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Kuhlmann v. Wilson: The Sixth Amendment Right to Counsel: Government Circumvention through Surreptitious Interrogation, 20 J. Marshall L. Rev. 567 (1987)

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*KUHLMANN v. WILSON:** THE SIXTH AMENDMENT RIGHT TO COUNSEL: GOVERNMENT CIRCUMVENTION THROUGH SURREPTITIOUS INTERROGATION

The sixth amendment[1] guarantees to an individual accused in a criminal prosecution the right to assistance of counsel.[2] The United States Supreme Court has interpreted the sixth amendment to prohibit the Government from deliberately eliciting incriminating statements from an accused[3] after the right to counsel has attached.[4] In

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* 106 S. Ct. 2616 (1986).

1. U.S. CONST. amend. VI. The sixth amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the Assistance of Counsel for his defense.*

Id. (emphasis added).

2. *E.g.*, Powell v. Alabama, 287 U.S. 45 (1932). In *Powell*, the United States Supreme Court for the first time found a limited right to counsel essential to due process in some criminal cases. *Id.* The *Powell* Court stressed that "notice and hearing" were "basic elements of the constitutional requirement of due process of law." *Id.* at 68. The concept of "hearing," in turn was the basis of inferring the need for legal representation. *Id.* As Justice Sutherland explained in *Powell:*

> 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 knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every stage of the proceedings against him.

Id. at 68-69. *Accord* Gideon v. Wainwright, 372 U.S. 335 (1963) (the right to counsel of one charged with a crime is deemed fundamental and essential to fair trials). *See also* Brewer v. Williams, 430 U.S. 387 (1977) (counsel is essential to communicate demands and commitments of sovereign to the citizen); Johnson v. Zerbst, 304 U.S. 458 (1938) (the obvious truth is that the average defendant does not have the legal skill sufficient to protect himself).

3. Massiah v. United States, 377 U.S. 201 (1964). In *Massiah*, the Court held that the defendant was denied the basic protections of the sixth amendment when the government used against him at his trial evidence of his own incriminating statements, which federal agents had deliberately elicited after defendant had been indicted and in the absence of his counsel. *Id.* at 206. *See also* Maine v. Moulton, 106 S. Ct. 477 (1985) (the sixth amendment imposes an obligation on prosecutor and police not to act in a manner that circumvents the right to counsel); United States v. Henry,

Kuhlmann v. Wilson,[5] the United States Supreme Court addressed the issue[6] of whether the sixth amendment right to counsel is violated when the government places an informant in a cell with the accused to passively listen for incriminating statements.[7] The *Wilson* Court held that merely placing an informant in the defendant's cell does not violate the sixth amendment.[8] The sixth amendment

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447 U.S. 264 (1980) (the government violates the sixth amendment when it intentionally creates a situation likely to induce a defendant to make incriminating statements in the absence of counsel); *Brewer* 430 U.S. at 415 (Stevens, J., concurring) (the State cannot be permitted to dishonor an individual's effective representation by counsel).

4. The Supreme Court has held that under the protection of the sixth and fourteenth amendments, a person is entitled to the assistance of counsel at or after the time judicial proceedings have been initiated against him. *Brewer*, 430 U.S. at 398. Thus, the right to counsel is not limited to participation in the trial itself. The right attaches at earlier stages in the criminal proceedings, where absence of counsel might "well settle the accused's fate and reduce the trial itself to a mere formality." United States v. Wade, 388 U.S. 218, 224 (1967) *quoted in* United States v. Gouveia, 467 U.S. 180, 189 (1984). *See also* Kirby v. Illinois, 406 U.S. 682 (1972); Coleman v. Alabama, 399 U.S. 1 (1970); Escobedo v. Illinois, 378 U.S. 478 (1964); White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961). The Supreme Court has observed that once the government decides to prosecute, the adverse positions of the government and defendant have solidified. United States v. Gouveia, 467 U.S. 180, 189 (1984) (quoting Kirby v. Illinois, 406 U.S. 682, 289 (1972)). Therefore, the right to counsel attaches at the time the accused is arraigned. *See* Estelle v. Smith, 451 U.S. 454, 469-70 (1981); *Brewer*, 430 U.S. at 398.

5. 106 S. Ct. 2616 (1986).

6. The Court first addressed a threshold issue of whether it would serve the ends of justice to entertain a second habeas corpus petition which raised a sixth amendment claim decided adversely to the defendant on a prior petition. *Wilson*, 106 U.S. at 2621-22. *See* Sanders v. United States, 373 U.S. 1 (1963). In *Sanders*, the Court had advised federal district courts to dismiss successive habeas corpus petitions if the "ends of justice" would not be served by reaching the merits of the subsequent application. *Id.* at 15-17. Although a majority of the *Wilson* Court could not agree as to the correct standard for the availability of federal habeas corpus relief, six members did agree to deny defendant's habeas corpus petition on the merits. *Wilson*, 106 U.S. 2616 (per Powell, J., with Burger, C.J., Rehnquist and O'Connor, J.J., concurring, with White and Blackmun, J.J., concurring in result). A plurality of the Court suggested that district courts may entertain successive habeas corpus petitions only in those instances where the prisoner can make a colorable showing of factual innocence. *Wilson*, 106 U.S. at 2627 (per Powell, J., with Burger, C.J. and Rehnquist and O'Connor, J.J., joining). It is beyond the scope of this casenote to thoroughly examine the Court's analysis of the habeas corpus issue. *See* Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977); Stone v. Powell, 428 U.S. 465 (1976); Fay v. Noia, 372 U.S. 391 (1963); Waley v. Johnston, 316 U.S. 101 (1942). For a discussion of the history and purpose of federal habeas corpus relief, see generally Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966).

7. In a previous case involving a similar sixth amendment right to counsel issue, the Supreme Court anticipated but did not decide the question of whether placing a "listening post" in a cell to record incriminating admissions violates the right to counsel. United States v. Henry, 447 U.S. 264, 271 n.9 (1979). In a footnote to the majority opinion, Chief Justice Burger observed that the *Henry* case was not such that "we are called upon to pass on the situation where an informant is placed in close proximity but makes no effort to stimulate conversations about the crime charged." *Id. See infra* note 25.

8. *Wilson*, 106 S. Ct. at 2628. There is no sixth amendment violation when a

does prohibit, however, the police and their informant from acting in some manner, beyond merely listening, which is deliberately designed to elicit incriminating remarks.[9]

In 1970, Joseph Allan Wilson and two accomplices killed an on-duty dispatcher while committing an armed robbery of the Star Taxicab Garage in the Bronx, New York.[10] After his arrest and arraignment on charges stemming from these crimes,[11] the police placed Wilson in a jail cell[12] with another prisoner,[13] who, unknown to Wilson, was a police informant. Wilson initially denied any involvement in the crimes,[14] but eventually made incriminating statements which the informant reported to the police.[15]

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passive listening device collects incriminating information, since such an instrument cannot lead a conversation or prompt a reply. *See, e.g.*, United States v. Hearst, 563 F.2d 1331, 1347-48 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978) (held no sixth amendment violation where government used an electronic device to secretly record the defendant's conversation with a friend).

9. *Wilson*, 106 S. Ct. at 2630.

10. *Id.* at 2619. Just before the murder, three Star employees saw Wilson, who had worked at the garage approximately a year and a half earlier, and two men, conversing in the garage. Brief for Petitioner at 7, Kuhlmann v. Wilson, 106 S. Ct. 2619 (1986) (No. 84-1479). The three witnesses, who later identified Wilson from photographs, saw Wilson run from the dispatcher's office carrying money in his arms. Brief for Petitioner at 3. As Wilson ran past, he said: "Keep cool. I've left something on the floor for you." *Id.* One of the witnesses then looked into the dispatcher's office and saw the body of Sam Reiner lying on the floor amid scattered money. *Id.*

11. *Wilson*, 106 S. Ct. at 2619. Wilson surrendered himself four days after the crime when he learned the police were searching for him. *Id.* A Detective Cullen immediately arrested Wilson and advised him of his fifth amendment rights. Brief for Petitioner at 7, Kuhlmann v. Wilson, 106 S. Ct. 2619 (1986) (No. 84-1479).

12. *Wilson*, 106 S. Ct. at 2619. The police transferred Wilson from his original cell to another that directly overlooked the Star Taxicab Garage, the scene of the crime. *Id.*

13. *Id.* Just prior to Wilson's arrest, Detective Cullen arranged for an inmate at the Bronx House of Detention to act as an informant. Brief for Respondent at 3, Kuhlmann v. Wilson, 106 S. Ct. 2616 (1986) (No. 84-1479). Detective Cullen had known the inmate for five years and had previously employed him as an informant. *Id.* Cullen told the inmate that he would arrange for Wilson's transfer to his cell. *Id.* Cullen instructed the inmate to "see if he could find out" the names of the two accomplices, but not to question Wilson. *Id.*

14. *Wilson*, 106 S. Ct. at 2619. At the time of his arrest, Wilson told Detective Cullen that he was at the scene of the crime while looking for his brother who was employed there. Brief for Respondent at 3, Kuhlman v. Wilson, 106 S. Ct. 2616 (1986) (No. 84-1479). Wilson told Cullen that he had fled from the scene for fear of being blamed. *Id.*

15. *Wilson*, 106 S. Ct. at 2619. When Wilson looked out the cell window, he immediately became upset by the view. Brief for Respondent at 4, Kuhlman v. Wilson, 106 S. Ct. 2616 (1986) (No. 84-1479). His first words to the informant were: "Somebody's messing with me because this is the place I'm accused of robbing." *Id.* Once Wilson had begun the conversation about the crime, he told the informant essentially the same story he related to the police. *Id.* Although the informant did not question Wilson, he said: "Look, you better come up with a better story than that because that one doesn't sound too cool to me." *Id.* Over the course of the next ten days in the same cell with the informant, Wilson gradually changed his story until he admitted to planning the robbery and killing the dispatcher with two other men. *Id.* at 5. The informant supplied Detective Cullen with notes he had taken during the

Prior to trial in New York state court, Wilson moved to suppress his incriminating remarks, on the grounds they were obtained in violation of his sixth amendment right to counsel.[16] The trial judge denied the motion, because the informant had obeyed police instructions not to question Wilson about the crimes, but only to listen for the names of his accomplices.[17] In 1972, Wilson was convicted of common law murder and felonious possession of a weapon.[18] In 1973, Wilson filed a petition in federal court for a writ of habeas corpus, again raising a sixth amendment claim.[19] The federal district court refused to issue the writ.[20]

In 1980, the United States Supreme Court decided *United*

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course of Wilson's admission. *Id.*

16. *Wilson*, 106 S. Ct. at 2620. An evidentiary hearing was held to determine the admissibility at trial of Wilson's admission to the informant, in accordance with People v. Huntley, 15 N.Y.2d 72 (1965).

17. *Wilson*, 106 S. Ct. at 2620. The trial court found that Wilson's statements were "spontaneous" and "unsolicited." *Id.* The trial court considered the significance of this fact under state precedent which held that volunteered statements to police agents were admissible, because the police were never required to stop talkative defendants from admitting their crimes. *Id. See* People v. Kaye, 25 N.Y.2d 139, 250 N.E.2d 329 (1969) (a defendant's spontaneous statements to police when advised of his constitutional rights were admissible).

18. Wilson was sentenced to a term of twenty years to life on the murder conviction and to a concurrent term not to exceed seven years on the weapons count. The state appellate court affirmed the convictions and the New York Court of Appeals denied leave to appeal. People v. Wilson, 41 A.D.2d 903, 343 N.Y.S.2d 563 (1973).

19. The writ of habeas corpus was traditionally used to elicit the cause of commitment and to ensure adherence to proscribed procedures in advance of trial. *See generally* CHURCH, THE WRIT OF HABEAS CORPUS 2-30 (1884); 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 104 (1926); WALKER, THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY (1960); Collings, *Habeas Corpus for Convicts—Constitutional Right of Legislative Grace?*, 40 CALIF. L. REV. 335, 341-61 (1952); Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243, 244-45 (1965). Today habeas corpus is primarily a means for one court of general jurisdiction to exercise post-conviction review over the decision of another court of like authority. *See, e.g.*, Pollack, *Proposals to Curtail Federal Habeas Corpus for State Prisoners—Collateral Attach on the Great Writ*, 66 YALE L.J. 50 (1956); Reitz, *Federal Habeas Corpus—Post Conviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960); Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956). The Supreme Court has previously held that federal district courts have the power, on habeas corpus petition, to determine facts *de novo* on a subject already considered by a state court. *See, e.g.*, Roberts v. Richmond, 357 U.S. 220 (1958); Brown v. Allen, 344 U.S. 443 (1953); Cranor v. Gonzales, 226. F.2d 83 (9th Cir. 1955). The Court has also found in habeas corpus an appropriate remedy to challenge a conviction which was obtained through a coerced confession. Fay v. Noia, 372 U.S. 391 (1963).

20. The United States District Court for the Southern District of New York on reviewing the record found that there was no sixth amendment violation where the defendant's statements were spontaneous. A divided panel of the Court of Appeals for the Second Circuit affirmed. Wilson v. Henderson, 584 F.2d 1185 (2d Cir. 1978), *reh'g denied*, 590 F.2d 408 (2d Cir. 1978), *cert. denied*, 442 U.S. 945 (1979). Judge Oakes dissented, arguing that the police investigory techniques used against Wilson violated the *Massiah* deliberate elicitation standard. *Id.* at 1194-95. For a discussion of deliberation elicitation standard, see *supra* note 3.

States v. Henry[21] on facts similar to *Wilson*[22] and held inadmissible, as a violation of the sixth amendment right to counsel, inculpatory statements made to a paid jailhouse informant.[23] In 1982, Wilson filed a second habeas corpus petition in district court, claiming that his original petition should be reconsidered in light of *Henry*.[24] The district court denied the second petition.[25] On appeal, the court of appeals reversed the district court's denial of Wilson's petition.[26] The court found that, under *Henry*, Wilson was entitled to relief, because the government violated his sixth amendment right to counsel by intentionally staging a scene that induced Wilson to make incriminating remarks.[27]

The United States Supreme Court, granting certiorari,[28] reversed the court of appeals.[29] The Supreme Court considered whether placing a jailhouse informant in close proximity to the defendant, when the informant makes no attempt to stimulate conver-

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21. United States v. Henry, 447 U.S. 264 (1979). In *Henry*, the Court identified the circumstances under which the government circumvented the defendant's sixth amendment right to counsel when it used an undisclosed informant to elicit incriminating statements from him. *Id.* at 270. "First, Nichols was acting under instructions as a paid informant for the government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols." *Id.* The Court held that the Government interfered with Henry's right to counsel when it intentionally created "a situation likely to induce Henry to make incriminating statements without the assistance of counsel. . ." *Id.* Thus, the *Henry* Court found the defendant's statements inadmissible. *Id.* at 274.

22. Virtually every court that compared *Wilson* with *Henry* has viewed the two cases as indistinguishable. *Henry*, 447 U.S. at 281 (Blackmun and White, J.J., dissenting); Wilson v. Henderson, 590 F.2d 408, 409 (2nd Cir. 1978) (Oakes, J., dissenting); Henry v. United States, 590 F.2d 544, 553 (4th Cir. 1978) (Russell, J., dissenting) ("certainly there can be no distinction drawn between this case and *Wilson*. In fact, if anything, the facts in that case were more favorable to the defendant's claim than are the facts in this case"); United States v. Sampol, 636 F.2d 621, 637-638 (D.C. Cir. 1980) (assertions "virtually identical").

23. *Henry*, 447 U.S. at 274.

24. *Wilson*, 106 S. Ct. at 2621. Wilson sought to relitigate his sixth amendment claim on the grounds that the decision in *Henry* was a new rule of law that should retroactively apply to his case. *Id.*

25. *Id.* The District Court for the Southern District of New York distinguished the *Wilson* case from *Henry*, thus finding it unnecessary to consider whether *Henry* applied retroactively. *Id. See supra* note 24. The court noted that *Wilson* presented the question reserved in *Henry* of whether the sixth amendment forbids admission in evidence of an accused's statements to an informant, who made no effort to stimulate conversations about the crime charged. *Wilson*, 106 S. Ct. at 2621. *See Henry*, 447 U.S. at 271, n.9. The court concluded that the Constitution does not forbid admission of evidence under such circumstances. *Wilson*, 106 S. Ct. at 2621.

26. Wilson v. Henderson, 742 F.2d 741 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 3499 (1985).

27. *Id.* at 746-474. The United States Court of Appeals for the Second Circuit found *Henry* and *Wilson* to be indistinguishable. *Id.*

28. 105 S. Ct. 3499 (1985).

29. *Wilson*, 106 S. Ct. at 2622.

sations about the crime charged, violates the sixth amendment.[30] The Court determined that the accused must demonstrate that the police and their informant went beyond merely listening and took some action which was deliberately designed to elicit incriminating statements.[31] The Court then concluded that since the trial court had previously determined that the informant made no affirmative effort to elicit information from Wilson,[32] the court of appeals erred in its failure to accord those factual findings their required presumption of correctness.[33]

The Court began its analysis with an examination of a line of sixth amendment cases beginning with *Massiah v. United States*.[34] In *Massiah*, the Court held that once the sixth amendment right to counsel has attached, a defendant is denied that right when federal agents deliberately elicit incriminating statements from him in the absence of counsel.[35] The *Wilson* Court noted that the primary aim of the *Massiah* test is to protect a defendant from surreptitious investigative techniques that are functional equivalent of direct police interrogation.[36] The Court then considered the *Massiah* test as it was applied in *United States v. Henry*.[37] Although the informant in *Henry* did not question the defendant, he did stimulate conversa-

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30. *Id.* at 2628. *See supra* note 7.

31. *Wilson*, 106 S. Ct. at 2630. The Court noted that "a defendant does not make out a violation of that [sixth amendment] right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police." *Id.*

32. *Id.* For a discussion of the trial court's findings, see *supra* note 17.

33. *Wilson*, 106 S. Ct. at 2630-31.

> In any proceeding instituted in Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, *shall be presumed correct*. . .
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28 U.S.C. § 2254(d) (1966) (emphasis added).

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

35. *Id.* at 206.

36. *Wilson*, 106 S. Ct. at 2629. The defendant in *Massiah* made the incriminating admissions to one of his accomplices, who had arranged to have government agents listen over a radio transmitter. *Massiah*, 377 U.S. at 202-03. The agents told the accomplice to "engage Massiah in conversation relating to the alleged crimes." United States v. Massiah, 307 F.2d 62, 72 (2d Cir. 1962) (Hays, J., dissenting in part). The *Massiah* Court found that, under these circumstances, the government agents secretly and deliberately elicited information from the defendant in a manner that was equivalent to direct interrogation. *Massiah*, 377 U.S. at 206.

37. *Wilson*, 106 S. Ct. at 2629. In *Henry*, the Court found that the informant developed a feeling of trust and confidence with the defendant in order to engage in conversations which were likely to induce incriminating statements. *Henry*, 447 U.S. at 270. The Court held that the informant intentionally used his position to secure the necessary information and thus violated the *Massiah* deliberate elicitation standard. *Id.* at 274.

tions in order to elicit incriminating information which was held to violate the sixth amendment.[38] The *Wilson* Court emphasized that the *Massiah* and *Henry* decisions were intended to restrict police conduct which amounts to indirect and surreptitious interrogation in the absence of counsel.[39]

The *Wilson* Court noted that the trial court made a factual finding that Wilson's statements were spontaneous and unsolicited.[40] The Court reasoned that the conversations between the informant and Wilson were not the equivalent of interrogation, since the informant had obeyed specific police instructions not to ask questions.[41] The Court thus concluded that, absent some form of interrogation, or its functional equivalent, the government did not violate Wilson's sixth amendment right to counsel.[42]

Although the result of the Court's decision in *Wilson* may seem equitable, considering the gravity of the particular crime involved,[43] the Court's reasoning was deficient for two reasons which are inherently intertwined. First, in light of *Henry*, the Court's inordinate emphasis on interrogation, in the sense of direct questioning, was an overly narrow construction of the *Massiah* deliberate elicitation standard.[44] The Court failed to recognize that the standard in *Henry*

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38. The *Henry* court observed that the informant prompted the incriminating conversations through his "conduct and apparent status as a person sharing a common plight." *Henry*, 447 U.S. at 274.

39. *Wilson*, 106 S. Ct. at 2630. The Court interpreted *Henry* to require a functional equivalent of interrogation before there is a sixth amendment violation. *Id.*

40. *Id.* at 2630-31. The Court criticized the Second Circuit's revising some of the trial court's findings that Wilson's statements were voluntary.

41. *Id.* at 2630. The Court noted that Detective Cullen specifically instructed the informant not to ask Wilson questions. *Id.* The Court interpreted these instructions as a "conscious effort" to protect Wilson's "constitutional rights [under Massiah] while pursuing a crucial homicide investigation." *Id.* at 2620, n.3 (quoting Wilson v. Henderson, 584 F.2d at 1191).

42. *Wilson*, 106 S. Ct. at 2630.

43. On overturning the decision of the District Court for the Southern District of New York, the Second Circuit Court of Appeals remanded with instructions to order Wilson's release unless the State chose to retry him. Wilson v. Henderson, 742 F.2d 741, 748 (2d Cir. 1984).

44. The *Henry* Court looked to the totality of the government's behavior rather than, as in *Wilson*, focus only on whether the informant asked questions of the accused or stimulated conversations about the crime charged. *Henry*, 447 U.S. at 271. The *Henry* court recognized the need to consider all the factors, physical and psychological, which the government may employ to obtain incriminating information without directly questioning a defendant. *Id.* at 273-74 (citing Miranda v. Arizona, 384 U.S. 436, 448-54). On the subject of police interrogation, see generally C. O'HARE, FUNDAMENTALS OF CRIMINAL INVESTIGATION, 102-03 (1st ed. 1956) (appeals to conscience and other psychological ploys are the constituents of which interrogation is made). One of the categories of interrogation described in the manual is "Friendliness" which includes the subdivisions "The Helpful Advisor" and "The Sympathetic Brother", each involving the subject's desire "to square things with his own conscience." *Id.* at 102. *See generally* Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968) (physical proximity leads to psychological proximity); Smith, *The Threshold Question in Applying Miranda: What Constitutes*

encompassed more subtle forms of interrogation, as in the present case, where the state intentionally created a situation which was likely to induce the accused to make incriminating admissions.[45] Second, the Court's analysis is inconsistent with the original spirit of *Massiah*.[46] The *Massiah* test was intended to guarantee an accused the right to legal representation at all stages of a criminal proceeding, regardless of whether the government interrogates him.[47]

In examining the *Wilson* decision, it is necessary to first understand the history of the *Massiah* test.[48] The *Massiah* test evolved from the reasoning of two concurring opinions in *Spano v. New York*.[49] The concurring opinions in *Spano* held that a formally charged person has a right to the assistance of counsel, and unless he knowingly waives that right, the absence of counsel is sufficient to exclude any resulting incriminating statements.[50] Several federal courts promptly adopted this reasoning.[51] The Supreme Court then held in *Massiah* that once the sixth amendment right to counsel has attached,[52] the government may not deliberately elicit incriminating statements from a defendant in the absence of counsel.[53] The *Massiah* Court recognized that the decisive factor was not whether the defendant was interrogated,[54] but whether the government's conduct

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Custodial Interrogation?, 25 S.C.L. REV. 699 (1974); Kamisar, *"Custodial Interrogation" Within the Meaning of Miranda* in INST. OF CONTINUING LEGAL EDUC., CRIMINAL LAW AND THE CONSTITUTION—SOURCES AND COMMENTARIES 335 (1968); Rothblatt & Pitler, *Police Interrogation: Warnings and Waivers—Where Do We Go From Here?*, 42 NOTRE DAME L. REV. 479 (1967).

45. *See Henry*, 447 U.S. at 270. *See supra* note 44.

46. The *Massiah* Court was not concerned with interrogation. *Massiah*, 377 U.S. at 206. In fact, the government never interrogated Massiah in the formal sense of the word. *Id.* at 202-03. The *Massiah* Court was primarily concerned with preventing the government from circumventing an accused's right to counsel in any manner once the right had attached. *Id.* at 206. *See also* Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation"? When Does It Matter?* 67 GEO. L.J. 1, 41 ("The Constitutional Irrelevance of "Interrogation" for Massiah Purposes").

47. *Massiah*, 377 U.S. at 206. *See supra* note 46.

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

49. Spano v. New York, 360 U.S. 315 (1958) (Douglas, J., with whom Black and Brennan, J.J., joined, concurring) (Stewart, J., with whom Douglas, and Brennan, J.J., joined, concurring).

50. *Id.* at 324, 327.

51. *See, e.g.*, People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961) (admissions obtained from indicted defendant excluded when not made in presence of counsel). *See also* People v. Meyer, 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962) (holding inadmissible any statement made after arraignment in absence of counsel); People v. DiBrasi, 7 N.Y.2d 544, 160 N.E.2d 825, 200 N.Y.S.2d 21 (1960); People v. Price, 18 App. Div. 2d 739, 235 N.Y.S.2d 390 (3d Dept. 1962); People v. Wallace, 17 App. Div. 2d 981, 231 N.Y.S.2d 579 (2d Dept. 1962); People v. Karneel, 17 App. Div. 2d 659, 230 N.Y.S.2d 413 (2d Dept. 1962); People v. Robinson, 16 App. Div. 2d 184, 224 N.Y.S.2d 705 (4th Dept. 1962).

52. *See supra* note 4.

53. *Massiah*, 377 U.S. at 206.

54. There was no interrogation in *Massiah*. *Massiah*, 377 U.S. at 202-03. Massiah was released on bail at the time the government elicited incriminating informa-

was intended to obtain incriminating statements from an accused in the absence of counsel.[55]

After *Massiah*, the Court recognized, in *Brewer v. Williams*,[56] that government agents often employ subtle conversational techniques which are more effective in prompting incriminating statements than direct questioning.[57] In *Brewer*, the Court found that a policeman's appeal to the defendant's religious convictions and sense of guilt was tantamount to interrogation.[58] In a concurring opinion in *Brewer*, Justice Powell noted that the government successfully exploited an atmosphere that was conducive to psychological coercion.[59]

The Court's recognition of the psychological aspects of interrogation laid the foundation for its decision in *Henry*.[60] In *Henry*, the Court observed that an incarcerated person has a psychological inducement to seek support from those around him.[61] The Court further noted that the stress of custody may subject an accused to subtle influences which will make him particularly susceptible to the deceptions of undercover government agents.[62] Finally, the *Henry*

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tion from him. *Id.* *See supra* note 46.

55. As Judge Hays pointed out in his dissent in the court of appeals, "if [the rule advocated by the two concurring Justices in *Spano* and adopted by the New York courts] is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse." United States v. Massiah, 307 F.2d 62, 72-73 (2d Cir. 1962).

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

57. *Id.* at 399-400. In his concurring opinion, Justice Powell "join[ed] the opinion of the Court which. . .finds that the efforts of Detective Leaming 'to elicit information from William,' as conceded by counsel for [Iowa] at oral argument. . .were a skillful and effective form of interrogation." *Id.* at 412.

58. *Id.* at 399-400. In *Brewer*, the defendant, an escapee from a mental institution, was suspected of murdering a young Iowa girl who had disappeared. *Id.* at 390. Brewer, a deeply religious person, surrendered himself to the police in Des Moines. *Id.* While driving the defendant some 160 miles to Davenport, Captain Leaming engaged Brewer in conversation. *Id.* The detective addressed Williams as "Reverend" and asked that the defendant think about the fact that the next day was Christmas and that the weather was so bad it would be nearly impossible to find the girl's body by the next day. *Id.* at 392-93. The detective then suggested that Brewer consider that the young girl would not get a "decent Christian burial." *Id.* After giving the matter consideration, Brewer confessed to the murder and led the detective to the body. *Id.* at 393. The *Brewer* Court found that the detective's comments to the defendant were tantamount to direct interrogation because of Brewer's deeply religious nature. *Id.* at 397-99.

59. *Id.* at 412 (Powell, J., concurring).

60. United States v. Henry, 447 U.S. 264 (1979). The Court noted that the informant had some conversations with the defendant and the incriminating statements resulted from these conversations. *Id.* at 271. Similar to *Brewer*, the *Henry* Court recognized that statements may be as effective as questions in eliciting information. *Id.* *See supra* note 44.

61. *Henry*, 447 U.S. at 274 (citing Miranda v. Arizona, 384 U.S. 436, 467 (1966)). *See also Miranda*, 384 U.S. at 448-54 (mere fact of custody imposes pressures on the accused).

62. *Henry*, 447 U.S. at 274. For list of references on various interrogation tech-

Court concluded that the government intentionally created a situation likely to induce the defendant to make incriminating admissions, thereby violating the sixth amendment right to counsel.[63]

In *Wilson*, a case substantially similar to *Henry*,[64] the police placed the accused and an informant in a cell directly overlooking the scene of the crime.[65] Wilson became very upset when he looked out the cell window.[66] The court of appeals in *Wilson* suggested that the cell placement was a governmental attempt to trigger incriminating remarks from the defendant.[67] The cell placement may not have been an intentional psychological ploy; nevertheless, it did induce Wilson to initiate a conversation about the crime.[68] Once the conversation was initiated, the informant commented that Wilson's account of the crime was unconvincing.[69] The informant further suggested that Wilson should think of a more believable story.[70] The *Wilson* Court, however, failed to recognize this as an instance where the government created a situation likely to induce incriminating admissions.[71] Instead, the Court found this to be a "listening post" situation, where the informant made no effort to stimulate conversations about the crime charged.[72]

The *Wilson* Court erroneously relied upon the state court's factual findings that the informant in no manner interrogated the accused.[73] As Justice Brennan argued in his dissent, the state court made its finding at a time prior to the Supreme Court's decision in *Henry*.[74] Thus, the state court relied on state precedents, which it

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niques, see *supra* note 44.

63. *Henry*, 447 U.S. at 274.

64. *See supra* notes 21-22.

65. *Wilson*, 106 S. Ct. at 2619.

66. Wilson v. Henderson, 742 F.2d 741, 745 (2d Cir. 1984). The court of appeals noted that Wilson was immediately suspicious of his placement in a cell with a view of the crime scene. *Id.*

67. *Id.*

68. *See supra* note 15.

69. Wilson v. Henderson, 742 F.2d 741, 745 (2d Cir. 1984). *See supra* note 15. The Supreme Court in *Wilson* did not view the informant's statements as prompting incriminating admissions from the defendant. *Wilson*, 106 S. Ct. at 2630.

70. Wilson v. Henderson, 742 F.2d 741, 745 (2d Cir. 1984). The court of appeals found that these comments were intended to deliberately elicit a different and more incriminating story from the defendant. *Id.*

71. *Wilson*, 106 S. Ct. at 2630. The Court found the situations in *Wilson* and *Henry* were totally distinguishable.

72. *Id.* The Court's conclusion was contrary to the trial record where the informant's testimony indicated that he had urged Wilson to create a more believable account of the crime.

73. *Id.* The *Wilson* Court concluded that the trial court's factual findings were entitled to a presumption of correctness. 28 U.S.C. § 2254(d).

74. *Wilson*, 106 S. Ct. at 2637 (Brennan, J., dissenting). The state court relied on a state precedent instead of the then available federal precedent of *Massiah*. *Id.* *See also* People v. Kay, 25 N.Y.2d 139, 250 N.E.2d 329 (1969) (absent interrogation, spontaneous statements made by suspects in custody who had not received the *Mi-*

interpreted as requiring affirmative interrogation as a prerequisite to a sixth amendment violation.[75]

The court of appeals in *Wilson* observed that, as a matter of law, the deliberate elicitation standard of *Henry* requires consideration of more subtle forms of eliciting admissions than affirmative interrogation.[76] The Court of Appeals did not disregard the state court's factual findings,[77] but realized that the old standard had evolved, adding considerations not used at the time of Wilson's original hearing. The court applied the *Massiah* test, as clarified in *Henry*, and concluded that *Wilson* did not present the listening post situation, where the informant makes no effort to stimulate conversations about the crime charged.[78] Instead, the court found the *Wilson* case to be indistinguishable from *Henry*.[79]

In *Wilson*, the Supreme Court failed to recognize a perfect example of the kind of situation which the *Massiah* decision was intended to prevent. The Court incorrectly concluded that the primary concern of the *Massiah* line of decisions is secret interrogation which is the equivalent of direct police interrogation.[80] The only real distinction advanced in *Wilson* is that the informant did not directly interrogate the accused.[81]

The government, however, had not interrogated Massiah.[82] The police merely instructed an informant to induce Massiah to talk.[83]

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randa warnings are admissible).

75. *Wilson*, 106 S. Ct. at 2637 (Brennan J., dissenting). *See also* People v. Kaye, 25 N.Y.2d at 142, 250 N.E.2d at 331-32. *Kaye* was a case involving a claim of a fifth amendment *Miranda* violation. *Id.* Under *Miranda*, there is a requirement to a fifth amendment violation. Miranda v. Arizona, 384 U.S. 436 (1966). The purpose of the *Miranda* rule is to restrict coercive custodial interrogation. *Id.* The *Massiah* decision required only the functional equivalent of interrogation for a sixth amendment violation. Thus, the state court interpreted the facts in Wilson's case under a misplaced precedent involving a fifth amendment question, rather than the sixth amendment right to counsel.

76. Wilson v. Henderson, 742 F.2d 741, 745 (2d Cir. 1984). *See* 447 U.S. at 274. The *Henry* Court focused on the end result of the government's actions rather than the means of obtaining that result. *Id.* Regardless of whether the actual means of gathering incriminating statements is impermissible, there is a sixth amendment violation under *Henry* if the government creates a situation likely to induce an accused's admissions. *Id.*

77. Wilson v. Henderson, 742 F.2d 741, 745 (2d Cir. 1984). The court of appeals expressly accepted the state court finding that the informant did not question Wilson. *Id.* The court held that, as a matter of law, the deliberate elicitation standard of *Henry* extends beyond direct questioning to prevent more subtle forms of stimulating incriminating statements. *Id.*

78. *Id.* at 747-48.

79. *Id.* at 747.

80. *Wilson*, 106 S. Ct. at 2630.

81. *Id.*

82. *Massiah*, 377 U.S. at 203. *See supra* note 46.

83. *Massiah*, 377 U.S. at 203. Arguably, in *Wilson*, the informant's suggestion to the defendant that he had better change his story could have induced Wilson into incriminating himself in the absence of counsel. Wilson v. Henderson, 742 F.2d 741,

The decisive factor was whether the police circumvented Massiah's sixth amendment right.[84] The *Massiah* Court focused on whether the police conduct deliberately elicited information, and not on the precise way in which it was obtained.[85] Thus, the *Wilson* Court's attention to the actual method of obtaining the incriminating information was misdirected.[86] The Court should instead have questioned whether the police had interfered with the relationship between the suspect and his counsel after formal proceedings had begun.[87]

Prior to *Wilson*, the sixth amendment protected the individual from government actions intentionally designed to circumvent his sixth amendment right to counsel.[88] The Court's decision in *Wilson* allows the government to place a "listening post" in a defendant's cell to record incriminating statements, as long as there is no attempt to encourage conversations about the crime charged.[89] In order to prove a constitutional violation, a defendant must show that the police and their informant took some form of action deliberately designed to elicit incriminating information in a manner that is the functional equivalent of direct police interrogation.[90]

The precedential value of the Court's decision is significant. In the future, sixth amendment right to counsel disputes will be resolved with a narrow construction of the *Massiah* deliberate elicitation standard. A narrow reading of the *Massiah* standard will greatly expand the government's use of incriminating admissions at trial which were previously held inadmissible. Although the *Wilson* decision may respond to a public desire for a harder stance on crime, the consequences of the Court's reasoning may serve to erode

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745 (2d Cir. 1984).

84. In his dissent to the court of appeals majority holding against the defendant, Judge Hays emphasized that "[f]ederal officers must *deal through and not around* an attorney retained by a defendant under indictment." United States v. Massiah, 307 F.2d 62, 72 (2d Cir. 1962) (Hays, J., dissenting) (emphasis added).

85. In *Massiah*, the decisive factor was that government "succeeded by *surreptitious means* in *listening to* incriminating statements" of a defendant in the absence of counsel while under indictment. *Massiah*, 377 U.S. at 201 (Stewart, J.,) (emphasis added). Thus, the main consideration of *Massiah* was not whether the government had interrogated the defendant, but that it had succeeded in listening to his incriminating statements in the absence of counsel. *Id.*

86. *Wilson*, 106 S. Ct. at 2616.

87. Rather than conduct a narrow search for the functional equivalent of interrogation, the Court should have looked to the net result of the government's actions to determine if there had been an interference with the defendant's right to counsel. *See, e.g.*, United States v. Henry, 447 U.S. 264 (1980); Brewer v. Williams, 430 U.S. 387 (1977); Massiah v. United States, 377 U.S. 201 (1964)

88. Massiah v. United States, 377 U.S. 201 (1984).

89. *Wilson*, 106 S. Ct. at 2630.

90. *Id.*

a fundamental constitutional right deemed essential to a fair criminal prosecution.

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