NOTES

THE RIGHT TO COUNSEL AFTER *KUHLMANN V. WILSON*: "DELIBERATE ELICITATION" OR "INTERROGATION"?

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> For 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.[1]

INTRODUCTION

On the morning of July 4, 1970, three men robbed and killed the night dispatcher at Star Taxicab Garage in the Bronx, New York. Shortly before the robbery, James A. Wilson was seen on the premises and was later observed fleeing the scene carrying loose money. Four days later, Wilson voluntarily surrendered to the police.[2] After receiving his *Miranda*[3] warnings from a Detective Cullen, Wilson admitted that he was at the garage on July 4, looking for his brother who worked there.[4] He claimed that he had witnessed the

1. Brewer v. Williams, 430 U.S. 387, 406 (1977) (quoting Spano v. New York, 360 U.S. 315, 320-21 (1959)).

2. Kuhlmann v. Wilson, 477 U.S. 436, 438-39 (1986).

3. Miranda v. Arizona, 384 U.S. 436 (1966). *Miranda* holds that a defendant's exculpatory or inculpatory statements stemming from a custodial interrogation are inadmissible unless the defendant is advised that she has the right to remain silent, that any statement she makes may be used as evidence against her in court, and that she has the right to consult with an attorney, either retained or appointed and have the attorney present during questioning. *Id.* at 479.

4. When Detective Cullen concluded the *Miranda* warnings, he asked Wilson whether he

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robbery, but was not involved; he fled only for fear of being blamed.[5] On July 9, Wilson was assigned counsel, appeared for the first time before a judge and was arraigned.

Following his arraignment, Wilson was jailed in the Bronx House of Detention.[6] Soon after, he was moved to a different cell, one which overlooked the Star Taxicab Garage. Upon entering the cell, Wilson's first words were, "somebody's messing with me because this is the place I'm accused of robbing."[7] Wilson then began to describe to his cellmate, Benny Lee, what had happened on the morning of July 4, 1970. Wilson told Lee that he had seen two men commit the crime and had only picked up some of the money which they had dropped. Lee replied, "Look, you better come up with a better story than that because that one doesn't sound too cool to me."[8] Wilson was not aware, however, that Detective Cullen had asked Lee whether he could assist the police with Wilson's case.[9] Lee agreed to work as a police informant, a job he had performed on numerous other occasions.[10] Detective Cullen directed him to find out as much as he could from Wilson without asking any questions.[11] During the next several days, Lee and Wilson discussed the incident, and Wilson changed parts of his story. Following an upsetting visit from his brother, Wilson admitted to Lee that he had been involved in committing the robbery with the other two men.[12] Lee reported these conversations to Cullen. He also gave the detective notes secretly made during his conversations with Wilson. The statements which Lee reported were used to convict Wilson at trial.[13]

The Supreme Court ultimately considered Wilson's case in 1986.[14] In a

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understood all his rights and whether he would like to make a "statement." Wilson replied, "No." Detective Cullen then asked, "Well, would you care to tell me what you did on July 4th?" Wilson responded affirmatively and stated that he had witnessed the robbery but had not been involved. Prior to trial, Wilson moved to suppress his statements to Detective Cullen, but the court denied his motion, and the statement was admitted at trial. Wilson v. Henderson, 584 F.2d 1185, 1186-87 (2d Cir. 1978).

5. *Kuhlmann*, 477 U.S. at 439.

6. Wilson v. Henderson, 742 F.2d 741, 742 (2d Cir. 1984).

7. *Id.*

8. *Kuhlmann*, 477 U.S. at 440 n.1.

9. *Wilson*, 742 F.2d at 745.

10. *Kuhlmann*, 477 U.S. at 475 (Brennan, J., dissenting). There is no record of whether Lee received compensation for his services to Cullen in this instance. However, "he usually received compensation for the services he rendered the police, and therefore had an incentive to produce the information which he knew the police hoped to obtain." *Id.*

11. *Wilson*, 742 F.2d at 745.

12. *Kuhlmann*, 477 U.S. at 440.

13. On May 18, 1972, Wilson was convicted in state court and sentenced to a term of twenty years to life for the murder and a concurrent term of seven years for possession of a weapon. *Id.* at 477. The New York Supreme Court, Appellate Division, affirmed without opinion. People v. Wilson, 41 A.D.2d 903, 343 N.Y.S.2d 563 (1st Dep't 1973). Wilson was denied leave to appeal by the New York Court of Appeals. *Kuhlmann*, 477 U.S. at 441.

14. In 1973, Wilson petitioned for federal habeas corpus relief, claiming that the methods which the police had employed to obtain his statements violated his fifth and sixth amendment rights. The United States District Court for the Southern District of New York denied his

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decision that retreats from the "deliberate elicitation" standard which the Supreme Court adopted in *United States v. Massiah*[15] and expanded in *United States v. Henry*[16] to protect defendants from unwittingly making statements to law enforcement agents, the United States Supreme Court held that neither Lee's presence nor his conduct constituted a violation of Wilson's sixth amendment right to counsel.[17] Justice Powell, writing for the majority, stated that the purpose of the "deliberate elicitation" standard, as articulated in *Massiah* and *Henry*, is to prevent the government from obtaining incriminating statements from a defendant, in the absence of counsel, through investigatory techniques "that are the equivalent of direct police interrogation."[18]

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petition, and Wilson appealed. *Kuhlmann*, 477 U.S. at 441. A divided panel for the Second Circuit affirmed. Wilson v. Henderson, 584 F.2d 1185 (2d Cir. 1978). The court held that (1) Detective Cullen's interrogation did not violate Wilson's fifth amendment privilege against compelled self-incrimination, *id.* at 1187-89; (2) Wilson's sixth amendment right to counsel was not violated when incriminating statements he made to his cellmate were admitted at trial, *id.* at 1189-91; and (3) a twenty-month delay between Wilson's indictment and his trial did not violate his sixth amendment right to a speedy trial, *id.* at 1191-92. The Supreme Court denied Wilson's 1979 petition for certiorari. Wilson v. Henderson, 442 U.S. 945 (1979).

In 1981, Wilson attempted to vacate his conviction in state court. Wilson relied on, as a basis for appeal, the Supreme Court's decision in United States v. Henry, 447 U.S. 264 (1980), which held that the sixth amendment precludes the police from deliberately eliciting incriminating information from an indicted defendant by intentionally creating a situation which would be likely to induce such information in the absence of counsel. The New York Supreme Court denied his motion on two grounds: first, there was no evidence that Lee was paid for his services to Cullen, and second, *Henry* could not be retroactively applied to Wilson's case. Wilson v. Henderson, 742 F.2d 741, 743 (2d Cir. 1984). In 1982, the Appellate Division of the New York Supreme Court denied Wilson's application for leave to appeal. *Id.*

Once again, Wilson sought federal habeas corpus relief, arguing that his statements to Lee were obtained in violation of his sixth amendment rights and that *Henry* constituted a new rule of law that should be retroactively applied. The District Court for the Southern District of New York, relying on the state court record, held that Wilson had not been "interrogated" and that his incriminating statements were spontaneous. *Id.*

Finally, on appeal in 1984, the Second Circuit reversed Wilson's conviction. *Id.* at 748. The court concluded that the facts in *Henry* were indistinguishable from the facts in Wilson's case and that the government's intentionally staging a scene which induced Wilson to make incriminating statements to Lee met the definition of "deliberate elicitation" stated in Massiah v. United States, 377 U.S. 201 (1964), thereby violating Wilson's sixth amendment right to counsel. *Wilson*, 742 F.2d at 745. The Supreme Court granted certiorari in 1985 to review the Second Circuit's application of *Henry* to the facts of Wilson's case. Henderson v. Wilson, 472 U.S. 1026 (1985).

15. 377 U.S. 201 (1964). *Massiah* holds that an individual is denied the basic protections of the sixth amendment right to counsel when "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" is used against the defendant at his trial. *Id.* at 206. The rule applies to direct, indirect, and surreptitious interrogations. *Id.*

16. 447 U.S. 264 (1980). *Henry* holds that the sixth amendment precludes the government from deliberately eliciting incriminating information from an indicted defendant by intentionally creating a situation which would be likely to induce such information in the absence of counsel. *Id.* at 274.

17. Kuhlmann v. Wilson, 477 U.S. 436, 461 (1986).

18. *Id.* at 459. Justice Powell's opinion in *Kuhlmann* is also important because it holds that the federal courts should not entertain successive habeas corpus petitions on the same claim absent a colorable claim of innocence. He concludes "that the 'ends of justice' require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim

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Kuhlmann v. Wilson reinterprets the "deliberate elicitation" standard and limits its meaning to the "functional equivalent of interrogation," a standard developed in fifth amendment cases to prevent compelled self-incrimination by criminal defendants.[19] *Kuhlmann* thus substantially narrows the scope of the sixth amendment's protections.

This note examines the purposes of the sixth amendment right to counsel in the interrogation setting once formal adversary proceedings have commenced as well as the sixth amendment's interplay with the fifth amendment right to counsel during interrogation. Although the rights protected by the fifth and sixth amendments often overlap, the policies underlying each are quite different.[20] This note will also focus on the standards articulated in the *Massiah-Henry* line of cases and suggest a rationale underlying the Court's divergence from precedent in *Kuhlmann v. Wilson.*

I.
Background: The Right to the Assistance of Counsel After the Commencement of Adversarial Proceedings

A. *The Sixth Amendment Right to Counsel*

The sixth amendment provides in part that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[21] "Assistance" includes an attorney's advice-giving function in counseling a defendant on whether to respond to the questions of law enforcement officials.[22] Indeed, this function has been codified in the American Bar

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with a colorable showing of factual innocence. . . . The prisoner must make his evidentiary showing even though . . . the evidence of guilt may have been unlawfully admitted." *Id.* at 454.

19. Rhode Island v. Innis, 446 U.S. 291 (1980). *Innis* concludes:

> [T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

Id. at 300-02 (footnotes omitted) (emphasis in original).

20. *Id.* at 300 n.4. The fifth amendment seeks to protect against coerced confessions because of their inherent unreliability, while the sixth amendment serves to protect the adversary process. *See infra* notes 64-75, 102 and accompanying text.

21. U.S. Const. amend. VI.

22. *See* Strickland v. Washington, 466 U.S. 668, 688-89 (1984). *See, e.g.*, American Bar Association Standards for Criminal Justice 4-1.1-4-8.6 (2d ed. 1980) [hereinafter Stan-

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Association standards for criminal defense.[23] A primary concern of the sixth amendment, therefore, is to prevent the state from gathering information from a defendant without the aid and advice of her attorney.[24]

The right to counsel under the sixth amendment is a broad right designed to preserve the integrity of the adversarial process itself.[25] Our criminal justice system is formally structured along adversarial lines. In an adversarial system of adjudication, decisions of law and fact rest with a neutral fact finder which makes its decisions based on the independent evidence presented by both parties.[26] To function effectively, an adversarial system requires the

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DARDS FOR CRIMINAL JUSTICE]; NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES 5.10 (1976). The Supreme Court has taken the position that the guidelines are an important measure of whether counsel performed effectively. *Strickland*, 466 U.S. at 688.

There is not complete unanimity on the importance of the advice-giving function and its relation to the sixth amendment. Some would limit the right to counsel to more traditional adversarial functions regardless of whether the right to counsel has attached. As a result, a defense lawyer's ability to impede the state's effectiveness in gathering evidence of guilt is impaired. For example, Chief Justice Rehnquist has stated:

> [T]here is nothing in the Sixth Amendment to suggest, nor does it follow from the general accusatory nature of our criminal scheme, that once the adversary process formally begins the government may not make any effort to obtain incriminating evidence from the accused when counsel is not present.... [T]here is no constitutional or historical support for concluding that an accused has a right to have his attorney serve as a sort of guru who must be present whenever an accused has an inclination to reveal incriminating information to anyone who acts to elicit such information at the behest of the prosecution.

United States v. Henry, 447 U.S. 264, 295-96 (1980) (Rehnquist, J., dissenting). *See also* Morris v. Slappy, 461 U.S. 1, 13-14 (1983) (where the Court found that indigent defendants are not entitled to "meaningful" relationships with their attorneys, a term the Court described as "novel" to sixth amendment jurisprudence).

23. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 22, at standard 4-5.1.

24. A defendant may waive her right to an attorney, but that waiver must be both knowing and voluntary. Brewer v. Williams, 430 U.S. 387, 403 (1977). The burden is on the government to prove "an intentional relinquishment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *See also* Brewer v. Williams, 430 U.S. 387, 401-06 (1977); *but cf.* Morris v. Slappy, 461 U.S. 1 (1983).

25. The Court in *Gideon v. Wainwright*, stated, "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law." 372 U.S. 335, 344 (1963). *See also* Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45 (1932); Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 980-81 (1986).

26. Each party is expected to show her side in the best light and to challenge the assertions of the other. The fact finder then adjudicates the conflicting issues. The self-interest of the parties ensures that all relevant facts come to light and their relative strengths and weaknesses are exposed. *See* Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185 (1983).

An exception to the adversarial view of the criminal justice system is the defendant's entitlement to the discovery of evidence in a criminal case. Here, unlike a civil case, the prosecution must turn over evidence that is favorable to the accused and "material either to guilt or punishment." Brady v. Maryland, 373 U.S. 83, 87 (1963). The purpose of this rule "is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." United States v. Bagley, 473 U.S. 667, 675 (1985). The prosecutor, however, is required to disclose only evidence favorable to the accused, including

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guiding hand of a lawyer skilled both in criminal procedure and substantive criminal law to ensure that the defendant has an adequate[27] opportunity to prepare and present her case. As the Supreme Court stated in *Powell v. Alabama*,[28]

> 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.[29]

Once formal adversarial proceedings commence, defense counsel's primary role is to equalize, as nearly as possible, the strength of the state and the ac-

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impeachment as well as exculpatory evidence, that, if suppressed, would deprive the defendant of a fair trial. *Id.* at 675-76.

27. The sixth amendment does not guarantee that criminal defense be *as able as* or *equal* to the prosecution. The standard is "effective assistance" which is defined in Strickland v. Washington, 466 U.S. 668, 687 (1984), to mean "reasonably effective assistance:"

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. Strickland further states that "an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691.

28. 287 U.S. 45 (1932).

29. *Id.* at 68-69. The Court in Gideon v. Wainwright, 372 U.S. 335 (1963), stated:

> [T]here are few defendants charged with crime . . . who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.

Id. at 344. *See also* Griffin v. Illinois, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 168-70 (1968).

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cused.[30] This role prevents the state from taking advantage of the defendant's lack of knowledge of criminal law and procedure, thereby depriving her of the opportunity to marshal a defense.

To ensure that a defendant can preserve her right to an adversarial disposition of her case, the accused is entitled to counsel at each "critical stage" in the criminal process occurring after the commencement of adversarial proceedings.[31] A "critical stage" is any proceeding or confrontation with the organized prosecutorial power of the state in which the defendant's right to present a defense might be substantially impaired in the absence of counsel.[32]

1. When the Right to Counsel Attaches

The question of when, in the span of time from arrest to trial, the right to counsel attaches, has been the subject of great debate. Since the focus of criminal procedure in the seventeenth and eighteenth centuries was on a defendant's right to a fair trial,[33] the Framers of the Constitution probably did not consider the need for pretrial assistance of counsel.[34] For the most part, the right to be represented at trial by a privately retained attorney has remained unqualified.[35] However, the sixth amendment right of indigent defendants to court-appointed counsel, and determining the point at which this right attaches, are relatively recent constitutional developments.[36] Today, complex pretrial procedures and modern investigatory techniques require the extension of sixth amendment protection to pretrial stages which can affect the outcome of the trial itself.[37]

30. "[A]ll defendants without counsel are constitutionally disadvantaged when faced with a government[al] armory of armed police, prosecutors and professional interrogators." State v. Wyer, 320 S.E.2d 92, 111-12 (W. Va. 1984), *overruled*, 359 S.E.2d 844, 847 (W. Va. 1987).

31. United States v. Wade, 388 U.S. 218 (1967).

32. *Id.* at 224, 227.

33. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 132-33 (1973); Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1030-31 (1964).

34. Note, *supra* note 33, at 1031.

35. Chandler v. Fretag, 348 U.S. 3 (1954).

36. Note, *supra* note 33, at 1031.

In 1932, the Supreme Court ruled for the first time in Powell v. Alabama, 287 U.S. 45 (1932), that an indigent defendant had a constitutional right to court-appointed counsel in a state prosecution for a capital offense. The Court based its holding on a "fundamental fairness" analysis of the fourteenth amendment. In 1938, the Court extended this right to all federal felony cases and concluded that a valid waiver of counsel requires proof of "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Finally, in 1963, the Supreme Court held that the fourteenth amendment incorporated the sixth amendment right to counsel in noncapital cases as well as felony cases. Gideon v. Wainwright, 372 U.S. 335, 341-45 (1963). The Court stated, "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344. States are now required to appoint counsel to indigent defendants in all criminal prosecutions where defendants face any sentence of imprisonment regardless of whether they are charged with a misdemeanor or a felony. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

37. The Court has acknowledged that certain pretrial events, such as confessions, can prejudice the outcome of a trial. If the government, especially the police, can take advantage of an

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The sixth amendment right to counsel first attaches with the initiation of "adversary judicial criminal proceedings."[38] The Supreme Court has recognized a number of critical pretrial stages which follow the initiation of the adversarial process, including initial appearance,[39] arraignment,[40] postindictment line-up,[41] out-of-court confrontation of the defendant by a state agent,[42] and preliminary hearings.[43] If the pretrial proceeding is not considered "critical," an individual is not entitled to be represented by counsel at that proceeding, even if adversary proceedings have commenced.[44]

In sum, the sixth amendment ensures the assistance of counsel once the government has decided, as a general matter, to act as an adversary. This assistance, however, extends only to specific instances of governmental conduct that pose "cognizable risks to the goal of adversarial equality."[45]

2. *Two Competing Theories of Criminal Justice*

The extent to which the sixth amendment and criminal procedure restrict the state's ability to elicit evidence of guilt from a defendant has a dramatic impact on the capacity of the criminal justice system to process large numbers of defendants through guilty pleas and other nonlitigatory dispositions. The more procedure restricts law enforcement, the more difficult it becomes to convict a person accused of committing a crime.[46] The more difficult it is to

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unrepresented defendant prior to trial, that advantage might render her trial meaningless. *See* Kirby v. Illinois, 406 U.S. 682 (1972); Powell v. Alabama, 287 U.S. 45 (1932).

38. *Kirby*, 406 U.S. at 689. Adversarial judicial criminal proceedings are initiated at the time the defendant finds herself "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Id.* They begin "by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* The Court has never held that adversary proceedings begin at arrest. United States v. Gouveia, 467 U.S. 180, 190 (1984). *But see* Miranda v. Arizona, 384 U.S. 436, 477 (1966).

39. White v. Maryland, 373 U.S. 59 (1963) (initial appearance is a critical stage in the proceedings and requires the appointment of counsel if the defendant is compelled to make a decision which may be formally used against her).

40. Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment is a critical stage where the law requires that defenses not raised at that point be abandoned).

41. United States v. Wade, 388 U.S. 218 (1967) (line-up after indictment is a critical stage where an attorney is necessary).

42. United States v. Massiah, 377 U.S. 201 (1964). *See infra* text accompanying notes 55-63.

43. Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing is a critical stage of the prosecution, since it is at this point that the judge or magistrate determines whether there is probable cause to hold the accused for prosecution. Counsel is necessary at this point to cross-examine witnesses and argue for the reduction of bail. Denial of counsel at this stage, however, may constitute "harmless error" unless the defendant can show that the lack of counsel at the hearing had a direct impact at trial).

44. *See* United States v. Ash, 413 U.S. 300 (1973) (photo display is not a critical stage because the presence of an attorney does not affect the fairness of the outcome); Kirby v. Illinois, 406 U.S. 682 (1972) (pre-indictment show-up is not a critical stage because formal proceedings have not been initiated); *Wade*, 388 U.S. 218 (1967) (blood and fingerprint tests are not critical stages because lack of counsel would not alter the results of the tests).

45. Tomkovicz, *supra* note 25, at 987.

46. *See* H. PACKER, *supra* note 29, at 150.

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obtain a conviction, the fewer the number of cases which the criminal justice system can process.[47] Therefore, whether the criminal justice system operates on a "crime control model"[48] or a "due process model"[49] may, in large measure, depend on the existence of restrictive procedural rules which protect individuals from intrusive government conduct and, in turn, promote an adversary system of justice.[50] Narrowing the scope of the sixth amendment's protections to permit the police to elicit damaging admissions from defendants

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47. *Id.*

48. The crime control model relies on the adversary process only so far as it works to obtain factually accurate determinations of guilt or innocence. It primarily emphasizes the criminal justice system's capacity to investigate crime efficiently and with finality, determine factual guilt and mete out appropriate dispositions to those convicted or pleading guilty. *Id.* at 158. In order to attain quick and final determinations of guilt or innocence, the criminal process must be stripped of "ceremonious rituals" which do not advance the progress of a case. Investigative techniques which reliably establish facts through early extrajudicial interrogation of the defendant by the state are preferable to the lengthy and formal judicial process of examination and cross-examination in a court. *Id.* at 159.

To function efficiently, the crime control model requires that the state make an early determination of the probable guilt or innocence of a suspect in order to screen out those who are probably innocent and maximize the use of scarce resources against those who are probably guilty; this group is left with, in effect, "a presumption of guilt." *Id.* at 160. The presumption of guilt is merely a prediction of the outcome based on the facts of the case as opposed to the presumption of innocence, which is a legal concept of adversarial justice and relates to the burden of proof which the prosecution must overcome to declare an individual guilty of committing a crime. *Id.* at 161.

The assumption, of course, underlying the crime control model is that the informal fact-finding undertaken by the police and prosecutors is reliable. *Id.* It is important to place as few restrictions as possible on this type of administrative fact-finding and to limit those restrictions to those enhancing reliability. *Id.* at 162. The pure crime control model, therefore, has little use for complicated adjudicative rules and, in fact, is wholly opposed to them if they impede the efficiency and finality of the criminal process. Finally, the primary tool of the crime control model is the guilty plea since it essentially eliminates the necessity for any adversary process whatsoever. *Id.*

49. The due process model emphasizes the importance of the "adversary system," "procedural due process," "notice and opportunity to be heard," and "a day in court." *Id.* at 157. Its purpose is to protect against mistake and to limit the state's potential abuse of the police power. *Id.* at 166. It refuses to rely on the reliability of informal, nonadjudicative police fact-finding, but instead, seeks to test the strength of the state's evidence against the evidence independently put forward by the accused. The due process model, therefore, insists "on formal, adjudicative, adversary fact-finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case" against her. *Id.* at 163-64. In contrast to the crime control model, the demand for finality in the due process model is very low because its interest is in ensuring that there has been no human error and that the accused is both legally and factually guilty of committing a crime. Legal guilt differs from factual guilt in that an individual is

> to be held guilty if and only if these factual determinations are made in a procedurally regular fashion and by authorities acting within the competences duly allocated to them. Furthermore, he is not to be held guilty, even though the factual determination is or might be adverse to him, if the various rules designed to protect him and to safeguard the intergrity of the process are not given effect. . . . None of these requirements has anything to do with the factual question of whether the person did or did not engage in the conduct that is charged as the offense against him; yet favorable answers to any of them will mean that he is legally innocent.

Id. at 166.

50. *See id.* at 152.

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limits the adversarial protections afforded the accused and increases the likelihood of disposition by guilty plea rather than by trial. This limitation on the sixth amendment results in the criminal justice system's more closely approximating a crime control model.

The state's ability to outmaneuver the defendant and potentially to eliminate the necessity of a trial is the thorny political question which lurks behind the Court's sixth amendment jurisprudence. The Supreme Court, in *Gideon v. Wainwright*, trumpeted the adversarial model and the importance of the accused's right to counsel.[51] In *Strickland v. Washington*,[52] moreover, the Court reiterated that the adversary model is the best method to arrive at a just result.[53]

The Court, however, has also recognized that guilty pleas are an acceptable alternative to adversarial justice and are actually the fodder upon which the criminal justice system subsists.[54] Guilty pleas, in turn, are greatly facili-

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51. 332 U.S. 335 (1963).

52. 466 U.S. 668 (1984).

53. *Id.* at 685. "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Id.*

54. Bordenkircher v. Hayes, 434 U.S. 357, 361-62 (1978) (" 'whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned.' " (quoting Blackledge v. Allison, 431 U.S. 63, 71 (1977)). It is estimated that guilty pleas account for 90% of all state convictions and perhaps 95% of all state misdemeanor convictions. F. ZIMRING & R. FRASE, THE CRIMINAL JUSTICE SYSTEM 494 (1980). In New York state in 1982, for example, guilty pleas accounted for 96.6% of all lower court misdemeanor convictions and 90.9% of all lower court felony convictions. 1985-86 NEW YORK STATE STATISTICAL YEARBOOK 318-19 (12th ed. 1986).

For years, courts were reluctant even to acknowledge the existence of plea bargaining. *See, e.g.*, *Bordenkircher*, 434 U.S. at 362. However, this outlook has changed, perhaps because the present criminal justice system is able to function *only* if most cases are disposed of by plea. Former Chief Justice Burger once stated:

> It is an elementary fact, historically and statistically, that the system of courts — the number of judges, prosecutors, and of courtrooms — has been based on the premise that approximately 90 per cent of all defendants will plead guilty, leaving only 10 per cent, more or less, to be tried. But that premise may no longer be a reliable yardstick of our needs.
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> * * *
>
> The consequences of what might seem on its face a small percentage change in the rate of guilty pleas can be tremendous. A reduction from 90 per cent to 80 per cent in guilty pleas requires the assignment of twice the judicial manpower and facilities — judges, court reporters, bailiffs, clerks, jurors and courtrooms. A reduction to 70 per cent trebles this demand.

Excerpts from Burger's Talk, N.Y. Times, August 11, 1970, at 24, col. 4 (address by former Chief Justice Warren E. Burger before the opening assembly of the American Bar Association's annual convention). *See also supra* note 53; Santobello v. New York, 404 U.S. 257, 260 (1971) (" 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."); Brady v. United States, 397 U.S. 742, 752 (1970) ("[f]or the State there are also advantages [from plea bargaining] — the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with

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tated by defendants' admissions prior to defense counsels' intervention. The greater the sixth amendment limitation on surreptitious questioning by the state — through informants or otherwise — the greater the likelihood of trial. The attachment of the right to counsel, therefore, presents a potentially disabling contradiction in the present administration of criminal justice.

3. *The Sixth Amendment and Interrogation*

The first significant Supreme Court case examining the sixth amendment right to counsel in a noncustodial, confession setting is *Massiah v. United States*.[55] Massiah and a codefendant, Colson, were arrested and indicted on narcotics charges in 1959. After retaining a lawyer, Massiah pleaded not guilty and was released on bail. Without Massiah's knowledge, Colson decided to cooperate with the government. He permitted federal agents to place a listening device in his car, so they could listen to his conversations from a distance. Colson and Massiah then had a long conversation in the wired car, during which Massiah made several incriminating statements which were used to convict him at trial.[56] The Supreme Court held that Massiah had been denied basic sixth amendment protections because federal agents "deliberately elicited" a statement from him "after he had been indicted and in the absence of counsel."[57]

Though there was no indication that Colson had ever questioned Massiah, the Court characterized Colson's actions as "indirect and surreptitious interrogation" and concluded that the government's use of Colson constituted "deliberate elicitation."[58] The Court indicated that continued investigation of Massiah's past, present and future criminal activities was entirely proper (even though he had already been indicted) but limited the government's efforts in obtaining statements from Massiah to ongoing and future misconduct.[59] The Court held "that the defendant's own incriminating statements, obtained by federal agents under the circumstances" in this case, were constitutionally protected and could not be used as evidence against Massiah at his trial.[60]

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the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.") (footnote omitted).

55. 377 U.S. 201 (1964).

56. *Id.* at 202-03.

57. *Id.* at 206. The Supreme Court relied on the four justice concurrence in Spano v. New York, 360 U.S. 315 (1959), which reversed the conviction in that case because the indicted defendant confessed when confronted by the police in the police station in the absence of counsel. *Massiah*, 377 U.S. at 204.

58. The *Massiah* Court agreed with Judge Hays, who dissented from the majority in the court of appeals, that " 'if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent.' " *Id.* at 206-07 (quoting United States v. Massiah, 307 F.2d 62, 72-73 (2d Cir. 1962)).

59. 377 U.S. at 207.

60. *Id.* The *Massiah* majority stated that it relied on both the fifth and sixth amendments

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Massiah's change in status after the commencement of formal adversary proceedings — from "suspect" to "formally accused" — caused the right to counsel to attach. The Court concluded that Massiah's statements were inadmissable, *despite* his being unaware that a government agent was speaking with him.[61] The *Massiah* rule regarding the permissible scope of the government's contact with a defendant is dependent neither on custody nor direct questioning, as it is in a fifth amendment context.[62] Indeed, the *Massiah* Court's central concern is the state's circumvention of the right to counsel by intentionally obtaining incriminating information from an indicted defendant.[63]

B. Massiah *and* Miranda *Contrasted*

The protection guaranteed by the sixth amendment applies whether or not the fifth amendment privilege against self-incrimination is implicated.[64] The contrast between the two is subtle but of utmost importance. The fifth amendment seeks to force the state to produce evidence against a suspect independently, without resorting to compulsion.

The fifth amendment provides in part that no person "shall be compelled in any criminal case to be a witness against himself."[65] The broad purpose of the fifth amendment is the prevention of compelled, testimonial self-incrimination and the preservation of the formal, accusatorial character of the criminal process.[66] The fifth amendment privilege, therefore, is indirectly related to the goals of adversarial justice: under the fifth amendment, the state is required to prove a case against a defendant based upon independently gathered evidence and is precluded from relying on an inquisitorial process which forces a suspect to incriminate herself.[67] The fifth amendment seeks to prevent involuntary confessions because of their inherent unreliability. Fifth amendment jurisprudence is concerned with that aspect of the adversarial process which

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in its decision, *id.* at 203-04, yet the fifth amendment was not discussed at all in the *Massiah* opinion. It is possible, however, that the Court considered the surreptitious methods used by the police as "compelling" Massiah's statements, thereby implicating the fifth amendment concern against compelled self-incrimination.

61. Kamisar, *Brewer v. Williams, Massiah and Miranda: What Is Interrogation? When Does It Matter?,* 67 GEO. L.J. 1, 37 (1978).

62. *See infra* text accompanying note 102.

63. Kamisar, *supra* note 61, at 36.

64. *See id. See* Miranda v. Arizona, 384 U.S. 436, 460 (1966) (fifth amendment privilege is implicated when the government "interrogates" an individual "in custody"); Tomkovicz, *supra* note 25, at 990-91. "Interrogation" in the fifth amendment context is defined in Rhode Island v. Innis, 446 U.S. 291, 300-02 (1980). *See supra* note 19. For a discussion of what constitutes "custody," see Berkemer v. McCarty, 468 U.S. 420, 435-42 (1984); California v. Beheler, 463 U.S. 1121, 1123-25 (1983); Oregon v. Mathiason, 429 U.S. 492, 495 (1977); Miranda v. Arizona, 384 U.S. 436, 444 (1966).

65. U.S. CONST. amend. V.

66. Miranda v. Arizona, 384 U.S. 436, 439, 443 (1966).

67. *Id.* at 460.

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requires the state to obtain reliable evidence of guilt without relying on coerced confessions.

Miranda v. Arizona[68] expanded the protection against self-incrimination to virtually all custodial interrogations. *Miranda* established specific, procedural safeguards to counter the effects of the inherently coercive atmosphere of the police precinct.[69] In the absence of those warnings, the *Miranda* Court found that "no statement obtained from [a] defendant [in custody] can truly be the product of his free choice."[70]

One of these warnings requires law enforcement officers and their agents to inform a suspect that she is entitled to consult with an attorney prior to, and during, any questioning.[71] The right to counsel in this context is intended to reduce the likelihood of undue coercion in a custodial setting. The purpose of the rule is to ensure that the individual's decision to speak is voluntary. In a situation when neither custody nor express questioning or its functional equivalent is present, *Miranda* warnings are not required. Under such circumstances, the fifth amendment protection against compelled, testimonial self-incrimination is not implicated.[72]

The sixth amendment, in contrast, provides broader protection. It applies whenever adversarial judicial proceedings have been initiated, and it remains in force until there is a valid waiver.[73] Neither custody nor direct

68. 384 U.S. 436 (1966). Though over sixty pages long, *Miranda* simply holds "that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized." *Id.* at 478.

69. The Court ordered that the police inform the suspect of her right to remain silent with an explanation that anything she says can and will be used against her in court. The suspect must also be told of her right to counsel and of her right to consult with counsel during interrogation. Finally, if the individual is indigent, she must be told that the court will appoint an attorney to represent her. *Id.* at 467-73. These warnings are necessary only when the suspect is "taken into custody or otherwise deprived of his freedom" and "subjected to questioning" by the authorities. *Id.* at 478. If the police do not interrogate — if a suspect volunteers a statement or confession — they do not have to supply a lawyer or dissuade the suspect from talking. *Id.* If they do interrogate a defendant and she requests an attorney, the police may not continue with the interrogation until an attorney is present. *Id.* at 474.

70. *Id.* at 458. The Supreme Court has not required strict adherence to the dictates of *Miranda*. The Court deprived the decision of its constitutional basis when it determined that "these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure the right against compulsory self-incrimination was protected.... [and that] [t]he suggested safeguards were not intended to 'create a constitutional jacket,'... but rather to provide practical reinforcement for the right against compulsory self-incrimination." Michigan v. Tucker, 417 U.S. 433, 444 (1974) (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)) (citations omitted). In New York v. Quarles, 467 U.S. 649 (1984), the Court concluded that *Miranda* warnings are unnecessary prior to questioning that is reasonably prompted by an objective concern for public safety on the part of the police. The Court noted that *Miranda* requirements are merely "prophylactic" measures and are "not themselves rights protected by the Constitution." *Id.* at 654 (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

71. The state will provide and pay for counsel if the defendant is indigent. *Miranda*, 384 U.S. at 473.

72. *Id.* at 477-78.

73. *See supra* notes 24, 39-45 and accompanying text.

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questioning or its functional equivalent is required to invoke the sixth amendment. For example, because Massiah was not in police custody and his statements were voluntary, his claim sounded only in sixth amendment terms.[74]

The differences between fifth and sixth amendment protections are explained by the values underlying each of the rights. The sixth amendment right to counsel seeks to maintain the adversarial nature of the criminal process, whereas the fifth amendment right seeks to preserve its accusatorial character.[75] Therefore, the standard of "interrogation" — direct questioning or its functional equivalent — applies when the state seeks to protect a criminal defendant from the coercive nature of custodial interrogation. The standard of "deliberate elicitation" is appropriate in order to maintain the adversarial nature of the process.

II.
THE CONFUSION BETWEEN THE "DELIBERATE ELICITATION" STANDARD AND "INTERROGATION"

A. Brewer v. Williams

In *Brewer v. Williams*,[76] the Supreme Court revisited the sixth amendment right to counsel in the context of a statement deliberately elicited from a defendant, arguably without express questioning or its functional equivalent.[77] In *Brewer*, a ten-year old child had been abducted and killed in Des Moines, Iowa. Williams, the suspect and a recent escapee from a mental hospital, turned himself in to the police in Davenport, Iowa, 160 miles from Des Moines, on the advice of his attorney, Henry McKnight. Williams was then arrested and given his *Miranda* warnings.[78] McKnight, who was in Des Moines, spoke to Williams by phone in front of the Des Moines chief of police and a detective named Leaming. He advised Williams that Des Moines police officers would pick him up in Davenport and drive him back to Des Moines. McKnight told Williams that he was not to discuss the case until after he had consulted with McKnight upon his return to Des Moines. McKnight and the Des Moines police officers then agreed that Detective Leaming and another officer would pick Williams up and drive him directly back to Des Moines without questioning him during the trip. Meanwhile, in Davenport, Williams

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74. *See supra* text accompanying notes 55-63.

75. Tomkovicz, *supra* note 25, at 993.

76. 430 U.S. 387 (1977).

77. Although one might argue that the *Brewer* "Christian burial speech" involved the functional equivalent of express questioning, *see infra* notes 82-85, the Court's later decision in Rhode Island v. Innis, 446 U.S. 291 (1980), a case virtually identical to *Brewer*, found no interrogation or its functional equivalent. *See infra* text accompanying notes 90-102.

Since Williams was in custody and knew he was speaking to a police officer, the facts of *Brewer* also lend themselves to a fifth amendment analysis under *Miranda*. Indeed, commentators have used the fifth amendment to interpret the *Brewer* decision, *see, e.g.*, Kamisar, *supra* note 61, at 28, even though the case was decided explicitly on sixth amendment grounds. *Brewer*, 430 U.S. at 397-98.

78. 430 U.S. at 390.

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was arraigned, advised of his *Miranda* rights, and allowed to confer with a lawyer named Kelly who advised him not to make any statements until he spoke with McKnight in Des Moines.[79] Kelly advised Detective Leaming not to question Williams during the 160-mile journey. He also requested, but was denied, permission to accompany Williams on the trip back to Des Moines.[80]

During the drive, however, Detective Leaming, knowing that Williams was a former mental patient who suffered from religious delusions, delivered the now infamous, "Christian burial speech." Leaming addressed Williams as "Reverend" and told him to think about the freezing sleet and snow which might prevent the parents, whose child was murdered, from ever locating her body and giving it a "Christian burial."[81] As a result of this speech, Williams directed the police to the victim's body, thereby implicating himself in her death.

In reviewing the admissibility of this statement, the Supreme Court observed that there could "be no serious doubt . . . that Detective Leaming 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. . . . [H]e purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible."[82] The lower courts characterized the "Christian burial speech" as "tantamount to interrogation," and the Supreme Court agreed by stating that "no such constitutional protection would have come into play if there had been no interrogation."[83]

The Court's choice description of Detective Leaming's conduct as "interrogat[ion]" is noteworthy because it applies fifth amendment language in a sixth amendment context. The Court based its holding on *Massiah* and stated

79. The Supreme Court declared there to be no doubt "that judicial proceedings had been initiated against Williams before the start of the automobile ride from Davenport to Des Moines." *Id.* at 392.

80. *Id.* at 390-92.

81. *Id.* at 392-93. Detective Leaming's exact words were:

> I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.

Id. Williams responded by asking Leaming why he thought their route would take them past the body, and Leaming stated that he knew the body was in the area of Mitchellville. *Id.* at 393. He then stated to Williams: " 'I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road.' " *Id.*

82. *Id.* at 399. *See also id.* at 406-09 (Marshall, J., concurring) (characterizing Leaming's conduct as a conscious and knowing violation of Williams' fifth and sixth amendment rights).

83. *Id.* at 400.

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that under the sixth amendment, Leaming's actions constituted deliberate elicitation.[84] The Court, therefore, defined "interrogation" in *Brewer* as simply one form of *Massiah*'s "deliberate elicitation" standard.[85] The Court's dictum that the circumstances in *Brewer* were constitutionally indistinguishable from *Massiah*, despite the fact that in *Brewer* the defendant was in a noncustodial setting, simply means that "interrogation," express questioning, or its functional equivalent is one form of "deliberate elicitation." The *Brewer* Court also found it "constitutionally irrelevant" that the *Massiah* elicitation was surreptitious.[86] The Court 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."[87]

The *Brewer* Court problematically injects fifth amendment analysis into sixth amendment jurisprudence with its interchangeable use of the terms "interrogation" and "deliberate elicitation." *Brewer*, then, creates an obstacle for future attempts to protect defendants from circumvention of their sixth amendment right to counsel through the elicitation of statements not rising to the level of "interrogation." In *United States v. Henry*,[88] for example, Justice Powell analyzes *Brewer* from a fifth amendment perspective and imports "interrogation" jurisprudence derived from *Miranda* in limiting the sixth amendment's "deliberate elicitation" standard.[89]

B. Rhode Island v. Innis

The notion that the *Brewer* "Christian burial speech" was a form of deliberate elicitation — and not a form of direct questioning — was confirmed in *Rhode Island v. Innis*.[90] *Innis* is factually indistinguishable from *Brewer*, except that Innis's sixth amendment right to counsel had not yet attached when Innis made statements to the police officer.

After being identified as a robbery suspect, Innis was arrested, read his *Miranda* warnings, and was driven to the police station by three police officers who had been instructed by a superior not to question Innis.[91] During the drive, the officers discussed the missing shotgun allegedly used to perpetrate the crime.[92] One officer noted the proximity of a school for handicapped chil-

84. *Id.*

85. "[T]he Court must be using 'interrogation' to mean *both* formal interrogation and 'deliberate elicitation.... 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*.' " Wilson v. Henderson, 584 F.2d 1185, 1194 n.10 (2d Cir. 1978) (Oakes, J., dissenting), *cert. denied*, 442 U.S. 945 (1979) (emphasis in the original). *See also* Kamisar, *supra* note 61, at 33.

86. Brewer v. Williams, 430 U.S. 387, 400 (1977).

87. *Id.* at 401.

88. 447 U.S. 264 (1980).

89. *Id.* at 275-77. (Powell, J., concurring). *See infra* text accompanying notes 119-24.

90. 446 U.S. 291 (1980).

91. *Id.* at 294.

92. *Id.*

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dren in the vicinity and commented, "God forbid one of them might find a weapon with shells and they might hurt themselves."[93] The other officer commented that as a safety factor, they should "continue to search for the weapon and try to find it."[94] Innis interrupted the conversation and asked the officers to turn the car around so that he could show them where the gun was located. The police then drove back to the scene of Innis's arrest and again advised him of his *Miranda* rights.[95] 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."[96] Innis then led the police to a nearby field and revealed the gun's location.[97]

Innis was subsequently indicted for kidnapping, robbery, and murder.[98] Without passing on whether the police officers "interrogated" Innis, the trial court admitted the shotgun and testimony concerning its discovery. Innis was convicted on all counts.[99]

The Supreme Court granted certiorari to address for the first time the meaning of "interrogation" in a fifth amendment context.[100] Based on the above facts, the *Innis* majority did not find "interrogation" or its "functional equivalent" and did not suppress the statements as "deliberate elicitation."[101] In a footnote, the Court distinguished the fifth amendment "interrogation" standard from the sixth amendment "deliberate elicitation" standard:

> Our decision in *Brewer* rested solely on the Sixth and Fourteenth Amendment right to counsel. That right, as we held in *Massiah v. United States*, prohibits law enforcement officers from 'deliberately elicit[ing]' incriminating information from a defendant in the absence of counsel after a formal charge against the defendant has been filed. . . . By contrast, the right to counsel at issue in the present case is based not on the Sixth and Fourteenth Amendments, but rather on the Fifth and Fourteenth Amendments as interpreted in the *Miranda* opinion. The definitions of 'interrogation' under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct.[102]

93. *Id.* at 294-95. One of the officers present testified that Officer Gleckman said, "It would be too bad if the little . . . girl would pick up the gun, maybe kill herself." *Id.* at 295.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 295.

99. *Id.* at 296. On appeal, the Rhode Island Supreme Court, relying in part on *Brewer*, set aside the conviction. The court found that the police officers had "interrogated" Innis and, therefore, violated *Miranda*. *Id.*

100. *Id.* at 297.

101. *Id.* at 302.

102. *Id.* at 300 n.4 (citations omitted).

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The *Innis* Court reaffirmed the notion that express questioning or its functional equivalent invokes fifth amendment interests in protecting the accusatorial nature of the adjudicatory process, while "deliberate elicitation" is associated with protections under the sixth amendment which guarantee the adversarial nature of the criminal process. Though factually similar to *Brewer*, *Innis* had a different outcome because of the analytical distinctions between the fifth and sixth amendments and because the right to counsel had not yet attached.

C. United States v. Henry

In *United States v. Henry*,[103] the Supreme Court reaffirmed the sixth amendment "deliberate elicitation" standard[104] and expanded the protections *Massiah* afforded defendants for whom the right to counsel had attached. Henry had been arrested, indicted for armed robbery, jailed pending trial, and assigned counsel. Government agents contacted an inmate named Nichols, an experienced informant, who informed the agents that he was in the same cellblock as Henry. An agent told Nichols "to be alert to any statements made by the federal prisoners, but not to initiate any conversation with or question Henry regarding the bank robbery."[105]

The agent submitted an affidavit to the district court describing his instructions to Nichols:

> I specifically recall telling Nichols that he was not to question Henry or [the other federal prisoners] about the charges against them, however, if they engaged him in conversation or talked in front of him, he was requested to pay attention to their statements. I recall telling Nichols not to initiate any conversations with Henry regarding the bank robbery charges against Henry, but that if Henry initiated the conversations with Nichols, I requested Nichols to pay attention to the information furnished by Henry.[106]

In other words, the agent's instructions guarded against "interrogation" — express questioning or its functional equivalent — but not the possibility that the informant's presence and his relationship with Henry might constitute "deliberate elicitation." Furthermore, the agent had no way of ascertaining whether Nichols actually followed his intructions. Payment was contingent on the amount of information Nichols could provide; therefore, Nichols had every reason to obtain information from Henry by any means short of direct questioning.

Nichols testified that "he had 'an opportunity to have some conversations with Mr. Henry while he was in the jail,' " and that "Henry described to him

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103. 447 U.S. 264 (1980).
104. *Id.* at 270.
105. *Id.* at 266.
106. *Id.* at 268.

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the details of the robbery."[107] The court of appeals held that this conversation, given Nichols' association with Henry, was a product of "deliberate elicitation" which violated Henry's sixth amendment right to counsel under *Massiah*.[108]

Chief Justice Burger's majority opinion phrased the issue on appeal to the Supreme Court in the following way: "whether under the facts of this case a Government agent 'deliberately elicited' incriminating statements within the meaning of *Massiah*."[109] The Court focused on three factors in concluding that the government *had* deliberately elicited Henry's statements. First, Nichols was a paid informant acting under the government's instruction to listen and memorize anything said to him by Henry and the other federal prisoners. Second, Nichols appeared to be no more than a fellow inmate. Third, Henry was in custody and under indictment.[110] The Court noted that although the government agents had instructed Nichols not to question Henry, Nichols was not simply a "passive listener;" he had " 'some conversations with Mr. Henry,' " and Henry's statements "were 'the product of this conversation.' "[111]

The majority found that Henry's custody was a "relevant factor," albeit not dispositive, of a sixth amendment claim which was separate and distinct from Henry's fifth amendment claim under *Miranda*.[112] Henry's custody was relevant because, as the Court had found in *Miranda*, there are "powerful psychological inducements to reach for aid when a person is in confinement."[113] The Supreme Court agreed with the court of appeals' finding that Nichols had gained Henry's confidence and that the incriminating conversations were "facilitated by Nichols' conduct and apparent status as a person sharing a common plight."[114] Finally, the Court held that "[b]y 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."[115] The *Henry* majority rejected the government's contention that "affirmative interrogation" was necessary to implicate sixth amendment protections and reaffirmed *Massiah*'s "deliberate elicitation" standard.[116]

The majority in *Henry* also clarified the confusion created by *Brewer*'s

107. *Id.* at 267.
108. *Id.* at 269.
109. *Id.* at 270.
110. *Id.* at 270-74.
111. *Id.* at 271.
112. *Id.* at 273-74 n.11.
113. *Id.* at 274.
114. *Id.*
115. *Id.*
116. *Id.* at 271. The Court explained:

The Government argues that this Court should apply a less rigorous standard under the Sixth Amendment where the accused is prompted by an undisclosed undercover informant than where the accused is speaking in the hearing of persons he knows to be Government officers. That line of argument, however, seeks to infuse Fifth Amend-

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emphasis on interrogation. "[W]e are not persuaded, as the Government contends, that *Brewer v. Williams* modified *Massiah*'s 'deliberately elicited' test."[117] The Court elaborated on the meaning of deliberate elicitation by holding that the sixth amendment is violated whenever the government "intentionally creat[es] a situation likely to induce [a defendant] to make incriminating statements without the assistance of counsel."[118]

1. Justice Powell's Concurrence

Justice Powell's concurrence in *Henry* foreshadowed his majority opinion in *Kuhlmann v. Wilson* and established the framework which would ultimately undermine the deliberate elicitation standard promoted in *Massiah* and *Henry*. In *Henry*, Powell noted that "the Sixth Amendment is not violated when a passive listening device collects, but does not induce, incriminating comments."[119] Justice Powell asserted that "the mere presence of a jailhouse informant who had been instructed to overhear conversations and to engage a criminal defendant in some conversations . . . [is not] necessarily . . . unconstitutional."[120] Rather, a court would have to consider "whether the informant's actions constituted deliberate and 'surreptitious *interrogatio[n]*' of the defendant."[121]

Justice Powell's reliance on "interrogation," however, is factually and analytically at odds with *Massiah* and *Henry*, where the Court found that the dispositive issue was the government's creation of a situation which enabled the informant to obtain statements from the defendant, rather than the presence or absence of interrogation. It was the act of *retaining the informants and putting them in contact with the defendants* which constituted the deliberate elicitation.

In his concurrence, Justice Powell stated that if the informant in *Henry* had not deliberately elicited a statement through interrogation, "there would be no interference with the relationship between client and counsel."[122] Furthermore, in order to prove a violation of the sixth amendment right to counsel, "a defendant must show that the government engaged in conduct that,

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> ment concerns against compelled self-incrimination into the Sixth Amendment protection of the right to the assistance of counsel.

Id. at 272-73. The majority also noted that the fourth and fifth amendments did not apply because " 'the Fourth Amendment [does not protect] a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.' " *Id.* at 272 (quoting Hoffa v. United States, 385 U.S. 293, 302 (1966)). The fifth amendment does not apply to undercover agents because of the absence of the potential for compulsion. *Id. See also* Fulton, *Sixth Amendment — Massiah Revitalized*, 71 J. CRIM. L. & CRIMINOLOGY 601, 605 (1980).

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

118. *Id.* at 274. Commentators have cited Wilson v. Henderson, 584 F.2d 1185 (2d Cir. 1978), *cert. denied*, 442 U.S. 945 (1979), as a case which would almost definitely be reversed given the new *Henry* standard. *See* Fulton, *supra* note 116, at 605.

119. 447 U.S. at 276 (Powell, J., concurring).

120. *Id.*

121. *Id.* (emphasis added).

122. *Id.*

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considering all of the circumstances, is the functional equivalent of interrogation."[123] Justice Powell, therefore, applied fifth amendment doctrine to a sixth amendment case and redefined the sixth amendment standard of "deliberate elicitation" in fifth amendment "interrogation" terms.[124] This analysis substantially narrows the range of protections afforded defendants under the right to counsel. Conversely, Powell's analysis allows the government to obtain admissions about past acts from an accused in the absence of counsel despite the fact that adversarial proceedings have commenced. This result clearly reduces an indicted defendant's meaningful opportunity to present a defense at trial and increases the likelihood that a guilty plea will dispose of the case.

III.
Kuhlmann v. Wilson

In *Kuhlmann v. Wilson*,[125] the Court again revisited the admissibility of statements made in the presence of a jailhouse informant. Writing for the majority, Justice Powell defined the issue in *Kuhlmann* as the question which he found was left undecided in *Henry*: "whether the Sixth Amendment forbids admission in evidence of an accused's statements to a jailhouse informant who was 'placed in close proximity [to the accused] but [made] no effort to stimulate conversations about the crime charged.' "[126]

Justice Powell characterized the sixth amendment right to the assistance of counsel as protecting defendants from "indirect and surreptitious interrogation as well as [from] those conducted in the jailhouse."[127] He reinterpreted *Massiah* to be only "concerned with interrogation or investigative techniques that were equivalent to interrogation."[128] In distinguishing *Henry* from

123. *Id.* at 277 (citing Brewer v. Williams, 430 U.S. 387 (1977)). *See also* Rhode Island v. Innis, 446 U.S. 291 (1980).

124. Justices Blackmun and White, dissenting in *Henry*, insisted that "deliberate elicitation" mandates a finding of specific intent on the part of the government. 447 U.S. 264, 278 (1980). They concluded that since the government agent told Nichols not to "elicit" statements from Henry, they were not acting with the intent to violate Henry's sixth amendment right to counsel. *Id.* This argument is flawed because the government agent told Nichols not to ask questions about the robbery but did want him to elicit information from Henry which was the whole purpose in using Nichols in the first place. Justices Blackmun and White also argued that "deliberately elicited" does not mean "intentionally creating a situation likely to induce" a defendant to make incriminating statements. *Id.* at 278-79. They argued that "likely to induce" saps the word "deliberately" of all significance. *Id.* at 279. The majority in *Henry*, however, is only rephrasing the *Massiah* rule, which equates "deliberate" with "intentional," not with "likely to induce." Justices Blackmun and White also objected to the *Henry* rule because they found Henry's statements to be "unquestionably voluntary," inserting fifth amendment concerns into a sixth amendment case where the question of voluntariness is irrelevant. *Id.* at 281.

125. 477 U.S. 436 (1986). For the facts of this case, see *supra* text accompanying notes 2-13.

126. *Id.* at 456 (quoting United States v. Henry, 447 U.S. 264, 271 n.9 (1980)).

127. *Id.* at 457 (quoting Massiah v. United States, 377 U.S. 201, 206 (1964) and United States v. Massiah, 307 F.2d 62, 72 (2d Cir. 1962) (Hays, J., dissenting in part)).

128. *Id.*

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Kuhlmann, Powell asserted that the *Henry* informant actually engaged the defendant in conversation, while the informant in *Kuhlmann* was "merely listening."[129] He rejected the reasoning of the court of appeals, which found, as the Supreme Court had in *Henry*, that the informant "[s]ubtly and slowly, but surely . . . served to exacerbate [the defendant's] already troubled state of mind," resulting in the deliberate elicitation of an incriminating statement.[130] Powell ignored the fact that the same three factors which the *Henry* court had found dispositive were present in the factual circumstances of *Kuhlmann*. Namely, Wilson's cellmate was an informant under instructions from the government to listen to and write down what Wilson said; the informant appeared to be a fellow inmate; and finally, Wilson was in custody and adversary proceedings against him had commenced.

In his dissent, Justice Brennan observed that "[t]he State intentionally created a situation in which it was foreseeable that [Wilson] would make incriminating statements" when counsel was not present.[131] He claimed that the case was "virtually indistinguishable" from *Henry* and agreed with the Second Circuit that the police had deliberately placed Wilson in a cell that overlooked the scene of the crime to elicit incriminating statements in conversation with the informant Lee.[132] Brennan emphasized that while the informant did not engage in "direct questioning" about the crime, his remark that the defendant's story was weak and needed strengthening deliberately elicited conversation about the crime.[133] Brennan further asserted that the "Sixth Amendment guarantees an accused, at least after the initiation of formal charges, the right to rely on counsel as the 'medium' between himself and the State,"[134] and thereby rejected the narrow view of the role of defense counsel as being limited to conducting a hearing or trial or advising the defendant whether to plead guilty.[135] Brennan also emphasized that the sixth amendment is not violated when the state obtains incriminating statements from an accused " 'by luck or happenstance.' "[136] By contrast, he explained that the right to counsel is violated when the state "knowingly circumvent[s] the accused's right to have counsel present in a confrontation between the accused

129. *Id.* at 459. Justice Powell presumed Wilson's statements to the informant to be "voluntary," as the state trial court record had found, and argued that the trial court's factual finding of voluntariness must be given a presumption of correctness. *Id.* As previously noted, the question of voluntariness is irrelevant in discussing the standard of "deliberate elicitation" under the sixth amendment. *See supra* note 124. Furthermore, the trial court's decision was handed down in 1972, well before *Brewer, Innis* and *Henry* were decided.

130. Wilson v. Henderson, 742 F.2d 741, 745 (2d Cir. 1984).

131. Kuhlmann v. Wilson, 477 U.S. 436, 476 (1986) (Brennan, J., dissenting).

132. *Id.* at 473. The only difference which Brennan found was that a visit from Wilson's brother was an additional catalyst of his confession to Lee. *Id.* at 475-76.

133. *Id.*

134. *Id.* at 473 (quoting Maine v. Moulton, 474 U.S. 159, 176 (1985)).

135. *See contra* United States v. Henry, 447 U.S. 264, 295-96 (1980) (Rehnquist, J., dissenting). *See supra* note 30.

136. *Kuhlmann*, 477 U.S. at 474 (quoting Maine v. Moulton, 474 U.S. 159, 176 (1985)).

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and a state agent."[137]

Brennan's dissent, therefore, points to the analytical differences between *Massiah* and *Henry*, on the one hand, and *Miranda* and *Innis*, on the other. Brennan refutes Powell's contention both in *Kuhlmann* and *Henry*. According to Brennan, what is dispositive is whether the state "deliberately elicits" a statement by placing the informant in the presence of the defendant once adversary proceedings have commenced rather than whether the informant actually questions the defendant.

In sum, Justice Powell takes a radically narrow view[138] of the sixth amendment protections which *Massiah*, *Brewer* and *Henry* afforded defendants. His use of a fifth amendment analysis in his *Henry* concurrence ignores the sixth amendment policies underlying these cases. In *Kuhlmann v. Wilson*, Powell substantially alters the meaning of "deliberate elicitation" to include only acts equivalent to interrogation. Powell's reformulation displaces sixth amendment values with those of the fifth amendment, thereby narrowing the protections of the sixth amendment.

CONCLUSION: THE EFFECT OF *KUHLMANN V. WILSON* ON THE FUTURE ADMINISTRATION OF CRIMINAL JUSTICE

Justice Powell's opinion in *Kuhlmann v. Wilson* reinterprets the sixth amendment standard of "deliberate elicitation" and limits it to a narrow definition of "interrogation" as found in *Rhode Island v. Innis*, a fifth amendment decision. Though Powell claims to base his opinion on *Massiah*, *Brewer* and *Henry*, none of these decisions limit themselves to investigative techniques tantamount to interrogation.

Massiah attempted to prevent the government from interfering with a defendant's right to counsel once adversary proceedings had commenced. In *Brewer*, the Court determined that the "Christian burial speech" deliberately elicited a statement from the accused regardless of whether the speech qualified as direct questioning or its functional equivalent. *Henry* extended the meaning of "deliberate elicitation" to government-created situations likely to induce incriminating statements from the accused in the absence of counsel.

Kuhlmann v. Wilson, however, represents a departure from the sixth amendment concerns advanced in *Massiah*, *Brewer* and *Henry*. In *Kuhlmann*, the concern for factual guilt triumphs over the adversarial protections afforded defendants by *Massiah*, *Brewer* and *Henry*. The case therefore suggests the promotion of a crime control model of criminal justice over a due process model, despite the Court's rhetoric regarding the adversarial process. A crime control model tolerates procedural rules which prohibit the government from intrusively gathering evidence where there is a good chance that the evidence

137. *Id.* (quoting Maine v. Moulton, 474 U.S. 159, 176 (1985)) (footnote omitted).

138. Powell's revisionist view is that the primary concern of the *Massiah* line of decisions is secret interrogation through police investigative techniques that are the equivalent of direct police interrogation. *Id.* at 456-57.

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will ultimately be deemed unreliable. But this model cannot tolerate the exclusion of illegally obtained yet completely reliable evidence. Thus, involuntary confessions with a substantial likelihood of mistaken identification may result in the state's declining prosecution, while illegally obtained, but otherwise reliable evidence, is admitted against the accused.

In *Kuhlmann v. Wilson*, Wilson's confession was both voluntary and reliable since he did not know that he was speaking to an agent of the police and was not coerced into telling the informant Lee that he had committed the crime. In light of this reliability, the Court rejected Wilson's sixth amendment claim that the government engaged in illegal conduct. By contrast, *Henry* held that the government's same act of placing an informant in an indicted defendant's cell was unlawful and violated the defendant's right to counsel. The inconsistency between these two decisions indicates the *Kuhlmann* majority's movement toward a reliance on a crime control model of criminal justice. Despite the Court's due process rhetoric, *Kuhlmann v. Wilson* reveals the Court's reluctance to impede the massive flow of criminal cases through the guilty plea process and other nonadversarial dispositions.

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