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Constitutional Law - Right to Counsel

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RECENT DECISIONS

CONSTITUTIONAL LAW—Right to Counsel—Use of defendant's incriminating statements, surreptitiously procured by government agents after indictment and in the absence of defendant's counsel, violates defendant's constitutional rights under the fifth and sixth amendments.

Massiah v. United States, 377 U.S. 201, 84 Sup. Ct. 1199 (1964).

Last June the United States Supreme Court decided to follow its current trend toward a greater expansion of the sixth amendment guarantee of right to counsel, while declining to examine pressing problems of search and seizure. It is submitted that the Court would have made a more significant contribution to the needs of the times by addressing itself to the real issue of search and seizure, rather than to illusory and almost fictional questions of right to counsel.

Petitioner Massiah and one Colson were arrested for violation of federal narcotics laws. Petitioner retained counsel and was arraigned, indicted and released on bail. Colson, also released on bail, decided to cooperate with the federal authorities in obtaining further evidence and, accordingly, permitted a United States government agent to install a radio transmitter in Colson's automobile. Petitioner, ignorant of Colson's cooperation with the authorities and of the presence of the transmitter, conversed with Colson in the latter's automobile. The conversation was overheard by the federal agent in a nearby car equipped with appropriate receiving apparatus. During the conversation petitioner made several incriminating statements, which were introduced into evidence at his trial.[1]

Petitioner was convicted and appealed, alleging that the evidence in question was inadmissible because the government's use of the radio equipment constituted an unreasonable search, in contravention of petitioner's rights under the fourth amendment,[2] and because the method of obtaining the evidence constituted a denial of petitioner's right to counsel,[3] and, therefore, a denial of due process.[4]

1. The evidence was presented through the oral testimony of the eavesdropping government agent.

2. U.S. CONST. amend. IV.

3. *Id.* amend. VI.

4. *Id.* amend. V.

By a vote of two-to-one, the court of appeals affirmed the conviction.[5] The United States Supreme Court granted certiorari. The Court declined to rule on the allegation of unreasonable search,[6] but reversed the judgment below on the grounds that the petitioner had been denied right to counsel and due process of law:

> All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial.[7]

The Court, through Justice Stewart, cited *Powell v. Alabama,*[8] where the Court emphasized the importance of counsel during the "critical period" between arraignment and trial.[9] The Court relied heavily on Justice Stewart's concurring opinion in *Spano v. New York.*[10] There the defendant, under indictment for murder, was subjected to prolonged nocturnal interrogation in the police station, culminating in defendant's confession. The rule in *Spano,* enunciated by Chief Justice Warren, was that the absence of counsel, under the circumstances,[11] rendered the confession involuntary and, therefore, inadmissible. Stewart, concurring, argued that ". . . the absence of counsel when this confession was elicited was alone enough to render it inadmissible. . . ."[12] The Court in *Massiah* noted that this concurring opinion in *Spano* has become the rule in New York.[13] The Court reasoned that an accused's right to counsel, if it is to be meaningful must apply to surreptitious, as well as open, interrogation by the prosecution. Justice White, joined in dissent by Justices Clark and Harlan, argued for the retention of the voluntary-involuntary standard[14] in determining the constitutionality of incriminating statements.

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5. Massiah v. United States, 307 F.2d 62 (2d Cir. 1962).

6. "Because of the way we dispose of the case, we do not reach the fourth amendment issue." Massiah v. United States, 84 Sup. Ct. 1199, 1201, 1202.

7. Massiah v. United States, *supra* note 6 at 1203.

8. 287 U.S. 45 (1932).

9. Counsel for the defendants in Powell was not appointed until the day of the trial. The Court subsequently applied the "critical period" standard so as to require counsel at an arraignment, Hamilton v. Alabama, 368 U.S. 52 (1961) and at a preliminary hearing, White v. Maryland, 373 U.S. 59 (1963).

10. 360 U.S. 315 (1959).

11. The defendant was foreign-born, had but a junior high school education, a history of mental and emotional disturbances, and no previous criminal record.

12. Spano v. New York, *supra* note 10 at 326.

13. People v. Waterman, 9 N.Y.2d 561, 216 N.Y.S.2d 70, 175 N.E.2d 445 (1961).

14. See Cicenia v. LaGay, 357 U.S. 504 (1958), Crooker v. California, 357 U.S. 433 (1958). *But see* Escobedo v. Illinois, 84 Sup. Ct. 1758 (1964).

In deciding *Massiah* as it did, the Court is following its now-established trend toward a wider application of the constitutional guarantee of right to counsel.[15] However laudable this trend may be, and however valid the *Massiah* rule may be as an abstract principle of constitutional law, the rule fails to come to grips with the actual problem presented by the facts. The real injury to Massiah was caused by the presence of the transmitter, not by the absence of Massiah's attorney. The presence of counsel could not have bettered Massiah's position vis-a-vis the eavesdropping authorities. Therefore, the basic question is, or should be, whether or not the activities of the authorities amounted to an unreasonable search. The present rule is that a search is not unreasonable unless it involves a physical trespass.[16] Thus a holding that Massiah was the victim of an unreasonable search would have necessitated a change in the current rule. Years ago direct and overt physical intrusion upon one's person or premises was the only possible means of invading the right to privacy. It is significant that the trespass standard was enunciated at a time when radios were not in widespread use, transistorized devices were unknown, and highly sensitive and easily-concealable transmitting, recording and receiving apparatus had not yet been developed. In short, the trespass standard was at one time a workable criterion. But new scientific methods of evidence procurement present concomitant threats to the right of privacy.[17] In the words of Justice Brandeis:

> Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.[18]

Through an ingeniously contrived rationale, the Court in *Massiah* surrendered to the "last temptation . . . to do the right deed for the wrong reason."[19]

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15. Hamilton v. Alabama, *supra* note 9, White v. Maryland, *supra* note 9, Gideon v. Wainwright, 372 U.S. 335 (1963), Escobedo v. Illinois *supra* note 14.

16. On Lee v. United States, 343 U.S. 747 (1952), United States v. Kabot, 295 F.2d 848 (2d Cir. 1961), *cert. den.* 369 U.S. 803 (1962). See also Davis, Federal Searches and Seizures, § 9.16 (1964).

17. See dissents in Olmstead v. United States, 277 U.S. 438 (1928) and On Lee v. United States, *supra* note 16.

18. Olmstead v. United States, *supra* note 17 at 473.

19. Eliot, *Murder in the Cathedral,* part 2.