ATTORNEY-CLIENT

TRUTH OR CONFIDENCES: EFFECTIVE ASSISTANCE OF COUNSEL AND CLIENT PERJURY—*NIX V. WHITESIDE*

INTRODUCTION

*"Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel."**

In *Nix v. Whiteside*,[1] the sixth amendment was the element casting varying hues on the question of client perjury.[2] It is axiomatic that lying is wrong.[3] However, *Whiteside* dealt with more than a client's attempt to lie.[4] *Whiteside* identified and prioritized elements at the very foundation of our legal system.[5] Those elements are the truth-seeking function of trials and an attorney's duty to protect client confidences.[6] Therefore, an analysis of *Whiteside* requires one to decide whether the Court was justified in placing the truth-seeking function of trials over the protection of client confidences.

The *Whiteside* opinion resolved an ineffective assistance of counsel claim and proposed to offer guidance for the attorney faced with client perjury.[7] The problem of a client's proposal to commit perjury has long been a quagmire of the law.[8] *Whiteside* met the problem by

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* Nix. v. Whiteside, 106 S. Ct. 988, 1007 (1986) (Stevens, J., concurring).

1. 106 S. Ct. 988 (1986).
2. *Id.* at 991.
3. *Exodus* 20:16.
4. *See generally Whiteside*, 106 S. Ct. 993-99.
5. *See id.*
6. *See id.*
7. *Id.* at 992, 994-96.
8. *See generally* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 27-41 (1975) (setting forth Professor Freedman's views on proposed client perjury, arguing that client confidences are supreme to the truth-seeking function of trials); Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 MO. L. REV. 601, 603-23 (1979) (analyzing client perjury in relation to Missouri law); Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332, 343-51 (1976) (including various examples of possible situations in which a conflict might arise and how an attorney should analyze each problem); Erickson, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client*, 59 DEN. L.J. 75, 91 (1981) (arguing that the truth-seeking function of trials is supreme to client confidences); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1475-78 (1966) (arguing that it is ethical for a lawyer to allow a client to commit perjury); Noonan, *The Purposes of Advocacy and the Limits of Confidentaility*, 64 MICH. L. REV. 1485, 1491-92 (1966) (specifically arguing against the theories set forth in Professor Freedman's article); Rieger, *Client Perjury, A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121, 123-25

analyzing the question of whether an attorney's attempt to meet ethical obligations interferes with a client's right to effective assistance of counsel.[9] Specifically, *Whiteside* held that an attorney does not violate the sixth amendment requirement of effective assistance of counsel by threatening to withdraw from the case and reveal a client's intention to commit perjury.[10]

While attorneys are expected to uphold the truth-seeking function of our judicial system, they are also expected to protect client confidences.[11] An attorney is an officer of the court, and as such is expected to do everything possible to uphold the integrity of the judicial system.[12] Yet, as a client's representative, an attorney is under a conflicting duty to preserve client confidences revealed in the preparation of the client's case.[13] The sixth amendment adds to the dilemma by guaranteeing a criminal defendant the right to effective assistance of counsel.[14] The sixth amendment complicates the formula because an attorney attempting to meet the obligation of an officer of the court runs the risk of rendering his assistance ineffective.[15]

This Note reviews the history of a criminal defendant's right to testify at the defendant's own trial and whether this right extends to testifying falsely.[16] It then examines the development of the test for judging ineffective assistance of counsel claims, culminating with an in-depth look at *Strickland v. Washington*.[17] Next, this Note explores the conflict between the truth-seeking function of our judicial system and client confidences.[18] Finally, this Note analyzes the *Whiteside* Court's application of the *Strickland* standard and discusses the probable course of future client perjury cases.[19]

(1985) (including a thorough and updated analysis of American Bar Association regulations); Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 848-53 (1977) (reviewing past cases dealing with client perjury).

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

10. *Id.* at 997.

11. Dunetz, *Surprise Client Perjury: Some Questions and Proposed Solutions to an Old Problem*, 29 N.Y.L. SCH. L. REV. 407, 409 (1984).

12. Note, *The Perjury Dilemma in an Adversary System*, 82 DICK. L. REV. 545, 546-49 (1977) (stating that the two conflicting policies are an attorney's duty as an officer of the court to reveal a client's intent to lie and an attorney's duty to preserve client confidences).

13. MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.6 comment (1983) (stating that "[a] fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation.").

14. Rieger, *supra* note 8, at 128.

15. *Id.*

16. *See infra* notes 65-75 and accompanying text.

17. 466 U.S. 688 (1984). *See infra* notes 76-117 and accompanying text.

18. *See infra* notes 118-52 and accompanying text.

19. *See infra* notes 153-81 and accompanying text.

FACTS AND HOLDING

On the evening of February 8, 1977, Emanuel Whiteside and two associates went to the apartment of Calvin Love in Cedar Rapids, Iowa.[20] Love was lying in his bed as Whiteside spoke to him about buying marijuana.[21] Before long, Love and Whiteside became embroiled in an argument over the drug sale.[22] During the argument, Love told his girlfriend to get his "piece."[23] Later, Love grabbed for something under his pillow and moved toward Whiteside.[24] As Love neared him, Whiteside pulled a knife and stabbed Love in the chest, inflicting a fatal wound.[25]

The State of Iowa charged Whiteside with the murder of Calvin Love and appointed Gary L. Robinson as Whiteside's counsel.[26] During preparation for Whiteside's defense, Whiteside told Robinson that he had never actually seen a gun, but he felt sure that Love was reaching for a gun.[27] Robinson's interviews with the eyewitnesses revealed that no one at the scene of the crime had seen a gun, nor did a subsequent police search of the apartment uncover a gun.[28]

Whiteside's story remained unchanged until one week before trial.[29] During a practice question session, Whiteside suddenly maintained that he had seen something "metallic" in Love's hand.[30] When asked about the change in his story, Whiteside said that "in Howard Cook's case there was a gun. If I don't say I saw a gun I'm dead."[31] Robinson explained to Whiteside that the actual presence of a gun was not necessary for his defense.[32] Robinson said that he could not allow Whiteside to testify falsely because, as an officer of the court,

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20. Nix. v. Whiteside, 106 S. Ct. 988, 991 (1986).

21. *Id.*

22. Brief for the Petitioner at 4, Nix. v. Whiteside, 106 S. Ct. 988 (1986).

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

24. *Id.*

25. *Id.*

26. *Id.* Originally, the Iowa District Court appointed Thomas M. Horan and Timothy S. White to represent Whiteside. Brief for the Petitioner at 4, *Whiteside*. Whiteside objected to their appointment and asked for Thomas L. Koehler to replace them. *Id.* However, Koehler was already representing Derrick Doolin, who was also present at the time of Love's murder. *Id.* at 4-5. After two court hearings, Whiteside was persuaded to accept Gary L. Robinson as counsel. Robinson's associate was Donna Paulsen. *Id.* at 5.

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

28. *Id.* After the initial police search, Love's relatives removed all his possessions from the apartment. *Id.*

29. Brief for the Petitioner at 5, *Whiteside*.

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

31. *Id.*

32. *Id.* at 992. Robinson reasoned that Whiteside's best defense was the theory that Whiteside had mistakenly thought that Love was armed. Brief for the Petitioner at 23, *Whiteside*.

he could not suborn perjury.[33] Robinson advised Whiteside that if he committed perjury, it would be Robinson's duty to advise the court, and also that Robinson might be required to impeach Whiteside's testimony.[34] Robinson also told Whiteside that if Robinson insisted on committing perjury, he would ask the court for permission to withdraw from the case.[35] At his trial, Whiteside testified that he knew Love had a gun; he admitted, however, on cross examination that he had not actually seen Love with a gun.[36]

Whiteside was convicted of second-degree murder.[37] Whiteside appealed the verdict, claiming that Robinson's threat to withdraw deprived him of his constitutional right to a fair trial.[38] The Supreme Court of Iowa affirmed the conviction and praised Robinson for the high ethical manner in which he handled the matter.[39] Whiteside then petitioned for a writ of habeas corpus in the United States District Court for the Southern District of Iowa, alleging that he had been denied effective assistance of counsel.[40] The district court denied the writ, holding that because there is no constitutional right to perjure oneself, Whiteside was not denied effective assistance of counsel.[41]

The Eighth Circuit reversed the district court and remanded the case with directions to grant the petition.[42] The Eighth Circuit, using the "effective representation" standards set forth in *Strickland v. Washington*,[43] held that Robinson's warnings to withdraw and inform the court of Whiteside's perjury violated Whiteside's sixth

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

34. *Id.*

35. *Id.* Whiteside's rendention of the pretrial meeting was hazier:

> Question: And as you went over the questions, did the two of you come into conflict with regard to whether or not there was a weapon?
> Answer: I couldn't-I couldn't say a conflict. But I got the impression at one time that maybe if I didn't go along with-with what was happening, that it was no gun being involved, maybe that he will pull out of my trial.

Id. at 992 n.2 (quoting Petition for Certiorari at A-70 app., Nix v. Whiteside, 106 S. Ct. 988 (1986)).

36. *Id.* at 992.

37. *Id.*

38. *Id.* Whiteside's claim that he was denied his due process right to a fair trial was accepted in the Eighth Circuit Court of Appeals, but the claim was dismissed by the Supreme Court. Whiteside v. Scurr, 744 F.2d 1323, 1328 (8th Cir. 1984), *rev'd sub nom.* Nix v. Whiteside, 106 S. Ct. 998, 999 (1986).

39. State v. Whiteside, 272 N.W.2d 468, 471 (Iowa 1978), *rev'd sub nom.* Whiteside v. Scurr, 744 F.2d 1323 (8th Cir.), *reh'g denied*, 750 F.2d 713 (8th Cir. 1984), *rev'd sub nom.* Nix v. Whiteside, 106 S. Ct. 998 (1986).

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

41. Brief for the Petitioner at 7, *Whiteside*.

42. *Whiteside*, 744 F.2d 1323, 1331 (8th Cir.), *reh'g denied*, 750 F.2d 713 (8th Cir. 1984), *rev'd sub nom.* Nix v. Whiteside, 106 S. Ct. 998 (1986).

43. 466 U.S. 668, 687 (1984).

amendment right to effective assistance of counsel.[44] Further, the Eighth Circuit held that under the second strand of the *Strickland* test, Robinson's actions were presumptively prejudicial to Whiteside's defense.[45] Subsequently, a petition for rehearing was denied.[46]

The United States Supreme Court granted certiorari and reversed the Eighth Circuit's grant of habeas corpus.[47] Chief Justice Burger wrote the majority opinion, joined by Justices White, Powell, Rehnquist, and O'Connor.[48] Under an application of the *Strickland* standard, the Court held that Robinson's actions fell within the sixth amendment range of acceptable professional responses to threatened client perjury, and that Robinson's conduct could not have established the requisite prejudice required for relief under the second strand of *Strickland*.[49]

In order to determine whether counsel's conduct fell within the wide range of professional responses acceptable under the sixth amendment, the Court set out an elaborate analysis of various rules and norms which govern threatened client perjury.[50] The majority concluded that the duty of counsel is limited to conduct that is compatible with the nature of a trial as a search for truth.[51] Therefore, the Court reasoned that an attorney's duty of confidentiality, which totally covers the client's admission of guilt, does not extend to a client's announced plans to engage in perjury.[52] The Court also held that Robinson's conduct could not establish the type of prejudice required for relief under the second prong of the *Strickland* test.[53]

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44. *Whiteside*, 744 F.2d at 1329, 1330. Under the *Strickland* test, in order for a movant to obtain relief by way of federal habeas corpus on a claim of ineffective assistance of counsel under the sixth amendment, the movant must establish both attorney error and prejudice. *Strickland*, 466 U.S. at 687. Under the first prong, the inquiry is whether the attorney's conduct was "reasonably effective." *Id.* at 687, 688. Under the second prong, it must be established that the claimed lapses in counsel's performance rendered the trial unfair so as to "undermine confidence in the outcome" of the trial. *Id.* at 694.

45. *Whiteside*, 744 F.2d at 1330. Prejudice is presumed when counsel represents conflicting interests which adversely affect the counsel's performance. *Id.* *See also infra* notes 112-16 and accompanying text (discussing instances in which presumptive prejudice arises).

46. Whiteside v. Scurr, 750 F.2d 713, 714 (8th Cir. 1984), *rev'd sub nom.* Nix v. Whiteside, 106 S. Ct. 988 (1986).

47. *Whiteside*, 106 S. Ct. at 991, 999.

48. *Id.* at 990.

49. *Id.* at 997, 999.

50. *See id.* at 993-97 (attempting to meet the first prong of the *Strickland* test).

51. *Id.* at 998.

52. *Id.* at 998-99.

53. *Id.* at 999. Under Cuyler v. Sullivan, 446 U.S. 335 (1980), it was ruled that a defendant can obtain relief without showing a specific prejudicial default by counsel, provided that the attorney has "actively represented conflicting interest." *Id.* at 350. However, in *Whiteside*, the Court reversed the circuit court's statement that *Cuyler* was applicable. The Court stated that *Whiteside* did not remotely involve the kind of

Justices Brennan and Stevens filed separate concurring opinions,[54] and Justice Blackmun filed a concurring opinion joined by Justices Brennan, Marshall, and Stevens.[55] Justice Brennan's separate opinion scolded the majority for attempting to set ethical guidelines for lawyers practicing in state courts.[56] Justice Brennan stated that the majority's treatment of the question of the correct response to client perjury was "pure discourse without force of law."[57]

Justice Blackmun's concurring opinion expressed the view that the majority had misapplied the *Strickland* test.[58] Justice Blackmun argued that the prejudice prong of the *Strickland* test should have been applied before the attorney-error prong.[59] Justice Blackmun reasoned that by first applying the prejudice prong, the Court could have dispensed with the case without reaching the attorney-error prong.[60] Therefore, the Court could have avoided unnecessary federal interference in state bar regulation.[61] However, Justice Blackmun agreed with the majority's conclusion that Whiteside's truthful testimony could not have prejudiced the result of his trial and that, therefore, Whiteside failed to make out a case for ineffective assistance of counsel.[62]

Justice Stevens' separate concurring opinion cautioned the majority that the Court should not set hard-and-fast guidelines for attorneys faced with client perjury, because it is often difficult for an attorney to distinguish between proposed perjury and innocent recollection.[63] In defining the problem, Justice Stevens eloquently stated:

> Justice Holmes taught us that a word is but the skin of a living thought. A "fact" may also have a life of its own. From the perspective of an appellate judge, after a case has been tried and the evidence has been sifted by another judge, a particular fact may be as clear and certain as a piece of crystal or a small diamond. A trial lawyer, however, must often deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a differ-

conflict of interests dealt with in *Cuyler* because Whiteside's truthful testimony could not have prejudiced the result of his trial. *Whiteside*, 106 S. Ct. at 999.

54. *Whiteside*, 106 S. Ct. at 1000 (Brennan, J., concurring); *Id.* at 1007 (Stevens, J., concurring).

55. *Id.* at 1000-07 (Blackmun, J. concurring).

56. *Id.* at 1000 (Brennan, J., concurring). Justice Brennan reasoned that the Supreme Court had no power to set ethical guidelines for lawyers because such questions should be controlled by state bars. *See id.*

57. *Id.*

58. *Id.* at 1003 (Blackmun, J., concurring).

59. *Id.*

60. *Id.*

61. *Id.* at 1006 (Blackmun, J., concurring).

62. *See id.*

63. *Id.* at 1007 (Stevens, J., concurring).

ent hue in a handful of gravel.[64]

BACKGROUND

Accused criminal defendants have not always enjoyed the right to testify in their own defense.[65] The first indication of such a right began to occur in the latter part of the preceding century.[66] For about the next one hundred years, the right to testify gained acceptance under the label of the right to be heard.[67] In fact, by the end of the nineteenth century, most states allowed criminal defendants to testify at their own trials.[68] It was not until 1971, however, that the United States Supreme Court finally recognized in dictum in *Harris v. New York*[69] that all criminal defendants have a "right to testify" in their own defense.[70] Since *Harris*, the Supreme Court has come to recognize that the right to testify exists.[71]

Recently, Supreme Court cases have indicated that the right to testify does not include the right to testify falsely.[72] For example, in *Dennis v. United States*,[73] the Court opined that a claim of unconsti-

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64. *Id.*

65. Rieger, *supra* note 8, at 129. Apparently, many courts reasoned that the accused's personal interests were too great to expect the accused to testify truthfully. *See Whiteside*, 106 S. Ct. at 993 (stating that "[u]ntil the latter part of the preceding century, criminal defendants in this country, as at common law, were considered to be disqualified from giving sworn testimony at their own trial by reason of their interest as a party to the case."). *See also* M. FREEDMAN, *supra* note 8, at 31 (stating that "it is simply too much to expect of a human being caught up in the criminal process and facing loss of liberty and the horrors of imprisonment, not to attempt to lie to avoid that penalty.").

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

67. Rieger, *supra* note 8, at 129.

68. *Whiteside*, 106 S. Ct. at 993. *See also* Thayer, *A Chapter of Legal History in Massachusetts*, 9 HARV. L. REV. 1, 12 (1895) (explaining the evolution of a criminal defendant's right to testify at trial).

69. 401 U.S. 222 (1971).

70. *Id.* at 225.

71. *See* Brooks v. Tennessee, 406 U.S. 605, 612 (1972) (stating that "[w]hether the defendant is to testify is an important tactical decision as well as a matter of constitutional right."). *See also* Jones v. Barnes, 463 U.S. 745, 751 (1983) (opining that "the accused has the ultimate authority to make certain fundamental decisions regarding the case, [such as] . . . whether to . . . testify in his or her own behalf. . . ."); Harris v. New York, 401 U.S. 222, 225 (1971) (stating that "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so.").

The Supreme Court has also suggested that there is a due process right for a criminal defendant to testify under the fifth amendment privilege against compelled testimony. *Whiteside*, 106 S. Ct. at 993. The fifth amendment of the United States Constitution provides: "No person 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 . . . ." U.S. CONST. amend V. The fourteenth amendment of the United States Constitution provides: "No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." *Id.* amend XIV, § 1.

72. *Harris*, 401 U.S. at 225.

73. 384 U.S. 855 (1966).

tutionality will not be allowed to excuse attempts at fraud and deceit.[74] After criminal defendants elect such courses as a means of self-help, they may not escape their destiny by urging that their conduct be excused because the statute that they sought to evade was unconstitutional.[75]

The sixth amendment assures a criminal defendant of the right to assistance of counsel.[76] The Supreme Court has interpreted the sixth amendment guarantee of the right to *effective* assistance of counsel.[77] For many years, the Supreme Court left the federal appellate courts without any clear standards to follow when judging claims of ineffective assistance of counsel.[78] As a result, the various circuit courts developed a number of their own unique and sometimes conflicting tests for judging such claims.[79] The First, Second, Ninth, and Tenth Circuits used the "farce or mockery" test when judging effective representation.[80] The Third and Fourth Circuits used a "normal

74. *Id.* at 867.

75. United States v. Knox, 396 U.S. 77, 79 (1969). *See also* McKissick v. United States, 379 F.2d 754 (5th Cir. 1967). The Fifth Circuit stated:

> If appellant told his attorney that he had committed perjury, that offense was in effect a continuing one so long as allowed to remain in the record to influene the jury's verdict. Whether appellant did or did not specifically authorize or direct his attorney to make it known to the court, or even directed it not be made known, he could not abrogate the attorney's discharge of his professional, ethical and public duty to report it. The statement was good cause to the attorney to withdraw from the case, and he would have been subject to discipline had he continued in the defense without making a report to the court. The attorney not only could, but was obligated to, make such disclosure to the court as necessary to withdraw the perjured testimony from the consideration of the jury. This was essential for good judicial administration and to protect the public.

Id. at 761. *But see* Rieger, *supra* note 8, at 142-43 (contending that the right to be heard should include the right to give false testimony).

76. U.S. CONST. AMEND. VI. The sixth amendment reads: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." *See also* Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (applying assistance of counsel in felony cases to the states through the fourteenth amendment).

77. *See* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (stating that "[i]t has long been recognized that the right to counsel is the right to effective assistance of counsel."); Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (contending that the right to counsel is meaningless without a competent advocate).

78. McQueen v. Swenson, 498 F.2d 207, 214 (8th Cir. 1974) (stating that "[t]he Supreme Court . . . has never enunciated any clear standards for courts to follow in passing on claims of ineffective assistance of counsel. As a result, circuit courts, left without guidance, have groped for the correct prescription to apply.").

79. *See* Note, *Ineffective Assistance of Counsel Claims: Toward A Uniform Framework For Review*, 50 MO. L. REV. 651, 651 (1985); 5 AM. JUR. PROOF OF FACTS 2D *Ineffective Assistance of Counsel* §§ 2, 13 (1975).

80. *See, e.g.*, Li Puma v. Commissioner of Dep't of Corrections, 560 F.2d 84, 90 (2d Cir. 1977) (opining that ineffective representation is denoted by a trial with such woefully inadequate proceedings as to be a farce and mockery of justice); United States v. Madrid Ramirez, 535 F.2d 125, 129 (1st Cir. 1976) (stating that the standard of ineffective counsel is a trial which is a sham or mockery); United States v. Larsen, 525 F.2d

competency" test.[81] The Fifth and Sixth Circuits recognized the "reasonably likely to render and rendering reasonably effective assistance" test.[82] The Seventh Circuit used a "minimum professional standard" test.[83] Finally, the Eighth Circuit recognized a two-step process in determining ineffectiveness claims.[84] The two steps were: first, whether the attorney failed to exercise customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances, and second, whether the defendant was prejudiced by the action of the attorney.[85] By 1983, some form of "reasonable attorney standard" was used by all the federal circuit courts.[86] Yet there remained, within this apparent unanimity, disagreement regarding whether the defendant should be required to prove that with the proper assistance of counsel the defendant would have won the case.[87]

STRICKLAND V. WASHINGTON: A UNIFIED APPROACH FOR TESTING INEFFECTIVE ASSISTANCE CLAIMS

Strickland v. Washington[88] was the Supreme Court's attempt to put an end to the ambiguity surrounding proposed client perjury by constructing a unified approach for testing ineffective assistance of

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444, 449 (10th Cir. 1975) (stating that there was effective assitance of counsel because the trial was not a sham or mockery), *cert. denied*, 423 U.S. 1075 (1976); Milligan v. Stone, 424 F. Supp. 1088, 1091 (S.D. Cal. 1976) (setting the standard for ineffective representation to be so ineffective as to be shocking to the conscience of the court, or a sham or mockery of a trial), *aff'd*, 548 F.2d 878, (9th Cir.), *cert. denied*, 432 U.S. 908 (1977).

81. United States *ex rel.* Johnson v. Johnson, 531 F.2d 169, 174 (3d Cir.) (citing as a rule that attorneys are expected to practice with the skill and knowledge required of attorneys practicing within their geographic areas), *cert. denied*, 425 U.S. 997 (1976); Marzullo v. Maryland, 561 F.2d 540, 543-44 (4th Cir. 1977) (adopting the range of competency standard), *cert. denied*, 435 U.S. 1011 (1978). The "normal competency" test required simply that the attorney's defense of the client had to fall within the standards expected of the average attorney. *Marzullo*, 561 F.2d at 544.

82. Howard v. Henderson, 519 F.2d 1176, 1178 (5th Cir.) (relating that the sixth and fourteenth amendments require the standard of reasonable likeliness to render and the rendering of reasonably effective assistance), *cert. denied*, 423 U.S. 1036 (1975); United States v. Toney, 527 F.2d 716, 720 (6th Cir. 1975) (stating that the Sixth Circuit's test for effective assistance of counsel is whether counsel is reasonably likely to render and does render reasonably effective assistance), *cert. denied*, 429 U.S. 838 (1976).

83. United States *ex rel.* Williams v. Brown, 721 F.2d 1115, 1120-21 (7th Cir. 1983) (reasoning that serious attorney error renders a counsel's assistance ineffective).

84. Agee v. Wyrick, 4801 F. Supp. 24, 26 (W.D. Mo.) (setting out the ineffective assistance two-step test in full), *aff'd*, 610 F.2d 498 (8th Cir. 1979).

85. *Id.*

86. Note, *supra* note 79, at 657.

87. *See id.* at 658.

88. 466 U.S. 668 (1984).

counsel claims.[89] In *Strickland*, the accused, David L. Washington, had during a ten-day period planned and committed numerous crimes, including three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft.[90] He was indicted for several of the crimes, and an experienced criminal lawyer was appointed to represent him.[91] Counsel made various recommendations to the accused, but was repeatedly ignored.[92] At the sentence hearing, Washington's counsel asserted several alternative defenses to convince the judge that the death penalty was not warranted.[93] Yet, the trial judge found the murders to be especially heinous and cruel, sentencing Washington to death.[94] On appeal, the Florida Supreme Court denied relief.[95] The defendant then filed a writ of habeas corpus with the federal district court.[96] The writ included a claim of ineffective assistance of counsel.[97] The district court denied relief, but the Eleventh Circuit Court of Appeals announced a new set of standards to be used in judging ineffective assistance of counsel claims, and the court reversed and remanded the case for an application of the new test.[98] Ironically, the Eleventh Circuit's new test was never used because the Supreme Court granted certiorari in order to decide which standards the sixth amendment required a court to use when judging ineffective assistance of counsel claims.[99]

The Supreme Court, reviewing tests used by various federal circuit courts, developed a uniform analysis for judging ineffective assistance claims.[100] Under the *Strickland* analysis, a criminal defendant's claim of ineffective assistance is judged by using a two-pronged test.[101] The first prong of the test requires that the defendant prove that the counsel's representation fell below an objective standard of reasonableness.[102] The Court stated that the customary practice as reflected by American Bar Association Standards and other such standards were guides, but only guides, in determining whether

89. *See* Note, *supra* note 79, at 651-52 (analyzing the reasoning of *Strickland*).
90. *Strickland*, 466 U.S. at 671-72.
91. *Id.* at 672.
92. *Id.*
93. *Id.* at 673-74.
94. Note, *supra* note 79, at 653.
95. Washington v. State, 397 So. 2d 285, 287 (Fla. 1981).
96. *Strickland*, 466 U.S. at 679.
97. *Id.* at 678.
98. *Id.* at 682.
99. *Id.* at 682, 687.
100. *See* Note, *supra* note 79, at 651, 658.
101. *Strickland*, 446 U.S. at 687.
102. *Id.*

an attorney acted reasonably.[103] Moreover, the Court noted that because of the infinite number of appropriate ways with which any particular case could be defended, the presumption must be that counsel's performance was reasonable.[104]

The second prong of the test requires that the defendant show that there is a reasonable probability that if the attorney would not have made the errrors complained of, the result of the proceeding would have been different.[105] A reasonable probability was defined by the Court as "a probability sufficient to undermine confidence in the [trial's] outcome."[106]

The Court's two-prong analysis was not meant to be a rigid test.[107] The Court, in deciding *Strickland*, emphasized that the ultimate inquiry should be on the fundamental fairness of the challenged proceeding.[108] As a result of those beliefs, the Court indicated that it would allow various approaches to the newly created standards.[109] The Court stated:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.[110]

The Court, in deciding *Strickland*, specificially stated that if it was easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.[111]

The Court also stated that there are certain cases in which prejudice could be presumed.[112] The Court reasoned that in some cases prejudice would be so likely that the inquiry into prejudice would not be worth the cost.[113] As examples of cases that warranted presumed prejudice, the Court listed actual or constructive denial of the assistance of counsel,[114] state interference with counsel's

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103. *Id.* at 688.
104. *Id.* at 688-89. Further, the Court stated that "[i]n any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688.
105. *Id.* at 694.
106. *Id.*
107. *Id.* at 696.
108. *Id.*
109. *See id.* at 696-97.
110. *Id.* at 697.
111. *Id.*
112. *Id.* at 692.
113. *Id.*
114. *Id. See also* Geders v. United States, 425 U.S. 80, 91 (1976) (holding that a trial judge's order to a defendant not to consult with counsel during a regular overnight recess violated the defendant's sixth amendment right to counsel).

assistance,[115] and attorneys burdened by an actual conflict of interest.[116]

After creating the structure for analysis, the *Strickland* Court applied the analysis to the facts of the case and held that the defendant failed to prove that counsel's performance fell outside the range of required reasonableness and that the defendant failed to prove sufficient prejudice to justify setting aside his death sentence.[117]

TRUTH AND CONFIDENCES

In the past, when a criminal defendant revealed an intention to commit perjury, which the attorney knew to be such because of prior confidences, the defense attorney was forced to walk a tightrope between two conflicting policies.[118] As an officer of the court, an attorney has a duty to uphold the integrity of our judicial system.[119] This responsibility includes the duty to ensure that only truthful testimony is presented.[120] On the other hand, as client's counsel, an attorney is under a conflicting duty to preserve information relating to a client's representation.[121] Therefore, if an attorney revealed to the

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115. *Strickland*, 466 U.S. at 692. *See also* Massiah v. United States, 377 U.S. 201, 206 (1964) (holding that when the government deliberately elicited incriminating evidence from the defendant in the absence of counsel and used it against him at trial, the government violated the defendant's sixth amendment rights).

116. *Strickland*, 466 U.S at 692. *See also* Cuyler v. Sullivan, 446 U.S. 344, 345, 349 (deciding that multiple representation was an actual conflict of interest which adversely affected a lawyer's performance and rendered the assistance ineffective).

117. *Strickland*, 466 U.S. at 698-99.

118. *See generally* Comment, *The Perjury Dilemma in an Adversary System*, 82 DICK. L. REV. 545, 546-49 (1977) (stating that the two conflicting policies are an attorney's duty as an officer of the court to reveal a client's intent to lie and an attorney's duty to preserve client confidences).

119. *Id.* at 549.

120. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A) (4) (1980). Subsection (A) of Disciplinary Rule 7-102 provides:

> (A) In his representation of a client, a lawyer shall not:
>
> . . . .
>
> (4) Knowingly use perjured testimony or false evidence.
>
> (5) Knowingly make a false statment of law or fact.
>
> (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
>
> (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

Id. DR 7-102 (A)(4)-(7) (footnote omitted).

121. *See id.* DR 4-101(B) (1980). Subsections (B) and (C) of Disciplinary Rule 4-101 provide:

> (B) except when permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

court the intention of a client to commit perjury, the attorney ran the risk of betraying the client's confidences.[122] If an attorney, however, elected to keep the client's perjury a secret and was discovered, the attorney ran the risk of suborning perjury.[123]

Whenever the truth-seeking function of our judicial system has come into conflict with an attorney's duty to provide zealous representation for a client, both policy considerations have had their respective advocates.[124] Professor Monroe H. Freedman[125] and the Association of Trial Lawyers of America lend strong support for the zealous representation of a client regardless of a client's intention to commit perjury.[126] Professor Freedman believes that a criminal defendant would be reluctant to tell counsel the full story if the defendant knew that counsel could be forced to reveal their communications.[127] Further, without full knowledge of what the criminal defendant actually did, a lawyer would not be able to properly defend the client.[128] As a result, the criminal adversary system would be impaired.[129] One author, in summing up Professor Freedman's view, stated that an attorney is merely a hired gun who, if necessary, must use all of the attorney's skill to help perpetrate a fraud against the members of the jury.[130]

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

Id. DR 4-101(B)-(C) (footnotes omitted).

122. *Id.* DR 4-101(B)-(C).

123. *See supra* note 120.

124. *Compare* M. FREEDMAN, *supra* note 8, at 27-41 (1975) (arguing that client confidences are supreme to the truth-seeking function of trials) *with* Noonan, *supra* note 8, at 1491-92 (arguing specifically against the theories set forth in Professor Freedman's book).

125. M. FREEDMAN, *supra* note 8, at 27-41. At the time Professor Freedman wrote his book on lawyers' ethics, he was Dean and Professor of Law at the Hofstra University School of Law. *Id.* at —.

126. *See* THE AMERICAN LAWYER'S CODE OF CONDUCT Rule 1.2 (Revised Draft, May, 1982), *reprinted in* Cmm'n on Professional Responsibility, *The American Lawyer's Code of Conduct*, 18 TRIAL 55, 59 (July, 1982).

127. M. FREEDMAN, *supra* note 8, at 5.

128. M. FREEDMAN, *supra* note 8, at 27.

129. M. FREEDMAN, *supra* note 8, at 8.

130. Dunetz, *Surprise Client Perjury: Some Questions and Proposed Solutions to An Old Problem*, 29 N.Y.L. SCH. L. REV. 407, 428 (1984). Dunetz, quoting Lord Brougham, wrote of an attorney's duty to a client:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and ex-

The truth-seeking function theory of our judicial system also has its advocates. The Supreme Court in *In re Michael*[131] stated that "perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth."[132] Professor Noonan has also expressed the opinion that the attorny-client confidentiality rule is a "barrier to the search for truth and the attainment of justice."[133] Professor Noonan argued that the main purpose of a trial is that of a search for truth.[134] When a criminal defendant lies on the stand, the defendant frustrates the purpose of the trial.[135]

Upholding a trial's truth-seeking function results in increasing the public's confidence in the criminal justice system.[136] Professor Wolfram asserted that the "[u]se of the adversary system for the adjudication of disputes is predicated on a belief that the system enhances the social and political acceptability of decisions."[137]

Over the years, the American Bar Association ("ABA") has struggled with the problem of client perjury.[138] However, because there are divided opinions within the ABA regarding the proper resolution of proposed client perjury, the rules that the ABA have passed reflect this infighting.[139] For example, the 1908 ABA Canons of Professional Ethics contained a Canon which was in direct conflict with its following opinion.[140] Canon 37 provided that "[t]he announced intention of a client to commit a crime is not included within the confidences which [an attorney] is bound to respect. [The attorney] may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened."[141] Yet, the Com-

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> pedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

Id. at 421-22 (quoting 2 Trial of Queen Caroline 8 (1921)).

131. 326 U.S. 224 (1945).

132. *Id.* at 227.

133. Noonan, *supra* note 8, at 1485. At the time Professor Noonan wrote his article, he was a Professor of Law at the University of Notre Dame Law School. *Id.*

134. *See id.* at 1492.

135. *Id.* at 1488.

136. *See In re* Winship, 397 U.S. 358, 364 (1970) (stating that the reasonable-doubt standard in criminal law commands the respect and confidence of the community).

137. *Comment, supra* note 8, at 833. At the time Professor Wolfram wrote this article, he was Professor of Law at the University of Minnesota Law School. *Id.* at 809.

138. Dunetz, *supra* note 11, at 408.

139. *See id.* at 408-09.

140. ABA Comm. on Professional Ethics and Grievances, Op. 287, at 36, 38 (1957) (reprinting CANONS OF PROFESSIONAL ETHICS Canon 37 (1937); ABA Comm. on Professional Ethics and Grievances, Op. 287 (1953)).

141. *Id.* at 36.

mittee on Professional Ethics and Grievances in Opinion 287, interpreting Canon 37, stated that "it was the duty of attorneys not to disclose the perjury of their clients when that information was revealed to the attorney in confidence."[142]

In addition to the Canons of Professional Ethics, the ABA promulgated the Model Code of Professional Responsibility.[143] However, the new rules did not clarify the existing dilemma created by Cannon 37 and Opinion 287. Disciplinary Rule ("DR") 4-101(B) requires a lawyer to protect client confidences,[144] while DR 7-102(A) prohibits attorneys from knowingly using perjured testimony or false evidence.[145] Recently, as a substitute for the ABA Model Code of Professional Responsibility, the ABA adopted the Model Rules of Professional Conduct.[146] The Model Rules specifically address the problem of client perjury in Rule 3.3(a)(4).[147] Rule 3.3(a)(4) provides that a lawyer may not offer evidence that the lawyer knows to be false.[148] However, this rule is further conditioned in the comment to Rule 3.3.[149] The comment specifically recognizes that there is a dispute concerning an attorney's obligation if a client cannot be persuaded to tell the truth.[150] The comment then explains that, in certain jurisdictions, constitutional provisions for due process and the right to counsel in criminal cases might require that counsel present an accused as a witness even if the accused wishes to testify falsely.[151] As a result, the ABA Model Rules offer little practical guidance for an attorney faced with the client perjury dilemma.[152]

ANALYSIS

In *Whiteside*, all nine members of the United States Supreme Court agreed that *Strickland v. Washington*[153] was the proper standard for judging the ineffective assistance of counsel claim.[154] How-

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142. *Id.* at 38.
143. Rieger, *supra* note 8, at 121 n.2.
144. *See supra* note 121.
145. *See supra* note 120.
146. *See* MODEL RULES OF PROFESSIONAL CONDUCT (1983).
147. *Id.* Rule 3.3(a)(4) (1983). Note that the rule seemingly leaves an option to the attorney whether to reveal the client's perjury. *See id.*
148. *Id.*
149. *Id.* Rule 3.3 comment (1983).
150. *Id.*
151. *Id.*
152. *See* Comment, *Lying Clients and Legal Ethics: The Attorney's Unsolved Dilemma*, 16 CREIGHTON L. REV. 487, 507 (1983). *See also* Rieger, *supra* note 8, at 123 (concluding that the ABA ethical rules and standards provide little guidance for attorneys dealing with proposed client perjury).
153. 466 U.S. 668 (1983).
154. Nix v. Whiteside, 106 S. Ct. 988, 993 (1986); *Id.* at 1003 (Blackmun, J., concurring).

ever, members of the Court filed concurring opinions because they did not agree with the majority's interpretation and application of *Strickland*.[155] The majority interpreted *Strickland* to require an application of both the attorney-error prong and the prejudice prong of the standard.[156] In contrast, Justice Blackmun's concurring opinion argued that the case could have been disposed of by an application of only the prejudice prong.[157]

As between the two applications of the standard, Justice Blackmun's concurring opinion is most directly supported by *Strickland*.[158] *Strickland* specifically provided that "[i]f 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."[159] Justice Blackmun's concurring opinion reasoned that if the majority would have disposed of *Whiteside* through an application of only the prejudice prong of *Strickland*, it would not have had to decide whether Robinson met the appropriate ethical standards for an attorney faced with proposed client perjury.[160] The first prong of *Strickland*, the attorney-error prong, requires such an inquiry.[161] If Justice Blackmun's interpretation of the *Strickland* standard had been used the resulting benefit would have been the avoidance of unnecessary federal interference in state bar regulations.[162]

A reading of *Strickland* indicates that its two-prong test was meant to be felxible.[163] The principles set forth in *Strickland* were only intended to be guides for judging ineffectiveness claims.[164] The major concern of the inquiry was meant to be centered on the fundamental fairness of the challenged proceedings.[165] Yet, the majority's application of *Strickland* is by no means unsupportable. First, by using both prongs of the *Strickland* standard, the majority used *Strick-*

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155. *See supra* notes 54-55 and accompanying text.

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

157. *Id.* at 1003 (Blackmun, J., concurring).

158. *Compare id.* (quoting *Strickland*) *with Strickland*, 466 U.S. at 697 (stating that the attorney-error prong of the *Strickland* test should not be used when the case can be disposed of by using only the prejudice prong).

159. *Strickland*, 466 U.S. at 697.

160. *Whiteside*, 106 S. Ct. at 1003 (Blackmun, J., concurring).

161. *See supra* notes 102-04 and accompanying text.

162. *See supra* notes 59-63 and accompanying text. Justice Blackmun's concurring opinions expressed a deep concern for the approach the majority used because he opined that the majority was constitutionalizing standards for ethical conduct. *Whiteside*, 106 S. Ct. at 1000 (Brennan, J., concurring).

163. *Strickland*, 466 U.S. at 696 (stating that "[m]ost important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules.").

164. *Id.*

165. *Id.*

land as its guide.[166] Second, the majority showed its concern regarding the fundamental fairness of the challenged proceeding by scrutinizing whether Whiteside's attorney acted correctly under particular circumstances.[167] In deciding a sixth amendment issue, the Court was within its bounds in setting ethical guidelines for attorneys faced with proposed client perjury.[168] This is because the first prong of the standard makes it essential for the court to decide if Robinson's actions were acceptable under the sixth amendment.[169]

It seems logical to assume that at least one of the reasons why the majority used the approach that it did was that the two-prong approach allowed the Court to deal with the problem of proposed client perjury. The approach the Court used can be viewed as either a welcome response to a controversial issue or as unwanted meddling with the right of the states to set ethical guidelines for practice in their courts.[170] Nevertheless, even if the *Whiteside* decision is seen as meddling with state rights, it is difficult to deny that the court's rationale is not supported by the substance of *Strickland*.[171]

The Eighth Circuit had dealt with the ineffective assistance of counsel claim without attempting to set any type of ethical guidelines.[172] The Eighth Circuit's decision, however, was flawed in its assumption that Whiteside had a right to testify falsely.[173] The Eighth Circuit held that Robinson's conflicting duties to the court and to his client created a prejudicial conflict which, first, forced an impermissible choice between the right to counsel and the right to testify, and second, compromised client confidences because of Robinson's threat to disclose the contemplated perjury.[174] *Whiteside* revealed the flaw in the Eighth Circuit's reasoning by asking exactly of what Whiteside had been deprived. Whiteside was not deprived of his right to testify, because Whiteside had in fact testified at trial, but was merely deprived of a chance to testify falsely.[175] The Supreme Court has made it clear that there is no constitutional right to testify falsely.[176] Therefore, Robinson's warnings to Whiteside could not have forced

166. *Whiteside*, 106 S. Ct. at 993-94.
167. *Id.* at 994-97.
168. Whiteside v. Scurr, 744 F.2d 1323, 1330 (8th Cir. 1984) (stating that the Supreme Court of Iowa is the last word on all questions of state law, but it remains the duty of the United States Supreme Court to determine sixth amendment requirements), *rev'd sub nom.* Nix v. Whiteside, 106 S. Ct. 998 (1986)).
169. *See supra* notes 102-04 and accompanying text.
170. *See Whiteside*, 106 S. Ct. at 1000 (Brennan, J., concurring).
171. *See supra* notes 103-69 and accompanying text.
172. *Whiteside*, 744 F.2d at 1327.
173. *Whiteside*, 106 S. Ct. at 997.
174. *Whiteside*, 744 F.2d at 1329.
175. *See supra* notes 72-75 and accompanying text.
176. *Id.*

Whiteside into making an impermissible choice between his right to counsel and his right to testify because there was no permissible choice to testify falsely.[177]

Whiteside has by no means solved the entire problem of proposed client perjury. The reasoning in *Whiteside*, however, will no doubt serve as a guide to other courts who find themselves faced with a similar set of circumstances, despite Justice Brennan's view that the majority in *Whiteside*, as it pertains to the appropriate response to proposed client perjury, "is pure discourse without force of law," and that "[l]awyers, judges, bar associations, students and others should understand that the problem has not now been 'decided.' "[178] Indeed, the problem was not decided, but addressed.[179] For instance, it now seems likely that an attorney faced with proposed client perjury will be able to tell a client that the attorney will testify against the client without the fear of violating the client's sixth amendment rights.[180] However, *Whiteside*, in most cases, will only be able to serve as a guide because the circumstances surrounding client perjury cases tend to be so variable.[181] It seems likely that the Court will, in some future case challenging attorney conduct in the course of a state court trial, refine its decision in *Whiteside*. Most probably, the refinement will be in light of the truth-seeking function of our judicial system. In other words, client confidences will continue to be seen as secondary, and the truth-seeking function of the judicial system as primary.

CONCLUSION

Whiteside, while disregarding *Strickland's* suggested form of analysis, nevertheless followed *Strickland*'s substantive requirements. As Justice Blackmun's concurring opinion in *Whiteside* pointed out, *Strickland* suggested that for cases like *Whiteside*, only the prejudice prong of the dual *Strickland* standard needs to be applied. Yet, the majority in *Whiteside* applied both prongs of the standard. The majority's application of the *Strickland* standard was acceptable because the standards in *Strickland* were meant to be flexible. *Strickland* only required that the application of its standards adequately test the fundamental fairness of the challenged proceeding.

Whiteside, by applying both prongs of the standard, was able to

177. *Id.*
178. *Whiteside*, 106 S. Ct. at 1000 (Brennan, J., concurring).
179. *See id.* at 994-97.
180. *Id.* at 997.
181. *See Strickland*, 466 U.S. 688-89.

set guidelines for the attorney faced with proposed client perjury. Moreover, through its use of the first prong of the *Strickland* standard, the *Whiteside* Court made it clear that the right to effective assistance of counsel was not violated by an attorney upon refusal to cooperate with the client in presenting perjured testimony.

The practical guidance of *Whiteside* in proposed client perjury cases will probably not be great because the facts in such cases are so widely varied. The following four factors will continue to effect a court's decision whether an attorney faced with proposed client perjury has been rendered the assistance required by the sixth amendment: the strength of the evidence giving rise to the attorney's belief that the client will commit perjury, the attorney's efforts to defend the client, the actions an attorney takes to persuade the client not to commit perjury, and the time at which the client reveals an intent to commit perjury.

Even though the practical impact of *Whiteside* may not be great, its theoretical impact is substantial because the United States Supreme Court, for the first time, made it clear that the truth-seeking function of trials will be given preference over client confidences. In future cases, the Supreme Court will likely refine the duties required by an attorney faced with the problem of client perjury by continuing to place emphasis on the truth-seeking function of trials at the expense of subordinating an attorney's duties to preserve client confidences.

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