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LEGAL LOG

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STATE DOCUMENTS

VOL. 3, NO. 9

NOVEMBER 1985

SIXTH AMENDMENT RIGHT TO COUNSEL AFTER MAINE V. MOULTON

by William C. Smith

On December 10, 1985, the U. S. Supreme Court handed down its decision in Maine v. Moulton and attempted to clarify the sometimes murky area of a defendant's right to counsel after indictment. Specifically, the court wrestled with the issue of whether government initiation of a confrontation with a defendant is a necessary element to trigger the protection of the Sixth Amendment Right to Counsel.

The facts in Moulton may be summarized briefly:

The defendant, Perley Moulton, Jr., was indicted along with his codefendant Gary Colson for theft of automotive vehicles and parts. Colson, having received threatening phone calls concerning the charges, made arrangements to meet with the police concerning the charges. Prior to the meeting, however, Colson met with Moulton to plan for the upcoming trial and during the meeting Moulton suggested the possibility of killing one of the State's principal witnesses in the case, Gary Elwell. Afterwards, when Colson and his lawyer met with the police, Colson related the suggestion made by Moulton concerning the killing of Elwell. Colson confessed to his participation in the crimes for which he and Moulton had been indicted, as well as others which the police had under investigation, but offered to testify as State's witness

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Henry Ray Wengrow
Legal Counsel

against Moulton if no further charges are filed against him. Colson further consented to have a recording device placed on his telephone to monitor any additional threatening calls, and agreed to wear a body wire transmitter at his next meeting with Moulton.

Colson was instructed not to question Moulton during his meeting with Moulton, but, nonetheless, Moulton made incriminating statements in response to remarks made by Colson.

Moulton was prosecuted on the original indictment and on additional indictments based on information obtained from recorded telephone conversations and body wire transmissions. Moulton moved to suppress the recorded statements. The trial judge denied the motion and Moulton proceeded to trial before a judge alone where he was convicted on those charges.

Moulton appealed his convictions on the ground that the admission into evidence of the recorded statements violated his right to the assistance of counsel under the Sixth Amendment. The Supreme Judicial Court of Maine agreed with Moulton's contention and returned Moulton's case for a new trial. The State petitioned for review by the U. S. Supreme Court.

The Supreme Court, in analyzing Moulton's contention that his right to assistance of counsel was denied, devotes a significant effort to an analysis of the origin and evolution of the right to counsel. Citing Brewer v. Williams (430 U.S. 387, 1977) the court notes that

"Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . ." Brewer at 398 (emphasis supplied).

Noting further that the "initiation of adversary criminal proceedings" indicates the government's commitment to prosecution," the court points out the extreme importance of the right to counsel in balancing the rights of the defendant against the "prosecutorial forces of organized society" Moulton at 3040, citing Kirby v. Illinois, 406 U.S. 682, 1972.

In short the court states that "[o]nce the right to counsel has attached and

been asserted, the State must of course honor it" Moulton at 3040. That right to counsel means that the prosecution not only has the obligation not to prevent the accused from obtaining counsel, but must as well not engage in conduct which circumvents or dilutes the protection afforded by the right to counsel.

Turning specifically to the facts of Moulton the court notes that the police suggested to Colson that his telephone conversations with Moulton be monitored and recorded and that Colson wear a body wire transmitter to a meeting with Moulton where they were to discuss pending criminal charges. "The police thus knew that Moulton would make statements that he had a constitutional right not to make to their agent [Colson] prior to consulting with counsel" Moulton at 3042.

The State of Maine argued that the police did not intentionally elicit incriminating statements from Moulton and that under Massiah v. United States (377 U.S. 201; 1964) such an intentional act on the part of the State is necessary for a violation of the right to counsel to occur. The Supreme Court disposes of the State's contention by reexamining the facts of Massiah and noting that an intent to elicit incriminating statements, or a lack thereof, is not the controlling issue:

". . . Knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." Moulton at 3042.

Thus, after Moulton a violation of the Sixth Amendment right to counsel occurs when the State, by design, exploits an opportunity to obtain incriminating statements from an accused where the right to counsel has attached.

The right to counsel attaches ". . . at or after the time that judicial proceedings have been initiated against [the accused]," Brewer v. Williams, *supra*. In South Carolina this has been interpreted to mean after an arrest warrant has been obtained.

If, however, the State should inadvertently (i.e., not by design or not by exploitation of an opportunity) obtain incriminating statements from an accused after the right to counsel has attached; those statements are admissible under the rule set out in Moulton.

LEGAL LOG is published monthly by the South Carolina Criminal Justice Academy, John A. O'Leary, executive director. The academy's legal affairs and legal instruction are handled by James M. Kirby, senior staff counsel, Henry R. Wengrow, general counsel, William C. Smith, staff counsel, and attorneys Everett N. Brandon and J.C. Coleman.