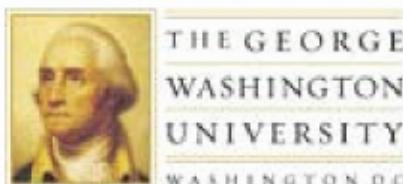


The Burger Court Opinion Writing Database

Weatherford v. Bursey
429 U.S. 545 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 10, 1977

RE: 75-1510 - Weatherford v. Bursey

Dear Byron:

I confirm my earlier "join" in this case.

Regards,



Mr. Justice White

Copies to the Conference

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 11, 1977

Re: No. 75-1510, Weatherford v. Bursey

Dear Byron,

I am glad to join your opinion for the Court in
this case.

Sincerely yours,


J. B.

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
~~Mr. Justice Marshall~~
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 1-8-77

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1510

Jack M. Weatherford, etc., et al., Petitioners, v. Brett Allen Bursey. On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[January —, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

The issues here are whether in the circumstances present in this case the conduct of an undercover agent for a state law enforcement agency deprived respondent Bursey of his right to the effective assistance of counsel guaranteed him by the Sixth and Fourteenth Amendments of the United States Constitution or deprived him of due process of law contrary to the Fourteenth Amendment.

I

This case began when respondent Bursey filed suit under 42 U. S. C. § 1983 against petitioners Weatherford and Strom, respectively an undercover agent for and the head of the South Carolina State Law Enforcement Division, asserting that defendants had deprived him of certain constitutional rights. The case was tried without a jury. The following facts are taken from the District Court's findings, which were not disturbed by the Court of Appeals.

On the night of March 19, 1970, Bursey and Weatherford, along with two others, vandalized the offices of the Richland County Selective Service in Columbia, S. C. Police were advised of the incident by Weatherford, who in order to maintain his undercover status and his capability of working on other current matters in that capacity, was arrested and

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1, 4-5, 8-9, 14

From: Mr. Justice White

2nd DRAFT

Circulated: _____

SUPREME COURT OF THE UNITED STATES

Recirculated: 1-12-77

No. 75-1510

Jack M. Weatherford, etc., et al., Petitioners, v. Brett Allen Bursey. On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[January —, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

The issues here are whether in the circumstances present in this case the conduct of an undercover agent for a state law enforcement agency deprived respondent Bursey of his right to the effective assistance of counsel guaranteed him by the Sixth and Fourteenth Amendments of the United States Constitution or deprived him of due process of law in violation of the Fourteenth Amendment.

I

This case began when respondent Bursey filed suit under 42 U. S. C. § 1983 against petitioners Weatherford and Strom, respectively an undercover agent for and the head of the South Carolina State Law Enforcement Division, asserting that defendants had deprived him of certain constitutional rights. The case was tried without a jury. The following facts are taken from the District Court's findings, which were not disturbed by the Court of Appeals.

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PP. 8. 12. 14

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

3rd DRAFT

Recirculated: 1-14-77

SUPREME COURT OF THE UNITED STATES

No. 75-1510

Jack M. Weatherford, etc., et al., Petitioners, v. Brett Allen Bursey. On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[January —, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

The issues here are whether in the circumstances present in this case the conduct of an undercover agent for a state law enforcement agency deprived respondent Bursey of his right to the effective assistance of counsel guaranteed him by the Sixth and Fourteenth Amendments of the United States Constitution or deprived him of due process of law in violation of the Fourteenth Amendment.

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STYLISTIC CHANGES THROUGHOUT.

~~SEE PAGES:~~

To: The Chief Justice
 ✓ Mr. Justice Brennan
 ✓ Mr. Justice Stewart
 ✓ Mr. Justice Marshall
 ✓ Mr. Justice Blackmun
 ✓ Mr. Justice Powell
 ✓ Mr. Justice Rehnquist
 ✓ Mr. Justice Stevens

4th DRAFT

From: Mr. Justice White

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 75-1510

Recirculated: 2-21-77

Jack M. Weatherford, etc., et al., | On Writ of Certiorari to
 Petitioners, | the United States Court
 v. | of Appeals for the
 Brett Allen Bursey. | Fourth Circuit.

[February 22, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

The issues here are whether in the circumstances present in this case the conduct of an undercover agent for a state law enforcement agency deprived respondent Bursey of his right to the effective assistance of counsel guaranteed him by the Sixth and Fourteenth Amendments of the United States Constitution or deprived him of due process of law in violation of the Fourteenth Amendment.

I

This case began when respondent Bursey filed suit under 42 U. S. C. § 1983 against petitioners Weatherford and Strom, respectively an undercover agent for and the head of the South Carolina State Law Enforcement Division, asserting that the defendants had deprived him of certain constitutional rights. The case was tried without a jury. The following facts are taken from the District Court's findings, which were not disturbed by the Court of Appeals.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 4, 1977

file

MEMORANDUM TO THE CONFERENCE

Re: Crow Dog v. United States, No. 75-1843, held for
Weatherford v. Bursey, No. 75-1510, decided
February 22, 1977

This case arose out of an incident that took place in Wounded Knee, South Dakota, involving the detention of four United States postal inspectors by members of the American Indian Movement. Petitioner was convicted of willfully interfering with a postal inspector in the performance of his duties and of robbing another postal inspector of property belonging to the United States, in violation of 18 U.S.C. §§ 111, 1114, 1153, and 2112. The petition for certiorari raises three issues, two of which merit discussion here.

(1) Petitioner argues that the prosecution's failure to disclose to the defense a group of photographs allegedly shown to the postal inspectors shortly after the inspectors had been released by the Indians denied him due process under Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97, 103-07 (1976) (decided after the CA's decision below). According to petitioner, each prosecution witness who subsequently made an in-court identification of petitioner at his trial was shown a stack of pictures, and none of these witnesses identified any of the pictures as petitioner's. Before, during, and after trial, petitioner moved the court to order the production of these photographs; the prosecution stated that it had produced "all the photographs that it had," but that no records had been kept of the photographs shown to the inspectors so that the group of pictures could not be reconstructed. The prosecution also stated that these photographs probably consisted of a group of photographs of persons arrested at places where petitioner was not arrested.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 12, 1977

Re: No. 75-1510, Weatherford v. Bursey

Dear Byron:

In due course, I will circulate a separate opinion
in this case.

Sincerely,



T. M.

Mr. Justice White

cc: The Conference

✓ (3)

JAN 28 1977

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1510

Jack M. Weatherford, etc., et al., Petitioners, v. Brett Allen Bursey. } On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[February —, 1977]

MR. JUSTICE MARSHALL, dissenting.

It is easy to minimize the significance of the incursion into the lawyer-client relationship that the Court sanctions today. After all, as the Court observes, there is no evidence that Weatherford went to the meetings between Bursey and his lawyer with an intent to spy; that he reported to the prosecutor on those meetings; or that what he learned was used to develop evidence against Bursey. But while what occurred here may be "the obnoxious thing in its mildest and least repulsive form . . . illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States*, 116 U. S., 616, 635 (1886). I cannot join in providing even the narrowest of openings to the practice of spying upon attorney-client communications.

There are actually two independent constitutional values that are jeopardized by governmental intrusions into private communications between defendants and their lawyers. First, the integrity of the adversary system and the fairness of trials is undermined when the prosecution surreptitiously acquires information concerning the defense strategy and evidence (or lack of it), the defendant, or the defense counsel. In *Wardius v. Oregon*, 412 U. S. 470 (1973), this Court made clear that while "the due process clause has little to say regarding the amount of discovery which the parties must be afforded . . . it does speak to the balance of forces between

13

FEB 1 1977

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1510

Jack M. Weatherford, etc., et al., Petitioners,
v. Brett Allen Bursey. On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[February —, 1977]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

It is easy to minimize the significance of the incursion into the lawyer-client relationship that the Court sanctions today. After all, as the Court observes, there is no evidence that Weatherford went to the meetings between Bursey and his lawyer with an intent to spy; that he reported to the prosecutor on those meetings; or that what he learned was used to develop evidence against Bursey. But while what occurred here may be "the obnoxious thing in its mildest and least repulsive form . . . illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States*, 116 U. S., 616, 635 (1886). I cannot join in providing even the narrowest of openings to the practice of spying upon attorney-client communications.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 17, 1977

Re: No. 75-1510 - Weatherford v. Bursey

Dear Byron:

Please join me in your recirculation of January 14.

Sincerely,



Mr. Justice White

cc: The Conference

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 11, 1977

No. 75-1510 Weatherford v. Bursey

Dear Byron:

Please join me.

Sincerely,

Lewis

Mr. Justice White

1fp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 10, 1977

Re: No. 75-1510 - Weatherford v. Bursey

Dear Byron:

Please join me.

Sincerely,

WR

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 12, 1977

Re: No. 75-1510 - Weatherford v. Bursey

Dear Byron:

I agree with John's proposed substitution of language in your draft opinion which is contained in his letter to you of January 12th.

Sincerely,

WR

Mr. Justice White

Copies to the Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 12, 1977

Re: 75-1510 - Weatherford v. Bursey

Dear Byron:

Would you consider omitting the sentence beginning at the bottom of page 13 ("The rationale of Brady is that a criminal case should be decided on all of the evidence, including that favorable to the accused.") and substituting something like this:

"The Brady principle relates only to the nondisclosure of evidence favorable to the accused."

As now written, I am afraid the sentence implies that any nondisclosure of exculpatory evidence is constitutional error. As you know, we rejected that contention in Agurs.

Apart from this flyspeck, I think the opinion is fine.

Respectfully,



Mr. Justice White

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Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 14, 1977

Re: 75-1510 - Weatherford v. Bursey

Dear Byron:

Please join me.

Respectfully,



Mr. Justice White

Copies to the Conference