False Massiah: The Sixth Amendment Revolution that Wasn't

Wayne A. Logan
Florida State University College of Law

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FALSE MASSIAH: THE SIXTH AMENDMENT REVOLUTION THAT WASN'T

Wayne A. Logan*

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Today, when one thinks of the United States Supreme Court's seminal decisions concerning the constitutional regulation of confessions, attention naturally turns to *Miranda v. Arizona.* In *Miranda,* the Court famously required that police provide warnings to suspects prior to conducting custodial interrogations, triggering a firestorm of criticism and an ever-expanding scholarly literature over the years. *Miranda,* decided by a 5-4 vote, has since "become part of our national culture," as evidenced by the spate of law review symposia commemorating its recent fifty-year anniversary.

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* Gary and Sallyn Pajcic Professor of Law, Florida State University College of Law. For much appreciated feedback, I thank David Ball, Carissa Hessick, Kay Levine, Paul Marcus, Eric Miller, George Thomas, Ron Wright, and attendees of the Texas Tech Law Review 2017 Entering the Second Fifty Years of Miranda Criminal Law Symposium and the Association of American Law Schools Criminal Justice Section Mid-Year Meeting. For excellent research assistance, thanks to James Falls, Molly Gray, Victoria Suarez, and, most especially, Jacqueline Van Laningham. Finally, I thank Professor Arnold Loewy and members of the Texas Tech Law Review for inviting me to, and hosting, the 2017 Criminal Law Symposium.

The purpose of this Article is to consider yet another Warren Court decision regarding confessions, one issued two years before *Miranda*: *Massiah v. United States*. In *Massiah*, the Court deviated from its decades-long reliance on due process to limit police authority to extract confessions, focusing instead on the right to counsel contained in the Sixth Amendment. According to the Court, police use of a co-defendant to surreptitiously obtain an incriminating statement from Massiah after he had been indicted in the absence of counsel violated the Sixth Amendment's "basic protections." *Massiah* was "a giant step in a wholly new direction" and inspired a spirited three-member dissent, written by Justice Byron White, voicing a tone of alarm akin to that in the *Miranda* dissents coming two years later. Testament to its perceived importance, a quarter century after *Massiah* was decided, the Reagan Administration's Office of Legal Policy published a series highlighting criminal procedure decisions qualifying as "obstructions of justice," dedicating an entire report to *Massiah*.

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8. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to... have the Assistance of Counsel for his defence.").
9. *Massiah*, 377 U.S. at 206. According to the majority, the government's use of Massiah's co-defendant to surreptitiously record the challenged statement resulted in Massiah's Sixth Amendment right being "more seriously imposed upon... because he did not even know that he was under interrogation by a government agent." *Id.* (quoting United States v. Massiah, 307 F.2d 62, 72-73 (2d Cir. 1962) (Hays, J., dissenting), rev'd, 377 U.S. 201 (1964)).
11. See *Massiah*, 377 U.S. at 208 (White, J., dissenting). Justice White, discussing the outcome, stated that it is, 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... 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.... [This decision 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... and it will have a severe and unfortunate impact upon the great bulk of criminal cases.
12. See, e.g., *Miranda v. Arizona*, 364 U.S. 436, 517, 541-42 (1966) (Harlan, J., dissenting) (asserting that the majority was "taking a real risk with society's welfare"). Justice Harlan declared that the majority's decision would "measurably weaken the ability of the criminal law to perform [its most basic] tasks... In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him." *Id.*
13. See OFFICE OF LEGAL POL'Y, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 3, REPORT TO THE ATTORNEY GENERAL ON THE SIXTH AMENDMENT RIGHT TO COUNSEL UNDER THE MASSIAH LINE OF CASES, reprinted in 22 U. MICH. J.L. REF. 661, 696, 706 (1989) (stating that *Massiah* is "detrimental to effective law enforcement, as well as subversive of the truth-finding process"). Like *Miranda*, *Massiah* was the subject of purported congressional repeal in 1968. WAYNE R. LAFAVE
Yet, unlike Miranda, Massiah's fifty-year anniversary (in 2014) passed unnoticed by legal commentators. Perhaps this should come as no surprise given the sustained attention Miranda has received from the Court, compared to the Court's relatively slim oeuvre of Massiah-related decisions. Indeed, a reading of the United States Reports can support an inference that the Court is rather satisfied with Massiah. For instance, in the late 1970s, a time when the Court repeatedly undercut Miranda protections, the Court decided Brewer v. Williams (also known as the "Christian burial speech" case), invoking Massiah to bar admission of a statement secured by police from an individual suspected of abducting a ten-year-old girl. Reflecting on Massiah, Professor James Tomkovicz opined in 2012 that "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," embodying "our nation's commitment to fair play."

This Article assesses whether Massiah warrants such praise and concern. It does so by reporting the results of a study of state and federal court cases deciding Massiah-related claims between the Massiah decision and when the Court decided Montejo v. Louisiana, which imposed major

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15. See Yale Kamisar, Police Interrogation and Confessions: Essays in Law and Policy 160 (1980) (observing that Massiah was "apparently lost in the shuffle of fast-moving events that reshaped constitutional-criminal procedure in the 1960s"); see also James J. Tomkovicz, Sacrificing Massiah: Confusion Over Exclusion and Erosion of the Right to Counsel, 16 LEWIS & CLARK L. REV. 1, 9 n.27 (2012) [hereinafter Tomkovicz, Sacrificing Massiah] ("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.").

Massiah is certainly a rare anomaly in these conservative times. Against a backdrop of erosion and decline for criminally accused individuals' constitutional rights . . . the Massiah right has survived . . . . The Massiah entitlement has been the one constitutional right that has consistently furnished criminal defendants with support for victorious claims.

Id. at 6 (noting also "Massiah's phenomenal endurance").
18. Tomkovicz, Sacrificing Massiah, supra note 15, at 67; see also James J. Tomkovicz, The Massiah Right to Exclusion: Constitutional Premises and Doctrinal Implications, 67 N.C. L. REV. 751, 752 (1989) [hereinafter Tomkovicz, The Massiah Right to Exclusion] ("The Massiah doctrine's Sixth Amendment right to counsel against open or surreptitious elicitation of incriminating information by state agents has proven remarkably durable for a quarter of a century.").
19. Tomkovicz, Sacrificing Massiah, supra note 15, at 66; see also Massiah v. United States, 377 U.S. 201, 205 (1964) (quoting People v. Waterman, 175 N.E.2d 445, 448 (N.Y. 1961)) (stating that the purpose of the Sixth Amendment is to protect "the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime[s]").
limits on Massiah's application. The study utilized a research method known as judicial opinion "content analysis," which is thought to be especially well-suited to critical evaluation of the actual impact of judicial doctrine. In addition to being the first large-scale empirical investigation of Massiah's impact, the study is important for its augmentation of research concerning the impact of due process and Miranda-based limits, allowing for a fuller understanding of the Court's constitutional regulation of confessions.

Part I describes the data collection and analysis effort, which entailed the review and coding of over 1,800 cases contained in the Westlaw "allcases" database decided during the above-described time period. If Montejo marks an end to what seemed a major limit on police authority, analysis of the data reported on in this Article, discussed in Part II, illuminate what has been lost. As it turns out, despite Massiah's initial promise, it has had only limited impact, at least when viewed in terms of the caselaw. Part III contextualizes these results by examining research conducted to date on the impact of other confession-related constitutional limits imposed on police by the Court, especially those concerning Massiah's contemporary—Miranda.

I. METHODS

The empirical method employed was straightforward: utilizing Westlaw, gather the cases decided from the date the Court issued Massiah on May 18, 1964 through May 26, 2009 (when the Court issued Montejo v.

21. See, e.g., Craig Bradley, What's Left of Massiah?, 45 TEx. TECH. L. REV. 247, 247, 264 (2012) (stating that Massiah "has largely been stripped of meaning by Montejo" and concluding that Montejo "tore down an elaborate edifice of law as to the right of counsel of defendants for whom formal proceedings had begun, which had grown up following the 1964 decision in Massiah v. United States"); Craig A. Mastantuono & Rebecca M. Coffee, SOS Defendant's Right to Counsel, 85 Wis. L. W. 6, 8 (2012) (stating that Montejo "shifted the balance of power dramatically in favor of the government"); Jonathan Witmer-Rich, Interrogation and the Roberts Court, 63 FLA. L. REV. 1189, 1227 (2011) (stating that Montejo "swept away most of Sixth Amendment interrogation law").

22. See Mark A. Hall & Ronald F. Wright, Systematic Content Analysis of Judicial Opinions, 96 CAL. L. REV. 63, 99–100 (2008) (describing the method as "a more systematic and objective way to document what courts do and what they say . . . . Content analysis can verify or refute descriptions of case law that are based on more anecdotal or subjective study"). Consistent with the approach outlined by Professors Hall and Wright, the study entailed three distinct components: (1) selecting cases; (2) coding cases; and (3) analyzing the cases coded. Id. at 79.

23. See Hall & Wright, supra note 22, at 84 (noting that "scholars have found it especially useful to code and count cases in studies that debunk conventional legal wisdom"). Hall and Wright assert that the "strongest application [of content analysis], . . . is when the subject of study is the behavior of judges in writing opinions. There, content analysis combines the analytic skills of the lawyer with the power of science that comes from articulated and replicable methods of reading and counting cases." Id. at 100.

24. See infra Part I.

25. See infra Part II.

26. See id.

27. See infra Part III.
and analyze and code the cases. Using a broad search query in the “allcases” database, 28 1,810 cases were generated from all levels of state and federal courts, including published and unpublished decisions. 29 The Author and several research assistants reviewed each of these cases, conferring when doubt existed over coding interpretive questions. Care was taken to ensure that cases were not double-counted; for instance, if a case was appealed, only the decision of the court of last resort (including the United States Supreme Court) was coded. Also, because of the breadth of the search query used, a substantial number of cases did not contain an actual Massiah-based claim; these cases were removed from the dataset. 30

Ultimately, the winnowed database contained 1,185 cases. As Table 1 illustrates, a proportion of the cases (n=144, or 12%) concerned claims based upon Massiah-based civil rights actions under 42 U.S.C. § 1983 or state or federal habeas corpus claims (or other avenues for post-conviction relief). 31 The vast majority (n=1041, or 88%) were trial or direct appeal decisions. 32

28. WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20%22sixth%20amend%22%20%22Massiah%20%22DA(bef/5/26/2009)&jurisdiction=ALL CASES&saveJuris=False&contentType=ALL&querySubmissionGuid=i0ad740120000015f06e1be8294c1b843&startIndex=1&searchld=i0ad740120000015f06e1be8294c1b843&kmSearchldRequested=False&simpleSearch=False&isAdvancedSearchTemplatePage=False&isTrDiscoverSearch=False&ancillaryChargesAccepted=False&proviewEligible=False&transitionType=Search&contextData=(sc.Default) (last visited Oct. 15, 2017). After consulting with Westlaw reference attorneys, and some trial and error, the query ultimately employed was: “‘sixth amend!’ & Massiah & da(bef 5/26/2009).” Id. Use of a textual query avoided the difficulties associated with simply using the Westlaw keynote system, which can reflect categorization choices by Westlaw staff. See Joshua M. Silverstein, Using the West Key Number System as a Data Collection and Coding Device for Empirical Legal Scholarship: Demonstrating the Method Via a Study of Contract Interpretation, 34 J.L. & COM. 203, 230–31 (2016).

29. WESTLAW, supra note 28. By capturing and coding unpublished decisions, not only published decisions, the study marks an improvement over other studies rightly criticized for excluding consideration of the former. See Harry T. Edwards & Michael A. Livermore, Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking, 58 DUKE L.J. 1895, 1899 (2009).

30. For instance, a case was removed if Massiah was cited in the decision for a more general purpose, such as the Sixth Amendment’s right to counsel or when a state court resolved a claim on the basis of its state constitutional counterpart to the Sixth Amendment. Also, early on, it was not uncommon for cases to turn on interpretation of some aspect of Escobedo v. Illinois, 378 U.S. 478 (1964)—decided the same term as Massiah—which limited police questioning of individuals who were the “focus” of investigative attention. See, e.g., Wade v. Yeager, 245 F. Supp. 67, 71 (D.N.J. 1965); Duncan v. State, 176 So. 2d 840, 863 (Ala. 1965); King v. State, 212 A.2d 722, 724 (Del. 1965); State v. Shannon, 405 P.2d 837, 838–39 (Or. 1965). In 1972, the Court in Kirby v. Illinois clarified that Escobedo was more properly deemed a Miranda (not Massiah) precedent, ultimately holding that the Sixth Amendment protection did not extend to the pre-critical stage of proceedings. See Moran v. Burbine, 475 U.S. 412, 429–30 (1986) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)) (reaffirming that Escobedo was later reinterpreted as a Miranda case).


32. Id.
Suffice it to say, using judicial content analysis is not the only, nor necessarily the best, method for empirical assessment. Doing so can elide the real-world effect that doctrinal rules can have on police behavior; for instance, police can refrain from particular behaviors that might violate rules or do things that they require. Moreover, when police violate a rule, charges against a suspect might be dismissed, or if the case proceeds, it might result in a plea bargain (perhaps a more favorable plea than would have occurred in the absence of police misconduct). Of course, both scenarios would fail to manifest in a caselaw database. Just the same, caselaw content analysis represents an important method of gauging the real-world impact of doctrinal rules.

II. OUTCOMES

As Table 2 reflects, the government prevailed in an overwhelming percentage of cases (15% versus 85%).

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34. See Paul G. Cassell, Miranda’s Social Costs: An Empirical Reassessment, 90 NW. U. L. REV. 387, 394 (1996). Professor Cassell would refer to these as “lost” confessions. Id.

35. See supra notes 22-24.

As Table 3 reflects, the sum total of government victories includes roughly 7% of cases in which, as a matter of substantive law, the defendant actually prevailed in a Massiah-based claim, yet the reviewing court ultimately held in favor of the government (most commonly, 5% of cases, on the basis of harmless error review).  

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Turning to Table 4, reflecting the merit-based reasons for the government’s win, the most common basis is that the prosecution had not reached a “critical stage” (28%), a key procedural event triggering Massiah’s protections. The next most common basis cited by a court for rejecting a defense claim was that the incriminating statement challenged was not secured by a government agent (22%).

![Table 4 - Reason for Government Win](image)

When reviewing the data, it is interesting to observe that the reasoning of courts is so readily susceptible to being categorized in the five doctrinal bases indicated. A mere 2% of the cases fell into the “other” category. It is also noteworthy that the categories themselves can be combined into three broader categories:


39. See McNeil v. Wisconsin, 501 U.S. 171, 175 (1991). The trigger has been defined by the Court as a time when “judicial proceedings have been initiated against [an individual]—‘whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.’” Brewer v. Williams, 430 U.S. 387, 398 (1977) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

40. See, e.g., Kuhlmann v. Wilson, 477 U.S. 436, 475–76 (1986); United States v. Henry, 447 U.S. 264, 265 (1980). When interpreting the results of Table 4, it should be noted that it is not unusual for a court to deny a Massiah claim on more than one basis. For instance, a court might determine that a government agent was not used to secure a confession but also conclude, assuming arguendo otherwise, that no deliberate elicitation occurred.

41. See Table 4 - Reasons for Government Win (2017), supra note 38.

42. Id.
1. What might be termed “Massiah availability” cases (combining cases in which a critical stage was not reached in a case in general (28%) or regarding a specific offense in particular (13%), accounting for a total of 41% of government victories). 43

2. Instances in which the government obtained an incriminating statement on the basis of an undercover operation (determined not to be a government agent (22%) and no deliberate elicitation occurred (18%), accounted for a total of 40% of government victories). 44

3. Instances in which the government prevailed on the basis of waiver (17%). 45

Overall, the 85% government victory rate is impressive in its own right. 46 It becomes even more impressive when one considers that many cases coded as defense wins would, if decided later, evaporate in light of subsequent Supreme Court decisions that limited Massiah’s protective reach. For instance, before the Court’s decision in Texas v. Cobb, 47 which narrowed the scope of the “offense-specific” requirement, 48 defendants, with some frequency, prevailed 49 on the reasoning that police questioning concerned an offense “closely related” or “inextricably intertwined” to an offense that had reached a critical stage. 50 Indeed, after Cobb held that the double jeopardy analysis set forth in Blockburger v. United States governs the “offense-specific” analysis, 51 one of the most notable Massiah defense victories, Brewer v. Williams (noted at the outset), would likely be a

43. See id.
44. See id. The result contradicts initial dire predictions of the negative impact on prosecutions of the Court’s decision in United States v. Henry, 447 U.S. 264, 276 (1980), which granted relief to petitioner on the basis of a generous test providing that Massiah is violated when police use an undercover informant and create a situation “likely to induce” an incriminating response in the absence of counsel. See, e.g., Joy D. Fulton, Note, Sixth Amendment—Massiah Revitalized, 71 J. CRIM. L. & CRIMINOLOGY 601, 608 (1980) (“The Henry decision may lead prosecutors to abandon the use of undercover informants, despite the acknowledged value of undercover work in effective law enforcement.”).
45. See Table 4 - Reasons for Government Win, supra note 38.
46. See Table 3 - Government v. Defendant Wins, supra note 37. Not surprisingly, criminal defendant-petitioners as a whole typically do not fare well in appeals. See, e.g., Brent E. Newton, The Supreme Court’s Fourth Amendment Scorecard, 13 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 14 (2017) (finding a defense win rate of just over 24% in a study of 148 Fourth Amendment cases decided by the Supreme Court between 1982 and 2015).
51. Cobb, 532 U.S. at 173 (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)).
government win, as the defendant was arraigned for abduction and questioned about a sexual assault and killing.\textsuperscript{52}

At least as important, after the Court decided \textit{Michigan v. Jackson} in 1986,\textsuperscript{53} courts granted relief to defendants when law enforcement re-approached and questioned a defendant after he was told of his right to counsel and invoked the right.\textsuperscript{54} \textit{Montejo v. Louisiana},\textsuperscript{55} however, overruled \textit{Jackson}.\textsuperscript{56} Likewise, defendants defeated government arguments of waiver,\textsuperscript{57} a litigation position that would have been to no avail after the Court's 1988 decision in \textit{Patterson v. Illinois}.\textsuperscript{58} Indeed, after \textit{Montejo}, even a defendant capable of prevailing under the more demanding \textit{Cobb} offense-specific standard would likely lose, given the power \textit{Montejo} afforded police to re-approach accused individuals and secure Sixth Amendment waivers.\textsuperscript{59}

Tables 5 and 6 reflect the ebb and flow of \textit{Massiah} litigation.\textsuperscript{60} Table 5 indicates that the high-water mark for government wins during the study period was years 2007 and 2008.\textsuperscript{61}
Table 5 - Government Wins by Year and Basis

Table 6 focuses on defense victories.\textsuperscript{62} It shows that after a few years of positive impact for defendants in the 1960s,\textsuperscript{63} defense wins decreased

\begin{itemize}
  \item \textsuperscript{62} See Table 6 - Defendant Wins by Year, supra note 60.
  \item \textsuperscript{63} Id. This is so even though \textit{Massiah} itself was deemed to be non-retroactive in its application. See, e.g., Milton v. Wainwright, 407 U.S. 371 (1972); United States \textit{ex rel.} Allison v. New Jersey, 418 F.2d 332 (3d Cir. 1969); United States \textit{ex rel.} Long v. Pate, 418 F.2d 1028 (7th Cir. 1969); Commonwealth v. Broaddus, 317 A.2d 635 (Penn. 1974); Commonwealth v. Coyle, 233 A.2d 542 (Penn. 1967).
\end{itemize}
sharply in the early-mid-1970s,\textsuperscript{64} spiked upwards in the late 1970s and 1980s, and fell again thereafter (except for a brief increase in the mid-late 2000s).\textsuperscript{65}

Correlating the impact of the Court’s Massiah-related decisions on litigation outcomes is difficult to do with specificity given the delay associated with the trial and appellate process, in addition to the judicial refusal to apply Massiah (and its progeny) retroactively.\textsuperscript{66}

Table 6 - Defendant Wins by Year

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Cases Won</th>
<th>Total Cases Brought</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960</td>
<td>60</td>
<td>60</td>
</tr>
<tr>
<td>1970</td>
<td>50</td>
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</tr>
<tr>
<td>1980</td>
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<td>2000</td>
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<tr>
<td>2010</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>2020</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

\textsuperscript{64} See Table 6 - Defendant Wins by Year, supra note 60. The extent of defense wins was significantly lessened by the tendency of courts, before 1971, to interpret Massiah as only addressing undercover law enforcement activity, a view belied by the Supreme Court in Brewer v. Williams, in which the Court suppressed a statement obtained by a uniformed officer. See Brewer v. Williams, 430 U.S. 387 (1977); see also Davis v. Burke, 408 F.2d 779 (7th Cir. 1969); United States v. Smith, 379 F.2d 628 (7th Cir. 1967); Mitchell v. Stephens, 353 F.2d 129 (8th Cir. 1965); United States v. Fiore, 258 F. Supp. 435 (W.D. Penn. 1966); State v. McNeil, 217 A.2d 233 (Conn. App. Ct. 1965); Baker v. State, 202 So.2d 563 (Fla. 1967); State v. Moon, 183 N.W.2d 644 (Iowa 1971); Commonwealth v. Kleciak, 216 N.E.2d 417 (Mass. 1966); State v. James, 415 P.2d 350 (N.M. 1966); Anders v. State, 445 S.W.2d 167 (Tex. Crim. App. 1969); State v. Cole, 408 P.2d 387 (Wash. 1965); State ex rel. Goodchild v. Burke, 133 N.W.2d 753 (Wis. 1965).

\textsuperscript{65} See Table 2 - Government v. Defendant Wins, supra note 36.

\textsuperscript{66} See cases cited in supra note 63 (declining to apply Massiah retroactively).
Moreover, it should be noted that with defense victories, the study employed generous definitions of a “win.” For instance, an outcome was coded as a defense victory if a reviewing court believed that the record afforded sufficient reason to conclude that the defendant had a meritorious claim but remanded for further factual development (with no indication in the dataset of the ultimate outcome).\(^67\) Similarly, a defense win was recorded when a court found Massiah error but remanded for a determination of prejudice (again, when no other decision in the database reflected the ultimate outcome).\(^68\)

At the same time, the defense win rate must be interpreted in light of the realities of the litigation dynamic. The cases contained in the database plausibly reflect a selection bias in that they are likely the strongest Massiah claims. Weaker claims, one can surmise, likely resulted in pleas—which are absent from the caselaw dataset.\(^69\) In other words, the 15% defense win rate likely reflects a robust picture of defense success.\(^70\)

The government’s overall win rate (85%), moreover, perhaps understates matters.\(^71\) This is because, again, the database contained only litigated cases, cases in which a defendant pleaded guilty due to the absence of a meritorious Massiah claim are not reflected in the statistical count (that is, Massiah did not adversely affect the government’s case).\(^72\) Although it is impossible to specify a precise figure, because guilty pleas account for the overwhelming percentage of case dispositions (typically in excess of 90%),\(^73\) the actual government “win” rate can be expected to be considerably higher.

Finally, it should be noted that the overall government win rate contains instances in which defendants actually had a meritorious Massiah substantive claim, but an appellate court concluded that the government should prevail because: (1) the error was harmless;\(^74\) (2) the Massiah-infirm...
statement of the defendant could be used for impeachment purposes; or (3) the court nullified what would otherwise have been a defendant win due to the existence of an independent source or application of the inevitable discovery doctrine. Of these, it is worth highlighting that harmless error was by far the most common reason (56 of the 80 cases decided on a non-merits basis, amounting to 70% of such cases), evidencing perhaps not so much the weakness of the Massiah doctrine, but rather the critical role of harmless error review in constitutional criminal procedure litigation more generally.

Looking at the data as a whole, again with due regard for the fact that the database does not reflect the many cases disposed of on the basis of pleas and that the litigated cases logically reflect stronger cases for the defense, one can draw several conclusions. First, as the earlier discussion regarding Table 4 reflects, courts are predisposed to condone government use of undercover agents, concluding either (or both) that the individual securing the confession was not a government agent and that the confession did not result from deliberate elicitation. Second, that law enforcement,


77. The sole case in which the Supreme Court expressly allowed for the exception is Nix v. Williams, 467 U.S. 431, 442–44 (1984).

78. See Table 3 - Government Win Bases, supra note 37.


80. See supra text accompanying note 69 (discussing that the database does not include cases that are resolved on the basis of plea bargains).

81. See supra text accompanying notes 69–72 (explaining that weaker cases are less likely to be litigated); see also Cynthia Alkon, Plea Bargain Negotiations: Defining Competence Beyond Lafler and Frye, 53 AM. CRIM. L. REV. 377, 399 (2016) (discussing situations in which a defense attorney advises a client not to plead guilty due to a strong defense).

82. See supra text accompanying note 44 (discussing the data regarding incriminating statements elicited by government and nongovernment agents).
often by dint of assistance from prosecutors, is skillful at making strategic use of the critical-stage-triggering event or offense-specific limits on Massiah's application. Finally, the data here suggests that the Supreme Court was mistaken in its empirical presumption in Montejo: that removing the Jackson limit on securing waivers accounted for an insignificant number of defense victories. Also, as noted earlier, it was also mistaken in its presumption in Texas v. Cobb that further limiting the "offense-specific" scope of Massiah, originated a decade earlier in McNeil v. Wisconsin, would not limit Massiah's protective reach; it has indeed done so.

III. CONFESSIONS CONTEXTUALIZED

The Supreme Court has been in the business of regulating confessions for a long time. Initially, the due process clauses of the Fifth and Fourteenth Amendments served as the textual sources for the Court's work. In decisions such as Brown v. Mississippi, in the "rubber hose" and "third degree" era of policing, through more subtle police methods condemned in Spano v. New York, the Court condemned involuntarily secured confessions. Today, however, due process endures as a limit, but establishing a claim is extremely difficult.

83. See Table 4 - Reasons for Government Win, supra note 38 (showing that 41% of government victories were due to a combination of critical stage or specific offense limits on Massiah). Whereas in the Miranda context police often act alone, in the Massiah context, after charges are filed, very often prosecutors play a more significant role in working with police. For a troubling instance of one such cooperative effort, see Orange County Register, Inside the Snitch Tank: A Secret Jail-Informant Network, YOUTUBE (Dec. 31, 2015), https://www.youtube.com/watch?v=xi9XLnxRCHU (recounting a recent practice in Orange County, California, in which police and prosecutors made long-term use of undercover agents in cells in which discussions with accused parties were audio-taped).

84. See Montejo v. Louisiana, 556 U.S. 778, 793-95 (2009); Table 4 - Reasons for Government Win, supra note 38; see also, e.g., People v. Richardson, 528 N.E.2d 612, 627 (Ill. 1988); State v. Dagnall, 612 N.W.2d 680, 696 (Wis. 2000); State v. Horning, 600 N.W.2d 264, 267-69 (Wis. Ct. App. 1999).

85. See supra text accompanying notes 47-50 (noting the offense-specific requirement).


88. See supra text accompanying note 43 (showing how Massiah's protective reach is limited by these requirements).


92. THOMAS & LEO, supra note 69, at 128, 139-40 (discussing findings of the Wickersham Commission in the early 1930s).


With Massiah, in 1964, the Court charted a different constitutional path based on the Sixth Amendment, but two years later decided Miranda v. Arizona, invoking the Fifth Amendment’s right against compelled self-incrimination. Since then, scholarly debate has raged over Miranda’s impact. Professor Paul Cassell in particular has repeatedly argued that Miranda has significantly impaired police authority. Others, including Professors John Donohue and Stephen Schulhofer, have questioned whether Miranda actually has had such a dire effect and expressed doubt over whether it is possible to reliably assess its actual impact.

Meanwhile, little work has examined the impact of Miranda in the caselaw. In perhaps the only study of its kind, Professor George Thomas analyzed a random sample of 211 Miranda-related cases from June 2002 in the Westlaw database and concluded that defendants prevailed in only 17% of cases analyzed—a figure remarkably close to the 15% defendant-victory rate uncovered in this study. According to Professor Thomas, by far the greatest number of outcomes overall (51%) were based on the reviewing

98. See, e.g., Cassell & Fowles, Handcuffing the Cops?, supra note 97, at 1057–60, 1125–26; Cassell, Miranda’s Social Costs, supra note 97, at 390–91, 423–24; Cassell & Fowles, Still Handcuffing the Cops?, supra note 97, at 725, 821.
99. Donohue, supra note 97, at 1170.
100. Schulhofer, supra note 97, at 502–03.
103. Id. at 1970.
104. Id. at 1966.
105. See Table 2 - Government v. Defendant Wins, supra note 36.
court’s conclusion that the defendant waived his *Miranda* rights. This study, by contrast, found a significantly lower *Massiah* waiver rate (17%).

In short, just as *Miranda*, in Professor Barry Friedman’s words, effectively has been overruled by "stealth," so too has *Massiah*, and just as police interrogators have learned to live with *Miranda*, they have learned to live with *Massiah*. With *Miranda*, the most significant tool of police to neutralize its protections is waiver, whereas with *Massiah*, the data examined here underscores widespread strategic police use of a few formalistic requirements, such as securing information by means of what a court concludes is a non-government agent, lack of deliberate elicitation, and triggering prerequisites (critical stage and offense-specificity) to secure admissible confessions. Going forward, if one were to examine caselaw decided after late May 2009, when the Court in *Montejo* overruled *Michigan v. Jackson* and allowed police to re-approach accused individuals, it should come as no surprise to see waiver rates in excess of that reported here (17%). Of course, it remains to be seen how broadly courts will interpret *Montejo*, but early signs indicate that courts are siding with breadth.

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106. Thomas, supra note 102, at 1973 (citing Table 3. All Categories of Outcomes (246)). Professor Thomas found, furthermore, that when police provided warnings to suspects, suspects waived *Miranda* in 68% of cases. *Id.* at 1972 (citing Table 2. Warnings given (186)); see also Paul O. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. Rev. 839, 859 (1996) (reporting that over 80% of 173 suspects whom the police advised of their *Miranda* rights waived them); Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 255–56 (2006) (finding that 80% of the 17-year-old suspects whose interrogations were video recorded waived their *Miranda* rights); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 226, 286 (1996) (finding that 78% of suspects in 182 confessions that were observed or recorded in California waived their *Miranda* rights).

107. *See Table 4 - Reasons for Government Win, supra note 38.*


109. *See Thomas, supra note 102, at 1979* (noting that “police and prosecutors manage quite nicely to get what they want in a *Miranda* world”); *see also Jacobi, supra note 14, at 16* (“Nowadays, the police are used to *Miranda* and no longer consider it a major hurdle to their investigative techniques . . . *Miranda* is no longer objectionable to many in the law enforcement community because of its minimalist and rote nature . . . .”).

110. *See Brooks Holland, A Relational Sixth Amendment During Interrogation, 99 J. CRIM. L. & CRIMINOLOGY 381, 385 (2009)* (surmising before *Montejo* that “[t]he practical consequence of [the Court’s] holding[] is that law enforcement easily can work around an existing attorney-client relationship to question a charged defendant about nearly anything, up to and including the precise factual subject of filed charges”).

111. *See supra* note 106 and accompanying text (discussing instances of suspect waiver); *see also Brensike-Primus, supra note 94, at 16–19.

112. *See supra* Introduction and Part I (discussing data collection and analysis methodology).

113. *See supra* note 21 and accompanying text (explaining the impact of *Montejo*).


115. *See Mastantuono & Coffee, supra note 21.*
To be sure, questions still exist regarding several important Massiah-related issues already resolved in favor of the government vis-à-vis Miranda, such as the permissible use of unlawfully secured physical evidence "fruits" and investigative leads, and whether a "public safety" exception exists. Decisions from the Burger, Rehnquist, and Roberts Courts, however, do not afford much reason to think that the doctrinal evolution of Massiah will differ from that of Miranda. Finally, if the Court's shift toward applying the Fourth Amendment's exclusionary rule only in instances of "sufficiently deliberate" police misconduct extends to instances of police use of undercover agents—what has been fairly termed a negligence standard—there will come further limits on the already modest extent of defense victories. When this occurs, the once-glowing promise

119. As has already occurred with respect to government use for impeachment purposes of statements secured in violation of Massiah. See Kansas v. Ventris, 556 U.S. 586, 590–93 (2009). Earlier, the Court held that a confession secured as a result of a government violation of the "prophylactic" rule of Michigan v. Jackson could be used for impeachment. See Michigan v. Harvey, 494 U.S. 344, 351–52 (1990). Lower courts, it should be noted, are inclined to conclude that when police violate Massiah and secure an initial confession, they can, after obtaining a waiver, secure a second confession for use in trial, as Oregon v. Elstad, 467 U.S. 431 (1984) permits in the Miranda context. See United States v. Fellers, 397 F.3d 1090 (8th Cir. 2005).
121. See United States v. Henry, 447 U.S. 264, 279 (1980) (Blackmun, J., dissenting) (condemning the majority for extending Massiah to "cover even a 'negligent' triggering of events resulting in reception of disclosures"). It should be noted, however, that the Court has seemingly ruled out adoption of a "good faith" exception in the Massiah context:
of Massiah will be snuffed out alongside that of due process and the Miranda limits on police interrogation.

IV. CONCLUSION

Analysis of forty-five years of caselaw suggests that, contrary to initial dire concern that Massiah would stifle police efforts to secure confessions, its actual impact has been limited. Indeed, despite the Supreme Court’s assurance in Montejo v. Louisiana that Massiah endured in “substance,” in truth, when Montejo was decided in 2009, little remained of what was once heralded as a constitutional bulwark against police overreach. As much was presaged in 1980 by Professor Yale Kamisar who noted that “Massiah . . . turn[ed] on nice distinctions that often will have no more relationship to the suspect’s plight than ‘the kind of electronic equipment employed’ had to protection[s] against unreasonable search[es] and seizur[es].”

Whether the outcome is perhaps attributable to Massiah’s purported amorphous constitutional rationale, or simply reflects the broader ongoing effort of conservative court majorities to limit Warren Court defense-oriented holdings, one cannot say for sure. There is no escaping, however, that based on the results reported on in this Article, Massiah has failed to live up to its promise as a protective shield for the criminally accused.

124. See Thomas, supra note 102, at 1979 (concluding, based on study of Miranda-related caselaw, that “police and prosecutors manage quite nicely to get what they want in a Miranda world”).
125. See Table 2 - Government v. Defendant Wins, supra note 36.
127. See generally supra Part II.
128. KAMISAR, supra note 15, at 223.
129. See, e.g., Tomkovicz, Adversary System, supra note 16, at 22–30 (noting the lack of an “in-depth constitutional justification for the Massiah right”); Tomkovicz, The Massiah Right to Exclusion, supra note 18, at 762 (“The Court has failed to rationalize Massiah-based exclusion with clarity or consistency, proffering deficient and potentially contradictory explanations.”); Uviller, supra note 10, at 1164 (noting that in a review of the Court’s Massiah-related decisions “[w]e are not much aided . . . by the Court’s own explanation in the principal cases”); see also The Supreme Court, 1963 Term – Developments in the Law, Right to Counsel Before Trial, 78 HARV. L. REV. 177, 217–221 (1964) (“The Court’s opinion in Massiah is so uninformative as to preclude a precise understanding of its rationale.”).