Duquesne Law Review

Volume 16 | Number 2 Article 11

1977

Constitutional Law - Sixth Amendment - Right to Counsel - Confidentiality of Attorney-Client Consultation

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CONSTITUTIONAL LAW—SIXTH AMENDMENT—RIGHT TO COUNSEL —CONFIDENTIALITY OF ATTORNEY-CLIENT CONSULTATION—The United States Supreme Court has held that the mere presence of an undercover agent at a pretrial conference between a criminal defendant and his attorney does not violate the defendant's sixth amendment right to counsel or his fourteenth amendment right to a fair trial, and hence cannot be the basis of a section 1983 claim, absent proof that the agent revealed the substance of the consultation to the government.

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

On March 19, 1970, Brett Allen Bursey, Jack M. Weatherford, and two other men vandalized the offices of the Richland County Selective Service Board.[1] Execution of the plan went smoothly but, unknown to Bursey, Weatherford was an undercover agent[2] for the South Carolina State Law Enforcement Division (SLED), and he reported the incident. The next day, Bursey and Weatherford were arrested and taken to the Richland County Sheriff's Office, where they were charged with malicious destruction of property and criminal conspiracy.

On two occasions prior to trial, Weatherford was invited to Bursey's conferences with his attorney. Bursey questioned Weatherford to obtain ideas for Bursey's defense, and Weatherford was asked if he intended to testify for the prosecution.[3] Weatherford assured Bursey that he would not testify and that he would, if necessary, invoke his fifth amendment privilege. Relying upon Weatherford's promise, Bursey was completely surprised when the first witness for the state was Weatherford.

Following his conviction,[4] Bursey filed a suit under the Civil

1. Weatherford v. Bursey, 429 U.S. 545, 547 (1977). According to Bursey, both he and Weatherford painted peace symbols on the wall and threw bricks at windows. Brief for Respondent at 8, Weatherford v. Bursey, 429 U.S. 545 (1977) [hereinafter cited as Brief for Respondent].

2. The Supreme Court noted the "unfortunate necessity" for undercover work and its value to effective law enforcement. 429 U.S. at 557. *See, e.g.*, United States v. Russell, 411 U.S. 423, 432 (1973) (a recognized and permissible means of investigation); Lewis v. United States, 385 U.S. 206, 208-09 (1966) (undercover agents are necessary but their actions are checked by the Bill of Rights).

3. Brief for Respondent, *supra* note 1, at 16-17.

4. Bursey neither appealed his conviction nor sought post-conviction relief under either state statute or federal habeas corpus proceedings. Bursey v. Weatherford, 528 F.2d 483, 485 n.1 (4th Cir. 1975), *rev'd*, 429 U.S. 545 (1977).

Rights Act of 1871[5] seeking damages from both Weatherford and his supervisor, Pete Strom, Chief of SLED.[6] Specifically, Bursey alleged interference with his sixth amendment[7] right to counsel and

5. The statute originally enacted by Congress as the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, provides:

> Every person who, under color of any statute . . . 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) [hereinafter referred to as section 1983]. Reportedly, agents from the Federal Bureau of Investigation worked along with state agents in investigating the incident at the Selective Service building. McDonald, *A Profile of Two Friends,* CIVIL LIBERTIES, November 1974, at 4, col. 1. Bursey could not, however, join the federal agents as defendants in his law suit since employees of the federal government cannot be sued under § 1983. Cases recognizing this limitation include: Roots v. Callahan, 475 F.2d 751 (5th Cir. 1973) (suit will not lie under this subchapter against federal officials acting under color of federal law); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972) (section 1983 does not apply to federal officers); Savage v. United States, 450 F.2d 449 (8th Cir. 1971) (section 1983 does not provide a basis for suit against federal officials), *cert. denied,* 405 U.S. 1043 (1972).

Bursey was additionally precluded from suing the trial judge or the prosecuting attorney because both judges and attorneys are immune from § 1983 suits for actions taken within their official capacities. *See, e.g.,* Pierson v. Ray, 386 U.S. 547, 554 (1967) (judge is immune "even when the judge is accused of acting maliciously and corruptly"); Phillips v. Nash, 311 F.2d 513 (7th Cir. 1962) (if the prosecutor acts within the discretionary role of his official duties, he is immune from § 1983 suits), *cert. denied,* 374 U.S. 809 (1963).

6. Before a supervisor of an offending government employee can be sued under § 1983, the court must find that the supervisor was personally involved in the wrongful conduct, rather than responsible in a general, supervisory capacity. *See, e.g.,* Bracey v. Grenoble, 494 F.2d 566 (3d Cir. 1974) (superior officer not responsible for prisoner's beating, absent evidence that superior saw beating or knew of past beatings); Jennings v. Davis, 476 F.2d 1271 (8th Cir. 1973) (Chief of Police and Board of Police Commissioners not liable under respondeat superior where they did not have the "duty, opportunity, or ability" to prevent alleged unreasonable search and seizure). For a rare case to the contrary, see Whirl v. Kern, 407 F.2d 781 (5th Cir.) (personal knowledge of unlawful detention not required to hold warden liable under § 1983 for failing to release prisoner when his sentence had ended), *cert. denied,* 396 U.S. 901 (1969).

7. The text of the sixth amendment to the United States Constitution reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI. The right to counsel arises at any critical stage of the criminal proceedings. White v. Maryland, 373 U.S. 59 (1963) (per curiam) (appointment of "all members of the bar" as counsel for arraignment not effective appointment). It has also been decided that the right to counsel extends to the decision of how to plead. United States *ex rel.* Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973) (counsel ineffective because single attorney represented several co-defendants).

his fourteenth amendment due process right to a fair trial. The United States District Court for the District of South Carolina, finding no gross intrusion upon the attorney-client relationship, held that neither Weatherford nor Strom had violated any of Bursey's constitutional rights.[8]

The Court of Appeals for the Fourth Circuit reversed[9] and remanded.[10] Disagreeing with the test used by the trial judge in which the extent of the intrusion was determinative, the court of appeals instead focused on the nature of the intrusion. If the intrusion was deliberate,[11] the right to counsel was sufficiently affected so as to

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8. The district court premised its decision upon three findings. First, since Weatherford had not intentionally sought information concerning Bursey's trial strategy, there had not been a "gross" intrusion into the confidential relationship between attorney and client and, therefore, there was no interference with Bursey's right to counsel. Second, Bursey did not show that he was prejudiced by Weatherford's attending the attorney-client conferences. Third, Weatherford and his attorney sought and succeeded in obtaining a severance of the two defendant's trials, considered to be quite unusual by the district court; therefore, Bursey should have suspected that Weatherford might be a government agent. Bursey v. Weatherford, 528 F.2d at 486.

9. *Id.* at 485. The court of appeals' decision was approved in a recent case note: 54 N.C.L. REV. 1276 (1976).

10. The court of appeals found both Weatherford and Strom personally liable. Weatherford was liable for his intrusion, whereas, Strom's liability arose from his participation in the decision to maintain Weatherford's cover, entrusting the details of protecting the cover to the prosecution, and personally concurring in the decision to allow Weatherford to testify. Nevertheless, the court of appeals remanded for a finding on a potential good faith defense. 528 F.2d at 488-89.

11. *Id.* at 486. The court of appeals was using the term "deliberate" to refer only to the decision to pursue a particular course of action, not the intent to purposely injure another. Intent to injure has been held to be unnecessary for a cause of action under § 1983. *See, e.g.*, Roberts v. Williams, 456 F.2d 819 (5th Cir.) (improper motive not a prerequisite), *cert. denied*, 404 U.S. 866 (1971); Allison v. Wilson, 434 F.2d 646 (9th Cir. 1970) (specific intent to violate constitutional rights not a necessary element of a § 1983 cause of action), *cert. denied*, 404 U.S. 863 (1971); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970) (intent to injure not required).

The court of appeals in *Weatherford* concluded it was not necessary that prejudice to the defendant be shown to have resulted from an intrusion by an agent when the action was deliberate, though it might be relevant to the issue of damages. 528 F.2d at 486-87. Presumably, an inadvertent violation of an individual's constitutional right to counsel would not raise a cause of action under § 1983. Additionally, the court considered "of no consequence" the possibility that the intrusion might not have been undertaken purposefully to obtain information, but simply to protect Weatherford's cover. The prosecution's knowing arrangement of or acquiescence in an intrusion into the attorney-client relationship sufficiently endangered the right to counsel so as to require a reversal and a new trial. 528 F.2d at 486.

The tack chosen by the court of appeals, focusing as it did upon the nature rather than the extent of the intrusion into the attorney-client relationship, has support in case law. Where an intrusion is proven to be purely inadvertent, the right to counsel is not denied. *See, e.g.*, United States v. Bullock, 441 F.2d 59 (5th Cir. 1971) (right to counsel not violated when

require a new trial. To support this per se rule, the court cited the Supreme Court's decisions of *Black v. United States*[12] and *O'Brien v. United States*,[13] cases in which the convictions were summarily vacated because conversations between the defendants and their attorneys were monitored during the pretrial period.[14] The court further held that Bursey's right to a fair trial was violated by Weatherford's deception.[15] Relying on *Brady v. Maryland*,[16] which held

officers eavesdropped on a telephone conversation of defendant with attorney since officers testified positively that they had no knowledge that the conversation was with counsel).

12. 385 U.S. 26 (1966) (per curiam). In *Black*, the defendant's conversations with his attorney had been monitored and taped for two months prior to and one month after evidence had been presented to the grand jury. The defendant was ultimately convicted for tax evasion. Subsequently, the Solicitor General revealed that conversations and exchanges between the defendant and his attorney were intercepted by agents of the Federal Bureau of Investigation, who were investigating a matter unrelated to the tax evasion case. The defendant appealed and the Supreme Court granted certiorari. Though the Solicitor General claimed that the prosecuting attorneys for the tax evasion case had never seen the reports and memoranda of the tapes, the Supreme Court felt that justice required a new trial so that the defendant could prepare a defense against "the use of evidence that might otherwise be inadmissible." *Id.* at 29.

13. 386 U.S. 345 (1967) (per curiam). In this case, defendant O'Brien and another were convicted on several counts of removing merchandise from a bonded area under the supervision of the United States Customs Service, a violation of 18 U.S.C. § 549 (1970). The defendant appealed, alleging trial errors and insufficient evidence. Apart from these issues raised by the defendant, the Solicitor General informed the Court that he had learned that the defendant's business premises had been bugged by the Federal Bureau of Investigation. The Solicitor General stated that the contents of the overheard conversation between the defendant and his attorney were not reported to the Department of Justice and the attorneys prosecuting this case. Regardless, the Supreme Court reversed without opinion, ordering a new trial.

In a dissenting opinion, Justices Harlan and Stewart thought the facts indicated an example of a "totally insignificant and uncommunicated eavesdropping." They saw *Black* as being distinguishable, for in *Black*, part of a recorded conversation had been incorporated into a memorandum used by the prosecuting attorneys. The prosecutor in the *O'Brien* case, however, knew nothing of the bugging. 386 U.S. at 347.

14. The court of appeals read *Black* and *O'Brien* together as establishing a per se rule of automatic reversal for deliberate governmental intrusions into privileged attorney-client conferences. 528 F.2d at 486.

15. The court of appeals explained that failure to disclose the existence of an informant during the defendant's trial preparation lulls an accused into a false sense of security prior to trial. Thus, Bursey's attorney was unable to evaluate the necessity of plea bargaining. Also, defense counsel was denied the opportunity to prepare for cross-examination of Weatherford by doing a background check on him. For this reason, defense counsel could not plan for the "devastating impact of eyewitness identification." *Id.* at 487.

16. 373 U.S. 83 (1963). In *Brady*, defendant Brady and his companion, Boblit, were charged with murder in the first degree. Brady maintained that Boblit committed the murder. To prepare his case, Brady's attorney asked the prosecution prior to trial for leave to examine Boblit's extrajudicial statements. A few of those statements were shown to Brady's counsel but not the one in which Boblit admitted his guilt. Brady's attorney did not learn of

that due process requires the disclosure, upon request, of evidence favorable to an accused, the court of appeals held the failure to reveal Weatherford's identity to be violative of this right.

On appeal, the United States Supreme Court reversed.[17] In an opinion written by Justice White, the Court held that the sixth amendment does not establish a per se rule forbidding an undercover agent from meeting with an accused's counsel. The majority noted the district court's finding, undisturbed by the court of appeals, that Weatherford did not communicate the substance of the attorney-client conference to his supervisor.[18] Since the informer did not relay this information to other law enforcement officials or the prosecutor,[19] the Court held that he posed no substantial threat to the defendant's sixth amendment rights. A per se rule was seen as too broad, needlessly interfering with police undercover work, a necessary and effective tool of law enforcement.[20]

The Court disagreed with the court of appeals' interpretation of *Black* and *O'Brien*.[21] Though both cases admittedly involved overheard conversations between counsel and client, the Court questioned whether these cases were delineating definitive sixth amendment rights. The *Black* and *O'Brien* opinions did not identify which amendment had been violated, but, the *Weatherford* Court noted, they were cases of clear fourth amendment violations by illegal search and seizure. The Court favored a fourth amendment reading of the two cases because the fourth amendment grounds for excluding the fruits of illegal surveillance were well established, whereas

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Boblit's confession until Brady had been convicted and the conviction affirmed on appeal. Thereupon, Brady appealed under the Maryland Post Conviction Procedure Act, but his conviction was affirmed by the state courts. The Supreme Court granted certiorari and held that the prosecution's suppression of evidence favorable to an accused, when requested, denies him due process if the evidence is material to either guilt or punishment. *Id.* at 87.

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

18. The action against Strom was summarily dismissed in a footnote. Since the Court concluded that Weatherford's activities did not violate Bursey's constitutional rights, Strom could not be found liable for his involvement in Weatherford's undercover work. *Id.* at 561 n.6.

19. In United States v. Crow Dog, 532 F.2d 1182 (8th Cir. 1976), *cert. denied*, 430 U.S. 929 (1977), the court of appeals similarly declined to reverse a conviction where it was not shown that an informant passed incriminating evidence to the authorities. Specifically, the court affirmed the conviction because the appellant failed to prove either that the government operative was present during discussions of defense strategy relevant to that particular defendant or that the operative passed such information to the FBI. *Id.* at 1197-98.

20. 429 U.S. at 557.

21. *Id.* at 550-52.

the sixth amendment protection had not, in the Court's opinion, evolved to such an extent.[22]

Although the Supreme Court refused to hold that Bursey's constitutional rights had been violated, it did not deny the existence of all sixth amendment protections for the attorney-client privilege. Had Weatherford conveyed the substance of the attorney-client meeting, either by testifying at Bursey's trial regarding the conference or by turning over evidence of the same to members of the prosecution,[23] then there would have been "at least a realistic possibility" of undue prejudice[24] to Bursey's right to the effective assistance of counsel or of undue benefit to the prosecution. By the majority's standards, the test for a sixth amendment violation when a government informer has been present at an attorney-client conference is whether any of the government's evidence originated in the reported conversations.[25]

Also rejected by the Supreme Court was the court of appeals' finding of a violation of the fourteenth amendment due process right to a fair trial. The majority said that the *Brady* prohibition against concealing evidence favorable to an accused did not create a constitutional right to discovery in criminal cases.[26] Particularly, the prosecution was not obliged to reveal the names of all the witnesses who would testify against the accused.[27]

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22. A third case, Hoffa v. United States, 385 U.S. 293 (1966), also relied upon by the court of appeals, was found inapposite by the Supreme Court. The Court said *Hoffa* did not hold that a conviction would have to be set aside simply because an informer overheard a defendant conversing with his attorneys. On the contrary, the Court thought that *Hoffa* merely assumed, without deciding, that irrespective of the validity of such a proposition, it did not bear upon Hoffa's case because the government informer had not testified regarding any overheard conversations between attorney and client. He only answered questions pertinent to conversations occuring between defendant Hoffa and third parties while Hoffa's attorneys were not present. 429 U.S. at 553-54.

23. 429 U.S. at 554.

24. In his brief, Bursey argued that proof of prejudice was not required as a condition for relief from sixth amendment violations. Brief for Respondent, *supra* note 1, at 26. Otherwise, defendants may be given impossible burdens of proof, for offending officials are not likely to confess their guilt. Furthermore, Bursey urged that courts should not speculate as to the degree of prejudice resulting from the denial of a fundamental right, such as the right to counsel. *Id.* at 27.

25. 429 U.S. at 554.

26. *Id.* at 559-60.

27. The Supreme Court similarly rejected the other conclusions of the court of appeals that Bursey's constitutional right to a fair trial was affected. The Court said that the effect of the prosecution's actions on Bursey's opportunity to plea bargain was not a constitutional issue, for there is no constitutional right to plea bargain. *Id.* at 560-61. The court of appeals

In a dissenting opinion, Justices Marshall and Brennan identified two independent constitutional values jeopardized by surreptitious governmental intrusions into confidential consultations between attorney and client.[28] The first of these was the fairness of a trial. If this value was to be protected, said the dissenters, then the integrity of the adversary system must be maintained. Under the due process clause, discovery must be a two-way street, and the state cannot seek information concerning the details of a defendant's case yet preserve the secrecy of its own case.

Of equal importance was privacy of communication with counsel— the essence, in the dissenters' view, of the sixth amendment right to confer with one's attorney.[29] To the extent that the sixth

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had also suggested that Bursey was deprived of an opportunity to prepare for the cross-examination of Weatherford, but the Court countered by noting that Bursey never objected to Weatherford's testimony at trial, nor requested a continuance. Therefore, in the Court's opinion, there was no showing that Bursey suffered substantial prejudice. As for the alleged devastating effect of Weatherford's surprise testimony, the Supreme Court concluded that the disadvantage to the defense was no greater than would result in any other case in which unanticipated, damaging evidence is introduced. *Id.* at 561.

28. *Id.* at 560 (Marshall, J., dissenting).

29. *Id.* at 564. The sixth amendment right to privacy between counsel and client is distinct from the traditional rule of attorney-client privilege found in the common law. The purpose of the attorney-client privilege, which has been part of Anglo-American common law for centuries, is to prevent others from compelling an attorney to divulge confidential information given to him by his client.

The common law privilege is frequently summarized as follows: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." 8 J. WIGMORE, EVIDENCE § 2292 (McNaughton rev. ed. 1961). The right to privacy under the sixth amendment is distinct from the common law privilege in two important respects. First, the attorney-client privilege is effective against anyone, government employee or private citizen, not a party to the confidential exchange between attorney and client. The right to privacy between attorney and client under the sixth amendment only shields the attorney-client meetings from intrusion by government-planted informants or listening devices, not from the actions of private citizens. *See* United States v. LaVallee, 319 F.2d 37 (2d Cir. 1963). Second, the attorney-client privilege prevents others from questioning the attorney about matters discussed with his client. The sixth amendment protection, as the majority in *Weatherford* construed it, forbids government-planted informants or undercover agents from revealing what they overheard from an attorney-client exchange to law enforcement officials.

These two distinctions indicate that the sixth amendment rule is quite different from the common law privilege. The attorney-client privilege is usually considered waived by the presence of a third party, except if that party is the authorized representative/agent of either the attorney or the client. *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 91 (2d ed. E. Cleary 1972). However, the presence of a co-defendant who is sharing the same attorney does not negate the existence of the privilege. *Id.* The presence of a co-defendant who does

amendment established a right to confidential communication with counsel, that right was invaded by the mere presence of a government agent. The dissenters concluded that even assuming a per se invasion into the privacy of the attorney-client meeting would not affect the fairness of the trial or the effectiveness of counsel, the practice of spying on attorney-client conferences should not be tolerated. A prophylactic rule was essential to provide breathing space for this precious constitutional right.[30]

The sixth amendment right to counsel has been held to guarantee not only the right to retain counsel, but also the right to effective assistance of counsel.[31] "Effective assistance" is a flexible term, taking its meaning from the facts of the case at hand.[32] In general, before a court will adjudge defense counsel's assistance as falling below constitutional minimums, his ineffectiveness must have been such that justice was not served.[33]

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not intend to employ the same attorney waives the attorney-client privilege. The privilege remains, however, when a joint conference between several defendants and their attorneys is conducted for the purpose of establishing a joint defense. *See* Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964) (court quashed subpeona duces tecum calling for production before grand jury of memoranda prepared by attorneys concerning information received from clients who were grand jury witnesses). Furthermore, an exchange of information between attorneys for different defendants has been held not to waive the attorney-client privilege where both defendants might be subject to indictment based on the same incident and so may share common issues. *See* Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965) (husband and wife employed separate counsel for defense of charges of income tax evasion).

As the dissenters in *Weatherford* interpreted the sixth amendment right to counsel, the guarantee of private consultation with counsel would not be waived by the presence of an undercover agent even though the defendant was aware of the presence of a third party. If that third party turned out to be a government agent, the sixth amendment protection would still stand, since the purpose of the sixth amendment right is to prevent the intrusion by the government agents *ab initio*. Weatherford v. Bursey, 429 U.S. at 563-64 (Marshall, J., dissenting).

30. 429 U.S. at 565.

31. Powell v. Alabama, 287 U.S. 45 (1932) (appointment of "all the members of the bar" not an effective appointment of counsel).

32. *See* Stone, *Ineffective Assistance of Counsel and Post-Conviction Relief in Criminal Cases: Changing Standards and Practical Consequences*, 7 COLUM. HUMAN RIGHTS L. REV. 427 (1975) [hereinafter cited as Stone].

33. Examples of the different standards used by the courts to measure effectiveness can be found in the following cases: Jenkins v. United States, 530 F.2d 1203 (5th Cir. 1976) ("reasonably effective"); United States v. Hines, 470 F.2d 225 (3rd Cir. 1972) ("customary skill"), *cert. denied*, 410 U.S. 968 (1973); United States v. Miramon, 470 F.2d 1362 (9th Cir. 1972) (counsel's ineffectiveness made trial a "farce or mockery of justice"), *cert. denied*, 411 U.S. 934 (1973); United States v. Currier, 405 F.2d 1039 (2d Cir.) (ineffectiveness such as would "shock the conscience"), *cert. denied*, 395 U.S. 914 (1969); Williams v. Beto, 354 F.2d 698 (5th Cir. 1965) (attorney so ineffective that trial was "a sham").

The denial of an opportunity for private discussions between an accused and his counsel has been held to be a denial of effective assistance of counsel. In *Coplon v. United States,*[34] where the defendant's telephone conversations with her attorney were allegedly tapped by the government, the Court of Appeals for the District of Columbia, citing numerous state decisions,[35] decided that such an intrusion would interfere with the defendant's right to effective assistance of counsel and, if proven, would entitle her to a new trial. The *Coplon* court did not require the defendant to demonstrate that she was prejudiced as a result of the sixth amendment violation, relying on *Glasser v. United States,*[36] where the Supreme Court held that the right to counsel is so fundamental that courts should not attempt to calculate the prejudice resulting from the denial.

The *Coplon* rationale was followed in *Caldwell v. United States,*[37] another decision of the Court of Appeals for the District of Columbia, where the prosecution had hired a person to spy on the defendant and his attorney on a matter unrelated to the defendant's upcoming trial. Not finding any distinction between an intrusion by wiretapping or by government agent,[38] the court reversed the conviction on sixth amendment grounds without requiring a demonstra-

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Generally, faulty "trial tactics" are not considered to be a basis for post-conviction relief, and courts usually require a showing of prejudice before reversing any conviction on this ground. *See* Stone, *supra* note 32, at 435-36. Likewise, allegations of insufficient time for trial preparation generally must be supported by proof of prejudice, especially where counsel is an experienced attorney. *Id.* at 441.

34. 191 F.2d 749 (D.C. Cir. 1951). The right to counsel issue arose because the government had tapped the defendant's phone conversations with her attorney prior to, during, and subsequent to her trial. The court, upon reversing the conviction, wrote: "It is well established that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him." *Id.* at 757. Although wiretapping was not a criminal offense, the court said that the fifth and sixth amendments nevertheless "unqualifiedly guard the right to assistance of counsel, without making the indication of the right depend upon whether its denial resulted in demonstrable prejudice." *Id.* at 759.

35. Among those cases cited by the court were Ex parte Qualls, 58 Cal. App. 2d 330, 331, 136 P.2d 341, 343 (1943) ("The right [of defendants] to private consultations with their counsel is a corollary of the constitutional right to be represented by counsel in their defense."); Hughes v. Cashin, 184 Misc. 757, 761, 54 N.Y.S.2d 437, 440-41 (Sup. Ct. 1945) ("It is . . . true that the right to a private interview by a person accused of crime with his lawyer prior to trial is a valuable right, and it is the duty of the court to jealously guard the accused from deprivation thereof.").

36. 315 U.S. 60 (1942) (attorney chosen by defendant was appointed by the trial court to also represent the accused's co-defendant).

37. 205 F.2d 879 (D.C. Cir. 1953).

38. *Id.* at 881.

tion of prejudice to the defendant from the intrusion.[39] *Weatherford* can be factually distinguished; *Coplon* involved surreptitious wiretaps, clearly fourth amendment violations, and *Caldwell* involved a government agent's relating the content of the attorney-client meeting to the prosecution. Nevertheless, the rationale behind *Coplon* and *Caldwell* would require a result in *Weatherford* opposite that reached by the Supreme Court.

Admittedly, *Coplon* and *Caldwell* are decisions by the court of appeals, but they were cited with apparent approval in subsequent Supreme Court cases.[40] Furthermore, two Supreme Court decisions, *Black*[41] and *O'Brien,*[42] could be viewed as supporting a per se right-to-counsel rule. A major dispute between the majority and the dissenters in *Weatherford* centered around their conflicting interpretations of *Black* and *O'Brien.* Since neither case expressly delineated the constitutional grounds for the reversal of the convictions, it was possible for the majority to read *Black* and *O'Brien* as focusing on a fourth amendment violation,[43] while the dissenters contended that the cases decided a sixth amendment issue.[44] Depending upon which fact is thought to be determinative, the illegal wiretaps or the intrusion into attorney-client discussions, either view might be accepted. In subsequent cases, however, the Supreme Court read and relied upon *Black* and *O'Brien* as sixth amendment cases.

In *Hoffa v. United States,*[45] an appeal from a mail fraud convic-

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39. The court found the prosecution's invasion of the confidential attorney-client consultations to be determinative. The case of On Lee v. United States, 343 U.S. 747 (1952), was distinguished in a footnote. In *On Lee,* a government agent had a hidden microphone on his person when he spoke with the defendant. The Supreme Court held that this procedure did not constitute an unreasonable search and seizure. To distinguish *On Lee,* the *Caldwell* court noted that the surreptitious effort before it was not an attempt to gather information directed at the accused alone, nor was it a case in which evidence had simply been improperly admitted—both fourth amendment violations. Instead, the *Caldwell* court viewed the issue as a sixth amendment problem: "Here the effort involved intrusion upon conferences, supposedly open only to the most loyal, between accused *and his counsel.*" 205 F.2d at 881 n.10 (emphasis by the court).

40. *See* Wolff v. McDonnell, 418 U.S. 539, 576 (1974) (civil rights action challenging administrative procedures of prison); Hoffa v. United States, 385 U.S. 293, 307 (1966) (prosecution's use of paid informant to engage defendant in incriminating conversations held not to violate sixth amendment since statements were not made in presence of counsel). *See also* notes 49 & 53 and accompanying text *infra.*

41. 385 U.S. 26 (1966). For factual and procedural history, see note 12 *supra.*

42. 386 U.S. 345 (1967). For factual and procedural history, see note 13 *supra.*

43. 429 U.S. at 552.

44. *Id.* at 567 n.6.

45. 387 U.S. 231 (1967) (petitioners convicted for mail and wire fraud).

tion, a communication between the defendant and a third party was overheard by the Federal Bureau of Investigation via electronic eavesdropping installed by trespass. The Supreme Court held that since there was no direct intrusion into an attorney-client relationship, as in *Black* and *O'Brien,* it would not, as it had in *Black* and *O'Brien,* require a new trial. Instead, the court vacated and remanded for proceedings to determine if the intercepted conversations vitiated the conviction in some manner.[46] The different remedy given in *Hoffa* strongly suggests that the Court in *Black* and *O'Brien* was not attempting to cure a fourth amendment violation but was directing its attention to the sixth amendment issue. Had the fourth amendment violation been the Court's concern, a remand would have been appropriate to determine whether in fact the illegal evidence was used in obtaining a conviction. Only a sixth amendment intrusion, affecting the fundamental fairness of the conviction, would have necessitated a new trial.

In an appeal of an unrelated jury tampering conviction, *Hoffa v. United States,*[47] the Court held that no sixth amendment right had been violated under the facts presented, even assuming *Coplon* and *Caldwell* were rightly decided, and generally referred to *Black* as authority for resolving the sixth amendment issue.

More recently, in *Wolff v. McDonnell,*[48] a civil rights action challenging a prison's administrative proceedings as violative of an inmate's sixth amendment rights, the Court cited *Black, O'Brien,* and *Coplon* to establish that the sixth amendment only protects the attorney-client relationship from intrusion in the "criminal setting."[49]

Therefore, at least three decisions of the Supreme Court prior to *Weatherford* have relied on *Black* and *O'Brien* as sixth amendment cases. If *Black* and *O'Brien* are sixth amendment cases, then the

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46. *Id.* at 233-34.

47. 385 U.S. 293, 307 (1966). *See* notes 51-53 and accompanying text *infra.*

48. 418 U.S. 539 (1974). Among other claims, the plaintiff alleged that his sixth amendment right to counsel had been violated by the prison's policy of opening all mail, including mail from the plaintiff's attorney, and inspecting it for contraband. Before the case reached the Supreme Court, the prison's policy had been modified so that any mail sent by an attorney was to be marked "privileged" and could not be opened except in the presence of the inmate to whom it was addressed. When the case reached the Supreme Court, the question was whether the prison's policy, as modified, violated the first, sixth, and fourteenth amendments. The Court held that none of these amendments were violated by the new procedure. *Id.* at 576.

49. *Id.*

rationale of those decisions would support a finding of a sixth amendment violation anytime an accused's confidential discussions with his attorney are invaded. Furthermore, the fact that in *Black* and *O'Brien* the intrusion was by electronic surveillance, rather than an informant, would not justify overlooking the sixth amendment violation in *Weatherford.* It is not the mode of the invasion that offends sixth amendment guarantees, but the presence of a governmental "ear" during private meetings preparatory to a criminal trial.[50] The significance to *Weatherford* of the *Hoffa* decision in the jury tampering case does not lie solely in its interpretation of *Black*. In *Hoffa*, the defendant was initially tried on charges of violating the Taft-Hartley Act[51] but was never convicted because his trial ended with a hung jury. Subsequently, the defendant was tried and convicted for attempting to bribe jurors at the former trial. The defendant appealed, maintaining that his sixth amendment rights had been violated by the presence of a government informer at conferences between the defendant and his attorney during the former trial.

The *Hoffa* Court assumed the informant was present during the attorney-client meeting preparatory to the defendant's trial for violation of the Taft-Hartley Act. Since that trial did not result in a conviction, it was not necessary for the Court to determine if the defendant's right to counsel had been violated for that trial. The defendant's bribery conviction presented an entirely separate matter, and, in the Court's view, the crucial question was whether the government informant was present at attorney-client conferences pertaining to the defense of the bribery charge.[52] Since the evidence supported a finding that the informant and defendant had only discussed the bribery plan when the defendant's counsel was not present, the court held the defendant's right to counsel for the brib-

50. *See* Weatherford v. Bursey, 429 U.S. at 564, 566-67 (Marshall, J., dissenting).

51. The official title of this Act is the Labor Management Relations Act, 29 U.S.C. §§141-197 (1970).

52. The Court's language was clear on this point.

> [The] clinching basic fact in the present case [is] that none of the petitioner's incriminating statements which Partin [the informer] heard were made in the presence of counsel, in the hearing of counsel, or in connection in any way with the legitimate defense of the Test Fleet prosecution [Taft-Hartley violations]. The petitioner's statements related to the commission of a quite separate offense—attempted bribery of jurors—and the statements were made to Partin out of the presence of any lawyers.

385 U.S. at 308.

ery trial was not violated. The *Hoffa* Court looked upon the sixth amendment right to counsel as a right arising each time an accused is brought to trial; thus, alleged violations of this right must be examined in the context of the trial on that particular charge.[53]

In *Weatherford,* the government agent was indisputably present during the attorney-client conference pertaining to the conviction and appeal then before the Court. While it is true the district court found that the agent never communicated the substance of the meeting to his superiors, communication was not the "clinching basic fact" referred to in the *Hoffa* case.[54] The *Hoffa* decision turned on the fact that the informant was not present during the attorney-client conference for the conviction before the Court on appeal. By contrast, the government agent in *Weatherford* knowingly attended an attorney-client consultation; under these facts, *Hoffa* would appear to support a finding of a sixth amendment violation.

Either the *Weatherford* majority is wrong in its interpretation of case law or, at best, case law is ambiguous. *Black, O'Brien,* and *Hoffa* appear to support Bursey's cause of action, but it is possible, as the majority did, to distinguish *Weatherford* factually from *Black* and *O'Brien* and to read *Hoffa* as not resolving the scope of the sixth amendment protection. In the face of this ambiguity, however, the Court should have resolved the sixth amendment issue in favor of Bursey on policy grounds. By tolerating intrusions into confidential attorney-client meetings, the Supreme Court is actually encouraging future invasions. The right to counsel is a fundamental right under the United States Constitution,[55] and the decision in *Weatherford* emasculates the protection afforded this right by the sixth amendment. The majority would condition a finding of a sixth amendment violation upon proof that the informant related the evidence to other law enforcement officials,[56] or that the informant went into the meeting with the intent of violating an accused's sixth amendment rights.[57] This is an unsatisfactory remedy because it places an almost impossible burden of proof on the defendant; offending government informants are not likely to admit their guilt.

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53. *Id.* at 307-08.

54. *See* note 52 *supra.*

55. In Chapman v. California, 386 U.S. 18 (1967), the Court noted that the right to counsel is so fundamental to a fair trial that an infraction of this right cannot be considered harmless error. *Id.* at 23 n.8 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)).

56. 429 U.S. at 556.

57. *Id.* at 558.

The courts should vigorously defend the right to counsel and all fundamental rights guaranteed by the Constitution. It would be understandable for the courts to allow a concession to the per se rule when it is shown that an informant would have placed himself in grave danger by refusing to attend the attorney-client meeting. Aside from this limited exception, intrusion upon an accused's sixth amendment right to counsel should not be tolerated.

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