

1987

Right to Counsel: Limited Postindictment Use of Jailhouse Informants Is Permissible--Sixth Amendment: Kuhlmann v. Wilson, 106 S. Ct. 2616 (1986)

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Recommended Citation

Bruce D. Lundstrom, Right to Counsel: Limited Postindictment Use of Jailhouse Informants Is Permissible--Sixth Amendment: Kuhlmann v. Wilson, 106 S. Ct. 2616 (1986), 77 J. Crim. L. & Criminology 743 (1986)

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SIXTH AMENDMENT—RIGHT TO COUNSEL: LIMITED POSTINDICTMENT USE OF JAILHOUSE INFORMANTS IS PERMISSIBLE

Kuhlmann v. Wilson, 106 S. Ct. 2616 (1986).

I. INTRODUCTION

In *Kuhlmann v. Wilson*,¹ the United States Supreme Court severely limited a suspect's sixth amendment right to counsel.² The decision marks a reversal of a previous trend of increasingly expansive interpretations given to the right to counsel.³ In *United States v. Henry*,⁴ the Supreme Court held that certain statements made to a paid jailhouse informant, who acted under police orders and actively engaged the defendant in conversation, could not be admitted into evidence at the defendant's trial.⁵ *Henry*, however, did not reach those instances where an informant, either by his actions or words, does nothing to entice incriminating statements.⁶ The Supreme Court reached this "passive informant"⁷ issue in *Wilson*. While the jailcell environment created by the police authorities in *Wilson* was arguably indistinguishable from the jailcell informant

¹ 106 S. Ct. 2616 (1986).

² The sixth amendment provides in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

³ This trend is discussed at length *infra* notes 55-76 and accompanying text.

⁴ 447 U.S. 264 (1980).

⁵ *Id.* at 269-74. Under the exclusionary rule, statements obtained by unconstitutional or otherwise illegal means cannot be admitted at trial. The exclusionary rule acts as a disincentive for using unlawful means to obtain evidence and helps maintain the purity of the American legal system. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁶ The *Henry* majority clarified, "[N]or are we 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." *Henry*, 447 U.S. at 271 n.9. The concurring opinion also advised, "Similarly, the mere presence of a jailhouse informant who had been instructed to overhear conversations and to engage a criminal defendant in some conversations would not necessarily be unconstitutional." *Id.* at 276 (Powell, J., concurring).

⁷ "Passive informant" refers to the *Henry* majority's description of an informant who "is placed in close proximity but makes no effort to stimulate conversations about the crime charged." *Id.* at 271 n.9. See *supra* note 6.

scheme rejected by the *Henry* Court, the *Wilson* Court permitted the admission of the accused's statements into evidence.

A plurality of Justices⁸ in *Wilson* also limited the criteria that lower courts are to consider in granting successive federal petitions of habeas corpus. Previously, federal trial judges exercised their "sound discretion" on a case-by-case basis in determining whether to hear successive habeas corpus petitions.⁹ District court judges were guided by *United States v. Sanders*,¹⁰ a Supreme Court decision that stipulated that successive review should be given in cases where review would serve the "ends of justice."¹¹ The *Sanders* Court, however, refused to create an exhaustive list of factors to be considered in an "ends of justice" analysis.¹² The *Wilson* plurality found that the *Sanders* Court's analysis provided insufficient guidance for lower courts.¹³ Accordingly, the *Wilson* plurality asserted that the "ends of justice" would be served only in those instances where the defendant could make "a colorable showing of factual innocence."¹⁴

This Note examines the *Wilson* opinions and concludes that the Court's decision represents an unjustified limitation on an accused's sixth amendment right to counsel. This Note argues that the Court's decision is an aberration from the Court's own "deliberately elicited"¹⁵ framework developed in *Massiah v. United States*¹⁶ and refined in *Henry*. Moreover, this Note considers *Wilson*'s impact for the future and concludes that the police practices encouraged by the decision are likely to foster greater abuses of an accused's rights. Finally, this Note examines the plurality-created standard for the review of successive federal habeas corpus petitions and suggests the problems that are likely to arise from the application of this standard.

⁸ See *infra* note 77 and accompanying text.

⁹ In *Sanders v. United States*, 373 U.S. 1, 18-19 (1963), the Court stated:

The principles governing [the] justifications for denial of a hearing on a successive application are addressed to the sound discretion of the federal trial judges. Theirs is the major responsibility for the just and sound administration of the federal collateral remedies, and theirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits.

¹⁰ 373 U.S. 1 (1963).

¹¹ *Id.* at 17.

¹² See *id.*

¹³ *Kuhlmann v. Wilson*, 106 S. Ct. 2616, 2622 (1986).

¹⁴ *Id.* at 2627.

¹⁵ For a discussion of the "deliberately elicited" standard, see *infra* notes 62-76 and accompanying text.

¹⁶ 377 U.S. 201 (1964).

II. FACTUAL BACKGROUND OF WILSON

On July 4, 1970, Joseph Wilson and two accomplices fatally shot a night dispatcher while robbing a New York City taxicab garage.¹⁷ Wilson surrendered himself to authorities four days after committing the offenses.¹⁸ Although witnesses testified that Wilson was at the garage before the crime¹⁹ and observed him fleeing with money soon after the robbery, Wilson denied any involvement.²⁰ Wilson did admit to witnessing the robbery and gave the police a description of the perpetrators.²¹ He claimed, however, that he did not know their identities.²² Wilson also asserted that he fled from the scene to avoid being held responsible for crimes he did not commit.²³

After his arraignment, Wilson was placed in a cell with another prisoner, Benny Lee.²⁴ The window in the cellblock overlooked the Star Taxicab Garage, the scene of Wilson's criminal offenses.²⁵ Unbeknownst to Wilson, Lee had been recruited by Detective Cullen to listen for and report any remarks made by Wilson that might reveal the identities of Wilson's confederates.²⁶ Initially, Wilson repeated to Lee the same story he had offered the police, reasserting his lack of involvement.²⁷ Although Lee was instructed to simply "keep his ears open,"²⁸ Lee advised Wilson that his narration "didn't sound too good" and that Wilson should "come up with a better story."²⁹ After a disturbing visit from his brother,³⁰ Wilson made new admis-

¹⁷ *Wilson*, 106 S. Ct. at 2619.

¹⁸ *Id.*

¹⁹ Workers at the garage observed Wilson and two unidentified men talking on taxicab garage property. *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* Lee was a three-time offender awaiting sentencing resulting from a guilty plea to a robbery charge. Joint Appendix of Parties at 43, *Kuhlmann v. Wilson*, 106 S. Ct. 2616 (1986)(No. 84-1479).

²⁵ *Wilson*, 106 S. Ct. at 2619.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* The court of appeals found that "Detective Cullen had told Lee to listen 'to see if [he] could find out' the names of the other two men involved in the crimes, but not to 'question the man in any way.'" *Wilson v. Henderson*, 742 F.2d 741, 742 (2nd Cir. 1984).

²⁹ *Wilson*, 106 S. Ct. at 2619 & n.1. Lee's version of exactly what he had told Wilson varied slightly between the hearing to determine the admissibility of his testimony and Wilson's trial. The substance of his remarks were essentially the same in either version. See *id.* at 2619 n.1.

³⁰ Wilson's brother related to Wilson that family members were distressed because they believed Wilson murdered the garage employee. *Id.* at 2619.

sions to Lee.³¹ Wilson admitted to Lee that he had participated in the robbery and in the shooting.³² Lee then informed Detective Cullen of Wilson's statements.³³

Before the trial began, Wilson unsuccessfully moved to suppress the statements made to Lee on the ground that they were obtained in violation of Wilson's sixth amendment right to counsel.³⁴ The trial court found that the informant had been carefully instructed not to ask any questions of Wilson concerning the crime, had carefully followed this advice, and, therefore, had only listened to Wilson's confessions.³⁵ The trial court ruled that the statements were "spontaneous" and "unsolicited" and, thus, admissible under New York law.³⁶ A New York jury found Wilson guilty of common law murder and felonious possession of a weapon.³⁷ The appellate division affirmed the conviction.³⁸ The New York Court of Appeals denied Wilson leave to appeal.³⁹

Wilson subsequently filed a federal petition for habeas corpus relief.⁴⁰ He reasserted that admission of the incriminating statements into evidence violated his sixth amendment right to counsel.⁴¹ The district court denied the writ⁴² and a divided court of appeals affirmed the denial.⁴³ The Supreme Court later refused a

³¹ *Id.* at 2619-20.

³² *Id.* at 2620.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* In determining the admissibility of Wilson's statements and the nature of the informant's role in inducing such statements, the trial court heard the testimony of Lee and Detective Cullen but not Wilson's testimony. *Id.* at 2620 & n.2.

³⁶ *Id.* at 2620.

³⁷ *Id.* Wilson was sentenced to twenty years to life for the murder of the garage dispatcher and to a concurrent term of up to seven years on weapons charges. *Id.* at 2620.

³⁸ *People v. Wilson*, 41 A.D.2d 903, 343 N.Y.S.2d 563 (1973)(without opinion).

³⁹ *Wilson*, 106 S. Ct. at 2620.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* The district court applied the *Massiah* standards to the trial court record and concluded that Wilson's statements were "spontaneous" rather than responses to state interrogation. *Id.*

⁴³ See *Wilson v. Henderson*, 584 F.2d 1185 (2d Cir. 1978). The court of appeals determined that a sixth amendment violation occurs if authorities make a deliberate effort to elicit incriminating statements from a criminal suspect after indictment of the suspect and in the absence of legal counsel. *Id.* at 1189 (relying on the standard created in *Massiah v. United States*, 377 U.S. 201, 206 (1964)). The court of appeals required "some circumstance more than the mere absence of counsel before a defendant's post-indictment statement is rendered inadmissible." *Wilson*, 584 F.2d at 1190. The court of appeals found no such circumstance in Wilson's case. *Id.* at 1190-91 (stressing that the trial judge's factual findings are entitled to a presumption of correctness under 28 U.S.C. § 2254).

petition for writ of certiorari.⁴⁴

After the United States Supreme Court ruling in *United States v. Henry*,⁴⁵ Wilson, believing that *Henry* constituted a new rule of law that should be retroactively applied to his case, filed a motion to vacate his conviction in the state trial court.⁴⁶ The court denied the motion.⁴⁷

Wilson then returned to the federal district court with a second federal habeas corpus petition.⁴⁸ The district court found that this case did not present the "passive informant" issue left open in *Henry*.⁴⁹ Because Lee had made no "affirmative effort" to induce the incriminating statements, the court held that Wilson's right to counsel was not violated.⁵⁰ In overruling the lower court's judgment, a divided court of appeals found the crucial elements in *Henry* and *Wilson* to be indistinguishable.⁵¹ The court of appeals directed the district court to hold a new trial for Wilson or order his release.⁵²

The United States Supreme Court granted certiorari to consider two issues. First, the Court contemplated whether justice required consideration of Wilson's second petition of habeas

⁴⁴ *Wilson*, 106 S. Ct. at 2620.

⁴⁵ 447 U.S. 264 (1980).

⁴⁶ *Wilson*, 106 S. Ct. at 2621. Wilson presumably noted that the *Henry* decision was the first Supreme Court case to apply the "deliberately elicited" standard to jailhouse informant practices and that the facts of the two cases were similar.

⁴⁷ *Id.* The state trial court judge found that *Henry* was factually distinguishable from *Wilson* since Lee was not paid for his services. *Id.* at 2621 & n.4. The trial court also ruled that *Henry* was not to be applied retroactively under state precedent. *Id.* at 2621.

⁴⁸ Wilson again argued that admission of his statements to Lee violated his right to counsel. He also argued that *Henry* should be given retroactive effect. *Id.* at 2621.

⁴⁹ *Id.* at 2621. See *supra* notes 6-7.

⁵⁰ *Wilson*, 106 S. Ct. at 2621. Because the district court found that *Henry* was distinguishable from *Wilson*, the lower court did not have to decide whether the holding in *Henry* should be retroactively applied. See *id.* The lower court also noted the 28 U.S.C. § 2254(d) presumption of correctness to be given to a state trial court's findings and added that the trial record in this case supported this presumption. *Id.*

⁵¹ *Wilson v. Henderson*, 742 F.2d 741, 745, 748 (2d Cir. 1984). The court of appeals first found that the "ends of justice" standard created in *Sanders v. United States*, 373 U.S. 1 (1963), required consideration of Wilson's successive habeas corpus petition. *Wilson*, 742 F.2d at 743. Second, since the court of appeals believed that the two cases were indistinguishable, the appellate court did not reach the "passive informant" question. *Id.* at 745. The court also decided that a retroactive application of *Henry* was appropriate since *Henry* involved the application of settled principles rather than the creation of a new constitutional rule. *Id.* at 746-47.

In dissent, Judge Van Graafeiland argued that Wilson had failed to demonstrate by convincing evidence that the initial findings of the state trial court were erroneous. Judge Van Graafeiland also scorned the majority for finding that a successive review of Wilson's habeas corpus petition would serve the "ends of justice" without properly supporting that conclusion. *Id.* at 749-50 (Van Graafeiland, J., dissenting).

⁵² *Wilson*, 742 F.2d at 748.

corpus.⁵³ Second, the Court considered whether the appellate court correctly applied *Henry* and its progeny to the facts of this case.⁵⁴

III. EVOLUTION OF THE *HENRY-MASSIAH* TEST

Since the landmark decision of *Powell v. Alabama*,⁵⁵ the United States Supreme Court has afforded the sixth amendment right to counsel an increasingly expansive and powerful interpretation.⁵⁶ Although the right to counsel has now permeated many aspects of criminal investigations and prosecutions,⁵⁷ the *Henry* line of decisions is concerned primarily with the postindictment efforts of state agents to surreptitiously induce incriminating statements from criminal defendants. The *Henry* line of decisions, however, actually has its underpinnings in *Spano v. New York*,⁵⁸ a decision that involved a coerced confession.

Police detectives in *Spano* employed lengthy interrogation and other unseemly police tactics to persuade Spano to confess to a murder.⁵⁹ The Supreme Court barred the admission of Spano's confession, ruling that the tactics employed by the detectives and the denial of Spano's attempts to interpose his attorney in the interrogation violated the defendant's right to counsel.⁶⁰ The concurring opinions stressed the importance of adequate protection at all

⁵³ *Wilson*, 106 S. Ct. at 2621.

⁵⁴ *Id.* at 2621-22.

⁵⁵ 287 U.S. 45 (1932). The Court held that the defendant in a capital offense crime has the right to have adequate time to meet with counsel and to prepare a defense. *Id.* at 68-71. The Court found that the right to have sufficient time to confer with counsel exists from the earliest stage of prosecution. The *Powell* Court termed this early investigation and preparation as "vitally important" and an entitlement of each defendant. *Id.* at 57 (citations omitted).

⁵⁶ See *infra* note 57.

⁵⁷ For example, the Court has ruled that an individual has the right to counsel while in state custody. See *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that any individual in custody must be informed of certain rights including the right to remain silent, the right to have an attorney present during questioning and the right to a court-appointed attorney if the individual cannot afford one). The Court has established the right to appointed counsel at all felony trials. See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that any defendant in a criminal trial who is unable to afford legal representation cannot be assured a proper trial unless legal counsel is provided by the state). The right to counsel was extended by the Court to any preliminary hearing where a suspect enters a plea. See *White v. Maryland*, 373 U.S. 59 (1963) (holding that the presence of counsel is necessary to enable the accused to plead intelligently and with a full understanding of all available defenses).

⁵⁸ 360 U.S. 315 (1959).

⁵⁹ *Id.* at 317-20. The interrogation lasted all night and into the early morning hours, totalling close to eight hours of nearly continuous questioning. The police also employed a friend of the defendant's in the interrogation. The friend falsely maintained to Spano that he, the friend, would be in trouble if Spano did not confess. *Id.* at 319.

⁶⁰ *Id.* at 322-24. The Court in a strongly critical opinion warned:

stages of prosecution and found that the denial of this protection by the police was sufficient grounds for reversal.⁶¹

The first Supreme Court attempt to develop a standard for scrutinizing surreptitious police practices in a right to counsel context came in the 1964 opinion of *Massiah v. United States*.⁶² In *Massiah*, the defendant and an accomplice were indicted on federal narcotics law charges and were subsequently released on bail pending trial.⁶³ *Massiah's* cohort, Colson, agreed to assist the government in its continuing investigation of *Massiah*.⁶⁴ Colson led *Massiah* into making several incriminating statements that were subsequently used against him at trial.⁶⁵ Relying heavily on the language of the *Spano* concurring opinions, the Court held:

[T]he petitioner was denied the basic protections of that guarantee [of the sixth amendment right to counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.⁶⁶

In the first right to counsel decision to involve the use of a jailhouse informant,⁶⁷ the Court in *United States v. Henry*⁶⁸ applied and

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

Id. at 320-21.

⁶¹ See *id.* at 324 (Douglas, J., concurring); *id.* at 326 (Stewart, J., concurring).

⁶² 377 U.S. 201 (1964).

⁶³ *Id.* at 202. *Massiah* was indicted for possession of narcotics aboard a United States vessel in violation of 21 U.S.C. § 184(a) (since repealed). *Massiah*, 377 U.S. at 202 & n.2.

⁶⁴ Colson permitted a government agent to place a radio transmitter underneath the front seat of his car and allowed the agent to overhear conversations between himself and *Massiah*. *Massiah*, 377 U.S. at 202-03.

⁶⁵ *Id.* at 203. Colson and *Massiah* discussed *Massiah's* narcotics activities at length while sitting in the parked automobile. *Id.* For a detailed account of the incriminating statements made by *Massiah*, see *United States v. Massiah*, 307 F.2d 62, 65 (2nd Cir. 1962).

The possible ways that state agents can lead a suspect into making incriminating statements are varied. In *Brewer v. Williams*, 430 U.S. 387 (1977), a police detective coaxed a mentally disturbed religious prisoner into revealing the whereabouts of his murder victim by persuading the prisoner that the victim was "entitled to a Christian burial." *Brewer*, 430 U.S. at 392-93.

⁶⁶ *Massiah*, 377 U.S. at 206.

⁶⁷ Although *United States v. Henry*, 447 U.S. 264 (1980), was the first case to involve the use of a jailhouse informant (i.e., another prisoner acting in concert with the police), *Henry* was not the first decision to confront the issue of an undercover government agent placed in the suspect's cell. In *Miller v. California*, 392 U.S. 616 (1968) (per curiam), a county sheriff's office employee was booked on a fictitious narcotics charge and placed in a cell with Miller. The employee conversed with Miller and later testified at Miller's trial. The employee revealed several incriminating remarks made by Miller during the

refined the “deliberately elicited” language of *Massiah*. In *Henry*, FBI agents employed an informant to listen to statements made by any of the several federal prisoners occupying the same cellblock and to report any useful information obtained.⁶⁹ After the informant was released from jail, a federal agent contacted him and the informant relayed several statements made by Henry during Henry’s incarceration.⁷⁰ These statements implicated Henry in the armed robbery for which he had been indicted and was being held.⁷¹ The informant was compensated by the federal government for his work and he later testified about the statements at Henry’s trial.⁷² Henry moved to have his sentence vacated on the ground that the admission of the informant’s testimony constituted a violation of his sixth amendment right to counsel.⁷³

The Court in *Henry* framed the issue as “whether under the facts of this case a Government agent ‘deliberately elicited’ incriminating statements from Henry within the meaning of *Massiah*.”⁷⁴ The Court found that the agent’s actions violated the framework created in *Massiah*.⁷⁵ The majority held, “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.”⁷⁶

IV. THE PLURALITY OPINION—SUCCESSIVE FEDERAL HABEAS CORPUS PETITIONS

Justice Powell’s opinion in *Kuhlmann v. Wilson* concerning the issue of successive habeas corpus petitions constituted only a plurality of four justices.⁷⁷ The plurality rejected the court of appeals’ application of the “ends of justice” standard⁷⁸ set forth in *Sanders v.*

course of their conversations. The Supreme Court, in a per curiam decision, dismissed the writ of certiorari as improvidently granted. *Id.* at 616. Justice Marshall, in his dissenting opinion, argued that Miller’s remarks had been “deliberately elicited” and therefore violated Miller’s sixth amendment right to counsel. *Id.* at 627 (Marshall, J., dissenting).

⁶⁸ 447 U.S. 264 (1980).

⁶⁹ *Id.* at 266.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 266-67.

⁷³ *Id.* at 267-68.

⁷⁴ *Id.* at 270.

⁷⁵ *Id.* at 274.

⁷⁶ *Id.* at 274 (footnote omitted).

⁷⁷ Justice Powell was joined by Chief Justice Burger and Justices Rehnquist and O’Connor. Justices Blackmun and White did not join in the plurality opinion, but neither did they join with the dissent on the successive habeas corpus petition issue.

⁷⁸ *Wilson*, 106 S. Ct. 2616, 2628 (1986).

United States.⁷⁹ Justice Powell found, moreover, that the "ends of justice" test⁸⁰ provided inadequate guidance to district courts concerning when review should be granted.⁸¹

Initially, the plurality briefly discussed the *Sanders* decision.⁸² Justice Powell noted that the *Sanders* Court addressed two fundamental issues.⁸³ First, *Sanders* contemplated whether a lower court could properly deny a federal prisoner's motion for habeas relief without a hearing if the court found the motion to be an abuse of the habeas corpus writ.⁸⁴ Second, the Court in *Sanders* considered the standard for examining successive habeas corpus petitions.⁸⁵ The plurality in *Wilson* noted that *Sanders* directed district courts to dismiss successive petitions if "the ends of justice would not be served by reaching the merits of the subsequent application."⁸⁶ The *Wilson* plurality found that the *Sanders* "ends of justice" framework "provided little specific guidance as to the kind of proof" important in an "ends of justice" inquiry.⁸⁷ Justice Powell emphasized the court of appeals' lack of discussion concerning that court's conclusion that habeas corpus review would serve the "ends of justice."⁸⁸ The plurality concluded that the relevant considerations in a decision to review a successive federal petition for habeas corpus should be more clearly defined.⁸⁹

⁷⁹ 373 U.S. 1 (1963). In *Sanders*, the defendant was arrested and charged with robbing a federally insured bank. Sanders declined counsel, pleaded guilty, and was sentenced to jail. He subsequently filed a petition for writ of habeas corpus, asserting several errors in the pleading proceeding. The sentencing court denied the petition. Later, Sanders filed a second petition for writ of habeas corpus and this time alleged specific facts in support of his claims. The district court denied this motion due to Sanders' failure to allege these specific facts in his first petition. The court of appeals affirmed the lower court's denial of Sanders' second habeas corpus petition. The United States Supreme Court, however, reversed and ruled that a hearing should have been granted based on the second petition. *Id.* at 2-23.

⁸⁰ The *Sanders* "ends of justice" test directed district courts to entertain a successive petition if they determined that such review would serve the "ends of justice." *Id.* at 17. *Sanders* placed the burden on the prisoner to show that the "ends of justice" would be served by a new hearing. *Id.*

⁸¹ *Wilson*, 106 S. Ct. at 2622.

⁸² *See id.*

⁸³ *Id.*

⁸⁴ *See Sanders*, 373 U.S. at 17-19.

⁸⁵ *See id.* at 15-17. For a discussion of the difference between a "successive petition" and an "abuse of the writ," see *Wilson*, 106 S. Ct. at 2622 n.6. Generally, a "successive petition" raises "grounds identical to those raised . . . on a prior petition" while an "abuse of the writ" raises "grounds that were available but not relied upon in a prior petition." *Id.* at 2622 n.6.

⁸⁶ *Wilson*, 106 S. Ct. at 2622 (quoting *Sanders*, 373 U.S. at 15).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

Justice Powell reviewed the line of cases interpreting congressional legislation in the area of federal habeas corpus review for persons in state custody.⁹⁰ The plurality related that, until the 1900's, the Supreme Court limited federal examination of habeas corpus petitions solely to the issue of the sentencing court's jurisdiction.⁹¹ The plurality noted that the Court incrementally expanded habeas review to other issues, but maintained that only the jurisdiction of the state court was being questioned.⁹² The contention that the Court was only questioning the state court's jurisdiction, the plurality explained, was later abandoned and the broad scope of the writ of habeas corpus was recognized.⁹³

Justice Powell observed, however, that the trend in federal habeas corpus review has not been one of constant expansion.⁹⁴ Specifically, Justice Powell noted the Supreme Court's ruling in *Stone v. Powell*,⁹⁵ which stated, "[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."⁹⁶ Because the interest in a "rational system of criminal justice" outweighed the interest in "Fourth Amendment rights," Justice Powell explained, the Court limited the review of search and seizure claims.⁹⁷

The plurality concluded that habeas corpus has historically been guided by equitable considerations and available to "persons whom society has grievously wronged."⁹⁸ The plurality asserted,

⁹⁰ *Id.* Congress did not authorize federal courts to review the habeas corpus petitions of state prisoners until 1867. *See id.* at 2622 n.7.

⁹¹ *Id.* at 2623. For a discussion of the evolution of federal habeas review, see *Stone v. Powell*, 428 U.S. 465 (1976) (holding that evidence may be introduced in a federal habeas corpus review of a state conviction despite a fourth amendment search and seizure violation); *Wainwright v. Sykes*, 433 U.S. 72 (1977).

⁹² *Wilson*, 106 S. Ct. at 2623.

⁹³ *Id.* The Court in *Waley v. Johnston*, 316 U.S. 101, 104-05 (1942) (citations omitted) stated, "It [the use of the writ in the federal court] extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights."

⁹⁴ *Wilson*, 106 S. Ct. at 2623.

⁹⁵ 428 U.S. 465 (1976).

⁹⁶ *Id.* at 494 (footnotes omitted). *See Wilson*, 106 S. Ct. at 2623.

⁹⁷ *Wilson*, 106 S. Ct. at 2623 (quoting *Stone v. Powell*, 428 U.S. 465, 494 (1976)). The interest in criminal justice included the desire to focus the question at trial on the defendant's guilt or innocence and to prevent the exclusion of important and reliable evidence. *See Stone*, 428 U.S. at 490. Justice Powell added that this limitation on habeas review was permissible since search and seizure claims usually have no bearing "on the basic justice of his [a convicted defendant's] incarceration." *Wilson*, 106 S. Ct. at 2623 (quoting *Stone*, 428 U.S. at 492 n.31).

⁹⁸ *Wilson*, 106 S. Ct. at 2623 (quoting *Fay v. Noia*, 372 U.S. 391, 438, 440-41 (1963)).

however, that the scope of the habeas corpus writ is not simply a function of the desire "to assure that an individual accused of crime is afforded a trial free of constitutional error."⁹⁹ The plurality stated that, instead, the scope of the writ is the product of a "sensitive weighing of the interests implicated."¹⁰⁰

Justice Powell then returned to a consideration of the "ends of justice" standard created in *Sanders*. Justice Powell noted that the phrase "ends of justice" was once part of the statute governing petitions of habeas corpus.¹⁰¹ Even though the *Sanders* Court cited this statutory phrase, the plurality found that the *Sanders* opinion did little to help identify the factors to be considered in an "ends of justice" determination.¹⁰² Justice Powell observed that the present statute governing successive habeas corpus petitions no longer contains the "ends of justice" language.¹⁰³ In interpreting the new legislation, the plurality considered Congress' intent in changing the statute.¹⁰⁴ The plurality found that the legislative history surrounding the changes to the statute suggested that Congress was greatly concerned about the inadequate degree of finality in habeas corpus judgments and the increasing number of state prisoner habeas

⁹⁹ *Id.* at 2624.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* The plurality related:

The provision, which then governed petitions filed by both federal and state prisoners, stated in relevant part that no federal judge "shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person . . . if it appears that the legality of such detention has been determined" by a federal court "on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge . . . is satisfied that the *ends of justice will not be served by such inquiry.*"

Id. (quoting 28 U.S.C. § 2244 (1964))(emphasis added by *Wilson* plurality).

¹⁰² *Id.* at 2624. The *Sanders* Court's failure to be more specific was not an oversight. The *Sanders* Court concluded, "[T]he test is 'the ends of justice' and it cannot be too finely particularized." *Sanders*, 373 U.S. at 17.

¹⁰³ *Wilson*, 106 S. Ct. at 2624. 28 U.S.C. § 2244(b) (1966) states:

When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

¹⁰⁴ The plurality stated, "[W]e are cognizant that Congress adopted the section in light of the need . . . to weigh the interests of the individual prisoner against the sometimes contrary interests of the State in administering a fair and rational system of criminal laws." *Wilson*, 106 S. Ct. at 2625.

corpus applications filed in the federal courts.¹⁰⁵

The plurality, nevertheless, found that the phrase "ends of justice" still provides an adequate framework for federal courts to evaluate successive habeas corpus petitions.¹⁰⁶ Justice Powell noted that "the permissive language of § 2244(b) gives federal courts discretion to entertain successive petitions under some circumstances" but this discretion is to be tempered by Congress' intent to limit such consideration to "rare instances."¹⁰⁷ The plurality concluded, therefore, that district courts need specific guidance regarding the application of the "ends of justice" framework.¹⁰⁸

In order to ascertain the applicable standard for an "ends of justice" determination, the plurality examined the interests of society and the prisoner in federal review of a successive habeas petition.¹⁰⁹ Justice Powell determined that in a successive review, a prisoner's sole interest is his release from custody if he is, in fact, innocent.¹¹⁰ Guilty prisoners, Justice Powell reasoned, have no interest in successive review.¹¹¹ Justice Powell then focused on the interests of the state and found that the state has a strong interest in finality.¹¹² Justice Powell determined that finality in habeas corpus judgments serves many legitimate state interests.¹¹³ First, Justice Powell found that restrictions on the availability of habeas review serve as a deterrent,¹¹⁴ helping to reduce unlawful conduct.¹¹⁵ Second, Justice Powell determined that the state interest in rehabilitation will be furthered by the prisoner's understanding that the determination of his guilt is settled and that he must now accept punishment.¹¹⁶ Third, the plurality stated that a federal determination that a prisoner must be retried may be difficult for the state to practically accomplish due to great lapses in time.¹¹⁷

¹⁰⁵ *Id.* See S. Rep. No. 1797, 89th Cong., 2d Sess. (1966); H.R. Rep. No. 1892, 89th Cong., 2d Sess. (1966).

¹⁰⁶ *Wilson*, 106 S. Ct. at 2625.

¹⁰⁷ *Id.* at 2625-26. See Advisory Committee Note, Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. § 2254 (1979).

¹⁰⁸ *Wilson*, 106 S. Ct. at 2626.

¹⁰⁹ See *id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* The plurality postulated, "[T]he deterrent force of penal laws is diminished to the extent that persons contemplating criminal activity believe there is a possibility that they will escape punishment through repetitive collateral attacks." *Id.* (footnote omitted).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2627. For example, the death, disappearance or inability of witnesses to

After evaluating the interests of the prisoner and the state, the four justices agreed:

In the light of the historic purpose of habeas corpus and the interests implicated by successive petitions for federal habeas relief from a state conviction, we conclude that the "ends of justice" require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence.¹¹⁸

Justice Powell asserted that a "colorable showing of factual innocence" would narrow the review to those "petitioners who are justified in again seeking relief from their incarceration."¹¹⁹ Furthermore, the plurality would apply the "colorable showing of factual innocence" standard where the primary or even sole evidence of guilt was admitted unlawfully.¹²⁰

Applying this newly created test to the facts of the *Wilson* case, the plurality found no "colorable showing of factual innocence."¹²¹ Since *Wilson* himself did not assert his innocence and the overwhelming evidence clearly supported a guilty verdict, the plurality found that the court of appeals was incorrect in ruling that review of *Wilson's* successive habeas corpus petition would serve the "ends of justice."¹²²

V. THE MAJORITY OPINION—SIXTH AMENDMENT RIGHT TO COUNSEL

In *Kuhlmann v. Wilson*, the United States Supreme Court reversed and remanded the appellate court's decision, holding that *Wilson's* sixth amendment right to counsel had not been violated. Justice Powell delivered the majority opinion.¹²³ He noted that the *Henry* Court had not decided the "passive informant" question,¹²⁴

recall events, destruction of other evidence, etc., will contribute to the difficulty of retrial after great time lapses. Justice Powell observed that the court of appeals ordered a retrial in this case some fourteen years after the murder and robbery were committed. The plurality also briefly mentioned other interests in limiting successive petitions, including reducing the financial resources expended in successive reviews and minimizing the frictions inherent in the federalism relationship. *Id.* at 2627 n.16.

¹¹⁸ *Id.* at 2627. The requirement that a defendant seeking federal habeas review make "a colorable showing of innocence" was a standard suggested by Judge Friendly in an academic composition. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970).

¹¹⁹ *Wilson*, 106 S. Ct. at 2627.

¹²⁰ *Id.*

¹²¹ *Id.* at 2628.

¹²² *Id.*

¹²³ Justice Powell was joined by Chief Justice Burger and Justices White, Blackmun, Rehnquist and O'Connor.

¹²⁴ See *supra* note 7.

but had expressly reserved judgment on that issue.¹²⁵ In *Wilson*, the Court perceived a "passive informant" scenario.¹²⁶ The majority relied on the framework established by *Massiah* and *Henry* to determine that the evidence obtained by a jailhouse informant "who was 'placed in close proximity but [made] no effort to stimulate conversations about the crime charged' " could be admitted at trial.¹²⁷

Initially, the majority reviewed the Supreme Court standards for analyzing a claim that the sixth amendment right to counsel has been violated.¹²⁸ The majority found that the *Massiah* line of decisions had its underpinnings in the two concurring opinions from *Spano v. New York*.¹²⁹ Justice Powell noted that "the concurring Justices [in *Spano*] also took the position that the defendant's right to counsel was violated by the secret interrogation."¹³⁰ Justice Powell observed that Justice Stewart had also commented that "an indicted person has the right to assistance of counsel throughout the proceedings against him."¹³¹ These two concurrences, according to Justice Powell, served as the basis for the decision in *Massiah v. United States*.¹³² The *Wilson* majority asserted that the "deliberately elicited" test of *Massiah*¹³³ was designed to prevent both straightforward questioning and "indirect and surreptitious interrogations."¹³⁴ Justice Powell concluded, "Thus, the [*Massiah*] Court made clear that it was concerned with interrogation or investigative techniques that were equivalent to interrogation, and that it so viewed the technique in issue in *Massiah*."¹³⁵

The majority then focused on *United States v. Henry*,¹³⁶ which applied the "deliberately elicited" test of *Massiah* to incriminating remarks made to a jailhouse informant.¹³⁷ The *Wilson* majority did not

¹²⁵ *Wilson*, 106 S. Ct. at 2628. See *supra* note 6. The "passive informant" question was also reserved in *Maine v. Moulton*, 106 S. Ct. 477 (1985). The Court explained, "Thus, as in *Henry*, . . . we need not reach the situation where the 'listening post' [e.g., an informant] cannot or does not participate in active conversation and prompt particular replies." *Moulton*, 106 S. Ct. at 488 n.13.

¹²⁶ See *Wilson*, 106 S. Ct. at 2630.

¹²⁷ *Id.* at 2628 (quoting *Henry*, 447 U.S. at 271 n.9). See *supra* note 6.

¹²⁸ See *Wilson*, 106 S. Ct. at 2628.

¹²⁹ *Id.* For a discussion of *Spano v. New York*, 360 U.S. 315 (1959), see *supra* notes 58-61 and accompanying text.

¹³⁰ *Wilson*, 106 S. Ct. at 2629 (citing *Spano*, 360 U.S. at 325 (Douglas, J., concurring)).

¹³¹ *Id.* at 2629 (citing *Spano*, 360 U.S. at 327 (Stewart, J., concurring)).

¹³² *Id.* at 2629. *Massiah v. United States* is reported at 377 U.S. 201 (1964).

¹³³ For a discussion of the *Massiah* decision and the "deliberately elicited" test, see *supra* notes 62-66 and accompanying text.

¹³⁴ *Wilson*, 106 S. Ct. at 2629 (quoting *Massiah*, 377 U.S. at 206).

¹³⁵ *Id.* at 2629 (footnote omitted).

¹³⁶ 447 U.S. 264 (1980).

¹³⁷ For a discussion of the *Henry* decision, see *supra* text accompanying notes 67-76.

note that the *Henry* Court refined the *Massiah* test,¹³⁸ although most commentators argue that the *Henry* Court made such a modification.¹³⁹ The *Wilson* majority observed, however, that the *Henry* informant had "developed a relationship of trust and confidence" and "deliberately used his position to secure incriminating information."¹⁴⁰ The *Wilson* majority contended, "The [*Henry*] Court emphasized that those facts, like the facts of *Massiah*, amounted to 'indirect and surreptitious interrogatio[n]'" of the defendant."¹⁴¹

Justice Powell completed his examination of the *Massiah* line of cases by focusing on the Court's recent decision in *Maine v. Moulton*.¹⁴² The facts of *Moulton* were strikingly similar to those the Court encountered in *Massiah*.¹⁴³ From the findings in *Moulton*, the *Wilson* majority concluded, "As our recent recent [sic] examination of this Sixth Amendment issue in *Moulton* makes clear, the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation."¹⁴⁴ The majority held that the use of a "passive informant" did not violate the sixth amendment right to counsel even if the informant was acting under a prior arrangement with authorities.¹⁴⁵ The Court ruled, "[T]he defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks."¹⁴⁶

¹³⁸ See *Wilson*, 106 S. Ct. at 2629.

¹³⁹ See Note, *Inanimate Listening Devices: A Violation of Sixth Amendment Right To Counsel*, 14 *LOY. U. CHI. L.J.* 359, 381 (1983) ("[T]he *Henry* decision created a new and more encompassing test than that of *Massiah*"); Note, *Interrogation Without Questions: Rhode Island v. Innis and United States v. Henry*, 78 *MICH. L. REV.* 1209, 1238 (1980) ("Henry extends *Massiah* by holding that, at least in the 'jail-plant' context, the government may violate the sixth amendment even though it lacked a specific purpose to elicit incriminating statements at the time they were elicited.").

¹⁴⁰ *Wilson*, 106 S. Ct. at 2629 (quoting *Henry*, 447 U.S. at 269-70).

¹⁴¹ *Id.* (quoting *Henry*, 447 U.S. at 273).

¹⁴² 106 S. Ct. 477 (1985).

¹⁴³ As in *Massiah*, the defendant in *Moulton* was encouraged by his accomplice to make incriminating statements. *Moulton*, 106 S. Ct. at 482 ("Apologizing for his poor memory, he [the accomplice] repeatedly asked Moulton to remind him about the details of what had happened, and this technique caused Moulton to make numerous incriminating statements." (footnote omitted)). A wire transmitter was used by the police, with the accomplice's consent, to record conversations and eventually the incriminating remarks were used in the defendant's trial. *Id.* at 481-82. The *Moulton* Court found that these procedures violated the sixth amendment right to counsel, since the informant's actions were "the functional equivalent of interrogation." *Id.* at 488 n.13 (quoting *Henry*, 447 U.S. at 277 (Powell, J., concurring)).

¹⁴⁴ *Wilson*, 106 S. Ct. at 2630.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

Applying this analysis of the sixth amendment line of decisions to the *Wilson* facts, the majority found no violation of the sixth amendment right to counsel.¹⁴⁷ The majority, moreover, disagreed with the court of appeals' conclusion that the case did not present the "passive informant" issue.¹⁴⁸ The appellate court's mistaken conclusion, according to Justice Powell, stemmed from the appellate court's "failure to accord to the state trial court's factual findings the presumption of correctness expressly required by 28 U.S.C. § 2254(d)."¹⁴⁹ The Court decided that the court of appeals' conclusion concerning the interaction between the informant Lee and the defendant were unsupported by the state court's findings of fact.¹⁵⁰ The majority stated:

After thus revising some of the trial court's findings, and ignoring other more relevant findings, the Court of Appeals concluded that the police "deliberately elicited" respondent's incriminating statements. This conclusion conflicts with the decision of every other state and federal judge who reviewed this record, and is clear error in light of the provisions and intent of § 2254(d).¹⁵¹

Based upon the factual findings of the trial court and the majority holding that the use of a "passive informant" did not violate the sixth amendment right to counsel, the Supreme Court reversed the judgment of the court of appeals and held that the testimony of the informant was admissible into the trial proceedings.¹⁵²

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (citations omitted). 28 U.S.C. § 2254(d) (1966) states in relevant part:

In any proceeding instituted in a 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 to be correct

¹⁵⁰ *Wilson*, 106 S. Ct. at 2630. The state court findings of fact, noted by Justice Powell, included the careful instructions given by Officer Cullen to Lee, Lee's adherence to those instructions and the existence of other solid evidence against the defendant. The only blemish in the record Justice Powell mentioned was the remark made by Lee to Wilson that his story "didn't sound too good." *Id.*

¹⁵¹ *Id.* at 2631 (citation omitted). The court of appeals' belief that "Lee's ongoing verbal intercourse with [Wilson] served to exacerbate [Wilson's] already troubled state of mind" was determined to be "completely at odds with the facts found by the trial court." *Id.* at 2630-31 (quoting the court of appeals' finding, *Wilson v. Henderson*, 742 F.2d 741, 745 (2nd Cir. 1984)).

¹⁵² *Id.* In a very brief concurring opinion, Chief Justice Burger subscribed fully to the majority opinion. *Id.* at 2631 (Burger, C.J., concurring). Chief Justice Burger contended that situations involving only the recording of remarks made by prisoners can be wholly distinguished from those instances involving the encouragement and subsequent recording of those same remarks. *Id.* (Burger, C.J., concurring). The Chief Justice ad-

VI. THE DISSENTING OPINIONS

Justice Brennan, joined by Justice Marshall, dissented on both the habeas corpus and right to counsel issues. Justice Brennan criticized the plurality's historic understanding of habeas corpus. Justice Brennan asserted that the plurality adopted "a revisionist theory of this Court's habeas corpus jurisprudence."¹⁵³ Moreover, he accused the plurality of implying that federal habeas corpus review may not be available to a prisoner in his first petition as a matter of right, even if the prisoner asserts a violation of a constitutional right.¹⁵⁴ The dissent further noted the plurality's focus on factual innocence as a cornerstone of habeas corpus review and their subsequent decision that factual innocence is crucial to an "ends of justice" inquiry.¹⁵⁵ Justice Brennan disagreed with the plurality's contention that factual innocence has played an important role in habeas review.¹⁵⁶ He maintained, "Neither the plurality's standard for consideration of successive petitions nor its theory of habeas corpus is supported by statutory language, legislative history, or our precedents."¹⁵⁷

Justice Brennan followed with his own historical interpretation of the scope and evolution of habeas corpus.¹⁵⁸ He contended that habeas corpus review traditionally has not focused on a weighing of prisoner and state interests.¹⁵⁹ Justice Brennan identified one area of habeas corpus adjudication where a balancing of state and prisoner interests has occurred—the area of collateral review of claims of constitutional violations procedurally defaulted in state court.¹⁶⁰ In this area of collateral review, Justice Brennan explained, "a state prisoner generally must show cause and actual prejudice."¹⁶¹ The

ded that the current abuse of habeas corpus writs needs to be impeded. *Id.* (Burger, C.J., concurring).

¹⁵³ *Id.* at 2631 (Brennan J., dissenting).

¹⁵⁴ *Id.* (Brennan, J., dissenting). Justice Brennan determined that under the plurality's understanding of habeas corpus, an initial review might be denied if the prisoner could not show his interest in freedom was stronger than the state's interest in the enforcement of criminal laws. *Id.* (Brennan, J., dissenting).

¹⁵⁵ *Id.* at 2632 (Brennan, J., dissenting).

¹⁵⁶ *See id.* (Brennan, J., dissenting).

¹⁵⁷ *Id.* (Brennan, J., dissenting)(footnote omitted).

¹⁵⁸ *See id.* (Brennan, J., dissenting).

¹⁵⁹ *Id.* (Brennan, J., dissenting).

¹⁶⁰ *Id.* at 2633 (Brennan, J., dissenting).

¹⁶¹ *Id.* (Brennan, J., dissenting)(citing *Wainwright v. Sykes*, 433 U.S. 72 (1977)). In *Wainwright*, the Court concluded that the requirement of showing cause and prejudice would force defense lawyers to make constitutional claims at the state trial court level, stopping needless reviews and adding to the integrity of the original trial. *Wainwright v. Sykes*, 433 U.S. 72 (1977). The *Wainwright* Court refused to give precise definitions for the terms "cause" and "prejudice." *See id.* at 91. As a general rule, "cause" requires the

dissent rejected the plurality's claim that a balancing of state and prisoner interests has been adopted for fourth amendment exclusionary claims.¹⁶² The dissent asserted that the limitations created in *Stone v. Powell* for review of fourth amendment claims did not "establish a new regime for federal habeas corpus under which the prisoner's interests are weighed against the State's interests" and have not been extended by the Court to any other context.¹⁶³ As a result of this analysis of habeas corpus jurisprudence, Justice Brennan stated:

Despite the plurality's intimations, we simply have never held that federal habeas review of properly presented, nondefaulted constitutional claims is limited either to constitutional protections that advance the accuracy of the factfinding process at trial or is available solely to prisoners who can make out a colorable showing of factual innocence. On the contrary, we have stated expressly that on habeas review "what we have to deal with is not the petitioner's innocence or guilt but solely the question whether their constitutional rights have been preserved."¹⁶⁴

The dissent found statutory support for its argument that federal courts were to be given broad discretion in deciding whether to review habeas corpus petitions.¹⁶⁵ The dissent observed that 28

defendant to show adequate reasons for the defendant's failure to raise the constitutional violation claim in state court while "prejudice" requires the defendant to show some actual harm resulting to the defendant from the admission of the illegally obtained evidence. See *Francis v. Henderson*, 425 U.S. 536, 542 (1976); *Wainwright*, 433 U.S. at 91 (1977). See also *Engle v. Issac*, 456 U.S. 107 (1982)(reaffirming the use of the cause and prejudice framework). In *Wilson*, Justice Brennan observed that the balancing utilized in procedurally defaulted claims was recognized as an exception to the general rule against interest balancing as set forth in *Brown v. Allen*, 344 U.S. 443 (1953). *Wilson*, 106 S. Ct. at 2633 (Brennan, J., dissenting)(citing *Wainwright*, 433 U.S. at 87).

¹⁶² *Wilson*, 106 S. Ct. at 2633 (Brennan, J., dissenting)(citing *Stone v. Powell*, 428 U.S. 465 (1976))(for a discussion of *Stone*, see *supra* notes 91, 95-97 and accompanying text).

¹⁶³ *Id.* at 2633 (Brennan, J., dissenting). Justice Brennan identified a number of decisions where extensions of the *Stone* rationale to other areas of the law had been specifically declined by the Court. These identified decisions included *Kimmelman v. Morrison*, 106 U.S. 2574 (1986)(refusing to extend *Stone* to the defendant's sixth amendment claims of ineffective assistance of counsel); *Rose v. Mitchell*, 443 U.S. 545 (1979)(refusing to extend *Stone* to claims of discrimination in the selection of grand juries); *Jackson v. Virginia*, 443 U.S. 307 (1979)(refusing to extend *Stone* to the state prisoner's claim that evidence in support of the conviction was insufficient to allow a rational trier of fact to determine guilt beyond a reasonable doubt). *Wilson*, 106 S. Ct. at 2633 (Brennan, J., dissenting).

¹⁶⁴ *Wilson*, 106 S. Ct. at 2633-34 (Brennan, J., dissenting)(quoting *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923)(Holmes, J.)).

¹⁶⁵ *Id.* at 2634 (Brennan, J., dissenting). Justice Brennan initially examined 28 U.S.C. § 2241 (1966) which empowers federal courts to grant habeas corpus writs. Justice Brennan noted the broad language of § 2241(c)(3), enabling federal courts to extend the writ to any prisoner held "in violation of the Constitution or laws or treaties of the United States." *Wilson*, 106 S. Ct. at 2634 (Brennan, J., dissenting)(quoting in relevant part § 2241(c)(3) (1966)). He concluded from the legislative history surrounding the

U.S.C. § 2244(b) and The Rules Governing Section 2254 Cases in the United States District Courts both contain language granting federal courts considerable discretion to entertain habeas corpus petitions.¹⁶⁶ Furthermore, the dissent found considerable legislative support evidencing Congress' clear intent "that courts continue to determine which successive petitions they may choose not to hear by reference to the *Sanders* ends of justice standard."¹⁶⁷ Justice Brennan contended that there was no evidence of a congressional intent to exclude guilty prisoners from obtaining federal habeas review.¹⁶⁸ The dissent, therefore, would have sustained the historical use of the phrase "ends of justice" established by the *Sanders* Court.¹⁶⁹

After asserting that the "ends of justice" standard has continuing vitality and that federal courts have been given historical responsibility and statutory discretion to apply this standard, the dissent found that the "respondent alleged a potentially meritorious Sixth Amendment claim."¹⁷⁰ Justice Brennan reasoned that the decision in *United States v. Henry*¹⁷¹ had clarified the sixth amendment right to counsel analysis applicable to claims similar to Wilson's.¹⁷² Accordingly, the dissent concluded that the court of appeals had not abused its discretion by granting review of the successive habeas corpus petition under this newly clarified legal standard.¹⁷³

After rebutting the plurality's arguments and standard of review for successive federal habeas corpus petitions, Justice Brennan

statute that Congress was satisfied with the Court's construction of habeas jurisdiction. *Id.* (Brennan, J., dissenting).

¹⁶⁶ *Wilson*, 106 S. Ct. at 2634 (Brennan, J., dissenting). Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts states:

A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Court, 28 U.S.C. § 2254 (1979). For the text of 28 U.S.C. § 2244(b), see *supra* note 103.

¹⁶⁷ *Wilson*, 106 S. Ct. at 2635 (Brennan, J., dissenting). Justice Brennan referred to the legislative history surrounding § 2244 and the Rules Governing Section 2254 Cases in the United States District Courts (along with the Advisory Committee's Notes pertaining to those rules) in support of his contention. *Id.* (Brennan, J., dissenting).

¹⁶⁸ *Id.* at 2636 (Brennan, J., dissenting).

¹⁶⁹ See *id.* (Brennan, J., dissenting).

¹⁷⁰ *Id.* (Brennan, J., dissenting).

¹⁷¹ 447 U.S. 264 (1980).

¹⁷² *Wilson*, 106 S. Ct. at 2636 (Brennan, J., dissenting). For a discussion of the *Henry* Court's sixth amendment right to counsel analysis, see *supra* text accompanying notes 67-76.

¹⁷³ *Wilson*, 106 S. Ct. at 2636 (Brennan, J., dissenting).

addressed the majority opinion.¹⁷⁴ Justice Brennan disagreed with the majority's criticism that the court of appeals had disregarded the state trial court's factual findings.¹⁷⁵ The dissent noted that the trial court's findings of fact in *Wilson* revealed several subtle forms of "deliberate elicitation."¹⁷⁶ Therefore, the dissent observed, the appellate court had concluded that *Wilson* fell directly within the framework of *Henry* and did not present the "passive informant" question.¹⁷⁷

The dissent challenged the majority's interpretation of the right to counsel line of cases.¹⁷⁸ Justice Brennan viewed *Maine v. Moulton* as confirming the right of the suspect to "rely on counsel as the 'medium' between himself and the State," as well as supporting the proposition that the state cannot knowingly circumvent the attorney-client relationship.¹⁷⁹ The *Wilson* dissent's detailed consideration of the important *Henry* decision contrasted sharply with the majority's cursory treatment.¹⁸⁰ Justice Brennan observed that the *Henry* Court found that the government "deliberately elicits" inculpatory remarks when it "'intentionally creat[es] a situation likely to induce [the accused] to make incriminating statements without the assistance of counsel.'"¹⁸¹ The dissent noted that the informant in *Henry* did not directly question the accused, but rather engaged the defendant in conversation.¹⁸² Justice Brennan cited three other factors that influenced the *Henry* Court and were critical to its ultimate determination: 1) The informant was compensated for his services on a contingent fee basis and therefore was provided with an incen-

¹⁷⁴ See *id.* at 2637 (Brennan, J., dissenting).

¹⁷⁵ Justice Brennan argued, "[T]he Court of Appeals did not disregard the state court's finding that Lee asked respondent no direct questions regarding the crime" but had only concluded that the "deliberate elicitation" test of *Henry* and *Massiah* involved "other, more subtle forms of stimulating incriminating admissions than overt questioning." *Id.* (Brennan, J., dissenting). For the decision of the court of appeals, see *Wilson v. Henderson*, 742 F.2d 741, 745 (2nd Cir. 1984).

¹⁷⁶ *Wilson*, 106 S. Ct. at 2637 (Brennan, J., dissenting). Specifically, the dissent referred to the cell's visual proximity to the taxi garage and the informant's advice to the defendant to improve his story. *Id.* (Brennan, J., dissenting).

¹⁷⁷ *Id.* (Brennan, J., dissenting).

¹⁷⁸ For a review of these decisions, see *supra* text accompanying notes 128-46.

¹⁷⁹ *Wilson*, 106 S. Ct. at 2637-38 (Brennan, J., dissenting)(citing *Maine v. Moulton*, 106 S. Ct. 477, 483-87 (1985)).

¹⁸⁰ See *id.* at 2629.

¹⁸¹ *Id.* at 2638 (Brennan, J., dissenting)(quoting *United States v. Henry*, 447 U.S. 264, 274 (1980)).

¹⁸² *Id.* at 2628 (Brennan, J., dissenting). The *Henry* Court noted, "Yet according to his own testimony, Nichols [the informant] was not a passive listener; rather, he had 'some conversations with Mr. Henry' while he was in jail and Henry's incriminating statements were 'the product of his conversation.'" *United States v. Henry*, 447 U.S. 264, 271 (1980).

tive to obtain results;¹⁸³ 2) Nichols' role as a government informant was not revealed to Henry;¹⁸⁴ and 3) Henry was incarcerated at the time of his conversations with the informant.¹⁸⁵

Justice Brennan reviewed the use of the jailhouse informant in *Wilson* and determined that the *Henry* factors should have been similarly balanced.¹⁸⁶ First, Justice Brennan perceived that the informant in *Wilson* had not directly questioned the suspect, but had conversed with him.¹⁸⁷ Second, Justice Brennan noted that although the evidence concerning state compensation for the informant's services was disputed in *Wilson*, Lee had been compensated for his services in the past.¹⁸⁸ Furthermore, the dissent observed that Lee's identity as a government agent was never disclosed to Wilson.¹⁸⁹ Finally, the dissent stressed that Wilson was incarcerated, as was Henry, during the informant's acts of alleged elicitation.¹⁹⁰ Unlike the facts in *Henry*, the dissent in *Wilson* noted that a visit from the defendant's brother had been a major factor in the decision to confess and confide in the cellmate informant.¹⁹¹ Justice Brennan found that the brother's visit was not enough to excuse the government-created situation designed to induce incriminating statements.¹⁹² As a result of their conclusion that the state had "deliberately elicited" incriminating remarks within the meaning of *Henry*, Justices Brennan and Marshall would have affirmed the Second Circuit Court of Appeals' decision barring the informant's unconstitutionally obtained evidence.¹⁹³

In a brief separate dissent, Justice Stevens agreed with Justice Brennan's interpretation of the right to counsel infringement standards and the application of these standards to the *Wilson* facts.¹⁹⁴ Additionally, Justice Stevens agreed that "a colorable showing of factual innocence" was not crucial to an "ends of justice" scrutiny.¹⁹⁵ Justice Stevens determined that the district court did not "abuse its discretion in entertaining the [habeas corpus] petition in

¹⁸³ *Wilson*, 106 S. Ct. at 2638 (Brennan, J., dissenting)(citing *Henry*, 447 U.S. at 270).

¹⁸⁴ *Id.* (Brennan, J., dissenting)(citing *Henry*, 447 U.S. at 270).

¹⁸⁵ *Id.* (Brennan, J., dissenting)(citing *Henry*, 447 U.S. at 274).

¹⁸⁶ *Id.* (Brennan, J., dissenting).

¹⁸⁷ *Id.* (Brennan, J., dissenting).

¹⁸⁸ *Id.* (Brennan, J., dissenting).

¹⁸⁹ *Id.* (Brennan, J., dissenting).

¹⁹⁰ *Id.* (Brennan, J., dissenting). For a review of the *Wilson* facts, see *supra* notes 17-54 and accompanying text.

¹⁹¹ *Wilson*, 106 S. Ct. at 2638-39 (Brennan, J., dissenting).

¹⁹² *Id.* at 2639 (Brennan, J., dissenting).

¹⁹³ See *id.* (Brennan, J., dissenting).

¹⁹⁴ *Id.* at 2639 (Stevens, J., dissenting).

¹⁹⁵ *Id.* (Stevens, J., dissenting).

this case.”¹⁹⁶ He conceded, however, that the case was close enough on its facts to justify a district court’s dismissal of a second petition for a writ of habeas corpus.¹⁹⁷

VII. ANALYSIS

A. SIXTH AMENDMENT RIGHT TO COUNSEL

The majority in *Kuhlmann v. Wilson* failed to accurately balance the factors in the sixth amendment right to counsel framework and mistakenly found that *Wilson* presented the “passive informant” issue.¹⁹⁸ The *Wilson* majority, surprisingly, only cursorily reviewed *United States v. Henry*¹⁹⁹ which involved a nearly identical set of facts. The *Wilson* Court’s examination of the jailhouse informant scenario is, therefore, incomplete and subject to criticism.

The precedential value of *Henry* for *Wilson* is underestimated even in Justice Brennan’s dissent. Several tribunals have considered the facts of *Wilson* and *Henry* and have found them to be indistinguishable.²⁰⁰ Indeed, Judge Russell, dissenting from the court of appeals’ holding in *Wilson*, concluded that *Wilson* presented a stronger sixth amendment right to counsel violation claim than did *Henry*.²⁰¹ Judge Russell contended, “Certainly, there can be no distinction drawn between this case and *Wilson*. In fact, if anything, the facts in that [the *Wilson*] case were more favorable to the defendant’s claim than are the facts in this [the *Henry*] case.”²⁰² An examination of *Henry* and *Wilson* reveals how the Supreme Court underestimated their similarities.

Henry involved the use of a jailhouse informant by government officials. As in *Wilson*, the informant in *Henry* was instructed not to interrogate the suspect.²⁰³ The *Henry* informant, similarly, was

¹⁹⁶ *Id.* (Stevens, J., dissenting).

¹⁹⁷ *Id.* (Stevens, J., dissenting).

¹⁹⁸ See *supra* note 7.

¹⁹⁹ 447 U.S. 264 (1980).

²⁰⁰ See *United States v. Henry*, 447 U.S. at 281 (Blackmun and White, JJ., dissenting) (observing that the police practices in each case were similar); *United States v. Henry*, 590 F.2d 544, 553 (4th Cir. 1978) (Russell, J., dissenting); *Wilson v. Henderson*, 590 F.2d 408, 409 (2nd Cir. 1978) (Oakes, J., dissenting) (petition for rehearing denied).

²⁰¹ *United States v. Henry*, 590 F.2d 544, 548 (4th Cir. 1978) (Russell, J., dissenting).

²⁰² *Id.* at 553 (Russell, J., dissenting).

²⁰³ Detective Cullen related the conversation he had with the informant Nichols:

I recall telling Nichols at this time to be alert to any statements made by these individuals [the federal prisoners] regarding the charges against them. I specifically recall telling Nichols that he was not to question Henry or these individuals about the charges against them, however, if they engaged him in conversation or talked in front of him, he was requested to pay attention to their statements.

Henry, 447 U.S. at 268.

found not to have engaged in direct inquiry but only "had some conversations with Henry."²⁰⁴ In *Wilson*, however, the government more affirmatively assured that a conducive environment for incriminating statements was set. Detective Cullen specifically asked Lee to find out from Wilson the identities of the other two participants in the crime.²⁰⁵ Wilson, moreover, was placed in a jail cell overlooking the scene of his criminal offenses.²⁰⁶ The close visual proximity of the taxi garage forced Wilson to reflect continually on his crimes and the story he gave to the police. Lee's statements to Wilson that Wilson's story "didn't sound too good" and that Wilson should "come up with a better story"²⁰⁷ were clearly intended to elicit responses. If Wilson had broken down at that moment, his statements probably would have been viewed as the product of an intentionally created situation that was likely to induce such statements. Lee's influences should not be overlooked merely because Wilson's confessions were not immediately forthcoming. In *Henry*, there was no more evidence of the informant directing questions to or eliciting statements from the accused than in *Wilson*.

Justice Brennan's dissent in *Wilson* correctly cited the three other factors of the jailhouse informant scheme that were influential in *Henry* and found these same factors in *Wilson*.²⁰⁸ First, there was substantial evidence that Lee was not acting solely out of an interest in the successful prosecution of guilty defendants. Lee testified that he had acted as an informant in approximately 150 other cases and admitted to receiving compensation in every other one of those instances.²⁰⁹ Even if money were not exchanged, similar incentives to produce valuable evidence probably existed.²¹⁰ State incentives, whether offers of financial remuneration or improvements in prisoner treatment, could induce an informant to distort his recall of his jail cell actions and conversations at a later trial. Second, the choice not to reveal Lee's identity as an agent of the government resulted

²⁰⁴ *Henry*, 447 U.S. at 271.

²⁰⁵ *Wilson*, 106 S. Ct. at 2619.

²⁰⁶ *Id.*

²⁰⁷ See *supra* note 29 and accompanying text.

²⁰⁸ These factors included: 1) informant compensation on a contingent fee basis; 2) informant's role as a government agent unrevealed to the defendant; and 3) defendant incarcerated during his conversations with the informant. See *Wilson*, 106 S. Ct. at 2638 (Brennan, J., dissenting); See also *supra* notes 183-85 and accompanying text.

²⁰⁹ See Joint Appendix of Parties at 104-05, *Kuhlmann v. Wilson*, 106 S. Ct. 2616 (1986)(No. 84-1479).

²¹⁰ In responding to the *Henry* decision, one law enforcement official commented, "I guess one thing we do now is, we don't pay the informant." But the officer added, "Inhabitants of jail cells tend to be looking for something for themselves." Mann, *High Court Curtails Use of Informants*, L.A. Times, June 23, 1980, at 15, col. 2.

in disclosures "that an accused would not intentionally reveal to persons known to be Government agents."²¹¹ In a situation where Wilson was unaware that Lee was a government agent, Wilson could not have effectively waived his right to the assistance of counsel. Third, Wilson, similar to Henry, was in custody at the time of the alleged elicitation. Wilson, moreover, occupied the cell with only one other prisoner, Lee.²¹² Lee had ample opportunity to develop cellmate camaraderie, to share "a common plight," and to capitalize on those "pressures" and "subtle influences" that confinement under hostile conditions creates.²¹³ Lee had a better opportunity to gain the confidence of the accused than did the informant in *Henry*.

If the jailhouse informant analysis of *Henry* was applied properly, then the informant practices in *Wilson* would have been held unconstitutional under the sixth amendment. Some might argue, however, that the *Henry* framework overprotects an accused's sixth amendment rights. The considerations deemed important by the *Henry* Court, however, are crucial to sixth amendment protection. Since *Powell v. Alabama*,²¹⁴ our judicial system has recognized that a criminal defendant is often unable to properly protect his interests against the powerful forces of the state, and resist the "nudges"²¹⁵ that may result in a suspect taking actions that are not in his self-interest. Interrogation acts as a "nudge" by encouraging suspects to make damaging disclosures. The *Massiah* Court, moreover, recognized that leading questions by a criminal cohort could serve as a very effective "nudge."²¹⁶ It is an unacceptable intrusion on a criminal defendant's right to counsel for the state to provide incentives for the cohort to induce or "deliberately elicit" incriminating statements and thereafter utilize such statements in prosecuting the criminal defendant.

Given an appropriate incentive, a jailhouse informant, even one that does not participate in explicit interrogation, can act as an equally effective "nudge." Once compensation is offered, the informant becomes an active agent of the government. The informant

²¹¹ *United States v. Henry*, 447 U.S. 264, 273 (1980).

²¹² *Henry* and *Nichols*, on the other hand, were "housed in the same cellblock with several federal prisoners awaiting trial." *Id.* at 266.

²¹³ The language quoted is from the Court's own analysis of the development of cellmate camaraderie during confinement under hostile conditions. *See Henry*, 447 U.S. at 274.

²¹⁴ 287 U.S. 45 (1932). *See supra* note 55.

²¹⁵ One *Henry* commentator adopted the word "tug" from a dissenting opinion in *Miranda v. Arizona*, 384 U.S. 436, 512 (1966) (Harlan, J., dissenting). Note, *Interrogation Without Questions: Rhode Island v. Innis and United States v. Henry*, 78 MICH. L. REV. 1209, 1241 (1980).

²¹⁶ *See supra* notes 62-66 and accompanying text.

can begin fostering a deceptive relationship with the accused. The informant's ultimate goal is to gain the defendant's trust and obtain damaging confessions. In his pursuit of the defendant's confidence, two factors aid the informant. First, the defendant and informant will be spending a great deal of time together and presumably will grow familiar with one another. The informant can shape that familiarity into trust. Second, the defendant and informant share an apparent mutual adversary, the police power of the state.²¹⁷ Confrontations with this mutual enemy will also help bring the pair closer together and further encourage the defendant to make incriminating confidential disclosures.

The accused's responses to an informant's direct questions regarding the accused's crimes, however, are not admissible under current law.²¹⁸ Incriminating disclosures, nevertheless, can be induced indirectly by other means. The informant, for example, may be permitted to ask questions about the defendant's prior dealings with the police, his need or desire for money, his familiarity with weapons, or his hopes for support from family and friends. The informant may even succeed in asking direct questions concerning the crimes committed. In *Wilson's* case, only the informant and Detective Cullen testified about what went on in the defendant's jail cell.²¹⁹ In testimony at trial, an informant may distort the nature of the questions posed to the accused and the accused's responses to serve the informant's own interests. A court could have a difficult time determining the veracity of the informant's statements.

The *Henry* decision recognized the potential for extensive jailhouse informant abuses. As a result, the *Henry* Court isolated three preconditions which often lead to informant abuses.²²⁰ First, the informant needs an incentive such as a contingent fee. Without any such consideration, the potential for mischaracterizations or abuses by the informant is diminished. Second, confinement over a significant period of time is necessary to develop camaraderie between the accused and the informant. If there is no confinement, the suspect is not subject to the intense need for association and support from fellow inmates. Third, the agent's true role must remain undisclosed to the accused. If the defendant knows he is facing a govern-

²¹⁷ The term "apparent" is used here to contemplate those instances where the "cellmate" is, in fact, an undercover policeman or detective and not a criminal suspect.

²¹⁸ Direct questions would constitute "deliberate elicitation" under *Massiah v. United States*, 377 U.S. 201 (1964) and *Maine v. Moulton*, 106 S. Ct. 477 (1985). See *supra* notes 62-66, 142-46 and accompanying text.

²¹⁹ *Wilson*, 106 S. Ct. at 2619 & n.2.

²²⁰ See *supra* notes 183-85 and accompanying text.

ment agent he can properly guard his disclosures. Without such knowledge, the defendant is unaware of the imminent peril. He cannot exercise his right to summon his attorney and cannot voluntarily and intelligently waive that right. Abuse of one condition may not be considered an obtrusive violation by the state. All three preconditions together pose an effective device for extracting information from the accused and, therefore, unjustifiably circumvent the right to counsel.

The *Wilson* decision was not an unexpected reversal in the Supreme Court's right to counsel philosophy. In fact, some commentators expected this reversal in sixth amendment philosophy to occur in *Henry*. In reporting the Supreme Court's decision in *Henry*, one commentator remarked, "The [C]ourt's reasoning was so unexpected that there had even been predictions it might use the *Henry* case to reverse the *Massiah* ruling and to throw out the limited protections against the use of informants that the Warren [C]ourt had established."²²¹ Given the recency of *Henry* and *Moulton*²²² and these decisions' affirmation of *Massiah*'s continued viability,²²³ sixth amendment protections should continue to evolve within the "deliberately elicited" framework. The *Wilson* Court's failure to apply the standards developed in *Henry*, however, raises serious questions as to the *Henry* framework's continued viability. Instead of focusing on the "situation" created by the state, the *Wilson* Court focused solely on the informant's actions and his attempts to "stimulate" conversation and prompt incriminating remarks.²²⁴ *Wilson* has, therefore, narrowed the scope of inquiry regarding the use of an informant. The *Wilson* decision urges lower courts to review defendant/informant dialogue rather than to examine the state-created circumstances in their entirety. In the future, agents of the state, whether or not their identities are revealed to the defendant, still cannot ask direct questions bearing on the crime. Particularly egregious informant coercions, in addition, will not receive court approval.²²⁵

²²¹ Mann, *High Court Curtails Use of Informants*, L.A. Times, June 23, 1980, at 15, col. 2 (italics added).

²²² 106 S. Ct. 477 (1985). See *supra* notes 142-46 and accompanying text.

²²³ In *Henry*, only Justice Rehnquist, in his dissent, proposed to "re-examine" the *Massiah* ruling. *United States v. Henry*, 447 U.S. 264, 290 (1980) (Rehnquist, J., dissenting). Justices Blackmun and White, in a separate dissent, voted to preserve the *Massiah* ruling but not to expand the decision to contemplate the circumstances presented in *Henry*. *Id.* at 289 (Blackmun, J., dissenting).

²²⁴ See *Wilson*, 106 S. Ct. at 2630.

²²⁵ For example, physical threats or strongly worded advisements to "stop the lying and confess" will not receive court approval.

Finally, and perhaps most importantly, it is necessary to explore how state deployment of jailhouse informants is likely to change as a result of *Wilson*. The use of jailhouse informants should increase as a direct result of *Wilson*. Similarly, the sixth amendment right to counsel protection, which is an essential element of our system of justice, will be diminished.

Police authorities can play a large, and apparently acceptable, role in the informant's activities. Compensation for an informant's results seems acceptable under *Wilson*. More cautious authorities can establish a more secretive, less tangible system of rewards. Such a system could include a more sympathetic prosecutorial stance, small favors such as extra visitor time or better food, and generally better treatment. The police can assist the informant in developing and sponsoring cellmate camaraderie. Arrangements could be made to keep the the defendant and informant together in as many prison activities as possible, or to treat the pair as if the state planned to prosecute their criminal misdeeds in a similar fashion. The increased use of informants might even induce the police to treat the defendant more harshly. Verbal and physical abuse will amplify the already uncomfortable prison experience and provide a reason for camaraderie to flourish.

The state, moreover, will now be more anxious as a result of *Wilson* to indict criminal suspects and incarcerate them quickly and for as long a period as possible. Counsel for the accused would be well-advised to provide for the expeditious release of their clients from a potentially damaging deception and should further discourage clients from trusting and confiding in fellow prisoners.

B. SUCCESSIVE FEDERAL PETITIONS FOR HABEAS CORPUS RELIEF

The plurality in *Kuhlmann v. Wilson* failed to weigh accurately the interests of the prisoner and the state in successive petitions for federal habeas corpus and created a standard with a number of inherent shortcomings. The plurality devised a solution to a problem which they failed, initially, to identify as a legitimate dilemma. Justice Powell contended, "Failure to provide clear guidance leaves district judges 'at large in disposing of applications for a writ of habeas corpus,' creating the danger that they will engage in 'the exercise not of law but of arbitrariness.'"²²⁶ The plurality, however, did not demonstrate that federal courts have acted arbitrarily in their deci-

²²⁶ *Wilson*, 106 S. Ct. at 2622 (quoting *Brown v. Allen*, 344 U.S. 443, 497 (1953)(opinion of Frankfurter, J.)).

sions to entertain successive habeas petitions.²²⁷ The Court should identify a flaw in our judicial system before contemplating any legitimate alternative.

While the dissent identified an area of constitutional concern that has been balanced against the interests of the state,²²⁸ any invasion into a constitutional right should be met with meticulous scrutiny. Indeed, in *Stone v. Powell*,²²⁹ where the Court arguably permitted a balancing of interests in fourth amendment claims,²³⁰ the Court cautioned, "Our decision today is *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally."²³¹ In contrast, the *Wilson* plurality contended, "[T]he Court has performed its statutory task [defining the scope of the writ] through a sensitive weighing of the interests implicated by federal habeas corpus adjudication of constitutional claims determined adversely to the prisoner by the state courts."²³² The plurality referred to one authority to support the proposition that state and prisoner interests are to be weighed in a habeas determination.²³³ This authority actually asserted, "Its [the habeas writ's] root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release."²³⁴ The plurality failed to offer convincing support for its proposition that the interests of the prisoner should be subject to any balancing against the interests of the state. Any attempt, therefore, by the *Wilson* Court to balance state and prisoner interests should be approached with great skepticism.

Even if a balancing of state and prisoner interests can be accepted as a legitimate judicial function in the context of habeas corpus writs, careful attention must be given to the importance of

²²⁷ The plurality pointed out that the number of habeas corpus applications filed in federal courts has grown but did not establish that this had led to arbitrary *entertainment* of these applications. See *id.* at 2625 n.12.

²²⁸ Claims of constitutional violations that are procedurally defaulted in state court have resulted in some balancing of state and prisoner interests. See *supra* notes 160-61 and accompanying text.

²²⁹ 428 U.S. 465 (1976). See *supra* notes 91, 95-97 and accompanying text.

²³⁰ The plurality and Justice Brennan in dissent disagreed on whether a balancing of interests had been undertaken by the *Stone* Court. See *supra* notes 94-97, 162-63 and accompanying text.

²³¹ *Stone*, 428 U.S. at 495 n.37 (emphasis in original).

²³² *Wilson*, 106 S. Ct. at 2624 (citing *Engle v. Issac*, 456 U.S. 107, 126-29 (1982)). See also *Stone*, 428 U.S. at 489-95; *Fay v. Noia*, 372 U.S. 391, 426-34 (1963).

²³³ See *Wilson*, 106 S. Ct. at 2624 (citing *Noia*, 372 U.S. at 426-34).

²³⁴ *Noia*, 372 U.S. at 402.

each interest implicated. The plurality identified finality as serving a number of important state interests.²³⁵ *Sanders* explicitly questioned the importance of finality concerns.²³⁶ The *Sanders* Court emphasized, "Conventional notions of finality of litigation have *no place* where life or liberty is at stake and infringement of constitutional rights is alleged."²³⁷ Despite the plurality's criticism of the *Sanders* Court's indefiniteness, the plurality failed to recognize *Sanders*' unqualified advice that a state's interest in finality was not to be considered in a habeas corpus determination.

Assuming, however, that finality can be considered in a weighing of interests, further examination must be given to the interests purportedly served by finality. The state has a legitimate interest in controlling the costs associated with successive appeals and subsequent retrials.²³⁸ The state, in addition, has a legitimate concern that any retrial ordered may be virtually impossible to orchestrate.²³⁹ There are, however, a number of state interests noted by the plurality that cannot survive close scrutiny. The state's interest in deterrence will not be served by a more rigorous standard for successive habeas corpus petitions. It is inconceivable that a jealous husband considering striking a discovered adulteress or a hungry indigent considering robbing a liquor store would contemplate the probability that their successive habeas corpus writ would be reviewed. Considering, moreover, the skepticism that prisons foster rehabilitation,²⁴⁰ the state's purported interest in rehabilitation is not convincing.²⁴¹

In response to a perceived need to balance the interests implicated, the plurality adopted the "colorable showing of factual innocence" standard. This standard had not been adopted by any other federal tribunal and had no statutory support, but was the product of a law review article written by Judge Friendly over fifteen years ago.²⁴² The standard requires the prisoner to show a fair probability in light of all of the evidence, including that which was

²³⁵ *Wilson*, 106 S. Ct. at 2626-27.

²³⁶ *Sanders v. United States*, 373 U.S. 1 (1963).

²³⁷ *Id.* at 8 (emphasis added).

²³⁸ See Friendly, *supra* note 118, at 145 n.12, for an excerpt of a speech made by Chief Justice Burger. In this address, Chief Justice Burger recounted the enormous amount of resources expended during the prolonged litigation over one criminal act. *Id.*

²³⁹ See *supra* note 117.

²⁴⁰ See, e.g., Bainbridge, *The Return of Retribution*, 71 A.B.A.J. 60 (May 1985).

²⁴¹ Judge Friendly suggested, however, "Neither is it an adequate answer that repentance and rehabilitation may be thought unlikely in many of today's prisons. That is a separate and serious problem, demanding our best thought but irrelevant to the issue here." Friendly, *supra* note 118, at 146 (footnote omitted).

²⁴² See *supra* note 118. Judge Friendly cited language from a lone dissenting opinion

allegedly improperly admitted, that the trier of fact would have a reasonable doubt as to his guilt.²⁴³ Although the "fair probability" test gives district courts a more objective standard to apply, it will not serve the courts' interest in expediting overcrowded dockets. As the dissent noted, a district court will have to review each petition carefully and act as a rough equivalent to a trier of fact.²⁴⁴ The substantial time required to review lengthy records and make such decisions will effectively negate the rewards expected by adopting the standard. The growing number of petitions the plurality found as increasingly burdensome on the federal judicial system²⁴⁵ will not necessarily decrease as a result of the "colorable showing of factual innocence" framework. Judge Friendly admitted:

Aside from the most drastic measures, changes that would narrow the grounds available for collateral attack would not necessarily discourage prisoners from trying; they have everything to gain and nothing to lose. Indeed, collateral attack may have become so much a way of prison life as to have created its own self-generating force: it may now be considered merely something done as a matter of course during long incarceration. Today's growing number of prisoner petitions despite the minute percentage granted points that way.²⁴⁶

The standard, moreover, will not cover all habeas corpus possibilities. Applications for writs of habeas corpus that cite state court errors at the sentencing stage of the trial proceedings cannot use a standard hinged on a showing of innocence.²⁴⁷ Since the defendant's guilt has been affirmatively established before the sentencing phase of a criminal proceeding, a requirement of "a colorable showing of factual innocence" is meaningless in that context. If district court difficulties in applying a discretionary standard do indeed exist, the Supreme Court will be forced to create another standard to cover these instances as well.

The plurality, in adopting Judge Friendly's standard of "a colorable showing of factual innocence," neglected to observe that Judge Friendly would not require such a showing in a sixth amendment right to counsel dispute. Judge Friendly explained:

by Justice Black for support. Friendly, *supra* note 118, at 142 (citing *Kaufman v. United States*, 394 U.S. 217, 235-36, 242 (1969)(Black, J., dissenting)).

²⁴³ Friendly, *supra* note 118, at 160. Justice Brennan, in his dissent, repeatedly referred to "actual innocence" as the plurality test. *See, e.g., Wilson*, 106 S. Ct. at 2636 n.5 (Brennan, J., dissenting). This is an unfair mischaracterization of the burden of production contemplated by the standard.

²⁴⁴ *Wilson*, 106 S. Ct. at 2636 n.7 (Brennan, J., dissenting).

²⁴⁵ *Id.* at 2625 & n.12.

²⁴⁶ Friendly, *supra* note 118, at 150 (footnote omitted).

²⁴⁷ This concern was noted by Justice Brennan in his dissent. *Wilson*, 106 S. Ct. at 2636 n.7 (Brennan, J., dissenting).

Still, in these cases where the attack concerns the very basis of the criminal process, few would object to allowing collateral attack regardless of the defendant's probable guilt. These cases would include all those in which the defendant claims he was without counsel to whom he was constitutionally entitled For, as Justice Schaefer of Illinois has so wisely said, "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."²⁴⁸

Under the framework proposed by Judge Friendly, Wilson would not be required to make "a colorable showing of factual innocence" but need only assert that the "criminal process itself ha[d] broken down."²⁴⁹ Claims of sixth amendment right to counsel violations, furthermore, are not the only area of habeas review where Judge Friendly found that an examination of the prisoner's claim is justified irrespective of any issue of innocence.²⁵⁰ The plurality, however, did not identify any area of constitutional law where the "colorable showing of factual innocence" framework would not apply. The plurality, instead, adopted the problematic "colorable showing of factual innocence" standard based upon an ill-advised weighing of prisoner and state interests.

VIII. CONCLUSION

Determining the scope of a suspect's sixth amendment right to counsel is, admittedly, a difficult area of constitutional adjudication. The interest in criminal justice and the successful investigation and prosecution of persons who pose a "dangerous threat to those unidentified and innocent people who will be the victims of crime today and tomorrow"²⁵¹ is undoubtedly compelling. It is important, therefore, that courts encourage and support emerging developments in police investigation. It is also important, however, that they carefully consider the Supreme Court's warning in the early decision of *Spano v. New York*: "But as law enforcement officers become more responsible, and the methods used to extract confes-

²⁴⁸ Friendly, *supra* note 118, at 152 (quoting Schaefer, *Federalism and State Criminal Trials*, 70 HARV. L. REV. 1, 8 (1956)).

²⁴⁹ Friendly, *supra* note 118, at 151.

²⁵⁰ Judge Friendly cited three additional areas in which collateral attack in his imaginary unitary system would be legitimate despite doubts over the defendant's innocence. These areas included: 1) where a violation of constitutional rights is asserted on the basis of facts foreign to the trial record and not considered by the reviewing tribunal; 2) where the state "failed to provide proper procedure for making a defense at trial and on appeal"; and 3) where the alleged violation concerns an area of modern constitutional developments bearing on criminal procedures. Friendly, *supra* note 118, at 152-53.

²⁵¹ *Massiah v. United States*, 377 U.S. 201, 207 (1964)(White, J., dissenting).

sions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made.”²⁵² In *Kuhlmann v. Wilson*, the United States Supreme Court turned its back on that “duty” and ignored the import of the right to counsel line of decisions. The majority essentially overlooked the well-considered informant framework developed in *Henry*. Instead of focusing on the actions of the state in their entirety, the majority limited its scrutiny to the actions of the jailhouse informant. The Court, in so doing, laid the groundwork for a future of unsettling and unacceptable violations of incarcerated suspects’ constitutional rights.

The “colorable showing of factual innocence” framework created by the plurality for review of successive federal petitions of habeas corpus was grounded upon weak precedential underpinnings and a number of questionable Supreme Court assumptions. Much of the standard’s utility, moreover, is dependent upon the ability of lower courts to effectively apply the test. In that respect, the framework has several inherent shortcomings to overcome.

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²⁵² *Spano v. New York*, 360 U.S. 315, 321 (1959).