

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-786

TITLE MAINE, Petitioner V. PERLEY MOULTON, JR.

PLACE Washington, D. C.

DATE October 8, 1985

PAGES 1 thru 36

IN THE SUPREME COURT OF THE UNITED STATES

MAINE,

Petitioner

V.

PERLEY MOULTON, JR.

No. 84-786

Washington, D.C.

Tuesday, October 8, 1985

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:02 a.m.

APPEARANCES:

WAYNE STUART MOSS, ESQ., Assistant Attorney General
of Maine, Augusta, Maine; on behalf of the
Petitioner.

ANTHONY WHITCOMB BEARDSLEY, ESQ., Ellsworth, Maine;
on behalf of the Respondent.

- - -

C O N T E N T S

ORAL ARGUMENT OF

PAGE

WAYNE STUART MOSS, ESQ.

3

on behalf of the Petitioner

ANTHONY WHITCOMB BEARDSLEY, ESQ.

22

on behalf of the Respondent

WAYNE STUART MOSS, ESQ.

34

on behalf of the Petitioner -- rebuttal

1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Moss, I think you may
3 proceed whenever you are ready.

4 ORAL ARGUMENT OF WAYNE STUART MOSS, ESQ.

5 ON BEHALF OF THE PETITIONER

6 MR. MOSS: Mr. Chief Justice, and may it please
7 the Court:

8 This is a criminal case from Maine involving a
9 Massiah issue of whether the Sixth Amendment right to counsel
10 applied to a post-indictment meeting between Respondent
11 Moulton and his friend, Gary Colson, a co-defendant, on
12 theft charges.

13 The central question here is whether the Massiah/
14 Henry rule should be extended to the facts of this particular
15 case.

16 There are two factors here which are important,
17 distinguishing this case from Massiah and Henry.

18 First, Moulton himself, not the police, created
19 his incriminating situation relative to the pending theft
20 charges.

21 Second, the police here put the body wire on Colson
22 as part of a legitimate investigation into a new crime which
23 was Moulton's plans to murder a key state's witness, Gary
24 Elwell.

25 In light of these two factors, there is no

deliberate elicitation here, because, as the Court said in Henry, the police here did not intentionally create the situation inducing Moulton's incriminating statements.

I would like to address each of these two factors in turn. First, as I said, Moulton himself, not the police, created this incriminating situation. Moulton initiated all the contacts between himself and Colson, including the meeting in which he incriminated himself. Respondent concedes that it was Moulton who did arrange the meeting in which Moulton incriminated himself.

Moreover, Moulton, on his own initiative, put on the agenda for that meeting a complete discussion of their trial strategy and the perjured testimony that Moulton wanted them to get. Just further evidence that Moulton himself created his own incriminating situation is that some of the statements at the meeting were made without any questioning or prompting by the informant Colson at all and other statements that he made in response to Colson's questions, that Colson asked those questions within the role that Moulton had created for him which was to review discovery materials and prepare a perjured defense for trial.

Additional evidence that this Moulton/Colson meeting was not a government-created confrontation is that here Colson was the one who initiated contact with the police to complain about threatening telephone calls. This is

1 not a case where the police sought out the informant to
2 investigate pending charges.

3 The second important factor here is that the police
4 placed the body wire on Colson as part of their legitimate
5 investigation into a new crime, Moulton's plans to murder
6 a key state's witness.

7 The suppression hearing justice below in fact
8 found that the police were involved in this legitimate purpose
9 of investigating a new crime and put the body wire on for
10 that purpose and also to protect Colson's safety and not
11 to gather evidence on the pending charges.

12 This finding is entitled to some deference because
13 it was the suppression hearing justice below who heard the
14 testimony firsthand, observed the demeanor of the witnesses
15 and found both the police and the informant Colson to be
16 believable.

17 The Maine Supreme Court found ample evidence to
18 support the justice's finding and Respondent, as I have
19 said, concedes that there was a legitimate purpose here
20 for this investigation into murder.

21 The police were making every effort here to comply
22 with Massiah while investigating the proposed murder and
23 this is evidenced by the police instructions themselves.
24 Prior to this Moulton/Colson meeting, the police instructed
25 Colson, the informant, to act like himself, converse normally,

1 and avoid trying to draw information out of Moulton.

2 The police consulted with the local District
3 Attorney's office before giving these instructions and the
4 instructions themselves are consistent with Massiah and
5 show a good-faith effort to comply with it.

6 QUESTION: But, he did ask questions, didn't he?

7 MR. MOSS: Yes, he did ask questions.

8 QUESTION: Do you think he elicited comments?

9 MR. MOSS: No, he did not elicit comments and
10 the reason why he did not elicit comments is because those
11 were statements that either Moulton was going to make anyway
12 or that those questions that Colson asked were questions
13 that Moulton required him to ask in order to develop the
14 perjured testimony that Moulton wanted him to give.

15 QUESTION: But your Supreme Judicial Court disagreed
16 with it?

17 MR. MOSS: Yes, and the reason that our Maine
18 Supreme Judicial Court disagreed is because our Maine
19 Supreme Court assumed that simply by putting the body wire
20 on the informant that the state somehow created the
21 incriminating situation.

22 Our Court also used a foreseeability test and
23 that is because it was foreseeable that the defendant and
24 the informant would be having conversations about pending
25 charges and that the defendant would be making incriminating

1 statements in this conversation, that because this was fore-
2 seeable this also violated Massiah and Henry.

3 QUESTION: If that evidence had been used against
4 Moulton in the trial on his initial charge, would it have
5 been admissible?

6 MR. MOSS: The evidence of murder? Yes, it would
7 have been admissible at least insofar as it would have showed
8 any consciousness of guilt. It certainly would have been
9 relevant evidence. And, also it would be admissible for
10 Sixth Amendment purposes as well because, at least as regards
11 to the murder, Moulton was planning to commit the murder.
12 There is no right to counsel for new crimes that someone
13 is planning to commit. Therefore, it should be admissible.

14 Another reason why the murder evidence would be
15 admissible, which also goes to why all this other evidence
16 should be admissible as well, is that there still has to
17 be a government-created confrontation for there to be a
18 Sixth Amendment violation. And, the state's position here
19 is that Moulton in this meeting was just continuing a dis-
20 cussion of ideas that he had originated in the telephone
21 conversation which he also initiated leading up to that
22 meeting.

23 QUESTION: If there were incriminating materials,
24 could it have been used against Colson on his first charge?

25 MR. MOSS: Oh, yes, it certainly could have been,

1 yes, against Colson.

2 QUESTION: If it was obtained afterward?

3 MR. MOSS: Used against Colson?

4 QUESTION: Colson, yes.

5 MR. MOSS: The informant.

6 QUESTION: Maybe I have got my parties mixed here.

7 MR. MOSS: Moulton is the defendant and Colson
8 is the informant. And, certainly it would have been
9 admissible against Colson.

10 QUESTION: Colson went to the Chief of Police,
11 didn't he?

12 MR. MOSS: Yes.

13 QUESTION: And said he was threatened and wanted
14 some protection among other things.

15 MR. MOSS: Yes.

16 QUESTION: Mr. Moss, the Supreme Court of Maine
17 found, as I recall, that Colson frequently pressed -- I
18 think that is the term used by the Maine Court -- the
19 respondent here to talk about the thefts. How do we get
20 around that?

21 MR. MOSS: Those questions have to be put back
22 in the context of this meeting itself.

23 In respondent's brief at pages seven and eight,
24 he lists some of those questions and when one takes those
25 questions and puts them back in context, one can see that

1 Moulton created the situation that required Colson to ask
2 him questions.

3 For example, the first question that respondent
4 has there on page seven is, and this is Colson, the informant,
5 asking the question and Caps, who he refers to is Moulton,
6 the defendant --

7 QUESTION: What page are we on?

8 MR. MOSS: Page seven of the respondent's brief.
9 It is the red brief.

10 QUESTION: Yes.

11 MR. MOSS: And, Colson asks, "One thing I cannot
12 remember, Caps, just can't remember, I know it was in December,
13 what night did we break into Lothrop Ford? What date?"
14 Now, unto itself that question might seem that it is eliciting
15 something that Moulton didn't want to talk about. However,
16 shortly before that question -- and that question is on
17 page 23, actually appears on page 23 of the transcript of
18 this meeting -- on page 22 of that transcript, shortly before
19 that meeting, Moulton said to Colson, "Anyways, we have
20 got to get a consistent story going on here because our
21 stories right now are all messed up."

22 So, what Moulton did there is he put Colson in
23 a situation where Colson had to get the facts straight,
24 they had to get the facts straight between the two of them,
25 just so they would be able to develop their perjured testimony.

1 This is evidenced by the fact that elsewhere in the meeting
2 Moulton accuses Colson, Moulton accuses Colson -- He says,
3 "You don't know what to say. You don't know what to lie
4 about and what to not lie about." And, he is accusing Colson
5 of that when Colson had his initial interview with the police
6 and the inference or what is actually being said there is
7 we have got to get the facts straight on this so we can
8 go ahead and develop our perjured testimony.

9 And, there are other situations where Moulton
10 also puts Colson in this situation.

11 QUESTION: If Colson did ask some questions and
12 he elicited responses, did the state tell him to do that?

13 MR. MOSS: No, the state did not tell him to do
14 that.

15 QUESTION: Who set up the meeting?

16 MR. MOSS: Moulton set up the meetings.

17 QUESTION: But the state did put a wire on him?

18 MR. MOSS: Yes.

19 QUESTION: But, they didn't -- What did they tell
20 him?

21 MR. MOSS: They told him to act like himself,
22 converse normally, and avoid trying to draw information
23 out of Moulton.

24 QUESTION: So, they didn't instruct him to ask
25 questions?

1 MR. MOSS: Correct.

2 QUESTION: As a matter of fact, the Superior Court
3 made an express finding that he was to avoid trying to draw
4 information out of Moulton.

5 MR. MOSS: Yes, that is correct.

6 QUESTION: Very different from Massiah or Henry.

7 MR. MOSS: Yes.

8 QUESTION: The police knew, as I recall, that
9 respondent did have counsel?

10 MR. MOSS: Yes.

11 QUESTION: And, of course, he was not notified.
12 He hadn't waived the right to have counsel, had he?

13 MR. MOSS: No, he had not. I might add though
14 here that --

15 QUESTION: He was talking to the state, wasn't
16 he?

17 MR. MOSS: Yes, the defendant was talking to an
18 agent of the state, yes.

19 QUESTION: All right.

20 MR. MOSS: But, there is no problem with that
21 unto itself. In Brewer versus Williams, one of the Massiah
22 progeny, the Court, in fact, said that no constitutional
23 protection would apply simply because the defendant is
24 making statements to an agent of the state as long as there
25 is no interrogation.

1 What the state is, in fact, contending here is
2 that there was no interrogation. I would add as well that
3 the reason the police put the body wire on Colson was to
4 investigate this proposed murder.

5 Now, the police had every obligation to investigate
6 that murder because somebody else -- As a matter of fact,
7 the key state's witness, his life was at stake. The police
8 had a responsibility to investigate that.

9 And, what the police were trying to do with Colson
10 was to use him to investigate the murder while simultaneously
11 having him avoid interrogating the defendant regarding the
12 underlying theft charges.

13 On the other hand, Colson was entitled to protect
14 his cover as an informant, therefore, he had to play along
15 with whatever Moulton had arranged for this meeting simply
16 to be able to protect his cover.

17 And, the state's position is that the questions
18 that Colson asked were questions that he was required to
19 ask in order to be able to go along with the defendant's
20 own plans to develop this perjured testimony.

21 I would add as well that some of the incriminating
22 statements -- and this is just further evidence that Moulton
23 created his own incriminating situation -- that some of
24 these incriminating statements were made without any
25 questioning or prompting by Colson at all. So, certainly

1 they are not the result of interrogation and they should
2 not be subject to any Massiah challenge.

3 There is another factor here that -- Well, the
4 Maine Supreme Court, as I mentioned earlier, they used the
5 test of foreseeability to find a Massiah violation. The
6 problem with that test though is -- defendants and informants,
7 just by the nature of informants, it is generally going
8 to be foreseeable that defendants and informants when they
9 get together, that the defendant might be making incriminating
10 statements.

11 That, however, does not mean that the government
12 has created a confrontation with the defendant. In fact,
13 it is the very foreseeability of those statements, that
14 just when a defendant and informant gets together or a
15 defendant and co-defendant gets together to talk about their
16 case that there might be incriminating statements made.

17 It is the very foreseeability of that situation
18 which means that, indeed, the government hasn't done anything
19 to try and elicit those statements.

20 So, although the Maine Supreme Court used this
21 test of foreseeability, the state's position is that it
22 is the very foreseeability of those statements that indicates
23 that this was not a government-created confrontation.

24 Now, there is the presence of the body wire itself
25 here.

1 QUESTION: Do you think, counsel, that the Maine
2 Supreme Court knew or should have-known-standard is really
3 any different from creating a situation likely-to-induce
4 standard in the Henry case?

5 MR. MOSS: Yes, it is, because the should-have-
6 known aspect of the Maine Court standard seems to get away
7 from the fact of whether the police were actually deliberately
8 going after statements on the theft charges. And, the Sixth
9 Amendment standard is that deliberateness.

10 The test which the Maine Court applied sounds
11 more like an objective test that would be more akin to
12 Rhode Island versus Innis and the statement that is used
13 for custodial interrogation under Miranda.

14 And, this Court has already said -- It said it
15 in a footnote, I believe, in Rhode Island versus Innis,
16 that when you are talking about Sixth Amendment deliberate
17 elicitation and Fifth Amendment interrogation, they are
18 really two separate concepts, because when you are talking
19 about Fifth Amendment custodial interrogation, you are talking
20 about the pressure that is already put on the defendant
21 that is inherent in a custodial situation.

22 Therefore, anything which the police do which
23 they should have known about that would prompt any statements
24 the police are going to be taxed for.

25 However, in the Sixth Amendment context, we really

1 are. We are talking about deliberate actions by the police
2 that actually destroy the adversary aspects of the trial
3 itself, that destroy the right to counsel that is available
4 for trial and that, in fact, reduces the trial itself to
5 a formality.

6 So, in the Sixth Amendment context, we really
7 are looking at have the police done anything intentional.
8 And, the state's position is that the combination of the
9 two factors that we have in this case, Moulton himself,
10 not the police, created this incriminating situation. Good
11 faith investigation of the police shows that the police
12 here did not intentionally create the situation.

13 QUESTION: What about the Mealer against Jones
14 case?

15 MR. MOSS: The state's position is --

16 QUESTION: Judge Lombard's opinion.

17 MR. MOSS: Is that the majority opinion?

18 QUESTION: Judge Lombard's opinion.

19 MR. MOSS: Well, Mealer versus Jones was incorrectly
20 decided from the state's point of view, because there --
21 Once again the government did not create the confrontation.
22 If I recall the facts of that case correctly, it was actually
23 the defendant who --

24 QUESTION: The government didn't create it, but
25 the government knew what was going to be discussed.

1 MR. MOSS: Yes. And, that is exactly the facts --
2 QUESTION: But, you say that is not enough.
3 MR. MOSS: Correct. And, that is exactly the
4 facts that we have here, because in our case the police
5 also knew and Chief Keating of the Belfast Police Department,
6 he says that. He knew that these things were going to be
7 discussed, but he hadn't done anything to bring that
8 discussion about. He, in fact, says, and it is in the
9 suppression hearing, they were going to discuss anything
10 and everything.
11 QUESTION: He got himself wired.
12 MR. MOSS: He got himself --
13 QUESTION: You said he didn't do anything. He
14 did something.
15 MR. MOSS: To investigate the murder and he was
16 obligated to investigate the murder and we have the finding
17 below that that was the purpose of the body wire, to investi-
18 gate the murder.
19 So, just because the police themselves were aware
20 of what was going to happen, that doesn't mean that they
21 have actually created the confrontation. They have to create
22 the confrontation for there to be a Sixth Amendment
23 violation.
24 I would also add that the presence of the body
25 wire itself does not unto itself indicate a Sixth Amendment

1 violation. If anything, the police would not have wanted
2 to make a perfect record of this meeting and memorialized
3 it through a body wire and tape recording if they were,
4 in fact, planning to violate Moulton's constitutional rights
5 by gathering evidence on the pending theft charges. They
6 would not have wanted to do that. They were investigating
7 murder.

8 Now, because of the factors, the two factors that
9 I have been emphasizing here, this case is distinguishable
10 from Henry. In Henry, the Court found that the government,
11 through its contingency arrangement with the informant and
12 through Henry's custody, had created a confrontation with
13 Henry and the Court found no evidence that Henry himself
14 had created his incriminating situation.

15 Here, however, there is ample evidence that Moulton
16 at every turn created his incriminating situation. As between
17 Moulton and Colson, Moulton was the moving party throughout
18 this entire relationship.

19 As I have said, some of Moulton's at the meeting
20 were made without any questioning by Colson at all and even
21 those statements that he made in response to Colson's
22 questions, that Colson's questions were simply within the
23 role-playing that Moulton had set up.

24 I have already given some illustrations. I would
25 just like to go back to the third --

1 QUESTION: May I just ask one question, General
2 Moss? Is the fact that there was an investigation of an
3 attempted murder critical to your first argument? Supposing
4 the informant had come in and said I know the defendant
5 wants to come in and talk to me about -- to get ready for
6 the trial and all the rest of it, do you want to put a wire
7 on me and I will just go in and listen to what he says.
8 Would you say Massiah applied then?

9 MR. MOSS: That would be a more difficult case.
10 Massiah, however, might still be inapplicable because --

11 QUESTION: I know it would be a more difficult
12 case. I can't really tell whether your first argument also
13 relies on the fact that there was a bona fide reason for
14 the wire apart from investigating the pending charge.

15 MR. MOSS: We are relying on both of those factors
16 in this case.

17 QUESTION: I see.

18 MR. MOSS: We are not just relying on one or the
19 other. We are relying on the two of them together.

20 QUESTION: All right.

21 MR. MOSS: And, the reason for that is because
22 the good-faith investigation itself into the new crime,
23 that is what they used the body wire for, that helps to
24 show that they were not actually eliciting or creating any
25 situation with regard to the old crime.

1 QUESTION: You refer to the investigation of the
2 new crime. Were there ever charges brought on the new crime?

3 MR. MOSS: No, there were no charges brought on
4 the new crime.

5 As I said though, it is a closer case though when
6 there is no bona fide investigation into the new crime.
7 And, I think at that point an important factor to consider
8 is the first factor that we are relying on here and that
9 is that whether the police created an incriminating situation
10 and then other factors would also have to be looked at to
11 determine whether there is a Massiah violation. At least
12 one other factor would be what type of instructions did
13 the police give the defendant at that point and another
14 factor, which was an important factor in Henry, is did the
15 police give the informant any incentives to deviate from
16 their instructions, because the problem in Henry was that
17 the contingent fee arrangement with the informant, in fact,
18 gave the informant some incentive to deviate from the
19 instructions in Henry which were to avoid questioning Henry,
20 because the contingent fee arrangement was that he would
21 be paid in exchange for any information he gathered.

22 But, that is not this case, because here the police
23 were investigating a new crime and they did not give the
24 defendant any incentives to go ahead and investigate the
25 pending theft charges.

1 As I said, the body wire was to investigate the
2 new crime. Although admittedly there was a deal here in
3 that charges were dropped against Colson -- that is the
4 new charge, not the pending theft charge, but rather new
5 charges. No new charges would be brought against Colson
6 in exchange for his cooperation; that is his testimony at
7 the trial. That was in exchange for his eye witness testimony
8 at the trial, in exchange for what he actually saw, what
9 he actually did with Moulton. That deal had nothing to
10 do with actually a continuing investigation to gather evidence
11 against Moulton on the pending theft charges.

12 The respondent also refers to the fact that Colson
13 had not yet been sentenced and that somehow this gave him
14 an incentive to go ahead at this meeting and to ask Colson
15 a lot of question to ingratiate himself with the police.

16 I would point out that the record nowhere supports
17 that. There was no sentencing deal here with the informant.
18 There was nothing said that the informant -- that the state
19 would recommend a lighter sentence in exchange for gathering
20 evidence on the pending charges.

21 To the extent that the sentencing means anything
22 at all, it means that it gave the informant an incentive
23 to follow the police instructions precisely, which was to
24 be himself and avoid drawing information out of Moulton,
25 and also the open sentencing gave Colson an incentive to

1 continue to do what the police wanted him to do, which was
2 to investigate the proposed murder. Those were the incentives
3 that Colson had.

4 So, the state's position here is that, at least
5 for Sixth Amendment purposes, there really was no interrogation
6 and there really was no elicitation; that Moulton's
7 incriminating statements were the product of a situation
8 which he himself had created that should not be charged
9 to the police.

10 Respondent says that the -- given the foresee-
11 ability of the defendant's incriminating statements at this
12 meeting, he somehow implies that the state somehow had some
13 duty to protect against the foreseeability of those statements,
14 but that is not the case. The Sixth Amendment protects
15 against government-created pre-trial confrontations in the
16 absence of counsel.

17 Where the defendant has created the pre-trial
18 confrontation through misplaced confidence in someone who
19 is really working for the state, then the Sixth Amendment
20 does not apply. The police are not obligated to protect
21 the defendant from his own inability to keep quiet and that
22 is especially so here where the defendant was planning new
23 crimes to obstruct justice, perjury and murder, for which
24 there was no right to counsel anyway.

25 I would like to reserve the remainder of my time

1 for rebuttal.

2 CHIEF JUSTICE BURGER: Very well.

3 Mr. Beardsley?

4 ORAL ARGUMENT OF ANTHONY WHITCOMB BEARDSLEY

5 ON BEHALF OF THE RESPONDENT

6 MR. BEARDSLEY: Mr. Chief Justice, and may it
7 please the Court:

8 The following questions were posed to Perley Moulton:
9 "I just can't remember. I know it was in December. What
10 night did we break into Lothrop Ford, what date? How many
11 times did we drill them locks? Remember when we took the
12 pickup truck out through there and we dumped all of that
13 stuff off of that? Did you follow me? Yes, you followed
14 me there or did you? One thing we still don't know. We
15 stole the Mustang on the 13th of December, we stole the dump-
16 truck on the 13th of January. How many holes did you drill?"

17 The state is trying to say that those questions are
18 not deliberate and that those statements are not inter-
19 rogation. Those statements came after -- Those questions
20 came after the state's agent, Gary Colson, whispered into
21 him microphone, I hope I can go through with this. Those
22 questions came after the defendant, Perley Moulton, had
23 disclaimed this new crime that they were investigating,
24 saying that it wouldn't work.

25 The state would have you believe that as soon

1 as Perley Moulton on his own voluntarily walks into the
2 police agent's home, that the police agent should not come
3 under constitutional scrutiny for his actions.

4 And, we feel that this type of action which the
5 state agent did was deliberately eliciting questions. There
6 is no question that the police agent was surreptitious.
7 There is no question that he was not a passive listener.
8 There is no question that the questions related specifically
9 to the crimes for which the defendant was under indictment.

10 QUESTION: Why do you use the term "deliberately
11 eliciting?" Do you use that as a word of art?

12 MR. BEARDSLEY: I use that word because that is
13 the term that is in the Massiah case to determine whether
14 or not the police agent got certain evidence out of the
15 defendant and it clearly applies in this case.

16 QUESTION: May I ask you a hypothetical extension
17 on these facts? Suppose in the conversation Colson said
18 let's get together tomorrow and Moulton said, no, I can't
19 do it, I am going to Washington to shoot the President of
20 the United States and then he asked how he is going to do
21 that and he explains in detail how he is going to do it,
22 with a camera that is a concealed gun.

23 Now, would this conversation be admissible in
24 a charge against Moulton for threatening the President of
25 the United States?

1 MR. BEARDSLEY: If this is a legitimate new crimes
2 investigation, perhaps that evidence could be used on some
3 potential --

4 QUESTION: Well, your state foreheld that it could,
5 didn't it?

6 MR. BEARDSLEY: That is correct.

7 QUESTION: I was exploring your view of the matter.

8 MR. BEARDSLEY: The new crimes -- The State of
9 Maine found that this was a new crimes investigation. I
10 will support their finding.

11 I think that the state's position is that this
12 is a new crimes investigation with fringe benefits that
13 they knew about ahead time. And, those fringe benefits
14 were that they knew that Perley Moulton was going to be
15 there and that these questions would be elicited.

16 The agent had every reason to elicit these questions.
17 The agent had not performed for the police up to that point.
18 He had tried these telephone taps and no evidence had come
19 out incriminating the defendant.

20 He had entered in this initial interrogation where
21 the defendant totally disclaimed this new crimes investigation
22 and the agent's -- his credibility was at stake. He hadn't
23 performed. He had a deal that he was to cooperate and he
24 indicated that he was only told to act normally. The agent,
25 when he testified, said he wasn't instructed as to anything

1 else, just to act normally. And, he proceeded to draw
2 incriminating statement after incriminating statement out
3 of the defendant.

4 And, if the state -- I think the state has to
5 be responsible -- I think they have to be responsible for
6 the acts of their agents. The agent is an arm of the state
7 and a task has to be set up, instructions have to be very
8 definite, because this investigation as to whether it is
9 a new crime or an old crime can get very confusing. That
10 is why the state has to be very clear in instructing their
11 agent not to do exactly what Gary Colson did in this case.
12 They didn't take that protection.

13 QUESTION: Well, Mr. Beardsley, both the trial
14 court and the Maine Supreme Court agreed that the state
15 had a legitimate purpose in mind in investigating a new
16 offense when it wired Mr. Colson for sound. Do you think
17 that there is any deterrent effect on the police in excluding
18 Mr. Moulton's statements under those circumstances? If
19 the police have a legitimate purpose in wiring Mr. Colson
20 for sound to investigate for a new offense, what deterrent
21 effect would it have to try to exclude the statements that
22 Moulton makes?

23 MR. BEARDSLEY: The state --

24 QUESTION: In trying Mr. Moulton for the original
25 offense?

1 MR. BEARDSLEY: The state perhaps could use state-
2 ments regarding the new crime if the trial judge found that
3 they were not prejudicial or constituting uncharged mis-
4 conduct, something along those lines.

5 I think what the state is trying to do here is
6 getting through the back door from their agent what they
7 could not do themselves directly.

8 They knew Perley Moulton has expressed his right
9 to remain silent and they knew that he had a lawyer and
10 they knew that this matter would be discussed.

11 I think what the Maine Supreme Court said was,
12 yes, it was a new crimes investigation, but also he was
13 not a passive listener. He took an active role. And, the
14 state took advantage of the situation where the agent and
15 the defendant were good friends, got together regularly
16 anyway, and took advantage of that situation.

17 And, where they knew that this would be discussed
18 they should have been explicit in telling their agent not
19 to ask any questions regarding the pending crime.

20 And, what they are doing is they are just cutting
21 their agent loose and say go to it, because if Perley Moulton
22 voluntarily comes to your home, anything goes, and that
23 is what the state is arguing here.

24 QUESTION: When did he become a government agent,
25 Colson? Not a date, but -- It wasn't until when?

1 MR. BEARDSLEY: Approximately three months prior
2 to -- Well, at the very beginning of November, he went to
3 the police and these statements took place the day after
4 Christmas. There had been numerous conversations with the
5 police by Gary Colson. They had forgiven him for a Class
6 A --

7 QUESTION: I know, but there were a lot of conversa-
8 tions between Moulton and Colson before even you would claim
9 he was an agent of the state.

10 MR. BEARDSLEY: That is correct.

11 QUESTION: And, I suppose those statements would
12 then -- Colson certainly could have taken the stand and
13 talked about them himself.

14 MR. BEARDSLEY: He sure could have and he did
15 and the trial court didn't believe a word he said because
16 all the other -- the other charge that was related, Perley
17 Moulton was found not guilty on and the evidence they had
18 was Colson's testimony.

19 QUESTION: But, he could have testified as to
20 the robbery charge.

21 MR. BEARDSLEY: The burglary and theft charge.

22 QUESTION: Yes.

23 MR. BEARDSLEY: Yes, and he did.

24 QUESTION: And, the earlier statements were not
25 excluded?

1 MR. BEARDSLEY: I don't believe it was the earlier
2 statements that he testified to. I think he testified about
3 the earlier acts that he was present --

4 QUESTION: Of course, if the state had just said --
5 If he had gone to the police and said -- Suppose there wasn't
6 any murder problem at all, no question about a new crime
7 at all, and Colson just comes to them and says here is what
8 Moulton is telling me to do, to testify to, and the police
9 said, well, we are glad to listen to you. If you have got
10 anything else to say some time, well, come on back. Well,
11 he does come back. Now, is that enough to make him an agent
12 of the state?

13 MR. BEARDSLEY: In your fact situation, perhaps
14 not, but in this fact situation --

15 QUESTION: Do you think the wire makes the difference?

16 MR. BEARDSLEY: The continued wire taps, the deal
17 to cooperate and the taking advantage of their situation
18 as far as they did. The police knew it was going to happen
19 and they encouraged it.

20 QUESTION: Who initiated the conversation between
21 the Chief of Police and Colson after Moulton had talked
22 to Colson?

23 MR. BEARDSLEY: It is my understanding that Colson
24 went on his own at the beginning to the Chief of Police.
25 The police gave Colson the wire tap and said, let us know

1 when you record some information and he took it in. They
2 fitted him with the body wire. They had --

3 QUESTION: He never set up any meetings?

4 MR. BEARDSLEY: Colson?

5 QUESTION: Yes.

6 MR. BEARDSLEY: He returned telephone calls.

7 He continued on in this relationship after defendant had
8 made a motion to sever that was opposed by the state
9 arguably while Colson was an agent of the state, and, all
10 of this preparation and topping it off with these questions
11 which have nothing to do about the new crimes investigation --

12 The new crimes investigation on this murder, Perley
13 Moulton said it wouldn't work and they joked about poison
14 darts from Soldiers of Fortune magazine.

15 QUESTION: Supposing that Moulton had simply
16 met -- saw Colson regularly at an Elks' lodge every Tuesday
17 night and just starting talking to him there about this
18 previous crime he had committed and Colson goes to the
19 police.

20 They say, well, you know, that is very interesting
21 information, we are going to take it down and if you hear
22 anything more, let us know.

23 So, Colson sees him the next Tuesday night and
24 Moulton talks again. Colson reports back to the police.
25 Is there anything wrong with that?

1 MR. BEARDSLEY: I don't think that there is, but
2 that is a lot different situation than we have here.

3 QUESTION: What on earth could there be wrong
4 with that?

5 MR. BEARDSLEY: I agree. I don't think that that
6 situation alone -- But, where -- The only thing that could
7 be wrong with that is that the state would be taking
8 advantage of --

9 QUESTION: Of a loose-lipped defendant.

10 MR. BEARDSLEY: That is correct. But, I am saying
11 arguably in that case you are correct that that evidence
12 might be admissible.

13 QUESTION: Well, you say arguably as though you
14 think there is some argument on the other side.

15 MR. BEARDSLEY: Well, in this case, they are taking
16 advantage of the fact that Colson and Moulton have a common
17 peril.

18 QUESTION: Why can't the state take advantage
19 of factors that happen to break its way so long as they
20 don't violate some constitutional privilege. There is nothing
21 in the Constitution that says the government can't take
22 advantage of a defendant.

23 MR. BEARDSLEY: No, there isn't, but there is
24 something that says that the state cannot deliberately elicit
25 incriminating statements from an indicted defendant

1 and that is exactly what they have done. These questions
2 are clear --

3 QUESTION: In your situation?

4 MR. BEARDSLEY: In my situation.

5 If they went to the Elks' Lodge and Colson came
6 up to Moulton, after having spoken with the police, and
7 continued to press detail after detail, it would be getting
8 a little less clear in that situation.

9 In this case, it is clear. Colson is -- after
10 this new crimes investigation has gone by the Board is
11 deliberately interrogated and is asking specific questions
12 that have nothing to do with the new crimes investigation.

13 QUESTION: Well, suppose there was just no question
14 at all but what -- the state had instructed him not to ask
15 any questions, but he did anyway. Is the state responsible
16 for that?

17 MR. BEARDSLEY: I think that the state has to
18 be responsible for the actions of their agents. The agent
19 is an extension of the state. I feel that --

20 QUESTION: Well, I don't know why you keep calling
21 him an agent. All the state did -- I don't think the wire
22 adds anything particular. All the state said was keep us
23 advised.

24 MR. BEARDSLEY: Well, I don't think so. I think
25 Colson had a lot at stake and they --

1 QUESTION: That may be so.

2 MR. BEARDSLEY: Well, you have got something
3 similar to the contingency fee agreement in that case where
4 Colson is facing sentencing, he has got to produce and he
5 hasn't produce. They are letting him walk on charges that
6 carry with it a potential 25 years in jail and he hasn't
7 produced.

8 And, when Moulton totally disclaims this new crimes
9 that they are investigating, he is saying into his microphone,
10 I hope I can go through with this, when Moulton is out of
11 the room, and he comes back in and the first words out of
12 his mouth are what night did we break into Lothrop Ford,
13 what date? And, he continues, question after question after
14 question on the old crime.

15 And, the state argues that this evidence would
16 have come out in the regular course of events and that is
17 absurd. Moulton --

18 QUESTION: So, you say the state, even though
19 they -- On the assumption that they instructed him not to
20 ask questions, the state is still disentitled to have
21 responses to questions that Colson nevertheless asks?

22 MR. BEARDSLEY: I think that the state is under
23 an obligation to instruct their agent so that type of
24 interrogation won't happen. And, if they choose an agent
25 that is going to interfere with the defendant's constitutional

1 rights, then that evidence should be excluded.

2 QUESTION: Although you agree the state certainly
3 could have instructed him to ask the questions about the
4 murder?

5 MR. BEARDSLEY: In a legitimate new crimes
6 investigation, yes.

7 QUESTION: Which this was, which you agree it
8 was.

9 MR. BEARDSLEY: A new crimes investigation with
10 fringe benefits that the state knew about.

11 QUESTION: Well, if they had indicted him for
12 this murder, everything he said about the murder could have
13 been admitted against him?

14 MR. BEARDSLEY: Yes. But, the evidence that he
15 said -- I am not sure that all of the evidence he said in
16 the murder investigation could have been brought against
17 him.

18 QUESTION: So, could have been indicted for murder
19 and he was on trial for murder, you could have used the
20 statements and after that they try him for the robbery,
21 they couldn't have used the statements?

22 MR. BEARDSLEY: That is correct.

23 Thank you very much.

24 CHIEF JUSTICE BURGER: Very well.

25 Do you have anything further, Mr. Moss?

1 MR. MOSS: Yes, Mr. Chief Justice.

2 ORAL ARGUMENT OF WAYNE STUART MOSS, ESQ.

3 ON BEHALF OF THE PETITIONER

4 MR. MOSS: The state would like to make a few
5 points here. First, as to those incriminating statements
6 that Moulton made without any questioning or prompting by
7 Colson at all, in that circumstance, Colson, with the body
8 wire, was no more than a passive listening post.

9 And, a passive listening post, the Court suggested
10 in Henry, does not unto itself constitute a government-
11 created confrontation.

12 As to Moulton's other incriminating statements
13 which he made in response to Colson's questions, there
14 Colson was role-playing and as Weatherford says he was
15 entitled to ask those questions in order to protect his
16 cover as an informant.

17 QUESTION: What did the Court below hold was
18 inadmissible, just the responses to interrogation or what,
19 or all statements?

20 MR. MOSS: All statements. The Court below held
21 that all of Moulton's statements at the meeting with Colson
22 were inadmissible, even those which were made without any
23 questioning or prompting at all, simply on the grounds that
24 they were foreseeable and that a body wire had been put
25 on Colson.

1 And, as the state has already said in its main
2 argument, just the body wire without more does not constitute
3 a government-created confrontation.

4 Now, respondent points out that Colson, in the
5 course of this meeting, said I hope I can make it through
6 this. Colson was nervous. He was scared. He was entitled
7 to ask questions to protect his cover. He may not have
8 asked questions or he may not have played out his role in
9 the same way as some one skilled in the law, but he was
10 still entitled to protect his cover as an informant,
11 especially insofar as the police were using him to investigate
12 proposed murder.

13 QUESTION: Is there anything in the record as
14 to how experienced he was as an informant?

15 MR. MOSS: No.

16 QUESTION: How long he had been doing this?

17 MR. MOSS: No, there is nothing in the record
18 to indicate that he had been an informant in the past.

19 Now, as to the statements that Moulton made
20 regarding the proposed murder itself, which were actually
21 not admitted at the trial, but those statements regarding
22 the proposed murder, there the Sixth Amendment has not even
23 attached yet, because that is a non-charge, that is a new
24 crime. And, there would be no problem with admitting those
25 statements, because Moulton had no right to counsel for

1 them anyway.

2 A final point that the state would wish to make
3 and that is what more could the police do in this case to
4 protect against a Massiah violation? They gave Colson
5 instructions to avoid questioning. They did not -- In
6 contrast to Henry, they did not give Colson any incentives
7 to go in and deviate from their instructions and question.
8 And, the body wire itself, as I have said, if anything,
9 indicates that the police were trying to comply with Massiah.

10 Given the good faith of the police here, the
11 deterrent rationale of the exclusionary rule which is to
12 deter purposeful, intentional police misconduct, would simply
13 be inapplicable.

14 If the Court does not have any other questions --

15 CHIEF JUSTICE BURGER: Very well. Thank you,
16 gentlemen.

17 The case is submitted.

18 (Whereupon, at 11:47 a.m., the case in the above-
19 entitled matter was submitted.)
20
21
22
23
24
25

CERTIFICATION

erson Reporting Company, Inc., hereby certifies that the
attached pages represents an accurate transcription of
electronic sound recording of the oral argument before the
Supreme Court of The United States in the Matter of:

#84-786 - MAINE, PETITIONER V. PERLEY MOULTON, JR.

and that these attached pages constitutes the original
transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

85 OCT 15 P3:44

RECEIVED
COMMUNICATIONS SECTION
MARSHAL'S OFFICE