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Weatherford v. Bursey: "Surreptitous Invasion . . . into the Legal Camp of the Defense"[1]

INTRODUCTION

In its decision in *Weatherford v. Bursey*,[2] the United States Supreme Court considered whether governmental intrusion into counsel-client consultations constituted an infringement of the right to the effective representation of counsel[3] when considered without regard to intent or actual prejudice caused by the intrusion. The Fourth Circuit held that all deliberate governmental intrusions into client-counsel consultations were unconstitutional "irrespective of any showing of substantial prejudice . . ."[4] and in dicta concluded that "whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial."[5] On appeal the Supreme Court reversed, holding that the sixth amendment was not violated where there was no tainted evidence used in the trial of the case, no communication of defense strategy to the prosecution, and no purposeful intrusion by the government or its agents.[6] The purpose of this note is to examine the propriety of this decision in light of previous decisions and the impact on the lawyer-client relation.

On March 19, 1970 Weatherford, an undercover agent of the state of South Carolina, and Bursey, the plaintiff in the instant case, vandalized a selective service office in Columbia. Upon information supplied by Weatherford, he and Bursey were ar-

1. *See* Hoffa v. United States, 385 U.S. 293, 306 (1966).

2. 97 S. Ct. 837 (1977).

3. The sixth amendment right to "effective assistance" of counsel was recognized in Powell v. Alabama, 287 U.S. 45 (1932), and incorporated by the fourteenth amendment in Gideon v. Wainright, 372 U.S. 335 (1963), where the right was declared "fundamental and essential to a fair trial." *Id.* at 342.

4. Bursey v. Weatherford, 528 F.2d 483, 487 (4th Cir. 1975).

5. *Id.* at 486.

6. 97 S. Ct. at 845. The court also reversed the Court of Appeals' ruling that Bursey's right to a fair trial had been abridged by the prosecution's failure to disclose Weatherford's identity. In so deciding the Court relied on Wardius v. Oregon, 412 U.S. 470 (1973), to refute the Fourth Circuit's interpretation of Brady v. Maryland, 373 U.S. 83 (1963).

rested for state criminal offenses. At the request of Bursey's counsel and in order to continue his undercover work on other matters, Weatherford met with Bursey and his counsel to discuss the approaching trial.[7] Weatherford did not communicate any information concerning the trial plans to his superiors or the prosecution.[8] Bursey was convicted, fled the state, apprehended and returned to South Carolina, where he served his sentence without appeal or attempts at post conviction relief.[9]

Alleging that he had been deprived of the effective assistance of counsel, Bursey brought civil suit in federal court[10] pursuant to 42 U.S.C. § 1983.[11] The district judge found that no "gross" intrusions into the attorney-client relationship had been made since the conferences had been attended only to allow Agent Weatherford to maintain his cover, and Bursey had not been prejudiced since the information gained at the conferences had not been communicated to the prosecution.[12] Judgment against the plaintiff was entered and appealed.

The Fourth Circuit Court, although accepting the district court's findings of fact, reversed the decision relying upon the brief *per curiam* opinions of *Black v. United States*[13] and *O'Brien v. United States*.[14] The court interpreted these decisions as establishing a *per se* rule requiring reversal and a new trial ". . . whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship . . . ."[15] It rejected the contention of the appellee, Weatherford, that "gross" intrusion into the attorney-client relationship is necessary for a violation of sixth amendment rights requiring reversal.[16]

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7. 97 S. Ct. at 839-840.

8. *Id.* The district court also found that at these meetings Bursey and his attorney raised the question of whether a possible informer might be used to prove the case, but Weatherford never made any statements as to his being an informer.

9. Bursey v. Weatherford, 528 F.2d 483, 485 (4th Cir. 1975).

10. *Id.* at 484.

11. The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970) (originally enacted as Act of April 20, 1871, ch. 22 § 1, 17 Stat. 13) provides:

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

12. Bursey v. Weatherford, 528 F.2d 483, 486 (4th Cir. 1975).

13. 385 U.S. 26 (1966).

14. 386 U.S. 345 (1967).

15. 528 F.2d at 486. *See generally* 54 N.C.L. REV. 1276.

16. *Id.*; *but see* United States v. Rispo, 460 F.2d 965 (3d Cir. 1972). This rule was apparently derived from the statement in Hoffa v. United States that Cald-

In *Black*, after the denial of certiorari by the Supreme Court,[17] the Solicitor General volunteered information that the Federal Bureau of Investigation, pursuant to an unrelated case, had installed a listening device in Black's hotel suite. The device had monitored exchanges between Black and his attorney. Information from the intercept had been relayed to the prosecution which was unaware that attorney-client conferences were among the sources of the information received. The Solicitor General reported that nothing in the reports had been used by the prosecution.[18] In response to the petition for rehearing, the Solicitor General suggested that a determination be made by an adversary hearing to determine whether the conviction should stand. In view of the circumstances, the Court held that justice required a new trial to allow Black the opportunity to ensure that no inadmissible evidence be used in his prosecution.[19] The Court concluded that a new trial was necessary for the ". . . removal of any doubt as to Black's receiving a fair trial with full consideration being given to the new evidence."[20]

O'Brien involved the monitoring of attorney-client conversations by the Federal Bureau of Investigation using a microphone installed in a commercial establishment owned by an acquaintenance of the accused. The contents of the monitored conversation were never communicated outside of the F.B.I. The Solicitor General voluntarily revealed the intrusion in response to a petition for certiorari. The judgement was vacated and the case remanded citing *Black*.[21]

At issue in the cases was the proper procedure for the determination of whether tainted evidence had been used in the trials of the accused. Taken together the decisions indicate that in federal cases where previously undiscovered illegal intelligence gathering activities are revealed after trial, the optimum

well v. United States, 205 F.2d 879 (D.C. Cir. 1953), and Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952), " . . . dealt with government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel." 385 U.S. 293, 306 (1966).

17. 384 U.S. 927 (1966).
18. 385 U.S. at 28.
19. *Id.* at 28-29.
20. *Id.* at 29.
21. 386 U.S. at 346.

manner for insuring that inadmissable evidence had not been used is to grant a new trial.

THE SUPREME COURT DECISION

Justice White, writing for the majority, rejected the lower court's interpretation of *Black* and *O'Brien*. The fourth amendment was given as the basis for holding the evidence to be illegal rather than a per se exclusionary rule based on the sixth amendment.[22] The Court based its conclusion on two factors, the Solicitor General's concession of taint deduced from his willingness to remand and the decision in *Silverman v. United States*.[23] In *Silverman* an electronic listening device similar to that used in *O'Brien* was held to be an "unauthorized physical penetration"[24] in violation of the fourth amendment.[25] Justice White pointed out that no ruling on sixth amendment rights was made in either the *Black* or *O'Brien* cases, but that the decisions were concerning how the determination of prejudice resulting from the eavesdroppings should be made.[26] The opinion concludes that:

> If anything is to be inferred from these two cases with respect to the right to cousel, it is that when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial.[27]

The majority recognized that a right to confidential communication exists but ruled that when an intrusion occurs there is no deprivation of the right unless the government attempted to or did in fact exploit the counsels of the defendants. It reached this conclusion after recognizing the obvious prophylactic effectiveness of the per se rule and balancing it against the necessity of undercover police work.[28]

The decision also indicated that "a much stronger case" would exist if testimony were given concerning the counsels of the defense, if any of the prosecution's evidence had originated

22. 97 S. Ct. at 841-843. The majority also identified Hoffa v. United States, 385 U.S. 293 (1966), as being relied on in the appellate decision. *Id.* at 841. The only discussion given *Hoffa* in the lower court was the refutation of the "grossness" test proffered by Weatherford. 528 F.2d at 486. Justice White's opinion explains that *Hoffa* assumed for the sake of argument, without deciding, the breach of Hoffa's sixth amendment rights in an earlier trial. 97 S. Ct. 842-843.

23. 365 U.S. 505 (1961).

24. *Id.* at 509.

25. 97 S. Ct. at 841 n.1.

26. *Id.* at 841-842.

27. *Id.* at 842.

28. *Id.* at 844-845. This was basically the argument of the United States in its brief as *amicus curiae*. *Id.* at 843 n.4.

from the conversations, or had the details been used by or communicated to the prosecution.[29] Justice White dismissed as unrealistic the Court of Appeal's finding that Weatherford was in fact a member of the prosecution.[30] The Court was further constrained by the nature of the investigating authority:

> We have no general oversight authority with respect to state police investigations. We may disapprove an investigatory practice only if it violates the Constitution; and judged in this light, the Court of Appeals' per se rule cuts much too broadly.[31]

The dissenting opinion of Justice Marshall joined by Justice Brennan criticized the allowance of the "narrowest of openings" to the practice of spying on attorney-client communications, citing the threat to the integrity of the adversary system and the right to the effective assistance of counsel.[32] The opinion emphasized the factors important to the right to effective assistance of counsel and the harmful effect of the majority ruling on this right. Justice Marshall stated,

> In my view, the "balance of forces between the accused and his accuser" is sharply skewed in favor of the accuser if the Government's key witnesses are permitted to discover the defense strategy by intercepting attorney-client communications, even if the witnesses cannot divulge the information to the prosecution. With this information, the witnesses are in a position to formulate in advance answers to anticipated questions, and even to shade their testimony to meet expected defenses. Furthermore, because of these dangers defendants may be deterred from exercising their right to communicate with their lawyers if government witnesses can intrude with impunity so long as they do not discuss what they learn with the prosecutor.[33]

The majority's rule requiring intent or disclosure was criticized as not leaving the needed " 'breathing space' " necessary to the survival of the sixth amendment in view of the difficulties of proof involved.[34] The dissent also argued that the per se rule derived by the Court of Appeals "was supported, if not compelled" by *Black* and *O'Brien*.[35] This argument was based on the fact that the Court remanded the cases for new trials in spite of the Solicitor General's statements that no tainted evidence had been used in the prosecution of the cases.

29. *Id.* at 843.
30. *Id.* at 844.
31. *Id.* at 845.
32. *Id.* at 847.
33. *Id.* at 848, (footnote omitted).
34. *Id.* at 848-849.
35. *Id.* at 849.

ANALYSIS OF THE DECISION

The majority recognized that a right to confidential communication exists but ruled that when an intrusion occurs, unless the government attempted to or did in fact exploit the counsels of the defense, no deprivation of that right has occurred. It reached this conclusion after recognizing the obvious prophylactic effectiveness of the per se rule and balancing it against the necessity of undercover police work.

While the majority and dissent agreed as to the existence of a right to the effective assistance of counsel, the dissent found that the right not only prohibited the use or attempted use of the attorney-client relationship to the detriment of the client, but also mandated the maintenance of a sterile environment within which the relationship could operate. It based its reasoning on the difficulties of proving intent or disclosure. In response to this the majority stated,

> Nor do we believe that federal or state prosecutors will be so prone to lie or the difficulties of proof so great that we must always assume not only that an informant communicates what he learns from an encounter with the defendant and his counsel but also that what he communicates has the potential for detriment to the defendant or benefit to the prosecutor's case.[36]

The reasons for this belief are not spelled out in the decision but analysis of several hypothetical situations involving undercover agents present at uninformative defense counsels is undertaken. Justice White concludes that in these hypotheticals, even though no realistic possibility of injury to the defendant or benefit to the government would exist, the per se rule would require reversal.[37] This would indicate that the majority was unwilling to accept the presumption of detriment as constitutionally mandated.

The dissent argued for acceptance of the presumption of detriment based on intangibles such as the ability of undercover agents to plan their testimony and the chill that might result from requiring prejudice or intent. The majority weighed the requirements of the sixth amendment against the day to day realities of law enforcement. The Court's exercise of its option to require retrial in *Black* and *O'Brien* was a concession to the right to counsel. To find this concession constitutionally mandated by the sixth and fourteenth amendments is to go much further. In *Mapp v. Ohio*[38] and *Miranda v. Arizona*[39] the Court

36. *Id.* at 844.
37. *Id.* at 845.
38. 367 U.S. 643, 651-655 (1961).
39. 384 U.S. 436, 445-458 (1966).

found that the Constitution did proscribe certain investigative and prosecutorial procedures. Each case was solidly founded on a firm factual base. The fears expressed by the dissent fall well short of the foundations present in *Mapp* and *Miranda*.

THE INTRUSION THREAT TO THE SIXTH AMENDMENT

The brief per curiam opinions of *Black* and *O'Brien* are scant authority for any rulings on sixth amendment rights. Lower court decisions on the issue reveal interesting logic. The First,[40] Second,[41] Fifth,[42] Seventh,[43] Eighth,[44] and Ninth[45] Circuits have all required a showing of prejudice or intentional intrusion. Some find that where the information was arrived at unintentionally, there was no intrusion.[46] Others seem to base their exclusion of tainted evidence on an analogy to search and seizure law which requires suppression of evidence derived by illegal means unless the evidence can be purged of taint.[47] The circuit court decision in *Bursey*, its District of Columbia Court precedents,[48] and the Third Circuit[49] in requiring neither intent nor prejudice rely chiefly on the statement in *Glasser v. United States*[50] concerning the denial of the accused's request for the undivided assistance of counsel. The Court stated that,

40. Grieco v. Meachum, 533 F.2d 713, 718 (1st Cir. 1976); Taglianetti v. United States, 398 F.2d 558, 569-571 (1st Cir. 1968). *aff'd*, 394 U.S. 316 (1969).

41. United States v. Arroyo, 494 F.2d 1316, 1323 (2d Cir. 1974), *cert. denied* 419 U.S. 827 (1974); United States v. Rosner, 485 F.2d 1213, 1224 (2d Cir. 1973), *cert. denied* 417 U.S. 950 (1974); United States v. Lebron, 222 F.2d 531, 534 (2d Cir. 1955), *cert. denied* 350 U.S. 876 (1955).

42. United States v. Brown, 484 F.2d 418, 425 (5th Cir. 1973), *cert. denied* 415 U.S. 960 (1974); United States v. Bullock, 441 F.2d 59, 64 (5th Cir. 1971); United States v. Zarzour, 432 F.2d 1, 3 (5th Cir. 1970).

43. United States v. Seale, 461 F.2d 345, 364-365, (7th Cir. 1972); United States v. Balistrieri, 403 F.2d 472, 477-478 (7th Cir. 1968), *cert. denied*, 402 U.S. 953 (1971).

44. United States v. Crow Dog, 532 F.2d 1182, 1197 (8th Cir. 1976); South Dakota v. Long, 465 F.2d 65, 72 (8th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973); Kaufman v. United States, 350 F.2d 408, 416 (8th Cir. 1965), *rev'd on other grounds*, 394 U.S. 217 (1969).

45. United States v. Choate, 527 F.2d 748, 751-752 (9th Cir. 1975); United States v. Scott, 521 F.2d 1188, 1192 (9th Cir. 1975); *see also* 1975 DUKE L.J. 1164.

46. *See, e.g.*, United States v. Rosner, 485 F.2d 1213, 1224 (2d Cir. 1973).

47. *See, e.g.*, United States v. Balistrieri, 403 F.2d 472, 478 (7th Cir. 1968).

48. Caldwell v. United States, 205 F.2d 879, 881 (D.C. Cir. 1953); Coplan v. United States, 191 F.2d 749, 757-760 (D.C. Cir. 1951).

49. United States v. Venuto, 182 F.2d 519, 522 (3d Cir. 1950).

50. 315 U.S. 60 (1942).

> To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of [his defense attorney] as counsel for [his co-defendant] is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from denial.[51]

The propriety of remand was also attacked by the Supreme Court of Washington in *State v. Cory*.[52] It pointed out that information gained in the first trial through intrusion into the accused's relation with counsel could be used in subsequent trials. The court therefore concluded that in such cases the proper remedy is the setting aside of the judgment and dismissal of the charges.[53]

The choice of a rule which would preclude the harmful effects of intrusion on the attorney-client relationship must logically begin by identifying these effects. There are three major dangers which must be considered: knowledge that the formulation of his defense may be used as an opportunity to obtain evidence may deter defendants from the full disclosure necessary in that situation;[54] the discovery of defense strategy may give the prosecution a tactical advantage at trial;[55] evidence may be produced from the leads obtained at the conferences.[56] The harmful effects of the intrusion are generally related to the information acquired thereby. It is the use of the ill-gotten information or the fear of its use that must be countered. This is quite different from cases such as *Glasser* and *United States v. Venuto*.[57] In *Glasser* the court, over defendant's objections, required counsel for the defendant to represent a co-defendant with possible conflicting interests. In *Venuto* the question was one of deprivation of the right to consult counsel during an eighteen hour recess. Neither of these cases involved the acquiring of information by exploitation of the attorney-client relationship, but instead are direct impediments to the effective assistance of counsel.

Intrusion cases pose a different type of threat to the right to effective assistance of counsel than do cases such as *Glasser* and *Venuto*. This difference makes it apparent that a more

51. *Id.* at 75-76.
52. 62 Wash. 2d 371, 382 P.2d 1019 (1963).
53. *Id.* at 377, 382 P.2d 1022, 1023. In reaching its conclusion the court was analyzing *inter alia, Coplon* and *Caldwell*, see n.16 *supra*. Whether they would advocate the same results in cases of unintentional intrusion is not indicated.
54. 97 S. Ct. at 848 (dissenting opinion).
55. *Id.*
56. Black v. United States, 385 U.S. 26, 28 (1966).
57. 182 F.2d 519 (3d Cir. 1950).

appropriate rule to control this threat is needed. Analysis of the Court's response to the intrusion threat to the sixth amendment must be undertaken in light of the operation of the other pertinent rules in the area. It is established that where the right to a fair retrial would be prejudiced by information obtained in the intrusion, dismissal of charges should be ordered.[58] Where the rule requiring a showing of prejudice, disclosure or intent would not require a new trial, if, from the facts, it appears that justice requires a new trial, the court may afford the accused that opportunity.[59] Finally, the presence of illicit evidence would make applicable by analogy the rules pertaining to the discovery and exclusion of such evidence in subsequent actions.[60]

In operation, whenever a court finds intentional intrusion into defense councils without intent to exploit, the court would remand the case for a new trial. If it appeared that the prosecution had insinuated itself into the defense to such an extent as to make problematic the fairness of a retrial, a dismissal would be ordered. In those cases the Court's rule does not differ from the per se rule in its results and its ability to preclude the harmful effects of intrusion. As noted in the dissent of *Weatherford*, the burden of proving the intent is not without its problems,[61] but cases such as the District of Columbia Circuit's *Coplan v. United States*[62] and *Caldwell v. United States*[63] do show the plausibility of producing such proof. Where unintentional intrusion is shown, the court would determine the extent and nature and make an evidentiary determination as well as a determination as to the loss of tactical advantage. It would then dismiss the charges if it found that the unintentional intrusion had been excessive; declare a mistrial or remand for a new trial, if it found that any information had been used by the prosecution or that justice would best be served by this course of action; continue to a verdict or deny a new trial if no prejudice was found. These determinations would prevent the use of leads in obtaining evidence and the use of any tactical advantage by the prose-

58. Hoffa v. United States, 385 U.S. 293, 308 (1966); Caldwell v. United States, 205 F.2d 879, 881-882 n.11 (D.C. Cir. 1953).
59. Black v. United States, 385 U.S. 26, 28-29 (1966).
60. *See generally*, Alderman v. United States, 394 U.S. 165 (1969).
61. 97 S. Ct. at 849.
62. 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952).
63. 205 F.2d 879 (D.C. Cir. 1953).

cution where it could be proved. In preventing the use of information gained through intrusion on defense preparation, the possible "chill" on the client's willingness to make full disclosure should be eliminated.

The per se rule would certainly be more effective than the Supreme Court rule in alleviating the defendant's burden of proof. The trade off, however, does not justify the application of the per se rule. As the Court pointed out, the per se rule would require an informant to refuse to attend attorney-client meetings with his supposed confederates. This would have the effect of disclosing his identity.[64] It would also require that legal eavesdropping in furtherance of unrelated investigations be terminated for fear of overhearing part of a discussion between the accused and his counsel. The strong policy in favor of undercover work in effective law enforcement and continued secrecy after arrest as recognized by the Court,[65] would suffer.

The per se rule, in finding a violation of the sixth amendment even without a realistic possibility of prejudice goes beyond the scope of federal authority. Application of a per se rule by federal courts could be required by the Supreme Court in the exercise of its oversight authority. To exact such a standard of state courts, however, would be an undue hindrance of state investigatory powers.[66]

The case of intrusion into the councils of the defense is more analogous to fourth amendment eavesdropping than it is to other denial of right to the effective assistance of counsel cases such as *Powell v. Alabama*.[67] The harm to be guarded against is the illegal acquisition of information. Rules for precluding this danger have been well developed in the fourth amendment setting.[68] The per se rule, while required where the effective assistance of counsel is hampered as in *Powell, Glasser* and *Venuto*, is out of place in the setting of *Weatherford*.

The right to consult privately with counsel is central to the right of effective assistance of counsel. Like all rights, however, it is not an absolute and must operate within limits. In arriving at the rule requiring intent or prejudice in invasion of the coun-

64. 97 S. Ct. at 844; *see also* n.12 *supra*.

65. 97 S. Ct. at 844-845 citing United States v. Russell, 411 U.S. 423, 432 (1973); Lewis v. United States, 385 U.S. 206, 208-209 (1966); and Roviaro v. United States, 353 U.S. 53, 59, 62 (1957).

66. *Id.* at 845.

67. 287 U.S. 45 (1932).

68. *See*, the Omnibus Control and Safe Streets Act of 1968, 18 U.S.C. § 2518 (8)(d) which provides for informing subjects of wire taps.

cils of the defense, the Court took a flexible approach in response to the distinct threat to the sixth amendment. Analysis indicates that it will prove to be a viable safeguard.

MINIMIZING THE DETRIMENTAL IMPACT ON THE DEFENSE

The problems posed to the defendant by the Court's ruling are not insurmountable. The fact that means of overcoming these problems are available to the courts through the exercise of judicial discretion provides additional justification for the requirement of intent, disclosure, or tainted evidence.

The problem of possible police perjury is, of course, not unique to the sixth amendment. The obstacles this problem presents to the exclusionary rule are extremely serious.[69] The direct involvement of the legal profession in the form of the prosecution, however, would provide a basis upon which to hope for an even smaller probability of perjured testimony. A logical method of decreasing the burden on the defense in cases where the government has unwittingly or out of the necessities of law enforcement intruded on the lawyer-client relationship can be arrived at by operation of the exclusionary rule with the "fruit of the poisonous tree" doctrine.[70] Since any exploitation of the lawyer-counsel relation would be unconstitutional, the existence of an intrusion would be equivalent to an illegal search or an unconstitutionally acquired confession. Unless the prosecution could carry the burden of proving an independent source[71] or that the causal connection was so tenuous as to "dissipate the taint"[72] the evidence should be excluded. Placing the burden on the prosecution to prove the propriety of its evidence is certainly warranted since it is the needs of the public for law enforcement or the unintended intrusion of the investigators acting for the government which cause the production of the tainted evidence.

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69. *See*, Grano, *A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury*, 1971 U. ILL. L.F. 405; and Sevilla, *The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839 (1974).

70. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), and Nardone v. United States, 308 U.S. 338, 341 (1939).

71. 251 U.S. at 392.

72. 308 U.S. at 341.

SUMMARY

The Court's ruling is a viable compromise between the requirement for effective assistance of counsel and the threat posed by the intrusion on that relationship. The defense attorney faces a potential problem with the burden of proof. To prevent the necessities of investigatorial practices from unduly hampering the defense and the attorney-client relationship, liberal relief should be granted within the framework provided by the Supreme Court. It is urged that the burden of proof be allocated in such a manner as to minimize the detriment to the defendant.

PAUL H. VOSS