

Successful *Massiah/Henry* Cases Updated September 2010

I. UNITED STATES SUPREME COURT

***Fellers v. United States,*
540 U.S. 519 (2004)**

Petitioner's right to counsel was violated where officers deliberately elicited information, post-indictment, from the petitioner at his home as he was placed under arrest, absent counsel or waiver of counsel. The case was reversed and remanded to the Eighth Circuit for a proper determination of whether petitioner's subsequent jailhouse statements should also be suppressed as fruits of the previous questioning.

***Satterwhite v. Texas,*
486 U.S. 249 (1988)**

Ex parte orders and filings concerning State's requests for psychiatric exams of capital murder defendant did not adequately notify defense counsel that psychiatrist would examine defendant to assess future dangerousness, and fact that they were in the court file did not satisfy defendant's right to consult with counsel before being examined. Psychiatrist's testimony on future dangerousness at sentencing proceeding violated Sixth Amendment.

***Maine v. Moulton,*
474 U.S. 159 (1985)**

Sixth Amendment violated where government took the opportunity to wire codefendant before he went to a meeting with defendant to plan defense strategy. By concealing fact that codefendant had become an agent of the state, government denied defendant the opportunity to consult with counsel. Court also rejected government's argument that statements should be admissible because they were really obtained through its investigation of other crimes. Court said this only invites phony investigations. The evidence would be admissible in prosecutions for those other crimes (assuming it was gathered prior to 6th Am. attachment), but not for the present charge.

***Estelle v. Smith,*
451 U.S. 454 (1981)**

Where defendant had been indicted and counsel was appointed before he was examined at the jail by a psychiatrist sua sponte appointed to determine competency to stand trial and counsel had not been notified of the hearing, defendant's Sixth Amendment right to assistance of counsel was violated when state introduced psychiatrist's adverse diagnosis on future dangerousness at penalty phase. The interview was a "critical stage" of the aggregate proceedings.

United States v. Henry,
447 U.S. 264 (1980)

Defendant's statements to paid informant who, while locked in same cellblock as defendant, had been told by government agents to be alert to any statements made by prisoners but not to initiate conversations with or question defendant on charges against him were inadmissible as "deliberately elicited" in violation of Sixth Amendment right to counsel.

Brewer v. Williams,
430 U.S. 387 (1977)

Petitioner's right to counsel was violated where legal proceedings had commenced against him, thereby establishing his 6th Amendment right to counsel, before he was transported by police, and prior to leaving for the trip police agreed with petitioner's counsel not to question him during the trip, but, although petitioner expressed no willingness to be interrogated, cop made statement intended to obtain incriminating information, and such information was elicited. [This is the famous "Christian burial" / "Christmas Eve" speech case].

Massiah v. United States,
377 U.S. 201 (1964)

Massiah's Fifth and Sixth Amendment rights were violated where, after their indictment, his co-defendant decided to cooperate with the government and allowed government agent to surreptitiously overhear his conversation with Massiah, who did not know co-defendant had turned. Government deliberately elicited the statements from Massiah after his indictment and in the absence of his counsel.

II. UNITED STATES COURT OF APPEALS

Randolph v. People of the State of California,
380 F.3d 1133 (9th Cir. 2004)

A jailhouse informant may be found an agent of the State even where there is no express agreement between the informant and the government that the informant will be compensated for his services. District court's decision is vacated and remanded for further fact-finding as to issues of timing and the informant's behavior.

United States v. Kennedy,
372 F.3d. 686 (4th Cir. 2004)

Where petitioner, whose drug trafficking conviction was on direct appeal, was brought before a grand jury investigating drug trafficking and money laundering activities, his Fifth and Sixth Amendment rights were violated and the Court would not hesitate to suppress his statements in any subsequent drug prosecution. However, the statements are admissible in petitioner's perjury

prosecution arising out of those statements.

United States v. Danielson,
325 F.3d 1054 (9th Cir. 2003)

The government improperly interfered with defendant's attorney-client relationship by obtaining recordings of an informant's conversations with defendant concerning trial strategy. The case is remanded to the district court to determine if government had established by preponderance of the evidence that it did not use privileged information.

Manning v. Bowersox,
310 F.3d 571 (8th Cir. 2002)

The government's use of informants to elicit information from defendant awaiting trial and assist him in fabricating an alibi violated the Sixth Amendment. It is immaterial that defendant was charged by complaint rather than indictment, and the government's agents deliberately elicited information. Defendant demonstrated that counsel's ineffective performance was cause and prejudice sufficient to overcome the procedural default and habeas relief is granted.

United States v. Bender,
221 F.3d 265, 269 (1st Cir. 2000)

The court of appeals upheld the district court's suppression of statements made to an undercover officer by defendant while awaiting trial for a felon in possession of a firearm charge. The statements related to defendant's consideration of ways to skew the trial in his favor, including suborning perjury and kidnaping and killing prosecution witnesses. The court rejected the government's contention that because the statements did not directly concern defendant's guilt or innocence of the crime charged, the Sixth Amendment did not prohibit their admission. The court explained that "[a]ll that matters is that the statements were incriminating as to the pending charges; it does not matter how. So while [defendant's] statements suborning perjury did not provide direct evidence in the pending case . . . or amount to an explicit confession, they 'strongly tended to show that a guilty mind was at work.'" (citation omitted). . . . [Defendant's] statements . . . were likely to be incriminating as to the pending charges, were deliberately elicited post-indictment, and were obtained in the absence of counsel. Thus, they were obtained in violation of the Sixth Amendment and were rightly suppressed by the district court."

United States v. Lozada-Rivera,
177 F.3d 98, 107 (1st Cir. 1999)

The court held that the erroneous admission of testimony by a jailhouse snitch indicating that defendant had attempted to bribe him the night before he was scheduled to testify at defendant's trial was not harmless. On appeal, the government conceded that the snitch was a government agent, and that he had deliberately elicited the incriminating statements from defendant. The court rejected the government's harmlessness arguments, explaining that despite the "substantial

evidence pointing toward [defendant's] guilt," the "jury would reasonably presume that an innocent man would have no reason to ask a witness to shade his testimony. . . . Once heard, [this information] could well have become the colored lens through which the jury viewed all of the other evidence."

United States v. Abdi,
142 F.3d 566 (2nd Cir. 1998)

Defendant's conviction for importing opium was reversed due to the prosecution's use on cross-examination of a statement defendant made in an INS initiated custodial interview after his arraignment and retention of counsel, but in the absence of his attorney, and without a waiver of counsel. Although the statement was used only to impeach defendant's claim that he could not speak English well, it was inadmissible as either substantive or impeachment evidence due to the absence of any evidence indicating that defendant's Sixth Amendment right to counsel had been knowingly and voluntarily waived as required by *Michigan v. Harvey*, 494 U.S. 344 (1990).

United States v. Arnold,
106 F.3d 37 (3rd Cir. 1997)

After the defendant was indicted for witness intimidation on morning of March 28, 1995, law enforcement officers conducted a sting operation that afternoon to gather information about an attempted murder charge. The court held that the defendant's right to counsel carries over from pending charge of witness intimidation to new, but closely related, charge of attempt to murder a witness. As a result, a tape recording of incriminating statements made by defendant during the sting operation was inadmissible with respect to attempted new murder charge.

United States v. O'Dell,
73 F.3d 364 (7th Cir. 1995) (unpublished)

Informant, whose placement in cell with defendant was not done at the request of the government, was a government agent for purposes of Sixth Amendment analysis because he had signed a cooperation deal with authorities years earlier which had never been revoked, and he had provided information through the years on various cases. Information gathered from defendant by informant was inadmissible because: (1) informant notified federal agent that he had some information and told him he would get more; (2) instead of acting only on the information gathered prior to informant's first call, federal agent waited for additional information to be gathered; and (3) although state did not intentionally create the opportunity, it did knowingly exploit the opportunity by failing to disaffirm informant's expressed intent to elicit information.

United States v. Brink,
39 F.3d 419 (3rd Cir. 1994)

Defendant raised a colorable claim that government violated his right to counsel by placing him

in a cell with a known informant. The informant had acted as a government agent in other cases and appeared to defendant as just another inmate. To meet the standard set forth in *Henry*, the only questions were whether the informant was acting as a government agent when he got defendant to admit the crime, and whether the information was deliberately elicited. Remanded for evidentiary hearing on those issues.

United States v. Johnson,
954 F.2d 1015 (5th Cir. 1992)

Sixth Amendment right to counsel violated where co-defendant, whom defendant knew had pled guilty, wore a wire to defendant's house and deliberately elicited information, despite government's claim that it told him not to ask defendant about the case. Government claimed defendant waived right to counsel because he made it known he was speaking to informant against counsel's advice. Court rejected this argument because defendant did not know informant was working for the government and was thus unable to make a knowing and intelligent waiver.

United States v. Mitcheltree,
940 F.2d 1329 (10th Cir. 1991)

Defendant's Sixth Amendment rights on pending charges of introducing misbranded drug into interstate commerce were violated by Government's scheme in which witness in narcotics cases acted as government agent to elicit and record comments from defendant concerning narcotics charges; while Government was free to investigate its suspicions that defendant would engage in witness tampering, it could not encourage witness to inquire into pending charges in more than tangential way.

United States v. Terzado-Madruga,
897 F.2d 1099 (11th Cir. 1990)

Government violated defendant's Sixth Amendment rights when it arranged to record postindictment conversations between defendant and undercover informant, even though government agent's stated purpose was to record conversations about murder scheme for which defendant had not been indicted and informant was told not to engage defendant in any discussions regarding pending federal case.

United States v. Geittmann,
733 F.2d 1419 (10th Cir. 1984)

Where government agents led witness, who had been arrested, to believe that his cooperation in investigation would help him and he began taping conversations at request of the government, use of defendant's inculpatory statements made by defendant during postindictment period to such witness was violation of defendant's Sixth Amendment right to counsel; same was true if government agents actually asked such witness to stop recording conversations. It was surreptitious questioning by government that offended defendant's right to counsel, and where

witness encouraged defendant to trust him, fact that defendant himself taped certain conversations between the two did not establish waiver of right to counsel, and witness would not be allowed to testify about defendant's inculpatory statements.

Cahill v. Rushen,
678 F.2d 791 (9th Cir. 1982)

Where right to counsel had attached at time of petitioner's confession following his first trial, confession was deliberately elicited by police officer in absence of counsel or waiver of counsel, and petitioner was prejudiced by state's use of his confession at second trial at which he was convicted, use of posttrial confession was violation of Sixth Amendment right to assistance of counsel.

United States v. Sampol,
636 F.2d 621 (D.C.Cir. 1980)

Under all circumstances of case in which witness' freedom on probation was contingent on his "coming through" as an informer who was to "forge ahead on [his] own" and "go all out," whose ability to "ingratiate" himself with criminals was part of his stock in trade and who did ingratiate himself with a defendant while they were fellow inmates, incriminating statements made by defendant to informant were inadmissible at trial. Same was true though conversations between the inmates had been broken off and then resurrected by defendant and though government claimed that informant's function was limited to matter of procuring weapons.

United States v. Mohabir,
624 F.2d 1140 (2d Cir. 1980)

Where defendant was not given any warnings other than standard Miranda warnings, was told that he was indicted and was given copy of indictment to read but neither INS agents nor U.S. Attorney explained what it meant to be indicted, and where record suggested that defendant did not understand gravity of his position and apparently hoped he would aid his case by telling his story, Government did not carry its heavy burden of proving that defendant's purported waiver of right to counsel satisfied 6th Amendment.

United States v. McManaman,
606 F.2d 919 (10th Cir. 1979)

Although statements of defendant obtained by secret interrogation through electronic transmitter worn by government agent, after defendant had been charged, had retained a lawyer and had been released on bail, were admissible for purposes of impeaching defendant's sweeping denials made on direct examination, its probative value was substantially outweighed by danger of unfair prejudice thus making its admission prejudicial error under Rule 403, in view of statements made by defendant during interrogation concerning murder plans not related to defendant's denials of drug dealings.

***United States v. Doss,*
563 F.2d 265 (6th Cir. 1977)(opinion on rehearing)**

Where a substantial purpose of calling indicted defendant before grand jury was to question him secretly and without counsel present without his being informed of the nature and cause of the accusation about a crime for which he stood already indicted, the proceeding was an abuse of process which violated 6th Amendment and due process clause of 5th Amendment and defendant could not be prosecuted or convicted of perjury arising out of invalid proceeding.

***United States v. Anderson,*
523 F.2d 1192 (5th Cir. 1975)**

Where Government did not establish that there was any ongoing investigation of defendant on suspicion that he was continuing his alleged criminal conduct, neither propriety of a continuing governmental investigation of suspected criminal activities nor principle that a defendant is not immunized from accountability for crimes committed after his indictment authorized admission of testimony as to defendant's statement and actions when confronted after indictment and in absence of counsel with a paid informant who gave fictional account of a need for drugs.

***Schantz v. Eyman,*
418 F.2d 11 (9th Cir. 1969), cert. denied, 397 U.S. 1021 (1970)**

Where, after indictment and in absence of notice to counsel, county attorney sent psychiatrists to interview accused who had given notice of asserting insanity defense and psychiatrist was permitted to testify at trial as to his confrontation with accused, accused was denied basic protection of Sixth Amendment.

***United States ex rel. Daley v. Yeager,*
415 F.2d 779 (3rd Cir. 1969), cert. denied, 397 U.S. 924 (1970)**

Where immediately after preliminary hearing at which accused requested a lawyer, and which was adjourned until accused got attorney, detectives got consent from accused to search his apartment and seized his bloodstained clothes that were received in evidence at trial despite timely motion to suppress, obtaining of consent violated accused's rights under 4th, 5th and 6th Amendments and absent overwhelming untainted evidence for prosecution and in light of weakened condition of accused from loss of sleep and history of schizophrenia, deprivation of constitutional right to see lawyer was not harmless beyond a reasonable doubt.

***United States ex rel. O'Connor v. State of New Jersey,*
405 F.2d 632 (3rd Cir. 1969), cert. denied, 395 U.S. 923 (1969)**

Where accused's statements, made during interrogation, that while in New York before his arrest he knew New Jersey police were looking for him were introduced and commented upon in prosecution's closing argument and included in trial court's charge as indicative of willful flight

to avoid prosecution and hence evidence of guilt, admission of the statements, taken in violation of defendant's constitutional rights to counsel, was prejudicial.

Pryor v. Henderson,
403 F.2d 46 (6th Cir. 1968), cert. denied, 396 U.S. 847 (1969)

Findings that defendant was under indictment for rape when he made incriminating statement to detective in apartment, that the detective deliberately, though not surreptitiously, obtained statement, and that defendant at that time had no lawyer and had not waived his right to lawyer were not clearly erroneous, and findings supported conclusion that defendant's constitutional rights were violated by admission of incriminating statement.

Worts v. Dutton,
395 F.2d 341 (5th Cir. 1968)

Defendant deprived of important Sixth Amendment right when court-appointed counsel was not present at sentencing of defendant to two consecutive terms of imprisonment on conviction of two robberies in single trial, and sentences were required to be vacated with provision that state be given right to resentence prisoner after he is afforded counsel.

United States ex rel. Hill v. Pinto,
394 F.2d 470 (3rd Cir. 1968)

Record of state court prosecution which contained no hearing on waiver of right to object to admission of allegedly unconstitutionally obtained statements not alone sufficient to justify finding in federal habeas that waiver had been deliberately made as matter of trial strategy, and evidentiary hearing was required on such question.

United States v. Slaughter,
366 F.2d 833 (4th Cir. 1966)

Where defendant's expressed desire for counsel was followed by taking, at instance of F.B.I. agents, of incriminatory statements, preceded by a recitation of defendant's formal rights, which occurred after expression of defendant's desire for counsel but before counsel had been obtained, defendant was denied right to counsel, and admission of testimony concerning what defendant said in response to interrogation after he claimed right to counsel was reversible error.

Clifton v. United States,
341 F.2d 649 (5th Cir. 1965)

Failure of federal agents who should have known that 19-year-old accused, incarcerated for over two months, was represented by counsel, to make reasonable effort to ascertain whether defendant desired to consult with attorney before making statements was denial of Sixth Amendment right to counsel and any incriminating statement made at interview could not be

admitted at his trial.

Ricks v. United States,
334 F.2d 964 (D.C.Cir. 1964)

Statements obtained after witness had positively identified defendant and before he was taken before magistrate, and statements taken by police while defendant was imprisoned pending determination of probable cause, his hearing having been continued so that he might obtain counsel, were inadmissible.

Lee v. United States,
322 F.2d 770 (5th Cir. 1963)

Use of oral admissions was a violation of due process. where government agents appeared at defendant's cell without notice and conducted a secret interrogation of him after he had been indicted and while he was awaiting trial. Prisoner's failure to request an attorney, if he did so fail, was not an excuse for government's conduct.

III. UNITED STATES DISTRICT COURT

United States v. Thomas,
2009 WL 4015420 (W.D. Pa. 2009) (not reported in F.Supp. 2d)

Defendant's Sixth Amendment right to counsel was violated when government agents placed a cooperating witness in defendant's jail cell and wired him with a recording device to record conversations with defendant about the defendant's alleged plot to murder a witness against him at his trial on pending drug charges. Defendant's motion to suppress the recording at his trial on the drug charges is granted, but the court does not suggest that the recorded statements would be inadmissible in any future proceedings against defendant in connection with the murder plot.

United States v. McManaman,
2008 WL 2397675 (N.D. Iowa 2008) (not reported in F.Supp 2d)
(report and recommendation adopted by *United States v. McManaman*, 2008 WL 2704557)

Defendant's motion to suppress is granted on Sixth Amendment grounds where a police officer questioned defendant about whether there was anything illegal inside his house after defendant came out onto the porch during his arrest. The officer's questioning occurred after defendant was told that he was under arrest and before he was advised of his constitutional rights in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966). The fact that the question was asked and answered before the *Miranda* warnings were administered violated defendant's Sixth Amendment right to counsel.

United States v. Lepp,
2008 WL 667397 (N.D. Cal 2008) (not reported in F.Supp. 2d)

Defendant's motion to suppress statements made, in the absence of counsel, to a confidential informant and an undercover agent was granted where both the agent and the informant were working in conjunction with the government, and where the defendant's Sixth Amendment right to counsel had already attached because he had been indicted.

United States v. Ramirez-Cortez,
2008 WL 65576 (D. Minn. 2008) (not reported in F.Supp. 2d)

Defendant's Sixth Amendment right to counsel was violated when an officer questioned him in his driveway during the execution of a search warrant after he had already been indicted and in the absence of his counsel or a waiver of counsel. Defendant's motion to suppress the statements he made to the officer is granted.

United States v. Pannell,
510 F.Supp.2d 185 (E.D.N.Y. 2007)

Informant was not a government agent at the time when he was randomly assigned to Pannell's cell, notwithstanding that informant had previously provided information to the government about other defendants. However, informant later became an agent when he returned to Pannell's cell after speaking to government agents about providing them with information about Pannell. The court found that the informant had deliberately elicited information, notwithstanding that agents had instructed him not to question Pannell about his case, where the informant had great incentive to actively encourage Pannell to incriminate himself, and informant was evasive as to why Pannell provided such detailed information about his crime.

United States v. Booker,
2006 WL 242509 (D.N.J. 2006) (not reported in F.Supp. 2d)

Informant, David Blickley, became a Government agent after a January 25, 2005 meeting at which Blickley first became aware of the Government's interest in Booker. This fact, taken together with Blickley's prior history of cooperation with the Government and a pending motion filed under Rule 35(b), Fed. R. Crim. P., seeking a sentence reduction for Blickley's cooperation in another matter, created at the very least an implicit quid pro quo agreement that did not exist prior to the January 25th meeting. Thus, the meeting gave rise to a "tacit agreement" between Blickley and the Government with the mutual expectation of a possible sentence reduction for informing against Booker, among others. Moreover, Blickley deliberately elicited incriminating statements from Booker following the January 25th meeting, evidenced by his careful written recordings of his subsequent conversations with Booker as well as the fact that he gathered more information than was necessary for his ostensible purpose of helping Booker with his legal questions. Thus, all of Booker's statements to Blickley after the January 25th meeting are inadmissible because they were deliberately elicited by a government agent in violation of the Sixth Amendment. Statements made prior to meeting are

admissible, but limited to those contained in the Government's written report of the interview with Blickley on January 25th to avoid the possibility that Blickley might blend pre- and post-January 25th conversations together in his recollection at trial.

***United States v. Lentz,*
419 F.Supp.2d 794 (E.D. Virginia 2005)**

Statements made to inmate informant, by defendant, regarding his plans to assassinate attorneys who had prosecuted him for the murder of his wife, were required to be suppressed at the retrial of the wife-murdering case, when offered to show consciousness of guilt, because the statements were made to a government agent in the absence of counsel. Although the Sixth Amendment right does not normally attach until indictment, and no criminal proceeding had begun regarding the plot to murder the attorneys, defendant's Sixth Amendment right had attached in the wife-murdering case, and that was sufficient.

***Schmitt v. True,*
387 F.Supp.2d 622 (E.D. Virginia 2005), *aff'd*, 189 Fed. Appx. 257 (4th Cir. 2006)**

Decision of the Supreme Court of Virginia was contrary to clearly established federal law, as articulated in *Massiah*, 377 U.S. 201 (1964), *Henry*, 447 U.S. 264 (1980), and *Maine v. Moulton*, 474 U.S. 159 (1985). Consideration or benefit to the informant is not an essential component of the informant's status as an agent of the state for purposes of a *Massiah* claim. Here, the informant was clearly acting as an agent of the state since the state recruited the informant to obtain information from petitioner and provided the informant with a tape recorder and cues as to what information the police desired that the informant elicit from petitioner. However, trial counsel for petitioner made a reasonable strategic decision to forego a motion to suppress petitioner's tape recorded statements to the informant. Accordingly, petitioner's claim for relief in his federal habeas corpus proceedings based on counsel's failure to raise the *Massiah* violation is dismissed.

***United States v. Smith,*
2004 WL 729137 (S.D. Iowa 2004)**

Statements obtained during transport of indicted defendant violated the Sixth Amendment where federal agent made statements and asked questions that deliberately elicited incriminating information from defendant without a waiver of his rights. Although defendant may have initiated contact, the agent asked follow-up questions and it's unlikely that a reasonable person would not feel compelled to provide information to the agent.

***United States v. Rodriguez,*
2002 WL 313894 (S.D. N.Y. 2002)**

Defendant's pretrial motion for a *Massiah* hearing is granted where defendant has made a sufficient factual showing in his motion and the government's response fails to provide detailed

information regarding when cooperation with the informant began and when defendant made the contested statement.

***United States v. Fernandez,*
172 F.Supp.2d 1252 (C.D. Cal. 2001)**

In a ruling on pretrial motions by several defendants, *Massiah* bars admission of testimony by a jailhouse informant regarding defendants' statements and a birthday card. However, testimony about a "snitch letter" seen by the informant is found admissible. It was written by an individual not on trial in the instant case to one of the defendants, not to the jailhouse informant.

***United States v. Orlando Perez and Teddy Ramos,*
948 F.Supp. 1191 (S.D.N.Y. 1996)**

Repeated refusal by officers to specifically identify the charges against the defendant and officers' statements that "we know you are a [gang member]" constituted the functional equivalent of an "interrogation." Defendant did not initiate further discussions with officers by requesting information about the charges against him and thus did not constitute a waiver of his Sixth Amendment rights. Because the Government deliberately elicited the statement by "positing the guilt of the defendant" he could not implicitly waive his Sixth Amendment right to counsel and his statement is therefore inadmissible.

***United States v. Reyes,*
934 F.Supp. 546 (S.D.N.Y. 1996)**

Money and jewelry informant received from defendant as payment not to assist government in defendant's prosecution was evidence gleaned through exploitation of government's previous violation of defendant's Sixth Amendment right to counsel in instructing government informant, after defendant had been indicted, to record conversations he had with defendant in which they arranged for such payment, and therefore money and jewelry were inadmissible at trial under fruit of poisonous tree doctrine.

***Franklin v. Duncan,*
884 F.Supp. 1435 (N.D.Cal. 1995)**

Defendant's Sixth Amendment rights violated when his daughter talked to prosecutor about visiting him in jail and attempting to get him to confess, prosecutor gave daughter his "blessing," and gave her the telephone number of a jail official to contact, and jail official made special arrangements for her to visit her father during nonvisiting hours.

***Cahill v. Rushen,*
501 F.Supp. 1219 (E.D.Cal. 1980), *aff'd*, 678 F.2d 791 (9th Cir. 1982)**

Police officer, who on day after prisoner's murder conviction brought him to his office for the express purpose of having him fulfill his pretrial promise to "tell all," deliberately elicited prisoner's confession and, thus, where such confession was made in the absence of counsel and without prisoner's waiver of his right to counsel, it could not be used against prisoner in a retrial following reversal of his conviction. Any statement deliberately elicited by law enforcement between sentencing and filing of notice of appeal, in the absence of counsel and without a waiver, has been obtained in violation of defendant's Sixth Amendment right to counsel and must be excluded upon retrial for the same crime.

Forman v. Smith,
482 F.Supp. 941 (W.D.N.Y. 1979)

Where, at time of police interrogation of petitioner, adversary proceedings had commenced, petitioner had retained counsel on criminal charges directly relating to murder charge, and officer knew or assumed that petitioner either had an attorney, officers acted impermissibly when they proceeded with questioning petitioner without first asking petitioner who his attorney was or notifying attorney of the questioning. Although petitioner was informed that he was entitled to a lawyer and to have him present during any questioning, petitioner's testimony that he believed that no oral statement he made could be used against him unless he signed a written statement did not reflect a comprehension of the complex and essential right to counsel he was purportedly waiving. In addition, petitioner never signed any waiver form, and actually scratched out his initials on a waiver form given him at prior questioning, and notes taken by police officers showed no evidence that petitioner signed any waiver form or statement. Thus, petitioner did not, as a matter of constitutional law, knowingly and intentionally waive his right to assistance of counsel before questioning.

United States ex rel. Sanders v. Rowe,
460 F.Supp. 1128 (N.D.Ill. 1978)

Under Illinois law, adversary judicial proceedings triggering 6th Am. right to counsel were commenced on issuance and filing of complaint and confessions obtained thereafter were required to be suppressed where obtained without advice of counsel or waiver of right to counsel. That second and third interrogations pertained to crimes different than offense for which complaint had been issued and filed and were conducted by different police agencies was irrelevant to 6th Am. violation, especially since all crimes occurred on same evening and appeared to be part of continuous and related series of criminal activity and defendant had never been released from custody and had not contacted his lawyer.

United States v. Orman,
417 F.Supp. 1126 (D.Colo. 1976)

DEA's eavesdropping on defendant's conferences with public defender during which agents obtained information that would be of help to them in structuring an answer to affirmative

defense based on alleged sexual activity between agents and defendant required dismissal of the indictment.

United States ex rel. Chabonian v. Liek,
366 F.Supp. 72 (E.D.Wisc 1973)

Incriminating statement allegedly made by petitioner to detective, while those two and defendant's father and attorney and others were walking between DA's office and office of issuing magistrate, was erroneously received in evidence, since there was no evidence that petitioner waived his right to have his retained counsel present, no evidence the statement was spontaneous, unsolicited and voluntary, and since the statement, secured after counsel had been retained and in response to the detective's remark that, since petitioner was on probation, he should tell the truth or he could be hurt by it, was elicited in violation of petitioner's Sixth Amendment right to counsel.

United States ex rel. Magoon v. Reincke,
304 F.Supp. 1014 (D.Conn. 1968), *aff'd*, 416 F.2d 69 (2d Cir. 1969)

Once attorney representing a suspected felon on whom investigation has focused contacts police officer in whose charge suspect is held and informs him that he does not want him interrogated further, admission into evidence of statements thereafter obtained from accused by interrogation in absence of counsel violates the accused's constitutional rights.

IV. STATE COURTS

Johnson v. State,
-- So.3d --, 2010 WL 121248 (Fla. 2010)

On appeal from denial of capital defendant's second successive post-conviction motion, the Supreme Court of Florida held that newly disclosed evidence established that jailhouse informant acted as a government agent after an initial meeting with an investigator who told the informant to "make notes" and "keep his ears open," such that defendant's subsequent statements to informant were obtained in violation of defendant's Sixth Amendment right to counsel. Moreover, although the prosecutor knew that defendant's statements were impermissibly elicited and that the informant's testimony was inadmissible, he knowingly used false testimony and misleading argument to convince the court to admit the testimony, thereby committing a *Giglio* violation. Defendant's death sentences are vacated and the case is remanded for a new penalty phase proceeding.

State v. Oliveira,
961 A.2d 299 (R.I. 2008)

Child protective investigator was an agent of the State, and thus defendant was denied the Sixth Amendment protection of the right to assistance of counsel when the statement he provided to the

investigator was used against him at trial on charges of first-degree child molestation. Child protective investigator conferred with police prior to her interview with defendant, she was statutorily obligated to forward any information she might obtain concerning child abuse to the police, and she admitted that one of her purposes in conducting the interview was to “add to the evidence.” The trial court’s error in admitting defendant’s statement was not harmless.

McBeath v. Commonwealth,
244 S.W.3d 22 (Ky. 2008)

Jailhouse informant became an agent for the State after signing a “memorandum of understanding,” in which he agreed that he would not question defendant directly about the crime, but would engage in everyday conversation, merely listen when defendant spoke about the crime or his defense to the crime, and then remember the exact words defendant used when speaking about the crime. The memorandum, followed by a series of meetings with the police in which the informant gave recorded reports about defendant’s statements, established an agency relationship. Even when the informant violated the memorandum by engaging in direct questioning, he was still sent back with the understanding that he would continue to collect information about the crime from the defendant. The government was not absolved of its use of the informant by the fact that it apparently never rewarded him for his actions or testimony. Further, the informant may have expected some future benefit because, on one occasion, he did ask the police what they could do for him and they responded that it would be up to the prosecutor to decide that issue. In addition to direct questioning, the informant also used interrogation techniques “designed to elicit incriminating remarks,” such as waiting until the defendant was upset to initiate conversation and telling the defendant that the fifth step in the Alcoholics Anonymous Program was to admit the exact nature of the wrong. Admission of the informant’s testimony at trial was reversible error.

State v. Howell,
2007 WL 610161 (Conn. Super. Ct. 2007) (unpublished opinion)

Informant became an agent of the state after a phone call with a case detective who expressed interest in the information that the informant had already collected and told him to “just hang tight . . . I’ll get back to you.” Moreover, the detective’s admonition not to “press him for right now,” was a far cry from the express and appropriate warnings the detective later gave to explain that the informant could not deliberately elicit information from the defendant. No evidence was offered to explain what the informant did after the phone call to gather additional information. The Court was persuaded by a fair preponderance of the evidence, however, that after the phone call, the informant understood that he should do whatever he could, short of pressing the defendant, to induce him to make further statements about the crime. Thus, the defendant’s statements taken after the phone call during which the informant became an agent were suppressed.

Commonwealth v. Murphy,
862 N.E.2d 30 (Mass. 2007)

Informant acted as a government agent where he entered into a specific agreement promising that the Assistant United States Attorney would file a motion to reduce his sentence if he gave substantial assistance to the government, and where the informant interpreted this agreement to mean finding out information and helping get someone convicted. Nothing in any United States Supreme Court case requires specific targeting of a defendant for agency to attach. Further, even though the agreement was with the United States Attorney's office, the Commonwealth could not use information obtained by unlawful police conduct. The informant deliberately elicited incriminating statements from the defendant by asking defendant what he did about his anger toward the victim and by creating an environment that lured the defendant into a false sense of trust. For example, the informant hid a "shank" for defendant and contacted a witness at the defendant's request. Defendant did not even speak to the informant until after he had performed these favors. This was not a case of merely passive listening where, by luck or happenstance, the informant acquired information about the defendant. Defendant's convictions are reversed and remanded for a new trial.

Commonwealth v. Hilton,
823 N.E.2d 383 (Mass. 2005)

Court officer escorting murder defendant was an agent of law enforcement where she: (1) had charge of detained defendants at the court house; (2) provided security for the premises, personnel, and public; (3) was authorized to exercise police powers; (4) wore a uniform and a badge; (5) was required to report any observations or information concerning criminal activity; and, (6) gave report on defendant's responses to her questions with her supervisor's permission during the hours she was on duty. The court officer's questions to defendant, outside the presence of defendant's counsel, concerning circumstances of and motive for murders with which she was charged, violated defendant's Sixth Amendment rights, and the defendant's incriminating responses were inadmissible. The questions were specifically about the crime and they were reasonably calculated to elicit incriminating responses from the defendant.

Bellamy v. Commonwealth,
2005 WL 1544775 (Va. App. 2005) (unpublished opinion)

Police deliberately elicited defendant's statements in violation of his Sixth Amendment right to counsel by sending an officer to question him about his case while the officer was wearing a recording device, and after the State had initiated judicial proceedings against defendant on rape charges. Defendant did not make a valid waiver of his Sixth Amendment rights where the officer merely mentioned *Miranda* in a frivolous manner, and there was no evidence that defendant expressly waived his rights. Presuming waiver from a silent record is impermissible. The record does not show that defendant was offered counsel but intelligently and understandingly rejected the officer. Anything less than that is not a valid waiver.

Commonwealth v. Cornelius,
856 A.2d 62 (Pa. 2004)

Defendant's Sixth Amendment rights were violated when the police discussed his case with him after he requested an attorney at his arraignment and his statements made during a tour of the crime scene should have been suppressed. However, the trial court's failure to suppress the statements was harmless error because pre-arraignment confessions and DNA evidence were overwhelming evidence of guilt.

Baker v. State,
853 A.2d 796 (Md.App. 2004)

Defendant's Sixth Amendment rights were violated where defendant had been charged and released on bail and detective asked him the whereabouts of a witness in his case. Trial court's focus on the incident as a chance encounter was misguided, as was its narrow view of 'interrogation.' The judgment is reversed and defendant's statement is suppressed.

State v. Peterson,
663 N.W.2d 417 (Iowa 2003)

Defendant's Sixth (and Fifth) Amendment rights were violated where detectives initiated interrogation after defendant's Sixth Amendment rights attached and were invoked by defendant. Discussion during transport was a continuation of the previous interrogation at the prison. These statements and subsequent statements given at the police station should have been suppressed. Given that the key evidence against defendant was uncorroborated accomplice testimony, the error in admitting defendant's statement was not harmless.

People v. Roman,
772 N.Y.S.2d 472 (N.Y. 2003)

The Sixth Amendment and NY state law barred admission in child sex abuse trial of defendant's recorded statements trying to bribe government agent witness, even if the trial was consolidated with his bribery trial. However, the statement may be admitted in a separate bribery trial.

Lightbourne v. State,
841 So.2d 431 (Fla. 2003)

Defendant's third postconviction motion, including allegations of a *Massiah* violation, was denied. However, a concurring opinion highlights the problems with jailhouse informant testimony and urges the State, with a footnote to the Illinois Commission's recommendations, to consider the long-term impact on a conviction's finality when choosing whether to present such testimony.

State v. Dagnall,
228 Wis.2d 495 (Wis. App. 1999), *aff'd*, 612 N.W.2d 680 (Wis. 2000)

Defendant's Sixth Amendment right to counsel was violated where detectives who traveled to Florida to retrieve him and return him to Wisconsin to face a charge of first degree intentional homicide questioned him despite defendant's statement that "My lawyer told me that I shouldn't talk to you guys," and the detectives' knowledge of a letter sent to law enforcement by defendant's attorney informing them of his representation of defendant and instructing them not to question defendant outside the attorney's presence. In reversing defendant's conviction, the court rejected the state's argument that the defendant's and the lawyer's letter should be considered separately, finding instead that "the primary evidentiary points in the case bearing on [defendant's] invocation of the right to counsel . . . are to be considered not in isolation, but together." Viewed in that manner, the court concluded that these facts "would warrant a reasonable officer to understand that [defendant] was indeed invoking his right to counsel."

Taylor v. State,
726 So.2d 841, 845 (Fla. App. 1999)

Defendant's conviction for dealing in stolen property was reversed due the erroneous admission against him of a statement made during custodial interrogation after his Sixth Amendment right to counsel had attached with respect to that charge. The interrogation was conducted by a law enforcement officer ostensibly inquire about the burglary during which the items defendant was later convicted of selling were stolen. In reversing defendant's conviction, the court acknowledged that the Sixth Amendment right to counsel is ordinarily "offense-specific," but found that here, "the facts of the charged [dealing in stoling property] and uncharged [burglary] offense are inextricably intertwined and, therefore, [defendant's] previously invoked right to counsel survived the police disclaimer concerning the dealing in stolen property charge."

Brown v. State,
725 So.2d 1164, 1166 (Fla. App. 1998) (per curiam)

Defendant's convictions for attempted first-degree murder of a law enforcement officer and other offenses were reversed where, after defendant's cellmate offered assistance in obtaining incriminating statements, state agents promised to reward him for the information he obtained, a detective asked a jail officer to keep the informant and defendant together, and the detective arranged for a visit with the informant a few days later to collect any information he had obtained. In light of these facts, the trial court's conclusion that the state had "remained passive in its dealings with [the informant] was erroneous, and the admission of the informant's testimony, upon which the state's case "heavily relied," was not harmless.

Commonwealth v. Franciscus,
710 A.2d 1112 (Penn. 1998)

Defendant's convictions for first-degree murder, robbery, and possession of an instrument of

crime were reversed due to the erroneous admission of incriminating statements deliberately elicited from defendant by a jailhouse informant after defendant's Sixth Amendment right to counsel had attached. The court rejected the state's contentions that the informant was not acting as a government agent since he had not been specifically instructed to target defendant. Instead the court looked to the existence of an "implicit understanding" between the state and the informant that he would be rewarded for supplying information, the fact that law enforcement officers had protected the informant when other inmates learned of his work as a snitch, and the fact that police officers supplied the informant with money in order to bolster his claims to other inmates that he had "connections" on the outside, and concluded that the informant was an agent of the prosecution. In addition, the court found that the informant "conducted a deliberate interrogation of [defendant] intended to evoke an inculpatory disclosure." Finally, the court made clear that defendant's rights under the Pennsylvania Constitution, as well as the Sixth Amendment to the United States Constitution, were violated by admission of the informant's testimony.

State v. Dixon,
916 S.W. 2d 834 (Mo. App. 1996)

Subsequent to defendant's arrest for sexual abuse, arraignment, and appointment of an attorney, a service worker with the Division of Family Services interviewed him and obtained incriminating statements. As required under state law, the service worker turned the statements over to the police. The service worker did not ask the defendant if he was represented by an attorney or if he wanted an attorney present during the interview. Although she did advise him that any statements he made could result in criminal prosecution, she failed to advise him of his constitutional rights. In reversing the conviction, the Missouri Court of Appeals held that the service worker was acting as a government agent and thus was required to advise the defendant of his constitutional rights. Advising him any statements he made could lead to a criminal prosecution was inadequate and misleading as she knew a criminal prosecution had already been initiated and that she was going to share her information with the police.

Jackson v. State,
643 A.2d 1360 (Del. 1994), cert. denied, 115 S.Ct. 956 (1995)

Friend of defendant who agreed to cooperate with police, using government recording equipment to tape telephone conversations with defendant, was acting as "state agent" for purpose of determining whether defendant's 6th Amendment right to counsel was violated; though defendant may have initiated telephone calls, friend deliberately elicited incriminating statements from him.

In re Neely,
864 P.2d 474 (Cal. 1993)

Defense counsel's failure to investigate adequately a factual basis for suppression of tape recording of conversation between defendant and codefendant on *Massiah* grounds, or to object on *Massiah* grounds, deprived defendant of competent representation; evidence indicated that,

while acting as government agent, codefendant deliberately elicited incriminating information from defendant after defendant had been arrested and charged with crimes.

State v. Leadingham,
438 S.E.2d 825 (W.Va. 1993)

While defendant is hospitalized in psychiatric facility for court-ordered psychiatric examination, sending undercover informant to facility to obtain incriminating statements without ascertaining mental condition violates due process.

State v. Meeks,
876 S.W.2d 121 (Tenn.Crim.App. 1993)

Defendant's 6th Amendment right to counsel violated when fellow inmate recorded two phone conversations with defendant and gave tapes to police; in exchange for inmate's assistance, authorities agreed to request his parole application be dropped, and thus inmate was acting as a police agent; moreover, fact that state might have legitimate reason for taping the conversations did not change result.

Sparks v. State,
1993 WL 151324 (Tenn. May 10, 1993)

Capital defendant granted resentencing. Court directed that evidence of conversation between defendant and codefendant, who agreed to wear a wire during his visit, which yielded incriminating statements, be excluded as a violation of *Massiah*.

State v. Watkins,
617 A.2d 281 (N.J.Super.App.Div. 1992)

Evidence, secured through violation right to counsel, that defendant attempted to contrive alibi seriously struck at his credibility at trial, and thus constitutional error was not harmless beyond reasonable doubt; the evidence was obtained by inducing defendant to call prosecutor's investigator who purportedly would have supplied defendant with an alibi witness.

Simpson v. United States,
632 A.2d 374 (D.C. 1992)

Defendant's pretrial statements, taken in violation of his 6th Amendment right to counsel, could not be used for impeachment during murder trial; defendant had not been fully advised of *Miranda* rights, officer who interrogated defendant knew he had a lawyer at time he was interrogated and statements, made while defendant was hospitalized with self-inflicted stab wounds, were involuntary.

Commonwealth v. Moose,
602 A.2d 1265 (Pa. 1992)

Inmate was state "agent," and thus Commonwealth knowingly circumvented defendant's 6th Amendment right to counsel when the inmate elicited confession from defendant after right to counsel had attached, even though inmate was not planted for purpose of gaining information from targeted defendants; inmate had been in jail for three years awaiting sentencing, Commonwealth repeatedly delayed sentencing every time inmate produced a new confession and Commonwealth was prepared to give inmate a lenient recommendation despite heinous charges filed against him.

People v. Cribas,
282 Cal.Rptr. 538 (Cal.App. 1991), cert. denied, 503 U.S. 951 (1992)

Incriminating statements by defendant during telephone conversation with rape victim following defendant's arrest and appointment of counsel were elicited in violation of defendant's 6th Amendment right to counsel; although conversation was initiated by defendant, victim was instructed by police to elicit statements concerning rape following previous call, and victim was staying at motel at taxpayer expense.

People v. Harper,
279 Cal.Rptr. 204 (Cal. App. 1991)

Admissions made by defendant to correctional officer during incarceration to effect that he had threatened witness, in response to officer's questioning which occurred in absence of counsel, could not be admitted to impeach defendant's conflicting testimony; without admission, evidence that witness was threatened came solely from witness, which contradicted defendant's testimony and witness' credibility was undermined.

State v. Clausell,
580 A.2d 221 (N.J. 1990)

Defendant's right to counsel violated where detective, whom defendant called, recorded inculpatory statements of defendant who was represented by counsel, falsely told defendant he was not recording the conversations, and ignored defendant's assertion that he did not want to be questioned about the murder for which he was convicted.

State v. Sargent,
762 P.2d 1127 (Wash. 1988)

Probation officer violated defendant's Sixth Amendment right to counsel by obtaining written confession knowing that defendant's appeal was pending; officer knew that defendant intended to confess at interview but did not contact defendant's counsel, despite being instructed to do so.

People v. Hoskins,
523 N.E.2d 80 (Ill. App. 1988), appeal denied, 530 N.E.2d 256 (Ill. 1988)

Even though no murder charge had yet been filed against him, defendant's 6th Amendment right to counsel had attached at time he was rearrested for assault victim's murder, where murder arose out of same underlying facts as assault; five to ten-minute interval between officers' interview with defendant and his request for officers return so he could confess was not sufficient to remove taint of original, purposeful violation of 6th Amendment counsel rights.

State v. Currington,
746 P.2d 997 (Idaho App. 1987)

Relief granted where informant was acting as State agent when he recorded conversation with defendant, for purposes of Sixth Amendment violation, although informant allegedly approached police for protection from defendant and was not paid for his services; informant was acting pursuant to instructions from employee of prosecutor's office when he made recording, and used equipment provided by that office.

State v. Nelsen,
390 N.W.2d 589 (Iowa 1986)

Defendant's Sixth Amendment right to counsel attached upon county attorney's filing of complaint and issuance of summons, and her right to counsel was violated by State's trial use of incriminating statements made to probation officer without presence of counsel or valid waiver.

State v. Lee,
1986 WL 2028 (Ohio App. 1986) (unpublished)

Massiah violated where police set witness up to record conversations with defendant after right to counsel had attached. Police paid for witness' motel room and knew she would seek information about offense for which defendant had already been appointed counsel. Court rejected State's invitation to adopt the "rescue doctrine" allowing circumvention of right to counsel where defendant is endangering a witness.

People v. Baker,
476 N.E.2d 1227 (Ill. App. 1985)

Defendant's 6th Amendment right to counsel violated where FBI had two wired informants talking to defendant after indictment and appearance of counsel. State tried to justify violation by pointing to court order FBI had gotten allowing the recordings, and by arguing that defendant made the statements voluntarily. Court rejected this and went on to conclude that admission of the evidence was not harmless.

Woodson v. United States,
488 A.2d 910 (D.C. 1985)

Defendant not knowingly and intelligently waive 6th Amendment right to presence of counsel during interrogation about prior charge, even though he signed written waiver of *Miranda* rights following arrest for subsequent incident, where he was neither informed nor understood that right to counsel in prior matter was distinct from any other rights he might have, police never offered to call his attorney nor referred to attorney by name, and he did not know prior to waiving *Miranda* rights and prior to interrogation that he would be questioned about prior incident.

People v. Otero,
486 N.Y.S.2d 825 (N.Y.Crim.1985)

In prosecution for murder, police tape recording of defendant's alleged attempt to bribe witness violated right to counsel and was inadmissible as evidence of defendant's consciousness of guilt; therefore, prosecution for murder and bribery would not be consolidated.

People v. Gonyea,
365 N.W.2d 136 (Mich. 1984)

Defendant did not waive right to counsel where, although he stated he did not need his attorney when detectives approached him after he was sentenced for second-degree murder guilty plea and asked him to help clear up unresolved matters in investigation, defendant specifically asked about attorney when detectives asked him to accompany them and retrace events of the eve of the killing, and where detectives lied that defense counsel had given permission to question him, when in fact defense counsel had refused permission. Under state constitution, statement was inadmissible for impeachment or substantive purposes.

Farruggia v. Hedrick,
322 S.E.2d 42 (W.Va. 1984)

Admission of statements made by defendant after indictment to accomplice who had been wired with two transmitters by sheriff's department without defendant's knowledge violated defendant's Sixth Amendment rights where statements were made in absence of counsel.

McCubbin v. State,
675 P.2d 461 (Okla.Crim.App. 1984)

Where informant was selected in advance by sheriff to obtain information about victim's death, and placed in jail with defendant pursuant to such arrangement, after defendant was arrested, charged and counsel had been appointed, sheriff deliberately enticed incriminating words from defendant in violation of the 6th Amendment. Admission was not harmless.

People v. Superior Court of Fresno County,
194 Cal.Rptr. 525 (Cal. App. 1983)

Statements by defendants to police informant during meetings arranged by the informant which occurred at time when the informant was receiving money for the information from the police were inadmissible as violative of defendants' Sixth Amendment rights, despite fact that the conversations were not held in a custodial setting and informant had not been instructed to interrogate either of the defendants.

Williams v. State,
644 S.W.2d 891 (Tex. App. 1982)

In prosecution for voluntary manslaughter, trial court committed reversible error by allowing a jailmate of defendant to testify concerning oral statements made to jailmate by defendant while both were in jail without first conducting a *Denno*-type hearing outside presence of the jury as to whether defendant's statements were voluntary where they were used to negative and destroy defendant's self-defense theory, and to impeach her testimony.

People v. Pottruff,
323 N.W.2d 402 (Mich. App. 1982)

Defendant's statement to police officer after polygraph examination, to which defendant and defense counsel had agreed, and after defendant was given *Miranda* rights was taken in violation of defendant's Sixth Amendment right to counsel and Fifth Amendment rights, no valid waiver having been shown, and, accordingly, admission of statement was error.

Iddings v. State,
427 N.E.2d 10 (Ind. App. 1981)

State's use of informant, who was recruited to gather information from fellow prisoners and report it to sheriff in return for sheriff's help with charges pending against him, to obtain information about defendant, a fellow inmate at county jail, interfered with defendant's 6th Amendment right to counsel and it was not important that informant did not tell police about defendant's statements about gas station robbery until after informant was convicted.

Loveless v. State,
634 P.2d 941 (Alaska App. 1981)

Error in permitting psychiatrist to testify as to certain statements made to him by defendant following defendant's arrest was not harmless.

State v. Mollohan,
272 S.E.2d 454 (W.Va. 1980)

Where defendant, whose right to counsel attached at extradition hearing, was arrested in New Hampshire on murder charges, and troopers threatened defendant with fingerprint evidence, played on defendant's avowed religious beliefs, and took advantage of his limited mental capacity over two-day period when he was isolated from everyone except preacher and troopers during transport to West Virginia, waiver of right to counsel, which occurred during trip, was coerced.

Malone v. State,
390 So.2d 338 (Fla. 1980), cert. denied, 450 U.S. 1034 (1981)

Incriminating statements made by defendant to cellmate informant should have been suppressed because those statements, made in the absence of counsel, with no prior waiver of counsel, were directly elicited by the State's strategy deliberately designed to elicit incriminating statements; informant and police came up with an elaborate scheme to gain defendant's trust and to extract incriminating information from him.

State v. Webb,
625 S.W.2d 281 (Tenn.Crim.App. 1980), aff'd, 625 S.W.2d 259 (1981), cert. denied, 456 U.S. 910 (1982)

Where state placed undercover agent in cell with defendant for purpose of obtaining information concerning homicide for which defendant had been arrested, there was an "interrogation" and defendant's 6th Amendment right to counsel was subverted and, thus, admission of agent's testimony as to incriminating statements made to him by defendant was prejudicial error.

State v. Berry,
592 S.W.2d 553 (Tenn. 1980), cert. denied, 449 U.S. 887 (1980)

Statements which defendant made, while in jail, to TBI agent posing as a prisoner after defendant had been indicted for murder and employed counsel and after law enforcement promised counsel there would be no interrogation, and which related to the murder case and to threats made against witnesses and plans for their extermination, were not admissible in murder prosecution even though the statements were voluntary.

People v. Lebell,
152 Cal.Rptr. 840 (Cal.App. 1979)

Where complaint had been issued charging defendant with murder, and arrest warrant issued thereon before police officer, who was acquaintance of defendant, visited him at his apartment, with officer being wired and accompanied by other officers who were stationed outside the apartment, recorded conversation was required to be suppressed as obtained in violation of right to counsel.

People v. Maerling,
385 N.E.2d 1245 (N.Y. 1978)

Police officer, who engaged in long, two-way conversation whose direction became apparent almost from the beginning, trespassed on spirit, if not on letter, of principles concerning protection of defendant's right to counsel and thus jailhouse confession taken from defendant, who never talked to his lawyer before his waiver of counsel, violated defendant's right to counsel.

People v. Boyd,
406 N.Y.S.2d 963 (N.Y.Sup.Ct. 1978)

Where defendant was represented by counsel, his statements to officer, who limited himself to inquiries about corruption in Department of Correction, as to jury tampering in another matter as to which he was under indictment were required to be excluded, notwithstanding that the conversations did not actually amount to interrogation.

People v. Colon,
405 N.Y.S.2d 735 (N.Y.App.Div. 1978)

Statement made by defendant to police officers in the absence of counsel some five months after defendant had been indicted was not admissible on theory that statement was unrelated to matters which caused defendant's arrest because the unrelated matters were not discussed until after defendant's inculpatory statement had been made

State v. Daugherty,
562 P.2d 42 (Kan. 1977)

Where codefendant became informer as part of deal with the state, and prosecutors knew defendant was represented by counsel, evidence collected through a bug in codefendant's motel room was "fruit" of an interrogation conducted in contravention of Sixth Amendment right to counsel, and in closely contested case, such evidence, admitted as evidence of a previous similar crime, was not harmless.

State v. Peters,
545 S.W.2d 414 (Mo. App. 1976)

Defendant's Sixth Amendment right to assistance of counsel was violated when police placed microphone in his former wife's hair and recorded and transcribed incriminating conversation during their visit at jail; such error was reversible error requiring new trial.

People v. Hobson,
348 N.E.2d 894 (N.Y. 1976)

Once attorney had been appointed for defendant to represent him during lineup, defendant while

being held in custody could not thereafter waive his right to counsel in the absence of that attorney while being questioned by police officer.

State v. McCorgary,
543 P.2d 952 (Kan. 1975), cert. denied, 429 U.S. 867 (1976)

Defendant who was placed in a cell with a police informer who had secretly prearranged with police to try to get statements from defendant did not make a voluntary and knowing waiver of assistance of counsel with respect to statements made to the informer; testimony of informer about these statements was inadmissible.

State v. Johns,
177 N.W.2d 580 (Neb. 1970)

Where defendant, advised of right to counsel, related that he wished to waive rights and give statement but, in response to first question, related that he wanted counsel present, and defendant did not indicate that he wished to make a statement prior to officer's re-advising him of his rights two hours later, with result that defendant related that he wished to proceed in absence of counsel, and counsel's request of county attorney that interrogation not proceed in his absence was not conveyed to interrogating officers until one hour after its receipt and subsequent to confession, confession and defendant's statements were tainted and admission thereof was prejudicial error.

State v. Seal,
160 N.W.2d 643 (S.D. 1968)

Defendant who claimed to have requested counsel at interrogation and who had reason to believe counsel was retained, did not waive his right to counsel during interrogation wherein he made incriminating statements, where police knew prior to interrogation that counsel had accompanied defendant for expected arraignment and where testimony of former prosecutor and sheriff, who was present at interrogation, concerning the interrogation was contradictory; defendant's incriminating statements made during the interrogation were inadmissible.

State v. Witt,
422 S.W.2d 304 (Mo. 1967)

Where defendant was represented by counsel when he first appeared in magistrate court to fix date for preliminary hearing, none of defendant's subsequent interrogators asked him if he wanted his lawyer present or told him of this right, and where only patrolman claimed that defendant was advised, not of his right to the presence of his lawyer during interrogation, but simply of general right to counsel, defendant's admissions were obtained in violation of his constitutional rights.

State v. Cowans,
227 N.E.2d 201 (Ohio 1967)

Because defendant's confession was obtained by police after his indictment and in the absence of counsel, and there was no knowing and intelligent waiver of the accused's constitutional rights but rather a demand that they be honored, it was error to admit testimony concerning that confession into evidence.

Williams v. Florida,
188 So.2d 320 (Fla. App. 1966)

Where police officers, knowing that defendant had been in jail for three weeks charged with first-degree murder, that he had already been indicted, and that he had a lawyer, took defendant out of his cell and transported him to a small room, closed the door, and thereafter obtained a confession, confession was inadmissible, even though defendant had not in terms demanded that his lawyer be present.

People v. Arguello,
407 P.2d 661 (Cal. 1965)

Undercover agent's testimony regarding murder defendant's admissions made to him, which were tantamount to a confession, was inadmissible where statements were deliberately elicited from defendant by government agent following defendant's indictment, in absence of counsel and without defendant's knowledge that government agent was not an inmate as he represented himself to be.

Commonwealth v. McCarthy,
200 N.E.2d 264 (Mass. 1964)

Admission of defendant's plainly prejudicial statement made to police over six months after he was indicted and in absence of counsel known to one officer was error; upon vacation of finding that one defendant had committed murder, justice required new trial for other defendant, where defendants were tried together, and finding that defendant had committed murder was required before other defendant could be convicted of murder.