RECENT DEVELOPMENT

UNITED STATES v. SCOTT: SIXTH AMENDMENT PROTECTIONS AGAINST INTRUSIONS INTO THE COUNCILS OF THE *PRO SE* DEFENDANT

In *United States v. Scott*,[1] the Ninth Circuit Court of Appeals held that the sixth amendment does not prohibit intentional intrusions by the government into the strategy conferences between a *pro se* defendant[2] and his lay advisers, unless the defendant can show that he was actually prejudiced by such intrusions. James Walter Scott, a self-styled "national tax resistance leader," was convicted after a jury trial of failure to file federal income tax returns over a four-year period.[3] Representing himself at trial, Scott was assisted in preparing his defense by a group of his fellow "tax resisters." This group met with Scott every day after trial to plan defense strategy. In addition, three of Scott's closest supporters participated extensively in various out-of-court hearings and conferences, and sat at the counsel table with Scott throughout the trial.[4] While these three individuals were not allowed to make objections or comments during the taking of testimony,[5] Scott frequently consulted with them in the presence of the jury. Thus, they played a particularly active role in Scott's overall defense effort.

After the trial had concluded, Scott learned that an undercover agent of the Internal Revenue Service had been among those attending his daily defense strategy sessions. Scott therefore moved that his conviction be set aside and a new trial ordered. In support of this motion, Scott submitted affidavits which asserted that the agent had regularly advised Scott on trial strategy, urging him at one point to take the stand in his own defense, and which also suggested that the agent had stolen certain defense papers.[6] Apparently unimpressed by these allegations, however,

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1. 521 F.2d 1188 (9th Cir. 1975).

2. A *pro se* defendant is one who represents himself instead of being represented by an attorney. *See* Faretta v. California, 95 S. Ct. 2525 (1975).

3. Under 26 U.S.C. § 7203 (1968), such failure constitutes a misdemeanor punishable by a fine of $10,000, or one year in prison, or both.

4. 521 F.2d at 1191 n.3.

5. *Id.*

6. Scott also claimed that

> . . . the agent interfered with his defense by burglarizing his trial headquarters,

the district court denied Scott's motion without even holding an evidentiary hearing to determine their substance. Scott appealed this decision primarily on the ground that, in penetrating his defense councils by means of an undercover agent, the government had infringed upon his sixth amendment rights.[7]

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attempting to influence the jury by riding on the elevator at the court house with them and making prejudicial remarks about Scott, engaging in electronic surveillance, making a bomb threat on the court house to adversely influence the jury, and lying to and misleading Scott to his detriment. *Id.* at 1190.

However, no affidavits were filed in support of these allegations. *Id.*

The penetration of Scott's defense councils by the undercover agent should be considered an intentional intrusiou for purposes of determining whether Scott was entitled to an automatic reversal of his conviction. See notes 52-60 *infra* and accompanying text. The agent was deliberately placed inside Scott's defense camp by the IRS, with full knowledge of the prosecution. *Id.* Although he was instructed not to interfere with the defense effort, on at least one occasion the agent passed information to the prosecution relating to alleged defense tampering with trial exhibits. Judge Browning, in his dissenting opinion, suggested that this finding in itself lent "some credibility to the conteution that [the agent] may have also communicated informatiou relevant to appellant's legitimate defense." *Id.* at 1200 n.11. Even if such information was not communicated, however, the very presence of a deliberately placed government agent inside the defense camp created a "very real likelihood of prejudice." United States v. Rispo, 460 F.2d 965, 977 (3d Cir. 1972). *See* Handschu v. Special Services Division, 349 F. Supp. 766, 771 (S.D.N.Y. 1972), holding that police department was responsible for the activities of police undercover agents, even if such activities violated departmental regulations. *Cf.* Sherman v. United States, 356 U.S. 369, 373-75 (1958) (government could not disown informer on basis that it was ignorant of his activities).

7. Scott also invoked the protection of the fourth and fifth amendments before the court of appeals. The court correctly noted that the Supreme Court's decision in Hoffa v. United States, 385 U.S. 293 (1966) (*Hoffa I*), was dispositive of the defendant's fourth amendment claim. 521 F.2d at 1190-91. In *Hoffa I*, which involved a factual situation similar to *Scott*, see notes 26-32 *infra* and accompanying text, the Supreme Court held that there had been no invasion of any interests legitimately protected by the fourth amendment. The Court said that the defendant had effectively waived any fourth amendment privilege since every word that the informer heard "was either directed to him or knowingly carried on in his presence." 385 U.S. at 302. The defendant's consent was not vitiated because the informer had failed to disclose his true identity as a government informer, since

> the risk of being overheard by an eavesdropper or betrayed by au informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of humau society. It is the kind of risk we necessarily assume whenever we speak. *Id.* at 303, *quoting* Lopez v. United States, 373 U.S. 427, 465 (1963) (dissenting opinion of Justice Brennan).

The Court in *Hoffa I* thus made it clear that the fourth amendment does not protect a defendant's misplaced belief that a person in whom he confides will not reveal information communicated to him. *Accord*, Lewis v. United States, 385 U.S. 206 (1966).

As to Scott's claim under the fifth amendment, both the dissenting opinion by Judge Browning, and the *Scott* majority opinion recognized that a governmental intrusion which was not sufficient to bring the sixth amendment into play could be a denial of a fair trial as guaranteed by the fifth amendment due process clause. The analysis to be used in such a case is nearly identical to the analysis used to determine if the sixth amendment has been violated; however, under the fifth amendment as applied by the *Scott* majority, the defendant must show actual prejudice. The outcome of *Scott* therefore depended upon the

The sixth amendment[8] right to counsel has been declared "fundamental and essential to a fair trial."[9] A defendant has a constitutional right to retain counsel of his own choosing,[10] and must be given a reasonable length of time to secure satisfactory representation.[11] If a criminal defendant cannot afford an attorney, one must be provided for him in all felony cases[12] and in any other case where he is faced with the possibility of imprisonment.[13] Counsel, whether retained or appointed, must provide a defendant with "effective assistance," not merely perfunctory representation.[14] Therefore, a court must give defense counsel sufficient time to prepare his case and to consult with his client.[15]

While he is entitled to effective representation, a criminal defendant is not required to accept the assistance of counsel. In *Faretta v. California*,[16] the Supreme Court recently made it clear that a defendant may elect to defend himself *as a matter of constitutional right*. The Court noted that

> [t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. . . . Although not stated . . . in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment.[17]

Thus, the sixth amendment provides a criminal defendant with two correlative and equal rights: a right to the effective assistance of counsel and a right to defend *pro se*.[18]

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court's interpretation of the sixth amendment issue, and the dissenting judge's differing interpretation.

8. The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

9. Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

10. Powell v. Alabama, 287 U.S. 45, 53 (1932). There is some indication that a defendant may be allowed to choose a laymen (*i.e.*, a non-lawyer) as his counsel. Although a defendant appears to have no constitutional right to be represented by a layman, *see* United States v. Cooper, 493 F.2d 473 (5th Cir.), *cert. denied*, 419 U.S. 859 (1974); United States v. Stockheimer, 385 F. Supp. 979, 983 (W.D. Wis. 1974); Hickock v. Hand, 190 Kan. 224, 373 P.2d 206 (1962), *cert. denied*, 372 U.S. 924 (1963), at least one court has held that the judge may in his discretion allow a defendant who so desires to be represented by a layman instead of an attorney. *See* United States v. Stockheimer, 385 F. Supp. 979, 985 (W.D. Wis. 1974).

11. Powell v. Alabama, 287 U.S. 45, 53 (1932).

12. Gideon v. Wainwright, 372 U.S. 335 (1963); *cf.* Johnson v. Zerbst, 304 U.S. 458 (1938).

13. Argersinger v. Hamlin, 407 U.S. 25 (1972).

14. Powell v. Alabama, 287 U.S. 45 (1932).

15. *Id.* at 53, 59.

16. 95 S. Ct. 2525 (1975).

17. *Id.* at 2533.

18. *Id.* As interpreted by the Court, the constitutional provision guaranteeing the

As a part of its guarantee of effective representation, the sixth amendment protects a criminal defendant from surreptitious governmental intrusions into his defense councils. The District of Columbia Circuit considered the problem of deliberate intrusions into the attorney-client relationship in *Coplon v. United States*[19] and *Caldwell v. United States*.[20] Judith Coplon had been convicted for copying and removing documents from the Department of Justice where she was employed. Following her conviction she moved for a new trial on the grounds that her telephone had been tapped by the FBI throughout her trial, and that protected communications with her attorney had been intercepted as a result. Her motion was denied by the trial court without a hearing, and she appealed. The court of appeals stated: "It is well settled that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him."[21] On this basis the court concluded that intentional governmental interference with a defendant's right to counsel invalidates the trial during which such interference has occurred,[22] and requires any resulting conviction to be set aside, regardless of whether prejudice has been shown.[23] The case was therefore remanded for an evidentiary hearing, with instructions that a new trial

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defendant the assistance of counsel merely supplements his basic right to conduct his own defense.

19. 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952).

20. 205 F.2d 879 (D.C. Cir. 1953).

21. 191 F.2d at 757. It seems obvious that a defendant must be able to speak honestly and openly with his attorney in order to prepare an effective defense. He may not feel free to do this if he fears that government representatives are listening in on his conferences. See notes 43-45 *infra* and accompanying text for a discussion of protections extending beyond lawyer-client conversations.

22. However, while that trial is invalidated, the defendant can subsequently be retried. This has been called the "trial-bar" rule by some commentators. *See* Note, *Government Interception of Attorney-Client Communications*, 49 N.Y.U.L. REV. 87, 90 (1974).

23. This doctrine requiring automatic reversal without the need to show prejudice is referred to as the "per se rule." The justification for the rule is 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." Glasser v. United States, 315 U.S. 60, 76 (1942). *See also* United States v. Rispo, 460 F.2d 965, 974 (3d Cir. 1972). It also has been described as a "salutory, prophylactic rule [since it] relieves the defendant of a practically impossible burden of proving that the unconstitutional conduct worked actual harm to him. A rule or constitutional principle is useless if the burden of proof necessary to vindicate it is so heavy as to preclude its being effective." United States *ex rel.* Cooper v. Denno, 221 F.2d 626, 631 (2d Cir.) (concurring opinion of Judge Frank), *cert. denied*, 349 U.S. 968 (1955). *See also* United States v. Gartner, 518 F.2d 633, 637 (2d Cir. 1975) (justifying the per se rule on the basis of its deterrent effect); Note, *supra* note 22 (advocating even stricter sanctions against the government for sixth amendment intrusions than the courts now impose).

be ordered in the event that Coplon's wiretap allegations were substantiated.

In *Caldwell*, the District of Columbia Circuit was again presented with an intentional intrusion into defense councils, this time through the use of an undercover agent, hired to find out who was "behind" the defendant's alleged offenses. The agent won the confidence of the defendant and his lawyer, and eventually joined the defense team as an investigator. In this capacity, he had "free access to the planning of the defense."[24] The prosecutor was fully aware of the agent's dual role, and he received frequent reports concerning defense preparation for the impending trial. The *Caldwell* court saw no reason to differentiate this type of penetration from the wiretaps which had been condemned in *Coplon*. Regardless of the means of intrusion, the court held that where such intrusion is deliberate, a defendant is entitled to a new trial without the need to show actual prejudice.[25]

The Supreme Court apparently placed its imprimatur on the *Coplon* and *Caldwell* decisions in *Hoffa v. United States (Hoffa I)*.[26] James Hoffa was originally tried in 1962 for violations of the Taft-Hartley Act, but the trial resulted in a hung jury. Subsequently, in 1964, Hoffa and three co-defendants were brought to trial on charges of attempting to bribe jurors during the 1962 proceeding. At this second trial an informer who had been planted by the government testified to various incriminatory remarks made by Hoffa in 1962 out of the presence of counsel. The Court held that this testimony had been properly admitted on the grounds that the incriminatory remarks in question had not been related to any legitimate defense effort in the first trial.[27] In reaching this assessment, however, the Court noted that the informer had also been involved in 1962 in several legitimate defense strategy conferences between Hoffa and his attorneys.[28] The Court suggested, while declining to expressly hold, that if the 1962 trial had resulted

24. 205 F.2d at 880.

25. *Id.* at 881. As opposed to *Coplon*, where the district court ruled solely on the basis of opposing affidavits, the district court in *Caldwell* had already established in an evidentiary hearing that an undercover agent had penetrated the defense effort. The court of appeals therefore reversed Caldwell's conviction and remanded the case for a new trial. *Id.* The court also made it clear that an outright acquittal—that is, a reversal of a defendant's conviction and a dismissal of the charges against him—would be ordered instead of a new trial *only* where a defendant shows such actual prejudice as would render the new trial itself unfair. *Id.* at 881 n.11.

26. 385 U.S. 293 (1966).

27. *Id.* at 309. In effect, this is an application of the trial-bar rule which had been announced in *Caldwell* and *Coplon*. See note 22 *supra* and accompanying text.

28. *Id.* at 306.

in a conviction, the very presence of the informer at these strategy conferences would have required that the conviction be set aside under the per se rule developed by the District of Columbia Circuit in *Coplon* and *Caldwell*.[29]

Hoffa I, as well as *Coplon* and *Caldwell*, dealt with intentional intrusions by the government. The Court extended the sixth amendment's protections to unintentional intrusions in *Black v. United States*.[30] In that case, the FBI had overheard conversations of a defendant and his lawyer through the use of a listening device installed for a purpose unrelated to the prosecution in question. The Court, in a per curiam opinion, ruled that a new trial was required in order to "permit the removal of any doubt as to Black's receiving a fair trial."[31] Justices Harlan and Stewart strenuously dissented. They conceded that the defendant was entitled to a remand for a prejudice hearing, but they did not believe that the record justified an automatic reversal.[32] Nevertheless, the Court followed *Black* in the subsequent case of *O'Brien v. United States*,[33] which involved unintentionally overheard conversations between the defendant and his lawyer, and between the defendant and a third person. The issue of unintentional intrusion has also arisen in several lower court cases. These courts have generally followed the approach advocated by Justices Harlan and Stewart, remanding for a hearing to determine if a defendant has been prejudiced.[34]

As *O'Brien* suggests, various courts have extended the sixth amendment beyond attorney-client conferences in order to protect other communications related to the defense effort. In *Hoffa v. United States*[35] *(Hoffa II)*, the FBI inadvertently overheard a conversation between one of the defendants and a third party. Since the conversation dealt with defense preparation for a pending trial, the Court remanded the case for a hearing to determine whether the intrusion had prejudiced the defendant.[36] In *United States v. Seale*,[37] the Seventh Circuit held that the sixth

29. *Id.* at 307.

30. 385 U.S. 26 (1966).

31. *Id.* at 29.

32. *Id.* at 31 (dissenting opinion).

33. 386 U.S. 345 (1967).

34. *See* United States v. Brown, 484 F.2d 418, 424-25 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); United States v. Bullock, 441 F.2d 59 (5th Cir. 1971); Taglianetti v. United States, 398 F.2d 558, 570 (1st Cir. 1968), *aff'd per curiam*, 394 U.S. 316 (1969). *But see* Gradsky v. United States, 376 F.2d 993 (5th Cir.), *cert. denied*, 389 U.S. 908 (1967).

35. 387 U.S. 231 (1967).

36. *Id.* at 232-33. The Court stated that it would not apply the per se rule and reverse the defendant's conviction since "there was apparently no direct intrusion here

amendment protected a conversation between two persons who were relaying a message to the defendant from his attorney.[38] The case was therefore remanded so the lower court could determine if the intrusion had proved prejudicial to the defense.[39]

The majority in *United States v. Scott*[40] rejected the defendant's reliance on these intrusion cases. In the court's view, these cases were distinguishable on the basis that they dealt with governmental intrusions into confidential communications between a defendant and his counsel, whereas no attorney-client relationship was violated in the case before the court.[41] Indeed, the court apparently viewed the decision to appear *pro se* as a waiver of the right to effective assistance of counsel, and it concluded that Scott had therefore forfeited any sixth amendment protection against governmental intrusions into his defense strategy conferences.[42]

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into attorney-client discussions." *Id.* at 233. However, the Court directed that a new trial be held if the district court, on remand, found that the defendant had been hindered in the preparation of his defense.

37. 461 F.2d 345 (7th Cir. 1972).

38. *Id.* at 364.

39. *See also* United States v. Lebron, 222 F.2d 534 (2d Cir.), *cert. denied*, 350 U.S. 876 (1955) (conference between defense lawyer and prospective witness is protected); United States v. Cooper, 397 F. Supp. 277, 283 (D. Neb. 1975) (conversations between defendant and non-lawyers working for the defense are protected); United States v. Doe, 364 F. Supp. 1385 (E.D. Pa. 1973).

It must be noted that in *Hoffa II* and *Seale* the interceptions of conversations relating to defense strategy were not intentionally made. The per se rule of *Caldwell* and *Coplon* is usually applied to intentional government intrusions, while in the case of unintentional intrusions all that is normally required is a hearing to determine whether the defendant has been prejudiced. See notes 57-60 *infra* and accompanying text. It is therefore unclear whether the courts in *Hoffa II* and *Seale* declined to order automatic reversals because the intrusion did not directly violate the attorney-client relationship, or because the intrusions were unintentional.

40. 521 F.2d 1188 (9th Cir. 1975).

41. *Id.* at 1191.

42. *Id.* at 1191-92. Additionally the court stated that even if the sixth amendment prohibited the penetration of an undercover agent into Scott's defense team, Scott would have to show that he had been prejudiced by this intrusion in order to gain a new trial. *Id.* at 1192. In the opinion of the majority, however, prejudice was impossible since the nature of Scott's defense was widely publicized and since the evidence against him was overwhelming. *Id.* at 1192-95.

Judge Browning responded to this reasoning with the following observations:

> Whether or not appellant was guilty of the charge against him, he was entitled to be fairly tried and to freely exercise his right to represent himself without interference or obstruction by the prosecution. The fact that appellant's general line of defense was well known does not mean that his trial tactics and strategy were foreordained. [The agent] allegedly sought to influence at least one element of that strategy (appellant's decision to take the stand) in a way that might have affected the outcome. *Id.* at 1200 (dissenting opinion).

See Coplon v. United States, 191 F.2d 749, 760 (D.C. Cir. 1951), *cert. denied*, 342 U.S.

Other cases, however, indicate that the sixth amendment's protection is not confined to communications between lawyer and client, but extends its guarantee to an "effective" defense. For example, a federal district court in *In re Terkeltoub*[43] viewed the amendment as ensuring the privacy of an attorney in all aspects of the preparation of the defendant's case.

> Because privacy is so vital to these preparatory efforts, the prosecution is forbidden to eavesdrop or plant agents to hear the councils of the defense. . . . It makes no difference whether the conversations unlawfully audited are solely between the counsel and client and thus within the traditional, nonconstitutional privilege. The *defendant* has a right to prepare in secret, seeking and inviting those he deems loyal or those with whom he is willing to risk consultation. The prosecution's secret intrusion offends both the Fifth and Sixth Amendments.[44]

Thus, the sixth amendment protection should extend to the entire defense preparation effort, including strategy sessions conducted by attorneys in the absence of the defendant.[45] When a *pro se* defendant—acting as his own attorney—performs these same functions, it follows that the amendment should also protect his efforts from government intrusion.

In dissent, Judge Browning took issue with the majority's con-

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926 (1952), where the court stated that no matter how overwhelming the evidence, a conviction cannot stand if the defendant has been denied effective assistance of counsel.

43. 256 F. Supp. 683 (S.D.N.Y. 1966). The case involved an application to compel an attorney to testify before a grand jury concerning conversations he had with a potential witness in the presence of his client.

44. *Id.* at 685 (emphasis added). *See also* United States v. Lebron, 222 F.2d 531 (2d Cir.), *cert. denied*, 350 U.S. 876 (1955) (defendant's lawyer must be free to interview witnesses without intrusion by government); Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953), *cert. denied*, 349 U.S. 930 (1955) (government placement of agent as friend and assistant to defendant violated sixth amendment right to effective counsel).

Hickman v. Taylor, 329 U.S. 495 (1947), lends further support for the position that sixth amendment protections extend beyond attorney-client discussions. Although *Hickman* involved an interpretation of the Federal Rules of Civil Procedure dealing with discovery, the court noted the significance of protecting the privacy of the persons preparing the case.

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his client. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and counsel. *Id.* at 510-11.

If, as both *Hickman* and *Terkeltoub* indicate, the purpose of protecting the privacy of trial preparation is to allow an effective presentation of a case, the policy would be equally applicable to all cases, whether the party is proceeding with counsel or *pro se*.

45. *See* Note, *Government Interception of Attorney-Client Communications*, 49 N.Y.U.L. REV. 87, 90 (1974).

clusion that the sixth amendment was inapplicable, as well as with its position that a showing of prejudice was required. He accused the majority of "neglect[ing] the fact that the accused in a criminal case has a constitutional right to defend himself that is equal in dignity to his constitutional right to counsel."[46] The sixth amendment, he concluded, fully protects the conferences of a *pro se* defendant and his lay advisers from governmental intrusions.[47]

As indicated, the Ninth Circuit apparently treated Scott's waiver of the right to counsel as a waiver of all sixth amendment protections. However, *Faretta v. California*[48] appears to support Judge Browning's position that the sixth amendment is equally applicable to the *pro se* defendant. In *Faretta,* the Court stated that the colonists and Framers never

> imagined that this right [of self-representation] might be considered inferior to the right of assistance of counsel. To the contrary, the colonists and the Framers, as well as their English ancestors, always conceived of the right to counsel as an "assistance" for the accused, to be used *at his option,* in defending himself.[49]

Yet the *Scott* majority seemingly considered the sixth amendment option to appear *pro se* as a right inferior to the sixth amendment guarantee of effective counsel, for the majority implied that where a government agent intrudes into strategy conferences between a defendant and his attorney, it would reverse any resulting conviction.[50] Thus, the *Scott*

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46. 521 F.2d at 1198 (dissenting opinion).

47. *Id.* at 1198-99.

48. 95 S. Ct. 2525 (1975). *Faretta* made it clear that a defendant has a constitutional right to represent himself. See notes 16-18 *supra* and accompanying text. The case was pending before the Court when *Scott* was decided. However, as Judge Browning pointed out, the Ninth Circuit has long recognized a sixth amendment *right* to defend *pro se.* 521 F.2d at 1198 (dissenting opinion). *See* United States v. Dujanovic, 486 F.2d 182 (9th Cir. 1973); Meeks v. Craven, 482 F.2d 465 (9th Cir. 1973); United States v. Price, 474 F.2d 1223 (9th Cir. 1973); Haslam v. United States, 431 F.2d 362 (9th Cir. 1970), *cert. denied,* 402 U.S. 976 (1971); Arnold v. United States, 414 F.2d 1056 (9th Cir. 1969), *cert. denied,* 396 U.S. 1021 (1970); Hodge v. United States, 414 F.2d 1040 (9th Cir. 1969) (*en banc*); Bayless v. United States, 381 F.2d 67 (9th Cir. 1967).

It is true that the Ninth Circuit occasionally referred to *pro se* representation as a "waiver" of the right to counsel. *See* United States v. Dujanovic, 486 F.2d 182 (9th Cir. 1973); Hodge v. United States, 414 F.2d 1040 (9th Cir. 1969) (*en banc*). However, these cases did not suggest that a *pro se* defendant has waived his sixth amendment protections. Rather, the Ninth Circuit was simply recognizing that since the right to counsel and the correlative sixth amendment right to defend oneself cannot both be exercised at the same time, the defendant must "waive" his right to counsel before his sixth amendment right to appear *pro se* can be exercised. *See* United States v. Dujanovic, 486 F.2d 182, 185 (9th Cir. 1973).

49. 95 S. Ct. at 2539 (emphasis added).

50. 521 F.2d at 1193; *cf. In re* Terkeltoub, 256 F. Supp. 683, 685 (S.D.N.Y. 1966).

court made it more "expensive" for a *pro se* defendant to confer with lay advisors than for a defendant who had retained counsel to confer with his attorney. This result is particularly difficult to accept in light of the Supreme Court's well-established position that a criminal defendant should not be deterred from exercising his constitutional rights, and that it is "intolerable that one constitutional right should have to be surrendered in order to assert another."[51]

Though the precedents indicate that the sixth amendment does protect a *pro se* defendant from governmental intrusion, and that the result reached in *Scott* is constitutionally unacceptable, the question of an appropriate remedy still remains. In most intrusion cases, courts either have remanded for a hearing to determine whether a defendant was actually prejudiced by the alleged intrusion,[52] or have applied a per se rule requiring the automatic reversal of the conviction, with leave to the government to re-prosecute the case.[53] When the problem of governmental intrusion into defense councils first arose in the *Caldwell* and *Coplon* cases, the District of Columbia Circuit adopted a "per se" rule requiring reversal without regard to whether a defendant had been prejudiced.[54] The Supreme Court seemed to endorse this approach in

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See generally Hoffa v. United States, 385 U.S. 293 (1966); United States v. Gartner, 518 F.2d 633, 637 (2d Cir. 1975); United States v. Rosner, 485 F.2d 1213, 1227 (2d Cir. 1973), *cert. denied,* 417 U.S. 950 (1974); United States v. Brown, 484 F.2d 418, 424-25 (5th Cir. 1973), *cert. denied,* 415 U.S. 960 (1974); South Dakota v. Long, 465 F.2d 65, 72 (8th Cir. 1972), *cert. denied,* 409 U.S. 1130 (1973); United States v. Zarzonr, 432 F.2d 1, 3 (5th Cir. 1970); Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953); Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 926 (1952).

51. Simmons v. United States, 390 U.S. 377, 394 (1968). In *Simmons,* the Court held that a defendant's testimony in support of a motion to suppress evidence on fourth amendment grounds could not be used against him at trial. The Court was of the opinion that without this rule, the defendant would be placed in the dilemma of either giving up what he believed to be a valid fourth amendment claim, or of waiving his fifth amendment privilege against self-incrimination. *See also* Griffin v. California, 380 U.S. 609 (1965).

52. *See, e.g.,* Hoffa v. United States, 387 U.S. 231, 233 (1967); United States v. Seale, 461 F.2d 345, 364, 366 (7th Cir. 1972); Manuel v. Salisbury, 446 F.2d 453, 456-57 (6th Cir. 1971), *cert. denied,* 405 U.S. 1046 (1972); United States v. Zarzour, 432 F.2d 1, 5 (5th Cir. 1970); Taglianetti v. United States, 398 F.2d 558, 570 (1st Cir. 1968), *aff'd per curiam,* 394 U.S. 316 (1969).

53. *See, e.g.,* O'Brien v. United States, 386 U.S. 345 (1967); Hoffa v. United States, 385 U.S. 293, 307 (1966); Black v. United States, 385 U.S. 26 (1966); Gradsky v. United States, 376 F.2d 993 (5th Cir.), *cert. denied,* 389 U.S. 908 (1967); Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953); Coplon v. United States, 191 F.2d 749, 759-60 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 926 (1952); *cf.* United States v. Rispo, 460 F.2d 965, 975-77 (3d Cir. 1972).

54. See notes 19-25 *supra* and accompanying text.

Hoffa I.[55] Nevertheless, the majority in *Scott* concluded that most courts have "refused to apply a per se rule."[56] Yet the cases cited by the majority do not support this conclusion. On the contrary, these cases have correctly noted that the per se rule should be applied in cases wherever, as in *Caldwell* and *Coplon*, there has been an intentional surreptitious invasion of the defense camp—where "government intrusion of the grossest kind" is evident.[57] Where, however, a defendant has not shown an impermissible intrusion into the councils of the defense,[58] or where the intrusion was unintentional,[59] a conviction will not be re-

55. See notes 26-29 *supra* and accompanying text.

56. 521 F.2d at 1192.

57. Hoffa v. United States, 385 U.S. 293, 306 (1966); *cf. In re* Terkeltoub, 256 F. Supp. 683, 685 (S.D.N.Y. 1966). *See also* United States v. Gartner, 518 F.2d 633, 637 (2d Cir. 1975); United States v. Rosner, 485 F.2d 1213, 1227-28 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); United States v. Brown, 484 F.2d 418, 424-25 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); South Dakota v. Long, 465 F.2d 65, 72 (8th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973); United States v. Rispo, 460 F.2d 965, 975-77 (3d Cir. 1972); Manuel v. Salisbury, 446 F.2d 453, 456 (6th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972); United States v. Zarzour, 432 F.2d 1, 3 (5th Cir. 1970); United States v. Lebron, 222 F.2d 531, 534 (2d Cir.), *cert. denied*, 350 U.S. 876 (1955); Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953); Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952); United States v. Cooper, 397 F. Supp. 277, 285 (D. Neb. 1975).

The penetration by the IRS into Scott's defense councils was deliberate, see note 6 *supra*, and arguably should therefore fall into this category of "gross" intrusions.

58. *See, e.g.*, United States v. Rosner, 485 F.2d 1213, 1227-28 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974) (co-defendant who had agreed to "cooperate" with prosecution nevertheless refused to inform on Rosner); United States v. Zarzour, 432 F.2d 1, 3 (5th Cir. 1970) (private investigator hired by defendant's lawyer was also a paid confidential FBI informer on unrelated matters, and he remained completely loyal to defense throughout trial); United States v. Alderisio, 424 F.2d 20 (10th Cir. 1970) (no attorney-client relationship existed at time of overheard conversations between defendant and third person who was an attorney, but who was not then representing defendant); United States v. Lebron, 222 F.2d 531, 535 (2d Cir.), *cert. denied*, 350 U.S. 876 (1955) (informer present at conference attended by defendant's attorney at which the only pertinent matter discussed was fund-raising for the defense). *See also* United States v. Gartner, 518 F.2d 633 (2d Cir. 1975); Manuel v. Salisbury, 446 F.2d 453 (6th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972); United States v. Andreadis, 234 F. Supp. 341 (E.D.N.Y. 1964).

59. *See, e.g.*, United States v. Brown, 484 F.2d 418, 424-25 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974) (conversation between defendant and counsel was overheard in course of unrelated electronic surveillance, but defendant did not allege that conversation was related to trial in question); United States v. Bullock, 441 F.2d 59 (5th Cir. 1971); Taglianetti v. United States, 398 F.2d 558, 570 (1st Cir. 1968), *aff'd per curiam*, 394 U.S. 316 (1969) (same fact pattern as *Brown*; additionally, information from the surveillance was not transmitted to prosecution). *But see* O'Brien v. United States, 386 U.S. 345 (1967); Black v. United States, 385 U.S. 26 (1966); Gradsky v. United States, 376 F.2d 993 (5th Cir.), *cert. denied*, 389 U.S. 908 (1967).

A line of unintentional intrusion cases has developed in the Second Circuit governing situations where there are two or more defendants, and one of them agrees to

versed automatically. Instead, a court will generally remand such a case for a hearing to determine whether the defendant has been prejudiced by the intrusion.[60] Thus, the court in *Scott* should, at the very least, have remanded the case for such a hearing.

The Supreme Court has made it clear that the sixth amendment guarantees a criminal defendant both the assistance of counsel and the right to appear *pro se*. In light of these two correlative and equal rights, this Recent Development has taken the position that sixth amendment protections should be applied so as to enable any defendant to make an "effective" defense. Since no defendant can present an effective defense if the prosecution is permitted to intrude into his defense councils, the sixth amendment must protect the *pro se* defendant, as well as the defendant who is represented by counsel, against such intrusions. When the government intrudes into the defense councils of any defendant, then depending upon whether the intrusion was intentional, the defendant should be given either a new trial or a remand to determine if he has been prejudiced.

"cooperate" with the prosecution but refuses to reveal defense trial strategy. Where the facts of a particular case have been clearly established by the district court, the Second Circuit has been willing to make its own finding that the defendant was not prejudiced. United States v. Arroyo, 494 F.2d 1316 (2d Cir.), *cert. denied*, 419 U.S. 827 (1974); United States v. Mosca, 475 F.2d 1052 (2d Cir.), *cert. denied*, 412 U.S. 948 (1973); Klein v. Smith, 383 F. Supp. 485, 487 (S.D.N.Y. 1974); United States v. Cohen, 358 F. Supp. 112, 127-29 (S.D.N.Y.), *aff'd*, 485 F.2d 945 (2d Cir. 1973); *cf.* South Dakota v. Long, 465 F.2d 65 (8th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973). *But see* United States v. Rispo, 460 F.2d 965 (3d Cir. 1972) (co-defendant had been a paid government informer throughout entire trial):

> Whether or not the intrusion by the Government here can be characterized as 'gross' is a matter of degree, and this court will not be bound by such considerations where the probability of unfairness due to the Government's misconduct is incapable of realistic delineation. *Id.* at 976.

Declining to apply a rigid per se rule, the Third Circuit nevertheless ordered a new trial because it considered the likelihood of prejudice so great that its elimination from the trial was required in order to satisfy the demands of due process. *Id.* at 977.

60. See cases cited in notes 58-59 *supra*.