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Blake R. Hills*

I. INTRODUCTION

Presidents, porn stars, and terrorists. What do they have in common? They have all been involved in recent controversies involving government intrusion into attorney-client communications.[1] While individual presidents, porn stars, and terrorists will come and go, the need for clear rules on intrusion into attorney-client communication will not.

Anyone who has watched television in the last fifty years is familiar with the pre-interrogation warning of, "you have the right to remain silent and the right to talk to a lawyer," from *Miranda v. Arizona.*[2] But what does the right to talk to a lawyer mean? Does it mean that a criminal defendant has an absolute right to speak to a lawyer without the government eavesdropping? Or does it mean that the government can be privy to some attorney-client conversations, but cannot use the information in a way that prejudices the defendant? If a showing of prejudice is required, who has the burden of showing it? What is the remedy?

The United States Supreme Court answered some of these questions in the landmark case of *Weatherford v. Bursey.*[3] Unfortunately, it failed to answer others. Specifically, the Court failed to answer the questions of whether prejudice must be shown, and if so, who bears the burden. This has led to a split between the circuits, with varying answers to these questions. The resulting system of rules that depend on location suggests that the Supreme Court should provide further clarification of the law surrounding government intrusion into attorney-client communications. The current system is not only inconsistent, it is unfair.

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1. *E.g.*, Nicolas Niarchos, *Has the NSA Wiretapping Violated Attorney-Client Privilege?*, THE NATION (Feb. 4, 2014), https://www.thenation.com/article/has-nsa-wiretapping-violated-attorney-client-privilege/ [https://perma.cc/H6HL-74VV] (discussing government monitoring of attorney-client conversations of those accused of terrorist acts); Jan Wolfe, *Factbox: How Does U.S. Attorney-Client Privilege Rule Apply to FBI Raid on Trump's Lawyer?*, REUTERS (Apr. 16, 2018, 4:57 PM), https://www.reuters.com/article/us-usa-trump-russia-privilege-factbox/factbox-how-does-u-s-attorney-client-privilege-rule-apply-to-fbi-raid-on-trumps-lawyer-idUSKBN1HN32R [https://perma.cc/G2J4-UBAX] (noting the controversy over the FBI raid on the office of President Trump's attorney who paid $130,000 to porn star Stormy Daniels, allegedly on Trump's behalf).

2. 384 U.S. 436, 444 (1966) (holding that appropriate procedural safeguards are to be used to protect a suspect's right against self-incrimination and to inform the suspect about the right to counsel).

3. 429 U.S. 545 (1977).

This Article proceeds in six parts. Part II examines the background of the right to counsel of the Sixth Amendment. Part III contains an overview of the privilege of attorney-client communications. Part IV examines the *Weatherford* decision, with discussion on what the Supreme Court did and did not say about government intrusion into attorney-client communications. Part V surveys the split of authority in the case law about the requirement of establishing prejudice from intrusions into attorney-client communications. Part VI discusses the core principle behind the Supreme Court's Sixth Amendment jurisprudence. Finally, Part VII suggests that the Court should rely on general principles of fairness to establish clear rules about government intrusion into attorney-client communications.

II. SIXTH AMENDMENT RIGHT TO COUNSEL

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."[4] The Sixth Amendment has been called "the heartland of constitutional criminal procedure."[5] In regard to the right to counsel, the central principles are "innocence protection and truth-seeking."[6] The most prominent value underlying the Supreme Court's case law on the right to counsel is fairness.[7]

The Supreme Court's first major discussion of the right to counsel occurred in *Powell v. Alabama*.[8] The Court held that due process requires a trial court to appoint counsel for defendants in capital cases.[9] In so holding, the Court noted the unfairness of having the defendants proceed without counsel in spite of their ignorance and illiteracy, their youth, the public hostility, and their isolation from family and friends.[10]

The Supreme Court also invoked the value of fairness in the landmark right to counsel case of *Gideon v. Wainwright*.[11] The Court held that indigent defendants

4. U.S. CONST. amend. VI. The full text of the Sixth Amendment provides:

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

5. Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 641 (1996).

6. *Id.* at 705. The right to counsel makes all the other rights of the Sixth Amendment possible because it often requires an attorney familiar with substantive and procedural law to secure the right to a speedy trial, the right to confrontation, and the right to compulsory process. *See id.* at 705–06.

7. *See* Martin R. Gardner, *The Sixth Amendment Right to Counsel and Its Underlying Values: Defining the Scope of Privacy Protection*, 90 J. CRIM. L. & CRIMINOLOGY 397, 399 (2000) ("The most prominent value bottoming the Sixth Amendment right to counsel provision is the concern for providing fair trials for criminal defendants. The cases seek to protect the fairness value not only during the actual trial but also under certain circumstances during the pretrial phase.").

8. 287 U.S. 45 (1932).

9. *Id.* at 71. The Court held that the Sixth Amendment right to counsel was applicable to the States under the Fourteenth Amendment. *Id.* at 66–68.

10. *Id.*

11. 372 U.S. 335 (1963).

in all cases in which they face imprisonment are entitled to counsel at state expense as a matter of fairness.[12] The Court stated:

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. . . . From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[13]

In essence, the Court recognized that it is unfair to require an untrained defendant to engage in an unequal legal contest with the State.[14]

The Supreme Court extended the Sixth Amendment right to counsel to certain pretrial situations in *Massiah v. United States.*[15] The Court held that deliberately eliciting incriminating statements from a defendant outside the presence of his counsel violates the Sixth Amendment and the statements are not admissible at trial.[16] In arriving at this decision, the Court indicated that this elicitation of statements in the absence of counsel "contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime."[17]

The Supreme Court examined direct interference with the right to counsel in *Geders v. United States.*[18] In that case, the trial court had issued an order preventing a defendant from counseling with his attorney about anything during a seventeen-hour overnight recess between his direct and cross-examination.[19] The

12. *Id.* at 344.
13. *Id.*
14. Gardner, *supra* note 7, at 400.
15. 377 U.S. 201 (1964).
16. *Id.* at 205–06.
17. *Id.* at 205 (citation omitted).
18. 425 U.S. 80 (1976).
19. *Id.* at 82–83.

Court held that this order violated the defendant's Sixth Amendment right to counsel.[20] In so holding, the Court invoked basic notions of fairness:

> Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance.
>
> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . [A defendant] is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."[21]

The common thread in all of these cases is that the purpose of the Sixth Amendment right to counsel is to promote fair trials. Any interference with that right must be closely examined to determine its effect on fairness.

III. ATTORNEY-CLIENT PRIVILEGE

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."[22] Indeed, the privilege has been recognized in the English common law since the sixteenth century and was functioning in American law at the time of the founding.[23] In general, the privilege is as follows:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[24]

The main rationales for the existence of the attorney-client privilege, much like those for the right to counsel itself, implicate basic concerns of fairness. These rationales are:

> First the law is complex and in order for members of the society to comply with it in the management of their affairs and the

20. *Id.* at 91.

21. *Id.* at 88–89 (alterations and omissions in original) (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).

22. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

23. Eric D. McArthur, *The Search and Seizure of Privileged Attorney-Client Communications*, 72 U. CHI. L. REV. 729, 734 (2005) (citations omitted).

24. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292 (McNaughton rev. 1961) (emphasis omitted).

> settlement of their disputes they require the assistance of expert lawyers. Second, lawyers are unable to discharge this function without the fullest possible knowledge of the facts of the client's situation. And last, the client cannot be expected to place the lawyer in full possession of the facts without the assurance that the lawyer cannot be compelled, over the client's objection, to reveal the confidences in court.[25]

While the attorney-client privilege "has not been elevated to the level of a constitutional right," it "is key to the constitutional guarantees of the right to effective assistance of counsel and a fair trial."[26]

Of course, the attorney-client privilege is not unlimited. For instance, the privilege is subject to the crime-fraud exception which applies when an attorney-client communication takes place in order to further a crime or fraud.[27] "Since the policy of the privilege is that of promoting the administration of justice, it would be a perversion of the privilege to extend it to the client who seeks advice to aid him in carrying out an illegal or fraudulent scheme."[28] Indeed, "[a]dvice given for those purposes would not be a professional service but participation in a conspiracy."[29] Another exception prevents federal government attorneys from asserting "attorney-client privilege before a federal grand jury if communications with the client contain information pertinent to possible criminal violations."[30] Essentially, basic notions of fairness dictate that the privilege be limited in situations where the reasons for the privilege are outweighed by a greater public good.

IV. WEATHERFORD V. BURSEY

Weatherford was a civil rights action that began when Brett Allen Bursey filed suit against Jack M. Weatherford[31] under 42 U.S.C. § 1983.[32] Weatherford, in his capacity as an undercover officer, participated with Bursey and others in

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25. 1 CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 87 (Kenneth S. Broun et al. eds., 7th ed. 2013).

26. United States v. Neill, 952 F. Supp. 834, 839 (D.D.C. 1997) (citations omitted).

27. *See* Clark v. United States, 289 U.S. 1, 15 (1933) ("The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law.").

28. CHARLES MCCORMICK, MCCORMICK ON EVIDENCE §95 (John W. Strong et al. eds., 5th ed. 1999).

29. *Id.*

30. *In re* Lindsey, 158 F.3d 1263, 1274 (D.C. Cir. 1998) (citation omitted). This is because allowing "any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets." *Id.* (citation omitted).

31. Weatherford v. Bursey, 429 U.S. 545, 547 (1977).

32. 42 U.S.C. § 1983 (2012). Section 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

vandalizing a selective service office.[33] Weatherford reported the incident to the police, and Weatherford was arrested and charged along with Bursey in order to maintain his undercover status.[34] Bursey hired a defense attorney, and Weatherford was invited to attend two meetings between Bursey and the attorney "in an effort to obtain information, ideas or suggestions as to [Bursey]'s defense."[35] Weatherford did not seek information from Bursey or the attorney during the meetings, and he repeatedly advised them that he would seek to sever his case from Bursey's.[36] Although he attended the meetings in order to preserve his undercover status, Weatherford did not reveal "any details or information regarding [Bursey]'s trial plans, strategy, or anything having to do with the criminal action pending against" Bursey to his superiors or the prosecutor.[37]

By the time of Bursey's trial, Weatherford's undercover status had been compromised, so the prosecutor called him as a witness.[38] Weatherford testified and gave an eyewitness account of Bursey's acts of vandalism.[39] Bursey was convicted and disappeared for two years until he was caught and incarcerated for his sentence.[40] Bursey then filed his Section 1983 action for monetary damages against Weatherford, alleging that Weatherford had violated his Sixth Amendment right to counsel by sharing defense plans and strategies with the government.[41]

The district court denied Bursey's claim because no information about his defense had been passed on to the government.[42] The Fourth Circuit reversed the trial court's decision and concluded that Bursey's Sixth Amendment right to counsel had been violated.[43] The court held that even though the government had learned nothing from Weatherford about the defense tactics, the rule should be that "whenever the prosecution knowingly arranges and permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial."[44]

The Supreme Court reversed the appellate court and found that Bursey's Sixth Amendment right to counsel had not been violated.[45] In doing so, the Court held that the "per se rule" of the Fourth Circuit's decision "cuts much too broadly."[46] The Court focused on two factors in finding that Bursey's Sixth Amendment right to counsel had not been violated, For the first factor, the Court focused on the fact that no attorney-client communications had been revealed to the government:

33. 429 U.S. at 547.
34. *Id.*
35. *Id.* at 547–48.
36. *Id.* at 548.
37. *Id.*
38. *Id.* at 549.
39. *Id.*
40. *Id.*
41. *Id.*
42. *See id.* at 548–49.
43. Bursey v. Weatherford, 528 F.2d 483, 486 (4th Cir. 1975), *rev'd*, 429 U.S. 545 (1977).
44. *Id.*
45. Weatherford v. Bursey, 429 U.S. 545, 558–59 (1977).
46. *Id.* at 557.

> Had Weatherford testified at Bursey's trial as to the conversation between Bursey and [Bursey's attorney]; had any of the State's evidence originated in these conversations; had those overheard conversations been used in any other way to the substantial detriment of Bursey; or even had the prosecution learned from Weatherford, an undercover agent, the details of the Bursey-[attorney] conversations about trial preparations, Bursey would have a much stronger case.[47]

For the second factor, the Court focused on the fact that intrusion into the attorney-client conversations was not of purposeful design:

> Moreover, this is not a situation where the State's purpose was to learn what it could about the defendant's defense plans and the informant was instructed to intrude on the lawyer-client relationship or where the informant has assumed for himself that task and acted accordingly. Weatherford . . . did not intrude at all; he was invited to the meeting, apparently not for his benefit but for the benefit of Bursey and his lawyer. . . . Weatherford went, not to spy, but because he was asked and because the State was interested in retaining his undercover services on other matters and it was therefore necessary to avoid raising the suspicion that he was in fact the informant whose existence Bursey and [his attorney] already suspected.[48]

Essentially, the Court's ruling was based on fairness grounds. In the absence of a deliberate intrusion into attorney-client communications and/or a revelation of defense strategy to the prosecution, it would be unfair to vacate a criminal conviction.

The *Weatherford* decisions leaves some questions unanswered. For instance, what if the government purposefully intrudes into attorney-client communications in bad faith? Is this a violation of the Sixth Amendment, or must there still be a showing of prejudice? If a showing of prejudice is required, who bears the burden?

V. THE CIRCUIT SPLIT

Given *Weatherford's* unanswered questions, it is not surprising that the lower courts have developed inconsistent rules for determining when an intrusion into attorney-client conversations amounts to a Sixth Amendment violation. The lower courts have also developed inconsistent rules about whether a showing of prejudice is required.

47. *Id.* at 554.

48. *Id.* at 557.

A. First Circuit

The First Circuit examined the issue of government intrusion into attorney-client communications in *United States v. Mastroianni.*[49] A number of defendants were convicted of conspiracy charges in that case, and two defendants claimed on appeal that their rights to effective assistance of counsel were violated.[50] After the police had searched the property of the defendants, one defendant asked a government informant whom he thought was a co-conspirator to attend a meeting with the attorneys for the two defendants, as well as all of the defendants.[51] The informant consulted with the authorities, and the prosecutor authorized the informant's attendance at the meeting in order to avoid risk to the informant's safety and to protect his cover.[52] At a debriefing after the meeting, the informant relayed confidential communications to the government but the information was not used by the government.[53]

The First Circuit began its analysis by noting that, like *Weatherford*, this was not a case in which the government "deliberately intruded into the defense camp."[54] However, the court held that even in the context of an intentional intrusion lacking any justification, "[a] Sixth Amendment violation cannot be established without a showing that there is a realistic possibility of injury to defendants or benefit to the State as a result of the government's intrusion into the attorney-client relationship."[55] Because "there are certain circumstances in which the revelation of confidential communications by the informant is harmless," defendants must "make a prima facie showing of prejudice" by proving "that confidential communications were conveyed as a result of the presence of a government informant at a defense meeting."[56] If a defendant offers this prima facie proof, "the burden shifts to the government to show that there has been and there will be no prejudice to the defendants as a result of these communications."[57] Because the government had clearly demonstrated that it did not use any information that came from the informant, there was no prejudice and thus, no violation of the Sixth Amendment.[58]

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49. 749 F.2d 900 (1st Cir. 1984).

50. *Id.* at 904.

51. *Id.* at 903.

52. *Id.* at 904.

53. *Id.* at 905.

54. *Id.* The court stated that "the government bears the burden of proving the necessity for its representative to attend meetings between defendants and their attorneys" and "preservation of an informant's cover and safety is a permissible rationale for an informant's attendance at a defense meeting." *Id.* at 906.

55. *Id.* at 907 (citations and internal quotations omitted); *see also United States v. DeCologero*, 530 F.3d 36, 64 (1st Cir. 2008) ("[T]he government's intrusion into the attorney-client relationship is not a *per se* Sixth Amendment violation; there must also be some demonstration of resulting prejudice.") (citation omitted).

56. *Mastroianni*, 749 F.2d at 907–08 (citations omitted).

57. *Id.* at 908 ("The burden on the government is high because to require anything less would be to condone intrusions into a defendant's protected attorney-client communications.").

58. *Id.*

B. Second Circuit

The Second Circuit examined the issue of government intrusion into attorney-client communications in *United States v. Ginsberg*, in which the defendant was convicted of conspiracy charges.[59] The defendant argued on appeal that his right to counsel had been violated when the government concealed the fact that a supposed co-defendant was actually an informant, which allowed the informant to sit at the defense table during court conferences.[60]

The court stated that although government interferences in the attorney-client relationship may violate the right to effective assistance of counsel, assuming that the government does not deliberately interfere in the relationship between defendant and counsel, the mere presence of a government agent, informant, or cooperating witness at conferences between defendant and counsel does not violate the sixth amendment.[61] The court held that when the intrusion into attorney-client communications is unintentional or justified, there is no Sixth Amendment violation "without some communication of valuable information derived from the intrusion to the government: absent such communication, there exists no realistic possibility of either prejudice to the defense or benefit to the government"[62] When the intrusion is unintentional or justified, the defendant has the burden to show that confidential information was conveyed to the government and that prejudice resulted.[63] The court held that the defendant had failed to meet that burden.[64]

C. Third Circuit

The Third Circuit examined the issue of government intrusion into attorney-client communications in *United States v. Costanzo*, in which the defendant appealed his conviction for conspiracy to possess and possession of stolen treasury checks.[65] The defendant claimed that his right to counsel was violated because his attorney had been acting as an informant and was disclosing confidential attorney-client conversations to the FBI.[66]

The Third Circuit began its analysis by stating that the rule for government intrusions into attorney-client communications is that:

> The sixth amendment is . . . violated when the government (1) intentionally plants an informer in the defense camp; (2) when confidential defense strategy information is disclosed to the prosecution by a government informer; or (3) when there is no

59. 758 F.2d 823, 825 (2d Cir. 1984).

60. *Id.* at 832.

61. *Id.* at 833 (citations omitted).

62. *Id.* (citations omitted).

63. *Id.*; *see also* United States v. Simels, 654 F.3d 161, 168 (2d Cir. 2011) (holding that the defendant had not established a Sixth Amendment violation because there was no claim that privileged information was passed to the government or that prejudice resulted from contact between the informant and the attorney).

64. *Ginsberg*, 758 F.2d at 833–34.

65. 740 F.2d 251, 254 (3d Cir. 1984).

66. *Id.*

> intentional intrusion or disclosure of confidential defense strategy, but a disclosure by a government informer leads to prejudice to the defendant.[67]

Significantly, the Third Circuit's rule is that intentional intrusions by the government are a *per se* violation of the Sixth Amendment.[68] The court then held that there had been no purposeful intrusion because the attorney did not represent the defendant in the criminal case and their dealings were of a business nature, including a scheme to defraud a bank.[69] In addition, the court determined that none of the disclosures involved confidential defense strategy or were prejudicial and thus, there was no Sixth Amendment violation.[70]

D. Fourth Circuit

The Fourth Circuit examined the issue of government intrusion into attorney-client communications in *United States v. Brugman*, in which two defendants were convicted of distributing cocaine.[71] The two defendants claimed on appeal that their Sixth Amendment rights to counsel were violated when their co-defendant pleaded guilty after five days of trial pursuant to a plea agreement which required him to testify against them.[72] The testifying co-defendant had attended a joint meeting with the defendants and their attorneys during the course of the trial.[73]

The Fourth Circuit began its analysis by noting that there is no "per se rule that whenever conversations with counsel are overheard the Sixth Amendment is violated."[74] Instead, the court stated:

> In determining whether there has been an invasion such as to be violative of the Sixth Amendment right to effective assistance of counsel, four factors must be considered. They include: (1) whether the presence of the informant was purposely caused by the government in order to garner confidential, privileged information, or whether the presence of the informant was a result of other inadvertent occurrences; (2) whether the government obtained, directly or indirectly, any evidence which was used at trial as a result of the informant's intrusion; (3) whether any other information gained by the informant's intrusion was used in any other manner to the substantial detriment of the defendant; and

67. *Id.* (citing Weatherford v. Bursey, 429 U.S. 545 (1977)).

68. *Id.*; *see also* United States v. Levy, 557 F.2d 200, 208 (3d Cir. 1978) ("Where there is a knowing invasion of the attorney-client relationship and where confidential information is disclosed to the government, we think that there are overwhelming considerations militating against a standard which tests the sixth amendment violation by weighing how prejudicial to the defense the disclosure is.").

69. *Costanzo*, 740 F.2d at 254–55.

70. *Id.* at 255–57.

71. 655 F.2d 540, 541–42 (4th Cir. 1981).

72. *Id.* at 541–42.

73. *Id.* at 545.

74. *Id.* at 546.

> finally, (4) whether the details about trial preparation were learned by the government.[75]

The court did not explain whether these factors are to be considered in totality, but seemed to imply that each factor by itself could be enough to support a Sixth Amendment violation. There was no need for the court to provide this explanation because it held that there was no Sixth Amendment violation because none of the factors were present in the case.[76]

E. Fifth Circuit

The Fifth Circuit examined potential remedies for government intrusion into attorney-client communications in *United States v. Melvin*.[77] In that case, the district court had dismissed the indictment for conspiracy charges as a sanction for what the court viewed as a government intrusion into the attorney client relationship.[78] The government appealed, and the Fifth Circuit reversed.[79]

After being arrested, Charles Powell and several others were charged with a conspiracy to import marijuana.[80] Powell agreed to cooperate with the prosecution against his co-conspirators in exchange for a reduction in charges.[81] One of the defendants subsequently invited Powell to attend a meeting with three attorneys and two defendants.[82] The attorneys questioned Powell about his knowledge of the case and discussed some trial strategy.[83] After this meeting, Powell met with the lead attorney a number of times, and he was debriefed after each meeting.[84]

The Fifth Circuit began its analysis by holding that there is no *per se* rule that requires dismissal of a case anytime there is a government intrusion into attorney-client communications.[85] Rather, the court stated that the trial court should not have dismissed the case "without first finding that the intrusion into appellees' attorney-client relationship prejudiced the ability of their attorneys to provide adequate representation or otherwise prejudiced their defense."[86] The court also stated that even if there was prejudice, courts should not automatically dismiss a case, but should "determine whether some remedy short of dismissal— *e. g.*,

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75. *Id.*

76. *Id.* Specifically, the court found that (1) the co-defendant's presence at the defense meeting was not induced or encouraged by the government, (2) the government did not use the information, (3) the information did not prejudice the defendants, and (4) the prosecution did not learn details about trial preparation.

77. 650 F.2d 641, 642 (5th Cir. 1981).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 642–43.

83. *Id.* at 643.

84. *Id.*

85. *Id.*

86. *Id.* at 644. The court did not expressly state which party had the burden of showing that there was or was not prejudice, but the court stated in United States v. Kilrain, 566 F.2d 979, 983 (5th Cir. 1978), that the burden is on defendants to demonstrate prejudice.

suppression—can be tailored to vindicate the appellees' Sixth Amendment rights to counsel and a fair trial and, at the same time, protect the public's interest in seeing that the guilty are brought to justice."[87]

The court then went on to state that Powell's presence at the defense meetings did not necessarily constitute an intrusion into a confidential relationship because disclosures made in the presence of third parties may not carry any reasonable expectation that they remain private.[88] The court held that:

> there is no governmental intrusion into the attorney-client relationship in violation of the Sixth Amendment when a confidential informant attends a meeting of other defendants and their counsel, at the request of other defendants and their attorneys, under such circumstances that the informant could not reasonably refuse to attend without jeopardizing his undercover status, and under circumstances indicating that the other defendants and their counsel knew or should have known that the informant was not part of the defense team and knew or should have known that there was no reasonable expectation of confidentiality in the presence of the informant.[89]

F. Sixth Circuit

The Sixth Circuit examined the issue of government intrusion into attorney-client communications in *United States v. Steele*, in which four defendants were convicted of various conspiracy charges.[90] The defendants claimed on appeal that their rights to effective assistance of counsel were violated when government informants "invaded the defense camp and were privy to attorney-client communications and trial strategies."[91] Specifically, the defendants contended that when they were incarcerated with one of the informants before trial, the informant repeatedly tried to get in close proximity to one of the defendants when he was discussing the case with his attorney.[92] The defendants also argued that their rights were violated because a defense investigator was acting as an informant for the FBI in another case and "possibly" relayed information about defense tactics in this case to the government.[93]

The court began its analysis by stating that in order to determine whether an intrusion into attorney-client communications constitutes a Sixth Amendment violation, courts must examine:

> 1) whether the presence of the informant was purposely caused by the government in order to garner confidential, privileged

87. *Melvin*, 650 F.2d at 644.
88. *Id*. at 645.
89. *Id*. at 646.
90. 727 F.2d 580 (6th Cir. 1984).
91. *Id.* at 585.
92. *Id.* at 586.
93. *Id.* at 587.

> information, or whether the presence of the informant was the result of other inadvertent occurrences; 2) whether the government obtained, directly or indirectly, any evidence which was used at trial as the result of the informant's intrusion; 3) whether any information gained by the informant's intrusion was used in any other manner to the substantial detriment of the defendant; and 4) whether the details about trial preparations were learned by the government.[94]

The court then adopted a rule that, "[e]ven where there is an intentional intrusion by the government into the attorney-client relationship, prejudice to the defendant must be shown before any remedy is granted."[95] The court also made it clear that the burden is on the defense to show prejudice from the intrusion.[96] Because the defendants had failed to show any prejudice, their convictions were affirmed.[97]

G. Seventh Circuit

The Seventh Circuit examined the issue of government intrusion into attorney-client communications in *United States v. Castor*, in which the defendant was convicted of extortion and firearm charges.[98] On appeal, the defendant argued that the district court erred when it denied his motion to dismiss because his Sixth Amendment right to counsel was violated when a defense attorney discussed the case with an FBI agent with whom she had a relationship.[99]

The court began its analysis by noting that the FBI had indicated that it would not call the agent as a witness.[100] The court also noted that the defendant could not show prejudice because there was no proof that any information about him had been passed from the defense investigator to the FBI agent.[101] The court then stated that "[w]ithout any proof of governmental intrusion or actual prejudice, the defendant cannot assert that the mere relationship of an investigator working for his attorney with an FBI agent assigned to the case violates his constitutional right to counsel."[102]

The holding in *Castor* implies that prejudice does not have to be shown if the intrusion into attorney-client communications is intentional. The Seventh Circuit subsequently stated that although the general rule is that the defendant must show prejudice in order to establish a Sixth Amendment violation, prejudice may not have

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94. *Id.* at 585 (citing Weatherford v. Bursey, 429 U.S. 545 (1977)).

95. *Id.* at 586 (citation omitted).

96. *Id.* at 586–87.

97. *Id.* at 587; *see also* Sinclair v. Schriber, 916 F.2d 1109, 1112 (6th Cir. 1990) ("[I]n order to establish a violation of the Sixth Amendment right to counsel ensuing from government surveillance, a claimant must not only show that conversations with an attorney were surreptiously [sic] monitored, but must also show that the information gained was used to prejudice the claimant's defense in his criminal trial.").

98. 937 F.2d 293, 295 (7th Cir. 1991).

99. *Id.* at 297.

100. *Id.*

101. *Id.* at 297–98.

102. *Id.* at 298 (citing Weatherford v. Bursey, 429 U.S. 545 (1977)).

to be shown in cases of continuous surveillance of conversations by the government where knowledge of the surveillance would make a defendant reluctant to make candid disclosures to his attorney.[103]

H. Eighth Circuit

The Eighth Circuit examined the issue of government intrusion into attorney-client communications in *United States v. Singer*, in which the defendant had his convictions for various conspiracy charges reversed on appeal and was convicted again after retrial.[104] The defendant argued that his Sixth Amendment right to counsel was violated because the government had received and reviewed fifty-six confidential documents from his attorney's file prior to the retrial of the case.[105] Specifically, an employee at the defense attorney's office, who was not connected with law enforcement in any way, had photocopied the confidential file after the first trial and provided it to a co-defendant who was acting as a government informant.[106] The informant then provided the file to a police sergeant as proof that the defendant's father had committed perjury at the first trial with approval of the defense attorney.[107]

The Eighth Circuit began its analysis by stating that in order to establish a violation of the Sixth Amendment, a defendant has the burden of showing: "first, that the government knowingly intruded into the attorney-client relationship; and second, that the intrusion demonstrably prejudiced the defendant, or created a substantial threat of prejudice."[108] The court also stated that even when there has been a violation of the Sixth Amendment, a case should not necessarily be dismissed because, "[t]he interests supporting the sixth amendment right, meant to assure fairness in the adversary criminal process, must be reconciled with society's competing interest in prosecuting criminal conduct."[109] Instead, the trial court should "tailor a remedy to the injury suffered, to assure the defendant effective assistance of counsel in a subsequent proceeding."[110]

The court agreed that there was a Sixth Amendment violation when the confidential file was viewed by the informant and sergeant, who both testified in the retrial, and by the prosecution, because there was a threat of prejudice during the retrial.[111] However, the court upheld the convictions because the testimony of the

103. United States v. DiDomenico, 78 F.3d 294, 299 (7th Cir. 1996). The court did not definitively decide the issue because it was unnecessary to do so under the particular posture of the case. *Id.* at 299–301.

104. 785 F.2d 228, 229–30 (8th Cir. 1986).

105. *Id.* at 230.

106. *Id.* at 231.

107. *Id.* at 230–31.

108. *Id.* at 234 (citations omitted); *see also* United States v. Tyerman, 701 F.3d 552, 559 (8th Cir. 2012) ("To establish a Sixth Amendment claim based on violation of the attorney-client privilege, this court requires the defendant to prove that the government knowingly intruded into the attorney-client relationship.") (citation and internal quotations omitted).

109. *Singer*, 785 F.2d at 234 (citation omitted).

110. *Id.* at 234–35 (citation omitted).

111. *Id.* at 235.

sergeant and informant at the retrial was not shaped by review of the file and because none of the prosecutors who had seen the file participated in the retrial.[112]

I. Ninth Circuit

The Ninth Circuit examined the issue of government intrusion into attorney-client communications in *United States v. Irwin*, in which the defendant was convicted of drug distribution and conspiracy charges.[113] The defendant claimed on appeal that his Sixth Amendment right to counsel was violated by an undercover DEA agent who was posing as a large-scale drug dealer.[114] Specifically, after the defendant was arrested and had counsel appointed, the undercover agent met with the defendant in the absence of his attorney and encouraged him to act as an informant in order to secure a favorable disposition of his case.[115]

The court began its analysis by rejecting a *per se* rule that all government interference with the attorney-client relation is a violation of the Sixth Amendment.[116] Instead, the court held that:

> From *Weatherford* . . . it is apparent that mere government intrusion into the attorney-client relationship, although not condoned by the court, is not itself violative of the Sixth Amendment right to counsel. Rather, the right is only violated when the intrusion substantially prejudices the defendant. Prejudice can manifest itself in several ways. It results when evidence gained through the interference is used against the defendant at trial. It also can result from the prosecution's use of confidential information pertaining to the defense plans and strategy, from government influence which destroys the defendant's confidence in his attorney, and from other actions designed to give the prosecution an unfair advantage at trial.[117]

The court found that the defendant was not entitled to relief because there was no showing of any of these types of prejudice.[118] However, the court did not indicate who bears the burden of proof of establishing prejudice.

The Ninth Circuit subsequently answered this question in *United States v. Danielson*.[119] The court adopted a two-part rule when it comes to the burden of establishing prejudice. First, the defendant must make a prima facie showing of prejudice by showing that the government informant "acted affirmatively to intrude into the attorney-client relationship and thereby to obtain the privileged

112. *Id.* at 235–36, 244.
113. 612 F.2d 1182, 1184 (9th Cir. 1980).
114. *Id.* at 1183–84.
115. *Id.* at 1188.
116. *Id.* at 1185.
117. *Id.* at 1186–87 (citations omitted).
118. *Id.* at 1187–91.
119. 325 F.3d 1054 (9th Cir. 2003).

information."[120] If the defendant makes this showing, "the burden shifts to the government to show that there has been no prejudice to the defendant as a result of these communications."[121]

J. Tenth Circuit

The Tenth Circuit examined the issue of government intrusion into attorney-client communications in *Shillinger v. Haworth*, in which the government appealed the grant of a petition for habeas relief.[122] The district court granted the petition after finding that the defendant's Sixth Amendment rights were violated by government intrusion into his trial preparation sessions with his attorney.[123]

The defendant was arrested and charged with aggravated assault for an incident involving an argument over a Milk Bone dog biscuit.[124] As the trial date approached, the defense attorney arranged to hold trial preparation sessions in the trial courtroom, which required a deputy sheriff to be present because the defendant was in custody.[125] After these sessions, the prosecutor initiated a conversation with the deputy and learned about the substance of the conversations that took place between the defendant and his attorney.[126] During cross-examination of the defendant at trial, the prosecutor asked whether he had specifically used the word "cut" instead of "stabbed."[127] The prosecutor also stated in closing argument that the defendant was the only witness who had practiced his testimony.[128]

The Tenth Circuit began by stating that the case did not involve the "state's interest in effective law enforcement," but was instead a purposeful intrusion for the purpose of learning the substance of the defendant's conversations with his attorney.[129] The court then stated:

> We necessarily recognize the right to counsel in order to secure the fundamental right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment. It follows that the "benchmark" of a Sixth Amendment claim is "the fairness of the adversary proceeding." The Supreme Court has therefore declared that "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." At the same time, however, "[i]n certain Sixth Amendment contexts, prejudice is presumed." This is particularly

120. *Id.* at 1071.
121. *Id.* (citation and internal quotations omitted).
122. 70 F.3d 1132, 1134 (10th Cir. 1995).
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 1134–35.
127. *Id.* at 1135.
128. *Id.* at 1135–36.
129. *Id.* at 1141.

> true with regard to "various kinds of state interference with counsel's assistance."[130]

In light of the above principals regarding fairness, the court adopted a rule that an intentional intrusion into attorney-client communications, without a countervailing state interest, is a *per se* violation of the Sixth Amendment.[131]

> In other words, we hold that when the state becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the trial process must be presumed. In adopting this rule, we conclude that no other standard can adequately deter this sort of misconduct. We also note that prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost.[132]

The court did note, however, that its *per se* rule did not apply to situations "in which the state has a legitimate law enforcement purpose for its intrusion."[133] In that situation, there would need to be proof of prejudice in order to constitute a Sixth Amendment violation.[134]

K. Eleventh Circuit

The Eleventh Circuit examined the issue of government intrusion into attorney-client communications in *United States v. Ofshe*, in which the defendant entered a conditional guilty plea to drug charges.[135] The defendant argued on appeal that his conviction should be reversed because the government used his defense attorney as an informant.[136]

After he was hired as co-counsel, one of the defendant's attorneys learned that he was a target of a public corruption investigation.[137] In order to diminish his own criminal responsibility, the attorney offered to act as an informant for the government in drug trafficking investigations.[138] The government subsequently placed a body bug on the attorney in order to conduct surveillance on conversations between the defendant and the attorney about future money laundering and drug

130. *Id.* (alterations in original) (citations omitted).
131. *Id.* at 1142.
132. *Id.* (citation omitted).
133. *Id.* (citing Weatherford v. Bursey, 429 U.S. 545 (1977)).
134. *Id.*
135. 817 F.2d 1508, 1510 (11th Cir. 1987).
136. *Id.* at 1515.
137. *Id.* at 1511.
138. *Id.*

transactions.[139] The monitored conversations included discussion of the timing of and likelihood of success of a motion to suppress in the pending case.[140]

The Eleventh Circuit held that "absent demonstrable prejudice," dismissal of a case is an inappropriate remedy for a Sixth Amendment violation.[141] The court then held that the defendant was not prejudiced because the "taped conversation produced no tainted evidence, . . . the intrusion into any potentially privileged attorney-client matters was not purposeful," and "no information was provided to the prosecuting attorney."[142]

L. District of Columbia Circuit

The District of Columbia Circuit examined the issue of government intrusion into attorney-client communications in *United States v. Kelly*, in which a former congressman was convicted of bribery and other charges.[143] The defendant filed a motion for a new trial, which was denied by the trial court.[144] The defendant argued on appeal that he was entitled to a new trial because an informant had met with the defendant and his attorney, had discussed trial strategy with them, and had stolen defense documents that he passed on to a second informant to sell to the FBI.[145]

On appeal, the defendant argued that he was not required to show any prejudice resulted from the intrusion, while the government argued that the defendant had a high burden of showing that he would probably be acquitted during a new trial.[146] The court stated that both parties had "missed the legal mark as to the applicable legal standards."[147] The court held that under *Weatherford*, some prejudice must be shown, but it need not be to the level of proving that a new trial would probably result in an acquittal.[148] Instead, courts should examine the following factors to determine whether a violation of the Sixth Amendment has occurred:

> (1) was evidence used at trial produced directly or indirectly by the intrusion; (2) was the intrusion by the government intentional; (3) did the prosecution receive otherwise confidential information about trial preparations or defense strategy as a result of the intrusion; and (4) were the overheard conversations and other

139. *Id.*

140. *Id.*

141. *Id.* at 1515 (citation omitted); *see also* United States v. Deluca, 663 Fed. Appx. 875, 878 (11th Cir. 2016) ("[F]or the sanction of dismissal to be appropriate, a showing of 'demonstrable prejudice, or substantial threat thereof,' must be made, even in cases where the violation is a deliberate intrusion.") (citation omitted).

142. *Ofshe*, 817 F.2d at 1515.

143. 790 F.2d 130, 132, 136–38 (D.C. Cir. 1986).

144. *Id.* at 132.

145. *Id.* at 133.

146. *Id.* at 136.

147. *Id.*

148. *Id.* at 137.

> information used in any other way to the substantial detriment of the defendant?[149]

The court did not address "what combination of these factors is necessary to" establish a violation of the Sixth Amendment.[150] However, the court did hold that the defendant had the burden to demonstrate "sufficient prejudice to establish a sixth amendment violation."[151] If the defendant establishes prejudice, the burden then shifts to the government to "defeat the new trial motion by showing that the constitutional violation was harmless error" by proving "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[152]

M. Summary of the Circuit Split

There is a significant split in authority in the circuit courts about whether a showing of prejudice is necessary, and if it is, who bears the burden. The First,[153] Fifth,[154] Sixth,[155] Eighth,[156] Ninth,[157] Eleventh,[158] and D.C.[159] Circuits require a showing of prejudice and place the burden on the defendant. The Second,[160] Fourth,[161] and Seventh[162] Circuits have recognized that intentional intrusions may not require a showing of prejudice, but have not specifically decided. The Third[163] and Tenth[164] Circuits have determined that intentional intrusions are *per se* violations of the Sixth Amendment that do not require a showing of prejudice by the defendant in most circumstances.

VI. POST-WEATHERFORD

Which set of rules from which circuit is correct? The Supreme Court should remedy this split of authority in order to end this location-based set of rules. Criminal activity and the need to investigate it exists in every jurisdiction, and many crimes and investigations will involve multiple jurisdictions. As technology and mobility increase, so will multi-jurisdictional crimes and investigations.

149. *Id.* (citing Weatherford v. Bursey, 429 U.S. 545, 554, 557 (1977)).
150. *Id.* at 137.
151. *Id.* at 138.
152. *Id.* (citation omitted).
153. United States v. Mastroianni, 749 F.2d 900, 907–08 (1st Cir. 1984).
154. United States v. Melvin, 650 F.2d 641, 644 (5th Cir. 1981).
155. United States v. Steele, 727 F.2d 580, 586 (6th Cir. 1984).
156. United States v. Singer, 785 F.2d 228, 234 (8th Cir. 1986).
157. United States v. Irwin, 612 F.2d 1182, 1186–89 (9th Cir. 1980).
158. United States v. Ofshe, 817 F.2d 1508, 1515 (11th Cir. 1987).
159. United States v. Kelly, 790 F.2d 139, 137 (D.C. Cir. 1986).
160. United States v. Ginsberg, 758 F.2d 823, 833 (2d Cir. 1985).
161. United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981).
162. United States v. Castor, 937 F.2d 293, 298 (7th Cir. 1991).
163. United States v. Costanzo, 740 F.2d 251, 254 (3d Cir.1984).
164. Shillinger v. Haworth, 70 F.3d 1132, 1142 (10th Cir. 1996).

The Supreme Court's pre-*Weatherford* cases indicate that fairness is the basic principle behind the right to counsel.[165] Although the Court has not addressed intrusion into attorney-client communications since *Weatherford*, an examination of the Court's post-*Weatherford* cases involving interference with attorney-client relationships indicates that fairness remains the guiding principle.[166]

A. United States v. Morrison

In *United States v. Morrison*,[167] the Supreme Court was confronted with the question of what is the appropriate remedy for an interference with the attorney-client relationship that amounts to a violation of the Sixth Amendment. In that case, two DEA agents met with a defendant who had been indicted for drug crimes without the knowledge or permission of her retained counsel.[168] During the conversation about the potential of cooperation in a related investigation, the agents "disparaged" defense counsel and suggested that the defendant would be better off if she was represented by a public defender.[169] The defendant rejected the offer to cooperate and continued to rely on the advice of her attorney.[170] The defendant subsequently moved to dismiss the case with prejudice by arguing that the agents had violated her Sixth Amendment right to counsel.[171]

The Supreme Court assumed, but did not decide, that there had been a Sixth Amendment violation.[172] It was not necessary for the Court to decide whether there had been a violation, because even if there had been, the defendant was not entitled to a dismissal.[173] The Court began its analysis by stating that the right to counsel "is meant to assure fairness in the adversary criminal process."[174] In addition, the Court "recognized the necessity for preserving society's interest in the administration of criminal justice."[175] Thus, cases involving violations of the Sixth Amendment are "subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."[176]

In light of this general rule, the court held that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate."[177] Because there had been no prejudice, there had been no unfairness, and thus, there was no need for a remedy.

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165. *See supra* notes 4–21 and accompanying text.
166. *See infra* notes 166–221 and accompanying text.
167. 449 U.S. 361 (1981).
168. *Id.* at 362.
169. *Id.*
170. *Id.* at 362–63.
171. *Id.* at 363.
172. *Id.* at 364.
173. *Id.* at 367.
174. *Id.* at 364 (citations omitted).
175. *Id.*
176. *Id.*
177. *Id.* at 365.

B. Inmate Informer Cases

The Supreme Court addressed situations in which inmates alert the government about incriminating statements made by fellow inmates in *United States v. Henry*[178] and *Kuhlmann v. Wilson*.[179] The decisions in both cases came down to basic notions of fairness.

In *Henry*, the defendant was incarcerated with an inmate who had been acting as a paid informant for the FBI for some time.[180] After the informant was released from custody, he reported to the FBI that the defendant had made several incriminating statements.[181] The informant was paid for this information, and he testified about it at trial although the fact that he was an informant was not disclosed to the jury.[182] The Supreme Court held that the admission of this testimony violated the Sixth Amendment because by using an inmate informer to engage in conversations with the defendant and paying him only if he produced useful information, the government had "intentionally creat[ed] a situation likely to induce [the defendant] to make incriminating statements without the assistance of counsel."[183] Essentially, the Court's holding reflects a recognition that it was unfair to allow the government to benefit by using the improperly obtained incriminating statements against the defendant at trial. Fairness required the testimony to be suppressed.

In contrast, the inmate informer in *Kuhlmann* was merely a passive listener who asked no questions of the defendant, but merely listened to and made notes about the defendant's "spontaneous and unsolicited" incriminating statements.[184] The Court held that the informant's testimony about the incriminating statements did not violate the Sixth Amendment because:

> the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached, a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.[185]

Because there was no government action beyond simply listening to a talkative defendant, there was nothing unfair about the admission of the informant's testimony.

178. 447 U.S. 264 (1980).
179. 477 U.S. 436 (1986).
180. 447 U.S. at 266.
181. *Id.*
182. *Id.* at 266–67.
183. *Id.* at 270–71, 274.
184. 477 U.S. at 440.
185. *Id.* at 459 (internal quotations omitted).

C. Deliberate Elicitation Cases

The Supreme Court addressed situations in which the government deliberately elicited statements from defendants in the absence of their counsel in *Brewer v. Williams*[186] and *Maine v. Moulton*.[187] The decisions in these cases came down to basic notions of fairness.

In *Brewer*, a detective obtained incriminating statements from a defendant after the defendant had obtained counsel and invoked his right to remain silent and the detective had promised the attorney that he would not question the defendant while he was being transported in a police car.[188] During the several-hour trip, the detective, who suspected that Williams had murdered a ten-year-old girl several days earlier, and the defendant engaged in conversation about religion.[189] The detective, who knew the defendant was a deeply religious man who had recently escaped from a mental institution, asked the defendant to think about the plight of the family of the dead girl, whose body had not been found, who were unable to see their loved one receive a proper "Christian burial."[190] The defendant then made incriminating statements and directed the police to the body.[191]

The Court began its analysis by stating that the Sixth Amendment right to counsel "is indispensable to the fair administration of our adversary system of criminal justice."[192] The Court then found that there was no doubt that the detective "deliberately and designedly set out to elicit information from [the defendant] just as surely as—and perhaps more effectively than—if he had formally interrogated him."[193] Thus, the Court held that the admission of the evidence obtained from the deliberate elicitation of statements was a violation of the Sixth Amendment.[194]

A similar result occurred in *Moulton* for similar reasons. In that case, the defendant and co-defendant were indicted and released on bail after they retained counsel.[195] The co-defendant subsequently agreed to cooperate with the police, and met with the defendant while equipped with a body wire.[196] During the recorded conversation, the co-defendant frequently claimed that he could not remember the events at issue and he repeatedly asked the defendant to remind him of the details, which caused the defendant to make numerous incriminating statements.[197] The statements were later introduced at trial.[198]

The Supreme Court began its analysis by stating that, "[t]he right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments is

186. 430 U.S. 387 (1977).
187. 474 U.S. 159 (1985).
188. 430 U.S. at 391–93.
189. *Id.* at 392.
190. *Id.* at 392–93.
191. *Id.* at 393.
192. *Id.* at 398.
193. *Id.* at 399.
194. *Id.* at 406.
195. Maine v. Moulton, 474 U.S. 159, 162 (1985).
196. *Id.* at 164.
197. *Id.* at 165–66.
198. *Id.* at 166.

indispensable to the fair administration of our adversarial system of criminal justice" and "the right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding."[199] The Court then applied these principles of fairness to hold that the Sixth Amendment was violated when the government introduced the defendant's incriminating statements into evidence at trial that it obtained by knowingly circumventing the right to counsel.[200]

D. Nix v. Williams

After the defendant in *Brewer v. Williams* had his conviction reversed because of the admission of his incriminating statements, he was retried and was convicted again. The Supreme Court had the opportunity to review the second trial in *Nix v. Williams*.[201]

In the retrial, the prosecution did not introduce the defendant's statements into evidence and it did not introduce evidence that the defendant directed the police to the child's body.[202] However, the prosecution did introduce evidence about the condition of the body and the results of medical and chemical tests performed on the body.[203] The defendant argued on appeal that the trial court should have suppressed this evidence because it was a product of the Sixth Amendment violation of his right to counsel.[204]

The central question in the case was whether the evidence about the body and its condition was admissible under the inevitable discovery exception to the exclusionary rule because the body would have been discovered eventually even in the absence of the Sixth Amendment violation.[205] To answer this question, the Court engaged in an extensive discussion of fairness. The Court stated:

> Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial. The Sixth Amendment right to counsel protects against unfairness by preserving the adversary process in which the reliability of proffered evidence may be tested in cross-examination. Here, however, [the] Detective['s] conduct did nothing to impugn the reliability of the evidence in question—the body of the child and its condition as it was found, articles of clothing found on the body, and the autopsy. No one would seriously contend that the presence of counsel in the police car when [the detective] appealed to [the defendant's] decent human instincts would have had any bearing on the reliability of the body as evidence. Suppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process, but

199. *Id.* at 168–69 (citations omitted).
200. *Id.* at 176–77.
201. 467 U.S. 431 (1984).
202. *Id.* at 437.
203. *Id.*
204. *Id.* at 441.
205. *Id.* at 440–41.

> would inflict a wholly unacceptable burden on the administration of criminal justice.[206]

The Court went on to state that suppression would not ensure the fairness of the adversary system.[207] Rather,

> Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. However, if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a worse position than it would have occupied without any police misconduct.[208]

Essentially, the defendant suffered no prejudice by the introduction of evidence that would have been discovered anyway, so it would be unfair to the government to have the evidence suppressed.

E. Impeachment Cases

The Supreme Court dealt with the question of whether statements taken in violation of the Sixth Amendment can be used to impeach a defendant's trial testimony in *Michigan v. Harvey*[209] and *Kansas v. Ventris*.[210] Both cases were decided on fairness grounds.

After the defendant in *Harvey* was charged and had counsel appointed, he told a police officer that he wanted to make a statement, but he did not know whether he should talk to his attorney first.[211] The police officer told the defendant he did not need to speak with his attorney, and the defendant gave a statement.[212] After the defendant testified at trial, the prosecutor used the defendant's statement to police to impeach his inconsistent testimony.[213] The question presented to the Court was whether this statement, which the government conceded was taken in violation of the Sixth Amendment, could be introduced to impeach the defendant's testimony.[214]

206. *Id.* at 446–47 (citations omitted).
207. *Id.* at 447.
208. *Id.* (emphasis deleted).
209. 494 U.S. 344 (1990).
210. 556 U.S. 586 (2009).
211. 494 U.S. at 346.
212. *Id.*
213. *Id.* at 347.
214. *Id.* at 349.

The Court held that although the prosecution cannot build its case in chief on evidence obtained from constitutional violations, "use of statements so obtained for impeachment purposes is a different matter."[215] Indeed,

> If a defendant exercises his right to testify on his own behalf, he assumes a reciprocal obligation to speak truthfully and accurately, and we have consistently rejected arguments that would allow a defendant to turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.[216]

Essentially, the Court's ruling recognizes that it would be unfair to allow a defendant to commit perjury, without allowing the prosecutor to counter the perjury with the defendant's own voluntary statement.

After the defendant in *Ventris* was charged with murder and other crimes, police officers planted an informant in his cell.[217] In response to the informant's remark that the defendant appeared to having something serious weighing on his mind, the defendant made an incriminating statement.[218] The prosecution conceded that the statement was taken in violation of the Sixth Amendment, but argued that the statement was admissible to impeach the defendant's inconsistent trial testimony.[219]

The Court began its analysis by noting that its "precedents make clear that the game of excluding tainted evidence for impeachment purposes is not worth the candle."[220] Indeed,

> The interests safeguarded by such exclusion are outweighed by the need to prevent perjury and to assure the integrity of the trial process. It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can . . . provide himself with a shield against contradiction of his untruths.[221]

The bottom line is that once the defendant testifies inconsistently with prior statements, preventing the prosecution from using those statements to impeach the

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215. *Id.* at 351.

216. *Id.* (citation and internal quotations omitted).

217. Kansas v. Ventris, 556 U.S. 586, 589 (2009).

218. *Id.*

219. *Id.* The Supreme Court cited *Kuhlmann v. Wilson* to note that this concession was likely unnecessary, but stated that the concession was now the law of the case. *Id.* at 590. The Court also noted that in regard to uncounseled interrogation of defendants represented by counsel, the constitutional violation occurs at the time of the interrogation, and not just when evidence is admitted at trial. *Id.* at 592.

220. *Id.* at 593.

221. *Id.* (citations and internal quotations omitted).

testimony is too "high [of a] price to pay for vindication of the right to counsel at the prior stage."[222]

VII. SETTLING THE WEATHER

The failure of the Supreme Court in *Weatherford* to establish clear rules for analyzing government intrusion into attorney-client conversations has led to a confused mixture of rules that depend on where the intrusion occurred. This situation is untenable in a modern age when crimes and investigations frequently cross jurisdictional boundaries. Both defendants and law enforcement officials are entitled to consistent rules.

From *Powell* to *Geders*, the Supreme Court's pre-*Weatherford* cases have been consistent in holding that fairness is the guiding principle of the Sixth Amendment.[223] Likewise, the Court's post-*Weatherford* right to counsel cases have been consistent in keeping fairness as the guiding principle.[224] Thus, rules for analyzing government intrusion into attorney-client conversations must be determined by what is fair.

The only fair rule is one that requires a showing of prejudice to the defendant in order for an intrusion to be considered a violation of the Sixth Amendment, or at least a violation that requires a remedy.[225] Although it was in a different context, the Court all but said as much in *Morrison* when it stated: "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate."[226] If the government intrudes into attorney-client communications, but overhears nothing or uses nothing pertaining to the case that harms the defendant or aids the government, a rule that punishes the government by requiring dismissal of the case would not be fair to members of the public.[227] This rule recognizes the government's legitimate need to investigate crime in a way that protects the safety of its informants.[228] It also recognizes the fact that the attorney-client privilege is subject to the crime-fraud exception[229] because it would be unfair to the public to keep certain communications confidential.

A fair rule is one that requires, for justifiable or unintentional intrusions, the defendant to establish a prima facie showing of prejudice by demonstrating that

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222. *Id.*

223. *See supra* notes 4–21 and accompanying text.

224. *See supra* notes 164–221 and accompanying text.

225. This may be a matter of semantics. The courts tend to use the term "violation" rather loosely in the intrusion context. Courts often call an intrusion a "violation" when it is significant enough to entitle the defendant to a remedy, but find that it is not a "violation" when the defendant is not entitled to a remedy. Whether an intrusion that does not entitle a defendant to a remedy in a criminal case may still be sufficient for civil damages under 42 U.S.C. § 1983 is beyond the scope of this Article.

226. United States v. Morrison, 449 U.S. 361, 365 (1981).

227. *See id.* at 364 (recognizing "the necessity for preserving society's interest in the administration of criminal justice"); *see also* United States v. Singer, 785 F.2d 228, 234 (8th Cir. 1986). (stating that "[t]he interests supporting the sixth amendment right, meant to assure fairness in the adversary criminal process, must be reconciled with society's competing interest in prosecuting criminal conduct").

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

229. *See supra* notes 27–29 and accompanying text.

confidential communications were conveyed to the government.[230] If a defendant offers this prima facie proof, the burden shifts to the government to show that there has not been and there will be no prejudice to the defendant as a result of the intrusion.[231] However, when the intrusion is intentional and unjustifiable, a fair rule is one that presumes there has been prejudice and requires the government to prove that it has not used the confidential information to prejudice the defendant or benefit itself in any manner.[232]

If prejudice is established, a court must then address potential remedies. It would be the rare case that would require dismissal as the remedy. Indeed, it would be unfair to the public to dismiss a case when another remedy would suffice. As the Supreme Court said in *Nix*, "[f]airness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place."[233] Rather than dismissal, fairness can generally be achieved by suppressing any statements obtained by the intrusion and possibly by barring members of the prosecution team who received the statements from participating in the trial.[234] However, fairness would allow the prosecution to introduce a defendant's statements to impeach the defendant's inconsistent testimony at trial.[235]

Of course, nothing in this proposed rule should be read to excuse or encourage deliberate, unjustifiable intrusions into attorney-client communications. Wise prosecutors should keep in mind that juries tend to have an innate sense of what is fair and what is not. A prosecutor who introduces statements from deliberate, unjustifiable intrusions runs the risk the jury may conclude that the prosecutor is engaging in unfair conduct. Research has shown that even strangers who observe one party acting unfairly towards another will attempt to punish the person who is acting unfairly.[236] No attorney wants to be punished by a jury for what is perceived to be unfair conduct.

VIII. CONCLUSION

Weatherford was decided over four decades ago, and it has been a source of confusion and inconsistency ever since. This inconsistency is the very definition of unfairness. The Sixth Amendment right to counsel and the attorney-client communications that support it should be treated with consistency.

The Civil War general, Thomas F. Meagher, once stated that, "Great interests demand great safeguards."[237] Fairness in the criminal justice system is one of the greatest of interests. It is time for the Supreme Court to safeguard this interest

230. *See* United States v. Mastroianni, 749 F.2d 900, 907–08 (1st Cir. 1984) (citations omitted); United States v. Danielson, 325 F.3d 1054, 1071 (9th Cir. 2003).

231. *See Mastroianni*, 749 F.2d at 908; *Danielson*, 325 F.3d at 1071.

232. *See* Shillinger v. Haworth, 70 F.3d 1132, 1142 (10th Cir. 1995).

233. Nix v. Williams, 467 U.S. 431, 447 (1984).

234. *See* United States v. Singer, 785 F.2d 228, 235–36 (8th Cir. 1986).

235. *See, e.g.*, Kansas v. Ventris, 556 U.S. 586, 593 (2009); Michigan v. Harvey, 494 U.S. 344, 351 (1980).

236. *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 308 (2011). In fact, studies have shown that this sort of altruistic punishment of unfair behavior increases activity in the pleasure centers of the brain. *Id.*

237. MICHAEL CAVANAGH, MEMOIRS OF GEN. THOMAS FRANCIS MEAGHER 61 (1892).

by establishing clear rules for analyzing government intrusion into attorney-client conversations.