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16 JUN 1981

MEMORANDUM FOR WILLIAM H. WEBSTER
Director, Federal Bureau of Investigation

Re: Representation of Criminal Defendants by FBI Agent-Attorneys

This responds to your oral request 1/ for our opinion concerning the constitutional and ethical issues that would arise if a proposed modification of an ongoing FBI undercover investigation of a state court system were implemented. The operation was the subject of two prior memoranda of this Office.2/ We recount only briefly the description and discussion in the prior memoranda and then turn to the facts and issues now presented for our consideration.

I.

In 1975, the Chicago Strike Force acquired in the course of a gambling investigation a tape recording that implicated a Chicago attorney in making payoffs to Chicago police officers and perhaps to Cook County court officials and judges. The attorney subsequently agreed to cooperate in an investigation of the court system, and he provided significant information concerning his payoffs to court personnel and judges. With the consent of the United States Attorney and the approval

1/ We agreed to accept an oral referral of your request to Assistant Attorney General Jensen of the Criminal Division because of your representations as to the urgent need for secrecy in this operation. The general and preferred practice of this Office, however, continues to be to require a written request.

2/ Memorandum for Thomas P. Sullivan, United States Attorney for the Northern District of Illinois, from Deputy Assistant Attorney General Lawton, Office of Legal Counsel, Re: Investigation of Illinois Courts, August 1, 1978 (Lawton Memorandum); Memorandum for Charles F.C. Ruff, Acting Deputy Attorney General, from Assistant Attorney General Harmon, Office of Legal Counsel, Re: Revised Proposed Undercover Investigations of Corruption in Chicago Courts, November 9, 1979 (Harmon Memorandum).

of this Office of the mode of law enforcement,3/ the informer made payments through two other attorneys to fix two misdemeanor drug cases.

Following the informer's election to the Cook County bench in the spring of 1979, the United States Attorney's Office submitted to the Bureau and the Department for review a proposal to continue the undercover investigation by other means. This "Phase I" proposal contemplated the use of "contrived cases" in the Traffic Court generated by arrests by cooperating police agencies of FBI undercover agents who would be represented in court by attorneys who were also FBI undercover agents. This Office again determined that the proposed undercover investigation would be "a permissible mode of law enforcement that is consistent with applicable legal and ethical standards."4/ In fact, this approach was considered to be more protective of individual rights than the earlier operation because it minimized the involvement of unsuspecting third party defendants.5/.

3/ Lawton Memorandum, supra note 2. The Lawton memorandum focused on the method as an approach to law enforcement. The memorandum noted that Government strategem had long been accepted by the courts in appropriate circumstances; that no issue of entrapment was raised on the facts; that given the law enforcement purpose, the Government's involvement in the criminal activity would not violate federal or state law; that the investigation had sufficient predication and justification to avoid the appearance of disregard for the integrity of the State's judicial process; and that the proposal would not cause attorneys to violate the ABA Code of Professional Responsibility. The Memorandum did not consider the Sixth Amendment issues that we discuss in this memorandum.

4/ Harmon Memorandum, supra note 2, at 1.

5/ Assistant Attorney General Harmon acknowledged that the Office had approved the earlier operation even though it involved actual criminal cases. The earlier memorandum, however, did caution that the investigation "should avoid, if at all possible, situations involving a final corrupt disposition of the state's case against a particular defendant." Lawton Memorandum, supra note 2, at 8. Although this caveat did not address the Sixth Amendment issues, it did sound a warning concerning some of the implications of influencing the outcome of "live" cases.

The U.S. Attorney's Office in Chicago has now proposed a further modification to the undercover operation.6/ To date, the operation has been limited to the Traffic Court. But significant predication exists for other judges, and Chicago would like to begin to gather evidence of corruption on judges in the criminal courts.

The Traffic Court operation has generally utilized contrived cases, but the proposed investigation of other courts would involve actual cases. The Chicago police, the FBI, and the United States Attorney believe that contrived criminal cases are not feasible because of what is said to be a significant risk of compromising the security of the undercover investigation in the process of identifying and enlisting cooperating police officers to perform the contrived arrests. There is also said to be a significant risk of physical danger to the agent from violent police action or fellow inmates if the agent were incarcerated even temporarily following arrest by a noncooperating (that is, an uninformed) police officer.

Accordingly, Chicago proposes in "Phase II" to use actual criminal cases by allowing one to three FBI undercover agents to hold themselves out as defense lawyers to solicit clients charged with certain offenses and likely to appear before a targeted judge. The "acceptable" offenses are relatively

6/ In July 1980, the Bureau proposed, and Deputy Attorney General Renfrew approved, three modifications to the operation. The undercover agent, acting in the role of a private attorney to present contrived cases in the Chicago Traffic Court, was to be allowed to accept actual cases involving minor traffic offenses so that he might build up his credibility and acceptability in the operation. No corrupt disposition of these live cases seems to have been intended. The other two modifications, however, did contemplate bribes taken in connection with live cases. First, the cooperating State's Attorney was authorized to accept payoffs that might be offerred to him as the prosecutor in a case. Second, another undercover agent to be assigned to the operation to work in the State's Attorney's Office would be similarly authorized to accept bribes to fix actual criminal cases. This Office was not asked to review these modifications at the time that they were proposed or approved. To the extent that this memorandum casts doubt on the legality or propriety of those modifications, we would leave to your determination in the first instance the actions required to bring the operation within the limitations suggested here. We would, of course, be happy to address specific questions as they arose in a precise context.

low-risk, nonserious misdemeanors such as theft under $150 (shoplifting), criminal trespass, gambling, some minor narcotics violations, simple assault and simple battery (not involving a deadly weapon or bodily harm), and driving while under the influence; and nonviolent felonies, such as theft over $150, auto theft, burglaries not involving a weapon or danger to persons, and gambling offenses. As a further assurance of the public safety and in deference to the State's interest in prosecuting repeat or dangerous offenders, defendants with a significant criminal background or violent tendencies will not be considered.

The cases accepted are intended to provide contact between the agent-attorney and the judge or his intermediary so that a bribe may be offered or solicited to effect the outcome of the case. The proposal contemplates that the undercover attorneys will handle only those cases scheduled to be heard by a judge on whom there is sufficient predication, in which the defendant admits that he is guilty and in which an agreement to fix the case is reached prior to a hearing on the merits. It is intended that the defendant will know that his case is being fixed. Although the defendant might not know that the fix involves bribing the judge, the proposal asks us to presuppose that the agent will be in a position, based on disclosures to the defendant, reasonably to believe that the defendant knows that his case is being handled in some way other than by a legitimate plea or trial. We are also to assume that the agent will "reasonably believe" that he has the defendant's permission so to dispose of the case. An acceptable arrangement would involve one of four possible dispositions: (1) dismissal of the charges, either directly or after suppression of crucial evidence; (2) supervision (the Illinois equivalent of pretrial diversion); (3) acquittal; or (4) probation. Procedures have also been formulated to relieve a defendant of a jail sentence if it were to be imposed notwithstanding an agreement to fix the case. Post-trial motions or, if necessary, the assistance of the State's Attorney's Office, would be pursued; as a last resort, Chicago would go public with the operation to secure retrial or dismissal of the case.7/

7/ A full description of the proposal appears in two documents: from the Chicago Office of the FBI, a Memorandum of December 18, 1980, entitled "Greylord: Phase II Proposal"; and from the

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We recognize that you have attempted to structure the operation so that it will be consistent with the limitations imposed by the Constitution, by the prior memoranda of this Office, and by the Supreme Court of Illinois and other courts in attorney discipline cases. Nevertheless, we conclude that the representation of criminal defendants by FBI undercover agents in the manner and under the circumstances contemplated would violate the Sixth Amendment to the Constitution of the United States.8/

We consider first the elements of a Sixth Amendment violation and then explain why we believe that the circumstances presented by the proposed modification would result in infringements on Sixth Amendment rights.

7/ (Cont.)
United States Attorney's Office, a Memorandum summarizing the history of the investigation and the proposal attached to Letter of April 10, 1981, from Thomas P. Sullivan, United States Attorney, to D. Lowell Jensen, Assistant Attorney General, Criminal Division. The documents also describe a proposed modification to the Traffic Court operation, but we have not been asked to comment on this aspect of the proposal.

8/ The request for advice also raised concerns with respect to the proper relationship between federal law enforcement activities and the State's criminal justice system. The use of actual criminal cases interferes more substantially with the State's administration of its criminal laws. The proposal contemplates notice to and approval of certain State executive and judicial officers to overcome the problems associated with this interference, but in these circumstances that notice and approval may not be adequate to overcome the problems.

The request also raised grave ethical considerations under federal and state standards of professional responsibility for attorneys because the proposal requires significant restructuring of the traditional relationships between the attorney and his client (without the fully informed consent of the client) and the courts.

Because of our conclusion that the Sixth Amendment issue is controlling, we have not attempted to resolve these other issues at this time. We would advise, however, that we believe these issues to be sufficiently serious on both legal and policy grounds for a policymaker involved in approving the operation to conclude that the proposal should not be implemented.

II.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence." The Supreme Court has not yet recognized a deprivation of these rights other than in the context of a criminal prosecution in which the defendant, deprived of these rights and convicted, has sought relief from the conviction. But the protection afforded by the Sixth Amendment appears to be broader than a right not to be convicted in violation of the guarantees. As we explain below, we believe that the Sixth Amendment provides a defendant an absolute entitlement to these rights. Even if he is not convicted, either because his case never goes to trial on the merits or because he is acquitted at trial, government action depriving him of his right to counsel would still violate the Sixth Amendment. A conviction, we believe, is not an element of a Sixth Amendment violation; rather, it is relevant only to the determination of an appropriate remedy.

Morrison v. United States, 101 S. Ct. 665 (1981), presented an analogous set of facts and an instructive result. Morrison, the defendant, had retained counsel to represent her on federal drug charges. Two agents of the Drug Enforcement Agency, aware that she had been indicted and had retained counsel, sought her cooperation in a related investigation. Without the knowledge or permission of her counsel, the agents met with the defendant and, in the course of the conversation, disparaged her attorney and suggested that she would be better represented by the public defender. The agents also indicated that she would benefit if she cooperated and that she would face a stiff jail sentence if she did not. The agents visited the defendant once more, again in the absence of counsel, although at no time did the defendant agree to cooperate, incriminate herself, provide any pertinent information, or cease to rely on her attorney. She subsequently moved to dismiss the indictment with prejudice on the ground that the agents' conduct violated the Sixth Amendment. The court of appeals reversed the district court's denial of the motion to dismiss, concluding that Morrison had been deprived of her right to counsel and that dismissal of the indictment was the appropriate remedy even in the absence of any tangible effect upon her representation.

The Supreme Court reversed. Although presented with the precise issue whether the Sixth Amendment was violated even in the absence of -- or as in Morrison, in advance of

-- a conviction, the Court refused to decide that issue. Instead, the Court held that the dismissal of the indictment was error in any event.9/ "[A]ssum[ing], without deciding that the Sixth Amendment was violated in the circumstances of this case," 101 S. Ct. at 667, the Court held that the remedy was inappropriate because of the absence of any prejudice in the criminal proceedings. "The Sixth Amendment violation, if any, accordingly provides no justification for interfering with the criminal proceedings against respondent Morrison, much less the drastic relief granted by the Court of Appeals." Id. at 669 (footnote omitted). The Court further noted that it did not suggest that "in cases such as this, a Sixth Amendment violation may not be remedied in other proceedings."

Morrison, therefore, did not determine the contours of Sixth Amendment rights; but it does suggest that there may be a remedy even in the absence of a conviction. The Court's deliberate recognition of the possibility that redress might be available in other proceedings suggests that the conduct violated the Sixth Amendment in the first instance.10/

9/ The Government in its brief in Morrison argued first that there was no Sixth Amendment violation because the agents' misconduct did not affect the criminal prosecution against her. Second, the Government argued that even if there was a Sixth Amendment violation, the remedy of dismissal of the indictment was inappropriate because the violation did not affect the criminal prosecution. Rather, "[i]f there must be some remedy for every constitutional violation, even one that causes no injury, then that remedy should be awarded in a separate proceeding, such as a civil action for damages, that does not interfere with the fair disposition of legitimate criminal charges. The government action of which respondent complains closely resembles a civil tort." Brief for Petitioner at 10.

10/ One alternative for these "other proceedings" is disciplinary or even criminal proceedings against the offending law enforcement officer; civil damages is another. Cf. Stone v. Powell, 428 U.S. 465, 496-502 (1976) (Burger, C.J., concurring). In its brief in Morrison, the Government admitted that the agents' conduct violated Department of Justice guidelines and informed the Court of the disciplinary sanctions against the agents. See Brief for Petitioner at n.12. The Government came close to conceding the damages remedy. Although stressing above all that the Court need not choose between the two

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The Supreme Court's other cases are somewhat less instructive because they involve review of the Sixth Amendment issue following a criminal conviction. Language used to describe a violation must therefore be read in context of the facts of the cases, and we are cautious about lifting a description out of context. Nevertheless, there are indications that the Sixth Amendment's protection is broader than merely the right not to be convicted in violation of the specific guarantees. The constitutional violation is described not in terms of the conviction obtained but in terms of the process itself. For example, Cuyler v. Sullivan, 446 U.S. 335, 343 (1980), cites Gideon v. Wainwright, 372 U.S. 335 (1963), as holding that

> "a defendant who must face felony charges in state court without the assistance of counsel guaranteed by the Sixth Amendment has been denied due process of law. Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself. Id., at 344; see Johnson v. Zerbst, 304 U.S. 458, 467-468 (1938)."

In United States v. Henry, 447 U.S. 264 (1980), the Court found a Sixth Amendment violation after stating that the issue was whether the defendant's "right to the assistance of counsel was violated by the admission at trial of incriminating

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10/ (Cont.)
analytical paths because both would lead to the same conclusion in that case, the Government allowed that "[t]he difference might be material in the context of a civil action for damages," id. at n.5, and that Morrison in fact "may be able to state a cause of action for damages against the DEA agents on the basis of their alleged Sixth Amendment violation." Id. at n.12. Such an action is, in fact, pending in the District Court for the Eastern District of Pennsylvania. Of course, the determination of the particular remedy is not relevant to the existence of the right in the first instance. We mention these possible remedies, however, because the Government has an interest in preventing conduct by its officers that would require disciplinary sanctions or give rise to civil liability. Both undermine the public's respect for law enforcement officers; the latter remedy additionally creates exposure to monetary damages.

statements made by [the defendant] to his cellmate, an undisclosed Government informant, after indictment and while in custody." Id. at 265. Mr. Justice Powell, concurring in Henry, stated that Massiah v. United States, 377 U.S. 201 (1964), "held that the Government violated the Sixth Amendment when it deliberately elicited incriminating information from an indicted defendant who was entitled to assistance of counsel." 447 U.S. at 275. Massiah itself held that the defendant "was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206.

The nature and purpose of the Sixth Amendment guarantees are fundamental to our analysis. For the purpose of illustration, we might assume a most egregious set of facts. Suppose that a defendant is not informed of the charges against him; he is made to stand trial in private proceedings, without a jury; he is denied the right to confront the witnesses against him and to compulsory process for obtaining witnesses on his behalf; and he is denied the assistance of counsel. Somehow the defendant is acquitted. We would have no difficulty in concluding that in such circumstances the defendant has been denied his Sixth Amendment rights, notwithstanding his acquittal.

The Sixth Amendment springs from a concern for the process by which the criminal justice system operates. Particular procedures are guaranteed absolutely, not merely as the means to an end; and they are required for constitutional compliance not merely because the defendant has a right not to be convicted in violation of those rights. The specific rights are guaranteed as an end in themselves: a system of justice characterized by fair process and regularized procedures. Thus, Mr. Justice White, writing for the Court in Duncan v. Louisiana, 391 U.S. 145, 155 (1968), stated that the right to a jury trial, also guaranteed by the Sixth Amendment, "reflect[s] a profound judgment about the way in which law should be enforced and justice administered."11/ The defendant

11/ The "right" to a jury trial guaranteed by the Sixth Amendment and confirmed in Duncan is especially instructive regarding the "public" dimension of that Amendment because, as the Court had earlier held, it is a right that even a defendant who has elected to proceed to trial may not dispositively "waive" over the objections of the prosecutor. Singer v. United States, 380 U.S. 24 (1965).

is deprived of his rights under the Sixth Amendment if he is not provided with this certain treatment in the course of the process. Intentional conduct that would deprive the defendant of these certain procedures is inconsistent with the duty of federal officers to uphold the Constitution; and without regard to what might be the remedy for a deprivation of Sixth Amendment rights, the existence of the rights defines the limits of the officers' conduct.

Moreover, we point out that for redress of other constitutional violations, the Court has recognized a cause of action for civil damages against the offending officer. See Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971); cf. Carlson v. Green, 446 U.S. 14 (1980); Davis v. Passman, 442 U.S. 228 (1979). Given our view that the Court's Sixth Amendment jurisprudence indicates that the Court would recognize a Sixth Amendment violation irrespective of the defendant's subsequent acquittal or conviction, we would conclude that the risk of civil liability if the proposal were implemented is sufficiently great that it ought not be intentionally courted.12/

12/ We do not believe that Weatherford v. Bursey, 429 U.S. 545 (1977), settled this question. Bursey, the defendant, was arrested and initially charged along with Weatherford, an undercover agent, who met on two occasions with Bursey and his attorney to discuss Bursey's defense. Bursey was convicted and did not appeal. After serving his sentence, he brought an action under 42 U.S.C. § 1983, alleging that Weatherford had communicated to his superiors and the prosecution the defense strategies and plans that he had learned at the meetings with Bursey and his attorney and thus had deprived Bursey of the effective assistance of counsel. The district court found for the defendants. The court of appeals reversed, holding 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." 528 F.2d 483, 486 (CA4 1975).

The Supreme Court reversed, but the opinion is perplexing in a number of respects. At times, the Court seemed to be concerned only with refuting the per se rule adopted by the court of appeals, which the Court thought "cuts much too broadly." 429 U.S. at 557; see also id. at 552. At other times, the Court, like the court of appeals, seemed to view the case not as a civil action for damages but as an appeal from the criminal conviction in which prejudice to the defendant

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We emphasize the element of intentional conduct. Under the Court's Sixth Amendment cases, the officer's intent might be relevant in the first instance to a finding of constitutional violation. Beginning with Massiah v. United States, 377 U.S. 201 (1964), the attorney-client relationship has been protected against deliberate intrusion. See United States v. Henry, 447 U.S. 264 (1980); Brewer v. Williams, 430 U.S. 387 (1977); see also Weatherford v. Bursey, 429 U.S. 545, 557 (1977) (specifically noting that "this is not a situation where the State's purpose was to learn what it could about the defendant's defense plans and the informant was instructed to intrude on the lawyer-client relationship or where the informant has assumed for himself that task and acted accordingly"); id. at 558 (finding that there was "no purposeful intrusion").13/

12/ (Cont.)
and benefit to the State would be essential elements of a constitutional claim. See id. at 552. The Court, it is true, did find that there was no Sixth Amendment violation on the facts of the case. But the Court itself must not regard Weatherford as having settled the issue of violation in the absence of a direct effect on the criminal proceeding, else the case would have been dispositive of the Sixth Amendment issue in Morrison. In Morrison, however, the Court not only assumed that there was a constitutional violation -- an indulgence if Weatherford is in fact authoritative on this point -- but the Court did not so much as cite Weatherford. The Government was equally cautious in its reading of Weatherford in its brief in Morrison when it also assumed, for purposes of its alternative argument directed solely to the remedy of dismissal of the indictment, that the Sixth Amendment was violated on the facts of the case.

13/ The Government in fact argued in its brief in Weatherford that either a deliberate attempt to intrude on the defense or an improper utilization of confidential information was required before the "fair functioning of the adversary system" was affected. Brief for the United States as Amicus Curiae at 12-14, 32-41. In Morrison, the court of appeals relied heavily on the agents' improper conduct, 609 F.2d 529, 531-532 (CA3 1979); and the Government labored mightily in its brief to the Supreme Court to dispel the effect of the agents' wrongful motivation and purposeful conduct. Given the Court's assumption that there had been a Sixth Amendment violation, and its decision based solely on the ground that the remedy was inappropriate in any event, the Morrison Court did not address this issue.

The element of intentional conduct might also be relevant in a civil action on the issue of damages, especially punitive damages. See Carlson v. Green, 446 U.S. 14, 21-22 (1980) (indicating that punitive damages may be awarded in a Bivens suit); cf. Carey v. Piphus, 435 U.S. 247, 257 n.11 (1978) (no basis for punitive damages under 42 U.S.C. § 1983 in the absence of "malicious intention"). Under the Phase II proposal, although there is certainly no malice and no desire specifically to violate the Sixth Amendment rights of defendants whose cases would be handled by the undercover agent, there is "intent" in the sense of volitional actions. There is also the specific intent and purpose to exploit the attorney-client relationship to further the federal end.

Given our conclusion that there can be a Sixth Amendment violation even in the absence of a criminal conviction, it remains to be discussed why we believe that the proposal here would give rise to such a violation.

III.

The particular Sixth Amendment right at issue, of course, is the defendant's right "to have the assistance of counsel for his defence." We believe that the traditional Sixth Amendment analysis of what constitutes a denial of the right to counsel in the context of relief from a criminal conviction would be applicable in a civil action. In the criminal context, the failure to provide an attorney at all is a per se violation of the Sixth Amendment; nothing further must be shown. Gideon v. Wainwright, 372 U.S. 335 (1963). For defendants who are represented by counsel, the Supreme Court generally has come to require a showing of either an actual conflict of interest or actual prejudice.

A. Under the proposal, the FBI agent-attorneys are not to be concerned with a defense. Their instructions are only to attempt to fix the case. In the absence of any commitment whatsoever to the defense function and no actions in pursuit of a defense, providing the defendant with an FBI agent for his attorney is tantamount to providing no attorney at all. Under Gideon, a per se violation of the Sixth Amendment would result. Cf. Powell v. Alabama, 287 U.S. 45 (1932). The proposal, it is true, allows the agent to accept a case only if the defendant admits his guilt. But the defendant's guilt or innocence has nothing to do with his right to the assistance of counsel for his defense. Moreover, even guilt in fact does not preclude the existence of a legal defense. In a particular case, independent counsel might conclude that no defense was possible; but that element of independent judgment is precisely

what is missing under the proposal. Finally, the defendant's admission of guilt does not inevitably mean that he is, in fact, guilty and it certainly does not necessarily mean that the State could prove that he was guilty beyond a reasonable doubt.

B. Even if the circumstances do not give rise to a per se Sixth Amendment violation, the defendant, we believe, could show either an actual conflict of interest or actual prejudice. The Supreme Court has held that the Sixth Amendment standard of effective assistance of counsel requires specifically that counsel not be disabled in his representation of the defendant by a conflict antagonistic to the defendant's interests. See Glasser v. United States, 315 U.S. 60, 69-70 (1942). The standard is sufficiently strenuous that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." Cuyler v. Sullivan, 446 U.S. 335, 349-350 (1980). See Holloway v. Arkansas, 435 U.S. 475 (1978); Glasser v. United States, supra. The issue is thus whether the FBI agent suffers an actual conflict of interest by virtue of his employment and his purpose in the undercover operation such that he would be disabled constitutionally from representing the defendant.

The most closely analogous cases involve representation by an attorney whose other clients or activities give rise to divided loyalty in representing the defendant's interests. In Von Moltke v. Gillies, 332 U.S. 708 (1948), the defendant received her advice to plead guilty from FBI agents. They were apparently attorneys, although they were not representing the defendant. The defendant subsequently sought release in a habeas corpus proceeding on the ground that her plea was entered without the benefit of counsel. The Supreme Court agreed.14/

> "The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client. Glasser v. United States, 315 U.S. 60, 70.

14/ Justices Black, Douglas, Murphy, and Rutledge, finding in addition that the defendant did not intelligently and understandingly waive her right to counsel, would have directed her release on habeas corpus. Justices Frankfurter and Jackson, however, joined the plurality opinion insofar as it found a deprivation of counsel but not the absence of waiver. The case was remanded for a hearing on the waiver issue.

> Before pleading guilty this petitioner undoubtedly received advice and counsel about the indictment against her, the legal questions involved in a trial under it, and many other matters concerning her case. This counsel came solely from government representatives, some of whom were lawyers. The record shows that these representatives were uniformly courteous to her, although there is no indication that they ever deviated in the slightest from the course dictated by their loyalty to the Government as its agents. In the course of her association with these agents, she appears to have developed a great confidence in them. Some of their evidence indicates a like confidence in her.
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> "The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be. Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision."

Id. at 725-726 (footnotes omitted). See also Glasser v. United States, supra, 315 U.S. at 70: "[W]e [are] clear that the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by [counsel's representation of] conflicting interests."

We do not believe that the proposal to allow an FBI agent to serve as counsel to a defendant in a live criminal case can satisfy this rigorous standard. The agent's primary concern will not be the defense function; it will be the undercover operation.15/ And whenever these two purposes

15/ This characterization of the conflict is the basis for distinguishing cases in which one attorney represents more than one defendant. In those cases, at least the attorney's undivided loyalty is to the defense, albeit to multiple defendants; and more than the fact of multiple clients is required for a showing of conflict. Where counsel's loyalties are split between the defense and another matter, however, there is no similar unity of purpose; and the multiple representation is impermissible. See, e.g., Zuck v. Alabama, 588 F.2d 436 (CA5 1979).

collide, an impermissible conflict is created.16/ To consider but one example of the conflict of interests that the agent's duties in the undercover operation might create, we understand that in many instances the agent's first task after acquiring a potential case will be to seek a continuance so that Chicago may have additional time to review the defendant's background and determine if the case would be acceptable for the operation. The defendant, however, with counsel not bound to seek a continuance, might turn a crowded court docket and an overworked prosecutor's schedule to his advantage by demanding to go to trial immediately. We do not purport to be able to make this tactical decision for any particular case. Our point is that only independent counsel can make this determination.

Nor do we believe that a defendant who knows only that his case is being fixed 17/ has waived his Sixth Amendment

16/ In Zuck v. Alabama, 588 F.2d 436 (CA5 1979), the defendant's attorney was representing the prosecutor in an unrelated civil matter. On the defendant's collateral attack, the State argued that there was no conflict "because the real party in interest in Zuck's case was the people of the State of Alabama and the prosecutor's only interest was in achieving justice, not in convicting Zuck." Id. at 439. The court rejected this argument and found that the dual representation created an actual conflict of interest. "[T]he sixth amendment," the court held,

> "requires that a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client. The fact that a particular lawyer may actually resist that temptation is of no moment. The right to effective assistance of counsel is so vital to a fair trial that courts are compelled to examine every potential infringement of that right with the most exacting scrutiny."

Id. at 440.

17/ We describe the proposal in the most favorable terms possible; some defendants will not know even this much. We are informed that in some cases, an actual "fix" will not be discussed, although the defendant will know that his case is being "handled" in some way, perhaps even some illegitimate way, out of the ordinary course of the judicial process. In other cases, the agent will merely have a subjective belief that the defendant knows that his case is being fixed or handled. According to the proposal, however, in no case should the defendant know that his case is being fixed by payment of a bribe to the judge.

right to independent counsel. The defendant will not know that his attorney is an FBI agent or that the judge is being bribed to dispose favorably of the defendant's case. The lack of this highly relevant and material information prevents the defendant's acquiescence in the agent's suggestion to fix the case or even the defendant's overt request to his attorney to fix the case from meeting the strict standard imposed for waiver of constitutional rights, which, in the classic formulation of Johnson v. Zerbst, 304 U.S. 458 (1938), requires "an intentional relinquishment or abandonment of a known right or privilege," id. at 464, and is effective only if made "competently and intelligently." Id. at 468. Moreover, the courts indulge every reasonable presumption against waiver. Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393 (1937); Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 307 (1937). See also Von Moltke v. Gillies, supra, 332 U.S. at 723-724 ("To be valid such waiver must be made with an apprehension of . . . all other facts essential to a broad understanding of the whole matter."). The courts might be especially reluctant to find waiver on these facts because the independent and honest counsel to which the defendant is entitled would advise the defendant against trying to have his case fixed and would refuse to pursue the scheme. The defendant loses this advice and relinquishes his constitutional rights in a corrupt transaction precisely because the agent-attorney is not independent.

C. We also believe that the defendant in an actual criminal case who does not know that his attorney is an FBI agent might suffer actual prejudice or injury because of the representation. We mention a number of possibilities in addition to the loss of a potential tactical advantage in proceeding to trial immediately, as we discussed above.

First, the defendant whose attorney arranges, among the four acceptable dispositions, for supervision or probation suffers a more onerous punishment than the acquittal or dismissal that he might have obtained by proceeding legitimately through the criminal justice system. The stigma and collateral consequences of a conviction, albeit one punished by pretrial or probationary supervision and not jail time, and the potential limitations on the defendant's freedom of activity during the period of supervision are easily identifiable prejudice to the defendant. Nor do we believe that the defendant's consent to pretrial diversion or supervision amounts to a waiver under these circumstances. To be valid, such consent would require the advice of independent counsel who has

assessed the defendant's best interests and recommended acceptance of a particular disposition. Cf. Boykin v. Alabama, 395 U.S. 238 (1969); Von Moltke v. Gillies, 332 U.S. 708 (1948) (guilty pleas).

Second, the defendant might in the course of discussing his case with the agent disclose some other criminal activity or other incriminating information. Of course, the agent would be obligated ethically not to divulge the information. Yet in exchange for his right not to incriminate or implicate himself, and in fact the prerogative to say not one word to an FBI agent, the defendant will have only the agent's commitment to the attorney-client relationship and the confidentiality that it requires. Should the agent violate the confidence, even unwittingly or subconsciously, the defendant will be left to argue about whether the information came or could have come from an independent source. See Brewer v. Williams, 430 U.S. 387, 406 n.12 (1977); cf. Wong Sun v. United States, 371 U.S. 471 (1963).

Third, the proposal recognizes the possibility that notwithstanding an agreement with the judge to dispose favorably of the case, something might go wrong and the defendant might be sentenced to jail time. The U.S. Attorney's Office in Chicago agrees that it would be "unsatisfactory for anyone to spend a significant period of time in jail after having been represented by our undercover agent lawyers"; and in fact, a procedure has been developed for obtaining relief from the conviction or sentence. But we are concerned with the interim period before retrial or dismissal of the charges, which we assume for present purposes could be obtained. It might be that the defendant would not serve any more jail time if caught in a "bad deal" than he would have if no attempt was ever made to fix his case. But we are troubled precisely because of this variable in a process set in motion by an FBI agent-attorney.

Finally, there is the possibility that the identity of a defendant whose case was fixed by acquittal or dismissal will become known when the undercover operation is completed and the cases against the judges, lawyers, and court personnel go to trial. If the public impression of the defendant is that he was not acquitted or did not have the charges against him dismissed "on the merits," but rather only because his case was fixed, he will have lost his right to go through the criminal justice system and be cleared of charges, and thus clear his reputation. Again, even if it is the defendant who has suggested fixing the case, or even if the defendant knows of and agrees to the agent's plan to fix the case, we would hesitate to find a waiver of right to use the system

for this purpose. With independent and honest counsel, the defendant would not have been involved in a scheme to fix his case.

It is impossible, of course, to state categorically that all defendants would suffer actual prejudice. But we do not believe that such certainty is required. The possibility that at least some would is a sufficient basis for concern that the proposal does not adequately protect the defendants' Sixth Amendment rights. Because the Constitution imposes this standard on federal officers, they cannot, consistent with the Constitution, implement the proposal.18/

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

18/ Ordinarily, if we found a proposal to be constitutionally deficient, we would attempt to work with you and suggest modifications to bring the proposal into constitutional compliance. One possibility here might be fully to inform the defendants in the actual criminal cases and secure their express cooperation in the operation. Another might be to use contrived cases. We understand, however, that these possibilities have been considered and rejected. Should you reconsider these possibilities or develop other alternatives, we would be happy to review them; and if satisfied on the Sixth Amendment issues, we would address whatever federalism and ethics problems might be involved in the proposal as modified.