CRIMINAL PROCEDURE—SIXTH AMENDMENT—ATTORNEY'S FAILURE TO COOPERATE WITH CRIMINAL DEFENDANT IN PRESENTING PERJURED TESTIMONY DOES NOT VIOLATE DEFENDANT'S RIGHT TO ASSISTANCE OF COUNSEL—*Nix v. Whiteside*, 106 S. Ct. 988 (1986).

The sixth amendment right to assistance of counsel[1] has long been regarded as essential in protecting the fundamental rights of those subjected to criminal prosecution.[2] In representing defendants, defense counsel serve as a legal advocate for the accused as well as an officer of the court.[3] Due to the ethical obligations of both roles, a conflict arises when an attorney discovers that the client insists on testifying[4] and reveals an intent to commit perjury.[5] When faced with such a dilemma, the precise duty of a defense attorney in rendering assistance has long been an issue of controversy.[6] Although it is universally agreed that an

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[1] The sixth amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

[2] *See, e.g.*, Powell v. Alabama, 287 U.S. 45 (1932). In *Powell*, Justice Sutherland recognized that:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id. at 68-69.

[3] *See* Callan and David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332, 335 (1976).

[4] Although the United States Supreme Court has never explicitly recognized a criminal defendant's constitutional right to testify in his own defense, several circuits have concluded that this right has long been recognized. *See, e.g.*, United States v. Curtis, 742 F.2d 1070,1076 (7th Cir. 1984); United States v. Bifield, 702 F.2d 342,349 (2nd Cir.), *cert. denied*, 461 U.S. 931 (1983).

[5] *See In re* Malloy, 248 N.W.2d 43, 45 (N.D. 1976); *see also* Harris v. New York, 401 U.S. 222, 225 (1971) ("[e]very 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.") (citations omitted).

[6] *See* Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 810-11 (1977) (hereinafter *Wolfram*); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1477-80 (1966) (hereinafter *Freedman*).

attorney should first attempt to dissuade perjurious testimony,[7] courts have varied as to what action should be taken when faced with a client's insistence on presenting such testimony.[8] This issue was confronted by the United States Supreme Court in *Nix v. Whiteside*.[9] In an opinion by Chief Justice Burger,[10] the Court held that a criminal defendant's sixth amendment right to assistance of counsel is not violated when an attorney refuses to cooperate with his client's intention to present false testimony at trial.[11]

On February 8, 1977, in Cedar Rapids, Iowa, Emanuel Charles Whiteside and two companions went to the apartment of Calvin Love to purchase marijuana.[12] During negotiation of the sale, an argument between Whiteside and Love ensued.[13] Love instructed his girlfriend to procure his "piece" and then returned to his bed.[14] Whiteside indicated that Love reached underneath

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7 *See* MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.3. The comment to the rule states:

> When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer *should seek to persuade the client that the evidence should not be offered*. . . .

Id. (emphasis added); *see also* Wolfram, *supra* note 6, at 846; *Freedman, supra* note 6, at 1478.

8 *Compare* United States v. Curtis, 742 F.2d 1070, 1074-75 (7th Cir. 1984) (no sixth amendment violation where attorney failed to present defendant as a witness based upon belief that he would commit perjury) *with* United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 122 (3rd Cir. 1977) (sixth amendment violation where attorney, without factual basis, discloses client's intent to commit perjury).

9 106 S.Ct. 988 (1986).

10 *Id.* at 991-99. Although the Court's ruling was unanimous, Justice Brennan filed a concurring opinion. *See id.* at 1000 (Brennan, J., concurring). Justice Blackmun, joined by Justices Brennan, Marshall and Stevens, also filed a concurring opinion. *See id.* at 1000-07 (Blackmun, J., concurring). Justice Stevens also filed a concurring opinion. *See id.* at 1007 (Stevens, J., concurring).

11 *Id.* at 991, 999. *But cf.* Lowrey v. Cardwell, 575 F.2d 727 (9th Cir. 1978) (Hufstedler, J., specially concurring). In *Lowrey*, Justice Hufstedler noted that:

> [W]hen defense counsel moved to withdraw, he ceased to be an active advocate of his client's interests. Despite counsel's ethical concerns, his actions were so adverse to [the defendant's] interests as to deprive her of effective assistance of counsel. No matter how commendable may have been counsel's motives, his interest in saving himself from potential violation of the canons was adverse to his client, and the end product was his abandonment of a diligent defense.

Id. at 732 (Hufstedler, specially concurring).

12 *Whiteside*, 106 S.Ct. at 991.

13 *Id.*

14 *Id.*

his pillow and began moving toward him.[15] Reacting to the movement, Whiteside fatally wounded Love by stabbing him in the chest.[16] Although Whiteside claimed that he was acting in self-defense, Whiteside was subsequently charged with murder and thereafter was appointed counsel.[17]

During the course of the investigation, Whiteside communicated to his attorney, Gary L. Robinson, that he stabbed Love while the latter " 'was pulling a pistol from underneath the pillow on the bed.' "[18] Further questioning revealed, however, that Whiteside did not actually see a gun, but only was convinced that Love had one in his possession.[19] Whiteside maintained this contention notwithstanding Robinson's advice that the presence of a weapon was not essential in establishing a claim of self-defense and that the reasonable belief that Love had a gun was sufficient.[20]

Approximately one week before trial, while preparing for direct examination, Whiteside revealed to Robinson[21] that he intended to testify as to having seen a "metallic" object in Love's hand prior to the stabbing.[22] When Robinson inquired further, Whiteside responded that he feared conviction if he did not testify as to having seen a gun.[23] Whiteside insisted on so testifying

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15 *Id.*

16 *Id.*

17 *Id.* Initially the Iowa District Court appointed Thomas M. Horan and Timothy S. White to represent Whiteside. *See* Appendix to Petition for Writ of Certiorari at A46, Nix v. Whiteside, 471 U.S. 1014 (1985) (hereinafter Cert. Appendix). Whiteside claimed, however, that he felt uncomfortable with attorneys who were former prosecutors, *Whiteside*, 106 S.Ct. at 991, and requested that Thomas L. Koehler replace them. Cert. Appendix at A46-47. This request as to Koehler was denied since one of the associates in Koehler's firm had already began to represent one of Whiteside's companions who was present at the stabbing. *Id.* at A46-48. Thereafter, Gary L. Robinson was appointed and began an investigation. *Whiteside*, 106 S. Ct. at 991.

18 *Whiteside*, 106 S. Ct. at 991.

19 *Id.* Although he did not actually see a gun, Whiteside stated that, based upon Love's reputation, he was convinced Love had a gun. Whiteside v. Scurr, 744 F.2d 1323, 1325 (8th Cir. 1984), *rev'd sub nom.* Nix v. Whiteside, 106 S. Ct. 988 (1986). Whiteside's two associates, as well as Love's girlfriend, also denied seeing a gun, but believed that Love probably had one in his possession. *Id.* A search of the victim's apartment by both the police and Robinson shortly after the stabbing, however, did not reveal a gun. *Id.*

20 *Whiteside*, 106 S.Ct. at 991.

21 Upon being appointed as counsel for Whiteside, Gary L. Robinson requested that Donna Paulsen be appointed to assist him. Cert. Appendix, *supra* note 17, at A63.

22 *See Whiteside*, 106 S. Ct. at 991-92.

23 *Id.* at 991. When asked about having seen something "metallic," Whiteside

despite Robinson's warning that such testimony would constitute perjury and was not necessary to establish a claim of self-defense.[24] Furthermore, Robinson advised Whiteside that if he insisted on committing perjury, Robinson would not only seek to withdraw as his attorney, but would also advise the court that the testimony was perjurious and that he would testify against Whiteside.[25] In response to this warning, Whiteside, while testifying in his own defense, admitted that he did not see a gun in the hand of the victim, Calvin Love.[26]

At the close of all the evidence, a verdict of second-degree murder was returned by the jury.[27] Subsequently, Whiteside filed a motion for a new trial maintaining general dissatisfaction with the representation of his attorney.[28] Whiteside alleged that he had been denied a fair trial by Robinson's insistence that he not testify as to having seen a gun or "something metallic."[29] Upon hearing the testimony of both Whiteside and Robinson, the trial judge believed the facts as related by Robinson—that the proposed testimony would have been perjurious.[30] The motion was denied.[31]

Thereafter, an undaunted Whiteside appealed to the Iowa Supreme Court.[32] In upholding the conviction, the court reasoned that although a defendant is entitled to testify freely as to all possible defenses, this right does not extend to the commis-

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stated that " 'in Howard Cook's case there was a gun. If I don't say I saw a gun I'm dead.' " *Id.*

24 *Id.* at 992. *See also supra* note 20 and accompanying text.

25 *Whiteside*, 106 S. Ct. at 992. According to Robinson's testimony, Robinson told Whiteside:

> we could not allow him to [testify falsely] because that would be perjury, and as officers of the court we would be suborning perjury if we allowed him to do it; . . . I advised him that if he did do that it would be my duty to advise the Court of what he was doing and that I felt he was committing perjury; also, that I probably would be allowed to attempt to impeach that particular testimony.

Id. (quoting Cert. Appendix, *supra* note 17, at A85.)

26 *Id.* at 992.

27 *Id.* As a result of his conviction, Whiteside was sentenced to a forty-year term to be served in the state penitentiary. State v. Whiteside, 272 N.W.2d 468, 470 (Iowa 1978).

28 *See Whiteside*, 106 S. Ct. at 992. Although he claimed he was dissatisfied with his attorney prior to pronouncement of his conviction, Whiteside advised the court that he was satisfied with the representation of Robinson. *See* Cert. Appendix, *supra* note 17, at A74.

29 *Whiteside*, 106 S.Ct. at 992.

30 *Id.*

31 *Id.*

32 *See id.*

sion of perjury.[33] With regard to Robinson's admonitions to prevent such testimony, the court affirmed the holding of the trial court.[34] In particular, the court held that the duty of an attorney to his client does not extend to subornation of perjury.[35]

Whiteside then petitioned the United States District Court for the Southern District of Iowa for a writ of habeas corpus.[36] In the petition, Whiteside realleged that he was denied effective assistance of counsel and denied his right to establish a defense by Robinson's unwillingness to permit him to testify as he wished.[37] The district court, in denying the writ, reaffirmed the state trial court's finding that Whiteside's testimony would have constituted perjury.[38] The court concluded that since "there is no constitutional right to present a perjured defense," Whiteside was not entitled to habeas corpus relief.[39]

On appeal, the United States Court of Appeals for the Eighth Circuit reversed and instructed that the writ of habeas corpus be granted.[40] In rendering its decision, the Court of Appeals afforded deference to the findings of the state supreme court and acknowledged that trial counsel reasonably believed that Whiteside's intended testimony would have been false.[41] Furthermore, the court noted that the right to testify on one's

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33 *Id.*

34 *Id.*

35 *Id.* In commending the actions of Robinson and his associate Donna L. Paulsen, the court relied on DR 7-102(A)(4) of the Iowa Code of Professional Responsibility for Lawyers, which expressly prohibits an attorney from "[k]nowingly us[ing] perjured testimony," and Iowa Code § 720.3 (1985), which makes the subornation of perjury a criminal offense. *Id.*

36 *Id.* Whiteside brought the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1976).

37 *Whiteside*, 106 S. Ct. at 992.

38 *Id.*

39 *Id.*

40 Whiteside v. Scurr, 744 F.2d 1323, 1325, 1331 (8th Cir. 1984), *rev'd sub nom.* Nix v. Whiteside, 106 S. Ct. 988 (1986).

41 *Id.* at 1328. In making this determination, the court acknowledged that whether counsel believed the defendant would testify falsely is a threshold question that must be determined. *Id.* As noted by Judge McMillian, " '[w]here . . . the veracity or falsity of the defendant's testimony is conjectural, the ethical dilemma does not arise.' " *Id.* (citation omitted). For example, the fact that the attorney suspects the contemplated testimony to be perjurious or the mere presence of inconsistent statements is insufficient to establish that the defendant will testify falsely or has so testified. *Id.; see also* Butler v. United States, 414 A.2d 844, 850-51 (D.C. 1980) (inconsistent statements insufficient to establish veracity or falsity of defendant's testimony); United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977) (in order to disclose client confidences, attorney must have a "firm factual basis" that his client's testimony would be perjurious).

behalf does not encompass the right to commit perjury.[42] Nevertheless, the court reasoned that even when the intent to commit perjury is communicated to counsel, this does not alter the defendant's right to a fair trial or an attorney's duty to afford effective assistance of counsel.[43] Accordingly, the court held that Robinson's threat to inform the court of the perjured testimony constituted a breach of client confidence which amounted to a deprivation of the defendant's right to effective assistance of counsel.[44] Thereafter, a petition for rehearing en banc was denied with four judges dissenting.[45]

The United States Supreme Court granted certiorari,[46] and reversed the decision of the court of appeals.[47] The Court held that Robinson's threat to inform the authorities of Whiteside's contemplated perjury did not violate Whiteside's sixth amendment right to counsel.[48]

The sixth amendment right to counsel[49] was initially addressed by the United States Supreme Court in *Powell v. Alabama*.[50] In *Powell*, several black men were indicted for a series of rapes committed on two white women.[51] Subsequent to their arraignment, the defendants entered pleas of not guilty.[52] The trial judge had "appointed all the members of the bar" for the purpose of representing the defendants at their arraignment.[53] A review of the record, however, revealed that no lawyer had been named or designated to represent the defendants until the morn-

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42 *Whiteside*, 744 F.2d at 1328 (citing Harris v. New York, 401 U.S. 222, 225 (1971)). *See also supra* note 5 and accompanying text.

43 *Whiteside*, 744 F.2d at 1328.

44 *Id.* The court held that counsel's threat to withdraw, to advise the state trial judge, and to testify against Whiteside if he testified falsely, deprived the defendant of due process and effective assistance of counsel. *Id.* The court noted that Robinson's actions fell short of effective assistance as they were contrary to his obligations of confidentiality and of presenting a diligent defense. *Id.* at 1329-30. *See also* Lowery v. Cardwell, 575 F.2d 727,732 (9th Cir. 1978) (Hufstedler,J., specially concurring).

45 *Whiteside*, 750 F.2d at 713.

46 Nix v. Whiteside, 471 U.S. 1014 (1985).

47 *Whiteside*, 106 S.Ct. at 993.

48 *Id.* at 997.

49 *See supra* note 1.

50 287 U.S. 45 (1932).

51 *Id.* at 49.

52 *Id.*

53 *Id.* The trial judge insisted that if no specific appointment of counsel was made, it was his understanding that the members of the bar would continue to represent the defendants. *Id.*

ing of the trial.[54] Following trial by jury, the defendants were found guilty by a jury and were sentenced to death.[55] Despite claims that the defendants were denied the right to counsel, the judgments were affirmed by the state supreme court.[56]

In reviewing the decision, the United States Supreme Court employed a fourteenth amendment due process analysis[57] to determine whether the defendants were denied the right to counsel.[58] The *Powell* Court ruled that the defendants were denied the right to counsel and asserted that those charged with a serious crime must be afforded an adequate opportunity to consult with counsel and to prepare a defense.[59] The Court concluded that the designation of counsel was either so uncertain or so close to the time of trial as to constitute a denial of effective appointment of counsel.[60] In conclusion, the *Powell* Court noted that the right to counsel was of such a "fundamental character" that it is embraced within the due process clause of the fourteenth amendment, even though the right to counsel is specifi-

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54 *Id.* at 56.

55 *Id.* at 50.

56 *See id.* The judgments were also challenged on the ground that the defendants were not given a "fair, impartial and deliberate trial," but the Court chose not to address these issues. *Id.* In addition, the Court declined to consider, in adjudicating the defendants guilty, whether blacks were systematically excluded from the jury. *Id.*

57 The fourteenth amendment to the United States Constitution provides that "[no] State [shall] deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

58 *See Powell*, 287 U.S. at 50.

59 *See id.* at 58-59. The Court noted that " '[i]t is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case.' " *Id.* at 59 (quoting Commonwealth v. O'Keefe, 298 Pa. 169, 173; 148 A. 73, 74 (1929)).

60 *Id.* at 53. Although the trial judge appointed the entire local bar for the purposes of arraignment, the Court held that the likelihood of continued representation was a matter of mere speculation and anticipation of the trial court. *Id.* at 56. Such actions imposed no absolute obligation on any member of the bar and served to deny the defendants the opportunity to consult with counsel and consequently the opportunity to investigate and prepare for trial. *See id.* at 56-57. Finally, the Court concluded that counsel's appearance on the day of trial " '. . . was rather *pro forma* than zealous and active . . .' " and therefore the defendants were not afforded the right of counsel in any meaningful sense. *Id.* at 58. *See* BLACKS LAW DICTIONARY 1091 (5th ed. 1979) (defining *pro forma* as "a matter of form or for the sake of form.") *Cf.* United States v. Cronic, 466 U.S. 648 (1984) (twenty five days to prepare defense not a breakdown in adversarial process as to render assistance ineffective); Avery v. Alabama, 308 U.S. 444 (1940)(counsel afforded three days to prepare defense held not to deny the defendant's right to effective assistance of counsel).

cally addressed in the sixth amendment.[61]

Six years later, the significance of *Powell* became apparent when the United States Supreme Court decided *Johnson v. Zerbst*.[62] In *Johnson*, the defendant was arrested and charged with feloniously possessing and distributing counterfeit money.[63] Thereafter, he requested the appointment of counsel for trial but his claim was denied.[64] Without the assistance of counsel, the defendant was tried, convicted, and sentenced.[65] In reviewing the defendant's conviction, the *Johnson* Court began its analysis by recognizing the sixth amendment right to counsel as necessary to guarantee the "fundamental human rights of life and liberty" of those subjected to criminal proceedings.[66] Moreover, since this right to counsel is constitutionally mandated, its denial amounts to a jurisdictional bar to an otherwise valid conviction and sentence.[67] Finally, the Court noted that while the accused may waive his right to counsel, such waiver must be both competently and intelligently asserted.[68] The *Johnson* decision, therefore, created an absolute right to counsel in all federal criminal proceedings.[69]

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61 *Powell*, 287 U.S. at 67-68. The Supreme Court held that

> '. . . it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.'

Id. (quoting Twining v. New Jersey, 211 U.S. 78, 99 (1908)).

62 304 U.S. 458 (1938).

63 *Id.* at 459-60.

64 *See id* at 460. Although a request for counsel was not directed to the trial judge, a review of the evidence developed at the habeas corpus hearing revealed that such a request was presented to the district attorney. *Id.* In support of the denial, the district attorney replied that the court in South Carolina only appointed counsel to those charged with a capital crime thereby making the defendant ineligible. *Id.* The district attorney, however, denied that such a request was ever made or that he indicated to the defendant that the latter had no such right. *Id.* at 460-61.

65 *Id.* at 460. The defendant was sentenced to four and one-half years in the Federal Penitentiary in Atlanta. *Id.*

66 *Id.* at 462. *See also supra* note 2 and accompanying text (*Powell* Court emphasizing importance of counsel throughout every step of criminal proceedings).

67 *Johnson*, 304 U.S. at 468.

68 *Id.* at 468-69.

69 *See id* at 462-63. This rule is currently codified in FED. R. CRIM. P. 44 which provides that "[i]f the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.

Since the decision in *Johnson*, the issue of whether the constitutional right to counsel in federal criminal proceedings extends to state criminal proceedings has been a source of much controversy and litigation.[70] It was not until the Court's ruling in *Gideon v. Wainwright*,[71] that this issue was resolved, and the right of counsel made applicable to the states.[72] In *Gideon*, the defendant, Clarence Earl Gideon, was charged with breaking and entering a poolroom with the intent to perpetrate a misdemeanor.[73] Due to his inability to afford an attorney, he appeared in court and requested that counsel be appointed.[74] The trial judge, however, denied this request.[75] Thereafter, Gideon represented himself at a trial by jury and was found guilty.[76] In reversing his conviction, the *Gideon* Court recognized that the sixth amendment guarantee of counsel is " 'fundamental and essential to a fair trial.' "[77] The Court concluded that because the right to counsel in felony cases is sufficiently "fundamental" to ensure a fair trial, the sixth amendment's guarantee "is made obligatory upon the States by the Fourteenth Amendment."[78]

While *Powell, Johnson*, and *Gideon*[79] adequately established the right to counsel as guaranteed by the sixth amendment, these decisions failed to address and to define the standards for such assistance.[80] In *Glasser v. United States*,[81] the United States Supreme Court recognized that the sixth amendment right to counsel guarantees the right to "effective assistance of

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70 *See* Gideon v. Wainwright, 372 U.S. 335, 337-38 & n.2 (1963).

71 372 U.S. 335 (1963).

72 *See id.* at 339-40. In so doing, the Court overruled Betts v. Brady, 316 U.S. 455 (1942), which held that the sixth amendment guarantee of counsel is not of such fundamental nature as to be made applicable to the states by virtue of the fourteenth amendment.

73 *Gideon*, 372 U.S. at 336.

74 *Id.* at 337.

75 *Id.* In denying Gideon's request for counsel, the court asserted that under existing Florida law the appointment of counsel was only authorized in capital cases. *Id.*

76 *Id.* Upon being found guilty, the defendant was sentenced to a five-year term in a state penitentiary. *Id.*

77 *Id.* at 342.

78 *Id.* In a subsequent decision, the Supreme Court extended the sixth amendment right to counsel to include misdemeanor as well as felony cases. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

79 *See supra* notes 50-78 and accompanying text (discussion of *Powell, Johnson*, and *Gideon*).

80 *See generally id.*

81 315 U.S. 60 (1942).

counsel."[82]

In *Glasser*, the defendants, Glasser and Kretske, were charged with conspiring to defraud the United States.[83] The trial court appointed a single attorney to represent both defendants,[84] despite being informed that conflicting interests might arise which would serve to diminish counsel's assistance.[85] After a verdict of guilty was returned, defendant Glasser claimed that joint representation was contrary to the sixth amendment since it served to deny him the assistance of counsel.[86] In reviewing Glasser's contention, the Court reasoned that simultaneous representation of both defendants prevented counsel's assistance from being as effective as it otherwise might have been.[87] As a result, the Court concluded that Glasser had been denied "effective assistance of counsel" and reversed the verdict.[88] The *Glasser* Court further held that in the circumstances before the Court, the need to determine the precise degree of prejudice resulting from this appointment was unnecessary.[89]

Although the Court in *Glasser* pronounced the right to effective assistance of counsel, it was not until the decision in *McMann v. Richardson*[90] that the Supreme Court sought to define precisely what constitutes such assistance.[91] In *McMann*, the defendants were charged with various felonies and entered pleas of guilty

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82 *Id.* at 76; *see also* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (sixth amendment right to counsel guarantees right to effective assistance of counsel).

83 *Glasser*, 315 U.S. at 63.

84 *See id.* at 68-69. Initially, the co-defendants, Glasser and Kretske, were represented by separate counsel of Messrs. Stewart and McDonnell, respectively. *Id.* at 68. Kretske, however, expressed disapproval with his attorney and McDonnell was therefore dismissed from representation. *See id.*

85 *Id.* at 76.

86 *See id.* at 67. In recounting Glasser's contentions, Justice Murphy noted that according to the litigant "the court's appointment of Stewart as counsel for Kretske embarrased and inhibited Stewart's conduct of his defense, in that it prevented Stewart from adequately safeguarding [his] right to have incompetent evidence excluded and from fully cross-examining the witnesses for the prosecution." *Id.* at 72.

87 *Id.* at 76.

88 *Id.*

89 *Id.* The Court held that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. *Id.*

90 397 U.S. 759 (1970).

91 *See id.* Prior to this, the standard for evaluating claims of ineffective assistance was the "farce and mockery" test. *See* Diggs v. Welch, 148 F.2d 667 (D.C.Cir.), *cert. denied*, 325 U.S. 889 (1945). This test required that counsel's errors "[shock] the conscience of the court" and reduce the proceedings to a "mockery of justice" before being rendered ineffective. *Id.* at 670.

upon the advice of counsel.[92] The defendants then petitioned for collateral relief, alleging that their pleas were the illegal product of prior coerced confessions.[93] Moreover, they claimed that counsel's mistaken assessment as to the admissibility of the confessions resulted in erroneous advice which led to their pleas of guilty.[94] Based upon the foregoing, the defendants asserted that their pleas were ill advised and, therefore, they were voidable acts.[95]

In reviewing counsel's advice to plead guilty, the *McMann* Court recognized that the determination of whether an attorney was incompetent is not contingent upon whether a court would, in hindsight, view the advice to be correct or incorrect.[96] Rather, the Court concluded that the inquiry is "whether that advice was within the range of competence demanded of attorneys in criminal cases."[97] Beyond this, however, the *McMann* Court did little in the way of delineating what conduct of counsel falls within the zone of competence.[98]

In 1984, the Supreme Court in *Strickland v. Washington*,[99] fully addressed, for the first time, the standards that should be considered in assessing whether counsel's assistance at the trial or sentencing was ineffective.[100] In *Strickland*, David Leroy Washington was indicted by the State of Florida on a series of charges

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92 *McMann*, 397 U.S. at 761-64.

93 *Id.*

94 *Id.* at 769.

95 *Id.*

96 *Id.* at 770-71.

97 *Id.* at 771.

98 *See id.* Writing for the majority, Justice White noted that:

> [b]eyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.

Id.

99 466 U.S. 668 (1984).

100 *Id.* at 683. Prior to this, the Court had only addressed sixth amendment claims arising from the actual or constructive denial of counsel's assistance. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (counsel not present at trial). In addition, the Court has reviewed claims of ineffective assistance of counsel based upon state interference. *See, e.g.*, United States v. Agurs, 427 U.S. 97 (1976) (prosecutor failing to supply counsel with defendant's criminal record); Geders v. United States, 425 U.S. 80 (1976) (defense counsel ordered not to confer with client during an overnight recess).

among which were three counts of first degree murder.[101] Against the advice of his attorney, William Tunkey, Washington pled guilty to all charges and waived his right to a jury at the sentencing hearing.[102] In his defense, Washington asserted that he had no substantial prior criminal record and, at the time of the incident, was under great stress due to his inability to meet the financial obligations of his family.[103]

At the sentencing hearing, Tunkey did not present any evidence concerning Washington's character and emotional state.[104] Instead, he merely emphasized the defendant's admission of guilt and the fact that he had no history of criminal activity.[105] At the close of the hearing the judge, in finding numerous aggravating circumstances, sentenced Washington to death on each of the three counts of murder and to prison terms for the other crimes.[106] The Supreme Court of Florida affirmed the judgements of the convictions and the sentences.[107]

Thereafter, Washington moved for post-conviction relief in a Florida circuit court.[108] Among the many challenges to his sen-

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101 *Strickland*, 466 U.S. at 672. The defendant was also charged with assault, attempted murder, breaking and entering, conspiracy to commit robbery, kidnapping for ransom, and robbery. *Id.*

102 *Id.* Immediately following his indictment, Washington was appointed the counsel of William Tunkey, an experienced criminal lawyer who was regarded as " 'one of the leading criminal defense attorney's in Dade County . . .' " Washington v. Strickland, 693 F.2d 1243,1247 n.2. (5th Cir. 1982) (en banc), *rev'd*, 466 U.S. 668 (1984).

103 *Strickland*, 466 U.S. at 672.

104 *Id.* at 672-73. This decision was reflective of Tunkey's sense of hopelessness in overcoming the effect of Washington's confession and guilty plea. *Id.* at 673. Moreover, Tunkey testified that he did not feel " 'that there was anything which [he] could do which was going to save David Washington from his fate.' " Washington v. Strickland, 673 F.2d 879, 886 (5th Cir.), *vacated*, 693 F.2d 1243 (5th Cir. 1982) (en banc), *rev'd*, 466 U.S. 668 (1984).

105 *Strickland*, 466 U.S. at 887. Tunkey later acknowledged that his decision to rely on Washington's confession and guilty plea was based on his familiarity of the sentencing judge, whom he described as a person who " 'respected any individual who had been accused of a crime and who, in fact, was guilty of a crime who came before him and admitted his guilt.' " *Id.*

106 Washington v. State, 362 So.2d 658, 662-63 (Fla. 1978), *cert. denied*, 441 U.S. 937 (1979), *remand*, 397 So.2d 285 (Fla. 1981), *remand habeas petition granted sub nom.* Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (en banc), *rev'd*, 466 U.S. 668 (1984). In addition to the imposition of the death penalty, Washington received sentences of life imprisonment in connection with the counts of robbery, kidnapping, breaking and entering, and unlawful assault; thirty years imprisonment with respect to each of the three counts of first degree attempted murder; and fifteen years imprisonment for conspiring to perpetrate robbery. *Id.* at 662. These sentences were to run consecutively. *Id.*

107 *Id.* at 667.

108 Washington v. State, 397 So.2d 285,286 (Fla.1981), *remand habeas petition*

tence, Washington's primary contention was that he was denied effective assistance of trial counsel as a result of his attorney's failure to present certain evidence in the sentencing phase of his prosecution.[109] Without holding an evidentiary hearing, the court denied the defendant's motion and, on appeal, the Florida Supreme Court affirmed.[110]

Having exhausted his state remedies, Washington then filed

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granted sub nom. Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (en banc), *rev'd*, 466 U.S. 668 (1984). Washington brought the motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. *Id.* The rule, in pertinent part, provides that:

> "[a] prisoner in custody . . . claiming the right to be released upon the ground that the judgment was entered or that the sentence was imposed in violation of the Constitution . . . may move the court which entered the judgment or imposed the sentence to vacate, set aside or correct the judgment or sentence."

FLA. R. CRIM. P. 3.850.

109 *Washington*, 397 So.2d at 286. In support of his claim that he was denied effective assistance of counsel, Washington asserted that his attorney was: (1) remiss in procuring a continuance in an effort to prepare a defense for the sentencing phase of the defendants' prosecution; (2) failed to acquire a psychiatric report; (3) declined to seek out the present character witnesses; (4) neglected to obtain a presentence investigation report; (5) failed to offer meaningful arguments to the sentencing judge; and (6) failed to research medical examiner's reports as well as to cross-examine those persons. *Id.*

110 *Id.* In denying the motion, the Florida circuit court reviewed Washington's allegations under the standards set forth in Knight v. State, 394 So.2d 997 (Fla. 1981). In setting forth the following four-step analysis for ineffective assistance of counsel claims, the Florida Supreme Court, in *Knight*, drew upon Judge Leventhal's plurality opinion in United States v. DeCoster, 624 F.2d 196 (D.C.Cir.)(en banc), *cert. denied*, 444 U.S. 944 (1979). *Knight*, 394 So.2d at 1000-01. Accordingly, the court held that:

> First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.
>
> Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel. . . . We recognize that in applying this standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances.
>
> Third, the defendant has the burden to show that this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings. In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error. . . .
>
> Fourth, in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the state still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact. This opportunity to rebut applies even if a constitutional violation has been established.

a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida.[111] Washington reasserted that he was denied effective assistance of counsel based on the same errors advanced in the lower courts.[112] After holding an evidentiary hearing, the district court concluded that Washington's sentencing hearing was not prejudiced through his attorney's failure to present mitigating evidence.[113] On appeal, the Fifth Circuit Court of Appeals remanded and ordered that the case be scrutinized under their newly developed framework for analyzing claims of ineffective assistance of counsel claims.[114]

In reversing the decision of the court of appeals, the United States Supreme Court initially acknowledged that the proper standard for attorney performance is that of " 'reasonably effective assistance.' "[115] The *Strickland* Court held that to sustain relief based on ineffective assistance, a defendant must show that the attorney's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[116] In making this determination, the Court applied a two-part test: first, the defendant must establish that his attorney's performance was deficient,[117] and second, counsel's deficient performance prejudiced the defendant by depriving him of a fair trial.[118] Based upon this criteria, the *Strickland* Court found that counsel's failure to present all mitigating evidence at the sentencing hearing was inadequate to establish that the defendant was denied his sixth amendment right to

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Knight, 394 So.2d at 1001 (citations omitted).

The *Washington* court held that under the *Knight* criteria, Washington had failed to establish a prima facie showing of a significant deficiency or potential prejudice so as to entitle him to relief. *Washington*, 397 So.2d at 287. Accordingly, the court held that the defendant's motion was without merit so as to preclude the necessity for an evidentiary hearing. *Id.* at 286.

111 *See* Strickland v. Washington, 466 U.S. 668, 678 (1984).

112 *Strickland*, 466 U.S. at 678; *see supra* note 109 and accompanying text (contentions advanced in lower courts).

113 *Washington*, 693 F.2d at 1249.

114 *Strickland*, 466 U.S. at 679.

115 *Id.* at 683 (citing Trapnell v. United States, 725 F.2d 149, 151-52 (2d Cir. 1983)).

116 *Id.* at 686.

117 *Id.* at 687. The Court noted that to establish counsel's performance as deficient, the defendant must show that counsel's errors were so egregious that counsel was not acting as the "counsel" mandated by the sixth amendment. *Id.*

118 *Id.* The Court noted that both showings must be made before it can be said that the conviction or sentence was due to a deterioration in the adversarial process. *Id.*

counsel.[119]

As supported by the aforementioned line of decisions, it is evident that the standard for determining a right to counsel claim is that of reasonable effective assistance. It was not until *Nix v. Whiteside*,[120] however, that the Supreme Court determined whether an attorney's refusal to cooperate with his client in presenting perjured testimony at trial is violative of the client's sixth amendment right to the assistance of counsel.[121]

Writing for the majority,[122] Chief Justice Burger initially addressed the two-pronged standard espoused in *Strickland*.[123] Although the Court did not define the precise conduct that an attorney should take when faced with the problem of client perjury, it pointed out that under *Strickland*, the sixth amendment inquiry is whether such conduct was " 'reasonably effective.' "[124] The majority observed that under this standard, not every ethical breach established a denial of assistance of counsel.[125] Moreover, the Court emphasized that courts should be careful in restricting standards of professional conduct since this is an area generally reserved for state authority.[126] Guided by these parameters, the *Whiteside* Court concluded that Robinson's actions in preventing client perjury fell within the wide range of "reasonable professional conduct" acceptable under the sixth amendment.[127]

In reaching its decision, the Court reasoned that although an attorney owes a duty of loyalty and an obligation to defend his

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119 *Id.* at 699-700.

120 106 S. Ct. 988 (1986).

121 *See id.* at 991.

122 Chief Justice Burger was joined by Justices White, Powell, Rehnquist, and O'Connor. *Id.* at 989. Justice Brennan filed an opinion concurring in the judgment. *Id.* Justice Blackmun filed an opinion concurring in the judgment in which Justices Brennan, Marshall, and Stevens joined. *Id.* Justice Stevens filed an opinion concurring in the judgment. *Id.*

123 *See supra* notes 117-118 and accompanying text (discussion of *Strickland*'s two-part standard).

124 *Id.* at 994. The Court noted that under the "reasonably effective" standard, a reviewing court must " 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' " to offset the inclination to criticize an unsuccessful defense. *Id.* (quoting *Strickland*, 466 U.S. at 689).

125 *Id.*

126 *Id.*

127 *See id.* at 997. The Court concluded that Robinson's conduct was within the range of reasonable professional conduct acceptable under *Strickland*; namely, "[w]hether . . . seen as a successful attempt to dissuade [Whiteside] from committing the crime of perjury, or whether seen as a 'threat' to withdraw from representation and disclose the illegal scheme. . . ." *Id.*

client's cause, such efforts are constrained by legitimate and lawful conduct that is in accord with the purpose of a trial as a fact-finding forum.[128] Chief Justice Burger held that despite these overlapping duties, an attorney is precluded from assisting his client in adducing false evidence or otherwise contravening the law.[129] Moreover, the Court observed that notwithstanding the attorney-client privilege of nondisclosure of confidential information, accepted norms require an attorney to reveal perjury that the client has committed or plans to commit.[130]

In reviewing the Court of Appeals holding that Robinson's " 'action deprived [Whiteside] of due process and effective assistance of counsel,' " Chief Justice Burger found that such a conclusion was unsupported by the record.[131] The Court recognized that Robinson's conduct served only to deprive Whiteside of his intent to commit perjury and did not refute Whiteside's claim that he acted on the belief that the victim was attempting to reach

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128 *Id.* at 994.

129 *Id.* In reaching this conclusion, Chief Justice Burger relied on the Canons of Professional Ethics, Canon 32, adopted in 1908, that provides:

> "No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. . . . He must. . . .observe and advise his client to observe the statute law. . . ."

Whiteside, 106 S. Ct. at 994 (quoting CANONS OF PROFESSIONAL ETHICS, Canon 32 (1908)); *see also* CANONS OF PROFESSIONAL ETHICS, Canon 37, (1928) (providing that "[t]he announced intention of a client to commit a crime is not included within the confidences which [the attorney] is bound to respect.").

The *Whiteside* Court further noted that these standards have endured and exist in contemporary codifications of the rules of professional responsibility. Relying on Disciplinary Rule 7-102 of the Model Code of Professional Responsibility (1980), Chief Justice Burger noted that:

> "(A) In his representation of a client, a lawyer shall not:
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> . . .
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> (4) Knowingly use perjured testimony or false evidence.
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> . . .
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> (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

Whiteside, 106 S. Ct. at 995 (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1980)).

130 *Id.* The Court noted that this exception to the attorney-client privilege is derived from the recognition that perjury is a statutory felony in most states. *Id.* at 996. Moreover, the Court observed that both the Model Code of Professional Conduct and the Model Rules of Professional Conduct require disclosure of client perjury. *Id.* at 995.

131 *Id.* at 997.

for a gun.[132] Similarly, the Chief Justice noted that the record was devoid of any indication that Robinson's efforts, in preventing the perjured testimony, undermined Whiteside's right to testify on his own behalf.[133] The Court therefore concluded that Robinson's performance was effective since he successfully dissuaded Whiteside from perpetrating the crime of perjury.[134]

Addressing the second prong of the *Strickland* inquiry, Chief Justice Burger concluded that counsel's actions fell short of establishing the prejudice required to sustain habeas corpus relief.[135] In support of this conclusion, the majority pointed out that Whiteside had failed to demonstrate " 'that there [was] a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' "[136] In particular, the Court found that his desisting from the contemplated perjury did not diminish the eventual findings of the trial court.[137] In an effort to circumvent the prejudice requirement, however, Whiteside also asserted that his attorney was representing conflicting interests.[138] Although Whiteside's proposed perjury and Robinson's ethical obligation as an officer of the court admittedly represented a "conflict," Chief Justice Burger concluded that it was not of the kind necessary to invalidate an otherwise sound representation.[139]

In a concurring opinion, Justice Brennan reemphasized the majority's holding that a state's authority to set standards of professional conduct for those who practice in its courts should not

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132 *Id.*

133 *Id.* In support of this, the Court noted that a review of the record revealed that Whiteside did in fact testify and was merely prohibited from testifying falsely. *Id.* Moreover, while testifying, he was aided by Robinson's efforts in establishing a self-defense claim based upon Whiteside's fear that the victim was reaching for a weapon. *Id.*

134 *Id.*

135 *See id.* at 999.

136 *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). In *Strickland*, the Court noted that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome [of the trial]." *Strickland*, 466 U.S. at 694.

137 *Whiteside*, 106 S. Ct. at 999. Chief Justice Burger noted that "[e]ven if we were to assume that the jury might have believed his perjury, it does not follow that Whiteside was prejudiced." *Id.*

138 *Id.*; *see* Cuyler v. Sullivan, 446 U.S. 335 (1980) (showing of prejudicial default on part of counsel unnecessary where attorney actively represents conflicting interests).

139 *Whiteside*, 106 S.Ct. at 999. The Court noted that if such a "conflict" were deemed prejudicial, "every guilty criminal's conviction would be suspect if the defendant had sought to obtain an acquittal by illegal means." *Id.*

be impeded.[140] The Justice noted that such a conclusion necessarily follows due to the absence of any constitutional authority to promulgate rules of professional conduct.[141] Justice Brennan, however, expressed displeasure with the majority's failure to observe this limitation and, as a result, the majority's sharing with the legal community its discourse on ethical conduct with regard to client perjury.[142] In conclusion, the Justice posited that the Court's efforts to this affect were without force of law and therefore were not controlling in determining the appropriate response to a client's insistence on committing perjury.[143]

Justice Blackmun also filed an opinion wherein he concurred with the Court's judgment.[144] He agreed with Chief Justice Burger that Whiteside was not injured by his attorney's actions to the level warranting federal habeas relief.[145] Justice Blackmun, however, believed that the majority erroneously employed the *Strickland* standard by basing its initial inquiry as to whether Robinson's performance was within the scope of reasonable professional assistance.[146] Justice Blackmun asserted that the issue of ineffective assistance of counsel should have been disposed of through the less onerous showing that Whiteside had failed to establish that he was prejudiced by his attorney's actions.[147] Moreover, the Justice pointed out the advantage of this approach as it precludes the need to determine the difficult question of whether counsel's performance was deficient.[148]

In assessing Whiteside's claim of prejudice, Justice Blackmun noted that such a determination should rest on whether he was, in some way, deprived of a fair trial.[149] In the instant action, Robinson's threat merely served to prevent Whiteside from testi-

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140 *See id.* at 1000 (Brennan, J., concurring).

141 *Id.* Justice Brennan also cited the lack of any statute which would afford the Federal courts jurisdiction over legal ethics. *Id.*

142 *Id.*

143 *Id.*

144 *See id.* at 1000 (Blackmun, J., concurring).

145 *Id.*

146 *See id.* at 1003 (Blackmun, J., concurring).

147 *See id.* at 1003-04 (Blackmun, J., concurring).

148 *Id.* at 1003 (Blackmun, J., concurring). Justice Blackmun pointed out that:

> a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Id. (quoting Strickland v. Washington, 466 U.S. 668, 697 (1984)).

149 *Id.* at 1004 (Blackmun, J., concurring).

fying falsely at his trial.[150] Thus, the Justice believed that the critical issue was whether the trial's outcome was adversely affected by the fact that Whiteside refrained from proffering such testimony.[151] Recognizing that perjured testimony is in direct opposition to our system of justice,[152] Justice Blackmun concluded that counsel's actions in preventing such evidence neither affected the judgment of the jurors nor undermined the outcome of Whiteside's trial.[153]

Justice Stevens, in the Court's final concurrence, noted that Whiteside clearly displayed an intent to commit perjury and that this fact was known by his attorney.[154] Recognizing that perjured testimony may potentially destroy an otherwise meritorious case, the Justice asserted that a duty is owed by the lawyer to prevent the admission of such testimony.[155] Based upon the foregoing, Justice Stevens examined Robinson's representation and found that not only were his efforts to this affect successful, but that in so doing his client suffered no " 'legally cognizable prejudice.' "[156] Although declining to address what an attorney "must, should, or may" do when faced with client perjury, the Justice concluded that, in this isolated instance, Robinson's actions were proper and provided his client with effective representation.[157]

In light of the existing law, the Supreme Court's resolution of the question presented in *Whiteside* was undoubtedly the correct one. As noted by the majority, aside from the absence of any constitutional right to commit perjury,[158] the admonitions of Whiteside's attorney in no way impaired the reliability of the fact-finding process.[159] Moreover, Robinson did not divulge any cli-

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150 *Id.*

151 *Id.*

152 *Id.* Justice Blackmun noted that " '[a]ll perjured . . . testimony is at war with justice, since it may produce a judgment not resting on truth.' " *Id.* (quoting In re Michael, 326 U.S. 224, 227 (1945)). *See also* United States v. Havens, 446 U.S. 620, 626-27 (1980) (indicating defendant's obligation to testify truthfully).

153 *See Whiteside*, 106 S.Ct. at 1004 (Blackmun, J., concurring); *see also* United States v. Agurs, 427 U.S. 97, 103 (1976) (if conviction is obtained by knowing use of perjured testimony, judgment must be set aside when there is any reasonable likelihood that testimony affected judgment of jury).

154 *Whiteside*, 106 S.Ct. at 1007 (Stevens, J., concurring).

155 *Id.* Justice Stevens additionally recognized that this duty imposed upon the attorney was owed to the court as well as the client. *Id.*

156 *Id.*

157 *Id.*

158 *Id.* at 993. *See also supra* note 5 (the right of an accused to testify does not include the right to commit perjury).

159 *Whiteside*, 106 S. Ct. at 993.

ent communication until it became absolutely necessary in response to Whiteside's challenge as to his representation.[160] Thus, the only impact of the admonitions was to prevent the proposed perjurious testimony at trial which should not be viewed as impermissibly compromising Whiteside's right to testify.[161]

In rendering this decision, the Court recognized that the intent to commit perjury is indistinguishable from the situation where a defendant threatens or tampers with a witness or a member of the jury.[162] In such instances, an attorney would not merely be limited to advising his client against such conduct.[163] Similarly, the duty of confidentiality which covers the attorney-client relationship does not extend to the announced plans of engaging in the future criminal act of perjury.[164] Against this backdrop, the *Whiteside* Court utilized the two-pronged *Strickland* inquiry in concluding that Robinson's actions were entirely appropriate and within the wide range of professionally competent assistance.[165]

In regard to the performance standard,[166] therefore, the *Strickland* majority undoubtedly theorized that the test's flexible nature would encompass most every criminal case. A review of the standard, however, serves to undermine that presumption. By assessing attorney performance against a "standard of reasonableness," the Court has left sixth amendment claims susceptible to varied interpretation and application by the lower courts.[167] The vagueness of this standard was perceived by Justice Marshall's dissent in *Strickland* in which he noted that "[t]o tell lawyers and the lower courts that counsel for a criminal defendant must behave 'reasonably' and must act like 'a reasonably competent attorney,'. . . is to tell them almost nothing."[168] Moreover, by leaving reviewing courts with unfettered discretion in deter-

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160 *Id.* at 997.

161 *See id.*

162 *Id.* at 998.

163 *Id.*

164 *Id.*; *see also* Clark v. United States, 289 U.S. 1, 15 (1933) (attorney-client privilege does not extend to commission of fraud).

165 *Whiteside*, 106 S. Ct. at 997.

166 *See supra* note 117 and accompanying text (discussing the performance standard of the two-pronged Strickland inquiry).

167 *See* Strickland v. Washington, 466 U.S. 668, 707-08 (1984) (Marshall, J., dissenting). Justice Marshall noted that the performance standard "is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts." *Id.* at 707 (Marshall, J., dissenting).

168 *Id.* at 707-08 (Marshall, J., dissenting) (citation omitted).

mining what constitutes "professional" representation, the development of more detailed standards in evaluating counsel performance is problematic.[169] Therefore, the seemingly "objective" nature of the "reasonably effective" test for counsel performance is, in actuality, too subjective to sustain uniform application.

Moreover, the requirement that the defendant establish prejudice[170] on account of his attorney's assistance is equally objectionable. For instance, it is often difficult to determine whether someone claiming ineffective assistance would have fared better had the attorney been more competent by a mere review of the appellate record.[171] These difficulties are further enhanced by the possibility that such evidence, which otherwise would have been contained in the record, is missing as a direct result of counsel's incompetence.[172] Based upon these impediments, it is unduly burdensome to require a defendant to establish prejudice where counsel has been shown to be incompetent.[173]

A major shortcoming of the *Whiteside* decision, therefore, was its strict adherence to the two-pronged standard set forth in *Strickland*. Presented with an opportunity to articulate uniform standards in resolving claims of ineffectiveness of counsel,[174] the majority chose to limit its holding to the facts of the case. Although removing from the ethical obligations of an attorney the continued representation of a perjury-determined client, the ruling in *Whiteside* did little in the way of adjudicating sixth amendment claims. Clearly, in the future, the Court must develop particularized standards that will ensure that all defendant's receive effective legal assistance.

James F. Mullen

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169 *Id.* at 708 (Marshall, J., dissenting).

170 *See supra* note 118 and accompanying text (discussing the prejudice standard of the two-pronged Strickland inquiry).

171 *See Strickland*, 466 U.S. at 710 (Marshall, J., dissenting). In *Strickland*, Justice Marshall recognized that, "it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well prepared lawyer." *Id.*

172 *Id.*

173 *Id.*

174 *See generally* Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L.REV. 233, 242-48 (1979) (reviewing decisions attempting to develop guidelines in assessing claims of ineffective assistance of counsel); Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After* United States v. Decoster, *93* HARV. L. REV. 752, 756-58 (1980).