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Constitutional Law -- Bursey v. Weatherford: The Sixth Amendment Protection Against Secret Agents in the "Counsels of Defense"

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Constitutional Law—Bursey v. Weatherford: The Sixth Amendment Protection Against Secret Agents in the "Counsels of Defense"[1]

The right of a criminal defendant to have the assistance of counsel is secured by the sixth amendment to the United States Constitution. The Supreme Court has declared that "[t]his is one of the safeguards . . . deemed necessary to insure fundamental human rights of life and liberty."[2] Corollary to the right to counsel is the right to privacy in the attorney-client relationship,[3] which is essential for effective representation. As interpreted by one court:

> The Constitution's prohibitions against unreasonable searches, and its guarantees of due process of law and effective representation by counsel, lose most of their substance if the Government can with impunity place a secret agent in a lawyer's office to inspect the confidential papers of the defendant and his advisers, to listen to their conversations, and to participate in their counsels of defense.[4]

In *Bursey v. Weatherford*[5] the Fourth Circuit Court of Appeals focused on the right to counsel in the context of our adversary system of justice and held that any deliberate intrusion by the prosecution into the confidential relationship between defendant and his counsel constitutes a violation of the sixth amendment guarantee.[6]

The constitutional issue was raised in federal court when Brett Bursey brought suit under 42 U.S.C. section 1983[7] seeking damages

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1. *See* Caldwell v. United States, 205 F.2d 879, 881 (D.C. Cir. 1953).
2. Johnson v. Zerbst, 304 U.S. 458, 462 (1938).
3. Confidentiality is the basis of Canon four of the American Bar Association Code of Professional Responsibility and of the attorney-client privilege in the rules of evidence. *See* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 201 (Tent. Draft 1970); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 87-97 (2d ed. E. Cleary 1972).
4. Caldwell v. United States, 205 F.2d at 881.
5. 528 F.2d 483 (4th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3738 (U.S. June 22, 1976).
6. *Id.* at 486.
7. The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970) (originally enacted as Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13) provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

from J. P. Strom, chief of the South Carolina State Law Enforcement Division, and Jack Weatherford, an undercover agent for that Division assigned to the University of South Carolina campus.[8] Bursey alleged that these officials, acting under color of state law, had invaded the confidences of his defense team and thus had deprived him of effective assistance of counsel in his prior criminal trial in state court.[9]

Bursey's civil suit arose out of an unusual chain of events. On March 20, 1970, Bursey and several others, including agent Weatherford, expressed their opposition to the war in Vietnam by throwing a brick through the window of the Richland County Selective Service Office in Columbia, South Carolina, and by defacing the building with red paint.[10] Later that day Weatherford arranged not only for Bursey's arrest but also for his own, and they were subsequently indicted as co-defendants for malicious destruction of property.[11] The purpose of Weatherford's arrest was to maintain his cover so that he could continue working as a secret agent in the university community.[12] Weatherford, with the approval of his superiors, perfected the ruse by retaining defense counsel and by feigning preparation for trial.[13]

During the period prior to trial, Bursey was completely deceived by the agent's tactics and continued to believe that Weatherford was his friend and "partner in crime."[14] On at least two occasions, Bursey and his attorney freely discussed the pending trial in the presence of Weatherford.[15] Subsequently, the agent's true status was discovered; and since he was no longer useful for undercover work, Strom permitted him to testify against Bursey.[16] Totally unprepared for Weatherford's incriminating eyewitness testimony, Bursey was convicted of malicious destruction of property. The court sentenced him to eighteen months in prison, and he served his time.[17] Thus an opportunity to appeal was no longer available to Bursey.

The federal district court held that the conduct of Weatherford and Strom did not violate Bursey's constitutional right to counsel. The

8. 528 F.2d at 484.
9. *Id.*
10. *Id.* at 485.
11. *Id.*
12. Brief for Appellee at 3, Bursey v. Weatherford, 528 F.2d 483 (4th Cir. 1975).
13. 528 F.2d at 485.
14. *Id.*
15. Brief for Appellant at 9-12, Bursey v. Weatherford, 528 F.2d 483 (4th Cir. 1975).
16. 528 F.2d at 485.
17. *Id.*

court based its opinion on two grounds: (1) there was no "gross" intrusion into the area protected by the sixth amendment because the specific intention of Weatherford and Strom was to preserve the agent's cover, not to spy on the defense team; and (2) since Weatherford did not communicate any information concerning trial strategy to the prosecution, Bursey was not prejudiced by the presence of the opposition at attorney-client conferences.[18] The Fourth Circuit Court of Appeals reversed the lower court decision and held that neither "gross" intrusion nor actual prejudice to defendant is required to sustain plaintiff's claim for damages for breach of his constitutional right to counsel.[19]

Before evaluating the court's decision, it is necessary to review the legal precedent established by judicial elaboration of the constitutional safeguard. Until the 1930's the essence of the right to counsel was merely the right of defendant to retain counsel.[20] However, in 1932, the United States Supreme Court in *Powell v. Alabama*[21] emphasized the fundamental character of the right to counsel and declared that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[22] Relying on the fourteenth amendment rather than the sixth, the Court held that at least in capital cases in which defendants are handicapped by ignorance, illiteracy, youth, and public hostility, failure to appoint effective counsel constitutes a denial of due process of law.[23]

The independent sixth amendment right to counsel was recognized for the first time in *Johnson v. Zerbst*,[24] a 1938 decision. In that case the Court looked to the nature of the offense and held that in every federal criminal case, both capital and non-capital, the accused who is unable to retain counsel must either have counsel appointed or must make "an intelligent and competent waiver."[25] Subsequent to *Johnson*, the Court gradually expanded the sixth amendment right to encompass various degrees of state offenses. The landmark decision of *Gideon v.*

18. *Id.* at 486.
19. *Id.* at 486-87.
20. M. ABERNATHY, CIVIL LIBERTIES UNDER THE CONSTITUTION 181 (2d ed. 1973); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 599 (3d ed. 1858).
21. 287 U.S. 45 (1932).
22. *Id.* at 68-69.
23. *Id.* at 71. *See generally* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 229 (1955).
24. 304 U.S. 458 (1938).
25. *Id.* at 465. *See also* A. HARDING, FUNDAMENTAL LAW IN CRIMINAL PROSECUTIONS 40 (1959).

Wainwright[26] in 1963 overruled the prior Court holding in *Betts v. Brady*[27] and incorporated the sixth amendment into the fourteenth,[28] thus securing the individual's right to counsel from infringement by state action. Since the Court found criminal defense attorneys to be "necessities, not luxuries,"[29] state courts were constitutionally required to appoint counsel for all indigents defending against felony charges. The right was recently extended in *Argersinger v. Hamlin*[30] to indigents defending in state courts against misdemeanors punishable by imprisonment.

In addition to judicial development of the right to counsel according to the nature of the offense, the Supreme Court has analyzed the sixth amendment protection in terms of critical stages in the criminal process. The scope of the sixth amendment protection has not been restricted to actual trial, but has been interpreted broadly so as to encompass every stage from the time of initial adversary proceedings[31] to post-conviction appeals.[32] In *Escobedo v. Illinois*[33] the right to counsel was found to attach as early as the moment the investigation had "begun to focus on a particular suspect."[34] However, prior to attachment,[35] the sixth amendment does not bar general undercover activity.[36]

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26. 372 U.S. 335 (1963). *See generally* TUFTS UNIVERSITY, THE COURTS MAKE POLICY: THE STORY OF CLARENCE EARL GIDEON (1969).

27. 316 U.S. 455, 461-62 (1942). *See also* I. BRANT, THE BILL OF RIGHTS 480 (1965).

28. 372 U.S. at 342.

29. *Id.* at 344.

30. 407 U.S. 25, 37 (1972).

31. Pre-trial proceedings at which the Supreme Court has held that the accused has a right to counsel include arraignment, Hamilton v. Alabama, 368 U.S. 52 (1961); lineups, United States v. Wade, 388 U.S. 218 (1967); and preliminary hearings, Coleman v. Illinois, 399 U.S. 1 (1970).

32. Douglas v. California, 372 U.S. 353 (1963). This case was limited to appeals of right by Ross v. Moffitt, 417 U.S. 600 (1974).

33. 378 U.S. 478 (1964).

34. *Id.* at 490.

35. In Kirby v. Illinois, 406 U.S. 682 (1972), the point of attachment was limited to the commencement of formal judicial proceedings. The Court distinguished *Escobedo* and refused to extend the right to counsel to lineups, which were prior to the "initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 689.

36. "The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." Lopez v. United States, 373 U.S. 427, 465 (1963). *See also* United States v. White, 401 U.S. 745, 752 (1971); Hoffa v. United States, 385 U.S. 293, 303 (1966); Lewis v. United States, 385 U.S. 206, 212 (1966); Comment, *Present and Suggested Limitations on the Use of Secret Agents and Informers in Law Enforcement*, 41 U. COLO. L. REV. 261, 272-73 (1969).

Since the accused in *Bursey v. Weatherford* had been taken into custody and indicted, his constitutional guarantee was clearly operative.

Proof of intrusion into the sphere protected by the sixth amendment has been held a sufficient ground to overturn a conviction regardless of the presence or absence of actual prejudice to defendants. The United States Supreme Court in two cases, *Black v. United States*[37] and *O'Brien v. United States*,[38] vacated judgments in the absence of any showing that the information gleaned from monitored conversations had been used by the prosecution to the detriment of defendant.[39] These two decisions were consistent with an earlier declaration of the Court in *Glasser v. United States*:[40] "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[41]

The only Supreme Court decision that has deviated from the per se approach to encroachment upon the sixth amendment right to counsel is *Hoffa v. United States*.[42] In that case the Court affirmed the jury-tampering conviction of Hoffa even though a government agent, Partin, had infiltrated the defense team at Hoffa's prior trial, during which the bribe was offered. The Court adopted the "separate offense theory," finding that Hoffa's incriminating statements to which agent Partin testified in the later case "were totally unrelated in both time and subject matter to any assumed intrusion by Partin into the conferences of the petitioner's counsel in the [prior] trial."[43] The Court concluded that if Hoffa had been convicted in. the first trial, "the conviction would presumptively have been set aside as constitutionally defective"[44] on the ground of gross government infringement of the right to counsel. The presumption, however, was inoperative in a trial for a different offense.

In *Bursey v. Weatherford* the court correctly identified the "separate offense theory" as the basis of the *Hoffa* decision and rejected the prosecution's theory that *Hoffa* mandated a "grossness" test.[45] Indeed

37. 385 U.S. 26 (1966) (per curiam).
38. 386 U.S. 345 (1967) (per curiam).
39. 386 U.S. at 346 (Harlan, J., dissenting); 385 U.S. at 30-31 (Harlan, J., dissenting).
40. 315 U.S. 60 (1942).
41. *Id.* at 76.
42. 385 U.S. 293 (1966).
43. *Id.* at 309. The "separate offense theory" has been adopted by the lower federal courts. *E.g.*, Ellsberg v. Mitchell, 353 F. Supp. 515, 516-17 (D.D.C. 1973).
44. 385 U.S. at 307.
45. 528 F.2d at 486. *Accord*, United States v. Rispo, 460 F.2d 965, 976 (3d Cir. 1972).

two examples[46] of government misconduct, analogous to the activity of agent Partin, were characterized in *Hoffa* as intrusions of the "grossest kind."[47] However, the Court's dictum does not require classification according to the degree of offensiveness. Adoption of the "grossness" test would mean that the presumption of a fair trial could be rebutted only by showing government intrusion so egregious that the conviction was actually tainted.[48]

In order to avoid placing such a heavy burden of proof on the accused, the Fourth Circuit in *Bursey* proposed another test, under which the crucial determination is whether the conduct of the prosecution represents deliberate or inadverent action. Thus "whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial."[49] Although the precise holding is limited by the civil posture of Bursey's case, this dictum is significant in that it proclaims the court's position on convictions as well as on civil damages.

The test adopted by the Fourth Circuit is notable in two respects. First, under the test, specific intent of the prosecution is immaterial since the mere presence of an authorized government informant for any purpose constitutes a violation of the right to counsel.[50] In our adversary system of justice, "learning the plans of one's opponent . . . is generally thought to be worthwhile."[51] Thus the "deliberateness" test protects the accused not only from the possibility of wilful infringement by the prosecution for the purpose of obtaining evidence but also from the subtle benefits derived from knowledge of the planned procedure and state of mind of defendant and his counsel.[52]

Secondly, the test eliminates actual prejudice as an essential element for sustaining a cause of action under 42 U.S.C. section 1983. Deprivation is the sole injury to which the statute refers. Thus plaintiff

46. The cases to which the Court refers are Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953), and Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952).

47. 385 U.S. at 306.

48. *See* United States v. Rispo, 460 F.2d 965, 977 (3d Cir. 1972).

49. 528 F.2d at 486.

50. *Id.* The finding of liability under section 1983 without proof of specific intent is consistent with established authority. *E.g.*, Monroe v. Pape, 365 U.S. 167, 187 (1961); Jenkins v. Averett, 424 F.2d 1228, 1232 (4th Cir. 1970); Basista v. Weir, 340 F.2d 74, 81 (3d Cir. 1965).

51. 528 F.2d at 487.

52. *Accord*, Taglianetti v. United States, 398 F.2d 558, 570 (1st Cir. 1968).

need prove only that some person acting under color of state law deprived him of a right, privilege, or immunity secured by the constitution. Plaintiff is not statutorily required to establish a causal connection between deprivation and further injury.[53]

Implicit in the court's expression of the test in terms of civil relief is approval of the same approach to prejudice in the criminal context. Overturning a conviction for a deliberate sixth amendment violation without proof of actual harm is considered a more radical stance on the issue of prejudice and is therefore unacceptable to some courts. The Fifth Circuit in *United States v. Zarzour*[54] viewed "with a jaundiced eye the conduct of the government" but held that such activity alone would not vitiate the conviction.[55] The Second Circuit has concurred in this position.[56] Diametrically opposed is the absolute approach to the right to counsel that the District of Columbia Court of Appeals expressed in *Coplon v. United States*:[57] "This is a fundamental right which cannot be abridged, interfered with, or impinged upon in any manner."[58] It appears from the allusion to the criminal law setting in the *Bursey* holding that the Fourth Circuit is more inclined to adopt the latter approach and hold that constitutional rights must be "scrupulously observed"[59] if a conviction is to stand.

The strength of the test proposed in *Bursey* is readily apparent. The obvious difficulties in satisfying either a specific intent or an actual prejudice requirement would severely restrict the sixth amendment protection. Although the Fourth Circuit test greatly alleviates the burden of proof placed on the accused, it fails to embrace fully the per se rule set forth in *Black v. United States* and *O'Brien v. United States*.[60] In the former, the prosecution unwittingly referred to notes that contained excerpts from monitored conversations,[61] and in the latter, the contents of the communications were not even transmitted to the prose-

53. Via v. Cliff, 470 F.2d 271, 275 (3d Cir. 1972); *cf.* Peters v. Kiff, 407 U.S. 493, 504 (1972). However, plaintiff is required to rebut a good faith defense. Pierson v. Ray, 386 U.S. 547 (1967); Hill v. Rowland, 474 F.2d 1374 (4th Cir. 1973).

54. 432 F.2d 1 (5th Cir. 1970).

55. *Id.* at 3; *accord*, United States v. Cohen, 358 F. Supp. 112 (S.D.N.Y. 1973). *See generally* Dix, *Undercover Investigations and Police Rulemaking*, 53 TEXAS L. REV. 203, 237-38 (1975).

56. United States v. Mosca, 475 F.2d 1052, 1061 (2d Cir.), *cert. denied*, 412 U.S. 948 (1973).

57. 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952).

58. *Id.* at 759.

59. *Id.* at 760.

60. *See* text accompanying notes 37-39 *supra*.

61. 385 U.S. at 28.

cution in any form.[62] The weakness of the *Bursey* test is the court's apparent departure from the strict per se rule established in *Black* and *O'Brien* when the intrusion in question is inadvertent. The distinction turns solely upon a finding of "deliberateness," an imprecise criterion that requires a subjective evaluation of the state of mind of the prosecution. From the point of view of the accused, knowledgeable conduct may at times be as difficult to prove as gross activity.

The significance of *Bursey* lies in its impact on the administration of criminal justice. The court's analysis demonstrates a full appreciation of the ramifications of the right to counsel protection. Undistracted by peripheral issues such as "grossness" and actual prejudice, the court sought to achieve the fundamental objectives of the sixth amendment. The decision serves two functions that are essential in our adversary system of justice: (1) misconduct by the prosecution is deterred, and (2) privacy in the attorney-client relationship is preserved.

Official abuse of a constitutional right is reprehensible in itself. The fact that the prosecution does not actually benefit from intrusion into defense counseling does not excuse the violation.[63] Indeed the consequences of abuse for defendant are immaterial in light of the purpose of section 1983 to preserve constitutional freedoms by punishing the offending officials.

The second function of *Bursey* is equally crucial. Privacy is a prerequisite to an effective attorney-client relationship. Good legal advice depends upon full knowledge of the circumstances. Unless the accused feels free to confide in his attorney, the right to counsel is a hollow guarantee.[64]

Bursey represents a pragmatic approach to sixth amendment protection. The court fashioned a solution that reflects sensitivity to the foreseeable consequences for the accused and that gives substance to the constitutional maxim. The crux of *Bursey* is that the right to effective assistance of counsel remains intact, unfettered by judicial limitations, thus facilitating the proper administration of criminal justice.

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62. 386 U.S. at 346 (Harlan, J., dissenting).

63. United States *ex rel.* Cooper v. Denno, 221 F.2d 626, 628 (2d Cir.), *cert. denied*, 349 U.S. 968 (1955).

64. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1475 (1966).