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Fear of Adversariness: Using *Gideon* To Restrict Defendants' Invocation of Adversary Procedures

ABSTRACT. Fifty years ago *Gideon* promised that an attorney would vindicate the constitutional rights of any accused too poor to afford an attorney. But *Gideon* also promised more. Writ small, *Gideon* promised to protect individual defendants; writ large, *Gideon* promised to protect our system of constitutional criminal procedure. Much has been written about *Gideon*'s broken promise to our poor; this Essay is about *Gideon*'s broken promise to our system.

With its army of zealous public defenders, *Gideon* should have produced litigation that vigorously protected the core structures of our adversary trial system. Instead, courts have converted *Gideon* representation into a *Gideon* defendant's *de facto* relinquishment of important Sixth Amendment rights. As a result, counsel – not client - controls the invocation and exercise of the adversary procedures. And, even as to those Sixth Amendment rights still within a defendant's exclusive control, *Strickland* eviscerates a defendant's capacity to seek redress when counsel precludes the exercise of a fundamental right. As a result, *Gideon* has increasingly become an enforcer of the status quo – a cog in the systemic machine that grinds continually toward under-enforcement of Sixth Amendment adversary rights.

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INTRODUCTION

Fifty years ago *Gideon v. Wainwright* promised that an attorney would vindicate the constitutional rights of any accused too poor to afford one.[1] But *Gideon* also promised more; *Gideon* promised to promote our adversarial system of constitutional criminal procedure.

The vitality of our adversarial system of constitutional criminal procedure "depends for its enforcement on criminal defense counsel,"[2] the vast majority of whom are appointed under *Gideon*'s mandate. Criminal defendants and their attorneys act as the "attorneys general of the Fourth, Fifth, and Sixth Amendments,"[3] and the guarantees of those Amendments can only be realized through "an adequate level of litigation by defendants, meaning in practice by defense counsel."[4] With an army of zealous public defenders, and an increasing recognition of the right to effective assistance of counsel, *Gideon* should have invigorated and sustained the adversarial core of our criminal justice system. Instead, our criminal justice system has become largely a system of settlement—not adversarial contest. And, even in those cases that proceed to trial, defendants have fewer and fewer opportunities to demand the full range of adversarial criminal procedures promised by the Constitution.

There are many reasons why *Gideon* failed to invigorate the adversarial system. Among them, I contend, is the Court's deep-seated fear of *Gideon* and of the full adversariness *Gideon* could bring to the criminal justice system. There are many ways that the Court has responded to this fear, but one is particularly tragic: it has used *Gideon* to cabin and restrict the full adversariness promised by the Sixth Amendment.

My focus in this Essay is on how the Supreme Court has used *Gideon* to decrease the protection of Sixth Amendment rights that constitute the core structures of the American adjudicatory process. When read as a restriction of defendant-directed adversariness, *Gideon* erodes the underlying architecture of American criminal procedure.

I. THE REGULATION OF DEFENDANT-DRIVEN ADVERSARINESS THROUGH *GIDEON* AND *STRICKLAND*

In this Essay, I argue that the Supreme Court is deeply afraid of the Sixth

1. 372 U.S. 335 (1963).
2. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 20 (1997).
3. Stuntz, *supra* note 2, at 20.
4. *Id.* at 12.

Amendment's true power. If "constitutional criminal procedure defines what the criminal process looks like, but is agnostic about how much of that process the system should have,"[5] the same cannot be said of the American judiciary.[6] After all, imagine the consequences if a modern army of criminal defendants insisted upon the full exercise of their Sixth Amendment rights: no plea bargains; no stipulations to the admissibility of evidence, including to witness testimony; no waivers of cross-examination; and full presentation of all available defense witnesses. The Court's fear of Sixth Amendment adversariness is most apparent in its careful protection of plea bargaining; it is most hypocritical in the Court's deliberate effort to use *Gideon* to justify rules that make the ever-dwindling number of trials move more efficiently—and less adversarially—toward a verdict.

A. The Court's General Preference for Nonadversarial Case Resolution

Shortly after announcing *Gideon*'s unfunded mandate, the Court began to regulate both guilty pleas generally[7] and guilty pleas obtained through plea bargaining.[8] *Gideon* informed the Court's willingness to endorse plea bargaining.[9] At that time, at least three-quarters of all criminal convictions resulted from guilty pleas, and the Court felt compelled to both recognize the criminal justice system's dependence upon guilty pleas, particularly those obtained through plea bargaining,[10] and to regulate the administration of those plea bargains.[11] Plea bargains were not merely "important components of this country's criminal justice system";[12] they were "essential" and "highly desirable

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5. Stuntz, *supra* note 2, at 22.

6. *See, e.g.*, Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1074 (2006) (describing how judges encourage plea bargaining as a way of disposing of lengthy dockets); *see also* Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1351 (2004) (describing the pervasive pressure to accept pleas exercised by judges on defendants).

7. *See, e.g.*, Boykin v. Alabama, 395 U.S. 238 (1969).

8. *See* Brady v. United States, 397 U.S. 742, 752 (1970).

9. *See id.* at 748-49 n.6.

10. *See id.* at 752. Other sources suggest that during the 1960s, plea bargains resolved about ninety percent of the nation's criminal cases. *See, e.g.*, Corinna Barrett Lain, *Accuracy Where It Matters:* Brady v. Maryland *in the Plea Bargaining Context*, 80 WASH. U. L.Q. 1, 1 & n.2 (2002). For a review of the political and systemic pressures that led to the prevalence of plea bargaining and the *Brady* decision, see Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 24-26 (1979); and Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the* Brady *Safety-Valve*, 2012 UTAH L. REV. 51, 79-82.

11. *See* Santobello v. New York, 404 U.S. 257, 260 (1971).

12. Blackledge v. Allison, 431 U.S. 63, 71 (1977).

part[s]" of the criminal process that led to "prompt and largely final disposition of most criminal cases."[13]

Once it legitimized plea bargains, the Court attached heavy weight to the viability of the plea bargaining system when it considered questions of constitutional criminal procedure.[14] After all, "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."[15]

Fifty years after *Gideon*, nearly ninety-five percent of all criminal convictions are the result of guilty pleas,[16] and the Supreme Court has a substantial commitment to constitutional rulemaking that upholds the primacy of the plea bargaining system.[17] Plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system."[18] Not surprisingly, then, the Court's criminal procedure jurisprudence reflects a fear that adversarial procedures must be restrained, or "our long and expensive process of criminal trial could not sustain the burden imposed on it, and our system of criminal justice would grind to a halt."[19] In this jurisprudence, the Court treats

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13. *Santobello*, 404 U.S. at 261.

14. *See, e.g.*, Blackledge v. Allison, 431 U.S. 63, 71-72 (1977).

15. *Santobello*, 404 U.S. at 260.

16. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

17. *See* Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 122-23 (1999) (arguing that the "due process revolution . . . put considerable pressure on the Supreme Court to constrain the scope of rights . . . thus providing a partial explanation for the Court's . . . endorsement in the 1970s of plea bargaining itself"); *see also* Montré D. Carodine, *Keeping It Real: Reforming the "Untried Conviction" Impeachment Rule*, 69 MD. L. REV. 501, 516 (2010) (arguing that "there is, as a general matter, a decided policy in both United States Supreme Court jurisprudence and the evidentiary rules of promoting plea bargaining").

18. Missouri v. Frye, 132 S. Ct. at 1407 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)). This does not mean that the Court is indifferent to the substantive rights of defendants entering into plea bargains; the Court's decisions in cases like *Padilla v. Kentucky,* 130 S. Ct. 1473 (2010), and *Frye*, 132 S. Ct. 1399, are ample evidence to the contrary.

19. Lafler v. Cooper, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting). In *United States v. Ruiz*, the Court considered whether the government had a "constitutional obligation to provide impeachment information during plea bargaining." 536 U.S. 622, 631 (2002). *Ruiz* called for the Court to answer constitutional procedure questions about due process and the knowing, intelligent, and voluntary entry of a guilty plea. However, the Court expanded its inquiry to consider whether the constitutional disclosure rule urged by Ruiz "could seriously interfere with . . . securing . . . guilty pleas that . . . help to secure the efficient administration of justice." *Id.* at 631. The Court balked at endorsing a rule that might "require the Government to devote substantially more resources to trial preparation prior to plea bargaining," or "abandon its heavy reliance upon plea bargaining in a vast number—90% or more—of federal criminal cases." *Id.* In the end, the *Ruiz* Court concluded that "the

the plea bargaining system as a quiet "party-in-interest" to the litigation. Even as to the Great Writ of habeas corpus, the Court's emphasis on finality over fairness in habeas rulings reflects its concerns that, absent a prioritization of finality, the plea bargaining system would be unsustainable.[20]

B. The Court's Efforts To Regulate Defendant-Driven Adversariness at Trial

The Court's anxiety about adversariness is not limited to shoring up the viability of the plea bargaining system. Rather, this anxiety extends to adversarial constitutional criminal procedures in the trial process itself.[21] It is my contention that one of the Court's primary means of regulating trial adversariness has been to reduce defendant control over the invocation of Sixth Amendment adversarial procedures such as confrontation, compulsory process, and the right to testify.[22]

The Court believes (correctly perhaps) that allowing defendants to control the exercise of their Sixth Amendment rights will increase the degree of adversariness at trial.[23] Perhaps, like many of us who have been public defenders, the Court suspects that, if they were truly were captains of their own

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Constitution's due process requirement" did not demand "radical" changes to the plea bargaining processes "in order to achieve [a] comparatively small constitutional benefit." *Id.* at 624 (emphasis added). For another example, see the discussion of *United States v. Hyde*, 520 U.S. 670 (1997), in Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U. COLO. L. REV. 863, 899 (2004), which describes *Hyde* as "emblematic of a lamentable plea process designed to further judicial economy at the expense of individual due process" and dependent upon "defendant ignorance about the realities of the plea process . . . to maintain its vibrancy."

20. *See* Blackledge v. Allison, 431 U.S. 63, 71 (1977); *accord* Hill v. Lockhart, 474 U.S. 52, 58 (1985) ("Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice." (citations omitted)).

21. For an excellent discussion of how this anxiety about adversariness leads the Court to narrow the scope of Sixth Amendment protections in order to mitigate their financial and logistical impacts, see Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 490 (2009).

22. The Court has also steadfastly refused to require prophylactic rules requiring either that a trial court advise a defendant about his Sixth Amendment rights or that the court ascertain that counsel has the defendant's consent to certain conduct. According to the Court, these procedures would be poor uses of judicial resources and might provoke disputes between counsel and courts, or prompt counsel to engage in Sixth Amendment contests that they might otherwise have waived. For discussions of the competing rationales for defendant autonomy and lawyer control, see Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right To Control the Case*, 90 B.U. L. REV. 1147 (2010); and Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621 (2005).

23. For evidence that the Court believes that defendant control will increase adversariness, see *infra* notes 82-84.

ships, defendants would insist upon more adversary procedures than do their lawyers.[24] Perhaps this belief reflects, in part, the high volume of ineffective assistance of counsel cases that come to the Court on a defendant's complaint about counsel's relinquishment of certain adversarial processes. Or, perhaps the Court recognizes that in a system dominated by institutional defenders, defendants fear that lawyers will "conserve" their adversariness and therefore advocate vigorously for scarce adversarial resources to be spent on their own cases.

The Court has cabined defendants' vigorous exercise of their adjudicatory rights by shifting control of Sixth Amendment rights from the accused to defense counsel.[25] The Court accomplishes this through both direct and indirect regulation of defendants' rights.

As a preliminary regulatory mechanism, the Court divides criminal procedure rights into two categories: some rights are fundamental; others are tactical or nonfundamental.[26] Fundamental criminal procedure rights are rights so personal to the accused that only the accused can waive them.[27] Accordingly, a defendant has ultimate authority to exercise his fundamental rights; the defendant alone can decide "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."[28] A valid waiver of one of these fundamental rights requires the defendant's "intentional relinquishment or abandonment of a known right or privilege."[29] Counsel cannot waive a defendant's fundamental right unless counsel "both consult[ed] with the

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24. "Every experienced advocate can recall the disconcerting experience of trying to conduct the examination of a witness or follow opposing arguments or the judge's charge while the client 'plucks at the attorney's sleeve' offering gratuitous suggestions." ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-5.2 cmt. (3d ed. 1993), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf [hereinafter ABA STANDARDS]. I note but lack the space to comment further upon the patronizing and dismissive way in which the ABA comment describes the defendant who seeks to assist counsel in a proceeding that puts the defendant—and the defendant alone—at risk of incarceration, or even death.

25. Reliance upon *Gideon* to cabin adversariness has affected indigent and nonindigent defendants alike. This is because the right to effective assistance of counsel is applied without regard to whether counsel was appointed or retained. *See* Cuyler v. Sullivan, 446 U.S. 335, 344-45 (1980).

26. *See* Gonzalez v. United States, 553 U.S. 242, 251-53 (2008).

27. New York v. Hill, 528 U.S. 110, 114-15 (2000).

28. Florida v. Nixon, 543 U.S. 175, 187 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 751 (1983)). Some commentators suggest that the Supreme Court has also ceded to a defendant the exclusive authority to waive the right to be present at trial. 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.6(a) (3d ed. 2000).

29. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

defendant and obtain[ed] consent" to the planned course of action.[30] When the validity of a waiver is in doubt, the Court requires that judges "'indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . 'not presume [a defendant's] acquiescence in the loss of fundamental rights.'"[31]

In contrast, tactical or nonfundamental rights are strategic rights that can be waived by counsel without consultation with the defendant.[32] Counsel controls the exercise of these "tactical" constitutional rights, such as the right to confrontation[33] and the right to compulsory process.[34] Counsel also controls decisions such as which appellate claims to advance,[35] which trial objections to invoke or waive,[36] whether to waive statutory speedy trial rights,[37] and whether, in the federal system, to demand that an Article III judge conduct jury selection.[38] Thus at the trial level, the Court directly regulates defendant-driven adversariness by allocating control of Sixth Amendment "tactical" rights, such as compulsory process and confrontation, to counsel.

In addition to directly regulating defendants' invocation of adversary Sixth Amendment procedures, the Court also indirectly regulates defendants' rights

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30. *Nixon*, 543 U.S. at 187.

31. *Zerbst*, 304 U.S. at 464 (quoting Ohio Bell Tel. Co. v. Pub. Utils. Comm'n, 301 U.S. 292, 307 (1937)).

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

33. *See* Gonzalez v. United States, 553 U.S. 242, 257 (2008) (Scalia, J. concurring); Taylor v. Illinois, 484 U.S. 400, 408 n.18 (1988); Henry v. Mississippi, 379 U.S. 443, 451 (1965); Janosky v. St. Amand, 594 F.3d 39, 47-48 (1st Cir. 2010); United States v. Gonzales, 342 F. App'x 446, 447-48 (11th Cir. 2009) (per curiam); United States v. Cooper 243 F.3d 411, 417-18 (7th Cir. 2001); United States v. Plitman, 194 F.3d 59, 63-64 (2d Cir. 1999); Hawkins v. Hannigan, 185 F.3d 1146, 1154-56 (10th Cir. 1999); *cf.* Clemmons v. Delo, 124 F.3d 944, 955-56 (8th Cir. 1997) (describing limited exceptions to the constitutional guarantee when waived or in the case of child abuse), Carter v. Sowders, 5 F.3d 975, 981 (6th Cir. 1993) (requiring consent by the defendant to waive the right); United States v. Stephens, 609 F.2d 230, 232-33 (5th Cir. 1980) (holding that the right to confrontation might be waived by counsel if the defendant does not object and if it is found to be a "legitimate trial tactic"). For an in-depth consideration of a defendant's interest in controlling confrontation, see Pamela R. Metzger, *Confrontation Control*, 45 TEX. TECH L. REV. 83 (2012).

34. *Taylor*, 484 U.S. at 404; Chappee v. Vose, 843 F.2d 25, 27-33 (1st Cir. 1988); United States v. Nersesian, 824 F.2d 1294, 1321 (2d Cir. 1987); Eaton v. United States, 437 F.2d 362, 363 (9th Cir. 1971). For an excellent overview of the adversarial significance of the accused's right to compulsory process, see Janet C. Hoeffel, *The Sixth Amendment's Lost Clause: Unearthing Compulsory Process*, 2002 WIS. L. REV. 1275.

35. *See* Jones v. Barnes, 463 U.S. at 751.

36. *See* Henry v. Mississippi, 379 U.S. at 451.

37. *See* New York v. Hill, 528 U.S. 110, 118 (2008).

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

through application of the *Strickland* rule. *Strickland* holds that a criminal defendant receives constitutionally ineffective assistance of counsel when the defendant can show that (1) counsel's performance was deficient; and (2) counsel's deficiency prejudiced the defendant.[39] Under *Strickland*, counsel's performance was deficient only if it "fell below an objective standard of reasonableness."[40] Moreover, reviewing courts must presume that defense counsel provided adequate assistance "in the exercise of reasonable professional judgment."[41] Thus counsel's strategic choices about the exercise of a defendant's rights are "virtually unchallengeable."[42] *Strickland* prejudice arises only if counsel's deficient performance gives rise to a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[43]

Strickland pays lip service to counsel's role "as assistant to the defendant," but *Strickland*'s holding gives the lie to that promise. Whether counsel complies with her "particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments" is irrelevant if counsel's failure to consult does not prejudice the outcome of the case.[44] Accordingly, "*Strickland* grants defense lawyers almost unlimited freedom of action in managing a case and assures them that their actions will be deemed professionally adequate as long as such acts can reasonably be considered to be consistent with sound trial strategy."[45]

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39. Strickland v. Washington, 466 U.S 668, 687 (1984).

40. *Id* at 688.

41. *Id*. at 690.

42. *Id.*

43. *Id*. at 694.

44. *Id*. at 688. But see Justice Brennan's dissent in *Jones v. Barnes*, arguing that counsel should assist the defendant in making choices rather than dictate the "best" choices for the defendant: "The role of the defense lawyer should be above all to function as the instrument and defender of the client's autonomy and dignity in all phases of the criminal process." 463 U.S. 745, 763 (1983) (Brennan, J., dissenting). Moreover, while Justice Brennan conceded that time constraints might require giving lawyers control over "the hundreds of decisions that must be made quickly *in the course of a trial*," there is no similar justification for granting a lawyer control over decisions that can easily be made pretrial such as noticing alibi witnesses and demanding the testimony of forensic witnesses. *Id.* at 760 (emphasis added).

45. 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, 789 (2000). Uphoff also concludes that state courts similarly favor counsel control because, among other reasons, they believe that "granting criminal defendants greater control over strategic decisions [may threaten] the orderly, efficient administration of the courts." *Id*. at 791. North Carolina is a notable exception inasmuch as the North Carolina Supreme Court has held that if counsel and client are at an "absolute impasse" about a tactical decision, the client's choice controls. *See* State v. Ali, 407 S.E.2d 183 (N.C. 1991).

The Court applies *Strickland* to claims of counsel's interference with a defendant's both fundamental and nonfundamental rights. The Court thereby indirectly regulates defendant-driven adversariness over fundamental rights by minimizing any possibility of reversal based upon interference with the defendant's exercise of that right.

II. DIRECT REGULATION OF DEFENDANT ADVERSARINESS OVER THE SIXTH AMENDMENT

Gideon was part of a "first wave" of judicial commitment to strengthening the structures of adversarial criminal procedure. As that first wave developed, it provided defendants with "a broad constitutional right to counsel."[46] However, the Court has subsequently "placed a great deal of power in the hands of attorneys [and] bound the [defendant] after the fact to virtually all of counsel's decisions and derelictions."[47] The last fifteen years have produced a "second wave" of judicial commitment to the structures of adversarial criminal procedure: the Court has issued a series of important decisions strengthening Sixth Amendment adversarial process rights such as the right to trial by jury, the right to counsel of choice, and the right to confrontation. However, these decisions have not signaled a retrenchment of the Court's fear of adversarial Sixth Amendment process. Rather, as I explain below, these decisions have been based, in part, on the Court's confidence in the success of its prior regulation of defendant-driven adversariness. Even as the Court rhetorically revives Sixth Amendment adversarial mandates, it minimizes the invocation of those adversarial rights by empowering attorneys—not defendants—to control them.

A. Direct Regulation: Relying on Counsel To Constrain the Invocation of "Tactical" Sixth Amendment Rights

The Court's delegation of control over "tactical" adversarial trial rights is exemplified by *Taylor v. Illinois*. In *Taylor*, defense counsel failed to provide the prosecution with the statutorily mandated pretrial notice of alibi witnesses.[48] After an in camera presentation of the witness testimony, the trial court concluded that the defendant had timely provided counsel with the names of the alibi witnesses; however, counsel had "blatantly" violated the discovery

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46. Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 26 (1986).

47. *Id.*

48. Taylor v. Illinois, 484 U.S. 400, 404 (1988).

rules by not disclosing that information.[49] The court precluded the testimony of the alibi witnesses.

On appeal, Taylor argued that the preclusion of the alibi witness "visit[ed] the sins of the lawyer upon his client," and unconstitutionally deprived Taylor of his right to compulsory process.[50] The Supreme Court rejected that argument, holding that Taylor could—and should—be held responsible for his attorney's conduct.[51]

In so doing, the Court invoked the principles of *Gideon*, claiming that a failure to hold Taylor responsible for "his lawyer's misconduct [would] strike[] at the heart of the attorney-client relationship."[52] This brief nod to defendant interests, however, scarcely masked the Court's primary concern: "[t]he adversary process could not function effectively if every tactical decision required client approval."[53] Absent such a conclusion, the "trial process would be a shambles."[54] As a general rule, "the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial."[55] Put another way, "counseled defendants [have no] right to g[u]ide the hands that guide[] them."[56]

Over time, the Court has come to rely upon defense counsel's control of "tactical" adversarial rights as a means of reconciling criminal procedure entitlements with its desire for a continued efficiency in criminal practice.[57] As a result, the Court has been able to strengthen its rhetorical commitment to adversarial process without risking a real increase in adversarial procedures.

For example, the Court's 2004 decision in *Crawford v. Washington*

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49. *Id.* at 405.

50. *Id.* at 416.

51. *Id.* at 418.

52. *Id.* at 417.

53. *Id.* at 418. The Court was unwilling even to require an inquiry into whether Taylor was complicit in the discovery violation. According to the Court, it would be "highly impracticable" to require a court to investigate the "relative responsibilities" of counsel and client "before applying the sanction of preclusion." *Id.*

54. *Id.* at 411.

55. *Id.* at 415.

56. Berger, *supra* note 46, at 30.

57. *See* Margareth Etienne, *Remorse, Responsibility and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2104 (2003) ("Zealous advocacy, or what is perceived as overzealous advocacy, is a common target of judges' efforts to regulate their courtrooms. While judges recognize the importance of zealous advocacy, they realize too that zeal and efficiency in criminal proceedings are often inversely related. That is, zeal is a 'cost' of judicial efficiency that judges have an incentive to minimize.").

established a defendant's right to confront testimonial witnesses, regardless of the reliability of their statements.[58] The Court characterized *Crawford* as a corrective measure, designed to honor the mandate of the Sixth Amendment's Confrontation Clause and to protect the American adversarial system from the "evil" of the "civil-law mode of criminal procedure."[59] Yet the Court's opinions following Crawford—*Melendez-Diaz v. Massachusetts*,[60] *Bullcoming v. New Mexico*,[61] and *Williams v. Illinois*[62]—were riddled with judicial anxiety about a potential avalanche of new adversariness.

For example, in *Melendez-Diaz*, the Court considered whether forensic declarations constituted testimonial evidence subject to the Confrontation Clause.[63] Unsurprisingly, the government argued that the "necessities of trial and the adversary process"[64] warranted a forensic exception to the Confrontation Clause. While the Court ultimately held that forensic reports were subject to the Confrontation Clause, much of the *Melendez-Diaz* opinion addressed concerns that the ruling would result in an avalanche of forensic confrontation.[65] Might defendants force the government to call scientific witnesses for confrontation and cross-examination?[66] Might the defense insist that the prosecution produce its' witnesses, only to later decline to examine them?[67] Worse yet, might the defense invoke the right to confrontation and then receive a "windfall" acquittal if the prosecution were unable to produce its witness?[68]

The salve to these judicial anxieties about adversariness was the Court's assumption that defense attorneys would rein in the invocation of adversarial procedure. There would be no marked increased in the appearance of forensic witnesses, because defense attorneys would make good (i.e., resource-efficient)

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58. Crawford v. Washington, 541 U.S. 36, 69 (2004).

59. *Id.* at 50.

60. 557 U.S. 305 (2009).

61. 131 S. Ct. 2705 (2011).

62. 132 S. Ct. 2221 (2012).

63. *See* 557 U.S. at 307.

64. *Id.* at 335 (quoting Brief for Respondent at 59, *Melendez-Diaz*, 557 U.S. 305 (No. 07-591), 2008 WL 4103864, at *59).

65. *See id.* at 312.

66. While much of this hysteria stemmed from a dubious concern about the resource-intensive risks of a nationwide invocation of the *Melendez-Diaz* ruling, it was accompanied by a sense of outrage about the possibility that "[g]uilty defendants will go free, on the most technical grounds." *Id.* at 342 (Kennedy, J., dissenting).

67. *See id.* at 343.

68. *See id.*

decisions that would restrain the practical implications of *Melendez-Diaz*.[69]

True, the Court offered an obligatory assertion that "[t]he Confrontation Clause . . . is binding, and we may not disregard it at our convenience."[70] However, the Court turned immediately to a discussion about why *Melendez-Diaz* would not mean a significant increase in the confrontation of drug analysts. First, the Court highlighted the relative scarcity of criminal trials involving forensic evidence.[71] Then, the Court scoffed at the "wildly unrealistic" notion that "defendant[s] will never stipulate to the nature of the controlled substance" or "will object to the evidence or otherwise demand the appearance of the analyst."[72]

The majority's confidence that *Melendez-Diaz* would have a minimal effect on trial adversariness stemmed not from a belief that defendants would want to relinquish their confrontation rights, but from a belief that defense attorneys would cabin defendant-driven adversariness. The *Melendez-Diaz* Court offered a primer on how counsel's control of confrontation would reduce the occurrence of the forensic confrontation that it had just mandated. First, the Court pointed out that most states have notice-and-demand statutes requiring "the defendant to assert (or forfeit by silence) his Confrontation Clause right."[73] Then, the Court underscored the fact that defense attorneys would be the primary gatekeepers of the *Melendez-Diaz* rule, preventing otherwise "obstructionist" defendants from "abusing" the "privilege" of confrontation.[74] Because "it [was] unlikely that defense counsel will insist on live testimony," stipulations had been—and would continue to be—the primary procedural mode for introducing drug evidence.[75]

What was the Court's explanation for this phenomenon? Defense attorneys would be unlikely to "want to antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion"; moreover, defense attorneys will not "believe that their clients' interests (or their own) are furthered by objections to analysts' reports whose conclusions counsel have no intention of challenging."[76] In other words, defense counsel will control the degree of

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69. *Id.* at 325-26 (majority opinion).

70. *Id.* at 325.

71. *Id.*

72. *Id.* at 325 n.10.

73. *Id.* at 326.

74. *Id.*

75. *Id.* at 328 (emphasis added).

76. *Id.* at 328 & n.13 (emphasis added). The claim that defense attorneys often act out of self-interest is neither novel nor inconsistent with adversarial zeal. Self-interest may arise when

adversariness.

There is no mistaking this judicial reliance upon defense counsel as the gatekeeper for adversariness. The dissenters observe that "the Court professes a hope that defense counsel will decline" to confront forensic analysts.[77] They underscore the conflicts of interest that may arise when "defense attorneys surrender constitutional rights because the attorneys do not 'want to antagonize the judge or jury by wasting their time.'"[78] The dissenters make the admirable, and somewhat unrealistic, assertion that defense attorneys should not—and would not—engage in such self-serving behavior.[79] Nevertheless, the dispute between the majority and the dissent is about whether defense counsel will fully invoke the adversarial opportunities presented by *Melendez-Diaz*—not whether defendants will want that adversarial invocation.[80]

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defense counsel believes that unnecessary invocation of adversariness will gain the client nothing and cost counsel—and her clients—something. Studies confirm that

> despite the adversarial nature of the court system, the participants learn early on to work together in order to move cases along efficiently. A certain degree of cooperation between the various players in the courtroom . . . is considered a key aspect of professionalism. A defense lawyer who does not learn this lesson early runs the risk of making life difficult for both herself and her clients.

Etienne, *supra* note 57, at 2138 (citing JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE 9-11 (1982)).

77. *Melendez-Diaz*, 557 U.S. at 352 (Kennedy, J., dissenting) (emphasis added).

78. *Id.* (quoting *id.* at 328 (majority opinion)). Of course, the "self-interest" may also be an allocation of scarce defendant resources across the defender's large client pool. *See* Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2422 (1996).

79. *But see* Etienne, *supra* note 57, at 2138 n.164 (quoting EISENSTEIN & JACOB, *supra* note 76, at 27) ("[The] defense attorney who violates routine cooperative norms may be punished by having to wait until the end of the day to argue his motion; he may be given less time than he wishes for a lunch break in the middle of a trial; he may be kept beyond usual court hours for bench conferences.").

80. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny offer a similar example of criminal procedure rules that *appeared* to portend an increase in adversarial Sixth Amendment process, but have, in fact, had little adversarial impact due, in part, to counsel's control over the adversarial right. *Apprendi* vindicated the Sixth Amendment jury trial right as to all essential elements of a crime and, under certain sentencing schemes, *Apprendi* increased the number of essential elements that the prosecution would have to prove to a jury. *Id.* Thus *Apprendi* had significant potential to increase both the number of trials (by encouraging more defendants to request juries) and the number of elements to be proven at those trials. In its post-*Apprendi* opinions, the Court expressed concern about *Apprendi*'s potential to increase trial adversariness. Writing for the majority in *Blakely*, Justice Scalia explained that *Apprendi* need not impact the amount of adversariness in the criminal justice system as "nothing prevents a defendant from waiving his *Apprendi* rights." Blakely v. Washington, 542 U.S. 296, 310 (2004). Even in trial cases, Justice Scalia urged, *Apprendi* need not increase the length of a trial or the number of contested issues. If the defendant consents to judicial factfinding as to sentence enhancements, trials could proceed precisely

B. *The Judicial Reliance on* Gideon *To Justify Direct Regulation of Defendants' Control over "Tactical" Sixth Amendment Rights*

The Constitution does not assign control over Sixth Amendment rights to counsel or to the accused. Rather, the language of the Sixth Amendment characterizes the counsel guarantee as the right to the "Assistance of Counsel."[81] Accordingly, the Court has had to justify its decision to divest defendants of control over "tactical" Sixth Amendment rights.

In *Jones v. Barnes*, the Court linked the right to appointed counsel to "the superior ability of trained counsel" to advocate on the defendant's behalf.[82] As to client autonomy over even the fundamental right to appeal a criminal conviction, the Court linked the achievement of counsel's purpose with the divestment of client autonomy. While maintaining the defendant's authority over whether to file an appeal, the Court restricted the defendant's authority over the appellate claims to be made. This restriction was justified by the idea that client control would reduce counsel's effectiveness. Allowing the client "to decide what issues are to be pressed . . . seriously undermines the ability of counsel to present the client's case in accord with counsel's professional evaluation."[83] More to the point, the Court's general premise was not merely that counsel would be more proficient than the defendant in identifying the best issues for appeal, but that the defendant would be more inclined than counsel to increase the volume of appellate issues. Thus, any obligation for "appointed counsel . . . to raise every 'colorable' claim suggested by a client" is characterized as a disservice to "vigorous and effective advocacy."[84] The goal of effective and vigorous advocacy for indigent defendants was then converted into a constraint on the defendant's control over his case.

In 1988, the *Taylor* Court reiterated the core justifications for attorney control over nonfundamental rights. Thereafter, it has been clear that a "criminal defense attorney is obligated to follow his client's wishes only with

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as they had before *Apprendi*, *United States v. Booker*, 543 U.S. 220 (2005), and *Blakely*. *See Blakely*, 542 U.S. at 310. Moreover, "when a defendant pleads guilty," the Constitution permits "judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial fact-finding." *Id.* Thus, "[i]f appropriate waivers are procured, States may continue to offer judicial fact-finding as a matter of course to all defendants who plead guilty." *Id.* In short, *Apprendi* only meant an increase in adversarial procedures if the defense declined to stipulate to an element. And courts have repeatedly held that *counsel*—and not the defendant—controls the decision whether to stipulate to an element of the crime charged.

81. U.S. CONST. amend. VI.

82. 463 U.S. 745, 751 (1983).

83. *Id.*

84. *Id.* at 754.

regard to the fundamental issues that must be personally decided by the client."[85] If the decision is a tactical one—even if it concerns a right clearly enunciated by the Sixth Amendment—the decision is "left to the sound judgment of counsel," who "need not consult with the client about the matter or obtain the client's consent."[86]

Courts routinely justify this "reallocation of rights and duties" as "necessary to give effect to the constitutional rights granted to criminal defendants and to insure the effective operation of our adversarial system."[87] In other words, *Gideon*'s logic and the need for efficiency both justify the delegation of control to counsel.

For example, in *United States v. Gonzalez*, the Court considered whether counsel or the defendant controlled the right to have an Article III judge select the trial jury.[88] The Court began by observing that

> [n]umerous choices affecting conduct of the trial, including the objections to make, the witnesses to call, and the arguments to advance, depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for the trial.[89]

According to the Court, these legal complexities are so intricate and "mystifying" that it would be "difficult" for counsel to explain them to the defendant.[90] Indeed, an effort to explain them might prove "futile."[91] This account of the defendant's hopeless ignorance of legal matters, and his utter dependence upon counsel to guide him, is "one of the reasons for the right to counsel," and thus echoes *Gideon*'s premise.[92]

Of course, *Gideon* never held that the "guiding hand of counsel," should become the guiding handcuffs of counsel's assistance. Yet the *Gonzalez* Court conflates the meaningful assistance of counsel with tactical control by counsel. Counsel thus controls the proceedings, rather than wasting time on "futile"

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85. United States v. Chapman, 593 F.3d 365, 369 (4th Cir. 2010) (emphasis added).

86. *Id.*

87. *Id.*

88. Gonzalez v. United States, 553 U.S. 242 (2008). The alternative would be a magistrate judge.

89. *Id.* at 249.

90. *Id.*

91. *Id.* (quoting ABA STANDARDS, *supra* note 24, § 4-5.2 cmt.) ("Many of the rights of an accused, including constitutional rights, are such that only trained experts can comprehend their full significance, and an explanation to any but the most sophisticated client would be futile.").

92. *Id.*

conversations with the ignorant and mystified defendant.

Here too, efficiency is never far from the Court's mind in allocating authority over procedural rights. The *Gonzalez* Court reinforces its commitment to attorney control as a matter of trial efficiency: "to require in all instances" that the waiver of rights "be approved by the client could risk compromising the efficiencies and fairness that the trial process is designed to promote."[93] Unsurprisingly, the "fairness" aspect of this analysis turns on counsel's independent right to make decisions for the client. Defendants are assumed to make poor decisions that, in turn, might produce unfairness. To minimize the risk of this unfairness, courts must give attorneys full rein over trial procedures.

Consider, for example, the Eleventh Circuit's defense of attorney control over "tactical" Sixth Amendment rights. The court emphasizes defense counsel's dual roles as "an adviser to a client" and "an officer of the court."[94] Counsel's "chief reason for being present" at trial is not to assist the defendant in exercising his Sixth Amendment rights, but "to exercise his professional judgment to decide tactics."[95] The Eleventh Circuit then equates defendant control over tactical choices with pro se representation: "When the defendant is given the last word about how his case will be tried, the defendant becomes his own trial lawyer."[96] And, if the judiciary "add[s] to the list of circumstances in which a defendant can trump his counsel's decision, the adversarial system becomes less effective."[97] One may speculate whether the court's concern about an "effective" system reflects a concern about accuracy or efficiency. However, there is no possibility that the court is concerned about defendant autonomy or the exercise of adversarial procedures for their own sake.

Of course, efficiency and "effectiveness" are rhetorically unattractive reasons for ceding control over constitutional rights. Moreover, *Gideon* itself posits both fairness and autonomy values in counsel's appointment.[98] Accordingly, courts also rely on what one might call a *Gideon*-agency theory to

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93. *Id.*

94. United States v. Burke, 257 F.3d 1321, 1323 (11th Cir. 2001). Under the "officer of the court" reasoning, some courts have argued that attorney control is necessary to avoid forcing attorneys to engage in unethical conduct. *See, e.g.*, United States v. Ayesh, 765 F. Supp. 2d 763 (E.D. Va. 2011). However compelling that argument might be when a defendant directs counsel to act unethically, it cannot explain why counsel should be allowed to disregard a defendant's lawful request for an adversarial process that may be unwise, but is not unethical.

95. *Burke*, 257 F.3d at 1323.

96. *Id.*

97. *Id.*

98. Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963).

justify counsel's control over a defendant's "tactical" rights. Under this rationale, when a defendant accepts representation by counsel—whether appointed or retained—the defendant enters into an agency relationship and is thus bound by the actions of his agent-attorney.

In articulating the agency rationale for binding criminal defendants to their attorneys, the Supreme Court cites to the 1962 civil case of *Link v. Wabash Railroad Co.*,[99] and lower courts have followed suit.[100] But comparing *Gideon*-representation to *Wabash* and true agency is utterly dishonest.

Wabash was the plaintiff in a civil suit, and he retained counsel to represent him.[101] Counsel failed to appear at a pretrial conference on Wabash's claim, and the court dismissed the suit for want of prosecution.[102] The Supreme Court held that it was not "an unjust penalty" to dismiss Wabash's claim because of his attorney's failure to file.[103] The Court explained:

> Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."[104]

Of course, on its facts *Wabash* is inapposite to representation by appointed counsel.

Moreover, with cases such as *Taylor* and *Barnes*, the Supreme Court has mandated that a relationship between a criminal defendant and his counsel will not be a true agency relationship. A criminal defense attorney's obligations as an agent do not "mirror the obligations of a general agent representing his

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99. 370 U.S. 626 (1962); New York v. Hill, 528 U.S. 110, 114-15 (2000).

100. United States v. Muhammad, 165 F.3d 327, 331 (5th Cir. 1999); Hudson v. Pennsylvania, No. 07-1685, 2009 WL 137313, at *10 (W.D. Pa. Jan. 20, 2009). These citations to *Wabash* do not distinguish between cases in which the defendant was appointed counsel and cases in which the defendant retained counsel. *See, e.g.*, Gonzalez v. United States, 553 U.S. 242, 249 (2008). Nor does the Court distinguish between criminal defendants who have a right to counsel and postconviction litigants who have no such right. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722 (1991). *Maples v. Thomas*, 132 S. Ct. 912 (2012), is not inconsistent with these decisions; *Maples* held that an indigent habeas petitioner and his counsel had an agency relationship and that counsel's abandonment of his client terminated the agency.

101. *Wabash*, 370 U.S. at 627-29.

102. *Id.* at 633.

103. *Id.*

104. *Id.* at 633-34 (quoting Smith v. Ayer, 101 U.S. 320, 326 (1879)).

principal on civil matters."[105] Typically an agent is "authorized to act for the principal in all matters within the scope of the agent's authority."[106] However, constitutional criminal procedure limits the scope of the authority of the criminal defense attorney-agent and the criminal defendant-principal. It limits the authority of the attorney-agent by requiring that the principal—the criminal defendant—"make the critical decisions about whether to plead guilty or go to trial, whether to testify, and whether to appeal."[107] More to the point, the fundamental rights doctrine restricts the authority of the defendant-principal in ways utterly foreign to a true agency relationship. In a true agency relationship, the principal "has the authority to dictate the *manner* in which his agent will carry out his duties."[108] For criminal defendants, that is not true; the Supreme Court has placed "certain tactical decisions solely in the hands" of the agent—the criminal defense attorney.[109]

Accordingly, a defendant's "expressed disagreement" with counsel's decision over "tactical" Sixth Amendment rights does not "convert the [decision about the right] into one that must be decided by the client."[110] Rather, "*even when the defendant expresse[s] a contrary wish to his lawyer*," the lawyer retains control over the decision.[111] Indeed, one federal appellate court has even held that a "trial court overreached its authority and infringed" upon the attorney-client relationship when the court required defense counsel to honor the defendant's request to call additional witnesses.[112]

This *Gideon*-agency doctrine works as a hedge against defendant-driven adversariness. In the Fifth Circuit's words, the criminal justice system relies upon "representative litigation, in which each party is deemed bound by the acts of his lawyer-agent,"[113] and "[o]ne can only imagine the havoc that would

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

106. *Id.*; *see also* RESTATEMENT (THIRD) OF AGENCY § 2.02 (2006).

107. *Chapman*, 593 F.3d at 370.

108. *Id.* (emphasis added). This is true regardless of whether counsel is appointed or retained. "The attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation." Coleman v. Thompson, 501 U.S. 722, 753 (1991). "Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program." Polk Cnty. v. Dodson, 454 U.S. 312, 318 (1981) (quoting ABA STANDARDS FOR CRIMINAL JUSTICE § 4-3.9 (2d ed. 1980)).

109. *Chapman*, 593 F.3d at 369.

110. *Id.*

111. *Id.* (quoting United States v. Burke, 257 F.3d 1321, 1324 (11th Cir. 2001)).

112. Blanco v. Singletary, 943 F.2d 1477, 1495 (11th Cir. 1991).

113. United States v. Muhammad, 165 F.3d 327, 331 (5th Cir. 1999) (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 634 (1962)).

ensue should we allow otherwise."[114] Similarly, the Eleventh Circuit believes that there is a war to be waged between an army of defendants who want to direct their counsel's actions and a judiciary that insists upon *Gideon*-agency. Defending an attorney's control over the defendant's Sixth Amendment rights, the Eleventh Circuit proclaimed that "[t]he sound functioning of the adversarial system" was at stake.[115] That system "is critical to the American system of criminal justice. We intend to defend it."[116] The defendant seeking control over his Sixth Amendment right is the enemy combatant who, if given control, would wreak destruction upon the adversarial system in which he is charged. The criminal defendant's invocation of his constitutional rights threatens the "sound functioning" of the constitutional system that has bestowed those rights upon him.

Thus *Gideon* itself has become an essential piece of the structure that seeks to minimize the invocation of Sixth Amendment adversarial procedures. *Gideon* representation has become a defendant's de facto relinquishment of the very rights his lawyer should protect.

Of course, "the counsel clause . . . say[s] that counsel's job is to 'assist[]' the accused in making 'his'—the accused's—defense, and it is hard to see how the accused would still own his defense if some government-imposed agent took it over against his will."[117] Moreover, the Supreme Court has also held that the right to counsel implies its negative: a criminal defendant need not accept the assistance of counsel.[118] Every defendant has the right to self-representation, even if it is "ultimately to his own detriment."[119]

When announcing the *Faretta* right to self-representation, the Court characterized counsel as "an aid to a willing defendant."[120] According to *Faretta*, the right to counsel "supplements" the adversarial structures associated with criminal trials.[121] The defendant owns constitutional entitlements, such as the right to confrontation or the right to compulsory process. The attorney assists the defendant in exercising those entitlements. After all, the Sixth Amendment "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant."[122]

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114. *Muhammad*, 165 F.3d at 331 (emphasis added).

115. *Burke*, 257 F.3d at 1323.

116. *Id.*

117. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 114 (1998).

118. Faretta v. California, 422 U.S. 806, 807 (1975).

119. *Id.* at 834.

120. *Id.* at 820.

121. *Id.*

122. *Id.*

Even in *Faretta*, the Court cautioned that the realities of trial procedure "may allocate to the counsel the power to make binding decisions of trial strategy in many areas."[123] However, the *Faretta* Court warned that "[t]his allocation can only be justified . . . by the defendant's consent, at the outset, to accept counsel as his representative."[124]

Faretta never explained the prerequisites to a "defendant's consent" for counsel to act as his representative. A straightforward assessment of *Faretta* would seem to endorse a client-command view of Sixth Amendment rights, modified by clients' consent to delegate to their "assistant" attorneys decisions about trial strategy. However, the Court has consistently refused to endorse such a defendant-autonomy model of *Gideon* representation—a model in which lawyers educate and advise clients but clients ultimately control the defense. Rather, the Court has firmly adhered to the view that, without any explicit waiver or consent, a represented defendant controls only his "fundamental" rights; counsel controls all others. And, if a defendant complains that counsel was ineffective for failing to follow the defendant-principal's direction about a "tactical" right, his claim will be reviewed under *Strickland*'s toothless standard for ineffective assistance of counsel.

III. INDIRECTLY REGULATING DEFENDANT-DRIVEN ADVERSARINESS BY APPLYING *STRICKLAND* TO DEPRIVATIONS OF FUNDAMENTAL RIGHTS

One might assume *Strickland* applies only to those nonfundamental rights that counsel is already empowered to waive on a defendant's behalf. Yet, even if a right is fundamental and therefore waivable only by the defendant, the Supreme Court applies *Strickland*'s ineffective assistance analysis to counsel's interference with that right.[125] Thus, at the appellate level, *Strickland* indirectly regulates defendant-driven adversariness about the invocation of rights that are both fundamental and nonfundamental.

The Court has routinely applied *Strickland* to cases in which a defendant claims that counsel interfered with his exercise of a fundamental right.[126] When

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123. *Id.*

124. *Id.* at 820-21 (emphasis added).

125. *See, e.g.*, Missouri v. Frye, 132 S. Ct. 1399, 1405 (2012); Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012).

126. *See, e.g.*, Roe v. Flores-Ortega, 528 U.S. 470 (2000) (holding that where counsel fails to file a notice of appeal, the defendant's claim of error will be evaluated as a claim of ineffective assistance of counsel); Hill v. Lockhart, 474 U.S. 52 (1985) (holding that in such cases, *Strickland* analysis applies to claims about the entry of guilty pleas).

confronted with questions about a defendant's objection to counsel's conduct regarding fundamental rights, the Court has refused to hold that counsel's defiance of the defendant's wishes constitutes a direct violation of the right in question, rather than a potential instance of ineffective assistance of counsel. This is in marked contrast to the standards applied when a court or the prosecution interferes with the defendant's exercise of a fundamental right.[127]

Even absent specific Supreme Court precedent, lower courts have applied *Strickland* to other fundamental rights, such as the right to testify.[128] Located in the Due Process Clause of the Fifth Amendment and the Compulsory Process Clause of the Sixth Amendment, the right to testify is "fundamental" and "personal" to a criminal defendant.[129] Accordingly, the defendant—not counsel—retains exclusive authority to invoke or waive it. The Eleventh Circuit has explicitly stated that "[a] criminal defendant clearly cannot be compelled to testify by defense counsel," nor can a "criminal defendant . . . be compelled to remain silent by defense counsel."[130] The defendant alone controls the fundamental right to testify.

Nevertheless, when counsel prevents a defendant from testifying—as opposed to merely giving bad advice—appellate courts routinely analyze those cases as claims of ineffective assistance of counsel.[131] Every federal circuit court of appeals to consider the issue has held that when counsel deprives a defendant of the fundamental right to testify, the rights deprivation does not trigger the harmless-error analysis that would apply if the court had caused the deprivation. Rather, a defendant can obtain relief only if he can satisfy *Strickland*'s challenging prejudice prong. Small wonder then that, as of 2012, "no defendant in any court in the United States has been able to prove *Strickland* prejudice on the basis of his counsel [erroneously] advising him not

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127. *See, e.g.*, United States v. Mullins, 315 F.3d 449, 452-53 (5th Cir. 2002) (holding that the court should address a possible violation of the substantive right to testify where the challenged conduct was by the court or the prosecutor, but should use *Strickland* analysis when defense counsel's conduct is at issue).

128. Arguably, *Nix v. Whiteside*, 475 U.S. 157 (1986), could be understood as a case asking whether a defendant has an absolute right to testify, regardless of his attorney's wishes. Seen in that light, *Nix* represents a decision to apply *Strickland* to the right to testify.

129. *See* Jones v. Barnes, 463 U.S. 745, 751 (1983); Brown v. Artuz, 124 F.3d 73, 78 (2d Cir. 1997); Teague v. United States, 953 F.2d 1525, 1532 (11th Cir. 1992) (en banc); Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1745-47 (2011).

130. *Teague*, 953 F.2d at 1532.

131. *E.g.*, Bray v. Cason, 375 F. App'x 466, 470-71 (6th Cir. 2010); Battle v. Sirmons, 304 F. App'x 688, 693 (10th Cir. 2008); United States v. Rashaad, 249 F. App'x 972, 973 (4th Cir. 2007); *Teague*, 953 F.2d at 1534-35. *But see* Passos-Paternina v. United States, 201 F.3d 428 (1st Cir. 1990) (recognizing a dispute over whether *Strickland* or the *Brecht* harmless-error standard applied, but finding that the defendant would lose under either standard).

to testify in his own defense at trial."[132] The application of *Strickland* to a lawyer's deprivation of a client's fundamental rights accomplishes at the appellate level what the *Gideon*-agency rule never could accomplish at the trial level: the utter elimination of meaningful defendant-driven invocation of constitutional rights.

IV. SOME OBSERVATIONS ABOUT THE CONSEQUENCES OF REGULATING DEFENDANT-DRIVEN ADVERSARINESS

A. Gideon*-Agency and* Strickland *Analysis Skew Behavior by Institutional Participants in the Criminal Justice System*

1. Skewing the Behavior of Lawyers and Professional Witnesses

Taken together, *Gideon*-agency and *Strickland* analysis skew the behaviors of participants in the adversarial system. Defense lawyers know that they have unilateral control over tactical rights. And, the application of *Strickland* to fundamental rights alerts defense counsel that there will be no judicial condemnation if they assume unauthorized control of fundamental rights.[133]

But the negative systemic effects of cabining defendant-driven adversariness extend far beyond the underregulation of defense counsel's conduct. The trial and appellate regulation of defendant adversariness sends powerful signals to prosecutors and law enforcement officers. As I have observed elsewhere, at the trial level, a reduction in adversarial procedure means a reduction in the power of trial courts to regulate the extrajudicial behavior of law enforcement and prosecutors.[134]

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132. United States v. Wines, 691 F.3d 599, 606 (5th Cir. 2012). This was not inevitable. As recently as the mid-1990s, some courts applied the *Brecht* harmless-error standard to claims that counsel prevented a defendant from exercising the right to testify. Jordan v. Hargett, 34 F.3d 310, 316 n.5 (5th Cir. 1994) (observing the agreement among some courts that "the right of a defendant to testify on his own behalf is a fundamental constitutional right entirely separate from his right to counsel"). Application of the *Strickland* standard "ignores recognition of the right as one personal to the defendant which can never be waived by counsel, competent or not." *Id.* Six years later, without acknowledging its reversal of course, the Fifth Circuit repudiated this holding, ruling that when a defendant alleges counsel prevented him from testifying, the "appropriate vehicle . . . is a claim of ineffective assistance of counsel." United States v. Brown, 217 F.3d 247, 258-59 (5th Cir. 2000), *vacated on other grounds sub nom.* Randle v. United States, 531 U.S. 1136 (2001).

133. There are many other reasons why defense counsel may eschew adversarial procedures. However, my focus here is on how the Supreme Court uses *Gideon* to limit *defendants'* invocation of adversarial procedure.

134. *See* Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475 (2006).

In the Confrontation Clause and *Apprendi* contexts, professional witnesses already know the slim likelihood that any particular case will go to trial. *Gideon*-agency rules help to confirm that, even in those rare cases that do go to trial, defense attorneys are unlikely to insist upon confronting forensic witness either to contest forensic reports or to contest essential elements related to the weight and quantity of controlled substances. This encourages even the most well-intentioned government actors to relax their quality-control and record-keeping standards. And the ill-intentioned or malicious government witness has an increasing sense of invulnerability. If no one ever insists upon cross-examining a forensic witness, why should the witness not cut corners, omit confirmation tests, or even falsify results? Without an adversarial process, there is no legal deterrent to careless, sloppy, or manufactured police work.

2. Skewing Judicial Behavior

Both *Gideon*-agency and wholesale reliance on *Strickland* review create strong incentives for trial courts to oversee less and less of the trial process by delegating more and more to defense counsel, most of whom are underfunded and overworked. Together, *Gideon*-agency and *Strickland* review offer an almost bulletproof way for trial judges to avoid the risk of reversal: foist as many potential judicial errors as possible onto trial counsel.

Judicial rulings are generally subject to harmless-error analysis; attorney errors are subject to the far less vigorous standard of *Strickland*. *Gideon*-agency rules already mean that defense counsel has responsibility for invoking most Sixth Amendment rights. Any judicial engagement in that process risks converting the inquiry from an ineffective assistance of counsel claim to one of judicial error.[135] Since claims that counsel violated a defendant's fundamental rights are also analyzed under *Strickland*, trial courts have little incentive to educate a defendant about those rights, much less to explain that the defendant controls those rights. By leaving the matters in counsel's "capable" hands, the Court shifts the risk of adverse appellate review from the trial court to trial counsel. This shift simultaneously increases the likelihood that the trial outcome will survive appellate review: the court shrugs off the harmless-error risk, and counsel shoulders the extremely small risk of a finding of ineffectiveness under *Strickland*. Thus, it is not in a trial judge's best interest to make an effort to guarantee that a defendant is given due control over

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135. *See, e.g.*, Williams v. United States, 632 F.3d 129, 133 (4th Cir. 2011) (holding that whatever the proper allocation of authority between counsel and client, it was trial error for the Court to read a stipulation to the jury *once the Court knew* that the defendant did not consent to the stipulation).

fundamental rights.[136]

This reallocation of judicial interests is not without significance. Once the inquiry is about the ineffective assistance of counsel rather than about the deprivation of the right in question, the legal inquiry shifts, as does the burden of proof. In the ineffective assistance of counsel inquiry, the "error" being assessed is the attorney's performance—that is, the reason why the rights deprivation occurred. In the harmless-error inquiry, the why of the rights deprivation is irrelevant; once the rights deprivation occurs, the inquiry focuses simply on whether the error was harmless. More importantly, in ineffective assistance analysis, the burden is on the defendant to show a reasonable probability that but for counsel's unprofessional performance, the outcome of the case would have been different.[137] In contrast, in harmless-error analysis, the prosecution bears the burden of proving beyond a reasonable doubt that the error did not affect the outcome of the case.

True, "defendants usually lose" on the merits of Sixth Amendment claims.[138] And "even when defendants win on the merits," they often lose under the harmless-error standard.[139] However, "one should not minimize the shadow these rights cast" through the power of harmless-error review.[140] Harmless-error review helps to encourage judicial behaviors that protect defendant rights. When given a way to avoid the "shadow" of harmless error, judges eagerly take it, by minimizing their engagement in the protection of defendants' rights and maximizing the accountability of defense counsel.

3. Minimizing the Significance of Appellate Opinions

Many commentators have already noted *Strickland*'s tendency to underdevelop appellate law about important issues.[141] Under *Strickland*, a defendant must prove both that counsel's performance was deficient and that the deficient performance prejudiced the defendant.[142] However, "even if

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136. For a discussion about how judges respond to the risk of reversal, see Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 77-78 (1994). For a more extended discussion about judicial consideration of appellate risks, see Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129 (1980).

137. Strickland v. Washington, 466 U.S. 668, 696 (1984).

138. Stuntz, *supra* note 2, at 13.

139. *Id.*

140. *Id.*

141. William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995).

142. *Strickland*, 466 U.S. at 697.

counsel's behavior manifests a total lack of concern for his client and clearly falls far below acceptable professional norms, his client's ineffectiveness claim will fail if she suffered no prejudice from her attorney's behavior."[143] If a reviewing court concludes that "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed."[144] Thus reviewing courts are actively encouraged to avoid making substantive rulings about the rights violation if a simpler ruling about prejudice will suffice.

Defaulting to a prejudice analysis makes it less likely that appellate courts will produce opinions that alert future generations of defense counsel and trial judges about what effective assistance of counsel requires. Application of the *Strickland* standard to defense counsel's management of an adversarial right means that courts can readily avoid developing this important area of law. For example, if an appellate court concludes that defendant's failure to testify did not prejudice the outcome of the case, it need never consider the attorney performance issues related to the deprivation of the right to testify.

B. Gideon*-Agency and* Strickland *Review Produce Perverse Outcomes*

Perhaps unsurprisingly, the regulation of adversariness through *Gideon* and *Strickland* produces equally perverse outcomes. Consider, for example, two defendants, *A* and *B*, who are charged with two separate crimes in two separate cases. In each case, an alleged eyewitness testifies before the grand jury. In *A*'s case, shortly before trial, defense counsel stipulates to the admission of the eyewitness's grand jury testimony. Counsel never consults with *A* about this decision, and it is only at trial that *A* learns he will have no opportunity to confront or cross-examine the eyewitness.

In *B*'s case, shortly before trial, the eyewitness is murdered. The prosecution argues that *B* procured the witness's murder with the express goal of preventing the witness from testifying at *B*'s trial. *B* has notice of the prosecution's position, and the trial court conducts an adversarial hearing on the prosecution's motion. The court finds in favor of the prosecution and, under the doctrine of forfeiture-by-wrongdoing, holds that *B* has forfeited any Confrontation Clause objection to the admission of the eyewitness's grand jury testimony.[145] Each case proceeds to trial. Each defendant is convicted.

Now, consider the perverse outcomes of the *Gideon*-agency rule. At trial,

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143. DeLuca v. Lord, 858 F. Supp. 1330, 1346 (S.D.N.Y. 1994).

144. *Strickland*, 466 U.S. at 697.

145. Giles v. California, 554 U.S. 353 (2008).

defendant *A*, who engaged in no wrongdoing, receives the same level of confrontation as did *B*, who procured a witness's unavailability. And, on appeal, *A* fares worse than *B*. When *B* appeals the use of unconfronted eyewitness testimony, the issue will be addressed on direct appeal. The appellate court will review the hearing transcript and consider the validity of the trial court's finding of forfeiture-by-wrongdoing. If the trial court's ruling was erroneous, then *B*'s conviction will be reversed unless the prosecution can show that the confrontation error was harmless beyond a reasonable doubt. In contrast, *A* cannot be heard on direct appeal to complain that counsel deprived him of the right to confront the eyewitness. Under *Gideon*-agency, *A* is responsible for her attorney's stipulation, even though the attorney never discussed it with *A*. On collateral attack, *A* can only raise a claim of ineffective assistance of counsel based on counsel's strategic decision to stipulate. And, even if counsel's decision was strategically indefensible, *A* has no remedy unless *A* can prove prejudice. Surely *Gideon* was never meant to produce these types of perverse results.

CONCLUSION

The most alarming perversities of *Gideon*-agency and *Strickland* fundamental rights review may be yet to come. In a little-noticed concurrence in *Gonzalez v. United States*, Justice Scalia urged that the Court abandon the specious divide between tactical and fundamental rights.[146] In its place, Justice Scalia offered an alarming alternative: "I would therefore adopt the rule that, as a constitutional matter, all waivable rights (except, of course, the right to counsel) can be waived by counsel."[147] In a system that places a very high value on the individual right to confrontation and on the freedom-of-choice principles articulated in *Faretta*, the notion of an implied waiver of such depth and breadth is extraordinary.

When *Gideon* was decided, the legal community believed deeply that "[t]he adversary system . . . makes essential and invaluable contributions to the maintenance of the free society."[148] Real adversarial challenge—and not just its possibility—was deemed essential to maintaining the American criminal justice system:

> The essence of the adversary system is challenge. The survival of our

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146. Gonzalez v. United States, 553 U.S. 242, 254 (Scalia, J., concurring).

147. *Id.* at 257.

148. FRANCIS A. ALLEN ET AL., REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 10-11 (1963).

> system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. The proper performance of the defense function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions.[149]

Fifty years later, the Supreme Court rhetorically exalts the Sixth Amendment as the paradigmatic expression of our constitutional criminal procedure, but routinely rationalizes away the exercise of those Sixth Amendment rights by the defendants entitled to invoke them. For defendants, the cost of *Gideon* has been the loss of control over the rights *Gideon* was designed to protect. For our criminal justice system, the cost has been the erosion of the adversarial system *Gideon* was designed to protect.

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149. *Id.* at 9-11.