FALSE *MASSIAH*: THE SIXTH AMENDMENT REVOLUTION THAT WASN'T

Wayne A. Logan[*]

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*.[1] In *Miranda*, the Court famously required that police provide warnings to suspects prior to conducting custodial interrogations, triggering a firestorm of criticism[2] and an ever-expanding scholarly literature over the years.[3] *Miranda*, decided by a 5-4 vote, has since "become part of our national culture,"[4] as evidenced by the spate of law review symposia commemorating its recent fifty-year anniversary.[5]

---

* 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.

1. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

2. *See, e.g.*, Arthur Krock, *Court's Ruling Restricts Police*, ATLANTA J. CONST., June 16, 1966, at 4; *Supreme Court Ruling Called Unrealistic by District Attorney*, L.A. TIMES, June 26, 1966, at OC1; Fred P. Graham, *High Court Puts New Curb on Power of the Police to Interrogate Suspects*, N.Y. TIMES (June 14, 1966), http://www.nytimes.com/learning/general/onthisday/big/0613.html#article.

3. *See, e.g.*, WESTLAW, http://www.westlaw.com (last visited Oct. 12, 2017). A Westlaw query in the "Journals and Law Reviews" database, for instance, generates over 9,500 entries. *Id.*

4. Dickerson v. United States, 530 U.S. 428, 443 (2000).

5. In addition to this Symposium, *Entering the Second Fifty Years of* Miranda, see, for example, Symposium, *The Fiftieth Anniversary of* Miranda v. Arizona, 97 B.U. L. REV. 681 (2017); Symposium, Miranda *at 50*, 43 N. KY. L. REV. 301 (2016); Symposium, *Policing in America on the Fiftieth Anniversary of* Miranda v. Arizona, 10 HARV. L. & POL'Y REV. 3 (2016). For individual commemorative articles, see, for example, Brooks Holland, Miranda v. Arizona*: 50 Years of Judges Regulating Police Interrogation*, 15 INSIGHTS ON L. & SOC'Y 2 (2015); Eugene R. Milhizer, Miranda*'s Near Death Experience: Reflections on the Occasion of* Miranda*'s Fiftieth Anniversary*, 66 CATH. U. L. REV. 577 (2017; Darnesha Carter & Ellen S. Podgor, Miranda *at 50*, CHAMPION, May 2016, at 16; David N. Wecht, Miranda *at 50*, PA. LAW., Nov.–Dec. 2016, at 26.

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*.[6] In *Massiah*, the Court deviated from its decades-long reliance on due process to limit police authority to extract confessions,[7] focusing instead on the right to counsel contained in the Sixth Amendment.[8] 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."[9]

Massiah was "a giant step in a wholly new direction"[10] and inspired a spirited three-member dissent, written by Justice Byron White, voicing a tone of alarm[11] akin to that in the *Miranda* dissents coming two years later.[12] 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*.[13]

---

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

7. *See* Catherine Hancock, *Due Process before* Miranda, 70 TUL. L. REV. 2195, 2198–2201 (1996).

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)).

10. H. Richard Uviller, *Evidence from the Mind of a Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1155 (1987).

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.

Id.

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,[14] compared to the Court's relatively slim oeuvre of *Massiah*-related decisions.[15] Indeed, a reading of the United States Reports can support an inference that the Court is rather satisfied with *Massiah*.[16] For instance, in the late 1970s, a time when the Court repeatedly undercut *Miranda* protections, the Court decided *Brewer v. Williams*[17] (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 "[f]or 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,"[18] embodying "our nation's commitment to fair play."[19]

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*,[20] which imposed major

---

ET AL., CRIMINAL PROCEDURE § 6.4(i) (4th ed. 2015–2017) (citing and discussing the Crime Control Act of 1968, 18 U.S.C. § 3501).

14. *See* Tonja Jacobi, Miranda *2.0*, 50 U.C. DAVIS L. REV. 1, 4–5 (2016) (noting multiple *Miranda*-related decisions and the complexity of resulting caselaw).

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*.").

16. *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, 4–5 (1988) [hereinafter Tomkovicz, *Adversary System*]. Describing *Massiah*, Professor Tomkovicz noted:

> *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").

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

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]").

20. *See* Montejo v. Louisiana, 556 U.S. 778 (2009).

limits on *Massiah*'s application.[21] The study utilized a research method known as judicial opinion "content analysis,"[22] which is thought to be especially well-suited to critical evaluation of the actual impact of judicial doctrine.[23] 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.[24] 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.[25] As it turns out, despite *Massiah*'s initial promise, it has had only limited impact, at least when viewed in terms of the caselaw.[26] 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*.[27]

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. LAW. 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.

Louisiana), 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]

---

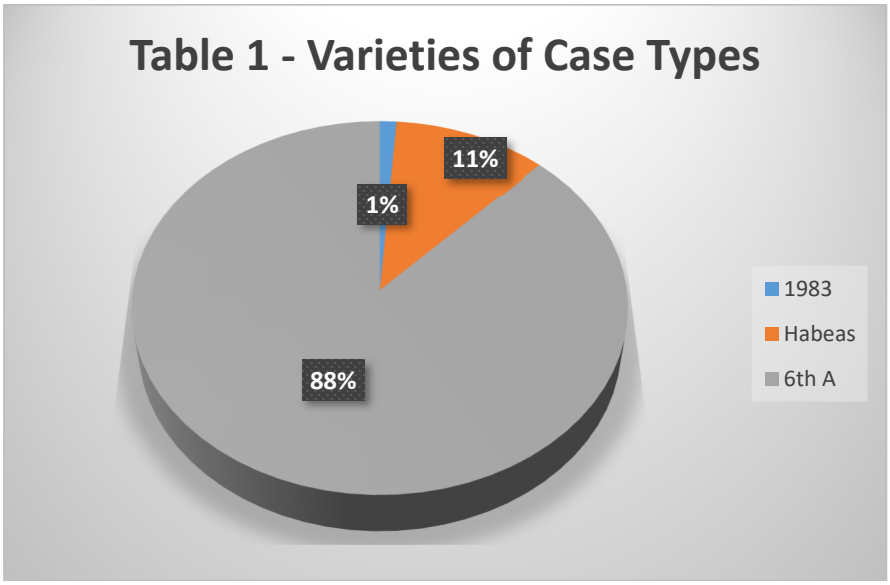
28. WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20%22sixth%20amend!%22%20%26%20Massiah%20%26%20DA(bef%205%2F26%2F2009)&jurisdiction=ALLCASES&saveJuris=False&contentType=ALL&querySubmissionGuid=i0ad740120000015f06e1be8294c1b843&startIndex=1&searchId=i0ad740120000015f06e1be8294c1b843&kmSearchIdRequested=False&simpleSearch=False&isAdvancedSearchTemplatePage=False&skipSpellCheck=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).

31. Wayne A. Logan, Table 1 - Varieties of Case Types (2017) (unpublished table) (on file with author).

32. *Id.*



Suffice it to say, using judicial content analysis is not the only, nor necessarily the best, method for empirical assessment.[33] 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.[34] 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.[35]

II. OUTCOMES

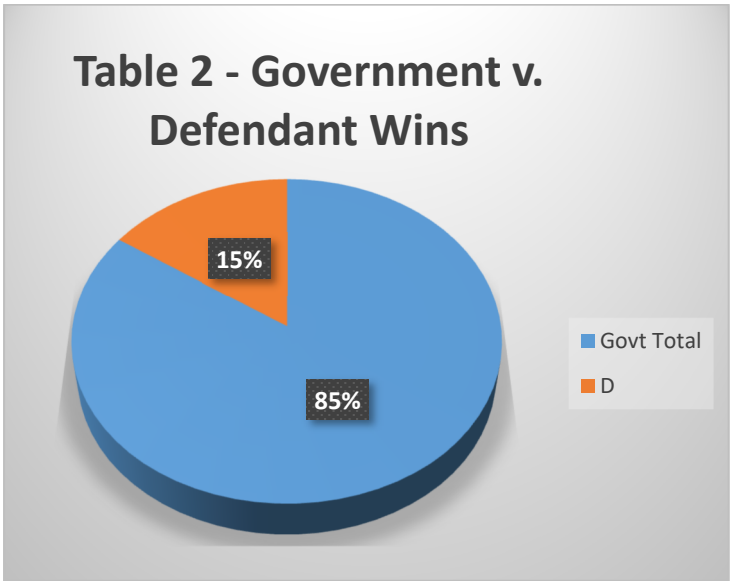
As Table 2 reflects, the government prevailed in an overwhelming percentage of cases (15% versus 85%).[36]

33. *Cf.* Atwater v. City of Lago Vista, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting) (noting that the "relatively small number of published cases" concerning a police practice does not reliably reflect the extent of its incidence).

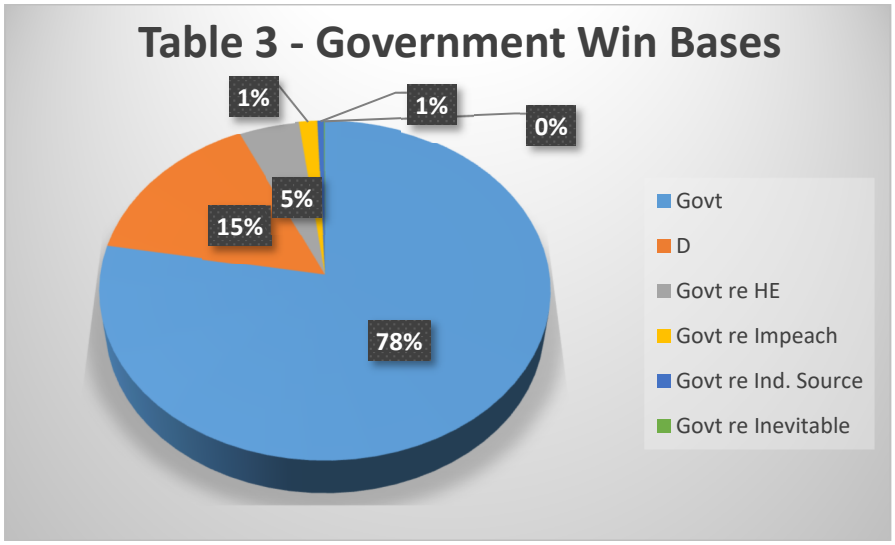
34. *See* Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 394 (1996). Professor Cassell would refer to these as "lost" confessions. *Id.*

35. *See supra* notes 22–24.

36. Wayne A. Logan, Table 2 - Government v. Defendant Wins (2017) (unpublished table) (on file with author).

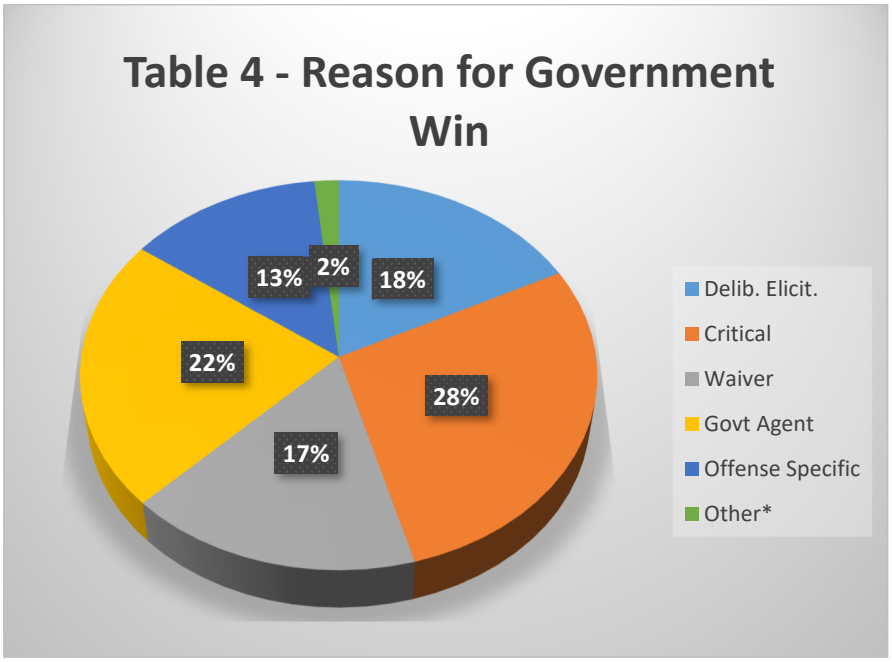


As Table 3 reflects, the sum total of government victories includes roughly 7% of cases in which, as a matter of substantive law, the defendant actually prevailed in a *Massiah*-based claim, yet the reviewing court ultimately held in favor of the government (most commonly, 5% of cases, on the basis of harmless error review).[37]



37. Wayne A. Logan, Table 3 - Government Win Bases (2017) (unpublished table) (on file with author).

Turning to Table 4, reflecting the merit-based reasons for the government's win,[38] the most common basis is that the prosecution had not reached a "critical stage" (28%), a key procedural event triggering *Massiah*'s protections.[39] 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%).[40]



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.[41] A mere 2% of the cases fell into the "other" category.[42] It is also noteworthy that the categories themselves can be combined into three broader categories:

38. Wayne A. Logan, Table 4 - Reasons for Government Win (2017) (unpublished table) (on file with author).

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).

47. Texas v. Cobb, 532 U.S. 162 (2001).

48. *See* McNeil v. Wisconsin, 501 U.S. 171, 175 (1991).

49. *See, e.g.*, United States v. Melgar, 139 F.3d 1005, 1016 (4th Cir. 1998); United States v. Arnold, 106 F.3d 37, 42 (3d Cir. 1997); United States v. Rodriguez, 931 F. Supp. 907, 928 (D. Mass. 1996); Taylor v. State, 726 So. 2d 841, 846 (Fla. Dist. Ct. App. 1999). That is not to say that the government did not also at times prevail in offense-specific cases pre-*Cobb*. *See, e.g.*, United States v. McKnight, 211 F.3d 1266 (4th Cir. 2000); United States v. Whatley, 245 F.3d 791 (5th Cir. 2000); United States v. Doherty, 126 F.3d 769, 778 (6th Cir. 1997); Commonwealth v. Rainwater, 681 N.E.2d 1218, 1230 (Mass. 1997).

50. *See* Holly Larsen, Note, United States v. Covarrubias*: Does the Ninth Circuit Add to the Ambiguity of the Inextricably Intertwined Exception?*, 30 GOLDEN GATE U. L. REV. 1, 14–32 (2000) (describing various tests used by courts during the time).

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.[52]

At least as important, after the Court decided *Michigan v. Jackson* in 1986,[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.[54] *Montejo v. Louisiana*,[55] however, overruled *Jackson*.[56] Likewise, defendants defeated government arguments of waiver,[57] a litigation position that would have been to no avail after the Court's 1988 decision in *Patterson v. Illinois*.[58] Indeed, after *Montejo*, even a defendant capable of prevailing under the more demanding *Cobb* offense-specific standard would likely lose, given the power *Montejo* afforded police to re-approach accused individuals and secure Sixth Amendment waivers.[59]

Tables 5 and 6 reflect the ebb and flow of *Massiah* litigation.[60] Table 5 indicates that the high-water mark for government wins during the study period was years 2007 and 2008.[61]

---

52. Brewer v. Williams, 430 U.S. 387, 390–94 (1977). According to the *Cobb* majority, "[t]he Court's opinion [in *Brewer v. Williams*] . . . simply did not address the significance of the fact that the suspect had been arraigned only on the abduction charge, nor did the parties in any way argue this question." *Cobb*, 532 U.S. at 169. For discussion of the significant narrowing effect of *Cobb* on *Massiah* claims, see Michael J. Howe, Note, *Tomorrow's* Massiah*: Towards a "Prosecution Specific" Understanding of the Sixth Amendment Right to Counsel*, 104 COLUM. L. REV. 134, 149–51 (2004); Melissa Minas, Note, *Blurring the Line: Impact of Offense-Specific Sixth Amendment Right to Counsel*, 93 J. CRIM. L. & CRIMINOLOGY 195, 213 (2002).

53. *See* Michael v. Jackson, 475 U.S. 625 (1986).

54. *See, e.g.*, United States v. Bird, 287 F.3d 709 (8th Cir. 2002); Wilson v. Murray, 806 F.2d 1232 (4th Cir. 1986); Shafer v. Bowersox, 168 F. Supp. 2d 1055 (E.D. Mo. 2001); People v. Richardson, 528 N.E.2d 612 (Ill. 1988); People v. Crowder, 492 N.E.2d 952 (Ill. App. Ct. 1986); Commonwealth v. Blagojevic, 22 MASS. L. RPTR. 285 (Super. Ct. Mass. 2007); Beckum v. State, 786 So. 2d 1060 (Miss. 2001); State v. Walker, No. 03C01-9110-CR-00346, 1993 WL 44195 (Tenn. Crim. App. Feb. 22, 1993); Nehman v. State, 721 S.W.2d 319 (Tex. Crim. App. 1986); State v. Dagnall, 612 N.W.2d 680 (Wis. 2000); State v. Hornung, 600 N.W.2d 264 (Wis. Ct. App. 1999). *But see* United States v. Thornton, 17 F. Supp. 2d 686 (E.D. Mich. 1998) (post-*Jackson* government win).

55. Montejo v. Louisiana, 556 U.S. 778 (2009).

56. *Id.* at 797.

57. *See, e.g.*, United States v. Brown, 699 F.2d 585, 590 (2d Cir. 1983); United States v. Mohabir, 624 F.2d 1140, 1153 (2d Cir. 1980).

58. Patterson v. Illinois, 487 U.S. 285, 296 (1988) ("As a general matter, . . . an accused who is admonished with the warnings prescribed by . . . *Miranda* . . . has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one.").

59. *See Montejo*, 556 U.S. at 789.

60. Wayne A. Logan, Table 5 - Government Wins by Year and Basis (2017) (unpublished table) (on file with author); Wayne A. Logan, Table 6 - Defendant Wins by Year (2017) (unpublished table) (on file with author).

61. *See* Table 5 - Government Wins by Year and Basis, *supra* note 60; *see also* Table 6 - Defendant Wins by Year, *supra* note 60. Year 2009, it should be noted, reflects only roughly one-half of the year's case outcomes because the search query excluded cases decided after May 26, 2009, when the Court decided *Montejo v. Louisiana*, 556 U.S. 778 (2009).

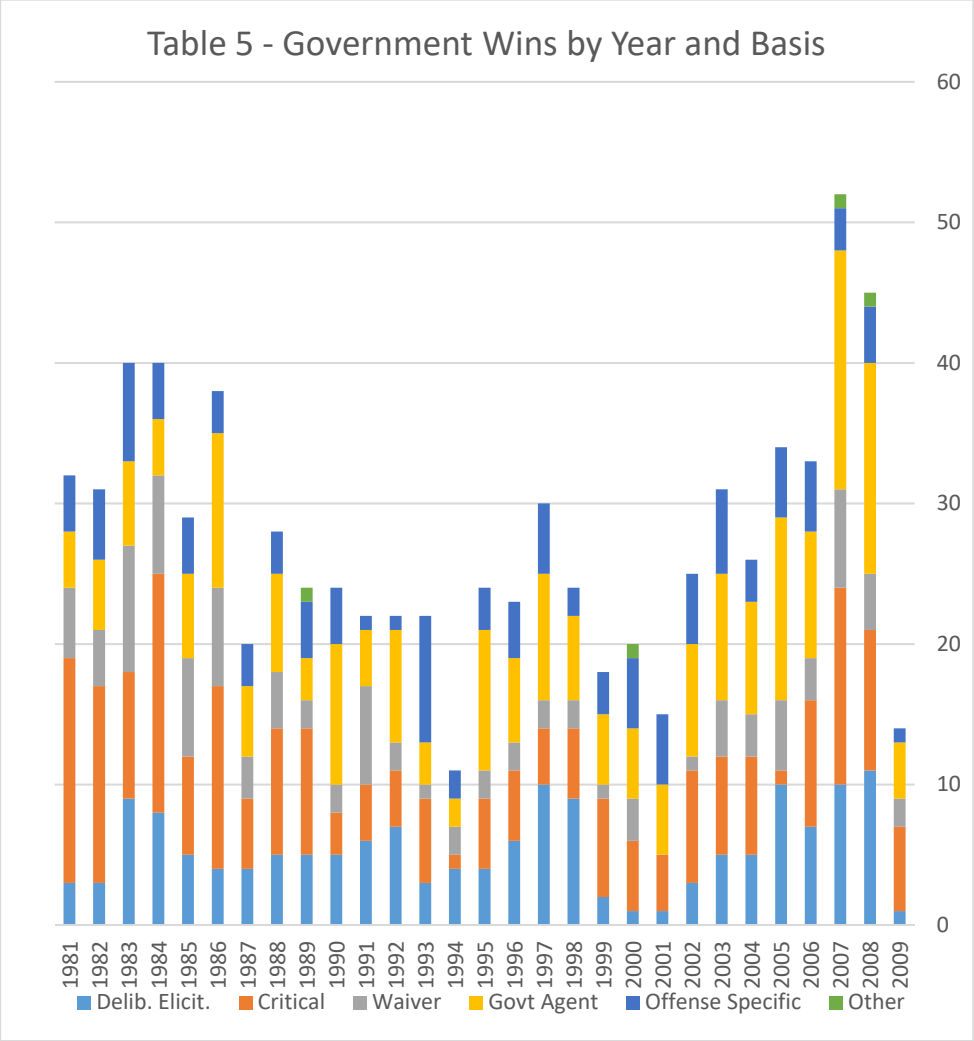


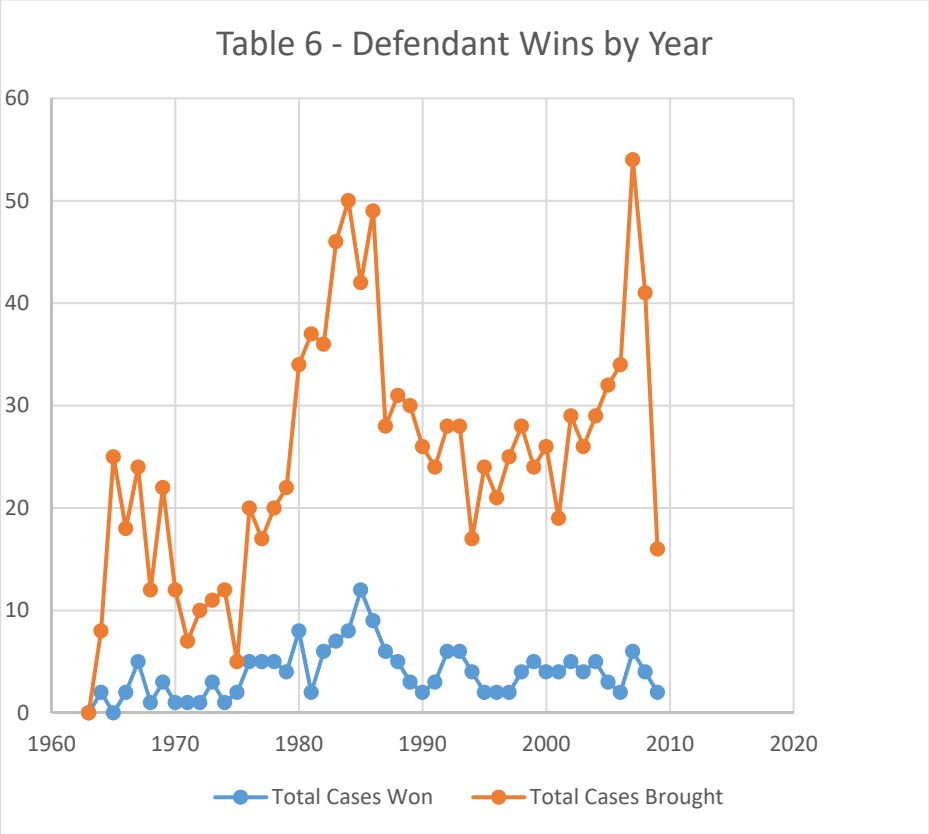
Table 6 focuses on defense victories.[62] It shows that after a few years of positive impact for defendants in the 1960s,[63] defense wins decreased

62. *See* Table 6 - Defendant Wins by Year, *supra* note 60.

63. *Id.* This is so even though *Massiah* itself was deemed to be non-retroactive in its application. *See, e.g.*, Milton v. Wainwright, 407 U.S. 371 (1972); United States *ex rel.* Allison v. New Jersey, 418 F.2d 332 (3d Cir. 1969); United States *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).

sharply in the early-mid-1970s,[64] spiked upwards in the late 1970s and 1980s, and fell again thereafter (except for a brief increase in the mid-late 2000s).[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.[66]



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).

65. *See* Table 2 - Government v. Defendant Wins, *supra* note 36.

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

---

67. *See, e.g.*, United States v. Rodriguez, No. 00 CR. 949(DAB), 2002 WL 313894 (S.D.N.Y. Feb. 27, 2002); United States v. Romero, No. 97 CR. 650(LMM), 1998 WL 788799 (S.D.N.Y. Nov. 10, 1998); Brown v. State, 947 A.2d 1062, 1073 (Del. 2007); Watson v. United States, 940 A.2d 182, 188 (D.C. 2008).

68. *See, e.g.*, People v. R.T.P., 43 Cal. Rptr. 3d 536, 548 (Cal. Ct. App. 2006).

69. *Cf.* GEORGE C. THOMAS & RICHARD A. LEO, CONFESSIONS OF GUILT: FROM TORTURE TO *MIRANDA* AND BEYOND 195 (2012) (observing that selection bias in examining caselaw "should be in the direction of finding more claims of *Miranda* violations than actually occur because most cases without plausible arguments will not reach trial or, if they do, will not be appealed" (emphasis in original)).

70. *See* Table 2 - Government v. Defendant Wins, *supra* note 36.

71. *See id*.

72. *See generally id.*; *supra* text accompanying note 69.

73. *See* Missouri v. Frye, 566 U.S. 133, 144 (2012) (observing that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system" (emphasis in original) (citation omitted)).

74. *See, e.g.*, United States v. Melgar, 139 F.3d 1005, 1016 (4th Cir. 1998); U.S. v. Kilpatrick, 821 F.2d 1456, 1475 (10th Cir. 1987); Mealer v. Jones, 741 F.2d 1451, 1455 (2d Cir. 1984); United States v. Guerra, 334 F.2d 138, 146 n.4 (2d Cir. 1964); Monroe v. Cain, No. 05-929, 2008 WL 818968, at *20–21, *31 (E.D. La. Mar. 20, 2008); United States v. Valencia-Vergara, No. 8:06-CR-279-T-17TBM, 2007 WL

statement of the defendant could be used for impeachment purposes;[75] or (3) the court nullified what would otherwise have been a defendant win due to the existence of an independent source[76] or application of the inevitable discovery doctrine.[77] 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),[78] 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.[79]

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[80] and that the litigated cases logically reflect stronger cases for the defense,[81] 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.[82] Second, that law enforcement,

---

177790, at *3 (M.D. Fla. Jan. 19, 2007); *In re* D.P., No. B194445, 2007 WL 4465512, at *22–23 (Cal. Ct. App. Dec. 21, 2007); People v. Viray, 36 Cal. Rptr. 3d 693, 711–12 (Cal. Ct. App. 2006); People v. Finn, 42 Cal. Rptr. 704, 707–08 (Cal. Dist. Ct. App. 1965); State v. LePage, 630 P.2d 674, 683–85 (Idaho 1981); State v. Kajoshaj, No. 76857, 2000 WL 1144929, at *9–12, *16–18, *20 (Ohio Ct. App. Aug. 10, 2000); State v. Webb, 625 S.W.2d 281, 284–85 (Tenn. Crim. App. 1980).

75. *See, e.g.*, Trevino v. Alameida, No. C 04-0720 MMC (PR), 2007 WL 781590, at *41–43 (N.D. Cal. Mar. 13, 2007); United States v. Langer, 41 M.J. 780, 783–84 (A.F. Ct. Crim. App. 1995); People v. Trevino, No. H022406, 2002 WL 31304238, at *37–48 (Cal. Ct. App. Oct. 15, 2002); State v. Darwin, 290 A.2d 593, 599 (Conn. Super. Ct. 1972); People v. Washington, 413 N.E.2d 170, 176 (Ill. App. Ct. 1980); State v. Conway, 842 N.E.2d 996, 1020 (Ohio 2006); State v. Mattatall, 603 A.2d 1098, 1111 (R.I. 1992); State v. Gardner, 789 P.2d 273, 282 (Utah 1989). These outcomes, it should be noted, occurred before the Court endorsed the impeachment exception in *Kansas v. Ventris*. *See* Kansas v. Ventris, 556 U.S. 586, 591 (2009).

76. *See, e.g.*, United States v. McManaman, No. CR08-4025-MWB, 2008 WL 2397675, at *12–13 (N.D. Iowa June 9, 2008); United States v. Holland, 59 F. Supp. 2d 492, 519 n.29 (D. Md. 1998); State v. Hackman, 943 P.2d 865, 869 (Ariz. Ct. App. 1997); People v. Wallace, Nos. D037057, D038339, 2002 WL 799713, at *13–14 (Cal. Ct. App. Apr. 30, 2002); Parker v. State, 533 N.E.2d 134, 135 (Ind. 1989).

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.

79. *See generally* Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 HARV. L. REV. 1791 (2017).

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,[83] 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.[84] Also, as noted earlier,[85] it was also mistaken in its presumption in *Texas v. Cobb* that further limiting the "offense-specific" scope of *Massiah*,[86] originated a decade earlier in *McNeil v. Wisconsin*,[87] would not limit *Massiah*'s protective reach; it has indeed done so.[88]

III. CONFESSIONS CONTEXTUALIZED

The Supreme Court has been in the business of regulating confessions for a long time.[89] Initially, the due process clauses of the Fifth and Fourteenth Amendments served as the textual sources for the Court's work.[90] In decisions such as *Brown v. Mississippi*,[91] in the "rubber hose" and "third degree" era of policing,[92] through more subtle police methods condemned in *Spano v. New York*,[93] the Court condemned involuntarily secured confessions. Today, however, due process endures as a limit, but establishing a claim is extremely difficult.[94]

---

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. Hornung, 600 N.W.2d 264, 267–69 (Wis. Ct. App. 1999).

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

86. *See* Texas v. Cobb, 532 U.S. 162, 168–71 (2001).

87. McNeil v. Wisconsin, 501 U.S. 171, 175 (1991).

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

89. *See generally Thirty-Ninth Annual Review of Criminal Procedure: Investigations and Police Practices*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 3 (2010).

90. Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 594 (2013).

91. *See* Brown v. Mississippi, 297 U.S. 278 (1936).

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

93. *See* Spano v. New York, 360 U.S. 315 (1959).

94. *See generally* Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1 (2015); Paul Marcus, *It's Not Just About* Miranda*: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601 (2006).

With *Massiah*, in 1964, the Court charted a different constitutional path based on the Sixth Amendment,[95] but two years later decided *Miranda v. Arizona*,[96] invoking the Fifth Amendment's right against compelled self-incrimination. Since then, scholarly debate has raged over *Miranda*'s impact.[97] Professor Paul Cassell in particular has repeatedly argued that *Miranda* has significantly impaired police authority.[98] Others, including Professors John Donohue[99] and Stephen Schulhofer,[100] 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.[101]

Meanwhile, little work has examined the impact of *Miranda* in the caselaw.[102] 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[103] and concluded that defendants prevailed in only 17% of cases analyzed[104]—a figure remarkably close to the 15% defendant-victory rate uncovered in this study.[105] According to Professor Thomas, by far the greatest number of outcomes overall (51%) were based on the reviewing

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

96. Miranda v. Arizona, 384 U.S. 436, 473–74 (1966).

97. *See, e.g.*, Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998) [hereinafter Cassel & Fowles, *Handcuffing the Cops?*]; Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996) [hereinafter Cassel, Miranda*'s Social Costs*]; Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of* Miranda*'s Harmful Effects on Law Enforcement*, 97 B.U. L. REV. 685 (2017) [hereinafter Cassel & Fowles, *Still Handcuffing the Cops?*]; John J. Donohue III, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147, 1170 (1998); Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996).

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.

101. *See id.*; Donohue, *supra* note 97, at 1170; *see also* Albert Alschuler, Miranda*'s Fourfold Failure*, 97 B.U. L. REV. 849, 883–91 (2017) (providing extensive analysis of methodological and data-collection challenges of assessing *Miranda*'s real-world impact).

102. *See generally* George C. Thomas, *Stories about* Miranda, 102 MICH. L. REV. 1959 (2004).

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.[106] This study, by contrast, found a significantly lower *Massiah* waiver rate (17%).[107]

In short, just as *Miranda*, in Professor Barry Friedman's words, effectively has been overruled by "stealth,"[108] so too has *Massiah*, and just as police interrogators have learned to live with *Miranda*,[109] they have learned to live with *Massiah*.[110] With *Miranda*, the most significant tool of police to neutralize its protections is waiver,[111] 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.[112] 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,[113] 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*,[114] but early signs indicate that courts are siding with breadth.[115]

---

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 G. 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.

108. Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 3–5 (2010). For discussion of how state and lower federal courts, left un-superintended by the Supreme Court, limit "from below" the scope of the Court's caselaw, see Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016).

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*).

114. *See generally* Edna Katherine Tinto, *Wavering on Waiver:* Montejo v. Louisiana *and the Sixth Amendment Right to Counsel*, 48 AM. CRIM. L. REV. 1335 (2011).

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"[116] and investigative leads,[117] and whether a "public safety" exception exists.[118] 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.*[119] Finally, if the Court's shift toward applying the Fourth Amendment's exclusionary rule only in instances of "sufficiently deliberate" police misconduct[120] extends to instances of police use of undercover agents—what has been fairly termed a negligence standard—[121] there will come further limits on the already modest extent of defense victories.[122] When this occurs, the once-glowing promise

---

116. United States v. Patane, 542 U.S. 630, 630 (2004).

117. Michigan v. Tucker, 417 U.S. 433 (1974).

118. New York v. Quarles, 467 U.S. 649, 655 (1984).

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).

120. *See* Herring v. United States, 555 U.S. 135, 144, 147 (2009).

> [T]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system . . . .
>
> . . . .
>
> . . . [W]hen police mistakes are the result of negligence . . . rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not "pay its way."

Id.

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:

> [T]o 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*.

Maine v. Moulton, 474 U.S. 159, 180 (1985).

122. *See Moulton*, 474 U.S. at 180 (granting relief based on government use of undercover agent to deliberately elicit confession); *Henry*, 447 U.S. at 279 (same). Indeed, the stage has long been set for the Court to more fully apply limits to the "fruit of the poisonous tree" doctrine in the *Massiah* context. *See, e.g.*, Nix v. Williams, 467 U.S. 431, 441 (1984) (applying the inevitable discovery doctrine to a Sixth Amendment violation, allowing admission of evidence of the location of victim's body and its condition). Time will tell whether the Court will also apply two other major limits to the doctrine—the independent source and attenuation limits. Already, lower courts have applied the independent source exception, holding in favor of the government despite the existence of a *Massiah* violation. *See, e.g.*, State v. Hackman, 943 P.2d 865, 870 (Ariz. Ct. App. 1997).

of *Massiah* will be snuffed out alongside that of due process[123] and the *Miranda* limits on police interrogation.[124]

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.[125] Indeed, despite the Supreme Court's assurance in *Montejo v. Louisiana* that *Massiah* endured in "substance,"[126] in truth, when *Montejo* was decided in 2009, little remained of what was once heralded as a constitutional bulwark against police overreach.[127] 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]."[128]

Whether the outcome is perhaps attributable to *Massiah*'s purported amorphous constitutional rationale,[129] or simply reflects the broader ongoing effort of conservative court majorities to limit Warren Court defense-oriented holdings,[130] 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.

---

123. *See* Tomkovicz, *Sacrificing* Massiah, *supra* note 15, at 54–55.

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.

126. Montejo v. Louisiana, 556 U.S. 778, 786 (2009).

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.").

130. *See generally* Carol S. Steiker, *Counter-Revolution in Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996).