SCCJA

# LEGAL LOG

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*In an effort to better disseminate information on legal matters that affect law enforcement officers, we are pleased to present to you the LEGAL LOG.*

*This publication will be made available to you on a regular basis.*

*Your comments and suggestions for future issues are solicited. Correspondence should be addressed to Legal Log, 5400 Broad River Rd., Columbia, S.C. 29210*

*Henry Ray Wengrow*
*Legal Counsel*

## "You have a right to have a lawyer present..."

### Right to Counsel at interrogations after Moran v. Burbine

by: William C. Smith

Following closely on the heels of its decision in Maine v. Moulton, (38 CrL 3037) the United States Supreme Court has once again delved into the area of protection afforded a defendant by the right to counsel. In Moulton, the court had addressed the issue of whether, after indictment, government initiation of questioning was required before the protection of the Sixth Amendment was triggered. In Moran v. Burbine (38 CrL 3182), decided March 10, 1986, the court looks to questioning prior to indictment and examines the right to counsel from the standpoint of the Fifth and Sixth Amendments.

Moran arose in the following factual setting:

In March of 1977, Mary Jo Hickey was found bleeding and unconscious in a factory parking lot in Providence, Rhode Island. She had extensive injuries to her skull and face which were apparently inflicted by a bloodstained metal pipe found near her. She died three weeks later.

Brian Burbine was arrested several months after Ms. Hickey's death on an unrelated burglary charge. At the time of the arrest, however, a Cranston, Rhode Island detective had received information from a confidential informant that implicated Burbine as Mary Jo Hickey's murderer. The detective advised Burbine of his Miranda rights and sought to question him. Burbine refused to waive his rights and the detective departed to speak to the other suspects arrested with Burbine on the burglary charge. Information obtained from those suspects implicated Burbine further in the Hickey murder and was conveyed to Providence, Rhode Island police. Shortly thereafter, three Providence officers arrived in Cranston for the purpose of questioning Burbine. An

hour and 15 minutes after the Providence officers had arrived, Allegra Munson, an assistant public defender whose office had been contacted by Burbine's sister, telephoned the Cranston police station and informed the Detectives section that she would act as Burbine's legal counsel in the event that he were to be questioned. Ms. Munson was told that Burbine would not be questioned or placed in a lineup that evening and that "...they were through with him for the night." (Moran at 3183.) In actuality, the Providence police were preparing to question Burbine at the time Ms. Munson called. She was not told of this fact nor even of the fact that Burbine was a suspect in the Hickey murder. Likewise, Burbine was not told that an attorney had been contacted on his behalf or that Ms. Munson had called the station.

Less than an hour after Ms. Munson's call, Burbine was brought to an interrogation room and questioned about Mary Jo Hickey's murder. He was first given a Miranda advisement and signed a waiver of rights form indicating specifically that he did "...not want an attorney called or appointed for him." (Moran at 3183.) Twice again Burbine was questioned, each time giving the identical waiver in response to the subsequent Miranda advisements. The ultimate outcome of the questioning was that Burbine signed three written statements fully admitting to the murder.

At trial Burbine asked the court to suppress the statements because the failure of the police to inform him of Ms. Munson's efforts to reach him cast serious doubt on the validity of his waiver of Miranda rights. The trial court disagreed and allowed Burbine to proceed to trial where he was convicted of first degree murder. The Supreme Court of Rhode Island likewise, on appeal, rejected Burbine's claim that failure to inform him of Ms. Munson's efforts tainted his waiver of rights.

Burbine thereafter unsuccessfully sought a writ of habeas corpus from the U. S. District Court of Rhode Island and appealed its denial to the U. S. Court of Appeals for the First Circuit. The Court of Appeals reversed finding that the police conduct had "...fatally tainted [Burbine's] 'otherwise valid' waiver of his Fifth Amendment privilege against self-incrimination and right to counsel." (Moran at 3184.) The state petitioned the U. S. Supreme Court for review.

The Supreme Court, in analyzing Burbine's waiver of rights and confession, notes that its decision in Miranda v. Arizona, 384 U.S. 436 (1966), imposed certain obligations upon the police prior to the questioning of a suspect in custody. Noting further that the police scrupulously complied with those obligations concerning the warning of Burbine, insuring that he understood his rights and obtaining an express waiver; the Court finds that the defendant made a valid waiver of his Fifth Amendment privilege against self-incrimination and right to counsel.

Turning to Burbine's allegation that the police failure to inform him of Ms. Munson's telephone call "fatally undermined the validity of the otherwise proper waiver" (Moran at 3184), the Supreme Court takes a look at the underlying protections afforded by Miranda:

> "[We] have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.... Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer and that he was aware of the state's intention to use his statements to secure a conviction, the analysis is

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complete and the waiver is valid as a matter of law." (Moran at 3185.)

Additionally, the Court reiterates, as it has done numerous times in the past, that the Miranda protections are all designed for the benefit of the defendant and not the attorney. Says the Court:

> "The purpose of the Miranda warnings....is to dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgement of the suspect's Fifth Amendment rights. Clearly, a rule that focuses on how the police treat an attorney -- conduct that has no relevance at all to the degree of compulsion experienced by the defendant during interrogation -- would ignore both Miranda's mission and its only source of legitimacy." (Moran at 3184, emphasis supplied.)

Likewise, the Supreme Court notes that its decision in Maine v. Moulton, ante, clearly declared that "...the Sixth Amendment right to counsel does not attach until after the initiation of formal charges." (Moran at 3187.) Analyzing the facts in Burbine's case the court emphasizes that "...the interrogation sessions that yielded the inculpatory statements took place before the initiation of 'adversary judicial proceedings.'" (Moran at 3186.) As such, Burbine's allegation that he had the right to the presence of an attorney during the interrogations is unfounded. As the court reemphasizes:

> "It is clear, of course, that absent a valid waiver, the defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches.... [O]nce the right has attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a 'medium' between [the suspect] and the state during interrogation." (Moran at 3186 citing Maine v. Moulton ante, emphasis supplied.)

For Burbine, no Sixth Amendment right to counsel had attached.

In summary, the U. S. Supreme Court's holding in Moran v. Burbine sheds more light into the sometimes unclear area of a defendant's Fifth and Sixth Amendment rights during interrogation. Specifically, the court's analysis rests upon its observation that the privilege against self-incrimination is for a defendant's protection and not the protection of the defendant's attorney. Thus, while some may find police deception of a defendant's attorney distasteful; where the deception occurs prior to the attachment of the right to counsel, it will not act to undermine a defendant's otherwise valid waiver of rights. In South Carolina, the right to counsel attaches at the time of the issuance of the arrest warrant.

While deception of an attorney reflects adversely on the professional ethics of a law enforcement officer and should not be condoned, practices which do not interfere with the defendant's free exercise of his or her right to request counsel will not bar admissibility of a defendant's properly warned statement where the defendant has validly waived Miranda protections prior to attachment of the right to counsel.

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The Attorney General has requested that we provide you with the information given below at our earliest possible convenience.

The statutes regulating masseurs and masseuses and requiring them to be licensed have been repealed by the General Assembly under the State Sunset Law. Attorney General Travis Medlock has advised that law enforcement should discontinue any enforcement of these statutes. The statutes, originally put into effect in 1975, are located in Sections 40-29-10 through 40-29-190 of the SOUTH CAROLINA CODE.

South Carolina's Sunset Law provides for the review and, in certain cases, abolition of specific government programs.

If you have any questions concerning this matter, please contact Edwin E. Evans, Deputy Attorney General, at the Attorney General's Office in Columbia, 758-2072.