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CLIENT PERJURY AND THE CONSTITUTIONAL RIGHTS OF THE CRIMINAL DEFENDANT

_Nix v. Whiteside_¹

Perhaps the most difficult ethical dilemma an attorney may be confronted with is determining the proper response upon learning that a client has committed or is planning to commit perjury. The problem is a natural result of the adversary system, and the commentary has failed to provide clear guidelines for practicing attorneys.² Further, when the client is a criminal defendant, the situation takes on constitutional dimensions. The United States Supreme Court addressed this issue recently in _Nix v. Whiteside_,³ in which a criminal defendant convicted of murder claimed that his attorney's response to his plan to present perjured testimony constituted a denial of his sixth amendment right to the effective assistance of counsel. It was hoped that the Court would use this case as an opportunity to provide some guidance for practitioners faced with perjurious defendants.⁴ This Note will examine the inherent conflicts which arise when a client proposes perjury, the guidance provided by the Court in _Nix v. Whiteside_, and the questions left unanswered by the decision.


The issue of client perjury cries out for guidance from the Supreme Court, and some direction may be forthcoming. The Court has agreed to review an Eighth Circuit case granting relief to a criminal defendant prevented by his lawyer from giving false testimony. Although the case may not be the ideal vehicle for settling the highly controversial issue it should nonetheless provide some guidance to lawyers faced with client perjury. _Id._ at 121 (footnotes omitted).
Emmanuel Charles Whiteside was convicted of second degree murder for a killing that took place in Cedar Rapids, Iowa, in February 1977. He had gone with two other men to the apartment of the deceased, Calvin Love, intending to purchase marijuana. Love was in bed when they arrived and when an argument ensued Whiteside fatally stabbed Love in the chest.5

Whiteside claimed the stabbing was in self-defense. Love had a reputation for violence and was known to carry weapons, and Whiteside claimed that he believed Love was reaching for a gun beneath his pillow when he stabbed him.6 No one present actually saw a gun, nor was any gun found by the police.7 After Whiteside objected to the lawyer initially appointed to represent him because he felt uncomfortable with a lawyer who had formerly been a prosecutor, Gary Robinson was appointed to represent Whiteside at trial. In preparation for trial, Whiteside admitted to Robinson that he had not actually seen a gun, but that he “knew” Love had one.8 Although Robinson had told Whiteside that the presence of the gun was not essential to a self-defense claim so long as Whiteside had had a reasonable belief he was in danger, Whiteside remained anxious about his self-defense claim because a gun had not been found.9 Shortly before trial, Whiteside informed Robinson that he intended to testify that he had seen something metallic in Love’s hand, telling Robinson, “If I don’t say I saw a gun, I’m dead.”10

Robinson believed that Whiteside was proposing to commit perjury and felt that, as an officer of the court, he could not allow such testimony. After futile attempts to dissuade Whiteside from so testifying, Robinson informed him that if Whiteside perjured himself, Robinson would: 1) inform the court that he believed his client was committing perjury, 2) seek to withdraw from the case, and 3) probably be allowed to impeach that particular testimony. Whiteside acquiesced, and upon taking the stand testified only to the effect that he “knew” Love had a gun. On cross-examination the prosecutor elicited the admission that Whiteside had not actually seen a gun, and Whiteside was ultimately convicted.11

On appeal Whiteside claimed that Robinson’s actions had denied him the effective assistance of counsel. The Iowa Supreme Court rejected Whiteside’s claim that his proposed testimony represented a truthful account of the events, agreeing with Robinson that such testimony would have amounted

7. Id.
11. Id. at 992.
to perjury. The Iowa Supreme Court held that Robinson’s actions were proper, and commended him for the “high ethical manner” in which the matter was handled.

Whiteside then unsuccessfully petitioned the Federal District Court for the Southern District of Iowa for a writ of habeas corpus. On appeal, the Court of Appeals for the Eighth Circuit reversed the denial of the writ. The court of appeals claimed its decision was not based on ethical claims, but was founded solely on constitutional grounds. Although accepting as true the state court’s determination that Whiteside’s proposed testimony would have been perjurious, the court of appeals maintained that Whiteside nevertheless had not waived his due process rights or his right to the effective assistance of counsel, and that Robinson’s actions effectively denied Whiteside these rights. The court ruled that Robinson’s conflicting ethical obligations to the court and his client amounted to a conflict of interest which was prejudicial under Strickland v. Washington, and that, as a result, Robinson ceased to be an effective advocate for his client as required by the Constitution. The court held further that Robinson impermissibly compromised Whiteside’s right to testify by conditioning confidentiality and continued representation on his testifying in a manner that corresponded to Robinson’s view of the truth. The Supreme Court reversed the decision of the court of appeals and reinstated Whiteside’s conviction. Writing for the Court, Chief Justice Burger found that Whiteside had failed to meet the requirements established by Strickland v. Washington for a claim of ineffective counsel, and rejected the argument that the different ethical considerations before Robinson amounted to a conflict of interest from which prejudice should be presumed. As a result, Robinson’s response to Whiteside’s attempted perjury was not found to have violated Whiteside’s constitutional rights.

The dilemma confronting an attorney when a client proposes perjury is an inescapable consequence of the adversary system. “The very premise of our adversary system of criminal justice is that partisan advocacy on both

13. Id. The Supreme Court of Iowa found the actions of Robinson to be vindicated by Canons 4 and 7 of the Iowa Code of Professional Responsibility for Lawyers, as well as § 721.2 of the Iowa Code (now § 720.3 Supp. 1977) dealing with the crime of subornation of perjury. There seems to be no place in the decision where the court actually held that Robinson’s actions were required by law as stated in the opinion by Chief Justice Burger in Nix v. Whiteside, 106 S. Ct. at 992.
15. Whiteside v. Scurr, 774 F.2d at 1328.
17. Whiteside v. Scurr, 744 F.2d at 1329.
sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." 20 Since such a system operates on the assumption that spirited debate by interested parties is the best means of bringing all pertinent factors before the decision-maker, the system demands that the attorney zealously defend the interests of his client, 21 and this is reflected in the different bodies of law that govern the behavior of members of the legal profession. 22 Model Code of Professional Responsibility Canon 7 mandates that an attorney represent a client zealously within the bounds of the law. 23 The American Bar Association's Standards Relating to the Administration of Criminal Justice 24 require the defense lawyer to serve as the accused's counsel and advocate with "courage, devotion, and to the utmost of his or her learning and ability and according to the law." 25 The ethical attorney is dedicated to his client's cause and will not divulge his client's confidences. 26 Moreover, an ethical attorney will not endanger rep-

20. Herring v. New York, 422 U.S. 853, 862 (1975) (Stewart, J.). While many of the same conflicts arise in the context of a civil lawsuit, the constitutional rights of a criminal defendant complicate the decision as to what types of response are permitted. Accordingly, this Note is concerned solely with a criminal setting.

21. Devotion to the client was understood to be essential to the role of defense counsel in a number of sixth amendment cases. "The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client." Von Molkte v. Gillies, 332 U.S. 708, 725 (1948) (Black, J.); See also Glasser v. United States, 315 U.S. 60 (1942); cf. United States v. Cronic, 466 U.S. 648, 656 (1984) ("The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. . . . If the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated."); Jones v. Barnes, 463 U.S. 745, 758 (1983) (Brennan, J., dissenting) (to satisfy the Constitution, counsel must function as an advocate for the defendant as opposed to a friend of the court).

22. The most significant bodies of law regarding legal ethics are the American Bar Association's Model Code of Professional Responsibility (1982), Model Rules of Professional Conduct (1983), and Standards Relating to the Administration of Criminal Justice (1982). Iowa has adopted a version of the Model Code in the Iowa Code of Professional Responsibility for Lawyers (1986), but has not adopted the Model Rules. The Model Code is a three-tiered structure consisting of general axioms with accompanying ethical considerations and disciplinary rules. While ethical considerations are aspirational in nature, the disciplinary rules are intended to be mandatory and represent a minimum standard of conduct below which attorneys are not allowed to go.

23. This maxim is repeated in Model Code of Professional Responsibility EC 7-1, which provides that the law includes disciplinary rules and enforceable professional regulations, but Model Code of Professional Responsibility EC 7-2, recognizes that the bounds of the law may be difficult to ascertain. Model Code of Professional Responsibility EC 7-3, directs the lawyer when functioning as advocate to resolve any doubts in favor of his client.


25. Id.

26. Model Code of Professional Responsibility EC 4-1, provides that both
representation of his client's interests by subjecting himself to conflicts of interests.\textsuperscript{27} Plainly, the adversary model envisions an attorney dedicated solely to the interests of his client and willing to use all his abilities to further those interests.\textsuperscript{28} However, the adversary system is subject to abuse if its participants are unchecked, and thus the advocate's dedication must be subject to limitations. In order for the system to operate effectively as a search for the truth, its integrity must be carefully guarded.\textsuperscript{29} This is reflected in the ethical prohibitions against the knowing use of false evidence.\textsuperscript{30} Similarly, an attorney cannot rely on the attorney-client privilege to justify his silence while his client perpetrates a crime.\textsuperscript{31}

An attorney is thus faced with a difficult conflict of ethical concerns when a client proposes perjury. As an officer of the court, he is sworn to the fiduciary relationship existing between the lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. \textit{Model Code of Professional Responsibility} DR 4-101(B)(1), provides that a lawyer shall not knowingly reveal a client confidence.

Similarly, \textit{Standards Relating to the Administration of Criminal Justice} § 4-3.1(a), states that defense counsel should seek to establish a relationship of trust, and explain the necessity for full disclosure while assuring the client that the lawyer is under an obligation of confidentiality.

27. \textit{Model Rule of Professional Conduct} Rule 1.7 comment (1983), maintains that loyalty is an essential element in a lawyer's representation of a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from representation.

28. \textit{Strickland v. Washington}, 466 U.S. 668 (1984) (O'Connor, J): Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause. . . .

\textit{Id.} at 688.


30. \textit{Model Code of Professional Responsibility} DR 7-102(A)(4), prohibits an attorney from knowingly using perjured testimony or false evidence, and \textit{Model Code of Professional Responsibility} DR 7-102(A)(7), prohibits counsel from assisting the client in conduct that is illegal or fraudulent. \textit{Model Rules of Professional Conduct} Rule 3.3(a)(4), similarly provides that a lawyer shall not offer evidence that the lawyer knows to be false.

31. \textit{Model Code of Professional Responsibility} DR 4-101(C)(3), allows an attorney to reveal the intention of his client to commit a crime, and the information necessary to prevent the crime. However, \textit{Model Rules of Professional Conduct} Rule 1.6(b)(1), qualifies this exception, allowing the attorney to reveal client confidences only where the crime would threaten serious harm or loss of life. The wording of Rule 1.6(b)(1) apparently would not allow revealing client confidences to expose an intent to commit perjury.
uphold the integrity of the fact-finding process. As an ethical lawyer he is bound to refrain from the knowing use of false evidence. Perjury is a crime in most states, and he arguably is not entitled to remain silent while his client commits a crime. On the other hand, he owes a duty of loyalty to his client, and the obligation to maintain client confidences is a fundamental part of the attorney-client relationship. It is clear that the attorney cannot easily fulfill one set of obligations without compromising the other.

Even if the proper response to client perjury may be ascertained from the ethical codes, there may be a conflict between the lawyer’s ethical response and the constitutional rights guaranteed the criminal defendant. Such a situation forces an attorney to choose whether to commit a possible violation of his client’s constitutional rights or to risk violating the ethical mandates of his jurisdiction and face possible disciplinary action. The following discussion will deal with the different approaches to client perjury that have been suggested, and the constitutional ramifications of each approach in light of the Supreme Court’s decision in Nix v. Whiteside.

The threshold issue in finding the proper response to a client’s proposal to commit perjury is to determine the basis for the attorney’s belief that the suggested testimony would be perjurious. In deciding Whiteside v. Scurr, the court of appeals emphasized that the ethical authorities presuppose that defense counsel actually know that the testimony will be false. Mere suspicion or inconsistent statements alone are insufficient to establish the falsity of the testimony. The attorney should remember that his duty is to defend his client, not to judge him. It is the role of the judge or jury to determine the facts, not the attorney, and thus counsel should act only if he has a firm factual basis for believing that the defendant will testify falsely.

33. See Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984). The court did not disagree with the state court determination that Robinson had behaved properly under the code of professional responsibility for that state. Instead, it held that such codes are necessarily subject to the Constitution and must give way in case of conflict. The court went on to declare that an attorney who is forced to cooperate in the presentation of perjured testimony due to the mandates of the Constitution cannot be subject to disciplinary action for doing so. The practical difficulty with this analysis is that the attorney cannot accurately predict beforehand if his actions are going to be deemed to have been required by the Constitution or were, in fact, ethical violations.
35. Whiteside v. Scurr, 744 F.2d 1323, 1328 (8th Cir. 1984), rev’d sub nom. Nix v. Whiteside, 106 S. Ct. 988 (1986); cf. Johnson v. United States, 404 A.2d 162 (D.C. 1979) (inconsistency between two proffered defenses was insufficient to establish that the second proffered, the intended testimony, was false).
In Whiteside’s case, however, the state supreme court had made a factual finding that Robinson was justified in his belief that Whiteside was planning perjury.\(^{37}\) Since that finding was supported by the evidence, the court of appeals accepted it as true, but also stated that it would be a rare case in which the factual requirements would be met.\(^{38}\)

Once the factual requirements are satisfied and the attorney is certain that his client intends to commit perjury, the attorney must decide how to handle the matter. The authorities agree that the first step an attorney should take is to attempt to dissuade the client from the “fraudulent” conduct.\(^{39}\) In this context, it is clear that Robinson’s actions can be vindicated on ethical grounds. His threats to withdraw and inform the court of his belief that Whiteside was committing perjury can easily be viewed as remonstrating with the client against committing perjury. Since he was successful in convincing Whiteside to testify truthfully, Robinson did not violate his duty to refrain from using false evidence, and he was not forced to reveal client confidences or to testify against his own client in order to accomplish this goal. The Court was satisfied that Robinson had ably presented Whiteside’s legal defenses to the jury,\(^{40}\) thereby fulfilling his duty to loyally and competently advocate his client’s cause within the bounds of the law.\(^{41}\)

An additional issue at this stage is what steps an attorney is required to take in order to know whether his client is testifying truthfully. The attorney should make some investigation into the case in order to competently represent his client. However, it would seem inconsistent with the duty of loyalty for this investigation to be conducted for the purpose of proving that one’s client is a liar. See generally Wolfram, Client Perjury, 50 S. Cal. L. Rev. 809 (1977); Standards Relating to the Administration of Criminal Justice § 4-4.1 (1983).

38. “Counsel must remember that they are not triers of fact but advocates. In most cases a client’s credibility will be a question for the jury.” Whiteside v. Scurr, 744 F.2d at 1328.
39. See, e.g., Wolfram, Client Perjury, 50 S. Cal. L. Rev. 809, 846 (1977); Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469, 1477 (1966); Standards Relating to the Administration of Criminal Justice § 4-7.7 (1982). Wolfram maintains that the required remonstration consists of five elements: advising the client that false testimony may be a crime, advising the client of the strategic risks of giving false testimony, urging the client to testify truthfully, advising the client that false testimony may cause the lawyer to withdraw from representation, and, where the jurisdiction requires it, informing the client that the attorney may be required to disclose the client’s perjury. Wolfram, supra, at 847.
40. This was especially true in that Robinson had informed Whiteside that it was not necessary for him to have actually seen a gun to maintain a successful defense, so long as he had a reasonable fear that Love had a gun. Nix v. Whiteside, 106 S. Ct. at 993.
41. Id. at 997 (Burger, C.J.):
Whiteside did testify... and was aided by Robinson in developing the basis for the fear that Love was reaching for a gun. Robinson divulged no
The court of appeals, in reversing Whiteside's conviction, reasoned that although Robinson initially acted properly in his efforts to dissuade Whiteside from committing perjury, he went so far as to effectively become an adversary rather than advocate. Particularly damning in the eyes of the appellate court was its understanding that Robinson's threat to impeach the false testimony was a threat to actually take the stand and testify as a prosecution witness on rebuttal. In the words of the court, "Surely a lawyer who actually testified against his own client could not be said to be rendering effective assistance. The same is true, we think, of a lawyer who threatens to testify against his own client."42 The Supreme Court was unpersuaded, however, and reversed the court of appeals. The Court said:

Whether Robinson's conduct is seen as a successful attempt to dissuade his client from committing perjury, or whether seen as a "threat" to withdraw from representation and disclose the illegal scheme, Robinson's representation of Whiteside falls well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable under Strickland.43

Although ultimately rejected, the position of the court of appeals is not without merit. There is arguably a substantive difference between urging a client to testify truthfully and threatening him into doing so. Threats by an attorney may have a chilling effect on the attorney-client relationship by making the client reluctant to be open with his attorney and disclose all relevant information.44 It has been universally accepted that such full disclo-

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42. Whiteside v. Scurr, 744 F.2d 1323, 1331 (8th Cir. 1984). The Supreme Court did not agree with the appellate court's understanding of Robinson's statement to Whiteside that he would probably be allowed to impeach the false testimony. In Note 7 of the opinion, the Court stated that it found no support in the record for a threat by Robinson to testify against Whiteside while acting as counsel. Nix v. Whiteside, 106 S. Ct. at 997 n.7.

43. 106 S. Ct. at 997.

44. Wolfram, Client Perjury, 50 S. CAL. L. REV. 809, 836 (1977) ("Imposing affirmative obligations on an attorney with respect to client perjury will create barriers between attorney and client that may prevent the attorney from discovering all facts known by the client and from maintaining the full trust of the client."); cf. Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 MICH. L. REV. 1469, 1470 (1966). Professor Freedman states:

It is essential to the effective functioning of this system that each adversary have . . . "entire devotion to the interests of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability." It is also essential to maintain the fullest uninhibited communication between the client and his attorney, so that the attorney can
sure is essential if the attorney is to provide the best representation for his client, and it is this need for full disclosure that serves as a primary basis for the attorney-client privilege.\textsuperscript{45}

This argument is bolstered by recognizing the degree of mistrust already present in the attorney-client relationship and the extent to which the kind of actions approved of in \textit{Nix v. Whiteside} will exacerbate the problem. One commentator has concluded that "[m]any attorneys and clients mistrust one another notwithstanding their initial hopes and the insistence of the profession's formal norms that a proper relationship requires mutual trust."\textsuperscript{46} Given the atmosphere of mistrust already present in the relationship between the client and the criminal defense lawyer, the kind of behavior followed by Robinson could effectively drive a wedge between defense counsel and defendants that would render it extremely difficult to provide an adequate defense.

Nevertheless, the Supreme Court's reversal of the court of appeals on this point probably represents the better policy view. Any attempt to dissuade a client from testifying in a manner which he perceives to be to his advantage is going to have adverse effects on the attorney-client relationship. On the other hand, protecting the attorney-client relationship absolutely at the expense of the attorney's obligation not to use false evidence represents a serious threat to the integrity of the judicial system. A public impression that lawsuits are won by the best liar would hardly inspire confidence in the most effectively counsel his client and advocate the latter's cause.

\textit{Id.} at 1470.

This concern is not limited to Law Review writers. \textit{See, e.g., United States v. Decoster}, 624 F.2d 196, 208 (D.C. 1976) ("[t]he court must be wary lest its inquiry and standards undercut the sensitive relationship between attorney and client and tear the fabric of the adversary system."); \textit{Von Moltke v. Gillies}, 332 U.S. 708, 725-26 (1948) ("Undivided allegiance and faithful devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision.").

\textsuperscript{45} \textsc{Model Code of Professional Responsibility EC 4-1 (1980); Model Rules of Professional Conduct Rule 1.6 comment (1983).}

\textsuperscript{46} \textit{Burt, Conflict and Trust Between Attorney and Client}, 69 Geo. L.J. 1015 (1981).

It is not surprising that attorneys and clients in criminal defense work often mistrust one another. They are typically separated by vast differences in social status and economic prospects. Race differences also accompany these other indicia of social distance and mutual incomprehension. As if these barriers to trust were not sufficiently impenetrable, defense attorneys often believe that most criminal defendants are guilty. . . .

Defense attorneys frequently believe that their clients lie to them, undermining the attorney's capacity to give effective representation. Criminal defendants often believe that their attorneys lie to them and betray them to their official adversaries.

\textit{Id.} at 1035 (footnotes omitted).
adversary system as a fact-finding process. The decision of the Supreme Court in Nix v. Whiteside can not be said to represent an unreasonable compromise between these conflicting policies.

It is necessary, however, to understand the precise holding of the Court in Nix v. Whiteside. The Court held that Robinson’s behavior was proper in that he successfully dissuaded his client from committing perjury, and that under these facts, he did not unreasonably compromise the attorney-client relationship. The Court may have been faced with a very different case if Whiteside had insisted on testifying that he saw a gun, and Robinson had been forced to actually carry out his proposed response to that testimony.

While the majority opinion in Nix v. Whiteside may provide some insight to the thoughts of the members of the Court on the ethical questions, it is important to remember that the principles on which the case was decided were primarily constitutional rather than ethical. This point is made in the concurring opinion of Justice Brennan, which states “[t]his Court has no constitutional authority to establish rules of ethical conduct for lawyers practicing in the state courts. Nor does the Court enjoy any statutory grant of jurisdiction over legal ethics.” Similarly, in his separate opinion, Justice Blackmun emphasized that the only issue being decided was whether Robinson’s actions had deprived Whiteside of a fair trial as guaranteed by the sixth amendment. Since the decision rests on constitutional considerations, it is important to understand the nature of Whiteside’s constitutional claims and why they failed.

As a preliminary matter, Robinson had advised Whiteside that he would seek to withdraw from the case should Whiteside testify falsely. Whether to actually withdraw is generally the next logical step an attorney must consider when he has been unsuccessful in his attempts to dissuade his client from testifying falsely. Withdrawal is an unsatisfactory solution for obvious rea-

47. This was true at the court of appeals level also. Whiteside v. Scurr, 744 F.2d 1323, 1327 (8th Cir. 1984) (“Our analysis does not deal with the ethical problem inherent in appellant’s claim. We are concerned only with the constitutional requirements of due process and effective assistance of counsel.”).

Unfortunately, the Court seems unable to resist the temptation of sharing with the legal community its vision of ethical conduct. But let there be no mistake: 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.

Id.

49. Nix v. Whiteside, 106 S. Ct. at 1000 (Blackmun, J., concurring). Blackmun was joined in the opinion by Justices Marshall, Brennan, and Stevens. Given that the author of the majority opinion, Chief Justice Burger, has now left the court, the significance of the opinion as it pertains to non-constitutional issues is in doubt. It would seem that Brennan is correct in declaring that the issue has not been decided. Nix v. Whiteside, 106 S. Ct. at 1000 (Brennan, J., concurring).
sons. First, it may not be feasible in the particular case, as the court may not permit the attorney to withdraw. More fundamentally, however, withdrawal is unsatisfactory because it does not solve the conflict but merely places it on the shoulders of another attorney, or even less desirable, teaches the client to lie to his next attorney in order to avoid the conflict the second time around. Thus, while withdrawal may solve the individual attorney's ethical dilemma, it does not remedy the larger problem facing the adversary system itself. Because Whiteside testified truthfully and Robinson did not withdraw from the case, the issue of withdrawal was not presented to the Court except to the extent that Robinson used it as leverage in coercing Whiteside to abandon his plan to perjure himself. As such, it was dealt with together with the other “threats” made in determining whether the making of such threats denied Whiteside any of his due process rights.

Whiteside argued that Robinson’s threatened withdrawal effectively conditioned his continued representation upon testifying in a manner that conformed to Robinson’s view of the truth, and thus constituted an impermissible infringement on Whiteside’s right to testify in his own behalf. This argument presupposes a criminal defendant’s right to testify, and raises issues similar to those in cases in which the attorney refuses to put his client on the stand because he believes the client will commit perjury.

50. This problem is illustrated by Sanborn v. State, 474 So. 2d 309 (Fla. Dist. Ct. App. 1985). Defense counsel in the case sought to withdraw from representation because the defendant had directed him to present evidence and testimony which defense counsel knew to be false. The trial court’s decision to deny the motion to withdraw and order representation was upheld on appeal. The court stated that as long as the trial court has a reasonable basis for belief that the relationship has not deteriorated to a point where counsel can no longer give effective aid, it is justified in its denial of a motion to withdraw, and the decision will not be disturbed absent a clear abuse of discretion. Id. at 314.

On remand to the trial court, defense counsel refused to comply with the trial court’s order to continue with representation and was held to be in contempt of court. The trial court’s decision was again affirmed by the court of appeals. Rubin v. State, 490 So. 2d 1001 (Fla. Dist. Ct. App. 1986).

For further discussion of this issue see Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978) (holding that counsel’s moving to withdraw during trial deprived client of a fair trial); Wolfram, supra note 44.

51. Recognizing this concern, the court in Sanborn v. State, stated: If withdrawal were allowed every time a lawyer was faced with an ethical disagreement with the accused, the ultimate result could be a perpetual cycle of eleventh-hour motions to withdraw and an unlimited number of continuances for the defendant. In addition, new counsel might fail to recognize the problem of fabricated testimony and false evidence would be presented to the court, or perhaps the defendant might eventually find an attorney who lacks ethical standards and who would knowingly present and argue false evidence.

Sanborn v. State, 474 So. 2d at 314.
By preventing his client from testifying the attorney certainly avoids having to present false evidence. He also prevents his client from committing the crime of perjury, and he, himself, avoids the crime of subornation of perjury.\textsuperscript{52} This course of action may in fact satisfy his conflicting ethical duty to his client as well. First, the attorney has successfully avoided disclosing his client's confidences as required by the codes of ethics. Further, refusing to allow the client to testify may very well be in the client's best interests as it will insulate him from the dangers of cross-examination by opposing counsel and can thus be defended in terms of trial strategy.

In a criminal case, however, the attorney's decision to keep his client off the stand may be a violation of the client's constitutional rights. The fifth amendment provides that a criminal defendant shall not be compelled to be a witness against himself.\textsuperscript{53} It does not expressly provide the converse that a criminal defendant has a right to testify in his own behalf.\textsuperscript{44} Through a long line of cases, however, the Supreme Court has continually indicated that such a right exists as a corollary to the fifth amendment, and a number

\textsuperscript{52} This is a very real threat in some jurisdictions, and particularly in Iowa, where Whiteside's trial took place. See State v. Whiteside, 272 N.W.2d 468, 471 (Iowa 1978) ("A lawyer who knowingly uses perjured testimony . . . is himself subject to disciplinary action, not to mention the possibility of his own prosecution for suborning perjury."); Committee on Professional Ethics v. Crary, 245 N.W.2d 298 (Iowa 1976) (Supreme Court of Iowa rejected reprimand recommended by its Grievance Commission for attorney's part in presenting perjured testimony in a discovery deposition, and ordered the attorney's license revoked).

Section 720.3 of the Iowa Code provides:

\textit{Suborning Perjury.} A person who procures or offers any inducement to another to make a statement under oath or affirmation in any proceeding or other matter in which statements under oath or affirmation are required or authorized, with the intent that such person will make a false statement, or who procures or offers any inducement to one who the person reasonably believes will be called upon for a statement in any such proceeding or matter, to conceal material facts known to such person, commits a class "D" felony.

\textbf{Iowa Code § 720.3 (Supp. 1983).}

\textsuperscript{53} The fifth amendment states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

\textbf{U.S. Const. amend. V.}

\textsuperscript{54} In fact, criminal defendants were disqualified from giving testimony at common law because of their interest in the case. This disqualification has been removed by statute in most jurisdictions. See, \textit{e.g.}, Ferguson v. Georgia, 365 U.S. 570 (1961).
of lower courts have so held.55 The import of these decisions is that the ultimate decision of whether the defendant will testify is outside the attorney’s control of trial strategy and rests personally with the defendant. If the defendant insists on testifying, the attorney cannot constitutionally prevent him from doing so.56 Whiteside argued that, since he had a constitutional right to testify, Robinson’s threats impermissibly infringed on the free exercise of that right by forcing him to testify in the manner Robinson prescribed.

This argument is in line with a pure view of the adversary system in mandating that the attorney allow the client to testify perjuriously, thereby sacrificing the policy against using false evidence to the presumably larger value of maintaining the attorney-client relationship.57 This argument is premised on the assumption that the attorney-client relationship is essential to the adversary system and in need of protection. While perjury presents a threat

55. In the case of In re Oliver, 333 U.S. 257, 273 (1948) (Black, J.), the Court stated that rights basic to our system include “as a minimum, a right to examine the witnesses against [the defendant], to offer testimony, and to be represented by counsel.” Cf. Brooks v. Tennessee, 406 U.S. 605 (1972) (Brennan, J.) (holding it unconstitutional to condition a defendant’s right to testify on his being the first defense witness to give testimony); Whiteside v. Scurr, 744 F.2d 1323, 1329 (8th Cir. 1984) (“We hold that criminal defendants have the constitutional right to testify”); United States v. Bifield, 702 F.2d 342, 347 (2d Cir. 1983), cert. denied, 461 U.S. 931 (1983) (stating that although a defendant has a right to testify has never been authoritatively settled, the court believes that such a right exists); Alicia v. Gagnon, 675 F.2d 913, 921 (7th Cir. 1982) (overruling prior case law which held that the right to testify stemmed only from statutory abrogation of incompetency) (an exhaustive survey of authorities is contained in note 15 of the opinion); Wright v. Estelle, 572 F.2d 1071, 1074 (5th Cir. 1978), cert. denied, 439 U.S. 1004 (1978) (Godbold, J., dissenting) (arguing for a constitutional right to testify).

56. Jones v. Barnes, 463 U.S. 745, 751 (1983) (accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal); United States v. Curtis, 742 F.2d 1070, 1076 (7th Cir. 1984), cert. denied, 100 S. Ct. 1374 (1986) (a defendant’s personal constitutional right to testify truthfully in his own behalf may not be waived by counsel as a matter of trial strategy); cf. Faretta v. California, 422 U.S. 806 (1975) (Stewart, J.) (counsel is only an assistant to the defendant and not the master, though once accepted, counsel should control trial strategy).

57. The foremost proponent of this position has been Professor Monroe Freedman. The argument was made in his article, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469 (1966), in which he argued against keeping a defendant off the stand should he communicate an intent to commit perjury:

There is a clear consensus among prosecutors and defense attorneys that the likelihood of conviction is increased enormously when the defendant does not take the stand. Consequently, the attorney who prevents his client from testifying only because the client has confided his guilt to him is violating that confidence by acting upon the information in a way that will seriously prejudice his client’s interests.

Id. at 1475.
to the fact-finding process, it is one the system is equipped to handle, albeit imperfectly, through the mechanisms of cross-examination and determination of witnesses' credibility by the fact-finder. 58 In contrast, the system has no means to guard against the damage caused by undermining the relationship of trust between an attorney and client. If the adversary system is truly "based upon the presupposition that the most effective means of determining truth is to present to a judge and jury a clash between proponents of conflicting views," 59 then the attorney-client relationship should be jealously guarded to ensure that those conflicting views are adequately represented, even at the expense of allowing a defendant to testify falsely.

This argument was misplaced in Whiteside's case, however, because Robinson did not prevent Whiteside from testifying. Whiteside was able to testify concerning his self-defense theory and was aided by counsel in developing his defense. He was prevented only from testifying that he actually saw a gun. 60 While Robinson's actions almost certainly harmed his relationship with Whiteside, that harm did not rise to the level which would have occurred had Whiteside been prevented from testifying. It is clear from all three appellate opinions 61 that Robinson had been informed of all facts relevant to the case, prepared a competent defense for his client, and aided the client in establishing that defense on the witness stand. Whatever Whiteside's personal feelings toward Robinson, it is clear that the ultimate objectives of the attorney-client relationship were achieved. Any slight compromise of that relationship was justifiable in preventing the introduction of false testimony. 62

Whiteside's only other claim to prejudice concerning his right to testify in his own behalf would necessarily require that he possess not only a right

58. This position was eloquently stated by Justice Black in In re Michael, 326 U.S. 224 (1945), in which the Court ruled that committing perjury could not support a conviction for contempt or obstructing justice. Although Justice Blackmun's concurring opinion quotes this passage by Justice Black, the meaning is distorted unless reproduced in full:

All perjured relevant testimony is at war with justice, since it may produce a judgement not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial. It need not necessarily, however, obstruct or halt the judicial process. For the function of a trial is to sift the truth from a mass of contradictory evidence, and to do so the fact finding tribunal must hear both truthful and false witnesses.

Id. at 227.

59. Freedman, supra note 44, at 1470.


61. Nix v. Whiteside, 106 S. Ct. 988 (1986); Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984); State v. Whiteside, 272 N.W.2d 468 (Iowa 1978).

62. It should be emphasized again at this point that only the use of threats are claimed to have been justified to prevent the introduction of false testimony. Had Whiteside insisted on testifying that he "saw" a gun, and Robinson then taken affirmative action, the question would be whether any of Whiteside's sixth amendment rights had been violated. That question is explored infra.
to testify generally, but a right to testify falsely. Such an argument would make any attempt to interfere with a defendant’s intent to perjure himself unconstitutional. While a criminal defendant probably does have a right to testify, it is clear that the right is not absolute so as to include a right to commit perjury. Thus, Whiteside’s claim that his right to testify in his own behalf was infringed because it was conditioned upon his testifying truthfully was without merit, and the Court so held.

Had Robinson been unsuccessful in deterring Whiteside from lying on the stand, he would have been squarely faced with the problem of how to deal ethically with his client’s conduct. The attorney may run afoul of the sixth amendment’s guarantee of a right to counsel in selecting the proper course of conduct at this juncture.

63. See supra note 51 and accompanying text.
64. A number of cases come down squarely against the right to commit perjury. See, e.g., Harris v. New York, 401 U.S. 222 (1971), in which the Court permitted a statement obtained in violation of Miranda v. Arizona to be introduced for purposes of impeaching a defendant who had testified perjurious. The Court said “Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury.” Id. at 225; cf. United States v. Havens, 446 U.S. 620, 626 (1980) (allowing evidence obtained in violation of the fourth amendment to be used for purposes of impeachment, in which the Court stated that “when defendants testify, they must testify truthfully or suffer the consequences”); United States v. Knox, 396 U.S. 77 (1969) (a defendant’s fifth amendment right against self-incrimination did not give him the right to submit fraudulent forms in order to avoid incrimination even when he was required to file the forms); United States v. Curtis, 742 F.2d 1070, 1076 (7th Cir. 1984) (“It is equally clear . . . that a defendant has no constitutional right to testify perjuriously in his own behalf.”).
65. Nix v. Whiteside, 106 S. Ct. at 998. This position is supported by language from Jenkins v. Anderson, 447 U.S. 231 (1980). In responding to the argument that allowing his pre-arrest silence to be used for impeachment purposes should he choose to testify infringed upon the defendant’s right to testify, the Court stated, “The Constitution does not forbid every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights. . . . The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.” Jenkins v. Anderson, 447 U.S. at 236 (citations omitted). But see United States v. Havens, 446 U.S. 620, 629 (1980) (Brennan, J., dissenting) (criticizing the Court’s intrusion on the defendant’s “unfettered right” to elect whether or not to testify in his own behalf).
66. The sixth amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. The Supreme Court made the right to counsel applicable to the states under the fourteenth amendment in the landmark case of Gideon v. Wainwright, 372 U.S. 335 (1965).
Denial of a defendant's right to counsel may result from state action which in some way interferes with the right to counsel, or from incompetent representation by defense counsel. The most obvious example of state interference with the right to counsel is a refusal to allow an attorney to represent a defendant, or more typically, a failure to appoint an attorney to a defendant who cannot afford one. These circumstances result in a total denial of counsel, and there is no difficulty in finding that they violate the sixth amendment. However, as the Court made clear in Powell v. Alabama, counsel must be more than counsel in name only; the defendant is entitled to effective assistance.

This requirement that the assistance of counsel must be effective assistance to satisfy the sixth amendment has led to a class of cases holding that certain state court restrictions on the manner in which defense counsel may present his case are in conflict with the sixth amendment. The sixth amendment also prohibits state practices which interfere with the relationship between a defendant and his attorney. It is clear from these cases that the state may not interfere with a defendant's right to have an attorney zealously advocate his interests in a criminal proceeding. As stated by the Court in


68. 287 U.S. 45 (1932). The case involved a number of out-of-state black men accused of raping two white girls on a train in Alabama. The trial judge appointed the entire local bar as counsel, with the result that no member of the bar took the initiative in preparing a defense until the day the trial began.


The important role counsel plays in the adversary system is apparent also in cases finding that a defendant has a right to have counsel present at line-ups. See United States v. Wade, 388 U.S. 218, 225 (1967) ("The plain wording of this right to counsel guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defense'"); see also Moore v. Illinois, 434 U.S. 220 (1977); Gilbert v. California, 388 U.S. 263 (1967).

70. See, e.g., Geders v. United States, 425 U.S. 80 (1976) (trial court order preventing defendant from conferring with counsel during seventeen hour recess between defendant's direct examination and his cross-examination ruled unconstitutional); Herring v. New York, 422 U.S. 853 (1975) (state law giving trial judge discretion to deny opportunity for closing summation to defense counsel held unconstitutional); Brooks v. Tennessee, 406 U.S. 605 (1972) (court rule requiring defendant to be the first witness if he elected to testify held unconstitutional); Ferguson v. Georgia, 365 U.S. 570 (1961).

Herring v. New York, 72 "the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact finding process."

Stated in other words, the sixth amendment requires that the prosecution's case be forced to withstand the crucible of adversary testing by an independent advocate dedicated to the interests of his client. The defense counsel is imposed between the defendant and the state to ensure that the defendant does not stand alone. This purpose would be defeated were defense counsel to be placed under restrictions that effectively converted him into a tool for the prosecution in its efforts to convict.

The ethical rules adopted by the Iowa Supreme Court arguably represented an impermissible intrusion on the attorney's freedom to vigorously advocate his client's cause by obligating Robinson to compromise his duty of loyalty to his client. Writing for the Court in Glasser v. United States,76 Justice Murphy stated that in all cases the constitutional safeguards are to be "jealously preserved for the benefit of the accused." A state imposed code of ethics compromising the attorney-client relationship in any way would be in contravention of the spirit, if not the letter, of the sixth amendment.

The argument proves too much, however, as it would serve to invalidate any code of ethics by which a state would seek to regulate the conduct of attorneys. Moreover, it rests on the fallacious notion that the rift in the relationship between Robinson and Whiteside was caused by the Iowa Code of Professional Responsibility for Lawyers, when it actually was the result of Whiteside's desire to commit perjury. Therefore, Whiteside's sixth amendment claim could not rest on an impermissible government interference with the function of counsel.

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73. Herring, 422 U.S. at 857.
76. United States v. Wade, 388 U.S. 218, 226 (1967). "[T]he core purpose of the counsel guarantee was to assure assistance at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." United States v. Cronic, 466 U.S. 648, 654 (1984) (quoting United States v. Ash, 413 U.S. 300, 309 (1973)).
77. In this context, recall the language of the court of appeals, holding that, in Robinson's zeal to prevent Whiteside from perjuring himself, Robinson effectively became an agent for the prosecution. Whiteside v. Scurr, 744 F.2d 1323, 1331 (8th Cir. 1984).
78. 315 U.S. 60 (1942).
The fact that Whiteside’s sixth amendment claim could not be predicated on any impermissible state action does not mean that he may not have been denied the effective assistance of counsel. The notion that a deprivation of counsel may occur when the performance of the attorney representing the defendant falls below acceptable standards is well settled. However, arguing that one’s right to counsel has been denied because of incompetent counsel is much more difficult than arguing that it has been denied by state interference. Since the state is not involved in and has no control over the planning and presentation of the defense, there is no need to discourage misconduct on the part of the government and hence it is difficult to establish a compelling reason to take away the government’s conviction on appeal.

The case establishing the standards for a claim of ineffective counsel is Strickland v. Washington. The Court in that case created a two-prong test that a criminal defendant must satisfy in order to successfully maintain that his sixth amendment right to counsel was violated. The defendant must show that counsel did not meet reasonable standards of effectiveness, and that those inadequacies caused actual prejudice to the defendant. In other words, the attorney must be so incompetent as to undermine confidence in the outcome of the trial. Having once determined that the ethical obligations placed on an attorney by the code of ethics adopted in the state in which he practices do not constitute a state imposed interference with the right to counsel, it becomes necessary to evaluate an attorney’s responses to client perjury under the standards of Strickland v. Washington.

For reasons already discussed, withdrawal is an unsatisfactory solution to the ethical conflict presented by a client determined to perjure himself. Assuming that the attorney does not withdraw, what options are available?

The American Bar Association’s proposed standard 4-7.7 cautions that lending aid to perjury or using perjured testimony is unprofessional conduct.

81. This responsibility rests with the defendant and his attorney. See Model Rules of Professional Conduct Rule 1.2 (1983); Standards Relating to the Administration of Criminal Justice § 4-5.1 (1982); see also supra note 66 and accompanying text.
82. 466 U.S. 668 (1984). Defendant Washington was sentenced to death after pleading guilty to three murders against the advice of counsel. He challenged counsel’s failure to present character witnesses at the sentencing hearing. The decision not to present character witnesses “reflected trial counsel’s sense of hopelessness about overcoming the evidentiary effect of respondent’s confessions to the gruesome crimes.” Id. at 671-73.
83. Id. at 687.
84. See supra text accompanying notes 74-75.
85. See supra text accompanying note 46.
86. Standards Relating to the Administration of Criminal Justice (1982). The proposed standard was withdrawn prior to submission to the ABA House of Delegates.
The proposed standard recommends making a record, which is not to be revealed to the court, that the defendant is taking the stand against the advice of counsel. The lawyer is then advised to avoid conventional direct examination on matters on which the defendant intends to testify falsely, allowing the defendant to engage instead in a "free narrative." Finally, the lawyer should not argue the false version of the facts or use the perjured testimony in any way in his closing argument.

Though the approach advocated by standard 4-7.7 has been approved in two circuits, it also is unacceptable. The free narrative approach is an obvious attempt to compromise between the competing values involved in client perjury, but one that sacrifices both values while advancing neither. Although depriving the defendant counsel's aid in presenting perjured testimony presumably renders such testimony less effective, it nevertheless allows the introduction of false testimony. Such a result should only be justified where a policy of greater significance is furthered, in this case, the attorney-client relationship. However, the free narrative approach fails in this respect also. Professor Freedman argues that letting the client take the stand without the attorney's participation, and omission of the testimony in closing argument, is as damaging as failing to argue the case and as improper as telling the jury that the client had lied in his testimony. In fact, such a departure from ordinary trial tactics would serve as an obvious tip-off to the court that the attorney believed his client was lying, thereby severely prejudicing his cause. Further, such action arguably amounts to a deprivation of counsel, as "[t]he right to be heard is valueless without the aid of counsel." In order to present a defense, the defendant "requires the guiding hand of counsel at every step in the proceedings against him." It is senseless to compromise

87. Id.
88. Id.
89. See Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984); Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978).
90. Freedman, supra note 44, at 1477. Professor Freedman's conclusion was that the adversary system allowed no alternative to putting a perjurious witness on the stand without implicit or explicit disclosure of the attorney's knowledge to either judge or jury. Id.
91. Freedman, supra note 44; Wolfram, supra note 44.
93. Powell v. Alabama, 287 U.S. 45, 69 (1932). Similarly, in Ferguson v. Georgia, 365 U.S. 570 (1961), the Court ruled it unconstitutional to deny the defendant the assistance of counsel's questioning in presenting a statement. Later, in Gilbert v. California, 388 U.S. 263, 279 (1967), it was stated:
The Court considers the "right to a fair trial" to be the overriding aim of the right to counsel. . . . But . . . this Court lacks constitutional power thus to balance away a defendant's absolute right to counsel. . . . The Framers did not declare in the Sixth Amendment that a defendant is entitled to a "fair trial," nor that he is entitled to counsel on the condition that this Court thinks there is more than a "minimal risk" that without a lawyer
the defendant's right to counsel while still allowing the introduction of perjured testimony. If the defendant is to be allowed to present his perjured defense at all, he has the right to do so effectively. If the defendant is to be denied the right to present such a defense effectively, then he should not be permitted to perjure himself at all. An additional concern running through any discussion of the proper response to client perjury is the possibility that, in taking measures to prevent the commission of perjury, the attorney may reveal client confidences. The present ethical codes permit an attorney to reveal client secrets for this limited purpose, but such a position is subject to attack as an unwise doctrine "that would open the door to a fundamental reordering of the adversary system into a system more inquisitorial in nature." It can only be assumed that many criminal defense lawyers, when faced with the choice of injuring their client's cause through a permitted disclosure of client confidences or risking disciplinary action for maintaining those confidences, will protect themselves first at the expense of their client by revealing client secrets. It cannot be disputed that such a result poses a serious threat to the adversary system, and indeed may make it more inquisitorial.

However grave these issues may be, they were not raised in Whiteside's case. Strickland v. Washington requires the petitioner to demonstrate that he suffered prejudice as a result of ineffective counsel. Whiteside was unable to meet this burden. The only thing he was prevented from doing was committing perjury. Since the Court made clear that there exists no right to

his trial will be "unfair."

388 U.S. at 279 (Black, J., concurring in part, dissenting in part).

94. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1982); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983); see also Clark v. United States, 289 U.S. 1, 13-15 (1933) (Cardozo, J.). In Clark, Justice Cardozo stated:

The recognition of a privilege does not mean that it is without conditions or exceptions. . . . There is a privilege protecting communications between attorney and client. The privilege takes flight if the relationship is abused. A client who consults an attorney for advice in the commission of a fraud will have no help from the law. He must let the truth be told.

Clark, 289 U.S. at 15.


98. In this respect, Strickland v. Washington rejected the statements in earlier cases concerning the right to counsel. See Glasser v. United States, 315 U.S. 60, 76 (1942) ("The right to have the assistance of counsel is too fundamental and absolute to allow the courts to indulge in nice calculations as to the amount of prejudice arising from its denial."); Chapman v. California, 386 U.S. 18 (1967) (Stewart, J.) (arguing that rejection of a harmless error standard in right to counsel cases was the whole point of Gideon v. Wainwright).
commit perjury, Robinson's actions deprived Whiteside of no right, and confidence in the outcome of the trial was not undermined.

Realizing that he could not demonstrate any actual prejudice on the facts of his case, Whiteside attempted to bring himself within a narrow line of cases in which the Court has been willing to presume prejudice to the defendant. The principal case for this proposition is Cuyler v. Sullivan, in which the Court held that prejudice need not be actually demonstrated when the accused has successfully shown that his counsel was under a conflict of interest. Whiteside claimed that Robinson's conflicting ethical obligations to the court and his client created a conflict of interest that was presumptively prejudicial. However, the utility to Whiteside of Cuyler v. Sullivan was extremely limited because of the narrow holding of that case. While the Court in Cuyler was willing to presume prejudice upon finding a conflict of interest, that conflict had to be actually demonstrated. The mere fact that defense counsel simultaneously represented two defendants was not enough to warrant reversal unless it could be demonstrated that the interests of the different defendants were actually in conflict.

Proving such a conflict of interest was not easy for Whiteside, and the Court rejected his attempt to bring his case under the conflict of interest umbrella. The Court made clear that the doctrine applies to cases where defense counsel represents different clients whose interests are opposed to each other, not to cases involving lawyers who are put under conflicting ethical duties while representing a single client. Further, the Court noted that it would be improper for Whiteside to claim the benefit of a conflict that he created by communicating his intention to commit perjury. Since the Court refused to find that Robinson's situation constituted a conflict of interest as envisaged by Cuyler v. Sullivan, Whiteside was denied a presumption of prejudice.

Without the benefit of presumed prejudice, Whiteside was unable to demonstrate that Robinson's actions had actually prejudiced his cause, and

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99. *See supra* note 60 and accompanying text.

100. 446 U.S. 335 (1980). Two privately retained lawyers represented all three defendants in their separate murder trials arising from the same crime. Sullivan alleged that the interests of the three defendants were in conflict, and that counsel withheld evidence in his trial so as to aid the other defendants in the upcoming proceedings. *Id.* at 337-40.


104. *Id.*
without a showing of prejudice he could not maintain a successful deprivation case under *Strickland v. Washington*. Therefore, it was unnecessary to the holding of the case to determine whether Robinson’s actions were ethically proper. This point is made in the concurring opinions to *Nix v. Whiteside*,105 which emphasize that the concurring Justices decided the case only on the issue of prejudice. As a result, it remains unclear whether Robinson’s threats against his client were ethically proper,106 though the decision indicates at least that such threats are not unconstitutional when their only effect is to successfully dissuade a client from testifying falsely.

In the final analysis it must be recognized that *Nix v. Whiteside* presented perhaps the worst set of facts upon which to base a claim of ineffective assistance of counsel. Though the tone of Robinson’s threats against his client were ominous, the actual effect was not substantial.107 The Court’s opinion may suggest a lack of sympathy for defendants prevented from testifying in an allegedly perjurious manner, but it is impossible to predict how the Court would react to a case in which it is forced to seriously weigh the different policies in conflict and make a determination as to which deserves the greater protection. Such a decision could have a serious effect on the sanctity of the attorney-client relationship if the Court were to approve the actions that Robinson threatened, and could significantly alter the nature of the adversary system in this country.

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105. Concurring opinions were filed by Justices Brennan, Blackmun, and Stevens. Justice Blackmun argued that under *Strickland v. Washington*, a petitioner had to satisfy both prongs of the test, but there was no reason not to dispose of the case on the basis of only one prong. Since Whiteside clearly was not constitutionally prejudiced, the case should be decided on that basis alone. *Nix v. Whiteside*, 106 S. Ct. at 1002.

106. Indeed, as Justice Brennan argued, it was not within the power of the Court to make such a determination. *Nix v. Whiteside*, 106 S. Ct. at 1000 (Brennan, J., concurring).

107. Forcing a defendant to testify he “knew” there was a gun, as opposed to he “saw” a gun does not represent a significant difference in the testimony being presented and may explain Robinson’s success in convincing Whiteside to change his story. A much more insistently defendant can be expected when his proposed testimony differs substantially from the attorney’s view of the facts.