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# Weatherford v. Bursey

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## NOTE: WEATHERFORD v. BURSEY

Weatherford, an undercover agent for the South Carolina Law Enforcement Division,[1] and Bursey vandalized a Selective Service office. Both were arrested and indicted based on information given to the police by Weatherford.[2] At the invitation of Bursey and Bursey's attorney, Weatherford attended two pre-trial meetings between Bursey and Bursey's attorney where possible defense strategies were discussed. Weatherford, who intended to continue his work as an undercover agent, advised Bursey that he would not testify for the prosecution at Bursey's trial but did not disclose his status as an undercover agent.

Subsequently, Weatherford's identity was discovered.[3] Because Weatherford's effectiveness as an undercover agent was terminated, he testified at Bursey's trial. Weatherford's testimony, however, was limited solely to Bursey's participation in the offense charged. No mention was made of what transpired at the defense meetings which Weatherford attended. Bursey was convicted and served an eighteen month sentence.

Upon his release[4] Bursey instituted an action for damages against Weatherford and Strom, the director of SLED, based on 42 U.S.C. § 1983,[5] claiming that the presence of Weatherford at meetings between Bursey and his attorney and the alleged communication of what was learned by prosecution officials violated Bursey's sixth amendment right[6] to effective representation by counsel.

The Fourth Circuit Court of Appeals reversed the district court,[7] adopting a per se rule that "whenever the prosecution know-

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1. [hereinafter cited as SLED].

2. Weatherford's efforts to maintain his appearance as a co-defendant extended to retaining his own counsel and advising Bursey that he intended to obtain severance of his trial from that of Bursey.

3. Weatherford was seen vacationing with known SLED agents by one of Bursey's friends. Bursey v. Weatherford, 528 F.2d 483, 485 n.2 (4th Cir. 1975).

4. Neither an appeal of his conviction nor a habeas corpus proceeding was available to Bursey since he had served his sentence.

5. (1970). The section reads as follows:

> 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.

6. U.S. Const. amend. VI provides in part: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

7. The district court, in an unreported opinion, found that Bursey's constitutional rights had not been violated by Weatherford's presence at the defense meetings. The court

ingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial."[8] The United States Supreme Court reversed the court of appeals, holding that Bursey's sixth amendment right to counsel had not been violated.[9] *Weatherford v. Bursey,* 429 U.S. 545 (1977).

The sixth amendment right to effective representation by counsel has been construed to encompass the right to consult freely with counsel at all stages of the investigation and prosecution without governmental interference.[10] While the sixth amendment protects against interception of attorney-client communications both inside and outside the custodial context,[11] the emphasis of this note will

based its holding on three specific findings of fact. These findings were that Weatherford neither initiated the meetings nor sought any information from Bursey or his attorney, hence, there was no "gross" intrusion upon the confidential relationship between Bursey and his attorney; Bursey was not prejudiced by Weatherford's presence at the meetings because Weatherford had not discussed what had transpired at the meetings, either with his superiors or the prosecution officials; and Weatherford's actions, especially his statement to Bursey and Bursey's attorney that he was planning to obtain a severance of his trial from that of Bursey, which was highly unlikely under the circumstances, should have placed Bursey and his attorney on notice that Weatherford might be an undercover agent. Bursey v. Weatherford, 528 F.2d 483, 485-86 (4th Cir. 1975).

8. *Id.* at 486.

9. Anytime an alleged violation of the attorney-client relationship has occurred, the concepts of due process and fair trial are inextricably woven into the sixth amendment considerations discussed in this note. The *Weatherford* majority also dealt with possible detrimental effects upon Bursey because of Weatherford's statement to Bursey that he would not testify at Bursey's trial. It was determined by the Court that Brady v. Maryland, 373 U.S. 83 (1963), did not create a general constitutional right to discovery in criminal cases, and therefore it was not a violation of the defendant's right to due process to introduce a "surprise" witness. In addition, the allegation that the defendant was denied an opportunity to plea bargain was not upheld, because the Court found there to be no constitutional right to plea bargain. Weatherford v. Bursey, 429 U.S. 545, 559-61 (1977).

10. Geders v. United States, 425 U.S. 80 (1976). A seventeen hour overnight recess was called between the direct examination of the defendant and the subsequent cross-examination. The trial judge ordered the defendant not to talk to anyone concerning the trial, to prohibit coaching of the defendant by his attorney during the recess. The Supreme Court reversed the conviction, holding that the sixth amendment right of the defendant to consult with his attorney during the long overnight recess outweighed any governmental interest in cross-examining an uncoached witness.

11. Interference with attorney-client communications in a custodial setting have taken the form of a requirement that a third person be present during attorney-client conferences while the defendant is incarcerated, the monitoring of telephone conversations and censoring of mail both received and sent by an imprisoned defendant and the placing of government agents in close proximity to the defense table at trial. The courts facing these alleged intrusions in custodial situations have evaluated such factors as the opportunities presented to attorneys and their clients to communicate in private during the regular visiting hours at the jail or prison, reasonably necessary measures to insure security, reasonably necessary measures to insure that a trial will be conducted without undue disruptions and disturbances caused by unruly defendants, independent sources for development of the information learned

be on the latter. Interceptions outside the custodial context, such as that alleged in *Weatherford,* have generally been accomplished either by electronic eavesdropping or by the presence of a government informant during meetings between the defendant and his attorney.

In *Wong Sun v. United States*[12] the Supreme Court held that any evidence which is obtained through exploitation of a search or seizure found to be illegal under the fourth amendment[13] is tainted by the original illegality and must be excluded at trial[14] as "fruit of the poisonous tree."[15] However, the Court further held that if an independent source for the challenged evidence could be sufficiently established, such evidence would be admissible.[16]

Where the Supreme Court has considered electronic eavesdropping as interference with the right to counsel it has been unclear whether the constitutional violation has been founded on the fourth or sixth amendment. In two per curiam opinions, *Black v. United States*[17] and *O'Brien v. United States,*[18] the Court apparently followed the fourth amendment rationale of *Wong Sun* but never explicitly stated which amendment was involved. Each case involved interference in the confidential relationship between an attorney

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through the alleged intrusion, and lack of knowledge on the part of the government agent that he was intruding upon an attorney-client conversation. In analysis of these custodial interferences the courts generally took notice of the special circumstances involved and found that the state's interest in maintaining security was sufficient to outweigh any intrusion. However, it was held that the defendant and his attorney must be allowed reasonable opportunities to consult in private and that any information overheard by the intruder must not be transmitted to the prosecution for use in the defendant's trial. *See generally* United States v. Brown, 484 F.2d 418 (5th Cir. 1973), *cert. denied,* 415 U.S. 960 (1974); State v. Long, 465 F.2d 65 (8th Cir. 1972), *cert. denied,* 409 U.S. 1130 (1973); Goodwin v. Oswald, 462 F.2d 1237 (2d Cir. 1972); United States v. Seale, 461 F.2d 345 (7th Cir. 1972); Smith v. Robbins, 454 F.2d 696 (1st Cir. 1972); United States v. Morris, 451 F.2d 969 (8th Cir. 1971); United States v. Bullock, 441 F.2d 59 (5th Cir. 1971); Ramer v. United States, 411 F.2d 30 (9th Cir. 1969), *cert. denied,* 396 U.S. 915 (1969); Haas v. United States, 344 F.2d 56 (8th Cir. 1965), and United States *ex rel* Cooper v. Denno, 221 F.2d 626 (2d Cir. 1955), *cert. denied,* 349 U.S. 968 (1955).

12. 371 U.S. 471 (1963). Statements made by a defendant who was arrested as a result of an unlawful entry into his house were excluded from use as evidence.

13. U.S. Const. amend. IV, provides in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

14. Weeks v. United States, 232 U.S. 383 (1914), and Mapp v. Ohio, 367 U.S. 643 (1961), established the exclusionary rules for evidence seized in violation of the fourth amendment and sought to be introduced in federal and state proceedings, respectively.

15. 371 U.S. 471, 487-88 (1963).

16. *Id.* at 485.

17. 385 U.S. 26 (1966) (*per curiam*).

18. 386 U.S. 345 (1967) (*per curiam*).

and his client through governmental use of electronic eavesdropping devices. The government contended that the information which was intercepted was not used in a manner that was prejudicial to either defendant,[19] but the Court remanded both cases for determination of whether any information obtained illegally was introduced at trial. Both opinions, however, were silent as to whether the Court was considering a violation of the fourth amendment or a violation of the sixth amendment as the basis for requiring a new trial.

Although not mentioned in either *Black* or *O'Brien,* the important sixth amendment considerations involved in governmental interception of attorney-client communications outside the custodial context were dealt with at length in two prior opinions of the District of Columbia Court of Appeals. In *Coplon v. United States*[20] it was alleged that the government used a wiretap to intercept telephone conversations between the defendant and her attorney, thereby violating the defendant's right to effective representation by counsel.[21] The court held that a criminal defendant has a fundamental right to consult privately with counsel, both before and during trial, and that such right cannot be "abridged, interfered with, or impinged upon in any manner."[22] In an explicit rejection of the prosecution's contention that the defendant has the burden of proving the exact prejudice suffered because of the intrusion, the court quoted the Supreme Court in *Glasser v. United States*:[23] "[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".[24]

The court of appeals relied on the language in *Glasser* to formu-

19. In *Black* a telephone tap was utilized in an unrelated investigation and the intercepted communications revealed no evidence useful in the trial of the defendant for income tax evasion. 385 U.S. 26, 28 (1966) (*per curiam*). In *O'Brien* a telephone conversation between the defendant and his attorney was recorded through the use of a microphone hidden in a commercial establishment. The substance of the recorded conversation was a request by the defendant that his attorney file an application relating to the territorial conditions of his release on bail. 386 U.S. 345, 346 (1967)(*per curiam*).

20. 191 F.2d 749 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 926 (1952).

21. The lower court rejected this claim and was reversed by the court of appeals, which remanded the case with instructions to grant a hearing to determine whether there had been an interception of attorney-client communications. The court of appeals further instructed the district court to reverse the conviction of the defendant and grant a new trial if the hearing should disclose that the alleged interceptions did occur, regardless of whether any prejudice to the defendant resulted. *Id.* at 759-60.

22. *Id.* at 759.

23. 315 U.S. 60 (1942).

24. Coplon v. United States, 191 F.2d 749, 759 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 926 (1952).

late a per se rule which required the reversal of any conviction obtained through the aid of an intrusion into the confidential relationship between a criminal defendant and his attorney. An intrusion by the government into the attorney-client relationship would be sufficient cause for reversal and a new trial, regardless of whether any prejudice to the defendant's cause had occurred.

Two years later the same court was presented with an intrusion upon the confidential relationship between an attorney and his client which took a different form. *Caldwell v. United States*[25] involved the use of a paid government informant in the dual capacity of defense assistant and government agent.[26] The court relied on its decision in *Coplon* in holding that the defendant's conviction should be reversed and a new trial granted because the presence of the government agent at meetings between the defendant and his attorney violated the defendant's sixth amendment rights.[27] This affirmed the per se rule announced in *Coplon* and expanded its scope to include intrusion into the attorney-client relationship through the use of an informant.

The Supreme Court's initial consideration of interference with the attorney-client relationship outside the custodial context came in *Hoffa v. United States.*[28] In *Hoffa* the defendant's conviction of jury tampering was based largely on the testimony of a government informant[29] who had been present at several meetings between the defendant and his attorneys during the trial in which the jury tampering occurred.[30] The Court assumed that *Coplon* and *Caldwell* had been decided correctly but found the per se rule applied in those cases to be inapplicable to the situation in *Hoffa.* The Court found no violation of the defendant's sixth amendment right because the incriminating evidence was not obtained by the informant in the presence of the defendant's counsel. The defendant's incriminating statements, which formed the basis for his conviction, were all overheard by the informant at times when the defendant's attorneys were not present; hence no interception of attorney-client communications was involved.[31] The testimony of the government agent did not involve any information which was protected by the attorney-

25. 205 F.2d 879 (D.C. Cir. 1953), *cert. denied,* 349 U.S. 930 (1955).

26. *Id.* at 880.

27. *Id.* at 881.

28. 385 U.S. 293 (1966).

29. *Id.* at 295.

30. *Id.* at 305. There was a great deal of dispute as to exactly what extent the informant was present during the defense meetings in the defendant's hotel suite.

31. *Id.* at 308.

client relationship and was therefore admissible because it was in no way the fruit of an illegality as prohibited by *Wong Sun*.[32] In its holding the Court apparently expanded the exclusionary rule pertaining to searches and seizures conducted in violation of the fourth amendment to require the exclusion of information gathered in a "search" or "seizure" that violates the sixth amendment.

Although Hoffa's conviction was affirmed, the Court, in dictum, assumed that the intrusion by the informant into the defense camp during the earlier trial was of sufficient magnitude to require reversal of a conviction in compliance with the holdings in *Coplon* and *Caldwell*.[33] It can be inferred from this dictum that the Supreme Court would have followed the per se rule requiring exclusion if the conviction presented to it had involved an intrusion into the attorney-client relationship. Although not explicit in the opinion, it appears that the *Hoffa* Court would have reversed any conviction obtained in violation of the sixth amendment, regardless of whether any prejudice to the defendant was shown.[34]

The majority in *Weatherford* discussed three factors to be used in determining whether an intrusion into the attorney-client relationship in violation of the sixth amendment had occurred.[35] The first factor was whether any evidence was obtained through or tainted by[36] an illegal interference with the privacy of communications between Bursey and his attorney.[37] Weatherford's testimony was limited solely to the events of the night the Selective Service office was vandalized. Since none of this testimony was based on information obtained through Weatherford's presence at the defense meetings, the Court found that none of the evidence which led to

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32. *Id.*

33. *Id.* at 307.

34. Despite the Supreme Court's apparent approval of the per se rule of *Coplon* and *Caldwell*, the Fourth Circuit Court of Appeals was the first lower federal court to adopt that rule in a non-custodial situation. Bursey v. Weatherford, 528 F.2d 483 (4th Cir. 1975). For the manner in which other federal circuit courts have treated interference in the attorney-client relationship in non-custodial situations, *see generally* United States v. Choate, 527 F.2d 748 (9th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); United States v. Scott, 521 F.2d 1188 (9th Cir. 1975); *cert. denied*, 424 U.S. 955 (1976); United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); United States v. Fanning, 477 F.2d 45 (5th Cir. 1973), *cert. denied*, 414 U.S. 1006 (1973); United States v. Rispo, 460 F.2d 965 (3rd Cir. 1972); and United States v. Zarzour, 432 F.2d 1 (5th Cir. 1970).

35. 429 U.S. 545, 558 (1977).

36. *Id.* at 552-54. The majority of the Court did not rely on the rule of *Black* and *O'Brien* because it was felt that those cases were not intended to be constructions of the sixth amendment right to counsel in light of the well defined fourth amendment prohibitions against using the fruits of an illegal surveillance. Some emphasis was placed on the fact that neither *Black* nor *O'Brien* even mentioned the sixth amendment in their short per curiam opinions.

37. 429 U.S. 545, 555 (1977).

Bursey's conviction could be said to be tainted by Weatherford's presence at the meetings.

Second, the Court considered whether any communications between Bursey and his attorney were relayed to the prosecution. The Supreme Court relied on the express finding of the district court that Weatherford communicated nothing to the prosecution about Bursey's trial plans or about the trial itself.[38] It was held that Weatherford was not a member of the prosecution[39] and therefore no defense strategies were ever communicated to the prosecution. The Court found that "as long as the information possessed by Weatherford remained uncommunicated, he posed no substantial threat to Bursey's sixth amendment rights."[40]

The final factor considered by the Court was the lack of intent on the part of the prosecution or Weatherford to intrude into the privacy of an attorney-client relationship. Weatherford was present at the defense meetings because he was invited to attend by Bursey and Bursey's attorney, apparently for Bursey's benefit.[41] Weatherford desired to maintain his undercover status, and his attendance at the defense meetings was necessary in order to avoid arousing Bursey's suspicions that Weatherford might be an informant.[42] The Court acknowledged the need for undercover work and its great value to law enforcement[43] and disagreed sharply with the per se rule of the lower court.[44] The Court felt that such a rule would require numerous undercover agents and informants to unmask themselves, thereby eliminating their effectiveness in law enforcement.

The majority felt that the presence of any of the three factors discussed above would necessitate reversal of a conviction involving interception of attorney-client communications outside the custodial context. If evidence which was tainted by the intrusion of the informant was introduced, or the defense plans and trial strategies of the defendant were communicated to the prosecution or the intrusion into the attorney-client relationship was for the purpose of intercepting such privileged information for use in prosecution of the defendant, there would be substantial prejudice suffered by the

38. *Id.* at 556.

39. *Id.* The Court disagreed with the findings of the court of appeals that Weatherford was a member of the prosecution, which would make anything learned by Weatherford known to the prosecution.

40. *Id.*

41. *Id.* at 557.

42. *Id.*

43. *Id.*

44. *Id.*

defendant and a conviction would be reversible within the confines of the sixth amendment guaranty of effective representation by counsel.

A dissent by Justice Marshall contended that the decisions in *Black* and *O'Brien* compelled application of the per se rule.[45] Marshall enumerated three results which he felt unfairly benefited the prosecution under the rule proposed by the majority. The first was the tremendous tactical advantage obtained by a prosecution witness in the preparation of his testimony.[46] A prosecution witness who attended defense meetings would not only learn of possible defense strategies but would also have the opportunity to formulate answers to anticipated cross-examination. Second, the prosecution would always be able to argue that the sole purpose of the intrusion into the attorney-client relationship was to protect the identity of the undercover agent.[47] Finally, Marshall observed the difficulty a defendant would have in proving that the informant did communicate to the prosecution what was learned at the defense meetings.[48] The defendant would have to obtain admissions by either the informant or the prosecutor to prove that defense strategies had been communicated.

The most significant impact of *Weatherford v. Bursey* is the unequivocal rejection of the per se rule announced in *Coplon* and *Caldwell.* Because that per se rule required only the indication that the privacy of communication between a criminal defendant and his attorney has been compromised, a conviction could be reversed due to an accidental and completely harmless intrusion even if the evidence "fairly shrieks the guilt of the parties."[49] In contrast to the per se rule, the guidelines proposed by the Court in *Weatherford* provide objective criteria to be applied to a particular situation, compelling reversal of a conviction only when the defendant's sixth amendment right to counsel has been violated by any one of three factors: (1) introduction at trial of any information obtained through the violation of the attorney-client privilege; (2) communication of defense strategies to the prosecution; or (3) a purposeful intrusion into the attorney-client relationship.[50]

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45. *Id.* at 566 (Marshall, J., dissenting).

46. *Id.* at 563-64 (Marshall, J., dissenting).

47. *Id.* at 565.

48. *Id.*

49. Lutwak v. United States, 344 U.S. 604, 619 (1953).

50. The majority opinion distinguishes between the chilling effect on attorney-client relations caused by the presence of informants and that caused by the use of electronic eavesdropping devices. Weatherford v. Bursey, 429 U.S. 545, 554-55 n.4 (1977). The opinion

The disturbing aspect of the *Weatherford* opinion is the protection given to the identity of undercover law enforcement agents at the possible expense of sixth amendment rights. The actual damage to the guaranty of effective representation by counsel will become evident only with time. Only interpretation and application of the standards proposed by the Supreme Court by various courts will indicate whether they are adequate to provide protection of sixth amendment rights or whether a return to the per se rule of *Coplon* and *Caldwell* is necessary.

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states that the impact of informant intrusions on the free exchange between attorneys and their clients is significantly less than the impact of electronic intrusions. The diminished impact results from the possibility of excluding third parties from conferences between attorneys and clients in situations outside the custodial context. This exclusion of third parties significantly reduces the chance of any conversation being overheard. However, because of the technological advancements made in electronics, remedies as simple as exclusion of third parties are not available to the attorney and client subjected to electronic surveillance. This inability to be assured that conversations are not being monitored could greatly inhibit the complete exchange of information which is vital to effective representation by counsel. In light of the factors discussed in the opinion, the validity of the distinction between informant and electronic eavesdropping appears to be drastically limited. In any case involving the interception of attorney-client communications through the use of a wiretap or other electronic device, it seems that the existence of a purposeful intent on the part of the government would already be established. Under the standards introduced by the Court in *Weatherford*, the mere presence of a purposeful intrusion would require reversal of any conviction obtained. *Id.* at 557-58.