THE CITY UNIVERSITY OF NEW YORK LAW REVIEW

City University of New York Law Review

Volume 20 | Issue 1

Winter 2016

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Acknowledgements

As always, I thank Mari Curbelo and Tom Klein for their encouragement and critiques. I also gratefully acknowledge the exceptional research assistance of Jacob Chin and the support of CUNY School of Law.

CUNY Law Review Footnote Forum
November 11, 2016

Recommended citation:
Steven Zeidman, *What Public Defenders Don't (Have to) Tell Their Clients*, 20 CUNY L. REV. F. 14 (2016), http://www.cunylawreview.org/what-public-defenders-dont-have-to-tell-their-clients/ [https://perma.cc/9KBV-B8ZK].

WHAT PUBLIC DEFENDERS DON'T (HAVE TO) TELL THEIR CLIENTS

Steven Zeidman[1]

INTRODUCTION

New York State courts, like many other state and federal courts, have seen an increase in cases that pit lawyer versus client; where the lawyer wanted to proceed in one way and the client wanted to go in another direction. The resulting decisions, often inconsistent and irreconcilable, reflect the difficulties in navigating the lawyer-client relationship.

Recently, the New York Court of Appeals again waded directly into the muddy waters of attorney versus client decision-making.[2] On the face of it, the Court was deciding whether counsel needed his client's consent before telling the prosecutor that his client would not exercise his statutory right to testify in the Grand Jury.[3] However, lurking beneath the surface are the larger and related questions of who, between lawyer and client, has ultimate decision-making power, and what information lawyers must provide clients about their rights.

Marcus Hogan was arrested on Tuesday, May 24, 2005 for being in the wrong place at the wrong time. Mr. Hogan was in his former girlfriend's apartment when police officers entered to execute a search warrant for the premises.[4] Officers testified that as they came into the apartment they saw Hogan running from the kitchen where, in open view, they discovered

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[2] People v. Hogan, 26 N.Y.3d 779 (2016).

[3] *Id.* at 781; N.Y. CRIM. PROC. LAW §190.50(5) (McKinney 1978) (prescribing a defendant's right to testify before the Grand Jury).

[4] *Hogan*, 26 N.Y.3d at 781-82.

cocaine, baggies and a razor blade.[5] Hogan's former girlfriend, Hope Fisher, was also inside the apartment and she, too, was arrested.

Since Mr. Hogan did not live at the apartment or have any contraband on him when he was stopped by the police, the prosecution's case hinged on the so-called drug factory presumption.[6] New York law allows "a permissible presumption, under which the [fact-finder] may assume the requisite criminal possession simply because the defendant . . . is within a proximate degree of closeness to drugs found in plain view, under circumstances that evince the existence of a drug sale operation[.]"[7]

Mr. Hogan appeared in court on May 26, 2005 and his case was scheduled for a preliminary hearing on Friday, May 27, 2005.[8] However, on May 27, Mr. Hogan asked that his lawyer subpoena Ms. Fisher to testify on his behalf.[9] Apparently, almost from the moment of arrest, Ms. Fisher took full and sole responsibility for the drugs and related paraphernalia.[10] As a result, the preliminary hearing was adjourned until the following Wednesday, June 1, 2005. Nevertheless, at approximately 4:00 p.m. on Friday, May 27, the prosecution faxed notice to defense counsel of their intent to bypass the preliminary hearing and present the case to the Grand Jury on Tuesday, May 31 at 1:45 p.m.[11] The fax further instructed defense counsel to notify the prosecutor if his client wanted to testify in the Grand Jury.

Friday, May 27, 2005 was the beginning of Memorial Day weekend,

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[5] *Id.* at 782.

[6] *Id.* at 783 (citing N.Y. PENAL LAW § 220.25(2) (McKinney 1985)).

[7] People v. Kims, 24 N.Y.3d 422, 432 (2014) (citing People v. Daniels, 37 N.Y.2d 624, 630-31 (1975)); *see also* William C. Donnino, *The "Close Proximity" Presumption*, *in* Practice Commentaries, N.Y. PENAL LAW § 220.25 (McKinney 1985) ("The presumption was intended to address the issue of proof of knowing possession by those who were supervising or participating in the preparation of drugs for resale but who did not have personal physical possession of the drugs when the police lawfully entered the premises."), *quoted in Hogan*, 26 N.Y.3d at 784.

[8] Record on Appeal at 37, People v. Hogan, 26 N.Y.3d 779 (2016) (No. 18), APL-2015-00035.

[9] *Id.*

[10] *Id.* at 439. On June 3, the prosecutor received a notarized letter from Ms. Fisher in which she assumed full responsibility for all the drugs and other items recovered from her apartment. *Id.* Fisher testified that "Marcus Hogan is not at all in any way possible responsible for the charges brought upon him . . . . Everything that was found . . . was mine and I accept full responsibility[.]" *Id.* at 579. Ms. Fisher eventually entered a plea of guilty to a reduced charge with a promise of a sentence of probation but only after she on the record disavowed part of the statement she made in her letter. *Id*. at 322-87.

[11] *Hogan*, 26 N.Y.3d at 782; *see also* N.Y. CRIM. PROC. LAW § 180.80 (McKinney 1982) (providing that the defendant must be released from custody if the prosecution does not obtain an indictment or provide a preliminary hearing within 120 or 144 hours of arrest); Record on Appeal, *supra* note 7, at 527-28.

and Hogan's defense counsel had left his office before the fax arrived.[12] He did not see the fax until Tuesday morning, May 31, the very day the prosecution was presenting the case to the Grand Jury.[13] Defense counsel immediately contacted the prosecutor and told her that his client was not going to testify.[14] The prosecutor went ahead with the Grand Jury presentation and Hogan was indicted for Criminal Possession of a Controlled Substance in the Fifth Degree and related charges.[15] Mr. Hogan first learned about the Grand Jury presentation and indictment the next day, June 1.[16]

Hogan was arraigned on the indictment on June 21, 2005.[17] On July 19, defense counsel filed an omnibus motion but did not address the adequacy and timeliness of the Grand Jury notice until he filed a supplemental motion on August 19, 2005 seeking to have the indictment dismissed and giving his client the opportunity to testify before the Grand Jury.[18] Defense counsel argued that he received late and inadequate notice of the Grand Jury presentation, thereby preventing his client from asserting his statutory right to testify.[19] The trial court focused on the requirement that motions to dismiss an indictment for failure to provide the accused the opportunity to testify must be brought within five days of arraignment and denied the motion as untimely.[20]

The judge eventually granted Mr. Hogan's request for a new court-appointed lawyer.[21] A non-jury trial commenced on May 1, 2006 and ended two days later.[22] The judge found Mr. Hogan guilty of Criminal Possession of a Controlled Substance in the Fifth Degree and associated charges, and

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[12] *Hogan*, 26 N.Y.3d at 782.

[13] *Id.* During oral argument in the Court of Appeals, Judge Eugene Pigott expressed concern with the prosecution sending a fax on a Friday afternoon prior to a holiday weekend, and seemed to question whether that provided sufficient statutorily required notice for the defendant to consider whether to exercise his right to testify in the Grand Jury. After noting the importance of the Grand Jury, he asked whether the timing of the notice was a "cheap shot" or some kind of "gamesmanship." Transcript of Oral Argument at 17-18, People v. Hogan, 26 N.Y.3d 779 (2016) (No. 18), APL-2015-00035.

[14] *Hogan*, 26 N.Y.3d at 782. Defense counsel recalled telling the prosecutor that he "didn't see the benefit to it, only the harm." *Id*.

[15] *Id.*

[16] Record on Appeal, *supra* note 7, at 528.

[17] *Id.* at 29.

[18] *Id.* at 525; *see also* N.Y. CRIM. PROC. LAW §§ 190.50(5)(a), 210.35(4) (McKinney 1978).

[19] Record on Appeal, *supra* note 7, at 528.

[20] *Id.* at 545; N.Y. CRIM. PROC. LAW §§ 190.50(5)(a), 210.35(4) (McKinney 1978). Mr. Hogan was arraigned on the indictment on June 21 and counsel filed his motion on August 19 – a delay of 59 days. Record on Appeal, *supra* note 7, at 19-50.

[21] Record on Appeal, *supra* note 7, at 60.

[22] *Id.* at 67-305.

sentenced him to nine years in state prison.[23]

Throughout the entire proceedings, Mr. Hogan kept trying to refocus the issue. His argument was not just that the prosecutor's Grand Jury notice was defective, but also that the decision to testify should have been his, not defense counsel's, to make, or, if not, that defense counsel had an obligation to consult with him before telling the prosecutor that he would not testify.[24] Put another way, Mr. Hogan was quite correctly framing the issue as a question of the allocation and attendant responsibilities of decision-making authority between lawyers and clients.

I. THE LAWYER AS DECISION MAKER

The Court of Appeals began its analysis in *Hogan* by adhering to the prevailing fundamental versus strategic decisions taxonomy. According to the U.S. Supreme Court case of *Jones v. Barnes*, only four of the myriad decisions made in the course of a criminal case are deemed sufficiently personal and fundamental for the accused to have ultimate decision-making authority: whether to plead guilty; whether to testify at trial; whether to have a jury or judge trial; and whether to appeal.[25]

The Court hewed to the traditional view that only those so-called fundamental four decisions were reserved for the accused and all others were strategic and ceded to defense counsel. However, the Court did more than just hold that the decision whether to testify in the Grand Jury was strategic and for the lawyer to make. The Court declined to squarely address defense counsel's failure to consult with Hogan before deciding he would not testify, suggesting that since the lawyer is the ultimate decision maker he was not required to consult with his client about the decision. In other words, it was of no constitutional moment that Hogan had no input into the decision regarding his right to testify in the Grand Jury.

The *Hogan* Court also seemed to go out of its way to make clear that counsel had a constitutional duty to make strategic decisions even in the face of his client's express disapproval: "If defense counsel solely defers to a defendant, without exercising his or her professional judgment, on a decision that is 'for the attorney, not the accused, to make' because it is not fundamental, the defendant is deprived of 'the expert judgment of counsel to which the Sixth Amendment entitles him' or her[.]"[26] While many lawyers feel it is appropriate, if not constitutionally or ethically required, for them to defer to their client's wishes even on strategic decisions, the Court

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[23] *Hogan*, 26 N.Y.3d at 783.
[24] *Id*. at 785.
[25] Jones v. Barnes, 463 U.S. 745, 751 (1983).
[26] *Hogan*, 26 N.Y.3d. at 786 (citing People v. Colville, 20 N.Y.3d 20, 32 (2012)).

made it clear that the constitutional guarantee of effective assistance of counsel requires lawyers to overrule their clients when there is disagreement over tactics.

Hogan seems to follow logically from *People v. Colville*,[27] a case decided by the Court just a few years earlier. Delroy Colville was charged with murder for stabbing and killing the 20-year-old victim on the third floor of a single room occupancy dwelling during an argument.[28]

At the conclusion of the evidence, defense counsel informed the court that he had advised the defendant that Manslaughter in the First and Second Degrees should be charged to the jury as lesser-included offenses[29] because charging murder alone left the jury with "no leeway, no choice."[30] Counsel, accordingly, requested that Manslaughter in the First and Second Degrees be charged to the jury, but the court denied the request and stated it would allow counsel to address the issue again when the trial reconvened.

Defense counsel subsequently informed the court that, after discussing the issue with the defendant again, he had been advised that the defendant did not want the lesser-included offenses charged to the jury. Counsel, however, still believed, and still advised his client, that submitting the lesser included charges was the best way to proceed. Faced with this quandary, counsel stated:

> [A]s the attorney here, I am only . . . as the Supreme Court has said, the guiding hand. It is my opinion as a matter of strategy, and as a matter of sound practice, it is my opinion that lesser-included should be submitted. It gives—in my opinion, and based upon my experience only—it gives the jury an out. . . . I am trying to protect Mr. Colville here . . . . I don't know where to go from here except I am always guided by the Court.[31]

After some further dialogue with counsel, the court spoke directly to Mr. Colville and asked if he wanted to withdraw the request to charge Manslaughter in the First and Second Degree. The following exchange took place:

> [Colville]: If the jury feels that I intentionally caused the death of Mr. Gardner, there is nothing I can do about it. I am prepared. The first time in my life I've been in a situation like this, I've been incarcerated, so . . . whatever decision they make, there is nothing I can do about it.

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[27] *Colville*, 20 N.Y.3d at 20.
[28] *Id.* at 21.
[29] *Id*. at 23; *see also* N.Y. CRIM. PROC. LAW § 300.50 (McKinney 2003).
[30] People v. Colville, 79 A.D.3d 189, 194 (2d Dep't 2010).
[31] *Id*. at 194-95.

> THE COURT: You don't want to give them the other charges?
> [Colville]: No.[32]

After a brief recess, the court made clear for the record that the defendant no longer wanted lesser offenses included in the charge to the jury, and defense counsel reiterated that this was against his advice.[33] The jury was instructed to only consider the Murder charge and Colville was convicted.[34]

On appeal, the question was initially framed around whether the decision about lesser included charges was for the accused or his lawyer to make.[35] However, New York's intermediate appellate court made short shrift of the issue by observing that if it was a fundamental decision then the defendant had been allowed to be the ultimate decision maker, and if it was a strategic decision then it was reasonable for the lawyer to have acceded to his client's request.[36]

The Court of Appeals reversed and ordered a new trial.[37] The Court determined that the decision whether to seek a jury instruction about lesser included offenses was a strategic one for the attorney to make, and that "[B]y deferring to defendant, the [trial] judge denied him the expert judgment of counsel to which the Sixth Amendment entitles him."[38]

Taken together, *Hogan* and *Colville* show the Court's clear preference for vesting decision-making power in defense counsel. In *Hogan*, the defendant claimed that the decision to testify in the Grand Jury was his to make and that, at a minimum, he had to be consulted before his lawyer made any decision.[39] The Court disagreed on both counts: the Grand Jury decision is ultimately for the lawyer to make and the lawyer is not required to consult with the client before making that decision.[40]

In *Colville*, the accused was consulted repeatedly, so the client's input was not the issue. Instead, the defendant claimed on appeal that the decision to submit lesser included offenses was for the lawyer,[41] not the accused, to make. In other words, he argued that his lawyer should have overridden his request, exercised independent professional judgment, and saved him from

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[32] *Id.* at 195-96.
[33] *Id.* at 196.
[34] *Id.* at 197.
[35] *Id.* at 197.
[36] *Colville*, 79 A.D.3d at 201.
[37] People v. Colville, 20 N.Y.3d 20, 23 (2012).
[38] *Id.* at 32.
[39] People v. Hogan, 26 N.Y.3d 779, 787 (2016).
[40] *Id.* The Court did note, however, that the "better practice may be for counsel to consult with his or her client[.]" *Id.* It is noteworthy that the Court qualified the "better practice" by the use of the words "may be" rather than the word "is." *Id.*
[41] *Colville*, 20 N.Y.3d at 23.

himself. The Court agreed.[42]

The full impact of the holdings in *Hogan* and *Colville* is apparent in the very recent case of *Romero v. Sheahan*.[43] Romero was convicted of Robbery in the First Degree and filed a pro se petition for a writ of habeas corpus claiming that his trial counsel provided him with ineffective assistance in violation of the Sixth Amendment because: (1) counsel failed to request that the jury be instructed on the affirmative defense to the charge of First Degree Robbery that the object displayed in the commission of the robbery was not a loaded weapon capable of producing death or other serious physical injury[44] and (2) counsel failed to request the lesser-included charge of Second Degree Robbery or consult with Romero before making that decision.[45]

The Court dealt swiftly and perfunctorily with the question of counsel's decision not to request jury instructions regarding the affirmative defense to Robbery in the First Degree or to add the charge of Robbery in the Second Degree.[46] In the Court's view, the defense theory of misidentification made it reasonable for defense counsel to avoid asking for any instructions that might dilute the force of his argument that the defendant was not the person who committed the robbery.

But as in *Hogan*, the defendant in *Romero* also argued that counsel was ineffective for failing to even consult with him prior to making these crucial

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[42] *Id.* For a recent application of *Colville*, see People v. Lowery, 127 A.D.3d 1109 (2d Dep't 2015). In *Lowery,* the defendant was charged with robbery. Defense counsel advised the trial judge that he wanted to request a jury charge on the lesser-included offense of petit larceny but that the defendant opposed that request. The judge deferred to the defendant and did not submit the lesser-included offense of petit larceny to the jury. The appellate court, citing to *Colville*, reversed the defendant's conviction holding that the decision whether to seek a jury charge on a lesser-included offense is a matter of strategy and tactics which is "for the attorney, not the accused, to make." *Id*. at 1110 (quoting *Colville*, 20 N.Y.3d at 32).

[43] Romero v. Sheahan, No. 13-CV-4048 (SJF), 2016 WL 3460372 (E.D.N.Y. June 21, 2016).

[44] *Id.* at *4; N.Y. PENAL LAW § 160.15(4) (McKinney 1973) provides in pertinent part: "A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime: . . . Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude conviction of, robbery in the second degree, robbery in the third degree or any other crime."

[45] *Romero*, 2016 WL 3460372, at *4.

[46] *Id.* at *8.

decisions.[47] In language strikingly similar to *Hogan*, the District Court held that:

> Even if *better practice* would have been for trial counsel to discuss his decision not to request affirmative defense and "lesser included charge" instructions with Romero (assuming he did not), the New York Court of Appeals has held that the decision regarding whether or not to request a "lesser included charge" instruction is ultimately the attorney's, not the defendant's, to make. Thus, even if Romero had objected to trial counsel's decision not to pursue contradictory misidentification and "lesser included charge" strategies, trial counsel would have been obligated to pursue the strategy that he, in his own professional judgment, believed had the highest likelihood of success, notwithstanding Romero's disagreement.[48]

In sum, while it has long been the case that strategic decisions are for the lawyer to make, it now seems clear that counsel is not required to even discuss those decisions with her clients. If, however she chooses to do so, and then discovers that her client disagrees with her decision, she must override the client and do what she thinks is best.[49] Put another way, no longer is defense counsel insulated from a claim of ineffective assistance of counsel by simply saying, in essence, that she merely did what her client told her to do.[50]

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[47] *Id.* at *10.

[48] *Id.* at *11 (emphasis added) (citing People v. Colville, 20 N.Y.3d 20 (2012)). *See also* People v. Williams, No. 5522/00, 2014 WL 5243476 (N.Y. Supp. Ct. Oct. 6, 2014) (finding no ineffective assistance where counsel neglected to consult with defendant about charging lesser included offenses); People v. Brown, 117 A.D.3d 1536 (4th Dep't 2014).

[49] In *People v. Lee*, 120 A.D.3d 1137 (1st Dep't 2014), the defendant appealed his conviction claiming that his right to confrontation had been violated. At trial, the defendant had asked that the jury hear a guilty plea allocution from a co-defendant. Defense counsel objected but the trial judge read the transcript which included statements incriminating Lee. The Court held that "[t]he decision to introduce evidence was not a fundamental decision reserved to defendant, but a strategic or tactical decision for his attorney[.] Thus, defendant was deprived of his right to counsel when the court admitted the evidence solely based on his own request, over his attorney's vigorous and consistent opposition[.]" *Id.* at 1137-38 (internal citations omitted).

[50] The Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), attempted to address the component parts of the Sixth Amendment's requirement of effective assistance of counsel. The Court set out a two-part test: to support a claim of ineffective assistance, the defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's actions had a prejudicial impact on the result. *Id.* at 689-92. The decisions in *Hogan*, *Colville*, and *Romero* indicate that it is not objectively reasonable for a lawyer to defer to a client on a strategic decision about which they disagree. Of course, the actual decision made by defense counsel could still be subject to an evaluation of its objective reasonableness, but as the Court made clear in *Strickland,*

II. THE CLIENT AS DECISION MAKER

Even as the Court is telling defense counsel to control the case and make the tactical decisions she deems best (even if in the face of the client's express disagreement), there is lurking along a parallel track another line of cases that suggest the opposite; that the lawyer can, or maybe even should, defer to the client's wishes even if she disagrees with the course of action the client desires or finds the defendant's choice to be devoid of any logic or merit.

In *People v. Henriquez*, the defendant, Michael Henriquez, approached a police officer and told him he had just killed his girlfriend. [51] Police officers went to Henriquez's apartment and found the victim dead from numerous gunshot wounds to the head.[52] Henriquez was taken to the precinct where he provided written and videotaped confessions.[53] He was subsequently charged with Murder in the Second Degree.[54]

After jury selection, Henriquez's appointed lawyer informed the trial judge of a conflict he had with his client:

> Your Honor, there is something I want to put on the record. The defendant advised me this morning . . . he is directing me not to cross-examine any witnesses, not to object to any line of questioning, not to call – to go even further, not to approach the bench, not to participate in any bench conferences or side bars, not to have any defense in this case, not to call any witnesses, not to sum up, not to do anything. He has indicated to me he just wants me to sit here and do nothing.[55]

Defense counsel then asked to be relieved from representing Mr. Henriquez and requested that Henriquez represent himself.[56] Henriquez, however, stated, "I didn't ask to represent myself. You can't tell me I have to represent myself."[57] The trial judge affirmed Mr. Henriquez's statement and informed him that he did not have to self-represent and denied defense

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"strategic choices made after thorough investigation of law and facts . . . are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91.

[51] People v. Henriquez, 3 N.Y.3d 210, 211 (2004).

[52] *Id.* at 212.

[53] *Id.*

[54] *Id.*

[55] Respondent's Brief at 7, People v. Henriquez, 3 N.Y.3d 210 (2004) (No. 121).

[56] *Henriquez*, 3 N.Y.3d at 212.

[57] *Id*.

counsel's application to withdraw from the case.[58]

The trial was filled with examples of defense counsel and the court deferring to the defendant on countless decisions and imbuing him with the power to control every aspect of the defense, including a multitude of strategic or tactical decisions.[59] During jury selection, when an issue arose concerning substitution of a juror, defense counsel informed the judge that the defendant would not permit him to provide any input to the court.[60] Just prior to the first witness being called to testify, the trial judge informed the defendant that he could always change his mind and "permit" his attorney to participate in the trial.[61] During the trial, defense counsel objected to the testimony of a proposed prosecution witness because that person had been seated in the court during the testimony of earlier witnesses.[62] Rather than rule on the objection, the court raised concerns that the objection was made without the defendant's permission.[63] Counsel thereupon conferred with the defendant and withdrew the objection.[64] To make it abundantly clear who he thought controlled the defense case, the court at one point flat out told the defendant, "Mr. Henriquez, I am respecting your right to restrict your attorney in the way he defends you."[65]

The Court of Appeals upheld Henriquez's conviction, finding that he was not denied his right to a fair trial and that he waived his right to the effective assistance of counsel by refusing self-representation and then restricting his lawyer's participation.[66] Rather than engage in a critical discussion of the allocation of decision-making authority between lawyers and clients, *Jones v. Barnes*, the relevant ethical rules, and the objective reasonableness of counsel's behavior, the majority appears to have simply viewed the case as a malingering, obstreperous defendant who got his just desserts: "Defendant asserts that his constitutional right to a fair trial was

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[58] *Id*. at 213.

[59] Respondent's Brief, *supra* note 54, at 7 (explaining that defendant instructed counsel not to make an opening statement, not to cross-examine any witnesses, not to call any witnesses, not to make a closing statement, and not to object to any line of questioning).

[60] *Id.* at 15-16; *see* People v. Colon, 90 N.Y.2d 824, 826 (1997) (stating that matters concerning jury selection have long been considered strategic and for defense counsel to decide). "The selection of particular jurors falls within the category of tactical decisions entrusted to counsel, and defendants do not retain a personal veto power over counsel's exercise of professional judgments[.]" *Id*.; *see also* United States v. Boyd, 86 F.3d 719, 724 (7th Cir. 1996).

[61] Respondent's Brief, *supra* note 54, at 14; *Henriquez*, 3 N.Y.3d at 213.

[62] FED. R. EVID. 615 (sequestering witnesses so that they do not hear testimony of other witnesses).

[63] *Henriquez*, 3 N.Y.3d at 213.

[64] *Id.*

[65] *Id.* at 222.

[66] *Id*. at 211, 217.

violated because the trial court and defense counsel *respected his desire* to refrain from presenting a defense."[67] While the Court writes of "respect" for the defendant, the opinion is devoid of any discussion of the thorny moral and ethical issues involved in the client autonomy versus lawyer paternalism aspect of the "who decides" debate. Rather, the decision reads more like the court's way of saying, "you made your bed and now you have to lie in it."

On the other hand, the lengthy dissent of Judge George Bundy Smith places the case entirely in the allocation-of-decision-making context: "The trial court and defense counsel did not adhere to the legal and professional standards regarding the allocation of decision-making authority between the accused and defense counsel."[68]

The dissent's tone of incredulity and repulsion is very apparent:

> As a consequence of the trial court's and defense counsel's compliance with defendant's instructions . . . [d]efense counsel did not respond to the People's opening statement, did not make any objections, cross-examine the People's witnesses, make any oral motions at the close of the People's case, put on a case, make a closing statement or provide any input regarding proposed jury charges because defendant did not want him to. The trial court allowed defendant's instructions to control and allowed defense counsel not to do anything on defendant's behalf.[69]

The dissent's logic is straightforward. The defendant made it clear that he did not wish to represent himself and that he wanted a lawyer. "As such, defendant had the constitutional right to the effective assistance of counsel,"[70] and sitting idly by as your client goes down a path of self-destruction cannot possibly be labeled as "effective" assistance. Judge Bundy Smith refers to counsel's "affirmative obligation"[71] to provide effective assistance. In other words, once Henriquez said he wanted a

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[67] *Id*. at 214 (emphasis added).

[68] *Id*. at 217-18 (G.B. Smith, J., dissenting).

[69] *Id.* at 222. The lawyer's failure to do anything calls to mind the remarks of defense attorney Brendan Sullivan when he was representing Oliver North in the Iran-Contra scandal in 1987. During the hearing in front of the Joint House-Senate Iran-Contra Committee, the Chair, Senator Daniel Inouye, admonished Sullivan for objecting to some of the questions put to his client and urged North to speak for himself. Sullivan famously responded, "Well, sir, I'm not a potted plant. I'm here as the lawyer. That's my job." Special to the New York Times, *Iran-Contra Hearings; Note of Braggadocio Resounds at Hearing*, N.Y. TIMES (July 10, 1987), http://www.nytimes.com/1987/07/10/world/iran-contra-hearings-note-of-braggadocio-resounds-at-hearing.html.

[70] *Henriquez*, 3 N.Y.3d at 225 (G.B. Smith, J., dissenting).

[71] *Id*.

lawyer, that lawyer had a constitutional duty to act, to make the strategic decisions he thought were best even if his client consistently and openly disagreed with those decisions.

The import of Judge Bundy Smith's reasoning should give pause to those lawyers who believe that the *Henriquez* trial was a travesty but consider themselves "client-centered" counselors who strive to vest their clients with autonomy and decision-making authority.[72] Judge Bundy Smith writes that the trial judge "mistakenly increased defendant's rights at trial[.]"[73] For support, he quotes Supreme Court Justice Harlan: "I believe a lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval."[74] Bundy Smith writes further that the majority's decision "grants defendant too much power over the trial," and suggests that if we go down this road it could "whittle away at the integrity of the trial process."[75]

Perhaps not surprisingly, Michael Henriquez subsequently moved pro se for a writ of habeas corpus alleging, *inter alia*, ineffective assistance of counsel.[76] Magistrate Judge Kevin Fox, a former Public Defender, recommended that the writ be granted.[77] According to Judge Fox,

> Henriquez made clear to the trial court that he did not wish to represent himself, but wanted to be represented by his trial

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[72] *See*, *e.g.*, Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 720 (1987) ("Broadly we can say that client-centered practice takes the principle of client decision-making seriously, and derives from this premise the prescription that a central responsibility of the lawyer is to enable the client to exercise his right to choose."); Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1742-48 (1993); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990).

[73] *Henriquez*, 3 N.Y.3d at 228 (G.B. Smith, J., dissenting).

[74] *Id*. at 226 (quoting Brookhart v. Janis, 384 U.S. 1, 8 (1966) (Harlan, J., concurring)); *see also* United States v. Chapman, 593 F.3d 365, 369 (4th Cir. 2010) ("The reasonableness of the tactical decision actually made by counsel is of course subject to challenge, but the decision is not unreasonable simply because the client expressed a contrary view."). The First Circuit put it even more affirmatively, noting that "counsel's decision not to abide by the 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." United States v. McGill, 11 F.3d 223, 227 (1st Cir. 1993); *see also* People v. Holt, 21 N.E.3d 695 (Ill. 2014) (finding Sixth Amendment does not guarantee a defendant a lawyer who will support the defendant's position that he or she is competent to stand trial when counsel disagrees with that position).

[75] *Henriquez*, 3 N.Y.3d at 232 (G.B. Smith, J., dissenting).

[76] Henriquez v. McGinnis, No. 05 Civ. 10893 (DLC) (KNF), 2007 BL 217379 (S.D.N.Y. Jan. 10, 2007)

[77] *Id.* at *16; *see also* Henriquez v. McGinnis, No. 05 Civ. 10893(DLC), 2007 WL 844672, at *1 (S.D.N.Y. Mar. 19, 2007).

> counsel. . . . Once this fact was made known to the court and to . . . counsel, it should have been clear to them that acquiescing in Henriquez's demands that prevented his attorney from acting as an advocate at the trial proceedings, and exercising his independent professional judgment in the management of the defense was an error of constitutional magnitude.[78]

But revealing the ambiguous and unsettled nature of these issues, District Court Judge Denise Cote, a former prosecutor, rejected Magistrate Judge Fox's recommendation as to ineffective assistance.[79] Judge Cote's opinion is couched in terms of the defendant's right to do as he pleases: "Given that a defendant may waive altogether the right to assistance at trial from an attorney, and can of course choose to plead guilty and forego the right to a trial altogether, it takes no great leap to conclude that a defendant also has *the ultimate right* to instruct his attorney to present no defense on his behalf."[80] As with the majority decision in the Court of Appeals, the opinion speaks of the defendant's rights, but is hardly about respect for autonomy. Rather, it reeks of disdain for the defendant daring to complain after he got what he wanted.[81]

Although its facts are indeed unique, the *Henriquez* rationale has not proven to be sui generis. The suggestion continues to surface that allowing the accused to be the ultimate decision maker regarding tactics is somehow about respect for that defendant. The decision at issue in *People v. Cruz* was whether to pose a defense of complete innocence to Murder or to pursue defenses that might have led to a Manslaughter conviction.[82] Defense counsel deferred to the client's all-or-nothing defense and the appellate

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[78] *Henriquez*, 2007 BL 217379, at *14.

[79] *Henriquez*, 2007 WL 844672, at *7.

[80] *Id*. (emphasis added) ("[N]ot every failure to subject the prosecution's case to adversarial testing is a violation of the Sixth Amendment.").

[81] Other jurisdictions have similarly held that a defendant cannot complain of ineffective assistance if counsel follows the client's even foolhardy request. In *United States v. Wellington*, 417 F.3d 284 (2d Cir. 2005), the defendant told his lawyer to stipulate to key facts and not to raise certain objections. Defense counsel told the court that "he did not necessarily agree with his client, but that defendant 'has given a lot of thought to this and I advised him, [and] he's the boss.'" *Id*. at 288. The Second Circuit observed that the strategy was "ill-advised and wholly ineffective," but there was no ineffective assistance since defense counsel followed the defendant's instructions. *Id*. *See also In re* Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 177 (2d Cir. 2008); Del Toro v. Quarterman, 498 F.3d 486, 491 (5th Cir. 2007) ("If, however, a client instructs his attorney not to hire an investigator or contact and interview witnesses, the client cannot later claim that the failure to do these things amounted to ineffective assistance.").

[82] People v. Cruz, 88 A.D.3d 540 (1st Dep't 2011). For example, defense could have pursued the affirmative defense of extreme emotional disturbance, or lack of homicidal intent. N.Y. PENAL LAW § 125.25(1)(a) (McKinney 2006).

court, in language similar to *Henriquez*, held that counsel "appropriately *respected* his client's desire."[83]

More recently, in *People v. Perry* the decision in question involved the accused's right to a 12-person jury.[84] During jury deliberations, Hurricane Sandy hit New York City and caused court to close. Several days later, the court contacted the jurors about continuing to serve and excused one juror who said he had to leave the country.

When trial resumed two days later, defense counsel objected to the discharge of the juror without her first having been consulted,[85] and informed the court that she told defendant "'a number of times that I do not think we should go forward with 11,' but defendant was 'extremely insistent,' was 'tired of this process,' and did 'not want to retry the case.'"[86] The trial judge confirmed that that was what the defendant wished to do, had the defendant and counsel sign waivers of the right to a 12-person jury, and proceeded with eleven jurors.

The Appellate Division observed that the court should have given defense counsel an opportunity to be heard before excusing the juror, but held that the defendant waived his right to a 12-person jury.[87] While the court cited *Henriquez* for the proposition that the defendant "must accept the decision he knowingly, voluntarily and intelligently made,"[88] it inexplicably made no reference to *Colville* and the line of cases holding that defense counsel must override the client on strategic decisions on which they disagree. For that matter, it is astonishing that the Court of Appeals, in its decision in *Colville* giving awesome decision-making power to the lawyer, did not even mention *Henriquez* and its paean to respect for the defendant's right to chart his own defense.

The most current incarnation of the decision-making authority conundrum is *People v. Clark*.[89] The defendant's assigned counsel advised the court that he had discussed with the defendant the possibility of presenting defenses of extreme emotional disturbance and/or justification in addition to the misidentification defense favored by the defendant, but added:

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[83] *Cruz*, 88 A.D.3d at 541 (emphasis added).

[84] People v. Perry, 129 A.D.3d 576 (1st Dep't 2015), *leave to appeal denied*, 26 N.Y.3d 970 (2015). *See also* N.Y. CRIM. PROC. LAW § 270.05 (McKinney 1970).

[85] *Perry*, 129 A.D.3d at 577; CRIM. PROC. § 270.35(2)(b).

[86] *Perry*, 129 A.D.3d at 577.

[87] *Id*. *Cf.* Commonwealth v. Simmons, 394 S.W.3d 903, 904 (Ky. 2013) (holding that the right to be tried by a 12-person jury guaranteed by the state constitution is a fundamental entitlement that could not be waived unilaterally by defense counsel).

[88] *Perry*, 129 A.D.3d at 577 (quoting People v. Gajadhar, 9 N.Y.3d 438, 448 (2007)).

[89] People v. Clark, 129 A.D.3d 1 (2d Dep't 2015), *leave to appeal granted*, 25 N.Y.3d 1174 (2015).

> I would need the defendant's permission to make such an argument. . . . [H]e said no way. I do not wish to have you indicate in any manner, shape or form as far as justification or diminished capacity on the murder two. Without his permission I've told him I cannot do it.[90]

Even while it cited to *Colville* and recognized that matters of strategy, like whether to request lesser included offenses for the jury's consideration, are generally ceded to counsel, the Court stated that "a defendant unquestionably has the right to chart his own defense."[91] The Court further held that the decision to pursue a defense based solely on misidentification, and to affirmatively reject an alternate defense based on justification, involved a matter that was "personal" and "fundamental" to the defendant and "did not implicate a matter of trial strategy or tactics."[92] The Court reasoned that to require defense counsel in this case, over his client's objection, to undermine the defendant's assertion of innocence by the injection into the case of a factually and logically inconsistent defense would, under the circumstances presented, impermissibly compromise the defendant's personal rights. Therefore, there existed "a sound basis for leaving the choice of defense, whether affirmative or ordinary, with the defendant rather than his or her attorney."[93]

Although the Court stated that "it was not the role of his counsel to override [the defendant's] wishes," it still had to address the Court of

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[90] *Clark*, 129 A.D.3d at 6.

[91] *Id*. at 11 (quoting People v. DeGina, 72 N.Y.2d 768, 776 (1988)). The dissent directly confronted the notion that the accused has a right to "chart his own defense." *Id.* at 47. "The proposition that defense counsel in this case properly refused to exercise his own professional judgment since the defendant had the right to chart his own defense, and that counsel could not override the defendant's wishes by advancing an inconsistent defense based on counsel's view of the evidence, is a novel interpretation of the scope of a defense counsel's duty." *Id*. at 47 (Miller, J., dissenting).

[92] *Id*. at 11 (majority opinion) (quoting People v. Colville, 20 N.Y.3d 20, 31 (2012); People v. Petrovich, 87 N.Y.2d 961, 963 (1996)).

[93] *Id*. at 14. The Court likened the situation at hand to that in *People v. Petrovich*, 87 N.Y.2d 961 (1996). In *Petrovich*, the trial court inquired whether the defendant wanted an instruction on the affirmative defense of extreme emotional disturbance, which, if successful, would reduce the murder counts to manslaughter. *Id.* at 962. Defense counsel responded affirmatively but the defendant disagreed. *Id.* Defense counsel insisted that he, not the defendant, should decide what instructions to request, but the trial court declined to charge the extreme emotional disturbance defense. *Id.* at 963. The defendant was convicted of murder and appealed, arguing that the trial court should have acted in accordance with his counsel's wishes. *Id.* at 962. The Court of Appeals affirmed the conviction, holding that "the decision whether to request submission of the affirmative defense of extreme emotional disturbance to the jury falls to defendant" as it was more in the nature of a fundamental decision than one that implicated trial strategy or tactics. *Id.* at 963.

Appeals's ruling in *Colville* to the contrary.[94] First, the Court questioned whether granting counsel ultimate authority regarding which lesser-included offenses to request necessarily also gave counsel final say over which defenses to present.[95] In other words, it appears the Court was clinging to the idea that the decision at issue in *Clark* was distinguishable from that in *Colville* and was more appropriately deemed to be a fundamental decision for the accused to make.[96] Additionally, the Court noted that Clark's trial took place two years before *Colville* was decided and counsel could not be deemed ineffective for failing to anticipate changes in the law.[97]

If anything is clear it is that the current state of the law is ambiguous. Lawyers representing clients in criminal cases are left with no comprehensible guidance about when they must defer to or override their clients' requests.[98]

III. CHARTING A PATH FORWARD

Michael Henriquez and Prince Clark certainly in hindsight needed to be saved from themselves. Their lawyers did as they were told and both defendants were convicted of Murder. To many, the lawyers' abdication of decision-making responsibility was at best, wrongheaded, and at worst, cowardly and deplorable. And yet the dissent in both cases, arguing forcefully that defense counsel was ineffective for acceding to the client's wishes, is also controversial.

Many lawyers for indigent defendants ascribe to a version of client-centered lawyering that seeks to imbue clients with agency, authority and autonomy.[99] Those advocates fear that if lawyers exercise the tightfisted control over the case advocated in the *Henriquez* and *Clark* dissents, they are in effect subjugating their clients, overwhelmingly people of color, in much the same way as have a variety of governmental agencies. More specifically, Judge Bundy Smith's admonition that the trial judge "mistakenly increased defendant's rights" and "grant[ed] defendant too much power," conjures up concerns of paternalism and of lawyers running roughshod over their clients.[100] Contrast that language and the message it

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[94] *Clark*, 129 A.D.3d at 14.

[95] *Id.*

[96] *See id.*

[97] *Id*. (citing People v. Lewis, 102 A.D.3d 505, 506 (1st Dep't 2013); People v. Abner, 101 A.D.3d 1628, 1629 (4th Dep't 2012)).

[98] New York's highest court granted leave in *Clark* and will hopefully take the opportunity to fashion a clear rule and clarify the critical question of who ultimately decides what in a criminal case. People v. Clark, 25 N.Y.3d 1174 (2015).

[99] *See* Dinerstein, *supra* note 71; *see also* Ellmann, *supra* note 71.

[100] People v. Henriquez, 3 N.Y.3d 201, 228, 232 (G.B. Smith, J., dissenting).

conveys with the equally blunt call for client autonomy from the dissent in *Colville*: "Because a defendant has the most to lose in a criminal proceeding (i.e., freedom), reason dictates that the defendant shall control his/her own destiny and have the ultimate authority regarding choices he/she makes (even if against the advice of counsel)."[101] On a very fundamental level, the defendant bears the consequences of a conviction; the defendant, not the lawyer, serves the jail or prison time imposed after conviction and faces a host of collateral consequences.[102]

Calls for defense counsel to be the ultimate decision maker also seem at odds with the longstanding judicial expectation that the defendant at the time of sentencing (and when eligible for parole) will accept full responsibility for his or her actions.[103] Shouldn't it then follow that the accused has responsibility for his or her trial?

The "who decides" analysis must also factor into the equation what kind of defense counsel we are imagining. When a client disagrees with his privately retained counsel, he is free to hire another attorney to do his bidding.[104] The majority of criminal defendants, however, are unable to afford counsel.[105] In cases where counsel is appointed by the government, the client is not entitled to replace one lawyer with another,[106] so the

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[101] People v. Colville, 20 N.Y.3d 20, 35 (Jones, J., dissenting).

[102] *See generally* Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301 (2015); INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002) [hereinafter INVISIBLE PUNISHMENT].

[103] *See* Mark W. Bennett & Ira P. Robbins, *Last Words: A Survey and Analysis of Federal Judges' Views on Allocution in Sentencing*, 65 ALA. L. REV. 735, 739 (2013). Federal judges responding to a survey included "genuine remorse" and "acknowledgment of and sincere apology to the victims" among the characteristics of defendants' allocutions that most impressed them, *id.* at 752, and advised defense attorneys to encourage their clients to "accept responsibility" for their actions, *id.* at 753. *See also* Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 FORDHAM L. REV. 2641 (2007).

[104] This freedom of choice is not absolute. A judge may refuse to permit the defendant to replace counsel if the judge views the switch as a dilatory tactic. *See*, *e.g.*, United States v. Gallop, 838 F.2d 105, 108 (4th Cir. 1988), *cert. denied*, 487 U.S. 1211 (1988) ("Such right must not obstruct orderly judicial procedure[.]"); *see also* United States v. Panzardi Alvarez, 816 F.2d 813, 815 (1st Cir. 1987).

[105] *See, e.g.*, STEVEN K. SMITH & CAROL J. DEFRANCES., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INDIGENT DEFENSE 1 (1996), https://www.bjs.gov/content/pub/pdf/id.pdf [https://perma.cc/QBW3-EVPA] ("In 1992, about 80% of defendants charged with felonies in the Nation's 75 largest counties relied on a public defender or on assigned counsel for legal representation.").

[106] The oft-repeated phrase is that a poor person is entitled to a lawyer but not one of his or her choosing. *See*, *e.g.*, People v. Sawyer, 57 N.Y.2d 12, 16 (1982) ("You may make your choice. One, represent yourself. Two be represented by the Public Defender. You have no other choice." (quoting the trial judge)); United States v. Pina, 844 F.2d 1, 6 (1st Cir. 1988) ("Appellant apparently fails to understand that there is no absolute right to a

allocation of decision-making authority becomes of paramount importance.

A poor defendant has two preliminary choices – eschew a lawyer and opt for self-representation,[107] or accept his or her constitutional right to a government supplied lawyer.[108] Courts have made abundantly clear that there is no such thing as hybrid representation.[109] If, for example, the client files a motion that the lawyer declined to file, the court is under no obligation to read it because the accused has opted to have a lawyer.[110] As the New York Court of Appeals stated, a defendant who chooses to defend through counsel cannot, as of right, make motions, file a supplemental brief on appeal, sum up before a jury, "or otherwise participate personally in the proceedings[.]"[111] In other words, if the accused accepts what he or she is constitutionally entitled to, he cedes control over substantial and critical aspects of his defense.

There is also the well-documented seemingly intractable crisis in indigent defense characterized by lawyers with too many clients and too few resources.[112] How much attention can typical Public Defenders pay to

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counsel of one's own choice; while a defendant may not be forced to proceed to trial with an incompetent or unprepared counsel, the court has no obligation to appoint a lawyer outside the public defender's office simply because a defendant believes all lawyers from that office are incompetent.").

[107] Faretta v. California, 422 U.S. 806, 817 (1975).

[108] Gideon v. Wainwright, 372 U.S. 335, 338 (1963) (guaranteeing indigent defendants the right to counsel in felony cases); Argersinger v. Hamlin, 407 U.S. 25, 33 (1972) (extending *Gideon*'s reach to all cases where the accused faced the possibility of incarceration).

[109] McKaskle v. Wiggins, 465 U.S. 168, 179 (1984); *see also* United States v. Muyet, 985 F. Supp. 440, 441 (S.D.N.Y. 1998); People v. Rodriguez, 95 N.Y.2d 497, 500 (2000).

[110] *Rodriguez*, 95 N.Y.2d at 500.

[111] *Id*. at 501 (citations omitted). *But see* People v. Delgado, 281 A.D.2d 556, 556 (2d Dep't 2001) (noting there may be some situations where an unjustified refusal to entertain a meritorious pro se motion would constitute an abuse of discretion).

[112] *See* Duncan v. State, 791 N.W.2d 713 (Mich. 2010); *see also* Hurell-Harring v. State, 15 N.Y.3d 8, 20-24 (2010); AM. BAR ASS'N., *GIDEON* UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING (1982), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/indigentdefense/gideonundone.authcheckdam.pdf [https://perma.cc/NME6-SM8X]; COMM'N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 34 (2006), http://www.nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf [https://perma.cc/S64G-67TN] ("The crisis in indigent representation in this state is a well documented fact. The time for action is now."); JOEL M. SCHUMM, STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, NATIONAL INDIGENT DEFENSE REFORM: THE SOLUTION IS MULTIFACETED (2012), http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_national_indigent_defense_reform.authcheckdam.pdf [https://perma.cc/232D-3H7Z]; Cara H. Drinan,

each client to inform their decision making?

Further, most Public Defenders don't look like their clients or come from similar backgrounds.[113] How should differences between lawyers and clients with respect to race, ethnicity, language, etc., affect who gets to make which decisions?[114] The well-documented lack of trust between indigent defendants and their lawyers is exacerbated by the institutional nature of the provision of defense lawyers for the poor – anyone in the defendants' shoes would question the loyalty of a lawyer supplied to them for free by the very government that is prosecuting them.[115]

The decisions that vest power with defense counsel and mandate that she overrule her clients when they disagree elide the impact that will likely have on the attorney/client relationship going forward. While it is true that the Supreme Court decided that the accused has no right to a "meaningful relationship" with counsel,[116] that is not a reason to ignore the effect on the

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The Third Generation of Indigent Defense Litigation, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 427 (2009) ("For years, scholars have documented the national crisis in indigent defense and its many tragic implications, and yet the crisis persists."); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006).

[113] *See*, *e.g.*, Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 173 (2012) (footnote omitted) ("Perceived and real differences in race and socioeconomic status also affect communication between clients and their lawyers. The criminal justice system disproportionately impacts poor people of color, whereas lawyers are disproportionately white and less likely to be poor.").

[114] *See, e.g.*, Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1007-31 (2007) (discussing lawyering across language barriers); Michelle S. Jacobs, *People From the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 374 (1997) (discussing how attorney-client relationships are impacted by race, gender, and culture); Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys*, 18 CORNELL J.L. & PUB. POL'Y 1 (2008) (addressing the impact of race in building attorney-client relationships); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 387-403 (2002); Kenneth P. Troccoli, *"I Want a Black Lawyer to Represent Me": Addressing a Black Defendant's Concerns With Being Assigned a White Court-Appointed Lawyer*, 20 LAW & INEQ. 1, 17-26 (2002).

[115] *See* Steven Zeidman, *Sacrificial Lambs or the Chosen Few?: The Impact of Student Defenders on the Rights of the Accused*, 62 BROOK. L. REV. 853, 890-91 (1996) (describing factors related to client distrust of institutional indigent criminal defense attorneys); *see also* Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 74 (1986) ("[D]efendants often do not trust defense counsel, particularly when the attorneys are public defenders or court appointees.").

[116] *See generally* Morris v. Slappy, 461 U.S. 1 (1983); *see also* Siers v. Ryan, 773 F. 2d 37, 44 (3d Cir. 1985) (noting that indigent defendants have no right to any special rapport or even confidence in their court-appointed counsel).

accused and on the quality of the representation that results from lawyers overruling their own clients.

It is hard to imagine being in prison and thinking every day that it would have turned out differently if only the lawyer did what I asked. But it is also hard to imagine being in prison and thinking every day that it would have turned out differently if only I listened to my lawyer. Is the lawyer ultimately just a mouthpiece? Isn't it too easy for defense lawyers to absolve themselves of difficult decisions by simply falling back on a mantra of, "Well, it was his choice," instead of accepting the heavy burden and responsibility of making crucial decisions? And if the adage is true that "[the] person who represents himself has a fool for a client,"[117] then isn't giving the accused decision-making power just a variation on that theme? Is someone likely filled with anxiety, fear, frustration, anger and misery (and typically lacking in legal training) in the best position to make his or her best legal decisions? In many cases, the accused's current predicament is the result of bad choices he has made. Is it wise or "client-centered" for him to now be entrusted with decision-making authority of such importance?[118]

Coming full circle to the most recent decision from New York's highest court − who should decide whether to testify in the Grand Jury?[119] If we adhere to the fundamental versus strategic decision dichotomy, why distinguish between testifying at trial (fundamental) and in the Grand Jury (strategic)? What about testifying at the sentencing phase of a capital case,[120] or at a competency,[121] parole violation,[122] or suppression

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[117] Marshall H. Tanick & Phillip J. Trobaugh, *Lincoln's Minnesota Legacy*, BENCH & B. MINN., Feb. 2009, at 1, 4, http://www2.mnbar.org/benchandbar/2009/feb09/lincoln.html [https://perma.cc/Q9A9-HBTD] (quoting Letter from Abraham Lincoln to Isham Reavis (Nov. 5, 1855)).

[118] Scholars have posited a number of rationales for and against giving the accused greater decision-making authority. *See generally* 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 (1998); *see also* Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147 (2010); Christopher Johnson, *The Law's Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Indignity*, 93 KY. L.J. 39 (2004); Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621 (2005); 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 (2000); 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 (2003).

[119] *See generally* People v. Hogan, 26 N.Y.3d 779 (2016).

[120] *See generally* Canaan v. McBride, 395 F.3d 376 (7th Cir. 2005) (finding failure to advise the defendant of his right to testify in the penalty phase proceeding of a capital murder case was ineffective assistance).

[121] *See generally* United States v. Gillenwater, 717 F.3d 1070 (9th Cir. 2013) (finding the defendant has a constitutional right to testify at a pretrial competency hearing that only

hearing?[123]

The decision whether to testify at trial was not always deemed fundamental and for the accused to make. There is no right to testify in the explicit text of the Constitution. However, in *Rock v. Arkansas*[124]the Supreme Court found that the right to testify "has sources in several provisions of the Constitution[,]"[125] including the Due Process Clause of the Fifth and Fourteenth Amendments and the Compulsory Process Clause of the Sixth Amendment.[126] Other courts observed that the right to testify is an inherent analog of the Fifth Amendment's protection against compelled testimony.[127]

Rock, however, did not address whether the decision to testify at trial was for the accused or counsel ultimately to make. The court in *Wright v. Estelle*[128] wrestled with that very question and in a per curiam decision held that defense counsel had ultimate decision-making authority. The court saw the decision as one about strategy and strongly believed that defense counsel was far better equipped to make the best choice for the client:

> The question here is twofold: who is in a better position to judge trial strategy and who is in a better position to ensure the best interests of the defendant. This court's history is filled with the recognition of the value of an attorney. No one could seriously contend that a defendant is in a better position to dictate trial strategy than his attorney.[129]

As for client autonomy, the court believed that defense counsel had a responsibility to protect the defendant from his bad choices:

> An attorney is not necessarily ineffective if he determines not to

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she or he can waive); *see also* United States v. Schlueter, 276 F. App'x 81, 84 (2d Cir. 2008) ("For present purposes, we may assume without deciding that [defendant's] right to testify at his competency hearing is tantamount to his right to testify at trial.").

[122] *See generally* Morrissey v. Brewer, 408 U.S. 471 (1972).

[123] *See* Hemingway v. Henderson, 754 F. Supp. 296, 302 (E.D.N.Y. 1991) ("If a strategic decision by defense counsel not to seek to suppress a confession may constitute a waiver of the claim [because in counsel's control], it would seem to follow that a strategic decision not to call the defendant as a witness at a suppression hearing, even when not made in full consultation with the defendant, should have a similar effect.").

[124] Rock v. Arkansas, 483 U.S. 44 (1987).

[125] *Id*. at 51.

[126] *Id*. at 51-52.

[127] *See, e.g.*, United States v. Bifield, 702 F.2d 342, 349 (2d Cir. 1983).

[128] Wright v. Estelle, 572 F.2d 1071 (5th Cir. 1978).

[129] *Id*. at 1073. The court expounded on its holding with much rhetorical flourish: "Trial attorneys are professional artisans working in a highly competitive arena that requires all the skills which education, training, and experience have given them. . . . A defendant has a right to necessary surgery, but he does not have the right to require the surgeon to perform an operation contrary to accepted medical practice." *Id*.

> allow his client to testify, even though he should give great deference to a defendant's desire to testify, however, we are here concerned with constitutional requirements and there is no constitutional requirement that a court-appointed attorney must walk his client to the electric chair.[130]

Judge Godbold's dissent was equally poetic and vigorous. He observed that many defendants might just believe that they have the capacity to persuade the jury, or that

> without regard to impact upon the jury, his desire to tell "his side" in a public forum may be of overriding importance to him. Indeed, in some circumstances the defendant, without regard to the risks, may wish to speak from the stand, over the head of judge and jury, to a larger audience.[131]

Autonomy played a central part in Judge Godbold's analysis. Rather than grant defense counsel the power to override the client in the name of protecting the client's best interests, Judge Godbold wrote that the "wisdom or unwisdom of the defendant's choice does not diminish his right to make it. The lawyer's authority is vindicated when he advises his client."[132]

The majority and dissenting opinions in *Wright* serve well to frame the issue. For the majority, the lawyer, with his or her special training and experience, is the better trial tactician and knows how to achieve the best result for the client.[133] For the dissent, the client's desire to testify, even if

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[130] *Id*. at 1073-74.

[131] *Id*. at 1078 (Godbold, J., dissenting). Judge Godbold's view on the subject seems to be powerfully heartfelt: "Indeed, our history is replete with trials of defendants who faced the court, determined to speak before their fate was pronounced: Socrates, who condemned Athenian justice heedless of the cup of hemlock; Charles I, who challenged the jurisdiction of the Cromwellians over a divine monarch; Susan B. Anthony, who argued for the female ballot; and Sacco and Vanzetti, who revealed the flaws of their tribunal. To deny a defendant the right to tell his story from the stand dehumanizes the administration of justice. I cannot accept a decision that allows a jury to condemn to death or imprisonment a defendant who desires to speak, without ever having heard the sound of his voice." *Id*.

[132] *Id*. at 1079. Even more pointedly, he wrote that the attorney's role was not to "muzzle" the client. *Id*. at 1078.

[133] Courts have proffered other reasons besides lawyer expertise for vesting defense counsel with decision-making authority over virtually all decisions designated as strategic. Some courts focus on the adversarial system and the overarching concern for a fair trial. *See, e.g.*, United States v. Burke, 257 F.3d 1321, 1323 (11th Cir. 2001) ("The sound functioning of the adversarial system is critical to the American system of criminal justice. We intend to defend it."). Still other courts highlight the need for judicial efficiency. *See, e.g.*, Gonzalez v. United States, 553 U.S. 242 (2008) (giving defense counsel control of trial management is a practical necessity); Taylor v. Illinois, 484 U.S. 400, 418 (1988) ("The adversary process could not function effectively if every tactical decision required client approval.").

seemingly unwise, must be respected in the interests of personal dignity and autonomy.

Ultimately, Judge Godbold's position prevailed and every circuit that has since addressed the issue has deemed the right to testify at trial to be a fundamental, personal right that only the accused may waive.[134] As the 11th Circuit held in *United States v. Teague*, "When an individual stands accused of criminal conduct, the choice to tell his side of the story has ramifications far beyond the mere immediate goal of obtaining an acquittal. It is, after all, the *defendant's* day in court."[135]

Why don't those same principles and rationales apply to the accused's Grand Jury testimony? Why is there nary a word in the Court of Appeals's opinion in *Hogan* of the client autonomy issues hotly debated regarding the right to testify at trial? The decision simply notes that the right to testify in the Grand Jury is statutory (as opposed to the constitutional right to testify at trial),[136] parrots the usual language about fundamental versus strategic decisions,[137] and then states that a lawyer's expertise is required because of the potential negative consequences that flow from the defendant's Grand Jury testimony.[138]

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[134] *See, e.g.*, Jordan v. Hargett, 34 F.3d 310 (5th Cir. 1994); *see also* United States v. Ortiz, 82 F.3d 1066 (D.C. Cir. 1996); United States v. Joelson, 7 F.3d 174 (9th Cir. 1993).

[135] United States v. Teague, 953 F.2d 1525, 1533 (11th Cir. 1992) (emphasis in original). However, the ruling giving the accused the power to decide whether to testify was not unanimous: "I understand and agree that a defendant must personally decide how he will plead to the charges against him, whether he will waive trial by jury, and whether he will appeal. But these decisions are not about trial tactics; they are materially different. These decisions determine whether there is to be a fight and who will judge the fight's outcome. But, once the client decides that there is to be a fight and that he wishes to be represented by a lawyer, I agree with those judges who say that defense counsel need not defer to the client's desires on how the fight is to be waged." *Id*. at 1536 (Edmondson, J., concurring). Judge Edmondson also drew a distinction between the requirements of the ethical rules that vest with the client the right to make this decision and the requirements of effective assistance of counsel, noting that ethical guidelines might serve other purposes rather than obtaining an acquittal. *Id.* In his view, those other purposes "complicate[] too much an already complex question of what is effective representation." *Id*. at 1537.

[136] People v. Smith, 665 87 N.Y.2d 715, 719 (1996) (holding that the right to testify in the Grand Jury is not a constitutional right).

[137] People v. Hogan, 26 N.Y.3d 779, 786 (2016) ("It is well established that a defendant, having accepted the assistance of counsel, retains authority only over certain fundamental decisions[.]" (quoting People v. Colon, 90 N.Y.2d 824, 825 (1997))).

[138] *Id*. The Court referred to the "potential disadvantages of providing the prosecution with discovery and impeachment material, making damaging admissions, and prematurely narrowing the scope of possible defenses[.]" *Id.* (quoting People v. Brown, 116 A.D.3d 568 569 (2014)). Other potential negative consequences include the prosecutor's refusal to plea bargain or a subsequent indictment for perjury. *See* Ric Simmons, *Re-examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1 (2002).

However, although well-established, the fundamental versus strategic distinction articulated in *Jones v. Barnes* is devoid of any meaningful underlying rationale,[139] and no court has yet taken the opportunity to acknowledge that truth and devise a more valid and useful way to distinguish the myriad decisions in a criminal case.

The time is ripe for such an analysis. Although the *Jones v. Barnes* **"**fundamental four" Supreme Court pronouncement took root long ago, there has been mounting dissatisfaction with, and criticism of, the distinction between fundamental and strategic decisions. Section 4-5.2(a) of the American Bar Association Standards for Criminal Justice: Prosecution Function and Defense Function, titled "Control and Direction of the Case," used to provide that "decisions which are to be made by the accused . . . *are*" essentially the same ones spelled out in *Jones*.[140] However, when the Standards were revised in 1993, Section 4-5.2(a) replaced the word "are" with the word "include" in order to "make it clear that this list is not deemed to be exclusive."[141]

Trial courts have been increasingly perplexed about how to allocate decision-making authority between lawyers and clients in capital cases (e.g., the accused wants to testify in favor of a death sentence against the wishes of defense counsel, or directs defense counsel not to present any mitigating evidence at the penalty phase of the case);[142] cases with mental

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[139] *See* Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths – A Dead End*?, 86 COLUM. L. REV. 9, 115 (1986) ("[The Court in *Jones v.*] *Barnes* . . . casually brushed aside the deeply vexing question of lawyer versus client control[.]"); *see also* 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, 765 n.7 (2000) (quoting WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 559-60 (1992)) ("The problems of uncertainty are exacerbated . . . by the absence of any well reasoned guidelines for distinguishing between those decisions requiring defendant's personal choice and those subject to counsel's control over strategy.").

[140] STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEF. FUNCTION § 4-5.2(a) (AM. BAR ASS'N 1980) (emphasis added).

[141] STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEF. FUNCTION hist. n. § 4-5.2(a) (AM. BAR ASS'N 1993), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf [https://perma.cc/4JMM-DS4Q].

[142] *See, e.g.*, Gilreath v. Head, 234 F.3d 547, 550 (11th Cir. 2000); People v. Deere, 710 P.2d 925 (Cal. 1985). Issues also frequently arise when defense counsel wishes to withhold the defense at the guilt stage and use it solely at the penalty phase. *See generally* State v. Carter, 14 P.3d 1138, 1140 (Kan. 2000); People v. Frierson, 705 P.2d 396, 402 (Cal. 1985); People v. Hattery, 488 N.E.2d 513, 516 (Ill. 1985). In 2014, a man on death row wrote to the Supreme Court asking that the justices reject the petition for certiorari that he said was filed without his knowledge or consent by the Executive Director of the Atlantic Center for Capital Representation. The Court denied the writ, directed defense counsel to file a response to the letter, and referred the allegations to the local disciplinary

health issues (e.g., a defendant with a history of mental illness is found competent to stand trial and then objects to his counsel's interposition of a mental status defense);[143] and cases with charges of terrorism (e.g., where the attorney wants to present a "traditional" criminal defense and the accused wants to assert a "political" defense).[144] Left with no decipherable, coherent guidance, trial judges muddle through as best they can leading to different rules and outcomes in different courts.

In one of the only examples of a Supreme Court Justice reflecting about which decisions are fundamental or strategic, Justice Scalia captured the extant lack of clarity: "I would not adopt the tactical-vs.-fundamental approach, which is vague and derives from nothing more substantial than this Court's say-so. . . . What makes a right tactical? . . . Whether a right is 'fundamental' is equally mysterious."[145] Justice Scalia would instead "adopt the rule that, as a constitutional matter, all waivable rights (except, of course, the right to counsel) can be waived by counsel."[146]

So back again to the decision whether to testify in the Grand Jury. Maybe the defendant knows his chances at trial are bleak and he wants to take a chance with the greater number of Grand versus Petit jurors.[147] Maybe he wants his day in court and knows that precious few cases actually go to a jury trial so this is likely his only chance.[148] Maybe, just as was

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board. Ballard v. Pennsylvania, No. 13-9364 (U.S. Aug. 11, 2014) (order referring letters to Disciplinary Board of the Supreme Court of Pennsylvania).

[143] *See, e.g.*, Cooke v. State, 977 A.2d 803, 820 (Del. 2009); Kaddah v. Comm'r of Correction, 939 A.2d 1185, 1192 (Conn. 2008); Johnson v. State, 17 P.3d 1008, 1011 (Nev. 2001); State v. Bean, 762 A.2d 1259, 1261 (Vt. 2000); Treece v. State, 547 A.2d 1054, 1059 (Md. 1988). Several commentators have addressed the defense attorney's challenges when representing clients with mental health issues. *See, e.g.*, Richard J. Bonnie et al., *Decision-Making in Criminal Defense: An Empirical Study of Insanity Pleas and the Impact of Doubted Client Competence*, 87 J. CRIM. L. & CRIMINOLOGY 48 (1996) (studying attorney-client decision-making in cases where the crucial decision was whether to pursue an insanity defense); Josephine Ross, *Autonomy Versus a Client's Best Interests: the Defense Lawyer's Dilemma When Mentally Ill Clients Seek to Control Their Defense*, 35 AM. CRIM. L. REV. 1343 (1998); Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate of Officer of the Court?*, 1988 WIS. L. REV. 65.

[144] *See, e.g.*, United States v. Siddiqui, 699 F.3d 690 (2d Cir. 2012); Mark Hamblett, *Openings Completed in Trial of Alleged al Qaida Conspirator*, 251 N.Y. L.J. 1 (2014); Benjamin Weiser, *Embassy Bombing Suspects Try to Put American Courts on Trial*, N.Y. TIMES (Oct. 26, 2000), http://www.nytimes.com/2000/10/26/nyregion/embassy-bombing-suspects-try-to-put-american-courts-on-trial.html.

[145] Gonzalez v. United States, 553 U.S. 242, 256 (2008) (Scalia, J., concurring).

[146] *Id*. at 257.

[147] N.Y. CRIM. PROC. LAW § 190.05 (McKinney 2016) ("A grand jury is a body consisting of not less than sixteen nor more than twenty-three persons[.]"). *Id.* § 270.05 ("A trial jury consists of twelve jurors[.]").

[148] *See* Steven Zeidman, Gideon*: Looking Backward, Looking Forward, Looking in the*

imagined with some trial testimony, he wishes to talk beyond the Grand Jurors and reach a wider, if not higher, audience.[149]

Courts that grant defense counsel ultimate decision-making authority over strategic choices assume that lawyers know best because they can rely on their legal training and experience. But is that actually true for the decision whether to testify in the Grand Jury? Many defense attorneys simply never put any clients to testify in the Grand Jury.[150] Can it be properly deemed a strategic decision if it is a blanket rule with no individual case-by-case analysis?[151]

Is it true that defense counsel knows best with respect to all strategic decisions? What about which jurors to keep or challenge peremptorily?[152] What special training or knowledge does defense counsel have in this regard that merits her having the final say? Courts have rarely carefully analyzed specific decisions to justify whether the lawyer really is best qualified to make a particular purportedly strategic decision.

However, while one could argue about whether the right to testify in the Grand Jury is fundamental or strategic and who should make the final call, perhaps the more contentious underlying issue has to do with the court's dispensing with the need for the lawyer to consult with the client (let alone obtain his consent). Recall that in *Hogan*, defense counsel did not discuss the issue with his client before he called the prosecutor and said the defendant would not testify.[153] While the court said that discussing the decision with the client might be the "better practice," it did not require it.[154]

The Supreme Court in *Florida v. Nixon*[155] emphasized the difference between consulting a client about a strategic decision and thereafter

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Mirror, 11 SEATTLE J. SOC. JUST. 933, 936 (2013); *see also* Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 409 (2008) ("[A]bout ninety-five percent of convictions are obtained by way of a guilty plea.").

[149] *See* Mayson, *supra* note 101; *see also* INVISIBLE PUNISHMENT, *supra* note 101.

[150] *See* Simmons, *supra* note 137, at 37 n.173 (citations omitted) ("Unfortunately not even the District Attorney's offices themselves keep track of how many defendants actually testify – only one out of fifty-four counties surveyed reported that they compiled data on how often defendants gave notice to testify or actually testified. . . . Forty-one of the fifty-four D.A.'s offices estimated that fewer than 10% of the incarcerated defendants who gave notice that they wished to testify actually did so.").

[151] In her dissent in *Hogan*, Judge Jenny Rivera questioned how defense counsel could have made a strategic decision that his client would not testify without having even consulted with his client about his potential Grand Jury testimony. People v. Hogan, 26 N.Y.3d 779, 791 (2016) (Rivera, J., dissenting).

[152] *See* People v. Colon, 90 N.Y.2d 824 (1997).

[153] *Hogan*, 26 N.Y.3d at 791.

[154] *Id.* at 787.

[155] Florida v. Nixon, 543 U.S. 175 (2004).

obtaining the client's consent to the lawyer's preferred choice. Defense counsel discussed with the defendant the strategy of conceding guilt at the trial stage of the capital case so as to present as strong and coherent a position as possible at the sentencing phase.[156] Nixon never gave his express consent but counsel conceded his guilt in his opening statement to the jury.[157]

The Court reasoned that while counsel "*undoubtedly* has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy . . . [t]hat obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.'"[158] Only for the standard four fundamental decisions (whether to plead guilty, waive a jury, testify at trial, and file an appeal) must counsel consult and obtain consent to her favored course of action.[159]

The relevant ethical rules seemingly call for less by way of client consultation. The American Bar Association Standards for Criminal Justice Prosecution Function and Defense Function provide that "Strategic and tactical decisions should be made by defense counsel after consultation with the client where *feasible and appropriate*."[160] The commentary explains that, "[n]umerous strategic and tactical decisions must be made in the course of a criminal trial, many of which are made in circumstances that do not allow extended, if any, consultation."[161] Apparent scorn for the client's input is revealed in the commentary's reference to "[e]very experienced advocate" recalling the "disconcerting experience of trying to conduct the examination of a witness . . . while the client 'plucks at the attorney's

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[156] *Id.* at 178.

[157] *Id.* at 181-83.

[158] *Id*. at 187 (emphasis added) (internal citations omitted) (quoting Taylor v. Illinois, 484 U.S. 400, 417-18 (1988)). The Court's reference to a "duty" to consult seems meant to imply an ethical obligation as opposed to a constitutional requirement.

[159] *Id.*

[160] STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEF. FUNCTION § 4-5.2(b) (AM. BAR ASS'N 1993), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf [https://perma.cc/4JMM-DS4Q] (emphasis added); *see also* MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_2_scope_of_representation_allocation_of_authority_between_client_lawyer.html [https://perma.cc/WVW9-8XUC] ("[A] lawyer 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.").

[161] STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEF. FUNCTION § 4-5.2 cmt. (AM. BAR ASS'N 1993),

http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf [https://perma.cc/4JMM-DS4Q].

sleeve' offering gratuitous suggestions."[162] However, the commentary does provide that certain decisions "can be anticipated sufficiently so that counsel can ordinarily consult with the client concerning them."[163]

While the Court in *Nixon* held that counsel could carry out strategic decisions without the client's express agreement, the decision left unresolved the question of whether counsel could proceed on her preferred path even in the face of the client's unequivocal disagreement. This is where the decision-making rubber hits the road. Assume the lawyer has consulted with the client. Assume further, that the lawyer ascribes to the belief that she is obligated to offer advice and to urge the client to accept her advice.[164] Assume, however, that the client cannot be persuaded and explicitly disagrees with the choice urged by the attorney. Now what should counsel do?

According to the New York Court of Appeals, the question is not what counsel should do but rather what counsel must do – she must overrule her client and go down the path she believes is best.[165]

To someone unfamiliar with criminal defense, it likely seems strange that the accused does not get to make the final decision or even have the right to be consulted. But to Public Defenders it might actually be a relief to finally receive the Court's imprimatur on their longstanding practice.

As the majority pointed out in *Hogan*, testifying in the Grand Jury is fraught with significant potential negative consequences, such as providing the prosecution with discovery, admissions and impeachment material.[166] Those fears may well be overplayed given that so few cases actually do go to trial, but for most lawyers discretion is the better part of valor when it comes to clients testifying in the Grand Jury.

Still, the possible costs only explain the reasons why defense lawyers believe their clients should not testify in the Grand Jury, not why so many lawyers decline to inform, let alone consult, their clients about their right to testify in the first place.

Consider the typical situation where the lawyer meets her client within

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[162] *Id*.

[163] *Id*.

[164] *See* Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841 (1998); *see also* Brown v. Artuz, 124 F.3d 73 (2d Cir. 1997) (noting that counsel may "strongly advise" the course that counsel thinks is best); Dean v. Clinton Correctional Facility, 93 F.3d 58, 62 (2d Cir. 1996) (referring to the "vigor" with which competent defense counsel advises clients about significant decisions).

[165] *See, e.g.*, United States v. Chapman, 593 F.3d 365, 369 (4th Cir. 2010) ("And if consultation and consent by the client are not required with regard to . . . tactical decisions, the client's expressed disagreement with counsel's decision cannot somehow convert the matter into one that must be decided by the client.").

[166] People v. Hogan, 26 N.Y.3d 779, 786 (2016); *see also* Simmons, *supra* note 137.

twenty-four hours of his arrest. She has a limited amount of time to conduct her interview, and in that time needs to learn the essential facts of the case and factors to persuade the judge to release her client on his own recognizance. Now add to the mix a discussion of the right to testify in the Grand Jury. Complicating that discussion of the right to testify is the lawyer's conviction that it will be not be exercised. For many lawyers, the idea of telling their client they have a right, but in the next breath telling them they should waive it, is too likely to lead to confusion, greater distrust, and conflict. Put simply, many defense lawyers, like defense counsel in *Hogan*, don't "see the benefit to [testifying in the Grand Jury], only the harm,"[167] and therefore decide it is a conversation best left unsaid.

The fundamental decision about whether the accused should testify at trial often reveals similar motivations on the part of defense counsel. Defense lawyers for the most part also tend not to want their clients to testify at trial.[168] Some people just don't make good, compelling, persuasive witnesses, are easily intimidated, are subject to impeachment, or have a prior record. There is also the fear that by testifying the defendant somehow relieves the prosecution of its burden of proof. But, again, these considerations only go to defense counsels' reasons for preferring that their clients do not testify. What, if anything, do they tell their clients about this fundamental constitutional right in cases where they firmly believe it should not be exercised?

The trial judge is not obligated to inform the accused of his right to testify.[169] Often, when the prosecution announces the end of its case-in-

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[167] *Hogan*, 26 N.Y.3d at 782.

[168] *See* Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 852 (2008) ("Although the exact numbers vary by jurisdiction, studies reveal that up to half of all criminal defendants who proceed to trial elect not to testify on their own behalf, and that this percentage has been increasing since at least the early twentieth century.").

[169] Only a few states require a trial judge to apprise the defendant of his right to testify and hold an on-the-record colloquy regarding any waiver of that right. *See* Timothy P. O'Neill, *Vindicating the Defendant's Constitutional Right to Testify at a Criminal Trial: The Need for an On-the-Record Waiver*, 51 U. PITT. L. REV. 809, 810 (1990). Federal courts do not impose a requirement that the trial judge inform the defendant of his right to testify and/or conduct an on-the-record colloquy to make sure the decision not to testify is the result of a voluntary waiver. *See* Artuz, 124 F.3d at 79 ("Just as the trial judge need not stop a defendant called by defense counsel to the stand and explain the right not to testify, the judge need not intervene when counsel announces that the defendant rests and the defendant has not testified."); *see also* United States v. Ortiz, 82 F.3d 1066 (D.C. Cir. 1996); United States v. Brimberry, 961 F.2d 1286 (7th Cir. 1992); Siciliano v. Vose, 834 F.2d 29 (1st Cir. 1987). The concerns are that any such dialogue might interfere with the attorney-client relationship and defense strategy, or in some way indicate to the accused that the court has an opinion on the matter. *See* United States v. Pennycooke, 65 F.3d 9 (3d Cir. 1995).

chief, the trial judge simply asks defense counsel if she is "putting on a case" or has "any witnesses." If counsel answers in the negative, that ends the inquiry.[170]

However, while the court is under no obligation to advise the accused about his right to testify, must defense counsel so inform her client? In *People v. Windley*,[171] at a post-conviction hearing regarding the defendant's claim that he was not advised of his right to testify at trial, his trial lawyer was asked if he discussed with his client whether he was going to testify. Counsel replied: "I'm not sure of that. . . . My philosophical bend, as a result of long discussions and pondering over that issue . . . [is] that you *never* put a defendant on the stand. Period."[172] When he was then asked whether that was his strategy in not putting this particular client on the stand, he replied, "In *every* case."[173]

While counsel in *Windley* may have been expressing the attitude and practice of many defense lawyers, the courts have a different view. In *People v. Cosby*[174] the court reiterated that there is no obligation on the part of the trial judge to inquire about the defendant's apparent decision not to testify, but held that defense counsel must advise her client of the right to testify and, further, must tell her client that the decision, the ultimate authority, rests with him.[175] This judicial pronouncement likely caused consternation among many Public Defenders who fear that if they tell their client about his right to testify, and further explain that he is the ultimate

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[170] Contrast the lack of an on-the-record colloquy or some similar kind of verification when the defendant waives or exercises other fundamental rights. *See, e.g.*, Taylor v. Illinois, 484 U.S. 400 (1988); Boykin v. Alabama, 395 U.S. 238 (1969).

[171] People v. Windley, 28 Misc. 3d 1232(A) (Sup. Ct. Bronx Cnty. 2010).

[172] *Id*. at *7 (emphasis added).

[173] *Id*. (emphasis added).

[174] People v. Cosby, 82 A.D.3d 63 (4th Dep't 2011).

[175] *See* Brown v. Artuz, 124 F.3d 73, 79 (2d Cir. 1997) ("Although counsel should always advise the defendant about the benefits and hazards of testifying and of not testifying, and may strongly advise the course that counsel thinks best, counsel must inform the defendant that the ultimate decision whether to take the stand belongs to the defendant, and counsel must abide by the defendant's decision on this matter."). Similarly, counsel must advise the defendant of his or her right to appeal. *See* Wolfe v. Randle, 267 F. Supp. 2d 743, 748 (S.D. Ohio 2003) ("[A] defendant must be told of his right to appeal, the procedures and time limits involved in proceeding with that appeal, and the right to have assistance of appointed counsel for that appeal."); *see also* White v. Johnson, 180 F.3d 648, 652 (5th Cir. 1999). In New York, the defendant has the right to appeal from final judgments in all criminal cases. N.Y. CRIM. PROC. LAW §§ 450.10, 1.20 (2013); People v. Callahan, 80 N.Y.2d 273 (1992); People v. Pollenz, 67 N.Y.2d 264, 268 (1986). Whether defendants are in fact advised of their right to appeal and that they have the ultimate authority to decide whether to appeal is an intriguing question that is beyond the scope of this article.

decision maker, he just might insist on testifying.[176]

Many years ago, when I was a supervising attorney in a Public Defender office, a staff attorney called me from the courthouse. He had a client who was insisting that he wanted to testify in the Grand Jury, and the lawyer thought that was a bad idea for all the usual reasons and also because his client's narrative was far from compelling. I went to court, talked with his client, and shared the attorney's assessment. Nevertheless, we could not convince our client that testifying was a terrible idea.

We considered our two choices – allow the client to testify or deny him his statutory right. The charges were serious and we went back and forth for the next few hours. New York's Criminal Procedure Law provides that if bail were set on a felony the prosecutor must obtain an indictment within 120-144 hours or the accused must be released.[177] We were at the end of that time limit and the prosecutor was waiting to present the case to the Grand Jury. Then we realized we had a third option – we waived for one day the statutory requirement that the prosecutor indict or release our client.[178] We thought that if our client slept on it and talked with other people incarcerated at Rikers Island he would come to the right conclusion.

The next day was more of the same. He insisted on testifying and we again waived his statutory right, this time for two days to give us time to go talk with him at Rikers Island. There was a long, hard conversation the next day at the jail that ended as it began – he still insisted on testifying.

Back in court, we were now firmly faced with two options: allow or deny him his right to testify in the Grand Jury. Even though we thought, actually we were convinced, that it was a terrible idea, we called the prosecutor and told him our client did in fact intend to exercise his right to testify in the Grand Jury.

The prosecutor called the defendant into the Grand Jury and he testified to an improbable and somewhat different version of events than he had told

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[176] In *Starkweather v. Smith*, 574 F.3d 399 (7th Cir. 2009), the defendant claimed ineffective assistance of counsel in that his lawyer encouraged him not to testify but never explained the basis for that advice (and that, as a result, his waiver of his right to testify was not knowing and intelligent). The Court candidly noted that perhaps counsel declined to explain his rationale out of concern that it might actually lead the accused to insist on testifying, but stated, "[b]e that as it may, an attorney's ethical duty to consult with his or her client is no less in situations where the attorney (perhaps reasonably) judges it best to keep his or her client in the dark." *Id*. at 404. However, while noting an aspirational ethical duty to consult, the Court ultimately stated there were no cases that actually establish that the Sixth Amendment requires an attorney to explain the basis for his or her legal advice. *Id.*

[177] N.Y. CRIM. PROC. LAW § 180.80 (McKinney 1982). The other option, seldom used by the prosecution, is to hold a preliminary hearing for a judge to determine whether there is reasonable cause to believe the accused committed a crime. CRIM. PROC. LAW § 180.70.

[178] CRIM. PROC. LAW § 180.80(1).

us. We walked out of the Grand Jury room and waited to hear the inevitable news of an indictment from the prosecutor. Several minutes later he came out and mumbled, "They voted no true bill. Your guy is being released." Our guy? I'm sure he didn't feel like he was in any way shape or form "our guy."

We waited for our client to be released but he must have gone out through a different door because we never saw him again. Did we do the right thing? I don't know, but the Court of Appeals certainly doesn't think so.[179]

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[179] People v. Hogan, 26 N.Y.3d 779 (2016).