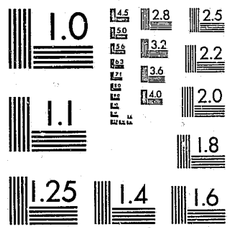

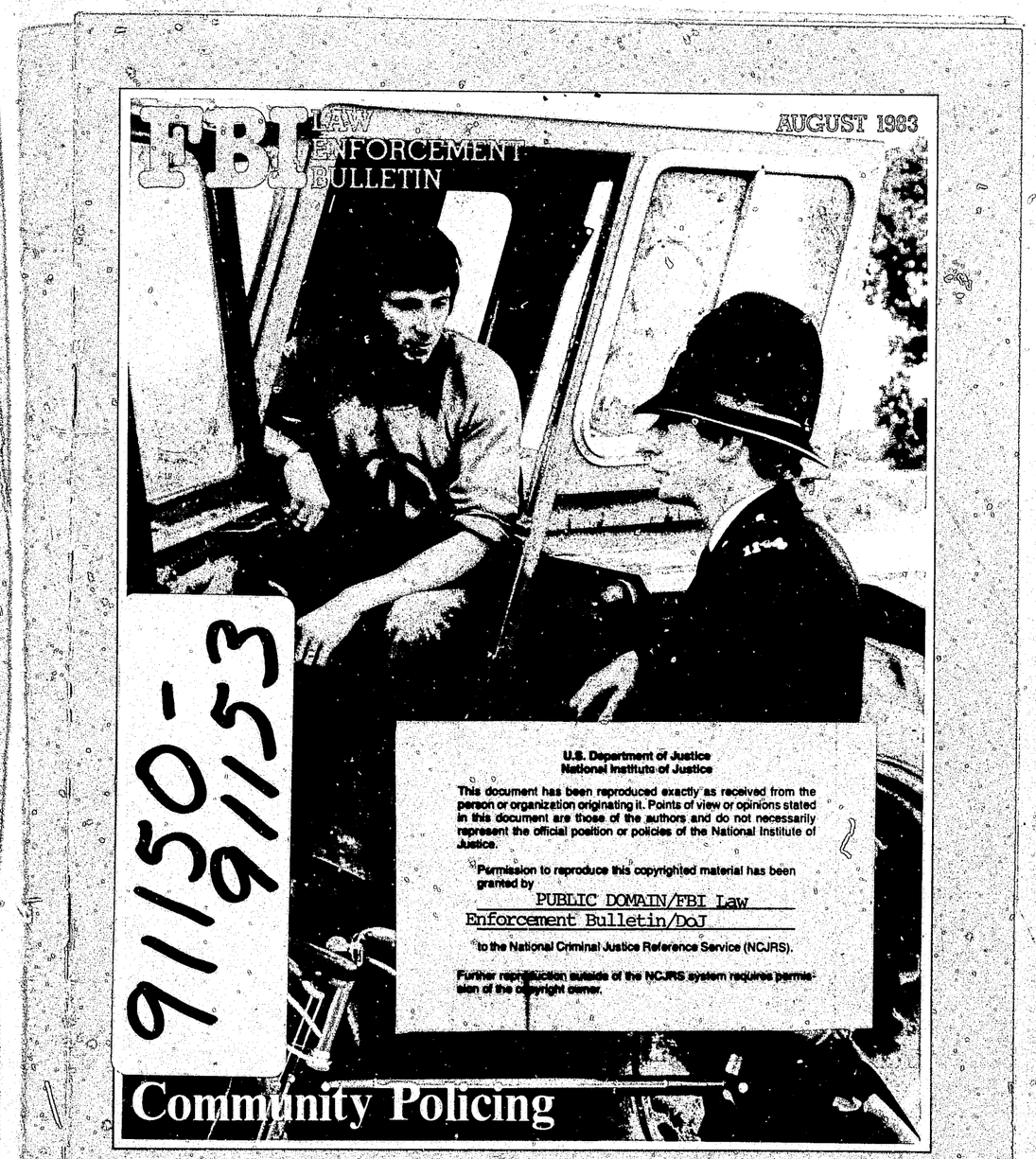

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Contents

The Cover:

Maintaining good police/public relations is an essential element of a community policing scheme. See article p. 1.

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CONFESSIONS AND THE SIXTH AMENDMENT RIGHT TO COUNSEL (Part I)

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

MASSIAH* v. *UNITED STATES [1]

THE BEGINNING

Winston Massiah and Jesse Colson were seamen on ships of the Grace Line during the late 1950's. In April 1958, customs agents received information that their ship, the S.S. Santa Maria, was scheduled to arrive in New York harbor from Chile and that it contained a shipment of cocaine. Customs agents boarded the ship when it docked and found in the "aft peak" five packages containing over 3½ pounds of cocaine.

Massiah and Colson were subsequently arrested and indicted for Federal drug violations. Following pleas of not guilty, both were released on bond pending trial. While free on bond, Colson met with customs investigator Finbarr Murphy and agreed to cooperate with the Government in its ongoing drug investigation. As part of his cooperation, Colson consented to have a portable transmitter placed under the front seat of his car.

On November 19, 1959, Massiah got in Colson's car, and Colson, following Murphy's instructions, induced Massiah to talk about the shipment of cocaine. Massiah spoke freely, and the entire conversation was overheard by Murphy, who was secreted in a nearby car equipped with a radio receiver. As a result of Massiah's admissions, several additional defendants and co-conspirators in the illicit drug operation were identified and prosecuted.

At Massiah's trial, defense counsel objected to Murphy's testimony concerning Massiah's statements in the car on grounds that the Government had obtained the statements through illegal eavesdropping and therefore in violation of Massiah's constitutional rights. The trial judge rejected this argument, allowed Murphy's testimony, and Massiah was convicted and sentenced to 9 years' imprisonment.

Massiah appealed his conviction to the Court of Appeals for the Second Circuit, restating his argument that the Government had obtained his statements in Colson's car as the result of illegal eavesdropping. However, perhaps realizing the futility of this argument in light of established legal precedent, Massiah added a new argument to his appeal by alleging that the Government had violated his sixth amendment right to the assistance of counsel by having one of its agents approach him in order to obtain incriminating statements after he had been indicted and had retained a lawyer. In support of this new argument, Massiah cited the 1959 Supreme Court decision in *Spano* v. *New York,*[2] noting that while Spano's conviction was overturned by a unanimous Supreme Court because his "will was overborne" and therefore his confession was involuntary, four justices stated they would have also

Special Agent Riley

reversed Spano's conviction on grounds that his confession was obtained as the result of police interrogation after Spano was indicted for murder and his lawyer had advised him not to answer any questions.

In a 2–1 panel decision, the second circuit rejected Massiah's arguments, ruling that the constitutional standard for the admissibility of a confession in a criminal case is voluntariness, and there was no evidence that Massiah's statements to Colson had been coerced. In rejecting Massiah's reliance on the opinions of four justices in *Spano,* the court found that a rule prohibiting the use of voluntary, highly relevant statements on grounds that they were obtained by a Government agent from an indicted defendant who had retained counsel was not required by the sixth amendment and would needlessly hamper investigations—investigations that frequently must continue beyond the indictment stage in order to ensure that everyone involved in a criminal enterprise is identified and prosecuted.[3]

On March 3, 1964, Massiah's case was argued before the Supreme Court. On May 18, 1964, in a 6–3 decision, the Court reversed Massiah's conviction and in the process created a new constitutional standard for the admissibility of confessions based on an accused's sixth amendment right "in all criminal prosecutions, . . . to have the assistance of counsel for his defense."[4] In short, the Court held that Massiah's sixth amendment right to counsel was denied when "there was used against him at his trial evidence of his own incriminatory words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."[5]

In a dissenting opinion written by Mr. Justice White, in which Justices Clark and Harlan joined, it was noted that while the sixth amendment had been interpreted to guarantee a defendant's right to the assistance of counsel, without Government interference, before and during trial, it had never before been used to exclude from evidence a defendant's voluntary pretrial admissions. Prophetically, Justice White wrote: "The importance of the matter should not be understated, for today's rule promises to have wide application well beyond the facts of this case."[6]

This article describes the development of the sixth amendment right to counsel since *Massiah,* with emphasis on the impact that this decision and decisions that followed have had on the admissibility of confessions in criminal trials.

GROWTH OF THE *MASSIAH* DOCTRINE—WHEN DOES THE RIGHT TO COUNSEL ATTACH?

The growth of sixth amendment confession law predicted by Justice White as the result of the *Massiah* decision has materialized; however, this growth was not immediate. In fact, the importance of the *Massiah* case was quickly overshadowed by the Supreme Court's landmark decision in

". . . *Massiah* had established that a voluntary confession deliberately elicited from an indicted defendant by the Government in the absence of counsel could be excluded on sixth amendment grounds. . . ."

Miranda v. *Arizona*,[7] in 1966. In *Miranda,* the Court once again stressed the requirement that confessions be voluntary before being used as evidence against a defendant. Then, in an effort to help insure voluntariness, the Court ruled that a confession obtained as the result of custodial interrogation is not admissible unless the Government first proves that before the confession was obtained, the defendant was advised of his "*Miranda* rights" and freely and voluntarily waived them. This new rule provided a powerful weapon for attacking the admissibility of confessions, and consequently, there was little development of the principle announced in *Massiah* during the late 1960's and early 1970's.

However, beginning in the 1970's, at least two trends emerged which made *Miranda* a less effective tool for defense attorneys to keep clients' out-of-court statements to the police from being used against them at trial. First, growing awareness on the part of law enforcement officers of the requirements of *Miranda* resulted in fewer violations of the rule. This was especially true of violations caused by lack of police training (e.g., complete failure to advise of rights or obtain a waiver, etc.). Second, in a series of cases beginning with *Harris* v. *New York*[8] in 1971, the Supreme Court arrested further growth in the application of the *Miranda* rule. As a result, defense attorneys were no longer as successful as they had been in the past in having their clients' out-of-court statements to the police ruled inadmissible on *Miranda* grounds.

Faced with admission at trial of clients' damaging statements—statements found to be voluntary and not violative of the *Miranda* rule—defense attorneys were forced to look elsewhere for arguments that might result in exclusion of this damaging evidence. Since *Massiah* had established that a voluntary confession deliberately elicited from an indicted defendant by the Government in the absence of counsel could be excluded on sixth amendment grounds, it was only logical that defendants would raise this argument in an attempt to have their admissions excluded. This argument worked for those defendants whose cases were factually similar to *Massiah*; however, if the incriminating statements at issue were deliberately elicited prior to indictment, *Massiah* simply would not apply unless the courts were willing to find that the sixth amendment right to counsel had attached at some earlier stage in the defendant's case.

Attachment of the Right to Counsel Before Indictment

In *Kirby* v. *Illinois,*[9] the Supreme Court reviewed a number of its prior decisions concerning the sixth amendment right to the assistance of counsel. While *Kirby* was not a confession case, attachment of the right to counsel was the major issue, and the Court ruled that the right attaches when "adversary judicial criminal proceedings" have been initiated against the defendant "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Additionally, the Court found that Kirby's warrantless arrest as the result of a "routine police investigation" did not equate with the initiation of "formal prosecutorial proceedings."[10]

After *Kirby,* a defendant who found himself in a *Massiah*-type situation no longer had to show that he had been indicted at the time his statements were deliberately elicited in order to make a sixth amendment argument. Instead, he needed to show only that at the time the statements were deliberately obtained by the Government in the absence of counsel, there had been an arraignment or preliminary hearing, an information had been filed, or he had been otherwise formally charged. Additionally, the general terrn "formal charge" used by the Court in *Kirby* allowed defendants to argue that the sixth amendment right to counsel attaches at even earlier stages than those specifically mentioned in that case.

Attachment of the Right to Counsel Based on the Filing of a Complaint and the Issuance of an Arrest Warrant

While it is generally acknowledged, based on *Kirby* and lower court decisions,[11] that the sixth amendment right to counsel does not attach as the result of a defendant's warrantless arrest, many defendants have argued that the filing of a complaint and the issuance of an arrest warrant constitute a "formal charge," so that formal prosecutorial proceedings have been initiated for sixth amendment purposes. Although the Supreme Court has not decided this issue, several lower Federal courts have, using different approaches and reaching different conclusions.

In *Robinson* v. *Zelker,*[12] the Court of Appeals for the Second Circuit was presented with the question of whether the filing of a complaint and the issuance of an arrest warrant under former section 144 of the New York Code of Criminal Procedure amounted to the initiation of adversary criminal proceedings. Holding that it did, the court stated:

> "Here the arrest warrant itself commanded that appellant be brought forthwith before the Criminal Court 'to answer the said charge, and to be dealt with according to law.' These were formal criminal proceedings, for the warrant had been signed by a judge based on an 'information upon oath' that appellant did commit the crimes of assault, robbery and possession of a dangerous weapon."[13]

As can be seen from the above, the *Robinson* court based its decision solely on the wording of the warrant itself. Nowhere in the opinion does the court indicate whether a prosecutor had authorized the filing of the complaint, assisted in its preparation, or had in any other way—formally or informally—committed the Government to prosecute the defendant. One result of *Robinson,* although probably not intended by the court, was to create an incentive for police officers not to obtain arrest warrants before taking a defendant into custody. Additionally, the possibility of this occurring is increased by the fact that arrest warrants are not constitutionally required in order to make a lawful arrest, at least where the arrest takes place in a public place.[14]

Four years later, in *United States* v. *Duvall,*[15] another three-judge panel in the Court of Appeals for the Second Circuit addressed the same issue presented in *Robinson;* however, in this case, the warrant had been issued under the Federal Rules of Criminal Procedure as the result of a Federal criminal investigation. Without articulating any differences between warrants obtained under the New York Code of Criminal Procedure and the Federal Rules of Criminal Procedure, except that under the Federal rules an affidavit, as well as a complaint, can be the basis for a warrant, the court stated: "We see no reason in principle why the filing of a complaint should be deemed to give rise to a right to counsel immediately upon arrest pursuant to warrant."[16] Significantly, the court mentioned in its opinion that an assistant U.S. attorney had assisted Secret Service agents in drafting the complaint, but this fact apparently was not given any weight by the court except for mention of the fact that the assistant who helped prepare the complaint was not the same assistant who ultimately prosecuted the case.

A different approach to this issue was taken by the Court of Appeals for the Fifth Circuit in *Lomax* v. *Alabama.*[17] In *Lomax,* the court steered clear of the formal language in the warrant itself. Instead, it analyzed the facts in light of the Supreme Court's language in *Kirby,* which explained that formal adversary proceedings are initiated when "a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."[18] Using this approach, the court found that the defendant's sixth amendment right to counsel had not attached at the time of his warrant arrest because the prosecutor was not aware of the arrest and had not involved himself in the investigation by helping to draft the complaint or obtain the warrant. The court made it clear, however, that if there had been evidence in the case that the prosecutor had been involved in the investigation or had in any other way evidenced his commitment to prosecute, the result might have been different.

In *Lomax,* the court's focus on prosecutor involvement to determine whether formal adversary proceedings have been initiated raises several

". . . the right to counsel . . . attaches when 'adversary judicial criminal proceedings' have been initiated against the defendant 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' "

problems. For example, many police departments do not have in-house legal counsel, and therefore, rely on prosecutors to assist in drafting complaints or to review complaints drafted by police officers to ensure that they establish probable cause. If this involvement is viewed as the initiation of formal adversary proceedings, even though the prosecutor's assistance has in no way committed the Government to prosecute, police officers may forgo such assistance, thereby increasing the chances that the complaint will later be found deficient, thus invalidating the arrest warrant. In the past, when arrest warrants were invalidated, the Government could attempt to prevent exclusion of evidence seized incident to the arrest by arguing that the arrest was still valid as a lawful warrantless arrest. However, in light of *Payton* v. *New York,*[19] which requires that absent emergency or consent a police officer must have a valid arrest warrant in order to enter a subject's residence to make an arrest, it is more likely today that loss of the arrest warrant will result in suppression of evidence.

A second problem raised by *Lomax* results from the court's determination that while a prosecutor's assistance is evidence that a case has moved from the investigative to prosecutive stage, the exercise of prosecutorial discretion almost certainly establishes the initiation of formal adversary proceedings for sixth amendment purposes. This is troublesome because commonsense dictates that prosecutors who assist police officers in drafting complaints or review police-drafted complaints, for legal sufficiency, are going to look at these cases in terms of their prosecutive merit. If the prosecutor determines that the case does not meet that jurisdiction's prosecutive guidelines, there is no longer any purpose to be served by filing the complaint, and the police officer can use the prosecutor's opinion as the basis for closing the case. The result is that the subject is spared the embarrassment of being arrested, and scarce police resources can be channeled to other cases. On the other hand, a prosecutor's authorization or acquiescence in the filing of a complaint may only evidence his determination that probable cause exists, and the case has prosecutive potential. Since many of these cases may never actually get to the prosecution stage, it is questionable whether the exercise of this type of prosecutorial discretion should be viewed as initiating formal adversary proceedings.

Finally, the *Lomax* court's heavy reliance on prosecutor involvement for determining when formal adversary proceedings have been initiated leaves room for defendants to argue that if a prosecutor has provided assistance and advice to the police during an investigation, formal adversary proceedings should be deemed to have been initiated at that point, regardless of whether the defendant has been arrested or otherwise charged at the time the alleged sixth amendment violation occurred.[20]

A review of the cases suggests that the question of whether the filing of a complaint and the issuance of an arrest warrant initiates formal adversary proceedings should only be decided after a court has analyzed (1) the role that the complaint and warrant play in that jurisdiction's criminal justice system, and (2) the nature and scope of any prosecutor involvement in the case. Finally, decisions which hold that a defendant's sixth amendment right to counsel attaches at an early stage in a criminal case, with the greater risk that the defendant's voluntary statements may not be admissible if obtained after that stage, make it more difficult for the Government to convict defendants of crimes. Difficulty on the part of the Government in obtaining a conviction does not justify, in and of itself, a narrow interpretation of the sixth amendment right to counsel; however, the impact of early attachment on society as a whole is an important factor which should be weighed by the courts before they rule in this very difficult area of the law.

Attachment of the Right to Counsel as the Result of a Defendant's First Appearance Before a Judicial Officer

As mentioned earlier, the Supreme Court has not decided whether the filing of a complaint and the issuance of an arrest warrant initiates formal adversary proceedings. However, in *Brewer* v. *Williams,*[21] the Court did rule that formal adversary proceedings had been initiated where the defendant was arrested and "arraigned" on a warrant and then committed to jail. At his arraignment, Williams was made aware of the charges contained in the warrant and advised of his *Miranda* rights. Bail also was discussed. It would appear that the Court's decision in *Brewer* was in line with its previous holding in *Kirby* that formal adversary proceedings are initiated at arraignment. However, the decision in *Kirby* was based on the Court's prior ruling in *Powell* v. *Alabama,*[22] a case which involved an arraignment on an indictment where Powell was required to enter a plea. Because of this, it could be argued that a judicial appearance like the one afforded Williams—where the defendant does not enter a plea, testimony is not taken, and defenses are not waived—should not be viewed as initiating formal adversary proceedings, at least in the absence of the other factors relied on by the Court in *Brewer,* i.e., issuance of a warrant and commitment of the defendant to jail.[23]

While this argument appears to have some validity, the Court's failure to discuss prosecutor involvement in *Brewer,* coupled with the fact that Williams' postarrest hearing was unremarkable in its scope and content, may require police legal advisers to read *Brewer* as holding that formal adversary proceedings are initiated once a defendant has had his first appearance before a judicial officer. This would be true regardless of what actually took place at the appearance, or whether the appearance was based on a warrantless arrest or resulted in the defendant being released on bond.

Attachment of the Right to Counsel to Offenses for Which the Defendant Has Not Been Formally Charged

An issue raised by the *Massiah* decision, but not answered in that case, is whether incriminating statements obtained by Government informants from defendants who have been formally charged can be excluded on sixth amendment grounds when the information that is obtained relates to offenses other than those for which they have been charged. For example, assume Colson's efforts to obtain incriminating statements from Massiah concerning the cocaine shipment for which he had already been indicted were unsuccessful, but Massiah did make incriminating statements concerning a second shipment of cocaine that was scheduled to arrive in New York harbor shortly, or his plan to bribe a juror at his upcoming trial.

Analysis of these questions begins with the *Massiah* decision itself, where the Court excluded Massiah's statements based on the facts in that case, but agreed with the Government's position that it was entirely proper to continue the investigation of the suspected criminal activities of Massiah even though he had already been indicted.

Two Federal circuit courts of appeals that have addressed the problem of continuing criminal activity have ruled that the sixth amendment right to counsel only applies to those matters for which the defendant has been formally charged.[24] Therefore, it would appear that in these jurisdictions, the statements in our hypothetical would be admissible at a later trial on these new charges. On the other hand, some courts have criticized the use of a *per se* rule and have rejected it in favor of an approach that requires the court to take into account such factors as how and why the incriminating statements were obtained and the relationship, if any, between the new crimes and the ones for which the defendant had already been formally charged.[25]

Regardless of the approach used, most courts agree that if the incriminating statements pertain to criminal acts that took place after the initiation of formal adversary proceedings on the original charges, and these criminal acts are unrelated to the original charges, the sixth amendment right to counsel does not apply, and the statements are admissible at the trial on these separate offenses. The rationale is simply that a defendant does not have a sixth amendment right to the assistance of counsel while committing a crime.[26] Since the plan to bribe a juror in our hypothetical is totally unrelated to the original charge, the statement concerning the plan

". . . if the incriminating statements pertain to criminal acts that took place after the initiation of formal adversary proceedings on the original charges, and these criminal acts are unrelated to the original charges, the sixth amendment right to counsel does not apply. . . ."

would likely be admissible in a later prosecution for that crime. Additionally, the prosecutor would argue that the statement concerning the second shipment of cocaine also constituted a separate offense, and therefore, should also be admissible in a later prosecution for that offense. However, unlike the bribery statement, the statement concerning the second shipment of cocaine is not totally unrelated to the original case.

The problem of related offenses was recently addressed by the Court of Appeals for the Fifth Circuit in *United States* v. *Capo.*[27] In *Capo,* the court was presented with a case where following his being formally charged for simple possession of marihuana, the defendant and his brother were approached by a Government informant who deliberately elicited incriminating statements. These statements resulted in the Government dropping the simple possession charge and replacing it with an indictment for conspiracy and possession of marihuana with intent to distribute. The defendant argued that his sixth amendment right to counsel, which had attached as the result of his having been formally charged for simple possession, carried over to the new charges—charges that the defendant argued were not separate and distinct from the original charge. The court rejected the defendant's argument and ruled that while the simple possession charge was somewhat related to the conspiracy and possession with intent to distribute offenses later charged, it was a tenuous relationship since the evidence in the simple possession case, marihuana residue found in the defendant's van, was not used in the trial on the subsequent charges. In a dissent, Chief Judge Godbold saw a much closer relationship between the two charges and argued that the Government should not be allowed to use the statement as evidence of an ongoing crime, conspiracy, where it is the Government that keeps the conspiracy going by arranging a meeting between the defendant and an informer.[28]

Based on the majority opinion in *Capo,* the incriminating statement in our hypothetical concerning the second shipment of cocaine would probably be admissible in the fifth circuit at a subsequent trial on that offense; however, other courts have focused on the purpose behind the deliberate elicitation in the first place, and in these jurisdictions, admissibility could be a problem.

In *United States* v. *Moschiano,*[29] the Court of Appeals for the Seventh Circuit ruled that it would closely scrutinize situations where the Government deliberately elicits postindictment statements from a defendant in order to determine the Government's reason for engaging in this activity. If, following review, the court determines that the incriminating statements evidencing continuing criminal activity were obtained as the result of a *bona fide* investigation aimed at these additional offenses, the statements would be admissible at later trials based on these new charges. However, the court noted that if its review determined that Government agents had engineered the activities that resulted in the incriminating statements for the purpose of obtaining evidence to use against the defendant at the trial on the charges that were already pending, the statements would not be admissible, regardless of how unrelated or separate the offenses were. Using this approach, the statements attributed to Massiah in our hypothetical would be inadmissible if the purpose behind Colson's meeting with Massiah was to obtain incriminating statements concerning the crime for which he had already been charged.

The *Moschiano* decision warrants one further observation. The issue in most cases where incriminating statements have been elicited concerning continuing criminal activity and separate offenses is whether these statements are admissible at later trials based on these separate violations. However, in *Moschiano,* the Government had used the statements concerning the separate offense, Moschiano's agreement to sell $50,000 worth of Preludin tablets to an undercover agent after he had already been indicted for distributing heroin, at the trial on the original heroin charges to evidence Moschiano's predisposition and thereby negate his entrapment defense. The court found no error in the use of the statements for this purpose since the postindictment statements concerning the Preludin involved a separate offense, and the independent Preludin investigation had been conducted in good faith and not for the purpose of eliciting incriminating responses for use at the defendant's trial on the heroin charges.[30]

FBI

(Continued next month)

Footnotes

[1] 377 U.S. 201 (1964).
[2] 360 U.S. 315 (1959).
[3] 307 F.2d 62, 66 (2d Cir. 1962).
[4] U.S. Const. amend. VI.
[5] 377 U.S. 201, 206 (1964).
[6] *Id.* at 208.
[7] 384 U.S. 436 (1966).
[8] 401 U.S. 222 (1971); *Michigan* v. *Tucker,* 417 U.S. 433 (1974); *Beckwith* v. *United States,* 425 U.S. 341 (1976); *Oregon* v. *Mathiason,* 429 U.S. 492 (1977).
[9] 406 U.S. 682 (1972) (plurality opinion).
[10] *Id.*
[11] *Id. See also, Caver* v. *Alabama,* 577 F.2d 1188 (5th Cir. 1978); *Jacks* v. *Duckworth,* 651 F.2d 480 (7th Cir. 1981), *cert. denied,* 102 S.Ct. 1010 (1982).
[12] 468 F.2d 159 (2d Cir. 1972).
[13] *Id.* at 163.
[14] *Payton* v. *New York,* 445 U.S. 573 (1980).
[15] 537 F.2d 15 (2d Cir. 1976), *cert. denied,* 426 U.S. 950 (1977).
[16] *Id.* at 22.
[17] 629 F.2d 413 (5th Cir. 1980).
[18] *Kirby* v. *Illinois,* 406 U.S. 682, 689 (1972) (plurality opinion).
[19] 445 U.S. 573 (1980).
[20] *See, United States* v. *Jamil,* 546 F.Supp. 646 (E.D.N.Y. 1982), *rev'd,* No. 82-1237 (2d Cir. May 2, 1983).
[21] 430 U.S. 387 (1977).
[22] 287 U.S. 45 (1932).
[23] *See, McGee* v. *Estelle,* 625 F.2d 1206 (5th Cir. 1980).
[24] *Boyd* v. *Henderson,* 555 F.2d 56 (2d Cir. 1977), *cert. denied,* 434 U.S. 927 (1978); *Sanchell* v. *Paratt,* 530 F.2d 286 (8th Cir. 1976).
[25] *Saltys* v. *Adams,* 465 F.2d 1023 (2d Cir. 1972); *United States* v. *Merritts,* 527 F.2d 713 (7th Cir. 1975); *United States* v. *Anderson,* 523 F.2d 1192 (5th Cir. 1975); *Grieco* v. *Meachum,* 533 F.2d 713 (1st Cir. 1976); *United States* v. *Capo,* 693 F.2d 1330 (11th Cir. 1982) (rehearing en banc granted 3/3/83); *United States* v. *Moschiano,* 695 F.2d 236 (7th Cir. 1982).
[26] *United States* v. *Moschiano,* 695 F.2d 236 (7th Cir. 1982).
[27] *United States* v. *Capo,* 693 F.2d 1330 (11th Cir. 1982) (rehearing en banc granted 3/3/83).
[28] *Id.* at 1340.
[29] 695 F.2d 236 (7th Cir. 1982).
[30] *Id.*

END