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Sixth Amendment Implications of Informant Participation in Defense Meetings

David R. Lurie

SIXTH AMENDMENT IMPLICATIONS OF INFORMANT PARTICIPATION IN DEFENSE MEETINGS

INTRODUCTION

The tension between the government's legitimate interest in effective law enforcement and the accused's constitutional right to effective assistance of counsel becomes acute when government informants attend post-indictment meetings between accused persons and their attorneys. In a recent survey of the criminal defense bar, thirty-nine percent of the respondents indicated that while representing their clients they had encountered persons they later learned were confidential government informants.[1] The increasing frequency of confidential informant ("CI") contacts with defense lawyers and their clients[2] raises questions concerning the constitutional permissibility of what critics contend are dangerous government invasions into the defense camp.[3]

CIs are powerful law enforcement tools, often providing government investigators with evidence essential to uncovering criminal activity and convicting wrongdoers—particularly in cases involving group criminality.[4] Even after defendants are indicted and their sixth amendment right to counsel[5] has attached,[6] the government may have a valid interest in initiating or continuing undercover investigations to garner information

1. *See* Genego, *The New Adversary*, 54 Brooklyn L. Rev. 781, 807 (1988).

2. Sixty-eight percent of the total reported instances of government informant contacts with defense attorneys for the period from 1974 to mid-1985 occurred between 1983 and 1985. *See id.*

3. *See* Halpern, *Government Intrusions into the Attorney-Client Relationship: An Interest Analysis of Rights and Remedies*, 32 Buffalo L. Rev. 127, 153 (1983); Note, *Government Intrusions into the Defense Camp: Undermining the Right to Counsel*, 97 Harv. L. Rev. 1143, 1144 (1984); Comment, *The Sixth Amendment Implications of a Government Informer's Presence at Defense Meetings*, 9 U. Dayton L. Rev. 535, 535 (1984).

4. *See* S. Dash, R. Schwartz & R. Knowlton, The Eavesdroppers 253-54 (1959); M. Whitaker, The Police Witness: Effectiveness in the Courtroom 62-63 (1985); Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Criminal Justice*, 69 Yale L.J. 543, 565 (1960). The Supreme Court has long recognized that undercover investigations are an "unfortunate necessity" of effective law enforcement. *See* Weatherford v. Bursey, 429 U.S. 545, 557 (1977); United States v. Russell, 411 U.S. 423, 432 (1973); Lewis v. United States, 385 U.S. 206, 208-09 (1966).

5. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

6. The right to counsel attaches when the government "crosse[s] the constitutionally-significant divide from fact-finder to adversary." United States *ex rel.* Hall v. Lane, 804 F.2d 79, 82 (7th Cir. 1986), *cert. denied*, 480 U.S. 921 (1987); *see also* Moran v. Burbine, 475 U.S. 412, 430 (1986) ("By its very terms, [the sixth amendment] becomes applicable only when the government's role shifts from investigation to accusation.").

The right itself attaches prior to trial, although the purpose of the sixth amendment guarantee of effective assistance of counsel "is simply to ensure that criminal defendants receive a fair trial." Strickland v. Washington, 466 U.S. 668, 689 (1984).

In *Maine v. Moulton*, the Supreme Court indicated that the right to counsel "attaches at earlier, 'critical' stages in the criminal justice process [because] 'the results [of pre-indictment government actions] might well settle the accused's fate and reduce the trial

probative of an accused's guilt.[7] Law enforcement officers may also investigate other charges to which the right to counsel has not attached.[8]

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itself to a mere formality.' " 474 U.S. 159, 170 (1985) (quoting United States v. Wade, 388 U.S. 218, 224 (1967)).

Some uncertainty exists about whether these "critical stages" can occur before formal charges have been filed against a defendant. *See, e.g., Moulton*, 474 U.S. at 170 (dictum suggesting that right to counsel might attach in pre-charge encounter constituting a "critical stage"); Brewer v. Williams, 430 U.S. 387, 398 (1977) (acknowledging occasional "difference of opinion . . . as to the peripheral scope" of right to counsel).

However, the Supreme Court recently held "that the Sixth Amendment right to counsel does not attach until after the initiation of formal charges." *Moran*, 475 U.S. at 431. The initiation of charges may take the form of an indictment, arraignment or preliminary adversary judicial proceedings. *See, e.g., Brewer*, 430 U.S. at 401 (right to counsel attached to post-arraignment interrogation); Coleman v. Alabama, 399 U.S. 1, 9-10 (1970) (right to counsel attached at post-indictment preliminary hearing); Massiah v. United States, 377 U.S. 201, 205-06 (1964) (right to counsel attached at post-indictment surreptitious interrogation); Hamilton v. Alabama, 368 U.S. 52, 53-55 (1961) (right to counsel attached at arraignment). *But see* Kirby v. Illinois, 406 U.S. 682, 689-90 (1972) (plurality opinion) (no right to counsel at pre-arraignment lineup); United States v. Ramsey, 785 F.2d 184, 193 (7th Cir.) (no sixth amendment right to counsel at grand jury), *cert. denied*, 476 U.S. 1186 (1986).

The point of indictment is constitutionally crucial because it signifies that " 'the government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified.' " *Moulton*, 474 U.S. at 170 (quoting *Kirby*, 406 U.S. at 689). At that point, the accused is " 'faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law' " and, therefore, requires the protection afforded by legal representation. *Id.* (quoting *Kirby*, 406 U.S. at 689).

7. *See infra* notes 39-40 and accompanying text.

8. *See Moran*, 475 U.S. at 430-31; *Moulton*, 474 U.S. at 180 n.16; *Weatherford*, 429 U.S. at 557; Roviaro v. United States, 353 U.S. 53, 59 (1957); United States v. Pace, 833 F.2d 1307, 1312 (9th Cir. 1987), *cert. denied*, 486 U.S. 1011 (1988).

In Hoffa v. United States, 385 U.S. 293, 304-05 (1966), a CI attended strategy meetings between the accused, his codefendants and their counsel. During one of these meetings, the CI overheard statements regarding the bribery of jurors. *See id.* at 296. These statements were entered into evidence against the accused in a later trial on jury tampering charges. *See id.* at 294-95. The Supreme Court assumed, without deciding, that the sixth amendment would have been violated if the CI had deliberately intruded upon the attorney-client relationship and reported the defense's plans to the government. *See id.* at 306-07. Such a violation, however, did not preclude the government from using evidence regarding other offenses garnered in the defense meeting where the incriminating statements were made outside the presence of counsel and were unrelated to any "legitimate defense" of charges as to which the right to counsel had attached. *See id.* at 306-08. The *Hoffa* Court also rejected the petitioner's fifth amendment claim, holding that due process was not violated, absent a showing that the government or its CI employed coercive tactics to elicit admissions from the accused. *See id.* at 303-04.

The implication in *Hoffa* that the Constitution imposes no limitation on CI intrusions upon the attorney-client relationship prior to the initiation of adversary proceedings has been borne out in subsequent decisions. In United States *ex rel.* Shiflet v. Lane, 815 F.2d 457, 464-65 (7th Cir. 1987), *cert. denied*, 484 U.S. 965 (1988), the Seventh Circuit held that the right to counsel was not violated where a member of the defense team disclosed privileged information to government investigators prior to indictment. The Court reasoned that the rule of Moran v. Burbine, 475 U.S. 412, 428-32 (1986), governed. *See Shiflet*, 815 F.2d at 464-65. In *Moran*, a defendant being held in custody prior to the issuance of an indictment was not notified that an attorney had been retained on his behalf and was attempting to contact him. *See Moran*, 475 U.S. at 416-18. The Court held that the sixth amendment affords no protection to the attorney-client relationship at

The right to counsel, however, imposes significant restrictions on the government's ability to question or otherwise elicit information or admissions from accused persons.[9] The sixth amendment also restricts government interference with the attorney-client relationship.[10]

In 1977, the Supreme Court held in *Weatherford v. Bursey*[11] that the sixth amendment does not absolutely proscribe the participation of CIs in meetings between accused persons and their attorneys.[12] The *Weatherford* Court, however, did indicate that the right to counsel limits the

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the investigatory stage, even where there is an established relationship between attorney and client. *See id.* at 430-32; *see also* United States v. Sam Goody, Inc., 506 F. Supp. 380, 393-94 (E.D.N.Y. 1981) (prosecutorial recording of CI communication with defendant prior to indictment not violative of sixth amendment).

Although the sixth amendment is inapplicable to government intrusions upon the attorney-client relationship prior to the onset of adversarial proceedings, non-constitutional limitations may apply. Federal courts are mandated to "enforce professional responsibility standards pursuant to their general supervisory authority over members of the bar." United States v. Hammad, 858 F.2d 834, 837 (2d Cir. 1988); *see In re* Snyder, 472 U.S. 634, 645 n.6 (1985).

The use of informants to interfere with the attorney-client relationship during the investigatory stage of criminal prosecutions may violate such professional standards. In *Hammad*, the Second Circuit held that the Model Code of Professional Responsibility precluded the government from using admissions elicited by a CI prior to indictment where the defendant had retained counsel in connection with the subject matter of a criminal investigation. *See id.* at 839; *see also* Model Code of Professional Responsibility DR 7-104(A)(2) (1981) ("[d]uring the course of his representation of a client a lawyer shall not . . . communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a party in that matter"). The *Hammad* court, however, was wary of the possibility that career criminals who are frequent targets of criminal investigations might retain "house counsel" in order to immunize themselves from informant infiltration. *See id.* The court, therefore, refused to construe the ethics rule to preclude undercover investigations at the investigatory stage. *See id.* at 839. Rather, the court adopted a case-by-case approach to ethical challenges of the pre-indictment, non-custodial employment of CIs by prosecutors. *See id.*

9. *See, e.g., Moulton*, 474 U.S. at 175-76, 177 n.13 (state recording of conversation between codefendant CI and defendant violated sixth amendment); *Brewer*, 430 U.S. at 399 n.6 (Christian burial speech made to defendant during four hour police car ride violated sixth amendment); *Massiah*, 377 U.S. at 205-06 (questioning of defendant by CI violated sixth amendment).

10. *See* Maine v. Moulton, 474 U.S. 159, 180 (1985). The *Moulton* Court emphasized that the government is under an affirmative obligation not to "circumvent" or "dilute" the protections afforded by the right to counsel.

11. 429 U.S. 545 (1977).

12. *See id.* at 553, 557-58; *infra* note 53 and accompanying text. The *Weatherford* Court did not distinguish between CIs who, like Weatherford, are government employees and CIs with less formal relationships to government investigators. This makes sense, because a CI gathering information as an agent of the government is no less a state actor for sixth amendment purposes if she is not a government employee. *See, e.g.*, Kuhlmann v. Wilson, 477 U.S. 436, 439-40 (1986) (prisoner sharing jail cell with accused with prior agreement to report defendant's statements to police agent of the state); Massiah v. United States, 377 U.S. 201, 205-06 (1964) (defendant's alleged confederate enlisted to elicit incriminating statements from accused agent of the state). However, there is no violation where an individual with no prior relationship to the government overhears, or even elicits, incriminating statements from the accused and then reports them to government agents. *See* United States v. Taylor, 800 F.2d 1012, 1015 (10th Cir. 1986), *cert. denied*, 484 U.S. 838 (1987).

government's use of informants in the attorney-client context after the right to counsel has attached.[13]

Since *Weatherford*, lower courts and commentators have attempted to develop a constitutional standard balancing the government's interest in conducting effective investigations with the defendant's interest in remaining free from government intrusions during the preparation of her defense.[14] Advocates of a highly restrictive standard argue that CI participation in defense meetings poses an unacceptable risk of communicating confidential defense information to prosecutors.[15] These critics also contend that the fear that third party participants may convey confidential information to the prosecution risks chilling attorney-client communication, and thereby, reducing an attorney's effectiveness.[16]

To remedy these concerns, one commentator has argued that a sixth amendment violation arises when the government cannot demonstrate that a compelling justification existed for a CI's presence at an attorney-client meeting *and* that the CI did not communicate "defense information" to the prosecution.[17]

Proponents of the liberal use of CIs contend that the sixth amendment is not a "protective cloak" around the attorney-client relationship.[18] Rather, the right to counsel ensures attorney-client privacy only to the extent necessary to protect the truth-finding function of the adversary

13. *See Weatherford*, 429 U.S. at 554 (rejecting state's contention that defendant "assumes the risk and cannot complain" if defense meeting participant who "turns out to be" informant obtains and relays defense information to prosecution).

14. *See* Greater Newburyport Clamshell Alliance v. Public Serv. Co., 838 F.2d 13, 20 (1st Cir. 1988); United States v. Kelly, 790 F.2d 130, 137 (D.C. Cir. 1986); United States v. Singer, 785 F.2d 228, 234 (8th Cir.), *cert. denied*, 479 U.S. 883 (1986); Clutchette v. Rushen, 770 F.2d 1469, 1471-72 (9th Cir. 1985), *cert. denied*, 475 U.S. 1088 (1986); United States v. Ginsberg, 758 F.2d 823, 833 (2d Cir. 1985); United States v. Costanzo, 740 F.2d 251, 254 (3d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985); Halpern, *supra* note 3, at 163-67; Note, *supra* note 3, at 1152; Comment, *supra* note 3, 539-42.

Justices White, Rehnquist and O'Connor dissented from the recent denial of a petition for a writ of certiorari requesting review of the standard for establishing a sixth amendment violation in the *Weatherford* context. *See* Cutillo v. Cinelli, 485 U.S. 1037, 1037-38 (1988).

15. *See, e.g.*, Note, *supra* note 3, at 1144 (courts cannot reliably determine whether informants have communicated defense meeting information to prosecutors); Comment, *supra* note 3, at 540 (defendants will often be unable to prove communication of defense information to prosecution).

16. *See* Note, *supra* note 3, at 1144; Comment, *supra* note 3, at 541-42. *But see* Weatherford v. Bursey, 429 U.S. 545, 554 n.4 (1977) (risk of CI spying may be avoided by excluding third parties from defense meetings).

17. *See* Note, *supra* note 3, at 1162; *see also* Halpern, *supra* note 3, at 166-67 (test should require affirmative showing by government of lack of prejudice where intrusion has not been demonstrably minimized).

18. Moran v. Burbine, 475 U.S. 412, 430 (1986); *see also* Maine v. Moulton, 474 U.S. 159, 178-79 (1985) (right to counsel does not preclude undercover investigations for "legitimate reasons"); United States v. Darwin, 757 F.2d 1193, 1199 (11th Cir. 1985) (right to counsel does not preclude use of CIs absent bad faith by police), *cert. denied*, 474 U.S. 1110 (1986).

process.[19] Therefore, a constitutional standard for CI participation should focus on whether the government actually garnered confidential information from a defense meeting, thereby impairing the defendant's confidential relationship with counsel.[20] Further, communication to the prosecution of information derived from a defense meeting should not automatically result in a remedy in a post-conviction proceeding. A defendant should be required to demonstrate that the disclosure of information aided the prosecution in preparing its case, thereby creating substantial prejudice.[21]

This Note argues that a sixth amendment test designed to discourage or prevent CI participation in defense meetings under all circumstances misconstrues the Court's holding in *Weatherford*, placing unwarranted limitations on legitimate investigative activities. Siding with advocates of a less restrictive standard, this Note contends that no constitutional violation requiring a criminal procedural remedy arises unless a CI communicates defense meeting information to prosecutors. However, if defense information is communicated to the government, the state's use of such evidence against the accused, either in pursuing its investigation or at trial, should be barred. This Note concludes that when a CI purposefully and unjustifiably intrudes upon an attorney-client meeting, a defendant should be able to pursue a civil remedy for violation of the right to counsel, even if the government did not use defense meeting information against her.

Part I analyzes *Weatherford* in relation to other Supreme Court cases involving the government's use of CIs and interference with the attorney-client relationship after the right to counsel has attached. Part II discusses the proposed requirement that defense information be communicated to the government for a violation requiring a criminal procedural

19. *See, e.g.*, Perry v. Leeke, 109 S. Ct. 594, 605 (1989) (Marshall, J., dissenting) ("legal representation for the defendant at every critical stage of the adversary process *enhances* the discovery of truth") (emphasis in original); Nix v. Whiteside, 475 U.S. 157, 166 (1986) ("duty [of defense counsel] is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth"); United States v. Cronic, 466 U.S. 648, 656 (1984) (sixth amendment ensures that prosecution's case is put to meaningful adversarial testing).

20. Accordingly, the issue of whether the government was justified in its intrusion upon the attorney-client relationship should not be reached under the sixth amendment inquiry. *Cf.* United States v. Morrison, 449 U.S. 361, 366-67 (1981) (intentional unjustified attempt to undermine defendant's relationship with counsel does not give rise to a violation of sixth amendment requiring criminal procedural remedy absent prejudice).

21. *See, e.g.*, Clutchette v. Rushen, 770 F.2d 1469, 1471-72 (9th Cir. 1985) ("passive" intrusion upon attorney-client relationship not violative of sixth amendment absent disclosure of defense strategy to prosecution), *cert. denied*, 475 U.S. 1088 (1986); United States v. Irwin, 612 F.2d 1182, 1186-87 (9th Cir. 1980) (no sixth amendment violation arising from CI intrusion absent showing of substantial prejudice caused by advantage to prosecution or damage to defendant's relationship with counsel); United States v. Glover, 596 F.2d 857, 863-64 (9th Cir.) (no violation of right to counsel from CI intrusion failing showing that prosecution obtained prejudicial evidence or damaged attorney-client relationship), *cert. denied*, 444 U.S. 860 (1979).

remedy to arise. Part III explores the sixth amendment basis for protecting confidential attorney-client communications and offers a definition of constitutionally protected attorney-client consultations. Part IV considers the requirements for applying a post-conviction remedy in the criminal context. Part V examines the possibility of a civil remedy for purposeful, unjustified CI intrusions upon defense consultations.

I. SUPREME COURT ANALYSIS

A. *The Guarantee of Effective Assistance of Counsel*

"Embodying 'a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself,' the right to counsel safeguards [those] rights deemed essential for the fair prosecution of a criminal proceeding," including the right to representation.[22] While the sixth amendment guarantees criminal defendants access to legal representation,[23] the right to counsel is not limited to a guarantee that criminal defendants will have a lawyer alongside them as they prepare their defense and at trial.[24] Rather, "the right to counsel is the right to the effective assistance of counsel."[25]

The right to effective assistance of counsel entitles a defendant to be represented by a lawyer who is an effective advocate in the adversary process;[26] such assistance is "necessary to ensure that the trial is fair."[27] Therefore, a defendant's lawyer must not only be present at critical stages[28] in criminal proceedings after indictment, but also must be able to advise and represent her client adequately.[29]

22. Maine v. Moulton, 474 U.S. 159, 169 (1985) (quoting Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938)); *see also* Strickland v. Washington, 466 U.S. 668, 685 (1984) (sixth amendment protects fundamental right to fair trial "in which evidence subject to adversarial testing is presented to an impartial tribunal"); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (right to counsel guarantee "fundamental and essential to fair trials"); Powell v. Alabama, 287 U.S. 45, 70 (1932) (assistance of counsel essential to fair trial).

23. *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (defendant has right to appointed counsel for misdemeanor charge when actually subject to imprisonment); *Gideon*, 372 U.S. at 344 (right to appointed counsel for felony charges). *But see* Scott v. Illinois, 440 U.S. 367, 373 (1979) (no right to appointed counsel where misdemeanor defendant is not actually imprisoned).

24. *See Strickland*, 466 U.S. at 685; *cf. Powell*, 287 U.S. at 71 (appointment of unprepared counsel days before complex trial violative of due process and right to counsel guarantees).

25. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

26. *See* Strickland v. Washington, 466 U.S. 668, 685 (1984). Counsel's assistance is critical to ensuring the "ability of the adversarial system to produce just results." *Id.*

27. *Id.*

28. *See infra* note 6.

29. *See, e.g.*, *Strickland*, 466 U.S. at 685 (accused's access to skill and knowledge of counsel necessary to fair trial); Adams v. United States, 317 U.S. 269, 275-76 (1942) (defendant requires assistance of counsel conversant with legal rules to "meet the case of the prosecution").

B. *Violation of the Right to Counsel*

The right to effective assistance of counsel is violated when a defense lawyer's deficient performance compromises the reliability of the adversarial process[30] or when the accused's counsel is burdened by an actual conflict of interest.[31] The effectiveness of representation may also be compromised by government actions that interfere with the attorney's ability to conduct the defense. After formal proceedings are initiated, "the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the [defendant's] right to counsel."[32]

The government violates the right to counsel by actually or constructively denying a defendant the right to consult with counsel during critical post-indictment proceedings.[33] A sixth amendment violation may also occur where the accused is confronted by state agents without counsel.[34] Thus, the attachment of the right to counsel imposes limitations on the questioning of accused persons.[35] A defendant who invokes her right to counsel by expressing the desire to communicate with state agents through a lawyer may not be interrogated outside the presence of counsel.[36] Law enforcement officials cannot circumvent the accused's right to consult with counsel by employing CIs to question a defendant.[37] The

30. A defendant's right to effective assistance of counsel is held to be violated upon a showing that counsel's deficient performance fell below an objectively reasonable standard, and that there was a reasonable probability that, but for counsel's unprofessional errors, the result of a judicial proceeding would have been different. *See* Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984).

31. *See id.* at 692.

32. Maine v. Moulton, 474 U.S. 159, 171 (1985).

33. *See, e.g.*, United States v. Cronic, 466 U.S. 648, 659-61 (1984) (denial of right to consult with counsel at critical stage of trial); Moore v. Illinois, 434 U.S. 220, 231 (1977) (denial of right to counsel during pretrial post-indictment identification); Geders v. United States, 425 U.S. 80, 91 (1976) (denial of right to counsel during overnight recess of trial while defendant was on witness stand); Herring v. New York, 422 U.S. 853, 864-65 (1975) (denial of right to trial summation by defense counsel); United States v. Wade, 388 U.S. 218, 236-37 (1967) (denial of counsel at pretrial, post-indictment line-up); Ferguson v. Georgia, 365 U.S. 570, 596 (1961) (denial of defendant's right to testify in her defense under questioning by defense counsel). *But see* Perry v. Leeke, 109 S. Ct. 594, 601-02 (1989) (right to counsel not violated by judge's refusal to allow counsel to consult with defendant during fifteen-minute recess while defendant was on witness stand).

34. *See, e.g.*, *Moulton*, 474 U.S. at 176 (defendant's right to rely on attorney as "medium" between himself and state violated by state's use of information obtained in conversation with CI outside presence of counsel); Brewer v. Williams, 430 U.S. 387, 404-05 (1977) (failure to provide counsel during four-hour police car ride violated sixth amendment).

35. *See* Michigan v. Jackson, 475 U.S. 625, 632 (1986); *see also* Spano v. New York, 360 U.S. 315, 325-26 (1959) (Douglas, J., concurring) (failure to provide representation during police interrogation denied defendant effective assistance of counsel) (overruled by Miranda v. Arizona, 384 U.S. 436 (1966)).

36. *See Jackson*, 475 U.S. at 626. If an accused person has requested counsel, the prophylactic rule of *Jackson* precludes the government from initiating interrogation. *See id.* at 629-36.

37. *See infra* notes 41-50.

sixth amendment also strictly limits a government investigator's ability to interfere with attorney-client communications regarding indicted offenses.[38]

C. *The Sixth Amendment and Government Investigations*

Though constrained by the accused's right to counsel, the police have an interest in investigating crimes for which formal charges have already been filed as well as new or additional crimes after indictment.[39] The attachment of the right to counsel does not preclude law enforcement agencies from initiating or continuing investigations of wrongdoing by an accused person or her associates, including investigations involving CIs.[40]

The government's obligation not to circumvent a defendant's right to effective representation, however, sometimes conflicts with its legitimate interest in investigating crimes and convicting wrongdoers. The risk of such conflict grows when the government utilizes CIs to obtain information regarding a defendant's criminal activities after indictment.[41]

According to *Massiah v. United States*,[42] the right to counsel is violated when a CI or police official "deliberately elicit[s]" incriminating statements from an indictee outside the presence of counsel.[43] The right is violated even if the state has a valid reason for employing a CI to interrogate surreptitiously.[44] Deliberate elicitation occurs where the conduct of the government or its CI is the "functional equivalent" of direct interrogation.[45] To violate the deliberate elicitation standard, the government need not explicitly instruct its CI to question a defendant in the

38. *See, e.g.*, O'Brien v. United States, 386 U.S. 345, 345 (1967) (per curiam) (FBI overhearing of telephone conversation between counsel and defendant found violative); Black v. United States, 385 U.S. 26, 26-29 (1966) (per curiam) (government overhearing of attorney-client conversation found violative). *But see* United States v. Morrison, 449 U.S. 361, 366-67 (1981) (interference with attorney-client relationship may not result in remediable constitutional violation absent showing of adverse impact upon criminal proceedings).

39. *See* Maine v. Moulton, 474 U.S. 159, 179 (1985); Massiah v. United States, 377 U.S. 201, 207 (1964).

40. "[T]he mere bringing of formal proceedings does not necessarily mean that an undercover investigation or the need for it has terminated." United States v. Henry, 447 U.S. 264, 299 (1980) (Rehnquist, J., dissenting); *see also* Weatherford v. Bursey, 429 U.S. 545, 557 (1977) (sixth amendment permits continuing undercover investigation after indictment); Roviaro v. United States, 353 U.S. 53, 59 (1957) (sixth amendment permits continued secrecy regarding identity of CI after indictment).

41. *See, e.g.*, Hoffa v. United States, 385 U.S. 293, 304-05 (1966) (information regarding jury tampering obtained during defense consultations); *Massiah*, 377 U.S. at 206 (incriminating statements deliberately elicited by confederate outside presence of counsel).

42. 377 U.S. 201 (1964).

43. *See id.* at 205-06.

44. *See* Maine v. Moulton, 474 U.S. 159, 179-80 (1985).

45. *See* Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986); United States v. Henry, 447 U.S. 264, 277 (1980) (Powell, J., concurring).

In *Massiah*, the government's intention to circumvent the right to counsel was clear. The government had instructed its CI, a co-indictee, to question the defendant outside

absence of counsel. When the state intentionally creates a situation in which the accused is induced to make incriminating statements to a CI without the assistance of counsel, the right to counsel is arguably violated.[46]

Such a situation may be created when a CI is encouraged to develop a relation of trust and confidence with an accused person such that she becomes "particularly susceptible to the ploys of [the] undercover" agent.[47] Under these circumstances, a constitutional violation may be found even when a CI is specifically instructed not to question the accused.[48]

The deliberate elicitation standard of *Massiah* is not met, however, if "by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached."[49] When the CI is merely a passive "listening post," taking no affirmative steps to elicit statements from the accused, no constitutional violation arises.[50]

In *Weatherford v. Bursey*,[51] the Supreme Court considered the constitutional limitations on government use of informants in the attorney-client context. The Court refused to construe the sixth amendment as "subsum[ing] a right to be free from intrusion by [government] informers into counsel-client consultations."[52] The *Weatherford* Court reversed the Fourth Circuit's holding that the presence of a CI at a defense meeting was a per se violation of the right to counsel.[53]

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the presence of his lawyer regarding offenses for which the right to counsel had attached. *See* Massiah v. United States, 377 U.S. 201, 202-03 (1964).

46. In *Henry*, the government paid its CI to procure incriminating statements from the defendant, a fellow prisoner. *See Henry*, 447 U.S. at 266-70. Similarly, in United States v. Lynch, 800 F.2d 765, 769-70 (8th Cir. 1986), *cert. denied*, 481 U.S. 1022 (1987), the state instructed its CI, the defendant's cellmate, to "see what he could find out" about a crime from the defendant.

47. *Henry*, 447 U.S. at 274.

48. For example, the *Henry* Court found a sixth amendment violation even though the police had not intended that their CI take "affirmative steps to secure incriminating information." *Id.* at 271 (1980).

49. Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986) (quoting Maine v. Moulton, 474 U.S. 159, 176 (1985) (citing *Henry*, 447 U.S. at 276 (Powell, J., concurring))).

50. "[A] defendant does not make out a violation of [the right to counsel] simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police." *Id.* In *Kuhlmann* the government placed a CI in the same cell as the defendant. However, neither the government nor its agent encouraged the defendant to make incriminating admissions. The government's actions were held not to be the functional equivalent of interrogation, and therefore did not circumvent the defendant's right to counsel. *See id.* at 459-61; *see also* Brooks v. Kincheloe, 848 F.2d 940, 944 (9th Cir. 1988) (no violation where police did not create situation to induce defendant to make statement, but merely instructed cellmate to remember what defendant said); United States v. Cruz, 785 F.2d 399, 408 (2d Cir. 1986) (placement of informant on same floor of jail as defendant not attempt to induce incriminating statements).

51. 429 U.S. 545 (1977).

52. *Id.* at 553; *see id.* at 557-58.

53. *See id.* at 552-53. The Fourth Circuit held that the sixth amendment imposed a prophylactic prohibition against state intrusion upon defense consultations. *See* Bursey

Weatherford was a police undercover agent and co-indictee[54] who participated in strategy meetings with defendant Bursey and his lawyer prior to the trial.[55] After learning that Weatherford was an undercover agent,[56] Bursey sued Weatherford and a superior in a section 1983 action,[57] alleging that his right to counsel had been violated.[58]

The trial court found that Weatherford communicated no information from the defense meetings to the prosecution or his police superiors and that he did not testify at Bursey's criminal trial about the contents of the meetings.[59] Therefore, the court concluded that Bursey was not prejudiced by the government's infiltration of the defense camp.[60] It also determined that the government permitted its CI to participate in attorney-client meetings to protect his cover.[61]

The Supreme Court concluded that Bursey had failed to establish a violation of the right to counsel.[62] In holding against the plaintiff the Court emphasized that: the prosecution entered no "tainted evidence" derived from defense meetings against Bursey at trial;[63] the CI did not communicate the substance of the meetings to the prosecution;[64] and the informant attended the defense meetings to retain his cover and "not to spy."[65]

In rejecting the court of appeals' per se rule, however, the *Weatherford* Court did not affirmatively state which factors would be sufficient for finding a constitutional violation arising from a CI's participation in a defense meeting. In particular, *Weatherford* failed to establish whether communicating defense meeting information is a prerequisite to finding a

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v. Weatherford, 528 F.2d 483, 486 (4th Cir. 1975), *rev'd*, 429 U.S. 545 (1977). The Fourth Circuit reasoned that the right to counsel is violated whenever the government either plans or knowingly permits its CI to engage in an intrusion upon the attorney-client relationship. *See id.*

54. Weatherford, who had infiltrated a group protesting the military draft, participated in the vandalization of a Selective Service office and was arrested to maintain his cover. *See Weatherford*, 429 U.S. at 547.

55. *See id.* at 547-48.

56. Bursey presumably learned of Weatherford's relationship to the government when the agent testified against him at his trial. *See id.* at 548-49.

57. 42 U.S.C. 1983 (1982); *see infra* note 137.

58. *See* Bursey v. Weatherford, 528 F.2d 483, 484 (4th Cir. 1975), *rev'd*, 429 U.S. 545 (1977).

59. *See* Weatherford v. Bursey, 429 U.S. 545, 549 (1977).

60. *See id.* at 556-57.

61. Bursey and his counsel asked Weatherford to attend the defense planning sessions. They renewed their request even after Weatherford told them that his trial would be severed, a statement that the trial court believed should have placed Bursey on notice that Weatherford might be an informant. *See* Bursey v. Weatherford, 528 F.2d 483, 486 (4th Cir. 1975), *rev'd*, 429 U.S. 545 (1977). Weatherford's superiors instructed him to accept the invitation, in order "to avoid raising the suspicion that he was . . . the informant whose existence Bursey and [attorney] Wise already suspected." *Weatherford*, 429 U.S. at 557.

62. *See Weatherford*, 429 U.S. at 558.

63. *See id.*

64. *See id.* at 556, 558.

65. *See id.* at 557.

violation of the right to counsel where the government "purposefully intrudes" on the attorney-client relationship in order to obtain defense strategy.[66]

II. COMMUNICATION TO GOVERNMENT REQUIREMENT

In rejecting the plaintiff's sixth amendment claim, the *Weatherford* Court emphasized that the CI's presence at defense meetings was not "purposely caused" by the government to garner information from confidential attorney-client communications.[67] This part of the decision led some lower courts to conclude that the right to counsel is violated when the state "intentionally plants an informer in the defense camp"—even if the CI does not convey confidential defense information to the prosecution.[68]

A. Coplon *and* Caldwell

Courts holding that a "purposeful intrusion" upon the attorney-client relationship is sufficient to find a constitutional violation rely upon decisions of the District of Columbia Circuit Court of Appeals in *Caldwell v. United States*[69] and *Coplon v. United States*.[70] That court held that the sixth amendment bars prosecutors from insinuating spies into the defense camp to overhear or wiretap attorney-client consultations.[71] Moreover, it held that when a government agent spies on an attorney-client meeting,

66. *See id.* at 558. The *Weatherford* minority construed the Court's holding as limited to situations in which a CI does not intend to "spy" on attorney-client consultations. *See id.* at 561-62 (Marshall, J., dissenting).

67. *Id.* at 557; *see also* United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981) (construing *Weatherford* as distinguishing between situations when government "purposely causes" informant to attend defense meetings and when the presence of informant is result of "inadvertent occurrences").

68. United States v. Costanzo, 740 F.2d 251, 254 (3d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985); *see also* Clutchette v. Rushen, 770 F.2d 1469, 1471-72 (9th Cir. 1985) (implying that sixth amendment violation may be established by government's intentional planting of CI in defense camp), *cert. denied*, 475 U.S. 1088 (1986); *Brugman*, 655 F.2d at 546 (implying that purposefully causing informant's presence at attorney-client meeting constitutes sixth amendment violation). These cases distinguish between situations in which the state is "passive," neither initiating nor encouraging the participation of its CI in attorney-client meetings, and when the government deliberately utilizes its agent to invade the attorney-client relationship. *See Clutchette*, 770 F.2d at 1471-72.

69. 205 F.2d 879 (D.C. Cir. 1953) (government agent posing as defense assistant).

70. 191 F.2d 749 (D.C. Cir. 1951) (government agent intercepting attorney-client telephone calls), *cert. denied*, 342 U.S. 926 (1952).

71. *See id.* at 759-66; *see also* Bursey v. Weatherford, 528 F.2d 483, 486-87 & n.3 (4th Cir. 1975) (violation where government "knowingly arranges or permits" intrusion into defense camp), *rev'd*, 429 U.S. 545 (1977); United States v. Scott, 521 F.2d 1188, 1198-1200 (9th Cir. 1975) (Browning, J., dissenting) (implying that "knowing intrusion" into defense camp is violative), *cert. denied*, 424 U.S. 955 (1976); United States v. Rispo, 460 F.2d 965, 975-78 (3d Cir. 1972) (mere intrusion upon defense camp may be violative); *see also* United States v. Orman, 417 F. Supp. 1126, 1133-38 (D. Colo. 1976) (dismissal of indictment absent communication of information to prosection warranted due to risk of use of information against defendant by law enforcement agency).

the sixth amendment is violated regardless of whether the CI communicated defense meeting information to the prosecution or otherwise prejudiced the defendant.[72]

B. Morrison

The Supreme Court's 1981 decision in *United States v. Morrison*[73] put into question whether even intentional government intrusions into defense meetings violate the sixth amendment absent a showing of prejudice. The *Morrison* Court held that where the government deliberately seeks to circumvent the attorney-client relationship by communicating with a defendant outside the presence of counsel,[74] "[t]here is no effect of a constitutional dimension which needs to be purged"[75] absent a showing of prejudicial impact on the accused's conduct of her defense. It added that remedies need only be applied where a violation of the right to counsel has an impact on the adversary process.[76]

Most courts have construed *Morrison* as precluding a criminal procedural remedy in the *Weatherford* context, absent a communication of confidential defense meeting information to the prosecution.[77] These courts reason that the attendance of a CI at a defense meeting cannot by

72. *See Caldwell*, 205 F.2d at 881; *see also* United States *ex rel.* Cooper v. Denno, 221 F.2d 626, 628 (2d Cir.) (right to counsel would be violated absent prejudice to accused if government's purpose was to overhear attorney-client discussion), *cert. denied*, 349 U.S. 968 (1955).

In a case preceding *Weatherford*, the Supreme Court had "assumed" that *Coplon* and *Caldwell* were correctly decided. *See* Hoffa v. United States, 385 U.S. 293, 307 (1966). However, the *Weatherford* majority stated that its earlier acceptance of the District of Columbia Circuit's sixth amendment interpretations did not imply that the cases were rightly decided. *See* Weatherford v. Bursey, 429 U.S. 545, 553-54 (1977).

73. 449 U.S. 361 (1981).

74. *See id.* at 365. In *Morrison*, government agents approached the defendant outside the presence of counsel and urged her to cooperate by disparaging her lawyer's skills and threatening her with harsh penalties if she refused. *See id.* at 362.

75. *Id.* at 366.

76. *See id.* at 365-66 ("The remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression."). The Court held, however, that the sixth amendment compels neither reversal of a conviction nor dismissal of an indictment where the violation "has no adverse impact upon the criminal proceedings," *id.* at 367, the Court stopped short of stating that a non-prejudicial, intentional intrusion upon the attorney-client relationship was absolutely unremediable. Indeed, the Court alluded to the availability of a civil remedy by stating "[n]or do we suggest that in cases such as this, a Sixth Amendment violation may not be remedied in other proceedings." *Id.*

77. *See* Greater Newburyport Clamshell Alliance v. Public Serv. Co., 838 F.2d 13, 20 (1st Cir. 1988); Clark v. Wood, 823 F.2d 1241, 1249-50 (8th Cir.), *cert. denied*, 484 U.S. 945 (1987); United States v. Singer, 785 F.2d 228, 234-35 (8th Cir.), *cert. denied*, 479 U.S. 883 (1986); United States v. Steele, 727 F.2d 580, 586 (6th Cir.), *cert. denied*, 467 U.S. 1209 (1984); United States v. Shapiro, 669 F.2d 593, 598 (9th Cir. 1982); United States v. LaRouche Campaign, 682 F. Supp. 627, 632-33 (D. Mass. 1987); United States v. Posner, 637 F. Supp. 456, 459-60 (S.D. Fla. 1986); United States v. Boffa, 513 F. Supp. 512, 514 (D. Del. 1981); *see also* United States v. King, 536 F. Supp. 253, 263 (C.D. Cal. 1982) ("rewards" of an intrusion into attorney-client relationship "may not taint" subsequent proceedings).

itself realistically have an impact on the adversary proceedings as required by the rule of *Morrison*.[78]

III. CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

This Part examines the attorney-client privilege in the *Weatherford* context. After concluding that neither the rules governing nor policies underlying the privilege are applicable to most CI intrusions into defense meetings, this Part offers an alternative explanation for constitutional protection of attorney-client confidentiality after the right to counsel has attached. This Part concludes that the sixth amendment bars the government from utilizing information regarding indicted offenses obtained through CI intrusions.

The state's freedom to use informant-provided defense meeting information against the accused is limited by the sixth amendment's protection of "the confidential relationship between the defendant and his counsel."[79] A defendant alleging a violation of the right to counsel must not only demonstrate that defense meeting information was communicated to the prosecution but also that the defense meetings the CI attended were confidential.

The *Weatherford* scenario, therefore, poses the problem of determining the nature of constitutionally protected attorney-client confidentiality, and thereby the limitations placed on the state's use of defense meeting information after the right to counsel has attached. Most courts construing *Weatherford* have concluded that the right to counsel provides a prophylactic evidentiary protection analogous or identical to that afforded by the attorney-client privilege.[80] The privilege, however, is likely to be inapplicable to most defense meetings attended by CIs. The presence of a third-party informant will generally preclude the privilege from applying.[81] Further, the underlying policies of the attorney-client privilege are inapplicable to the *Weatherford* scenario.[82] An alternative rationale for constitutional protection of attorney-client confidentiality may be grounded in the sixth amendment's role in ensuring the fairness and reli-

78. *See Clark*, 823 F.2d at 1249-50; *Singer*, 785 F.2d at 234-45; *Posner*, 637 F. Supp. at 459-60. Some courts holding the majority view, however, note that a constitutional violation may arise, albeit one unremediable in the criminal context, absent communication of defense information to the prosecution. *See* Cinelli v. City of Revere, 820 F.2d 474, 478 (1st Cir. 1987), *cert. denied*, 485 U.S. 1037 (1988); *LaRouche Campaign*, 682 F. Supp. at 632-33.

79. Hoffa v. United States, 385 U.S. 293, 306 (1966).

80. *See, e.g.*, United States v. Ofshe, 817 F.2d 1508, 1515 (11th Cir.) (*Weatherford* violation entails purposeful intrusion upon "potentially privileged attorney-client matters"), *cert. denied*, 484 U.S. 963 (1987); United States v. Bavers, 787 F.2d 1022, 1029 (6th Cir. 1985) (no *Weatherford* violation where CI not put "in a position to discover any privileged information"); Note, *supra* note 3, at 1145 (arguing that sixth amendment "subsumes the attorney-client privilege"); Comment, *supra* note 3, at 541 (sixth amendment should protect communications "normally protected by attorney-client privilege").

81. *See infra* notes 86-94 and accompanying text.

82. *See infra* notes 95-103.

ability of the adversary process.[83]

A. *The Attorney-Client Privilege in the* Weatherford *Scenario*

Courts adhering to the majority view hold that a prosecutor violates a defendant's right to counsel by receiving attorney-client communications protected by the privilege.[84] The dissent in *Weatherford* adopted this view, arguing that the sixth amendment right to private communication with counsel should be defined in relation to policies underlying the attorney-client privilege.[85] This view, however, was impliedly criticized by the *Weatherford* majority.[86]

The attorney-client privilege applies to any client communication to counsel *intended* to be confidential[87] and made for the purpose of garnering legal advice or assistance.[88] The intentionality test is an objective

83. *See infra* notes 104-120 and accompanying text. Fairness may be impaired in two ways. First, the truth finding function of the adversary process may be undermined. Second, the society's perception of the reliability of the criminal justice system may be weakened.

"[O]ur chosen system of criminal justice is built upon a truly equal and adversarial presentation of the case." Caplin & Drysdale v. United States, 109 S. Ct. 2667, 2674 (1989) (Blackmun, J., dissenting). By surreptitiously obtaining defense strategy, the government inevitably undermines the defendant's ability to challenge the prosecution's case at trial. " '[W]eakening the ability of an accused to defend himself at trial is an advantage for the government. But it is not a legitimate government interest that can be used to justify invasion of a constitutional right.' " *Id.* at 2676 (quoting United States v. Monsanto, 852 F.2d 1400, 1403 (2d Cir. 1988) (en banc) (Feinberg, C.J., concurring), *rev'd*, United States v. Monsanto, 109 S. Ct. 2657 (1989)). Such government action may "so undermine[ ] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984).

Prosecution use of defense information also risks undermining the perceptions held by the public and accused persons of the fairness and reliability of the adversary process. As the *Monsanto* dissent pointed out, defendants who question the fairness of the adversary process and the system's ability to reach correct results may be unwilling to abide by court judgments. *See Monsanto*, 109 S. Ct. at 2673 (Blackmun, J., dissenting).

84. *See, e.g.*, Greater Newburyport Clamshell Alliance v. Public Serv. Co., 838 F.2d 13, 15, 21 (1st Cir. 1988) (obtaining "privileged communications" violates sixth amendment); United States v. Ginsberg, 758 F.2d 823, 833 (2d Cir. 1985) (sixth amendment claim requires allegation of communication of privileged information by CI to prosecutor). The *Ginsberg* court cited to United States v. Dien, 609 F.2d 1038, 1043 (2d Cir.), *aff'd*, 615 F.2d 10 (2d Cir. 1979), which construed *Weatherford* to require a showing that "privileged information had been passed to the government" by a CI.

85. *See* Weatherford v. Bursey, 429 U.S. 545, 563-64 (1977) (Marshall, J., dissenting).

86. *See id.* at 554-55 & n.4. (implying that conferences attended by defendant Weatherford were unprotected by privilege).

87. *See, e.g.*, United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961) ("What is vital to the privilege is that the communication be made *in confidence* for the purpose of obtaining *legal* advice *from the lawyer*.") (emphasis in original); *United Shoe*, 89 F. Supp. at 358 ("strangers" must be excluded from attorney-client communications for privilege to inhere).

88. *See In re* Sealed Case, 737 F.2d 94, 98-99 (D.C. Cir. 1984); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

As the Supreme Court indicated in *Weatherford* and *Massiah*, the government's purpose in initiating or continuing the use of a CI after the right to counsel has attached is

one, entailing the application of specific rules.[89] A client who does not manifest the intent to maintain confidentiality waives the privilege.[90] A third party's presence during attorney-client communications usually eliminates the manifestation of intent for confidentiality.[91] Therefore, a CI's presence at an attorney-client meeting may preclude assertion of the privilege.

Most courts hold that the privilege is not waived when a co-party is present at an attorney-client meeting and the discussion concerns a matter of common legal interest.[92] The common legal interest privilege, however, is narrowly construed, particularly in the criminal context.[93] The exception will not apply when a co-defendant participates in an attorney-client meeting without a prior agreement between the parties' counsel to undertake a joint defense effort or strategy[94] or where discussion at a meeting concerns the defense of only one individual rather than all of the defendants collectively.[95] Therefore, unless a CI is a co-indictee, participates in a defense meeting after agreeing to discuss issues concerning common strategy, and the discussion is limited to issues con-

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often to garner information regarding planned or continuing crimes. *See supra* notes 39-40. Under the crime/fraud exception, discussions regarding planned or ongoing offenses will not be protected by attorney-client privilege, even if arguably related to defense strategy (for example, Hoffa's plan to bribe jurors). *See* United States v. Harrelson, 754 F.2d 1153, 1167 (5th Cir.), *cert. denied*, 474 U.S. 908 (1985); United States v. Hodge & Zweig, 548 F.2d 1347, 1354 (9th Cir. 1977).

89. *See infra* notes 90-94 and accompanying text.

90. *See Sealed Case*, 737 F.2d at 98-99 (quoting *United Shoe*, 89 F. Supp. at 358-59); Bartell, *The Attorney-Client Privilege and Work Product Doctrine*, in ALI/ABA Resource Materials—Civil Practice and Litigation in Federal and State Courts 445, 518 (3d ed. 1985).

91. "It is axiomatic that the presence of a third party eliminates the intent for confidentiality necessary to make a communication privileged." Bartell, *supra* note 90, at 518. *See* Weatherford v. Bursey, 429 U.S. 545, 555 n.4 (1977) (citing 8 J. Wigmore, Evidence § 2311, at 601-02 (McNaughton ed. 1961)); United States v. Fortna, 796 F.2d 724, 730 (5th Cir.), *cert. denied*, 479 U.S. 950 (1986); Hodges, Grant & Kaufman v. United States, 768 F.2d 719, 721 (5th Cir. 1985); *In re* Sealed Case, 737 F.2d 94, 98-99 (D.C. Cir. 1984) (quoting United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950)).

92. *See, e.g.*, *Hodges*, 768 F.2d at 721 (common legal interest exception applied where attorney represents third party); United States v. McPartlin, 595 F.2d 1321, 1336-37 (7th Cir.) (exception applied to communication to agent of codefendant's attorney for purpose of "pooling of information" between codefendants' attorneys), *cert. denied*, 444 U.S. 833 (1979).

93. *See* Bartell, *supra* note 90, at 523. Where a criminal defendant and her attorney participate in a meeting with a codefendant and her attorney, the privilege will protect communications made between the attorneys that concern formulation of a "common defense." *See* United States v. Melvin, 650 F.2d 641, 645-46 (5th Cir. 1981); Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977). *But see* United States v. Simpson, 475 F.2d 934, 936 (D.C. Cir.) (no privilege due to presence of co-party's attorney), *cert. denied*, 414 U.S. 873 (1973).

94. *See* United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1114 (1990); Capra, *Attorney-Client Privilege When Parties Share Interests*, N.Y.L.J., March 9, 1990, at 3, col. 1.

95. *See* United States v. Cariello, 536 F. Supp. 698, 702 (D.N.J. 1982).

cerning the common defense, the common legal interest exception will not apply.

Determining that the attorney-client privilege is inapplicable in most instances of CI participation in defense meetings does not end the inquiry. Some defenders of the majority view argue that despite the actual inapplicability of the attorney-client privilege to many informant intrusions into defense meetings, the sixth amendment shares the underlying policies of the evidentiary rule.[96] Under this view, the sixth amendment "subsumes" the privilege, while enlarging the scope of its protection.[97]

This argument fails because the policies underlying the attorney-client privilege are different from the rationale for the sixth amendment's protection of the attorney-client relationship.[98] The privilege guarantees the confidentiality of attorney-client communications in the interest of effective "administration of justice."[99] Protection of confidentiality seeks to encourage free and open communication between the attorney and client,[100] thereby permitting lawyers to provide sound legal advice.[101]

The social good resulting from enabling lawyers to act as informed representatives of their clients outweighs the "harm that may come from the suppression of the evidence in specific cases."[102] The protection of attorney-client confidentiality is therefore a necessary evil provided despite the risk of loss of probative evidence.[103]

Under circumstances, such as those presented in *Weatherford*, in which a defendant chooses to speak freely with counsel despite the obvi-

96. *See* Note, *supra* note 3, at 1145-46; *see also* United States v. Levy, 577 F.2d 200, 209 (3d Cir. 1978) (while sharing underlying "purpose" of attorney-client privilege, sixth amendment protects any "advice received" as result of defendant's disclosures to counsel).

97. *See, e.g.*, Note, *supra* note 3, at 1145 (right to private attorney-client communication "derives from the policies and principles" underlying privilege); Comment, *supra* note 3, at 536 (arguing that policies underlying sixth amendment rule are analogous to those underlying work-product doctrine).

98. *See infra* notes 99-103 and accompanying text.

99. Hunt v. Blackburn, 128 U.S. 464, 470 (1888); Bartell, *supra* note 90, at 458.

100. Clients are presumed to be reluctant to confide in an attorney when there is a threat of disclosure to opponents:

> The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. . . . [I]f the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.

Fisher v. United States, 425 U.S. 391, 403 (1976) (citations omitted); *see also* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (purpose of privilege is to encourage clients to make full disclosure to counsel).

101. *See Upjohn*, 449 U.S. at 389; Model Code of Evidence Rule 210 comment a (1942).

102. Model Code of Evidence Rule 210 comment a (1942); *see also* Trammel v. United States, 445 U.S. 40, 51 (1980) (privilege applies where it promotes "sufficiently important interests" to outweigh need for probative evidence).

103. *See Trammel*, 445 U.S. at 50; United States v. Bryan, 339 U.S. 323, 331 (1950); *cf.* United States v. Nixon, 418 U.S. 683, 709-10 (1974) (presidential privilege justified on similar grounds).

ous unavailability of privilege protection, the balancing of policies underlying the privilege militates *against* the protection of confidentiality and in favor of the admissibility of evidence. Those policies seek to limit the privilege protection only to those attorney-client conversations that might not occur absent the protection of the evidentiary rule.[104]

B. *Protection of Confidentiality Is Compelled by the Sixth Amendment*

Given the failure of the privilege analogy, any rationale for protecting attorney-client consultations in the *Weatherford* scenario must be found in the underlying purpose of the sixth amendment right to effective assistance of counsel: to ensure the fairness and reliability of the adversary process.[105]

The *Massiah* line of cases provides a starting point for defining the constitutional limitations placed upon the government in the *Weatherford* context. The *Weatherford* Court indicated that the right to counsel would be violated if the government or its CI "purposely intruded" upon the attorney-client relationship with the intent to gain access to defense consultations.[106] Such purposeful intrusion is arguably analogous to the strategy of deliberately eliciting incriminating statements from the accused outside the presence of counsel proscribed by *Massiah*.[107]

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104. *See* Fisher v. United States, 425 U.S. 391, 403 (1976); *In re* Horowitz, 482 F.2d 72, 80-82 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973); United States v. Goldfarb, 328 F.2d 280, 282 (6th Cir.), *cert. denied*, 377 U.S. 976 (1964).

105. *See, e.g.*, Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) (right to counsel "assures the fairness, and thus the legitimacy, of our adversary process"); Maine v. Moulton, 474 U.S. 159, 168-69, 177 (1985) (right to counsel indispensable to fair administration of adversarial system of criminal justice); Strickland v. Washington, 466 U.S. 668, 685 (1984) (right to counsel exists to protect fundamental right to fair trial).

In refusing to accept the government's contention that the meetings attended by CI Bursey were absolutely unprotected by the right to counsel, *see* Weatherford v. Bursey, 429 U.S. 545, 554 (1977), the *Weatherford* Court implied that protecting attorney-client privacy is necessary to ensure the fairness of the adversary process.

106. *See id.* at 558. Intrusions calculated to sever or disrupt the relationship between defendant and attorney may also violate the right to counsel. *See* United States v. Morrison, 449 U.S. 361, 366 (1981). The Supreme Court recently reaffirmed, however, that government law enforcement interests limit the right to be free from government interferences that might chill or disrupt the relationship between defendant and attorney after the sixth amendment right has attached. *See* Caplin & Drysdale v. United States, 109 S. Ct. 2646, 2651-55 (1989). In two 1989 cases, the Court held that defendants' right to secure their counsel of choice may be overcome by the government's interest in securing and recovering the profits of a criminal enterprise pursuant to federal forfeiture statutes. The cases upheld statutes permitting the pretrial seizure and post-conviction forfeiture of assets used by defendants to pay attorneys' fees. *See* United States v. Monsanto, 109 S. Ct. 2657, 2666-67 (1989) (pretrial asset seizure provision constitutional); *Caplin*, 109 S. Ct. at 2651-55 (forfeiture provision constitutional).

These holdings, however, do not sanction government actions designed to interfere with the attorney-client relationship. The *Caplin* Court noted that the Constitution might be violated if a prosecutor "abused" a forfeiture provision. *See Caplin*, 109 S. Ct. at 2657. Abuse might occur if the government utilized a forfeiture provision as a pretext for separating a defendant from his counsel of choice. *See id.*

107. The *Massiah* proscription against deliberate elicitation of incriminating state-

Under this analogy, the affirmative obligation of the government not to circumvent or dilute the protections afforded by the sixth amendment prohibits the government from intentionally placing its agents in the defense camp.[108] Where an informant, however, "inadvertently" ends up in a defense meeting (as in *Weatherford*), no constitutional limitations would be placed upon the government's use of defense meeting evidence provided by its CI.[109] Faced with facts analogous to those presented in *Weatherford*, one court adopted this construction of the sixth amendment. It held that the government was free to use defense meeting evidence against the accused if the government informant was an "innocent" invitee to a defense conference.[110]

In *Massiah* and its progeny, the right to counsel has been expanded to its "outermost point" to protect the right to consultation with counsel under circumstances in which the defendant unwittingly confides in a government agent.[111] In contrast, the *Weatherford* scenario involves government intrusion upon activities at the heart of the right to counsel: communications between the accused and her attorney. Therefore, common sense suggests that the sixth amendment affords greater protections of confidentiality in the *Weatherford* than in the *Massiah* context.

In the *Massiah* context, the sixth amendment offers no protection to a

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ments outside the presence of counsel, like the *Weatherford* bar against "purposeful intrusion" into the defense camp, "rests squarely" on the sixth amendment's protection against interference with a defendant's right to counsel. *See* United States v. Henry, 447 U.S. 264, 270 (1980).

108. In the *Massiah* context, the government is unable to make use of defense information it obtains by intentionally creating or exploiting an opportunity to elicit incriminating statements regarding indicted offenses from the accused outside the presence of counsel. *See* Maine v. Moulton, 474 U.S. 159, 176-77 (1985); *infra* notes 142-146 and accompanying text. Analogously, in the *Weatherford* context, the sixth amendment may be violated where the government intentionally and unjustifiably intrudes upon the attorney-client relationship in order to obtain information regarding indicted offenses. *See* Cinelli v. City of Revere, 820 F.2d 474, 478 (1st Cir. 1987), *cert. denied*, 484 U.S. 1037; *cf. Morrison*, 449 U.S. at 366 (Court assuming without deciding that contact with uncounseled defendant that was calculated to disrupt attorney-client relationship violated sixth amendment).

109. Under this view, a CI who has not deliberately set out to intrude on attorney-client consultations is equivalent to the passive "listening post" in *Wilson*. *See* Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986). Under the rationale of *Wilson*, the sixth amendment does not protect a defendant from her own unwitting error in making incriminating statements to an informant who takes no affirmative steps to elicit the admissions. *See id.*; *cf.* Moran v. Burbine, 475 U.S. 412, 430 (1986) (sixth amendment does not absolutely protect defendant from consequences of her own candor).

110. *See* United States v. Melvin, 650 F.2d 641, 645-46 (5th Cir. Unit B 1981). In *Melvin*, the CI, a co-defendant, was invited to attend a defense meeting and did so, like Weatherford, ostensibly to maintain his cover. *See id.* at 642-43. As in *Weatherford*, the CI attended the meeting without counsel. *See id.* The Court held that absent an intentional government intrusion upon the attorney-client relationship, the sixth amendment's protection of the right to confidential communication with counsel extends only to the limits of the attorney-client privilege in the *Weatherford* context. *See id.* at 645.

111. *See* United States v. Henry, 447 U.S. 264, 281-82 (1980) (Blackmun, J., dissenting).

defendant admitting his guilt to a "passive" informant who does not solicit the admission.[112] The *Weatherford* Court implied, however, that the sixth amendment may protect a defendant from her own erroneous invitation of a CI to defense consultations.[113] The Court refused to accept the state's argument that a criminal defendant "assumes the risk" whenever he converses with counsel in the presence of a third party "thought to be a confederate and ally" who "turns out" to be a government informer.[114]

Some lower courts, apparently relying on the qualification in *Weatherford*, have construed *Weatherford* as prohibiting the government from using defense meeting information against accused persons, even in the absence of demonstrated privilege protection or purposeful state intrusion upon the attorney-client relationship.[115] Beyond referring to the *Weatherford* dictum, however, most of these courts have failed to explain the basis for expanding the sixth amendment protection to preclude the prosecution's use of information from defense consultations.[116]

A rationale for protecting the confidentiality of defense consultations may be grounded in the state's affirmative duty to ensure balance in the adversary process and, therefore "the fairness of the trial itself."[117] The Supreme Court has consistently held that the right to counsel encompasses the right to consult with counsel at all critical stages of the adversary process.[118] Moreover, the right to consultation encompasses a guarantee of the confidentiality of attorney-client meetings.[119]

The sixth amendment protects the attorney-client relationship to ensure that the state's case will be effectively challenged and that a fair and *true* result will be obtained.[120] If the prosecution is free to use surrepti-

112. *See supra* note 50 and accompanying text.

113. *See* Weatherford v. Bursey, 429 U.S. 545, 554 (1977).

114. *Id.*

115. *See, e.g.*, United States v. Ginsberg, 758 F.2d 823, 833 (2d Cir. 1985) (discussions overheard by cooperating defendant in the defense camp presumed confidential); Brewer v. State, 649 S.W.2d 628, 632 (Tex. Crim. App. 1983) (en banc) (defense meeting attended by unindicted CI confidential).

116. One court apparently failed to recognize that it had broadened sixth amendment protections beyond the boundaries of the privilege. Though the court stated that the *Weatherford* doctrine applies to government use of "privileged" information, the court presumed that meetings between co-incitees were protected by the sixth amendment without undertaking a privilege analysis. *See Ginsberg*, 758 F.2d at 833.

117. Schneckloth v. Bustamonte, 412 U.S. 218, 238-39 (1973).

118. *See, e.g.*, Geders v. United States, 425 U.S. 80, 88-89 (1976) (constitutional right to discuss trial tactics with counsel); Powell v. Alabama, 287 U.S. 45, 68-69 (1932) ("guiding hand" of counsel required throughout adversary process); *see also* Perry v. Leeke, 109 S. Ct. 594, 603 (1989) (Marshall, J., dissenting) (aid of counsel guaranteed at each critical stage of adversary process).

119. *See* United States v. Henry, 447 U.S. 264, 295 (1980) (Rehnquist, J., dissenting); United States v. Rosner, 485 F.2d 1213, 1224 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *see also* Massiah v. United States, 377 U.S. 201, 209 (1964) (White, J., dissenting) (implying that intrusion upon private attorney-client communications would be constitutionally violative).

120. *See Leeke*, 109 S. Ct. at 605 (Marshall, J., dissenting); Penson v. Ohio, 109 S. Ct.

tiously obtained trial strategy in formulating its case, the fairness of the adversary process will inevitably be compromised. Therefore, although the participation of a CI "ruptures" the privacy of attorney-client deliberations, the sixth amendment precludes the government from using evidence obtained as a result of a CI intrusion against a defendant.[121]

IV. POST-CONVICTION REMEDY

Two different approaches have developed to the application of a post-conviction remedy in the *Weatherford* context when the effect of a violation is not cured at trial. Some courts presume prejudice once the defendant establishes that a CI communicated information to the police or prosecution. These courts apply a post-conviction remedy regardless of the content of the information communicated or the intrusion's effect on the outcome of a trial.[122] This approach suggests that once "actual disclosure" of defense information has been established, inquiring into the effect of the disclosure on the prosecution's conduct of its case is speculative and unnecessary.[123]

The actual-disclosure rule conflicts with the reasoning of *Weatherford*. It permits the application of a remedy absent a demonstration that an intrusion upon attorney-client confidentiality created the "realistic possibility" of injury to the defendant or benefit to the state.[124] The rule also conflicts with *Morrison*, which requires a showing that wrongful government conduct has had an identifiable detrimental effect on the fairness of criminal proceedings before a post-conviction remedy will be considered.[125] A better, more restrictive view finds prejudice only when CI information is used against the defendant either at trial or to disrupt the attorney-client relationship, thereby giving the government an unfair advantage.[126] In the strictest formulation of this test, the defendant bears

346, 352 (1988). *See generally Powell*, 287 U.S. at 69 (constitution guarantees accused right to respond effectively to prosecution's proof).

121. The sixth amendment exclusionary rule established in *Massiah* is applied when the government obtains evidence in violation of the right to counsel. *See* Maine v. Moulton, 474 U.S. 159, 180 (1985); *Massiah*, 377 U.S. at 207.

122. *See* Briggs v. Goodwin, 698 F.2d 486, 494-95 (D.C. Cir.), *vacated*, 712 F.2d 1444 (1983) (judgment vacated due to changes in law of governmental immunity), *cert. denied*, 464 U.S. 1040 (1984); United States v. Levy, 577 F.2d 200, 210 (3d Cir. 1978). It is unclear whether the District of Columbia Circuit still adheres to the broad definition of prejudice given in *Briggs*. In United States v. Kelly, 790 F.2d 130, 137 (D.C. Cir. 1986), the circuit court stated that it had not determined what "quantum" of prejudice need be shown to establish a sixth amendment violation.

123. "We think that the inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government. . . ." *Levy*, 577 F.2d at 209. The actual disclosure position has been adopted by several commentators who criticize the *Weatherford* Court's refusal to adopt the Fourth Circuit's per se position and limit the participation of CIs in defense meetings. *See* Note, *supra* note 3, at 1152; Comment, *supra* note 3, at 543.

124. *See* Weatherford v. Bursey, 429 U.S. 545, 558 (1977).

125. *See supra* notes 73-76 and accompanying text.

126. *See* United States v. Singer, 785 F.2d 228, 234 (8th Cir.), *cert. denied*, 479 U.S.

the burden of proving that the prosecution used information obtained in contravention of the right to counsel against the accused.[127] By requiring a defendant to demonstrate how the government's use of improperly obtained evidence affected her trial, this rule comports with the Supreme Court's mandate that post-conviction criminal remedies addressing government interference with the attorney-client relationship be applied only when an unfair impact on the adversary proceeding has been demonstrated.[128]

V. CIVIL REMEDY: THE ROLE OF INTENT AND JUSTIFICATION

Lower courts have concluded that "[e]ven where there is an intentional intrusion . . . prejudice to the defendant must be shown before any remedy is granted."[129] This position is clearly correct under the rule of *Morrison* when applied in the criminal context. Some commentators contend that a violation of the right to counsel resulting from improper government interference with the attorney-client relationship does not occur unless and until the state uses evidence to the detriment of the defendant.[130] Under this view, even a civil remedy would be foreclosed

883 (1986); *see also* Bishop v. Rose, 701 F.2d 1150, 1156-57 (6th Cir. 1983) (prejudice established where prosecution uses confidential information for its benefit "or the detriment of the defendant"); United States v. Irwin, 612 F.2d 1182, 1187 (9th Cir. 1980) (prejudicial for prosecution to obtain confidential information giving it unfair advantage).

127. In practice, this test requires a defendant to identify testimony or evidence entered into the trial record indicating that the government has used defense meeting information in the prosecution of the case. *See Singer*, 785 F.2d at 235; *Bishop*, 701 F.2d at 1156-57; *Irwin*, 612 F.2d at 1187-89.

128. *See* United States v. Valenzuela-Bernal, 458 U.S. 858, 867-69 (1982); United States v. Morrison, 449 U.S. 361, 365-66 (1981); Maine v. Moulton, 474 U.S. 159, 190-91 (1985) (Burger, C.J., dissenting); United States v. Gouveia, 467 U.S. 180, 201 (1984) (Marshall, J., dissenting).

To establish prejudice arising from government interference with the confidential relationship between defendant and counsel, the defendant need only demonstrate that tainted evidence was "used for the benefit of the government or the detriment of the defendant." *Bishop*, 701 F.2d at 1156; *see* Note, *The Impeachment Exception to the Sixth Amendment Exclusionary Rule*, 87 Colum. L. Rev. 176, 189-90 (1987). Therefore, while an impact on the adversary process must be established, *see Morrison*, 449 U.S. at 365, the defendant need not demonstrate that the government's violation had an effect on the outcome of an adversary proceeding. *See* Note, *supra*, at 190.

The prejudice test applied to a *Weatherford* violation is distinguishable from that used where a government interference actually or constructively denies a defendant the assistance of counsel altogether at a critical stage in the adversary process. In such cases, prejudice is presumed. *See* Perry v. Leeke, 109 S. Ct. 594, 599-600 (1989); Strickland v. Washington, 466 U.S. 668, 692 (1984). *Weatherford* violations are also distinguishable from violations of the right to counsel arising from counsel's own professional errors. In such cases, the defendant must demonstrate a reasonable probability that the outcome of the trial would have been different absent counsel's error in order to establish prejudice. *See Strickland*, 466 U.S. at 691-92.

129. United States v. Steele, 727 F.2d 580, 586 (6th Cir.), *cert. denied*, 467 U.S. 1209 (1984).

130. *See, e.g.*, Note, *supra* note 128, at 188 ("If the violation occurs when tainted evidence is used against the defendant, then initial governmental intrusions create only the *potential* for sixth amendment violations.") (emphasis in original); Schulhofer, Book Re-

for a defendant who has been subjected to an improper government intrusion, absent an affirmative showing of prejudice resulting from the government action.[131] The Supreme Court has stated, however, that a violation of the right to counsel may occur absent any adversary prejudice to the defendant.[132] Moreover, both *Hoffa v. United States*[133] and *Weatherford* indicate that when the government "insinuate[s] [a CI] into the councils of the defense"[134] to learn about a defendant's trial plans, the right to counsel is violated.[135] Although a non-prejudicial intrusion does not entitle a defendant to a criminal procedural remedy,[136] an intentional, unjustified intrusion may entitle a defendant to relief in a collateral proceeding, for example, a civil suit under section 1983 of title 42.[137] As a result, it is essential to identify precisely what constitutes an intentional, unjustified government intrusion into the defense camp.

In his dissent in *Weatherford*, Justice Marshall questioned whether it would ever be possible for an accused person to establish that "a desire to intercept confidential communications" motivated the government's decision to begin or continue to use a CI after the right to counsel had attached.[138] A majority of courts applying the *Weatherford* standard

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view, 79 Mich. L. Rev. 865, 889 (1981) ("[I]t is the admission [of tainted evidence] at trial that in itself denies the constitutional right.").

131. Holders of this view note that "the right to the effective assistance of counsel is recognized [by the sixth amendment] not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." United States v. Cronic, 466 U.S. 648, 658 (1984). Therefore, they contend that a sixth amendment violation is consummated only if a government interference causes the defendant to suffer prejudice during criminal proceedings. *See* Note, *supra* note 128, at 186-89.

132. *See, e.g.*, Maine v. Moulton, 474 U.S. 159, 176 (1985) ("it is clear that the State violated [the defendant's] Sixth Amendment right when it arranged to record conversations between [the defendant] and its undercover informant"); United States v. Henry, 447 U.S. 264, 274 (1980) (violation of right to counsel when state "intentionally creat[ed] a situation" designed to induce defendant to make incriminating statements).

133. 385 U.S. 293 (1966).

134. Hoffa v. United States, 385 U.S. 293, 308 (1966).

135. *See id.*; Weatherford v. Bursey, 429 U.S. 545, 557 (1977).

136. *See supra* notes 76-77 and accompanying text.

137. Section 1983 imposes civil liability upon state actors subjecting persons to "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (1982). Under section 1983, "[e]ach citizen 'acts as a private attorney general' . . . [policing] those who are charged with policing us all." Wood v. Breier, 54 F.R.D. 7, 10-11 (E.D. Wis. 1972) (quoting Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 715 (7th Cir. 1969)).

In Cinelli v. City of Revere, 820 F.2d 474, 478 (1st Cir. 1987), *cert. denied*, 485 U.S. 1037 (1988), the First Circuit suggested, without deciding, that an intentional, unjustified government intrusion into the defense camp, absent prejudice, might be sufficient for a recovery under section 1983 if the plaintiff suffered emotional distress. *See id.* at 478. For a discussion of emotional distress damages arising from government intrusions upon the attorney-client relationship, see Halpern, *supra* note 3, at 149-52.

138. Weatherford v. Bursey, 429 U.S. 545, 565 (1977) (Marshall, J., dissenting). Justice Marshall argued that the government may contend that it had other legitimate purposes for employing a CI and did not intend that its agent would participate in defense meetings. Under his reasoning, once the government establishes that its CI did not initiate her presence at a defense meeting, it has proven that there was no "intentional intru-

have limited the definition of "purposeful intrusion" to circumstances in which a CI attends a defense meeting uninvited, or in which the defendant proves that the government instructed its agent to intrude on the attorney-client relationship.[139] This approach supports the criticism of Justice Marshall by limiting the definition of intentional intrusion to circumstances in which a government plan to infiltrate the defense camp is uncovered.

The *Massiah* line of cases, however, offers a more expansive definition of intentional government circumvention of the right to counsel applicable, by analogy, to the *Weatherford* context. Under the rule of *Massiah*, a defendant's right to counsel is violated when a CI deliberately uses his position to secure incriminating information from the accused outside the presence of counsel in a manner substantively equivalent to interrogation.[140] A court will not find deliberate elicitation without proof that a CI took affirmative steps to induce a defendant to make incriminating statements.[141]

The *Massiah* inquiry, however, considers all of the circumstances relating to the government's employment of a CI to determine if the agent's conduct constituted the "functional equivalent of interrogation."[142] Therefore, where a CI develops a relationship of trust or shares a legal interest with the accused, merely engaging the defendant in conversation regarding an upcoming trial may suffice to meet the deliberate elicitation standard.[143]

The government may set the stage for violating the right to counsel by placing its agent in a situation in which the CI is "likely to induce"[144] the defendant to make incriminating statements outside the presence of counsel.[145] Even under circumstances in which neither the government nor its CI actually initiates a meeting with the accused, the sixth amendment inquiry is not necessarily resolved in favor of the government.[146]

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sion" into the defense camp. *See id.* Justice Marshall's argument is convincing only if the definition of intentional intrusion is limited to instances in which a CI is explicitly directed or requests to attend defense meetings.

139. *See, e.g.*, United States v. Mastroianni, 749 F.2d 900, 905 (1st Cir. 1984) (no deliberate intrusion under *Weatherford* standard because defendant invited CI to attend meeting); United States v. Medina-Medina, 617 F. Supp. 1163, 1174 (S.D. Cal. 1985) (intent prong of *Weatherford* test not satisfied because government did not "purposefully urge[] [its informant] to acquire defense strategy information"); United States v. Slochowsky, 575 F. Supp. 1562, 1574 (E.D.N.Y. 1983) (no purposeful intrusion where government had not instructed its CI to garner defense strategy information).

140. *See supra* notes 42-46 and accompanying text.

141. *See supra* notes 49-50 and accompanying text.

142. United States v. Henry, 447 U.S. 264, 277 (1980) (Powell, J., concurring).

143. *See* Maine v. Moulton, 474 U.S. 159, 177 n.13 (1985); *Henry*, 447 U.S. at 273-74.

144. *Henry*, 447 U.S. at 274.

145. The stage may be set where the government exploits the accused's invitation to a CI to discuss indicted offenses. *See Moulton*, 474 U.S. at 174, 176-77.

146. In *Moulton*, the government's conduct was no less violative because it waited for its CI, a co-indictee, to be invited to a meeting to discuss indicted offenses. *See Moulton*, 474 U.S. at 177. In *Moulton*, where the defendant demonstrated that the government

A broader interpretation of the intent prong of *Weatherford*, informed by the reasoning of *Massiah*, permits courts to infer an intent to intrude upon the defense camp from the state's investigative tactics and decisions. Such a test permits a more thorough inquiry into the government's use of its CI in order to determine whether the right to counsel has been circumvented.[147]

Courts adopting a broader definition of intent recognize that "the identity of the party who instigated the meeting [is] not decisive or even important" to the sixth amendment inquiry.[148] This argument does not imply that a defendant can meet the requirements of an intent test merely by showing that a CI ended up participating in defense meetings "by luck or happenstance."[149] The defendant must demonstrate that the police or the CI took actions "designed deliberately" to circumvent the right to counsel.[150]

When inquiring into government intent, however, courts may take into account the circumstances under which an agent was employed in order to determine whether, taken as a whole, the actions of the government and its agent evidenced a design to gain entrance to the defense camp.[151] The analysis should also consider whether use of the CI was initiated before or after the right to counsel attached; whether the CI developed a relationship of trust and confidence with the defendant so that his attendance at defense meetings was likely to be solicited; and whether, as in *Weatherford*, the government indicted the CI, giving rise to the illusion of a common legal interest between the accused and the agent.[152] Finally, a court could justifiably impute to the government an intention to intrude on the attorney-client relationship if a CI participated in a de-

"must have known" that its co-indictee CI was likely to obtain incriminating statements during a meeting with the accused simply by participating in a discussion, the Court concluded that the sixth amendment barred the government from using recordings of the defendant's statements. *See id.*

147. *See, e.g.*, United States v. Bavers, 787 F.2d 1022, 1029 (6th Cir. 1985) (no violation where government "did not put [its CI] in a position to discover" confidential information); United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981) (court applying *Weatherford* test should determine whether presence of CI at defense meeting was purposely caused to garner confidential information).

148. Maine v. Moulton, 474 U.S. 159, 174 (1985); *see also* United States v. Costanzo, 740 F.2d 251, 255 (3d Cir. 1984) (trial court examining government intent inquired into whether government endeavored to keep its use of a CI "within legal limits"), *cert. denied*, 472 U.S. 1017 (1985).

149. Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986) (quoting *Moulton*, 474 U.S. at 176).

150. *Id.*

151. *See Costanzo*, 740 F.2d at 255; United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981).

152. For example, where the government solicits the assistance of a co-indictee CI and encourages her to develop a relationship of trust and confidence with the accused that results in an invitation to participate in defense meetings, the government should not be able to claim that the intrusion was unintentional. *See* Maine v. Moulton, 474 U.S. 159, 176-77 (1985); United States v. Henry, 447 U.S. 264, 270-71 (1980).

fense meeting without a legitimate investigative purpose.[153]

Lower courts have construed *Weatherford* as requiring an inquiry into the government's justification for permitting a CI to participate in an attorney-client meeting after the right to counsel has attached.[154] Under these decisions, the right to counsel appears to be violated when the government has no justification for intruding on the attorney-client relationship.[155]

The justification prong of *Weatherford* has been described as a "state of mind standard."[156] Courts are required to discern the true motive underlying the state's decision to permit a CI to participate in defense consultations when determining whether an intrusion was justified by a legitimate law enforcement purpose.[157]

The First Circuit has held that the justification prong requires the government to produce a " 'substantial record' " demonstrating the need for a CI intrusion.[158] Under this view, the government bears the burden of proving the necessity of its CI's participation in defense consultations and "the burden . . . is high."[159] The government may not engage in a

153. In United States v. Mastroianni, 749 F.2d 900 (1st Cir. 1984), the court applied such an inclusive test in determining whether the government purposefully intruded upon a defense meeting in order to obtain confidential information regarding indicted offenses. The government contended that it had two independent purposes for instructing its informant to participate in defense consultations: to protect its informant's cover and to investigate possible future criminal activity. *See id.* at 904. Furthermore, investigators instructed the CI to avoid, if possible, any discussion of charges pending against the defendant. *See id.* at 905. Under these circumstances, the court found there was no deliberate intrusion into the defense camp. *See id.*

A contrary inference of government intent might be drawn under the facts in Greater Newburyport Clamshell Alliance v. Public Serv. Co., 838 F.2d 13, 15-16 (1st Cir. 1988). A CI infiltrated an anti-nuclear power organization, was indicted along with members of the organization for criminal trespass, and attended defense consultations. *See id.* at 16. The informant then allegedly passed along information from the meetings to a prosecution witness who revealed it at trial. *See id.* The facts of *Clamshell* evince a government intent to intrude upon the attorney-client consultations in order to gain an advantage over the defendants at trial that violates the mandate of *Weatherford*.

154. *See* United States v. Ginsberg, 758 F.2d 823, 833 (2d Cir. 1985); United States v. Mastroianni, 749 F.2d 900, 905-06 (1st Cir. 1984). In finding for the defendant, the *Weatherford* Court emphasized that the CI's attendance at defense meetings was necessary to prevent the "unmask[ing]" of his identity. *See* Weatherford v. Bursey, 429 U.S. 545, 557 (1977).

155. *See Clamshell*, 838 F.2d at 19-20; *Ginsberg*, 758 F.2d at 833; *Mastroianni*, 749 F.2d at 905.

It is conceivable that even a purposeful intrusion into the attorney-client relationship could be justified. In such cases, however, the government will have difficulty establishing a plausible justification. Where it has designedly intruded on attorney-client meetings, the government cannot claim that it permitted CI participation in a defense meeting in order to protect its agent's identity or safety. The government, however, may have other legitimate investigative goals. For example, investigators may seek information regarding wrongdoing by a defendant's attorney.

156. *See* United States v. LaRouche Campaign, 682 F. Supp. 610, 618 (D. Mass. 1987).

157. *See* United States v. Mastroianni, 749 F.2d 900, 905-06 (1st Cir. 1984).

158. *See Clamshell*, 838 F.2d at 20 (quoting *Mastroianni*, 749 F.2d at 905).

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

"mere recitation" of the need to protect its CI's identity or investigate future criminal activity.[160] Rather, law enforcement agencies must "create a substantial record to justify intrusion into this otherwise constitutionally protected domain."[161]

The heavy-burden test balances the defendant's interest in confidential consultation with counsel against the government's law enforcement interests. Only in exceptional circumstances will the government's investigative interests overcome its "obligation to respect the sanctity of attorney-client relationship," thereby justifying an intrusion into the defense camp.[162]

Placing the burden on the government to establish a legitimate investigative purpose for its intrusion upon attorney-client consultations is congruent with the reasoning of *Weatherford*. In finding for the defendant, the *Weatherford* Court emphasized that the state had demonstrated a legitimate purpose for permitting its CI to attend defense consultations.[163] A justification test requiring the government to provide a record in supporting a legitimate purpose for an intrusion is supportable on policy grounds as well, because it would preclude the government from inventing a legitimate purpose for an intrusion retroactively.[164] However, the Supreme Court has emphasized that the test designed to protect the accused's right to effective assistance of counsel should not unreasonably burden the government's pursuit of legitimate law enforcement activities.[165]

The heavy-burden test imposes an indirect limitation on government

160. *Id.* at 905-06.

161. *Id.*

162. *Id.* at 905. Even more stringent justification inquiries have been suggested by commentators. *See* Halpern, *supra* note 3, at 163-67; Note, *supra* note 3, at 1156; Comment, *supra* note 3, at 539-42. One author has argued that law enforcement agencies should be required to demonstrate that they have established guidelines and procedures designed "to minimize the incidence and scope of intrusion" into defense meetings. Halpern, *supra* note 3, at 166. Another author has argued that courts should consider whether an "investigation was important enough" to justify the presence of a CI at defense meetings. Note, *supra* note 3, at 1156.

163. *See* Weatherford v. Bursey, 429 U.S. 545, 557 (1977).

164. *See* United States v. Mastroianni, 749 F.2d 900, 905-06 (1st Cir. 1984).

165. In balancing the interests of the government against the rights of the accused after the right to counsel has attached, the Supreme Court has declined to second-guess the legitimacy of the government investigatory practices where the state offers a plausible explanation. *See, e.g., Weatherford*, 429 U.S. at 557 ("We have no general oversight authority with respect to [government] investigations."). The Court has also refused to construe the sixth amendment to prevent the pursuit of undercover investigations after indictment. *See* Maine v. Moulton, 474 U.S. 159, 178-79 (1985); *supra* note 40 and accompanying text.

Courts have identified two legitimate purposes: protection of the CI's identity for future undercover investigations, *see Weatherford*, 429 U.S. at 557-58, and ensuring the CI's safety. *See Mastroianni*, 749 F.2d at 906. Other legitimate purposes not identified in case law might include the following: The state may be pursuing an investigation of unindicted parties associated with the defendant. *See* Massiah v. United States, 377 U.S. 201, 207 (1964). The government may be investigating the accused for other offenses. *See* Hoffa v. United States, 385 U.S. 293, 308 (1966). Even where an investigation has

pursuit of legitimate investigative strategies. When law enforcement agencies know that their strategic investigative decisions might be subject to such after-the-fact judicial review, they may hesitate to permit CI participation in defense consultations for fear that a court will later find that the defendant's confidentiality interest outweighed the government's investigative needs. Moreover, by requiring the government to assert and prove the existence of exceptional circumstances in order to meet its burden of justification, the test goes beyond the mandate of *Weatherford*. *Weatherford* does not indicate that the justification prong entails a balancing of defendant's interests against state interests. The state met its justification burden in *Weatherford* simply by asserting and demonstrating an interest in protecting the services of its CI.[166]

Therefore, the reasoning of *Weatherford* indicates that the government can satisfy its justification burden when it asserts and supports a legitimate law enforcement purpose for an intrusion.[167] Where the state demonstrates "reasonable grounds"[168] for permitting an informant's attendance at a defense meeting, its burden should be satisfied. The test should not involve judicial balancing to determine whether the government's investigative purpose outweighed the defendant's confidentiality interest under a given set of circumstances.

CONCLUSION

Fulfilling the sixth amendment's guarantee of effective assistance of counsel during critical stages of the adversary process requires protection of the attorney-client relationship from government interference. CI's, however, serve useful and legitimate law enforcement purposes.

A CI's presence at a defense meeting does not vitiate constitutional protections of confidentiality. Law enforcement officials should be barred from using defense meeting information concerning indicted offenses against an accused person at trial. Convicted persons should be entitled to post-conviction remedies wherever they can demonstrate prejudice arising from the prosecution's use of such information.

The sixth amendment may be violated even where a defendant suffers no demonstrable prejudice as a result of government intrusion upon the attorney-client relationship. A civil cause of action for violation of the right to counsel should require a showing that the government deliberately intruded upon the attorney-client relationship and a failure by the

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been completed, the prosecution may have an interest in preventing the defense from learning of the CI's existence. *See* Roviaro v. United States, 353 U.S. 53, 59 (1957).

166. *See* Weatherford v. Bursey, 429 U.S. 545, 557 (1977).

167. *See* United States v. LaRouche Campaign, 682 F. Supp. 610, 619-20 (D. Mass. 1987).

168. *See id.* at 618-19.

government to demonstrate a legitimate law enforcement purpose for its intrusion.

David R. Lurie