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THE SIXTH AMENDMENT IMPLICATIONS OF A GOVERNMENT INFORMER'S PRESENCE AT DEFENSE MEETINGS

I. INTRODUCTION

The use of informers to gain information about a criminal suspect is a generally accepted police practice.[1] To protect informers' identities,[2] they are often arrested and charged along with the actual suspect. Further protection of an informer's identity thus sometimes requires that the informer participate, in the guise of a codefendant, in meetings with defense counsel.[3] But in such a situation, the government's interest in protecting the informer's status is of course in potential conflict with the defendant's constitutionally protected right to the effective assistance of counsel.[4]

The United States Supreme Court has held that the mere presence of a government informer at a defense-related meeting does not necessarily violate a defendant's sixth amendment right to counsel.[5] However, the Court has never defined what other factors must also be present to conclusively establish a constitutional violation in such cases. Lower court decisions on the issue are inconsistent.[6]

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1. *See, e.g.*, United States v. Russell, 411 U.S. 423, 432 (1973); Lewis v. United States, 385 U.S. 206, 208–09 (1966). *See generally* 2 C. TORCIA, WHARTON'S CRIMINAL PROCEDURE § 379 (12th ed. 1975 & Supp. 1983).

Technically speaking, an "informer" is anyone who "volunteers material information of law violations to officers . . . ." BLACK'S LAW DICTIONARY 701 (5th ed. 1979). On the other hand, an "undercover agent" is one who is actually employed by the police to seek out information about a criminal suspect. *See id.* at 1368. While the situations dealt with in this comment more precisely involve the use of "undercover agents" rather than "informers," the authorities cited herein use these terms interchangeably. Accordingly, the two terms will be treated as synonymous in this comment.

2. In general, the government is privileged from disclosing the identity of persons who supply information about unlawful activities to law enforcement officials. *E.g.*, McCray v. Illinois, 386 U.S. 300, 308–09 (1967) (citing 8 J. WIGMORE, EVIDENCE § 2374 (McNaughton rev. ed. 1961)). This privilege is, however, limited in certain circumstances. For instance, if disclosure of the informer's identity is essential to ensure a fair trial, the privilege must yield. Roviaro v. United States, 353 U.S. 53, 60–61 (1957).

3. A joint meeting might be deemed necessary by the actual defendant for a number of reasons. For example, discussion might be needed to determine if joinder would be prejudicial, thereby enabling the defendant to prepare a motion for severance if necessary. *See* FED. R. CRIM. P. 14.

4. *See infra* notes 8–11 and accompanying text.

5. Weatherford v. Bursey, 429 U.S. 545, 550–51 (1977).

6. *Compare* United States v. Levy, 577 F.2d 200, 209 (3d Cir. 1978) (communication of privileged information to prosecution authorities is sufficient to show a sixth amendment violation) *with* United States v. Irwin, 612 F.2d 1182, 1186–87 (9th Cir. 1980) (evidence gained through

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This comment will examine the sixth amendment implications of a government informer's infiltration of defense-related meetings. The comment will propose that a presumption of a sixth amendment violation should arise where there has been a deliberate intrusion into the attorney-client relationship, or where privileged information gained by the informer—though not the result of a deliberate intrusion—is nonetheless transmitted to the prosecutor. Such a violation should arguably result in either dismissal of the charges against the defendant or the granting of a new trial, depending upon the "curability" of any resulting prejudice.[7]

II. BACKGROUND

The sixth amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[8] The amendment has long been construed as a guaranty not only of *access* to counsel, but also of the right to the *effective* assistance of counsel.[9] Because private discussion with one's attorney is a vital element of effective legal advocacy,[10] an important part of the sixth amendment right is the protection of attorney-client confidences.[11]

The scope of this constitutional protection is comparable to the common-law attorney-client privilege,[12] which provides that when a client seeks legal advice from an attorney, confidential communications made by the client regarding that purpose are permanently protected from disclosure by the client or the attorney, unless the privilege is waived.[13] The presence of a third party at the conference is usually

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interference with the attorney-client relationship is prejudicial if it is used against the defendant at trial). *See also infra* notes 27–29 and accompanying text.

7. In this comment, discussion of such remedies will occur only in the context of their being applied at the appellate level.

8. U.S. CONST. amend. VI.

9. This right to the "effective assistance" of counsel was first recognized in Powell v. Alabama, 287 U.S. 45 (1932). The right was made applicable to the states via the fourteenth amendment in Gideon v. Wainwright, 372 U.S. 335 (1963), where the right was held to be "fundamental and essential to a fair trial." *Id.* at 342.

10. *See infra* note 13.

11. United States v. Rosner, 485 F.2d 1213, 1224 (2d Cir. 1973) (stating that "the essence of the Sixth Amendment right is . . . privacy of communication with counsel"), *cert. denied*, 417 U.S. 950 (1974). *See also* Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 485–86 (1977).

12. *See* United States v. Melvin, 650 F.2d 641, 645 (5th Cir. 1981) ("A communication is protected by the attorney-client privilege—and . . . is protected from government intrusion under the Sixth Amendment—if it is intended to remain confidential and was made under such circumstances that it was reasonably expected and understood to be confidential.").

13. 8 J. WIGMORE, *supra* note 2, § 2292. This is the classic common-law formulation of the attorney-client privilege and the one that is used by the federal courts pursuant to FED. R. EVID.

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considered a waiver of the attorney-client privilege, because it belies the confidential nature of the communication.[14] However, the privilege is intact in cases where codefendants jointly confer with attorneys for the purpose of discussing possible defense strategies.[15]

Prior to 1977, the nearest the United States Supreme Court came to deciding the issue of what constitutes an impermissible intrusion into the attorney-client relationship was in two wiretapping cases. In *Black v. United States*,[16] it was revealed (after the defendant's conviction for income tax evasion) that the FBI, during the course of an unrelated investigation, had intercepted conversations between the defendant and his attorney.[17] Summaries of those conversations were transmitted to the prosecution, though the prosecution was unaware that the source of the information was attorney-client meetings.[18] Nevertheless, the Court ordered a new trial to enable the defendant to protect himself from the

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501 ("[P]rivilege . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."). *See, e.g.*, Fisher v. United States, 425 U.S. 391, 403 (1976).

The purpose of the attorney-client privilege is to promote complete and honest communications between attorneys and their clients, thereby enabling attorneys to better serve their clients. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Trammel v. United States, 445 U.S. 40, 51 (1980); 8 J. WIGMORE, *supra* note 2, § 2291.

The importance of such a privilege is reflected in the ABA Code of Professional Responsibility, which states:

> A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1979).

14. 8 J. WIGMORE, *supra* note 2, § 2311. *See also* United States v. Blackburn, 446 F.2d 1089, 1091 (5th Cir. 1971) ("[C]ommunications between defendant and [his lawyer] were not privileged, since third persons were present at the time the communications were made."), *cert. denied*, 404 U.S. 1017 (1972).

15. *See* Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965); Continental Oil v. United States, 330 F.2d 347 (9th Cir. 1964).

Proposed Federal Rule of Evidence 503(a)(5) allows for these types of situations by defining a "confidential communication" as one that is "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client . . . ." FED. R. EVID. 503(a)(5) (Proposed Rev. Draft 1971), 51 F.R.D. 315, 361 (1971). The Advisory Committee's Note to Proposed Rule 503 makes it clear that in joint-defense situations each client should be allowed a privilege as to his or her own statements. 51 F.R.D. at 364. *See generally* Comment, *A Survey of Attorney-Client Privilege in Joint Defense*, 35 U. MIAMI L. REV. 321 (1981).

16. 385 U.S. 26 (1966) (per curiam).

17. This revelation was made voluntarily by the solicitor general after the United States Supreme Court denied *certiorari*. *Id.* at 26.

18. *Id.* at 28.

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use of possibly inadmissible evidence.[19]

The later case of *O'Brien v. United States*[20] also presented the issue of FBI "bugging" of attorney-client conversations. With no precedent noted other than a citation to *Black*, the Court reversed the defendant's conviction and ordered a new trial[21]—in spite of the fact that none of the information gained by the FBI was reported to the prosecution.[22]

In 1977, in the case of *Weatherford v. Bursey*,[23] the Supreme Court faced the issue of whether the presence of a government informer—in the guise of a codefendant—at a meeting between a defendant and his or her attorney constitutes a *per se* violation of the defendant's constitutional right to the assistance of counsel.[24] The Court rejected a *per se* rule as being too broad.[25] There can be no sixth amendment violation, the Court noted, absent "tainted evidence," communication of the substance of the attorney-client conversations to the prosecution, or "purposeful intrusion" by the government agent into the attorney-client relationship.[26]

Since *Weatherford*, most of the United States courts of appeals that have considered the issues raised by the presence of an informer at defense meetings have focused their inquiry on whether, and to what extent, the defendant was prejudiced as a result of the informer's infiltration.[27] The courts of appeals are, however, in disagreement as to

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19. *Id.* at 29. The Court felt that, because neither the trial judge nor the defendant knew about the eavesdropping during the trial, a new trial on the merits was more appropriate than a mere hearing on the issue. *Id.* at 28.

20. 386 U.S. 345 (1967) (per curiam).

21. *Id.*

22. *Id.* at 346 (Harlan, J., dissenting).

23. 429 U.S. 545 (1977).

24. Bursey and Weatherford and two others had vandalized the offices of the Richland County Selective Service Board in South Carolina. *Id.* at 547. Unknown to Bursey, Weatherford was an undercover agent for the South Carolina Law Enforcement Division, and he was the one who reported the incident. *Id.* In order to maintain his effectiveness, Weatherford had attended two meetings, at Bursey's insistence, for the purpose of discussing the upcoming trial. *Id.* at 557–58. Bursey was ultimately convicted, and after serving his sentence, he brought suit under 42 U.S.C. § 1983 alleging, *inter alia*, that Weatherford's presence at the two meetings had deprived him of the effective assistance of counsel in violation of the sixth and fourteenth amendments. *Id.* at 549. The district court found for Weatherford, but the Court of Appeals for the Fourth Circuit reversed, holding that "whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial." Bursey v. Weatherford, 528 F.2d 483, 486 (4th Cir. 1975), *rev'd*, 429 U.S. 545 (1977).

25. 429 U.S. at 557.

26. *Id.* at 558.

27. *See, e.g.*, Bishop v. Rose, 701 F.2d 1150 (6th Cir. 1983); *Melvin*, 650 F.2d 641 (5th Cir. 1981); United States v. Irwin, 612 F.2d 1182 (9th Cir. 1980); United States v. Dien, 609 F.2d 1038 (2d Cir. 1979), *adhered to*, 615 F.2d 10 (2d Cir. 1980); United States v. Levy, 577

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what constitutes prejudice in such situations. For example, one court has held that the agent's transmittal of defense information to the prosecution creates a presumption of prejudice.[28] Other courts have indicated that the transmittal of such information constitutes prejudice only if it results in some benefit to the prosecution.[29] As a result, there is no clear-cut standard for evaluating a defendant's claim that his or her constitutional rights have been violated by an intrusion into the attorney-client relationship.

III. Analysis

A. *The Violation*

In *Weatherford v. Bursey*,[30] the Supreme Court indicated that one proper basis for a sixth amendment claim might be a "purposeful intrusion" into the attorney-client relationship,[31] but did not explicitly define what might constitute such an intrusion. However, there are at least three possible scenarios in which a court might find that an intrusion is purposeful along the lines of the *Weatherford* opinion: (1) where the government initiates the meeting; (2) where the government's intent is to intrude and the agent is instructed accordingly; and (3) where the agent takes it upon himself or herself to intrude.[32]

For several reasons, these situations should all raise the presumption of a sixth amendment violation without the necessity of inquiry into possible prejudice to the defendant. First, since the sixth amendment right to counsel can only be meaningful if the privacy of attorney-client communications is respected,[33] that right is necessarily violated by a deliberate attempt to invade the privacy. Also, because the gov-

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F.2d 200 (3d Cir. 1978); Mastrian v. McManus, 554 F.2d 813 (8th Cir.), *cert. denied*, 433 U.S. 913 (1977).

The requirement of a showing of prejudice seems to be based in part upon language in *Weatherford* suggesting that a sixth amendment violation can occur only if the intrusion results in "a realistic possibility of injury" to the defendant, or a "benefit to the State." 429 U.S. at 558. *See also infra* note 36 and accompanying text; *infra* text accompanying note 37.

For an exhaustive treatment of the issues raised by an informer's presence at defense meetings, see United States v. Pioggia, No. 82-231-K (D. Mass. July 29, 1983) (order denying motion to dismiss); 97 Harv. L. Rev. 1143 (1984).

28. *Levy*, 577 F.2d at 209.

29. *See Irwin*, 612 F.2d at 1186; *Mastrian*, 554 F.2d at 821.

30. 429 U.S. 545 (1977).

31. *Id.* at 558.

32. In *Weatherford*, the Supreme Court made a point of quoting the district court's findings that the informer Weatherford never sought information from Bursey or his attorney, nor did he initiate the meetings. *Id.* at 548. The Supreme Court also pointed out that the *Weatherford* case did not involve a situation where the purpose of the government was to seek out the defendant's strategies and the informant was instructed to that effect, nor was it a situation where the agent had taken it upon himself to fulfill such a function. *Id.* at 557.

33. *See supra* notes 10-13 and accompanying text.

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ernment's objective in such situations is to gain constitutionally protected information, the three types of intrusions indicated by *Weatherford* are surely intrusions of the "grossest kind," in which a showing of prejudice at trial should not be necessary in establishing a sixth amendment violation.[34] Finally, a presumptive sixth amendment violation rule is more likely to deter such undesirable conduct than a rule which places the burden of proof on the wronged party to establish prejudice to his or her defense efforts as a threshold matter.[35]

Aside from cases where purposeful intrusion is present, the *Weatherford* Court left open the possibility that a sixth amendment violation may otherwise be presumed where attorney-client conversations are transmitted by the informer to the prosecution.[36] However, the Court also noted that some types of attorney-client discourse—for example, discussions about the weather—are by their nature such that no possible prejudice or even threat of prejudice would result from their disclosure.[37] While this reasoning supports a rule which would require a defendant to show prejudice in order to establish a sixth amendment violation,[38] there are also valid reasons weighing against such a rule.

For instance, focusing on whether there has been any resulting prejudice *before* finding a sixth amendment violation unfairly burdens a defendant who discovers that attorney-client communications have been relayed to the prosecution. Under this rule the defendant has the burden of proving not only that conversations were transmitted, but also that he or she was in some way prejudiced thereby. As Justice Marshall observed in his dissent in *Weatherford*, such proof will often be difficult if not impossible to establish.[39] Even the *Weatherford* majority agreed that a defendant should not be the one who "assumes the risk" of disclosure of supposedly confidential conversations by a person whom he or she believed to be a "confederate and ally."[40]

34. In Caldwell v. United States, 205 F.2d 879, 880–81 (D.C. Cir. 1953), the court held that a sixth amendment violation occurs when the government intentionally places a secret agent in the defense camp, regardless of whether prejudice to the defendant is shown. In Hoffa v. United States, 385 U.S. 293, 306–07 (1966), the United States Supreme Court, while declining to decide the precise issues involved in *Caldwell*, did state that *Caldwell* involved "government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel."

35. See *infra* text accompanying notes 39–40 for related arguments in the context of a nondeliberate intrusion.

36. In *Weatherford*, the Court suggested that communication of a defendant's defense plans, strategy, and trial preparation efforts would be "inherently detrimental" to the defendant, and would give the prosecution an unfair advantage, thereby "threaten[ing] to subvert the adversary system of criminal justice." 429 U.S. at 556.

37. *Id.* at 558.

38. *See supra* note 27 and accompanying text.

39. 429 U.S. at 565 (Marshall, J., dissenting).

40. *Id.* at 554.

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A much more equitable approach would be to focus on the *nature* of the disclosed information. If the information is of a type normally protected by the attorney-client privilege,[41] a sixth amendment violation should be presumed. This approach would eliminate the possibility of finding a constitutional violation in situations where only innocuous subjects are discussed and relayed to the prosecution,[42] because such discussions are not the type protected by the privilege.[43]

A rule such as the one just proposed finds some support in the case of *Glasser v. United States*,[44] where the United States Supreme Court pronounced that the right to counsel[45] is so fundamental that courts should not become involved in calculating the extent of prejudice resulting from its denial.[46] Additionally, the proposed rule is consistent with the spirit of the discovery rules. For example, the well-known "work-product doctrine," which precludes one party from forcing his or her adversary to reveal materials prepared "in anticipation of litigation,"[47] is within the protection afforded by Federal Rule of Criminal Procedure 16(c).[48] It is obvious that a prosecutor who is denied access to privileged information[49] through legitimate means of discovery should also be precluded from obtaining the same information by resorting to subterfuge.

Finally, the proposed rule would lessen any chilling effect that the threat of governmental intrusion might have on the attorney-client relationship. It is obvious that fear of disclosure might make clients reluctant to confide in attorneys, thereby making it difficult to obtain the best possible legal advice.[50] It is equally plain that such a fear would be

41. *See supra* note 13 and accompanying text. Examples of this type of information include trial plans and strategy.

42. Therefore, it should dispel some of the fears of the *Weatherford* Court. *See supra* note 37 and accompanying text.

43. Discussions of such subjects lack two necessary elements of privileged information, in that they are not related to the purpose for which legal advice is sought and they are obviously not intended to remain confidential. *See supra* note 13 and accompanying text.

44. 315 U.S. 60 (1942).

45. As has already been pointed out, this right includes the right to private communications with one's attorney. *See supra* note 11 and accompanying text.

46. 315 U.S. at 76.

47. The work-product doctrine, which was developed in the context of civil discovery, was first announced in the case of Hickman v. Taylor, 329 U.S. 495 (1947). In justifying the rule, the United States Supreme Court observed that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id.* at 510–11.

48. *See* United States v. Nobles, 422 U.S. 225, 238, 339 n.13 (1975).

49. In fact, the work-product doctrine is even broader in its scope than the attorney-client privilege. *Id.* at 238 n.11.

50. *See, e.g.*, Fisher v. United States, 425 U.S. 391, 403 (1976). *See also supra* notes 10–13 and accompanying text.

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greatly reduced if defendants knew that disclosure of properly privileged information would result in an automatic finding of a sixth amendment violation.

B. The Remedy

Once a sixth amendment violation in this context is established, the court must then focus its attention on finding the proper remedy. The most recent United States Supreme Court case dealing with this issue, *United States v. Morrison*,[51] held that the remedy in such cases should be commensurate with the injury suffered from the violation.[52] Even assuming a deliberate violation of an accused's right to counsel, the *Morrison* Court stated, the dismissal of charges is an inappropriate remedy unless prejudice or a "substantial threat of prejudice" is shown.[53] According to the *Morrison* Court, the proper approach is to determine the extent of a defendant's injury resulting from a sixth amendment violation and then to provide a remedy that is designed to safeguard the defendant's rights in subsequent proceedings.[54]

It therefore appears that an appellant demonstrating a sixth amendment violation must also allege some form of prejudice or threat of prejudice to him or her. If the record clearly indicates continuing prejudice that cannot be cured by a new trial, dismissal of the indictment is obviously the appropriate remedy.[55] Such continuing prejudice exists, for example, where the prosecution learned of defense strategies through the informer's presence at attorney-client meetings. In such a case, a new trial would be meaningless because the prosecution would be incapable of not taking such information into account in developing its own strategies.

If the record indicates a form of prejudice that can be cured by subsequent proceedings, a new trial is appropriate.[56] An example of this type of prejudice is testimony given by the informer which includes the substance of a protected attorney-client conversation. On remand, it would be the trial judge's duty to see that such testimony is excluded.

Finally, if the record is unclear as to whether there was any resulting prejudice, but there exists at least a "realistic possibility" of prejudice,[57] a new trial is again warranted. The purpose of such a trial would be to determine whether there was in fact prejudice to the defen-

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51. 449 U.S. 361 (1981).
52. *Id.* at 364.
53. *Id.* at 365.
54. *Id.*
55. *See* United States v. Levy, 577 F.2d 200, 210 (3d Cir. 1978).
56. *See, e.g.*, Gilbert v. California, 388 U.S. 263 (1967).
57. *See Weatherford*, 429 U.S. at 558.

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dant and, if so, whether the prejudice was of a type as to warrant dismissal or exclusion. It is in this third type of situation that the rules proposed by this comment are the most valuable to a defendant. Under the present trend of reported cases, a defendant who discovers the informer after trial might not be able to prove prejudice to the satisfaction of an appeals court. However, under the proposed method, the defendant will be given the opportunity to fully present evidence of prejudice to a trial court.

IV. Conclusion

The expectation of confidentiality is a very important factor in enabling an attorney to effectively represent his or her client. If it is shown that a government informer purposely intruded into a confidential attorney-client meeting, a sixth amendment violation should be presumed. Similarly, if any communications in that meeting of the type protected by the attorney-client privilege are transmitted to the prosecution by the informer, a violation of the right to counsel should also be presumed. Once the constitutional violation is apparent, the type of remedy available to a defendant should be based on whether or not such remedy will afford the defendant a fair trial. To do otherwise is to perpetuate a situation where the " 'balance of forces between the accused and his accuser' is sharply skewed in favor of the accuser."[58]

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58. *Id.* at 564 (Marshall, J., dissenting).

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