

and four Justices wished to place the holding solely on the basis that post-indictment interrogation in the absence of defendant's lawyer was a denial of his right to assistance of counsel. The Court issued that holding in *Massiah v. United States*,³⁶⁸ in which federal officers caused an informer to elicit from the already-indicted defendant, who was represented by a lawyer, incriminating admissions that were secretly overheard over a broadcasting unit. Then, in *Escobedo v. Illinois*,³⁶⁹ the Court held that preindictment interrogation violated the Sixth Amendment. But *Miranda v. Arizona*³⁷⁰ switched from reliance on the Sixth Amendment to reliance on the Fifth Amendment's Self-Incrimination Clause in cases of pre-indictment custodial interrogation, although *Miranda* still placed great emphasis upon police warnings of the right to counsel and foreclosure of interrogation in the absence of counsel without a valid waiver by defendant.³⁷¹

Massiah was reaffirmed and in some respects expanded by the Court. In *Brewer v. Williams*,³⁷² the right to counsel was found violated when police elicited from defendant incriminating admissions not through formal questioning but rather through a series of conversational openings designed to play on the defendant's known weakness. The police conduct occurred in the post-arraignment period in the absence of defense counsel and despite assurances to the attorney that defendant would not be questioned in his absence. In *United States v. Henry*,³⁷³ the Court held that government agents violated the Sixth Amendment right to counsel when they contacted the cellmate of an indicted defendant and promised him pay-

³⁶⁸ 377 U.S. 201 (1964). See also *McLeod v. Ohio*, 381 U.S. 356 (1965) (applying *Massiah* to the states, in a case not involving trickery but in which defendant was endeavoring to cooperate with the police). But see *Hoffa v. United States*, 385 U.S. 293 (1966). Cf. *Milton v. Wainwright*, 407 U.S. 371 (1972). In *Kansas v. Ventris*, 556 U.S. ___, No. 07-1356, slip op. at 5 (Apr. 29, 2009), the Court "conclude[d] that the *Massiah* right is a right to be free of uncounseled interrogation, and is infringed at the time of the interrogation," not merely if and when the defendant's statement is admitted into evidence.

³⁶⁹ 378 U.S. 478 (1964).

³⁷⁰ 384 U.S. 436 (1966).

³⁷¹ The different issues in Fifth and Sixth Amendment cases were summarized in *Fellers v. United States*, 540 U.S. 519 (2004), which held that absence of an interrogation is irrelevant in a *Massiah*-based Sixth Amendment inquiry.

³⁷² 430 U.S. 387 (1977). Chief Justice Burger and Justices White, Blackmun, and Rehnquist dissented. Id. at 415, 429, 438. Compare *Rhode Island v. Innis*, 446 U.S. 291 (1980), decided on self-incrimination grounds under similar facts.

³⁷³ 447 U.S. 264 (1980). Justices Blackmun, White, and Rehnquist dissented. Id. at 277, 289. Accord, *Kansas v. Ventris*, 556 U.S. ___, No. 07-1356, slip op. at 2 (Apr. 29, 2009). But cf. *Weatherford v. Bursey*, 429 U.S. 545, 550 (1977) (rejecting a per se rule that, regardless of the circumstances, "if an undercover agent meets with a criminal defendant who is awaiting trial and with his attorney and if the forthcoming trial is discussed without the agent revealing his identity, a violation of the defendant's constitutional rights has occurred . . .").