

# The Burger Court Opinion Writing Database

## *Maine v. Moulton*

474 U.S. 159 (1985)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

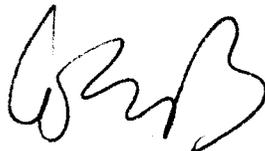
November 14, 1985

Re: 84-786 - Maine v. Moulton

Dear Lewis:

I hope you will "hold your fire" until you read  
my dissent.

Regards,

A handwritten signature in black ink, appearing to be 'W. Powell', written in a cursive style.

Justice Powell

To: Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **The Chief Justice**

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1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-786

MAINE, PETITIONER *v.* PERLEY MOULTON, JR.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT  
OF MAINE

[November —, 1985]

CHIEF JUSTICE BURGER, dissenting.

Today the Court holds that the Sixth Amendment prohibits the use at trial of post-indictment statements made to a government informant, even where those statements were recorded as part of a good faith investigation of entirely separate crimes. I find no warrant whatever in the Constitution or our prior opinions for this bizarre result. I dissent and would reverse.

### I

Before reaching the legal issues, it is important that the factual basis on which the State acted here be clearly understood. Since the Court's opinion glosses over some of the more relevant facts, I review them here briefly.

After respondent and a co-defendant, Gary Colson, were indicted on several felony counts of theft by receiving stolen goods, Colson telephoned Belfast Police Chief Robert Keating to arrange a meeting. At that meeting, on November 4, 1982, Colson told Chief Keating that he had been receiving "threatening phone calls" and that "it had gone too far." In this conversation, Colson indicated his desire to tell Chief Keating about the circumstances giving rise to the indictment; but Chief Keating appropriately cautioned him to consult with an attorney before saying more.

Two days later, Colson and respondent met. Respondent spoke of "[g]etting rid of a couple of witnesses," including

To: Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **The Chief Justice**

STYLETIC CHANGES THROUGHOUT

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1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-786

MAINE, PETITIONER *v.* PERLEY MOULTON, JR.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT  
OF MAINE

[November —, 1985]

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE and  
JUSTICE REHNQUIST join, dissenting.

Today the Court holds that the Sixth Amendment prohibits the use at trial of post-indictment statements made to a government informant, even where those statements were recorded as part of a good faith investigation of entirely separate crimes. I find no warrant whatever in the Constitution or our prior opinions for this bizarre result. I dissent and would reverse.

### I

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Two days later, Colson and respondent met. Respondent spoke of "[g]etting rid of a couple of witnesses," including

To: Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **The Chief Justice**

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*changes  
as marked*

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-786

MAINE, PETITIONER *v.* PERLEY MOULTON, JR.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT  
OF MAINE

[December —, 1985]

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, and with whom JUSTICE O'CONNOR joins as to Parts I and III, dissenting.

Today the Court holds that the Sixth Amendment prohibits the use at trial of post-indictment statements made to a government informant, even where those statements were recorded as part of a good faith investigation of entirely separate crimes. Nothing whatever in the Constitution or our prior opinions supports this bizarre result, which creates a new "right" only for those possibly habitual offenders who persist in criminal activity even while under indictment for other crimes. I dissent and would reverse.

### I

Before reaching the legal issues, it is important that the factual basis on which the State acted here be clearly understood. Since the Court's opinion glosses over some of the more relevant facts, I review them here briefly.

After respondent and a co-defendant, Gary Colson, were indicted on several felony counts of theft by receiving stolen goods, Colson telephoned Belfast Police Chief Robert Keating to arrange a meeting. At that meeting, on November 4, 1982, Colson told Chief Keating that he had been receiving "threatening phone calls" and that "it had gone too far." In this conversation, Colson indicated his desire to tell Chief Keating about the circumstances giving rise to the in-

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

October 15, 1985

Re: Assignments of opinions

Dear Chief,

This is just to confirm that I will try my hand at the opinions for the Court in Maine v. Moulton, No. 84-786, and Eastern Airlines, Inc. v. Mahfoud, No. 83-1807.

Sincerely,

*Bill*

Copies to the Conference

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

NOV 13 1985

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1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-786

MAINE, PETITIONER *v.* PERLEY MOULTON, JR.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT  
OF MAINE

[November —, 1985]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is whether respondent's Sixth Amendment right to the assistance of counsel was violated by the admission at trial of incriminating statements made by him to his codefendant, a secret Government informant, after indictment and at a meeting of the two to plan defense strategy for the upcoming trial.

### I

On the night of January 15, 1981, police officers in Belfast, Maine, responded to a fire call in the vicinity of the Belfast Dodge automobile dealership. Arriving at the scene, the officers discovered a burning Chevrolet dump truck which they recognized as a vehicle that had been reported stolen.<sup>1</sup> After examining the burning truck, the officers searched a building located on the Belfast Dodge property. This building was not part of the dealership, but was leased to respondent Perley Moulton and his codefendant Gary Colson who were using the space to restore and sell old Ford Mustangs. Inside, the officers discovered evidence of several recent automobile and automobile-related thefts.

On April 7, 1981, a Waldo County grand jury returned indictments charging Moulton and Colson with four counts of

<sup>1</sup> Indeed, in pursuing an anonymous tip received earlier that day that the stolen truck could be found at Belfast Dodge, one of the officers had conducted a consent search of the main building of the dealership facility.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

November 22, 1985

84-786 - Maine v. Moulton

Dear Chief,

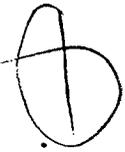
Please join me.

Sincerely yours,



The Chief Justice

Copies to the Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 14, 1985

Re: No. 84-786-Maine v. Moulton

Dear Bill:

Please join me.

Sincerely,

*T.M.*  
T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

November 27, 1985

Re: No. 84-786, Maine v. Moulton

Dear Bill:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal line underneath.

Justice Brennan

cc: The Conference

November 22, 1985

84-786 Maine v. Moulton

Dear Chief:

This will acknowledge your note expressing the hope that I would await the dissent in this case. I respected your request, and have now carefully considered your dissent. As always, you write forcefully and persuasively. Yet, I also have carefully considered this case and think I must adhere to my Conference vote.

Although Justices normally stay with their votes without explanation, as you and I usually are together in criminal cases, I will state briefly my view of this case. Respondent Moulton had retained counsel after he and Colson were indicted for "various thefts". The police knew Moulton had engaged counsel. Colson went to the police and agreed to become an agent of the state. As part of this arrangement, the police offered a deal to Colton whereby no further charges would be brought against him if he would testify against Moulton and otherwise cooperate in the prosecution of Moulton on pending charges. Presumably as a result of this deal, Colson ultimately received a two year sentence with all but 15 days suspended.

The police knew that Moulton and Colson were close friends as well as co-defendants in the theft cases. They also knew these co-defendants were in frequent communication with each other. A tap was placed on Colson's phone for over a month. When the police were advised of the December 26 meeting, they placed a body "recorder" on Colson. A substantial part of the conversation between the two co-defendants on the 26th related not to the possibility that a murder was planned, but to the upcoming trial on the theft indictments. Colson steered much of the conversation to the subject of the thefts, and this resulted in incriminating evidence that probably assured Moulton's conviction.

The strongest argument to the contrary, and emphasized by the SG and by you, is the statement by the Maine Supreme Judicial Court, approving the trial court's finding that the December 26 recordings were made "for legitimate purposes not related to the gathering of evidence concerning the crime for which defendant had been indicted." But there

can be no doubt that the police had other reasons also, that were not legitimate. As Chief Judge McKusic - writing for a unanimous court - concluded:

"The record plainly reveals that the police knew, or should have known, that Moulton likely would make incriminating statements at the meeting that Colson recorded."

In sum the two critical facts with me - facts that bring this case within the rationale of Massiah and Henry - are that (i) the police knew Moulton had retained counsel, and (ii) the police made Colson their agent. There is every reason to believe they tapped Colson's phone for more than a month, and placed a recorder on Colson's body, in the hope and reasonable expectation of obtaining incriminating evidence. In my view, there was a violation of the Sixth Amendment right to counsel.

For these reasons, I will stay with my Conference vote.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

November 22, 1985

84-786 Maine v. Moulton

Dear Bill:

Please join me.

Sincerely,



Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 25, 1985

Re: No. 84-786 Maine v. Moulton

Dear Chief,

Please join me in your dissent in this case.

Sincerely,



The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

November 14, 1985

Re: 84-786 - Maine v. Moulton

Dear Bill:

Please join me.

Respectfully,



Justice Brennan

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

November 26, 1985

No. 84-786 Maine v. Moulton

Dear Chief,

Please join me in Parts I and III of your  
dissent.

Sincerely,

*Sandra*

The Chief Justice

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