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CRIMINAL LAW—THE CRUCIBLE OF ADVERSARIAL TESTING: INEFFECTIVE ASSISTANCE OF COUNSEL AND UNAUTHORIZED CONCESSIONS OF CLIENT'S GUILT

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NOTE

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INTRODUCTION

During voir dire, Steven Abshier's court-appointed defense attorney told the prospective jury, "Steven Abshier committed child abuse murder and the State will prove it beyond a reasonable doubt. We are here for sentencing and sentencing only."[1] Subsequently, the State of Oklahoma tried and sentenced Abshier to death for first-degree murder of a child.[2]

While defending Joe Elton Nixon against charges of first-degree murder, kidnapping, robbery, and arson,[3] defense counsel told the jury during his opening statement, "In this case, there won't be any question, none whatsoever, that my client . . . caused Jeannie [sic] Bickner's death. Likewise, that fact will be proved to your satisfaction beyond any reasonable doubt."[4] Nixon's counsel appeared to believe that, in this trial, the jury's most important function was not to determine his client's guilt or innocence, but to decide whether to sentence Nixon to death or to life in prison.[5]

After refusing a plea bargain that would have required him to plead guilty to accomplice to second-degree murder, Anthony Anaya went to trial on a charge of accomplice to first-degree murder.[6] During the opening statement, his counsel told the jurors, "We're not asking for an acquittal."[7] During closing argument, defense counsel urged, "Please, please, please do as we're asking you:

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1. Abshier v. State, 28 P.3d 579, 593 (Okla. Crim. App. 2001), *cert. denied*, 122 S. Ct. 1548 (2002).

2. *Id.* at 587. The child in question was Abshier's twenty-two month old daughter, Ashley.

3. Nixon v. Singletary, 758 So. 2d 618, 619 (Fla. 2000).

4. Nixon v. State, 572 So. 2d 1336, 1339 (Fla. 1990) (alteration in original).

5. *Id.*

6. State v. Anaya, 592 A.2d 1142 (N.H. 1991).

7. *Id.* at 1144.

convict [Defendant] of being an accomplice to second degree murder. He was bad."[8] Anaya's counsel did not believe that he could credibly argue that Anaya was innocent of all charges,[9] and so he entreated the jury to impose the penalty that would have resulted had Anaya accepted the plea-bargain.[10]

At Nazzaro Scarpa's trial for drug trafficking and unlawful distribution of cocaine, his attorney urged the jury to believe the testimony of the prosecution's witnesses (DEA agents who witnessed the drug sales),[11] and argued that Scarpa was neither a drug user nor a drug seller, but a "mere conduit" for the cocaine.[12] This argument conceded the elements of the offense and "not only failed to assist in fashioning a defense but also cemented the prosecution's theory of the case."[13] Apparently, Scarpa's defense counsel misunderstood the charged offense, and failed to realize that persons who knowingly serve as intermediaries in drug transactions are punishable under the law.[14]

As these cases illustrate, defense counsel may concede the client's guilt in a variety of contexts. The attorney may make an explicit admission while addressing the jury, or guilt may be implied more subtly, by counsel's failure to raise issues that the defendant considers exculpatory but that may seem less than credible to defense counsel and the jury.[15] Guilt may also be conceded by the manner in which counsel cross-examines prosecutorial witnesses at trial.[16] Such an admission may be the result of an inexperienced attorney's failure to understand the elements of the offense, as in *Scarpa*, or part of a well-reasoned strategy by experienced criminal

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8. *Id.*

9. *Id.* at 1143.

10. *Id.* at 1144.

11. Scarpa v. Dubois, 38 F.3d 1, 10 (1st Cir. 1994).

12. *Id.*

13. *Id.* at 11.

14. *Id.* at 10.

15. *See In re* Personal Restraint of Stenson, 16 P.3d 1 (Wash. 2001). In that case, during defendant's trial for the murder of his wife and his business partner, defense counsel "essentially chose to bargain for [Stenson's] life in the penalty phase by forfeiting his innocence in the guilt phase." *Id.* at 26 (Sanders, J, dissenting). On appeal of his conviction, the defendant challenged his attorneys' failure to advance several arguments which Stenson considered exculpatory, most notably, counsel's refusal (in light of convincing physical evidence implicating Stenson as the killer) to cross-examine the wife of one of the victims in such a way as to "lay the crime at her feet." *Id.* at 6.

16. *See* State v. Wiplinger, 343 N.W.2d 858, 861 (Minn. 1984) (finding that counsel's cross examination of victim and her grandmother impliedly conceded that defendant molested the victim).

counsel aimed at appealing to a jury's mercy in sentencing, as in *Nixon* and *Anaya*.

The critical issue in such cases is the extent to which a defense attorney's decision, expressly or impliedly, to admit a client's guilt is a tactical choice within the attorney's discretion, or whether the right to make such a decision is inextricably linked with a defendant's constitutional rights such that an unauthorized admission of guilt by one's attorney may give rise to a claim of ineffective assistance of counsel and may justify a new trial.

This Note explores the tension between defense attorneys' latitude in choosing trial strategy and criminal defendants' constitutional rights in determining whether and by what means to mount a defense at trial. Part I describes the development of the effective assistance of counsel doctrine and current standards for evaluating the merit of effective assistance of counsel claims. Part II evaluates several principal cases that develop the polar positions in the courts' struggle to determine the proper judicial response when defense counsel makes an unauthorized admission of guilt. Finally, Part III argues that existing notions of the collaborative nature of the attorney client relationship, constitutional protections surrounding the entrance of guilty pleas, and public policy considerations all establish the need for a clear rule that an attorney may not concede guilt without the defendant's consent.

I. DEVELOPMENT OF THE CONSTITUTIONAL REQUIREMENT OF EFFECTIVE ASSISTANCE OF COUNSEL AND THE STANDARDS OF APPELLATE REVIEW OF EFFECTIVE ASSISTANCE CLAIMS

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." For the past seventy years, the right to counsel has been interpreted as the right to effective assistance of counsel.[17]

Historically, a variety of standards have been applied to assess whether a defendant received effective assistance of counsel. At one time, the standard most frequently employed asked whether counsel's performance made the trial a "farce and mockery of jus-

17. *See* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right of counsel is the right to effective assistance of counsel."); Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding that counsel must not be appointed "under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case").

tice."[18] Gradually, the "farce and mockery" standard gave way to an analysis of whether the lawyer's conduct equaled that of a "reasonably competent attorney."[19]

The Supreme Court did not provide guidance for assessing effective assistance of counsel challenges until 1984, when it decided *Strickland v. Washington*[20] and *United States v. Cronic*.[21] Both cases provide a different standard for evaluating effective assistance claims,[22] and there is much disagreement among lower courts as to which standard should be applied to ineffective assistance claims stemming from defense counsel's unauthorized admission of guilt. This Note will examine both standards and address the different interpretations by the lower courts.

A. *The General Rule*: Strickland v. Washington

In *Strickland v. Washington*,[23] a habeas corpus case wherein the defendant alleged ineffective assistance of counsel arising from his defense attorney's failure to defend him adequately during the sentencing phase of his capital murder trial,[24] the Court established a two-prong test for determining whether counsel's assistance falls below the constitutional standard for effectiveness. To prevail on a Sixth Amendment claim, a defendant must demonstrate, first, that the attorney's performance "fell below an objective standard of reasonableness,"[25] and second, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[26] The defendant is entitled to

18. *See* United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949) (holding that "[a] lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice"); *see also* Bottiglio v. United States, 431 F.2d 930, 931 (1st Cir. 1970) (per curiam); Cofield v. United States, 263 F.2d 686, 689 (9th Cir. 1959), *rev'd per curiam on other grounds*, 360 U.S. 472 (1959).

19. *See, e.g.*, Trapnell v. United States, 725 F.2d 149, 153 (2d Cir. 1983) (holding that "the time has come to declare that 'effective' assistance means 'reasonably competent assistance,' which we regard as a shorthand for the standard that the quality of a defense counsel's representation should be within the range of competence reasonably expected of attorneys in criminal cases"); Cooper v. Fitzharris, 586 F.2d 1325, 1328 (9th Cir. 1978) (en banc); United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978); United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976).

20. 466 U.S. 668 (1984).

21. 466 U.S. 648 (1984).

22. *See* discussion *infra* Parts I.A, I.B.

23. 466 U.S. 668 (1984).

24. *Id.* at 675.

25. *Id.* at 688.

26. *Id.* at 694.

a new trial only upon satisfaction of both elements.[27]

The second prong of the *Strickland* standard is commonly known as the prejudice requirement: it requires that the defendant demonstrate not only that counsel erred, but that his case was prejudiced as a result. The Court defined a reasonable probability as "a probability sufficient to undermine confidence in the outcome [of the proceeding]."[28] The Court established the reasonable probability standard as a middle ground between a lax standard that would merely require the defendant to demonstrate that counsel's errors "had some conceivable effect on the outcome of the proceeding,"[29] and a stringent standard that would require the defendant to prove "that counsel's deficient conduct more likely than not altered the outcome in the case."[30] In determining whether there is a reasonable probability of prejudice, a court reviewing an ineffectiveness claim must evaluate the case record in order to "consider the totality of the evidence before the judge or jury."[31]

Although a "reasonable probability" of prejudice is by no means a precise standard, it is the first prong of the *Strickland* test, reasonableness of counsel's representation, that engenders debate in ineffectiveness claims arising out of unauthorized concessions of guilt by counsel. Courts disagree whether an unauthorized admission of guilt can ever be a reasonable trial strategy.[32]

In defining the reasonableness standard of the first prong of the *Strickland* test, the Supreme Court endorsed the "reasonably effective assistance" standard that, by 1984, had been adopted by all the federal circuit courts and most state courts.[33] The Court declined to delineate a more specific measure of attorney competence than the objective standard of reasonableness,[34] observing that "any . . . set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude coun-

27. *Id.* at 700.
28. *Id.* at 694.
29. *Id.* at 693.
30. *Id.*
31. *Id.* at 695.
32. *See* discussion and principal cases *infra* Part II.
33. *Id.* at 683.
34. *Id.* at 688. The majority stated, "More specific guidelines are not appropriate. The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance . . . . The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* Justice Brennan wrote that "[w]ith respect to the performance standard, I agree with the Court's conclusion that a 'particular set of detailed rules for counsel's conduct' would be inappropriate." *Id.* at 703 (Brennan, J., concurring in part and dissenting in part) (quoting *id.* at 688).

sel must have in making tactical decisions."[35]

Under the *Strickland* analysis, "[j]udicial scrutiny of counsel's performance must be highly deferential."[36] In evaluating ineffective assistance claims, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[37] The reasonableness prong requires the defendant to overcome the "presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"[38]

Legal scholars tend to view the Court's deference to attorney strategy and its unwillingness to articulate specific standards of attorney conduct with favor.[39] Because there are myriad ways to provide effective assistance of counsel in any given case,[40] courts have expressed fear that specific guidelines promulgated by the Supreme Court would deter defense counsel from providing innovative and vigorous advocacy.[41]

However, in his vigorous dissent to *Strickland*, Justice Marshall criticized the Court's deferential stance with respect to attorney performance:

> My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different

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35. *Id.* at 689.

36. *Id.*

37. *Id.* "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." *Id.*

38. *Id.* at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

39. *See, e.g.*, Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 86 (1986) (stating that "at this stage of development of the law on ineffective assistance, the difficulty of articulating a comprehensive list of duties justifies the Court's reluctance to constitutionalize any specific directives to counsel").

40. For a discussion of the different variables that a criminal defense attorney has to measure, see, for example, Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 343 (1983).

41. *See Strickland*, 466 U.S. at 689-90. *See also* State v. Piche, 430 P.2d 522, 526 (Wash. 1967).

> To assure the defendant of counsel's best efforts . . . the law must afford the attorney a wide latitude and flexibility in his choice of trial psychology and tactics. If counsel is to be stultified at trial by a post trial scrutiny of the myriad choices he must make in the course of a trial . . . he will lose the very freedom of action so essential to a skillful representation of the accused.

Id.

> courts. To 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. In essence, the majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes "professional" representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel. In my view, the Court has thereby not only abdicated its own responsibility to interpret the Constitution, but also impaired the ability of the lower courts to exercise theirs.[42]

In the years since the *Strickland* standard was announced, these words have proven prophetic, at least with respect to ineffective assistance claims arising out of unauthorized concessions of guilt by defense counsel. While courts seem to recognize that the vast majority of ineffective assistance claims must be evaluated according to the two prongs of the *Strickland* test—unreasonably deficient performance and prejudice—there is widespread disagreement among the courts about how to evaluate a situation where the defense attorney admits guilt without the client's consent.

In such a situation, the *Strickland* analysis appears not to fit, because that test is tailored to claims of "actual ineffectiveness" of counsel's assistance.[43] A claim of ineffectiveness generally challenges counsel's preparation (i.e., whether counsel adequately investigated, researched, interviewed witnesses, filed motions, *et cetera*) or performance at trial (i.e., whether counsel cross-examined witnesses, presented mitigating evidence, made a closing statement).[44] Other claims challenge grossly unprofessional conduct such as being intoxicated,[45] using drugs,[46] or sleeping through

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

43. *Id.* at 683.

44. For compilations of ineffective assistance claims, see generally JOHN M. BURKOFF & HOPE HUDSON, INEFFECTIVE ASSISTANCE OF COUNSEL 1-3 (1994); LARRY FASSLER, INEFFECTIVE ASSISTANCE OF COUNSEL (1993). *See also* Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59 (1986); Barbara R. Levine, *Preventing Defense Counsel Error—An Analysis of Some Ineffective Assistance of Counsel Claims and Their Implications for Professional Regulation*, 15 U. TOL. L. REV. 1275 (1984).

45. *See, e.g.*, Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993) (holding that although defendant alleged that counsel had been intoxicated during trial and counsel entered an alcohol treatment program after trial, there were no specific instances of deficient conduct by counsel); Fowler v. Parratt, 682 F.2d 746, 750 (8th Cir. 1982) (rul-

trial.[47] Some claims simply allege ineffective assistance because counsel did not have adequate experience in criminal trials or did not have sufficient time to prepare a case.[48]

Contrast with these cases the ineffective assistance claim raised in *Nixon v. Singletary*.[49] In that case, defense counsel was an experienced attorney whose strategy, in admitting the defendant's guilt, was praised by the trial judge as being the defendant's best hope of avoiding the death penalty.[50] The reasonableness of counsel's strategy in this situation would likely have been beyond reproach—*if* the defendant had consented to the tactic. He did not,[51] and the *Strickland* analysis of reasonable performance and prejudice appears inadequate to address the issue of whether his attorney's admission—though well-intentioned and an objectively good strategy—nevertheless violated the defendant's constitutional rights.

When faced with a scenario like that raised in *Nixon*, courts struggle with whether to apply the *Strickland* analysis or one of the

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ing that although defense counsel admitted being an alcoholic and suffering blackouts during trial, there was no evidence that it affected his representation of defendant).

46. *See, e.g.*, Young v. Zant, 727 F.2d 1489, 1492-93 (11th Cir. 1984) (holding that even though counsel had an admitted drug problem, there was no showing of ineffective assistance).

47. *See, e.g.*, Burdine v. Johnson, 262 F.3d 336, 338 (5th Cir. 2001) (en banc) (affirming district court holding that "sleeping counsel is equivalent to no counsel at all"), *cert. denied*, 122 S. Ct. 2347 (2002); Javor v. United States, 724 F.2d 831, 833-34 (9th Cir. 1984) (finding ineffective assistance where counsel slept through substantial portions of the trial); McFarland v. State, 928 S.W.2d 482, 505 n.20 (Tex. Crim. App. 1996) (finding no ineffective assistance where counsel slept through parts of trial, and opining that co-counsel may have let the attorney sleep as a strategic choice aimed at gaining jurors' sympathy for defendant), *overruled on other grounds by* Mosley v. State, 983 S.W.2d 249 (Tex. Crim. App. 1998).

48. *See, e.g.*, United States v. Cronic, 466 U.S. 648, 663-66 (1984) (alleging ineffective assistance where defense attorney had no previous experience with jury trials or criminal law and had twenty-five days to prepare a case that took the government four and one-half years to investigate); Avery v. Procunier, 750 F.2d 444, 447 (5th Cir. 1985) (holding that counsel was not ineffective even though appointed the morning of trial).

49. 758 So. 2d 618 (Fla. 2000). *See* discussion *infra* Parts II.B, III.B.

50. *Id.* at 630 (Wells, J., dissenting). Justice Wells quoted a statement by the trial judge lauding the defense attorney's methods:

> It is my view that the tactic employed by trial counsel in this case was an excellent analysis of [the] reality of his case and the preservation of his credibility. . . . A less experienced attorney, probably seeking to avoid criticism . . . would have tried the case differently, and probably would have left no hope at all for Mr. Nixon.

Id.

51. Nixon was disruptive and uncooperative at trial. *Id.* at 625. He refused to attend the majority of the trial and was not present when his attorney made the statements that formed the basis of his appeal. *Id.* at 620 n.3.

three recognized exceptions to that standard.[52] The most common exception is the "surrounding circumstances" standard articulated in *United States v. Cronic*,[53] decided by the Supreme Court on the same day as *Strickland*.

B. *The "Surrounding Circumstances" Exception*: United States v. Cronic *and Meaningful Adversarial Testing*

Where the *Strickland* standard evaluates the reasonableness and the prejudicial effect of specific counsel errors, the *Cronic* standard looks to the adequacy of counsel's overall performance in the context of the surrounding circumstances of the case.[54] The *Cronic* standard applies to a limited category of cases "in which the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness [is] properly presumed without inquiry into actual performance at trial."[55] The Court identified three trial situations that implicate *Cronic* analysis.[56] The first and "[m]ost obvious" situation is the "complete denial of counsel" during a critical stage of the proceeding.[57] The

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52. Each of the three exceptions to the *Strickland* test presumes prejudice rather than requiring the defendant to demonstrate that, but for counsel's admission, he or she would not have been convicted. In addition to the "surrounding circumstances" exception discussed, *infra* Part I.B, the Supreme Court articulated a conflict of interest exception in *Cuyler v. Sullivan*, 446 U.S. 335 (1980). Under this test, the defendant must demonstrate (1) that his attorney "actively represented conflicting interests" and (2) that the "actual conflict of interest affected his lawyer's performance." *Id.* at 350.

The third exception to *Strickland* is the "irreconcilable conflict" standard recognized by the Ninth Circuit. This standard applies specifically to the situation where a conflict develops between counsel and the defendant such that "the relationship between lawyer and client completely collapses." *In re* Personal Restraint of Stenson, 16 P.3d 1, 9 (Wash. 2001) (citing United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998)).

For more information on the "irreconcilable conflict" standard, see, for example, *Moore*, 159 F.3d at 1154 (finding *per se* prejudice where motion to substitute counsel was denied after defendant threatened to sue counsel for malpractice and counsel effectively stopped working on defendant's defense); United States v. Williams, 594 F.2d 1258, 1260 (9th Cir. 1979) (presuming prejudice where attorney-client relationship was a "stormy one with quarrels, bad language, threats, and counter-threats"); Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970) (presuming prejudice where defendant went to trial with attorney with whom he would not cooperate or communicate, because the court found that defense was perfunctory, and that it would not be unreasonable to believe that, had defendant been represented by an attorney with whom he had a better relationship, he would have been convicted of a lesser offense).

53. 466 U.S. 648 (1984).

54. *See id.* at 666 n.41.

55. *Id.* at 661.

56. *Id.* at 658-59. *See also* Bell v. Cone, 122 S. Ct. 1843, 1850-51 (2002).

57. *Cronic*, 466 U.S. at 659.

Court has used the phrase "critical stage"[58] to "denote a step of a criminal proceeding . . . that [holds] significant consequences for the accused."[59] The absence of counsel at a critical stage of the trial may be actual or constructive.[60]

Second, a trial is presumptively unfair under *Cronic* "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing."[61] In *Bell v. Cone*,[62] the Supreme Court clarified this statement by concluding, "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*."[63]

Finally, "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not,"[64] the *Cronic* standard applies. As an example of such a case, the Court cited *Powell v. Alabama*,[65] a highly publicized capital rape trial in which the trial judge appointed "all the members of the bar" to represent the defendants rather than appointing a single attorney.[66] The Court held that this designation of counsel "was ei-

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58. *Id.*

59. *Bell*, 122 S. Ct. at 1851 n.3 and accompanying text. Whether a proceeding is a "critical stage" depends upon an analysis of "whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice." United States v. Wade, 388 U.S. 218, 227 (1967). The Supreme Court has identified a number of "critical stages" throughout a criminal proceeding. *See, e.g.*, Mickens v. Taylor, 122 S. Ct. 1237, 1250 (2002) (appointment of counsel to indigent defendants and the opportunity for pretrial consultation with counsel); Michigan v. Jackson, 475 U.S. 625, 636 (1986) (interrogation after the defendant asserts the right to counsel); Estelle v. Smith, 451 U.S. 454, 470-71 (1981) (pretrial psychiatric examinations); Herring v. New York, 422 U.S. 853, 858 (1975) (closing argument); Coleman v. Alabama, 399 U.S. 1, 9-10 (1970) (preliminary hearing to fix bail); *Wade*, 388 U.S. at 227 (pretrial identification lineup); Mempa v. Rhay, 389 U.S. 128, 129 (1967) (sentencing); Swain v. Alabama, 380 U.S. 202, 219 (1965) (jury selection), *overruled on other grounds by* Batson v. Kentucky, 476 U.S. 79 (1986); White v. Maryland, 373 U.S. 59, 60 (1963) (preliminary hearing to enter plea); Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment).

60. Frazer v. United States, 18 F.3d 778, 786 (9th Cir. 1994) (Beezer, J., concurring).

61. *Cronic*, 466 U.S. at 659.

62. 122 S. Ct. 1843 (2002).

63. *Id.* at 1851 (emphasis added).

64. *Bell*, 122 S. Ct. at 1851 (citing *Cronic*, 466 U.S. at 659-62).

65. 287 U.S. 45 (1932).

66. In *Powell*, three black defendants were charged with the highly publicized rape of two white women. *Id.* at 49. The trial judge appointed "all the members of the bar" to arraign them, but on the morning of trial, the only attorney to appear for the defense was a lawyer from Tennessee, who had not had time to prepare for the case or to familiarize himself with Alabama procedure, and therefore stated he was unwilling to

ther so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard."[67]

The *Cronic* exception reflects the Supreme Court's recognition that the underlying purpose of the Constitution's guarantee of effective assistance of counsel is to ensure truth and fairness through adversarial testing.[68] Partisan advocacy on both sides of a case is the "very premise" of our criminal justice system.[69] That premise "underlies and gives meaning to the Sixth Amendment. It is meant to assure fairness in the adversary criminal process."[70] Thus, the purpose of the *Cronic* standard is to evaluate whether counsel's performance "require[d] the prosecution's case to survive the crucible of meaningful adversarial testing."[71] If the reviewing court examines the trial record and determines that counsel's performance did not meet this standard, prejudice is presumed,[72] and the defendant is granted a new trial.

C. *Debating the Scope of the* Cronic *Exception*

There is debate over how narrowly to limit the category of cases to which the *Cronic* standard should appropriately be applied. Several courts apply *Cronic* review when defense counsel concedes guilt or absence of reasonable doubt without the defendant's consent, on the theory that to do so "entirely fails to subject the prosecution's case to meaningful adversarial testing."[73]

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represent the defendants. *Id.* at 56-57. The attorney was appointed anyway, to be provided with voluntary assistance from the local bar, and trial proceeded without delay. *Id.* at 57.

67. *Id.* at 53.

68. *Cronic*, 466 U.S. at 655-56.

69. *Id.* at 655.

70. *Id.* at 655-56 (quoting United States v. Morrison, 449 U.S. 361, 364 (1981)).

71. *Id.* at 656.

72. Prejudice is presumed because failure to submit the prosecution's charges to adversarial testing is a *per se* violation of the Sixth Amendment right to effective assistance of counsel. "When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* at 656-57.

73. *See* United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991) (quoting *Cronic*, 466 U.S. at 659) (applying *Cronic* review where defense counsel conceded, during closing argument, that no reasonable doubt existed regarding the only factual issues in dispute); Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000) (presuming prejudice where counsel admitted defendant's guilt in an attempt to persuade the jury not to sentence his client to death); State v. Anaya, 592 A.2d 1142, 1147 (N.H. 1991) (finding prejudice *per se* where counsel urged the jury to convict his client of a lesser-included offense, even though his client had refused to plea to that offense and had testified to his complete innocence); State v. Harbison, 337 S.E.2d 504, 507 (N.C. 1985) (holding that

The above approach, however, has vocal detractors who believe that the *Cronic* test should be applied to an extremely narrow category of cases. In *Scarpa v. Dubois*,[74] the First Circuit criticized what it considered a trend toward overextending the *Cronic* exception:

> A few courts have extended the exception's boundaries beyond the circumstances surrounding representation and found that a lawyer's particular errors at trial may cause a breakdown in the adversarial system and thus justify invocation of the *Cronic* dictum. We believe that these cases misperceive the rationale underlying the *Cronic* exception. In our view, the Court's language in *Cronic* was driven by the recognition that certain types of conduct are *in general* so antithetic to effective assistance—for example, lawyers who leave the courtroom for long stretches of time during trial are unlikely to be stellar advocates in any matter—that a case-by-case analysis simply is not worth the cost of protracted litigation. No matter what the facts of a given case may be, this sort of conduct will almost always result in prejudice. But attorney errors particular to the facts of an individual case are qualitatively different. Virtually by definition, such errors "cannot be classified according to likelihood of causing prejudice" or "defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid." Consequently, the Court has declined to accord presumptively prejudicial status to them.[75]

The *Scarpa* court predicted that overextending the *Cronic* exception would require an inquiry into the facts of individual cases, thus requiring litigation to determine initially whether the *Cronic* test applies[76] and defeating the purpose of the exception, which is to presume prejudice where the attorney's ineffectiveness is so patently egregious that litigation to establish it is unnecessary.[77]

"when counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed").

74. 38 F.3d 1 (1st Cir. 1994).

75. *Id.* at 12-13 (citations omitted).

76. *Id.* at 14.

77. United States v. Cronic, 466 U.S. 648, 661 (1984) (holding that prejudice should only be presumed in cases where "the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness [is] properly presumed without inquiry into actual performance at trial"). The Court recognized that while the burden of demonstrating a constitutional violation in counsel's performance generally rests on the accused, there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* at 658.

II. PRINCIPAL CASES

This Part presents the development of a circuit split regarding the scope of the *Cronic* exception. Section A introduces the federal circuit cases that best articulate the polar positions in interpreting *Cronic*'s *per se* prejudice standard. Section B explores how the debate has been expanded in state courts and examines the two most common scenarios that give rise to a defense attorney's tactical decision to admit the defendant's guilt. Finally, Section C evaluates a case in which the two-prong *Strickland* analysis remains the appropriate standard despite defense counsel's concession of guilt.

A. *The Federal Circuit Split*: United States v. Swanson *and* Scarpa v. Dubois

1. *Cronic* Broadly Interpreted: *United States v. Swanson*[78]

In February 1989, Brent Paul Swanson was indicted on one count of bank robbery.[79] Swanson initially pleaded guilty, but withdrew his plea after learning that he would be sentenced as a career offender.[80] At trial, Swanson's court-appointed counsel rested after the prosecution's case in chief, without calling any witnesses.[81]

During closing argument, Swanson's attorney asserted that a defense attorney's "job" was to raise reasonable doubt.[82] Nevertheless, the attorney went on to make several statements to the effect that inconsistencies in the testimony of prosecution's witnesses did not "[come] to the level of raising reasonable doubt."[83] He told the jury that the evidence against his client was "overwhelming,"[84] and concluded his closing argument by saying, "*And if [Swanson] is proven guilty, don't hesitate in saying so and when you go home tonight don't ever look back and say 'Did I do the right thing?'* If your conscience dictates that that was the right thing to do, you have done your part."[85]

Following Swanson's conviction, his case came before the Ninth Circuit in a habeas corpus proceeding alleging ineffective assistance of counsel because his attorney conceded in his closing ar-

78. 943 F.2d 1070 (9th Cir. 1991).
79. *Id.* at 1071.
80. *Id.*
81. *Id.*
82. *Id.* at 1077. The full text of defense counsel's closing argument is attached as an appendix to the *Swanson* opinion. *Id.* at 1076-78.
83. *Id.*
84. *Id.*
85. *Id.* at 1078.

gument "that there was no reasonable doubt regarding the only factual issues in dispute."[86] The Ninth Circuit, though recognizing that the prejudice standard established in *Strickland* is the general test of ineffective assistance of counsel claims,[87] decided that the circumstances of *Swanson* justified application of the *Cronic* exception.[88]

The Ninth Circuit held that Swanson's defense counsel's conduct "caused a breakdown in our adversarial system"[89] for several reasons. First, defense counsel's statements lessened the government's burden of proof[90] and "tainted the integrity of the trial."[91] Second, the court held that "[t]he concession that there was no reasonable doubt . . . was an abandonment of the defense of his client at a critical stage[92] of the proceedings."[93]

The court commented, "We cannot envision a situation more damaging to an accused than to have his own attorney tell the jury that there is no reasonable doubt that his client was the person who committed the conduct that constituted the crime charged in the indictment."[94] Indeed, the court so strongly believed that Swanson's counsel's conduct was indefensible that it directed its clerk to provide the State Bar of Arizona with a copy of the *Swanson* opinion so that the attorney involved would be sanctioned for negligence.[95]

2. *Cronic* Narrowly Interpreted: *Scarpa v. Dubois*[96]

During the summer of 1987, a Boston-based DEA agent posing as a cocaine purchaser met several times with his initial target, Rob-

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86. *Id.* at 1072.

87. *Id.*

88. *Id.* at 1074 (holding that defense counsel's conduct "caused a breakdown in our adversarial system of justice in this case that compels an application of the *Cronic* exception to the *Strickland* requirement of a showing that the outcome of the trial would have been different without counsel's errors or omissions") (citing *Cronic*, 466 U.S. at 659-60).

89. *Id.*

90. *Swanson*, 943 F.2d at 1075 (stating that, "[b]y arguing that no reasonable doubt existed regarding the only factual issues in dispute, [defense counsel] shouldered part of the Government's burden of persuasion").

91. *Id.* at 1074.

92. *See supra* note 59 for a discussion of what constitutes a "critical stage."

93. *Swanson*, 943 F.2d at 1074 (citing Herring v. New York, 422 U.S. 853 (1975) (holding that closing argument is a "critical stage")).

94. *Id.* at 1075.

95. *Id.* at 1076.

96. 38 F.3d 1 (1st Cir. 1994).

ert Ricupero.[97] Petitioner Nazzaro Scarpa accompanied Ricupero to these meetings.[98] At the first meeting, Scarpa handed drugs to Ricupero, who handed them to the DEA agent.[99] The agent then gave Ricupero $1,500 in cash, which Ricupero, after taking a $100 share for himself, gave to Scarpa.[100] At the second meeting, Scarpa and Ricupero were joined by James Marcella, who handed a package containing cocaine to Scarpa, who passed it to Ricupero, who in turn gave it to the agent: the money then passed from the agent, to Ricupero, to Scarpa, and lastly back to Marcella.[101]

Following these transactions, the Commonwealth of Massachusetts indicted Scarpa for drug trafficking and unlawful distribution.[102] He was convicted and sentenced to a lengthy prison term. After exhausting his state law claims,[103] he filed an application for a writ of habeas corpus in federal district court.[104] The district court applied the *Cronic* analysis and granted the petition, finding that "defense counsel's performance not only fell below an objectively reasonable standard of proficiency but also caused a breakdown in the adversarial system. This . . . constituted prejudice *per se*."[105] Pursuant to these findings, the district court vacated the conviction and ordered Scarpa released from state custody.[106]

The district court noted several misgivings about defense counsel's performance. While the prosecution presented its case primarily through two witnesses, a DEA agent and a Boston police detective,[107] defense counsel cross-examined only the DEA agent, did not attempt to impeach him, and did not call witnesses in Scarpa's defense.[108] Instead, his closing argument urged the jury to accept the government's testimony as truth.[109] Counsel said in closing:

> What happened to that money? What was its final destina-

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97. *Id.* at 5.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *See* Commonwealth v. Scarpa, 571 N.E.2d 28 (Mass. 1991), *aff'g* 567 N.E.2d 1268 (Mass. App. Ct. 1991).
104. *Scarpa*, 38 F.3d at 5.
105. *Id.*
106. *Id.* At the time of argument before the First Circuit, Scarpa was not incarcerated.
107. *Id.* at 9.
108. *Id.*
109. *Id.*

> tion? Is Scarpa a user of drugs? Is Scarpa someone that Ricupero, the target of the investigation—is Scarpa—was he used by Ricupero to shield himself? . . . And I'm suggesting to you—again, at the expense of being repetitious, Scarpa is not found—and it is undetermined—that is the word that Agent Desmond used on July 8th—it's undetermined if Scarpa had any of that money. . . . And clearly, the source of the cocaine on the 8th was not Scarpa. *At best he was a conduit; someone through whom it passed, and through whom the money passed.*[110]

Although the First Circuit agreed with the district court's finding that the defense counsel's argument "effectively conceded the only disputed elements of the . . . crimes and relieved the prosecution of its burden of proof,"[111] and that counsel's performance was objectively unreasonable, the court nevertheless reversed the judgment because the district court reached its decision by inappropriately applying the *Cronic* test rather than *Strickland* analysis.[112]

The First Circuit had several justifications for its decision not to apply the *Cronic* exception to Scarpa's counsel's errors,[113] but one of the court's reasons bears further discussion. The First Circuit cited recent Supreme Court cases that held that "trial errors"[114]

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110. *Id.* at 10.

111. *Id.*

112. *Id.* at 14.

113. *Id.* at 13-15. Those reasons not discussed in the text are: the court's belief that the Supreme Court did not intend *Cronic* to be broadly expanded, *id.* at 14; the court's fear that broad application of *Cronic* would "replace case-by-case litigation over prejudice with case-by-case litigation over prejudice *per se*," *id.*; and the court's desire to protect the State's interest in the finality of jury verdicts and the related goal of avoiding the loss of time and resources required to retry cases, *id.* at 15.

114. A trial error occurs "during the presentation of the case to the [trier of fact], and which may therefore be qualitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Arizona v. Fulminante, 499 U.S. 279, 307–08 (1991). *See* Clemons v. Mississippi, 494 U.S. 738, 752-54 (1990) (overbroad jury instructions at the sentencing stage of a capital case); Carella v. California, 491 U.S. 263, 266 (1989) (jury instruction containing an erroneous conclusive presumption); Satterwhite v. Texas, 486 U.S. 249, 258-60 (1988) (admission of evidence at the sentencing stage of a capital case violated defendant's Sixth Amendment rights); Pope v. Illinois, 481 U.S. 497, 501-504 (1987) (jury instruction misstating an element of the offense); Rose v. Clark, 478 U.S. 570, 584 (1986) (jury instruction containing an erroneous rebuttable presumption); Crane v. Kentucky, 476 U.S. 683, 691 (1986) (erroneous exclusion of defendant's testimony regarding the circumstances of his confession); Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (restriction on a defendant's right to cross-examine a witness for bias in violation of the Sixth Amendment Confrontation Clause); Rushen v. Spain, 464 U.S. 114, 117-118, & n.2 (1983) (denial of a defendant's right to be present at trial); United States v. Hasting, 461 U.S. 499 (1983) (improper comment on defendant's silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause); Hopper v. Evans,

are properly analyzed by harmless-error standards, which require the defendant to demonstrate prejudice, while "structural errors" defy harmless-error analysis.[115] Structural errors are fundamental errors that disturb the framework of the trial[116] and thus necessitate "automatic reversal of the conviction because they infect the entire trial process."[117] Structural errors include the total deprivation of the right to counsel,[118] failure to give a sufficient "reasonable doubt" instruction,[119] and race-based discrimination in jury selection.[120] Trial errors come in far more varieties,[121] but "all such errors occur 'during the presentation of the case to the jury,' and therefore may 'be quantitatively assessed in the context of [the] evidence presented' in order to gauge harmlessness."[122]

The First Circuit held that Scarpa's attorney's conduct was analogous to a trial error[123] because, "[l]ike the line separating trial errors from structural errors, the line past which prejudice will be presumed in cases involving claims of ineffective assistance ought to be plotted to exclude cases in which a detailed contextual analysis is required."[124] Put another way, the court seems to suggest that in cases where a review of the trial record enables the court to weigh the severity of defense counsel's errors—in this case, concession of reasonable doubt—against the overall fairness of the trial, it would not be judicially advisable to presume prejudice.

The First Circuit analyzed Scarpa's counsel's errors in the context of the whole record, including the facts of the case, the tran-

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456 U.S. 605 (1982) (statute improperly forbidding trial court's giving a jury instruction on a lesser-included offense in a capital case in violation of the Due Process Clause); Kentucky v. Whorton, 441 U.S. 786 (1979) (failure to instruct the jury on the presumption of innocence); Moore v. Illinois, 434 U.S. 220, 232 (1977) (unconstitutional admission of identification evidence); Brown v. United States, 411 U.S. 223, 231-32 (1973) (admission of the out-of-court statement of a nontestifying codefendant); Milton v. Wainwright, 407 U.S. 371 (1972) (confession obtained in violation of *Massiah v. United States,* 377 U.S. 201 (1964)); Chambers v. Maroney, 399 U.S. 42, 52-53 (1970) (admission of illegally obtained evidence); Coleman v. Alabama, 399 U.S. 1, 10-11 (1970) (denial of counsel at a preliminary bail hearing).

115. *Scarpa*, 38 F.3d at 14 (citing Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993), and Arizona v. Fulminante, 499 U.S. 279, 306-08 (1991)).

116. *Scarpa*, 38 F.3d at 14.

117. *Brecht*, 507 U.S. at 629-30.

118. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

119. *See* Sullivan v. Louisiana, 508 U.S. 275 (1993).

120. *See* Vasquez v. Hillery, 474 U.S. 254, 260-62 (1986) (grand jury); Batson v. Kentucky, 476 U.S. 79, 100 (1986) (petit jury).

121. *See supra* note 114.

122. *Scarpa*, 38 F.3d at 14 (citing *Fulminante*, 499 U.S. at 307-08).

123. *Id.*

124. *Id.*

script of proceedings, exhibits, and applicable substantive law.[125] The court held "that *Strickland* controls inquiries concerning counsel's actual performance at trial, and that substandard performance, in the nature of particular attorney errors, cannot conclusively be presumed to have been prejudicial."[126]

Under *Strickland* analysis, Scarpa's failure to demonstrate prejudice was fatal to his case.[127] The First Circuit cited several reasons why prejudice had not been demonstrated in this case: the one-sidedness of the evidence in the prosecution's favor,[128] the fact that defense counsel's "conduit" argument conceded only facts that were "overwhelmingly supported" by the government's evidence,[129] and Scarpa's ongoing failure to "identify any promising line of defense."[130]

Although the First Circuit's narrow interpretation of *Cronic* led it to apply the *Strickland* standard in *Scarpa*, the court did not entirely disregard the more expansive *Cronic* interpretation. In a footnote, the court stated that "[e]ven if one were to accept the expansive view of *Cronic* . . . the record here simply does not justify a finding of a complete failure to subject the prosecution's case to meaningful adversarial testing."[131] The court then catalogued the few positive aspects of the defense attorney's representation,[132] and concluded that the record did not demonstrate "such a deliberate rolling over as might warrant a finding of an absolute breakdown of the adversarial process."[133]

Finally, one fact-determinative difference sets *Scarpa* apart from cases applying the broadly interpreted *Cronic* exception: Scarpa's attorney never expressly admitted his client's guilt. Perhaps conceding reasonable doubt through a theory of defense that is ignorant of the substantive law is not as "deliberate [a] rolling over"[134] as an outright admission of culpability.

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125. *Id.* at 15.
126. *Id.*
127. *Id.* at 16.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 15 n.8.
132. Specifically, defense counsel focused his closing argument on the government's burden of proof beyond a reasonable doubt; he informed the jury that they could choose whether or not to believe witness testimony, and he urged the jurors that, in deciding the case, they must "have an abiding conviction." *Id.*
133. *Id.*
134. *Id.*

B. *The Expanding Debate in the State Courts*

1. Admitting Guilt to Lesser-Included Offenses: *State v. Anaya*[135]

When representing defendants charged with serious offenses, attorneys sometimes tell the jury that the client is guilty of lesser-included offenses in an attempt to prevent conviction on more serious charges.[136] Courts are divided about whether to view the attorney's conduct as constitutionally ineffective assistance or reasonable trial strategy.[137]

In *State v. Anaya*, the New Hampshire Supreme Court applied the *Cronic* standard to overturn the defendant's accomplice to second-degree murder charge without finding prejudice. Anaya's trial counsel's closing argument contained at least five requests for his conviction as an accomplice to second-degree murder, and for his acquittal on the charge of accomplice to first-degree murder.[138] Defense counsel pursued this strategy even though Anaya had rejected a negotiated plea on the second-degree charge and had taken the stand at trial to testify that he was "completely innocent."[139]

Anaya's well-documented refusal to consent to counsel's strategy[140] was the dispositive factor in the court's decision to overturn his conviction. Although the court recognized that other courts faced with the situation where the attorney admits the client's guilt to a lesser-included offense generally "view the attorney's conduct as a sound strategical move made in the face of overwhelming evidence of the defendant's guilt,"[141] the court distinguished such cases[142] on two grounds. First, those other defendants had not testified to their complete innocence, as Anaya had,[143] and second, they

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135. 592 A.2d 1142 (N.H. 1991).

136. *See id; see also* Haynes v. Cain, 272 F.3d 757 (5th Cir. 2001), *rev'd en banc*, 298 F.3d 375 (5th Cir. 2002) (en banc); McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984); Faraga v. State, 514 So. 2d 295 (Miss. 1987); People v. Siverly, 551 N.E.2d 1040 (Ill. App. Ct. 1990), and Alexander v. State, 782 S.W.2d 472 (Mo. Ct. App. 1990).

137. *See Anaya*, 592 A.2d at 1145-46.

138. *Id.* at 1144.

139. *Id.*

140. In addition to testifying to his own innocence, "Anaya became so agitated during his attorney's closing argument" that co-counsel had to restrain him. *Id.*

141. *Id.* at 1145.

142. The cases distinguished by the court were McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984); People v. Siverly, 551 N.E.2d 1040 (Ill. App. Ct. 1990); Alexander v. State, 782 S.W.2d 472 (Mo. Ct. App. 1990); and Faraga v. State, 514 So. 2d 295 (Miss. 1987). *Cf.* Haynes v. Cain, 272 F.3d 757 (5th Cir. 2001), *rev'd en banc*, 298 F.3d 375 (5th Cir. 2002).

143. *Anaya*, 592 A.2d at 1146.

had not rejected an opportunity to plead to the lesser offense urged upon the jury by counsel.[144]

Notably, the *Anaya* court did not hold that defense counsel must obtain the defendant's consent before pursuing a strategy that concedes guilt to a lesser offense, although some courts have.[145] Instead, the court held only that counsel may not pursue such a strategy over the defendant's objection.[146]

Although the *Anaya* court applied the *Cronic* exception and did not require the defendant to prove prejudice, the decision is still troublesome. A defendant has a constitutional right *not* to testify,[147] so making a defendant's testimony as to his innocence a determinative factor in evaluating the validity of an ineffective assistance claim is problematic. Securing one's constitutional right to effective assistance of counsel should not be conditioned upon surrendering another constitutionally protected privilege. Likewise, the second factor considered by the *Anaya* court, the rejected plea-bargain, should not determine the success of the ineffective assistance claim because the availability of a plea offer—and the opportunity to reject it—is completely outside the defendant's control. Instead, the only determinative factor should be whether or not the defendant consented to his attorney's strategy, and the defendant should be given an opportunity to express that consent on the record before the attorney concedes guilt—rather than requiring the defendant to object to the strategy once the damage has been done.

2. Appealing to the Jury's Mercy: Admitting Guilt in Capital Crimes

In capital cases, as in cases with lesser-included offenses, ineffective assistance of counsel claims may arise out of a defense attorney's unauthorized admission of the defendant's guilt.[148] Because

144. *Id.*

145. *See* State v. Harbison, 337 S.E.2d 504, 507 (N.C. 1985); State v. House, 456 S.E.2d 292, 297 (N.C. 1995). For further discussion on the need to make a record of the defendant's consent to an admission of guilt, see discussion *infra* Part III.B.

146. *Anaya*, 592 A.2d at 1146.

147. U.S. CONST. amend. V; *see also* Malloy v. Hogan, 378 U.S. 1 (1964) (holding that the Fifth Amendment privilege against self-incrimination is applicable to the states under the Fourteenth Amendment).

148. *See* Kitchens v. Johnson, 190 F.3d 698 (5th Cir. 1999); Carter v. Johnson, 131 F.3d 452 (5th Cir. 1997); Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988); People v. Lucas, 907 P.2d 373 (Cal. 1995); People v. Cain, 892 P.2d 1224 (Cal. 1995); Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000); Abshier v. State, 28 P.3d 579 (Okla. Crim. App.

capital trials are bifurcated into guilt and penalty phases,[149] defense attorneys may consider the defendant's guilt a fairly minor issue—even a non-issue—compared to the goal of avoiding a death sentence in the penalty phase.[150]

Most courts faced with this issue have held that admissions of guilt by counsel are reasonable in the context of a death penalty defense.[151] In *Abshier v. State*,[152] the Oklahoma Court of Criminal Appeals held:

> In some circumstances . . . where the defendant has confessed and the evidence is overwhelming, it could be reasonable trial strategy to candidly concede guilt early in the trial in order to establish credibility with the jury in the hope that at least one juror can be persuaded to vote for a sentence less than death in the penalty stage.[153]

The reasoning behind the *Abshier* decision, and those like it, seems to be that defense counsel should be allowed, as a matter of trial strategy, to admit what he knows the government can prove in order to maintain credibility with the jury for the "critical" penalty phase.[154] If there is overwhelming evidence of guilt, counsel's admissions cannot prejudice the defendant's case.[155]

However, this argument assumes that the penalty phase is more "critical" than the guilt phase. Nevertheless, some defendants

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2001), *cert. denied*, 122 S. Ct. 1548 (2002); *In re* Personal Restraint of Stenson, 16 P.3d 1 (Wash. 2001).

149. Although the Supreme Court has never expressly required bifurcated trials in death penalty cases, the states have interpreted the Court's remarks condoning bifurcation as "virtually requiring it." Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 309. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 195 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.) ("As a general proposition, these concerns [expressed in *Furman* regarding the arbitrary and capricious administration of capital punishment] are best met by a system that provides for a bifurcated proceeding . . . .") (citing Furman v. Georgia, 408 U.S. 238 (1972)).

150. *See* Nixon v. State, 572 So. 2d 1336, 1339 (Fla. 1991) (defense counsel stated in opening statement, "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"); *Abshier*, 28 P.3d at 593 ("We are here for sentencing and sentencing only . . . .").

151. *See, e.g.*, *Kitchens*, 190 F.3d at 704; *Carter*, 131 F.3d at 466; *Lucas*, 907 P.2d at 392; *Cain*, 892 P.2d at 1241; *Abshier*, 28 P.3d at 594.

152. 28 P.3d 579.

153. *Id.* at 594. *See also Lucas*, 907 P.2d at 392 (reasoning that "it is not necessarily incompetent for an attorney to concede his or her client's guilt of a particular offense" when defense counsel knows the prosecution has ample evidence to prove the charge).

154. *Abshier*, 28 P.3d at 595.

155. *Id.*

may wish to profess their innocence even at the risk that the jury may be alienated and return a death sentence. Consider the complaint of the capital murder defendant in *State v. Stenson*:[156]

> [T]hey [Stenson's attorneys] said that unless I agreed to the way they wanted to proceed on the trial that they were going to withdraw and what they wanted to—both their views on the death penalty prohibit them from fighting for me.
>
> And I want to state that I am not guilty of these charges that are against me. . . . But I was told that because of their views on my, the potential of me receiving the death penalty, that they would not fight for me. . . . [B]asically what they wanted to do is pussy foot through the trial and concentrate on getting me a life sentence . . . .[157]

Although the trend seems to be to find counsel admissions of guilt reasonable in the context of capital defense,[158] the Supreme Court of Florida bucked the trend with its decision in *Nixon v. Singletary*.[159] In that case, Nixon appealed his death penalty conviction for first-degree murder, kidnapping, robbery, and arson.[160] During the guilt phase of his trial,[161] his attorney admitted Nixon's guilt during the opening statement[162] and the closing argument.[163] On appeal, Nixon argued that "these comments were the equivalent of a guilty plea by his attorney"[164] and amounted to ineffective representation.[165]

The court agreed.[166] Although the court recognized that "in certain unique situations, counsel for the defense may make a tacti-

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156. 940 P.2d 1239 (Wash. 1997) (applying the *Strickland* standard to uphold the defendant's conviction).

157. *Id.* at 1286 (Sanders, J., dissenting) (quoting R. of Proceedings (July 13, 1994) at 3121-22).

158. *See supra* notes 151-155.

159. 758 So. 2d 618 (Fla. 2000).

160. *Id.* at 619.

161. *Id.* at 620.

162. In his opening statement, Nixon's attorney said, "[T]here won't be any question, none whatsoever, that my client . . . caused Jeannie [sic] Bickner's death. . . . [T]hat fact will be proved to your satisfaction beyond any reasonable doubt." Nixon v. State, 572 So. 2d 1336, 1339 (Fla. 1990) (alterations in original).

163. In closing, Nixon's attorney remarked to the jury, "I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. . . . I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged . . . ." *Id.*

164. *Nixon*, 758 So. 2d at 620.

165. *Id.*

166. *Id.* at 624. *See* discussion comparing unauthorized admissions of guilt to guilty pleas *infra* Part III.B.

cal decision to admit guilt during the guilt phase in an effort to persuade the jury to spare the defendant's life during the penalty phase,"[167] the court held that "the dividing line between a sound defense strategy and ineffective assistance of counsel is whether or not the client has given his or her consent to such a strategy."[168] Remanding the case for an evidentiary hearing to establish whether Nixon consented,[169] the court held that the *Cronic* exception would control on remand if Nixon could establish that "he did not consent to counsel's strategy."[170]

In *Nixon*, the court grounded its decision in the principle that only the defendant can make the fundamental decision to admit guilt.[171] The court was unpersuaded that, in light of Nixon's disruptive behavior and the overwhelming evidence against him,[172] counsel's strategy could be considered effective assistance.[173] While the court recognized that Nixon's trial counsel's strategy might have been Nixon's best chance of avoiding the death penalty,[174] it suggested that, absent Nixon's consent to admitting guilt, counsel should have "[held] the State to its burden of proof by clearly articulating to the jury . . . that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt."[175] If this more conservative strategy works to the defendant's detriment, he has no one to blame but himself.[176]

C. Strickland *Analysis Appropriately Applied*: In re Personal Restraint of Stenson[177]

In rare circumstances, the two-prong *Strickland* analysis re-

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167. *Nixon*, 758 So. 2d at 623.

168. *Id.*

169. *Id.* at 624. The record did not clearly indicate Nixon's lack of consent: he was absent from the courtroom for most of his trial, due to his mental illness and disruptive behavior. *Id.* at 620 n.3, 628-29, (Anstead, J., concurring).

170. *Id.* at 623.

171. *Id.* at 624-25. "[T]he Supreme Court has made it clear that the defendant, not the attorney, is the captain of the ship. Although the attorney can make some tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant." *Id.* at 625 (citations omitted).

172. *Id.* at 625.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* (citing Faretta v. California, 422 U.S. 806, 834 (1975), *limited by* Martinez v. Ct. App., 528 U.S. 152 (2000) ("The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction.")).

177. 16 P.3d 1 (Wash. 2001).

mains the appropriate standard by which to evaluate an ineffective assistance claim arising out of counsel's unauthorized concession of guilt. *In re Personal Restraint of Stenson* is one such case. There, the defendant asked the Washington Supreme Court to reverse his death penalty conviction for the murder of his wife and business partner.[178] Stenson argued, essentially, that his attorneys considered the guilt phase of his trial not "winnable"[179] and instead concentrated their efforts on the penalty phase,[180] while Stenson wanted his attorneys to do everything possible to prove his innocence.[181] Because of this disagreement over the primary objective of the trial, Stenson argued that his attorneys' perfunctory handling[182] of the guilt phase amounted to a concession of the guilt issue.[183]

Although one justice dissented,[184] believing that Stenson's attorneys effectively conceded his guilt,[185] the majority of the court applied the two-prong *Strickland* analysis and upheld the conviction.[186] In evaluating the reasonableness prong of *Strickland*, the court held that "there is no evidence to suggest that the representation Stenson received was in any way inadequate."[187] Both attorneys were experienced[188] and communicated regularly with Stenson.[189] In preparing for the guilt phase, the defense's investiga-

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178. *Id.* at 5.

179. *Id.* at 6.

180. *Id.* at 8. Stenson complained that the lead attorney assigned to his case "spent virtually no time preparing for the jury trial but concentrated instead on motions, jury selection, and the penalty phase." *Id.* at 11.

181. *Id.* at 8.

182. Stenson principally objected to counsels' refusal to introduce "other suspect" evidence that would have suggested that Denise Hoerner, the widow of one of the victims, actually committed the murders. *Id.* at 11. His attorneys rejected this tactic because it was unsupported by the physical evidence, and they feared it would turn the jury against Stenson and make a death penalty verdict more likely. *Id.* Stenson also objected to counsels' decision not to call defense witnesses, *id.* at 18, and to counsels' allegedly inadequate preparation for cross-examination of crucial prosecution witnesses, *id.* at 23-25.

183. *See id.* at 26 n.4 & 29 (Sanders, J., dissenting).

184. *Id.* at 26. Justice Sanders would have reversed the conviction and presumed prejudice based upon the "irreconcilable conflicts" exception to the *Strickland* standard. *Id.* at 26-29. *See supra* note 52.

185. *Stenson*, 16 P.3d at 26.

186. *Id.* at 25.

187. *Id.* at 12.

188. *Id.* at 10. Lead counsel, Attorney Fred Leatherman, had "extensive experience" in death penalty defense, and co-counsel, David Neupert, though not "death-penalty qualified," had been co-counsel on several homicide cases. *Id.*

189. *Id.* at 11. Leatherman met with Stenson ten times between October 1993

tor billed the court approximately $35,000 for his services.[190] At trial, defense counsel cross-examined twenty-five of the State's thirty-three witnesses[191] and called five defense witnesses.[192] Perhaps most importantly, defense counsel made no statement expressly conceding guilt or reasonable doubt until the penalty phase of the trial.[193] These facts undermined Stenson's claim that the defense mounted by his attorneys was in any way perfunctory; indeed, the quality of representation Stenson received seems far superior to that given many death penalty defendants represented by appointed counsel.[194]

In cases like *Stenson*, where the defense counsel's admission is not express or even clearly implied, and the trial record reveals that defense counsel rigorously held the prosecution to the burden of proof, the *Strickland* analysis is appropriate. In such a case, the Sixth Amendment requirement that the prosecution "survive the crucible of meaningful adversarial testing"[195] has been satisfied, and the *Cronic* exception does not apply.

III. JUSTIFYING A CLEAR RULE AGAINST UNAUTHORIZED ADMISSIONS BY COUNSEL

Courts that resist a broader application of the *Cronic* exception fear that such application will require an in-depth inquiry into the facts of individual cases,[196] thereby undermining what they consider the purpose of the exception—to identify a narrow class of cases in which prejudice may be presumed "without inquiry into

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and January 1994, and Neupert met with Stenson "roughly twice a week" between November 1993 and June 1994. *Id.*

190. *Id.*

191. *Id.* at 12.

192. *Id.*

193. *Id.* at 22. In the penalty phase, counsel told the jury, "[W]e accept your verdict without reservation whatsoever." *Id.* Stenson argued that this statement violated his Fifth Amendment privilege against self-incrimination, but the court held that that privilege does not extend to the penalty phase. *Id.*

194. *See* discussion *infra* Part III.C; *see generally* 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 (1994); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995); Margaret H. Lemos, Note, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808 (2000); Erika E. Pedersen, Note, *You Only Get What You Can Pay For:* Dziubak v. Mott *and Its Warning to the Indigent Defendant*, 44 DEPAUL L. REV. 999 (1995).

195. *See* United States v. Cronic, 466 U.S. 648, 656 (1984).

196. *See* discussion *supra* Part I.C, especially notes 76-77 and accompanying text.

counsel's actual performance at trial"[197]—and encouraging increased litigation because trial records on Sixth Amendment appeals would need to be examined in greater detail.

To some degree, this fear may be warranted. There are many contexts in which defense counsel may admit a client's guilt, and each case has its own unique facts and circumstances. Broad application of the *Cronic* exception may lead some appellate courts to get bogged down in the minutiae of these cases and lose sight of the dispositive issue: the reliability of the original conviction.[198] However, applying the *Strickland* analysis to these cases may actually lead to even more litigation; often the trial record must be scrutinized to determine, first, whether defense counsel's admission was objectively reasonable, and second, whether the defendant suffered prejudice. A clear rule establishing that it is never reasonable for defense counsel to concede guilt or the absence of reasonable doubt to any charged offense without the defendant's consent would resolve the vast majority of cases like *Swanson* and the others examined in this Note. A simple review of the trial record would suffice to demonstrate whether or not a prohibited concession had been made.

More difficult cases where the attorney's concession is not express or even clearly implied[199] may not be resolved by such a rule. In such cases, the *Strickland* two-prong analysis will remain appropriate because a perfunctory defense that nevertheless holds the government to the burden of proof does not constitute a breakdown in the adversary system.

The necessity of such a rule is bolstered by already existing notions of the attorney-client relationship in the criminal context, constitutional protections surrounding the entrance of guilty pleas, and public policy reasons. The next section addresses each of these justifications in turn.

A. *The Attorney-Client Relationship: Rights and Responsibilities of Counsel and Accused*

Our justice system is grounded in the perception that the relationship between counsel and accused is a somewhat collaborative one, in which certain fundamental decisions are reserved for the

197. *Cronic*, 466 U.S. at 662.

198. *See, e.g.*, Scarpa v. Dubois, 38 F.3d 1, 14-15 (1st Cir. 1994).

199. *See, e.g.*, *In re* Personal Restraint of Stenson, 16 P.3d 1, 9-10 (Wash. 2001). *See* discussion *supra* Part II.C.

accused,[200] while other decisions are the province of defense counsel.[201] This understanding of the attorney-client relationship lays the groundwork for a clear rule precluding unauthorized admissions of guilt by counsel. Such a rule would reflect the principle that effective representation must comport with the basic responsibilities of defense counsel without encroaching upon the fundamental rights of the defendant.

Defense counsel's overarching function is to ensure that the defendant receives a fair trial.[202] This function involves certain basic duties. Counsel owes the client a duty of loyalty and must avoid conflicts of interest.[203] Counsel must serve as an advocate for the defendant, rather than a friend of the court.[204] Arising out of the role of advocate are more particular duties, such as the duty to "consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution."[205] Counsel must also provide the skill and knowledge necessary to ensure reliable adversarial testing of the prosecution's case at trial.[206]

Beyond this, there are guidelines establishing which tactical de-

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200. *See infra* notes 209-213.

201. *See infra* notes 207-208.

202. Strickland v. Washington, 466 U.S. 668, 684-85 (1984). "[T]his Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Id.* at 684.

203. *See* Cuyler v. Sullivan, 446 U.S. 335, 346 (1980). Although tactical disputes between the attorney and client are not traditionally characterized as conflicts of interest, the *Cuyler* test is beginning to be raised in this context. In *Osborn v. Shillinger*, the Tenth Circuit stated:

> A defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest. . . . In fact, an attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition.

861 F.2d 612, 629 (10th Cir. 1988). *See also In re* Personal Restraint of Stenson, 16 P.3d 1, 8-9 (majority opinion), & 29 (Sanders, J., dissenting).

Those who would apply conflict of interest analysis to tactical admissions of guilt by counsel argue that "ultimately there are some decisions reserved to the client, even when his lawyer honestly . . . believes the client fails to promote his self-interest in the best possible fashion." *Stenson*, 16 P.3d at 29 n.7.

204. Anders v. California, 386 U.S. 738, 744 (1967); s*ee also* Ferri v. Ackerman, 444 U.S. 193, 204 (1979) (stating that "[i]ndeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the government and to oppose it in adversary litigation").

205. *Strickland*, 466 U.S. at 688.

206. *See* Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

cisions are within the attorney's sole discretion. The ABA Standards for Criminal Justice provides such guidelines:

> (a) Certain decisions relating to the conduct of the case are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are:
> (i) what plea to enter;
> (ii) whether to waive jury trial; and
> (iii) whether to testify in his or her own behalf.
> (b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and *all other strategic and tactical decisions* are the exclusive province of the lawyer after consultation with the client.[207]

These guidelines create the inference that so long as the attorney does not infringe upon the enumerated rights of the defendant, all reasonable tactical decisions are permissible. But the ABA guidelines also suggest that the lawyer must reach these decisions "after consultation with the client."[208]

As provided by the ABA's Standards for Criminal Justice, a number of fundamental decisions are reserved for the defendant.[209] The decision of how to plead, for example, must be made solely by the defendant, based on his intelligent and voluntary choice.[210] To insure that the plea is voluntary and intelligent, the trial court must make an on-the-record inquiry of the defendant.[211] The defendant also has ultimate authority as to whether to waive a jury trial, testify on his or her own behalf, or to take an appeal.[212]

Although the Supreme Court has never explicitly so held, many lower federal courts and state courts interpret the Sixth

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207. 1 ABA STANDARDS FOR CRIMINAL JUSTICE 4-5.2 (2d ed. Supp. 1986) (emphasis added).

208. *Id.*

209. *Id.* *See also* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2001) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.").

210. Boykin v. Alabama, 395 U.S. 238, 242 (1969). In *Boykin*, the Supreme Court held that because a guilty plea constitutes a waiver of several constitutional rights—specifically the Fifth Amendment privilege against self-incrimination and the Sixth Amendment rights to trial by jury and to confront one's accusers—that cannot be presumed from a silent record, courts must conduct an on-the-record inquiry of the accused "to make sure he has a full understanding of what the plea connotes and of its consequence." *Id.* at 243-44.

211. *Id.*

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

Amendment as granting the defendant a right to decide, within the range of permissible defenses, the type of defense he wishes to mount.[213] The ABA Model Rules of Professional Conduct provide that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."[214] Without affording the defendant total control over his defense, the Supreme Court in *Strickland* observed that "[c]ounsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."[215]

These professional guidelines and case law suggest that the attorney-client relationship ought to be a collaborative one, in which there is no firm rule that matters of strategy are left solely to the attorney's discretion, and decisions integral to the objectives of representation should be made by the defendant after receiving the advice of counsel. A clear rule that counsel may not make unauthorized concessions of guilt would comport with these traditional conceptions of the attorney-client relationship and would not infringe upon counsel's autonomy in making strategic decisions beyond those limits already recommended by current standards of criminal representation.

B. *Counsel's Admission Is Tantamount to a Guilty Plea*

In *Nixon v. Singletary*,[216] the Supreme Court of Florida held that defense counsel's admissions of his client's guilt during his opening statement[217] and closing argument[218] "were the functional equivalent of a guilty plea."[219] A concession of guilt by counsel

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213. *See, e.g.*, Nixon v. Singletary, 758 So. 2d 618, 625 (Fla. 2000) (making extended metaphor of trial as ship voyage, with defendant as captain, with "ultimate choice as to which direction to sail"); State v. Carter, 14 P.3d 1138, 1147 (Kan. 2000) ("The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'" (quoting Faretta v. California, 422 U.S. 806, 819 (1975)); State v. Benn, 845 P.2d 289, 308-09 (Wash. 1993) (finding that it was not unreasonable trial strategy for an attorney to accede to defendant's wishes as to how to conduct the defense at trial, even though the tactic ultimately proved unsuccessful).

214. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2000).

215. Strickland v. Washington, 466 U.S. 668, 691 (1984).

216. 758 So. 2d 618, 634 (Fla. 2000). *See* discussion *supra* Part II.B.2.

217. *See* Nixon v. State, 572 So. 2d 1336, 1339 (Fla. 1990).

218. *Id.*

219. *Nixon*, 758 So. 2d at 624. *See also* State v. Gordon, 641 N.W.2d 183 (Wis. Ct.

deprives the defendant of his "constitutional right to have his guilt or innocence decided by the jury,"[220] a right reserved by the defendant when he enters a plea of "not guilty" and makes the decision to proceed to trial.[221] In pleading "not guilty," a defendant makes it clear "that he intends to hold the government to strict proof beyond a reasonable doubt as to the offense charged,"[222] and a concession of guilt by counsel, no matter how well-reasoned the strategy behind it, alleviates the government of this burden.

Because counsel's admission of guilt is the functional equivalent of a guilty plea by the defendant, a rule prohibiting such an admission should provide a procedure for documenting the defendant's consent. Failure to define such a procedure will likely result in case-by-case litigation necessary to determine whether and how a defendant manifested his consent. The *Nixon* court required that, when a trial court knows or suspects defense counsel's strategy requires conceding guilt or the absence of reasonable doubt, the judge should make an on-the-record examination of the defendant to ensure that the defendant has given his independent, informed consent to counsel's strategy.[223] This examination is the same as that required of defendants entering a guilty plea,[224] and it should

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App. 2002). In *Gordon*, the court held that "a defense attorney need not say the magic words 'my client has decided to plead guilty,' before a court may conclude that defense counsel unconstitutionally waived a defendant's right to plead not guilty." *Id.* at 195 (citing Underwood v. Clark, 939 F.2d 473, 474 (7th Cir. 1991)). *But see* United States v. Gomes, 177 F.3d 76, 83-84 (1st Cir. 1999) (evaluating counsel's concession of guilt under the *Strickland* prejudice standard). In *Gomes*, the First Circuit commented that "[c]ounsel's concession was not a guilty plea, which involves conviction *without proof*, and is therefore properly hedged with protections. Here, the government had to provide a jury with admissible evidence of guilt and did so in abundance." *Id.* at 84.

There is also an argument that, in jurisdictions where the jury determines the sentence as well as the issue of guilt, an attorney's admission of guilt cannot be equated with a guilty plea because, despite the attorney's concession, the defendant retains the right to be sentenced by the jury. *See* Abshier v. State, 28 P.3d 579, 597 n.7 (Okla. Crim. App. 2001), *cert. denied*, 122 S. Ct. 1548 (2002).

220. *Nixon*, 758 So. 2d at 623 (quoting Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir. 1981)).

221. *Wiley*, 647 F.2d at 650 (citing Boykin v. Alabama, 395 U.S. 238 (1969)).

222. *Id.* (citing Byrd v. United States, 342 F.2d 939, 941 (D.C. Cir. 1965)).

223. *Nixon*, 758 So. 2d at 625. *See also Wiley*, 647 F.2d at 650 (holding that "[i]n those rare cases where counsel advises his client that the latter's guilt should be admitted, the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record in the manner consistent with *Boykin*") (referring to Boykin v. Alabama, 395 U.S. 238 (1969), *see* discussion *supra* note 210); State v. House, 456 S.E.2d 292, 297 (N.C. 1995) (urging "both the bar and the trial bench to be diligent in making a full record of a defendant's consent when a *Harbison* issue arises at trial") (referring to State v. Harbison, 337 S.E.2d 504 (N.C. 1985)).

224. *See Boykin*, 395 U.S. at 242-44.

be utilized to establish a defendant's consent to counsel's admission because the consequences of such an admission are indistinguishable from the consequences of entering a guilty plea.

Some courts have held that a plea-like waiver recording the defendant's intelligent and voluntary consent is not necessary when defense counsel admits the client's guilt. These courts believe that the defendant's silence at trial while counsel makes the admission demonstrates acquiescence.[225] Unfortunately, this silent waiver approach fails to recognize that the defendant might feel too intimidated to speak out of turn and object, or may not understand the import and effect of counsel's statements until the window of opportunity to object has passed.[226]

Moreover, in *Cronic*, the Supreme Court suggested that the measure of effective assistance is independent of the defendant's subjective opinion of his counsel's performance, commenting:

> If counsel is a reasonably effective advocate, he meets constitutional standards irrespective of his client's evaluation of his performance. It is for this reason that we attach no weight to either respondent's expression of satisfaction with counsel's performance at the time of his trial, or to his later expression of dissatisfaction.[227]

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225. *See* Abshier v. State, 28 P.3d 579, 598 (Okla. Crim. App. 2001) (finding that "[a]ppellant acquiesced in the trial strategy of his counsel where he made no effort at any time during the trial to express to the judge his disagreement with the strategy"), *cert. denied*, 122 S. Ct. 1548 (2002); People v. Cain, 892 P.2d 1224, 1241 (Cal. 1995) (commenting that "[i]t is not the trial court's duty to inquire whether the defendant agrees with his counsel's decision to make a concession, at least where, as here, there is no explicit indication the defendant disagrees with his attorney's tactical approach "); State v. Provost, 490 N.W.2d 93, 97 (Minn. 1992) (noting that "[f]rom his opening statement through his closing argument, defense counsel consistently took the position that defendant had caused the victim's death. At no time does the record disclose that defendant had any objection to or dissatisfaction with this trial strategy").

The issue of whether an on-the-record waiver is advisable or necessary when counsel pursues a strategy admitting guilt remains an open question in the First Circuit. *See* United States v. Gomes, 177 F.3d 76, 84 (1st Cir. 1999) (failing to reach the question of "whether and when a defendant's consent . . . to a course of action might be relevant to an ineffective assistance claim," because such an argument could not be supported by the record of the case at bar).

226. There is a similar debate regarding whether waiver of a defendant's right to testify may be demonstrated by a silent record. *Compare* United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991) (per curium) (requiring defendant to protest his lawyer's action denying the right to testify to the judge during trial), *and* United States v. Martinez, 883 F.2d 750, 760-61 (9th Cir. 1989), *vacated on other grounds*, 928 F.2d 1470 (9th. Cir 1991), *with* People v. Curtis, 681 P.2d 504, 514-15 (Colo. 1984) (requiring the judge to inquire of the defendant directly whether he wants to testify), *and* State v. Neuman, 371 S.E.2d 77, 81-82 (W.Va. 1988).

227. United States v. Cronic, 466 U.S. 648, 657 n.21 (1984) (citation omitted).

If the defendant's satisfaction or dissatisfaction with counsel's performance is not germane to the question of whether the constitutional standards of effective assistance have been met, it serves no purpose to require that the defendant express his dissatisfaction at trial in order to preserve an ineffective assistance of counsel claim for appeal. A clear rule requiring trial courts to conduct a colloquy to record the defendant's consent to a strategy that concedes guilt is necessary to eliminate time consuming and counterproductive litigation over whether or not the defendant's silence at trial constituted a waiver.

C. *The Nexus Between Indigent Defense and Ineffective Assistance*

When reviewing cases involving an unauthorized admission of guilt by counsel, a disturbing pattern emerges. Most of these cases involve court-appointed representation,[228] and, by implication, indigent defendants whose socio-economic disadvantage makes them dependent upon appointed counsel to assist with their defense.

The nexus between indigent defense and (in)adequacy of representation is well documented and much lamented.[229] Public defense programs are notoriously overburdened and under-funded,[230] which degrades the quality of representation.[231] Due to inadequate compensation and excessive caseloads, public defenders often lack

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228. Frequently, appellate decisions addressing attorney admissions of guilt expressly note that trial counsel was court-appointed. *See* Brookhart v. Janis, 384 U.S. 1, 5 (1965); Haynes v. Cain, 272 F.3d 757, 759 (5th Cir. 2001), *rev'd en banc,* 298 F.3d 375 (5th Cir. 2002); Kitchens v. Johnson, 190 F.3d 698, 699 (5th Cir. 1999); United States v. Swanson, 943 F.2d 1070, 1071 (9th Cir. 1991); Osborn v. Shillinger, 861 F.2d 612, 614 (10th Cir. 1988); Wiley v. Sowders, 647 F.2d 642, 644 (6th Cir. 1981); State v. Carter, 14 P.3d 1138, 1141 (Kan. 2000); State v. Harbison, 337 S.E.2d 504, 506 (N.C. 1985); State v. Anaya, 592 A.2d 1142, 1143 (N.H. 1991); State v. Stenson, 940 P.2d 1239, 1270 (Wash. 1997), *aff'd, In re* Personal Restraint of Stenson, 16 P.3d 1 (Wash. 2001). Although many decisions make no mention of whether defense counsel was appointed, my research only uncovered one case where the court specifically noted that defense counsel was privately retained, *State v. Wiplinger*, 343 N.W.2d 858, 859 (Minn. 1984).

229. *See generally* David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469 (1992); Erika E. Pedersen, *You Only Get What You Can Pay For:* Dziubak v. Mott *and Its Warning to the Indigent Defendant*, 44 DEPAUL L. REV. 999 (1995); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995).

230. Pedersen, *supra* note 229, at 1003-07.

231. *Id.* As one court has observed, "The relationship between an attorney's compensation and the quality of his or her representation cannot be ignored." White v. Bd. of Comm'rs, 537 So. 2d 1376, 1380 (Fla. 1989).

the time and resources to interview all witnesses, investigate facts thoroughly, and file all appropriate pretrial motions.[232] Without the ability to perform such vital and basic investigative and preparatory tasks, public defenders have no choice but to rely on the government to produce all of the relevant facts of the case.[233]

The impact of the indigent defense crisis on the issue of unauthorized admissions of guilt by counsel is readily apparent. Without adequate resources to investigate and prepare alternate theories of defense, appointed counsel may see no alternative but to accept the prosecution's evidence of guilt and concede reasonable doubt at trial.

Likewise, overworked public defenders often do not have the time for lengthy consultations with clients to establish an understanding of the client's defense objectives. At best, these attorneys may not even realize that their client does not understand or approve of the strategy to concede guilt at trial. At worst, they may not care: defense counsel may take a patronizing view of their indigent and often uneducated clients and may believe that the better course is to follow their own more experienced judgment about how to proceed with the case. Defense counsel's decision to pursue a strategy requiring a concession of guilt may be exacerbated when the client is a member of a minority group[234] or, though competent to stand trial, has only marginal mental competency.[235]

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232. Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 369 (1993).

233. The facts of *United States v. Cronic* illustrate this problem: there, the court-appointed attorney had less than one month to prepare a defense against charges arising out of a complicated "check-kiting scheme," while the government took more than four years to investigate the crime. 466 U.S. 648, 649-50. The Supreme Court stated that this discrepancy did not violate the constitutional requirement of effective assistance of counsel, since "[a] competent attorney would have no reason to question the authenticity, accuracy, or relevance of [the government's] evidence." *Id.* at 664. However, the nature of the adversarial justice system requires competent defense attorneys to do just that.

234. *See* Goodwin v. Balkcom, 684 F.2d 794, 805 n.13 (11th Cir. 1982) (defense counsel referred to defendant as a "little old nigger boy" at the close of state's presentation of documentary evidence during sentencing phase of trial); *Ex Parte* Guzmon, 730 S.W.2d 724, 736 (Tex. Crim. App. 1987) (defense counsel referred to El Salvadoran client as "wet back" in front of jury). While these decisions do not involve admissions of guilt by counsel, they exemplify racially-motivated contempt for and condescension toward clients.

235. Several cases concerning an unauthorized concession of guilt by counsel involve defendants of dubious mental competency. *See* Kitchens v. Johnson, 190 F.3d 698, 701-02 n.3 (5th Cir. 1999) (holding that defense counsel's failure to present evidence of defendant's hospitalizations for suicidal behavior and hallucinations was not prejudicial); Nixon v. Singletary, 758 So. 2d 618, 627-29 (Fla. 2000) (Anstead, J., concurring)

CONCLUSION

Prejudice analysis under *Strickland* will almost always be fatal to claims of ineffective assistance of counsel by defendants whose attorneys admit their guilt. After all, if these defendants could not convince their own attorneys to argue their innocence at trial, there is virtually no likelihood that an appellate court will find a reasonable probability that, but for counsel's admission, the defendant would not have been convicted.[236] But whether or not the defendant should have been convicted is not the right standard by which to judge ineffective assistance of counsel claims arising from defense counsel's unauthorized concession of guilt.

Like Joe Elton Nixon[237] and Steven Abshier,[238] many of the defendants whose attorneys pursue a guilt-conceding tactic have committed terrible crimes, and ought to be convicted—but the defendant's guilt or innocence is really beside the point. The atrocity of their crimes, their inability to hire their own attorneys, their race, their mental illnesses—these factors do not justify suspending defendants' constitutional rights to a fair trial, presumption of innocence, proof beyond a reasonable doubt, and especially, to effective representation. Society needs people like Nixon and Abshier to be convicted, but they should be convicted because the government's case has "survive[d] the crucible of meaningful adversarial testing,"[239] not because their attorneys made the decision, for 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.

Heidi H. Woessner

(arguing that defense counsel's failure to request a competency hearing in light of defendant's bizarre and disruptive behavior provided an alternate basis for reversing defendant's murder conviction), *cert. denied*, 531 U.S. 980 (2000); State v. Provost, 490 N.W.2d 93, 95 (Minn. 1992) (involving a schizophrenic defendant).

236. *See* Strickland v. Washington, 466 U.S. 668, 694 (1984).

237. *See* Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000). Nixon was convicted of kidnapping, murder, and arson after accosting a woman, stealing her jewelry and her car, tying her to a tree, and setting her on fire. *Id.* at 629-30 (Wells, J., dissenting).

238. *See* Abshier v. State, 28 P.3d 579 (Okla. Crim. App. 2001), *cert. denied*, 122 S. Ct. 1548 (2002). Abshier was convicted of child abuse murder in the death of his twenty-two month old daughter, Ashley.

239. United States v. Cronic, 466 U.S. 648, 656 (1984).