

**THE SIXTH AMENDMENT, ATTORNEY-  
 CLIENT RELATIONSHIP AND  
 GOVERNMENT INTRUSIONS: WHO  
 BEARS THE UNBEARABLE BURDEN  
 OF PROVING PREJUDICE?**

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I. INTRODUCTION

The United States Supreme Court has characterized the sixth amendment’s guarantee of assistance of counsel in all criminal prosecu-

tions<sup>1</sup> as a right fundamental to liberty and justice.<sup>2</sup> The underlying justification for the right to counsel is the presumed inability of a defendant to make informed choices about the preparation and conduct of her defense.<sup>3</sup> Communication between the defendant and counsel must remain confidential for the right to counsel to have any meaning.<sup>4</sup> If the government can obtain damaging information from counsel, defendants will not confide in their lawyers. The predictable result would be to undermine the quality of the legal representation guaranteed by the sixth amendment.<sup>5</sup>

In *Weatherford v. Bursey*,<sup>6</sup> the United States Supreme Court defined what constitutes an impermissible intrusion into the attorney-client relationship in a limited factual context. The Court held that the mere presence of a government informant at a defense-related meeting does not necessarily violate the defendant's sixth amendment right to counsel.<sup>7</sup> The Court held further that to establish a violation of a defendant's right to counsel requires showing, at minimum, a realistic possibility of prejudice to the defendant or of benefit to the prosecution stemming from the government intrusion.<sup>8</sup> In making its determination, however, the *Weatherford* Court did not define what constitutes prejudice or who bears the burden of proving it.<sup>9</sup> Consequently, lower

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1. U.S. CONST. amend. VI.

2. *Powell v. Alabama*, 287 U.S. 45, 67 (1932). Judge Wallace of the Ninth Circuit Court of Appeals stated:

It does not belittle the other constitutional rights enjoyed by criminal defendants to state this right to counsel is perhaps the most important of all. Otherwise, the basic integrity of our criminal justice system would be suspect. Were the state able to marshal its formidable resources against those accused of committing crimes and force them to stand alone while their life and liberty is in jeopardy, there could be no assurance that those sent to prison were indeed guilty of the offenses charged.

*Cahill v. Rushen*, 678 F.2d 791, 799 (9th Cir. 1982) (Wallace, J., dissenting).

3. *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938).

4. *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978).

5. *See Weatherford v. Bursey*, 429 U.S. 545, 563 (1977) (Marshall, J., dissenting).

6. 429 U.S. 545 (1977).

7. *Id.* at 550-51.

8. *Id.* at 558.

9. *See, e.g., United States v. Kelly*, 790 F.2d 130, 137 (D.C. Cir. 1986) (while the *Weatherford* court made it clear that some prejudice must be shown as an element of a sixth amendment violation, the Court did not answer the crucial question of what showing of prejudice is required); *United States v. Mastroianni*, 749 F.2d 900, 907 (1st Cir. 1984) (The *Weatherford* court had no occasion to determine what showing of prejudice is required or who bears the burden of proving prejudice).

courts have reached inconsistent results on the issue.<sup>10</sup>

This Note will examine the conflicting approaches the lower courts have taken in addressing claims of sixth amendment violations involving government interference with the attorney-client relationship. First, this Note will explain the development of sixth amendment jurisprudence and the right to counsel. Second, this Note will examine the attorney-client relationship, as viewed under the sixth amendment and common law doctrines. Third, this Note will focus on the divergent approaches taken by the federal appellate courts with respect to burden of persuasion in cases of government intrusion. Finally, this Note will propose that a deliberate government intrusion into the attorney-client relationship should constitute a per se violation of the defendant's right to counsel raising an irrebuttable presumption of prejudice. This Note will further propose that where the government obtains confidential defense information through an unintentional intrusion into the attorney-client relationship, the burden of showing a lack of prejudice to the defendant and, therefore, the absence of a sixth amendment violation should rest on the government.

## II. THE SIXTH AMENDMENT RIGHT TO COUNSEL

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 defense."<sup>11</sup> This amendment has long been construed as a guarantee of both access to counsel and the right to effective assistance of counsel.<sup>12</sup>

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10. Compare *United States v. Costanzo*, 740 F.2d 251, 254 (3d Cir. 1984) (a government informant's communication of confidential defense strategy information to the prosecution creates a presumption of prejudice sufficient to establish a sixth amendment violation), *cert. denied*, 472 U.S. 1017 (1985) with *United States v. Irwin*, 612 F.2d 1182, 1186-87 (9th Cir. 1980) (government interference with the attorney-client relationship is prejudicial only if it is used against the defendant at trial).

11. U.S. CONST. amend. VI. The full text of the sixth amendment reads:

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

*Id.*

12. See generally Note, *Harmless Sixth Amendment Violations?*, 7 CRIM. JUST. J. 97 (1983) (historical review of the sixth amendment right to counsel).

### A. *Background of the Right to Counsel*

The Supreme Court first recognized the right to appointment of counsel in *Powell v. Alabama*.<sup>13</sup> In that case, several black defendants were charged with the rape of two women.<sup>14</sup> The defendants were tried without aid of counsel, found guilty, and sentenced to death.<sup>15</sup> The Supreme Court found that the lack of specifically designated counsel constituted a denial of the defendants' sixth amendment right to counsel.<sup>16</sup> In a capital case where the defendant has insufficient resources to employ a lawyer, the Court held that the trial court is charged with the affirmative duty to assign counsel.<sup>17</sup> Moreover, the Court emphasized that such assignment should be made at a time and under such circumstances to provide the defendant with effective aid in the preparation and trial of the case.<sup>18</sup>

With *Johnson v. Zerbst*,<sup>19</sup> the Supreme Court significantly expanded the constitutional guarantee of right to counsel. In *Johnson*, the police arrested the petitioner and another person on a felony charge of uttering and passing counterfeit federal reserve notes.<sup>20</sup> Both men were tried, convicted and sentenced to four and one-half years in the federal penitentiary.<sup>21</sup> Although counsel represented both men at their preliminary hearing, the defendants were unable to secure counsel for any subsequent stages of the criminal proceedings.<sup>22</sup>

According to the Supreme Court, the purpose of the sixth amendment's right to counsel was "to protect an accused from conviction resulting from his own ignorance of his legal or constitutional rights."<sup>23</sup> Further, the Court established two duties of every federal

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13. 287 U.S. 45 (1932).

14. *Id.* at 49.

15. *Id.* at 50.

16. *Id.* at 53.

17. *Id.* at 71. The Court limited its holding to capital offenses, and stated that it did not consider the issue of whether the sixth amendment required appointment of counsel in other criminal prosecutions. *Id.*

18. *Id.*

19. 304 U.S. 458 (1938).

20. *Id.* at 459-60.

21. *Id.* at 460. The district court denied petitioner habeas corpus. *Bridwell v. Aderhold*, 13 F. Supp. 253, 254 (D. Ga. 1935). The court of appeals affirmed. *Johnson v. Zerbst*, 92 F.2d 748 (5th Cir. 1937).

22. *Johnson*, 304 U.S. at 460.

23. *Id.* at 465.

trial court in criminal cases.<sup>24</sup> First, the trial court should ascertain whether the defendant desired counsel and whether he was able to employ counsel.<sup>25</sup> Second, the trial court should appoint counsel for the indigent defendant who sought representation or who failed to intelligently waive that right.<sup>26</sup> The Court concluded that a trial court's failure to fulfill these constitutionally mandated duties rendered it without jurisdiction to proceed.<sup>27</sup>

In *Gideon v. Wainwright*,<sup>28</sup> the Supreme Court extended the indigent defendant's sixth amendment right to counsel to non-capital offenses at the state level. In that case, the petitioner was charged with breaking and entering with the intent to commit a misdemeanor.<sup>29</sup> Refused assistance of counsel, and unable to employ counsel himself, the petitioner conducted his own criminal defense.<sup>30</sup> The petitioner was found guilty and sentenced to five years in the state prison.<sup>31</sup> The Florida Supreme Court denied petitioner's habeas corpus petition without opinion.<sup>32</sup> In reversing the Florida court, the United States Supreme Court reaffirmed that the sixth amendment right to assistance of counsel is indispensable to the fair administration of the adversarial system of criminal justice.<sup>33</sup> The Court held that the fourteenth amendment requires appointment of counsel for indigent defendants in state court no less than the sixth amendment requires it in federal court.<sup>34</sup>

### B. Attachment of the Sixth Amendment Right

In order to establish a sixth amendment violation, the accused must show that the right to counsel attached at the time of the government

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24. *Id.* at 468.

25. *Id.*

26. *Id.*

27. *Id.* The *Johnson* Court limited its holding to the appointment of counsel for indigent defendants in federal court. *Id.* at 462-63.

28. 372 U.S. 335 (1963).

29. *Id.* at 336-37.

30. *Id.* at 337.

31. *Id.*

32. *Id.*

33. *Gideon*, 372 U.S. at 344. See *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938); *Powell v. Alabama*, 287 U.S. 45, 67 (1932); see also *Maine v. Moulton*, 474 U.S. 159, 169 (1985) ("[T]he right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding.").

34. *Gideon*, 372 U.S. at 342-43, 345.

misconduct.<sup>35</sup> In *Kirby v. Illinois*,<sup>36</sup> the Supreme Court held that the right to counsel attaches when the state initiates an "adversary judicial proceeding."<sup>37</sup> The majority stated that adversary judicial proceedings were not limited to the actual trial, but included formal charges, preliminary hearings, the indictment, information or assignment.<sup>38</sup> The majority reasoned that the initiation of criminal proceedings triggered the accused's right to counsel because at this juncture, "the government has committed itself to prosecute and [it is] only then that the adverse positions of government and defendant have solidified."<sup>39</sup>

The mere fact that the police are committed to investigating the accused or the fact that the accused has retained counsel, however, will not trigger the right to counsel.<sup>40</sup> In *Moran v. Burbine*,<sup>41</sup> the police arrested the defendant in connection with a local burglary and on suspicion of murder.<sup>42</sup> Upon learning of the defendant's arrest, the defendant's family immediately retained counsel for him without his knowledge.<sup>43</sup> That same evening, police questioned the defendant about the murder and obtained a confession from him.<sup>44</sup> The defendant moved to suppress the confession on the ground that his right to counsel had been violated.<sup>45</sup> The Court rejected the defendant's contention that the sixth amendment right to counsel inures the moment

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35. See generally Project: *Eighteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1987-88* (pt. 2), 77 GEO. L.J. 931, 958 (1989) (necessary elements of a sixth amendment violation).

36. 406 U.S. 682 (1972). In *Kirby*, the police arranged for an eyewitness to identify the defendant before the defendant had been formally charged with the crime. *Id.* at 684-85.

37. *Id.* at 688.

38. *Id.* at 689.

39. *Id.* The majority reasoned further that it is upon the initiation of formal judicial proceedings that "a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Id.*

40. See *Hoffa v. United States*, 385 U.S. 293, 309-10 (1966), *reh'g denied*, 386 U.S. 940 (1967).

41. 475 U.S. 412 (1986).

42. *Id.* at 416.

43. *Id.* at 416-17.

44. *Id.* at 418. The Court found that the defendant had received *Miranda* warnings on several separate occasions and had "knowingly, intelligently and voluntarily waived his privilege against self-incrimination." *Id.* See *Miranda v. Arizona*, 384 U.S. 436 (1966).

45. *Id.*

the relationship between the criminal suspect and attorney is formed, or, when authorities subject the suspect to custodial interrogation.<sup>46</sup> Applying the *Kirby* rule, the Court stated that the defendant's right to counsel did not attach until after the initiation of formal charges.<sup>47</sup> Accordingly, the Court ruled that the police did not violate the defendant's sixth amendment right to counsel by questioning the defendant prior to this point without telling him that an attorney had been retained for him.<sup>48</sup>

The Supreme Court has suggested that the right to assistance of counsel might attach prior to formal judicial proceedings.<sup>49</sup> For example, in *Maine v. Moulton*,<sup>50</sup> the Court stated that "the right [to counsel] attaches at earlier, critical stages in the criminal justice process where the results might well settle the accused's fate and reduce the trial itself to a mere formality."<sup>51</sup> The Court, however, has never extended that right to events occurring prior to the initiation of adversary judicial proceedings.<sup>52</sup> Recent Supreme Court cases involving defendants who have not been indicted consistently have ruled that the right to counsel had not yet attached.<sup>53</sup>

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46. *Id.* at 432. See *supra* notes 35-39 and accompanying text explaining that the sixth amendment right to counsel does not attach until initiation of adversary judicial proceedings.

47. *Moran*, 475 U.S. at 431. Additionally, the Court stated that "[b]y its very terms, [the right to counsel] becomes applicable only when the government's role shifts from investigation to accusation." *Id.* at 430.

48. *Id.* at 432.

49. Comment, *Sixth Amendment Exclusionary Rule: Step-Child of the Right to Counsel*, 24 HOUS. L. REV. 765, 771 (1987).

50. 474 U.S. 159 (1985).

51. *Id.* at 170 (citing *United States v. Wade*, 388 U.S. 218, 224 (1967)). In *Moulton*, however, the defendant claimed his sixth amendment right to counsel was violated after indictment. *Id.* at 161. See also *Brewer v. Williams*, 430 U.S. 387, 398 ("Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time the judicial proceedings have been initiated against him. . . ."), *reh'g denied*, 431 U.S. 925 (1977).

52. Comment, *supra* note 49, at 771.

53. See, e.g., *Moran v. Burbine*, 475 U.S. 412 (1986); *United States v. Gouveia*, 467 U.S. 180 (1984); *Rhode Island v. Innis*, 446 U.S. 291 (1980); see also *United States ex rel. Shiflet v. Lane*, 815 F.2d 457 (7th Cir. 1987), (Government intrusion into the attorney-client relationship did not violate defendant's right to counsel because the defendant had not been indicted or formally charged), *cert. denied*, 485 U.S. 965 (1988); *United States v. Langley*, 848 F.2d 152, 153 (11th Cir.) (the mere filing of a complaint and issuance of a warrant for the defendant's arrest does not trigger the defendant's sixth amendment right to counsel), *cert. denied*, 488 U.S. 897 (1988); *United States v.*

C. *Exclusionary Rule - - Incriminating Statements Obtained from Defendant After the Right to Counsel Attached*

Once the accused's right to counsel attaches, the sixth amendment guarantees the accused the right to rely on counsel as a "medium" between her and the state.<sup>54</sup> The sixth amendment imposes an affirmative obligation upon the prosecutor and police not to act in any manner that circumvents the protection afforded by the right to counsel.<sup>55</sup>

*Massiah v. United States*<sup>56</sup> represented the Supreme Court's first attempt to develop a standard for scrutinizing surreptitious police practices in the right to counsel context. In that case, the defendant and an accomplice were indicted on federal narcotics charges and then released on bail.<sup>57</sup> While cooperating with government agents, the defendant's accomplice spoke with the defendant, using a radio transmitter to allow government agents to listen for incriminating statements.<sup>58</sup> The Court held that the Government violates a defendant's sixth amendment rights when it deliberately elicits incriminating statements from an indicted defendant in the absence of counsel.<sup>59</sup> The Court added that the sixth amendment applied to "indirect and surreptitious interrogations" as well as those conducted in the jailhouse.<sup>60</sup>

The Supreme Court applied the *Massiah* framework to the context

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Fortna, 796 F.2d 724, 731 (5th Cir.) (although Government intrusion into attorney-client relationship may constitute sixth amendment violation, the sixth amendment right does not attach until initiation of adversarial judicial proceedings), *cert. denied*, 479 U.S. 950 (1986).

54. *Moulton*, 474 U.S. at 176.

55. *Id.*

56. 377 U.S. 201 (1964).

57. *Id.* at 202.

58. *Id.* at 202-03. The defendant's accomplice, Colson, allowed a government agent to place a radio transmitter underneath the front seat of his car so that the agent could overhear conversations between Colson and the defendant. *Id.*

59. *Id.* at 206. The Court relied heavily on *Spano v. New York*, 360 U.S. 315 (1959), in formulating its holding. *Massiah*, 377 U.S. at 204-06. In *Spano*, police employed lengthy interrogation and other questionable tactics to induce the defendant to confess to murder. *Spano*, 360 U.S. at 317-20. The Supreme Court suppressed the defendant's confession, holding that the methods employed by the police and the denial of defendant's request for his counsel during the interrogation violated the defendant's sixth amendment right to counsel. *Id.* at 323-24. See *Sixth Amendment - Right to Counsel: Limited Postindictment Use of Jailhouse Informants is Permissible*, 77 J. CRIM. L. & CRIMINOLOGY 743, 748-49 (1986) [hereinafter *Jailhouse Informants*].

60. *Massiah*, 377 U.S. at 206. The Court stated that it did not intend its holding to prohibit continued police investigation into the indicted crime, but rather to exclude

of jailhouse informants in *United States v. Henry*.<sup>61</sup> In *Henry*, FBI agents employed an informant to listen to statements made by any of several federal prisoners occupying the same cellblock, and to report any useful information obtained.<sup>62</sup> The informant forthwith engaged the defendant in conversation during which the defendant made incriminating statements regarding the crime for which he had been indicted.<sup>63</sup> The Court ruled that the Government's actions violated the "deliberate elicitation" standard of *Massiah*.<sup>64</sup> The Court held that "[by] intentionally creating a situation likely to induce Henry to make incriminating statements without assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel."<sup>65</sup> The constitutional violation, therefore, owed to a combination of surreptitious government activity and the defendant's peculiar vulnerability as a prisoner.<sup>66</sup>

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from evidence incriminating statements obtained from the defendant through indirect and surreptitious interrogation methods. *Id.* at 207.

There are various ways that government agents can lead a suspect into making incriminating statements. For example, in *Brewer v. Williams*, 430 U.S. 387 (1977), a police officer induced the defendant into revealing the location of his murder victim by persuading the defendant that the victim was entitled to a "Christian burial." *Id.* at 392-93. The Supreme Court held that the "Christian burial speech" made during the four-hour police ride violated the sixth amendment because it was the functional equivalent of direct interrogation. *Id.* at 399. See also Saltzburg, *Forward: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 205-07 (1980) (review of postindictment interrogation decisions).

61. 447 U.S. 264 (1980).

62. *Id.* at 266. The FBI agent had specifically instructed the informant not to question the defendant. *Id.*

63. *Id.*

64. *Id.* at 274. See *Jailhouse Informant*, *supra* note 59, at 750.

65. *Henry*, 447 U.S. at 274. See also *Satterwhite v. Texas*, 486 U.S. 249, 254-56 (1988) (court found sixth amendment violation when police conducted psychiatric examination to determine defendant's future dangerousness without prior notification to defense counsel because district attorney did not serve defense counsel with copy of motion requesting examination); *Maine v. Moulton*, 474 U.S. 159, 176 (1985) ("[T]he Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent."). See generally Cluchey, *Maine v. Moulton: The Sixth Amendment and "Deliberate Elicitation": The Defendant's Position*, 23 AM. CRIM. L. REV. 43 (1985).

66. The Court emphasized four factors it considered crucial in determining that the Government elicited incriminating statements. First, the defendant had been indicted, therefore his sixth amendment right to counsel had attached. *Henry*, 447 U.S. at 270. Second, the defendant was unaware that his fellow prisoner was a government informant thus capable of eliciting information from the defendant that he would otherwise

In *Kuhlmann v. Wilson*,<sup>67</sup> however, the Supreme Court limited the *Henry* doctrine by holding that the use of a "passive informant" did not violate a defendant's sixth amendment right to counsel, even if the informant was acting under a prior arrangement with the government.<sup>68</sup> The Court found that the conversations between the informant and defendant were entirely spontaneous, and that the informant asked no questions.<sup>69</sup> Furthermore, the Court noted that the police instructed the informant to listen only for the identities of the defendant's accomplices.<sup>70</sup> The Court ruled that the sixth amendment primarily protects against secret interrogation by means of techniques functionally equivalent to direct police interrogation.<sup>71</sup> In so holding, the Court determined that the police and their informant must take some action designed to deliberately elicit incriminating remarks; mere listening would not violate an accused's right to counsel.<sup>72</sup>

The Supreme Court appears to limit the exclusion of incriminating statements deliberately elicited from an accused without the waiver or presence of counsel to the specific crime or crimes to which the defendant's right to counsel has already attached.<sup>73</sup> Thus, the government

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not reveal to the Government. *Id.* at 272-73. Third, the defendant could not make a knowing and voluntary waiver of his sixth amendment rights because he was not aware that his fellow prisoner was an undercover agent. *Id.* at 273. Finally, the Court stressed that incarceration created strong psychological inducements to confide in a fellow prisoner. *Id.* Consequently, the Government should have reasonably known that the defendant would likely make incriminating statements. *Id.* at 273-74. *See* Comment, *supra* note 49.

67. 477 U.S. 436 (1986).

68. *Id.* at 459. *See generally* *Jailhouse Informants*, *supra* note 59 for a detailed review of the *Kuhlmann* decision.

69. *Kuhlmann*, 477 U.S. at 460.

70. *Id.*

71. *Id.* at 459. The Court distinguished *Massiah* stating that while *Massiah*'s "deliberately eliciting" test focused on prevention of indirect or surreptitious interrogation, the informant in *Kuhlmann* did not ask any questions. *Id.* at 457. The Court distinguished *Henry* on the ground that although the informant in *Kuhlmann* was placed in close proximity to the defendant, the informant made no effort to stimulate conversations about the crimes charged or otherwise surreptitiously induce incriminating statements from the defendant. *Id.* at 458.

72. *Id.* at 459. *See also* *McDonald v. Blackburn*, 806 F.2d 613, 622-23 (5th Cir. 1986) (no sixth amendment violation when police placed cellmate in cell to listen and did not ask questions), *cert. denied*, 481 U.S. 1070 (1987); *United States v. Cruz*, 785 F.2d 399, 408 (2d Cir. 1986) (Government's placement of informant on the same floor of the jail as the defendant was not a sixth amendment violation because it did not constitute an attempt to deliberately seek information).

73. *See, e.g.,* *Maine v. Moulton*, 474 U.S. 159, 180 n.16 (1985) ("Incriminating

may freely investigate the defendant's completed or proposed criminal conduct relating to new or additional offenses.<sup>74</sup> However, the investigation of a new crime will not legitimize the admission of incriminating statements relating to a pending offense.<sup>75</sup>

#### D. *Waiver of the Right to Counsel*

Once the defendant invokes the sixth amendment right to counsel,<sup>76</sup> the police are barred from post-indictment interrogations in the absence of counsel.<sup>77</sup> The Supreme Court in *Michigan v. Jackson*,<sup>78</sup> held that by asserting his right to assistance of counsel, the defendant precludes the police from even initiating a meeting for the purpose of persuading the defendant to waive his right to counsel.<sup>79</sup>

Conversely, when a defendant voluntarily elects not to exercise the

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statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses."); *Hoffa v. United States*, 385 U.S. 293, 308-09 (1966) (defendant's conviction in a subsequent trial for the new offense of attempting to bribe jurors was not rendered invalid by the admission overheard by a government agent following defendant's indictment on a previous crime).

74. See Cluchey, *supra* note 65, at 55-57; see also *United States v. Nocella*, 849 F.2d 33, 37 (1st Cir. 1988) (no sixth amendment violation when the Government deliberately instigated a meeting between defendant and government informer and recorded incriminating statements relating to ongoing cocaine investigation even though charges were pending against the defendant for sale of marijuana); *Garofolo v. Coombs*, 804 F.2d 201, 205 (2d Cir. 1986) (no violation of defendant's right to counsel when police officers questioned defendant concerning murder even though police knew defendant recently had been arrested for rape and was probably represented by counsel).

75. See Cluchey, *supra* note 65, at 55.

76. See *supra* notes 35-54 and accompanying text discussing the requirements for when the right to counsel attaches.

77. *Michigan v. Jackson*, 475 U.S. 625, 636 (1986). See generally Note, *Constitutional Law - The Edwards Rule Applies to Sixth Amendment Claims When the Accused Has Been Formally Charged with a Crime and Has Explicitly Expressed His Right to Counsel* - *Michigan v. Jackson*, 106 S. Ct. 1404 (1986), 37 *DRAKE L. REV.* 153 (1987-88) (review of *Michigan v. Jackson*).

78. 475 U.S. 625 (1986).

79. *Jackson*, 475 U.S. at 636. In *Jackson*, the Court applied the rule from *Edwards v. Arizona*, 451 U.S. 477 (1981), which stated that if a pre-indictment suspect is being questioned and invokes his fifth amendment right to have counsel present, then he cannot thereafter be interrogated again unless he initiates the meeting. *Jackson*, 475 U.S. at 636. See *Edwards*, 451 U.S. at 484-85. The *Jackson* Court held that the *Edwards* rule was based on the view that the invocation of the right to counsel is a "significant event" that should be subject to the same protection regardless of whether the right was invoked under the fifth or sixth amendment. *Jackson*, 475 U.S. at 635-36. See *Project*, *supra* note 35, at 935. See also *Minnick v. Mississippi*, 111 S. Ct. 486 (holding "when

right to counsel, the defendant's uncounseled, incriminating statements are valid if the state can prove the existence of a "knowing and intelligent" waiver.<sup>80</sup> In *Patterson v. Illinois*,<sup>81</sup> the police obtained a post-indictment confession from a defendant who had been informed repeatedly of his *Miranda* rights.<sup>82</sup> The defendant subsequently moved to suppress his statements to the police on the ground that his waiver of his sixth amendment right to counsel was invalid.<sup>83</sup> The Supreme Court stated that a valid sixth amendment waiver required both awareness of the right and of the consequences of failing to exercise it.<sup>84</sup> In finding that the defendant executed a valid waiver,<sup>85</sup> the Court held that the fifth amendment *Miranda* warnings suffice to inform a defendant of his sixth amendment right to counsel in the context of post-indictment questioning.<sup>86</sup>

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counsel is requested, interrogation must cease, and officials may not reinitiate interrogation").

80. *Patterson v. Illinois*, 487 U.S. 285, 294 (1988).

81. 487 U.S. 285 (1988).

82. *Id.* at 292.

83. *Id.* at 293. The defendant claimed his waiver did not sufficiently satisfy the "knowing and intelligent" minimum standard. *Id.*

84. *Id.* at 292-93. In *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), the Supreme Court defined a waiver of the sixth amendment right to counsel as valid only if it demonstrates "an intentional relinquishment or abandonment of a known right or privilege." *Id.* In *Moran v. Burbine*, 475 U.S. 412, 421 (1986), the Court construed this to mean that the accused possesses "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* See *Sixth Amendment - - Waiver of the Sixth Amendment Right to Counsel at Post-Indictment Interrogation*, 79 J. CRIM. L. & CRIMINOLOGY 795, 801 (1988).

85. The Court specifically noted the defendant's failure to assert his right to counsel during the various interrogations. *Patterson*, 487 U.S. at 292. The Court stated that had the defendant invoked his right to counsel, "a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship [would have taken] effect" and changed the outcome of the case. *Id.* at 290 n.3. "[T]he accused, who waived his Sixth Amendment rights during postindictment questioning . . . [was] made sufficiently aware of his right to have counsel present during the questioning, and of the possible consequences of a decision to forgo the aid of counsel[.]" *Id.* at 292-93.

86. *Id.* at 293-94. The Court expressly stated that it did not consider the question of whether the accused must be told that he has been indicted before a post-indictment sixth amendment waiver would be valid. *Id.* at n.8. In *Riddick v. Edmiston*, 894 F.2d 586 (3d Cir. 1990), the Third Circuit Court of Appeals considered whether during the police's questioning, failure to inform the defendant that he had been indicted for murder precluded him from making a knowing, voluntary and intelligent waiver of his sixth amendment right to counsel. *Id.* at 587. The Third Circuit found that the defendant knew that he had been arrested for murder and freely chose to speak to the police after the *Miranda* warnings were given. *Id.* at 591. Additionally, the court found that the

### III. THE ATTORNEY-CLIENT RELATIONSHIP

The preceding discussion provides an overview of the sixth amendment right to counsel, and illustrates some of the procedural and substantive rules designed to protect this fundamental right. Of equal concern, however, are government intrusions into the attorney-client relationship which threaten the criminal defendant's right to effective assistance of counsel.<sup>87</sup>

#### A. *The Attorney-Client Privilege*

Effective legal representation requires full disclosure in the attorney-client relationship.<sup>88</sup> Accordingly, the judiciary has long recognized that privacy of communications between the criminal defendants and their counsel largely defines the sixth amendment right to counsel.<sup>89</sup> The scope of this constitutional protection parallels the common law attorney-client privilege.<sup>90</sup> This rule of evidence provides that when a client seeks legal advice from an attorney, all confidential communications relating to that purpose are permanently protected from disclosure by the client or the attorney, unless the privilege is waived.<sup>91</sup> The attorney-client privilege promotes the policy of free communication be-

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defendant was plainly aware of the gravity of his situation. *Id.* Relying on the *Patterson* test for a valid waiver, the Third Circuit concluded that the defendant knowingly and intelligently executed a valid waiver of his sixth amendment right to counsel even though he was not expressly informed of his indictment. *Id.*

87. See *supra* notes 16-18 and accompanying text noting that the sixth amendment right to counsel necessarily contemplates the "effective assistance" of counsel in the preparation and trial of the case.

88. See *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978) ("free two-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful."); see also *infra* notes 95-96 and accompanying text explaining that complete and honest communications between attorneys and their clients enable the attorney to better serve their clients.

89. *United States v. Rosner*, 485 F.2d 1213, 1224 (2d Cir. 1973), ("[T]he essence of the Sixth Amendment right is . . . privacy of communication with counsel."), *cert. denied*, 417 U.S. 950 (1974). See also *Caldwell v. United States*, 205 F.2d 879 (D.C. Cir. 1953); *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952).

90. See *infra* notes 96-102 and accompanying text discussing Fifth Circuit's application of the attorney-client privilege framework to determine whether there was unconstitutional government intrusion into the defendant's sixth amendment right to counsel; see also Comment, *The Sixth Amendment Implications of a Government Informer's Presence at Defense Meetings*, 9 U. DAYTON L. REV. 535 (1984).

91. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292 at 554 (1961). This statement of the attorney-client privilege at common law has been accepted by

tween client and attorney, crucial for effective representation in an adversarial system.<sup>92</sup> Moreover, the rule encourages otherwise reluctant clients to disclose damaging information by removing the threat of compelled disclosure.<sup>93</sup>

The presence of a third party at an attorney-client conference usually operates to waive the privilege because it belies the confidential nature of the communication.<sup>94</sup> In *United States v. Melvin*,<sup>95</sup> the Fifth Circuit applied the doctrine of attorney-client privilege to determine whether a confidential government informer's presence in defense meetings constituted an unconstitutional intrusion into the attorney-client relationship. In that case, Powell, a co-defendant turned informant, attended several defense meetings upon the insistence of the other defendants and their attorneys.<sup>96</sup> The Fifth Circuit stated that a communication is protected by the attorney-client privilege, and from government intrusion under the sixth amendment, if the attorney and client: (1) intended the communication to remain confidential; and (2) reasonably expected and understood it to be confidential under the circumstances.<sup>97</sup> The court found that Powell had never agreed to become a member of the collective defense.<sup>98</sup> Furthermore, the court pointed to definite indications that the other defendants had some res-

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many jurisdictions and essentially remains the statement of the principle embodied in various statutory forms. *Id.* at 555. *See, e.g.*, CAL. EVID. CODE § 954 (West 1966).

92. *See Upjohn v. United States*, 449 U.S. 383, 389 (1981); 8 J. WIGMORE, *supra* note 91, § 2291, at 554.

93. 8 J. WIGMORE, *supra* note 91, § 2291, at 554.

94. *Id.* § 2311, at 601-02. *See also United States v. Landof*, 591 F.2d 36, 39 (9th Cir. 1978) (presence of third person who was not "acting as an attorney or an agent at the meeting destroyed the privilege"); *United States v. Blackburn*, 446 F.2d 1089, 1091 (5th Cir. 1971) (communications between defendant and his lawyer "were not privileged, since third persons were present at the time of the communications were made."), *cert. denied*, 404 U.S. 1017 (1972).

95. 650 F.2d 641 (5th Cir. 1981).

96. *Id.* at 642-43. Initially, Powell attempted to avoid participation in the defense meeting. *Id.* However, the other defendants and their attorneys persisted in their requests for Powell's attendance. *Id.* Finally, the United States Customs Service Agents allowed Powell to attend ostensibly to avert suspicion and protect Powell's informer status. *Id.* *See infra* notes 144-46 and accompanying text stating that protection of undercover status is a justifiable reason for intrusion.

97. *Melvin*, 650 F.2d at 645.

98. *Id.* at 646. Indeed, the other defendants knew that Powell sought to be represented by an attorney other than those on the defense team. *Id.* The court, however, did note that one of the defense team attorneys represented Powell for a short period of time. *Id.* at 643.

ervations about Powell's loyalty.<sup>99</sup> The court ruled that no confidentiality exists when parties make disclosures in the presence of a person who has not joined the defense team and with respect to whom there is no reasonable expectation of confidentiality.<sup>100</sup> The Fifth Circuit concluded that absent a "confidential setting," there can be no unconstitutional intrusion into the attorney-client relationship.<sup>101</sup>

While the attorney-client privilege in no way rises to the stature of the constitutional right to counsel, it evidences a judicial concern for the protection of the attorney-client relationship.<sup>102</sup> It is difficult to imagine how the sixth amendment right to counsel could effectively exist in the absence of protections afforded to the attorney-client relationship by the privilege of non-disclosure.<sup>103</sup>

### B. *Intrusion Into the Attorney-Client Relationship*

Government actions constituting intrusions into the attorney-client relationship generally fall within three broad categories of conduct. First, unauthorized post-indictment interrogation of the accused without counsel present and from which defense strategy is obtained may constitute an intrusion.<sup>104</sup> Second, an intrusion can occur in the con-

99. *Id.* at 646.

100. *Id.* The Fifth Circuit acknowledged that the attorney-client privilege protects disclosures between co-defendants and their attorneys in the group defense context. *Id.* at 645. See *United States v. McPartlin*, 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979); *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965); see also 8 J. WIGMORE, *supra* note 91, § 2312. See generally Comment, *A Survey of Attorney-Client Privilege in Joint Defense*, 35 U. MIAMI L. REV. 321 (1981). The Fifth Circuit added that, even in the multi-party context, the disclosures must occur under circumstances which indicate their confidential nature. *Melvin*, 650 F.2d at 645. See also *United States v. Bell*, 776 F.2d 965 (11th Cir. 1985) (no intrusion into the attorney-client relationship when a defendant and his attorney initiated meetings with co-defendants turned informants who had not agreed to join the defense team, and where there was no reasonable expectation that the conversations would remain confidential), *cert. denied*, 477 U.S. 904 (1986); *United States v. Gartner*, 518 F.2d 633, 637-38 (2d Cir.) (rejecting a sixth amendment claim due to an absence of a confidential relationship between the informants, the defendant and the defendant's attorney), *cert. denied*, 423 U.S. 915 (1975).

101. *Melvin*, 650 F.2d at 646. The Fifth Circuit found the trial record incomplete as to whether the defendants reasonably expected that the conversations would remain confidential. *Id.* Consequently, the Fifth Circuit remanded the case to the district court for a determination of that question. *Id.* at 646-47.

102. See Note, *supra* note 12, at 113.

103. See Note, *The Attorney-Client Privilege: Fixed Rules, Balancing and Constitutional Entitlement*, 91 HARV. L. REV. 464, 485-86 (1977) (importance of the attorney-client privilege to the fifth and sixth amendments).

104. See, e.g., *Cinelli v. City of Revere*, 820 F.2d 474, 478 (1st Cir. 1987) (govern-

text of government eavesdropping on privileged defense communications.<sup>105</sup> This encompasses both the acquisition of defense documents related to the indicted crime<sup>106</sup> as well as interception of attorney-client conversations, electronically or through an informant.<sup>107</sup> Finally, direct government interference with the attorney-client relationship may result in an unlawful intrusion.<sup>108</sup> This interference can occur through disparagement of the defendant's counsel<sup>109</sup> or by actions

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ment intrusion into the attorney-client relationship found where police interrogated the defendant and obtained defense strategy without either counsel being present or a valid waiver of the right to counsel), *cert. denied sub nom.* Cutillo v. Cinelli, 485 U.S. 1037 (1988).

105. See *infra* notes 106-07 and accompanying text.

106. See, e.g., United States v. Singer, 785 F.2d 228, 232 (8th Cir.) (the Government's review of the defendant's confidential trial strategy files acquired through an informant constituted an unconstitutional intrusion into defendant's attorney-client relationship), *cert. denied*, 479 U.S. 883 (1986); Bishop v. Rose, 701 F.2d 1150, 1157 (6th Cir. 1983) (the prosecution's use at trial of defendant's 14 page handwritten statement to his attorney violated his right to effective assistance of counsel).

107. See, e.g., Briggs v. Goodwin, 698 F.2d 486, 494-95, (D.C. Cir.) (government informer's transmission to the prosecution of confidential conversations between the defendant and his attorney constituted an unconstitutional intrusion into the attorney-client relationship), *reh'g granted and opinion vacated*, 712 F.2d 1444 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); United States v. Levy, 577 F.2d 200, 210 (3d Cir. 1978) (the Government violated the defendant's sixth amendment right to effective assistance of counsel when a co-defendant, who was actually a government informant, disclosed defense strategy to the Government); see *infra* notes 114-21 and accompanying text for a discussion of surreptitious government eavesdropping on attorney-client communications.

108. See *infra* notes 109-10 and accompanying text.

109. See, e.g., United States v. Morrison, 602 F.2d 529, 532 (3d Cir. 1979), (Drug Enforcement Agency (DEA) agent's statements to defendant disparaging defendant's counsel as well as other attempts to interfere with the attorney-client relationship violated the defendant's sixth amendment right to counsel), *rev'd. on other grounds*, 449 U.S. 361 (1980); United States v. Glover, 596 F.2d 857, 861 (9th Cir.), *cert. denied sub nom.* Morrow v. United States, 444 U.S. 857 (1979); United States v. Glover, 596 F.2d 857 (9th Cir.), *cert. denied*, 444 U.S. 860 (1979). In dicta, the Ninth Circuit stated in *Glover* that "disparaging comments about counsel, particularly when coupled with a warning that reliance on counsel's judgment will not keep the defendant out of jail, can be detrimental to the attorney-client relationship" and may deprive the defendant of the right to counsel. *Glover*, 596 F.2d at 861. See also *Commonwealth v. Manning*, 373 Mass. 438, 442-43, 367 N.E.2d 635, 638 (1977) (Supreme Judicial Court of Massachusetts held that a government agent's disparaging remarks about counsel violated the defendant's sixth amendment right to counsel and warranted dismissal of the indictment); *People v. Moore*, 57 Cal. App. 3d 437, 441, 129 Cal. Rptr. 279, 281 (Dist. Ct. App. 1976) (government agent's disparaging comments about counsel, as well as ordering defendant not to inform his attorney about his dealings with the district attorney's office unconstitutionally intruded into the attorney-client relationship).

which prohibit or restrict the defendant's ability to meet with counsel.<sup>110</sup>

Courts generally agree that government intrusion into the attorney-client relationship acts to undermine the defendant's sixth amendment right to counsel necessary for effective legal representation and a fair trial.<sup>111</sup> Courts, however, have not settled on a single standard for determining at which point government conduct becomes an unconstitutional intrusion into the attorney-client relationship.<sup>112</sup> Consequently, courts differ on whether particular acts of government misconduct, although not condoned, rise to the level of sixth amendment violations.<sup>113</sup>

An early federal appellate case considered whether surreptitious government eavesdropping on attorney-client communications amounted to an unconstitutional intrusion into the attorney-client relationship. In *Coplon v. United States*,<sup>114</sup> government agents electronically intercepted telephone communications between the defendant and her lawyer before and during the trial.<sup>115</sup> The court held that the Government's conduct deprived the defendant of her sixth amendment right to effective assistance of counsel.<sup>116</sup> The court further held that the defendant need not show demonstrable prejudice in order to vindi-

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110. See, e.g., *Sanders v. Lane*, 861 F.2d 1033, 1039 (7th Cir. 1988) (judicial order prohibiting conversations between defendant and attorney during trial recess violated defendant's sixth amendment right to counsel), *cert. denied*, 489 U.S. 1057 (1989); *Via v. Cliff*, 470 F.2d 271, 275 (3d Cir. 1972) (a sixth amendment violation may be established where prison officials wrongfully interfere with or restrict defendant's access to counsel). See generally Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CALIF. L. REV. 1569, 1665-72 (1985) (discussing government conduct which interferes with the effective assistance of counsel).

111. In *Weatherford v. Bursey*, 429 U.S. 545 (1977), the government conceded that "the sixth amendment's assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations for trial are secure against intrusion by the government, his adversary in the proceeding." *Id.* at 554 n.4 (quoting Brief for the United States at 71, *Hoffa v. United States*, 385 U.S. 293 (1966)) quoted in Brief for the United States as *Amicus Curiae* at 24 n.1, 3, *Weatherford v. Bursey*, 429 U.S. 545 (1977).

112. See *supra* note 10 providing cases to exemplify the lack of a unified standard for determining which conduct amounts to an intrusion into the attorney-client relationship.

113. *Id.*

114. 191 F.2d 749, *cert. denied*, 342 U.S. 926 (1952).

115. *Id.* at 757.

116. *Id.* at 759.

cate her right to counsel.<sup>117</sup>

Similarly, in *Caldwell v. United States*,<sup>118</sup> the District of Columbia Circuit Court of Appeals held that the presence of an undercover government agent in the defense camp violated the defendant's sixth amendment right to counsel.<sup>119</sup> In that case, an undercover agent worked as an assistant for the defense and regularly reported to the prosecution on matters connected with the impending trial.<sup>120</sup> Citing *Coplon*, the court saw no reason to distinguish intrusion by means of wiretapping from intrusion by means of undercover agents.<sup>121</sup>

In *Via v. Cliff*,<sup>122</sup> the Third Circuit set forth a standard for determining when an unconstitutional intrusion into the attorney-client relationship has occurred. In *Via*, prison officials refused defendant's counsel permission to meet with the defendant on several occasions immediately before and during trial.<sup>123</sup> The defendant initiated a civil rights suit under 42 U.S.C. § 1983<sup>124</sup> against prison officials seeking damages for alleged infringement of his sixth amendment right to counsel.<sup>125</sup> The Third Circuit stated that if the interference was either "wrongfully motivated" or without "adequate justification," then the defendant will have established a violation of his sixth amendment right to counsel.<sup>126</sup> The court implied that while no showing of harm

117. *Id.*

118. 205 F.2d 879 (D.C. Cir. 1953).

119. *Id.* at 881.

120. *Id.* at 880.

121. *Id.* at 881. As in *Coplon*, the *Caldwell* court stated that the defendant need not show prejudice in order to establish a sixth amendment violation. *Id.*

122. 470 F.2d 271 (3d Cir. 1972).

123. *Id.* at 273-74. On one such occasion, the prison officials terminated a meeting between defendant and his attorney over the objections of defendant's counsel. *Id.* at 273. After the attorney's departure, the police interrogated the defendant about his alleged criminal conduct. *Id.* On a second occasion, prison officials simply denied defendant's counsel access to the defendant although the trial judge previously had instructed the prison officials to permit counsel to visit the defendant "at any time for any length of time." *Id.*

124. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1988)). Section 1983 proscribes discrimination "under color of any statute, ordinance regulation, custom, or usage" with respect to constitutional rights. *Id.*

125. *Via*, 470 F.2d at 273-74. *Via* appealed the district court's grant of summary judgment for all defendants. *Id.* at 274.

126. *Id.* at 275. The Third Circuit stated that the trial record did not contain sufficient information to determine whether the prison officials' conduct was wrongfully motivated. *Id.* The court noted, however, that the right to counsel takes on special

to the defense at trial was needed to maintain a section 1983 action, a court might require such a showing were the defendant to seek reversal of his conviction.<sup>127</sup>

Prior to 1977, the nearest the United States Supreme Court came to establishing a standard for determining an unconstitutional intrusion into the attorney-client relationship occurred in *Black v. United States*<sup>128</sup> and *O'Brien v. United States*.<sup>129</sup> Both cases involved surreptitious Government eavesdropping which came to light following the trial and conviction.<sup>130</sup> In each case, attorney-client conversations were electronically monitored in the course of Government investigations pertaining to crimes unrelated to the indicted offenses.<sup>131</sup> In *Black*, the prosecutors obtained summaries of the conversations without knowledge that the discussion originated with attorney-client conversations.<sup>132</sup> The *Black* Court reversed the conviction and ordered a new trial to afford the defendant an opportunity to protect himself from possibly inadmissible evidence.<sup>133</sup>

In *O'Brien*, the intercepted conversations were neither mentioned in the investigative reports nor otherwise transmitted to the prosecution.<sup>134</sup> Nevertheless, the Supreme Court ordered a new trial, merely citing to *Black*.<sup>135</sup>

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importance in the days immediately before and during trial. *Id.* The court added that at such times the regulation of access to counsel should be "more restrained." *Id.*

127. *Id.*

128. 385 U.S. 26 (1966) (per curiam).

129. 386 U.S. 345 (1967) (per curiam).

130. *Black*, 385 U.S. at 27; *O'Brien*, 386 U.S. at 346 (Harlan, J., dissenting).

131. *Id.*

132. *Black*, 385 U.S. at 27-28. The Government maintained that none of the evidence used against the defendant at trial was gained as a result of the intrusion. *Id.* at 28. The Government further maintained that none of this information was relevant to the indicted crimes. *Id.*

133. *Id.* at 29. The Government suggested that the case be remanded to the district court for an evidentiary hearing with the relevant materials produced in order to determine whether the conviction should be vacated. The Supreme Court, however, rejected the request for a new trial which would allow the trial court to consider the admissibility of any evidence or remove any doubt as to the unfairness of the defendants trial. *Id.*

134. *O'Brien*, 386 U.S. at 346 (Harlan, J., dissenting).

135. *Id.* at 345. In *Weatherford v. Bursey*, 429 U.S. 545 (1977), the Supreme Court suggested that the holdings in *Black* and *O'Brien* were actually based on fourth amendment violations and, therefore, do not apply to the sixth amendment context. *Id.* at 551-52. The Court pointed out that neither the sixth amendment nor the right to counsel was explicitly mentioned in either case. *Id.*

In his dissenting opinion, Justice Marshall found the majority's interpretation of

### C. *Weatherford v. Bursey*

In 1977, the United States Supreme Court reexamined the issue of Government intrusion into the attorney-client relationship in *Weatherford v. Bursey*.<sup>136</sup> Specifically, the Court faced the issue of whether the presence of an undercover Government agent at attorney-client conferences between the defendant and his lawyer constituted a per se<sup>137</sup> violation of the defendant's right to counsel.<sup>138</sup> The defendant and an undercover law enforcement official were arrested and charged with vandalizing a county selective service office.<sup>139</sup> On two occasions thereafter, the undercover agent participated in defense strategy sessions with the defendant and his attorney.<sup>140</sup> After conviction and service of sentence, the defendant brought suit under 42 U.S.C. § 1983<sup>141</sup> against state officials for violations of his sixth amendment rights.<sup>142</sup> Reversing the Fourth Circuit's reversal of conviction, the Supreme Court refused to establish a "per se right to counsel" rule.<sup>143</sup>

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*Black* and *O'Brien* unpersuasive. *Id.* at 567 n.6 (Marshall, J., dissenting). Justice Marshall first pointed out that the *Black* opinion did not mention either the fourth or sixth amendment. *Id.* Secondly, Justice Marshall stated that the narration of the facts in *Black* made it clear that the Justices in *Black* were primarily concerned with the interception of attorney-client communications. *Id.* Third, Justice Marshall pointed out that several subsequent Supreme Court cases cited *Black* and *O'Brien* as sixth amendment cases. *Id.* Justice Marshall concluded that *Black* and *O'Brien* established a per se rule that Government intrusions into the attorney-client relationship amount to a per se violation of a defendant's sixth amendment right. *Id.* at 567-68.

136. 429 U.S. 545 (1977).

137. See *infra* notes 143-150 for an analysis of the Fourth Circuit's per se rule.

138. *Weatherford*, 429 U.S. at 547.

139. *Id.* Unknown to Bursey, Weatherford acted as an undercover agent for the South Carolina State Law Enforcement Division, and was the person who reported the incident to local authorities. *Id.* Weatherford was charged along with Bursey in order to maintain his undercover status. *Id.*

140. *Id.*

141. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1988)).

142. *Weatherford*, 429 U.S. at 549. Bursey brought actions against Weatherford, the agent, and Strom, the head of the South Carolina State Law Enforcement Division. *Id.* at 547. The case was tried without a jury and the district court rendered judgment for Weatherford and Strom. The Fourth Circuit Court of Appeals reversed, concluding that Bursey's right to effective assistance of counsel and a fair trial had been violated. *Bursey v. Weatherford*, 528 F.2d 483, 486 (4th Cir. 1975), *rev'd*, 429 U.S. 545 (1977).

143. *Weatherford*, 429 U.S. at 557. The Fourth Circuit held that "whenever the prosecution knowingly arranges and permits intrusion into the attorney-client relationship, the right to counsel is sufficiently endangered to require reversal and a new trial." *Bursey*, 528 F.2d at 486. In so holding, the Fourth Circuit relied on *Black v. United*

In rejecting the per se rule, the Court focused on the purpose of the intrusion and stated that instances arise when Government intrusions are justified or unavoidable.<sup>144</sup> The Court, in *Weatherford*, found that the legitimate interest of maintaining the agent's undercover status for ongoing investigations motivated the state's intrusion.<sup>145</sup> In reaching its conclusion, the Court emphasized that this was not a situation in which the state purposely sought access to defense strategies or where the informant assumed for himself that task and acted accordingly.<sup>146</sup>

Additionally, the Court stressed that purposefulness alone does not produce a constitutional violation.<sup>147</sup> The Court required there also be a realistic possibility of harm to the defendant or of benefit to the state consequent to the intrusion.<sup>148</sup> The *Weatherford* Court found that the

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States, 385 U.S. 26 (1966), *O'Brien v. United States*, 386 U.S. 345 (1967), and *Hoffa v. United States*, 385 U.S. 293 (1966), as establishing a "per se right to counsel rule." *Bursey*, 528 F.2d at 486.

In rejecting the Fourth Circuit's per se rule, the Supreme Court distinguished *Black*, *O'Brien* and *Hoffa*. *Weatherford*, 429 U.S. 550. See *supra* note 135 for a discussion of the *Weatherford* rationale. The Court resolutely added that "[n]either *Black*, *O'Brien*, *Hoffa*, nor any other case in this Court to which we have been cited furnishes grounds for the interpretation and application of the Sixth and Fourteenth Amendments appearing in the Court of Appeals' opinion and judgment." *Weatherford*, 429 U.S. at 554. See *supra* note 135. See generally Comment, *supra* note 90 for an analysis of the *Weatherford* case.

144. *Weatherford*, 429 U.S. at 557, 558. The *Weatherford* Court's requirement of purposeful intrusion comports with the Third Circuit's approach in *Via v. Cliff*, 470 F.2d 271 (3d Cir. 1972), in which the appellate court focused on whether the intrusion was "wrongfully motivated" or "without adequate justification." *Id.* at 275. See *supra* notes 122-27 and accompanying text for a discussion of the *Via* case.

145. *Weatherford* 429 U.S. at 557. The Court noted that previous cases recognized both the practical necessity and effective law enforcement value of undercover work, as well as the desirability and legality of continued secrecy after the arrest. *Id.* See, e.g., *United States v. Russell*, 411 U.S. 423, 432 (1973); *Lewis v. United States*, 385 U.S. 206, 208-09 (1966); *Roviaro v. United States*, 353 U.S. 52, 59, 62 (1957). The Court noted further that the broad prophylactic effects of the Fourth Circuit's per se rule would require all undercover agents to refuse to participate in attorney-client meetings, even though invited, and thus unmask themselves. *Weatherford*, 429 U.S. at 557.

146. *Weatherford*, 429 U.S. at 557. The Court noted that *Weatherford* participated in the defense meetings only after the defendant requested that he attend, and only to avoid raising the suspicion that he was in fact an informant. *Id.* at 558.

147. *Id.*

148. *Id.* The Supreme Court stated that prejudice could have been shown if: (1) *Weatherford* had testified at *Bursey's* trial as to the conversations between *Bursey* and his attorney; (2) the state relied on these conversations for other evidence; (3) the overheard conversations were otherwise used in any way to the substantial detriment of *Bursey*; or (4) the prosecution learned of *Bursey's* trial strategy from these conversations. *Id.* at 554.

agent neither communicated the substance of the conversations to the prosecution nor testified about them at the trial.<sup>149</sup> Thus, the Court held that absent tainted evidence, communication of defense strategy to the prosecution, or purposeful intrusion, the mere presence of Government agents at a defense meeting does not constitute a sixth amendment violation.<sup>150</sup>

#### IV. CONFLICTING APPROACHES—WHO BEARS THE BURDEN OF PERSUASION?

The *Weatherford* case provided three important principles for analyzing Government intrusions into the attorney-client relationship. First, a Government intrusion must be purposeful in order to be considered intentional.<sup>151</sup> The *Weatherford* Court firmly recognized that some Government intrusions will be justified or inadvertent.<sup>152</sup> Sec-

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149. *Id.* at 558. In criticizing the Fourth Circuit's per se rule, the Court argued that its prophylactic effects cut too broadly. *Id.* at 557. The Court pointed out that a literal application of the rule would set aside a conviction regardless of whether the informant communicated useful information to the prosecution or merely information concerning the weather that day. *Id.* at 557-58.

150. *Id.* at 558. In his dissenting opinion, Justice Marshall argued that a per se rule is both warranted under the Constitution and supported by precedent. *Id.* at 562, 566, 567-68 (Marshall, J., dissenting). Justice Marshall noted that Government intrusions into the attorney-client relationship jeopardize two constitutional values: (1) the integrity of the adversarial system of justice and the fairness of trials, and (2) the criminal defendant's right to effective assistance of counsel. *Id.* at 562. Furthermore, Justice Marshall stated that the "balance of forces between the accused and his accuser" will be sharply tilted in favor of the accuser if the state's key witnesses are allowed to discover the defense strategy by intercepting attorney-client communications. *Id.* at 564. Finally, Justice Marshall argued that the majority's decision placed an almost unbearable burden of proof on the defendant to show "intent to intrude" or "disclosure." *Id.* at 565.

151. *Id.* at 557, 558. See *supra* notes 144-46 and accompanying text reviewing *Weatherford*'s purposeful intrusion standard.

152. *Weatherford*, 429 U.S. at 557. Specifically, the *Weatherford* Court found that the state's legitimate interest in maintaining the agent's undercover status justified the agent's attendance at meetings between the defendant and his attorney. *Id.* Lower courts have also found non-purposeful intrusions where the Government authorized an informant's participation in attorney-client conferences out of concern for the informant's safety as well as secrecy. See, e.g., *United States v. Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985); *United States v. Mastroianni*, 749 F.2d 900, 906 (1st Cir. 1984). In *Mastroianni*, the First Circuit argued that to ban an informant's solicited attendance would provide defendants with an easy alarm system to detect informants by inviting all known associates to a meeting. *Id.*

Another justifiable circumstance involves the Government's anticipation that future criminal activity will take place. *Mastroianni*, 749 F.2d at 905-06. In *United States v.*

ond, confidential defense information must be communicated to the prosecution to support an allegation that the Government intercepted attorney-client communications.<sup>153</sup> Third, the *Weatherford* case conclusively demonstrated that a sixth amendment violation requires a showing of prejudice to the defendant resulting from the Government intrusion.<sup>154</sup> Such a showing is necessary whether or not the intrusion was intentional. Lower courts have gleaned four factors from *Weatherford* relevant to show whether the intrusion prejudiced the defendant.<sup>155</sup> While the courts generally agree that these "*Weatherford*

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*Costanzo*, the Third Circuit held that the sixth amendment does not protect attorney-client communications involving a prospective crime. *Costanzo*, 740 F.2d 251, 257 (3d Cir.), cert. denied, 472 U.S. 1017 (1984). Similarly, the Eighth Circuit has held that the Government may properly receive confidential defense documents if: (1) it plays no role in their wrongful procurement, and (2) it has probable cause to believe the documents constitute proof of criminal activity. *United States v. Singer*, 785 F.2d 228, 232 (8th Cir.), cert. denied, 479 U.S. 883 (1986). The Eighth Circuit added, however, that the Government must "conscientiously endeavor" to obtain no more documents than support the representation of wrongdoing. *Id.*

The Government cannot intrude into the attorney-client relationship without showing exceptional circumstances. In *Mastroianni*, the First Circuit stated that the Government's mere recitation of the need to protect the informant or to investigate future criminal activity is not enough to justify the intrusion. *Mastroianni*, 749 F.2d at 905-06. Accordingly, the First Circuit held that the Government bears the burden of creating a "substantial record to prove necessity for its representative to attend meetings between defendants and their attorneys" or otherwise intercept attorney-client communications. *Id.* at 905.

153. *Weatherford*, 429 U.S. at 556, 558. The *Weatherford* Court noted that absent communication of confidential information to the prosecution, there is no realistic possibility of injury to the defendant or benefit to the state and, therefore, no sixth amendment violation. *Id.* at 558.

Lower courts have construed this statement as applicable only to alleged intrusions involving Government interception of attorney-client communications. See *United States v. Morrison*, 602 F.2d 529, 532 (3d Cir. 1979), rev'd on other grounds, 449 U.S. 361 (1981).

In *Morrison*, the Third Circuit stated that *Weatherford* applies in the eavesdropping context where no prejudice to the defendant's case exists and where no wrongfully motivated intrusion occurred. *Id.* The *Morrison* case itself, by contrast, involved a Government agent's disparagement of counsel and other coercive conduct calculated to destroy the attorney-client relationship. *Id.* at 531. The Third Circuit stated that "[I]n the case of a deliberate attempt actually to sever or otherwise interfere with the attorney-client relationship, a much more explicitly intrusive offense, the analysis must proceed differently." *Id.* at 532. The court concluded that prejudice could be inferred from the wrongfully motivated or inadequately justified conduct. *Id.*

154. *Weatherford*, 429 U.S. at 558. See *supra* notes 147-150 and accompanying text reviewing *Weatherford's* prejudice requirement.

155. Based upon what the *Weatherford* Court found the defendant did not show, lower courts have compiled the following four factors: (1) Whether evidence was used

factors" serve as the criteria for establishing prejudice,<sup>156</sup> they differ widely in their selection of factors necessary to make out a sixth amendment violation. Moreover, the courts are equally divided over who bears the burden of proving prejudice or the lack thereof.<sup>157</sup> Consequently, the lower courts have developed conflicting approaches to evaluating a defendant's claim that a Government intrusion into the attorney-client relationship violated her constitutional rights.

Under one approach, the defendant bears the full burden of proving prejudice arising from the intrusion.<sup>158</sup> This approach posits that no inference of prejudice may be drawn from the intrusion or the communication of confidential information to the prosecution.<sup>159</sup> Thus, the defendant must allege specific facts establishing demonstrable prejudice or a substantial threat of a prejudicial result.<sup>160</sup> In *United States v. Ginsberg*,<sup>161</sup> the Second Circuit articulated several ways in which a de-

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at trial produced directly or indirectly by the intrusion; (2) whether the Government's intrusion was intentional; (3) whether the prosecution received otherwise confidential information about trial preparations or defense strategy as a result of the intrusion; and (4) whether the overheard conversations or other information were used in any other way to the substantial detriment of the defendant or benefit to the Government. *United States v. Kelly*, 790 F.2d 130, 137 (D.C. Cir. 1986).

156. *See, e.g.*, *United States v. Roper*, 874 F.2d 782 (11th Cir.), *cert. denied*, 110 S. Ct. 189, *cert. denied*, 110 S. Ct. 369 (1989); *United States v. Dyer*, 821 F.2d 35 (1st Cir. 1987); *United States v. Bavers*, 787 F.2d 1022 (6th Cir. 1985); *United States v. Ginsberg*, 758 F.2d 823 (2d Cir. 1985); *United States v. Costanzo*, 740 F.2d 251 (3d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985); *United States v. Brugman*, 655 F.2d 540 (4th Cir. 1981); *United States v. Irwin*, 612 F.2d 1182 (9th Cir. 1980); *United States v. Kilrain*, 566 F.2d 979 (5th Cir.), *cert. denied*, 439 U.S. 819 (1978).

157. *See infra* notes 158-85 and accompanying text describing three general approaches taken by the federal courts of appeals for allocating the burden of proof.

158. *See, e.g.*, *United States v. Singer*, 785 F.2d 228 (8th Cir.), *cert. denied*, 479 U.S. 883 (1986); *United States v. Ginsberg*, 758 F.2d 823 (2d Cir. 1985); *United States v. Steele*, 727 F.2d 580 (6th Cir.), *cert. denied sub nom. Scarborough v. United States*, 467 U.S. 1209 (1984); *Bishop v. Rose*, 701 F.2d 1150 (6th Cir. 1983); *United States v. Irwin*, 612 F.2d 1182 (9th Cir. 1980); *United States v. Dien*, 609 F.2d 1038 (2d Cir. 1979); *Mastrian v. McManus*, 554 F.2d 813 (8th Cir.), *cert. denied sub nom. Mastrian v. Wood*, 433 U.S. 913 (1977).

159. *Bishop*, 701 F.2d at 1156. In *United States v. Irwin*, 612 F.2d 1182 (9th Cir. 1980), the Ninth Circuit appeared to distinguish surreptitious Government eavesdropping through electronic device from the presence of an informant in the defense camp. *Id.* at 1189. Without elaborating, the Ninth Circuit implied that prejudice is presumed in the former category, while the defendant must demonstrate actual prejudice in the latter. *Id.* at 1189 & n.18 (citing *United States v. Orman*, 417 F. Supp. 1126 (D. Colo. 1976)).

160. *Dien*, 609 F.2d at 1043.

161. 758 F.2d 823 (2d Cir. 1985).

fendant could satisfy this burden when the alleged violation involved interception of privileged attorney-client communications.<sup>162</sup> Essentially, the Second Circuit required the defendant to show in some detail how the prosecution used information obtained from the intrusion to the defendant's detriment or Government's advantage.<sup>163</sup>

Likewise, the Ninth Circuit requires a defendant alleging Government interference to demonstrate actual prejudice resulting from the Government misconduct.<sup>164</sup> In *United States v. Irwin*,<sup>165</sup> the Ninth Circuit cautioned that not all police actions which could arguably be called interference rise to the level of a sixth amendment violation.<sup>166</sup> The Ninth Circuit added that to establish prejudice, the defendant must show that the Government's conduct destroyed the defendant's confidence in her counsel and was designed to give the prosecution an unfair advantage at trial.<sup>167</sup>

In contrast, other courts apply a per se rule.<sup>168</sup> Under this theory,

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162. *Id.* at 833. Specifically, the Second Circuit listed three ways a defendant could satisfy the prejudice requirement: (1) by showing that a prosecution witness's testimony concerned privileged communications; (2) by showing that prosecution evidence originated in such communications; or (3) by showing that privileged communications have been used in any other way to the substantial detriment of the defendant. *Id.*

163. *Id.* *Cf. Mastrian v. McManus*, 554 F.2d 813, 821 & n.10 (8th Cir.), *cert. denied sub nom. Mastrian v. Wood*, 433 U.S. 913 (1977). In *Mastrian*, the Eighth Circuit implied that if the defendant could show the prosecution used information gained from an intrusion in any way, prejudice would be found. *Id.*

164. *United States v. Irwin*, 612 F.2d 1182, 1186-87 (9th Cir. 1980). *See supra* notes 108-10 and accompanying text discussing direct Government interference with the attorney-client relationship.

165. 612 F.2d 1182 (9th Cir. 1980). In *Irwin*, the defendant alleged Government interference with the attorney-client relationship in violation of the sixth amendment. *Id.* at 1185. Specifically, the defendant claimed that a DEA agent counseled him to ignore the advice of his lawyer not to speak or cooperate with police, and to resume his activities as a Government informant. *Id.*

166. *Id.*

167. *Id.* at 1187. The court found that the defendant never showed a lack of confidence in his attorney as a result of the agent's conduct. *Id.* at 1188. Furthermore, the court found that the defendant's attorney put forth a competent and vigorous defense. *Id.* The Ninth Circuit concluded that although the agent's conduct was improper, it did not constitute a sixth amendment violation. *Id.* *But cf. United States v. Morrison*, 602 F.2d 529, 532 (3d Cir.) (prejudice may be inferred from the wrongfully motivated or inadequately justified conduct), *rev'd on other grounds*, 449 U.S. 361 (1980). For a review of the Third Circuit's decision in *Morrison*, see *supra* note 153.

168. *See, e.g., United States v. Costanzo*, 740 F.2d 251 (3d Cir. 1984); *Briggs v. Goodwin*, 698 F.2d 486 (D.C. Cir.), *reh'g granted and opinion vacated*, 712 F.2d 1444 (1983), *cert. denied*, 464 U.S. 1040 (1984); *United States v. Levy*, 577 F.2d 200 (3d Cir. 1978).

once a defendant shows that the prosecution has improperly obtained information relating to confidential defense strategy or that the prosecution has intentionally intruded into the attorney-client relationship, the defendant need not show further prejudice because these acts constitute per se violations of the sixth amendment.<sup>169</sup> In *Briggs v. Goodwin*,<sup>170</sup> the District of Columbia Circuit held that a defendant is not obligated to prove that the prosecution actually used the improperly obtained information in order to show prejudice.<sup>171</sup> In so holding, the court reasoned that it would be virtually impossible for a defendant or a court to ascertain how any particular piece of information possessed by the prosecutor "consciously or subconsciously" factored into the host of discretionary decisions the prosecution makes in preparing its case.<sup>172</sup> The court concluded that the prosecution's mere possession of privileged defense information about the defendant's strategy or position suffices to establish prejudice to the criminal defendant.<sup>173</sup>

Similarly, in *United States v. Levy*,<sup>174</sup> the Third Circuit held that the inquiry into prejudice ends at the point where attorney-client communications are actually conveyed to the Government enforcement agen-

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169. *Costanzo*, 740 F.2d at 254. The Third Circuit's per se rule differs from the Fourth Circuit's rule rejected in *Weatherford* in two important ways. First, the broad prophylactic effects of the Fourth Circuit's rule prohibited any type of Government intrusion into the attorney-client relationship, regardless of the purpose. *Bursey v. Weatherford*, 528 F.2d 483, 486 (4th Cir.), *rev'd*, 429 U.S. 545 (1977). See *supra* note 143 for text of the Fourth Circuit's per se rule. In contrast, the Third Circuit's per se rule recognizes that some Government intrusions are either necessary or unavoidable. See, e.g., *Costanzo*, 740 F.2d at 255, 257. Second, the Fourth Circuit's rule resulted in a sixth amendment violation whether or not information was actually communicated to the Government as a result of the intrusion. *Bursey*, 528 F.2d at 486. By contrast, the Third Circuit's per se rule is triggered only upon disclosure of confidential information to the prosecution due to an unintentional intrusion. See, e.g., *United States v. Levy*, 577 F.2d 200, 208-09 (3d Cir. 1979).

170. 698 F.2d 486 (D.C. Cir. 1983).

171. *Id.* at 494.

172. *Id.*

173. *Id.* at 494-95. The court noted that the sixth amendment, although primarily concerned with fairness at trial, also protects a range of defendant interests implicated by the criminal prosecution. *Id.* at 494. The court added that "these interests may extend beyond the wish for exoneration to include the possibilities of a lesser charge, a lighter sentence, or the alleviation of the practical burdens of a trial." *Id.* Consequently, the court ruled that the threat of significant harm contemplated in *Weatherford* does not have to amount to "prejudice" in the sense of altering the actual trial outcome *Id.*

174. 577 F.2d 200 (3d Cir. 1978).

cies responsible for investigating and prosecuting the case.<sup>175</sup> Like the *Briggs* court, the Third Circuit maintained that the determination of how confidential information may have aided the Government in further investigations, in selecting witnesses and jurors, or in the dynamics of the trial itself required excessive speculation on the part of the court.<sup>176</sup> The court in *Levy* concluded that "any other rule would disturb the balance implicit in the adversary system and thus would jeopardize the very process by which guilt and innocence are determined in our society."<sup>177</sup>

Finally, the First Circuit has taken an intermediate position.<sup>178</sup> Under the First Circuit's approach, the defendant must establish a prima facie showing of prejudice by proving that the Government obtained confidential communications as a result of the intrusion.<sup>179</sup> Upon such proof, the burden shifts to the Government to show that the defendant has not suffered nor will suffer any prejudice as a result of the intrusion.<sup>180</sup> The First Circuit chose this middle ground after balancing what it perceived to be competing concerns.<sup>181</sup> On the one hand, circumstances arise in which the disclosure of confidential communication results in no harm;<sup>182</sup> on the other hand, requiring the defendant to prove both disclosure and use of the confidential information creates an unreasonable burden.<sup>183</sup> In *United States v.*

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175. *Id.* at 209.

176. *Id.* at 208.

177. *Id.* at 209.

178. See, e.g., *Greater Newport Clamshell Alliance v. Public Serv. Co. of N.H.*, 838 F.2d 13 (1st Cir. 1988); *United States v. Dyer*, 821 F.2d 35 (1st Cir. 1987); *Cinelli v. City of Revere*, 820 F.2d 474 (1st Cir. 1987), cert. denied sub nom. *Cutillo v. Cinelli*, 485 U.S. 1037 (1988); *United States v. Mastroianni*, 749 F.2d 900 (1st Cir. 1984).

179. *Mastroianni*, 749 F.2d at 907-08. In *Cinelli v. City of Revere*, for example, the court held that the defendant established a prima facie case of prejudice by showing that police detectives obtained from the defendant the identities of two potential alibi witnesses during an improper post-indictment interrogation. *Cinelli*, 820 F.2d at 478. The court ruled that the burden shifted to the police detectives to show that the information did not prejudice the defendant's case. *Id.*

180. *Mastroianni*, 749 F.2d at 908. In *Mastroianni*, the First Circuit found that the Government had satisfied its burden by showing it did not use any of the confidential information gained from the intrusion into the attorney-client relationship. *Id.* Additionally, the court found that the Government convincingly demonstrated that it had acquired most of the disputed information prior to the intrusion. *Id.*

181. *Id.* at 907.

182. *Id.*

183. *Id.* (citing *Briggs v. Goodwin*, 698 F.2d 486, 494-95 (D.C. Cir. 1983)).

*Mastroianni*,<sup>184</sup> the First Circuit justified placing a higher burden on the Government by observing that requiring "anything less would be to condone intrusions into a defendant's protected attorney-client communications."<sup>185</sup>

## V. PROPOSAL: RESOLUTION OF THE CONFLICT

### A. *Deliberate Intrusions*

For several reasons, deliberate intrusions into the attorney-client relationship should raise an irrebuttable presumption of a sixth amendment violation without requiring proof of prejudice.<sup>186</sup> First, the sixth amendment right to counsel must assure the criminal defendant effective assistance of counsel and a fair trial.<sup>187</sup> The United States Supreme Court has recognized repeatedly that invasions into the privacy of attorney-client communications seriously compromise this fundamental right.<sup>188</sup> The right to counsel necessarily is violated when overzealous authorities deliberately intrude into the attorney-client relationship or intercept privileged communications.

Second, willful intrusions by the Government into the protected sphere of attorney-client confidences impugn the integrity of the adversary system and undermine the fairness of trials. How can a trial be fair when the Government knows in advance the defendant's strategy and evidence (or lack of evidence)?<sup>189</sup> The *Weatherford* Court recog-

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184. 749 F.2d 900 (1st. Cir. 1984).

185. *Id.* at 908.

186. The scope of this Note is limited to the question of which party bears the burden to establish the existence of lack of prejudice in cases of Government intrusion. This Note does not address the often controversial issue of the appropriate remedy for a sixth amendment violation. For a discussion of remedies, see *United States v. Morrison*, 449 U.S. 361 (1981). In *Morrison*, the Court stated that the remedy in a criminal proceeding is limited to denying the prosecution the fruits of its transgression. *Id.* at 366. Thus, when the prosecution has improperly obtained inconsistent information from the defendant in the absence of his counsel, the typical remedy is suppression of the evidence. *Id.* at 365. Similarly, if the evidence had been admitted at trial or the defendant was convicted, the remedy is to order a new trial. *Id.* The Court added that "absent demonstrable prejudice, or a substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." *Id.*

187. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). See *supra* notes 17 & 33.

188. See *supra* notes 88-89, & 111, and accompanying text explaining that the essence of the sixth amendment right is confidential communications with counsel.

189. *Weatherford v. Bursey*, 429 U.S. 545, 556 (1977). See *supra* note 150 for Justice Marshall's dissenting opinion in *Weatherford*; see also *United States v. Levy*, 577 F.2d 700, 709 (3d Cir. 1978).

nized that the prosecution's possession of confidential information is "inherently detrimental to the defendant" and "unfairly advantages the prosecution."<sup>190</sup> Moreover, the Government's deliberate subversion of constitutional rights should of itself suffice to establish a sixth amendment violation.<sup>191</sup> The per se rule represents a moral as well as legal condemnation of intolerable practices which otherwise might flourish under a prejudice requirement.<sup>192</sup>

Finally, a presumptive sixth amendment violation rule akin to that of the Third Circuit's approach in *Levy*<sup>193</sup> is more likely to deter misconduct than a rule which places a threshold burden of proving prejudice on the wronged party.<sup>194</sup>

### B. *Inadvertent Intrusions*

When the Government unintentionally intrudes, a different rule should apply. Many of the compelling policy concerns favoring a presumptive violations rule do not apply to justified or inadvertent Government intrusions.<sup>195</sup> Regarding inadvertent intrusions, focus should be placed on the effects rather than the purpose.

The *Weatherford* Court left open the question of whether a sixth amendment violation may be presumed when an informant conveys the substance of attorney-client communications to the prosecution.<sup>196</sup> In *Weatherford*, the Supreme Court determined that some attorney-client disclosures - - for example, discussions about the weather - - present no threat of prejudice and, therefore, do not constitute a sixth amendment violation.<sup>197</sup> Arguably, this reasoning could be stretched to require

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190. *Weatherford*, 429 U.S. at 556.

191. *United States v. Morrison*, 602 F.2d 529, 533 (3d Cir.), *rev'd on other grounds*, 449 U.S. 361 (1980).

192. *See United States v. Gartner*, 518 F.2d 633, 637 (2d Cir.), *cert. denied*, 423 U.S. 915 (1975); *United States v. Rosner*, 485 F.2d 1213, 1226-27 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974).

193. *See supra* notes 168-77 and accompanying text for an analysis of the per se violation approach.

194. In *Weatherford*, the Supreme Court recognized that a per se violation rule would act prophylactically to inhibit Government intrusions. *Weatherford*, 429 U.S. at 557. The Court, however, rejected the Fourth Circuit's rule as being too broad. *Id.* In contrast, the Third Circuit's per se rule has a more limited reach. *See supra* note 169 for a comparison of the per se rules.

195. *See supra* note 152 for circumstances justifying Government intrusion.

196. *Weatherford*, 429 U.S. at 554. *See supra* note 148 indicating instances where the court may presume prejudice.

197. *Weatherford*, 429 U.S. at 558.

that the defendant show both communication of privileged information to the prosecution and actual prejudice arising from the intrusion in order to establish a sixth amendment violation.<sup>198</sup> Practical and equitable factors militate against such an approach. Placing the burden of proof on the defendant creates a seemingly insurmountable requirement.<sup>199</sup> As the District of Columbia Circuit recognized in *Briggs*,<sup>200</sup> it would be virtually impossible to determine the degree to which a piece of an item of information possessed by the prosecution factored into the multitude of trial preparation decisions.<sup>201</sup>

A more equitable approach would be to require the defendant to make a prima facie case for prejudice by showing that confidential communications were conveyed to the Government as a result of the Government intrusion.<sup>202</sup> Upon such proof, the burden should shift to the Government to prove a lack of prejudice.<sup>203</sup> This approach would allow the Government, which possesses the facts, to prove that it discovered and conveyed to the prosecution only non-prejudicial information.

The proposed two-tiered rule would lessen any "chilling effect" that the threat of government intrusion might have on the attorney-client relationship.<sup>204</sup> The fear of unapproved disclosure certainly makes clients reluctant to confide in their attorneys. Without full disclosure attorneys will not be able to provide the best possible legal advice. A rule which places a heavy burden upon the Government to disprove claims of prejudice will inhibit the Government from either seeking or disclosing confidential information, while serving the interests of justice and fair play.

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198. See *supra* notes 158-67 for an analysis of the actual prejudice approach.

199. *Weatherford*, 429 U.S. at 565 (Marshall, J., dissenting).

200. See *Briggs v. Goodwin*, 698 F.2d 486 (1983).

201. *Id.* at 494. See *supra* notes 170-73 and accompanying text for a discussion of the *Briggs* case.

202. *United States v. Mastroianni*, 749 F.2d 900, 907-08 (1st Cir. 1984). See *supra* notes 178-85 and accompanying text for an analysis of the First Circuit's prima facie case approach.

203. *Mastroianni*, 749 F.2d. at 908.

204. See *supra* notes 90-93 and accompanying text discussing the purpose of the attorney-client privilege doctrine. See also Mosteller, *supra* note 110, at 1666-68 explaining the chilling effect on the attorney-client relationship.

## VI. CONCLUSION

Effective representation of criminal defendants requires strict confidentiality of attorney-client communications. If the Government intentionally intrudes into an attorney-client relationship and conveys confidential communications or otherwise engages in conduct calculated to destroy that relationship, the court should presume a sixth amendment violation. If the Government obtains privileged communications unintentionally, the presumptive violations rule should not apply. Instead, the Government should bear the burden of proving that the defendant has not suffered and will not suffer prejudice as a result of the intrusion. Any other rule ignores the balancing process between society's interest in prosecuting criminal conduct and the individual's constitutional right to the effective assistance of counsel and a fair trial.

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