Law Quadrangle (formerly Law Quad Notes)

Volume 29 | Number 4 Article 7

Summer 1985

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COUNSEL'S CONTROL OVER DEFENSE STRATEGY

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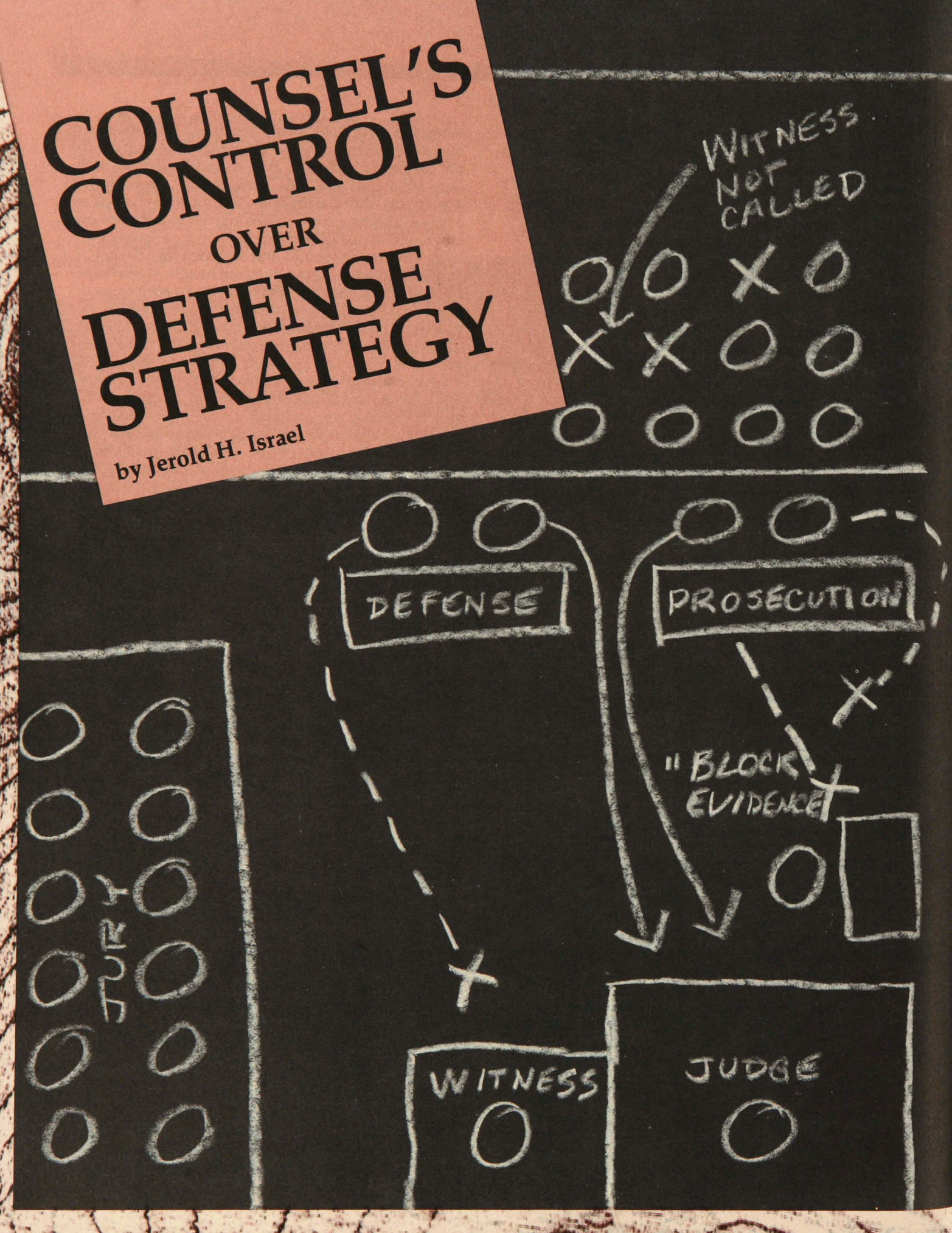


editor's note: The article that follows is a condensation of a section of Criminal Procedure, *a hornbook co-authored by Professor Israel and Wayne R. LaFave, and published by West Publishing Co. in 1985. That hornbook, in turn, is a condensation of the authors' three-volume treatise by the same title.*

Prior to *Faretta*,[1] a long line of cases had held that defense counsel had the authority to make various defense decisions on his own initiative. These decisions, commonly characterized as relating to matters of "strategy" or "tactics," were said to be within the "exclusive province" of the lawyer. Counsel had no obligation to consult with the defendant,[2] and if he did consult, had no obligation to follow the defendant's wishes.[3] Other defense decisions, however, were said to rest in the ultimate authority of the defendant. As to those decisions, commonly said to require the "personal choice" of the defendant, counsel had to advise the client and abide by his directions.

The Supreme Court's decision in *Faretta* was thought by some to have altered this basic division between strategic and personal decisions. The *Faretta* opinion had referred to the "law and tradition" that granted counsel ultimate authority to make "binding decisions of trial strategy in many areas." Indeed it had cited that law and tradition as a factor pointing towards the recognition of an alternative of self-representation where defendant wanted to control his own destiny. The argument was advanced, however, that the overall perspective of the *Faretta* opinion also required that the attorney's ultimate authority be limited, perhaps only to "on-the-spot" decisions where timing considerations precluded consultation with the defendant. *Faretta*, it was argued, was "predicated on the view that the function of counsel under the Sixth Amendment is to protect the dignity and autonomy of a person on trial by *assisting* him in making choices that are his to make, not to make choices for him, although counsel may be better able to decide what tactics will be most effective."

In *Jones v. Barnes*,[4] a divided Supreme Court rejected this view of *Faretta*. *Jones* held that appellate counsel did not have to present a nonfrivolous claim that his client wished to press if counsel believed that the better strategy was to limit his argument and brief to other issues. Counsel was free to follow the time-tested advice of countless advocates that inclusion of "every colorable claim" will "dilute and weaken a good case and will not save a bad one." It was for counsel to decide which claims were strong enough to be presented consistent with this strategy. *Faretta* gave the defendant an opportunity to control the presentation of his case by proceeding pro se. Neither it nor decisions defining the obligation of appointed appellate counsel had altered counsel's right to act upon his best professional judgment as to matters of strategy.

The issue of client control was raised in *Jones* through a claim of ineffective assistance of counsel. While that is probably the most common avenue for presenting that issue, questions of client control also may be raised in other procedural settings. An indigent defendant may claim that he has a right to appointment of new counsel because his current attorney refuses to accept his directions on an issue that should be within defendant's control. A defendant may seek a continuance for the purpose of replacing retained counsel on the same ground. A substantial number of the leading opinions on client control have involved collateral attacks raising constitutional claims that were not presented at trial. When the state has argued that the claim was "waived" by counsel's failure to raise it at trial, the petitioner has responded that a valid waiver of that claim required his personal decision and that counsel had not even consulted with him in deciding not to raise the issue. *Jones* left open whether counsel's strategic decision not to raise on appeal a constitutional claim urged by defendant would bar consideration of that claim on collateral attack. However, various other Supreme Court decisions have held that a counsel's deliberate decision not to raise a particular claim at trial did bar review on collateral attack, provided that decision dealt with a matter subject to counsel's control over strategy. Taken as a whole, the cases indicate that, in piecing together the overall distribution of decision-making authority, one usually can assume that rulings on that subject made in one procedural setting ordinarily will be carried over to other settings as well.

Though the various rulings on client control are not entirely consistent, they recognize several decisions as to which defendant's "personal choice" clearly is required. The Supreme Court has stated, in dictum or holding, that it is for the defendant to decide whether to take each of the following steps: plead guilty or take action tantamount to entering a guilty plea;[5] waive the right to jury trial; testify on his own behalf; or forego an appeal. On the other side, the Supreme Court has indicated, in dictum or holding, that counsel has the ultimate authority in deciding whether or not to advance the following defense rights: barring prosecution use of unconstitutionally obtained evidence; obtaining dismissal of an indictment on the ground of racial discrimination in the selection of the grand jury; wearing civilian clothes, rather than prison garb, during the trial; striking an improper jury instruction; and including a particular nonfrivolous claim among the issues briefed and argued on appeal. Lower court rulings have added to this list a variety of other determinations, including the following: whether to request, or object to, the exclusion of the public from the trial; whether to seek a change of venue, continuance, or other relief due to prejudicial pretrial publicity; whether to seek a continuance and thereby relinquish a statutory right to trial within a specified period; and whether to call a certain witness.

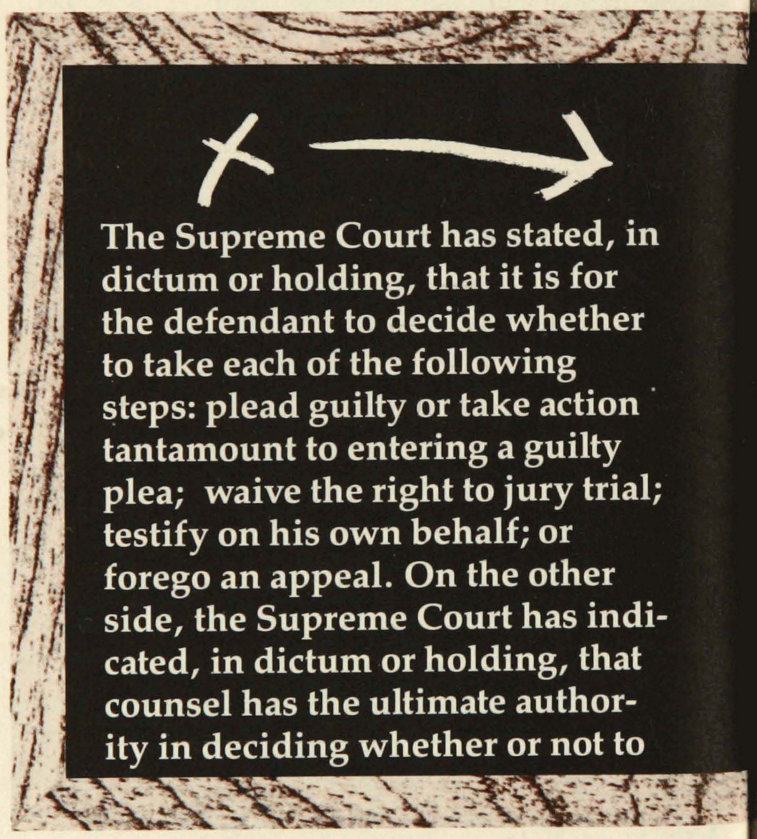
Taken together, the various rulings produce a picture that is clear at many points but clouded at others. General agreement exists that the decisions as to guilty plea, jury trial, appeal, and the defendant testifying

are for the defendant, and that decisions on a substantially larger group of matters, such as objecting to inadmissible evidence, are for counsel. As to various other decisions, however, the courts either have not spoken or are divided. Thus, Justice Brennan, dissenting in *Jones*, was on uncertain ground when he suggested that a defendant would have the right to insist that his counsel forego other strategies more likely to produce a dismissal and rely exclusively on a claim of innocence. That assumption, though it relates to an issue basic to the division of responsibility between lawyer and client, is hardly clear under the precedent. Of course, one cannot expect a ruling on each and every decision on which lawyer and client are likely to disagree. The problems of uncertainty are exacerbated, however, by the absence of any well-reasoned guidelines for distinguishing between those decisions requiring defendant's personal choice and those subject to counsel's control over strategy.

The Supreme Court's explanations of why particular decisions are for counsel or client have been brief and conclusionary. Decisions within the client's control are simply described as involving "fundamental rights," while those within the lawyer's control are said to involve matters requiring the "superior ability of trained counsel" in assessing "strategy." While the rights subject to defendant's "personal choice" clearly are "fundamental," the Court has not explained why various rights subject to counsel's authority are not equally fundamental. Arguably, the decision to plead guilty has a special quality because it involves the relinquishment of so many basic rights. But it is more difficult to distinguish the right to be tried before a jury, for example, from the right to present a particular witness or to cross-examine an opposing witness. If the fundamental nature of a right is measured by its importance, its historic tradition, or its current status in constitutional or state law, those rights would appear to be on the same plane.

The Court's emphasis upon the strategic element in those decisions subject to counsel's control also fails to fully explain the distinctions that have been drawn. Certainly the decisions to waive a jury or not have the defendant testify also involve substantial strategic considerations. It may be argued that the elements of strategy involved in such decisions are more readily understood by the layman because they do not as frequently rest on technical concerns as many of the tactical decisions made by counsel. But they are hardly distinguishable in this regard from still other decisions made by counsel. For example, counsel's decision not to have a particular witness testify often rests on considerations of the same kind that would lead counsel, if he had such control, to keep the defendant from testifying. Similarly, much the same type of judgment is involved in deciding that a jury should be waived because the trial judge is likely to be the more sympathetic factfinder as in deciding that an unconstitutionally composed jury should not be challenged because discriminatory jury selection has produced a more sympathetic group of jurors. In sum, just as the fundamental rights characterization could be applied to many of the rights subject to counsel's control, so could the characterization of a decision as strategic and requiring counsel's expertise be applied to certain basic determinations subject to defendant's control.

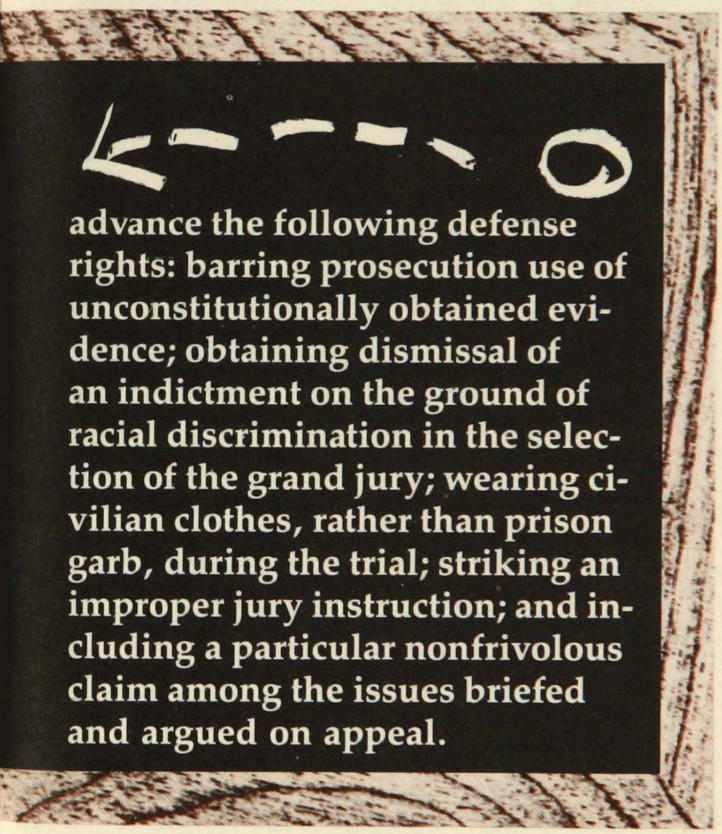
As various lower courts have noted, the determination that particular decisions do or do not require defendant's personal choice has obviously rested on a balancing of several factors. The fundamental nature of the right involved and the significance of strategic considerations obviously are two important considerations. Other factors given substantial weight appear to be the objective of avoiding the disruption of the litigation process, the "inherently personal character" of the particular decision, and the need to maintain a strong defense bar.



The Supreme Court has stated, in dictum or holding, that it is for the defendant to decide whether to take each of the following steps: plead guilty or take action tantamount to entering a guilty plea; waive the right to jury trial; testify on his own behalf; or forego an appeal. On the other side, the Supreme Court has indicated, in dictum or holding, that counsel has the ultimate authority in deciding whether or not to

The court's concern with the possible disruption of the litigation process is manifested most clearly in opinions stressing the timing of the particular decision. The exercise of defendant's personal choice requires an opportunity for meaningful consultation that often is not consistent with the exigencies of litigation. Thus, Justice Brennan, who would grant defendant far more control than the Supreme Court majority, nevertheless acknowledges that defense counsel must be given "decisive authority. . .with regard to the hundreds of decisions that must be made quickly in the course of a

trial."[6] Still another concern of judicial administration is that the trial judge be able to establish on the record, without a lengthy, disruptive procedure, that the decisions subject to defendant's control were actually made by the defendant. Without such a record, convictions could readily be subject to challenge by defendants claiming that counsel usurped the defendant's authority. The trial judge can readily determine that decisions requiring the explicit waiver of rights (such as the guilty plea) were made by the defendant himself, but he is hardly in a position to "continually satisfy himself that the defendant was fully informed as to, and in complete accord with, his attorney's every action or inaction that involved any possible constitutional right."[7]



advance the following defense rights: barring prosecution use of unconstitutionally obtained evidence; obtaining dismissal of an indictment on the ground of racial discrimination in the selection of the grand jury; wearing civilian clothes, rather than prison garb, during the trial; striking an improper jury instruction; and including a particular nonfrivolous claim among the issues briefed and argued on appeal.

Still another factor that has apparently influenced the balancing process, though it tends to be cited more frequently by commentators than courts, is the probability that defendant's interest in the particular decision extends beyond simply presenting a successful defense. The client, it is often said, must be able to control the "end," while the lawyer determines the "means" for reaching that end. Where, as is usually the case, the client's primary objective is to gain an acquittal, the lawyer is only controlling the means to that end when he decides whether or not to advance certain claims or raise particular objections. However, as to the exercise of a few rights, the client may often have a different or additional objective in mind. For example, a defendant may have an interest in testifying himself even though he recognizes that doing so may hurt his chances for acquittal (perhaps because cross-examination will reveal his prior convictions). He may view as more important his opportunity to "tell his story to the public." Similarly, a defendant may want a prompt trial, to relieve his anxiety, even though he recognizes that delay might weaken the prosecution's evidence. Decisions of this type are said to more appropriately rest with the defendant because they have an "inherently personal" quality, reflecting defendant's interest in controlling objectives rather than simply tactics. Of course, a wide variety of decisions may have this quality under the circumstances of an individual case. The courts have indicated, however, that they will judge the decision in terms of the general nature of the interests protected by the particular right. None have suggested, for example, that counsel will lose his control over whether a suppression motion should be made when the particular defendant's political beliefs make it so important to him that police illegality be revealed that he insists on the motion even though it might work against the possibility of an acquittal.

Finally, the line drawn between "personal" and "strategic" decisions probably also reflects some concern that lawyers not be placed in a position so inhibiting or embarrassing, as it relates to their professional expertise, that they are discouraged from engaging in criminal defense work. A lawyer is not placed in a professionally embarrassing position when he is reluctantly required to try his case to a jury rather than a judge. Neither should he be embarrassed because he is required to go to trial in a weak case, since that decision is clearly attributed to his client. The situation would be somewhat different, however, were a lawyer required to raise a "colorable" procedural objection simply because his client insisted that he do so. An objection may be "nonfrivolous" yet so unlikely to succeed that the lawyer who raises it will be viewed as wasting the time of the court. If the lawyer were forced to raise such a claim because of his client's insistence, he could hardly inform the court that he was presenting the claim only because he was required to do so. So too, if forced to present the testimony of an exceptionally weak witness, the lawyer could hardly inform the jury that the witness was called at his client's direction. In the end, this concern that the lawyer not be forced to sacrifice his professional reputation while providing no true assistance to his client may explain, as well as any other factor, the narrow range of decisions assigned to the control of the client.[8] ⊠

Footnotes

1. Faretta v. California, 422 U.S. 806 (1975). Faretta held that a defendant has a constitutional right to proceed pro se that cannot be conditioned on his capacity to perform at the level of a skilled attorney. Defendant is entitled to represent himself provided he "knows what he is doing [in giving up his right to counsel] and his choice is made with eyes open." While the framers of the Constitution recognized the value of representation by counsel in as-

suring that the defendant received a fair trial, they placed on a higher plane the "inestimable worth of [defendant's] free choice."

2. Our discussion deals only with those obligations of counsel that may require reversal of a conviction when violated. Thus, though it is said in this regard that the lawyer has no obligation to consult with his client as to those decisions over which counsel has exclusive control, he may nevertheless have such an obligation to consult under standards of professional responsibility. See ABA Model Rules of Professional Conduct, Rule 1.4 (Approved Draft, 1983). Consider also §20.3(b) as to the special obligations attending counsel's advice on the entry of a guilty plea.
3. Of course, a defendant with a retained attorney can discharge his attorney and look for another who will abide by his wishes. The indigent defendant has no right to a substitute counsel where the disagreement with counsel relates to a matter within the exclusive province of the lawyer. See §11.4(b). Thus his choice commonly is either to keep the counsel or proceed pro se. See §11.4(d). The courts have not seen this distinction in the ability of the non-indigent and indigent defendant to "control counsel" as raising a significant equal protection problem. Many non-indigents are not in a positon to "shop around" for a lawyer more willing to accept the defendant's judgment on matters of strategy. If the disagreement between counsel and client arises at a point where substitution of new counsel can be achieved only with a continuance, the non-indigent, like the indigent, may face the choice of proceeding pro se or retaining his current counsel and accepting counsel's decisions. See §§11.4(c), (d). Moreover, just as equal protection has never been thought to guarantee to the indigent a lawyer as experienced or skillful as the best that a non-indigent might obtain, neither does it require a lawyer as compliant in his relationship with his client as the most submissive attorney a non-indigent may retain. See generally, State v. Superior Court, 2 Ariz. App. 458, 409 P.2d 742 (1962).
4. 463 U.S. 745.
5. See Brookhart v. Janis, 384 U.S.1 (1966). *Brookhart* held that defense counsel could not enter an agreement, without defendant's informed consent, "that all the state had to prove was a prima facie case, that he would not contest it, and that there would be no cross-examination of witnesses." The Court noted that the defendant had desired to plead not guilty, but the counsel had accepted a procedure largely inconsistent with such a plea. That procedure was characterized by Justice Harlan, in his concurring opinion, as having "amounted almost to a plea of guilty or nolo contendere."
6. See Jones v. Barnes, supra note 4 (Brennan, J., concurring). Justice Brennan has argued against "a constitutional rule that encourages lawyers to disregard their clients' wishes without compelling need." It is not clear what factors other than the exigencies of litigation would establish such "compelling need."
7. Winters v. Cook, 489 F.2d 174 (5th Cir. 1973). This is not to say, of course, that a decision will be held to be within counsel's control simply because a record of defendant's personal participation in the waiver is not easily established. Whether to appeal is a decision for the defendant to make, though the failure of counsel to file an appeal hardly indicates in itself (or readily permits a court to establish on the record) that defendant participated in that decision. So too, while the exigencies of the trial process will contribute to the assignment of certain decisions to counsel's bailiwick, the presence of ample opportunity for consultation does not necessarily mean that the decision will be assigned to defendant's control. See e.g., *Jones v. Barnes*, supra note 4, where, as Justice Brennan stressed in the dissent, there was ample time for consultation. Defense counsel also would have had ample time before trial to discuss with defendant the possibility of raising many of the objections considered in the cases cited in the sentence in the text following note 5.
8. Even where an objection has a good chance of success, it might be viewed as "wasteful flyspecking" when it relates to a point that will be of no tactical benefit to the accused in the context of a particular case. Courts more often stress the lack of benefit to the client than their concern for the lawyer's reluctance to serve in a capacity in which he cannot exercise his professional judgment. See Jones v. Barnes, supra note 4. But the two interests run together. See Nelson v. California, 346 F.2d 73 (9th Cir. 1965) (noting that "few competent counsel would accept retainers or appointment***if [required] to consult the defendant and follow his views on every issue of trial strategy that might, often as a matter of hindsight, involve some claim of constitutional right").

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