

JAILHOUSE INFORMANTS AND THE SIXTH AMENDMENT: IS THE U.S. SUPREME COURT ADEQUATELY PROTECTING AN ACCUSED'S RIGHT TO COUNSEL?

Abstract: A defendant's Sixth Amendment right to counsel is a fundamental pillar of our criminal justice system. The Sixth Amendment guarantees a criminal defendant the right to a lawyer during any critical stage of a criminal proceeding. There is perhaps no time when an accused party's right to counsel becomes more important than during an interrogation. It is clear that the government cannot deliberately elicit information from an accused party in the absence of his or her lawyer. "Deliberate elicitation," however, becomes difficult to define or detect when the government employs indirect methods of interrogation, rather than overt questioning, to obtain information from an accused party. One such indirect method, the use of jailhouse informants, presents special constitutional problems because of the unique dynamics that exist in a jail cell encounter between an unsuspecting defendant and an undercover informant. Courts have struggled to apply the Sixth Amendment's prohibition on the elicitation of information in the absence of counsel to situations involving jailhouse informants. The U.S. Supreme Court has directly considered the issue twice and has reached conflicting results despite strong factual similarities. This Note proposes a new standard for detecting right-to-counsel violations in the jailhouse informant context, a two-tiered inquiry that attempts to address the unique constitutional problems that the use of jailhouse informants creates.

INTRODUCTION

The right to counsel for a criminal defendant is a fundamental pillar of our system of justice.¹ The Sixth Amendment embodies this concept by guaranteeing an accused party the right to the assistance of counsel for his or her defense.² In the absence of this right to a lawyer during key events in a criminal proceeding, a criminal defendant might not know how, or even when, to assert important constitutional rights.³ Thus, the U.S. Supreme Court has interpreted the Sixth

¹ See *Massiah v. United States*, 377 U.S. 201, 204-05 (1964); *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

² See U.S. CONST. amend. VI.

³ See, e.g., *Powell v. Alabama*, 287 U.S. 45, 69 (1942).

Amendment to entitle an accused party to a lawyer during any critical stage of a criminal proceeding.⁴

There is perhaps no time when an accused's right to counsel becomes more important than during a government interrogation.⁵ Although it is clear that the government itself cannot deliberately elicit information from an accused party in the absence of his or her lawyer, "deliberate elicitation" becomes difficult to define or detect when the government attempts to elicit information indirectly.⁶ In situations where the government uses undercover informants, the accused party does not know that he or she is effectively being interrogated by a government agent, and is thus unaware of the need to invoke his or her right to counsel.⁷

Of the various undercover techniques that the government uses to obtain information from accused parties, the use of jailhouse informants presents special constitutional problems.⁸ Jailhouse informants—incarcerated individuals placed in proximity to an accused party to obtain incriminating information—often develop close relationships with unsuspecting defendants who think they are merely conversing with fellow cellmates.⁹ Because of the unique dynamics that exist in a cellmate encounter between a defendant and a jailhouse informant, including a sense of shared plight and the day-to-day pressures of incarceration, it can be difficult to discern when exactly undercover interrogation has taken place in this context.¹⁰

Given all of this, courts have struggled mightily to apply the Sixth Amendment's prohibition on the elicitation of information in the absence of counsel to situations involving jailhouse informants.¹¹ The U.S. Supreme Court has dealt with the issue on only two occasions, and despite strong factual similarities, reached conflicting results in

⁴ See *Massiah*, 377 U.S. at 205; *Spano v. New York*, 360 U.S. 315, 321 (1959); *Powell*, 287 U.S. at 69; see also *Spano*, 360 U.S. at 326 (Douglas, J., concurring).

⁵ See *Massiah*, 377 U.S. at 206; *Spano*, 360 U.S. at 326 (Douglas, J., concurring).

⁶ See *Spano*, 360 U.S. at 321.

⁷ See, e.g., *Brewer v. Williams*, 430 U.S. 387, 399 (1977); *Massiah*, 377 U.S. at 206.

⁸ See, e.g., *Kuhlmann v. Wilson*, 477 U.S. 436, 457-59 (1986); *United States v. Henry*, 447 U.S. 264, 273-74 (1980).

⁹ See *Wilson*, 477 U.S. at 439-40; *Henry*, 447 U.S. at 266-69; Jana Winograde, *Jailhouse Informants and the Need for Judicial Use Immunity in Habeas Corpus Proceedings*, 78 CAL. L. REV. 755, 755-56 (1990).

¹⁰ See *Henry*, 447 U.S. at 274.

¹¹ See, e.g., *United States v. Brink*, 39 F.3d 419, 422-24 (3d Cir. 1994) (broadly defining the right to counsel in the jailhouse informant context); *Commonwealth v. Franciscus*, 710 A.2d 1112, 1118-20 (Pa. 1998) (same); see also *United States v. York*, 933 F.2d 1343, 1357-60 (7th Cir. 1991) (giving a narrower reading to the right to counsel in the jailhouse informant context).

these decisions.¹² In the earlier of the two cases, *United States v. Henry*, the U.S. Supreme Court announced broad Sixth Amendment protections for an accused party confronted by a jailhouse informant.¹³ There, the Court held that even without specific evidence that an informant took active steps to elicit information from a defendant, a right-to-counsel violation could still occur if the government agents had worked behind the scenes to create a situation in which statements were likely to be made.¹⁴ In *Kuhlmann v. Wilson*, the more recent of the two cases, however, the U.S. Supreme Court announced that for a right-to-counsel violation to occur, a jailhouse informant must himself or herself take active conversational steps, "beyond merely listening," to elicit information from an accused.¹⁵ This standard makes determining when a jailhouse informant has violated a defendant's Sixth Amendment rights no easy task.¹⁶

This Note proposes a new standard for detecting violations of the Sixth Amendment right to counsel when an accused party is confronted by an undercover jailhouse informant.¹⁷ Part I explores the fundamental principles behind the Sixth Amendment as defined by the U.S. Supreme Court.¹⁸ It examines the basic contours of the right to counsel in its most important context: direct and indirect methods of police interrogation.¹⁹ Part II focuses on a unique form of indirect interrogation: the government's use of jailhouse informants to elicit information from an accused party.²⁰ It discusses in detail the only two cases in which the U.S. Supreme Court has examined the right to counsel as it applies to the use of jailhouse informants—*Wilson* and *Henry*.²¹ This Part also examines *Maine v. Moulton*, an important right-

¹² *Wilson*, 477 U.S. at 439–40, 459; *Henry*, 447 U.S. at 266–69, 274–75.

¹³ 447 U.S. at 274–75.

¹⁴ See *id.*

¹⁵ 477 U.S. at 459; see Bruce D. Lundstrom, *Sixth Amendment—Right to Counsel: Limited Postindictment Use of Jailhouse Informants is Permissible—Kuhlmann v. Wilson*, 106 S. Ct. 2616 (1986), 77 J. CRIM. L. & CRIMINOLOGY 743, 743–44 (1986).

¹⁶ See, e.g., *State v. Leopardi*, 701 A.2d 952, 956 (N.J. Super. Ct. App. Div. 1997) (lamenting the court's own "difficulty in reconciling" jailhouse informant cases); Richard T. Saas, *Constitutional Rights of the Accused—Sixth Amendment Right to Counsel—Admissibility of Incriminating Statements Obtained by Passive Jailhouse Informants—Kuhlmann v. Wilson*, 106 S. Ct. 2616, 54 TENN. L. REV. 105, 125 n.223 (1986) (commenting that "struggled" may be a kind word" to use to describe courts' difficulties in defining the right to counsel in undercover situations); Louis D. Lappen, Note, *A Reconciliation of Henry and Wilson: The Intersection of Constitutional Rights with Procedural Review*, 1987 DUKE L.J. 945, 953.

¹⁷ See *infra* notes 284–314 and accompanying text.

¹⁸ See *infra* notes 26–40 and accompanying text.

¹⁹ See *infra* notes 41–101 and accompanying text.

²⁰ See *infra* notes 102–227 and accompanying text.

²¹ See *infra* notes 110–192 and accompanying text.

to-counsel case decided by the U.S. Supreme Court only months before *Wilson* because it presents a surprisingly broader reading of the Sixth Amendment than one would expect given its proximity to *Wilson*.²² Part III examines scholarly critiques of the *Wilson* decision.²³ These critiques center around the contention that *Wilson* is a worrisome narrowing of an accused's right to counsel in the jailhouse informant setting, a right that according to *Henry* enjoys a broader protection.²⁴ Part IV proposes a new standard with which to protect an accused's Sixth Amendment rights in the jailhouse informant context.²⁵

I. THE SIXTH AMENDMENT RIGHT TO COUNSEL

The Sixth Amendment to the U.S. Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."²⁶ This right is fundamental to the fair trial of an accused party,²⁷ and the U.S. Supreme Court has consistently given an expansive reading to the protections that it affords.²⁸ In defining the contours of the right to counsel, the Court has reiterated a single theme—that an accused party is entitled to the assistance of counsel at any stage in a criminal proceeding where it would help him or her.²⁹ Thus, the instant that the State's interactions with a suspect turn from being investigatory to accusatory, the adversarial system has commenced, and an accused must be allowed access to a lawyer.³⁰

The U.S. Supreme Court's first modern exposition of the right to counsel came in 1932, in the seminal case of *Powell v. Alabama*.³¹ This case involved three defendants accused of rape who had been con-

²² See *infra* notes 193–227 and accompanying text.

²³ See *infra* notes 228–272 and accompanying text.

²⁴ See *infra* notes 228–272 and accompanying text; see also, e.g., Lundstrom, *supra* note 15, at 748; James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the Messiah Doctrine*, 22 U.C. DAVIS L. REV. 1, 78–81 (1988).

²⁵ See *infra* notes 273–314 and accompanying text.

²⁶ U.S. CONST. amend. VI.

²⁷ *Gideon v. Wainwright*, 372 U.S. 335, 342–46 (1963) (holding that the right to counsel is so fundamental a right that it is an integral part of due process, and thus the Sixth Amendment guarantee applies to state criminal proceedings via the Fourteenth Amendment).

²⁸ Lundstrom, *supra* note 15, at 748.

²⁹ See, e.g., *Maine v. Moulton*, 474 U.S. 159, 170 (1985); *Messiah v. United States*, 377 U.S. 201, 205 (1964); *Powell v. Alabama*, 287 U.S. 45, 69 (1932); Saas, *supra* note 16, at 109 n.48 (1986).

³⁰ See *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964).

³¹ 287 U.S. 45, 71 (1932); see Saas, *supra* note 16, at 109.

victed and sentenced to death without having been appointed counsel during the short time between their arraignments and trials.³² The U.S. Supreme Court reversed their convictions, finding that the defendants' Sixth Amendment right to counsel had been violated.³³ The Court stated that the right to counsel applies not only during a trial, but to any situation in which an accused would need the advice of a lawyer.³⁴ In giving the right to counsel this broad interpretation, the Court made an important, fundamental recognition—that an accused “requires the guiding hand of counsel at every step in the proceedings against him.”³⁵ Because the period of time between an accused's arraignment and trial is a “critical period” where “consultation, thorough-going investigation and preparation [are] vitally important,” the right to counsel exists just as strongly before trial as it does during trial.³⁶

Decisions after *Powell* broadened its basic holding in a number of important ways.³⁷ In 1961, in *Hamilton v. Alabama*, the Court clarified what constitutes a critical stage in a criminal proceeding, defining it as any period during which “[w]hat happens there may affect the whole trial.”³⁸ In 1967, in *United States v. Wade*, the Court took the critical stage concept a step further, saying that the definition applies whenever “counsel's absence . . . might derogate from [an accused's] right to a fair trial.”³⁹ Around that same time, in 1964 in *Escobedo v. Illinois*, the Court held that the right to counsel could even attach *before* official proceedings have commenced against an accused—so long as it is clear that police have moved beyond general investigation of a crime to a point where their purpose is to elicit a confession from a suspected party.⁴⁰

A. *The Right to Counsel in the Context of Direct Police Interrogation*

There is perhaps no more “critical” pretrial stage in a criminal proceeding than an interrogation.⁴¹ In an interrogation setting, the government actively attempts to elicit incriminating statements from

³² *Powell*, 287 U.S. at 49–50, 57.

³³ *Id.* at 71–73.

³⁴ *Id.* at 57.

³⁵ *Id.* at 69.

³⁶ *Id.* at 57.

³⁷ Saas, *supra* note 16, at 109 n.48.

³⁸ 368 U.S. 52, 54 (1961).

³⁹ 388 U.S. 218, 228 (1967); see Tomkovicz, *supra* note 24, at 13 n.53.

⁴⁰ See 378 U.S. at 484–85, 492.

⁴¹ See *Massiah*, 377 U.S. at 206; *Spano v. New York*, 360 U.S. 315, 325–26 (1958) (Douglas, J., concurring).

an accused party.⁴² It is crucial that a defendant have the advice of counsel when the State's "undeviating intent" is to use its prosecutorial power to obtain a confession.⁴³ Hence, the U.S. Supreme Court's protection of an accused's Sixth Amendment right to counsel is perhaps at its apex when methods of police interrogation are involved.⁴⁴

An important pronouncement of the right to counsel in the context of direct police interrogation came when the U.S. Supreme Court decided *Spano v. New York* in 1959.⁴⁵ There, in an important concurrence, one Justice stated emphatically, and two others agreed, that the Sixth Amendment meant little if it did not mean that an accused party is entitled to counsel during an interrogation.⁴⁶ *Spano* involved petitioner, Vincent Spano, who allegedly had shot and killed a professional boxer who had previously assaulted him at a local bar.⁴⁷ Spano was indicted on first-degree murder charges, and three days later turned himself in to authorities, accompanied by counsel.⁴⁸ His attorney instructed him not to answer any questions, and left him in the custody of police officers.⁴⁹ Authorities then began to question Spano, and engaged him in a "persistent and continuous" all-night interrogation.⁵⁰ During the initial stages of the interrogation, Spano refused to answer any questions, and made multiple requests to speak to his attorney.⁵¹ The police denied these requests, and by the early hours of the morning, successfully elicited a confession from Spano.⁵² At his trial, the court admitted Spano's confession into evidence over his objection, convicted him of first degree murder and sentenced him to death.⁵³

The U.S. Supreme Court overturned Spano's conviction on Fourteenth Amendment grounds, finding that the method in which

⁴² See *Escobedo*, 378 U.S. at 485; Welsh S. White, *Interrogation Without Questions: Rhode Island v. Innis and United States v. Henry*, 78 MICH. L. REV. 1209, 1209-10 (1980).

⁴³ See *Spano*, 360 U.S. at 324.

⁴⁴ See *Massiah*, 377 U.S. at 206; *Spano*, 360 U.S. at 324.

⁴⁵ See 360 U.S. at 324-26.

⁴⁶ *Id.* at 325-26 (Douglas, J., concurring).

⁴⁷ *Id.* at 316.

⁴⁸ *Id.* at 316-17.

⁴⁹ *Id.* at 317.

⁵⁰ *Spano*, 360 U.S. at 317-20. Spano was questioned almost continuously from 7:15 p.m. until 4:05 a.m. *Id.*

⁵¹ *Id.* at 317-18.

⁵² *Id.* at 319. At around 11:00 p.m., interrogators convinced a friend of Spano, a cadet in the police academy at the time, to use deceptive tactics to convince Spano that making a confession was in his best interest. See *id.* at 317-19. He eventually succumbed to these requests and confessed at approximately 3:30 a.m. *Id.* at 319.

⁵³ *Id.* at 320.

officers extracted the confession violated traditional principles of due process.⁵⁴ A concurring opinion, however, examined the Sixth Amendment implications of the case, elaborating on what it saw as a "flagrant" violation of Spano's right to counsel.⁵⁵ This concurrence, written by Justice Douglas and joined by two other members of the Court, reaffirmed a fundamental Sixth Amendment principle first announced in *Powell*—that the assistance of counsel prior to trial was just as necessary, if not more so, than it was in open court.⁵⁶ Later in his concurrence, Justice Douglas asked a rhetorical question that highlighted the Sixth Amendment concerns to which unlawful police interrogations give rise:

[W]hat use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses? In that event the secret trial in the police precincts effectively supplants the public trial guaranteed by the Bill of Rights.⁵⁷

Thus, in *Spano*, an important concurrence made clear that the right to counsel is entitled to special protection when an accused is subjected to police interrogation.⁵⁸

B. *The Right to Counsel in the Context of Undercover Interrogation*

For the purposes of the Sixth Amendment right to counsel, surreptitious methods of interrogation can be the functional equivalent of direct questioning.⁵⁹ Whether through the use of an undercover agent, a turncoat accomplice, or a jailhouse informant, the government often attempts to obtain through indirect means what it likely could not get through direct interrogation.⁶⁰ Indeed, police and other authorities realize that subtle, deceptive tactics for obtaining information from an accused can be far more effective than overt,

⁵⁴ *Id.* at 324.

⁵⁵ *Spano*, 360 U.S. at 325 (Douglas, J., concurring).

⁵⁶ *Id.* (Douglas, J., concurring).

⁵⁷ *Id.* at 326 (Douglas, J., concurring).

⁵⁸ *Id.* at 325–26 (Douglas, J., concurring).

⁵⁹ See *Massiah*, 377 U.S. at 206; White, *supra* note 42, at 1210. Although various definitions exist for what exactly constitutes "surreptitious" or "undercover" interrogation, for the purposes of this Note the term is meant to connote any type of police attempt to elicit incriminating statements from an accused party in which the accused is unaware that he is talking to a government agent. See Saas, *supra* note 16, at 108 n.32.

⁶⁰ See *Spano*, 360 U.S. at 321; White, *supra* note 42, at 1210–11.

"browbeating" techniques such as direct questioning.⁶¹ When an accused party is unknowingly confronted by an undercover police informant, he is surely in as much of a critical stage of his pretrial proceedings as he is during an open interrogation.⁶² This is because, unlike a situation involving the direct questioning of a suspect by authorities, when undercover means are used, the suspect is unaware of a need to invoke his or her right to counsel.⁶³ Recognizing that methods used to extract confessions are constantly becoming more sophisticated, the Court has made it clear that the Sixth Amendment's protections apply just as strongly to undercover interrogations as they do to direct police questioning.⁶⁴

1. *Massiah v. United States*: The U.S. Supreme Court Creates the "Deliberate Elicitation" Standard

In 1964, in the seminal case of *Massiah v. United States*, the U.S. Supreme Court first examined the Sixth Amendment right to counsel in the context of undercover, surreptitious police practices.⁶⁵ The *Massiah* Court held that the government violated a defendant's Sixth Amendment right when it "used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."⁶⁶ In so holding, the *Massiah* Court created a two-pronged test for detecting right to counsel violations in interrogation settings.⁶⁷ A defendant must show (1) that the person to whom he or she spoke was a government agent, and (2) that the agent "deliberately elicited" incriminating information from him or her in the absence of counsel.⁶⁸ *Massiah's* test has provided the standard by which the Court has evaluated Sixth Amendment surreptitious interrogation claims ever since.⁶⁹

Massiah involved a merchant seaman, Winston Massiah, who had been accused of federal narcotics offenses.⁷⁰ Massiah and a codefen-

⁶¹ See White, *supra* note 42, at 1211.

⁶² See Brewer v. Williams, 430 U.S. 387, 399 (1977); *Massiah*, 377 U.S. at 206.

⁶³ See Tomkovicz, *supra* note 24, at 79-81.

⁶⁴ See *Massiah*, 377 U.S. at 206; *Spano*, 360 U.S. at 321.

⁶⁵ 377 U.S. at 206; see Lundstrom, *supra* note 15, at 749.

⁶⁶ 377 U.S. at 206.

⁶⁷ *Id.*

⁶⁸ See *id.*; Tomkovicz, *supra* note 24, at 13-14, 17.

⁶⁹ See Kuhlmann v. Wilson, 477 U.S. 436, 457, 459 (1986); *Moulton*, 474 U.S. at 172-73; *United States v. Henry*, 447 U.S. 264, 270 (1980); *Brewer*, 430 U.S. at 401; Lundstrom, *supra* note 15, at 749-50.

⁷⁰ 377 U.S. at 201-02.

dant, Jesse Colson, were released on bail following their arraignment.⁷¹ After their release, Colson decided to cooperate with government agents in their investigation of ongoing narcotics activities in which Massiah was allegedly involved.⁷² Colson and a federal agent installed a radio transmitter in Colson's automobile with which the agent could monitor any conversation that took place in the car.⁷³ Shortly thereafter, Colson and Massiah had a long conversation while sitting in the automobile, during which Massiah made a number of incriminating statements related to his narcotics charges.⁷⁴ At trial, these statements were used against him through the testimony of the agent who had monitored them, and Massiah was convicted of multiple narcotics offenses.⁷⁵

The U.S. Supreme Court reversed Massiah's conviction on Sixth Amendment grounds.⁷⁶ Stressing that the right to counsel applies equally to both overt and covert government interrogations, the Court found that Massiah's Sixth Amendment rights had been violated by the government's actions.⁷⁷ The police's illicit tactics led Massiah to make incriminating statements that he almost certainly would not have made had he known Colson was acting on the government's behalf.⁷⁸ The Court found that this tactic constituted deliberate elicitation of statements from Massiah, in violation of his right to counsel.⁷⁹

The *Massiah* Court recognized that the government's use of undercover agents can be the functional equivalent of direct interrogation.⁸⁰ The Court further recognized that surreptitious interrogation can be *more* of a threat to an accused's Sixth Amendment rights than overt questioning.⁸¹ *Massiah's* "deliberate elicitation" standard thus protects the important Sixth Amendment principle that an accused party is entitled to counsel in any type of interrogation situation,

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 202-03.

⁷⁴ *Id.* at 203.

⁷⁵ *Massiah*, 377 U.S. at 203.

⁷⁶ *Id.* at 205-07.

⁷⁷ *Id.* at 206. "[I]f such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse." *Id.* (quoting *United States v. Massiah*, 307 F.2d 62, 72 (2d Cir. 1962) (Hays, J., dissenting), *rev'd*, 377 U.S. 201 (1964)).

⁷⁸ April Lee Ammeter, Comment, *Kuhlmann v. Wilson: "Passive" and "Active" Government Informants—A Problematic Test*, 72 IOWA L. REV. 1423, 1426 (1987).

⁷⁹ *Massiah*, 377 U.S. at 206.

⁸⁰ *See id.*

⁸¹ *Id.*

whether or not such accused party is aware that he or she is being interrogated.⁸²

2. *Brewer v. Williams*: Deliberate Elicitation Includes Subtle Methods of Interrogation

More than a decade after *Massiah*, the U.S. Supreme Court went further in defining what constitutes deliberate elicitation in the context of a Sixth Amendment right-to-counsel claim.⁸³ In 1977, in *Brewer v. Williams*, the Court found that a detective's use of subtle psychological tactics to elicit a statement from a mentally ill murder defendant constituted deliberate elicitation, in violation of his right to counsel.⁸⁴

In *Brewer*, an individual named Robert Williams had been arraigned for the murder of a ten year-old girl who had vanished outside of a Des Moines, Iowa, YMCA.⁸⁵ Williams, who had recently escaped from a mental hospital, had abandoned his car about 160 miles outside of Des Moines and turned himself in at a police station nearby.⁸⁶ Subsequently, two police detectives drove Williams to Des Moines.⁸⁷ Before Williams embarked on the three-hour drive, his attorney told him that the detectives were simply transporting him, and that he should not speak with them at all about the crime until arriving.⁸⁸ During the car trip, however, a detective began to converse with Williams in an attempt to elicit information.⁸⁹ Because the detective knew that Williams was a former mental patient, and also that he was deeply religious, he suggested that they should find the girl's body to give her a proper Christian burial.⁹⁰ In response, Williams directed

⁸² See *id.* The *Massiah* dissent saw the issue in a completely different light. Joined by two other members of the Court, Justice White expressed concerns that the majority opinion had created a rule which would bar the use of important evidence in criminal cases. See *id.* at 208 (White, J., dissenting). In Justice White's view, the case simply involved a defendant who, at his own risk, chose to speak to a friend about a crime, who later decided to disclose what he had heard. *Id.* at 208, 211-12 (White, J., dissenting).

⁸³ *Brewer*, 430 U.S. at 399-400.

⁸⁴ *Id.* at 399.

⁸⁵ *Id.* at 390.

⁸⁶ *Id.* at 390-91.

⁸⁷ *Id.*

⁸⁸ *Brewer*, 430 U.S. at 391.

⁸⁹ *Id.* at 392-93.

⁹⁰ *Id.* at 392-93, 399. The detective said:

I want to give you something to think about while we're traveling down the road. . . . 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 And, since we will be going right past the area on the way into Des

the police to the body.⁹¹ At Williams's trial, the court admitted evidence of these statements over defense objections, and convicted Williams of murder.⁹²

The U.S. Supreme Court affirmed the Court of Appeals's reversal of Williams's conviction, finding that the detective's "Christian burial speech" constituted deliberate elicitation of information from Williams, in violation of his Sixth Amendment right to counsel.⁹³ The Court began its analysis by restating the broad contours of the right to counsel—that it applies in any type of proceeding, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."⁹⁴ Finding that Williams's post-arraignment car ride with two Des Moines detectives clearly met the standard for a critical stage of the proceedings against him, the Court went on to inquire whether the detective had deliberately elicited information from him.⁹⁵

The Court's finding of deliberate elicitation in *Brewer* rested on an important premise—that the detective's use of subtle pressures to obtain information from Williams was the functional equivalent of an interrogation.⁹⁶ As the Court itself put it, whether or not the interrogation took place through surreptitious means or otherwise was "constitutionally irrelevant."⁹⁷ The detective's "Christian burial speech" was, in the eyes of the Court, "tantamount to interrogation" and thus violated Williams's Sixth Amendment rights because it was conducted in the absence of his attorney.⁹⁸ Indeed, the subtle tactics used by the detective to obtain a confession from Williams were as effective—if not more effective—than open, direct questioning.⁹⁹

Thus, in cases such as *Spano*, *Massiah*, and *Brewer*, the U.S. Supreme Court has outlined broad contours for the applicability of the Sixth Amendment right to counsel.¹⁰⁰ An accused party is entitled to the advice of counsel whenever the government attempts to obtain

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 . . .

Id. at 392–93.

⁹¹ *Id.* at 393.

⁹² *Id.* at 394.

⁹³ *Brewer*, 430 U.S. at 400–01.

⁹⁴ *Id.* at 398 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)).

⁹⁵ *Id.* at 399.

⁹⁶ *Id.* at 400.

⁹⁷ *Id.* at 400.

⁹⁸ *Brewer*, 430 U.S. at 400–01.

⁹⁹ *See id.* at 399–401.

¹⁰⁰ *See id.*; *Massiah*, 377 U.S. at 206; *Spano*, 360 U.S. at 325–26 (Douglas, J., concurring); *supra* notes 45–99 and accompanying text.

information from him or her, whether through open interrogation or through subtle, undercover techniques.¹⁰¹

II. JAILHOUSE INFORMANTS—THE RIGHT TO COUNSEL IN THE CONTEXT OF JAIL CELL ENCOUNTERS

In addition to the surreptitious, indirect interrogation tactics described above, the government's use of jailhouse informants to elicit incriminating information raises serious Sixth Amendment concerns.¹⁰² In a typical jailhouse informant situation, an incarcerated individual who has agreed to act as a government informant is placed in close proximity to the target of a government investigation—most likely an accused party awaiting trial.¹⁰³ A typical jailhouse informant is told not to actively engage the accused in conversation about a crime, but to be alert for any statements made by the accused.¹⁰⁴ Jailhouse informants are often rewarded for any information that they provide, either in the form of monetary compensation or sentence reduction.¹⁰⁵

Although the U.S. Supreme Court has been relatively consistent in defining the *Massiah v. United States* deliberate elicitation standard as it applies to other forms of indirect interrogation,¹⁰⁶ the right to counsel becomes harder to circumscribe in the context of government use of jailhouse informants.¹⁰⁷ This is because there are factors present in a jail cell interaction not present in other types of informant-accused encounters.¹⁰⁸ These factors include a strong desire for camaraderie with fellow inmates, a sense of common plight, and the day-to-day pressures of incarceration, factors that make it difficult to discern when, exactly, deliberate elicitation of information has occurred.¹⁰⁹ Two U.S. Supreme Court cases, *United States v. Henry* and *Kuhlmann v. Wilson*, have attempted to define the contours of the right to counsel as it exists in the unique context of a jailhouse infor-

¹⁰¹ See *Brewer*, 430 U.S. at 400–01; *Massiah*, 377 U.S. at 206; *Spano*, 360 U.S. at 325–26 (Douglas, J., concurring).

¹⁰² See *Kuhlmann v. Wilson*, 477 U.S. 436, 458–59 (1986); *United States v. Henry*, 447 U.S. 264, 273–75 (1980).

¹⁰³ See *Wilson*, 477 U.S. at 439–40; *Henry*, 447 U.S. at 266; Robert M. Bloom, *Jailhouse Informants*, CRIM. JUST., Spring 2003, at 20, 20–21; Winograde, *supra* note 9, at 755–56.

¹⁰⁴ See *Wilson*, 477 U.S. at 439–40; *Henry*, 447 U.S. at 266.

¹⁰⁵ See *Henry*, 447 U.S. at 266; Winograde, *supra* note 9, at 755–56.

¹⁰⁶ See, e.g., *Massiah v. United States*, 377 U.S. 201, 202 (1964) (turncoat accomplice); *Spano v. New York*, 360 U.S. 315, 323 (1959) (deception by friend).

¹⁰⁷ See *Wilson*, 477 U.S. at 456–59; *Henry*, 447 U.S. at 274–75.

¹⁰⁸ See *Henry*, 447 U.S. at 274.

¹⁰⁹ See *id.*

mant encounter.¹¹⁰ *Maine v. Moulton*, a case decided between *Henry* and *Wilson*, completes the trio of cases that comprise the modern Court's exposition of the right to counsel as it applies to undercover informants.¹¹¹ Although *Moulton* does not deal specifically with the use of a jailhouse informant, it contains important pronouncements about the deliberate elicitation standard, and is illuminating because it was decided in the same term as *Wilson*.¹¹²

A. United States v. Henry: *The Court Provides Broad Protections Against the Use of Jailhouse Informants*

In 1980, in *Henry*, the U.S. Supreme Court applied *Massiah*'s deliberate elicitation standard to the jailhouse informant context for the first time, and in doing so announced broad Sixth Amendment protections for an accused party.¹¹³ In that case, the defendant, Billy Gale Henry, was indicted for a bank robbery and incarcerated in a city jail in Norfolk, Virginia.¹¹⁴ Shortly after Henry was incarcerated, government agents contacted Edward Nichols, another inmate being held at that jail.¹¹⁵ Nichols, who had on prior occasions acted as a paid informant for the government, told agents that he was housed in the same cellblock as Henry.¹¹⁶ An agent told Nichols to pay attention to any statements he overheard from Henry or the other federal prisoners in his cellblock, but not to question or initiate any conversation with Henry about the bank robbery.¹¹⁷ After this meeting, Henry and Nichols had a conversation in which Henry told Nichols about the bank robbery.¹¹⁸ It is unclear from the facts of the case exactly what transpired in the conversations between Henry and Nichols.¹¹⁹ Henry shared a number of details about the crime with Nichols, including a description of evidence connecting him to the robbery.¹²⁰ Henry also

¹¹⁰ *Wilson*, 477 U.S. at 459; *Henry*, 447 U.S. at 274-75.

¹¹¹ *Maine v. Moulton*, 474 U.S. 159, 176-77 (1985); Tomkovicz, *supra* note 24, at 20.

¹¹² See *Moulton*, 474 U.S. at 176.

¹¹³ *Henry*, 447 U.S. at 270, 274-75.

¹¹⁴ *Id.* at 265-66.

¹¹⁵ *Id.* at 266.

¹¹⁶ *Id.*

¹¹⁷ *Id.* The agent later submitted an affidavit in which he stated "I specifically recall telling Nichols that he was not to question Henry . . . I recall telling Nichols not to initiate any conversations with Henry regarding the bank robbery charges." *Id.* at 268.

¹¹⁸ *Henry*, 447 U.S. at 266.

¹¹⁹ See *id.* at 266-67.

¹²⁰ *Id.*

tried to enlist Nichols's help in a number of ways, including asking Nichols to contact people for him after his release.¹²¹

After his release from jail, agents contacted Nichols, who then shared the information he had obtained from Henry.¹²² The agents paid Nichols for providing the information.¹²³ A few months later, Nichols testified at Henry's trial as to the incriminating statements Henry had made.¹²⁴ The jury, which was not told that Nichols was a paid government informant, convicted Henry of bank robbery.¹²⁵ Henry was sentenced to prison for twenty-five years.¹²⁶ Upon learning that Nichols was an informant, Henry sought habeas relief to vacate his sentence, alleging that the admission of Nichols's testimony violated his Sixth Amendment right to counsel.¹²⁷ The United States District Court for the Eastern District of Virginia denied his motion, but the Fourth Circuit Court of Appeals reversed.¹²⁸ In so holding, the Fourth Circuit stated that by developing a relationship of confidence with Henry, to the point where Henry felt comfortable revealing incriminating information, Nichols and the government interfered with his right to counsel.¹²⁹

In an opinion by Chief Justice Burger, the U.S. Supreme Court affirmed the Fourth Circuit's decision.¹³⁰ 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."¹³¹ Thus, the Court found that the government's use of Nichols as a jailhouse informant to obtain statements from Henry constituted deliberate elicitation of information, as defined in *Massiah*.¹³²

In reaching its conclusion, the *Henry* Court put forth a number of important considerations about the right to counsel as it relates to the use of jailhouse informants.¹³³ The Court confirmed *Massiah's*

¹²¹ *Id.* at 266 n.2. These requests indicate the level of trust that Henry had in Nichols as a confidant. *See id.*

¹²² *Id.* at 266.

¹²³ *Henry*, 447 U.S. at 266.

¹²⁴ *Id.* at 267.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 267-68.

¹²⁸ *Henry*, 447 U.S. at 268-69; *Henry v. United States*, 590 F.2d 544, 547 (4th Cir. 1978), *aff'd*, 447 U.S. 264 (1980).

¹²⁹ *Henry*, 447 U.S. at 269 (citing *Henry*, 590 F.2d at 547).

¹³⁰ *Id.* at 275.

¹³¹ *Id.* at 274.

¹³² *See id.*; *Massiah*, 377 U.S. at 206.

¹³³ *See* 447 U.S. at 274.

holding that the Sixth Amendment applies just as strongly to indirect and surreptitious methods of interrogation as it does to traditional, overt methods of questioning.¹³⁴ Thus, the Court made clear that deliberate elicitation could just as easily take place in a jail cell conversation as it could during an all-night police interrogation.¹³⁵

The *Henry* decision went far in defining what exactly constitutes deliberate elicitation in the unique jailhouse informant context.¹³⁶ In examining Nichols's actions as a government agent, the Court discussed a number of important factors, including the fact that Nichols was placed in close proximity to Henry, that Nichols was paid for information on a contingent fee basis, and that he had previously been an informant.¹³⁷ These circumstances showed that the government must have known that some sort of elicitation of information would take place.¹³⁸ The Court further recognized that even when instructions were given to an informant *not* to elicit incriminating information from a target, a government agent should know that the informant might try to do so anyway in various subtle ways.¹³⁹ In an important observation, the Court noted that telling a jailhouse informant not to initiate conversation with a particular inmate could actually focus the informant *more* on the inmate than if there had been no instruction at all.¹⁴⁰

The *Henry* decision also contained a number of candid recognitions about the realities of jailhouse encounters that should play a role in determining whether deliberate elicitation has occurred.¹⁴¹ The Court recognized that incarceration brings unique pressures into play that might not exist in other surreptitious interrogation situations—including powerful psychological inducements, a desire for camaraderie, and a sense of common plight among inmates.¹⁴² These factors create "subtle influences" that make an accused party "particularly susceptible to the ploys of undercover Government agents."¹⁴³ Conversations that take place in a jail cell have the tendency to yield

¹³⁴ *Id.* at 273; *Massiah*, 377 U.S. at 206.

¹³⁵ *See Henry*, 447 U.S. at 273.

¹³⁶ *See id.* at 270–75.

¹³⁷ *Id.* at 270.

¹³⁸ *Id.* at 270–71.

¹³⁹ *See id.* at 271 n.8.

¹⁴⁰ *See Henry*, 447 U.S. at 271 n.8. This is because when a government agent mentions a particular inmate's name to an informant, it becomes quite obvious at that point that the government must have some interest in obtaining information from him or her. *See id.*

¹⁴¹ *See id.* at 273–75.

¹⁴² *Id.* at 274.

¹⁴³ *Id.*

information that an accused would not otherwise share if he knew he was speaking to a government agent.¹⁴⁴ As the Fourth Circuit had concluded in the case, even if Henry had been induced to give Nichols information only through general conversation, it still was apparent that a type of "interrogation" had occurred.¹⁴⁵ Thus, in affirming the Fourth Circuit's holding, the Court seemed to indicate a willingness to more readily find deliberate elicitation in the jailhouse informant context than in other types of undercover encounters with an accused party.¹⁴⁶

Applying these principles to the facts of the case, the Court noted that Nichols had obviously managed to earn a great deal of trust from Henry because Henry felt comfortable enough with him to discuss details of the bank robbery.¹⁴⁷ It was this trust, the Court implied, that enabled Nichols to obtain incriminating information from Henry, even without evidence that he resorted to using leading questions.¹⁴⁸ Because Nichols appeared to Henry to be a jailhouse acquaintance sharing a "common plight," he could easily induce Henry to discuss his past crimes.¹⁴⁹

The *Henry* Court thus broadly construed deliberate elicitation in the jailhouse informant context.¹⁵⁰ Even though it was not clear from the facts of the case that Nichols affirmatively elicited specific remarks from Henry, the Court still found deliberate elicitation.¹⁵¹ It did this by looking at not only Nichols's actions, but also at the fact that the government placed Nichols in the situation in the first place.¹⁵² Because the government had to have known that doing so would result in his obtaining information, the government itself had taken steps to deliberately elicit statements from Henry.¹⁵³ In the words of the Court, this was not a case where the "constable . . . blundered," rather, it is one where the 'constable' planned an impermissible interference with the right to assistance of counsel."¹⁵⁴ Thus, because the government intentionally created a situation in which it was likely that

¹⁴⁴ *Henry*, 447 U.S. at 273.

¹⁴⁵ *See Henry*, 590 F.2d at 547.

¹⁴⁶ *See Henry*, 447 U.S. at 273-75.

¹⁴⁷ *Id.* at 274 n.12. The Court stated that "Nichols had managed to become more than a casual jailhouse acquaintance. That Henry could be induced to discuss his past crime is hardly surprising . . ." *Id.*

¹⁴⁸ *See id.* at 273-74.

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*; Ammeter, *supra* note 78, at 1428-29.

¹⁵¹ *See Henry*, 447 U.S. at 266, 273-75.

¹⁵² *See id.* at 274; Ammeter, *supra* note 78, at 1428-29.

¹⁵³ *Henry*, 447 U.S. at 274.

¹⁵⁴ *Id.* at 274-75 (citation omitted) (quoting *People v. DeFore*, 242 N.Y. 13, 21 (1926)).

Henry would make incriminating statements to a jailhouse informant, the Court found that it had violated Henry's right to counsel.¹⁵⁵

B. Kuhlmann v. Wilson: *The Court Narrows an Accused's Protections*

In 1986, six years after *Henry*, the U.S. Supreme Court revisited the jailhouse informant issue in *Wilson*, and narrowed an accused party's Sixth Amendment protections in that context.¹⁵⁶ In *Henry*, the Court had reserved judgment on the question of the constitutionality of the government's use of a jailhouse informant who acts in a completely passive fashion.¹⁵⁷ In *Wilson*, the Court purported to deal with that precise issue.¹⁵⁸ In spite of strong factual similarities with *Henry*, the *Wilson* Court decided that the jailhouse informant in *Wilson* had made no effort to stimulate conversations about any crime.¹⁵⁹ The Court found that such a situation does not violate an accused's right to counsel, and in so doing seemed to retreat from the broader Sixth Amendment protections it had announced in *Henry*.¹⁶⁰

In *Wilson*, the defendant, Joseph Allan Wilson, had been involved in a taxicab garage robbery in which a murder had taken place.¹⁶¹ After turning himself into authorities while maintaining his innocence, he was arraigned and incarcerated in a local jail.¹⁶² Prior to Wilson's

¹⁵⁵ *Id.* In dissent, Justice Blackmun disputed the majority's conclusion that "subtle influences" would make it likely that statements would be made in a jail cell setting. *Id.* at 284-85 (Blackmun, J., dissenting). Justice Blackmun argued that there was just as much pressure for a defendant *not* to speak, because it should be obvious to any detainee that a jail is generally not filled with trustworthy characters. *Id.* (Blackmun, J., dissenting).

Justice Rehnquist, dissenting separately, was even more dismissive of the right-to-counsel concerns in this case. *See id.* at 289-302 (Rehnquist, J., dissenting). Justice Rehnquist argued that there was no constitutional support for the idea that an attorney must be present at any stage where an accused party might reveal information to someone trying to elicit it. *Id.* at 295-96 (Rehnquist, J., dissenting). Echoing the speak-at-your-own-risk approach to the right to counsel espoused by Justice White in *Massiah*, Justice Rehnquist wrote, "[W]hen an accused voluntarily chooses to make an incriminatory remark . . . he knowingly assumes the risk that his confidant may be untrustworthy." *Id.* at 297-98 (Rehnquist, J., dissenting).

¹⁵⁶ *See Wilson*, 477 U.S. at 459; Lundstrom, *supra* note 15, at 744.

¹⁵⁷ 447 U.S. at 271 n.9.

¹⁵⁸ 477 U.S. at 456.

¹⁵⁹ *Id.* at 456, 460-61. It is important to note that in neither *Henry* nor *Wilson* was it clear from the record what exactly had transpired between the defendants and informants. *See id.* at 439-40; *Henry*, 447 U.S. at 266-67. Although the records in both cases described the relationships between the parties in broad strokes, neither contains extensive discussions of any actual conversations that had taken place between the defendants and informants. *See Wilson*, 477 U.S. at 439-40; *Henry*, 447 U.S. at 266-67.

¹⁶⁰ *See Wilson*, 477 U.S. at 459; Ammeter, *supra* note 78, at 1440.

¹⁶¹ 477 U.S. at 438-39.

¹⁶² *Id.* at 439. Coincidentally, Wilson's jail cell overlooked the scene of the crime. *Id.*

arrival at the jail, a jailhouse informant named Benny Lee had agreed with authorities to listen to Wilson and report any incriminating remarks that he made.¹⁶³ A detective told Lee not to ask Wilson any questions, but to "keep his ears open" for information.¹⁶⁴ Shortly thereafter, Wilson discussed details of the crime with Lee, apparently without having been asked to do so.¹⁶⁵ Initially, Wilson told Lee the same version of the story that he had given police, claiming that he had no involvement in the crime.¹⁶⁶ After a few days, however, he changed his story, and admitted to Lee that he had indeed been involved in the robbery and murder.¹⁶⁷ Lee, who had been secretly keeping notes of the details of his conversations with Wilson, provided this information to a detective, and Lee subsequently testified against Wilson at his trial.¹⁶⁸ The trial court convicted Wilson of murder and felonious possession of a weapon.¹⁶⁹ After having his state appeals denied, he filed for federal habeas relief based on the rule announced in *Henry*.¹⁷⁰ Finding that the facts of Wilson's case were indistinguishable from those of *Henry*, the Second Circuit Court of Appeals ruled that his right to counsel had been violated, and granted him habeas relief.¹⁷¹

The U.S. Supreme Court reversed, finding that the Sixth Amendment did not block the admission of Wilson's statements to Lee, because Lee had himself made no efforts to elicit information from him.¹⁷² Examining precedent such as *Spano v. New York, Massiah*,

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Wilson*, 477 U.S. at 440.

¹⁶⁷ *Id.* During this period of time, Wilson's brother visited Wilson in jail. *Id.* He told Wilson that his family was upset because they believed that he had committed the murder. *Id.* This may have had some effect on Wilson's decision to change his story and tell the truth. *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 441.

¹⁷⁰ *Id.* at 442-43.

¹⁷¹ *Wilson v. Henderson*, 742 F.2d 741, 745, 748 (2d Cir. 1984), *rev'd and remanded sub nom. Kuhlmann v. Wilson*, 477 U.S. 436 (1986). Examining Lee's relationship with Wilson, the Court of Appeals concluded that:

[s]ubtly and slowly, but surely, Lee's ongoing verbal intercourse with Wilson served to exacerbate Wilson's already troubled state of mind The instant case cannot be held to be equivalent to one where an informant merely sits back and makes no effort to stimulate conversations with the suspect about the crime charged In fact, we conclude that *Henry* is indistinguishable from the present case.

Id. at 745 (citation omitted).

¹⁷² *Wilson*, 477 U.S. at 456, 459.

and *Henry*, the Court concluded that the primary concern of those cases was the prevention of investigative techniques that were the equivalent of interrogation.¹⁷³ Because Lee had taken no affirmative steps to engage Wilson in conversation about the crimes, his actions were *not* the equivalent of interrogation, and thus did not offend the principles of *Massiah* and its progeny.¹⁷⁴ The Court stated that a showing that a jailhouse informant had reported incriminating statements to the police, even if acting as a government agent, was not sufficient to make out a Sixth Amendment violation.¹⁷⁵ Instead, the Court held that "the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks."¹⁷⁶

In dissent, Justice Brennan argued forcefully that the facts in *Wilson* were virtually indistinguishable from those in *Henry*, and therefore that a Sixth Amendment violation had occurred.¹⁷⁷ Justice Brennan pointed out three important similarities between the two cases: first, in both cases the informants usually received compensation for information; second, both informants had been instructed not to question the accused; and third, the informants had engaged in conversations with the accused that encouraged discussion of crimes.¹⁷⁸ Conceding that Lee's actions might not have been the immediate cause of Wilson's admissions, Justice Brennan argued that this was of little importance, because the Court instead should have focused on the broader context of the encounters—just like it had in *Henry*.¹⁷⁹ Critical of the narrow view of deliberate elicitation applied by the *Wilson* majority, Justice Brennan contended that "the deliberate-elicitation standard requires consideration of the entire course of government behavior."¹⁸⁰ Justice Brennan offered a somewhat different standard for detecting deliberate elicitation in the jailhouse informant context: looking to whether the government's action has a "sufficient nexus" with an accused's admission of guilt.¹⁸¹ For Justice Brennan, if the

¹⁷³ *Id.* at 456–59; see *Henry*, 447 U.S. at 273–75; *Massiah*, 377 U.S. at 206; *Spano*, 360 U.S. at 325–36 (Douglas, J., concurring).

¹⁷⁴ *Wilson*, 477 U.S. at 459.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 473–76 (Brennan, J., dissenting).

¹⁷⁸ *Id.* at 475–76 (Brennan, J., dissenting).

¹⁷⁹ *Wilson*, 477 U.S. at 476 (Brennan, J., dissenting). In the majority's view, Lee acted primarily as a listener in his interactions with Wilson, and the immediate cause of Wilson's admissions was his own unsolicited decision to make them. See *id.* at 460–61.

¹⁸⁰ *Id.* (Brennan, J., dissenting).

¹⁸¹ *Id.* (Brennan, J., dissenting).

steps that the government took with an informant could be causally linked to an accused's statements, then the government was as guilty as the informant of a Sixth Amendment infringement.¹⁸² Therefore, this nexus would demonstrate the government's surreptitious violation of an accused's right to counsel.¹⁸³

The *Wilson* decision seemed to signal a retreat from the broader reading of the right to counsel given to jailhouse informant encounters in *Henry*.¹⁸⁴ On facts very similar to those in *Henry*, the *Wilson* court reached the opposite result, finding that the use of a jailhouse informant did not offend Sixth Amendment principles.¹⁸⁵ Whereas in *Henry* the Court looked at the activity of both the jailhouse informant and the government actors that placed the informant, *Wilson* seemed to focus only on the informant himself.¹⁸⁶ It was not clear from the record in *either* case that the informants had actually used conversation to deliberately elicit information from the accused.¹⁸⁷ Thus, the differing results in *Henry* and *Wilson* seem to be based not on any significant factual differences between the two cases, but instead on a difference in how the two Courts chose to approach the matter.¹⁸⁸

After *Wilson*, criminal defendants will have to meet a high threshold to demonstrate a Sixth Amendment violation inside of a jail cell.¹⁸⁹ The government's intentional creation of a situation in which information is likely to be elicited does not seem, on its own, to violate an accused's right to counsel.¹⁹⁰ In addition to government action, the informant must himself or herself take active steps to elicit information from the accused.¹⁹¹ In other words, "both 'active informant elicitation' and 'knowing state exploitation' are requisites for the critical *Massiah* stage."¹⁹²

¹⁸² See *id.* (Brennan, J., dissenting).

¹⁸³ See *Wilson*, 477 U.S. at 476 (Brennan, J., dissenting).

¹⁸⁴ See *Ammeter*, *supra* note 78, at 1440; *Lundstrom*, *supra* note 15, at 743-44.

¹⁸⁵ *Wilson*, 477 U.S. at 459; see *Lappen*, *supra* note 16, at 946.

¹⁸⁶ See *Ammeter*, *supra* note 78, at 1434.

¹⁸⁷ See *Wilson*, 477 U.S. at 439-40; *Henry*, 447 U.S. at 266-69; *White*, *supra* note 42, at 1219.

¹⁸⁸ See *Wilson*, 477 U.S. at 459; *Henry*, 447 U.S. at 474-75; *Lappen*, *supra* note 16, at 953-54.

¹⁸⁹ See *Wilson*, 477 U.S. at 459; *Tomkovicz*, *supra* note 24, at 20.

¹⁹⁰ See *Wilson*, 477 U.S. at 459; *Tomkovicz*, *supra* note 24, at 20.

¹⁹¹ *Tomkovicz*, *supra* note 24, at 20.

¹⁹² *Tomkovicz*, *supra* note 24, at 20 (emphasis added).

C. Maine v. Moulton: *The Case That Wilson Forgot*

In 1985, only six months before *Wilson*, the U.S. Supreme Court made some of its strongest pronouncements in two decades about the breadth of the right to counsel in *Moulton*.¹⁹³ Although *Moulton* did not deal specifically with the use of a jailhouse informant, it contains illuminating language about the contours of deliberate elicitation when the government uses undercover informants.¹⁹⁴ In *Moulton*, the Court read the Sixth Amendment not only as providing protections to accused parties, but also as creating an affirmative duty on the part of police and prosecutors to avoid taking steps to infringe upon that right.¹⁹⁵ Because it was decided so close to *Wilson*, the fact that *Moulton* gives such a robust reading to the right to counsel warrants examination.¹⁹⁶

Moulton involved two defendants, Perley Moulton and Gary Colson, who were indicted on charges of burglary and theft, and were released on bail pending trial.¹⁹⁷ Shortly thereafter, Colson confessed to his part in the crimes to local police and was offered a deal by which no further charges would be brought against him if he would cooperate in the prosecution of Moulton.¹⁹⁸ Colson agreed, and allowed authorities to electronically monitor both his telephone calls and face-to-face meetings with Moulton.¹⁹⁹ During one of these meetings, Moulton made a number of incriminating statements to Colson, thinking that he was merely discussing trial strategy with his codefendant.²⁰⁰ During the conversation, Colson told Moulton he had a poor memory about the crimes, and asked Moulton to remind him about the details of the crimes.²⁰¹ Moulton obliged.²⁰² In addition, Colson "reminisced" about the various crimes they had committed, which also caused Moulton to join in and make incriminating statements.²⁰³ Moulton's statements were used against him at his trial, and the court

¹⁹³ See 474 U.S. at 176-77.

¹⁹⁴ *Id.* at 171-76.

¹⁹⁵ *Id.* at 171.

¹⁹⁶ See *id.*; Tomkovicz, *supra* note 24, at 18-20.

¹⁹⁷ 474 U.S. at 162. Coincidentally, the informant in this case had the same surname as the informant in *Massiah*. See *Massiah*, 377 U.S. at 202-03.

¹⁹⁸ *Moulton*, 474 U.S. at 162-63.

¹⁹⁹ *Id.* at 163-64.

²⁰⁰ *Id.* at 164-65.

²⁰¹ *Id.* at 166.

²⁰² *Id.* Colson made remarks to Moulton such as "I want you to help me with some dates. One date I . . . just can't remember . . . what night did we break into Lothrop Ford?" *Id.* at 166 n.5.

²⁰³ *Moulton*, 474 U.S. at 166.

convicted him of numerous counts of burglary and theft.²⁰⁴ On appeal, the Supreme Judicial Court of Maine concluded that the method authorities used to acquire information from Moulton violated his Sixth Amendment right to counsel, and remanded the case for a new trial.²⁰⁵

The U.S. Supreme Court affirmed the Supreme Judicial Court of Maine's decision, holding that Maine authorities had actively circumvented Moulton's Sixth Amendment rights.²⁰⁶ In an opinion written by Justice Brennan, the Court concluded that the right to counsel means much more than a simple prohibition on certain types of State behavior.²⁰⁷ It also imposes an obligation on the government to avoid acting in any fashion that circumvents an accused party's Sixth Amendment protections in any way.²⁰⁸ According to the Court, "*at the very least*, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel."²⁰⁹ By setting this minimum standard of acceptable investigatory behavior, the *Moulton* Court seemed to make it the duty of every government agent to take steps to avoid infringing on a suspect's right to counsel in any way.²¹⁰

The *Moulton* Court found that the police had not met that affirmative obligation to avoid circumventing the right to counsel.²¹¹ Examining the actions authorities took in using Colson to obtain information, the Court concluded that the government had interfered with Moulton's right to have a lawyer act as a medium between himself and the State.²¹² Because the government had to have known that Moulton would reveal information to Colson under the assumption he was merely a codefendant, the government knowingly circumvented Moulton's ability to request the presence of counsel.²¹³

In reaching this conclusion, the Court recognized that there are circumstances in which engaging a suspect in a conversation—without anything else—can have the same effect as an open interrogation.²¹⁴

²⁰⁴ *Id.* at 166–67.

²⁰⁵ *Id.* at 167–68 (citing *State v. Moulton*, 481 A.2d 155 (Me. 1984), *aff'd sub nom. Maine v. Moulton*, 474 U.S. 159 (1985)).

²⁰⁶ *See id.* at 180.

²⁰⁷ *See id.* at 176.

²⁰⁸ *See Moulton*, 474 U.S. at 176.

²⁰⁹ *Id.* at 171 (emphasis added).

²¹⁰ *See id.*

²¹¹ *Id.* at 176.

²¹² *Id.*

²¹³ *See Moulton*, 474 U.S. at 176.

²¹⁴ *Id.* at 176–77 n.13–14.

According to the Court, because Moulton believed Colson to be a co-defendant with the same interests at stake, he felt free to discuss the crimes with him and make incriminating statements.²¹⁵ Had he known Colson was acting as a government informant and wearing a wire, he likely would not have done so.²¹⁶ Thus, the State knowingly circumvented Moulton's right to counsel by deliberately eliciting statements from him in this indirect way.²¹⁷

The *Moulton* view of the Sixth Amendment's protections represents one of the Court's broadest readings to date of the deliberate-elicitation standard.²¹⁸ Its analysis of deliberate elicitation is consistent with *Henry* in recognition of what the government "must have known" was going to happen during such an encounter.²¹⁹ Like the *Henry* Court, the *Moulton* Court examined the totality of the circumstances surrounding the accused-agent encounter, by analyzing not only Colson's actions, but also the actions taken by the government in using him as an informant.²²⁰

Nevertheless, the *Moulton* Court seemed to go a step further than the *Henry* Court when it imputed to prosecutors an affirmative duty to respect an accused's Sixth Amendment rights.²²¹ The Court phrased the right to counsel not only as a "negative" (that an accused cannot be denied counsel), but also as a "positive" (that the government has a duty not to circumvent that right, even when not asserted).²²² Thus, in 1985, five years after *Henry* and a year before *Wilson*, the U.S. Supreme Court made some of the last quarter-century's strongest pronouncements about the Sixth Amendment right to counsel.²²³ That these pronouncements were made at nearly the same time as *Wilson* is remarkable.²²⁴

The Court has not spoken on the subject of jailhouse informants since *Wilson*, leaving it and *Henry* as controlling precedent on the matter.²²⁵ Taken together with *Moulton*, these three cases comprise the

²¹⁵ See *id.*

²¹⁶ See *id.* at 177.

²¹⁷ *Id.*

²¹⁸ See 474 U.S. at 177; Tomkovicz, *supra* note 24, at 18.

²¹⁹ *Moulton*, 474 U.S. at 176 n.12 (citing *Henry*, 447 U.S. at 271).

²²⁰ *Id.* at 176-77.

²²¹ See *id.*

²²² See *id.* at 171, 176.

²²³ See *id.*; Tomkovicz, *supra* note 24, at 18.

²²⁴ See *Wilson*, 477 U.S. at 436; *Moulton*, 474 U.S. at 176-77.

²²⁵ See *Wilson*, 477 U.S. at 459; *Henry*, 447 U.S. at 274-75. As discussed previously, *Wilson* purported to decide a jailhouse informant question different than that of *Henry*, meaning that *Henry* was in no way overturned by *Wilson*. See *supra* notes 156-160 and accompanying text.

modern legal standard by which courts assess right-to-counsel claims involving jailhouse informants.²²⁶ Determining whether deliberate elicitation has occurred using these cases has proven to be a difficult task for courts.²²⁷

III. THE STATE OF THE LAW AFTER *UNITED STATES v. HENRY* AND *KUHLMANN v. WILSON*

As can be seen from the divergent rulings in *Kuhlmann v. Wilson* and *United States v. Henry*, the use of jailhouse informants to obtain information from incarcerated defendants presents difficult Sixth Amendment problems.²²⁸ Indeed, when the deliberate elicitation inquiry is grafted onto an encounter between a jailhouse informant and an accused party, a number of subtle factors come into play that confound the equation.²²⁹ Given this, courts and scholars have debated exactly what the contours of an accused's right to counsel are in the nuanced context of a jailhouse informant encounter.²³⁰ In this debate, *Wilson* has been largely viewed as an unwarranted retreat from *Henry*'s broader Sixth Amendment protections.²³¹

²²⁶ See *Wilson*, 477 U.S. at 459; *Moulton*, 474 U.S. at 180; *Henry*, 447 U.S. at 274-75; Tomkovicz, *supra* note 24, at 20.

²²⁷ Some courts have relied primarily upon *Wilson* in right-to-counsel cases involving jailhouse informants. See, e.g., *Moore v. United States*, 178 F.3d 994, 1000 (8th Cir. 1999) (declining to examine deliberate elicitation issue in the absence of any evidence that the informant himself had engaged defendant in conversation); *United States v. York*, 933 F.2d 1343, 1359 (7th Cir. 1991) (finding no deliberate elicitation by an informant in a murder case, in spite of informant having had conversations with the accused about the crime). But see, e.g., *United States v. Brink*, 39 F.3d 419, 424 (3d Cir. 1994) (finding that because government agents were aware that the informant in the case had a "propensity to inform on his cellmates," the mere act of placing him in the cell with the defendant could constitute deliberate elicitation in violation of his right to counsel); *Commonwealth v. Francis*, 710 A.2d 1112, 1119 (Pa. 1998) (holding that in a jailhouse informant case, the court's focus should be on whether the government met its "affirmative obligation" not to circumvent an accused's right to counsel). For a taste of the difficulty courts are having in reaching decisions on this difficult issue, see *State v. Leopardi*, 701 A.2d 952, 956 (N.J. Super. Ct. App. Div. 1997), which reviews jailhouse informant case law and states that "candor requires us to confess our difficulty in reconciling several of these decisions," including *Henry* and *Wilson*.

²²⁸ See *Kuhlmann v. Wilson*, 477 U.S. 436, 458-59 (1986); *United States v. Henry*, 447 U.S. 264, 273-75 (1980); see also *supra* notes 184-192 and accompanying text.

²²⁹ *Henry*, 447 U.S. at 274. As discussed, these factors include the unique pressures of incarceration, the desire to form jail cell camaraderie, and the perception of a common foe, the government. See *supra* notes 141-146 and accompanying text.

²³⁰ See generally Ammeter, *supra* note 78; Lundstrom, *supra* note 15; Saas, *supra* note 16; Tomkovicz, *supra* note 24; Lappen, *supra* note 16.

²³¹ See, e.g., Ammeter, *supra* note 78, at 1440; Lundstrom, *supra* note 15, at 743-44; Tomkovicz, *supra* note 24, at 80-81.

A. Kuhlmann v. Wilson Assessed

The *Wilson* decision has been criticized for unduly narrowing an accused's right-to-counsel protections in jail cell situations.²³² In contrast to *Henry's* broader definition, the type of government/informant behavior that will trigger a Sixth Amendment violation was cast in narrower terms by the *Wilson* decision.²³³ As the *Wilson* Court stated, to make out a violation of the right to counsel, "the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks."²³⁴ Because this standard seems to shift the Sixth Amendment inquiry from the totality of the circumstances, including government action, to an inquiry into specific action by an informant, scholars have contended that *Wilson* fails to protect an accused's Sixth Amendment rights in certain types of jailhouse informant encounters.²³⁵

One major criticism of *Wilson* centers on the argument that its facts are largely indistinguishable from those of *Henry*, and therefore it should have been decided in the same way.²³⁶ Based on the contention that *Henry* was correctly decided, and constitutes valid precedent, *Wilson* should have been similarly decided because the two cases shared three major factual similarities.²³⁷ First, both cases involved paid government informants.²³⁸ Second, both cases had government agents taking affirmative steps to place the informants in close proximity to the accused parties.²³⁹ In addition, the informants in both cases were instructed by agents *not* to initiate conversation with the accused about their charges.²⁴⁰ Third, and perhaps most importantly, in both cases it seems that informants were able to develop some level of close rapport with the accused—at least to the point where incriminating information was revealed.²⁴¹ In spite of these similarities, *Wilson* did not adequately discuss or distinguish *Henry's* direct prece-

²³² See, e.g., Ammeter, *supra* note 78, at 1440; Lundstrom, *supra* note 15, at 743–44; Tomkovicz, *supra* note 24, at 80–81.

²³³ See *Wilson*, 477 U.S. at 459–60; *Henry*, 447 U.S. at 274.

²³⁴ 477 U.S. at 459.

²³⁵ See, e.g., Ammeter, *supra* note 78, at 1434; Lundstrom, *supra* note 15, at 743–44; Tomkovicz, *supra* note 24, at 80.

²³⁶ See Lappen, *supra* note 16, at 946.

²³⁷ See *id.* at 951–52, 962.

²³⁸ *Id.* at 951–52.

²³⁹ See *id.* at 952.

²⁴⁰ *Id.*

²⁴¹ See Lappen, *supra* note 16, at 952.

dent.²⁴² In fact, the *Wilson* Court devoted only three brief paragraphs to an analysis of *Henry*, and after doing so, reached the opposite result.²⁴³ In doing so, it has been argued that confusing, conflicting precedent has been created with which courts will have to grapple.²⁴⁴ Based on the premise that *Henry* and *Wilson* are factually indistinguishable, this line of criticism goes as far as to say that *Wilson* was decided incorrectly.²⁴⁵

It has also been argued that *Wilson's* focus on the activity or passivity of a jailhouse informant is misguided.²⁴⁶ *Wilson's* focus on the actions of the informant himself, divorced from the context of the government activity that placed him there, is an incomplete inquiry.²⁴⁷ No jailhouse informant is truly "passive," because behind that informant is a government agent who has actively and deliberately placed him near the accused in hopes of obtaining information from him.²⁴⁸ Thus, weighing the "activity" or "passivity" of a jailhouse informant misses the mark, and the *Wilson* Court's focus should have been on the government action in placing the informant in the cell in the first place instead.²⁴⁹ It is at *that* step that deliberate elicitation has occurred.²⁵⁰ Further, a "passive" undercover informant endangers an accused's right to counsel just as much as an "active" one does, because in both situations the accused has no idea that he or she is speaking to a government agent.²⁵¹

A distinction between "passive" and "active" informants—even if it were valid—would be practically impossible to define for three reasons.²⁵² First, it is often difficult to examine the record of a case and determine from it the character of an informant's actions towards an accused.²⁵³ Evidence of this can be found in *Wilson* itself, where the majority and dissent interpreted the same factual record in very different manners.²⁵⁴ Second, there exist serious evidentiary problems in determining what took place inside of a jail cell.²⁵⁵ Often, the only

²⁴² See, e.g., Lundstrom, *supra* note 15, at 764.

²⁴³ See *Wilson*, 477 U.S. at 458–61; Lundstrom, *supra* note 15, at 764.

²⁴⁴ See Lappen, *supra* note 16, at 953.

²⁴⁵ See Lundstrom, *supra* note 15, at 744, 763.

²⁴⁶ See, e.g., Ammeter, *supra* note 78, at 1437–38.

²⁴⁷ See *id.* at 1434.

²⁴⁸ See Tomkovicz, *supra* note 24, at 79–80.

²⁴⁹ See Ammeter, *supra* note 78, at 1437–38.

²⁵⁰ See *id.*; Tomkovicz, *supra* note 24, at 79–80.

²⁵¹ See Tomkovicz, *supra* note 24, at 80–81.

²⁵² See Ammeter, *supra* note 78, at 1434.

²⁵³ *Id.* at 1435.

²⁵⁴ *Id.*; see 477 U.S. at 459–60, 476 (Brennan, J., dissenting).

²⁵⁵ Ammeter, *supra* note 78, at 1435–36.

available evidence consists of the conflicting testimony of the informant and the accused as to what was said by whom.²⁵⁶ Finally, it is difficult to determine what informant action can properly be labeled as an active attempt to elicit information.²⁵⁷ Discerning this "triggering" event can be nearly impossible after the fact.²⁵⁸

B. *Calls For A Revival of United States v. Henry*

The most compelling critique of *Wilson* is that it is an unwarranted retreat from the Sixth Amendment protections announced by the Court in prior decades.²⁵⁹ From *Massiah v. United States* through *Maine v. Moulton*, the Court had broadly defined when the government violated the right to counsel, examining not only the actions of undercover informants, but also the nature of the government's aid to the informant.²⁶⁰ *Wilson*'s primary focus on the actions of the informant—and not the government action placing him there—was a sharp deviation from larger principles announced in *Massiah*, *Henry*, and *Moulton*, that there is an affirmative duty on the part of the government to respect an accused's Sixth Amendment rights.²⁶¹ *Wilson* thus represents a sudden break in what has been a long chain of broad, liberal readings of the Sixth Amendment's guarantees.²⁶²

The *Wilson* standard allows the government to shirk that duty, because it may create a situation where information is likely to be obtained, but deliberate elicitation will not occur unless the informant himself or herself takes active steps in conversation with the accused.²⁶³ Contrary to the fundamental holding of *Wilson*, it is of no constitutional import whether an informant is passively listening or not.²⁶⁴ By deceiving an accused party into thinking that he or she is simply speaking to a fellow cellmate, the government has actively violated that defendant's right to counsel.²⁶⁵

As noted by Justice Burger in *Henry*, when the government knowingly and intentionally creates a situation in which it is likely that an accused party will make incriminating statements without counsel

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 1436.

²⁵⁸ *Id.*

²⁵⁹ See, e.g., *id.* at 1434; Lundstrom, *supra* note 15, at 743–44; Tomkovicz, *supra* note 24, at 83.

²⁶⁰ See *Ammeter*, *supra* note 78, at 1434.

²⁶¹ See *id.*

²⁶² See *id.* at 1440.

²⁶³ See 477 U.S. at 459; *Ammeter*, *supra* note 78, at 1437.

²⁶⁴ See *Ammeter*, *supra* note 78, at 1437.

²⁶⁵ See *id.* at 1437–38; Tomkovicz, *supra* note 24, at 80–81.

present, deliberate elicitation occurs.²⁶⁶ In light of the "powerful psychological inducements" of incarceration—such as a desire on the part of an accused party to form bonds with fellow inmates—deliberate elicitation of incriminating statements happens much more readily in a jail cell than it does in other situations.²⁶⁷ *Wilson* failed to take these factors into account when defining what constitutes deliberate elicitation inside of a jail cell, and in doing so defined that term too narrowly.²⁶⁸

Although *Wilson* has engendered some support—for example, on the ground that it provides a workable, bright-line test with which to detect jail cell right-to-counsel violations²⁶⁹—the overall scholarly reaction to *Wilson* seems to be much more negative than positive.²⁷⁰ In cases where little or no evidence exists that an informant took active conversational steps to induce an accused party to make incriminating statements, *Wilson* would prevent a successful right-to-counsel claim.²⁷¹ *Wilson's* requirement that the informant himself or herself do something beyond passive listening in order to trigger a right-to-counsel violation narrows the number of successful Sixth Amendment claims that can be made.²⁷²

IV. A NEW STANDARD

A. Kuhlmann v. Wilson's Shortcomings

The Sixth Amendment standard announced in *Kuhlmann v. Wilson* fails to detect a wide range of Sixth Amendment violations that take place when the government uses a jailhouse informant to obtain information from an accused party.²⁷³ By requiring an informant to do something "beyond mere listening" in order to satisfy the requirement of deliberate elicitation, the *Wilson* standard fails to recognize that government prearrangement with an informant can be, by itself, an act of elicitation.²⁷⁴ The government's act of placing an informant in close proximity to an accused party—knowing that it is

²⁶⁶ See *Henry*, 447 U.S. at 274; Tomkovicz, *supra* note 24, at 79–80.

²⁶⁷ See *Henry*, 447 U.S. at 273–74; Lundstrom, *supra* note 15, at 767.

²⁶⁸ See Ammeter, *supra* note 78, at 1436–38.

²⁶⁹ See Saas, *supra* note 16, at 126–27.

²⁷⁰ See, e.g., Ammeter, *supra* note 78, at 1437–38; Lundstrom, *supra* note 15, at 773–74; Tomkovicz, *supra* note 24, at 79–81.

²⁷¹ See 477 U.S. at 459.

²⁷² See *id.*; Lundstrom, *supra* note 15, at 769.

²⁷³ See 477 U.S. 436, 459 (1986); Lundstrom, *supra* note 15, at 744.

²⁷⁴ See *United States v. Henry*, 447 U.S. 264, 274 (1980); Ammeter, *supra* note 78, at 1437.

more likely than not that the party will make statements to the informant—is a deliberate circumvention of an accused's right to counsel, one that should be barred by the Sixth Amendment.²⁷⁵

Wilson, however, requires that the government and informant work in tandem to actively elicit information from an accused in order to violate the right to counsel.²⁷⁶ This dual requirement simply sets the bar too high.²⁷⁷ Even without active, conversational participation by an informant, a Sixth Amendment violation occurs when the government takes advantage of an accused party's ignorance and puts him in the presence of an undercover agent.²⁷⁸ By failing to accord weight to this important premise, *Wilson* represents an unsound and unwarranted retreat from the right-to-counsel protections announced in *United States v. Henry*.²⁷⁹

The government has an affirmative obligation not to circumvent an accused's right to counsel.²⁸⁰ When the government knowingly exploits an opportunity to obtain information from an accused party in the absence of counsel—which it surely does when it places an informant in a cell with the accused—it shirks this obligation.²⁸¹ Under *Wilson*, however, the government may do precisely that, so long as it instructs an informant merely to listen.²⁸² Thus, the *Wilson* standard fails to hold the government to its affirmative obligation to respect an accused's right to counsel.²⁸³

B. A New Standard

A better standard to detect Sixth Amendment violations would apply a two-tiered inquiry.²⁸⁴ First, a court should inquire whether an informant actively engaged the defendant so as to deliberately elicit incriminating statements from him or her.²⁸⁵ If an informant is found to have done so at the behest of the government, a violation of the right to counsel has clearly occurred.²⁸⁶ If an informant has been

²⁷⁵ See *Maine v. Moulton*, 474 U.S. 159, 176 (1985); Tomkovicz, *supra* note 24, at 79–80.

²⁷⁶ 477 U.S. at 459.

²⁷⁷ See *supra* notes 259–268 and accompanying text.

²⁷⁸ Tomkovicz, *supra* note 24, at 80–81.

²⁷⁹ See *supra* notes 259–265 and accompanying text.

²⁸⁰ *Moulton*, 474 U.S. at 176; see *supra* notes 206–213 and accompanying text.

²⁸¹ See *id.*; Tomkovicz, *supra* note 24, at 80.

²⁸² See *Wilson*, 477 U.S. at 459.

²⁸³ See *id.*; *Moulton*, 474 U.S. at 176; Tomkovicz, *supra* note 24, at 80; see also *supra* notes 259–265 and accompanying text.

²⁸⁴ See *Wilson*, 477 U.S. at 476 (Brennan, J., dissenting); *Henry*, 447 U.S. at 274.

²⁸⁵ See *Wilson*, 477 U.S. at 459.

²⁸⁶ *Id.*

"passive," however, the inquiry should not end, and a second test should be applied.²⁸⁷ As the second tier of its inquiry, a court should examine the entire course of the government's action in the case, and determine whether the government created a situation in which it was likely that incriminating statements would be made.²⁸⁸ If a sufficient nexus can be found between the State's action and any admissions made by the accused, a violation of the right to counsel has occurred, regardless of the informant's passivity.²⁸⁹

This standard would combine the somewhat conflicting holdings of *Henry* and *Wilson* into a single inquiry.²⁹⁰ It recognizes that in an undercover jailhouse interrogation, there are really two parties working to obtain information—the informant, and the government agent that placed the informant in proximity to the accused.²⁹¹ This standard would take *Wilson's* focus on the actions of the informant, and *Henry's* focus on the actions of the government, combining them into a broader, more effective standard for protecting an accused's Sixth Amendment rights.²⁹² This standard would capture far more right-to-counsel violations than the narrower *Wilson* test does, and in doing so would restore the scope of Sixth Amendment protections to where they were for the better part of a quarter-century prior to *Wilson*.²⁹³

The first tier of this two-tiered approach would incorporate *Wilson's* distinction between passive and active informants.²⁹⁴ The *Wilson* Court showed a valid concern about the legitimate use of passive informants who overhear incriminating statements and voluntarily pass that information on to authorities without any prompting beforehand.²⁹⁵ Under this proposed standard, that behavior would satisfy the first (and second) tier of the inquiry, consistent with the contours of the Sixth Amendment.²⁹⁶ Informants who take active conversational

²⁸⁷ See *Wilson*, 477 U.S. at 475–76 (Brennan, J., dissenting); Ammeter, *supra* note 78, at 1437–38.

²⁸⁸ See *Moulton*, 474 U.S. at 176; *Henry*, 447 U.S. at 273–74; see also *supra* notes 136–155 and accompanying text.

²⁸⁹ See *Wilson*, 477 U.S. at 475–76 (Brennan, J., dissenting); see also *supra* notes 177–183 and accompanying text.

²⁹⁰ See *Wilson*, 477 U.S. at 459; *Henry*, 447 U.S. at 274.

²⁹¹ See Ammeter, *supra* note 78, at 1434–38.

²⁹² See *Wilson*, 477 U.S. at 459; *Henry*, 447 U.S. at 274.

²⁹³ See Ammeter, *supra* note 78, at 1440; see also *supra* notes 59–155 and accompanying text.

²⁹⁴ See *Wilson*, 477 U.S. at 459.

²⁹⁵ *Id.*

²⁹⁶ *Id.*; see also *supra* notes 284–289 and accompanying text.

steps to elicit incriminating remarks from accused parties, however, would, and should, trigger a right-to-counsel violation.²⁹⁷

This approach recognizes that even objectively passive jailhouse informants cannot be fairly labeled as "merely listening."²⁹⁸ They are prisoners with a vested interest in obtaining information from unsuspecting cellmates.²⁹⁹ They are undercover government agents with a powerful interrogatory tool at their disposal—the unique pressures of incarceration.³⁰⁰ Thus, given the many subtle ways in which an informant can elicit information, whether or not he or she says certain magic words to cause an accused to speak should be of little import to a valid Sixth Amendment inquiry.³⁰¹ An informant will rarely resort to blatant, open questioning in order to elicit a confession, and instead might use far more subtle methods to induce statements.³⁰² When the government, fully aware of this fact, places an informant in a cell with an accused, the Sixth Amendment violation has already occurred.³⁰³

The second tier of this approach would examine the steps taken by the government to create a situation in which information would be obtained.³⁰⁴ If a sufficient nexus exists between the government action and the statements made, then the government action is akin to surreptitious interrogation, and is thus violative of the right to counsel.³⁰⁵ This inquiry recognizes that the placement of an informant in the proximity of an unsuspecting accused party is, effectively, just as much an act of deliberate elicitation of information as direct questioning.³⁰⁶

This second tier takes into account that there are unique pressures of incarceration which make it far more likely that an accused party will reveal information than in other settings.³⁰⁷ The perception that an informant is a fellow inmate sharing a common plight, coupled with a desire for camaraderie in such a harsh setting, make an accused party more susceptible to subtle tactics than in other situa-

²⁹⁷ See *id.*

²⁹⁸ See *id.*; Lundstrom, *supra* note 15, at 766–67.

²⁹⁹ See Lundstrom, *supra* note 15, at 766–67.

³⁰⁰ See *Henry*, 447 U.S. at 273–74; Lundstrom, *supra* note 15, at 767.

³⁰¹ See *Ammeter*, *supra* note 78, at 1437; see also *supra* notes 246–258 and accompanying text.

³⁰² See *Henry*, 447 U.S. at 272 n.8; Lundstrom, *supra* note 15, at 766–67.

³⁰³ See *Tomkovicz*, *supra* note 24, at 79–80.

³⁰⁴ See *Henry*, 447 U.S. at 274; *Ammeter*, *supra* note 78, at 1438–39.

³⁰⁵ See *Wilson*, 477 U.S. at 475–76 (Brennan, J., dissenting); *Ammeter*, *supra* note 78, at 1438–39.

³⁰⁶ See *Wilson*, 477 U.S. at 475–76 (Brennan, J., dissenting); *Tomkovicz*, *supra* note 24, at 79.

³⁰⁷ *Henry*, 447 U.S. at 273–74.

tions.³⁰⁸ The pressures of incarceration themselves can lead to the elicitation of statements, even if an informant is "merely listening."³⁰⁹ By actively placing an informant and an accused together in this type of environment, the government engages in the functional equivalent of interrogation.³¹⁰ The second tier of this proposed inquiry recognizes that basic fact, and would find a Sixth Amendment violation whenever the government took steps to create a situation in which incriminating statements were likely to be made in a jailhouse setting.³¹¹

The two-tiered inquiry proposed here would represent somewhat of a revival of *Henry*, and in doing so would better prevent abuses of an accused's right to counsel.³¹² The broader definition of a right-to-counsel violation in the jailhouse informant setting fits far better with the principles announced as far back as *Massiah v. United States* and even *Powell v. Alabama*.³¹³ By examining the totality of the circumstances, as was done in *Henry*—looking at both the actions of the jailhouse informant and the government in any given jail cell encounter—this standard would capture far more Sixth Amendment violations than the *Wilson* standard currently does.³¹⁴

CONCLUSION

Although the use of jailhouse informants to obtain information from an accused party may be a highly effective law enforcement tool, the tactic raises serious constitutional questions. Providing prisoners with an incentive to obtain information from unsuspecting cellmates does not look like the activity of a government concerned with the Sixth Amendment rights of its citizens. The government has an affirmative obligation to respect an accused's right to counsel, and the use of a jailhouse informant "middle man" to elicit information from a defendant comes dangerously close to an abandonment of that obligation. Courts should be as concerned—if not more so—with subtle

³⁰⁸ *Id.*

³⁰⁹ See *Wilson*, 477 U.S. at 459; *Henry*, 447 U.S. at 273-74; Lundstrom, *supra* note 15, at 766-67.

³¹⁰ See *Wilson*, 477 U.S. at 475-76 (Brennan, J., dissenting); *supra* notes 263-268 and accompanying text.

³¹¹ See *Henry*, 447 U.S. at 273-75; *supra* notes 263-268 and accompanying text.

³¹² See *id.*; *supra* notes 284-293 and accompanying text.

³¹³ See *supra* notes 31-82 and accompanying text.

³¹⁴ See *Wilson*, 477 U.S. at 459; *id.* at 475-76 (Brennan, J., dissenting); *Henry*, 474 U.S. at 274-75.

tactics of deliberate elicitation as they are with more overt methods of interrogation.

The standard set forth in *Kuhlmann v. Wilson* does not adequately reflect that concern. The right to counsel is too important to hinge on whether or not a jailhouse informant says certain magic words. As the Court in *United States v. Henry* recognized, courts also need to look at the actions government agents take in placing the informant there in the first place. When the government takes deliberate steps to create a situation in which it is likely that information will be elicited, it is, in terms of the right to counsel, just as constitutionally offensive as an all-night interrogation is. The standard proposed in this Note recognizes this broad reading of the Sixth Amendment, and would ensure that statements obtained in violation of its principles would not be admitted in a court.

Although this standard would substantially limit the use of jailhouse informants as a permissible method of undercover investigation, this should be viewed as a desirable goal. Especially in today's legal and political climate, where legitimate concerns exist about the curtailment of individual liberties in the face of increasing government police power, courts need to be vigilant in their protection of the rights of accused parties. The right to counsel is far too fundamental and important to be afforded anything less.

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