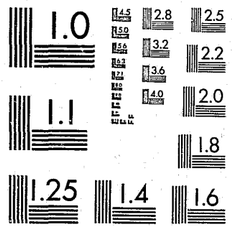

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SEPTEMBER 1983

The Police and the Elderly

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CONFESSIONS AND THE SIXTH AMENDMENT RIGHT TO COUNSEL (Conclusion)

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

VIOLATION OF THE RIGHT TO COUNSEL

The point at which a defendant's right to counsel attaches in a criminal case is a crucial factor in any sixth amendment analysis; however, attachment of the right is meaningless unless the right is violated. In *Massiah,* there would have been no violation had the Government not—through Colson—deliberately elicited the incriminating statements from Massiah in the absence of his counsel. Two questions immediately come to mind. First, would Massiah's right to counsel, which clearly had attached as the result of his indictment, have been violated if Colson had deliberately elicited the statements from Massiah on his own initiative and then contacted Murphy and agreed to testify to the admissions in court? Second, assuming that Colson was acting as an agent of the Government, and there is no doubt that he was, would there have been a violation if Colson had obtained the incriminating statements from Massiah without deliberate elicitation?

The Requirement of Government Involvement

It is a fundamental principle of constitutional criminal procedure that the exclusionary rule only operates to exclude evidence that has been obtained as the result of unconstitutional conduct on the part of Federal or State officials and their agents.[31] As a result of this principle, incriminating statements deliberately elicited by private persons—persons who are not acting pursuant to Government direction—should not be subject to exclusion even though the defendant's sixth amendment right to counsel had attached at the time the statements were obtained. While this rule appears to have been generally accepted by the courts, there has been some controversy over what type of relationship must exist between a private citizen and the Government before the private citizens' actions will be viewed as those of the Government.

In *United States* v. *Van Scoy,*[32] one Casebeer, who in the past had acted as a Government informant, deliberately elicited incriminating statements in the form of notes passed from cell to cell from the defendant Van Scoy while they were incarcerated at the Lewisburg Penitentiary. These notes detailed Van Scoy's involvement in the murder of another prisoner, a crime for which Van Scoy had been charged at the time the notes were elicited. Casebeer turned these notes over to the FBI, and over objection, they were admitted in evidence against Van Scoy at his murder trial. Van Scoy appealed his conviction on grounds that Casebeer was acting as a Government agent at the time he deliberately elicited the notes, and therefore, his (Van Scoy's) sixth amendment right to counsel had been violated. The appellate court reviewed the transcript of the suppression hearing conducted in the case and agreed with the trial court that although Casebeer had served as an informant for the FBI in the past, there was nothing to suggest that he had been paid or had been given any favorable treatment as the result of his cooperation. Furthermore, the court found there was no evidence which suggested that the Government instructed Casebeer to secure information with regard to the murder or that Casebeer was in any way paid to discover such information. The court adopted the following findings as set forth by the trial court:

> "At best, it can be said that Casebeer was willing to furnish certain information without any instructions from the government. Although it is true that Casebeer undoubtedly knew that the information he secured would be useful and accepted by the government, it is the Court's view that this does not convert him into a government agent . . . and the Court cannot say that the mere acceptance of such inculpatory information converts an informant acting without direction from the government into a government agent." [33]

Although Casebeer was not found to be a Government agent, the opinion certainly suggests that the court might have ruled differently if Casebeer had been paid or otherwise compensated for his past activities. This is interesting because it suggests that an informant's deliberate elicitation can result in a sixth amendment violation requiring suppression, even though the Government has not solicited the informant's help or in any way targeted the informant against the defendant.

In *United States* v. *Sampol,*[34] the court addressed the question left open in *Van Scoy,* i.e., whether a jailhouse informant's deliberate elicitation of incriminating statements from an indicted defendant and his subsequent testimony concerning these statements violates the defendant's sixth amendment right to counsel where the Government has not directed or targeted the informant against the defendant.

In *Sampol,* one Sherman Kaminsky had been indicted for extortion and interstate racketeering in the Southern District of New York, in the District of New Jersey, and in the Northern District of Illinois. After pleading guilty to each indictment, he became a fugitive and remained in that status until his arrest in the State of Washington in January 1978. Kaminsky was returned to New York and incarcerated at the Metropolitan Correctional Center in New York City to await sentencing. Upon his arrival at the center, Kaminsky began to develop information from fellow inmates, information that his attorney passed on to the FBI. On June 14, 1978, Kaminsky was taken before a Federal judge for sentencing, and the judge was told of Kaminsky's cooperation.

Special Agent Riley

" . . . deliberate elicitation of . . . incriminating statements [is] a necessary ingredient in the sixth amendment right to counsel violation. . . ."

The judge sentenced Kaminsky on the New York charges and then continued the sentencing in the New Jersey case for 6 months, with the understanding that continued cooperation with the Government would be taken into consideration at that time. In referring to the level of cooperation that was expected from Kaminsky, the judge stated: "If you don't make good, I will throw you in the can if it's the last act I do before I pass on. . . ." [35]

Kaminsky was returned to the center following his sentencing and proceeded to develop information from inmates concerning a variety of crimes—some for which the inmates involved had already been formally charged and others that had gone undetected by the police up to that time or were still in the planning stage. This information was dutifully reported by Kaminsky either directly to Government agents or indirectly through his attorney. One inmate who was unlucky enough to befriend Kaminsky during this time was Alvin Ross, who was awaiting trial on numerous Federal charges resulting from the 1976 murder of Chilean Ambassador Orlando Letelier in Washington, D.C. While Kaminsky was not directed by the Government to elicit information from Ross, at least no more so than any other inmate, Ross and Kaminsky were confined in the same unit, and some time after June 14, 1978, they "began to talk to each other." Ross made incriminating statements to Kaminsky concerning the murder of Letelier, and this information was reported to the assistant U.S. attorney who was handling Kaminsky's case.

On October 31, 1978, Kaminsky and his attorney met for the first time with the Federal prosecutor in the Letelier case. The prosecutor advised Kaminsky that he should continue his association with Ross; however, he admonished Kaminsky not to initiate any conversations with Ross or report any information to the Government he might overhear concerning Ross' legal defense. Kaminsky continued to obtain information from Ross after this meeting, and this information was transmitted to the prosecutor.

At Ross' trial, Kaminsky took the stand but was only allowed to testify about conversations he had with Ross prior to his October 31, 1978, meeting with the prosecutor. This limitation was placed on Kaminsky's testimony as the result of the trial court's determination that after the October 31 meeting, Kaminsky was a Government agent who had been specifically targeted at Ross, and therefore, the statements obtained after that date were obtained in violation of Ross' sixth amendment right to counsel.

Following his conviction, Ross appealed, alleging that Kaminsky was a Government agent as of his June 14, 1978, sentencing hearing, and therefore, the trial court erred in not excluding all of Kaminsky's testimony as being obtained in violation of Ross' sixth amendment right to counsel. The appeals court agreed with Ross, and in reversing his conviction, found that Kaminsky's relationship with the Government, a relationship that was enhanced by the possibility that the sentencing judge in his own case would impose a shorter sentence (a possibility that in fact materialized), was sufficient as of June 14, 1978, for the court to find that statements elicited from Ross after that date were deliberately elicited by the Government in violation of Ross' right to counsel.[36]

In both *Van Scoy* and *Sampol,* the courts placed heavy emphasis on whether the informants reasonably could expect to gain or benefit from the Government in return for their services. In *Sampol,* this factor was paramount; the court ruling that the potential gain or benefit to Kaminsky was such that it justified exclusion of all of Ross' statements despite the fact that some of the statements were obtained by Kaminsky before the Government had even indicated an interest in Ross. As a result of these cases, future defendants can be expected to argue that once it is shown that the informant reasonably can expect to benefit from the Government as a result of his activities, he becomes a Government agent at that point, regardless of whether there is a specific agreement between the Government and the informant concerning the role the informant is to play.

Ironically, the *Sampol* court's reliance on gain or benefit to the informant in resolving this issue has prompted at least one other court to conclude that absent a promise of pecuniary gain or freedom in return for furnishing information, an informant is not a Government agent even though there was a conversation between a law enforcement officer and the informant prior to the time that some of the statements were elicited and this conversation included an instruction to the informant to try to get what he could.[37]

The Requirement of Deliberate Elicitation

It is clear from the *Massiah* decision that the Supreme Court viewed Colson's deliberate elicitation of Massiah's incriminating statements as a necessary ingredient in the sixth amendment right to counsel violation it found in that case. It has remained a necessary ingredient over the years; however, what constitutes deliberate elicitation, and what does not, has been the subject of some controversy.

In *United States* v. *Hearst,*[38] the defendant, while incarcerated at the San Mateo County Jail awaiting trial on bank robbery charges for which she had been indicted, was allowed to receive and speak with visitors. One visitor was a childhood friend, and the conversation that took place in the visiting room was monitored and recorded by jail authorities pursuant to established jail policy. The resulting tape contained incriminating statements, and it was delivered to the FBI by jail authorities for use at the defendant's trial. Defense counsel objected to the introduction of the tape on grounds, *inter alia,* that the Government violated the defendant's sixth amendment right to counsel by "surreptitiously making itself a party to [her] conversations and thereby deliberately elicited incriminating statements made in the absence of counsel." [39]

In rejecting this argument, the court found that there was no evidence to suggest that the defendant's childhood friend had initiated the conversation at Government direction and stated: "The obvious problem with applying *Massiah* to the facts surrounding the making of the . . . tape is the absence of any governmental effort to elicit incriminating statements from appellant." [40]

The *Hearst* opinion stresses that Government presence at the time incriminating statements were made is not sufficient to establish a sixth amendment violation. Presence must be accompanied by some act or words on the part of the Government that can be characterized as a deliberate effort to obtain or elicit an incriminating response. However, exactly what words or actions a defendant must show in order to prove deliberate elicitation was not addressed in this case.

In *United States* v. *Henry,*[41] the Supreme Court was presented a case where the defendant, Billy Gale Henry, had been indicted for armed robbery and was incarcerated in the Norfolk city jail pending trial. Shortly after Henry's incarceration, an FBI Agent contacted one Nichols, who was a paid FBI informant serving a sentence in the jail for forgery. Nichols told the FBI Agent that he was housed in the same cell block with several Federal prisoners awaiting trial, including Henry. The Agent instructed Nichols to be alert for any incriminating statements made by these Federal prisoners; however, he specifically told Nichols not to initiate any conversations with Henry or to question him regarding the bank robbery. Nichols was recontacted by the FBI shortly after he was released from jail, at which time he stated that he had engaged in conversations with Henry and Henry had admitted his participation in the bank robbery for which he was charged. Nichols was paid for this information, and ultimately, he testified at Henry's trial concerning the incriminating statements. Henry was convicted and sentenced to 25 years in prison.

Following a series of appeals, the substance of which it is not necessary to deal with here, Henry's case came before the Supreme Court with a single issue to be decided: Did the Government agent, Nichols, deliberately elicit incriminating statements from Henry within the meaning of *Massiah*? The Court answered this question in the affirmative and stated: "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." [42]

In reaching the conclusion that the Government had intentionally created a situation likely to induce Henry to make incriminating statements, the Court relied on three factors. First, Nichols was acting under instructions as a paid informant for the Government. Although this included instructions not to initiate any conversations with Henry or to question him regarding the bank robbery, the Court determined that these instructions were not controlling, not when Nichols would only be paid if he produced information, and Nichols himself testified that he had "some conversations with Mr. Henry." Second, the Court noted that

". . . Government presence. . . is not sufficient to establish a sixth amendment violation. Presence must be accompanied by some act or words . . . that can be characterized as a deliberate effort to obtain or elicit an incriminating response."

when an accused is in the company of a fellow inmate who is acting as a Government agent, conversations stimulated in these circumstances may elicit information that an accused would not intentionally reveal to persons known to be Government agents. Third, the Court pointed out that Henry was incarcerated at the time the statements were made, and that while custody is not required for a sixth amendment right to counsel violation, it does impose pressures on the accused and could bring into play "subtle influences that will make him particularly susceptible to the ploys of undercover government agents." [43]

Since the second and third factors discussed by the Court are present in every case where a Government informant obtains incriminating statements from an incarcerated defendant, it is possible that the *Henry* decision has, in effect, totally outlawed the investigative technique used in that case. The possibility of this result is enhanced by the fact that even though the first factor can be controlled somewhat by the Government, the Court made it very clear that factual issues concerning such matters as whether the informant stood to gain from his assistance, or who initiated the conversation, should be decided in favor of the defendant absent convincing proof to the contrary.

Finally, while the third factor discussed by the Court (custody) is not applicable where the defendant is not incarcerated at the time he makes incriminating statements to a Government agent, the other two factors would still apply. Hence, the *Henry* decision is expected to impact negatively on the use of this investigative technique in a noncustody situation, as well as where the defendant makes the statements while in jail.

WAIVER OF THE SIXTH AMENDMENT RIGHT TO COUNSEL

As early as 1938, in *Johnson* v. *Zerbst,*[44] the Supreme Court held that the sixth amendment right to counsel can be waived by a defendant as long as the Government proves that the defendant understood what his right was and evidenced his intention to waive it. Based on these requirements for a valid waiver, it is not surprising that the Government did not argue waiver in *Massiah,* nor is it likely that a waiver argument can be made in any case where a Government agent surreptitiously attempts to obtain incriminating statements from a charged defendant.

However, the *Massiah* rule applies equally to situations where a known Government agent attempts to directly and deliberately elicit incriminating statements from a defendant who has been formally charged, and in these cases, the waiver issue can and does come into play. For example, suppose that upon entering Colson's automobile, Massiah had been greeted by Murphy who immediately identified himself as a customs agent and then began to ask Massiah questions concerning his role in the drug operation that resulted in his indictment on Federal drug charges. This fact situation would clearly fall under *Massiah* because Murphy's questions would be an attempt by the Government to deliberately elicit incriminating statements from an indicted defendant in the absence of counsel. However, in this scenario, the question that remains is whether Murphy could attempt to obtain, and Massiah agree to provide, a waiver of his sixth amendment right to the assistance of counsel that would meet the requirements of *Johnson* v. *Zerbst,*[45] thereby rendering any incriminating statements obtained after that point admissible.

One of the most publicized cases dealing with waiver of the sixth amendment right to counsel is the Supreme Court's 1977 decision in *Brewer* v. *Williams.*[46] In this case, the defendant Robert Williams, an escaped mental patient, voluntarily turned himself in to the Davenport, Iowa, Police Department when he found out that the Des Moines, Iowa, Police Department had obtained a warrant for his arrest charging him with the abduction of 10-year-old Pamela Powers in Des Moines 2 days earlier. The Davenport police booked Williams and advised him of his rights. Additionally, Williams spoke with his lawyer in Des Moines on the telephone, and his lawyer advised him that the Des Moines police would be coming to Davenport to bring him back and that they had agreed not to interrogate him on the return trip. Williams was also instructed not to volunteer any information to the Des Moines police concerning Pamela Powers.

Prior to the arrival of the Des Moines police in Davenport, Williams was arraigned before a judge in Davenport on the abduction warrant, again advised of his rights, and committed to jail to await transfer back to Des Moines. A Davenport lawyer named Kelly also spoke with Williams and told him not to speak with the police until after he had met with his lawyer in Des Moines. When the Des Moines police arrived, attorney Kelly advised one of the transporting officers, Detective Leaming, that Williams should not be questioned during the return trip. Attorney Kelly also sought permission to ride in the car with Williams back to Des Moines, but his request was denied.

On the return trip Detective Leaming, who knew that Williams was a former mental patient and was deeply religious, delivered what has become commonly known as the "Christian Burial Speech." The substance of Detective Leaming's spiel was that if it snowed, it would be difficult to locate Pamela Powers' body and she deserved a Christian burial. The result of Detective Leaming's statements was that Williams made several incriminating statements and then led the officers to Powers' body. Williams was subsequently tried and convicted of first degree murder.

Williams appealed his conviction within the Iowa State Court System alleging, *inter alia,* that his sixth amendment right to counsel had been violated as the result of Detective Leaming's deliberate elicitation of his incriminating statement in the absence of counsel after he had been formally charged. These direct appeals failed as the Iowa courts ruled that while the incriminating statements had been deliberately elicited after he was formally charged, Williams had validly waived his sixth amendment right to the assistance of counsel before the statements were made, and therefore, no *Massiah* violation occurred.

Williams then petitioned the U.S. district court for a writ of *habeas corpus*, again alleging that his sixth amendment right to counsel had been violated. The district court granted the writ ruling that Williams had not waived his right to counsel. The Federal Court of Appeals for the Eighth Circuit subsequently upheld the district court's decision.

The State of Iowa then appealed to the Supreme Court, arguing that the lower Federal courts had erred in concluding that Williams had not validly waived his sixth amendment right to counsel. In affirming the decision of the eighth circuit, the Supreme Court ruled that Williams had not waived his sixth amendment right to counsel. In reaching its decision, the Court found that while Williams understood what his rights were, the State failed to meet the heavy burden of proving that Williams intentionally relinquished or abandoned this right as required by *Johnson* v. *Zerbst.*[47] In support of this conclusion, the Court noted that Williams had clearly evidenced his intention to deal with the police through his lawyers, attorney Kelly in Davenport and attorney McKnight in Des Moines, and there were no facts that evidenced his intention to forgo this decision. In fact, the Court found that Williams' statements to Detective Leaming that he would talk to him after he saw his lawyer in Des Moines, and his reliance on his attorney's statements that the police had agreed not to question him on the return trip, evidenced just the contrary.

Although a valid waiver was not found in *Brewer,* the Court did point out the following:

> "The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams *could not,* without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not." [48] (emphasis in original) (footnote omitted)

The above statement from the Court's opinion, coupled with Justice Powell's concurring opinion and the opinions of the four dissenters in the case, clearly implies that after the right to counsel attaches and counsel has been appointed, the defendant can still validly waive this right, in the absence of counsel, as long as the waiver meets the requirements of *Johnson* v. *Zerbst.*[49]

The most common method of obtaining a waiver of a defendant's sixth amendment right to counsel is by use of the standard warning and waiver form developed by all police departments as the result of the *Miranda* decision. Although this form was created in order to assist police officers in ob-

"The most common method of obtaining a waiver of a defendant's sixth amendment right to counsel is by use of the standard warning and waiver form developed . . . as the result of the *Miranda* decision."

taining a valid waiver of a defendant's *Miranda* rights which are based on the fifth amendment right against compelled self-incrimination, a knowing, intelligent, and voluntary waiver of these rights is generally found to also waive the defendant's sixth amendment right to the assistance of counsel. Of course, the use of this method to obtain a waiver of sixth amendment rights requires police officers who are going to question a charged defendant to advise the defendant of his *Miranda* rights and obtain a waiver, even where the charged defendant is not in custody.

Although use of the *Miranda* warnings and waiver has generally been found to be sufficient to waive a defendant's sixth amendment right to counsel, one Federal appellate court has rejected this approach, at least where the defendant has been formally charged by indictment. In *United States* v. *Mohabir,*[50] the Court of Appeals for the Second Circuit was presented with a case where the defendant, following his indictment on Federal charges, turned himself in to Federal authorities and was booked. A little later in the day, before the defendant had been arraigned, he was interviewed by an assistant U.S. attorney who advised him that he had been indicted and gave him a copy of the indictment to read. Additionally, the assistant read the defendant his *Miranda* rights, and the defendant agreed to answer questions. In the resulting interview, the defendant made incriminating statements which were used against him at his trial. Following his conviction, the defendant appealed, arguing that he had not validly waived his sixth amendment rights, and therefore, the incriminating statements deliberately elicited from him by the Government in the absence of counsel should have been excluded. The appeals court agreed with the defendant, noting that "waivers of Sixth Amendment rights must be measured by a 'higher standard' than are waivers of Fifth Amendment rights." [51] Additionally, the court found that this higher standard requires that a defendant who has been indicted understand the significance of this event before the right can be waived. In this case, the court ruled that while the defendant was told that he had been indicted and a copy of the indictment was given him to read, the record suggested that the defendant did not understand the gravity of his position when he agreed to answer the assistant's questions.

The court then reversed the defendant's conviction. The court also ruled, in the exercise of its supervisory power, that a waiver of the sixth amendment right to have counsel present during postindictment interrogation must be preceded by a Federal judicial officer's explanation of the content and significance of this right.[52]

CONCLUSION

In 1964, the Supreme Court created a new constitutional standard for the admissibility of a defendant's confession in a criminal case. In short, the Court ruled that the sixth amendment right to the assistance of counsel is violated where the Government deliberately elicits incriminating statements from an indicted defendant in the absence of counsel and then uses these statements as evidence at the defendant's trial.

The *Massiah* rule has been expanded substantially since it was first announced by the Court. For example, in 1972, the Supreme Court made it clear that a defendant no longer had to show that he was indicted at the time his statements were deliberately elicited in order to make a sixth amendment argument. Instead, he need show only that at the time the statements were obtained by the Government in the absence of counsel, there had been an arraignment or a preliminary hearing, an information had been filed, or he had been otherwise formally charged. Furthermore, some courts have ruled that the filing of a complaint and the issuance of an arrest warrant is a formal charge that triggers a defendant's sixth amendment right to counsel.

Attachment of the sixth amendment right to counsel does not prevent the Government from continuing its investigation of the defendant or from deliberately eliciting statements concerning separate and distinct crimes for which the defendant had not been charged. However, some courts have held that the right attaches to other related, uncharged crimes, especially where it is shown that the motive behind the Government's deliberate elicitation was to obtain statements relating to the original charge.

Incriminating statements deliberately elicited by private persons—persons not acting pursuant to Government direction—are not subject to exclusion under the *Massiah* rule. However, some persons have been found to be Government agents even though they were not specifically directed to obtain information from a particular defendant. These cases usually involve jailhouse informants who reasonably expect to gain a benefit from the Government in return for their services.

Deliberate elicitation is a necessary ingredient in a *Massiah* violation. Mere presence by the Government at the time an incriminating statement is made is not sufficient to establish deliberate elicitation. Presence must be accompanied by some act or words on the part of the Government that can be characterized as a deliberate effort to obtain or elicit an incriminating response. Arguments that incriminating statements were not deliberately elicited from an incarcerated defendant are closely scrutinized by the courts, and factual issues concerning how the statements came about are decided in favor of the defendant absent convincing proof to the contrary.

Waiver of the sixth amendment right to counsel is not an issue in cases, like *Massiah,* where the Government surreptitiously obtains incriminating statements from a charged defendant. However, the *Massiah* rule applies equally to situations where a known Government agent attempts to directly and deliberately elicit incriminating statements from a defendant who has been formally charged, and in these cases, the waiver issue does come into play. A defendant can waive his sixth amendment right to counsel, in the absence of counsel, as long as the Government proves that the defendant understood his right and evidenced his intention to waive it. The most common method of obtaining a waiver of a defendant's sixth amendment right to counsel is to advise the defendant of his *Miranda* rights and then obtain a knowing, intelligent, and voluntary waiver of those rights. However, one Federal circuit court of appeals has ruled that where a defendant has been charged by indictment, a waiver of *Miranda* rights is not sufficient to waive the sixth amendment right to counsel.

FBI

Footnotes

[31] *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971).
[32] 654 F.2d 257 (3d Cir.), *cert. denied,* 102 S.Ct. 977 (1981).
[33] *Id.* at 260.
[34] 636 F.2d 621 (D.C. Cir. 1980) (per curiam).
[35] *Id.* at 634.
[36] *Id.* at 638.
[37] *State* v. *Krause,* 644 P.2d 964 (Hawaii 1982).
[38] 563 F.2d 1331 (9th Cir. 1977).
[39] *Id.* at 1344.
[40] *Id.* at 1347.
[41] 447 U.S. 264 (1980).
[42] *Id.* at 274.
[43] *Id.*
[44] 304 U.S. 458 (1938).
[45] *Id.*
[46] 430 U.S. 387 (1977).
[47] 304 U.S. 458 (1938).
[48] 430 U.S. 387, 405 (1977).
[49] 304 U.S. 458 (1938).
[50] 624 F.2d 1140 (2d Cir. 1980).
[51] *Id.* at 1146.
[52] *Id.* at 1153. *See also, United States* v. *Payton,* 615 F.2d 922 (1st Cir. 1980); *United States* v. *Durham,* 475 F.2d 208 (7th Cir. 1973).

END