CRIMINAL PROCEDURE—HABEAS CORPUS AND RIGHT TO COUNSEL—SUPREME COURT PLURALITY DETERMINES THAT SUCCESSIVE PETITIONS FOR HABEAS RELIEF MAY ONLY BE GRANTED IF DEFENDANT CAN DEMONSTRATE "COLORABLE SHOWING OF FACTUAL INNOCENCE" AND SIXTH AMENDMENT DOES NOT FORBID ADMISSION INTO EVIDENCE OF DEFENDANT'S STATEMENTS TO INFORMANT—*Kuhlmann v. Wilson*, 106 S. Ct. 2616 (1986).

An imprisonment violative of the United States Constitution may be challenged by a writ of habeas corpus.[1] The writ of habeas corpus is grounded upon a deeply rooted belief that incarceration resulting from an abridgement of a defendant's constitutional rights is intolerable.[2] Utilization of habeas corpus proceedings, however, is not unbounded.[3] The entitlement of criminal defendants to vindicate their federal constitutional rights has historically conflicted with considerations of federalism and the perceived need for finality in criminal litigation.[4] Supreme Court decisions have confronted this inherent tension on numerous occasions.[5] The Court recently addressed these fundamental conflicts surrounding the writ of habeas corpus in

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[1] *See* 28 U.S.C. § 2241 (1982). Section 2241 states in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .
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> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
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> (c) The writ of habeas corpus shall not extend to a prisoner unless
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> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
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> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
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> (3) He is in custody in violation of the Constitution or laws or treaties of the United States. . . .

[2] *See* Fay v. Noia, 372 U.S. 391, 401-02 (1963).

[3] *See generally* Rosenberg, *Constricting Federal Habeas Corpus: Great Writ to Exceptional Remedy*, 12 HASTINGS CONST. L.Q. 597 (1985) (analyzing recent cases restricting right to habeas corpus relief).

[4] *See generally* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (examining situations in which federal courts' habeas corpus jurisdiction should be utilized to relitigate constitutional issues decided in state criminal proceedings).

[5] *See, e.g.*, Jackson v. Virginia, 443 U.S. 307 (1979); Wainwright v. Sykes, 433 U.S. 72 (1977); Stone v. Powell, 428 U.S. 465 (1976); Brown v. Allen, 344 U.S. 443

Kuhlmann v. Wilson.[6]

On July 4, 1970, three armed individuals robbed the Star Taxicab Garage located in the Bronx, New York.[7] During the course of the robbery, the night dispatcher was fatally shot.[8] Three witnesses identified Joseph Wilson as being on the premises before the robbery occurred.[9] Additionally, the witnesses observed Wilson fleeing the scene of the crime, carrying money in his arms.[10] Wilson voluntarily surrendered to the police on July 8, 1970.[11] After receiving his *Miranda* warnings, Wilson admitted that he had been present during the commission of the crimes.[12] He stated, however, that he had played no part in the robbery and that he was merely a witness.[13]

After arraignment and assignment of counsel, Wilson was confined in the Bronx House of Detention.[14] Pursuant to the plan of New York City Detective Cullen, Wilson was transferred to a cell which overlooked the scene of the crime.[15] Wilson's cellmate was prisoner Benny Lee,[16] who had agreed with Detective Cullen to act as a police informant.[17] Lee was instructed to "keep his ears open"[18] and "to see if [he] could find out"[19] the

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(1953); Smith v. Baldi, 344 U.S. 561 (1953); Moore v. Dempsey, 261 U.S. 86 (1923); Frank v. Mangum, 237 U.S. 309 (1915).

6 106 S. Ct. 2616 (1986).

7 *Id.* at 2619 (Powell, J., plurality opinion).

8 *Id.*

9 The witnesses implicated Wilson in the crimes by identifying photographs in police possession. Brief for Respondent at 2, Kuhlmann v. Wilson, 106 S. Ct. 2616, No. 84-1479 (1986) [hereinafter Brief for Respondent].

10 *Id.* Only two of the three witnesses who testified to seeing Wilson on the premises of the Star Garage prior to the robbery also claimed to have seen him fleeing the scene of the crime carrying money. *Id.*

11 Wilson v. Henderson, 742 F.2d 741, 742 (2d Cir. 1984), *rev'd sub nom.* Kuhlmann v. Wilson, 106 S. Ct. 2616 (1986).

12 *Id.* Wilson was a former employee of the Star Taxicab Garage. *Kuhlmann*, 106 S. Ct. at 2619 (Powell, J., plurality opinion).

13 *Id.* Wilson further contended that his flight was a result of his fear of being blamed for the crime. *Wilson*, 742 F.2d at 742.

14 *Wilson*, 742 F.2d at 742. Wilson was arraigned and assigned counsel on July 9, 1970. Brief for Respondent, *supra* note 9, at 3.

15 *Wilson*, 742 F.2d at 742.

16 *Kuhlmann*, 106 S. Ct. at 2619 (Powell, J., plurality opinion). Lee, a narcotics addict and a third time offender, was being held at the Bronx House of Detention awaiting sentencing on a guilty plea for a reduced charge of third degree robbery. Brief for Respondent, *supra* note 9, at 3.

17 Brief for Respondent, *supra* note 9, at 3. Lee had known Detective Cullen for five years. *Id.* During this period Cullen had utilized Lee's services as an informant for the police. *Id.*

18 *Kuhlmann*, 106 S. Ct. at 2619 (Powell, J., plurality opinion). Detective Cullen had approached Lee on July 7, 1970, one day before Wilson's surrender. Brief for

identity of the other perpetrators involved in the robbery and murder at the Star Taxicab Garage.[20]

Viewing the scene of the robbery visibly upset Wilson, prompting him to discuss the crimes with Lee.[21] Wilson related to Lee the identical account of events which he had given to the police at the time of his arrest.[22] Lee advised Wilson to "come up with a better story"[23] since Wilson's first one "didn't sound too good."[24] Initially Wilson did not alter his story, but he later began to change details in his original narrative.[25] Eventually, Wilson admitted his participation in the crimes to Lee.[26] Shortly thereafter, Lee reported Wilson's inculpatory remarks to Detective Cullen.[27]

Wilson was subsequently indicted and charged with murder and felonious possession of a weapon.[28] A pre-trial *Huntley*[29]

Respondent, *supra* note 9, at 3. Showing Lee a photograph of Wilson, Detective Cullen asked Lee if he was at all familiar with Wilson. *Id.* Lee revealed that he had " 'seen him around' but did not know Wilson very well." *Id.* Cullen then asked Lee to attempt to elicit any information that could help establish the case against Wilson. *Id.*

19 Brief for Respondent, *supra* note 9, at 3. The testimony at trial never clearly resolved the issue whether Lee received some form of consideration for his testimony against Wilson. *Id.* at 3-4. Evidence was presented, however, which revealed that in the past Lee had been paid to provide the police with information which he elicited from select criminal defendants. *Id.*

20 *Id.* at 3. Lee testified at trial that he had served as an informant for the police on more than 100 prior occasions. *Id.*

21 *Wilson*, 742 F.2d at 742. Upon entering the cell, and viewing the scene of the crime, Wilson's first words to Lee were that "someone's messing with me because this is the place I'm accused of robbing." *Id.*

22 *Id.* Wilson stated that on the night of the robbery he was visiting his brother who worked at the Star Garage. Brief for Respondent, *supra* note 9, at 4.

23 *Kuhlmann*, 106 S. Ct. at 2619 n.1 (Powell, J., plurality opinion).

24 *Id.*

25 *Id.* at 2619 (Powell, J., plurality opinion). Wilson's change of heart may also be partially attributed to a visit he received from his brother. *Id.* During their conversation, Wilson's brother told him that their family was upset by Wilson's implication in the shooting and robbery. *Id.* at 2619-20 (Powell, J., plurality opinion).

26 *Id.* at 2620 (Powell, J., plurality opinion). Although descriptions of the other perpetrators were given to the police by eye witnesses, they were never apprehended. Brief for Respondent, *supra* note 9, at 4 n.1.

27 *Kuhlmann*, 106 S. Ct. at 2620 (Powell, J., plurality opinion). Lee spent nine to ten days alone with Wilson in the cell overlooking the scene of the crime. Brief for Respondent, *supra* note 9, at 5. During this time, Wilson gradually began to change details in his account of the events surrounding the robbery of the Star Garage. *Id.* Lee surreptitiously recorded a written account of these conversations with Wilson. *Id.* Lee then gave these notes to Detective Cullen. *Id.*

28 *Wilson*, 742 F.2d at 742.

29 *See* People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965). *Huntley* established the pre-trial procedure utilized in New York criminal

hearing was held in response to Wilson's motion to suppress Lee's testimony at trial.[30] The motion was denied based on the trial court's determination that Wilson's statements to Lee were voluntary and unsolicited, rather than a product of an interrogation.[31] A jury convicted Wilson of common law murder and felonious possession of a weapon.[32] Direct appeals to the appellate division and to the New York Court of Appeals were unavailing.[33]

Having exhausted his state remedies,[34] Wilson filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York.[35] The habeas petition alleged that Wilson's sixth amendment right to counsel had been violated by the admission of Lee's testimony at trial.[36] The district court denied the writ and reasoned that no sixth amendment violation could be present where formal interrogation by Lee was absent.[37] The court found that Wilson's statements were spontaneous rather than the product of interrogation, and accordingly, it rejected Wilson's argument.[38] The district court's decision was affirmed by the Court of Appeals for the Second Circuit.[39] Thereafter, the United States Supreme Court denied certiorari in 1979.[40]

The following year, the United States Supreme Court an-

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cases when a defendant moves to suppress evidence at trial. *See id.* at 78, 204 N.E.2d at 183, 255 N.Y.S.2d at 843.

30 *Wilson*, 742 F.2d at 742.

31 *Id.* The denial of Wilson's suppression motion resulted in the admittance of Lee's testimony into evidence at trial. *Id.*

32 *Id.* Wilson was sentenced to twenty years to life for his part in the murder of the dispatcher at the Star Garage. Brief for Respondent, *supra* note 9, at 6. For the weapons count, he was sentenced to a concurrent term not to exceed seven years. *Id.*

33 *Wilson*, 742 F.2d at 742. The trial court's decision was affirmed by the appellate division without an opinion. People v. Wilson, 41 A.D. 2d 903, 343 N.Y.S.2d 563 (1973). Wilson was denied leave to appeal by the New York Court of Appeals. *Kuhlmann*, 106 S. Ct. at 2620 (Powell, J., plurality opinion).

34 A federal court will not review a habeas corpus petition until all potential state remedies have been exhausted. *See generally* Wainwright v. Sykes, 433 U.S. 72 (1977).

35 *Kuhlmann*, 106 U.S. at 2620 (Powell, J., plurality opinion). Wilson's petition for habeas corpus relief was filed *pro se*. Brief for Respondent, *supra* note 9, at 6.

36 *Kuhlmann*, 106 S. Ct. at 2620 (Powell, J., plurality opinion).

37 *Id.*

38 Wilson v. Henderson, 584 F.2d 1185, 1187 (2d Cir. 1978), *cert. denied*, 442 U.S. 945 (1979).

39 *Kuhlmann*, 106 S. Ct. at 2620 (Powell, J., plurality opinion).

40 Wilson v. Henderson, 442 U.S. 945 (1979). The United States Supreme Court denied certiorari without opinion. *See id.*

nounced its decision in *United States v. Henry*.[41] The *Henry* Court utilized the test enunciated in *Massiah v. United States*[42] to suppress statements made by a defendant to a paid police informant.[43] *Massiah* held that a defendant is denied the basic protections of the sixth amendment when statements are "deliberately elicited" after indictment and in the absence of counsel.[44] The *Henry* Court, however, expanded the protections of *Massiah* by asserting that a sixth amendment violation occurs when the government creates an atmosphere "likely to induce" inculpatory statements from the defendant.[45] Consequently, with reliance on this new standard, Wilson filed a motion in state court to vacate his conviction.[46] Wilson contended that admission of Lee's testimony was unconstitutional in light of *Henry*.[47] The motion, however, was denied on the grounds that *Henry* was both factually distinguishable and incapable of having retroactive effect.[48] The appellate division denied Wilson's application for leave to appeal.[49]

Having again exhausted all available state court remedies, Wilson filed a second petition for a writ of habeas corpus in the district court.[50] This second habeas petition was also denied.[51] The Court of Appeals for the Second Circuit reversed this determination, finding *Henry* to be factually indistinguishable.[52] The circuit court repudiated the notion that principles of finality should be dispositive of Wilson's habeas petition.[53] Instead, the court of appeals considered Wilson's application because it believed that the "ends of justice" required the granting of re-

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41 447 U.S. 264 (1980).

42 377 U.S. 201 (1964).

43 *See id.* at 206.

44 *Id. Massiah* established that once a defendant's sixth amendment right to counsel has attached, any statements deliberately elicited in the absence of his attorney must be excluded from evidence at trial. *Id.*

45 *See Henry*, 447 U.S. at 274.

46 *Kuhlmann*, 106 S. Ct. at 2621 (Powell, J., plurality opinion).

47 *Id.*

48 *Id. Henry* was distinguished on the basis that the informant in *Henry* had been paid by the government. *Wilson*, 742 F.2d at 743.

49 *Kuhlmann*, 106 S. Ct. at 2621 (Powell, J., plurality opinion). Wilson's petition was denied on the grounds that his case was distinguishable on its face from *Henry*. *Id.*

50 *Id.*

51 *Id.* The district court concluded that Wilson's inculpatory statements to Lee were spontaneous rather than the product of interrogation. *Id.*

52 *Id.* The circuit court found that all the elements given consideration by the *Henry* Court were also present in Wilson's case. *Wilson*, 742 F.2d at 745.

53 *Wilson*, 742 F.2d at 743.

view.[54] Applying the standards enunciated in *Henry*,[55] the Second Circuit determined that the lower court had erred[56] and remanded the case to the district court.[57] Simultaneously, the state of New York sought review of the circuit court's ruling.[58] In response, the United States Supreme Court granted certiorari to permit review of both issues: the applicability of *Henry* and the legitimacy of the circuit court's entertaining of successive habeas corpus petitions.[59] In a plurality decision, the Supreme Court reversed the judgment of the Second Circuit.[60]

SUCCESSIVE WRITS OF HABEAS CORPUS

Historically, the Supreme Court has displayed a willingness to reevaluate and modify its earlier views of the scope of the writ of habeas corpus.[61] Perhaps the most obvious reason for this mutability is the significance of the principles underlying the writ's existence.[62] Habeas corpus is rooted in the principle "that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release."[63]

Originally a common law right, the writ of habeas corpus is

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54 *Id.*

55 *See infra* notes 141-151 and accompanying text for a discussion of *Henry*.

56 *Wilson*, 742 F.2d at 745. The circuit court found that Lee's ongoing conversations with Wilson, coupled with the scene intentionally staged by the government, induced Wilson to make the incriminating remarks. *Id.*

57 *Id.* at 748. The district court was instructed to order Wilson's release from prison unless the state elected to relitigate the charges. *Id.*

58 *See Kuhlmann*, 106 S. Ct. at 2621 (Powell, J., plurality opinion).

59 *Id.* at 2621-22 (Powell, J., plurality opinion).

60 *Id.* at 2622 (Powell, J., plurality opinion).

61 *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72 (1977) (establishing "cause and prejudice" standard for review of habeas corpus); Stone v. Powell, 428 U.S. 465 (1976) (eliminating habeas corpus review of fourth amendment challenges where state court has provided full and fair opportunity for review of issue); Brown v. Allen, 344 U.S. 443 (1953) (examining degree of deference that federal court must give to state court's determination of constitutional issues on habeas review); Waley v. Johnston, 316 U.S. 101 (1942) (eliminating concept of jurisdiction as primary consideration in granting federal habeas corpus review); Moore v. Dempsey, 261 U.S. 86 (1923); Frank v. Mangum, 237 U.S. 309 (1915) (broadening concept of habeas corpus jurisdiction of federal courts).

62 *See* Fay v. Noia, 372 U.S. 391, 401 (1963). According to the Court, development of habeas corpus is "inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints." *Id.* at 401-02.

63 *Id.* at 402.

explicitly recognized in the United States Constitution.[64] Initially, the habeas corpus writ did not extend to prisoners in state custody.[65] Seeking to extend the protection of the habeas corpus writ to prisoners in state custody, Congress expanded the statutory language of the Judiciary Act of 1867.[66] Consequently, the writ of habeas corpus was expressly made available to those in either state or federal custody.[67]

Originally, the grounds for the granting of a habeas petition were exceedingly narrow.[68] Gradually, the Court expanded the availability of habeas corpus review to preserve the constitutional rights of a criminal defendant.[69] Most attempts at expansion or contraction of the writ's scope, however, engendered heated debate.[70] The granting of successive habeas corpus petitions is one facet of the writ that has elicited such debate.[71]

In 1923, the Court first considered the issue of successive habeas corpus petitions in *Salinger v. Loisel*.[72] The situation in *Salinger* arose as a result of the defendant's persistent resistance to the government's efforts to remove him to the District of South Dakota.[73] In that case, Salinger, indicted on charges of mail fraud, posted bail but later failed to appear in the South Dakota District Court.[74] In an attempt to avoid the jurisdiction of the district court, Salinger fled to New York.[75] Once his whereabouts

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64 Habeas corpus is incorporated into the United States Constitution in the following provision: "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

65 *See Fay*, 372 U.S. at 409.

66 *Id.* at 415-18. *See also Kuhlmann*, 106 S. Ct. 2622 n.7 (Powell, J., plurality opinion).

67 *See Fay*, 372 U.S. at 438.

68 *See* Wainwright v. Sykes, 433 U.S. 72, 79 (1977). Until the twentieth century, the substantive scope of review was exclusively limited to the concept of jurisdiction. *Id.* A court entertaining a habeas corpus petition was exclusively limited to reviewing the validity of the jurisdiction of the sentencing court. *Id.* at 78-79. In Waley v. Johnston, 316 U.S. 101 (1942), this limitation was expressly abandoned. *Wainwright*, 433 U.S. at 79.

69 *See, e.g.*, Brown v. Allen, 344 U.S. 443 (1953); Smith v. Baldi, 344 U.S. 561 (1953); Moore v. Dempsey, 261 U.S. 86 (1923). The Court's decisions, however, have not been exclusively limited to extending the scope of habeas corpus review. *See supra* note 61.

70 *See Wainwright*, 433 U.S. at 78. *See also supra* notes 61 and 68.

71 *See generally* Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966) (tracing development of habeas corpus doctrine).

72 265 U.S. 224 (1924).

73 *Id.* at 225-26.

74 *Id.* at 226-27.

75 *Id.* at 226.

were discovered, proceedings were begun to arrest and remove him from New York to South Dakota.[76] After his arrest, Salinger petitioned for habeas corpus relief in New York.[77] This petition was denied.[78]

Rather than remand Salinger into a marshal's custody to insure his removal to South Dakota, the New York court, with misplaced trust, allowed Salinger to again post a bond for his release.[79] Before he was scheduled to appear in South Dakota, Salinger travelled to New Orleans and voluntarily appeared before a local commissioner with a representative of the surety that issued his bond in New York.[80] Salinger was subsequently held in a Louisiana marshal's custody to await the issuance of an order for his removal to South Dakota.[81] Salinger filed another petition for habeas corpus relief in Louisiana and was once again released on bail pending a hearing on the habeas petition.[82] While awaiting the results of this proceeding, Salinger was arrested for his failure to appear in South Dakota as ordered.[83] This resulted in the issuance of a third petition for habeas corpus review.[84] After habeas relief was denied, Salinger appealed to the Supreme Court for review of the denials of his successive habeas corpus petitions.[85]

The *Salinger* Court first addressed the state's contention that the habeas decision in New York should be considered a final adjudication and that all subsequent habeas reviews were precluded by the doctrine of *res judicata*.[86] Writing for the Court, Justice Van Devanter refuted the state's per se application of the doctrine and observed that at common law *res judicata* did not ap-

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76 *Id.* The presiding commissioner in New York found probable cause after reviewing Salinger's indictment and instructed him to await issuance of a warrant for his removal. *Id.*

77 *Id.* Salinger was granted a hearing at which probable cause was found to detain him until a warrant could be issued for his removal to South Dakota. *Id.*

78 *Id.* Salinger appealed the denial of his habeas petition, but the circuit court affirmed the decision of the district court. *Id.*

79 *Id.* at 227. Salinger had been ordered to appear in the South Dakota district court two weeks after his New York habeas appeal was reviewed. *Id.*

80 *Id.* The surety's representative undertook the surrender with Salinger's complete consent. *Id.*

81 *Id.*

82 *Id.*

83 *Id.* Salinger was again incarcerated pending the issuance of a warrant for his removal to South Dakota. *Id.*

84 *Id.* at 228. Despite his previous record, Salinger was again released on bail pending the court's hearing of his petition for habeas corpus relief. *Id.*

85 *Id.*

86 *Id.* at 230.

ply to denial of habeas corpus relief.[87] The Justice noted, however, that "it does not follow that a refusal to discharge on one application is without bearing or weight when a later application is being considered."[88] The *Salinger* Court asserted that the principle of *res judicata* was insufficient in and of itself to dispose of the issue of what treatment should be accorded successive habeas petitions.[89] Justice Van Devanter opined that the Court should maintain a policy of disposing each successive habeas petition by exercising "a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought."[90] Thus, although the traditional *res judicata* doctrine was inapplicable, a court "may take into consideration the fact that a previous application has been made to another officer and refused; and in some instances that fact may justify a refusal of the second."[91] The Supreme Court maintained that this policy would secure the status of habeas corpus as a "privileged writ of freedom"[92] while simultaneously safeguarding against abuse of the writ.[93] Accordingly, Justice Van Devanter established that the per se use of the doctrine of *res judicata* was inapplicable in successive habeas corpus proceedings.[94]

The Court did not address the issue of successive habeas corpus petitions until forty years later when it rendered its decision in the landmark case of *Sanders v. United States*.[95] In *Sanders*, the defendant pleaded guilty[96] to charges of bank robbery after waiving indictment and the assistance of counsel.[97] He later filed

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87 *Id.*

88 *Id.*

89 *Id.* at 230-31.

90 *Id.* at 231.

91 *Id.* The consideration of the court on the second petition "will naturally be affected to some degree by the character of the court or officer to whom the first application was made, and the fullness of the consideration given to it." *Id.* at 231-32 (quoting Ex Parte Cuddy, 40 F. 62 (1889)).

92 *Id.* at 232.

93 *Id.*

94 *Id.* at 230. The Court noted that "[t]he state courts generally have accepted that rule where not modified by statute; the lower federal courts usually have given effect to it; and this Court has conformed to it and thereby sanctioned it, although announcing no express decision on the point." *Id.* at 230.

95 373 U.S. 1 (1963).

96 *Id.* at 4. Before his sentencing, Sanders admitted to his drug addiction and requested to be sent for drug rehabilitation. *Id.* The presiding judge agreed to recommend this course of action. *Id.*

97 *Id.* Sanders failed to raise any claim pertaining to the adequacy of the procedure employed "to advise him of his constitutional rights to assistance of counsel, grand jury indictment, and trial by jury." *Id.* at 4 n.2.

a petition for habeas corpus relief which was denied.[98] Sanders then filed a second habeas application alleging mental incompetence at his trial and sentencing due to his narcotic addiction.[99] The district court denied Sander's motion on the ground that he should have introduced the issue of his mental incompetency at the time of his first motion.[100] The court of appeals affirmed this decision.[101]

In an opinion by Justice Brennan, the Supreme Court reversed the circuit court's decision.[102] The Court asserted that "a prisoner shall be granted a hearing on a motion which alleges sufficient facts to support a claim for relief unless the motion and the files and the records of the case 'conclusively show' that the claim is without merit."[103] Justice Brennan observed that the principles promulgated in *Salinger* were not rigid rules;[104] accordingly, he asserted that a court is permitted, not compelled, to decline to entertain a successive habeas petition.[105]

The *Sanders* Court established a standard of review to assist courts in determining when controlling weight should be given to the prior denial of a petition for habeas corpus relief.[106] The test contemplated a situation in which the "ground"[107] presented in the successive petition was the same "ground" determined ad-

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98 *Id.* at 5. The habeas petition was denied because it stated conclusions rather than facts. *Id.* Additionally, the Court noted that the files and records conclusively showed that Sanders was not entitled to relief. *Id.*

99 *Id.* Because of his addiction, Sanders was intermittently given drugs by the jail's medical personnel. *Id.*

100 *Id.* at 6.

101 Sanders v. United States, 297 F.2d 735, 736-37 (9th Cir. 1961), *rev'd*, 373 U.S. 1 (1963). In a per curiam opinion, the court of appeals held:

> Where, as here, it is apparent from the record that at the time of filing the first motion the movant knew the facts on which the second motion is based, yet in the second motion set forth no reason why he was previously unable to assert the new ground and did not allege that he had previously been unaware of the significance of the relevant facts, the district court, may, in its discretion, decline to entertain the second motion.

Id. at 736-37.

102 *Sanders*, 373 U.S. at 6. The Supreme Court held that the sentencing court should have granted a hearing for the successive habeas petition. *Id.*

103 *Id.*

104 *Id.* at 12.

105 *Id.* The Court reaffirmed the principle expressed in *Salinger* that the doctrine of *res judicata* was inherently inapplicable to habeas corpus proceedings. *Id.*; *see also supra* notes 72-94 and accompanying text (discussion of *Salinger*).

106 *Sanders*, 373 U.S. at 15.

107 The Court defined "ground" to mean "a sufficient legal basis for granting the relief sought by the applicant." *Id.* at 16.

versely to the defendant, on the merits, in a prior application.[108] Additionally, the *Sanders* Court determined that "the ends of justice would not be served by reaching the merits of the subsequent application."[109] The Court emphasized that the essence of the test is " 'the ends of justice' " and that this phrase "cannot be too finely particularized."[110] The Court ruled that the burden of proof rests on the applicant to show that "although the ground of the new application was determined against him on the merits on a prior application, the ends of justice would be served by a redetermination of the ground."[111] The Court asserted that the burden of proof, however, shifts to the government to show an abuse of the writ[112] if a different ground is presented by a new application or if the same ground was presented earlier but was not adjudicated on the merits.[113] In either situation, the Court established that determinations are ultimately delegated to the "sound discretion of the federal trial judges."[114] Accordingly, the Court remanded the case to the district court to reconsider the denial of Sander's successive habeas corpus petition.[115]

SIXTH AMENDMENT RIGHT TO COUNSEL

The exclusion of evidence for violation of a defendant's right to the assistance of counsel is a relatively modern development in criminal procedure. *Spano v. New York*[116] presaged the expansion of the sixth amendment to exclude the admission of evidence de-

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108 *Id.*

109 *Id.* at 15. The Court held that "[i]f purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application." *Id.* at 17.

110 *Id.* In adopting the "ends of justice" test, the Court seemed to indicate that it wanted to establish a flexible, broad standard for review of successive habeas petitions. *See id.*

111 *Id.*

112 *Id.* at 10-12. Relying on *Sanders*, the *Kuhlmann* Court noted that "[t]he concept of 'abuse of the writ' is founded on the equitable nature of habeas corpus." *Kuhlmann*, 106 S. Ct. at 2622 n.6 (Powell, J., plurality opinion). If a defendant "engages in other conduct that 'disentitles him to the relief he seeks', the federal court may dismiss the subsequent petition on the ground that the prisoner has abused the writ." *Id.* (quoting *Sanders*, 373 U.S. at 17-19).

113 *Sanders*, 373 U.S. at 15-17.

114 *Id.* at 18. The establishment of this broad, discretionary standard for reviewing successive habeas petitions reflects the principle that habeas corpus relief has historically been viewed as "governed by equitable principles." *Id.* at 17.

115 *Id.* at 23.

116 360 U.S. 315 (1959).

liberately elicited in the absence of counsel.[117] The *Spano* Court relied upon the "totality of the circumstances test" to reverse a criminal conviction obtained through the use of a coerced confession.[118] Four Justices in two concurring opinions averred that the outcome could have been similarly resolved on sixth amendment grounds.[119] They opined that reversal of the conviction was required on the specific ground that deliberate elicitation of a confession after indictment, as well as the failure to provide counsel when requested, was violative of the sixth amendment.[120] The concurring Justices in *Spano* asserted that the constitutional guarantee of counsel's assistance at trial was intended to protect an indicted defendant during police interrogation in extrajudicial proceedings.[121] The concurring Justices observed that providing a defendant with any less protection potentially denies him "effective representation by counsel at the only stage when legal aid and advice would help him."[122]

The theories espoused by the concurring Justices in *Spano* were adopted by the Court in 1964 in *Massiah v. United States*.[123]

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117 *Id.* at 327 (Stewart, J., concurring). The sixth amendment right to counsel attaches at least at the time of indictment. *Id.* at 326-27 (Stewart, J., concurring). Later cases have broadened this protection to apply at the time that adversary judicial proceedings have commenced. *See* Massiah v. United States, 377 U.S. 201, 205-06 (1964).

118 *Id.* at 320-24. Prior to *Miranda*, courts utilized a "totality of the circumstances test" to determine if a confession was coerced. All the circumstances surrounding the confession were examined to determine if the statements were made voluntarily. *See, e.g.*, Rogers v. Richmond, 365 U.S. 534 (1961) (confessions held inadmissible when obtained by subterfuge and force); Lisenba v. California, 314 U.S. 219 (1941) (confession held involuntary unless product of defendant's free and rational choice); Brown v. Mississippi, 297 U.S. 278 (1936) (confession held inadmissible if product of coercion and brutality).

119 *See Spano*, 360 U.S. at 324-26 (Douglas, J., concurring); *id.* at 326-27 (Stewart, J., concurring).

120 *Id.* at 326 (Douglas, J., concurring).

121 *Id.* Historically, the Court has determined that the period of time following arraignment until the time of trial is the most critical span of time in the criminal proceedings. *Id.* at 327 (Douglas, J., concurring). During this time, a criminal defendant's rights must be carefully protected. *See, e.g.*, White v. Maryland, 373 U.S. 59 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); Powell v. Alabama, 287 U.S. 45 (1932).

122 *Spano*, 360 U.S. at 326 (Douglas, J., concurring). The power of sixth amendment protections espoused by the concurring Justices in *Spano* were viewed as being reflective of the basic constitutional principles established more than 25 years earlier in Powell v. Alabama, 287 U.S. 45, 57 (1932). *See Spano*, 360 U.S. at 325 (Douglas, J., concurring).

123 377 U.S. 201 (1964). *Massiah* developed from the perceived need to restrain the coercive power of the police. *See generally* Kamisar, *"Interrogation" After Brewer v. Williams*, 67 GEO. L.J. 1 (1978).

Following his indictment, Massiah retained counsel and pleaded not guilty to charges of conspiracy to possess and distribute cocaine.[124] Federal agents utilized Massiah's co-defendant as an informer to elicit inculpatory statements from Massiah while he was free on bail.[125] These incriminating statements were instrumental in obtaining Massiah's conviction.[126] The Supreme Court reversed the conviction on the basis that the inculpatory statements were acquired in violation of Massiah's sixth amendment right to counsel.[127]

The *Massiah* Court determined that the basic protections of the sixth amendment right to counsel are denied a defendant when, after indictment, information is deliberately elicited in the absence of his attorney.[128] The Court noted that if the protection afforded by a guarantee of counsel "is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse."[129] The Court declared that the imposition on the right to counsel is even more serious when a defendant is unaware that he is under interrogation by a government agent.[130] The *Massiah* Court concluded that a defendant's inculpatory statements deliberately elicited after the right to counsel attaches must therefore be excluded from evidence at trial.[131]

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[124] *Massiah*, 377 U.S. at 202. Massiah was a merchant seaman aboard the S.S. *Santa Maria*. *Id.* When the *Santa Maria* arrived in New York, federal agents searched the ship and uncovered five packages containing approximately three and a half pounds of cocaine. *Id.* Evidence was found linking Massiah to the drugs. *Id.*

[125] *Id.* An individual named Colson was arrested for the identical substantive offense. *Id.* Colson was released on bail at approximately the same time as Massiah. *Id.* Several days after their conditional release, Colson decided to assist the government in its investigation of the alleged narcotics trafficking. *Id.* Massiah was unaware of Colson's cooperation with the government. *Id.*

[126] *Id.* at 203. In order to elicit information from the unsuspecting Massiah, Colson allowed the government to install a radio transmitter in the front of his automobile. *Id.* at 202-03. On November 19, 1959, Colson met with Massiah in his car. *Id.* at 203. The two men engaged in a lengthy conversation while a government agent sat nearby listening to the transmission. *Id.* These statements were used against Massiah at his trial. *Id.*

[127] *Id.* at 207.

[128] *Id.* at 206. The right to counsel can be waived but the waiver must be voluntary and knowing. *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[129] *Massiah*, 377 U.S. at 206.

[130] *Id.* The *Massiah* Court, in resolving the issue on sixth amendment grounds, declined to address potential fourth amendment grounds for holding Massiah's statements inadmissible. *Id.* The Court apparently wished to utilize the opportunity presented to firmly establish the sixth amendment right to counsel as a viable protection for criminal defendants. *See id.* at 204.

[131] *Id.* at 206-07. The Court declared that its holding in *Massiah* only prohibited

The principles established in *Massiah* were reasserted in the 1977 decision of *Brewer v. Williams*.[132] In that case, the defendant Williams was arrested, arraigned, and committed to jail for the abduction and murder of a young girl.[133] During a police escorted transfer to Des Moines, Iowa, Williams expressed his intention to remain silent until he reached his attorney.[134] Nevertheless, one of the police officers elicited inculpatory statements from the deeply religious defendant by delivering what has become known as the "Christian burial speech."[135] Williams' incriminating actions and statements were subsequently used to obtain his conviction.[136] In affirming the lower courts' decisions, the United States Supreme Court ruled that the conviction was violative of Williams' sixth amendment right to counsel.[137]

Writing for the majority, Justice Stewart asserted that *Massiah* clearly established that, once the adversary process has begun, a defendant has a right to legal representation whenever the

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the use of a criminal defendant's own incriminating remarks against himself at trial. *Id.* at 207. The decision did not prohibit these remarks from being utilized by the prosecution against other potential criminal defendants. *See id.*

132 430 U.S. 387 (1977). The result in *Brewer* also could have been reached by applying the fifth amendment's protection against self-incrimination instead of utilizing the sixth amendment right to counsel argument.

133 *Id.* at 390-91. The victim, Pamela Powers, was ten years old at the time of her death. *Id.* at 390. She was abducted on December 24, 1968 while attending her brother's wrestling tournament at a local YMCA with her family. *Id.* Shortly before her abduction and murder, Williams had escaped from a mental hospital. *Id.*

134 *Id.* at 392. Williams had two attorneys, one in Davenport where he was apprehended and another in Des Moines. *Id.* at 390-91. Williams' Davenport attorney was denied permission to travel with the defendant during the police escorted ride to Des Moines. *Id.* at 391-92. The escorting officers agreed that Williams was not to be questioned until he reached his other attorney at the journey's end. *Id.* at 391.

135 *Id.* at 392. The "Christian burial speech" was delivered by one of the detectives who addressed Williams as Reverend and stated:

> They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered. . . .

Id. at 392-93.

136 *Id.* at 394. Williams directed the police to where Pamela Powers was buried. *Id.* at 393.

137 *Id.* at 406. Following his conviction, Williams sought habeas corpus relief in the United States District Court for the Southern District of Iowa. *Id.* at 394. The district court held that Williams' actions and statements were improperly admitted at trial. *Id.* The Eighth Circuit affirmed. *Id.* at 395.

government interrogates him.[138] Justice Stewart ruled that the "Christian burial speech" was "tantamount to interrogation."[139] Consequently, the majority held that any inculpatory statements extracted from Williams were inadmissible.[140]

The scope of the sixth amendment protections were next confronted by the Court in 1980 in *United States v. Henry*.[141] In that case, the defendant, Henry, was indicted for armed robbery and placed in jail with another would-be inmate, Nichols.[142] Nichols, however, was a paid government informant.[143] Nichols had been instructed to acquire information without initiating conversations concerning Henry's pending charges.[144] While Nichols did not ask pointed questions, he did engage in conversations which elicited inculpatory statements from Henry.[145]

The *Henry* Court, in an opinion by Chief Justice Burger, substantially expanded the reach of *Massiah* by broadly interpreting the standard of "deliberate elicitation."[146] Chief Justice Burger began his analysis by emphatically refusing the dissent's recommendation to reconsider the continuing vitality of *Massiah*.[147] The Chief Justice noted that "the mere fact of custody imposes

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138 *Id.* at 401.

139 *Id.* at 400. Williams' mental instability and deeply religious nature were contributing factors in the Court's decision that the "Christian burial speech" was tantamount to interrogation. *Id.*

140 *See id.* at 406. Justice Stewart addressed the state's contention that Williams had waived his sixth amendment right to counsel. *Id.* at 404-05. The Justice stated that there was no affirmative evidence to indicate that Williams waived his rights. *See id.* at 405-06. Additionally, Justice Stewart observed that the state has the burden of proving " 'an intentional relinquishment or abandonment of a known right or privilege.' " *Id.* at 404 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

141 447 U.S. 264 (1980).

142 *Id.* at 266. Nichols had been convicted of forgery. *Id.*

143 *Id.* While incarcerated, Nichols had frequently been paid by the FBI to provide them with confidential information. *Id.*

144 *Id.*

145 *Id.* at 267. Henry confided in Nichols, describing the details of the robbery to him. *Id.*

146 *Id.* at 270-75. *Henry* broadened the scope of the inquiry that courts must make when determining whether "deliberate elicitation" is present. *Id.* at 274. The *Henry* Court held that a court must examine the totality of the circumstances surrounding the elicitation of inculpatory statements to determine if these factors create a situation "likely to induce" a defendant to incriminate himself. *Id.*

147 *Id.* at 269 n.6. Justice Rehnquist expounded his view of *Massiah* and its progeny in his dissenting opinion in *Henry*. *Id.* at 289 (Rehnquist, J., dissenting). Far from desiring the expansion of *Massiah* that *Henry* accomplished, the Justice sought a re-examination of *Massiah's* language and holding. *Id.* at 290. Justice Rehnquist contended that the *Massiah* line of cases "rests on a prophylactic application of the Sixth Amendment right to counsel that in [his] view entirely ignores the doctrinal foundation of that right." *Id.* at 289 (Rehnquist, J., dissenting).

pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents."[148]

Chief Justice Burger next rejected the argument that *Brewer* restricted the applicability of *Massiah*'s "deliberately elicited" test to situations where the functional equivalent of affirmative government interrogation was present.[149] Instead, he expanded the definition of "deliberate elicitation" to cover instances in which the government intentionally created a situation likely to induce the defendant to make inculpatory remarks.[150] Observing that the government had created just such an atmosphere in *Henry*, the Court held that the inculpatory remarks obtained by Nichols were inadmissible.[151]

The principle promulgated by the Supreme Court in *Henry* was reaffirmed in the 1985 decision of *Maine v. Moulton*.[152] Moulton's conviction for burglary and theft was primarily based upon the admission into evidence of inculpatory statements made to an undercover government informant.[153] These incriminating remarks were elicited after Moulton's right to counsel had attached.[154] Drawing from the *Henry* and *Massiah* decisions, the Court reversed the conviction, holding that the sixth amendment "guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections afforded the accused by invoking this right."[155] Therefore, the *Maine* Court asserted that "[t]he determination whether particular action by

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148 *Id.* at 274.

149 *See id.* at 271. In *Brewer*, the Court determined that the defendant's sixth amendment right to counsel was violated because the "Christian burial speech" was the functional equivalent of interrogation. *See supra* notes 132-140 and accompanying text (discussion of *Brewer*).

150 *Henry*, 447 U.S. at 270. The *Henry* Court held three factors to be dispositive in finding deliberate elicitation: "First, Nichols was acting under instructions as a paid informant for the Government; second Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols." *Id.*

151 *Id.* at 270-71, 274-75.

152 106 S. Ct. 477 (1985).

153 *Id.* at 482-83.

154 *Id.* at 485. The Court observed that Moulton had been indicted prior to the elicitation of his remarks, and accordingly, his right to counsel had attached. *Id.*

155 *Id.* at 487. The Court noted that a defendant will seldom be able to produce direct proof of the state's knowledge. *Id.* at 487 n.12. The *Moulton* Court observed, however, that evidence indicating that the state must have known that the actions of its agent were likely to induce incriminating statements in the absence of counsel is sufficient to constitute a violation of the sixth amendment. *Id.*; *see also Henry*, 447 U.S. at 271.

state agents violates the accused's right to assistance of counsel must be made in light of this obligation."[156]

In these prior decisions, the Supreme Court appeared to sanction both an expansive utilization of the sixth amendment right to counsel and a liberal attitude toward the granting of successive habeas petitions. In these prior cases, however, the Court has rarely reached a unanimous decision. The strong dissenting and concurring opinions surrounding these issues reflect the unsettled nature of this area of law. The debate flowing from these constitutional issues was evidenced in the Court's split decision in *Kuhlmann v. Wilson*.[157]

Justice Powell, writing for the *Kuhlmann* plurality, began his analysis of successive habeas corpus petitions with an examination of *Sanders*.[158] The Justice noted that *Sanders* did not set forth particularized guidelines for determining when the "ends of justice" would be served by relitigating issues decided adversely to a defendant.[159] Attempting to ameliorate this situation, Justice Powell defined considerations that should guide the disposition of successive habeas corpus petitions.[160] He sought to redefine the *Sanders* "ends of justice" test as a balancing of the need for finality in criminal litigation and the right of recourse to habeas corpus relief.[161]

In redefining *Sanders*, Justice Powell relied on cases in which the Court denied habeas corpus jurisdiction because the cost to the government in granting review outweighed the interest of the defendant.[162] Similarly, the Justice drew from the text and legis-

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156 *Moulton*, 106 S. Ct. at 487.

157 *Kuhlmann*, 106 S. Ct. at 2618-19. Although Justice Powell authored the opinion of the Court in *Kuhlmann*, his treatment of successive habeas corpus petitions resulted in a splintering of the majority. *Id.* Only three other members of the Court, Chief Justice Burger, Justice Rehnquist, and Justice O'Connor, could be persuaded to concur with Justice Powell's explication of the habeas corpus issue delineated in Parts II and III of the Court's opinion. *Id.* While Justice White and Justice Blackmun joined the plurality in voting for reversal, they refused to indorse the plurality's interpretation of habeas corpus relief. *See id.*

158 *Id.* at 2622 (Powell, J., plurality opinion).

159 *See id.* Justice Brennan, in dissent, believed that this omission by the *Sanders* Court was intentional. *Id.* at 2631 (Brennan, J., dissenting). The Justice further stated that *Sanders* purposely established a broad standard for review of successive habeas corpus petitions. *Id.* at 2631-32 (Brennan, J., dissenting). Finally, Justice Brennan asserted that the *Sanders* Court desired to leave determinations of this sensitive issue to the discretion of the federal trial judges. *Id.*; *see also supra* notes 95-115 and accompanying text (discussion of *Sanders*).

160 *Kuhlmann*, 106 S. Ct. at 2625-26 (Powell, J., plurality opinion).

161 *Id.* at 2626 (Powell, J., plurality opinion).

162 *Id.* at 2622-24 (Powell, J., plurality opinion).

lative history of the habeas corpus statutes which, in pertinent part, set forth the requisites for successive habeas corpus review.[163] Justice Powell asserted that the judiciary should "weigh the interests of the individual prisoner against the sometimes contrary interests of the State in administering a fair and rational system of criminal laws."[164] After enunciating this standard, Justice Powell opined that a defendant must "supplement[] his constitutional claim with a colorable showing of factual innocence"[165] before his interest in accessing a forum for a successive habeas proceeding will outweigh the countervailing state interests.[166] Justice Powell asserted that adoption of this standard would effectuate what he viewed as the Congressional intent behind the habeas statutes—to grant successive habeas petitions in rare instances.[167] In balancing the conflicting interests in *Kuhlmann*, Justice Powell asserted that the evidence of Wilson's guilt was "nearly overwhelming."[168] In view of the fact that Wilson's constitutional claim failed to raise any question as to his guilt or innocence, Justice Powell ruled that the successive

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163 Justice Powell cited 28 U.S.C. § 2244(b) (1982) which provides in pertinent part:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

Kuhlmann, 106 S. Ct. at 2624 n.10 (Powell, J., plurality opinion) (quoting 28 U.S.C. § 2244(b) (1982)).

164 *Id.* at 2625 (Powell, J., plurality opinion). Justice Brennan, in dissent, pointed out that the balancing test previously utilized by the Court was strictly limited to cases of procedural default in state court. *See id.* at 2632-33 (Brennan, J., dissenting).

165 *Id.* at 2627 (Powell, J., plurality opinion). *See generally* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970) (arguing for adoption of "colorable showing of innocence" before state criminal conviction could be collaterally attacked).

166 *Kuhlmann*, 106 S. Ct. at 2627 (Powell, J., plurality opinion).

167 *Id.* at 2625-26 (Powell, J., plurality opinion).

168 *Id.* at 2628 (Powell, J., plurality opinion) (quoting Wilson v. Henderson, 742 F.2d 741, 742 (2d Cir. 1984)).

habeas petition should be dismissed.[169]

The plurality's analysis next shifted to the sixth amendment argument for Wilson's entitlement to relief under the standard set forth in *Henry*.[170] Justice Powell began his inquiry by reviewing *Massiah* and its progeny.[171] The Justice observed that the constitutional protections promulgated by the *Massiah* line of cases were primarily concerned with "secret interrogation by investigatory techniques that are the equivalent of direct police interrogation."[172] The plurality posited that, standing alone, an informant's report of a criminal defendant's incriminating statements is not violative of the sixth amendment right to counsel.[173] Additionally, the plurality ruled that a victimized defendant must demonstrate that the police and the informant performed some action designed to deliberately elicit incriminating remarks.[174] Justice Powell asserted that something beyond an informant's mere listening is necessary before a sixth amendment violation occurs.[175] Embracing this standard, the Court asserted that Lee had not "deliberately elicited" information from Wilson.[176] Accordingly, the plurality held that the circuit court erred in determining that Wilson's right to counsel was violated.[177]

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169 *Id.* This determination was based on the ground that a prior judgment denying relief must be final when an appeal is based on an identical claim. *Id.*

170 *Id.* The plurality determined that the facts of *Wilson* presented the question of a passive listener testifying with regard to incriminating statements he had overheard. *Id.*

171 *See id. See also supra* notes 123-31 and accompanying text.

172 *Kuhlmann*, 106 S. Ct. at 2630 (Powell, J., plurality opinion).

173 *Id.* As Justice Powell asserted in *Henry*, "the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached." *Id.* (quoting *Henry*, 447 U.S. at 276 (Powell, J., concurring)).

174 *Id.* An attempt must be made by the informant to elicit the inculpatory statements. *Id.* This does not necessarily mean that an informant must directly question the defendant. *See id.* All that is needed is a finding that the informant's actions are the equivalent of direct police interrogation. *Id.*

175 *Id.* The *Kuhlmann* plurality stated that the "listening post" exception was a question they would reserve for future review. *Id.*

176 *Id.*

177 *Id.* The plurality determined that the circuit court erred in implicitly concluding that *Wilson* did not present the issue of a passive informant's testimony—the specific question reserved in *Henry*. Justice Powell observed that a prior arrangement for a police informant to be in close proximity to a criminal defendant does not necessarily constitute a sixth amendment violation of the right to counsel. *Id.* The plurality observed that the trial court found that Lee had not "interrogated" Wilson. *Id.* The plurality noted Judge Van Graafeiland's dissent in the lower court wherein he asserted that the majority could not " 'dispense with the presumption that the State court's factual findings are correct without an adequate explanation as to why the findings are not fairly supported by the record.' " *Id.* at 2630 n.23

Concurring in an opinion notable for its extreme brevity as well as for its vehemence, Chief Justice Burger opined that he viewed *Kuhlmann* as presenting a vastly different situation from that in *Henry*.[178] The Chief Justice refused to extend the applicability of the sixth amendment right to counsel further than *Henry* had previously established.[179] Additionally, the Chief Justice took this opportunity to underscore his extreme displeasure with the abusive use of successive habeas corpus petitions.[180] The Chief Justice declared that "the abuse of the Great Writ needs to be curbed so as to limit, if not put a stop to the 'sporting contest' theory of criminal justice so widely practiced today."[181]

In his dissenting opinion, Justice Brennan first addressed the plurality's treatment of the habeas corpus issue.[182] Although a majority of the Court implicitly rejected the view of habeas corpus posited by Justice Powell, the importance of the issues raised compelled Justice Brennan to illustrate why he believed this view was incorrect.[183] Justice Brennan decisively rejected the plurality's interpretation and extrapolation of *Sanders*.[184] The Justice agreed with the plurality's finding that *Sanders* left open "the question of what considerations should inform a court's decision that successive review of an issue previously decided will

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(quoting Wilson v. Henderson, 742 F.2d 741, 749 (2d Cir. 1984) (Graafeiland, J., dissenting)). The Court declared, therefore, that the circuit court's failure to accord to the state trial court's factual findings the presumption of correctness, which is expressly required by 28 U.S.C. § 2254(d), resulted in the erroneous conclusion. *Id.* at 2630. The *Kuhlmann* plurality determined that the circuit court's interpretation of the facts was "completely at odds" with the factual findings espoused by the trial court. Accordingly, the plurality reversed the judgment of the circuit court and concluded that the facts did not present a violation of Wilson's sixth amendment right to counsel. *Id.*

178 *Id.* at 2631 (Burger, C.J., concurring). Chief Justice Burger, the author of *Henry*, contended that *Kuhlmann* presented the question of a passive informer which he had refused to address in *Henry*. *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

182 *See id.* (Brennan, J., dissenting).

183 *See supra* note 157.

184 *See Kuhlmann*, 106 S. Ct. at 2631 (Brennan, J., dissenting). Justice Brennan emphasized the importance of habeas review as a basic safeguard against unconstitutional deprivations of liberty. *See id.* at 2632 (Brennan, J., dissenting). In support of his contentions, Justice Brennan traced the legislative history of the habeas corpus legislation. *Id.* at 2632-35 (Brennan, J., dissenting). The Justice also pointed to Congress' adoption of the standards established in *Sanders* to govern successive habeas corpus review. *Id.* at 2635 (Brennan, J., dissenting).

serve the 'ends of justice.' "[185] The dissent, however, contended that the question was not reserved for consideration at a later date, but left open "to the sound discretion of federal trial judges because the definition of the 'ends of justice' 'cannot be too finely particularized.' "[186]

The dissent characterized the plurality's effort to define when the "ends of justice" are served as an unwarranted attempt to graft a requirement of actual innocence onto 28 U.S.C. § 2244(b).[187] Additionally, the dissent rejected as revisionist the plurality's espousal of a balancing test to determine entitlement to review of successive habeas petitions.[188] Justice Brennan distinguished the precedents cited by the plurality to support its assertion that the state's interests may be balanced against the defendant's interests in granting successive habeas petitions.[189] The Justice posited that this case law merely established a narrow exception for habeas review of claims procedurally defaulted in state court.[190] In support of his proposition, Justice Brennan espoused the rule " 'that the federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination of his federal claim. . . .' "[191]

Justice Brennan found further support in the primary habeas corpus statutes[192] which do not establish guilt or innocence as a consideration for the granting of review of a successive habeas

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185 *Id.* at 2632 n.2 (Brennan, J., dissenting) (quoting *id.* at 2628 n.18 (Powell, J., plurality opinion)).

186 *Id.* (quoting *Sanders*, 376 U.S. at 17).

187 *Id.* at 2634-35 (Brennan, J., dissenting). The plurality contended that a colorable showing of factual innocence should be a necessary prerequisite for review of successive habeas corpus petitions. *Id.*; *see also supra* note 163 (text of § 2244(b)).

188 *Kuhlmann*, 106 S. Ct. at 2632 (Brennan, J., dissenting).

189 *Id.* at 2632-34 (Brennan, J., dissenting).

190 *Id.* at 2633 n.3 (Brennan, J., dissenting). The narrow categories in which the Supreme Court has denied habeas review were interpreted in very different ways by Justice Powell and Justice Brennan. Justice Powell viewed these denials of habeas review as examples of the Court's willingness to balance the interests of the State against that of the individual criminal defendant. *Id.* at 2623-24 (Powell, J., plurality opinion). Justice Brennan, however, contended that the cases denying habeas review merely carve out narrow exceptions to the established body of habeas corpus law. *Id.* at 2633-34 n.3 (Brennan, J., dissenting).

191 *Id.* at 2633 (Brennan, J., dissenting) (quoting Wainwright v. Sykes, 433 U.S. 72, 87 (1977)).

192 28 U.S.C. § 2244(b) governs applications for habeas writs. *See supra* note 163 (text of § 2244(b)). 28 U.S.C. § 2241 grants the federal courts statutory authority to issue writs. *See supra* note 1 (text of § 2241).

petition.[193] The dissenting Justice further observed that neither statute suggested a need to balance the interests of the state against the defendant.[194] Accordingly, the dissent opined that the circuit court did not abuse its discretion in granting reconsideration of the defendant's sixth amendment claim.[195]

The dissent next attacked the plurality's treatment of the sixth amendment right to counsel.[196] Justice Brennan contended that the plurality mischaracterized the circuit court's treatment of the facts and issues presented.[197] The dissent rejected the plurality's conclusion that the circuit court had failed to accord the state trial court's findings of fact a presumption of correctness.[198] On the contrary, Justice Brennan opined that the circuit court had expressly accepted the trial court's fact findings.[199] Despite these findings, Justice Brennan noted that the circuit court "concluded that, as a matter of law, the deliberate elicitation standard of *Henry* . . . and *Massiah* . . . encompasses other, more subtle forms of stimulating incriminating admissions than overt questioning."[200]

Accordingly, Justice Brennan reasoned that while the informant failed to ask any express questions about the crimes, the combined actions of the police and the informant could constitute "deliberate elicitation."[201] The dissent posited that when

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193 *Kuhlmann*, 106 S. Ct. at 2634 (Brennan, J., dissenting).

194 *Id.* Justice Brennan also noted that Congress has had several bills before it proposing habeas corpus revision. *Id.* On each occasion, Congress has consistently refused to authorize any significant alterations in the habeas statutes. *Id.*

195 *Id.* at 2636 (Brennan, J., dissenting). Justice Brennan opined that Wilson advanced a "potentially meritorious Sixth Amendment claim. [Wilson] also advanced a complete justification for returning to federal court a second time with [his] claim." *Id.*

196 *Id.* The dissent rejected the plurality's assertion that *Kuhlmann* presented the "listening post" question reserved in *Henry*. *Id.*

197 *Id.* The trial court merely determined that Lee did not ask Wilson any direct questions about the crime. *Id.* It interpreted this fact through a consideration of New York State precedents. *Id.* The state trial court asserted that under its precedents a showing of affirmative interrogation was necessary before a violation of the sixth amendment could be found. *Id.*

198 *Id.* at 2637 (Brennan, J., dissenting).

199 *See id.* The court of appeals found the existence of deliberate elicitation "[e]ven accepting that Lee did not ask Wilson any direct questions. . . ." *Wilson*, 742 F.2d at 745.

200 *Kuhlmann*, 106 S. Ct. at 2637 (Brennan, J., dissenting).

201 *See id.* at 2639 (Brennan, J., dissenting). Justice Brennan posited that the government's conduct in placing Wilson in a cell overlooking the scene of the crime could be viewed as a factor in finding deliberate elicitation by the police and their agents. *Id.* Although Lee did not directly question Wilson, he made comments designed to stimulate conversation about the crimes charged. *Id.*

viewed in this manner, Wilson's case "did not present the situation reserved in *Henry*, where an accused makes an incriminatory remark within the hearing of a jailhouse informant, who 'makes no effort to stimulate conversations about the crime charged.' "[202] Instead, the dissent asserted that Wilson's case was virtually indistinguishable from *Henry*.[203]

In support of these contentions, the dissent analogized the Court's decision in *Henry* with the facts in *Kuhlmann*.[204] The dissent determined that the factors in *Henry* held to be dispositive of a finding of deliberate elicitation were present in Wilson's situation.[205] The dissent asserted that the totality of the government's behavior should be considered whenever the "deliberately elicited" standard is utilized.[206] The dissent posited that "[t]he State intentionally created a situation in which it was foreseeable that the respondent would make incriminating statements without the assistance of counsel."[207] Justice Brennan, therefore, determined that Wilson's sixth amendment right to counsel was violated by the state's actions.[208] Accordingly, the dissent would have affirmed the judgment of the court of appeals.[209]

Justice Stevens, in a brief dissent, opined that when reviewing successive habeas corpus petitions, a colorable claim of innocence can be considered, but that it is not a vital element for disposition of the petition.[210] The Justice, however, was less emphatic in asserting that successive habeas review was required in Wilson's case.[211] He stated that the case was a close one which could have been decided either way without raising the abuse of

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202 *Id.* at 2637 (Brennan, J., dissenting) (quoting *Henry*, 447 U.S. at 271 n.9).

203 *Id.* Justice Brennan stressed that deliberate elicitation was found in *Henry* even though the informant did not ask direct questions of the defendant. *Id.* at 2638 (Brennan, J., dissenting).

204 *Id.*; *see also supra* note 150 and accompanying text.

205 *Kuhlmann*, 106 S. Ct. at 2639 (Brennan, J., dissenting).

206 *Id.*

207 *Id.* The dissent determined that several elements combined to create an atmosphere likely to induce the elicitation of incriminating remarks. First, the government assigned Wilson to a cell overlooking the crime scene. *Id.* at 2639 (Brennan, J., dissenting). Second, Lee was known to Wilson on an informal basis. *Id.* Third, Lee's status as a government informant was not known by Wilson. *Id.* at 2638 (Brennan, J., dissenting). Thus, Lee was in a position to gain Wilson's trust. Even though Lee avoided asking direct questions, his position enabled him to elicit incriminating information. *Id.*

208 *Id.* at 2639 (Brennan, J., dissenting).

209 *Id.*

210 *Id.* (Stevens, J., dissenting).

211 *Id.*

discretion charge.[212] Ultimately, he agreed with Justice Brennan's examination of *Henry* and the dissent's affirmation of the judgment of the court of appeals.[213]

Despite the Court's thorough examination of successive habeas petitions, the *Kuhlmann* decision leaves certain issues unresolved. Justice Powell's opinion splintered the Court over what constitutes proper treatment of successive habeas corpus petitions.[214] Justice Blackmun and Justice White joined Justices O'Conner, Burger, Rehnquist, and Powell in the plurality's assessment of the sixth amendment issue presented in *Kuhlmann*. Significantly, however, Justices Blackmun and White declined to join either Justice Powell's treatment of successive habeas corpus petitions or any of the dissents' habeas arguments. A majority of the Court, therefore, implicitly disagreed with Justice Powell's opinion regarding habeas corpus.[215] The silence of Justice Blackmun and Justice White on this issue produces an atmosphere of uncertainty, leaving the status of the habeas corpus arguments raised by Justice Powell unclear. If the issue of successive habeas petitions were to arise again in different circumstances, it is questionable how their pivotal votes would be cast. It appears likely, however, that the refusal by Justices Blackmun and White to support the plurality's habeas determinations signals their willingness to join the position espoused by the *Kuhlmann* dissenters.

The uncertainty engendered by the silence of the two concurring Justices colors any analysis of *Kuhlmann's* affect on the availability of habeas corpus relief. A majority of the Court may in the future reject the need for a "colorable showing of factual innocence"[216] as a prerequisite for federal review of successive habeas petitions.[217] In addition, a majority of the Court may reaffirm the decision to leave review of successive habeas petitions to the discretion of the federal trial judges for resolution on a case-by-case basis.[218] This places the discretionary power to decide whether relief should be granted at the place where it can

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212 *Id.* Justice Stevens would leave the decision to grant or deny review of successive habeas corpus petitions to the discretion of the federal trial judges to resolve on a case-by-case basis. *Id.*

213 *Id.*

214 *See id.* at 2618-19.

215 *See id.*

216 *Id.* at 2627 (Powell, J., plurality opinion).

217 *See Sanders*, 376 U.S. at 1.

218 *See supra* notes 164-65 and accompanying text.

best be utilized. Similarly, a majority of the Court may not find it necessary to particularize standards beyond the "ends of justice" for the federal courts to follow in rendering decisions on successive applications.

Justice Powell's attempt to institute a balancing test[219] for accessing a federal forum for successive habeas petitions has a better chance for success on future review. On prior occasions, the Court has permitted a balancing of the interests of the state against those of the defendant.[220] While adoption of this balancing test was expressly limited to cases of procedurally defective claims, it signaled the Court's willingness to utilize this method to limit habeas review. If the unpublished reservations of either Justice Blackmun or Justice White are asserted in the future, the scope of habeas corpus review may be substantially limited.

The manner in which the plurality addressed the sixth amendment right to counsel issue also raises several questions.[221] The Court interpreted *Massiah* and its progeny as prohibiting "secret interrogation by investigatory techniques that are the equivalent of direct police interrogation."[222] Curiously, and without expressly stating so, this determination in *Kuhlmann* overruled a portion of *Henry*.[223] The *Henry* Court had specifically rejected the argument that deliberate elicitation exists only where the functional equivalent of direct interrogation is present.[224] *Kuhlmann* therefore transformed the *Henry* "likely to induce" test into a much stricter standard. Deliberate elicitation must currently be proven by evidence of the use of methods equivalent to interrogation by the police.

This curtailment of sixth amendment rights reflects the Burger Court's general tendency to constrict the privileges extended by the Warren Court.[225] While the *Massiah* line of cases have not been expressly overruled, their utility has been significantly cir-

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219 *See Kuhlmann*, 106 S. Ct. at 2624 (Powell, J., plurality opinion); *see also* Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977).

220 *See generally* Marcus, *Federal Habeas Corpus After State Court Default: A Definition of Cause and Prejudice*, 53 FORDHAM L. REV. 663 (1985) (analyzing *Wainwright* "cause and prejudice" standard for granting successive habeas corpus review).

221 *See Kuhlmann*, 106 S. Ct. at 2628 (Powell, J., plurality opinion).

222 *Id.* at 2630 (Powell, J., plurality opinion). This result was contrary to the standard established by the Court in *Henry*. *See supra* notes 140-50 and accompanying text.

223 *See Henry*, 447 U.S. at 271; *see also supra* notes 141-51 (discussion of *Henry*).

224 *Id.*

225 *See generally* McMahon, *Recent Criminal Law Rulings From the Supreme Court: The Conservative Bloc Begins to Exercise Control*, 3 DEL. LAW 49 (1984) (examining trend of Burger Court to restrict expansion of constitutional rights for criminal defendants).

cumscribed by the decision in *Kuhlmann*. The content and tone of the plurality opinion suggests that the question reserved in *Henry* would be resolved in a similar fashion to *Kuhlmann*.[226] If Lee's actions were condoned in *Kuhlmann*, then certainly the Court will not find a violation of the sixth amendment when the government utilizes passive informants to garner inculpatory information.

The Court's decision in *Kuhlmann* marks an erosion of the sixth amendment protections established in *Massiah* and subsequent decisions. In *Massiah*, the Court concluded that once the right to counsel attaches, the government must deal through and not around a defendant's attorney.[227] *Kuhlmann* eases the government's ability to circumvent the sixth amendment protections established by the Court over the past twenty-two years. Any means may now be utilized to garner inculpatory information as long as they are not the functional equivalent of direct police interrogation. Thus, the precise nature of government conduct prohibited by the sixth amendment has become a clouded and uncertain issue.

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226 *See supra* note 146 and accompanying text.
227 *See Massiah*, 377 U.S. at 207.