The Burger Court Opinion Writing Database

United States v. Henry

447 U.S. 264 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: APR 22 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-121

United States, Petitioner, v. Billy Gale Henry. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[April —, 1980]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether respondent's Sixth Amendment right to the assistance of counsel was violated by the admission at trial of incriminating statements made by respondent to his cellmate, an undisclosed government informant, after indictment and while in custody. — U. S. — (1979).

I

The Janaf Branch of the United Virginia Bank/Seaboard National in Norfolk, Va., was robbed in August 1972. Witnesses saw two mean wearing masks and carrying guns enter the bank while a third man waited in the car. No witnesses were able to identify respondent Henry as one of the participants. About an hour after the robbery, the getaway car was discovered. Inside was found a rent receipt signed by one "Allen R. Norris" and a lease, also signed by Norris, for a house in Norfolk. Two men, who were subsequently convicted of participating in the robbery, were arrested at the rented house. Discovered with them were the proceeds of the robbery and the guns and masks used by the gunmen.

Government agents traced the rent receipt to Henry; on the basis of this information, Henry was arrested in Atlanta, Ga., in November 1972. Two weeks later he was indicted for armed robbery under 18 U. S. C. § 2113 (a) and (d). He

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 23, 1980

Re: 79-121 - United States v. Henry

MEMORANDUM TO THE CONFERENCE:

Some printing "garbles" got into Draft I and they have been corrected -- along with minor stylistic changes.

Regards,

WEB

CHANGES THROUGHOUT

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: APR 23 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79–121

United States, Petitioner, *v.* Billy Gale Henry. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[April —, 1980]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 6, 1980

PERSONAL

RE: 79-121 - United States v. Henry

Dear Lewis:

I will defer response to your April 29 memo until the dissent comes around. I have contemplated the need for meeting some of the points you raised. I would hope my responses to the dissent will meet all your concurring points.

Regards,

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 12, 1980

Re: 79-121 - United States v. Henry

MEMORANDUM TO THE CONFERENCE:

I will have a few modest changes in this case.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 28, 1980

PERSONAL

RE: 79-6 - United States v. Henry

Dear Lewis:

Enclosed is a copy of a new draft of Henry which I am circulating to the Conference today. I have decided that it is unnecessary to make major changes in response to Bill's dissent. His central thrust is a challenge to the Massiah rule itself, but it is too late to fight that battle.

With regard to your memo of April 29th, I think you may have "over characterized" the Court's holding. The situation of a passive listening device or a situation where an informant is merely placed in close proximity to the accused is not before the Court in this case. I surely would not alter the 9th Circuit holding. I have tried to limit the holding here only to the facts of this case and no more. While your reading may be the logical next step in another case, I prefer to wait until those cases are before us.

I think I have met the points raised on your concurring opinion. I have added some language in footnote 6 which makes it clear that we are not deciding the issues which seem to trouble you. This may persuade you to withdraw your concurrence! (Hope springs eternal!)

As to your memorandum of May 10, I have changed the language in the statement of the holding on page 9 from "should have known" to "with the objective of" in order to avoid any appearance of a negligence test.

Regards,

WEB

Mr. Justice Powell

CHANGES THROUGHOUT

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

3rd DRAFT

Recirculated: MAY 28 1980

SUPREME COURT OF THE UNITED STATES

No. 79-121

United States, Petitioner, v. Billy Gale Henry. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[April —, 1980]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 29, 1980
PERSONAL

RE: 79-121 - Henry v. United States

Dear Harry:

Bill and Potter having responded, I think you can proceed on the assumption that the present draft will be acceptable to at least a plurality and more likely a majority.

Regards,

WEB

Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 29, 1980

RE: 79-121 - United States v. Henry

Dear Bill:

I have your memorandum of May 29 indicating your disagreement with the change in the penultimate paragraph. While there is no doubt that the opinion has objective elements, some concern was expressed that the language in the first draft would lead to a pure negligence test. The Court may in some other case wish to extend the Massiah "deliberately elicited" test that far, but it does not seem necessary here. Certainly, nothing in the opinion precludes such a test. This part of the opinion was the most tricky for me, and I am willing to try to accomodate other views.

Would the substitution of "likely to induce" rather than "with the objective of inducing" on page 9 strike the proper balance?

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1980

RE: 79-121 - United States v. Henry

MEMORANDUM TO THE CONFERENCE

Enclosed is Wang-draft of footnctes that will be added to the opinion.

Regards,

WEB

[illegible] footnote 5a, page 5, at end of first full paragraph:

Although both the Government, and Mr. Justice Rehnquist in dissent, question the continuing vitality of the Massiah branch of the Sixth Amendment, we reject their invitation to reconsider it.

5b, page 6, at the end of line 10 of the second
ph:

affidavit of the agent discloses that "Nichols had been
y the FBI for expenses and services in connection with
rmaton he had provided" as an informant for at least a
r. The only reasonable inference from this statement is
hat Nichols was paid when he produced information, not that
Nichols was continuously on the payroll of the FBI. Here, the
service requested of Nichols was that he obtain incriminating
information from Henry; there is no indication that Nichols
would have been paid if he had not performed the requested
service.

[redacted] end of the first sentence of

[redacted]gent's affidavit are particularly

[redacted]t is clear that the agent in his

[redacted]ichols singled out Henry as the inmate in

[redacted]had a special interest. Thus, the affidavit

[redacted]"I specifically recall telling Nichols that he was

[redacted]stion Henry or these individuals" and "I recall

[redacted]Nichols not to initiate any conversations with Henry

[redacted]dfng the bank robbery charges," but to "pay attention to

[redacted]information furnished by Henry." (emphasis added) Second,

[redacted]he agent only instructed Nichols not to question Henry or to

initiate conversations regarding the bank robbery charges.

Under these instructions, Nichols remained free to discharge

his task of eliciting the statements in myriad less direct

ways.

6a, page 7, at the end of line 9:

the role of the agent at the time of the tions between Massiah and his codefendant was more than that of the federal agents here. Yet the tional fact in Massiah that the agent was monitoring the versations is hardly determinative. In both Massiah and his case, the informant was charged with the task of obtaining information from an accused. Whether Massiah's codefendant questioned Massiah about the crime or merely engaged in general conversation about it was a matter of no concern to the Massiah Court. Moreover, we deem it irrelevant that in Massiah the agent had to arrange the meeting between Massiah and his codefendant while here the agents were fortunate enough to have an undercover informant already in close proximity to the accused.

Insert footnote 7a, page 9, at end of the first paragraph:

This is admittedly not a case such as Massiah where the informant and the accused had a prior longstanding relationship. Nevertheless, there is ample evidence in the record which discloses that Nichols had managed to become more than a casual jailhouse acquaintance. That Henry could be induced to discuss his past crime is hardly surprising in view of the fact that Nichols had so engratiated himself that Henry actively solicited his aid in executing his next crime--his planned attempt to escape from the jail.

Insert in text after the first paragraph on page 9:

Our conclusion derives support from the American Bar Association's Code of Professional Responsibility as applied to civil cases. Although the Code of Professional Responsibility and the disciplinary rules are not constitutionally based, they are designed to apply to practicing lawyers and their representatives. See Massiah v. United States, 377 U.S. 201, 210-211 (1964)(White, J., dissenting). That Code makes clear that for an attorney or his representative to attempt to extract information from the opposing litigant without the presence or permission of that litigant's attorney would be regarded as unprofessional conduct.[7a] The ethical considerations in this criminal case, with the defendant under indictment and in custody, are surely no less.

[7a]Disciplinary Rule 7-104(A)(1) provides:

> "(A) During the course of his representation of a client a lawyer shall not:
>
> (1)Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

See also Ethical Consideration 7-18.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1980

RE: 79-121 - United States v. Henry

Dear Harry:

I am sure your June 5 memo was not intended to foreclose responses to your dissent. They will be around later today.

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1980

RE: 79-121 - United States v. Henry

MEMORANDUM TO THE CONFERENCE

The textual paragraph on page 9 proposed in my June 6 memorandum will be deleted.

I propose to change Note 7a, page 10 to the following:

"Although it does not bear on the constitutional question in this case, we note that Disciplinary Rule 7-104(A)(1) of the Code of Professional Responsibility provides:

'(A) During the course of his representation of a client a lawyer shall not:

(1)Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.'

See also Ethical Consideration 7-18."

Regards,

CHANGES AS MARKED:

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: JUN 10 1980

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79–121

United States, Petitioner, *v.* Billy Gale Henry. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[April —, 1980]

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The Janaf Branch of the United Virginia Bank/Seaboard National in Norfolk, Va., was robbed in August 1972. Witnesses saw two men wearing masks and carrying guns enter the bank while a third man waited in the car. No witnesses were able to identify respondent Henry as one of the participants. About an hour after the robbery, the getaway car was discovered. Inside was found a rent receipt signed by one "Allen R. Norris" and a lease, also signed by Norris, for a house in Norfolk. Two men, who were subsequently convicted of participating in the robbery, were arrested at the rented house. Discovered with them were the proceeds of the robbery and the guns and masks used by the gunmen.

Government agents traced the rent receipt to Henry; on the basis of this information, Henry was arrested in Atlanta, Ga., in November 1972. Two weeks later he was indicted for armed robbery under 18 U. S. C. § 2113 (a) and (d). He

HA

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 17, 1980

MEMORANDUM TO THE CONFERENCE:

Re: One case held for No. 79-121 - United States v. Henry

One case has been held for Henry: No. 79-6227 - Rosario v. United States. I WILL VOTE TO DENY.

Petitioner was indicted for furnishing false information in the acquisition of firearms. After indictment, petitioner was by chance introduced to an ATF agent, who was posing as a South American businessman engaged in gun running. The agent was not investigating petitioner, nor did he know that petitioner was under indictment on a firearms charge. At this meeting, petitioner made incriminating statements. Thereafter, after the agent learned that petitioner was under indictment, the agent had a subsequent meeting with petitioner, at which petitioner repeated his incriminating statements. The DC admitted the statements, and the CA6 affirmed, holding that the statements were voluntarily given and not deliberately elicited from petitioner.

Both courts below held that petitioner's statements were volunteered by him at a time when the informant was not investigating petitioner, nor did he know that petitioner was under indictment. Under these circumstances, I do not see a violation of petitioner's Sixth Amendment rights.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 23, 1980

RE: No. 79-121 United States v. Henry

Dear Chief:

I agree.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 29, 1980

RE: No. 79-121 United States v. Henry

Dear Chief:

Thank you very much for your suggestion of May 29 to substitute "likely to induce" for "with the objective of inducing" on page 9 of your circulation of May 25. That substitution is entirely satisfactory to me.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 29, 1980

RE: 79-121 - United States v. Henry

Dear Chief:

I note that you have changed the penultimate paragraph in the above to reflect a subjective standard rather than the objective one referred to in earlier drafts. I am inclined to think that the objective standard was preferable. Could you lay the case over for a week so I can take another look and consider writing something?

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 30, 1980

Re: No. 79-121, U.S. v. Henry

Dear Chief,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 29, 1980

Re: 79-121 - United States v. Henry

Dear Chief:

Substitution of the phrase "likely to induce" for the phrase "with the objective of inducing" entirely takes care of my problem.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 29, 1980

Re: No. 79-121, United States v. Henry

Dear Chief,

Your most recent circulation gives me concerns similar to those expressed by Bill Brennan. I shall await your final decision, which you will undoubtedly make fairly promptly in view of Harry Blackmun's dilemma.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 6, 1980

Re: No. 79-191, United States v. Henry

typing mistake US v. Henry is 79-121

Dear Chief,

The proposed additional footnotes enclosed with your Memorandum of June 6 are entirely acceptable to me, but I would strongly object to the proposed additional paragraph on page 9 of the text.

Sincerely yours,

P.S.
I

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 22, 1980

Re: No. 79-121 United States v. Henry

Dear Bill,

Help yourself, and thanks.

Sincerely yours,

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 5, 1980

Re: 79-121 - United States v. Henry

Dear Harry,

Please join me in your excellent opinion in this case.

Sincerely yours,

Mr. Justice Blackmun

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 14, 1980

Re: No. 79-121 - United States v. Billy Gale Henry

Dear Chief:

Please join me.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 2, 198(

Re No. 79-121 - United States v. Henry

Dear Chief:

I, of course, shall await the dissent in this case.

Sincerely,

HAB

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 29, 1980

Re: No. 79-121 - United States v. Henry

Dear Chief:

As I stated at Conference this morning, I had a dissent to your second draft circulation ready to be distributed on Wednesday. Then your third draft recirculation of May 28 arrived with, I think, a very definite change in approach.

In view of Bill Brennan's note of this morning, I am at a loss now as to where the votes stand. What I write in dissent, of course, depends on the form your majority opinion finally takes.

Will you let me know as soon as possible whether the second draft or the third draft will be the final one so that I may proceed and get this case on the way without further waste effort on my part.

Sincerely,

HAB

The Chief Justice
cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 5, 1980

MEMORANDUM TO THE CONFERENCE:

Re: No. 79-121 - United States v. Henry

I am assuming that the Chief Justice's recirculation of May 28, Lewis' recirculation of May 29, and the Chief's change submitted with his letter of May 29, are now the definitive writings in this case. It is on that assumption that I have prepared the enclosed revised dissent.

HAB

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: JUN 06 1980

Recirculated: _____

No. 79-121 - United States v. Henry

MR. JUSTICE BLACKMUN dissenting.

In this case the Court, I fear, cuts loose from the moorings of Massiah v. United States, 377 U.S. 201 (1964),[1] and overlooks or misapplies significant facts to reach a result that is not required by the Sixth Amendment, by established precedent, or by sound policy.

The Court of Appeals resolved this case by a divided vote, with all three judges writing separately. Three of the seven judges then on that court dissented from the denial of rehearing en banc. And MR. JUSTICE POWELL, in his separate

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: JUN 11 1980

Page references changed to correspond with other writings; stylistic changes; and pp. 1, 6-7, 9, and 11.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-121

United States, Petitioner, *v.* Billy Gale Henry. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June —, 1980]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE WHITE joins, dissenting.

In this case the Court, I fear, cuts loose from the moorings of *Massiah* v. *United States*, 377 U. S. 201 (1964),[1] and overlooks or misapplies significant facts to reach a result that is not required by the Sixth Amendment, by established precedent, or by sound policy.

The Court of Appeals resolved this case by a divided vote, with all three judges writing separately. Three of the seven judges then on that court dissented from the denial of rehearing en banc. And MR. JUSTICE POWELL, in his separate concurring opinion, obviously is less than comfortable, finds the case "close and difficult," *ante*, at 2, and writes to assure that his concurring vote preserves his contrary posture when the Court will be confronted with only "the mere presence or incidental conversation of an informant in a jail cell." *Ibid.* This division of opinion about this case attests to the importance of correct factual analysis here.

Because I view the principles of *Massiah* and the facts of this case differently than the Court does, I dissent.

I

Massiah mandates exclusion only if a federal agent "deliberately elicited" statements from the accused in the absence

[1] For purposes of this case, I see no need to abandon *Massiah* v. *United States*, 377 U. S. 201 (1964), as MR. JUSTICE REHNQUIST does.

April 29, 1980

79-121 United States v. Henry

Dear Chief:

John's note prompts me to comment.

I agree with the first paragraph of John's letter and would be pleased if you would cite to pages 1347-1348 of the Hearst decision.

I do not believe, however, that I have misread your opinion. On page two of my concurrence I state that "I therefore agree with the Court that Massiah is not violated when a passive listening device merely collects, but does not induce, incriminating comments. Ante, at 7 n.6 citing United States v. Hearst." I believe that this comment is supported by footnote six of your opinion where you state that an inanimate electronic device "has no capability of leading the conversation into any particular subject or prompting any particular replies."

Furthermore, I believe that my characterization is consistent with the Hearst decision itself. In that decision CA9 dismissed appellant's Massiah claim by stating that "[t]he obvious problem with applying Massiah to the facts surrounding the making of the Tobin tape is the absence of any governmental attempt to elicit incriminating statements from appellant." 563 F.2d at 1347. Mere surreptitious listening was insufficient because "under Massiah, as interpreted by Brewer, there was no violation of appellant's Sixth Amendment right to the assistance of counsel because there was no interrogation of her--either formally or surreptitiously--by the government." Id., at 1348.

Of course, as John's note indicates, if there were any intrusion (by listening device or otherwise) on a conversation betweeen an inmate and his lawyer, that would present a different and easy case for suppression. In those circumstances even passive listening would interfere with the right to assistance of counsel.

I recognize that our characterization of the Hearst opinion is not at the crux of this case. Nonetheless I plan to retain the language of my current draft unless you believe that I have misconstrued your opinion.

Sincerely,

The Chief Justice

lfp/ss

cc: Mr. Justice Stevens

April 29, 1980

79-121 United States v. Henry

Dear Chief:

I am circulating today the enclosed concurring opinion.

As I stated at Conference, I would have preferred to remand this case for an evidentiary hearing. It is not entirely clear that the informer engaged in the type of deliberate inquiry (interrogation) that is necessary under Massiah and Brewer. The dissent is likely to attack vigorously on this issue.

Also, as indicated in a recent telephone talk, I have some concern that your opinion may be read as enunciating - in effect - a per se rule that any conversation in which an informer in a jail cell participates, is presumptively a deliberate intent to obtain incriminating evidence.

I recognize that drawing the line will not be easy, especially where a conversation took place on a "one-on-one" basis. Nevertheless, as stated in my concurrence, I do not believe that the mere presence of an informer in a position where he can associate with suspects, creates any presumption of a Massiah violation. Nor do I think that merely engaging in conversation should require suppression of incriminating statements that may have been made voluntarily. The conversation could have been about how the New York Yankees are doing, the unpalatability of jailhouse food, or how much the informer misses his mistress. There is a vast amount of conversation among prisoners that is irrelevant to a particular inmate's possible guilt.

The purpose of my concurrence is to state these views.

Sincerely,

The Chief Justice

lfp/ss

April 29, 1980

79-121 United States v. Henry

Dear Potter:

I enclose a copy of a concurring opinion in the above case that I am circulating today, together with a copy of my letter to the Chief Justice.

I find his opinion ambiguous. Although my preference still would be to remand, I think it is permissible to accept the conclusion of the Court of Appeals - and now of a majority of our Brothers - that the government did act improperly in this case. But I think it quite important to make clear that an informer in the jailhouse, no more than the placing of a "bug" there, is not a per se violation of Massiah and Brewer. In both of those cases, as your opinions make clear, there was a good deal more than the presence of an officer or informer, and a general conversation. If you should agree with me, perhaps you will think it appropriate to join my opinion.

Sincerely,

Mr. Justice Stewart

lfp/ss

4-29-80

From: Mr. Justice Powell

Circulated: APR 29 1980

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-121

United States, Petitioner, v. Billy Gale Henry.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[May —, 1980]

MR. JUSTICE POWELL, concurring.

The question in this case is whether the Government deliberately elicited information from respondent in violation of the rule of *Massiah* v. *United States*, 377 U. S. 201 (1964), and *Brewer* v. *Williams*, 430 U. S. 387 (1977). I join the opinion of the Court, but write separately to state my understanding of the Court's holding.

I

In *Massiah* v. *United States*, this Court held that the Government violated the Sixth Amendment when it deliberately elicited incriminating information from an indicted defendant who was entitled to assistance of counsel. 377 U. S., at 201. Government agents outfitted an informant's automobile with radio transmitting equipment and instructed the informant to engage the defendant in conversation relating to the crimes. *United States* v. *Massiah*, 307 F. 2d 62, 72 (CA2 1962) (Hayes, J., dissenting). In suppressing statements overheard during the resulting conversation, the Court emphasized that the Sixth Amendment must "'apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. . . .'" 377 U. S., at 206, quoting 307 F. 2d, at 72 (Hayes, J., dissenting). Similarly, in *Brewer* v. *Williams*, *supra*, we applied *Massiah* to a situation in which a police detective purposefully isolated a suspect from his lawyers and, during a long ride in a police car, elicited incriminating remarks from the defendant through skillful interrogation.

May 10, 1980

PERSONAL

79-121 United States v. Henry

Dear Chief:

I appreciate your desire to defer a response to my memorandum of April 29th until you circulate changes in light of Bill's dissent.

I wonder if I might burden you with one further question. On page nine you state that the government violated Massiah "[b]y intentionally creating a situation which the agents should have known would induce Henry to make incriminating standards." The "should have known" language suggests the creation of a negligience standard as part of the Massiah/Brewer test. Yet the agents acted intentionally and the Court of Appeals stated that "Nichols deliberately used his position" to secure information. Ante, at 6.

I am afraid this "should have known" phrase will be read to broaden Massiah and Brewer beyond the facts of this case.

Sincerely,

The Chief Justice

lfp/ss

1-2

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

5-29-80

2nd DRAFT

From: Mr. Justice Powell

Circulated: _____

Recirculated: MAY 29 1980

SUPREME COURT OF THE UNITED STATES

No. 79-121

United States, Petitioner, v. Billy Gale Henry. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[May —, 1980]

MR. JUSTICE POWELL, concurring.

The question in this case is whether the Government deliberately elicited information from respondent in violation of the rule of *Massiah* v. *United States*, 377 U. S. 201 (1964), and *Brewer* v. *Williams*, 430 U. S. 387 (1977). I join the opinion of the Court, but write separately to state my understanding of the Court's holding.

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pp. 1, 2, 3

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

6-10-80

Circulated: _____

3rd DRAFT

Recirculated: JUN 10 198

SUPREME COURT OF THE UNITED STATES

No. 79-121

United States, Petitioner, v. Billy Gale Henry. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[May —, 1980]

MR. JUSTICE POWELL, concurring.

The question in this case is whether the Government deliberately elicited information from respondent in violation of the rule of *Massiah* v. *United States*, 377 U. S. 201 (1964), and *Brewer* v. *Williams*, 430 U. S. 387 (1977). I join the opinion of the Court, but write separately to state my understanding of the Court's holding.

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In *Massiah* v. *United States*, this Court held that the Government violated the Sixth Amendment when it deliberately elicited incriminating information from an indicted defendant who was entitled to assistance of counsel. 377 U. S., at 201. Government agents outfitted an informant's automobile with radio transmitting equipment and instructed the informant to engage the defendant in conversation relating to the crimes. *United States* v. *Massiah*, 307 F. 2d 62, 72 (CA2 1962) (Hays, J., dissenting). In suppressing statements overheard during the resulting conversation, the Court emphasized that the Sixth Amendment must "'apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. . . .'" 377 U. S., at 206, quoting 307 F. 2d, at 72 (Hays, J., dissenting). Similarly, in *Brewer* v. *Williams*, *supra*, we applied *Massiah* to a situation in which a police detective purposefully isolated a suspect from his lawyers and, during a long ride in a police car, elicited incriminating remarks from the defendant through skillful interrogation.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 22, 1980

Re: No. 79-121 - United States v. Henry

Dear Chief:

If neither Byron nor Harry decide to write or assign a dissent in this case, I will do so.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

1st DRAFT

Circulated: 8 MAY 1980

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 79-121

United States, Petitioner, *v.* Billy Gale Henry.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[May —, 1980]

MR. JUSTICE REHNQUIST, dissenting.

The Court today concludes that the Government through the use of an informant "deliberately elicited" information from respondent after formal criminal proceedings had begun, and thus the statements made by respondent to the informant are inadmissible because counsel was not present. The exclusion of respondent's statements has no relationship whatsoever to the reliability of the evidence, and it rests on a prophylactic application of the Sixth Amendment right to counsel that in my view entirely ignores the doctrinal foundation of that right. The Court's ruling is based on *Massiah* v. *New York*, 377 U. S. 201 (1964), which held that a post-indictment confrontation between the accused and his accomplice, who had turned State's evidence and was acting under the direction of the government, was a "critical" stage of the criminal proceedings at which the Sixth Amendment right to counsel attached. While the decision today sets forth the factors that are "important" in determining whether there has been a *Massiah* violation, *ante*, p. 6, I think that *Massiah* constitutes such a substantial departure from the traditional concerns that underlie the Sixth Amendment guarantee that its language, if not its actual holding should be re-examined.

I

The doctrinal underpinnings of *Massiah* have been largely left unexplained, and the result in this case, as in *Massiah*, is difficult to reconcile with the traditional notions of the role of

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 23, 1980

Re: 79-121 - United States v. Henry

Dear Chief:

Please join me.

Respectfully,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 29, 1980

Re: 79-121 - United States v. Henry

Dear Chief:

You can solve my concern about footnote 6 if you will simply add a reference to pages 1347-1348 immediately after the Hearst citation. The portion of the Hearst opinion that troubles me appears at pages 1344-1346.

I wonder if Lewis could be persuaded to omit the words "I therefore agree with the Court that" on page 2 of his concurrence. The two reasons why I think he might be willing to omit these words are (1) I do not believe the Court has so held; and (2) I wonder if he would feel the same way if the listening device picked up conversations between a prisoner and the prisoner's lawyer. NO

Respectfully,

John

The Chief Justice

cc: Mr. Justice Powell