Journal of Criminal Law and Criminology

Volume 71
Issue 4 *Winter*

Article 17

Winter 1980

Sixth Amendment--Massiah Revitalized

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0091-4169/80/7104-0601$02.00/0
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 71, No. 4
Printed in U.S.A.

SIXTH AMENDMENT—*MASSIAH* REVITALIZED

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

During the past term, the United States Supreme Court established a new test to determine whether government activity has violated an indicted defendant's sixth amendment right to the assistance of counsel.[1] In *United States v. Henry*,[2] the Court held that by having the defendant's cellmate act as a paid, undisclosed informant while the defendant was in custody and under indictment, the government intentionally created a situation "likely to induce"[3] the defendant to make incriminating statements without the assistance of counsel in violation of his rights under *Massiah v. United States*.[4]

With the formulation of this new test, the Court clarified the degree of governmental interference necessary to invoke the right to counsel, indicating that a lesser degree of wrongful governmental conduct was necessary to invoke the right than was required under the Court's previous interpretations of *Massiah*. In addition, the Court's application of this new test seemed to indicate that it would be more willing to find a violation of a defendant's sixth amendment rights under the *Henry* test than it would be to find a violation of fifth amendment protections utilizing a similar test.

I. BACKGROUND

Defendant Henry was arrested and indicted by a federal grand jury for the armed robbery of a Virginia bank and was held pending trial in the Norfolk City Jail. Shortly after Henry was incarcerated, federal agents contacted Edward Nichols, an inmate housed in Henry's cellblock. For some time prior to this contact, the Federal Bureau of Investigation had employed Nichols as a paid informant. The agent told Nichols to pay attention to any statements made by Henry or other federal prisoners in the cellblock, but not to initiate conversation with Henry or question him regarding the bank robbery.[5] Several weeks later, after Nichols had been released, he reported that he had had " 'an opportunity to have some conversations with Mr. Henry while he was in the jail' "[6] and that Henry had made incriminating statements to Nichols.

Nichols' testimony as to Henry's incriminating statements was admitted at Henry's trial,[7] and he was subsequently convicted of bank robbery and sentenced to twenty-five years in prison. He appealed, raising no sixth amendment claims, and the Fourth Circuit affirmed his conviction.[8] The Supreme Court denied certiorari.[9]

Henry then moved to vacate his sentence pursuant to 28 U.S.C. § 2255,[10] contending that the admission of Nichols' testimony violated his sixth amendment right to the assistance of counsel. He alleged that he had been intentionally placed in the same cell with Nichols so that Nichols could obtain information about the robbery. The district court denied the motion without a hearing. The court of appeals, however, reversed and remanded for an evidentiary inquiry into whether Nichols was acting as a government agent when he conversed with Henry.[11]

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

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

[3] *Id.* at 2189.

[4] 377 U.S. 201 (1964). In *Massiah*, the Court held that the admission of the defendant's incriminating statements, which federal agents had deliberately elicited from him in the absence of his counsel after he had been indicted, violated the defendant's sixth amendment rights.

[5] 100 S. Ct. 2184.

[6] Whether Nichols or Henry instigated these conversations is unclear. However, in an affidavit submitted by the F.B.I. agent who contacted Nichols, the agent stated, "I recall telling Nichols not to initiate any conversations with Henry .... " *Id.* at 2186.

[7] Nichols testified at trial that Henry had told Nichols that he had on several occasions gone to the bank to see which employees opened the vault. He also testified that Henry had described the details of the robbery to him. *Id.* at 2185.

[8] 483 F.2d 1401 (4th Cir. 1973).

[9] 421 U.S. 915 (1975).

[10] That section provides in relevant part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States ... may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255 (1976).

[11] Henry v. United States, 551 F.2d 306 (4th Cir. 1977).

Following the evidentiary inquiry, the district court again denied Henry's motion. The Fourth Circuit again reversed and remanded,[12] however, finding that the undisclosed government monitoring of Henry while he was in custody and under indictment violated his sixth amendment right to the assistance of counsel under *Massiah*.[13]

The Supreme Court, in an opinion by Chief Justice Burger, affirmed. The *Henry* majority also relied heavily on *Massiah* where the Court held the admission of a defendant's incriminating statements, which federal agents had "deliberately elicited" from him after indictment and in the absence of his counsel, violated the defendant's sixth amendment right to counsel.[14] In finding that the government "deliberately elicited" incriminating statements from Henry within the meaning of *Massiah*, the Court emphasized three specific factors. "First, Nichols was acting under instructions as a paid informant for the government; second, Nichols ostensibly was no more than a fellow inmate of Henry's; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols."[15] From these three factors, the Court concluded that the government intentionally created a situation "likely to induce"[16] Henry to make incriminating statements in the absence of counsel, and that as a consequence the government had violated the prohibition of *Massiah*.

Since the government was to pay Nichols for producing information, the Court seemed to conclude that this would lead to more vigorous attempts by Nichols to obtain statements from Henry.[17] It stated that "[e]ven if the agent's statement is accepted that he did not intend that Nichols would take affirmative steps to secure incriminating information, he must have known that such propinquity likely would lead to that result."[18]

In considering the effect of Nichols' undercover status, the Court considered the government's position that a more lenient sixth amendment standard should be applied when the accused has made incriminating statements to an undisclosed informant than when the accused has spoken in the presence of known government officers. The Court implied that the rationale for this argument was that the accused is under less inherent pressure to incriminate himself when he thinks he is speaking, not to an agent of the government, but to a fellow prisoner.[19]

Rejecting the government's argument, Chief Justice Burger pointed out that when speaking to an undercover informant, the accused may be *more* likely to disclose information that he would not intentionally reveal to a known government agent.[20] As the Chief Justice further noted, the *Massiah* Court had itself pointed out that Massiah was "more seriously imposed upon because he did not even know that he was under interrogation by a government agent."[21] In discussing Henry's custody at the time he made his incriminating statements to Nichols, the Court utilized the rationale of *Miranda v. Arizona*.[22] In *Miranda*, the Court held that the statements of an accused which stem from his custodial interrogation will not be admissible against him unless the prosecution can demonstrate the use of procedural safeguards to protect the accused's privilege against self-incrimination.[23] As

[12] 590 F.2d 544 (4th Cir. 1978).

[13] *Id.* at 547 (citing Massiah v. United States, 377 U.S. 201). In *Massiah*, the petitioner had been indicted for possession of narcotics when he was released on bail. Subsequently, and unknown to Massiah, a codefendant, Colson, decided to cooperate with the government in its continuing investigation into the illegal narcotics activities with which Massiah and Colson had been charged. Colson allowed a federal agent to install a radio transmitter in Colson's car, enabling the agent to overhear conversations carried on in the vehicle. Colson then proceeded to converse with Massiah while seated in the parked car. During this conversation, Massiah made several incriminating statements. The agent, parked in a car down the street, overheard the entire conversation and testified as to Massiah's incriminating statements at the trial. Curiously, the Court did not discuss what Colson said or how he said it during the course of this conversation. Evidently, the Court considered Colson's conduct to be irrelevant.

[14] 377 U.S. at 206.

[15] 100 S. Ct. at 2186.

[16] *Id.* at 2189.

[17] The majority stated that Nichols was to be paid on a contingent fee basis; therefore he would be compensated only if he produced useful information. *Id.* at 2187. However, Justice Blackmun disagreed that such an arrangement existed. *Id.* at 2193 (Blackmun, J., dissenting).

[18] *Id.* at 2187. As the quote indicates, the majority took the position that Nichols somehow deliberately used his position to secure incriminating information from Henry. Nowhere in the opinion, however, does the Court indicate exactly what conduct Nichols engaged in in order to do so.

[19] 100 S. Ct. at 2188.

[20] *Id.*

[21] *Id.* (citing Massiah v. United States, 377 U.S. at 207).

[22] 384 U.S. 436 (1966).

[23] These procedural safeguards are embodied in the now famous *Miranda* warnings: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the

the Court recognized in *Miranda*, the very atmosphere associated with custodial interrogation is likely to compel the accused to speak.[24]

Thus, the *Henry* Court noted that "the mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover government agents."[25] The Court specifically stated, however, that it did not intend to make custody a prerequisite to the applicability of the right to counsel under *Massiah*; rather, the fact of Henry's custody constituted a factor in determining whether the government had engaged in the "deliberate elicitation" of his incriminating statements.[26]

Finally, the Court held that waiver of the right to counsel by Henry did not constitute an issue for resolution, since he could not knowingly and voluntarily have waived his rights when speaking to an individual whom he did not know to be an agent of the government.[27]

Justice Powell filed a concurring opinion to clarify his position in light of the particular facts of *Henry*. He viewed as crucial to the decision the majority's finding that Nichols had "deliberately used his position to secure incriminating information from Henry."[28] In his view, "the mere presence of a jailhouse informant who had been instructed to overhear conversations and to engage a criminal defendant in some conversations would not necessarily be unconstitutional."[29] Powell also noted that the case was made difficult by the lack of an evidentiary hearing on the *Massiah* claim. However, it is clear that he felt the finding that Henry's incriminating statements were not wholly spontaneous was essential to the Court's holding.[30]

Justices Blackmun and Rehnquist filed dissenting opinions in *Henry*. Justice Blackmun, with whom Justice White joined, argued that not only did the majority engage in an undue expansion of *Massiah* with its "likely to induce" test, but that it had also misapplied the new test.[31] Justice Blackmun contended that the *Massiah* rule covers "only action undertaken with the specific intent to evoke an inculpatory disclosure."[32] Thus, he reasoned that since the federal agent who had contacted Nichols had specifically instructed him not to initiate conversations with or question Henry about the robbery, this requisite intent was absent. Justice Blackmun regarded the majority's test as an expansion of sixth amendment rights, which also resulted in broadening of the exclusionary rule to encompass a violation of those rights. Justice Blackmun stressed the lack of congruence of the facts of *Henry* with the goals sought to be furthered by the exclusionary rule. In this regard, he noted that Henry's statements were unquestionably voluntary, that the condemned police conduct was not what he would regard as culpable, and that the government's actions did not violate any "canons of fairness."[33]

Finally, Justice Blackmun argued that the majority had misapplied its own test to the facts of the case. He interpreted the majority's test to be a two-pronged one, requiring not only a showing that the government created a situation "likely to induce" the defendant to make incriminating statements, but also that the informant in fact had "prompted" the defendant.[34] Justice Blackmun argued that the facts of *Henry* satisfied neither prong of this test.

Justice Rehnquist also disagreed with the majority's interpretation of the facts of the case. However, he devoted most of his opinion to an argument that *Massiah* itself should be completely reevaluated.[35] In his view, the sixth amendment's guarantee of the right to counsel requires the presence of counsel only if the event is one that "requires knowledge of legal procedure, involves a communication between the accused and his attorney concerning investigation of the case or the preparation of a defense, or otherwise interferes with the attorney-client relationship."[36] Justice Rehnquist also noted that the policies underlying the exclu-

presence of an attorney, either retained or appointed." *Id.* at 444.

[24] "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak." *Id.* at 461.

[25] 100 S. Ct. at 2188.

[26] *Id.* at 2188 n.11.

[27] *Id.* at 2188. This issue was not discussed at length by the Court, nor was it treated at all by the lower court, since the point was not disputed. The Fourth Circuit noted in its opinion that the government did not contend that Henry had waived his right to counsel at the time of his conversations with Nichols. 590 F.2d at 545 n.1.

[28] 100 S. Ct. at 2187.

[29] *Id.* at 2190 (Powell, J., concurring).

[30] "I could not join the Court's opinion if it held that the mere presence or incidental conversation of an informant in a jail cell would violate *Massiah*." *Id.*

[31] *Id.* at 2193 (Blackmun, J., dissenting).

[32] *Id.* at 2191 (Blackmun, J., dissenting).

[33] *Id.* at 2192.

[34] *Id.* at 2193.

[35] *Id.* at 2197 (Rehnquist, J., dissenting).

[36] *Id.* at 2199 (Rehnquist, J., dissenting).

sionary rule did not justify the result reached in *Henry*.[37]

II. The New Objective Standard

The significance of *Henry* regarding the sixth amendment right to counsel lies in the new standard which it promulgates to determine whether certain governmental activity violated an indicted defendant's right to counsel. In *Massiah*, the Court first prohibited the government from introducing at trial incriminating statements deliberately elicited from an indicted defendant in the absence of counsel.[38] Although the *Massiah* Court did not explicitly indicate whether the test of elicitation was objective or subjective, the Court's "deliberately elicited" language implies that the subjective intent of the government agent constituted a relevant factor. In contrast, the *Henry* Court's formulation of the "deliberately elicited" test constitutes an objective, rather then a subjective standard. Thus, the test focuses not on the government's subjective intent in engaging in a particular activity, but rather on an objective evaluation of the likely consequences of that activity, presumably the evaluation of a reasonable person.

By holding that Henry's rights were violated because the government had intentionally created a situation "likely to induce" Henry to make incriminating statements, the Court indicated that the subjective intent of the government agent in instructing Nichols to report anything he heard was irrelevant. The *Henry* test apparently prohibits the government from engaging in any conduct which is likely to result in an incriminating response from the defendant. This approach appears to constitute an expansion of recent interpretations of the right to counsel rule under *Massiah*.

An expansive reading of *Massiah* accords with early opinions advocating the right to counsel rule later mandated in *Massiah*. In *Spano v. New York*,[39] four justices in two concurring opinions laid the groundwork for what was later to become the *Massiah* rule.[40] Justices Douglas and Stewart wrote dissenting opinions which advanced the view that once adversary proceedings have been initiated against an individual, his right to the assistance of counsel should attach. The facts of that case were decidedly more extreme than those of *Henry* in that a confession was obtained from defendant Spano after an eight-hour, all-night questioning session and false pleas from a police officer friend. In *Spano*, neither Justice Douglas nor Justice Stewart predicated the attachment of the right to counsel upon the deliberateness of police interrogation. In fact, Justice Stewart strongly suggested a per se rule against the admissibility of any confession obtained in the absence of counsel from a defendant under indictment.[41] Thus, the early concept of the *Massiah* rule was broader than even the *Henry* test, since the *Spano* dissent urged per se exclusion regardless of whether the government objectively or subjectively sought by its conduct to obtain incriminating information.

However, in *Brewer v. Williams*,[42] the Court appeared to narrow the scope of the right to counsel under *Massiah* by stating that right was violated only when the government engaged in interrogation. Justice Blackmun relied on this aspect of *Brewer* to contend in his *Henry* dissent that "deliberate elicitation" entails purposeful police action.[43] In *Brewer*, the Court found a violation of the defendant's sixth amendment right to the assistance of counsel when a police detective, in the absence of Williams' lawyer, "deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him."[44]

In *Brewer*, the Court's discussion of the subjective intentions of the detective was directed at determining whether the "Christian burial speech"[45] was tantamount to formal interrogation. The *Brewer* Court indicated that the defendant's right to counsel under *Massiah* was not violated unless the police had in fact "interrogated" him.[46]

[37] *Id.* at 2200.

[38] 377 U.S. at 207.

[39] 360 U.S. 315 (1959).

[40] *Id.* at 324, 325 (Douglas, J., concurring); *id.* at 326, 327 (Stewart, J., concurring).

[41] Justice Stewart states at the outset that "the absence of counsel when this confession was elicited was alone enough to render it inadmissible under the Fourteenth Amendment." 360 U.S. at 326 (Stewart, J., concurring).

[42] 430 U.S. 387 (1977).

[43] 100 S. Ct. at 2191.

[44] 430 U.S. at 392–93.

[45] The "Christian burial speech," as it has been termed, refers to remarks made by the detective to the defendant during a lengthy car ride from Davenport, Iowa, where Williams had turned himself in, back to Des Moines, the scene of the crime. The officer, who knew that Williams was a former mental patient and a deeply religious individual, sought to obtain incriminating statements from Williams by telling him that the parents of the 10-year-old girl whom he had abducted were entitled to a Christian burial for their daughter and that they should therefore try to locate the body while they were on the way back to Des Moines. *Id.* at 392.

[46] As the Court stated, "[N]o such constitutional pro-

This interrogation requirement constituted an unprecedented and anomalous development in the sixth amendment right to counsel area.[47] Nothing in the Court's opinion in *Massiah* indicated that Massiah had been interrogated, nor that such a finding was essential in order for his right to counsel to attach. A finding that "interrogation" had occurred would of course have been a prerequisite to a holding that Williams' statements were inadmissible under *Miranda v. Arizona*, since Williams had effectively asserted his right to counsel by retaining attorneys.[48] Thus, any further interrogation would have violated Williams' fifth amendment rights under *Miranda*.[49]

The *Brewer* Court's emphasis on interrogation in its *Massiah* analysis led lower courts to interpret *Brewer* as requiring a greater showing of affirmative action by the government than was originally contemplated in *Massiah*. One illustration of such an interpretation is *Wilson v. Henderson*,[50] in which the Second Circuit held that incriminating admissions which a defendant made to his cellmate, who had previously agreed with the police to act as an informant, were properly admitted at the defendant's trial. Wilson's cellmate, like Nichols, had been instructed not to inquire or to question Wilson, but to "keep his ears open"[51] for information which would lead to the apprehension of Wilson's accomplices. When Wilson subsequently told the informant the same story that he had told the authorities, the informant replied "that the story did not sound too good."[52] Eventually, however, Wilson confessed his complicity in the robbery and murder to the informant.

In holding that the defendant's statements to his cellmate were properly admitted, the court of appeals viewed *Brewer* as a restrictive interpretation of *Massiah*. It framed its analysis in terms of "interrogation," and stated that "[t]he complete absence of interrogation in this case negates the proposition that Wilson's statement was deliberately elicited."[53] In light of the Supreme Court's decision in *Henry*, however, the lower court's decision may well have gone the other way.

The *Henry* Court did not explain the emphasis which it had placed on interrogation in *Brewer*; rather, the Court merely stated that "we are not persuaded, as the Government contends, that *Brewer v. Williams* ... modified *Massiah*'s 'deliberately elicited' test."[54] However, the *Henry* majority plainly rejected "interrogation" as a prerequisite for the attachment of the sixth amendment right to counsel, since it did not so much as mention interrogation in its decision. This rejection properly interprets *Massiah* since *Massiah* did not require interrogation for the right to counsel to attach. The Court's de-emphasis of interrogation will now indicate to the lower courts that the right to counsel applies even in the absence of a finding of "interrogation."[55]

The Court in *Henry* thus reaffirmed the continuing vitality of *Massiah* and rejected the restrictive interpretation cast upon the *Massiah* rule by *Brewer*.[56] The *Henry* Court chose to revitalize *Massiah* despite the strong dissent of Justice Rehnquist, who argued that *Massiah* itself was "fundamentally inconsistent with traditional notions of the role of the attorney that underlie the Sixth Amendment

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tection would have come into play if there had been no interrogation." *Id.* at 400. The Court further stated that "the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government *interrogates* him. *Id.* at 401 (emphasis added).

[47] *See* Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is Interrogation? When Does It Matter?*, 67 GEO. L.J. 1 (1978). Professor Kamisar stated that "the transformation of *Williams* from a *Miranda* case to a *Massiah* one would have been a good deal more understandable if the *Williams* court found not only 'no need to review the *Miranda* doctrine' but no need to consider whether 'the speech' constituted 'interrogation' either." *Id.* at 32–33 (footnote omitted).

[48] Brewer v. Williams, 430 U.S. at 405.

[49] Miranda v. Arizona, 384 U.S. at 444–45.

[50] 584 F.2d 1185 (2d Cir. 1978), *cert. denied*, 442 U.S. 945 (1979).

[51] *Id.* at 1187.

[52] *Id.*

[53] *Id.* at 1190.

[54] 100 S. Ct. at 2187.

[55] Such decisions as United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978), would probably result differently after *Henry*. In *Hearst* the Court found no violation of appellant's sixth amendment right to the assistance of counsel when a tape recording of her conversation with a jail visitor was admitted at trial because "there was no interrogation of her—either formally or surreptitiously—by the government." *Id.* at 1348.

[56] Judge Oaks, dissenting in *Wilson*, set forth what may have been the proper interpretation of the interrogation language in *Brewer*.

> [T]he Court must be using 'interrogation' to mean *both* formal interrogation and 'deliberate eliciting'.... The 'interrogation' language may be ill-chosen, but the Court's statement that 'the clear rule of *Massiah* is that the right to counsel attaches when the State 'interrogates' could not by any stretch of the imagination be interpreted as a *limitation* of *Massiah*.

584 F.2d at 1194 n.10 (Oaks, J., dissenting).

right to counsel."[57] He maintained that the traditional concerns underlying the right to counsel are to assist the layman in arguing the law, to aid in coping with complex legal procedure, and to minimize the imbalance that results when the unaided defendant is opposed by a trained prosecutor.[58] Justice Rehnquist argued that none of these objectives mandated the presence of counsel when Henry carried on his conversations with Nichols. In Justice Rehnquist's view, the sixth amendment does not prohibit the government from making any effort to obtain incriminating evidence from an accused when his counsel is not present.[59]

In support of his argument, Justice Rehnquist cited several cases in which the Court held that the sixth amendment does not require the presence of counsel when the government engages in particular activities. In *United States v. Ash*,[60] the accused was denied the right to have his counsel present during a postindictment photographic display which was conducted in order to allow a witness to identify the offender. In that case, the Court perceived no need for the presence of counsel, because "no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary."[61]

Similarly, in *Gilbert v. California*[62] the Court held that the taking of a handwriting exemplar in the absence of the defendant's counsel did not violate the defendant's rights, since "there is a minimal risk that the absence of counsel might derogate from his right to a fair trial."[63]

These cases are easily distinguishable from *Henry* because the presence of counsel during the governmental activity in both *Ash* and *Gilbert* would not have made any difference in the defendant's conduct. The handwriting of the defendant in *Gilbert* would be unaffected by the presence or absence of counsel, as would the ability of the witness in *Ash* to identify the offender. In *Henry*, however, the presence of counsel would have affected the defendant's behavior during the time that Henry carried on his conversations with Nichols, since counsel would certainly have told him to remain silent. In Henry's case, a distinct possibility did exist that he may have been "misled by his lack of familiarity with the law or overpowered by his professional adversary."[64]

Thus, Justice Rehnquist's interpretation of the sixth amendment is too narrow. The *Henry* Court's decision to reaffirm *Massiah* and the right to counsel was consistent with the traditional policies and concerns of the sixth amendment.

III. Application of the "Likely to Induce" Standard

When read in the light of the Court's recent opinion in *Rhode Island v. Innis*,[65] *Henry* may also indicate a willingness by the Court to construe liberally the "likely to induce" standard under *Massiah* in comparison to the narrower construction of a similar objective standard the Court utilizes to determine whether governmental conduct violates *Miranda*. The *Henry* Court found that the government's use of an undercover cellmate informant was "likely to induce" Henry's incriminating disclosures in violation of his rights under *Massiah*, despite the complete lack of any evidentiary inquiry into what was said and by whom to indicate the degree of the government's interference. In contrast, the Court in *Innis* held, under a similar objective test and in the face of arguably more elicitous police conduct, that there had been no violation of the defendant's fifth amendment rights under *Miranda*.

Both *Innis* and *Henry* promulgated objective tests to determine whether the government had violated the respective defendants' rights. The *Innis* court interpreted *Miranda* to require that the government adhere to the *Miranda* safeguards, not only when the suspect is in custody and subjected to express questioning, but also when the police engage in any conduct which they "should know [is] reasonably likely to elicit an incriminating response from the suspect."[66] Applying this test to the facts of *Innis*, the Court found no violation of the defendant's rights under *Miranda* since the circumstances showed that the patrolmen could not have known that their conversation was reasonably likely to elicit an incriminating response from Innis.[67]

However, the facts of *Innis* indicate that the police conduct in that case was more "likely to elicit" incriminating information than the presence

[57] 100 S. Ct. at 2199 (Rehnquist, J., dissenting).
[58] United States v. Ash, 413 U.S. 300, 307–09 (1973).
[59] 100 S. Ct. at 2199 (Rehnquist, J., dissenting).
[60] 413 U.S. 300 (1973).
[61] *Id.* at 317.
[62] 388 U.S. 263 (1967).
[63] *Id.* at 267. This case did not really involve the *Massiah* rule, since the handwriting exemplars referred to were taken before the defendant's indictment. However, the Court's reasoning still applies.
[64] 413 U.S. at 317.
[65] 100 S. Ct. 1682 (1980). *See* Note, *Fifth Amendment—The Meaning of Interrogation Under Miranda*, 71 J. Crim. L. & C. (1980).
[66] *ia.* at 1689 (footnotes omitted).
[67] *Id.* at 1691.

of the informant was "likely to induce" incriminating statements in *Henry*. In *Innis*, a man robbed and killed a taxicab driver with a shotgun. Police arrested Innis shortly after another cab driver reported being robbed by a man wielding a sawed-off shotgun. Innis was placed in a squad car to be taken to the police station, accompanied by three patrolmen. On the way to the station, two of the officers riding with Innis struck up a conversation concerning the shotgun which had been used in the murder. The patrolmen discussed the possibility that a child from a nearby school for the handicapped might find the weapon and be hurt. At this point, Innis interrupted the officers, telling them to turn the car around so that he could lead them to the gun. At the time Innis told the officers to turn the car around, they had traveled no more than a mile. They subsequently returned to the scene of the arrest, and the defendant was advised of his *Miranda* rights for the fourth time. Innis replied that he understood his rights, but that he " 'wanted to get the gun out of the way because of the kids in the area in the school.' "[68] Innis then led the police to the place where he had hidden the shotgun.

In holding that the police officers' conduct did not violate Innis' rights under *Miranda*, the Court emphasized that there was "nothing in the record to suggest that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children."[69] It also noted that there was no suggestion that the police knew that Innis was "unusually disoriented or upset" when he was arrested.[70] The Court acknowledged that Innis had been subjected to " 'subtle compulsion,' "[71] but concluded that this was insufficient to constitute a violation of his rights under *Miranda*.

The tension between the Court's decision in *Innis* and that in *Henry* is apparent from a comparison of the two sets of facts and the Court's reasoning in arriving at the respective conclusions. In both cases, the Court used a similar objective test to determine whether the defendant's rights had been violated. One factor which the *Henry* Court relied upon to conclude that Nichols' presence was "likely to induce" Henry's incriminating statements was the inherent pressures and "subtle influences" of custody.[72] Yet, at the time Henry made his statements to Nichols, he undoubtedly considered himself not in the presence of coercive government agents, but in the company of a friend or confidant. On the other hand, Innis had just been arrested and was being transported to the police station in the company of three police officers. It seems clear that of the two defendants, Innis was under more of the custodial pressure discussed in *Henry*.

Moreover, the character of the patrolmen's conversation in *Innis* seems "likely to elicit" an incriminating response from even the most hardened individuals. As Justice Marshall pointed out in his *Innis* dissent: "[o]ne can scarcely imagine a stronger appeal to the conscience of a suspect—*any* suspect—than the assertion that if the weapon is not found an innocent person will be hurt or killed."[73] In *Henry* there was no record of the exact content of the conversation between Nichols and Henry which led to Henry's incriminating statements, but it is improbable that the discussion was more leading than the one in *Innis*.

The *Innis* Court also discussed the absence of any "peculiar susceptibility" or "unusual disorientation" on the part of Innis as support for its decision that the patrolmen's conversation was not "likely to elicit" a response from him.[74] The *Henry* decision contains no mention of any such limiting factors.

A comparison of the two decisions leads to the conclusion that the Court is willing to apply its objective test under *Massiah* so as to find a violation of the defendant's sixth amendment rights when it would not find a fifth amendment violation under the similar objective *Miranda* test. The *Innis* Court did note that *Brewer* was irrelevant to the decision in *Innis*, since *Brewer* was based upon the sixth amendment rather than the fifth and since "the policies underlying the two constitutional protections are quite distinct."[75] However, the similarity in the formulation of the two standards calls for some sort of justification for the disparate applications of the standards in *Henry* and *Innis*. The *Henry* Court offered no such explanation. Apparently, the "subtle compulsion" acknowledged in *Innis* is less "likely to elicit" an incriminating re-

[68] *Id.* at 1687.
[69] *Id.* at 1690.
[70] *Id.*
[71] *Id.* at 1691.
[72] 100 S. Ct. at 1692.
[73] *Id.* at 1692 (Marshall, J., dissenting).
[74] *Id.* at 1690.
[75] *Id.* at 1689 n.4. The purpose of the fifth amendment was to prohibit the use of coerced confessions, whereas the sixth amendment was intended to guarantee the accused the aid of counsel. Nevertheless, the tests are phrased in such a similar fashion that analysis of their application requires some sort of reconciliation between *Henry* and *Innis* beyond a simple statement of the purposes of the amendments invoked in support of each result.

sponse under *Miranda* than a virtual absence of compulsion in *Henry* is "likely to induce" an incriminating response under *Massiah*.

As the comparison of *Henry* with *Innis* demonstrates, an objective standard can be difficult to apply and can lead to disparate results. The lack of a record as to what actually transpired between Henry and Nichols in the cell does not help to resolve this disparity. As a result, beyond the immediate facts of the case it is difficult to determine exactly what *Henry* prohibits. For example, it is unclear how much weight should be given to each of the three factors enumerated by the majority,[76] especially the fact that Henry was in custody. Furthermore, the Court does not clarify whether it is necessary under the new "likely to induce" test to find that the undercover informant in fact "prompted" the defendant to make his incriminating admissions, and if such prompting did occur, what constitutes the prohibited degree of affirmative action. For example, the new test does not indicate whether the mere *presence* of an informant cellmate who did not converse with the defendant, but who overheard incriminating admissions from the defendant, nevertheless, would violate his right to counsel.

Justice Blackmun's dissent further illustrates the potential for confusion inherent in the "likely to induce" test. In addition to his disagreement with the substance of the majority's test, Justice Blackmun argued that the majority misapplied that test to the facts. Under his interpretation of the facts of *Henry*, he concluded that the government's employment of Nichols to act as an informant was not likely to induce Henry to incriminate himself, and further, that Nichols had engaged in no "prompting" in order to obtain statements from Henry.

Justice Blackmun first noted that the reasonable conclusion to be drawn from Nichols' contingent fee arrangement, if indeed such an arrangement existed,[77] was that Nichols would refrain from questioning Henry or otherwise initiating conversation with him for fear of forfeiting his remuneration. He further stated that the majority wrongly emphasized the fact that Henry was unaware that Nichols was a government agent because the *Brewer* Court had stated that whether incriminating statements were obtained directly or surreptitiously was " 'constitutionally irrelevant.' "[78]

Justice Blackmun also criticized the Court's application of the custody factor. He pointed out that in *Henry* there was no display whatsoever of governmental power which might have overcome Henry's free will.

Furthermore, Justice Blackmun stated that the scant record showed only that Nichols and Henry had engaged in conversations, and not that Nichols had "stimulated" these remarks in any way, "particularly whether Nichols subtly or otherwise focused attention on the bank robberies."[79] He concluded that the *Henry* majority "disregards precedent and stretches to the breaking point a virtually silent record."[80] Justice Blackmun's opinion illustrates that the *Henry* test may be susceptible of as many different applications as there are judges who attempt to apply it, an obvious problem with an objective standard.

The difficulty in the application of the *Henry* test poses problems not only for the lower courts, but also for the police and prosecutors who must attempt to abide by the prohibition of the test in their dealings with defendants. The *Henry* decision may lead prosecutors to abandon the use of undercover informants, despite the acknowledged value of undercover work in effective law enforcement.[81] In addition, *Henry* mandates the exclusion of relevant evidence which was unquestionably given voluntarily.[82] Nevertheless, as the *Spano* majority noted in support of its exclusion of unconstitutionally obtained evidence, "the police must obey the law while enforcing the law; . . . in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."[83]

IV. Conclusion

Thus, in *Henry* the Court formulated a new objective standard to determine whether governmental conduct violates a defendant's sixth amendment right to counsel under *Massiah*. In so doing, the Court reaffirmed the vitality of the *Massiah* rule and rejected any restrictive reading which might have been placed on that rule by *Brewer*.

The test set forth in *Henry* may result in widely differing applications as evidenced by the differing conclusions reached in the two dissenting opinions. Thus, case-by-case applications in the lower courts

[76] *See* note 15 & accompanying text *supra*.

[77] *See* note 17 & accompanying text *supra*.

[78] 100 S. Ct. at 2194 (Blackmun, J., dissenting) (citing 430 U.S. at 400).

[79] *Id.* at 2196 (Blackmun, J., dissenting).

[80] *Id.*

[81] *See* Weatherford v. Bursey, 429 U.S. 545, 557 (1977).

[82] *See* 100 S. Ct. at 2200-01 (Rehnquist, J., dissenting).

[83] 360 U.S. at 320-21.

will be necessary to develop guidelines for when particular governmental conduct will be held to be in violation of a defendant's right to counsel.

In addition, a comparison of the application of the *Henry* standard with that of the *Innis* test for violation of *Miranda* rights may indicate a renewed importance of the *Massiah* doctrine in that the Court may prove to be more willing to find a violation of a defendant's rights under the former than the latter. However, additional decisions of the Court in this area also will be required in order to arrive at this conclusion.

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