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In the

Supreme Court of the United States

UNITED STATES)
)
PETITIONER,)
)
V.) No. 79-121
)
BILL GALE, HENRY)
)
RESPONDENT.)
)

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner, :

v. : No. 79-121

BILL GALE, HENRY, :

Respondent. :

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Washington, D. C.,

Wednesday, January 16, 1980.

The above-entitled matter came on for oral argument at 2:02 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ANDREW L. FREY, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Petitioner

MICHAEL E. GELTNER, ESQ., Georgetown University Law Center, Appellate Litigation Clinic, 600 New Jersey Avenue, N. W., Washington, D. C. 20001; on behalf of the Respondent

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CONTENTS

ORAL ARGUMENT OF PAGE

ANDREW L. FREY, ESQ.,
on behalf of the Petitioner 3

MICHAEL E. GELTNER, ESQ.,
on behalf of the Respondent 28

ANDREW L. FREY, ESQ.,
on behalf of the Petitioner -- Rebuttal 49

- - -

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 79-121, United States v. Henry.

Mr. Frey, I think you may proceed whenever you are ready.

ORAL ARGUMENT OA ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: Mr. Chief Justice, and may it please the Court:

This case is here on the government's petitioner for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. That court granted respondent collateral relief from his conviction on the ground that certain testimony admitted at his trial of a jail cellmate was admitted in violation of his Sixth Amendment right to counsel.

In the fall of 1972, respondent was arrested and indicted on a charge of participation in a bank robbery in Norfolk, Virginia. At his trial some months later, the prosecution's evidence included the testimony of two individuals who had been cellmates with the respondent at the Norfolk Jail during the period between respondent's indictment and his trial. One of the cellmates, Nichols, was a government informant. The other, Sadler, was not. Both men testified about damaging admissions that the

respondent had made to them which indicated that he was a participant in the bank robbery.

Several years later, respondent filed a motion for collateral relief in which he charged for the first time, among other things, that the admission of Nichols' testimony violated his Sixth Amendment right to the assistance of counsel. His motion was denied, but on appeal the Court of Appeals remanded for an evidentiary inquiry into the claim. On remand, the District Court again denied the motion without a hearing on the basis of affidavits submitted by two FBI agents regarding the nature of their contacts with the witness Nichols.

The significant affidavit for purposes of this case was that of Agent Coughlin. Perhaps the best way to put the issue that is before the Court today into focus is if I read the pertinent excerpts from his affidavit, which begin at page 57A of the Appendix, the Petition for a Writ of Certiorari.

Agent Coughlin averred that, "On November 21, 1972, I contacted Edward Benjamin Nichols at the Norfolk City Jail. Nichols had been contacted by me for approximately a year prior to this and during my contacts with him, he had provided confidential information to the FBI," and had been paid for it.

"At the time I contacted Nichols, Nichols advised

that he was in the same cellblock as Billy Gale Henry as well as other prisoners who had federal charges against them. I recall telling Nichols at this time to be alert to any statements made by these individuals regarding the charges against them. I specifically recall telling Nichols that he was not to question Henry or these individuals about the charges against them, however, if they engaged him in conversation or talked in front of him, he was requested to pay attention to their statements. I recall telling Nichols not to initiate any conversations with Henry regarding the bank robbery charges against Henry, but that if Henry initiated the conversations with Nichols, I requested Nichols to pay attention to the information furnished."

The affidavit goes on to relate the provision of information by Nichols to the agent after Nichols got out of jail, and then it states, on page 59a, "Nichols was paid by the FBI for expenses and services in connection with the requests that Henry had made of him in jail and for the information furnished by Nichols."

Finally, it says:

"I never requested anyone affiliated with the Norfolk City Jail to place Edward Benjamin Nichols in the same cell with Henry."

Now, on the basis essentially of this affidavit, the district court denied relief, and on exactly the same

basis, the court of appeals majority upheld respondent's Sixth Amendment claim.

The court described the issue before it as whether undisclosed government monitoring of respondent's conversations while he was in custody violated his right to counsel.

In responding to the government's argument based on the language in Brewer v. Williams, suggesting that some form of interrogation is a prerequisite to finding a Massiah violation, the court held that requirement satisfied by general conversation. The holding which is under review today may perhaps best be summarized in the following statement from the Court of Appeals opinion:

"In the instant case, even if we assume that Nichols obeyed his instructions not to interrogate Henry about the bank robbery, Nichols did testify that he engaged in conversation with his cellmate Henry. If by association, by general conversation, or both, Henry developed sufficient confidence in Nichols that Nichols bared" -- excuse me -- "that Henry bared his incriminating secrets to an undisclosed paid informer, we think that there was interrogation within the meaning of Brewer, and therefore a violation of the Massiah doctrine."

QUESTION: Do you think this is basically a question of fact or law?

MR. FREY: A question of law, as the case now

stands. Unfortunately, the facts are not very well developed.

QUESTION: They aren't.

MR. FREY: But in effect, what happened was the Court of Appeals granted summary judgment against us, determining that the mere fact that Nichols was an informant, that he shared the cell with Henry, and that he engaged in general conversation --

QUESTION: You don't mean in any technical sense that the Court of Appeals granted summary judgment against you, did they?

MR. FREY: They granted relief without a hearing having been held on the facts. In other words, they granted relief on the assumption that the fact that there was association and general conversation was sufficient to make out a violation of the Massiah doctrine.

QUESTION: Has this Court ever held who has the burden of proof in a Federal habeas action?

MR. FREY: The habeas petitioner would have the burden of proof. However, if as here was the case it was conceded the operative facts on which the decision of the court of appeals rested are conceded by the government, and I think they are, then this court can review the question of whether the court of appeals was correct in saying that was enough to grant relief.

Now, in dealing with the issue posed by this case, I think there are two different sets of variables to be considered: The first set involves the manner in which the witness came to share a cell with the defendant and agreed to testify at trial on the prosecution's behalf.

The one extreme is a case like Milton v. Wainwright, where an undercover officer posing as a fellow inmate is deliberately placed in the defendant's cell.

QUESTION: Do you think the case turns on whether he was deliberately placed there or --

MR. FREY: We don't think the case turns on that. That is, we think that there would have to be a reversal in either event. But in this case, as the record now stands, there is no evidence that he was deliberately placed in there for the purpose of extracting statements from the respondent.

QUESTION: So we should decide the case on the assumption, among other things, that he was deliberately placed there?

MR. FREY: No, I don't think if that is --

QUESTION: You say it doesn't make any difference, so it doesn't make --

MR. FREY: We say that you could not sustain the decision of the Court of Appeals even if he were deliberately placed there, but I'm not sure that it would make no difference. It's a little hard for me --

QUESTION: I thought that's what you did say.

MR. FREY: We believe we should win even if he were deliberately placed there as long as there was not the kind of deliberate elicitation or interrogation that --

QUESTION: Well now, Massiah didn't require interrogation, did it?

MR. FREY: Well, I would be happy to discuss that now, if you'd like.

QUESTION: You are going to direct yourself to that?

MR. FREY: I certainly will direct myself to that.

Apart from the situation where an officer is put in the cell, as in Milton, at the other extreme is the not uncommon situation where a cellmate of a defendant comes to the authorities, tells them that the defendant is talking about the crime with which he is charged, and offers to inform the authorities about the defendant's statements. This case is somewhere in between those two extremes.

QUESTION: Well, in that latter case, if that's all he did, and then informed the authorities of the statements --

MR. FREY: No, I'm talking about statements that were --

QUESTION: -- that he had made, then he wouldn't have been a government --

MR. FREY: There would be no problem; it would be the statements made thereafter.

QUESTION: Oh. That's different.

MR. FREY: There would be no issue as to statements already made.

Now, the second kind of variable, and the one that is perhaps in the forefront of the present case concerns the nature of the relationship or interaction between the witness and the defendant. Again the possibilities can be arrayed along the spectrum. At one end of the spectrum is an informant in an adjoining cell to the defendant's who simply overhears incriminating statements but has no interaction whatsoever with the defendant. At the other end is the situation in Milton in which an extended and calculated effort is made to, quote, "open the defendant up" by repeated questioning about the crime of which the defendant stands charged.

Now, unless the rationale underlying the Massiah doctrine is to be entirely reexamined, it seems clear that the Milton situation constitutes a denial of the right to counsel.

Conversely, I see absolutely nothing in the Court's opinions on the subject to suggest that the purely passive overhearing of conversations between the defendant and some third party other than the defendant's lawyer could properly be held to evade the right to counsel.

QUESTION: What would you say about placing a transmitter right in the cell; not a person, a transmitter?

MR. FREY: I would say that would not violate the Sixth Amendment right to counsel. They might be Fourth Amendment questions. That is similar to the issue in the Hearst, Patty Hearst case, in the 9th Circuit, and we believe that that was correctly decided by the 9th Circuit.

QUESTION: When you say a third party, do you draw any distinction between a third party who is paid by the government and a third party who is just another convict, so to speak?

MR. FREY: Well, that's -- I think it's clear that if he speaks to another convict, who is not a government agent, there is no Massiah issue whatsoever. So I am assuming in this hypothetical that the agent is silent in the next cell, or a prison guard who walks by and overhears a statement -- that is, I am talking about obtaining a statement with absolutely no active effort on the part of the government, and I view that as one polar extreme and the active effort to "open up" the defendant by intensive interrogation about the offense to be the other polar extreme.

QUESTION: But there's no question this man was a government agent?

MR. FREY: There's no question that this man was a government agent.

QUESTION: And being paid?

MR. FREY: Well, we know that he was paid at some point for the information that he provided.

QUESTION: And he was paid for listening but not asking questions?

MR. FREY: That's what he was instructed to do.

QUESTION: And do I assume from that that if he said he did ask questions, he wouldn't be paid?

MR. FREY: I don't know.

QUESTION: Well, if he didn't ask questions, he'd be like, he'd be in a passive role like the transmitter bug, wouldn't he?

MR. FREY: That would be true.

QUESTION: But you say the transmitter would be all right, too?

MR. FREY: I think that there is no basis in any of this Court's decisions to suggest that the transmitter would violate the right to counsel. And while the opinion of the Court of Appeals initially cast the issue in terms of monitoring the defendant's conversations, I don't think even its decision really can be read to hold that mere overhearing violates the right to counsel. They relied on also the fact that there was conversation between the witness informant and the defendant.

It is clear, however, that the Court did not

require that the conversation relate in any way to the defendant's case. Accordingly, the narrow question before the Court is whether general conversation about sports, the weather, or other neutral topics makes any incriminating statements thereafter volunteered by the defendant to a cellmate inadmissible.

Now, as I understand it, the Court of Appeals theory for finding a violation in such circumstances is that by manifesting friendliness, the informant will have created an atmosphere in which the defendant is more likely to trust him and to reveal incriminating information.

Now, it seems plain to me that the Court of Appeals decision cannot be squared either with the past descriptions of the kind of conduct that the Massiah rule prohibits or with the right to counsel rationale of that rule. Looking first at what the court has said is prohibited, the Massiah opinion speaks of deliberate elicitation. Now, elicitation is a somewhat vague term, but to me it clearly suggests some kind of drawing out, of overcoming some resistance to speak, or at least of constructing some artificial situation that is particularly likely to produce the desired statements.

Massiah, in fact, involves specific questioning of the defendant about the crime by the informant. And in Brewer, the court made quite clear that interrogation or something quite like it is the touchstone for finding of

violation of the right to counsel.

QUESTION: Well, was that the holding, do you think?

MR. FREY: Well, the holding is that the right to counsel is violated by what was tantamount --

QUESTION: By interrogation.

MR. FREY: -- to interrogation. However --

QUESTION: But it didn't -- is there something -- is there any case that -- I guess if there were a case, we wouldn't be here -- saying that no violation if no interrogation?

MR. FREY: There is no case of this Court saying that there's no violation in any circumstances that have been before this Court.

QUESTION: There was no interrogation as such in Massiah itself, was there? And certainly there wasn't in McLeod v. Ohio?

MR. FREY: There's nothing in McLeod to suggest that there was not interrogation. If you go back to the opinion of the Ohio court the court does refer to the statements having been voluntarily made, but I believe in context that is a reference to their having been uncoerced, and not a reference to their having been spontaneous.

The issue in McLeod, and this is a problem in dealing with a summary disposition without opinion, is that the Ohio Supreme Court held in McLeod that an indicted defendant

who did not yet have counsel did not have the right to counsel under Massiah, so that it's hard to tell what the court's reversal was based on.

QUESTION: And there was another summary reversal in which it was even clearer that there was not interrogation, wasn't there?

MR. FREY: Well, the Beatty case --

QUESTION: What's the name of it?

MR. FREY: Beatty.

QUESTION: Yes.

MR. FREY: That is unquestionably the closest I think that the Court has come to holding that, letting the defendant tell you facts about the crime violates Massiah.

QUESTION: Well, it's a person who's been indicted, isn't it?

MR. FREY: Yes. And there's no question --

QUESTION: Been indicted, under indictment.

MR. FREY: No question. When I use the word "defendant," I am referring to somebody who has been --

QUESTION: Not a suspect, but someone who's been indicted.

MR. FREY: That's correct. That's correct.

QUESTION: And this all goes back to the concurring opinions in Spano v. New York.

MR. FREY: Indeed it does.

QUESTION: Not those opinions nor any other case from this Court has ever held that if a defendant simply blurts out to the warden of the jail in which he's confined, "I want to get this off my chest; I want to tell you what happened," that that's inadmissible?

MR. FREY: They haven't, and I'm almost certain that --

QUESTION: And you won't find any way they've got to administer either, will you? So this is a paid government informer.

MR. FREY: That's true.

QUESTION: And a paid government informer do you recognize is different from a warden?

MR. FREY: Well, a warden is also an agent of the government.

QUESTION: Is he a paid government informer?

MR. FREY: Well, he's paid, he works for the government.

QUESTION: Is he a paid government -- you know what a paid government informer is.

MR. FREY: Well, no, not in the colloquial sense.

QUESTION: You don't?

MR. FREY: No, I'm saying that the warden is not a --

QUESTION: Paid government informer.

MR. FREY: -- or a --

QUESTION: He's a legal stool.

MR. FREY: Well, let me come back to make the point that I slightly lost touch with here about what Brewer does hold in response to Justice White's question.

It's true that the state lost Brewer, but it is also true that the opinion in Brewer makes clear that there was both extended association and general conversation over a wide-ranging variety of topics, and yet the Court said that these ingredients alone would not have rendered Williams' incriminating statements and actions admissible, at least that is how I read the statement by the Court, that no constitutional protection would have come into play if there had been no interrogation.

Now, there would hardly have been any need for the Court in Brewer to engage in the extended analysis of whether the Christian burial speech constituted interrogation if the mere fact that Detective Captain Leaming was in the car and being friendly to Williams was enough to cause any statements that Williams made to violate Massiah.

QUESTION: Is the statement of the defendant that the conversation was in reality a form of interrogation disputed categorically anywhere, or other than --

MR. FREY: The statement in this case?

QUESTION: I'm referring to the concurring opinion

of Judge Butzner who says, "Nevertheless, absent testimony by the informant," where he suggested that there should have been a hearing by the district judge on this issue, "absent testimony by the informant about what he said to the defendant, the judgment must be reversed because of the informant's admission that he had conversed with the defendant and because of the defendant's assertion that the conversation was a form of questioning."

Is that disputed?

MR. FREY: I have to say --

QUESTION: Did the informant dispute that at any point?

MR. FREY: Well, I think we do dispute it.

QUESTION: But did the informant?

MR. FREY: Well, the informant, we don't have an affidavit from the informant in the record in this case. All we have is the testimony of the informant at trial, and I don't recall that the testimony specifically denied interrogating him. But I do find Judge Butzner's opinion very strange in this regard, that the assertion of the petitioner in a 2255 petition that there was interrogation, which is a legal term about which much ink has been spilled by the scholars after Brewer v. Williams should be dispositive of this case.

Let me try to address a point that Justice Stewart

made about the turning from Brewer itself to the Sixth Amendment policies that underlie the right to counsel principle that's involved here. The mainstream of the Court's Sixth Amendment cases have, starting with Powell v. Alabama, have dealt with the formal judicial proceeding, that is various stages of pre-trial, which have a degree of formality where the defendant is facing unfamiliar surroundings, complex legal issues, and an experienced prosecutor.

QUESTION: That's what generally follows an indictment, isn't it?

MR. FREY: Yes. Those are things that do follow an indictment.

QUESTION: The administration of the criminal law.

MR. FREY: Yes, they do.

QUESTION: When a person's indicted, it is followed by formal judicial proceedings in an open courtroom where there are all sorts of constitutional rights to counsel, to confrontation --

MR. FREY: That's true.

QUESTION: -- it's open to the public, and it's presided over by a judge.

MR. FREY: Well, if I can -- I agree with that completely, and in those cases the need for counsel is obvious when we are talking about those proceedings.

QUESTION: The courtroom isn't always open to the

public, of course, is it?

MR. FREY: Well, I'd rather not get into --

(Laughter.)

MR. FREY: To me, the reasons for implicating the right to counsel in the Massiah setting are less obvious than they are in the formal judicial proceeding setting. And neither Massiah nor Brewer undertake a detailed analysis of the connection between the suppressed statements and the role that counsel would play.

QUESTION: Well, have you read the final paragraph in the Spano concurrence?

MR. FREY: I was coming to that; I was about to say that I think the best sources for understanding the applicable policies are your concurring opinion in Spano and the Court's opinion in Ash.

Now, Ash speaks of trial-like confrontations, and as I read the Spano opinion, it focuses on the notion that extra-judicial interrogation of the accused, which was unquestionably what there was in Spano, constitutes in effect a pre-trial trial, a trial outside the trial, to invert the Hamlet metaphor.

Now, bringing these notions to bear upon the present case, I don't think that there is anything about association and general conversation among cellmates in a jail that remotely resembles the trial-type confrontation that

brings the requirement that counsel be present into play. It seems to me that only if there is specific questioning by a government agent designed to elicit information about the offense, or some other actions or statements uniquely likely to draw the defendant out on the subject, to overcome his reticence to reveal what he knows, that we have the necessary conditions for recognition of the right to counsel, that we have a basis to say, "Yes, this is really part of the trial, this is a critical stage of the prosecution," which is the standard that has been used in Sixth Amendment cases.

Now, it's true I think that when he makes a confession to a cellmate who is going to report it, that is critical, but it is not, I believe, a stage of the prosecution, unless it emerges out of a proceeding that in some way resembles a trial-type proceeding. And at least that's the way I read Spano and Ash.

Now, in the present case, the record is entirely consistent with the conclusion that respondent was quite willing to volunteer information about the crime, and that neither specific interrogation nor any kind of trick was necessary to draw him out on the subject.

Accordingly, I think the record falls far short of justifying the relief accorded him by the Court of Appeals.

QUESTION: Well, was he drawn out or not?

MR. FREY: We don't know that. We don't know that in --

QUESTION: Well, what if he was?

MR. FREY: We -- excuse me?

QUESTION: What if he was drawn out? Was that interrogation, or --

MR. FREY: Well, I think we would have to know more. I mean, we can spin endless hypotheticals about things that could have gone on in the cell and ask ourselves whether that would or would not be the kind of trial-like confrontation for which counsel is thought to be justified under the Massiah doctrine.

QUESTION: Well, these were questions used and certainly language is drawn out, elicited, interrogated -- do you conceive those to be just used in the ordinary dictionary sense of the word, or do you conceive them to be words of art representing various places along the spectrum that you've described?

MR. FREY: Well, I am frankly somewhat at a loss, because the sources in terms of this Court's decisions to draw on are relatively limited in terms of an explication of what the concept of deliberately elicited means. I think that --

QUESTION: That was the word in Massiah, I gather.

MR. FREY: That was the expression in Massiah,

"deliberately elicited."

QUESTION: And in Brewer, it was "interrogated"?

MR. FREY: Yes, well --

QUESTION: Oh, no, it was both, both.

MR. FREY: There was a reference to "deliberately elicited," as well.

QUESTION: Well, that was a quote from Massiah.

MR. FREY: Well, there are several places where the topic is touched upon. But --

QUESTION: And you tell us that the facts in the Massiah case can be gleaned from the record in the District Court, the Court of Appeals, or perhaps in the trial court, but the, so far as reviewed in the opinion of this Court, the facts in the Massiah case were no more nor less than a conversation between Massiah and his supposed friend, weren't they?

MR. FREY: Well, except that the --

QUESTION: In the front seat of that car which had been wired for sound.

MR. FREY: Well, the opinion says that -- now, let me see if I can find the place. There are several places in the opinion where it refers to --

QUESTION: In New York City.

MR. FREY: -- you cite with approval, for instance, Judge Hayes' dissent in the Court of Appeals --

QUESTION: Yes, but I'm talking about so far as the facts reviewed in the Massiah case by this Court, there wasn't much review of them, was there?

MR. FREY: There was not much.

QUESTION: It was given that Massiah had been indicted and that his supposed friend was in fact a government agent, and that the government agent deliberately elicited or acquired information from Massiah, sitting on the front seat of that car in New York City.

MR. FREY: It didn't say deliberately elicited or acquired; it said deliberately elicited.

QUESTION: Well, and what's it -- well, I'll have to read it.

MR. FREY: I mean, in my view, I confess that I have some difficulty in evaluating our brief addresses this somewhat, what the connection is between the right to counsel and the right not to have these statements admitted.

In trying to discern it and looking at the sources that have explained it, the best I can come up with, in my understanding, is this notion that what is going on outside the trial bears the characteristics that sufficiently resemble a trial that a lawyer should be there. And I don't think jailhouse banter about the weather or other kinds of --

QUESTION: Jailhouse banter? Isn't it a little bit different when one of the bantering parties has a contingent

fee arrangement with the government, that if the bantering elicits information, he gets paid; if it doesn't, he does not get paid?

MR. FREY: It's different only in the sense that there would be no issue at all about the admissibility of the statements if he were not a government --

QUESTION: It is clear that the informant had a motive to elicit information.

MR. FREY: It's clear, in --

QUESTION: And in fact received information and in fact was paid for it. The only missing link is exactly how did he get it.

MR. FREY: Well, I think -- our position is that --

QUESTION: It's kind of hard to draw a constitutional line on just suggesting, getting a lot of conversation that will sooner or later draw out the statement --

MR. FREY: The difficulty is that the alternative is, it seems to me, to push these principles to their logical extreme because of the difficulty of drawing a line, and to end up with the situation where you simply can't overhear the defendant, I mean --

QUESTION: Well, it's easy to draw a line between somebody who was not in contact with the government before and didn't have a motive to do that --

MR. FREY: I understand, but the government doesn't

have to stop investigating the crime because the defendant has been indicted.

QUESTION: Well, but it has to stop taking him off by himself and asking him questions, at least that much.

MR. FREY: Well, but that --

QUESTION: It has to give Miranda --

MR. FREY: -- that is what Massiah and Brewer held. We can't take him off by himself and ask questions, but in this case we are talking about four or five cell mates in a cell in the Norfolk Jail who for all we know --

QUESTION: But you don't have a man under indictment and in custody unless you've got a pretty well made case, do you?

MR. FREY: Well, that is not -- well, usually, by the time of indictment, although often there are cases where more evidence would be very helpful at getting an accurate outcome of the trial. Let me just turn to my second point for one minute because my time is short, and that is the question of the scope of the agency of the informant, and I just want to make one point.

Here we had Mr. Nichols in the jail and he knew from his past experiences -- I expect most people in jail cells probably know that if they can provide information that would be helpful to the prosecution on one of their cell mates, they could expect some kind of consideration

for this information. I think it is fairly clear that if Nichols had not talked to Agent Coughlin but had simply in the expectation that he would probably get something listened, the way Sadler did, and then come forward afterwards there would be no issue in this case of a Massiah violation.

Yet what we have here is that Nichols and the agent communicate, the result of this communication is not really to impart any new information to Nichols that the FBI would like any confessions that Henry makes, and Nichols knew that, but to impose constraints on the way Nichols behaves, to tell Nichols, look, we have to have a scrupulous regard for the Sixth Amendment rights of this defendant --

QUESTION: This is a jail bird and a stool pigeon and you talk about scruples?

(Laughter)

MR. FREY: Yes, it seems to me that the agent certainly was acting scrupulously. The government --

QUESTION: We are talking about this man who did the testifying.

MR. FREY: We are talking about exclusion --

QUESTION: Isn't it true that if he admitted he questioned him, he wouldn't get paid?

MR. FREY: I can't say that. I am not --

QUESTION: Well, wasn't he told not to question and he would be paid?

MR. FREY: He was told not to question him and one of the issues that we raised --

QUESTION: And he got paid?

MR. FREY: And we don't know that he questioned him. That is the very issue in this case.

I would like to reserve what little time I have left for rebuttal.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Geltner.

ORAL ARGUMENT OF MICHAEL E. GELTNER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GELTNER: Mr. Chief Justice, and may it please the Court:

In my view, the Court of Appeals was perfectly correct both in its view of the law and in its handling of the case, given it peculiar procedural history. If we look at that procedural history, what we see is first of all the fact that the trial testimony of Mr. Nichols -- he came before the jury without any knowledge on the part of the defense that Mr. Nichols was an informant and because of that a deficiency in the development of the record as to the way in which he and Mr. Henry interacted.

The issue was squarely put by the first motion to vacate and the District judge dismissed it without a hearing. The Court of Appeals then remanded to the District judge with an opinion in which it explained to the District judge what facts to find, and the District judge, rather than holding an evidentiary hearing, wrote a letter to the prosecutor indicating that he believed the matter could be disposed of without the necessity of a public hearing and advised him if the agents did request Mr. Nichols or Sadler to interview Henry, we probably will have to grant a hearing.

At that point, the affidavit of Agent Coughlin comes forward and says that he advised Mr. Nichols not to initiate conversations with regard to the bank robbery or to question Mr. Henry. Now, in that light, I think it is easy to understand that the Court of Appeals saw the question as whether or not the record was adequate for outright reversal of the conviction or whether, on the contrary, it made sense to remand one more time for an evidentiary hearing.

With that in mind, I would like to go on and take a look at the record because I believe the record strongly supports the conclusion that the Court of appeals was correct, no matter how we interpret the Massiah decision.

We know from the record that the bank robbery ocurred on the 28th of August of 1972, and on that date

Mr. Moore and Mr. Luck were arrested and charged with the crime. On the 22nd of September, a complaint was sworn out by Agent O'Hara, who is the supervising agent in charge of the investigation, which indicates that at that time the case against Mr. Henry consisted of the FBI's knowledge that he had participated in a rental of the house on Wales Avenue in Norfolk at which Mr. Moore and Mr. Luck were arrested.

QUESTION: Mr. Geltner, let me ask you one question, referring to a statement you made a couple of moments ago, as to whether the Court of Appeals should have remanded for another hearing after the District Court treated them in the first remand the way it did. You are not suggesting here that the present decision under review remanded the habeas petition for another hearing, are you?

MR. GELTNER: No. Quite the contrary, Your Honor. The Court of Appeals saw the question as whether or not the conviction should be set aside or whether or not a hearing which would have filled out the record on the interaction between Mr. Henry and Mr. Nichols was necessary.

QUESTION: Well, it assumed then all resolved doubts in favor of the government and nonetheless set the conviction aside.

MR. GELTNER: Yes, Your Honor, precisely. And

the point of my summary of the record now is to establish that the record is quite adequate to support that conclusion.

As I was saying, when the complaint was sworn out in September, what the case against Mr. Henry consisted of was evidence that he was connected with the rental of the house which Mr. Moore and Mr. Luck were found in. On the 8th of November, the warrant turned up in Atlanta, Georgia, and on the 10th of November Mr. Henry was arrested in Atlanta, Georgia. On the 15th of November, Mr. Henry was indicted and charged with the crime.

On the 21st of November, 1972, after a period of transit, Mr. Henry arrived in Norfolk and was put in the Norfolk City Jail. At that time, from all we can tell from the record -- and I think the record clearly destablishes it -- the government's case still consisted of the evidence that he was a participant in the rental of the hideout.

On the 21st of November, Agent O'Hara visited Mr. Henry in the Norfolk City Jail, interrogates him a bit and finally Mr. Henry refuses to answer questions. According to Agent O'Hara, in his testimony which is at transcript page 106, Mr. Henry stated he would not like to answer general questions in regards to his activities as he was afraid we would change his answers around.

On the same day, without any more of a case that I have already laid out, on the very same day Mr. Coughlin

tells us from his affidavit, Agent Coughlin, that he went to visit Mr. Nichols in the Norfolk City Jail at which time he gave him instructions with regard to Mr. Henry, and although the affidavit of Agent Coughlin tells us that he placed limitations on what he wanted Mr. Nichols to do, it also tells us that he advised Mr. Nichols that there was a bank robbery, a bank robbery charge against Mr. Henry, and what the agency was interested in was getting statements about the bank robbery. It was quite clear, even if we believe Agent Coughlin's affidavit and all of its nuances, it is quite clear that he put Mr. Nichols on notice precisely as to what he wanted.

On the 27th of November, Mr. Henry appeared in court for arraignment for the -- this is the first court appearance that we know of from the record. On the morning he appeared without counsel before Judge McKensey, Judge McKensey asked him if he wanted counsel, he said he did, and Judge McKensey appointed counsel. There was a recess taken and Mr. Henry was arraigned that afternoon and appeared in court.

The next thing the record tells us is that on the 6th of December, Agent Coughlin again visited with Nichols and Nichols told him what information he had obtained from Mr. Henry. The information was essentially the same information that he testified to at trial. This

we get from Agent Coughlin's affidavit.

Now, if we -- so what we are talking about is the period of time from the 21st of November through the 6th of December during the majority of which period Nichols and Henry and others were in jail together. Now, if we look at Nichols' trial testimony, which admittedly is not laid out in -- admittedly was not the result of specific questioning on what happened between Nichols and Henry, we nevertheless see that the conversations that occurred between Henry and Nichols were quite direct and related quite specifically to the crime in question.

QUESTION: Mr. Geltner, I understand there is no question but what Henry had been indicted, but you say he had been arraigned and counsel had been appointed?

MR. GELTNER: He was arraigned and counsel was appointed on the 27th of November.

QUESTION: Does that appear somewhere here? I don't --

MR. GELTNER: That appears in the record on page one of the joint appendix, the second reference, November 28th, court proceedings, before JAM, who was Judge McKensey. That should be November 27th, not 28th. The appendix is in error. I checked it myself.

QUESTION: The appendix is in error or the record?

MR. GELTNER: The appendix is in eror. The record indicates, he docket sheet and the record indicate November 27th.

QUESTION: I see.

MR. GELTNER: The entry immediately below that, November 27, CJA 20 appointment and voucher for counseling services.

QUESTION: I see that.

MR. GELTNER: So what we have is the date of appointment of counsel for sometime in the middle of the period during which the jail interrogation eliciting, obtaining or whatever occurred. The indictment preceded the entire period, falling on November 15.

QUESTION: And then when did Nichols' conversations take place, sometime between the 15th and --

MR. GELTNER: The Nichols conversations with Henry in the jail cell occurred sometime between the 21st of November and the 6th of December.

QUESTION: So that --

MR. GELTNER: All post-indictment.

QUESTION: All post-indictment.

MR. GELTNER: All post-indictment.

QUESTION: Some post-appointment of counsel.

MR. GELTNER: That much is clear. As I am sure Your Honor is aware, the cases interpreting -- the cases

in this Court interpreting Massiah, some of them involve counsel plus indictments, some of them involve simply indictments.

QUESTION: Both Massiah and Brewer involved counsel, indictment plus counsel.

MR. GELTNER: Massiah and Brewer both involve counsel plus indictment.

QUESTION: Indictment or charge of some kind.

MR. GELTNER: Yes. Brewer involved formal charges.

QUESTION: Counsel.

MR. GELTNER: Not indictment, but there had been counsel in the case, formal charges had been filed. In McLeod, the statement was obtained after indictment but before counsel came into the case.

QUESTION: How about the other one?

MR. GELTNER: That is likewise true of the Beatty case.

QUESTION: In what jurisdiction was Beatty?

MR. GELTNER: Beatty was the Fifth Circuit decision.

QUESTION: Mr. Geltner, do you have any comment about the Hoofa and Hearst cases? You don't cite the former one, you do only in describing the dissenting opinion below.

MR. GELTNER: Yes, Your Honor. I will be happy to address those now. In the Hoffa case, we are faced with three issues, the Fourth Amendment question, the self-incrimination question, and the right to counsel question. On the right to counsel question, it seems to me that the Hoffa case turns on the proposition that the evidence obtained from Hoffa by the undercover Agent Horton was used in another case, and that if the information had been obtained for use in the case before the court at the time, then we would have Massiah. By that I mean, if the court, if you remember, Your Honor, Hoffa was on trial in something referred to in the opinion as the test fleet trial, and Mr. Horton came to see him in an undercover role while he was awaiting trial; during the period of the trial the testimony that Horton gave that was before this Court was his testimony in the jury tampering trial which resulted from in part the information that he developed.

On the Sixth Amendment question, it seems to me that the case turns on that and the Court in the Court's opinion we see a reference to that part of the Massiah opinion which says that the crucial question is whether or not information in the pending case is elicited and used in the pending case.

With regard to Hearst, Hearst of course relates to Mr. Chief Justice Burger's question before as to the

placement of a listening device. The Ninth Circuit's opinion in Hearst turns on the fact that the listening device was a listening device which was generally available and used in that jail for the purpose of monitoring security matters. The statement was not made to an agent nor was the listening device placed for the purpose of obtaining information in the pending case. That was an accident, according to the opinion of the Ninth Circuit, in Hearst, and I prefer to rest at this point on that distinction. It seems to me that is sufficient to distinguish from this case.

QUESTION: Mr. Geltner, where do you draw the line in the spectrum that Mr. Frey has referred to, would you think that a person who is under indictment and in jail volunteering a confession to the warden is a violation of Massiah?

MR. GELTNER: No, Your Honor. I think the government must attempt to obtain information in the pending case from somebody against whom an indictment is pending. That is what makes it a violation.

QUESTION: So a totally voluntary confession in effect to someone in the employ of the government does not violate Massiah?

MR. GELTNER: Unconnected with the case?

QUESTION: Well, unconnected with the case, I

don't know exactly what you mean.

MR. GELTNER: In your example, Your Honor, the warden is waiting in his office and Mr. Henry goes up and says I'd like to confess today. The fact that the warden is a government employee does not in my opinion make out a violation of Massiah. If the warden or anybody else is procured to attempt to get Mr. Henry to do so, then it seems to me that makes that a violation of Massiah.

QUESTION: What if the cellmate who isn't a government agent at the time interrogates or finds out and then as it turns out he is quite willing to testify for the government because he knows that people who do get a break but he was never put there for that purpose?

MR. GELTNER: I think I have to agree with Mr. Frey on that, Your Honor, that that is not a violation of the Massiah case because that is not the government obtaining information from the accused after --

QUESTION: Well, it happens to be the policy of this prison and this warden and this government that people who do us a favor get done a favor.

MR. GELTNER: The word is put out? Well, I think we probably --

QUESTION: Well, the word just seeps through the walls.

MR. GELTNER: I think I have to still agree with

Mr. Frey that that is not this case and that is not a government agent. At some point the government makes somebody an agent when it seeks to have him do its bidding and he does so.

QUESTION: And I suppose if the government agent who was put in this cell, if he was mute, he couldn't speak, he could just listen, I suppose you would be still making your argument because he was put there to listen?

MR. GELTNER: Put there to obtain information, that's right.

QUESTION: And it wouldn't make any difference whether he said a word or interrogated anybody or not?

MR. GELTNER: Precisely, Your Honor.

QUESTION: He would be the passive person like the passive electronic bug, is that right?

MR. GELTNER: The listening post.

QUESTION: Except the one where a man got on bail, he is indicted, he has counsel, he is out on bail and the prosecutor gets hold of one of these guys and he says he hangs out at one of the bars up there on H Street, go up there and see if you hear him bragging.

MR. GELTNER: It is the same case, Your Honor. I think that is a violation of the right to counsel.

QUESTION: Do you mean he is bragging and the agent happens to hear him?

MR. GELTNER: If the agent went there for that purpose, yes, Your Honor. If somebody else sitting at the bar happens to turn up and testify --

QUESTION: Suppose he goes up there and he brags and an FBI agent is there getting a drink, too, but he didn't go there for that purpose.

MR. GELTNER: I think that is the warden and Justice Rehnquist's example.

QUESTION: Well, it is a pretty factual inquiry, isn't it, as to the intent with which the government employee approaches the defendant?

MR. GELTNER: That is why I am summarizing the facts, Your Honor. I think that is right. I think that has been pointed out in some of the opinions, in Brewer, that is that it is essentially a factual inquiry. I think it is Mr. Justice Blackmun's opinion in Brewer that points out that the subjective intention of the agent is very important in these cases.

QUESTION: Suppose we disagree with you on the submission that just passive listening by the agent would violate the right to counsel, do you lose this case?

MR. GELTNER: Of course not, Your Honor. That is precisely where I was going with my recitation of the record. I had a reason. One of my reasons is to request the Court to take a look at the testimony of Mr. Nichols.

QUESTION: What do you think the Court of Appeals answer to my question would be?

MR. GELTNER: Precisely the same as mine. I think that is the import of Judge Butzner's opinion.

QUESTION: So do you think they said there is a violation here because passive listening would violate the right to counsel?

MR. GELTNER: They --

QUESTION: If they said that, I am not sure they went on and answered the question that you are about to answer.

MR. GELTNER: Well, Judge Winter's opinion, which is the majority opinion, which Judge Butzner concurred with, says if by association by general conversation or both Henry develops sufficient confidence and Nichols said Henry bared his incriminating secrets, we have a violation, and they --

QUESTION: That is agreeing with you that passive listening is --

MR. GELTNER: It is either/or. Judge Winter's opinion --

QUESTION: Oh, yes.

MR. GELTNER: -- is either/or. Judge Butzner's opinion places greater emphasis in my opinion on the fact that here we have a record which indicates that there were

some conversations between Nichols and Henry and those conversations were about the subject of the bank robbery.

QUESTION: Yet he concurred in Judge Winter's opinion.

MR. GELTNER: He did, sir.

QUESTION: Do you think his limitations narrowed the thrust of the court's opinion?

MR. GELTNER: The Fourth Circuit's opinion?

QUESTION: Yes.

MR. GELTNER: I think they do.

QUESTION: In other words, he is indicating he agrees with the limitations expressed in his concurring opinion.

MR. GELTNER: I think that is a fair reading. And as I was indicating, I think that they read the record well and fairly. On page 134 of the transcript, which is the first page of Nichols' testimony, Mr. Nichols is asked the question, "Did you have an opportunity to have some conversations with Henry while he was in the jail? Some conversations, we are not talking about somebody who sat there as a listening post."

QUESTION: But, Mr. Geltner, you said that the record would have supported a narrower opinion in effect than the Court of Appeals wrote, I take it, because on page 7a of the petition, the language you've been referring to

in Judge Winter's opinion, he says, "Even if we assume that Nichols obeyed his instructions not to interrogate Henry about the bank robbery, he did testify that he engaged in conversation." So they certainly don't go much beyond purely passive listening to find a violation of Massiah, do they?

MR. GELTNER: I think that is correct and I think particularly Judge Winter's opinion which here is an either/or, if by association, by general conversation or both, which I think is either/or. I think Judge Winter's opinion means either is enough. I think Judge Butzner's opinion does not place it in terms of either/or, and I think the record doesn't require it and I think that is probably the most important thing for the decision today. The record does not require it.

I want the Court to understand my position. My position is that any efforts by the government to obtain information for use in a pending trial against whom they have a pending indictment is a violation of the right to counsel unless there has been a suitable waiver, which we don't have in this case --

QUESTION: Mr. Geltner --

MR. GELTNER: Excuse me, Your Honor?

QUESTION: Go ahead.

MR. GELTNER: -- unless there has been a suitable

waiver or unless counsel is present.

QUESTION: And you draw the line on whether this is pursuant to arrangements made in advance as distinguished from something that develops after the event?

MR. GELTNER: Yes, I do, Your Honor.

QUESTION: In other words, if the arrangements are made in advance, then the listening post is an agent; if they are not made in advance, then he is just an ordinary informant like any other witness for the prosecution?

MR. GELTNER: Yes, Your Honor.

QUESTION: Mr. Geltner, let's assume Congress passed a statute requiring that listening devices be placed in the cells of all federal prisons and operated 24 hours a day. Would you think that would be valid?

MR. GELTNER: I think we would have a terrific Fourth Amendment problem. But your question is addressed to the Sixth Amendment question --

QUESTION: Yes.

MR. GELTNER: -- and I think that is Hearst. I think that my position on that is the same as my position on Hearst, that is if the purpose is something other than to obtain information for use in pending cases against whom there are people who have a right to counsel, then it is a violation. If the purpose is general, security measures, for example, then I think that -- then I have to

concede that that is not a violation of the right to counsel.

QUESTION: I take it your position would be no different if the agent in this case -- if the cellmate had said to him, "By the way, whether you know it or not, I am a government agent"?

MR. GELTNER: Then I think we've got something more like Brewer than we have here, that is we have the possibility of waiver. I think it is implicit in all of the opinions in the Brewer case that it is possible for somebody who has a right to counsel, because of indictment or formal adversary proceedings, to waive --

QUESTION: But if all this cellmate ever said is, by the way, the government has asked me to report, I am just going to tell you, they have asked me to report and I promised to report anything you ever say, and then he just shuts up, he never says another word, and the other fellow sooner or later tells him something that is incriminating.

MR. GELTNER: We might have a waiver.

QUESTION: Might have a waiver?

MR. GELTNER: We might have a waiver.

QUESTION: But except for that would be the same. Except for that, you would make the same argument?

MR. GELTNER: Yes. As the opinions, particularly the dissenting opinions in Brewer indicate, the waiver

question is always a close question in cases in which we have somebody known to be a police officer, and it seems to me it is always a very easy question and you can't find waiver when we've got an undercover informant.

Now, Your Honors, I had wanted to take a bit of time to point out in Mr. Nichols' testimony how strongly that testimony supports particularly Judge Butzner's concurring opinion for the Court of Appeals.

QUESTION: Now you are really going to try to win the case.

(Laughter)

QUESTION: Do you go far as to say after an indictment and counsel is appointed, any information obtained by any government agent cannot be used?

MR. GELTNER: Any information obtained by a government agent who seeks to obtain information for use in a pending trial --

QUESTION: I don't mean seeks. This is a guy who is just standing there.

MR. GELTNER: Why did he go there? If he went there to get information --

QUESTION: The FBI agent went there to get a drink, that is what I say in my hypothetical.

MR. GELTNER: In your hypothetical, if the FBI agent went there to get a drink and it just happened that

Mr. Henry came along and made incriminatory statements --

QUESTION: Yes, sir.

MR. GELTNER: -- in my position, that is not a violation of the right to counsel, the government has not done anything to obtain the --

QUESTION: Oh, I thought you said he did.

MR. GELTNER: I'm sorry, Your Honor, I must have confused you with my answer. I thought that was the same as the warden.

As I was saying, Your Honors, if we look at page 135 of the transcript, question, "Did Mr. Henry tell you anything about that bank robbery?" Now, tell means you've got a conversation between the two about the bank robbery. Perhaps it is not questioning, but it is a conversation. "Would you relate to the jury what he told you?" At that point, Mr. Nichols tells the jury the substance of the admissions that he attributes to Mr. Henry.

Further down, on page 136 of the transcript, question to Mr. Nicholds, "Did he give you any reason for going in the bank?" People give reasons for doing things when they are engaged in a conversation on a subject. Nowhere do we hear questions or answers in which Mr. Nichols tells us, "I overheard Henry bragging to other prisoners."

QUESTION: Well, have you ever seen transcripts of your own examination of witnesses and realize that

colloquial expressions are frequently used in eliciting testimony at trials?

MR. GELTNER: I think, Your Honor, we must assume that Mr. Sims prepared his witness and he knew what the witness' story was and he wanted to get it to the jury accurately. If I were the prosecutor in this case and had been advised by the FBI agents or the witness that what this man was was a listening post, it seems to me that the question I would have asked is did you ever hear anything while you were in the cell with Mr. Henry. We don't see that question, and because we don't see that I think we can assume that the totality of the record reflects the facts as described to the prosecutor by either the agents or Mr. Nichols before he was questioned.

QUESTION: So the use of the word "tell" as opposed to "overhear" by the prosecutor in examining a witness on direct --

MR. GELTNER: The case does not completely turn on that, but if it is crucial to the court's decision as to whether or not this was overhearing as opposed to some efforts to draw the defendant out, it seems to me that the record supports that conclusion.

And then finally we have on page 137 again the use of the word "describe" in the questions and answers and again "tell," all of which seems to lead me to the

conclusion that although we believe the proper reading of the Massiah decision, the two per curiams and of Brewer is that the government may not after formal adversary proceedings seek to obtain information from the accused without respecting the right to counsel if we have to find what is tantamount to interrogation in this case under the circumstances of a jail cell, we've got an adequate record to support the Court of Appeals in doing so.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Frey.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. FREY: Just a couple of points. I want to make clear what our position is. It is not that the informant can't open his mouth. It is that the informant can't lead the defendant to talk about the subject which he would not otherwise have talked about.

Now, with respect to Justice Marshall's question of Professor Geltner, I think it is quite clearly our view that we could send somebody down to the bar to listen because we expect him to make statements at the bar about the crime and we could use those statements without violating Massiah. Our motive to acquire information in my view is clearly not enough. And unless we do something

more that constitutes elicitation by us, the Court is being led it seems to me in an extreme position and it is an extreme position which is not defensable under the right to counsel rationale. I did not hear Professor Geltner once explain why the right to counsel was implicated in the listening post kind of situation.

The concept of interrogation did not --

MR. CHIEF JUSTICE BURGER: I think we have your point, Mr. Frey.

MR. FREY: Okay. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentltmen. The case is submitted.

(Whereupon, at 3:01 o'clock p.m., the case in the above-entitled matter was submitted.)

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