

# Pleading Guilty Without Client Consent

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## PLEADING GUILTY WITHOUT CLIENT CONSENT

GABRIEL J. CHIN\*

### ABSTRACT

*In some cases, lawyers are, and should be, permitted to conclude plea bargains to which their clients have not agreed. Because clients bear the consequences of a conviction, ordinarily, clients should choose between a plea and the possibility of acquittal at trial. Further, clients have the right to decide that even though conviction is practically certain, moral or political reasons warrant insistence on a trial. But some clients have the goal of minimizing incarceration, have been offered reasonable pleas, face substantially greater sentences if convicted after trial, have no plausible ground for acquittal—and nevertheless decline to plead guilty. They may do so because they are cognitively unable to make a decision or complete a plea colloquy, or because they are holding out for a miracle. The traditional understanding of lawyer-client decision-making authority would lead to the conclusion that the client has the absolute right to reject a plea, even if it inevitably makes the client worse off, on her own terms, by increasing the imprisonment she is trying to avoid. This Article proposes that the Supreme Court’s decision in Florida v. Nixon leads to a different conclusion. In Nixon, a unanimous Court held that defense counsel could tell the jury in an opening statement that a defendant was guilty in hopes of improving the client’s*

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*position for sentencing. The principle of Nixon has been expanded in lower courts to cover a range of issues and contexts. If Nixon allows a concession of guilt in the inchoate hope of obtaining a more favorable sentence, it should also allow a concession to obtain a specific agreement. Nixon does not extend to situations where the client actually objects to defense counsel's action. But short of actual client objection, defense counsel should be able to assist a client in achieving her goal of minimizing incarceration or avoiding execution even if that means making concessions on issues that were once thought to require personal action by the client.*

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## INTRODUCTION

This Article proposes that defense counsel are, and should be, authorized to negotiate and conclude plea bargains to which their clients have not agreed when a client faces catastrophic sentencing consequences by irrationally refusing a reasonable plea. This is a decidedly second-best solution to problems created by our criminal justice system, which in many jurisdictions is characterized by harsh mandatory sentences, overcriminalization and overprosecution, underresourced or otherwise ineffective defense counsel, and use of the criminal justice system to address problems like mental illness that would be better handled by other institutions. Nevertheless, it may be the best second-best solution available.

Overwhelming majorities of criminal defendants whose cases progress to the point of decision elect to plead guilty.<sup>1</sup> The numbers are so high that the question of “why” is interesting and important.<sup>2</sup> Indeed, the numbers are so high that the question of “why does anyone plead *not* guilty” is equally interesting. Given “the reality that criminal justice today is for the most part a system of pleas, not a system of trials,”<sup>3</sup> what motivates a handful of defendants to go to trial, knowing that the result may well be a much harsher sentence? There are, of course, many understandable reasons for failure to

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1. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions result from guilty pleas.”). This Article does not address the merits of plea bargaining as an institution. For recent relevant literature on that subject, see generally Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150 (2012); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464 (2004) [hereinafter Bibas, *Outside the Shadow of Trial*]; Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN ST. L. REV. 1155 (2005); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 84 (2005) (“Acquittals are steadily disappearing from the federal system.... [I]ncreasing accuracy probably does not explain this trend; unfortunately, the pattern has unfolded because federal prosecutors have accumulated so much power under the sentencing laws that they can punish defendants too severely for going to trial.”).

2. One reason in some cases is the inadequacy of defense services. See generally Cara H. Drinan, *Getting Real About Gideon: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1310 (2013); Eve Brensike Primus, *The Illusory Right to Counsel*, 37 OHIO N.U. L. REV. 597 (2011); Robert E. Toone, *The Absence of Agency in Indigent Defense*, 52 AM. CRIM. L. REV. 25 (2015).

3. *Lafler*, 132 S. Ct. at 1388.

reach agreement, even if the prosecution, defense counsel, and the client are informed, rational, and engaged.<sup>4</sup> One unfortunate reason—the focus of this Article—is that some clients who cannot plausibly assert innocence and want to minimize their incarceration nevertheless irrationally decline reasonable plea offers in favor of hopeless trials.<sup>5</sup> Abbe Smith has usefully cataloged techniques that conscientious defense lawyers can use to persuade clients to plead guilty when there is no chance of acquittal at trial.<sup>6</sup> But for a variety of reasons, including youth and mental illness, some clients will not “cut their losses in the face of certain disaster.”<sup>7</sup>

Imagine, for example, Donna Davenport, a thirty-two-year-old client in state court facing a counterfeiting charge. Multiple officers arrested the client for possession of forged state government checks at an apartment leased in Ms. Davenport’s name. Her fingerprints

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4. The prosecution may consider its case so strong and/or the offense so serious that no plea offer is made. A plea offer may be close to the potential sentence exposure after trial, giving the client no incentive to take it. The defense may have judgments about whether witnesses will show up or whether evidence will persuade a jury. The defense may have cards to play at trial that the prosecution does not fully appreciate. In principle, because of constitutional disclosure obligations, there should be fewer surprises in the prosecution’s case. See, e.g., Jonathan Abel, *Brady’s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 745 (2015). The prosecution might make a reasonable offer, but the defendant might want to take a chance on even a relatively low possibility of acquittal. A defense attorney may persuade a client to reject a reasonable plea and go to trial against the client’s interests because, for example, the attorney is paid more per hour for trial work than for out-of-court work. “Some ... defendants might insist on objectively hopeless trials for a reason that oversimplified, punishment-focused applications of the rational-actor model do not fully account for: principle.” Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 CALIF. L. REV. 1573, 1625 (2012) (discussing tax protesters). For further discussion of various structural and psychological influences that affect plea bargaining, see Bibas, *Outside the Shadow of Trial*, *supra* note 1, at 2467-69.

5. See Alex Stein, *The Right to Silence Helps the Innocent: A Response to Critics*, 30 CARDOZO L. REV. 1115, 1127 (2008) (“A hopeless trial has a downside: criminal defense costs money and effort. Furthermore, finding out that the defendant wasted her time may prompt the sentencing judge to waste the defendant’s time in return.”).

6. See Abbe Smith, *“I Ain’t Takin’ No Plea”: The Challenges in Counseling Young People Facing Serious Time*, 60 RUTGERS L. REV. 11, 23-30 (2007) [hereinafter Smith, *Challenges in Counseling*]; Abbe Smith, *The Lawyer’s “Conscience” and the Limits of Persuasion*, 36 HOFSTRA L. REV. 479, 491-96 (2007).

7. Smith, *Challenges in Counseling*, *supra* note 6, at 12. For an example of a case that went to trial in which an appeals court found the evidence of guilt overwhelming, and no defenses sufficiently substantial to be worthy of jury consideration, see *People v. Dwight*, 592 N.Y.S.2d 10, 10-11 (App. Div. 1993).

were found on the checks, and color laser printers and blank check stock were found in open view in the apartment. Forensic examination of a computer found in the apartment revealed an account with the username "Donna" containing images of forged checks which had been passed, other checks in the process of creation, and email and social media accounts in the name "Donna Davenport." The search was based on a warrant supported by an affidavit from an informant who swore that he had recently purchased forged checks from Ms. Davenport at her apartment.

Ms. Davenport has a prior misdemeanor forgery conviction for which she received probation, and a felony forgery conviction for which she was sentenced to ninety days in jail plus probation. The current charge carries a ten-year mandatory minimum sentence, a probable guideline calculation of fourteen years, and a twenty-year maximum. The district attorney offered Ms. Davenport a sentence of six years in exchange for a guilty plea, but the client, aware that criminal cases are sometimes dismissed outright, and that some defendants charged with serious crimes are allowed to plead to minor sentences, insisted that she will accept no more than five years. If the case is tried, Ms. Davenport has decided not to testify, because she recognizes it would not help. She also understands that she would be impeached with prior forgery convictions, and that her sentence might well be increased if the judge concludes she lied about her conduct.

After reviewing the search warrant and police report, evaluating the records of the officers who executed the search, interviewing Ms. Davenport about her background and possible defenses, and researching the provisions and constitutional validity of the substantive offense and of the sentencing regime, defense counsel concluded that the search was valid, the evidence is overwhelming, there are no viable defenses, and, therefore, that a trial will result in a conviction. Defense counsel also made the case to the prosecutor that a sentence of less than six years was appropriate, to no avail. Defense counsel has concluded that the sentence will be at least the mandatory minimum, and the assigned judge tends to follow the guidelines, so the sentence is likely to be fourteen years. But in spite of half a dozen visits to the jail where Ms. Davenport is confined, defense counsel has been unable to persuade her that accepting the

plea offer is the right decision. Ms. Davenport has expressed willingness to take probation, pay partial restitution, or accept community service.

On their surface, traditional rules of legal ethics and constitutional doctrine lead to the conclusion that there is no solution to the problem of an irrational client acting against her interests; Ms. Davenport may conclusively reject the six-year offer even though that decision will harm her as surely as summer follows spring.<sup>8</sup> Traditionally, the ethical rules seem to say that clients set goals and lawyers decide strategy and tactics.<sup>9</sup> A lawyer cannot unilaterally conclude that a client would be better off taking a plea of ten years, rather than risking a 30 percent chance of a murder conviction at trial. Similarly, a client cannot insist that a lawyer put on a fifth cumulative impeachment witness, or refuse to stipulate to foundation of an indisputably genuine document. This is understood to mean that clients make the basic choice between trial and plea.<sup>10</sup> After all, as the saying goes, the lawyer is not the one who has to do the time.

In addition, the Court has stated that some specific decisions are within the client's exclusive authority as a matter of constitutional criminal procedure, including "whether to plead guilty, waive a jury, testify on his or her own behalf, or take an appeal.... [W]ith some limitations, a defendant may [also] elect to act as his or her own advocate."<sup>11</sup>

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8. I do not say that conviction is an absolute certainty—police evidence rooms can be destroyed in disasters such as earthquakes or floods—rather, conviction is practically certain. Cf. Michael Sullivan, *How a Volcano Eruption Wiped Away Summer*, NPR (Oct. 22, 2007, 12:55 PM), <http://www.npr.org/templates/story/story.php?storyId=15448607> [<https://perma.cc/X5JN-9P2W>] (noting that, in 1816, spring and summer weather patterns were disrupted worldwide after a volcanic eruption).

9. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2013); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 22 (AM. LAW INST. 2000). See generally Lynn Mather, *What Do Clients Want? What Do Lawyers Do?*, 52 EMORY L.J. 1065 (2003); Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 KAN. L. REV. 1 (1998).

10. See *supra* note 9 and accompanying text.

11. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (citations omitted); see also, e.g., *Gonzalez v. United States*, 553 U.S. 242, 248 (2008) (citing *New York v. Hill*, 528 U.S. 110, 114-15 (2000)).

Based on these constitutional and ethical constraints, it would appear that an attorney is required to educate, persuade, and counsel,<sup>12</sup> but that the client enjoys the final decision of whether to reject an advantageous guilty plea offer in favor of a certain conviction that will result in a much more severe penalty.

Traditional principles of allocating lawyer-client authority were established when there were fewer pleas, or at least when the centrality of plea bargaining was not fully appreciated and recognized.<sup>13</sup> Equally important, mandatory sentencing was much less prevalent.<sup>14</sup> Traditional doctrines thus create a paradox. The Supreme Court has held that there must be a knowing and voluntary waiver of important rights as a predicate to pleading guilty.<sup>15</sup> This principle recognizes that a guilty plea is a dangerous path when it means giving up a free shot at acquittal through trial, especially when the sentence after trial may be the same. In *Boykin v. Alabama*, for example, guilty pleas to robbery charges led to five death sentences; the plea may have been convenient for the court-appointed lawyer, but it had no apparent benefit for Boykin.<sup>16</sup> The knowing and

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12. See MODEL RULES OF PROF'L CONDUCT r. 2.1 cmt. (AM. BAR ASS'N 2013) ("A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."). I thank Bryan Taylor for pointing out that whether a plea is accepted may turn on the views of defense counsel as much as the views of the client. That is, defense lawyers may fail to convey offers to clients (which is clearly unethical), or may fail to offer advice about the likely consequences of various courses of action that the client might have taken, or at least considered, had such advice been rendered.

13. See generally George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000) (examining the increasing prevalence and power of the plea-bargaining system during the late twentieth century).

14. See *id.* at 1067-72 (discussing the impact of mandatory sentencing on power dynamics in plea bargaining).

15. See *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) ("It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."); see also, e.g., *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) ("A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences.'" (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970))).

16. See 395 U.S. at 240. Thus, the dissenting Alabama Supreme Court justices who believed the conviction should be reversed stated:

It is to be noted that we are not dealing here with a case where there was an agreement between the district attorney and the defendant as to a sentence less

voluntary waiver rule recognizes that a client faces a dilemma when the choice is between a plea bargain and a calculated risk at trial. Such value choices and risk calculations are properly for the client, not for the attorney.<sup>17</sup>

Given the importance of pleas and the realities of mandatory sentencing, however, the choice will now often be between a plea offer and the practical certainty of a conviction carrying a much higher sentence.<sup>18</sup> In such instances, one might contend that a plea of not guilty is as risky and portentous as a guilty plea because it also waives substantial rights—a favorable plea bargain—and therefore it, too, should be knowing, voluntary, and intelligent.<sup>19</sup> Clients seeking the lowest possible sentence and with nothing to gain from a trial might nevertheless be unable to accept a plea. A client might be competent to stand trial under the lenient standard, yet be uncommunicative.<sup>20</sup> Another client might not be sufficiently

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than capital upon the entering by defendant of a guilty plea. There is nothing in the record or briefs indicating the defendant's trial strategy in pleading guilty in these five cases.

Boykin v. State, 207 So. 2d 412, 415 (Ala. 1968) (Goodwyn, J., dissenting), *rev'd*, 395 U.S. 238 (1969).

17. See Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147, 1178 (2010) ("For example, imagine a defendant who has only a twenty percent chance of being acquitted at trial and will receive a sentence of thirty years in prison if convicted. If the prosecutor offers a plea that would result in a fifteen-year sentence, most lawyers would recommend that the defendant take that plea. But different defendants have different views of the value of the twenty percent chance of being acquitted.... [T]he defendant is the only person who can prioritize the various competing interests at stake.").

18. See, e.g., Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1610-11 (2005).

19. "Given modern realities, the decision to reject a plea bargain merits similar protection" as that given to waivers of other important rights. Recent Case, *Williams v. Jones*, 571 F.3d 1086 (10th Cir. 2009) (*per curiam*), 123 HARV. L. REV. 1795, 1800 (2010); see also Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2669-72 (2013); David A. Perez, Note, *Deal or No Deal? Remediating Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532, 1535-36 (2011).

20. See *United States v. McDonald*, No. 01-2348, 2002 WL 1767534, at \*5 (10th Cir. Aug. 1, 2002) ("Defendant also argues that his conduct at trial demonstrated an inability to 'consult with counsel with a reasonable degree of rational understanding.' Yet his conduct at trial was less disruptive than anticipated by the district court, and his one outburst was no more incoherent than his remarks at the competency hearing. Despite noting persistent psychoses that could affect his approach to the case, all three competency reports stated that Defendant could still consult with his attorney with a rational degree of understanding."); *Strickland v. State*, 815 S.W.2d 309, 311-13 (Tex. Crim. App. 1991) (upholding competency finding even though

organized cognitively to get through a plea colloquy, causing a judge to reject the plea and send the case to trial.<sup>21</sup> Some clients might be too indecisive to accept or reject any given course of action, preferring to wait another day, thus allowing the opportunity to pass.<sup>22</sup> In short, in the context of a hopeless case some clients may not, in the broadest sense, be capable of knowingly, voluntarily, and intelligently pleading either guilty or not guilty. In terms of minimizing sentences, it might be advantageous for the default rule to be that the client accepts the last best plea offer unless she affirmatively rejects it and demands a trial, rather than the opposite.

This Article proposes, tentatively, that there may be a legitimate and fair workaround in “situations where there is overwhelming evidence of guilt and no defense”<sup>23</sup> yet the client is unable to plead guilty. Under Supreme Court decisions as developed in the lower courts, the formal decision-making regime has changed, at least practically and functionally, in favor of the attorney: attorneys can now effectively plead guilty without their clients’ consent.<sup>24</sup> As a tentative conclusion, holding constant other aspects of the criminal

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defense counsel gave the following testimony during the competency hearing: “I have been unable to communicate with my client, I find that he has no reasonable degree of rational understanding of the proceedings against him. He has no rational or factual understanding at all of what is happening to him.”).

21. *See* *United States v. Hernandez-Rivas*, 513 F.3d 753, 760-61 (7th Cir. 2008) (“[T]he district court judge did not abuse his discretion when he rejected Hernandez-Rivas’s guilty plea after repeated attempts to obtain a sufficient factual basis from Hernandez-Rivas under Rule 11.”).

22. *See* *United States v. Evans*, 496 F. App’x 950, 955 (11th Cir. 2012) (“[T]he district court rejected Evans’s guilty plea based upon the plea’s questionable voluntariness, particularly because Evans had already changed his mind about pleading guilty multiple times during that same hearing.”); *cf.* *State v. Gordon*, 880 A.2d 825, 831 (R.I. 2005) (quoting trial judge who stated: “It’s clear to this Court, to this Judge, that this defendant commenced a campaign to delay this trial in the hope that it’s going to go away.”).

23. *People v. Johnson*, 538 N.E.2d 1118, 1125 (Ill. 1989); *see also, e.g.*, *United States v. Robinson*, No. 06-604-01, 2010 WL 3749475, at \*2 (E.D. Pa. Sept. 24, 2010) (“This is truly a case in which no defense counsel, however skilled or imaginative, could have secured a not guilty verdict given the nature of the government’s overwhelming evidence.”).

24. *See infra* Part I.

justice system,<sup>25</sup> this shift in authority is probably good for clients and for the legal system.

Concretely, my proposal addresses serious felony cases with the following characteristics: (1) the prosecution has made a plea offer that is favorable in some way—to a specific sentence, without certain enhancements or mandatory minimums, or to a lesser charge; (2) the post-trial sentence is likely to be substantially higher than the plea offer; (3) after full factual and legal investigation, counsel concludes that there is no realistic likelihood of an acquittal because the readily available admissible evidence is overwhelming and there are no available defenses; (4) the client has set the goal of the representation as minimizing the sentence; and (5) there is no reasonable basis to decline the plea offer; but (6) after thorough counseling and discussion, the client is unwilling or unable to plead guilty. In such cases, the prosecution might be willing to leave the plea offer open, not in exchange for a guilty plea, but in exchange for a streamlined trial presentation. If so, defense counsel should be able to stipulate to facts and to admission of evidence and testimony, thereby achieving the best available outcome for her client. The trial, such as it is, could be done largely on paper, and perhaps without a jury. To return to the Donna Davenport example, if the prosecution will agree to the six-year sentence, her lawyer should be able to stipulate to the admission of the check stock into evidence, that it was blank check stock found in her apartment, and that the evidence shows she is guilty of the offense, so long as the lawyer consults with Ms. Davenport about this plan, and she does not affirmatively object.

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25. Two features of the system make it important that clients have every opportunity to obtain the benefits of plea bargains: (1) the absence of a principle that sentences based on pleas should be proportional to sentences following trials; and (2) the absence of a financial constraint on police, prosecutors, and judges when arresting, prosecuting, or sentencing. Cf. Jeffrey Bellin, *Attorney Competence in an Age of Plea Bargaining and Econometrics*, 12 OHIO ST. J. CRIM. L. 153, 153 (2014) (asserting that “[f]acts should control who wins or loses in court” but suggesting that evidence shows that quality of defense counsel is a significant factor); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1655 (2010) (suggesting that “prosecutors are ill-suited to consider the normative merits of potential charges”); Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 262-63 (2011) (noting that prosecutors are too overworked to pay careful attention to individual cases).

I. THE QUIET REVOLUTION OF *FLORIDA V. NIXON*

The Supreme Court has made clear the domain of exclusive client decision-making authority is mapped narrowly. As Pamela Metzger explained in an article critical of the development, “[t]he Court has cabined defendants’ vigorous exercise of their adjudicatory rights by shifting control of Sixth Amendment rights from the accused to defense counsel.”<sup>26</sup> The key case is *Florida v. Nixon*, a unanimous 2004 decision written by Justice Ginsburg, with Chief Justice Rehnquist not participating.<sup>27</sup> The Court nominally adhered to the rule that the lawyer cannot plead guilty for the client.<sup>28</sup> But, without so much as a cautionary concurrence, the Court held that the lawyer can tell the jury that the client is guilty, even without the client’s consent, as a tactical choice.<sup>29</sup>

*Nixon* was a capital murder case.<sup>30</sup> Nixon’s trial lawyer evidently prepared the case well; after he deposed all of the prosecution’s witnesses,<sup>31</sup> he concluded that guilt was not “subject to any reasonable dispute.”<sup>32</sup> In addition to physical evidence, there were police and nonpolice confessions.<sup>33</sup> The lawyer unsuccessfully sought a noncapital plea.<sup>34</sup> He concluded that the best strategy was to concede guilt, thereby preserving his credibility with the jury when arguing against the death penalty during the penalty phase.<sup>35</sup> The lawyer explained the strategy to the client, who neither agreed nor

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26. Pamela R. Metzger, *Fear of Adversariness: Using Gideon to Restrict Defendants’ Invocation of Adversary Procedures*, 122 YALE L.J. 2550, 2556 (2013).

27. See 543 U.S. 175 (2004).

28. See *id.* at 187.

29. See *id.* at 192. *Nixon* was not the first decision to so hold. See, e.g., *Abshier v. State*, 28 P.3d 579, 594 (Okla. Crim. App. 2001) (acknowledging that “it could be reasonable trial strategy to candidly concede guilt early in the trial in order to establish credibility”), *overruled in part on other grounds by Jones v. State*, 134 P.3d 150, 155 (Okla. Crim. App. 2006). In addition, apparently not all courts follow *Nixon*; under state law, at least Minnesota and North Carolina seem to require client consent to concede guilt. See, e.g., *State v. Prtine*, 784 N.W.2d 303, 318 (Minn. 2010) (“The decision to concede guilt is the defendant’s decision alone to make.”); *State v. Maready*, 695 S.E.2d 771, 775 (N.C. Ct. App. 2010) (holding the same).

30. See *Nixon*, 543 U.S. at 178.

31. See *id.* at 180.

32. *Id.* at 181.

33. *Id.* at 179.

34. *Id.* at 181.

35. *Id.*

objected.<sup>36</sup> In his opening statement, the lawyer told the jury: “In this case, there won’t be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie Bickner’s death .... [T]hat fact will be proved to your satisfaction beyond any doubt.”<sup>37</sup> Defense counsel put on eight witnesses, including a psychiatrist and a psychologist in the penalty phase, but the jury voted for the death penalty.<sup>38</sup>

The Florida Supreme Court reversed, holding that a concession of guilt by counsel required at least affirmative client consent,<sup>39</sup> but the Supreme Court disagreed. The Court said that the lawyer was “obliged to, and in fact several times did, explain his proposed trial strategy .... [He] was not additionally required to gain express consent before conceding Nixon’s guilt.”<sup>40</sup> The Court explained: “Counsel ... may reasonably decide to focus on the trial’s penalty phase, at which time counsel’s mission is to persuade the trier that his client’s life should be spared.”<sup>41</sup> This is a tactic to achieve the ends apparently set by the client—avoiding execution.

The Court drew a fine line between a formal guilty plea and a factual concession. Notwithstanding the concession during opening,

Nixon retained the rights accorded a defendant in a criminal trial.... The State was obliged to present during the guilt phase competent, admissible evidence establishing the essential elements of the crimes with which Nixon was charged.... Further, the defense reserved the right to cross-examine witnesses for the prosecution and could endeavor, as [counsel] did, to exclude prejudicial evidence.<sup>42</sup>

The Court distinguished an important Warren Court precedent, *Brookhart v. Janis*, which involved a defendant who expressly waived a jury trial and whose lawyer agreed to a “prima facie trial,” but who personally stated that he did not wish to plead guilty.<sup>43</sup> A

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36. *Id.*

37. *Id.* at 182.

38. *Id.* at 183-84.

39. *Id.* at 185-86 (citing *Nixon v. Singletary*, 758 So. 2d 618, 624 (Fla. 2000)).

40. *Id.* at 189.

41. *Id.* at 191.

42. *Id.* at 188.

43. *See id.* at 187-89 (citing *Brookhart v. Janis*, 384 U.S. 1, 6-7 (1966)).

“prima facie trial,” a procedure obscure even to the Ohio Assistant Attorney General who argued the case, was apparently the equivalent of a no contest plea.<sup>44</sup> The Court held that counsel had no “power to enter a plea which is inconsistent with his client’s expressed desire and thereby waive his client’s constitutional right to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him.”<sup>45</sup>

But the Court’s distinction between a permissible concession and an impermissible plea is evanescent. Technically, Nixon could put on evidence and challenge the prosecution’s case, and if for some bizarre reason it turned out, say, that all of the state’s evidence was about some other incident not involving Nixon, his lawyer could make that point. However, the practical opportunity to contest the key trial issue—whether the defendant committed a murder—no longer existed.<sup>46</sup> Also, the value of doing so had dramatically changed; if Nixon’s attorney had suddenly suggested that particular pieces of evidence were unpersuasive or irrelevant, the jury would have been at least perplexed and possibly angered. Indeed, the distinction between a formal guilty plea and what the Court approved is so thin that some courts simplify *Nixon* as holding that counsel can plead guilty without a client’s permission.<sup>47</sup>

In lower courts, *Nixon* has been expanded in several ways. First, the principle clearly applies to noncapital cases. *Nixon* itself stated that “such a concession in a run-of-the-mine trial might present a closer question, [but] the gravity of the potential sentence in a

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44. *Brookhart v. Janis*, 384 U.S. 1, 9 & n.\* (separate opinion of Harlan, J.).

45. *Id.* at 7.

46. See *Nixon*, 543 U.S. at 191 (“It is not good to put on a ‘he didn’t do it’ defense and a ‘he is sorry he did it’ mitigation. This just does not work.” (quoting Andrea Lyon, *Defending the Death Penalty Case: What Makes Death Different*, 42 MERCER L. REV. 695, 708 (1991))). Presumably, it works even less well to whipsaw the jury and court by contending that “he didn’t do it,” “he did it,” “oops, he didn’t do it” and then “he is sorry he did it” by pleading not guilty, conceding during opening statement, reneging on the concession by taking advantage of trial rights, and then making an apologetic case in mitigation.

47. See *Nance v. Ozmint*, 626 S.E.2d 878, 880 (S.C. 2006) (“In *Nixon*, the United States Supreme Court held that entering a guilty plea on behalf of a defendant without his express consent did not constitute ineffective assistance of counsel. The Court opined that the decision to plead guilty was a strategy employed by trial counsel in an effort to present mitigating evidence at sentencing in an attempt to save the defendant’s life.” (citation omitted); see also Alan Dershowitz, *Legal Ethics and the Constitution*, 34 HOFSTRA L. REV. 747, 756-57 (2006) (describing the *Nixon* holding as “you can’t plead a client guilty without his consent but you can, in effect, plead him guilty by acknowledging that he did it”).

capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus."<sup>48</sup> But of course, in jurisdictions like the United States that have mandatory or discretionary sentencing guidelines, there is also a two-phase structure with a trial-type sentencing hearing normally following a guilty plea or a trial conviction. In addition, as the Court has recognized, even noncapital sentences may be quite grave.<sup>49</sup> Thus, lower courts have applied *Nixon* outside the capital context.<sup>50</sup>

In addition, many courts have held that *Nixon* applies to formal stipulations as well as statements.<sup>51</sup> This makes sense given the practical implications of a trial concession. It is further supported by the legal principle, for some reason not mentioned in the Court's decision, that an unambiguous factual concession in an opening statement can constitute a binding judicial admission.<sup>52</sup> Courts have

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48. 543 U.S. at 190-91.

49. *See, e.g.*, *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (invalidating mandatory life without parole sentences for juveniles).

50. *See, e.g.*, *Monroe v. Dale*, No. 05 Civ. 6704(LAK), 2007 WL 1766770, at \*7 (S.D.N.Y. June 17, 2007) ("[C]oncession of guilt in non-capital case does not necessarily warrant finding of prejudice under *Cronic*; concession may be made without client's express consent" (citing *Frascone v. Duncan*, No. 01 Civ. 5924, 2005 WL 1404791, at \*2 (S.D.N.Y. June 14, 2005))); *United States v. Larson*, 66 M.J. 212, 218 (C.A.A.F. 2008) (applying *Nixon* in a noncapital case, and noting that *Pineo v. State*, 908 A.2d 632, 638-39 (Me. 2006), also did so); *Hopkins v. United States*, 84 A.3d 62, 66 (D.C. 2014) (upholding "defense counsel's strategic concession at trial that Hopkins was guilty of unarmed [possession of drugs with intent to distribute]").

51. *See, e.g.*, *Allerdice v. Ryan*, 395 F. App'x 449, 452 (9th Cir. 2010) ("The stipulations did not compare to a guilty plea. Defense counsel still vigorously contested the state's evidence, especially with respect to Allerdice's mental state."); *Commonwealth v. Brown*, 18 A.3d 1147, 1163 (Pa. Super. Ct. 2011) ("Thus, the United States Supreme Court has held that the decision as to whether to cross-examine a witness and what agreements to enter about admission of evidence are rights that a lawyer may relinquish on behalf of a defendant without the defendant's express consent. These matters relate to the conduct of trial and strategy, and in the absence of ineffectiveness in making the decision, which did not occur herein, the client is bound by his counsel's decision. Thus, a colloquy did not have to be held in this case."); *Whitehurst v. Commonwealth*, 754 S.E.2d 910, 912 (Va. Ct. App. 2014) ("Decisions that may be made without the defendant's consent primarily involve trial strategy and tactics, such as what evidence should be introduced, what stipulations should be made, what objections should be raised, and what pre-trial motions should be filed." (quoting *Sexton v. French*, 163 F.3d 874, 885 (4th Cir. 1998))). *But see* *State v. Humphries*, 336 P.3d 1121, 1123, 1126 (Wash. 2014) (finding impermissible a stipulation to the existence of prior conviction when made over client's objection).

52. *See, e.g.*, *United States v. Houser*, 754 F.3d 1335, 1352 (11th Cir. 2014) ("Mr. Houser's counsel invited the court to conclude that the Government had met its burden of proof with respect to all of the elements of Count Eleven; having done so, he cannot now claim error in the court's determination that the Government did, in fact, meet that burden."); *United States*

also held that because the decision is within the lawyer's discretion, the trial court need not inquire of the client directly.<sup>53</sup>

Moreover, courts have applied *Nixon* to give lawyers final decision-making authority on a wide range of other legal and factual matters,<sup>54</sup> including whether to call<sup>55</sup> or cross-examine<sup>56</sup> witnesses,

v. McKeon, 738 F.2d 26, 30 (2d Cir. 1984) (“The binding effect on a party of a clear and unambiguous admission of fact made by his or her attorney in an opening statement was acknowledged by the Supreme Court in *Oscanyan v. Arms Co.*, 103 U.S. 261, 263 (1880).”); see also FED. R. EVID. 801(d)(2)(D) (statement not hearsay if it “was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed”).

53. See *State v. Allen*, 220 P.3d 245, 246 (Ariz. 2009) (“This case addresses whether a court must engage a defendant who stipulates to the elements of a criminal offense in a colloquy like that afforded a defendant who pleads guilty. We conclude that, unless the defendant pleads guilty to an offense, no specific colloquy is required by *Boykin v. Alabama* or Arizona Rule of Criminal Procedure 17.”) (citation omitted); *Armenta-Carpio v. State*, 306 P.3d 395, 396 (Nev. 2013) (“We now hold, consistent with *Florida v. Nixon*, that a concession-of-guilt strategy is not the equivalent of a guilty plea and therefore the trial judge has no obligation to canvass a defendant concerning a concession-of-guilt strategy.”) (citation omitted); see also *Commonwealth v. Evelyn*, 26 N.E.3d 158, 165 (Mass. 2015) (“Because no colloquy was required regarding defense counsel’s concession of guilt to the lesser included offense of manslaughter in opening statement and closing argument, the defendant’s convictions are affirmed.”).

54. Of course, even before *Nixon*, courts recognized that counsel had final decision-making authority over many issues. See, e.g., *New York v. Hill*, 528 U.S. 110, 114-15 (2000) (“Thus, decisions by counsel are generally given effect as to what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence. Absent a demonstration of ineffectiveness, counsel’s word on such matters is the last.”) (citations omitted); see also WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 11.6(a) (4th ed. 2015).

55. See, e.g., *United States v. Parker*, 716 F.3d 999, 1011 (7th Cir. 2013) (“But whether to call any other witnesses was her lawyer’s decision.... Parker’s attorney consulted with her about whether to call any other witnesses and he decided against it.... [I]n another case, he had called a witness his client wanted to testify, and ‘watched that whole case fall apart.’ He was ‘not inclined to do it again.’”); *Puglisi v. State*, 112 So. 3d 1196, 1206 (Fla. 2013) (“[T]he decision to present witnesses is not a fundamental decision resting exclusively with a criminal defendant.... Defense counsel must have the ultimate authority in exercising his or her client’s constitutional right to present witnesses as such is a tactical, strategic decision within counsel’s professional judgment. Therefore, if a criminal defendant disagrees[,] ... it is the defense counsel who has the ultimate authority on the matter so long as he or she continues to represent the defendant.”) (footnote omitted).

56. See, e.g., *United States v. Zepeda*, 738 F.3d 201, 207 (9th Cir. 2013), *reh’g en banc granted*, 742 F.3d 910 (9th Cir. 2014) (“[D]efense counsel may waive an accused’s constitutional rights as a part of trial strategy. Counsel’s authority extends to waivers of the accused’s Sixth Amendment right to cross-examination and confrontation as a matter of trial tactics or strategy.”) (citation omitted); *People v. Campbell*, 802 N.E.2d 1205, 1210 (Ill. 2003) (“We note ... that a majority of the courts that have addressed the issue have held that counsel in a criminal case may waive his client’s [S]ixth [A]mendment right of confrontation by stipulating to the admission of evidence.”).

raise defenses,<sup>57</sup> or request or object to instructions,<sup>58</sup> whether the client is present at sidebar discussions,<sup>59</sup> and whether the trial is public.<sup>60</sup> *Nixon* has also been applied to a range of issues about the identity of the judge or factfinder: attorneys have been allowed to decide whether a federal magistrate rather than an Article III judge

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57. See, e.g., *United States v. Cronin*, 466 U.S. 648, 656-57, 656 n.19 (1984) (“[T]he Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade.”); *Hyde v. Branker*, 286 F. App’x 822, 833 (4th Cir. 2008) (“Hyde’s counsel essentially made the strategic choice to try to preserve their credibility with the jury by not asserting a defense they thought would fail, in the hopes of persuading the jury at sentencing to spare Hyde’s life.”); *Allen v. Sobina*, 148 F. App’x 90, 92-93 (3d Cir. 2005) (“The record here indicates that Allen’s defense counsel was faced with overwhelming evidence establishing that Allen committed the killing, including Allen’s own oral admission to police. Thus, counsel’s decision to concede Allen’s involvement, but to focus on avoiding the death penalty, is deemed a ‘tactical decision’ after *Nixon*, and the *Cronin* presumption of prejudice does not apply. Given the evidence against Allen, he cannot show that he was prejudiced by his attorney’s decision.”); *Pineo v. State*, 908 A.2d 632, 639 (Me. 2006) (“There was overwhelming evidence of Pineo’s guilt. Arguing that Pineo was not intoxicated, especially after the loss of a motion in limine to exclude the blood-alcohol test, or that Pineo was not the cause of the accident, despite overwhelming evidence to the contrary, could reasonably be perceived as being likely to undermine the defendant’s credibility before the jury and with the court at sentencing.... Moreover, the attorney’s decisions not to call an expert witness to offer a psychological report about Pineo’s mental state, and not to request a presentence investigation for the sentencing hearing, are strategic choices entitled to substantially heightened deference.”).

58. See *Woodard v. United States*, 738 A.2d 254, 258 (D.C. 1999) (noting split on question of whether counsel or client decides whether to request instruction on lesser included offense).

59. See, e.g., *United States v. Johnson*, 677 F.3d 138, 141-42 (3d Cir. 2012) (“An attorney’s obligation to consult with his client ‘does not require counsel to obtain the defendant’s consent to ‘every tactical decision.’ As with the choice to proceed before a magistrate judge during voir dire, the decision to have a criminal defendant present—and in close proximity to individual jurors—during individual voir dire conducted at sidebar is tactical and does not require the defendant’s express consent.” (quoting *Florida v. Nixon*, 543 U.S. 175, 187 (2004))); *Cox v. Ayers*, 414 F. App’x 80, 84 (9th Cir. 2011) (“The trial court did not violate Petitioner’s right to be present when it excluded him from a side-bar conference about counsel’s decision not to present a closing argument during the guilt phase. This particular bench conference was not a ‘critical’ stage in the trial. Further, the record shows that Petitioner was present in court during discussions about his right to present a defense, that he was aware of his counsel’s decisions and actions and had the opportunity to object in court, and that he never objected to his counsel’s decisions, actions, or assertion on the record that there was no conflict between counsel and Petitioner about their defense strategy. Under these circumstances, Petitioner had no right to be present at the side-bar conference for the purpose of objecting to counsel’s strategic decision.”) (citations omitted).

60. See, e.g., *State v. Overline*, 296 P.3d 420, 424 (Idaho App. 2012); *State v. Bauer*, 851 N.W.2d 711, 716-18 (S.D. 2014).

will preside over jury selection<sup>61</sup> or closing argument,<sup>62</sup> and whether the same or a different judge would preside over a resentencing after appeal.<sup>63</sup>

Most courts hold that *Nixon* is inapplicable when the client actually objects.<sup>64</sup> This seems right. Although there is some question whether the Supreme Court would agree,<sup>65</sup> some lower courts have held that a lawyer may be obligated not to comply with a client's

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61. See *Gonzalez v. United States*, 553 U.S. 242, 250-51 (2008).

62. See *United States v. Gamba*, 541 F.3d 895, 901 (9th Cir. 2008) ("After all, few defendants have the training to permit them to appreciate the various legal concerns at issue when a magistrate judge is delegated authority to preside over closing argument. An attorney understands the importance of consistency in a trial proceeding, therefore, he is best equipped to make an immediate determination as to the risks or benefits of accepting a magistrate judge as a substitute for a district court judge.").

63. See *United States v. Oakes*, 680 F.3d 1243, 1247-48 (10th Cir. 2012) ("In the present case it is not disputed that defense counsel requested that the same judge conduct the resentencing. What Defendant challenges is his attorney's authority to make that request on his behalf. He asserts that only he could make the request and that he did not personally, knowingly, and intelligently waive his right to resentencing before another judge. We reject the argument.") (footnote omitted).

64. Compare *People v. Bergerud*, 223 P.3d 686, 699 n.11 (Colo. 2010) (distinguishing *Nixon* from the case before the court, in which "the defendant *explicitly* objected to counsel's actions on his behalf"), and *Cooke v. State*, 977 A.2d 803, 847 (Del. 2009) ("However, where, as here, the defendant *adamantly objects* to counsel's proposed objective to concede guilt and pursue a verdict of guilty but mentally ill, and counsel proceeds with that objective anyway, the defendant is effectively deprived of his constitutional right to decide personally whether to plead guilty to the prosecution's case, to testify in his own defense, and to have a trial by an impartial jury."), and *State v. Humphries*, 336 P.3d 1121, 1125 (Wash. 2014) ("Although courts can presume a defendant consents to a stipulation, this presumption disappears where the defendant expressly objects."), with *United States v. Flores*, 739 F.3d 337, 340 (7th Cir. 2014) ("Flores tries to distinguish *Nixon* as a situation in which counsel alerted his client to his plan to concede guilt on some charges, while Flores insists that his lawyer never told him what the trial strategy would be and thus violated the duty to discuss tactics with the accused. This is not a compelling line of distinction, because Nixon, having been alerted, sat in silence and neither approved nor objected. The Court nonetheless held that counsel's performance met the [S]ixth [A]mendment's requirements. Lack of notice seems a lesser sin, unless we are confident that the client would have objected and that counsel would have followed the accused's instructions.") (citations omitted), and *Woodward v. Epps*, 580 F.3d 318, 327 (5th Cir. 2009) ("Here, however, the trial judge afforded Woodward an opportunity to express disagreement with his counsel's tactics on the record, which he did not. Had Woodward expressed disagreement with his counsel's strategy, this might present a closer question as to whether *Cronic's* presumption of prejudice applies. We find that *Strickland's* standard applies here." (citing *Florida v. Nixon*, 543 U.S. 175, 187 (2004), and *United States v. Thomas*, 417 F.3d 1053, 1057 (9th Cir. 2005))).

65. In *Burt v. Titlow*, the Court held that a lawyer was entitled to act on a client's inaccurate statement of facts, without independent investigation, even though that course led to disaster. See 134 S. Ct. 10, 18 (2013).

request if it is unreasonable or unwise for some reason, and if the matter is within the lawyer's authority to decide.<sup>66</sup> There is also disagreement on whether client consultation is actually required or if consultation is merely good practice.<sup>67</sup> It is hard to imagine a legitimate reason for a lawyer not to consult with her client about plea offers.<sup>68</sup> In practice, however, as long as the decision to concede is reasonable in the first place, a client will have difficulty proving prejudice, even if the attorney's failure to consult, or decision to act in spite of a client's objection, constitutes deficient performance.<sup>69</sup>

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66. *Bemore v. Chappell*, 788 F.3d 1151, 1164 (9th Cir. 2015) (stating that counsel may have a duty "to discourage his client from presenting an uncorroborated, implausible alibi theory"); *Hayes v. State*, 56 So. 3d 72, 74 (Fla. Dist. Ct. App. 2011) (per curiam) ("We recognize that, in this case, there is some evidence that Hayes objected to the defense that counsel intended to assert. But in light of Hayes' history of mental illness, the evidence against him, and his fragile mental state prior to trial, it is not clear that counsel's decision to honor Hayes' objection was reasonable."). *But see Ex parte Mills*, 62 So. 3d 574, 590 (Ala. 2010) ("Simply because defense counsel may make the tactical decision whether to request certain jury instructions, it does not follow that the trial court is required to follow the wishes of defense counsel as to every decision regarding trial strategy under any circumstance, even over the objection of the defendant.").

67. *Compare Stenson v. Lambert*, 504 F.3d 873, 891 (9th Cir. 2007) ("Stenson argues that Leatherman's concession of guilt went beyond *Nixon* because Leatherman did not consult with him before conceding that he 'accepted' the jury's guilty verdict. But *Nixon* did not hold that an attorney must obtain defendant's consent when conceding guilt in the sentencing phase."), *Davenport v. Diguglielmo*, 215 F. App'x 175, 180 (3d Cir. 2007) ("Even if Davenport did not explicitly consent to trial counsel's pursuit of the diminished capacity defense or the concession of guilt during his closing argument, we do not find defense counsel's performance deficient."), *Atwater v. Crosby*, 451 F.3d 799, 808 (11th Cir. 2006) ("[T]he concession of guilt was a 'legitimate trial strategy even without the defendant's knowledge or consent.'"), and *Commonwealth v. Cousin*, 888 A.2d 710, 722 (Pa. 2005) ("Appellant ... urges us to construe *Nixon* narrowly as applying only in capital cases where defense counsel has informed the defendant that the optimal strategy is to concede guilt but the defendant fails to respond.... While Appellant's argument is not without some foundation, we ultimately do not read *Nixon* so narrowly."), with *Thomas*, 417 F.3d at 1056 ("[W]e assume that counsel's concession of guilt without consultation or consent is deficient." (citing *Nixon*, 543 U.S. at 187 ("An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy."); *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (same))).

68. It is always possible, of course, that through discussion counsel will become convinced that she is wrong.

69. *Lott v. Trammell*, 705 F.3d 1167, 1189 (10th Cir. 2013) ("And, given the overwhelming evidence of Lott's involvement in the charged crimes, we could not say that Lott was prejudiced."); *Darden v. United States*, 708 F.3d 1225, 1233 (11th Cir. 2013) ("*Nixon* can be read in one of two compelling ways. On the one hand, the Supreme Court's statement that '[a]n attorney undoubtedly has a duty to consult with the client,' 'suggest[s] that consultation could be the key fact that requires *Strickland* prejudice to be presumed under *Cronic*.' On the other hand, the fact that the *Nixon* Court went to pains to distinguish a guilty plea and concession

*Nixon* makes clear that, in some circumstances, it is constitutionally reasonable for a lawyer to concede a client's guilt.<sup>70</sup> At the same time, conceding guilt without a client's permission is ironic and extraordinary—reminiscent of destroying the village in order to save it. As the Utah Court of Appeals explained, “conceding a ‘client’s guilt to the jury’ is at times ‘a paradigmatic example of the sort of breakdown in the adversarial process’ that the Sixth Amendment guards against.”<sup>71</sup> Accordingly, conceding guilt remains fully subject to scrutiny under the Sixth Amendment, and because of its unusual nature, courts should be willing to take a closer look at a decision to concede guilt than at ordinary tactical decisions. When a concession is made by inadvertence,<sup>72</sup> or as an error in judgment when

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strategy ‘suggests that consent is irrelevant for determining whether prejudice should be presumed.’ And furthermore, ‘*Cronic*’s presumed prejudice standard is only available in extreme circumstances “where counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing.” We are convinced the latter reading is correct, and the former an unwarranted expansion of the *Cronic* exception.” (quoting *Florida v. Nixon*, 543 U.S. 175, 187 (2004), and *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1251 (11th Cir. 2011)) (citations omitted); *Hendrix v. State*, No. S15A1169, 2015 WL 6631487, at \*3 (Ga. Nov. 2, 2015) (“[A]n attorney’s failure to fulfill the duty to consult regarding trial strategy does not in and of itself constitute ineffective assistance.”) (citation omitted).

70. Indeed, some litigants have claimed that their lawyer was ineffective for not conceding guilt. See *Hernandez v. State*, No. SC13-2330, 2015 WL 5445655, at \*31 (Fla. Sept. 17, 2015) (noting that “Hernandez contends that Stokes was ineffective in failing to concede second-degree murder, and that the defense presented in the guilt phase, which contested all the crimes charged, was incoherent and not credible, prejudicing the defendant in the penalty phase” but rejecting claim on the merits, because failing to concede was reasonable).

71. *State v. Lingmann*, 320 P.3d 1063, 1072 (Utah Ct. App. 2014) (quoting *United States v. Gonzalez*, 596 F.3d 1228, 1239 (10th Cir. 2010)).

72. See, e.g., *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. Dist. Ct. App. 2011) (“Prior to trial, counsel had explained that he intended to admit that Benitez-Saldana was guilty of grand theft but deny responsibility for a robbery or a burglary with an assault or battery. While counsel attempted to pursue this trial strategy by making assertions to this effect, counsel’s factual concessions inadvertently established Benitez-Saldana’s responsibility for the charged crimes.”).

the evidence is not overwhelming,<sup>73</sup> courts, appropriately, are willing to find counsel ineffective and invalidate convictions.

## II. NIXON, LAWYER AUTONOMY, AND PLEA BARGAINING

### A. *The Nixon Minimum: Maintaining Credibility for Sentencing*

Courts now hold that “in an appropriate case, strategic concessions of guilt can strengthen a defendant’s position and represent not just reasonable professional assistance, but astute advocacy.”<sup>74</sup> Thus, it may be appropriate for counsel to concede on some counts or issues in order to strengthen the likelihood of acquittal or favorable finding on others.<sup>75</sup> Or, as in *Nixon* itself, it may be appropriate strategy for an attorney to concede guilt on all charged offenses to

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73. See *Thompson v. Small*, 145 F. App’x 581, 583 (9th Cir. 2005) (“[U]nlike *Nixon*, this is not a capital case, evidence of guilt is not overwhelming, and ‘avoiding execution’ is not ‘the best and only realistic result possible.’ This is a non-capital case in which the only evidence of guilt was conflicting testimony. Nevertheless, defense counsel admitted the credibility of the government’s principal eyewitnesses, and then proceeded to admit his client’s failure to raise reasonable doubt on the only element of robbery being contested at trial. In fact he stated that the defense had proved the prosecution’s case *beyond a reasonable doubt*. Moreover, counsel continued to rely exclusively on a necessity defense despite the court’s refusal to issue a necessity instruction.” (quoting *Florida v. Nixon*, 543 U.S. 175, 190 (2004)) (citations omitted)); *Mohanlal v. State*, 162 So. 3d 1043, 1046 (Fla. Dist. Ct. App. 2015) (per curiam) (ordering hearing on claim of ineffective assistance where “[t]he summary record does not show any reasonable tactical reason for admitting to the phone sex”); *Edgar v. State*, 283 P.3d 152, 159-60 (Kan. 2012) (“Despite this recognition that most trial decisions are left to defense counsel’s professional judgment regarding strategy, [m]ere invocation of the word “strategy” does not insulate the performance of a criminal defendant’s lawyer from constitutional criticism, especially when counsel lacks the information to make an informed decision due to inadequacies of his or her investigation.” (quoting *State v. Gonzales*, 212 P.3d 215, 221 (Kan. 2009))); see also *id.* at 159-60 (“In addition, [a]n attorney undoubtedly has a duty to consult with the client regarding “important decisions,” including questions of overarching defense strategy. Edgar’s allegations place this last qualification into issue; he suggests defense counsel’s closing argument was contrary to agreed-upon defense strategy. Hence, in this case, the first prong of the *Strickland/Chamberlain* test could not be determined based merely on a conclusion that defense counsel’s closing argument was ‘trial strategy.’ Rather, as the Court of Appeals concluded, factual questions exist that cannot be determined without an evidentiary hearing.” (quoting *Florida v. Nixon*, 543 U.S. 175, 187 (2004)) (citations omitted) (alteration in original)).

74. *Lingmann*, 320 P.3d at 1072.

75. See, e.g., *Martin v. Waddington*, 118 F. App’x 225, 226 (9th Cir. 2004) (“Conceding guilt of promoting prostitution was strategic because the charge was supported by overwhelming evidence, and the concession provided an avenue to gain credibility with the jury to more effectively argue that the State had not met its burden on the two more serious charges.”).

preserve credibility for sentencing.<sup>76</sup> In the federal system, for example, a defendant who pleads guilty is often given a two-point reduction under the U.S. Sentencing Guidelines.<sup>77</sup> But a defendant who goes to trial and concedes guilt through counsel might also be able to obtain the reduction.<sup>78</sup>

The necessary conditions for considering whether a concession might be warranted without client consent are when: (1) the prosecution has overwhelming admissible and readily available evidence of guilt;<sup>79</sup> (2) there are no arguable defenses; and (3) there is reason to expect some concrete advantage for the client because of the concession. When those conditions exist, the option of concession may be better than the other alternatives. A defense lawyer could instead hold the prosecution to the letter of the rules of evidence, but “[t]oo many objections will, of course, annoy the jury.”<sup>80</sup> A lawyer can aggressively cross-examine truthful prosecution witnesses,<sup>81</sup> but, given the overwhelming evidence, the impeachment will probably be on peripheral issues, be unsuccessful, or successfully undermine testimony about issues that are also supported by unimpeachable

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76. The general principle of strategic concession may be sound, but it is not necessarily the right strategy in the *Nixon v. Florida* context. In *Elmore v. Sinclair*, Judge Andrew Hurwitz wrote that: “[P]leading guilty without a guarantee that the prosecution will recommend a life sentence holds little if any benefit for the defendant.” 781 F.3d 1160, 1177 n.1 (9th Cir. 2015) (Hurwitz, J., concurring in part and concurring in the result) (quoting *Florida v. Nixon*, 543 U.S. 175, 191 n.6 (2004)); see also *id.* (citing Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 331-32 (1983) (noting that “there is usually some value in putting on a reasonable doubt defense [during the guilt phase] even in cases where overwhelming evidence of guilt exists,” and observing that “a reasonable doubt defense does not preclude the defendant” from making a remorse defense during the penalty phase)).

77. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM’N 2014).

78. See *id.* § 3E1.1 cmt. n.2 (“This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt .... [However,] [i]n rare situations, a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt.”).

79. See, e.g., *Stenson v. Lambert*, 504 F.3d 873, 890 (9th Cir. 2007) (finding that concession may be appropriate “[w]hen the evidence against a defendant in a capital case is overwhelming and counsel concedes guilt in an effort to avoid the death penalty”).

80. ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 98 (1999).

81. See R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to “Seek Justice”*, 82 NOTRE DAME L. REV. 635, 668 (2006) (“Most scholars now agree that it is ethically appropriate, if not ethically required, for a criminal defense attorney to impeach a truthful witness.”).

evidence. As Justice Stevens explained: “[T]he Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade.”<sup>82</sup>

When evidence of guilt is overwhelming and there is no available defense, courts have also upheld counsel’s use of the “silent strategy’... the phrase often used to describe an attorney’s decision either not to participate at trial or to participate minimally.”<sup>83</sup> This strategy reduces the risk that the jury or judge will look on the client with disfavor, but it does nothing to obtain the benefit which might be available through a concession. Compared to doing nothing, or doing nothing useful, a concession which might lead to a sentencing advantage could be a preferable trial strategy.

#### *B. Implications for Formal and Further Concessions*

In limited circumstances, a lawyer might permissibly concede her client’s guilt in the inchoate hope of creating an advantage for her client at sentencing. If this is so, then it also should be permissible for counsel to make decisions about issues less substantial than conceding guilt in the hope of obtaining leniency.<sup>84</sup> In addition, it should be permissible for lawyers to make concessions for expectations more substantial than the mere hope of maintaining credibility for sentencing.

Concretely, imagine if the prosecutor in *Nixon* offered to take the death penalty off the table in exchange for a concession of guilt and an agreement not to contest a sentence of life without parole. If Nixon’s lawyer could permissibly concede guilt for a mere hope of a benefit, then a concession for an enforceable promise would be at least as reasonable. Imagine further that the prosecutor was not satisfied with a concession of guilt, but she instead wanted defense counsel to stipulate also to the admission of prosecution exhibits and summaries of prior testimony. Assume that defense counsel had

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82. *United States v. Cronin*, 466 U.S. 648, 656 n.19 (1984).

83. *Walker v. State*, 892 A.2d 547, 561 (Md. 2006) (citing *Warner v. Ford*, 752 F.2d 622, 625 (11th Cir. 1985)).

84. See John Rappaport, *Unbundling Criminal Trial Rights*, 82 U. CHI. L. REV. 181, 184 (2015).

every reason to think that the substance of everything the prosecutor wanted was admissible and would be admitted. Under those circumstances, it is hard to see how that hypothetical stipulation would put Nixon in a worse place than he was in at the actual trial. On the contrary, in the hypothetical, he obtained a benefit. This hypothetical assumes that counsel's decision-making authority is scalable and cumulative. If a lawyer can stipulate to one thing, she can stipulate to one hundred things; if a lawyer has power to stipulate, waive a defense, or decline to call or cross-examine witnesses, then she can do all of those things in the same case if it is reasonable.

If defense counsel may permissibly concede for a benefit instead of a hope, then defense counsel and the prosecution could substantially replicate a guilty plea without affirmative client consent and without defense counsel putting words in the defendant's mouth. After negotiation between the prosecutor and defense counsel, defense counsel could, in a document such as a pretrial statement, agree to waive a jury (or peremptory challenges and individual voir dire once twelve qualified jurors were seated). Prosecution exhibits could be stipulated into evidence. Preliminary hearing testimony could be admitted by stipulation even if the witnesses were available, or defense counsel could stipulate as to the substance of the testimony.<sup>85</sup> Defense counsel could report that she had no witnesses to offer and no basis, or at least no intention, to cross-examine or impeach any prosecution witnesses.

In exchange, the prosecution could stipulate to advantageous sentencing facts, withdraw or commit to not filing notices for a mandatory minimum sentence or particular sentence enhancements, or recommend or not oppose a specific sentence. Depending on the jurisdiction, this sort of pretrial agreement could be the subject of judicial approval. The documentation of such a trial might be quite similar to that normally used in a carefully crafted guilty plea agreement. To protect the prosecutor, the agreement could waive double jeopardy (or agree that a manifest-necessity mistrial is appropriate) if the defense breaches the agreement by impeaching

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85. See, e.g., *United States v. Kleinschmidt*, 596 F.2d 133, 136 (5th Cir. 1979) (upholding such a stipulation).

a prosecution witness on an unexpected ground or offering a surprise witness or argument.

Although these changes would streamline the prosecution's presentation, critically, they are in large part matters of timing, not substance. If Nixon's lawyer's concession of guilt was reasonable, it was so only because the lawyer knew the jury would, in time, reach that conclusion on its own. By hypothesis, a strategy of concession without client consent is reasonable only when defense counsel is confident that the prosecution can prove every element of the offense with overwhelming admissible evidence, and when the defense can respond with no meaningful exculpatory argument. Also, unlike disclosure of affirmative evidence, there is little strategic advantage to the prosecutor in early defense notice of a reasonable concession. Thus, negotiating to streamline the trial means making clear in advance only what defense counsel knows will inevitably develop. This sort of negotiation allows defense counsel to get an advantage for the client in exchange for acknowledging facts that the defense will later be unable to contest.

The Court has made clear, although perhaps in dicta, that a client herself must be the one to waive certain fundamental rights.<sup>86</sup> There is an argument that waiver by counsel should be permitted when counsel has permissibly conceded important substantive aspects of the case. In his concurrence in the judgment in *Gonzalez v. United States*, Justice Scalia proposed that counsel should be able to invoke or waive all rights except the right to counsel itself, which was personal to the client.<sup>87</sup> That is, there would be no special treatment for waiver of the right to testify, to a jury, or to appeal. He contended that there was no principled basis for distinction between waivable and nonwaivable rights:

I would not adopt the tactical-vs.-fundamental approach, which is vague and derives from nothing more substantial than this Court's say-so.... Depending on the circumstances, waiving *any* right can be a tactical decision. Even pleading guilty, which waives the right to trial, is highly tactical, since it usually

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86. See, e.g., *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988) (“[T]here are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client.”).

87. 553 U.S. 242, 257 (2008) (Scalia, J., concurring in the judgment).

requires balancing the prosecutor's plea bargain against the prospect of better and worse outcomes at trial.

Whether a right is "fundamental" is equally mysterious. One would think that any right guaranteed by the Constitution would be fundamental. But I doubt many think that the Sixth Amendment right to confront witnesses cannot be waived by counsel. Perhaps, then, specification in the Constitution is a necessary, but not sufficient, condition for "fundamental" status. But if something more is necessary, I cannot imagine what it might be. Apart from constitutional guarantee, I know of no objective criterion for ranking rights.<sup>88</sup>

Justice Scalia explained: "There is no basis in the Constitution, or as far as I am aware in common law practice for distinguishing in this regard between a criminal defendant and his authorized representative. In fact, the very notion of representative litigation suggests that the Constitution draws no distinction between them."<sup>89</sup>

Justice Scalia was right that it is not clear why some decisions are said to be for the client only, yet others are left to counsel. The ethical constraints seem not to be independent but rather derivative of Supreme Court dicta.<sup>90</sup> The ABA Model Rules of Professional Conduct provide that "the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."<sup>91</sup> But the annotator's explanation is that the ethical constraint is based on constitutional law: "[A] lawyer representing a criminal defendant must meet obligations imposed by the Constitution, as well as those imposed by the ethics rules. The decision-making authority of a criminal defendant is therefore broader than that of a client in a civil matter."<sup>92</sup>

Similarly, the rationale of the Restatement of the Law Governing Lawyers is not based on ethical considerations *per se*, but on what is perceived to be the constitutional doctrine:

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88. *Id.* at 256 (citations omitted).

89. *Id.* at 257. However, consistent with *Nixon*, Justice Scalia would not allow attorney action over a client's objection. *Id.* at 254.

90. *See supra* note 86 and accompanying text.

91. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2015).

92. ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROF'L CONDUCT 38 (8th ed. 2015).

Constitutional criminal law requires decisions about three matters to be made personally by the client: whether to plead guilty, whether to waive jury trial, and whether to testify. Delegation of those decisions to a lawyer, even a revocable delegation, is not permitted. Guilty pleas in criminal prosecutions have drastic effects for the client. The legal system has strong interests in requiring the defendant to participate personally in securing pleas that are not susceptible to later claims of involuntariness. A criminal defendant's decision whether to waive the right to jury trial or to testify also involves surrender of basic constitutional rights and implicates the defendant's autonomy and participation in the trial.<sup>93</sup>

Again, there is no independent rationale in the commentary for distinct treatment of these rights.

In a case in which guilt is contested, it makes sense for the client to decide whether a judge or jury is the factfinder. The client will often be better able than the lawyer to evaluate how the community will perceive the case. But the *Florida v. Nixon* scenario is different. If the trial is one in which counsel, consistent with the Sixth Amendment, may concede factual guilt in opening, has determined not to cross-examine prosecution witnesses or call any of her own, and has introduced undisputed facts through stipulation or prior testimony, then the jury does not play a critical role. Because in such cases the die has been cast and conviction is a foregone conclusion, nominal jury participation does not give the client a better chance of acquittal or change the legitimacy of the inevitable decision. In such cases, it is not clear what client interest is furthered by holding that only a client can waive the right to a jury. In such cases, defense counsel should be able to waive a jury unless the client affirmatively objects.

Clearly, counsel should not have the unilateral authority to waive the client's right to challenge whether the lawyer's action was consistent with the Sixth Amendment through either appeal or collateral attack. Whatever the status of effective assistance of counsel

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93. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 22 cmt. d (AM. LAW INST. 2000).

waivers in other contexts,<sup>94</sup> a *Nixon* concession is sufficiently unusual and in potential tension with constitutional norms that vicarious waiver should not be permitted.

### C. Objections

There are, of course, a number of potential objections to this argument. None of them seem fatal.

#### 1. Client Autonomy

This proposal is unabashedly paternalistic, although so is *Nixon* itself. It assumes that, in very limited circumstances, lawyers should be able to make decisions in the absence of a client decision. Nevertheless, even if every possible step has been taken to get client consent, unilateral attorney action will do nothing to generate client confidence in the criminal justice system. Justice Brennan passionately dissented in favor of client autonomy in *Jones v. Barnes*:

I cannot accept the notion that lawyers are one of the punishments a person receives merely for being accused of a crime. Clients, if they wish, are capable of making informed judgments about which issues to appeal, and when they exercise that prerogative their choices should be respected unless they would require lawyers to violate their consciences, the law, or their duties to the court.<sup>95</sup>

Overriding client autonomy inevitably involves an element of disrespect, no matter how well intentioned the action may be.<sup>96</sup>

There is a significant argument that impairment of client autonomy is worth the costs. Doctrine already constrains client autonomy in a range of ways. The criminal proceeding is not necessarily fundamentally a forum for vindication of the client's right to make her

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94. See generally Nancy J. King, *Plea Bargains That Waive Claims of Ineffective Assistance—Waiving Padilla and Frye*, 51 DUQ. L. REV. 647 (2013) (arguing defendants may knowingly and voluntarily waive their right to claim ineffective assistance of counsel, but enforcing such waivers in the context of plea bargaining would be unwise).

95. 463 U.S. 745, 764 (1983) (Brennan, J., dissenting).

96. Erica Hashimoto has persuasively made the case for client autonomy in a range of circumstances. See generally Hashimoto, *supra* note 17.

own decisions; a client's participation in it at all is almost always compelled. Most aspects of the process will occur regardless of the client's views, or even without her voluntary participation. And even aspects of the process in which the client has a choice are not always deemed central. For example, many courts hold that denial of a defendant's right to testify is subject to harmless error analysis.<sup>97</sup>

One justification for infringement in the *Nixon* situation is that there is no way to avoid running roughshod over a client's interests. The client either loses her autonomy now by having her wishes overridden, or she loses her autonomy later by imprisonment for years longer than she otherwise would have been confined.

Abbe Smith's comment that "adolescents not only 'make bad decisions,' they 'make decisions badly'"<sup>98</sup> might not be unfairly extended to defendants as a whole. Professor Albert Alschuler dryly noted that "criminal defendants may not be an especially rational group."<sup>99</sup> The point is not that clients do not deserve to make choices because they are not smart enough. But it may be that they are disproportionately unable to make reliable and informed decisions about the merits of various possible courses of action. The justification for lawyer decision making goes beyond the claim that because

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97. Compare *Momon v. State*, 18 S.W.3d 152, 166 (Tenn. 1999) ("[T]he vast majority of jurisdictions which have considered this issue have held either that the harmless error doctrine applies when a defendant establishes a denial of the right to testify under the Fifth Amendment or that the prejudice prong of *Strickland v. Washington* must be established if the defendant is to prove ineffective assistance of counsel as a result of counsel's unilateral waiver of the right to testify.") (citation omitted), and *State v. Nelson*, 849 N.W.2d 317, 319 (Wis. 2014) ("We conclude that harmless error review applies to the circuit court's alleged denial of Nelson's right to testify because its effect on the outcome of the trial is capable of assessment. We further conclude that, given the nature of Nelson's defense and the overwhelming evidence of her guilt, the alleged error was harmless beyond a reasonable doubt.") (citation omitted), with *State v. Rivera*, 741 S.E.2d 694, 706 (S.C. 2013) ("The Supreme Court has not directly addressed whether a trial court's improper refusal to permit a defendant to testify in his own defense is a structural error or one which is subject to harmless-error analysis. We find this error is not amenable to harmless-error analysis and requires reversal without a particularized prejudice inquiry."). See generally Kenneth Duvall, *The Defendant Was Not Heard ... Now What?: Prejudice Analysis, Harmless Error Review, and the Right to Testify*, 35 HAMLIN L. REV. 279 (2012).

98. Smith, *Challenges in Counseling*, *supra* note 6, at 20 (quoting Elizabeth Cauffman & Laurence Steinberg, *Researching Adolescents' Judgment and Culpability*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 243, 243 (Thomas Grisso & Robert G. Schwartz eds., 2000)).

99. Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1245 (1975).

lawyers make better decisions, their judgments and values should be honored. Instead, the justification is that defense lawyers may be in a position to make reliable predictions about what the client would in fact choose if she understood what was at stake. Defense lawyers have seen many clients make many choices and know that clients come to regret certain kinds of decisions.<sup>100</sup> A defense lawyer's decision to salvage a hopeless case does not necessarily conflict with the client's moral or political judgment. Instead, counsel may be facilitating a decision that the lawyer has reason to believe the client, in the future, will wish she had made.

Finally, there are interests beyond those of the client herself. This is illustrated by the Court's decisions regarding the right of self-representation at trial.<sup>101</sup> The self-representation right does not apply on appeal; a defendant can be forced to appear through counsel or not at all.<sup>102</sup> Nor is the right to self-representation at trial necessarily violated by involuntary imposition of standby counsel, even over the defendant's objection, so long as standby counsel does not override the defendant's tactical decisions<sup>103</sup> or "destroy the jury's perception that the defendant is representing himself."<sup>104</sup>

A defendant who meets the quite minimal competency standards necessary to stand trial, but who is nevertheless profoundly mentally ill, may be denied self-representation entirely.<sup>105</sup> The Court had previously grounded the right of self-representation in principles of

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100. See, e.g., Report and Recommendation of the United States Magistrate Judge at 11, *Braswell v. United States*, No. A-10-CR-692-LY, 2014 WL 774670, at \*6 (W.D. Tex. Feb. 25, 2014) ("[I]t is plain that Braswell rejected the government's second plea deal *against* [counsel's] advice, and now regrets that."); *Dong Cai v. United States*, No. 13-CV-3617, 2013 WL 5934314, at \*1 (E.D.N.Y. Nov. 1, 2013) ("When [defense counsel] discussed the government's final proposed plea agreement with Cai, petitioner expressed regret at having rejected the prior offer."); *United States v. Ellis*, No. 05-495-KKC, 2006 WL 3412280, at \*6 (E.D. Ky. Aug. 16, 2006) ("Ellis simply regrets his own decision to reject the plea offer and is attempting to blame both of his attorneys.")

101. See, e.g., *Faretta v. California*, 422 U.S. 806, 836 (1975) (holding the defendant had a right to conduct his own defense).

102. See *Martinez v. Court of Appeal*, 528 U.S. 152, 163 (2000).

103. See *id.* at 162.

104. *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984).

105. See *Indiana v. Edwards*, 554 U.S. 164, 167 (2008) (holding a state can deny a defendant the right to represent himself when the defendant is competent to stand trial but not competent to proceed pro se). See generally Christopher Slobogin, *Mental Illness and Self-Representation: Faretta, Godinez and Edwards*, 7 OHIO ST. J. CRIM. L. 391 (2009).

“dignity” and “autonomy,”<sup>106</sup> but the majority in *Indiana v. Edwards* reasoned:

[T]he spectacle that could well result from ... self-representation at trial is at least as likely to prove humiliating as ennobling. Moreover, insofar as a defendant’s lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution’s criminal law objectives, providing a fair trial.<sup>107</sup>

In addition, “proceedings must not only be fair, they must ‘appear fair to all who observe them.’”<sup>108</sup> That is, there is an interest in substantive accuracy and fairness that sometimes trumps an individual’s interest in autonomy and dignity. Finally, many cases deny requests for self-representation based on an untimely assertion of the right, again indicating that it is far from absolute.<sup>109</sup> As a result, savvy clients could not overcome *Florida v. Nixon* by demanding to represent themselves at the eleventh hour—although they could probably do so by objecting to counsel’s actions with which they disagreed.

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106. *Edwards*, 554 U.S. at 176 (quoting *McKaskle*, 465 U.S. at 176).

107. *Id.* at 176-77.

108. *Id.* at 177 (quoting *Wheat v. United States*, 486 U.S. 153, 160 (1988)); see also, e.g., *United States v. Chapman*, 593 F.3d 365, 370 (4th Cir. 2010) (“And notwithstanding the fact that a principal generally has the authority to dictate the manner in which his agent will carry out his duties, the law places certain tactical decisions solely in the hands of the criminal defense attorney. This reallocation of rights and duties is necessary to give effect to the constitutional rights granted to criminal defendants and to insure the effective operation of our adversarial system, where defense attorneys must protect the interests of their clients while also serving as officers of the court.”).

109. See *United States v. McKinley*, 58 F.3d 1475, 1480 (10th Cir. 1995) (holding self-representation right must be invoked timely, clearly, and unequivocally); *People v. Windham*, 560 P.2d 1187, 1189 (Cal. 1977) (“[W]hen a defendant has elected to proceed to trial represented by counsel and the trial has commenced, it is thereafter within the sound discretion of the trial court to determine whether such a defendant may dismiss counsel and proceed *pro se.*”); *Commonwealth v. El*, 977 A.2d 1158, 1165 (Pa. 2009) (declaring that, because “meaningful trial proceedings had commenced,” defendant’s “subsequent request for self-representation was untimely” and therefore he was not entitled to self-representation).

## 2. *Opening the Door to Bad Lawyering*

Another potential objection is that embrace of this doctrine, intended to offer a tool to conscientious lawyers, would protect bad lawyering. Lawyers could wash their hands of difficult cases and too easily sell clients down the river.<sup>110</sup> But the conduct of lawyers is already evaluated deferentially.<sup>111</sup> Lawyers in appointed cases can easily get away with providing minimalist representation. Unlike in the commercial realm, few criminal defendants both are repeat players and have market power. In addition, the incentives of defense counsel are often to take the case to trial—because they get paid by the hour, sometimes more for in-court time—even though there is no reason to think that the outcome will be better than the last best plea offer.<sup>112</sup>

One protective measure should be closer scrutiny of a decision to plead guilty without client consent through the ineffective assistance of counsel regime, rather than ordinary tactical decisions. Pleading guilty may be a tactical decision, but it is an extraordinary one. Another protective measure, which could be adopted by institutions employing or paying criminal defense attorneys, might be to require a second opinion from another attorney before this type of arrangement could be concluded.<sup>113</sup>

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110. For a discussion of the importance of enforcement of Sixth Amendment rights, see Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1031-32 (2006) (discussing problems in indigent defense), and Jenia Iontcheva Turner, *Effective Remedies for Ineffective Assistance*, 48 WAKE FOREST L. REV. 949, 949-54 (2013).

111. As Professor Garrett has aptly noted, “the *Strickland v. Washington* inquiry is notoriously malleable.” Brandon L. Garrett, *Validating the Right to Counsel*, 70 WASH. & LEE L. REV. 927, 929 (2013).

112. A now-famous Rand study found that in Philadelphia, public defenders achieved better outcomes in murder cases than appointed counsel. See James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 159 (2012). One reason was that clients of public defenders pled guilty more often; appointed counsel had a “financial incentive ... to take a case to trial when that may not be in the client’s best interest.” Peter A. Joy & Kevin C. McMunigal, *Does the Lawyer Make a Difference? Public Defender v. Appointed Counsel*, CRIM. JUST., Spring 2012, at 46, 46-47 (citing Anderson & Heaton, *supra*).

113. “One means of providing a check on the lawyer in this situation would be to require the lawyer to confer with another attorney, analogous to the ‘second opinion’ requirement in medical practice.” Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer’s Fiduciary Duty to Clients with Mental Disability*, 68 FORDHAM L. REV. 1581, 1641 n.279 (2000) (arguing that defense counsel should be able to plead guilty for certain mentally disabled

### 3. *Straw Case*

A final objection is that there are few, if any, prosecutions that are entirely hopeless. Every experienced trial lawyer, it seems, can recount apparently unwinnable cases which came out in surprising ways. Just as many good appellate defenders go through their entire careers without filing an *Anders* no-merit brief, perhaps good defense attorneys can always come up with some hook, some creative legal theory or imaginative spin on the facts which can be advanced with a straight face.

It is true that in any case, a bolt from the blue might bring an unexpected victory; the key police investigator might be indicted or the file might disappear.<sup>114</sup> But such improbable rarities do not warrant categorically discarding an available strategy that has a reasonable chance of success in the face of a practical certainty of a conviction.

Another potential problem is that allowing pleas without client consent might induce lawyers to stop the persuasion and counseling process earlier than they should. An important skill of good lawyers is building trust with clients so that the clients can make the right decision. There is no question that it is better for a client to understand her factual and legal situation and come to her own judgment. On the other hand, even taking client autonomy seriously, perhaps getting to the point at which the client does not object—the *Nixon* threshold—is enough.

## CONCLUSION

Some clients decline reasonable plea offers in favor of a shot at acquittal at trial or to make a moral or political point. Others, however, reject pleas even though the evidence is overwhelming, there are no defenses, and their goal is to minimize or eliminate the sentence. In such cases, clients may be throwing away their only chance

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clients).

114. Cf. Gabriel J. Chin, *Getting Out of Jail Free: Sentence Credit for Periods of Mistaken Liberty*, 45 CATH. U. L. REV. 403, 403 (1996) (discussing situations in which a criminal defendant experiences unexpected freedom and referencing Judge Cardozo's quip, "[t]he criminal is to go free because the constable has blundered" (quoting *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926))).

of reducing the time they will spend behind bars. When, after thorough and careful investigation, it is clear that the case is hopeless, defense counsel should be empowered to give their clients the best defense available by getting some benefit out of the inevitable. Conceding guilt without the client's permission should be an unusual last resort. But in some cases, it will be the best available chance of obtaining a benefit for the client.