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SACRIFICING *MASSIAH*: CONFUSION OVER EXCLUSION AND EROSION OF THE RIGHT TO COUNSEL

by
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In this Article, Professor Tomkovicz examines the Sixth Amendment right-to-counsel-based "exclusionary rule" first announced in 1964, in Massiah v. United States. *The impetus for this examination is the Supreme Court's 2009 ruling in* Kansas v. Ventris*—more specifically, that decision's dubious and disingenuous explanation of the constitutional rationale for* Massiah*'s exclusion doctrine. The Article describes the original vision of suppression that seemed to animate the ruling in* Massiah. *It then traces the cryptic development of the Sixth Amendment exclusion doctrine through nearly a half-century of post-*Massiah *opinions. Next, Professor Tomkovicz focuses his attention on* Ventris*—the first definitive exploration of the justification for barring admissions deliberately elicited from uncounseled defendants. The* Ventris *majority classified* Massiah *suppression as a mere deterrent safeguard designed to prevent pretrial counsel deprivations. The Court rejected the view that exclusion is a right—that is, that an accused has a personal entitlement not to be convicted based on uncounseled admissions elicited by government agents. The Court's understanding of* Massiah *exclusion runs contrary to the original conception. More important, it is utterly irreconcilable with the nature of the guarantee of pretrial legal assistance that is* Massiah*'s foundation. It ignores the core reasons for the pretrial extension of the right to trial assistance—to preserve a fair adversarial process and to guard the accused against negative courtroom consequences of imbalanced pretrial clashes.* Ventris

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rests on the indefensible premises that pretrial assistance exists for its own sake, that constitutional harm is inflicted only before trial, and that damage to an accused's chances for acquittal at trial is not the constitutional concern. This Article proffers reasons why the Justices might have arrived at this hopelessly misguided conception. Those reasons include uncritical, monolithic thinking about "exclusionary rules," palpable, abiding hostility toward constitutional suppression doctrines that defeat the search for truth, and dissatisfaction with Massiah*'s extension of the right to counsel's assistance. Finally, the Article discusses the pragmatic consequences of* Ventris*'s impoverished vision, concluding that constraints imposed on Fourth Amendment exclusion—another purely deterrent bar to evidence—will surely be imposed on Sixth Amendment suppression. As a result, the right-to-counsel "exclusionary rule" will be constrained in ways that would be impossible if the Justices acknowledged the true "constitutional right" character of* Massiah*'s evidentiary bar. According to Professor Tomkovicz,* Ventris*'s legacy—an array of restrictions on the reach of the Sixth Amendment "exclusionary rule"—will pose a genuine threat to the vitality of the fundamental right to the assistance of counsel.*

I. INTRODUCTION

The *Massiah* doctrine has been an integral part of my professional life for more than twenty years. Our relationship began early on in my academic career with an effort to proffer possible justifications for *Massiah*'s pretrial extension of the right to the assistance of counsel.[1] Soon, our bond deepened, first with an exploration of *Massiah*'s bar to admissions of guilt,[2] and then with a response to attacks on *Massiah*'s legitimacy.[3] The ensuing years involved brief, cursory encounters, first in a text devoted to an examination of every nuance of the Sixth Amendment right to counsel,[4] and then in a contribution solicited for a book that explored the jurisprudence of former Chief Justice Rehnquist.[5] Not long thereafter, a terse Supreme Court opinion in a *Massiah* case brought us back together in earnest.[6] Our reunion produced two offspring, one focused on the scope of *Massiah*'s pretrial guarantee,[7] the other concerned with the courtroom consequences of denying pretrial assistance.[8] At that point, I concluded that our relationship had exhausted all productive possibilities and decided that we should go our separate ways once again.

As fate would have it, this separation would not be permanent. A confluence of unrelated events conspired to bring us together once more. First, I stumbled upon a novel idea for a book—a text that would juxtapose and scrutinize every constitutional basis for excluding evidence of guilt. The idea rapidly ripened into a proposal, then a contract, then a three-year journey.[9] During that endeavor, I could hardly ignore *Massiah*'s significant Sixth Amendment bar to inculpatory statements.

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[1] *See* James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the* Massiah *Doctrine*, 22 U.C. DAVIS L. REV. 1 (1988) [hereinafter Tomkovicz, *Truth, Fair Play, and the* Massiah *Doctrine*].

[2] *See* James J. Tomkovicz, *The* Massiah *Right to Exclusion: Constitutional Premises and Doctrinal Implications*, 67 N.C. L. REV. 751 (1989) [hereinafter Tomkovicz, *The* Massiah *Right to Exclusion*].

[3] *See* James J. Tomkovicz, *The Truth About* Massiah, 23 U. MICH. J.L. REFORM 641 (1990) [hereinafter Tomkovicz, *The Truth About* Massiah].

[4] *See* JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION (2002) [hereinafter TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL].

[5] James J. Tomkovicz, *Against the Tide: Rehnquist's Efforts to Curtail Expansion of the Right to Counsel*, *in* THE REHNQUIST LEGACY 129 (Craig Bradley ed., 2006).

[6] The opinion was Fellers v. United States, 540 U.S. 519 (2004).

[7] *See* James J. Tomkovicz, *Reaffirming the Right to Pretrial Assistance: The Surprising Little Case of* Fellers v. United States, 15 WM. & MARY BILL RTS. J. 501 (2006) [hereinafter Tomkovicz, *Reaffirming the Right to Pretrial Assistance*].

[8] *See* James J. Tomkovicz, *Saving* Massiah *From* Elstad*: The Admissibility of Successive Confessions Following a Deprivation of Counsel*, 15 WM. & MARY BILL RTS. J. 711 (2007) [hereinafter Tomkovicz, *Saving* Massiah *From* Elstad].

[9] *See* JAMES J. TOMKOVICZ, CONSTITUTIONAL EXCLUSION: THE RULES, RIGHTS, AND REMEDIES THAT STRIKE THE BALANCE BETWEEN FREEDOM AND ORDER (2011) [hereinafter TOMKOVICZ, CONSTITUTIONAL EXCLUSION].

One of the text's seven chapters is devoted entirely to a depiction of *Massiah*'s suppression mandate.[10]

Second, the recent Supreme Court opinion in *Kansas v. Ventris*[11] took the long overdue step of explaining the nature of and justifications for *Massiah*'s exclusionary rule. Throughout my text on constitutional exclusion, I did my best to explain the justifications for evidentiary suppression in a balanced way that credited all competing arguments. I tried not to let my own judgments about the merits distort the analyses. The one time that I found it necessary to abandon neutrality was in the discussion of *Ventris*'s long overdue explanation of the *Massiah* exclusion doctrine. For the other six constitutional bars, even though I might not have agreed with the Supreme Court's interpretations, I recognized that they had defensible foundations. *Ventris* prompted a different reaction, for I could (and still can) find no redeeming merit in its characterization of *Massiah*'s evidentiary bar. In my view, it is fundamentally misconceived, entirely lacking in logic, and at bottom, superficial and disingenuous.

These events alone might not have compelled me to once again take up arms in *Massiah*'s defense. The critical impetus was my discovery that no other scholar had confronted the indefensible logic of *Ventris*. My long-time relationship with *Massiah* has always been the product of a genuine concern for the integrity of the Sixth Amendment right to counsel. Because that concern has never wavered and because the fallacies of *Ventris* threaten the right that is the fulcrum of our adversarial criminal justice systems, I again find it necessary to stand up for *Massiah*.

This Article first explores the origins and evolution of *Massiah*'s Sixth Amendment exclusion doctrine, concluding with a thorough examination of *Ventris*'s premises and conclusions. It then dismantles those premises and conclusions, discussing why they are simply irreconcilable with *Massiah*'s interpretation of the right to counsel and, indeed, with the core Sixth Amendment entitlement on which *Massiah* rests. Finally, this Article explains the potential impacts of *Ventris*'s misguided understanding of the *Massiah* doctrine. As will be seen, *Ventris* is a theoretically unsound decision with significant pragmatic ramifications that undermine a fundamental Bill of Rights guarantee. It is an emperor whose patent lack of clothing must be proclaimed.

II. THE BIRTH AND DEVELOPMENT OF THE *MASSIAH* EXCLUSION DOCTRINE

The Sixth Amendment right-to-counsel bar to inculpatory government evidence was the first of four new constitutional exclusion doctrines announced by the Warren Court during a mere four-year span

[10] Chapter Four of the book is entitled *The* Massiah *Doctrine: Sixth Amendment Exclusion of Confessions*. *See id.* at 155–218.

[11] 129 S. Ct. 1841 (2009).

in the mid-1960s.[12] For the 45 years that followed, the Court devoted astoundingly little attention to the rationales or justifications for *Massiah*'s suppression mandate.[13] The failure to explore the underpinnings of the Sixth Amendment's evidentiary bar stands in marked contrast to the Court's treatment of two of the most prominent constitutional exclusion doctrines.[14] In *Kansas v. Ventris*, a surprisingly

[12] The others, which followed close on the heels of *Massiah*, were the Fifth Amendment privilege-based exclusion doctrine of *Miranda v. Arizona*, 384 U.S. 436 (1966), the Sixth Amendment-based bar to evidence announced in *United States v. Wade*, 388 U.S. 218 (1967), and the due process prohibition on proof discerned in *Stovall v. Denno*, 388 U.S. 293 (1967). Moreover, just three years before *Massiah*, in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court announced that due process forbade the states from admitting the products of unreasonable searches and seizures. However, that suppression doctrine, unlike those discussed above, had roots in the Fourth Amendment-based bar to evidence promulgated early in the twentieth century. *See* Weeks v. United States, 232 U.S. 383 (1914). The only other constitutional exclusionary commands—the Fifth and Fourteenth Amendment bars to coerced confessions and the Sixth Amendment Confrontation Clause prohibition on hearsay—both date to the late nineteenth century. *See* Bram v. United States, 168 U.S. 532 (1897) (recognizing a Fifth Amendment bar to inculpatory statements); Reynolds v. United States, 98 U.S. 145 (1878) (acknowledging a Confrontation Clause constraint on the use of hearsay).

[13] The Court's neglect of the underlying premises for the right to counsel that is the basis of the suppression doctrine has been even more astounding. The Court's opinion in *Massiah* did contain some intimations about the reasons for exclusion, some subsequent opinions devoted a small amount of attention to those reasons, and the *Ventris* opinion finally faced the subject directly. In contrast, the *Massiah* Court did not explain the constitutional logic beneath extending a pretrial guarantee of counsel to the "critical stage" defined by *Massiah*. *See* Tomkovicz, *Saving* Massiah *from* Elstad, *supra* note 8, at 745–47; Tomkovicz, *Reaffirming the Right to Pretrial Assistance*, *supra* note 7, at 505; Tomkovicz, *Truth, Fair Play, and the* Massiah *Doctrine*, *supra* note 1, at 30. Moreover, in the nearly fifty years since that extension the Court has never explored the constitutional justifications for *Massiah*'s pretrial entitlement to assistance. *See* Tomkovicz, *Saving* Massiah *from* Elstad, *supra* note 8, at 745–46; Tomkovicz, *Truth, Fair Play, and the* Massiah *Doctrine*, *supra* note 1, at 22. This silence is all the more remarkable in light of the complaints of dissenters—on more than one occasion—that the right to pretrial assistance against deliberate elicitation is constitutionally indefensible. *See* United States v. Henry, 447 U.S. 264, 289–90, 293–96 (1980) (Rehnquist, J., dissenting); Massiah v. United States, 377 U.S. 201, 209–10 (1964) (White, J., dissenting). As will become clear later, the rationales for the right to counsel and for suppressing evidence obtained when an accused is denied that right are intertwined.

[14] It is truly remarkable that the *Massiah* exclusion doctrine existed for well over forty years without a definitive explanation of its underlying premises and rationales. During that time, the nature and justifications for both the Fourth Amendment and the *Miranda* exclusionary rules were the subjects of explicit discussion on multiple occasions and underwent dramatic revisions. *See, e.g.*, United States v. Patane, 542 U.S. 630, 639–44 (2004) (Thomas, J., plurality opinion) (exploring the character of and rationales for *Miranda* exclusion); Withrow v. Williams, 507 U.S. 680, 691–92 (1993) (explaining the *Miranda* suppression doctrine's foundations); United States v. Leon, 468 U.S. 897, 906–13 (1984) (discussing the nature and premises of the Fourth Amendment exclusionary rule); United States v. Calandra, 414 U.S. 338, 347–48 (1974) (discussing the logic underlying the Fourth Amendment exclusionary rule). In stark contrast, the Court devoted exceedingly little attention to the foundations of *Massiah*'s bar.

large seven-Justice majority at long last agreed upon and set forth the bases and objectives of *Massiah*'s exclusion mandate.

A. Original Insights of the Massiah *Opinion*

Massiah v. United States involved a defendant who had been indicted for narcotics offenses.[15] A codefendant who had "decided to cooperate with" federal agents allowed investigators to place a "radio transmitter" in his automobile and to listen in while he "held a lengthy conversation" with Massiah.[16] The prosecution then used inculpatory admissions that agents overheard to prove his guilt at the trial. The Court concluded that Massiah had been "denied the basic protections of [the Sixth Amendment right to counsel] *when there was used against him at his trial* evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."[17] In the majority's view, because Massiah was entitled to the assistance of counsel during the pretrial encounter with a government agent, the disclosures he made "could not constitutionally be used by the prosecution as evidence against *him* at his trial."[18]

Massiah commanded suppression of the defendant's admissions because the defendant was entitled to counsel, and the government did not respect that entitlement. The new bar to evidence recognized in *Massiah* was rooted in the new extension of the Sixth Amendment right to assistance and was a result of the government's denial of the pretrial entitlement to counsel's aid. The breadth of the suppression mandate, therefore, depended on the breadth of the pretrial counsel entitlement. By its terms, *Massiah* granted this entitlement only to individuals formally charged with offenses. Massiah "had been indicted" at the time he was confronted by a government agent.[19] On the other hand, the right to

[15] 377 U.S. 201 (1964).

[16] *Id.* at 202–03.

[17] *Id.* at 206 (emphasis added).

[18] *Id.* at 207.

[19] A primary foundation for the *Massiah* opinion—the concurring opinions in *Spano v. New York*, 360 U.S. 315, 324–26 (1959) (Douglas, J., concurring); *id.* at 326–27 (Stewart, J., concurring)—had emphasized the importance of indictment, and in earlier decisions the Court had denied right-to-counsel protection prior to formal accusations. *See* Cicenia v. Lagay, 357 U.S. 504, 508–10 (1958); Crooker v. California, 357 U.S. 433, 438–41 (1958). Nevertheless, dissenting Justices in *Massiah* did question whether the newly recognized right to counsel, and thus the evidentiary exclusion mandate, would extend to situations in which an individual had been arrested, but not yet formally charged. *Massiah*, 377 U.S. at 212 (White, J., dissenting). Their fears were realized in an opinion handed down just one month after *Massiah*. *Escobedo v. Illinois*, 378 U.S. 478 (1964), involved the admissibility of incriminating statements made during the interrogation of a man who had been arrested for, but not formally charged with, a murder. *Id.* at 485. The authorities had denied numerous requests by a retained lawyer to see the suspect and numerous requests by the suspect to consult with counsel. *Id.* at 481–82. After acknowledging that Massiah had been indicted at the time his statements were elicited, the Court declared that "that fact should make no difference"

counsel was *not* restricted to cases involving "interrogation" by known police officers—the situation involved in *Spano v. New York*. It also reached situations in which unknown state operatives "deliberately elicited" admissions from unsuspecting defendants by merely conversing

because in *Escobedo* law enforcement officers were not investigating an "unsolved crime." *Id.* at 485 (quoting *Spano*, 360 U.S. at 327 (Stewart, J., concurring)). Instead, Escobedo "had become the accused, and the purpose of the interrogation was to 'get him' to confess his guilt." *Id.* Just like the defendants in *Spano* and *Massiah*, he needed the advice of counsel at this "critical" stage of the process where events "could certainly 'affect the whole trial.'" *Id.* at 486 (citation omitted). In the majority's view, "[i]t would exalt form over substance to make the right to counsel . . . depend on whether . . . the interrogation" occurred after "a *formal* indictment," because Escobedo "had, *for all practical purposes*, already been charged with murder." *Id.* (emphasis added). The assistance of a lawyer at trial would be of little value if the authorities could secure and use inculpatory admissions from a person in his position.

A number of limiting circumstances narrowed the actual holding of *Escobedo*. According to the majority, "no statement elicited by the police during [an] interrogation [could] be used against [a defendant] at a criminal trial" if: (1) it was obtained when "the investigation [was] no longer a general inquiry into an unsolved crime but ha[d] begun to focus on a particular suspect"; (2) if the suspect was in "custody," was subjected to "a process of interrogations," and had "requested and been denied an opportunity to consult with his lawyer"; and (3) if "the police ha[d] not . . . warned him of his . . . right to remain silent." *Id.* at 490–91. In such a situation, an individual had a Sixth Amendment entitlement to assistance and a denial required the suppression of any disclosures. *Id.* at 491.

Despite these limiting criteria, *Escobedo* was a significant ruling. For the first time, the Court extended the Sixth Amendment right to counsel to an individual who had not been formally accused and barred probative evidence the authorities had obtained from him. *Id.* at 490–91. The *Escobedo* Court did not explore the justifications for Sixth Amendment suppression. Courtroom use was forbidden because the statements were acquired by means of an encounter in which the authorities failed to respect the defendant's constitutional entitlement to legal assistance.

Four dissenting Justices objected to *Escobedo*'s expansion of the right to counsel to the pre-accusation phase of the criminal process. *See id.* at 492 (Harlan, J., dissenting); *id.* at 493 (Stewart, J., dissenting); *id.* at 495 (White, J., dissenting). Their reasoning and position would soon prevail. Just two years later, the Court declared that the *Escobedo* ruling had actually been based upon and intended to implement the Fifth Amendment privilege against compulsory self-incrimination, *not* the Sixth Amendment entitlement to counsel. *See* Johnson v. New Jersey, 384 U.S. 719, 729–30 (1966); Miranda v. Arizona, 384 U.S. 436, 465–66 (1966). In a number of subsequent decisions, the Court made it unmistakably clear that the Sixth Amendment right *never* attaches prior to a formal accusation. *See, e.g.*, Rothgery v. Gillespie County, Tex., 128 S. Ct. 2578, 2583 (2008); Moran v. Burbine, 475 U.S. 412, 428–32 (1986); United States v. Gouveia, 467 U.S. 180, 187–88 (1984). Consequently, the Sixth Amendment exclusion doctrine does not bar inculpatory statements obtained prior to formal accusation. *See* Illinois v. Perkins, 496 U.S. 292, 299–300 (1990) (observing that there was no Sixth Amendment basis for barring the confession because the defendant was not formally accused at the time his statements were secured); *Burbine*, 475 U.S. at 428, 432 (explaining that defendant had no right-to-counsel entitlement because he had not been formally accused at the time officers secured admissions). Historically, *Escobedo* proved to be a constitutional misstep, a short-lived expansion of the right to counsel's scope and its corresponding suppression doctrine. Today, *Massiah*'s counsel extension—and its exclusion mandate—are operative only after the formal accusatory process commences.

with them.[20] The *Massiah* majority made it clear that the Sixth Amendment entitlement to assistance reached *both* direct and open interrogations *and* "indirect and surreptitious" efforts to secure incriminating disclosures.[21] A "defendant's own incriminating statements . . . could not constitutionally be used . . . against *him* at his trial" if they were the product of either sort of confrontation with the government.[22] Mere conversation by Massiah's codefendant—who was working with federal agents—was sufficient to trigger a Sixth Amendment right to legal assistance.[23]

Finally, while the *Massiah* majority did not discuss the constitutional justifications for suppressing deliberately elicited statements separately or in any depth, the unavoidable implication of its conclusions and reasoning was that exclusion was an indivisible part of the Sixth Amendment right to assistance. The Court did "not question" the constitutional propriety of eliciting incriminating revelations from accused persons in order to investigate crimes—either additional crimes the accused individual is suspected of committing or the involvement of other suspects in the offenses that are the subject of the pending accusation.[24] In the majority's view, such investigatory conduct did not offend the Sixth Amendment. Rather, it was the *use* of the elicited revelations in the courtroom to prove that *the accused* had committed the charged offenses that was "constitutionally" forbidden.[25] A defendant "was denied . . . basic" Sixth Amendment "protections" only when the prosecution "used against him at his trial evidence of his own incriminating words."[26] At birth, the nature of *Massiah* exclusion was unmistakable. The bar to incriminating admissions was a defendant's

[20] *Massiah*, 377 U.S. at 203, 206.

[21] *Id.* (citation omitted). Although the Court's language implied that Massiah had been subjected to interrogation, *id.*, it seems clear that it was not using that term in its ordinary sense of questioning (or equivalent conduct) by known law enforcement officers (or other known state actors). The facts of the case established only that there was a "conversation" between Colson and Massiah, not that Massiah was questioned about his crimes or subjected to any conduct with coercive effects similar to direct questioning. *Id.* at 203. Later opinions have confirmed that mere deliberate elicitation—something less than interrogation—triggers the right to counsel and its exclusionary consequences. An accused individual has a right to assistance when an undercover agent merely converses with him, *see* United States v. Henry, 447 U.S. 264, 271 (1980) (finding a right-to-counsel deprivation and requiring the exclusion of statements made when a cellmate working with law enforcers engaged in conversation with the defendant), or when officers engage in evocative conduct that does not constitute "interrogation." *See* Fellers v. United States, 540 U.S. 519, 524–25 (2004) (unanimously concluding that officers who engaged in brief conversation with the accused had triggered the protection of the right to counsel under *Massiah* because interrogation is not required).

[22] *Massiah*, 377 U.S. at 207.

[23] *Id.* at 203, 206.

[24] *Id.* at 207.

[25] *Id.*

[26] *Id.* at 206.

personal trial right. The introduction at trial of the evidence secured before a trial effected an unconstitutional deprivation of that right.[27]

B. Ambiguities and Uncertainties Generated by Massiah*'s Offspring*

Twenty years after *Massiah*, the Court issued its first Sixth Amendment "exclusionary rule" decision.[28] *Nix v. Williams*[29] was the first post-*Massiah* case that did not involve a question of whether the accused had been denied the right to pretrial assistance. In *Nix*, the issue was whether derivative physical evidence obtained by means of disclosures that were the product of an acknowledged right-to-counsel deprivation had to be suppressed. More specifically, the question was whether the prosecution was constitutionally entitled to introduce forensic evidence found as a result of the defendant's improperly elicited revelation of the

[27] Two years after *Massiah*, the Court recognized another constitutional basis for barring a defendant's incriminating admissions in the controversial landmark ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966). Although the *Miranda* opinion cast no doubt on the *Massiah* doctrine and there was no logical tension between the two exclusionary dictates, during the years following *Miranda*, the Supreme Court virtually ignored *Massiah*. One year after *Miranda*, the Court rendered an insignificant *per curiam* ruling in *Beatty v. United States*, 389 U.S. 45 (1967), and for the next ten years the Court did not address a single *Massiah* issue. There was reason to suspect that *Miranda*'s Fifth Amendment dictates might have superseded *Massiah*'s Sixth Amendment constraints.

Two decisions that followed this decade of dormancy proved that *Massiah*'s pretrial extension of the right to counsel and its courtroom bar to admissions of guilt had not been supplanted. In *Brewer v. Williams*, 430 U.S. 387 (1977), the Court required the suppression of statements made by a formally charged individual in response to an officer's "Christian burial speech,"—conduct that the lower courts had considered "tantamount to interrogation." *Id.* at 400. Then, in *United States v. Henry*, 447 U.S. 264 (1980), the Court reaffirmed the applicability of the *Massiah* doctrine to statements made by an indicted individual during a mere conversation with a cellmate who was working for the government. Because in both cases government agents had deliberately elicited the disclosures from an individual who had been formally accused, the Sixth Amendment forbade their use at trial. *See id.* at 270–74; *Brewer*, 430 U.S. at 399, 406–07 n.12. The issue in each case was whether the defendant had been deprived of the constitutional entitlement to assistance. In *Brewer*, the specific question was whether the accused made a valid waiver of the right to counsel. *See id.* at 401–06. In *Henry*, the narrow issue was whether the circumstances established deliberate elicitation that was attributable to the government. *See Henry*, 447 U.S. at 270. Once the Court decided that each defendant had been denied a Sixth Amendment entitlement to assistance, suppression followed. Neither case involved any question or discussion about the proper scope of the *Massiah* exclusion doctrine, and neither opinion addressed the nature or underpinnings of the suppression sanction. The historical significance of *Brewer* and *Henry* was their reaffirmance of the *existence* of the right-to-counsel exclusion doctrine and their reinforcement of the conclusion that it applied to confessions elicited either openly or surreptitiously.

[28] In contrast, the first significant opinion addressing (and altering) the foundational premises of *Miranda*'s controversial bar to confessions was handed down just five years after the Court's ruling in *Miranda*. *See* Harris v. New York, 401 U.S. 222, 224 (1971).

[29] 467 U.S. 431 (1984).

site of the victim's body—"evidence of the condition of her body" and "the results of . . . medical and chemical tests [performed] on [her] body."[30]

The Court held that the derivative evidence was admissible, despite the fact that it had been acquired by eliciting uncounseled disclosures from an accused in violation of his Sixth Amendment entitlement to assistance. According to the Justices, the evidence at issue fell within an "inevitable discovery" exception to the Sixth Amendment exclusion doctrine.[31] The prosecution could use the probative physical evidence because if it had not been found by improper means it "inevitably would have been discovered by lawful means."[32]

Initially, the *Nix* majority implicitly assumed that the Sixth Amendment and Fourth Amendment exclusionary rules were similar, if not identical, in nature. Citing Fourth Amendment precedents, the Court observed that the exclusionary rule requires the suppression of "the tainted 'fruit' of unlawful governmental conduct," including "not only . . . illegally obtained evidence itself, but also . . . other incriminating evidence derived from the primary evidence."[33] It affirmed that the exclusion of not only immediate, but also derivative, evidentiary products, although socially costly, is "needed" to further the core objective of suppression—"to deter police from violations of

[30] *Id.* at 437. The issue of whether officers had denied Williams his Sixth Amendment entitlement to assistance of counsel had been before the Court several years earlier in *Brewer v. Williams*. A little girl had gone missing, and the state had sufficient reason to initiate formal proceedings accusing the defendant of abduction. While two police officers were transporting the defendant across the state of Iowa, one of them delivered evocative remarks that induced the defendant to lead them to the body of the little girl. Because the accused's lawyer was not present and he had not validly waived assistance, the officer's interaction with him—which the Court characterized as both interrogation and deliberate elicitation—was a denial of the Sixth Amendment right to counsel. *See Brewer*, 430 U.S. at 397–400, 404–06. Consequently, under *Massiah*, his disclosure of the victim's location had to be suppressed. *See id.* at 406 n.12 (affirming the lower court's ruling that the defendant's "incriminating statements" had to be excluded).

[31] *Nix*, 467 U.S. at 444, 448–50. This was the first time the Court addressed whether an "inevitable discovery" exception was an appropriate qualification of a constitutional exclusion mandate. Although the logic of *Nix* clearly means that the exception also applies to evidence subject to suppression under the Fourth Amendment exclusionary rule, the Court has never so held.

[32] *Id.* at 444. The factual basis for the conclusion that the body would have been found by alternative lawful means was an organized search for the victim that was in progress, but had been suspended temporarily when it was learned that the defendant might lead the authorities to the body. *Id.* at 448–49. This search was never resumed because the accused led the authorities to the location of the victim. The Court announced that the inevitability of the discovery need only be shown by a preponderance of the evidence—that is, prosecutors need only establish that it is more likely than not that the evidence would have been discovered by lawful means if it had not been found illegally. *Id.* at 444.

[33] *Id.* at 441.

constitutional . . . protections."[34] The competing interests in deterring constitutional transgressions and in admitting probative evidence to prove guilt were "properly balanced by putting the police in the same, not a *worse*, position [than] they would have been in if no police error or misconduct had occurred."[35]

In sum, the reasoning in *Nix* indicated that, just like the Fourth Amendment exclusionary rule, Sixth Amendment suppression is designed to deter future law enforcement improprieties; that it presumptively reaches derivative evidence; that some evidence derived from counsel deprivations is nonetheless admissible; and that cost-benefit balancing informs *Massiah* exclusion analyses. The *Nix* majority deemed an inevitable discovery exception appropriate because it was consistent with deterrent objectives. The costs were thought to exceed any speculative deterrent gains that might result from suppression when the unlawfully acquired evidence at issue would have been obtained lawfully.

Had the *Nix* opinion ended after this ostensible equation of the Sixth and Fourth Amendment suppression doctrines, it would have provided relatively clear insights into the character of *Massiah*'s suppression mandate. The opinion, however, continued by entertaining an alternative, or supplemental, understanding of Sixth Amendment suppression posited by the defendant. Because the Court neither endorsed nor rejected this different conception of the *Massiah* bar, the insights *Nix* provided into the nature of Sixth Amendment exclusion were anything but lucid. The defendant had argued that, "unlike the exclusionary rule in the Fourth Amendment context, the essential purpose of which is to deter police misconduct, the Sixth Amendment exclusionary rule is designed to protect the right to a fair trial and the integrity of the factfinding process."[36] The contention was essentially that the suppression of statements under *Massiah* is an inseparable part of the counsel guarantee and that cost-benefit balancing was impermissible in resolving Sixth Amendment exclusion issues.[37]

The Court did not decide whether the defendant's depiction of *Massiah*'s bar was constitutionally valid. Instead, it concluded that the admission of illegally gained evidence that would have been legally

[34] *Id.* at 442–43.

[35] *Id.* at 443. The Court was unanimous in its endorsement of the inevitable discovery exception. The sole disagreement was over the appropriate burden of proof. *See id.* at 459 (Brennan, J., dissenting) (asserting that the preponderance standard was too low for inevitable discovery determinations and that the government should have to satisfy the higher clear and convincing evidence standard).

[36] *Id.* at 446 (majority opinion). The argument was that *Massiah* suppression was similar in nature to the bar to coerced confessions that is grounded in both the guarantee of due process of law and the privilege against compulsory self-incrimination. Because the use of a coerced confession at trial violates due process and the privilege, exclusion is essential to preserve those trial rights. The bar is an inseparable part of the rights granted by the Fourteenth and Fifth Amendments.

[37] *Id.*

acquired was entirely reconcilable with an understanding of Sixth Amendment exclusion as an integral part of the counsel guarantee necessary to safeguard the entitlement to a fair trial.[38] If the evidence would have been lawfully discovered without the improper conduct that led to its acquisition, it would have been used against the defendant at trial. Although illegally obtained evidence has been introduced into the trial, the accused has received the very same trial that he would have received absent the official impropriety.[39] For that reason, the government's wrong could not have undermined the fairness of his trial.[40]

The Court's receptivity to the *possibility* that Sixth Amendment suppression is dramatically different in character from its Fourth Amendment counterpart generated ambiguity and uncertainty about the nature and functions of the *Massiah* bar. Based on the initial reasoning of the *Nix* Court, it was possible that Sixth Amendment and Fourth Amendment suppression were, in fact, identical in character—that is, that both were nothing more than deterrent safeguards designed to prevent future right-to-counsel violations. It was also possible, however, that exclusion was a trial right, a personal constitutional entitlement of the accused essential to full enjoyment of the Sixth Amendment right to counsel. It was even possible that *Massiah* suppression had a dual nature and multiple functions—that it was *both* a future-oriented deterrent sanction and a personal right necessary for preservation of the Sixth Amendment's protection at the accused's trial.[41] In sum, the Court's first post-*Massiah* foray into the underlying premises and operation of *Massiah*'s evidentiary bar—two decades after it was first announced—did not clarify the character of or justifications for *Massiah*'s Sixth Amendment suppression doctrine.

The very next year, *Maine v. Moulton*[42] presented a Sixth Amendment suppression issue that afforded another opportunity to explore the

[38] *Id.* at 446–47.

[39] *Id.* at 447.

[40] The Court also noted that the evidence at issue in *Nix*—the forensic evidence derived from the body of the victim—was reliable forensic evidence that could not have undermined the fairness of the trial. *Id.* at 446–47. In essence, the Court reasoned that because the evidence at issue was reliable, it could not have affected the fairness—the accuracy—of the trial outcome, and because it would have been introduced at trial anyway, its use could not have produced a less fair process or outcome.

[41] The reasoning in the bulk of the *Nix* opinion did suggest that the rule was at least partially rooted in deterrent objectives—that is, that one goal was to discourage confrontations of unassisted defendants. Nonetheless, the Court did not overtly declare that Sixth Amendment exclusion is designed to deter and did not contradict the defendant's contention that the purpose of *Massiah* exclusion is unlike the purpose of Fourth Amendment exclusion. Consequently, in a subsequent case, the Court could have announced that it had simply *assumed* that the Sixth Amendment rule was like the Fourth Amendment rule as a basis for explaining why the inevitable discovery exception is compatible with deterrent objectives.

[42] 474 U.S. 159 (1985).

nature, premises, and objectives of *Massiah* exclusion. The government claimed that the Sixth Amendment allowed the introduction of statements to prove crimes that were the subject of a formal accusation at the time the statements were elicited if officers were engaged in a legitimate, good faith investigation of a separate, uncharged offense at the time.[43] In essence, the contention was that there should be an exception to right-to-counsel suppression for disclosures deliberately elicited from an accused whenever the government had legitimate law enforcement reasons for seeking those disclosures. A five-Justice majority rejected the claim, holding that the prosecution may not use statements to prove an offense that was the subject of a formal accusation *if* government agents acquired those statements "by knowingly circumventing the accused's right to the assistance of counsel."[44] If the evidence was secured in disregard of the defendant's entitlement to assistance, the government's motivation did not matter. According to the majority, proper motives did not justify an exception to the Sixth Amendment suppression mandate.

Unfortunately, the Court did not explain *why* statements had to be excluded in these circumstances. It avoided direct discussion of this critical topic, making no effort to dispel the uncertainty that *Nix* had engendered about the nature of the *Massiah* bar.[45] After *Moulton*, the

[43] *Id.* at 178.

[44] *Id.* at 180.

[45] There is some indirect support in *Moulton* for the view that exclusion is a future-oriented deterrent safeguard. The Court repeatedly suggested that a constitutional violation occurs out of court—at the time government agents secure incriminating admissions from an accused without counsel. *See id.* at 176 (stating that "*the Sixth Amendment is violated when* the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent") (emphasis added)); *id.* (asserting that "it is clear that *the State violated Moulton's Sixth Amendment right when* it arranged to record conversations between [him] and its undercover informant") (emphasis added)); *id.* at 180 (observing that *"the State violated the Sixth Amendment by* knowingly circumventing the accused's right to the assistance of counsel") (emphasis added)); *see also* United States v. Henry, 447 U.S. 264, 274 (1980) (deciding that "[b]y intentionally creating a situation likely to induce [the accused] to make incriminating statements without the assistance of counsel, the Government violated [his] Sixth Amendment right to counsel"). If a Sixth Amendment violation occurs at the pretrial stage, it seems likely that *a* purpose, and perhaps *the* purpose, of suppression is to discourage officers from committing such violations in future situations.

On the other hand, there are indications in *Moulton* that deterrence may not be the objective of Sixth Amendment suppression. The Court reaffirmed what it had suggested in *Massiah* about the propriety of post-charge efforts to secure information from accused persons in order to investigate suspected, but uncharged, criminal activities. It did not find such investigatory efforts objectionable, but instead acknowledged the legitimacy of the government's "interest in investigating new or additional crimes." *Moulton*, 474 U.S. at 179. Thus, like the *Massiah* Court, the *Moulton* Court indicated that the Constitution was not concerned with or offended by such legitimate investigatory efforts—even when those efforts involved eliciting information from an accused that was relevant proof of already charged offenses. *See id.* (suggesting

character and underpinnings of the right-to-counsel exclusion doctrine remained murky.[46]

The final two *Massiah* opinions in this review of Sixth Amendment exclusion both addressed the propriety of using barred statements for the limited evidentiary purpose of impeaching the defendant's trial testimony. The first involved a very narrow issue and produced a quite limited ruling that provided little insight into the *Massiah* exclusionary rule. The second addressed a broader question and produced long overdue clarity about the Court's conception of the Sixth Amendment suppression doctrine.

Michigan v. Harvey held that a prosecutor may impeach a testifying defendant with statements that were inadmissible to prove his guilt because officers had elicited them from him in the absence of counsel after he had been charged.[47] Significantly, *Harvey* involved a violation of the *Michigan v. Jackson*[48] branch of *Massiah*'s Sixth Amendment constraints. *Jackson* had held that when a defendant requests counsel at an arraignment, he invokes his right to counsel for *Massiah* purposes and that any subsequent waiver would be "presumed invalid if secured pursuant to police-initiated conversation."[49] A valid waiver was possible after a defendant asserted his right to assistance *only* if the accused initiated the communications with the authorities that yielded the waiver.[50]

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that it was understandable and acceptable that "officials investigating an individual suspected of committing one crime and formally charged with having committed another [would] . . . seek to discover evidence useful at a trial of either crime"). If the conduct at issue was not constitutionally offensive, but instead was legitimate and proper law enforcement, it seems unlikely that exclusion would (or should) be designed to discourage that conduct. If deterrence is not the goal because no violation of the Sixth Amendment occurs when evidence is obtained from an accused individual, then it seems likely that the object of suppression is to prevent constitutional injury in the courtroom—that is, to prevent completion of the right-to-counsel deprivation at trial.

[46] Four dissenting Justices, who would have endorsed the exception to *Massiah* exclusion advocated by the government, were absolutely clear about their understanding of Sixth Amendment suppression. They asserted that the Sixth Amendment "'wrong' . . . [is] 'fully accomplished' by the elicitation of comments from the defendant and 'the exclusionary rule is neither intended nor able to cure the invasion of . . . rights'" that has already occurred. *Id.* at 191 (Burger, C.J., dissenting) (quoting United States v. Leon, 468 U.S. 897, 906 (1984)). The *Massiah* rule is "premised on deterrence of certain types of conduct by the police," and when the police are legitimately investigating uncharged offenses, the costs of exclusion outweigh any deterrent benefit and dictate the admission of the evidence obtained. *Id.* at 191–92 (Burger, C.J., dissenting).

[47] 494 U.S. 344, 345–46 (1990).

[48] 475 U.S. 625 (1986).

[49] *Harvey*, 494 U.S. at 345.

[50] *Jackson* had concluded that the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), which barred police-initiated waivers of *Miranda*'s Fifth Amendment entitlement to counsel after a suspect invoked that entitlement, also forbade government-initiated

In *Harvey*, the Court concluded that the government could use statements obtained in violation of *Jackson* to impeach a defendant's trial testimony because of the special character of the *Jackson* constraint.[51] The five-Justice majority characterized the *Jackson* branch of *Massiah* as a mere "prophylactic rule . . . designed" to protect the right to counsel by ensuring that waivers are "voluntary, knowing, and intelligent."[52] Although it was "based on the Sixth Amendment," *Jackson*'s specific limitation on law enforcement was analogous to, and even had "its roots" in, *Miranda*'s Fifth Amendment restrictions on custodial interrogation.[53] Like *Miranda*'s dictates, the rule invalidating waivers resulting from government-initiated encounters following requests for counsel was overprotectively prophylactic in nature.[54] It protected defendants even when they were not in fact deprived of their Sixth Amendment right to assistance.[55] In this respect, it was unlike deprivations of the pretrial entitlement to assistance that "violate[] the 'core value' of the Sixth Amendment's constitutional guarantee."[56] Put otherwise, within *Massiah*'s domain, *Jackson* violations were *sui generis*—and of less constitutional concern—because a waiver obtained in violation of *Jackson* meant merely that there was a risk of a Sixth Amendment deprivation, not that an accused had actually been denied the fundamental right to legal assistance.[57] For that reason, the propriety of excluding evidence had to be determined by balancing the increased enforcement of the Sixth Amendment produced by suppression against the social costs imposed by suppression.[58] This balance favored an impeachment-use exception for this one type of *Massiah* violation for the same reasons it had led to an impeachment-use exception for violations of *Miranda*'s prophylactic regulations.[59]

The *Harvey* Court left entirely open the possibility that evidence obtained by violating other *Massiah* doctrine constraints—those implicating "core" elements of the right to counsel, not overprotective,

waivers of the Sixth Amendment *Massiah* right to counsel after a suspect invoked that right. *See Jackson*, 475 U.S. at 635–36.

[51] *Harvey*, 494 U.S. at 346, 350–51.

[52] *Id.* at 351.

[53] *Id.* at 349–50.

[54] *See id.*

[55] *See id.* at 350–53.

[56] *Id.* at 353. The four dissenters disagreed with this characterization of the *Jackson* rule as a prophylactic safeguard of the right to counsel. They would have barred the introduction of statements for impeachment purposes because in their view, even the limited use of statements obtained in violation of *Jackson* constituted an in-court deprivation of the Sixth Amendment right. *See id.* at 361–63 (Stevens, J., dissenting).

[57] *See id.* at 351–53.

[58] *See id.* at 351–52.

[59] *See id.* at 350–53.

prophylactic rules—would be inadmissible for impeachment purposes.[60] More important, although *Harvey* made it clear that the bar to evidence secured in violation of *Jackson* was not an integral part of the right to counsel, it provided no new insights into the premises and objectives that ordinarily underlie the Sixth Amendment exclusion doctrine. It remained possible that suppression for core *Massiah* violations was necessary either to avoid constitutional deprivations at trial, to deter future pretrial violations of the right to counsel, or for both reasons.[61]

C. Ventris *Clarifies the Nature of and the Rationale for* Massiah *Exclusion*

In *Kansas v. Ventris*,[62] nearly half a century after it first announced the *Massiah* bar, the Court finally provided a definitive explanation of the character of and constitutional justifications for Sixth Amendment suppression. Ventris had been charged with murder, aggravated robbery, and various other offenses.[63] Before his trial, "officers planted an informant in" his holding cell to secure statements.[64] According to the informant, Ventris responded to his observation that he seemed to have "'something . . . on his mind'" by admitting that he had shot a man and had taken money and a vehicle.[65] At trial, Ventris testified that his codefendant was to blame for the robbery and shooting.[66] Conceding that there had "probably" been a denial of Ventris's right to counsel, the prosecutor nonetheless sought to introduce the holding-cell admissions to impeach his contradictory testimony.[67] The trial judge allowed the informant to testify for that limited purpose.[68] The jury acquitted Ventris of felony murder and misdemeanor theft but found him guilty of aggravated burglary and aggravated robbery.[69] The Kansas Supreme

[60] Thus, the *Harvey* majority did not decide whether statements obtained from an accused by means of deliberate elicitation by an undercover government informant could be used to impeach a defendant's testimony. Nor did the Court determine whether statements elicited by an officer who did not secure a valid waiver would be admissible for impeachment purposes. *See id.* at 354 (stating that the Court "need not consider the admissibility for impeachment purposes of a voluntary statement obtained in the absence of a knowing and voluntary waiver of the right to counsel").

[61] Two 2009 rulings robbed *Harvey* of all significance. In *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009), the Court overruled the prophylactic Sixth Amendment rule of *Michigan v. Jackson* which was the predicate for the holding in *Harvey*. *Id.* at 2091–92. Moreover, in the final case discussed in this historical account, the Court concluded that impeachment use is permissible for *all* types of *Massiah* deprivations. *See infra* text accompanying notes 87–95.

[62] 129 S. Ct. 1841 (2009).

[63] *Id.* at 1844.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

Court reversed the convictions, holding that the statements were "not admissible at trial for any reason."[70]

The Supreme Court granted certiorari to decide whether the prosecution may use an "incriminating statement to a jailhouse informant, concededly elicited in violation of Sixth Amendment strictures, . . . to impeach the defendant's conflicting statement" at trial.[71] In a brief opinion joined by seven Justices, the Court held that revelations obtained in disregard of *any* facet of *Massiah*'s entitlement to pretrial assistance are admissible to impeach an accused's trial testimony.[72] The reasoning that supported this conclusion is significant.

Justice Scalia insightfully observed that whether evidence must be suppressed in a particular situation "depends upon the nature of the constitutional guarantee that is violated."[73] For example, the nature of the Fifth Amendment privilege against compulsory self-incrimination "mandates exclusion from trial" for all purposes because the admission of "a truly coerced confession" for any purpose is a violation of that right.[74] On the other hand, because the Fourth Amendment is not violated when illegally obtained evidence is admitted at trial, and exclusion serves solely as a "deterrent sanction," cost-benefit balancing dictates whether evidence is admissible at trial.[75] To determine whether evidence secured in violation of *Massiah*'s Sixth Amendment dictates is admissible to impeach an accused, it was necessary to ascertain the nature of the guarantee at issue.

According to the *Ventris* majority, the "core" of the Sixth Amendment grant of counsel "has historically been, and remains today, 'the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for *trial*.'"[76] The guarantee of "counsel is indeed a *trial* right" that promotes "meaningful adversarial testing" of "the prosecution's case" in the courtroom.[77] The Court acknowledged that it had held that "the right extends to having counsel present at various pretrial 'critical' interactions between the defendant and the State, including the deliberate elicitation . . . of statements."[78] This extension of the right to counsel to "pretrial interrogations" was necessary to "ensure that police manipulation does not render [trial]

[70] *Id.* (quoting State v. Ventris, 176 P.3d 920, 928 (Kan. 2008)).

[71] *Id.*

[72] *Id.* at 1843, 1847.

[73] *Id.* at 1845.

[74] *Id.*

[75] *Id.* The Court added that the admissibility of evidence obtained by violating "Fifth and Sixth Amendment prophylactic rules" also hinges on cost-benefit balancing because it is not barred "to avoid violation of [a] substantive guarantee" at trial. *Id.*

[76] *Id.* at 1844–45 (emphasis added) (quoting Michigan v. Harvey, 494 U.S. 344, 348 (1990)).

[77] *Id.* at 1845 (emphasis added) (quoting United States v. Cronic, 466 U.S. 648, 656 (1984)).

[78] *Id.* (citation omitted).

counsel entirely impotent—[by] depriving the defendant of" counsel when assistance is most needed.[79]

According to the *Ventris* majority, the source of this pretrial extension of counsel, the "opinion in *Massiah*," had been "equivocal" about whether the pretrial conduct of the authorities that prompts an accused to make incriminating admissions or the use of those admissions at trial constituted the Sixth Amendment violation.[80] The issue in *Massiah* did not require a definitive answer to that critical question, and the Court's opinion contained support for both positions.[81] The issue in *Ventris*, however, could not be resolved without deciding whether the right to counsel was in jeopardy during the pretrial encounter or in the courtroom. Forced to choose, the *Ventris* majority concluded that "the *Massiah* right *is a right to be free of uncounseled interrogation, and is infringed at the time of the interrogation.*"[82]

According to Justice Scalia, it was simply "illogical to say that the right is not violated until" an elicited "statement's admission into evidence" at trial.[83] There is no denial of counsel's aid when the prosecution introduces the evidence, even if the evidence makes the task of "gaining an acquittal . . . impossible."[84] The defendant in that situation "continues to enjoy the assistance of counsel" even though that "assistance is simply not worth much."[85] In *Massiah* settings, assistance "has been denied . . . [only] at the prior critical stage which produced the inculpatory evidence. . . . It is *that* [pretrial] deprivation which demands a remedy" at trial.[86]

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[79] *Id.*

[80] *Id.* at 1846. The Court quoted language in *Massiah* that putatively supported the view that the Sixth Amendment violation occurred before trial, as well as other language in the same opinion that could be interpreted to mean that the counsel deprivation occurred at trial.

[81] *Id.*

[82] *Id.* (emphasis added); *see also id.* ("The constitutional violation occurs when the uncounseled interrogation is conducted.").

[83] *Id.*

[84] *Id.*

[85] *Id.* It is somewhat surprising that the Court was willing to conclude that a defendant still enjoys the right to assistance at trial when pretrial events have rendered trial counsel "not worth much." The opinion contains no explanation of why such dramatic impact at trial was not itself a violation of the core right to trial assistance.

[86] *Id.* According to the Court, "that reality" is reflected in the cases "holding that the stringency of the warnings necessary for a waiver of . . . counsel varies according to" counsel's usefulness in the particular proceeding at issue. *Id.*

The United States, as amicus curiae, had resisted the notion that the Sixth Amendment was violated prior to trial, "insist[ing] that" uncounseled pretrial encounters with charged defendants were "not intrinsically unlawful." *Id.* (citation omitted). The Court replied that this contention was "true when the questioning is unrelated to charged crimes" but observed that it had "never said . . . that officers may badger counseled defendants about charged crimes so long as they do not use information they gain," and declared that "[t]he constitutional violation occurs when the uncounseled interrogation is conducted." *Id.*

This conception of the *Massiah* counsel entitlement meant that the suppression question before the Court—whether statements could be used to impeach—did "not involve . . . the prevention of a constitutional violation" at trial, "but rather" a determination of "the scope of the remedy for a violation that has already occurred."[87] With respect to other constitutional exclusion sanctions of the same nature, "precedents" had already made it "clear that the game of excluding tainted evidence for impeachment purposes is not worth the candle."[88] According to those precedents, the costs of suppression outweigh the "interests safeguarded by . . . exclusion."[89] Similarly, once an accused "testifies in a way that contradicts prior statements," preventing the government from using those statements to promote the truth-finding process "is a high price to pay for vindication of the right to counsel at the prior stage."[90] Moreover, a bar to "impeachment use of statements taken in violation of *Massiah* would add little appreciable deterrence."[91] The possibility of using "lawfully obtained" statements "for all purposes" produces a "significant incentive" to respect the pretrial right to counsel, and, because "the *ex ante* probability that" improperly obtained evidence "would be of use for impeachment is exceedingly small," it is unlikely to induce officials "to risk squandering the opportunity of using a properly obtained statement for the prosecution's case in chief."[92]

In sum, "in every other context" involving the exclusion of "evidence whose very introduction does not constitute the constitutional violation, but whose obtaining was constitutionally invalid," the Justices had decided that evidence barred for substantive purposes "is admissible for impeachment."[93] The *Ventris* majority could "see no distinction that . . . alter[ed] the balance" and dictated a different conclusion for *Massiah* exclusion purposes.[94] Consequently, "the informant's testimony . . . was admissible to challenge Ventris's inconsistent testimony at trial."[95]

Massiah exclusion began as an essential part of the Sixth Amendment right. The Court forbade the government's use of an accused's disclosures against him at trial because courtroom use violated the entitlement to assistance. In the 45 years that followed, the Court muddied the waters, assuming that *Massiah*'s suppression doctrine served

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[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.* at 1847.

[92] *Id.* The Court observed that "even if 'the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material,' we have multiple times rejected the argument that this 'speculative possibility' can trump the costs of allowing perjurious statements to go unchallenged." *Id.* (quoting Oregon v. Hass, 420 U.S. 714, 723 (1975)).

[93] *Id.*

[94] *Id.*

[95] *Id.*

a deterrent function—that is, that it was aimed at altering pretrial conduct by law enforcement officials—but never denying that exclusion was a personal right of the accused. In fact, the Court seemed receptive to the possibility that it was both a courtroom right and a deterrent safeguard. *Ventris* swept away all uncertainty, announcing that the Sixth Amendment bar is *not* a trial right belonging to the accused, that suppression is *not* necessary to prevent in-court violations of the right to counsel, and that in-court use of evidence obtained in violation of *Massiah*'s out-of-court constraints effects no constitutional deprivation and inflicts no constitutional harm. In short, Sixth Amendment exclusion is a mere deterrent "remedy" designed to discourage officials from conducting uncounseled pretrial encounters with formally accused individuals. It aims to ensure respect for defendants' entitlements to assistance in future pretrial confrontations. The *Ventris* majority painted a pellucid picture of right-to-counsel suppression, expressing an understanding that is the antithesis of the original view. In the almost half century between *Massiah* and *Ventris*, the Sixth Amendment's evidentiary bar underwent a gradual and dramatic transformation.

The simple purpose of the preceding Part was to describe the evolution of *Massiah*'s suppression doctrine and to detail the vision of the Sixth Amendment bar that prevailed in *Ventris* and will dictate answers to unresolved questions of its scope and operation. The next Part highlights the numerous flaws in *Ventris*'s reasoning and explains why the conception of *Massiah* suppression that prevailed is fundamentally misguided and unsupportable. It also sketches the only constitutionally defensible explanation for Sixth Amendment exclusion of deliberately elicited admissions.

III. A CRITICAL ASSESSMENT OF *KANSAS V. VENTRIS*: FAULTY PREMISES AND ILLEGITIMATE CONCLUSIONS

Ventris announced that an accused has no constitutional right to exclude evidence and that the right to counsel is not violated when improperly obtained evidence is introduced in court. It cast the *Massiah* suppression mandate as a deterrent remedy whose singular concern is the future conduct of law enforcement agents. In fact, the only constitutionally plausible understanding of *Massiah*'s evidentiary bar acknowledges that it is an inseparable part of the Sixth Amendment guarantee. The deterrence of uncounseled interactions is, at best, an ancillary justification for, or a fortunate by-product of, suppression. In my view, because no constitutional harm occurs prior to trial and because some of the law enforcement conduct that produces inadmissible evidence is desirable, deterrence is not an appropriate objective of the *Massiah* exclusion doctrine. If officers refrain from uncounseled elicitation, the result is little net gain in enforcement of the right to counsel and potentially counterproductive impacts on effective law enforcement.

A. Why the Exclusion of Evidence Under Massiah *Is a Constitutional Right*

According to the *Ventris* majority, the *Massiah* Court was "equivocal" about the character of the Sixth Amendment's exclusion mandate.[96] This characterization is worse than misleading. Although *Massiah* did not explicitly declare suppression to be a part of the right to counsel, it did so implicitly and quite unequivocally. Justice Stewart asserted that Massiah "was denied the basic protections of [the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words."[97] For that reason, those words "could not constitutionally be used by the prosecution as evidence against *him* at his trial."[98] If the government's use of his words against him at trial was constitutionally forbidden because such use denied the "basic protections" of the Sixth Amendment, then Massiah had a constitutional right—as part of the entitlement to the assistance of counsel—to the exclusion of those words from his trial.

Although it is hardly necessary in light of the clarity of the Court's declarations, there is additional evidence that the *Massiah* majority originally conceived of exclusion as a constitutional right. The United States Solicitor General had argued that law enforcement officers had legitimate investigative reasons to seek additional information from the defendant about his illegal narcotics enterprise even after the grand jury had indicted him. Agents were trying to uncover the source and the buyer of the narcotics that had been found, and they hoped to ascertain the identities of the other individuals involved in the illicit enterprise.[99] The Court "accept[ed]" and "completely approve[d]" of the implications of this argument and did "not question that in [*Massiah*], as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the [indicted] defendant and his alleged confederates."[100] The majority did not condemn this pretrial conduct. "All" that it held was that Massiah's "incriminating statements . . . could not constitutionally be used . . . against *him* at his trial."[101] The message was clear. Investigating agents did not violate a defendant's right to counsel by eliciting information about offenses for which he has been charged. Instead, the sole violation of the Sixth Amendment occurred later, in court, when the prosecution used elicited disclosures to prove the defendant's guilt at trial.[102]

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[96] *Id.* at 1846.

[97] Massiah v. United States, 377 U.S. 201, 206 (1964).

[98] *Id.* at 207.

[99] *Id.* at 206.

[100] *Id.* at 206–07.

[101] *Id.* at 207.

[102] Two decades later, the Court "reaffirm[ed]" what it had said in *Massiah* about the constitutional implications of the pretrial efforts to investigate crimes by eliciting information from charged individuals. *See* Maine v. Moulton, 474 U.S. 159, 178–80 (1985).

The basis for *Ventris*'s description of *Massiah* as "equivocal" was an earlier suggestion in the opinion that post-indictment interrogation itself was contrary to basic principles of fairness.[103] The declaration that it was unfair for officials to elicit information from a charged individual, however, was nothing other than a necessary predicate for the conclusion that an accused person had a constitutional entitlement to assistance during such a pretrial encounter. Before discussing the consequences of a pretrial denial of counsel—and *when* a constitutional violation occurred—the Court had to establish that an accused was entitled to pretrial assistance. The premise that it is unfair for officials to seek incriminating disclosures from a charged individual was not meant to suggest that a right-to-counsel violation was completed by the uncounseled pretrial encounter. This essential predicate for evidentiary exclusion—that pretrial efforts to secure admissions from an accused individual before trial were a critical stage that triggered an entitlement to assistance—was not evidence of equivocality about *when* the violation of the right to counsel was accomplished. It cast no shadow upon the Court's unambiguous view that the violation of the Sixth Amendment occurred when uncounseled disclosures were introduced at trial. In fact, the *Massiah* Court could hardly have been clearer about its conception of exclusion as a personal right that belonged to the accused. *Ventris*'s suggestion that the *Massiah* opinion was "equivocal on what precisely constituted the violation"[104] was not just strained, it was both unfair and disingenuous.

The Court did not have to mischaracterize *Massiah* in order to reach the conclusions it reached in *Ventris* about the nature of the exclusion sanction. The fact that the *Massiah* Court believed that the right to counsel was violated in the courtroom and saw exclusion as a right, not a mere deterrent remedy,[105] does not mean that the *Ventris* Court's contrary conception of exclusion is wrong. Perhaps the *Massiah* Court misunderstood the nature of the right it discerned and misconceived the premises and functions of the courtroom consequence of a pretrial denial of counsel. Whether or not its opinion was equivocal, the *Massiah* majority's conclusions could have been misguided. The *Ventris* revision of *Massiah*'s premises might be a better explanation of the pretrial right to assistance and its exclusion sanction.[106]

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[103] Kansas v. Ventris, 129 S. Ct. 1841, 1846 (2009).

[104] *Id.*

[105] It is also noteworthy that the *Massiah* Court made no mention of a deterrent objective for the evidentiary bar it announced. Deterrence as a rationale for exclusion had already played a prominent role in the Court's explanation of the underpinnings of the rule barring evidence acquired by means of an unreasonable search or seizure. *See* Mapp v. Ohio, 367 U.S. 643, 651–53, 656 (1961). If the Court believed that Sixth Amendment exclusion rested, even in part, on deterrent logic, one would expect to see some suggestion that that was the case.

[106] One question is why the Court did not forthrightly acknowledge what the *Massiah* majority had said about Sixth Amendment exclusion. Put otherwise, there is

For reasons I have explained in earlier scholarship, I believe that the original understanding of the Sixth Amendment right and the bar to incriminating statements is not just preferable. In my view, it is the *only* constitutionally defensible explanation, the *only* way to make sense of the *Massiah* doctrine. In the discussion that follows, I explain why the original conception of *Massiah*'s evidentiary bar is correct and then discuss why and how *Ventris*'s logic and conclusions are entirely misguided.

The question is whether the suppression of evidence mandated by the *Massiah* doctrine is a present trial right belonging to the accused—an integral part of the Sixth Amendment entitlement to the assistance of counsel. The alternative view, the one endorsed by *Ventris*, is that suppression is solely a future-oriented deterrent safeguard designed to prevent extrajudicial, pretrial conduct that deprives accused individuals of their Sixth Amendment entitlement. In general, evidentiary exclusion is a constitutional right when the use of evidence by the prosecution to convict a defendant violates a constitutional provision designed to ensure a fair trial. When the only constitutional transgression occurs outside the courtroom and the use of evidence at trial does not itself deprive a defendant of any constitutionally protected interest, the accused has no right to bar the evidence.[107] The admission of evidence violates a fair-trial right when the interest protected by that right is endangered in the courtroom—that is, when the introduction of the evidence inflicts the kind of injury or harm to an accused that the right is designed to prevent. When the damage to constitutionally protected values occurs before trial begins—at the time evidence is acquired—the admission of that evidence at trial violates no fair-trial right.

To illustrate, a defendant has a constitutional right to exclude a genuinely coerced confession because the introduction of such a confession violates the Fifth Amendment privilege against compulsory self-incrimination.[108] The admission of a coerced confession violates this

reason to wonder why the *Ventris* majority insisted on depicting *Massiah* as equivocal when it was not. Perhaps the Court was reluctant to contradict the original reasoning out of deference to precedent. But as Justice Scalia himself has observed, it is hardly respectful to affirm a precedent while modifying its "most significant element"—its core "rationale." *See* Dickerson v. United States, 530 U.S. 428, 445 (2000) (Scalia, J., dissenting). Perhaps the Court refused to recognize the foundational premises of *Massiah* to avoid meaningful engagement with those premises. As will be seen, the Court did not confront and rebut the logic that supports the original conception of *Massiah* and its suppression mandate.

[107] The suppression of evidence at trial is solely a deterrent safeguard when the official conduct that produces the evidence violates a constitutional provision that accords individuals some extrajudicial entitlement, when the interest safeguarded is not a courtroom interest.

[108] The Fifth Amendment privilege provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The introduction of a coerced or compelled confession to convict the individual who was compelled to speak violates that individual's Fifth Amendment right. *See* Chavez

provision because its objective is to protect a defendant from conviction based on revelations forced from his mind.[109] Harm to the underlying constitutional interest and to the values that interest promotes occurs when a coerced confession contributes to conviction.[110] A Fifth Amendment violation certainly begins with the government's pretrial conduct, but it is completed *only* when the fruits of that conduct cross the courtroom's threshold.[111]

Similarly, a defendant has a personal right to suppress testimonial hearsay from a nontestifying declarant, unless the declarant is unavailable and the accused had a prior opportunity to cross-examine her, because the use of such hearsay violates the Sixth Amendment Confrontation Clause.[112] This fundamental guarantee is violated by the introduction of evidence because its object is to guard an accused against conviction based on potentially untrustworthy accusations made outside his presence by witnesses he is unable to challenge.[113] Injury to the

v. Martinez, 538 U.S. 760, 766–67 (2003) (Thomas, J., plurality opinion); *id.* at 777 (Souter, J., concurring in the judgment); *Dickerson*, 530 U.S. at 433. Use of a coerced confession also violates the Fourteenth Amendment guarantee of due process. *See id.*; Mincey v. Arizona, 437 U.S. 385, 398 (1978).

[109] Inquisitorial systems find it acceptable to convict individuals based on their extorted disclosures. *See* Arizona v. Fulminante, 499 U.S. 279, 293–94 (1991) (White, J., dissenting); Chambers v. Florida, 309 U.S. 227, 237–38 (1940). Our Framers rejected inquisitorial methods and opted for an accusatorial approach which deems it fundamentally unfair to use compelled self-incriminating disclosures to fuel the adjudicatory process. *See* Rogers v. Richmond, 365 U.S. 534, 540–41 (1961).

[110] *See* Withrow v. Williams, 507 U.S. 680, 691–92 (1993) (discussing the array of values that are threatened by the use of a coerced confession to secure a conviction, including "our preference for an accusatorial" system, our fear of "inhumane treatment," our sense that "fair play" dictates a balance in which the government shoulders the load, "our respect for the inviolability of the human personality, . . . our distrust of self-deprecatory statements, and our realization that the privilege" often protects innocent persons (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964))).

[111] The Fifth Amendment guarantee can be violated only in the courtroom. *See Chavez*, 538 U.S. at 766–67 (plurality opinion); *id.* at 777 (Souter, J., concurring in the judgment). In contrast, the guarantee of due process can be violated not only by the use of a coerced confession to convict, but also by sufficiently "egregious" or "conscience shocking" coercion itself. *See id.* at 774–75 (plurality opinion); *see also id.* at 779 (Souter, J., concurring in the judgment) (suggesting that "outrageous conduct by the police" violates due process).

[112] The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

[113] Similarly, the Due Process Clause is violated by the introduction of eyewitness identification evidence that is the product of unnecessarily suggestive identification processes and is not shown to be "reliable." *See* Manson v. Brathwaite, 432 U.S. 98, 113–14 & n.14 (1977); *see also* TOMKOVICZ, CONSTITUTIONAL EXCLUSION, *supra* note 9, at 294–300. The objective of the Fourteenth Amendment's guarantee of due process of law is fundamental fairness in criminal proceedings. Consequently, the conduct of an unnecessarily suggestive identification process is not itself a violation of due process. *See Brathwaite*, 432 U.S. at 113 n.13. Unfairness, and thus a due process

underlying constitutional interest—and the values promoted by this Sixth Amendment entitlement—occurs when the unconfrontable hearsay is admitted at trial and contributes to conviction.

On the other hand, an accused has no constitutional right to bar the evidentiary products of an unreasonable search. The introduction of such evidence does not violate the Fourth Amendment because that provision protects against unjustified invasions of privacy. The constitutional damage occurs at the time of the search, and the use at trial of any evidence obtained occasions no additional constitutional injury—no cognizable invasion of privacy. Deprivations of Fourth Amendment rights begin and end—that is, they are "fully accomplished"—at the time of pretrial searches.[114]

The origin and underpinnings of the *Massiah* right to counsel lead unavoidably to the conclusion that the Sixth Amendment bar to deliberately elicited statements is an inseparable part of the right to counsel, not merely a deterrent sanction designed to prevent future extrajudicial deprivations of assistance. Contrary to the *Ventris* Court's conclusion, it is very much like the Fifth Amendment bar to coerced confessions and the Confrontation Clause bar to hearsay, and it is worlds apart from Fourth Amendment suppression of the fruits of illegal searches.

The Sixth Amendment extends to accused persons a fundamental "right . . . to have the Assistance of Counsel for [their] defence."[115] The original intent of this provision was to grant those charged with crimes a right *to retain* legal assistance *for trial*.[116] During the twentieth century, the

deprivation, results only when the evidentiary product of such a process—a possible mistaken identification by an eyewitness—is introduced at trial and engenders a risk that an innocent person will be convicted in error. It is only at that point that the goal of the Due Process Clause is jeopardized.

[114] This is the prevailing interpretation of the Fourth Amendment by the Supreme Court. *See* United States v. Calandra, 414 U.S. 338, 354 (1974). It is not an indisputably correct position. Earlier interpretations of the Fourth Amendment and Fourteenth Amendment guarantees against unreasonable searches and seizures cast exclusion as an integral part of the constitutional right. *See* Mapp v. Ohio, 367 U.S. 643, 655–56 (1961) (describing the due process guarantee of suppression in state courts as a part of the right of privacy); Weeks v. United States, 232 U.S. 383, 398 (1914) (concluding that the use of evidence at trial denied the accused's Fourth Amendment right); *see also* United States v. Leon, 468 U.S. 897, 934–38 (1984) (Brennan, J., dissenting) (explaining why Fourth Amendment exclusion should be understood as a constitutional right).

Under the prevailing interpretations of *Miranda v. Arizona*, 384 U.S. 436 (1966), because statements obtained in violation of *Miranda* are not actually coerced, evidentiary exclusion is not a constitutional right but, instead, is a prophylactic safeguard against risks of Fifth Amendment violations at trial. *See* United States v. Patane, 542 U.S. 630, 639–40 (2004) (Thomas, J., plurality opinion); *Withrow*, 507 U.S. at 690–91 (1993); New York v. Quarles, 467 U.S. 649, 654–58, 655 n.5, 658 n.7 (1984).

[115] U.S. CONST. amend. VI.

[116] TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL, *supra* note 4, at 20–21, 50–51, 81.

Supreme Court construed the guarantee to include a right to appointed counsel for indigent defendants.[117] Later, the Court concluded that the right to legal assistance could not be confined to trial and had to reach certain pretrial settings deemed "critical stages" of the prosecution.[118] The Court first found a right to assistance in certain formal, courtroom clashes between the state and the accused that occurred prior to the commencement of trials.[119] Soon, the Court discerned two informal pretrial settings—contexts that involved out-of-court confrontations between the government and the defendant—that necessitated extensions of the Sixth Amendment guarantee. The *Massiah* Court identified one such encounter, concluding that an accused has an entitlement to counsel when government agents deliberately elicit incriminating statements.[120]

At the time the Sixth Amendment was adopted, the adversarial battle between an accused and the government occurred entirely at the trial. Because the government did not engage with defendants prior to trial, defendants had no pretrial need for the protection of a trained advocate.[121] As criminal justice systems evolved, however, the government began to confront accused individuals in both formal and informal settings that preceded the trial. The adversarial battle—the effort to secure a conviction by engaging with the accused—commenced before the formal start of the trial. In extending the right to counsel to newly developed pretrial confrontations, the Court simply recognized that the adversary-system values and the fair-trial objectives served by the grant of trial assistance would be eroded if the right to assistance did not reach these confrontations. To have kept the guarantee of counsel restricted to trial would have been to ignore critical changes in the adjudicative process and would have exalted form over substance. The trial—the

[117] *See* Johnson v. Zerbst, 304 U.S. 458 (1938) (recognizing the right to appointed counsel in federal trials); *see also* Gideon v. Wainwright, 372 U.S. 335 (1963) (interpreting the due process guarantee to include appointed counsel in state trials). This extension of the right to counsel is not at issue here. It is clear that the *Massiah* right encompasses an entitlement to appointed assistance for indigent defendants.

[118] *See* United States v. Ash, 413 U.S. 300, 309–11 (1973); *see also* United States v. Henry, 447 U.S. 264, 269 (1980).

[119] *See* Coleman v. Alabama, 399 U.S. 1, 8–10 (1970) (extending the right to counsel to a preliminary hearing); Hamilton v. Alabama, 368 U.S. 52, 54–55 (1961) (holding that defendant was entitled to assistance at arraignment).

[120] A lineup for identification purposes was the other informal pretrial confrontation to which the Court extended the right to the assistance of counsel. *See* United States v. Wade, 388 U.S. 218 (1967).

[121] It bears mention that the accused has always had a need for pretrial assistance in order to prepare adequately for trial. *See* Stovall v. Denno, 388 U.S. 293, 298–99 (1967); Powell v. Alabama, 287 U.S. 45, 57–58 (1932); TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL, *supra* note 4 at 81, 124–27. The point in the text is that there were no pretrial events at which the government adversary interacted with the accused in an effort to advance the conviction process. Consequently, there was no need for counsel to shield the accused against the adversary's pretrial efforts to build its case.

adversarial contest between the state and the accused that determines guilt or innocence—had expanded. Fidelity to the Framers' objectives—ensuring fairness by providing the defendant with the assistance needed for a balanced contest between equals—required extensions of the counsel guarantee to pretrial events that were, in reality, phases of the guilt determination process. If the primary reason for the right to counsel was to give accused individuals an equalizing champion *during* the clash with the state, once the clash expanded, the entitlement had to expand. Otherwise, the shelter afforded by the grant of trial assistance could be circumvented and either diminished or eviscerated.

This analysis rests on a sensible assumption: that the object of the Framers was not merely to grant counsel for the event called a trial, but to ensure that an accused had an equalizing assistant during encounters with the governmental adversary that might undermine the chances of attaining a favorable outcome. The implication is that entitlements to counsel at critical pretrial stages of the prosecution, including the *Massiah* entitlement, do not alter the nature or content of the guarantee provided in the Sixth Amendment. In nature and in function, pretrial entitlements are inseparable and indistinguishable from the right to trial assistance promised by the Sixth Amendment. Whether before or during the formal trial, the right to assistance exists primarily to ensure a fair adversarial adjudication of guilt. Like the right to counsel at an arraignment or preliminary hearing, the purpose of the *Massiah* entitlement to counsel is not to further extrajudicial interests somehow independent of the adjudicative process. Rather, every pretrial entitlement to assistance, including the one defined by *Massiah*, is primarily designed to promote and preserve the fairness of guilt determinations.[122] Before and after the formal commencement of the trial, the Sixth Amendment right to an equalizing, expert assistant has a common, singular goal—to shield the lay accused against the risks of conviction generated by encounters with his adversary.

An accused who is denied counsel at any point *during* a trial suffers a deprivation of the Sixth Amendment right at that point because a denial of assistance in court increases the chance of an unfavorable verdict. The prejudice from the inequality of the battle is immediate. An accused who lacks assistance during a pretrial confrontation does not suffer a constitutional deprivation at that point, for there is no immediate impact on the trial process—no increased risk of a skewed, unfair outcome from the denial. Put otherwise, the fairness of a trial—the abiding, constant

[122] Although the right to assistance at *formal* judicial phases of the process that precede the trial safeguards the fairness of the ultimate trial, it *also* serves to protect against pretrial harms such as losses of liberty resulting from pretrial detention or reputational injuries resulting from unjustified charges. *See Coleman*, 399 U.S. at 9 (1970) (referring to the protection afforded against pretrial detention). Because uncounseled deliberate elicitation does not threaten the infliction of any similar pretrial harms, the right to counsel at the informal critical stage governed by *Massiah* guards solely against injuries suffered as a result of the adjudicative process.

objective of the right to counsel at every stage—cannot be threatened *at* the uncounseled pretrial encounter. That can occur only when the consequences of the pretrial imbalance reach the courtroom. For *Massiah* counsel deprivations, this happens when, and only when, the evidentiary products of deliberate elicitation—a defendant's uncounseled revelations—are introduced into evidence. The fairness of the adversarial process that is the animating force of assistance at any stage is jeopardized *only* when an imbalanced pretrial clash has courtroom consequences.

The objectives of the Sixth Amendment guarantee are in no way threatened during or by a pretrial confrontation alone. An accused cannot suffer a completed violation of the entitlement to counsel prior to the formal trial because prior to trial he cannot suffer the kind of injury counsel guards against. Neither the fairness of the adjudicatory process nor its outcome can be affected until an imbalanced pretrial confrontation has an impact in the courtroom. On the other hand, when advantages the government has gained from such a pretrial confrontation appear at trial, both the process and the result are affected in ways the guarantee of counsel was intended to prevent. A right-to-counsel violation ripens and a Sixth Amendment transgression is completed when the deprivation of assistance at the pretrial encounter has a harmful impact at trial because that impact undermines the fairness of the adversarial adjudication of guilt.

The *Ventris* majority did not engage with, much less respond persuasively to, the logic that supports the original view of *Massiah* exclusion as an inseparable part of the right to counsel. Moreover, the reasons the Court offered for rejecting the contention that the Sixth Amendment is violated when the products of an uncounseled pretrial encounter are used to convict are both insubstantial and irrational. Justice Scalia began by laying a fundamentally flawed foundation. He asserted that "[t]he core of" the Sixth Amendment guarantee "has historically been, and remains today," the right to legal assistance to prepare for and to present a defense at trial.[123] He then suggested that the pretrial entitlement to counsel is different from, and less significant than, the right to assistance at trial.[124] This premise is both unfounded and misleading. As the preceding discussion made clear, in extending the right to trial assistance to critical pretrial interactions, the Court did not create a new Sixth Amendment right distinct from, and somehow

[123] Kansas v. Ventris, 129 S. Ct. 1841, 1844–45 (2009).

[124] After stating that the core of the right had been, and still was, the opportunity to consult with counsel and have counsel investigate and prepare a defense for trial, the majority observed that the Court "ha[d] held, *however*, that the right extends to having counsel present at various pretrial 'critical' interactions between the defendant and the State." *Id.* at 1845 (emphasis added). The language employed clearly implied a second-class, non-core status for pretrial extensions.

inferior to, the one the Framers provided.[125] Instead, the Court merely interpreted the right to trial assistance, giving it a breadth that was necessary to preserve its value in light of the changes that had occurred in the operation of criminal justice systems. Counsel at the formal trial and counsel before the formal trial are both parts of the "core" adversary-system right to assistance against the opponent's efforts to convict.

The *Ventris* Court next intimated that evidentiary exclusion is a part of a constitutional guarantee *only* when the text of the guarantee addresses and "explicitly mandates exclusion from trial."[126] According to Justice Scalia, "[t]he Fifth Amendment guarantees that no person shall be compelled to give evidence against himself," while "[t]he Fourth Amendment . . . says nothing about excluding [the] fruits" of unreasonable searches and seizures "from evidence."[127] First, this intimation is wholly irreconcilable with the fact that the Court has recognized constitutional rights to exclusion based on provisions that do not explicitly command the suppression of evidence. The Sixth Amendment Confrontation Clause does not address the exclusion of evidence, yet its longstanding bar to hearsay is undeniably a part of the confrontation guarantee.[128] Likewise, the Due Process Clause says nothing about evidentiary exclusion, yet its prohibitions on the use of coerced confessions and unnecessarily suggested identifications are constitutional rights belonging to those on trial.[129]

More important, whether exclusion is part of any particular constitutional right cannot hinge on whether the provision at issue contains an explicit bar to evidence. Instead, that determination must depend on whether the admission of evidence implicates the interests underlying the provision and whether exclusion is necessary to prevent the accused from suffering the kind of harm the right is designed to prevent. The notion that exclusionary language is essential is both

[125] Justice Scalia himself surely would agree that the Justices have no authority to do so. *See* Dickerson v. United States, 530 U.S. 428, 460–61, 465 (2000) (Scalia, J., dissenting) (maintaining that *Miranda* is illegitimate because the Court does not have the authority to expand the protection provided by the Fifth Amendment privilege by prescribing an overprotective prophylactic scheme).

[126] *Ventris*, 129 S. Ct. at 1845.

[127] *Id.*

[128] In fact, the Confrontation Clause bar to hearsay is the constitutional exclusionary command with the deepest historical roots. The Court first acknowledged that the right to be confronted with adverse witnesses could be violated by the introduction of hearsay evidence in an opinion handed down in 1878. *See* Reynolds v. United States, 98 U.S. 145, 158 (1878).

[129] As the Court has said, "*any* criminal trial use" of coerced admissions against a defendant is a violation of the right to due process of law. Mincey v. Arizona, 437 U.S. 385, 398–402 (1978). Moreover, the right to due process is not violated at the time government officials conduct an unnecessarily suggestive identification process, *see* Manson v. Brathwaite, 432 U.S. 98, 113 n.13 (1977), but only when the prosecution introduces an eyewitness identification that is the product of such a process. *See id.* at 113–14.

inconsistent with precedent and the ultimate exaltation of form over substance. In sum, a defendant must have a right to suppression if suppression is necessary to avoid violation of the constitutional right at trial, and suppression is necessary to avoid the violation of a constitutional right if the introduction of evidence threatens the values underlying that right.

In dismissing a government claim premised on the argument that "the Sixth Amendment's right to counsel is a 'right an accused is to enjoy a[t] trial,'" the majority reiterated that assistance at trial is "[t]he core" of the Sixth Amendment guarantee.[130] More important, Justice Scalia posited an indefensibly narrow purpose for trial assistance—to "ensur[e] that the prosecution's case is subjected to 'the crucible of meaningful adversarial testing'"—then asserted that the reason for extending the guarantee to "pretrial interrogations [is] to ensure that police manipulation does not render counsel entirely impotent."[131] Surely, trial counsel serves broader purposes. The objectives of the right are to protect an accused against being taken advantage of by a legally trained adversary who knows the system,[132] to enable presentation of the best defense to charges,[133] and to zealously employ every legitimate means of promoting an accused's interests in defeating the state's efforts to convict.[134] Challenging the prosecution's case is just one of several roles played by a defense attorney. By focusing on this "adversarial testing" function alone, the Court minimized the worth of *Massiah* counsel, whose role clearly is not to subject the prosecution's case to "meaningful adversarial testing." Moreover, the reason for *Massiah*'s recognition of a right to assistance in pretrial confrontations is not to prevent manipulation that somehow diminishes the "potency" of counsel's trial efforts—i.e., to prevent pretrial occurrences that impair counsel's abilities to function effectively during the trial. Rather, it is to prevent the government from lessening an accused's chances for acquittal by confronting him before trial without counsel and then using the products of that confrontation to convict him. Put otherwise, extension of the right to assistance to the critical pretrial settings identified by the *Massiah* doctrine was designed to prevent circumvention of the protection afforded by the guarantee of trial counsel, not to prevent the government from "render[ing trial] counsel entirely impotent."[135]

After paving the path with these utterly defective premises, Justice Scalia turned explicitly to the pivotal inquiry—whether the Sixth

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[130] *Ventris*, 129 S. Ct. at 1845.

[131] *Id.* (citation omitted).

[132] *See* United States v. Ash, 413 U.S. 300, 308–09 (1973).

[133] *See* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942); Powell v. Alabama, 287 U.S. 45, 68–69 (1932); *see also* Gonzalez v. United States, 128 S. Ct. 1765, 1770 (2008); Faretta v. California, 422 U.S. 806, 818 (1975).

[134] Tomkovicz, *Truth, Fair Play, and the* Massiah *Doctrine*, *supra* note 1, at 41–42, 51–52.

[135] *Ventris*, 129 S. Ct. at 1845.

Amendment right to assistance is violated when counsel is denied during deliberate elicitation prior to trial or when elicited statements are introduced at trial. He chose the former, "conclud[ing] that the *Massiah* right is a right to be free of uncounseled interrogation, and [that it] is infringed at the time of the interrogation."[136] According to *Ventris*, "[t]hat . . . is when the 'Assistance of Counsel' is denied."[137] It was "illogical to say that the right is not violated until trial counsel's task of opposing conviction has been undermined by the statement's admission."[138] When the government introduces "evidence of guilt—even evidence so overwhelming that the attorney's job of gaining an acquittal is rendered impossible," there is no Sixth Amendment deprivation.[139] Despite the admission of even devastating inculpatory evidence, trial counsel continues to furnish and "the accused continues to enjoy . . . assistance."[140] The effect of introducing the evidence obtained by the uncounseled confrontation is not to deny the defendant legal assistance at trial, but "simply" to render that assistance "not worth much."[141] In the *Ventris* Court's view, the denial of counsel was completed "at the prior critical stage which produced the inculpatory evidence."[142] According to Justice Scalia, "*that* deprivation . . . demands a remedy" at trial—the exclusion of the inculpatory evidence produced.[143]

This reasoning, the heart of the majority's indefensible characterization of *Massiah* exclusion, has superficial appeal, but is profoundly and fundamentally flawed. To borrow the Court's characterization of the opposing position, it is irredeemably "illogical." The Court was correct in describing *Massiah*'s right to pretrial assistance as an entitlement to be free of official efforts to secure incriminating statements in the absence of counsel.[144] It went astray, however, in

[136] *Id.* at 1846.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] It is nothing less than remarkable that Justice Scalia refers, more than once, to the conduct which triggers right-to-counsel protection as "interrogation." *See id.* at 1845–46. Just five years earlier, a unanimous Court went out of its way to correct a lower court that had opined that *Massiah*'s protection extended only to interrogation contexts and to hold that "deliberate elicitation"—something less than interrogation—was sufficient to constitute a critical stage entitling an accused to assistance. *See* Fellers v. United States, 540 U.S. 519, 523–25 (2004). One has to wonder whether Justice Scalia's use of the term was merely careless oversight. In light of the fact that he used the same terminology in another restrictive *Massiah* opinion from the same term, *see* Montejo v. Louisiana, 129 S. Ct. 2079, 2085–89 (2009), it seems conceivable that the Court—or at least some Justices—might be considering restricting not only *Massiah*'s exclusionary command, but the basic sphere of *Massiah*'s right to counsel. The significance of the linguistic focus on "interrogation" in these two opinions remains to be seen.

suggesting that the infringement of that right is consummated at the time of an uncounseled pretrial encounter. This conception of the *Massiah* guarantee rests on a patently fallacious assumption that the only purpose of the pretrial extension of assistance is to guard against harms suffered *during* the pretrial confrontation with government agents. The objective of the entitlement to pretrial assistance cannot be merely to protect the accused against being induced to disclose incriminating facts. The pretrial right does not serve purposes divorced from the trial process. It is not, for example, a shelter against the indignity of voluntarily divulging one's guilt or the embarrassment of being deceived by the government into admitting culpability. It is most assuredly not a species of extrajudicial "privacy" entitlement.

To the contrary, the objective and rationale of *Massiah*'s grant of legal assistance is inextricably tied to the trial process. As a necessary extension of the Sixth Amendment trial guarantee, the goal of the right to pretrial assistance—its very *raison d'etre*—is to protect the accused against adversary-system harms that can only occur during the process of adjudication. Both before and during trial, defense counsel promotes a fair adversarial process and prevents the government from fueling its case with advantages gained by confronting an unequal, unequipped lay accused. For these reasons, and contrary to Justice Scalia's confident declaration, it is not at all "illogical to say that the right [to counsel] is not violated until" the products of the pretrial encounter are used at trial to assist the prosecution's efforts to convict. That is the critical point, the stage at which the government brings to fruition the deprivation of counsel by reaping the benefits of denying assistance and inflicting the harms that counsel is supposed to prevent. In fact, it is the very essence of rationality to conclude that a violation of the pretrial right to counsel is not fully accomplished until the adjudicatory harm that right is meant to forestall occurs. That harm does and can occur *only* at trial.

A comparison to the Fifth Amendment privilege against compulsory self-incrimination is instructive. When a defendant is compelled to speak before trial and his forced revelations are admitted into evidence, the Fifth Amendment violation occurs upon the introduction of the evidence, not at the time he is forced to make the revelations.[145] This is true even though the accused is not subjected to compulsion in the courtroom. The Court finds it not at all illogical that the right is not violated until the evidence extorted from the defendant undermines the integrity of the trial process. The violation of the Fifth Amendment does require official compulsion to make testimonial revelations, and thus the unconstitutionality begins when pressure is applied to the individual prior to trial. The violation ripens, however, only when the accusatorial-system harm the Fifth Amendment is designed to foreclose comes to pass—i.e., when a conviction is secured based on compelled testimonial

[145] *See* Chavez v. Martinez, 538 U.S. 760, 766–67 (2003) (Thomas, J., plurality opinion); *id.* at 777 (Souter, J., concurring in the judgment).

revelations.[146] Before that point, the deprivation of the Fifth Amendment entitlement is incomplete because the interests that guarantee furthers are *trial* interests.[147] When the government jeopardizes those interests by introducing compelled disclosures into the adjudicatory process, it denies the accused the benefits of the Fifth Amendment and completes the constitutional transgression.

In this respect, the fundamental rights accorded by the Fifth and Sixth Amendments are quite similar. The focus of both is the trial, and both provide shelter against harms occasioned by unfair methods of establishing guilt. While both can be violated by acts and injuries that occur entirely in the courtroom, both can also be violated by official acts that take place prior to the formal trial if those acts have damaging evidentiary consequences in court. Because the privilege and the right to counsel are fundamental trial rights, they are endangered when a process that our Constitution deems unfair contributes to the adjudication of guilt.

In addition, the *Ventris* majority's assertion that the introduction of evidence of an uncounseled confrontation at trial does not itself prevent an accused's trial counsel from providing assistance and does not prevent an accused from enjoying that assistance is correct, even unarguable. It is also quite beside the point. The denial of counsel is occasioned by the *pretrial* deprivation of assistance coupled with the use of evidence obtained to the accused's courtroom disadvantage. It is entirely irrelevant that the introduction of the evidence occasions no *additional* deprivation of assistance or impairment of counsel's functioning *during* the trial. The assumption that a deprivation of the right to assistance cannot occur unless there is some interference with the ability of counsel to perform at or during the trial is misguided. This seriously flawed premise ignores several critical facts: that the adversarial battle begins with formal accusation; that a partial deprivation of counsel is no less a deprivation; and that when the advantages gained by the uncounseled pretrial confrontation are exploited at trial, a partial deprivation of counsel does occur. An accused can be denied the benefits of the Sixth Amendment right even though the introduction of the evidence does not impede the operation of counsel at trial or somehow prevent counsel from furnishing trial assistance. The violation is independent of trial counsel's performance and occurs because the inability to assist the accused during the earlier phase of the adversarial contest occasions harm during the most important stage of the adversarial process—when the merits of the government's accusation are determined.

A Fifth Amendment comparison again proves illuminating. A partial deprivation of the Fifth Amendment privilege occurs when compelled

[146] *See id.* at 767–71 (Thomas, J., plurality opinion).

[147] *See id.* at 767, 769; *see also* Withrow v. Williams, 507 U.S. 680, 691–92 (1993) (concluding that the Fifth Amendment privilege is "a fundamental *trial* right") (citation omitted)).

self-incriminating pretrial disclosures are used as evidence of guilt at trial. There is no demand that the accused also be compelled to speak during the trial itself. The fact that the right is not further infringed upon during the trial does not preclude a constitutional deprivation. Moreover, when a defendant is deprived of counsel's assistance for a brief period or a limited purpose during a trial, a Sixth Amendment violation occurs even if the partial deprivation has no impact on the performance of counsel during the rest of the trial.[148] It is enough that the limited deprivation has an effect upon the trial process.[149] The same reasoning must apply to a deprivation of the entitlement to pretrial assistance, which is nothing other than an extension of the trial guarantee to ensure protection during the expanded adversarial contest.[150]

Other perspectives shed further light on this issue. If the government was allowed to confront an unassisted accused during an early stage of the trial, it would not matter that this deprivation did not have impact on counsel's efficacy during later parts of the trial. The right to counsel would be violated because of the impairment of the chance for a favorable verdict resulting from the unequalized confrontation earlier in the process. If the government sought and secured a two-week continuance during a criminal trial, then approached the accused without his attorney and videotaped inculpatory admissions elicited by officials, surely the use of the videotape as evidence once the trial resumed would be an equivalent violation of the right to counsel even though there was a moratorium in the formal trial process at the time the admissions were elicited. It surely would not matter that the introduction of the videotape did not prevent defense counsel from performing his duties during the formal trial proceedings or that the trial was not "in session" when the deprivation of counsel occurred. Once a formal accusation initiates the adversarial process and triggers the fair-trial guarantees that are part of our constitutional system—including the fundamental right to legal assistance—an uncounseled encounter before trial should be analyzed similarly. The fact that the admission of the evidence does not impede the actual performance of trial counsel does not preclude the occurrence of a Sixth Amendment violation in court. The use of evidence obtained from that encounter is the critical step that

[148] *See, e.g.*, Geders v. United States, 425 U.S. 80, 91 (1976) (holding that the denial of consultation with counsel during an "overnight recess" violated the Sixth Amendment); Herring v. New York, 422 U.S. 853, 863–65 (1975) (concluding that a denial of all opportunity for closing argument during a bench trial violated the Sixth Amendment).

[149] The effect on the trial process is presumed for limited denials of assistance during trial. *See* Perry v. Leeke, 488 U.S. 272, 278–80 (1989) (concluding that an accused who is denied his constitutional right to consult with counsel for any period during the trial need not show any prejudice to establish a Sixth Amendment violation).

[150] *See supra* text accompanying notes 118–21 for a discussion of historical changes in the process that necessitated extensions of the right to counsel.

completes the deprivation of the substance of the Sixth Amendment right.

A deprivation of assistance during post-accusation, pretrial encounters with the government is not constitutionally problematic because of the impact it might have on trial counsel's ability to defend the accused. It is constitutionally problematic because of the impact it might have on the trial process and on its outcome. The point is not, as Justice Scalia would have it, that the admission of inculpatory, possibly devastating, evidence renders trial counsel's assistance "not worth much."[151] The point is that the admission of evidence renders the adversarial process unfair by allowing the government to prove guilt with the evidentiary profit of an imbalanced confrontation with the accused at a time when the Sixth Amendment guaranteed a protective, equalizing assistant.

Equally irrational is the *Ventris* Court's characterization of evidentiary exclusion as a necessary "remedy" for the deprivation of counsel "at the prior critical stage."[152] Although, it is true that the actual denial of assistance occurred at that earlier stage of the adversarial contest, the harm the right to pretrial assistance is intended to prevent did not occur until later. Evidentiary exclusion is not a needed "remedy" for an already inflicted constitutional injury. Instead, it is a constitutionally essential means of preventing the pretrial denial of assistance from harming the accused at trial, thereby defeating the Sixth Amendment's promise of a fair adversarial adjudication of guilt. Like the Fifth Amendment's bar to compelled testimonial revelations, the evidentiary exclusion mandated by *Massiah* is not at all a "remedy" for a pretrial denial of a constitutional right. It is not designed to repair damage done, to compensate an accused for past injury, or to discourage future efforts to elicit information.[153] It is essential to preserve the Sixth Amendment right to assistance granted by the Framers from erosion resulting from historical changes in the process of determining guilt. It is the only way to prevent a courtroom violation of an accused's most fundamental trial right.

The final paragraph of Justice Scalia's reasoning about the nature of *Massiah* exclusion was a response to an amicus curiae argument made by the United States. The federal government's contention "that 'post-charge deliberate elicitation of statements without . . . counsel or a valid waiver . . . is not intrinsically unlawful'" rested on the premise that officials do not violate the Sixth Amendment by confronting an uncounseled accused—i.e., that a pretrial interaction with a defendant

[151] Kansas v. Ventris, 129 S. Ct. 1841, 1846 (2009).

[152] *Id.*

[153] *See infra* text accompanying notes 179–80 for a discussion of future-oriented deterrence as an ancillary or supplemental objective.

alone does not effect a constitutional deprivation.[154] Justice Scalia's answer was that this claim was "true when the questioning is unrelated to charged crimes," but that officers were not constitutionally free to "badger counseled defendants about charged crimes so long as they do not use information they gain."[155] In that case, there is a "constitutional violation" at the time "the uncounseled interrogation is conducted."[156] Consequently, the function of *Massiah* exclusion is not to prevent "a constitutional violation" in the courtroom, "but rather" to "remedy . . . a violation that has already occurred."[157]

This response is as flawed and indefensible as the earlier reasoning offered in support of the view that right-to-counsel violations are completed prior to trial.[158] Moreover, the suggestion that the Sixth Amendment is violated when officers "badger counseled defendants about charged crimes" is irreconcilable with the logic of prior *Massiah* decisions that rest on the sensible premise that uncounseled pretrial confrontations themselves cannot violate that provision.[159] Although

[154] *Ventris*, 129 S. Ct. at 1846. The argument proffered by the United States was an effort to preserve the constitutional authority to elicit information acknowledged by the Court in both *Massiah v. United States*, 377 U.S. 201 (1964), and *Maine v. Moulton*, 474 U.S. 159 (1985). In those opinions, the Court had announced that officials were free to continue investigating uncharged offenses by deliberately eliciting information from charged defendants. *See Massiah*, 377 U.S. at 206–07; *see also Moulton*, 474 U.S. at 179–80. The underlying premise of these rulings was that the Sixth Amendment was not offended by the elicitation of disclosures from an accused even if the revelations pertained to charged offenses. The Constitution merely forbade the use of the revelations to convict the defendant. *See Massiah*, 377 U.S. at 207; *see also Moulton*, 474 U.S. at 180.

[155] *Ventris*, 129 S. Ct. at 1846.

[156] *Id.*

[157] *Id.*

[158] The majority again failed to explain *why* or *how* deliberate elicitation of disclosures about *any* offense, charged or uncharged, infringes on constitutional interests or inflicts the sort of harm the Sixth Amendment aims to prevent.

[159] The majority opinions in *Massiah* and *Moulton* clearly endorse this premise. Both concluded that officials were constitutionally free to seek information from accused individuals as long as they did not use any admissions to prove the charges that were pending. *See Moulton*, 474 U.S. at 179–80; *Massiah*, 377 U.S. at 206–07. Moreover, the restrictive ruling in *Texas v. Cobb*, 532 U.S. 162 (2001), rests on the assumption that violations of the right to counsel occur only when evidence is used at trial to prove charged offenses. According to *Cobb*, the right to counsel is "offense specific." *Id.* at 164, 167; *see also id.* at 170 (referring to the "offense-specific nature of the Sixth Amendment right to counsel"). If officers elicit disclosures from a formally charged, unaided defendant, those disclosures may be admitted at the trial of an uncharged offense. *Id.* at 167–68. Even if the elicitation involves "badger[ing]" a "counseled defendant[] about [a] charged crime," officials are free to "use information they gain" to prove other, uncharged offenses. *Ventris*, 129 S. Ct. at 1846. Surely, this is because the mere acquisition of the admissions does not complete a right-to-counsel violation with regard to the charged offense. Because the use of evidence at trial is essential for a constitutional deprivation, the Sixth Amendment is not violated if officials "do not use information they gain" to prove that the accused committed an offense for which the right to counsel had attached. *Id.*

there have been instances in which the Court's careless language has suggested that pretrial confrontations could violate the right to counsel,[160] the reasoning and holdings of significant *Massiah* doctrine opinions reflect an understanding that constitutional deprivations occur at trial. Finally, the majority's response to the federal government's contention was incomplete, ambiguous, and downright confusing because it did not address every sort of official conduct that, according to longstanding precedent, triggers the protection of the right to counsel.[161] Suffice it to say that Justice Scalia's narrowly framed answer to the broad contention that deliberate elicitation after accusation is not "unlawful" is unsatisfying, enigmatic, dissonant with more than one precedent, and potentially corrosive of the pretrial guarantee *Massiah* recognizes. This concluding portion of Justice Scalia's reasoning raised more questions than it answered. If anything, it cast further doubt on the legitimacy of the Court's ill-conceived portrayal of the *Massiah* right to assistance.[162]

Other Sixth Amendment decisions confirm the illegitimacy of *Ventris*'s depiction of the *Massiah* right. Before the Court extended the right to counsel to the informal pretrial confrontations governed by *Massiah*, it had held that the right to assistance reached certain in-court

[160] *See Moulton*, 474 U.S. at 170, 176, 180; United States v. Henry, 447 U.S. 264, 274 (1980).

[161] The only conduct that Justice Scalia condemned was "badger[ing] counseled defendants about charged crimes." *Ventris*, 129 S. Ct. at 1846. He did not discuss surreptitious or open efforts to secure information from unaided defendants concerning offenses for which the right to counsel has attached—that is, conduct that does not rise to the level of "badgering." In addition, he did not discuss conduct (even badgering) that is designed to secure information about uncharged crimes, but that is known to be likely (or even certain) to produce statements probative of charged offenses. One is left to wonder whether the majority believed that other sorts of confrontations violate the Sixth Amendment. If the Sixth Amendment is violated *only* when officers "badger," *only* when a defendant is already "counseled," and *only* if the badgering is "about charged crimes," then the governing doctrine will require substantial revision. The current doctrine requires exclusion if officers *deliberately elicit* information from charged defendants who are *not yet counseled*, even if the officers are *concerned with* and attempting to secure information *about uncharged offenses*.

[162] If pretrial confrontations of unassisted defendants do violate the Sixth Amendment, as the *Ventris* Court concludes, then defendants would have bases for civil suits for violations of their rights whenever officials engage in the unconstitutional pretrial conduct. A civil claim would be potentially valid whether or not any disclosures were used at the defendant's criminal trial. Although it seems unfathomable that the Court meant to sanction such claims, *Ventris*'s reasoning about the nature and timing of Sixth Amendment transgressions leads to that conclusion. The prospect of civil damages for uncounseled encounters further demonstrates how misguided and ultimately illegitimate *Ventris*'s understanding of *Massiah* must be. It is ludicrous to suggest that an accused who has not suffered any constitutionally cognizable injury should be made whole, or that officers who may well be involved in commendable efforts to uncover other criminal actors or the full breadth of the defendant's scheme should be subject to liability for damages.

stages of the pretrial process.[163] These holdings that the trial right granted by the Sixth Amendment had to be extended to certain pretrial stages of the criminal process—stages that preceded the formal adjudication of guilt—were largely based on the premise that uncounseled confrontations before trial could be critical because of the adverse impacts they could have on the trial itself. A focal concern was that if the defendant did not have the assistance of counsel at an arraignment or at a preliminary hearing, he might be seriously disadvantaged at the subsequent trial.[164] The Court was clearly concerned with the injurious effects that an accused might suffer at trial if the government could expand the adversarial battle without affording the vital protection that was the defendant's trial entitlement.[165]

Unless the Court was to draw an implausible line between formal and informal pretrial confrontations, *Ventris*'s logic requires the conclusion that a constitutional violation is completed when counsel is denied at a preliminary hearing or arraignment and that no Sixth Amendment transgression occurs when the prosecution exploits any evidentiary or other advantage gained to the accused's disadvantage at trial.[166] Indeed, the prosecution should be permitted to profit from those advantages if the costs of exclusion from the trial outweigh any "remedial" benefits produced by suppression. By conducting formal courtroom proceedings prior to the formal start of the trial and denying

[163] *See* White v. Maryland, 373 U.S. 59, 60 (1963) (per curiam) (preliminary hearing); Hamilton v. Alabama, 368 U.S. 52, 54–55 (1961) (arraignment). The Court also ruled that the Sixth Amendment entitlement to assistance reached preliminary hearings in a significant post-*Massiah* ruling. *See* Coleman v. Alabama, 399 U.S. 1, 9–10 (1970).

[164] *See id.* at 9–11; *Hamilton*, 368 U.S. at 54.

[165] The *Coleman* Court did recognize that the potential impact on the fairness of the trial process had been the foundation for extending the right to counsel to critical pretrial stages of prosecutions. *See Coleman*, 399 U.S. at 7. Moreover, the Court held that the accused was entitled to assistance at the preliminary hearing involved in *Coleman* because a lawyer's "skilled interrogation of witnesses" at such a hearing could "fashion a vital impeachment tool for use in cross-examination of the State's witnesses *at the trial*, or preserve testimony favorable to the accused of a witness who does not appear *at the trial*" and because "trained counsel" could "more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case *at the trial*." *Id.* at 9 (emphasis added). It is true that the *Coleman* Court also relied on potential pretrial consequences resulting from an uncounseled preliminary hearing. An accused might be held over for trial because he lacked the assistance necessary to persuade a judge "to refuse to bind [him] over" and might receive an unfavorable "bail" decision because counsel was not present to make "effective arguments." *See id.*

[166] It is irrational to suggest that the concern in *formal* pretrial proceedings is the impact on the accused at trial, while the concern in *informal* pretrial proceedings is the impact on the accused prior to trial. In fact, an accused is much more likely to suffer immediate, cognizable injury from formal pretrial confrontations with the state than from informal confrontations like those governed by *Massiah*. *See supra* note 165. Informal pretrial encounters are unlikely to inflict pretrial injuries that the Sixth Amendment is designed to prevent, but are quite likely to impact a defendant's interests in a fair adversarial trial.

an accused the assistance required at the trial, the government would be able to circumvent and erode the adversary-system protection afforded by the Sixth Amendment. It is inconceivable that the Framers of the Sixth Amendment's grant of counsel's protection during the adversarial process could be thwarted in this way.[167] Constitutional injury, and thus a constitutional violation, occurs when a formal pretrial confrontation has adverse effects at trial. Whether counsel is denied at the trial, at a formal pretrial encounter, or at an informal pretrial confrontation, the primary concern must *always* be the impact of that denial on the trial process and on its outcome.

The ineffective assistance of counsel doctrine announced in *Strickland v. Washington*[168] provides useful insights. The details of *Strickland*'s "actual ineffectiveness" doctrine and its underlying premises are wholly incompatible with *Ventris*'s conception of *Massiah*. According to *Strickland*, no completed Sixth Amendment deprivation occurs when a defense attorney renders a constitutionally deficient performance before or at a trial *unless* the deficiency results in "prejudice" to the outcome of the trial.[169] Even if a lawyer is woefully incompetent, wholly neglecting a basic pretrial duty or a fundamental trial obligation, no constitutional violation occurs unless an accused can show a cognizable negative impact on the trial—that is, "a reasonable probability that . . . the result of the proceeding would have been different."[170] *Strickland* made it clear that counsel's utter failure to fulfill his role as assistant *at the trial itself* does not deprive the defendant of the right to assistance unless it has an adverse effect upon the trial's outcome. *Ventris*, on the other hand, concluded that a denial of assistance at a brief pretrial encounter with an officer or a cellmate can effect a Sixth Amendment deprivation and that the impact of that confrontation on the adjudicatory process is not a constitutional concern. *Ventris*'s explanation of *Massiah*'s pretrial extension of the Sixth Amendment guarantee collides with *Strickland*'s logic.

Consider the analytical differences between deficient performance by an attorney and the government's denial of counsel in a pretrial setting. Suppose that during a pretrial confrontation with a police officer, defense counsel, due to wholesale ignorance of clear legal constraints, fails to advise the accused not to freely admit his guilt or affirmatively counsels an accused that he should tell the officer all that

[167] Indeed, the Court's recognition of the need for counsel in critical pretrial confrontations has, in fact, been based on the premise that denying counsel at these newly developed stages of a prosecution would allow the government to circumvent the fundamental right to trial assistance. *See* United States v. Ash, 413 U.S. 300, 310–12 (1973); *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 238–39 (1973) (declaring that "the 'trial' guarantees that have been applied to the 'pretrial' stage of the criminal process are . . . designed to protect the fairness of the trial itself").

[168] 466 U.S. 668 (1984).

[169] *Id.* at 687, 691–92.

[170] *Id.* at 694.

he knows. According to *Strickland*, to establish a Sixth Amendment violation the government must introduce statements made by the accused at trial, and there must be a reasonable probability that without those statements the outcome of the trial would be different. The effect of the incompetent assistance on the trial is determinative of, and essential to, a violation of the Sixth Amendment. Now assume that the government conducts the very same encounter in the absence of counsel or a waiver and that the accused makes identical statements. According to *Ventris*, a right-to-counsel deprivation occurs if the government does not introduce those statements at trial or if the government does introduce them and they have no effect on the trial's outcome. *Ventris* holds that there is a fully accomplished Sixth Amendment transgression whether or not the evidence reaches the courtroom.[171]

In sum, the conception of the Sixth Amendment right to assistance of counsel reflected in the "actual ineffectiveness" doctrine is incompatible with *Ventris*'s conclusions that a Sixth Amendment violation occurs at the pretrial encounter and that the impact of introducing evidence gained from that encounter at trial is irrelevant to the realization of a counsel deprivation. According to the Court, the right to counsel is a fundamental trial right.[172] Because its core purpose is to promote and ensure fair trials,[173] constitutional deprivations occur when denials of the assistance guaranteed by the Bill of Rights jeopardize the fairness of adjudications of guilt.[174] The right to assistance does not exist "for its own sake."[175] The objective is to ensure that the accused does not suffer adversary-system harms that the Sixth Amendment guarantee was designed to prevent. By concluding that a deprivation of the *Massiah* pretrial entitlement fully accomplishes a Sixth Amendment violation and that harmful consequences in the courtroom are not the concern of that

[171] It is true that when the government denies an accused the assistance of counsel at trial, even for a limited time or purpose, no showing of prejudice is necessary. *See id.* at 692; *see also* Perry v. Leeke, 488 U.S. 272, 278–80 (1989). The reason an accused need not show prejudice, however, is not that impact on the trial is deemed unimportant to the existence of a Sixth Amendment violation. Instead, when there is an official deprivation of assistance, the Court believes that it is both logical and appropriate to *presume* that the deprivation was prejudicial—that is, that it harmed the accused's interest in a fair trial. *See Strickland*, 466 U.S. at 692; United States v. Cronic, 466 U.S. 648, 659 (1984). If the existence of a Sixth Amendment violation due to a denial of assistance during or for the trial itself hinges on a presumption that such a denial does prejudice the fairness of the trial—i.e., if no violation of the core Sixth Amendment right occurs without a negative impact on the trial—it seems senseless to conclude, as *Ventris* does, that a violation of *Massiah*'s pretrial extension of that same right can occur without any adverse impact on the trial—indeed, without any adverse impact on the accused whatsoever.

[172] *See Strickland*, 466 U.S. at 684–85; *see also* Martinez v. Court of Appeal of Cal., 528 U.S. 152, 159–60 (2000).

[173] *See Strickland*, 466 U.S. at 684–85; *Cronic*, 466 U.S. at 658; Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963).

[174] *See Strickland*, 466 U.S. at 686, 696.

[175] *See Cronic*, 466 U.S. at 658.

entitlement, the *Ventris* Court divorced *Massiah*'s pretrial extension of the Sixth Amendment guarantee from the trial right that is the source of its legitimacy. In fact, the *Massiah* right is inseparable and indistinguishable from the Sixth Amendment right to trial assistance—a necessary expansion of that very right and not an independent right with distinct purposes. The common goal of both trial and pretrial entitlements to assistance is to protect defendants against adjudicatory disadvantages during the battle with the government adversary. For that reason, the use of evidence is critical to finding a *Massiah* violation. Evidentiary suppression is an indivisible part of the pretrial entitlement to assistance against deliberate elicitation. Exclusion is a constitutional right, not a mere deterrent remedy.

The *Ventris* majority offered no logical or precedential support for its impoverished understanding of *Massiah*'s guarantee of counsel and its bar to deliberately elicited statements. The Court simply refused to engage with or respond to the powerful logic that supports the conclusion that *Massiah*'s suppression mandate is an integral part of the Sixth Amendment right. Moreover, the reasoning employed to dismiss that conception and to support the view that evidentiary suppression is merely a courtroom "remedy" for a fully accomplished constitutional deprivation is grounded in a fundamental misconception of the pretrial extension of the Sixth Amendment trial right as somehow independent of the trial process. The Court's position rests on the indefensible notions that the right to counsel against deliberate elicitation serves some undefined extrajudicial interests of the accused and that the Sixth Amendment entitlement to assistance can be violated at trial only if counsel's performance during the trial is somehow restricted or impaired. In fact, like every other aspect of that guarantee, the pretrial right recognized by *Massiah* is a safeguard against trial harms. Moreover, the right to assistance can be denied in the courtroom without any impairment of counsel's functioning *during* the trial. A Sixth Amendment violation that begins before trial commences is fully accomplished when, and only when, evidence obtained at an uncounseled confrontation damages the accused's chances for a favorable verdict at trial. This is the only understanding of the *Massiah* right to counsel that makes any constitutional sense.

B. Massiah *Exclusion Is Not a Deterrent Sanction*

The *Ventris* Court denied *Massiah* exclusion its proper role as a constitutional right and cast it as a "remedy" for an already completed violation of the right to counsel. The Court's use of this description was odd because it suggested that evidentiary exclusion somehow repairs or compensates for the pretrial deprivation of counsel. In fact, no

constitutional exclusion doctrine is a "remedy" in this sense.[176] Probative evidence is *never* barred from criminal trials to somehow make an accused whole or to undo constitutional harm inflicted by official pretrial conduct. When the Court addressed the specific issue raised by *Ventris*—whether the prosecution may introduce statements obtained in violation of the *Massiah* entitlement to assistance to impeach an accused's testimony—it quickly became clear that the majority does not conceive of exclusion as a present "remedy" for the accused on trial. Instead, it is a deterrent sanction whose object is only to prevent future deprivations of assistance for other defendants at the critical pretrial confrontations governed by *Massiah*. Suppression is not designed to benefit the individual defendant who has suffered a deprivation of the pretrial right to counsel. He or she is the fortuitous beneficiary of a courtroom sanction that is constitutionally necessary to prevent officials from depriving future defendants of the right to assistance. In the Court's view, like Fourth Amendment suppression, *Massiah*'s bar is a mere exclusionary rule that aims to discourage officers from denying the right to pretrial assistance by removing the incentives for such denials.

The preceding Part explained how the admission of evidence obtained in contravention of *Massiah*'s constraints completes a right-to-counsel violation and why exclusion should be considered a constitutional right. Contrary to *Ventris*'s assertion, suppression is surely not a *mere* deterrent sanction. It remains possible, however, that deterrence is a supplemental or ancillary justification for barring evidence. Although today Fourth Amendment suppression is solely a deterrent, at one time it was both a right and a deterrent safeguard.[177] In other contexts, the Court has at times intimated that evidentiary suppression serves multiple purposes, including deterring improper future conduct by officials.[178] The theoretical question here is whether it makes sense to conclude that deterrence is an intended function or even a salutary consequence of *Massiah*'s exclusionary dictate.

The right to counsel is a trial right intended to prevent trial harms. When an accused is denied pretrial assistance, the first step in a right-to-counsel violation occurs, but the violation is not completed unless and

[176] For a discussion of the characters of and justifications for the seven constitutional mandates to exclude evidence from criminal trials, see TOMKOVICZ, CONSTITUTIONAL EXCLUSION, *supra* note 9.

[177] *See* Mapp v. Ohio, 367 U.S. 643, 655–56 (1961).

[178] *See* Oregon v. Elstad, 470 U.S. 298, 308 (1985) (suggesting that *Miranda*'s exclusion doctrine serves both to guard against the use of untrustworthy coerced statements and to deter officers); Manson v. Brathwaite, 432 U.S. 98, 112 (1977) (indicating that the due process right to exclude unreliable eyewitness identifications that are the products of unnecessary suggestion also serves deterrent purposes); United States v. Wade, 388 U.S. 218, 228, 235–36 (1967) and Gilbert v. California, 388 U.S. 263, 273–74 (1967) (indicating that the bar to identification evidence produced at uncounseled lineups is necessary both to preserve the right to a fair trial and to deter the arrangement of uncounseled lineups).

until there is some injury to the defendant's interest in a fair adversarial trial. Violation of the Sixth Amendment occurs but once and only in the courtroom. Consequently, evidentiary suppression is not needed to deter officers from constitutional transgressions effected by eliciting inculpatory disclosures from accused individuals. Elicitation by itself is not a constitutional wrong. Moreover, there is not even a risk that elicitation alone will deprive an accused of the Sixth Amendment entitlement. Therefore, suppression cannot be designed to prevent *pretrial* violations of future defendants' rights to assistance.

Deterrence could serve as an ancillary rationale for Sixth Amendment suppression if, by preventing imbalanced pretrial confrontations, it provides an additional shield against conviction based on the products of those confrontations. If officers do not engage in uncounseled deliberate elicitation because the prospect of evidentiary exclusion deters them, evidence that could violate the Sixth Amendment in court never comes into existence and cannot jeopardize the fairness of the trial. Of course, if judges correctly resolve every *Massiah* issue, such evidence will never be admitted at trial. Prevention of the events that generate the forbidden disclosures will produce no net protection for the right to the assistance of counsel. It is inevitable, however, that judges will sometimes err in determining whether a *Massiah* violation has occurred and will admit evidence that does in fact violate the Sixth Amendment. Consequently, whether deterrence is a purpose or merely an effect of *Massiah*'s exclusion doctrine, if suppression deters uncounseled confrontations it will prevent some courtroom violations of the right to counsel. Effective deterrence of the pretrial encounters themselves diminishes the *risks* of future in-court violations resulting from mistaken trial rulings.[179]

One question raised by this potential deterrent rationale for Sixth Amendment exclusion is how likely it is that judges will erroneously fail to screen out evidence whose admission is unconstitutional. If the risk of incorrect decisions is sufficiently low, any gains in Sixth Amendment protection might well be outweighed by the harm to legitimate law enforcement caused by discouraging officers from eliciting information from a charged individual. A defendant's revelations might assist in the effective prosecution of other culpable individuals or furnish important proof that an accused committed other, uncharged offenses. Deterring

[179] It also diminishes the risks that the government will benefit in the adversarial contest from its encounter with an unaided accused in unseen, perhaps undetectable, ways. The prosecution might gain advantages other than incriminating disclosures made by an unassisted defendant—advantages that make conviction more likely. Officials might, for example, uncover information that enables them to more effectively cross-examine an accused or his witness. What they learn from an unaided defendant might enable them to present a more coherent narrative of guilt even though they do not use any evidence they obtained as a result of the imbalanced encounter. If the encounters that produce such benefits do not take place, the threat they pose to the fairness of the trial is eliminated.

officers from conducting uncounseled elicitation might be quite counterproductive, impeding these proper law enforcement efforts. Future constitutional benefits secured by preventing judicial errors at trial might well be outweighed by the investigatory, evidence-gathering costs of exclusion. These potentially costly impacts are a substantial reason for concluding that deterrence is neither a designed function nor a desirable consequence of Sixth Amendment suppression.

There is an even more persuasive reason to reject the view that deterrence provides a supplemental rationale for *Massiah* exclusion. If the risk of future judicial errors at the trials of other defendants is large enough to justify measures that discourage future efforts to elicit disclosures from those defendants, the risks of the same sort of judicial error at the current trial—and of violating the current defendant's right to counsel—would seem to justify a broader exclusionary mandate than currently exists. Put otherwise, the likelihood that a judge will improperly admit statements obtained from the accused would seem to call for more expansive suppression in order to prevent a constitutional deprivation from occurring in *his* trial—not only in future trials.[180]

For these reasons, I would conclude that deterrence is not a supplemental or ancillary rationale for suppression. Risks of erroneous judicial determinations are always present. If they are unacceptably or abnormally high, the best solution would seem to be direct modification of the adjudicatory process. Addressing the problem of constitutionally erroneous judicial resolutions of *Massiah* claims indirectly—if such a problem does exist—by deterring officers from engaging in uncounseled elicitation does not seem like a sensible choice. Moreover, some deliberate elicitation of statements from charged individuals is both desirable and productive and not a fit object of deterrent sanctions. The system should not seek to discourage legitimate investigatory efforts by suppressing evidence of guilt but should leave it to law enforcement officers to decide whether they would prefer to conduct those investigations, even though they might not be able to use evidence they gain for all purposes. In my view, the *Ventris* Court completely miscast the *Massiah* suppression sanction. The Sixth Amendment's evidentiary bar is a present, personal trial right belonging to the accused from whom information is elicited, not a beneficial means of deterring future violations of other defendants' rights to counsel.

[180] Because judges believe that they are correctly admitting the evidence in cases where they are, in fact, erring, it is difficult to see how broadened preventive suppression could be implemented without requiring a judge to exclude evidence that actually should be admitted. In other words, if judges are informed that they must exclude statements even though they do not find *Massiah* violations, they might defeat legitimate prosecutorial interests in cases where admission would *not* be error. If the risks of *Massiah* errors are intolerably high for some reason, then adjusting the burden of proof would seem to be the proper way to address the problem. If this adjustment were made, then there would be no need to exclude statements as a safeguard against risks of errors at future trials.

C. Explanations for Ventris*'s Gross Misconception of the* Massiah *Exclusion Doctrine*

Ordinarily, I find arguable merit in Supreme Court opinions with which I ultimately disagree. For rulings that I believe are misinterpretations of the Constitution, I typically recognize, and acknowledge, that there is room for reasonable disagreement. As the preceding analyses make clear, I find no room for rational dispute about the nature of *Massiah*'s exclusionary rule. *Ventris* is one of the most misguided, indefensible opinions I have ever encountered. The question here is why the Court—indeed, a remarkable seven-Justice majority of the Court—missed the mark so badly. I offer three possible explanations.

1. Uncritical, Monolithic Thinking About Evidentiary Exclusion

Perhaps the most benign explanation is that the Court was unduly influenced by the most prominent of the exclusionary rules—the Fourth Amendment's command that evidence obtained by means of unreasonable searches and seizures must be suppressed. Approximately 40 years ago, the Court rejected the notion that Fourth Amendment exclusion is a personal right of the accused and concluded that its primary purpose is to deter future illegalities.[181] Since then, the deterrent conception of the Fourth Amendment exclusionary rule has dominated analysis.[182] Moreover, during this time the Court has rendered many more decisions involving exclusion issues under the Fourth Amendment than under any other constitutional guarantee.

The Fourth Amendment is the "big dog" of constitutional exclusionary rules. As a consequence, it has sometimes had a distorting, misleading influence on exclusionary analyses in other domains.[183] At times, the Court has appeared to succumb to the myth of the monolith—the false and misleading view that all exclusionary rules are alike in character.[184] The consequence is the employment of Fourth Amendment

[181] *See* United States v. Calandra, 414 U.S. 338, 347–48 (1974). For all intents and purposes, deterrence is the sole purpose of Fourth Amendment exclusion. Although the Court appears to acknowledge that "judicial integrity" remains a rationale for barring the products of unreasonable searches and seizures, the view that a judge does not jeopardize her integrity if she excludes evidence whenever deterrence calls for exclusion makes that rationale entirely coextensive with the deterrent objective. *See* United States v. Leon, 468 U.S. 897, 921 n.22 (1984).

[182] *See, e.g.*, *Leon*, 468 U.S. at 906–13, 918–19; Stone v. Powell, 428 U.S. 465, 486–87, 492–94 (1976); *Calandra*, 414 U.S. at 347–48.

[183] *See, e.g.*, Colorado v. Connelly, 479 U.S. 157, 166 (1986) (describing the purpose of exclusion as deterrence and citing *Leon*, 468 U.S. at 906–13, a Fourth Amendment precedent, in a case involving the due process *right* to bar coerced confessions); Nix v. Williams, 467 U.S. 431, 441–48 (1984) (relying on the deterrent foundations of the Fourth Amendment exclusionary rule and a number of Fourth Amendment opinions in addressing a Sixth Amendment *Massiah* suppression issue).

[184] I have recently authored a book juxtaposing all seven constitutional exclusion mandates. *See* TOMKOVICZ, CONSTITUTIONAL EXCLUSION, *supra* note 9. That project was motivated by concern for the distortion of constitutional guarantees that can result

reasoning and principles in situations where they are simply not appropriate. One possibility, therefore, is that *Ventris* reflects this phenomenon and that it is the product of careless, uncritical analysis resulting from a simple failure to recognize that Sixth Amendment exclusion—an infrequent visitor to the Court—is a very different breed.

The evidence, however, powerfully suggests that inappropriate Fourth Amendment sway is not *the* reason—in fact, that it is not even *a* reason—for *Ventris*'s misconception of *Massiah*. First, early in his brief majority opinion, Justice Scalia focused on the fact that suppression doctrines have different characters and made clear that the Justices were aware that the answer to doctrinal questions—such as whether impeachment use is permissible—depends on the nature of a particular suppression doctrine. Moreover, the *Ventris* opinion does not contain the usual indicia of the Fourth Amendment's long, dark shadow—citations to Fourth Amendment opinions or references to "*the* exclusionary rule," a sure-fire indicator of monolithic thinking. To the contrary, the majority opinion makes it evident that the Court was aware of the starkly different alternatives—that *Massiah* exclusion was either a right or a mere deterrent safeguard—and realized that the choice would be determinative of the limited doctrinal question raised by *Ventris*. This is hardly surprising. In light of the accused's powerful arguments in support of the contention that *Massiah* suppression is a personal constitutional right;[185] the unavoidable declarations in *Massiah* that the trial use of evidence violated the Sixth Amendment;[186] the earlier acknowledgment in *Nix v. Williams* that exclusion could be an essential component of adversary-system fairness;[187] and Justice Stevens's dissents in *Michigan v. Harvey*[188] and *Ventris*,[189] it would have been astounding if the Fourth Amendment's dominance had led the *Ventris* Court astray. Although it is impossible to know if monolithic thinking played any role, there is every reason to believe that it did not play a significant part in the Court's mischaracterization of *Massiah* suppression.

2. Hostility to Evidentiary Exclusion

A majority of the Supreme Court has long been hostile toward expansive interpretations of constitutional exclusion doctrines.[190] The results have been narrow interpretations of their breadth and increasing

from the illegitimate assumption that all "exclusionary rules" are alike and from the failure to decide evidentiary exclusion questions by reference to the character and objectives of the constitutional provision that is the basis for suppression.

[185] *See* Brief for Respondent at 17–20, 23–24, Kansas v. Ventris, 129 S. Ct. 1841 (2009) (No. 07-1356).

[186] *See* Massiah v. United States, 377 U.S. 201, 205–06 (1964).

[187] *See Nix*, 467 U.S. at 446–47.

[188] *See* Michigan v. Harvey, 494 U.S. 344, 355 (1990) (Stevens, J., dissenting).

[189] *See* Kansas v. Ventris, 129 S. Ct. 1841, 1847 (2009) (Stevens, J., dissenting).

[190] *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98, 112–13 (1977); United States v. Calandra, 414 U.S. 338, 347–48 (1974).

numbers of exceptions.[191] Recently, the tenor of the Court's opinions has evinced an even more intense antipathy toward the prospect of barring probative evidence of guilt from criminal trials and increased concern with the social consequences of evidentiary suppression.[192] The results of decisions, the reasoning employed, and the language used all suggest that a majority of the Justices find suppression more objectionable than ever—a distasteful medicine to be taken in only the smallest of doses and only when genuinely necessary.[193] Until *Ventris*, however, there was only limited evidence that this general hostility to suppression might influence interpretations of *Massiah* exclusion; the recent anti-exclusion fervor had not touched the Sixth Amendment domain.[194]

Ventris is devoid of the rhetorical venom that the modern Court has aimed at the Fourth Amendment exclusionary rule.[195] On the whole, the opinion has a more temperate quality. In fact, the only pejorative I could find in the opinion—the Court's reference to exclusion under *Massiah* as a "game" that was "not worth the candle"[196]—is mild, to say the least. Moreover, this characterization did not appear until after the Court had

[191] *See* TOMKOVICZ, CONSTITUTIONAL EXCLUSION, *supra* note 9 at 35–58 (documenting the ways in which the Fourth Amendment exclusionary rule has been narrowed); *id.* at 132–51 (describing the diminution and erosion of the *Miranda* exclusion doctrine).

[192] The Fourth Amendment and *Miranda* evidentiary bars have been the targets of this intensified hostility. *See* Herring v. United States, 129 S. Ct. 695, 701–03 (2009) (expanding the Fourth Amendment "good faith" exception and suggesting the possibility of a culpability threshold requirement for Fourth Amendment suppression); Hudson v. Michigan, 547 U.S. 586, 594, 599 (2006) (holding that evidence obtained in violation of the Fourth Amendment knock-and-announce rule is not subject to exclusion); United States v. Patane, 542 U.S. 630, 637, 642, 644 (2004) (Thomas, J., plurality opinion) (concluding that derivative evidence is not subject to exclusion under *Miranda*).

[193] *See* Davis v. United States, 131 S. Ct. 2419, 2427 (2011) (describing the Fourth Amendment exclusionary rule as a "bitter pill" that "society must swallow . . . when necessary, but only as a 'last resort'" (quoting *Hudson*, 547 U.S. at 591)).

[194] The opinion in *Nix v. Williams*, 467 U.S. 431 (1984), first assumed that the *Massiah* bar served deterrent goals but then seriously entertained the possibility that Sixth Amendment exclusion also was a constitutional right. *See id.* at 442–43, 446–47. In *Michigan v. Harvey*, 494 U.S. 344 (1990), the Court rejected a claim that evidence obtained in violation of the *Massiah* doctrine could not be used to impeach the defendant's testimony, but the Court based its holding on the fact that the government had violated a mere "prophylactic" branch of *Massiah*. *See id.* at 350–53. The Court preserved the possibility that the Sixth Amendment might forbid any use of evidence obtained by violating one of *Massiah*'s core right-to-counsel safeguards. *Id.* at 353–54. Moreover, the Court's rejection of a legitimate, good faith investigation exception to *Massiah*'s bar in *Maine v. Moulton*, 474 U.S. 159, 179–80 (1985), suggested no inclination to constrict Sixth Amendment exclusion. It bears mention, however, that *Harvey*, the latest of these three opinions, was rendered in 1990, prior to the recent surge in the Justices' anti-exclusionary-rule sentiment. *Ventris* was the first opportunity to address a *Massiah* exclusion question in twenty years.

[195] *See Hudson*, 547 U.S. at 591, 594–97, 599.

[196] Kansas v. Ventris, 129 S. Ct. 1841, 1846 (2009).

already explained why suppression was no more than a deterrent "remedy." Although misguided, the reasoning proffered to justify that conclusion lacks the intensity that has pervaded some of the Court's recent rejections of exclusion claims.

Nonetheless, I suspect that the negative attitude reflected in the Fourth Amendment and *Miranda* decisions—an attitude that has not influenced coerced confession and Confrontation Clause rulings—was a factor that contributed to the *Ventris* majority's illogic. A primary basis for the intense animosity toward Fourth Amendment and *Miranda* suppression is that those doctrines bar *probative* evidence whose *reliability* has not been called into question. The unreasonableness of a search or seizure or the mere failure to comply with *Miranda* does not call the trustworthiness or probative value of the evidence acquired into question. In those domains, the truth is a casualty of suppression. Those constitutional bars hijack the quest for accurate determinations of guilt and produce a most undesirable result—the release of guilty, sometimes dangerous, criminals. The same is not true for the coerced confessions barred by the Fifth and Fourteenth Amendments or the unconfronted testimonial hearsay forbidden by the Confrontation Clause. Official coercion threatens the trustworthiness of a suspect's admissions, and the absence of an opportunity to challenge those who furnish testimonial hearsay raises genuine concerns about the reliability of that hearsay. In those arenas, the truth is jeopardized by the admission of the evidence, not by its exclusion. The introduction of coerced confessions or unconfronted testimony generates risks that innocent, non-dangerous persons will lose their freedom.

In these respects, *Massiah*'s exclusion doctrine is like the Fourth Amendment and *Miranda* doctrines—and quite unlike exclusion mandates that have not been the object of judicial hostility. There is nothing about the governmental conduct that is the concern of *Massiah*—deliberate elicitation of admissions from an uncounseled defendant—that casts doubt upon the reliability of statements made or the fruits of those statements.[197] The Sixth Amendment bar keeps presumptively truthful evidence from the courtroom, thwarting the successful prosecution of guilty criminals. The fact that an accused lacked legal assistance when he made inculpatory statements in response to noncoercive official inducements does not raise serious questions about the accuracy of those statements.[198]

[197] *See* Massiah v. United States, 377 U.S. 201, 208–09 (1964) (White, J., dissenting); *see also Nix*, 467 U.S. at 446–47 (1984).

[198] The National Association of Criminal Defense Lawyers (NACDL) made an effort to play the reliability card. As amicus curiae in support of Ventris, the NACDL argued that at least some of the evidence barred by *Massiah*—admissions reported by "jailhouse snitches"—was "so inherently unreliable" that "a broader exclusionary rule" was required. *See Ventris*, 129 S. Ct. at 1847 n.*. Justice Stevens was persuaded that the potential falsity of evidence secured in violation of the right to counsel was a reason for constitutional concern. *See id.* at 1848–49 & n.2 (Stevens, J., dissenting). The majority, however, believed

For these reasons, the hostility that has made the Justices increasingly chary of mandating exclusion under the Fourth Amendment and *Miranda* probably influenced *Ventris*'s indefensible interpretation of the *Massiah* rule. Earlier opinions had drastically revised the foundations of both the Fourth Amendment and *Miranda* exclusionary rules in ways that permit cost-benefit balancing that almost always leads to restriction of their reach.[199] In *Ventris*, the Court followed suit under *Massiah*, characterizing its bar as a mere deterrent safeguard whose breadth must be dictated by the same sort of cost-benefit assessment. It then employed cost-benefit analysis to narrow *Massiah* exclusion by authorizing impeachment use. An abiding distaste for any constitutional impediment to truthful, probative evidence and accurate adjudications of guilt almost certainly played a role in the Court's gross mischaracterization of the Sixth Amendment bar.

3. Discontent with Massiah*'s Extension of the Right to Counsel*

The primary culprit—the main reason the Court missed the mark so badly in *Ventris*—may well be doubts about the validity of *Massiah*'s extension of the right to counsel to pretrial deliberate elicitation by state agents. In *Massiah*, three dissenters contested the legitimacy of the Court's recognition of a pretrial Sixth Amendment right to assistance against government efforts to induce voluntary admissions.[200] In the years that followed, there were some objections to expansive readings of the *Massiah* entitlement to assistance,[201] and one Justice questioned the validity of *Massiah*'s interpretation of the right to counsel.[202] Between 1980 and 2009, however, no Justice had challenged the decision to extend the right to assistance to deliberate efforts to elicit information from accused persons. In one of the more noteworthy *Massiah* opinions during this span, a *unanimous* Court affirmed that interrogation is not necessary and that mere deliberate elicitation is sufficient to trigger Sixth Amendment protection.[203]

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that the source of the unreliability cited by amicus—the questionable veracity of jailhouse snitches—could not support a more expansive constitutional bar. Instead, assessment of the "credibility" of jailhouse informants is a matter that "[o]ur legal system" entrusts to juries and instructions by trial judges. *Id.* at 1847 n.*.

[199] Both the Fourth Amendment and *Miranda* exclusion doctrines began as constitutional rights. *See* TOMKOVICZ, CONSTITUTIONAL EXCLUSION, *supra* note 9, at 5–6, 16, 23–24 (describing the original nature of the Fourth Amendment rule); *id.* at 110–11, 123–25 (describing the original character of *Miranda*'s bar). The Court later converted the Fourth Amendment bar into a future-oriented deterrent sanction, *see id.* at 24–26, and transformed the *Miranda* bar into a prophylactic safeguard against risks of compulsory self-incrimination that may also be a deterrent sanction. *See id.* at 112–22, 125–26.

[200] *See Massiah*, 377 U.S. at 207, 209 (White, J., dissenting).

[201] *See* Maine v. Moulton, 474 U.S. 159, 184–90 (1985) (Burger, C.J., dissenting); United States v. Henry, 447 U.S. 264, 277–82 (1980) (Blackmun, J., dissenting).

[202] *See Henry*, 447 U.S. at 289–96 (Rehnquist, J., dissenting).

[203] *See* Fellers v. United States, 540 U.S. 519 (2004). In light of his earlier overt hostility to the *Massiah* right, it was more than a little surprising that even Chief Justice Rehnquist joined the majority opinion in *Fellers*, which reaffirmed a broad

When *Ventris* was argued in early 2009, there was no reason to believe that hostility toward the *Massiah* entitlement might influence the interpretation of its exclusion doctrine. The majority opinion, however, contains substantial evidence that doubts and concerns about the legitimacy of the underlying right were a major contributor to the Court's irrational characterization of *Massiah*'s exclusion doctrine. The majority may well have assuaged its doubts and addressed its concerns by minimizing the adverse consequences of denying assistance. The characterization of suppression as a mere deterrent "remedy" subject to limitations based on cost-benefit balancing was an effective way to hamstring the dubious right.

Justice Scalia asserted twice that the right to assistance *at trial* is the "core" of the Sixth Amendment guarantee.[204] He effectively severed the right to pretrial assistance from the trial right that is its very foundation, casting the former as a separate, second-class entitlement that resides outside the Sixth Amendment's core. He further undermined the value of the *Massiah* entitlement by describing the purpose of the core trial right in restrictive terms that do not apply to the pretrial entitlement. According to Justice Scalia, trial counsel's purpose is to meaningfully test the government's case,[205] an objective that the right to pretrial assistance against deliberate elicitation does not promote. Instead, *Massiah*'s limited function is "to ensure that police manipulation does not render [trial] counsel entirely impotent."[206] With this observation, the Court accorded pretrial counsel a narrow role in the adversary process, a role tied to and dependent upon the performance of counsel at trial.

In addition, more than once, Justice Scalia referred to the official conduct that triggers the right to pretrial assistance as "interrogation"—not simply deliberate elicitation.[207] In the last major *Massiah* decision preceding *Ventris*, a unanimous Supreme Court had declared with resounding clarity that interrogation—the potentially coercive predicate for *Miranda*'s Fifth Amendment protection—was not required for *Massiah*'s distinct Sixth Amendment safeguard and that mere "deliberate elicitation" was sufficient to trigger the fundamental adversary-system safeguard of legal assistance.[208] The repeated intimations in *Ventris* that

interpretation of that right. For a thorough discussion of the significance of the ruling in *Fellers*, see Tomkovicz, *Reaffirming the Right to Pretrial Assistance*, *supra* note 7.

[204] Kansas v. Ventris, 129 S. Ct. 1841, 1844–45 (2009).

[205] *Id.* at 1845.

[206] *Id.* The Court first suggested that the concern of the pretrial entitlement was to prevent "police manipulation," *id.*, then suggested that *Massiah*'s grant of counsel was even more narrow, affording protection against "badger[ing]"—not against mere efforts to secure incriminating admissions from an unaided accused. *Id.* at 1846.

[207] *Id.* at 1845–46.

[208] *See Fellers*, 540 U.S. at 521, 524. This was not the first time the Court found it necessary to clarify confusion over the conduct that constitutes a "critical stage of the prosecution" for *Massiah* purposes. *See* Tomkovicz, *Reaffirming the Right to Pretrial Assistance*, *supra* note 7, at 509–12 (discussing how the Court's references to

Massiah protects against "uncounseled interrogation" are nothing short of astonishing. The most likely explanation is a revival of hostility to the breadth of *Massiah*'s counsel guarantee.[209]

Finally, the Court's utter refusal to even acknowledge—much less respond to—the logic of the arguments supporting a right to exclusion,[210] coupled with the superficiality of the reasons proffered for rejecting the contention that suppression is part and parcel of the Sixth Amendment guarantee, bolster the impression that discontent with *Massiah*'s extension of the right to counsel led the Court to mischaracterize its exclusion doctrine in ways that undermine the value and erode the force of that pretrial entitlement.

In sum, by driving a wedge between the *Massiah* right to assistance and the trial right that is its only source of legitimacy; by promulgating a narrow conception of the purpose of trial assistance and announcing a different, quite constricted understanding of the functions and objectives of the *Massiah* extension; and by ignoring the reasoning that supports a Sixth Amendment right to suppress evidence elicited without counsel, the *Ventris* Court evinced antipathy to the *Massiah* entitlement. Disdain for *Massiah*'s branch of the Sixth Amendment promise is palpable. That attitude almost certainly explains the irrational, misguided, and ultimately disingenuous decision to demote *Massiah*'s Sixth Amendment exclusion mandate from constitutional right to deterrent "remedy."[211]

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interrogation in *Brewer v. Williams* required it to clarify that *Massiah* granted a right to the assistance of counsel whenever the government engaged in deliberate elicitation). In *Fellers*, all nine Justices appeared to settle the matter once and for all, pointedly correcting a circuit court ruling that interrogation was necessary. *Fellers*, 540 U.S. at 524–25. Now that the Court has reverted again to the term "interrogation," the finality of the *Fellers* pronouncement is questionable.

[209] *Ventris* is not the only indication of a resurgence of hostility toward *Massiah*'s extension of the counsel guarantee. In yet another *Massiah* opinion authored by Justice Scalia in 2009, the Court referred to the concern of the *Massiah* doctrine as "interrogation." *See* Montejo v. Louisiana, 129 S. Ct. 2079, 2085 (2009). The following year, in a dissent in a significant Sixth Amendment opinion regarding the ineffective assistance of counsel, Justice Scalia again referred to the provenance of *Massiah* as "interrogations." *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1495 (2010) (Scalia, J., dissenting). There is reason to suspect that Justice Scalia and others could be launching a campaign to confine the substantive ambit of *Massiah*'s right to assistance.

[210] The reasoning that leads to the conclusion that suppression is a part of the right to counsel was explained in dissents by Justice Stevens. *See Ventris*, 129 S. Ct. at 1847–49 (Stevens, J., dissenting); Michigan v. Harvey, 494 U.S. 344, 362–63 (1990) (Stevens, J., dissenting). The constitutional-right foundation for *Massiah*'s evidentiary bar had also been the subject of extensive scholarly explanations. *See, e.g.*, Tomkovicz, *Saving* Massiah *From* Elstad, *supra* note 8, at 745–57 (discussing the character of Sixth Amendment exclusion); Tomkovicz, *The* Massiah *Right to Exclusion*, *supra* note 2, at 762–72 (explaining the nature of the *Massiah* suppression doctrine). The majority's failure to engage with the reasoning supporting the constitutional-right conception of *Massiah*'s exclusion command had to be deliberate.

[211] I say "demote" because, despite the ambiguity of some opinions following *Massiah*, the Court had never rejected the view that exclusion was part of the Sixth

This apparent reason for the Court's decision to cast the *Massiah* bar to deliberately elicited statements as a deterrent sanction raises two questions. Is the Court's hostility toward *Massiah*'s pretrial grant of counsel justified? Moreover, if it is justified, is *Ventris*'s restrictive conception of evidentiary exclusion an appropriate constitutional response to *Massiah*'s illegitimacy? The answer to the first question depends on whether the Court's extension of the entitlement to counsel to official pretrial efforts to deliberately elicit admissions from accused persons is a valid interpretation of the Sixth Amendment guarantee. Justices and scholars have objected to the Warren Court's determination to extend the guarantee of counsel to the informal, extrajudicial confrontations governed by *Massiah*. The arguments offered to support their challenges to *Massiah* are not implausible. In other words, there is a case to be made against the legitimacy of *Massiah*'s pretrial extension of the Sixth Amendment trial right.[212]

On prior occasions, I have explained at length why I find the challenges to *Massiah* unpersuasive and why I believe that its pretrial extension of the right to the assistance of counsel is consistent with Sixth Amendment goals and values. I will not recount those arguments in detail here.[213] In my view, the opponents' conception of the purposes and functions of counsel is much too constricted. A more generous understanding of the multifaceted role trial counsel should play in defending an accused, coupled with a determination not to allow evisceration of the substance of the Sixth Amendment trial entitlement by pretrial confrontations of unassisted defendants, furnish a firm, indeed, a compelling foundation for recognizing an entitlement to protection against efforts to elicit inculpatory admissions. Consequently, I find antipathy toward the underlying right an unjustifiable basis for distorting the nature of the *Massiah* exclusion doctrine in ways that defeat its Sixth Amendment ends and jeopardize the most fundamental guarantee the Bill of Rights extends to those accused of crime.[214]

Moreover, even if *Massiah*'s critics were correct about its illegitimacy and the Court's hostility toward this pretrial extension of counsel was justified, I would still find fault with *Ventris*. If *Massiah* was a constitutional misstep, the Justices should address its invalidity openly and directly. The

Amendment right, a view that the original *Massiah* majority clearly held. *See supra* text accompanying notes 24–27, 97–102.

[212] For explanations of the arguments challenging *Massiah*'s legitimacy, see Tomkovicz, *The Truth About* Massiah, *supra* note 3, at 654–83; Tomkovicz, *Truth, Fair Play, and the* Massiah *Doctrine*, *supra* note 1, at 25–30.

[213] The discussion earlier in this Article regarding the premises of the *Massiah* right provides an adequate sketch of the reasoning I find persuasive. For more thorough explanations of that reasoning, see Tomkovicz, *The Truth About* Massiah, *supra* note 3, at 665–83; Tomkovicz, *Truth, Fair Play, and the* Massiah *Doctrine*, *supra* note 1, at 39–62.

[214] I have long subscribed to the view that "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

Court owes an explanation of why the right lacks defensible Sixth Amendment foundations and why the preservation of *Massiah*'s extension of the right to counsel for nearly fifty years has been constitutional error.

Perhaps stare decisis concerns prevent the Justices from confronting *Massiah* head-on. But if respect for a longstanding precedent whose fundamental legitimacy has been questioned only episodically, and by only a few Justices, precludes its abandonment, surely it ought to preclude the disrespect involved in *Ventris*'s gross distortion of its meaning and significance. Moreover, one objective of stare decisis is to maintain respect for the Supreme Court as an institution. *Ventris*'s abuse of *Massiah*, rooted in fallacious premises and specious logic, can only breed cynicism about the Court.

Perhaps the Justices are merely doubtful about *Massiah*'s legitimacy—uncertain whether it is a valid interpretation of the Sixth Amendment. *Ventris*'s approach—which diminishes the stature of the guarantee of counsel by according it limited, second-class status and categorizing its exclusion doctrine as a mere deterrent—might be a compromise by jurists who are unsure of the landmark's merits. Abandonment of *Massiah* could eliminate a valid constitutional safeguard, while wholehearted, unqualified endorsement could grant accused individuals more protection than they deserve. *Ventris*'s approach can be understood as a happy medium that preserves a watered-down right to assistance and a weakened exclusion doctrine. In my view, however, such a "medium" is anything but "happy." The Sixth Amendment either does or does not provide protection in the pretrial contexts that *Massiah* governs. Whether or not they are uncertain of its constitutional merit (hardly an uncommon phenomenon), the Justices must decide the question, and subsequent opinions must be faithful to and consonant with their decision. If *Massiah* is illegitimate, then officials are free to elicit information from uncounseled accuseds and to use that information to convict. On the other hand, if it is a valid constitutional interpretation, then the right to pretrial assistance is not inferior to or independent of the "core" right to trial assistance, and its exclusion sanction is an inseparable part of the Sixth Amendment's core. A ruling that splits the *Massiah* baby and grants half a guarantee is a constitutionally indefensible dodge, not a Solomonic resolution.[215] If *Ventris* represents such a compromise, it is cause for regret, not celebration.[216]

[215] It bears note that in the biblical tale, King Solomon did *not* end up dividing the child between the disputant mothers. *See* 1 *Kings* 3:16–28. Had he done so, his wisdom would not be legendary.

[216] If *Ventris* is a compromise between wholehearted embrace of the *Massiah* right and outright elimination of any right-to-counsel protection against pretrial efforts to secure admissions from accused persons—if it is an effort to balance the need for a basic adversary-system safeguard against the harm done when that safeguard operates prior to trial—then it seems fair to accuse the Justices of substituting their own

In my view, there is no defense of what the *Ventris* Court did. The refusal to acknowledge, confront, and resolve any doubts about or hostility toward *Massiah* directly, and the surreptitious assault on the entitlement to pretrial assistance and on Sixth Amendment exclusion in an opinion whose logic is, at best, superficial, is not the sort of constitutional adjudication we have a right to expect from our highest Court. The *Ventris* opinion is manipulative, disingenuous, opaque, political, and, ultimately, unfaithful to a fundamental liberty enshrined in our Bill of Rights.

In this Part, I have explained why, if *Massiah*'s extension of the right to counsel to pretrial deliberate elicitation is a proper interpretation of the Sixth Amendment, as I believe, *Ventris* is dead wrong about the character of the *Massiah* exclusion doctrine. The majority's conclusion that exclusion is nothing but a deterrent "remedy" is unsupported because it is unsupportable. The premises offered to sustain that conclusion are not just questionable, they are misguided, misleading, and entirely unresponsive to the logic that shows suppression to be a Sixth Amendment trial right. The explanation for *Ventris* must be hostility toward evidentiary exclusion and/or toward *Massiah*'s interpretation of the right to counsel. A few years ago, I described the Court's opinion in *Fellers v. United States*[217]—the *Massiah* opinion that preceded *Ventris*—as a "surprising little case."[218] *Fellers* was a pleasant surprise in which the Justices unanimously rejected a constricting interpretation of *Massiah*'s pretrial right to assistance that would have been irreconcilable with its origins. *Ventris*'s infidelity to the nature of the *Massiah* guarantee prompts a very different assessment. It is a "disturbingly dishonest little opinion" and a genuinely unpleasant surprise that betrays *Massiah*'s Sixth Amendment heritage.[219]

IV. IMPLICATIONS AND CONSEQUENCES OF *VENTRIS*

This final Part discusses why *Ventris* matters. As I just suggested, *Ventris* is a "little" opinion. The terse majority opinion consists of a mere seven pages of text that contain just eight paragraphs of reasoning and a single footnote. More important, the hole it punches in *Massiah*'s exclusion doctrine is relatively small, allowing prosecutors to introduce pretrial admissions elicited in violation of the right to counsel to

judgment about the proper balance of interests for that of the Sixth Amendment's Framers. If *Ventris*'s mischaracterization of the *Massiah* exclusion doctrine is the product of such an expedient compromise, its legitimacy is vulnerable to the same sort of criticism that Justice Scalia himself recently leveled at *Miranda* and its bar to confessions. *See* Dickerson v. United States, 530 U.S. 428, 445–46, 453–55, 460–61, 465 (2000) (Scalia, J., dissenting).

[217] 540 U.S. 519 (2004).

[218] *See* Tomkovicz, *Reaffirming the Right to Pretrial Assistance*, *supra* note 7.

[219] I deem *Ventris* "dishonest" because I do not believe that its merits are debatable, and I cannot believe that the majority could fail to perceive how utterly indefensible it is.

impeach a defendant's inconsistent testimony. Nonetheless, as a matter of constitutional theory, *Ventris* has major significance. Consequently, the threats it poses to the *Massiah* exclusion doctrine, and its destructive implications for the Sixth Amendment right to counsel, are anything but "little." The significance of the Court's choice of a "remedial" foundation for Sixth Amendment suppression cannot be understated.

The majority rejected the contention that the *Massiah* bar is part of the right to counsel, instead characterizing it as a mere exclusionary rule, a "remedy" designed solely to deter future deprivations of counsel during pretrial confrontations. This description of its underpinnings renders the Sixth Amendment suppression sanction—and the *Massiah* right to counsel—vulnerable to considerable erosion. As a judicially devised, although constitutionally grounded, means of preventing denials of the pretrial entitlement to assistance against official efforts to elicit revelations, Sixth Amendment exclusion is subject to the same cost-benefit balancing that has steadily reduced the potency of the Fourth Amendment exclusionary rule. As the Court has said on many occasions, evidentiary bars of this nature must be "restricted to those areas where [their] remedial objectives are thought most efficaciously served."[220] According to the Justices, judge-made rules must not impede the introduction of probative evidence in situations where their social costs—the defeated prosecutions and the release of guilty individuals—outweigh their constitutional benefits—the gains in future enforcement of constitutional commands.[221] The fact that suppression will yield incremental deterrence of constitutional violations is not, by itself, sufficient to justify exclusion.[222]

In contrast, recognition that *Massiah*'s mandate is an inseparable part of the entitlement to assistance—a necessary means of avoiding deprivations of the Sixth Amendment right to counsel at trial—would have fortified both the suppression doctrine and the fundamental guarantee it enforces against erosion. A rights-based foundation would have furnished shelter from the destructive impacts of free-wheeling cost-

[220] United States v. Calandra, 414 U.S. 338, 348 (1974); *see also* Hudson v. Michigan, 547 U.S. 586, 591 (2006); United States v. Leon, 468 U.S. 897, 908 (1984).

[221] *See* Herring v. United States, 129 S. Ct. 695, 700 (2009); *Hudson*, 547 U.S. at 594; *Leon*, 468 U.S. at 906–10.

[222] *See Herring*, 129 S. Ct. at 704 (stating that the "deterrent effect of suppression must be substantial and outweigh any harm to the justice system"); *Leon*, 468 U.S. at 909–10; *Calandra*, 414 U.S. at 350–51. In accord with this logic, the Court has readily and regularly, without any means of objectively measuring costs and benefits, concluded that the costs of the Fourth Amendment exclusionary rule do in fact exceed its benefits. In the years since the Court shifted the search and seizure exclusionary rule onto a deterrent foundation, the cost-benefit balance has tipped in favor of suppression only on rare occasions. For a full discussion of the several doctrinal restrictions on the Fourth Amendment exclusionary rule that are the product of deterrent cost-benefit analysis, and the few occasions in the modern era in which the Court has decided that deterrent benefits justify costs, see TOMKOVICZ, CONSTITUTIONAL EXCLUSION, *supra* note 9, at 28–58.

benefit assessments.[223] The Court lacks authority to balance away the benefits of constitutional *rights* to exclude evidence—i.e., evidentiary bars that are necessary to enforce trial guarantees. Evidence may not be admitted based on judicial assessments of relative costs and benefits. The costs of Sixth Amendment suppression may be great, precluding successful prosecutions of dangerous offenders who have caused serious harm and may well cause more. From a right-to-exclusion perspective, however, such costs are unavoidable consequences of the Framers' decision to grant a right to assistance. The Sixth Amendment reflects their conclusion that the fair-trial benefits of impeding proof of guilt—the resulting fairness of the adversarial process of adjudication—justify the price paid.[224] Some specific illustrations of the concrete consequences of the Court's misguided choice of justifications will make the impacts of *Ventris* clear.

A. The Presumptive Breadth of the Evidentiary Bar

The cost-benefit balancing dictated by deterrent reasoning could lead to a severe narrowing of the presumptive scope of the *Massiah* exclusionary rule. Precedents from other exclusionary arenas suggest two possibilities. First, recent Fourth Amendment opinions indicate that, when deterrence of future misconduct is the objective, exclusion is unjustifiable unless pretrial transgressions are culpable. Only deliberate, reckless, grossly negligent, or recurrently negligent constitutional violations can justify suppression.[225] Now that *Ventris* has rested *Massiah*'s bar upon deterrent quicksand, the Court could easily conclude that the Sixth Amendment benefits of excluding inculpatory admissions outweigh the costs *only* when officials who elicit disclosures unconstitutionally have acted with sufficient fault. Having adopted this threshold requirement for Fourth Amendment suppression,[226] the Court will almost certainly impose an identical restriction on *Massiah*'s Sixth Amendment

[223] *See Leon*, 468 U.S. at 942–43 (Brennan, J., dissenting) (challenging the unprincipled nature of the Court's Fourth Amendment assessments of costs and benefits); United States v. Havens, 446 U.S. 620, 633–34 (1980) (Brennan, J., dissenting) (criticizing the Court's interest-balancing approach to deciding Fourth Amendment exclusionary rule issues).

[224] Of course, the Court has a role in interpreting the breadth of the underlying right that dictates suppression. The Justices must ascertain the precise balance the Framers struck. Once they have done so, however, they are not free to suspend a right granted by a constitutional provision because of the prosecutorial costs entailed. Those costs are inherent in the right.

[225] *See* Davis v. United States, 131 S. Ct. 2419, 2427–28 (2011); *Herring*, 129 S. Ct. at 702–03.

[226] The indications in *Herring* that a culpability threshold might apply were dicta—unnecessary to the Court's resolution of the narrow Fourth Amendment exclusionary-rule issue presented by the case. Two years after *Herring*, however, a solid six-Justice majority reaffirmed *Herring*'s dicta, making it unmistakably clear that the Court is serious about requiring sufficient culpability as a predicate for suppression. *See Davis*, 131 S. Ct. at 2427–28.

exclusionary rule, which, after all, enforces an extension of the Sixth Amendment guarantee that lies outside its "core."

The Court might even rely on the deterrent nature of Sixth Amendment exclusion—together with the fact that the *Massiah* right to assistance is not part of the "core" right-to-counsel guarantee—to confine the presumptive scope of the *Massiah* bar even more than it has confined the reach of the Fourth Amendment rule. The Justices could decide that, like *Miranda*'s evidentiary bar, *Massiah*'s exclusionary rule has no derivative-evidence principle.[227] If so, the only evidence subject to suppression would be the improperly elicited statements themselves. Any evidence acquired as a direct or indirect result—i.e., any fruits of the poisonous *Massiah* tree—would be admissible.

It is true that the rejection of a derivative-evidence bar for *Miranda* transgressions is primarily rooted in the premise that a failure to comply with *Miranda* involves no violation of constitutional rights at any time—neither at the time of the custodial interrogation nor at the time evidence is introduced at trial.[228] This is not the case under *Massiah*. Like the Fourth Amendment exclusionary rule, the Sixth Amendment bar to probative evidence is triggered by out-of-court conduct that does violate a constitutional right.[229] This fact would militate in favor of a presumptive derivative-evidence bar like that which governs under the Fourth Amendment. The Court might conclude that a fruit of the poisonous tree doctrine is essential to adequately discourage deprivations of *Massiah*'s pretrial guarantee.

On the other hand, there is a distinction between *Massiah* violations and Fourth Amendment violations that could support a narrower

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[227] The Fourth Amendment's presumptive exclusionary scope has long included both the direct, immediate products of illegalities and indirect, derivative evidence with a "but for" causal connection to those illegalities. *See* Murray v. United States, 487 U.S. 533, 536–37 (1988). Once the accused establishes a causal link between a constitutional violation and the government's acquisition of the evidence at issue, this derivative-evidence principle—or "fruit of the poisonous tree" doctrine—bars the evidence unless the government can show that it falls within an exception to the exclusionary rule. In stark contrast, in *United States v. Patane*, 542 U.S. 630 (2004), a majority of the Court held that the *Miranda* exclusion doctrine does not reach derivative evidence—that is, it bars only the initial confessions obtained by violating *Miranda*'s constraints on custodial interrogation. *See id.* at 640, 642–44 (Thomas, J., plurality opinion) (declining to extend the *Miranda* presumption to include a derivative-evidence principle); *id.* at 645 (Kennedy, J., concurring in the judgment) (agreeing that nontestimonial physical fruits of *Miranda* violations are not subject to suppression).

[228] *See Patane*, 542 U.S. at 639 (Thomas, J., plurality opinion) (observing that *Miranda* "create[d] a presumption of coercion" in order to "protect against" the "danger" of violating "a suspect's privilege against self-incrimination"); *id.* at 641 (observing that a failure by law enforcement to comply with *Miranda*'s guidelines for custodial interrogation does not "violate a suspect's constitutional rights" and that "*[p]otential* violations occur, if at all, only upon the admission" of evidence "at trial") (emphasis added)).

[229] *Ventris* holds that the Sixth Amendment is violated when officers confront defendants without counsel. *See* Kansas v. Ventris, 129 S. Ct. 1841, 1846 (2009).

presumptive scope for evidentiary suppression. When an officer conducts an unreasonable search or seizure, she undoubtedly violates a "core" Fourth Amendment right. According to *Ventris*, however, *Massiah* transgressions do not infringe on the core safeguard afforded by the Sixth Amendment—the right to assistance *for trial*. The Justices could conclude that the interest in deterring violations of this collateral entitlement to assistance is less weighty and that the less significant gains achieved by suppressing derivative evidence are ordinarily outweighed by the ubiquitous social costs of exclusion. In sum, a bar to statements alone might be considered adequate to enforce *Massiah*'s extended right to pretrial assistance.

Neither of these dramatic constraints upon the ambit of exclusion would be possible if the Court had acknowledged the real character of *Massiah*'s bar. A *right* to suppression would not depend on or be limited by a culpability demand. Innocent deprivations of the Sixth Amendment right to assistance are no less deprivations. An accused's entitlement to the benefits of equalizing assistance does not turn on or vary with the fault of government officials. The accused has an explicit entitlement to "enjoy the right" to the "Assistance of Counsel for his defence,"[230] and both culpable and non-culpable deprivations of this essential component of adversary-system fair play are forbidden.

Moreover, a *right* to suppression must encompass derivative evidence. At trial, the government is not entitled to reap the advantages of imbalanced pretrial adversarial confrontations with an accused. Derivative evidence—proof of guilt that officials would not have "but for" the denial of assistance—is constitutionally barred because its use would deprive the accused of the benefits counsel affords. Whether it is the initial disclosures or the contraband or witness testimony acquired as a result of those disclosures, the accused has the right not to be convicted on the basis of evidence secured by denying counsel at a critical stage of the prosecution.

B. Possible Exceptions to the Exclusion of Evidence

The cost-benefit balancing that informs deterrence-based exclusionary rules can also support "exceptions" to suppression that would be irreconcilable with *rights* to exclude evidence.

1. Attenuation

Under the Fourth Amendment, the traditional "attenuation" exception authorizes the admission of evidence with a "but for" causal connection to an unreasonable search or seizure *if* the connection between the illegality and the acquisition of the evidence is sufficiently

[230] U.S. CONST. amend. VI.

"attenuated as to dissipate the taint" of the impropriety.[231] In essence, evidentiary products that lack a sufficiently close, direct connection to a constitutional wrong—those whose acquisition is somewhat remote from the official misconduct—are admissible because the incremental deterrent benefits of barring evidence with attenuated connections cannot justify the costs of suppression.[232]

If *Massiah*'s bar were properly understood as a personal trial entitlement to prevent conviction based on imbalanced confrontations with one's governmental adversary, attenuated evidence would have to be suppressed. Advantages are still advantages, no matter how remotely obtained. When the object of suppression is not to remove incentives for future misconduct but to prevent the government from reaping at trial the benefits of a pretrial counsel denial, and thereby gaining a conviction through a process our adversarial system deems unfair, no adversarial advantages are permissible. If there is any causal connection between a denial of counsel and the acquisition of evidence, the admission of that evidence undermines the fairness of the trial. The Sixth Amendment assures an accused the right to bar both direct and indirect evidentiary products of uncounseled deliberate elicitation.

2. Good Faith

The traditional attenuation exception, by definition, reaches only derivative evidence. Immediate, direct products of illegalities cannot have a weakened or remote causal connection. On the other hand, the "good faith" exceptions to exclusion—as developed in Fourth Amendment decisions—encompass both primary and derivative evidence. Cost-benefit balancing has led the Court to conclude that if an officer conducts an unreasonable search or seizure, but it was objectively reasonable to believe that his conduct did not violate the Fourth Amendment, the costs of exclusion cannot justify any "marginal or nonexistent" deterrent gains.[233] Now that *Massiah* rests on a deterrent

[231] *See* Nardone v. United States, 308 U.S. 338, 341 (1939). There is a second, modern branch of the attenuation exception that is entirely different and can justify the introduction of illegally acquired evidence with a close causal link to an illegality. That exception has, to date, been applied in only one, narrow Fourth Amendment context. *See* Hudson v. Michigan, 547 U.S. 586, 592–94 (2006) (relying on an "attenuation" exception to support suspension of the exclusionary rule for violations of the Fourth Amendment knock-and-announce rule). It is unclear whether it would have any relevance to any *Massiah* suppression claims. For a discussion of the differences between traditional attenuation and the newly minted type of attenuation, see James J. Tomkovicz, Hudson v. Michigan *and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819, 1862–71 (2008).

[232] For a cost-benefit-based application of the attenuation exception to justify the admission of derivative evidence with a weak causal connection to an unreasonable search, see *United States v. Ceccolini*, 435 U.S. 268, 273–80 (1978).

[233] *See* United States v. Leon, 468 U.S. 897, 922 (1984). The textual description of the current good faith doctrines is somewhat overbroad. The Court has decided that illegally acquired evidence is admissible in situations where officers reasonably rely on a warrant issued by a neutral and detached magistrate, *see id.*; reasonably rely on a

foundation, it would seem logical to conclude that evidence secured by denying counsel is admissible whenever it was objectively reasonable to believe that an encounter with an accused did not violate the Sixth Amendment.[234] If suppression were a right, however, an official's "good faith"—that is, the objective reasonableness of the belief that there was no deprivation of a Sixth Amendment entitlement to assistance—would not matter. As suggested earlier, a Sixth Amendment *right* to exclusion requires protection against all evidentiary advantages of imbalanced encounters no matter how faultless the conduct of officials.[235]

Prior to *Ventris*, the Court rejected a different variety of "good faith" exception to *Massiah*. In *Maine v. Moulton*, the Court held that deliberately elicited disclosures are barred even if officers were engaged in a legitimate, good faith investigation of an uncharged offense at the time they denied counsel for an offense that was already the subject of a formal accusation. Those disclosures may not be used to prove the offense that was charged at the time of the elicitation. *Moulton* did not involve a situation where it was reasonable to believe that the confrontation did not deprive the accused of his entitlement for the charged offense. In *Moulton*, the government claimed that statements should be admissible when officers elicit them in order to investigate an offense for which the right to assistance had not yet attached. The assertion was that when the effort to obtain information from a defendant is motivated by a legitimate investigative objective, there is good reason to lower the presumptive evidentiary bar in the trial of the charged offense.

If *Massiah*'s evidentiary bar is a Sixth Amendment right, as I have maintained, then disclosures should be suppressed despite officers' good faith intentions to investigate charged crimes. The fact that the officials who elicited admissions had legitimate investigative motives is no reason to deny a defendant the fair trial contemplated by the right to counsel. Conviction based on advantages gained from an imbalanced adversarial confrontation is forbidden by the Sixth Amendment no matter what the

statute enacted by a legislature, *see* Illinois v. Krull, 480 U.S. 340 (1987); reasonably rely on an erroneous arrest warrant record when the mistake is attributable to a judicial branch employee, *see* Arizona v. Evans, 514 U.S. 1 (1995); reasonably rely on an unreasonably erroneous record of an arrest warrant attributable to the mistake of another police department, *see* Herring v. United States, 129 S. Ct. 695 (2009); and reasonably rely on binding appellate precedent, *see* Davis v. United States, 131 S. Ct. 2419 (2011). The logic of these decisions, however, does suggest the possibility of extension to any situation in which officers act with an objectively reasonable belief that their conduct is consistent with the Fourth Amendment.

[234] To illustrate, officers might reasonably, but erroneously, believe that an accused had not yet been formally charged with an offense at the time of elicitation. Alternatively, they might reasonably, but mistakenly, conclude that their conduct was not sufficiently active to constitute deliberate elicitation. In those situations, the principle underlying the Fourth Amendment good faith doctrines could justify the admission of statements elicited in violation of the right to assistance.

[235] *See supra* text accompanying note 230.

motive for confronting the accused.[236] A proper understanding of right-to-counsel suppression validates the *Moulton* decision.

In contrast, under *Ventris*, the merits of the holding in *Moulton* are debatable. The cost-benefit assessments that underlie determinations of when exclusion is necessary to deter constitutional violations never rest on empirical proof.[237] The Justices could reaffirm *Moulton* by declaring that the good faith, legitimate investigation exception to the *Massiah* exclusionary rule would provide too much incentive to deprive future defendants of assistance.[238] On the other hand, they might announce that the social costs of exclusion—both the serious damage to the effort to bring the present defendant to justice and the harm to the effort to uncover evidence of uncharged offenses—are not outweighed by any benefits of suppression in situations where officers are prompted by legitimate investigative motives.[239] In sum, *Ventris*'s reasoning would permit a result that is not logically possible under a conception of *Massiah* exclusion as a trial right. The Court could overrule *Moulton*'s holding and conclude that a good faith, legitimate investigation exception to *Massiah* is justified.[240]

3. Public Safety

The deterrent foundations of *Massiah* exclusion might also sustain a "public safety" exception that would apply when officers deny a defendant counsel and elicit disclosures to serve a sufficiently compelling societal need.[241] Suppose, for example, that there is a substantial risk that an explosive will be detonated in a heavily populated area. Reasonably believing that an accused has information that could enable them to prevent detonation, officers confront him without counsel to secure the information they need to combat the peril and protect the public. A

[236] This was the basic substantive premise underlying the *Moulton* Court's rejection of the legitimate investigation exception to *Massiah*'s bar. *See* Maine v. Moulton, 474 U.S. 159, 179–80 (1985).

[237] *See Leon*, 468 U.S. at 929, 943 (Brennan, J., dissenting).

[238] *Moulton* also seemed to rest, in part, on this premise. *See Moulton*, 474 U.S. at 180 ("To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in *Massiah*.").

[239] The four dissenters in *Moulton* explained why they believed that deterrent analysis justified the exception sought by the government. *Id.* at 191–92 (Burger, C.J., dissenting).

[240] It is noteworthy that this position had the support of four Justices at the time. The tenor of *Ventris*, coupled with changes in the constituency of the Court since the *Moulton* decision, suggest that there could be five Justices who would endorse the exception today.

[241] It seems unlikely, however, that many public safety needs will justify elicitation in situations involving attachment of the right to counsel. Arrestees and suspects might well have information that will enable officers to deal with dangerous threats to the public. The situations in which formally accused individuals have information that will protect the public *and* provide proof of an offense for which charges are pending will probably be quite rare.

public safety exception would authorize the use of the accused's revelations to prove an offense that was the subject of charges at the time of the confrontation.

There is no "public safety" exception to the Fourth Amendment exclusionary rule. Public safety considerations that prompt a search or seizure would almost certainly render a search or seizure constitutionally reasonable. Because there would be no basis for suppression, there is no need for an exclusionary-rule exception in such cases. Statements otherwise inadmissible under *Miranda*, however, may be introduced if officers conduct unwarned custodial interrogation when "reasonably prompted by a concern for the public safety."[242] This "public safety" exception to *Miranda*'s already limited evidentiary bar rests on the premise that neither unwarned custodial interrogation nor the trial use of statements obtained by means of unwarned custodial interrogation can violate the Fifth Amendment.[243]

As noted earlier, *Massiah* violations are different from *Miranda* violations. A failure to respect the entitlement to pretrial assistance deprives an accused of an actual constitutional right. Consequently, the reasoning that supports *Miranda*'s public safety exception cannot sustain a similar exception to the *Massiah* bar. Nonetheless, the Court might conclude that the benefits of deterring violations of a pretrial entitlement that resides outside the "core" of the Sixth Amendment guarantee are outweighed by the costs of exclusion when public safety interests are factored into the balance. *Ventris* certainly makes that conclusion conceivable. The endorsement of a deterrent foundation along with the decision to distinguish between the "core" right to counsel for trial and the peripheral extension of that right to pretrial encounters could pave the way for a "public safety" exception if the Court were inclined to further dilute the *Massiah* right or its evidentiary bar. The social costs of deterring efforts to obtain information needed to preserve the public safety are much higher than simply the inability to prosecute a guilty individual or even the discouragement of the pursuit of legitimate investigations of uncharged offenses. The benefits of enforcing *Massiah*'s less substantial entitlement to counsel might be insufficiently weighty to justify the potential harm to the public that could result if the threat of suppression were to prompt officers to refrain from securing information vital to neutralizing a threat.

Of course, there is no "public safety" exception to the Sixth Amendment entitlement to trial counsel. The government may not deny assistance because respect for that right would endanger the public. If *Massiah* is part of that core right to counsel and exclusion is part of the *Massiah* right, as I have maintained, then a "public safety" exception to Sixth Amendment suppression would be illegitimate. No matter how

[242] *See* New York v. Quarles, 467 U.S. 649, 656 (1984).

[243] *See id.* at 654–55 & n.5, 658 n.7.

compelling the reason for denying pretrial assistance, evidence acquired could not be used to convict. Put simply, the unqualified right to a fair adversarial process precludes a public safety exception to the *Massiah* exclusion doctrine.[244]

4. Impeachment Use

Ventris held that the cost-benefit analysis that informs deterrence-based exclusion dictates an impeachment-use exception for improperly acquired evidence that is inadmissible as substantive proof of guilt.[245] The exception parallels those already recognized under the Fourth Amendment and *Miranda*.[246] Having concluded that the *Massiah* bar's foundation was identical to the foundation of the Fourth Amendment bar—that the concern was prevention of future pretrial conduct by law enforcement officials—the Court could find no basis for a different conclusion regarding impeachment use.[247] Surely, the impeachment-use exception is as extensive as that developed under the Fourth Amendment and will permit the use of illegally obtained statements to impeach a defendant's testimony on both direct examination and cross-examination.[248] Perhaps, because the constitutional right enforced by *Massiah* suppression is not part of the "core" of the constitutional guarantee, the Court will recognize an even broader impeachment-use exception. Under the Fourth Amendment, the state may not impeach testimony by defense witnesses other than the accused.[249] Because enforcement of "non-core" constitutional rights is less important, that fragile limitation on the breadth of the Fourth Amendment exception might not restrict the impeachment-use exception to the *Massiah* bar.[250]

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[244] No matter how great the threat to the public defeated by coercing admissions from a suspect, the Fifth Amendment categorically forbids the use of those admissions to convict that suspect. Fairness in our accusatorial system requires an absolute bar to compelled, testimonial self-incrimination. The argument here is that fairness in our adversarial system requires a similar absolute bar to evidence secured in violation of an accused's guarantee that he need not stand alone against the state adversary. Neither the Fifth nor the Sixth Amendment prevents the conduct that enables law enforcement officers to protect the public, but both preclude the use of evidence in court.

[245] *See* Kansas v. Ventris, 129 S. Ct. 1841, 1846–47 (2009).

[246] *See* United States v. Havens, 446 U.S. 620, 627–28 (1980) (endorsing an impeachment-use exception to the Fourth Amendment exclusionary rule); Harris v. New York, 401 U.S. 222, 226 (1971) (announcing an impeachment-use exception to *Miranda*'s bar).

[247] *See Ventris*, 129 S. Ct. at 1847 ("We have held in every other context that tainted evidence . . . is admissible for impeachment. We see no distinction that would alter the balance here." (citations omitted)).

[248] The Fourth Amendment impeachment-use exception extends not only to the testimony given in response to direct examination by the accused's counsel, but also to testimony given in response to proper cross-examination by the prosecution. *See Havens*, 446 U.S. at 627–28.

[249] *See* James v. Illinois, 493 U.S. 307, 313–20 (1990).

[250] The ban on the use of illegally gained evidence to impeach defense witnesses is fragile because it was originally endorsed by the bare minimum of five Justices. The

The Court has held that the Fifth Amendment and due process rights to exclude coerced confessions preclude an impeachment-use exception because any use of a coerced confession violates those guarantees.[251] The same conclusion would follow from recognition that *Massiah* exclusion is a Sixth Amendment right. Impeachment use of statements elicited without assistance promotes the case for conviction, inflicting the kind of harm counsel is intended to prevent. Even though the incriminating impact of casting doubt on a witness's testimony is milder than the incriminating impact of substantive use of improperly acquired statements, the right to a fair trial—a balanced adversarial contest—is undermined. Under a proper conception of *Massiah*'s bar, impeachment use would be impermissible because it deprives a defendant of his constitutional entitlement to a fair trial.

5. A Bar to Federal Habeas Corpus Relief

Finally, the deterrent underpinnings of *Ventris* support a limitation on *Massiah* exclusion identical to that imposed upon the Fourth Amendment exclusionary rule in *Stone v. Powell*.[252] In *Stone*, the Court held that a federal habeas petitioner may not raise a claim that the trial judge erred in refusing to exclude evidence from his trial under the Fourth Amendment unless the state court did not accord his claim a "full and fair" hearing.[253] Despite the fact that evidence obtained by means of an unreasonable search and seizure was admitted at his trial, he may not collaterally challenge his conviction in federal court on that basis, except in the rare case where the state judiciary denied adequate consideration. Under *Ventris*, the same cost-benefit reasoning that was the foundation for *Stone* would surely lead to an identical restriction on *Massiah* exclusion. Even if state courts erroneously decide *Massiah* suppression claims, habeas relief generally will not be available. Valid right-to-counsel claims will go unvindicated. Habeas claimants will not be entitled to the Sixth Amendment exclusionary "remedy" for deprivations of assistance because the costs of vindication at that late stage of the process outweigh any deterrent benefits.

The opposite result would follow from an acknowledgment of *Massiah*'s true nature. The Supreme Court has rejected every claim that the *Stone* doctrine should bar efforts to vindicate genuine constitutional

powerful four-Justice dissent was authored by Justice Kennedy. *See id.* at 322–30 (Kennedy, J., dissenting). Today, there are four other Justices predictably hostile to evidentiary exclusion. It seems entirely likely that if the question were to arise again today, a majority of the Court might permit the impeachment of defense witnesses by evidence obtained by means of a Fourth Amendment violation.

[251] *See* New Jersey v. Portash, 440 U.S. 450, 459–60 (1979) (opining that impeachment use is not permissible under the Fifth Amendment privilege); Mincey v. Arizona, 437 U.S. 385, 397–98, 402 (1978) (rejecting impeachment use under the Due Process Clause).

[252] 428 U.S. 465 (1976).

[253] *Id.* at 481–82, 494.

rights. In *Kimmelman v. Morrison*,[254] a majority held that a convicted defendant may seek habeas relief for a denial of effective assistance of counsel at trial based on his attorney's unreasonable failure to litigate a Fourth Amendment exclusion claim. *Stone*'s logic did not apply when the petitioner sought relief for a denial of his Sixth Amendment entitlement to assistance—even though the deficiency of counsel rested upon a lawyer's failure to pursue deterrence-based suppression.[255] Moreover, in *Withrow v. Williams*, the Justices distinguished exclusion under *Miranda*—hardly a favored suppression doctrine—from exclusion under the Fourth Amendment, concluding that because the former provides an in-court safeguard against risks of Fifth Amendment violations at trial, *Stone*'s logic did not apply.[256] An accused may raise a claim that a state court erred in denying suppression of his confession under *Miranda* even though he received an ample hearing from the state. There can be no doubt that if *Massiah* exclusion had been deemed a part of the right to counsel—a necessary means of avoiding Sixth Amendment violations at trial—*Stone*'s restriction would be entirely inapplicable.

In sum, because *Ventris* irrationally decided to classify *Massiah* exclusion as a mere deterrent safeguard—indeed, a "remedy" for a completed violation of a right that lies outside the "core" of the underlying guarantee—many limitations upon the reach and applicability of *Massiah*'s evidentiary bar will certainly follow. Moreover, other restrictions—some quite severe—are logically defensible. The practical ramifications of the Court's long overdue, but wholly misconceived, guidance about the justifications for Sixth Amendment exclusion are serious and substantial. In this respect, the "little" opinion in *Ventris* will leave a very big footprint on the *Massiah* right to counsel's terrain.

V. CONCLUSIONS

In *Kansas v. Ventris*, the Supreme Court finally explained the nature and objectives of the exclusion of evidence obtained in violation of the *Massiah* doctrine. The majority's superficial and illogical analysis, rooted in an impoverished conception of the right to pretrial assistance against deliberate elicitation, yielded indefensible conclusions about the character and purposes of *Massiah* suppression. In prior scholarship, I have endeavored to give positions with which I disagree their due, acknowledging when premises are debatable and highlighting the arguments that support different resolutions. In contrast, this piece contains unmitigated criticism of and disagreement with virtually every facet of the Court's opinion in *Ventris*. I would have preferred to have found some redeeming feature, some aspect of the reasoning that had

[254] 477 U.S. 365 (1986).

[255] *See id.* at 374–75.

[256] Withrow v. Williams, 507 U.S. 680, 682–83, 690–92 (1993).

arguable merit. In fact, *Ventris* starts off on the wrong foot and consists of a series of missteps that ultimately lead the Court off a constitutional cliff. The conclusion that suppression is a future-oriented deterrent sanction for a completed Sixth Amendment deprivation is fallacious and utterly indefensible. If the *Massiah* right to counsel is a legitimate extension of the right to legal assistance, the only logical conclusion is that evidentiary exclusion is a personal right belonging to the accused on trial.

If I am correct about the legitimacy of the *Massiah* right and about the role and function of Sixth Amendment suppression, then *Ventris* endangers one of the most fundamental rights—perhaps *the* most fundamental right—that the Bill of Rights extends to criminal defendants. It threatens the prospect of unfair trials of the sort that the right to the assistance of counsel is designed to prevent. The *Massiah* right is not a second-class constitutional entitlement that resides outside the Sixth Amendment's core. It is an extension of the guarantee of assistance necessary to preserve that core against threats posed by the evolutionary growth of the adversarial process of adjudicating guilt. *Ventris*'s conception of the right to counsel and of the suppression of evidence that is necessary to ensure enjoyment of that right will enable the government to commence the adversarial contest before the formal trial, to deprive defendants of assistance at that early, pretrial stage, and then to reap the advantages of that deprivation in the courtroom. The decision is nothing less than an assault, and a significant one indeed, on a constitutional right that embodies our nation's commitment to fair play. It is a springboard for serious erosion of the substance of the counsel guarantee.

It is always difficult to defend the exclusion of potentially probative evidence, for suppression undoubtedly entails harmful social consequences. Moreover, of all the constitutional rights to exclusion, the *Massiah* right is the hardest to defend. The Fifth and Fourteenth Amendment rights to bar coerced admissions, the due process right to suppress identifications that are the product of unnecessary suggestion, and the Sixth Amendment Confrontation Clause entitlement to exclude testimonial hearsay are all grounded, at least in part, in genuine concerns with risks of unreliability that threaten conviction of the innocent. These evidentiary bars can promote accurate outcomes. The absence of counsel during the pretrial elicitation of inculpatory admissions, however, does not undermine the trustworthiness of those admissions. *Massiah* excludes potentially probative evidence whose reliability is not seriously in question.[257] The impediment to convicting

[257] In cases involving elicitation by an undercover informant—particularly elicitation by jailhouse snitches—there are concerns with the reliability of the evidence offered at trial. *See* Kansas v. Ventris, 129 S. Ct. 1841, 1847 n.* (2009); *id.* at 1849 n.2 (Stevens, J., dissenting). The risks of untrustworthiness, however, are not due to any misconduct by government officials that might distort the accuracy of the evidence. If an accused makes incriminating statements to an undercover agent,

guilty defendants is not offset by any protection it provides against the injustice of convicting those who are innocent. In this sense, the *Massiah* evidentiary bar is unique among the suppression doctrines that are constitutional trial rights.

This uniqueness is no reason to refuse to acknowledge the true nature of *Massiah* exclusion, for it is the result of the special nature of the right to the assistance of counsel. In many ways, that fundamental entitlement of those accused by the government does furnish protection for the innocent. Nonetheless, it also ensures *all* accused persons, innocent and guilty alike, a fair and balanced adversarial contest. The truth is that sometimes this entitlement to equalizing assistance can prevent the government from carrying its heavy burden of proof against a guilty accused.[258] The social costs that *Massiah* imposes are the price paid for a right deemed essential to adversary-system fairness. They are a price the Framers of our Constitution chose to pay for the invaluable, if somewhat intangible, benefits counsel affords. For nearly fifty years, the *Massiah* doctrine has saved the Sixth Amendment right to trial counsel from efforts to circumvent and dilute the shelter it affords. After *Ventris*, *Massiah* needs a savior.

there is no reason to question the trustworthiness of those statements. Concerns with unreliability are rooted in the questionable veracity of the source and suspicions that informants sometimes fabricate inculpatory admissions by defendants in order to gain advantages for themselves.

[258] *Cf.* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2540 (2009) (observing that the Sixth Amendment right to be confronted with adverse witnesses is "binding" and that the Court has no "authority" to "disregard it" even though, like the constitutional right to jury trial and the privilege against compulsory self-incrimination, it makes prosecuting "criminals more burdensome").