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A NEW WAVE OF SIXTH AMENDMENT WAIVERS: THE USE OF JUDICIAL OFFICERS AS ADVISERS

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THE fifth [1] and sixth [2] amendments to the United States Constitution exemplify the balance which exists between effective law enforcement and fundamental constitutional rights. These amendments incorporate the fundamental protections for the criminally accused that are held paramount to society's interest in prosecuting criminals. The protections granted by the Constitution, however, are not ironclad. Often the accused may be asked or induced to give up, or waive, its protections. On such occasions, the interaction between constitutional rights and criminal prosecution is sharply defined because societal restraint implicit in the constitutional guarantees defers to the successful use of evidence. Yet, the courts, wary of involuntary or unintentional waivers of fundamental rights, have attempted to safeguard those rights. The purpose of this Article, therefore, is to discuss waiver under the fifth and sixth amendments and to explore the alternatives that exist to insure a proper balance between prosecution and waiver.

I. THE FIFTH AMENDMENT AND THE PRE-PROSECUTION STAGE

The fifth amendment, perhaps the paradigmatic constitutional provision, stands as a cornerstone of the fundamental protections afforded to the criminally accused. By providing protection against self-incrimination, the amendment emphasizes the adversarial design

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1. The fifth amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The self-incrimination clause is applicable to the states through the fourteenth amendment. Malloy v. Hogan, 378 U.S. 1, 8 (1964).

2. The sixth amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The sixth amendment is applicable to the states through the fourteenth amendment. Gideon v. Wainwright, 372 U.S. 335, 339-42 (1963).

of the judicial system and the rejection of inquisitional processes.[3] By freeing the accused from aiding in his own prosecution,[4] the accuser must carry the burden of proof through independent sources of incriminating evidence.[5]

The Supreme Court's decision in *Miranda v. Arizona*[6] embellished the simply phrased self-incrimination clause with monumental significance.[7] *Miranda* dealt with the issue[8] of protection against self-incrimination in the context of custodial interrogation[9] of the accused by law enforcement authorities. Given a factual situation in which an individual in custody made incriminating statements without the as-

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3. *See* Kastigar v. United States, 406 U.S. 441, 444-46 (1972); Miranda v. Arizona, 384 U.S. 436, 458-63 (1966); Ullmann v. United States, 350 U.S. 422, 426-29 (1956); United States v. Yurasovich, 580 F.2d 1212, 1215 (3d Cir. 1978).

4. *In re* Gault, 387 U.S. 1, 47 (1967); Miranda v. Arizona, 384 U.S. 436, 460 (1966); 8 J. Wigmore, Evidence § 2251, at 317-18 (rev. ed. J. McNaughton 1961) ("This philosophy . . . naturally nurtures the concept that the individual may not be conscripted to assist his adversary, the government, in doing him in."); *see* Rogers v. Richmond, 365 U.S. 534, 541 (1961). Protection of an individual's privacy is the central aim of the privilege against self-incrimination. Fisher v. United States, 425 U.S. 391, 416 (1976) (Brennan, J., concurring in the judgment); Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

5. 8 J. Wigmore, *supra* note 4, § 2251, at 317; *see* Garner v. United States, 424 U.S. 648, 655-56 (1976); Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 414 n.12 (1966).

6. 384 U.S. 436 (1966).

7. For a discussion of the impact of *Miranda*, see Elsen & Rosett, *Protections for the Suspect under Miranda v. Arizona*, 67 Colum. L. Rev. 645 (1967); Grano, Rhode Island v. Innis: *A Need to Reconsider the Consitutitional Premises Underlying the Law of Confessions*, 17 Am. Crim. L. Rev. 1 (1979). Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 Mich. L. Rev. 59 (1966); Lederer, Miranda v. Arizona—*The Law Today*, 78 Mil. L. Rev. 107 (1978); Schrock, Welsh & Collins, *Interrogational Rights: Reflections on* Miranda v. Arizona, 52 S. Cal. L. Rev. 1 (1978); White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 581 (1979).

8. The Court framed the issue before it as "deal[ing] with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself." Miranda v. Arizona, 384 U.S. at 439.

9. Custodial interrogation was defined by the Court as "questioning initiated . . . after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444 (foonote omitted). Subsequent decisions, however, demonstrate that the relative nature of both "custody" and "interrogation" varies, thereby creating uncertainty over the scope of the terms and the periphery of *Miranda*'s protections. *See, e.g.*, United States v. Henry, 100 S. Ct. 2183, 2186-90 (1980) (incriminating statements made by defendant to an undisclosed, undercover government informant while in prison and after indictment are inadmissible as violative of the sixth amendment); United States v. Mendenhall, 100 S. Ct. 1870 (1980) (questioning by a law enforcement official in a public place does not constitute a seizure of person); Rhode Island v. Innis, 100 S. Ct. 1682 (1980) (express questioning or its functional equivalent triggers the *Miranda* safeguards for a suspect in custody). *See generally* Kamisar, Brewer v. Williams, Massiah, *and* Miranda: *What is "Interrogation"? When Does It Matter?*, 67 Geo. L.J. 1 (1978).

sistance of counsel, the Court found that the presence and assistance of counsel during custodial interrogation were essential elements of the privilege.[10] The problems inherent in secret or incommunicado interrogation procedures[11] necessitated the establishment of standards to protect the individual's guarantee against self-incrimination.[12] Accordingly, the Court required that, prior to any questioning, the interrogators must inform the subject that he is entitled to an attorney.[13] If an attorney is requested, the interrogators are required to cease questioning until the attorney is present and to afford the individual an opportunity to confer with his attorney.[14] The failure to provide these guarantees would result in the exclusion of statements taken from the individual.[15]

An ancillary issue that the Court raised and resolved concerned the waiver of these fifth amendment rights. Recognizing the state's interest in interrogation,[16] the Court granted that waiver would be permissible,[17] but only after emphasizing the heavy burden carried by the state to demonstrate a knowing and voluntary waiver.[18] A silent record or a statement ultimately given would not indicate that a waiver had occurred.[19]

Following *Miranda*, it appeared that only an express statement would suffice.[20] Recently, the Court rejected that notion in *North*

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10. Miranda v. Arizona, 384 U.S. at 469-74.

11. *Id.* at 445-58.

12. *Id.* at 467-74.

13. The Court delineated the now renowned "*Miranda* warnings" as follows: "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479.

14. The Supreme Court had previously guaranteed the right to the appointment and assistance of counsel at trial. Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963). This guarantee was later extended to situations in which a general investigation has been narrowed to a specific inquiry focusing on a particular suspect already in custody. Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964). *Miranda*, by entitling the assistance of counsel to a suspect in custody before he becomes the object of a prosecution or the subject of a specific inquiry, was a logical culmination of this trend of judicial thinking.

15. Miranda v. Arizona, 384 U.S. at 479.

16. *Id.* at 475.

17. A suspect in custody can waive his *Miranda* rights even after he has asserted them. Michigan v. Mosley, 423 U.S. 96, 102-04 (1975); *see* United States v. Boyce, 594 F.2d 1246, 1250 (9th Cir.), *cert. denied*, 444 U.S. 855 (1979); United States v. Corral-Martinez, 592 F.2d 263, 267-68 (5th Cir. 1979). A post-assertion waiver is violative of the suspect's rights only if the questioning officers do not scrupulously honor the suspect's right to remain silent. *See* Michigan v. Mosley, 423 U.S. at 104.

18. Miranda v. Arizona, 384 U.S. at 475.

19. *Id.* at 475-76.

20. The language in *Miranda* suggested this conclusion. *Id.* at 475. ("An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver.").

Carolina v. Butler.[21] In *Butler*, the state court had ruled that in the absence of an express statement of waiver, all statements made were per se inadmissible.[22] The Court, after examining its holding in *Miranda*, found that an express statement is not indispensable to a valid waiver.[23] Rather, if an individual is properly advised of his rights and implies by word or action that he wishes to waive those rights, he may properly do so.[24] The Court, therefore, adopted an ad hoc approach to waiver that would focus on the facts and circumstances of each case.[25] Although an attorney is an important part of the fifth amendment safeguards, no requirement for his presence at the time of waiver is imposed.[26]

The Supreme Court has expressed its views concerning the procedures necessary to implement the guarantees of the fifth amendment and has set standards for waiving those protections. Essential guidance for the suspect and the attorney has been provided on the critical issues—nature of the rights, the trigger mechanism for those rights, and waiver—concerning the fifth amendment.[27] Although the Court has been equally diligent in delineating a defendant's sixth amendment rights, the waiver issue remains the subject of controversy and debate.

II. THE SIXTH AMENDMENT: WAIVER AT CRITICAL STAGES OF PROSECUTION

While the fifth amendment guarantees attach to all incidents of custodial interrogation, the sixth amendment guarantees attach only at critical stages of prosecution.[28] A critical stage has been held to exist at arraignment,[29] at a preliminary hearing,[30] at post-indictment iden-

21. 441 U.S. 369 (1979).

22. *Id.* at 370.

23. *Id.* at 373.

24. *Id.* at 373-74.

25. *Id.* at 374-75.

26. *See generally* North Carolina v. Butler, 441 U.S. 369 (1979); Miranda v. Arizona, 384 U.S. 436 (1966).

27. Professor Kamisar has posed some interesting questions concerning the scope of these *Miranda* rights when the focus is shifted to different constitutional guarantees. *See* Kamisar, *supra* note 9, at 69-101. For example, can *Miranda* rights be scrupulously honored if a police officer "deliberately elicits" information under a sixth amendment standard? *Id.* at 73.

28. A critical stage of a criminal prosecution is reached "when the process shifts from investigatory to accusatory." Escobedo v. Illinois, 378 U.S. 478, 492 (1964). Critical stages involve "points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Kirby v. Illinois, 406 U.S. 682, 689 (1972).

29. Brewer v. Williams, 430 U.S. 387, 398-99 (1977); Hamilton v. Alabama, 368 U.S. 52, 53-54 (1961).

30. Coleman v. Alabama, 399 U.S. 1 (1970); White v. Maryland, 373 U.S. 59 (1963).

tifications,[31] and after indictment.[32] Once an accused has reached a critical stage of his prosecution, protection of his sixth amendment rights is guaranteed,[33] including the right to the presence and assistance of counsel.[34] Any further attempts by law enforcement authorities to extract statements will be closely scrutinized and a violation of the guarantees will cause the exclusion of the statements.[35]

Three cases illustrate the nature and scope of the sixth amendment right to counsel in post-critical stage interrogations. In *Massiah v. United States*,[36] the defendant was under indictment and had re-

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31. *Compare* Kirby v. Illinois, 406 U.S. 682 (1972) (plurality opinion) *with* United States v. Wade, 388 U.S. 218 (1967).

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

33. Kirby v. Illinois, 406 U.S. 682, 688-89 (1972) (plurality opinion); Massiah v. United States, 377 U.S. 201 (1964).

34. The "guiding hand of counsel" is essential to the accused at a critical stage of prosecution. Powell v. Alabama, 287 U.S. 45, 69 (1932); *accord*, Escobedo v. Illinois, 378 U.S. 478, 486 (1964) (quoting Powell v. Alabama, 287 U.S. at 69). Protection of sixth amendment rights is crucial in "those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel." Gerstein v. Pugh, 420 U.S. 103, 122 (1975); *see* Stovall v. Denno, 388 U.S. 293 (1967); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967); Powell v. Alabama, 287 U.S. 45 (1932). *See generally* Comment, *The Right To Counsel: Attachment Before Criminal Judicial Proceedings?*, 47 Fordham L. Rev. 810, 812-22 (1979).

35. The guarantee is personal to the defendant, and therefore, only his statements will be excluded. As the Court noted in Massiah v. United States, 377 U.S. 201 (1964), "in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. 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." *Id.* at 207. Given the applicability of the fourth amendment "fruit of the poisonous tree" doctrine, Wong Sun v. United States, 371 U.S. 471, 488 (1963), to fifth amendment circumstances, Brown v. Illinois, 422 U.S. 590, 604-05 (1975); Michigan v. Tucker, 417 U.S. 433, 446-47 (1974), it seems apparent that evidence improperly obtained through police questioning and any evidence gathered as a result of those answers is inadmissible under *Massiah*. Thus, *Massiah's* proviso may eventually be expanded to instances in which the primary illegality against the interrogated defendant will work to exclude evidence concerning other parties involved in the crime. *See* Brewer v. Williams, 430 U.S. 387, 413-14 (1975) (Powell, J., concurring).

36. 377 U.S. 201 (1964). The roots of the majority opinion in *Massiah* can be traced to the concurring opinions in Spano v. New York, 360 U.S. 315 (1959). *See* Grano, *supra* note 7, at 19-22; Kamisar, *supra* note 9, at 34-41. The *Spano* Court held that the admission into evidence of a coerced confession from an indicted suspect, who was held in custody and interrogated without the assistance of his retained counsel, violated the due process clause of the fourteenth amendment. 360 U.S. at 323-24. Justice Douglas argued that the police behavior violated the suspect's right to counsel. *Id.* at 324-26 (Douglas, J., concurring). "[T]he right of counsel extends to the preparation for trial, as well as to the trial itself." *Id.* at 325 (Douglas, J., concurring). Furthermore, Justice Stewart believed that the absence of counsel alone was sufficient to render the confession inadmissible under the fourteenth amend-

tained an attorney.[37] During the defendant's release on bail,[38] law enforcement agents enlisted the assistance of his confederate to engage the defendant in conversation.[39] Unaware of the plan, the defendant made incriminating statements which were used at his trial and which aided in his conviction.[40] Examining the admissibility of these statements on fourth, fifth, and sixth amendment grounds,[41] the Court opted for a sixth amendment analysis, holding that the defendant was entitled to the assistance of his attorney when agents "deliberately elicited" such statements from him after indictment.[42] The indictment, therefore, clearly served as the triggering device for the defendant's sixth amendment right to an attorney.[43]

Although *Massiah* indicated that any attempt to use covert methods of questioning to procure incriminating statements would constitute deliberate elicitation,[44] the criteria to judge more subtle variations of questioning were left undefined. The answers were long delayed as *Massiah*'s significance was unexplored during a period of judicial activism in other areas.[45] The full impact of *Massiah* was resurrected in *Brewer v. Williams*.[46]

In *Brewer*, the defendant had been arraigned and had received the assistance of counsel.[47] During the defendant's transfer to another jail, however, the police officers who accompanied him elicited incriminating statements concerning the commission of the crime by

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ment, stating that an indictment is a crucial period for a defendant in a capital crime prosecution and that, at such a time, the right to the assistance of counsel is absolute. *Id.* at 326-27 (Stewart, J., concurring); *see* Massiah v. United States, 377 U.S. at 204.

37. 377 U.S. at 201.

38. *Id.*

39. *Id.* at 202-03.

40. *Id.* at 203.

41. *Id.* at 203-04.

42. *Id.* at 205-06. The "deliberately elicited" test is not readily definable. Subsequent decisions, however, indicate that any attempt by the government to obtain incriminating statements from a person in a critical stage of prosecution without fully informing that person of the facts, circumstances, and purposes of the questioning will satisfy the test. *See* United States v. Henry, 100 S. Ct. 2183, 2188 (1980); Rhode Island v. Innis, 100 S. Ct. 1682, 1689 n.4 (1980); Brewer v. Williams, 430 U.S. 387, 399-400 (1977). Moreover, the *Massiah* test invariably encompasses a broader range of circumstances than a fifth amendment "interrogation" test. *See* Kamisar, *supra* note 9, at 66-68. *Compare* Massiah v. United States, 377 U.S. 201, 205-06 (1964) *with* Rhode Island v. Innis, 100 S. Ct. 1682, 1689 (1980). *See generally* pt. IV(A)-(B) *infra*.

43. 377 U.S. at 205-06; Spano v. New York, 360 U.S. 315 (1959).

44. 377 U.S. at 206.

45. During the period after *Massiah*, the Court was primarily concerned with the scope of the fourth and fifth amendment guarantees. *See* Kamisar, *supra* note 9, at 24-27.

46. 430 U.S. 387 (1977).

47. *Id.* at 391.

inflaming his religious fervor.[48] Williams challenged the use of these statements on the bases of his sixth amendment right to counsel and his fifth amendment *Miranda* guarantees.[49] Faced with an interesting option,[50] the Court decided that a resolution of the *Miranda* claim was unnecessary in light of the sixth amendment-*Massiah* violation of the right to counsel.[51] The Court, following the "deliberate elicitation" test enunciated in *Massiah*,[52] determined that the officers' questions were designed to produce incriminating statements.[53] Because Williams had entered a critical stage of his prosecution—arraignment—the absence of counsel rendered the statements inadmissible.[54]

Finally, in *United States v. Henry*,[55] "situations by design" were included in an extended "deliberate elicitation" test. The defendant had been indicted and was in custody. An informant was asked to listen to his conversations, but not to engage in direct conversations concerning the crime.[56] Nevertheless, when incriminating statements were made, the Court found that they were deliberately elicited by the compelling circumstances of incarceration and the presence of an informant.[57]

The facts and constitutional issues in the *Massiah*, *Brewer*, and *Henry* trilogy bear a striking resemblance to those underlying a *Miranda*-fifth amendment analysis. Although a *Miranda* analysis could easily be adapted to those cases,[58] a sixth amendment analysis has been followed because a critical stage of prosecution had been reached.[59] Whenever a critical stage is presented in a particular fac-

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48. *Id.* at 391-93.

49. *Id.* at 394-95. Williams had been advised of his *Miranda* rights prior to the statements being made. *Id.* at 391-92.

50. *Brewer* could have been discussed in terms of either a fifth amendment-*Miranda* analysis or a sixth amendment-*Massiah* analysis. *See* Kamisar, *supra* note 9, at 3-14. Moreover, with current fourth amendment analysis, an option now available is a motion to suppress under the fourth amendment. *See* Dunaway v. New York, 442 U.S. 200 (1979); Brown v. Illinois, 422 U.S. 590 (1975).

51. 430 U.S. at 397-98.

52. *See* note 42 *supra*.

53. 430 U.S. at 399-400. The Court noted "[t]hat the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is constitutionally irrelevant." *Id.* at 400 (citations omitted); *see* United States v. Henry, 100 S. Ct. 2183, 2185-86 (1980).

54. 430 U.S. at 399-401, 406.

55. 100 S. Ct. 2183 (1980).

56. *Id.* at 2184-85.

57. *Id.* at 2187-89; *accord*, United States v. Sampol, Nos. 79-1541, -1542, -1803 (D.C. Cir. Sept. 15, 1980) (per curiam).

58. *See* Kamisar, *supra* note 9, at 28-33.

59. Professor Kamisar explored the fifth amendment option and analyzed *Brewer* under a fifth amendment-*Miranda* approach. *See id.* at 24-41. Subsequently, the Court implied in Rhode Island v. Innis, 100 S. Ct. 1682 (1980), that Williams' state-

tual pattern, a *Massiah* analysis is appropriate regardless of whether a *Miranda* interrogation analysis would seemingly apply and mandate a different result.[60] While the protections seem almost indistinguish-

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ments would be admissible under a fifth amendment-*Miranda* analysis. *Id.* at 1689-90 & n.4. *Innis* involved a police ploy similar to the action taken in *Brewer*. In both *Brewer* and *Innis*, incriminating statements were made. *Miranda* warnings were issued to both suspects before the ploy was initiated. *Innis* held that such conduct falls far short of the "interrogation" required to trigger a fifth amendment-*Miranda* analysis. As a result, the answers to the "questioning" were admissible. A similar result could have been reached in *Brewer* under a fifth amendment analysis. Yet, by adopting a sixth amendment analysis, the *Brewer* Court avoided the complexities that now arise in light of *Innis'* fifth amendment analysis. Because *Brewer* involved a post-arraignment setting, however, a critical stage had been reached in the prosecution, thereby initiating a sixth amendment-*Massiah* analysis. Significantly, the comparison of the facts in *Brewer* and *Innis* indicates the willingness of the Court to extend the "deliberately elicited" test of *Massiah* beyond the *Innis* "interrogation" definition despite the factual similarities. When the police, as in *Innis*, are still in the investigative stage, no one suspect is the focus of police efforts to gather evidence. The necessity to solve crime demands a shifting of the balance between the public and private interests to the police. Accordingly, the Supreme Court has fashioned a lenient "interrogation" test to aid the police. When the police power is concentrated on the conviction of a single individual, however, the individual needs added protection against the full power of the state. *See* People v. Cunningham, 49 N.Y.2d 203, 207, 400 N.E.2d 360, 363, 424 N.Y.S.2d 421, 424 (1980) (per curiam). The *Massiah* "deliberately elicited" test shifts the balance to the private interest to shield the individual from governmental action. Grano, *supra* note 7, at 19-25. By distinguishing the two standards in *Innis*, the Court implicitly demonstrates its intent to protect individuals by creating a wide and seemingly impenetrable zone around *Massiah* rights. *Compare* Hoffa v. United States, 385 U.S. 293 (1966) *with* United States v. Henry, 100 S. Ct. 2183 (1980).

60. Unless the critical stage factor is incorporated into the analysis, the *Massiah-Miranda* distinctions would be in disarray. *Massiah's* "deliberately elicited" test is clearly more subtle, but more comprehensively applied, than the *Miranda* "interrogation" test. Assuming the absence of the critical stage factor, if the *Massiah* type questioning were subject to a fifth amendment-*Miranda* analysis, it is clear that the questioning would not constitute an interrogation. *Innis* defined interrogation as "either express questioning or its functional equivalent. . . . [This includes] any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 100 S. Ct. 1682, 1689 (1980) (footnotes omitted). The Court noted that "interrogation" under the fifth and sixth amendments is not an interchangeable term. *Id.* at 1689 n.4. Although the ploys used in both *Rhode Island v. Innis* and *Brewer v. Williams* are almost indistinguishable, the *Massiah* test extended far beyond a *Miranda* test to exclude the statements in *Henry* and *Brewer*. It seems, therefore, that an interface exists between a fifth amendment-*Miranda* analysis and a sixth amendment-*Massiah* analysis. United States v. Henry, 100 S. Ct. 2183, 2188 (1980). In *Henry* it was argued that "a less rigorous standard [should apply] under the Sixth Amendment where the accused is prompted by an undisclosed undercover informant than where the accused is speaking in the hearing of persons he knows to be government oficers." *Id.* This argument was rejected, however, because it attempted "to infuse Fifth Amendment concerns against compelled self-incrimination into the Sixth Amendment protection of the right to the assistance of counsel." *Id.* Once a *Massiah* analysis attaches, it is

able,[61] a critical stage of prosecution that will trigger the right to counsel in a sixth amendment setting provides the analytical line of demarcation between the two constitutional standards.[62]

The *Massiah* analysis commands a powerful position in any sixth amendment questioning setting. Consideration of the open waiver question may be the best demonstration of its significance. Although the *Miranda* waiver issue is resolved, the *Massiah* waiver issue was left unresolved in *Brewer*.[63] Consequently, questions exist concerning the propriety of the accused waiving rights that have attached, the characteristics of the waiver, and the necessity of an attorney's presence and consent to the waiver. While the answers to these questions are unclear, some guidance does exist in precedent.

III. THE *MASSIAH* WAIVER

A. Is a Sixth Amendment Waiver Permissible?

Historically, constitutional guarantees have been deemed to be personal to the individual.[64] *A fortiori*, the individual can choose not to

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clear that a broader range of tactics will render statements inadmissible than if similar tactics were employed under a *Miranda* analysis. The *Massiah* rule seems, therefore, to have limitless application to even the most subtle situations. This characteristic of the *Massiah* rule alleviates the tension between *Innis* and *Brewer*. Rhode Island v. Innis, 100 S. Ct. 1682, 1691 (1980) (Burger, C.J., concurring). The "subtle compulsion" that the *Innis* Court found not to be equal to a *Miranda* "interrogation" might arguably be a *Massiah* "deliberate elicitation." Under a *Massiah* analysis, he need not be "in custody" for the protection to attach. The result in *United States v. Henry* "is not to read a 'custody' requirement, which is a prerequisite to the attachment of *Miranda* rights, into this branch of the Sixth Amendment. . . . Rather, . . . the fact of custody bears on whether the government 'deliberately elicited' the incriminating statements . . . ." 100 S. Ct. at 2188 n.11.

61. *See* notes 59-60 *supra*. *Compare* Hoffa v. United States, 385 U.S. 293 (1966) *with* Massiah v. United States, 377 U.S. 201 (1964).

62. The dividing point between a sixth and fifth amendment analysis may be subject to further fluctuation if the Court considers other stages of prosecution to be critical. For example, grand jury proceedings are an apparent critical stage; the sixth amendment rights, however, have not yet attached. The inquisitional, rather than adversarial, nature of grand jury proceedings may explain this apparent inconsistency. For a fifth amendment analysis in the grand jury setting, see United States v. Washington, 431 U.S. 181, 190 (1977); United States v. Mandujano, 425 U.S. 564 (1976) (plurality opinion).

63. "The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams *could not*, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not." Brewer v. Williams, 430 U.S. 387, 405-06 (1977) (footnote omitted).

64. Brewer v. Williams, 430 U.S. 387, 419 (1977) (Burger, C.J., dissenting); *cf.* United States v. Payner, 100 S. Ct. 2439, 2444 (1980) (fourth amendment rights are violated only if the official conduct invades one's own legitimate expectation of privacy); Rakas v. Illinois, 439 U.S. 128, 138 (1978) (fourth amendment rights are personal).

exercise these rights. This option has been recognized under the fourth,[65] fifth,[66] and sixth[67] amendments.

When constitutional guarantees under the sixth amendment are involved, a strict standard for waiver is applied. To preserve the integrity and fairness of the trial, the courts require that waiver of sixth amendment rights be made knowingly, intelligently, and voluntarily.[68] This standard has been applied in waiver situations concerning the right to confront witnesses,[69] the right to a jury trial,[70] the right to counsel at trial,[71] the right to counsel during the entry of a guilty plea,[72] the right to a speedy trial,[73] and the right to enter a plea of guilty and withdraw a not guilty plea.[74] In view of the significant body of case law that allows waiver of important sixth amendment rights, it seems clear that a defendant may waive his right to the assistance of counsel during questioning that follows a critical stage of the prosecution. If waiver is permitted at stages of the prosecution as critical as the circumstances presented in *Massiah*, *Brewer*, and *Henry*, it would be anomalous to reject the potential for waiver in the post-critical stage questioning setting as well.[75]

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65. Under a fourth amendment analysis, the decision not to invoke an individual's right is viewed as "consent" rather than "waiver." *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

66. Miranda v. Arizona, 384 U.S. 436, 475-79 (1966).

67. Faretta v. California, 422 U.S. 806, 835-36 (1975).

68. The sixth amendment waiver standard is "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). A heavy burden is on the government to demonstrate that the right to counsel has been waived because of the great responsibility on the trial judge to evaluate the validity of the waiver. *Id.* at 464-65; *see* Faretta v. California, 422 U.S. 806, 835 (1975); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972)

69. Brookhart v. Janis, 384 U.S. 1, 3-4 (1966); *see* United States v. Price, 577 F.2d 1356, 1363 (9th Cir. 1978), *cert. denied*, 439 U.S. 1068 (1979); United States v. Calhoun, 544 F.2d 291, 296-97 (6th Cir. 1976).

70. Adams v. United States *ex rel.* McCann, 317 U.S. 269, 277-78 (1942); *see* United States v. Smyer, 596 F.2d 939, 942 (10th Cir.), *cert. denied*, 444 U.S. 843 (1979).

71. Faretta v. California, 422 U.S. 806, 835 (1975); *see* United States v. Aponte, 591 F.2d 1247, 1249 (9th Cir. 1978); Badger v. Cardwell, 587 F.2d 968, 972 n.3 (9th Cir. 1978); United States v. Lawriw, 568 F.2d 98, 105 (8th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978).

72. Boyd v. Dutton, 405 U.S. 1, 3 (1972) (per curiam); Van Moltke v. Gillies, 332 U.S. 708, 720-21 (1948). *see* Lewellyn v. Wainwright, 593 F.2d 15, 16 (5th Cir. 1979) (per curiam).

73. Barker v. Wingo, 407 U.S. 514, 529 (1972); *see* United States v. Poulack, 556 F.2d 83, 84 & n.1 (1st Cir.), *cert. denied*, 434 U.S. 986 (1977); United States v. Didier, 542 F.2d 1182, 1184 (2d Cir. 1976).

74. McMann v. Richardson, 397 U.S. 759, 766 (1970); Boykin v. Alabama, 395 U.S. 238, 242 (1969).

75. *See* Grano, *supra* note 7, at 34-36.

B. *What Type of Waiver Is Required?*

Assuming that waiver is permissible, the next issue that arises is whether the waiver must be explicitly made or whether the waiver may be implied from the circumstances. Although either an explicit or implicit waiver is permissible under a fifth amendment analysis, a sixth amendment analysis apparently precludes an implied waiver of the right to counsel in post-critical stage settings. The courts have recognized that the sixth amendment demands a higher standard of waiver of the right to counsel than is required for waiver of fifth amendment-*Miranda* rights[76] because the purpose of the criminal investigation has shifted from investigatory to accusatory.[77] Therefore, the conceptual underpinning of the sixth amendment does not support an implied waiver analysis because cooperation at a critical stage may increase the likelihood of conviction. An express waiver is permitted[78] because the intent to cooperate is clearly and unambiguously demonstrated.

Moreover, given the application of a higher standard of waiver under a sixth amendment analysis, case law supports the proposition that implicit waivers are unacceptable under that analysis. For example, the factual patterns in *Massiah v. United States*,[79] *United States v. Henry*,[80] and *Hoffa v. United States*[81] are fundamentally indistinguishable. In each case, the government utilized an informant as a

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76. United States v. Mohabir, 624 F.2d 1140, 1147 (2d Cir. 1980); Carvey v. LeFevre, 611 F.2d 19, 22 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 1858 (1980); United States v. Massimo, 432 F.2d 324, 327 (2d Cir. 1970) (Friendly, J., dissenting), *cert. denied*, 400 U.S. 1022 (1971). The Supreme Court has yet to define the characteristics of a *Massiah* waiver under the sixth amendment, although certain justices have made their positions known. Justice White found no distinctions between *Massiah* and *Miranda* rights. Brewer v. Williams, 430 U.S. 387, 435-38 (1977) (White, J., dissenting). He, therefore, would not perceive a higher standard for sixth amendment waivers. Justice Blackmun, however, has implied that the sixth amendment demands a higher waiver standard. When the Court permitted implied waivers of *Miranda* rights, the majority supported their rationale through the use of the sixth amendment waiver standard. North Carolina v. Butler, 441 U.S. 369, 374-75 (1979) (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). Justice Blackmun noted that applying the *Johnson* standard in a fifth amendment context was inappropriate. 441 U.S. at 376-77 (Blackmun, J., concurring). *See also* Grano, *supra* note 7, at 35 n.215.

77. Brewer v. Williams, 430 U.S. 387, 404 (1977); Kirby v. Illinois, 406 U.S. 682, 689-90 (1972); Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964).

78. The dissenters in *Brewer* found a waiver of the suspect's right to counsel. Chief Justice Burger noted that the waiver was valid because the incriminating statements were made voluntarily and in full awareness of the *Miranda* rights. Brewer v. Williams, 430 U.S. 387, 417-20 (1977) (Burger, C.J., dissenting). Justice White stated that a waiver was implied by the suspect's actions. *Id.* at 433-37 (White, J., dissenting).

79. 377 U.S. 201 (1964).

80. 100 S. Ct. 2183 (1980).

81. 385 U.S. 293 (1966).

means of obtaining incriminating statements.[82] Nevertheless, the results differed dramatically. In *Massiah* and *Henry*, the incriminating statements, being "deliberately elicited," were excluded under a sixth amendment analysis,[83] whereas Hoffa's statements were found to be admissible.[84] Although the decisions are difficult to justify *factually*, the salutary distinguishing factor is that Massiah and Henry had entered critical stages of prosecution,[85] while Hoffa had not.[86]

Because the three cases differed on the main issue of application of sixth amendment rights, it seems to follow that different results would be reached on the ancillary issue of waiver. In light of *Rhode Island v. Innis*[87] and *North Carolina v. Butler*,[88] it seems clear that Hoffa could have waived his right to counsel, even though unaware of the informer's status, because the questioning would not constitute deliberate elicitation or interrogation.[89] In stark contrast, the lack of knowledge concerning the nature of the informant in *Massiah* and *Henry* precluded waiver because an individual is incapable of waiving that fundamental sixth amendment guarantee if knowledge of important factors bearing on that right was lacking.[90] A higher standard of waiver would seem mandatory in the sixth amendment setting because of the greater protection afforded under the *Massiah* analysis than a *Miranda* analysis in identical circumstances.

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82. *See* notes 37-40, 55-56 *supra* and accompanying text. In *Hoffa*, an undisclosed government informer reported on the activities of suspect's counsel during preparation of a Taft-Hartley trial. The incriminating statements, however, were used for a subsequent bribery trial. Hoffa v. United States, 385 U.S. 293, 296 (1966). *See also* Kamisar, *supra* note 9, at 55-63.

83. United States v. Henry, 100 S. Ct. 2183, 2187-89 (1980); Massiah v. United States, 377 U.S. 201, 205-06 (1964). *Hoffa* also fits easily into a fifth amendment-*Miranda* analysis because Hoffa was not "in custody" and was not the subject of "interrogation." *See* Rhode Island v. Innis, 100 S. Ct. 1682, 1689-90 (1980). Massiah was also not "in custody." Because he was under indictment, however, a sixth amendment analysis using the "deliberately elicited" test was adopted. In a sixth amendment situation, "[c]ustody . . . is not controlling." *Id.* at 1689 n.4.

84. Hoffa v. United States, 385 U.S. 293, 309-10 (1966).

85. Massiah and Henry were under indictment at the time they made incriminating statements. United States v. Henry, 100 S. Ct. 2183, 2184 (1980); Massiah v. United States, 377 U.S. 201, 202-03 (1964).

86. Hoffa v. United States, 385 U.S. 293, 309-10 (1966). The incriminating statements were used at a subsequent trial even though they were made during a critical stage of an unrelated prosecution. *Id.* at 309-10; *see* note 82 *supra*.

87. 100 S. Ct. 1682 (1980).

88. 441 U.S. 369 (1979).

89. *See* notes 59-60 *supra*.

90. In *Henry*, the Court stated that "the concept of a knowing and voluntary waiver of Sixth Amendment rights does not apply in the context of communication with an undisclosed undercover informant acting for the government." United States v. Henry, 100 S. Ct. 2183, 2188 (1980); *accord*, United States v. Mohabir, 624 F.2d 1140 (2d Cir. 1980) (failure to inform defendant of crucial facts concerning indictment renders waiver inadmissible).

Rhode Island v. Innis[91] and *Brewer v. Williams*[92] also involved similar factual patterns with different legal results. In both *Innis* and *Brewer*, the defendants were engaged in conversations with police officers who were escorting them in a police car.[93] As a result of those conversations, each defendant made incriminating statements.[94] Even though both defendants were informed of their *Miranda* rights,[95] the Court reached different conclusions. In *Innis*, the conversation did not even amount to "interrogation."[96] As a result, there was no violation of Innis' fifth amendment rights because they had not attached; the incriminating statements were, therefore, admissible.[97] The questioning in *Brewer*, on the other hand, was designed to elicit incriminating testimony from the accused without the presence of counsel.[98] Consequently, Williams' sixth amendment right to counsel was violated and the statements were inadmissible.[99]

If the police conversation in *Innis* had been an interrogation, an implicit waiver would seem apparent under the analysis in *North Carolina v. Butler*.[100] In both cases, the defendants, after being apprised of their *Miranda* rights,[101] made statements that were admissible despite the lack of a specific acknowledgment of each element of those rights.[102] The statements in *Brewer* were not admissible, however, because the defendant did not, and *could not*, explicitly waive a guarantee when the elements of that guarantee were not specifically explained.[103]

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91. 100 S. Ct. 1682 (1980).

92. 430 U.S. 387 (1977).

93. The Rhode Island policemen, having a conversation that the suspect could obviously overhear, expressed concern that the hidden shotgun involved in the crimes could be found by retarded children from a nearby school, who might hurt themselves. Rhode Island v. Innis, 100 S. Ct. at 1686-87. The Iowa policeman in *Brewer* specifically addressed the suspect, delivering the "Christian burial speech" to persuade the defendant to reveal the location of the body of the murdered girl. Brewer v. Williams, 430 U.S. at 391-93.

94. Rhode Island v. Innis, 100 S. Ct. at 1687; Brewer v. Williams, 430 U.S. at 393.

95. The suspect in *Innis* was given his *Miranda* rights three times—twice at arrest and once before he brought the police to the hiding place of the gun. Rhode Island v. Innis, 100 S. Ct. at 1686-87. The accused in *Brewer* was also given his *Miranda* rights three times—when booked, when arraigned, and when met by the officer who eventually questioned him. Brewer v. Williams, 430 U.S. at 390-91.

96. Rhode Island v. Innis, 100 S. Ct. at 1690-91.

97. *See id.*

98. Brewer v. Williams, 430 U.S. at 405-06.

99. *Id.*

100. 441 U.S. 369 (1979).

101. Rhode Island v. Innis, 100 S. Ct. at 1686-87 (1980); North Carolina v. Butler, 441 U.S. at 371 n.1.

102. "[T]he defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may . . . support a conclusion that a defendant has waived his rights." North Carolina v. Butler, 441 U.S. at 373.

103. Brewer v. Williams, 430 U.S. 387, 402 (1977).

The distinction between these results demonstrates that a sixth amendment waiver analysis requires an explicit acknowledgment of each element of the guarantee and the specific circumstances in which it attaches.[104] Because the inference of knowledge from the simple recitation to the defendant of his *Miranda* rights does not satisfy the higher standard, it logically follows that the waiver of those rights will not be implied under the more stringent standard.[105] To preserve a semblance of conceptual consistency between the fifth and sixth amendment analyses, the higher standard of waiver under the sixth amendment requires express statements of waiver for each specific element under the guarantee, thus adding credence to the purportedly greater protections afforded under a sixth amendment-*Massiah* analysis. A lesser standard would distort the balance that the courts have attempted to create in this area.

C. *What Procedures Will Insure a Proper Waiver?*

While a defendant may waive the guarantees of the fifth amendment in the absence of his attorney, sixth amendment procedure is muddled because the federal and state courts have developed three alternative standards for waiver.

1. The Per Se Rule

Some federal and state courts have opted for a strict per se standard of waiver for the sixth amendment right to counsel in a post-critical stage setting.[106] Under this standard, waiver is impermissible in the absence of, and without the advice or consent of, the attorney, even though *Miranda* warnings may have been given.[107] This posi-

104. *Compare* Brewer v. Williams, 430 U.S. 387, 404-05 (1975) *with* North Carolina v. Butler, 441 U.S. 369, 373 (1979).

105. *See* J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 504 (1978).

106. *See* United States v. Durham, 475 F.2d 208 (7th Cir. 1973); United States v. Thomas, 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973); United States *ex rel.* O'Connor v. New Jersey, 405 F.2d 632 (3d Cir.), *cert. denied*, 395 U.S. 923 (1969); Hancock v. White, 378 F.2d 479 (1st Cir. 1967); United States v. Howard, 426 F. Supp. 1067 (W.D.N.Y. 1977); United States *ex rel.* Lopez v. Zelker, 344 F. Supp. 1050 (S.D.N.Y. 1972), *aff'd*, 465 F.2d 1405 (2d Cir.), *cert. denied*, 409 U.S. 1049 (1972). Several states have adopted a strict per se rule of waiver. People v. Isby, 267 Cal. App. 2d 484, 73 Cal. Rptr. 294 (1968); Williams v. State, 188 So. 2d 320 (Fla. Dist. Ct. App. 1966), *modified on other grounds*, 198 So. 2d 21 (Fla. 1967); State v. Peters, 545 S.W.2d 414 (Mo. 1976); State v. Witt, 422 S.W.2d 304 (Mo. 1967); State v. Johns, 185 Neb. 590, 177 N.W.2d 580 (1970); State v. Green, 46 N.J. 192, 215 A.2d 546 (1965), *cert. denied*, 384 U.S. 946 (1966); People v. Settles, 46 N.Y.2d 154, 385 N.E.2d 612, 412 N.Y.S.2d 874 (1978); People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976); *In re* Robinson, 125 Vt. 343, 215 A.2d 525 (1965).

107. Support for the adoption of a per se rule exists in Supreme Court opinions. *See* Spano v. New York, 360 U.S. 315, 326 (1959) (Douglas, J., concurring); *id.* at

tion, however, is beyond the periphery of the rights enunciated under *Massiah* and its progeny.[108] In adopting this stance, these courts have provided considerable protection to the defendant by significantly restricting the prosecution's ability to question the defendant.

2. The Super-*Miranda* Rule

The majority position among federal and state courts is that waiver is permissible in the absence of counsel if appropriate procedural safeguards exist to insure a knowing and intelligent waiver.[109] Ini-

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327 (Stewart, J., concurring). To date, however, a majority of the Court has not supported this position. Whether the right to counsel could be waived in the absence of counsel has been left open and the procedures needed to effectuate that waiver have not been delineated. Brewer v. Williams, 430 U.S. 387, 405-06 (1975). The American Law Institute, however, has adopted a modified per se approach by allowing waivers, but not questioning, without the presence of counsel. ALI Model Code of Pre-Arraignment Procedure § 140.8 (1975).

108. New York's position is the most developed and best represents the per se rule. *See* Kelder, *Criminal Procedure, 1978 Survey of N.Y. Law*, 30 Syracuse L. Rev. 15, 121-26 (1979); *The Survey of New York Practice*, 51 St. John's L. Rev. 201, 216-22 (1976). In New York, "a criminal defendant under indictment and in custody may not waive his right to counsel unless he does so in the presence of an attorney." People v. Settles, 46 N.Y.2d 154, 162-63, 385 N.E.2d 612, 616, 412 N.Y.S.2d 874, 879 (1978) (citations omitted); *see* People v. Hobson, 39 N.Y.2d 479, 481, 348 N.E.2d 894, 896, 384 N.Y.S.2d 419, 420 (1976); People v. Donovan, 13 N.Y.2d 148, 151, 193 N.E.2d 628, 629, 243 N.Y.S.2d 841, 842-43 (1963). Moreover, even if the Supreme Court ultimately decides against a per se waiver rule, the New York rule would not be affected because its basis is in the state constitution. People v. Settles, 46 N.Y.2d at 161, 385 N.E.2d at 615, 412 N.Y.S.2d at 877.

109. *See* United States v. Brown, 569 F.2d 236 (5th Cir. 1978); United States v. Monti, 557 F.2d 899 (1st Cir. 1977); United States v. Satterfield, 558 F.2d 655 (2d Cir. 1976); Moore v. Wolff, 495 F.2d 35 (8th Cir. 1974); United States v. Cobbs, 481 F.2d 196 (3d Cir.), *cert. denied*, 414 U.S. 980 (1973); United States v. Springer, 460 F.2d 1344 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972); Coughlan v. United States, 391 F.2d 371 (9th Cir.), *cert. denied*, 393 U.S. 870 (1968); United States v. Miller, 432 F. Supp. 382 (E.D.N.Y. 1977), *aff'd sub nom.* United States v. Fernandez, 573 F.2d 1297 (2d Cir. 1978); Thompson v. State, 347 So. 2d 1371 (Ala. Crim. App. 1977), *cert. denied*, 434 U.S. 1018 (1978); State *ex rel.* Berger v. Superior Court, 105 Ariz. 553, 468 P.2d 580 (1970); State v. McLucas, 172 Conn. 542, 375 A.2d 1014, *cert. denied*, 434 U.S. 855 (1977); Jackson v. United States, 404 A.2d 911 (D.C. 1979); Sanders v. State, 378 So. 2d 880 (Fla. Dist. Ct. App. 1979); Shouse v. State, 231 Ga. 716, 203 S.E.2d 537 (1974); People v. Sandoval, 41 Ill. App. 3d 741, 353 N.E.2d 715 (1976); Jackson v. State, 268 Ind. 360, 375 N.E.2d 223 (1978); State v. Johnson, 223 Kan. 237, 573 P.2d 994 (1977); State v. Cotton, 341 So. 2d 355 (La. 1976); State v. Carter, 412 A.2d 56 (Me. 1980); State v. Blizzard, 278 Md. 556, 366 A.2d 1026 (1976); Commonwealth v. Andujar, 79 Mass. App. Ct. Adv. Sh. 1245, 390 N.E.2d 276 (1979); People v. Green, 405 Mich. 273, 274 N.W.2d 448 (1979); State v. Hull, ___ Minn. ___, 269 N.W.2d 905 (1978); State v. Haynes, 288 Or. 59, 602 P.2d 272 (1979), *cert. denied*, 100 S. Ct. 2175 (1980); Commonwealth v. Yates, 467 Pa. 362, 357 A.2d 134 (1976); State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Lamb v. Commonwealth, 217 Va. 307, 227 S.E.2d 737 (1976).

tially, the courts mandate that the requirements of *Miranda v. Arizona* be met.[110] Thereafter, the courts will examine the facts and circumstances of the particular case to determine whether additional safeguards were provided to insure a knowing and intelligent waiver.[111] If protections in addition to those set forth in *Miranda* are provided to guarantee that the higher standard for the sixth amendment waiver is met, the courts that follow this position generally will recognize the permissibility of waiver. This stance, therefore, is aptly termed the "super-*Miranda* rule" because it requires a showing that safeguards beyond *Miranda* were provided.[112] In these jurisdictions, a per se rule is deemed inappropriate because of the sufficiency of the additional safeguards to protect the defendant. Furthermore, the per se rule has been specifically rejected under this line of reasoning for the courts can find no support under *Massiah* for requiring the presence of counsel for waiver.[113]

3. The New Second Circuit Rule

Prior to its decision in *United States v. Mohabir*,[114] the Second Circuit Court of Appeals had adopted a "super-*Miranda*" rule of

110. *See* United States v. Satterfield, 558 F.2d 655 (2d Cir. 1976); United States v. Springer, 460 F.2d 1344 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972).

111. *See, e.g.*, Carvey v. LeFevre, 611 F.2d 19 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 1858 (1980); United States v. Satterfield, 558 F.2d 655 (2d Cir. 1976).

112. No uniform set of standards to implement this rule exists, however, and the sufficiency of additional requirements varies among the courts. *Compare* United States v. Satterfield, 558 F.2d 655 (2d Cir. 1976) *with* Coughlan v. United States, 391 F.2d 371 (9th Cir.), *cert. denied*, 393 U.S. 870 (1968). Some dissatisfaction with the approach was, therefore, inevitable. As the court noted in *Coughlan*, "[i]t may well be that the day is approaching when the right to counsel may be expanded to the point where an accused may only be interrogated by the police in the presence of his lawyer." 391 F.2d at 372.

113. Representative of this position are the Second Circuit decisions under United States v. Satterfield, 558 F.2d 655 (2d Cir. 1976). *See* Carvey v. LeFevre, 611 F.2d 19 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 1858 (1980); United States v. Lord, 565 F.2d 831 (2d Cir. 1977). After considering the requirements of *Massiah* and after reviewing other waiver principles, the circuit holds that, if a defendant is properly advised of his rights and the options available to him, he may knowingly, voluntarily, and explicitly waive his right to counsel. The circuit relies upon precedent that acknowledges the permissibility of waiver in other circumstances. The circuit, however, has acknowledged that explicit statements of waiver are required. *See* United States v. Mohabir, 624 F.2d 1140 (2d Cir. 1980); pt. IV(B) *supra*. Therefore, in addition to the recital of *Miranda* rights, the Second Circuit requires that the nature of the proceedings and the available alternatives be explained to the defendant in terms that he understands. If the defendant acknowledges that he understands his rights and asserts his desire to waive them, the waiver is permissible. Although the Second Circuit recognizes that the standard for waiver under the sixth amendment is more stringent than under the fifth amendment, statements received in the absence of counsel and during critical stages of prosecution will be deemed proper. United States v. Satterfield, 558 F.2d at 657.

114. 624 F.2d 1140 (2d Cir. 1980).

waiver.[115] *Mohabir* represents a distinct shift in that position and provides a unique procedure for sixth amendment waiver. Following his indictment but prior to his arraignment, Mohabir was brought to an office of an Assistant United States Attorney for questioning pursuant to a routine practice.[116] After being advised of his *Miranda* rights, Mohabir made incriminating statements that were instrumental in obtaining his conviction.[117] On appeal, the use of *Miranda* warnings to satisfy the sixth amendment waiver standard was attacked.[118]

Tracing the circuit's decisions after Judge Friendly's influential dissent in *United States v. Massimo*,[119] the *Mohabir* court noted its consistent reliance on a higher standard of waiver under the sixth amendment.[120] Those cases uniformly held that *Miranda* warnings were insufficient to satisfy the sixth amendment waiver standards and that the sixth amendment required additional inquiry into waiver. Despite the recital of *Miranda* warnings, no sixth amendment waiver could result if the defendant was emotionally unprepared to waive[121] or if the defendant was not informed of the nature of the indictment.[122] Prior precedent, therefore, indicated that a sixth amendment waiver was impermissible in the absence of a "super-*Miranda*" type procedure.[123]

Mohabir altered that thinking. The circuit court, after analyzing the existing rationales,[124] held that waiver of the sixth amendment

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115. *See* note 113 *supra*.

116. United States v. Mohabir, 624 F.2d 1140, 1145 (2d Cir. 1980). That practice previously had been criticized in the Second Circuit. *See* United States v. Duvall, 537 F.2d 15, 22-26 (2d Cir.), *cert. denied*, 426 U.S. 950 (1976).

117. United States v. Mohabir, 624 F.2d at 1146.

118. *Id.*

119. 432 F.2d 324, 327 (2d Cir. 1970) (Friendly, J., dissenting), *cert. denied*, 400 U.S. 1022 (1971).

120. United States v. Mohabir, 624 F.2d at 1146-50.

121. United States v. Satterfield, 558 F.2d 655, 657 (2d Cir. 1976).

122. Carvey v. LeFevre, 611 F.2d 19, 21-22 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 1858 (1980).

123. *Id.* at 22.

124. The circuit court initially examined the adoption of a per se rule to exclude all statements in the absence of counsel. United States v. Mohabir, 624 F.2d 1140, 1152 (2d Cir. 1980). Consideration of this restrictive approach was deferred. "Such a course would be the most drastic. . . . [It] might run counter to the policy that a defendant constitutionally can insist upon proceeding without counsel even though he has been fully advised of the folly of doing so." *Id.* at 1153 (footnote omitted). The court further analyzed a "super-*Miranda*" procedure that would insure a knowing and intelligent waiver, *id.* at 1151-52, but it rejected this rationale because of the serious ethical conflicts that exist when a prosecutor or law enforcement official advises a defendant in an adversarial context. *Id.* at 1152-53. Many courts have expressed their concern over the ethical conflicts inherent in this situation. *See* United States v. Brown, 569 F.2d 236, 249-51 (5th Cir. 1978) (Simpson, J., dissenting); United States v. Crook, 502 F.2d 1378, 1380 (3d Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975);

right to counsel will be invalid unless an impartial judicial officer administers "super-*Miranda*" type warnings and advice [125] to assure full comprehension of that right.[126] By adopting that procedure, the Second Circuit panel instituted a unique and innovative test for weighing sixth amendment waivers.[127]

IV. A RECOMMENDED APPROACH

To date, little guidance has flowed from the Supreme Court concerning sixth amendment waivers. Thus, a definitive method for insuring a proper balance between the defendant's constitutional guarantee and the need for effective law enforcement does not exist. The judicial officer rule of the Second Circuit should be uniformly adopted not only because it incorporates the benefits of the per se rule and the "super-*Miranda*" rule without their respective drawbacks, but also because it will effectively satisfy the higher waiver standard of the sixth amendment.

The per se rule shrouds a defendant in maximum sixth amendment protections. Yet, by failing to recognize a defendant's ability to exercise his choice in the absence of counsel, the rule overly restricts a defendant's freedom, doing a disservice to his right to the advice and consent of counsel.[128] Furthermore, assuming the absence of a per

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United States v. Springer, 460 F.2d 1344, 1352-53 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972). The Second Circuit had raised the issue in its decision in *Massiah*, but the Supreme Court did not provide further enlightenment on the topic. United States v. Massiah, 307 F.2d 62, 66-67 (2d Cir. 1962), *rev'd*, 377 U.S. 201 (1964).

125. "To avoid the ethical problems inherent in imposing on the prosecutor this obligation to inform and to secure the benefits of the neutral intervention of a judicial officer at this critical stage, we conclude, in the exercise of our supervisory power, that a valid waiver of the Sixth Amendment right to have counsel present during post-indictment interrogation must be preceded by a federal judicial officer's explanation of the content and significance of this right. Normally, this would occur at the appearance before the court or magistrate required by Fed. R. Crim. P. 9(c)(1). In addition to the advice of rights given at an appearance required by Fed. R. Crim. P. 5(a), following an arrest upon a complaint, a defendant arrested after indictment should be shown the indictment and told by the judicial officer that he has been indicted, the significance of the indictment, that he has a right to counsel, and the seriousness of his situation in the event he should decide to answer questions of any law enforcement officers in the absence of counsel." United States v. Mohabir, 624 F.2d at 1153.

126. *Id.* at 1153.

127. No other court has adopted the Second Circuit approach to sixth amendment waivers.

128. "The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists. . . . An un-

se standard in the wide range of permissible sixth amendment waivers,[129] it would seem anomalous to impose a narrower restriction for similar guarantees under *Massiah*.[130] Precedent indicates that a defendant may embark on a course of folly if it is his knowing and intelligent choice to do so.[131] The rejection of a per se rule of waiver under a fifth amendment analysis[132] and the emphasis placed on the extent of the defendant's knowledge, irrespective of the presence of counsel, under sixth amendment analysis[133] leads to the conclusion that a per se rule of waiver would extend unjustifiably beyond the requirements of *Massiah*.[134]

Finally, a per se rule does not foreclose collateral attacks on a purported waiver.[135] Because a per se rule would operate without the necessity for, or benefit of, a uniform set of standards for waiver, the defendants will rely on the advice of different attorneys, which may vary the requirement to make a knowing and intelligent waiver of sixth amendment rights.[136] In this situation, a defendant's waiver may still be invalid despite the presence of an attorney because faulty or insufficient information will not satisfy the higher standard of sixth amendment waiver.[137] Therefore, a per se rule may serve merely to complicate the waiver mechanism without guaranteeing the effectiveness of the waiver or providing actual benefits to either the defendant or the justice system.

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wanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense." Faretta v. California, 422 U.S. 806, 820-21 (1975) (citations and footnote omitted).

129. *See* notes 66-72 *supra* and accompanying text.

130. *Massiah* relied upon Spano v. New York, 360 U.S. 315 (1959), although it apparently did not adopt the per se approach recommended by the concurring justices. *See* note 107 *supra*.

131. *See* Faretta v. California, 422 U.S. 806 (1975).

132. North Carolina v. Butler, 441 U.S. 369, 374-75 (1979).

133. For example, in both *Massiah* and *Henry*, the defendant's ignorance of the informant's role precluded a finding of a knowing waiver. United States v. Henry, 100 S. Ct. 2183, 2188-89 (1980); Massiah v. United States, 377 U.S. 201, 206 (1964); *see* Carvey v. LeFevre, 611 F.2d 19 (2d Cir. 1979) (failure to inform defendant of nature of indictment), *cert. denied*, 100 S. Ct. 1858 (1980).

134. The state courts are free to interpret their constitutions more broadly than the sixth amendment and adopt a per se rule. *See* People v. Settles, 46 N.Y.2d 154, 165, 385 N.E.2d 612, 618, 412 N.Y.S.2d 874, 881 (1978). The Supreme Court would therefore be precluded from further review. *See* North Carolina v. Butler, 441 U.S. 369, 376 n.7 (1979); Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940).

135. Collateral attacks on improperly entered judgments are allowed in the federal court system. 28 U.S.C. § 2255 (1976).

136. The per se rule merely excludes statements made in the absence of counsel. The flaw in the rule is that it provides defense counsel with minimal specific guidance concerning the exact scope of his duties in a waiver situation.

137. *See* United States v. Henry, 100 S. Ct. 2183 (1980); Carvey v. LeFevre, 611 F.2d 19 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 1858 (1980).

The "super-*Miranda*" standards represent a more balanced alternative than the per se rule. This approach accommodates both the defendant's right to waive counsel and the government's duty to solve crimes. Because the "super-*Miranda*" warnings would be issued by the prosecutor or his agents, however, serious ethical problems would arise in the inherently adversarial context of the questioning session.[138] Unnecessary pressure is placed on the prosecutor to play the dual role of fair and impartial advisor to the defendant and staunch advocate for the government. In addition, by allowing the prosecutor to gain access to pertinent information, even through a "super-*Miranda*" procedure, the defendant's leverage to seek a grant of immunity or lesser plea is diminished. Cooperation prior to an agreement with the government concerning those amenities will necessarily restrict the defendant's bargaining position.

The defendant's ability to contest the validity of a waiver taken in the adversarial context of prosecutorial interrogation further diminishes the desirability of the "super-*Miranda*" rule.[139] Due to the court's careful review of these arguments, additional efforts will be needed to hear the claims of invalid waivers. That time and effort could be better utilized by providing a procedure that would assure knowing and intelligent waivers and minimize the frequency of claims of invalidity.

The Second Circuit approach represents the most practical alternative. That procedure guarantees that proper safeguards will be used to assure a valid waiver and relieves the prosecutor of the severe ethical conflicts inherent in the "super-*Miranda*" context. The procedures provided for the acceptance of guilty pleas,[140] the choice of a non-jury trial,[141] and the option to proceed at trial without counsel[142] strongly support the Second Circuit's posture. Those procedures not only recognize a defendant's right to waive these guarantees, but also set forth specifically drawn standards, *administered by the trial judge*, that adequately apprise the defendant of his position.[143] The safeguards proposed by the Second Circuit, therefore, would require

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138. *See* note 124 *supra*.

139. A mechanism for *de novo* judicial review of these claims has been provided. 28 U.S.C. § 2255 (1976).

140. *See* Boykin v. Alabama, 395 U.S. 238, 243 n.5 (1969). Rules 11(c) and 11(d) of the Federal Rules of Criminal Procedure set forth the procedure concerning guilty pleas. For example, the court must inform the defendant of the nature of the charge, the possible sentences, the right to counsel, and the ramifications of his pleadings. Fed. R. Crim. P. 11(c). The court must also insure that the plea is voluntarily entered. Fed. R. Crim. P. 11(d). *But see* United States v. Timmreck, 441 U.S. 780 (1979) (failure to advise defendant about every step under Rule 11 is not basis for overturning plea).

141. *See* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275 (1942).

142. *See* Faretta v. California, 422 U.S. 806, 835-36 (1975).

143. *See* notes 129-30 *supra* and accompanying text.

no greater effort to administer than those administered in other similar critical situations.

Moreover, the procedure would not impose undue hardship or inconvenience on any party. In light of the uniform procedure for presenting a person before a judicial officer,[144] the awarding of additional safeguards would not pose any extraordinary burden on the system. In fact, any judicial officer—whether from the state or federal system—could initiate the waiver procedure.[145]

The Second Circuit judicial officer rule would unify federal waiver practice under *Massiah*, thereby insuring that the higher standard for waiver under the sixth amendment is met. By assuring both the existence of these safeguards and their uniform application by impartial advisors, the additional effort and time needed to process claims of invalid waiver will be reduced substantially, if not entirely. The clear benefits of the judicial-officer rule demonstrate that this procedure is the best method for insuring proper waivers.

CONCLUSION

The courts have developed different tests and requirements to deal with the rights safeguarded by the fifth and sixth amendments. Specifically, the government must clearly meet a higher standard when sixth amendment rights are implicated than when fifth amendment rights are involved. The courts act like doting parents when the initiation of judicial criminal proceedings triggers the application of the sixth amendment. Different standards for waiver should be appropriately developed for each amendment because the very integrity of the trial process is challenged in the context of a sixth amendment analysis. Beyond that realization, however, the sixth amendment remains an enigma. Clarification must be forthcoming from the United States Supreme Court.

It is submitted that a demarcation between constitutional and unconstitutional waivers of rights should be clear and exact. An acceptance of uncertainty and ambiguity by the courts would forcibly diminish the role that the law should play in locating the proper balance between the competing demands for effective law enforcement and the protection of fundamental constitutional rights.

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144. *See* Fed. R. Crim. P. 5(a).
145. *Id.*