The Burger Court Opinion Writing Database

Nix v. Whiteside

475 U.S. 157 (1986)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: The Chief Justice

Circulated: JAN 7 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–1321

CRISPUS NIX, WARDEN, PETITIONER *v.* EMANUEL CHARLES WHITESIDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[January ——, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Sixth Amendment right of a criminal defendant to assistance of counsel is violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial.[1]

I

A

Whiteside was convicted of second degree murder by a jury verdict which was affirmed by the Iowa courts. The killing took place on February 8, 1977 in Cedar Rapids, Iowa. Whiteside and two others went to one Calvin Love's apart-

[1] Although courts universally condemn an attorney's assisting in presenting perjury, Courts of Appeals have taken varying approaches on how to deal with a client's insistence on presenting perjured testimony. The Seventh Circuit, for example, has held that an attorney's refusal to call the defendant as a witness did not render the conviction constitutionally infirm where the refusal to call the defendant was based on the attorney's belief that the defendant would commit perjury. *United States* v. *Curtis*, 742 F. 2d 1070 (CA7 1984). The Third Circuit found a violation of the Sixth Amendment where the attorney could not state any basis for her belief that defendant's proposed alibi testimony was perjured. *United States ex rel Wilcox* v. *Johnson*, 555 F. 2d 115 (CA3 1977). See also *Lowery* v. *Cardwell*, 575 F. 2d 727 (CA9 1978) (withdrawal request in the middle of a bench trial, immediately following defendant's testimony).

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: The Chief Justice

Circulated: _____

Recirculated: JAN 24 1986

STYLISTIC CHANGES THROUGHOUT

CHANGES PP. 5, 6, 7, 8, 12, 14, 15, 17

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1321

CRISPUS NIX, WARDEN, PETITIONER *v.* EMANUEL CHARLES WHITESIDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[January ——, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Sixth Amendment right of a criminal defendant to assistance of counsel is violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial.[1]

I

A

Whiteside was convicted of second degree murder by a jury verdict which was affirmed by the Iowa courts. The killing took place on February 8, 1977 in Cedar Rapids, Iowa. Whiteside and two others went to one Calvin Love's apart-

[1] Although courts universally condemn an attorney's assisting in presenting perjury, Courts of Appeals have taken varying approaches on how to deal with a client's insistence on presenting perjured testimony. The Seventh Circuit, for example, has held that an attorney's refusal to call the defendant as a witness did not render the conviction constitutionally infirm where the refusal to call the defendant was based on the attorney's belief that the defendant would commit perjury. *United States* v. *Curtis*, 742 F. 2d 1070 (CA7 1984). The Third Circuit found a violation of the Sixth Amendment where the attorney could not state any basis for her belief that defendant's proposed alibi testimony was perjured. *United States ex rel Wilcox* v. *Johnson*, 555 F. 2d 115 (CA3 1977). See also *Lowery* v. *Cardwell*, 575 F. 2d 727 (CA9 1978) (withdrawal request in the middle of a bench trial, immediately following defendant's testimony).

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: FEB 21 1986

See p. 9, n. 4
Stylistic changes throughout

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1321

CRISPUS NIX, WARDEN, PETITIONER *v.* EMANUEL CHARLES WHITESIDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[February ——, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Sixth Amendment right of a criminal defendant to assistance of counsel is violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial.[1]

I

A

Whiteside was convicted of second degree murder by a jury verdict which was affirmed by the Iowa courts. The killing took place on February 8, 1977 in Cedar Rapids, Iowa. Whiteside and two others went to one Calvin Love's apart-

[1] Although courts universally condemn an attorney's assisting in presenting perjury, Courts of Appeals have taken varying approaches on how to deal with a client's insistence on presenting perjured testimony. The Seventh Circuit, for example, has held that an attorney's refusal to call the defendant as a witness did not render the conviction constitutionally infirm where the refusal to call the defendant was based on the attorney's belief that the defendant would commit perjury. *United States* v. *Curtis*, 742 F. 2d 1070 (CA7 1984). The Third Circuit found a violation of the Sixth Amendment where the attorney could not state any basis for her belief that defendant's proposed alibi testimony was perjured. *United States ex rel. Wilcox* v. *Johnson*, 555 F. 2d 115 (CA3 1977). See also *Lowery* v. *Cardwell*, 575 F. 2d 727 (CA9 1978) (withdrawal request in the middle of a bench trial, immediately following defendant's testimony).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 27, 1986

RE: No. 84-6050 - Curtis v. United States

MEMORANDUM TO THE CONFERENCE:

This petition was held for Nix v. Whiteside, No. 84-1321.

Three years after being convicted of bank robbery, petitioner filed this §2255 motion to vacate his conviction, asserting that his trial counsel had performed ineffectively because, among other things, he refused to permit petitioner to testify. The District Court (E.D. Ill., Baker, J.) conducted an evidentiary hearing on the motion. Petitioner and his trial counsel, Isiah Gant, testified. The District Court credited Gant's testimony and found that petitioner had admitted to Gant his complicity in the robbery but nonetheless had asked Gant to allow him to testify and present an alibi defense. Gant refused to call petitioner to testify because he believed that petitioner would perjure himself and because he thought that petitioner's two prior convictions for armed robbery, which would have to be revealed to the jury on cross examination, would have damaged petitioner's defense irreparably. Gant told petitioner that he would withdraw from the case if petitioner insisted on testifying. The District Court denied petitioner's §2255 motion, finding Gant's actions to be reasonable under the circumstances.

The Seventh Circuit Court of Appeals affirmed. It held that a defendant's right to testify in his own behalf is a personal constitutional right that cannot be waived by counsel. The Court of Appeals held that this right extends only to truthful testimony, and that a defendant has no constitutional right to testify perjuriously. Accordingly, the Court of Appeals held that since the District Court found that petitioner would have committed perjury on the stand, counsel's refusal to put petitioner on the stand did not violate petitioner's constitutional rights.

In his petition, petitioner relies only on the refusal of his attorney to permit him to testify. The Seventh Circuit's decision in this case is entirely in accord with the decision and opinion of this Court in Nix v. Whiteside. Accordingly, I shall vote to deny the petition.

Regards,

WEB

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: FEB 4 1986

Recirculated: FEB 4 1986

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1321

CRISPUS NIX, WARDEN, PETITIONER *v.* EMANUEL CHARLES WHITESIDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[February ——, 1986]

JUSTICE BRENNAN, concurring in the judgment.

This Court has no constitutional authority to establish rules of ethical conduct for lawyers practicing in the state courts. Nor does the Court enjoy any statutory grant of jurisdiction over legal ethics.

Accordingly, it is not surprising that the Court emphasizes that it "must be careful not to narrow the wide range of professional conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the State's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts." *Ante*, at ——. I read this as saying in another way that the Court *cannot* tell the states or the lawyers in the states how to behave in their courts, unless and until federal rights are violated.

Unfortunately, the Court seems unable to resist the temptation of sharing with the legal community its vision of ethical conduct. But let there be no mistake: the Court's essay regarding what constitutes the correct response to a criminal client's suggestion that he will perjure himself is pure discourse without force of law. As JUSTICE BLACKMUN observes, *that* issue is a thorny one, *post*, at ——, but it is not an issue presented by this case. Lawyers, judges, bar asso-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 5, 1986

No. 84-1321

Nix v. Whiteside

Dear Harry,

Please join me in your opinion concurring in the judgment.

Sincerely,

Bill

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 31, 1986

84-1321 - Nix v. Whiteside

Dear Chief,

Please join me. I would not want to decide this case on the lack of prejudice alone and to leave undecided the question whether the attorney's performance here was outside the range of professional competence.

Sincerely yours,

Byron

The Chief Justice
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 4, 1986

Re: No. 84-1321 - Nix v. Whiteside

Dear Harry:

Please join me in your opinion concurring in the judgment.

Sincerely,

T.M.

Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 17, 1986

Re: No. 84-1321, Nix v. Whiteside

Dear Chief:

I prefer to rest this case on the prejudice prong alone. I therefore shall be writing separately in due course.

Sincerely,

HAB.

The Chief Justice

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: JAN 29 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–1321

CRISPUS NIX, WARDEN, PETITIONER *v.* EMANUEL CHARLES WHITESIDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[January ——, 1986]

JUSTICE BLACKMUN, concurring in the judgment.

How a defense attorney ought to act when faced with a client who intends to commit perjury at trial has long been a controversial issue.[1] But I do not believe that a federal habeas corpus case challenging a state criminal conviction is an appropriate vehicle for attempting to resolve this thorny problem. When a defendant argues that he was denied effective assistance of counsel because his lawyer dissuaded him from committing perjury, the only question properly presented to this Court is whether the lawyer's actions deprived the defendant of the fair trial which the Sixth Amendment is meant to guarantee. Since I believe that the respondent in this case suffered no injury justifying federal habeas relief, I concur in the Court's judgment.

[1] See, *e. g.*, Callan and David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 Rutgers L. Rev. 332 (1976); Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 Minn. L. Rev. 121 (1985); compare, *e. g.*, Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966), and ABA Standards for Criminal Justice, Proposed Standard 4–7.7 (2d ed. 1980) (approved by the Standing Committing on Association Standards for Criminal Justice, but not yet submitted to the House of Delegates), with Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 Mich. L. Rev. 1485 (1966), and ABA Model Rules of Professional Conduct, Rule 3.3 and comment, at 66–67 (1983).

STYLISTIC CHANGES
+ pp. 1, 11

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: FEB 5 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–1321

CRISPUS NIX, WARDEN, PETITIONER *v.* EMANUEL CHARLES WHITESIDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[February ——, 1986]

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, concurring in the judgment.

How a defense attorney ought to act when faced with a client who intends to commit perjury at trial has long been a controversial issue.[1] But I do not believe that a federal habeas corpus case challenging a state criminal conviction is an appropriate vehicle for attempting to resolve this thorny problem. When a defendant argues that he was denied effective assistance of counsel because his lawyer dissuaded him from committing perjury, the only question properly presented to this Court is whether the lawyer's actions deprived the defendant of the fair trial which the Sixth Amendment is meant to guarantee. Since I believe that the respondent in

[1] See, *e. g.*, Callan and David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 Rutgers L. Rev. 332 (1976); Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 Minn. L. Rev. 121 (1985); compare, *e. g.*, Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966), and ABA Standards for Criminal Justice, Proposed Standard 4–7.7 (2d ed. 1980) (approved by the Standing Committing on Association Standards for Criminal Justice, but not yet submitted to the House of Delegates), with Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 Mich. L. Rev. 1485 (1966), and ABA Model Rules of Professional Conduct, Rule 3.3 and comment, at 66–67 (1983).

January 18, 1986

84-1321 Nix v. Whiteside

Dear Chief:

In accord with our recent telephone conversation, I make the following comments on the first draft of your opinion in this important case. Let me say at the outset that, while I do think - as you suggested - some revision and editing is necessary - your basic decision is entirely correct. I make the following comments:

1. The issue is whether respondent was denied effective assistance of counsel. On page 6, the draft cites Strickland as establishing "cause and prejudice" as the applicable standard. This, of course, is the Wainwright v. Sykes standard. The Strickland test requires a showing of (i) serious attorney error and (ii) prejudice.

2. Language on pages 7 and 8 of the draft may be read as narrowing the excellent standard expressed in Strickland. The relevant language in Strickland is as follows: A reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." You refer to this language, but in the next two paragraphs on page 7 the draft unnecessarily reinterprets the favorable Strickland standard. For example, the draft uses the term "range of acceptable conduct", rather than "wide-range of reasonable professional assistance". In other places later in the draft you do, however, come back to Strickland's helpful language. E.g. P. 16, 17.

3. It seems to me that the emphasis on ethical codes and standards may suggest that counsel is constitutionally ineffective if his assistance falls below the high standards expressed in the canons. Such a suggestion or inference could be at odd with Strickland. For example, on page 12, the draft states that the Court will apply these "accepted norms of professional conduct" to counsel's action here. Strickland provides the constitutional "norms", and allows wider latitude than some of the canons of professional ethics. On page 15, the draft further states that "we can discern no breach of professional duty" in counsel's conduct. We could say this, but emphasize that certainly there has been no violation of Strickland.

4. It is entirely appropriate to cite the ABA standards, and emphasize their importance in the regulation of the profession. I question, however, whether this Court - in this case - should appear to hold that the standards are applicable law where the issue is ineffective assistance of counsel.

5. A couple of minor points: On p. 15 in the first paragraph you have a sentence to the effect that: "a lawyer who would [cooperate with planned perjury] would be at risk of possible prosecution for suborning perjury ...." I would strike the word "possible". One guilty of suborning perjury is clearly subject to prosecution. I also think the dissenting judges wrote two sensible opinions in this case, and suggest that it would be entirely appropriate for your opinion to note these dissents generally with approval.

* * *

Forgive me for this unduly long letter that I have dictated at home. The essence of it is that, as so often happens in a first draft, a good many unnecessary things have been said. My concern is that some of them may detract from - or be viewed as a retreat from - Strickland's excellent constitutional standard.

Sincerely,

The Chief Justice

LFP/vde

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 29, 1986

84-1321 Nix v. Whiteside

Dear Chief:

I join your opinion.

Sincerely,

Lewis

The Chief Justice

cc - The Conference

LFP/vde

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 27, 1986

Re: No. 84-1321 Nix v. Whiteside

Dear Chief,

Please join me.

Sincerely,

WHR

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 31, 1986

Re: 84-1321 - Nix v. Whiteside

Dear Harry:

Please join me in your opinion concurring in the judgment.

Respectfully,

John P.

Justice Blackmun

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: FEB 12 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1321

CRISPUS NIX, WARDEN, PETITIONER *v.* EMANUEL CHARLES WHITESIDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[February ——, 1986]

JUSTICE STEVENS, concurring in the judgment.

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 different hue in a handful of gravel.

As we view this case, it appears perfectly clear that respondent intended to commit perjury, that his lawyer knew it, and that the lawyer had a duty—both to the court and to his client, for perjured testimony can ruin an otherwise meritorious case—to take extreme measures to prevent the perjury from occurring. The lawyer was successful and, from our unanimous and remote perspective, it is now pellucidly clear that the client suffered no "legally cognizable prejudice."

Nevertheless, beneath the surface of this case there are areas of uncertainty that cannot be resolved today. A lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury—as well as judicial review of such apparent certainty—should be tempered by the realization that, after reflection, the most honest witness may recall

(1)

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 9, 1986

No. 84-1321 Nix v. Whiteside

Dear Chief,

I join your opinion. I hope, however, that you will consider omitting use on p. 6 of the language of a "cause and prejudice" test as the shorthand explanation of the requirements of Strickland v. Washington. It seems to me it could cause confusion with the Wainwright v. Sykes "cause and prejudice" inquiry in the procedural default context.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference