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UNITED STATES V. BROWN: IMPLEMENTING MASSIAH

While participating in an attempted purchase of a diamond ring with stolen Sears merchandise certificates, Mary Brown was apprehended by a security guard and charged with violations of state law. Immediately prior to her preliminary hearing on these accusations, while she was waiting to meet with her state-appointed public defender, two agents from the Federal Bureau of Investigation approached Brown, intending to inquire into the violations of federal law resulting from the theft. Before questioning Brown, the agents recited the *Miranda* rights and obtained from her a signed statement that purported to waive all of the privileges identified in those warnings, including her right to an attorney.¹ Although they assumed that counsel had been appointed for Brown, the agents did not ask specifically whether she desired to consult with her particular lawyer.

As a result of the agents' omission, the Court of Appeals for the Fifth Circuit held in *United States v. Brown*² that the interrogation had unconstitutionally denied Brown her sixth amendment right to counsel³ and that any evidence relating to it should have been ex-

1. Mary Brown received the following warnings:

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

United States v. Brown, 551 F.2d 639, 648 (5th Cir.), *rehearing en banc granted*, 558 F.2d 327 (5th Cir. 1977) (dissenting opinion). Brown signed the following waiver:

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

2. 551 F.2d 639 (5th Cir.), *rehearing en banc granted*, 558 F.2d 327 (5th Cir. 1977).

3. *Id.* at 643.

cluded from her federal prosecution.⁴ Because the district court did not suppress this evidence, the court of appeals reversed Brown's federal conviction.⁵ The decision in *Brown* did not rely upon *Miranda v. Arizona*,⁶ in which the Supreme Court held that the fifth amendment right against self-incrimination required that all persons subjected to a custodial interrogation be informed of their sixth amendment rights to consult with counsel and to have an attorney present during questioning.⁷ Instead, the appellate court recognized that two pre-*Miranda* decisions, *Massiah v. United States*⁸ and *Escobedo v. Illinois*,⁹ had determined that the sixth amendment required law enforcement officials to respect an attorney-client relationship established prior to a police interrogation.¹⁰ Arguably, the warnings outlined by the Court in *Miranda*, which were intended to protect a suspect's fifth amendment right against self-incrimination, were insufficient to safeguard the other constitutional rights of an individual. In *Brown* the court stated that the FBI agents, in order to effectuate Brown's sixth amendment right as anticipated in *Massiah*, were required to use precautions beyond those listed in *Miranda* and to inquire specifically whether Brown desired to consult with her previously appointed counsel.¹¹

Recently, in *Brewer v. Williams*,¹² the Supreme Court has reaffirmed the importance of the right to counsel in an attorney-client relationship established prior to a suspect's interrogation. To some extent, however, the breadth of this right depends on the required procedures through which law enforcement officials implement it. Unfortunately, the Supreme Court has identified neither the precise contours of the sixth amendment guarantee nor the required proce-

4. *Id.* at 644.

5. *Id.* at 647.

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

7. "[W]e hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . ." *Id.* at 471. See Spring, *The Nebulous Nexus: Escobedo, Miranda and the New 5th Amendment*, 6 WASHBURN L.J. 428 (1967); Warden, *Miranda—Some History, Some Observations, and Some Questions*, 20 VAND. L. REV. 39 (1966); Comment, *The New Definition: A Fifth Amendment Right to Counsel*, 14 U.C.L.A. REV. 604 (1967); Comment, *The New Right—Fifth Amendment Right to Counsel*, 20 U. MIAMI L. REV. 893 (1966).

8. 377 U.S. 201 (1964).

9. 378 U.S. 478 (1964).

10. 551 F.2d at 642-44. See also *Brewer v. Williams*, 430 U.S. 387 (1977).

11. 551 F.2d at 643. The dissent, in contrast, did not interpret *Massiah* as requiring that warnings in addition to those enunciated in *Miranda* be given to Brown before she could be interrogated. *Id.* at 648.

12. 430 U.S. 387 (1977).

dures through which the right may be exercised. This Comment outlines the right to counsel as articulated in *Massiah* and its progeny. It then discusses both the propriety and effectiveness of the differing implemental procedures recognized in the various state and federal courts.

RECOGNITION OF THE MASSIAH RIGHT TO COUNSEL

In *Massiah v. United States*¹³ the Supreme Court first recognized that an interrogation of a defendant conducted without the presence of his previously-retained attorney could constitute a violation of the accused's sixth amendment right to counsel.¹⁴ *Massiah* involved the post-indictment, clandestine surveillance of the defendant after he had retained an attorney.¹⁵ The Supreme Court held inadmissible the resulting evidence,¹⁶ stating that this extra-judicial "interrogation" violated the defendant's right to counsel.¹⁷ Rejecting the premise that the sixth amendment guarantee only provided an accused with the right to the assistance of an attorney at his trial, the Court noted that such a restriction could deprive the defendant of legal advice when he most needed it.¹⁸

One month after *Massiah* the Court in *Escobedo v. Illinois*¹⁹ determined that the right to counsel attaches during the accusatory rather than at the post-indictment stage of the legal proceedings.²⁰ This extension of the protection of the sixth amendment depended on two interrelated factors:²¹ the functional insignificance of a formal

13. 377 U.S. 201 (1964).

14. *Id.* at 206.

15. While *Massiah* was free on bail and in a codefendant's car, he made incriminating statements, which were heard by a government agent who had hidden a radio transmitter in the automobile. The Court characterized this surveillance as an interrogation. *Id.* at 206.

16. *Id.* at 207.

17. *Id.* at 206.

18. *Id.* at 204.

19. 378 U.S. 478 (1964).

20. *Id.* at 485. Justice White's dissent in *Massiah* predicted this extension:

The importance of the matter should not be underestimated, for today's rule promises to have wide application well beyond the facts of this case. The reason given for the result here—the admissions were obtained in the absence of counsel—would seem equally pertinent to statements obtained at any time after the right to counsel attaches, whether there has been an indictment or not; to admissions made prior to arraignment, at least where the defendant has counsel or asks for it

377 U.S. at 208 (White, J., dissenting).

21. 378 U.S. at 486-92.

indictment and the importance and vulnerability of the fifth amendment right against self-incrimination.

Discussing the first element, the Court emphasized the purpose of the police interrogation. In *Escobedo* the police had ceased conducting a general investigation of an unsolved crime and had begun seeking a confession from a particular suspect.²² In effect, the suspect already had been charged; to require the issuance of a formal indictment before permitting him to consult with his attorney would exalt form over substance and sanction a cynical manipulation of the formalities.²³ This analysis led the Court to view the "accusatory stage" of the legal process as the time when the sixth amendment right to counsel attaches.²⁴

The Court's definition of the accusatory stage emphasizes the second crucial element in the *Escobedo* decision: protection of the guarantee against self-incrimination. The accusatory process begins "when [the] focus [of the investigation] is on the accused and its purpose is to elicit a confession."²⁵ Police efforts to evoke a confession threaten a suspect's right against self-incrimination, and the Court has recognized that an accused may need the advice of an attorney before he can exercise his fifth amendment right intelligently.²⁶ Thus, a suspect may invoke the sixth amendment guarantee for the purpose of protecting his other constitutional rights during the accusatory process.²⁷

Despite its potentially broad impact, the holding in *Escobedo* was based upon a particularly egregious factual situation. The subject of

22. *Id.* at 485.

23. *Id.* at 486, 488.

24. *Id.* at 492.

25. *Id.* Since *Escobedo*, courts have determined whether an accusatory stage has been reached by considering a variety of factors, including the length, time, and place of the interrogation; the type of questions asked; and the evidence existing at the time of the inquiry. See, e.g., *United States ex rel. Dickerson v. Rundle*, 238 F. Supp. 218 (E.D. Pa. 1965), *aff'd*, 363 F.2d 126 (3d Cir. 1966), *cert. denied*, 386 U.S. 916 (1967) (accusatory stage reached when questions at defendant's interrogation concerned inconsistencies in statements he had made at a preliminary hearing); *People v. Sears*, 62 Cal. 2d 737, 401 P.2d 938, 44 Cal. Rptr. 330 (1965) (accusatory stage reached when defendant, following his arrest but prior to his arraignment, was interrogated for 45 minutes after police already had spoken with several witnesses); *People v. Stewart*, 62 Cal. 2d 571, 400 P.2d 97, 43 Cal. Rptr. 201 (1964), *aff'd sub nom. Miranda v. Arizona*, 384 U.S. 436 (1966) (accusatory stage reached when defendant was interrogated daily for the five days during which he was in custody).

26. 378 U.S. at 488.

27. See, e.g., *Warden, supra* note 7, at 44. See generally Comment, *The Right to Counsel During Police Interrogation: The Aftermath of Escobedo*, 53 CALIF. L. REV. 337 (1965).

a murder investigation, Escobedo had requested permission to consult with his previously-retained attorney throughout his interrogation. Similarly, the suspect's lawyer repeatedly attempted to meet with his client. Notwithstanding the unsuccessful attempts of the accused and his attorney to confer, the police were unable to elicit inculpatory statements from Escobedo until they exploited his ignorance of the law and tricked him into incriminating himself.²⁸

These circumstances invited narrow factual distinctions by courts that later diminished the impact of *Escobedo*.²⁹ Thus, when situations involved more restrained police conduct than that in *Escobedo*, courts tended to reach results differing from the latter case, noting a defendant's failure to demand counsel³⁰ or narrowly delineating the scope of the accusatory stage concept.³¹ Moreover, the defendant's retention of an attorney prior to the extraction of incriminating information in both *Escobedo* and *Massiah* distinguished those cases from others in which a defendant did not obtain counsel.³²

In 1966, however, the Court expanded the application of the principles implicit in *Escobedo*, holding in *Miranda v. Arizona*³³ that a suspect has the right to counsel throughout his custodial interrogation, regardless of his prior retention of or request for an attorney.³⁴ An accused must be advised expressly not only of this right but also

28. For a complete statement of the facts in *Escobedo* see 378 U.S. at 479-83.

29. See *Browne v. State*, 24 Wis. 2d 491, 131 N.W.2d 169 (1964), *cert. denied*, 379 U.S. 1004 (1965); authorities cited at note 31 *infra*.

30. See, e.g., *Browne v. State*, 24 Wis. 2d 491, 131 N.W.2d 169 (1964), *cert. denied*, 379 U.S. 1004 (1965) (defendant's failure to request attorney's presence and counsel's failure to attempt a conference with defendant distinguish *Escobedo*). But see *People v. Dorado*, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169, *cert. denied*, 381 U.S. 937, 946 (1965) (distinction of *Escobedo* on the basis of defendant's failure to request counsel is an overly formalistic interpretation). Note, *Escobedo in the Courts: May Anything You Say Be Held Against You?*, 19 RUTGERS L. REV. 111, 122-26 (1964). See generally, e.g., Comment, *The Right to Counsel During Police Interrogation*, 25 MD. L. REV. 165, 171-76 (1965).

31. See, e.g., *United States v. Konigsberg*, 336 F.2d 844 (3d Cir.), *cert. denied*, 379 U.S. 930, 933 (1964) (accusatory stage not reached when defendant voluntarily answered questions of a general nature while in custody); *Commonwealth v. Lepore*, 349 Mass. 121, 207 N.E.2d 26 (1965) (accusatory stage not reached when defendant, the day after arrest, answered investigatory questions at his apartment). See generally Rothblatt, *Police Interrogation and the Right to Counsel*, Post *Escobedo v. Illinois: Application v. Emasculation*, 17 HASTINGS L.J. 41 (1965).

32. See generally Note, *The Coming of Massiah: A Demand for Absolute Right to Counsel*, 52 GEO. L.J. 825, 844-45 (1964).

33. 384 U.S. 436 (1966).

34. *Id.* at 471. See note 7 *supra* & accompanying text.

of his right to remain silent.³⁵ Moreover, unless a suspect knowingly and intelligently waives these rights, he may not be questioned.³⁶

The revolutionary potential of *Miranda* lay in its formulation of required police procedures through which a defendant's fifth amendment right against self-incrimination could be protected. With its sweeping pronouncements and encompassing effect, that case overshadowed *Massiah* and *Escobedo*. In *Brewer v. Williams*,³⁷ however, the Supreme Court recognized a vitality in *Massiah* that was independent of the holding in *Miranda*. While transporting Williams, the defendant in *Brewer*, from one city to another, a police officer persuaded him to reveal the location of his murder victim's body. Although the defendant was given the *Miranda* warnings before the trip began, the officer obtained no express waiver of these rights before he conducted his interrogation. Moreover, the detective ignored the instructions of Williams's attorney to refrain from speaking with the accused during the trip,³⁸ and the officer continued to talk to the defendant even after Williams had said that he would make a statement regarding his involvement in the crime after conferring with his attorney at the completion of the journey.³⁹

Avoiding the issues of whether the defendant had been denied his privilege against self-incrimination or whether the detective had violated the requirements of *Miranda* during his interrogation of the suspect, the Supreme Court reversed Williams's conviction because the police officer failed to respect the accused's right to counsel.⁴⁰ The detective's conduct, which prevented the defendant from exercising his sixth amendment guarantee to consult with his previously-retained attorney, therefore was proscribed by the Court's decision in *Massiah*.⁴¹

Similarly, in *Brown* the Fifth Circuit invoked neither the fifth amendment nor *Miranda* in reversing Brown's conviction. An assertion of a defense based on a fifth amendment violation however, probably would have been unsuccessful. Brown had been given the warnings required by *Miranda* on at least three occasions, the last immediately before the FBI interrogation, and had signed a document expressly waiving those rights.⁴² The role of the sixth amendment, on

35. 384 U.S. at 478-79.

36. *Id.* at 471, 479.

37. 430 U.S. 387 (1977).

38. *Id.* at 391-92.

39. *Id.* at 392.

40. *Id.* at 397-98.

41. *Id.* at 400-01.

42. 551 F.2d at 642.

the other hand, is clear in *Brown*. The Fifth Circuit refused to give efficacy to the defendant's signed waiver, not because Brown had been denied the *Miranda* warnings, a requirement that in fact had been met, but because the defendant had not been asked whether she wished to consult with the attorney appointed to represent her.⁴³ Determining that the process already had shifted to an accusatory stage before Brown's interrogation,⁴⁴ the court held that the agent's failure to inquire whether the accused desired to confer with her attorney prior to the questioning constituted a violation of the sixth amendment.⁴⁵

In *Brown* the Fifth Circuit delimited the sixth amendment right to counsel that the Supreme Court identified in *Massiah* and extended in *Escobedo*. Basically, the privilege entitles an individual who has acquired an attorney to consult with that particular lawyer during any police interrogation involving an investigation that has reached the accusatory stage.⁴⁶ This guarantee is applicable only when the police know or have reason to know that the accused individual has an attorney.⁴⁷ Although *Brown's* definition of the sixth amendment right is within the scope of Supreme Court precedent, the court of appeals also addressed the question of implementation of the privilege, thereby confronting an issue not yet resolved by the Supreme Court.

IMPLEMENTING THE MASSIAH RIGHT

To a certain extent, the breadth and the strength of the *Massiah* right to counsel depend upon the procedures that the police must follow to safeguard the constitutional guarantee. Subsequent to *Massiah*, lower courts have adopted two approaches effecting the privilege. Treating the right as absolute, one approach prohibits the interrogation of an accused unless either his attorney is present throughout the questioning or the suspect affirmatively waives his *Massiah* privilege in the presence of the lawyer.⁴⁸ Under the second approach,

43. *Id.* at 643.

44. *Id.* Using the "focus on the accused" test of *Escobedo*, see note 25 *supra* & accompanying text, the Fifth Circuit has construed broadly the term "accusatory stage." See *Clifton v. United States*, 341 F.2d 649, 651 (5th Cir. 1965).

45. 551 F.2d at 643.

46. *Id.*

47. *Cf. id.* at 642-44.

48. *People v. Arthur*, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968). See generally 20 BUFFALO L. REV. 704 (1971). In *Arthur* the court relied on the New York Constitution and state precedent, not on the sixth amendment and Supreme Court precedent. New York Court of Appeals decisions have been cited with approval, however, by the Supreme Court. See note 54 *infra*.

courts view the constitutional guarantee as waivable: the police may bypass the attorney and directly contact a suspect who then, under appropriate circumstances, may relinquish his right to his lawyer's presence.⁴⁹

Jurisdictions adhering to the second method have adopted variations in the sufficiency of the warnings designed to inform suspects of their right to counsel. In some areas, a suspect simply may be given the *Miranda* warnings, the courts failing to distinguish between the *Miranda* and *Massiah* rights.⁵⁰ Alternatively, a court may consider the *Massiah* right to be waivable but nevertheless may require the police to employ a distinct warning in addition to that required by *Miranda*. The Fifth Circuit endorsed the latter view in *Brown*.⁵¹

The Absolute Right Approach

The New York Court of Appeals, in *People v. Arthur*,⁵² adopted an absolute approach to the *Massiah* right to counsel. The court determined that under the New York Constitution⁵³ a suspect who has an attorney, whether by appointment or personal retention, cannot be interrogated unless he affirmatively waives his right to counsel in the presence of his lawyer.⁵⁴ This privilege, which mandates that counsel be notified and present at least at the inception of any police interrogation, attaches as soon as the police know or have reason to know that the suspect is legally represented.⁵⁵ In effect, the absolute position proscribes the direct communication by the police with a suspect who they are aware has an attorney; instead, questions must be channeled through his lawyer.

49. See *United States v. Brown*, 551 F.2d 639, 643 (5th Cir. 1977); cf. *Brewer v. Williams*, 430 U.S. 387, 402 (1977).

50. See, e.g., *Reinke v. United States*, 405 F.2d 228 (9th Cir. 1968); *Coughlan v. United States*, 391 F.2d 371 (9th Cir.), cert. denied, 393 U.S. 870 (1968).

51. 551 F.2d at 643.

52. 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968).

53. N.Y. CONST. art. I, § 6, provides in pertinent part: "[I]n any trial in any court whatever the party accused shall be allowed to appear and defend . . . with counsel . . ."

54. 22 N.Y.2d at 328-30, 239 N.E.2d at 539, 292 N.Y.S.2d at 666-67. The court relied on its own precedents, the most important of which are *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963) and *People v. Waterman*, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961). *Waterman* is cited with approval in *Massiah*, 377 U.S. at 205, and *Donovan* is quoted extensively in *Escobedo*, 378 U.S. at 486-87.

55. 22 N.Y.2d at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666. Therefore, the right attaches whether the police are informed of the attorney-client relationship by the suspect or his lawyer.

Underlying the rationale of the absolute right is the implicit view that all direct police-suspect contact violates the latter's constitutional right to counsel.⁵⁶ Generally, a police approach that bypasses the attorney in favor of direct communication with a suspect denies that individual the assistance of legal representation and may be condemned as governmental misconduct.⁵⁷ Misconduct was suggested in *Massiah* from the tactics employed by the police. The interrogation, a secret surveillance by the police that was engineered with the assistance of a codefendant, elicited incriminating statements by an accused who was unaware either that he was being overheard or that his conversation would be introduced as evidence in trial. *Massiah* contrasts with *Brown*, in which the police approached openly, identified themselves, and warned Brown of certain of her constitutional rights. The implications of governmental misconduct in *Brown*, however, stem from the timing of the interrogation, immediately before the defendant's appointment with her attorney, and from the agent's assumption that Brown had a lawyer.⁵⁸

If a deliberate attempt to isolate a client from his attorney constitutes police misconduct, then an investigating official's motive to deny a suspect his lawyer's assistance can provide the basis to define the actions that violate the sixth amendment. In classifying a specific act as impermissible, a court could focus on whether governmental efforts were designed to prevent client-attorney contact. This analysis could equate the open police approach in *Brown* with the surreptitious surveillance in *Massiah*: both cases involved deliberate governmental actions that denied the suspect the advantage of consulting with his attorney.

Reliance on police motive to define misconduct, however, raises other problems. An intent to deprive a suspect of his right to counsel is difficult, if not impossible, to prove. Moreover, the police activity

56. All though the New York rule is required by that state's constitution, the Supreme Court, in its citation and discussion of the New York cases in *Massiah* and *Escobedo*, see note 54 *supra*, has made clear that the underlying rationale for the absolute right is applicable to an analysis of the sixth amendment.

57. See discussion in *United States v. Thomas*, 474 F.2d 110, 111-12 (10th Cir.), cert. denied, 412 U.S. 932 (1973); *United States v. DeLoy*, 421 F.2d 900, 902 (5th Cir. 1970). See also Enker & Elsen, *Counsel for the Suspect: Massiah v. United States & Escobedo v. Illinois*, 49 MINN. L. REV. 47, 57-58 (1964) (ultimate issue in *Massiah* was the permissible extent of governmental deceit).

58. 551 F.2d at 644. The dissent in *Brown* agreed that attempts by the police to isolate a suspect from his counsel are improper: "We cannot condone such tactics as deliberately intercepting a 'known target' in a criminal investigation walking through the halls of a state court en route to a conference with her attorney to prepare for a preliminary hearing." *Id.* at 650.

itself, not the motive prompting such conduct, infringes upon the suspect's right to his lawyer's assistance. In condemning all governmental contact that bypasses the suspect's attorney, the absolute right method permits the court to avoid determining the subjective intent of the police. Conclusively presuming an unconstitutional motive, this approach suggests that the possibility of a legitimate police inducement is so slight as to make unnecessary an individual judicial determination in each case.⁵⁹

In 1973, the Court of Appeals for the Tenth Circuit adopted an alternative justification to the constitutional basis for the absolute right to counsel. In *United States v. Thomas*,⁶⁰ the court invoked the ABA Canons of Professional Ethics, which prohibited the direct contact by an attorney with an adversary,⁶¹ to formulate a prospective administrative rule that is similar to New York's absolute approach.⁶² The Tenth Circuit's rule prevents the admission into evidence of statements made during questioning by a defendant whose previously-retained attorney was neither notified of the interrogation nor given a reasonable opportunity to be present.⁶³ The only qualification placed on this rule requires that a suspect have counsel prior to his interrogation.⁶⁴ In addition, because an ethical rule applicable to the conduct of lawyers forms the basis for the decision, only the defendant's attorney, and not the suspect himself, may waive the right.⁶⁵ As

59. Although the possibility of an innocent direct contact remains, the requirement of the absolute approach that police know or have reason to know of the suspect's attorney-client relationship minimizes the potential harm of presuming an unlawful intent. See note 55 *supra* & accompanying text.

60. 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973).

61. ABA CANONS OF PROFESSIONAL ETHICS NO. 9. The corresponding disciplinary rule to Canon No. 9 provides in pertinent part: "[A] lawyer shall not: (1) Communicate or cause another to communicate . . . with a party he knows to be represented by a lawyer . . . unless he has the prior consent of the lawyer representing such another party . . ." ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104.

62. 474 F.2d at 112. In *Thomas* the defendant had requested an interview with a governmental agent and signed a "Miranda type waiver of rights form." *Id.* at 111. Basing its decision on the ABA Canons, the court implied that if the result had been required by the Constitution the defendant could have benefited from the ruling. *Id.* at 112.

63. *Id.* The interrogator need not be a prosecuting attorney. The court considers law enforcement officials to be agents of the prosecutor; therefore, a suspect's communications to them also are inadmissible. *Id.* Similarly, DR 7-104 of the ABA Code of Professional Responsibility expressly prohibits an attorney from "causing another to communicate." See note 61 *supra*.

64. 474 F.2d at 112.

65. The court did not determine whether an attorney, through his negligence or otherwise, could force a waiver of his client's right to counsel. For example,

with the absolute approach that is based on constitutional considerations, the Tenth Circuit's rule permits its courts to avoid issues of police motive and therefore implicitly recognizes that the conduct of the police in bypassing the suspect's attorney, not their intent, damages the substance of the defendant's right to counsel.⁶⁶

The Waivable Right Approach

Relying on the general principle that constitutional rights may be waived,⁶⁷ some courts implicitly reject the proposition that any direct governmental contact with a suspect who has an attorney, by itself, may violate the sixth amendment; instead, these courts place the burden of exercising the *Massiah* right on the defendant.⁶⁸ The strongest support for this viewpoint derives from the Supreme Court's decision in *Brewer*. Refusing to decide whether an accused could ever relinquish his *Massiah* right,⁶⁹ the Court implicitly approved the waiver approach in *Brewer* by explaining why the detective had not obtained a renunciation from Williams.⁷⁰

Disagreement exists, however, as to the warning prerequisites necessary to permit waiver of the sixth amendment guarantee. One position, that taken by the dissenting judge in *Brown*, maintains that *Miranda* warnings sufficiently apprise the accused of his right to counsel.⁷¹ The *Brown* majority rejects this position in favor of a requirement that the suspect be advised not only of his privileges under *Miranda* but also of his specific right to the presence of his particular attorney.⁷² The foundation for both positions rests on the waiver

because the rule requires that the police give a suspect's lawyer only a reasonable opportunity to be present during any interrogation, *see* text accompanying note 63 *supra*, a court might permit the introduction of evidence from questioning that was conducted after the defendant's attorney failed to appear. If the purpose of the rule is to protect the defendant, however, it should be construed as a condemnation of direct police-suspect contact, rather than as a standard that a lawyer may waive without the consent of his client.

66. *See* text accompanying note 59 *supra*.

67. *See, e.g.,* Johnson v. Zerbst, 304 U.S. 458 (1938); Comment, *The Statute of Limitations in a Criminal Case: Can it be Waived?*, 18 WM. & MARY L. REV. 823, 835-36 (1977).

68. *See, e.g.,* United States v. Brown, 551 F.2d 639 (5th Cir. 1977); Reinke v. United States, 405 F.2d 228 (9th Cir. 1968); Coughlan v. United States, 391 F.2d 371 (9th Cir.), *cert. denied*, 393 U.S. 870 (1968).

69. 430 U.S. at 405-06.

70. *Id.* at 405. *See* text accompanying notes 40-41 *supra*.

71. 551 F.2d at 648; *accord*, Reinke v. United States, 405 F.2d 228, 229 (9th Cir. 1968); Coughlan v. United States, 391 F.2d 371, 371-72 (9th Cir.), *cert. denied*, 393 U.S. 870 (1968).

72. 551 F.2d at 643.

standard enunciated in *Johnson v. Zerbst*,⁷³ in which the Supreme Court determined that a valid renunciation of a constitutional guarantee must be "an intentional relinquishment of a known right or privilege."⁷⁴ Thus, the question is whether the *Miranda* warnings sufficiently advise the suspect of his *Massiah* privilege, for if the individual is unaware of the guarantee, he cannot relinquish it.

In determining that Brown had not been denied her right to counsel,⁷⁵ Judge Fay, the dissenter in *Brown*, focused on the accused's knowledge of her sixth amendment privilege and concluded that the defendant must have known she had an attorney.⁷⁶ Reasoning that the *Miranda* warnings unambiguously advised Brown of her right to the presence of her attorney,⁷⁷ the judge argued that the defendant effectively had waived her *Massiah* right.⁷⁸ The dissent's position, however, relied on the case's peculiar facts, particularly the defendant's college education; it assumed, without proof, that Brown possessed knowledge of her rights.⁷⁹ Under Judge Fay's rationale, the *Miranda* warnings could have been insufficient in a different factual situation, and arguably, the required content of any police preinterrogation notice would have depended upon the criminal suspect's level of sophistication or intelligence.

Although in *Johnson* the Supreme Court stated that the accused's background and experience should be evaluated when determining the effectiveness of a relinquishment of his constitutional rights,⁸⁰ the Court in *Brewer* refused to recognize an implied waiver by a defendant who appeared to understand his *Massiah* right.⁸¹ Placing an affirmative duty on the police to establish that the suspect understood and intended to waive his right to counsel, the court refused to presume that Williams, the defendant, knowingly surrendered his sixth amendment guarantee merely because earlier he had been given his *Miranda* warnings and appeared to understand his right to counsel.⁸² Before a voluntary relinquishment of Williams's *Massiah* right could be found, the Court implied that the defendant, an escaped mental patient, would need to be advised specifically of his sixth amendment privi-

73. 304 U.S. 458, 464 (1938).

74. *Id.*

75. 551 F.2d at 650 (dissenting opinion).

76. *Id.* at 648.

77. *Id.*

78. *Id.* at 650.

79. *Id.* at 648.

80. 304 U.S. at 464.

81. 430 U.S. at 404-06.

82. *Id.*

lege.⁸³ What should be included in an effective warning and whether such a statement need be given to an individual possessing a greater intellectual capacity than did Williams remained among the questions unresolved by the court in *Brewer*.⁸⁴

The majority in *Brown* addressed both of these issues and determined that the sixth amendment rights enunciated in *Massiah* require an accused to be given a warning in addition to those necessitated by *Miranda*.⁸⁵ Moreover, in according this protection to Brown, who was well-educated, the court rejected any proposition that the police need to offer an explanation of the privilege only to unsophisticated suspects. These safeguards must be implemented before an individual becomes capable of intelligently considering a waiver of his right to consult with his attorney.⁸⁶

Brown correctly concludes that the FBI agents specifically should have advised the defendant of her *Massiah* right. Unlike the *Miranda* requirements, which primarily are designed to protect a suspect's constitutional guarantee against self-incrimination,⁸⁷ the specific warning acknowledges the independent importance of the sixth amendment right to counsel⁸⁸ and the respect that an existing attorney-client relationship requires. In addition, *Brown* complements the decisions of the Supreme Court in *Massiah* and *Escobedo* by establishing guidelines for the implementation of the right recognized in those cases. Thus, when an investigation has reached the accusatory stage and the police have reason to know that a suspect previously has

83. *Id.* at 405. In his dissent in *Brewer*, Justice White stated that *Massiah* provides an identical right to counsel as that involved in *Miranda*. *Id.* at 435 n.5 (White, J., dissenting). See note 7 *supra* & accompanying text. As a result, he argued that "[t]here is absolutely no reason to require an additional question to the already cumbersome *Miranda* litany . . ." 430 U.S. at 435 n.5. Although not explicitly disagreeing with Justice White, the majority in *Brewer* stated that the *Miranda* doctrine was "designed to secure the constitutional privilege against compulsory self-incrimination," *Id.* at 397, thereby implying that the *Miranda* warnings may be insufficient to safeguard a suspect's sixth amendment rights under *Massiah*. See text accompanying note 14 *supra*.

84. A third important question left unanswered in *Brewer* concerns the time of the required warnings and whether the police must repeat them periodically. A discussion of this issue is beyond the scope of this Comment.

85. 551 F.2d 643.

86. *Id.* at 643 & n.13.

87. See, e.g., *Brewer v. Williams*, 430 U.S. 387, 397 (1977); notes 7, 83 *supra* & accompanying text.

88. The importance of the right to counsel is discussed in *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963), and *Powell v. Alabama*, 287 U.S. 45, 68-71 (1932). See also, e.g., Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 IOWA L. REV. 1249, 1250-51 (1970).

retained an attorney, the "interrogating officers must make a reasonable attempt to determine prior to the interrogation whether the individual questioned has an attorney with whom she would like to consult."⁸⁹ In contrast, the *Miranda* warnings must be given only before a custodial interrogation.⁹⁰ Because the accusatory stage may be reached before a custodial interrogation occurs,⁹¹ those jurisdictions employing only the *Miranda* warnings will have to use those statements more often than is required by the Supreme Court. In the Fifth Circuit, however, the police must warn the suspect only of his *Massiah* right during the accusatory stage, and this advice may be treated as a codicil to the *Miranda* warnings when the interrogation reaches a custodial context.

By requiring that an accused be advised specifically of his *Massiah* right in addition to his *Miranda* privileges during a custodial interrogation, *Brown* comports with the Court's decision in *Brewer*. Such a warning notifies the defendant that he may exercise not only his right against self-incrimination but also his sixth amendment guarantee to consult with his previously-retained lawyer.⁹² Once apprised of his *Massiah* right, a suspect should possess sufficient knowledge to determine whether he will make a voluntary waiver that complies with the requirements of *Brewer*⁹³ and *Johnson*.⁹⁴ Finally, *Brown* extends the boundaries of Supreme Court precedent and creates a rule of administrative convenience for law enforcement officers. Although the Court has not required that every suspect possessing an attorney be advised specifically of his right to counsel, it has refused to approve either an involuntary or an unintelligent waiver.⁹⁵ By requiring an explicit *Massiah* warning, the Fifth Circuit rule will permit the police to avoid litigating the issue of whether a waiver is effective simply because the accused did not understand his sixth amendment guarantee.

89. 551 F.2d at 643.

90. See *Beckwith v. United States*, 425 U.S. 341, 344-48 (1976); notes 7, 34 *supra* & accompanying text.

91. The accusatory stage is reached whenever the purpose of the investigation is to elicit a confession from the suspect. See note 25 *supra* & accompanying text. In contrast, a custodial interrogation is not defined by the police purpose; instead, it occurs when investigators have taken the suspect into actual custody or otherwise significantly restrained his freedom. See, e.g., *Orozco v. Texas*, 394 U.S. 324, 326-27 (1969); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The distinction between the accusatory stage and a custodial interrogation is unclear. In *Miranda* the Court appeared to equate a custodial interrogation with "an investigation which had focused on an accused." *Id.* at 444 & n.4.

92. See notes 83-84 *supra* & accompanying text.

93. See notes 81-83 *supra* & accompanying text.

94. See text accompanying note 74 *supra*.

95. *Brewer v. Williams*, 430 U.S. 387, 404-06 (1977).

*The Absolute Right and the Waivable Right Approaches:
A Comparative Analysis*

In a comparison of the two methods of implementing an accused's *Massiah* right, the waivable approach possesses several advantages over the absolute procedure. For example, by preventing waivers, the absolute approach provides suspects with protection apparently exceeding the requirements of the sixth amendment as construed by the Court in *Brewer*.⁹⁶ As a result, a jurisdiction requiring this procedure should rely upon authority other than the Constitution.⁹⁷

Another difficulty with the absolute right approach stems from its condemnation as police misconduct of all governmental contact bypassing a suspect's attorney.⁹⁸ In New York this blanket prohibition has prompted the court of appeals to recognize an equally comprehensive exception to the rule. Thus, the court has recognized that the right applies only to custodial interrogations⁹⁹ and has determined that the initiation of contact by an accused removes an interrogation from the custodial context.¹⁰⁰

United States v. DeLoy,¹⁰¹ a 1970 Fifth Circuit decision, demonstrates conclusively that the police require some leeway in those circumstances when a suspect initiates the interrogation. Following his indictment and the appointment of counsel, the defendant, DeLoy, repeatedly and without invitation approached FBI agents and made incriminating statements.¹⁰² Before he presented the evidence, the defendant was given his *Miranda* warnings and advised to contact his attorney, a suggestion DeLoy maintained he had followed. In this situation, which lacked even a hint of governmental impropriety, a strict adherence to the absolute method would have served no purpose.

96. See text accompanying notes 69-70 *supra*.

97. Thus, the New York Constitution provided the basis for the absolute right requirement in that state, see notes 53-54, 56 *supra* & accompanying text, and the Tenth Circuit's authority for its rule was Canon No. 9 of the ABA Canons of Professional Ethics. See notes 60-62 *supra* & accompanying text.

98. See note 59 *supra* & accompanying text.

99. See 20 BUFFALO L. REV. 704, 707-08 (1971).

100. See, e.g., *People v. Kaye*, 25 N.Y.2d 139, 250 N.E.2d 329, 303 N.Y.S.2d 41 (1969) (spontaneous admissions to police after advice of rights by counsel not the result of interrogation); *People v. McKie*, 25 N.Y.2d 19, 250 N.E.2d 36, 302 N.Y.S.2d 534 (1969) (incriminating statement made in street argument with police not the result of interrogation); cf. *People v. Robles*, 27 N.Y.2d 155, 263 N.E.2d 304, 314 N.Y.S.2d 793 (1970) (incriminating statement made to detective in conversation after defendant's attorney left the room not the result of interrogation).

101. 421 F.2d 900 (5th Cir. 1970).

102. DeLoy estimated that he made more than twenty unsolicited visits to different FBI offices.

In other, less extreme circumstances, however, in which the defendant was less persistent than DeLoy in initiating contact with the police, the wisdom of an absolute exception to the New York rule is questionable. For example, in *People v. McKie*,¹⁰³ the defendant made incriminating assertions to the police during a street encounter he initiated. McKie made the statements only after previous police abuses of his right to counsel caused him to believe that law enforcement officials were preparing once more to approach and question him.¹⁰⁴ Although the defendant's assumption was accurate, the New York Court of Appeals upheld the admission of the incriminating evidence because McKie initially had contacted the police.¹⁰⁵

That the defendant's right to counsel can depend on the identity of the party initiating the interrogation is as troublesome as the absolute right's presumption that all police activity circumventing a suspect's lawyer constitutes misconduct. The individual most likely to approach the police is the suspect who probably does not understand his constitutional privilege and who is incapable of making an intelligent waiver of his sixth amendment guarantee. By excluding this person from coverage, the exception to the absolute approach may deny the suspect his *Massiah* right.

In contrast, the waivable right approach eliminates much of the potential for police misconduct by requiring the interrogator to advise the suspect of his *Massiah* right, regardless of which party initiates the conversation. Under this procedure, the defendant in *DeLoy*, having been advised of his right to counsel, would have made a valid waiver. In *McKie*, on the other hand, in which the accused received no warnings prior to his incriminating statements, a court applying the waivable right approach would not have permitted law enforcement officials to capitalize on the suspect's ignorance of his constitutional privilege. Instead, the court would have upheld a waiver by McKie only after the police had advised the defendant of his right to consult with his attorney.

The waivable procedure holds a final advantage over the absolute approach in the degree to which each method comports with the Supreme Court's philosophy in *Miranda*. In announcing a police procedure designed to protect an accused's right against self-incrimination, the Court in *Miranda* did not intend to eliminate all direct police-suspect contact; rather, it attempted to prevent interrogative tactics

103. 25 N.Y.2d 19, 250 N.E.2d 36, 302 N.Y.S.2d 534 (1969).

104. McKie's attorney on numerous occasions had asked the detectives, who repeatedly had approached McKie, to refrain from speaking to the defendant.

105. 25 N.Y.2d at 28, 250 N.E.2d at 41, 302 N.Y.S.2d at 540-41.

designed to exploit a suspect's ignorance of his constitutional rights.¹⁰⁶ After the investigator advises a suspect of his fifth amendment privilege, *Miranda* permits the accused to make a voluntary waiver of that right.¹⁰⁷ The waivable approach to implementing the *Massiah* right comports with the *Miranda* requirements; in contrast, the absolute method, by preventing waiver, is subject to criticism for placing an undue restriction on police investigations.¹⁰⁸

This analysis demonstrates that the waivable right approach is the correct procedure for implementing the *Massiah* right to counsel. Unlike the absolute approach, the waivable method provides a suspect with protection that is coextensive with the constitutional privilege; it neither overinsulates some defendants from police questioning nor underprotects others merely because they initially contact their interrogators. Moreover, the waivable approach conforms to the philosophy of *Miranda* and creates no unreasonable obstruction of law enforcement officials' investigations.

CONCLUSION

Normally, police guidelines implementing state and federal constitutional rights should be established not by judicial pronouncements of specific procedural requirements, but through legislature enactments. In *United States v. Brown*, however, the Court of Appeals for the Fifth Circuit successfully interpreted several complex Supreme Court opinions involving extremely disparate factual situations and announced a simple method through which law enforcement officials could refrain from infringing upon a suspect's sixth amendment right to consult with his previously-retained attorney. Of the various judicial approaches adopted to date, the procedure announced in *Brown* most closely comprehends the scope of the constitutional guarantee. For this reason, the decision in *Brown*, which has been granted a rehearing *en banc*, should be left undisturbed so that it may serve as a model for the other circuits.

106. 384 U.S. at 479-91. In *Miranda* the Court discussed at length the various means through which the police abuse their power. *Id.* at 445-58.

107. *Id.* at 475. See text accompanying notes 34-36 *supra*.

108. In his dissent in *Brewer*, Chief Justice Burger articulated another possible objection to an absolute approach:

The Court's holding operates to "imprison a man in his privileges," . . . it conclusively presumes a suspect is legally incompetent to change his mind and tell the truth until an attorney is present. It denigrates an individual to a nonperson whose free will has become hostage to a lawyer It denies that the rights to counsel and silence are personal, nondelegable, and subject to waiver only by that individual.

430 U.S. at 419 (Burger, C.J., dissenting) (citation and footnote omitted).