SUPREME COURT OF UNITED STATES

Winston Massiah

Vs.

United States

No. 199.

Argued March 3, 1964.

Decided May 18, 1964.

Robert J. Carluccio, New York City, Edmund A. Rosner, New York City, of counsel, for petitioner.

Archibald Cox, Sol. Gen., for respondent.

Mr. Justice STEWART delivered the opinion of the Court.

The petitioner was indicted for violating the federal narcotics laws. He retained a lawyer, pleaded not guilty, and was released on bail. While he was free on bail a federal agent succeeded by surreptitious means in listening to incriminating statements made by him. Evidence of these statements was introduced against the petitioner at his trial over his objection. He was convicted, and the Court of Appeals affirmed.1 We granted certiorari to consider whether, under the circumstances here presented, the prosecution's use at the trial of evidence of the petitioner's own incriminating statements deprived him of any right secured to him under the Federal Constitution. 374 U.S. 805, 83 S.Ct. 1698, 10 L.Ed.2d 1030.

The petitioner, a merchant seaman, was in 1958 a member of the crew of the S. S. Santa Maria. In April of that year federal customs officials in New York received information that he was going to transport a quantity of narcotics aboard that ship from South America to the United States. As a result of this and other information, the agents searched the Santa Maria upon its arrival in New York and found in the afterpeak of the vessel five packages containing about three and a half pounds of cocaine. They also learned of circumstances, not here relevant, tending to connect the petitioner with the cocaine. He was arrested, promptly arraigned, and subsequently indicted for possession of narcotics aboard a United States vessel.2 In July a superseding indictment was returned, charging the petitioner and a man named Colson with the same substantive offense, and in separate counts charging the petitioner, Colson, and others with having conspired to possess narcotics aboard a

United States vessel, and to import, conceal, and facilitate the sale of narcotics.3 The petitioner, who had retained a lawyer, pleaded not guilty and was released on bail, along with Colson.

A few days later, and quite without the petitioner's knowledge, Colson decided to cooperate with the government agents in their continuing investigation of the nacotics activities in which the petitioner, Colson, and others had allegedly been engaged. Colson permitted an agent named Murphy to install a Schmidt radio transmitter under the front seat of Colson's automobile, by means of which Murphy, equipped with an appropriate receiving device, could overhear from some distance away conversations carried on in Colson's car.

On the evening of November 19, 1959, Colson and the petitioner held a lengthy conversation while sitting in Colson's automobile, parked on a New York street. By prearrangement with Colson, and totally unbeknown to the petitioner, the agent Murphy sat in a car parked out of sight down the street and listened over the radio to the entire conversation. The petitioner made several incriminating statements during the course of this conversation. At the petitioner's trial these incriminating statements were brought before the jury through Murphy's testimony, despite the insistent objection of defense counsel. The jury convicted the petitioner of several related narcotics offenses, and the convictions were affirmed by the Court of Appeals.

The petitioner argues that it was an error of constitutional dimensions to permit the agent Murphy at the trial to testify to the petitioner's incriminating statements which Murphy had overheard under the circumstances disclosed by this record. This argument is based upon two distinct and independent grounds. First, we are told that Murphy's use of the radio equipment violated the petitioner's rights under the Fourth Amendment, and, consequently, that all evidence which Murphy thereby obtained was, under the rule of Weeks v. United States, [1913] USSC 86; 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, inadmissible against the petitioner at the trial. Secondly, it is said that the petitioner's Fifth and Sixth Amendment rights were violated by the use in evidence against him of incriminating statements which government agents had deliberately elicited from him after he had been indicted and in the absence of his retained counsel. Because of the way we dispose of the case, we do not reach the Fourth Amendment issue.

In Spano v. New York, [1959] USSC 119; 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265, this Court reversed a state criminal conviction because a confession had been wrongly admitted into evidence against the defendant at his trial. In that case the defendant had already been indicted for first-degree murder at the time he confessed. The Court held that the defendant's conviction could not stand under the Fourteenth Amendment. While the Court's opinion relied upon the totality of the circumstances under which the confession had been obtained, four concurring Justices pointed out that the Constitution required reversal of the conviction upon the sole and specific ground that the confession had been deliberately elicited by the police after the defendant had been indicted, and therefore at a time when he was clearly entitled to a lawyer's help. It was pointed out that under our system of justice the most elemental concepts of due process of law contemplate that an indictment be followed by a trial, 'in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law.' 360 U.S., at 327, 79 S.Ct. at [1959] USSC 119; 1209, 3 L.Ed.2d 1265 (STEWART, J., concurring). It was said that a Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less,

it was said, might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.' 360 U.S., at 326, 79 S.Ct., at [1959] USSC 119; 1209, 3 L.Ed.2d 1265 (DOUGLAS, J., concurring).

Ever since this Court's decision in the Spano case, the New York courts have unequivocally followed this constitutional rule. 'Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.' People v. Waterman, 9 N.Y.2d 561, 565, 216 N.Y.S.2d 70, 75, 175 N.E.2d 445, 448.5

This view no more than reflects a constitutional principle established as long ago as Powell v. Alabama, [1932] USSC 137; 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, where the Court noted that '* * * during perhaps the most critical period of the proceedings * * * that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation (are) vitally important, the defendants * * * (are) as much entitled to such aid (of counsel) during that period as at the trial itself.' Id., 287 U.S., at 57, 53 S.Ct., at 59[1932] USSC 137; , 77 L.Ed. 158. And since the Spano decision the same basic constitutional principle has been broadly reaffirmed by this Court. Hamilton v. Alabama, [1961] USSC 155; 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114; White v. Maryland, [1963] USSC 91; 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193. See Gideon v. Wainwright, [1970] USCA9 917; 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799.

Here we deal not with a state court conviction, but with a federal case, where the specific guarantee of the Sixth Amendment directly applies.6 Johnson v. Zerbst, [1938] USSC 145; 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461. We hold that the petitioner was denied the basic protections of that guarantee 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. It is true that in the Spano case the defendant was interrogated in a police station, while here the damaging testimony was elicited from the defendant without his knowledge while he was free on bail. But, as Judge Hays pointed out in his dissent in the Court of Appeals, 'if such a rule is to have an efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon * * * because he did not even know that he was under interrogation by a government agent.' 307 F.2d at 72–73.

the Solicitor General, in his brief and oral argument, has strenuously contended that the federal law enforcement agents had the right, if not indeed the duty, to continue their investigation of the petitioner and his alleged criminal associtates even though the petitioner had been indicted. He points out that the Government was continuing its investigation in order to uncover not only the source of narcotics found on the S. S. Santa Maria, but also their intended buyer. He says that the quantity of narcotics involved was such as to suggest that the petitioner was part of a large and well-organized ring, and indeed that the continuing investigation confirmed this suspicion, since it resulted in criminal charges against many defendants. Under these circumstances the Solicitor General concludes that the Government agents were completely 'justified in making use of Colson's cooperation by having Colson continue his normal associations and by surveilling them.'

We may accept and, at least for present purposes, completely approve all that this argument implies, Fourth Amendment problems to one side. We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial.

Reversed.

Mr. Justice WHITE, with whom Mr. Justice CLARK and Mr. Justice HARLAN join, dissenting.

The current incidence of serious violations of the law represents not only an appalling waste of the potentially happy and useful lives of those who engage in such conduct but also an overhanging, dangerous threat to those unidentified and innocent people who will be the victims of crime today and tomorrow. This is a festering problem for which no adequate cures have yet been devised. At the very least there is much room for discontent with remedial measures so far undertaken. And admittedly there remains much to be settled concerning the disposition to be made of those who violate the law.

But dissatisfaction with preventive programs aimed at eliminating crime and profound dispute about whether we should punish, deter, rehabilitate or cure cannot excuse concealing one of our most manacing problems until the millennium has arrived. In my view, a civilized society must maintain its capacity to discover transgressions of the law and to identify those who flout it. This much is necessary even to know the scope of the problem, much less to formulate intelligent counter-measures. It will just not do to sweep these disagreeable matters under the rug or to pretend they are not there at all.

It is therefore a rather portentous occasion when a constitutional rule is established barring the use of evidence which is relevant, reliable and highly probative of the issue which the trial court has before it—whether the accused committed the act with which he is charged. Without the evidence, the quest for truth may be seriously impeded and in many cases the trial court, although aware of proof showing defendant's guilt, must nevertheless release him because the crucial evidence is deemed inadmissible. This result is entirely justified in some circumstances because exclusion serves other policies of overriding importance, as where evidence seized in an illegal search is excluded, not because of the quality of the proof, but to secure meaningful enforcement of the Fourth Amendment. Weeks v. United States, [1913] USSC 86; 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652; Mapp v. Ohio, [1961] USSC 142; 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081. But this only emphasizes that the soundest of reasons is necessary to warrant the exclusion of evidence otherwise admissible and the creation of another area of privileged testimony. With all due deference, I am not at all convinced that the additional barriers to the pursuit of truth which the Court today erects rest on anything like the solid foundations which decisions of this gravity should require.

The importance of the matter should not be underestimated, for today's rule promises to have wide application well beyond the facts of this case. The reason given for the result here—the admissions were obtained in the absence of counsel—would seem equally pertinent to statements obtained at any time after the right to counsel attaches, whether there has been an indictment or not; to admissions made prior to arraignment, at least where the defendant has counsel or asks for it; to the

fruits of admissions improperly obtained under the new rule; to criminal proceedings in state courts; and to defendants long since convicted upon evidence including such admissions. The new rule will immediately do service in a great many cases.

Whatever the content or scope of the rule may prove to be, I am unable to see how this case presents an unconstitutional interference with Massiah's right to counsel. Massiah was not prevented from consulting with counsel as often as he wished. No meetings with counsel were disturbed or spied upon. Preparation for trial was in no way obstructed. It is only a sterile syllogism an unsound one, besides—to say that because Massiah had a right to counsel's aid before and during the trial, his out-of-court conversations and admissions must be excluded if obtained without counsel's consent or presence. The right to counsel has never meant as much before, Cicenia v. LaGay, [1958] USSC 139; 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523; Crooker v. California, [1958] USSC 163; 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448, and its extension in this case requires some further explanation, so far unarticulated by the Court.

Since the new rule would exclude all admissions made to the police, no matter how voluntary and reliable, the requirement of counsel's presence or approval would seem to rest upon the probability that counsel would foreclose any admissions at all. This is nothing more than a thinly disguised constitutional policy of minimizing or entirely prohibiting the use in evidence of voluntary out-of-court admissions and confessions made by the accused. Carried as far as blind logic may compel some to go, the notion that statements from the mouth of the defendant should not be used in evidence would have a severe and unfortunate impact upon the great bulk of criminal cases.

Viewed in this light, the Court's newly fashioned exclusionary principle goes far beyond the constitutional privilege against self-incrimination, which neither requires nor suggests the barring of voluntary pretrial admissions. The Fifth Amendment states that no person 'shall be compelled in any criminal case to be a witness against himself * * *.' The defendant may thus not be compelled to testify at his trial, but he may if he wishes. Likewise he may not be compelled or coerced into saying anything before trial; but until today he could if he wished to, and if he did, it could be used against him. Whether as a matter of self-incrimination or of due process, the proscription is against compulsion—coerced incrimination. Under the prior law, announced in countless cases in this Court, the defendant's pretrial statements were admissible evidence if voluntarily made; inadmissible if not the product of his free will. Hardly any constitutional area has been more carefully patrolled by this Court, and until now the Court has expressly rejected the argument that admissions are to be deem d involuntary if made outside the presence of counsel. Cicenia v. LaGay, supra; Crooker v. California, supra.*

The Court presents no facts, no objective evidence, no reasons to warrant scrapping the voluntary-involuntary test for admissibility in this area. Without such evidence I would retain it in its present form.

This case cannot be analogized to the American Bar Association's rule forbidding an attorney to talk to the opposing party litigant outside the presence of his counsel. Aside from the fact that the Association's canons are not of constitutional dimensions, the specific canon argued is inapposite because it deals with the conduct of lawyers and not with the conduct of investigators. Lawyers are forbidden to interview the opposing party because of the supposed imbalance of legal skill and acumen between the lawyer and the party litigant; the reason for the rule does not apply to non-lawyers and certainly not to Colson, Massiah's codefendant.

Applying the new exclusionary rule is peculiarly inappropriate in this case. At the time of the conversation in question, petitioner was not in custody but free on bail. He was not questioned in what anyone could call an atmosphere of official coercion. What he said was said to his partner in crime who had also been indicted. There was no suggestion or any possibility of coercion. What petitioner did not know was that Colson had decided to report the conversation to the police. Had there been no prior arrangements between Colson and the police, had Colson simply gone to the police after the conversation had occurred, his testimony relating Massiah's statements would be readily admissible at the trial, as would a recording which he might have made of the conversation. In such event, it would simply be said that Massiah risked talking to a friend who decided to disclose what he knew of Massiah's criminal activities. But, if, as occurred here, Colson had been cooperating with the police prior to his meeting with Massiah, both his evidence and the recorded conversation are somehow transformed into inadmissible evidence despite the fact that the hazard to Massiah remains precisely the same—the defection of a confederate in crime.

Reporting criminal behavior is expected or even demanded of the ordinary citizen. Friends may be subpoenaed to testify about friends, relatives about relatives and partners about partners. I therefore question the soundness of insulating Massiah from the apostasy of his partner in crime and of furnishing constiutional sanction for the strict secrecy and discipline of criminal organizations. Neither the ordinary citizen nor the confessed criminal should be discouraged from reporting what he knows to the authorities and from lending his aid to secure evidence of crime. Certainly after this case the Colsons will be few and far between; and the Massiahs can breathe much more easily, secure in the knowledge that the Constitution furnishes an important measure of protection against faithless compatriots and guarantees sporting treatment for sporting peddlers of narcotics.

Meanwhile, of course, the public will again be the loser and law enforcement will be presented with another serious dilemma. The general issue lurking in the background of the Court's opinion is the legitima y of penetrating or obtaining confederates in criminal organizations. For the law enforcement agency, the answer for the time being can only be in the form of a prediction about the future application of today's new constitutional doctrine. More narrowly, and posed by the precise situation involved here, the question is this: when the police have arrested and released on bail one member of a criminal ring and another member, a confederate, is cooperating with the police, can the confederate be allowed to continue his association with the ring or must he somehow be withdrawn to avoid challenge to trial evidence on the ground that it was acquired after rather than before the arrest, after rather than before the indictment?

Defendants who are out on bail have been known to continue their illicit operations. See Rogers v. United States, [1963] USCA10 269; 325 F.2d 485 (C.A.10th Cir.). That an attorney is advising them should not constitutionally immunize their statements made in furtherance of these operations and relevant to the question of their guilt at the pending prosecution. In this very case there is evidence that after indictment defendant Aiken tried to persuade Agent Murphy to go into the narcotics business with him. Under today's decision, Murphy may neither testify as to the content of this conversation nor seize for introduction in evidence any narcotics whose location Aiken may have made known.

Undoubtedly, the evidence excluded in this case would not have been available but for the conduct of Colson in cooperation with Agent Murphy, but is it this kind of conduct which should be forbidden to those charged with law enforcement? It is one thing to establish safeguards against

procedures fraught with the potentiality of coercion and to outlaw 'easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection.' McNabb v. United States, [1943] USSC 120; 318 U.S. 332, 344[1943] USSC 120; , 63 S.Ct. 608, 615[1943] USSC 120; , 87 L.Ed. 819. But here there was no substitution of brutality for brains, no inherent danger of police coercion justifying the prophylatic effect of another exclusionary rule. Massiah was not being interrogated in a police station, was not surrounded by numerous officers or questioned in relays, and was not forbidden access to others. Law enforcement may have the elements of a contest about it, but it is not a game. McGuire v. United States, [1927] USSC 14; 273 U.S. 95, 99[1927] USSC 14; , 47 S.Ct. 259, 260[1927] USSC 14; , 71 L.Ed. 556. Massiah and those like him receive ample protection from the long line of precedents in this Court holding that confessions may not be introduced unless they are voluntary. In making these determinations the courts must consider the absence of counsel as one of several factors by which voluntariness is to be judged. See House v. Mayo, [1945] USSC 39; 324 U.S. 42, 45&#65533;46[1945] USSC 39; , 65 S.Ct. 517, 519&#65533;520[1945] USSC 39; , 89 L.Ed. 739; Payne v. Arkansas, [1958] USSC 84; 356 U.S. 560, 567[1958] USSC 84; , 78 S.Ct. 844, 849&#65533;850[1958] USSC 84; , 2 L.Ed.2d 975; Cicenia v. LaGay, supra, 357 U.S., at 509, 78 S.Ct., at 1300. This is a wiser rule than the automatic rule announced by the Court, which requires courts and juries to disregard voluntary admissions which they might well find to be the best possible evidence in discharging their responsibility for ascertaining truth.