OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1321

TITLE CRISPUS NIX, WARDEN V. EMANUEL CHARLES WHITESIDE

PLACE Washington, D. C.

DATE November 5, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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CRISPUS NIX, WARDEN, :

Petitioner :

v. : No. 84-1321

EMANUEL CHARLES WHITESIDE :

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Washington, D.C.

Tuesday, November 5, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:37 o'clock p.m.

APPEARANCES:

BRENT R. APPEL, ESQ., Deputy Attorney General of Iowa, Des Moines, Iowa; on behalf of Petitioner.

PATRICK REILLY GRADY, ESQ., Cedar Rapids, Iowa, Appointed by This Court; on behalf of Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Appel, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF BRENT R. APPEL, ESQ.

ON BEHALF OF THE PETITIONER

MR. APPEL: Mr. Chief Justice, and may it please the Court:

This interesting case raises questions regarding the proper role of the federal court in reviewing the conduct of an attorney who is faced with a client whom he has good cause to believe is about to commit perjury in a state court criminal trial. In a nutshell, the Court of Appeals held that admonitions by an attorney violated the right to effective assistance of counsel, the right to testify, and due process of law.

I think the best way I can assist the Court this afternoon first is a rendition of the facts, because there are significant constitutional factual issues raised by the record that the Court should be informed of. Secondly, I'll dive directly into the merits of this case.

The state's position is that where the only effect of admonition is the exclusion of perjured testimony at trial it is not a basis for habeas corpus

reversal of a state court criminal conviction.

Secondly and consistently with the first argument, the state's position is that Strickland v. Washington provides guidance for analyzing the facts in this case, and that: first, the facts reveal no error of counsel that is outside the wide range of professionally competent assistance; and second, even if there were such errors, actual prejudice in the sense of substantial likelihood that the jury verdict would have been affected is not present here.

Let's take our voyage through the facts. Whiteside and two companions in the early morning hours approached Calvin Love's small apartment, where he was sleeping with his girlfriend. They obtained entry to the apartment and a heated argument occurred over drugs.

Love arose from his bed and was stabbed by Calvin -- by the defendant here, Whiteside. As a result of the stabbing, Whiteside fled, disposed of the knife. But before he could make arrangements to flee to Michigan, he was arrested by police. Calvin Whiteside died shortly thereafter at the Cedar Rapids Hospital.

Whiteside's conflict with the judicial system began almost immediately. His first appointed attorneys were former prosecutors and, after several sessions

meeting with his attorneys, the attorneys approached the state trial court and moved to withdraw and Whiteside testified he just didn't want these attorneys. When asked why, he said: Well, they're former prosecutors; I don't feel comfortable with them.

At that time he then insisted on the appointment of an attorney by the name of Thomas Cailor. The state trial court would not allow that appointment because Cailor's law partner was already representing one of the companions of Whiteside who was present at the scene of the crime, thereby raising a potential issue of multiple representation. Nonetheless, statute insisted he wanted Cailor to represent him.

Finally, Gary Robinson was appointed by the court to represent Whiteside. What this fact shows -- what this series of facts show is that Whiteside knew how to complain about attorneys and was not shy about expressing those views to the court.

Robinson immediately began a zealous defense of Whiteside on the charges of murder. In the 69 days before trial, he met with his client 23 times or more, and I think the record demonstrates the very effective character of Robinson's representation.

At the beginning of his representation, he met

with Whiteside in his jail cell and was presented with a written piece of paper that purported to describe the character of transactions that led to White's death. And in that written statement the following words appear: "He was pulling a pistol from underneath the pillow in bed just prior to the stabbing."

And his attorney asked, did you see the gun? Did you actually see the gun? And the answer was no, but I thought for sure he had a gun. It was also revealed that Whiteside had some assistance in preparing the statement.

Consistently throughout the representation, then, Whiteside said that he did not see a gun, but thought that the deceased did have a gun. He thought this because Calvin Love had a reputation for being armed. He thought that because the night of the homicide he instructed his girlfriend, in the heat of the argument, to get his piece, which is slang of course for a weapon.

Robinson conducted an independent investigation to determine if a weapon actually existed. He talked to the three eyewitnesses who were on the scene of the crime, and they did not see a weapon.

And there were two police searches, really, of

the small apartment. The first was what has been characterized as a cursory search, and no doubt it was, several minutes after police arrived on the scene, and they did not find a gun. The apartment was then padlocked and about an hour later the police ID team arrived and searched for a weapon and did not find a gun.

With that, Robinson was convinced that indeed there was no gun, but that the best defense would be that the defendant reasonably thought that Calvin Love while he was in his bed was armed, and that's how the defense proceeded.

But about a week before trial, the defendant, in his own words, "got nervous" about his upcoming defense, and in a question and answer period with his attorney he stated that he saw something metalic in Love's hands.

And with that, the two lawyers who were present, Robinson and an associate, Donna Paulson, stopped him and said, where did this metalic item come from? You haven't told us anything about that before. And, in Whiteside's words -- and these are important: "In Howard Cooke's case there was a gun. If I don't say I saw a gun, I'm dead."

With that, his lawyers were shocked and they

issued anti-perjury admonitions. Specifically, the admonitions were: number one, it's not necessary to say that you actually saw a gun to have a defense here; you could present the argument you reasonably believed a gun was present.

The lawyers said they would not allow perjury in the courts of Iowa and that they would seek to withdraw if he insisted upon presenting perjured testimony. If perjured testimony was presented, Robinson told his client he would advise the court of that fact.

And finally -- and this is interesting and I'll quote it completely -- Robinson told his client: "I probably would be allowed to impeach that particular testimony."

That's the end of the admonitions. And with that, Robinson instructed his client to think about it, and in the end Whiteside dropped his assertion that there was something metalic on Love's hands. And indeed, the question and answer periods in later meetings continued; and Whiteside appeared at his criminal trial and testified fully about the events of that evening and testified why he thought that indeed Calvin Love had a gun, but under questioning did not say that he actually saw the gun.

QUESTION: Mr. Appel, I take it you take the position that under these circumstances the attorney had a duty to challenge his client's proposed false testimony?

MR. APPEL: Well, I think there's no question --

QUESTION: What standard do you think should be employed to determine when the facts are sufficient to impose such a professional obligation on the lawyer?

MR. APPEL: Under the Iowa Code of Professional Responsibility, which follows closely the ABA Model Code, a lawyer cannot knowingly used perjured testimony at trial. And I think it's fair to say --

QUESTION: Does the lawyer have to be convinced beyond a reasonable doubt, or just have a mere suspicion, or what?

MR. APPEL: Well, he must have more than a mere suspicion, clearly.

QUESTION: What standard, then? What level of certainty must a lawyer have in your view?

MR. APPEL: I think, once again, a lawyer has to know -- and under the Model Penal Code definition, for instance, of what "know" is, it means a high probability. I would even accept for argument purposes reasonable -- without reasonable doubt. But let me

carry this a step further, because I think I see where you're heading.

A lawyer before he or she issues anti-perjury admonitions probably should know beyond reasonable doubt that his client is preparing to commit perjury. I think the facts clearly bear that out in this case. Nonetheless --

QUESTION: Mr. Appel, let me interrupt just a minute. What is the source of this law that you're talking about, the duty of the lawyer, the standard applied?

We have Iowa law before us, and that was the jurisdiction in which this case arose. You have mentioned the Model Penal Code, and apparently you've given us some of your own ideas. Do those really have any relevance?

MR. APPEL: I think they do. They have relevance for the Sixth Amendment question, and the Sixth Amendment question is: Was somehow ineffective assistance of counsel provided here? And the way we analyze Sixth Amendment cases I think is presented in Faretta and Herring v. New York.

In Faretta we learned that the Sixth Amendment constitutionalizes in an adversary trial the right to defend oneself. And in Herring v. New York, we learned

that elements of the adversary system that are universally accepted and traditional are incorporated within that Sixth Amendment, for instance the right for summation at the close of evidence even in a non-jury case.

I submit to you that the Sixth Amendment here is not so broad as to cover an extraordinary obligation on the part of a defense attorney to conduct himself in an unethical manner and offer perjured testimony in an upcoming criminal trial at the request of the defendant. That's how it becomes relevant.

QUESTION: Well, but can't we say that without affirmatively adopting some standard, from heaven knows where, as to what the duties of a lawyer are in this situation?

QUESTION: Well, hasn't the Bar of the State of Iowa already declared a standard of the professional conduct of lawyers admitted to practice in their courts?

MR. APPEL: Yes, it has. The Iowa rule once again is that a lawyer shall not knowingly used perjured testimony at trial, and that's similar to the historical traditions of the profession. And it's clear, the Iowa Supreme Court held indeed, that lawyer Robinson acted in the highest traditions of the legal profession.

And it seems to me that because of that long history that's embraced in the Iowa ethical rules, it is indeed an extraordinary proposition and an extension of the right to counsel beyond what has ever been recognized in any of the cases of this court to suggest that the defendant has a right to the unethical assistance of an attorney simply at his request.

This Court has never held that, nor would it qualify under Faretta and Herring as being something that's universally accepted as part of the adversary system.

QUESTION: One of the elements of an inadequate assistance of counsel is there's got to be some prejudice.

MR. APPEL: Yes.

QUESTION: Now, the argument for the defendant has to be that his being deprived of perjured testimony is prejudice.

MR. APPEL: Right.

QUESTION: I'd say all you have to do is convince us that that isn't so and you win your case, don't you?

MR. APPEL: To start with --

QUESTION: Without all these other arguments?

MR. APPEL: That's absolutely correct, and I

think the Court of Appeals erred in applying what amounted to a per se approach. The Court of Appeals held that under Cuyler v. Sullivan, which as you recall is that multiple representation case, there was no need to demonstrate any prejudice on the facts. Number one, that was a misapplication of Cuyler v. Sullivan. But I think it's clear that there is no justification for a per se rule in this case.

In Cronic v. United States, we describe why per se rules are sometimes applied. First, there are some kinds of situations that are so inherently prejudicial that we know that nine times out of ten or maybe even 99 out of 100 that there's going to be adverse impact at trial.

And the multiple representation setting is a good example. Where there are three defendants in the same room and there are multiple crimes, it's almost inevitable that there are going to be conflicting interests, and therefore, under Cuyler v. Sullivan and Holloway, we take a more restrictive approach to prejudice.

But that's not the case here. The alleged conflict of interest, which I submit to you wasn't a conflict of legally recognized interests at least, is not of the character that it inherently taints the

truth-finding process that occured at trial.

And secondly, we have a really good record --

QUESTION: Well, that's hard to say. If a court says, sure, he was going to produce -- he was going to perjure himself, but nevertheless we're worried about the truth-finding process, that's a contradiction in terms.

MR. APPEL: Surely. It's the ultimate irony, and that's why the state's first position on the merits is that where the only impact on the trial process is exclusion of perjured testimony that ought not be a basis for reversal.

QUESTION: Even if what the lawyers did might be subject to sanction --

MR. APPEL: That's correct.

QUESTION: -- under the state rules of ethics.

MR. APPEL: That's entirely correct. Indeed --

QUESTION: Then why do we have to argue so much about the conduct of counsel?

QUESTION: Would this be a different case if the defendant had, faced with the challenge of the lawyer, not taken the stand at all in your view, or is it just the same?

MR. APPEL: I think that helps demonstrate, number one, the lack of prejudice in the case. Number two, I think it also shows that this contest of wills between the attorney and his client did not so undermine the attorney-client relationship that it wasn't possible to mount an effective defense.

QUESTION: I guess I didn't hear if you answered my question. Would it be a different case if the defendant had not taken the stand at all?

MR. APPEL: I think it would be a different case. Nonetheless, I would argue that where a defendant is determined to commit perjury on the stand the lawyer may refuse to call that individual. So I would say that, even had the lawyer looked at Whiteside and said, you don't take the stand, that that would be constitutionally defensible.

Justice Rehnquist, I want to get back to your question. Absolutely correct, this Supreme Court is not sitting as a state bar committee to decide which possible approach to the perjury dilemma is best. The only reason that this case is here is to determine, of course, what the constitutional boundaries might be.

QUESTION: The Supreme Court of Iowa can't lay down a Canon of Professional Ethics that violates the federal Constitution.

MR. APPEL: That's --

QUESTION: Or rather, it can, but it won't prevail on federal habeas.

MR. APPEL: That's correct. And so what we're looking for here are what the constitutional limitations are, and that's why I discussed the Faretta and Herring approach to the right to counsel.

If it had been a part of the adversary system that an attorney should put on testimony that he or she knows is false and should argue the case to the jury, which is what the Respondent's suggesting here, then perhaps maybe we'd have a right to counsel violation. But the Eighth Circuit's holding is a tremendous extension of right to counsel beyond any case that I'm familiar with.

QUESTION: Is there a separate right of the defendant to be heard, do you think?

MR. APPEL: I think there --

QUESTION: Is that involved here at all, as opposed to any Sixth Amendment right to counsel?

MR. APPEL: Yes, the Court of Appeals indicated that there was a right to testify, and that by being put in the position of having to choose between the right to effective assistance of counsel and the right to testify, the lawyer in this case violated

both.

I think there perhaps is a right --

QUESTION: Doesn't the right to testify carry with it the right to testify truthfully?

MR. APPEL: I think that's correct.

QUESTION: I don't see --

MR. APPEL: I think the Grayson v. United States suggests --

QUESTION: I don't see why you're worried about that at all.

MR. APPEL: Right.

QUESTION: But did we not say in Harris against New York, about ten or a dozen years ago or more, that the right to testify does not include the right to testify falsely?

MR. APPEL: Yes, you did, in Harris v. New York and in Grayson.

QUESTION: In other words, it's a corollary of what Justice Marshall has just suggested.

MR. APPEL: And indeed, it might be argued that the lawyers' admonition had an effect on the right to testify. Of course it did, but that's what it was specifically designed to do, as do a whole host of other statutes.

The perjury statute, for instance, has an

effect on the right to testify. It's designed to inhibit people from getting on the stand and testifying falsely.

QUESTION: Well, taking his statements, the Respondent's statements, at their face value, the lawyer was urging him not to commit a crime --

MR. APPEL: That's correct.

QUESTION: -- that he proposed to commit.

MR. APPEL: That's correct.

QUESTION: Is that basically any different from his saying that: I think I'll go out and shoot that witness, the one eye witness, and the lawyer talks him out of shooting the eye witness? Fundamentally any different?

MR. APPEL: I think it is not, because there is no constitutional right to an unethical attorney to present false evidence, and there is no constitutional right to mount the stand and testify falsely. And therefore, the so-called conflict of interest that occurred here was a specious one. There was no constitutionally protected interest at stake on the part of Mr. Whiteside here.

I think it's clear as well that, whatever the proper admonitions might have been in this case -- and I know in the Court of Appeals's opinion there's this

business about, I might, I probably would be allowed to impeach, is discussed at some length. The record shows that Whiteside, when he was at his post-trial hearing on his motion for a new trial, he relied upon the so-called threat to withdraw.

He said -- the question was posed to him: Did you have a conflict your attorney? Answer: Well, I don't know if I'd call it a conflict, but he said something about withdrawing.

Well, plainly, under any of the rules of ethics it's proper, and all the traditions, it's proper for the attorney to withdraw in light of a plan of a client to commit perjury. So I think the reliance on the so-called impeachment admonition was improper.

Indeed, the impeachment admonition isn't that far off, either, because under Iowa law the intention of a client to commit a future crime is not protected by attorney-client privilege. And under the Canons that you've described, Mr. Chief Justice, a lawyer shall not knowingly use perjured evidence, and he is allowed to reveal the intention of his client to commit a crime and the necessary testimony to prevent that crime.

So let me review where we are --

QUESTION: Did the client -- after the lawyer said he would withdraw and so on, did the client then

say, I won't do that?

MR. APPEL: No, he said -- well, the lawyer left it: Think about that, think about the admonitions.

QUESTION: All right. Well, but then he, without any further communication, he put him on the stand?

MR. APPEL: No. He came back and they went through questions and answers again. The record is not clear as to what occurred on those subsequent meetings.

QUESTION: But suppose this. Suppose the client then had gotten on the stand and in the course of his examination he said he saw something in his hand. Well, the lawyer could have cured it all, if he thought he was going to commit perjury, by getting out of the case or at least trying to get out.

But if he gets surprised, may he then say, may I approach the bench, and say to the judge that this fellow's lying?

MR. APPEL: Yes.

QUESTION: You think he could do that?

MR. APPEL: Yes. And with what result --

QUESTION: And you think that he could -- that he as a lawyer could be permitted to go on the stand and testify and impeach him?

MR. APPEL: The result that would likely happen is a mistrial in that setting, Justice White. But of course, once again, that is not the situation that we're facing.

QUESTION: No, no.

MR. APPEL: And the lawyer may well have an ethical obligation at that stage of the game to call a halt to this proceeding. Now, maybe it would require a new trial. It could be, if it was highly prejudicial, as well it might be.

But there's at least one case, United States v. Campbell out of the Ninth Circuit, where an attorney in the view of the jury indicated reservations about the truth and veracity of his client's testimony.

QUESTION: Of course, you don't know what the client would have done if all the controversy had said, unless you agree not to do that I'm going to withdraw.

MR. APPEL: That's right.

QUESTION: You don't know what the client would have done then. He probably would have said, well, go ahead and withdraw, George.

MR. APPEL: Well, the burden --

QUESTION: I'll get another lawyer and I won't tell him the truth, ever.

MR. APPEL: I don't think there's a problem

in --

QUESTION: But the lawyer said more than that. He said, if you do I'm going to tell the judge and testify against you.

MR. APPEL: That's not what he said. He said that he was going to inform the court and might be allowed to impeach that particular testimony.

QUESTION: Well, he said he'd be willing to impeach him.

MR. APPEL: He probably would be allowed to impeach, is exactly what he said.

QUESTION: Well, I know, but he said he'd be willing to.

MR. APPEL: That could be implied from that statement from the record. But even so, at the post-trial hearing on his motion for a new trial, where the Petitioner carries the burden: Did you have a conflict with counsel? Well, I don't know if it was a conflict; it might have been something -- well, I think he was going to withdraw.

There appears to be no reliance on that so-called impeachment admonition at all. But indeed, isn't this an open and shut case when the only effect, the only effect of a lawyer's admonition, is the exclusion of perjured testimony? This isn't the kind of

case where habeas corpus relief should be granted.

QUESTION: May I ask you a kind of a preliminary question. As I understand it, the relief was granted on a Sixth Amendment theory of ineffective assistance of counsel; is that correct?

MR. APPEL: Yes, that was part of it, though it was also a right --

QUESTION: At least part of it was?

MR. APPEL: Yes, it was.

QUESTION: Was any Sixth Amendment claim ever made to the state court as part of the exhaustion of state remedies?

MR. APPEL: Right. Not by that label. The claim was that the attorney improperly coerced his client into making -- changing his testimony. And the federal court --

QUESTION: Sort of a due process claim, wasn't it?

MR. APPEL: Well, it was due process, but it was also that the attorney acted improperly. The lower court, lower federal courts, as you know, ruled that the Sixth Amendment claim was exhausted.

QUESTION: But you're satisfied with that ruling? That's really what I'm asking.

MR. APPEL: I'm satisfied with that ruling. I

don't think it would have been any different if it had gone back to the Iowa Supreme Court and recast it.

Let's review where we are. What are the four important aspects of the factual record?

Number one, I think it's a very strong record in terms of intent to testify falsely. In Howard Cooke's case there was a gun; if I don't say I saw a gun, I'm dead.

Second, this is not the kind of case where the fact finder or the jury learns about the lawyer's reservations about the client's testimony. The judge and jury did not, were not advised.

Third, the defendant actually did take the stand and he had his say in court.

And fourth -- I haven't gotten to this fact -- after the close of evidence, the state trial court asked him if he was satisfied with the representation of his counsel. Once again, this brings me back to my earlier discussion of how he fought the system of appointment of counsel. He said: Yes, I'm satisfied.

And then the jury came back with guilty on second degree murder, and then he was dissatisfied.

QUESTION: Well, I don't know whether that doesn't raise a question in my mind. Why would you ask a question like that? Would there be a suspicion that

he hadn't acted properly?

MR. APPEL: No, I think that that was a conservative approach.

QUESTION: Why? What provoked it?

MR. APPEL: The record doesn't indicate. I can speculate.

QUESTION: Do you think maybe the trial judge was making a record?

QUESTION: For himself?

MR. APPEL: Once again, there is no violation of effective assistance of counsel here because the activities of counsel did not fall outside the broad band of professionally competent counsel. Nor is this a case where a per se approach like Cuyler v. Sullivan should be applied. This is not inherently damaging to the fact finding process.

Indeed, why do we hold criminal trials? The reason why we have trials is to counter that human tendency to judge in the familiar that which is not yet fully known. And that's what the Powell v. Alabama is all about, the guiding hand of counsel. Why? Because, the next sentence reads: "Without it, though he be not guilty, he runs the risk of conviction because he does not know how to establish his innocence."

And it's hard for me to see the Eighth

Circuit's decision as anything other than a topsy-turvy approach to these constitutional rights.

One final aspect of the record that I think we do need to discuss about; and it might be a troublesome one for the state, so let's get it clear right now. At the discussion between the court and Whiteside over who would be appointed ultimately as his counsel, when Gary Robinson was appointed the court said that, your chances of another change in attorneys is about zero.

Okay, that was after the change from his first attorneys and the insistence on Thomas Cailor, who had a conflict of interest. Finally he got an attorney, and the trial judge looked down and said, your chances of another change in attorney are about zero.

Does that mean that the admonitions, when combined -- the admonitions of counsel, when combined with this trial court ruling, does that mean that indeed the choice for the defendant was to proceed pro se if Robinson ultimately withdrew?

Might be. But what I want to close with is that, where a defendant insists on committing perjury at trial it would be constitutionally proper to require him to proceed pro se. There would be no problem with that with an appropriate Faretta-style warning. Of course, that is not right, because, once again, the witness did

mount the stand and did testify fully.

I think I'll reserve -- unless there are further questions, I'll reserve my time for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Mr. Grady.

ORAL ARGUMENT OF

PATRICK REILLY GRADY, ESQ.,

ON BEHALF OF RESPONDENT

MR. GRADY: Mr. Chief Justice and may it please the Court:

I think in light of what was discussed here previously in Mr. Appel's opening statement, it's important to emphasize what was the limited holding of the majority of the Court of Appeals in this case, and that is, whatever counsel's duties may or may not be when their confronted with a client who insists on testifying to what that attorney believes to be false information, that attorney cannot disclose or threaten to disclose to the fact finder his or her disbelief in the client and the fact that the client is lying. And that's what the attorney threatened to do here.

That's what puts counsel and the defendant at odds, and that is why the Court of Appeals was correct in applying the presumptive level of prejudice in this particular case, because there was a complete

deprivation of counsel. And that is why this Court should affirm the Court of Appeals for the Eighth Circuit.

Now, another reason which would allow this Court to affirm --

QUESTION: Yes, but the Court of Appeals would put all cases in one bag. It wouldn't make any difference what the evidence was with respect to whether the client was going to tell a falsehood on the stand. I mean, as the case comes to us I take it the Court of Appeals decided, even if it's perfectly clear and no one would doubt that the client planned to commit perjury, even so the lawyer may not threaten him with anything that would keep him from saying that.

MR. GRADY: I don't believe that's what the Court of Appeals was saying, but the limited portion of their holding is simply that an attorney cannot threaten or actually disclose.

QUESTION: Even no matter what the degree of certainty that the client is going to commit perjury?

MR. GRADY: That is the holding of the Court of Appeals.

QUESTION: Yes. Yes, exactly.

MR. GRADY: That -- and the reason --

QUESTION: So as the case comes to us, that's

the given, that the client was going to commit perjury?

MR. GRADY: That is how the Court of Appeals assumed it. Now, we are not conceding that the Court of Appeals was even correct in reaching that.

QUESTION: No, no. But that's the way it comes to us.

MR. GRADY: That's correct.

And the problem with this is it's not necessarily just limited to the situation as it arose here simply right before trial, but this goes all the way back to the initial interview that an attorney might have with a particular client, where that attorney, as is normal, is going to guarantee that client confidentiality and the fact that that confidentiality will not be breached; and that for an attorney -- and the lower federal cases that have reviewed --

QUESTION: Mr. Grady, let me follow up on a question that the Chief Justice asked your opponent. Supposing the client had told the lawyer that he was going to kill a witness, a prosecuting witness, and the lawyer said to him: If you do, I will tell the judge what you've done and I will withdraw. Now, would that be unethical?

MR. GRADY: That's a wholly different matter, and the reason for that --

QUESTION: Now, why is it different?

MR. GRADY: The reason for that is that the purpose of the attorney-client privilege as set out in this Court's cases -- for example, Upjohn and Fisher -- indicates that for the defendant to be able to give the lawyer the defendant's version of what happened is necessary for the attorney to be able to advise the client, to develop a strategy of the defense, and to actually intelligently exercise the client's option whether or not to take the stand.

QUESTION: Yes, but I am assuming a case in which the client has given his version of what happened and then, having given the version, says, yes, but I'm going to testify differently, and what I testify to will be false. I'm assuming an easy case where we know he's testifying falsely.

Then why is it different?

MR. GRADY: Well, okay. It's still different from the situation with the witness because having the client -- having the attorney-client privilege remain inviolate and having the attorney still give his guiding hand to the client is part of the traditional adversarial system. Nothing in terms of bribing jurors or threatening witnesses has ever been recognized as part of the adversarial system in this country or in any

other country that I know of, and that is an important --

QUESTION: Well, has perjury ever been recognized as part of the adversary system?

MR. GRADY: No, it hasn't. In fact, as was brought up in an earlier question, it's clear, and we are not urging and the Eighth Circuit is not urging, that there is certainly not a constitutional right to perjure oneself.

The question is, however, is what enforcement mechanism is necessary, in light of the impairment on the attorney-client privilege that this would bring out, that is proper to balance both of those interests.

QUESTION: But I wonder how much of an impairment there is at all. There are certainly cases from this Court, an opinion of Justice Cardozo's back in the thirties, I think, that said not only is potential criminal conduct not protected by the confidence, but even a scheme to commit fraud is not protected.

MR. GRADY: Well, again, that's why in cases such as Harris of course the defendant can be cross-examined about prior inconsistent statements, a perjury prosecution is proper, and of course the judge can enhance a sentence if in fact the judge believes that the client -- or, excuse me -- the defendant is

going to perjure -- or has perjured himself.

QUESTION: Well, in this particular case when your client said, I'm going to perjure myself, what redress do you think the lawyer should take?

MR. GRADY: Okay. Well, a few facts. If I might ask, are you giving me a hypothetical?

QUESTION: Well, I don't need any facts for my question.

MR. GRADY: Okay.

QUESTION: I'd like to get an answer to it.

MR. GRADY: Okay. The answer you can give -- and this is the first thing that an attorney must do in that particular situation, and that is an attorney must give the -- start out telling the client first basically just the strategic or even moral reasons why it's not proper or advisable to testify to the version the defendant wants to give.

For example, he could point to other facets in the record which would contradict the defendant. He could point to the fact, again, of a potential perjury prosecution, or again point to the enhanced sentencing. There are plenty of things an attorney might do in that situation.

And the record doesn't reflect that the attorney in this case in fact did those things.

QUESTION: And it didn't say that he did not, did it?

MR. GRADY: Well --

QUESTION: It's just silent on it.

MR. GRADY: Well, I think the record --

QUESTION: Well, we'll take a hypothetical.

MR. GRADY: Okay.

QUESTION: The witness says, I'm going to perjure myself and I'm going to say that I saw a gun.

MR. GRADY: Okay.

QUESTION: What can the lawyer do? What can he do and what should he do?

MR. GRADY: Okay. Again, as I stated earlier, the attorney first must try to dissuade the client by using basically practical, strategic reasons to try to talk the client out of perjuring himself.

QUESTION: Well, the client says, I'm going to perjure myself.

MR. GRADY: Okay. At that point -- and again, this depends on again at what stage in the proceeding this would particularly happen, if it's the day before trial or several months before trial.

QUESTION: Or during the trial.

MR. GRADY: Or during the trial. And that makes a difference, because, again as I think the Deputy

Attorney General indicated, during the trial --

QUESTION: Well, at the same time as it is in this trial.

MR. GRADY: Okay, which would be shortly before trial?

QUESTION: Right.

MR. GRADY: Okay. At that particular point, the attorney, if he cannot dissuade the client, the options that have been spelled out either allow the attorney to attempt to withdraw, which again -- and what this does, and this is the only way that this makes sense, is one has to look at the implications of that, that goes back to the overall attorney-client privilege, in the sense that if you allow the attorney to withdraw --

QUESTION: I'm still asking what he could do. He said he could withdraw.

MR. GRADY: Right.

QUESTION: Now, what else could he do?

MR. GRADY: Well, if I might explain, the problem with the withdrawal method is that at that point if another attorney is appointed then the client's simply going to tell the attorney the last story.

QUESTION: What else could an attorney do other than to withdraw?

MR. GRADY: Okay. The other -- another option that's been recommended is the fact that the client would have to testify by narrative. That way the client would be able to put the story on, but the attorney would not have a conflict in that the attorney would not be assisting in the alleged perjured testimony.

The criticism of that particular method is that --

QUESTION: Well, did the attorney stop him from testifying here?

MR. GRADY: In this particular case?

QUESTION: Yes.

MR. GRADY: He did not prevent him from taking the stand, no.

QUESTION: So what else could the attorney have done other than what he did?

MR. GRADY: Well, the attorney could have first started out with attempting to talk the client out of it through lesser methods. What the attorney did in this particular case is jump all the way to the end of the spectrum, which --

QUESTION: Didn't he have 23 meetings?

MR. GRADY: Something like that.

QUESTION: Well, I mean, they did a lot of discussing.

MR. GRADY: They did.

QUESTION: But you want more discussion?

MR. GRADY: Certainly this particular fact situation demands more discussion. When this particular whatever, conflict arises, it does demand more discussion.

QUESTION: Do you by any chance say that the attorney should have just sat there and let him go ahead and not said anything about it?

MR. GRADY: There is a point where, if it is impracticable to withdraw, I suppose the attorney -- there is the method, the attorney can go and try to get the trial judge to let him out of the case. Then if the trial judge doesn't let him, it just --

QUESTION: If he had let him perjure himself, he'd have been subject to disbarment.

MR. GRADY: Well, I think that --

QUESTION: Wouldn't he?

MR. GRADY: I don't believe so.

QUESTION: Well, what does the Code -- don't you have a code of ethics in Iowa that says that if you put on, knowingly produce perjured testimony you're disbarred?

MR. GRADY: That is in the Code of Professional Responsibility, yes.

QUESTION: It is.

MR. GRADY: Yes.

QUESTION: Well, I said wouldn't that happen in this case?

MR. GRADY: Well, if, again consistent with the Sixth Amendment attorney-client privilege, if the attorney goes ahead and allows that testimony, I think under Mannes versus Meyers that the attorney would probably be protected in the long run.

QUESTION: He wouldn't be disbarred?

MR. GRADY: In the long run, he would be protected against --

QUESTION: I would suggest you not try it.

MR. GRADY: Pardon me?

QUESTION: I'd suggest you not try it. I mean, I don't know of anything worse for a lawyer to do than to produce perjured testimony, because he's suborning it and that's a crime, to suborn perjury. Isn't it in Iowa?

MR. GRADY: Well, suborning perjury as it's defined in Iowa would be for the attorney first to either encourage or pay someone to actually perjure himself, as suborning perjury is defined in the Iowa Code.

And I think there is a distinction which has

been made, that there is a difference between the attorney suggesting to the client how best to get around particular difficult facts and the fact of letting the client testify himself to those particular facts, and that's a distinction I think that has to be made.

QUESTION: Mr. Grady, how did the action of the lawyer here, whether or not it met in all respects the Iowa Code of Professional Responsibility, how did that conduct undermine the fairness and reliability of the trial, in your view?

MR. GRADY: What it particularly did -- and this is why I think the Eighth Circuit's treating it as a presumptive prejudice issue is appropriate -- is the fact that the jury system -- to produce a reliable result, the jury system allows someone, with the assistance of counsel, of course, to be able to testify as to their particular facts of the event.

QUESTION: Well, doesn't encouraging a client to testify truthfully enhance the reliability of the trial?

MR. GRADY: There's no question about that. The question is how far is the attorney allowed to go to get that result.

QUESTION: Well, if the only effect is to in fact have a trial based on truthful testimony, how is

that in any sense a violation of any constitutional requirement to achieve a fair trial?

MR. GRADY: Well, again, as the so-called conflict of interest analysis goes, what a court simply looks to in that particular situation is the fact that the relationship was changed because of what the attorney saw as conflicting duties. An actual prejudice standard is not appropriate in this circumstance because of the effect that this particular instance had on the whole attorney-client relationship, just like in the multiple representation case. And therefore --

QUESTION: Why should the conduct of the lawyer rub off on the conviction if the conviction has been accurately and truthfully arrived at?

MR. GRADY: Well, it's again the same as --

QUESTION: Accurately and truthfully because there wasn't any perjured testimony in the trial.

MR. GRADY: Well, again, based on that assumption, again that --

QUESTION: Well, that's the way the case comes to us.

MR. GRADY: Okay. But again, I think that there are other interests involved here, and that's where, for example --

QUESTION: Why can't they be taken care of by

policing the defense bar?

MR. GRADY: Well, I think in that --

QUESTION: Teaching the defense bar how to act. Why should it really involve setting convictions aside?

MR. GRADY: Well, because the --

QUESTION: Unless there's some prejudice?

MR. GRADY: Well, essentially because of the actual -- the client is entitled to conflict-free counsel, as this Court has held in other cases. And in the conflict of interest context the Court doesn't weigh whether or not a just result is obtained.

QUESTION: Well, do you argue that there is some right to testify falsely on the part of -- not the lawyer now, but on the part of the defendant, a witness? That there is some right to testify falsely if will help you?

MR. GRADY: No, I'm not, Your Honor. That's why, if there is a right --

QUESTION: And at most, all the lawyer did here, if it had any impact, was to dissuade him from committing perjury.

MR. GRADY: Well, again, I think there's two facets to your question. First, there is not a right to testify falsely. If there was a right to testify

falsely, then of course the defendant could not be held to a higher sentence if there was a right to testify falsely.

QUESTION: Well, we have at least three cases where we've addressed that.

MR. GRADY: Right. So that's not what we're urging.

QUESTION: -- Havens, and Harris against New York.

MR. GRADY: Right, and because of those cases it's clear there is no right to testify falsely. But that is not what we're urging.

QUESTION: What right is it that you're urging on us?

MR. GRADY: We are urging the right -- well, we're basically urging the right of the client to rely on the attorney-client privilege and prevent from disclosure.

QUESTION: Well, there was no disclosure here by the lawyer.

MR. GRADY: There was threatened disclosure, and there really is no significant difference on that.

QUESTION: Well then, let's take that other, harsher case. If he said he was going to go out and kill or persuade somebody to kill the principal witness,

would you say that that is a different kind of a felony from committing perjury or suborning perjury?

MR. GRADY: I think in the context of the attorney-client privilege it certainly is a much larger difference, again in light of the adversary proceeding.

QUESTION: Well, what about, let's make it gentler, then. He's going to bribe a witness.

MR. GRADY: No difference, in the sense of it's the same as --

QUESTION: Is that somewhere between suborning perjury and murder?

MR. GRADY: Well, it falls in the same category as going out and doing harm to a witness.

QUESTION: Aren't they all in the same category?

MR. GRADY: I don't believe so, and that's because of the impact on the attorney-client privilege as it relates to the adversary system. And that's where the disclosure of the particular perjured testimony goes all the way back to anyone's initial interview.

QUESTION: Well, why is the conflict different in the case which the Chief Justice has put to you than in the case we have before us? In each case the lawyer urges the client not to do something which is unlawful, the client apparently goes ahead and says, I'm going to

do it anyway. And then the lawyer says: All right, I'm going to impeach you, I'm going to advise the judge.

Isn't there just as great a conflict whether the client is talking about bribing a witness or killing a witness as there is in the case where he says he's going to commit perjury, isn't there?

MR. GRADY: Well, again --

QUESTION: Can't you answer that yes or no?

MR. GRADY: My answer that is no, it is not the same situation.

QUESTION: Why not?

MR. GRADY: Okay, and the reason for that being again the right of the defendant, again going back to the initial interview all the way through trial, to be able to fully give all information, good or bad, to the attorney, so that the attorney can advise the defendant as to --

QUESTION: Why does that distinguish those three cases one from another?

MR. GRADY: Those three hypotheticals?

QUESTION: The two hypotheticals from the present?

MR. GRADY: Okay. Because the client's actually talking to the attorney regarding the client's involvement as to this continuing representation. It's

something that's been accepted over time as part of the adversary system.

QUESTION: Well, but you're not --

MR. GRADY: These other matters have not.

QUESTION: You're simply -- that may satisfy you as an answer. It's just utterly unconvincing to me as to why the three shouldn't be treated the same way for conflict of interest purposes.

QUESTION: And what about, suppose there had been two defendants in this case, they were joint defendants, co-defendants, they each had separate lawyers. Each of them told his lawyer privately: I'm going to commit perjury.

The one lawyer says: Oh, don't do that; you may be -- you know, it's just a bad thing to do, it's the wrong thing to do, and you may be indicted for perjury. That's all he says, and the guy says, well, I guess I better not.

And the other fellow does what this lawyer did, and so the fellow says, I guess I better not. And in both cases he's deprived of a chance to commit perjury. But you draw a distinction between the two?

MR. GRADY: There is a very large distinction again, in terms of the threat to the attorney-client privilege. The first set of admonitions that was given

is done consistently with an attorney and a client basically still sharing the same interests, and just like any other type of advice as to why --

QUESTION: Why should all of this -- even if you're right about the lawyer's conduct, again why should this have a consequence for the conviction?

MR. GRADY: Again, because that -- it is the defendant's right in that sense that was --

QUESTION: His right is not -- his right certainly wasn't to try to mislead the jury by perjured testimony.

MR. GRADY: That's correct, and we're not arguing that. His right to have an attorney --

QUESTION: You seem to be.

MR. GRADY: -- dedicated to the preservation of the attorney-client privilege.

QUESTION: Well, couldn't your client have complained to the judge that the lawyer interfered with him or threatened him?

MR. GRADY: At the point when --

QUESTION: Yes, couldn't he have gone to the judge and said, judge, my lawyer has threatened me by having me charged with perjury? Why couldn't he have done that?

MR. GRADY: Well, I suppose theoretically he

could have. I think part of the reason behind that is --

QUESTION: Don't you know why he didn't?

MR. GRADY: Well, certainly he didn't want -- I mean, part of the reason the threat worked is he didn't want the trial judge to know of the particular problem.

QUESTION: That's right.

MR. GRADY: In fact, that's what the attorney testified to.

QUESTION: That's right.

MR. GRADY: But regardless of that, you know, I think the point here is that there are certain interests within the adversary system that -- this Court, for example in the Portash case, this Court held that someone could not be impeached with immunized sworn testimony when that defendant wanted to get up and give testimony which was different from that.

Now, obviously the Court was finding in that case that the truth-seeking function was subservient to, for example, one's right against self-incrimination. And I think that's what --

QUESTION: In this case, as I understand your position, really the heart of your argument is there's a conflict between the lawyer and the client, that they

have a different -- that the lawyer is not pursuing the client's interests.

But what if the lawyer thinks that perjury would be a tactical mistake and more likely to result in conviction than if he told the truth, and therefore everything he did was justified by his interest in acquitting the client? How do you find a conflict of interest there?

MR. GRADY: Because I think essentially -- and the Curtis court in the Seventh Circuit recognized this -- that the tactical reasons for trying to talk a client out of either testifying or what to testify to is still as decision of the client's himself, because the right to testify or the decision to testify, at least, is personal right of the defendant.

QUESTION: Well, the decision to testify. But in the fact pattern we have, where he's going to testify and it's just a question of what he's going to say, and the lawyer sincerely and effectively urges him to tell the truth because he thinks it's going to be more persuasive than introducing a falsehood into the story and maybe looking very bad on the witness stand, wouldn't that be in the client's best interests?

MR. GRADY: Certainly that would be. But when it gets to the point --

QUESTION: Well, where's the conflict?

MR. GRADY: Well, the conflict is reached at the point where the client is not, theoretically -- and again, in this case we don't have the record to support that the attorney tried those methods -- that the client won't acquiesce.

And at that point, and the attorney then is going to threaten to violate the attorney-client privilege, that's when the conflict arises. The conflict wouldn't have arisen until that point if the attorney was simply trying tactical methods to talk a client out of giving what he believed to be false testimony.

And again, in this particular case the lower courts did not apply a standard which was proper to even make that determination, in which the Eighth Circuit assumed that in fact this particular client was going to testify falsely based on the fact that simply the good cause standard was supplied or a compelling support standard applied, when really reasonable doubt is the proper standard in the sense that attorney as an advocate must apply at least as high a standard as a jury, who are not partisans, to determine whether or not a defendant is lying.

QUESTION: Of course, the Eighth Circuit

accepted a fact finding against you on that point, didn't they?

MR. GRADY: That's correct. Now, the Eighth Circuit believed that they were precluded by Sumner versus Mada from making a different fact finding, and the case law indicates that they did not have to do that under 2254 because the standards under which an attorney has to make that particular conclusion is really, at the very least, a mixed question of law and fact, because besides just historical fact, the attorney has to apply again the Canon of Ethics, he has to apply the fact that any doubts must be resolved in favor of the client, and the fact that just someone might give contradictory statements is clearly not enough.

QUESTION: Well, did you urge that as an alternative ground for affirmance in your brief?

MR. GRADY: Yes, I did. That was the initial few paragraphs before I treated it as if there was a presumption that in fact there was going to be false testimony there. And that is the real key here, because an improper evidentiary standard was used.

And again, I think it's important when one looks at this case, however distasteful of course to everyone the aspect of a client testifying falsely is, is the fact that any rule that might come out of this

case is going to affect how an attorney is going to address his or her client in the initial client interview; that if the attorney cannot tell the client that what the client tells the attorney cannot be told to anyone else, then in fact the attorney is not going to have the benefit of full disclosure, to be able, in fact, number one, to dissuade the client if in fact there is some type of false testimony coming up; number two, being able simply to give the guiding hand of counsel that is required by the Sixth Amendment.

QUESTION: Well, in your view of this initial interview where the attorney tells the client that he can fully disclose because none of it will ever be repeated, does the attorney have to go ahead and mention the instances which are exceptions to the confidentiality, where there's a threat of committing fraud, where there's a threat of committing a crime?

MR. GRADY: Well, in terms of if -- for one thing, I think it's very difficult to just tell a client regarding what, you know, fraud or perjury. You have to explain things in a little more detail and a little more plainly.

But the fact is is that how an attorney in honesty would have to explain that would deter a client from being absolutely honest, because the client

probably isn't going to know what is and what isn't going to work against him.

QUESTION: So you don't tell the client the actual state of what the law is respecting the confidentiality of the lawyer-client privilege. You give kind of a gloss to it to indicate it's a lot more sweeping than it is?

MR. GRADY: Well, that I think is current practice among the defense bar. Now, if in fact you give exceptions to the attorney-client privilege and try to explain them in the initial interview, that's going to deter the client from giving full information to the attorney.

QUESTION: Mr. Grady, it would help me if you would summarize exactly what you think the lawyer should have done in this case.

MR. GRADY: In this particular case, the lawyer under these facts should have first tried to dissuade the client.

QUESTION: He did that.

QUESTION: He succeeded.

QUESTION: He did that. The lawyer tried to dissuade his client. What else should he have done?

MR. GRADY: Well, my reading of the record indicate that the client -- that the attorney jumped

straight to the threat to disclose, without going through those other steps of explaining to the client what exactly would be in store for him in terms of potential perjury prosecution, cross-examination, and enhanced punishment.

QUESTION: And should the lawyer have permitted him to go ahead and testify falsely?

MR. GRADY: At that point, I think the attorney at that point, if all else fails and withdrawal is totally impractical, I think that at that point we have to rely on the adversary system to seek out the truth and that they're going to disbelieve the client and the client's the one that's going to pay the ultimate price.

QUESTION: You think counsel should have permitted the defendant to testify? That's what CA-8 said.

MR. GRADY: That's basically it.

QUESTION: Yes.

MR. GRADY: Well, I don't think -- again, I don't think the Eighth Circuit necessarily said that. Their limited holding is that --

QUESTION: Well, if you look at page 20, page 89, I think you'll find they did say that. Judge Gibson thought the Court of Appeals said that.

MR. GRADY: The dissent -- that is how the dissent characterized it. Again, the narrow holding of the Eighth Circuit --

QUESTION: Well, what do you think? I understood you to say you thought the lawyer finally, after trying to dissuade him, should have permitted the defendant to testify.

MR. GRADY: At that point, the attorney -- the system requires that then at that point the jury make the decision, and the face that's been placed on the jury is that the jury is going to find the client out and the client's going to pay the price.

QUESTION: The answer to my question is the lawyer should have permitted the defendant to testify and kept his mouth shut?

MR. GRADY: Had all those other steps in the meantime been --

QUESTION: Well, can he at least, say, try to talk him out of it, then he'd say: If you still insist, I'm going to try -- I'm going to withdraw? He can say that, can't he?

MR. GRADY: Well, the attorney could say, yes, I can attempt to withdraw.

QUESTION: Yes.

MR. GRADY: Now, again --

QUESTION: He can go that far.

MR. GRADY: I would agree that he could go that far.

QUESTION: And then, if he talks him out of it using that threat you wouldn't be here.

MR. GRADY: I think there's -- well, assuming he went through the intermediate steps --

QUESTION: Yes.

MR. GRADY: -- I would agree. I would agree that, because all that basically does is it means the attorney has to go to the judge and the judge has to let the attorney out.

QUESTION: Suppose he testifies falsely and he's acquitted. May the lawyer then say he committed perjury?

MR. GRADY: I would say not, again because the attorney-client privilege would extend beyond that.

QUESTION: Then isn't he concealing perjury?

MR. GRADY: Well, again, as to the impact of the attorney-client privilege, that's where that exception has to be made.

QUESTION: Well, the attorney-client relationship has terminated at that point, after the verdict.

MR. GRADY: Well, but the confidences of a

client are not terminated at the time an employment with the attorney ends.

QUESTION: Well, let's take the other extreme, then, the one that Justice Stevens and I were putting to you. Suppose he actually killed one of the major witnesses against him, carried that out. Would the lawyer be required to conceal that?

MR. GRADY: I don't believe so, because that's not within the scope of that initial representation.

QUESTION: Well, they're both felonies. They're both felonies, aren't they?

QUESTION: And they're both done to get himself off.

MR. GRADY: That's correct. But again, as to how it affects the attorney-client relationship is what makes the difference between those particular cases.

QUESTION: What would you say if, right before the defense rests, the defendant then said to his lawyer, I'm going to testify thus and so, and he immediately gets up and walks on the stand to testify falsely?

At that point in this hypothetical, the defense counsel gets up and says, if the court please -- or goes to the bench, rather, not in the hearing of the jury: I am bound under the ethical standards of the

profession to ask the court immediately to let me withdraw from this case.

The judge is likely to say: Why? I am unwilling to disclose the reason, but the reason has to do with the testimony the defendant is about to give. Well, that tells the judge --

MR. GRADY: Right.

QUESTION: -- doesn't it? Could he do that?

MR. GRADY: In terms of -- I don't believe he can disclose that to the judge. In other words --

QUESTION: Well, what has he disclosed?

MR. GRADY: There's a point, I suppose, where you have to draw the line as to what he's going to disclose to the judge, what the problem is. But again, what that does is throws the problem in the judge's lap.

QUESTION: The jury is still not informed.

MR. GRADY: Right, and again that makes it less egregious. But again, of course, the judge may be the one that sentences the client down the road. That still is problematic.

QUESTION: Very well.

Do you have anything further, counsel?

REBUTTAL ARGUMENT OF

BRENT R. APPEL, ESQ.,

MR. APPEL: Just briefly.

Justice O'Connor, I wanted to come back to the question that you raised in the middle of my argument that I perhaps didn't have an opportunity to respond to fully. And you were asking the question about what kind of standards ought to be applied.

And in my view, under the Iowa rules once again, the lawyer has to know about the proposed use of perjured testimony, okay. The initial judgment is that for the lawyer to make, much as any other tactical decision an attorney comes upon in the course of representation.

A reviewing court then in reviewing the lawyer's conduct should use the deferential standards that are in Washington v. Strickland: Did the lawyer's decision to issue the admonitions in that case fall within the broad range of professionally competent counsel?

And even though I get the drift if this Court that maybe because the second prong of Strickland hasn't been satisfied in this case you may not reach the first question of ineffective assistance, that's the proper approach.

QUESTION: But wouldn't you think this was a relatively rare case, where a lawyer -- where the defendant just says, I'm going to commit perjury, and it's so clear? Because you would concede that the lawyer may not -- if there's a real doubt about the truth fo the thing --

MR. APPEL: Sure.

QUESTION: -- you wouldn't be here at all.

MR. APPEL: It's a relatively rare case. The case books have some instances where a lawyer has an alibi or a client presents an alibi testimony to his lawyer and then at trial he says, oh no, the crime didn't happen this way, it happened that way, and kind of demonstrates that he was actually there. There are few cases like that.

But where it's more conjecture, mere speculation -- that is of course notthis case --

QUESTION: Or even if the lawyer is himself completely convinced that the story his client is telling is false.

MR. APPEL: We don't have a disagreement.

QUESTION: No.

MR. APPEL: The bottom line here is that the problem the defendant had was not that he had a less than zealous attorney; it's that the prosecution had an

airtight case, and that is not grounds for reversal of a conviction.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:36 p.m., oral argument in the above-entitled matter was concluded.)

* * *