ORIGINAL

In the

Supreme Court of the United States

Jack M. Weatherford, etc., et al.,

Petitioners,

v. No. 75-1510

Brett Allen Bursey,

Respondent

Washington, D. C.
December 7, 1976

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JACK M. WEATHERFORD, etc., et al., Petitioners, v. BRETT ALLEN BURSEY, Respondent.	No. 75-1510

Washington, D. C.,

Tuesday, December 7, 1976.

The above-entitled matter came on for argument at 10:41 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOSEPH CROUCH COLEMAN, ESQ., Deputy Attorney General of South Carolina, P. O. Box 11549, Columbia, South Carolina 29211; on behalf of the Petitioners.

ANDREW L. FREY, ESQ., Deputy Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; on behalf of the United States as amicus curiae.

LAUGHLIN McDONALD, ESQ., 52 Fairlie Street, N.W., Atlanta, Georgia 30303; on behalf of the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 1510, Weatherford against Bursey.

Mr. Coleman, you may proceed whenever you're ready.

ORAL ARGUMENT OF JOSEPH C. COLEMAN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. COLEMAN: Mr. Chief Justice, and may it please the Court:

I'm going to take a little of my time to review the facts, which I realize are already in the record. However, I do think it important for this reason: to show a little more clearly the relationship between the two principals in this case -- and when I say the two principals, I'm speaking of Weatherford and Bursey; although, of course, Strom is a defendant and was the South Carolina Law Enforcement chief.

These events occurred, the events leading up to this litigation occurred in 1970, approximately at the end of a period of several years of dissension on the college campuses of this country and, I believe, other parts of the world as well.

Weatherford was a salaried undercover police agent. I think that's important to remember in this case; not controlling, but important. He has been referred to in the case as a paid informer, and I guess in the broad sense he was. But, nevertheless, he was a hired salaried member of the

South Carolina Law Enforcement Division, assigned to undercover work, as opposed to an informer who might be paid by the job or by the person he turned in; he was not that type of individual.

He was also a student at the University of South Carolina. His principal assignment was to report to the other defendant Strom, who was and is the chief or head of the South Carolina Law Enforcement Division, which is, of course, the chief police agency or the State Police of South Carolina, other than the State Highway Patrol.

The plaintiff Bursey -- plaintiff below Bursey, of course, was a student at the University of South Carolina. And the two became very close friends. They were not simply acquaintances. They visited each other in their homes. They associated with each other in various campus activity groups. I believe the testimony in the record shows that, at least on one occasion, Bursey and Weatherford were co-chairpersons of an AWARE group on the campus of the University of South Carolina.

The record will show further, I think, that Weatherford later married a very close friend, the roommate of Mr. Bursey's wife. So they were much closer than mere acquaintances, and we think that that is important in this case.

This association went on and, of course, Bursey was completely without any knowledge that Weatherford was an under-

cover agent. And the two, together with two other persons who do not really enter this case, except that they participated in the event, in March of 1970, in order to demonstrate their opposition to the Vietnam War, afflicted considerable damage to the personal property and the real property of the Selective Service office, the draft board in Columbia, South Carolina.

Admittedly, Strom, the police chief, had been given prior notice of this crime by Weatherford. Weatherford did participate with Bursey and two others in the crime. And, although there were police agents in the building, who had been placed there in order to either stop the crime or capture the criminals, were unable to do so; and the four persons escaped.

That was early in the morning hours, I believe, of March 20, 1970. Later that same day, from information furnished to Chief Strom by his undercover agent Weatherford, Weatherford and Bursey were arrested on the campus of the University of South Carolina, charged with the crime of mallicious destruction of personal and real property. A statutory crime under the laws of South Carolina.

Both were jailed on the same charge, and Weatherford soon thereafter was released through an arrangement made by Strom, and Bursey stayed in jail, I believe, for some 12 days before he was able to put up bond and obtain his release.

Thereafter, and I think the record is clear on this from certain testimony, although there was not a specific

finding of fact by the trial judge on this particular point, it was decided, and it was desirable from the State's viewpoint, to have the undercover agent Weatherford continue as an undercover agent on the University of South Carolina campus, as long as he could. Because he was a valuable man, according to the testimony, and at that time, I believe the testimony is that he was the only agent, only undercover agent on the University of South Carolina campus in the employ of SLED.

It would have been impossible, with the very close relationship between Weatherford and Bursey for Bursey to have been -- to reveal himself, it would have been impossible for him to do anything unusual without raising very great suspicion. And in order to see that Weatherford was not forced to deal with Bursey's lawyer, or he was not forced to make, maybe, an explanation as to why he did not wish to be represented by Bursey's lawyer, an explanation that would hardly have been plausible, the State Solicitor, John W. Foard, arranged -- which was admittedly a false arrangement, for one -- for a local attorney, Frank Taylor, in Columbia, a well-known attorney, to pose as Weatherford's attorney in this particular charge.

QUESTION: The State Solicitor, was he a county or State official?

MR. COLEMAN: He is a Circuit Solicitor, and the particular Circuit he serves has two counties in it. South

Carolina has 16 different Circuits, varying in size from two counties to five.

QUESTION: I see. He was the prosecutor, though?

MR. COLEMAN: He was the prosecutor.

QUESTION: He would be like a County Prosecutor or District Attorney, except his jurisdiction was two counties?

MR. COLEMAN: That's right. South Carolina law, his title is Solicitor, although it is --

QUESTION: Right. I just wanted to be sure I understood what his office was.

MR. COLEMAN: Yes, sir.

He arranged for this false representation or dummy representation, however it might be put, by Attorney Taylor, of Weatherford; and that's admittedly for the purpose of maintaining Weatherford's cover.

Thereafter, both men went about their normal life, with the exception -- or the inclusion; whichever it might be -- of two meetings. There's some mention of maybe a third meeting, but no particular testimony with regard to the details. I think the testimony, read as a whole, indicates there were two meetings at which Bursey was present, his attorney, a Mr. Wise from Greenwood, South Carolina -- approximately 70 miles from Columbia -- was present, and of course Weatherford was present.

QUESTION: And Bursey is now out on -- released on bond, pending trial?

MR. COLEMAN: He was released on appeal bond, yes, Mr. Justice.

QUESTION: Not appeal bond, is it?

MR. COLEMAN: No, not appeal bond, I beg your pardon; on bond --

QUESTION: Pending trial? Before trial?

MR. COLEMAN: Yes, sir. He was on bond, I think it was $12,500.

QUESTION: And is Weatherford also purportedly out on bond?

MR. COLEMAN: Purportedly out on bond. That was admittedly not a true situation. Yes, sir.

QUESTION: Unh-hunh.

MR. COLEMAN: There were two meetings involving the plaintiff Weatherford -- the plaintiff Bursey. Weatherford and Bursey's attorney Wise.

One was at a party at Bursey's house. I believe it's described as an ACLU party. It makes no difference, except that it was a social event. And during that course of that social event, I believe the testimony is that Weatherford and Bursey and Bursey's attorney Wise got away from the majority of the crowd, somewhere out in the field somewhere, and did go into a discussion of this particular case.

There was a finding of fact by the Circuit Judge that Weatherford never did categorically and specifically deny that

he was an agent. There was, quite naturally, in a case like this there would be, and there was in this case, a general discussion between the three as to whether or not an informer or an undercover agent or something of that nature might be involved in the case.

There was some discussion by Weatherford of that, in response to discussions by the other two. Weatherford, I believe, did state, upon maybe this occasion, maybe another, but he did state that he would not testify in the case against Bursey.

That would normally come up, because, I think, in every criminal case involving multiple defendants, there's always the question of whether one is going to be approached by the authorities and asked to turn State's evidence in a plea-bargaining situation. And Weatherford denied that -- I think it was necessary that he do so. He had to do that, or either state that he was going to testify. And had he made such an assertion as that, I am quite sure that his cover would have disappeared completely and he could no longer have operated as an undercover agent on the campus.

And I think that's true, whether or not Bursey and his attorney might have deducted from that fact that Weatherford was an agent. His effectiveness certainly would have disappeared, whether he was an agent or whether he simply was going to testify, to save his own skin at the trial.

I think it's clear that this meeting was without question arranged by Bursey. It was not sought out by Weatherford, not in any degree.

And with the closeness, the close personal relationship of these two men, it would have been impossible for Bursey to avoid such occasional contacts as these.

I think, rather than it being against Weatherford, it's rather to his credit that he limited such meetings to only two during this nearly four-month period between the time of the crime and the time of the trial.

On the only other occasion, as I recall the evidence, that there was a meeting between the three -- that is, Weatherford, Bursey, and Bursey's attorney -- it was on an occasion that was brought about entirely by Bursey and his attorney Wise.

The testimony shows that -- and their own testimony shows that they came to Columbia without having made prior arrangements, or even given prior information to Bursey that they were coming -- I mean, to Weatherford, that they were coming. And went to Weatherford's residence, and he was not there. They guessed that he might be at the house of a friend of Weatherford, went there, and, as it turned out, he had been there and would return very soon, and did return.

QUESTION: Let me interrupt you just a moment, Mr. Coleman, if I may. I take it you're going to devote some time

to telling us, or suggesting, that, even assuming that there were constitutional or other violations, which would have led to -- supported a reversal of the conviction, there is no basis for a civil action for damages.

MR. COLEMAN: Yes, sir.

QUESTION: You're going to get to that?

MR. COLEMAN: Yes, and I will very, very quickly.

I was simply going over these facts, to support really our first proposition: that these circumstances do not constitute an intrusion at all; that there was no intrusion; that there was a presence by Weatherford at these two conferences, they were necessary presences. They were necessitated by a legitimate State interest of the State, to maintain Weatherford' cover, and, of course, his own legitimate interest to maintain that cover; plus the fact that there was some fear in some people's minds that his life might be endangered if his cover had been blown at that point.

Now, the Fourth Circuit does hold, as we read it, as I read it, that the mere presence of Weatherford at these attorney-client meetings constituted a per se Sixth Amendment violation of the effective assistance of counsel.

And the Black and O'Brien cases are cited as authority for that proposition. The Coplon and Caldwell cases from the District of Columbia Circuit are cited in support.

We do not agree that Black and O'Brien stand for such

a per se proposition.

As far as this particular point is concerned, that is, the violation of the constitutional right to effective assistance of counsel, I can't see -- although I stand to be corrected -- that it makes a lot of difference whether this Court sent those cases back simply for a hearing on whether or not there was damage or prejudice, or whether they sent them back for a new trial, really, for the same purpose. I think it's the same thing, in so far as this particular point is involved.

QUESTION: The only technical difference, as I remember it, was that the Court, as such, set aside the convictions and Mr. Justice Harlan and I would not have done so, would have allowed the trial judge to make a determination of whether or not there was any taint, and allow him, in his discretion, to set aside the convictions if he found that there was taint; but I think you're right to take --

MR. COLEMAN: Prejudice, as I recall it. Yes, sir.

QUESTION: But, in any event, at most, that was -- even what the Court did, was to set aside the convictions and then, for a determination of how much, if any, taint there had been of the Sixth Amendment right to counsel; isn't that it?

MR. COLEMAN: That is exactly our point. That Black and O'Brien are simply not support of the --

QUESTION: For any per se rule?

MR. COLEMAN: Of any per se rule; yes, sir. Exactly.

QUESTION: Because it had been conceded that there had been electronic surveillance in the one case -- do both cases involve electronic surveillance?

MR. COLEMAN: I think one case involved the intrusion of a police agent of some description, --

QUESTION: Unh-hunh, and the other was electronic surveillance in one of the Washington, D. C., hotels, isn't that right?

MR. COLEMAN: I believe that Black -- the Black case involved an electronic surveillance; yes, sir.

QUESTION: Right.

MR. COLEMAN: And, of course, I think both Coplon and Caldwell did involve electronic surveillance cases.

We submit, further, that the facts of the Coplon-Caldwell cases and the O'Brien and the Black cases are so far different from the facts in this Bursey case as to make them in applicable in any event.

In those cases there was a deliberate, admitted, affirmative intrusion by the government on the attorney-client relationship. It was certainly not necessitated by any legitimate government interest, as we think the case is in Bursey.

QUESTION: What's the governmental interest here,

in having this man sit down at the conference between lawyer and client?

MR. COLEMAN: Justice Marshall, we do not claim that as being a legitimate State interest. We simply that the --

QUESTION: Well, how do you defend it?

MR. COLEMAN: We say that the maintenance of the identity of the agent Weatherford, or the maintenance of his cover, was the legitimate State interest.

QUESTION: And that's sufficient to override a federal constitutional interest?

MR. COLEMAN: We -- well, we think, of course, the federal constitutional issue is there. We say that --

QUESTION: Well, couldn't they have said that you may maintain your cover, but just pick a fight with him and say you don't want to talk to him any more?

MR. COLEMAN: That, ofcourse, could have been done, sir.

QUESTION: That's right. You didn't have to sit down twice -- not once, twice.

MR. COLEMAN: However, as you say, it is our position that this was necessary in those circumstances to --

QUESTION: Just like putting the spike in the wall and they called up the hotel was necesaary on the Black case.

MR. COLEMAN: No, sir, I can't agree that it's analogous, although I see your point.

QUESTION: This is not the only agent that they have in South Carolina, is it?

MR. COLEMAN: Not in South Carolina. As I understand it, however, and I remember --

QUESTION: How long had he been an agent?

MR. COLEMAN: Oh, short of a year or something like that.

QUESTION: Well, there might have been some others that could have done it.

MR. COLEMAN: Yes, there could have been another agent.

QUESTION: I mean, rather than to sit through what you -- you admit that it was wrong?

MR. COLEMAN: I admit that I wouldn't have done it. I can't say it was wrong in those circumstances.

QUESTION: It's not wrong for the government to have a government agent sitting down at a conference between a lawyer and a client?

MR. COLEMAN: I cannot say that I feel that that is --

QUESTION: Well, let's say, it is immoral?

MR. COLEMAN: Not in those circumstances.

QUESTION: Is it "dirty pool"?

MR. COLEMAN: Not in my opinion, in those circumstances.

QUESTION: Is it good?

MR. COLEMAN: I don't think it's good. I wouldn't consider it good, no, sir.

I, however, think it's necessary.

QUESTION: In between?

MR. COLEMAN: Yes, sir. Well, I think it's necessary. And, unfortunately, of course, the use of undercover agents is necessary in police work, I feel. And I do feel that what was done in this case was necessary, and it did not and cannot be characterized as the petitioner -- I mean as the plaintiff below, Bursey, has attempted to characterize it, as a deliberate effort on the part of the State of South Carolina to mislead Bursey. It was not that. It has no -- there's no possible way that it can be characterized as that, as I can see it.

QUESTION: Mr. Coleman, I come back to my prior point. You've used 22 of your 30 minutes, --

MR. COLEMAN: Yes, sir.

QUESTION: -- and you haven't got to the question of whether, assuming all these things, there is a damage action available.

MR. COLEMAN: Well, the only case cited by the Fourth Circuit in support of the rule that there would be a damage action is the, I believe, Via v. Cliff from the Third Circuit. And that case is supported --is reported in support of the Fourth Circuit's holding that there can be a 1983 action, even though there might not be provable damage to the defendant.

to the criminal defendant in the case.

QUESTION: That case was decided at the district court level not on the papgers, not on a motion, but after a trial, wasn't it?

MR. COLEMAN: That's correct, sir. That's correct, sir.

QUESTION: And then the judgment was for the defendants.

MR. COLEMAN: It was for the defendants. I think, however, --

QUESTION: And that was reversed by the Court of Appeals, without --

MR. COLEMAN: I believe that's correct.

QUESTION: So there's been no assessment of damages, or anything like that.

MR. COLEMAN: No, sir. I believe that's correct.

In that case, however, the Court, in that case, said that -- what was done there, of course, was not an intrusion into the client-attorney relationship, it was, I believe, an action by a prison head and some guards to cut off prematurely a conference between a murder defendant, I believe it was, and his attorney.

And it was alleged there that that was an unlawful, unconstitutional interference with the --

QUESTION: Going back to Mr. Bursey's situation, were all of these claims which are made as a basis for a 1983 damage

claim available as challenges to the validity of his conviction originally?

MR. COLEMAN: I don't know when --

QUESTION: Well, do you --

MR. COLEMAN: Yes, sir, they would be, because he was the -- Weatherford was the very first witness. Now, of course -- at the criminal trial. That's --

QUESTION: Well, Bursey was convicted.

MR. COLEMAN: Bursey was convicted.

QUESTION: And he took no appeal.

MR. COLEMAN: He took no appeal.

QUESTION: He fled the State actually, didn't he?

MR. COLEMAN: Beg pardon, sir?

QUESTION: He fled the State, didn't he?

QUESTION: He was a fugitive.

MR. COLEMAN: Oh, yes, he did flee the State after -- after his conviction. He put up an appeal bond, and was released, and thereafter fled the State, and was not apprehended for approximately two years.

QUESTION: Then he did come back and serve his sentence?

MR. COLEMAN: He was apprehended, came back and served his sentence.

QUESTION: And then --

MR. COLEMAN: Then, after that, --

QUESTION: -- did not appeal, as the Chief Justice said?

MR. COLEMAN: Did not appeal; did not appeal his criminal conviction.

QUESTION: But could he have appealed when they brought him back, after three years --

MR. COLEMAN: I think not, sir. I think the appeal time would have expired then. However, he didn't flee immediately. There was ample time, and I think the record will show there's testimony that appeal was discussed between Mr. Bursey and his attorney. And it was decided by the attorney that the appeal would be fruitless, and therefore that it would not be made.

QUESTION: You didn't plead a res judicata or collateral estoppel in your pleadings in the District Court, did you?

MR. COLEMAN: No, we did not, sir.

QUESTION: And there are still proceedings to go in the district court?

MR. COLEMAN: Well, --

QUESTION: With respect to qualify -- to immunity?

MR. COLEMAN: -- the Fourth Circuit, of course, has remanded it.

QUESTION: Yes, so that an immunity claim, a good-faith immunity claim is still open to you?

MR. COLEMAN: The Fourth Circuit indicates that the other defenses, not originally raised, would be -- might be open.

QUESTION: Might. It said it was, didn't it?

MR. COLEMAN: Yes, I believe so.

QUESTION: Yes.

MR. COLEMAN: Yes, sir.

I would hope that that is an explanation of our position on that particular point.

The other big question, of course, with the fair trial issue, and the Fourth Circuit ruled, as we understand it, that the simple neglect or -- of the State to inform the defendant Bursey or his attorney that there was an eye-witness in the case, which had not been previously known, was sufficient, in itself, to constitute unfair trial, and a violation of the constitutional right. And of course would have supported a reversal of the conviction.

QUESTION: Well, I take it, your position, the State's position, is that the only remedy that Mr. Bursey had was to take an appeal, and then, perhaps, if he got his conviction reversed upon these grounds, then he might conceivably have a different cause of action from the one the Fourth Circuit has now.

MR. COLEMAN: That is certainly a possibility. I have not thought out that process to the point of taking that firm a

position. Our position, of course that's No. 1; No. 2 is that, even if he had -- could show a violation now that the action has been brought, we took the position in the Circuit Court that it did not state a cause of action. Of course, that was overruled by the Circuit Court.

The third issue decided by the Court, which I wish to get to very briefly, is the liability of Chief Strom as opposed to that of Weatherford. It's clear, I think, that the defendant Strom did not know that Weatherford was actually attending conferences between Bursey and his attorney. He did know, and he did order, of course, the maintenance of the cover, and that he was fully aware of the fact that Weatherford was going about his business and had not revealed these things to Bursey.

But the record is clear that he did not know that there was any conference between the attorneys -- Mr. Bursey and his attorney. And we feel that the Fourth Circuit was clearly in error in ruling that he either did know or should have known it in those circumstances. We think the Fourth Circuit puts the knowledge of Strom on the wrong set of circumstances. It puts the knowledge of Strom on the fact that there was a maintenance of the cover, when it's clear that there was no knowledge on the part of either Strom or the Solicitor Foard for that matter, that there had been attorney-client attendances by Weatherford.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Coleman.

Mr. Frey.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. FREY: Mr. Chief Justice, and may it please the Court:

In reading through the briefs of this case and the opinions below, one is struck by an almost schizophrenic character that the case has assumed. It has, in effect, three different faces.

First is the case described in the findings and conclusions of the District Court. Central among them, the finding that the State's motive in allowing petitioner Weatherford to proceed as he did, was to protect his cover so that he could continue investigations of other matters.

Secondly, that the State initially hoped to make its case against the respondent without Weatherford's testimony, and that the decision to call him as a witness at trial was a last-minute decision by the prosecutor.

Third, that Weatherford's role in the conversations with respondent and his lawyer was limited, involved no attempt to secure defense strategy information, and entailed discovery of little that was surprising or highly significant about respondent's defense strategy.

And fourth, that no information acquired by Weatherford during these meetings was conveyed to the prosecutor.

Now, the second case is that perceived by the Court of Appeals, which accepted virtually all of the facts found by the district court, but applied a radically different legal analysis.

QUESTION: Including the facts, those basic facts you've just stated; --

MR. FREY: Yes.

QUESTION: -- those were accepted by the Court of Appeals, weren't they?

MR. FREY: They were all accepted.

QUESTION: Yes.

MR. FREY: But substituting certain per se requirements for the balancing of interest approach that the district court took.

Now, the third case is that painted by respondent in his brief in this Court. The case of malevolent contrivance by the State to spy upon and sabotage his defense.

Our position in this case is based essentially on the facts found by the district court, and our concern in this case is with the legal principles announced by the Court of Appeals to govern those facts.

Accordingly, I will not address at any length the factual controversies with which this Court is confronted,

except to make two observations in passing.

The first is that it seems to me difficult to sustain the notion that petitioner's actions in this case were motivated to any significant degree by an attempt to secure advantage over respondent in his prosecution.

With petitioner Weatherford's testimony available, the State's case was secure. And it's difficult to perceive as a practical matter how the State could have imagined it would strengthen its case by non-disclosure of Weatherford's status.

The second point seems to me quite ironic, in light of respondent's present posture in this case. The disclosure of Weatherford's status as an agent of the State Police, far from helping respondent's defense, was fatal to it.

Respondent's best hope of acquittal lay in a decision by the prosecution to maintain Weatherford's cover past the trial, rather than to reveal his status by allowing him to testify. Had Weatherford done what respondent now insists he should have done, the hopes for a successful defense would simply have been dashed sooner than in fact they were in this case.

QUESTION: That is, had he maintained his cover?

MR. FREY: No. Had he not maintained -- had he not maintained his cover, and had he said to Bursey --

QUESTION: He did not maintain --

MR. FREY: -- "I am an agent, I am an informer, I

am going to testify at trial".

QUESTION: Yes.

MR. FREY: But had he maintained his cover, as respondent now argues he should not have done, attempted to do at all, had he maintained his cover through the trial, respondent had a hope of acquittal and, indeed, --

QUESTION: Well, that's what I meant.

MR. FREY: -- that was respondent's trial strategy, so to speak.

QUESTION: That's what I mean.

MR. FREY: Now, turning to the legal questions, we disagree with two central ingredients of the Court of Appeals' holding. The first is the adoption of a per se prohibition --

QUESTION: Let me ask you this, just before you leave that: I read in the briefs that he ultimately, at the trial, he pretty well admitted his implication, that is, Bursey did, the defendant.

MR. FREY: Yes, he did.

QUESTION: Did he -- he did not plead guilty, did he?

MR. FREY: No, he didn't. He denied the requisite mallicious intent that was an element of the offense under the statute.

QUESTION: But did concede his participation in the episode.

MR. FREY: Yes, as indeed seemed inevitable in the

face of the prosecution's evidence at that point.

The first part of the Court of Appeals' holding to which we object is the adoption of a per se prohibition upon contact of any kind between undercover agents or informants and the defense, even where such contacts come about because of an effort to maintain an agent's cover.

The second holding to which -- with which we disagree is the requirement that the prosecution reveal in advance of trial the identity of an undercover informant who it plans to use as a witness at trial.

Now, I might say to Justice Marshall, that in our assessment of the case, we don't think that Weatherford was wrong in attending the meeting. We think it would have been desirable had that been avoidable, and certainly we think it would have been wrong for him to take any affirmative steps to insinuate himself into the defense camp. But, confronted as he was with anunexpected situation, where respondent's lawyer asked if he could interview Weatherford, which was the substance of at least one of the meetings, it seems to me that given the need to maintain the cover, which the district court found was the motive in acting here, it was not improper for Weatherford.

QUESTION: You see, I have so much difficulty with this "need to maintain cover" which was gotten rid of.

MR. FREY: Well, --

QUESTION: All this need for cover until they got this information, and then, after that, they didn't need the cover any longer. Is that true?

MR. FREY: Well, I don't think it's accurate to say that they got the information. What is an important part of the case is that they got -- "they" being the prosecution, got no information.

QUESTION: The facts are that, one, they wanted to keep the cover; two, because they wanted to keep the cover, he sat down in the meeting between Bursey and the lawyer; three, that when it got to time of trial, they decided they didn't need the cover. Those are the facts.

MR. FREY: Well, those are some of the facts. The district court found that the reason that they didn't need the cover, or the reason that they elected to abandon the cover, which is really what happened, was a fear that the cover had been blown by independent incidents.

In any event, the decision about the cover and about whether to call Weatherford as a witness was made by the prosecutor, and the findings of the district court are unequivocal and I think supported by the record that the prosecutor was not aware of any of the contacts between Weatherford and Bursey or Bursey's attorney, when he made the decision. These were two independent events.

QUESTION: Mr. Frey, what if the government had asked

the agent on the stand to testify as to what happened at the meetings between the defendant and his lawyer, and that the question was -- and the information he wanted was clearly relevant to guilt?

MR. FREY: I think that would probably be admissible.

QUESTION: Why?

MR. FREY: Well, the -- in terms of our analysis, there are two ingredients in a possible Sixth Amendment or due process, I'm not sure what the ground is -- violation for intrusion into defense's --

QUESTION: Well, you say it's inadmissible and it has to be -- and it would be inadmissible because of some constitutional reason.

MR. FREY: I think it -- yes.

QUESTION: And when did the constitutional violation occur?

MR. FREY: The constitutional --

QUESTION: When the evidence is offered or when the --

MR. FREY: It would occur when the evidence is offered. I mean, that was certainly true in Massiah, where the constitutional violation that was found by the Court there was not in conducting the further investigation of the offense, but in using, in evidence against the defendant at trial, his statements made in a period -- pretrial, post-

indictment and pretrial period.

QUESTION: But the violation is rooted in sitting in in the defense counsel.

MR. FREY: Yes, but it's not -- it's not because the sitting in is itself a violation, standing alone, in our view; it's because the utilization by the prosecution of any fruits of that activity would be a violation.

QUESTION: That is your fundamental position in this case, I take it?

MR. FREY: I think -- well, our position is twofold.

QUESTION: That's one of the --

MR. FREY: There are two --

QUESTION: That's the end of the case, if you're right, I suppose.

MR. FREY: Well, that's not necessarily the end of a civil case, the point that the Chief Justice made, which I don't believe was raised in the petition --

QUESTION: On the unfair trial?

MR. FREY: That would be the end -- that would be the end of the trial; you would have to have a new trial, at which that evidence was excluded, I think.

QUESTION: Well, on page 49 of your brief, which is near the end -- as you are near the end of your time of argument -- you say that Weatherford's testimony at trial is not an appropriate source of civil liability. Are you going to

discuss that subject?

MR. FREY: Well, that --

QUESTION: The State didn't seem to be much interested in it.

MR. FREY: Well, I had not -- we addressed it in the brief, because we felt that this was a consideration of which the Court should be aware in evaluating this case. I don't understand it to have been an issue presented by the Court, or claims raised by the State so far in the proceedings.

I am not clear on whether or not the State can raise it.

Let me just say, and it's not a matter that is of central interest to the federal government in this case, but it seems to me that whether there is a civil action depends upon what the violation was. If the violation was sitting in the meeting, as in a Bivens case the violation is the illegal search and seizure itself, then I think an independent civil action would lie, regardless of what happened in the criminal trial.

If, on the other hand, the violation was trial-related and had to do with the introduction of the evidence at trial, then, in our view, the defendant's failure to take measures that were available to him at that time might foreclose his action. It certainly would reduce his damages material.

QUESTION: When you say "take measures", you mean take an appeal from his conviction?

MR. FREY: Well, first object to the introduction of this evidence, object if it was improper for Weatherford to testify at the trial. The defendant could have objected. Had the objection been denied, he could have appealed. And, indeed, in this case I believe the district court found that even after he was recaptured, he had post-conviction relief available under South Carolina law.

QUESTION: Mr. Frey, unless the violation occurred at the time of the meeting, why would the agent ever be liable for what happened at trial? He was called by the prosecution.

MR. FREY: We suggest in our brief he would not be.

QUESTION: He's called by the prosecution and he's under an obligation to testify.

MR. FREY: Yes, we suggest that as long as he gives truthful testimony, at least, he's absolutely immune from liability.

QUESTION: Unless there's a violation at the time of the meeting.

MR. FREY: Well, yes, that -- for that he would be liable. But this is somewhat beside the point that is of -- points that are of central concern to the federal government in this case.

Now, we have no doubt that the Constitution affords

substantial protections to the confidentiality of relations between a criminal defendant and his attorney, and that this extends to many facets of defense strategy planning. But we can't agree that this right of confidentiality is so sweeping as to prohibit virtually any contact between government agents and the defense, regardless of the government's reasons for permitting a situation in which such contact comes about, regardless of the nature of the contact, and regardless of the impact that the contact actually has upon the fairness of the criminal trial.

So when the Court of Appeals stated that it was of no consequence, that the intrusion here was not for the purpose of information but was to maintain Weatherford's cover, we think it unjustifiably slight in important societal interest in protecting the flow of information about crime to law enforcement authorities and the safety of undercover agents and informants.

Now, we've argued in this case that certain critical factors must be examined in determining whether a Sixth Amendment violation has occurred. The most important of these is whether the so-called intrusion into defense counsel is active or passive.

A violation should be found, in our view, whenever there's been a deliberate effort to penetrate the defense camp, so that the prosecution may acquire defense strategy informa-

tion that can aid it in its adversarial struggle.

This is hopefully a --

QUESTION: What kind of a violation are you addressing now?

MR. FREY: Well, I think that would be the situation, I think, Caldwell and Hoffa would be --

QUESTION: A constitutional violation?

MR. FREY: A constitutional violation.

QUESTION: Yes.

MR. FREY: I'm a little uneasy about resting it on the Sixth Amendment, and I have to hark back to cases like Herring and even Faretta, where the Court is somewhat divided on what the roots of some of these rights are. But I do think it would be constitutionally impermissible for the prosection, in this manner, to invade the defense camp.

Now, a violation also may occur when there has been an actual acquisition by the prosecution, by whatever means, of defense strategy information; and Coplon and Black are examples of this.

I haven't very much time remaining, but I want to make a couple of points that have come up in the briefing.

One is the notion that the Court of Appeals appeared to entertain, that the undercover agent is a member of the prosecution. I think that notion is wrong in the context of this case.

Respondent cites a number of Brady type cases, and those are cases where I think the notion of the prosecution being held responsible for knowledge of the police is far more appropriate, because those are cases in which what is at stake is a direct impact on guilt or innocence by the withholding or the availability to the defense of evidence.

Now, this is not a case of that sort. And it seems to me that if the Court can find, in fact, that a barrier has been established, a quarantine around the agent's contact with the attorneys -- and that has not been transmitted to the prosecution in any form that it could be utilized -- there would be no violation.

I also think that the reasons for whatever per se rule there may be in Black and even O'Brien don't extend to this case.

First of all, there's a distinction between cases that involve intrusions and cases that involve prosecution access to defense information. And these are cases that are discussed in respondent's brief, many Court of Appeals cases, and I think what one can distill from these cases is that where the prosecution has acquired defense strategy information and where this fact has not come out until the trial is ended, and, therefore, can't be explored in the context of the criminal trial itself, the remedy has been to order a new trial. And that's what happened in Black at least, and a number of the

other cases.

Now, on the other hand, where there's been an intrusion, but it has not been established that information has reached the prosecution and that the prosecution may thereby have gained an unfair advantage in the trial process itself, there has been not a per se rule, but an inquiry into prejudice. We think this is a case on the findings of the district court where you have the intrusion, perhaps, but not the unfair prosecutorial advantage that has been gained.

Now, I just want to comment, then, briefly, if I have a minute left, on the second point decided by the Court of Appeals, which is the duty imposed upon the prosecution to disclose the identity of an undercover agent.

Now, Brady, which the Court principally relied on, is plainly inapplicable. This is not an exculpatory evidence case.

The holding of the Court of Appeals in this case amounts, in our view, and logically can only mean, that any damaging exculpatory evidence must be produced by the prosecution in advance of trial. The policies to which the Court of Appeals referred, which are set forth at page 262 of the Appendix, are: first, to consider whether plea bargaining might be the best course.

Well, -- I'm sorry, I seem to have run out of time.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. McDonald.

ORAL ARGUMENT OF LAUGHLIN McDONALD, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. McDONALD: Mr. Chief Justice, and may it please the Court:

I concur in Mr. Coleman's observation, and I agree that the district court made no direct finding that there was a need for cover in this case. And I think that a review of the record will conclude independently that, as a factual matter, there was no need for cover. And Strom himself testified on several occasions during the federal trial precisely to that effect.

The district court judge at one point asked Chief Strom whether or not there was anything that Weatherford was working on that would require the maintenance of his cover, following Bursey's arrest, and Strom said that there was not. There was nothing that he was working on. And Strom, in response to questions from counsel on cross-examination, stated that furthermore he was fundamentally unconcerned about his agent's cover being blown. And the reason he was unconcerned was that he doubted whether Weatherford could be effective after the arrest, in any event.

There's also a suggestion in the brief of the Solicitor General that there was some concern about the agent's life, or that he might be done physical injury.

Weatherford certainly never indicated that he was in fear for his life, or that that was the reason his cover was being maintained. In point of fact, Strom offered him protection and Weatherford declined the offer.

And, moreover, had Weatherford's position as a law enforcement agent been truly compromised, then he never would have been offered a job by Strom and never would have considered that he, himself, could have accepted such a job and still been an effective law enforcement agent. So --

QUESTION: When is the offer of protection given, after he has testified or before?

MR. McDONALD: I believe that's correct, sir.

QUESTION: Which is it? After or before?

MR. McDONALD: I think it was after he testified, Strom offered to give him a job as a so-called above-the-ground kind of agent, to use Weatherford's phrase, and he declined. He decided to pursue graduate studies instead.

But Weatherford himself said that he felt in time he could be effective as an agent in almost any other capacity. But Strom's testimony was quite explicit. There was nothing that Weatherford was working on.

I think the argument really is one of generalized convenience rather than any demonstrated need, and of course the district court made no specific finding in that regard.

Not only does the record not substantiate that there

was any need, but the record really doesn't show that Weatherford did anything other than what he did in this case that could be conceived of as a benefit to law enforcement. There was, for example, evidence in the record that he participated in vandalism at the Administration Building of the University of South Carolina, that he went to Atlanta, Georgia -- I can't conceive why his State law enforcement duties would take him there; but, nonetheless, he went there to interview about going to Cuba to check up on radicals, to use his phrase. But he never made a single arrest as a SLED agent. He testified in only one trial, and that was Mr. Bursey's trial. And he could not remember a single assignment which he had been given which led to a conviction, other than Bursey's.

So I think that to the extent that an argument of law enforcement need is made here, it completely collapses. But even if there was a need for cover, I think that the decisions of this Court clearly indicate that that State interest can never be exhausted over a defendant's right to the effective assistance of counsel and a fair trial.

One of the reasons that is true is because there are other less intrusive ways for a State to protect its legitimate interest in secrecy, if, in fact, it had one.

One way, as this Court knows, would be simply to forego prosecution. But Strom himself suggested another way in which this problem could be solved, and that is, he simply

would have taken his agent off the case.

As a matter of fact, Strom himself conceded that what had happened in this case was, in his judgment, a violation of the Constitution, and he also said that it was unethical. Of course, he said that he didn't know that the intrusion was taking place.

QUESTION: How, in your view, did the testimony of Weatherford -- just the testimony now, not anything that preceded it -- cause a damage, an actionable damage to him?

MR. McDONALD: Well, Your Honor, the gist of our complaint is that there was interference with the right to counsel prior to trial, and that there was the creation of surprise --

QUESTION: Well, to what did he testify? Weatherford.

MR. McDONALD: He testified about what was done at the Selective Service Board itself.

QUESTION: Yes, including his being an eye-witness of the event; was he not?

MR. McDONALD: That's right, sir.

QUESTION: Well, did he testify to any facts which he learned after the events --

MR. McDONALD: I think the answer --

QUESTION: -- that were based in the indictment?

MR. McDONALD: The answer is no. He didn't -- he didn't reveal any attorney-client confidences during the

trial of the case. I think the record doesn't reflect that.

QUESTION: And he didn't testify falsely, did he?

MR. McDONALD: We don't attack his testimony in this civil suit, Your Honor.

QUESTION: No.

QUESTION: He didn't testify as an eye-witness, he testified as a fellow participant, didn't he?

MR. McDONALD: That's right, sir -- oh, he was a participant, yes, sir; no -- there's no question about that. And he also participated in the planning of it, as well.

QUESTION: That made him an eye-witness, didn't it?

MR. McDONALD: He was both. Both, Your Honor.

QUESTION: Mr. McDonald, I have a little trouble with the surprise theory, because, what difference would have been made if you had known ten days in advance that he was going to testify?

MR. McDONALD: I think one of the differences -- well, for example, he might have had a defense based on entrapment, had he known that Weatherford was an agent. As you recall, there was direct testimony from the Solicitor, as well as from Weatherford himself, not only that Weatherford was an agent, but a Mr. Merrick also was an undercover agent. Solicitor Foard, for example, said that there was another agent, and there were so many of them that he didn't know who was working for whom; but there was an agent who was unavailable

to testify and was out of the country, and there was other testimony indicating that that person was Mr. Merrick.

So we have a situation where there really were two agents involved, and I think that Mr. Bursey --

QUESTION: But why couldn't he have made that decision whether to claim entrapment at the close of the prosecution's case? He didn't have to get on the witness stand first -- the defendant didn't, I mean.

MR. McDONALD: Well, Your Honor, that's, of course, part of the -- it seems to me -- part of the vice in allowing the State to try a case basically by ambush. I don't think that's too strong a phrase.

QUESTION: There's another thought that runs through my mind. You mean you'd have to -- the defendant would not know whether or not he was entrapped until he heard the prosecution's evidence?

MR. McDONALD: I think that he wouldn't know if that defense was available, Your Honor, if he didn't know the law enforcement agents were his conspirators or his -- the persons who had participated with him.

QUESTION: You want a per se rule that every stool-pigeon's testimony must be revealed before trial?

MR. McDONALD: Your Honor, we argue that a per se rule would be applicable in this case, but it's possible for this Court to affirm the opinion of the Court of Appeals

without reaching such a result, because I think there clearly was constitutional prejudice here, in that the -- as the Court of Appeals found, there was deliberate intrusion. This was not a case of passive intrusion into defense counsel, but this involved affirmative misconduct on the part of the State.

We also, I think, can demonstrate action --

QUESTION: What was affirmative, other than hiring this man?

MR. McDONALD: Well, --

QUESTION: He didn't set up either one of these meetings, did he?

MR. McDONALD: No, he did not, Your Honor, but he made contact with --

QUESTION: And they came after him. Is that correct?

MR. McDONALD: The meetings were, Your Honor, set up by Mr. Bursey, and it is true that Mr. Weatherford was asked to join those meetings. But I think that we must understand that Weatherford was hired by Strom and his specific instructions were to infiltrate certain groups at the University and to establish contact with certain people. And one of the people who was specifically mentioned, specifically talked about by the Chief was Bursey.

Now, he said that he didn't point him out, but he did say that he did discuss Bursey with Weatherford, and he assumed that he would be one of the persons that Mr. Weatherford

would investigate.

QUESTION: And Chief Strom said that he knew nothing about this.

MR. McDONALD: He said that he didn't know the actual --

QUESTION: And he said if he had known about it, he would have stopped it. I got that out of your brief, didn't I?

MR. McDONALD: That's correct, sir. He denied that he had any direct knowledge that the agent was sitting in on the discussions. But it's our position that in an action for 1983, that all we must establish is -- or that he must be held to a standard of accepting the reasonable consequences of the things that he directed.

After the arrest, his instructions remained the same to Weatherford, and that is that he continue his investigation of people at the University; and, more importantly than that, the Chief knew that Weatherford was still continuing to investigate Bursey specifically. So he knew that his agent was doing the very same things after the arrest as he did before the arrest. And in point of fact, he continued that instruction. So the Chief knew that Weatherford was investigating Bursey. The Chief also knew that an attorney had been appointed, a sham attorney had been appointed to represent Weatherford, and that one of the purposes of that

whole ruse was to have somebody with whom Bursey's attorney could talk. And --

QUESTION: And he specifically denied ever knowing about it.

MR. McDONALD: He did specifically deny that. And we, of course, -- if our standard --

QUESTION: You're stuck with it.

MR. McDONALD: And if our standard of proof, Your Honor, is that we must prove that he either knew or that the prosecutor was told by Weatherford, then we lose, because --

QUESTION: What evidence do you have in the record to show that the Chief was not telling the truth on the statement that he knew nothing of the two conferences with the lawyer?

MR. McDONALD: Your Honor, there are a lot of things we can look at in the record to suggest whether or not the Chief's memory was actually faithful. There was continuous contact between Weatherford and the Chief following the arrest. Every other week Weatherford would go to the SLED office in Columbia and pick up his paycheck. He picked --

QUESTION: You mean you can assume that -- is there any testimony from Weatherford that he talked to him?

MR. McDONALD: Talked to the Chief, Your Honor?

QUESTION: About this?

MR. McDONALD: He denied that he talked to the Chief

specifically.

QUESTION: Well, you've got two people who deny it. Now, what witness do you have that says it did happen? You have no witness.

MR. McDONALD: Your Honor, I candidly concede that if we must prove that, we lose, because we can't.

QUESTION: Right. Well, I thought so.

MR. McDONALD: And I think --

QUESTION: Mr. McDonald, would you have stated a 1983 cause of action if Bursey had pleaded guilty?

MR. McDONALD: Your Honor, I think without a doubt that that's the --

QUESTION: Or if, suppose Bursey had been charged or indicted and then before trial the case had been dismissed because the prosecution didn't think it could win?

MR. McDONALD: I think under those circumstances he would be entitled to recover for the constitutional violation which had occurred, in the same way that a person who is the victim of an unlawful search and seizure, even if there's no trial, could bring an action under 1983.

QUESTION: So your theory is that the constitutional violation was complete at the time of the participation in the meetings, and that at the trial, it's just a question of damages?

MR. McDONALD: I think that it does go to a question

of damages.

QUESTION: But the right to counsel depends on the pendency of a criminal proceeding, doesn't it? It's not a separate and independent right, such as the Fourth Amendment freedom from unlawful searches and seizures.

MR. McDONALD: That may be true, but the right to counsel has been recognized as existing prior to a trial. So I think that --

QUESTION: But it's dependent on the impending trial.

MR. McDONALD: Which there was here, that's right, sir.

Now, I think the more difficult question, if I understand Your Honor, is this whole question of res judicata and collateral estoppel.

Let me say --

QUESTION: Before you get to that, could you just tell me a little -- tell me again exactly what the constitutional violation is, assuming the trial is unimpaired by what happened?

MR. McDONALD: Well, the constitutional violation here was an intrusion into the Sixth Amendment right to counsel. That was a deliberate intrusion and the capture of the entire defense strategy. It was captured by someone who was an agent, so that --

QUESTION: Well, is it critical to your theory that there was some use made of the prosecution of the defense

strategy?

MR. McDONALD: We don't think we have to show that. But we think that there was prejudice from the conduct of the government here.

What the government did is it misrepresented its case. It misrepresented who the witnesses were going to be. So that it made it impossible for the defendant to prepare for the case, which was actually thrown upon him.

It's not a situation that --

QUESTION: But assuming that -- does that all, then, depend on having some impact on the trial process? What difference does it make if they misrepresented, if it didn't affect the trial? That's what I'm driving at.

MR. McDONALD: Well, in Via vs. Cliff is an instance where the Court found that even though there was no prejudice or no impact on trial, that a defendant who had been denied a constitutional right would still be able to maintain an action under 1983. And in that case the prisoner --

QUESTION: But the -- well, go ahead; excuse me.

MR. McDONALD: -- that the prisoner was incarcerated and he was denied access to his attorney on two occasions. After the second occasion, that was brought to the attention of the Court and there was a recess.

So that as far as the trial is concerned, there was a curing of that defect. But, the court said, that, nonetheless,

he still had an action for damages for denial of the right to counsel, and an action under Section 1983.

So I think that would be an instance.

QUESTION: In other words, he was denied access to counsel before trial.

Now, what was denied here before trial, then?

MR. McDONALD: Well, the right --

QUESTION: There's no interference with access between the client and the lawyer.

MR. McDONALD: We think that you have a right not to have an agent for the prosecution sit in on the defense planning sessions, as he --

QUESTION: Even if the defense asks him to sit in?

MR. McDONALD: Well, Your Honor, I think that that really is a question of semantics more than substance, because he was there in his role as an undercover agent. His specific assignment was to infiltrate the University. And, more importantly and more specifically, his assignment was to get information about Bursey. And he was there because that was his assignment.

And even after the arrest, the Chief knew that he was continuing to investigate Bursey, and he continued his instructions. So he was there because he was an agent.

QUESTION: I understand all that.

MR. McDONALD: And in point of fact that was his

testimony at the State court trial. He had long hair, as informers do, and he was dressed in the hippie style clothes.

QUESTION: Well, I understand all that, but the right is that -- they have a right, an absolute right, not to have an informant who is concealing his identity present while the lawyer and the client are together?

MR. McDONALD: Well, I don't think the Court has to adopt a per se rule for Bursey to be entitled to relief. For at least two reasons: No. 1, there was affirmative misconduct here, the rule arguably might be different if the conduct was truly passive; but we have involved here a deliberate course of activity on the prosecution, which I think the Court has to be sensitive to because of the special role of the prosecutor.

QUESTION: Well, you're asking -- you say we have to make findings the district court did not make, then?

The district court found no affirmative misconduct, did it?

MR. McDONALD: Well, the district court recited the facts, but concluded that there was no constitutional violation. The Court of Appeals found that there was a deliberate intrusion, and I think there clearly was. And there also was the manufacturing of surprise.

I just don't think that the prosecutor can be allowed, under such cases as Blackledge vs. Perry and other cases in

which the Court talks about the prosecutor having an interest to serve the cause of justice.

I don't think that it's tolerable to have him go to a defendant and say: This is the kind of case that's going to be presented to you.

These things were volunteered. Weatherford himself stated, and it was a lie is what it was, a deception, he said that he was not going to testify; he said he was not going to be at the trial.

QUESTION: Was it an untruth at the time he made the statement?

MR. McDONALD: It was -- oh, he knew from the very beginning, Your Honor, that he would be a witness. And his testimony was uncontradicted in that regard.

QUESTION: I thought it was a change of strategy. Isn't there a finding in the district court that they had originally not intended to call him?

MR. McDONALD: I think, Your Honor, that it is true that the final decision to use Weatherford as a witness might have been made at the day of trial.

QUESTION: Well, then, why did you say a moment ago that he knew he was going to testify from the beginning?

MR. McDONALD: He knew, he said, that it was always a possibility that he would be a witness.

QUESTION: Well, but that isn't quite the same

thing as saying he knew.

MR. McDONALD: I think, Your Honor, that he knew that there was a possibility, which is what I --

QUESTION: Well, those aren't the same things.

QUESTION: Mr. McDonald, there's an express finding, at the bottom of page 30 on the Petition that "Weatherford did not know he would be used as a witness in the criminal action and Solicitor Foard had not decided, until just prior to the call of the case, that he would use Weatherford as a witness." Do you accept that?

MR. McDONALD: Your Honor, I'm not trying to say anything that's inconsistent with that. I agree that the final decision to use him was made at the day of trial.

But all the parties knew that it was a possibility that he would be a witness. Weatherford testified to that effect, and so did Strom. Strom said that all your so-called big cases, where you use an undercover agent, it's simply implicit that that person at some point may very well be a witness. And Strom said: It's no big deal, you let them testify, their cover is blown, then you give them a job as another agent.

So I think that it's not correct to say that it was not implied in the whole undercover agent --

QUESTION: But your statement was that he knew all the time that he would testify.

MR. McDONALD: Well, Your Honor, if I said that, I misspoke myself. What I meant to say is that he knew that it was a possibility.

QUESTION: In your brief, among other things, you say that the prosecution was able to discover the complete defense strategy by these tactics.

MR. McDONALD: That's right.

QUESTION: Is there any support in the findings of the district court for that statement?

MR. McDONALD: Well, the Court of Appeals, of course, found that Weatherford did have knowledge of the defense tactics, and I think that --

QUESTION: Any indication in the findings of either court that the information you refer to was revealed to the prosecution?

MR. McDONALD: There is not, Your Honor. I used the phrase "prosecution" because the district court found that the agent -- Weatherford was an agent of the prosecution, and it assumed that, when it uses the phrase -- well, when I use the phrase "prosecution" it presupposes that we assume, as did the Court of Appeals, that Weatherford is to be regarded, for purposes of finding a constitutional violation, as a member of the prosecution.

But, as I say, if we must prove that the prosecutor knew about what happened in the defense counsel, then we lose,

because we can't. Because we depend, in order to establish that kind of proof, on what amounts to a confession of wrongdoing from the parties, that we're assuming, and I think realistically --

QUESTION: Mr. McDonald, one thing puzzles me. What was the defense strategy?

MR. McDONALD: Well, Your Honor, they knew that -- well, there were three people who actually participated in the incident at the Draft Board: Merrick and Bursey and Weatherford. Weatherford had already ruled himself out. He was not going to testify. As you recall, he said that his benefactor, Dr. Hardwicke, had insisted that he talk to the police, that he had gone down to Hilton Head, that he had talked with them, they wanted him to --

QUESTION: Well, I just wonder if you could sum it up in a word. Was the strategy to deny the incident?

MR. McDONALD: I'm sorry. Reasonable doubt, Your Honor.

QUESTION: To plead entrapment, or just inadequate proof, or what?

MR. McDONALD: Inadequate proof and reasonable doubt. There was no eye-witness. Merrick was out of town. He was out of the country, I believe.

QUESTION: In other words, what was revealed to the prosecution then was that the defense hoped that the government

couldn't prove its case?

MR. McDONALD: Yes, sir.

QUESTION: Yes.

MR. McDONALD: That's what they were going with, they were going to argue reasonable doubt.

QUESTION: Was there, at the time of the trial, cross-examination of Weatherford as to these meetings, these two meetings with counsel?

MR. McDONALD: Very limited cross-examination, Your Honor. I think that Mr. Wise alluded to the fact that he had established contact with various people and he had a lot of friends in the movement; but I don't believe there was any direct examination about the attorney-client meetings. In fact, my recollection is that there was not.

QUESTION: Unh-hunh.

MR. McDONALD: In point of fact, I think if you read the State transcript, you will see how ineffective counsel was rendered by the surprise, and he, himself, testified that it totally changed the case, and he felt that his ability to function as attorney was completely impaired.

I think one can appreciate that.

QUESTION: Well, just that he was met with a much stronger case for the prosecution than he had anticipated, because he had not anticipated that an eye-witness would testify, and one did. But -- and that's always somewhat of a

shock to defense counsel.

MR. McDONALD: Yes. It changed other things, too, Your Honor. They determined that Mr. Bursey would have to take the stand. He had -- they had ruled that out.

QUESTION: Well, if there's a very strong case against the defendant, he sometimes feels impelled to take the stand, where he wouldn't otherwise.

MR. McDONALD: I think had he known about that in advance -- of course, preparation is a benefit, and had he known about that prior to the trial he might have been more effective.

QUESTION: Did you ask for a continuance on that basis?

MR. McDONALD: No, he did not. No, he did not.

QUESTION: In your specific claim of constitutional violation by sitting in on the meetings, is it trial strategy, learning trial strategy, or is it learning confidential -- or sitting in on confidential communications between the attorney and the client?

MR. McDONALD: Well, I think there are a lot of vices inherent in sitting --

QUESTION: Well, which is it here?

MR. McDONALD: Well, here it's learning defense strategy. It would be -- of course, Weatherford already knew the incriminating evidence; but that could be involved, or

people might be concerned about evidence of other crimes. Or --

QUESTION: Well, doesn't it make a little bit of a difference which you're claiming as to whether the -- whether the violation occurs at the trial or when you're sitting in on the meetings?

MR. McDONALD: Well, I think Your Honor is getting around again to the question of res judicata and collateral estoppel.

QUESTION: No, I'm not at all. I'm not at all. I'm just wondering when the -- what the constitutional violation is and when it occurred.

MR. McDONALD: Well, there are different kinds of harm that could result. The harm here was twofold. It was that the defense strategy was captured, and it could have been -- well, it was relayed to at least a member of the prosecution. We did not prove that that defense strategy had actually been relayed to the prosecutor, but it's clear that knowledge of an opponent's tactics give a person quite an advantage in an adversarial situation.

That's one of the --

QUESTION: Well, what if, at the time he was sitting in, they were also planning another crime?

MR. McDONALD: I think that would be -- would be different, Your Honor.

QUESTION: You mean to be admissible?

MR. McDONALD: Well, the --

QUESTION: Well, would there be a constitutional violation at that time?

MR. McDONALD: I don't know that the right to plan crimes is constitutionally protected, in the sense that the right to plan a defense is constitutionally protected. That would be --

QUESTION: So you would suggest there wasn't any violation there of a third party, a government agent, sitting in on those kinds of conversations?

MR. McDONALD: Well, like -- it was sort of a roughly analogous situation was involved in the Hoffa case. The Court there --

QUESTION: Well, I take it, under your position, there would have been a 1983 violation in the Hoffa case?

MR. McDONALD: Well, of course, that involved the United States Government there, but the Court did --

QUESTION: Well, all right, but it would be a constitutional violation, you say, --

MR. McDONALD: The Court didn't rule --

QUESTION: -- of a Sixth Amendment right to counsel?

MR. McDONALD: Had the State been the prosecuting party there, it may well have been that Mr. Hoffa could have had an action under 1983 for what happened --

QUESTION: Well, I know, but does -- the Federal government is, and if it's a violation of the Sixth Amendment, there might be a Bivens type of action.

MR. McDONALD: We certainly don't rule out that possibility, Your Honor; perhaps there could have been.

QUESTION: Well, your theory seems to reach that in the Hoffa case.

MR. McDONALD: Yes, sir.

QUESTION: That at the time the agent was sitting in on conversations between lawyer and client, there was a violation.

MR. McDONALD: Right, sir. And if the -- there would be a violation for the intrusion that occurred at the case at which it occurred, rather than a case or a prosecution which would grow out of the criminal activity which might have been discussed. And I think Hoffa involves that, the duality situation that clearly suggests that had Hoffa been convicted at his trial that he would have had grounds to set aside that conviction on the grounds of intrusion; and I assume that he would also have a 1983 action.

The Solicitor General has raised an issue involving the general use of informers and has suggested that if the opinion of the Court of Appeals is to be affirmed in this case, that it would provide a so-called fail-safe method for detecting informers. We responded to that in our brief, but

let me simply add to that. I direct the Court's attention to testimony by Strom. He indicated that the ruling of the Fourth Circuit -- or he testified that the present practice in South Carolina was not to allow undercover agents to participate in defense strategy sessions.

He claimed that it happened in this case because he was ignorant of it, but he was quite pointed in his testimony that he simply would not permit one of his agents to participate in defense consultations, and he didn't qualify his remark in the way that such instructions are qualified, apparently, which are given to the FBI.

He stated that informer participation in defense strategy sessions wouldn't be ethical, it wouldn't be legal, so that it does not appear that the ruling of the Fourth Circuit varies in any way what the present practice of the stated practice is in South Carolina.

I think this fail-safe argument also overlooks the fact that a person would decline an invitation to participate in defense planning sessions for a number of reasons, and some of them would have nothing to do with the fact that that person was an agent.

QUESTION: Mr. McDonald, let me just interrupt once more, if I may.

MR. McDONALD: Yes, sir.

QUESTION: What is the authority or the closest

authority for the proposition that there is some kind of protection, either constitutional or otherwise, for a, quote, "defense strategy session", unquote, other than a session at which only the attorney and the client were present? I mean, we don't have a normal privilege situation. But where is the source for this notion of a broad, you know, a broad grouping that's also protected?

MR. McDONALD: I think there are a number of cases, Your Honor, which establish that proposition. Hoffa, for example, assumed that Caldwell and Coplon had been correctly decided. And in Coplon, the Court there articulated a right of a defendant to have an unsurveilled defense planning relationship with an attorney. I think that --

QUESTION: Is this about a third person present, between the defendant and the attorney, as well?

MR. McDONALD: Well, of course, those cases involved electronic surveillance; but I think the Court can take --

QUESTION: Right, so those are intrusions on the privacy of the attorney and the client.

MR. McDONALD: That's right.

QUESTION: I'm just wondering about intrusions on the non-privacy of the attorney, the client and the third party. Are there any such cases?

MR. McDONALD: I'm not certain that I understand the question, Your Honor.

QUESTION: Well, it's easy to understand what you're talking about when you've got an attorney and a client in a normally privileged situation, and there's an intrusion on that relationship.

I'm asking you what cases are there that involve a three-party situation: an attorney, a client and a third party; and then someone else intrudes or -- what is the source of the notion that that relationship is protected?

MR. McDONALD: Well, I think that it would be protected by the notion that the right to confer with an attorney includes the notion to prepare a defense. And preparation of defense, it seems to me, --

QUESTION: Well, I'm not asking you about the theory. Are there cases that establish this general notion, that's what I'm trying to get.

MR. McDONALD: Well, there are two cases, Your Honor, we cited in our brief involving the attorney-client privilege, which say that communications made between joint defendants and attorneys is protected by the attorney-client privilege; and I should think that the scope of the protection afforded by the Sixth Amendment would not be less than that.

QUESTION: Let me put it to you this way: Suppose there were two people sitting in on the defense -- these same meetings, one was the government agent and the other one was not a government agent at the time, and never was a government

agent, except that the government heard that he was sitting in and he agreed to testify, and they offered his testimony at the trial?

MR. McDONALD: Well, the Sixth Amendment violation wouldn't exist in that circumstance, --

QUESTION: All right. And then they -- and you don't think that the information, that the testimony of that non-agent would be excludable?

MR. McDONALD: If he acted without any State informant whatsoever, I --

QUESTION: Without any -- postulate all you want. There was no connection with the government.

MR. McDONALD: All right, sir.

QUESTION: Then they call the agent at the same trial.

MR. McDONALD: I think that one of the things --

QUESTION: Who testified to the identical things.

MR. McDONALD: The Sixth Amendment does apply against the government, I think is the answer to that. And the court also was --

QUESTION: But I know, but the question is -- the question is, was it a confidential meeting or wasn't it?

MR. McDONALD: Well, I think if that --

QUESTION: Or was it something that they could expect to be private or not?

MR. McDONALD: Well, of course, that's --

QUESTION: You had two extra people in the meeting besides the client and the lawyer.

MR. McDONALD: The court might conclude that there had been, you know, a deliberate waiver or that there was no attorney-client meeting to intrude, or that there had been no intrusion, that that was a meeting that was open to the public, that there had been a complete publication of the strategy; and those considerations might call for a different result than the one we think is appropriate here, where there was prosecutorial misconduct, there was deliberate intrusion, as the Fourth Circuit found, and there was also substantial interference with the right to prepare for the trial.

QUESTION: Suppose Weatherford had never attended any meeting at which Bursey's attorney was present, and then, nevertheless, testified as he did here?

MR. McDONALD: I think the Court would have to --

QUESTION: Would you be here?

MR. McDONALD: Well, we might not be here, Your Honor. I think the Court would have to look at a number of factors. If there was no intrusion --

QUESTION: Well, if there weren't,we wouldn't have to look at any of them, would we?

MR. McDONALD: Well, there would be no intrusion under those circumstances, so that we wouldn't be here --

QUESTION: But you would have been no less surprised, would you?

MR. McDONALD: No, I think we would have been much less surprised, because what the government did here it deliberately ruled out the very case which it presented; had they not done that, had Weatherford not deliberately said that he was not going to be there, when he knew there was a possibility that he could be there; had he not done that, then the defense could not have ruled out the possibility of his testimony.

But because of the very specific misrepresentations which he made, the very case that was presented was the one case which had been completely ruled out.

QUESTION: That being the eye-witness testimony of the fugitive presumed accomplice?

MR. McDONALD: The testimony of Weatherford, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

[Whereupon, at the reconvening of the Court, the argument was not resumed; therefore, the case in the abovementitled matter was submitted.]

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