

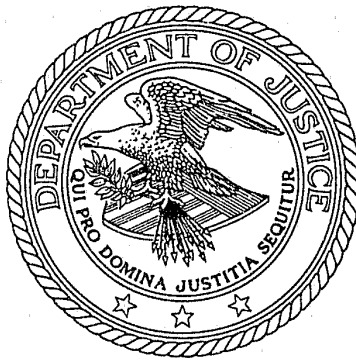
U.S. Department of Justice
Office of Legal Policy



Report to the Attorney General
The Sixth Amendment Right to
Counsel Under the Massiah Line
of Cases

June 27, 1986

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Truth in Criminal Justice Series
Report No. 3

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REPORT TO THE ATTORNEY GENERAL

on

**THE SIXTH AMENDMENT RIGHT TO COUNSEL
UNDER THE MASSIAH LINE OF CASES**

**Truth In Criminal Justice
Report No. 3**

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JUNE 27, 1986



Office of the Attorney General
Washington, D. C. 20530

The function of the criminal justice system might best be summed up as the protection of the innocent. In criminal prosecutions, an extensive system of rights and procedures guards against the conviction of an innocent person. Equally important, enforcement of the criminal law in all its phases -- crime prevention, police investigations, criminal prosecutions and corrections -- also aims at protection of the innocent. By detecting, convicting and punishing those who break our laws, we protect innocent people from the depredations of criminals.

To protect the innocent effectively, the criminal justice system must be devoted to discovering the truth. The truth is the surest protection an innocent defendant can have. Uncovering the truth and presenting it fully and fairly in criminal proceedings is also of critical importance to the effort to restrain and deter those who prey on the innocent.

Over the past thirty years, however, a variety of new rules have emerged that impede the discovery of reliable evidence at the investigative stages of the criminal justice process and that require the concealment of relevant facts at trial. This trend has been a cause of grave concern to many Americans, who perceive such rules as being at odds with the goals of the criminal justice system. Within the legal profession and the law enforcement community, debate over these rules has been complicated by disagreements about the extent to which constitutional principles or valid policy concerns require the subordination of the search for truth to other interests.

This report is a contribution to that debate. It was prepared by the Office of Legal Policy, a component of the Department of Justice which acts as a principal policy development body for the Department. At my request, the Office of Legal Policy has undertaken a series of studies on the current status of the truth-seeking function of the criminal justice system.

This volume, "The Right to Counsel Under the Massiah Line of Cases," is the third in that series. It examines the historical understanding of the Sixth Amendment right to counsel, and reviews the Supreme Court's decisions in Massiah v. United

States, 377 U.S. 201 (1964), and subsequent cases, which have effectively created a new right not to be questioned about pending charges without an attorney present. It also presents a critical analysis of the Massiah doctrine and the exclusionary rule that is used to enforce it, and discusses the prospects for reform in this area of the law.

In light of the general importance of the issues raised in this report and its companion volumes, it is fitting that they be available to the public. They will generate considerable thought on topics of great national importance, and merit the attention of anyone interested in a serious examination of these issues.

Edwin Meese III

EDWIN MEESE III
Attorney General

EXECUTIVE SUMMARY

The Sixth Amendment guarantees to the accused in a criminal prosecution the right "to have the Assistance of Counsel for his defence." In *Massiah v. United States*, 377 U.S. 201 (1964), the Supreme Court held this right was violated when there was used against the defendant at trial evidence of incriminating statements deliberately elicited from him by an informant after he had been indicted and in the absence of counsel. In effect, this decision and others that followed have created a new constitutional right not to be questioned about pending charges prior to trial except in the presence of an attorney.

One consequence of the *Massiah* line of cases is that federal and state investigators may not use otherwise legitimate investigative methods to obtain incriminating statements from a person once he has been charged with a crime. Another is that federal and state prosecutors may not introduce at trial probative, reliable, and voluntary admissions of guilt by the defendant. The overall result is that the search for truth in criminal investigations and trials is aborted.

A. The *Massiah* Line of Cases

Apart from *Massiah* itself, the principal Supreme Court cases on the right not to be questioned in the absence of counsel are *Brewer v. Williams*, 430 U.S. 387 (1977), *United States v. Henry*, 447 U.S. 264 (1980), and *Maine v. Moulton*, 106 S. Ct. 477 (1985). In *Williams*, the Court explained that *Massiah* prohibits not only surreptitious questioning of a charged defendant in the absence of counsel, but also conduct by known police officers that -- while not constituting "interrogation" in the traditional sense -- is deliberately and designedly intended to obtain incriminating evidence. *Henry* ruled that *Massiah*'s "deliberately elicited" test was satisfied when the government created a situation likely to induce the defendant to make incriminating statements to a fellow prisoner who was acting as a paid informant. Finally, *Moulton* held that *Massiah*'s prohibition applied even though the defendant's inculpatory remarks to a cooperating codefendant were obtained during an investigation of crimes by the defendant other than those with which he had already been charged.

B. Critique of the *Massiah* Line of Cases

The *Massiah* doctrine and its exclusionary rule enforcement mechanism have no support in history, logic, or considerations of sound public policy.

1. The *Massiah* right not to be questioned

As a historical matter, *Massiah* has no basis in the common law view of the right to counsel, or in the modified version of that right adopted in the American colonies, or in the apparent understanding of the right on the part of those who proposed and ratified the Sixth Amendment. Throughout the entire period of its development prior to 1932, the right to counsel was regarded as no more than a guarantee of the assistance of retained counsel *at trial*.

The original meaning of the right to counsel has been expanded dramatically over the past half-century by Supreme Court decisions that have interpreted the Sixth Amendment as mandating the appointment of counsel for indigent defendants and requiring the assistance of counsel at certain "critical" pre-trial stages of criminal proceedings. These decisions have been justified by reference to the core purpose of the Sixth Amendment -- ensuring the fairness of trials and the integrity of the truth-finding process -- and to the traditional role of an attorney in achieving this purpose by helping the accused cope with legal complexities and with the advocacy of a skilled and experienced prosecutor.

But even those decisions requiring the assistance of counsel at "critical" pre-trial stages do not support the *Massiah* rule. When the government attempts surreptitiously to obtain incriminating statements from an indicted defendant, the accused is not exposed to legal questions, complex or otherwise; he is not confronted by an expert adversary; and there is no reason to believe that his voluntary self-incriminating statements are untruthful. There is, therefore, no sound basis for concluding that counsel is necessary to act as a "medium" between the accused and the government to protect the accused from unfairness at trial or from the risk of conviction on the basis of unreliable evidence.

None of the other justifications that have been offered for the *Massiah* doctrine are persuasive. The right not to be questioned is not needed to protect the defendant's Fifth Amendment right against compulsory self-incrimination, since no element of compulsion exists

when a person not in custody chooses to confide in someone who he does not believe to be a government agent. Nor is such a right necessary to prevent "overreaching" by the government. Surreptitious questioning, which is entirely lawful before indictment, cannot fairly be characterized as "overreaching" when it occurs after indictment, since it does not expose the defendant to any danger against which the Sixth Amendment was intended to protect. Finally, it begs the question to argue that *Massiah* prevents unfairness by forbidding the government to use deception to prevent a defendant who is entitled to legal assistance from availing himself of that right. That argument assumes that a person who has been formally charged *has* a right not to be questioned without his attorney present.

The *Massiah* doctrine is, in fact, merely a cover for a judicially-imposed policy against the use of post-indictment confessions and admissions. That policy is unwise because it precludes the use of otherwise legitimate and fruitful investigative techniques to obtain evidence that may be necessary to prove guilt beyond a reasonable doubt, because it may endanger the public by causing the authorities to delay arrests or indictments in order to complete their investigations, and because it impairs the administration of justice by inhibiting voluntary admissions of guilt.

2. The *Massiah* exclusionary rule

Even if there were adequate justification for the *Massiah* right not to be questioned, there would be no basis for *Massiah's* automatic exclusionary rule. That rule has no independent constitutional basis -- it is merely a judicially created device for enforcing a constitutional right. As such, its use can be justified only if its benefits outweigh its costs. In fact, the costs plainly exceed the benefits.

The substantial costs of *Massiah's* exclusionary rule include the impairment of the truth-finding process that results from suppression of reliable and probative evidence of guilt, the consequent release or lenient treatment of obviously guilty defendants, and the generation of public disrespect for a system that shields criminals from the consequences of incriminating statements made voluntarily to confederates in crime.

On the other hand, suppression produces precious little in the way of offsetting benefits, other than to reward defendants with windfalls that are wildly disproportionate to the gravity of the violations involved. The

gain to society in terms of deterrence of unlawful police conduct is insubstantial, if it exists at all, because in most cases it is difficult to conclude that the police were guilty of any misconduct, let alone serious transgressions. Moreover, just as in the Fourth Amendment area, there exist equally effective but less costly deterrent and remedial alternatives to the suppression of evidence -- administrative guidelines, training requirements, disciplinary sanctions, and civil suits for damages.

C. Potential Reforms and Implementing Strategies

The Department should seek reform of the *Massiah* doctrine on the grounds that it is irrational and harmful to effective law enforcement, as well as subversive of the search for truth in criminal trials. Reform could be pursued either by a direct attack on the *Massiah* right not to be questioned, or by an effort to eliminate or modify *Massiah*'s exclusionary rule enforcement mechanism. Success on either front would not impair the value of the Sixth Amendment right to counsel at trial or during pre-trial confrontations at which the assistance of an attorney serves the purposes of the Sixth Amendment.

A frontal assault on the constitutional right created by *Massiah* does not seem promising at this time, however. Several years ago, the Court declined the government's invitation to reconsider *Massiah*'s novel view of the Sixth Amendment right to counsel, and it has reaffirmed that view three times in the past year. Moreover, in one of these recent opinions, the Court expressly rejected the argument that *Massiah* should not apply when the police are engaged in a bona fide investigation of new criminal activity by an indicted defendant.

An approach that holds somewhat greater promise for more immediate success would be to pursue judicial or legislative elimination or modification of *Massiah*'s exclusionary rule. In addition to making the usual arguments for complete abolition based on a balancing of the costs and benefits of suppression, the Department could argue for the same result on the basis of an existing statute -- 18 U.S.C. § 3501. The argument would be that § 3501, which restored the pre-*Miranda* test of voluntariness for the admissibility of confessions, forecloses suppression of voluntary incriminating statements, even if they are made after indictment and in the absence of counsel. There is sound basis in the statute's text and legislative history for this argument. Alternatively, we could argue for recognition of a "good faith" exception to *Massiah*'s exclusionary rule for situations in which the police obtain incriminating

statements concerning a charged offense during a legitimate investigation of other criminal activity by the defendant.

To achieve reform in this area of the law, it is recommended that the Department consider the following litigative, legislative, investigative, administrative, and educational strategies:

1. *Litigative strategy*: The Department should continue to take advantage of litigative opportunities to express its fundamental disagreement with the notion that the Sixth Amendment includes a right not to be questioned in the absence of counsel. In addition, the Department should urge judicial elimination or modification of *Massiah's* exclusionary rule.

2. *Legislative strategy*: The Department should consider the advisability of seeking legislation -- as part of a broader criminal procedure reform package -- specifically abrogating the *Massiah* exclusionary rule, either completely or in cases in which incriminating statements concerning charged offenses are obtained during bona fide investigations of crimes with which the defendant has not yet been charged.

3. *Investigative and administrative strategy*: The Department should continue to utilize electronic surveillance and passive informants to gather incriminating statements from an indicted defendant concerning the pending charges when necessary to amass sufficient evidence to prove guilt beyond a reasonable doubt at trial. The Department should also make use of informants to elicit evidence concerning the participation of indicted defendants in additional criminal activities, even when there is reason to believe that the defendants may make incriminating statements about the offenses with which they have already been charged. The Department's guidelines and procedures for the use of these investigative techniques against persons under indictment should be reviewed and modified if necessary. In addition, the Department should review, and improve if necessary, existing administrative mechanisms for monitoring post-indictment investigations and for imposing appropriate disciplinary sanctions in the event of serious noncompliance with the guidelines and procedures.

4. *Educational strategy*: The Department should undertake a "consciousness raising" campaign aimed at making the *Massiah* doctrine a more visible public issue by exposing the irrational and dangerous state of the law in this area. This campaign, which should be waged in

scholarly journals, newspapers, and speeches, should emphasize the distinction between the right to counsel established by the Founders in the Sixth Amendment and the right not to be questioned created by the Court in *Massiah*, thereby making it clear that an attack on the latter does not threaten the continued vitality of the former.

TABLE OF CONTENTS

| | Page |
|---|------|
| INTRODUCTION | 1 |
| I. THE ORIGINAL UNDERSTANDING OF THE RIGHT TO COUNSEL | 2 |
| II. CASELAW DEVELOPMENT | 4 |
| A. Pre-trial Assistance of Counsel Generally | 4 |
| B. The <i>Massiah</i> Line of Cases | 7 |
| 1. <i>Spano v. New York</i> | 7 |
| 2. <i>Massiah v. United States</i> | 7 |
| 3. <i>Brewer v. Williams</i> | 9 |
| 4. <i>United States v. Henry</i> | 10 |
| 5. <i>Maine v. Moulton</i> | 11 |
| C. Summary of Current Law | 13 |
| III. CRITIQUE OF CURRENT LAW | 14 |
| A. Objections to the <i>Massiah</i> Doctrine | 14 |
| 1. Lack of historical support | 14 |
| 2. Lack of logical support | 15 |
| 3. Lack of policy support | 18 |
| B. Objections to Application of an Exclusionary Rule | 21 |
| 1. Exclusion is not constitutionally required | 21 |
| 2. Exclusion is not justified on policy grounds | 23 |
| IV. POTENTIAL REFORMS AND IMPLEMENTING STRATEGIES | 27 |
| A. Elimination or Limitation of the <i>Massiah</i> Right Not to be Questioned | 27 |
| B. Elimination or Modification of the <i>Massiah</i> Exclusionary Rule | 29 |

| | |
|--|-----------|
| C. Specific Recommendations | 33 |
| 1. Litigative strategy | 33 |
| 2. Legislative strategy | 33 |
| 3. Investigative and administrative strategy | 34 |
| 4. Educational strategy | 36 |
| CONCLUSION | 36 |

Report to the Attorney General on the Sixth Amendment Right to Counsel Under the *Massiah* Line of Cases

INTRODUCTION

The Sixth Amendment to the Constitution of the United States provides in part that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” In *Massiah v. United States*, 377 U.S. 201 (1964), and subsequent cases, the Supreme Court has interpreted this guarantee to prohibit law enforcement officers from using undercover techniques to elicit incriminating statements from an accused in the absence of counsel after the initiation of judicial proceedings, and to require the exclusion of statements so obtained at the defendant’s trial. By so interpreting the right to counsel provision, the Court has, in effect, conjured up a new right not to be questioned in the absence of counsel. More serious, by foreclosing the use of otherwise legitimate investigative methods to obtain probative, reliable, and voluntary statements for use as evidence at trial, this interpretation plainly impedes the search for truth in criminal investigations and prosecutions.

The Office of Legal Policy has undertaken a review of the law relating to the Sixth Amendment right to counsel, with particular attention to the development of, and the justification for, the *Massiah* doctrine. The results of this review are set out in this report.¹

Part I of the report traces briefly the history of the right to counsel from its origins in the Middle Ages to the beginning of its modern development in *Powell v. Alabama*, 287 U.S. 45 (1932). This examination demonstrates that the *Massiah* doctrine has no historical support in the common law right to counsel, in the original intention of the proponents

¹This paper is part of a general, ongoing reexamination of the law governing criminal investigation and adjudication being conducted by the Office of Legal Policy to identify features of contemporary procedure that unduly hinder the search for truth in criminal cases and to develop specific recommendations for eliminating or alleviating such impediments. Earlier reports in this series have examined the law of pre-trial interrogation (the *Miranda* Report) and the search and seizure exclusionary rule (the *Mapp* Report).

of the Sixth Amendment, or in the sparse jurisprudence on the subject in the ensuing 150 years.

Part II reviews the modern development of the right to counsel, with particular attention to the formulation and application of the *Massiah* doctrine. Part III, a critical analysis of the *Massiah* rule, develops two points: the right not to be questioned created by *Massiah* cannot be justified by arguments based on history, logic, or considerations of sound public policy, and -- even if justified -- should not be enforced by the exclusion of probative and reliable evidence at trial. Finally, Part IV discusses potential reforms and recommends implementing strategies. One of the conclusions is that elimination or modification of the *Massiah* right not to be questioned is not a realistic goal at this time, even though its achievement would not impair the right to counsel at trial or in pre-trial contexts in which an attorney's presence would fulfill the purposes of the Sixth Amendment. A more important conclusion is that some restriction of *Massiah's* exclusionary rule enforcement mechanism may be attainable through the use of recommended litigative, legislative, and educational strategies. In addition, Part IV outlines suggested investigative measures designed to take full advantage of exceptions to the *Massiah* doctrine, as well as administrative steps to create a more clearly adequate deterrent alternative to *Massiah's* exclusionary rule.

I. THE ORIGINAL UNDERSTANDING OF THE RIGHT TO COUNSEL

The right to counsel as it now exists was unheard of at common law. From at least the early 12th century to about the middle of the 18th century, felony defendants were not entitled to be represented by counsel except in pleading matters of law at trial. This restriction was apparently based on the belief that such persons posed especially grave dangers to the Crown. In contrast, defendants in misdemeanor prosecutions and civil cases were allowed to present a full defense at trial. This same right was extended to defendants in treason cases by statute in 1695, no doubt because Members of Parliament could readily imagine being accused of treason themselves. During the latter half of the 18th century, English judges began to give defense counsel in felony cases greater latitude by interpreting the concept of "questions of law" to include direct and cross-examination of witnesses at trial. However, the earlier, more restrictive

approach was not formally abandoned until a statute of 1836 authorized the presentation of a full defense at felony trials by retained counsel.²

The English practice was not adopted in this country. In their constitutions or statutes, at least twelve of the thirteen colonies rejected the common law rule, choosing instead to recognize the right to full representation by counsel, without regard to distinctions between questions of law and issues of fact, and -- for the most part -- irrespective of the seriousness of the offense. This conception of the right to counsel provided the background against which the Sixth Amendment was proposed in 1789, passed by both Houses of Congress almost without debate, and ratified by the states in 1791.³ The various debates on the provisions of the Bill of Rights shed no light on the significance or meaning that Congress attributed to the right to counsel.⁴

In the absence of illumination from this quarter, and given the actual words and context of the Sixth Amendment right, it must be assumed that the right to counsel clause was simply a restatement of the right already recognized by the individual states. As such, the critical aspect of the Sixth Amendment right for present purposes -- and the characteristic that distinguishes the original understanding of this right from its contemporary interpretation -- is that the right of the accused "to have the Assistance of Counsel for his defence" was considered a right to have counsel for the purpose of assisting in presenting a defense *at trial*.⁵ There is no reason to believe that the Sixth Amendment was

²See L. Levy, *THE ORIGINS OF THE FIFTH AMENDMENT* 320-23 (1968); Note, *An Historical Argument for the Right to Counsel at Police Interrogation*, 73 *Yale L.J.* 1000, 1018-28 (1964); Beaney, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 8-12, 24 (1955). See also *Powell v. Alabama*, 287 U.S. 45, 60 (1932); *Betts v. Brady*, 316 U.S. 455, 466 (1942). Throughout this period, the right to counsel in English procedure was almost exclusively a right to retained counsel. The right to appointed counsel was not established until the enactment of a statute in 1695, but even then it applied only in treason cases. See Note, *supra*, at 1027; Beaney, *supra*, at 9.

³See Note, *supra* note 2, at 1030-31; *Powell v. Alabama*, 287 U.S. at 61-65.

⁴See Beaney, *supra* note 2, at 23-24. Beaney accounts for the "atmosphere of silence" concerning the intentions that produced the right to counsel clause by referring to the "logical assumption" that no great thought was given to the precise nature of the federal right to counsel because of "a general understanding that the federal courts would have jurisdiction of an insignificant number of criminal proceedings." *Id.* at 25.

⁵Another distinction, not here material, is that the right was viewed as requiring only an opportunity to be represented by retained -- as opposed to appointed -- counsel. In the period preceding the adoption of the Constitution, only four states provided for the

intended to create a right to have the aid of counsel at any pre-trial stage at which the defendant might find such assistance useful, for there was no right to counsel under the common law procedure of preliminary examinations, and nothing in the history of the Bill of Rights or the colonial enactments that preceded it suggests a purpose to extend the right beyond the trial context.⁶ Rather, the contrary is suggested by the placement of the right in the Sixth Amendment, which was formulated primarily as a compilation of guarantees designed to ensure the fairness of criminal trials.⁷

For nearly a century and a half after ratification of the Sixth Amendment, neither the Supreme Court nor the lower federal courts had much occasion to interpret the right to counsel provision, and the few cases on the subject raised issues that are not germane here.⁸

II. CASELAW DEVELOPMENT

A. Pre-trial Assistance of Counsel Generally

During the past half century, Supreme Court decisions have transformed the Sixth Amendment's "Assistance of Counsel" clause from a simple guarantor of the aid of retained counsel at trial into a requirement that counsel be available to protect the defendant's interests

appointment of counsel, and in three of these such appointments were limited to capital cases. The original federal statute relating to appointment of counsel, adopted in 1790, was also limited to capital cases. See *Beaney*, *supra* note 2, at 16-18, 25, 28-29. See also *Betts v. Brady*, 316 U.S. at 466-71.

⁶See *Cox v. Coleridge*, 1 B.&C. 37, 107 Eng. Rep. 15 (1822) (no right to counsel at preliminary examination); Note, *supra* note 2, at 1039-40 (no right to counsel at magistrate's hearing in England until 1848). None of the state provisions preceding the Bill of Rights referred to a pre-trial right to counsel, and a number of them clearly characterized the right as a right to counsel at trial. The point is illustrated by the provisions of Virginia and New York, two of the three states whose ratification conventions proposed an amendment to the Federal Constitution safeguarding the right to counsel. A Virginia statute of 1786 allowed the accused to retain counsel to assist him at trial, and the New York Constitution of 1777 stated that "in every trial . . . for crimes or misdemeanors, the party . . . indicted shall be allowed counsel, as in civil practice." See *Beaney*, *supra* note 2, at 19-20. The provisions of the remaining states are surveyed in *id.* at 18-22.

⁷See L. Mayers, *SHALL WE AMEND THE FIFTH AMENDMENT?* at 200 n. 42 (1959); Note, *supra* note 2, at 1034; *United States v. Ash*, 413 U.S. 300, 309 (1975) ("the core purpose of the counsel guarantee was to assure 'Assistance' at trial").

⁸See *Beaney*, *supra* note 2, at 30-33 for a discussion of the decisions during this period.

in an ever expanding variety of pre-trial contexts. The decisions have generally attempted to justify this metamorphosis on the theory that representation by counsel during pre-trial confrontations between the accused and his accusers is necessary to ensure the fairness and integrity of the trial itself.

The development of the contemporary understanding of the right to counsel can be traced to *Powell v. Alabama*, 287 U.S. 45 (1932), in which the Supreme Court reversed the rape convictions of four defendants on the grounds that their rights to due process under the Fourteenth Amendment had been violated by the trial court's failure to provide them with appointed counsel until the morning of trial. Two aspects of this decision account for its influence upon subsequent developments. The first is Justice Sutherland's explanation of the reason for recognizing the right to the assistance of counsel at trial -- the "guiding hand of counsel" is necessary then, he wrote, in order to guard against the conviction of a defendant who is not guilty but who, because of his unfamiliarity with legal requirements and procedures, is unable adequately to establish his innocence.⁹ The second influential aspect of *Powell* is its conclusion that effective assistance of counsel at trial requires access to counsel during "critical" pre-trial phases of criminal proceedings.¹⁰

⁹See *Powell v. Alabama*, 287 U.S. at 69: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."

¹⁰In its holding, the Court stated that the duty to assign counsel "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." 287 U.S. at 71. Earlier in the opinion, Justice Sutherland had observed that "during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation, and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid as at the trial itself." *Id.* at 57.

In subsequent cases concerning the existence and scope of the right to counsel, the Court has continued to assess the defendant's need for counsel, and to relate that need to the functions that could be performed by counsel. For example, in decisions establishing the right of indigent defendants under the Sixth and Fourteenth Amendments to have counsel appointed for them in federal and state criminal proceedings, the Court stressed "the obvious truth" that representation by counsel places the defendant on an equal footing with the prosecution and, thereby, serves to assure a fair trial. See *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) (contrasting the average defendant's "lack of professional legal skill" with that of "experienced and learned counsel" for the prosecution); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (explaining that the "noble ideal" of equality before the law "cannot be realized if the poor person charged with crime has to face his accusers without a lawyer to assist him").

Similarly, in cases interpreting the "critical period" language of *Powell*, the Court held that access to counsel is required at preliminary judicial proceedings to help overcome the disadvantages an accused would otherwise suffer at trial. See, e.g., *Hamilton v. Alabama*, 368 U.S. 52, 54-55 (1962) (counsel is necessary at arraignment so that the accused knows all the defenses available to him and can plead intelligently); *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (plurality opinion) (an indigent accused is entitled to counsel at a preliminary hearing to protect against an erroneous or improper prosecution).

The same considerations have also informed the Court's decisions on the right to counsel in various non-judicial pre-trial contexts. Thus, the Court has recognized the need for -- and, therefore, the right to have -- counsel at a pre-trial lineup to protect the accused's right to a fair trial. See *United States v. Wade*, 388 U.S. 218, 226-38 (1967) (assistance of counsel is required to ensure that the lineup is not conducted in a manner that might affect the accuracy of testimony at trial, and to permit effective confrontation of witnesses at trial). On the other hand, the Court has not recognized a constitutional right to counsel in pre-trial situations where the accused is not involved in complex legal proceedings or confronted by witnesses or an expert adversary. See, e.g., *Gilbert v. California*, 388 U.S. 263, 267 (1967) (no right to counsel at the taking of handwriting exemplars after indictment); *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972) (plurality opinion) (no right to counsel at pre-indictment "showup"); *United States v. Ash*, 413 U.S. 300, 317-21 (1973) (no right to counsel at post-indictment photo identification); *United States v. Gouv-*

eia, 467 U.S. 180, 187-92 (1984) (no right to counsel prior to initiation of adversary judicial proceedings against prisoners held in administrative segregation during a murder investigation); *Moran v. Burbine*, 106 S. Ct. 1135, 1146-47 (1986) (no right to counsel during custodial interrogation prior to the initiation of formal judicial proceedings).

B. The *Massiah* Line of Cases

1. *Spano v. New York*

The immediate precursor of *Massiah* and its progeny was *Spano v. New York*, 360 U.S. 315 (1959), involving a coerced post-indictment confession.¹¹ The two concurring opinions of four Justices argued that the Fourteenth Amendment's due process clause precluded post-indictment interrogation of the defendant by the police in the absence of counsel. The theory of these opinions was that secret interrogation of a person formally accused of a crime is inconsistent with an adversary system of justice, under which such an accusation must be followed by arraignment and trial, rather than "a kangaroo court procedure" by which the police obtain a confession and thereby deprive the accused of effective representation by counsel at the only stage when legal advice and aid would help him. 360 U.S. at 324-27.

2. *Massiah v. United States*

A majority of the Court adopted this premise in *Massiah v. United States*, 377 U.S. 201 (1964), a case involving the admissibility of incriminating statements made by the defendant to one Colson, a codefendant, following their indictment and in the absence of counsel. Unbeknownst to *Massiah*, Colson -- who had decided to cooperate with the government in its continuing investigation of the narcotics conspiracy charged in the indictment -- had been instructed by a federal agent to engage *Massiah* in conversation concerning the charges against them and had permitted the installation of a radio transmitter in his car so that the agent could overhear the conversation.

¹¹The confession was extracted following an eight-hour post-indictment interrogation during which the police rebuffed the defendant's repeated requests to see his attorney and, through false statements, induced him to believe that a childhood friend -- who had persuaded him to surrender -- would lose his job with the police force if the defendant did not confess. 360 U.S. at 317-20.

The Court conceded that the government had acted properly in continuing to investigate the criminal activities of Massiah and his confederates after he had been indicted. 377 U.S. at 207. However, a 6-3 majority of the Court, in an opinion by Justice Stewart (who had authored one of the concurring opinions in *Spano*), held that Massiah had been "denied the basic protections 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."¹² Justice Stewart considered it unimportant that Massiah's incriminating statements were made, not to the police during custodial interrogation, but to an undisclosed informant while Massiah was free on bail. If a rule excluding statements obtained from an uncounseled defendant after indictment is to have any efficacy, he wrote, "it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse."¹³

In dissent, Justice White, joined by Justices Clark and Harlan, objected strongly that there was no sound basis for erecting "additional barriers to the pursuit of truth" by adopting a constitutional rule barring the use of the relevant, reliable, and highly probative evidence at issue. To begin with, Justice White argued, there had been no unconstitutional interference with the defendant's right to counsel, since Massiah had not been prevented from consulting with counsel as often as he wished, no meetings with counsel had been disturbed or spied upon, and there had been no obstruction of defense preparations for trial.¹⁴ The Court's new rule, he continued, was merely "a thinly disguised constitutional policy" against the evidentiary use of voluntary admissions and confessions by the accused, a policy that went far beyond the requirements of the

¹²377 U.S. at 206. To support this conclusion, Justice Stewart referred to the views expressed in the concurring opinions in *Spano* which, he claimed, simply reflected the constitutional principle established in *Powell v. Alabama* that an indicted defendant is as much entitled to the assistance of counsel before trial as at trial. 377 U.S. at 204-05.

¹³377 U.S. at 206 (quoting the dissenting opinion below). Justice Stewart added that "Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent." *Ibid.*

¹⁴Under these circumstances, Justice White concluded, "It is only a sterile syllogism -- an unsound one, besides -- to say that because Massiah had a right to counsel's aid before and during the trial, his out-of-court conversations and admissions must be excluded if obtained without counsel's consent or presence." 377 U.S. at 209.

privilege against self-incrimination.¹⁵ That policy was both unwise and unnecessary, he argued: unwise because it immunized statements made in furtherance of continuing illicit operations and relevant to guilt at a pending prosecution; and unnecessary because a defendant in *Massiah's* position was amply protected by the Court's voluntary confession rules.¹⁶

3. *Brewer v. Williams*

The first major application of *Massiah*¹⁷ occurred in *Brewer v. Williams*, 430 U.S. 387 (1977).¹⁸ There, in another opinion by Justice Stewart, the Court declared that the *Massiah* rule was not limited to surreptitious elicitation of incriminating statements outside the presence of counsel, but also covered conduct by known police officers that was "deliberately and designedly" intended to obtain information from a defendant after the initiation of judicial proceedings and in the absence of counsel. 430 U.S. at 399-401. "The clear rule of *Massiah*," Justice Stewart said, "is that once adversary proceedings have been commenced against an individual, he has a right to legal representation when the government interrogates him." 430 U.S. at 401. Holding that the defendant had not waived that right, the Court affirmed the lower court's reversal of the conviction. 430 U.S. at 401-06. Four Justices dissented,

¹⁵ *Ibid.*

¹⁶ 377 U.S. at 213. Justice White also argued that application of the exclusionary sanction was particularly inappropriate because the situation involved no suggestion or possibility of coercion, and because *Massiah's* statements would have been admissible if there had been no prior arrangements between Colson and the police, even though the hazard to *Massiah* -- the defection of a confederate in crime -- would have been precisely the same. *Id.* at 211.

¹⁷ *Massiah's* requirements were first applied to the states in *McLeod v. Ohio*, 321 U.S. 356 (1965), in which the Court, in a per curiam opinion, reversed a state court murder conviction obtained nearly four years before *Massiah* on the basis of a post-indictment, pre-arraignment confession made while the defendant was voluntarily assisting the police in locating the murder weapon but before he had sought or obtained the assistance of counsel.

¹⁸ The essential facts of *Williams* were that, following the defendant's arraignment on an arrest warrant charging abduction and after he had consulted with two attorneys who advised him not to make any statements to the police and who secured an agreement from the police that they would not question him, the defendant made incriminating statements and led the police to the victim's body following a statement to him by one of the officers in the absence of counsel that the victim's parents were entitled to "a Christian burial" for their daughter. 430 U.S. at 390-93.

principally because they believed that the defendant had waived his right to counsel, but also on the grounds that the conduct of the police did not imperil the core values that the Sixth Amendment was intended to protect -- the fairness of trials and the integrity of the truth-finding process -- and, therefore, did not merit the sanction of suppression of relevant and reliable evidence.¹⁹

4. *United States v. Henry*

Next, in *United States v. Henry*, 447 U.S. 264 (1980), the Court declined the government's invitation to reconsider *Massiah* and, instead, applied *Massiah's* prohibition to require the exclusion of incriminating post-indictment statements made in the absence of counsel by an incarcerated defendant to a fellow prisoner who was acting as a paid informant for the government. The Chief Justice's opinion for the Court pointed out that, although the informant had been instructed not to question Henry about the pending charges, the informant was not a passive listener; rather, he had "some conversation" with Henry and Henry's incriminating statements were "the product of this conversation." 747 U.S. at 271. For this and other reasons,²⁰ the Court concluded that the government had "intentionally [created] a situation likely to induce Henry to make incriminating statements without the assistance of counsel," and, in so doing, had violated his Sixth Amendment right to counsel. 447 U.S. at 274. However, the opinion contrasted the use of an inanimate electronic "listening post," which has no capacity to influence the subject matter or substance of a conversation, and expressly reserved the question of using an informant who makes no effort to stimulate conversation about the crime charged. 447 U.S. at 271 & n.9.²¹

¹⁹*Id.* at 415-29 (Chief Justice Burger, dissenting), 429-38 (Justice White, joined by Justices Blackmun and Rehnquist, dissenting), 438-41 (Justice Blackmun, joined by Justices White and Rehnquist, dissenting).

²⁰The Chief Justice also stressed the facts that the informant was to be paid only if he produced useful information, that he was ostensibly no more than a fellow inmate of Henry, and that Henry was in custody at the time. 447 U.S. at 270.

²¹*See also id.* at 276-77 (Justice Powell, concurring on the express understanding that such methods were not prohibited by the Court's opinion). The question left open in *Henry* was resolved in *Kuhlmann v. Wilson*, 106 S. Ct. 2616 (1986), a habeas case in which the defendant challenged the admission of incriminating statements he made to a cellmate after being charged with murder. The cellmate, who was cooperating with the police and who had been instructed only to "listen to what the defendant might say about the identities of his accomplices," asked the defendant no questions and merely

Justices Blackmun (joined by Justice White) and Rehnquist filed dissenting opinions. The former contended that the majority had unwisely abandoned *Massiah's* "deliberately elicited" test which, he claimed, had been designed to impose the exclusionary sanction on "conduct that is most culpable, most likely to frustrate the purpose of having counsel, and most susceptible to being checked by a deterrent." 447 U.S. at 277-82 & n.6. The latter argued forcefully and at length that *Massiah* should be reconsidered and that there was no justification for applying the exclusionary rule in such cases. 447 U.S. at 290-302.

5. *Maine v. Moulton*

The most recent application of the *Massiah* doctrine occurred in *Maine v. Moulton*, 106 S. Ct. 477 (1985). In several respects, the facts in *Moulton* were quite similar to those in *Massiah*.²² However, in *Moulton* it was the defendant who arranged the encounter at which he made incriminating statements, and in *Moulton* the police were using the cooperating codefendant to investigate a new crime -- threats by the defendant against a potential witness for the state -- rather than to obtain additional evidence concerning the crime for which the defendant had already been indicted.

Justice Brennan's opinion for the Court rejected these distinctions as irrelevant. First, he said after reviewing the Court's earlier right to counsel cases with particular emphasis on *Spano*, *Massiah*, and *Henry*, the Sixth Amendment guarantees a person who has been formally charged with an offense the right to rely on counsel as a "medium" between him and the State, and imposes on the State an affirmative obligation not to act in a manner that circumvents the protection accorded by this right. 106 S. Ct. at 483-87.²³ Here, he pointed out, the

listened to his spontaneous and unsolicited statements. On these facts, a 6-3 majority of the Court rejected the *Massiah* argument because the defendant failed to show that "the police and their informant took some action, beyond mere listening, that was designed deliberately to elicit incriminating remarks." 106 S. Ct. at 2630.

²² Having been indicted for theft, Moulton retained counsel and was released on bail. Thereafter, he made incriminating statements to his codefendant Colson (who was no relation to *Massiah's* codefendant of the same name), who was secretly cooperating with the police, which were recorded and used against him at trial. See *Maine v. Moulton*, 106 S. Ct. at 480-82.

²³ With reference to this obligation, Justice Brennan added: "[K]nowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of

police knew that Moulton and Colson were meeting to discuss the pending charges and to plan their defense; they knew, therefore, that Moulton would make statements that he had a constitutional right not to make to their agent prior to consulting with counsel. Therefore, by concealing the fact that Colson was their agent, the police denied Moulton the opportunity to consult with counsel and thus deprived him of the assistance of counsel guaranteed by the Sixth Amendment. 106 S. Ct. at 488.

Second, said Justice Brennan, the argument that the defendant's statements should not be suppressed because the police had other, legitimate reasons for listening to his conversation with Colson, was no more persuasive than the similar contention in *Massiah*. Permitting the use of evidence obtained in violation of the accused's Sixth Amendment rights whenever the police asserted an alternative, legitimate reason for their surveillance would, he said, invite "abuse by law enforcement personnel in the form of fabricated investigations" and risk "evisceration of the Sixth Amendment right recognized in *Massiah*." *Id.* at 488-89. On the other hand, he conceded, as had the Court in *Massiah*, that "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses." *Id.* at 490 n.16.

The Chief Justice dissented. In his view, *Massiah*'s prohibition is limited to the deliberate elicitation of statements for use against the defendant in connection with the trial of charges with respect to which the right to counsel has already attached. Therefore, he argued, if alternative, legitimate reasons motivated the surveillance, no Sixth Amendment violation occurred. 106 S. Ct. at 491-95.²⁴ Moreover, he contended, application of the exclusionary rule in this situation could not be justified on grounds of deterrence; since the police obtained the incriminating evidence in the course of attempting to thwart a potentially lethal obstruction of justice, rather than in an effort to strengthen the existing case against the defendant, there was no police "misconduct" to deter. 106 S. Ct. at 495-96.²⁵

counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." 106 S. Ct. at 487.

²⁴Justices White and Rehnquist joined in this portion of the dissent.

²⁵Justices White, Rehnquist, and O'Connor joined in this portion of the dissent.

C. Summary of Current Law

The cases reviewed above demonstrate that the Court currently views the Sixth Amendment right to counsel as serving two functions. On the one hand, in its traditional role, it serves to protect the accused's right to a fair trial and to safeguard the integrity of the truth-finding process by enabling the accused to cope with the intricacies of the law and to face his expert adversary on equal terms.²⁶ Thus, the accused is entitled to the assistance of counsel not only at trial, but also during earlier post-charge proceedings and confrontations with the government that are "critical" in the sense that, if conducted in the absence of counsel, their result might unfairly prejudice the accused's defense at trial.²⁷

On the other hand, as interpreted in the *Massiah* line of cases, the Sixth Amendment also prohibits a person from being questioned -- overtly or covertly -- by government agents in the absence of counsel concerning an offense that has led to his indictment.²⁸ By requiring the suppression of incriminating evidence so obtained, this interpretation insulates the accused from the consequences of uncounseled but voluntary statements whether or not their admission would impair the fairness of the trial or the integrity of the truth-finding process.

However, the "magic cloak" provided by the Sixth Amendment²⁹ does not provide complete protection for a person who has been indicted or otherwise charged with a crime. It is clear, for example, that the authorities may continue to investigate a person following his indictment.³⁰ If, through the use of an electronic "listening post" or a passive informant, they obtain incriminating statements concerning pending

²⁶ See, e.g., *Powell v. Alabama*, *supra*; *Johnson v. Zerbst*, *supra*; *Gideon v. Wainwright*, *supra*; *United States v. Ash*, *supra*.

²⁷ See, e.g., *Hamilton v. Alabama*, *supra*; *Coleman v. Alabama*, *supra*; *United States v. Wade*, *supra*.

²⁸ See *Massiah v. United States*, *supra*; *Brewer v. Williams*, *supra*; *United States v. Henry*, *supra*; *Maine v. Moulton*, *supra*.

As used above and in the remainder of this Report, the term "indictment" and variants thereof includes other methods by which a person is formally charged with a crime, such as arraignment following arrest and the filing of an information.

²⁹ See *Maine v. Moulton*, 106 S. Ct. at 492 (Burger, C.J., dissenting).

³⁰ See *Massiah v. United States*, 377 U.S. at 206-07; *Maine v. Moulton*, 106 S. Ct. at 488-89.

charges "by luck or happenstance," that evidence is admissible at the trial of those charges.³¹ Furthermore, if the government surreptitiously obtains evidence of the defendant's involvement in a crime other than that with which he has already been charged, it may use that evidence to convict him of the other crime.³²

III. CRITIQUE OF CURRENT LAW

The *Massiah* doctrine, and its enforcement by means of an automatic exclusionary rule, are vulnerable to criticism on a number of grounds, none of which, in our judgment, has ever been addressed adequately by the Court.

A. Objections to the *Massiah* Doctrine

The Court has never explained satisfactorily its conclusion that the Sixth Amendment right to counsel is violated when the government obtains incriminating statements from an indicted defendant in a non-coercive atmosphere outside the presence of counsel. Indeed, such an explanation would be difficult, since *Massiah's* view of the right to counsel has no support in history, logic, or considerations of sound policy.

1. Lack of historical support

The most obvious flaw in the *Massiah* doctrine is its lack of historical basis. Neither the common law view of the right to counsel, nor the modified version of that right adopted in the American colonies, nor the apparent understanding of the right on the part of those who proposed and ratified the Sixth Amendment provides any basis for the rule. As the discussion in Part I above demonstrates,³³ the right to counsel adopted in the Sixth Amendment merely echoed the right as recognized by the states, and that right, in turn, was no more than a guarantee of the assistance of retained counsel *at trial*. The Founders

³¹ See *Maine v. Moulton*, 106 S. Ct. at 487; *United States v. Henry*, 447 U.S. at 271 n.9; *id.* at 276 (Powell, J., concurring); *Kuhlmann v. Wilson*, 106 S. Ct. at 2630.

³² See *Maine v. Moulton*, 106 S. Ct. at 489, 490 n.16; *United States v. Henry*, 447 U.S. at 272; *United States v. White*, 401 U.S. 745, 749 (1971) (plurality opinion); *Hoffa v. United States*, 385 U.S. 293, 308 (1966).

³³ See pp. 2-4, *supra*.

simply did not contemplate a right to counsel prior to trial, perhaps because they saw no need for such a right.³⁴

2. Lack of logical support

Subsequent developments in investigative and prosecutorial practices in the United States convinced the Supreme Court of the need to extend the Sixth Amendment right to counsel to certain pre-trial contexts. However, the logic of the decisions expanding the scope of the Sixth Amendment right does not support, much less compel, the results reached in *Massiah* and its progeny. Those decisions establish that recognition of the right to counsel in a particular situation depends on the need to provide the assistance of counsel in that context to protect the values that the Sixth Amendment is designed to safeguard.³⁵ As the cases make clear, the core purpose of the Sixth Amendment is to ensure the fairness of trials by equalizing the strength of the adversaries and by protecting the integrity of the truth-finding process.³⁶ The traditional role of an attorney in achieving these goals is to prepare the accused's defense,³⁷ and to act as his advocate in encounters with the government at which the case is advanced toward disposition or at which the reliability of the truth-finding process might be unfairly undermined.³⁸

Neither the core purposes of the Sixth Amendment nor the traditional functions of counsel in contributing to the realization of those purposes are implicated when a government investigator attempts surreptitiously to obtain incriminating statements from an indicted

³⁴The focus on the trial as the point at which the assistance of counsel should be available to the accused has been explained on the ground that it was not until then that the accused was confronted with the full adversary force of the state. See Note, *supra* note 2, at 1040-41, 1045; *United States v. Wade*, 388 U.S. at 224.

³⁵See *United States v. Ash*, 413 U.S. at 311 ("The Court consistently has applied a historical interpretation of the guarantee, and has expanded the constitutional right to counsel only when new contexts appear presenting the same dangers that gave birth initially to the right itself").

³⁶See, e.g., *Powell v. Alabama*, 287 U.S. at 69; *Johnson v. Zerbst*, 304 U.S. at 462-63; *Gideon v. Wainwright*, 372 U.S. at 344; *United States v. Wade*, 388 U.S. at 224; *United States v. Ash*, 413 U.S. at 311-13.

³⁷See *Powell v. Alabama*, 287 U.S. at 58.

³⁸See Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 Am. Crim. L. Rev. 1, 9-10 & n.59 (1979); Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 Minn. L. Rev. 47, 49-50 (1964).

defendant. In this situation, the accused is not confronted with complex legal procedures or by an expert adversary, nor is there any interference with his right to consult freely with counsel or otherwise to prepare his defense.³⁹ There is, therefore, no reason to believe that the absence of counsel at this point will result in unfairness to the defendant at trial, either by rendering him less able to deal with the intricacies of the law and the advocacy of an expert opponent, or by subjecting him to the risk of conviction on the basis of unreliable evidence.

It has been suggested, nevertheless, that recognition of the right to counsel in this situation is justified because an attorney could advise the defendant on "the benefits of the Fifth Amendment" and protect him from "the overreaching of the prosecution."⁴⁰ Neither rationale can withstand analysis. While it is true -- indeed, likely -- that counsel will protect a defendant against self-incrimination by advising him to say nothing,⁴¹ counsel's presence would not protect the accused from *compulsory* self-incrimination, which is what the Fifth Amendment prohibits. This is so because there is no element of compulsion -- let alone compulsion by the government -- when a person not in custody chooses to confide in someone who he does not believe to be a government agent.⁴²

The suggestion that "overreaching" occurs when an informant is used to question an indicted defendant in the absence of counsel seems to proceed from a jaundiced view of the propriety of employing certain investigative techniques at the post-accusation stage, rather than from a

³⁹ See *Massiah v. United States*, 377 U.S. at 209 (White, J., dissenting); *United States v. Henry*, 447 at 293-94 (Rehnquist, J., dissenting).

⁴⁰ See *United States v. Ash*, 413 U.S. at 312.

⁴¹ See *Watts v. Indiana*, 338 U.S. 49, 59 (1949) ("[Under our adversary system of justice] any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances") (Jackson, J., concurring).

⁴² See Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation" When Does It Matter?*, 67 Geo. L.J. 59, 63 (1980); Grano, *supra* note 38, at 21 n.134. See also *Massiah v. United States*, 377 U.S. at 211 (White, J., dissenting); *United States v. Henry*, 447 U.S. at 297 (Rehnquist, J., dissenting). Furthermore, even if a *Massiah*-like situation could be regarded as involving coercion, there would be no need to extend the scope of the Sixth Amendment, since the Fifth Amendment's self-incrimination and due process clauses would provide protection enough against compelled incrimination. See *Massiah v. United States*, 377 U.S. at 209-10 (White, J., dissenting); *Henry v. United States*, 447 U.S. at 295-96 (Rehnquist, J., dissenting).

concern for the right to counsel as such.⁴³ Yet, in other contexts, the Court has fully approved the use of undercover methods to solve crimes,⁴⁴ and it is not apparent why investigative activities that are entirely lawful prior to the commencement of formal proceedings should become entirely unlawful thereafter, so long as they do not impair the accused's opportunities to prepare his defense and his right to fair treatment at trial.

One suggested explanation for such a distinction is that the filing of formal charges shifts proceedings from an investigatory to an accusatory stage.⁴⁵ This explanation merely begs the question. There is no logical reason why the initiation of formal charges should entitle the accused to greater protection against the use of non-coercive investigative techniques than before. The protection of counsel is warranted only if the altered nature of the situation faced by the accused subjects him to a danger that he did not face earlier, and if that is a danger against which the Sixth Amendment right to counsel is intended to safeguard him. Neither of these conditions is met in the situation under consideration. The risk caused by the making of incriminating statements is a greater likelihood of conviction at trial. That risk is just as great when the statements are made before indictment as when they are made after the accused has been formally charged. Moreover, the greater danger of conviction results not from the defendant's inability to cope with the intricacies of the law or to withstand the superior advocacy of an expert prosecutor, but rather from his inability to keep quiet and his misplaced

⁴³See Enker & Elson, *supra* note 38, at 57, 80-82; *Massiah v. United States*, 377 U.S. at 212 (White, J., dissenting).

⁴⁴See, e.g., *Weatherford v. Bursey*, 429 U.S. 545, 557-58 (1977); *United States v. Russell*, 411 U.S. 423 (1973); *United States v. White*, 401 U.S. 745, 749 (1971) (plurality opinion); *Hoffa v. United States*, 385 U.S. 293, 308 (1966).

⁴⁵See Grano, *supra* note 38, at 18-25. The Court has consistently taken the position that the commencement of formal proceedings marks the point at which an accused is constitutionally entitled to the assistance of counsel. See, e.g., *Powell v. Alabama*, 287 U.S. at 57; *Kirby v. Illinois*, 406 U.S. at 688-89; *United States v. Gouveia*, 467 U.S. at 187-88; *Moran v. Burbine*, 106 S. Ct. at 1146-47. The stated rationale for this view is that it is only after the initiation of formal charges that the accused is faced with the awesome power of a government that has committed itself to securing his conviction, and only then that he confronts difficulties that he could not cope with adequately without the help of an attorney. See, e.g., *United States v. Gouveia*, 467 U.S. at 188-89; *Maine v. Moulton*, 106 S. Ct. at 454; *Moran v. Burbine*, 106 S. Ct. at 1146-47.

trust in a fellow criminal. This is simply not "unfairness" of the kind with which the Sixth Amendment right to counsel is concerned.⁴⁶

Finally, it has been argued, in effect, that the *Massiah* doctrine is a logical corollary to the Sixth Amendment because it prevents unfairness resulting from the use of deception to prevent a defendant whose right to the assistance of counsel has attached from recognizing his possible need to avail himself of that right.⁴⁷ But this argument also begs the question -- by assuming that a person who has been formally charged *has* a right not to have the government attempt to obtain incriminating information from him except with the consent, or in the presence, of his attorney. Unless such a right exists, there is no "unfairness" in the use of investigative techniques that impair its exercise.

The major historical and rational objections to the recognition of such a right have already been mentioned. An additional argument is that its recognition is logically inconsistent with the apparent acceptability of using an electronic listening post or a passive informant to obtain incriminating statements concerning a charged offense. The use of such "passive" techniques after indictment also involves government action that circumvents the right to counsel -- assuming that it exists -- and exposes the defendant to the same danger as if he were actively questioned by a person he did not realize was a government agent.⁴⁸

3. Lack of policy support

The *Massiah* doctrine's lack of support in the history or logic of the Sixth Amendment suggests that it is merely a cover for a judicially

⁴⁶See *Massiah v. United States*, 377 U.S. at 211 (White, J., dissenting); *United States v. Henry*, 447 U.S. at 281 (Blackmun, J., dissenting); *id.* at 294, 297-98 (Rehnquist, J., dissenting).

⁴⁷See *Maine v. Moulton*, 106 S. Ct. at 488: "By concealing the fact that Colson was an agent of the State, the police denied Moulton the opportunity to consult with counsel and thus derived him the assistance of counsel guaranteed by the Sixth Amendment."

⁴⁸The argument in favor of such a right is also undercut by the acceptability of surreptitious interrogation of an indicted defendant during an investigation of additional crimes. In that situation, incriminating statements concerning the new crime are admissible at the defendant's trial for that offense even though they may have been obtained during a confrontation that violated his right to counsel in connection with an earlier charge.

imposed policy against the use of post-indictment confessions.⁴⁹ However, the requirement that counsel be available at all times after indictment to act as a "medium" between the accused and the government⁵⁰ or as "a sort of a guru" to prevent ill-advised statements by the accused⁵¹ is unsound as a matter of policy for several reasons.

First, preventing the use after indictment of investigative techniques that are perfectly proper before indictment forecloses efforts that may be necessary to obtain evidence to prove the defendant's guilt beyond a reasonable doubt at trial. In some cases it is true that formal proceedings are initiated only after exhaustive police investigations and grand jury proceedings. In other cases, however, a person may be arrested on the basis of probable cause in the immediate aftermath of an offense and during an early stage of the investigation, before there has been an opportunity to establish clearly his connection with the crime. Once arrested, such a person must be arraigned promptly. By precluding the use of a fruitful investigative technique after the accused has been charged, the *Massiah* doctrine causes the loss of confessions and incriminating statements that are never obtained because the police do not question the defendant, and this loss may prevent the accumulation of evidence sufficient to sustain the government's burden of proof at trial.⁵²

A second and related policy objection is that *Massiah's* prohibition may cause authorities to delay initiating formal charges against some persons in order to complete their investigations, even though they have sufficient evidence to arrest or indict the suspect. Presumably, such forbearance would not be exercised in cases of suspects known to be dangerous, but in other cases it might seem a reasonable course despite the potential -- and, in some instances, actual -- harm that would be caused to the public by leaving the suspect at large.

⁴⁹ See *Massiah v. United States*, 377 U.S. at 210 (White, J., dissenting): "[the *Massiah* rule] is nothing more than a thinly disguised constitutional policy of minimizing or entirely prohibiting the use in evidence of voluntary out-of-court admissions and confessions made by the accused."

⁵⁰ See *Maine v. Moulton*, 106 S. Ct. at 487.

⁵¹ See *United States v. Henry*, 447 U.S. at 295 (Rehnquist, J., dissenting).

⁵² Apart from penalizing society unfairly, application of the *Massiah* doctrine in such cases may also be harmful to some defendants, either because they will be subjected to trial on the basis of marginal evidence of guilt, or because further investigation would have exonerated them or at least persuaded the prosecutor not to bring them to trial.

Third, by requiring that all post-indictment statements be made in the presence of or with the consent of an attorney, the *Massiah* doctrine strongly discourages the making of admissions of guilt, no matter how voluntary. The Court has repeatedly recognized society's strong interest in securing this kind of evidence in order to facilitate the swift and effective operation of the criminal justice system,⁵³ yet *Massiah*'s requirement is virtually certain to ensure the making of no statements at all.⁵⁴

Fourth, the policy considerations underlying the ethical rule against communication by an attorney with an opposing party who is represented by counsel⁵⁵ do not apply in a *Massiah*-type situation.⁵⁶ As Justice White observed in his dissent in *Massiah*, that rule deals with the conduct of lawyers, not investigators. "Lawyers," he pointed out, "are forbidden to interview the opposing party because of the supposed imbalance of legal skill and acumen between the lawyer and the party litigant." 377 U.S. at 210-11. Thus, the reason for the rule does not apply to the conduct of nonlawyers, and certainly not to communications with a defendant by a co-defendant, as in *Massiah* and *Moulton*, or by another fellow criminal, as in *Henry*.

Finally, in assessing the wisdom of the *Massiah* doctrine, it is worth noting that England -- the common law jurisdiction most closely akin to

⁵³See *United States v. Washington*, 431 U.S. 181, 187 (1977) ("Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable"); *Moran v. Burbine*, 106 S. Ct. at 1144 ("Admissions of guilt are more than merely 'desirable,' [citing *United States v. Washington*]; they are essential to society's compelling interest in finding, convicting and punishing those who violate the laws").

⁵⁴*Cf. Watts v. Indiana*, 338 U.S. at 59 (Jackson, J., concurring).

⁵⁵Rule 4.2 of the *Model Rules of Professional Conduct* (American Bar Association 1983) which is substantially similar to former Disciplinary Rule 7-104(A)(1), provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

⁵⁶The Court's only suggestion that the Rule is in any way implicated in such a situation is a cryptic reference to DR 7-104(A)(1) in a footnote to the statement in *Henry* that *Henry* was a case "where the 'constable' planned an impermissible interference with the right to the assistance of counsel." *United States v. Henry*, 447 U.S. at 275. The footnote simply "note[d]" the provisions of the Rule, while acknowledging that it did not "bear upon the constitutional question in this case." *Id.* at 275 n.14.

our own -- does not appear to countenance such an impediment to the search for truth in criminal cases. Under the English "Judges' Rules," although post-charge questioning is discouraged, the police are explicitly permitted to question a person in the absence of counsel after he has been charged, if such interrogation is "necessary for the purpose of preventing or minimizing harm or loss to some other person or the public." Moreover, the use of trickery to obtain a confession or incriminating statements is also permitted, so long as "unfair" tactics are not employed. The critical question in determining the admissibility of any such evidence is whether it was provided voluntarily.⁵⁷ That should be the decisive factor in this country as well.

B. Objections to Application of an Exclusionary Rule

Even assuming that the Sixth Amendment may properly be interpreted to forbid the government from confronting an indicted defendant without counsel being present, there remains the question whether a violation of this prohibition requires application of an exclusionary rule that withholds reliable and probative evidence from the factfinder at trial. The Court has applied an automatic rule of suppression in these cases, but has never explained why that remedy is either necessary or appropriate. Two issues must be addressed in this connection: whether exclusion is a constitutional requirement, and -- if it is not -- whether it is justified by policy considerations.

1. Exclusion is not constitutionally required

The language of the Court's holding in *Massiah* indicates that the defendant's right to counsel was violated when his uncounseled post-indictment statements were used against him at trial,⁵⁸ not when the

⁵⁷ See Kaci, *Confessions: A Comparison of Exclusion Under Miranda in the United States and Under the Judges' Rules in England*, 8 Am. Crim. L. J. 87, 109-12 (1982) (reproducing the text of the Judges' Rules); *Developments in the Law -- Confessions*, 79 Harv. L. Rev. 935, 1094 (1966).

⁵⁸ See *Massiah v. United States*, 377 U.S. at 206 ("We hold that the petitioner was denied the basic protections 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"); *id.* at 207 ("All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution against *him* at his trial"). Even the dissenters in *Massiah* seem to have shared the view that the constitutional violation

statements were elicited from him. On its face, that suggests that *Massiah's* exclusionary rule may be constitutionally required. However, a convincing argument can be made that this view is incorrect -- that the constitutional violation occurs (if at all) when the government circumvents an indicted defendant's right to the assistance of counsel, and that exclusion of the fruits of such a violation is merely a prophylactic device to deter unlawful police conduct.

In the first place, *Massiah's* description of the point at which the right to counsel was violated -- at trial -- makes no sense. Nothing in the Court's opinion or in the opinion of the court below suggested any sort of interference with the defendant's free exercise of his right to the assistance of counsel at trial. The entire focus of both courts was on the propriety of the government's conduct prior to trial. Moreover, the suggestion that the constitutional violation occurred at trial implies that there was nothing improper in the government's earlier deliberate elicitation of incriminating statements from him in the absence of counsel. Yet, if that were so, there would be no basis for suppressing the statements at trial. In short, despite the confusing language of its holding, it seems clear that what the Court found offensive was the government's post-indictment investigative conduct, not its conduct at trial.⁵⁹

Second, subsequent decisions make it clear that what violates the Sixth Amendment in the *Massiah* sense is the use of evidence gathering methods that frustrate an indicted defendant's right to the assistance of counsel. Thus, in *Brewer v. Williams*, 387 U.S. at 401, the Court stated:

occurred when the evidence was introduced at trial. See *id.* at 208 (White, J., dissenting) (describing the majority opinion as creating "a constitutional rule . . . barring the use of evidence").

⁵⁹One explanation for the curious language of the holding in *Massiah* may be the Warren Court's penchant for viewing remedies as well as rights in constitutional terms. See *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (describing the Fourth Amendment exclusionary rule as "constitutionally necessary"); *Miranda v. Arizona*, 384 U.S. 436, 457-58 (1966) (holding that the Fifth Amendment is violated by noncompliance with rules designed to ensure the voluntariness of statements obtained during custodial interrogation). Later decisions have eschewed this expansive approach. See, e.g., *United States v. Calandra*, 414 U.S. 338, 347-48 (1974) (describing the Fourth Amendment exclusionary rule as "a judicially created remedy . . . rather than a personal constitutional right of the party aggrieved"); *Michigan v. Tucker*, 417 U.S. 433, 443-46 (1974) (holding that failure to comply with *Miranda's* requirements did not violate the Fifth Amendment). See also *Report to the Attorney General on the Search and Seizure Exclusionary Rule* at 29-30 (Office of Legal Policy, February 26, 1986); *Report to the Attorney General on the Law of Pre-trial Interrogation* at 76-80 (Office of Legal Policy, February 12, 1986).

“[T]he clear rule of *Massiah* is that once adversary proceedings have been commenced against an individual, he has a right to legal representation when the government interrogates him.” The point was made even more explicitly in the holding in *United States v. Henry*, 447 U.S. at 274: “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.” See also *Maine v. Moulton*, 106 S. Ct. at 485 (explaining that the ground for reversal in *Massiah* was that “the incriminating statements were obtained in violation of *Massiah*’s rights under the Sixth Amendment.” (emphasis supplied)); *id.* at 487 (“the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused’s right to have counsel present in a confrontation between the accused and a state agent”); *Kuhlmann v. Wilson*, 106 S. Ct. at 2630 (“[T]he primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation”).

Thus, there can be no doubt that the constitutional violation involved in a *Massiah*-type situation consists of post-indictment efforts by the government to secure incriminating statements from the defendant in the absence of counsel, not of using the statements so obtained at his trial. It follows, accordingly, that the rule excluding statements obtained by means of a Sixth Amendment violation has no independent constitutional basis; as is true in the Fourth and Fifth Amendment contexts, it is merely a judicially created device for enforcing a constitutional right. Cf. *United States v. Calandra*, 414 U.S. at 347-48; *Michigan v. Tucker*, 417 U.S. at 443-46.

2. Exclusion is not justified on policy grounds

As in the Fourth and Fifth Amendment contexts,⁶⁰ a balancing approach should be employed to determine whether suppression of evidence is the appropriate response to a violation of the *Massiah* right to counsel.⁶¹ Application of such a test demonstrates clearly that exclusion is unjustified.

⁶⁰ See, e.g., *United States v. Leon*, 104 S. Ct. 3405, 3412-13 (1984) (Fourth Amendment); *Michigan v. Tucker*, 417 U.S. at 450 (Fifth Amendment).

⁶¹ See *Brewer v. Williams*, 387 U.S. at 420-27 (Burger, C.J., dissenting); *Maine v. Moulton*, 106 S. Ct. 495-96 (Burger, C.J., dissenting). Cf. *Nix v. Williams*, 104 S. Ct. 2501, 2509-11 (the use of a balancing process is appropriate in determining whether evidence

First, the costs of exclusion are unquestionably substantial.⁶² The most obvious and serious costs are the impairment of the truth-finding process that results from suppression of reliable and probative evidence of guilt, the consequent release or lenient treatment of obviously guilty defendants, and the generation of public disrespect for a system that shields a defendant from the consequence of incriminating statements made voluntarily to confederates in crime.⁶³

Second, suppression produces "precious little in the way of offsetting 'benefits,'"⁶⁴ other than to reward defendants with windfalls that are wildly disproportionate to the gravity of the constitutional violations involved. Measured in terms of deterrence of unlawful police conduct,⁶⁵ the gain to society is insubstantial, if it exists at all. In most cases, it is difficult to conclude that the police were guilty of *any* misconduct, let alone transgressions so egregious as to warrant application of a deterrent sanction.⁶⁶ Certainly, that is true in cases such as *Massiah* and *Moulton*, where the police were merely conducting permissi-

obtained in violation of the accused's right to counsel should be admitted under an "inevitable discovery" exception to the exclusionary rule).

⁶² See *Massiah v. United States*, 377 U.S. at 208 (White, J., dissenting); *Brewer v. Williams*, 417 U.S. at 415-17 (Burger, C.J., dissenting); *Maine v. Moulton*, 106 S. Ct. at 495 (Burger, C.J., dissenting).

⁶³ These costs are taken more seriously in other democracies, including England and Canada, which generally permit the use of confessions and incriminating statements obtained in violation of limitations on police interrogation practices if the evidence is found to have been given voluntarily. See *Report to the Attorney General on the Law of Pre-trial Interrogation*, *supra* note 59, at 87-95.

⁶⁴ *Maine v. Moulton*, 106 S. Ct. at 495 (Burger, C.J., dissenting).

⁶⁵ Deterrence is the appropriate measure of benefit in the Fourth Amendment context since the primary, if not the sole, purpose of excluding evidence obtained through unreasonable searches and seizures is to deter such unlawful police conduct. See *United States v. Calandra*, 414 U.S. at 347; *United States v. Leon*, 104 S. Ct. at 3412. No reason appears why the same test should not be applied in the Sixth Amendment right to counsel context, where the object is also to prevent unconstitutional police conduct, as opposed to curing a wrong that has already been suffered. See *Maine v. Moulton*, 106 S. Ct. at 495 (Burger, C.J., dissenting).

⁶⁶ See *Massiah v. United States*, 377 U.S. at 209-211 (White, J., dissenting); *Brewer v. Williams*, 387 U.S. at 420-27 (Burger, C.J., dissenting); *United States v. Henry*, 447 U.S. at 281 (Blackmun, J., dissenting); *id.* at 297 (Rehnquist, J., dissenting); *Maine v. Moulton*, 106 S. Ct. at 495-96 (Burger, C.J., dissenting).

ble investigations of continuing or new offenses in which they reasonably believed the indicted defendant was involved.⁶⁷

Contrary to the Court's contention in *Moulton*, 106 S. Ct. at 489, admitting evidence obtained in violation of a defendant's right to counsel whenever the police assert an alternative, legitimate reason for their surveillance would not invite law enforcement abuses in the form of fabricated investigations. The Court cited no evidence to support a belief that law enforcement officers would deliberately violate the Constitution by fabricating investigations for the purpose of evading defendants' rights to counsel, much less that they would do so commonly. Indeed, precisely the opposite conclusion seems warranted. The officers in *Henry* and *Moulton* took pains to prevent their informants from engaging in conduct that might violate the defendant's right to counsel as that right was then understood.⁶⁸ Moreover, as a general matter, federal and state law enforcement officers are instructed in the requirements of the Sixth Amendment and are subject to disciplinary sanctions for deliberate violations of the right to counsel.⁶⁹ These deterrents to unlawful conduct are reinforced by the threat of civil actions for damages under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), or under 42 U.S.C. § 1983.

In any event, the risk that appears to trouble the Court could be averted simply by limiting application of the exclusionary rule to cases in which the police did not act in good faith. For example, as a precondition to the admissibility of the evidence, the police could be required to justify the continuing or new investigation that produced it by showing that

⁶⁷ As the Chief Justice observed in his dissent, in *Moulton*: "In fact, if anything, actions by the police of the type involved here should be encouraged. The diligent investigation of the police in this case may have saved the lives of several potential witnesses and certainly led to the prosecution and conviction of respondent for additional serious crimes." 106 S. Ct. at 496.

⁶⁸ See *United States v. Henry*, 447 U.S. at 268 (the informant was instructed not to initiate conversation with the defendant about the pending charges or to question him about them); *Maine v. Moulton*, 106 S. Ct. at 481 (the informant was told not to attempt to question the defendant). See also *Kuhlmann v. Wilson*, 106 S. Ct. at 2614, 2630 (the informant was instructed not to ask any questions, but simply to keep his ears open for the names of the defendant's accomplices). Even in *Brewer v. Williams*, 387 U.S. at 391-93, which involved a direct confrontation between the police and the accused, the police demonstrated their sensitivity to the right to counsel, and to counsel's request that they not question the accused in his absence, by not subjecting the accused to "interrogation" in the commonly understood sense of that term.

⁶⁹ See p.26 and n.72, *infra*.

they had reasonable suspicion -- or, perhaps, even probable cause to believe -- that the defendant was involved in a continuing offense or was embarked on additional criminal activity.

In short, because these are typically situations in which the police act in good faith, there is no more benefit to be derived from excluding the evidence they obtain than would be realized by suppressing the fruits of a good faith violation of the Fourth Amendment.⁷⁰

A final argument against application of an exclusionary rule to evidence obtained through *Massiah* violations is that -- just as in the Fourth Amendment context -- there are available equally effective but less costly methods of achieving deterrence and redress.⁷¹ For example, the Federal Bureau of Investigation instructs its agents -- as well as state and local police officers who attend its training sessions -- on the requirements of *Massiah*, and has developed administrative guidelines, which are backed up by disciplinary sanctions for noncompliance, to govern the conduct of post-indictment efforts to obtain inculpatory material from defendants.⁷² In addition, redress for a violation of a defendant's right to the assistance of counsel can already be sought in a civil action under 42 U.S.C. § 1983 when state or local police are involved,⁷³ and *Bivens* provides a comparable remedy in cases involving federal agents. A combination of these approaches would supply a more direct incentive to respect an accused's right to counsel, but would not entail the prohibitive costs of the current exclusionary rule approach.

⁷⁰*Cf. United States v. Leon*, 104 S. Ct. at 3419-21 (adopting a limited "good faith" exception to the search and seizure exclusionary rule on the basis of the conclusion that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion").

⁷¹*Cf. INS v. Lopez-Mendoza*, 104 S. Ct. 3479 (1984) (holding that the Fourth Amendment exclusionary rule need not be applied in civil deportation proceedings in part because of the existence of administrative measures adopted by the INS to prevent unreasonable searches and seizures by its agents).

⁷²See *FBI Legal Handbook for Special Agents*, section 7; *FBI Manual of Administrative Operations and Procedures*, section 13.

⁷³*Cf. Weatherford v. Bursey*, 429 U.S. 545 (1977) (§ 1983 suit brought against an undercover agent on the theory that the agent violated the defendant's right to counsel by attending meetings held by defendant and his attorney to prepare for trial).

IV. POTENTIAL REFORMS AND IMPLEMENTING STRATEGIES

Because the *Massiah* doctrine comes into play only after a defendant has been indicted, it has not had the far reaching effects -- or consequences as baneful -- as the limitations on police interrogation adopted in *Miranda*, which constitute far more serious impediments to the search for truth in criminal investigations and trials. Nevertheless, the doctrine is irrational and harmful to effective law enforcement, as well as subversive of the truth-finding process. Moreover, it is worth emphasizing that a successful attack on *Massiah* would not impair the value of the right to counsel at trial or during "critical" pre-trial confrontations at which the assistance of an attorney serves the purposes of the Sixth Amendment. For these reasons the possibility of eliminating the doctrine, or at least reducing its scope, deserves serious consideration. These goals could be sought either by a direct attack on the *Massiah* right not to be questioned, or by striking at *Massiah*'s exclusionary rule enforcement mechanism. Given the Court's recent reaffirmations of the understanding of the constitutional right to counsel expressed in *Massiah*, the latter strategy seems more immediately promising.

A. Elimination or Limitation of the *Massiah* Right Not to be Questioned

Unlike the more notorious *Mapp* and *Miranda* decisions, which established what are now understood to be merely remedial measures aimed at protecting Fourth and Fifth Amendment rights, respectively, *Massiah* created a new constitutional right -- the right not be questioned by government agents after indictment except in the presence or with the consent of counsel. Because this right has been couched in constitutional terms, efforts to abrogate or modify it must be addressed to the Supreme Court.

The principal arguments that can be made against *Massiah*'s novel expansion of the Sixth Amendment right to counsel -- as discussed in Part III above -- are that the *Massiah* rule is historically unsound, is unnecessary to serve the fundamental purposes of the Sixth Amendment right, and is unwise as a matter of policy. The presence of counsel during post-indictment questioning affects neither the fairness of the process by which the defendant's guilt or innocence is determined at trial, nor the reliability of the evidence used to arrive at that determination; and, the

Fifth Amendment provides adequate protection for the legitimate interests of defendants from whom the government seeks incriminating statements after indictment.⁷⁴ The *Massiah* rule represents unwise policy because it precludes the use of otherwise legitimate and useful investigative techniques, because it may endanger the public by causing delays in arrests or indictments, and because it impairs the administration of justice by inhibiting the making of voluntary admissions of guilt.

Two alternative arguments might provide the Court with an attractive middle ground between complete repudiation of *Massiah* and continued adherence to its irrational view of the right to counsel: (1) limiting *Massiah* to custodial situations⁷⁵ or other settings in which the indicted person may be considered particularly vulnerable, as when he has not actually consulted with counsel, for example; and (2) arguing that no Sixth Amendment violation occurs when the police surreptitiously confront an indicted defendant during a bona fide investigation of his participation in a separate offense, because in that situation the state is not seeking to elicit information concerning a charge with respect to which the defendant's right to counsel has attached.⁷⁶

Despite their apparent validity, however, neither the primary nor the alternative arguments appear likely to succeed at this time. The Court declined the government's invitation in *Henry* to reconsider *Massiah's* view of the right to counsel, and it recently reaffirmed that view in *Moulton*, in an opinion that expressly rejected the separate investigation argument made in the Department's amicus brief.⁷⁷

⁷⁴The self-incrimination clause guards against subtle as well as blatant forms of coercion, and the due process clause prevents the use of other "unconscionable" techniques. Cf. *Lyra v. Denno*, 347 U.S. 556 (1954) (defendant was denied due process when he was convicted of murder on the basis of a confession extracted from him in the absence of counsel by a highly skilled psychiatrist who the police had falsely led him to believe could provide him with medical relief from an acutely painful sinus attack).

⁷⁵Cf. *United States v. Henry*, 447 U.S. at 273-74 ("[T]he mere fact of custody imposes pressure on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents").

⁷⁶See *Maine v. Moulton*, 106 S. Ct. at 491-95 (Burger, C.J., dissenting). The Court has not yet been asked to decide a case in which an indicted defendant, who was being surreptitiously questioned about a separate crime, unexpectedly divulged incriminating information concerning the offense with which he had already been charged.

⁷⁷More recently yet, in *Michigan v. Jackson*, 54 U.S.L.W. 4334, 4335-36 (April 1, 1986), which applied *Edwards v. Arizona*, 451 U.S. 477 (1981), to prohibit post-arraignment questioning of a person who had requested the appointment of counsel, the Court

Moreover, the only members of the current Court who appear to favor overruling *Massiah* completely are Justices White and Rehnquist,⁷⁸ and they -- together with the departing Chief Justice -- seem to be the only ones willing to restrict *Massiah*'s right to counsel to cases in which the police attempt to obtain evidence concerning an offense for which the defendant has already been charged. Thus, reconsideration of these points would not be likely to be fruitful at present.

B. Elimination or Modification of the *Massiah* Exclusionary Rule

An approach that holds greater promise for more immediate success would be to argue that the exclusionary rule should not be applied to evidence obtained by means of a *Massiah* violation or, alternatively, that the evidence should be suppressed only when the police have not acted in good faith. Such an argument could be made either to the Court or to Congress, since the exclusionary rule aspect of *Massiah* is not constitutionally required.⁷⁹

Two points could be made to support an argument that the *Massiah* exclusionary rule should be abandoned entirely. The first is the familiar contention that a weighing of the costs and benefits of exclusion requires complete abrogation of the suppression sanction.⁸⁰ This Office has previously recommended that the Department take this position with respect to the Fourth Amendment exclusionary rule.⁸¹ As a matter of logic, no reason appears why the Department should not take the same

stated: "[A]fter a formal accusation has been made -- and a person who had previously been just a 'suspect' has become an 'accused' within the meaning of the Sixth Amendment -- the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation."

⁷⁸See *Massiah v. United States*, 377 U.S. at 209 (White, J., dissenting); *United States v. Henry*, 447 U.S. at 290 (Rehnquist, J., dissenting).

⁷⁹See discussion at pp. 21-23, *supra*.

⁸⁰See discussion at pp. 23-26, *supra*. This argument could also stress the availability of such alternative deterrent and remedial devices as administrative measures -- guidelines, training requirements, and disciplinary sanctions -- and civil suits for damages.

⁸¹See *Report to the Attorney General on the Search and Seizure Exclusionary Rule*, *supra* note 59, at 50-53.

position regarding the *Massiah* exclusionary rule, for the latter is as bereft of deterrent or other justification as the former.

Another, less obvious, point that could be made in this connection is that an existing statute -- 18 U.S.C. § 3501 -- forecloses suppression of incriminating statements that are made voluntarily, even if they are made after indictment and in the absence of counsel. Section 3501, which was enacted in 1968, provides in subsection (a) that a confession -- defined in subsection (e) to include a self-incriminating statement -- is admissible in a federal criminal prosecution if it is voluntarily given. Subsection (b) directs the trial judge to take into consideration all the circumstances surrounding the giving of the confession, including five specifically designated factors, in determining the issue of voluntariness. One of the factors is whether the defendant was without the assistance of counsel when he was questioned and made the confession.

Although § 3501 was enacted principally to overrule the *Miranda* decision,⁸² its text and legislative history can reasonably be read to support an argument that it should be construed to govern the admissibility not only of pre-arraignment confessions but of post-indictment incriminating statements as well. Subsection (a) requires the admission of voluntary confessions without reference to the time at which they are given. More telling yet, among the circumstances required by subsection (b) to be considered by the trial judge in determining voluntariness is the following: "(2) whether such defendant knew of the nature of the offense *with which he was charged* or of which he was suspected at the time of making the confession" (emphasis supplied). The italicized language clearly contemplates the application of subsection (a) to incriminating statements made after, as well as before, the accused has been formally charged.⁸³

⁸²See Report to the Attorney General on the Law of Pre-trial Interrogation, *supra* note 59 at 64-72.

⁸³This interpretation could be supported by reference to the fourth consideration listed in subsection (b) -- "whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel." Since a person has no Sixth Amendment right to the assistance of counsel prior to the commencement of judicial proceedings against him, see *Kirby v. Illinois*, 406 U.S. at 688-89; *United States v. Gouveia*, 467 U.S. at 187-88, we could argue that the statutory directive to consider whether the person was advised of this right also indicates that Congress contemplated the applicability of Section 3501 in a case in which the person's confession was made after he was formally charged.

The legislative history of the statute supports the broad reading suggested by the text. Although it is apparent that Congress was concerned primarily with the problems caused by *Miranda*, and although the Committee Report contains no mention of *Massiah*, the Report plainly indicates a concern with the Court's Sixth Amendment cases, as well as a purpose to go beyond merely overturning *Miranda*. Thus, the Report contains several references to the harmful effects of *Escobedo v. Illinois*, 378 U.S. 478 (1964), which was understood at the time to be based on the Sixth Amendment right to counsel.⁸⁴ In addition, in explaining the general purpose of the legislation, the Report states:⁸⁵

[C]rime will not be effectively abated so long as criminals who have voluntarily confessed their crimes are released on mere technicalities. The traditional right of the people to have their prosecuting attorneys place in evidence before juries the voluntary confessions and incriminating statements made by defendants simply must be restored.

Moreover, several of the Committee's criticisms of *Miranda* are also applicable to *Massiah*, albeit not necessarily with the same force.⁸⁶

Finally, we can argue, there is no logical reason why the test of voluntariness restored by § 3501 should not govern the admissibility of both pre-indictment statements and post-indictment statements. In either

⁸⁴See, e.g., S. Rep. No. 1097, 90th Cong. 2d Sess., reprinted in 1968 U.S. Code Cong. & Admin. News 2127-31. *Escobedo* held that a person's Sixth Amendment right to counsel is violated when, in the course of an investigation that has begun to focus on him as a suspect, he is subjected to custodial interrogation without being warned of his right to remain silent and after denial of his request to consult with his lawyer. 378 U.S. at 490-91. The Court has since reinterpreted *Escobedo*, explaining that counsel was required in that case "in order to protect the Fifth Amendment privilege against self-incrimination rather than to vindicate the Sixth Amendment right to counsel." *United States v. Gouveia*, 467 U.S. at 188 n.5.

⁸⁵S. Rep. No. 1097, *supra* note 54, at 2123.

⁸⁶For example, the Senate Report stated: "One of the most damaging aspects of the *Miranda* decision is its apparent holding that, absent waiver, no suspect can be interrogated at all without the benefit of counsel. It is widely known that counsel will advise the suspect to make no statement at all. The police are virtually hamstrung. This is much more serious than the barring from evidence of a confession -- the suspect may refuse to make *any statement whatever*." *Id.* at 2134 (emphasis in original). Except for the fact that the police are not "hamstrung" in a *Massiah*-type situation, since they will already have accumulated enough evidence to charge the suspect, this statement is as applicable to *Massiah* as to *Miranda*.

context, the interests of the accused are the same, as are those of society, and in each context the statute strikes a fair balance between competing values.⁸⁷

The foregoing arguments are aimed at complete elimination of the *Massiah* exclusionary rule. As an alternative, we could argue that exclusion should be limited to situations in which the police had no legitimate reason for surreptitious questioning of an indicted defendant other than to obtain inculpatory statements for use at the trial of the pending charge. Except in such a situation, there is simply no police misconduct to deter and, therefore, no justification whatever for incurring the heavy costs associated with the suppression of reliable and probative evidence.⁸⁸ This is an especially promising argument because it commanded the support of four members of the Court in *Moulton*⁸⁹ and because six Justices accepted a comparable argument in the Fourth Amendment context in *Leon*. Since the two additional members of the Court who formed the majority in *Leon* -- Justices Powell and Blackmun -- have previously expressed reservations about *Massiah*,⁹⁰ it may not be too much to hope that a majority of the Court will accept the views of

⁸⁷ Another argument that might be made is that -- regardless of the wisdom of the exclusionary rule -- the Court lacks the power to impose it even in the federal system. Such an argument would require careful analysis of the Court's ill-defined "supervisory power" over lower federal courts, an exercise that is beyond the scope of this Report but that will be undertaken in a subsequent paper in this series. In essence, the argument would have two prongs. The first point would be that the Court has no common-law authority to establish rules of evidence for use in federal courts and that, even if it had such power, the power would be limited to the prescription of rules designed to ensure the accuracy of the factfinding process, a goal that the exclusionary rule plainly does not serve. The second point would be that the existence of such limited authority to lay down rules of evidence (assuming that it does exist) does not permit the Court -- in the guise of performing that function -- to control the behavior of Executive branch officials. So far as we are aware, the Court's authority has never been challenged in either of these respects. It might, therefore, be futile and damaging to the Department's credibility to advance such an argument at this late date. Moreover, such an argument might well irritate the Court, to the possible disadvantage of our primary arguments, which are strong standing by themselves.

⁸⁸ See discussion at pp. 23-26, *supra*.

⁸⁹ See *Maine v. Moulton*, 106 S. Ct. at 495-96 (Burger, C.J., joined by White, Rehnquist and O'Connor, JJ., dissenting).

⁹⁰ See *Brewer v. Williams*, 430 U.S. at 413-14 (Powell, J., concurring); *id.* at 438-40 (Blackmun, J., dissenting); *United States v. Henry*, 447 U.S. at 275-77 (Powell, J., concurring); *id.* at 277-82 (Blackmun, J., dissenting).

the dissenters in *Moulton* in a case in which the facts are more favorable to the government.

C. Specific Recommendations

In view of *Maine v. Moulton* and *Michigan v. Jackson* in the current Term, a frontal assault on *Massiah* would probably be quixotic unless the composition or thinking of the Court were to change further. Accordingly, current reform efforts should be directed toward the more modest goal of eliminating or limiting *Massiah*'s exclusionary rule component. The following specific strategies are recommended to achieve that goal.

1. Litigative strategy

Even though the Court remains devoted to *Massiah*, the Department should continue to avail itself of litigative opportunities to express its fundamental disagreement with the notion that the Sixth Amendment includes a right not to be questioned.

Second, the Department should continue to urge judicial elimination or modification of *Massiah*'s exclusionary rule. In addition to making the usual case against suppression of reliable and probative evidence, the Department should also contend that the voluntariness standard reestablished by the enactment of 18 U.S.C. § 3501 precludes automatic application of an exclusionary rule in the Sixth Amendment context, just as it does in Fifth Amendment cases. However, it would be better to reserve this argument until after the statute has been upheld under the Fifth Amendment. Such a strategy would avoid jeopardizing efforts to obtain the abrogation of *Miranda* -- a more important goal to the government than abolition of the *Massiah* exclusionary rule -- and a prior declaration of the statute's validity as a test of the admissibility of pre-charge confessions would probably enhance the prospects of a similar decision in the context of post-charge incriminating statements.

2. Legislative strategy

As a supplement to its litigative strategy, the Department should also consider whether it would be advisable to seek legislation specifically abrogating *Massiah*'s exclusionary rule, either in toto or in cases in which incriminating statements are obtained during bona fide investigations of separate crimes. Consideration of this course is recommended, even though we may be arguing simultaneously in court that 18 U.S.C. § 3501 already achieves the same result. The two strategies are not mutually

exclusive. Moreover, it will take some time to secure a definitive judicial determination of the validity and scope of § 3501, and that determination could be adverse to the government, at least in the sense that the Court may conclude that the statute -- even though constitutional -- was not intended to govern the admissibility of post-indictment confessions.

A proposal to eliminate or modify the *Massiah* exclusionary rule could be offered either in a separate bill or as an amendment to proposed legislation to eliminate or create a statutory "good faith" exception to the Fourth Amendment exclusionary rule. A bill directed solely to the Sixth Amendment exclusionary rule probably would not have sufficient appeal to be enacted.⁹¹ Chances of passage would be greater if the proposal were included in a package of other worthwhile reforms.⁹² On the other hand, an effort to broaden a Fourth Amendment exclusionary rule bill would create a new set of legislative obstacles that might seriously jeopardize the bill's prospects of success. In addition, if the proposed legislation to which a *Massiah* amendment was offered were limited to establishing a "good faith" exception to the Fourth Amendment exclusionary rule, it would probably be necessary to accept a similar limitation with respect to the *Massiah* exclusionary rule.

3. Investigative and administrative strategy

In light of the acceptability of the use of electronic surveillance and passive informants to gather incriminating statements concerning pend-

⁹¹ Although it seriously impedes the search for truth, *Massiah* cannot fairly be equated with *Mapp* and *Miranda* in this respect, since it requires suppression of evidence in far fewer cases, and in those cases there is at least enough other evidence to have warranted the commencement of prosecution. Thus, even strenuous efforts to educate Congress and the public concerning *Massiah*'s irrational and harmful effects, see p. 36 *infra*, might not generate a critical mass of support for enactment of a bill dealing only with *Massiah*'s exclusionary rule.

⁹² It is anticipated that this Office's Truth in Criminal Justice project will identify other aspects of federal criminal procedure warranting remedial legislation. In addition, a more comprehensive bill could include an amendment to the Federal Tort Claims Act to provide a damage remedy against the United States for egregious violations of the *Massiah* right not to be questioned. This right can now be vindicated by means of a *Bivens* suit against the responsible federal agents. However, unlike the situation with respect to violations of Fourth Amendment rights by federal law enforcement officers not acting in good faith, see 28 U.S.C. § 2680(h); *Norton v. Turner*, 581 F.2d 390, 393 (4th Cir.), cert. denied, 439 U.S. 1003 (1978), federal law currently provides no means of redress against the government itself.

ing charges from a defendant after the commencement of judicial proceedings, the Department should continue to utilize these techniques when necessary to amass enough evidence to prove guilt beyond a reasonable doubt at trial.⁹³ In addition, the government should not hesitate to use undercover informants to deliberately elicit evidence concerning an indicted defendant's participation in additional criminal activity -- with respect to which he has no right to counsel since he has not been charged -- even when there is reason to believe that he may make incriminating statements regarding the offense with which he has already been charged.

Administrative initiatives should also be taken to ensure against misuse of these permissible investigative techniques and to demonstrate the feasibility and reliability of administrative alternatives to the Sixth Amendment exclusionary rule. Thus, to the extent that they do not already exist in all federal law enforcement agencies, the Department should develop written guidelines and procedures for the conduct of investigations of persons under indictment.⁹⁴ Those provisions should be designed to meet current constitutional requirements, but should take full advantage of existing exceptions to those requirements. Finally, to ensure that the guidelines and procedures are followed, the Department should review -- and improve if necessary -- existing mechanisms for monitoring post-indictment investigations and for imposing appropriate

⁹³As noted earlier, *supra* p. 20, there is no sound basis for concern that the ethical prohibition on communication by an attorney with an opposing party who is represented by counsel applies to conversation between an informant and a represented defendant. A fortiori, there should be no concern on this score when passive methods are used to receive incriminating statements, since these techniques do not involve "communication" by an agent of the government, much less by an attorney for the government. For a very thorough examination of the applicability of the prohibition to communications by the Department with represented persons in criminal cases, see Memorandum dated January 29, 1984, to Stephen S. Trott from William J. Landers, Re: *Communication with Represented Persons in Criminal Matters and DR 7-104 of the Code of Professional Responsibility*.

⁹⁴The FBI's guidelines require a warning and waiver of the right to counsel before an accused who has been formally charged is questioned about the pending charge, see *Legal Handbook for Special Agents*, *supra* note 72, at section 7-3.2(1)(d), 7-3.2(4), but they do not appear to cover the use of covert techniques to obtain incriminating statements in such a situation. This Office has been advised informally, however, that the use of electronic surveillance or a passive informant for this purpose is permitted with the approval of FBI headquarters.

disciplinary sanctions in the event of serious noncompliance with the guidelines and procedures.

4. Educational strategy

The relatively poor prospects of obtaining immediate judicial or legislative relief from the *Massiah* doctrine can be attributed in part to a lack of public awareness of the irrational and damaging state of the law in this area. Unlike the *Miranda* decision, which was greeted by immediate and wide-spread outrage, *Massiah* and its progeny seem to have received very little public attention, and have not generated much controversy. It would behoove the Department, therefore, to undertake a "consciousness raising" program aimed at making the *Massiah* doctrine a more visible public issue. Steps to this end could include preparation of a law review article based on this Report for publication, preparation and dissemination to journalists of a distillation of this Report, Op Ed pieces, and critical appraisals of the *Massiah* line of cases in criminal law speeches by Department officials.

Two closely related points should be stressed in our discussion of the subject. First, we should emphasize the distinction between the right incorporated by the Founders in the Sixth Amendment and the right created by the Court in *Massiah*. This can best be done by avoiding characterizations employed by the Court, such as "the *Massiah* right to counsel," and by speaking instead of "the *Massiah* 'right' not to be questioned." Second, we should take pains to allay apprehensions -- unfounded though they would be -- that elimination or modification of the *Massiah* doctrine, or of its exclusionary rule component, would impair the utility of the Sixth Amendment right to the assistance of counsel at trial or during pre-trial confrontations at which the presence of counsel would protect the fairness and the integrity of the truth-finding process of a subsequent trial. Clarification of these points would assuage legitimate concerns and should make it easier to persuade the public and members of Congress of the merits of our substantive arguments for reform.

CONCLUSION

Despite intermittent efforts by the Court to justify *Massiah's* expansion of the Sixth Amendment right to counsel, the rationale of that decision remains an enigma. More serious, *Massiah* continues to thwart the search for truth in criminal investigations and prosecutions by

prohibiting the use of legitimate investigative techniques and by requiring the exclusion of reliable and probative evidence the use of which would not deprive the defendant of a fair trial. In effect, the *Massiah* right not to be questioned and the *Massiah* exclusionary rule constitute obstructions of justice. The Department should intensify its efforts to correct this bizarre situation. Although it may not be immediately feasible to seek to reverse *Massiah's* conception of the right to counsel, there remains a reasonable possibility of limiting or eliminating *Massiah's* exclusionary rule. That goal may be attainable by employing the litigative, legislative, administrative, and educational strategies recommended above.