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ARTICLES

THE CONSTITUTIONAL LIMITS OF CLIENT-CENTERED DECISION MAKING

Todd A. Berger *

INTRODUCTION

Some years ago in a courtroom in Philadelphia, I found myself in a rather troubling predicament. My client threatened to stab me with a pen. I was his defense attorney.¹

My client had been charged with a gunpoint robbery. He was picked out of a random photo array by the complainant a few days after the incident occurred. If we lost the trial, he was going to receive a sentence of at least ten to twenty years in prison.

* Associate Professor, Syracuse University College of Law. I am extremely grateful to the 2015 Clinical Writers' Workshop for giving me the opportunity to present this particular piece. I owe a special thanks to Professors Keith Findley, Jenny Roberts, Vida Johnson, and Joy Radice. Additional thanks are owed to Professors Lauryn Gouldin, Ann Pfeiffer, Jason Hoge, J.C. Lore, and Aliza Milner. I am extremely grateful to Megan Brooks, Victoria Radcliffe, and Cory Schoonmaker for their excellent research assistance. Lastly, a special thank you is owed to Hedimay Berger and Beverly Beaver for their editing, feedback, and general willingness to discuss this article far more than either of them would have liked.

1. The author is mindful of the concern raised by some legal ethicists that publically disclosing certain aspects of client representation without the client's consent may violate the ethical prohibition against disclosing client confidences. See Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 *GEO. J. LEGAL ETHICS* 1, 48–52 (2000); see also MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 2013). In recognition of this concern, facts have been altered in such a way that it would be virtually impossible to identify the client. As a result, the author believes that the story recounted in this article's introduction does not run afoul of existing ethical rules. Further, certain facts have been changed in order to more plainly illustrate this article's ultimate point with respect to the intersection of client-centered counseling and the constitutional guarantee of effective assistance of counsel.

I believed that the best trial theory was one of misidentification, in which the unfortunate client, without any provable connection to the area where the robbery took place, happened to be randomly picked out of a photo array. However, my client also insisted he had a witness who could prove it was impossible for him to have committed the crime.

I interviewed his proposed witness. The witness told me that she was with the client at a local bar on the night in question, but that the client left the bar about fifteen minutes prior to the time that the robbery occurred. The bar was about two blocks from the scene of the crime.

After interviewing the witness, it became clear that far from being helpful, her testimony was actually inculpatory. For starters, her testimony actually placed my client in the vicinity of the robbery. In fact, except for the victim's identification of my client, which I felt I could persuasively attack, the prosecution had no evidence that placed my client in the area where the crime occurred.

Therefore, if I called this witness, I, rather than the prosecution, would have presented evidence that could be viewed as corroboration of the victim's identification of my client as the robber. Moreover, the witness's testifying that the client left the bar shortly before the robbery, and her being unable to account for the client's whereabouts during the robbery, actually would have suggested that the client had the opportunity to commit the crime.

I walked my client through how I thought a jury would process his proposed witness's testimony. He nevertheless insisted that I call his witness. For reasons that were never entirely clear, the client seemed to attach a value to the witness's testimony that I simply could not see. Frankly, I thought she would have made an excellent witness for the prosecution.

Following cross-examination in which I challenged the ability of the complainant to make an accurate identification, my client demanded that I call his witness to the stand. I explained to my client once again why it was not a good idea to call this witness. He disagreed and told me I should. I refused. He insisted—it was his witness, his right to a defense, and it was his freedom we

were talking about. After all, he was the one staring down ten to twenty years in prison, not me. I still refused. Then he threatened to stab me if I did not accede to his wish.

The above situation highlights one of the most vexing quandaries in American criminal law. Simply put, when the attorney and the client disagree concerning a matter of trial tactics and strategy, who should make the ultimate decision?²

The United States Supreme Court held in *Jones v. Barnes* that there are four decisions that relate to the “fundamental” rights of the criminal defendant and are therefore exclusively the defendant’s to make.³ These decisions are whether to plead guilty, whether to waive a jury trial, whether to testify, and whether to appeal.⁴ Beyond these decisions, which are deemed fundamental and personal to the defendant, almost all other decisions are considered “strategic” or “tactical” decisions and fall within the lawyer’s control.⁵

Further, while current ethics rules are slightly more expansive, they nevertheless track closely to the *Jones* view of the allocation of attorney/client decision-making authority.⁶ Therefore, with respect to both constitutional jurisprudence and ethical guidelines, criminal defense attorneys are generally given wide-ranging decision-making authority over strategic and tactical decisions during the trial process.⁷

2. Indeed, “[l]egal scholars vigorously disagree about the appropriate role for the lawyer in wielding decisionmaking power in the attorney-client relationship, a disagreement that has spawned a host of articles and books.” Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 4 (1998).

3. *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

4. *Id.*

5. See Rodney J. Uphoff, *Strategic Decisions in the Criminal Case: Who’s Really Calling the Shots?*, CRIM. JUST., Fall 1999, at 4, 5 (referencing the four fundamental rights that can only be exercised with the consent of the accused as explained by the United States Supreme Court in *Jones v. Barnes* and noting, “[b]eyond these fundamental matters, however, the lawyer is responsible for all tactical and strategic decisions”) [hereinafter Uphoff, *Strategic Decisions*]. Part I of this article provides a more complete overview of the proper allocation of decision-making authority between the lawyer and client as reflected in current decisional law.

6. Peter A. Joy & Kevin C. McMunigal, *Counsel or Client—Who’s in Charge?*, CRIM. JUST., Winter 2008, at 34, 34 (stating that, with respect to ethics rules, their “allocation of authority to the client is consistent with the Supreme Court’s view in *Jones v. Barnes*”).

7. See *Jones*, 463 U.S. at 751; see also Joy & McMunigal, *supra* note 6, at 34–35 (positing that current ethics standards “adopt a view of defense counsel expressed by former Chief Justice Warren Burger that once the defendant hires counsel or receives appointed

Nevertheless, the above jurisprudence does not end the discussion. Even if an attorney has the legal authority to make a particular decision over his or her client's objection, an important question remains: should defense counsel nonetheless yield to the client's wishes regarding a particular question of strategy if a disagreement arises?

Legal scholars have looked at two primary models of lawyer decision making in an attempt to answer this question.⁸ These are (1) the "traditional" lawyer-centered model and (2) the client-centered lawyering model.⁹ The lawyer-centered model vests primary decision-making control with the lawyer.¹⁰ Unlike the lawyer-centered model, however, the theory of client-centered lawyering provides that the client, and not the lawyer, makes all decisions that are likely to have a substantial legal or non-legal impact on the client's life.¹¹

counsel, "the day-to-day conduct of the defense rests with the attorney").

8. See Uphoff & Wood, *supra* note 2, at 5 (stating that there are "two major approaches" to resolving conflicting views regarding the proper allocation of decision-making responsibility within the lawyer-client relationship and noting the two models are "the traditional, lawyer-centered model and the participatory, client-centered approach").

9. *Id.*

10. See Uphoff, *Strategic Decisions*, *supra* note 5, at 5 ("According to the traditional view, once a criminal defendant makes the decision to retain counsel—or to accept an appointed lawyer—the defendant's role is largely passive.").

11. See G. NICHOLAS HERMAN & JEAN M. CARY, A PRACTICAL APPROACH TO CLIENT INTERVIEWING, COUNSELING, AND DECISION-MAKING: FOR CLINICAL PROGRAMS AND PRACTICAL-SKILLS COURSES 7 (2009) (stating that, with respect to client-centered lawyering, "[t]he client is given primary decision-making power throughout the representation, and the lawyer is obligated to make every reasonable effort to accede to the client's decisions about the end and means of the representation"). This article uses the phrases client-centered lawyering, client-centered representation, and client-centered counseling interchangeably. For reasons expounded upon in Part II, this article's discussion of client-centered lawyering refers to the most widely used approach to this particular lawyering orientation, which was first proposed by Professors David Binder and Susan Price in their 1977 work, *Legal Interviewing and Counseling*. See DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977). Successive versions of the text have been titled, *Lawyers as Counselors: A Client-Centered Approach*, and it is now in its third edition. DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (3d ed. 2012). It should be noted that the most commonly referenced model of client-centered representation involves two distinct components. The first component relates to the manner in which the attorney provides the client with advice regarding important decisions. See *id.* at 335. In terms of how advice should be given, while the client-centered model does not require that a lawyer refrain from offering a client his or her opinion, "it discourages lawyers from 'taking the lead' in rendering opinions about the proper decision the client should make." See HERMAN & CARY, *supra*, at 8; see also BINDER ET AL., *supra*, at 335–38. The second component of client-centered representation relates to what can be referred to as its decision-making component. See BINDER ET AL., *supra*, at 336. The decision-making aspect of client-centered representation once again provides that it is the client and not the lawyer who should make

Since the introduction of client-centered lawyering to the law school curriculum more than thirty-five years ago, it has become the predominant model for teaching lawyering theory, particularly within the context of clinical legal education.¹² Despite this fact, proponents of client-centered lawyering have generally failed to account for how the decision-making component of client-centered representation intersects with the Sixth Amendment's guarantee of effective assistance of counsel.¹³ Specifically, the construct of client-centered lawyering has failed to address whether the Sixth Amendment's guarantee of effective assistance of counsel may be violated when defense counsel acquiesces to a client's strategic demands. In other words, does the constitutionally prescribed

all important decisions in the client's case. See HERMAN & CARY, *supra*, at 10; BINDER ET AL., *supra*, at 318, 323. As this article progresses, it will address the constitutionality of the decision-making aspect of client-centered representation and not the constitutionality of the manner in which the client-centered lawyer should provide the client with legal advice. For a discussion of whether the advice giving component of client-centered representation is consistent with the Sixth Amendment's guarantee of effective assistance of counsel, see Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841 (1998).

12. See *supra* note 11; see also Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 370 (2006) ("Introduced by David Binder and Susan Price in 1977 in a groundbreaking interviewing and counseling textbook, the client-centered approach helped fill a curricular void in the growing clinical legal education movement, and quickly emerged as the leading model of client counseling taught in American law schools.") (citations omitted). This is not to suggest that the lawyer-centered and client-centered approaches are the only lawyering philosophies being taught in American law schools or employed by practitioners. In recent years, the "collaborative model" of decision making has emerged as an alternative approach. The collaborative model represents a middle ground between the lawyer-dominated and client-centered models of representation. Under the collaborative model, the client controls decisions, but the lawyer provides advice to the client in a more directed manner than under the classic Binder/Price Model of client-centered counseling. See *id.* at 10. It should be noted that to the extent to which the collaborative model vests ultimate decision-making control with the client, even over the lawyer's objections, the collaborative model is subject to the same concerns regarding its compatibility with the Sixth Amendment's guarantee of effective assistance of counsel that will be detailed in Parts III and IV of this article. Further, other legal commentators have argued that there may be occasions in which it is more, or less appropriate to employ one decision-making model over another. This may, in part, depend on the particular needs or expectations of the client, the particular subject matter of the representation, the lawyer's role in the representation, the stage of the litigation, or the consequences at stake. See *id.*

13. The Sixth Amendment of the United States Constitution reads in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his [defense]." U.S. CONST. amend. VI. The actual text of the Amendment uses the British spelling "defence" as opposed to the modern American spelling "defense." In *McMann v. Richardson*, the Supreme Court noted that in order to give meaning to the right to counsel, "the right to counsel is the right to the effective assistance of counsel." 397 U.S. 759, 771 n.14 (1970). Parts III and IV of this article provide a more detailed discussion of the right to effective assistance of counsel.

guarantee of effective assistance of counsel serve as a limitation placed on the client-centered ideal that clients should exercise final decision-making control over all important strategic and tactical matters during the trial process?

Consequently, in answering the above question, this article's principal objective is to fill what has otherwise been a void in the theory of client-centered lawyering. Indeed, other scholars have explored the intersection of client-centered representation and the allocation of attorney/client decision making when a disagreement arises between the lawyer and the client.¹⁴ Unlike other scholarly works, however, this article thoroughly addresses the specific question of whether the guarantee of effective assistance of counsel is violated when the lawyer yields decision-making control to the client, and how the answer to that question impacts the theory of client-centered lawyering.¹⁵

14. See generally Rodney J. Uphoff, *Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant's Tactical Choices*, 68 U. CIN. L. REV. 763, 764-65 (2000) [hereinafter Uphoff, *Tactical Choices*] (exploring how the traditional and client-centered lawyering models answer the question of whether it is the lawyer or the client who has the final say when it comes to calling a witness during a criminal trial); Uphoff & Wood, *supra* note 2, at 5-7 (examining the views of over 700 public defenders expressed through survey data about whether the lawyer or the client should have the final say on a wide range of decisions made at the trial stage when the lawyer and client disagree).

15. The question of whether acceding to a client's strategic preferences is violative of the constitutional guarantee of effective assistance of counsel was addressed, to a limited extent, by Professor Rodney Uphoff. See Uphoff, *Tactical Choices*, *supra* note 14, at 792. Professor Uphoff concluded that judicial opinions generally allow for lawyers to accede to their client's wishes with respect to strategic and tactical decisions. *Id.* This conclusion is indeed correct. However, unlike Professor Uphoff's article, this article explores many of the same cases, as well as similar cases, and explains why those cases were wrongly decided. Further, this article details why defense counsel may be compelled to overrule a client's strategic preference based on the Supreme Court's seminal case of *Strickland v. Washington*, 466 U.S. 668, 681 (1984). Additionally, Professor Marla L. Mitchell addressed the intersection of the effective assistance of counsel and control over attorney/client decision making in a footnote in a 1995 review of a legal ethics book. Marla L. Mitchell, *Beyond a Book Review: Using Clinical Scholarship in Our Teaching*, 2 CLINICAL L. REV. 251, 259 n.25 (1995) (reviewing RODNEY UPHOFF, *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYERS: PRACTICAL ANSWERS TO TOUGH QUESTIONS* (1995)). Professor Mitchell ultimately reaches a similar conclusion to the one reached in this article. *Id.* Professor Mitchell's treatment of this particular legal issue, while valuable, is presented through a more abbreviated analysis than takes place in this article (which is certainly understandable given the context in which Professor Mitchell was writing). To that end, this article more completely addresses the question of whether a lawyer's acquiescence to a client's strategic demands can violate the constitutional guarantee of effective assistance of counsel by deconstructing those cases which hold the opposite, explaining why those cases are wrongly decided, and why existing constitutional jurisprudence sometimes compels the opposite conclusion. Moreover, unlike other works, this article synthesizes its conclusions squarely within the framework of client-centered lawyering. Justin F. Maceau has explored the intersection of client-centered representation and the right to effective assistance of counsel in the specific context of presenting mitigating evidence during the penal-

With this in mind, this work demonstrates that the decision of a client-centered advocate to yield to his or her client's preference regarding important questions of trial strategy or tactics may be entirely consistent with the Sixth Amendment's guarantee of effective assistance of counsel. Nevertheless, this article also demonstrates that a core tenet of client-centered representation, relating to the proper allocation of attorney/client decision-making authority, is at times limited by the same guarantee. In such instances, a lawyer may be required to overrule the client's strategic or tactical preference and, in fact, adopt a lawyer-centered approach to decision making.

This article proceeds in four parts. Part I provides an overview of existing legal authority in terms of the proper allocation of decision-making responsibility between the lawyer and the client. Part II describes the two primary types of lawyering models that speak to whether it is the lawyer or the client who should have the final say regarding matters of trial strategy. Part III provides an overview of the Sixth Amendment's guarantee of effective assistance of counsel. Part IV details how the decision-making aspect of the client-centered lawyering model intersects with that guarantee.

ty phase of a capital trial. See Justin F. Marceau, *Exploring the Intersection of Effectiveness & Autonomy in Capital Sentencing*, 42 CAL. W. L. REV. 183, 186–87 (2006). Specifically, Maceau suggests that blind adherence to a client's request not to present mitigation evidence during the penalty phase of a capital trial—which may be considered somewhat related to client-centered representation—violates the guarantee of effective assistance of counsel. *Id.* at 208. In this regard, Maceau's focus is on the Sixth Amendment's requirement that the lawyer provide the client with a sufficient degree of information to allow the client to make an informed decision over which the client has ultimate control. *Id.* However, unlike Maceau's work, this article addresses a different factual and legal question, i.e., assuming the client has been properly advised with respect to a decision over which the lawyer, and not the client, retains ultimate control, how does the Sixth Amendment guarantee of effective assistance of counsel limit the client-centered lawyer's ability to allow the client to make the ultimate decision? Professor Steven Zeidman has likewise raised concerns regarding the Sixth Amendment's guarantee of effective assistance of counsel and client-centered representation, but in the context of giving the client advice relating to a guilty plea. See Zeidman, *supra* note 11, at 849. Specifically, Professor Zeidman notes that the dominant Binder/Price model of client-centered lawyering dictates that advice giving is permitted, but not required. *Id.* at 878–79. As a result, the type of client-centered lawyering proposed in the Binder/Price model is inconsistent with the guarantee of effective assistance of counsel required when counseling a client to accept or reject a plea bargain, which is entirely the client's prerogative. In this sense, Professor Zeidman's focus is on the counseling aspect of client-centered representation during the plea bargaining stage of a criminal trial and with respect to a decision over which the client retains ultimate control. *Id.* at 843, 849. As discussed in note 11, unlike Professor Zeidman's work, this article's focus is on the decision-making aspect of client-centered representation during the actual criminal trial itself when looking at a decision over which the lawyer, and not the client, has final decision-making authority. See *id.* at 847–49.

I. ALLOCATING DECISION-MAKING AUTHORITY: LEGAL DOCTRINE

The following part explores the legal authority that defines the contours of attorney/client control over the decision-making process during the criminal trial. This issue is explored from the perspective of both decisional law and ethical guidelines.

In terms of decisional law, as outlined in Subpart A, courts have generally addressed the question of attorney/client control from the perspective of whether the defendant has the constitutional right to make certain decisions.¹⁶ While ethics rules may give clients greater decision-making authority by limiting the number of decisions over which the attorney has exclusive control, ethics rules, as outlined in Subpart B, obviously cannot remove decisions that the client has a constitutional right to make from the ambit of client control.¹⁷

A. *Decisional Law*

In light of the above, the following discussion of constitutional jurisprudence represents the minimum amount of authority that the defendant must be given with respect to his or her right to control strategic and tactical decisions made during trial.¹⁸

1. *Jones v. Barnes* Limits the Client's Decision-Making Power

Of course, the criminal defendant can maintain ultimate decision-making control over all decisions at trial by completely waiving the right to counsel and representing him or herself.¹⁹

16. See WAYNE R. LAFAVE ET AL., 3 CRIMINAL PROCEDURE § 11.6(a), at 770–73, 783–86 (3d ed. 2007) (providing an extensive overview of both federal and state court decisions exploring whether it is the criminal defendant who has a constitutional right to make a broad range of decisions that are a part of the trial process).

17. See Nancy J. King, *Plea Bargains That Waive Claims of Ineffective Assistance – Waiving Padilla and Frye*, 51 DUQ. L. REV. 647, 663–64 (2013) (“States are free to specify rules of professional responsibility for their lawyers that are more demanding than the constitutional minimum.”).

18. *Id.*

19. See *Faretta v. California*, 422 U.S. 806, 817, 833–34 (1975) (holding that the Sixth Amendment allows the defendant to completely waive the right to counsel and represent himself in a criminal trial).

If the defendant elects to be represented by counsel, however, the defendant's right to exercise ultimate decision-making authority is much more constrained.²⁰ In terms of the allocation of attorney/client decision-making authority, perhaps the most important judicial decision is the United State Supreme Court's 1983 decision in *Jones v. Barnes*.²¹ The specific issue presented in *Jones* was whether defense counsel provided ineffective assistance of counsel by refusing the client's request to raise certain issues on appeal.²² Or said another way, is a defense attorney required to argue every non-frivolous claim that the client wishes to present?²³

In concluding that appellate counsel was not so required, the Supreme Court identified four specific decisions that it deemed "fundamental," and therefore the ultimate authority over these decisions belongs exclusively to the accused.²⁴

As noted in this article's introduction, the *Jones* court identified the following four such decisions: (1) whether to plead guilty,

20. See *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

21. *Id.*

22. *Id.* at 746, 749–50. The vast majority of decisions addressing the issue of attorney/client control typically arise in the context of an ineffective assistance of counsel claim. See LAFAYE ET AL., *supra* note 16, § 11.6(a). In the context of an ineffective assistance of counsel claim, when defense counsel makes a decision that the defendant claims is reserved for him or her alone, the defendant's argument is essentially that the Sixth Amendment's guarantee of effective assistance of counsel was violated in that "the failure to perform in accord with the obligation would constitute incompetent performance, possibly leading to the reversal of any subsequent conviction of the client." *Id.* § 11.6(a) n.4. However, this is not the only context in which the issue of attorney/client control arises. It may also arise through a motion for substitute counsel when the defendant feels that the attorney has or is exercising illegitimate control over some matter. The same reason may be asserted by a defendant seeking a continuance in order to replace retained counsel. *Id.* Regardless of the procedural posture in which such claims are made, courts tend to apply the same reasoning to the issue of attorney/client control. See *id.* ("Although the difference in procedural setting could conceivably influence a court's analysis of the client-control issue, the courts have tended to treat the issue as basically the same whether presented in one procedural context or another. Rulings recognizing attorney or client control with respect to a particular defense decision will be carried over from one procedural context to another."). As a result, regardless of the procedural context in which the claim is made, the primary issue for a court in deciding an issue of client control is simply to determine if the decision in question implicates a fundamental right that belongs to the client or involves a tactical decision that belongs to the lawyer. Therefore, for the purposes of this article's discussion concerning how various cases have decided the issue of attorney/client control, the particular procedural posture in which the issue was raised is immaterial in determining whether the authority to make any particular decision belongs to the attorney or the client.

23. See *Jones*, 463 U.S. at 749–54.

24. See *id.* at 751.

(2) whether to waive a jury, (3) whether to testify on his or her own behalf, or (4) whether to take an appeal.²⁵ However, beyond decisions that are deemed fundamental, defense counsel has the right to make all tactical and strategic decisions, even over the client's objection.²⁶

Indeed, following *Jones*, once the defendant has agreed to be represented by counsel, "[t]he attorney has the authority to make tactical decisions with which the client disagrees."²⁷ Courts have further observed, "[t]he client's expressed disagreement with counsel's tactical decisions cannot somehow convert the matter into one that must be decided by the client."²⁸

25. *Id.* (citing *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring), ABA Standards for Criminal Justice 4-5.2, 21-2.2 (2d. 1980)). It should be noted that because the defendant has the authority to make the ultimate decision concerning whether to plead guilty, defense counsel is not permitted to usurp that right by engaging in conduct that is the functional equivalent of a guilty plea. In *Brookhart v. Janis*, the United States Supreme Court held that defense counsel could not enter an agreement with the state, without the defendant's informed consent, that he would neither offer evidence on the defendant's behalf nor cross-examine any of the State's witnesses if the state made a prima facie showing of guilt. 384 U.S. 1, 7 (1966). The defendant himself desired to plead not guilty, but defense counsel had accepted a procedure largely inconsistent with such a plea. *See id.* The procedure accepted by defense counsel was characterized by Justice Harlan, in his concurring opinion, as having "amounted almost to a plea of guilty or *nolo contendere*." *Id.* at 9 (Harlan, J., concurring).

26. *See Jones*, 463 U.S. at 751. In citing with approval to ABA Criminal Justice Standard, Defense Function 4-5.2, the *Jones* Court noted that—with the exception of the decisions to plead guilty, waive a jury trial, or testify—"strategic and tactical decisions are the exclusive province of the defense counsel, after consultation with the client." *Id.* at 753 n.6. Further, the Court held that "[w]ith the exception of these specified fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client." *Id.* This is not to suggest that decisions that are deemed matters of trial strategy and tactics are necessarily unrelated to a defendant's constitutional rights. *See United States v. Teague*, 953 F.2d 1525, 1531 (11th Cir. 1992) (internal citations omitted) ("Criminal defendants possess essentially two categories of constitutional rights: those which are waivable by defense counsel on the defendant's behalf, and those which are considered 'fundamental' and personal to defendant, waivable only by the defendant. Generally included in the former are matters which primarily involve trial strategy and tactics. Examples of such matters are what evidence should be introduced, what stipulations should be made, what objections should be raised, and what pre-trial motions should be filed. Examples of fundamental decisions which only the defendant is empowered to waive are entry of a guilty plea, waiver of a jury trial, and whether to pursue an appeal."); *see also State v. Williams*, 794 N.E.2d 27, 48-49 (Ohio 2003) (quoting *State v. Keith*, 684 N.E.2d 47 (1997)) (holding that "[n]onfundamental rights, those rights that primarily involve trial strategy and tactics, are waivable by defense counsel on the defendant's behalf").

27. *Arko v. People*, 183 P.3d 555, 558 (Colo. 2008); *see also Sistrunk v. Vaughn*, 96 F.3d 666, 670 (3d Cir. 1996) (noting that "as a general matter, it is not inappropriate for counsel, after consultation with the client, to override the wishes of the client when exercising professional judgment regarding 'non-fundamental' issues").

28. *Bell v. United States*, No. PJM 13-1682, 2014 U.S. Dist. LEXIS 171705, at *11 n.4

2. The Supreme Court's Reluctance to Extend the Defendant's Decision-Making Power

Unfortunately, Supreme Court jurisprudence has done little to illuminate what exactly separates a decision that is deemed fundamental from a decision that is merely a question of trial strategy and tactics. As one legal commentator has noted:

The Supreme Court's explanations of why particular decisions are for counsel or client have been brief and conclusionary. Decisions within the client's control are simply described as involving "fundamental rights," while those within the lawyer's control are said to involve matters requiring the "superior ability of trained counsel" in assessing "strategy."²⁹

To that end, beyond the four decisions the *Jones* Court deemed to be fundamental, the Supreme Court has been exceedingly reluctant to extend the scope of the criminal defendant's decision-making power. In fact, beyond the decisions in *Jones*, the Supreme Court has only identified—and in dicta no less—one other decision that belongs exclusively to the defendant—the decision to waive the right to be present at trial.³⁰

In all other cases in which the Supreme Court has been asked to determine whether a particular decision was one of tactics (and therefore reserved to the lawyer) or a fundamental decision (and therefore reserved to the defendant), the Court has determined that the particular decision in question was tactical in nature and

(D. Md. Dec. 8, 2014), *dismissed*, 599 F. App'x 505 (4th Cir. 2015).

29. Kenneth P. Troccoli, *Control Over the Defense: Representing Zacarias Moussaoui*, 33 CHAMPION 30, 34 (2009) (quoting LAFAVE ET AL., *supra* note 16, § 11.6(c)).

30. See *Taylor v. Illinois*, 484 U.S. 400, 418 n.24 (1988) (citing *Cross v. United States*, 325 F.2d 629, 630–33 (D.C. Cir. 1963)). In *Strickland v. Washington*, the Supreme Court arguably extended, to a limited extent, the rights of criminal defendants in the context of attorney/client control without directly extending the defendant's decision-making authority. In *Strickland*, the Supreme Court held in very general language that defense counsel has an obligation pursuant to the Sixth Amendment's guarantee of effective assistance of counsel to consult with the defendant regarding important strategic decisions, even though the lawyer retains the ultimate authority to make those decisions. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (noting defense counsel's "duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution"); see also *Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1436 (3d Cir. 1996) (positing that the Supreme Court's decision in *Strickland* imposed on defense counsel "[t]he requirement that counsel consult with his or her client concerning issues on which counsel has the final word").

therefore fell within the purview of the attorney's control. These decisions include: calling a possible witness (other than the defendant to testify at trial),³¹ forgoing cross-examination of a witness,³² deciding not to disclose the identity of certain witnesses before trial,³³ making decisions related to scheduling matters,³⁴ stipulating to the admission of certain evidence at trial,³⁵ making a contemporaneous evidentiary objection,³⁶ seeking to bar the introduction of unconstitutionally obtained evidence,³⁷ seeking to dismiss an indictment because the grand jury was unconstitutionally selected,³⁸ having the defendant wear civilian clothes rather than prison garb during trial,³⁹ moving to strike an improper

31. *Taylor*, 484 U.S. at 418 ("Putting to one side the exceptional cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial.").

32. *Id.*

33. *Id.*

34. *New York v. Hill*, 528 U.S. 110, 115 (2000) (holding that "[s]cheduling matters are plainly among those for which agreement by counsel generally controls" and defense counsel could properly waive the 180-day time period in which the defendant must be brought to trial as specified within the Interstate Agreement on Detainers).

35. *Id.* However, defense counsel cannot stipulate to the introduction of evidence in such a way that doing so amounts to the functional equivalent of a guilty plea. See *Brookhart v. Janis*, 384 U.S. 1, 7 (1966); see also *supra* note 25.

36. See *Henry v. Mississippi*, 379 U.S. 443, 450–52 (1965). The *Henry* Court held only that the decision whether to object to the introduction of a piece of evidence should be considered a matter of strategy. *Id.* at 451. However, in reaching this decision, the *Henry* Court noted:

Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims, we think that the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy would have that effect in this case.

Id. at 451–52 (citations omitted). As a result, some courts have read *Henry* in a broader fashion than simply relating to the contemporaneous-objection rule and believe it stands for the proposition that the selection of a given theory of defense is likewise a matter of trial strategy that is reserved for defense counsel. See *United States v. Wadsworth*, 830 F.2d 1500, 1509 (9th Cir. 1987) (referencing *Henry v. Mississippi* for the proposition that "[i]t is equally clear that appointed counsel, and not his client, is in charge of the choice of trial tactics and the theory of defense"). Further, while the United States Supreme Court has never explicitly addressed this issue, in addition to *Henry*, some legal commenters have suggested that because the Supreme Court held in *Jones* "that defendants do not have the right to dictate issues for their lawyers to present on appeal, it would appear that there is no constitutional right to control case theory at the trial level." Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 509 n.148 (1994).

37. See *Wainwright v. Sykes*, 433 U.S. 72, 74 (1977) (*Miranda* violation).

38. See *Francis v. Henderson*, 425 U.S. 536, 542 (1976); *Tollett v. Henderson*, 411 U.S. 258, 266 (1973).

39. See *Estelle v. Williams*, 425 U.S. 501, 512–13 (1976).

jury instruction,⁴⁰ allowing a federal magistrate judge and not a federal district court judge to conduct voir dire and jury selection,⁴¹ and after consulting with the defendant who refuses to either approve or disapprove of counsel's strategy, conceding the defendant's guilt at the guilt phase of a capital trial.⁴²

3. Lower Federal and State Court Decisions Provide Attorneys with Broad Decision-Making Authority

Of course, one cannot expect the United States Supreme Court to render an opinion regarding every decision on which a lawyer and client are likely to disagree and to determine which party gets to make the final decision. Unfortunately, as stated above, the Supreme Court has provided little guidance to lower courts in terms of how to decide whether a given decision implicates a fundamental choice of the defendant's, or instead is a tactical decision that belongs to defense counsel.⁴³ Nevertheless, when deciding whether the lawyer or the client has the final say on any given decision, lower federal and state courts have generally employed four different rationales.

First, courts have concluded that decisions relating to the objective of the representation are uniquely personal to the defend-

40. See *Engle v. Isaac*, 456 U.S. 107, 110 (1982).

41. See *Gonzalez v. United States*, 553 U.S. 242, 253 (2008).

42. See *Florida v. Nixon*, 543 U.S. 175 (2004). Nixon's lawyer theorized that conceding guilt during the guilt phase of the trial would prevent the presentation of inconsistent evidence during the penalty phase and therefore minimize the defendant's chances of receiving the death penalty. However, despite the fact Nixon was repeatedly consulted by his lawyer regarding this strategy, Nixon was verbally unresponsive and never approved, nor protested, defense counsel's decision. *Id.* at 181. The United States Supreme Court has never addressed the issue of whether defense counsel's concession of guilt over the defendant's express objection is the functional equivalent of a guilty plea (a fundamental right reserved only for the defendant). See *Brookhart v. Janis*, 384 U.S. 1, 7 (1966); see also *supra* note 25 and accompanying text. And the *Nixon* decision does little to provide lower courts with meaningful guidance with respect to this issue. This is because, to the extent *Nixon* provides meaningful guidance to lower courts, the decision may be relevant only when the defendant is charged with a capital offense and the defendant is consulted and refuses to make a decision. In noting that the *Nixon* decision was indeed very narrow, the Colorado Supreme Court explained *Nixon* by noting, "[a]s illustrated by the holding, both the fact that capital cases present defense attorneys with different strategic decisions than do other cases and the defendant's silence were critical to the Court's conclusion." See *People v. Bergerud*, 223 P.3d 686, 699–700 n.11 (Colo. 2010). The Colorado Supreme Court further observed, "[n]either consideration applies" when "the death penalty has been abandoned by the prosecution and the defendant *explicitly* objected to counsel's actions on his behalf" *Id.*

43. See *supra* Part I.A.2.

ant in a way that other types of decisions are not and therefore belong to the defendant alone.⁴⁴ For example, the Third Circuit noted that defendants retain the right to decide whether to plead guilty or take an appeal precisely because these decisions relate to the objective of the representation.⁴⁵ And while decisions such as waiving a jury trial or testifying may be viewed as strategic decisions that are designed to achieve that objective, "these decisions are so personal and crucial to the accused's fate that they take on an importance equivalent to that of deciding the objectives of the representation."⁴⁶ However, other decisions—for example, the decision to object to possible juror misconduct—relate more directly to the means of achieving that objective and are therefore viewed as decisions that belong to defense counsel.⁴⁷

Second, in deciding whether a right belongs to the accused as opposed to defense counsel, courts will look to the legal complexity of the decision involved.⁴⁸ The more legally complex a decision is, the more likely a court is to conclude that the decision must belong to the defense counsel, even over the client's objection.⁴⁹ The reason for this is fairly straightforward: giving the defendant the right to make this decision would be useless because the defendant is simply ill-equipped to exercise that right properly.⁵⁰

Third, lower courts appear particularly concerned that increasing the number of decisions that fall within the exclusive control of the defendant could significantly reduce trial efficiency.⁵¹ Put

44. See *Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1435 (3d Cir. 1996) (noting that such decisions include the entering of a guilty plea, taking an appeal, waiving a jury trial, and testifying).

45. *Id.* (holding that the decision to bring alleged juror misconduct to the attention of the trial judge belonged to the attorney because it was not a "fundamental personal decision comparable to the decisions on whether to forgo assistance of counsel, to waive a jury trial, or to testify in one's own behalf").

46. *Id.*

47. See *id.*

48. See *Van Alstine v. State*, 426 S.E.2d 360, 363 (Ga. 1993) (holding that the decision to submit lesser-included offense instructions is a strategic decision that belongs to defense counsel because it "is often based on legal complexities only the most sophisticated client could comprehend, not unlike the tactical decisions involved regarding the assertion of technical defenses"); see also *State v. Eckert*, 553 N.W.2d 539, 544 (Wis. Ct. App. 1996) (noting that the decision to request lesser-included offense instructions belongs to the lawyer because it "is a complicated one involving legal expertise and trial strategy").

49. See, e.g., *Van Alstine*, 426 S.E.2d at 363; *Eckert*, 553 N.W.2d at 544.

50. See, e.g., *Van Alstine*, 426 S.E.2d at 363; *Eckert*, 553 N.W.2d at 544.

51. See *United States ex rel. Brown v. Warden*, 417 F. Supp. 970, 973 (N.D. Ill. 1976) (holding that one factor to be considered in determining the scope of attorney/client control relates to the "the practical necessities of the adversary system").

simply, “[t]he adversary process could not function effectively if every tactical decision required client approval.”⁵² In this sense, the trial judge is hardly in a position to “continually satisfy himself that the defendant was fully informed as to, and in complete accord with, his attorney’s every action or inaction that involved any possible constitutional right.”⁵³

Lastly, courts may be inclined to restrict the decisions that belong exclusively to clients in order to avoid discouraging lawyers from accepting appointed cases—something that may occur if defense attorneys are not permitted to maintain control over the conduct of the case.⁵⁴ To that end, attorneys may be unwilling to accept cases if clients could force them to make decisions that the attorneys thought would cause them to lose cases and adversely affect their professional reputations.⁵⁵

This is not to say that lower courts are completely unwilling to expand the number of decisions that are deemed fundamental and therefore reserved to the defendant,⁵⁶ or that lower courts are

52. *United States v. Chapman*, 593 F.3d 365, 370 (4th Cir. 2010).

53. *Winters v. Cook*, 489 F.2d 174, 177 (5th Cir. 1973).

54. See *LAFAVE ET AL.*, *supra* note 16, § 11.6(b) (“In the end, this concern of the courts that the lawyer not be forced to sacrifice his professional reputation while providing no true assistance to his client may explain much of the law governing the division of authority between counsel and client.”).

55. *Id.*

56. Lower federal and state courts have held that, in addition to those rights deemed fundamental by the United States Supreme Court, the defendant has a fundamental right to decide the matters discussed below. First, whether to waive the right to attend important pre-trial hearings. See, e.g., *Carter v. Sowders*, 5 F.3d 975, 980–81 (6th Cir. 1993) (deposition); *Don v. Nix*, 886 F.2d 203, 206–07 (8th Cir. 1989) (deposition); *Garcia v. State*, 492 So. 2d 360, 363–64 (Fla. 1986) (pretrial conference on issues addressing both venue and jury selection); *State v. Johnson*, 635 A.2d 527, 533 (N.J. Super. Ct. App. Div. 1993) (speedy trial hearing). Second, whether to waive the constitutional right to a speedy trial. See, e.g., *Townsend v. Superior Court of L.A. Cty.*, 543 P.2d 619, 624–25 (Cal. 1975) (distinguishing between constitutional and statutory speedy trial rights). In *New York v. Hill*, which held that being tried within the 180-day time period specified in the Interstate Agreement on Detainers was a tactical decision for the attorney to make, the Supreme Court spoke generally about an attorney’s traditional right to control “scheduling matters.” See 528 U.S. 110, 115 (2000); *supra* note 34 and accompanying text. In this regard, *Hill* did not address the constitutional right to a speedy trial but dealt only with partial relinquishment of certain statutory speedy trial rights. Third, whether to pursue an insanity defense. See, e.g., *People v. Gauze*, 542 P.2d 1365, 1369–70 (Cal. 1975); *Jacobs v. Commonwealth*, 870 S.W.2d 412, 417–18 (Ky. 1994); *Treece v. State*, 547 A.2d 1054, 1055 (Md. 1988); *Johnson v. State*, 17 P.3d 1008, 1013, 1015 (Nev. 2001) (presenting an insanity defense against defendant’s wishes is a constitutional violation constituting per se reversible error). The defendant’s authority to reject the defense attorney’s recommendation and insist that an insanity defense not be raised is premised on the assumption that the defendant has the competency to stand trial and make decisions for himself. See *Godinez v. Moran*, 509 U.S. 389, 396 (1993).

always in agreement regarding which decisions belong to the lawyer and which belong to the accused.⁵⁷ However, for many of the reasons detailed above, in the words of one legal commentator, “courts are naturally reluctant to expand the number of matters over which a criminal defendant has control.”⁵⁸

As a result, while certainly not the case with respect to every possible decision,⁵⁹ and while any given jurisdiction may depart from the norm, in addition to the Supreme Court holdings referenced above, lower federal and state courts appear to be in general agreement that a broad range of decisions are deemed mat-

57. See LAFAVE ET AL., *supra* note 16, § 11.6(a) (summarizing numerous court decisions relating to whether certain decisions were matters of strategy or concerned the fundamental rights of the accused and noting that, “[t]aken together, the various rulings produce a picture that is clear at many points but clouded at others”). The following examples provide a sample of lower federal and state court rulings. First, whether to present a possible mitigating factor in the penalty phase of a capital case. Compare *People v. Deere*, 710 P.2d 925, 931–32 (Cal. 1985) (failure of defense counsel to present any mitigating evidence at the penalty phase of a capital trial constitutes ineffective assistance even though counsel acted in obedience to his client’s request), with *State v. Maestas*, 299 P.3d 892, 959 (Utah 2012) (defendant’s “Sixth Amendment right to ‘control the course of the proceedings carries with it the right to choose how much—if any—mitigating evidence is offered’”); see also *Schriro v. Landrigan*, 550 U.S. 465, 478 (2007) (holding that where a mitigating factor cannot be supported without the defendant’s cooperation, the defendant has an inherent veto authority in his refusal to cooperate). Second, whether to stipulate to the introduction of prior recorded testimony. See, e.g., *United States v. Stephens*, 609 F.2d 230, 232–33 (5th Cir. 1980) (holding that defense counsel in a criminal case may waive his client’s Sixth Amendment right of confrontation by stipulating to the admission of preliminary hearing transcript); cf. *Phillips v. Wyrick*, 558 F.2d 489, 496 (8th Cir. 1977) (holding that in the context of admitting preliminary hearing testimony, the defendant’s decision to waive the right of confrontation must be effected personally by an accused who is acting intentionally and knowledgeably). Third, whether, over the defendant’s objections, defense counsel has authority to concede guilt to a less serious crime as part of a trial strategy designed to avoid conviction for a more serious crime. See *Haynes v. Cain*, 298 F.3d 375, 381 (5th Cir. 2002). This is an area in which substantial disagreement exists. See Kimberly Helene Zelnick, *In Gideon’s Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion*, 30 AM. J. CRIM. L. 363, 393 (2003) (explaining that “[e]very [federal] circuit to consider the question has held that a concession strategy, even if employed over the defendant’s objections, is within counsel’s purview”). However, this is not to say that this issue is likewise foreclosed in state courts. See *Jones v. State*, 877 P.2d 1052, 1057 (Nev. 1994) (holding defense counsel could not concede his client’s guilt to second degree murder but argue the client was not guilty of the more serious first-degree murder charge); *State v. Anaya*, 592 A.2d 1142, 1147 (N.H. 1991) (indicating when defense counsel admitted to a lesser-included offense over defendant’s objection, the attorney “prevented any meaningful adversarial testing of the prosecution’s case”). It is unclear how the Supreme Court’s decision in *Florida v. Nixon* will impact this area of law, as the Court’s decision in *Nixon* may relate only to capital trials and circumstances in which the defendant never expressly accepts nor rejects defense counsel’s strategy. See 543 U.S. 175, 192 (2004).

58. Troccoli, *supra* note 29, at 34.

59. See *supra* note 56 and accompanying text.

ters of trial strategy and belong to the attorney.⁶⁰ These decisions include: whether to request that the jury be charged on lesser-included offenses,⁶¹ whether to request or consent to a mistrial,⁶² whether to seek a change of venue due to prejudicial pre-trial publicity,⁶³ whether to seek a competency determination,⁶⁴ and choosing among different theories of defense that could produce a complete acquittal.⁶⁵

60. See *infra* notes 61–65 and accompanying text.

61. The decision to request a lesser-included offense instruction is essentially a question of gambling. In other words, “[t]actically, the choice is whether to ‘go for broke,’ that is, have the jury vote up or down on the gravest charge, or to provide a possible locus of compromise.” H. Richard Uviller, *Calling the Shots: The Allocation of Choice Between the Accused and Counsel in the Defense of a Criminal Case*, 52 RUTGERS L. REV. 719, 748 (2000). However, it should be noted that, unlike the decision to concede guilt to a lesser offense when defense counsel simply requests a lesser-included offense instruction, the attorney may nonetheless argue for a complete acquittal. Compare *Arko v. People*, 183 P.3d 555, 558 (Colo. 2008) (noting that “a defendant retains all of his trial rights when he requests that a jury consider a lesser offense instruction,” including, “the opportunity to advocate for outright acquittal”), with *supra* note 57 and accompanying text. The third edition of the ABA Standards of Criminal Justice provides that the decision to request a lesser-included offense instruction belongs to the attorney. See ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-5.2 cmt. (3d ed. 1993). And, “[s]ince issuance of the 1993 ABA Commentary, courts have uniformly decided that whether or not to ask the trial judge to instruct the jury on lesser-included offenses is a matter of strategy and tactics ceded by a defendant to his lawyer.” *People v. Colville*, 979 N.E.2d 1125, 1130 (N.Y. 2012).

62. See *United States v. Chapman*, 593 F.3d 365, 368 (4th Cir. 2010) (“Given the many issues that must be identified, evaluated, and weighed when determining whether to seek or accept a mistrial, we think it clear that the decision is a tactical one to be made by counsel, not the client.”); see also *United States v. Washington*, 198 F.3d 721, 723 (8th Cir. 1999); *Watkins v. Kassulke*, 90 F.3d 138, 142 (6th Cir. 1996); *Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1434 (3d Cir. 1996); *People v. Ferguson*, 494 N.E.2d 77, 80 (N.Y. 1986).

63. See *Muldrow v. State*, 744 S.E.2d 413, 417–19 (Ga. Ct. App. 2013) (holding that the trial court properly accepted counsel’s stipulation as to venue, even though this stipulation was made in defendant’s presence and the defendant was never asked if he agreed); *State v. Hereford*, 592 N.W.2d 247, 252 (Wis. Ct. App. 1999) (holding that venue is within the sphere of tactical decision making reserved to defense counsel and therefore waiver does not require defendant’s personal participation); see also *United States ex rel. Agron v. Herold*, 426 F.2d 125, 127 (2d Cir. 1970) (holding that when the record shows appellant waived the pretrial publicity claim, the court may deny him or her relief).

64. See *Blakeney v. United States*, 77 A.3d 328, 345 (D.C. Cir. 2013), cert. denied, 135 S. Ct. 689 (2014) (obligating defense counsel to raise the issue of competency where indicia of incompetence raises a reasonable doubt as to defendant’s competence to stand trial and noting, “deference to the client’s desire not to raise the issue of his competency does not justify or excuse such a failure. It is well-settled that counsel is obligated to raise the issue over the defendant’s objections if reason exists to doubt the defendant’s competency”); see also *Bundy v. Dugger*, 816 F.2d 564, 566 n.2 (11th Cir. 1987) (citation omitted) (“If defense counsel suspects that the defendant is unable to consult with him with a reasonable degree of rational understanding, he cannot blindly accept his client’s demand that his competency not be challenged.”).

65. See *United States v. Wadsworth*, 830 F.2d 1500, 1509 (9th Cir. 1987) (positing

B. *Ethical Guidelines and Attorney-Client Control Over Decision Making*

While constitutional jurisprudence represents the minimum amount of authority that the criminal defendant must be given with respect to his or her right to make certain decisions, ethical rules could provide the client with greater decision-making control than he or she is constitutionally entitled.⁶⁶ As indicated below, while current ethics rules do somewhat expand the number of decisions that are reserved exclusively for the client, ethics rules generally do not alter the dominant paradigm of expansive attorney control over strategic and tactical decisions.

1. ABA Model Rules of Professional Conduct

The most important set of ethics rules that regulate attorney conduct are the ABA Model Rules of Professional Conduct. The Model Rules have been adopted, at least in part, as the formal ethics rules by every state in the country, with the exception of California.⁶⁷

In terms of regulating attorney/client decision making, Model Rule 1.2 establishes that the client defines the objectives of the representation, while the lawyer is tasked with consulting the client as to the means by which those objectives should be achieved.⁶⁸ In the context of a criminal matter, Model Rule 1.2

that defense counsel's right to select the theory of defense is derived from the Supreme Court's decision in *Henry v. Mississippi*). For a discussion of *Henry*, see *supra* note 36. See also *United States v. Ladd*, 215 F. App'x 526, 529 (7th Cir. 2007) ("[A]s a general rule choosing a defensive theory" is a decision "to be made by counsel, not the defendant."); *Arko*, 183 P.3d at 558 (quoting *Steward v. People*, 498 P.2d 933, 934 (1972)) ("Defense counsel stands as captain of the ship in ascertaining what evidence should be offered and what strategy should be employed in the defense of the case.").

66. See *infra* note 90.

67. "The ABA *Model Rules of Professional Conduct* were adopted by the ABA House of Delegates in 1983. . . . Before the adoption of the Model Rules, the ABA model was the 1969 *Model Code of Professional Responsibility*. . . . Preceding the Model Code was the 1908 *Canons of Professional Ethics*." MODEL RULES OF PROF'L CONDUCT, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Apr. 15, 2016) (providing a history of the evolution of ABA ethics codes). The author does not wish to give the impression that attorneys practicing in the State of California are doing so within some sort of ethical vacuum. In fact, attorney conduct in California is regulated by a separate ethics code called the California Rules of Professional Conduct. See CALIFORNIA RULES OF PROF'L CONDUCT (CAL. BAR ASS'N 1992) <http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct.aspx> (last visited Apr. 15, 2016).

68. See MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2013) ("[A] lawyer

tracks closely to the decision-making paradigm established in *Jones* and indicates that the client has authority to decide, “as to a plea to be entered, whether to waive jury trial and whether the client will testify.”⁶⁹

Model Rule 1.2 appears to suggest that the “means” used to accomplish the defendant’s objectives are the functional equivalent of strategic and tactical decisions, and as such fall within the province of the lawyer’s decision-making authority.⁷⁰ However, while this objective-means test appears fairly easy to follow, Model Rule 1.2 is somewhat less precise than it appears.

With regard to control over strategic and tactical decisions, the official comment to Rule 1.2 provides that, while the client should normally defer to the lawyer with respect to the means used to accomplish the client’s objectives, lawyers should normally “defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.”⁷¹ Importantly, the comment to Model Rule 1.2, without further elaboration, provides that beyond those concerns, when the lawyer and the client “disagree about the means to be used to accomplish the client’s objectives” because “of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved.”⁷²

As a result, current ethics rules provide little meaningful guidance for defense counsel faced with the dilemma of whether to ignore his or her client’s demands regarding a wide array of trial tactics or strategy. In light of this recognition, it is not surprising

shall abide by a client’s decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued.”)

69. *Id.*; see *Jones v. Barnes*, 463 U.S. 745, 751 (1983); see also *Joy & McMunigal*, *supra* note 6, at 34.

70. See *Uphoff & Wood*, *supra* note 2, at 14 (commenting that Model Rule 1.2 appears to suggest “[s]trategic and tactical decisions are only means and, as such, are squarely within the lawyer’s province”).

71. MODEL RULES OF PROF’L CONDUCT r. 1.2, cmt. 2 (AM. BAR ASS’N 2013). Professor Rodney Uphoff provides an example of when defense counsel may be ethically required to defer to the client’s wishes with respect to a tactical decision that would adversely affect a third person. According to Uphoff, defense counsel may be required to respect a client’s decision not to call his elderly father as an exculpatory witness at trial because of the defendant’s concerns that the stress of testifying at trial would impact his elderly father’s health. See *Uphoff, Tactical Choices*, *supra* note 14, at 778.

72. MODEL RULES OF PROF’L CONDUCT, r. 1.2, cmt. 2 (AM. BAR ASS’N 2013).

to hear one legal commentator observe that the vagueness of the objective-means test and the inconsistencies in the Model Rules and its official comments leave the lawyer relatively free to decide strategic and tactical questions as he or she sees fit, even in the face of a client's objections.⁷³ Therefore, while the Model Rules do not expressly indicate which party should have final say with respect to strategic and tactical decisions about which the lawyer and client disagree, the Model Rules do little to restrict the attorney who wishes to exercise ultimate attorney control over such decisions.⁷⁴

2. ABA Criminal Justice Standards—Defense Function

Additionally, in deciding whether to abide by a client's wishes, defense attorneys may look to the ABA Standards for Criminal Justice—Defense Function. While the ABA's Standards for Criminal Justice have no legal authority unless adopted by a court or legislature, they nevertheless serve as among the most widely cited set of guidelines detailing professional norms.⁷⁵ The Standards for Criminal Justice also represent an influential source of guidance in terms of defining the ethical limitations of attorney conduct.⁷⁶

Most relevant to the instant discussion, Standard 4-5.2 provides that in addition to those rights reserved exclusively to the client pursuant to *Jones*, a competent client retains the sole right to decide whether to be represented by counsel, to cooperate with the government, and to speak at sentencing.⁷⁷ However, beyond those decisions, Standard 4-5.2(d) reads, “[s]trategic and tactical decisions should be made by defense counsel, after consultation with the client where feasible and appropriate.”⁷⁸ In fact, the

73. “When decisions are truly tactical, however, the Model Rules . . . neither require nor expressly encourage that the choices be made by the client. Thus, counsel has considerable freedom in allocating decision-making authority when faced with tactical decisions.” Mitchell, *supra* note 15, at 257–58.

74. *Id.*

75. See Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111, 1113 (2011).

76. Cecelia Klingele, *Confidentiality and Disclosure: What the New ABA Criminal Justice Standards (Don't) Say About the Duties of Defense Counsel*, 38 HASTINGS CONST. L. Q. 983, 985 (2011).

77. CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION § 4-5.2 (AM. BAR ASS'N 4th ed.).

78. *Id.*

comment to Rule 4-5.2 reads, “[t]he lawyer should seek to maintain a professional relationship at all stages while maintaining the ultimate choice and responsibility for the strategic and tactical decisions in the case.”⁷⁹ In this sense, while somewhat expanding the number of decisions over which the client retains exclusive control, the latest edition of the Criminal Justice Standards continues to provide the attorney with broad authority to make strategic and tactical choices.

II. HOW DIFFERENT LAWYERING PHILOSOPHIES ADDRESS THE ISSUE OF ATTORNEY/CLIENT CONTROL OVER THE DECISION-MAKING PROCESS

Clearly, decisional law at both the state and federal level, as well as current ethical guidelines, generally provides the criminal defense attorney with fairly expansive decision-making authority, even in the face of his or her client’s objection.

However, the mere fact that an attorney may have the legal authority to make a given decision, even over his or her client’s objection, does not end the debate concerning the proper allocation of decision-making authority between the lawyer and the client. For example, assume that defense counsel and the accused disagree regarding a decision that, in a given jurisdiction, is considered a tactical decision the lawyer is privileged to make. Even though the attorney may have the legal authority to make such a decision over the client’s objection, should defense counsel nonetheless yield to the client’s wishes?

As noted earlier, legal scholars have attempted to answer this question through the formulation of two primary models of lawyering:⁸⁰ the traditional lawyer-centered model which dictates that defense counsel should make whatever decision he or she

79. See ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-5.2 cmt. (3d ed. 1993). The Fourth Edition is the most recent edition of the Standards for Criminal Justice-Defense Function. However, as of this writing, the Standards have been released without comments. Therefore, the above quote is from the Third Edition of the Standards for Criminal Justice-Defense Function, Standard 4-5.2. However, both the Third and Fourth Editions of Standard 4-5.2 plainly indicate that defense counsel should make all strategic and tactical decisions after consulting with the client, where feasible. It is unlikely that the Fourth Edition of Standard 4-5.2 would therefore alter the validity of the above quoted commentary in any meaningful way. See *supra* notes 8–11.

80. See ABA Defense Function Standard 4-5.2 comment (Third Edition); *supra* notes 8–11 and accompanying text.

deems best regardless of the client's demands,⁸¹ and the client-centered model, which provides that the defendant should exercise ultimate control over all decisions that are likely to have a substantial legal or non-legal impact on the client's life.⁸²

A. *The Lawyer-Centered Approach*

The lawyer-centered approach is regarded as the traditional approach to the lawyer-client relationship.⁸³ Under this view, once the client has agreed to be represented by trained counsel, "the client essentially delegates to the lawyer primary responsibility for problem solving and decision making."⁸⁴ As a result, the client's role in the representation becomes largely passive.⁸⁵ The lawyer-centered approach is premised on the notion that the lawyer should exercise "broad autonomy and authoritarian control over the professional relationship,"⁸⁶ because it is the lawyer, not the client, who is the skilled professional with specialized legal knowledge.⁸⁷ Moreover, in addition to the lawyer's expertise, the

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

82. See *supra* note 8 and accompanying text; see also *supra* note 12 (noting a different approach, beyond the lawyer and client-centered models, in answering the question of whether it is the lawyer or the client who should have ultimate decision-making control). Interestingly, data has emerged indicating that a majority of lawyers advocate for a lawyer-centered, as opposed to client-centered, approach. See Uphoff & Wood, *supra* note 2, at 51. In a comprehensive study of almost 700 public defenders from five different jurisdictions, Professors Rodney Uphoff and Peter Wood asked lawyers who should have the final say on twelve different strategic decisions that frequently confront lawyers. *Id.* at 30-32. The survey results indicated that, while somewhat dependent upon the particular public defender office, the majority of respondents adopted a lawyer-centered approach to decision making, whereas a substantial minority advocated for a client-centered position. *Id.* at 38, 57.

83. See Uphoff, *Strategic Decisions*, *supra* note 5, at 5 (describing the lawyer-centered model as the traditional view of lawyering theory).

84. See HERMAN & CARY, *supra* note 11, at 8.

85. See *id.* at 10.

86. *Id.*

87. Uphoff, *Tactical Choices*, *supra* note 14, at 766. In terms of the lawyer-centered model,

[t]he lawyer, as a trusted and skilled professional, utilizes her training and specialized knowledge to manage the client's legal problem or case in accordance with counsel's best judgment. Thus, except for a few fundamental decisions specifically reserved for the defendant, the criminal defense lawyer makes all tactical and strategic decisions.

Id.

lawyer is in a better position to make decisions than the client because the lawyer is not as emotionally involved in the case.⁸⁸

As a result, with the exception of the “few fundamental decisions” that are reserved for the client, “the criminal defense lawyer [should] make all tactical and strategic decisions” that may occur during the trial process.⁸⁹ This is true even when defense counsel and the client disagree over a question of strategy and tactics.⁹⁰

Perhaps the most poignant summary of the arguments for a lawyer-centered approach to decision making can be found in the Ninth Circuit’s opinion in *Nelson v. California*.⁹¹ In *Nelson*, defense counsel refused to accede to the client’s wishes regarding a question of trial strategy (pursuing a motion to suppress physical evidence).⁹² In advancing a lawyer-centered approach to decision making the court wrote,

[d]oes the fact that here there was prior consultation with the accused, and that he disagreed with counsel’s strategy, make a legal difference? . . . Our view is that the result should be the same. Our reasons are that only counsel is competent to make such a decision, that counsel must be the manager of the law-suit, that if such decisions are to be made by the defendant, he is likely to do himself more harm than good, and that a contrary rule would seriously impair the constitutional guaranty of the right to counsel. One of the surest ways for counsel to lose a law-suit is to permit his client to run the trial.⁹³

88. See Uphoff & Wood, *supra* note 2, at 7 (noting that with respect to the lawyer-centered model, the lawyer makes all tactical and strategic decisions in part “because the lawyer as a detached expert is in a better position to do so than is the untrained, emotionally involved client”).

89. See Uphoff, *Tactical Choices*, *supra* note 14, at 766. It should be pointed out that, while the lawyer-centered model empowers the lawyer to make decisions on behalf of the client, the lawyer must still comply with existing ethical rules, as indicated in Part I.B. See MODEL RULES OF PROF’L CONDUCT R. 1.2 (AM. BAR ASS’N 2013). As a result, the lawyer must allow the client to make the decisions ethics rules deem within the exclusive province of the client. *Id.* Further, while the attorney may have authority to make strategic and tactical decisions, ethics rules may nevertheless impose an ethical duty upon defense counsel to consult with his/her client regarding matters of trial tactics and strategy. See CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION standard 4-5.2 (AM. BAR ASS’N 4th ed.); see also *supra* note 72 and accompanying text.

90. See *Nelson v. California*, 346 F.2d 73, 81 (9th Cir. 1965) (summarizing the argument for the lawyer-centered approach to decision making).

91. *Id.*

92. *Id.* at 78–79.

93. *Id.* at 81 (citation omitted).

Therefore, under the traditional lawyer-centered approach to decision making, when the lawyer has the legal authority to make a particular strategic decision, the lawyer does not yield to the client's wishes. Instead, it is the lawyer who knows best, and, as a result, the lawyer makes whatever decision he or she deems likely to be the most effective.

B. *The Client-Centered Approach*

The client-centered approach to the attorney/client relationship is regarded as "being at the opposite end of the theoretical spectrum from the lawyer-centered model."⁹⁴ To that end, the lawyer-centered approach has been heavily criticized for its paternalistic focus and corresponding lack of attention to client dignity and autonomy.⁹⁵ However, unlike the traditional lawyer-centered model, the client-centered approach stresses the importance of client autonomy by expanding the decision-making authority given to the client.⁹⁶

In this regard, the emergence of the client-centered model of lawyering began in earnest with the growth of clinical legal education in the 1960s and 1970s.⁹⁷ Many of these early clinical law professors came from civil legal services or public defender offices.⁹⁸ Based upon their experiences, they came to believe that too many public interest lawyers forced "decisions upon their clients."⁹⁹ Advocates of the client-centered model "emphasized the need to promote increased client participation in the resolution of their cases."¹⁰⁰ Further, the growing clinical education movement of the 1970s was in search of a particular pedagogy, and a lawyering model focused on the goal of increased client participation resonated strongly with the values of these early clinical law professors.¹⁰¹

94. See HERMAN & CARY, *supra* note 11, at 11.

95. See *id.* at 10 ("The lawyer-centered model has been widely criticized as being inconsistent with client dignity and the intrinsic value of client self-determination.")

96. Uphoff, *Tactical Choices*, *supra* note 14, at 768-69 ("The client-centered model seeks to promote client autonomy by making clients responsible for decisionmaking.")

97. See Zeidman, *supra* note 11, at 876-77.

98. See *id.* at 877.

99. *Id.*

100. *Id.*

101. See Kruse, *supra* note 12, at 381, 383 (noting that the emergence of client-centered lawyering "fell into the hands of an eager and growing audience of clinical law professors,

Against this backdrop, the construct of client-centered lawyering emerged. The most widely used paradigm of client-centered lawyering was first proposed by Professors David Binder and Susan Price in their groundbreaking 1977 work, *Legal Interviewing and Counseling*,¹⁰² and in revised editions of the text now called *Lawyers as Counselors: A Client-Centered Approach*.¹⁰³ To that end, “[a]lthough presented under the rubric of interviewing and counseling, the client-centered approach offered something much more momentous: an alternative vision of lawyering that conceptualized legal representation primarily in problem-solving terms and redefined the boundaries of decision-making authority in the lawyer-client relationship.”¹⁰⁴

With the release of the third edition of *Lawyers as Counselors*, more than thirty-five years since its introduction, the Binder/Price model of client-centered lawyering “retains its center-stage position in legal education.”¹⁰⁵

Since 1977, when the model of client-centered representation proposed by Binder and Price was first introduced, variants of this model have emerged and new lawyering skill texts have indeed entered the field.¹⁰⁶ As a result, *Lawyers as Counselors* is

who saw its value within the new curricula they were developing for use in live-client clinics, and immediately put it to use”).

102. See BINDER & PRICE, *supra* note 11.

103. In 1991, Professors Binder and Price published a revised version of their original text. They added Paul Bergman as a third author and changed the name of the text to *Lawyers as Counselors: A Client-Centered Approach*. See DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991). In 2004, the second edition of *Lawyers as Counselors: A Client-Centered Approach* was published, adding Paul R. Tremblay as a fourth author. See DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE & PAUL TREMBLAY, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004). In 2012, a third edition of the book was released, with Ian S. Weinstein replacing Susan Price. See BINDER ET AL., *supra* note 11. By the early 1990s, the Binder/Price text enjoyed widespread use in American law schools. See Anthony V. Alfieri, *The Politics of Clinical Knowledge*, 35 N.Y. L. SCH. L. REV. 7, 15 n.49 (1990) (“In 1989 and 1990, the West Publishing Co. estimated adoption of Binder and Price’s *Legal Interviewing and Counseling* by over 100 law schools and colleges in the United States.”). Writing in 2006, Professor Katherine Kruse observed of the Binder/Price text, “[o]ver twenty-five years and two editions later, the client-centered approach remains the predominant model for teaching lawyering skills.” Kruse, *supra* note 12, at 370.

104. Kruse, *supra* note 12, at 376.

105. See Amelia J. Uelmen, “*Millennial Momentum*” for *Revising the Rhetoric of Lawyers’ Relationships and Roles*, 9 U. ST. THOMAS L.J. 446, 462–63 (2011).

106. See Kruse, *supra* note 12, at 371. With the addition of these new lawyering texts, as indicated in note 102, some legal educators and practitioners now prefer the collaborative model of client counseling, or use of different decision-making models depending on the particular issues involved in each decision.

certainly not the only lawyering skills text in circulation. However, the model of client-centered representation laid out in the Binder/Price texts is frequently cited in other lawyering skills textbooks as *the* model for client-centered counseling.¹⁰⁷ Further, “[e]ven approaches that critique or depart from the client-centered approach use it as the benchmark against which to measure themselves.”¹⁰⁸

Consequently, the model laid out by Binder and Price in *Lawyers as Counselors* is “undoubtedly” the most influential model of client-centered representation.¹⁰⁹ For this reason, unless otherwise noted, this article’s description of client-centered lawyering refers to the model created in *Lawyers as Counselors*, as this is the most widely utilized paradigm of client-centered lawyering.¹¹⁰

This dominant model of client-centered representation assumes that clients are quite capable and willing to participate in the decision-making process. Assuming such, the role of the client-centered lawyer is to: (1) help the client identify legal problems as well as the non-legal aspects of the client’s situation; (2) identify the client’s goals; (3) identify and evaluate options and likely alternatives as a way of achieving the client’s goals; (4) provide the client with advice when requested; and (5) *allow the client to make all decisions that are likely to have a substantial legal or non-legal impact on the client’s life.*¹¹¹

107. See *id.* at 370–71; see, e.g., HERMAN & CARY, *supra* note 11, at 11; see also COCHRAN ET AL., *THE COUNSELOR-AT-LAW* 4–6 (3d ed. 2014); STEFAN H. KRIEGER & RICHARD K. NEUMAN, *ESSENTIAL LAWYERING SKILLS* 22 (5th ed. 2015).

108. See Kruse, *supra* note 12, at 370 n.5.

109. See Uphoff & Wood, *supra* note 2, at 8 n.25.

110. Zeidman, *supra* note 11, at 847 n.42. Moreover, I believe the above approach is consistent with that of other legal scholars. See, e.g., Miller, *supra* note 36, at 503 n.113 (critiquing the theory of client-centered lawyering and its relationship to the client’s role in constructing case theory and stating, “I rely primarily on the model set out in Binder, Bergman, and Price’s *Lawyers as Counselors* as the most typical model and the one most commonly used in legal education”); Paul R. Tremblay, *Counseling Community Groups*, 17 *CLINICAL L. REV.* 389, 397 (2010) (“For purposes of both respect and convenience, I will refer to the default understanding of individual counseling as the ‘Binder & Price’ model.”); Zeidman, *supra* note 11, at 847 n.42 (“By ‘client-centered’ counseling, I refer to the model proposed originally in DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977).”).

111. See BINDER, ET AL., *supra* note 11, at 316–44 (exploring the role of the client-centered lawyer through the use of hypotheticals).

According to the proponents of client-centered representation, clients are primary decision makers for reasons related to the importance of protecting client dignity and autonomy.¹¹² The theory holds, “[c]lients should have primary decision-making power in part because of the simple truth that *problems are theirs, not yours*. After all, clients and not you have to live with decisions’ immediate and long term consequences.”¹¹³ Further, vesting clients with primary decision-making power increases the chances of clients obtaining maximum satisfaction, as clients are presumably better able to determine for themselves how a potential decision is most likely going to achieve this result.¹¹⁴

This is not to say, however, that client-centered representation entails providing clients with the authority to make every decision that is part of the trial process.¹¹⁵ Indeed, client-centered advocates acknowledge this would prove unworkable for reasons related to time and common sense.¹¹⁶ Additionally, a client’s reasonable expectation in agreeing to be represented by counsel is that the lawyer will make certain decisions that are related to the lawyer’s technical knowledge and skill, even without consulting the client.¹¹⁷

In this regard, decisions that “involve primarily the exercise” of a lawyer’s “skills and crafts” fall within the purview of the attorney’s exclusive control.¹¹⁸ As a result, only when a decision is “likely to have an influence beyond that normally associated with the exercise of lawyering skills and crafts” does the “substantial impact standard” require that the lawyer consult with the client regarding what decision to make¹¹⁹ and to correspondingly respect the client’s wishes.¹²⁰ Examples of decisions that are uniquely re-

112. *Id.* at 4 (“Underlying client-centeredness is the philosophy that clients are autonomous and therefore deserving of making important decisions that lead to resolution of their legal problems and the achievement of their aims.”).

113. *Id.* at 318.

114. *Id.*

115. *Id.* at 321.

116. *Id.* at 322 (observing that neither clients nor lawyers would find acceptable a situation where constant consultation regarding simple matters, such as whether to send documents by regular or overnight mail, was required).

117. *Id.* at 326.

118. *Id.*

119. *Id.*

120. *Id.* at 338 (“Being a lawyer does not provide you with a license to refuse to implement or even to try to talk clients out of all decisions with which you disagree. Indeed, client-centeredness insists that clients have the privilege to make lousy decisions that ‘give

lated to lawyering skills include how to cross-examine a witness, write briefs, or phrase a contingency clause.¹²¹

Obviously, it is not possible to create a complete list of every decision that must be made during the trial process and to preemptively determine whether a client-centered advocate would consider that decision as one belonging to the lawyer or the client. Nor will it always be easy to discern whether the impact of a given decision is beyond that normally associated with the exercise of lawyering skills and crafts.¹²² Instead, the proponents of client-centered representation view the "substantial impact" standard as one that leaves room for the lawyer to exercise practical judgment when determining if a given decision belongs to the lawyer or the client.¹²³

In light of this observation, assume that a lawyer uses his or her practical judgment and determines that a given decision satisfies the substantial impact standard and is therefore the client's decision to make, but the lawyer believes the client is making an ill-advised choice. When the lawyer finds himself or herself in this predicament, what is the client-centered counselor supposed to do? According to client-centered advocates, "[c]lient-centeredness regards clients as moral agents whose decisions you [meaning the lawyer] are normally bound to respect, even if you would have made different ones."¹²⁴

In fact, only when the lawyer feels as though the client has made a decision that substantially contravenes the client's stated objective, runs afoul of the lawyer's moral beliefs, fails to take sufficient account of risk, or is contrary to the lawyer's professional standards, might the lawyer even "seek to have the clients reconsider their decisions."¹²⁵

If the client cannot be persuaded to reconsider his or her decision, the client-centered lawyer's options are severely limited. Basically, the client-centered advocate must implement the client's

up the store' if they so choose.").

121. *Id.* at 326.

122. *See Miller, supra* note 36, at 513-14. (positing that a potential drawback of the Binder/Price model of client-centered counseling is that it provides "little guidance on how to distinguish the typical lawyering skill that calls for lawyer-dominated choices from the kind of skill that requires participatory decisionmaking").

123. BINDER ET AL., *supra* note 11, at 324.

124. *Id.* at 338.

125. *Id.* at 339; *see also id.* at 338-44, 538-41 (demonstrating this principle through hypotheticals).

choice or attempt to withdraw from the representation, although pursuing the withdrawal option is not mandated.¹²⁶

Further, withdrawing from the client's case may not always be permitted under a jurisdiction's ethics rules.¹²⁷ And, in a criminal case, the trial judge may not allow the lawyer to withdraw from the representation based on a number of different factors, including the timing of withdrawal, the age of the case, and the inconvenience to the witnesses.¹²⁸

Consequently, if the lawyer decides against making a motion to withdraw or withdrawal is otherwise not possible, other than a limited number of exceptions that are addressed below, the lawyer should not simply overrule the client and implement the decision he or she deems best.¹²⁹ In fact, at no point in their discussion does the dominant Binder/Price model suggest overruling the client's preference and becoming a lawyer-centered advocate, even if the client will not reconsider his or her position or the lawyer cannot withdraw.¹³⁰ Instead, the lawyer should continue to adopt a client-centered approach.¹³¹ Put simply, according to the most

126. *See id.* at 442 (“Thus, unless you intend to withdraw as counsel, you may find yourself implementing decisions that you disagree with.”). *See generally id.* at 338–44, 538–41.

127. *Id.* at 344. The Model Rules provide that a lawyer may withdraw if “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.” MODEL RULES OF PROF'L CONDUCT r. 1.16(b)(4) (AM. BAR ASS'N 2013). However, it may not always be possible to do so. For example, if the disagreement arises in the middle of the trial or otherwise too late in the representation to provide for meaningful substitution, the trial judge may not allow the lawyer to withdraw. In fact, the drafters of the rule seem to acknowledge such and provide that a lawyer cannot withdraw if he or she is ordered to continue representation by the tribunal. *Id.* at 1.16(c).

128. *Wilson v. State*, 753 So. 2d 683, 688 (Fla. Dist. Ct. App. 2000) (quoting *Sanborn v. Florida*, 474 So. 2d 309, 314 (1985)) (listing typical factors that courts will consider when an attorney makes a motion to withdraw from a criminal case).

129. *See generally* BINDER ET AL., *supra* note 11, at 338–39, 428–48, 538–41. The third edition of *Lawyers as Counselors* provides a separate section on counseling clients in criminal cases. The vast majority of that section addresses how to counsel clients with respect to accepting plea bargains and spends little time addressing whether the lawyer or client should have final say when a disagreement occurs regarding a matter of trial tactics and strategy. To the limited extent that this section touches on this topic, its approach is consistent with the rest of the Binder/Price model of client-centered lawyering in that lawyers are never told to overrule a client's strategic preference when a disagreement occurs regarding matters of trial tactics and strategy. Instead, lawyers are only told that they should withdraw from representation if such a disagreement effects the lawyer's ability to represent the client, but that this option, if it is even possible, should be utilized rarely. *Id.* at 538–41.

130. *See generally id.* at 338–44, 428–48, 538–41.

131. *See supra* note 127 and accompanying text.

widely utilized model of client-centered representation, “unless you intend to withdraw as counsel, you may find yourself implementing decisions that you disagree with.”¹³²

When the client-centered advocate finds himself or herself in such a predicament, although it may risk damaging his or her rapport with the client, some lawyers might ask clients to acknowledge in writing that their lawyer has “reviewed with them the risks that the decisions would not achieve their desired aims.”¹³³ Moreover, Binder and Price identify a limited number of exceptions to the rule that the client gets to make every important decision. In this sense, client-centered lawyers recognize that the client’s decision-making control may be constrained by the bounds of the law generally,¹³⁴ and more specifically, the requirement that a lawyer comply with ethical rules governing decision making.¹³⁵ An additional exception relates to instances in which the client is a minor or suffers from a mental impairment.¹³⁶

Indeed, as Professor Paul Temblay has noted with respect to client-centered counseling, “[w]hile thoughtful critics have continued to refine its understandings, the central premise of client-centeredness—that lawyers ought to respect the ultimate choices of their clients, rather than seek to impose their own choices, on questions of legal objectives as well as tactics—has become established doctrine within the academy.”¹³⁷

132. BINDER ET AL., *supra* note 11, at 442.

133. *Id.* at 431 n.28.

134. Robert J. Condlin, “What’s Love Got to Do with It?”—“It’s Not Like They’re Your Friends for Christ’s Sake”: *The Complicated Relationship Between Lawyer and Client*, 82 NEB. L. REV. 211, 228 (2003) (referencing the Binder/Price model of client-centered lawyering and observing that, “[w]hen ‘clients seek to go beyond the bounds of what is legal or just,’ however, client-centered lawyers do not ‘disregard fundamental legal concepts and moral values’”).

135. BINDER, ET AL., *supra* note 11, at 323 (citing MODEL RULES OF PROF’L CONDUCT r. 1.2, 1.4 (2010)) (positing that lawyers “need to be aware of and comply with ethical rules governing decision-making”).

136. *Id.* at 10 n.8 (noting that “if your client is a minor or suffers from some sort of mental impairment, you may need to undertake more of the decision-making than when such factors are not present”).

137. Paul R. Tremblay, *Critical Legal Ethics*, 20 GEO. J. LEGAL ETHICS 133, 140 n.36 (2007) (reviewing LAWYERS ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER (Susan D. Carle ed., 2005)).

Although the above lawyering philosophy has become “established doctrine within the academy,” there appears to be no discussion of whether the above approach is consistent with the Sixth Amendment’s guarantee of effective assistance of counsel.¹³⁸ This topic will be addressed below.

III. AN OVERVIEW OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Regardless of whether the attorney adopts the lawyer-centered or the client-centered approach to attorney/client decision making, the attorney’s actions must comport with the Sixth Amendment’s guarantee of effective assistance of counsel.¹³⁹

In the traditional lawyer-centered approach, whenever the lawyer exercises his or her authority to make a given strategic decision and does so over the client’s objection, clients can complain that the attorney exercised poor judgment and therefore deprived him or her of effective assistance of counsel.¹⁴⁰ Even when the attorney adopts a client-centered approach and yields to the defendant’s demands, despite the attorney’s belief that a deci-

138. U.S. CONST. amend. VI. Once again, this article has focused on the Binder/Price theory of client-centered representation, as this is the most widely accepted model of client-centered lawyering. However, it is worth briefly noting that other client-centered advocates have espoused somewhat different views regarding the proper allocation of attorney/client decision making. To that end, Professor Alex J. Hurder has called for negotiation between lawyers and clients in making all decisions. See Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 BUFF. L. REV. 71, 75 (1996). Professor Hurder does not address how his proposal may be limited by the Sixth Amendment’s guarantee of effective assistance of counsel. *Id.* Additionally, in a 1979 article, Professor Mark Spiegel called for the development of an informed-consent doctrine that would take account of the interests of the client, the lawyer, and the public in determining which decisions belonged to which party. See Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 42–43 n.10 (1979). However, Professor Spiegel’s theory regarding informed-consent and attorney/client decision making is limited to civil cases because of what Spiegel describes as constitutional considerations that are present in criminal, but not civil matters. *Id.* at 43 n.10. However, Professor Spiegel never specifically addresses the Sixth Amendment’s guarantee of effective assistance of counsel or elaborates on what he means by constitutional considerations. *Id.* at 139.

139. See *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970)) (holding that “the right to counsel is the right to the effective assistance of counsel”).

140. See *People v. Bergerud*, 223 P.3d 686, 694 (Colo. 2010) (citation omitted) (observing that one of the “limitations on an attorney’s actions is that these decisions of trial strategy are held to a standard of professional reasonableness. Without some ability to review an attorney’s allegedly unreasonable decisions, the right to counsel would be a hollow promise.”).

sion is unwise, defendants nevertheless complain that the attorney provided ineffective representation by respecting their choice.¹⁴¹

A. *The Sixth Amendment's Guarantee of Effective Assistance of Counsel*

1. The *Strickland* Test

The United States Supreme Court's seminal 1984 decision in *Strickland v. Washington* created the current legal framework under which ineffective assistance of counsel claims are analyzed.¹⁴² The *Strickland* Court articulated what has been referred to as both the "well-worn"¹⁴³ and now "famous"¹⁴⁴ two-prong test used by courts when reviewing Sixth Amendment claims of ineffective assistance of counsel.¹⁴⁵

At its most basic, the test formulated in *Strickland* requires: (1) attorney error (referred to as the performance prong) and (2) prejudice (referred to as the prejudice prong) flowing from that error.¹⁴⁶ Although more than thirty years have passed since

141. See Glenn E. Bradford, *Who's Running the Show? Decision-Making in the Courtroom in Civil and Criminal Cases*, 62 J. MO. B. 148, 156 (2006) (observing "[i]ronically, criminal defendants have been known to allege ineffective assistance of counsel based on counsel's acquiescing to the defendant's own wishes as to matters of trial tactics or strategy"). It should be noted that this article addresses the defense attorney's obligation to provide effective assistance of counsel in instances in which the lawyer exercises final decision-making authority. When it is the defendant who has the authority to make the ultimate decision, defense counsel's obligation to provide effective assistance of counsel is limited to providing competent advice regarding that decision. See *In Re Trombly*, 627 A.2d 855, 857 (Vt. 1993) (holding that when the defendant had final authority over the decision to request lesser-included offenses be presented to the jury, "[i]t follows that relief should not be available . . . unless defense counsel improperly advised defendant or undertook substandard practices at trial").

142. *Strickland*, 466 U.S. at 687; Stephen F. Smith, *Taking Strickland Claims Seriously*, 93 MARQ. L. REV. 515, 518 (2009) ("The governing standard for constitutional claims of ineffective assistance of counsel comes from *Strickland v. Washington*"). The right to effective assistance of counsel applies to both court-appointed and privately retained attorneys. See *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980); see also *Strickland*, 466 U.S. at 685 ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.")

143. *Seaton v. United States*, No. C-08-0105 MHP, 2010 U.S. Dist. LEXIS 56130, at *4 (N.D. Cal. May 14, 2010).

144. Christopher Seeds, *Strategy's Refuge*, 99 J. CRIM. L. & CRIMINOLOGY 987, 994 (2009).

145. *Strickland*, 466 U.S. at 687.

146. *Id.*; see also Richard E. Myers II, *The Future of Effective Assistance of Counsel: Re-reading Cronic and Strickland in Light of Padilla, Frye, and Lafler*, 45 TEX. TECH L. REV.

Strickland's holding, it still remains governing law today.¹⁴⁷ Indeed, the Supreme Court made clear in its 2000 declaration in *Williams v. Taylor* that the two-prong *Strickland* test “provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims.”¹⁴⁸

a. The Performance Prong

The first prong of the test articulated in *Strickland* is the performance prong.¹⁴⁹ The performance prong is the primary focus of this article’s ensuing discussion concerning ineffective assistance of counsel and attorney/client decision-making control. For a criminal defendant to prevail on a Sixth Amendment claim of ineffective assistance of counsel, the performance prong requires the defendant to show that “counsel’s performance was deficient . . . [with] errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”¹⁵⁰ Counsel’s performance will be deemed constitutionally deficient if it falls “below an objective standard of reasonableness.”¹⁵¹ The *Strickland* Court further provided that in order to determine whether counsel’s conduct fell below an objective standard of reasonableness, reviewing courts should look to whether the attorney’s performance was reasonable under prevailing professional norms at the time of representation.¹⁵²

The Supreme Court noted, however, that “[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides.”¹⁵³ In this regard, the appropriate focus in

229, 233–34 (2012) (referring to the first prong of the *Strickland* test as the “performance prong” and the second prong as the “prejudice prong”).

147. See Smith, *supra* note 142, at 518. *Strickland* itself involved a capital sentencing proceeding. 466 U.S. at 686–87. However, the Supreme Court stated that such proceedings are “sufficiently like a trial in its adversarial format and in the existence of standards for decision, that counsel’s role in the proceeding is comparable to counsel’s role at trial.” *Id.* (citations omitted). This passage made clear that both prongs of the *Strickland* test were to be employed not just during the sentencing phase of a criminal proceeding, but during the trial phase as well. *Id.*

148. *Williams v. Taylor*, 529 U.S. 362, 391 (2000).

149. *Strickland*, 466 U.S. at 687; see also Myers, *supra* note 146, at 233–34 (referring to the first prong of *Strickland*).

150. *Strickland*, 466 U.S. at 687, 689.

151. *Id.* at 688.

152. *Id.*

153. *Id.*

evaluating a Sixth Amendment claim is whether defense counsel has fulfilled his or her expected role in the adversarial process.¹⁵⁴ As defined by the *Strickland* Court, the test of whether defense counsel's performance was objectively reasonable is whether defense counsel fulfilled his or her "overarching duty" to "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."¹⁵⁵ Or, as expressed by the Tenth Circuit, "[t]he overarching test for effective assistance of counsel is whether the defendant's attorney subjected the prosecution's case to meaningful adversarial testing."¹⁵⁶

In determining whether the lawyer's performance met this particular goal, the Court noted that there are countless ways to defend the same case and that even the best criminal defense attorneys would not defend the same case in the same way.¹⁵⁷ Therefore, in evaluating defense counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action, 'might be considered sound trial strategy.'"¹⁵⁸

b. The Prejudice Prong

In order to satisfy the *Strickland* test, however, the defendant must also satisfy *Strickland's* prejudice prong.¹⁵⁹ *Strickland's*

154. See *id.* at 687–91 (outlining expectations and evaluations of defense counsel); see also *People v. Watson*, 965 N.E.2d 474, 481 (Ill. App. Ct. 2012) ("The appropriate focus in evaluating a sixth amendment claim is the adversarial process.").

155. *Strickland*, 466 U.S. at 688; see LAFAYE ET AL., *supra* note 16, § 11.10(b) ("The ultimate point of reference is that performance by counsel needed, under the circumstances of the case, to ensure 'the proper functioning of the adversarial process.' It is this function of counsel that provides the 'objective standard of reasonableness' and determines what is 'within the range of competence demanded of attorneys in criminal cases.'") (quoting *Strickland*, 466 U.S. at 686–88).

156. *Fisher v. Gibson*, 282 F.3d 1283, 1290 (10th Cir. 2002) (citing *Strickland*, 466 U.S. at 686). The *Strickland* requirement of adversarial testing is most applicable when the defendant proceeds to trial. Following *Strickland*, the Supreme Court has extended defense counsel's duty under the performance prong to include the duty to inform the defendant of a plea offer and to provide correct advice when the defendant is entering a guilty plea or rejecting a guilty plea and deciding to proceed to trial. See *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012); *Laffler v. Cooper*, 132 S. Ct. 1376, 1388 (2012); *Hill v. Lockhart*, 474 U.S. 52, 57–58 (1985).

157. *Strickland*, 466 U.S. at 689.

158. *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

159. *Id.* at 687. The *Strickland* Court held that "a court need not determine whether

prejudice prong requires a defendant to demonstrate “a reasonable probability that, but for counsel’s unprofessional errors [i.e., in violating the performance prong], the result of the proceeding would have been different.”¹⁶⁰ “A reasonable probability is a probability sufficient to undermine confidence in the outcome.”¹⁶¹

IV. CLIENT-CENTERED LAWYERING AND EFFECTIVE ASSISTANCE OF COUNSEL

A. *How Courts Have Analyzed Claims That Client-Centered Defense Counsel Was Ineffective by Deferring to the Client’s Wishes*

As noted above, defendants have in fact claimed they were denied effective assistance of counsel precisely because an attorney engaged in client-centered representation by deferring to the client’s wishes regarding a particular decision over which the parties disagreed.¹⁶²

counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” *Id.* at 697. Thus, courts may dispose of claims of ineffective assistance of counsel by resolving the prejudice prong, thereby avoiding an evaluation of defense counsel’s performance. *See also* United States *ex rel.* Cross v. DeRobertis, 811 F.2d 1008, 1014 (7th Cir. 1987) (proceeding directly to prejudice prong since performance issue requires “a particularly subtle assessment”).

160. *Strickland*, 466 U.S. at 694.

161. *Id.* *Strickland*’s “reasonable probability” language requires demonstrating something more than “some conceivable effect” yet less than a “more likely than not” effect on outcome. *See id.* at 693. As indicated above, a successful ineffective assistance of counsel claim generally requires the defendant to demonstrate actual prejudice, i.e., a reasonable probability that, but for counsel’s deficient performance, the result of the trial would have been different. There is an exception, however, where counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, where there is the complete denial of counsel during a critical stage of the prosecution, or circumstances surrounding the trial make it impossible for even competent counsel to provide effective representation. *See* United States v. Cronic, 466 U.S. 648, 659–60 (1984). In such instances, prejudice is presumed. *Id.* at 660. But the *Cronic* exception is exceedingly narrow, and applies where the defendant has demonstrated that “the attorney’s failure [was] complete.” *Bell v. Cone*, 535 U.S. 685, 697 (2002); *see* Florida v. Nixon, 543 U.S. 175, 190 (2004). In other words, “the circumstances leading to counsel’s ineffectiveness [must be] so egregious that the defendant was in effect denied any meaningful assistance at all.” United States v. Griffin, 324 F.3d 330, 364 (5th Cir. 2003) (citation omitted). Therefore, in order to successfully invoke the *Cronic* exception to the requirement of having to prove prejudice, it may be necessary for the defendant to show that counsel failed “entirely” to oppose the prosecution as opposed to showing simply that counsel failed to oppose the prosecution “at specific points” in the proceeding. *Bell*, 535 U.S. at 697.

162. *See supra* note 142.

However, courts have tended to reject such claims, finding that although the attorney deferred to the client regarding a decision over which the attorney had ultimate control, the defendant was not denied effective assistance of counsel.¹⁶³

In analyzing such claims, with rare exception (an example of which is a case decided by the Court of Appeals for Ohio,¹⁶⁴ which will be discussed below), the majority of courts have adopted the same analytical approach. In this regard, most courts have found that once the lawyer has decided to acquiesce to the defendant's demands regarding a strategic decision, the defendant is estopped from bringing a claim of ineffective assistance of counsel based on a version of the invited error doctrine.¹⁶⁵ In the words of one court,

163. Uphoff & Wood, *supra* note 2, at 24 ("State judges, like their federal counterparts, have been quite willing to find that a lawyer has rendered constitutionally adequate and effective representation even though counsel permitted her client to make a strategic decision typically made by counsel. A defendant whose lawyer follows his instructions regarding a strategic trial decision rarely will be able to complain successfully on appeal that the lawyer acted unprofessionally in abiding by the client's wishes.")

164. See generally *State v. Rubenstein*, 531 N.E.2d 732 (Ohio Ct. App. 1987) (holding that courts must evaluate if lawyer's decision to follow client's wishes was itself ineffective counsel). Another example of a decision which departs from the standard approach to resolving claims of ineffectiveness based on defense counsel's acquiescence to a client's strategic demands, and adopts the same approach as *Rubenstein*, can be found in *State v. Lee*, which is discussed in greater detail in note 165. 689 P.2d 153 (Ariz. 1984); see *infra* note 165.

165. "The invited-error doctrine operates . . . to estop a defendant from claiming ineffective assistance of counsel based on counsel's acts or omissions in conformance with the defendant's own requests." *People v. Majors*, 956 P.2d 1137, 1153 (Cal. 1998) (quoting *People v. Long*, 782 P.2d 627 (Cal. 1989)) (noting that this is held such in the context of the defense attorney's failure to request a lesser-included offense instruction at the client's insistence); see also *Foster v. Strickland*, 707 F.2d 1339, 1343-44 (11th Cir. 1983) (holding defense counsel was not ineffective for pursuing a trial theory that was demanded by the defendant, despite counsel's desire to pursue alternative defense theories and that "[p]etitioner, who preempted his attorney's strategy choice, cannot now claim as erroneous the very defense he demanded [his lawyer] present"); *Adkins v. State*, 930 So. 2d 524, 539-40 (Ala. Crim. App. 2001) (holding that the defendant was estopped from claiming ineffective assistance of counsel based on defense counsel's failure to present mitigation evidence during the penalty phase of a capital trial when the defendant chose to waive the presentation of that evidence); *People v. Galan*, 261 Cal. Rptr. 834, 836-37 (Cal. Ct. App. 1989) (finding defendant could not complain he was denied effective assistance of counsel because the defense attorney yielded to the defendant's demand to call a witness despite counsel's advice). This is not to say that no court has ever held that defense counsel's acceding to the client's wishes regarding a strategic decision constitutes ineffective assistance of counsel. See *State v. Lee*, 689 P.2d 153 (Ariz. 1984). In *State v. Lee*, the Arizona Supreme Court held that because defense counsel succumbed to his client's demand to call two witnesses, whom defense counsel believed would present inconsistent and perjurious testimony that would be harmful to his client's defense, counsel provided ineffective assistance of counsel because he did not fulfill his duty to make tactical and strategic decisions. *Id.* The court found defense counsel's conduct fell below the minimal level of competence demanded of an attorney under *Strickland's* performance prong. *Id.* at 156-59. It should

“when a defendant insists on a course of action despite his counsel’s contrary warning and advice, he may not later complain that his counsel provided ineffective assistance by complying with his wishes.”¹⁶⁶ Said another way, if the lawyer and the defendant disagree regarding a strategic decision, and the defendant demands that the lawyer follow a given course of action despite being told that doing so would increase the chances of the defendant’s being found guilty, “[u]nder the doctrine of invited error, a defendant cannot by his own voluntary conduct invite error and then seek to profit thereby.”¹⁶⁷ As a result, courts have held that the defendant is estopped from claiming ineffective assistance of counsel.¹⁶⁸

As one legal commentator has observed, perhaps courts have reached for the estoppel doctrine because “there is a sort of intuitive appeal to the idea that a client who unequivocally expresses his wishes cannot later complain that representation consistent

be noted that the issue most squarely addressed in this article concerns claims of ineffective assistance of counsel when the lawyer has the ultimate authority over important strategic decisions, but nevertheless surrenders that authority to the defendant—as the client-centered lawyering model largely demands attorneys do. In this regard, other courts have found that the attorney has not provided ineffective assistance of counsel when the lawyer accedes to the client’s demands. However, unlike the issue addressed in this article, those decisions are premised on the notion that it was the defendant who maintained ultimate decision-making control, not the attorney. In such a predicament, as explained in note 142, defense counsel cannot be found ineffective for allowing the defendant to make a decision upon which the defendant had ultimate authority. See *supra* note 142 (citing *In re Trombly*, 627 A.2d 855, 856 (Vt. 1993)) (noting that when it is the defendant who has the authority to make the ultimate decision, defense counsel’s obligation to provide effective assistance of counsel is limited to providing competent advice regarding that decision). For that reason, while those cases may be worth noting, their exact rationale is not entirely relevant to the precise issue addressed in this article. See, e.g., *Trombly*, 627 A.2d at 856–57 (holding that defense counsel was not ineffective by yielding to the defendant’s request not to seek a lesser-included offense instruction; *Trombly* was based on an older version of the ABA Standards for Criminal Justice in which the decision to request a lesser-included offense instruction belonged to the defendant); cf. *People v. Colville*, 979 N.E.2d 1125, 1130 (N.Y. 2012) (indicating that since the introduction of the more recent ABA Standards, courts have universally held this is a matter of trial strategy that belongs to the lawyer); *State v. Ali*, 407 S.E.2d 183, 189 (N.C. 1991) (holding that as a matter of state law, because of the “principal-agent nature of the attorney/client relationship” when the attorney and the client reach an impasse regarding the decision to strike certain jurors, the client’s wishes must control, notwithstanding the tactical nature of the decision); *Zagorski v. State*, 983 S.W.2d 654, 658 (Tenn. 1999) (holding that defense counsel was ethically bound to follow the defendant’s request not to present mitigating evidence at the sentencing phase of a capital case).

166. *Galan*, 261 Cal. Rptr. at 836 (quoting *People v. Frierson*, 218 Cal. Rptr. 73, 82 (1985)).

167. *Adkins*, 930 So. 2d at 539–40 (quoting *Phillips v. State*, 527 So. 2d 154, 156 (Ala. 1988)).

168. See *supra* notes 166–68 and accompanying text.

with his wishes amounted to ineffective assistance of counsel.”¹⁶⁹ Regardless of the intuitive appeal of such an argument however, it is worth pointing out once again the Supreme Court’s 2000 statement that the two-prong “*Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims.”¹⁷⁰

Therefore, rather than simply concluding that a defendant is estopped from raising an ineffective assistance of counsel claim when defense counsel accedes to the client’s wishes, courts should attempt to answer this question by actually employing *Strickland*’s analytical framework.

In this sense, when faced with the question of whether acquiescence to a client’s strategic preferences constituted ineffective assistance of counsel, the Court of Appeals of Ohio in *State v. Rubenstein* did not conclude the defendant was estopped from bringing such a claim. Instead, the court in looking to *Strickland* correctly determined that in evaluating such a claim (like all ineffective assistance of counsel claims), “[f]irst there must be a determination as to whether there has been a substantial violation of any of defense counsel’s essential duties to his client.”¹⁷¹

Otherwise stated, rather than applying the estoppel doctrine, courts should ask whether defense counsel’s initial acquiescence to the client’s strategic decision was consistent with counsel’s “duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.”¹⁷² Simply put, was it ineffective assistance of counsel to accede to the client’s wishes in the first place?¹⁷³

While *Strickland*’s test of reasonableness is intended to be objective, *Strickland* nevertheless requires that counsel’s conduct be

169. Marceau, *supra* note 15, at 196.

170. *Williams v. Taylor*, 529 U.S. 362, 391 (2000).

171. *See State v. Lee*, 689 P.2d 153, 156–59 (Ariz. 1984). For another example of a court applying the same analytical approach to claims of ineffective assistance of counsel based on defense counsel’s acquiescence to a client’s strategic preferences, see *supra* note 166.

172. *State v. Rubenstein*, 531 N.E.2d 732, 739 (Ohio Ct. App. 1987) (referencing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

173. *See Marceau, supra* note 15, at 184 (noting that in addition to a lawyer’s chosen strategy, “a client’s express request can conflict with the prevailing professional norms, and, therefore, both must be reviewed by appellate courts to determine whether certain minimum constitutional requirements have been satisfied”).

evaluated considering all the circumstances in the given case.¹⁷⁴ The test almost always necessitates a “context-dependent, case-by-case examination of the evidence.”¹⁷⁵

In light of this recognition, there are an infinite number of scenarios that could come into play when evaluating whether the decision to accede to the client’s wishes was objectively reasonable. This article cannot possibly endeavor to articulate all of them with an eye toward determining whether defense counsel’s conduct is objectively reasonable in each circumstance.

Nevertheless, as the below examples demonstrate, if courts were to apply the proper analysis dictated by *Strickland*, they would reach the conclusion that the lawyer who accedes to the client’s wishes, in many cases, does provide effective assistance of counsel in accordance with *Strickland*’s performance prong. However, in some cases, counsel does not meet the performance standard.

B. *Client-Centered Decision Making and Strickland’s Performance Prong*

1. When Deference Satisfies *Strickland*’s Performance Prong

As noted previously, with respect to determining whether defense counsel’s performance was objectively reasonable, reviewing courts will presume that “counsel’s conduct falls within the wide range of reasonable professional assistance.”¹⁷⁶

In this sense, the attorney and the client may disagree about a particular strategic decision. However, the mere fact that the client wishes to adopt a particular strategic approach with which the attorney disapproves does not by itself mean the client’s preferred choice is objectively unreasonable. For example, in some instances, had defense counsel made the same decision that the client preferred, the given strategic decision may very well have fallen within the wide range of reasonable professional assis-

174. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

175. McGregor Smyth, *From “Collateral” to “Integral”*: *The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 820 (2011).

176. *Strickland*, 466 U.S. at 689.

tance.¹⁷⁷ Further, as courts have observed, “[t]he range, it must be said, is quite wide.”¹⁷⁸

Take for example the previously mentioned case of *State v. Rubenstein*.¹⁷⁹ In *Rubenstein*, the defendant was charged with two counts of assault arising out of a stabbing incident.¹⁸⁰ One of the victims failed to appear at the trial.¹⁸¹ The defendant instructed his attorney not to cross-examine witnesses, to forgo opening statements, and to stipulate to a psychiatric report.¹⁸² The attorney complied with these requests.¹⁸³

While the court acknowledged that the ultimate decision regarding these matters belonged to the lawyer, the court nevertheless found that even though defense counsel acceded to the client’s wishes, the lawyer provided effective assistance of counsel.¹⁸⁴ In reaching this conclusion, the court found that the defense strategy that counsel pursued at the insistence of the defendant appeared to be one in which the attorney would argue that the state could not prove its case without the testimony of the victim and “consequently the defense would not risk opening the door to an undesirable matter.”¹⁸⁵

Certainly, there may have been better trial strategy available to the defense, but the Court of Appeals for Ohio nevertheless found this trial strategy reasonable based on the facts of the case.¹⁸⁶ Presumably, if the defense attorney had adopted this approach on his own without the insistence of his client, it would have likewise been considered objectively reasonable under *Strickland*’s performance prong.¹⁸⁷ Therefore, implementing the

177. Indeed, legal commentators have observed, “There are times when the client is as good a legal strategist as the lawyer.” Abbe Smith, *Rosie O’Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R. C.L. L. REV. 1, 28 (1993).

178. *Bell v. United States*, No. PJM 13-1682, 2014 U.S. Dist. LEXIS 171705, at *9 (D. Md. Dec. 8, 2014), *dismissed*, 599 F. App’x 505 (4th Cir. 2015).

179. 531 N.E.2d 732 (Ohio Ct. App. 1987).

180. *Id.* at 734.

181. *Id.* at 735 n.2.

182. *Id.* at 740.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. Additionally, in some instances, counsel’s accession to the defendant’s wishes may itself be characterized as a strategic decision if doing so is necessary to ensure there is not a breakdown of lawyer-client communication. In such circumstances, accession to the cli-

client's strategic preferences did not cause the defense attorney to forsake the type of meaningful adversarial testing envisioned by the Sixth Amendment.

2. When Deference Violates *Strickland's* Performance Prong

Not every strategic decision that is favored by the defendant will necessarily fall within the wide range of reasonable professional assistance. To that end, it is worthwhile to recall the dilemma I faced in the introduction of this article—whether to follow my client's demands that I call a potential witness.¹⁸⁸ While my client insisted that I call this witness, I believed that doing so would have resulted in introducing of evidence that would have inculpated my client in the commission of the crime, without helping his case.

The witness's testimony that she had been with my client at a bar in the area of the robbery and that my client had left the bar fifteen minutes before the robbery took place not only would have placed my client in the area of the crime, but her testimony also would have helped the prosecution prove that my client was actually in a position to commit the crime in question. Further, this was evidence that the prosecution would have not otherwise

ent's wishes is consistent with prevailing professional norms. See, e.g., *Hance v. Zant*, 981 F.2d 1180, 1183 (11th Cir. 1993) (noting that counsel complied with defendant's instruction not to contact his family members because counsel feared he would otherwise lose defendant's cooperation). In the same vein, a lawyer may defer to the client's demands in order to prevent the client from completely waiving the right to counsel and proceeding pro se. See *Adkins v. State*, 930 So. 2d 524, 540 (Ala. Crim. App. 2001). Presumably, while any given decision may be strategically unreasonable, yielding to the client's demands in such instances may preserve the general integrity of the adversarial testing process. Of course, this particular inquiry would be fact specific, and not every time the lawyer overrules the client's strategic preference is such a breakdown in lawyer-client communication likely to occur or is the client likely to waive his right to counsel. See *Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1437 (3d Cir. 1996) ("In many trial situations, the nature or importance of the issue over which a client-counsel disagreement occurs cannot be expected to cause the client seriously to consider foregoing the advantages of the current representation."). Further, if the law is unclear in terms of whether it is the lawyer or the client who has ultimate decision-making authority, the lawyer may defer to the client's wishes. LAFAVE ET AL., *supra* note 16, § 11.6(a). Lastly, the lawyer is ethically required to defer to the client's wishes regarding decisions that implicate third persons that might be adversely affected. See *supra* Part I.B.1. And, in *Nix v. Whiteside*, a majority of the Supreme Court suggested that "action taken by an attorney to prevent a breach of professional responsibility necessarily meets *Strickland's* performance standard." See LAFAVE ET AL., *supra* note 16, § 11.10(b) (quoting *Nix v. Whiteside*, 475 U.S. 157, 174 (1986)).

188. See *supra* Introduction.

known about, and this evidence would have actively undermined what I believed was a viable misidentification defense.

If I had called this witness, at the client's insistence, I believe my decision would have constituted ineffective assistance of counsel. Indeed, prevailing professional norms are violated when defense counsel introduces non-cumulative evidence of the defendant's guilt without a sufficient strategic justification.¹⁸⁹

To that end, had I called the witness, I could not justify the decision as one of trial strategy. As courts have observed in the context of an ineffective assistance of counsel claim, "the presumption that the challenged action or inaction was the product of sound trial strategy may be overcome where no reasonably effective defense attorney, confronted with the circumstances of the defendant's trial, would engage in similar conduct."¹⁹⁰ Based on the facts of my client's case, in particular, the availability of a sound misidentification defense, the inculpatory nature of the witness's testimony, the fact that the witness's testimony had little or no exculpatory quality, and the fact that the prosecution would not have otherwise had access to this information, no reasonably effective attorney would have called the witness in this scenario. Therefore, calling this proposed witness would have fallen outside of the wide range of reasonably acceptable performance.¹⁹¹

As a result, had I surrendered ultimate decision-making control and allowed my client to have the final say on this issue (believing it to be a matter that was likely to have a substantial legal impact), I would have knowingly implemented a decision that fell below the minimal level of competence demanded of attorneys under *Strickland's* performance prong.

In fact, by finding that defense counsel was not ineffective in overruling a client's wishes regarding questions of strategy, numerous courts have noted, "counsel's decision not to abide by the

189. See Justin F. Marceau, *Remedying Pretrial Ineffective Assistance*, 45 TEX. TECH L. REV. 277, 278 (2012) (positing that a defense lawyer has provided ineffective assistance of counsel when he or she provides representation that results in the discovery of additional, non-cumulative evidence of the defendant's guilt); see also *United States ex rel. Washington v. Acevedo*, 630 F. Supp. 2d 927, 937 (N.D. Ill. 2009) (holding that defense counsel did not provide ineffective assistance of counsel by refusing to present evidence that would otherwise have inculpated the defendant in the commission of the crime).

190. *People v. Watson*, 965 N.E.2d 474, 481 (Ill. App. Ct. 2012).

191. See *supra* notes 189–90.

wishes of his client has no necessary bearing on the question of professional competence; indeed, in some instances, listening to the client rather than to the dictates of professional judgment may itself constitute incompetence.”¹⁹²

3. The Constitutional Implications of Deference to the Client’s Strategic Choices

It is essential to note once again that the *Strickland* Court held that defense counsel has a “duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.”¹⁹³ Consequently, if the client insists that defense counsel violates that duty by implementing a decision that falls outside of the range of reasonably competent representation that is required of defense attorneys, the client-centered lawyer must implore the client to reconsider the particular question of trial strategy or tactics at hand. If the client will not, however, the constitutionally mandated duty to provide the defendant with effective assistance

192. *United States v. McGill*, 11 F.3d 223, 227 (1st Cir. 1993) (emphasis added); see also *Weatherwax*, 77 F.3d at 1435; *Bell v. Georgia*, 554 F.2d 1360, 1361 (5th Cir. 1977); *Bell v. United States*, No. PJM 13-1682, 2014 U.S. Dist. LEXIS 171705, at *11 n.4 (D. Md. Dec. 8, 2014). It is worth pointing out the possibility that acceding to the client’s wishes when doing so constitutes ineffective assistance of counsel may also represent a violation of a defense attorney’s ethical obligation of diligent advocacy. See MODEL RULES OF PROF’L CONDUCT r. 1.3 (AM. BAR ASS’N 2013). However, this is not always the case and such a determination is necessarily fact specific. See *In re Wolfram*, 847 P.2d 94, 98 (Ariz. 1993) (declining “to adopt a *per se* rule that successful post-conviction relief based on ineffective assistance of counsel automatically results in an ethical violation, or, conversely, that a denial of post-conviction relief will always insulate an attorney from professional discipline. This rule apparently represents the uniform rule followed by other courts.”). Additionally, even if the lawyer is found to be ineffective in acceding to a client’s wishes, it is unlikely that a lawyer would have engaged in malpractice. This is because,

the default rule appears to bar malpractice actions even where the defendant can demonstrate that but for the errors of counsel there is a reasonable probability that the defendant would have been acquitted, which would suffice for Sixth Amendment relief. Instead, the malpractice standard requires not just proof of a likely different outcome at trial, but a showing by the defendant that he is *actually* and not merely *legally* innocent.

Marceau, *supra* note 15, at 302. In this sense, the malpractice standard “is many degrees more difficult to satisfy than the *Strickland* test.” *Id.* at 303. As a result, the criminal defense attorney who is faced with the dilemma of whether or not to acquiesce to the client’s strategic demands will primarily be concerned with satisfying the Sixth Amendment’s guarantee of effective assistance of counsel as opposed to thinking about how his or her decision to yield to a client’s wishes will impact malpractice related liability.

193. *Strickland v. Washington*, 466 U.S. 668, 688 (1984); see also *In re Yung-Cheng Tsai*, 351 P.3d 138, 142 (Wash. 2015) (citing *Strickland* and noting that, pursuant to the Sixth Amendment, “a criminal defense attorney has the constitutional duty to provide assistance that is effective”).

of counsel in such a situation may actually require the attorney to adopt a lawyer-centered model of decision making and overrule the client's decision.

To that end, one legal scholar has opined that when the client insists on making an unwise strategic decision, the lawyer should do everything in his or her power to convince the client to make a different decision.¹⁹⁴ However, if the client will not, the lawyer can, "*honor the client's preference unless acquiescence in the client's decision would amount to ineffective assistance under the Strickland standard, as it would, for example, if the client's preferred course of action were so unwise that no reasonable lawyer would ever have chosen it in the absence of client insistence.*"¹⁹⁵

It may be suggested that the above examples and conclusion are all premised on the idea that the client's goal is to win the case. Accordingly, it should certainly be noted that while most defendants are primarily concerned with obtaining an acquittal or a lower sentence, this is not always true. A defendant's primary objective in electing to proceed to trial may be to shed light on what the defendant views as police misconduct despite his or her guilt, to express social or political frustrations, or even to prove that the defendant, while admittedly very guilty, was not an FBI informant.¹⁹⁶

Regardless, *Strickland* in no way indicates that defense counsel's duty to bring about reliable adversarial testing of the prose-

194. Mitchell, *supra* note 15, at 259 n.25.

195. *Id.* (emphasis added); see also *State v. Lee*, 689 P.2d 153, 157–58 (Ariz. 1984); discussion *supra* note 166.

196. A recent high-profile example of this was seen in the trial of Whitey Bulger, the notorious Boston crime boss. It was alleged that Bulger had for many years been an FBI informant while running a crime syndicate predicated on murdering his enemies. He went to trial at the age of eighty-three on charges of racketeering, money laundering, extortion, firearms possession, drug distribution, and murder. At trial, Bulger basically conceded that he was guilty of most of the crimes with which he was charged. His defense seemed to largely focus on proving that he was not an informant for the FBI. As one courtroom observer commented,

[h]owever far-fetched, Bulger's informant denial is hardly new; at trial, it was the overriding theme of his defense. He fully admitted to being a callous crime boss who pocketed millions off illegal drugs and gambling, but he wanted the world to know he was definitely no rat (and that he would never kill a woman, even though he was charged with two counts of doing just that). For Bulger, his high-profile trial—"the Big Show" as he dubbed it—offered one last opportunity to rewrite the record, facts be damned.

Michael Friscolanti, *Notorious Gangster James 'Whitey' Bulger Tells His Story*, MACLEAN'S (Apr. 19, 2014), <http://www.macleans.ca/culture/movies/notorious-gangster-james-whitey-bulger-tells-his-story/>.

cution's case is somehow triggered only when the defendant indicates that his or her specific goal is to win the case. In fact, the *Strickland* Court broadly held that, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."¹⁹⁷

Certainly, if the client wants to exercise final decision-making authority over tactical decisions as well as pursue his or her goals, the client can always waive the right to counsel and represent himself or herself.¹⁹⁸ But, when the client elects to be represented by counsel and to proceed to trial, the client has chosen to be represented by a lawyer who owes the client a constitutionally mandated duty of effective assistance of counsel as defined by the *Strickland* Court.¹⁹⁹

It should be noted that the client-centered counselor may subscribe to a more holistic or even consumer-oriented view of the lawyer's role than the client is entitled to under the Sixth Amendment.²⁰⁰ The client-centered lawyer focuses on providing the client with maximum satisfaction.²⁰¹ However, the Sixth Amendment does not appear to recognize the right to counsel for that purpose. Rather, "[t]he fundamental purpose of counsel under the Sixth Amendment is to make sure that the Government's evidence undergoes the testing provided by the adversarial system."²⁰²

197. *Strickland*, 466 U.S. at 686 (emphasis added); see *Fisher v. Gibson*, 282 F.3d 1283, 1290 (10th Cir. 2002) (citing this particular passage from *Strickland* and positing that it stands for the fact that "[t]he overarching test for effective assistance of counsel is whether the defendant's attorney subjected the prosecution's case to meaningful adversarial testing").

198. See *Faretta v. California*, 422 U.S. 806, 808 (1975); *supra* note 19.

199. See also *In re Yung-Cheng Tsai*, 351 P.3d 138, 142–43 (2015) (citing *Strickland*, 466 U.S. at 686, 688) (holding that "a criminal defense attorney has the constitutional duty to provide assistance that is effective [including the] duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process").

200. See L. Timothy Perrin, *The Perplexing Problem of Client Perjury*, 76 FORDHAM L. REV. 1707, 1720 (2007) (observing that "the widely embraced client-centered approach to lawyering contributes to a consumeristic mentality on the part of lawyers. An advocate's decisions during the client representation focus on providing the client with 'maximum satisfaction.'"); see also BINDER ET AL., *supra* note 11, at 318.

201. *Id.*

202. *Waldrop v. Thigpen*, 857 F. Supp. 872, 905 (N.D. Ala. 1994), *aff'd sub nom*, *Waldrop v. Jones*, 77 F.3d 1308 (11th Cir. 1996).

In light of this observation, the constitutional right to an attorney does not exist in order to ensure that the defendant has an attorney who will pursue whatever goal will make him or her most content. Instead, a criminal defendant has a constitutional right to an attorney for the limited, but extremely important, purpose of ensuring that the defendant who is untrained in the law is not required to defend himself or herself against the power and legal acumen of the state when it attempts to impose a criminal penalty.²⁰³

In this regard, the fact that defense counsel's ability to yield to a defendant's wishes may be constrained by the "constitutional requirement"²⁰⁴ of effective assistance of counsel is entirely consistent with the very reason that a defendant has a right to a lawyer in a criminal trial. Indeed, "[t]he 'core purpose' of the Sixth Amendment right to counsel is to guarantee effective assistance at trial."²⁰⁵ In the words of one federal court, in the context of a criminal trial, the right to "[e]ffective assistance of counsel involves the lawyer's help to win an acquittal or lower sentence, that is, 'vigorous advocacy of the defendant's cause.'"²⁰⁶

Therefore, regardless of how the client defines the goals of the representation, defense counsel owes the client a constitutionally mandated duty of effective assistance of counsel, i.e., meaningful adversarial testing,²⁰⁷ rather than a duty to pursue whatever goal the client desires. As previously stated, in order to ensure that the actual duty owed to the defendant is not violated, if the client demands that defense counsel implement a decision that falls

203. *Id.*; see also *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); James Tomkovicz, *The Massiah Right to Exclusion: Constitutional Premises and Doctrinal Implications*, 67 N.C. L. REV. 751, 753 (1989). Tomkovicz describes the right to counsel in the following manner:

[O]ur adversary system . . . contemplates a contest between opposing sides. By nature, one of those sides is significantly more powerful in most, if not all, relevant respects. The grant of counsel to the inherently inferior defendant is designed to promote balanced contests by equalizing the adversaries. Counsel brings legal expertise, knowledge of the system, tactical and strategic savvy, and a commitment to the defense of the accused against state efforts to impose a criminal penalty.

Id.

204. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

205. *United States v. Wilson*, 719 F. Supp. 2d 1260, 1266 (D. Or. 2010).

206. *United States v. Teague*, 953 F.2d 1525, 1537 (11th Cir. 1992) (Edmonson, J., concurring) (rejecting the contention that effective assistance of counsel at the trial stage involves other "ideas").

207. See *In re Yung-Cheng Tsai*, 351 P.3d 138, 142 (2015).

outside of the range of professionally competent assistance, a lawyer-centered approach to decision making is required.

Of course, oftentimes a client's goal may not be entirely clear, or the client may have goals that are somewhat mixed in terms of wanting to pursue one goal that is related to winning the case and another that is not. At other times, clients are very clear—he or she simply wants to be acquitted. Regardless of how the client defines the goals of the representation, it is likely that most decisions that are favored by the client will be consistent with prevailing professional norms.

As explained above, because the range of what is considered reasonable professional assistance is quite wide,²⁰⁸ many times a client's strategic preferences may be entirely consistent with the type of meaningful adversarial testing envisioned by the Sixth Amendment. As a result, legal commenters have noted that a lawyer can generally defer to the client's wishes, unless doing so requires "the lawyer to forsake 'meaningful adversary testing' of the prosecution's case."²⁰⁹

C. *The Client-Centered Lawyer Would Follow the Dictates of the Sixth Amendment*

The most widely utilized paradigm of client-centered counseling has failed to account for the ways in which the constitutional guarantee of effective assistance may limit an attorney's ability to surrender ultimate decision-making control to the client.²¹⁰ Indeed, the primary objective of this article is to fill this void in the theory of client-centered counseling.

208. *Bell v. United States*, No. PJM 13-1682, 2014 U.S. Dist. LEXIS 171705, at *9 (D. Md. Dec. 9, 2014) *dismissed*, 599 F. App'x 505 (4th Cir. 2015).

209. LAFAVE ET AL., *supra* note 16, § 11.6(a) (positing that "where the client's preference is not based on a misunderstanding of the law or an inability to understand why the lawyer favors an alternative tactic," the lawyer can generally defer to the client's wishes if the client's preference does not require the lawyer to "forsake 'meaningful adversarial testing' of the prosecution's case"). Even if the client-centered lawyer's decision to yield to a defendant's strategic preference was violative of *Strickland's* performance prong, as noted in Part III.A.1.b, the client will not automatically prevail on a claim of ineffective assistance of counsel. Unless the client can successfully argue that prejudice should be presumed pursuant to one of the exceptions provided for in *United States v. Cronic*, the client would most likely be required to demonstrate that he or she was actually prejudiced by counsel's decision to accede to the client's demand, pursuant to *Strickland's* prejudice prong. See *supra* note 162 for a more thorough description of *Strickland's* prejudice prong and the exceptions to the prejudice requirement provided for in *Cronic*.

210. See *supra* Part II.B.

However, while failing to recognize the impact of the Sixth Amendment, the dominant paradigm of client-centered lawyering recognizes other lawfully imposed limitations on the application of its decision-making philosophy.²¹¹ This is certainly the case with respect to ethical prohibitions²¹² as well as in situations where clients, either because of age or mental impairment, require that counsel exercise more decision-making control than is typical of client-centered lawyers.²¹³

Of course, the client-centered counselor would not directly advocate that a lawyer yield to a client's strategic demands if doing so would otherwise be unconstitutional. The reason for this is simple: client-centered lawyering is intended to operate within the bounds of the law.²¹⁴ In this sense, while somewhat ironic, if overruling a client's strategic preference is necessary to ensure compliance with the Sixth Amendment, a client-centered approach would dictate nothing different than doing so.

CONCLUSION

This article has demonstrated that the client-centered lawyer may defer to the defendant's wishes with respect to important matters of trial tactics and strategy, so long as those decisions do not cause the defense counsel to forsake meaningful adversarial testing of the prosecution's case. In this sense, defense counsel's decision to yield to the defendant's strategic preference is entirely consistent with the duty of effective assistance of counsel that is owed to the defendant.

Nevertheless, there are, in fact, times when a criminal defendant will demand that a lawyer implement strategic decisions that are not reasonable under prevailing professional norms and that fall outside of the range of competency demanded of attorneys in criminal cases. In such instances, the Sixth Amendment guarantee of effective assistance of counsel requires that the attorney ask the client to make a different strategic choice that is reasonable under prevailing professional norms. If the client refuses, the defense attorney's constitutional obligation to provide effective

211. See Condlin, *supra* note 134, at 288.

212. See BINDER ET AL., *supra* note 11, at 323.

213. *Id.* at 10 n.8.

214. See Condlin, *supra* note 134, at 228.

assistance of counsel requires that defense counsel adopt the lawyer-centered model of decision making and overrule the client's preference.

In delineating the ways in which the Sixth Amendment guarantee of effective assistance of counsel may limit an attorney's ability to surrender ultimate decision-making control to the client, this article has addressed what had otherwise been a blind spot in the most widely utilized paradigm of client-centered lawyering.
