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REAFFIRMING THE RIGHT TO PRETRIAL ASSISTANCE: THE SURPRISING LITTLE CASE OF *FELLERS V. UNITED STATES*

James J. Tomkovicz*

INTRODUCTION

During the 2003 Term, the Supreme Court decided three cases involving confessions. Each raised intriguing constitutional questions regarding the methods employed to obtain incriminating admissions and the subsequent use of those admissions to secure convictions. Two of the cases—*United States v. Patane*¹ and *Missouri v. Seibert*²—yielded controversial,³ highly-publicized opinions⁴ regarding the scope of *Miranda v. Arizona*⁵ and its exclusionary doctrine. *Patane* and *Seibert* provide unambiguous evidence that the Court is deeply divided over the meaning and breadth of the *Miranda* doctrine.⁶ Neither case produced a majority opinion, and four Justices dissented in each. Nonetheless, the legal doctrine generated by those decisions proves that a bare Court majority is firmly committed to paring that landmark ruling to the bone.⁷

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¹ 542 U.S. 630 (2004).

² 542 U.S. 600 (2004).

³ See, e.g., Yale Kamisar, *Postscript: Another Look at Patane and Seibert, the 2004 Miranda "Poisoned Fruit" Cases*, 2 OHIO ST. J. CRIM. L. 97 (2004); Joëlle Anne Moreno, *Faith-Based Miranda?: Why the New Missouri v. Seibert Police "Bad Faith" Test Is a Terrible Idea*, 47 ARIZ. L. REV. 395 (2005); Daniel S. Nooter, *Is Missouri v. Seibert Practicable?: Supreme Court Dances the "Two-Step" Around Miranda*, 42 AM. CRIM. L. REV. 1093 (2005); Stewart J. Weiss, *Missouri v. Seibert: Two-Stepping Towards the Apocalypse*, 95 J. CRIM. L. & CRIMINOLOGY 945 (2005).

⁴ *An End Run Around Miranda*, N.Y. TIMES, Dec. 9, 2003, at A30; Jan Crawford Greenburg, *Supreme Court Revisits Scope of Miranda Rights*, CHI. TRIB., Dec. 10, 2003, at C16; Linda Greenhouse, *Justices Hear New Arguments About Meaning of Miranda*, N.Y. TIMES, Dec. 10, 2003, at A27; Linda Greenhouse, *Tactic of Delayed Miranda Warning Is Barred*, N.Y. TIMES, June 29, 2004, at A17; Jerry Markon, *Police Tactic to Sidestep Miranda Rights Rejected*, WASH. POST, June 29, 2004, at A1.

⁵ 384 U.S. 436 (1966).

⁶ Although the membership of the Court has changed—Chief Justice Roberts taking Chief Justice Rehnquist's seat and Justice Alito assuming Justice O'Connor's place—it seems virtually certain that the outcomes in *Patane* and *Seibert* would be identical today and that the Court remains equally divided over the *Miranda* doctrine. Neither new Justice is at all likely to be markedly more generous in interpreting that landmark than his predecessor.

⁷ In light of the affirmation of *Miranda*'s constitutional basis in *Dickerson v. United*

As currently construed, *Miranda*, which is a shadow of its original self and seems destined to shrink further, offers exceedingly limited Fifth Amendment shelter against conviction based on inculpatory admissions.

The instant Article is not about *Patane*, *Seibert*, or the steady evisceration of *Miranda*—topics worthy of much attention.⁸ Instead, the focus here is on *Fellers v. United States*,⁹ the third of the 2003 Term confessions cases. *Fellers* did not involve the controversial Fifth Amendment scheme developed in *Miranda* and its progeny; instead, it was rooted in the much less notorious Sixth Amendment doctrine of *Massiah v. United States*.¹⁰ The outcome of *Fellers* stands in dramatic contrast to those of *Patane* and *Seibert*. *Fellers* yielded a terse, unanimous, uncontroversial,¹¹ and scarcely noticed opinion just one and a half months after the Court heard argument.¹² Moreover, the opinion provided an unequivocal answer to a straightforward, substantive issue by reiterating and applying the oft-recited, original *Massiah* standard, and then remanded a much more complex exclusionary rule issue to the lower court.¹³

I had two initial reactions to the *Fellers* opinion. The first was surprise that the petitioner had prevailed, for I had assessed the chances of reversal as slim indeed.¹⁴ My second reaction was astonishment at the remarkably unenlightening character

States, 530 U.S. 428 (2000), there was some doubt about whether *Miranda* would continue to shrink, as it had for many years prior to *Dickerson*. It seemed possible that *Dickerson* might have signaled an end to the erosion of *Miranda* and might even have initiated a resurgence of that beleaguered doctrine. James T. Pisciotto, *Miranda Survives to Be Heard: Dickerson v. United States*, 75 ST. JOHN'S L. REV. 673 (2001); Mitch Reid, *United States v. Dickerson: Uncovering Miranda's Once Hidden and Esoteric Constitutionality*, 38 HOUS. L. REV. 1343 (2001). The lower court's opinion in *Patane* was based on the premise that *Dickerson* had given new life to the *Miranda* doctrine and had undermined some of the decisions that had diminished its force. *United States v. Patane*, 304 F.3d 1013, 1019 (10th Cir. 2002), *cert. granted*, 538 U.S. 976 (2003).

⁸ For treatments of those topics, see, for example, WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* (2001); Ronald J. Allen, *Miranda's Hollow Core*, 100 NW. U. L. REV. 71 (2006); David Bosworth, *United States v. Patane: The Supreme Court's Continued Assault on Miranda*, 56 MERCER L. REV. 1499 (2005).

⁹ 540 U.S. 519 (2004).

¹⁰ 377 U.S. 201 (1964).

¹¹ The sole law review piece I have discovered that gives any substantial attention to *Fellers* is a student note. See Justin Bishop Grewell, Note, *A Walk in the Constitutional Orchard: Distinguishing Fruits of Fifth Amendment Right to Counsel from Sixth Amendment Right to Counsel in Fellers v. United States*, 95 J. CRIM. L. & CRIMINOLOGY 725 (2005).

¹² In contrast, oral argument in *Patane* and *Seibert* was held in early December 2003, but the opinions were not issued until June 28, 2004, at the end of the Court's Term.

¹³ *Fellers*, 540 U.S. at 524–25.

¹⁴ My involvement in drafting an *amicus curiae* brief in *Patane* led to some discussion with *Fellers*'s counsel of the issues raised and the arguments that should be pursued. My feeling at the time was that the Supreme Court would decide the case on the basis of the exclusionary rule issue and would rule against *Fellers*. The seemingly elementary substantive Sixth Amendment issue discussed in this Article hardly seemed worthy of the Court's time and attention.

of the Court's ruling. At first glance, the opinion seemed patently insignificant.¹⁵ It was hardly surprising that such an apparently minor blip on the radar would create no stir in legal circles and would receive precious little public attention.

My surprise was soon tempered by a colleague's somewhat cynical, yet realistic and prophetic observation that Mr. Fellers's victory was limited and might well be very short-lived. She thought it entirely possible that on remand the Eighth Circuit would once again affirm his conviction, clearly rooting its conclusion this time in the exclusionary rule doctrine of *Oregon v. Elstad*¹⁶ that it had adverted to in its initial opinion.¹⁷ More importantly, reflection upon the Court's opinion has prompted me to reconsider my assessment of *Fellers*'s significance. I am now convinced that what the Court *did* say provides vital insights into and has potentially important consequences for the scope of the pretrial right to the assistance of counsel. I am also persuaded that both what the Court said and what it *did not* say may have significant implications for an important topic that the Court has seriously neglected—*Massiah*'s Sixth Amendment exclusionary doctrine.¹⁸

The modest object of the instant Article is to explore the substantive Sixth Amendment ramifications of *Fellers*—the lessons that it teaches about the nature and scope of the right to counsel. The steady, dramatic erosion of *Miranda*'s Fifth Amendment safeguards makes it all the more critical for the Court to preserve the fundamental, albeit circumscribed,¹⁹ constitutional protection against unfair conviction

¹⁵ At least one other commentator formed the same impression. See William E. Hellerstein, *A Year to Remember: The Supreme Court's Fourth, Fifth, and Sixth Amendment Jurisprudence for the 2003 Term*, 20 *TOUROL REV.* 831, 858 (2005) (observing that *Fellers* "had the potential to produce a decision of considerable significance, but [instead] . . . went out with a whimper").

¹⁶ 470 U.S. 298 (1985).

¹⁷ My perceptive colleague, Professor Margaret Raymond, responded to the Supreme Court's decision in *Fellers* with the immediate observation that it seemed likely the Eighth Circuit would resolve the remanded exclusionary rule question in the government's favor and the Supreme Court would then deny a petition for review of that decision. The Eighth Circuit did exactly as Professor Raymond predicted. See *United States v. Fellers*, 397 F.3d 1090, 1098 (8th Cir. 2005). The Supreme Court followed suit, validating the remainder of her prediction by denying *Fellers*'s effort to secure a second writ of certiorari. *Fellers v. United States*, 126 S. Ct. 415 (2005).

¹⁸ In a subsequent piece I plan to examine the exclusionary rule issue that was remanded by the Supreme Court and that was the basis for Mr. Fellers's ultimate defeat in the Court of Appeals. James J. Tomkovicz, *Saving Massiah from Elstad: The Admissibility of Successive Confessions Following a Deprivation of Counsel*, 15 *WM. & MARY BILL RTS. J.* (forthcoming Feb. 2007) [hereinafter Tomkovicz, *Saving Massiah*]. That endeavor will necessitate a fresh exploration of the premises underlying Sixth Amendment exclusion.

¹⁹ The pretrial right to counsel is severely restricted by the demand for a formal accusation. The right "does not attach until after the initiation of formal charges." *Moran v. Burbine*, 475 U.S. 412, 431 (1986). Moreover, the right to counsel is "offense specific"—i.e., although an individual has been formally charged with one offense, he has no right to counsel for another, uncharged offense unless the two constitute the "same offence" under the exceedingly narrow standard of *Blockburger v. United States*, 284 U.S. 299 (1932). See *Texas v. Cobb*, 532 U.S.

afforded for more than forty years by the *Massiah* doctrine. *Fellers* powerfully re-affirmed and preserved *Massiah*'s substantive core, providing a foundation upon which further defenses of the right to counsel might be erected.

I. THE FACTS, ISSUES, AND OPINIONS IN *FELLERS V. UNITED STATES*

This preliminary section describes the facts of and the substantive issues raised in *Fellers*; the terse, cryptic, initial circuit court opinion; and the Supreme Court's efficient reversal and remand.

A. *The Facts*

John Fellers was indicted for conspiracy to distribute methamphetamine.²⁰ Subsequently, officers went to his home to arrest him.²¹ After they identified themselves and asked to enter, Fellers invited the officers into his living room.²² They informed him that he had been indicted for conspiracy to distribute methamphetamine and that they had a warrant for his arrest.²³ They further explained that the indictment described his involvement with other individuals.²⁴ After the officers named four such persons, Fellers admitted "that he knew the four people and had used methamphetamine during his association with them."²⁵ Approximately fifteen minutes later, the officers arrested him, took him to the county jail, booked him, and escorted him to an interview room.²⁶ For the first time, the officers then recited the *Miranda* warnings.²⁷ Fellers provided both verbal and written waivers of his rights before repeating the incriminating admissions he had made in his home.²⁸ During this "jailhouse interrogation," Fellers also confessed that he had purchased methamphetamine from some of the named co-conspirators, had purchased and used methamphetamine with several other individuals, and had loaned money to one individual implicated in the charged conspiracy "even though he suspected that the money might have been used for drug transactions."²⁹ Throughout the process, however, he "repeatedly denied that he had ever sold methamphetamine."³⁰

162, 164, 167–68, 172–73 (2001).

²⁰ *Fellers v. United States*, 540 U.S. 519, 521 (2004).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*; *United States v. Fellers*, 397 F.3d 1090, 1092 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 415 (2005).

²⁷ *Fellers*, 540 U.S. at 521.

²⁸ *Id.*; *Fellers*, 397 F.3d at 1092.

²⁹ *Fellers*, 540 U.S. at 521; *Fellers*, 397 F.3d at 1092.

³⁰ *Fellers*, 397 F.3d at 1092.

Before trial, Fellers moved to suppress all of his inculpatory statements.³¹ A federal magistrate concluded that the statement in his home should be excluded because the officers had Fellers in custody and “used deceptive stratagems to prompt” that statement.³² The magistrate believed that the statements at the jail should also be suppressed because they “would not have been made but for the prior ill-gotten statements.”³³ A district court judge agreed that the in-home statements had to be excluded from trial but decided that the jailhouse statements were admissible under *Oregon v. Elstad*³⁴ because Fellers “had knowingly and voluntarily waived his *Miranda* rights before making the statements.”³⁵ After a trial in which the prosecution introduced the jailhouse admissions, a jury convicted Fellers of conspiracy to possess methamphetamine with intent to distribute it.³⁶

B. The Court of Appeals Opinions

Fellers appealed, arguing that the jailhouse statements should have been suppressed “as fruits of the statements obtained at his home in violation of the Sixth Amendment.”³⁷ The Eighth Circuit unanimously rejected his contention, sustaining the district court’s refusal to suppress the statements made at the jail and affirming Fellers’s conviction.³⁸ The supporting reasoning occupied less than one printed page.³⁹ The two judges in the majority first noted that the “voluntariness of a confession” is subject to “plenary appellate review”⁴⁰ and is determined by the “totality of the circumstances.”⁴¹ They next concluded that the Supreme Court’s opinion in *Oregon v. Elstad* undermined Fellers’s suppression claim and rendered his jailhouse statements admissible.⁴² The majority rejected Fellers’s argument that the officers’ “failure to administer the *Miranda* warnings at his home violated his sixth amendment right to counsel”⁴³ The Sixth Amendment counsel guarantee was deemed

³¹ *Fellers*, 540 U.S. at 522.

³² *United States v. Fellers*, 285 F.3d 721, 723 (8th Cir. 2002).

³³ *Id.*

³⁴ 470 U.S. 298 (1985).

³⁵ *Fellers*, 540 U.S. at 522.

³⁶ *Id.*

³⁷ *Id.* According to the Eighth Circuit’s opinion, Fellers “argue[d] that the district court should have suppressed his inculpatory statements made at the jail because the primary taint of the improperly elicited statements made at his home was not removed by the recitation of his *Miranda* rights at the jail.” *Fellers*, 285 F.3d at 724.

³⁸ *Fellers*, 285 F.3d at 724.

³⁹ *Id.*

⁴⁰ *Id.* It is far from clear why the court mentioned the question of “voluntariness.” The facts of the case provide no support for a due process-coerced confession claim and there is no indication that Fellers had raised such an unsustainable argument.

⁴¹ *Id.* (quoting *United States v. Robinson*, 20 F.3d 320, 322 (8th Cir. 1994)).

⁴² *Id.*

⁴³ *Id.*

“not applicable” because “the officers *did not interrogate* Fellers at his home.”⁴⁴ Finally, the judges concluded that because the record supported the district court’s finding that the “jailhouse statements were knowingly and voluntarily made following the administration of the *Miranda* warning,”⁴⁵ the statements made at the jail were properly admitted at trial.

A concurring judge disagreed with the conclusion that the officers’ interaction with the accused had not triggered an entitlement to the assistance of counsel.⁴⁶ He observed that for Sixth Amendment purposes, “an interrogation takes place when agents of law enforcement deliberately attempt to elicit incriminating information from the indicted defendant.”⁴⁷ “[B]y telling Fellers they wanted to discuss his involvement in the use and distribution of methamphetamine,” the officers had “violated Fellers’s right to counsel under the Sixth Amendment.”⁴⁸ Although he found an initial failure to respect Fellers’s entitlement to counsel, the concurring judge agreed with the majority’s conclusion that the later jailhouse statements were admissible.⁴⁹ He believed that *Elstad* dictated that result because the officers had secured a waiver of rights prior to securing those statements.⁵⁰

C. The Supreme Court Opinion

In an *in forma pauperis* petition, Fellers successfully sought a writ of certiorari from the Supreme Court.⁵¹ Two quite separable Sixth Amendment issues were presented. The first involved the breadth of the out-of-court protection provided by the pretrial right to counsel discerned in *Massiah v. United States*.⁵² The second involved the extent of the exclusionary consequences that flow from a *Massiah* doctrine transgression.⁵³ The “substantive” question was whether a known police officer’s expression of a desire to discuss criminal conduct that has been the subject of an indictment is conduct which triggers an entitlement to counsel’s assistance.⁵⁴ The “remedial” question was whether the limitation upon the *Miranda* exclusionary rule announced in *Oregon v. Elstad* is equally applicable to situations involving deprivations of the Sixth Amendment—*Massiah* right to counsel.⁵⁵

⁴⁴ *Id.* (emphasis added).

⁴⁵ *Id.*

⁴⁶ *Id.* at 726–27 (Riley, J., concurring).

⁴⁷ *Id.* at 726.

⁴⁸ *Id.* at 727.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Fellers v. United States*, 538 U.S. 905 (2003).

⁵² *Fellers v. United States*, 540 U.S. 519, 524–25 (2004) (citing *Massiah v. United States*, 377 U.S. 201 (1964)).

⁵³ *Id.* at 525.

⁵⁴ *Id.* at 524.

⁵⁵ *Id.* at 525.

The Supreme Court disposed of *Fellers* in four brief paragraphs of reasoning that cover approximately two pages of text.⁵⁶ In an opinion authored by Justice O'Connor, a unanimous Court⁵⁷ resolved the substantive issue⁵⁸ and sent the exclusionary rule question back to the Court of Appeals.⁵⁹ Quoting *Massiah*, the wellspring of doctrine regarding the pretrial entitlement to counsel against official efforts to secure confessions, the Court observed that it had previously held that "an accused is denied" the Sixth Amendment entitlement to a lawyer's assistance "when there [is] used against him . . . his own incriminating words, which . . . agents [have] *deliberately elicited* from him after he ha[s] been indicted and in the absence of his counsel."⁶⁰ Justice O'Connor then documented what she described as the Court's "consistent[]" application of "the deliberate-elicitation standard in subsequent Sixth Amendment cases."⁶¹

According to the Court, the Eighth Circuit had erred in concluding that the "absence of an 'interrogation' foreclosed [Fellers's] claim that [his] jailhouse statements should have been suppressed as fruits of the statements taken . . . at his home."⁶² The threshold requirements necessary to trigger *Massiah* doctrine protection were clearly present. Because Fellers had already been indicted, there was an "initiation of formal adversary judicial proceedings,"⁶³ and the Sixth Amendment right to counsel had attached.⁶⁴ In addition, the officers came to his home, "informed him that their purpose in coming was to discuss his involvement" in methamphetamine distribution "and his association with certain charged co-conspirators," and discussed these matters with him.⁶⁵ There could be "no question that," by this conduct, "the officers . . . 'deliberately elicited' information" from the accused.⁶⁶ Because counsel was not present and Fellers had not waived the right to assistance, "the Court of Appeals erred

⁵⁶ *Id.* at 523–25.

⁵⁷ *Id.* at 520.

⁵⁸ *Id.* at 524–25.

⁵⁹ *Id.* at 525.

⁶⁰ *Id.* at 523 (first alteration in original) (emphasis added) (quoting *Massiah v. United States*, 377 U.S. 201, 206 (1964)).

⁶¹ *Id.* at 524. For support, Justice O'Connor cited *United States v. Henry*, 447 U.S. 264 (1980), and *Brewer v. Williams*, 430 U.S. 387 (1977).

⁶² *Fellers*, 540 U.S. at 524.

⁶³ *United States v. Hayes*, 231 F.3d 663, 680 (9th Cir. 2000) (quoting *United States ex. rel. Hall v. Lane*, 804 F.2d 79, 82 (7th Cir. 1986)).

⁶⁴ *See Fellers*, 540 U.S. at 524–25. The Court has repeatedly confirmed that the right to counsel does not attach until the initiation of formal proceedings, the point at which a suspect becomes an "accused" within the meaning of the Sixth Amendment. *See, e.g., Illinois v. Perkins*, 496 U.S. 292, 299 (1990); *Moran v. Burbine*, 475 U.S. 412, 431–32 (1986).

⁶⁵ *Fellers*, 540 U.S. at 524.

⁶⁶ *Id.* For this reason, the encounter between Fellers and the officers qualified as a "critical stage[]" of the prosecution," at which the accused was entitled to assistance. *See Henry*, 447 U.S. at 269 (noting that right to counsel for pretrial "confrontations" after accusation hinges on the determination of "whether they are 'critical stages' of the prosecution").

in holding that the officers' actions did not violate the Sixth Amendment standards established in *Massiah*, and its progeny."⁶⁷

According to Justice O'Connor, because the lower court had erroneously determined "that [Fellers] was not questioned in violation of Sixth Amendment standards," it had "improperly conducted its 'fruits' analysis under the Fifth Amendment."⁶⁸ The court had "not reach[ed] the question [of] whether the Sixth Amendment requires suppression of [the] jailhouse statements on the ground that they were the fruits of previous questioning conducted in violation of the Sixth Amendment deliberate-elicitation standard."⁶⁹ Because the Supreme Court itself had not yet addressed "whether the rationale of *Elstad* applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel notwithstanding earlier police questioning in violation of Sixth Amendment standards," it remanded the case "to the Court of Appeals to address this issue in the first instance."⁷⁰

⁶⁷ *Fellers*, 540 U.S. at 524–25 (citation omitted).

⁶⁸ *Id.* at 525.

⁶⁹ *Id.*

⁷⁰ *Id.* As noted in the Introduction, the Eighth Circuit ultimately held that *Elstad* dictated the admission of Fellers's jailhouse statements, and the Supreme Court subsequently denied a request for review. In another article devoted to the exclusionary rule question, I plan to examine and critique in detail the Eighth Circuit's lengthy opinion on remand. Tomkovicz, *Saving Massiah*, *supra* note 18.

In earlier *Massiah* precedents, the Court had made statements indicating that deliberate elicitation of statements violates the Sixth Amendment right to counsel. *See, e.g.*, *Maine v. Moulton*, 474 U.S. 159, 178 n.14 (1985) (Sixth Amendment "right was violated as soon as the State's agent engaged Moulton in conversation about the charges pending against him"); *id.* at 176 (suggesting that when the State "knowingly circumvent[s] the accused's right to have counsel present" and thereby obtains incriminating statements, "the Sixth Amendment is violated"); *Henry*, 447 U.S. at 274 ("By intentionally creating a situation likely to induce [the accused] to make incriminating statements without the assistance of counsel, the Government violated [the accused]'s Sixth Amendment right to counsel.").

The *Fellers* Court repeatedly asserted that the officers had violated Sixth Amendment standards, not once stating that their conduct constituted a violation of the Sixth Amendment right at issue. *See Fellers*, 540 U.S. 519. I am hopeful that this careful expression reflects a recognition by the Justices that a constitutional violation does not occur until the accused is harmed by the use of his statements in court.

This interpretation makes the right similar to the Fifth Amendment privilege against compulsory self-incrimination which cannot be violated by out-of-court conduct alone, but, instead, is violated by the use of evidence in the courtroom. *See Chavez v. Martinez*, 538 U.S. 760, 767 (2003) (plurality opinion); *id.* at 777–79 (Souter, J., concurring in the judgment). I have suggested before that the right-to-counsel deprivation begins during a pretrial encounter governed by *Massiah* and is only completed when the government uses the products of the encounter at trial. *See James J. Tomkovicz, The Massiah Right to Exclusion: Constitutional Premises and Doctrinal Implications*, 67 N.C. L. REV. 751, 762–75 (1989) [hereinafter Tomkovicz, *Right to Exclusion*]. According to this view, exclusion under *Massiah* is an integral part of the constitutional right, not merely a deterrent remedy. The Court has failed to clearly explain the premises

II. *FELLERS* AND THE PRETRIAL RIGHT TO THE ASSISTANCE OF COUNSEL

This section first explains and analyzes the precedential significance of the *Fellers* ruling. In fact, the Court's unanimous, simple, and straightforward ruling clarified an ambiguity generated and perpetuated by opinions spanning the four decades between *Massiah* and *Fellers*. Next, the discussion turns to the theoretical implications of the holding. This Part explains and examines the nature of the constitutional premises that must underlie and justify the Court's emphatic clarification of Sixth Amendment doctrine. Finally, the controlling doctrinal criterion—"deliberate elicitation"—is analyzed and a proposal for further clarification is offered. The Court has long evaded the task of defining deliberate elicitation. Now that it has confirmed that standard's determinative role in Sixth Amendment inquiries, it is time to illuminate its meaning.

A. *The Banishment of Interrogation and the Recoronation of Deliberate Elicitation*

A majority of the Eighth Circuit panel asserted that the officers' interaction with Mr. Fellers in his home did not implicate his Sixth Amendment right to counsel because they "did not interrogate" him.⁷¹ In essence, the two judges in the majority concluded that the officers' conduct during their encounter with the accused was not sufficiently evocative to constitute a critical stage of the prosecution and require legal assistance.⁷² A unanimous Supreme Court held that the majority had applied the wrong standard in judging whether the officers had crossed the Sixth Amendment's threshold.⁷³ According to the Justices, the Court's "consistent[]" application of "the deliberate-elicitation standard" in *Massiah* and subsequent interpretations made it clear that "interrogation" is *not* a necessary predicate for the Sixth Amendment entitlement.⁷⁴ The official conduct needed to trigger *Miranda*'s Fifth Amendment protection is not required for *Massiah*'s Sixth Amendment shelter. The right to counsel guards against actions even less likely to induce a defendant to confess.⁷⁵

1. The Mixed Messages of the Pertinent Precedents

The *Fellers* opinion pointedly observed that the Court had "consistently applied the deliberate-elicitation standard in . . . Sixth Amendment cases,"⁷⁶ suggesting that

that justify exclusion under *Massiah*. *Id.* at 792–93. *Fellers* could turn out to be even more significant if it proves to be a first step toward a coherent explanation of *Massiah*-based exclusion.

⁷¹ *Fellers v. United States*, 285 F.3d 721, 724 (8th Cir. 2002).

⁷² *See id.*

⁷³ *Fellers*, 540 U.S. at 524–25.

⁷⁴ *Id.* at 524.

⁷⁵ I explore whether actions must be "likely to succeed" to constitute deliberate elicitation later in my analysis. *See infra* notes 168–76 and accompanying text.

⁷⁶ *Fellers*, 540 U.S. at 524.

the Eighth Circuit's insistence upon interrogation was an obvious, somewhat incomprehensible, blunder. One might wonder how (or why) two members of the Eighth Circuit could have misperceived the oft-reiterated refrain of *Massiah* precedents and deemed "interrogation" to be a Sixth Amendment prerequisite. The answer could be that the Supreme Court's *Massiah* opinions paint anything but a picture of consistency.⁷⁷ Instead, they are plagued by inveterate equivocation and unresolved ambiguity concerning the nature of the conduct that gives rise to the entitlement to pretrial assistance. Despite frequent endorsement of *Massiah*'s original "deliberate-elicitation" formulation and occasional efforts to clarify the governing standards, on a number of occasions between 1964 and 2004 the Court itself insinuated the notion of "interrogation" into right-to-counsel discussions, obscuring the Sixth Amendment's threshold.⁷⁸

In *Brewer v. Williams*,⁷⁹ the Court's first major post-*Massiah* opinion concerning the right to pretrial assistance against efforts to secure inculpatory statements, Justice Stewart (*Massiah*'s author) played linguistically fast and loose with the doctrinal standards governing the Sixth Amendment claim. He first observed that a detective had "*deliberately* and designedly set out to *elicit* information from [the accused] just as surely as . . . if he had formally *interrogated* him."⁸⁰ He next asserted that the lower courts had found an entitlement "to the assistance of counsel" and that "no such constitutional protection would have come into play if there had been no *interrogation*."⁸¹ Justice Stewart did quote *Massiah*'s governing holding that the accused was "'denied the basic protections of'" the Sixth Amendment right to counsel "'when there was used against him at his trial evidence of his own incriminating words, which federal agents had *deliberately elicited* from him."⁸² In the very next paragraph, however, he proceeded to declare that "the *clear* rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government *interrogates* him."⁸³

⁷⁷ I say "could" because there is no explicit indication in the Eighth Circuit's opinion that the Supreme Court's vacillation and inconsistency were the source of its erroneous interpretation.

⁷⁸ Even *Massiah* itself is not *entirely* blameless. After noting that *Spano v. New York*, 360 U.S. 315 (1959), involved police station interrogation, the majority approved the view of a dissenter in the lower court that the right to counsel also "'must apply to indirect and surreptitious interrogations.'" *Massiah v. United States*, 377 U.S. 201, 206 (1964) (quoting *United States v. Massiah*, 307 F.2d 62, 72 (2d Cir. 1962) (Hays, J., dissenting)). Thus, while holding that deliberate elicitation implicated *Massiah*'s right to counsel, the Court implicitly endorsed a description of the conduct at stake as "surreptitious *interrogations*." *Id.* (emphasis added).

⁷⁹ 430 U.S. 387 (1977).

⁸⁰ *Id.* at 399 (emphasis added).

⁸¹ *Id.* at 400 (emphasis added).

⁸² *Id.* (emphasis added) (quoting *Massiah*, 377 U.S. at 206).

⁸³ *Id.* at 401 (emphasis added). It is possible that the emotionally-charged nature of the case and the divisive, controversial character of the holding that the accused had not in fact waived his right to assistance prompted Justice Stewart's emphases on interrogation. The Court split five to four on the waiver question. Dissenters expressed outrage at the majority's result in

This seesawing between interrogation and deliberate elicitation engendered understandable confusion about the official conduct needed to constitute a “critical stage of the prosecution”⁸⁴ for *Massiah* purposes. In two 1980 opinions, the Court confronted the question head on, providing what appeared to be definitive clarification. According to Justice Stewart’s majority opinion in *Rhode Island v. Innis*,⁸⁵ it was “erroneous” to conclude that “the definition of ‘interrogation’ under *Miranda* [was] informed by th[e] Court’s decision in *Brewer v. Williams*” because the latter opinion was concerned “solely” with the Sixth Amendment right to counsel which “prohibits law enforcement officers from ‘deliberately elic[it]ing’ incriminating information.”⁸⁶ And in *United States v. Henry*,⁸⁷ Chief Justice Burger asserted that even though “affirmative interrogation . . . would certainly satisfy *Massiah*, . . . *Brewer v. Williams* [did not] modif[y] *Massiah*’s ‘deliberately elicited’ test”⁸⁸—i.e., it did not elevate the Sixth Amendment’s doctrinal demand to “interrogation.” Thus did *Innis* and *Henry* endeavor to clear away the cobwebs spun by *Williams*. Their combined message seemed both lucid and sensible: Interrogation is a Fifth Amendment–privilege-based demand imposed by the *Miranda* doctrine and rooted in the constitutional concept of compulsion. The Sixth Amendment counsel guarantee is less demanding; it requires only “deliberate elicitation” and thereby regulates a wider range of conduct that encompasses both interrogation and “lesser” efforts to secure incriminating admissions.

atypically inflammatory, accusatory language. See *id.* at 415 (Burger, C.J., dissenting) (“The result in this case ought to be intolerable in any society which purports to call itself . . . organized . . .”); *id.* at 417 (charging that the majority had “regresse[d] to playing a grisly game of ‘hide and seek,’” and had reached a “bizarre result”); *id.* at 437 (White, J., dissenting) (accusing the majority of the “extremely serious” consequence of releasing a “mentally disturbed killer whose guilt is not in question”); *id.* at 438 (calling the “result in this case . . . utterly senseless”). Justice Stewart might have believed that his stress on the offensive nature of the officer’s actions—that is, that he had not merely engaged the accused in conversation, but had actually conducted an “interrogation”—lent additional, if implicit, force to the majority’s conclusion that a waiver had not been proven and responded, albeit subtly, to the dissenters’ cries.

⁸⁴ *United States v. Henry*, 447 U.S. 264, 269 (1980).

⁸⁵ 446 U.S. 291 (1980). It is interesting that Justice Stewart is responsible for the original opinion in *Massiah*, for the unclarity and confusion generated by *Williams*, and for the attempt to clarify the doctrine in *Innis*.

⁸⁶ *Id.* at 300 n.4 (second alteration in original). The Court’s clarification effort was not entirely successful, however. Justice Stewart proceeded to assert that “[t]he definitions of ‘interrogation’ under the Fifth and Sixth Amendments, if indeed the term ‘interrogation’ is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct.” *Id.* (emphasis added). Thus, while he did question the appropriateness of using the term “interrogation” to describe the Sixth Amendment’s concern, Justice Stewart did not decisively purge the word from Sixth Amendment discourse.

⁸⁷ 447 U.S. 264.

⁸⁸ *Id.* at 271 (citation omitted).

The Court apparently found consistency to be “the hobgoblin of little minds.”⁸⁹ Five years later, in *Maine v. Moulton*,⁹⁰ the majority asserted that a turncoat codefendant’s active conversation with the accused satisfied the deliberate-elicitation requirement but inexplicably described his role “in this conversation [as] ‘the functional equivalent of interrogation.’”⁹¹ And just one year after that, in *Kuhlmann v. Wilson*,⁹² the majority again succumbed to the temptation to entangle Fifth and Sixth Amendment terminology. In a case involving a jailhouse informant’s passive listening to incriminating disclosures by an accused, Justice Powell first documented the Court’s use of the term “interrogation” in a number of Sixth Amendment precedents.⁹³ He then offered an explanation for that phenomenon, declaring it “clear [that] the primary concern of the *Massiah* line of decisions is secret *interrogation* by investigatory techniques that are *the equivalent of direct police interrogation*.”⁹⁴ The Court ultimately announced that to succeed with a Sixth Amendment claim “the defendant must demonstrate that the police and their informant took some action . . . that was designed *deliberately to elicit* incriminating remarks.”⁹⁵ In the wake of the renewed emphasis on “interrogation,” however, not-so-little minds might understandably have found the Sixth Amendment’s doctrinal demands to have been anything but clear. A judge could reasonably have concluded that “interrogation” was, at least in some settings, a necessary trigger for Sixth Amendment protection.

2. Options Available to and the Path Chosen by the *Fellers* Court

In *Fellers*, the Court chose to ignore the several instances in which it had engendered confusion about the relevance of interrogation to *Massiah* analyses. Instead, the Court proclaimed that it had “consistently applied the deliberate-elicitation

⁸⁹ RALPH WALDO EMERSON, *Self-Reliance*, in *ESSAYS: FIRST SERIES* (1841), reprinted in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 497 (15th ed. 1980) (“A foolish consistency is the hobgoblin of little minds . . .”).

⁹⁰ 474 U.S. 159 (1985).

⁹¹ *Id.* at 177 n.13 (quoting *Henry*, 447 U.S. at 277 (Powell, J., concurring)).

⁹² 477 U.S. 436 (1986).

⁹³ *Id.* at 456–60. Justice Powell noted that the pretrial right to counsel recognized in *Massiah* had roots in the view of concurring Justices in *Spano v. New York*, 360 U.S. 315 (1959), a case involving police interrogation. *Kuhlmann*, 477 U.S. at 456. He stated that the *Massiah* majority had “adopted the reasoning of the” *Spano* concurrences and had “made clear that it was concerned with interrogation or investigative techniques that were equivalent to interrogation.” *Id.* at 457. Powell next opined that the *Henry* Court had emphasized that, just as in *Massiah*, the facts before it amounted to “indirect and surreptitious interrogatio[n].” *Id.* at 458 (alteration in original) (citation omitted). Finally, he observed that the *Moulton* majority had borrowed language from his concurrence in *Henry*, describing the “informant’s participation” in conversation with the defendant as “the functional equivalent of interrogation.” *Id.* at 459 (quoting *Moulton*, 474 U.S. 159).

⁹⁴ *Kuhlmann*, 477 U.S. at 459 (emphasis added).

⁹⁵ *Id.* (emphasis added).

standard.”⁹⁶ Justice O’Connor might have been more forthright about the ambiguities in the precedents. She could have acknowledged the Justices’ proclivity for injecting “interrogation” into Sixth Amendment discussions before banishing the term once and for all and declaring deliberate elicitation to be the sole governing criterion. Alternatively, she might have clarified the law by offering a substantive explanation for the refusal to eliminate interrogation from *Massiah* discussions once and for all.

In fact, it was logically possible to reconcile both the language and the results in all the *Massiah* precedents by endorsing a simple doctrinal dichotomy tied to the character of the government agent who actually confronts an accused. The recurrent references to the concept of “interrogation” in Sixth Amendment opinions could have been harmonized with assertions that *only* deliberate elicitation is required by distinguishing between situations involving confrontations with undercover government agents (or “informants”) and those involving encounters with known officers.⁹⁷

Reasoning in *Massiah* itself could have supported a regime of dual governing standards. The *Massiah* Court first announced the “deliberate-elicitation” standard in a case that involved *surreptitious* efforts to secure incriminating admissions. According to the Court, the elicitation by an undercover government operative sufficed because it was an even more serious imposition than interrogation by known officers.⁹⁸ The next opportunity the Court had to discuss Sixth Amendment doctrine was *Brewer v. Williams*, a case involving an encounter between an accused and a *known* law enforcement officer.⁹⁹ In that context, the Court declared that there would have been no entitlement to counsel without “interrogation.”¹⁰⁰ Soon thereafter, in *United States v. Henry*,¹⁰¹ the Court denied any need for “affirmative interrogation,” suggesting that *Williams*’s references to interrogation were not intended to modify the governing doctrine.¹⁰² *Henry*, however, involved *undercover* efforts by a cellmate to secure inculpatory admissions.¹⁰³ In *Maine v. Moulton*,¹⁰⁴ another unknown government operative situation,

⁹⁶ *Fellers v. United States*, 540 U.S. 519, 524 (2004).

⁹⁷ Such a doctrinal dichotomy can find clear support in Justice Powell’s concurring opinion in *United States v. Henry*, 447 U.S. 264, 276–77 (1980) (Powell, J., concurring), and in the opinion he authored for the majority in *Kuhlmann v. Wilson*, 477 U.S. at 458–59. Justice Blackmun made it clear, in *Brewer v. Williams*, that in his view when known police officers confront an accused the Sixth Amendment is implicated only when the officers engage in “interrogation.” 430 U.S. 387, 439–40 (1977) (Blackmun, J., dissenting).

⁹⁸ *Massiah v. United States*, 377 U.S. 201, 206 (1964) (“*Massiah* was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent.” (quoting *United States v. Massiah*, 307 F.2d 62, 72–73 (2d Cir. 1962) (Hays, J., dissenting)). The Court did not explain *why* the imposition was more serious in cases involving surreptitious confrontation of the accused.

⁹⁹ 430 U.S. 387.

¹⁰⁰ *Id.* at 401.

¹⁰¹ 447 U.S. 264.

¹⁰² *Id.* at 271.

¹⁰³ *Id.* at 266.

¹⁰⁴ 474 U.S. 159 (1985).

the majority recited and applied the deliberate-elicitation standard, finding it satisfied.¹⁰⁵ It furnished potential support for a scheme that involved dual standards, however, by describing the undercover agent's conduct as "'the functional equivalent of interrogation.'"¹⁰⁶ Finally, in *Kuhlmann v. Wilson*,¹⁰⁷ the last pre-*Fellers* word on the question, the Court provided the clearest indication of any *Massiah* case that surreptitious efforts to secure statements were governed by the "deliberate-elicitation" standard while encounters with known police officers might have to involve actual "interrogation." According to the majority, "the primary concern of the *Massiah* line of decisions is secret *interrogation* by investigatory techniques that are the *equivalent* of direct police *interrogation*."¹⁰⁸ It would have been entirely plausible to understand this assertion as an endorsement of distinct standards for the two different settings.

Furthermore, an endorsement of this dichotomy would have been fully consistent with the *outcomes* of the *Massiah* cases. The pre-*Fellers* cases finding the Sixth Amendment violated by mere conversation that amounted to "deliberate elicitation" all involved undercover operatives.¹⁰⁹ The cases in which known officers ran afoul of *Massiah*'s mandate entailed conduct that unquestionably constituted "interrogation" under *Miranda*—i.e., express questioning or its clear functional equivalent.¹¹⁰ Despite the recitation of the deliberate-elicitation standard in known officer cases,¹¹¹ not a single case before *Fellers* had concluded that an accused had a Sixth Amendment right to assistance—much less that the Sixth Amendment was violated—when officers engaged in conduct that fell short of interrogation.¹¹²

¹⁰⁵ *Id.* at 173, 176.

¹⁰⁶ *Id.* at 177 n.13 (quoting *Henry*, 447 U.S. at 277 (Powell, J., concurring)).

¹⁰⁷ 477 U.S. 436 (1986).

¹⁰⁸ *Id.* at 459 (emphasis added). The author of the majority opinion, Justice Lewis Powell, had previously espoused the view that an undercover agent has to engage in more than "incidental conversation" with an accused in order to implicate the right to counsel. *See Henry*, 447 U.S. at 277 (Powell, J., concurring). According to Justice Powell, an "informant [must] deliberately elicit[] incriminating information by" engaging in "conduct that . . . is the functional equivalent of interrogation." *Id.* In *Kuhlmann*, Justice Powell found a majority willing to support his phrasing of the standards that define the Sixth Amendment threshold. 477 U.S. 436.

¹⁰⁹ *See, e.g., Moulton*, 474 U.S. 159; *Henry*, 447 U.S. 264; *Massiah v. United States*, 377 U.S. 201 (1964).

¹¹⁰ *See, e.g., Michigan v. Jackson*, 475 U.S. 625 (1986); *Brewer v. Williams*, 430 U.S. 387 (1977); *see also Patterson v. Illinois*, 487 U.S. 285, 292–97, 300 (1988) (concluding that law enforcement authorities had not deprived the defendant of his Sixth Amendment right to counsel because they had secured valid waivers before "questioning" him).

¹¹¹ *See, e.g., Jackson*, 475 U.S. at 630 (holding that after formal charges, Sixth Amendment applies to "government efforts to elicit information from the accused"); *Williams*, 430 U.S. at 400 (quoting *Massiah*'s "deliberately elicited" standard).

¹¹² In *Williams*, the Court held that the *interrogation* had occurred in the absence of a valid waiver, and, thus, that the accused had been deprived of his Sixth Amendment entitlement to counsel. 430 U.S. at 400. In *Jackson*, the Court found a Sixth Amendment deprivation because

An additional reason why it would not have been implausible to interpret the *Massiah* precedents as endorsing and adopting dual standards for the government behavior that entitles an accused to counsel is the Court's persistent failure to explain the constitutional rationales for extending the explicit guarantee of trial counsel to pretrial efforts to secure inculpatory admissions.¹¹³ Without identification of the Sixth Amendment policies or objectives that justify the right to assistance guaranteed by the *Massiah* doctrine, there is no theoretical basis for determining whether it makes sense to demand *Miranda*-type interrogation when known officers are involved.

Because it chose to assert that its opinions had been "consistent," the Court made no mention of the fact that *Fellers* involved a substantive Sixth Amendment issue of first impression. It was the first case to squarely raise the question of whether an accused has a right to assistance in situations where known state agents elicit without interrogating. Unless the Court was willing to disagree with the lower court's determination that the officers' conduct at *Fellers*'s home did *not* constitute interrogation,¹¹⁴ *Fellers* required it to decide whether the deliberate-elicitation standard governs confrontations with known officers. Put otherwise, the Court had to determine whether deliberate elicitation by undercover agents is regulated *because* it is the "functional

officers initiated *interrogation* of an accused who had invoked his right to counsel. 475 U.S. at 636. And in *Patterson*, the majority had "no doubt" that the accused had a right to counsel at "interviews with law enforcement authorities," that the Court subsequently described as "postindictment *questioning*." 487 U.S. at 290, 292 (emphasis added). The Court deemed the questioning permissible because the defendant had been given sufficient information to make a "knowing" waiver of his right. *Id.* at 299–300. Finally, in *Texas v. Cobb*, 532 U.S. 162 (2001), the Court rejected a right to counsel claim only because the defendant had not been formally charged with the crimes at issue at the time he was confronted by officers. *Id.* at 163. While the Supreme Court's opinion does not describe the conduct of the officers that produced the defendant's confession, the lower court opinion asserted that the officers had "interrogated him" by engaging in "ninety minutes of questioning." See *Cobb v. State*, 93 S.W.3d 1, 5 (Tex. Crim. App. 2000).

¹¹³ At this point, perhaps a more accurate characterization is "persistent refusal." In *Massiah*, Justice White challenged the Court to justify its pretrial extension to undercover elicitation, proffering several reasons why no right to counsel should be recognized in that case and similar situations. 377 U.S. at 208–12 (White, J., dissenting). Later, in *Henry*, Justice Rehnquist picked up the same cudgel, reinforced it, and used it to challenge the legitimacy of the *Massiah* entitlement to assistance. 447 U.S. at 289–90 (Rehnquist, J., dissenting); see also James J. Tomkovicz, *Against the Tide: Rehnquist's Efforts to Curtail Expansion of the Right to Counsel*, in *THE REHNQUIST LEGACY* 129, 146 (Craig M. Bradley ed., 2006) [hereinafter Tomkovicz, *Against the Tide*]. Despite these direct challenges to the constitutional legitimacy of a right against pretrial efforts to elicit admissions, majorities have not offered any explanation of that right's logical underpinnings. See *infra* note 123 and accompanying text.

¹¹⁴ That option would not have been attractive to a Court determined to weaken the protection afforded by the *Miranda* doctrine. To hold that the officer's minimal conduct at *Fellers*'s home was interrogation could have implicitly expanded that concept and invited lower courts to follow suit. The result of a more expansive understanding of interrogation, of course, would be more generous *Miranda* shelter.

equivalent of interrogation” by known officers.¹¹⁵ The Court rose to the occasion, providing the clearest of answers. After *Fellers*, the threshold requirement in all *Massiah* contexts—those involving undercover agents and those involving known government officials—is nothing more nor less than “deliberate elicitation.”¹¹⁶ There is but one regime and it constrains both types of government agent from “deliberately eliciting” admissions from an accused in the absence of counsel or a valid waiver of assistance. The significance of this conclusion is far from negligible. By so holding, the Court decisively resolved a longstanding, yet virtually unacknowledged, doctrinal ambiguity regarding the breadth of a fundamental constitutional right.¹¹⁷

The *Fellers* ruling constitutes a significant advance in the evolution of Sixth Amendment doctrine. Unfortunately, the Court failed to exploit an opportunity to make much more progress. From its inception, the *Massiah* doctrine has been seriously deficient in more than one respect. The most significant deficiency is theoretical. From the start, and throughout the forty years since *Massiah*, the Court has failed to explain the Sixth Amendment premises that justify a pretrial right to counsel against deliberate elicitation by government officials.¹¹⁸ In *Fellers*, the Court had the opportunity to remedy that deficiency by explaining the constitutional underpinnings for its rejection of an interrogation requirement and reaffirmation of a single deliberate-elicitation

¹¹⁵ See *Henry*, 447 U.S. at 277 (Powell, J., concurring).

¹¹⁶ The Court’s opinions in *Henry*, 447 U.S. 264, and *Maine v. Moulton*, 474 U.S. 159 (1985), do impose a separable requirement in cases involving undercover informants. Not only must the informant engage in active elicitation, but there must be a sufficient factual basis—beyond mere recruitment—for attributing that conduct to government agents. *Henry* declared it sufficient that the government “intentionally creat[ed] a situation likely to induce [the accused] to make incriminating statements.” 447 U.S. at 274. *Moulton* held that “knowing exploitation . . . of an opportunity to confront the accused without counsel” also suffices. 474 U.S. at 176. For discussion of this additional demand in surreptitious elicitation contexts, see JAMES J. TOMKOVICZ, *THE RIGHT TO THE ASSISTANCE OF COUNSEL* 93–94 (2002) [hereinafter TOMKOVICZ, *RIGHT TO ASSISTANCE*]; James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the Massiah Doctrine*, 22 U.C. DAVIS L. REV. 1 (1988) [hereinafter Tomkovicz, *Adversary System*].

¹¹⁷ The right to counsel is arguably the most fundamental of all the entitlements accorded a defendant by our Constitution. See TOMKOVICZ, *RIGHT TO ASSISTANCE*, *supra* note 116, at 45.

Perhaps it is premature to conclude that *Fellers* has eliminated the concept of interrogation from Sixth Amendment discourse once and for all. It would not be entirely unreasonable to fear that at the next opportunity the Court will once again find “interrogation” a useful term for analyzing a Sixth Amendment claim. Nonetheless, the unanimity, directness, and clarity of the Court’s opinion leaves no doubt that for the present “deliberate elicitation” is the sole criterion for determining whether the accused’s encounter with any state agent is a “critical stage [] of the prosecution.” See *Henry*, 447 U.S. at 269. For now, interrogation has been exiled from *Massiah*’s Sixth Amendment realm and relegated to the Fifth Amendment-*Miranda* domain for which it was designed.

¹¹⁸ For a discussion of the inadequacy of the Court’s explanations of justifications for the *Massiah* right, see Tomkovicz, *Adversary System*, *supra* note 116, at 22–24. See also TOMKOVICZ, *RIGHT TO ASSISTANCE*, *supra* note 116, at 45.

threshold. The Court apparently felt no need to provide a rationale for its decision, i.e., to root the rule of *Fellers* in a coherent understanding of the reasons for granting an entitlement to assistance. Instead, it was content to rely on the alleged “consistency” of confusing precedents that were equally devoid of constitutional justifications.

Another notable deficiency is doctrinal. In the four decades since *Massiah* the Court has failed to *define* the determinative criterion—“deliberate elicitation.”¹¹⁹ The clarifying force of *Fellers*’s ruling that a single deliberate-elicitation standard defines the threshold of the right to counsel surely is undermined by a failure to explain more precisely what those terms signify and encompass. *Fellers* offered a golden opportunity to give meaning and content to the concept—i.e., to explain the nature of the conduct that is necessary, and sufficient, for an entitlement to legal assistance and to expound upon the differences between Sixth and Fifth Amendment policies. Instead, the Court merely declared that there was “no question” that the officers’ conduct in *Fellers* constituted deliberate elicitation.¹²⁰ The practical impacts of the Court’s important endorsement of a single standard—the concrete consequences of holding that the *Massiah* entitlement is always triggered by deliberate elicitation—depend entirely on the differences between deliberate elicitation and interrogation. Yet the Court neglected to illuminate those differences.¹²¹

The remaining two subsections of this Article address these significant theoretical and doctrinal deficiencies. Based on the simple holding announced in *Fellers*, I believe it is possible to make logical inferences about underlying theoretical premises—i.e., to discern an understanding of the right to counsel that can justify the *Massiah* right. Moreover, the premises that appear to underlie the *Massiah* right to assistance might be used to shed additional light on the meaning of deliberate elicitation.¹²²

¹¹⁹ This is not to say that the Court has completely neglected the deliberate-elicitation demand. In *Henry* and *Moulton*, majorities discussed the necessary relationship between regular government officials and undercover agents, announcing standards for determining whether informants’ actions are attributable to the government. See *Moulton*, 474 U.S. at 176 (concluding that knowingly exploiting an opportunity to confront an accused absent counsel suffices as a basis for attribution); *Henry*, 447 U.S. at 270–71 (holding that intentional creation of situation likely to induce statements is a basis for attribution). In *Kuhlmann v. Wilson*, 477 U.S. 436, 458–59 (1986), the majority concluded that *active* elicitation is required and that the passive receipt of disclosures is insufficient to deprive an accused of counsel. Nonetheless, as will be seen below, there remain troubling ambiguities about the meaning of deliberate elicitation that a comprehensive definition could eliminate.

¹²⁰ *Fellers v. United States*, 540 U.S. 519, 524 (2004).

¹²¹ Yet another major deficiency in the Supreme Court’s explanation of the *Massiah* doctrine is its failure to clearly and comprehensively explain the character of and rationales for exclusion. I have discussed that topic on a prior occasion. See Tomkovicz, *Right to Exclusion*, *supra* note 70, at 762–72. Moreover, I intend to return to that topic in a piece addressing the *Elstad* question remanded in *Fellers*. Tomkovicz, *Saving Massiah*, *supra* note 18.

¹²² In addition, the premises can be of enormous assistance in analyzing the exclusionary rule issue remanded to the Eighth Circuit in *Fellers* and in informing Sixth Amendment exclusion questions in general. The rationales for “exclusionary rules” are vitally important.

B. The Constitutional Logic Underlying Fellers: Why Interrogation Is Not Necessary and Deliberate Elicitation Is Sufficient

The most serious inadequacy has been the Court's utter failure to explain the logical underpinnings for the pretrial extension of counsel defined by *Massiah* and its offspring.¹²³ That fundamental deficiency has left *Massiah* vulnerable to intense criticism from opponents.¹²⁴ In my view, the modest holding of *Fellers* that interrogation is never required and that deliberate elicitation is always sufficient to trigger a counsel entitlement reflects a particular conception of the constitutional justifications for the *Massiah* right to assistance.

"Interrogation" has always played a central, defining role in *Miranda* law.¹²⁵ It constitutes one of the two essential prerequisites¹²⁶ that trigger the warnings and waiver scheme and the additional protections that guard against violations of the Fifth

Because *Miranda* exclusion is merely a means of enforcing Fifth Amendment rights but is not itself a constitutional right, and because Fourth Amendment exclusion is a future-oriented deterrent safeguard, the government may use illegally obtained evidence to impeach an accused's testimony. *See United States v. Havens*, 446 U.S. 620 (1980) (evidence obtained in violation of Fourth Amendment may be used to impeach the accused); *Harris v. New York*, 401 U.S. 222 (1971) (statements secured in violation of *Miranda* are admissible to impeach defendant). On the other hand, exclusion under the Due Process-coerced confession doctrine is, in fact, part of the constitutional right to fundamental fairness in the conduct of trials. Consequently, impeachment use of coerced statements is impermissible. *See Mincey v. Arizona*, 437 U.S. 385, 396–402 (1978). In the subsequent piece that addresses the application of the *Elsstad* doctrine to *Massiah* violations, I will examine *Fellers*'s ramifications for the doctrine that governs Sixth Amendment exclusion. Tomkovicz, *Saving Massiah*, *supra* note 18.

¹²³ The *Massiah* doctrine is genuinely anomalous in this respect. I cannot think of another doctrine in constitutional criminal procedure that is so totally devoid of underlying reasoning connecting it to the objectives of the guarantee which it purports to construe. This is not to say that the Court's explanations of other doctrines are complete or entirely comprehensible, but in other areas the Court at least has made some effort to explain the logic that justifies its doctrinal translations of specific constitutional commands.

¹²⁴ For a discussion of the Court's failure to explain and the criticisms leveled by opponents, see Tomkovicz, *Adversary System*, *supra* note 116, at 25–35.

¹²⁵ In *Miranda*, Chief Justice Warren made it repeatedly clear that the sole focus of concern was custodial *interrogation*—the atmosphere generated by that practice and the resulting endangerment of the Fifth Amendment privilege. *Miranda v. Arizona*, 384 U.S. 436, 444, 447–49, 455 (1966); *see also Edwards v. Arizona*, 451 U.S. 477, 486 (1981) (observing that "[a]bsent . . . interrogation" there would be no Fifth Amendment problem); *Rhode Island v. Innis*, 446 U.S. 291, 299 (1980) (noting that *Miranda*'s concern was "the 'interrogation environment' created by the interplay interrogation and custody" (quoting *Miranda*, 384 U.S. at 457–58)).

¹²⁶ The other, of course, is "custody." *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 441–42 (1984) (holding that because an ordinary traffic stop does not generate sufficient threats of compulsion it does not qualify as custody for purposes of *Miranda* and, therefore, does not trigger the need for warnings). No *Miranda* doctrine protection is available unless both custody and interrogation are present.

Amendment privilege against compulsory self-incrimination.¹²⁷ The Fifth Amendment privilege is not a guarantee against self-incrimination; it protects a person *only* against being *compelled* to be a witness against himself.¹²⁸ Thus, that guarantee leaves the government entirely free to seek admissions and to convict based on those admissions, as long as it does not employ pressure to force them from a person's mind. Interrogation encompasses those official actions that, when coupled with custody, are sufficient to justify a presumption of compulsion to speak.¹²⁹ Government agents interrogate only when they subject a suspect to "express questioning or its functional equivalent"¹³⁰—i.e., "words or actions . . . that [they] should know are reasonably likely to elicit an incriminating response from the suspect."¹³¹ Moreover, only "official interrogation" qualifies—that is, the conduct that constitutes interrogation must be performed by someone known by the suspect to be a government agent.¹³²

These doctrinal demands are firmly rooted in the essence of the Fifth Amendment privilege—shelter against *compulsion*. In the Court's view, it is fair to *presume* that a suspect in custody has not responded freely, but instead has been forced to speak, *only* when he is subjected to an express question or to equally evocative verbal or nonverbal conduct by an official known to possess governmental authority.¹³³ There is a constitutionally defensible basis for demanding that official conduct be of this nature to trigger Fifth Amendment scrutiny. Absent "official interrogation" so defined, the constitutional privilege against compelled disclosure is not in jeopardy and the interests that justify this protection against government-compelled disclosure are not at risk.¹³⁴

¹²⁷ By "additional protections," I refer to the *Miranda* safeguards triggered by invocation of the right to remain silent, *see* *Michigan v. Mosley*, 423 U.S. 96 (1975), and invocation of the *Miranda* entitlement to counsel, *see* *Edwards*, 451 U.S. at 477. In both instances, special safeguards against invalid waivers arise.

¹²⁸ *See* U.S. CONST. amend. V.

¹²⁹ *Innis*, 446 U.S. at 300 (1980). Although the confluence of custody and interrogation give rise to a *presumption* of compulsion, according to the prevailing interpretation of *Miranda*, custodial interrogation alone does not justify a finding of *actual* compulsion. *See* *Oregon v. Elstad*, 470 U.S. 298, 307 (1985); *New York v. Quarles*, 467 U.S. 649, 654, 658 n.7 (1984).

¹³⁰ *Innis*, 446 U.S. at 300–01.

¹³¹ *Id.* at 301 (citations omitted).

¹³² *See* *Illinois v. Perkins*, 496 U.S. 292, 297 (1990).

¹³³ *See, e.g., id.*

¹³⁴ According to *Miranda*, the Fifth Amendment privilege "is founded on a complex of values." *Miranda v. Arizona*, 384 U.S. 436, 460 (1966). Its "foundation . . . is the respect a government . . . must accord to the dignity and integrity of its citizens." *Id.* The privilege is designed "[t]o maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' [and] to respect the inviolability of the human personality." *Id.* (citation omitted). In a later opinion in *Withrow v. Williams*, 507 U.S. 680 (1993), the Court explained the fundamental values reflected in the privilege: a "preference for an accusatorial" system, a fear of inhumane treatment, a sense that fair play dictates a balance in which the government shoulders the load, a "respect for the inviolability of the human personality," a "distrust

In *Fellers*, all nine Justices agreed that “interrogation” is not an appropriate determinant of whether an accused has a pretrial entitlement to the Sixth Amendment guarantee of counsel.¹³⁵ This conclusion first reflects a pragmatic belief that “interrogation,” a term with a well-developed Fifth Amendment meaning, should *not* be used in Sixth Amendment contexts to signify a distinct type of governmental conduct.¹³⁶ More importantly, the Court’s holding that the Eighth Circuit erred in demanding interrogation must rest on the substantive premise that the right to counsel and the values it furthers are imperiled by official conduct that does not rise to the level of “interrogation” as defined by *Miranda* law.¹³⁷

Fellers resoundingly, though inexplicitly, reaffirmed a relatively simple, but important, point about Sixth Amendment “policies”—that they are distinct from those that undergird the Fifth Amendment privilege and its *Miranda* doctrine.¹³⁸ Put otherwise, the *Fellers* holding reflects the view that the interests and values furthered by the right to counsel are different from and independent of the policies served by the privilege against compelled self-incrimination.

Most significantly, *Fellers* appears to reflect an expansive conception of the objectives of guaranteeing a constitutional entitlement to legal assistance. The *Massiah*

of self-deprecatory statements,” and a concern with protecting innocent persons against mistreatment and erroneous convictions. *Id.* at 692 (quoting *Murphy v. Waterfront Comm’n of New York Harbor*, 378 U.S. 52, 55 (1964)).

¹³⁵ *Fellers v. United States*, 540 U.S. 519, 525 (2004).

¹³⁶ To use the same term to refer to a different sort of official conduct—particularly in two related contexts—can only lead to confusion. Unless interrogation as defined in *Miranda* cases has a role to play in Sixth Amendment analysis, it seems eminently wise to purge the term from the latter context. In *Rhode Island v. Innis*, the Court indicated that the term “interrogation” *may not* be “apt” under the Sixth Amendment. 446 U.S. at 300 n.4. In *Fellers*, the Court effectively held that the term *is not* appropriate in Sixth Amendment settings. After *Fellers*, therefore, a judge should never inquire into whether interrogation has occurred in deciding whether an accused was deprived of counsel. All that needs to be determined is whether the government deliberately elicited information. *Fellers*, 540 U.S. at 524–25.

¹³⁷ Although *Fellers*’s holding that one standard of conduct governs all state agents serves the interest in simple, clear constitutional doctrine, dual standards would hardly have made *Massiah* doctrine inordinately complex. In the first place, the nuances of “interrogation” have largely been worked out by *Miranda* cases. Moreover, the criterion that would have determined whether interrogation or deliberate elicitation was necessary to constitute a critical stage—whether the confrontation was with an undercover agent or a known law enforcement officer—would have posed few difficulties. Consequently, clarity alone was hardly an adequate reason to eliminate interrogation.

¹³⁸ I say “reaffirmed” because the Court explicitly endorsed this proposition in *Innis*, 446 U.S. at 300 n.4. In *Innis*, the fact that the policies were distinct led the Court to eschew reliance on a Sixth Amendment precedent in defining the conduct that is sufficient to trigger *Miranda*’s Fifth Amendment safeguards. *Id.* In *Fellers*, the differences in the objectives of the privilege and the right to counsel produced a holding that the conduct necessary to trigger *Miranda*’s protections is not a necessary predicate for Sixth Amendment coverage. *Fellers*, 540 U.S. at 524–25 (2004).

right to counsel is a pretrial extension of the right to *trial* assistance.¹³⁹ According to the Court, the central purpose of this trial right is to ensure that an accused receives a “fair trial.”¹⁴⁰ That simple description of the guarantee’s ultimate purpose, however, is not particularly informative. Most, if not all, constitutional rights pertaining to the criminal process are designed in some way to promote the “fair” resolution of accusations. For present purposes, the important question is *how* a right to the assistance of counsel ensures a fair adjudication of guilt.

It seems elementary that lawyers promote fair trials by ensuring that innocent defendants are not convicted either as a result of their unfamiliarity with the law or their vulnerability to official pressures to make false inculpatory admissions. Counsel “equalizes” an accused by furnishing the legal knowledge and expertise a lay accused lacks, enabling him to cope with the legal system and the trained, motivated prosecutor.¹⁴¹ Without assistance, the outcome of a prosecution might be skewed simply because a defendant lacks legal training or is unequipped to withstand official pressures.

The right to counsel against deliberate elicitation by undercover agents or known officials is not necessary to prevent disadvantages resulting from a lack of legal expertise or to shield against pressures to cooperate. The “critical stages” identified in *Massiah* and refined by subsequent opinions involve no questions of a technical, legal nature and mere “elicitation” is not inherently coercive—i.e., it does not threaten an accused’s freedom of choice.¹⁴² The Court’s conclusion that deliberate elicitation

¹³⁹ The right to counsel was intended as a right to assistance *at trial*. See *United States v. Ash*, 413 U.S. 300, 309 (1973) (noting that history shows that “the core purpose of the counsel guarantee was to assure ‘Assistance’ at trial”); see also TOMKOVICZ, RIGHT TO ASSISTANCE, *supra* note 116, at 81. Extension of this fundamental right to the period following accusation but preceding trial was essential to avoid circumvention of the guarantee of assistance and erosion, if not evisceration, of the interests served and safeguarded by granting those on trial an entitlement to expert legal assistance. See *Ash*, 413 U.S. at 310–11 (“[C]hanging patterns of criminal procedure and investigation” prompted the Court to expand guarantee of counsel to pretrial settings that present “the same dangers that gave birth initially to the right itself”); *United States v. Wade*, 388 U.S. 218, 224 (1967) (asserting that because “today’s law enforcement machinery involves critical confrontations of the accused by the prosecution” before trial that “might well settle the accused’s fate and reduce the trial itself to a mere formality,” guarantee of assistance has been construed “to apply to ‘critical’ stages” prior to trial).

¹⁴⁰ See *Strickland v. Washington*, 466 U.S. 668, 684 (1984) (rooting ineffective assistance of counsel doctrine in the notion that the purpose of Sixth Amendment entitlement is to ensure a “fair trial”); *Wade*, 388 U.S. at 224, 226–27 (extending right to counsel to pretrial lineup because counsel’s absence endangers the “right to a fair trial” and the “security of that right is . . . the aim of the right to counsel”); see also TOMKOVICZ, RIGHT TO ASSISTANCE, *supra* note 116, at 45–50, 122–23, 155–56.

¹⁴¹ See *Ash*, 413 U.S. at 309.

¹⁴² These premises have supported critics’ claims that *Massiah* is an indefensible extension of the right to trial counsel. See, e.g., *United States v. Henry*, 447 U.S. 264, 289–90 (1980) (Rehnquist, J., dissenting); *Massiah v. United States*, 377 U.S. 201, 209 (1964) (White, J., dissenting). I have no doubt about the accuracy of these factual premises; it seems clear that

by any government agent generates a need for counsel's aid must rest on a broader understanding of the fair-trial interests served by the Sixth Amendment right.

Fellers furnishes potent, albeit inexplicit, support for the view that, in our adversary system, once the battle has been commenced by the filing of formal charges it is unfair for the government to engage or interact with an unassisted accused in ways that enhance its opportunity to secure a conviction.¹⁴³ The Court's decision to constrain all deliberate elicitation by informants or officers makes it clear that a defense lawyer is expected to do more than furnish technical legal expertise or guard against official pressures to speak. Counsel is to serve as a partisan, a champion, and an all-purpose assistant. Counsel is empowered and expected to shield the accused against any official effort to induce him to help the state's quest to convict and against any kind of disadvantage flowing out of "confrontations" with state agents.

According to this view, counsel does not merely protect *innocent* defendants against *inaccurate* convictions. Counsel helps *every* defendant—innocent and guilty alike—make self-protective decisions about the wisdom of assisting his adversary. A trial or any postaccusation pretrial process is "unfair" if the government seeks to take advantage of an unassisted opponent. Attorneys ensure fair adversarial contests by providing input and advice—i.e., "counsel," broadly defined—that can help the accused fend off the government's efforts to secure a conviction. A critical component of the entitlement to assistance is advice about the advisability of cooperating by divulging potentially damaging information. Before making a decision to share what he knows with the state, an accused is entitled to the expertise of a trained lawyer who is familiar with the system and understands its nuances and pitfalls.

Put simply, the Sixth Amendment guarantees a defendant the aid of a loyal assistant devoted entirely to his interests, an equalizer who knows the factual, legal, and practical ramifications and perils of sharing information with the government. A fair adversarial contest is one with a fully-equalized accused who has access to unrestricted advice about the advantages, disadvantages, and potential consequences of confrontations with his committed, powerful opponent.¹⁴⁴

deliberate elicitation, whether by an undercover informant or a known police officer, does not involve substantive or procedural legal intricacies and does not generate cognizable pressures that might overcome an accused's free will. I do disagree with the assumption that these are the only perils against which the right to counsel affords protection.

¹⁴³ Looked at from the defendant's standpoint, the protection is against official actions that increase the risk of an unfavorable outcome whether or not that outcome is accurate and justified.

¹⁴⁴ A defendant's entitlement to assistance is not entirely unrestricted. Ethical constraints and the obligation not to serve conflicting interests do limit what a lawyer may do to champion an accused's cause. *See, e.g., Wheat v. United States*, 486 U.S. 153 (1988) (concluding that counsel may not represent the accused if such representation would conflict with obligations to another client); *Nix v. Whiteside*, 475 U.S. 157 (1986) (holding that ethical obligation not to put on perjured testimony or false evidence limits what counsel may do for client). In such cases, countervailing interests outweigh the defendant's interests in assistance and justify the limitation. There is no comparable basis, however, for restricting the input provided by defense

There is no irrefutable historical or other evidence that this broad understanding of counsel's purposes is correct. Narrower conceptions of Sixth Amendment fair trial interests are conceivable. A more restrictive vision could have supported the conclusion that undercover agents may not deliberately elicit, whereas known officers may not *interrogate*. One might plausibly argue, for example, that the government acts unfairly only when it disadvantages an accused by either *deceiving* or *pressuring* him into admitting or disclosing evidence of guilt. False friends¹⁴⁵ who elicit by mere conversation would violate canons of fair play because they gain advantages by deceit. Because deception is absent when known officers openly confront an accused, unfairness would result only when those officers employ pressure to induce an accused to cooperate—i.e., only when they engage in interrogation. This alternative understanding of adversary system fair play could rest on the premise that a lay accused is fully capable of making an informed, uncoerced decision about whether to reveal information to his adversary. He needs no equalizer unless officials employ either deceptive or coercive techniques.¹⁴⁶

Whatever the merits of this more limited understanding of the nature of adversary system fair play,¹⁴⁷ it is implicitly rejected by the conclusion in *Fellers* that a defendant has a right to counsel when a known police officer actively elicits information by means that are neither deceptive nor coercive.¹⁴⁸ The Court's unanimous ruling would seem

counsel to technical legal matters alone.

¹⁴⁵ False friends include cellmates, codefendants, and others who are secretly working with the adversary to secure incriminating admissions.

¹⁴⁶ This conception could explain the suggestion in *Massiah* that a defendant confronted surreptitiously by an unknown government agent is "more seriously imposed upon" than a defendant who is subjected to interrogation by a known officer. *Massiah*, 377 U.S. at 206. It could also explain the *Kuhlmann* majority's description of elicitation by an informant as "the functional equivalent of interrogation." *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986) (quoting *Henry*, 447 U.S. at 277).

¹⁴⁷ There is certainly room for reasonable debate over the correct constitutional conception of counsel's roles in ensuring fair trials. I have made it clear before that I agree with the broader conception of counsel and fairness that I perceive in the *Fellers* decision. See Tomkovicz, *Adversary System*, *supra* note 116, at 39–62. Among the reasons why a more limited understanding seems unsatisfactory is that the right involved in *Massiah* is the same right that exists at trial. If the pretrial right to assistance is only a safeguard against deception or pressure, it would seem logical that the trial right to assistance is similarly limited. I am highly skeptical of that position. It seems to me that whether or not the government was deceptive or brought pressure to bear, it would deprive an accused of his Sixth Amendment entitlement were it to confront him at trial in the absence of counsel in order to further the effort to convict. If the values that call for counsel's aid at trial are threatened without deception or pressure, the same would seem true at pretrial confrontations.

¹⁴⁸ The reasoning of *Ash* may well reinforce the view that nondeceptive, noncoercive efforts to engage or take advantage of an unequal accused in the absence of counsel are inconsistent with the notions of fair play that underlie the Sixth Amendment. *United States v. Ash*, 413 U.S. 300 (1973). In *Ash*, the Court rejected the claim of entitlement to counsel at a pretrial

to validate the view that a fair adversarial trial in our constitutional system is one in which the state refrains from active interaction with an unassisted accused in ways that could redound to the accused's detriment. This vision of fair play in the adversary system and of the roles of counsel in ensuring fair trials explains why an accused is entitled to protection against both conversations with undercover government operatives and noncoercive remarks by known officers.¹⁴⁹ It explains why Mr. Fellers was entitled to a lawyer when known officers merely approached him after indictment, said that they wanted to discuss his involvement in drug distribution and his association with co-conspirators, and discussed those matters with him.

C. The Practical Consequences of the Fellers Ruling: The Meaning and Scope of Deliberate Elicitation

As already noted, the Court has never defined "deliberate elicitation"—the core doctrinal component of *Massiah* that dictated the outcome of *Fellers*.¹⁵⁰ This failure stands in marked contrast to the Court's efforts to specify the meaning of "interrogation"—the parallel *Miranda* element involved in *Fellers*.¹⁵¹ The object here is to

photo array. *Id.* at 317–18. The Court, however, reaffirmed the entitlement to counsel at a corporeal lineup involving the physical presence of the accused because counsel could assist the accused at such a lineup, furnishing the expertise that a layperson lacks and combating the prosecution's efforts to take advantage of the accused. *Id.* at 314. Lineups involve no deception or coercion, but they do provide opportunities for the state to interact with the defendant and secure evidence that can harm his chances for acquittal at trial. *Id.* The *Ash* majority denied that the risks of erroneous conviction resulting from improper suggestion were the reasons for granting a right to counsel at a lineup, emphasizing that a lineup is a critical stage triggering the right to counsel because it constitutes a "trial-like confrontation" between the government and the accused. *Id.*

¹⁴⁹ The decision not to require either deception or coercion as a predicate for the right to counsel seems consistent with the absence of any specific indications in the *Massiah* precedents involving undercover agents that *deceit* was somehow *essential* to the recognition of a right to counsel. Although deception has always been present in the undercover agent cases, the emphasis has always been on "deliberate elicitation" of incriminating remarks in the absence of counsel or a waiver. If an undercover informant who was merely a cellmate or codefendant, for example, were to end the deception by revealing that he had been recruited by the state to secure information from the accused, it seems clear that an accused would still have an entitlement to counsel's assistance against deliberate elicitation by that informant.

Moreover, the entitlement to counsel recognized by *Massiah* surely would not be honored by surreptitious elicitation in the presence of counsel. The right recognized in *Massiah* must include an entitlement to be made aware that one is dealing with one's adversary.

¹⁵⁰ See *supra* note 119 and accompanying text.

¹⁵¹ *Illinois v. Perkins*, 496 U.S. 292 (1990) (enhancing understanding of the concept by holding that interrogation requires a known government actor); *Rhode Island v. Innis*, 446 U.S. 291, 298–99 (1980) (providing a definition of "interrogation" and a relatively thorough explanation of some of the details of that definition).

suggest a definition that gives content to the controlling Sixth Amendment criterion and highlights its differences from the government conduct needed for *Miranda*'s Fifth Amendment protection.¹⁵²

I start with the ordinary meaning of the words "deliberate elicitation." To elicit is "to call forth or draw out."¹⁵³ Thus, the government engages in "elicitation" when it calls forth admissions from an accused or draws disclosures out of his mind. The adjective "deliberate" suggests a need for "intent" and is synonymous with "voluntary."¹⁵⁴ An alternative, potentially appropriate definition of deliberate is "characterized by . . . awareness of . . . consequences."¹⁵⁵ Consequently, elicitation could be deliberate when it is intentional or voluntary or when the elicitor is aware of the consequences of the conduct.

Multiple ambiguities lurk beneath the surface of these elementary definitions. One question is whether active elicitation is required. It is conceivable that one might passively and silently call forth or draw revelations from an accused.¹⁵⁶ The Court has rejected this position, however, holding that only *active* elicitation can give rise to a critical stage that necessitates counsel's assistance.¹⁵⁷ According to the majority in *Kuhlmann v. Wilson*,¹⁵⁸ "the defendant" who claims an entitlement to counsel "must demonstrate that the police and their informant *took some action*, beyond merely listening, that was designed deliberately *to elicit* incriminating remarks."¹⁵⁹ By word, deed, or some combination of the two, state agents must call forth or draw out the accused's revelations.

Another significant question is whether the agent who elicits must merely engage in intentional or voluntary conduct that does, in fact, yield disclosures. Instead, an elicitor might have to intend to elicit—i.e., to produce results—by his or her conduct. Alternatively, an "awareness" that elicitation of statements will (or might) be the "consequence" of his or her actions could be sufficient. The Court's position regarding

¹⁵² One clear difference is that only known state agents can interrogate—i.e., that even express questioning by an undercover operative does not qualify and trigger *Miranda*'s Fifth Amendment scheme. See *Perkins*, 496 U.S. at 296. Moreover, *Fellers* makes it evident that conduct by known officers that is insufficiently evocative to qualify as interrogation may well constitute deliberate elicitation. See *Fellers v. United States*, 540 U.S. 519, 524 (2004).

¹⁵³ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 736 (3d ed. 1993).

¹⁵⁴ *Id.* at 596.

¹⁵⁵ *Id.* Other meanings that suggest a need for "careful thorough calculation and consideration" or a "slow, unhurried" decision-making process seem unnecessarily demanding in this context. *Id.* There is no apparent reason why an official's quickly-conceived and quickly-executed effort to secure inculpatory admissions should be beyond the Sixth Amendment's reach.

¹⁵⁶ The mere presence of another's ear, an apparent willingness to listen, or even an unwillingness to respond might prompt a particular defendant to make disclosures.

¹⁵⁷ *Kuhlmann v. Wilson*, 477 U.S. 436 (1986).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 459 (emphasis added).

the mental state of the individual who elicits is murky. In his dissent in *United States v. Henry*,¹⁶⁰ Justice Blackmun argued that elicitation should be “deliberate” only when a government actor has an “intent” to secure admissions—i.e., that obtaining disclosures must be the object of the conduct.¹⁶¹ He accused the majority of eliminating the intent demand and effectively replacing it with a negligence standard.¹⁶² The majority ignored that charge and did endorse a standard that might seem to undercut, or at least dilute, any “intent to elicit” demand.¹⁶³ Moreover, in both *Henry* and *Massiah* the Court found deliberate elicitation merely because some conversations occurred.¹⁶⁴ It neither examined the nature of those conversations nor found that the specific conduct of the informants during those conversations was intended, designed, or known to be likely to produce the accused’s admissions.

On the other hand, the language employed by the majority in *Kuhlmann*—that the elicitor’s action must be “*designed deliberately to elicit* incriminating remarks”—strongly suggests that intent to elicit is a requisite.¹⁶⁵ Moreover, the doctrinal standards promulgated in *Henry* and *Moulton* do not necessarily undermine an intent to elicit demand. First, because they were developed to determine whether the government is responsible for an undercover operative’s active elicitation, those standards do not directly address the separable question of whether the individual who actively elicits must have an intent to do so. Second, *Moulton* indicates that those standards are not satisfied by negligence;¹⁶⁶ rather, the government must at least “know” that its undercover operative is likely to elicit.¹⁶⁷ Thus, those decisions could be consistent

¹⁶⁰ 447 U.S. 264 (1980).

¹⁶¹ See *id.* at 278 (Blackmun, J., dissenting).

¹⁶² *Id.* at 279 (“The Court’s extension of *Massiah* would cover even a ‘negligent’ triggering of events resulting in . . . disclosures. This approach . . . is unsupported and unwise.”).

¹⁶³ The *Henry* majority found a Sixth Amendment deprivation because the government had “intentionally creat[ed] a situation likely to induce [the defendant] to make incriminating statements.” *Id.* at 274. Moreover, the Court asserted that “[e]ven if” the FBI agent “did not intend that [his informant] would take affirmative steps to secure incriminating information . . . he must have known that” such a result was “likely.” *Id.* at 271. This language plausibly could be read to undermine, even eliminate, a demand for an “intent to elicit.”

¹⁶⁴ *Id.* at 270; *Massiah v. United States*, 377 U.S. 201, 206 (1964).

¹⁶⁵ *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986) (emphasis added).

¹⁶⁶ *Maine v. Moulton*, 474 U.S. 159, 176 (1985) (indicating that the Sixth Amendment is not violated when the government obtains statements “by luck or happenstance,” but only when it intentionally creates or knowingly exploits “an opportunity to confront the accused without counsel being present”).

¹⁶⁷ The *Moulton* Court held, “that when the State obtains incriminating statements by knowingly circumventing the accused’s right to have counsel present in a confrontation between the accused and a state agent,” it deprives the accused of his Sixth Amendment entitlement. *Id.* at 176. The Court then made it clear that the “must have known” language employed by the *Henry* majority was not intended to suggest that negligence is sufficient. See *supra* note 163; *Moulton*, 474 U.S. at 176. Instead, because “[d]irect proof of the State’s knowledge will seldom be available,” the accused can carry his burden by demonstrating

with a broad definition of “deliberate” which encompasses both a purpose to elicit and an awareness that elicitation is a likely consequence. Furthermore, the Court’s failure to examine the conversations in *Massiah* and *Henry* could simply reflect an implicit conclusion that the prior arrangements between the undercover operative and the government provided ample evidence that any conversations by the informant with the accused were designed to produce results.

Although there is ample room for debate, it seems fair to say that the Court probably contemplates an intent-to-elicite requirement, but defines intent broadly to include either a purpose to produce or knowledge that actions are likely to produce admissions. Moreover, the determination of whether purpose or knowledge existed does not call for an exploration of the actual subjective state of mind of the eliciting agent. Instead, that state of mind is determined objectively by asking whether the actions of the elicitor evince an intent to or an awareness that he would (or was likely to) elicit admissions.

Whether the deliberate-elicitation standard requires that conduct be sufficiently “likely” to succeed in drawing admissions from an accused is also uncertain. The holding in *Henry* could be read to incorporate a “likelihood” of success requirement.¹⁶⁸ As mentioned above, the “likely-to-induce” standard announced in that opinion was designed to determine whether government agents who have enlisted undercover agents should be held responsible for active elicitation by those agents, not to decide whether the agents have engaged in conduct that triggers the right to counsel.¹⁶⁹ Still, it seems unlikely that the government could satisfy that standard unless the eliciting agent’s conduct was itself likely to produce disclosures. On the other hand, language in *Henry* may indicate that the relevant question is not whether there was a likelihood of success, but whether the undercover agent was likely to act to secure information.¹⁷⁰

The *results* in both *Massiah* and *Henry* provide powerful support for the view that a likelihood of success is not necessary for conduct to qualify as “deliberate elicitation.”¹⁷¹ In both cases, covert agents deliberately elicited merely by conversing with the accused. No showing was made, and there was no determination that the agents’ contributions to the conversations made admissions of guilt at all likely. The Court’s

“that the State ‘must have known’ that its agent was likely to obtain incriminating statements” *Id.* at 176 n.12. Thus, knowledge is required, but, according to *Moulton*, objective proof of that subjective mental state is sufficient.

¹⁶⁸ *Henry*, 447 U.S. at 274 (holding that the Sixth Amendment had been transgressed because the government had “intentionally creat[ed] a situation *likely* to induce [the accused] to make incriminating statements” (emphasis added)).

¹⁶⁹ See *supra* notes 116 and 119.

¹⁷⁰ See *Henry*, 447 U.S. at 271 (stating that it is enough if the government agent “must have known” that his operative “*would take affirmative steps to secure* incriminating information” (emphasis added)). But see *Moulton*, 474 U.S. at 176 n.12 (asserting that proof that the government “‘must have known’ that its agent *was likely to obtain* incriminating statements from the accused in the absence of counsel suffices” (emphasis added)).

¹⁷¹ See *Henry*, 447 U.S. 264; *Massiah v. United States*, 277 U.S. 201 (1964).

conclusion in *Fellers* itself provides further support. Justice O'Connor asserted that there was "no question" that by informing the defendant that they had the purpose of discussing his drug distribution and his association with charged co-conspirators the officers had deliberately elicited information from him.¹⁷² She did not pause to assess or even advert to the probability that *Fellers* would inculcate himself.

Furthermore, unless express questions are asked, *interrogation* occurs only when officers "should know" that their words or acts are "reasonably likely to elicit an incriminating response from the suspect."¹⁷³ In *Rhode Island v. Innis*, the Court indicated that actions sufficient to trigger right to counsel protection do not necessarily satisfy this definition of interrogation.¹⁷⁴ The *Fellers* Court held that actions that apparently did not satisfy *Innis*'s "reasonably likely to elicit" standard easily cleared the "deliberate-elicitation" hurdle.¹⁷⁵ At the very least, these two opinions make it clear that the actions regulated by the Sixth Amendment need not be "reasonably likely" to produce admissions. Of course, this does not foreclose the possibility that some lesser likelihood—a reasonable possibility or a nonnegligible risk, for example—could be required.

Thus, there may be no specific doctrinal demand for a showing of likelihood that conduct will yield statements. Still, if an intent to elicit or an awareness that elicitation will (or is likely to) be the consequence of one's actions is required, then assessments of probable success will, in fact, prove relevant. In making the objective determination of intent or awareness, the chances that certain conduct will prompt disclosures would be a significant factor. The more probable that outcome, the more likely it will be found to have been intended or contemplated by the elicitor. If the likelihood of securing disclosures was slim or minuscule, a court might well conclude that elicitation was neither intended nor anticipated.¹⁷⁶

¹⁷² *Fellers v. United States*, 540 U.S. 519, 524 (2004).

¹⁷³ *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (emphasis added).

¹⁷⁴ *Id.* at 300 n.4 (deeming "erroneous" the "suggestion" that "the definition of 'interrogation' under *Miranda* is informed by th[e] Court's decision in *Brewer v. Williams*" because that "decision . . . rested solely on the Sixth . . . Amendment right to counsel," which "prohibits law enforcement officers from 'deliberately elic[it]ing' incriminating information from a defendant").

¹⁷⁵ *Fellers*, 540 U.S. at 524. I say "apparently" because while the lower court held that no interrogation had occurred, the Supreme Court did not address that question. It seems unlikely, however, that the Court would have disagreed with the lower court if it had considered the issue. See *supra* note 114 and accompanying text (discussing why the Court would have been reluctant to classify officers' actions in *Fellers* as interrogation).

¹⁷⁶ The substantive criminal law recognizes the logic of reliance on the probability of a particular outcome in deciding whether a defendant possessed the mens rea of "intent" to cause that outcome. See, e.g., *Smallwood v. Maryland*, 680 A.2d 512, 515–16 (Md. 1996) (asserting that intent to kill can be inferred if risk of death from an accused's conduct is high enough, but because likelihood of death from unprotected sex was low, it could not alone support inference of intent to kill required for attempted murder).

In sum, there is very little support for the view that conduct cannot amount to deliberate elicitation unless it is likely to produce admissions from an accused. On the other hand, the probability that actions will result in incriminating responses could be an important variable in determining whether eliciting actions were sufficiently “deliberate.”

The Court did not provide a rationale for its holding in *Kuhlmann v. Wilson* that active elicitation is necessary to trigger right-to-counsel protection.¹⁷⁷ That conclusion, however, can be reconciled with the implicit understanding of the Sixth Amendment’s objectives reflected in *Fellers* and prior *Massiah* precedents. The right to counsel is a generous safeguard that protects defendants against the efforts of their government adversary to secure convictions. It is arguable that an accused needs equalizing assistance only when the government actively engages him in ways that could disadvantage his defense. He needs no help to determine whether it is wise to spontaneously volunteer incriminating information to inactive associates. The mere presence of the adversary does not take advantage of or exploit his vulnerability or inequality. For that reason, it is not “unfair” to convict a person based on disclosures passively received. They are not the product of an imbalanced adversarial “confrontation.” In sum, it is plausible to conclude that active elicitation is required because mere listening by one’s adversary does not threaten the interests and policies that inform and justify an entitlement to legal assistance.¹⁷⁸

In my view, however, the policies underlying the right to counsel do not dictate either a requirement that active elicitation must be intentional or knowing or a demand for some cognizable likelihood of producing results. If the elicitor is, in fact, acting for the government¹⁷⁹ and engages in conduct that does induce an accused to reveal

¹⁷⁷ 477 U.S. 436, 456 (1986).

¹⁷⁸ The holding in *Kuhlmann* is not an indisputably correct interpretation of the Sixth Amendment. In an earlier article, I outlined the arguments that could support extension of the right to counsel to passive reception of incriminating statements and endorsed that position. See Tomkovicz, *Adversary System*, *supra* note 116, at 79–81. Although I have not changed my view of the merits, I do acknowledge that the arguments for limiting counsel to active elicitation situations are credible. It is noteworthy that while the two most liberal members of the Court, Justices Brennan and Marshall, dissented in *Kuhlmann*, they did not advocate coverage of passive listening by informants. See *Kuhlmann*, 477 U.S. at 475–76 (Brennan, J., dissenting) (maintaining that the facts showed active deliberate elicitation that gave rise to a right to counsel).

¹⁷⁹ As already noted, *Henry* and *Moulton* seem to require more than recruitment or employment by the government—i.e., they do not hold the state responsible for an undercover agent’s elicitation simply because he is working for the state. See *supra* note 116. Instead, the facts must show that the government either “intentionally creat[ed]” or “knowing[ly] exploit[ed]” an opportunity to confront the accused without counsel. See *supra* note 116. I will not discuss that requirement at length here, but have discussed and challenged it on a previous occasion. See Tomkovicz, *Adversary System*, *supra* note 116, at 71–77. My view is that if an undercover agent is, in fact, acting for the state, not for his or her private purposes, that alone should make the state responsible for any conduct that meets the deliberate elicitation standard. *Id.* There should be no need to determine whether the state intended active elicitation or knew that it

information, there has been an unequal adversarial engagement of the kind the Sixth Amendment is designed to prevent. There may be superficial appeal in the notion that the government should not be penalized for unintended, unexpected, accidental, or unlikely elicitation. Penalization of the state, however, is not the issue. The apposite inquiry is whether an accused has suffered the sort of harm and the kind of adversarial disadvantage that the Framers meant counsel to guard against. If active engagement with an uncounseled defendant has produced an evidentiary advantage for the state, the injury to the accused is the same whether or not the elicitor had "fault" and whether or not the interactions had a cognizable chance of success.

Massiah involved a surreptitious scheme in which a federal agent and the accused's codefendant set out to induce him to speak about his criminality.¹⁸⁰ It seems likely that the Court described the constitutionally regulated conduct as "deliberate elicitation" because that phrase accurately described the facts of the case. The Justices probably gave no thought to whether a right to counsel would be appropriate in a case with unintended or unexpected elicitation. That issue was not before the Court. Instances of unintended or unexpected elicitation would seem to be rare and, thus, unlikely to cross the minds of or concern those who were announcing a novel, pretrial extension of the Sixth Amendment.¹⁸¹ In my view, it would be preferable to trim the doctrine, eliminating the word "deliberate" and describing the regulated conduct as "elicitation by a government agent." This helpful clarification would be consistent with the purposes of recognizing pretrial right to counsel protection. I have no illusions, however, that the Court will adopt this proposal. I will be more than content if the Justices reach the same result by refusing to interpret the "deliberate elicitation" criterion in ways that may seem implicit in the terminology or precedents but are inconsistent with the spirit of the counsel guarantee.

CONCLUSION

Fellers v. United States is a terse, scarcely noticed opinion that purported to do nothing more than apply settled doctrine to undisputed facts in order to correct a patently erroneous legal conclusion reached by the Court of Appeals. The rare show of unanimity regarding the *Massiah* doctrine's pretrial extension of the right to trial counsel only enhances the impression that the decision is inconsequential.¹⁸² In my

was likely. *Id.*

¹⁸⁰ *Massiah v. United States*, 377 U.S. 201, 203–04 (1964).

¹⁸¹ For this reason, the resolutions of the doctrinal questions discussed in this section are likely to make little, if any, difference in actual cases. The rarity of elicitation that is unintended, unexpected, or unlikely means that the practical impact of demanding fault or likelihood would probably be insignificant.

¹⁸² The unanimity of the Court's decision to purge the more demanding interrogation standard is actually quite remarkable. Somewhat "moderate" members of the Court—Justices Lewis Powell and Harry Blackmun—had indicated that in their view interrogation was

view, however, *Fellers* is a deceptive opinion that, in fact, addressed and clarified a virtually unnoticed, yet central, ambiguity of Sixth Amendment law. By announcing that interrogation is not necessary to trigger Sixth Amendment protection, confirming that undercover operatives and known officers are subject to the same standard, and holding that the right to counsel exists whenever *any* state agent engages in deliberate elicitation, *Fellers* made a notable contribution to substantive Sixth Amendment law. The result of a decision that known officers are free to interact with an accused as long as they do not interrogate would have been a less generous entitlement to counsel.

More importantly, the Court's decision to eliminate "interrogation" from Sixth Amendment discussions and to reaffirm the controlling significance of "deliberate elicitation" in both undercover agent and known officer settings speaks volumes, albeit silently, about the nature of the conception of counsel that justifies the *Massiah* doctrine. It implicitly confirms that the Court has an expansive understanding of the roles of counsel in sheltering accused persons against government efforts to convict and a generous view of the character of the "fair trial" guaranteed by our Constitution. By searching between the lines of the *Fellers* opinion and listening carefully, one can hear telling responses to the critiques leveled against the *Massiah* right during the forty years since it was first announced.

Fellers clarified the doctrine, but also highlighted the need for further doctrinal development. The rejection of interrogation and forceful confirmation of the sufficiency of mere deliberate elicitation are a welcome recognition that right-to-counsel protection reaches well beyond that provided by the guarantee against compulsory self-incrimination. One can hope that in future cases the Court does not undermine the promise of *Fellers* with unjustifiably narrow interpretations of the meaning of deliberate elicitation.

sometimes needed for Sixth Amendment protection. See *Brewer v. Williams*, 430 U.S. 387, 410 (1977) (Powell, J., concurring); *id.* at 439 (Blackmun, J., dissenting). Justice Powell had managed to plant a powerful suggestion to that effect in the last pre-*Fellers* majority opinion pertinent to the topic. See *Kuhlmann*, 477 U.S. at 457. Most surprising of all is Chief Justice Rehnquist's decision to join an expansive interpretation of *Massiah*, a decision whose very legitimacy he had directly challenged. *United States v. Henry*, 447 U.S. 264, 289–90 (Rehnquist, J., dissenting); see also Tomkovicz, *Against the Tide*, *supra* note 113, at 146–48 (documenting the Chief Justice's "hostility" toward *Massiah*).