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Right to Counsel: Balancing the Burden of Persuasion on the Adversarial Scales of Criminal Justice

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How much is society willing to pay to protect constitutional rights from government infringement? How much constitutional protection is society allowed to forfeit in exchange for more effective law enforcement? The criminal justice system's allocation of the burdens of proof ultimately decides these questions. When do effective law enforcement tactics, such as undercover agent investigations, violate a defendant's sixth amendment right to the effective assistance of counsel? When does the sixth amendment violation warrant judicial remedies? Only the government knows when and how improperly obtained information is ultimately utilized. The adversarial context of American criminal justice dictates allocating to the government the burden of persuasion on the issue of whether an intrusion into the defendant's right to counsel was unconstitutionally prejudicial.

I. INTRODUCTION

Twelve years ago, in *Weatherford v. Bursey*,[1] the Supreme Court established that judicial remedies for a violation of a defendant's sixth amendment right to effective counsel require a showing of "at least a realistic possibility"[2] of prejudice to the defendant or benefit to the prosecution.[3] The Court assigned the burden of production upon the defendant, but the Court left unanswered the question of who bears the burden of persuasion for establishing prejudice or lack thereof.[4] The circuit courts have split into three diverse positions on the appropriate allocation of the burdens of proof.[5]

1. 429 U.S. 545 (1977).
2. *Id.* at 558.
3. *Id.* at 545.
4. Cutillo v. Cinelli, 485 U.S. 1037, 1037 (1988) (Rehnquist, C.J., White & O'Connor, JJ., dissenting).
5. *Id.*

This Comment will focus on sixth amendment violations which occur when government agents discover information about the defendant by infringing upon a defendant's right to be represented by counsel or by invading the defendant-attorney relationship. The government's discovery methods are technically improper but may be justified.[6] The government agent may discover defense strategy information.[7] The defendant is prejudiced when this improperly obtained information is used for the benefit of the prosecution or to the detriment of the defendant.[8] This Comment will discuss which party must persuade the court when adjudicating whether a prejudicial sixth amendment violation has occurred.[9] Part Two will discuss the Supreme Court's position. Part Three will identify the conflicting positions that have developed amongst the circuit courts. Part Four will consider five factors to determine a fair and consistent method of allocating the burden of persuasion. Part Five argues why this com-

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6. The defense strategy is improperly obtained when the defendant reveals it to a government agent without an opportunity to have her attorney present. For example, Bonnie and Clyde rob a liquor store. Bonnie stays in the car, out of sight, while Clyde goes in and robs the store. Bonnie is really an undercover agent. The two are arrested and prosecuted for the crime. Their cases are severed and each retains counsel. Clyde invites Bonnie to have lunch with Clyde and his attorney and discuss trial strategy. Clyde's attorney advises Clyde that the only available defense is to attack the credibility of the government's witnesses. Clyde's attorney explains the strategy of attack: the government witnesses' credibility will never hold up to cross examination because one is a legally blind prostitute who is having an affair with the arresting officer, and the other is her pimp, the liquor store clerk, who was arranging a drug deal on the phone when the robbery occurred. The prosecution does not know this information because the witnesses lied to the police about what they were doing when the robbery occurred. Bonnie may legally testify that she drove Clyde to the liquor store. But Bonnie intrudes upon Clyde's sixth amendment rights when she attends the attorney-client conference. The intrusion may or may not be justified or prejudicial. But Bonnie violates Clyde's sixth amendment rights, with prejudice, when Bonnie communicates to the prosecutor any defense strategy details of the attorney conversation.

7. Defense strategy involves tactical decisions about how the defendant, and her attorney, intend to defend her right to freedom. *See generally* Note, *Government Intrusions into the Defense Camp: Undermining the Right to Counsel*, 97 HARV. L. REV. 1143 (1984). A quintessential defense strategy is an alibi. A more sophisticated defense strategy is an attack upon the credibility of the prosecution's witnesses. If the prosecution knows before the trial that defendant's only plausible defense strategy is to attack the credibility of the government's witnesses, the prosecution will be able to focus its efforts on countering that specific defense. In short, *anticipating* the defendant's defense strategy and *knowing* the defendant's defense strategy are not analogous within the adversarial context of criminal trials. *See, e.g.*, United States v. Levy, 577 F.2d 200, 204 (3rd Cir. 1978).

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

9. A question is often answered by the framing of the query. The reader should note that the word prejudice has special connotations in the criminal procedure context. The opposite of prejudice is harmless error. Generally, the defendant bears the burden of persuasion on the issue of prejudice. The government generally bears the burden of persuasion on the issue of harmless error. Therefore, it is interesting that the dissenting justices in *Weatherford* framed the question in terms of prejudice. This Comment will explore the issues in terms of prejudice or lack thereof simply because that is the query as posed by the dissenting justices.

mentator believes the burden of persuasion should be allocated to the government whenever the defendant has satisfied his burden of production.

II. THE SUPREME COURT'S POSITION

A. The Sixth Amendment

The sixth amendment provides that "the accused shall. . .have the Assistance of Counsel for his defense."[10] The assistance of counsel for one's defense has evolved over time to include more than a bare right to have an attorney present in the courtroom during criminal proceedings. The right to counsel includes the right to confer with one's lawyer[11] and to prepare a legal defense without unjustified government interference.[12] The state has an obligation not to circumvent the defendant's right to the assistance of counsel.[13]

The sixth amendment provides a right to the assistance of counsel during critical stages of criminal proceedings even though there is neither interrogation by government agents nor a fifth amendment violation.[14] The arraignment or indictment initiates adversary judicial proceedings and triggers the defendant's sixth amendment right to the assistance of counsel.[15] The adversarial context involves complicated substantive and procedural rules that ultimately distinguish guilt in fact from guilt in law.[16] Therefore, an innocent accused is no longer capable of independently defending herself from criminal

10. U.S. CONST. amend. VI.
11. Geders v. United States, 425 U.S. 80, 91 (1976).
12. Massiah v. United States, 377 U.S. 201, 206 (1964). "[T]he essence of the Sixth Amendment [is]. . .privacy of communication with counsel." United States v. Rosner, 485 F.2d 1213, 1224 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974).
13. "[K]nowing exploitation by the State of an opportunity to confront the accused without counsel being present is. . .a breach of the State's obligation not to circumvent the right to the assistance of counsel." Maine v. Moulton, 474 U.S. 159, 176 (1985).
14. United States v. Wade, 388 U.S. 218 (1967). A fifth amendment violation occurs whenever an accused is interrogated during police custody and after the accused has either requested the presence of counsel or has expressed her desire to remain silent. Miranda v. Arizona, 384 U.S. 436 (1966). By comparison, a criminal defendant's sixth amendment right to counsel is violated whenever a government agent speaks to the defendant without the presence of the defendant's counsel, unless the defendant has expressly waived her right to have counsel present. Brewer v. Williams, 430 U.S. 387, 398 (1977); *See infra* notes 15-17 and accompanying text.
15. Kirby v. Illinois, 406 U.S. 682, 688-89 (1972); *see also* United States v. Gouveia, 467 U.S. 180, 188 (1974).
16. *Kirby*, 406 U.S. at 689.

prosecution.[17] Thus, a defendant is entitled to the help of a lawyer to protect her from the prosecutorial arm of an organized state.

"[T]he constitutional right to the assistance of counsel is of such importance that the police [and government agents] may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation."[18] The right to counsel attaches whether or not the defendant expressly requests assistance.[19] Methods of investigation that are permissible before arraignment and become potentially violative of defendant's sixth amendment rights upon formal accusation include: government employing of a cellmate as an informant;[20] a codefendant employed as a government agent and present during defendant-attorney communication;[21] a government agent speaking to the defendant without the presence of defendant's counsel;[22] an undercover government agent present during defendant-attorney communication;[23] and electronic surveillance of defendant's conversations with third parties.[24] When these situations arise and a claim of sixth amendment right to counsel violation is made, the courts must determine whether a violation has occurred and whether a judicial remedy is warranted. The courts' decisions implicitly require allocation of the burdens of proof on each issue.[25]

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17. Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938). "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will *not* still be done." *Id.* at 462 (emphasis added).

18. Michigan v. Jackson, 475 U.S. 625, 632 (1986).

19. *See* Brewer v. Williams, 430 U.S. 387, 398 (1977).

20. *See, e.g.*, United States v. Henry, 447 U.S. 264 (1980).

21. *See, e.g.*, United States v. Levy, 577 F.2d 200 (3d Cir. 1978).

22. *See, e.g.*, United States v. Morrison, 449 U.S. 361 (1981); Cinelli v. City of Revere, 820 F.2d 474 (1st Cir. 1987), *cert. denied sub nom.* Cutillo v. Cinelli, 485 U.S. 1037 (1988); United States v. Costanzo, 740 F.2d 251 (3d Cir. 1984), *cert. denied*, 427 U.S. 1017 (1985); United States v. Irwin, 612 F.2d 1182 (9th Cir. 1980).

23. *See, e.g.*, Weatherford v. Bursey, 429 U.S. 545 (1977); United States v. Mastroianni, 749 F.2d 900 (1st Cir. 1984).

24. *See, e.g.*, Maine v. Moulton, 474 U.S. 159 (1985); Massiah v. United States, 377 U.S. 201 (1964).

25. The burdens of proof include two separate and distinct burdens: (1) the burden of production, and (2) the burden of persuasion. The burden of production involves the burden of bringing forward argument or evidence in support of a proposition. The test to determine who bears the burden of production considers which party would be successful if no evidence at all were given, or if no more evidence were given at a particular point in a case. The burden of production is inherently dynamic and may shift many times throughout the litigation. The burden shifts whenever one party has produced enough evidence to produce a prima facie case in their favor.

The burden of persuasion requires one party to establish a proposition as against all counterarguments. The burden of persuasion on a particular issue remains attached to the same party throughout the litigation; it does not shift. Thus the burden of persuasion may or may not be allocated to the same party who bears the burden of production. Thayer, *The Burdens of Proof*, 4 HARV. L. REV. 45 (1890).

B. Weatherford v. Bursey: *Defendant Bears Burden of Production on Issue of Sixth Amendment Violation*

Weatherford and Bursey were arrested for vandalizing a Selective Service office. Weatherford was an undercover agent for South Carolina State Law Enforcement Division. He was arrested and charged in order to maintain his undercover status and protect his personal safety. He retained counsel for the same reasons. Bursey was later released on bail and retained his own counsel. After arraignment and before trial, Bursey invited Weatherford to attend defense strategy meetings between Bursey and his counsel. Weatherford attended two such meetings.[26] Bursey was convicted.

After Bursey served his sentence, he brought an action against Weatherford,[27] alleging deprivation of effective assistance of counsel.[28] The district court found for Weatherford.[29] The Fourth Circuit Court of Appeals reversed, but did not disturb the district court's factual findings.[30] The Supreme Court reversed.[31] The Court rejected the Fourth Circuit's prophylactic per se rule.[32] The Court noted that the per se rule failed to consider the following: (1) The agent's purpose in attending the meeting;[33] (2) whether the agent reported to his superiors any details or information regarding the

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26. *Weatherford*, 429 U.S. at 547-49.

27. The action was brought pursuant to 42 U.S.C. § 1983 (1982), which reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons 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 proceedings for redress.

28. Bursey alleged that Weatherford's participation in the attorney-client meetings had deprived Bursey "of the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments, as well as his right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment." *Weatherford*, 429 U.S. at 545.

29. Bursey v. Weatherford, 528 F.2d 483 (4th Cir. 1975), *rev'd*, 429 U.S. 545 (1977).

30. *Id.*

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

32. The Fourth Circuit's prophylactic rule asserted that "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." *Id.* at 549 (quoting *Bursey*, 528 F.2d at 486). The Court also rejected the government's argument that "[w]henever a defendant converses with his counsel in the presence of a third party thought to be a confederate and ally, the defendant assumes the risk and cannot complain if the third party turns out to be an informer for the government who has reported on the conversations to the prosecution and who testifies about them at the defendant's trial." *Id.* at 554.

33. *Id.* at 550.

plaintiff's trial plans, strategy, or anything having to do with the criminal action pending against plaintiff;[34] (3) whether any of the state's evidence originated in the overheard defendant-attorney conversation;[35] and ultimately (4) whether the agent's intrusion into defendant's attorney-client communications demonstrated *or threatened* any specific prejudice to the defendant's preparation for or conduct of the trial.[36]

The Court found: (1) the government's purpose for the intrusion was legitimate, *e.g.*, to protect Weatherford's cover and personal safety;[37] (2) Weatherford did not report on the meeting to his superiors nor to the prosecution;[38] (3) none of the state's evidence originated in the overheard conversations;[39] and (4) the intrusion did not result in, nor threaten, any specific prejudice to defendant's trial preparation or trial conduct.[40]

The Court held that governmental intrusions into attorney-client communications are unconstitutional if they result in trial prejudice against the defendant.[41] However, there can be no sixth amendment violation unless the informant's conduct resulted in at least a realistic possibility of injury to the defendant or benefit to the prosecution.[42] The Court indicated that prejudice may be produced if any of

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34. *Id.* at 548-50.

35. "[W]hen conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial." *Id.* at 552.

36. *Id.* at 550. Tape recordings of conversations between defendant and counsel entitled defendant to a "judicial determination" of whether "the monitoring of conversations between [Black] and his attorney had [any] effect upon his conviction or the fairness of his trial." *Id.* at 551 (quoting Brief for the United States at 4, Black v. United States, 385 U.S. 26 (1966) (No. 1029)).

37. *Id.* at 557. The Court noted that the informant attended the meeting at the defendant's request, and not as a means of spying upon the defendant's trial preparations. *Id.*; *see also* United States v. Russell, 411 U.S. 423, 432 (1973) (effective law enforcement necessitates utilization of undercover police agents); Rovario v. United States, 353 U.S. 53, 59, 62 (1957) (the desirability and legality of continued secrecy after arrest).

38. *Weatherford*, 429 U.S. at 549. The Supreme Court rejected the court of appeal's finding that Weatherford was himself a "member of the prosecution." *Id.* (quoting Bursey v. Weatherford, 528 F.2d 483, 487 (4th Cir. 1975)).

39. *Id.* at 556. Specifically, the Court noted that the informant did not testify about the attorney-client conversations he overheard. The Court also distinguished third party sources of overheard defense strategy information from electronically overheard defense strategy information. *Id.* at 551; *see also* Black v. United States, 385 U.S. 26 (1966) (electronic surveillance of attorney-defendant meeting constitutes a prejudicial sixth amendment violation, whether or not the improperly obtained information was a source of evidence used against the defendant). *Contra Weatherford*, 429 U.S. at 567 (Marshall & Brennan, JJ., dissenting).

40. "As long as the information possessed by Weatherford remained uncommunicated [to his superiors or to the prosecution], he posed no substantial threat to Bursey's Sixth Amendment rights [to counsel]." *Weatherford*, 429 U.S. at 556.

41. *Id.* at 552.

42. *Id.* at 558.

the following occur: (1) The informant testifies at defendant's trial about the defendant's conversations with his attorney; (2) any of the state's evidence originates in the attorney-client conversations; (3) the overheard conversations are used in any other way to the defendant's substantial detriment; or (4) the prosecution learns about trial preparation details from an undercover agent who overheard defendant-attorney conversations.[43]

The Court did not expressly place the burden of production upon the defendant. However, this is the effect of the Court's decision.[44] The Court expressly refused to assume that a law enforcement agent's intrusion into the defendant-attorney relationship is unjustified and prejudicial to the defendant.[45] Yet, at the same time it is

43. *Id.* at 554. These factors are also factors to determine whether the burden of persuasion has been satisfied on the issue of prejudice.

44. Cutillo v. Cinelli, 485 U.S. 1037, 1037 (1988) (Rehnquist, C.J., White & O'Connor, JJ., dissenting). The test to determine who bears the burden of production considers which party would be successful if no evidence at all was given, or if no more evidence was given at a particular point in the case. Thayer, *Burdens of Proof*, 4 HARV. L. REV. 45 (1890); *see also supra* note 25 and accompanying text. Here, the government would win if no evidence at all was given on the issue of sixth amendment violation. Thus, the defendant bears the burden of producing evidence to support her sixth amendment violation argument that the undercover agent's conduct violated her sixth amendment right to effective assistance of counsel.

If the burden of production were allocated to the government, the government would be required to produce evidence whenever the defendant merely raised the issue. A quintessential example of an issue where the government bears the burden of production is the voluntariness of the defendant's custodial confession. The government must produce evidence that the confession was voluntary, as an evidentiary foundation, before the confession is admitted into evidence. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).

Scrutiny of the Court's precise words reveals that *Weatherford* did not allocate the burden of persuasion to the defendant. The Court merely required the defendant to produce evidence that the government's conduct created a "*realistic possibility*" of detriment to the defendant or benefit to the prosecution. *Weatherford*, 429 U.S. at 558. The burden of persuasion on evidentiary issues traditionally involves a "more likely than not" standard.

Realistic possibility is a lower standard of proof than "more likely than not." Realistic possibility is a standard of proof consistent with a burden of production, and is inconsistent with the heavy burden of persuasion.

45. *Weatherford*, 429 U.S. at 556-57. The Court explained that placing the burden of production upon the defendant was aimed at preventing a defendant from receiving judicial remedy for government conduct that could be justified or purely unprejudicial. The defendant's burden of production was specifically groomed to meet that goal when the Court distinguished a law enforcement government agent from a prosecutorial government agent for purposes of showing a realistic possibility of prejudice. *Id.* at 558. Subsequently, the defendant's burden of production requires the defendant to show two things: (1) A government agent was present during attorney-defendant trial preparation meetings; and (2) the government agent's conduct created a realistic possibility of prejudice to the defendant or benefit to the prosecution at trial. *Id.* In dicta, the Court noted examples of how a defendant might satisfy her burden of production by showing

not supposed to cripple the defendant's ability to assert constitutionally guaranteed rights.[46] Defendant Bursey's case failed in large part because he was unable to show that the undercover agent transmitted any information about the defendant-attorney conversations to the prosecution.[47]

C. United States v. Morrison: *Defendant Bears the Burden of Production on Issue of Prejudice*

Four years after *Weatherford*, the Supreme Court decided *United States v. Morrison*.[48] Defendant Morrison was indicted on two counts of distributing heroin. She retained private counsel. Thereafter, two agents of the Drug Enforcement Agency (DEA) met and conversed with her without her attorney's knowledge, permission, or presence. The agents knew defendant had been indicted and had retained counsel. They hoped to convince her to become a government informant. In the course of conversation, the agents criticized her attorney's competence, offered benefits in exchange for cooperation, and threatened a stiff jail sentence if she refused to cooperate. At no time did defendant agree to cooperate with the DEA, incriminate herself, or supply any information pertinent to her case.[49]

The Third Circuit Court of Appeals dismissed the indictment on the ground that the agents' conduct constituted a violation of defendant's sixth amendment right to the effective assistance of counsel.[50] The court held that whether or not any tangible effect had been demonstrated or alleged, the appropriate remedy was dismissal of

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any one of the following to be true:

> Had Weatherford testified at Bursey's trial as to the conversations between Bursey and Wise; 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 of [the defendant]; or even had the prosecution learned from Weatherford, an undercover agent, *the details* of the Bursey-Wise conversations about trial preparations, Bursey would have a much stronger case.

Id. at 554. (emphasis added). These examples are consistent with a burden of production and do not require the defendant to bear the heavy burden of persuasion. *See supra* note 43 and accompanying text; *see also* Note, *The Improper Use of Presumptions in Recent Criminal Law Adjudications*, 38 STAN. L. REV. 423 (1986) (utilizing a rebuttable legal presumption, in favor of *P*'s position, is the logical equivalent of allocating the burden of production to *D*).

46. *Weatherford*, 429 U.S. at 545. The court of appeals' prophylactic per se rule was rejected because it cut too broadly and provided the defendant with a windfall of judicial remedies for justified or harmless government intrusions upon defendant's right to counsel. *Id.* at 557.

47. "[U]nless Weatherford communicated the substance of the Bursey-Wise conversations and thereby created at least a realistic possibility of injury to Bursey or benefit to the State, there can be no Sixth Amendment violation." *Id.* at 558.

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

49. *Id.* at 362-63.

50. *Id.* at 363; *see also* United States v. Morrison, 602 F.2d 529 (3d Cir. 1979), *rev'd*, 449 U.S. 361 (1981).

the indictment with prejudice.[51] The Supreme Court reversed.

The Supreme Court assumed *arguendo* that the DEA agents' conduct violated defendant's sixth amendment rights and proceeded to employ a balancing test to devise the appropriate remedy: "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."[52] Defendant's right to effective assistance of counsel was balanced against society's interest in effective law enforcement.[53] Defendant's interest was defined in terms of the sixth amendment's ability to assure fairness in the adversarial criminal process.[54] Thus, sixth amendment deprivations cause injury requiring judicial remedy when they prejudice defendant's ability to receive a fair trial.[55]

Once again, the Court did not expressly allocate the burdens of proof. However, the practical impact of *Morrison* was to allocate the burden of production to the defendant on the issue of prejudice.[56] In *Morrison*, the deliberate nature of the agents' intrusion into defendant's right to be represented by counsel was not independently sufficient to show prejudice.[57] Although dismissal was not appropriate, the Court suggested that sixth amendment violations may be remedied in "other proceedings."[58] Allocation of the burden of production to the defendant prevents the defendant from obtaining windfall judicial remedies.[59] This suggestion indicates that a pretrial evidentiary hearing may be appropriate in some cases involving sixth amendment violations.[60]

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51. *Morrison*, 449 U.S. at 363.
52. *Id.* at 364.
53. *Id.*
54. *Id.*
55. *Id.* at 365. Furthermore, certain violations of the right to counsel may be disregarded as harmless error. *Id.*; *see supra* note 9 and accompanying text.
56. "Here, respondent has demonstrated no prejudice of any kind. . .to the ability of her counsel to provide adequate representation in these criminal proceedings." *Morrison*, 449 U.S. at 364. "The Sixth Amendment violation. . .accordingly provides no justification for interfering with the criminal proceedings against respondent Morrison. . . ." *Id.* at 366-67.
57. *Id.* at 366. The Court reversed the court of appeals' dismissal of the indictment as too drastic. *Id.* at 367.
58. *See infra* note 60 and accompanying text.
59. *Morrison*, 449 U.S. at 367.
60. *See* Cinelli v. City of Revere, 820 F.2d 474 (1st Cir. 1987), *cert. denied sub nom.* Cutillo v. Cinelli, 485 U.S. 1037 (1988). The Court may also be referring to 42 U.S.C. § 1983 proceedings.

III. THE CIRCUIT COURTS' DIVISION

Both *Weatherford* and *Morrison* implicitly allocate the burden of production to the defendant. However, neither decision reached the issue of who must bear the burden of persuasion[61] once the defendant satisfies the burden of production. Three diverse and conflicting views have developed in the circuit courts.

A. Burden of Persuasion on Prosecution

The Third Circuit Court of Appeals places the burden of persuasion upon the prosecution when deciding the issue of prejudicial sixth amendment violations. In *United States v. Levy*,[62] defendant Levy was indicted for conspiracy to distribute heroin. Codefendant Viseglia became a government informant and continued to attend defense strategy meetings between Levy and his attorney. Viseglia communicated to the prosecution that defendants were basing their defense strategy upon the noncredibility of the government's two key witnesses.[63]

The circuit court interpreted *Weatherford*[64] to suggest by negative inference that either a prejudicial sixth amendment violation occurs whenever defense strategy is communicated to the prosecution, or, that public policy may define an appropriate allocation of the burdens of proof because the Supreme Court has not expressly addressed instances where defense strategy is actually disclosed to the prosecution.[65] Policy considerations moved the *Levy* court to reject the balancing test that would require courts to make "virtually impossible" speculations about prejudice, because the prosecution has a multitude of opportunities to benefit from the improperly transmitted

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61. The burden of persuasion is best understood as defining a zone in which the facts of the case are too close for decision by the factfinder, and as providing a standard for deciding such cases. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1300 (1977) [hereinafter Underwood, *Scales of Justice*]. Allocating the burden of persuasion to the government enables the defendant to win when the facts are too close for decision and is supported by language used in the *Weatherford* holding, *e.g.*, defendant must merely show a "realistic possibility" that a sixth amendment violation had prejudiced him or benefited the prosecution. Weatherford v. Bursey, 429 U.S. 545, 558 (1977). Requiring a mere showing of a realistic possibility of a threat is the logical equivalent of allowing the defendant to win when the facts are too close for a decision. *See also supra* note 44.

62. 577 F.2d 200 (3d Cir. 1978).

63. The district court found, and the circuit court noted, that the government also learned that this was defendant's *only* defense. *Id.* at 204.

64. "There being no tainted evidence in this case, no communication of defense strategy [information] to the prosecution,. . .there was no violation of the Sixth Amendment. . . ." *Id.* at 210 (quoting *Weatherford*, 429 U.S. at 554, 558). The negative inference of this statement would be that if there was any tainted evidence, or if there was any communication of defense strategy to the prosecution, then there would be a sixth amendment violation.

65. *Id.*

information.[66] Thus, the defense satisfies its initial burden of production upon showing that defense strategy was actually transmitted to the government agent.[67] The defendant need not make an additional showing of prejudice.[68]

The *Levy* court did not expressly place the burden of persuasion upon the prosecution. However, the court held that the defendant created a presumption of prejudice upon successfully showing that the informant communicated defense strategy to his superiors or to the prosecution.[69] The presumption of prejudice also relieved the defendant of any additional burdens of proof.[70] Thus, the burden of persuasion was, in effect, allocated to the government.[71] Furthermore, the *Levy* court held that the presumption of prejudice is conclusive whenever disclosure of defense strategy becomes part of the

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66. The opportunities for the prosecution to benefit from improperly transmitted defense strategy information include further investigations of the case, subtle pretrial discussions with potential witnesses, voir dire, jury selection, and during the trial itself. *Id.* at 208.

67. *Id.* at 209.

68. *Id.*

69. *Id.*; *see also* United States v. Costanzo, 740 F.2d 251 (3d Cir. 1984) (the third circuit's most recent case involving prejudicial sixth amendment violations), *cert. denied*, 472 U.S. 1017 (1985). The *Costanzo* court applied a three-branch test to determine whether defendant's sixth amendment rights were prejudicially violated.

> The sixth amendment is. . .violated when the government (1) intentionally plants an informer in the defense camp; (2) when confidential defense strategy information is disclosed to the prosecution by a government informer; or (3) when there is no intentional intrusion or disclosure of confidential defense strategy, but a disclosure by a government informer leads to prejudice to the defendant.

Costanzo, 740 F.2d at 254. The defendant bears the burden of production for each of the three branches. The defendant creates a presumption of prejudice upon making a prima facie showing that any one of the three branches are applicable to the case at bar.

Defense camp means a place where defense strategy is discussed and determined. *See* Note, *Government Intrusions into the Defense Camp: Undermining the Right to Counsel*, 97 HARV. L. REV. 1143 (1984) [hereinafter Note]. The *Costanzo* holding did not interpret nor mention United States v. Morrison, 449 U.S. 361 (1981). The first prong of the Third Circuit's *Weatherford* test appears to be in direct conflict with *Morrison*. "Absent demonstrable prejudice, or substantial threat thereof. . .dismissal of the indictment is plainly inappropriate, *even though the violation may have been deliberate.*" *Morrison*, 449 U.S. at 362 (emphasis added).

70. *See supra* note 25 and accompanying text.

71. The government must persuade the court that the improperly obtained information does not constitute defense strategy. *Accord Costanzo*, 740 F.2d at 257. The burden of persuasion is assigned whenever a presumption becomes an assumption. Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 172, 173 (1969) [hereinafter Ashford & Risinger]; *see also* United States v. Cooper, 397 F. Supp. 277 (D. Neb. 1975) (prejudice will be presumed if the informer transmits information on defense strategy to the government); United States v. Crow Dog, 532 F.2d 1182 (8th Cir. 1976).

public domain.[72]

B. Burden of Persuasion on Defendant

The Ninth Circuit Court of Appeals places both the burden of persuasion and the burden of production on the defendant.[73] In *United States v. Irwin*,[74] defendant was arrested and charged with possession of cocaine. In exchange for dismissal of the charge, defendant agreed to become an informant for the Police Department. The DEA suspected defendant of "double-dealing" by being an informant and a drug dealer simultaneously. Defendant was prosecuted for subsequent sale of narcotics to a DEA agent. After charges had been filed, but before trial, the DEA agent spoke to defendant several times, without the knowledge and against the express admonition of defendant's attorney.[75] Defendant discussed defense strategy[76] and made incriminating statements[77] during telephone conversations with the DEA agent. The DEA agent taped the telephone conversations and turned the tapes over to the prosecution. The prosecution submitted the tapes to the trial court and successfully defeated defendant's motion to dismiss.[78] Defendant's inculpatory statements contained in the taped conversation were suppressed at trial.[79]

The *Irwin* court refused to provide an evidentiary hearing to determine whether the improperly obtained information posed a substantial threat of current or future prejudice to the defendant or benefit to the prosecution.[80] The prosecution was never required to produce trial evidence that the improperly obtained information was not used

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72. *Levy*, 577 F.2d at 210. The information becomes part of the public domain when it is improperly admitted into evidence at the criminal trial. "In our judgment, the only appropriate remedy is the dismissal of the indictment. . . . The disclosed information is now part of the public domain. Any effort to cure the violation by some elaborate scheme. . .would involve the court in the same sort of speculative enterprise we have rejected." *Id.*; *see generally* Ashford & Risinger, *supra* note 71, at 172, 173.

73. United States v. Irwin, 612 F.2d 1182 (9th Cir. 1980); *see also* United States v. Steele, 727 F.2d 580 (6th Cir. 1984) (nonprejudicial sixth amendment violation found where informant in defendant's cell overheard and transmitted defense strategy to prosecution).

74. 612 F.2d 1182, 1183 (9th Cir. 1980).

75. *Id.* at 1188-89 n.17.

76. The DEA agent suggested to defendant that he ask his attorney to attempt to reach an agreement with the U.S. Attorney, and the agent said he would call the U.S. Attorney on defendant's behalf and tell him that defendant wanted "to talk to him or whatever." The court found that defendant had previously told the government the nature of his defense, *e.g.*, defendant's criminal conduct was an effort to fulfill a previous plea bargain. *Id.* at 1188.

77. Defendant admitted he was "purely on [his] own." *Id.* at 1187.

78. *Id.* at 1184 (district court granted government's motion to dismiss defendant's 42 USC § 1983 action).

79. *Id.*

80. *Id.* at 1187.

in trial preparation to the defendant's detriment.[81] The Ninth Circuit's interpretation of *Weatherford* tolerates government intrusions upon a defendant's right to counsel as long as the prosecution does not *directly* use the improperly acquired information against defendant and to defendant's prejudice.[82] The *Irwin* court noted *Weatherford*'s rejection of a prophylactic per se sixth amendment violation rule.[83] Furthermore, the right to counsel "is only violated when the intrusion *substantially* prejudices the defendant."[84]

The *Irwin* Court interpreted the *Weatherford* guidelines[85] into a four-prong test to determine when defendant's sixth amendment rights are violated. Prejudicial sixth amendment violations occur whenever any of the following occur: (1) Evidence is gained through the interference with defendant's rights *and it is used against the defendant at trial*; (2) the prosecution directly uses confidential information pertaining to the defense plans and strategy; (3) the government influence destroys defendant's confidence in his attorney; or (4) the government takes other actions designed to give the prosecution an unfair advantage.[86]

The defendant bears a heavy burden of production under the Ninth Circuit's four-prong test. In addition to showing that defendant's right to counsel was intentionally invaded by government agents and that the improperly obtained information was transmitted to the prosecution, defendant must also show the specific ways in which the prosecution used the improperly obtained information.[87] This transforms the defendant's burden of production into a heavier burden that includes the burden of persuasion. In effect, the Ninth Circuit allocates the burden of persuasion to the defendant.

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81. *Id.* at 1186-87. The government produced affidavits denying prejudice. *Id.* *Contra* United States v. Levy, 577 F.2d 200 (3rd Cir. 1978) (prejudicial sixth amendment violation occurs upon a showing that informant transmits confidential information to prosecution, no additional showing of prejudice is required). "Where there is a knowing invasion of the attorney-client relationship and where confidential information is disclosed to the government, we think that there are overwhelming considerations militating against a standard which tests sixth amendment violation by weighing how prejudicial to the defense the disclosure is." *Id.* at 208.

82. *Irwin*, 612 F.2d at 1186-87.

83. *Id.* at 1185.

84. *Id.* at 1187 (emphasis added). *Contra* Weatherford v. Bursey, 429 U.S. 545, 556 (1977) (defendant must make a showing of a *realistic possibility* of prejudice to defendant or benefit to prosecution).

85. *See supra* notes 33-36 and accompanying text.

86. *Irwin*, 612 F.2d at 1187 (emphasis added).

87. Defendant must show as a matter of law that he is entitled to relief, if alleged facts are proved, before an evidentiary hearing is granted. *Id.*

C. *Defendant Who Meets Burden of Production, Shifts Burden of Production onto Prosecution. Prosecution Has the Burden of Persuasion.*

The First Circuit allows the burden of production to shift to the prosecution when confidential defense strategy is improperly obtained and transmitted to the prosecution.[88] The burden of persuasion is allocated to the prosecution. The defendant must satisfy her burden of production as a prerequisite to activating the prosecution's burden of persuasion.[89] Defendant satisfies her burden of production upon making a prima facie showing of prejudice.[90]

In *United States v. Mastroianni*,[91] defendant was arrested for conspiracy to distribute cocaine. An informant was arrested and charged as a coconspirator. The informant attended a defense strategy meeting between defendant and defendant's counsel.[92] The Assistant United States Attorney instructed the informant not to reveal information about the pending criminal case to law enforcement officials.[93] However, government agents debriefed the informant about the meeting on two separate occasions.[94]

The court held "that the government bears the burden of proving the necessity for its representative to attend meetings between defendants and their attorneys."[95] In accordance with *Weatherford v. Bursey*, the First Circuit found the government intrusion into the defendant's sixth amendment rights was justified by a necessity to preserve the informant's cover.[96] Thus, the government successfully met its burden of production on the issue of the initial intrusion upon defendant's sixth amendment rights. However, the government agents further intruded upon defendant's right to effective assistance of counsel when they debriefed the informant about the defense strategy meeting. The First Circuit court held that the government's debriefing of the informant about the defense strategy meeting was

88. Cinelli v. City of Revere, 820 F.2d 474, 478 (1st Cir. 1987) *cert. denied sub nom.* Cutillo v. Cinelli, 485 U.S. 1037 (1988); United States v. Mastroianni, 749 F.2d 900, 907-08 (1st Cir. 1984).

89. *Cinelli*, 820 F.2d at 478; *Mastroianni*, 749 F.2d at 907-08.

90. *Cinelli*, 820 F.2d at 478; *Mastroianni*, 749 F.2d at 907-08.

91. 749 F.2d 900 (1st Cir. 1984).

92. *Id.* at 903.

93. *Id.* at 905.

94. *Id.* at 906.

95. *Id.* at 905.

96. "We recognize that automatically to require the government to ban an informant's solicited attendance [at a defense meeting] would provide the defense with a quick and easy alarm system to detect the presence of any informants, simply by inviting all known associates of defendants to a supposed defense strategy meeting." *Id.* at 906. The First Circuit rejected the government's argument the intrusion was justified by a need to gather evidence regarding defendant's future criminal conduct. *Id. Accord* Weatherford v. Bursey, 429 U.S. 545, 556-57 (1977); *see also supra* notes 41-43 and accompanying text.

an unjustified intrusion into defendant's constitutionally protected attorney-client relationship.[97]

The *Mastroianni* court went on to consider who bears the burden of persuasion on whether the intrusion constituted a prejudicial sixth amendment violation.[98] The court expressly agreed with the Third Circuit's[99] determination that, "placing the entire burden on the defendant to prove the disclosure and use of confidential information is unreasonable."[100] However, the court also agreed with the Ninth Circuit[101] "that there are certain circumstances in which the revelation of confidential communication by the informant is harmless."[102]

The *Mastroianni* court held that defendant met its burden of production, and made a prima facie case of prejudice upon showing that the informant transmitted confidential information to the government. However, the government met its heavy burden of persuasion[103] by producing enough evidence to establish that the informant's debriefing "did not in any way tend to suggest the appellant's [the defendant's] defense strategy to the government."[104]

Cinelli v. City of Revere[105] is the most recent First Circuit case addressing the burden of persuasion for a prejudicial sixth amendment violation. In *Cinelli*, defendant was arrested and indicted for armed robbery and attempted murder. Defendant retained counsel. Unable to post bail, defendant was incarcerated. Four days later, detectives went to the jail to interrogate defendant in the absence of counsel. The detectives deliberately violated defendant's sixth amendment right to counsel when they continued to interrogate the defendant after he expressly asked to have his attorney present.[106] Defendant subsequently told the detectives that he was depending

97. *Mastroianni*, 749 F.2d at 907.

98. The *Mastroianni* court discussed the split of authority among the circuit courts. *Id.*

99. *See* United States v. Levy, 577 F.2d 200 (3d Cir. 1978); *see also supra* notes 69-72 and accompanying text.

100. *Mastroianni*, 749 F.2d at 907.

101. *See* United States v. Irwin, 612 F.2d 1182 (9th Cir. 1980); *see supra* notes 85-87 and accompanying text.

102. *Mastroianni*, 749 F.2d at 907.

103. "The burden on the government is high because to require anything less would be to condone intrusions into a defendant's protected attorney-client communications." *Id.* at 908.

104. *Id.* The court also noted that the government's evidence established that the government knew, prior to the informant's attendance at the defense strategy meeting, that the defendants were trying to establish legitimate sources for their illicit money. *Id.*

105. 820 F.2d 474 (1st Cir. 1987).

106. *Id.* at 476.

upon an alibi defense strategy and gave them the names of his two alibi witnesses.[107] The detectives communicated this defense strategy information to the prosecution. The prosecution used this improperly obtained evidence in preparing their motion for summary judgment, which the district court granted.[108]

The First Circuit reversed the summary judgment and remanded the case to the district court. The court noted "that a Sixth Amendment violation cannot be established without a showing that there is a 'realistic possibility of injury' to defendant or benefit to the State."[109] The court then held that defendant made a prima facie showing of prejudice "by establishing that defense strategy was communicated to *the detectives*."[110] Defendant's showing created a question of material fact and prohibited the granting of a summary judgment.[111] Upon remand, prosecution must bear the burden of production and persuasion to show that the improperly obtained information resulted in no prejudice to the defendant and no benefit to the prosecution.[112] The First Circuit suggested that the government may satisfy its burdens of proof by producing enough evidence to establish that the government knew defendant was relying on an alibi defense and knew the names of the alibi witnesses prior to the improper interrogation.[113]

IV. Allocating The Burden Of Persuasion

Neither the prosecution nor the defense is allocated the burden of persuasion for all possible issues that might arise at trial.[114] For most issues, the burden of persuasion has traditionally been decided by statute or by case law. However, when new issues arise, courts, out

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107. *Id.* at 478.

108. *Id.* at 479 (the district court granted the government's motion for summary judgment against defendant's action pursuant to 42 U.S.C. § 1983 (1982)).

109. *Id.* at 477 (quoting Weatherford v. Bursey, 429 U.S. 545, 558 (1977)). The *Cinelli* court is in accordance with the *Mastroianni* court. *See supra* notes 105-08 and accompanying text; *see infra* notes 110-13 and accompanying text.

110. *Id.* at 478 (emphasis added).

111. *Id. Contra* United States v. Levy, 577 F.2d 200 (3d Cir. 1978) (disclosure of defense strategy to prosecution, by itself, creates a sufficient showing of prejudice).

112. *Cinelli*, 820 F.2d at 478. The *Cinelli* court noted that the record did not provide adequate information to determine whether the prosecution benefited from the improperly obtained information. *Id.*

113. *Id.* This suggests adopting the "independent source doctrine" from the fourth amendment's exclusionary rule. *See* Nix v. Williams, 467 U.S. 431 (1985).

114. *See* Patterson v. New York, 432 U.S. 197 (1977) (allocating burden of persuasion to defendant to prove extreme emotional disturbance as mitigating element of murder); Rivera v. Delaware, 429 U.S. 877 (1976) (allocating the burden of persuasion to defendant on issue of insanity as affirmative defense to murder charges); Mullaney v. Wilbur, 421 U.S. 684 (1975) (allocating burden of persuasion to prosecution to prove malice aforethought as an element of murder conviction); *In re* Winship, 397 U.S. 358 (1970) (allocating the burden of persuasion to the prosecution for each and every fact necessary to constitute the crime charged).

of necessity, must determine which side bears the burdens of proof. A single method of allocation is not consistently utilized.[115] Professor McCormick asserted that the only consistently applied method of allocation ultimately results from balancing the relative weight "that is given to any one of several factors, including: (1) the natural tendency to place the burden on the party desiring change, (2) judicial estimates of probabilities, (3) convenience, (4) fairness, and (5) special policy considerations."[116] Policy considerations ultimately determine the relative weight of these competing factors.[117]

A. The Natural Tendency to Place the Burden on the Party Desiring Change

The plaintiff is traditionally the party seeking change. The plaintiff has brought the action to court in search of a judicial order altering the current state of affairs between the parties. The burden of persuasion is traditionally assigned to the party bringing the action in both civil[118] and criminal[119] cases. The defendant traditionally bears the burden of persuasion on affirmative defenses.[120]

In sixth amendment violation cases, the government is the party seeking change. In the name of law enforcement, the government is seeking judicial tolerance of deliberate intrusion upon defendant's constitutionally protected right to have the assistance of counsel[121] as a "medium" between the defendant and his adversary, the state.[122] Absent conflicting interests, the government's intrusion would constitute an unjustified violation of defendant's sixth amendment

115. C. MCCORMICK, MCCORMICK ON EVIDENCE 952 (E. Cleary 3d ed. 1984) [hereinafter MCCORMICK].

116. *Id.*

117. *Id.*

118. Reliance Life Ins. Co. v. Burgess, 112 F.2d 234 (8th Cir.) (party who has burden of pleading a fact is allocated the burden of production and the burden of persuasion), *cert. denied*, 311 U.S. 699 (1940).

119. *In re* Winship, 397 U.S. 358, 364 (1970) (prosecution has burden of persuasion on every element necessary to constitute the crime charged).

120. Schmitz v. Mathews, 133 Wash. 335, 233 P. 660 (1925) (defendant has burden of persuasion for affirmative defense of contributory negligence); *see also* Leland v. Oregon, 343 U.S. 790 (1952) (defendant has the burden of persuasion for affirmative defense of insanity).

121. *See* Colorado v. Connelly, 479 U.S. 157 (1986) (burden of persuasion allocated to government to prove defendant waived his right to assistance of counsel during custodial interrogation).

122. Maine v. Moulton, 474 U.S. 159, 176 (1985).

rights.[123] This factor would weigh on the side favoring allocation of the burden of persuasion to the prosecution.

B. Judicial Estimates of the Probabilities

It is inevitable that in some cases the trier of fact will come to an erroneous conclusion of fact.[124] Allocating the burden of persuasion is essentially allocating the risk of failure of proof.[125] Judicial estimates of the probabilities allocate the burden of persuasion to the "party who contends that the more unusual event has occurred."[126] Here, the issue is prejudice caused by government transgression of constitutional safeguards.[127] Sixth amendment rights are specifically designed to prevent trial prejudice within the competitive context of law enforcement.[128] Violation of procedural safeguards specifically designed to protect against trial prejudice renders the claim of no prejudice more unusual than a claim of prejudice. The defendant and society rely upon the judiciary to diligently enforce these procedural safeguards. Diligent enforcement warrants government justification for unjustified intrusions into the defendant's right to counsel. Furthermore, precious constitutional rights, such as a defendant's right to counsel, need "breathing space to survive."[129]

The burden of persuasion is best understood as defining a zone in which the facts of the case are too close for decision by the factfinder, and then as providing a consistent standard for deciding such cases.[130] Judicial estimates of probabilities must ultimately consider the severity of hardship caused by an erroneous judgment. In civil cases, an erroneous judgment may cause serious financial injustice.[131] However, an erroneous criminal judgment may cause a more transcending injustice.[132] "Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden. . .of persua[sion]."[133] This factor would

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123. "[R]emedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." United States v. Morrison, 449 U.S. 361, 364 (1981).

124. *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

125. McCormick, *supra* note 115, at 950.

126. *Id.* For example, it is unlikely that business services are provided gratuitously, and the party claiming gratuitous service is allocated the burden of persuasion on the issue. Carrill v. Carbolic Smoke Ball Co., 1 Q.B. 256 (1893).

127. *See* Chimel v. California, 395 U.S. 752 (1969).

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

129. Weatherford v. Bursey, 429 U.S. 545, 565 (1977) (Marshall, J., dissenting).

130. Underwood, *Scales of Justice*, *supra* note 61.

131. *In re* Winship, 397 U.S. 358, 371 (1970) (Harlan, J., concurring).

132. *See id.* at 372 (Harlan, J., concurring); *see also* McCormick, *supra* note 115, at 362.

133. Speiser v. Randall, 357 U.S. 513, 525-26 (1958).

weigh in favor of allocating the burden of persuasion to the government.

C. Convenience

Bentham argued that the burden of persuasion should be placed "on whom it sits the lightest."[134] Courts often assign the burden of persuasion to the party who has peculiar knowledge of the relevant facts.[135] Here, the government discovers relevant information by invading the defendant-attorney relationship. Only the government knows whether the information was transmitted to the prosecution, whether the improperly obtained information was used to the defendant's prejudice or the prosecution's benefit, and whether the transmitted information contained defense strategy details. Thus, the government has peculiar knowledge of the relevant facts. This factor weighs heavily in favor of allocating the burden of persuasion to the government.[136]

D. Fairness

The sixth amendment provides that an accused shall enjoy the right "to have the effective assistance of counsel for his defen[s]e."[137] The right to the effective assistance of counsel is not recognized for its own sake, but because of the effect it has on the "ability of the accused to receive a fair trial."[138] Defendant's ability to receive a fair trial depends upon the court's ability to preserve the adversary nature of the criminal justice system.

The First and Third Circuits recognize that allocating the burden of persuasion to defendant is unduly prohibitive and fundamentally unfair. "It would be virtually impossible for [a defendant] or a court to sort out how any particular piece of information in the possession of the prosecution was consciously or subconsciously factored into each of [the government's] decisions."[139] Furthermore, the adver-

134. J. BENTHAM, WORKS vi, 139, 136 (1962).
135. MCCORMICK, *supra* note 115, at 952.
136. The First Circuit and the Third Circuit have expressly recognized this factor in allocating the burden of persuasion to the government on this issue. "[P]lacing the entire burden on the defendant to prove both the disclosure and the use of confidential information is unreasonable." United States v. Mastroianni, 749 F.2d 900, 907 (1st Cir. 1984). *Accord* United States v. Levy, 577 F.2d 200 (3rd Cir. 1978); Briggs v. Goodwin, 698 F.2d 486 (D.C. Cir. 1983).
137. U.S. CONST. amend. VI.
138. United States v. Cronic, 466 U.S. 648, 651 (1984).
139. United States v. Mastroianni, 749 F.2d 900, 907 (1st Cir. 1984) (quoting

sarial nature of criminal justice severely limits defendant's access to the relevant facts necessary for successful persuasion.[140] Successful persuasion by the defendant would require him to virtually discover the prosecution strategy, thereby threatening further breakdown of the adversary nature of the criminal justice system.[141] Placing the burden of persuasion upon the defendant who has limited access to relevant facts seriously cripples her ability to effectively seek judicial remedies.[142] Defendant's inability to prove prejudice would facilitate, instead of deter, governmental infringements on her right to counsel.[143] It also reduces the defendant's ability to prepare an effective defense.[144] Fairness considerations support allocating the burden of persuasion to the government.

E. Special Policy Considerations

Judicial remedies for sixth amendment violations are the product of balancing two competing policy interests: (1) the defendant's interest in receiving effective assistance of counsel (a fair trial) against (2) society's interest in effective administration of criminal justice.[145] Judicial determination of their relative weight ultimately decides who shall bear the burden of persuasion on the prejudice issue.[146]

1. Defendant's Interest: Effective Assistance of Counsel and Receiving a Fair Trial

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other right."[147] Thus, protecting the defendant's sixth amendment right to the effective assistance of counsel from government infringement is an essential means of promoting the defendant's interest in receiving a fair trial. The right to the effective

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Briggs v. Goodwin, 698 F.2d 486, 494-95 (D.C. Cir. 1983)).

140. "There is not general constitutional right to discovery in a criminal case." Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (defendant does not have a right to discover the identity of prosecution's witnesses).

141. *See generally* Note, *supra* note 69.

142. *See supra* note 136 and accompanying text.

143. *Mastroianni*, 749 F.2d at 908. The burden of persuasion must be allocated to the government "because to require anything less would be to condone intrusions into a defendant's protected attorney-client communications." *Id.*

144. "It is vain to give the accused a day in court, with no opportunity to prepare for it." Powell v. Alabama, 287 U.S. 45, 59 (1932) (quoting Commonwealth v. O'Keefe, 298 A. 169, 173, 148 Pa. 69, 73 (1930)).

145. United States v. Morrison, 449 U.S. 361, 364 (1981).

146. *Id.* This commentator notes that it may be difficult to determine which came first, the allocation of the factors' relative weights or the allocation of the burden of persuasion. The ultimate answer remains that the two are intimately intertwined.

147. United States v. Cronic, 466 U.S. 648, 654 (1984) (quoting Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

assistance of counsel has been expanded to include the right to representation at critical pretrial proceedings.[148] The sixth amendment also involves defendant's right to confidentially prepare a defense strategy.[149] The adversarial nature of criminal proceedings inherently requires protecting attorney-client communications, especially defense preparations, from government infiltration.[150]

The fundamental role of the right to counsel warrants an affirmative judicial role in deterring government infringements.[151] "Scrupulous adherence to constitutional procedures as well as substantial fairness in applying them may foster a belief in the importance of these procedures and thereby affect the discretionary decisionmaking of actors in the drama of the criminal trial."[152] Judicial remedies may effectively deter the government from intruding upon an accused's right to counsel by excluding all evidence that is directly or indirectly the product of the intrusion.[153] The indirect products of the intrusion may be so omnipotent that dismissal is the only realistic method of deterrence. The defendant must be able to satisfy the requisite burdens of proof before the issue is ripe for judicial remedy. Thus, allocating the burden of persuasion to the defendant would dramatically restrict access to judicial remedies for sixth amendment violations.[154] A right without a corresponding remedy for violation of that right is an illusory right. The burden of persuasion must be allocated to the government to effectively deter sixth amendment violations.[155] If preserving the sanctity of a defendant's right to counsel were the only relevant policy consideration, the courts would adopt a per se rule deeming any transgression to be unconstitutionally

148. "[T]he most critical period of the proceedings. . .when consultation, thorough-investigation and preparation [are] vitally important, the defendants. . .[are] as much entitled to such aid [of counsel] during that period as at the trial itself." Powell v. Alabama, 287 U.S. 45, 57 (1932). "[T]he right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pre-trial examination." *In re* Groban, 352 U.S. 330, 344 (1964) (Black, J., dissenting).

149. Weatherford v. Bursey, 429 U.S. 545, 563 (1977) (Marshall, J., dissenting). "The essence of the Sixth Amendment's right is. . .privacy of communications with counsel." *Id.* (quoting United States v. Rosner, 485 F.2d 1213, 1224 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974)).

150. *See* Note, *supra* note 69, at 1147-51.

151. *See* United States v. Wade, 388 U.S. 218, 227 (1967); O'Brien v. United States, 386 U.S. 345 (1967); *see also supra* note 148 and accompanying text.

152. *See* Note, *Harmless Constitutional Error: A Reappraisal*, 83 HARV. L. REV. 814, 818 (1970).

153. *Id.*

154. *See supra* notes 139-42 and accompanying text.

155. *See supra* notes 143-44 and accompanying text.

prejudicial.

2. *Society's Interest: Effective Administration of Criminal Justice*

Society has an interest in convicting perpetrators of crime. Government intrusions into defendant's right to counsel may often further this societal goal. The improperly obtained information is reliable because a defendant's efforts to receive effective representation encourages her to tell her attorney the truth. In addition, the accused offers the information to her attorney voluntarily. Indeed, the defendant rarely alleges that improperly acquired information is false or unreliable.[156] Excluding potentially relevant and reliable information may cost society access to valuable evidence necessary to secure a conviction of a defendant.[157] Society's interest in convicting more perpetrators of crime could be facilitated by allocating the burden of persuasion to the defendant. This would reduce the number of perpetrators who are acquitted, not because they are not guilty in fact, but because the government made a procedural mistake during the criminal proceedings. Allocating the burden of persuasion to the government will add another thread to the endless web of criminal procedure that reduces the effectiveness of law enforcement. The defendant should not be compensated for the government's mistake if it causes her no injury. Society ultimately bears the burden in terms of less effective law enforcement. Thus, the burden of persuasion should be allocated to the defendant.

However, "[i]f the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."[158] Society's interest in the effective administration of criminal justice is served by measures that preserve the integrity of the criminal justice system itself. At first impression, it may seem harmless to intrude upon a defendant's constitutionally protected attorney-client relationship when the intrusion benefits the prosecution of a defendant who has undeniably violated a law. But, society must beware of "the obnoxious thing in its mildest and least repulsive form; . . .illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure."[159] Recurrent violations of constitutional safeguards, even in pursuit of convicting heinous defendants, ultimately contaminate the judicial process and undermine

156. "[O]ur Constitution, and our criminal justice system, protect other values besides the reliability of the guilt or innocence determination." Rose v. Clark, 478 U.S. 570, 588 (1986) (Stevens, J., concurring).

157. *Id.* at 590.

158. Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

159. Boyd v. United States, 116 U.S. 616, 635 (1886).

society's confidence in the administration of justice.[160] Thus, society's interest in effective administration of criminal justice can be served by deterring even the mildest of government intrusions into an accused's constitutionally protected right to counsel. Intrusions can be deterred by requiring the government to justify the intrusion, *e.g.*, by allocating to the government the burden of persuasion on the issue of prejudice.

Effective administration of criminal justice often requires undercover police investigation.[161] Protecting the cover and personal safety of undercover government agents may warrant limited government intrusions into defendant's sixth amendment rights.[162] Recruiting potential informants may also justify a limited degree of deliberate government intrusions.[163] These two societal interests—(1) protection of informant's cover, and (2) recruitment of undercover informants—must be narrowly construed. Government intrusions into defendant's right to counsel may not be justified by a search for evidence of future criminal conduct.[164] Furthermore, "[t]he mere recitation of the need to protect the informant" will not "relieve the State of its obligation to respect the sanctity of the attorney-client relationship and the defendants' Sixth Amendment rights."[165]

3. Balance

Weatherford and *Morrison* held that the defendant's right to effective assistance of counsel must be balanced against law enforcement's need to use undercover agents.[166] "Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer."[167] Sometimes, balancing these conflicting interests requires judicial tolerance of government intrusions into

160. Note, *Harmless Error: Abettor of Courtroom Misconduct*, 74 J. CRIM. L. & CRIMINOLOGY 457 (1983); *see generally* Olmstead v. United States, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting) (overruled by Katz v. United States, 399 U.S. 347 (1967)).

161. "Certain criminal offenses present the police with unique and difficult detection problems because they are committed privately between individuals who are willing participants." Consequently, law enforcement often requires use of undercover government agents or informants. W. LA FAVE & J. ISRAEL, CRIMINAL PROCEDURE § 5.1, at 247 (1985).

162. Weatherford v. Bursey, 429 U.S. 545, 557 (1977); *see supra* note 96 and accompanying text.

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

164. United States v. Mastroianni, 749 F.2d 900, 905-06 (1st Cir. 1984).

165. *Id.* at 905.

166. *Morrison*, 449 U.S. at 361; *Weatherford*, 429 U.S. at 545.

167. Escobedo v. Illinois, 378 U.S. 478, 488 (1964).

defendant's right to counsel.[168] The Supreme Court expressly "did not hold that the sixth amendment right to counsel subsumes a right to be free from intrusion by informers into counsel-client consultations."[169] Society's interest in effective criminal justice through the use of undercover agents outweighs defendant's right to communicate confidentially with his attorney unless the agent interferes with defendant's attorney-client relationship in ways that cause prejudice to the defendant or benefit to the prosecution.[170] Therefore, the balance must also reflect that confidential information transmitted to the prosecution may not include defense strategy information.[171]

The First Circuit has achieved a just balance of the competing interests involved in sixth amendment cases. The defendant must present a prima facie showing of prejudice before the court will consider whether the government informant's intrusion into defendant's right to counsel was prejudicial.[172] This is a heavy burden for the defendant to bear due to defendant's lack of access to the relevant facts.[173] This burden ensures that a defendant will be unable to claim prejudice unless there is at least a realistic possibility of prejudice.[174] Thus, society's undercover law enforcement efforts will not be easily thwarted, and undercover agents may continue to provide relevant and reliable evidence in an effort to convict perpetrators of crime. The burden on the government is also heavy "because to require anything less would be to condone intrusions into a defendant's protected attorney-client communications."[175] The government's heavy burden of persuasion protects defendant's interest in the effective assistance of counsel.

The Third Circuit makes a valuable contribution to balancing the competing interests by distinguishing cases where the improperly obtained information contains defense strategy *and* is transmitted to the government.[176] Once defense strategy has been leaked to the government, the damage is irreversible.[177]

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168. *Morrison*, 449 U.S. at 364-65.
169. Weatherford v. Bursey, 429 U.S. 545, 553 (1977).
170. *See id.* at 557-58.
171. United States v. Mastroianni, 749 F.2d 900, 907 (1st Cir. 1984).
172. *Id.* at 907-08. A prima facie showing of prejudice involves producing evidence that: (1) a government agent confronted the defendant after formal charging, and in the absence of defendant's counsel; (2) the government agent's improper conduct provided the agent with information that could be used to benefit the prosecution or to cause prejudice against the defendant; and (3) the government agent directly or indirectly transmitted the improperly obtained information to the prosecution. *Id.*
173. *See supra* notes 135-36 and accompanying text.
174. *Weatherford* requires "at least a realistic possibility" of prejudice, *not* proof of prejudice. *Weatherford*, 429 U.S. at 558.
175. *Mastroianni*, 749 F.2d at 908; *see supra* notes 99-100 and accompanying text.
176. United States v. Levy, 557 F.2d 200 (3d Cir. 1978).
177. *Id.*

The Supreme Court has clearly established that a stricter standard must apply whenever a government agent improperly acquires "*defense plans and strategy* and [defendant's] attorney's efforts to prepare for trial, *all of which [is] inherently detrimental to [defendant], unfairly advantage[ous to] the prosecution, [and] threaten[s] to subvert the adversary system of criminal justice.*"[178] Negative inferences support a per se rule of prejudicial violations whenever defendant satisfies his burden of production and makes a prima facie showing that defense strategy was communicated to the prosecution.[179]

If such a per se rule were clearly established, the prosecution would be motivated to produce evidence and expose the totality of the circumstances in an effort to convince the court that the transmitted information did not include any defense strategy information. The courts would then be better able to distinguish harmless government intrusions into the defense camp from those that threaten the adversary nature of criminal proceedings. The Third Circuit approach fails to incorporate the Supreme Court's refusal to assume that transmission of defense strategy to a government agent is the equivalent of transmission of defense strategy to the prosecution.[180] The better rule is once defense strategy has been leaked to the prosecution, the damage is irreversible. In other words, transmission of defense strategy to the prosecution is per se unconstitutional.

Thus, the proper balance of the competing interests involved would produce the following allocations of the burdens of proof. The defendant must produce evidence that: (1) a government agent contacted the defendant, after formal charging and either undercover or in the absence of defendant's attorney; (2) the government agent's improper conduct provided the agent with information that could be used to the defendant's detriment or to the prosecution's benefit; and (3) the government agent directly or indirectly transmitted the improperly obtained information to the prosecution. Once the defendant makes such a prima facie showing of prejudice, the courts must determine whether the government intrusion caused a prejudicial violation of defendant's sixth amendment right to effective assistance of counsel. The government must bear the burden of persuasion on the issue of prejudice. However, if the defendant also produces evidence that the improperly obtained and transmitted information was

178. *Weatherford*, 429 U.S. at 556 (emphasis added).
179. *Id.* at 554, 558.
180. *Id.* at 556.

defense strategy information, the government agent's improper conduct constitutes a per se prejudicial violation of defendant's sixth amendment right to effective assistance of counsel. The damage is fatally irreversible. The case must be dismissed.[181]

V. CONCLUSION

Twelve years ago, *Weatherford v. Bursey*[182] left unanswered the question of who shall bear the burden of persuasion on the issue of prejudicial sixth amendment violations. The conflict needs to be replaced by a fair and consistent method of determining (1) when prejudicial sixth amendment violations occur, and (2) who shall bear the burden of persuasion on the issue of prejudice. Combining the First and Third Circuit approaches achieves a reliable method of protecting defendant's constitutionally protected attorney-client relationship while promoting society's interest in effective administration of criminal justice.[183]

The burden of persuasion in criminal cases is traditionally allocated to the government. The natural tendency to place the burden on the party seeking change does not support allocating the burden of persuasion to the defendant on the issue of prejudicial sixth amendment violations. Neither do the judicial estimates of the probabilities, convenience, and fairness or special policy considerations. On the contrary, these factors clearly support placing the burden of persuasion upon the government.

The government's access to relevant facts is a crucial factor within the adversarial criminal context. Only the government has access to the relevant facts necessary to establish whether the government intrusion caused prejudice to the defendant or benefit to the prosecution. The criminal context limits the defendant's ability for discovery. Allocating the burden of persuasion to the defendant would unjustifiably tip the adversarial scales of criminal justice in favor of the government on the prejudice issue. The criminal context also increases the detrimental effect of an erroneous judgment to transcending proportions: the defendant has her liberty at stake. The defendant must be given the benefit of the doubt whenever the case facts are too close for the factfinder to decide. The risk of nonpersuasion should be allocated to the government. Therefore, once the de-

181. This position may be strongly opposed by analogizing sixth amendment violations involving defense strategy communicated to the prosecution to fifth amendment violations involving transactional immunity and the defendant's right to not incriminate himself. But this analogy is inaccurate and beyond the scope of this Comment. For an excellent discussion see *generally* Beale & Bryson, GRAND JUR. L. & PRAC. § 9:19 (1986).

182. 429 U.S. 545 (1977).

183. *See supra* notes 172-77 and accompanying text.

fendant has met her burden of production concerning confidential communication improperly obtained by government informers and transmitted to the government, the burden of persuasion that no prejudice resulted should be placed upon the prosecution.

Policy considerations ultimately determine the relative weight of competing factors. This commentator asserts that deterring government violations of a defendant's sixth amendment right to counsel must be the most dominant policy consideration when allocating the burdens of proof. Effective deterrence may be accomplished by providing judicial remedies whenever state action threatens prejudicial sixth amendment violations. However, judicial remedies are accessible only after the defendant has satisfied the necessary burdens of proof. Allocating the burden of persuasion to the defendant would provide judicial remedies for prejudicial violations that a defendant is able to prove, but not state actions that threaten prejudicial sixth amendment violations. As outlined above, the burden of persuasion is an extremely difficult burden for the defendant to bear. Therefore, access to judicial remedies for sixth amendment violations is greatly reduced by allocating the burden of persuasion to the defendant. Providing a right to counsel while barricading access to judicial remedies when it is violated reduces the right to an illusion. The burden of persuasion must be placed upon the prosecution to deter unjustified intrusions into a defendant's right to counsel.

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