type of search and seizure, an intrusive means of invading an individual's right of privacy. Consequently, cases on the subject have

98. Id.
101. An inanimate listening device, or bug, refers to a miniature device which overhears, broadcasts, or records a conversation without the necessity of penetrating a wire. A bug is considerably more intrusive than a wiretap since it can hear all conversations within its range. It must, however, be installed on the premises and plugged in or recharged. J. Carr, The Law of Electronic Surveillance 2, 3 (1977). See generally S. Dash, R. Schwartz & R. Knowlton, The Eavesdroppers (1959); A. Westin, Privacy & Freedom (1967).
102. Electronic surveillance includes a second category of eavesdropping devices, those which intercept our communications without entry to the premises. The most common of these is the wiretap. A wiretap basically involves a connection to the wires in which the conversation is carried. J. Carr, supra note 101, at 2. See generally C. Fishman, Wiretapping and Eavesdropping (1978); M. Paulsen, The Problems of Electronic Eavesdropping (1977).
fallen within the purview of the fourth amendment.\footnote{103} Though the Supreme Court has sanctioned the use of electronic surveillance in certain circumstances,\footnote{104} it has exhibited marked wariness and unease in dealing with the subject.\footnote{105} Since \textit{Olmstead v. United States},\footnote{106} the earliest electronic surveillance case to reach the Supreme Court, members of the Court have expressed their disdain and disgust with all forms of electronic eavesdropping, questioning whether the cost of using such techniques outweighs any benefits derived from them.\footnote{107} In \textit{Olmstead}, the Court announced the "trespass doctrine" under which warrantless interceptions of oral communications, accomplished without physical trespass to a constitutionally protected area, were not

\begin{footnotesize}
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\item \footnote{103} The fourth amendment provides:
\begin{quote}
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon public cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
\end{quote}
U.S. CONST. amend. IV.
\item \footnote{104} Prior to 1967, the interception of oral communication by any form of electronic listening device or wiretap, was excluded from fourth amendment protection as long as no physical trespass to property was involved. \textit{See supra} note 59. After the Court's decisions in \textit{Berger v. New York}, 388 U.S. 41 (1967) and \textit{Katz v. United States}, 389 U.S. 347 (1967), electronic eavesdropping could be utilized by the government for law enforcement purposes within the limits set out in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1976 & Supp. IV 1980). For a discussion of \textit{Katz}, \textit{Burger} and Title III, see \textit{infra} notes 117-27 and accompanying text. Generally, the use of secret agents who are wired for sound to implement face to face eavesdropping is not covered by the fourth amendment based on the premise that an individual takes a risk that the other party to the conversation would consent to the conversation being overheard by others. \textit{See United States v. White}, 401 U.S. 745 (1971); \textit{Lopez v. United States}, 373 U.S. 427 (1963).
\item \footnote{106} \textit{277 U.S. 438} (1928). \textit{Olmstead} was a wiretapping case. The \textit{Olmstead} rule was later applied in \textit{Goldman v. United States}, 316 U.S. 129 (1942), the first bugging case before the Court. For a discussion of the facts of \textit{Goldman}, see \textit{supra} note 59.
\item \footnote{107} \textit{See infra} text accompanying notes 108-30.
\end{itemize}
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deemed violations of an individual’s fourth amendment rights. Though the Constitution protected an individual’s property, it did not afford the same protection to his right of privacy.

Justice Holmes dissented, calling wiretapping a “dirty business” and stating that “it is a less evil that some criminals should escape than that the government should play an ignoble part.” Justice Brandeis also dissented, expressing his fear of the impact of the development of modern electronic eavesdropping equipment on society. Brandeis warned that wiretapping may be only the first in a line of increasingly sophisticated means by which the government can inobtrusively invade the sanctity of the home and queried, “Can it be that the Constitution affords no protection against such invasions of individual security?”

In On Lee v. United States, a case authorizing eavesdropping via equipment concealed on the person of a party to the conversation, Justice Frankfurter expressed his bias against extending legal sanction to such “dirty business” because “it makes for lazy and not alert law enforcement. It puts a premium on force and fraud, not on imagination and enterprise and professional training.” Justice Brennan, dissenting in Lopez v. United States, another participant monitoring case, viewed electronic surveillance with great apprehension. He stated: “Electronic aids ... make [eavesdropping] more penetrating, more indiscriminate, more truly obnoxious to a free society. Electronic surveillance, in fact, makes the police omniscient; and police omniscience is one of the most effective tools of tyranny.” In United States v. White, Justice Douglas labeled electronic surveillance the “greatest leveler of human privacy ever known.”

The Supreme Court fundamentally altered the constitutional principles governing electronic surveillance in Berger v. New

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108. The trespass doctrine requires a physical intrusion into an institutionally protected area. An individual’s fourth amendment rights are not violated unless there has been an official search and seizure of his person, a seizure of his material effects, or an actual physical invasion of his home. Olmstead v. United States, 277 U.S. at 466.
109. Id. at 470 (Holmes, J., dissenting).
110. Id. at 474 (Brandeis, J., dissenting).
112. 343 U.S. at 761 (Frankfurter, J., dissenting).
114. 373 U.S. at 466 (Brennan, J., dissenting).
116. 401 U.S. at 756 (Douglas, J., dissenting).
York and Katz v. United States, The Court in Berger held a New York surveillance statute unconstitutional because it lacked fourth amendment particularity requirements. By setting out criteria necessary to bring the state statute in line with constitutional requirements, the Supreme Court brought electronic surveillance fully within the ambit of the fourth amendment. The Court noted that the ultimate danger posed by electronic surveillance devices could easily be compared to the danger in general warrants, a catalyst to the adoption of the fourth amendment. The Katz decision redefined the scope of the fourth amendment prohibition of unreasonable search and seizure. In overruling Olmstead, the Court concluded that oral communications are protected by the fourth amendment even if the seizure is not accomplished by physical trespass. In essence, fourth amendment protection was extended to encompass the privacy upon which an individual justifiably relies.

The Berger and Katz cases set forth standards for constitutionally permissible electronic surveillance by the government for law enforcement purposes. Responding to the dictates of these cases, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968 to regulate electronic surveillance by the government for law enforcement purposes. The Act prohibits all electronic surveillance unless conducted by authorized local, state, and federal law enforcement officers engaged in the investigation or prevention of enumerated serious crimes and, even then, the surveillance is permissible only if a certain procedure is followed.

117. 388 U.S. 41 (1967). The Court found the New York eavesdropping statute unconstitutional because it failed to have applicants state the alleged crime, the place to be searched, and the type of conversation to be seized. Id. at 55.
118. 389 U.S. 347 (1967). In Katz, federal agents, without a court order, tapped a public telephone booth regularly used by the defendant for placing illegal wagers.
120. Id. at 65 (Douglas, J., concurring).
124. Id.
Yet, even in this period of regulated use of electronic surveillance, the same doubts and uneasiness manifested in pre-Title III eavesdropping cases have surfaced. For example, in *Scott v. United States*, the Court held that the proper approach for evaluating compliance with the minimization requirement of Title III is to assess objectively the agent's actions in light of the facts and circumstances confronting him at the time, without regard to his underlying good faith, intent, or motive. Absent a requirement that the officers, in good faith, attempt to minimize interception of all non-relevant conversation, the incentive to comply with the minimization requirement is greatly reduced. Justice Brennan voiced his concern that in *Scott*, "the Court has disregarded or diluted congressionally established safeguards designed to prevent Government electronic surveillance from becoming the abhorred general warrant which historically had destroyed the cherished expectation of privacy in the home."

The use of these questionable devices has now become an important issue relative to a defendant's sixth amendment right to counsel, particularly in light of the Supreme Court's opinion in *United States v. Henry*. In *Henry*, the majority reserved judgment on the situation in which a listening device is planted near the defendant, stating that such a device has no capability of leading the conversation into any particular subject or of promoting any particular responses. Justice Powell, in his concurring opinion, advanced similar views on the use of inanimate listening devices. He contended that a sixth amendment violation under *Massiah* required that the informer deliberately elicit information by his own conduct. Consequently, the sixth amendment does not bar the use of passive listening devices which collect but do not induce incriminating statements. It is

127. *Id.* at 143-44 (Brennan, J., dissenting).
128. *United States v. Henry*, 447 U.S. 264, 271 n.9 (1980). The Court also reserved the question of the "passive informant," one who is placed in close proximity to the accused but makes no effort to stimulate conversation about the crime charged. *Id.*
129. *Id.* at 277 (Powell, J., concurring).
130. *Id.* at 276 (Powell, J., concurring).
submitted that *Massiah* does not stipulate that such factors be present in order to characterize police action as deliberate elicitation. Neither *Massiah* nor subsequent cases place emphasis on who initiated or led conversations that resulted in incriminating statements. Accordingly, no such limitation can be placed on *Henry*. The *Henry* rule makes it evident that it is the environment produced by the government that induces the statement and not the action of the agent per se.

*Environment: An Integral Element of Interrogation*

*Henry* clarifies a subtle nuance of the *Massiah* doctrine and, thus, expands and refines it. The use of the words “deliberately elicit” in *Massiah* focuses on the government’s specific intent to elicit an incriminating statement but does not mandate that the government agent take an active role in eliciting the information.131 Neither the facts of *Massiah* nor the opinion of the Court places an emphasis on how the conversation between the government agent, Colson, and the defendant began.132 There is no indication that Colson was the first to broach the subject of the criminal activity. All that is known is that Colson’s instructions were to permit a radio transmitted to be installed in his car, to persuade *Massiah* to take a ride with him, and to engage *Massiah* in conversation relating to the alleged crime.133 In effect, Colson was told to create a situation which would induce *Massiah* to make incriminating statements.

The Court’s per curiam decision in *Beatty v. United States*134 illustrates that *Massiah* does not stand for the proposition that statements are rendered inadmissible only when an officer or informer actively and deliberately induces the accused to make such admission. In *Beatty*, the defendant was convicted of unlawful possession and sale of a machine gun. Sirles was a

131. See Kamisar, *supra* note 61, at 42-44. His discussion of *Massiah* demonstrates that the case’s result should not turn upon whether Colson asked any questions or even whether the two engaged in any conversation at all.
133. *Id.* at 72.
134. 389 U.S. 45 (1967). See also *McLeod v. Ohio*, 381 U.S. 356 (1965) (per curiam). This case reversed a state court holding that *Massiah* was not applicable absent questioning or deception. At the time McLeod voluntarily confessed to law enforcement authorities riding with him in a police car, he was under indictment for murder, but he was not represented by, nor did he request, counsel. *State v. McLeod*, 1 Ohio St. 2d 60, 60, 203 N.E.2d 349, 350 (1964).
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witness and a government informant who purchased the gun from Beatty. Prior to the purchase, Sirles was not instructed to engage Beatty in conversation or even to associate with him. Beatty made the sale and later contacted Sirles to speak with him about the sale and other illegal activities. Sirles received permission to attend the meeting and arranged to have the government agent in the trunk of his car with a recording device. Once at the meeting, Beatty talked freely with no inducements from Sirles. Though the agent's recording device failed, he heard the conversation in its entirety, and Beatty was convicted on that testimony.

The Fifth Circuit affirmed the conviction. The court stated that the admission of the informant's testimony did not deprive Beatty of his sixth amendment right because Beatty had initiated the meeting and was not induced or encouraged by the informer to make any statements. Dissenting Judge Ainsworth argued that the evidence was inadmissible because the "eavesdropping setup" was the result of a deliberate prearrangement with the government agent. He further noted "the inference is inescapable that he expected appellant to incriminate himself during the meeting and that he wanted a recording of the conversation for use at trial. . . ." The Supreme Court apparently agreed with Judge Ainsworth in reversing Beatty on the authority of Massiah

Henry is the culmination of the evolution of sixth amendment policy as it relates to the interrogation of suspects after formal adversarial proceedings have begun. Whereas Beatty clarified the Massiah test, the Henry decision created a new and more encompassing test than that of Massiah. Massiah, by implication, was a subjective test. The Court's use of the phrase "deliberately elicited" emphasized the subjective intent of the agent in

136. Id. at 190.
137. Id. at 184.
138. Id.
139. Id. at 190.
140. Id. at 184-85.
141. Id. at 191.
142. Id. at 190-91.
143. Id. at 193 (Ainsworth, J., dissenting).
144. Id.
engaging in an activity. The *Henry* formulation creates an objective standard which emphasizes the likely consequence of an activity. The new test switches the focus from the government's intent in deliberately eliciting a statement to the government's intent in creating a situation likely to induce such a statement. In essence, the legal principle emerging from *Henry* is that to show a violation of sixth amendment right to counsel, one need only prove that the government took affirmative action in structuring a situation in which incriminating statements would be likely to occur.

At least one lower court interpreting *Henry* has recognized that *Henry* sets forth a new standard, but has failed to grasp the full implication of it. While most of the cases to which *Henry* has been applied had specific characteristics, dealing with jail plant scenarios, persons wearing inanimate listening devices, or recorded phone conversations, the *Henry* standard never-

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146. Note, Massiah Revitalized, supra note 80, at 604.
147. Id. But see White, supra note 80, at 1239. White suggests that the *Henry* test is not entirely objective.

[It is not clear whether this test requires (1) that the government know that incriminating statements are likely to be induced by the situation it created, or (2) that the government should have known of this possibility, or (3) only that the government “intentionally create a situation” which in fact is likely to induce incriminating statements.

Id.

148. See United States v. Johnson, 516 F. Supp. 696 (E.D. Pa. 1981). The Court in *Johnson* found that the government had created a situation which they should have known was “likely to induce” the defendant to make incriminating statements when they brought the defendant in front of a magistrate for a bail hearing. *Id.* at 699. The defendant was never informed of his right to counsel and subsequently made incriminating statements at the hearing. *Id.* The Court stated that it was “quite foreseeable” that the defendant would try to explain his side of the story at the judicial hearing; therefore, the situation resulted in an impermissible interference with defendant’s right to counsel. *Id.*

Most lower court decisions holding evidence inadmissible on *Henry* grounds have arisen in the context of “jail plant” cases. See, e.g., United States v. Sampol, 636 F.2d 621 (D.C. Cir. 1980); Malone v. State, 390 So. 2d 338 (Fla. 1980); State v. La Page, 182 Idaho 387, 630 P.2d 674 (1981); State v. Webb, 625 S.W. 2d 259 (Tenn. 1981).

149. United States v. Bagley, 641 F.2d 1235, 1238 n.3 (9th Cir. 1981).

152. See, e.g., Holt v. Wyrick, 649 F.2d 543 (8th Cir. 1981); State v. Ortiz, 131 Ariz. 195,
theless expands generally the boundaries of sixth amendment protection. The words of the test do not mandate that a government agent (if there need be one) do anything in a situation to elicit a statement. Thus, the use of an electronic listening device alone is affirmative action on the part of the government to structure a situation where it expects to gain incriminating statements. Whether an agent is involved to act as a "tug" or means of inducement is not a critical element affecting the outcome.

Placing an electronic listening device in a jail cell is a deliberate elicitation of information under Henry because it places the suspect in a situation in which the police can take advantage of normal pressure to speak to a person in close proximity. Particularly where individuals are confined for a substantial length of time, conversation is likely to ensue on perhaps the only thing they have in common—their reason for being incarcerated. The nature of confinement generates the need to speak, the need to reach out for support. Consequently, if a bug were planted in


153. This is contrary to the current interpretation of the Henry test under which the role of the government agent is crucial. Lower courts have consistently found evidence of incriminating statements inadmissible only if the individual offering the statement was in the employ of or in cooperation with the government at the time the information was obtained. If the individual gathering incriminating statements was not a government agent or if he offered to cooperate with the government after having elicited such information, such evidence has been held admissible at trial. See, e.g., United States v. Surridge, 687 F.2d 250 (8th Cir. 1982); United States v. Jones, 678 F.2d 102 (9th Cir. 1982); United States v. Van Scoy, 654 F.2d 257 (3d Cir. 1981); United States v. Calder, 641 F.2d 76 (2d Cir. 1981); State v. Schad, 121 Ariz. 557, 633 P.2d 366 (1981); Barfield v. State, 402 So. 2d 377 (Fla. 1981); Sireci v. State, 399 So. 2d 964 (Fla. 1981); State v. Krause, 644 P.2d 964 (Hawaii 1982); Hall v. State, 425 A.2d 227 (Md. Ct. Spec. App. 1981).

Moreover, if an agent of the government elicits information about a crime to be committed or any crime other than that with which the accused is charged, such evidence will also be admitted at trial. See, e.g., Meyer v. State, 47 Md. App. 679, 425 A.2d 664 (1981); People v. Ferrara, 54 N.Y.2d 498, 430 N.E.2d 1275 (1981). But see State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1981) (evidence of new crime used to prove a crime for which defendant's right to counsel had attached at time information elicited held not to be admissible).

154. See Note, The Right to Counsel, supra note 67, at 123 & n.68. This note suggests that a jail plant is a deliberate elicitation because the police can take advantage of psychological pressure to speak inherent in the situation. The same principle would apply in a situation in which an electronic bug had been placed in a cell containing two men, neither of whom is a government agent. The situation is still structured to induce the same pressure.

155. See supra text accompanying notes 90-92. See also People v. Brooks, 83 A.D.2d 349, 444 N.Y.S.2d 615 (1981). The defendant was arrested, retained counsel, and was released on bail. He telephoned an alleged accomplice, who, unknown to him, was acting
a cell to gather information, and neither of the inhabitants was a paid informant, it is probable that circumstances would lead each inmate to induce the other to speak in the normal course of the day. If one man spoke on his role in a crime, the natural response from the other would be to comment on the crime with which he was charged. This result can be anticipated in other contexts where pressure or a need to speak is inherent in the situation itself.\(^{156}\)

Moreover, in view of the constitutional interests at stake, it is futile to draw artificial distinctions between active listening, passive listening, or surveillance by electronic devices because the ultimate result is the same—the accused has been deprived of his right to interpose the attorney between himself and the state. The sixth amendment expressly warrants the defendant’s use of his attorney as a shield.\(^{157}\) Thus, state use of electronic surveillance is an egregious violation of that warrant because the state, by employing secretive means, completely forecloses the defendant’s ability to exercise his right to counsel. The defendant is unaware of his peril. He has been denied the opportunity to elect whether or not to summon his attorney. His remarks can scarcely be called voluntary because he has not made a knowing, intelligent and voluntary waiver\(^{158}\) of his right to counsel, a right which attached at the moment adversarial proceedings commenced. To hold otherwise is to negate the import of the right to counsel cases.\(^{159}\)

**Policy Implications**

The only way to safeguard the sixth amendment right to counsel is to prohibit the use of electronic listening devices after adversarial proceedings have commenced. To allow the use of inanimate listening devices after counsel is given notice of the practice does not alleviate the danger inherent in the situation. The right of counsel is not protected by telling an accused that as a police informant for the purpose of participating in a stake out to snare two other accomplices. At the time the defendant made the call, he was in custody as a parole violator. The defendant made incriminating statements in the course of the conversation. Id. at 349-50, 444 N.Y.S.2d at 615-16. Citing Henry, the court held that the statement should have been excluded on sixth amendment grounds because the incriminating statements had been facilitated by the informant’s “conduct and apparent status as a person sharing a common plight.” Id. at 353, 444 N.Y.S.2d at 617.

156. See supra note 148.
157. See supra notes 32-37 and accompanying text.
158. See supra note 78.
159. See supra notes 32, 37 and accompanying text.
all conversations will be recorded whenever and to whomever he speaks.\textsuperscript{160} Since an attorney cannot maintain a continuous presence at the jail, an accused may unwittingly fall victim to a scheme or ploy devised by the police. Of utmost importance is the fact that the suspect may not have the aid of an attorney at a point when such help is needed. Moreover, such action would result in a blanket suppression of free speech. Surveillance of this kind, in the absence of imperative need, is repulsive to a free society even though it is taking place in a jail context. Police investigative needs do not constitute adequate justification. By the indictment stage, the police should have gathered adequate physical evidence and witnesses to support the case of the prosecution; if guilt is so uncertain that it can be proved only by the words of the suspect himself, then perhaps criminal proceedings should never have been commenced against the accused.\textsuperscript{161}

Further, the government's use of inanimate listening devices when counsel is present is tantamount to eavesdropping on the attorney-client relationship and may result in a violation of the sixth amendment right to counsel. Although the very essence of the sixth amendment right to effective counsel is privacy of communication with counsel,\textsuperscript{162} not every intrusion into the attorney-client relationship has been held violative of that right. In \textit{Weatherford v. Bursey},\textsuperscript{163} the Supreme Court ruled that there is no per se rule that whenever attorney-client conversations are overheard, the sixth amendment is violated and a new trial must be had.\textsuperscript{164} The Court went on to conclude that "when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial."\textsuperscript{165} \textit{Weatherford} was an informant case, however, and
the Court clearly established a distinction between cases involving the use of informants to intrude on attorney-client privileged communications and the use of electronic eavesdropping. The Court indicated that the use of an informant inhibited attorney-client communications to a lesser degree than electronic eavesdropping because one could take precautions to protect communications from a third party informant.

It is impossible to take protective measures against an electronic listening device. Assuming a bug has been planted in a defendant's jail cell during the pretrial period, the fruit of all attorney-client conferences during this critical time would be channeled to the authorities. Certainly this intrusion is purposeful and any evidence handed to the prosecutorial authorities would be tainted and prejudicial to the accused. As Justice Marshall stated in his *Weatherford* dissent, "the precious constitutional rights here... need 'breathing space to survive'".

Assuming that counsel is informed that the cell is bugged, the outcome does not change. The sixth amendment guarantee to assistance of counsel is effective only when the defendant knows his communications with his attorney are private and that all trial preparation is secure against intrusion by the government. The defendant's jail cell or the prison visitors' room is the only "office" available to the attorney to meet with his client. Making these unavailable for private communication is, in effect, the same as prohibiting such communication. Compliance with the right to counsel is thereby rendered a sham.

**A Case in Point: United States v. Hearst**

A case that illustrates the applicability of *Henry* to situations...
Inanimate Listening Devices

involving electronic listening devices is United States v. Hearst. In Henry, Chief Justice Burger cited the Hearst case in explaining the Court's reservation on the issue of whether the use of an inanimate electronic device is a violation of the sixth amendment. Under the reformulation of "deliberate elicitation" in Henry, and in light of the Court's articulated policy on the role of the attorney, the government action in Hearst would certainly have been held a violation of the defendant's right to counsel.

Patricia Hearst was tried under a two-count indictment charging her with the armed robbery of a San Francisco bank. She was convicted on both counts and sentenced to seven years in prison on one count and two years on the other. While in custody at the San Mateo County jail, she talked with a friend in the jail's visiting room. Much of the conversation was recorded by a deputy sheriff pursuant to a prison policy that such recordings be made of "very publicized cases or high security problems." The tapes of the conversation, which contained some damaging statements by Hearst were subsequently turned over to the Federal Bureau of Investigation. On appeal, Hearst argued that the deliberate, secret listening adequately met the deliberate elicitation requirement of Massiah and violated her sixth amendment right to counsel. The Court held that under Massiah, as interpreted by Brewer, there was no violation of the defendant's sixth amendment right to counsel because "there

170. 563 F.2d 1331 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978).
172. 563 F.2d at 1335.
173. Id.
174. Id. at 1344.
175. Id.
176. Id.
177. Id. Hearst based her appeal on numerous other grounds. She alleged that the trial court erred in, introducing evidence of other crimes committed while in the company of other bank robbers, ruling that she had fully waived her privilege against self-incrimination by testifying on her own behalf, excluding a tape of her psychiatrist's initial post-arrest interview with her, excluding a psycholinguist's testimony to establish that she had not written certain statements, permitting the government's experts to express their opinion on the ultimate issues of duress and voluntariness, and denying her motion for a new trial based on newly discovered evidence. Id. at 1335, 1338, 1347, 1349, 1350.
178. Id. at 1348. This position was also adopted in Wilson v. Henderson, 584 F.2d 1185 (2d Cir. 1978), cert. denied, 442 U.S. 945 (1979). A jail cell plant was involved in Wilson. Wilson's cellmate was an informant who had been instructed to keep his ears open for information but not to inquire or question. 584 F.2d at 1187. Wilson repeated to Lee, the informant, the same story he had told the police. The informant's only comment was that
was no interrogation of her—either formally or surreptitiously—by the governemnt."

The same case, if before the Court after Henry, a scant two years later, should be decided differently. Hearst had been indicted; thus, her sixth amendment protections had attached. Under the Henry rule, the recording of Hearst's post-indictment conversation would be deemed interrogation because the government created circumstances in which it had every reason to expect incriminating statements to be made by Hearst. Officials anticipated that, once Hearst was released from her cell and permitted to speak with friends, her conversation would focus on her immediate plight. If prison officials did not expect such a result, they would not have bothered to make a regular practice of recording conversations between inmates and visitors in order to obtain information.

Further, it is apparent that the police did not act in a manner consistent with the defendant's right to invoke counsel. Absent knowledge of the government action, she could not effectively use her counsel or waive her right to counsel. The

it "did not sound too good." Id. Wilson confessed shortly thereafter. The court held that there was no interrogation under the restrictive Brewer interpretation of Massiah. Id. at 1190.

Both Hearst and Henderson stand for the proposition that the interrogation requirement of Brewer limited Massiah by calling for interrogation in the traditional fifth amendment sense. The better view, in accord with the subsequent development of sixth amendment policy under Henry, is that interrogation is defined differently for fifth amendment and sixth amendment purposes. Judge Oakes, the dissenting judge in Wilson, suggested the following interpretation of the interrogation language in Brewer:

[T]he Court must be using 'interrogation' to mean both formal interrogation and 'deliberate eliciting'. . . . The interrogation language may be ill chosen, but the Court's statement that the 'clear rule' of Massiah is that the right to counsel attaches when the State 'interrogates' could not by any stretch of the imagination be interpreted as a limitation of Massiah.

584 F.2d at 1194 n.10 (Oakes, J., dissenting).

179. United States v. Hearst, 563 F.2d 1331, 1348 (1977). In addition to her sixth amendment argument, Hearst also alleged that the monitoring and recording of her conversations with visitors violated her fourth amendment rights. Id. at 1344-47. Further, she alleged that the jail supervisor's delivery of the tape to the government and the government's use of the tape at trial constituted an independent fourth amendment violation. Both arguments were summarily rejected. Id.

180. See supra note 52 and accompanying text.

181. See United States v. Crisp, 435 F.2d 354, 358 (7th Cir. 1970), cert. denied, 402 U.S. 947 (1971) ("the crucial feature of both Massiah and McLeod was the deliberate acquisition of information by police from a suspect under circumstances preventing his effective exercise or waiver of his right to counsel. . . .").

182. There was some evidence in the record to indicate that Hearst knew her conver-
government circumvented her attorney; it did not act through him as articulated sixth amendment policy demands. The government's action should not be condoned on the pretense that it was vital to prison security. If, indeed, prison security was a compelling state interest, the government would still have a heavy burden in proving that surreptitious recordings of prisoners' conversations was the only or the most effective means of protecting that interest. In the absence of such proof, a fundamental constitutional right, the right to counsel, should have prevailed.

CONCLUSION

The rationale supporting the proposition that the use of inanimate listening devices violates the right to counsel is firmly rooted in sixth amendment precedent and policy. The major objective of such policy is that the state and the accused come into the adversarial process on equal terms as "arm's length" adversaries. Once adversarial proceedings have begun, the accused is entitled to the same protection he is afforded at trial to insure the balance. Prohibiting the use of electronic devices to elicit incriminating statements outside the presence of counsel allows the Court to give optimum protection to this policy. Adoption of this rule may lead the Supreme Court one step closer to

sation was being monitored. The district judge made no definite finding on that point, however. United States v. Hearst, 563 F.2d 1331, 1347-48 n.13 (1977).

183. Brewer v. Williams, 430 U.S. at 415 (Stevens, J., concurring) ("the lawyer is the essential medium through which the demand and commitments of the sovereign are communicated to the citizen.").

184. United States v. Hearst, 563 F.2d at 1346. The Supreme Court addressed the issue of the legality of jail monitoring in Lanza v. New York, 370 U.S. 139 (1962). In dictum, the Court concluded that a jail is not a constitutionally protected area, hence, "official surveillance has traditionally been the order of the day in prisons." Id. at 143. Though Lanza relied on the doctrine of constitutionally protected areas which was amended by Katz v. United States, 389 U.S. 347 (1967), the decision that emphasized fourth amendment protection given to people rather than places, courts have consistently upheld eavesdropping in prisons. These courts have based their decisions on Lanza and the attitude that there is no reasonable expectation of privacy in a jail. The primary justification for such surveillance appears to be the need to preserve jail security. See, e.g., People v. Dominguez, 121 Cal. App. 3d 481, 175 Cal. Rptr. 445 (1981); People v. Jardine, 116 Cal. App. 3d 907, 172 Cal. Rptr. 408 (1981) (monitoring in a patrol car); People v. Estrada, 93 Cal. App. 3d 76, 155 Cal. Rptr. 731 (1979); Brown v. State, 349 So. 2d 1196 (Fla. Dist. Ct. App. 1977) (monitoring in a police car); People v. Myles, 62 Ill. App. 3d 931, 379 N.E.2d 897 (1978). But see In re Kozak, 256 N.W.2d 717 (S.D. 1977).
banning the use of any statement obtained from a suspect in the absence of counsel during the post-arraignment or post-indictment period, and perhaps that would be the proper course to follow. The police have no “right to interrogation;” it is the accused who is entitled to the right to counsel, one of the oldest procedural rights of the Anglo-American legal system and one of the most fundamental guarantees of the Constitution.

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