

JUSTICE JOHN PAUL STEVENS (Ret.)

**Luncheon Meeting of the
Forum Club of the Palm Beaches
Palm Beach County Bar Association**

**Kravis Center (Cohen Pavilion)
West Palm Beach, Florida
November 9, 2012**

Shortly after I became a federal judge in 1970 I participated in a case involving a Catholic Priest - Father Groppi - who had led a parade of demonstrators onto the floor of the Wisconsin General Assembly to protest against cuts in welfare benefits. The case involved the constitutionality of the Legislature's decision to hold him in contempt and sentence him to prison. It was a high visibility case in which the press coverage highlighted the disrespectful conduct of the protesters. Making what was quite obviously a popular decision, the elected judges on the Wisconsin Supreme Court unanimously upheld the contempt. When Father Groppi sought relief by way

of an application for a federal writ of habeas corpus, our court was divided on the issue, but when the case reached the United States Supreme Court, that court ruled unanimously in Groppi's favor. I devote several pages to the case in my book, FIVE CHIEFS, but today I just want to make three brief points. First, the fact that the Supreme Court's opinion was unanimous does not mean that the judges who had voted the other way were not competent, well qualified judges. Second, I have always considered it possible that the publicity the case received when it was pending in the state court may have had an unrecognized impact on the deliberations of the elected judges who ruled against Father Groppi. Third - and most important for me - the case provided unforgettable evidence to a newly appointed federal judge that a guarantee of life tenure removes the risk that popular approval or disapproval of a decision will affect his or her

analysis of the law. Popularity is important and relevant to the work performed by policy-making officials but impartiality should characterize the work of judges.

During my years on the bench I have not only opposed the popular election of judges but I have also opposed the use of retention ballots as a method of removing unqualified judges from office. Strict ethical standards can be enforced more effectively by the courts themselves or by impartial agencies authorized to investigate allegations of judicial misconduct and to impose, or recommend, sanctions in appropriate cases. Like Justice O'Connor, I have publicly criticized Iowa's use of the retention ballot to retaliate against the Justices who concluded that the Iowa Constitution prohibited discrimination against same-sex marriage. Today I shall say a few words about the Florida case that provided the original justification for the campaign to use the

retention ballot as a method of determining whether three members of your Supreme Court - Justices Lewis, Pariente, and Quince, are still qualified for judicial service.

The case, *Florida v. Nixon*, arose out of a brutal murder that Nixon committed near Tallahassee on August 13, 1984. The gruesome facts - Nixon had tied his victim to a tree and set her on fire - obviously would make the defendant eligible for the death penalty in any jurisdiction where that penalty is authorized, no matter how narrowly the eligibility for that penalty is defined. Moreover, the evidence of guilt was overwhelming. In plea negotiations, Nixon's competent counsel, Michael Corin, offered a plea of guilty to all charges in exchange for a recommendation of a sentence other than death. The prosecutor's decision to turn down that offer is responsible for all of the litigation that has been on-going for over 28 years. The only

question that has ever separated the litigants is whether Nixon shall die a natural death in prison or be put to death by the State. I have no idea how many thousands of dollars Florida has spent litigating that question, but I do know that there would have been no need to spend any of that money if Florida did not authorize the death penalty.

The first round of the litigation was, of course, the trial. In his opening statement, his lawyer, Corin, acknowledged Nixon's guilt and urged the jury to focus on the penalty. After telling them that his client's guilt would be proved to their satisfaction beyond any doubt, he correctly continued:

"This case is about the death of Joe Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement."

Nixon was excluded from attendance at most of the trial because of his disruptive and violent misbehavior. No evidence was offered on his behalf during the guilt phase. At the penalty phase, however, Corin presented the testimony of eight witnesses, including friends and relatives who described Nixon's emotional troubles and erratic behavior, and both a psychologist and a psychiatrist who addressed his history of emotional instability, his low I.Q. and the possibility that he had suffered brain damage. After three hours of deliberation, the jury recommended the death sentence which the trial court imposed.

On direct appeal to the Florida Supreme Court, Nixon's new lawyer argued that Corin had rendered ineffective assistance by conceding Nixon's guilt without his express consent. Given the similarity between that strategy and a guilty plea, and the fact that the law is well settled that counsel may

not enter a guilty plea without first obtaining his client's express consent, there was obviously a substantial basis for the argument. (A similar argument had been endorsed by state supreme courts in Illinois and South Carolina and by the federal court of appeals for the 6th Circuit.) Instead of resolving the issue, the Florida Supreme Court entered three different orders directing the trial court to supplement the record. First, on October 27, 1987, it ordered the trial judge to conduct a hearing to determine whether Nixon was informed of Corin's strategy; second, on October 4, 1988, it ordered the judge to make appropriate findings; and third, on February 1, 1989, because Nixon had refused to waive the attorney-client privilege, it ordered another hearing at which Nixon would have the burden of proving that he had not been informed of, or had not consented to, the strategy. The evidence at that hearing established that Corin had fully explained his

strategy to Nixon, but that Nixon had neither objected nor consented. Thus, the trial court found that Nixon had not sustained his burden of proof. The Supreme Court described those proceedings but instead of deciding whether the defendant must affirmatively consent to a trial strategy that is arguably the functional equivalent of a guilty plea, it invited further consideration of the issue in a state post-conviction proceeding at which further evidence could be heard. The opinion, which has been referred to as "Nixon I", was announced in 1990 before Justice Parente, Justice Lewis, or Justice Quince joined the court; it was unanimous.

In 1993, after the United States Supreme Court denied Nixon's certiorari petition, he renewed his claim in a state post-conviction proceeding under Rule 3.850. The trial court denied relief without conducting a hearing, but the Florida Supreme Court, in "Nixon II", held that his claim should

prevail if the evidence established that he had not made "an affirmative, explicit acceptance" of his lawyer's trial strategy. The Court concluded that another hearing should be held to resolve that issue. This time, however, the Court was not unanimous. 758 So. 2d 618. Instead of joining the court's *per curiam* opinion, Justice Lewis and Justice Wells each wrote a separate dissent.

After the remand in Nixon II, the trial judge conducted a further hearing and concluded that Nixon's silence in response to his lawyer's explanation of his proposed strategy was adequate evidence of consent to that strategy. In 2003, in "Nixon III", the Florida Supreme Court again reversed because the evidence did not establish that Nixon had made the kind of explicit consent that a valid guilty plea would require. Justice Wells again dissented, but Justice Lewis concurred in the result, quite reasonably concluding that the law of the case as announced in Nixon II was

controlling even though he had disagreed with that decision. It seems to me particularly ironic for those who disagree with the decisions in all three of the appeals to criticize Justice Lewis for correctly concluding that the majority's rejection of his dissenting position in Nixon II constituted the law of the case that he had a duty to respect in Nixon III.

The State Attorney General, Charles Crist (who later became Governor) then filed a petition for certiorari presenting the United States Supreme Court with the question whether counsel's conduct should be evaluated under the standard set forth in my opinion in *United States v. Cronin*, 466 U. S. 648 (1984), or Justice O'Connor's opinion in *Strickland v. Washington*, 466 U. S. 668 (1984). He correctly argued that there was a conflict among the state supreme courts on the question and, with Chief Justice Rehnquist participating, the justices voted to grant. For health reasons,

the Chief was unable to participate in the decision on the merits. The Nixon case was therefore one in which I presided at the oral argument and assigned the majority opinion to Ruth Ginsburg. With her characteristic skill and eloquence she wrote an opinion that turned out to be unanimous. The fact that she was so persuasive in explaining the reasonableness of Corin's trial strategy, and in distinguishing the guilty plea cases, surely does not raise any question whatsoever about the competence of the state judges who had come to a different conclusion. Indeed, although I did not agree with my law clerk's analysis in the case, I find this excerpt from his cert memo interesting. He wrote:

"I think the Florida court got it exactly right: While it may on occasion be a legitimate strategy for a lawyer to concede his client's guilt during the guilt phase of a capital trial, the decision to choose such a strategy belongs to

the client. When a lawyer pursues such a strategy without a client's consent, that lawyer's actions constitute an impermissible forfeiture of the client's constitutional right to an adversarial proceeding to determine guilt. I think this is exactly the kind of case that should be governed by *Cronic* rather than *Strickland*."

The expression of that opinion was fully consistent with his qualifications as a law clerk. Surely the earlier expression of that opinion by two judges on your supreme court tells us nothing about their fitness for judicial service.

Finally, let me add a word about the aftermath of the decision. I had assumed that in the ensuing eight year period, Florida would have executed Nixon. In fact, however, he remains alive on death row, some 28 years after the prosecutor's decision to reject the offer of a plea of guilty that, if accepted, would have required him to spend the rest of his life in

prison. He has not been on death row as long as Gary Elton Alvord - who was sentenced to death in 1974 and remains on death row today - but his case is one of those that give the Florida death row population a constantly increasing life expectancy. According to statistics compiled by my law clerk, the 73 prisoners executed in Florida since 1974 had an average life expectancy following the imposition of their death sentences of 13.4 years. However, the time between sentencing and execution has steadily grown. The last five prisoners executed by Florida had spent 26, 31, 17, 30, and 24 years respectively on death row. Indeed, only two prisoners sentenced to death after the enactment by Congress of the Anti-Terrorism and Effective Death Penalty Act in 1996 - the statute that was supposed to streamline post-conviction proceedings in capital cases - have been executed. This slow pace has allowed

Florida's capital prisoner population to balloon to 404 inmates.

In an opinion in a Florida capital case that I wrote in 1977, I pointed out that "the action of the sovereign in taking the life of one of its citizens . . . differs dramatically from any other state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U. S. 349, 357-358 (1977). Reflecting about the issue over the past 35 years has made it clear to me that it is nothing other than emotion that explains the extravagant use of the judicial and legal talent that is devoted to the maintenance of your capital punishment system. Perhaps Florida's policy makers should make a cost-benefit analysis to determine whether that extravagance should continue.

I thank you for your attention and I congratulate Justices Lewis, Pariente, and Quince for their well-deserved victories in an election that, in my judgment, should never even have been held.