

## Recent Decisions: Criminal Law: Sixth Amendment Right to Counsel

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## RECENT DECISIONS

**Criminal Law: Sixth Amendment Right to Counsel**—In *Massiah v. United States*,<sup>1</sup> the petitioner and a man named Colson were indicted for violating the federal narcotics laws. Each retained counsel, pleaded not guilty, and was released on bail. A few days later, without the petitioner's knowledge, Colson decided to cooperate with the Government agents in their continuing investigation of the narcotics activities in which the petitioner, Colson, and others allegedly had been engaged. Colson permitted an agent to install a radio transmitter under the front seat of Colson's automobile so that the agent, equipped with a receiving device, would be able to hear any conversations carried on inside. Subsequently, Colson and the petitioner had a lengthy conversation while sitting in the car, in the course of which the petitioner made several incriminating statements. At the petitioner's trial, these incriminating statements were brought before the jury through the agent's testimony, despite the petitioner's objection.

On appeal, the petitioner argued that it was error to allow the agent to testify to the incriminating statements. This argument was based on two separate and distinct grounds. First, he contended that the use of the radio equipment violated his fourth amendment rights and, consequently, that all evidence thereby obtained was inadmissible under the rule of *Weeks v. United States*.<sup>2</sup> Second, he contended that his fifth and sixth amendment rights were violated because the Government agents had deliberately elicited the incriminating statements from him after his indictment and in the absence of his counsel.

The Court decided in favor of the petitioner and based its reasoning on his second argument, stating that the right to assistance of counsel accrues, at the latest, when the suspect is indicted and that any statement elicited from the accused after indictment and in the absence of his counsel can not be used as evidence against him at his trial. In so disposing of the case, the Court never reached the fourth amendment issue. Mr. Justice Stewart, who wrote the majority opinion, stated that the petitioner's sixth amendment right to counsel was denied even though the incriminating statements were indirectly gained through the help of his co-defendant, Colson. Such an indirect and surreptitious interrogation was said to be more of an infringement of an accused's rights than an ordinary police interrogation, because the accused did not realize that he was being questioned. The Court, however, took pains to point out that it was permissible to continue an investigation of the petitioner's alleged criminal activities, but that statements of a defendant so obtained could not be introduced as evidence against him.

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<sup>1</sup> 84 Sup. Ct. 1199 (1964).

<sup>2</sup> 232 U.S. 383 (1914).

One month after the Court handed down the decision of *Massiah v. United States*, it extended the *Massiah* rule in the case of *Escobedo v. Illinois*.<sup>3</sup> In *Escobedo*, the Court said that when the investigation is no longer a general inquiry into an unsolved crime, but has focused on a particular suspect, the right to assistance of counsel attaches. Therefore, the sum effect of the *Massiah* and *Escobedo* decisions is that when a person becomes the "accused," irrespective of whether or not he has been formally charged, a right to assistance of counsel arises. This right, once established, continues to exist unless it is competently and intelligently waived.<sup>4</sup>

It should be noted that the Court did not consider any fourth amendment issues in reaching its decision in *Massiah*. Faced with a comparable situation in *On Lee v. United States*,<sup>5</sup> the Court, on the other hand, based its decision on the fourth amendment while ignoring the sixth amendment implications. That case involved facts similar to those in *Massiah*, except that the incriminating evidence was obtained before the indictment. In *On Lee*, an acquaintance equipped with a hidden radio transmitter engaged the petitioner in a conversation while in the petitioner's store and later, while on a city street. The Court held that the federal agent who heard the incriminating statements on his radio receiver could testify to the conversation. The incriminating statements in *Massiah* were made post-indictment and on the street. The statements in *Escobedo* were pre-indictment and in the police station. Those in *On Lee* were pre-indictment and on the street. Using time and location as salient parameters, it appears that *On Lee* would be decided differently today in light of the later Court pronouncements.

Approximately a year before the Court decided the *Massiah* and *Escobedo* cases, it handed down a decision in *Lopez v. United States*<sup>6</sup> which seems to be in conflict with these cases. The *Lopez* case involved the attempted bribery of an Internal Revenue agent. The evidence at the trial showed that the agent, while investigating the petitioner's business, was offered a sum of money as a bribe to keep the agent from reporting an alleged tax evasion. The agent, equipped with a hidden wire recorder, met with the petitioner several days later on the pretense of accepting some more bribe money. During the course of their conversation, the petitioner again offered the agent money. The Court, after rejecting the petitioner's defense of entrapment, stated that the recording of the conversation did not violate the petitioner's rights under the fourth amendment. The Court reasoned that because the agent could testify about the conversation, an electronic device used to obtain the most reliable evi-

<sup>3</sup> 84 Sup. Ct. 1758 (1964).

<sup>4</sup> 372 U.S. 335 (1963).

<sup>5</sup> 343 U.S. 747 (1952).

<sup>6</sup> 373 U.S. 427 (1963).

dence of that conversation would also be admitted. In reaching this decision, the Court never discussed the sixth amendment implications.

Considering the *Lopez* fact situation, it would appear that when the agent returned to record the petitioner's statements, the investigation was no longer a general inquiry and the petitioner was actually, although not formally, the "accused," thus rendering the recording inadmissible under the *Massiah-Escobedo* rule. *Lopez* was not mentioned in *Massiah* or *Escobedo*, although on its face, the reasoning behind the *Massiah-Escobedo* rule impliedly overrules *Lopez*, unless the Court makes the distinction between a statement which admits a past crime and a statement which is made during the commission of a crime. A possible reason for such a distinction is that the Court would feel that a person might be forced or tricked into admitting a past crime, whereas no coercion would be involved in merely recording the statements made while the criminal act is taking place.

Many questions are yet unanswered. Has an investigation "focused" on the accused as soon as he is picked up for questioning? Must he be advised of his right to counsel? Must counsel be appointed during interrogation if the accused is indigent? In time, the answers will be provided by the Court on a case-by-case basis.

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**Evidence: Admission of Third Party's Declaration Against Penal Interest**—The defendant was arrested and convicted of possessing heroin in violation of California law. The lower court refused to permit a police officer called by the state to testify on cross-examination that the defendant's companion had admitted to the officer that heroin which the defendant was charged with possessing actually belonged to her. Upon appeal, the defendant argued that the police officer should have been allowed to answer the question, contending that the hearsay rule does not preclude admission of a declaration against penal interest. The state's argument was that the traditional rule only admits those declarations which are against the pecuniary or proprietary interests of the declarant. Further, the state contended that there was no showing that the declarant was unavailable to testify as to the matters involved. The Supreme Court of California, in *People v. Spriggs*,<sup>1</sup> held in favor of the defendant and ordered a new trial.

The English *Sussex Peerage* case,<sup>2</sup> decided in 1844, constitutes the first expression of the rule that a declaration of a third party against his penal interest is not admissible. Wigmore calls this case a "backward step and an arbitrary limit put upon the [hearsay] rule."<sup>3</sup>

<sup>1</sup> 36 Cal. Rptr. 841, 389 P. 2d 377 (1964).

<sup>2</sup> 11 Cl. & F. 109 (1844), where the declarations of a clergyman that he had performed a marriage which would subject him to a prosecution were rejected.

<sup>3</sup> WIGMORE, EVIDENCE §1476 (3d ed. 1940).