

Notes

***People v. Tamborrino*: Should Inquiry By a Trial Judge Into Confidential Communication Between the Attorney and the Accused Be Harmless Error?**

I. INTRODUCTION

In *People v. Tamborrino*, the California Court of Appeal held that a trial judge's violation of the criminal defendant's attorney-client privilege, in the presence of the jury, was harmless error.¹ By a divided court, the majority held this type of constitutional error should be evaluated for prejudice under the harmless error doctrine established by the U.S. Supreme Court in *Chapman v. California*.² Under *Chapman*, an error is harmless if the court concludes beyond a reasonable doubt that the evidence complained of did not contribute to the conviction.³ The *Tamborrino* majority, applying the harmless error standard, determined the error did not contribute to the conviction and therefore affirmed the trial court's findings.⁴

The dissent argued that the error was reversible per se⁵ because the questioning of the defendant by the trial judge, in the presence of the jury, impermissibly infringed on the defendant's sixth amend-

1. *People v. Tamborrino*, 215 Cal. App. 3d 575, 263 Cal. Rptr. 731 (1989).

2. *Id.* at 583, 263 Cal. Rptr. at 735 (citing *Chapman v. California*, 386 U.S. 18 (1967)).

3. *Chapman*, 386 U.S. at 24.

4. *Tamborrino*, 215 Cal. App. 3d at 585, 263 Cal. Rptr. at 736.

5. Reversible per se means that the error is automatically reversed without any inquiry into the amount of prejudice to the defendant. *See, e.g.*, *Delaware v. Van Arsdall*, 475 U.S. 673, 677-78 (1986).

ment guarantee of assistance of counsel.⁶ The dissent asserted that a trial judge's violation of a criminal defendant's attorney-client privilege, in the presence of a jury, "warrants the sharpest possible sanction" because of its damage to the constitutional right to counsel.⁷ In the alternative, the dissent argued that even under the harmless error rule, the error was reversible.⁸

This Note discusses whether the harmless error rule of *Chapman*⁹ should apply when the trial judge invades the attorney-client privilege or whether the error should be automatically reversible. Part II will present the facts of the *Tamborrino* case, the majority opinion and the dissent. Part III of this Note will explain the application of the harmless error rule to sixth amendment violations. Part IV analyzes whether the harmless error rule should apply to the *Tamborrino* case under federal and California constitutional law.¹⁰ In Part V, this Note proposes that an inquisition by the trial judge regarding confidential attorney-client communications, in the presence of a jury, should be grounds for automatic reversal under both the Federal Constitution and the California Constitution.

I. THE TAMBORRINO CASE

A. Facts of the Tamborrino Case

Gary Tamborrino was on trial for a residential robbery.¹¹ The victim, Deborah Clarke claimed three men forced their way into her apartment. She stated that one man held a gun to her while the others ransacked the apartment and stole property.¹² During the alleged robbery, a jewelry box on the dresser had been moved and opened.¹³

6. *Tamborrino*, 215 Cal. App. 3d at 591, 263 Cal. Rptr. at 740-41 (Johnson J., dissenting).

7. *Id.* at 595-96, 263 Cal. Rptr. at 743 (Johnson J., dissenting). Judge Johnson, the dissenting judge, stated that the inquiry into confidential attorney-client communications by the trial judge harms the constitutional right to counsel by discouraging full and open communication between defendants and their attorneys. *Id.* The dissenting judge noted however, that there are no California or Federal cases that consider whether this type of error is automatically reversible. *Id.* at 595 n.8, 263 Cal. Rptr. at 743 n.8.

8. *Tamborrino*, 215 Cal. App. 3d at 596, 263 Cal. Rptr. at 744 (Johnson, J., dissenting).

9. *Chapman v. California*, 386 U.S. 18 (1967). The *Chapman* harmless error rule is: the error is harmless and the conviction must stand if an appellate court concludes, beyond a reasonable doubt, that the error had no impact upon the finding of guilt. *Id.* at 24.

10. Because the focus of this Note is on whether the harmless error rule or a rule of automatic reversal should govern a violation of a criminal defendant's attorney-client privilege by a trial judge, the proper *application* of the harmless error rule to this case will not be addressed.

11. *Tamborrino*, 215 Cal. App. 3d at 578, 263 Cal. Rptr. at 732.

12. *Id.* at 579, 263 Cal. Rptr. at 732.

13. *Id.*

When the three men left, Clarke got the license number of their car and called the police.¹⁴ The police were able to lift a fingerprint from the lid of the jewelry box.¹⁵ The fingerprint was identified as belonging to the defendant, Tamborrino.¹⁶

Clarke was the sole witness to the robbery and stated she had been too frightened to look at the robbers' faces.¹⁷ Clarke was unable to identify Tamborrino from a six photo lineup shown to her by the police.¹⁸ She did, however, report to the police that the gun was small, and the man who held it wore a green and brown camouflage hat.¹⁹

Six weeks after the alleged robbery, the police pulled over a Datsun automobile with the license number identified by Clarke.²⁰ Tamborrino was driving the automobile.²¹ In the back of the car, the police found a camouflage colored hat later identified by Clarke as the type worn by the robber.²² The police also found a .25 caliber handgun under the driver's seat.²³

At the trial, Clarke testified that she was remotely related to a man named Eddie Brown.²⁴ Tamborrino claimed that Eddie Brown was his stepbrother.²⁵ Tamborrino also testified that he had known Deborah Clarke since she was in high school and had met her several times.²⁶ Clarke, however, testified that she has never had any relationship with Tamborrino, nor had she ever seen him before.²⁷

After the prosecution's case, which consisted of Deborah Clarke's testimony and the fingerprint from her jewelry box, Tamborrino took the stand.²⁸ Tamborrino denied that he committed the robbery and explained how his fingerprint got on the jewelry box.²⁹ He revealed for the first time during the trial that he had previously sold

14. *Id.* at 579, 263 Cal. Rptr. at 733.

15. *Id.*

16. *Id.*

17. *Id.* at 596, 263 Cal. Rptr. at 744 (Johnson J., dissenting).

18. *Id.* at 580, 263 Cal. Rptr. at 733.

19. *Id.* at 579, 263 Cal. Rptr. at 733.

20. *Id.* at 580, 263 Cal. Rptr. at 733.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 596-97, 263 Cal. Rptr. at 744 (Johnson J., dissenting). Tamborrino also admitted to two prior felony convictions for robbery (after the judge ruled that he would allow the prosecution to offer this evidence anyway). *Id.* at 589, 263 Cal. Rptr. at 739.

29. *Id.* at 580-81, 263 Cal. Rptr. at 733.

Deborah Clarke “bad” cocaine.³⁰

He stated that prior to the alleged robbery Clarke asked him to get her some cocaine.³¹ Tamborrino said that he had gone to Clarke’s apartment and sold her what she thought were two ounces of cocaine for \$1,600. Tamborrino did not dispute that his fingerprints were on Clarke’s jewelry box.³² He explained that he must have touched the box when he sold Clarke the bad cocaine.³³ Tamborrino’s testimony implied that Clarke falsely accused him of robbery because he had sold her “bad” cocaine.³⁴

While Tamborrino was still on the stand, over defense counsel’s repeated objections, the trial judge asked Tamborrino in the presence of the jury, “[d]id you tell your lawyer about the story you just related on the stand?”³⁵ Tamborrino replied “[n]o. I just told him what it referred to. I didn’t tell all exactly.”³⁶

30. *Id.* at 591, 263 Cal. Rptr. at 740 (Johnson, J., dissenting). Tamborrino allegedly sold Clark lactose or “bunk” cocaine. *Id.* at 580, 263 Cal. Rptr. at 733.

31. *Id.* at 580, 263 Cal. Rptr. at 733.

32. *Id.*

33. *Id.* at 585, 263 Cal. Rptr. at 736.

34. *Id.*

35. *Id.* at 581, 263 Cal. Rptr. at 734. The full text of the exchange which occurred in the presence of the jury is as follows:

“THE COURT: Did you tell your lawyer about the story you just related on the stand?

[DEFENSE COUNSEL]: Your Honor, excuse me. I must object to the court’s question. That violates the attorney-client privilege.

THE COURT: Did you tell your lawyer what you have testified to on the stand today?

[DEFENSE COUNSEL]: May the record reflect my objection?

THE COURT: Yes, it will so reflect.

[DEFENSE COUNSEL]: Thank you, your Honor.

THE COURT: Did you tell your lawyer about this story that you told on the stand?

THE WITNESS [defendant]: No. I just told him what it referred to. I didn’t tell all, exactly.

THE COURT: When did you first tell him that?

THE WITNESS: From the very beginning.

THE COURT: Well, so he knew about it at the time that Miss Clarke was on the stand, is that correct?

[DEFENSE COUNSEL]: Your Honor, again my objection is that that violates the attorney-client privilege, sir.

THE COURT: I know, we have heard that before.

Let’s get on with the case. He knew about it before he was cross examining Miss Clarke, didn’t he?

[DEFENSE COUNSEL]: Your honor, may we be heard at side bar, please?

THE COURT: No.

[PROSECUTOR]: May we approach, your Honor?

THE COURT: Yes. I will withdraw the last question.”

Id. at 592, 263 Cal. Rptr. at 740-41.

36. *Tamborrino*, 215 Cal. App. 3d at 592, 263 Cal. Rptr. at 740-41.

The judge continued, “[w]hen did you first tell him that?”³⁷ Tamborrino answered, “[f]rom the very beginning.”³⁸ The judge then said, “[w]ell, so he knew about it at the time Miss Clarke was on the stand, is that correct?”³⁹ At that point, the prosecutor, seemingly eager to avoid a mistrial, asked if both attorneys could approach the bench.⁴⁰ The jury did not hear any part of the exchange after that point.⁴¹ The judge explained to the attorneys that he wanted to know if the defense counsel knew how Tamborrino would testify.⁴² The trial judge said if the defense counsel did know, the defense counsel should have asked Clarke if she had purchased any cocaine from Tamborrino.⁴³

The defense moved for a mistrial on the grounds that the questions by the judge violated the attorney-client privilege.⁴⁴ The trial judge denied the motion, insisting that no privilege was violated because Tamborrino disclosed in court what he had told his attorney.⁴⁵ According to the trial judge, Tamborrino waived the privilege despite defense counsel’s repeated objections.⁴⁶

The jury found Tamborrino guilty of residential robbery.⁴⁷ Tamborrino appealed the judgment to the California Court of Appeal in the Second Appellate District.⁴⁸ The Court of Appeal affirmed the judgment of the trial court by a two to one vote.⁴⁹ On

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 592, 263 Cal. Rptr. at 741 (Johnson, J., dissenting).

41. *Id.* at 582, 263 Cal. Rptr. at 734. The trial judge revealed that his questions were to determine if defense counsel knew how Tamborrino would testify at the time he cross-examined Clarke. *Id.* According to the trial judge, “if [defense counsel did know], he should have asked her [Clarke] if she bought any cocaine from [Tamborrino].” *Id.*

Defense counsel responded “that he ‘made a tactical decision not to ask her [Clarke]’ and [that] the prosecution has the right to recall her”. *Id.* The prosecutor later attempted to recall Clarke but was unable to contact her. *Id.* The prosecutor, however, felt it was unnecessary because of her previous denials that she had ever met Tamborrino. *Id.*

42. *Tamborrino*, 215 Cal. App. 3d at 582, 263 Cal. Rptr. at 734.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 592, 263 Cal. Rptr. at 741 (Johnson, J., dissenting). According to the trial judge, Tamborrino waived the attorney-client privilege when Tamborrino took the stand and testified about the drug transaction he had with Ms. Clarke. *Id.* A defendant, however, does not waive his attorney-client privilege by testifying concerning facts which might have been discussed in confidence with his attorney. *Mass v. Superior Court*, 175 Cal. App. 3d 601, 606, 221 Cal. Rptr. 245, 248 (1985).

47. *Tamborrino*, 215 Cal. App. 3d at 578, 263 Cal. Rptr. at 732.

48. *Id.* at 575, 263 Cal. Rptr. 731.

49. *Id.* at 591, 263 Cal. Rptr. at 740 (Johnson, J., dissenting).

February 21, 1990, the Supreme Court of California denied Tamborrino's petition for review.⁵⁰

B. The Majority Opinion of the Court of Appeals

The Court of Appeal held that the trial judge's questions violated the defendant's attorney-client privilege.⁵¹ The majority rejected Tamborrino's claim that he was denied the right to counsel as guaranteed under the sixth amendment to the U.S. Constitution and Article I, section 15 of the California Constitution.⁵² The court stated that there was no denial of counsel to the defendant and that, if any harm was caused by the judge's questions, "it could have only affected the policy upon which strict confidentiality of the attorney-client privilege is based"⁵³

The majority, citing *Gideon v. Wainwright*,⁵⁴ acknowledged that a violation of the guarantee of counsel is reversible per se.⁵⁵ The court distinguished *Gideon*,⁵⁶ which involved the complete denial of counsel, from *Tamborrino*. The court stated, "the judge's questions did not affect the attorney-client relationship . . . in this trial. . . and therefore [w]e cannot equate this situation with *Gideon*⁵⁷ in which there was a complete denial of the right to counsel."⁵⁸

The court also distinguished *Tamborrino* from *Coplon v. United States*,⁵⁹ *Cadwell v. United States*,⁶⁰ and *Barber v. Municipal*

50. *People v. Tamborrino*, No. B034031215 (Cal. Feb. 21, 1990) (1990 LEXIS 834 (1990)).

51. *Tamborrino*, 215 Cal App. 3d at 582, 263 Cal. Rptr. at 734-35. The court also acknowledged that the defendant did not waive the attorney-client privilege. The court stated, that, "Defendants testimony concerning facts . . . related by him to his counsel . . . does not constitute waiver of the privilege." *Id.* at 582, 263 Cal. Rptr. at 734.

52. *Tamborrino*, 215 Cal. App. 3d at 583, 263 Cal. Rptr. at 735.

53. *Id.*

54. *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Gideon* involved an indigent defendant that was charged with breaking and entering with the intent to commit a misdemeanor. *Id.* This offense was a felony under Florida law. *Id.* at 336-37. The U.S. Supreme Court overturned a Florida Supreme Court ruling that held an indigent defendant is not entitled to appointed counsel for a felony charge *unless* the charge is a capital offense. *Id.* at 337. The U.S. Supreme court held that in all criminal prosecutions, the accused shall enjoy the right to assistance of counsel under the sixth amendment. *Id.* at 335.

55. *Tamborrino*, 215 Cal. App. 3d at 583, 263 Cal. Rptr. at 735.

56. *Gideon*, 372 U.S. 335.

57. *Id.*

58. *Tamborrino*, 215 Cal App. 3d at 584, 263 Cal. Rptr. at 735.

59. *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951). In *Coplon*, the Court of Appeals for the D.C. Circuit held that where government agents intercepted telephone messages between the criminal defendant and her attorney, the defendant has been denied the effective aid and assistance of counsel. *Id.* The court stated that the right to assistance of counsel is absolute and that no conviction can stand no matter how overwhelming the evidence of guilt if the accused is denied the effective assistance of counsel. *Id.* at 759-60.

60. *Cadwell V. United States*, 205 F.2d 879 (D.C. Cir. 1953). In *Cadwell*, the

Court,⁶¹ all of which involved government interception of confidential communications between defendants and their attorneys.⁶² In those three cases, the courts reversed the convictions without requiring the defendants to prove prejudice.⁶³ In distinguishing *Tamborrino*, the majority held that the breach was not the same as a "serious breach of confidentiality by the direct invasion by a government agent of the privacy of a defendant's consultation with his attorney."⁶⁴

The court reasoned that because the error by the trial judge was less severe than other sixth amendment violations,⁶⁵ it did not fit into the reversible per se category.⁶⁶ The majority decided that the harmless error rule of *Chapman*⁶⁷ should apply to the case.⁶⁸ The court

D.C. Circuit Court held that a conviction must be reversed where a government agent gained access to trial plans of the defense. *Id.* The court indicated that the defendant need not show actual prejudice to be entitled to a new trial. *Id.* at 881. The Court stated, "[t]he Constitution's . . . guarantees of . . . 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 confidential papers of the defendant and his advisors, to listen to their conversations, and to participate in their counsels of defense." *Id.* According to the D.C. Circuit, a conviction cannot stand if tainted by this type of conduct by the government. *Id.*

61. *Barber v. Municipal Court*, 24 Cal. 3d 742, 598 P.2d 818, 157 Cal. Rptr. 658 (1979). *Barber* involved fifty defendants that were arrested for demonstrating at a nuclear power plant. *Id.* at 745, 598 P.2d at 819, 157 Cal. Rptr. at 659. An undercover police officer posed as one of the jointly represented defendants. *Id.* The undercover police officer attended meetings with defense counsel. *Id.*

The Supreme Court of California reversed the lower court's ruling that the prosecution could use evidence if the prosecution could prove that the evidence was obtained independently of the undercover agent. *Id.* at 760, 598 P.2d 828, 157 Cal. Rptr. 668. The California Supreme Court held that the defendants' right to confer privately with their counsel was violated and ordered the suit dismissed. *Id.* For a more detailed discussion of *Barber*, see *infra* Part IV, Subpart C.

62. *Tamborrino*, 215 Cal. App. 3d at 583, 263 Cal. Rptr. at 735.

63. *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951); *Cadwell v. United States*, 205 F.2d 879 (D.C. Cir. 1953); and *Barber v. Municipal Court*, 24 Cal. 3d 742, 598 P.2d 818, 157 Cal. Rptr. 658 (1979).

64. *Tamborrino*, 215 Cal. App. 3d at 584, 263 Cal. Rptr. at 735.

65. The more severe sixth amendment violations the court was referring to were: (1) the complete deprivation of counsel as occurred in *Gideon*, 372 U.S. 335 (1963) and (2) a breach of confidentiality by listening directly to a criminal defendant's consultation with his attorney as the situation which occurred in *Coplon*, 191 F.2d 749 (D.C. Cir. 1951) and *Barber*, 24 Cal. 3d 742, 598 P.2d 818, 157 Cal. Rptr. 658 (1979). *Tamborrino*, 215 Cal. App. 3d at 584, 263 Cal. Rptr. at 735.

66. *Tamborrino*, 215 Cal. App. 3d at 584, 263 Cal. Rptr. at 735.

67. *Chapman v. California*, 386 U.S. 18 (1967). The *Chapman* harmless error rule is: the error is harmless and the conviction must stand if an appellate court concludes, beyond a reasonable doubt, that the error had no impact upon the finding of guilt. *Id.* at 24.

68. *Tamborrino*, 215 Cal. App. 3d at 584, 263 Cal. Rptr. at 735.

explained that the trial judge's questions did not imply that the judge disbelieved the defendant's testimony.⁶⁹ The court also dismissed the defendant's assertion that the judge assumed the role of prosecutor.⁷⁰

In determining that the error was harmless beyond a reasonable doubt,⁷¹ the majority recounted the evidence against the defendant; including the type of distinctive hat found in his car, his possession of a handgun, his possession of a Datsun automobile with the suspect license number, and his fingerprint on the jewelry box.⁷² The majority pointed out that if Clarke was trying to set Tamborrino up, it "seems only reasonable that . . . she would have readily identified him . . . from the photo line up."⁷³ The court explained that Tamborrino was not very credible because he admitted two prior convictions for robbery⁷⁴ and gave a false name to the officer when he was arrested.⁷⁵

Although the court acknowledged that the jury requested a reading of Tamborrino's testimony, the court stated that it could not speculate that the jury thought it was a close case.⁷⁶ The majority asserted that the defendant lost because of the strength of the evidence against him and the weakness of his own case.⁷⁷ The court then concluded that the error was harmless beyond a reasonable doubt because the error by the judge did not contribute to the conviction.⁷⁸

C. *The Dissenting Opinion of the Court of Appeals*

The dissent written by Justice Johnson, agreed with the majority that the trial judge breached Tamborrino's attorney-client privilege.⁷⁹ However, the dissent contended that the effect of the error denied Tamborrino his constitutional right to counsel.⁸⁰ Accordingly, Judge Johnson believed the conviction should be automatically

69. *Id.*

70. *Id.* at 584, 263 Cal. Rptr. 736.

71. *Id.*

72. *Id.* at 586, 263 Cal. Rptr. at 737.

73. *Id.*

74. *Id.* Tamborrino admitted to two prior felony convictions for robbery after the judge had ruled that he would allow the prosecution to offer the prior convictions as evidence. *Id.* at 591, 263 Cal. Rptr. at 740.

75. *Id.* at 586, 263 Cal. Rptr. at 737.

76. *Id.* at 587, 263 Cal. Rptr. at 737.

77. *Id.* at 588, 263 Cal. Rptr. at 738.

78. *Id.* at 585, 263 Cal. Rptr. at 736.

79. *Id.* at 591, 263 Cal. Rptr. at 740 (Johnson, J., dissenting).

80. *Id.* The judge stated that without a guarantee of confidentiality, a criminal defendant will be deprived of effective assistance of counsel because a criminal defendant may refrain from disclosing information vital to his defense to his attorney. *Id.*

reversed instead of subject to the harmless error rule.⁸¹

The dissent stated that the attorney-client privilege must be strictly protected in order to implement the sixth amendment right to counsel.⁸² The attorney-client privilege assures the defendant adequate and effective legal representation because it allows and encourages full disclosure to the attorney.⁸³ Absent an absolute guarantee of confidentiality, a defendant may be deprived of effective assistance of counsel because he may fear disclosing critical facts to his attorney.⁸⁴ Citing *Barber v. Municipal Court*,⁸⁵ the dissent pointed out that the California Supreme Court has held that "the right to counsel guaranteed by the California Constitution embodies the right to communicate in absolute privacy with one's attorney."⁸⁶

The dissent described the error by the trial judge as "of the most obvious and fundamental nature . . . [a]nd of . . . constitutional dimension."⁸⁷ In the dissent's view, this type of error deserves the "sharpest possible sanction," because it discourages the full and open communication between defendants and their attorneys.⁸⁸

Although the dissent contended that the error mandated an automatic reversal, it proceeded to apply the harmless error rule because "properly construed, [the harmless error rule] likewise dictates reversal of the instant case."⁸⁹ Under the dissent's construction of the harmless error rule, an appellate court must reverse a conviction "unless it can fairly find *beyond a reasonable doubt* that the defendant would have been convicted even if the error had not been committed."⁹⁰ This construction of the harmless error rule requires the remaining case against the defendant to be overwhelming before the error can be considered harmless.⁹¹ It is not enough that a reasonable juror *could have* found the defendant guilty without the error.⁹²

81. *Id.* at 595, 263 Cal. Rptr. at 743 (Johnson, J., dissenting).

82. *Id.* at 593, 263 Cal. Rptr. at 741 (Johnson, J., dissenting).

83. *Id.* (Johnson, J., dissenting) (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

84. *Id.* at 593-94, 263 Cal. Rptr. at 742 (Johnson, J., dissenting).

85. 24 Cal. 3d 742, 598 P.2d 818, 157 Cal. Rptr. 658 (1979).

86. *Tamborrino*, 215 Cal. App. 3d at 594, 263 Cal. Rptr. at 742 (Johnson, J., dissenting).

87. *Id.* at 595, 263 Cal. Rptr. 743 (Johnson, J., dissenting).

88. *Id.* at 595-96, 263 Cal. Rptr. at 743 (Johnson, J., dissenting).

89. *Id.* at 596, 263 Cal. Rptr. at 743 (Johnson, J., dissenting).

90. *Id.* (Johnson, J., dissenting).

91. *Id.* at 596, 263 Cal. Rptr. at 744 (Johnson, J., dissenting).

92. *Id.* Under the harmless error rule, the error is not harmless if a juror merely *could have* found the defendant guilty. *Id.* The harmless error rule requires an appellate court to find beyond a reasonable doubt, that the defendant would have been convicted

According to the dissent, the *Tamborrino* case was a credibility contest between the victim and the defendant.⁹³ Most of the evidence “not only about the identity of the robbers but that she was robbed at all came directly and solely from Ms. Clarke.”⁹⁴ The only evidence independent of Ms. Clarke’s testimony was the defendant’s fingerprint. One fingerprint does not prove guilt.⁹⁵ It only proves that the defendant touched the box for some reason.⁹⁶ In fact, the defendant’s story, “if believed, accounted for and discredited all evidence against him.”⁹⁷

Accordingly, any error which would impugn the defendant’s credibility would tip the scales in favor of the prosecution.⁹⁸ The judge’s questions created the inference that the defendant was lying and that the events he testified to (*Tamborrino* selling Clarke cocaine) never happened.⁹⁹ The “clear effect” of the trial judge’s questions was to discredit the defendant.¹⁰⁰

The dissent explained that the only way to counteract the prejudice caused by the negative inference would be for the defense counsel to take the stand and reveal his trial strategy.¹⁰¹ The defense counsel would have to explain why he did not reveal this information earlier.¹⁰² The dissent stated, “. . . the only way to overcome the prejudice caused . . . is to further expand the inquiry [into confidential attorney-client communications] and thus further eviscerate the attorney-client privilege.”¹⁰³

The dissent concluded that “there is no responsible way a reviewing court could conclude that the People have proved ‘beyond a reasonable doubt’ that had the trial judge not committed these errors, the jury still would have reached the same verdict.”¹⁰⁴ Because the trial judge questioned the defendant regarding confidential attorney-client communications, the defendant was deprived of the right to

even if the error had not been committed, before the error can be considered harmless. *Id.* at 596, 263 Cal. Rptr. at 743 (Johnson, J., dissenting).

93. *Id.* at 600, 263 Cal. Rptr. at 746 (Johnson, J., dissenting). The Trial judge recognized how close a case this was because the judge granted the prosecutions request to introduce evidence of the two prior convictions. *Id.* (Johnson, J., dissenting). The judge granted the request because he felt the case against the defendant was not strong. *Id.* (Johnson, J., dissenting).

94. *Id.* at 597, 263 Cal. Rptr. at 744 (Johnson, J., dissenting).

95. *Id.*

96. *Id.* The defendant testified he must have touched the box when he was selling Ms. Clark bad cocaine. *Id.*

97. *Id.*

98. *Id.* at 597, 263 Cal. Rptr. at 744 (Johnson, J., dissenting).

99. *Id.*

100. *Id.*

101. *Id.* at 598, 263 Cal. Rptr. at 745 (Johnson, J., dissenting).

102. *Id.*

103. *Id.*

104. *Id.* at 601, 263 Cal. Rptr. at 747 (Johnson J., dissenting).

have his case decided by untainted jurors.¹⁰⁵

III. THE HARMLESS ERROR RULE AS APPLIED TO SIXTH AMENDMENT VIOLATIONS

In *Chapman v. California*,¹⁰⁶ the U.S. Supreme Court held that some constitutional errors may be subject to the harmless error rule.¹⁰⁷ However, the Court explained that certain "constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error."¹⁰⁸ The Court stated, in *Rose v. Clark*,¹⁰⁹ that harmless error analysis "presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury."¹¹⁰

105. *Id.* at 600, 263 Cal. Rptr. at 746 (Johnson J., dissenting).

106. 386 U.S. 18 (1967).

107. *Id.* at 22. Among the constitutional errors that the U.S. Supreme Court has expressly or impliedly held subject to the *Chapman* harmless error rule are: failure to permit cross-examination concerning witness bias (*Delaware v. Van Arsdall*, 475 U.S. 673 (1986)); denial of the right to be present at trial (*Rushen v. Spain*, 464 U.S. 114 (1983)), improper comment on defendants' failure to testify (*United States v. Hasting*, 461 U.S. 499 (1983)); admission of witness identification obtained in violation of the right to counsel (*Moore v. Illinois*, 434 U.S. 220 (1977)); admission of confession in violation to the right to counsel (*Milton v. Wainwright*, 407 U.S. 371 (1972)); admission of evidence obtained in violation of the fourth amendment (*Chambers v. Maroney*, 399 U.S. 42 (1970)); failure of the court to give lesser-included offense instruction (*Hopper v. Evans*, 456 U.S. 605 (1982)); due process right against a burden shifting jury instruction (*Rose v. Clark*, 478 U.S. 570 (1986)); the due process right against improper prosecutorial argument (*Darden v. Wainwright*, 477 U.S. 168 (1986)); the due process right against unduly suggestive pretrial identification procedures (*Manson v. Brathwaite*, 432 U.S. 98, 113-14 (1977)); violations of the right of confrontation upon the admission of inculpatory out-of-court statements made by nontestifying codefendants (*Brown v. United States*, 411 U.S. 223, 231-32 (1973)); the sixth amendment right not to be interrogated by government agents once the right to counsel has attached (*Milton v. Wainwright*, 407 U.S. 371, 378 (1972)); and the sixth amendment right to confrontation (*Harrington v. California*, 395 U.S. 250, 253-54 (1969)).

108. *Chapman*, 386 U.S. at 23. The Court then enumerated the types of errors that could never be considered harmless: a coerced confession (*Payne v. Arkansas*, 356 U.S. 560 (1958) *But see* *Arizona v. Fulminante*, 499 U.S. ____, 111 S. Ct. 1246, 113 L.Ed. 2d 302 (March 1991) (admission of involuntary confession at a capital murder trial held subject to harmless-error analysis), *reh'g denied*, ____, U.S. ____, 111 S. Ct. 2067, 114 L. Ed. 2d 472 (May 1991)), the denial of the right to counsel (*Gideon v. Wainwright*, 372 U.S. 335 (1963)), and the denial of a trial by an impartial trial judge (*Tumey v. Ohio*, 273 U.S. 510 (1927)). *Chapman*, 386 U.S. at 23 n.8.

109. 478 U.S. 570 (1986).

110. *Rose v. Clark*, 478 U.S. 570, 579 (1986). In *Rose*, the court applied the harmless error rule to an erroneous jury instruction. The Court explained however, that some types of constitutional errors could never be subject to a harmless error rule: introduction of a coerced confession, the complete denial of right to counsel, and adjudication by a biased trial judge. *Id.* at 578. *But see* *Arizona v. Fulminante*, 499 U.S. ____, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (March 1991) (admission of involuntary confession at a

Accordingly, some errors require reversal without regard to their amount of prejudice because "some errors necessarily render a trial fundamentally unfair."¹¹¹ One of the errors included in this category is the denial of right to counsel.¹¹² The court hearing *Gideon v. Wainwright*¹¹³ ruled that complete denial of counsel was per se reversible error.¹¹⁴ The doctrine of per se reversal has also been extended to apply to the denial of counsel during an overnight recess.¹¹⁵ In *Perry v. Leeke*,¹¹⁶ the Court stated that "[a]ctual or constructive denial of assistance of counsel altogether, is not subject to [a] . . . prejudice analysis."¹¹⁷

Beside *Tamborrino*, no other case has addressed the constitutionality of a trial judge violating a criminal defendant's attorney-client privilege in the presence of a jury.¹¹⁸ Courts have addressed the analogous situation of a government agent who intercepts confidential communication between a criminal defendant and his or her attorney, and uses the information to the detriment of the defendant. The U.S. Supreme Court in *Weatherford v. Bursey* addressed the issue of an undercover government agent who attended attorney-client meetings of a criminal defendant.¹¹⁹

In *Weatherford*, Bursey and Weatherford were arrested for vandalizing a selective service office in Columbia, South Carolina.¹²⁰ In order to maintain his undercover status, Weatherford, the undercover agent, did not reveal that he was a government agent.¹²¹ At the request of Bursey, Weatherford was invited to attend meetings with Bursey and Bursey's attorney.¹²² Weatherford attended two such meetings at which defense strategies were discussed.¹²³ Weatherford did not discuss with his superiors or with the prosecution

capital murder trial held subject to harmless-error analysis), *reh'g denied*, ____ U.S. ____, 111 S. Ct. 2067, 114 L. Ed. 2d 472 (May 1991).

111. *Rose*, 478 U.S. at 578.

112. *Id.* at 577.

113. *Gideon*, 372 U.S. 335 (1963).

114. *Id.* *Gideon* involved an indigent defendant that was charged with breaking and entering with the intent to commit a misdemeanor. *Id.* This offense was a felony under Florida law. *Id.* at 336-37. The U.S. Supreme Court overturned a Florida Supreme Court ruling that held that an indigent defendant is not entitled to appointed counsel for a felony charge *unless* the charge is a capital offense. *Id.* at 337. The U.S. Supreme Court held that in all criminal prosecutions, the accused shall enjoy the right to assistance of counsel under the sixth amendment. *Id.* at 335.

115. *Perry v. Leeke*, 488 U.S. 272 (1989).

116. *Id.*

117. *Id.* at 280.

118. *Tamborrino*, 215 Cal App. 3d at 595 n.8, 263 Cal. Rptr. at 743 n.8 (Johnson, J., dissenting).

119. *Weatherford v. Bursey*, 429 U.S. 545 (1977).

120. *Id.* at 548.

121. *Id.*

122. *Id.*

123. *Id.* at 547-48.

any information "regarding [Burse's] trial plans, strategy, or anything having to do with the criminal action pending against [Burse]." ¹²⁴

The Supreme Court held that the sixth amendment does not establish a per se reversal rule when a government agent merely attends an attorney-client meeting. ¹²⁵ The Court reasoned that the sole fact that the agent met with the defendant and his attorney did not violate the defendant's right to counsel. ¹²⁶ In dicta, the Court stated:

[h]ad Weatherford testified at Bursey's trial as to the conversation between Bursey and [his attorney]; had any of the State's evidence originated in these conversations; had those overheard conversations been used in any other way to the substantial detriment to Bursey; or even had the prosecution learned from Weatherford, an undercover agent, the details of the Bursey-[attorney] conversations about trial preparations, [the defendant] would have a much stronger case. ¹²⁷

The court noted that "the constitutionality of the conviction depends on whether the overheard conversations have produced . . . any of the evidence offered at trial." ¹²⁸

IV. ANALYSIS

In *Tamborrino*, the majority held that a violation of a defendant's attorney-client privilege in the presence of a jury is subject to the harmless error rule of *Chapman*. ¹²⁹ The majority distinguished the situation in *Tamborrino*, where a judge revealed confidential attorney-client conversations for the jury, from the previously discussed case law where an undercover agent intercepted attorney-client communications and conveyed the information to the prosecution for use against the defendant. ¹³⁰

Although the infringement upon the defendant's right to counsel is just as severe when a judge violates the attorney-client privilege as

124. *Id.*

125. *Id.* at 557-58.

126. *Id.* at 558-59.

127. *Id.* at 554 (Emphasis added).

128. *Id.* at 552. The Federal circuit courts as well as the California Supreme Court have differing interpretations of the requirements necessary to establish a sixth amendment violation and whether a rule of per se reversal should apply when a defendant's attorney-client privilege is impaired. For a more detailed discussion, see *infra* Part IV of this Note.

129. *Tamborrino*, 215 Cal. App. 3d 575, 263 Cal. Rptr. 731. The *Chapman* harmless error rule is: the error is harmless and the conviction must stand if an appellate court concludes, beyond a reasonable doubt, that the error had no impact upon the finding of guilt. *Chapman v. California*, 386 U.S. 18, 24 (1966).

130. *Tamborrino*, 215 Cal. App. 3d at 583, 263 Cal. Rptr. at 735.

when an undercover agent violates the privilege, the court ruled that the harmless error rule applies when there is no "physical invasion" of the defendant's consultation with his attorney.¹³¹ However, when there is a physical interception of confidential attorney-client communications by a government agent, both federal and California courts have held that the error is automatically reversible.¹³²

Apparently, no other cases in California or the federal courts have expressly considered whether this type of action by a trial judge makes a case reversible per se.¹³³ The closest case authority for determining if there is a sixth amendment violation requiring an automatic reversal is *Weatherford v. Bursey*.¹³⁴ As previously discussed, the Supreme Court in *Weatherford* stated in dicta that "unless . . . [the disclosure of the confidential conversations] created at least a realistic possibility of injury . . . there can be no Sixth Amendment violation".¹³⁵ The Supreme Court's dicta in *Weatherford* seems ambiguous.¹³⁶ The opinion by the Supreme Court does not rule out per se reversal if confidential communication is disclosed at trial.¹³⁷ On the other hand, the opinion does not mandate automatic reversal if confidential communication is revealed at trial either.¹³⁸

In deciding *Weatherford*, the Supreme Court distinguished *Black v. United States*¹³⁹ and *O'Brien v. United States*¹⁴⁰ from *Weatherford*. In *Weatherford*, the government agent did not communicate to the prosecution any information gained while attending the defendant's conference with his attorney.¹⁴¹ In contrast, in both *Black* and *O'Brien*, confidential communications between the defendants and

131. *Id.*

132. *See, e.g.,* *Cadwell v. United States*, 205 F.2d 879 (D.C. Cir. 1953); *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951); and *Barber v. Municipal Court*, 24 Cal. 3d 742, 598 P.2d 818, 157 Cal. Rptr. 658 (1979).

133. *Tamborrino*, 215 Cal App. 3d at 595 n.8, 263 Cal. Rptr. at 743 n.8 (Johnson, J., dissenting).

134. 429 U.S. 545 (1977).

135. *Id.* at 559.

136. *See infra* note 142.

137. *Weatherford*, 429 U.S. at 559; *See supra* text accompanying note 129.

138. *See United States v. Levy*, 577 F.2d 200, 210 (3d Cir. 1978). In reference to the U.S. Supreme Court decision in *Weatherford*, the Third Circuit Court of Appeals in *Levy* stated:

[w]e think that the Court was suggesting by negative inference that a sixth amendment violation would be found where, as here, defense strategy was actually disclosed or where, as here, the government enforcement officials sought such confidential information. Whether or not that negative inference was intended, the Court certainly did not lay down a rule that when actual disclosure occurred, additional prejudice must be found." *Id.*

The court in *Levy* reversed the lower court's ruling that whether a case should be overturned or not would turn on whether a government informer's disclosure prejudiced the defendant. *Id.*

139. 385 U.S. 26 (1966).

140. 386 U.S. 345 (1967).

141. *Weatherford v. Bursey*, 429 U.S. 545, 548.

their attorneys were conveyed to the prosecution.¹⁴² The Court refused to remand the cases for hearings to determine whether the intrusions had tainted the evidence at trial; instead the court remanded the cases for new trials.¹⁴³ If the Court had remanded the cases for hearings to determine if the intrusions had tainted the trial, the effect would have been to apply the harmless error rule. By refusing to remand for hearings, the Court may have implicitly rejected the application of the harmless error rule to the invasion of the attorney-client privilege.¹⁴⁴

A. *The Interpretation of Weatherford by the U.S. Courts of Appeals*

Although some circuit courts¹⁴⁵ require the defendant show that he has been prejudiced before claiming a sixth amendment violation, other circuits¹⁴⁶ do not. The Court of Appeals for the District of Columbia Circuit explained that the amount of harm required to make out a claim for sixth amendment violation does not "have to amount to 'prejudice' in the sense of altering the actual outcome of the trial."¹⁴⁷ The Third Circuit has held that prejudice will be presumed when confidential information is disclosed to a government informer.¹⁴⁸ However, the First, Second, Sixth, Eighth, and Ninth Circuits require the defendant to demonstrate actual prejudice or that the disclosure resulted in some benefit to the government.¹⁴⁹

The First Circuit Court of Appeals has held that "[a] Sixth Amendment violation cannot be established without a showing that

142. *Black v. United States*, 385 U.S. 26 (1966), *O'Brien v. United States*, 386 U.S. 345 (1967). In both *Black* and *O'Brien*, conversations between the criminal defendants and their attorneys were overheard via electronic listening devices. *Black*, 385 U.S. 26, *O'Brien*, 386 U.S. 345.

143. *Weatherford*, 429 U.S. at 568 (Marshall, J., dissenting).

144. The Court may also have been applying its own prejudice analysis to the case.

145. The First, Second, Sixth, Eighth, and Ninth Circuits require that the defendant show that he was prejudiced. See *United States v. Mastroianni*, 749 F.2d 900, 907 (1st Cir. 1984); *United States v. Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985); *United States v. Steele*, 727 F.2d 580, 586 (6th Cir. 1984); *United States v. Singer*, 785 F.2d 228, 234 (8th Cir. 1986); and *Clutchette v. Rusher*, 770 F.2d 1469, 1471 (9th Cir. 1985).

146. The Third Circuit and the D.C. Circuit do not require a showing of prejudice to establish a sixth amendment violation. See *United States v. Costanzo*, 740 F.2d 251, 257 (3d Cir. 1984); *Cadwell v. United States*, 205 F.2d 879, 881 (D.C. Cir. 1953).

147. *Briggs v. Goodman*, 698 F.2d 486, 494 (D.C. Cir. 1983).

148. *United States v. Costanzo*, 740 F.2d 251, 257 (3d Cir. 1984).

149. See *infra* text accompanying notes 154-60.

there is a 'realistic possibility of injury' to defendants or 'benefit to the State.'"¹⁵⁰ If the defendant proves that the confidential information was communicated to the government, the burden shifts to the government to prove that no prejudice resulted.¹⁵¹

The Second Circuit requires a defendant to prove he was prejudiced to establish a Sixth Amendment violation.¹⁵² The Second Circuit held that when a violation of the attorney-client privilege results from the unintentional presence¹⁵³ of a government agent, a defendant must show that privileged communication passed to the prosecutor and resulted in prejudice to the defendant.¹⁵⁴ To show prejudice, the defendant must prove "that a prosecution witness testified concerning privileged communications, that prosecution evidence originated in such communications, or that such communications have been used in any other way to the substantial detriment of the defendant"¹⁵⁵

The Sixth, Eighth and Ninth Circuits require the defendant to show he was prejudiced by the governmental interference with the confidential relationship in order to establish a Sixth Amendment violation.¹⁵⁶ However, to show prejudice, the defendant need only show that the information gained by the intrusion *was used* against the defendant *at trial*, among other ways.¹⁵⁷ Once a defendant shows

150. *United States v. Mastroianni*, 749 F.2d 900, 907 (1st Cir. 1984).

151. *Id.* at 907-08. In addition to demonstrating the realistic possibility of injury, the defendant must prove that the confidential information was passed to the government. *Id.*

152. *United States v. Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985).

153. Unintentional presence would occur when an undercover agent is invited to meet with the defendant and his attorney. In order to preserve his cover and avoid suspicion, the agent accepts the invitation and attends the meeting without revealing his undercover status.

154. *Ginsberg*, 758 F.2d at 833.

155. *Id.*

156. *United States v. Steele*, 727 F.2d 580, 586 (6th Cir. 1984); *United States v. Singer*, 785 F.2d 228, 234 (8th Cir. 1986); *Clutchette v. Rusher*, 770 F.2d 1469, 1471 (9th Cir. 1985).

157. *United States v. Steele*, 727 F.2d 580, 586 (6th Cir. 1984); *Mastrian v. McManus*, 554 F.2d 813, 821 n.10 (8th Cir. 1977); *United States v. Irwin*, 612 F.2d 1182, 1187 (9th Cir. 1980).

In *Steele*, the court implied that to show prejudice the defendant must show that "the government obtained directly or indirectly any evidence used at trial . . . ; that any information gained by [the government agent] was used in any manner to the substantial detriment of [the] defendant; or that the details about defense trial preparations were learned by the government." *Steele*, 727 F.2d at 586.

The court stated, in *Mastrian*, that "the accused must show . . . that the substance of the overheard conversation was of some benefit to enforcement officials." *Mastrian v. McManus*, 554 F.2d at 821.

In *Irwin*, the court stated that prejudice "results when evidence gained through the interference is used against the defendant at trial. It also can result from the prosecution's use of confidential information pertaining to the defense plans and strategy, from government influence which destroys the defendant's confidence in his attorney, and from other actions designed to give the prosecution an unfair advantage at trial." *Irwin*, 612

that the information gained by the intrusion into the attorney-client relation was used against the defendant at trial, the defendant is entitled to an automatic reversal.¹⁵⁸

In contrast, the D.C. Circuit and the Third Circuit do not require a defendant to show prejudice to claim a sixth amendment violation.¹⁵⁹ The Court of Appeals for the Third Circuit held that prejudice, and thus a sixth amendment violation, is presumed when confidential defense strategy is disclosed to the government by an informer.¹⁶⁰ The Court of Appeals for the D.C. Circuit stated that the defendant need not prove the prosecution has actually used the information because "[m]ere possession . . . of otherwise confidential knowledge about the defense's strategy or position is sufficient . . . to establish detriment to the criminal defendant".¹⁶¹ Citing *Weatherford*, the D.C. Circuit stated, "[s]uch information is 'inherently detrimental[,] . . . unfairly advantage[s] the prosecution, and threaten[s] to subvert the adversary system of criminal justice.'" ¹⁶²

The Third Circuit's reasoning was that the Supreme Court, in *Weatherford*, "was suggesting by negative inference" that if confidential attorney-client communications were disclosed to the prosecution, there would be a sixth amendment violation mandating a reversal.¹⁶³ Accordingly, the Third Circuit expressly rejected a rule which would require a court to weigh the amount of prejudice caused by the disclosure on a case by case basis.¹⁶⁴

The Third Circuit Court of Appeals explained that a standard which requires a court to weigh the amount of prejudice caused by a sixth amendment violation is inappropriate for three reasons.¹⁶⁵ First, a trial court would be faced with the virtually "impossible

F.2d at 1187.

158. *United States v. Steele*, 727 F.2d 580, 586 (6th Cir. 1984); *Mastrian v. McManus*, 554 F.2d 813, 821 n.10 (8th Cir. 1977); *United States v. Irwin*, 612 F.2d 1182, 1187 (9th Cir. 1980).

159. *United States v. Costanzo*, 740 F.2d 251, 257 (3d Cir. 1984); *Briggs v. Goodman*, 698 F.2d 486, 494 (D.C. Cir. 1983).

160. *United States v. Costanzo*, 740 F.2d 251, 257 (citing *United States v. Levy*, 577 F.2d 200, 210 (3d Cir. 1978)).

161. *Briggs v. Goodman*, 698 F.2d 486, 494-95.

162. *Id.* at 495.

163. *United States v. Levy*, 577 F.2d at 210.

164. *Id.* The court stated: "Since in this case an actual disclosure of defense strategy occurred and since we reject the proposed rule that the damage done by such disclosure should be weighed on a case-by-case basis, we must consider what remedy is appropriate. In our judgement, the only appropriate remedy is the dismissal of the indictment." *Id.*

165. *Id.*

task” of determining whether the disclosure influenced the outcome of the case.¹⁶⁶ Second, not all government attorneys can be relied on to be candid about the scope of the information that they received.¹⁶⁷ Finally, there is a genuine risk that some law enforcement agents would not admit that information was obtained in violation of the sixth amendment.¹⁶⁸ According to the Third Circuit, a harmless error rule “would disturb the balance implicit in the adversary system and would thus jeopardize the very process by which guilt and innocence are determined in our society.”¹⁶⁹

The Supreme Court’s statement in *Glasser v. U.S.*¹⁷⁰ supports the Third Circuit’s application of the per se reversal rule. In *Glasser*, the Supreme Court stated that “[t]he 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.”¹⁷¹ In fact, the Court of Appeals for the Second Circuit observed that the per se reversal rule has been applied where the government’s intrusion upon the attorney-client privilege has been “an offensive interference . . . without any justification.”¹⁷²

Although no federal courts have applied the harmless error rule of *Chapman* to a violation of the defendant’s attorney-client privilege, the federal courts are reluctant to reverse a conviction unless the invasion into the attorney-client privilege results in prejudice.¹⁷³ An example of the court’s reluctance to reverse is *United States v. Morrison*.¹⁷⁴ In *Morrison*, federal agents met with the defendant without her attorney’s permission.¹⁷⁵ Although the defendant did not incriminate herself or supply any information relevant to her case, she claimed her sixth amendment right to counsel was violated.¹⁷⁶ The Supreme Court stated, “[t]he premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel’s representation or . . .

166. *Id.* at 208. A standard which allows a court to weigh the amount of prejudice caused by a sixth amendment violation would require the court to speculate about the amount of prejudice caused by the disclosure. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 209.

170. *Glasser v. United States*, 315 U.S. 60 (1942).

171. *Id.* at 76.

172. *United States v. Gartner*, 818 F.2d 633, 637 (2d Cir. 1975) (citing *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973); *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951); *Cadwell v. United States*, 205 F.2d 879 (D.C. Cir. 1953); *United States v. Rispo*, 460 F.2d 965 (3d Cir. 1972); and *United States v. Lusterino*, 450 F.2d 572 (2d Cir. 1971)).

173. *United States v. Morrison*, 449 U.S. 361 (1981).

174. *Id.*

175. *Id.* at 362.

176. *Id.* at 362-63.

some other prejudice to the defense."¹⁷⁷ "Absent such impact on the criminal proceeding, . . . there is no basis for imposing a remedy"¹⁷⁸

B. *Application of Federal Constitutional Law to the Tamborrino Case*

An important distinction must be made between the federal cases involving government agents intercepting confidential attorney-client communications and *Tamborrino*. In the federal cases, the interception of the confidential communication between the attorney and the defendant occurs prior to trial.¹⁷⁹ When confidential communication is intercepted prior to trial, courts are reluctant to grant relief to a defendant unless the information either threatens or is actually used to the detriment of the defendant.¹⁸⁰ If the jury is never exposed to the confidential communication and the prosecution is prevented from benefiting from disclosure,¹⁸¹ the intrusion by the government would not have an effect on the trial. In contrast, the disclosure of confidential information in *Tamborrino* occurred at trial in front of the jury.¹⁸² The disclosure in front of a jury is much more likely to effect the outcome of the trial because the privileged communication is presented directly to the trier of fact.¹⁸³

Because the confidential conversations by Tamborrino were used

177. *Id.* at 365.

178. *Id.*

179. *Cadwell v. United States*, 205 F.2d 879, 880 (D.C. Cir. 1953); *U.S. v. Mastroianni*, 749 F.2d 900, 907 (1st Cir. 1984); *United States v. Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985); *United States v. Costanzo*, 740 F.2d 251, 257 (3d Cir. 1984); *United States v. Steele*, 727 F.2d 580, 586 (6th Cir. 1984); *Mastrian v. McManus*, 554 F.2d 813, 821 n.10 (8th Cir. 1977); and *United States v. Irwin*, 612 F.2d 1182, 1187 (9th Cir. 1980).

180. *United States v. Morrison*, 449 U.S. 361. There are three ways that the confidential information between the attorney and client could be used to the detriment of the defendant: (1) the privileged information is used against the defendant at trial, (2) the privileged information is used by the prosecution to prepare its case and (3) the privileged information enables the government to obtain other evidence against the defendant. *See, e.g. United States v. Steele*, 727 F.2d 580, 586 (6th Cir. 1984).

181. The prosecution could benefit when the illegal obtained information leads them to other evidence or when the prosecution learns the trial strategy and is able to anticipate the defense.

182. *Tamborrino*, 215 Cal. App. 3d at 591, 263 Cal. Rptr. at 740 (Johnson, J., dissenting).

183. In *United States v. Arthur*, the Fourth Circuit Court of Appeals held that when a judge asked a defendant about advice given to him by his attorney in a previous trial, the inquiry had no effect on the outcome of the trial because the inquiry took place outside the presence of the jury. 602 F.2d 660, 664 (4th Cir. 1979).

at trial, Tamborrino established that he was prejudiced.¹⁸⁴ Having shown that he was prejudiced by the use of the privileged communications, Tamborrino established a sixth amendment violation even under the most rigorous standard laid down by the U.S. Courts of Appeals.¹⁸⁵ Accordingly, the error by the trial judge (exposing the confidential attorney-client communication to the jurors) is automatically reversible and does not require any further demonstration of harm to the defendant. Therefore, Tamborrino's conviction should be overturned under the U.S. Courts of Appeals' interpretation of *Weatherford*.¹⁸⁶

C. *Establishing a Violation of the Right to Counsel Under California Law*¹⁸⁷

The leading California case with facts similar to *Weatherford* is *Barber v. Municipal Court*.¹⁸⁸ The Supreme Court of California held that it was reversible per se when an undercover police officer merely attended a confidential meeting with the defendants and their attorney.¹⁸⁹ Even though the undercover police officer did not communicate information to the prosecution, the court stated that the intrusion into the attorney client-relationship violated the right under California law to communicate privately with counsel.¹⁹⁰

The *Barber* case involved fifty anti-nuclear power demonstrators who were arrested along with two undercover police officers for trespassing and unlawful assembly.¹⁹¹ Forty of the arrested demonstrators agreed upon joint representation.¹⁹² An undercover police officer

184. *United States v. Mastroianni*, 749 F.2d 900, 907 (1st Cir. 1984); *United States v. Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985); *United States v. Costanzo*, 740 F.2d 251, 257 (3d Cir. 1984); *United States v. Steele*, 727 F.2d 580, 586 (6th Cir. 1984); *Mastrian v. McManus*, 554 F.2d 813, 821 n.10 (8th Cir. 1977); and *United States v. Irwin*, 612 F.2d 1182, 1187 (9th Cir. 1980).

185. *See supra* text accompanying note 159.

186. *United States v. Mastroianni*, 749 F.2d 900, 907 (1st Cir. 1984); *United States v. Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985); *United States v. Costanzo*, 740 F.2d 251, 257 (3d Cir. 1984); *United States v. Steele*, 727 F.2d 580, 586 (6th Cir. 1984); *Mastrian v. McManus*, 554 F.2d 813, 821 n.10 (8th Cir. 1977); and *United States v. Irwin*, 612 F.2d 1182, 1187 (9th Cir. 1980).

187. The California Legislative Proposition 115 (1990) has eliminated the ability of a criminal defendant to rely on Constitutional rights grounded in California law after July 1 1990. *Tamborrino*, however, was decided before the effective date of Proposition 115. *Tamborrino*, 215 Cal. App. 3d 575, 263 Cal. Rptr. 731 (1989).

188. 24 Cal. 3d. 742, 598 P.2d 818, 157 Cal. Rptr. 658 (1979).

189. *Id.* at 756, 598 P.2d at 826, 157 Cal. Rptr. at 666.

190. *Id.* The court remarked the defendants "no longer feel they can freely, candidly, and with complete confidence discuss their case with their attorney". *Id.* The court stated that, "[t]he right to confer privately with one's attorney is 'one of the fundamental rights guaranteed by the American criminal law - a right that no legislator or court can ignore or violate' ". *Id.* at 760, 598 P.2d at 828, 157 Cal. Rptr. at 668 (emphasis added).

191. *Id.* at 747, 598 P.2d at 820, 157 Cal. Rptr. at 660.

192. *Barber v. Municipal Court*, 24 Cal. 3d at 767, 598 P.2d at 833, 157 Cal.

who posed as a defendant attended numerous confidential attorney-client conferences where defense strategy was discussed.¹⁹³

Prior to trial, the demonstrators discovered that one of their codefendants was an undercover police officer.¹⁹⁴ After learning of the undercover agent's true identity, the defendants became suspicious of one another and were reluctant to cooperate with the defense counsel.¹⁹⁵ However, during the hearing on a motion to dismiss, it was determined that no confidential information had been disclosed to the prosecution.¹⁹⁶ As a result, the trial court denied the motion to dismiss,¹⁹⁷ but ordered the prosecution to refrain from using evidence for rebuttal purposes unless the prosecution could prove beyond a reasonable doubt that the evidence was obtained independently of the undercover agent.¹⁹⁸ The California Supreme Court reversed and held that the error was per se reversible and ordered the suit dismissed.¹⁹⁹ The California Supreme Court stated that the California Constitution gives a defendant the right to communicate with his or her attorney in absolute privacy.²⁰⁰ The Court stated, "if an accused is to derive the full benefits of his right to counsel, he must have the assurance of confidentiality and privacy of communication with his attorney."²⁰¹ Quoting a U.S. Supreme Court case,²⁰² the court explained, "if the client knows that damaging information could be . . . obtained from the attorney following disclosure, . . . the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."²⁰³ Thus, as the court points out, the right to consult privately with counsel "involves public policies of paramount importance."²⁰⁴

The court then distinguished *Barber* from *Weatherford*. The court

Rptr. at 673. (Clark, J., dissenting).

193. *Id.* at 748, 598 P.2d at 820, 157 Cal. Rptr. at 660-61.

194. *Id.* at 745, 598 P.2d at 819, 157 Cal. Rptr. at 659.

195. *Id.* at 750, 598 P.2d at 821-22, 157 Cal. Rptr. at 662. Defense counsel testified that the defendants ability to proceed with their defense was substantially impaired because the defendants refusal to participate in the meetings with defense counsel. *Id.*

196. *Id.* at 750, 598 P.2d at 822, 157 Cal. Rptr. at 662.

197. *Id.*

198. *Id.*

199. *Id.* at 760, 598 P.2d at 828, 157 Cal. Rptr. at 668.

200. *Id.* at 751, 598 P.2d at 822, 157 Cal. Rptr. at 662.

201. *Id.*

202. *Fisher v. United States*, 425 U.S. 391, 403 (1976).

203. *Barber v. Municipal Court*, 24 Cal. 3d at 751, 598 P.2d at 822, 157 Cal. Rptr. at 662 (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)).

204. *Id.* at 752, 598 P.2d at 823, 157 Cal. Rptr. at 663. The public policy involved is the right of the accused to have effective assistance of counsel. *Id.*

pointed out that in *Weatherford* there was no specific prejudice shown or otherwise threatened.²⁰⁵ However, in *Barber*, the defendants demonstrated they were prejudiced because of their inability to participate in their defense.²⁰⁶ Moreover, the court dismissed *Weatherford* as controlling in *Barber* because “the right to privacy of communication between an accused and his attorney [is] grounded on California Law”.²⁰⁷

D. Application of *Barber* to the *Tamborrino* Case

In *Barber*, the California Supreme Court held that the case against the defendants must be dismissed because an undercover police officer attended confidential attorney-client conferences of the accused.²⁰⁸ *Barber* could be read for the proposition that *any intrusion* by the government into the attorney-client privilege is grounds for automatic reversal. The majority in *Tamborrino* apparently rejected this interpretation of *Barber*.²⁰⁹ The majority distinguished *Barber*, stating that a question by a trial judge in front of a jury is not the same as a “direct invasion by a government agent of the privacy of a defendant’s consultation with his attorney.”²¹⁰

On this point, the current majority rule is that of *Tamborrino*. However, the same automatic reversal rule that applies when a gov-

205. *Id.* at 755, 598 P.2d at 825, 157 Cal. Rptr. at 665. In *Weatherford*, the undercover government agent who attended confidential meetings with the defendant and his attorney, did not communicate any information to his superiors or to the prosecution. *Weatherford*, 429 U.S. at 556. The Court stated: “[a]s long as the information possessed by Weatherford [the undercover agent] remained uncommunicated, he posed no substantial threat to Bursley’s [the defendant’s] Sixth Amendment rights.” *Id.*

206. *Barber*, 24 Cal. 3d at 756, 598 P.2d at 826, 157 Cal. Rptr. at 666. In *Barber*, the court explained that there was direct evidence that the defendants had been prejudiced. *Id.* A hearing was held on the defendant’s motion to dismiss on the ground that the presence of the police officer at confidential attorney-client conferences had deprived the defendants of their right to effective assistance of counsel. *Id.* at 745, 598 P.2d at 819, 157 Cal. Rptr. at 659.

At the hearing on the motion to dismiss, the defendant’s attorney testified that the defendants participated actively in meetings with their attorney prior to the revelation that one of the defendants was a police officer. *Id.* at 750, 598 P.2d at 821-22, 157 Cal. Rptr. at 662. After the true identity of the police officer was revealed, the defendants, fearing that there might be other undercover agents among them, were very distrustful of one another. *Id.* at 750, 598 P.2d at 822, 157 Cal. Rptr. at 662. As a result of the suspicion, the plaintiffs became reluctant to reveal information to their counsel and were unable to receive effective assistance of counsel. *Id.* at 750, 598 P.2d at 821-22, 157 Cal. Rptr. at 662. Defense counsel further testified that “the defendants ability to proceed with their defense and to assist [the attorney] in preparing their defense [had] been substantially impaired” as a result of the government’s use of the undercover agent. *Id.*

207. *Barber*, 24 Cal. 3d at 755, 598 P.2d at 825, 157 Cal. Rptr. at 665.

208. *Barber v. Municipal Court*, 24 Cal. 3d. 742, 598 P.2d 818, 157 Cal. Rptr. 658. The California Legislative Proposition 115 (1990) has eliminated the ability of a criminal defendant to rely on Constitutional rights grounded in California law after July 1 1990.

209. *Tamborrino*, 215 Cal. App. 3d at 583, 263 Cal. Rptr. at 735.

210. *Id.*

ernment agent intercepts attorney-client communication should apply when a judge elicits confidential information in front of a jury. Any question posed by a judge regarding confidential attorney-client communication is more likely to cause damage to the defendant than an intrusion by an undercover agent for two reasons. First, the jury will be directly exposed to the content of the confidential conversation. Second, the judge is a figure of overpowering influence, and therefore the jury will give great weight to the judge's questions and inferences. The disclosure of confidential attorney-client communication to the jurors will be factored into their verdict, subconsciously or otherwise, regardless of any limiting instructions.²¹¹ Finally, this line of questioning by the judge constituted impeachment of the witness before the jury by the judge, giving the appearance of a judicial opinion that the witness has perjured himself.

Although an inquiry by the judge is not the same as an "invasion by the government" into attorney-client communication, the detrimental effect to the defendant is more severe. Since the content of the confidential attorney-client communication was presented directly to the jurors by the trial judge, the jurors in all probability gave more weight to the inferences drawn by the judge.²¹²

Since an intrusion into attorney-client communication by the judge is more likely to cause damage to the defendant than a government agent intercepting confidential communications, it should warrant a more severe sanction. Therefore, the intrusion by the trial judge should be automatically reversed without an inquiry into the amount of prejudice.

Under California law, a criminal defendant's right to counsel is violated if the privacy of his or her attorney-client communication is involved.²¹³ The policy underlying this rule is to give the accused the full benefit of the right to counsel.²¹⁴ If an accused feels his confidences with his attorney will be violated, he will not confide in his attorney. Absent an ability to freely confide in his attorney, an accused will be denied the right to counsel.

The same policy of assuring that the defendant has the right to prepare and present his defense is at stake when a judge reveals, for the entire jury, the contents of a conversation between the accused

211. No limiting instruction was given in *Tamborrino* because the trial judge insisted that he had not violated the attorney-client privilege. *Tamborrino*, 215 Cal. App. 3d at 600, 263 Cal. Rptr. at 746 (Johnson, J., dissenting).

212. *Id.* at 599, 263 Cal. Rptr. at 745-46 (Johnson, J., dissenting).

213. *Barber*, 24 Cal. 3d at 756, 598 P.2d at 826, 157 Cal. Rptr. at 666.

214. *Id.* at 751, 598 P.2d at 822, 157 Cal. Rptr. at 662.

and his lawyer. Therefore, the same rule of automatic reversal should apply when a judge violates the attorney-client privilege as when a government agent violates it.²¹⁵ Because the judge violated Tamborrino's attorney-client privilege in the presence of the jury, Tamborrino's conviction should have been automatically reversed.

V. CONCLUSION

The U.S. Courts of Appeals have interpreted *Weatherford* to require automatic reversal if confidential attorney-client communications are intercepted by the government and the defendant is prejudiced.²¹⁶ To establish prejudice, generally the defendant needs to prove that the intercepted communication was actually used to his detriment.²¹⁷

Under this interpretation, Tamborrino's conviction should be overturned. Tamborrino demonstrated that he was prejudiced because the confidential attorney-client communications were used to his detriment at trial. Accordingly, Tamborrino's conviction should be automatically reversed under the U.S. Courts of Appeals' interpretation of the Federal Constitution.

Under California law, Tamborrino's conviction should also be automatically reversed. The same policy in *Barber* of assuring private consultation with one's attorney should apply in Tamborrino's case. Tamborrino's right to consult with his attorney in absolute privacy was violated by the trial judge when the judge inquired into the confidential communications. Therefore, under the reasoning set forth in *Barber*, Tamborrino's conviction should be overturned as well.

215. California Civil Code Section 3511 provides, "[w]here the reason is the same, the rule should be the same." CAL. CIV. CODE § 3511 (West 1990).

216. The First, Second, Sixth, Eighth, and Ninth Circuits require that the defendant show that he was prejudiced. *United States v. Mastroianni*, 749 F.2d 900, 907 (1st Cir. 1984); *United States v. Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985); *United States v. Steele*, 727 F.2d 580, 586 (6th Cir. 1984); *United States v. Singer*, 785 F.2d 228, 234 (8th Cir. 1986); *Clutchette v. Rusher*, 770 F.2d 1469, 1471 (9th Cir. 1985).

The Third Circuit and the D.C. Circuits do not require a showing of prejudice to establish a sixth amendment violation. *United States v. Costanzo*, 740 F.2d 251, 257 (3d Cir. 1984); *Cadwell v. United States*, 205 F.2d 879 (D.C. Cir. 1953).

217. In the First Circuit, the defendant must prove that privileged communication was transmitted to the government to show prejudice. *United States v. Mastroianni*, 749 F.2d 900, 907 (1st Cir. 1984).

In the Second Circuit, to show prejudice, the defendant must prove either that the prosecution witness testified concerning privileged conversations, or that the prosecution's evidence originated in the privileged conversation, or that the privileged communication has been used to the detriment of the defendant in some other way. *Ginsberg*, 758 F.2d at 833.

In the Sixth, Eighth and Ninth Circuits, to demonstrate prejudice, the defendant must show that the information was used against the defendant at trial, among other ways. *United States v. Steele*, 727 F.2d 580, 586 (6th Cir. 1984); *Mastrian v. McManus*, 554 F.2d 813, 821 n.10 (8th Cir. 1977); *United States v. Irwin*, 612 F.2d 1182, 1187 (9th Cir. 1980). See *supra* note 161.

The attorney-client relationship goes to the very heart of the Constitutional right to effective assistance of counsel. Public confidence in the legal system will be eroded if judges are allowed to inquire into the confidential communication between an accused and his attorney. To this end, an invasion of the attorney-client privilege by a trial judge in the presence of jury, merits the sharpest possible sanction: a rule of per se reversal.

Once the confidential attorney-client information is disclosed in an open courtroom, the information is likely to cause the defendant prejudice. Any rule other than a rule of automatic reversal would require speculation by the court to determine the actual impact of the wrongful disclosure upon the jury. Since the right to communicate in privacy with one's attorney is considered fundamental, the courts should not be at liberty to speculate as to the amount of prejudice caused by the judge's invasion. Although the harmless error rule provides some deterrence to judges from violating a defendant's attorney-client privilege,²¹⁸ a stronger deterrent is necessary.

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218. A judge may be required to sit through a retrial and suffer the embarrassment of reversal under the harmless error rule.

