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People v. Meredith: The Attorney-Client Privilege and the Criminal Defendant's Constitutional Rights

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People v. Meredith: The Attorney-Client Privilege and the Criminal Defendant's Constitutional Rights

The attorney-client privilege has been a part of American jurisprudence since the foundation of the legal system.[1] It has remained essentially intact through two centuries,[2] subject only to a few time-honored exceptions which have generally been part of the common-law evolution of the privilege.[3]

Modern courts have generally been content to retain the common law rules. But in *People v. Meredith*,[4] the California Supreme Court created a new exception to the attorney-client privilege. It held that when a client communicates the location of physical evidence to his attorney in an otherwise privileged communication, and the attorney then moves or alters the evidence, the attorney-client privilege is waived as to the location of the evidence. The court also stated that an attorney who takes possession of incriminating evidence must turn it over to the prosecution. Thus, the decision means that an accused may confidentially discuss incriminating physical evidence with his attorney, take no action which would waive his attorney-client privilege, and still find both the evidence and its location introduced against him at trial if the attorney has moved or altered the evidence.

Part I of this Note summarizes the facts of the case and the court's opinion. Part II sets forth the proposition that the attorney-client privilege is a constitutional doctrine which, in criminal cases, is necessary in order to protect a defendant's privilege against self-incrimination and

1. The attorney-client privilege apparently has its roots in Roman law. *See, e.g.*, Comment, *Legal Ethics: Confidentiality and the Case of Robert Garrow's Lawyers*, 25 BUFFALO L. REV. 211, 213-14 (1975). Historically, the privilege originated in a desire to uphold the attorney's honor and his oath as an attorney. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 543 (McNaughton rev. ed. 1961) [hereinafter cited as WIGMORE]. The modern view, however, is that its purpose is to encourage full and open communication between client and attorney as it allows a client to make disclosures to his attorney without fear that the attorney will be forced to reveal the information confided to him. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

2. 8 WIGMORE, *supra* note 1, § 2290, at 542.

3. *See id.* § 2292, at 555-57. The California privilege is codified in CAL. EVID. CODE §§ 950-962 (West 1966 & Supp. 1981), and in CAL. BUS. & PROF. CODE § 6068(c) (West 1974).

4. 29 Cal. 3d 682, 631 P.2d 46, 175 Cal. Rptr. 612 (1981) (5-0 decision) (opinion of Tobriner, J.; Bird, C.J., Mosk and Newman, JJ., concurring; Richardson, J., concurring in the result, without opinion).

right to counsel. The exception in *Meredith*, it is argued, abridges both of these constitutional rights. Part III criticizes the court's assumption that a defense attorney has a duty to turn over incriminating physical evidence to the prosecution, and argues that, for constitutional reasons, physical evidence is sometimes within the attorney-client privilege. Finally, Part IV recommends the adoption of an "inevitable discovery" rule to reconcile the maintenance of these constitutional rights with insuring the prosecution's ability to investigate. The proposed rule would allow the prosecution to obtain physical evidence from an attorney only when it could prove that it would have obtained the evidence in the normal course of its investigation.

I
THE CASE

A. The Facts

On April 3, 1976, defendant Michael Meredith asked codefendant Frank Scott to help him commit a robbery. Scott helped entice the victim, David Wade, to Wade's car, where Meredith attacked him. After a brief struggle, Meredith shot and killed Wade. Meredith and Scott were later arrested and questioned by the police.

About a month after the arrest, Scott's appointed attorney, James Schenk, visited Scott in jail. Schenk stressed that he had to become fully acquainted with the facts of the case to avoid being "sandbagged" by the prosecution. Scott then told Schenk that he stole the victim's wallet, divided the money with Meredith, and threw the wallet in a trash can behind his house. Without further consulting Scott, Schenk sent an investigator to locate the wallet. The investigator found the wallet and gave it to Schenk, who examined it and gave it to the police without commenting on how he obtained it.

Scott was charged with first-degree robbery and first-degree murder. At Scott's preliminary hearing, both Schenk and his investigator were subpoenaed to testify. Schenk initially refused to answer questions relating to the wallet. When threatened with contempt, however, he revealed that he learned of the wallet through his client. The investigator, over objections, testified as to where he found the wallet. The trial court found Scott guilty on both counts.[5]

5. Scott was linked to the murder on a conspiracy theory, which depended primarily on the prosecution's ability to show that the wallet was found in Scott's trash can. 29 Cal. 3d at 686, 631 P.2d at 48, 175 Cal. Rptr. at 614. Meredith was also convicted of first-degree murder and first-degree robbery.

B. The Opinion

In affirming Scott's conviction, the California Supreme Court held, with little discussion, that the wallet itself was admissible into evidence. It then turned to the main question of whether the location of the wallet should be privileged as a confidential communication between attorney and client. The court first held that the location of the wallet was privileged because the attorney-client privilege must be construed to apply not ouly to communications, but also to observations made as a result of privileged communications. Moreover, the privilege attached even though the observation was made by the investigator, as the investigator came within the privilege statute as one who was needed to accomplish the purpose for which Schenk was being consulted.

The *Meredith* court, however, then proceeded to "craft an exception" to the attorney-client privilege in cases where defense counsel moves or alters evidence. To the court, the wallet figuratively bore a tag on which was written the words "located in the trash can by Scott's residence," and the defense, by removing the evidence, also removed the tag. Application of the privilege to this case, the court reasoned, would encourage defense counsel to race the police to seize critical evidence. The court viewed the defense decision to remove evidence as a "tactical choice"—defense counsel can either leave the evidence alone, thus maintaining the privilege, or move the evidence and lose the privilege.[6] Finally, the court rejected as "unworkably speculative" the defense's proposal that the attorney-client privilege continue to apply unless the prosecution could prove that the police probably would have discovered the evidence had it remained in its original location.

II

THE CONSTITUTIONAL FOUNDATIONS OF THE PRIVILEGE

While the attorney-client privilege did not originate as a constitutional doctrine, in criminal cases it plays an important role in protecting the defendant's fifth and sixth amendment rights. This Part establishes that in criminal cases the attorney-client privilege is essential to both the fifth amendment privilege against self-incrimination and the sixth amendment right to counsel.[7] It further shows that with-

6. 29 Cal. 3d at 695, 631 P.2d at 54, 175 Cal. Rptr. at 620. Under a literal reading of the court's opinion, the attorney would lose the privilege if he picked up the wallet, examined it, and returned it to its original location. But even if this is not what the court meant, its decision at least precludes the attorney from ever being able to do more than give the evidence a cursory examination.

7. One case has stated that the privilege, in criminal cases, is not a constitutional doctrine. Beckler v. Superior Court, 568 F.2d 661, 663 n.3 (9th Cir. 1978), premises this statement on dictum in Maness v. Meyers, 419 U.S. 449, 466 n.15 (1975). The *Maness* dictum is in response to Justice Stewart's concurrence, in which he asserts his belief that a state cannot arbitrarily punish good-

out the attorney-client privilege, a constitutionally impermissible tension is created between those rights. Finally, it shows that the *Meredith* exception to the attorney-client privilege is constitutionally defective because it creates such an impermissible tension between a defendant's fifth and sixth amendment rights.[8]

A. The Sixth Amendment and the Attorney-Client Privilege

The Sixth Amendment provides that "[i]n all criminal cases, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[9] This constitutional right is only fulfilled if an attorney provides his client with reasonably effective legal assistance.[10] Although some courts and commentators have stated that effective assistance requires a privilege for attorney-client communications, most of them have not set forth their reasoning in detail.[11] An examination of case law, however, shows strong authority for the proposition that a limitation on attorney-client confidentiality results in a denial of effective assistance of counsel because it deprives a defendant of a partisan advocate and restricts attorney-client communications.

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faith professional legal advice from attorney to client. Justice Stewart continues, "[w]hether a contempt citation constitutes an arbitrary interference with the *constitutionally protected attorney-client* relationship depends on both the tenor of the advice and the circumstances under which it is given." *Id.* at 472 (Stewart, J., concurring) (emphasis added). The majority opined that Justice Stewart's concurrence went too far, and held only that an attorney cannot be punished for advising his client to invoke his privilege against self-incrimination. It then added its dictum: "We are not aware that the Court has ever identified a 'constitutionally protected attorney-client' privilege of the scope postulated by MR. JUSTICE STEWART." *Id.* at 466 n.15. The location of the Court's quotation marks makes clear that the majority refers to the Stewart-type advice immunity, and not to the attorney-client privilege; *Maness* has nothing to do with the attorney-client privilege per se. The *Beckler* statement, therefore, is simply wrong.

The California Supreme Court has stated that the attorney-client privilege is "not of constitutional origin . . . [but may have] important constitutional implications . . . ." People v. Collie, 30 Cal. 3d 43, 55, 634 P.2d 534, 540-41, 177 Cal. Rptr. 458, 464-65 (1981). That the privilege is not of constitutional origin is clear, for it originated in the upholding of the attorney's honor. *See* 8 WIGMORE, *supra* note 1, § 2290, at 543. But doctrines with "important constitutional implications" which are not expressly written into the Constitution are still often seen as constitutional in nature. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579-80 (1980).

8. For another view on the constitutional problems posed in *Meredith*, see Comment, *Extending the Attorney-Client Privilege: A Constitutional Mandate*, 13 PAC. L.J. 436 (1982).

9. U.S. CONST. amend. VI.

10. Glasser v. United States, 315 U.S. 60, 76 (1942); *In re* Saunders, 2 Cal. 3d 1033, 1040, 472 P.2d 921, 926, 88 Cal. Rptr. 633, 638 (1970).

11. *See, e.g.*, People v. Belge, 83 Misc. 2d 186, 189, 372 N.Y.S.2d 798, 801 (Onondaga County Ct.), *aff'd mem.*, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (1975), *aff'd per curiam*, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976); State v. Kociolek, 23 N.J. 400, 413-14, 129 A.2d 417, 424 (1957); Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1062 (1978); Morgan, *Foreword* to MODEL CODE OF EVIDENCE 27 (1942); Comment, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 485 (1977).

1. Partisan Advocacy

If a state denied a criminal defendant the attorney-client privilege, the client's sixth amendment rights would be violated because he would be deprived of an active, partisan advocate.[12] A fundamental premise of American law is that justice is achieved through the adversarial system.[13] Each side presents its case and challenges the other's arguments. This is accomplished mainly through the use of attorneys who are advocates for the parties they represent.[14]

Active, partisan advocacy, however, is impossible when a defense attorney is expected to give evidence to the prosecution while he is supposed to defend his client.[15] Without the attorney-client privilege, defense attorneys could routinely be subpoenaed to give evidence against their clients. Far from being partisan advocates, they would instead become "medium[s] of confession against their clients."[16] Thus, active, partisan advocacy can only be achieved if the attorney cannot be required to divulge his client's confidences to the prosecution.[17]

2. The Attorney's Ability to Investigate

The denial of the attorney-client privilege would also violate the client's sixth amendment rights because it would damage the attorney's ability to investigate his client's case. To provide effective legal assistance, an attorney must investigate the facts of his client's case.[18] A

12. For the proposition that the constitutional right to counsel requires an active partisan advocate, see, *e.g.*, Anders v. California, 386 U.S. 738, 744 (1967); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980).

13. *See* Faretta v. California, 422 U.S. 806, 818 (1975).

14. *See* Herring v. New York, 422 U.S. 853, 862 (1975).

15. *See* United States *ex rel.* Bell v. Brierton, No. 75 C 4315, slip op. at — (N.D. Ill. Apr. 6, 1979) ("A criminal defendant should at least have the right to expect that his own attorney will not place on the record evidence more damning than the prosecution itself could produce."); Comment, *Fruits of the Attorney-Client Privilege: Incriminating Evidence and Conflicting Duties*, 3 DUQ. L. REV. 239, 249 (1965).

16. Hazard, *supra* note 11, at 1062 (1978).

17. The Supreme Court has observed, albeit in a different context, that "[t]he mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations has [sic] effectively sealed his lips on crucial matters." Holloway v. Arkansas, 435 U.S. 475, 490 (1978). It can be inferred that the right to counsel cannot be fulfilled when the attorney has conflicting obligations to defend his client and to supply the prosecution with evidence.

18. *E.g.*, Barber v. Municipal Court, 24 Cal. 3d 742, 751, 598 P.2d 818, 822, 157 Cal. Rptr. 658, 662 (1979); Eldridge v. Atkins, 665 F.2d 228, 232 (8th Cir. 1981); United States v. Baynes, 622 F.2d 66, 69 (3d Cir. 1980); 1 ABA STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION, Standard 4-4.1, at 53 (2d ed. 1980) [hereinafter cited as ABA STANDARDS]. The ABA Standards on the duties of a defense attorney have been used in various California and lower federal cases. *See, e.g.*, Eldridge v. Atkins, 665 F.2d at 232; United States v. DeCoster, 624 F.2d 196, 304-06 (D.C. Cir. 1976); People v. Cropper, 89 Cal. App. 3d 716, 719, 152 Cal. Rptr. 555, 556 (2d Dist. 1979).

proper investigation can only be made if an attorney is able to communicate with his client and ascertain the client's version of the facts.[19] Based on those communications, the attorney may then perform other functions required for an adequate defense, such as interviewing witnesses[20] or examining physical evidence.[21] Without the attorney-client privilege, however, the client would be reluctant to confide in his attorney.[22] Thus, by fostering attorney-client communication, the attorney-client privilege helps to ensure that an attorney has whatever information might be necessary for a full investigation.[23]

When an action of the state prevents a defense attorney from discharging functions vital to effective representation of his client, a sixth amendment violation will be found without a need for showing prejudice.[24] Thus, in *Geders v. United States*,[25] the Supreme Court held that a court order preventing a criminal defendant from communicating with his attorney during an overnight recess deprived him of his sixth amendment right to counsel.[26] Because such recesses are frequently necessary for attorney-client communications, the Court reasoned, barring an attorney from meeting with his client could stifle the attorney's ability to conduct a proper defense.[27] The defendant was not

19. ABA STANDARDS, *supra* note 18, Standard 4-5.2, at 65-66. *See* Smotherman v. Beto, 276 F. Supp. 579, 588 (N.D. Tex. 1967); City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 235, 231 P.2d 26, 30 (1951).

20. *See, e.g.*, Rummel v. Estelle, 590 F.2d 103, 104 (5th Cir. 1979) (per curiam) (failure to conduct pretrial interviews of witnesses might deny defendant the effective assistance of counsel).

21. ABA STANDARDS, *supra* note 18, Commentary to Standard 4-4.1, at 54. The *Meredith* court acknowledged that in some cases, a "ballistics or fingerprint test [for example might be] required" to determine whether the evidence is useful. 29 Cal. 3d at 693 n.7, 631 P.2d at 53 n.7, 175 Cal. Rptr. at 619 n.7.

22. *See, e.g.*, Fisher v. United States, 425 U.S. 391, 403 (1976) ("As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.").

23. *See* People v. Belge, 83 Misc. 2d at 189, 372 N.Y.S.2d at 801:

> The effectiveness of counsel is only as great as the confidentiality of its client-attorney relationship. If the lawyer cannot get all the facts about the case, he can only give his client half of a defense. This, of necessity, involves the client telling his attorney everything remotely connected with the crime.

It has been argued that *Fisher* recognizes a constitutional dimension to the attorney-client privilege. *See* Seidelson, *The Attorney-Client Privilege and Client's Constitutional Rights*, 6 HOFSTRA L. REV. 693, 727 n.77 (1978).

24. Cooper v. Fitzharris, 586 F.2d 1325, 1332 (9th Cir. 1978). In contrast, when a claimed sixth amendment violation is predicated upon alleged attorney incompetence or error, a showing of prejudice will be required. *See, e.g.*, Holloway v. Arkansas, 435 U.S. 475, 490 (1978); Chambers v. Maroney, 399 U.S. 42, 53-54 (1970).

25. 425 U.S. 80 (1976).

26. *Id.* at 91. Other cases have gone further and held that preventing an accused from speaking to his attorney during *any* recess deprives the accused of effective assistance of counsel. *E.g.*, United States v. Conway, 632 F.2d 641, 645 (5th Cir. 1980); Bova v. State, — Fla. —, 410 So. 2d 1343, 1344-45 (1982). The *Geders* Court did not rule on this question.

27. 425 U.S. at 88.

required to show prejudice to obtain a reversal; as another Supreme Court case stated, such a requirement would require "unguided speculation" in cases where counsel is prevented from carrying out his normal functions.[28] These principles demonstrate that a state's abridgment of the attorney-client privilege, by limiting the attorney's ability to communicate with his client and to investigate the case, would deny the client effective assistance of counsel.

B. The Fifth Amendment and the Attorney-Client Privilege

The fifth amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[29] The amendment prohibits compelled testimonial disclosures which might serve as a "link in a chain" of evidence leading to a criminal conviction.[30] The privilege against self-incrimination, like the right to counsel, has frequently been linked to the attorney-client privilege.[31]

Some courts have stated in dictum that the attorney-client privilege is essential in criminal cases if the client is to maintain his fifth amendment protection against self-incrimination. In *People v. Belge*,[32] a New York court said: "[T]he criminal defendant's self-incrimination rights become completely nugatory if compulsory disclosure can be exacted through his attorney."[33] Similarly, in *State v. Kociolek*,[34] the New Jersey Supreme Court stated that the "attorney-client privilege in this country . . . [i]s indispensable to the fulfillment of the constitutional security against self-incrimination . . . ."[35]

Belge and *Kociolek* do not explain how a denial of the attorney-client privilege violates a defendant's fifth amendment right against compelled self-incrimination. The Supreme Court has held repeatedly that the fifth amendment is a personal privilege limited to prohibiting compulsion of the accused.[36] Therefore, for the attorney-client privilege to protect the client's fifth amendment rights, compulsion of the accused would need to result from denial of the privilege.

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28. Holloway v. Arkansas, 435 U.S. at 491.

29. U.S. CONST. amend. V.

30. Maness v. Myers, 419 U.S. 449, 461 (1975).

31. *See, e.g.*, Lanza v. New York State Joint Legislative Committee on Government Operations, 3 N.Y.2d 92, 97, 143 N.E.2d 772, 774, 164 N.Y.S.2d 9, 12 (1957); Morgan, *supra* note 11, at 27; Hazard, *supra* note 11, at 1062.

32. 83 Misc. 2d 186, 372 N.Y.S.2d 798, *aff'd mem.*, 50 App. Div. 2d 1088, 376 N.Y.S.2d 771 (1975), *aff'd per curiam*, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976).

33. *Id.* at 190, 372 N.Y.S.2d at 802 (quoting Amicus Curiae brief filed by the National Association of Criminal Defense Lawyers).

34. 23 N.J. 400, 129 A.2d 417 (1957).

35. *Id.* at 414, 129 A.2d at 424.

36. Fisher v. United States, 425 U.S. at 397; Couch v. United States, 409 U.S. 322, 329 (1973); Schmerber v. California, 384 U.S. 757, 765 (1966).

Compulsion of an accused is found whenever the accused must suffer a penalty for invoking his fifth amendment right to remain silent. For example, in *Garrity v. New Jersey*,[37] the Supreme Court held that statements obtained under threat of removal from public office could not be used in subsequent criminal proceedings. The defendants' choice either to forfeit their jobs or to incriminate themselves caused the statements to be "infected by coercion."[38] It was considered irrelevant that the defendants in *Garrity* actually chose to make the incriminating statements, as the statutory scheme which penalized a defendant for invoking his right to remain silent was itself sufficient coercion to violate the fifth amendment.[39]

Denial of the attorney-client privilege is compulsion because it penalizes the client's right of effective counsel if he wishes to avoid self-incrimination.[40] Without the attorney-client privilege, an attorney could routinely be subpoenaed to produce his communications with his client. The only way the client could prevent self-incriminating statements from reaching the prosecution would be for him to limit his communications with his attorney. If this occurs, the attorney may not receive all the facts necessary for an adequate defense.[41] As shown earlier, such limitations on communication between attorney and client constitute automatic violations of the sixth amendment guarantee of effective counsel.[42] Thus, without the attorney-client privilege, the client loses his constitutional right to counsel in order to avoid self-incrimination. This is compulsion violating the fifth amendment.

C. Constitutional Tensions and the Attorney-Client Privilege

Denial of the attorney-client privilege can also be seen as a method of forcing an accused to choose between his fifth and sixth amendment rights. As discussed above, without the attorney-client privilege, an accused is compelled to incriminate himself through his attorney.[43] If he does not, the defendant's attorney does not have all the information necessary to provide effective assistance of counsel. Thus, the attorney-client privilege is necessary to protect the client's simultaneous enjoyment of his fifth and sixth amendment rights.

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37. 385 U.S. 493 (1967).

38. *Id.* at 497-98.

39. *Id.* at 497-99.

40. A recent Supreme Court case following the *Garrity* analysis, Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977), states that "the touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids."

41. *See supra* notes 18-23 and accompanying text.

42. *See supra* notes 24-28 and accompanying text.

43. *See supra* notes 40-42 and accompanying text.

1. Impermissible Tensions: Simmons v. United States

The Supreme Court has suggested that compelling this type of choice between provisions of the Bill of Rights creates a constitutionally impermissible tension. In *Simmons v. United States*,[44] the defendant had to admit a possessory interest in a suitcase to gain standing to assert that a seizure of the suitcase violated his fourth amendment rights. When the defendant's effort to suppress the evidence failed, the prosecution used the admission of possessory interest against him at trial.

The Court held that it was constitutionally impermissible to force the defendant to choose between giving up what he believed to be a valid fourth amendment claim and waiving his privilege against self-incrimination.[45] To the Court, it was "intolerable that one constitutional right should have to be surrendered in order to assert another."[46] Thus, the Court held that when a defendant testifies in support of a fourth amendment claim, that testimony cannot later be used at trial to convict him.[47]

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44. 390 U.S. 377 (1968).

45. *Id.* at 393-94.

46. *Id.* at 394.

47. Technically, the Court found that the tension created compulsion which violated the fifth amendment. Thus, in order to alleviate the fifth amendment violation, the Court granted "use immunity" for the defendant's testimony at the suppression hearing. The case, however, need not be interpreted solely to stand for the proposition that such tensions violate the fifth ameudment. Instead, the case can be seen as holding that when a defendant is guaranteed two constitutional rights, creating a tension between them violates both. This Note will use the latter interpretation, although the analysis can also be based on the former.

In McGautha v. California, 402 U.S. 183 (1971), the Court made clear that *Simmons* did not stand for the proposition that all tensions are per se unconstitutional. In *McGautha*, the Court rejected the defendant's argument that a unitary capital trial created an impermissible tension between his fourteenth amendment due process right to be heard on the issue of punishment and his fifth amendment privilege against self-incrimination. The defendant unsuccessfully argued that the unitary trial deprived him of the right to be heard on the punishment issue without having his testimony used against him on the issue of guilt.

Lower courts, however, have recognized *Simmons*, rather than *McGautha*, as controlling for many constitutional tensions. *See, e.g.*, cases cited in United States v. Dohm, 597 F.2d 535, 545-46 (5th Cir. 1979) (Goldberg, J., dissenting). In addition, *McGautha* can be distinguished from Simmons on at least three grounds. First, *McGautha* itself distinguished *Simmons* on the ground that *Simmons* presented a conflict between two provisions of the Bill of Rights. 402 U.S. at 212. Second, although the Court purported to look at the policies behind the coustitutional rights involved, its decision, in substance, was that the state's one-phased trial procedure simply did not violate either the defendant's fifth or fourteenth amendment rights. Thus, with no coustitutional rights violated, no tension could have existed in *McGautha*. *See id.* at 213-20. Third, to the extent that a tension existed in *McGautha*, it involved a mid-trial choice between constitutioual rights. Such a choice is forced only because of the strength of the state's evidence, and is inherent in the adversarial system. *Simmons* involved a pre-trial choice between constitutional rights, a choice which is forced not because of the state's evidence, but because of its rules or procedures. This is not inherent in the adversarial system, and thus should be alleviated. *See* Note, *Resolving Tensions*

2. *Applying* Simmons *to the Attorney-Client Privilege*

The *Simmons* rationale has been applied expressly to cases involving constitutional tensions between the fifth amendment privilege against self-incrimination and the sixth amendment right to counsel. Thus, in *United States v. Branker*,[48] the prosecution introduced at trial defendant's statement in an earlier proceeding that his financial condition required appointment of counsel. The court, citing *Simmons*, held that because the defendant's testimony used to secure his right to counsel was later used to convict him, an impermissible constitutional tension had been created.[49] Lower federal courts[50] and the California Supreme Court[51] have used the *Branker* analysis to support the proposition that a tension between fifth and sixth amendment rights is impermissible.

It can reasonably be concluded, therefore, that compelling a defendant to choose between his fifth amendment privilege against self-incrimination and his sixth amendment right to counsel creates a constitutionally impermissible tension between those rights. As discussed above, denial of the attorney-client privilege in criminal cases would force this type of choice.[52] Therefore, the attorney-client privilege is needed in criminal cases to protect a defendant from a tension between his fifth and sixth amendment rights.[53]

Between Constitutional Rights: Use Immunity in Concurrent or Related Proceedings, 76 COLUM. L. REV. 684, 708-11 (1976).

These distinctions can be applied equally to the tension between fifth and sixth amendment rights created by an absence of the attorney-client privilege. Thus, *Simmons*, and not *McGautha*, should control when the *Meredith* exception or other deprivations of the attorney-client privilege are being evaluated.

48. 418 F.2d 378 (2d Cir. 1969).

49. *Id.* at 380-81. The court did not reverse the defendant's conviction, however, because he failed to make a timely objection at trial. *Id.* at 381.

50. United States v. Anderson, 567 F.2d 839, 841-42 (8th Cir. 1977) (financial information supporting request for appointed counsel cannot be made available for purposes of tax prosecution, citing *Simmons* and *Branker*); Davis v. Wainwright, 342 F. Supp. 39, 43 (M.D. Fla. 1971) (same, citing *Simmons*; no reversal because testimony held not used against petitioner), *aff'd mem.*, 469 F.2d 1405 (5th Cir. 1972); *cf.* United States v. Ellsworth, 547 F.2d 1096, 1098 (9th Cir. 1976), *cert. denied*, 431 U.S. 931 (1977) (where trial court assured defendant it would not make financial information available to prosecution, defendant could not claim fifth amendment privilege and also obtain appointed counsel).

51. People v. Canfield, 12 Cal. 3d 699, 527 P.2d 633, 117 Cal. Rptr. 81 (1974) (post-*McGautha*). The *Canfield* court distinguished United States v. Kahan, 415 U.S. 239 (1972), by saying that the incriminating component of the statements in *Kahan* derived from their falsity, while in *Canfield* it derived from their contents. 12 Cal. 3d at 706, 527 P.2d at 637-38, 117 Cal. Rptr. at 85-86. Because *Kahan* used the same distinction to reach the opposite result from that in *Branker*, the California court can fairly be said to support the reasoning in *Branker*.

52. *See supra* text accompanying note 43.

53. It may at first appear that this constitutional formulation is completely different from the statutory attorney-client privilege because it omits the requirement of confidentiality present in the statutes. However, the attorney-client relationship, by its own definition, is inherently confidential

D. *Unconstitutional Tensions and the* Meredith *Exception*

The discussion in the preceding section concludes that the attorney-client privilege prevents a tension that might otherwise occur between a defendant's fifth and sixth amendment rights. The *Meredith* exception to the attorney-client privilege creates the type of tension that the privilege would prevent. The exception provides that whenever an attorney learns of evidence in a confidential communication with his client and moves or alters that evidence, the attorney-client privilege is waived as to the location of the evidence. Thus, when an attorney needs to examine evidence to make a proper investigation of his client's case, he must then divulge the location of the evidence to the prosecution.

The requirement that the attorney divulge the location of the evidence if he wishes to move it for examination forces his client to sacrifice one constitutional right as the price for asserting another. If the client does not communicate with his attorney or the attorney does not examine evidence about which his client has told him, the attorney's ability to investigate the facts of the case will have been constrained. As shown above, a state constraint on the attorney's ability to perform his functions denies effective assistance of counsel.[54] But if the client communicates with the attorney and the attorney must move the evidence to examine it, the attorney must then tell the prosecution what his client told him. This is compelled self-incrimination because the client's only alternative to incriminating himself is forfeiture of his right to effective counsel.[55] In either case, the *Meredith* exception creates an impermissible tension which maintenance of the attorney-client privilege would avoid.

III
THE PRIVILEGE AGAINST PRODUCING EVIDENCE

The California Supreme Court assumed in *Meredith* that it was attorney Schenk's duty to surrender the wallet to the prosecution.[56]

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in nature. *See* 8 WIGMORE, *supra* note 1, § 2285, at 527, 528. Thus, when a client breaches the confidentiality of statements he made to his attorney, the constitutional protections of the relationship should no longer apply (to the extent of the breach). It follows that the attorney-client privilege is not required for the coexistence of the fifth and sixth amendment rights when there is no confidentiality.

54. *See supra* notes 9-28 and accompanying text.

55. In theory, there are two other alternatives. One is that the attorney can ask the client whether he wishes the attorney to move the evidence; the other is that the attorney can warn the client in advance that all communications are privileged, but if the client discloses the location of evidence which the attorney later moves for investigation, the privilege is lost as to the location of the evidence. However, neither alternative eliminates the compulsion on the client, in that he still must choose between fifth and sixth amendment rights.

56. 29 Cal. 3d at 689, 631 P.2d at 50, 175 Cal. Rptr. at 616.

Commentators, however, disagree as to whether an attorney should have a duty to surrender to the prosecution physical evidence incriminating his client.[57] Many have argued, for instance, that such a duty would make an attorney little more than an agent of the state,[58] and thus is inconsistent with an adversarial system of justice[59] in which an attorney is a zealous advocate for his client's cause.[60] This Part proposes that an attorney should not have a duty to surrender physical evidence when it would create an impermissible tension between a client's privilege against self-incrimination and his right to counsel.

A. · Background

At common law, a defense attorney had no duty to surrender evidence incriminating his client to the prosecution if the client himself could not be forced to surrender the evidence. An individual was exempt from giving evidence against himself when he was a party to any legal action,[61] and an attorney was considered as "one in contemplation of the law" with his client.[62] Thus, an attorney was as exempt from providing evidence to the opposition as was his client.

Some modern cases, however, appear to be predicated on the view that an attorney has an affirmative duty to surrender physical evidence that incriminates his client. Thus, in *People v. Lee*,[63] a California appeals court held that the prosecution had the right to obtain evidence incriminating a defendant which had been turned over to the public

57. For arguments espousing such a duty, see, *e.g.*, Saltzburg, *Communications Falling Within the Attorney-Client Privilege*, 66 IOWA L. REV. 811, 828-45 (1981).

58. *See* Comment, *supra* note 15, at 249; Hazard, *supra* note 11, at 1062 (absent attorney-client privilege, the attorney is a medium of confession to the state).

59. Comment, *Ethics, Law and Loyalty: The Attorney's Duty to Turn Over Incriminating Physical Evidence*, 32 STAN. L. REV. 977, 993 (1980). *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); Comment, *Professional Responsibility and* In re Ryder: *Can an Attorney Serve Two Masters?*, 54 VA. L. REV. 145, 156-57 (1968). On the importance of maintaining the adversarial system, see Herring v. New York, 422 U.S. 852, 862 (1975).

60. *See* New York State Bar Soc'y Comm. on Professional Ethics, Opinion No. 405 (August 15, 1975). The standard of advocacy can be found in Anders v. California, 386 U.S. 738, 744 (1967).

The argument that such a duty violates the presumption that an accused is innocent until proven guilty because it forces a lawyer to present evideuce of guilt while maintaining innocence is similar, as it also presupposes that the attorney is required to be a partisan advocate for his client. *See* Comment, *An Attorney in Possession of Evidence Incriminating His Client*, 25 WASH. & LEE L. REV. 133, 136 (1968). *See also* Comment, *supra* note 72, at 422.

61. *See, e.g.*, Mitchell's Case, 12 Abb. Pr. 249, 257-59 (N.Y.C.P. 1861), *cited with approval in* Jones v. Reilly, 174 N.Y. 97, 105, 66 N.E. 649, 651 (1903); 1 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 330, at 431 (5th ed. Boston 1850) (1st ed. Boston 1842).

62. State v. Squires, 1 Tyler 147, 152 (Vt. 1801). *See also* Rhoades v. Selin, 20 Fed. Cas. 631, 633 (No. 11, 740) (C.C.E.D. Pa. 1827); Mitchell's Case, 12 Abb. Pr. at 262 (citing J. GILBERT, THE LAW OF EVIDENCE 138-39 (3d ed. London 1756)).

63. 3 Cal. App. 3d 514, 83 Cal. Rptr. 715 (4th Dist. 1970).

defender's office by the defendant's wife.[64] And in *State ex rel. Sowers v. Olwell*,[65] the Washington Supreme Court suggested that an attorney should have turned over his client's knives which had been subpoenaed from the attorney. Other state courts have interpreted these decisions to mean that the attorney does have a general affirmative duty to turn over physical evidence.[66]

The United States Supreme Court appears to follow the common law approach exempting the attorney from surrendering evidence when his client is also exempt. In *Fisher v. United States*,[67] the Court said: " '*[W]hen the client himself would be privileged* from production, either as a party at common law . . . or as exempt from self-incrimination, the attorney having possession of the documents is not bound to produce.' "[68] Thus, modern courts have expressed different views as to whether an attorney has a general duty to surrender incriminating evidence.

B. Compelled Production of Physical Evidence and the Fifth Amendment

An attorney should have no duty to surrender incriminating physical evidence when that would violate his client's constitutional rights. Part II demonstrated that the attorney-client privilege, in criminal cases, must apply to communications between attorney and client. Otherwise, a client could be forced to forfeit either his fifth or sixth amendment right to preserve the other, creating a constitutionally impermissible tension. Analogously, then, the attorney should have no duty to surrender physical evidence when such a duty would create an impermissible tension.

In order for this tension to exist, however, the client must have a fifth amendment privilege against producing the physical evidence. Otherwise, the client is not threatened with a choice between giving up either his fifth or sixth amendment rights as no fifth amendment right is involved. This Section demonstrates that compelling an individual to produce physical evidence can sometimes violate that individual's fifth amendment rights.

64. The factual situation was slightly more complex; the public defender's office gave the evidence, a pair of bloody shoes, to a judge, pending a determination of whether they were privileged. The prosecution then obtained a search warrant against the judge, and the court held that this did not violate the defendant's rights. The main issue in that part of the case, however, was whether the attorney had a right to retain the evidence, or was required to surrender it.

65. 64 Wash. 2d 828, 394 P.2d 681 (1964).

66. *See, e.g.*, Morrell v. State, 575 P.2d 1200 (Alaska 1976); People v. Nash, 110 Mich. App. 428, —, 313 N.W.2d 307, 313-14 (1981).

67. 425 U.S. 391 (1976).

68. *Id.* at 404 (quoting 8 WIGMORE, *supra* note 1, § 2307, at 592 (emphasis in original)).

The fifth amendment does not completely protect the defendant from being compelled to produce incriminating evidence. Its protection extends only to *testimonial* disclosures that may serve as a "link in a chain" of evidence leading to conviction.[69] Compelled disclosures of physical evidence are usually not testimonial. For instance, in *Schmerber v. California*,[70] a defendant was compelled to submit to a blood alcohol test, the results of which were used to convict him of drunk driving. The Court held that "although [the evidence was] an incriminating product of compulsion, [it] was neither petitioner's testimony nor evidence relating to some communicative act . . . ."[71] Hence, the evidence was not testimonial, and the defendant had no fifth amendment protection.

One of the issues in *Fisher*[72] was whether the production of the evidence by the defendant was testimonial. On the facts of *Fisher*, the Supreme Court stated that production was not testimonial because the existence or location of the physical evidence was a "foregone conclusion,"[73] and the act of producing it would have "[added] little or nothing to the . . . government's information . . . ."[74] From this, it can be inferred that where the existence or location of physical evidence is *not* a "foregone conclusion," compelling its production would be sufficiently testimonial to trigger the fifth amendment.[75]

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69. Maness v. Meyers, 419 U.S. 449 (1975).

70. 384 U.S. 757 (1966).

71. *Id.* at 758-59.

72. 425 U.S. 391 (1976).

73. The *Fisher* Court appears to have equated the particularity necessary to issue a subpoena, *see, e.g.*, U.S. CONST. amend. IV; Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 208-09 (1946), with a "foregone conclusion." However, the Court also recognized that some events might prove too trivial a self-incrimination to justify invocation of the privilege. 425 U.S. at 411. Presamably, because it would add "little" to the government's information, the defendant's production of evideuce would be too trivial an incrimination to trigger the fifth amendment if it merely transformed particularity into certainty.

74. 425 U.S. at 411. The Court also found production nontestimonial because it would not have constituted an authentication of the documents. *Id.* at 411-13. For cases applying the *Fisher* authentication rationale to find that production of physical evidence was testimonial, see, *e.g.*, State *ex rel.* Hyder v. Superior Court, 128 Ariz. 253, 255-57, 625 P.2d 316, 318-20 (1981); Briggs v. Salcines, 392 So. 2d 263, 266-67 (Fla. Dist. Ct. App. 1980).

75. Cases which have applied *Fisher's* "foregone conclusion" test include: *In re* Katz, 623 F.2d 122, 126 (2d Cir. 1980) (compelled surrender of incriminating documents testimonial self-incrimination, as existence and location of papers not a foregone conclusion and production would have added to government's information); United States v. Praetorius, 622 F.2d 1054, 1062-63 (2d Cir. 1979) (because existence and location of passport not in question, act of production did not constitute testimony within protection of fifth amendment); *In re* Grand Jury Empaneled on Jan. 17, 1980, 505 F. Supp. 1041, 1043 (D.N.J. 1981) (turning over records not testimonial, and therefore not protected by fifth amendment, when existence and possession by subpoenaed party a foregone conclusion); *cf.* United States v. Davis, 636 F.2d 1028, 1041 (5th Cir. 1981) (testimonial nature of compelled production should be ignored as de minimis when there is no question as to existence and location of papers). *But see* Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of* Fisher v. United States, 95 HARV. L. REV. 683, 686-87

There are at least two instances where the prosecution will not have enough knowledge to satisfy the *Fisher* "foregone conclusion" test. The most obvious example is when the existence or location of evidence is not a foregone conclusion because the prosecution does not know the evidence exists or does not know who has it. In such a case, if the defendant could be compelled to surrender the evidence, he would be admitting its existence or location and adding to the prosecution's knowledge. Thus, the admission would be testimonial. Another example is when the prosecution cannot describe the items it seeks by subpoena or warrant with adequate specificity.[76] Then, the existence or location of the items is again not a "foregone conclusion," and production would add to the prosecution's knowledge. In this case, compelled production would also be testimonial.

C. The Constitutional Tension Limitation on the Compelled Production of Physical Evidence

When an individual's compelled production of physical evidence would violate the fifth amendment, compelling his attorney to produce the evidence creates an impermissible tension between the client's constitutional rights. To provide effective assistance of counsel, an attorney may have to examine physical evidence. If the attorney can be compelled to produce that evidence once he obtains it, the client who has a fifth amendment privilege against producing the evidence will be reluctant to provide his attorney with the evidence or information regarding it. Thus, the client who wishes to avoid helping the prosecution convict him must waive his constitutional right to effective assistance of counsel. As discussed above, disclosures under such a scheme are compelled, and the client's fifth amendment rights are violated. If the client does not yield to the compulsion, he loses his guarantee of effective assistance of counsel.

Therefore, physical evidence should be within the attorney-client privilege when allowing the prosecution to compel its production would create a tension between fifth and sixth amendment rights. No constitutionally impermissible tension exists, however, unless both con-

(1982) (arguing that because the extent to which mere production conveys information is not altered by the depth of the government's knowledge, that knowledge should not affect the existence of a fifth amendment privilege).

76. A warrant must be specific enough to make general searches impossible and to leave nothing to the discretion of the person executing the warrant. Marron v. United States, 275 U.S. 192, 196 (1927). Subpoenas must be similarly specific. Hale v. Henkel, 201 U.S. 43, 76-77 (1906). An example of an overly broad or vague subpoena is given in the latter case; the subpoena requested, inter alia, all understandings of any kind evidenced in writing between a given company and six other firms from the date of the company's organization and all correspondence between the company and the six firms. *Id.* at 45, 76-77.

stitutional rights are implicated. First, the evidence must be delivered to the attorney, or the communication which led to the attorney obtaining the evidence must be made, for the purpose of receiving legal advice relating to a criminal prosecution.[77] Otherwise, production violates no sixth amendment rights. Second, compelled production of the evidence must be testimonial. If it is not testimonial, no fifth amendment rights are violated.

This tension analysis distinguishes *Meredith* from the two cases discussed in Section A that are most often cited for the proposition that an attorney has a duty to turn over physical evidence, *People v. Lee*[78] and *State ex rel. Sowers v. Olwell*.[79] In neither case would compelling an attorney to produce physical evidence incriminating his client have created a tension between constitutional rights. In *Olwell*, the prosecution knew of the evidence and issued a valid subpoena against the attorney. The *Fisher* foregone conclusion test was satisfied, and no fifth amendment right was implicated. Thus, there was not tension between constitutional rights, and the evidence should not have been within the attorney-client privilege. In *Lee*, the public defender's office did not obtain the physical evidence for the purpose of providing legal advice. The sixth amendment right was not implicated, and there was no tension between constitutional rights. Therefore, the physical evidence in *Lee* should not have been within the attorney-client privilege.[80]

In *Meredith*, on the other hand, both constitutional rights were involved. Scott's attorney obtained the evidence as part of his efforts to provide legal services for Scott. Furthermore, the existence of the wallet was not a foregone conclusion because the prosecution was not aware of its existence or location. The foregoing analysis shows that allowing the prosecution to compel production of physical evidence

77. 425 U.S. at 405. While *Fisher* dealt only with evidence which had been given to the attorney by the client, the fifth amendment concern is with disclosure. Therefore, evidence such as that in *Meredith* which was obtained by the attorney as a result of a confidential communication with his client would be equally encompassed by the self-incrimination privilege.

78. 3 Cal. App. 3d 514, 83 Cal. Rptr. 715 (4th Dist. 1970). *Lee* is generally cited in California cases for the proposition that such a duty exists. *See, e.g.*, People v. Meredith, 159 Cal. Rptr. 877, 881 (3d Dist. 1980), *officially depublished pursuant to* CAL. CT. R. 976(d) (West 1982).

The drafters of the California Evidence Code, however, appear to have believed that at least some physical evidence could be subject to an attorney-client privilege. *See* CAL. EVID. CODE § 401 Law Revision Commission Comment (West 1966) (" 'Proffered evidence' includes such matters as . . . testimony or tangible evidence claimed to be privileged. . . .' ").

79. 64 Wash. 2d 828, 394 P.2d 681 (1964).

80. Similarly, in *In re* Ryder, 263 F. Supp. 360 (E.D. Va. 1967), *aff'd*, 381 F.2d 701 (4th Cir. 1968), an attorney placed his client's sawed-off shotgun and money allegedly obtained in a robbery into his safe deposit box. Subsequently, FBI agents procured search warrants for the box, and obtained the secreted evidence Ryder was eventually suspended from practice. The ethical violation is clear; but in addition, neither the money nor the shotgun would have been privileged under the above analysis, as neither was obtained for purposes of legal advice, and production was nontestimonial because of the warrants.

under these circumstances created a tension between the client's fifth and sixth amendment rights. Since putting Scott to this choice violated his constitutional rights, the physical evidence in *Meredith* should have been within the attorney-client privilege.

IV
RECONCILIATION OF PRIVILEGE AND PROSECUTORIAL NEEDS

A. The Competing Interests

Thus far, this Note has focused on the constitutional rights of the defendant and the importance of protecting the attorney-client privilege. The *Meredith* court, however, was also concerned with protecting the state's interest in administering its criminal justice system. The court felt that to extend the attorney-client privilege to a case in which the defense removed evidence might encourage defense counsel to race the police to seize critical evidence.[81] The court, however, failed to consider the constitutional implications of its decision.

The state's interest in truth-seeking cannot support the restriction of constitutional rights found in *Meredith*. The fifth amendment protection against self-incrimination is necessary to protect individual liberty from government abuse even though this necessarily restricts the state in its truth-seeking.[82] Moreover, it is a basic tenet of the common law system that on balance, effective assistance of counsel advances, rather than impedes, the search for truth.[83] Finally, to ensure that no one is alone in defending a criminal charge prosecuted by the government's vast resources, society should maintain the privacy of the attorney-client relationship in spite of any perceived threats to the search for truth:[84]

> Truth like all other good things may be loved unwisely, may be pursued too keenly, may cost too much. And surely the meanness, and the mischief of prying into a man's confidential communications with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness and suspicion and fear, into these communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself.[85]

Thus, if privileges exist to afford neeessary safeguards to those who

81. 29 Cal. 3d at 694, 631 P.2d at 53, 175 Cal. Rptr. at 619.

82. *See, e.g.*, Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

83. *See, e.g.*, Faretta v. California, 422 U.S. 806, 827-28 n.35 (1975) (quoting 2 Z. SWIFT, A SYSTEM OF LAWS OF THE STATE OF CONNECTICUT 398-99 (1796)).

84. People v. Cahan, 44 Cal. 2d 434, 438, 450, 282 P.2d 905, 907, 914 (1955) (Traynor, J.); *see* State v. Kociolek, 23 N.J. 400, 415-16, 129 A.2d 417, 425 (1957).

85. State v. Douglass, 20 W.V. 770, 783 (1882) (quoting Pearse v. Pearse, 63 Eng. Rep. 950,

must use the legal system, then sometimes the truth-seeking function must give way to those safeguards. Still, the conclusions so far reached, while protecting the attorney-client privilege, show only that the defense must be allowed to remove and study evidence without penalty. They do not show what the defense should do with the evidence once it is studied, or whether it is possible to avoid irreparable damage to the prosecution's ability to investigate the case while maintaining the privilege. There is, however, a solution to the problem which ensures that only minimal, speculative harm will be done to the "search for truth" while maintaining the attorney-client privilege and the individual constitutional rights underlying it.

B. Inevitable Discovery: A Proposed Solution

In *Meredith*, the defense argued that because it was unlikely that the prosecution could ever have found the wallet, its location should not have been admissible.[86] The court considered that any standard based on the probability of the prosecution's finding evidence would be unworkable.[87] In so doing, it failed to consider a doctrine of criminal procedure which forces the prosecution to prove it "inevitably" would have found evidence. The same doctrine can be applied to the situation in a *Meredith*-type case. This would ensure that the prosecution, though not given every conceivable opportunity to obtain evidence, has a fair and equitable chance to do so without damage to the attorney-client privilege and the constitutional rights underlying it.

Some courts have recognized an "inevitable discovery" exception to the exclusionary rule. Normally, evidence obtained in an illegal search or as a result of other prosecutorial actions violating an accused's rights is inadmissible against the accused.[88] In some jurisdictions, however, if the prosecution can prove that there was a high probability that the tainted evidence would have been discovered without the illegal act, the evidence will be admissible. To do this, the prosecution generally must show a strong possibility that the evidence would have been discovered by a normal police investigation.[89]

957 (Ch. 1846)), *quoted in part in* People v. Meredith, 29 Cal. 3d at 691, 631 P.2d at 51, 175 Cal. Rptr. at 617.

86. Appellant's Response to Brief of Amicus Curiae California District Attorney's Association at 7-10, People v. Meredith, 29 Cal. 3d 682, 631 P.2d 46, 175 Cal. Rptr. 612 (1981).

87. 29 Cal. 3d at 694-95, 631 P.2d at 53, 175 Cal. Rptr. at 619.

88. Mapp v. Ohio, 367 U.S. 643 (1961).

89. *See* People v. Superior Court (Tunch), 80 Cal. App. 3d 665, 673-83, 145 Cal. Rptr. 795, 799-805 (1st Dist. 1978), for a detailed discussion of the history of the "inevitable discovery" rule, and the role's various formulations. The formulation in the text is basically that used in *Tunch* above, and is supported by law in other jurisdictions. *See, e.g.*, United States v. Cales, 493 F.2d 1215, 1216 (9th Cir. 1974); People v. Fitzpatrick, 32 N.Y.2d 499, 506-07, 300 N.E.2d 139, 141-42, 346 N.Y.S.2d 793, 797, *cert. denied*, 414 U.S. 1033, 1050 (1973); ORE. REV. STAT. § 133.683 (1981);

Thus, a rule already exists in which the probability that the prosecution would have found evidence must be determined. That rule can be adapted to cases such as *Meredith*. The resulting procedure would protect an individual's liberty and his constitutional rights, while ensuring that such protection would not unduly hamper legitimate prosecutorial goals.

This Note's proposed adaptation of the inevitable discovery doctrine would first require a determination of whether physical evidence is privileged. Immediately after the attorney obtains the physical evidence and performs necessary tests, he will be required to surrender the evidence to a judge[90] for an ex parte hearing.[91] At that time, the defense will have the burden of proving that the physical evidence and its location are privileged.[92]

If the defense meets its burden, and the physical evidence and its location are ruled privileged, the judge will retain the evidence until shortly before trial. At that time, a hearing can be conducted in which the prosecution, as it does under present procedures, will have the bur-

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LaCount & Girese, *The "Inevitable Discovery" Rule, An Evolving Exception to the Constitutional Exclusionary Rule*, 40 ALB. L. REV. 483, 491 (1976).

The United States Supreme Court has suggested that it might accept the inevitable discovery rule. Brewer v. Williams, 430 U.S. 387, 406-07 n.12 (1977).

90. The judge can be viewed as one "to whom disclosure is reasonably necessary for the . . . accomplishment of the purpose for which the lawyer is consulted," thus placing him within the California attorney-client privilege statute, CAL. EVID. CODE § 952 (West 1966).

91. Because a privilege would be defeated if the hearing were adversarial, the hearing should be ex parte. The prosecution will later be given ample opportunity to show inevitable discovery even if the defense is able to establish a privilege at the ex parte proceeding. The California Supreme Court has also recommended an ex parte hearing in a privilege case. *In re* Lifschutz, 2 Cal. 3d 415, 437 n.23, 467 P.2d 557, 571 n.23, 85 Cal. Rptr. 829, 843 n.23 (1970); *cf.* CAL. EVID. CODE § 915(b) (West 1966) (ex parte proceeding to determine whether official informant or trade secret privilege applies). Such an ex parte proceeding has ample precedent. A proceeding to obtain a search warrant is necessarily ex parte, in order to ensure that the warrant is not defeated by the defendant's later destruction of the evidence. Franks v. Delaware, 438 U.S. 154, 169 (1978).

Finally, even though the hearing must necessarily be in camera, this is consistent with California evidentiary procedures, as the judge will ordinarily hear questions of privilege out of the jury's presence. CAL. EVID. CODE §§ 400, 402, 405 (West 1966); *see* Carlton v. Superior Court, 261 Cal. App. 2d 282, 292, 67 Cal. Rptr. 568, 574 (2d Dist. 1968).

92. This is consisteut with present California practice in allocating the burden of proof to the party asserting the privilege. *See* San Diego Professional Ass'n v. Superior Court, 58 Cal. 2d 194, 199, 373 P.2d 448, 451, 23 Cal. Rptr. 384, 387 (1962); Chronicle Publishing Co. v. Superior Court, 54 Cal. 2d 548, 565, 354 P.2d 637, 645, 7 Cal. Rptr. 109, 117 (1960). The defense can meet this burden by showing that compelled production of the evidence would be testimonial and that the evidence was obtained to perform legal services, i.e., that the attorney-client privilege would be required to avoid a tension between the client's fifth and sixth amendment rights.

In some situations, the location of the evidence might be privileged because it was obtained through a confidential attorney-client communication, but the physical evidence itself might not be privileged—either because compelled production of the physical evidence would not be testimonial, or the evidence was not obtained to provide legal services. In such a situation, the defense will not be able to show the physical evidence is privileged, and it will be surrendered to the prosecution. The location of the evidence, however, may still be privileged.

den of justifying the invocation of an exception to the privilege.[93] That burden can be met by having the judge examine the prosecution's records of where it searched. If the evidence was located in a place where the police would need a warrant to search, inevitable discovery can be shown only if a warrant actually issued. If no search warrant would have been required, the judge can determine from the records whether the prosecution searched the place where the evidence was located; if it did, production of the evidence and its location will be required.[94]

This proposal would not compromise the constitutional rights protected by the attorney-client privilege. If the prosecution would have found evidence in its original location and could lawfully have seized it, the client would not have had a fifth amendment protection against keeping the evidence from the prosecution. No tension between fifth and sixth amendment rights would therefore have existed, so the client would lose nothing by confiding in his attorney.

The inevitable discovery proposal could be criticized as subject to abuse because it requires the cooperation of the attorney in presenting evidence to a judge. It could thus be argued that instead of cooperating, attorneys would be likely to destroy evidence. On this ground, however, the proposal is no more vulnerable to criticism than is the *Meredith* exception. *Meredith* relies upon the good faith of the attorney to refrain from destroying evidence as much as this proposal does.[95] In both cases, the attorney's integrity and the threat of disciplinary sanctions[96] are the only means the state has of ensuring cooperation with the rule.

93. *See* CAL. EVID. CODE § 405 Assembly Committee on the Judiciary Comment (West 1966).

94. If, by testing the evidence, the defense so alters it that the prosecution is unable to run its own tests, it is not inconsistent with the attorney-client privilege to allow the prosecution access to the defense's test results, when the prosecution has proven inevitable discovery.

95. The *Meredith* exception also allows the attorney to move or alter evidence, as long as he then gives the evidence and its location to the prosecution. Therefore, the only difference between this and "inevitable discovery" is that under *Meredith*, the attorney must routinely turn evidence over to the prosecution, while under "inevitable discovery," the attorney who moves evidence to investigate must surrender the evidence to a judge and justify his actions. But even where, as under *Meredith*, there is a duty to surrender evidence, the attorney who wishes to destroy evidence and does not fear the possible consequences will still do so. *See* Comment, *The Right of a Criminal Defense Attorney to Withhold Physical Evidence Received From His Client*, 38 U. CHI. L. REV. 211, 213 n.13 (1970).

96. Under present law, the destruction or concealment of evidence is a crime. *See, e.g.*, CAL. PENAL CODE § 135 (West 1970). Furthermore, if an attorney counsels his client to engage in conduct the attorney knows to be illegal, the attorney has breached disciplinary rules, and may be sanctioned professionally. CAL. BUS. & PROF. CODE §§ 6076 (Rule 11), 6077 (West 1974); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (A)(7) (1979).

CONCLUSION

In *People v. Meredith*, the California Supreme Court established a new exception to the attorney-client privilege. The court held that whenever the attorney moves or alters evidence, the privilege is waived as to the location of that evidence. This Note argues that in criminal cases, such an exception to the attorney-client privilege creates an impermissible tension between the client's fifth amendment privilege against self-incrimination and his sixth amendment right to effective counsel. It further argues that *Meredith's* assumption that an attorney has a duty to turn over physical evidence incriminating his client creates a similar constitutional tension. Finally, the Note recognizes that the *Meredith* exception was directed toward an important state interest, ensuring that the prosecution is not unduly hampered in collecting information. Thus, it suggests a means of reconciling prosecutorial needs with the individual's constitutional rights. The court should have adopted an "inevitable discovery" rule, mandating that a defense attorney must surrender physical evidence and its location if the prosecution shows it would have discovered the evidence in the normal course of investigation. This rule allows an attorney to make reasonable investigations without damaging his client's constitutional rights or curtailing the rights of the prosecution.

The *Meredith* decision, however, failed adequately to consider the constitutional rights of the individual in making a new exception to the attorney-client privilege. Instead, it focused mainly on prosecutorial needs. The decision thus has the effect of abridging the constitutionally protected attorney-client relationship in order to further a policy goal. Such a result may ultimately cause a decline in attorney-client communication and trust which the legal system has, over the years, sought so vigorously to protect.

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