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SIXTH AMENDMENT—EFFECTIVE ASSISTANCE OF COUNSEL: A DEFENSE ATTORNEY’S RIGHT TO REFUSE COOPERATION IN DEFENDANT’S PERJURED TESTIMONY


I. INTRODUCTION

In Nix v. Whiteside, the Supreme Court upheld a defense attorney’s right to refuse to assist his client in presenting testimony which counsel believes is false. The Court held that counsel’s refusal to participate in the perjury did not stifle the criminal defendant’s sixth amendment right to effective assistance of counsel. In so holding the Court relied upon the two-pronged standard of Strickland v. Washington to determine the realm of conduct permitted under the sixth amendment’s guarantee of effective assistance of counsel. The Court held that counsel’s actions in the present case conformed to the ethical standards set by the “recognized canons of ethics, the standards established by the State in statutes or professional codes, and the sixth amendment.” Additionally, the Court noted that counsel’s actions were insufficient to establish the prejudice required to constitute a prima facie case of ineffective assistance of counsel. The Court also firmly denied the defendant’s

1 106 S. Ct. 988 (1986).
2 Id. at 989.
5 Note, Sixth Amendment—Defendant’s Dual Burden in Claims of Ineffective Assistance of Counsel, 75 J. CRIM. L. & CRIMINOLOGY 755, 762-64 (1984). The dual burden consists of (1) proving counsel acted “unreasonably” under “the prevailing norms of the profession;” and (2) proving “counsel’s incompetent assistance prejudiced the defense by rendering the proceeding fundamentally unfair.” Id.
6 106 S. Ct. at 994. Essentially the Court decided the sixth amendment issue, but avoided deciding specific standards of professional conduct. The Court left those issues to the states to decide. Id.
7 106 S. Ct. at 999.
contention that the constitutional right to testify includes the right to testify falsely. The Court, using the Strickland standard, reversed the Eighth Circuit's decision to issue a writ of habeas corpus because the defendant could maintain neither that counsel acted "unreasonably" under the existing norms of the profession nor that the proceedings were prejudiced as a result of such acts.

This Note argues that while the Supreme Court correctly approved counsel's actions in the present case, it failed to set a standard against which future cases can be measured. The Court clearly affirmed that where the client intends to commit perjury, counsel may take certain preventative actions to dissuade the client from committing the perjury. The courts, however, should not permit counsel to make threats to breach client confidences or withdraw representation where counsel suspects the possibility of perjury. Such conduct would effectively destroy the benefits of the present adversary system. The adversary system attempts to promote justice and the effective representation of counsel by encouraging clients to be candid with counsel without the fear of any breaches in confidence. After all, the judge or jury, not counsel, should decide the truth of a defendant's testimony.

II. Facts

On February 8, 1977, Emanuel Charles Whiteside and two others went to Calvin Love's apartment in Cedar Rapids, Iowa, looking for marijuana. Love was in bed with his girlfriend when Whiteside arrived. An argument broke out between Whiteside and Love over the marijuana. At one point during the argument Love asked his girlfriend to get his "piece." Later, Love got out of

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8 Id. at 998.
9 Id. at 999.
10 It will be argued that obvious perjury should be limited to those circumstances where the client admits his intended perjury to counsel.
11 Such preventative actions consist of (1) informing clients of the penalties for perjury; (2) threatening to withdraw as counsel; and (3) continuing as counsel, but threatening to reveal the client's perjury to the court.
12 See Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469, 1476-78 (1966). Freedman argues that if counsel is allowed to withdraw, the client will simply go to another attorney and withhold the incriminating evidence from the new attorney. Id.
13 Id. at 1470.
14 Id.
15 106 S. Ct. at 991.
16 Id.
17 Id.
18 Id.
bed, but returned without physical confrontation with Whiteside. According to Whiteside's testimony, Love then started to reach under his pillow and advanced toward Whiteside. At this point, Whiteside stabbed Love in the chest causing his death.

The police charged Whiteside with murder. Whiteside requested appointed counsel. He rejected his first appointed counsel, saying that he was uncomfortable dealing with an attorney who was a former prosecutor. The court then appointed Gary L. Robinson who shortly thereafter began his investigation. Whiteside told Robinson that he stabbed Love as Love "was pulling a pistol from underneath the pillow on the bed." Upon further questioning by Robinson, however, Whiteside admitted that he had not actually seen a gun, but that he was sure Love possessed one. The police found no gun on the premises of Love's apartment and neither of Whiteside's two companions admitted to seeing a gun during the incident. After hearing this information, Robinson counseled Whiteside that he needed to establish only a reasonable belief that a gun existed to prove a claim of self-defense.

Whiteside consistently told Robinson that he had never actually seen a gun in Love's hand. About one week before trial, however, during preparation for testimony, Whiteside told Robinson and his associate, Donna Paulsen, that he remembered seeing something "metallic" in Love's hand. Robinson asked Whiteside about the "metallic" object and Whiteside responded that "in Howard Cook's case there was a gun. If I don't say I saw a gun I'm dead." Robinson told Whiteside that if he testified to seeing a gun he would be

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19 Id.
20 Id.
21 Id.
22 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id. It should be noted that shortly after the police search of Love's apartment, the victim's family removed all of Love's personal effects from the apartment. Id.
29 Id. It seems clear that counsel accurately conveyed the requirements for establishing a claim of self-defense and that Whiteside knew that the existence of a gun was not necessary, though it may be presumed he knew it would be helpful.
30 Id.
31 Id.
32 Id. Howard Cook apparently was someone whom Whiteside knew who was convicted of murder. The Court made no attempt to explain the specific circumstances of Howard Cook's case. It may be inferred that Whiteside thought Howard Cook was convicted primarily because he did not lie about seeing a gun.
committing perjury. Whiteside insisted he would still testify to that effect at trial. Robinson then advised Whiteside that if Whiteside committed perjury it would be Robinson's duty as counsel to tell the court and attempt to impeach that particular testimony. Robinson also indicated that he might attempt to withdraw his representation if Whiteside insisted on committing perjury.

At trial Whiteside testified that he acted in self-defense. He stated that he "knew" Love had a gun and that he was under the impression Love was reaching for a gun when he fatally stabbed Love. On cross-examination, however, Whiteside admitted that he never actually saw a gun in the victim's hand. Robinson developed testimony of other witnesses and presented evidence on Whiteside's behalf that Love had been seen on prior occasions with a sawed-off shotgun, that the police search of Love's apartment was careless, and that Love's family removed everything after the police search. Robinson presented this evidence in an attempt to prove a basis for Whiteside's fear that Love had a gun.

The jury returned a guilty verdict of second-degree murder. Whiteside then moved for a new trial, claiming Robinson's warnings not to testify that he saw a gun or "something metallic" deprived him of his right to a fair trial. After a hearing, the trial court denied Whiteside's motion and made specific findings of facts consistent with Robinson's testimony.

Whiteside appealed the trial court's decision to the Supreme Court of Iowa. The Supreme Court of Iowa affirmed Whiteside's conviction, holding that Whiteside had no right to have counsel present perjured testimony and that counsel had no duty to assist a client in committing perjury. In addition, the court lauded both

33 Id. at 992.
34 Id.
35 Id. It should be noted that counsel's motivation in the present case may have stemmed from his belief that his client's testimony would ruin his case. Clearly, the prosecution could impeach the client's perjurious testimony and thereby discredit even the client's truthful testimony.
36 Id. Whiteside testified that he feared that if he "didn't go along with what was happening, that it was no gun being involved, maybe that he will pull out of my trial." 106 S. Ct. at 992 n.2 (citing Appeal to Petition for cert. at A-70).
37 106 S. Ct. at 992.
38 Id.
39 Id.
40 Id.
41 Id.
42 Id.
43 Id.
44 Id.
Robinson and Paulsen for their ethical behavior, noting that both attorneys acted as required under Iowa law.\[46\] Having exhausted his appeals in the Iowa courts, Whiteside filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Iowa.\[47\] The district court denied the petition on the grounds that there could be no habeas relief since no constitutional right exists to present a perjured defense.\[48\]

The United States Court of Appeals for the Eighth Circuit reversed the district court and granted the writ of habeas corpus.\[49\] Accepting both the factual findings of the trial court and the ruling that a criminal defendant has no right to commit perjury, the court, nevertheless, held that Robinson violated Whiteside’s right to effective assistance of counsel.\[50\] The court reasoned that a defendant’s communication of an intent to commit perjury to counsel does not destroy his right to effective assistance of counsel.\[51\] Therefore, the court found that Robinson’s warning to Whiteside that he would reveal the perjurious testimony to the court was “a threat to violate the attorney’s duty to preserve client confidences.”\[52\] The court held that Robinson’s threatened violation of a client confidence constituted “unreasonable” conduct under the standards laid down in Strickland v. Washington.\[53\] The court also held that the conflict between Robinson’s ethical duties and his duty of loyalty to his client met Strickland’s prejudice standard.\[54\]

The Supreme Court granted Whiteside’s petition for certio-

\[46\] 106 S. Ct. at 992.
\[47\] Id.
\[48\] Id. The district court also accepted the state trial court’s factual finding that Whiteside’s testimony as to the existence of a gun would have been perjurious.
\[49\] Id. See Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984).
\[50\] 106 S. Ct. at 993. In Harris v. New York, 401 U.S. 222 (1971) the Supreme Court held that a criminal defendant’s privilege to testify in his defense did not include the right to commit perjury. Id.
\[51\] 106 S. Ct. at 993.
\[52\] Id. It should be noted that although Whiteside presented “his claim before the Supreme Court of Iowa as a denial of his due process right to a fair trial, and not as a denial of his Sixth Amendment right to counsel, the Court of Appeals accepted the District Court’s conclusion that the Sixth Amendment claim was exhausted.” Id.
\[53\] Id. The Court in Strickland v. Washington, 466 U.S. at 684-87, held that a defendant must prove that (1) the conduct of counsel was “unreasonable” given the accepted standards of professional ethics and (2) that counsel’s conduct prejudiced the outcome of the case.
\[54\] 106 S. Ct. at 993. The court further denied a petition for rehearing en banc. Id.
to determine "whether the Sixth Amendment right of a criminal defendant to assistance of counsel is violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial." 56

III. The Supreme Court Decision

A. The Majority Opinion

In Nix v. Whiteside, the Supreme Court 57 held that the conduct of an attorney who successfully dissuades his client from committing perjury by threatening to withdraw from representation and disclose the perjury falls within the range of reasonable professional conduct as set down in Strickland v. Washington. 58 The Court held Robinson's conduct reasonable and beneficial to his client in light of the unanimity of the sources of standards for professional conduct which clearly prohibit an attorney from aiding in his client's perjury. 59

Further, the Court held that the scope of the constitutional right to testify does not include the right to testify falsely. 60 The

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56 106 S. Ct. at 993.
57 Chief Justice Burger's majority opinion was joined by Justices White, Powell, Rehnquist and O'Connor. Justice Brennan filed a concurring opinion. Justice Blackmun filed a concurring opinion joined by Justices Brennan, Marshall and Stevens. Justice Stevens also filed a separate concurring opinion.
58 106 S. Ct. at 997.
59 Id. The Court determined that Robinson only dissuaded his client from testifying falsely and that he aided Whiteside in establishing the basis for Whiteside's fear that Love possessed a gun. Id. According to the Court, an attorney has always had the duty to prevent a client's intended commission of a crime and that a client's admission of his intention to commit a crime is not within the confidences which an attorney must respect. Id. at 995. In essence the Court reasoned that dissuasion from the commission of a crime is beneficial to the client. Id. See Model Code of Professional Responsibility DR 7-102(A)(4), (6), (7), DR 7-102(B)(1), DR 4-101(C)(3) (1980); Model Rules of Professional Conduct 1.2(d), 3.3(a)(4) (1983). See also MacCarthy & Mejia, The Perjurious Client Question: Putting Criminal Defense Lawyers Between a Rock and a Hard Place, 75 J. CRIM. L. & CRIMINOLOGY 1197, 1200-08 (1984).
60 106 S. Ct. at 998. Harris v. New York, 401 U.S. at 225, held that prior contrary statements inadmissible under Miranda v. Arizona, 384 U.S. 436 (1966), could be used to impeach a defendant's testimony. The Court cited Harris and United States v. Havens, 446 U.S. 620, 626-27 (1980), for the proposition that no constitutional right exists to testify falsely. 106 S. Ct. at 998. Apparently, the right to testify in one's own defense "is of relatively recent origin." The courts previously reasoned that defendants should not be allowed to testify as a result of their obvious bias in the case. Id. at 993. See also Ferguson v. Georgia, 365 U.S. 570 (1960); State v. Laffer, 38 Iowa 422 (1874)(upholding Iowa's disqualification of criminal defendant testimony); R. Morris, Studies in the History of American Law 59-60 (2d ed. 1959).

This trend was reversed by the close of the nineteenth century as most states and the federal courts abolished the rule by statute. Act of Mar. 16, 1878, ch. 37, 20 Stat. 30-31; see also 106 S. Ct. at 993; Thayer, A Chapter of Legal History in Massachusetts, 9 HARV. L. REV. 1, 12 (1895). Despite the fact the Court has never held that criminal defendants
Court also held that counsel’s duty of confidentiality “does not extend to a client’s announced plans to engage in future criminal conduct.”61

Additionally, the Court held that Whiteside did not establish the prejudice required by the second prong of the Strickland standard.62 The Court reasoned that since Whiteside’s testimony would have been false the failure to submit the false testimony to the jury did not prejudice the outcome of the trial.63 The Court determined that Robinson’s conduct was consistent with the standards laid down in Strickland and did not deprive Whiteside of his constitutional rights to testify in his own behalf and to assistance of counsel.64

The Court reiterated that the Strickland standard encompassed the correct measure for all claims of habeas corpus relief based upon the deprivation of assistance of counsel guaranteed by the sixth amendment.65 The Court acknowledged that the defendant must prove that (1) counsel made such grievous error that counsel effectively was not serving as “counsel” as contemplated in the sixth amendment, and that (2) the error prejudiced the outcome of the trial such that it was unfair.66 Additionally, the Court held that courts must possess a strong presumption that counsel’s performance falls inside the area of reasonable professional conduct.67

The Court held that the power rests with the states to set reasonable standards of attorney conduct.68 All other codes of profes-

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62 106 S. Ct. at 999. The Court found that “to show prejudice, it must be established that the claimed lapses in counsel’s performance rendered the trial unfair so as to undermine confidence in the outcome of the trial.” Id. at 994; Strickland, 466 U.S. at 694.

63 106 S. Ct. at 994.

64 Id.

65 Id. at 993.

66 Id. at 993-94.

67 Id. at 994. In order to react to the tendency to blame the unsuccessful defense, the courts should “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” 106 S. Ct. at 994 (citing Strickland, 466 U.S. at 689).

68 Id. Specifically, the Court held that a court must be careful not to narrow the wide range of conduct acceptable under
The Court refused to consider the weight to be assigned to the recognized canons of ethics, the state codes of ethics, and the sixth amendment in defining the parameters of attorney conduct. The Court reasoned that such a determination was unnecessary in the present case, since all of the sources point to the same conclusion: that counsel may not assist in his client's perjury.

The Court rejected the Eighth Circuit's determination that in the event of suspected perjury, counsel should allow the client to take the stand but force the client to relate his testimony in his own "free narrative" without assistance from counsel. The Court reasoned that standards outlined in the various codes rejected the passive participation involved in the "free narrative" approach.

Consequently, applying the Strickland standard to Nix, the Court found that Robinson's refusal to participate in his client's perjury, his threat to withdraw as counsel and his threats to reveal the per-
jury to the court were the required actions according to all applicable canons of ethics.\textsuperscript{74} The Court held that since Whiteside did not carry his burden of proving the unreasonableness of Robinson's actions, Whiteside's sixth amendment rights were not violated.\textsuperscript{75} Furthermore, the Court refuted Whiteside's argument that he sustained prejudice since his attorney represented conflicting interests.\textsuperscript{76} Whiteside alleged the conflicting interests were counsel's duty to maintain client confidences and counsel's duty not to aid in the presentation of perjurious testimony.\textsuperscript{77} The Court held that the conflict in the present case was imposed on counsel by Whiteside's proposed perjury, and as a result was not the same as counsel creating the conflict.\textsuperscript{78}

\section*{B. JUSTICE BRENNAN'S CONCURRING OPINION}

Justice Brennan, concurring in the result, emphasized that the Court has no authority to establish the ethical standards for attorneys practicing in state courts.\textsuperscript{79} In addition, he noted that the Court has no jurisdiction over legal ethics.\textsuperscript{80} Justice Brennan read the majority's decision as concluding that the Court may regulate the conduct of state court proceedings only when federal rights are violated.\textsuperscript{81} Justice Brennan further pointed out that the issue of

\begin{itemize}
\item \textsuperscript{74} Id. at 997. See Model Rules of Professional Conduct Rule 1.6(a)(1), Rule 1.6, Comment (1983); Model Code of Professional Responsibility DR 2-110(B),(C) (1980)(all cited for allowing counsel withdrawal as a proper response to intended client perjury). The Court noted, however, that withdrawal may result in problems of mistrial and double jeopardy. 106 S. Ct. at 996. The "free narrative" approach has been suggested in cases where withdrawal is not possible. Id. Most jurisdictions and the Model Rules have rejected this approach, prohibiting any participation by counsel in allowing the alleged perjury. Id.
\item \textsuperscript{75} 106 S. Ct. at 996.
\item \textsuperscript{76} Id. at 999. See Cuyler v. Sullivan, 446 U.S. 335 (1980)(in alleging conflict of interest in case of multiple representation defendant must prove counsel's conflict of interest made representation ineffective).
\item \textsuperscript{77} 106 S. Ct. at 999.
\item \textsuperscript{78} Id. The Court went further to point out that allowing a conflict between a client's proposed perjury and counsel's ethical considerations "to give rise to a presumption that counsel's assistance was prejudicially ineffective" would call into question every criminal conviction where the defendant had sought to achieve acquittal through illegal means. Id.
\item \textsuperscript{79} Id. at 1000 (Brennan, J., concurring).
\item \textsuperscript{80} Id. (Brennan, J., concurring).
\item \textsuperscript{81} Id. (Brennan, J., concurring). The language Justice Brennan relied on is:
\begin{quote}
When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the State's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts.
\end{quote}
\end{itemize}

Id. at 994.
proper ethical conduct in cases of intended perjury was not an issue in the present case.\textsuperscript{82} Accordingly, he noted that "the Court's essay regarding what constitutes the correct response to a criminal client's suggestion that he will perjure himself is pure discourse without force of law."\textsuperscript{83}

C. JUSTICE BLACKMUN'S CONCURRING OPINION

Justice Blackmun, joined by Justices Brennan, Marshall and Stevens, concurred in the judgment, but disagreed with the majority's use of a federal habeas corpus case to determine how counsel should treat a client's intended perjury.\textsuperscript{84} Accordingly, Justice Blackmun argued that the only question in \textit{Nix} was "whether the lawyer's actions deprived the defendant of a fair trial which the Sixth Amendment is meant to guarantee."\textsuperscript{85} Justice Blackmun found that the defendant failed to show the prejudice necessary for federal habeas relief.\textsuperscript{86}

Justice Blackmun chastised the Court for approaching this case as if the \textit{Strickland} standard always required the determination of the perimeters of reasonable professional conduct.\textsuperscript{87} \textit{Strickland} expressly dictates that the prejudice requirement should be decided ahead of the performance standard where it is convenient.\textsuperscript{88} Justice Blackmun suggested that the only question the Court needed to consider was "whether its confidence in the outcome of Whiteside's trial is in any way undermined by the knowledge that he refrained from presenting false testimony."\textsuperscript{89}

Citing a long line of cases, Justice Blackmun implied that the absence of perjured testimony at trial may never be questioned as part of the fairness of a trial.\textsuperscript{90} He reiterated the majority's stand that the privilege to testify in one's own defense does not extend to perjury.\textsuperscript{91} Thus, since Whiteside received a fair trial and none of

\textsuperscript{82} \textit{Id.} at 1000 (Brennan, J., concurring).
\textsuperscript{83} \textit{Id.} (Brennan, J., concurring).
\textsuperscript{84} \textit{Id.} (Blackmun, J., concurring).
\textsuperscript{85} \textit{Id.} (Blackmun, J., concurring).
\textsuperscript{86} \textit{Id.} (Blackmun, J., concurring).
\textsuperscript{87} \textit{Id.} at 1003 (Blackmun, J., concurring).
\textsuperscript{88} \textit{Id.} (Blackmun, J., concurring). \textit{See} 466 U.S. at 697.
\textsuperscript{89} \textit{Id.} (Blackmun, J., concurring).
\textsuperscript{90} \textit{Id.} (Blackmun, J., concurring). \textit{See} United States v. Agurs, 427 U.S. 97, 103 (1976) (asserting that use of perjured evidence by the prosecution has continually been deemed unfair where use of such evidence resulted in a conviction). The converse of \textit{Agurs} is that the absence of such perjured evidence cannot be deemed unfair.
\textsuperscript{91} 106 S. Ct. at 1004 (Blackmun, J., concurring)(citing Harris v. New York, 401 U.S. at 225). At this point Justice Blackmun questioned the implicit assertion that the right of a defendant to testify in his own trial is not a settled issue. Justice Blackmun found that
the constitutional protections guaranteeing a fair trial were breached, no prejudice could be found.92

Justice Blackmun joined the majority in attacking the defendant's contention that a conflict of interest existed between his counsel's ethical obligations and counsel's duty of loyalty to his client.93 Justice Blackmun stated that the defendant had no legitimate interest that conflicted with counsel's ethical obligation.94 Thus, unless a conflict denied a defendant's federally protected constitutional right to counsel, no prejudice existed.95

Furthermore, Justice Blackmun suggested that counsel's ethical obligation not to present perjured testimony is entirely consistent with the defendant's best interest.96 In fact, had Whiteside lied, not only would he have risked being convicted of perjury, but the prosecution could have impeached his testimony.97 Additionally, the judge could have taken such impeachment into his consideration of Whiteside's sentence.98 Justice Blackmun also suggested that the jury could have convicted Whiteside of first-degree murder if they believed he lied about the absence of premeditation.99

In the absence of prejudice, Justice Blackmun noted that no reason existed to judge counsel's conduct.100 Justice Blackmun continued, however, to list several factors which would have a bearing on whether a client's sixth amendment rights were violated in the event counsel suspects his client intends to commit perjury.101

any state statute abrogating such a right would violate both the sixth and fourteenth amendments and perhaps the due process clause of the fifth amendment. Id. at 1004-05 (Blackmun, J., concurring). See also Jones v. Barnes, 463 U.S. 745, 751 (1983)(cited for the proposition that defendants have fundamental authority to make certain decisions, such as whether to testify at trial); Brooks v. Tennessee, 406 U.S. 605, 612 (1972)(invalidating a Tennessee law requiring a defendant to testify first for defense or not at all, on grounds that the law violated defendant's privilege against self-incrimination).92 106 S. Ct. at 1005 (Blackmun, J., concurring).

93 Id. (Blackmun, J., concurring).
94 Id. (Blackmun, J., concurring). Justice Blackmun held the line of cases the defendant relied on inapposite because, unlike the present case, the conflicts involved serious violations of constitutional rights. Id. at 1005 (Blackmun, J., concurring). See supra notes 71 and 76. See also Wood v. Georgia, 450 U.S. 261, 268-71 (1981)(counsel paid by employer may have followed employer's interest instead of defendant's interest); Glasser v. United States, 315 U.S. 60, 72-75 (1942)(counsel representing two defendants attempted to minimize one codefendant's guilt by failing to object to certain testimony).95 106 S. Ct. at 1005 (Blackmun, J., concurring).

96 Id. (Blackmun, J., concurring).
97 Id. (Blackmun, J., concurring).
98 Id. (Blackmun, J., concurring).
99 Id. (Blackmun, J., concurring).
100 Id. at 1006. (Blackmun, J., concurring).
101 Id. (Blackmun, J., concurring). Three factors Justice Blackmun mentioned are: (1) the degree of certainty with which counsel feels the testimony is false; (2) the stage at
Justice Blackmun warned attorneys not to act as judge and jury in determining the facts.\(^{102}\) He counseled that attorneys judging their own clients "pose[s] a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment."\(^{103}\) Justice Blackmun also expressed concern about "the Court's implicit adoption of a set of standards of professional responsibility for attorneys in state criminal proceedings."\(^{104}\) The states, not the Supreme Court, should decide how attorneys should conduct themselves in state courts.\(^{105}\) Finally, Justice Blackmun argued that determining first whether a defendant has carried the burden of proving prejudice before delving into counsel's performance "avoids unnecessary federal interference in a State's regulation of its bar."\(^{106}\)

D. JUSTICE STEVEN'S CONCURRING OPINION

Justice Stevens, also concurring in the judgment, found that despite the apparent clarity with which counsel in the present case saw the client's intended perjury, a danger still existed in making such pretrial judgments.\(^{107}\) He warned that after reflection even "the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked."\(^{108}\) Justice Stevens suggested that in cases of suspected client perjury, resolving the "areas of uncertainty" that exist with respect to acceptable attorney conduct will be "colored by the the particular circumstances attending the actual event and its aftermath."\(^{109}\)

V. ANALYSIS

In *Nix v. Whiteside*, though the Supreme Court demonstrated its

\(^{102}\) *Id.* (Blackmun, J., concurring) (quoting United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 122 (3rd Cir. 1977) (where counsel's threat to withdraw in middle of trial caused defendant not to take stand at all, the court found defendant's right to testify violated)).

\(^{103}\) *Id.* (Blackmun, J., concurring).

\(^{104}\) *Id.* (Blackmun, J., concurring).

\(^{105}\) *Id.* (Blackmun, J., concurring). Justice Blackmun asserted that the American Bar Association's amicus curiae brief in support of the A.B.A. Model Rules of Professional Conduct should have been addressed to the states rather than the Supreme Court. *Id.* (Blackmun, J., concurring).

\(^{106}\) *Id.* (Blackmun, J., concurring).

\(^{107}\) *Id.* at 1007. (Stevens, J., concurring).

\(^{108}\) *Id.* (Stevens, J., concurring).

\(^{109}\) *Id.* (Stevens, J., concurring).
desire to reduce the probability of success "in claims of ineffective assistance of counsel," it once again refused to establish standards to guide attorneys in cases of suspected client perjury.\(^{110}\) When establishing such standards, the Court certainly needs to take note of the dangers of allowing counsel too much freedom in reacting to impending perjury by a client.\(^{111}\) Ultimately it is for the judge or jury to decide the truth—not defense counsel. Justice will be better served through establishing a standard which allows counsel in cases of obvious perjury\(^{112}\) to inform the judge or jury while reserving less obvious cases of perjury for adjudication in the normal course of trial.\(^{113}\) In cases that involve situations constituting mere factual discrepancies without a client admission of intent to commit perjury, counsel should be required to pursue the case as if counsel believes the client's testimony.\(^{114}\) The health of the adversary sys-

\(^{110}\) Note, supra note 5, at 755 (discussing Strickland).

\(^{111}\) 106 S. Ct. at 1006 (Blackmun, J., concurring).

\(^{112}\) The only situations of obvious perjury are those where the client admits his intention to commit perjury. The facts of Nix v. Whiteside fit this characterization of perjury. No other factual possibilities should be considered obvious since that would force an attorney to judge his client. Allowing withdrawal or the breach of client confidences at trial in cases where the client admits he will commit perjury does not force counsel to make a judgment.

This standard will minimize the adverse effects on the adversary system and be easily applicable by practicing attorneys.


See also Callan & David, Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System, 29 Rutgers L. Rev. 332 (1976); MacCarthy & Mejia, supra note 59, at 1197.

\(^{114}\) This places the full burden of determining the truth of the client’s testimony on the judge or jury. Placing the burden on the judge or jury eliminates all ineffective assistance of counsel claims and guarantees the client his proper constitutional guarantees to testify in his own behalf, right to counsel, and right to a fair trial.

It is important to give the client the benefit of the doubt as to his or her own testimony. The criminal justice system in this country ascribes to the maxim that defendants shall be presumed innocent until proven guilty.

See also Freedman, supra note 12, at 1469, where Freedman argues that to preserve the adversary system given the presumption of innocence, the right to counsel, the attor-
tem depends upon the avid assistance given to defendants by counsel. Creating uncertainty in the minds of defense counsel, by requiring them to speculate as to the veracity of their client’s testimony, will decrease the efficiency of the entire judicial system and weaken the protection of the sixth amendment.

Although the Court refused to set specific standards for attorney conduct, the Court did observe that defendants have no sixth amendment right to commit perjury. The Court, however, should have gone further to protect the integrity of the adversary system through limiting its holding to the facts of the present case. Counsel’s actions should be limited to factual situations where clients admit to counsel an intent to commit perjury.

Instead, the Court suggested that state ethical codes, or perhaps the American Bar Association’s Model Rules of Professional Conduct, will serve as the standard for determining reasonable conduct. These codes, however, provide no guidance to counsel in situations where counsel believes the client intends to commit perjury. Additionally, the Model Code of Professional Responsibility makes no mention of how an attorney should deal with cases where

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115 Id. at 1476-78.
116 106 S. Ct. at 997.
117 Critics may point out that forcing attorneys to assist in presenting potentially perjured testimony seems inconsistent with the lack of a constitutional right to testify falsely and with the American Bar Association’s Model Rules. It is agreed that inconsistency exists between the proposed standard and the absence of a right to testify falsely, but the nature of the problem precludes any other alternative. The inconsistency with the Model Rules will be dealt with later in this Note.
118 Id. at 994. The Court is correct in reserving to the states the authority to enact the rules to govern the practice of law in state courts.
119 Rieger, supra note 113, at 124. Model Rules of Professional Conduct Rule 3.3(C) only prohibits counsel from offering false evidence “knowingly” or evidence he “reasonably believes” is false. Model Rules of Professional Conduct Rule 3.3(A)(4) and 3.3(B) also order counsel to take “reasonable remedial measures” even if evidence is privileged. Thus, the Model Rules appear to eliminate the gap between perjury and the client confidence rules of the Model Code.

The Model Rules perpetuate the uncertainty about acceptable attorney conduct as there is a dispute in the official comment as to what means of persuasion may be used on a client and also as to what course of action should be taken in the event the client refuses to cooperate.

counsel is not absolutely sure the client will commit perjury.\textsuperscript{120}

The three approaches to proper attorney conduct in cases of suspected client perjury that will be discussed in this Note are Justice Blackmun’s approach in his concurring opinion; Carol T. Rieger’s “beyond a reasonable doubt” approach; and the “free narrative” approach. Though courts and scholars have attempted to devise alternatives to solve the problem of client perjury, most approaches have failed to set a feasible standard for counsel to judge a client’s testimony.

First, Justice Blackmun, in his concurring opinion, suggested three factors which the courts and attorneys in general might consider in determining how to proceed: “how certain the attorney is that the proposed testimony is false, the stage of the proceeding at which the attorney discovers the plan, and the ways in which the attorney may be able to dissuade his client.”\textsuperscript{121} Justice Blackmun elaborated on these factors only by stating that these factors will vary enough from case to case to render “inappropriate a blanket rule that defense attorneys must reveal, or threaten to reveal, a client’s anticipated perjury to the court.”\textsuperscript{122}

Justice Blackmun’s first standard requires counsel to judge his client in cases where no clear evidence of intended perjury exists. In applying standards requiring such a value judgment by counsel, there exists a difficulty in determining the appropriate degree of certainty necessary to allow counsel to reveal his or her doubts to the court.\textsuperscript{123}

Justice Blackmun’s second factor relates only to the potential conduct to be chosen by counsel after he learns of the perjury. Counsel cannot withdraw upon discovery of perjury during or right before trial since such action might prejudice the client.

\textsuperscript{120} \textit{Model Code of Professional Responsibility} DR 7-102(A)(4) states that an attorney may not “knowingly use perjured testimony.” The Model Code makes no attempt to define what scope or standards should be applied to the term “knowingly.”

\textit{See also} Callan & David, supra note 113, at 394, where the authors argue that the application of the many ethical standards requires the disclosure of client misconduct only in limited situations. Callan and David point out, however, that there is a need to remove the ambiguity from the principles dealing with disclosure of client misconduct. \textit{Id.} The authors make specific suggestions for changes which will provide clear standards to guide attorney conduct. \textit{Id.} They argue that preservation of the adversary system is important because without it counsel would not be privy to the client’s admissions in the first place. \textit{Id.} at 395.

\textsuperscript{121} 106 S. Ct. at 1006 (Blackmun, J., concurring).

\textsuperscript{122} \textit{Id.} at 1000 (Blackmun, J., concurring).

\textsuperscript{123} Counsel’s judgment of a client reflects only the facts in counsel’s possession. In fact counsel may not have the full set of facts in his possession. It is the purpose of a trial to ascertain all the facts and have the judge or jury render a decision.
As Justice Stevens pointed out in his concurring opinion, a mere change in testimony by a client before or during trial may reflect an honest recollection of the facts.\textsuperscript{124} As time passes, witnesses recall some things and forget others. To submit all defendants to potential persecution by counsel for changes in testimony is unfair.

Justice Blackmun’s third factor revives the original problem of deciding what constitutes permissible conduct in persuading a client not to commit perjury. Counsel obviously must be careful not to discourage accurate testimony by the client.

Consequently, in cases of suspected client perjury, counsel should be allowed only to inform the client of the penalties for perjury and the potential effect of the perjury on the case. In situations of less than obvious perjury, allowing any greater action by counsel will potentially suppress valuable testimony.\textsuperscript{125}

A second approach suggested by Carol T. Rieger advocates the use of a “beyond a reasonable doubt” standard for determining the veracity of a client’s testimony.\textsuperscript{126} Under this standard counsel can request an in camera hearing if counsel is convinced “beyond a reasonable doubt” that the client did or will commit perjury.\textsuperscript{127}

Unfortunately, applying this standard forces counsel to make value judgments on less than perfect information. In addition the “beyond a reasonable doubt” standard is the same standard the jury will use in the real trial so, the jury could apply that standard rather than have counsel presort the testimony before trial.\textsuperscript{128} Certainly, the suggested in camera proceeding would tend to protect the cli-

\textsuperscript{124} 106 S. Ct. at 1007 (Stevens, J., concurring).
\textsuperscript{125} Counsel should not put pressure on the client through threats to withdraw or reveal the perjury at trial unless the client admits he intends to commit perjury. Threats are as good as judgment when testimony is suppressed.
\textsuperscript{126} Rieger, supra note 113, at 149-51. The author explains that this standard should be used in view of the fact that juries are supposed to apply this standard in judging criminal defendants. Id. at 149. Allegedly, if defense counsel in view of the evidence finds “beyond a reasonable doubt” that the client will or did commit perjury, then counsel should request a continuance in the trial. Id. at 150. Rieger suggests that counsel and client who disagree as to the truth of the client’s testimony should appear before a non-presiding judge for an in camera hearing to determine the truth. Id. Rieger says this separate in camera proceeding will give the client added protection from incorrect judgments by counsel. Id. at 152.
\textsuperscript{127} Id.
\textsuperscript{128} Another related problem with Rieger’s approach is that the approach requires the non-presiding judge to determine whether the client intends to commit perjury. In order to make this determination, however, other evidence would have to be introduced, such as the evidence to be introduced at trial. Consequently, the defendant should have counsel to insure the fairness of the proceeding. Also, because this evidence will be introduced at trial, justice will be expedited if the judge and jury are allowed to determine the truth of the client’s testimony at trial.
ent, but at the expense of using the already scarce resources of the legal system. Additionally, Rieger suggests that at such a proceeding the defendant would have no right to counsel.\textsuperscript{129} Depriving the defendant of counsel at any point during his trial would seem to violate the defendant’s constitutional rights.

Rieger further suggested that the defendant would have a right to present his testimony at trial, without assistance of counsel, despite an unfavorable ruling in the in camera proceeding.\textsuperscript{130} Such a procedure would run into the same problems as the “free narrative” approach. The “free narrative” approach allows defense counsel to place his client on the stand but refuse to develop the client’s testimony through examination where counsel suspects the client intends to commit perjury. Essentially, if counsel suddenly discontinues examination of his client on the stand the judge or jury might sense the change and not evaluate the client’s testimony in a fair light.\textsuperscript{131}

The “free narrative” approach amounts to a weak compromise. Allowing an attorney to temporarily withdraw while the client testifies in his own words effectively denies the client the right to counsel. Further, this alternative only exists when the attorney decides the client will commit perjury. Consequently, the problem of determining standards to guide attorney conduct in such cases still exists.

The preceding three approaches, as well as the Court’s decision in \textit{Nix}, leave important questions unanswered: (1) should counsel ever judge the client and, if so, how?; and (2) what actions should counsel take when evidence of perjury is not clear? In spite of the narrow stance the Court has taken in construing ineffective assistance of counsel claims, attorneys should be careful not to mistakenly dissuade a client from testifying. Situations abound where a defendant’s sixth amendment right to testify would be violated by the conduct of counsel as approved in this case.\textsuperscript{132}

\textsuperscript{129} See Rieger, \textit{supra} note 113, at 159-60. Essentially the author’s premise is wrong because in fact the in camera proceeding is adversarial in nature. The client is pitted against his attorney and, regardless of the presence of the prosecutor, still deserves representation. The author reasons that this process could be endless if the client were entitled to new counsel as the next counsel may for the same reason as the first counsel feel his client will commit perjury in the in camera proceeding. This problem no doubt might suggest a good reason to forgo counsel during the in camera proceeding. This would, however, probably run afoul of the sixth amendment right to counsel.

\textsuperscript{130} \textit{Id.} at 160-62.

\textsuperscript{131} 106 S. Ct. at 996.

\textsuperscript{132} Rieger, \textit{supra} note 113, at 121 (pointing out that this was not the proper case to deal with the issue of client perjury). It is probable that the Court also felt this way because it refused to set any standards for future cases.

For example, if counsel threatened to withdraw or reveal alleged perjury to the
The courts should determine the truth or falsity of statements made by defendants. The interests of the adversary system are served best by limiting counsel's actions in cases involving alleged client perjury. While defendants have no sixth amendment right to commit perjury, attorneys have the duty to present the client's view of the case at trial. If client testimony is false, it will presumably be impeached.

The courts should trust the ability of the prosecution to impeach perjured testimony and the ability of the jury to render a just verdict. The bias of the system guarantees that innocent people are not wrongly convicted even if it means that a few guilty people are set free. The present decision shifts that bias in a way which may see innocent defendants constrained by counsel who have the power to judge their guilt.

The system guarantees all defendants the right to a fair trial and the right to counsel. The system also gives defendants the right not to testify against themselves. The system does not require counsel to reveal a client's confession of guilt at trial even when the court in every case where a defendant changed his mind, truthful testimony might be suppressed. As Justice Stevens noted in his concurring opinion, even honest witnesses change their minds concerning testimony as events fade into the past. 106 S. Ct. at 1007 (Stevens, J., concurring). In these situations a defendant might decide not to testify to make the best of the situation. Certainly, disagreeable counsel might hurt the defendant's case more than if the defendant remained silent as to his recollection of the events.

Ideally, defendants should be permitted to testify as they wish and suffer the penalties of perjury later. Counsel should advise them to tell the truth, but not attempt to make a judgment as to the veracity of the testimony.

A rule should be sought which infringes only marginally on these constitutional rights. The adversary system only functions efficiently when both sides do their best within the rules of the game. If a person is acquitted through the use of perjured testimony, perhaps the blame should be placed on the prosecution for not impeaching the testimony.

Enforcing a rule of disclosure essentially forces counsel to be both an advocate and a spy. Freedman points out that no one complains when a person is acquitted because of an illegal search even though the person's guilt was evident. The situation of client perjury would not seem to be much different. In order to preserve the benefits of the entire system society must put up with some minimal abuses.

The sixth amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have Assistance of Counsel for his defense." U.S. CONST. amend. VI. The fourteenth amendment states that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

The fifth amendment states that no person "shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.
guilty defendant is acquitted. Consequently, the question should be asked: Why should an attorney ever have to judge the truth of his client's testimony, especially when counsel is not allowed to reveal a client's guilt in the event the client never takes the stand?

In situations where the attorney suspects a perjury attempt during or before trial, counsel should be allowed great flexibility to persuade his client not to commit perjury. But threats of revealing the crime or withdrawing representation should only be allowed where the client actually admits his plan to commit perjury.

The obvious perjury standard advocated in this Note effectively avoids the problems of an attorney-client value judgment. The standard also preserves the confidentiality of the attorney-client relationship. Confidentiality facilitates the open discourse between counsel and his client which allows counsel to advise his client with full knowledge of the facts. If the courts allow attorneys to breach client confidences or make threats, clients will be less likely to tell counsel the truth. Since the quality of the adversary system depends greatly on the frank disclosure of the facts by a client to counsel, the system would be irretrievably damaged by allowing counsel too much power to act upon suspected client perjury.

In essence, a trade-off exists between increasing the authority of counsel to take action in the event of suspected client perjury and the quality of the adversary system. Forcing attorneys to reveal suspected client perjury reduces the trust a client has in his attorney. The system recognizes the confidentiality of the attorney-client relationship and provides a fair trial to uncover perjury and to decide guilt in order to instill this trust. The obvious perjury standard preserves this trust and maximizes the quality and fairness of the adversary system.

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137 See MacCarthy & Mejia, supra note 59, at 1219.
138 The Model Rules and the Model Code go too far in suggesting that an attorney's first duty is to reveal client perjury. The main duty of an attorney is to the client. There can be no doubt that an attorney who wishes to best serve his client will advise his client not to commit perjury.
139 See Callan & David, supra note 113, at 332. Essentially without the adversary system counsel would never learn of the client's intended perjury. Thus, a rule forcing counsel to disclose confidential communications will effectively do away with the issue of client perjury in the future, since counsel will not have the information which uncovers the potential perjury.

Such a result would be detrimental to both counsel and the client. The system primarily depends on the attorney-client relationship. Without such candid interaction between counsel and clients the system would be overloaded and inefficient. In order for attorneys to render the best advocacy, they must know the full factual situation. A rule requiring disclosure must reduce the quality of representation in the system.
140 Freedman, supra note 12, at 1473.
141 Admittedly, no easy solution exists to the problem of client perjury, but attorneys
VI. Conclusion

In *Nix v. Whiteside*, the Supreme Court held that counsel may refuse to assist a client in presenting testimony which counsel is convinced is false. The Court reasoned that a defendant's sixth amendment right to effective assistance of counsel does not prohibit counsel from refusing to participate in his perjury. The Court relied on the two-pronged standard for ineffective assistance of counsel claims first outlined by the Court in *Strickland v. Washington*. The Court found that not only did counsel act "reasonably" under the standards set by the canons of professional ethics, but also that the defendant failed to prove that counsel's refusal to participate in perjury prejudiced the fair outcome of the defendant's trial. The Court concluded that a defendant's constitutional right to testify does not include the right to testify falsely.

Despite the wisdom of the holding in the present case, the Court failed to provide any guidance to attorneys in dealing with client perjury. The Court's failure to clarify the existing applicable canons of ethics may place defendants in the unfortunate position of receiving less than full advocacy from counsel. The Court should establish a standard which will protect the constitutional rights of the defendant while preserving the effectiveness of the adversary system. The Court could have embraced a standard which prohibits disclosure of suspected perjury except in obvious cases where the intended perjury is admitted to counsel by the client. Such a standard should be able to live with an obvious perjury standard. This writer is inclined to favor prohibiting counsel from disclosing client misconduct even in cases of obvious perjury, but that would do much to degrade the humanity of attorneys. See Noonan, supra note 113, at 1485. Noonan argues that an attorney not only has a duty to the adversary system, but contends the adversary system "does not demand active suppression of the truth." *Id.* at 1492. He says the attorney is also a human being and that "the stating of truth [is] so necessary to the human personality and so demanded by broad social values that the systematic presentation of falsehood is both personally demeaning and socially frustrating." *Id.* Noonan states: "the lawyer must act with regard for the requirements of the adversary system and with concern for his own standards as a human person, as well as with regard for the requirements of the society which the system serves." *Id.*

Consequently, counsel can live with the morality of presenting testimony which counsel suspects is perjurious based on counsel's own deductions. But when a client admits his intention to commit perjury counsel can only conclude that he is actively participating in the perjury. This is manifestly unfair and demeaning to the humanity of the attorney.

The holding in the present case could be limited to a situation where the client admits the intended perjury to counsel. Though there exists dicta discussing the various codes and canons of professional ethics, the Court failed to acknowledge any standards which could be used to guide attorneys in the future.
standard should achieve fairness and justice without destroying the adversary system itself.

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