Maine v. Moulton: Striking the Balance between the Sixth Amendment Right to Counsel and Society's Interest in Criminal Investigation of the Indicted Defendant

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NOTES

MAINE v. MOULTON: STRIKING THE BALANCE BETWEEN THE SIXTH AMENDMENT RIGHT TO COUNSEL AND SOCIETY'S INTEREST IN CRIMINAL INVESTIGATION OF THE INDICTED DEFENDANT

INTRODUCTION

In Massiah v. United States, the United States Supreme Court held that the government violates the sixth amendment right to counsel when it deliberately elicits incriminating statements from an indicted defendant in the absence of counsel. Consequently, the statements resulting from such a violation are inadmissible at the trial for the indicted offense. In Massiah, the Court recognized for the first time that certain governmental efforts to obtain incriminating evidence from an accused can violate the sixth amendment. Massiah and its progeny, however, did not fully delineate this sixth amendment right. Because Massiah and its progeny left many sixth amendment issues unaddressed, the Court considered these issues in Maine v. Moulton.

In Moulton, the Court held that the government violates the sixth amendment when it "knowingly circumvent[s] the accused's right to have counsel present in a confrontation between the accused and a state agent." A violation occurs under this standard when the government knowingly exploits an opportunity to confront the accused without the presence of counsel. Under the Court's prior Massiah formulations, a sixth amendment violation did not occur unless the government had acted with the intent of obtaining incriminating evidence. The Moulton Court expanded the Massiah right to

2. U.S. Const. amend. VI.
3. Prior to Massiah, only the due process clauses of the fifth and fourteenth amendments protected the accused from the use at trial of his pretrial incriminating statements. Under due process analysis, the determinative issue is whether the statements were made voluntarily given the "totality of circumstances." See, e.g., Fikes v. Alabama, 352 U.S. 191, 197 (1957) (totality of circumstances that preceded confessions went beyond allowable limits).
4. See infra text accompanying notes 21-61.
6. Id. at 487.
7. Id.
8. See infra text accompanying notes 117-19.
counsel by establishing a standard that does not require actual governmental intent to obtain incriminating evidence. Mere knowledge that incriminating statements will result from the government's actions causes a violation.

The Moulton Court also addressed the difficult issue of the admissibility of evidence relating to pending charges obtained during a legitimate investigation of crimes for which the accused had not been formally charged. In such situations, the government ostensibly does not act with the intention of gaining evidence concerning pending charges. Therefore, the Court held that evidence pertaining to pending charges obtained in violation of the new "knowing circumvention" standard is inadmissible at the trial on those charges, regardless of whether the evidence was obtained during a legitimate investigation of a separate offense.

This Note examines the possible reasons for the Court's adoption of the less stringent "knowing circumvention" standard. The Note concludes that the Court was forced to adopt such a standard because of its holding with respect to the admissibility of evidence obtained during investigations of "separate crimes." The Note also analyzes the Court's reasoning with respect to "separate crimes" investigations and questions the propriety of applying the exclusionary rule under a standard that does not require intent for a violation.

I. BACKGROUND

A. The Sixth Amendment Right to Counsel

The sixth amendment guarantees that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Initially, the Court interpreted the sixth amendment as only guaranteeing the right to counsel at trial itself. The Court has since expanded the sixth amendment to guarantee the right to counsel during certain pretrial stages. Recognizing that the denial of counsel during certain pretrial stages may be more damaging than denial of the right at trial itself, the Court has determined that the right to counsel attaches at some time prior to trial.

9. 106 S. Ct. at 489-90. Prior to Moulton, the circuits were divided on the issue of whether incriminating statements obtained in the course of police investigation of "new crimes" are admissible at the trial of the pending offense. See infra note 127 and accompanying text.
10. 106 S. Ct. at 489-90.
11. U.S. CONST. amend. VI. See also Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (sixth amendment right to counsel applicable to states through fourteenth amendment).
13. It appears that "critical stage" analysis is only appropriate after the right to counsel has attached. See United States v. Henry, 447 U.S. 264, 269 (1980) (Court scrutinized post-indictment confrontations between government agents and accused to determine whether they are "critical stages" of prosecution). See also Grano, Rhode Island v. Innis: A Need to Reconsider the
After this attachment, the accused has the right to have counsel present during any critical stage of the prosecution. Critical stages arise when the accused is confronted by the prosecution or the procedural system, and the result of such confrontation "might well settle the accused's fate and reduce the trial itself to a mere formality." The Justices of the present Supreme Court disagree as to when the right to counsel attaches. Some members of the Court hold that the right to counsel attaches only "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." This appears to be the position held

Constitutional Premises Underlying the Law of Confessions, 17 Am. Crim. L. Rev. 1, 7 (1979). Professor Grano concluded that following Kirby v. Illinois, 406 U.S. 682 (1972) (plurality decision), critical stage analysis is only appropriate for proceedings that occur after the right to counsel has attached by the initiation of formal criminal prosecution. *Id.*


Conversely, the accused does not have a right to the presence of counsel where the proceedings or confrontation are not critical to their defense. See Gerstein v. Pugh, 420 U.S. 103, 122 (1975) (preliminary hearing conducted to determine probable cause to detain accused); United States v. Ash, 413 U.S. 300, 317 (1973) (photo display is not critical stage because defendant is not present and no danger exists that his lack of familiarity with the law will prejudice his defense); Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (no automatic right to counsel exists at probation revocation hearing unless defendant first shows that due process requires representation); Gilbert v. California, 388 U.S. 263, 267 (1967) (taking of handwriting exemplar is not critical stage because of minimal chance of making trial unfair); United States v. Wade, 388 U.S. 218, 227-28 (1967) (noting in dicta that taking of defendant's blood and fingerprints not critical stage).


16. Kirby v. Illinois, 406 U.S. 682, 689 (1972). In Kirby, Justice Stewart stated that the right to counsel only attached after the initiation of judicial proceedings:

The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that the defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.

*Id.* at 689-90. Chief Justice Burger and Justices Blackmun and Rehnquist concurred in the opinion, and Justice Powell concurred in the result. *Id.* at 682.
by a majority of the present members of the Court.\textsuperscript{17} However, there is some indication that at least three members of the present Court would be willing to recognize that the sixth amendment right to counsel attaches prior to the initiation of adversary judicial criminal proceedings.\textsuperscript{18} This view was articulated in Escobedo v. Illinois,\textsuperscript{19} where the Court held that a defendant has the right to counsel "when the [investigatory and prosecutorial] process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession."\textsuperscript{20}

For purposes of this Note, it suffices to assume that the sixth amendment right to counsel attaches at or after adversarial judicial proceedings commence. After attachment, certain governmental actions that produce incriminating evidence constitute critical stages during which the accused has the right to the assistance of counsel. If the accused is denied counsel during a critical stage, the evidence obtained is inadmissible at trial.

\textbf{B. The Massiah Doctrine}

The Supreme Court's application of the sixth amendment to the police "interrogation" context is a relatively recent development. Although the

\begin{quote}

18. In United States v. Gouveia, 467 U.S. 180 (1984), Justices Stevens, Brennan and Marshall indicated that the right to counsel might attach prior to the formal initiation of adversary judicial proceedings. Id. at 193 (Stevens, J., concurring, joined by Brennan, J.); id. at 197 (Marshall, J., dissenting).


20. Id. at 492. The Escobedo Court noted several factors that commentators have concluded limit its subsequent application. These factors are: (1) the suspect in Escobedo was in police custody; (2) the investigation had begun to focus on the suspect and was no longer a general inquiry into an unsolved crime; (3) the suspect was subject to police interrogation aimed at eliciting incriminating statements; (4) the suspect had requested and been denied an opportunity to consult with counsel; and (5) the police failed to effectively warn the suspect of his constitutional right to remain silent. Id. at 490-91. See Kamisar, Brewer v. Williams, Massiah and Miranda What is "Interrogation"? When Does It Matter?, 67 Geo. L.J. 1, 25 n.145 (1978).

Some members of the Court and many commentators have concluded that Escobedo was either overruled or supplanted by Miranda. In his plurality opinion in Kirby, Justice Stewart, a dissenter in Escobedo, stated, "[T]he Court in retrospect perceived that the 'prime purpose' of Escobedo was not to vindicate the constitutional right to counsel as such, but, like Miranda, 'to guarantee full effectuation of the privilege against self-incrimination . . . . .' " Kirby, 406 U.S. at 689 (quoting Johnson v. New Jersey, 384 U.S. 719, 729 (1966)). See Beckwith v. United States, 425 U.S. 341, 344 (1976) (Miranda implicitly redefined Escobedo "focus" test as individual taken into custody and deprived of liberty in significant way). See also Kamisar, supra, at 20 (Miranda displaced Escobedo); Note, Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel, 82 Colum. L. Rev. 363, 371 n.50 (1982) (Court's fifth amendment decision in Miranda obviated Escobedo's need to strain traditional sixth amendment analysis).

21. The term "interrogation" is used loosely in much fifth and sixth amendment scholarly writing. The common conception of "interrogation" is the "custodial interrogation" envisioned by the Miranda Court. Professor Kamisar contends that one cannot be subject to police interro-
approach did not gain majority support until *Massiah v. United States*, the rationale for adopting such an approach was first suggested in two concurring opinions in *Spano v. New York*.

In *Spano*, the police continued to interrogate coercively the indicted defendant despite his repeated requests to see his lawyer. The Supreme Court reversed the defendant’s conviction on due process grounds, looking to the totality of the circumstances under which the police obtained his confession. The four concurring Justices said that they would have reached the same conclusion on sixth amendment grounds rather than the due process clause. They reasoned that allowing police to obtain a confession from an indicted defendant in the absence of counsel might deny the defendant “effective representation by counsel at the only stage when legal aid and advice would help him.”

The Supreme Court in *Massiah v. United States* adopted the approach suggested by the concurring Justices in *Spano*. Massiah and Colson were indicted for conspiracy to possess and distribute cocaine. Unbeknownst to Massiah, Colson decided to cooperate with the government in its continuing investigation of the narcotics activity for which he and Massiah had been indicted. Colson permitted a government agent to place a radio transmitter under the front seat of his automobile. Massiah held a lengthy conversation with Colson, during which Massiah made several incriminating statements that were introduced at his trial.

Reversing Massiah’s conviction on sixth amendment grounds, the Court formulated what has come to be known as the “deliberately elicited” test.

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25. 360 U.S. at 325-26 (Douglas, J., concurring, joined by Black and Brennan, J.J.); *see also* 360 U.S. at 326-27 (Stewart, J., concurring, joined by Douglas and Brennan, J.J.). As Justice Douglas noted, “What use is a defendant’s right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses?” *Id.* at 326.
27. It is not apparent why Colson decided to cooperate with the authorities. However, it is reasonable to assume that he hoped to receive some leniency from the authorities. *See Enker & Elsen,* *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois,* 49 *MINN. L. REV.* 47, 53 (1965). Nevertheless, it seems that Colson’s motivation for cooperating with the government was not a factor in the *Massiah* Court’s decision. *But see* United States v. Henry, 447 U.S. 264 (1980). In *Henry*, the Court based its decision in large part on its conclusion that the informant in that case had acted affirmatively to gain incriminating statements because he was to be paid by the government on a contingency basis. *Id.* at 270.
According to the Court, "[Massiah] was denied the basic protections of [the sixth amendment] guarantee [of right to counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." The Court emphasized that the sixth amendment is particularly susceptible to violation in non-custodial, surreptitious confrontations between the accused and the government.

Significant was the Court's discussion of continuing police investigation as it relates to an indicted defendant's right to counsel. The government asserted that the federal agents not only had the right, but also the duty, to continue their investigation of Massiah and his accomplices. The Court did not take issue with this. However, in ambiguous language, the Court equivocally stated, "All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial."

Thirteen years passed before the Court directly considered the right recognized in Massiah. In Brewer v. Williams, a warrant was issued for the arrest of Robert Williams on a charge of abduction, following the disappearance of a ten-year-old girl in Des Moines, Iowa. When Williams surrendered to police in Davenport, Iowa, the Davenport police contacted their counterparts in Des Moines and agreed that a Detective Leaming and a fellow officer would drive to Davenport to bring Williams back to Des Moines. Williams' Des Moines attorney and the Des Moines police agreed that Williams would not be questioned during the trip from Davenport. In the meantime, a Davenport judge arraigned Williams on the outstanding

29. 377 U.S. at 206.
30. Id. In this respect, the Court quoted Judge Hays in his dissent from the Court of Appeals decision affirming Massiah's conviction:
   "[If] such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent.
Id. at 206 (quoting United States v. Massiah, 307 F.2d 62, 72-73 (2d Cir. 1962) (Hays, J., dissenting)).
31. Id. at 207.
32. Several weeks after its Massiah decision, the Court announced its decision in Escobedo v. Illinois, 378 U.S. 478 (1964). Although Escobedo was initially interpreted as an expansion of Massiah, the case has since come to be viewed as a precursor to the Miranda custodial interrogation cases. See Kirby v. Illinois, 406 U.S. 682, 689 (1972).
Prior to the Court's decision in Brewer v. Williams, 430 U.S. 387 (1977), the Court's only consideration of the Massiah doctrine was by way of summary reversals in which the Court merely cited Massiah. See Beatty v. United States, 389 U.S. 45 (1967) (per curiam); McLeod v. Ohio, 381 U.S. 356 (1965) (per curiam).
34. Id. at 390.
35. Id. at 391.
arrest warrant and informed him of his *Miranda* rights.\textsuperscript{36} Shortly after leaving Davenport with Williams in custody, Detective Learning, knowing Williams to be deeply religious, commenced to deliver what is commonly called the “Christian burial speech.”\textsuperscript{37} After hearing the speech, Williams directed the police to the missing girl’s body.\textsuperscript{38}

After reviewing its sixth amendment decisions,\textsuperscript{39} the Supreme Court concluded that judicial proceedings had initiated against Williams, causing his right to counsel to attach prior to Learning’s speech.\textsuperscript{40} The Court also found that Learning’s conduct was the type prohibited by *Massiah*.\textsuperscript{41} It did so, however, in language that arguably limited *Massiah* to situations involving police interrogation.\textsuperscript{42} The Court expressly equated “deliberate elicitation”  

\textsuperscript{36} Id.
\textsuperscript{37} Id. at 392-93. According to the Court’s opinion, the detective addressed Williams as “Reverend” and said:

\begin{quote}
I want to give you something to think about while we’re traveling down the road . . . . Number one, I want you to observe the weather conditions, it’s raining, it’s sleetig, it’s freezing, driving is very treacherous, visibility is poor, it’s going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person who knows where this little girl’s body is, that you 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 [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.
\end{quote}

The Court stated:

Williams asked Detective Learning why he thought their route to Des Moines would be taking them past the girl’s body, and Learning responded that he knew the body was in the area of Mitchellville—a town they would be passing on the way to Des Moines. Learning then stated: “I do not want you to answer me. I don’t want to discuss it any further. Just think about it as we’re riding down the road.”

\textsuperscript{38} Id. at 392-93.
\textsuperscript{39} Id. at 393.
\textsuperscript{40} Justice Stewart, writing for the Court, stated:

\begin{quote}
There has occasionally been a difference of opinion within the Court as to the peripheral scope of this constitutional right . . . . 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—“whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.”
\end{quote}

430 U.S. at 398 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).
\textsuperscript{41} Id. at 399. Justice Stewart noted that: (1) a warrant had been issued for Williams’ arrest; (2) a Davenport judge had arraigned Williams on the warrant; and (3) Williams had been confined to jail. \textsuperscript{Id.}
\textsuperscript{42} Id. at 399. The Court stated: “There can be no serious doubt . . . that Detective Learning deliberately and designedly set out to elicit information from Williams just as surely as—and
with interrogation when it stated, "the clear rule of Massiah is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." \(^4\)

*Brewer* gave new life to the constitutional protections recognized in *Massiah*, but did so reluctantly. Reasonably interpreted, the Court’s repeated use of the term "interrogation" when there was an obvious *Massiah* violation leads to the conclusion that in reaffirming *Massiah*, the Court was also narrowing it. Indeed, commentators have so interpreted the case until recently.\(^3\)

The Court reversed its apparent trend toward limiting the *Massiah* doctrine in *United States v. Henry*.\(^4\) After indictment for armed robbery, Henry was held in jail pending trial. Shortly after Henry’s incarceration, federal agents contacted Edward Nichols, an inmate housed in Henry’s cell block.\(^6\) At the time, the Federal Bureau of Investigation had employed Nichols as an informant for more than a year. A federal agent told Nichols to be alert to any statements Henry made but also warned him that he should not "initiate any conversation with or question Henry" about the bank robbery.\(^7\) Several weeks later, Nichols reported that he and Henry had engaged in conversation and that Henry had told him about the robbery.\(^8\) Nichols was paid for furnishing this information.\(^9\) At Henry’s trial, Nichols testified about Henry’s incriminating statements, and Henry was convicted.\(^0\)

In affirming the Fourth Circuit’s reversal of Henry’s conviction,\(^5\) the Supreme Court held that the government had deliberately elicited statements perhaps more effectively than—if he had formally interrogated him.” \(^43\) at 399.

"Both [state] courts recognized that Williams had been entitled to the assistance of counsel at the time he made the incriminating statements. Yet no such constitutional protection would have come into play if there had been no interrogation.” \(^40\) at 400.

43. *Id.* at 401.

44. See White, *Interrogation Without Questions: Rhode Island v. Innis and United States v. Henry*, 78 Mich. L. Rev. 1209, 1214 (1980) (Court’s intimation in *Brewer* that sixth amendment precluded only “interrogation” suggested that *Brewer* definition of sixth amendment right was narrower than *Massiah* definition).


46. It does not appear that the federal agents were responsible for Nichols being housed in the same cell block with Henry. *Id.* at 268.

47. *Id.* at 266.

48. *Id.* It is unclear whether Nichols or Henry initiated the conversation. At trial, Nichols testified that he had "an opportunity" to talk with Henry. *Id.* at 267. In addition, the F.B.I. agent who contacted Nichols stated in an affidavit, "I recall telling Nichols not to initiate any conversations with Henry regarding the bank robbery charges against Henry, but that if Henry initiated the conversations with Nichols, I requested Nichols to pay attention to the information furnished by Henry." *Id.* at 268.

However, Chief Justice Burger’s opinion proceeded on the presumption that Nichols had taken affirmative steps to secure incriminating statements from Henry. See infra note 52 and accompanying text.

49. *Id.* at 266.

50. *Id.* at 267.

from Henry within the meaning of Massiah by "intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel." In an opinion authored by Chief Justice Burger, the Court emphasized three factors in support of its conclusion.

First, the Court placed great reliance on the fact that Nichols was paid on a contingent-fee basis and therefore had a substantial interest in securing useful information from Henry. The Court concluded that because of the nature of this arrangement the government "must have known" that Nichols would take affirmative steps to obtain incriminating evidence from Henry.

Second, the Court considered it important that "Nichols was ostensibly no more than a fellow inmate of Henry." The government had argued that a less stringent sixth amendment standard should apply when an accused was unaware that he was speaking to a government informant. Rejecting the government's contention as confusing sixth and fifth amendment concerns, Chief Justice Burger pointed out that an accused is more likely to make incriminating statements to an undercover informant than to a known government agent.

The Court's final concern was Henry's incarceration at the time he made incriminating statements to Nichols. The Chief Justice argued that Henry's confinement increased the likelihood that Henry would make incriminating statements to Nichols. He stated, "The mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents."

Although subject to several interpretations, the Henry "likely to induce" test broadened an accused's right to be free from pretrial confrontations with the government. The decision indicates that "deliberate elicitation"

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52. 447 U.S. at 274. Chief Justice Burger further noted, "This is not a case where, in Justice Cardozo's words, 'the constable . . . blundered,' rather, it is one where the 'constable' planned an impermissible interference with the right to the assistance of counsel." Id. at 274-75 (quoting People v. DeFore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926)).

53. The majority concluded that Nichols was to be paid on a contingent fee basis; therefore, he would be compensated only if he produced useful information. 447 U.S. at 270. However, Justice Blackmun disagreed that such an arrangement existed. Id. at 283 (Blackmun, J., dissenting).

54. Id. at 271.
55. Id. at 270.
56. Id. at 272-73.
57. Id. at 273.
58. Id. at 274.
59. See White, supra note 44, at 1239-40. Professor White posits three possible interpretations of the language used by the Henry Court: "(1) that the government know that incriminating statements are likely to be induced by the situation it created; or (2) that the government should have known of this possibility; or (3) only that the government 'intentionally created a situation' which in fact is likely to induce incriminating statements." Id. at 1239 (emphasis in original).
60. Justice Blackmun, in a highly critical dissent, claimed that the majority's "likely to induce" test "fundamentally restructured" Massiah. Emphasizing that Massiah applies only to actions
within the meaning of Massiah can occur without actual interrogation. In this sense, Henry rejected the narrow interpretation afforded the Brewer decision. Yet, Henry continues to require some type of governmental action that causes the accused to make incriminating statements. Literally read, it seems that the Henry "likely to induce" test would be violated when an undercover government informant arranges for a meeting with the accused, but in no way prompts the accused to make incriminating statements. Chief Justice Burger, however, based his holding on the presumption that Nichols did in fact take affirmative steps to obtain incriminating statements from Henry. Although Henry is subject to an expansive reading, it continues to require some type of governmental action which causes the accused to make incriminating statements.

II. MAINE v. MOULTON

On April 7, 1981, Perley Moulton and Gary Colson were charged with four counts of theft by receiving in two indictments returned by a Waldo County, Maine, grand jury. The indictments alleged that Moulton and Colson received, retained or disposed of two trucks, an automobile, and assorted automobile parts knowing them to be stolen and intending to deprive the owners of possession. Two days later, Moulton and Colson, represented by retained counsel, appeared before the Maine Superior Court for Waldo County and entered pleas of not guilty.

On November 4, 1982, Colson called Belfast Police Chief Robert Keating and complained that he had been receiving anonymous threatening telephone
calls regarding the pending charges. He also indicated that he wanted to talk with police about those charges. Chief Keating told Colson to speak with his lawyer and then to call back.\(^6\)

Moulton and Colson met on November 6 to plan for their trial. According to Colson, Moulton suggested the possibility of killing Gary Elwell, a state's witness.\(^6\) On November 9 and 10, Colson, accompanied by his lawyer, met with Keating and State Police Detective Rexford Kelley. Colson confessed to the crimes for which he and Moulton had been indicted. He also confessed to several other crimes he and Moulton had committed. Colson discussed with the officers the anonymous threats he had been receiving and Moulton’s plan to kill Gary Elwell. As a result, Colson agreed to testify against Moulton and cooperate in Moulton's prosecution in exchange for the state’s promise not to bring any further charges against him.\(^6\) Colson consented to having a recording device placed on his home telephone to record any calls from Moulton or other anonymous threats.\(^7\)

While the recording device was in place, Colson received three calls from Moulton that he later turned over to the police.\(^6\) The first call, on November 22, concerned primarily personal matters, with only one reference to the pending charges and Moulton’s plan to kill Gary Elwell. As a result, Colson consented to having a recording device placed on his home telephone to record any calls from Moulton or other anonymous threats.\(^6\)

While the recording device was in place, Colson received three calls from Moulton that he later turned over to the police.\(^6\) The first call, on November 22, concerned primarily personal matters, with only one reference to the pending charges and Moulton’s plan to kill Gary Elwell.\(^6\) The second telephone conversation, on December 2, was prompted by Moulton’s receipt of copies of statements made by three state’s witnesses. The conversation

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64. Id. According to Chief Justice Burger's dissent, Colson not only telephoned Keating on November 4, but also met with him. Id. at 490 (Burger, C.J., dissenting).
65. 106 S. Ct. at 480.
66. Id. at 480-81 n.2. Colson eventually pleaded guilty to two counts of theft. The trial court, on the prosecution’s recommendation, sentenced Colson to two years imprisonment, all but fifteen days to be suspended, and placed him on two years probation. Colson also agreed to make restitution up to $2,000 during the probationary period. Id.
67. Id. at 481.
68. Id. None of the recorded telephone conversations were introduced at Moulton’s trial. Id. at 483.
69. Id. at 481. The portion of the November 22 telephone conversation that apparently concerned the alleged plan to kill Gary Elwell was as follows ["M" is Perley Moulton; "C" is Gary Colson]:

M. I come up with a method.
C. You did?
M. Yeah, some day I’d like to get together and talk with you about it.
C. You.
M. After, I . . . work out the details on it. . . .
C. Nothing you want to talk to me about right now then?
M. Oh no.
C. No.
M. Nothing yet it’s just something that’s been rolling in my brains.
C. Yeah.
M. Oh, you know, what the heck?
M. Yeah, I gotta research it thoroughly (Laughing).
Exh. S-1, Tr. of Nov. 22, 1982 Conversation 4-5.
concluded without Moulton incriminating himself. The final recorded telephone conversation occurred on December 14. The conversation concerned the pending charges, but again Moulton said nothing inculpatory. At the end of the conversation, they agreed to meet on Sunday, December 26, and plan their defense.

The police obtained Colson's consent to be equipped with a body wire transmitter to record what was said at the December 26 meeting. Colson was instructed "to act like himself, converse normally, and avoid trying to draw information out of Moulton." The meeting was a prolonged discussion of the pending charges. Specifically, Moulton and Colson discussed what had actually occurred, what the state's evidence would show, and what they should do to obtain a verdict of acquittal. Only once, early in the conversation, was the subject of eliminating state's witnesses discussed. However, Moulton quickly stated that they should not follow through with the plan.

70. 106 S. Ct. at 481. It is not apparent whether the majority, in stating that Moulton did not incriminate himself, was referring to incriminating statements concerning Moulton's alleged plan to kill Elwell or whether it was referring to incriminating statements concerning offenses for which Moulton had already been charged. For two reasons it would seem that only statements relating to the plan to kill Elwell would be of any relevance. The recorded telephone conversations were not admitted into evidence at trial and thus were not the subject of constitutional scrutiny. Accordingly, the only relevance of the telephone conversations went to the issue of the state's justification for recording the December 26 face-to-face meeting between Moulton and Colson. Therefore, only statements concerning the plan to kill Elwell or other unindicted crimes would have been relevant.

Chief Justice Burger disagreed with the majority's conclusion that Moulton did not make any incriminating statements during the December 2 conversation. Rather, he concluded that Moulton "made several incriminating statements." Id. at 490 (Burger, C.J., dissenting). For a discussion of the Chief Justice's interpretation of the recorded telephone conversations, see infra note 101.

71. Colson made the following apparent reference to Moulton's plan to kill Elwell:


72. 106 S. Ct. at 481.

73. Id.


75. 106 S. Ct. at 481.

76. Id. at 481-82. Only four pages of the 122-page transcript of the December 26 meeting contain discussion of the alleged plan to kill Elwell. That portion of the meeting went as follows:


M. You know I thought of a way to eliminate them. Remember we were talking about it before?

C. Yes, you thought of a way?

M. Yeah, but ah I don't think that we ought to go for it . . . .

C. Well, let me (Inaudible).

M. Well you know those air guns . . . . They make little darts for those little feather back darts that you can put in there you've seen em . . . . I's thinking just hollow the tip out like a needle . . . and you fill it with a lethal injection and the shooting impact . . . would shoot all the stuff out of it . . . into the individuals body,
Moulton and Colson decided to create false alibis as their defense at trial. Because they sought to conform these alibis as closely as possible to what really happened, much of their discussion involved recounting the crimes. In addition, Colson professed to being unable to recall certain events and asked Moulton to remind him of the details of what had happened. Many of these queries were unnecessary for formulating false alibis. Moulton made numerous incriminating statements concerning the pending charges. Further, Colson “reminisced” about events surrounding the various thefts,
which caused Moulton to make incriminating statements.80

After learning that the statements he made to Colson in the three telephone conversations and at the December 26 meeting were recorded, Moulton filed a pretrial motion to suppress the recordings. The trial court denied Moulton's motion, finding that the recordings were made for the legitimate purposes of protecting Colson and gathering information about the anonymous threats and Moulton's plan to kill Elwell.81 At trial, the state offered into evidence portions of the December 26 recordings, particularly those containing direct conversations about the thefts for which Moulton was originally indicted. The state did not offer the portion of the conversation concerning the plan to kill Elwell and offered only one portion of the discussion about developing false testimony. The trial court found Moulton guilty on several counts.82

On appeal, the Supreme Judicial Court of Maine found that Moulton's sixth amendment rights were violated when the tapes of the December 26 meeting were admitted at trial. The court agreed with the trial court's determination that the authorities wired Colson for legitimate purposes, but stated that "Reference to the state's legitimate motive may be relevant to, but cannot wholly refute, the alleged infringement of Moulton's right to counsel."83 The court held that the police violated Moulton's sixth amendment right when they "intentionally created a situation that they knew, or should have known, was likely to result in Moulton's making incriminating statements during his meeting with Colson."84 However, the court concluded that despite the inadmissibility of the statements at Moulton's trial on the original indictments, the statements may be admissible in the prosecution of crimes for which, at the time the recordings were made, adversary proceedings had not yet commenced.85

80. C. [R]emember, remember when we took the pick-up out through there and we, and we dumped all the stuff off it, that truck out back. Then I drove it back and then we, then I dumped it into whatever pond it was out there.

M. Sanborn's Pond.

C. Sanborn's Pond right.

Id. at 24.

81. 106 S. Ct. at 482.

82. Id. at 483.


84. Id. at 161. In reaching its conclusion that the police "knew or should have known" that Moulton would make incriminating statements, the Maine Supreme Court noted several factors. First, Chief Keating himself admitted that he was aware that Colson and Moulton would probably discuss their case at the upcoming meeting. Id. at 160. Second, the court stated that because Colson and Moulton were friends and co-defendants, there was a significantly greater chance, as Chief Keating should have known, that Moulton would confide incriminating information to Colson. Id. The court also held that despite the instructions given to Colson to act like himself, the fact that the conversation was to concern the pending charges made it likely that Moulton would incriminate himself. Id. at 161. Furthermore, the court concluded that Colson was not merely a "passive listener," because he frequently pressed Moulton for details of various thefts. The court noted that this was precisely what Chief Keating should have anticipated. Id.

85. Id.
In a 5-4 decision, the Supreme Court affirmed. The Court emphasized that once the right to counsel has attached, the state has "an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel."\(^87\)

The government argued that Moulton's sixth amendment rights were not violated when the state recorded the December 26 meeting because Moulton himself had arranged for the meeting. After noting that its prior cases ruled out the government's contention,\(^88\) the Court articulated the nature of the right to counsel recognized in \textit{Massiah}. Emphasizing the accused's right to rely on counsel as a "medium" between him and the state, the Court stated:

[The sixth amendment] guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right . . . . [K]nowing 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.\(^9\)

The Court held that the government violated the sixth amendment by "knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent."\(^90\) In a footnote, the Court recognized that direct proof of the state's knowledge is seldom available.\(^91\) Nevertheless, it stated that a violation occurs whenever the government "must have known" that its agent was likely to obtain incriminating statements from the accused.\(^92\)

Applying its holding to the facts, the Court found that, given the nature of the planned meeting, there was no question that the police knew that


Two strange turnabouts occurred in the Moulton decision. First, Justice Blackmun, who filed a strenuous dissent in \textit{Henry}, joined the majority in an opinion that broadens the \textit{Massiah} doctrine even further than \textit{Henry} did. Second, Chief Justice Burger, who authored the \textit{Henry} decision, dissented in Moulton when faced with the specter that incriminating statements obtained in violation of the sixth amendment would be inadmissible despite the fact that they were gathered during a legitimate investigation of another crime.

\(^{87}\) \textit{Id.} at 485.

\(^{88}\) \textit{Id.} at 487. The Court noted that the \textit{Massiah} Court did not mention in its opinion which party arranged for the meeting during which Massiah made his incriminating statements. It also cited Beatty v. United States, 389 U.S. 45 (1967) (per curiam), in which the Court summarily rejected the contention that a defendant's incriminating statements were admissible because he had arranged for the meeting and led the conversation. \textit{Id.}

\(^{89}\) \textit{Id.} at 487. The Court noted, however, that 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." \textit{Id.}

\(^{90}\) \textit{Id.}

\(^{91}\) \textit{Id.} at 487 n.2.

\(^{92}\) \textit{Id.} at 487-88 n.12.
Moulton would make incriminating statements to Colson concerning the pending charges.\textsuperscript{93} The Court emphasized Colson's role as a government agent\textsuperscript{94} and concluded that because the purpose of the December 26 meeting was to discuss the pending charges, a constitutional violation was inevitable, despite the authorities' warnings to Colson not to question Moulton.\textsuperscript{95}

Unlike its prior decisions, the Court did not emphasize Colson's conduct during the meeting. The Court's only statement in this regard was made in a footnote.\textsuperscript{96} After noting that Colson had acted affirmatively in obtaining statements from Moulton, the Court stated "we need not reach the situation where the 'listening post' cannot or does not participate in active conversation and prompt particular replies."\textsuperscript{97}

The Court next turned to the state's argument that Moulton's incriminating statements were admissible because the authorities had legitimate reasons for listening to Moulton's conversation with Colson. The Court recognized that the authorities have a legitimate interest in investigating new or additional crimes,\textsuperscript{98} but held:

To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in \textit{Massiah}.\textsuperscript{99}

Accordingly, the Court held that when the government violates the sixth amendment by knowingly circumventing the accused's right to counsel, any statements "pertaining" to pending charges that result from such a violation are inadmissible at the trial of those charges. The Court noted, however, that evidence obtained during the violation that pertains to crimes for which the accused has not been charged is admissible at the trial on those charges.\textsuperscript{100}

Disagreeing with the majority's interpretation of the facts, Chief Justice Burger argued in dissent that there had been no sixth amendment violation

\begin{footnotes}
\footnote{93. \textit{Id.} at 488.}
\footnote{94. \textit{Id.}}
\footnote{95. Rejecting the state's contention that there was no violation of Moulton's right to counsel because it had instructed Colson not to question Moulton, the Court stated: The Sixth Amendment protects the right of the accused not to be confronted by an agent of the State regarding matters as to which the right to counsel has attached without counsel being present. This right was violated as soon as the State's agent engaged Moulton in conversation about the charges pending against him. Because these charges were the only subject to be discussed at Colson's December 26 meeting with Moulton, a Sixth Amendment violation was inevitable once Colson agreed to this meeting with Moulton. \textit{Id.} at 488 n.14.}
\footnote{96. \textit{Id.} at 488 n.13.}
\footnote{97. \textit{Id.}}
\footnote{98. \textit{Id.} at 489.}
\footnote{99. \textit{Id.}}
\footnote{100. \textit{Id.} at 490 n.16.}
\end{footnotes}
because the police had acted for alternative and legitimate reasons when they recorded the December 26 meeting. He also argued that even if there had been a Massiah violation, the majority should not have applied the exclusionary rule to Moulton's statements because there had been a finding that the police had not recorded the Moulton-Colson meeting for the purpose of gaining evidence concerning the pending charges.

101. Chief Justice Burger primarily disagreed with the majority's conclusion that Moulton did not make any incriminating statements during the December 2 and December 14 recorded telephone conversations. With respect to the December 2 conversation, the Chief Justice concluded that Moulton "made several incriminating statements." Id. at 490-91 (Burger, C.J., dissenting).

However, the transcript of the December 2 conversation contains only one passage that might be interpreted as incriminating. Moulton quoted to Colson the following from a state witness's statement: "Perley Moulton said that why should we break the lock when I'm a locksmith? We don't need too [sic]." Colson responded, "What's that pertaining to though?" Moulton then said, "The Mustang, and taking the locks out of it. There was no locks in the doors and stuff like that. Mm." Exh. S-2, Tr. of Dec. 2 Conversation 4. One of the charges in the initial indictments against Colson and Moulton concerned a Mustang automobile. Consequently, Moulton's response to Colson's inquiry can be construed as indicative of Moulton's knowledge of the stolen Mustang.

However, if this statement is incriminating, it is incriminating with regard to an offense for which Moulton had been indicted. Whether Moulton made such statements in the taped telephone conversations should be irrelevant for two reasons. First, the statements, which were arguably obtained in violation of Moulton's Massiah rights, were never admitted at trial. Second, it would seem that the recorded telephone conversations were relevant only to determine whether the state was justified in recording the December 26 face-to-face conversation between Moulton and Colson. Accordingly, only statements concerning threats to witnesses, Moulton's inchoate plan to kill Elwell, or other unindicted crimes would have been relevant to this inquiry.

The Chief Justice's conclusion with respect to the December 14 conversation is somewhat more tenable. During that conversation the following discussion took place:

M. Ok then all you got is the Mustang and ... the parts.
C. Right.
M. Ok, the parts I bought. I never denied that. I did buy those.
C. Right.
M. Ok, so I bought those.
C. Right. The [M]ustang ... same here.
M. And the [M]ustang, we bought that?
C. Yeah.
M. Ok. Its [sic] just a coincidence that ah, they happened to be ....
C. Yeah.
M. Hot or whatever ....
C. Yeah.
M. You've got a bill of sale for the Mustang. I got a bill of sale for parts. So, you know, what the hell? What can they say?

It can be reasonably asserted that this discussion was evidence of a conspiracy to commit perjury, a crime for which Moulton had not been indicted. Therefore, the conversation would be relevant to the determination of whether the authorities were justified in recording the December 26 meeting as an investigation of "other crimes." However, the authorities did not indicate that the purpose of recording the meeting was to gain evidence of conspiracy to commit perjury or to obstruct justice.
The Chief Justice first argued that there had not been a sixth amendment violation because the police were not acting with the purpose of obtaining evidence related to the pending charges. In this respect, he stated that the majority had misapplied the reasoning underlying *Massiah* by “first positing a constitutional violation and then asking whether ‘alternative, legitimate reasons’ for the police surveillance are sufficient to justify that constitutional violation.”102 As the Chief Justice saw it, if the “alternative, legitimate” reasons motivated the police in recording the December 26 meeting, there was no sixth amendment violation.103 Similarly, he criticized the majority for finding a sixth amendment violation because the police “must have known” Colson would cause Moulton to make incriminating statements. In his opinion, the inquiry under *Massiah* should be whether the state recorded the statements “not merely in spite of, but because of” the likelihood that the defendant would make incriminating statements.104 Recognizing the possibility of police abuse of the “other crimes” justification, the Chief Justice proposed that evidence obtained through a separate crimes investigation should be admitted only “so long as investigating officers show no bad faith and do not institute the investigation of the separate offense as a pretext for avoiding the dictates of *Massiah*.”105

The Chief Justice then addressed the propriety of applying the exclusionary rule in cases where the police had gained the incriminating statements in the course of a valid investigation of “other crimes.” Emphasizing that the purpose of the exclusionary rule is to deter improper police conduct, he reasoned that because the police in *Moulton* were legitimately investigating other crimes, the exclusion of Moulton’s statements would have had no deterrent effect. The police would still have conducted their investigation of Moulton’s alleged “other crimes.”106 He concluded by stating, “If anything,
the argument for admission of evidence here is even stronger because 't]his is not a case where . . . the constable . . . blundered.'

III. ANALYSIS

One must question why the Court chose to review the Moulton case. It would seem that under any of the prior sixth amendment standards, there had been a violation of Moulton's rights because Colson actively prompted Moulton to inculpate himself. Further, it was undisputed that Police Chief Keating knew that Moulton would make incriminating statements at the December 26 meeting.

Moreover, two of the factors relied on by Chief Justice Burger in Henry were present in Moulton. Colson, although he was not being paid by the government, certainly had an incentive to produce valuable evidence against Moulton. Realistically, Colson's chances for leniency from the prosecution were directly related to the amount of evidence he produced. In addition, Colson and Moulton were long-time friends who were ostensibly suffering the common plight of prosecution for theft. This situation is analogous to Chief Justice Burger's reliance in Henry on the fact that Henry was more likely to confide in someone who he was not aware was acting as a government agent.

It seems that the Court granted certiorari in Moulton because it recognized the need to address the thorny issue of how to balance the Massiah right to counsel against society's interest in investigating the criminal activity of an indicted defendant. In deciding this issue, the Court adopted the new "knowing circumvention" standard.

A. The "Knowing Circumvention" Standard

Two elements are present in each of the various tests formulated by the Court for determining whether the government violates an accused's sixth amendment right to counsel. First, there is an element of mens rea. That is, the government must possess some type of intent or knowledge. Second, there must be an element of action—the government must act in some manner that results in a sixth amendment violation.

Prior to Moulton, the Court discussed the mens rea requirement in Massiah and Henry. In Massiah, the Court used the term "deliberate" to define the requisite intent for a sixth amendment violation. Reasonably interpreted, "deliberateness" indicates that the government must possess the specific intent to obtain incriminating statements. With respect to the requisite

107. Id. at 496 (Burger, C.J., dissenting) (quoting United States v. Henry, 447 U.S. 264, 274-75 (1980)).
108. See infra notes 110-14 and accompanying text.
109. See infra notes 115-16 and accompanying text.
element of action, the *Massiah* Court held that the government must have "elicited" the statements.\(^{111}\) Although "elicitation" can occur without affirmative conduct on the part of the actor, the Court has consistently held, expressly or by implication, that affirmative conduct is required for a sixth amendment violation.

The Court in *Henry* held that a violation occurs when the government "intentionally creat[es] a situation likely to induce [a defendant] to make incriminating statements."\(^{112}\) This equivocal language is subject to numerous interpretations.\(^{113}\) However, read in light of *Massiah*, it would seem that *Henry* requires the intentional creation of a situation for the purpose of producing incriminating statements. Therefore, the intent required under *Henry* is identical to that required under *Massiah*—the government must possess the specific intent to gain incriminating statements.\(^{114}\)

Analysis of the governmental action component of the *Henry* test is somewhat more difficult. First, one must distinguish governmental action taken by the authorities themselves from governmental action in the form of an undercover informant acting as a government agent. The *Henry* decision indicates that both types of governmental conduct are required for a sixth amendment violation. With respect to governmental action as action taken by the authorities themselves, *Henry* requires that the authorities "create a situation likely to induce" the making of incriminating statements.\(^{115}\) On its face, the phrase "likely to induce" would seem to apply to situations where the authorities take no affirmative action but place the accused in an environment in which there is some level of probability that he will incriminate himself. But this was not the gist of the Court's holding in *Henry*. Rather, it seems that the "likely to induce" language was directed, at least in part, to the likelihood that the authorities' actions would cause their informant to take affirmative steps toward obtaining incriminating statements.\(^{116}\) Accordingly, the creation of an environment conducive to obtaining incriminating statements is not sufficient for a sixth amendment violation under *Henry*. An additional factor must be present—there must be some type of conduct by the government agent that causes the accused to utter incriminating statements.

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111. *Id.*
113. See supra note 59 and accompanying text.
114. But see White, supra note 44, at 1238. Professor White contends that the *Henry* standard can be violated even where the government lacked the specific purpose to elicit incriminating statements at the time they were elicited. However, the *Henry* decision mandates a different conclusion. At the end of his opinion in *Henry*, Chief Justice Burger stated that the government "planned an impermissible interference with the right to the assistance of counsel." 447 U.S. at 275.
115. 447 U.S. at 274.
116. See supra note 54 and accompanying text.
Synthesizing the Massiah and Henry standards, it is apparent that: (1) the
government must have possessed the specific intent of obtaining incriminating
statements from the accused; and (2) the government must have acted in
some affirmative manner that resulted in the accused's having made incrim-
inating statements. The second element of this "generic" Massiah formulation
is met whenever an informant, acting on the government's behalf, takes
affirmative steps to induce the accused to incriminate himself.

Given this framework, it is clear that Moulton and its "knowing circum-
vention" standard broadened the sixth amendment right to counsel. Because
the Court adopted a "knowing" standard rather than an "intentional"
standard, specific intent to obtain incriminating statements is no longer
required for a sixth amendment violation. A violation occurs under Moulton
whenever the authorities "must have known" that an accused would make
incriminating statements, even if the authorities did not specifically intend
for the accused to make such statements.\(^{117}\)

The governmental action component of the Moulton standard consists of
"circumventing the accused's right to have counsel present in a confrontation
between the accused and a state agent."\(^{118}\) Central to determining the type
of governmental action circumscribed by Moulton is an interpretation of the
Court's use of the term "confrontation."

Initially, it is necessary to compare the Moulton and Henry opinions. In
Henry, Chief Justice Burger proceeded on the presumption that the agent,
Nichols, had acted affirmatively in obtaining statements from Henry. In
finding that the authorities had "creat[ed] a situation likely to induce"
Henry to incriminate himself, Chief Justice Burger emphasized that Nichols
was to be paid on a contingency basis and that the authorities "must have
known" that Nichols would act affirmatively.

The focus in the Moulton decision is far different. Rather than emphasizing
the likelihood that Colson would take affirmative steps to secure incrimi-
inating statements from Moulton, the Court emphasized the nature of the
planned meeting between Colson and Moulton. Because it was apparent
from the recorded telephone conversations that the December 26 meeting
was going to involve a discussion of the pending charges, "The police knew
that Moulton would make incriminating statements that he had a constitu-
tional right not to make to their agent prior to consulting with counsel."\(^{119}\)

Further emphasis on the nature of the planned meeting is found in the
following footnote:

The Sixth Amendment protects the right of the accused not to be con-
fronted by an agent of the State regarding matters as to which the right
to counsel has attached without counsel being present . . . . Because [the
pending] charges were the only subject to be discussed . . . , a Sixth

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\(^{117}\) Moulton, 106 S. Ct. at 487-88 n.12.
\(^{118}\) Id. at 487.
\(^{119}\) Id. at 488.
Amendment violation was inevitable once Colson agreed to this meeting with Moulton.\textsuperscript{120}

Of further relevance is the total absence of any discussion in the text of the Court’s opinion about Colson’s conduct during the December 26 meeting even though the record on appeal was replete with instances of affirmative questioning.\textsuperscript{121} This apparent lack of concern with Colson’s conduct, together with the Court’s emphasis on the nature of the planned meeting, leads to the conclusion that no affirmative conduct on the part of the state’s agent is required for the type of confrontation prohibited by \textit{Moulton}.

Although \textit{Moulton} does not appear to require affirmative action on the part of the state’s agent, the Court mentioned in a footnote that Colson had actively elicited statements from Moulton, but then stated, “we need not reach the situation where the ‘listening post’ cannot or does not participate in active conversation and prompt particular replies.”\textsuperscript{22} Consequently, the Court managed to skirt the issue of the “passive listener.” This was necessary to gain a majority for Justice Brennan’s opinion. Justice Powell in his \textit{Henry} concurrence made it clear that he would not find a \textit{Massiah} violation unless the state’s agent had engaged in deliberate elicitation. Thus, Justice Brennan would not have commanded a majority unless he had, at least ostensibly, based his opinion on Colson’s affirmative conduct in the December 26 meeting.

Nevertheless, it appears that four members of the present Court would be willing to find a sixth amendment violation even when the state’s agent has not engaged in affirmative conduct to cause the accused to inculpate himself. This is apparent when one considers that the agent’s conduct was a primary factor in \textit{Henry}, while the significance of the agent’s conduct was relegated to a footnote in \textit{Moulton}.\textsuperscript{23}

\textit{Moulton}, like \textit{Henry}, technically requires affirmative conduct on the part of the government through its agent for a violation to occur. Accordingly, it can be said that a violation under \textit{Moulton} occurs when: (1) the government must have known, but need not have intended, that incriminating statements would be made to its agent; and (2) the government agent actually took affirmative steps to obtain incriminating statements from the accused.

It is worthwhile to examine why the Court did not adopt an “intentional circumvention” standard. Such a standard would be more consistent with the Court’s prior decisions. The reason is inherently connected with the other issue facing the \textit{Moulton} Court, that of police investigations of “separate crimes.” The \textit{Moulton} Court was confronted with a case in which there was a finding that the police had acted for legitimate reasons in recording the December 26 meeting. Indeed, whenever the authorities gain “protected”

\textsuperscript{120.} Id. at 488 n.14.
\textsuperscript{121.} See supra notes 79-80.
\textsuperscript{122.} 106 S. Ct. at 488 n.13.
\textsuperscript{123.} Id. at 487 n.12.
evidence through the investigation of "separate crimes," they can assert that they did not intend to obtain such evidence. Consequently, the Court was forced to adopt a standard that could be violated without a showing of specific intent. However, such a standard would be consistent with the Court's holding with respect to "separate crimes" investigations.

B. The Inadmissibility of Evidence Obtained During the Investigation of "Separate Crimes"

Consideration of the issue of whether evidence concerning an offense for which the right to counsel has attached should be admissible if it were obtained during the investigation of a different offense must begin with the Court's decision in Hoffa v. United States. James Hoffa was originally charged with violating the Taft-Hartley Act and was on trial in Nashville, Tennessee. During the trial, Hoffa was often in the company of two other Teamster officials, one of whom was acting as a government informant. Through this informant, the government obtained evidence of Hoffa's attempts to bribe two jurors. In a separate trial, Hoffa was convicted of jury tampering. On appeal, the Court held that the post-indictment statements obtained by the government informant "related to the commission of a quite separate offense" and were properly admitted at the subsequent trial for the separate crime. Consequently, as Chief Justice Burger noted in Moulton, the government does not engage in any impermissible conduct by investigating crimes for which the right to counsel has not attached. The issue is whether evidence pertaining to the "protected offense" should be admissible at the trial on that offense if it is obtained during a legitimate investigation of a crime for which the right to counsel has not attached.

Prior to Moulton, there were two possible reasons for such evidence to be admissible. First, under the Court's prior sixth amendment standards, the government had to act with the intent of obtaining evidence concerning the "protected" offense for a violation to occur. Whenever evidence is obtained during the course of an investigation of another crime, the government does not act with the intent of gathering evidence of the "protected" offense. Consequently, under prior standards, no sixth amendment violation would occur, and the evidence so obtained would theoretically be admissible. Second, because the government engages in no impermissible conduct by investigating separate crimes, it seems improper to apply the exclusionary rule to evidence so obtained because it will have little, if any, deterrent effect.

Some circuits that considered the issue prior to Moulton held that evidence obtained during the investigation of a separate offense was admissible at the

125. Id. at 308.
126. 106 S. Ct. at 492 (Burger, C.J., dissenting).
trial of the offense for which the right to counsel had attached. This position is theoretically sound; however, it does not adequately protect the accused's sixth amendment rights. As the Moulton Court noted:

To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in Massiah.

Consequently, the Moulton Court was faced with the difficult issue of whether to maintain theoretical purity or to recognize practical reality. The Court chose to recognize practical reality, reasoning that to allow the admission of evidence obtained during an investigation of an ostensibly separate offense is to make the protections formulated in Massiah essentially empty. If the Court had chosen to maintain theoretical purity, the government could gather evidence concerning a "protected offense" merely by asserting that it was investigating the possibility of subornation of perjury. Realistically, the Court had no choice but to hold as it did.

By holding that evidence obtained in the investigation of a separate offense is inadmissible at the trial on a pending charge, the Court was forced to remove some of the theoretical problems in excluding such evidence by adopting a standard that does not require intent to gather "protected evidence" for a violation to occur. Nevertheless, the theoretical problem of applying the exclusionary rule in such situations remains. As Chief Justice Burger properly noted in his dissent, the purpose of the exclusionary rule is to deter police misconduct. Because the police engage in no impermissible conduct in investigating separate offenses, it seems anomalous to apply a rule that is designed to deter the authorities. However, to preserve the efficacy of the protections formulated in Massiah, the Court properly ignored this theoretical problem.

CONCLUSION

The Moulton decision marks a dramatic change in sixth amendment jurisprudence. By holding that the sixth amendment can be violated by the

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128. 106 S. Ct. at 489.

129. Id. at 495 (Burger, C.J., dissenting); see also United States v. Leon, 468 U.S. 897, 916 (1984) (exclusionary rule designed to deter police misconduct rather than to punish errors of judges and magistrates).
authorities without specific intent, the Court has substantially broadened an accused's right to be free from governmental interference with the right to counsel. The Court has preserved the integrity of the protections formulated in Massiah by refusing to allow the government to introduce evidence obtained in the course of legitimate investigations of other crimes, even when the government did not specifically intend to gain such evidence.

Stuart D. Kenney