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DEFENSE ATTORNEYS AS GOVERNMENT INFORMANTS: STRANGERS IN A STRANGE LAND?

INTRODUCTION

If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.¹

As described by one commentator, *United States v. Ofshe*² is truly a “story without heroes.”³ Ronald Ofshe was arrested in December 1982 on charges of possession with intent to distribute cocaine.⁴ At that time he retained the services of local Florida counsel, Melvin Black.⁵ In February 1983 he also retained the services of out-of-state counsel, Marvin Glass.⁶ Glass, a Chicago attorney, was retained to assume “a *lead* counsel position with respect to communications with the prosecution and plea negotiations.”⁷

Shortly after his representation of Ofshe commenced, Glass was informed by the United States Attorney’s Office that Glass himself was the target of a criminal investigation.⁸ In response, Glass offered his services in “identifying and investigating

1. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

2. 817 F.2d 1508 (11th Cir. 1987).

3. Berg, *Shallow Ruling Trespasses on Client Confidentiality*, *Fulton Co. Daily Rep.*, Sept. 2, 1987, at 2, col. 1.

4. *United States v. Ofshe*, 817 F.2d at 1510.

5. *Id.*

6. Petition for Certiorari at 4, *United States v. Ofshe*, 817 F.2d 1508 (11th Cir.) (No. 87-407), *cert. denied*, 108 S. Ct. 451 (1987).

7. *Id.*

8. *Ofshe*, 817 F.2d at 1511. Glass’ criminal indictment resulted from Operation Grey-lord, “a three and one-half year undercover investigation of corruption in the Cook County court system conducted by the Federal Bureau of Investigation, United States Attorney for the Northern District of Illinois, and the Cook County State’s Attorney.” Note, *The Grey-lord Investigation Guidelines: Protection for Grey-lord Attorneys?* 16 LOY. U. CHI. L.J. 641, 641 n.1 (1985).

suspected drug traffickers" to Assistant U.S. Attorney Scott Turow of the U.S. Attorney's Office in Chicago, Illinois.⁹ By June 1983 Glass even had suggested his client, Ofshe, as a possible target for the investigation.¹⁰ To this end, Turow "sought and received permission to place a Nagra body bug on Glass and to conduct an electronic surveillance of the conversations between Glass and his client."¹¹

Glass continued to represent Ofshe in this manner for ten more months with the knowledge of Turow, the U.S. Attorney for the Southern District of Florida, and the presiding trial judge.¹² Ultimately, Ofshe's motions to suppress the evidence¹³ and to dismiss the indictment¹⁴ were denied. He was convicted of possession with intent to distribute cocaine and sentenced to four years in the penitentiary.¹⁵

While expressing grave constitutional concerns, the Court of Appeals for the Eleventh Circuit affirmed Ofshe's conviction.¹⁶ The court held that Glass' ineffective representation of Ofshe did not prejudice the defendant; that the government intrusion in

9. *Ofshe*, 817 F.2d at 1511.

10. *Id.*

11. *Id.* A Nagra body bug is a surveillance device which is placed on an individual to monitor conversations and provide a taped recording of the conversations. See Petition for Certiorari, *supra* note 6, at 4-5.

12. *Ofshe*, 817 F.2d at 1511. Upon learning of Glass' conflict in February of 1984, the trial judge ordered the U.S. Attorney to notify Ofshe that Glass was acting as a government informant against him. However, Glass' appeal of the judge's order resulted in keeping the court file on this matter sealed until February of 1985. *Id.*

13. Ofshe filed a motion to suppress evidence obtained by the government, claiming that his fourth amendment rights were violated because the warrant was issued by and directed to be executed by the same individual. Furthermore, Ofshe contended that the warrant contained insufficient information regarding the reliability of the government informant and the description of the premises to be searched. *Id.* at 1513-14. According to the appellate court, the district court properly rejected Ofshe's fourth amendment claim because "[t]he errors assailed were those of form, not of substance." *Id.* at 1514. See also *Seventeenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1986-1987*, 76 GEO. L.J. 521, 549 n.151 (1988), citing *Ofshe* for the proposition that a "warrant naming only one business in multiple use commercial building [was] valid when officers had no reason to know premises subdivided into separate offices." *Id.*

14. Ofshe's motions to dismiss for violations of due process and the right to counsel were filed on July 15, 1985. Petition for Certiorari, *supra* note 6, at 3. The motion was filed following attorney Black's receipt of a letter from Chief Assistant U.S. Attorney Joseph McSorley, on February 16, 1985, informing him that Glass was a government informant who had taped a conversation with Ofshe while acting as his counsel. *Ofshe*, 817 F.2d at 1512.

15. See Berg, *supra* note 3, at 2, col. 1.

16. *Ofshe*, 817 F.2d at 1517.

this case did not prejudice Ofshe; and that there was no conflict of interest which worked to Ofshe's prejudice.¹⁷

Ofshe's basic contention on appeal was that the government's use of his attorney as an informant against him warranted a reversal of his conviction because such action violates both the sixth amendment right to counsel and the fifth amendment right to due process.¹⁸ Ofshe's sixth amendment claim challenged the constitutionality of government intrusion into the attorney-client relationship, asserting that such intrusion resulted in both ineffective representation and a conflict of interest.¹⁹ Ofshe's fifth amendment claim focused on the questionable methods employed by the government to obtain information concerning Ofshe's activities.²⁰

The Court of Appeals for the Eleventh Circuit examined and summarily disposed of Ofshe's fifth and sixth amendment claims with little more than cursory analysis. This Comment briefly discusses the fifth amendment issue raised, but primarily focuses on the potential implications of the court of appeals' analysis of the sixth amendment's guarantee of right to counsel. In re-examining these claims, it is interesting to note the juxtaposition of the court's recognition of the egregious facts of this case²¹ with its decision that Ofshe suffered no harm from either his defense counsel's or the government's activities.

I. SIXTH AMENDMENT ISSUES

The sixth amendment provides in part that "[i]n all criminal prosecutions the accused shall . . . have the assistance of counsel for his defense."²² The United States Supreme Court has long held that this constitutional right to counsel is the right to "effective assistance of competent counsel."²³ To this end, the

17. *Id.* at 1516.

18. *Id.* at 1515-16.

19. *Id.* at 1515.

20. *Id.* at 1516.

21. The court acknowledged its belief "that Glass' and Turow's conduct was reprehensible." *Id.* at 1516 n.6.

22. U.S. CONST. amend. VI.

23. *McMann v. Richardson*, 397 U.S. 759, 771 (1970). See also *Reece v. Georgia*, 350 U.S. 85, 90 (1955) (denial of counsel before grand jury indictment violated constitutional requisite of due process which states must recognize); *Glasser v. United States*, 315 U.S. 60, 70 (1942) ("'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired"); *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (right of criminal defendant to assistance of counsel includes not only formal

(*k*) providing suitable programmes keeping in view the special needs of the minorities and tribal communities;

(*l*) taking special steps to protect the interests of children, the blind, the aged, the handicapped and other vulnerable Sections of the people;

(*m*) promoting national integration by broadcasting in a manner that facilitates communication in the languages in India; and facilitating the distribution of regional broadcasting services in every State in the languages of that State;

(*n*) providing comprehensive broadcast coverage through the choice of appropriate technology and the best utilisation of the broadcast frequencies available and ensuring high quality reception;

(*o*) promoting research and development activities in order to ensure that radio and television broadcast technology are constantly updated; and

(*p*) expanding broadcasting facilities by establishing additional channels of transmission at various levels.

(3) In particular, and without prejudice to the generality of the foregoing provisions, the Corporation may take such steps as it thinks fit—

(*a*) to ensure that broadcasting is conducted as a public service to provide and produce programmes;

(*b*) to establish a system for the gathering of news for radio and television;

(*c*) to negotiate for purchase of, or otherwise acquire, programmes and rights or privileges in respect of sports and other events, films, serials, occasions, meetings, functions or incidents of public interest, for broadcasting and to establish procedures for the allocation of such programmes, rights or privileges to the services;

(*d*) to establish and maintain a library or libraries of radio, television and other materials;

(*e*) to conduct or commission, from time to time, programmes, audience research, market or technical service, which may be released to such persons and in such

manner and subject to such terms and conditions as the Corporation may think fit;

(f) to provide such other services as may be specified by regulations.

(4) Nothing in sub-sections (2) and (3) shall prevent the Corporation from managing on behalf of the Central Government and in accordance with such terms and conditions as may be specified by that Government the broadcasting of External Services and monitoring of broadcasts made by organisations outside India on the basis of arrangements made for reimbursement of expenses by the Central Government.

(5) For the purposes of ensuring that adequate time is made available for the promotion of the objectives set out in this Section, the Central Government shall have the power to determine the maximum limit of broadcast time in respect of the advertisement.

(6) The Corporation shall be subject to no civil liability on the ground merely that it failed to comply with any of the provisions of this Section.

(7) The Corporation shall have power to determine and levy fees and other service charges for or in respect of the advertisements and such programmes as may be specified by regulations:

Provided that the fees and other service charges levied and collected under this sub-section shall not exceed such limits as may be determined by the Central Government, from time to time.

13. Parliamentary Committee.—(1) There shall be constituted a Committee consisting of twenty-two Members of Parliament, of whom fifteen from the House of the People to be elected by the Members thereof and seven from the Council of States to be elected by the Members thereof in accordance with the system of proportional representation by means of the single transferable vote, to oversee that the Corporation discharges its functions in accordance with the provisions of this Act and, in particular, the objectives set out in Section 12 and submit a report thereon to Parliament.

(2) The Committee shall function in accordance with such rules as may be made by the Speaker of the House of the People.

14. Establishment of Broadcasting Council, term of office and removal, etc., of members thereof.—(1) There shall be estab-

substantial disadvantage to the course of his defense.'"³⁶ The stricter Supreme Court standard of prejudice entails "a general requirement that the defendant affirmatively prove prejudice."³⁷ This requirement of proof of actual prejudice has led at least one commentator to conclude that the standard is too stringent to provide relief for criminal defendants raising general ineffectiveness of counsel claims.³⁸

Even when courts acknowledge blatant deficiencies on the part of an attorney, they have been hesitant in concluding that such deficiencies prejudiced a defendant.³⁹ Thus, success on the first prong of the test does not satisfy the complete standard.

Prejudice within the context of an ineffective assistance of counsel claim has not been clearly defined by the Court. Although the Court has established prejudice as an element of the test, it has deliberately failed to specify what constitutes prejudice.⁴⁰ According to the *Strickland* Court, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."⁴¹

Curiously, the Eleventh Circuit Court of Appeals did not apply the Supreme Court's *Strickland* test in its analysis of Ofshe's claims. Although the court clearly conceded that Glass' representation of Ofshe was deficient,⁴² it held, without further elaboration, that Ofshe did not suffer prejudice.⁴³

36. *Id.* at 682 (quoting *Washington v. Strickland*, 693 F.2d 1243, 1262 (5th Cir. 1982)).

37. *Id.* at 693.

38. For a discussion of the strengths and weaknesses of the *Strickland* test, see Note, *Ineffective Assistance of Counsel Claims: Toward a Uniform Framework For Review*; *Strickland v. Washington*, 50 Mo. L. Rev. 651 (1986).

39. See, e.g., *United States v. Mouzin*, 785 F.2d 682 (9th Cir. 1986) (disbarment of defendant's attorney not enough to establish that counsel's assistance to defendant was ineffective). But see *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984) (defendant's trial counsel held ineffective when, unbeknownst to defendant, counsel engaged in similar type of criminal activity for which defendant was being tried); *Solina v. United States*, 709 F.2d 160 (2d Cir. 1983) (failure of defendant's attorney to pass any state bar denied defendant the effective assistance of counsel).

40. *Strickland*, 466 U.S. at 688 ("More specific guidelines are not appropriate.").

41. *Id.* at 694.

42. *United States v. Ofshe*, 817 F.2d 1508, 1516 (11th Cir. 1987). The court noted that "the government allowed the ineffective representation to continue for over 10 months." *Id.* at 1511. See also Appellee's Motion to Amend Panel Opinion at 10, *United States v. Ofshe*, 817 F.2d 1508 (11th Cir. 1987) (No. 86-5351). ("In this case, the foreseeable result of Turow's conduct was that Glass' representation of Ofshe would be rendered ineffective.").

43. *Ofshe*, 817 F.2d at 1515. "We reiterate and emphasize that Ofshe suffered no prejudice as a result of the taped conversation." *Id.* The court's failure to develop its reasoning leaves unanswered a crucial question: how could such blatantly ineffective

Because *Ofshe* was not examined under the *Strickland* guidelines, one avenue of challenging a sixth amendment violation was automatically closed to Ofshe. The court of appeals could have analyzed this issue, regardless of whether the *Strickland* standard had been raised by Ofshe at the trial level, because the facts established that such ineffective representation on Glass' part was apparent.⁴⁴ The court of appeals readily determined that the first prong of the *Strickland* test was met; there was an acknowledged ineffective representation.⁴⁵ If the court had applied *Strickland*, it should have determined whether the ineffective representation by Glass prejudiced Ofshe's defense such that the result rendered was unreliable. The failure of the Eleventh Circuit to apply *Strickland* in a case peculiarly suited to its application is noteworthy in light of the importance the Supreme Court has placed on the right to effective representation.⁴⁶

B. Government Intrusion into the Attorney-Client Relationship

A second aspect of the sixth amendment guarantee to effective assistance of counsel is implicated when governmental agents, including informers, impermissibly intrude into the attorney-client relationship.⁴⁷ The Supreme Court addressed this issue in *United States v. Morrison*.⁴⁸ Defendant Hazel Morrison, indicted on federal drug charges, retained private counsel. Although government agents were aware that Morrison was represented by counsel, they met with her twice without her attorney's knowledge or permission and urged her to cooperate with the government in making its case.⁴⁹ After refusing to cooperate, Morrison moved to have her indictment dismissed claiming the governmental intrusion had violated her sixth amendment right to counsel. The district court denied her motion and the Court

representation not constitute prejudice to Ofshe's defense? The opinion does not address this question because the court of appeals never applied the standards or reasoning of *Strickland* to Ofshe's case. No reference to *Strickland* appears within the court's opinion.

44. See *Wood v. Georgia*, 450 U.S. 261 (1981). Justice Powell, writing for the majority, noted that failure to raise a constitutional issue in the lower court does not preclude the Court from addressing such an issue "in the interests of justice," when such constitutional violation is apparent from the record. *Id.* at 265 n.5.

45. *Ofshe*, 817 F.2d at 1511. The words "ineffective representation" appear only in the court's initial reference to Glass' poor representation. *Id.*

46. See *supra* note 27 and accompanying text.

47. See cases cited *supra* note 25.

48. 449 U.S. 361 (1981).

49. *United States v. Morrison*, 449 U.S. at 362.

of Appeals for the Third Circuit reversed.⁵⁰ The Supreme Court accepted certiorari and articulated the standard for sixth amendment claims arising out of governmental intrusion into the attorney-client relationship.

The Court in *Morrison* established a fairly stringent two-prong test for dismissal of an indictment when government agents violate a defendant's sixth amendment right to effective assistance of counsel. A defendant must first establish that actions on the part of the government violated the sixth amendment.⁵¹ Secondly, the defendant must demonstrate that the violation led to actual prejudice resulting in an "adverse . . . impact on the criminal proceedings."⁵² The practical effect of the *Morrison* test is that government intrusion alone into an attorney-client relationship will not result in automatic dismissal of an indictment absent a showing of "demonstrable prejudice" to the defendant.⁵³ The Court of Appeals for the Eleventh Circuit espoused this view in *Ofshe*.

Although courts have found government activity which was intrusive enough to constitute reversal of a conviction or indictment,⁵⁴ the trend has been to uphold a defendant's conviction even if a sixth amendment violation by the government has been established.⁵⁵ Thus, an ineffective assistance of counsel claim is

50. *Id.* at 363.

51. *Id.* at 365.

52. *Id.*

53. *Id.* See also *Seventeenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1986-1987*, 76 GEO. L.J. 921, 945 n.2092 (1988), referencing the *Ofshe* case in support of the *Morrison* theory that government intrusion alone, in the absence of proven prejudice, will not warrant dismissal of an indictment.

54. See, e.g., *Moore v. Illinois*, 434 U.S. 220, 231 (1977) ("[P]etitioner's Sixth Amendment rights were violated by a corporeal identification conducted after the initiation of adversary judicial criminal proceedings and in the absence of counsel."); *Geders v. United States*, 425 U.S. 80, 91 (1976) (The trial court's "order preventing petitioner from consulting his counsel 'about anything' during a 17-hour overnight recess . . . impinged upon his right to the assistance of counsel . . ."); *Herring v. New York*, 422 U.S. 853, 858 (1975) (New York statute allowing trial judge to deny defense counsel the right to summation at close of trial held unconstitutional violation of a criminal defendant's right to counsel); *United States v. Valencia*, 541 F.2d 618, 622 (6th Cir. 1976) (government's action in employing undercover informant acting as secretary to attorney for defendant in drug prosecution case mandated reversal of conviction and new trial).

55. See, e.g., *Morrison*, 449 U.S. at 361 (government agents meeting with defendant without knowledge or permission of her attorney violated her sixth amendment rights but did not justify dismissal of indictment absent showing of prejudice to counsel's ability to represent defendant); *Weatherford v. Bursey*, 429 U.S. 545 (1977) (participation in pretrial meetings between accused, accused's attorney, and undercover agent did not unconstitutionally infringe accused's right to effective assistance of counsel even when

immediately disadvantaged if the only sixth amendment challenge is tied solely to government action in the case.⁵⁶ Interestingly, the court of appeals based most of its sixth amendment analysis upon this claim.⁵⁷ This narrow focus led the court to conclude that the facts of *Ofshe*, limited to government action alone, did not demonstrate the requisite prejudice resulting from the government's actions and, thus, could not sustain a sixth amendment challenge based on this singular claim.⁵⁸

Under *Morrison* and related cases, it is not surprising that the *Ofshe* court found the government's actions to be borderline constitutional.⁵⁹ Some courts have subjected government intrusion claims to very strict standards,⁶⁰ deferring to the government's legitimate interest in acting to deter crime and apprehend criminals.⁶¹

undercover agent later testified on behalf of the prosecution); *United States v. Melvin*, 650 F.2d 641 (5th Cir. Unit B 1981) (codefendant turned informant did not merit dismissal of defendant's case if some other remedy could be fashioned to vindicate defendant's right to counsel); *United States v. King*, 536 F. Supp. 253 (C.D. Cal. 1982) (effective assistance of counsel did not guarantee confidentiality regarding attorney's criminal activity on behalf of client).

56. When government conduct leads to violation of the sixth amendment right to counsel the usual remedy is not dismissal, but rather suppression of evidence so obtained. *See Morrison*, 449 U.S. at 365. If any evidence illegally obtained is not introduced at trial, as in the *Ofshe* case, a government intrusion claim alone is an empty sixth amendment challenge.

57. The court of appeals cited five cases in its analysis of *Ofshe*'s sixth amendment claim. Four of these were "government intrusion" cases: *Morrison*, 449 U.S. 361 (1981) (prejudice required to effect dismissal of indictment in government intrusion case); *Weatherford*, 429 U.S. 547 (1977) (government intrusion results in sixth amendment violation only if information obtained is communicated to prosecution); *Melvin*, 650 F.2d 641 (5th Cir. 1981) (absent showing of prejudice, government informant's presence at strategy meetings between defendant and counsel does not constitute sixth amendment violation); *United States v. Sander*, 615 F.2d 215 (5th Cir. 1980), *cert. denied*, 449 U.S. 835 (1980) (no sixth amendment violation when police examine file of defendant's murdered attorney and no information contained therein is utilized by prosecution). *Ofshe*, 817 F.2d at 1515.

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

59. However, the court still categorized the government's actions through Assistant U.S. Attorney Turow as "reprehensible." *Id.* at 1516 n.6.

60. *See, e.g., United States v. King*, 536 F. Supp. 253, 258-61 (C.D. Cal. 1982) (district court formulated a three-prong test to determine whether a government intrusion has, in fact, undermined a legitimate attorney-client relationship).

61. *Morrison*, 449 U.S. at 364 ("[W]e have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice."). Arguably, government action to deter crime and apprehend criminals would be ineffective if the government were so hamstrung by judicial rules that the government could never intrude upon the attorney-client relationship, even through constitutionally permissible means.

Had the facts of *Ofshe* implicated only the government's activity, the court of appeals' analysis under *Morrison* would be more convincing. However, the flaw in this narrow approach is that the court's analysis does not address the constitutional concerns associated with a sixth amendment violation resulting from the actions of the government concurrent with the actions of the defendant's attorney.

By focusing primarily on the government's conduct, the *Ofshe* court narrowed the sixth amendment question to the single issue of whether the government's action in taping attorney Glass' conversation with his client constituted prejudice to *Ofshe*.⁶² The court of appeals noted that the government did not provide evidence procured from this tape to the prosecutor in *Ofshe*'s case.⁶³ Thus, the court's logical conclusion, premised solely on *Morrison*, was that *Ofshe* was not prejudiced by the government's action.

It is unclear why the Eleventh Circuit concentrated its analysis solely upon whether the government's action was such that evidence should be excluded. The court's limited analysis foreclosed consideration of the broader and more relevant issue raised by the facts of *Ofshe*. The controlling issue is not one of tainted evidence due to government intrusion into the attorney-client relationship.⁶⁴ Rather, more subtle and grave constitutional concerns are generated when the government acts in concert with the criminal defense attorney to the detriment of the defendant's representation. The court's primary focus on the government's activity in a vacuum, rather than on the compelling constitutional implications of the combined activity of Glass and the government, circumvented any complete and thorough analysis of *Ofshe*'s sixth amendment challenge.

C. Attorney Conflict of Interest

A third aspect of the sixth amendment right to counsel is analogous to the maxim that "no man may serve two masters."⁶⁵ A legal corollary to this maxim is that no attorney can effectively

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

63. *Id.*

64. *Id.*

65. *Matthew* 6:24.

serve competing interests.⁶⁶ The validity of sixth amendment attorney conflict of interest claims is judged by the Supreme Court's standard enunciated in *Cuyler v. Sullivan*.⁶⁷

In *Cuyler*, John Sullivan and two co-defendants were represented by two privately retained attorneys in separate murder trials.⁶⁸ Sullivan was tried first. At the close of the state's case, the defense rested without presentation of any evidence. Consequently, Sullivan was convicted and sentenced to life imprisonment based on circumstantial evidence.⁶⁹ The Court of Appeals for the Third Circuit granted Sullivan's habeas corpus petition, holding that the joint representation by Sullivan's defense counsel evidenced "a possible conflict of interest."⁷⁰

Upon review, the Supreme Court reversed, stating that a possible conflict does not establish a sixth amendment violation.⁷¹ The *Cuyler* standard mandates an actual conflict of interest resulting in the attorney's adverse performance.⁷² Significantly, the Court also emphasized 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."⁷³

There has been some disagreement among lower courts as to whether the *Cuyler* test is satisfied once an actual conflict of interest has been established or whether the test requires additional proof establishing that the conflict resulted in an inability of the attorney to effectively represent his client.⁷⁴ One important factor distinguishing the *Cuyler* standard from that of *Morrison* and *Strickland* is clear, however. The *Cuyler* test does

66. See *Holloway v. Arkansas*, 435 U.S. 475 (1978). The Court held that "requiring an attorney to represent two codefendants whose interests were in conflict [denies] one of the defendants his Sixth Amendment right to the effective assistance of counsel." *Id.* at 481.

67. 446 U.S. 335 (1980).

68. *Cuyler v. Sullivan*, 446 U.S. at 337.

69. *Id.* at 338.

70. *Id.* at 340.

71. *Id.* at 348.

72. *Id.*

73. *Id.* at 349-50 (emphasis added).

74. Compare *Baty v. Balkcom*, 661 F.2d 391, 397 (5th Cir. Unit B 1981) ("[T]he standard imposed by the Supreme Court in *Cuyler* is met by proof of an actual conflict of interest.") with *Parker v. Parratt*, 662 F.2d 479, 483-84 (8th Cir. 1981) (The *Cuyler* standard mandates evidence of both an actual conflict of interest and adverse effect.).

For a thorough discussion of the varying interpretations by the lower courts of the *Cuyler* standard, see Note, *Conflicts of Interest in the Representation of Multiple Criminal Defendants: Clarifying Cuyler v. Sullivan*, 70 GEO. L.J. 1527 (1982).

not require the defendant to further bear the burden of proving how this conflict actually prejudiced him. The prejudice is presumed.⁷⁵ The *Strickland* Court, in distinguishing ineffective assistance of counsel claims from conflict of interest claims, articulated the necessity for presuming prejudice in the latter:

[When an attorney is burdened by an actual conflict of interest,] counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts . . . it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.⁷⁶

It would have been more appropriate for the court of appeals to base the *Ofshe* opinion upon the *Cuyler* premise that an actual conflict of interest results in presumed prejudice.⁷⁷ Glass' actions were designed to mitigate his own pending criminal culpability and arguably created such a gross distortion between the concepts of loyalty to the client and loyalty to one's own best interests that an inherent conflict of interest arose at the inception of the "deal" struck between Glass and Turow.⁷⁸ This conflict constituted a continuing and blatant violation of *Ofshe*'s fundamental sixth amendment rights that could not be remedied once it occurred.

Inexplicably, the *Ofshe* court devoted scant attention to the conflict of interest issue in its opinion and did no more than

75. *Cuyler*, 446 U.S. at 349.

76. *Strickland v. Washington*, 446 U.S. 668, 692 (1984). Other courts have also emphasized the constitutional status of an attorney's loyalty to his client. *See, e.g., United States v. Alvarez*, 580 F.2d 1251, 1254 (5th Cir. 1978) ("Undivided loyalty and fidelity of commitment is therefore the guiding principle in this important area of Sixth Amendment jurisprudence.").

77. The conflict of interest aspect of a sixth amendment claim is perhaps the least tested with respect to the peculiar facts of *Ofshe*. Most cases have dealt with issues of multiple or joint representation of defendants. *See, e.g., Cuyler*, 446 U.S. 335 (multiple representation issue implicated when two privately retained attorneys represented three criminal co-defendants jointly); *Alvarez*, 580 F.2d 1251 (attorney's multiple representation of defendant and two co-defendants who turned government witnesses at trial created actual conflict of interest); *Illinois v. Washington*, 101 Ill. 2d 104, 461 N.E.2d 393 (1984) (application of *Cuyler* actual conflict of interest standard restricted to multiple representation cases).

78. *Ofshe*, 817 F.2d at 1511. Ironically, Glass' egregious methods appear to have served him little. He was convicted of the criminal charges he had tried to mitigate and was sentenced to eight years in prison. Berg, *supra* note 3, at 2, col. 3.

tacitly acknowledge that Glass did indeed have a significant conflict of interest.⁷⁹ The court did not consider whether this, the strongest of Ofshe's claims, merited a presumption of prejudice and a subsequent dismissal of his conviction, nor did the court refer to the *Cuyler* case or its historical predecessors.⁸⁰

The government's action in aiding and encouraging a criminal defense attorney to betray his loyalty to his client concurrent with that attorney's acquiescence jeopardizes the criminal defendant's constitutional guarantee of effective counsel.⁸¹ This issue is especially significant in *Ofshe* because the court declined to address what could be a paradigm example of an actual conflict of interest. This failure by the court raises grave constitutional concerns for potential judicial erosion of the attorney-client relationship.⁸²

79. *Ofshe*, 817 F.2d at 1516.

80. Predecessors of *Cuyler* include *Holloway v. Arkansas*, 435 U.S. 475 (1978) and *Glasser v. United States*, 315 U.S. 60 (1942). One could argue that the standards of *Cuyler* do not apply to *Ofshe* as *Cuyler* and its predecessors addressed the conflict of interest issue in multiple representation cases. However, a significant number of courts addressing a variety of conflict of interest issues have applied the *Cuyler* standard outside the genre of multiple representation cases. See, e.g., *Wood v. Georgia*, 450 U.S. 261 (1981) (conflict exists when attorney representing defendant employees was retained and paid by employer whose interests conflicted with those of his employees); *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984) (conflict of interest arose when defense counsel was implicated in criminal activity similar to that for which his client was being tried); *Solina v. United States*, 709 F.2d 160 (2d Cir. 1983) (inherent conflict of interest found when defense counsel failed to inform defendant that counsel had never passed a required state bar examination); *United States v. Knight*, 680 F.2d 470 (6th Cir. 1982) (defense counsel implicated in theft of documents during defendant's trial); *United States v. Hearst*, 638 F.2d 1190 (9th Cir. 1980) (conflict claim centered on allegation that defense counsel pursued his own interest in publication rights rather than defendant's interest in acquittal).

Further, as recently as 1984, Justice Rehnquist, in a strongly worded dissent to a denial of certiorari, argued that the Illinois Supreme Court erred in interpreting *Cuyler* as applying only to those cases involving multiple representation of defendants and stated that, as evidenced by lower court decisions, proper application of *Cuyler* was not so limited. See *Illinois v. Washington*, 101 Ill. 2d 104, 461 N.E.2d 393, cert. denied, 469 U.S. 1022 (1984) (Rehnquist, J., dissenting). Justice Rehnquist argued that the proper standard to apply in conflict of interest cases was an issue which should be addressed by the Supreme Court. *Id.* at 1022. In this context, it is interesting to note that a writ of certiorari for *Ofshe* was denied on November 30, 1987. *Ofshe v. United States*, 108 S. Ct. 451 (1987).

81. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984). ("Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest.").

82. Commentators have noted the emergence of a judicial trend allowing intrusions upon the historically safeguarded attorney-client relationship. See, e.g., Falsgraf, *A Dangerous Wedge Between Lawyer and Client*, 72 A.B.A. J. 8 (1986) (discussing the increase of grand jury subpoenas to criminal defense attorneys); Merkle & Moscarino, *Are Prose-*

Application of the *Cuyler* standard to the facts of *Ofshe* may have resulted in the court's reconsideration of its conclusion that "Ofshe suffered no prejudice."⁸³ *Cuyler*'s premise is that no demonstration of prejudice is required once the "mixed question of law and fact"⁸⁴ establishes that an actual conflict of interest has adversely affected an attorney's ability to represent his client loyally and zealously. The court should have followed this analysis to determine whether the concerted actions of attorney Glass and the government affected Ofshe's sixth amendment rights. Concededly, because of the insidious nature of the combined actions of Glass and the government, it would be nearly impossible to pinpoint any concrete action which actually prejudiced Ofshe.⁸⁵ Under the rationale of *Cuyler*, however, it is not necessary to do so.⁸⁶

Although the claims of attorney conflict of interest and ineffective assistance of counsel are governed by two separate Supreme Court standards,⁸⁷ they are intertwined to the extent that a finding of an actual conflict of interest will necessarily affect the ability of an attorney to represent his client effectively.⁸⁸ An ineffective assistance of counsel claim therefore merits serious scrutiny if the facts, as they did in *Ofshe*, also indicate an inherent conflict of interest. It is uncertain why the Eleventh Circuit

cutors Invading the Attorney-Client Relationship?, 71 A.B.A. J. 38, 38 (1985) (analyzing the implications of the Comprehensive Crime Control Act of 1984 which "increased the government's power to seek forfeiture of attorney's fees and all other assets" received as payment by criminal defense attorneys).

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

84. *Strickland v. Washington*, 466 U.S. 668, 698 (1984) (quoting *Cuyler*, 446 U.S. at 342).

85. Because the *Strickland* and *Morrison* tests require demonstrable prejudice, any claim by Ofshe utilizing either test alone would probably have failed. In the instant case, although Glass' representation of Ofshe was poisoned throughout, it would be difficult to isolate one tangible action that the court could readily identify as demonstrating actual prejudice.

86. Courts had recognized this constitutional premise prior to *Cuyler*. As the Ninth Circuit noted: "Unlike *competency* of representation, where an attorney's conduct may fall anywhere along a continuum ranging from the incompetent to the superlative, conflict-laden representation is not susceptible of such fine gradations. Such representation is invidious, often escaping detection on review, and is tantamount to a denial of counsel itself." *United States v. Mouzin*, 785 F.2d 682, 703 (9th Cir. 1986) (quoting *United States v. Alvarez*, 580 F.2d 1251, 1256-57 (5th Cir. 1978)).

87. See *supra* notes 34 & 73 and accompanying text.

88. The converse does not necessarily hold true. An ineffective assistance of counsel claim does not always turn upon whether a conflict of interest existed. It is when an actual conflict of interest results in a continuing adverse impact on the defense that such claim exacts thorough examination by the court.

ignored this analysis. The conflict of interest issue appears to represent Ofshe's strongest challenge.⁸⁹ Ofshe's Petition for Certiorari emphasized the constitutional concerns raised by the appellate court's dismissal of the claim that Glass' conflict of interest had a chilling effect on Ofshe's defense.⁹⁰ As stated in the court's opinion, Glass' actions were tainted with self-interest and deceit almost from the inception of his representation of Ofshe.⁹¹

Obviously, any delay on Glass' part in bringing Ofshe's case to trial correlated to the possibility of delaying his own imminent criminal indictment. Glass had local counsel, Black, file numerous motions for continuance and instructed his client, Ofshe, to execute waivers of his right to a speedy trial.⁹² Glass' actions had the effect of delaying Ofshe's case considerably.

Because of this delay, Ofshe's case reached trial after the Supreme Court created an entirely new exception for search and seizure cases.⁹³ Arguably, Ofshe would have had a reasonable probability of prevailing on his motion to suppress if his case had been decided earlier.⁹⁴

Ofshe's local counsel, Black, contended that the facts of *Ofshe* uniquely demonstrate how a client's interests can be prejudiced

89. See *Ofshe*, 817 F.2d at 1515-16.

90. Petition for Certiorari at 11, *United States v. Ofshe*, 817 F.2d 1508 (11th Cir.) (No. 87-407), *cert. denied*, 108 S. Ct. 451 (1987):

The Court of Appeals glossed over the major issue in the case—it does not matter what prejudice the defendant could prove. The error was fundamental and of far greater import than the incarceration of one defendant. No client should ever have to fear that his own lawyer intends to harm him for that lawyer's own personal gain.

Id.

91. *Ofshe*, 817 F.2d at 1511.

92. *Id.*

93. In *United States v. Leon*, 468 U.S. 897 (1984), the Court set forth a "good faith exception" to the exclusionary rule governing unconstitutional searches and seizures. Prior to *Leon*, the evidence obtained in an unconstitutional search conducted pursuant to a facially valid warrant was subject to exclusion. Subsequent to *Leon*, evidence obtained under a constitutionally deficient warrant is not excluded provided the officer acted in good faith in execution of a facially valid warrant.

According to Ofshe's local counsel, Melvin Black, the *Leon* holding adversely affected Ofshe because it "gutted the motion to suppress," and caused Ofshe's case to conclude differently than it would have had his case gone to trial in a timely manner. Berg, *supra* note 3, at 2, col. 3.

94. Ofshe's strongest fourth amendment contentions, that the search warrant was unconstitutional due to lack of probable cause and failure to describe the location to be searched with particularity, are rendered moot in the wake of *Leon's* good faith exception. See Berg, *supra* note 3, at 2, col. 3.

inherently by an actual conflict of interest on the part of his attorney.⁹⁵ In his Writ of Certiorari, Ofshe contended that the court of appeals' failure to address the overwhelming evidence of a conflict of interest foreshadows a judicial breakdown of the sixth amendment right to counsel protections.⁹⁶ When a client must question not only whether his attorney is acting in the client's best interests but, more egregiously, whether the attorney, with the government's aid and encouragement, is in fact "representing" his client for the purpose of advancing the attorney's best interests, the fundamental framework of protection upon which the sixth amendment right to counsel rests is completely undermined.

II. FIFTH AMENDMENT ISSUES

The fifth amendment provides in part that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."⁹⁷ Ofshe's second contention on appeal was that "the government's conduct in invading the communications between him and Glass was so outrageous that it violated his Fifth Amendment due process rights."⁹⁸ Although few Supreme Court decisions address the dismissal of a criminal conviction because of outrageous government conduct in violation of the fifth amendment, the Supreme Court discussed the issue in *United States v. Russell*.⁹⁹ In *Russell*, the Court rejected the defense of entrapment stating that the case did not fall within the scope of

95. Petition for Certiorari at 9, *United States v. Ofshe*, 817 F.2d 1508 (11th Cir.) (No. 87-407), *cert. denied*, 108 S. Ct. 451 (1987) ("A defendant's attorney has a clearly defined and crucial role in the administration of justice, to-wit: to provide advocacy to the citizen accused in the adversary system of trial. That role is literally destroyed when the defense attorney becomes an agent of the prosecution.").

96. *Id.*

Although the court of appeals indicated that it would not "condone" such conduct, it provided no remedy to deter future prosecutors from that conduct If prosecutors are free to use defense attorneys as informants against their clients, irreparable and fatal damage will be done to the delicate balance between the functions of the defense and the prosecution in making the criminal justice system work.

Id.

97. U.S. CONST. amend. V.

98. *Ofshe*, 817 F.2d at 1516.

99. 411 U.S. 423 (1973). *See also* *Hampton v. United States*, 425 U.S. 484 (1976) (defendant predisposed to committing crime of selling heroin could not claim that his fifth amendment due process rights were violated as a result of entrapment by government agents acting in concert with defendant).

outrageous government conduct implicating due process principles.¹⁰⁰ However, the Court noted that future actions of "law enforcement agents" could conceivably constitute conduct which would fall within this context and "would absolutely bar the government from invoking judicial processes to obtain a conviction."¹⁰¹ Although the *Russell* Court recognized outrageous government conduct as a legal defense, the Court required the defendant to show that the challenged government conduct violated "that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment."¹⁰² Once a defendant has established that government action falls within the judicial definition of "outrageous conduct," this alone is sufficient to justify dismissal.¹⁰³

Ofshe contended that the government's conduct in his case did violate that "fundamental fairness, shocking to the universal sense of justice," articulated by the Supreme Court in *Russell*.¹⁰⁴ In rejecting Ofshe's claim, the Eleventh Circuit nevertheless stressed that its opinion was restricted solely to the facts before it and, further, that the court did not condone the government's conduct.¹⁰⁵ Additionally, the court refused Turow's demand to delete any reference to and subsequent recommendation regarding Turow's "reprehensible" behavior from its published opinion.¹⁰⁶

100. *United States v. Russell*, 411 U.S. 423, 431–32 (1973). The Court noted that the defendant's possible predisposition to unlawfully manufacture and sell methamphetamine seriously undercut his claim of entrapment. *Id.* at 432.

101. *Id.*

102. *Id.* at 432 (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960)).

103. *Id.* at 431–32.

104. *Ofshe*, 817 F.2d at 1516.

105. *Id.* The court went so far as to suggest that Glass' and Turow's behavior was so "reprehensible" as to merit further investigation, as evidenced by the court's inclusion in its opinion of the address, complete with zip code, of the Attorney Registration and Disciplinary Commission of Illinois, implicitly directing the district judge to pursue the matter further. *Id.* at n.6.

106. Appellee's Motion to Amend Panel Opinion, *United States v. Ofshe*, 817 F.2d 1508 (11th Cir. 1987) (No. 86-5351). The court further expressed its concern that Turow's actions may have constituted an obstruction of justice under 18 U.S.C. § 1503 (1982):

In this case, the foreseeable result of Turow's conduct was that Glass' representation of Ofshe would be rendered ineffective. Indeed, Turow's own testimony reveals that he subjectively foresaw that very result

In our opinion . . . Turow should have reasonably foreseen that the natural and probable consequence of the success of his scheme to monitor Ofshe's conversations with Glass would be to impede the due administration of justice in violation of section 1503. When a federal court becomes aware of conduct that may be criminal, it is duty bound to alert the appropriate

Arguably, a flaw in the court's reasoning is that it again circumvented the broader constitutional implications of *Ofshe* by limiting itself within its narrow analysis. Future fifth and sixth amendment violation claims may be endangered should the court of appeals' ruling be interpreted as upholding the government's conduct in actively encouraging defense attorneys to become informants against their own clients.¹⁰⁷ Had the court focused on this issue, the government's activity might well have been held violative of due process if for no other reason than that the "dismissal of an indictment because of deliberate governmental misconduct [can be] used as a prophylactic tool for discouraging future actions of the same nature."¹⁰⁸

The Supreme Court generally recognizes that the due process clause limits government actions which violate a protected right of the defendant.¹⁰⁹ Because the government's actions in *Ofshe* were characterized as "reprehensible"¹¹⁰ with no further elaboration, it is difficult to discern what fine gradation caused these same actions to fall short of outrageous conduct. The court of appeals appears content to premise its decision upon a summary finding that, despite the deplorable actions of the government, *Ofshe* suffered no prejudice.¹¹¹ Curiously, the two Supreme Court

authorities.

Id. at 10, 12–13. *But cf.* Uviller, *Presumed Guilty: The Court of Appeals Versus Scott Turow*, 136 U. PA. L. REV. 1879 (1988), a thoughtful analysis focusing on the Eleventh Circuit's panel opinion censuring Turow and raising the spectre of his possible criminal behavior in the *Ofshe* case. Professor Uviller eventually concludes that Glass did labor "under an unethical conflict of interest," but takes issue with the court's proposition that Glass' "dereliction [should] be attributed to Turow." *Id.* at 1894.

In further support of his analysis, Professor Uviller notes that Turow was acting "in accord with the policy of his office and the Department of Justice," the latter recently having "informed Mr. Turow that the matter would not be presented to a grand jury." *Id.* at 1901 n.64. The troubling question, of course, is whether such a departmental policy itself violates the sixth amendment right to counsel.

107. This concern is raised and stated succinctly in *Ofshe's* Petition for Certiorari: "It is imperative that the sanction of dismissal be prescribed as the remedy to deter prosecutors from converting defense attorneys into informants against their own clients." Petition for Certiorari at 8, *United States v. Ofshe*, 817 F.2d 1508 (11th Cir.) (No. 87-407), *cert. denied*, 108 S. Ct. 457 (1987).

108. *United States v. Houghton*, 554 F.2d 1219, 1224 (1st Cir. 1971). The government's continued recalcitrance in failing to divulge information about informants to defense counsel was held not to constitute outrageous conduct. Taken as a whole, the Court found the government acted with "due diligence." *Id.* at 1224–25.

109. *Hampton v. United States*, 425 U.S. 484, 490 (1976). Note, however, that the Court does not elaborate on what type or extent of a protected right must be violated before the limits of the due process clause come into play.

110. *Ofshe*, 817 F.2d at 1516 n.6.

111. *Id.*

cases articulating the due process defense of "outrageous government conduct" do not require a defendant to demonstrate prejudice; outrageous conduct alone is sufficient to justify dismissal.¹¹² In *Ofshe*, it would appear that the court of appeals did in fact find the government's conduct outrageous but not sufficiently outrageous to merit dismissal of the case against Ofshe.

Courts have long recognized that the motivating force behind the due process clause is the promotion of fundamental fairness in government procedures.¹¹³ Thus, due process was intended to protect individuals from the very type of egregious government conduct suffered by Ofshe.¹¹⁴ Inherent in the court of appeals' disposition of *Ofshe* is this pivotal question: In the long run, does the court's decision promote or deter due process protections? There being nothing recondite about the court's analysis, the latter proposition would appear to be true. The constitutional precept of fundamental fairness in government procedures is strained to support an opinion such as *Ofshe*.

CONCLUSION

There are serious flaws in the *Ofshe* decision with respect to fifth and sixth amendment issues. Most significantly, the court's failure to consider Ofshe's claims under the *Strickland* and the *Cuyler* tests appears to leave wide gaps in the court's analysis.

Ofshe met the first prong of the *Strickland* test. The court acknowledged that Glass' representation of Ofshe was ineffective. Yet, inexplicably, the court failed to reference the *Strickland* standard in its opinion. Although it is uncertain whether Ofshe could have proved that this ineffective representation prejudiced his defense, this was a pertinent issue which merited thorough discussion by the court.

Additionally, the court's omission of any discussion of the *Cuyler* standard in its analysis of Glass' conflict of interest is

112. See *United States v. Russell*, 411 U.S. 423, 432 (1973); *Hampton*, 425 U.S. 484, 490.

113. See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Due process represents "a profound attitude of fairness between man and man, and more particularly between the individual and government."); *Pedersen v. South Williamsport Area School Dist.*, 677 F.2d 312, 317 (3d Cir. 1982) ("Essentially, fundamental fairness is what due process means."); *Gibbany v. Department of Corrections*, 415 F. Supp. 1117, 1121 (W.D. Okla. 1976) ("The touchstone of due process is fundamental fairness.").

114. *Betts v. Brady*, 316 U.S. 455, 462 (1942) ("Due process of law is secured against invasion by the federal Government by the Fifth Amendment and is safeguarded against state action in identical words by the Fourteenth.").

surprising. Whether the facts of *Ofshe* could ultimately support a valid conflict of interest claim is debatable. However, the court's recognition that Ofshe's attorney had such conflicting interests would appear to mandate application of *Cuyler*.

In its analysis of both the fifth and sixth amendment claims, the court stressed repeatedly that its holding was limited to the unique facts of *Ofshe*. Ultimately, however, this rationale proves fatal to the court's opinion.

The issue of concurrent attorney and government conduct in this case transcends the conviction of a single criminal defendant. This decision potentially will influence future actions by the government and by criminal defense counsel by defining broad parameters within which overzealous government officials and less-than-loyal defense attorneys may function. The precepts of the fifth and sixth amendments are too fundamental to our system of justice to be sacrificed to the type of "ends justifying means" mentality evidenced in *Ofshe*.

A client's justified belief in his attorney's undivided loyalty should never be compromised by the actions of the government in converting that attorney into a government informant against his own client. The grave constitutional transgressions of the attorney and the government in *Ofshe* should mandate that these facts, as a matter of law, establish an actual conflict of interest giving rise to a per se presumption of prejudice, thus relieving the defendant of the burden of proving actual prejudice. Such a presumption is required when, as here, the combined actions of the government and the attorney produce a representation of a criminal defendant that is irreparably tainted with deceit, self-interest and disloyalty. There can be no true representation within constitutional parameters by counsel in such circumstances. The charges against Ofshe should have been dismissed in order to salvage what dignity of the law is left in this particularly egregious situation.

Cathy Bradl Peterson