Michigan Law Review

Volume 101 | Issue 7

2003

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NOTE

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INTRODUCTION

Once a criminal investigation has identified a suspect, and adversarial proceedings have begun, the Sixth Amendment[1] confers a right to be represented by counsel at the "critical stages" of the process.[2] The Supreme Court has made clear that the government cannot circumvent this requirement merely by designating a civilian informant

1. "In all criminal prosecutions, the accused shall enjoy a right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

2. *See* United States v. Ash, 413 U.S. 300, 310-11 (1973); United States v. Wade, 388 U.S. 218, 224 (1967). *See generally* James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants*, 22 U.C. DAVIS L. REV. 1, 9-22 (1988) (providing history and development of this right). The beginning of adversarial proceedings, roughly indictment or arraignment, has been the subject of some litigation. *See, e.g.*, United States v. Gouveia, 467 U.S. 180 (1984) (holding that right had not vested for prisoners in administrative segregation). This Note does not address the separate issues surrounding when the right to counsel vests, but instead considers only the defendants in whom the right has vested. Regardless of any lack of clarity at the margins, almost all jail inmates do have a Sixth Amendment right to counsel: an individual may not be held for a long period without a judicial determination of probable cause, at which point the right vests. *See infra* note 41.

to engage in questioning on its behalf.[3] Less clear is when the government is responsible for the actions of an informant; particularly in the case of jailhouse informants, incarcerated individuals who question fellow inmates, government responsibility is a difficult issue for which no clear legal standard has emerged.[4] An examination of federal appellate and state supreme court case law reveals two distinct factors that courts accord the most weight in making their decisions: the agreement between the informant and the government, and the government's targeting of a particular defendant. Federal appellate and state supreme courts disagree about whether one, both, or either are required.[5]

The relevant Sixth Amendment principle was first articulated in 1964 in *United States v. Massiah*.[6] The defendant was a merchant seaman accused of possession of narcotics, and released on bail.[7] Unbeknownst to him, government agents had struck a deal with his co-defendant to allow them to install a radio transmitter in his car and listen in on their conversation.[8] The court held that the defendant's "Sixth Amendment rights were violated by the use in evidence against him of incriminating statements which Government agents had deliberately elicited from him after he had been indicted and in absence of his retained counsel."[9] This is the core *Massiah* standard.

In 1980, the Court applied this rule to jailhouse informants in *United States v. Henry*,[10] holding that the government's use of an informant to elicit information from a postindictment jailmate violated the Sixth Amendment as interpreted by *Massiah*. Looking at the circumstances, the Court determined that the government, and not the informant, had responsibility for creating a situation in which it was likely that information would be elicited from the accused in violation

3. Kuhlmann v. Wilson, 477 U.S. 436 (1986); Maine v. Moulton, 474 U.S. 159 (1985); United States v. Henry, 447 U.S. 264 (1980); United States v. Massiah, 377 U.S. 201 (1964); Martin R. Gardner, *The Sixth Amendment Right to Counsel and Its Underlying Values: Defining the Scope of Privacy Protection*, 90 J. CRIM. L. & CRIMINOLOGY 397, 422-31 (2000) (discussing jailhouse informant cases).

4. *See* United States v. LaBare, 191 F.3d 60, 65 (1st Cir. 1999) (recognizing circuit split); United States v. Johnson, 196 F. Supp. 2d 795, 847 (N.D. Iowa 2002) ("[L]ower courts have combed the Supreme Court's decisions and other sources for indicia of agency for *Massiah* purposes."); Tomkovicz, *supra* note 2, at 8 ("*Massiah* doctrine is anything but the picture of clarity.").

5. *See infra* notes 33-37.

6. 377 U.S. 201 (1964).

7. *Massiah*, 377 U.S. at 202.

8. *Id.* at 202-03.

9. *Id.* at 204. The *Massiah* Court held this action to be a violation of both the Fifth and Sixth Amendments, but the Court later clarified that the right rests in the Sixth Amendment. *See* United States v. Henry, 447 U.S. 264, 272-73 (1980).

10. 447 U.S. 264 (1980).

of the Sixth Amendment.[11] The FBI agent "must have known" that the informant would question the defendant in the absence of counsel.[12] The Court thus focused on the government's responsibility — as determined by what it "must have known" — not the informant's actions.

In 1986, in *Kuhlmann v. Wilson*,[13] the Court held that the government does not offend the Sixth Amendment by using a passive informant who asks no questions of the accused,[14] settling the "listening post" question, which *Henry* had left open.[15] There was no question that the state was responsible for the informant's actions.[16] Thus, where the government is responsible for the actions of an informant, the informant's behavior must constitute active elicitation[17] to violate the Sixth Amendment right to counsel.[18]

The fundamental standard remains constant in these cases: the state is prohibited from deliberately eliciting incriminating information to further its case after indictment in the absence of counsel — directly or indirectly.[19] In the jailhouse context, lower courts have broken this standard into two prongs. The first prong focuses on government responsibility for the informant's actions; the second part focuses on whether the informant's elicitation was active.[20]

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11. The Court noted that the agents who contacted the informant were working on the robbery of which the defendant was accused. *Henry*, 447 U.S. at 266. They had interviewed the defendant the day they contacted the informant, and the defendant had exercised his right to terminate the interview. *Id.* at 266 n.1. One of the agents testified that he had asked the informant to be alert for statements from the defendant, but not to question him. *Id.* at 268.

12. *Id.* at 271.

13. 477 U.S. 436 (1986).

14. *Wilson*, 477 U.S. at 456.

15. 447 U.S. at 271 n.9.

16. A police detective placed the informant in the defendant's cell to determine confederates' identities and instructed him to gather information passively. *See Wilson*, 477 U.S. at 439.

17. *Id.* at 456. This Note does not address active elicitation, an issue that has engendered its own line of cases. Roughly speaking, after *Wilson*, the informant could make remarks in response to the defendant's spontaneous statements about the crime (commenting that the defendant's story "didn't sound too good"), but could not make statements or ask questions designed to get an incriminating response from the defendant. *See* Brewer v. Williams, 430 U.S. 387 (1977) (holding that a police officer's "Christian burial speech" constituted deliberate elicitation of information about the location of a murder victim in light of defendant's known vulnerability to religious concerns); Stephen E. Hessler, Note, *Establishing Inevitability Without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule*, 99 MICH. L. REV. 238, 248-52 (2000) (giving background and subsequent history of the *Brewer* case).

18. *Wilson*, 477 U.S. at 456.

19. *See Henry*, 447 U.S. at 271; *Massiah*, 377 U.S. at 204.

20. *See* United States v. York, 933 F.2d 1343, 1355 (7th Cir. 1991); Depree v. Thomas, 946 F.2d 784, 793 (11th Cir. 1991); Lightbourne v. Dugger, 829 F.2d 1012, 1019 (11th Cir.

There is substantially less guidance for the first prong of the inquiry than for the second prong.[21] Although sometimes referred to as "agency,"[22] the first prong's analysis is more analogous to state action[23] than to commercial agency.[24] The Sixth Amendment inquiry, like the state action inquiry, focuses on the government's unique constitutional obligation.[25] Lower courts generally agree that the fundamental concern is to distinguish the situation in which the state has deliberately elicited information in violation of the *Massiah* right to counsel, and the one in which an enterprising informant or good

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1987); *In re* Neely, 864 P.2d 474, 481 (Cal. 1993); State v. Fields, 908 P.2d 1211, 1217 (Idaho 1995); State v. Hernandez, 842 S.W.2d 306, 313 (Tex. App. 1992).

This Note does not address the second prong, which focuses on what the informant must do to violate the right to counsel. *Wilson* supplied the answer to that question in requiring active elicitation. *Wilson*, 477 U.S. at 456.

21. *See* United States v. Taylor, 800 F.2d 1012, 1015 (10th Cir. 1986) ("We have been unable to find any brightline test for determining whether an individual is a Government agent for purposes of the Sixth Amendment right to counsel."); Thomas v. Cox, 708 F.2d 132, 135 n.2 (4th Cir. 1983) (noting that the Supreme Court has not addressed the agency issue directly in the *Massiah* context); *supra* note 4.

22. *See, e.g.*, United States v. Li, 55 F.3d 325, 328 (7th Cir. 1995). Although not a jailhouse case, *Li* offers a good example of the difficulty with agency analysis. There, the informant had exchanged information for a reward on several past occasions. The informant then contacted the government and learned that the defendant had already been indicted. He also told the government of his intended meeting with the defendant. *Id.* at 327. Nonetheless, the court rejected the *Massiah* claim because "[t]he evidence demonstrated no government control over . . . [the informant's] actions." *Id.* at 328. Yet, whether the informant was more akin to an agent or an independent contractor, the ultimate action, gathering information, was a government project. The Sixth Amendment was violated because the government knowingly exploited an opportunity to question a postindictment defendant in the absence of counsel. Maine v. Moulton, 474 U.S. 159, 176 (1985); *see infra* note 29 and accompanying text. *Li*'s distinction of *Moulton*, that the informant there wore a wire at government request and was thus subject to more control than the informant in *Li*, is unpersuasive. *See Li*, 55 F.3d at 328 (distinguishing *Moulton*). *Moulton*'s rationale was based on state action, not control. 474 U.S. at 171 ("[A]t the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel."); *see also Henry*, 447 U.S. at 274-75; Craig M. Bradley & Joseph L. Hoffman, *"Be Careful What You Ask For": The 2000 Presidential Election, the U.S. Supreme Court, and the Law of Criminal Procedure*, 76 IND. L.J. 889, 923 (2001) (arguing that *Henry* was an expansive rights case because it held that the Sixth Amendment was violated despite the government's express instruction to the informant not to ask questions).

23. The state action doctrine applies to Section 1 of the Fourteenth Amendment, which provides that "no state shall" infringe certain rights. United States v. Morrison, 529 U.S. 598, 619 (2000).

24. *See* United States v. LaBare, 191 F.3d 60, 65 (1st Cir. 1999) (holding that government was not responsible for jailhouse informant, even though informant might be an agent under traditional agency test); Jeffrey M. Rosenfeld & Sheri Klintworth, *Right to Counsel*, 89 GEO. L.J. 1485, 1486-87 (2001) ("[The *Massiah*] prohibition applies both to police and to individuals used by the police to gain information."); *see also* Colorado v. Connelly, 479 U.S. 157, 162 (1986) (noting consistency between state and federal involuntary confession jurisprudence and state action doctrine); Cuyler v. Sullivan, 446 U.S. 335, 342-43 (1980) (holding that habeas corpus relief requires showing state action in violation of Sixth Amendment right to counsel).

25. *See Moulton*, 474 U.S. at 176 & n.12 (1985).

citizen has undertaken to question the defendant about the crime and furnished this information to the prosecution.[26] The Court laid down the standard in *Henry*: the government is responsible for acts that it "must have known" will lead to rights violations.[27] Similarly, in *Maine v. Moulton*,[28] the Court barred "knowing exploitation by the state of an opportunity to confront the accused without counsel being present."[29] As for state action, and unlike for commercial agency,[30] the focus here is on the principal's motivation, and not on objective appearance; the aim of the rule is "to assure that constitutional standards are invoked 'when it can be said that the State is *responsible* for the specific conduct' "[31] that violates the defendant's right to counsel.[32]

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26. *See, e.g.*, Creel v. Johnson, 162 F.3d 385, 394 (5th Cir. 1998) ("[T]he fact that [the informant] wanted to help the police solve a murder case does not necessarily make her an agent for Sixth Amendment purposes."); United States v. Birbal, 113 F.3d 342, 346 (2d Cir. 1997) (noting requirement to distinguish between deputized agent and entrepreneur); Commonwealth v. Franciscus, 710 A.2d 1112, 1120 (Pa. 1998) (distinguishing standing agreement from "the case in which an inmate unexpectedly comes forward with incriminating information . . . ."); Tomkovicz, *supra* note 2, at 21 n.91.

27. United States v. Henry, 447 U.S. 264, 271 (1980). Following *Henry*, there has been some doubt about the requisite state of mind for the violation. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.4(g) (2d ed. 1999). This Note advocates following *Henry*'s "must have known" standard, which neither finds a constitutional violation for negligence nor requires purpose instead of knowledge. *See* United States v. Brink, 39 F.3d 419, 424 (3d Cir. 1994) (holding government awareness of informant's propensity sufficient to confer government responsibility for placing detainee in cell with him); United States v. Johnson, 196 F. Supp. 2d 795, 874 (N.D. Iowa 2002) (holding that government was responsible if it "intentionally created" or "knowingly exploited" situation); *cf.* Valdez v. Ward, 219 F.3d 1222, 1235 (10th Cir. 2000) ("Where government officials *must have known* that a defendant will make incriminating statements about a charged crime, their interrogation . . . clearly violates the Sixth Amendment.").

28. 474 U.S. 159 (1985).

29. *Moulton*, 474 U.S. at 176.

30. *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 8 (1958) ("Apparent Authority").

31. Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).

32. *See Moulton*, 474 U.S. at 171; United States v. Bender, 221 F.3d 265, 268 (1st Cir. 2000) (applying "knowing exploitation" standard in a case involving an undercover officer).

It is interesting to note that the Sixth Amendment, unlike the Fourth Amendment, confers a right expressly associated with trial. *See* U.S. CONST. amend. VI ("In all *criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial . . . ." (emphasis added)). Indeed, *Massiah* speaks of the "use in evidence" as the violation, United States v. Massiah, 377 U.S. 201, 204, although it also suggests that "secret interrogation" itself is a violation, *id.* at 205. Later cases appear to have clarified that the Sixth Amendment forbids government-endorsed questioning in the absence of defense counsel in pursuit of its adversarial case — a bar that is, of course, enforced by exclusion of the evidence at trial. *See* Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986) (holding that right is violated where "the police and their informant took some action . . . designed deliberately to elicit incriminating remarks"); United States v. Henry, 447 U.S. 264, 274 (1980) (holding that the government violated the right "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel"); *see also* United States v. Wade, 388 U.S. 218, 224 (1967) (holding that the right to counsel can be violated at "critical stages," beyond actual trial).

Two factors emerge from discussions of government responsibility: agreement and targeting. The first factor is that the government and the informant have agreed that the informant will provide the government with information about fellow inmates.[33] Among courts that emphasize agreement, different courts place emphasis on various dimensions of this agreement: for example, some courts are interested in the degree of control the government has over the informant;[34] others emphasize the benefit the informant gained from providing the information — the quid pro quo.[35] There remains the common strand among these courts of an agreement factor.

Second, some courts look at whether the government has targeted this particular defendant.[36] Targeting, or singling out a particular defendant from whom to obtain information, is distinct from agreement. The state can target a defendant in the complete absence of any agreement with an informant, for example by placing an informant who is known to be talkative in proximity to the suspect, without telling the potential informant anything.[37] This factor recognizes that the

33. *See, e.g.*, United States v. Brink, 39 F.3d 419, 424 (3d Cir. 1994); United States v. York, 933 F.2d 1343, 1357 (7th Cir. 1991); Commonwealth v. Moose, 602 A.2d 1265, 1268-73 (Pa. 1992) (finding agreement sufficient without targeting any specific suspect); Hartman v. State, 896 S.W.2d 94, 100 (Tenn. 1995) (finding error, although harmless, to admit statements informant elicited from defendant after the informant entered into a cooperation agreement with the state). Although some cases involve informants or defendants who are not in jail, this Note focuses on the jailhouse context, where virtually all potential targets of an informant's questioning would have a right to counsel.

34. *See* United States v. Li, 55 F.3d 325, 328 (7th Cir. 1995); *York*, 933 F.2d at 1359.

35. *See* Creel v. Johnson, 162 F.3d 385, 393 (5th Cir. 1998) (requiring both quid pro quo and control); United States v. Birbal, 113 F.3d 342, 344-46 (2d Cir. 1997) (requiring an "express or implied quid pro quo"); Thomas v. Cox, 708 F.2d 132, 135 (4th Cir. 1983) (finding significant lack of control, lack of express agreement, and lack of reward); *In re* Neely, 864 P.2d 474, 481 (Cal. 1993) (holding that informant must act as a government agent at the behest of the police and with expectation of receiving a benefit or advantage); Stewart v. State, 549 So. 2d 171, 173 (Fla. 1989) (declining to find agency where detective agreed with defendant's grandmother to listen in on their conversation because she was not a paid informant).

36. *See* United States v. Murray, 103 F.3d 310, 323 (3d Cir. 1997) (appearing to examine only targeting in finding no error in determination jailhouse informant was not an agent).

37. Pure targeting cases are rare, because the primary reason the state would know an informant was likely to be talkative would be previous cases in which the informant agreed to provide information, giving rise to an implicit, standing agreement. Even if the previous agreement was decisively terminated, however, some courts have suggested that placing the informant in proximity would be sufficient. *See Brink*, 39 F.3d at 424. Police have been suspected of placing known informants in jail cells in other cases. A police officer in Washington testified that police sometimes illicitly placed "known snitches" in the cells of pretrial defendants to obtain information. *In re* Benn, 952 P.2d 116, 138-39 (Wash. 1998); *see also* United States v. Pelaes, 790 F.2d 254, 258 (2d Cir. 1984) (holding that the government did not intend to elicit information in agreement with informant, but expressing low tolerance for future "coincidental" placement of cooperating informants in proximity to indicted defendants).

government's attempts to circumvent the right to counsel need not take the form of an agreement with an informant.[38]

This Note argues that either an agreement with the informant to provide information about fellow inmates or the targeting of a particular defendant is sufficient to show that the government is responsible for the informant's questioning, thus furthering its case in violation of the Sixth Amendment right to counsel. The government, in agreement or targeting, has knowingly caused the informant to "deliberately elicit" statements from the accused in contravention of the *Massiah* standard. Part I argues that an agreement alone confers government responsibility for the informant's actions. Part II delimits the contours of an agreement sufficient to make the state responsible for the informant, arguing that the government is responsible for the informant's actions within the scope of the agreement. Part III asserts that targeting is also government misconduct that independently creates responsibility for an informant's actions.

I. THE JAILHOUSE INFORMANT'S AGREEMENT TO PROVIDE INFORMATION TO THE GOVERNMENT

In focusing on the agreement, express or implied, standing or targeted, courts correctly discern that if the government deputizes a private citizen to gather information, that informant becomes an extension of the state.[39] This satisfies the first part of the two-part standard for *Massiah* violations: (1) government responsibility; (2) active elicitation. The agreement allows the informant's targeting of the defendant for elicitation to be imputed to the government.[40] Thus, government officials need not have personally targeted the defendant. Section I.A argues that, under Supreme Court precedent, an agreement is sufficient to confer government responsibility where it creates an "informant at large." Section I.B argues that the underlying rationale for the Sixth Amendment right to counsel — preservation of the adversarial system — requires that the government be responsible for creation of informants at large via agreements.

38. As an egregious example, a Los Angeles newspaper uncovered a memorandum showing a prosecutor had covered for suspected police targeting of postindictment defendants. *See infra* note 178 and accompanying text.

39. *See supra* notes 33-35 and accompanying text.

40. To be sure, to show a Sixth Amendment violation, the defendant must also show that the government's informant actively elicited statements from her, individually — this inquiry is the second part of the test. *See supra* note 20 and accompanying text.

A. *The "Informant at Large"*

Courts that require targeting, refusing to find government responsibility based on agreement alone, exclude a significant type of government circumvention of the right to counsel. By implicitly or explicitly tasking an inmate with obtaining information from jailmates, usually for rewards on a contingency basis, the government encourages that inmate to question suspects who, overwhelmingly, have acquired the right to counsel, which vests approximately at indictment.[41] The government creates what the D.C. Circuit has termed an "informant at large" — the agreement does not, then, have to be targeted to a particular defendant to show government responsibility for the constitutional violation.[42]

Soon after the Supreme Court applied the Sixth Amendment to bar the government's use of a jailhouse informant in *Henry*, the D.C. Circuit recognized that *Henry* forbade government creation of jailhouse informants at large when the court held that the government was responsible for the informant in *United States v. Sampol*.[43] The informant did not apply for bail, according to the prosecutor in part because "his ability to demonstrate his good faith and his cooperation, seem to be enhanced, strangely enough, by his continued incarceration"[44] — he was staying in jail to be a jailhouse informant. Pursuant to an agreement, the informant used "his ability to 'ingratiate' himself with criminals" to coax incriminating statements from a jailmate toward whom the prosecutor had not initially directed the informant's attention.[45] Thus, the government had impermissibly circumvented the Sixth Amendment in deputizing an informant at large.[46]

Similarly, the Supreme Court of Pennsylvania adjudicated a compelling example of this type of government misconduct in *Commonwealth v. Moose*.[47] In that case, the district attorney had kept

41. *See* United States v. Sampol, 636 F.2d 621, 638 (D.C. Cir. 1980); Commonwealth v. Franciscus, 710 A.2d 1112, 1119-20 (Pa. 1998); *cf.* County of Riverside v. McLaughlin, 500 U.S. 44 (1991) (generally requiring judicial determination of probable cause to hold a suspect more than forty-eight hours); Gerstein v. Pugh, 420 U.S. 103 (1975) (requiring judicial determination of probable cause prior to extended restraint of liberty). This Note does not address the separate issue of the point at which the right vests. *See supra* note 2.

42. *See Sampol*, 636 F.2d at 638.

43. *Id.*

44. *Id.* at 636. Not only the prosecutor but also the judge had made clear that lenience was contingent on continued, vigorous, effective cooperation. The court held that the judge's actions did not confer government responsibility, but "merely confirmed [the informant] in the status of informer, and pledged him to 'go all out' and 'forge ahead on his own . . . .'" *Id.* at 638.

45. *Id.* at 636-38.

46. *See id.*

47. 602 A.2d 1265 (Pa. 1992).

the informant in the county jail for three years awaiting sentencing for murder, pursuant to "an implied understanding" that the informant would elicit incriminating statements from his fellow inmates.[48] The informant gained a delay in transfer to prison, and an implied promise of a good recommendation at sentencing.[49] Since "[t]he vast majority of people in the county jail are charged with crimes and awaiting trial," and thus questioning almost any one of them on behalf of the government would violate *Massiah*, the court held that the lack of targeting was not significant.[50] When it implicitly agreed for him to act as an informant at large, the government accepted responsibility for the informant's questioning in the absence of counsel.

That an agreement suffices to confer government responsibility even absent targeting is consistent with Supreme Court precedent, which charges the government with an affirmative responsibility to ensure the defendant's right to counsel,[51] in *Massiah*, *Henry*, *Moulton*, and *Wilson*. The *Massiah* Court articulated the basic principle: "Any secret interrogation of the defendant... after... the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal cases and the fundamental rights of persons charged with crime."[52] Here, as for state action, the constitutional mandate to the government to conduct a fair trial, and not formal designations should control.[53]

Applying this principle to jailhouse informants, *Henry* supports holding the government responsible for the actions of an informant at large. The defendant was indicted for bank robbery and was being held in jail awaiting trial when a government agent contacted a fellow inmate in the same cellblock who had been a paid FBI informant for some time.[54] The government agent testified that he told the informant to be alert for information, but "not to question [the defendant]... about the charges."[55] The informant then had "some conversations with" the defendant in jail, and testified against him at trial, for which the informant was paid.[56]

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48. *Moose*, 602 A.2d at 1267, 1271 & n.2.

49. *See id.* at 1270-71.

50. *Id.* at 1270.

51. *See Sampol*, 636 F.2d at 638; *Moose*, 602 A.2d at 230.

52. United States v. Massiah, 377 U.S. 201, 205 (1964) (quoting People v. Waterman, 175 N.E.2d 445, 448 (N.Y. 1961)).

53. *See* Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 302 n.4 (2001); *supra* note 31 and accompanying text.

54. United States v. Henry, 447 U.S. 264, 265-66 (1980).

55. *Id.* at 268.

56. *Id.* at 266-67.

The court explicitly disavowed a focus on targeting: "The record does not disclose whether the [FBI] agent contacted [the informant] specifically to acquire information about [the defendant] . . . ."[57] True, the Court may have inferred targeting from the situation, but its approach focused on government misconduct, not a bright-line targeting requirement.[58]

The *Henry* Court did not articulate an explicit standard, but found three facts significant in establishing that the government had deliberately elicited incriminating statements in violation of the Sixth Amendment as interpreted under *Massiah*. First, the informant was acting under government instructions on a contingency-fee basis. Second, the defendant was unaware that the informant was any more than a fellow inmate, and thus would confide information inappropriate to give to an adversary. Finally, the defendant was incarcerated at the time of the conversation; "the mere fact of custody imposes pressures on the accused."[59] The last two of these three factors are always present in the jailhouse informant context; thus, a violation is particularly likely in this context, and the government should take precautions to ensure that its actions do not circumvent the constitutional guarantee.[60] By creating an informant at large, the government secretly commissions an inmate to interrogate jailmates. It is this underhandedness, not the targeting of a specific defendant, that shocked the Court in *Henry*.[61]

The Court made the government's accountability even more explicit in *Maine v. Moulton*,[62] noting that "at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel."[63] *Moulton* held that police use of a co-defendant to gather incriminating information in the absence of counsel violated the Sixth Amendment, even if the accused, not the police or their

57. *Id.* at 266.

58. *See* United States v. Johnson, 196 F. Supp. 2d 795, 860 (N.D. Iowa 2002); *supra* note 11 and accompanying text.

59. *Henry*, 447 U.S. at 274. A second informant, who was not paid and had no arrangements with the government to report conversations with the defendant, also testified to incriminating statements. *See id.* at 267 n.3. The Court did not consider this testimony of a "neutral fellow inmate" to be a violation. *See id.* at 274-75 n.3.

60. *See Johnson*, 196 F. Supp. 2d at 860.

61. *Henry*, 447 U.S. at 274-75 n.3 ("This is not a case where, in Justice Cardozo's words, 'the constable . . . blundered'; rather, it is one where the 'constable' made an impermissible interference with the right to effective assistance of counsel." (quoting People v. DeFore, 150 N.E. 585, 587 (N.Y. 1926))).

62. 474 U.S. 159 (1985).

63. *Moulton*, 474 U.S. at 171; *see also* Gardner, *supra* note 3, at 426-31 (arguing that *Moulton* best articulated underlying principles of the right).

agent, initiated the contact.[64] *Henry* and *Moulton* show that the government must affirmatively guarantee the defendant's full enjoyment of a right to counsel,[65] an obligation inconsistent with generalized agreements that set up systematic questioning of inmates by government informants at large.[66]

Several courts have mistakenly argued that the "listening post" case, *Kuhlmann v. Wilson*,[67] justifies a targeting requirement.[68] *Wilson* addressed whether the agent's role was passive or active and did nothing to change the standard for the government's role. These courts rely on various statements, often quoted out of context, from the following passage:

> As our recent 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. Since "the Sixth Amendment is not violated whenever — by luck or happenstance — the State obtains incriminating statements from the accused after the right to counsel has attached," a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.[69]

Thus, the First Circuit argued, "it is a stretch to describe the jail mate's inquiries as 'government interrogation' " in the absence of targeting.[70] This *Wilson* language, however, supports two separate inquiries: (1) whether the government was responsible for the informant; (2) whether the informant's actions were sufficient to constitute deliber-

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64. 474 U.S. at 170.

65. *See id.* at 171 ("The Sixth Amendment . . . imposes on the state an affirmative obligation to respect and preserve the accused's choice to seek [the] assistance [of counsel].").

66. *See* Commonwealth v. Franciscus, 710 A.2d 1112, 1119 (Pa. 1998); Commonwealth v. Moose, 602 A.2d 1265, 1271 (Pa. 1992).

67. 477 U.S. 436, 460-61 (1986).

68. United States v. Birbal, 113 F.3d 342, 345 (2d Cir. 1997); United States v. D.F., 63 F.3d 671, 682 n.16 (7th Cir. 1995) (stating that "[t]he key" in *Henry* and *Wilson* was "whether the government directed the interrogator toward the defendant. . . ."); United States v. Hicks, 798 F.2d 446, 449 (11th Cir. 1986); *In re* Williams, 870 P.2d 1072, 1077 (Cal. 1994) (citing *Wilson* to support the assertion that "a general policy of encouraging inmates to provide useful information does not transform them into government agents . . . ." (quoting People v. Williams, 751 P.2d 901, 910 (Cal. 1988))). *But see* United States v. Johnson, 196 F. Supp. 2d 795, 848 (N.D. Iowa 2002) (arguing that such interpretations are misguided).

69. 477 U.S. at 459 (citations omitted).

70. United States v. LaBare, 191 F.3d 60, 65 (1st Cir. 1999); *see also Birbal*, 113 F.3d at 345; Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir. 1987) (quoting with approval state finding in *Lightbourne v. State*, 438 So. 2d 380, 386 (Fla. 1983), that "Investigator LaTorre's advice to the informant Chavers to keep his ears open does not constitute an attempt by the state to deliberately elicit incriminating statements").

ate elicitation.[71] If the government has encouraged an informant to gather information from jailmates, the first prong is satisfied and any elicitation should be attributed to the government action.[72]

Some courts have relied on the *Wilson* language stating that a violation requires something more than an informant reporting "through prior arrangement or voluntarily," to argue that the additional factor must be targeting.[73] These courts ignore the context that makes clear that the additional factor is the informant's active questioning of the defendant, not government targeting.[74] Where the government creates an informant at large in the jailhouse context, it has taken action "designed deliberately to elicit incriminating remarks"[75] through providing an incentive for the informant to question pretrial inmates.[76] Thus, *Wilson* stands not for the proposition that targeting is required in addition to agreement, but for the proposition that active questioning is required in addition to government responsibility.

Although evaluating an agreement is slightly more complex than looking for simple targeting,[77] it is of little use to have a bright-line test that looks for the wrong things.[78] Yet, in the name of clarity, the First Circuit would endorse government creation of agents at large, and insulate it from their actions.[79] The First Circuit has argued:

> The government enlists jailhouse informants often enough that it is better to have clear ground rules for what they can and cannot do. Where a jail mate simply agrees to report whatever he learns about crimes from other inmates in general, we think there is not enough to trigger *Massiah*.[80]

This approach fails for two reasons. First, since the vast majority of inmates will have a right to counsel on the crime for which they are incarcerated, a general agreement with an inmate to gather information about other inmates amounts to a systematic violation of the

71. *See Lightbourne*, 829 F.2d at 1028 (Anderson, J., dissenting); *see also id.* at 1019 (applying two-prong test); Tomkovicz, *supra* note 2, at 20 (noting that *Wilson* supports a two-prong test).

72. *See* Commonwealth v. Franciscus, 710 A.2d 1112, 1120 (Pa. 1998).

73. *See Birbal*, 113 F.3d at 345; Stano v. Dugger, 901 F.2d 898, 907 (11th Cir. 1990) (Edmonson, J., concurring); *In re Williams*, 870 P.2d at 1086.

74. *See supra* note 69 and accompanying text.

75. Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986).

76. *See* United States v. Sampol, 636 F.2d 621, 638 (D.C. Cir. 1980); *Franciscus*, 710 A.2d at 1120.

77. *See infra* Part II.

78. *See* United States v. Johnson, 196 F. Supp. 2d 795, 874 (N.D. Iowa 2002) (rejecting bright-line rule).

79. *See* Tomkovicz, *supra* note 2, at 75.

80. United States v. LaBare, 191 F.3d 60, 65-66 (1st Cir. 1999).

rights of the inmates.[81] Second, it is not clear why a rule that prohibits agreements to gather information while in jail would not be as easy for law enforcement authorities to follow as one that prohibits targeting.

Some courts invoke a modified agency analysis to analyze government responsibility. It is not clear that this analysis, developed in the commercial context, clarifies matters in the context of jailhouse informants, but it certainly does not require targeting. A jailhouse informant at large meets the definition of an agent — one who acts for another by agreement and whose work is subject to control by the principal.[82] Related to agency, several courts have remarked that control is important to the Sixth Amendment determination.[83] Control, however questionable a measure of government responsibility, does not require targeting: the government controls the informant's actions to a large degree, often offering direction about how to gather information,[84] promising rewards for evidence gathered,[85] conferring with the informant on a regular basis,[86] and, perhaps most importantly, physically restraining the informant's liberty.[87] Similarly, respondeat superior principles have sometimes been applied to determine if an informant is acting for the government.[88] These principles accord with an understanding of principal responsibility well beyond explicitly authorized acts.[89] The question of responsibility is more akin to state action than agency law, but agency law imposes no targeting requirement.

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81. *See* Commonwealth v. Moose, 602 A.2d 1265, 1270 (Pa. 1992).

82. *See LaBare*, 191 F.3d at 65 ("On strict agency principles, it could be argued that [the informant] became a government agent . . . when he agreed to report on future crime-related statements of fellow prisoners and accepted direction as to how to perform this task."); RESTATEMENT (SECOND) OF AGENCY §§ 1, 14 (1958).

83. *See, e.g.*, United States v. Li, 55 F.3d 325, 328 (7th Cir. 1995); United States v. York, 933 F.2d 1343, 1359 (7th Cir. 1991).

84. *See, e.g.*, United States v. Henry, 447 U.S. 264, 270 (1980) (informant told to be alert to statements but not initiate conversations); *LaBare*, 191 F.3d at 65 (informant told "don't ask questions"); *York*, 933 F.2d at 1358 (informant told the type of information the government was interested in receiving).

85. *See, e.g.*, *York*, 933 F.2d at 1358; United States v. Sampol, 636 F.2d 621, 632-34 (D.C. Cir. 1980); *Moose*, 602 A.2d at 1270-71.

86. *See, e.g.*, *Sampol*, 636 F.2d at 638.

87. *Henry*, 447 U.S. at 273-74 (noting particular susceptibility of incarcerated individuals to government coercion); H. Blake Sims, Casenote, *Constitutional Law — The Sixth Amendment Right to Counsel — Admissibility of Testimony from a Voluntary Active Informant*, 63 TENN. L. REV. 453 (1996) (arguing that state creation of reward system for information makes all informants state actors). While this approach undoubtedly goes too far, it is important to recognize the substantial degree of control the state has simply by nature of the prison context.

88. *See, e.g.*, *York*, 933 F.2d at 1357.

89. *See* State v. Wells, 731 S.W.2d 250, 251 (Mo. 1987) (holding that police must take responsibility for acts within the apparent scope of an informant's employment).

When government officials encourage an inmate to collect information from jailmates, they deputize an informant at large, commissioning him to gather information from those the government is forbidden by the Sixth Amendment to question out of the presence of counsel.[90] The Supreme Court has made clear that the government's obligation is to comprehensively guarantee full and effective adversary representation.[91] This obligation bars deputizing an informant at large to question uncounseled inmates. Thus, the government must be held responsible for the informant's violations, regardless of whether the government intended to target a specific pretrial defendant, or simply hoped for information from inmates generally.

B. *Equality in the Adversarial System*

Henry articulates an underlying concern that the government is stepping out of its role as "arms length" adversary in secretly using an informant to question the defendant in the absence of defense counsel.[92] The Sixth Amendment right to counsel is grounded in the idea of equalization, balancing the resources and legal expertise of the state with an advocate for the defendant.[93] This equalization has two related goals: the first is a belief that the truth will better appear through a balanced contest; the second is a concern for the moral or normative authority of the judicial system.[94] The right to counsel vests as soon as the parties become official adversaries, because, as the Supreme Court has recognized, pretrial confrontations may be dispositive of the outcome of the trial itself.[95] Both concerns, finding the truth and normative authority, suggest that an agreement should be sufficient to confer government responsibility and, indeed, may counsel against narrow construction of government responsibility for the actions of jailhouse informants in general.

A targeting requirement in particular is inconsistent with the requirement that adversarial proceedings place defendants, as far as possible, on equal footing with accusers.[96] Once an informant becomes

90. *See Sampol*, 636 F.2d at 638; *Moose*, 602 A.2d at 1270.

91. *See* Maine v. Moulton, 474 U.S. 159, 170 (1985); *Henry*, 447 U.S. at 273.

92. *Henry*, 447 U.S. at 273.

93. *See* Gardner, *supra* note 3, at 403 ("[T]he Court's concern was to protect against government circumvention of the ideal of maintaining a fair balance between adversarial opponents . . . ."); Tomkovicz, *supra* note 2, at 53.

94. *See* Miranda v. Arizona, 384 U.S. 436, 480-82 (1966); Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 187-97 (1983); Tomkovicz, *supra* note 2, at 43-60. *But see* Gardner, *supra* note 3 (arguing that "privacy" is a primary goal of Sixth Amendment jurisprudence).

95. *See* United States v. Wade, 388 U.S. 218 (1967).

96. *See* Commonwealth v. Moose, 602 A.2d 1265, 1271 (Pa. 1992).

a state agent, pursuant to an agreement to collect information, her actions weigh in on the government side — particularly in the case of the informant at large.[97] The prosecution uses its resources to create representatives at large who can take advantage of defendant's lack of legal skill to extract incriminating statements or details from a number of fellow inmates.[98]

While the information gained may appear likely to be reliable, there is no indication that this is, in fact, the case. In a particularly infamous example, the *Los Angeles Times* exposed a ring of jailhouse informants who had developed a system to fabricate confessions.[99] Tipped off that an inmate accused of a serious crime was to be transferred to their vicinity, the informants used the telephone they were provided to call the police station and other information sources, posing as police officers, prosecutors, and reporters. They divided the inmates up, striking deals with each other about who would get the rewards for informing in each case. The *Times* documented at least three cases where defendants were sent to jail on the weight of fabricated confessions.[100] The *Times* also documented police and prosecutor complicity with this arrangement.[101] While courts have noted danger, they are oddly reluctant to translate the acknowledged fact that informants often fabricate confessions pursuant to implied deals with the state into a legal rule that gives the government responsibility for generalized eliciting of uncounseled confessions.[102] Even where the informant does not lie, the government wins the case not by careful investigation but by taking advantage of the defendant's lack of counsel; this imbalance may well lead to false convictions based on suggestibility or bravado, a defendant fabricating or exaggerating claims to impress or gain the sympathy of a jailmate.[103] Thus, the Sixth Amendment right to counsel assists the truth finding process even in

97. *See Moose*, 602 A.2d at 1271; Tomkovicz, *supra* note 2, at 76-77.

98. *See* Commonwealth v. Franciscus, 710 A.2d 1112, 1120 (Pa. 1998).

99. *See* Ted Rohrlich & Robert W. Stewart, *Jailhouse Snitches Trading Lies for Freedom*, L.A. TIMES, Apr. 16, 1989, at 1.

100. *See id.*

101. *See id.*; Kevin Cody, *Jailhouse Informants: The D.A.'s Ethical Bind*, L.A. TIMES, Nov. 13, 1988, at 5; Ted Rohrlich, *Illegal Use of Informers Suspected in '87*, L.A. TIMES, Aug. 17, 1989, at 2.

102. *See* United States v. LaBare, 191 F.3d 60, 66 (1st Cir. 1999) (noting that the informant "had ample reason to fabricate" but refusing to hold the state responsible for his actions).

103. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279 (1991) (finding confession to prison informant coerced by informant's scare tactics, but admission was harmless error); Thurman v. Commonwealth, 975 S.W.2d 888, 894 (Ky. 1998) (describing contradictory statements given to jailhouse informant); *cf.* United States v. Henry, 447 U.S. 264, 272-75 (1980) (finding that defendant's incarceration and lack of knowledge that informant was working for the government contributed to serious nature of Sixth Amendment violation).

the jailhouse informant context, and this value weighs against allowing the government broad latitude to circumvent it.

Perhaps more disturbing, the moral or normative authority of the judicial system is undermined if it allows the government to regularly prove its case by incarcerating defendants and sneaking information from them in circumvention of the requirement that the government use its position not only to prosecute its case, but to safeguard the defendant's interests.[104] In many cases, the defendant attempts to construct a defense with someone thought to be a sympathetic ally who is in fact a secret government informant.[105] As Professor Tomkovicz has argued, it may be a sense of equality or fair play, more than anything else, that motivates *Massiah* jurisprudence.[106]

That the Supreme Court has somewhat left aside the moral authority line of reasoning in other contexts[107] should not preclude considering normative concerns in this context. First, the *Massiah* context may be particularly compelling. The government must gain society's confidence that it is justified in taking the extreme action of depriving an individual of liberty; winning the trial by depriving the defendant of counsel undermines that confidence.[108] As the Court put it, "[T]he government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."[109] Second, the Court has continued to look to the more normative rationale for due process protections in another, closely related context. In its reaffirmation of *Miranda v.*

104. *See* Gardner, *supra* note 3, at 400-03 (discussing fairness goal); Tomkovicz, *supra* note 2, at 77 n.296 ("[P]ermitting the government to disavow responsibility for the conduct of those it has encouraged to obtain information offends the 'appearance of justice,' an integral component of justice itself.").

105. *See, e.g.*, Maine v. Moulton, 474 U.S. 159, 164-65 (1985) (describing witness's incriminating statements made in the course of strategizing a defense with a co-defendant informant); United States v. Smallwood, 188 F.3d 905, 910 (7th Cir. 1999) (describing defendant's incriminating statements made during a consultation about his case to a jailhouse lawyer and secret informant); United States v. Pelaes, 790 F.2d 254, 256 (2d Cir. 1986) (describing informant co-defendant's testimony that defendant urged him to testify in his favor).

106. *See* Tomkovicz, *supra* note 2.

107. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 485 (1976) ("Although our decisions often have alluded to the 'imperative of judicial integrity,' they demonstrate the limited role of this justification in the determination whether to apply the [Fourth Amendment exclusionary] rule in a particular context." (citation omitted)).

108. *See, e.g.*, *Moulton*, 474 U.S. at 168-70.

109. Kirby v. Illinois, 406 U.S. 682, 689 (1972), *quoted in Moulton*, 474 U.S. at 170. Both *Henry* and *Wilson* rely on the need to preserve the adversary system. Kuhlmann v. Wilson, 477 U.S. 436, 457 (1986); United States v. Henry, 447 U.S. 264, 273 (1980). In contrast, Fourth Amendment cases of the same era were rejecting the fairness rationale. *See, e.g.*, United States v. Leon, 468 U.S. 897, 916 (1984).

Arizona,[110] the Court noted that it was concerned not only with truth but also with curtailing government overreaching when it stated that, "[C]ustodial interrogation exacts a heavy toll on individual liberty."[111] While the legal issues are not identical in a *Miranda* case, the normative argument is similar: the government cannot conduct its investigations in a way that infringes on individual rights. Thus, the normative argument weighs against abuses of power such as creating informants at large.

The underlying rationale for the *Massiah* and *Henry* line of cases does not support a targeting requirement. Both the pursuit of truth and the normative authority of the criminal court require that the defendants not be subject to questioning by undercover government informants at large, with free rein to question them in the absence of counsel.

An agreement is sufficient to create government responsibility under the Sixth Amendment for the actions of a jailhouse informant.[112] An untargeted agreement creates an informant at large, a sweeping constitutional violation, inconsistent with the government's obligations under *Massiah*, *Henry*, and *Moulton*.[113] The principles that underlie the Sixth Amendment right to counsel require that the scales of justice be balanced both to better get at the truth, and to maintain the normative power of the criminal law.[114] Targeting should not be required where there is an agreement.

II. CONTOURS OF THE AGREEMENT

Perhaps the most difficult aspect of determining whether the government is responsible for the actions of a jailhouse informant is developing the level of agreement that endows the informant with government authority to ask questions of fellow inmates. Courts enumerate daunting lists of factors to consider whether the government must have anticipated that the informant will question an inmate whose right to counsel had vested.[115] It is possible, however, to isolate the core of the inquiry and prevent it from becoming the amorphous multifactor test feared by some courts.[116] This Part examines the key factors that courts have discussed: scope, benefit, and

110. 384 U.S. 436 (1966).

111. Dickerson v. United States, 530 U.S. 428, 435 (2000) (quoting *Miranda*, 384 U.S. at 455).

112. *See supra* notes 39-111 and accompanying text.

113. *See supra* notes 51-91 and accompanying text.

114. *See supra* notes 92-111 and accompanying text.

115. *See, e.g.*, United States v. York, 933 F.2d 1343, 1356-58 (7th Cir. 1991).

116. *See, e.g.*, United States v. LaBare, 191 F.3d 60, 65 (1st Cir. 1999).

formality. It concludes that scope suffices to show that the government "must have known" the informant's likely actions, satisfying the *Henry* standard for government responsibility.[117]

A. *Scope*

Since the focus in this constitutional inquiry is on government responsibility, essentially akin to state action, it is important not to break it down beyond the simple question of whether, under the circumstances, we believe that the state knowingly created a situation in which it was likely the defendant's right to counsel would be violated.[118] This requires an inquiry into the nature of the agreement, showing that it covered activities sufficiently related to jailhouse informing to expect government knowledge of the informant's probable course of conduct.

Where an agreement is targeted, such that it specifically covers the informant's obtaining information about a particular defendant, courts usually agree that it is sufficient to invoke government responsibility.[119] The government either directs the informant's attention to a particular pretrial defendant,[120] or places an informant with whom it has an agreement in proximity to such a defendant.[121] The government must know that this action will induce the informant to ask questions.[122] Normally, instructions not to question the defendant are insufficient in this situation because they are predictably ineffective.[123] Thus, agreements accompanied by targeting are almost always sufficient in scope to confer on the government responsibility for the informant's actions.

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117. United States v. Henry, 447 U.S. 264, 274 (1980) ("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.").

118. *See* People v. Frye, 959 P.2d 183, 238 (Cal. 1998); *cf.* Tomkovicz, *supra* note 2, at 74 ("An informant should probably become a state actor whenever law enforcement actions provide any encouragement to secure information for state use.").

119. *See LaBare*, 191 F.3d at 65-66; United States v. Birbal, 113 F.3d 342, 346 (2d Cir. 1997); United States v. Panza, 750 F.2d 1141, 1152 (2d Cir. 1984); *In re* Benn, 952 P.2d 116, 139 (Wash. 1998).

120. *See In re* Neely, 864 P.2d 474, 481 (Cal. 1993) ("Circumstances probative of an agency relationship include the government's having directed the informant to focus on a specific person . . . ."); *see also Panza*, 750 F.2d at 1152 (finding no agency because agreement did not require informant to gather information from defendant).

121. *See* Stano v. Butterworth, 51 F.3d 942, 946 (11th Cir. 1995) (finding no agency because informant not directed to gather information from defendant). Some courts have upheld findings of no targeting based on district court fact finding, but expressed suspicion that the government was actually placing informants in proximity to defendants after closing cooperation agreements. *See* United States v. Cruz, 785 F.2d 399, 408 (2d Cir. 1986); United States v. Pelaes, 790 F.2d 254, 257-58 (2d Cir. 1986).

122. *See Henry*, 447 U.S. at 271.

123. *See* Maine v. Moulton, 474 U.S. 159, 177 n.14 (1985); *Henry*, 447 U.S. at 271.

The scope of the agreement can also cover the jailhouse informant's conduct without targeting. This can occur, for example, if it creates an "informant at large."[124] The court in *In re Benn*[125] declined to infer government responsibility for an informant who had a "long history as a police informant and . . . [returned] to that occupation after his release from jail," solely because no targeting had been shown.[126] This approach fails to recognize the other possible source of government responsibility — a nontargeted understanding that the informant would gather information while in jail.[127] If the government officials include in their dealings with the informant an understanding that the informant will continue actively investigating crimes while in jail, this understanding covers activities that the government should realize will make the informant likely to elicit information from fellow inmates who have a right to counsel.

The scope inquiry ensures that the government is not held responsible where it could not have predicted an informant's actions. These cases can be factually distinguished. For example, in *United States v. Hicks*,[128] an informant cooperating on an unrelated case was incarcerated for a parole violation. While the informant had an agreement to cooperate in the investigation of the unrelated case, the government never asked her to gather information while in jail; indeed, the agents with whom she was working did not know she was in jail until she contacted them with the defendant's incriminating remarks.[129] Further, she testified that she was motivated to inform in this case by a personal dislike for drugs and there was no indication the government knew of this dislike.[130] Although she had an agreement to work for the government, it was not reasonable to expect the government agents, working with the informant out of jail on an unrelated investigation, to anticipate her actions, which were motivated by considerations of which they were presumably unaware.[131] Courts have thus succeeded in distinguishing those agreements that are insufficiently related to jailhouse informing to put the government on notice of the informant's likely action.[132]

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124. *See supra* Section I.A.

125. 952 P.2d 116, 138-39 (Wash. 1998).

126. *In re Benn*, 952 P.2d at 138. Even the testimony of a police officer that "known snitches" had been placed in proximity to particular inmates to elicit information did not suffice to show that the police had placed the informant in this case. *See id.* at 139.

127. *See supra* Part I.

128. 798 F.2d 446, 449 (11th Cir. 1986).

129. *See Hicks*, 798 F.2d at 449.

130. *See id.*

131. *See id.*

132. *See id.*

Scope must not be interpreted so narrowly as to exclude predictable actions, even if the agreement formally excludes them. In *Henry* and *Moulton*, the government explicitly told the informant not to ask questions, but the Court refused to absolve the government of responsibility because the informant's actions were foreseeable.[133] In *Moulton*, the Court also focused on the government's motives in so instructing the informant, which were obviously not to protect the defendant's rights, but to make the operation more effective.[134] Even the *Wilson* Court appeared to concede that the police's instructions to listen only were insufficient to show that the Sixth Amendment had not been violated — the government was required to show that the informant had followed the instructions.[135] As in agency law, predictable actions exceeding instructions are still the responsibility of the principal.[136]

Thus, to confer on the government responsibility for an informant's actions, an agreement must be sufficient to impute government knowledge that the informant likely would question defendants in the absence of counsel. This scope can come from targeting, but it can also come from other details, such as an agreement to gather information from jailmates.

B. *Benefit*

The promise or provision of a reward can be very strong evidence of an agreement.[137] It is also true that there are cases in which the informant approaches the government for the first time with information already gathered, and the government provides a reward (the "entrepreneur" scenario). Such ex-post arrangements can be factually distinguished from informal prior agreements where the government encourages the gathering efforts.[138] It is the government's knowing or

133. *See* United States v. Moulton, 447 U.S. 159, 177 n.14 (1985); United States v. Henry, 447 U.S. 264 (1980).

134. *See Moulton*, 447 U.S. at 177 n.14.

135. Kuhlmann v. Wilson, 477 U.S. 436, 460 (1986).

136. *See* RESTATEMENT (SECOND) OF AGENCY § 230 & cmt.b (1958).

137. *See* United States v. Johnson, 4 F.3d 904, 910 (10th Cir. 1993); United States v. York, 933 F.2d 1343, 1358 (7th Cir. 1991); United States v. Surridge, 687 F.2d 250, 254 (8th Cir. 1982).

138. *See York*, 933 F.2d at 1357 ("That inmates realize there is a market for information about crime does not make each inmate who enters the market a government agent."); United States v. Malik, 680 F.2d 1162, 1165 (7th Cir. 1982) (finding record supports finding informant not an agent where there was testimony that, during the relevant period, the inmate felt double crossed by the government and planned to make a deal with the defendants); *In re* Neely, 864 P.2d 474, 481 (Cal. 1993); Commonwealth v. Lopez, 739 A.2d 485, 500 (Pa. 1999); Ramirez v. State, 722 So. 2d 254, 255 (Fla. Dist. Ct. App. 1998) (finding information "in no way a product of any stratagem employed by the state" despite subsequent recommendation for leniency); State v. Carter, No. 21394-0-II, 1999 WL 305233, at *4

purposeful circumvention of the requirements of the Sixth Amendment, not its provision of a benefit, that renders it responsible for the violation. Thus, this Section argues that a benefit is a good, but not conclusive, indicator of an agreement.

Some courts have erroneously reasoned that if reward implies agreement, the converse also must hold true: if there is no government reward, there must be no agreement. These cases fall into two categories. In the first category, a previous government informant provides information but does not obtain a benefit specific to this instance of assistance.[139] The lack of reward may have a limited function as an indication that the agreement may not have covered this activity.[140] On the other hand, arrangements may be informal and flexible; where an informant is rewarded more broadly for government cooperation, it may be difficult to point to a reward specific to the information provided from the defendant.[141] Relieving the government of responsibility without further inquiry misses these cases. Therefore, rigid insistence on a quid pro quo is not warranted.

The second category of cases that take the lack of benefit to mean no agreement existed are those that refuse to hold the government responsible when it takes advantage of other motivations.[142] For example, in *Thomas v. Cox*,[143] the Fourth Circuit found the lack of benefit important, upholding the trial court's finding that "conscience" motivated the informant.[144] Informants may have personal motivations

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(Wash. Ct. App. May 14, 1999). There appears to be general agreement that the burden of proof of government responsibility is on the defendant. *See*, *e.g.*, United States v. Smallwood, 188 F.3d 905, 912 (7th Cir. 1999).

139. *See* United States v. Watson, 894 F.2d 1345, 1347-48 (D.C. Cir. 1990); United States v. Panza, 750 F.2d 1141, 1152 (2d Cir. 1984); United States v. Van Scoy, 654 F.2d 257, 260 (3d Cir. 1981).

140. *See* United States v. Brink, 39 F.3d 419, 423-24 (3d Cir. 1994) (noting that informant "denied receiving any promises or rewards for informing" in this case, which might show agency relationship was terminated); *Panza*, 750 F.2d at 1152 (considering it significant that defendant stood to gain nothing through elicitation of information outside scope of cooperation agreement).

141. *See Brink*, 39 F.3d at 424 (noting that despite lack of specific reward, informant may have had "tacit agreement" with the government); *see also Watson*, 894 F.2d at 1348 (refusing, mostly because of lack of benefit, to hold government responsible for acts of a D.E.A. informant despite regular contact with government agents while in jail and instruction about investigation of the defendant).

142. *See* Creel v. Johnson, 162 F.3d 385, 394 (5th Cir. 1998) (finding citizen informant motivated to assist police); United States v. Hicks, 798 F.2d 446, 448-49 (11th Cir. 1986) (finding informant motivated by personal crusade against drugs); *Surridge*, 687 F.2d at 253-54 (finding no *Henry* violation despite police knowledge that citizen informant would probably elicit incriminating information and police involvement in setting up meeting, because no benefit or explicit instruction was provided); Stewart v. State, 549 So. 2d 171 (Fla. 1989) (holding defendant's grandmother, who agreed to allow officer to listen secretly on a telephone extension to conversation with defendant, was not a state agent).

143. 708 F.2d 132, 133, 137 (4th Cir. 1983).

144. *Thomas*, 708 F.2d at 135-36.

for providing the government with information; the government is still responsible for the knowing exploitation of this situation,[145] because it is the government that must abide by the Constitution.[146] While *Henry* relied in part on the fact that the informant was paid on a contingency basis, this factor was only one part of the Court's determination of government responsibility.[147] The government is implicated by any pre-arrangement with an informant to elicit information from a defendant in violation of the right to counsel. Thus, while a benefit may provide evidence of an agreement sufficient to create government responsibility, it is not a necessary factor; both flexible, long-term agreements and agreements that take advantage of informant's personal motivations constitute government circumvention of Sixth Amendment guarantees.

C. *Formality*

Some courts have refused to recognize that an agreement that is not formalized may nonetheless lead to a violation of the Sixth Amendment.[148] Such a refusal is unwarranted. The Eleventh Circuit's decision in *Lightbourne v. Dugger*[149] presents a problematic example of a court's refusal to credit informal agreements. There, the informant contacted a state investigator, intimating that he had information about the defendant's case.[150] The investigator told him to "keep your ears open."[151] Two meetings ensued. The investigator testified that he understood that the informant anticipated asking for assistance in procuring leniency, and, indeed, the investigator agreed to talk with

145. *See* Maine v. Moulton, 474 U.S. 159, 176 (1985) (holding knowing exploitation of defendant initiated meeting with informant equal to creation of such a meeting); United States v. Henry, 447 U.S. 264, 274-75 (1980) ("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.").

146. *Cf.* Colorado v. Connelly, 479 U.S. 157, 164 (1986) (holding "coercive police activity" necessary to render confession involuntary for due process purposes).

147. *See supra* note 11.

148. For example, in one case the informant's attorney discussed the possibility of cooperation with the United States Attorney. The informant then elicited incriminating information from the defendant. They did not sign a formal cooperation agreement until two weeks after this conversation, however, so the court did not examine the extent of the earlier discussion. *See* United States v. Calder, 641 F.2d 76, 79 (2d Cir. 1981). In another case, not involving a jailhouse informant, the Fifth Circuit upheld a trial court's finding that a police officer did not impliedly direct the defendant's girlfriend to gather information when he told her that she "was the nearest one to [the defendant], and if anyone could get information, [she] could." Creel v. Johnson, 162 F.3d 385, 394 (5th Cir. 1998).

149. 829 F.2d 1012 (11th Cir. 1987).

150. *Lightbourne*, 829 F.2d at 1019.

151. *Id.*

the judge to arrange his bail.[152] Ultimately, the informant received an early release on bail and $200 from a "general reward fund."[153] Nonetheless, the court found no agreement: "Chavers's motives alone cannot make him an agent of the police even if the police knew and understood that his motives were probably self-serving and related to getting police cooperation in his own case."[154] The court was apparently willing to ignore Sixth Amendment violations in the absence of a formal agreement for exchange.

The Eleventh Circuit's approach is inconsistent with the Supreme Court's statements in *Henry* and *Moulton* that the state has an affirmative duty to guarantee the right to counsel.[155]

Refusing to consider more informal agreements ignores the reality of these arrangements, where an implication can carry as much force as an explicit promise. As the Supreme Court has made clear in the analogous state action context, "[I]f formalism were the sine qua non of state action, the doctrine would vanish owing to the ease and inevitability of its evasion, and for just that reason formalism has never been controlling."[156] Unstated understandings that an inmate will receive benefits for information are one of the most common forms of informal agreement. When the government hints at a reward the informant values, the informant is strongly influenced to gather information in reliance on these intimations.[157] Moreover, where the government consistently rewards information obtained by a jailhouse informant, a symbiotic relationship develops in which the informant reasonably anticipates future rewards for future information, and the court should infer an informal agreement.[158] Since jailhouse informants are unlikely to risk informing, which involves substantial danger to them, without a clear expectation of reward, courts should be particularly sensitive to such sub-rosa, informal agreements.[159]

For example, in *United States v. York*, the Seventh Circuit noted that the government agent told the informant "the type of information he was interested in receiving; that statement was tantamount to an invitation . . . to go out and look for that type of information."[160] In

152. *Id.* at 1029-30 & nn. 2, 5 (Anderson, J., dissenting) (quoting investigator's testimony).

153. *Id.* at 1019.

154. *Id.* at 1021.

155. *See* Maine v. Moulton, 474 U.S. 159, 176-77 (1985); United States v. Henry, 447 U.S. 264, 270-71 (1980).

156. Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 301 n.4 (2001).

157. *See* Commonwealth v. Moose, 602 A.2d 1265, 1270-71 (Pa. 1992).

158. *See* United States v. York, 933 F.2d 1343, 1358 (7th Cir. 1991).

159. *See id.*

160. *Id.*

contrast, the Fourth Circuit refused to see a veiled promise in *Thomas v. Cox*,[161] when it held that a meeting between a state police investigator and the informant did not create an agency relationship. The informant met with the investigator, offering incriminating statements by the defendant in a murder case; the investigator claimed to have told the informant that he could pursue the inquiry or not — making no promise of reward.[162] The informant nonetheless elicited several more incriminating statements, motivated, he said, by "curiosity," and testified at trial. The trial court found that it was "conscience" that motivated the informant.[163] The Fourth Circuit decided that even if motivated by an "unencouraged hope to curry favor," the informant's actions were not attributable to the government.[164] In so holding, the court ignored not only the contradictions between the informant's story and the trial court's findings, but also the reality that police are in a position to offer powerful implicit promises of reward to inmates who are themselves accused of a crime.[165]

Once again, shifting the focus from the state action analogy to commercial agency does not avail proponents of a narrow scope of state responsibility. A formality requirement also contradicts the common law of agency, particularly since "authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him to act on the principal's account."[166] The government can confer authority on an informant to gather information, and thus become responsible for her actions, without a formal contract. Formality is not required.

The overall contours of an agreement sufficient to confer government responsibility emerge in a relatively straightforward inquiry. The scope of the agreement must compel the conclusion that the government knew that the informant would likely question the defendant about an offense for which the right to counsel had attached. Evidence of a benefit conferred is probative but not required. The agreement is often implied rather than formal, but nonetheless can be sufficient. The critical inquiry is the government's knowledge, viewed in light of its affirmative obligation to uphold the Sixth Amendment.

161. 708 F.2d 132, 133, 137 (4th Cir. 1983).

162. *See Thomas*, 708 F.2d at 132.

163. *See id.* at 137.

164. *See id.*

165. *See York*, 933 F.2d at 1358.

166. RESTATEMENT (SECOND) OF AGENCY § 26 (1958).

III. THE GOVERNMENT'S ACTION IN TARGETING A DEFENDANT TO OBTAIN INFORMATION

The situation discussed thus far, where the government agrees with an informant to provide information, thus in effect deputizing a government investigator, is the most common in the case law. While perhaps more rare, it is important to examine the second situation that confers on the government responsibility for the informant's actions. In this second situation, no agreement exists, but the government targets a defendant through placement proximity to an inmate who will likely inform the government of any incriminating statements. A number of courts have suggested that this action would be insufficient, articulating a requirement of an agreement.[167] This approach is both unfaithful to Supreme Court precedent and at odds with the underlying rationale of preservation of the adversary system. The correct focus is still on the government's responsibility. In agreement cases, the government agrees to, and therefore becomes vicariously responsible for, the informant's questioning; in pure targeting, the government has direct responsibility because it has engineered the situation to elicit information from a pretrial inmate.

If the government is aware that an inmate is likely to elicit incriminating information, and takes advantage of that fact by placing her in proximity to a defendant from whom it desires information but who is protected by a right to counsel, it circumvents that right.[168] As the Third Circuit has recognized,[169] placing an inmate in a cell with a particular pretrial defendant when the government knows of the first inmate's propensity to inform on cellmates[170] is analogous to the situa-

167. *See* United States v. Birbal, 113 F.3d 342, 346 (2d Cir. 1997) ("[A]n informant becomes a government agent for purposes of *Wilson* only when the informant has been instructed by the police to get information about the particular defendant."); Stano v. Butterworth, 51 F.3d 942, 946 (11th Cir. 1995) (finding no evidence of agreement, therefore no violation); United States v. Surridge, 687 F.2d 250, 252, 254 (8th Cir. 1982) (holding no Sixth Amendment violation where government knew informant would likely elicit information and apparently made special arrangement for meeting, but did not instruct or pay informant); *see also* People v. Frye, 959 P.2d 183, 198, 238 (Cal. 1998) (holding that police arranging defendant's meeting with noninmate, cooperating girlfriend did not violate the Sixth Amendment because the police had no agreement with the girlfriend to elicit information).

168. *See* United States v. Brink, 39 F.3d 419, 424 (3d Cir. 1994); State v. Pierre, 614 So. 2d 1309, 1311 (La. App. 1993) (discussing deliberate placement of inmate who had expressed willingness to provide information in a particular case in defendant's proximity as a Sixth Amendment violation), *rev'd on other grounds*, 631 So. 2d 427 (La. 1994).

169. *See Brink*, 39 F.3d at 424.

170. While this action should be sufficient to confer on the government responsibility for the informant's deeds, the second prong of the inquiry will still require that the informant actively question the defendant, not merely be a "listening post." *See* Kuhlmann v. Wilson, 477 U.S. 436, 456 (1986); *supra* note 20 and accompanying text (regarding two-prong test). This Note deals only with the first question: When is the government responsible for what the informant does?

tion in *Henry*. There, the government was presumed to have known that placing the informant in a cell with a pretrial detainee in whom it had expressed interest would lead to the informant's asking questions.[171] In both cases, the government knew that the informant would likely question the defendant and report to the government, which would result in a Sixth Amendment violation. In *Henry*, the government's knowledge came from its agreement with the informant; in the Third Circuit's scenario, it would come from background knowledge of the informant's propensities.[172] This distinction seems unimportant, given that it is the government's intentional creation or knowing exploitation of "an opportunity to confront the accused without counsel" that violates the Sixth Amendment.[173]

Cases in which the government is not implicated, where the informant acted on personal initiative, can be readily distinguished because of the absence of government action to place the informant in proximity to the defendant.[174] It is therefore not persuasive to argue that the citizen's duty to report knowledge of crime precludes government responsibility for targeting.[175] There are at least some cases where the information is due to government manipulation and not good citizenship. In one case, a police officer testified that the state had sometimes placed "known snitches" in particular cells to gather information.[176] In Los Angeles, where the *Los Angeles Times* documented widespread fabrication, prosecutors refused to create a central file on jailhouse informants for fear defense attorneys would see it.[177] A memorandum written by a deputy district attorney stated that one of the reasons senior D.A. staff rejected the proposal was that they "suspected that LASD (the Sheriff's Department) intentionally put jailhouse informants in jail cells with defendants from whom law enforcement could use a confession."[178] Because police and prosecu-

171. United States v. Henry, 447 U.S. 264, 271 (1980).

172. *Cf.* United States v. Surridge, 687 F.2d 250, 254 (8th Cir. 1982) (arguing that an agreement is essential because, in *Henry*, the "key issue is the extent of the government's involvement").

173. Maine v. Moulton, 474 U.S. 159, 176 (1985); *see also* People v. Frye, 959 P.2d 183, 238 (Cal. 1998).

174. *See, e.g.*, United States v. Hicks, 798 F.2d 446, 449 (11th Cir. 1986) (finding police who worked with informant were unaware she was even in jail, so her questioning of a jailmate due to a personal desire to fight drug traffic was not state action); State v. Payne, 325 S.E.2d 205, 216 (N.C. 1985).

175. *See, e.g.*, Lightbourne v. Dugger, 829 F.2d 1012, 1020 (11th Cir. 1987) (arguing that the duty to report crime means that "courts should be slow to discourage disclosures," announcing a rule that the government is not responsible for a violation in the absence of an agreement).

176. *See In re* Benn, 952 P.2d 116, 139 (Wash. 1998).

177. *See supra* notes 99-101 and accompanying text.

178. Rohrlich, *supra* note 101.

tors do sometimes knowingly use informants to circumvent the right to counsel and bolster a weak case, it is worth the trouble to inquire into the facts each time to determine whether the informant can truly be considered an entrepreneur or a good citizen, acting alone.

The reason the government must be held to this high standard of affirmative responsibility is that the right to counsel is rooted in concern for equality within the adversarial system, balancing the judicial contest both to ensure that the truth is reached and that the defendant is treated with basic fairness.[179] Just as the government may breach its duty through creation of an informant at large,[180] so it may breach it by targeting a particular defendant with an unwitting informant. Thus, targeting, even absent an agreement, is sufficient to confer government responsibility for Sixth Amendment violations, satisfying the first prong of the two-part test for *Massiah* violations.

CONCLUSION

An examination of the case law in this area reveals that the seemingly amorphous investigation required to hold the government responsible for an informant's conduct can be resolved into two overlapping inquiries. First, did the government have an agreement with the informant? Second, did the government target a particular defendant for elicitation of incriminating information? If either question is answered in the affirmative, then the government is responsible for violating the Sixth Amendment.

In the first situation, where the government has an agreement with a particular informant, sufficient scope is required to show that the government can reasonably be charged with knowledge that the informant was likely to elicit incriminating information. Agreements accompanied by targeting satisfy this scope requirement. Other factors, however, may show that the government intended the informant to act as an "agent at large," and should be held responsible for the informant's actions. Formality and benefits conferred serve as evidence of an agreement, but are not required.

In the second situation, the government takes advantage of an informant's known predisposition to target a defendant for elicitation of incriminating information. No agreement is necessary because the government can be charged directly with knowledge that it has intentionally created a situation likely to induce the defendant to make incriminating statements in the absence of counsel, which is a prohibited circumvention of the Sixth Amendment.

179. *See* Maine v. Moulton, 474 U.S. 159, 170-71 (1985); Tomkovicz, *supra* note 2.

180. *See supra* Section I.A.

A fundamental guarantee of the Sixth Amendment is equality with the state in the judicial process. Agreements, whether general or specific, and targeting, even with unwitting informants, undermine that guarantee. Both exercise the state's advantage of control over jail inmates, and therefore violate the *Massiah* assurance of a fair trial.