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Sharon G. Scudder

With Friends Like You, Who Needs a Jury? A Response to the Legitimization of Conceding a Client's Guilt*

INTRODUCTION

> "Of all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."[1]

Joe Elton Nixon was charged with murder and desperately needed an attorney to protect his rights. Nixon had a low IQ and had suffered from multiple mental and emotional disabilities throughout his life, which had required periodic psychiatric treatment. Nixon's behavior was sometimes erratic and uncooperative.[2] When Nixon was arrested in 1984 for the murder of a Tallahassee woman, the court appointed an attorney to defend him against Florida's prosecution.[3] Preserving his constitutional right to a fair trial, Nixon entered a plea of not guilty.[4] Nixon's court-appointed attorney stood before the jury on the first day of his murder trial, however, and delivered a staggering opening statement.[5] Without Nixon's consent, his attorney told the jury that Nixon indeed was guilty of the murder beyond a reasonable doubt.[6] The opening statement conceding his guilt was followed by a sparse cross-examination of a few of the state's witnesses and no defense at all.[7]

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1. Walter V. Schaefer, *Federalism and State Criminal Procedure,* 70 HARV. L. REV. 1, 8 (1956).

2. *See* Florida v. Nixon, 543 U.S. 175, 183-85 (2004) (reversing Florida Supreme Court's judgment that defendant received ineffective assistance of counsel), *remanded to* Nixon v. State, 932 So.2d 1009 (Fla. 2006) (affirming conviction, denying rehearing and denying habeas relief). *See also* Nixon v. State, 857 So.2d 172, 187 (Fla. 2003); Nixon v. Singletary, 758 So.2d 618, 625 (Fla. 2000).

3. *See* Nixon v. State, 572 So.2d 1336 (Fla. 1990), *rev'd,* 857 So.2d 172 (Fla. 2003), *rev'd,* Florida v. Nixon, 543 U.S. 175 (2004), *remanded to* Nixon v. State, 932 So.2d 1009 (Fla. 2006).

4. *Id.*

5. Nixon v. Singletary, 758 So.2d 618 (Fla. 2000) (remanding for evidentiary hearing to determine if Nixon consented to the concession of guilt and denying direct appeal); *see also* Florida v. Nixon, 543 U.S. 175 (2004).

6. Nixon v. Singletary, 758 So.2d 618 (Fla. 2000).

7. *See* Nixon v. State, 857 So.2d 172, 187 (Fla. 2003); *rev'd,* Florida v. Nixon, 543 U.S. 175, 183 (2004); *remanded to* Nixon v. State, 932 So.2d 1009 (Fla. 2006).

The advocacy of Nixon's attorney was all that stood between Nixon and the death penalty, but Nixon's attorney unilaterally decided that he would determine guilt rather than allow a jury of Nixon's peers to make this determination. Intended as a strategy to preserve credibility for the sentencing phase, the attorney's concession instead removed all question of guilt and any need for hesitation in sentencing.[8] With all lingering doubt of guilt removed in the minds of jurors, Joe Elton Nixon was convicted of murder and then sentenced to death after only three hours of jury deliberation.[9]

The United States Supreme Court announced a sweeping rule in *Florida v. Nixon* that the concession of a defendant's guilt by his own attorney without express consent is not presumed to be prejudicial to the defendant and does not deprive the defendant of his Sixth Amendment right to counsel.[10] The ruling overturned the Florida Supreme Court, which had determined that a lawyer who concedes a defendant's guilt in the absence of explicit authorization has deprived the defendant of the effective assistance of counsel.[11] The final ruling in *Nixon* is based upon a case with graphically compelling facts,[12] thus the precedent it established may be limited by those facts and the overwhelming evidence of Nixon's guilt. If interpreted broadly or extended, however, *Nixon* may take the legal profession one more step down the road of blind deference to criminal defense lawyers at the great expense of the constitutional rights of the accused defendants.

In response to the potential impact of the *Nixon* decision on the important Sixth Amendment right to effective counsel for the accused, this comment reviews the current legal standard and then advances two proposals. First, *Nixon* should be narrowly interpreted, because permitting attorneys to concede guilt without client consent is completely inconsistent with the protections afforded guilty pleas and confessions and further weakens the constitutional protection of effective

8. *See* William Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 28 (1988); Michael Mello & Ruthann Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31, 59-60 (1985); Lawrence T. White, *Juror Decision-Making in the Capital Penalty Trial*, 11 LAW & HUM. BEHAV. 113, 123-26 (1987).

9. *See* Florida v. Nixon, 543 U.S. 175, 184 (2004) (citing 21 Record 4013).

10. *Nixon*, 543 U.S. 175.

11. Nixon v. State, 857 So.2d 172, 174 (Fla. 2003), *rev'd*, Florida v. Nixon, 543 U.S. 175 (2004), *remanded to* Nixon v. State, 932 So.2d 1009 (Fla. 2006).

12. *Nixon*, 543 U.S. 175 (affirming Nixon's sentence and conviction of murder after presentation of unchallenged prosecution evidence that Nixon tied the victim to a tree with jumper cables and killed her by setting her on fire while she was still alive).

assistance of counsel. Second, the American Bar Association and state bar associations should specifically require express consent prior to a lawyer conceding a client's guilt as a matter of professional ethics within the Rules of Professional Conduct to more clearly and consistently define an acceptable standard of professional conduct.

BACKGROUND

I. THE HISTORICAL CONTEXT OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the Constitution guarantees certain rights to those who stand accused of a crime.[13] One of the rights protected within the Sixth Amendment is the right "to have the Assistance of Counsel" for the defense of the accused.[14] The right to have an attorney when accused of a crime was a late development in English law, but this right was enforced and protected early in the development of the American legal system.[15]

Criminal defendants in American courts have long had the right to privately retained counsel.[16] It was not until 1932, however, that the constitutional right of an indigent defendant to court appointed counsel was first announced.[17] In the landmark case *Powell v. Alabama,* the Supreme Court asserted that the right to counsel is an essential constitutional guarantee, and the Court explicitly described the inability of an average defendant to protect himself in a criminal trial without representation.[18] This language was strengthened by

13. U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.").

14. *Id.*

15. Schaefer, *supra* note 1, at 8.

16. *Id.*

17. Powell v. Alabama, 287 U.S. 45 (1932).

18. *Id.* at 68-69 ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though

Johnson v. Zerbst, in which the Court asserted the defendant's effective assistance of counsel as a prerequisite to jurisdiction of the court to hear a criminal case.[19] Further, in *Gideon v. Wainwright*, the Supreme Court extended the right to effective counsel in criminal trials to state proceedings by incorporation of the Sixth Amendment through the Fourteenth Amendment and mandated appointed counsel to ensure a fair criminal trial.[20]

The Court has also noted that the constitutional right to counsel has some demands on the nature of representation.[21] The right to the assistance of *effective* counsel is implied in the enumerated "right to counsel" guaranteed by the Constitution.[22] In *Avery v. Alabama*, the Court noted that the right to counsel is not satisfied by the mere formality of simply appointing an attorney.[23] In *Strickland v. Washington*, the Court went further, stating that the entire purpose of the right to counsel is to guarantee assistance from the attorney that is sufficient to warrant the defendant's uncompromised reliance on the proceeding.[24]

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he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.").

19. 304 U.S. 458, 467-68 (1938) ("Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty.").

20. 372 U.S. 335, 342-45 (1963) (emphasizing the adversarial nature of the criminal justice system and the need for defendants to have counsel but leaving open the question of whether the ruling also applied to misdemeanors).

21. *See* Reece v. Georgia, 350 U.S. 85, 90 (1955); McMann v. Richardson, 397 U.S. 759, 771 (1970) ("[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.").

22. *See* Avery v. Alabama, 308 U.S. 444, 445-46 (1940); *Reece*, 350 U.S. at 90; Glasser v. United States, 315 U.S. 60, 69-70 (1942); *Powell*, 287 U.S. at 57.

23. *Avery*, 308 U.S. at 446.

24. 466 U.S. 668, 686 (1984) ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.").

II. THE CURRENT STANDARD FOR DETERMINING EFFECTIVE ASSISTANCE OF COUNSEL

For years, lower courts debated the interpretation of "effective" counsel and assigned a wide variety of tests, resulting in different outcomes among the federal courts of appeal.[25] In 1984, the Supreme Court responded by firmly establishing the current general test of ineffective assistance of counsel in *Strickland v. Washington*.[26] For a criminal defendant to prove his attorney has provided ineffective assistance of counsel under a Sixth Amendment claim for relief, a two-pronged test now known as the *Strickland* test must be satisfied.[27] First, the defendant must prove that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms.[28] Second, the defendant must prove that the defense was prejudiced to the extent that there is a reasonable probability of a different result with effective assistance.[29]

The review of counsel's representation under the *Strickland* standard is highly deferential, with "counsel . . . strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."[30] The evaluation of attorney performance should reflect the attorney's perspective at the time, without the benefit of hindsight.[31] The challenging defendant must also prove specific acts or omissions that did not comport with prevailing professional norms.[32]

25. *Id.* at 713-14 (Marshall, J., dissenting) (explaining in detail the path that led to the Court's holding in *Strickland*, and describing the prior assortment of standards). *See also* State v. Pacheco, 588 P.2d 830, 833 (Ariz. 1978); Line v. State, 397 N.E.2d 975, 976 (Ind. 1979); Hoover v. State, 606 S.W.2d 749, 751 (Ark. 1980).

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

27. *Id.* at 688.

28. *Id.* ("The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions.").

29. *Id.* at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.").

30. *Id.* at 690.

31. *Id.* at 689-90.

32. *Id.* at 690.

III. "*CRONIC*" EXCEPTIONS TO PROVING PREJUDICE AND THE PRACTICAL IMPLICATIONS

The Court also gave exceptions to the application of the two-prong *Strickland* test on the same day *Strickland* was decided in *United States v. Cronic*.[33] While denying that the defendant in the case suffered ineffective representation of counsel, the *Cronic* Court described four circumstances in which prejudice to the defendant would be presumed and need not be proven.[34] Under any one of these four circumstances, the defendant does not have to prove the prejudice prong because the circumstances are "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[35] Prejudice is presumed, and the *Cronic* test is applied:

1. When the "accused is denied counsel at a critical stage of his trial";[36]
2. When counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable";[37]
3. When counsel is available but "the likelihood that any lawyer, even a fully competent one, could provide effective assistance

33. 466 U.S. 648, 659-60 (1984); *see also Strickland*, 466 U.S. 668.

34. *Cronic*, 466 U.S. at 659-660.

35. *Id.* at 658; *see, e.g.*, Flanagan v. United States, 465 U.S. 259, 267-69 (1984); Estelle v. Williams, 425 U.S. 501, 504 (1976); Murphy v. Florida, 421 U.S. 794, 798 (1975); Payne v. Arkansas, 356 U.S. 560, 563-64 (1958).

36. *Cronic*, 466 U.S. at 659. This exception was developed and has since been applied by the Court when attorneys were either totally absent or were prevented from providing assistance during critical stages. *See* Penson v. Ohio, 488 U.S. 75, 89 (1988) (applying *Cronic* exception to reverse judgment of lower court because defendant was denied counsel during his appeal when the attorney withdrew completely); Geders v. United States, 425 U.S. 80, 91 (1976) ("[A]n order preventing petitioner from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct- and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment."); Robinson v. Ignacio, 360 F.3d 1044, 1061 (9th Cir. 2004) (presuming prejudice when defendant was denied counsel at the sentencing phase, and remanding for new sentencing).

37. *Cronic*, 466 U.S. at 659. *See also* Bell v. Cone, 535 U.S. 685, 696-97 (2002) ("When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete"). *See generally* Davis v. Alaska, 415 U.S. 308 (1974) (demonstrating the development of the *Cronic* exception and finding counsel presumptively ineffective because petitioner was denied the right to cross examine a key prosecution witness who was a juvenile).

is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial";[38] or

4. When the attorney's representation presents a true conflict of interest.[39]

In practice, the most important battle to win in proving an ineffective counsel claim may be persuading the court to apply a *Cronic* exception rather than the two-prong *Strickland* standard, due to *Strickland*'s almost insurmountable burden of proof.[40] The denial of effective assistance of counsel is a very common claim on appeal, particularly in death sentence cases.[41] A reversal for a successful ineffective assistance of counsel claim is exceedingly rare, however, "even if the defendant's lawyer was asleep, drunk, unprepared, or unknowledgeable."[42] The *Strickland* test has been criticized as "allowing slipshod representation of indigent defendants because it creates a presumption that counsel was competent and places the burden of showing prejudice upon the defendant."[43]

Proving the prejudice prong of *Strickland* is especially difficult if the attorney has, indeed, been ineffective.[44] If the attorney failed to meticulously investigate and present a compelling defense case, the defendant is much less likely to have material with which to prove the attorney failed "because the abdication results in an incomplete trial record from which a court cannot properly evaluate whether a defendant has or has not suffered prejudice from the attorney's conduct."[45]

38. *Cronic*, 466 U.S. at 659-60. *See generally* Powell v. Alabama, 287 U.S. 45, 53-54 (1932) (demonstrating landmark application of presumed prejudice when black youths accused of highly publicized, heinous crimes were appointed as counsel "all the members of the bar" six days before the trial, and the judge directed the one, unprepared, out-of-state lawyer who appeared to proceed as best he could).

39. Strickland v. Washington, 466 U.S. 668, 692 (1984) (citing Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1980)). *See also Cronic*, 466 U.S. at 662.

40. Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425 (1996).

41. Jonathan P. Tomes, *Damned If You Do, Damned If You Don't: The Use of Mitigation Experts in Death Penalty Litigation*, 24 AM. J. CRIM. L. 359, 361 (Spring 1997).

42. Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1 (2004).

43. Kirchmeier, *supra* note 40, at 427.

44. Heidi H. Woessner, Note, *The Crucible of Adversarial Testing: Ineffective Assistance of Counsel and Unauthorized Concessions of Client's Guilt*, 24 W. NEW ENG. L. REV. 315, 348 (2002); *see also* Abshier v. State, 28 P.3d 579 (Okla. Crim. App. 2001), *cert. denied*, Abshier v. Oklahoma, 535 U.S. 991 (2002).

45. Bell v. Cone, 535 U.S. 685, 718 (2002).

Without a sufficient record to prove that the outcome could have been different, most claims for ineffective counsel under *Strickland* fail, leading one author to claim that the courts "demean the Sixth Amendment by employing the *Strickland* standard."[46]

IV. IMPACT ON THE DEATH ROW POPULATION AND SPECIFICALLY ON JOE ELTON NIXON

Death row prisoners are one of the most compelling populations impacted by *Strickland's* extreme burden of proof. One author has contended the death row population is "made up of people who are distinguished by neither their records nor the circumstances of their crimes, but by their abject poverty, debilitating mental impairments, minimal intelligence, and the poor legal representation they received."[47]

Joe Elton Nixon is one of the current inhabitants of death row. Nixon was accused and convicted of capital murder for the August 1984 death of Jeanne Bickner.[48] The prosecution theorized that Nixon met Bickner for the first time in a shopping mall parking lot and asked for her assistance with his car.[49] Bickner agreed to give Nixon a ride, and he directed her to a remote location where he attacked her, robbed her, then tied her to a tree and set her on fire while she was still alive.[50] Her badly burned body was found the next day.[51] Though no defense at all was presented by his defense attorney in the guilt phase of the trial, in the sentencing phase of the trial, Nixon's attorney presented the testimony of a psychiatrist and a psychologist to show that Nixon had an antisocial personality, a history of mental illness and psychiatric care, a low IQ, and possible brain damage.[52] Rather than mounting a defense for Nixon, his attorney conceded Nixon's guilt without his consent in a startling opening statement on the first day of the guilt phase of the trial:

> In this case, there will be no question that Jeannie [sic] Bickner died a horrible, horrible death. Surely she did and that will be shown to you.

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46. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1880 (1994).

47. *Id.* at 1840.

48. Nixon v. State, 857 So.2d 172, 174 (Fla. 2003), *rev'd*, Florida v. Nixon, 543 U.S. 175 (2004), *remanded to* Nixon v. State, 932 So.2d 1009 (Fla. 2006).

49. *Id.*

50. *Id.*

51. *Id.*

52. Nixon v. Singletary, 758 So.2d 618, 628 (Fla. 2000), *rev'd*, Florida v. Nixon, 543 U.S. 175 (2004), *remanded to* Nixon v. State, 932 So.2d 1009 (Fla. 2006).

> In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt. In this case, there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death. Likewise, that fact will be proved to your satisfaction beyond any reasonable doubt. This case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement.[53]

After the State presented its evidence, the jury found Nixon guilty on all counts, and then, after only three hours of deliberation, Nixon was sentenced to death.[54] After a series of appeals and remands for evidentiary hearings,[55] the Florida Supreme Court overturned the conviction and ordered a new trial after it found that the concession of Nixon's guilt was the functional equivalent of a guilty plea.[56] Based upon that finding, the Florida court required express consent from Nixon, but the evidentiary hearings had produced "no evidence that show[ed] that Nixon affirmatively, explicitly agreed with counsel's strategy."[57]

The attorney testified that he used the strategy of conceding Nixon's guilt in an attempt to save his own credibility as defense counsel with the jury during the sentencing phase.[58] By the attorney's own report, when he discussed this strategy with Nixon, Nixon did not respond at all, and "he did nothing, except after it occurred that he was not real [sic] pleased."[59] Without the consent of the defendant, the Florida Supreme Court found the concession of guilt *per se* prejudicial, after applying the *Cronic* standard, and ordered a new trial because Nixon's right to effective assistance of counsel had been violated.[60]

When the Supreme Court subsequently overruled this Florida decision, one key factor was the Court's determination that a concession of guilt was not the functional equivalent of a guilty plea and

53. Nixon v. State, 857 So.2d 172, 174 (Fla. 2003), *rev'd*, Florida v. Nixon, 543 U.S. 175 (2004), *remanded to* Nixon v. State, 932 So.2d 1009 (Fla. 2006).

54. Nixon v. State, 572 So.2d 1336 (Fla. 1990), *rev'd*, 857 So.2d 172 (Fla. 2003), *rev'd*, Florida v. Nixon, 543 U.S. 175, 184 (2004), *remanded to* Nixon v. State, 932 So.2d 1009 (Fla. 2006).

55. *Id.*

56. Nixon v. State, 857 So.2d 172, 176 (Fla. 2003), *rev'd*, Florida v. Nixon, 543 U.S. 175 (2004), *remanded to* Nixon v. State, 932 So.2d 1009 (Fla. 2006).

57. *Id.* at 176.

58. Nixon v. State, 857 So.2d 172, 175 (Fla. 2003), *rev'd*, Florida v. Nixon, 543 U.S. 175 (2004), *remanded to* Nixon v. State, 932 So.2d 1009 (Fla. 2006).

59. *Id.* at 175.

60. *Id.* at 176.

therefore did not require express consent.[61] After making this determination, the Supreme Court removed the presumption of prejudice and applied the *Strickland* standard.[62] The Court stated that counsel's strategy to concede guilt during the opening statement, given the weight of evidence against the defendant, did not fall below the objective standard of professional reasonableness even without the consent of the defendant.[63] As a result, the case failed under the reasonableness prong of the *Strickland* standard based upon the Court's evaluation of the weight of the evidence against Nixon.[64] The Court also discussed that focusing on the penalty phase is a practical reality of capital murder cases and implied that an evaluation of professional reasonableness under *Strickland* should be particularly deferential during the guilt phase of a capital murder trial.[65] Even though his lawyer's strategy failed and he sits on death row today, the Supreme Court determined Nixon had not been deprived of his Sixth Amendment right to effective counsel.[66]

PROPOSALS

I. *NIXON* SHOULD BE NARROWLY INTERPRETED, BECAUSE LEGITIMIZING THE NONCONSENSUAL CONCESSION OF GUILT IS INCONSISTENT WITH THE JUDICIAL PROTECTION OF GUILTY PLEAS AND CONFESSIONS AND WEAKENS THE CONSTITUTIONAL PROTECTION OF EFFECTIVE ASSISTANCE OF COUNSEL.

The precedent established by *Nixon* that an attorney may concede a defendant's guilt without his consent should be narrowly interpreted for three reasons. First, the Supreme Court's conclusion that a nonconsensual concession of guilt is not functionally equivalent to a guilty plea does not withstand close scrutiny, because conceding guilt to a jury effectively renders the trial a technicality and prevents true adversarial testing. The Court's conclusion that the concession of guilt is not functionally the same as a guilty plea produces the undesirable result that a concession of guilt does not require the same informed consent and procedural protection for the defendant. Second, even if the concession of guilt is not the functional equivalent of a guilty plea, it is analogous to an involuntary confession of guilt and deserves the same legal protections currently afforded confessions. Third, the appli-

61. Florida v. Nixon, 543 U.S. 175 (2004).
62. *Id.* at 192.
63. *Id.* at 178.
64. *Id.*
65. *Id.*
66. *Id.*

cation of *Nixon* in state and appellate courts should not be permitted to further weaken the constitutional protection of effective assistance of counsel.

A. *The concession of guilt by one's attorney during the opening statement is the functional equivalent of a guilty plea, because it effectively waives the constitutional rights to trial, removing meaningful adversarial testing, and therefore, should require the consent of the defendant.*

The Supreme Court decided *Nixon* based upon the preliminary conclusion that conceding a client's guilt to the jury is not the functional equivalent of a guilty plea, and in reaching this conclusion, removed the need for Nixon's attorney to secure the consent of his client.[67] An attorney has an established legal duty to consult with a client regarding decisions that are important to the overall strategy of a criminal defense case,[68] but attorneys are not obliged to secure the defendant's consent to "every tactical decision."[69] In prior decisions, the Supreme Court established that the criminal defendant does have, however, "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."[70] A defendant must give informed consent when his attorney enters a guilty plea on his behalf, because he "simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, right to trial by jury and right to confront his accusers."[71]

1. *Conceding guilt functionally destroys the constitutional rights to trial by removing the doubt of guilt in the eyes of the jury.*

To waive any constitutional right to trial, the defendant must give a clear voluntary waiver of that right.[72] A waiver of a constitutional right must be "an intentional relinquishment or abandonment of a known right or privilege."[73] In fact, courts must "indulge every rea-

67. Florida v. Nixon, 543 U.S. 175 (2004).

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

69. Taylor v. Illinois, 484 U.S. 400, 417-18 (1988).

70. Jones v. Barnes, 463 U.S. 745, 751 (1983) (citing Wainwright v. Sykes, 433 U.S. 72, 93, n.1 (1977) (Burger, C.J., concurring)).

71. McCarthy v. United States, 394 U.S. 459, 466 (1969).

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

73. *Id.* at 464.

sonable presumption against waiver"[74] of fundamental constitutional rights to trial and should "not presume acquiescence in the loss of fundamental rights."[75] The determination of whether there has been an intelligent waiver of a fundamental constitutional right must be assessed case by case "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."[76] The Supreme Court in *Nixon* avoided these requirements, including the need for clear consent of the defendant, by finding that Nixon did not lose or waive his constitutional rights to trial.[77]

The Court stated that the concession of guilt was not the functional equivalent of a guilty plea and that Nixon's fundamental rights were not waived at all, because Nixon actually still retained three constitutional rights to trial.[78] First, the Court acknowledged that the State was still required to present admissible evidence to prove the essential elements of the crime.[79] Second, the Court determined that the defense still had the right to cross-examine and could exclude evidence even though guilt had been conceded.[80] Third, the Court stated that Nixon still retained his right to appeal.[81]

Each of these three rights Nixon retained is illusory, however, when considered in light of the true impact of an attorney telling a jury his client is guilty. The first and second rights were not truly retained by Nixon because of the realistic impact of the jury hearing that the defendant was guilty beyond any doubt from his own lawyer during the opening statement. In emphasizing the important role of the lawyer in building an effective story when representing his client, one author has noted that "[o]nce a juror begins to envision events in a certain context, new information will tend to be evaluated in that same context."[82]

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74. Aetna Ins. Co. v. Kennedy to Use of Bogash, 301 U.S. 389, 393 (1937) (citing Foust v. Munson S.S. Lines, 299 U.S. 77, 84 (1936); Dimick v. Schiedt, 293 U.S. 474, 486 (1935); Patton v. United States, 281 U.S. 276, 312 (1930); Slocum v. New York Life Ins. Co., 228 U.S. 364, 385 (1913)). *See also* Hodges v. Easton, 106 U.S. 408, 412 (1882).

75. Ohio Bell Tel. Co. v. Pub. Utils. Comm'n, 301 U.S. 292, 307 (1937).

76. *Johnson*, 304 U.S. at 464.

77. Florida v. Nixon, 543 U.S. 175, 188 (2004).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. STEVEN LUBET, NOTHING BUT THE TRUTH: WHY TRIAL LAWYERS DON'T, CAN'T AND SHOULDN'T HAVE TO TELL THE WHOLE TRUTH 5 (New York University Press 2001).

When a defendant's own attorney clearly states that the defendant is guilty beyond a reasonable doubt in the absence of any defense or justification, any effect other than a clear confirmation of guilt is difficult to imagine. Research on juror reactions has shown that up to 90 percent of all jurors have reached their ultimate verdict during or immediately after opening statements, with all further testimony being perceived through that initial impression.[83] When the defendant's sole advocate declares in his opening statement that his client is guilty of the graphic crime described by the prosecution, it is reasonable to suspect that many jurors will not continue to analyze the proof of each element of the crime or even listen carefully to cross-examination of the prosecution's witnesses. If the jury believed the defendant's attorney when he conceded his client's guilt, then the subsequent presentation of evidence by the state and any cross-examination were hollow technicalities instead of a true preservation of the fundamental right to be tried by a jury of one's peers.

To say that Nixon retained the right to exclude prejudicial evidence or to cross-examine witnesses ignores the realistic impact of the most prejudicial of all statements being uttered by his own attorney in the opening statement. The attorney's opening statement conceded not just the elements of the crime but conceded the defendant's guilt beyond doubt,[84] which effectively took the case out of the hands of the jury. As one author noted, "Concessions of guilt during opening statements relieve the prosecution of its burden of proof."[85] A reasonable juror may assume that if the client's own attorney is convinced the defendant is guilty, and then, the trial is realistically over before it starts.[86]

The third reason the Supreme Court held Nixon's constitutional rights were not lost was that Nixon retained his right to appeal, but in determining that the *Strickland* standard would apply, his only chance at appealing the most prejudicial error of his case, his attorney telling the jury he was guilty beyond a reasonable doubt, was arguably destroyed.[87] Following a somewhat circular argument, the Supreme Court stated that even with the concession of guilt, Nixon still retained

83. DONALD E. VINSON, JURY TRIALS: THE PSYCHOLOGY OF WINNING STRATEGY 171-72 (1986).

84. Nixon v. State, 857 So.2d 172, 174 (Fla. 2003), *rev'd*, Florida v. Nixon, 543 U.S. 175 (2004), *remanded to* Nixon v. State, 932 So.2d 1009 (Fla. 2006).

85. Robert J. Nolan, Note, *Prejudice Presumed: The Decision to Concede Guilt to Lesser Offenses During Opening Statements*, 55 HASTINGS L. J. 965, 965 (2004).

86. Woessner, *supra* note 44, at 348.

87. *See* Kirchmeier, *supra* note 40.

the right to appeal his conviction of guilt but then determined that Nixon had not been prejudiced by his attorney admitting his guilt to the jury because of the overwhelming evidence against him.[88] When the Supreme Court determined that the concession was not functionally equivalent to a guilty plea, did not require consent, and did not meet the presumed prejudice required for the *Cronic* standard, then the nearly insurmountable *Strickland* standard was applied to the case.[89] The conclusions of law reached by the Court in dispensing with the application of *Cronic,* however, also defeated the *Strickland* test, because the Court determined that the concession of guilt was reasonable and not prejudicial given the weight of the evidence.[90] Further, any other issue that Nixon would appeal must use the same trial record crafted by the same attorney who conceded his guilt to the jury without his consent and removed all question of guilt before the trial ever started, rendering the right of appeal hollow.

2. *The concession of guilt is the functional equivalent of a guilty plea because it dilutes the adversarial process, and the consent of the defendant should be required before his attorney removes the adversarial challenge to a guilty verdict.*

In determining that conceding a defendant's guilt was not the functional equivalent of a guilty plea, the *Nixon* Court also distinguished *Brookhart,* in which the Supreme Court had previously held that a truncated trial was the "practical equivalent" of a guilty plea.[91] In *Brookhart*, the petitioner's conviction was reversed because his counsel agreed, without petitioner's informed consent, to a prima facie trial in which evidence was not offered on petitioner's behalf and witnesses were not cross-examined.[92] The petitioner had pleaded not guilty and affirmed his plea to the court, but his attorney stipulated to both a shortened proceeding and a set of facts which lead to the inescapable conclusion that he would be convicted.[93] With the trial being a mere technicality, leading to an obvious conclusion, the Supreme Court in *Brookhart* determined that the stipulations created the functional equivalent of a guilty plea and therefore must have had the defendant's full and informed consent.[94]

88. Florida v. Nixon, 543 U.S. 175 (2004).
89. *Id.* at 184.
90. *Id.*
91. Brookhart v. Janis, 384 U.S. 1, 7 (1966).
92. *Id.*
93. *Id.*
94. *Id.*

The Court emphasized in *Brookhart* that the "petitioner himself did not intelligently and knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea."[95] Similarly, Nixon did not "intelligently and knowingly agree" to being part of a trial in which his guilt would be conceded to the jury before the evidence was ever presented.[96] Nixon's attorney did not offer a defense during the guilt phase, and by conceding his guilt in the opening statement, he effectively contradicted Nixon's plea of not guilty.[97] Unlike *Brookhart*, however, Nixon did not voluntarily waive a trial by jury and agree to a bench trial, and Nixon's attorney did cross-examine some of the witnesses against him.[98] Due to these differences and the fact that the *Nixon* trial was not formally truncated and shortened, the Supreme Court found that *Brookhart* was not controlling.[99]

The *Brookhart* reasoning arguably still applied to Nixon's situation, however, regardless of whether the trial was formally truncated, because the Court in *Brookhart* was most concerned with preventing the defense counsel for a criminal defendant from "overrid[ing] his client's desire expressed in open court to plead not guilty and enter[ing] in the name of his client another plea - whatever the label."[100] Rather than examining a technical comparison of the length and factual details of the trials in *Nixon* and *Brookhart*, the essential common issue is instead the dilution of the adversarial process by the defense attorney when the defendant has exercised his right to plead not guilty. Conceding a defendant's guilt without his consent has the same effect of overriding the client's spoken plea that the Supreme Court was determined to prevent in *Brookhart* and relieves the prosecution of the burden of proving its case even though the defendant has chosen to plead not guilty.

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95. *Id.*

96. Nixon v. State, 857 So.2d 172, 176 (Fla. 2003) ("[T]here is no competent, substantial evidence which establishes that Nixon *affirmatively* and *explicitly* agreed to counsel's strategy . . . Since we held in *Nixon II* [758 So.2d 618] that silent acquiescence to counsel's strategy is not sufficient, we find that Nixon must be given a new trial."), *rev'd*, Florida v. Nixon, 543 U.S. 175 (2004), *remanded to* Nixon v. State, 932 So.2d 1009 (Fla. 2006) (affirming conviction and denying habeas relief).

97. *See id.*

98. Florida v. Nixon, 543 U.S. 175, 188 (2004).

99. *Id.*

100. *Brookhart*, 384 U.S. at 7-8.

3. To clarify the need for client consent, the concession of guilt by defense counsel should be deemed the functional equivalent of a guilty plea, and a judicial colloquy should be required.

Perhaps the most compelling reason why it matters that the concession of guilt was not deemed the functional equivalent of a guilty plea is that this removed the protection of an informed consent requirement. Legal precedent has established that a criminal defendant's attorney may not submit a guilty plea for an accused, and a trial judge may not accept a guilty plea "without an affirmative showing that it was intelligent and voluntary."[101] If an attorney enters a guilty plea without the consent of the defendant, then prejudice is presumed, and the *Cronic* standard is applied to any claim of ineffective assistance of counsel.[102] "Because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."[103] Express, informed consent from the defendant should also be required when an attorney is planning to concede his client's guilt for the same reasons it is required when a defendant is entering a plea of guilty, because adversarial testing of the defendant's guilt is waived when his attorney tells the jury he is guilty. Jurors are not typically concerned with the subtleties of legal procedures and will hear the same affirmation of absolute guilt in an attorney's concession of guilt that they would hear in a defendant's guilty plea.[104]

Evidentiary hearings confirmed that Nixon did not expressly consent,[105] and silent acquiescence should not be sufficient when a defendant is facing a criminal charge and his attorney tells the jury he is guilty.[106] The attorney for Nixon reported that his client was fully silent when the strategy of concession was explained.[107] The attorney did not further inquire into why the defendant was unresponsive or ask for help from anyone to determine why the defendant was unresponsive.[108] He did not apparently assess whether Nixon, who was mentally impaired, understood anything about what was going on at

101. Boykin v. Alabama, 395 U.S. 238, 242 (1969).

102. Nixon v. State, 857 So.2d 172, 174 (Fla. 2003), *rev'd*, Florida v. Nixon, 543 U.S. 175 (2004), *remanded to* Nixon v. State, 932 So.2d 1009 (Fla. 2006).

103. *Boykin*, 395 U.S. at 243.

104. *See* Nolan, *supra* note 85, at 965.

105. *Nixon*, 857 So.2d at 174.

106. Johnson v. Zerbst, 304 U.S. 458, 465-66 (1938).

107. *Nixon*, 857 So.2d at 174.

108. *Id.*

all.[109] This could not have been deemed reasonable professional conduct if informed consent had been required.[110]

Had Nixon chosen to actually plead guilty himself, rather than his attorney choosing to concede his guilt, Nixon would also have been afforded the protection of a colloquy from the court.[111] Before accepting a guilty plea in a criminal prosecution from a defendant himself, the court must conduct a colloquy to determine that the defendant understands the consequences of making such a plea, to inform him of such consequences if he is not already advised of the consequences and insure that he has made a knowing and deliberate choice to plead guilty.[112] When Nixon's attorney conceded his guilt, there was, of course, no colloquy. The Supreme Court has not directly examined the question of whether trial proceedings which are deemed to be functionally equivalent to a guilty plea should also require the protection of a guilty plea colloquy to ascertain informed consent, but as discussed below, several state courts have dealt with the issue and are split on its resolution.

When a defendant pleads "not guilty," but then stipulates to a record of evidence which will ensure conviction, several states require the trial judge to admonish the defendant of his constitutional rights as if he had pleaded guilty, because the stipulation to evidence has become the functional equivalent of a guilty plea.[113] In the states which require a guilty plea colloquy in circumstances which are func-

109. Nixon v. State, 572 So.2d 1336 (Fla. 1990), *rev'd,* 857 So.2d 172 (Fla. 2003), *rev'd,* Florida v. Nixon, 543 U.S. 175 (2004), *remanded to* Nixon v. State, 932 So.2d 1009 (Fla. 2006).

110. MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 7 (2003) ("[A] lawyer may not assume consent from a client's or other person's silence.").

111. FED. R. CRIM. P. 11(b)(1-2).

112. *Id.* (requiring that before a court accepts a plea of guilty, the defendant must be placed under oath, and the court must address the defendant personally in open court, informing the defendant of the right to plead not guilty, the right to a jury trial, the right to be represented by counsel at trial and at every other stage of the proceeding, the right at trial to confront and cross-examine adverse witnesses, the right to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses, the nature of each charge to which the defendant is pleading, any maximum possible penalty, and the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises). *See also* Fogus v. United States, 34 F.2d 97, 98 (4th Cir. 1929) ("Before receiving a plea of guilty in a criminal case, the court should see that it is made by a person of competent intelligence, freely and voluntarily, and with a full understanding of its nature and effect, and of the facts on which it is founded.") (quoting Nicely v. Butcher, 94 S.E. 147, 148 (W.Va. 1917)).

113. *See* People v. Dorsey, 101 Cal. Rptr. 826 (Cal. Ct. App 1972); Glenn v. United States, 391 A.2d 772 (D.C. 1978); People v. Gale, 390 N.E.2d 921 (Ill. App. Ct. 1979);

tionally equivalent to a guilty plea, the trial judge must question the defendant in open court about his knowing consent to the stipulations to be entered or the circumstances which are producing the effect of rendering his trial a mere formality.[114]

Other states have determined that only an actual guilty plea requires the usual colloquy required from the court to ensure the plea was voluntary and informed, even if circumstances of a trial do not leave a reasonable possibility of acquittal.[115] For example, an Iowa court held that a bench trial on a stipulated factual record should not be treated the same as a guilty plea proceeding, and due process did not require the court to undertake a guilty plea colloquy prior to accepting the stipulated factual record.[116] The reasoning of the Iowa court was that the decision of guilt still remained with the fact finder, even when the stipulated evidence was admittedly overwhelming.[117] The Arizona Supreme Court applied a different reasoning to achieve the same result, stating that the need to maintain the orderly administration of justice outweighed the potential prejudice to the accused.[118] The delay and difficulty of determining, case by case, which stipulations were functionally equivalent to a guilty plea prohibited application of guilty plea safeguards to stipulations which amount to a guilty plea.[119]

On the other hand, the Maryland Court of Appeals held that regardless of what counsel chooses to call it, a procedure that leaves no reasonable verdict except guilt demands precisely the same protection as a guilty plea.[120] A defendant in one Maryland case was prosecuted for attempted forgery along with breaking and entering and entered a plea of not guilty on an agreed statement of facts.[121] The arrangement that had been negotiated with the prosecutor was deemed the functional equivalent of a guilty plea, and the defendant was therefore entitled to formal guilty plea safeguards that would ensure he had

Sutton v. State, 424 A.2d 755 (Md. 1981); Commonwealth v. Duquette, 438 N.E.2d 334 (Mass. 1982); Commonwealth v. Davis, 322 A.2d 103 (Pa. 1974).

114. *See Dorsey*, 101 Cal. Rptr. 826; *Glenn*, 391 A.2d 772; *Gale*, 390 N.E.2d 921; *Sutton*, 424 A.2d 755; *Duquette*, 438 N.E.2d 334; *Davis*, 322 A.2d 103.

115. *See* State v Avila, 617 P.2d 1137 (Ariz. 1980); State v. Sayre, 566 N.W.2d 193 (Iowa 1997); State v. Johnson, 689 N.W.2d 247 (Minn.Ct.App. 2004); State v. Mierz, 901 P.2d 286 (Wash. 1995).

116. *Sayre*, 566 N.W. 2d 193.

117. *Id.*

118. *Avila*, 617 P.2d 1137.

119. *Id.*

120. Yanes v. State, 448 A.2d 359 (Md. 1982).

121. *Id.*

knowingly and intentionally consented to the agreement and fully understood the impact of the stipulated record.[122] This type of arrangement among counsel is the same as a guilty plea from the defendant, because the trier of fact could not have arrived at any verdict except guilty.[123]

The Illinois Supreme Court has also held that when the prosecution will present the entire case by stipulation and the defendant does not present or preserve a defense or when the defendant is stipulating to any statement that indicates the evidence is sufficient for a conviction, then fundamental due process rights are implicated.[124] Fundamental rights to trial can only be waived by the defendant voluntarily and personally.[125]

Following this latter line of reasoning, Nixon had no true opportunity of acquittal when his attorney conceded his guilt, regardless of the fact that the trial continued. Conceding a defendant's guilt to the jury is not meaningfully different than stipulating to facts sufficient to produce a conviction. If Nixon had been given the same procedural safeguards as are required for the functional equivalent of a guilty plea, the trial judge could have addressed the issue of consent in open court in a colloquy. The judge may have concluded that Nixon did not consent to the strategy of his attorney conceding his guilt and not allowed the attorney to make the statement during his opening. The *Nixon* opinion, as written, does not answer the question of whether the Supreme Court would have reached the same conclusions had Nixon vehemently denied consent for the attorney's decision to concede his guilt rather than remaining silent. If the concession of guilt was deemed to be the functional equivalent of a guilty plea and required colloquy, however, the line would be clearer, and the decision to concede guilt would plainly require the consent of the defendant before the judge.

The true irony is that under the current holding, Nixon would have been given more protection from the court in regard to his understanding of the proceeding and his level of consent if he had decided to plead guilty himself during his trial. If Nixon had pleaded guilty himself, the judge would have explained the impact of the plea and made sure Nixon understood his plea and was acting out of his own independent will.[126] Instead, when Nixon's attorney, who spoke on Nixon's behalf, chose to concede his guilt, none of the protections of

122. *Id.*
123. *Id.*
124. People v. Campbell, 802 N.E.2d 1205 (Ill. 2003).
125. *Id.*
126. *See* FED. R. CRIM. P. 11(b)(1-2).

the court were in place. This is completely inconsistent with the underlying purpose of assuring that criminal defendants have the representation of counsel, which is to increase the defendant's protection, not to diminish a defendant's protection as he stands trial.[127]

Perhaps even more interesting, if Nixon had pleaded guilty on the advice of his attorney and later challenged his guilty plea through an ineffective assistance of counsel claim, he would have had less of a legal burden to meet to prevail on appeal.[128] If an attorney enters a guilty plea without the consent of the defendant, then prejudice is presumed, and the *Cronic* standard is applied to any claim of ineffective assistance of counsel.[129] To challenge poor guilty plea advice as ineffective assistance of counsel rather than a lack of consent, the defendant must first demonstrate under the *Strickland* standard that his counsel's guilty plea advice fell below an objective standard of reasonableness for the legal profession.[130] However, under the second prong of *Strickland*, a defendant challenging guilty plea advice must prove only that, but for counsel's advice, *he would not have pleaded guilty* and would have insisted on going to trial.[131] Conversely, to challenge the concession of guilt by his attorney as ineffective assistance of counsel, Nixon was required to prove that the case *would have had a different outcome,* if he could have surmounted the reasonableness prong.[132] Unfortunately, under the current law, a defendant whose attorney insists upon conceding his guilt without his consent may be better off pleading guilty himself and then challenging the validity of his plea.

Although fully discussed in *Nixon*, there is also no compelling reason to analyze the *intent of the attorney* in determining whether the defendant's constitutional rights to trial have been protected. Notably, Nixon's attorney conceded his client's guilt not out of ill will or incom-

127. Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

128. Reid v. True, 349 F.3d 788 (4th Cir. 2003), *cert. den.*, 540 U.S. 1097 (2003) (stating that a defendant asserting ineffective assistance in connection with guilty plea must prove a reasonable probability that, but for counsel's errors, he would not have pled guilty, but would have insisted on going to trial). *See also* U.S. v. Bowman, 348 F.3d 408 (4th Cir. 2003) (holding that in an ineffective assistance of counsel challenge to a guilty plea upon the advice of an attorney, the defendant must prove that the attorney acted outside of established professional norms and that, but for the attorney's advice, the defendant would have pleaded not guilty and demanded a trial).

129. Nixon v. State, 857 So.2d 172, 174 (Fla. 2003), *rev'd*, Florida v. Nixon, 543 U.S. 175 (2004), *remanded to* Nixon v. State, 932 So.2d 1009 (Fla. 2006).

130. *Id.;* Strickland v. Washington, 466 U.S. 668 (1984).

131. *Strickland,* 466 U.S. 688.

132. Florida v. Nixon, 543 U.S. 175 (2004); *see also* Williams v. Taylor, 529 U.S. 362, 363 (2000); Strickland v. Washington, 466 U.S. 668 (1984).

petence but because he likely thought it was his only chance to save Nixon's life.[133] Similarly, when record stipulation agreements are reached that are deemed to be functionally equivalent to guilty pleas, attorneys are generally also trying to achieve the best sentencing for their client.[134] Still, in either case, the guilt of the defendant is no longer truly in question, and the right to have the fact finder determine guilt as guaranteed by the text of the Constitution is denied.[135] Both cases are the functional equivalent of a guilty plea, and both should require informed consent from the defendant, which is most clearly insured by a judicial colloquy. Not demanding that a court ensure that a defendant fully consents to having his guilt conceded by his attorney is completely inconsistent with other measures taken by the court to ensure that defendants are not compelled to waive their fundamental rights.[136]

133. Nixon v. State, 572 So.2d 1336 (Fla. 1990), *rev'd,* 857 So.2d 172 (Fla. 2003), *rev'd,* Florida v. Nixon, 543 U.S. 175 (2004), *remanded to* Nixon v. State, 932 So.2d 1009 (Fla. 2006).

134. *See generally* State v Avila, 617 P.2d 1137 (Ariz. 1980); People v. Dorsey, 101 Cal. Rptr. 826 (Cal. Ct. App 1972); Glenn v. United States, 391 A.2d 772 (D.C. 1978); People v. Gale, 390 N.E.2d 921 (Ill.App.Ct. 1979), *cert. denied,* 445 U.S. 944 (1980); Commonwealth v. Duquette, 438 N.E.2d 334 (Mass. 1982); Sutton v. State, 424 A.2d 755 (Md. 1981); Commonwealth v. Davis, 322 A.2d 103 (Pa. 1974); State v. Sayre, 566 N.W.2d 193 (Iowa 1997); State v. Johnson, 689 N.W.2d 247 (Minn.Ct.App. 2004); State v. Mierz, 901 P.2d 286 (Wash. 1995); People v. Campbell, 802 N.E.2d 1205 (Ill. 2003); Yanes v. State, 448 A.2d 359 (Md. 1982).

135. U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherin the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.").

136. *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 529 (1972) ("In ruling that a defendant has some responsibility to assert a speedy trial claim, we do not depart from our holdings in other cases concerning the waiver of fundamental rights, in which we have placed the entire responsibility on the prosecution to show that the claimed waiver was knowingly and voluntarily made."); Glasser v. United States, 315 U.S. 60, 70 (1942) ("To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights."); Chambers v. State of Florida, 309 U.S. 227, 241 (1940) (holding that it is a miscarriage of justice to allow a coerced confession to be heard at trial); Aetna Ins. Co. v. Kennedy to Use of Bogash, 301 U.S. 389, 393 (1937) ("[A]s the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver.").

B. Even if conceding a client's guilt without his consent is not the functional equivalent of a guilty plea, it should at least require the constitutional protections given to confessions, and confessions of guilt require voluntary consent.

The Supreme Court has carefully guarded against the admission of involuntary statements by criminal defendants to ensure that guilt is not determined beyond the eyes of the jury and without meaningful adversarial testing, because to do so would completely undermine the judicial process.[137] Nixon could not have been forced to testify against himself nor could he have an involuntary confession to a police officer heard by the jury.[138] Yet, Nixon's attorney, to whom he had confided everything, was permitted to speak on Nixon's behalf, as his only representative to the court, and deliver an admission of guilt without Nixon's voluntarily consent.[139] The attorney's concession of his client's guilt during his statement to the jury could not be tested by any adversarial process. To deny Nixon the same protection when his attorney confesses his guilt as given when a defendant confesses guilt turns the adversarial system on its ear. If Nixon cannot be made to testify against himself unless he fully and voluntarily consents, then he should also be able to prevent an attorney who knows his confessions from uttering the same, unless it is completely voluntary and consensual.

1. Involuntary confessions cannot be the basis of conviction, regardless of the weight of the evidence against the accused, and an involuntary concession by a defendant's attorney should also be excluded.

In 1897, the Supreme Court firmly established, in *Bram v. United States*, that a criminal defendant shall not be convicted based upon a confession that is not free and voluntary.[140] The Court emphasized that the Fifth Amendment guarantees that a defendant may not be

137. *Chambers*, 309 U.S. at 241 (1940) (holding that it is a miscarriage of justice to allow a coerced confession to be heard at trial).

138. *See* U.S. CONST. amend. V, cl. 2. ("[N]or shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."); *see also* Bram v. United States, 168 U.S. 532 (1897).

139. Nixon v. State, 857 So.2d 172, 174 (Fla. 2003), *rev'd*, Florida v. Nixon, 543 U.S. 175 (2004), *remanded to* Nixon v. State, 932 So.2d 1009 (Fla. 2006).

140. 168 U.S. 532, 542 (1897).

"compelled in any criminal case to be a witness against himself."[141] Criminal defendants have a constitutional right to be free of a conviction based upon a coerced confession under the Due Process Clause of the Fourteenth Amendment.[142] Confessions to police or other officials that are coerced or compelled may not be used to convict a defendant.[143]

The fact that a criminal defendant may not be compelled to be a witness against himself is true regardless of the strength of the case against him. In *Bram,* the defendant, who had been convicted of a triple murder at sea, had his conviction reversed because the testimony of a police official who had questioned the defendant was admitted during trial.[144] The defendant's statement to the officer was deemed involuntary because it was not made with his free and independent will.[145] A new trial was ordered even though another witness aboard the ship testified to being an eyewitness to the triple axe murder.[146]

Cases that followed *Bram* have continued to emphasize that if an involuntary confession is admitted at trial, the judgment of conviction will be set aside *even though* the evidence other than the confession might have been sufficient to sustain the jury's verdict,[147] but this is in sharp contrast to the analysis used by the *Nixon* Court.[148] If an involuntary confession had been admitted at trial against Nixon, then the sufficiency of the evidence would not have been reviewed at all before the Court reversed the conviction. However, the sufficiency of the evidence was a primary consideration of the *Nixon* Court in determining that the attorney could confess his client's guilt without his voluntary consent.[149] The Court cited the *overwhelming evidence* of guilt against Nixon to support its conclusion that the concession of guilt was an allowable and reasonable trial strategy.[150] The Court does not give any indication of whether conceding a client's guilt without consent

141. *Id.* at 541 (quoting U.S. CONST. amend. V); *see also* Malloy v. Hogan, 378 U.S. 1 (1964) (applying these same rights to the states).

142. Jackson v. Denno, 378 U.S. 368, 377 (1964) (holding that allowing the trial jury to determine if a confession was involuntary, with the instruction to disregard the confession if found involuntary, was inadequate protection of defendant's right to be free of conviction based on coerced confession under the Due Process Clause).

143. Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944).

144. *Bram*, 168 U.S. at 537-39.

145. *Id.* at 562.

146. *Id.* at 565.

147. Lyons v. Oklahoma, 322 U.S. 596, 597 n.1 (1944).

148. Florida v. Nixon, 543 U.S. 175, 190 (2004).

149. *Id.*

150. *Id.*

should also be seen as a trial strategy, however, when the evidence against the accused is not overwhelming.[151] If confessing a client's guilt without his consent is not a trial strategy when less evidence of guilt is available, the point at which the evidence is *not quite overwhelming enough* is also not indicated by the Court.[152] Just like an involuntary confession, an involuntary concession of guilt should not be allowed without any consideration of the weight of the evidence.

Weighing evidence is the traditional and established role of the fact finder, and it weakens the adversarial system when the weighing of facts becomes a key factor in determining when constitutional protections should be applied. In the years since *Bram*, the Court has strained repeatedly to rigidly protect the fundamental rights to have a trial and to not involuntarily testify against oneself, because "the Bill of Rights was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed."[153]

2. *Voluntary consent must be explicit and supported by, rather than defeated by, the surrounding circumstances.*

Allowing the concession of guilt when the defendant has not expressly given consent is also irreconcilable with the Court's high standard of protecting defendants who may appear to speak a confession freely but were surrounded by circumstances that cast doubt upon the free and voluntary nature of the confession. In one such instance, the Supreme Court reversed a conviction for burglary after determining that a defendant's confession to police was not given with an adequate level of voluntary consent and independent will.[154] The defendant was questioned for approximately one hour the night of his arrest and then four more hours the next day.[155] During his questioning, however, he was not advised of his constitutional rights until after he made a full oral confession, which he reduced to writing.[156] The Supreme Court found that the lack of presence of counsel, lack of constitutional warnings, and the lack of food, sleep, and medication created circumstances which rendered the defendant's confession to the

151. *Id.*
152. *Id.*
153. Feldman v. United States, 322 U.S. 487, 489 (1944).
154. Greenwald v. Wisconsin, 390 U.S. 519, 521 (1968).
155. *Id.*
156. *Id.*

police an involuntary act.[157] Those conditions were enough to suppress his confession from being used for any purpose in the trial, despite the fact that the adult defendant testified that he never requested food or medication, was not abused or threatened in any way, and testified that he knew during his interrogation that he had a constitutional right to refuse to answer any questions, that anything he said could be used against him and that he had a constitutional right to retain counsel.[158] The Supreme Court reasoned that the confession was not credibly a "rational and free choice of the defendant" under the circumstances of the questioning, and therefore the Court overturned his conviction.[159]

The Supreme Court also reversed an Arizona criminal conviction in *Mincey*, because the defendant's confession was deemed involuntary and was not permitted to be used for any purpose in the criminal trial against the defendant, who offered a hospital-bed confession to police.[160] The Arizona Supreme Court had previously found the statement in violation of *Miranda*[161] but deemed the confession sufficiently *voluntary* to allow its use for impeachment purposes under *Harris v. New York*.[162] The Supreme Court disagreed and refused to allow the confession to be heard by the jury for any purpose because the confession was not clearly made with Mincey's free volition.[163] Again, the Court stated that the defendant's statements were not "the product of his free and rational choice."[164]

Read together with the legal precedent established regarding the admission of confessions at trial, *Nixon* directs a trial court judge to exclude the defendant's confession to police when the will of the defendant may have been compromised due to sickness, hunger, fatigue or lack of legal representation. However, the court is to allow the same defendant's attorney to concede the defendant's guilt without any indication of his voluntary consent during the trial. To overturn convictions when involuntary confessions are admitted but then to affirm convictions when the same defendant's attorney stands before the jury

157. *Id.*

158. *Id.* at 521-22 (quoting Greenwald v. State, 150 N.W.2d 507, 509 (Wis. 1967)).

159. *Id.*

160. Mincey v. Arizona, 437 U.S. 385, 401-02 (1978).

161. Miranda v. Arizona, 384 U.S. 436 (1966) (requiring a warning for defendants taken into custody prior to questioning to protect right against self-incrimination).

162. Harris v. New York, 401 U.S. 222, 224 (1971) (holding that statements made by a defendant in circumstances violating *Miranda* are admissible for impeachment if their trustworthiness satisfies legal standards).

163. *Mincey*, 437 U.S. at 401.

164. *Id.* at 401 (quoting Greenwald v. Wisconsin, 390 U.S. 519, 521 (1968)).

and concedes his guilt without the defendant's express and voluntary consent, is to give effect to a legal technicality. An attorney is guaranteed by the Sixth Amendment to assist a defendant in his defense,[165] and an attorney's well-established role is to speak on behalf of the defendant.[166] When an attorney speaks within his representation of a defendant and concedes his guilt without express consent, the jury has essentially heard a compelled confession of the defendant through his attorney. A confession made at the police station should not be so fervently protected if the line of protection for the defendant abruptly ends when the defendant walks into the courtroom. Either way the jury hears the same statement of guilt, and the defendant has been denied the true adversarial testing of evidence that is guaranteed by the Constitution.[167]

In *Bram*, *Mincey*, and other cases, the Supreme Court has painstakingly defined the meaning of *voluntary consent* in reviewing confessions of guilt made by suspects to police and has made clear that confessions of guilt must be made by the rational, free choosing of the defendant, or the confession cannot be heard by the jury.[168] This same deliberate, free choice should apply when an attorney will concede a defendant's guilt before the jury, because conceding guilt to the jury also presents an indirect admission from the defendant that removes the doubt of guilt from the jury's consideration. In fact, an attorney conceding the guilt of his client may be even more convincing than the testimony of a police officer describing a prior confession, because the attorney is never cross-examined, and the jury may assume the defendant's attorney has heard the unfiltered truth from his client.

165. U.S. CONST. amend. VI.

166. MODEL RULES OF PROF'L CONDUCT pmbl. § 1-2 (2003) ("A lawyer, as a member of the legal profession, is a representative of clients. . . . As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

167. U.S. CONST. amend. VI.

168. *See* Townsend v. Sain, 372 U.S. 293 (1963) (refusing to allow a confession obtained by trickery); Reck v. Pate, 367 U.S. 433 (1961) (requiring a careful evaluation of all the circumstances of an interrogation prior to admitting a confession of defendant); Blackburn v. Alabama, 361 U.S. 199, 206 (1960) ("Coercion can be mental as well as physical, and the blood of the accused is not the only hallmark of an unconstitutional inquisition."); Brown v. Mississippi, 297 U.S. 278 (1936) (finding a confession involuntary due to beatings of the defendant).

3. The analogy of confessions to concessions raises policy questions that should be addressed.

One difference in defendant confessions and an attorney conceding guilt without consent is clear when one of the underlying reasons for excluding involuntary confessions is examined. When a criminal defendant's will is broken and he is compelled to utter a confession to police during questioning, one fear is that the confession is unreliable and therefore should not be heard by the jury, because it has been compelled through a perceived or genuine threat or promise of benefit.[169] The defendant may have confessed guilt to escape the burden of the questioning itself, and the confession may be completely inaccurate.[170] The concession of a defendant's guilt by his attorney, on the other hand, is not likely to carry the same degree of unreliability. In fact, if the defendant has indeed freely confessed the details of his guilt to his attorney, then the attorney's statement to the jury that his client is guilty may be the most reliable statement heard in the courtroom. However, this defeats the purpose of the Sixth Amendment to provide a defendant with a trial and a jury of his peers[171] and places a burden and power into the attorney's hands which should make him very uncomfortable. The judgment of an attorney of the guilt or innocence of his client should not short-circuit the adversarial system, even though it may be reliable, because our system of justice is based upon adversarial testing, and an attorney also can occasionally be wrong in judging the guilt of a client. This again brings about the unanswered question of just how much evidence is *overwhelming enough* to allow a concession of guilt without consent, and at precisely what point the attorney's judgment and statement of his client's guilt ceases to become *per se* prejudicial to the outcome of the case.[172]

Another important underlying reason to guard against the admission of involuntary statements is completely applicable to an involuntary concession of guilt by the attorney. The historical bases of the Fifth Amendment protection against self-incrimination, the protection against unlawful search and seizure of the Fourth Amendment, and the protection of a trial by a jury in the Sixth Amendment all originated from a desire to avoid the early English tradition of inquisition and interrogation and to perpetuate instead "principles of humanity and

169. Bram v. United States, 168 U.S. 532, 547 (1897).

170. *Id.*

171. *See* U.S. CONST. amend. VI; Duncan v. Louisiana, 391 U.S. 145, 149 (1968) ("[T]rial by jury in criminal cases is fundamental to the American scheme of justice. . ..").

172. *See* United States v. Cronic, 466 U.S. 648, 657 (1984).

civil liberty into the criminal justice system."[173] This protection from inquisition is arguably eroded when an attorney who has been entrusted to hear the details of the alleged crime from the defendant himself has the unseemly power to decide to concede the defendant's guilt to the jury without his consent. Civility and respect for the adversarial system would perhaps demand that the attorney say nothing at all in his opening statement, rather than confess to the jury without express consent that the defendant committed the crime. The strategy of saying nothing at all or simply explaining the state's burden of proof would at least force the state to convince the jury of the defendant's guilt, and the attorney could lose no credibility for the sentencing phase if he makes no representation at all about the defendant's guilt during the guilt phase of the trial.

C. *The full impact of* Nixon *upon the legal standard of effective assistance of counsel is still unclear, but a broad interpretation could further weaken this constitutional guarantee.*

The Sixth Amendment guarantees a criminal defendant "the Assistance of Counsel for his defence" to ensure a fair trial.[174] By the plain language of the Amendment, an examination of whether counsel's efforts actually provided any assistance to the defendant as he faced prosecution may be helpful in determining if the defendant's rights were protected. Instead, the Supreme Court has interpreted this guarantee by developing the *Strickland* standard, which examines whether representation prejudiced the case and whether the representation fell below a low, ambiguous standard of reasonableness in light of professional norms.[175] As Justice Marshall noted in his dissent to the opinion that first established the two-pronged test of *Strickland,* "[t]o tell lawyers and the lower courts that counsel for a criminal defendant must behave 'reasonably' and must act like 'a reasonably competent attorney' . . . is to tell them almost nothing."[176] A criminal defendant's Sixth Amendment right to effective counsel has continued to be weakened under interpretations of *Strickland*.[177] In many of these cases, the attorney's behavior was arguably very different from Nixon's attorney, because the same *Strickland* standard applies to both patently incom-

173. *Bram*, 168 U.S. at 544.

174. U.S. CONST. amend. VI.

175. *See* Bibas, *supra* note 42, at 1; Woessner, *supra* note 44; Nolan, *supra* note 85, at 965; Kirchmeier, *supra* note 40; Strickland v. Washington, 466 U.S. 668, 690 (1984).

176. *Strickland*, 466 U.S. at 707-08 (1984) (Marshall, J., dissenting).

177. *See* Kirchmeier, *supra* note 40.

petent performance and to more prepared, well-meaning attorney conduct that ultimately infringes upon constitutional rights, as in *Nixon*.

1. *The* Strickland *standard has been completely swallowed by the blind deference given to attorneys.*

Once the Supreme Court determined that the concession of guilt was not the functional equivalent of a guilty plea in *Nixon*, it applied the *Strickland* analysis and concluded that the concession of guilt was a professionally reasonable trial strategy.[178] The Court supported the *reasonableness* of this strategy by noting the weight of the evidence and by citing articles which described that an overall congruent defense strategy is the best approach in bifurcated capital murder trials.[179] However, in *Nixon* the concession of guilt was not actually coupled with any defense theme or overall congruent strategy as described in the cited articles.[180] Further, juror studies not cited by the Court actually support that conceding a client's guilt is an extremely ineffective approach to reducing the probability of a death penalty.[181] Some juror studies suggest that the tactic used in *Nixon* increases the possibility that the jury will sentence the accused to death by removing any lingering doubt of guilt.[182] Geimer and Amsterdam studied the reports of post-sentencing jurors in Florida and found that the top reason given by 69 percent of respondents for recommending life in prison over the death penalty was some degree of "lingering doubt" of the guilt of the accused.[183] Extensive post-sentencing juror studies conducted by the Capital Jury Project have also revealed that lingering juror uncertainty is consistently the single biggest factor in avoiding the death penalty after murder convictions.[184] Thus, when the attorney in *Nixon* conceded his client's guilt, he not only assured a conviction, but he also

178. Florida v. Nixon, 543 U.S. 175 (2004).

179. *Id.*

180. *Id.*

181. William Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 28 (1988); Michael Mello & Ruthann Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31, 59-60 (1985); Lawrence T. White, *Juror Decision-Making in the Capital Trial*, 11 LAW & HUM. BEHAV. 113, 123-26 (1987).

182. *See* Geimer, *supra* note 181, at 28; Mello, *supra* note 181, at 60; White, *supra* note 181, at 123-26.

183. Geimer, *supra* note 181, at 28.

184. William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decisionmaking*, 83 CORNELL L. REV. 1476, 1486-87 (1998). *See also* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1541 (1998).

removed the greatest barrier the jury perceives to imposing the death penalty-lingering doubt.[185]

However, second-guessing the concession of guilt by Nixon's attorney is precisely what the Court *does not want to do* under *Strickland*.[186] The Court has made clear that the *Strickland* standard presumes competence in favor of attorneys, refuses to employ hindsight, and allows for a "wide range" of acceptable strategies.[187] Deference must be afforded to criminal defense attorneys facing retrospective challenges of ineffective assistance of counsel, but this necessary deference may have been extended too far when conceding guilt without consent was added to the list of other *reasonable* trial behaviors allowed under *Strickland*.[188]

Long before *Nixon*, the constitutional protection of the effective assistance of counsel had already become feeble under *Strickland*, even in cases where attorneys were clearly not as prepared or well-meaning as Nixon's attorney.[189] In one case, a defense attorney was appointed to the case the morning the trial started and had never reviewed the file, conducted any investigations, or talked to any witnesses.[190] The defendant was subsequently sentenced to life in prison for a robbery conviction.[191] He was unable to prevail on his claim of ineffective assistance of counsel, however, because he could not prove from the existing trial record that the outcome of his case would have been different.[192]

In another case applying *Strickland*, a defendant was unable to prevail on an ineffective assistance of counsel claim even though the lawyer in a capital murder case admitted to sleeping through most of the trial, explaining that he was accustomed to taking afternoon

185. Garvey, *supra* note 184, at 1540-42.

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

187. *Id.* at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.").

188. *Id.*; *see, e.g.*, Avery v. Procunier, 750 F.2d 444, 447 (5th Cir. 1985); Brimmer v. State, 29 S.W.3d 497, 509 (Tenn. Crim. App. 1998); McFarland v. State, 928 S.W.2d 482 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 1119 (1997).

189. *See, e.g. Avery*, 750 F.2d at 447; *Brimmer*, 29 S.W.3d at 509; *McFarland*, 928 S.W.2d 482, *cert. denied*, 519 U.S. 1119 (applying *Strickland*, 466 U.S. 668).

190. *Avery*, 750 F.2d at 447.

191. *Id.*

192. *Id.*

naps.[193] The defendant was convicted of capital murder and sentenced to death even though no physical evidence linked him to the crime, and the only eyewitness changed her description of the shooter.[194] In the appeal, the defendant was unable to prevail on the issue of ineffective assistance of counsel under the *Strickland* standard in part because the defendant was unable to pinpoint exactly when the chief counsel was sleeping during the proceeding.[195]

Another defendant, who was diagnosed with "atypical psychosis,"[196] was charged with murder in February of 1990.[197] He was assigned an attorney who did not contact him or order any discovery for seven months.[198] The attorney did not have a psychiatrist or psychologist examine the defendant prior to hearings, because the attorney believed that psychiatric evidence was nothing but "voodoo."[199] The attorney admitted to having "severe alcohol and cocaine abuse problems" prior to and during the capital murder trial.[200] According to others involved in the trial, the attorney would arrive for early morning meetings with a six-pack of beer, with one or two already gone, and was constantly inebriated.[201] The defendant was convicted and sentenced to death.[202] The Tennessee Criminal Court of Appeals found that the defendant had not been denied effective assistance of counsel during the guilt phase of his trial.[203] The court stated that the attorney's alcohol and cocaine abuse and his complete lack of consultation with the client were not enough to overturn the conviction because the

193. *McFarland*, 928 S.W.2d at 508.

194. Jeanette Popp, Another sleeping lawyer case but Texas says he had sufficient representation, September 23, 2005, http://texasmoratorium.org/mod.php?mod=user page&menu=130014&page_id=74&group=3 (last visited Oct. 7, 2006).

195. *McFarland*, 928 S.W.2d at 508 (citing also the presence of junior counsel assisting the sleeping lawyer during some stages of the trial as a reason not to overturn the conviction).

196. Brimmer v. State, 29 S.W.3d 497, 505 (Tenn. Crim. App. 1998).

197. *Id.* (noting that Brimmer was apprehended several months after the murder because he was driving the car that had belonged to a victim of the murder).

198. *Id.* at 512.

199. *Id.* at 503.

200. *Id.* at 509.

201. *Id.*

202. *Id.* at 506.

203. *Id.* On appeal, the Tennessee Court of Appeals denied ineffective assistance of counsel in the guilt phase, and Brimmer's murder conviction stood. The Court of Appeals did remand for another sentencing hearing, however, because Brimmer's attorney presented no mitigation evidence during the sentencing phase and did not object to jury instruction exclusions during sentencing. Litigation over his conviction continues.

defendant did not sufficiently prove prejudice under the *Strickland* standard.[204] The United States Supreme Court denied his petition for writ of certiorari.[205]

As seen in these cases, *Strickland* has produced a difficult legal standard of proof to establish ineffective assistance of counsel. *Strickland* compels appellate courts to give broad deference to attorneys and to consider the weight of the evidence in determining whether the actions of the attorney were unreasonable and prejudicial,[206] even though the actions of the attorney may have negatively affected the appearance of the evidence in the record. A broad reading of *Nixon* would further reduce that standard. In *Nixon*, the Supreme Court's determination that the concession of guilt without consent *does not* fall below a reasonable objective standard of representation further weakens the protection of Sixth Amendment rights under the *Strickland* standard because it now arguably allows attorneys to weigh the evidence and effectively take that role from the jury.

2. *The initial application of* Nixon *in recent cases suggests that it may make the* Strickland *standard even more difficult and ambiguous, further weakening the constitutional right to effective assistance of counsel.*

Several lower appellate and state courts have already applied *Nixon* within the *Strickland* analysis, and the confusing variety of interpretations of *Nixon* warrants attention.[207] The current applications of *Nixon* indicate that some courts have ignored or altered *Nixon*, while others demonstrated that its impact on the standard for ineffective assistance of counsel may not be narrowly limited to only bifurcated death penalty trials with the same overwhelming evidence as seen in *Nixon*.

The Eleventh Circuit Court of Appeals, in June 2006, interpreted the Supreme Court's holding in *Nixon* to say that the concession of guilt in the opening statement by Nixon's attorney was *the equivalent of a guilty plea*[208] and offered only minimal clarification of the impact of *Nixon* on the proof of ineffective assistance of counsel. The court

204. *Id.* at 510 (applying Strickland v. Washington, 466 U.S. 668, 686 (1984)).

205. Brimmer v. Tennessee, 513 U.S. 1020 (1994).

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

207. *See* Atwater v. Crosby, 451 F.3d 799, 808 (11th Cir. 2006); Commonwealth v. Cousin, 888 A.2d 710, 722 (Pa. 2005); Goodwin v. State, 191 S.W.3d 20, 39 (Mo. 2006); Nance v. Ozmint, 626 S.E.2d 878, 881 (S.C. 2006).

208. *Atwater*, 451 F.3d at 808 (describing Florida v. Nixon, 543 U.S. 175, 187 (2004)).

denied that the defendant suffered ineffective assistance of counsel and affirmed the denial of habeas relief for the murder conviction in *Atwater v. Crosby*.[209] Atwater's defense attorney had stated in his closing argument, without Atwater's consent, that the evidence may support a guilty verdict for the lesser charge of second-degree murder but not felony murder.[210] In upholding Atwater's subsequent death penalty conviction of felony murder, the Eleventh Circuit endorsed the reasoning of the Florida Supreme Court.[211] The state court's reasoning, however, was apparently based upon the earlier Florida Supreme Court decision which was overturned by the United States Supreme Court in *Nixon* eighteen months prior to *Atwater*.[212] The Eleventh Circuit agreed with the State of Florida which argued "that the Florida State Court was correct in distinguishing *Nixon* from the instant case, as the trial strategy that Atwater's counsel employed did not amount to a guilty plea, but rather was a strategy intended to save Atwater's life."[213] Even though Nixon's attorney also testified that he was trying to save his client's life,[214] the *Atwater* court cited a differing intent of the attorney along with the delivery of the concession during the closing argument, rather than the opening statement, to distinguish *Nixon*.[215] However, the *Atwater* court then applied the *Strickland* standard, just like the *Nixon* Court, and quickly dispensed with the appeal by stating, "[i]n light of the overwhelming evidence of guilt presented by the State, which we acknowledged in our opinion on the direct appeal, defense counsel's argument was reasonable."[216]

Shortly after the Supreme Court decided *Nixon*, it also vacated the state court judgment and remanded *Nance v. Ozmint* to the Supreme Court of South Carolina "for further consideration in light of *Florida v. Nixon*."[217] The South Carolina Supreme Court had originally concluded that defendant Nance's attorney provided ineffective assistance of counsel and granted Nance a new trial.[218] Despite the United States

209. *Id.*

210. *Id.* at 808-09.

211. *Id.* at 808.

212. *See* Nixon v. State, 857 So.2d 172, 187 (Fla. 2003), *rev'd* Florida v. Nixon, 543 U.S. 175 (2004) (reversing Florida Supreme Court and denying ineffective assistance of counsel), *remanded to* Nixon v. State, 932 So.2d 1009 (Fla. 2006) (affirming conviction, denying rehearing and denying habeas relief).

213. *Atwater*, 451 F.3d at 808-09.

214. *Nixon*, 543 U.S. at 181.

215. *Atwater*, 451 F.3d at 808.

216. *Id.* at 809.

217. Ozmint v. Nance, 543 U.S. 1043 (2005).

218. Nance v. Frederick, 596 S.E.2d 62 (S.C. 2004).

Supreme Court vacating the decision and remanding the case, the Supreme Court of South Carolina marched forward with the exact same result, again granting Nance a new trial on remand.[219]

Factually in contrast to *Nixon*, Nance was sentenced to death after being represented at trial by an attorney who had suffered from "pneumonia, gout, ulcers, diabetes, alcoholism, and congestive heart failure" and was taking prescription medications including Valium, which caused impaired memory, sleep interference and sedation.[220] In the opening statement, his inexperienced co-counsel introduced the two defense attorneys as people who did not even want to be there and who did not wish to represent the defendant.[221] Only three witnesses were later called to testify on behalf of the defense in the guilt phase of the trial, and each was unprepared.[222] The witness list was limited to a psychologist who was never qualified as an expert, a staff person from the Department of Corrections who testified only to the defendant's misbehavior, and the defendant's sister, who testified without context about the defendant's strange behavior as a child, including accounts of him killing all of the family pets, pulling a gun on their father, and trying to bury his brother alive.[223] After conviction, during the death penalty sentencing phase, the testimony presented by the defense attorney took only seven minutes, with the trial judge even attempting to intervene to encourage the defense attorney to provide further mitigating evidence.[224]

Dismissing any real impact from the holding in *Nixon* during its reconsideration of *Nance*, the South Carolina Supreme Court arguably mischaracterized the holding in *Nixon* as one involving the submission of a *guilty plea*:

> In *Nixon*, the United States Supreme Court held that entering a guilty plea on behalf of a defendant without his express consent did not constitute ineffective assistance of counsel. The Court opined that the decision to plead guilty was a strategy employed by trial counsel in an effort to present mitigating evidence at sentencing in an attempt to save the defendant's life.[225]

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219. Nance v. Ozmint, 626 S.E.2d 878 (S.C. 2006). The United States Supreme Court denied certiorari on October 2, 2006 (No. 05-1580). This could indicate that the Court ultimately agreed with South Carolina that *Nixon* was essentially inapplicable to the case at bar, or certiorari may have been denied for other reasons.

220. *Id.* at 881.

221. *Id.*

222. *Id.* at 881-82.

223. *Id.*

224. *Id.* at 882.

225. *Id.* at 880 (internal citations omitted).

The South Carolina Supreme Court then concluded that in light of *Nixon,* Nance's defense still fell into one of the rare circumstances in which the *Cronic* standard of presumed prejudice must be applied because the adversarial system had completely failed.[226] The court granted Nance a new trial once again,[227] and *Nixon* had no impact on the clear denial of Nance's constitutional right to effective assistance of counsel.

Even if the South Carolina court had not characterized *Nixon* as a case about guilty plea submissions, *Nance* still would have provided no real insight into how a court may apply *Nixon*, however, because the issues in *Nance* had little to do with the holding in *Nixon.*[228] There was no concession of guilt in an attempt to save the defendant's life in *Nance*, but instead there was just a very weak, inadequate and unprepared presentation of a defense effort.[229] The interesting part of the analysis of *Nance*, however, is to consider why the United States Supreme Court believed *Nixon* warranted the remand and reconsideration of *Nance.*[230] The United States Supreme Court may view *Nixon* more broadly, as signaling an even more rigorous scrutiny of all ineffective assistance of counsel claims, even in cases like *Nance*, but this remains to be seen in future cases.

Applying *Nixon* to a somewhat more similar case, the Supreme Court of Pennsylvania conducted a thorough analysis in extending *Nixon* to apply to *Common Wealth v. Cousin.*[231] The defense attorney in *Cousin* admitted that to avoid a conviction for a higher degree of criminal homicide, he had conceded the defendant's guilt to voluntary manslaughter during the closing argument, having never even discussed the strategy with his client.[232] The defense attorney in *Cousin* conceded the defendant's guilt without consent, but he did so without the compelling need to avoid a death penalty.[233] In conducting its analysis, the Pennsylvania court reasoned around a section of key limiting language in *Nixon.*[234] The United States Supreme Court had warned that although it determined the concession of Nixon's guilt did not destroy his right to an adversarial trial, "such a concession in a

226. *Id.* at 881.
227. *Id.*
228. *Compare* Nixon v. State, 857 So.2d 172, 174 (Fla. 2003), *and* Nance v. Ozmint, 626 S.E.2d 878, 881 (S.C. 2006).
229. *Nance,* 626 S.E.2d at 881.
230. Ozmint v. Nance, 543 U.S. 1043 (2005).
231. 888 A.2d 710 (Pa. 2005).
232. *Id.* at 714.
233. *Id.* at 721.
234. *Compare id.*, *and* Florida v. Nixon, 543 U.S. 175, 190-91 (2004).

run-of-the-mine trial might present a closer question, the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus."[235] The Pennsylvania court stated that even though the attorney in *Cousin* was not trying to save his client from a death penalty by conceding guilt without consent, the possibility of a death penalty was only one basis for the *Nixon* Court's decision that an attorney's nonconsensual concession was reasonable conduct, and "it does not follow that the Court's holding in that case was meant to apply only in death penalty cases."[236]

Following *Nixon*, the Pennsylvania court then applied *Strickland* rather than the presumptive prejudice standard of *Cronic,* stating "there are *multiple scenarios* in which a defense attorney may reasonably determine that the most promising means of advancing his client's interests is to admit what has become plain to all concerned."[237] The court did not explain what could be included in "multiple scenarios" but seemed to give expansive application to the deference to attorneys suggested by *Nixon*.[238] The Pennsylvania court did suggest an outer limit to the extension of *Nixon*, however, stating that certain circumstances, such as an attorney *contradicting his own client's testimony* by conceding guilt which had been affirmatively denied in testimony by the defendant, could be presumptively prejudicial and require application of the *Cronic* standard.[239] The suggestion that an attorney must actually contradict and impeach his own client to be presumed ineffective when conceding the client's guilt without consent serves to further extend the *Nixon* distortion of effective adversarial representation.

Nance, Atwater and particularly *Cousin* demonstrate how the application of *Nixon* could create an even more confused, weakened and unpredictable standard of effective assistance of counsel under *Strickland*.[240] Although it may be more embarrassing to the profession to allow a drunk, asleep or unprepared attorney to pass as effective counsel, permitting the nonconsensual concession of guilt of a defen-

235. *Nixon,* 543 U.S. at 190-91.

236. *Cousin*, 888 A.2d at 722.

237. *Id.* at 719 (emphasis added).

238. *Id.*

239. *Id.* at 716 (citing State v. Anaya, 592 A.2d 1142 (N.H. 1991)). In *Anaya,* the defendant had plead guilty and testified to his complete innocence during the trial, but his attorney contradicted the defendant's testimony by admitting his guilt to a lesser charge in the closing argument.

240. *Id.* at 719; Ozmint v. Nance, 543 U.S. 1043 (2005); Atwater v. Crosby, 451 F.3d 799, 808 (11th Cir. 2006) (applying Strickland v. Washington, 466 U.S. 668 (1984) and Florida v. Nixon, 543 U.S. 175 (2004)).

dant on a case-by-case basis is even more dangerous to the health of the adversarial system and the established role of counsel.

The "paramount importance of vigorous representation follows from the nature of our adversarial system of justice,"[241] and allowing an attorney to concede the guilt of a client without consent defeats the purpose of the attorney's representation. Certainly, as a civilized society, we need guilty murderers to be convicted but not by their attorneys. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."[242] The role of the attorney in our adversarial system is to be an advocate, and in representing a client, one author notes, "[g]uilt or innocence do not figure into the equation; that is for the jury to decide, not the attorney."[243]

As Justice Anstead noted in a concurrence to the Florida Supreme Court decision, "[d]espite his difficult behavior, Nixon was still entitled to his constitutional rights. Without the benefit of these rights, we can place no credence in the jury's verdict of guilt in this case. Any other conclusion would rend the very fabric from which our justice system was woven."[244] The adversarial process protected by the Sixth Amendment "can only be attained where counsel acts in the role of an active advocate in behalf of his client,"[245] and conceding guilt before the jury, in the opening statement is simply not active advocacy, even when the intent is benevolent.

To retain the constitutional protections of the Sixth Amendment, a defendant's express consent should be required for any trial strategy which involves the attorney conceding the client's guilt before the jury, and in the absence of such consent, the result should be the presumption of prejudice in an ineffective assistance of counsel claim. The current rule established in *Nixon* should be narrowly interpreted to avoid a further dilution of the important constitutional right to the effective assistance of counsel.

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241. Penson v. Ohio, 488 U.S. 75, 84 (1988).

242. Herring v. New York, 422 U.S. 853, 862 (1975).

243. STEVEN LUBET, NOTHING BUT THE TRUTH: WHY TRIAL LAWYERS DON'T, CAN'T AND SHOULDN'T HAVE TO TELL THE WHOLE TRUTH 171 (New York University Press 2001).

244. Nixon v. State, 857 So.2d 172, 179 (Fla. 2003) (Anstead, J., concurring) (quoting Nixon v. Singletary, 758 So.2d 618, 626 (Fla. 2000) (Harding, C.J., concurring)).

245. Anders v. California, 386 U.S. 738, 744 (1967); *see also* Jones v. Barnes, 463 U.S. 745, 758 (1983).

II. EVEN IF THE SUPREME COURT DOES NOT FURTHER ADDRESS THE CONCESSION OF GUILT BY CRIMINAL DEFENSE ATTORNEYS, THE LEGAL PROFESSION SHOULD DO SO BY CLARIFYING ETHICAL STANDARDS FOR DEFENSE COUNSEL.

The Supreme Court has been urged to make attorneys more accountable for the Sixth Amendment guarantee of effective counsel prior to *Nixon*, and yet, the standards of protection have weakened;[246] however, the dilemma can be vigorously addressed through professional standards to preserve the adversarial system. Challenges in the interpretation of the standard for effective assistance of counsel can be addressed by the legal profession, which can prevent further degeneration by clarifying the established professional norms. As one scholar stated, "[t]he low standard for effective assistance of counsel under the Sixth Amendment should not be mistaken for competent representation."[247] The Court's interpretation of the meaning of effective counsel should not define our standard as a profession of what is acceptable when defending an accused. In fact, the Supreme Court stated that the "Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance. It *relies instead on the legal profession's maintenance of standards* sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions."[248]

As a professional field that self-governs, our own code of ethics must reflect a higher standard that would ensure the rights of clients who are facing the loss of their life or liberty. In *Strickland*, the Supreme Court stated that the "purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation."[249] However, all attorneys admitted to the bar do have the ethical duty to "seek improvement of . . . the administration of justice and the quality of service rendered by the legal profession."[250]

246. *See* Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983); Jeffrey Levinson, Note, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147 (2001); Bibas, *supra* note 42, at 1; Kirchmeier, *supra* note 40, at 427; Woessner, *supra* note 44, at 348; Bright, *supra* note 46.

247. Paul J. Kelly, Jr., C.J., 10th Cir., Are We Prepared To Offer Effective Assistance Of Counsel?, Speech delivered at the 2000 Adler Rosecan Jurist-In-Residence Program (2000), *in* 45 ST. LOUIS U. L.J. 1089, Fall 2001, at 1093.

248. Strickland v. Washington, 466 U.S. 668, 688 (1984) (emphasis added).

249. *Id.* at 689.

250. MODEL RULES OF PROF'L CONDUCT pmbl. § 6 (2003).

For two important reasons, the Rules of Professional Conduct[251] should include the need for express consent from a client anytime defense counsel plans to concede a client's guilt as a strategy in a criminal trial. First, requiring express consent as a matter of professional ethics prior to conceding a criminal defendant's guilt would help ensure that defendants like Nixon, who suffered mental illness, would have necessary procedural protections, such as the appointment of a guardian ad litem. Second, the legal profession should demand higher standards of criminal defendant representation to preserve our system of advocacy and to promote more consistency in our professional standards.

A. *Currently there are no clear professional standards that apply to conceding a client's guilt.*

Currently in the American Bar Association Model Rules of Professional Conduct, the concession of guilt of criminally accused defendants is not directly addressed.[252] In describing a lawyer's duty in establishing the objectives of representation, the Rules state that a "lawyer shall abide by a client's decision."[253] As described in Rule 1.4, a lawyer "shall . . . *reasonably consult* with the client about the means by which the client's objectives are to be accomplished."[254] There are certain specific circumstances in which a lawyer "*shall abide* by the client's decision."[255] These circumstances include the decision "whether to settle a matter" in a civil case and in a criminal case "as to a plea to be entered, whether to waive jury trial and whether the client will testify."[256] In addition, as required by the Federal Rules of Criminal Procedure, a guilty plea may not be accepted until the judge has conducted colloquy with the defendant, ensuring he understands the basis of the plea, the potential sentencing, and that the decision was completely voluntary and informed.[257]

B. *Express consent prior to concession of guilt should be required to protect the defendant.*

When an attorney will concede a defendant's guilt in front of the jury, informed consent should be required to provide the defendant

251. MODEL RULES OF PROF'L CONDUCT (2003).
252. *See id.*
253. *Id.* R. 1.2(a).
254. *Id.* R. 1.4(a) (emphasis added).
255. *Id.* R. 1.2(a) (emphasis added).
256. *Id.* (emphasis added).
257. FED. R. CRIM. P. 11(b)(1-2).

with the same protections currently available when a defendant pleads guilty, and these protections are particularly important when a defendant has diminished capacity.[258] Joe Elton Nixon had diminished capacity, including a history of mental illness and possible brain damage, and he was uncooperative and disruptive at times.[259] Nixon's lawyer reported three attempts to discuss his strategy of conceding guilt with Nixon, who remained unresponsive.[260] The attorney did not continue to attempt communication, and he did not seek outside assistance from family or from mental health professionals to try to elicit some response.[261]

Gaining express consent from an uncooperative, juvenile or mentally diminished client is challenging, and this is already an issue when considering other decisions attorneys must make with their clients.[262] The American Bar Association Model Rules of Professional Conduct clearly state that "a lawyer may not assume consent from a client's or other person's silence."[263] When capacity is questioned in situations which require consent such as entering a guilty plea, "the option chosen by most capital defense attorneys in this situation is to seek a mental examination of the client."[264] If a client is deemed competent, he or she is then "presumptively entitled to make fundamental decisions regarding his or her case."[265]

The Model Rules of Professional Conduct also provide direction when a client may not be deemed competent:

> When a lawyer reasonably believes the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the law-

258. *See* Lenhard v. Wolff, 443 U.S. 1306 (1979); Godinez v. Moran, 509 U.S. 389 (1993); North Carolina v. Alford, 400 U.S. 25 (1970).

259. Nixon v. State, 572 So.2d 1336 (Fla. 1990).

260. Florida v. Nixon, 543 U.S. 175, 181 (2004).

261. Nixon v. State, 572 So.2d 1336 (Fla. 1990).

262. *See* Diane E. Hoffman, *Mediating Life and Death Decisions*, 36 ARIZ. L. REV. 821 (1994); Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings: Cognitive Maturity and the Attorney-Client Relationship*, 33 U. OF LOUISVILLE J. OF FAM. L. 629 (1995); Victor L. Streib, *Standing Between the Child and the Executioner: The Special Role of Defense Counsel in Juvenile Death Penalty Cases*, 31 AM. J. CRIM. L. 67 (2003); Beth A. Danon, *Special Focus: Disability Law: Ethical Considerations When Representing a Client who is "Under a Disability,"* 28 VER. B. J. & L. DIG. 62 (2002).

263. MODEL RULES OF PROF'L CONDUCT R.1.0 cmt 7 (2003).

264. Streib, *supra* note 262, at 73-74.

265. Christopher Slobogin & Amy Mashburn, Symposium, *The Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disability*, 68 FORDHAM L. REV. 1581, 1584 (2000).

> yer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.[266]

The comments also suggest that if an attorney is in doubt when communicating with a client who may have diminished capacity, then it is appropriate if the client wishes, "to have family members or other persons participate in discussions with the lawyer."[267]

Under current standards, Joe Elton Nixon was not required to give his express, informed consent to the strategy of concession. Therefore, these careful evaluative and protective measures were never afforded to him, even though his attorney argued during sentencing that he had a history of mental illness, psychiatric care, a low IQ, and possibly brain damage.[268] Professionally requiring attorneys to obtain the same consent to the concession of guilt by the attorney as currently required for a guilty plea may help ensure the necessary precautions are taken to protect the rights of all defendants but particularly those with diminished capacity.

C. *Express consent before conceding guilt should be required to protect the adversarial system and to promote more consistent professional standards.*

In the preamble to the American Bar Association Model Rules of Professional Conduct, the responsibility of a lawyer is described as that of a zealous advocate.[269] The responsibility of maintaining the rights of the accused and the integrity of representation is a duty of every lawyer because, "lawyers are the brains and backbone of our criminal adversarial system."[270] The first goal of a defense attorney should be to act as an advocate for her client, maintaining the defendant's innocence until guilt is proven. In cases where attorneys are faced with criminal defendants who may indeed be guilty of horrible crimes, society needs a conviction. Conviction should result, however, because "the government's case has survived . . . meaningful adversarial testing, not because their attorneys made the decision, for

266. MODEL RULES OF PROF'L CONDUCT R. 1.14(b) (2003).

267. *Id.* at Note 3.

268. Nixon v. State, 572 So.2d 1336 (Fla. 1990).

269. MODEL RULES OF PROF'L CONDUCT pmbl. §2 (2003) ("as advocate, a lawyer zealously asserts the client's position under the rules of the adversary system").

270. Major Edye U. Moran, *Pyrrhic Victories and Permutations: New Developments in the Sixth Amendment, Discovery and Mental Responsibility,* 1998 ARMY LAW. 106, 117 (1998).

whatever reason, to abandon their role as the defendant's advocate in our adversarial criminal justice system by conceding the defendant's guilt to the jury."[271] When, in the rare circumstance that an attorney believes that conceding guilt is his only viable strategy, the American Bar Association Model Rules of Professional Conduct should clearly require that the client expressly consent to this strategy.

Although it is arguably the functional equivalent of a guilty plea, conceding a criminal client's guilt is not currently one of the circumstances in which a lawyer "*shall abide* by the client's decision."[272] Interestingly, one of the circumstances that does command the lawyer to abide by the client's wishes is the decision "whether to settle a matter" in a civil case.[273] Settling a civil case, which may or may not entail admitting liability, requires more consent from a client than conceding a criminal defendant's guilt to the jury in a murder trial.[274]

Although not protected at all by the Sixth Amendment, the inclusion of "whether to settle a matter" in a civil case is arguably analogous to the concession of guilt of the criminally accused by his attorney and presents an interesting question of how lawyers currently approach the ethical issues of representation. Imagine the ridiculous result of extending the holding in *Nixon* to an analogous situation in a civil liability case. Hypothetically, a large home-improvement chain is sued for knowingly allowing unsafe store conditions which allegedly caused the injuries and deaths of hundreds of shoppers and employees, all in an attempt to save money for the corporation. The corporate executives are sitting in their ties and suits near the civil defense attorney as the trial begins. Wishing to maintain his own credibility with the jury, the corporate defense attorney, without express consent from the client, decides to tell the jury in his opening statement that the corporate executives actually did knowingly allow all of the horrendous safety violations. The attorney then states that his client is absolutely liable but asks the jury to go light on the award of damages because this corporation has done nice things for the community.

The legal profession and the corporate defendant, of course, would be outraged by this conduct from the attorney, regardless of how weighty and despicable the evidence was against the corporation. As a profession, we appear to fully expect civil defense attorneys to zealously advocate for clients even if they know the client should be liable, but then, we hypocritically allow criminal defense attorneys to

271. Woessner, *supra* note 44, at 348.
272. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2003) (emphasis added).
273. *Id.* (emphasis added).
274. *Id.*

concede guilt before a jury without the client's consent when life and liberty are at stake. Of course, *Nixon* will never be extended to civil liability cases, but why should less vigorous advocacy and less exacting client consent be accepted when an attorney defends a client who may be sentenced to death than when he defends one who may lose money for his misconduct?

To remedy professional hypocrisy and maintain our valued criminal justice system of "innocent until proven guilty," our professional standards must directly address the attorney's role when representing a criminal client with substantial evidence against him. Attorneys need to be encouraged to allow the adversarial system to work as it was intended to work. In the cases in which concession of guilt is part of a strategy, the defendant must have the final decision whether to pursue this strategy for the same well-established reasons he must decide "as to a plea to be entered, whether to waive jury trial and whether the client will testify."[275] Allowing an attorney to relinquish his role as a zealous advocate and concede a client's guilt without his consent is damaging to the profession and the criminal justice system.

CONCLUSION

Even when a criminal defendant has overwhelming evidence against him, the Sixth Amendment protection of effective assistance of counsel is critical to our system of justice. Defending clients with a strong adversarial argument enriches the judicial process and ensures that juries and not attorneys determine the guilt of the accused. The Supreme Court's interpretation of standards for effective assistance of counsel continues to steadily diminish the constitutional rights of defendants. *Nixon* has the potential to further dilute the standards for effective representation for all criminal defendants without providing limiting factors of precisely when the concession of guilt by an attorney is appropriate without the consent of the client and when evidence is sufficiently overwhelming. If we allow the adversarial system to be diminished to the point that lawyers may unilaterally choose to concede guilt as a substitute for contesting the guilt of the accused, not only will the judicial system, legal profession and criminal defendants suffer, but the constitutional guarantees of a fair trial will be significantly diluted. Attorneys carry the burden of protecting the health of the adversarial system and must demand higher standards for effective

275. *Id.*

assistance of counsel to ensure the constitutional rights of those whose lives depend upon our skills of advocacy.

Sharon G. Scudder