Missouri Law Review

Volume 69
Issue 2 *Spring 2004*

Article 6

Spring 2004

Prosecutor Circumvents the Sixth Amendment Right to Counsel with a Simple Wink and Nod, The

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The Prosecutor Circumvents the Sixth Amendment Right to Counsel with a Simple "Wink and Nod"

United States v. Johnson[1]

I. INTRODUCTION

The Sixth Amendment right to counsel[2] embodies an internal clash between two important societal interests: effective law enforcement and fair play within our adversarial justice system.[3] While this conflict is significant when known government agents, like uniformed police officers, attempt to obtain incriminating statements from criminal defendants, the conflict is intensified when undercover agents elicit incriminating statements from defendants. Thus, the Supreme Court of the United States and the United States Court of Appeals for the Eighth Circuit have consistently upheld Sixth Amendment protections against overzealous law enforcement practices involving undercover and jailhouse informants.[4]

This Note argues that the Eighth Circuit's recent decision in *United States v. Johnson*[5] severely limits a defendant's protections against the government's intentional use of implicit, or "wink and nod," agreements with undercover informants to circumvent the right to counsel. Although the court's decision may further the interests of effective law enforcement, the resulting sacrifice of fair play in the adversarial justice system is too costly for society to bear.

II. FACTS AND HOLDING

In 1993, a federal grand jury indicted Dustin Honken on a conspiracy to distribute methamphetamine charge.[6] During the federal government's investigation of the conspiracy, five witnesses who were going to testify against Honken disappeared.[7] The lack of witnesses forced the prosecutor to abandon

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1. 338 F.3d 918 (8th Cir. 2003).

2. U.S. CONST. amend. VI.

3. Nix v. Williams, 467 U.S. 431, 442-44 (1984); James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the* Massiah *Doctrine*, 22 U.C. DAVIS L. REV. 1, 1 (1988).

4. Maine v. Moulton, 474 U.S. 159 (1985); United States v. Henry, 447 U.S. 264 (1980); Massiah v. United States, 377 U.S. 201 (1964); United States v. Bird, 287 F.3d 994 (8th Cir. 2002).

5. 338 F.3d 918 (8th Cir. 2003).

6. *Id.* at 919.

7. *Id.* The witnesses included three adults and the two young daughters of one of the adults. *Id.*

his case against Honken, but federal investigators continued to investigate the conspiracy and the disappearance of the witnesses.[8]

The investigation later focused on Angela Johnson, Honken's girlfriend at the time of the disappearances.[9] In July of 2000, a grand jury indicted Johnson for "aiding and abetting the murder of the five witnesses, aiding and abetting the solicitation of the murder of witnesses, and conspiring to interfere with witnesses."[10] She was subsequently arrested on July 30, 2000.[11] The prosecutor then intervened by placing Johnson in the Benton County Jail instead of "the Linn County Jail, where [she] would ordinarily have been placed upon her arrest."[12]

At the time Johnson was sent to the Benton County Jail, the prosecutor knew that Robert McNeese, an inmate who had a history of providing information he gathered in prison in exchange for favorable treatment, was already housed in the Benton County Jail.[13] Within eight days, McNeese established contact with Ms. Johnson.[14] McNeese and Johnson communicated frequently thereafter.[15] A month later, McNeese informed an investigator that he had obtained incriminating statements from Johnson.[16] The investigator told McNeese not to get further information from Johnson until the investigator could obtain instructions from the prosecutor concerning how the situation should be handled.[17]

Five days later, on September 11, 2000, McNeese received "listening-post" instructions regarding Johnson.[18] McNeese then signed a plea agreement in which he would receive favorable treatment in exchange for extracting information from Johnson and cooperating in future cases that might arise in the

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8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. United States v. Johnson, 196 F. Supp. 2d 795, 875 (N.D. Iowa 2002), *rev'd*, 338 F.3d 918 (8th Cir. 2003).

13. *Johnson*, 338 F.3d at 919.

14. *Id.*

15. *Id.* at 919-20.

16. *Id.* at 920; *Johnson*, 196 F. Supp. 2d at 818. The investigator, who worked for the Iowa Division of Criminal Investigation, was the same investigator who had arrested Johnson and, as directed by the prosecutor, transported her to the Benton County Jail. *Johnson*, 196 F. Supp. 2d at 808.

17. *Johnson*, 338 F.3d at 920.

18. *Id.* The instructions first listed all of the contacts McNeese previously had with Johnson. *Johnson*, 196 F. Supp. 2d at 821. Next, the instructions explained that McNeese should not initiate any conversation with Johnson or any other inmate regarding past criminal conduct in order to elicit information about that conduct, but that McNeese may listen to any statements regarding past criminal conduct, unless the statements were protected by legal privilege. *Id.* at 821-22.

Northern District of Iowa.[19] Two weeks later, McNeese disclosed the incriminating statements he elicited from Johnson.[20]

The prosecutor then filed a notice of intent to use Johnson's disclosures as evidence against her.[21] Johnson subsequently moved to suppress the evidence, contending that because McNeese acted as a government agent who deliberately obtained the incriminating statements from her, use of the statements would violate her Sixth Amendment right to counsel.[22] After an evidentiary hearing, the United States District Court for the Northern District of Iowa granted Johnson's motion and suppressed Johnson's disclosures to McNeese.[23] In this ruling, the court rejected the Eighth Circuit's bright-line agency rule requiring that an inmate acting as a government agent must receive instructions targeting the particular defendant.[24] Instead, the court analyzed the question of McNeese's agency in light of all the circumstances, including the possibility that an implicit or tacit agreement targeting Johnson existed between the prosecutor and McNeese.[25] Thus, the court held that because of his "symbiotic relationship" with the government as a long-standing jailhouse informant who was led to believe that providing incriminating statements from inmates would result in favorable treatment, McNeese was acting as a government agent before September 11, 2000.[26]

The prosecutor appealed, and the United States Court of Appeals for the Eighth Circuit reversed.[27] The court applied its previously-adopted bright-line rule stating, "'*only* when the informant has been instructed by the police to get information about the particular defendant'" will the informant be a government agent.[28] The court held that this language could not be explained away, and thus,

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19. *Johnson*, 338 F.3d at 920.
20. *Id.*
21. *Id.*
22. *Id.* at 919.
23. *Id.* at 920 (citing *Johnson*, 196 F. Supp. 2d 795).
24. *Johnson*, 196 F. Supp. 2d at 902.
25. *Id.*
26. *Id.* In support of this holding, the court found:

> [B]oth that the government "intentionally created" the opportunity to circumvent Johnson's right to counsel, by placing Johnson in a jail like the Benton County Jail with McNeese, and that the government "must have known that [the] propinquity [of McNeese and Johnson in that jail] likely would lead to [securing incriminating information]," owing to what government officials knew or should have known about the nature of that jail.

Id. at 875-76 (alterations in original) (quoting United States v. Henry, 447 U.S. 264, 271 (1980)).
27. *Johnson*, 338 F.3d at 919.
28. *Id.* at 922 (quoting Moore v. United States, 178 F.3d 994 (8th Cir. 1999)).

McNeese was not acting as a government agent before receiving the listening-post instructions on September 11, 2000.[29]

III. LEGAL BACKGROUND

A. The Sixth Amendment Right to Counsel

The Sixth Amendment ensures that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[30] The Supreme Court of the United States has held that this right first attaches upon the initiation of formal charges against the accused.[31] When the prosecutor initiates formal charges, the government's role shifts from investigation to accusation, and the protections of the Sixth Amendment right to counsel must then take effect.[32]

Once the government's role becomes accusatory, the adversarial process commences and government agents cannot deliberately attempt to obtain incriminating statements from the accused without the presence of counsel.[33] If incriminating statements are obtained from the defendant without counsel present, the defendant can prove that the incriminating evidence was obtained in violation of the Sixth Amendment by showing (1) that the right to counsel had attached, (2) that the informant was a government agent, and (3) that the informant deliberately elicited the incriminating statements.[34] If a court finds that the accused has met all three elements, she is entitled to suppression of the incriminating evidence at trial.[35]

B. The "Deliberate Elicitation" Rule in Supreme Court Precedent

The Supreme Court first recognized the prohibition of the "deliberate elicitation" of evidence from a criminal defendant in the absence of counsel in *Massiah v. United States*.[36] In *Massiah*, the defendant was indicted on narcotics

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29. *Id.* But "[a]ll parties agree[d] that Mr. McNeese was acting as a government agent from this point forward." *Id.* at 920.

30. U.S. CONST. amend. VI.

31. Moran v. Burbine, 475 U.S. 412, 431 (1986); *see also* Illinois v. Perkins, 496 U.S. 292, 299 (1990) (concluding that the Sixth Amendment precedents were not applicable to the defendant's case because "no charges had been filed on the subject of the interrogation" at the time he was interrogated).

32. *Moran*, 475 U.S. at 430.

33. *Id.* at 431.

34. United States v. Henry, 447 U.S. 264, 270 (1980); Massiah v. United States, 377 U.S. 201, 206 (1964).

35. *Henry*, 447 U.S. at 270; *Massiah*, 377 U.S. at 206.

36. 377 U.S. 201 (1964).

charges and subsequently posted bail.[37] Unbeknownst to Massiah, a co-defendant, Colson, had begun cooperating with the police.[38] The police convinced Colson to put a radio transmitter in his car with which they monitored Colson and Massiah's conversations.[39] In one of these conversations, Massiah made incriminating statements.[40] The prosecutor then used these statements against Massiah at trial.[41] Massiah objected to the use of the evidence on the grounds that the statements were elicited in the absence of counsel, but the court overruled his objection and the jury convicted him.[42]

The Supreme Court reversed the conviction.[43] The Court found that after Massiah's indictment, federal agents "deliberately elicited" incriminating statements from him "in the absence of his counsel."[44] According to the Court, when the trial court allowed the use of the incriminating evidence against Massiah, the trial court denied Massiah the basic protections of the Sixth Amendment right to counsel.[45] In later cases, including *Brewer v. Williams*,[46] *United States v. Henry*,[47] *Maine v. Moulton*,[48] and *Kuhlmann v. Wilson*,[49] the Court further elucidated the meaning of deliberate elicitation.

In *Brewer v. Williams*, the Court analyzed a conversation between the defendant and a police detective.[50] In that case, police were investigating the abduction of a young girl from a YMCA in Des Moines, Iowa.[51] Two days later, Williams, a recently-escaped mental patient who was a resident of the YMCA, phoned a Des Moines attorney, McKnight, requesting advice concerning the disappearance.[52] McKnight advised Williams, who had fled to Davenport, Iowa, to turn himself in to the police.[53] A Davenport judge subsequently arraigned Williams and provided another lawyer, Kelly, to assist him while in Davenport.[54] McKnight agreed to let the police transport Williams from Davenport to Des

37. *Id.*
38. *Id.* at 202.
39. *Id.* at 202-03.
40. *Id.* at 203.
41. *Id.*
42. *Id.* at 203-04.
43. *Id.* at 206.
44. *Id.*
45. *Id.* at 205-06.
46. 430 U.S. 387 (1977).
47. 447 U.S. 264 (1980).
48. 474 U.S. 159 (1985).
49. 477 U.S. 436 (1986).
50. *Brewer*, 430 U.S. 387.
51. *Id.* at 390.
52. *Id.*
53. *Id.*
54. *Id.* at 391.

Moines on the condition that the police would not interrogate or mistreat him.[55] Both McKnight and Kelly advised Williams not to make any statements to the police until after consulting with McKnight in Des Moines.[56] During the transport, the police encouraged Williams to tell them what he had done with the body so that the victim could have a proper "Christian burial."[57] Williams ultimately made incriminating statements regarding the location of the body and at trial the prosecutor used those statements to convict him.[58]

The Supreme Court overturned the conviction, concluding that the "'Christian burial speech' [was] tantamount to interrogation," making the "circumstances of [the] case . . . constitutionally indistinguishable from those presented in *Massiah v. United States*."[59] The clear rule of *Massiah*, the Court stated, "Is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."[60]

The next case in this line of decisions, *United States v. Henry*, involved another surreptitious acquisition of a defendant's incriminating statements as in *Massiah*. Upon Henry's indictment for bank robbery, police incarcerated Henry in the city jail.[61] Soon thereafter, the FBI contacted Nichols, another inmate in the jail, who previously worked as a paid informant for the FBI.[62] An agent told Nichols to be alert to statements made by any prisoners in the jail, including Henry, but instructed Nichols not to initiate any conversation with Henry or question him specifically about the bank robbery.[63] Nichols later informed the investigating agents that Henry had told him about the robbery, and the FBI paid him for providing that information.[64] During Henry's trial, Nichols testified that Henry had explained certain details of the planning and execution of the robbery, and a jury convicted Henry on the basis of Nichols' testimony.[65]

As the Supreme Court considered whether the government agent "deliberately elicited" incriminating statements from Henry, the Court noted several important factors.[66] "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

55. *Id.*
56. *Id.*
57. *Id.* at 392-93.
58. *Id.* at 393-94.
59. *Id.* at 400.
60. *Id.* at 401.
61. United States v. Henry, 447 U.S. 264, 265-66 (1980).
62. *Id.* at 266.
63. *Id.*
64. *Id.*
65. *Id.* at 267.
66. *Id.* at 270.

at the time he was engaged in conversation by Nichols."[67] In light of these factors, the Court found that the Court of Appeals for the Fourth Circuit, which found for Henry, correctly analyzed the case according to the "deliberate elicitation" standard.[68] The Court noted that Nichols was a paid FBI informant for more than a year, and the FBI agent was aware that Nichols could engage Henry in conversations without arousing Henry's suspicion.[69] The Court further explained that even if the agent did not intend for Nichols to take affirmative steps to secure incriminating statements from Henry, "he must have known that such propinquity likely would lead to that result."[70] Thus, the Court concluded, by "intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel."[71]

In *Maine v. Moulton*, the Court expanded the principles developed in *Massiah*, *Brewer*, and *Henry* into an affirmative obligation by the government "not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel."[72] The *Moulton* Court explained that honoring the right to counsel must mean more than merely preventing the accused from obtaining the assistance of counsel.[73] Otherwise, the Court reasoned, the right would be of little use as a mechanism to protect fairness in an adversarial proceeding.[74] Conversely, the Court recognized that the Sixth Amendment is not violated if a government agent obtains incriminating statements by luck or happenstance.[75] The Supreme Court concluded, however, that knowing exploitation of the opportunity to confront the defendant in the absence of counsel "is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity."[76]

In *Kuhlmann v. Wilson*, the most recent Supreme Court decision in the *Massiah* line of cases, the Court further clarified the deliberate elicitation rule by distinguishing between "mere listening" and "deliberate elicitation."[77] The Court first acknowledged that "the primary concern of the *Massiah* line of cases is secret interrogation by investigatory techniques that are the equivalent of police

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67. *Id.*
68. *Id.* at 271.
69. *Id.* at 270.
70. *Id.* at 271.
71. *Id.* at 274.
72. Maine v. Moulton, 474 U.S. 159, 171 (1985).
73. *Id.* at 170-71.
74. *Id.* at 171.
75. *Id.* at 176 (citing *Henry*, 477 U.S. at 276 (Powell, J., concurring)).
76. *Id.*
77. Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986).

interrogation."[78] But because a government agent's acquisition of incriminating statements by luck or happenstance does not involve secret interrogation by the police, the Court reasoned, a defendant making a *Massiah* violation claim "must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks."[79]

C. Application of the "Deliberate Elicitation" Rule in the Eighth Circuit

The United States Court of Appeals for the Eighth Circuit follows the "deliberate elicitation" exclusionary rule developed in the *Massiah* line of cases.[80] In the Eighth Circuit, "[a]ny statement about the charged crime that government agents deliberately elicit from a defendant without counsel present after the defendant has been indicted must be suppressed under the Sixth Amendment exclusionary rule."[81] To make a successful "*Massiah* violation" claim, a defendant must show (1) that the right to counsel had attached, (2) that the informant was a government agent, and (3) that the informant deliberately elicited statements from the defendant.[82]

The Eighth Circuit recently clarified when the right to counsel attaches for *Massiah* purposes.[83] According to the court, the right to counsel attaches "at or after the time judicial proceedings have been initiated against [the defendant] 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'"[84] The court also affirmed the right of the accused to rely on the assistance of counsel as a medium between the accused and the authorities.[85]

In *Moore v. United States*,[86] the Eighth Circuit adopted a bright-line rule for determining whether an informant is a government agent.[87] The court announced: "'An informant becomes a government agent for purposes of [*Massiah*] only when the informant has been instructed by the police to get

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78. *Id.*

79. *Id.*

80. United States v. Bird, 287 F.3d 709, 713 (8th Cir. 2002).

81. *Id.*

82. United States v. Moore, 178 F.3d 994, 999 (8th Cir. 1999). These are the same factors listed in *Massiah* and *Henry*. United States v. Henry, 447 U.S. 264, 270 (1980); Massiah v. United States, 377 U.S. 201, 206 (1964).

83. *Bird*, 287 F.3d at 713.

84. *Id.* (quoting Brewer v. Williams, 430 U.S. 387, 398 (1977)).

85. *Id.* (citing Maine v. Moulton, 474 U.S. 159, 176 (1985)).

86. 178 F.3d 994 (8th Cir. 1999).

87. *Id.* at 999-1000. The Supreme Court has not explicitly defined "government agent" for Sixth Amendment purposes. Matteo v. Superintendant, SCI Albion, 171 F.3d 877, 893 (3d Cir. 1999) (en banc) (citing Dupree v. Thomas, 946 F.2d 784, 793-94 (11th Cir. 1991)).

information about the particular defendant.'"[88] The apparent rationale for adopting this rule was that "[t]he 'primary concern' of the government informant rule is to avoid 'secret interrogation by investigatory techniques that are the equivalent of direct police interrogation.'"[89]

IV. INSTANT DECISION

In *United States v. Johnson*, the United States Court of Appeals for the Eighth Circuit overturned the United States District Court for the Northern District of Iowa's decision and held that McNeese was not a government agent until he received the listening-post instructions on September 11, 2000.[90] Applying the *Moore* definition of agency, the appellate court found that "Mr. McNeese was not, at any time before September 11, 2000, instructed, either in express words or by implication, to get information about Ms. Johnson."[91] The court acknowledged that McNeese had helped the government in the past, and that he had proved himself an expert interrogator and informant.[92] The court also acknowledged that the government may have hoped that, when Johnson was placed in the same institution as McNeese, McNeese might come up with helpful information.[93] The appellate court concluded, however, that all of these facts taken together "do not amount to an instruction to Mr. McNeese to get information about Ms. Johnson in particular."[94]

In support of its holding, the court admonished the district court for declining to apply the rule of *Moore*.[95] The plain language of *Moore* requiring an instruction specifically targeting Johnson could not be explained away, the court reasoned, and thus, *Moore* was binding precedent.[96] Furthermore, the court explained, even though the district court may have believed that *Moore* was an incorrect application of *Henry* and other cases in the *Massiah* line resolving the question of agency, the district court was not "free to depart from [the *Moore* interpretation of agency]."[97]

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88. *Moore*, 178 F.3d at 999 (alteration in original) (quoting United States v. Birbal, 113 F.3d 342, 346 (2d Cir. 1997)). The First and Eleventh Circuits have also adopted this rule. *See* United States v. LaBare, 191 F.3d 60 (1st Cir. 1999); Stano v. Butterworth, 51 F.3d 942, 977 (11th Cir. 1995).

89. *Birbal*, 113 F.3d at 346 (quoting *Stano*, 51 F.3d at 977).

90. United States v. Johnson, 338 F.3d 918, 921 (8th Cir. 2003).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 922-23.

96. *Id.* at 922.

97. *Id.* at 922-23.

Judge Bye dissented.[98] Contrary to the majority, he believed that the government did instruct McNeese to obtain information from Johnson prior to September 11, 2000.[99] The majority's characterization of the facts, Judge Bye explained, ignored some of the well-grounded findings of fact made by the trial court.[100] Judge Bye noted that Johnson "did not land in the same jail as [McNeese] by happenstance," but instead the prosecutor directed the U.S. Marshal to send her to the Benton County Jail, the only facility where McNeese would have access to her.[101] Although the government argued that it placed Johnson in the Benton County Jail for security reasons, Judge Bye explained that the district court rejected the prosecutor's explanation as pretextual because of "inconsistencies in the prosecutor's evidence and the testimony of the U.S. Marshal indicating that prosecutors rarely direct the placement of prisoners."[102] Judge Bye saw no clear error in the district court's findings that the prosecutor was motivated by an intent to circumvent Johnson's right to counsel.[103]

The final question considered by Judge Bye was whether the district court erred in concluding that McNeese was a government agent when he interrogated Johnson.[104] Judge Bye recognized that, according to the *Moore* rule, McNeese was a government agent only if he was "instructed" by the government to acquire information about Johnson.[105] Judge Bye noted that the majority recognized that the instructions may be implied as well as express, and agreed that implied instructions may satisfy the *Moore* rule.[106] The holdings of *Massiah*, *Henry*, and *Moulton* would be diminished, Judge Bye explained, if the court were to "limit agency to cases where the government gave the informant direct, explicit oral or written instructions to obtain evidence regarding a defendant."[107]

Judge Bye concluded that the acts of the prosecutor impliedly communicated instructions to McNeese.[108] To support his conclusion, Judge Bye noted that McNeese knew the prosecutor well from prior dealings in which

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98. *Id.* at 923 (Bye, J., dissenting).

99. *Id.* (Bye, J., dissenting).

100. *Id.* at 924 (Bye, J., dissenting).

101. *Id.* at 924-25 (Bye, J., dissenting).

102. *Id.* at 925 (Bye, J., dissenting).

103. *Id.* (Bye, J., dissenting); *see* United States v. Guevara-Martinez, 262 F.3d 751, 753 (8th Cir. 2001) ("When a district court grants a motion to suppress evidence, we review its findings of fact for clear error . . . ."). Judge Bye also noted that McNeese recognized the prosecutor's intent, stating, "In fact, McNeese correctly interpreted the prosecutor's actions as an instruction to help the government obtain information from Johnson, later saying he believed Johnson was incarcerated with him so he 'could work her.'" *Johnson*, 338 F.3d at 925 (Bye, J., dissenting).

104. *Johnson*, 338 F.3d at 925 (Bye, J., dissenting).

105. *Id.* (Bye, J., dissenting).

106. *Id.* (Bye, J., dissenting).

107. *Id.* (Bye, J., dissenting).

108. *Id.* (Bye, J., dissenting).

McNeese received a substantial reduction in his sentence.[109] The prosecutor sent Johnson to the Benton County Jail for McNeese to interrogate her, Judge Bye explained, and McNeese correctly interpreted the prosecutor's acts and obtained the incriminating information.[110] According to Judge Bye, the meeting between McNeese and Johnson "was purposefully arranged by the prosecutor to 'circumvent[ ] the accused's right to have counsel present in a confrontation between the accused and a state agent.'"[111] Because the prosecutor's acts constituted an implied instruction to McNeese and because McNeese acted upon the instruction and deliberately elicited the incriminating information from Johnson, Judge Bye would have held that Johnson's Sixth Amendment right to counsel was violated and the incriminating information could not "be used to secure her conviction."[112]

V. COMMENT

In making its ruling in *Johnson*, the majority substituted its judgment for that of the trial court and applied the *Moore* rule to the *Johnson* facts. This substitution was well within the power of the Eighth Circuit, for the district court had improperly rejected the binding rule of *Moore*. However, the majority's application of *Moore* in this case diminished *Moore*'s "primary concern"[113] of avoiding secret interrogations by informants that are the equivalent of police interrogations, and also diminished the right to counsel the *Moore* rule was designed to protect. First, the court ignored the critical fact found by the district court—that the prosecutor's placement of Johnson in the same jail as a known informant was motivated by an intent to circumvent Johnson's Sixth Amendment right to counsel—without any mention of clear error.[114] By not affording proper deference to the district court's finding, the majority diminished the importance of the Sixth Amendment right. Second, by ignoring the district court's finding of fact, the court sent a signal that the affirmative obligation required by *Moulton* is not a significant consideration in the Eighth Circuit. Third, although the court recognized that implied instructions can satisfy the *Moore* test, the court diminished the importance of the right to counsel by not explaining why the implied instructions in this case were insufficient to satisfy the test.

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109. *Id.* (Bye, J., dissenting).

110. *Id.* (Bye, J., dissenting).

111. *Id.* at 926 (Bye, J., dissenting) (alteration in original) (quoting Robinson v. Clarke, 939 F.2d 573, 576 (8th Cir. 1991)).

112. *Id.* (Bye, J., dissenting).

113. United States v. Moore, 178 F.3d 994, 1000 (8th Cir. 1999).

114. *Johnson*, 338 F.3d 918; *see* United States v. Guevara-Martinez, 262 F.3d 751, 753 (8th Cir. 2001) ("When a district court grants a motion to suppress evidence, we review its findings of fact for clear error . . . .").

As Judge Bye noted in his dissent, the fact that the prosecutor intentionally placed Johnson in the Benton County Jail[115] is never discussed in the majority opinion.[116] According to the standard of appellate review in the Eighth Circuit, an appellate court is free to disregard a lower court's finding of fact only on the basis of clear error.[117] Nevertheless, the *Johnson* court disregarded the crucial fact of the prosecutor's intent without any discussion of clear error.[118]

That the court disregarded the prosecutor's intent shows that the court minimized the importance of the Sixth Amendment right to counsel. As the Supreme Court has consistently explained, the right to counsel is an indispensable feature of the American justice system.[119] In the instant case, the district court found that the prosecutor intentionally denied Johnson her right to counsel.[120] The prosecutor intentionally sent Johnson to a specific jail, for the specific purpose of putting her in close proximity with a prior government informant who had earned a particular reputation for extracting incriminating information from criminal defendants.[121] The district court's finding alone does not satisfy the *Massiah* test, but by ignoring this intentional act designed to skirt Johnson's right to counsel, the majority appeared not to recognize the importance of this fundamental feature of our criminal justice system.

Second, by disregarding the trial court finding, the court appeared to ignore the *Moulton* requirement that prosecutors have an affirmative duty not to act in a manner that circumvents the accused's Sixth Amendment protections.[122]

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115. *Johnson*, 338 F.3d at 924-25 (Bye, J., dissenting).

116. *Id.* at 924 (Bye, J., dissenting).

117. *Guevara-Martinez*, 262 F.3d at 753.

118. *Johnson*, 338 F.3d at 918-23.

119. *See, e.g.*, Maine v. Moulton, 474 U.S. 159, 168 (1985) ("The right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments is indispensable to the fair administration of our adversarial system of criminal justice."); United States v. Cronic, 466 U.S. 648, 653-54 (1984) (stating that accused's right to counsel is "pervasive" and "a fundamental component of our criminal justice system"); Brewer v. Williams, 430 U.S. 387, 398 (1977) (stating that the Sixth Amendment is "indispensable to the fair administration of our adversary system of criminal justice"); Argersinger v. Hamlin, 407 U.S. 25, 31 (1972) ("The assistance of counsel is often a requisite to the very existence of a fair trial."); Johnson v. Zerbst, 304 U.S. 458, 462 (1938) (noting that the Sixth Amendment counsel guarantee is necessary to ensure fundamental rights).

120. *Johnson*, 338 F.3d at 924-25 (Bye, J., dissenting).

121. *Id.* (Bye, J., dissenting).

122. The government prosecutor is presumed to know that placing a pretrial defendant in a jail cell in close proximity to another inmate who has a propensity to inform will lead the informant to take steps to obtain incriminating information from the defendant. United States v. Henry, 447 U.S. 264, 271 (1980). The Third Circuit has recognized that such an action can "represent a deliberate effort to obtain incriminating information from a prisoner in violation of his Sixth Amendment right to counsel."

Although the court did not blatantly disregard the rule of *Moulton*, it signaled that the affirmative obligation required by *Moulton* was not an important consideration in the court's decision.

The court's decision not to apply *Moulton* is troubling because it sends a message to prosecutors that some intentional acts that evade the protections of the right to counsel will be tolerated by the court. Explicit behavior will always be sufficient to trigger a *Massiah* violation.[123] But by not recognizing the danger of the implicit acts of the prosecutor, the court is sending a signal to prosecutors that if they are sneaky enough, the safeguards of the Sixth Amendment will not protect the accused. This message is inconsistent with *Massiah*'s protection against deliberate interference with the right to counsel.[124] This message is also inconsistent with the substance of *Moore*—that secret interrogations that are the equivalent of police interrogations will not be tolerated by the court.[125] Furthermore, the court's action is inconsistent with defendants' vital need to be aided by counsel during "the most critical period of the proceedings against [them], . . . the time of their arraignment[s] until the beginning of their trial[s]."[126] Surreptitious acts at trial equivalent to what prosecutors may be permitted to do before trial would not be tolerated by the court.[127] Even though the right to counsel is just as important, if not more important, to the accused before trial as during trial, the *Johnson* court has apparently developed a different standard for pre-trial misconduct. These inconsistencies lessen the significance of Sixth Amendment protection.

Third, the court minimized the importance of the Sixth Amendment by ignoring the prosecutor's established intent while simultaneously holding that implied instructions can satisfy the *Moore* test. The prosecutor's actions were a crucial part of this case because, as Judge Bye argued, the prosecutor intended

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United States v. Brink, 39 F.3d 419, 424 (3d Cir. 1994).

123. In *Johnson*, all parties agreed that once McNeese received the listening-post instructions, he was acting as a government agent. *Johnson*, 338 F.3d at 920.

124. *See* Massiah v. United States, 377 U.S. 201, 206 (1964).

125. Moore v. United States, 178 F.3d 994, 1000 (8th Cir. 1999) (citing Kuhlmann v. Wilson, 477 U.S. 436 (1986)).

126. Powell v. Alabama, 287 U.S. 45, 57 (1932).

127. *See* Tomkovicz, *supra* note 3, at 53:

> Suppose, for example, that during a trial the prosecutor enlisted an informant to approach and speak with the defendant in the courtroom while the jury watched from a nearby room. Alternatively, imagine that an undercover agent with a transmitter broadcasted a lunch break conversation with the accused into the courtroom while a judge or jury listened. In either situation, whether counsel was absent, present at the encounter, or listening with the factfinder, the government's conduct would violate the sixth amendment. It would deprive the defendant of counsel's advice concerning a vital decision—whether to divulge unique knowledge regarding guilt or innocence to the authorities and to the trier of fact.

for McNeese to interpret them as implied instructions to obtain incriminating information from Johnson.[128] By ignoring the district court's finding that the prosecutor's actions were intended to circumvent Johnson's Sixth Amendment right to counsel, however, the majority eliminated the possibility of finding that McNeese received an implied instruction. Not surprisingly, then, when the court applied the bright-line rule of *Moore* it concluded that neither express nor implied instructions were given to McNeese before September 11, 2000.[129] But in stating this conclusion, the court recognized that implied instructions could satisfy the *Moore* test. Because the court recognized that implied instructions could satisfy the test while simultaneously disregarding evidence of implied instructions in this case, the court was very unclear about what kind of implied instructions, if any, would truly satisfy *Moore*.

That the court did not articulate its reasons for concluding that no implied instructions were given in this case is disturbing. First, by not mentioning the crucial fact that the prosecutor intentionally placed Johnson in the jail with McNeese, the majority calls into question the sensibleness of its decision. As Judge Bye explained, this fact could certainly be interpreted as an implied instruction, and it was interpreted by McNeese as such an instruction.[130] But by not explaining why the prosecutor's intent was not considered, or why the circumstances in this case do not amount to an implied instruction, the court was unclear about whether it even considered what kinds of implied instructions could satisfy *Moore*. Leaving this question unanswered did a great disservice to Ms. Johnson, who deserves to know why her incriminating statements were deemed admissible, as well as to other citizens, who deserve to know under what circumstances they will not be afforded the protection of the Sixth Amendment.

In each of the three ways described above, the Eighth Circuit has restricted the protection of *Moore* and diminished the value of the Sixth Amendment right to counsel. The Sixth Amendment embodies a weighty clash, however, between the fundamental principles of the justice system and the essential use of

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128. *Johnson*, 338 F.3d at 925 (Bye, J., dissenting).

129. *Id.* at 921.

130. *Id.* at 925 (Bye, J., dissenting). The Seventh Circuit, in *United States v. York*, supports the argument that past conduct between a government agent and an informant can constitute an agreement to establish the informant's agency: "Agreements, of course, don't have to be explicit or formal, and are often inferred from evidence that the parties behaved as though there were an agreement between them, following a particular course of conduct over a sustained period of time." United States v. York, 933 F.2d 1343 (7th Cir. 1991), *overruled on other grounds by* Wilson v. Williams, 182 F.3d 562 (7th Cir. 1999). Also, the Third Circuit has recognized that an informant could have a tacit agreement with the government if (1) the informant previously gave information to the government on other cases for some benefit, and (2) the informant elicited additional information from the defendant with the hope that the cooperation would result in a sentence reduction. United States v. Brink, 39 F.3d 419, 424 (3d Cir. 1994).

undercover informants in effective law enforcement.[131] Courts interpreting the Sixth Amendment must constantly balance the societal interest in effective law enforcement against the societal interest in being protected from overzealous police conduct.[132] Thus, a possible explanation for the court's decision in *Johnson* is that, in this case, the cost to law enforcement was greater than the cost to society of abrogating the Sixth Amendment right to counsel in the absence of explicit attempts by the government to obtain incriminating information. The cost of enforcing the right to counsel in this case was that the government would lose the ability to use probative evidence of an extremely serious crime—the murder of five witnesses. But the cost to society of not enforcing the right is the inability to protect itself against police conduct designed to surreptitiously obtain incriminating information despite the attachment of the right. Not enforcing the right to counsel in cases like *Johnson* would reduce the protections necessary for our adversarial justice system to work fairly and effectively.[133] This is simply not a cost society should have to bear.[134]

VI. CONCLUSION

The Sixth Amendment affords defendants protection from the government's overzealous use of undercover informants to obtain incriminating information. According to the Eighth Circuit's opinion in *Johnson*, however, prosecutors in the Eighth Circuit enjoy wider latitude to use implicit or tacit agreements with informants to circumvent a defendant's right to counsel than was envisioned in previous Supreme Court cases such as *Henry*. Thus, while law enforcement interests are furthered by the use of these "wink and nod" agreements, Johnson's (and society's) interest in ensuring that fair play exists within our adversarial justice system is severely diminished.

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131. Tomkovicz, *supra* note 3, at 2-3.

132. *See, e.g.*, Nix v. Williams, 467 U.S. 431, 442-44 (1984) (noting that exclusionary rules are the balancing of these interests).

133. Tomkovicz, *supra* note 3, at 55.

134. United States v. Johnson, 196 F. Supp. 2d 795, 903 (N.D. Iowa 2002), *rev'd*, 338 F.3d 918 (8th Cir. 2003).