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Government Agents and the Sixth Amendment Reconsidered

Scott M. Beller

COMMENTS

GOVERNMENT AGENTS AND THE SIXTH AMENDMENT RECONSIDERED

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

Where a government agent is present during a conference between an accused and his attorney, the question has arisen whether such an intrusion without more is in itself a violation of the sixth amendment right to counsel.[1] The circuit courts of appeals have differed in their approaches to this problem, with some circuits requiring in addition to the intrusion, a showing of prejudice to the defendant, purposeful invasion of an attorney-client conference, or "gross" misconduct by the government in order to establish a violation of the sixth amendment.

In *Weatherford v. Bursey*,[2] the United States Supreme Court held that the sixth amendment's guarantee of the right to counsel is not violated when a government agent[3] is present during an attorney-client conference, so long as: (1) the agent is not present for the purpose of gathering information; and (2) no information is in fact communicated to the prosecution. The Court rejected the view that such an intrusion is per se a violation of the sixth amendment, regardless of intent or actual prejudice to the defendant, a view that the Court had previously appeared to endorse.[4]

It is the purpose of this case comment to examine the impact of *Weatherford* on the sixth amendment's protection of an accused criminal's right to confer with counsel. The Court's holding and reasoning will be evaluated in the context of other decisions by the Supreme Court and the courts of appeals in similar cases.

1. The sixth amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense."

2. 429 U.S. 545 (1977).

3. For purposes of this case comment, the term "government agent" will denote one who was an agent of the government at the time the intrusion occurred, as distinguished from the case where a party not originally working for the government turns informer. This comment will deal only with the former situation. *See* Comment, *Present & Suggested Limitations on the Use of Secret Agents and Informers in Law Enforcement*, 41 COLO. L. REV. 261, 272-73 (1969).

4. Although *Weatherford* was a civil suit for damages, the Court's analysis would seem to apply in the criminal context as well. Vacation of a conviction is a remedy looked on with less favor by courts than an award of damages. *See* United States v. Zarzour, 432 F.2d 1, 3 (5th Cir. 1970). The Court's refusal to uphold an award of damages on the facts of *Weatherford* indicates a fortiori that it would refuse to vacate a conviction in like circumstances.

THE FACTUAL BACKGROUND OF WEATHERFORD V. BURSEY[5]

Brett Bursey's trial and conviction for malicious damage to property arose out of an incident when Bursey and others allegedly vandalized the Richland County Selective Service Office in Columbia, South Carolina. One of the participants in this act of vandalism was Jack Weatherford, an undercover agent of the South Carolina Law Enforcement Division, who arranged for his own and Bursey's arrests. Weatherford was assigned an attorney by the Law Enforcement Division to preserve the secrecy of his identity as a government agent. On at least two occasions, Weatherford attended meetings between Bursey and Bursey's attorney at which the upcoming trial was discussed.

The district court found that Weatherford's presence at these meetings was for the purpose of maintaining his cover. The court also noted that he did not initiate either meeting or seek to obtain information regarding Bursey's trial plans for the purpose of passing it on to his superiors or the prosecution.[6] Although it was not originally intended that Weatherford would testify at trial, his effectiveness as an undercover agent had been diminished because he had been seen in the company of police officers. As a result, it was decided on the morning of the trial that Weatherford would testify. Totally unprepared for this eyewitness testimony, Bursey was found guilty and sentenced to eighteen months in prison. Since Bursey went ahead and served the prison term, he was no longer entitled to a direct appeal of his case.[7] Upon release from prison, however, Bursey filed an action under section 1983 of the Civil Rights Act[8] against Weatherford and others, alleging deprivation of his constitutional rights secured to him under the fifth, sixth and fourteenth amendments.[9]

The district court concluded that Bursey's rights had not been violated, basing its decision on two grounds: (1) that the intrusion was not of a "gross" nature because it was not made with the intent to spy for the

5. 429 U.S. 547-50 (1977).

6. Bursey v. Weatherford, 528 F.2d 483, 485-86 (4th Cir. 1975) (the district court opinion was not reported).

7. It is unclear why Bursey did not seek habeas corpus relief.

8. Section 1983, under which Bursey brought his action, provides:

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

42 U.S.C. § 1983 (1970).

9. U.S. CONST. amends. V, VI and XIV. Bursey also alleged that his fifth amendment right to a fair trial had been denied by the prosecution's failure to disclose beforehand that Weatherford would testify at trial.

prosecution; and (2) that no prejudice resulted from the intrusion because no information was, in fact, communicated to the prosecution.[10]

The Court of Appeals for the Fourth Circuit reversed,[11] holding 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."[12] The Fourth Circuit concluded that the Supreme Court had established a rule that such intrusions automatically violate a defendant's sixth amendment right to counsel.[13] The appellate court rejected the prosecution's argument that "grossness" of the intrusion was the test of a constitutional violation[14] and held that whether a constitutional violation had occurred should instead turn upon whether the intrusion was deliberate or inadvertent.[15] Under this test, so long as the intrusion is knowingly committed or permitted, the fact that it was done without the motive of obtaining trial-related information is irrelevant and a constitutional violation will be found.

In order to understand the significance of the Supreme Court's holding in *Weatherford*, previous Supreme Court and circuit court decisions must be considered. Consequently, before evaluating the *Weatherford* opinion, past judicial treatment of similar sixth amendment cases will be surveyed.

SUPREME COURT PROTECTION OF THE RIGHT TO COUNSEL

Beginning in 1932 with *Powell v. Alabama*,[16] where the right to counsel was held applicable to the states through the due process clause of the fourteenth amendment, the Supreme Court has emphasized that the right to counsel is fundamental to the concept of due process.[17] Thus, the states have been held required to supply counsel to indigents who are unable to afford a lawyer[18] and the right to counsel has been held to apply from the moment an investigation begins to focus on a particular suspect.[19]

Privacy of communication between an accused and his attorney has been viewed as the essence of the right to counsel.[20] The rationale for regarding privacy of communication as an element of the constitutional

10. *See* 528 F.2d at 486 for a discussion of the unpublished district court decision.
11. *Id.* at 485.
12. *Id.* at 486.
13. *Id.* at 486-87.
14. *Id.* at 486.
15. *Id.*
16. 287 U.S. 45 (1932). *See generally* Brewer v. Williams, 97 S. Ct. 1232, 1239 (1977), and cases cited therein.
17. 287 U.S. at 67-68.
18. Gideon v. Wainright, 372 U.S. 335 (1963).
19. Escobedo v. Illinois, 378 U.S. 478 (1964).
20. United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974).

guarantee is similar to the rationale underlying the common law evidentiary privilege by which a client may prevent his lawyer from testifying to statements made by the client in the course of the professional relationship.[21] The privilege is thought to promote the full disclosure by a client to his attorney necessary to effective representation. Intrusion into the attorney-client relationship is not itself of constitutional dimension but it becomes so when the intrusion is committed or induced by a state or federal government agent.[22]

In contrast to this evidentiary privilege, which is considered waived as to statements made in the presence of a third party,[23] waiver of the constitutional right to counsel must conform to the standard set forth by the Supreme Court in *Johnson v. Zerbst*.[24] That case presented a petition for a writ of habeas corpus by a prisoner who had been tried and convicted without representation by a lawyer. In response to the contention that the petitioner had waived his right to counsel by appearing for himself, the Court held that a waiver is "an intentional relinquishment or abandonment of a known right"[25] and, hence, must be made "competently and intelligently."[26] While the Supreme Court has held that the fourth amendment proscription against unreasonable searches and seizures does not protect against procurement of evidence by use of government agents,[27] it has never held that the sixth amendment right to counsel is waived where an agent is present at an attorney-client conference.

The Supreme Court addressed the problem of government intrusion into defense conferences in only a few cases before *Weatherford*.[28] Those cases seemed to indicate, however, that the Supreme Court had endorsed the principle enunciated by the Fourth Circuit in *Weatherford*[29] that the presence of a government agent at a defense conference constitutes a per se constitutional violation.

The Fourth Circuit relied on *Black v. United States*[30] and *O'Brien v. United States*[31] in support of this view. Both cases involved electronic

21. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, §§ 87-97 (2d ed. 1972) [hereinafter cited as MCCORMICK].
22. *See* 485 F.2d at 1227.
23. MCCORMICK, *supra* note 21, at 194.
24. 304 U.S. 458 (1938).
25. *Id.* at 464.
26. *Id.* at 468.
27. Hoffa v. United States, 385 U.S. 293, 303 (1966).
28. *See* United States v. White, 401 U.S. 745 (1971); O'Brien v. United States, 386 U.S. 345 (1967); Black v. United States, 385 U.S. 26 (1966); Hoffa v. United States, 385 U.S. 293 (1966); Glasser v. United States, 315 U.S. 60 (1942).
29. 528 F.2d at 486.
30. 385 U.S. 26 (1966).
31. 386 U.S. 345 (1967).

monitoring of conversations between an accused and his attorney. In both cases, the Supreme Court rejected the argument that a hearing should be held to determine whether the defendant had been prejudiced by the interception and instead vacated the judgment and remanded for a new trial. Justice Harlan dissented in both cases[32] on the ground that no use had been made by the prosecution of the intercepted material in either conviction. Harlan argued that the only way to justify vacating these convictions was by a rule that any governmental activity of this kind automatically vitiates a conviction. Since no such rule had ever been established and since this point had not been briefed or argued in these cases, Harlan argued that the Court's decisions were inappropriate.

However, the two decisions were interpreted by the Fourth Circuit in *Weatherford* to stand for the proposition that Justice Harlan had disclaimed; that governmental interference with the attorney-client relationship automatically calls for a conviction obtained in such circumstances to be vacated. Such a reading of *Black* and *O'Brien* was not unreasonable, particularly in light of an earlier pronouncement by the Court in *Glasser v. United States*[33] 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."[34]

The Supreme Court's next confrontation with the problem of government intrusion into a defense conference came in *Hoffa v. United States*,[35] where the alleged interference was by the agent's presence rather than by electronic means. In a previous trial, known as the Test Fleet trial, James Hoffa, then president of the Teamsters Union, had been charged with violation of the Taft-Hartley Act.[36] During the course of the Test Fleet trial, Ed Partin, a Teamsters Union official, had become a confidante of Hoffa's. Partin had been present at conferences between Hoffa and his attorneys. He had also been present at other conferences between Hoffa and third parties who were not lawyers where the bribing of jurors allegedly was discussed. Partin relayed the contents of these discussions to federal agents and after the first trial resulted in a hung jury, Hoffa was indicted and convicted of jury-tampering on the basis of Partin's testimony.[37]

The Supreme Court held that the use of incriminating statements obtained in this manner did not violate Hoffa's constitutional rights.[38] The

32. *See* 385 U.S. at 29-31; 386 U.S. at 345-47.
33. 315 U.S. 60 (1942).
34. *Id.* at 76.
35. 385 U.S. 293 (1966).
36. 29 U.S.C. §§ 141-179 (1970).
37. United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965).
38. 385 U.S. at 301-03.

use of informers was held not to be unconstitutional in itself on the theory that the fourth amendment does not protect against misplaced trust in a confidante.[39] The sixth amendment claim that the government, through Partin, had intruded upon the attorney-client relationship was disposed of on the ground that, assuming arguendo that the right to counsel was violated in the Test Fleet trial, evidence obtained thereby was not rendered inadmissible in a different trial for a separate offense.[40]

After *Hoffa* it was clear that the use of secret agents, even those equipped with recording devices,[41] did not violate the fourth amendment. However, *Hoffa* appeared to leave undisturbed the apparent rule of *Black* and *O'Brien* that intrusion by a government agent into an attorney-client conference would violate the sixth amendment.

Hoffa seemed distinguishable from *Black* and *O'Brien* in two respects. First, in *Hoffa* the Court had based its conclusion that no violation of Hoffa's right to counsel had occurred because the infiltration of Hoffa's defense had occurred in a previous trial, the Test Fleet trial, for a separate offense than the one at bar.[42] Second, the *Hoffa* opinion distinguished two earlier cases, *Coplon v. United States*[43] and *Caldwell v. United States,*[44] in which the Court of Appeals for the District of Columbia had held that intrusion by a government agent into an attorney-client conference, even without a further showing of prejudice, requires vacation of a conviction. In *Hoffa* the Court viewed *Coplon* and *Caldwell* as concerning "government intrusion of the grossest kind."[45] The implication was that the sixth amendment would be violated by an agent's intrusion into a defense conference, even without a showing of resulting prejudice to the defendant, at least where government misconduct was particularly egregious or "gross."

Hoffa, together with *Black* and *O'Brien*, could be read, as the Fourth Circuit had read them, as establishing that the sixth amendment is violated by the presence of a government agent at a defense conference regardless of intent or prejudice to the defendant. Yet the other courts of appeals have employed different approaches in similar cases.

THE COURTS OF APPEALS

A Per Se Rule

The Court of Appeals for the District of Columbia in *Coplon* and *Caldwell* established a rule that such intrusion per se violates the sixth

39. *Id.*
40. *Id.* at 307-09.
41. United States v. White, 401 U.S. 745, 748-54 (1971).
42. 385 U.S. at 304-09.
43. 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952).
44. 205 F.2d 879 (D.C. Cir. 1953).
45. 385 U.S. at 306.

amendment.[46] *Coplon* involved interception of phone calls between an accused and his attorney by government agents. The appellate court vacated the conviction despite the undisturbed finding by the district court that no evidence used to convict the defendant was derived from the intercepted conversations. In so doing, the court rejected the contention that denial of the right to counsel should be dependent upon a showing of prejudice resulting from the intrusion.[47]

Caldwell involved intrusion by the presence of a government agent at several defense conferences rather than by electronic means, as in *Coplon*. Relying on *Coplon*, the appellate court vacated the conviction. The court reasoned that intrusion by the physical presence of an agent was not distinguishable from intrusion by electronic means and that, in both instances, actual prejudice need not be shown in order to entitle a defendant to a new trial.[48]

A rule akin to a per se rule was adopted by a Colorado district court in *United States v. Orman*.[49] *Orman* concerned a motion to dismiss an indictment for distributing heroin. The defendant alleged that government agents had eavesdropped on her conferences with her lawyers. While the court viewed prejudice to the defendant as an element of a constitutional violation, it reasoned that "where there is surveillance of attorney-client conferences, prejudice must be presumed. . . ."[50] The court held that this presumption was not overcome and the motion for dismissal was granted.[51] *Orman* rejected "grossness" of intrusion as the test for a constitutional violation.[52]

A test only slightly less protective of sixth amendment rights was established by the Third Circuit in *Via v. Cliff*.[53] That case was an action for damages under the Civil Rights Act.[54] The plaintiff alleged that his consultations with his attorney while in jail awaiting trial had been deliberately obstructed and cut short by jail officials. The court held that if the officials' interference was either wrongfully motivated or without adequate justification, the plaintiff had established infringement of his constitutional right to counsel and need not additionally prove resultant prejudice.[55]

46. *See* text accompanying notes 43-44 *supra*.
47. 191 F.2d at 759.
48. 205 F.2d at 881.
49. 417 F. Supp. 1126 (D. Colo. 1976). The Court of Appeals for the Tenth Circuit, in which Colorado is located, has not addressed the issue.
50. *Id.* at 1133.
51. *Id.* at 1138.
52. *Id.* at 1136.
53. 470 F.2d 271 (3d Cir. 1972).
54. 42 U.S.C. § 1983 (1970).
55. 470 F.2d at 275.

The More Restrictive View

A more restrictive view of the sixth amendment's protection was taken by the Second, Fifth and Eighth Circuits which adopted substantially the same test.[56] In these circuits, prejudice would generally have to be demonstrated to warrant a new trial, unless government misconduct was sufficiently "gross". It follows that misconduct could serve as an alternate basis for granting a new trial and a showing of prejudice to the defendant would not be required.

The Second Circuit held in *United States v. Mosca*,[57] that, absent a showing of prejudice to the defendant, the government's conduct in permitting a co-defendant to participate in conferences with other criminal defendants after the co-defendant had begun to cooperate with the government did not warrant automatic reversal.[58] The court noted that the government made no attempt to procure testimony from the co-defendant regarding conversations overheard by him subsequent to his decision to cooperate.[59] This lack of motive to interfere with counsel was an important element in the court's decision.

In *United States v. Rosner*,[60] the Second Circuit further acknowledged in dicta that some circumstances, apparently depending on the seriousness of government misconduct, could invoke a per se rule that a new trial should be granted.[61] In *Rosner*, the court refused to grant a new trial where a co-defendant who had turned informer had participated in pre-trial strategy discussions with the defendant and his counsel. No evidence was offered that the agent had communicated information obtained from these conversations to the government. While rejecting application of a per se rule, the court acknowledged that such a rule existed and could be appropriately invoked in the case of "intrusions of the grossest kind."[62]

The Fifth Circuit, in *United States v. Zarzour*,[63] stated in dicta that a new trial is required where government intrusion into a defense conference is by "gross" misconduct, even absent prejudice to the defendant.[64] Absent such a "gross" intrusion, however, prejudice to the defendant would have to be proved in order to establish a constitutional violation. Moreover, the

56. *See* text accompanying notes 57-69 *infra*.
57. 475 F.2d 1052 (2d Cir.), *cert. denied*, 412 U.S. 948 (1973).
58. *Id.* at 1060-61.
59. *Id.*
60. 485 F.2d 1213 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974).
61. *Id.* at 1226-27.
62. *Id.* at 1223-26.
63. 432 F.2d 1 (5th Cir. 1970).
64. *Id.* at 3.

court in *Zarzour* emphasized the requirement of prejudice by defining "intrusion" to include use by the prosecution of information obtained thereby.[65]

In *South Dakota v. Long*,[66] a habeas corpus proceeding by state prisoners, the Eighth Circuit stated in dicta that no prejudice would have to be shown to establish a constitutional violation if the intrusion were sufficiently "gross."[67] At the preliminary hearing in the original case, one of the prosecuting attorneys was seen holding a microphone so as to record a conference between defendants and their attorney. Since this intrusion was in open court and in plain view of the judge, counsel and the defendants, the intrusion was held not to have risen to the level of surreptitious intrusion which would require vacation of defendant's conviction, absent a showing of prejudice.[68]

In *United States v. Dodge*,[69] the Eighth Circuit reaffirmed its conclusion in *Long* that prejudice to the defendant was required absent a showing of "gross" government misconduct.[70] In *Dodge*, cases arising from occupation by the American Indian Movement of government buildings in Wounded Knee, South Dakota were consolidated on appeal. The defendants alleged, *inter alia*, that their right to counsel had been violated because undercover agents of the Federal Bureau of Investigation had had access to the legal files of defendants' attorneys and because the government was guilty of "gross" misconduct. The Eighth Circuit upheld the convictions on the ground that there was no evidence that any agent was present when defense strategy relating to the defendants was discussed or that defense strategy was communicated.[71] Hence, there was no prejudice to the defendants.

In *United States v. Balistrieri*,[72] the Seventh Circuit, without examining approaches taken by other circuits, also took a restrictive view of the sixth amendment's protection. In this case, the court indicated that governmental intrusion into a defense conference must be with the purpose of interfering with the right to counsel or must in fact produce evidence used at trial in order for there to be a sixth amendment violation.[73] Appealing from

65. *Id.* at 3-5.
66. 465 F.2d 65 (8th Cir. 1972), *cert. denied sub nom.*, Hale v. South Dakota, 409 U.S. 1130 (1973).
67. *Id.* at 72.
68. *Id.*
69. 538 F.2d 770 (8th Cir. 1976).
70. *Id.* at 777-78.
71. *Id.* at 776-79.
72. 403 F.2d 472 (7th Cir. 1968), *vacated on other grounds*, 395 U.S. 710 (1969), 436 F.2d 1212 (7th Cir.), *cert. denied*, 402 U.S. 953 (1971).
73. *Id.* at 478.

his conviction for income tax evasion, the defendant in *Balistrieri* alleged that eavesdropping on the office of one of his attorneys constituted interference by the government with his right to counsel. The court affirmed the conviction on the ground that nothing supported the allegation that the purpose of the surveillance was to gain information relating to trial strategy.[74] The court also emphasized that since the eavesdropping was disclosed before conviction, the case could be distinguished from *O'Brien*.[75]

THE SUPREME COURT'S TEST

Under the Supreme Court's test a defendant would apparently be required to show one of the following in order to establish a constitutional violation by government intrusion into an attorney-client conference: "tainted evidence . . ., communication of defense strategy to the prosecution . . ., or purposeful intrusion, *i.e.*, with intent to gather trial-related information for the prosecution."[76] The Court did not expressly adopt the approach of any of the circuit courts of appeals and, in fact, the Court's approach is distinct from that of any prior case. The Court's position may be seen as lying between those decisions espousing a per se test, and thus protective of sixth amendment rights, and those decisions requiring prejudice to be shown. Under the Court's test, if either purposeful intrusion or communication to the prosecution could be proven, then a further showing that such activity actually prejudiced the defendant's case would not be necessary. Since a case where such governmental activity could occur without actually prejudicing a defendant is unlikely to arise, the Court's position is actually close to those cases requiring that prejudice must be shown to establish a constitutional violation. The opinion does not expressly consider "grossness" of government conduct as a basis for overturning a conviction. However, there is no indication that the Court supports this view.

Citing its long-standing recognition of the need for undercover activity,[77] the Court declined to adopt a per se rule, reasoning that such a rule would compel a government agent to refuse to participate in an attorney-client conference even if invited, thereby effectively revealing his identity as a government agent.[78] The court denied that it had already established a per

74. *Id.* at 477-78.
75. *Id.* at 478.
76. 429 U.S. 545 (1977).
77. *Id.* at 556-59. The cases cited by the Court as supporting the need for undercover agents are not entirely on point. *See* United States v. Russell, 411 U.S. 423, 432 (1973); Lewis v. United States, 385 U.S. 206, 208-09 (1966). It was not the need for undercover agents which was in dispute in *Weatherford* but whether that need must yield where it conflicts with the right to counsel. The right to counsel was not at issue in the cases cited by the Court.
78. 429 U.S. at 556.

se rule in *Black* and *O'Brien*, as the Fourth Circuit had concluded.[79] *Black* and *O'Brien* were distinguished on the ground that the results in those cases could have been reached by reliance on well settled fourth amendment grounds and that it was not clear that those cases involved the sixth amendment.[80] The Court denied that *Hoffa* had indicated any acceptance of the approach taken in *Caldwell* and *Coplon*, pointing out that in *Hoffa* it had only *assumed*, without deciding, that *Caldwell* and *Coplon* had been correctly decided.[81]

The Court made clear that it regarded interception of attorney-client communications by an undercover agent as less offensive to the sixth amendment than interception by electronic means,[82] despite the contrary conclusion in *Caldwell*.[83] The Court reasoned that a client's willingness to communicate freely with his attorney is chilled less by a fear that a third party may turn out to be a government agent than by a fear that the government is electronically monitoring conversations.[84] This is so, in the Court's view, because the former intrusion may be avoided by excluding third parties from defense conferences or by refraining from disclosing defense strategy when third parties are present at these meetings.[85]

A Critique of the Supreme Court's Test

The Court's conclusion and its reasoning constitute an unsatisfactory solution to the problem of accommodating governmental use of undercover agents with the sixth amendment's guarantees. The decision is unsatisfactory in that it invites abuse by prosecutors because of the difficulty an accused will now have in establishing a constitutional violation.

Under the Court's test, any intrusion by a government agent into a defense conference is presumed harmless and the burden of showing otherwise is on the defendant. A defendant would apparently be required to show subjective intent to gather trial-related information or actual communication of such information to the prosecution in order to establish a constitutional violation. This test will be difficult to meet. Intent to gather information for the prosecution would be virtually impossible to prove unless, for example, an incriminating memorandum could be found containing a record of such instructions. It is unlikely that such a memorandum would exist.

79. *Id.* at 550-54.
80. *Id.*
81. *Id.* at 553-55.
82. *Id.* at 554-55, n.4.
83. 205 F.2d at 381.
84. 429 U.S. at 554-55, n.4.
85. *Id.*

Communication of information to the prosecution could be proven if the prosecution used evidence at trial that it could only have obtained through an undercover agent. However, if the only evidence used at trial could have been obtained by other means, communication of trial-related information probably could not be proven. Thus, an unfair advantage might accrue to a prosecution team who had in fact obtained useful information through intrusion upon a trial strategy conference but whose misconduct could not be proven because of the difficulty of meeting the requirements imposed by *Weatherford*.

Moreover, the Court's definition of "communication of defense strategy"[86] does not include the situation where the agent himself testifies for the prosecution, as happened in *Weatherford*. Yet, as Justice Marshall pointed out in his dissent, "[i]f, for example, agent Weatherford had learned that Bursey would use an entrapment defense, Weatherford could have planned his testimony so as to minimize his own role in the vandalism and to emphasize Bursey's predisposition to the crime."[87] Assuming that the prosecution is aided by such testimony, it seems inaccurate to hold that nothing has been "communicated" to the prosecution.

Similarly, where the defendant's case has been damaged by government intrusion, it makes little sense to deny the harm done to the defendant on the ground that aiding the prosecution was not the purpose of the intrusion. A requirement of intent seems contrary to the principle, settled since *Monroe v. Pape*,[88] that specific intent to deprive a person of constitutional rights is not a requisite of a constitutional violation.[89] The Court cursorily acknowledged and dismissed the argument that the elements of subjective intent or actual communication will be difficult to prove or that prosecutors are prone to lie.[90] Because the Court's test would make lying virtually impossible to prove, the Court's faith seems unrealistic.

A Better Test

A solution more consonant with the Court's avowed commitment to protecting the right to counsel[91] would have been adoption of a rule that the presence of a government agent in a conference between an accused and his attorney is presumptively violative of the sixth amendment.[92] If the prosecution could then demonstrate some justification for extending undercover

86. *Id.* at 557-59.
87. *Id.* at 564, n.1 (Marshall & Brennan, JJ., dissenting).
88. 365 U.S. 167, 187 (1961).
89. *Accord*, Jenkins v. Averett, 424 F.2d 1228, 1232-33 (4th Cir. 1970); Basista v. Weir, 340 F.2d 74, 81 (3d Cir. 1965).
90. 429 U.S. at 556-57.
91. *See generally* Brewer v. Williams, 97 S. Ct. 1232, 1239 (1977), and cases cited therein.
92. This is essentially the test proposed in United States v. Ormen, 417 F. Supp. 1126 (D.

activities past the time of arrest, in addition to meeting *Weatherford*'s requirements that there was no purposeful intrusion and no communication to the prosecution, a holding that the sixth amendment had not been violated would be more justified.

The Court's rationale for rejecting a rule that government intrusion per se violates the sixth amendment was that such a rule would, in effect, require an agent to reveal his identity, thus destroying his efficacy as an agent.[93] However, assuming that there may be instances where an agent must maintain his cover beyond the time of indictment, there is no requirement under *Weatherford* that the prosecution make a showing of such need. In *Weatherford*, in fact, there was no justification for the agent's continued secrecy after Bursey's indictment. Had Weatherford earlier revealed his identity as an undercover agent, his usefulness in future assignments would indeed have been impaired as to those familiar with his role in Bursey's case. However, such impairment was inevitable, because placing Weatherford on the stand in the role of a defendant would have constituted a fraud upon the court.[94] As for those not familiar with Bursey's case, Weatherford's effectiveness might not have been impaired at all.

A rule that government intrusion into a defense conference is presumptively unconstitutional would provide for those occasions where use of undercover agents past the time of arrest is justified by exigent circumstances, such as where a possibility exists that revelation of the agent's identity will endanger his life or jeopardize any ongoing investigations.[95] Thus, this test would be more accommodating to the use of undercover agents by police forces, which the Court has repeatedly recognized as necessary,[96] than a rule that government intrusion into a defense conference per se warrants a new trial. A presumption that such activity is unconstitutional would be more protective of the right to counsel than the Court's solution. The result would be a prophylactic rule excluding use of evidence obtained through violation of the right to counsel with allowance made for circumstances where intrusion was unavoidable but not actually prejudicial to the fairness of the defendant's trial.

Such a prophylactic rule needs to be adopted for the same reason that the fourth amendment exclusionary rule evolved. That rule excludes use at

Colo. 1976), where the court held that prejudice would be rebuttably presumed. *See* text accompanying note 49 *supra*.

93. 429 U.S. at 556-57.

94. United States v. Rosner, 485 F.2d 1213, 1227 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974).

95. These are the examples offered by Justice Marshall who argued in his dissent that there was no need for Weatherford's services as an undercover agent to have continued after Bursey's indictment. 97 S. Ct. at 849 n.5 (Marshall, J., dissenting).

96. *See* note 69 *supra*.

trial of improperly obtained evidence in violation of the fourth amendment.[97] The rationale for that rule is the belief that if law enforcement officers know that violation of the fourth amendment will not benefit them, they will be deterred from unconstitutional conduct.

The absence of a similar rule that intrusion into a defense conference presumptively violates the sixth amendment ensures that there will be such intrusions. An agent who attends a defense conference can be of great help to the prosecution, if only through his own testimony at trial, as in *Weatherford*. Hence, the government will now have an incentive to maintain agents in their undercover roles past the time when they have completed their legitimate duty of contributing to the arrest of criminals.

Where there are exigent circumstances making continued secrecy reasonable and an agent has no choice but to attend a defense conference, the continued secrecy seems justifiable only so long as the need for it continues. However, an agent who has been privy to such meetings should not be permitted to testify at trial.

Although attempts at infiltration of an attorney-client conference could be defeated by an attorney who investigates each of his clients to determine if he is a government agent, this will not always be done. Since such infiltration after trial preparation has commenced seems beyond the scope of duty of law enforcement officers, the extra burden placed on the accused and his counsel of ensuring the bona fides of all persons concerned seems unjustifiable.

CONCLUSION

Weatherford v. Bursey takes its place among those recent cases which have constricted the scope of constitutional guarantees.[98] While the *Weatherford* requirement of a showing of purposeful intrusion or communication is ostensibly more protective of sixth amendment rights than those circuits which required an actual showing of prejudice in order to establish a sixth amendment violation, in effect the Court's test is equally burdensome. While the Court's rejection of a per se rule requiring a new trial was arguably justifiable, the Court failed to fully explore alternative approaches, such as a rule that government intrusion into a defense conference would presumptively violate the sixth amendment.

After *Weatherford*, the sixth amendment offers little protection against government intrusion into conferences between an accused and his attorney.

97. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

98. *See generally*, Brennan, *State Constitutions & Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Miles, *The Ailing Fourth Amendment: A Suggested Cure*, 63 A.B.A.J. 365 (1977).

The obstacles erected by the Court to use of the sixth amendment to protect against such intrusion will rarely be surmounted. Since this result is as apparent to prosecutors as it is to defense attorneys, the potential for abuse of the Court's ruling is great.

Weatherford puts a gloss on the sixth amendment which limits its protection to the wary and the skillful. Those criminal defendants and their lawyers who are able to prevent government intrusion or who are able to meet the test imposed by *Weatherford* may still seek vindication of their rights through the sixth amendment. For all others, the scope of the sixth amendment's protection has been restricted.

SCOTT M. BELLER