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United States v. Henry, 100 S. Ct. 2183 (1980)

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Criminal Law—RECRUITED GOVERNMENT INFORMANTS: WHEN DOES THE RIGHT TO COUNSEL ATTACH?—*United States v. Henry*, 100 S. Ct. 2183 (1980)

In a decision reminiscent of the Warren Court,[1] the Supreme Court in *United States v. Henry*[2] excluded inculpatory statements made by the indicted Billy Gale Henry to an undercover government agent sharing his jail cell. This expansive interpretation of the sixth amendment caught the attention of the nation's popular press,[3] and reaffirmed the vitality of another sixth amendment lodestar, *Massiah v. United States*.[4]

The purpose of this note is to place *Henry* in its proper historical niche—the latest chapter in the exposition of the sixth amendment right to counsel. This historical process will trace the right to counsel from the modest protections it afforded in the twelfth century, through its matter of fact inclusion in the Bill of Rights, to its full bloom under the Warren Court, and its surprising extension in *Henry*.

The first section of this note will be a brief overview of sixth amendment history describing the ever more expansive interpretation that the sixth amendment has received. Section two is a discussion of *United States v. Henry*, particularly as viewed within the framework of *Massiah* principles. The final section asks what effect *Henry* will have on police procedure.

I. NUTSHELL HISTORY OF THE SIXTH AMENDMENT

The history of the right to counsel stretches back to 1115.[5] A passage from *Legis Henrici Primi* is cited by legal scholars for the proposition that the right to counsel was not available in felony cases.[6] Nevertheless, at least three different types of counsel were

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1. *See generally* J. POLLACK, EARL WARREN: THE JUDGE WHO CHANGED AMERICA 342-43 (1979); J. WEAVER, WARREN: THE MAN, THE COURT, THE ERA 219-38 (1967). For an unusual analysis of what made the Warren Court "activist" see D. SELVAR, LEGAL THINKING IN SIX SELECTED CIVIL LIBERTIES DECISIONS OF THE WARREN COURT (1973).

2. 100 S. Ct. 2183 (1980).

3. TIME, June 30, 1980, at 51. Professor Kamisar notes that the *Henry* opinion will make *Massiah* stronger than ever. *Id.*

4. 377 U.S. 201 (1964).

5. Note, *An Historical Argument For the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1018 (1964). *See* Powell v. Alabama, 287 U.S. 45, 60-62 (1932) (providing an overview of the history of right to counsel).

6. *"De causis criminalibus uel capitalibus . . . nemo quaerat consilium, quin inplacitatus statim perneget sine omni peticione consilii, ciuscumque nacionis uel condicionis sit: uel eius affirmacionem uel negacionem defensor aut dominus prosequatur competenti termino comprobandum."* 1 LIEBERMANN, GESETZE DER ANGELSACHSEN 547, 571

available by the thirteenth century: the *pleader*, the *attornatus*, and the *advocatus*.[7] The *pleader* stood by his client's side and spoke on his behalf. The *attornatus* represented his client by appearing for him and presenting his case. The *advocatus* appeared not for the defendant, but for himself. He was usually the defendant's lord, and acted as his surety.[8] It is an irony of history that this wealth of counsel was not available to those in greatest need: those accused of felonies. In the twelfth century, conviction for any felony carried a sentence of death—or worse.[9]

In those early days before crime and tort became settled categories, those nonfelony defendants who had the benefit of counsel labored under the law/facts dichotomy. This meant that the defendant had to present the facts to which he was presumed to have easiest access, while his counsel applied the law to the facts.[10] Though the origin of this dichotomy is uncertain, by the time of Lord Coke it was firmly established.[11] In 1695, an Act of Parliament extended the right to counsel to those accused of treason or misprision of treason, and further required the appointment of

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(1903) (quoted in Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1018 (1964). The author of the note translated the above phrase as follows:

> In criminal or capital cases let no man seek *consilium;* rather let him forthwith deny [the charge] without having pleaded [having impleaded?] [and] without any asking for *consilium*, of whatever nation or state of life he may be; [then] let his defendor or his lord follow up his affirmance [affirmative defense] or denial by the appropriate method of proof.

Id.

Legis Henrici is "a book written between 1114 and 1118 containing Anglo-Saxon and Norman law. It is said to be an invaluable source of knowledge of the period preceding the full developments of the Norman law." BLACK'S LAW DICTIONARY 1045 (4th ed. 1968)

The note contains a very thorough and enlightening treatment of the subject. An "Appendix of Colonial Provisions on Counsel to 1800" contains a discussion of each of the thirteen colonies' approach to this criminal procedure. *Id.* at 1055.

7. P. LEWIS & K. PEOPLES, THE SUPREME COURT AND THE CRIMINAL PROCESS—CASES AND COMMENTS 549 (1978).

8. *Id. See also* 1 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 211-13 (2d ed. 1968); Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1019 (1964).

9. 2 POLLOCK & MAITLAND, *supra* note 8, at 452-53, 490, 500. "When punishment came it was severe . . . . [There are examples] of death inflicted by hanging, beheading, burning, drowning, stoning . . . . [Other torments were the] loss of ears, nose, upper lip, hands and feet; . . . castration and flogging . . . ." *Id.* at 452-53. *See also* M. FOUCEAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1977).

10. P. LEWIS & K. PEOPLES, *supra* note 7, at 550.

11. *Id.* This was called the absolutist era of criminal procedure in England. Note, *supra* note 8, at 1032.

counsel for these cases when necessary.[12] Counsel was allowed to aid the defendant in matters of both fact and law.

The eighteenth century saw an increase in counsel functions that made it possible for a defendant to have the assistance of his attorney during all parts of the trial except the conclusion of evidence, a privilege reserved for the King's Counsel.[13] The procedural handicaps deriving from the law/facts dichotomy had also disappeared.[14] At the time the sixth amendment to the United States Constitution was proposed in 1789, every state but Rhode Island had incorporated some provision for right to counsel into its constitution.[15]

Modern sixth amendment right to counsel cases trace their geneology to *Powell v. Alabama*[16] and *Johnson v. Zerbst*.[17] *Powell* is one of the notorious Scottsboro cases from the early 1930's. Three black defendants were denied the aid of counsel when accused of rape and faced the death penalty in Alabama.[18] Reversing their conviction, the Court carved out a well-defined area of required court-appointed counsel:

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12. P. LEWIS & K. PEOPLES, *supra* note 7, at 550.

13. *Id. See generally* G. FLETCHER, RETHINKING CRIMINAL LAW (1978); D. MELLINKOBB, THE CONSCIENCE OF A LAWYER (1973).

14. P. LEWIS & K. PEOPLES, *supra* note 7, at 550.

15. Note, *supra* note 8, at 1030, 1055. The sixth amendment, when proposed by Madison on July 2, 1789, passed both houses almost without debate. *Id.* at 1031. From that time until 1932 there were almost no cases on right to counsel. *Id.* For two examples from this quiescent period see Holden v. Hardy, 169 U.S. 366 (1898) and Anderson v. Treat, 172 U.S. 24 (1898).

In *Holden*, Justice Brown in comparing the English and American right to counsel said:

> The earlier practice of the common law, which denied the benefit of witnesses to a person accused of felony, had been abolished by statute, though as far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses, it had not been changed in England. But to the credit of her American colonies, let it be said that so oppressive a doctrine had never obtained a foothold there.

169 U.S. at 386. It was not until the American public became aware of a national crime wave in the 1920's that defendants' rights were eclipsed by a move for law and order. Note, *supra* note 8, at 1031. *See* F. HELLER, THE SIXTH AMENDMENT 109-38 (1969).

16. 287 U.S. 45 (1932). *See generally* 13 B.U.L. REV. 92 (1933) (an especially good article that traces the history of the right to counsel); 32 COLUM. L. REV. 1430 (1932); 18 IOWA L. REV. 383 (1933); 23 J. CRIM. L.C. & P.S. 841 (1933) (a discussion of Justice Holmes' formulation for defendant protection from courts influenced by mob violence as set forth in Moore v. Dempsey, 261 U.S. 86 (1923), and an hypothesis of why the Court decided not to follow that formula in *Powell*); 8 NOTRE DAME LAW. 260 (1933); 19 VA. L. REV. 293 (1933).

17. 304 U.S. 458 (1938). *See generally* 24 CORNELL L.Q. 270 (1939); 24 IOWA L. REV. 170 (1938).

18. *See* D. CARTER, SCOTTSBORO: A TRAGEDY OF THE SOUTH (1979). This award winning book contains an excellent bibliography of the popular press reaction during the time of the trials.

> [I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . .[19]

Moreover, the assignment of counsel must be made so as to allow enough time to prepare for trial and to provide an effective defense.[20]

Johnson v. Zerbst extended the right to appointed counsel to all federal felony cases.[21] Hence, by 1938, *Powell* principles required counsel in all capital cases and *Johnson* required counsel in all federal felony cases. Further, the Court in *Johnson* determined that a valid waiver of counsel requires proof of "an intentional relinquishment or abandonment of a known right or privilege."[22] Subsequently, in *Betts v. Brady*,[23] the Court refused to extend the *Powell* principles to the states when noncapital felonies were involved. The Court held that the sixth amendment neither guaranteed counsel for every offense, nor rendered inherently unjust, any trial conducted without counsel for the defense.[24]

In 1963, with only two justices of the *Betts* court remaining (Black and Douglas, who both dissented in that case), *Gideon v. Wainwright*[25] was decided, signalling the beginning of the criminal law revolution in sixth amendment cases. *Gideon* requires a state to appoint counsel in noncapital, as well as capital felony cases. Decided on the same day as *Gideon*, *Douglas v. California*[26] held that the determination of the need for counsel did not lie with the

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19. 287 U.S. at 71. The Court did not focus on the sixth amendment right to counsel, but instead on the fact that the defendant was denied the prerequisites of the fourteenth amendment due process clause. The applicability of the sixth amendment right of counsel to the states was first addressed by the Court in Gideon v. Wainwright, 372 U.S. 335 (1963) and Douglas v. California, 372 U.S. 353 (1963).

20. 287 U.S. at 71.

21. 304 U.S. at 468.

22. *Id.* at 464.

23. 316 U.S. 455 (1942).

24. *Id.* at 473.

25. 372 U.S. 335 (1963). *See generally* THE CRIMINAL LAW REVOLUTION AND ITS AFTERMATH 1960-1971 (1972); Grove, *Gideon's Trumpet: Taps for an Antiquated System? A Proposal for Kentucky*, 54 KY. L. J. 527 (1965); Hunsaker, *Right to Counsel—Before and After Gideon*, 4 WASHBURN L.J. 78 (1964); Monaghan, *Gideon's Army: Student Soldiers*, 45 B.U.L. REV. 445 (1965); Norton, *Gideon and the Habitual Criminal Statutes*, 6 WASHBURN L.J. 24 (1966); Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965).

26. 372 U.S. 353 (1963).

appellate court, but flowed from the fourteenth amendment requirement of due process.

Escobedo v. Illinois[27] left its mark on the 1963-64 term, and together with the principles of *Massiah* and *Brewer v. Williams*,[28] it embodies the fullest extension of the sixth amendment protection prior to *Henry*.[29] While under interrogation and in custody, Escobedo was consistently denied his request for counsel. As a result of his successful challenge of this police practice, Escobedo brought the right to counsel out of the courtroom, and into the interrogation room. The Court stated, "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."[30] If *Escobedo* extended sixth amendment protections from the courtroom to the police interrogation room, *Massiah*, as discussed in the next section, freed it from the confines of "custody" entirely.

The Warren Court, which fathered *Gideon* and *Escobedo*, had a tremendous impact on criminal procedure from 1953 to 1969.[31] The intense public reaction to these cases led to what has been called a conservative backlash.[32] Presidents Nixon and Ford appointed a total of five justices: Burger, Blackmun, Powell, Rehnquist, and

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27. 378 U.S. 478 (1964). *See generally* Dowling, *Escobedo and Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure*, 56 J. CRIM. L.C. & P.S. 143 (1965); Rothblatt, *Police Interrogation and the Right to Counsel, Post Escobedo v. Illinois: Application v. Emasculation*, 17 HASTINGS L.J. 41 (1965); Van Pelt, *The Meaning and Scope of Escobedo v. Illinois*, 38 F.R.D. 441 (1966).

28. 430 U.S. 387 (1977). At issue in *Brewer*, was the knowing and intelligent waiver of the right to counsel and the meaning of interrogation. Powell's two pronged analysis, deliberateness and surreptitious interrogation, as enunciated in *Henry*, emanates from *Brewer*.

29. The 1966-67 term saw the Supreme Court extending the right to protection of counsel into the police line-up identification rooms. This trilogy includes United States v. Wade, 388 U.S. 218 (1967), Gilbert v. California, 388 U.S. 263 (1967), and Stovall v. Denno, 388 U.S. 293 (1967). The Court in these cases guaranteed, "[i]n recognition of the realities of modern criminal prosecution," that the sixth amendment guarantee applies to all critical stages of the proceedings. CRIMINAL LAW REVOLUTION, *supra* note 25, at 98. "[T]he accused must be guaranteed that he need not stand alone against the state at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate the accused's right to a fair trial." *Id.* Of particular concern to the Court was the inability to reconstruct at the trial the potentially prejudicial manner in which the line-ups could be conducted. *Id.* at 98-99.

30. 378 U.S. at 492.

31. *See* CRIMINAL LAW REVOLUTION, note 25 *supra*. *See generally* G. KURLAND, THE SUPREME COURT UNDER WARREN (1973); R. MEDALIE, FROM ESCOBEDO TO MIRANDA: THE ANATOMY OF A SUPREME COURT DECISION (1966).

32. CRIMINAL JUSTICE & THE BURGER COURT 2 (J. Galloway ed. 1978).

Stevens.[33] Their antipathy to Warren Court decisions has been shown in the restrictive manner in which the Burger Court has interpreted these cases. Though not specifically overruling the cases, the Burger Court's restrictive policy has gradually eroded the various rights extended during the Warren Court era.[34] It is for this reason—the generally restrictive interpretation of defendants' rights in criminal procedure cases—that the *Henry* decision is so surprising. Under the Warren Court, *Henry* would have been viewed as a logical extension of *Massiah;* as a product of the Burger Court, it has the appearance of an abrupt turnabout from judicial conservatism.

II. *Massiah*'s GODCHILD: *United States v. Henry*

Massiah is the touchstone of sixth amendment right to counsel cases in a post-indictment setting. In that case, the codefendants had been indicted on drug related charges and had been released on bail pending trial. Massiah's codefendant, Colson, decided to aid the government in its continuing investigation of the crime.[35] Colson planted a radio transmitter in a parked car monitored by a nearby agent. During the course of a lengthy conversation in the bugged car, Massiah made several incriminating statements.[36] In applying the exclusionary remedy to Massiah's incriminating remarks, the Court held, "[t]he petitioner was denied the basic protections [of the sixth amendment] when there was used against him . . . his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."[37] The Court went on to emphasize the application of sixth amendment protections to "surreptitious interrogations" as well as to direct questions.[38]

In *Henry,* the defendant had been indicted on charges of armed robbery of a bank and was awaiting trial in the Norfolk County Jail.[39] Sharing his cellblock was forger cum informer Edward B. Nichols.[40] Acting as the human counterpart to Massiah's mechani-

33. *Id.*

34. *See generally* Williams v. Florida, 399 U.S. 78 (1970); Chambers v. Maroney, 399 U.S. 42 (1970); Brady v. United States, 397 U.S. 742 (1970); Turner v. United States, 396 U.S. 398 (1970). *See, e.g.,* CRIMINAL JUSTICE & THE BURGER COURT *supra* note 32, at 213-15.

35. 377 U.S. at 202.

36. *Id.* at 203.

37. *Id.* at 206.

38. *Id.*

39. 100 S. Ct. at 2184.

40. The timing of exactly who was where first seems an unresolved detail in determining

cal "bug," Nichols, a paid government informer, ingratiated himself and gained Henry's confidence to the point that Henry trusted him to aid in a planned escape. As a surprise witness at Henry's trial, Nichols then testified to incriminating statements made by Henry while in jail.[41]

Writing for a five justice majority,[42] Chief Justice Burger concluded that the cellmate informer had "deliberately elicited" statements from Henry.[43] Though the FBI agent had specifically told Nichols *not* to take any affirmative steps, the agent "must have known that such propinquity likely would lead to that result."[44]

The majority also rejected a government assertion that Henry had waived his right to counsel by voluntarily discussing his crime with the informer. Because Henry did not know that Nichols was a paid informer, he cannot be said to have "knowingly and voluntarily" waived his sixth amendment rights.[45] In addition, the Court emphasized the fact that Henry was in custody. It noted that the subtle influences of confinement make a defendant more vulnera-

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how much of a "plant" Nichols was. In the respondent's brief, it is stated that both Nichols and Sadler (whose role will be delineated later) were moved into Henry's cell. Brief of Respondent at 9, United States v. Henry, 100 S. Ct. 2183 (1980). The Court, in its statement of the facts of the case, indicates that Nichols had both been serving time, and informing, prior to Henry's incarceration. The suggestion is that Henry "came to" Nichols in both a figurative and literal sense. 100 S. Ct. at 2184.

The Court further indicates that it was Nichols who informed the agent that Henry was in his cell. *Id.* This would suggest the serendipitous nature of the proximity of Henry to Nichols.

41. 100 S. Ct. at 2185-86.

42. Justices Brennan, Stewart, Marshall, Powell, and Stevens joined the Chief Justice. The most surprising members of this majority are Chief Justice Burger and Justice Powell. As shown in an analysis of right to counsel cases decided by the Burger Court from 1970-1977, the Chief Justice voted to extend the sixth amendment in only two of the twelve surveyed cases: in Kitchens v. Smith, 401 U.S. 847 (1971), a per curiam decision which was held fully retroactive, and in Argersinger v. Hamlin, 407 U.S. 25 (1972). P. LEWIS & K. PEOPLES, *supra* note 7, at 593. *See generally* Froyd, *Is Argersinger a Shot in the Arm or a Coup de Grace?* 62 A.B.A.J. 1154 (1976). In *Argersinger*, the right to counsel was extended to all offenses punishable by imprisonment. 407 U.S. at 37.

In contrast, the votes of Marshall and Brennan in *Henry* are indicative of their strong support of sixth amendment extension cases. They both voted *against* an extension of the sixth amendment in only two cases, Gagnon v. Scarpelli, 411 U.S. 778 (1973), and Wolff v. McDonnell, 418 U.S. 539 (1974). Each of these cases concerned the right to counsel in quasi-judicial settings. *Gagnon* held there was no right to have appointed counsel at probation revocation hearings, although the Court further stated that this should be a case-by-case determination. 411 U.S. at 787-88. *Wolff* held there was no right to counsel at prison disciplinary hearings. 418 U.S. at 570.

43. 100 S. Ct. at 2186-89.

44. *Id.* at 2187. The Court indicated that Nichols was paid *only* when he produced the information wanted by the FBI. *Id.* at n.7.

45. *Id.* at 2188-89.

ble to the wiles of undercover agents.[46]

Henry is in many ways a foursquare affirmation of the protective arm of the sixth amendment extended by *Massiah*. Though Henry was in custody and Massiah was not, they have in common the three elements that the *Henry* Court found critical in determining whether the incriminating statements had been deliberately elicited by a government agent.[47] First, each was under indictment; therefore, sixth amendment protections had attached.[48] Second, Colson and Nichols, the informers, were being paid by the government and were therefore under the same constraints as government agents. Third, Massiah and Henry each thought that they were speaking to trusted co-conspirators, so there was no voluntary and knowing waiver of rights.[49]

Writing in concurrence, Justice Powell[50] placed emphasis on the deliberate nature of the government's actions. Distinguishing *Massiah* from the hypothetical case of a totally passive informer, Powell wrote:

> The rule of *Massiah* serves the salutary purpose of preventing police interference with the relationship between a suspect and his counsel once formal proceedings have been initiated. But *Massiah* does not prohibit the introduction of spontaneous statements that are not elicited by governmental action . . . . Simi-

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46. *Id.* at 2188.

47. *Id.* at 2186.

48. *See, e.g.*, United States v. Ash, 413 U.S. 300 (1973); United States v. Wade, 388 U.S. 218 (1967); Massiah v. United States, 377 U.S. 201 (1964).

49. *See* Massiah v. United States, 377 U.S. 201 (1964); Johnson v. Zerbst, 304 U.S. 458 (1938).

50. Justice Powell's record on sixth amendment cases has been conservative. In only one-third of twelve cases surveyed did he vote to extend the sixth amendment. P. LEWIS & K. PEOPLES, *supra* note 7, at 593. He wrote a concurring opinion in Argersinger v. Hamlin, 407 U.S. 25 (1972), and joined the majority in both Faretta v. California, 422 U.S. 806 (1975), upholding a right to self-representation at felony trials and Herring v. New York, 422 U.S. 853 (1975), in which the Court held that denying counsel an opportunity for closing argument during a nonjury trial was a denial of right to counsel. *Id.*

Faretta has been the source of a judicial broadside and a wealth of commentary: "If there is any truth to the old proverb that 'one who is his own lawyer has a fool for a client,' the Court by its opinion today now bestows a *constitutional* right on one to make a fool of himself." 422 U.S. at 852 (Justice Blackmun with whom the Chief Justice and Justice Rehnquist join, dissenting) (emphasis in original). *See generally* Chused, *Faretta and the Personal Defense: The Role of a Represented Defendant in Trial Tactics*, 65 CALIF. L. REV. 636 (1977); Note, *Faretta v. California and the Pro Se Defense: The Constitutional Right of Self Representation*, 25 AM. U.L. REV. 897 (1976); Note, *Faretta v. California: The Constitutional Right to Defend Pro Se*, 5 CAP. U.L. REV. 277 (1976); Note, *Faretta v. California: The Law Helps Those Who Help Themselves*, 28 HASTINGS L.J. 283 (1976); Comment, *The Right to Appear Pro Se: Developments in the Law*, 59 NEB. L. REV. 135 (1980).

> larly, the mere presence of a jailhouse informant . . . would not necessarily be unconstitutional . . . . [T]he question would be whether the informant's actions constituted deliberate and "surreptitious interrogation" . . . .[51]

The Powell test, then, has two elements: deliberateness and surreptitious interrogation. In *Henry,* the moment the government agent told Nichols to overhear Henry's conversations, and Nichols then *engaged* him in conversation, the first element, deliberateness, was satisfied.[52] The government had sought to obtain statements from Henry after formal proceedings had begun without the presence of counsel. There can be little doubt that Nichols' actions were surreptitious; Henry thought he was speaking to a fellow convict, not a paid informer. But are conversations between cellmates interrogation? If one of them is being paid by the government to procure information, then the conversation is interrogation.[53]

As discussed by legal commentators, and approved by the majority,[54] however, the critical element was not interrogation at all. No inquiry was made in *Massiah* as to who initiated the conversation about the crime, Massiah or Colson.[55] The Court's decision in *Henry* indicates that once the sixth amendment right to counsel attaches, the full protection of the sixth amendment will follow a defendant wherever and however the government may choose to question him. In the words of Chief Judge Lumbard, restating the arguments for Massiah's counsel, "[Massiah] could not legally *be approached* by persons acting on behalf of the government in the absence of his counsel."[56] As said in the *Massiah* dissent from the Second Circuit Court of Appeals, "federal officers must deal through and not around an attorney retained by a defendant under indictment."[57]

In *Henry* there were actually two informers, offering a nice counterpoint of forbidden active eliciting of information on one hand, and permissible passive information gathering on the other. Nichols, of course, was *paid* to "keep his ears open," but was told not to

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51. 100 S. Ct. at 2190.

52. *Id.*

53. Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is Interrogation? When Does It Matter?*, 67 GEO. L.J. 1 (1978).

54. *Id.* at 41; 100 S. Ct. at 2186-87.

55. 100 S. Ct. at 2186-87.

56. United States v. Massiah, 307 F.2d 62, 64 (2d Cir. 1962), *rev'd,* 377 U.S. 201 (1964) (emphasis added).

57. *Id.* at 72.

ask any questions.[58] Sadler, a second cellmate, told his attorney of statements that Henry had made while in conversation with *him*. His attorney suggested he inform the government of these conversations.[59] The only plausible reason that counsel would suggest such a move would be in hope of a reward for his client. To the degree that Sadler anticipated a reward for his disclosures they were as much elicited by the government as was the testimony of Nichols. The government had been active in the Nichols situation, passive with Sadler; the government approached Nichols, but Sadler approached the government. The Constitution speaks to governmental action, not action initiated by a private individual.[60] Though Sadler was in some attenuated fashion motivated by the government, this is no more a "governmental action" than when a private citizen seeks to gain a monetary reward for locating or supplying critical information on one of the "wanted" in the post office's rogues' gallery.

The *Henry* opinion contains a strong dissent. In an eleven page opinion, only two and a half pages are the opinion of the majority. Justice Powell's concurrence is less than a page in length. Justice White joins Justice Blackmun in his dissent, and Justice Rehnquist writes a separate dissent.[61]

Justices White and Blackmun highlight six policy objections to the *Henry* doctrine in their lengthy dissent.[62] The first objection is that the sanction imposed for finding a sixth amendment viola-

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58. 100 S. Ct. at 2185-86.

59. *Id.* at 2185 n.3.

60. No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (emphasis added).

61. Justice Blackmun, other than the per curiam decision in Kitchens v. Smith, 401 U.S. 847 (1971), has only once voted to extend a sixth amendment right to counsel—in Argersinger v. Hamlin, 407 U.S. 25 (1972). Justice Rehnquist cast his sole pro-extension vote in a concurring opinion in that same case. Justice White dissented in Brewer v. Williams, 430 U.S. 387 (1972), the infamous "Christian Burial Speech" case, which reaffirmed *Massiah* principles (in which Justice White also dissented) and clarified the necessity for a knowing and intelligent waiver of sixth amendment protections. In *Brewer*, *Massiah*, and *Henry*, Justice White has consistently maintained that the role of counsel has been improperly extended beyond, in the words of Enker and Elsen, the "traditional function of preparing for and participating in a trial or trial type proceeding to the representation and counseling of persons under police investigation where they are under indictment." *See* Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47, 48 (1964-65).

62. 100 S. Ct. at 2192-93.

tion—the exclusion of evidence—is too severe, because it prevents probative evidence from being admitted at trial. Second, the dissenters assert that the Court has undermined, and has little appreciation for, undercover work. Third, subjectively considered at the time they were given, Henry's statements were entirely voluntary. Fourth, the police action here was not egregious, and in fact demonstrates an effort to comply with constitutional standards, because the informer was specifically told not to question the suspect. Fifth, citing *Hoffa v. United States*,[63] White and Blackmun found no breach of "the canons of fairness" when the government uses statements obtained through an informer and a "wrongdoer's misplaced belief that a person to whom be [*sic*] voluntarily confides his wrongdoing will not reveal it."[64] Lastly, the two dissenters decry any further extension of *Massiah*. They note the limiting language of other sixth amendment cases "of providing counsel to counterbalance prosecutorial expertise and to aid defendants faced with complex and unfamiliar proceedings."[65]

In the first four reasons, Justices Blackmun and White seem to emphasize what they perceive as a trivial breach of sixth amendment rights—the attempt was well intended, the suspect was not physically coerced, and the cure much worse than the slight illness.[66] In citing *Hoffa* for the conceptual underpinnings of the fifth reason, the dissenters have, however, chosen a case easily distinguishable from *Henry*. In *Hoffa*, the informant elicited information during a purely investigatory stage of the proceedings. No sixth amendment protections attached because there were no adversarial criminal proceedings in progress for the crime being *investigated*, although Hoffa was on trial and had retained counsel for a separate offense.[67]

Blackmun and White seek to distinguish between "deliberate" interference with a suspect's right to counsel, and an incidental, less culpable form of conduct.[68] In *Henry*, no investigator was responsible for placing the defendant in the same cell as Nichols.[69] Henry's statements were not coerced. Any trespass upon the defendant's right to counsel was purely incidental.

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63. 385 U.S. 293 (1966).
64. 100 S. Ct. at 2192 (quoting Hoffa v. United States, 385 U.S. 293, 302 (1966)).
65. *Id.*
66. *Id.*
67. 385 U.S. at 308.
68. 100 S. Ct. at 2193 n.6.
69. *Id.* at n.7.

Yet the agent's actions, once he knew of the propinquity of his informer and Henry, and once he *told* the informer he specifically wanted information about *that* man and the very crime for which he had been arrested, moved Nichols from a passive to an active role. Thereafter, Nichols' actions must be viewed as deliberate. The informer was paid for getting the information. The informer was an agent of the government.[70]

Would there be a question of the inadmissibility of the information if the informer had not also been a fellow prisoner? What if Nichols were himself an FBI agent? It is the two-step nature of the situation which seems to be clouding the picture.

The stance of the Tennessee Supreme Court in relation to the jailhouse undercover agent is straightforward. *State v. Berry*[71] was a prison-informant case that correctly anticipated the Supreme Court's decision in *Henry* by several months. In *Berry,* the defendant had been indicted and was awaiting trial, in jail, for the bludgeon murder of his father-in-law and the attack and torture of his mother-in-law. Defendant's counsel had been promised by the authorities that Berry would not be interrogated. But in fact, the promise of no interrogation of Berry without counsel being present was made *after* those same authorities had already planned to place an undercover agent (who was *not* a fellow prisoner acting as an agent) in Berry's cell. In the words of the court, "To say the least the Sheriff was somewhat less than candid about the matter, lulling Lawyer Bowman into a false sense of security."[72] In fact, Berry himself was lulled into a false sense of security and, while never actually admitting to the crimes, he made incriminating statements placing him at the scene of the crime. The Tennessee Court ruled that irrespective of the authorities' promises, the sixth amendment protections had already attached.[73]

In *Berry,* the state argued that the agent had been placed in the cell not to interrogate Berry, nor to even passively absorb any other information about the crime. Rather, the agent was placed to find out what, if anything, Berry was threatening to do to the prosecution's main witness and investigator.[74] Noting the meager proof for the belief that Berry had any such plans, the court stated that even if arguendo there had been reasonable proof of such plans,

70. *Id.* at 2187.
71. 592 S.W.2d 553 (Tenn. 1980).
72. *Id.* at 555.
73. *Id.* at 561.
74. *Id.* at 555.

that proof would not validate the action of the state in exploiting the consequences of its placing a law enforcement officer in Berry's cell: "The testimony of the agent may or may not be competent in the context of another trial on another charge, *e.g.*, solicitation to commit murder or arson, but it is not admissible in this trial."[75]

In a California case, *People v. Bowman*,[76] decided only two days after *Escobedo*, the court held that the presence of an undercover agent who is not *also* a fellow prisoner is a violation of the right to counsel once the proceedings have become accusatory. *Bowman* involved a bugged confederate seeking information for the government about an arson. *Henry* makes it clear that an undercover fellow prisoner is nevertheless an agent, and as an agent is restrained by sixth amendment considerations.

Justice Rehnquist wrote a separate dissent. He denounced not only the holding in *Henry*, but its source, *Massiah*.[77] It is the opinion of Justice Rehnquist that *Massiah* and *Henry* have run too far afield of the "doctrinal underpinnings" of the sixth amendment.[78]

> [T]here is no constitutional or historical support for concluding that an accused has a right to have his attorney serve as a sort of guru who must be present whenever an accused has an inclination to reveal incriminating information to anyone who acts to elicit such information at the behest of the prosecution.[79]

In sum, the right to counsel has enjoyed a long and burgeoning career. From the modest beginning of a lord acting as surety for his vassal's misdemeanor, the right has grown to protect those accused of felonies of both capital and non-capital crimes. It has reached from a simple recitation of the law, to the full sway of courtroom procedure. It has anticipated the defendant in the interrogation rooms of police stations, in the monitored cars of informers, and, with *Henry*, in the jail cell. Has the sixth amendment spanned the full reach of adversarial criminal proceedings? Where can it go from here?

III. Conclusion

In *Henry*, the majority opinion fails to determine the status of a

75. *Id.* at 555-56.
76. 49 Cal. Rptr. 772 (Ct. App. 1966).
77. 100 S. Ct. at 2196-97.
78. *Id.*
79. *Id.* at 2200.

totally passive confidant placed by happenstance or artifice in close proximity to the accused who makes no effort to engage in conversation, presents the same question of admissibility of incriminating information obtained with an inanimate electronic device.[80] As long as the court maintains its "deliberately elicited" standard, however, it is difficult to see how any informer who has been given prior instructions by the government will be competent to testify over a sixth amendment objection. Once the informer has aligned himself with the prosecution, that alignment will trigger the "deliberately elicited" test.

On the other hand, the second informant's testimony in *Henry* was not viewed as "deliberately elicited" suggesting that the role of undercover agent is far from dead. The fact that Sadler first approached the government with his information, rather than the government requesting information as it did with Nichols, is clearly the distinguishing fact. As suggested by Justice Powell's concurrence, it is the active role as exemplified by Nichols that is forbidden, not the passive role as exemplified by Sadler.

Henry's effects on the courts and law enforcement officials have already been felt. In *Malone v. State*,[81] the Supreme Court of Florida overturned the murder and robbery convictions of Charles Malone, ruling that the refusal of the trial court to suppress incriminating statements made by Malone to a cellmate informant violated his sixth amendment right to counsel.[82]

The informer in *Malone*, who remains nameless, was a fellow prisoner. Although it is unclear whether the informer had ever reported before, and it is unknown whether he even gained any benefit from this job, it is clear that two and a half weeks after meeting Malone, the informer was asked by a detective to listen for information on the location of the victim's body. When listening failed to provide the needed information, it was the informer who suggested the ruse which finally won Malone's confidence. The informer arranged to be transferred to another jail, but lead Malone to believe that the informer was being freed. Malone then told the informer the location of the body and asked the informer to make sure it could not be found. Ironically, though the police followed the informer's directions, it was not until Malone's co-con-

80. *Id.* at 2187 n.9. *See generally* Hoffa v. United States, 385 U.S. 293 (1966); Osborn v. United States, 385 U.S. 323 (1966).

81. 37 FLA. L.W. 448 (Sept. 25, 1980).

82. *Id.* at 449.

spirator lead the police to the body that it was actually located.[83]

Malone, like *Henry* before it, satisfies both elements of the Powell test. The first element, deliberateness, can scarcely be denied in view of the scenario proposed and acted out by the informer. The second element, surreptitious interrogation, is found in Malone's unwitting incriminating statements made to the informer. It is interesting to note that although the jail cell ruse was the brainchild of the informer, the informer's initial involvement resulted from recruitment by a detective. As a government recruit, the "deliberately elicited" test was triggered and in the words of the court, "[I]t was indirect surreptitious State action which elicited Malone's incriminating statements . . . ."[84] *Malone* not only parallels the facts in *Henry,* but reflects the struggle between protecting the rights of the accused, and protecting the safety of the general population through expeditious and efficient police work. *Henry* may have reaffirmed the rights of the accused, but it also hindered all but the most circumspect investigation of a criminally accused person after indictment.

Malone's murders were brutal and random. Will the police, realizing that their investigations will be restricted in the post-indictment setting, postpone the final indictment leaving the murderer on the street? The thought of Malone being free until police had located his victim's body, a span of considerable time even *with* an informer, creates a question whether the net result of *Henry* will be increased protection *for* the defendant at the cost of decreased protection *from* the defendant. The problem of balancing this protection equation is a computation the Court will have to deal with on a case-by-case basis.

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83. *Id.* at 448-49.
84. *Id.* at 449.