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**GOVERNMENT INTRUSION UPON
ATTORNEY-CLIENT RELATIONSHIPS—
WEATHERFORD V. BURSEY**

Privacy of attorney-client communications is protected by the Sixth Amendment's guarantee that a criminal defendant "have the Assistance of Counsel for his defense."¹ When the government intrudes into the legal camp of the defense, via undercover agent or electronic monitor, does the Sixth Amendment's right to effective assistance of counsel demand reversal of the defendant's conviction and a new trial? In *Weatherford v. Bursey*,² the Supreme Court determined that in the absence of a purposeful intrusion, tainted evidence presented at trial, or communication of defense strategy to the prosecution, a defendant has not been deprived of the right to effective assistance of counsel. Therefore, reversal and new trial are not mandated by the Sixth Amendment.

Petitioner Weatherford, while working as an undercover agent in 1970, participated with respondent Bursey in a draft board demonstration which resulted in their arrest for the malicious destruction of property.³ After indictment, while posing as a co-defendant, Weatherford participated in two meetings with Bursey and his attorney at which the upcoming trial was discussed.⁴ Bursey's subsequent conviction was due in large part to Weatherford's eyewitness tes-

1. U.S. CONST. amend. VI. Privacy of attorney-client communications is also protected by the common-law attorney-client privilege:

(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 WIGMORE, EVIDENCE § 2292 (McNaughton rev. 1961). The constitutional right to effective assistance of counsel is a much broader right than the common-law privilege, which is said to be strictly construed within the narrowest possible limits. See *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 323 (7th Cir. 1963), cert. denied, 375 U.S. 929 (1963).

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

3. Weatherford, an employee of the South Carolina Law Enforcement Division (SLED) serving as an undercover agent on the University of South Carolina Campus, was released within hours of his arrest. Bursey remained in jail for twelve days and was told by SLED agents that Weatherford was also still in jail. Upon Bursey's release, Weatherford confirmed his fellow agents' falsifications.

In order to maintain the co-defendant deception, Solicitor Foard made arrangements for a lawyer, Frank Taylor, to appear to represent Weatherford. Bursey's lawyer was completely deceived by Taylor's purported representation of Weatherford. Brief for Respondent at 9-11, *Weatherford v. Bursey*, 429 U.S. 545 (1977).

4. Discussion included defense tactics generally, Weatherford's plans to seek a severance, and the problem of a possible informer. Weatherford suggested that a third participant, Merrick, might be an agent. Since Weatherford denied that he would testify against Bursey, and

timony at trial.⁵ The prosecution disavowed any calculated plan of using Weatherford as a witness, claiming that the decision that he testify was made on the day of Bursey's trial. The decision was a result of Weatherford's having been seen in the company of law enforcement agents, thus losing some of his effectiveness for undercover work.⁶ Bursey, upon completing his prison sentence, commenced a federal civil rights action under 42 U.S.C. § 1983⁷ seeking redress from Weatherford and his superior for violation of his constitutional rights, including his Sixth Amendment right to the effective assistance of counsel.⁸

The district court concluded that Bursey's constitutional rights had not been violated because Weatherford did not communicate the sub-

Merrick was believed to be out of the country, it was determined that the State would be unable to prove by direct testimony that Bursey was present at the draft board demonstration. At the second meeting it was also determined that Bursey would not testify. *Id.* at 14-16.

5. *Id.* at 17.

6. Weatherford went on a weekend vacation with fellow SLED agents to Hilton Head, a plush South Carolina resort. Thinking that he might have been seen there by a friend of Bursey's, Weatherford attempted to preserve the co-defendant deception by telling Bursey that a benefactor named Dr. Hardwick had insisted he discuss his case with the police. Weatherford assured Bursey that he would not cooperate with government officials and had rejected all their overtures. *Id.* at 15.

7. 42 U.S.C. § 1983 (1970) provides that:

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.

For an extensive discussion of the background of § 1983 and suggestions for improving its effectiveness in vindicating constitutional rights, see Note, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

Although § 1983 was enacted as part of the Civil Rights Act of 1871, it was seldom used for almost a century because of restrictive judicial construction. The volume of litigation increased, however, after the Supreme Court's decision in *Monroe v. Pape*, 365 U.S. 167 (1961), which held that proof of neither willful conduct nor invocation of state remedies was required to state a cause of action under the statute. As a result of this increased litigation, courts have begun to fashion doctrines to limit § 1983 lawsuits. In addition, recovery is unlikely for a plaintiff who is a former criminal defendant and is viewed in an unfavorable light by members of the jury. Because of these difficulties, the § 1983 damage action has proved largely ineffective as a mechanism for obtaining compensation for this class of plaintiffs. *Id.*

8. Respondent also contended that Weatherford's assertion, up until the day of the trial, that he would not testify against Bursey operated to deprive him of due process of law in violation of the Fourteenth Amendment. The court of appeals agreed with this contention, reasoning that the prosecution's conduct lulled Bursey into a false sense of security, denying him the opportunity to plea bargain, to do a background check on Weatherford for cross-examination purposes, and to counter the impact of eyewitness identification. *Bursey v. Weatherford*, 528 F.2d 483, 487 (4th Cir. 1975). The Supreme Court, observing that there is no right under the Constitution to plea bargaining or to discovery in a criminal case, found respondent's due process argument to be without merit. 429 U.S. at 559-61.

stance of any overheard conversations to the prosecution.⁹ Moreover, his presence at those discussions resulted not from any hope of obtaining privileged information, but from a desire merely to protect his cover.¹⁰ The court of appeals,¹¹ unimpressed by the district court's finding that Weatherford communicated nothing to the prosecution,¹² reversed Bursey's conviction.¹³ Finding the government's motive for intruding upon the conferences to be of no consequence, the court concluded that the Sixth Amendment is violated whenever the government intrudes upon the privacy of attorney-client relations.¹⁴

The Supreme Court, in a 7-2 decision, found no Sixth Amendment violation.¹⁵ The Court held that the Sixth Amendment does not establish a *per se* right to reversal and a new trial whenever the government intrudes upon defense conferences. It concluded, rather, that in the absence of a purposeful intrusion, tainted evidence used at trial, or disclosure to the prosecution of information gleaned from defense strategy sessions, there was no violation of the Sixth Amendment.¹⁶ This Note will examine the reasoning the Court employed to so constrict a defendant's right to private consultation with counsel. It will demonstrate the majority's misuse of precedent and expose the superficial nature of the Court's analysis. Finally, *Weatherford's* impact on the security of attorney-client relations will be discussed.

The *per se* rule of reversal and retrial favored by the court of appeals is hardly a novel formulation.¹⁷ Two cases dealing squarely with the effect of government eavesdropping on defense conferences were decided early in the 1950's by the Court of Appeals for the

9. *Bursey v. Weatherford*, 528 F.2d 483, 486 (4th Cir. 1975).

10. *Id.*

11. For a discussion endorsing the court of appeals decision, see Note, *Constitutional Law—Bursey v. Weatherford: The Sixth Amendment Protection Against Secret Agents in the "Counsels of Defense,"* 54 N.C. L. REV. 1276 (1976).

12. The court of appeals reasoned that Weatherford was himself a member of the prosecution. *Bursey v. Weatherford*, 528 F.2d 483, 487 (4th Cir. 1975).

13. *Id.* at 489.

14. The court of appeals concluded that "whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial." *Id.* at 486. However, because Bursey had already completed his sentence, reversal and retrial was no longer possible. He therefore sought relief by way of a damage action under 42 U.S.C. § 1983. See note 7 *supra*.

15. 429 U.S. 545 (1977). Justice White delivered the opinion of the Court. Justice Marshall, joined by Justice Brennan, dissented. *Id.* at 561 (Marshall, J., dissenting).

16. *Id.* at 558.

17. The Court, in referring to the *per se* rule as "the rule announced by the Court of Appeals," implied that the rule originated with the appellate court opinion in this case. This reference to the rule as a new one is misleading. See notes 18-39 and accompanying text *infra*. A statement with similar effect is the assertion that the "exact contours of the Court of Appeals' *per se* right-to-counsel rule are difficult to discern . . ." 429 U.S. at 550.

District of Columbia Circuit. In *Coplon v. United States*,¹⁸ government wiretapping resulted in interception of attorney-client conversations. The court held that the right to assistance of counsel was so fundamental that a verdict of guilty must be set aside whenever that right has been denied, regardless of any showing of prejudice to the defendant's case.¹⁹ This rule of automatic reversal was applied in *Caldwell v. United States*²⁰ to government eavesdropping by way of undercover agent. The court saw no reason for differentiating between intrusion by means of wiretapping and intrusion by means of secret agents, and again indicated that a right to retrial should not be conditioned upon a showing of prejudice.²¹

The *Coplon-Caldwell* principle²² at least impliedly found expression in two Warren Court decisions in the late sixties. In *Black v. United States*,²³ attorney-client conversations were monitored by F.B.I. agents, and memoranda concerning the overheard conversations were made available to the prosecution.²⁴ The Court, in a *per curiam* opinion, vacated the conviction and remanded the case for a

18. 191 F.2d 749 (D.C. Cir. 1951).

19. *Id.* at 759. The accused, Judith Coplon, was an employee of the Department of Justice assigned to the Internal Security Section to examine F.B.I. reports relative to the activities of Russian agents or Communists. When she came under suspicion by the F.B.I., appellant was directed by her superior to no longer examine the reports. She nevertheless managed to obtain several documents and made three trips to New York City to deliver copies of them to Gubitchev, a Russian national. Unaware that F.B.I. agents were following her and observing her movements, appellant was arrested in New York and underwent trial there, as well as in the District of Columbia. During a pretrial hearing in New York, appellant for the first time discovered that her telephone wires had been tapped by F.B.I. agents before, during, and after her District of Columbia trial and that conversations between her and her attorney had been intercepted. The court of appeals set aside the order denying a motion for a new trial and remanded the case for a hearing merely to determine whether the alleged interceptions had actually occurred. The court directed that if they had, a new trial was to be ordered. *Id.* at 750-52, 756-57, 760.

20. 205 F.2d 879 (D.C. Cir. 1953). Caldwell was indicted for attempting to obstruct justice in the criminal trial of another person. While under indictment, appellant and his attorney became intimately acquainted with agent Bradley and solicited his cooperation in preparing the defense. In his dual capacity as defense assistant and government agent, Bradley gained free access to information covering many matters connected with the impending trial. When Caldwell discovered Bradley's double dealing, he filed a motion for a new trial, alleging violation of his right to effective representation by counsel. The court of appeals considered its decision in *Coplon* to be controlling and awarded a new trial. *Id.* at 879-81.

21. *Id.* at 881.

22. Judge Winner so termed the rule of those decisions in *United States v. Orman*, 417 F. Supp. 1126, 1135 (D. Colo. 1976).

23. 385 U.S. 26 (1966).

24. *Id.* at 27-28. The Solicitor General advised the Court that F.B.I. agents, in connection with an investigation unrelated to the tax evasion charges, had installed a listening device in petitioner's hotel suite about two months before evidence was presented to the grand jury. The monitoring agents overheard conversations between petitioner and his attorney. Although the

new trial.²⁵ Four months later, in *O'Brien v. United States*,²⁶ the Court again vacated the conviction and remanded for a new trial even though no F.B.I. reports concerning the intercepted lawyer-client conversations were made available to the prosecution.²⁷ In each instance the Solicitor General advocated remand for an adversary hearing to determine the effect of government activity on the validity of the convictions;²⁸ and in each instance the Supreme Court chose instead to remand for an entirely new trial. The Court's action impliedly affirmed the *per se* rule of reversal announced in *Coplon* and *Caldwell* as a sanction against government intrusion into the counsels of defense.²⁹

While the lower federal courts have universally recognized³⁰ what the Third Circuit termed "the rule announced in *Black* and *O'Brien*,"³¹ some of them have interpreted certain statements made in *Hoffa v. United States*³² as modifying the *per se* rule.³³ This decision involved the use of an informer who overheard conversations

recordings had been erased from the tapes, notes summarizing and often quoting the conversations were included in material transmitted to the Tax Division attorneys. The Solicitor General advised the Court that the Tax Division attorneys did not receive the materials until an advanced stage of trial preparations and had found nothing relevant to the tax evasion charges. *Id.*

25. *Id.* at 29.

26. 386 U.S. 345 (1967).

27. *Id.* at 346 (Harlan, J., dissenting). Petitioners O'Brien and Parisi were charged with removing merchandise from a bonded area under the supervision of the United States Customs Service in violation of 18 U.S.C. § 549 (1948). The Solicitor General advised the Court that a microphone had been installed in a commercial establishment owned by a friend of O'Brien's. O'Brien was overheard placing a call to his attorneys requesting that one of them file an application relating to the territorial conditions of his release on bail. Although the conversation was noted in the logs, it was not communicated in any way outside the F.B.I. *Id.* at 345-46.

28. 385 U.S. at 28; 386 U.S. at 346 (Harlan, J., dissenting).

29. It has been observed that the Supreme Court, in *Black* and *O'Brien*, had finally come to consider the issue of government intrusion upon attorney-client communications, and, in so doing, reasserted the *Coplon-Caldwell* no-prejudice rule. Note, *Government Interceptions of Attorney-Client Communications*, 49 N.Y.U. L. REV. 87, 95 (1974).

30. In *United States v. Orman*, 417 F. Supp. 1126, 1135 (D. Colo. 1976) the court stated that "the *Coplon-Caldwell* principle . . . has been universally recognized by the lower courts which have had occasion to study the matter." See, e.g., *United States v. Choate*, 527 F.2d 748, 751 (9th Cir. 1975); *United States v. Gartner*, 518 F.2d 633, 637 (2d Cir. 1975); *United States v. Rosner*, 485 F.2d 1213, 1224 (2d Cir. 1973); *United States v. Rispo*, 460 F.2d 965, 975-77 (3d Cir. 1972); *United States v. Zarzour*, 432 F.2d 1, 3-4 (5th Cir. 1970); *Taglianetti v. United States*, 398 F.2d 558, 569-70 (1st Cir. 1968); *United States v. Ostrer*, 422 F. Supp. 93, 104-05 (S.D.N.Y. 1976).

31. *United States v. Rispo*, 460 F.2d 965, 977 (3d Cir. 1972).

32. 385 U.S. 293 (1966).

33. See, e.g., *United States v. Choate*, 527 F.2d 748, 751 (9th Cir. 1975); *United States v. Gartner*, 518 F.2d 633, 637 (2d Cir. 1975); *United States v. Rosner*, 485 F.2d 1213, 1227 (2d Cir. 1973).

between Hoffa and his lawyers. The Court in *Hoffa* described *Coplon* and *Caldwell* as cases dealing with government intrusion "of the grossest kind"³⁴ upon the confidential lawyer-client relationship. Lower federal courts have often interpreted this dictum in *Hoffa* as an authoritative modification of the *per se* rule of reversal³⁵ and have therefore required that an intrusion be gross in order to trigger the operation of that rule.³⁶ An intrusion has been considered gross when it is purposeful³⁷ or when, through communication of defense plans to the prosecution, it results in tainted evidence.³⁸ In focusing upon the *Hoffa* dictum, these lower courts have neglected the actual holding in that case. The *Hoffa* Court merely held that, except in extraordinary circumstances, when a government agent intrudes upon defense conferences, he may nevertheless testify about matters unrelated to the overheard conversations at a subsequent trial on different charges.³⁹

34. 385 U.S. 293, 306 (1966).

35. It has been observed that the *Hoffa* decision "has borne interesting fruit in the lower federal courts." Cited as most notable was *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973), wherein the court applied the "contrapositive to *Hoffa*." Rather than regarding grossness as one of the factors sufficient to warrant application of the *per se* rule, the court treated it as a necessary prerequisite for application of that rule. Note, *Government Interceptions of Attorney-Client Communications*, 49 N.Y.U. L. REV. 87, 97-98 (1974).

36. See *United States v. Choate*, 527 F.2d 748, 751 (9th Cir. 1975) ("gross surreptitious governmental invasions into the legal camp of the defense . . . may violate defendant's Sixth Amendment right to counsel"); *United States v. Gartner*, 518 F.2d 633, 637 (2d Cir. 1975) (The *per se* rule represents a moral condemnation of "egregious and unequivocal conduct" on the part of the Government and has been applied to Government intrusions upon the attorney-client relationship only where there was an "offensive" interference "without any justification"); *United States v. Rosner*, 485 F.2d 1213, 1227 (2d Cir. 1973) ("When the Government is not found guilty of such avowed corrupting conduct . . . the rule must, of necessity, be different"); *United States v. Oster*, 422 F. Supp. 93, 104 (S.D.N.Y. 1976) (The application of a *per se* rule "has been reserved for those instances where the conduct of the Government has been 'manifestly and avowedly corrupt'").

37. See *United States v. Gartner*, 518 F.2d 633, 637 (2d Cir. 1975); *United States v. Rosner*, 485 F.2d 1213, 1227 (2d Cir. 1973); *United States v. Ostrer*, 422 F. Supp. 93, 104 (S.D.N.Y. 1976).

38. See *United States v. Zarzour*, 432 F.2d 1, 3-5 (5th Cir. 1970).

39. 385 U.S. at 307-08. James Hoffa, former president of the International Brotherhood of Teamsters, was tried in 1962 for violation of the Taft-Hartley Act, and the jury in that trial, known as the Test Fleet trial, hung. He was then tried for endeavoring to bribe members of that jury. During the course of the Test Fleet trial, an informer, Edward Partin, was continually in the company of Hoffa and his associates in and around the hotel suite, which Hoffa's lawyers used each day as a place to confer with each other, to interview witnesses, and to plan the following day's trial strategy. Partin made frequent reports to federal agent Sheridan concerning efforts to bribe members of the Test Fleet jury. Hoffa contended that this intrusion upon the security of his attorney-client relationship violated his Sixth Amendment right to effective assistance of counsel in the second trial. The Supreme Court held that while it might be possible to imagine a case in which the Government's previous activities in undermining a defendant's Sixth Amendment rights at one trial would render evidence obtained thereby inad-

The Court in *Weatherford* contended that *Black* and *O'Brien* far from establishing a *per se* rule, do not even lend it support.⁴⁰ In reaching this conclusion, the Court characterized *Black* and *O'Brien* as cases primarily concerned with Fourth Amendment issues.⁴¹ The Court stressed the fact that they both involved electronic surveillance and that the Sixth Amendment was not even mentioned in the *Black per curiam* opinion.⁴² However, neither the Fourth nor the Sixth Amendment was mentioned; and the narration of the facts in *Black* clearly reveals that the Court's primary concern was the intercepted lawyer-client conversations.⁴³ Moreover, reference to *Black* and *O'Brien* is universally made in the context of a Sixth Amendment issue.⁴⁴

While the casting of these cases in a Fourth Amendment role is unpersuasive,⁴⁵ it did provide the uncertain foundation upon which the Court then erected its own interpretation of *Black* and *O'Brien*. Having indicated that those cases probably have nothing to say about the Sixth Amendment, the Court conceded that if they have any relevance at all to attorney-client concerns, it is that when conversations with counsel have been overheard, the validity of the conviction depends on whether the overheard conversations have produced any evidence presented at trial.⁴⁶

As Justice Marshall argued in his dissent, such an inference "twists" *Black* and *O'Brien* "beyond recognition."⁴⁷ The majority in *Weatherford* simply refused to recognize that a *per se* rule impliedly was established in *Black* and *O'Brien*. Justice Harlan, who dissented in *Black*, acknowledged that the Court was promulgating a rule of automatic reversal in that case. Though reluctant to believe that the Warren Court was making "any such sweeping innovation" in the criminal law, Justice Harlan conceded that the only basis for justifying

missible in a different trial on separate charges, the *Hoffa* trial for attempting to bribe jurors did not remotely approach such a situation. *Id.* at 294-96, 304-05, 308.

40. 429 U.S. at 551.

41. *Id.*

42. *Id.*

43. *Id.* at 567 n.6 (Marshall, J., dissenting).

44. See *Hoffa v. United States*, 387 U.S. 231, 233 (1967); *Hoffa v. United States*, 385 U.S. 293, 307 (1966); *United States v. Choate*, 527 F.2d 748, 751 (9th Cir. 1975); *United States v. Rosner*, 485 F.2d 1213, 1224 (2d Cir. 1973); *United States v. Rispo*, 460 F.2d 965, 975-76 (3d Cir. 1972); *United States v. Zarzour*, 432 F.2d 1, 3 (5th Cir. 1970); *Taglianetti v. United States*, 398 F.2d 558, 569-70 (1st Cir. 1968); *United States v. Ostrer*, 422 F. Supp. 93, 104 (S.D.N.Y. 1976); *United States v. Orman*, 417 F. Supp. 1126, 1134 (D. Colo. 1976); *People v. Knippenberg*, 66 Ill.2d 276, 285, 362 N.E.2d 681, 685 (1977).

45. 429 U.S. at 567 n.6 (Marshall, J., dissenting).

46. *Id.* at 552.

47. *Id.* at 567 (Marshall, J., dissenting).

the Court's reversal was that any governmental intrusion of this kind "automatically vitiates" the conviction.⁴⁸ Thus, even the dissent in *Black* attests to the fact that the Warren Court was establishing a *per se* rule of reversal as a sanction against governmental intrusion upon defense conferences.

The *Weatherford* Court's interpretation of *Hoffa*, while not clearly inaccurate, is nearly as misleading as its treatment of *Black* and *O'Brien*. The actual *Hoffa* ruling was all but omitted in the Court's opinion.⁴⁹ Emphasis was placed instead on the fact that, in *Hoffa*, the informer's testimony was unrelated to any overheard conversations,⁵⁰ and at least some information was communicated to the prosecuting attorneys.⁵¹ The *Hoffa* Court did indeed refer to these facts,⁵² but neither observation was essential to the ultimate holding in that case. The *Hoffa* Court held that intrusions into defense conferences do not necessarily vitiate later convictions on separate charges. Clearly, the Court did not reject the *Coplon-Caldwell* principle of automatic reversal.⁵³ Indeed, the *Hoffa* decision is supportive of a *per se* rule.⁵⁴ The *Weatherford* Court camouflaged the actual holding in *Hoffa* with an array of casual observations from that opinion.

Not only did the Court present a questionable interpretation of precedent; it also set forth requirements for finding a Sixth Amendment violation without adequate explanation or support. The Court noted that agent Weatherford communicated nothing to the prosecution concerning the overheard conversations.⁵⁵ The majority indicated that, had Bursey proved communication, he might have had "a

48. 385 U.S. at 31 (Harlan, J., dissenting).

49. 429 U.S. at 552-54.

50. *Id.*

51. *Id.*

52. 385 U.S. at 305-06, 309.

53. *United States v. Orman*, 417 F. Supp. 1126, 1135 (D. Colo. 1976).

54. The Court, in *Hoffa*, "assume[d] that the *Coplon* and *Caldwell* cases were rightly decided, and further assume[d] . . . that the Government's activities during [Hoffa's first] trial were sufficiently similar to what went on in *Coplon* and *Caldwell* to invoke the rule of those decisions." 385 U.S. at 307 (emphasis added). The *Hoffa* Court then cited *Black* for the proposition that, had Hoffa's first trial "resulted in a conviction instead of a hung jury, the conviction would presumptively have been set aside as constitutionally defective." *Id.* The Court then decided that "[e]ven assuming, therefore, as we have, that there might have been a Sixth Amendment violation which might have made invalid a conviction, if there had been one, in the Test Fleet case," the evidence supplied by the informer in the second Hoffa trial "was in no sense the 'fruit' of any such [Sixth Amendment] violation." *Id.* at 308. Thus, in its decision, the *Hoffa* Court assumed the existence of the *per se* rule.

55. 429 U.S. at 554.

much stronger case.”⁵⁶ However, aside from *Hoffa* dicta,⁵⁷ the Court offered little more to substantiate this disclosure requirement than its own conclusory observation that unless the substance of overheard conversations is communicated to the prosecution, there is no “realistic possibility of injury.”⁵⁸

Prejudice to the defendant’s case, however, can arise despite a lack of disclosure to the prosecution. The First Circuit has recognized that the real nemesis is:

subtle benefits that might consciously or unconsciously accrue to the government in knowing the planned procedure or even the state of mind of the defendant and his counsel . . . , quite apart from hearing affirmative evidence or leads to evidence.⁵⁹

Another court has pointed out that information learned by a government agent at defense conferences can be helpful in structuring his testimony at trial, even if he never communicates this knowledge to the prosecution.⁶⁰ And with regard to prejudice in general, the Third Circuit has observed that harmless error and untainted evidence tests are incapable, in some situations, of yielding a realistic appraisal of injury. There is often no tainted evidence which can be isolated, and some errors which affect the entire trial process produce effects that cannot be intelligently gauged by such methods. These tests, whether they are designated as harmless error, untainted evidence, or overwhelming evidence tests, are only effective in assessing errors that bear on particular evidence.⁶¹ Thus, whether or not the substance of overheard conversations is communicated to the prosecution, the possibility of injury is indeed real and deserving of more attention by the Court.

The motive for intruding upon the attorney-client relationship is another factor accorded substantial weight by the Court, again without serious examination. Like the lower courts which cite *Hoffa* for the proposition that an intrusion must be gross, or purposeful, to warrant application of a *per se* rule,⁶² the Court stressed the fact that agent Weatherford attended defense conferences solely to protect his

56. *Id.*

57. See notes 50-54 and accompanying text *infra*.

58. 429 U.S. at 558.

59. *Taglianetti v. United States*, 398 F.2d 558, 570 (1st Cir. 1968).

60. See *United States v. Orman*, 417 F. Supp. 1126, 1136 (D. Colo. 1976) in which the information obtained enabled the agents to structure an answer to an anticipated affirmative defense.

61. *United States v. Rispo*, 460 F.2d 965, 974 (3d Cir. 1972).

62. See note 36 and accompanying text *infra*.

cover.⁶³ Perhaps the Court's emphasis on motive is based upon a belief that the *per se* rule is a rule of deterrence. The Second Circuit has expressed the view that a *per se* rule must be thought of in terms of sanctions against the government for conduct pursued in bad faith.⁶⁴ But the Supreme Court, in a different context,⁶⁵ has observed that "there is another consideration—the imperative of judicial integrity."⁶⁶ A *per se* rule operates not only to deter government misconduct, but also to preserve public confidence in our judicial system.⁶⁷ Even where government conduct is pursued in good faith, the "imperative of judicial integrity" calls for application of a *per se* rule. Yet nowhere in the Court's discussion of motive is this important value even mentioned.

Will the superficial nature of the Court's inquiry and its often doubtful logic dull *Weatherford's* potential impact on Sixth Amendment guarantees? An Illinois Supreme Court opinion rendered approximately three months after the decision in *Weatherford* serves as a basis for prediction. In *People v. Knippenberg*,⁶⁸ a murder defendant's attorney obtained the services of an investigator to assist him in interviewing some witnesses. With the attorney's approval, the investigator interviewed the defendant in jail and prepared a report summarizing the defendant's statements. A copy of this report was made available to the prosecution. Without ever informing defense counsel that the report had been released, the prosecution used the defendant's statements at trial for impeachment purposes.

In reversing the defendant's conviction, the court briefly reviewed relevant Supreme Court precedent. *Black* and *O'Brien* were cited first, merely for the proposition that governmental intrusions of an even less offensive nature often result in reversal and retrial.⁶⁹ No mention was made of a *per se* rule emanating from those cases. To

63. 429 U.S. at 557. The Chief of the South Carolina State Law Enforcement Division admitted, however, that after the arrest Weatherford was not working on anything particular for which he needed to maintain his cover. The Chief further acknowledged that he was not very concerned about losing Weatherford's cover, because he knew his identity would nonetheless have to be revealed once the trial began. *Id.* at 555 n.5. Indeed, had the need for Weatherford's services been so acute, he certainly would not have been allowed to go on a weekend vacation with fellow SLED agents at a popular seaside resort. Brief for Respondent at 15, 72-73.

64. *United States v. Rosner*, 485 F.2d 1213, 1227 (2d Cir. 1973).

65. The Supreme Court had occasion to discuss the purpose behind a *per se* rule in *Mapp v. Ohio*, 367 U.S. 643 (1961), which involved the exclusion of evidence obtained in violation of the Fourth Amendment.

66. *Id.* at 659.

67. *People v. Knippenberg*, 66 Ill.2d 276, 286, 362 N.E.2d 681, 685 (1977).

68. 66 Ill.2d 276, 362 N.E.2d 681 (1977).

69. *Id.* at 285, 362 N.E.2d at 685.

the contrary, the *Weatherford* opinion was quoted verbatim for the very proposition which, as argued by Justice Marshall, twists *Black* and *O'Brien* beyond recognition. The court simply restated the *Weatherford* Court's interpretation of *Black* and *O'Brien* as cases indicating that when conversations with counsel have been overheard, the validity of the conviction depends on whether the overheard conversations produced any evidence presented at trial.⁷⁰ Noting that the confidential materials of the interview had been disclosed to the prosecution and used at trial, the *Knippenberg* court found that, notwithstanding the reduced protection afforded by *Weatherford*, the violation of the attorney-client relationship was clear.⁷¹

Because the court rejected the prosecution's contention that the error was harmless, it did not reach the question of whether any governmental intrusion upon the attorney-client relationship should result in reversal and retrial.⁷² The opinion concludes, however, with the admonition that the right to assistance of counsel is of first importance and should not be diminished by attrition.⁷³ Although the court appeared to be aware that *Weatherford* dilutes the right to counsel, it has followed, perhaps reluctantly, the mandate of that decision.

The *per se* rule of reversal approved in *Black* and *O'Brien* has been, in effect, repealed by *Weatherford*. *Weatherford* erroneously interpreted *Black* and *O'Brien* to be cases which, far from establishing a *per se* rule, demanded reversal only in situations where tainted evidence was presented at trial. As the *Knippenberg* opinion amply demonstrates, quoting the error verbatim, it is this interpretation of *Black* and *O'Brien* that most likely will prevail. Thus, while purportedly distinguishing *Black* and *O'Brien*, the *Weatherford* Court, promulgating its own interpretation, effectively invalidated the rule of those decisions.

The Court's action provides a narrow opening to the practice of spying upon attorney-client discussions.⁷⁴ A defendant must now prove intent on the part of the government to intercept confidential communications, or disclosure of those communications to the prosecution, or perhaps both.⁷⁵ As Justice Marshall pragmatically ob-

70. *Id.* at 286, 362 N.E.2d at 685.

71. *Id.*

72. *Id.*

73. *Id.* at 288, 362 N.E.2d at 686.

74. 429 U.S. at 562 (Marshall, J., dissenting).

75. The Court did not explicitly state what requirements of proof must be met in order to obtain relief from government intrusions of this nature. The Court merely indicated that, had Bursey proved intent or disclosure, he might have had a "much stronger case." *Id.* at 554.

served, a "rule that offers defendants relief only when they can prove 'intent' or 'disclosure' is . . . little better than no rule at all."⁷⁶ Indeed, nothing short of a rule of automatic reversal can adequately protect the right to private consultation with counsel. The Court would do well to more jealously guard such a precious constitutional right.

Weatherford is nonetheless representative of a trend in the field of criminal procedure. The tide of decisions expanding the rights of a criminal defendant has ebbed in the days of the Burger Court.⁷⁷ Warren Court decisions have been eviscerated by narrow interpretations, nonretroactive applications, and generous construction of the harmless error doctrine.⁷⁸ The Fifth Amendment's protection against self-incrimination has been abridged by decisions holding that statements obtained in violation of *Miranda v. Arizona*⁷⁹ can be admissible for impeachment purposes.⁸⁰ The Fourth Amendment's guarantee against unreasonable searches and seizures has suffered as well in that the Burger Court has given the constitutional imprimatur to all searches incident to arrest.⁸¹ As Justice Brennan recently observed, the Sixth Amendment guarantee has fared no better.⁸² *Weatherford* plainly illustrates the Court's retreat in this area.

A partial solution to the problems posed by decisions such as *Weatherford* is suggested by a recent state court development. Since

Having left the question of proof open, the Court could conceivably establish, in a future case, even more rigid requirements of proof.

76. *Id.* at 565 (Marshall, J., dissenting).

77. Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 905 (1976). See also notes 78-82 and accompanying text *infra*.

78. Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 423-24 (1974).

79. 384 U.S. 436 (1966).

80. In *Harris v. New York*, 401 U.S. 222 (1971) the Court held that statements obtained from a defendant without first advising him of his rights as required by *Miranda* were nevertheless admissible to impeach his credibility as a witness at trial. See also *Lego v. Twomey*, 404 U.S. 477 (1972), in which the Court ruled that the voluntariness of a confession is to be determined by a mere preponderance of the evidence.

81. In *United States v. Robinson*, 414 U.S. 218 (1973) the Court abandoned case-by-case adjudication of the reasonableness of searches under the Fourth Amendment by ruling that a full search of the person is *per se* reasonable once the fact of custodial arrest has been established. See also *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) in which the Court held that consent searches can be justified by the prosecution without proof that the subject of the search had knowledge of his right to refuse consent.

82. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 497 (1977). See *Kirby v. Illinois*, 406 U.S. 682 (1972) in which the *per se* rule announced in *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967), excluding identification testimony obtained in the absence of counsel, was held not to apply to a pre-indictment police station lineup. The Court reasoned that such a procedure, occurring before indictment, was not a critical stage of the prosecution.

Supreme Court interpretation of federal constitutional guarantees establishes only the minimum protection that a state must grant,⁸³ many state courts have accepted the Burger Court's retrenchment in the field of criminal procedure as an invitation to adopt more exacting standards based on identical language in their state constitutions.⁸⁴

Supreme Court review is thus evaded, because the Court has no jurisdiction to review state law decisions which are based on 'adequate' and 'independent' state law grounds.⁸⁵ Applauding this development, Justice Brennan has suggested that it would be most unwise these days for counsel to raise only federal constitutional issues.⁸⁶ Indeed, for a criminal defendant who seeks to preserve the sanctity of his attorney-client relationship, the pleading of state constitutional issues seems to be the only viable course.

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83. Project Report: *Toward an Activist Role for State Bills of Rights*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 271, 285 (1973). See *Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards").

84. Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 899 (1976); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977). See, e.g., cases dealing with state constitutional guarantees: *Blue v. Alaska*, 558 P.2d 636 (1977) (right to counsel); *Allen v. Superior Court of Alameda County*, 18 Cal.3d 520, 557 P.2d 65, 134 Cal. Rptr. 774 (1976) (privilege against self-incrimination); *People v. Anderson*, 6 Cal.3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972) (prohibition against cruel and unusual punishments); *People v. Counterman*, — Colo. —, 556 P.2d 481 (1976) (prohibition against unreasonable searches and seizures); *State v. Santiago*, 53 Haw. 254, 492 P.2d 657 (1971) (privilege against self-incrimination); *State v. Mora*, — La. —, 330 So.2d 900 (1976) (prohibition against unreasonable searches and seizures); *State v. Sklar*, — Me. —, 317 A.2d 160 (1974) (right to trial by jury); *People v. Cooper*, 398 Mich. 450, 247 N.W.2d 866 (1976) (Double Jeopardy Clause); *State v. Phinney*, — N.H. —, 370 A.2d 1153 (1977) (privilege against self-incrimination); *State v. Johnson*, — N.J. —, 346 A.2d 66 (1975) (prohibition against unreasonable searches and seizures); *State v. Gallagher*, — Ohio St.2d —, 348 N.E.2d 336 (1976) (privilege against self-incrimination); *Commonwealth v. Richman*, 458 Pa. 167, 320 A.2d 351 (1974) (right to counsel); *State v. Opperman*, — S.D. —, 247 N.W.2d 673 (1976) (prohibition against unreasonable searches and seizures).

As the above list makes clear, the courts of certain states are more likely to adopt expansive interpretations of state constitutional guarantees. For a short profile of each state identifying promising features of its bill of rights law, see Project Report: *Toward an Activist Role for State Bills of Rights*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 271, 322-50 (1973).

85. For discussion of the adequate state ground doctrine in the context of 'evasion' cases, see Wilkes, *The New Federalism in Criminal Procedure Revisited*, 64 KY. L.J. 729, 749-50 (1976); Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873, 891-94 (1975); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 426-31 (1974); Project Report: *Toward an Activist Role for State Bills of Rights*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 271, 312-15 (1973).

86. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

