

December 27, 2004

Council Members

Peter J. Skandalakis
Chairman
District Attorney
Coweta Judicial Circuit

Leslie Case Abernathy
Vice Chair
Solicitor-General
Forsyth County

J. David Miller
Secretary
District Attorney
Southern Judicial Circuit

Kermit McManus
District Attorney
Conasauga Judicial Circuit

Stan Gunter
District Attorney
Enotah Judicial Circuit

Sheryl B. Jolly
Solicitor-General
Richmond County

Spencer Lawton, Jr.
District Attorney
Eastern Judicial Circuit

Kenneth B. Hodges, III
District Attorney
Dougherty Judicial Circuit

Terry Turner
Solicitor-General
Appling and Jeff Davis Counties

O'Kelley v. State

278 Ga. 564; 2004 Ga. LEXIS 936 (Oct. 25, 2004)
Attachment of 6th Amendment Right to Counsel at Preliminary Hearing

TO: All District Attorneys and Solicitor Generals
FROM: Trial Support Division – Michael Jacobs / J.F. Burford

O'Kelley overruled *Ross v. State* 254 Ga. 22, 326 SE 2d 194 (1985). *Ross* held that a first appearance hearing does not constitute an adversary judicial proceeding that triggers the attachment of the 6th Amendment right to counsel.

In *O'Kelley v. State*, the Court held that an initial appearance hearing, although often not a critical stage of a criminal proceeding requiring the actual presence of a defense attorney, is a formal legal proceeding wherein the 6th Amendment, right to counsel attaches, if the defendant requests counsel.

Per *O'Kelley*, if a defendant chooses to assert his or her 6th Amendment right to counsel at an initial appearance hearing, it is not necessary for the magistrate to make defense counsel available immediately. However, the defendant's exercise of the right does suspend the magistrate's power to conduct further proceedings that constitute critical aspects of the defendant's trial proceedings. The magistrate is limited to conducting scheduling and other "housekeeping" measures and to fulfilling the duty to ensure that counsel is provided prior to the conduct of any critical proceedings.

Interrogation is a *critical stage* of defendant's criminal proceeding to which the 6th Amendment right to counsel, once that right has attached, does apply.

In *Michigan v. Jackson*, 475 U.S. 625 (1986), the U.S. Supreme Court held that the 6th Amendment right to counsel, *once attached*, cannot be waived by the defendant during questioning that is initiated by interrogators.

All law enforcement officers must understand that any statement obtained from the accused, after counsel has been requested, will most likely be suppressed. The *O'Kelley* Court made clear that the right to counsel does attach at an initial appearance hearing, if requested by the defendant, and, thereafter, it cannot be waived by the defendant during questioning that is initiated by interrogators.

It is our suggestion that the *O'Kelley* case be discussed with all law enforcement agencies and jailers in your jurisdiction. Additionally, we suggest that, if a defendant makes a request for counsel at the preliminary hearing, that a notation of the fact be immediately made on the defendant's booking sheet and in the police officer's case file.

F Y I