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Criminal Law - Evidence - Interrogation in the Absence of Counsel

Frank W. Hill

possibility of losing a valid election, thus barring for at least a year any opportunity to represent the employees. The employer, on the other hand, should be most willing to agree to a consent election. By pursuading the union to take the election route, the employer will have an opportunity to change the minds of the employees prior to the election. If the union loses a *valid* election, it will lose its previous right to represent the employees and also lose the opportunity to rely on refusal-to-bargain charges. As a practical matter, the ultimate decision by either side will be dependent upon its bargaining power in any given situation.

Carl W. McKinzie

Criminal Law — Evidence — Interrogation in the Absence of Counsel

Defendant was indicted for a violation of the federal narcotics laws. He retained counsel, pleaded not guilty and was released on bail. Similarly, Colson, who was indicted along with defendant for the same offense, was released on bail. Federal agents induced Colson to cooperate in further investigation. Colson permitted a federal agent to install an inflectional transmitter beneath the front seat of Colson's automobile. Thereafter, Colson engaged defendant in a lengthy conversation inside the automobile, during which petitioner made several incriminating remarks. The federal agent, by prearrangement with Colson, was listening to defendant's remarks by means of a receiving device in an automobile parked out of sight. The federal agent was allowed to testify to defendant's incriminating remarks at the trial. Defendant was convicted and the conviction was affirmed by the court of appeals.[1] *Certiorari* was granted by the Supreme Court to determine if use of defendant's remarks, acquired by use of a concealed device, deprived him of any constitutional rights. *Held, reversed:* The eliciting of incriminating remarks after indictment for a federal crime by surreptitious interrogation in the absence of counsel is violative of the sixth amendment to the Constitution of the United States, and remarks so elicited are inadmissible as evidence. *Massiah v. United States,* 377 U.S. 201 (1964).

The admissibility of confessions and other self-incriminating evidence in criminal prosecutions long has been a problem in both

[1] United States v. Massiah, 307 F.2d 62 (2d Cir. 1962).

federal and state courts, and the right to counsel always has been entangled with that problem. In federal cases, the sixth amendment guarantees a defendant the right to counsel.[2] The exact extent of this right, however, is highly controversial. It does give an indigent defendant the right to have court-appointed counsel.[3] Moreover, it is clear that the right extends to all stages of the trial,[4] whether or not the offense charged is serious in nature.[5] Much less clear is the question of *when* the right to counsel attaches[6] and, after it has attached, what constitutes a denial of that right.[7]

The problem of a defendant's right to counsel often arises in a case in which the admissibility of his confession is questioned. Although, as has been pointed out, each of the two problems (admissibility and the right to counsel) has a separate basis for application in federal jurisdiction,[8] in state prosecutions the supervisory powers of the court are inapplicable and both problems turn on an application of due process. In dealing with the admissibility of a confession, state courts generally have employed the voluntary-involuntary test, much like that used in federal courts before 1943.[9] Since the sixth amendment was thought not to apply directly to state procedure, the presence or absence of counsel during the period of interrogation in which the confession was elicited was not, in itself, an abridgement of the defendant's rights.[10] Rather, the presence or absence of counsel was only one element to be considered in scrutinizing the confession to ascertain its voluntary or involuntary character.[11] After an abortive attempt by the Court to enlarge the test applied in the state courts by rejecting confessions made in an air of "inherent coercion,"[12] whether or not voluntarily made in fact, it seemed settled that only

[2] U.S. Const. amend. VI states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the *assistance of counsel* for his defense." (Emphasis added.) Johnson v. Zerbst, 304 U.S. 458 (1937).

[3] Johnson v. Zerbst, *supra* note 2.

[4] Edwards v. United States, 139 F.2d 365 (D.C. Cir. 1943), *cert. denied*, 321 U.S. 769 (1944).

[5] Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942).

[6] The moment of indictment is no longer determinative. See Escobedo v. Illinois, 378 U.S. 478 (1964).

[7] A denial of counsel can exist when waiver of the right is made by an incompetent defendant. Moore v. Michigan, 355 U.S. 155 (1957); Wade v. Mayo, 334 U.S. 672 (1948); Marino v. Ragan, 332 U.S. 561 (1947).

[8] That is, federal courts have enforced the right to counsel by direct application of the sixth amendment, while the admissibility of confessions has been judged since McNabb v. United States, 318 U.S. 332 (1943), largely on the separate basis of the Court's "supervisory power." See Inbau, Criminal Interrogation and Confessions 148 (1962).

[9] Brown v. Mississippi, 297 U.S. 278 (1936). This was the first state court confession case to be decided by the United States Supreme Court.

[10] Crooker v. California, 357 U.S. 433, 438 (1958).

[11] Spano v. New York, 360 U.S. 320 (1959).

[12] Ashcraft v. Tennessee, 322 U.S. 143 (1944).

the "totality of the circumstances" surrounding the confession would determine its admissibility.[13] *Spano v. New York,*[14] a 1959 case, does not hold otherwise. But in that decision, four of the concurring justices[15] were of the opinion that the denial of counsel in that case constituted, in itself, a denial of due process. That is, in the opinion of these four justices, the admissibility of confessions and right to counsel should be separate bases on which to review the state court procedure. The sixth amendment, they felt, should apply directly to the states, through the fourteenth amendment.[16] In *Gideon v. Wainwright,*[17] the Court so held. It is within this milieu that the instant case must be examined, for the voluntary-involuntary test so long applied to confessions was still associated with the right to counsel issue—*i.e.,* the question of whether a defendant had *voluntarily waived counsel* had become confused with the question of whether he had *voluntarily confessed.* The dissenting opinion in the instant case is an example of this confusion.

Perhaps the most important element of the *Massiah* case is what it does *not* do. In the development of standards to be followed by federal courts in applying the sixth amendment, the Supreme Court has never extended the "absolute" right to counsel to every confrontation which the defendant may have with law enforcement authorities. That is, the Court never has held voluntary admissions inadmissible simply because counsel was not present. A suspect, fully apprised of his right to counsel, has been able to make such voluntary statements; unless the suspect had been denied counsel actively, such statements have been deemed admissible.[18] *Massiah,* it is suggested, does not change this rule.

Mr. Justice White, dissenting, asserted that: "it is only a sterile syllogism—an unsound one besides—to say that because Massiah had a right to counsel's aid before and during the trial, his out-of-court conversations and admissions must be excluded if obtained without counsel's consent or presence. The right to counsel has never meant as much before. . . ."[19] Thus, the dissent is of the opinion that all

[13] Payne v. Arkansas, 356 U.S. 560, 562 (1958); Fikes v. Alabama, 352 U.S. 191, 197 (1957); Stroble v. California, 343 U.S. 181, 190 (1952); Gallegos v. Nebraska, 342 U.S. 55, 64 (1951).

[14] 360 U.S. 320 (1959). The majority in *Spano,* treating admissibility and right to counsel as one problem under the due process clause of the fourteenth amendment, held that the defendant's confession was inadmissible where he had been denied counsel *and* had been deceived by the lies of interrogating officers.

[15] Mr. Chief Justice Warren and Justices Black, Brennan, and Douglas concurred therein.

[16] Spano v. New York, 360 U.S. 320, 326 (1959).

[17] 372 U.S. 335 (1963), noted in 18 Sw. L.J. 284 (1964).

[18] See McNabb v. United States, 318 U.S. 332, 346 (1943); Sparf v. United States, 156 U.S. 51 (1895).

[19] 377 U.S. at 209.

voluntary admissions made in the absence of counsel would be inadmissible under the rule of the majority opinion.[20] The majority, however, were careful to delimit their holding: "All that we hold is that the defendant's own incriminating statements, obtained by federal agents *under the circumstances here disclosed,* could not constitutionally be used by the prosecution as evidence against him at his trial."[21] The "circumstances here disclosed," of course, were surreptitious and indirect interrogation. Citing the New York rule, as laid down in *People v. Waterman,*[22] the Court said that the right to counsel after indictment, to have any efficacy, "must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse."[23] This is the crux of the decision. It is the element of secrecy which the Court condemns. If the defendant is deprived of the knowledge that he is under interrogation, the fruits of which can be used against him, he is deprived of the *choice of summoning counsel.* The fact that his *remarks* are voluntary is immaterial because he has not waived his right to counsel voluntarily. *Massiah* is limited to a narrow situation—surreptitious interrogation after defendant's release on bail. It is significant that by so limiting its decision the majority have incorporated the progressive Waterman Rule of New York into federal procedure without the result predicted by many critics.[24]

Thus, the underlying reason for the Court's decision, although not articulated specifically, is probably this element of what might be called "constructive coercion" in depriving the defendant of counsel.

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[20] *Ibid.*

[21] *Id.* at 207. (Emphasis added.)

[22] 9 N.Y.2d 561, 175 N.E.2d 445 (1961). The significant part of the decision set forth the so-called "Waterman Rule" as follows:

> An indictment is the first pleading on the part of the people . . . and marks the formal commencement of the criminal action against the defendant. Since the finding of the indictment presumably imports that the people have legally sufficient evidence of the defendant's guilt of the crime charged . . . the necessities of appropriate investigation "to solve a crime, or even to absolve a suspect" cannot be urged as justification for any subsequent questioning of the defendant . . . Any *secret interrogation* of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime. *Id.* at 447. (Emphasis added.)

[23] The majority were quoting Judge Hays' dissent in the court of appeals, United States v. Massiah, 307 F.2d 62, 72 (2d Cir. 1962).

[24] See Inbau, *Public Safety v. Individual Civil Liberties: The Prosecutor's Stand,* 53 J. Crim. L., C. & P.S. 85 (1962). It was the fear of Mr. Inbau that the dual effect of the McNabb-Mallory Rule and the Waterman Rule would be to outlaw police interrogations altogether. By denying police the right to hold and question a defendant for any substantial length of time pursuant to *McNabb,* and by assuring the defendant the presence of counsel after that period under the Waterman Rule, a defendant's remarks would be few, indeed, since the standard legal advice is for the defendant to say nothing.

That is, although it is true that Massiah "was not questioned in what anyone could call official coercion,"[25] the effect was the same. The salient characteristic of the surreptitious interrogation was that the defendant was unaware of his peril. Because Massiah did not know that he was being interrogated, the Court reasoned that he had been deprived of the *opportunity to elect* whether or not to call counsel, an opportunity previously established as one of the federal standards used in applying the sixth amendment.[26] This rationale shows that the Court has not discarded the voluntary-involuntary test of confessions. Rather, the Court seems to be applying a voluntary-involuntary test to the presence or absence of counsel.

There is some indication, however, that the dissent's sense of direction is not inaccurate. Although the Court's decision can be justified on its limited grounds, it is likely that *Massiah* represents only a brief respite in the Supreme Court's march toward an absolute right to counsel. As has been pointed out, the Court's limited application of the "Waterman Rule"[27] averted the total destruction of police interrogations in the absence of counsel, at least temporarily. However, the Court cited *People v. DiBiasi*,[28] a New York case which held that a voluntary confession made in the absence of counsel was inadmissible, although the defendant never requested counsel and had an opportunity to do so. The Supreme Court did not elaborate on *DiBiasi*, but its inclusion may be a forecast of things to come. Further, it should be pointed out that the Court has held since the *Massiah* decision that active denial of counsel *before indictment* contravenes the sixth amendment.[29] The Court cited *Massiah* in reaching the decision, and summarily disposed of the indictment problem by saying that it "should make no difference."[30] If the "circumstances" present in *Massiah* can be eliminated so handily, one can hardly doubt that the secrecy upon which the majority evidently based its decision will be discarded also as a superfluity.[31]

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[25] *But see* People v. Everett, 180 N.E.2d 556 (1962), which held that mere deception is not coercion in *state* proceedings. See also Comment, 14 Syracuse L. Rev. 117 (1963).

[26] Chandler v. Fretag, 348 U.S. 3, 10 (1954).

[27] See note 22 *supra*. See also note 24 *supra* and accompanying text.

[28] 7 N.Y.2d 544 (1960), 166 N.E.2d 825 (1960).

[29] Escobedo v. Illinois, 378 U.S. 478 (1964). Although the Court refused to overrule Crooker v. California, 357 U.S. 433 (1958), and, ostensibly, maintained the totality of circumstances test, the distinction is somewhat nebulous. See note 31 *infra*.

[30] Escobedo v. Illinois, 378 U.S. 478, 485 (1964).

[31] It is suggested that, in the light of *Gideon*, *Massiah*, and *Escobedo*, *Crooker* is practically, though not specifically, overruled. *Gideon* requires counsel at trial, and *Massiah* extends that right to all stages of the judicial proceeding, and the Court states that Crooker's refusal of an "absolute" right to counsel in every instance "does not compel a contrary *result*." Escobedo v. Illinois, 378 U.S. 478, 491 (1964). (Emphasis added.) But the Court continued, "to the extent that *Cicenia* or *Crooker* may be inconsistent with the *principles*