CONSTITUTIONAL LAW—SIXTH AMENDMENT—ERODING DEFENDANT AUTONOMY: ATTORNEYS HAVE ULTIMATE AUTHORITY TO DETERMINE ISSUES TO BE ARGUED ON APPEAL—*Jones v. Barnes*, 103 S. Ct. 3308 (1983).

The right to counsel clause of the sixth amendment[1] permits a defendant to interpose a shield of skilled legal assistance between himself and the resources of the prosecution.[2] In cases spanning the past fifty years, the United States Supreme Court has extolled the benefits of representation by counsel, and has expanded indigents' access to this representation at critical stages of criminal proceedings.[3] The Court has also recognized, on the other hand, that the sixth amendment guarantees a defendant the right to autonomy in the presentation of his defense.[4] Courts have managed to accomodate both of these rights at the trial level, requiring counsel to defer to the client on substantive matters,[5] but also recognizing that strategic or tactical decisions properly reside with the skilled advocate.[6] At the appellate stage, however, where the distinction between decisions relating to matters of substance and those that are purely strategic is unclear,[7] the rights of defendants and the duties of counsel become difficult to reconcile, especially when a defendant wishes to take an active role in his case.

In *Jones v. Barnes*,[8] the Supreme Court addressed the allocation of decision making authority between attorney and client at the ap-

---

1 The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

2 The prosecution will ordinarily have its case against the accused well established before defense counsel even begins to prepare. *See* STANDARDS RELATING TO CRIMINAL JUSTICE, THE DEFENSE FUNCTION Standard 4-4.1 commentary (2d ed. 1982). Defense counsel must then provide the expertise that the defendant lacks but the system requires to ensure a fair contest. See *infra* note 64 for comment on the need to protect a defendant who is unfamiliar with legal proceedings.

3 Faretta v. California, 422 U.S. 806, 836 (1975) (Burger, C.J., dissenting); *id.* at 851 (Blackmun, J., dissenting); United States v. Wade, 388 U.S. 218, 224 (1967); Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

4 *See* Faretta v. California, 422 U.S. 806 (1975); *accord* McKaskle v. Wiggins, 104 S. Ct. 944 (1984).

5 *See infra* notes 90-97 and accompanying text.

6 *See infra* notes 110-16 and accompanying text.

7 *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 comment (Final Draft 1982) (noting distinction between "objectives" and "means" and difficulty sometimes encountered when trying to distinguish between them). As used in this casenote, substantive matters are those that involve the theory and content of a defense or an appeal. Strategic or tactical concerns are those that arise while ascertaining the most promising method of presenting substantive theory.

8 103 S. Ct. 3308 (1983).

pellate level. The issue facing the Court was whether an attorney's decision not to raise nonfrivolous claims requested by his client rendered his assistance constitutionally ineffective.[9]

In 1976, David Barnes was convicted by a jury of assault and robbery.[10] Michael Melinger was appointed to represent Barnes in his appeal.[11] Barnes provided Melinger with a list of four claims that he believed should be raised,[12] one of which was ineffective assistance of trial counsel.[13] Melinger responded with a list of seven issues that he believed would be most viable on appeal.[14] That list did not include the ineffectiveness claim proposed by Barnes.[15] In his appellate brief, Melinger argued three of the points that he had enumerated earlier, and subsequently addressed only those issues at oral argument.[16] Melinger also submitted a pro se brief that he had received from Barnes.[17] The appeal proved unsuccessful, however, and fur-

---

9 *Id.* at 3310, 3314 n.7.

10 *Id.* at 3310.

11 *Id.*

12 *Id.* Barnes proposed the following grounds for appeal: 1) suppression of the victim Butts's identification testimony should have been required; 2) psychiatric evidence related to Butts's credibility was improperly excluded; 3) his trial counsel was ineffective; and 4) the District Attorney's cross-examination was improper. Barnes v. Jones, 665 F.2d 427, 430 (2d Cir. 1981), *rev'd*, 103 S. Ct. 3308 (1983).

13 *Barnes*, 103 S. Ct. at 3310. Barnes premised this claim on errors of omission of his trial counsel. He first maintained that his trial attorney was inadequately prepared. Barnes v. Jones, 665 F.2d 427, 434 (2d Cir. 1981), *rev'd*, 103 S. Ct. 3308 (1983). Second, Barnes contended that an offer of proof should have been made to show that Butts's history of blackouts was relevant to his ability to make a reliable identification. *Barnes*, 103 S. Ct. at 3310. In addition, Barnes testified that he had spent the evening of the robbery with his father; however, his attorney failed either to call Barnes's father as a witness or to mention the alibi in his summation. *Barnes*, 665 F.2d at 430. Lastly, Barnes claimed his counsel should have objected to the prosecution's inflammatory summation. *Id.* See *id.* at 435 n.5 for an excerpt of that summation.

14 *Barnes*, 103 S. Ct. at 3310. The list included the following arguments: 1) psychiatric evidence was improperly excluded; 2) the summation by the prosecutor was improper; 3) the trial judge's examination of Barnes was improper; 4) the accessorial charge requested by defense counsel was improperly denied; and 5) the finding of facts establishing Butts's prior familiarity with Barnes was insufficient to validate his identification of Barnes. Barnes v. Jones, 665 F.2d 427, 430 (2d Cir. 1981), *rev'd*, 103 S. Ct. 3308 (1983).

15 Barnes v. Jones, 665 F.2d 427, 430 (2d Cir. 1981), *rev'd*, 103 S. Ct. 3308 (1983). Melinger had rejected the claim because it necessitated the introduction of facts that existed at the time of trial but were not included in the record and thus could not be used on appeal. *Id.* The Second Circuit found Melinger's rejection ill-founded because of the availability of a *coram nobis* proceeding, which allows counsel to return to the trial court to supplement the record. *Id.* at 430 n.1 (citation omitted).

16 *Barnes*, 103 S. Ct. at 3311. The three claims argued were "improper exclusion of psychiatric evidence, failure to suppress Butts' identification testimony, and improper cross-examination . . . by the trial judge." *Id.*

17 *Id.* Barnes independently submitted two additional pro se briefs. *Id.*

ther leave to appeal was denied.[18]

Barnes then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York, in which he reasserted the four claims that he had suggested earlier to Melinger.[19] The district court found the petition to be without merit.[20] Its holding was affirmed by the United States Court of Appeals for the Second Circuit.[21]

After two unsuccessful challenges in state court,[22] Barnes petitioned the New York Court of Appeals to reconsider its denial of leave to appeal, alleging for the first time ineffectiveness of appellate counsel.[23] Reconsideration was denied.[24] Undaunted, Barnes filed a second petition for a writ of habeas corpus in Federal district court, introducing his claim of ineffective assistance of appellate counsel in the Federal system.[25] The district court denied the writ, concluding that Melinger's performance had satisfied the "farce and mockery" standard, as well as a "reasonable competence" standard, of effectiveness.[26] The district court deemed it Melinger's duty to exercise his professional judgment when selecting issues for appeal.[27]

The Second Circuit reversed, holding that appointed appellate counsel was required to argue nonfrivolous issues proposed by a defendant.[28] The circuit court observed that Barnes's claim of ineffective legal assistance at trial was colorable.[29] The court further found

---

18 *Id.*

19 *Id.* See *supra* note 12 for the claims proposed by Barnes.

20 *Barnes*, 103 S. Ct. at 3311. The district court used the farce and mockery standard to gauge the effectiveness of Barnes's trial counsel. *Id.*; *see also infra* note 77 (discussing farce and mockery standard). *But cf. infra* note 79 (farce and mockery no longer used by any Federal circuit).

21 *Barnes*, 103 S. Ct. at 3311.

22 *Id.* Barnes filed a motion for collateral review of his sentence, which was denied. Leave to appeal this decision also was denied. *Id.*

23 *Id.*

24 *Id.*

25 Barnes v. Jones, 665 F.2d 427, 431 (2d Cir. 1981), *rev'd*, 103 S. Ct. 3308 (1983).

26 *Id.* See *infra* notes 78-80 and accompanying text for discussion of the reasonable competence standard.

27 Barnes v. Jones, 665 F.2d 427, 432 (2d Cir. 1981), *rev'd*, 103 S. Ct. 3308 (1983).

28 *Id.* at 429. Circuit Judge Oakes, writing for the majority, reasoned that

> appointed counsel's unwillingness to present particular arguments at appellant's request functions not only to abridge defendant's right to counsel on appeal, but also to limit the defendant's constitutional right of equal access to the appellate process in order to redress asserted errors at trial—the very right that an appointment of appellate counsel was designed to preserve.

Id. at 433-34.

29 *Id.* at 434-35. The Second Circuit employed a reasonable competence standard to evaluate Barnes's trial counsel, the same standard employed by New York courts. The circuit court noted that because the determination of trial counsel's competence was for

that Melinger's failure to raise that nonfrivolous claim rendered his appellate performance ineffective.[30] The Supreme Court reversed, holding that counsel appointed to pursue an appeal is not required to raise all nonfrivolous issues urged by a defendant.[31]

The Court's ability to address the precise issue posed in *Barnes* was inhibited by a paucity of precedent. Interpretation of the right to counsel clause has spawned two distinct branches of case law. The first, peculiar to indigents, addresses the constitutional foundations for appointing counsel at different stages of criminal proceedings.[32] Once a defendant has been represented by counsel, appointed or retained, courts are faced with the task of determining whether that representation comported with the level of effectiveness demanded by the sixth amendment.[33] Because sixth amendment considerations are implicated only at the trial level,[34] both branches of case law—appointment and effectiveness—have focused predominantly on that stage.[35] However, neither branch provides guidance, other than by analogy, as to how decision making authority should be allocated between attorney and client on appeal.

APPOINTMENT OF COUNSEL AND THE RIGHT TO SELF-REPRESENTATION

While an indigent's right to counsel at trial is firmly rooted in the sixth amendment,[36] the Supreme Court has yet to establish assistance of counsel on appeal as a constitutional right. Indeed, the question of whether there exists a right to an appeal at all has not been considered by the Court since the sixth amendment was made appli-

---

the purpose of obtaining a state court review, the district court erred in not applying the appropriate state standard. *Id.* The Second Circuit has since abandoned the farce and mockery standard and has adopted a reasonableness standard. *See* Trapnell v. United States, 725 F.2d 149 (2d Cir. 1983).

30 Barnes v. Jones, 665 F.2d 427, 433, 435 (2d Cir. 1981) (relying on Anders v. California, 386 U.S. 738 (1967)), *rev'd*, 103 S. Ct. 3308 (1983).

31 *Barnes*, 103 S. Ct. at 3312.

32 *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel applicable to state defendants through fourteenth amendment), *rev'g* Betts v. Brady, 316 U.S. 455 (1942); Douglas v. California, 372 U.S. 353 (1963) (equal protection clause requires right to appointment on first appeal as of right); Powell v. Alabama, 287 U.S. 45 (1935) (due process clause of fourteenth amendment requires appointment of counsel for defendants at state trials).

33 For a discussion of the constitutional requirement of effective assistance of counsel and standards of effectiveness, see *infra* notes 74-80 and accompanying text.

34 The Supreme Court has never held that the sixth amendment is applicable to an appeal. *But see infra* note 37.

35 *But see infra* text accompanying notes 44-49 & 129-32.

36 Gideon v. Wainwright, 372 U.S. 335 (1963).

cable to the states, and its status remains somewhat unclear.[37] The Supreme Court has repeatedly recognized, however, that the disparity between the system's treatment of indigents and of those who can afford appellate counsel is sufficient to warrant application of the equal protection clause.[38] Thus, when a system provides for appellate review, equal protection principles demand that such review not be foreclosed because of indigency.[39]

In *Griffin v. Illinois*,[40] the Supreme Court held that conditioning an appeal, granted as of right, on a defendant's ability to pay for a transcript violated the equal protection rights of those defendants who could not afford one.[41] The Court asserted that access to an appellate forum may not be made contingent upon a defendant's ability to pay for it.[42] This principle was applied by the Court in *Douglas v. California*[43] to the appointment of counsel on a first appeal as of right.[44] The *Douglas* Court struck down a California statute that conditioned appointment upon a court's initial determination that assistance of counsel would benefit either the court or the defendant.[45] That procedure was held unconstitutionally discriminatory because it absented from scrutiny non-indigents, who were

---

[37] *Compare* McKane v. Durston, 153 U.S. 684, 687 (1894) ("[R]eview by an appellate court of the final judgment in a criminal case . . . is not . . . a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review.") *with Barnes*, 103 S. Ct. at 3315 n.1 (Brennan, J., dissenting) (if question of constitutional right to appeal presented to Court now, it would probably find constitutional right to some form of review) *and* Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 465 (1977) (suggesting that Court, if faced with issue, might be willing to recognize right to appeal, with attendant right to counsel, as "present day basic constitutional right[s]").

[38] Douglas v. California, 372 U.S. 353, 355-57 (1963) (employing equal protection principles where disparity between indigents' and non-indigents' access to fair appellate review significant); *cf.* Anders v. California, 386 U.S. 738, 745 (1967)(noting disparity between "rights and opportunities" afforded paying defendents and indigents). The equal protection clause provides, in relevant part, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[39] *See* Anders v. California, 386 U.S. 738 (1967); Douglas v. California, 372 U.S. 353 (1963); Burns v. Ohio, 360 U.S. 252 (1959); Griffin v. Illinois, 351 U.S. 12 (1956). *But cf.* Ross v. Moffitt, 417 U.S. 600 (1974)(equal protection clause does not require appointment of counsel on discretionary appeal).

[40] 351 U.S. 12 (1956).

[41] *Id.* at 18-19. The procedure reviewed in *Griffin* required that either a bill of exceptions or a certified report of the trial proceedings be submitted to pursue an appeal as of right. *Id.* at 13. The *Griffin* Court found that a transcript was necessary to prepare either of the two documents. *Id.* at 13-15, 14 n.4.

[42] *Id.* at 18.

[43] 372 U.S. 353 (1963).

[44] *Id.* at 356-57.

[45] *Id.* at 355.

guaranteed appeals replete with briefs and arguments.[46] The Court observed that only indigent defendants were required to prove the value of counsel and that, when they could not, pro se appeals were prejudiced by a record marred by the implication that the appeal was without merit.[47]

Four years later, in *Anders v. California*,[48] the Supreme Court required appointed counsel, seeking to withdraw from appeals that they believed to be meritless, to submit nonetheless a brief enumerating any plausible grounds for the appeal.[49] The *Anders* Court, alluding to equal protection principles,[50] sought to neutralize any difference between retained and appointed attorneys' commitments to securing appellate review for their clients.[51]

After nearly five decades of attempting to ensure the availability of assistance of counsel to indigents, the Court was faced with a different issue. In 1975, in *Faretta v. California*,[52] it was asked to determine whether a state court defendant was constitutionally entitled to conduct his own defense.[53] The *Faretta* Court, relying on the historical preference for self-representation,[54] held that the right to appear

---

[46] *Id.* at 358. The Court noted that "the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf" and "can require the court to listen to argument of counsel before deciding on the merits, [while] a poor man cannot." *Id.* at 357-58.

[47] *Id.* at 355-56, 358. The *Douglas* Court viewed this prejudicial effect as especially pernicious, noting that "[a]ny real chance [petitioner] may have had of showing that his appeal has hidden merit is deprived him when the court decides on an *ex parte* examination of the record that the assistance of counsel is not required." *Id.* at 356.

[48] 386 U.S. 738 (1967).

[49] *Id.* at 744. A copy of the so-called "*Anders* brief" is given to the defendant while the court determines whether the appeal is "wholly frivolous." If the appeal has merit, the indigent must be afforded the assistance of counsel. *Id.*

[50] *See id.* at 741 (citing *Griffin* and *Douglas*). The *Anders* Court acknowledged the "continuing line of cases . . . concerning discrimination against the indigent defendant on his first appeal." *Id.* The Court premised its holding on "[t]he constitutional requirement of substantial equality." *Id.* at 744; *see infra* note 51.

[51] *See Anders*, 386 U.S. at 745. The Court expressed hope that its holding would "assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel." *Id.*

[52] 422 U.S. 806 (1975).

[53] *Id.* at 807. The Court found it necessary to confirm that there exists a constitutional right to self-representation even though it had previously determined that a defendant may waive the right to counsel. *Id.* at 819 & n.15. The Court noted that "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." *Id.* at 819 n.15 (quoting Singer v. United States, 380 U.S. 24, 34-35 (1965)).

[54] *See generally id.* at 821-32 (extensive discussion of history of self-representation in England and America).

pro se is implicitly guaranteed by the sixth amendment.[55] The Court described the right to counsel contemplated by the amendment's drafters as secondary to the more fundamental, though implied, right to represent oneself.[56] The language of the clause, which speaks of the *assistance* of counsel, suggested to the *Faretta* Court that the role of counsel was only intended to supplement a defendant's exercise of the personal right to defend himself.[57]

The *Faretta* Court was faced with a dilemma: It was required to establish not only the existence of a right of self-representation, but also the preeminence of that right over the express right to counsel.[58] The Court reconciled its holding with its oft-repeated contention that assistance of counsel is essential to a fair defense, declaring that "it is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, [but] quite another to say that a State may compel a defendant to accept a lawyer he does not want."[59] The *Faretta* Court concluded that once the right to counsel has been validly waived,[60] a defendant is free to conduct his own defense.[61]

The *Faretta* Court acknowledged the discretion of trial courts to appoint "standby counsel" to assist a pro se defendant.[62] The function of standby counsel, it noted, is to aid a defendant who needs or

---

55 *Id.* at 819.

56 *Id.* at 829-30. The *Faretta* Court concluded that "[t]he right to counsel was clearly thought to supplement the primary right of the accused to defend himself." *Id.*

57 *Id.* The *Faretta* Court characterized the right to counsel as only one of the "defense tools" afforded defendants by the sixth amendment. The Court noted that the right to counsel clause "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Id.* at 120. The "defense tools" were intended, the Court suggested, to aid a defendant in his exercise of the personal right to defend. *See id.* Thus, the "defense tools" are necessarily not as important as the amendment's primary guarantee—the personal right to defend.

58 *See id.* at 832-33. The Court recognized that

> the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel. For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial.

Id. (citations omitted).

59 *Id.* at 833.

60 In Johnson v. Zerbst, 304 U.S. 458 (1938), the Supreme Court imposed upon trial courts a duty to ensure the validity of waivers of counsel and to include such determinations in the court record. *Johnson*, 304 U.S. at 465. The *Johnson* Court defined a valid waiver as an "intentional relinquishment or abandonment of a known right or privilege." *Id.* at 464.

61 *Faretta*, 422 U.S. at 835-36.

62 *Id.* at 834-35 n.46.

requests help, and to assume control should termination of self-representation become necessary.[63] Standby counsel, observed the Court, serves to ensure that the integrity of the judicial system will not be undermined by an unruly or unskilled pro se defense.[64]

Faretta did not delineate, however, the proper degrees of participation to be assumed by attorney and client when a defendant proceeding pro se is appointed standby counsel.[65] Many courts have held that a defendant has no right to insist upon integrating the right to appear pro se with assistance of counsel.[66] Courts' reluctance to

---

[63] *Id.* Recently, the Supreme Court had occasion to define more clearly the role of standby counsel. *See* McKaskle v. Wiggins, 104 S. Ct. 944 (1984). Wiggins, a pro se defendant, claimed that he had been denied his right to self-representation because of standby counsel's excessive interference in his trial. *Id.* at 947-48. Wiggins claimed that *Faretta* limited standby counsel's participation to instances where his aid was *solicited* by the defendant. *Id.* at 950. The Supreme Court disagreed, maintaining that while the "right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occassionally, be the accused's best possible defense [, b]oth of these objectives can be achieved without categorically silencing standby counsel." *Id.* Justice O'Connor, writing for the majority, recognized that "[t]he *pro se* defendant must be allowed *to control the organization and content of his own defense*, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and jury at appropriate points in the trial." *Id.* at 949 (emphasis added). The majority conceded that substantial interference or control by standby counsel could "erode" the right granted by *Faretta*, but suggested that such erosion was possible only when a jury's perception of whether the defendant was carrying out his own defense was affected. *See id.* at 951.

[64] *Faretta*, 422 U.S. at 834 n.46. Justice Stewart, writing for the *Faretta* majority, advocated the employment of standby counsel in response to the fear that pro se defendants might deliberately disrupt trial proceedings and necessitate termination of self-representation because of "obstructionist misconduct." *Id.* at 834.

The integrity of the judicial system may also be undermined by allowing an obviously inept defendant to fend for himself in a legal environment he is inadequately skilled to confront. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (society's interest in fair and impartial trial requires that defendant be able to counter prosecution); Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (one skilled in "science of law" essential to maintain integrity of system by ensuring fidelity to procedural safeguards perhaps unknown to defendant). Thus, if defendants are found guilty because they are incapable of defending themselves adequately within the confines of the system, the system is tainted by even allowing them to try.

[65] But compare McKaskle v. Wiggins, 104 S. Ct. 944 (1984), in which the Court clearly characterized the role of standby counsel as properly limited to procedural and technical matters. *Wiggens*, 104 S. Ct. at 953-54. The *Wiggins* Court noted that standby counsel may "assist the *pro se* defendant in overcoming routine procedural or evidentiary obstacles to the completion of some specific task . . . that *the defendant has clearly shown he wishes to complete.*" *Id.* at 954 (emphasis added). Hence, the pro se defendant retains control over the content, or substantive element, of his defense, though standby counsel may, despite the defendant's objection, interfere to help with procedural and technical difficulties. *Id.* at 949-50.

[66] *See, e.g.*, United States v. Shea, 508 F.2d 82 (5th Cir. 1975) (no right to hybrid representation); United States v. Klee, 494 F.2d 394, 396 (9th Cir.) (no right to proceed pro se and with counsel simultaneously), *cert. denied*, 419 U.S. 835 (1974); United States

permit coordination of attorney and client participation stems from a preference for the more orderly conduct of trials by trained professionals, and from a fear that minimizing the role of counsel will dissuade competent attorneys from pursuing criminal defense work.[67] Hence, when standby counsel participates too actively in a defense, some courts have held that a defendant thereby waives the right to appear pro se.[68]

In contrast, some courts have implicitly recognized the right to counsel and the right to self-representation as opposites on a continuum that permits combinations of the two in various proportions.[69] Courts recognizing such combinations, termed "hybrid representation,"[70] allow greater integration of representative effort without an attendant risk of forfeiture of the defendant's right to participate in his own defense.[71] With hybrid representation, the degree of counsel's involvement is determined by the defendant according to his needs.[72] Because it seeks to ensure a meaningful accommodation of a defendant's right to appear pro se and with the aid of counsel, hybrid representation contemplates the active participation of both defend-

---

v. Dujanovic, 486 F.2d 182 (9th Cir. 1973) (rights to counsel and self-representation cannot actively coexist); United States v. Condor, 423 F.2d 904, 907-08 (6th Cir.) (same), *cert. denied*, 400 U.S. 958 (1970). See also United States v. O'Clair, 451 F.2d 485 (1st Cir. 1971) (per curiam), wherein the court declared that

> [a] defendant is free to offer advice to his appellate counsel, who may or may not act upon it as he, in his judgment, may decide. Beyond that, in the absence of a showing of serious default on the part of counsel, we recognize only two alternatives. Either the defendant is, for some unusual reason, qualified to conduct his own appeal, or he is not. If he feels qualified, he may choose to represent himself. If he is not qualified, then he is represented by counsel. He may make written suggestions to counsel, but counsel is under no duty to accept them, or even to explain, unless he wishes to, why he does not.

O'Clair, 451 F.2d at 486.

67 Note, *Assistance of Counsel: A Right to Hybrid Representation*, 57 B.U.L. REV. 570, 579 n.25 (1977).

68 *See* United States v. Condor, 423 F.2d 904, 908 (6th Cir.), *cert. denied*, 400 U.S. 958 (1970). Likewise, a pro se defendant may be denied his right to self-representation if counsel, over defendant's objection, interferes too much in the presentation of the pro se defense. *See supra* notes 63 & 65.

69 *See, e.g.*, Haslam v. United States, 431 F.2d 362 (9th Cir. 1970) (defendant and counsel both actively participated during trial), *cert. denied*, 402 U.S. 976, *aff'd on rehearing*, 437 F.2d 955 (9th Cir. 1971); United States v. Grow, 394 F.2d 182 (4th Cir. 1968) (counsel performed voir dire for defendant and gave advice during trial); Bayless v. United States, 381 F.2d 67 (9th Cir. 1967) (attorney assisted defendant with cross-examination).

70 United States v. Shea, 508 F.2d 82, 86 (5th Cir. 1975); *see* Note, *supra* note 67, at 570.

71 *See* cases cited *supra* note 69; *see also* Note, *supra* note 67, at 573 (hybrid representation poses no threat of forfeiture as it is expected that counsel actively participate in, though not control, trial).

72 *See* United States v. Grow, 394 F.2d 182 (4th Cir. 1968).

ant and attorney.[73]

THE RIGHT TO "EFFECTIVE" ASSISTANCE OF COUNSEL

In the other branch of case law, the right to counsel has consistently been recognized by the Supreme Court as conferring a guarantee of effective assistance;[74] however, precisely what constitutes ineffectiveness has been the subject of various definitions and debate.[75] The inconsistency that has traditionally prevailed among general standards of effectiveness is attributable to the extrapolation of those standards from two different constitutional guarantees: the right to due process and the right to counsel.[76] Due process analyses yielded the "farce and mockery" standard.[77] Since *Gideon v. Wain-*

---

[73] *E.g.*, Haslam v. United States, 431 F.2d 362 (9th Cir. 1970), *cert. denied*, 402 U.S. 976, *aff'd on rehearing*, 437 F.2d 995 (9th Cir. 1971).

[74] McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."); *see* Glasser v. United States, 315 U.S. 60, 69-70 (1941); Avery v. Alabama, 308 U.S. 444, 446 (1940); *see also* Powell v. Alabama, 297 U.S. 45, 55 (1932) (defendants without counsel denied "effective and substantial aid").

[75] *See generally* Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233, 234-48 (1979); Levine, *Toward Competent Counsel*, 13 RUTGERS L.J. 227, 231-44 (1982); Smithburn & Springmann, *Effective Assistance of Counsel: In Quest of a Uniform Standard of Review*, 17 WAKE FOREST L. REV. 497, 502-11 (1981).

[76] *Compare* Diggs v. Welch, 148 F.2d 667 (D.C. Cir.) (due process clause governs effectiveness of counsel; sixth amendment requires only appointment) (overruled by United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973)), *cert. denied*, 325 U.S. 889 (1945) *with* Beasley v. United States, 491 F.2d 687 (6th Cir. 1974) (sixth amendment requires specific degree of competence). For a comparison of due process and sixth amendment-derived effectiveness standards, see Erickson, *supra* note 75, at 237-42; Levine, *supra* note 75, at 235-41; Smithburn & Springmann, *supra* note 75, at 502-04; Strazzella, *supra* note 37, at 446-54.

[77] *See* Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir.) (overruled by United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973)), *cert. denied*, 325 U.S. 889 (1945). Under a due process analysis, counsel's performance is evaluated in terms of its effect on the fairness of the entire trial. That effect must be so severely adverse as to render the trial a "farce and mockery" of justice. *Id.* The assessment of counsel under this standard "focus[es] . . . not on the individual instances of ineffectiveness during trial [as determinative of a constitutional violation in and of themselves,] but on the cumulative effect of th[o]se instances on the trial as a whole." Smithburn & Springmann, *supra* note 75, at 502, 506; *cf. infra* note 80 (Court's most recent pronouncement of effectiveness standard, though not as severe as farce and mockery standard, also requires showing of how ineffectiveness affected trial).

The farce and mockery standard also requires a defendant to show prejudice. *See* Estes v. Texas, 381 U.S. 532, 542 (1965) (due process violation ordinarily requires showing of prejudice); *cf.* Strickland v. Washington, 104 S. Ct. 2052, 2063 (1984) ("Sixth Amendment right to counsel exists . . . to protect the fundamental right to a fair trial," guaranteed by the due process clauses). *But cf.* Smithburn & Springmann, *supra* note 75, at 506 (criticizing due process approach because it treats defendant's sixth amendment right as merely element of due process). When the sixth amendment's guarantee of effective assistance is viewed merely as a component of the much greater right to due

wright,[78] however, most courts have abandoned that test, adopting instead some form of a reasonableness standard to gauge the effectiveness of counsel.[79] Courts utilizing reasonableness standards demand a requisite degree of quality and skill on the part of an attorney, and failure of counsel to so provide, if prejudicial, constitutes a denial of effective assistance.[80]

In *McMann v. Richardson*,[81] the Supreme Court tangentially articulated a competency standard while considering whether a guilty plea may be successfully attacked because it was based on the erroneous advice of counsel.[82] The attorneys in *McMann* advised their clients to plead guilty, anticipating that illegally obtained confessions would be admitted and would preclude the possibility of success at trial.[83] The petitioners argued that their pleas were involuntary because they were offered in reliance on ineffective counsel.[84] The *Mc-*

process, the right to effective counsel is not really a guarantee, since, in effect, it may be denied without consequence so long as the greater right is not impaired. Thus, the Supreme Court's recent declaration that ineffectiveness, to require reversal, must be such that the possibility of a "just result" is undermined, *Strickland*, 104 S. Ct. at 2064, differs from the farce and mockery test only in the degree of prejudice a defendant must prove.

78 372 U.S. 335 (1963) (rendering right to counsel fundamental right of *all* defendants by applying it to states through fourteenth amendment).

79 All Federal circuits have abandoned the farce and mockery language and employ instead a reasonableness standard. Trapnell v. United States, 725 F.2d 149, 151-52 (2d Cir. 1983).

80 Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); *see also* Cooper v. Fitzharris, 586 F.2d 1325, 1329 (9th Cir. 1978) (en banc) (reasonableness standards "avoid[] the misleading implication that what occurred at the trial and appears on the face of the record is all that is relevant"), *cert. denied*, 440 U.S. 974 (1979). This method of evaluating effectiveness claims will perforce be changed by the Supreme Court's recent decision expressly requiring prejudice in order to reverse a conviction on the ground of ineffectiveness. Where an ineffectiveness claim relates specifically to an act or omission of counsel, a defendant must be prepared to show that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984). That case, which was decided after *Barnes*, set up a two-part burden of proof when a defendant alleges ineffectiveness. First, he must show that counsel's performance was not "reasonable considering all the circumstances." *Id.* at 2065. Second, "[t]he defendant must show that there is a reasonable probability that, but for [the ineffectiveness], the result of the proceeding would have been different." *Id.* at 2068. Although *Strickland* involved effectiveness at a sentencing hearing, *id.* at 2057, because the Court found that type of a proceeding and a trial similar in all relevant respects, *see id.* at 2063-64, it may be assumed that *Strickland* stands as the Court's most recent pronouncement of the standards governing effectiveness at trial.

81 397 U.S. 759 (1970).

82 *Id.* at 760. The issue in *McMann* involved the impeachment of guilty pleas motivated by illegally obtained confessions. *Id.* The Court's comments regarding levels of attorney effectiveness are dicta. *See id.* at 771.

83 *Id.* at 769.

84 *Id.* at 761-64.

Mann Court held that the mere showing of a nexus between an involuntary confession and a counselled plea of guilty was insufficient to obtain a hearing on a habeas corpus motion unless petitioners could prove that their attorney was incompetent.[85] The Court noted that proof of such incompetence depended "not on whether a court would retroactively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases."[86] The *McMann* Court created a radius within which "the good faith evaluations of a reasonably competent attorney" on matters inherently incapable of precise prediction are insulated from charges of ineffectiveness should the evaluations later prove erroneous.[87]

Despite the *McMann* Court's use of reasonableness language,[88] effectiveness remains an elusive concept with respect to the allocation of decision making authority between attorney and client on appeal. Professional codes offer some guidance in defining the rights of defendants and the correlative responsibilities of counsel and suggest guidelines to help attorneys maintain the required levels of competence.[89] Standards devised by the American Bar Association, for example, provide that a criminal defendant has absolute control over certain aspects of his defense, such as how to plead,[90] whether to

---

85 *Id.* at 772.

86 *Id.* at 771; *accord* Tollett v. Henderson, 411 U.S. 258, 266 (1973) (voluntariness of plea advised by counsel determined by whether counsel's advice fell within *McMann*'s "range of competence").

87 *McMann*, 397 U.S. at 770. The *McMann* Court noted that the decision made by trial counsel was one "subject to uncertainty," *id.*, and that a defendant contemplating a guilty plea "assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts." *Id.* at 774. The Court reasoned that when an attorney advises a defendant to plead guilty, relying on a judgment that a confession will be admitted, such advice does not necessarily render counsel incompetent where he believed that the probability of admission was high enough to justify his advice. *Id.* at 770.

88 The Court's phrase "reasonably competent attorney," *id.*, has been used as an effectiveness standard by some lower courts. *E.g.*, Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979); Marzullo v. Maryland, 561 F.2d 540, 542 (4th Cir. 1977) (en banc), *cert. denied*, 435 U.S. 1011 (1978). *But cf. McMann*, 397 U.S. at 774. The *McMann* Court declared that a defendant "is bound by his plea and conviction unless he can . . . prove *serious derelictions* on the part of counsel." *Id.* (emphasis added). Such a strict burden of proof seems little more than a restatement of the farce and mockery standard. Since *McMann*, however, the Court has made it clear that reasonableness is indeed the standard by which an attorney's performance is assessed. *See* Strickland v. Washington, 104 S. Ct. 2052 (1984).

89 *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT (Final Draft 1982); STANDARDS RELATING TO CRIMINAL APPEALS (2d ed. 1980); MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1979) (amended 1980).

90 STANDARDS RELATING TO CRIMINAL JUSTICE, THE DEFENSE FUNCTION Standard 4-5.2(a)(i) (2d ed. 1982); *see also id.* Standard 4-5.1(b) (counsel must not unduly influence client's plea).

waive the right to a jury,[91] whether to testify,[92] and whether to pursue an appeal.[93] The ABA standards further protect a defendant's control over fundamental decisions by requiring that he be appraised of counsel's dealings with the prosecution,[94] and by making any endeavors to plea bargain contingent upon a client's consent.[95]

Similarly, the Model Code of Professional Responsibility[96] provides that the authority to make decisions, other than tactical ones, resides exclusively with the defendant.[97] The Model Code makes the rights of defendants and the duties of counsel truly correlative by condoning counsel's pursuit of a course of action chosen by his client even if it is contrary to the dictates of his professional judgment, as long as the client has been properly advised.[98]

Representation by counsel that violates any of the rights guaranteed defendants will ordinarily be deemed constitutionally deficient. In *Francis v. Spraggins*,[99] the United States Court of Appeals for the Eleventh Circuit found defense counsel to be ineffective because, after the defendant had testified to his innocence, counsel conceded his client's guilt to the jury, thus vitiating the defendant's right to control his plea.[100] Similarly, counsel's failure to inform a defendant of a right of appeal and to preserve issues for appeal have been deemed ineffective assistance of counsel because they effectively usurp the defendant's right to decide whether to appeal.[101]

In addition to protecting defendants' rights, both the ABA standards and the Model Code enumerate an attorney's duties to his cli-

---

91 *Id.* Standard 4-5.2(a)(ii).

92 *Id.* Standard 4-5.2(a)(iii); *cf. id.* Proposed Standard 4-7.7(a) (attorney must warn defendant demanding trial, where facts establish guilt, against perjury and must withdraw if defendant insists upon perjuring himself).

93 *Id.* Standard 4-8.2(a).

94 *Id.* Standard 4-3.8.

95 *See id.* Standard 4-6.1(b).

96 MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1979) (amended 1980).

97 *Id.* EC7-7.

98 *Id.* EC7-5. Of course the action can be neither inconsistent with the law nor frivolous. *Id.*

99 720 F.2d 1190 (11th Cir. 1983).

100 *Id.* at 1194. Defense counsel anticipated a guilty verdict because of the strong evidence against his client and conceded Francis's guilt to avoid appearing inconsistent at the sentencing hearing. The Eleventh Circuit held that counsel's interest in maintaining his credibility was subordinate to his duty to render a defense consistent with his client's plea. *Id.*; *see also* STANDARDS RELATING TO CRIMINAL JUSTICE, THE DEFENSE FUNCTION Standard 4-1.6 (2d ed. 1982)(counsel's duty is to his client, not his reputation).

101 *See* Wilson v. United States, 554 F.2d 893, 894 (8th Cir. 1977) (per curiam)(failure to inform a defendant of right to appeal); Robinson v. Wyrick, 635 F.2d 757, 758 (8th Cir. 1981) (failure to preserve issues for appeal).

ent. Counsel is duty bound, for example, to keep his client informed[102] and honestly advised,[103] to investigate potential lines of defense,[104] and to explore alternatives to disposition of the case at trial.[105] Counsel's paramount obligation, however, is fidelity to the interests of his client.[106] An attorney's breach of any of these duties will often render the assistance provided constitutionally ineffective.[107] In *King v. Strickland*,[108] for example, the Eleventh Circuit found a denial of effective assistance where defense counsel divorced himself from his client's cause by conveying to the jury his reluctance to represent one who had committed a heinous crime.[109]

With respect to decision making authority, the ABA standards expressly provide, and courts overwhelmingly agree, that strategic and tactical decisions are exclusively within counsel's discretion.[110] Courts have categorically refused to find counsel ineffective for making reasonable tactical decisions, even when those decisions are later shown to have been erroneous.[111] Reasonable mistakes in judgment are permitted—counsel cannot always correctly anticipate the consequences of an adopted strategy.[112] Hence, the instances in which a court will premise a finding of ineffectiveness on the prudence of a tactical decision are rare. Such a finding ordinarily requires a show-

---

102 STANDARDS RELATING TO CRIMINAL JUSTICE, THE DEFENSE FUNCTION Standard 4-3.8 (2d ed. 1982); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC7-7 (1979). The ABA drafters noted that attorneys "must remember that the case is the *defendant's* case and he is entitled to know of [counsel's] progress." STANDARDS RELATING TO CRIMINAL JUSTICE, THE DEFENSE FUNCTION Standard 4-3.8 (2d ed. 1982) (emphasis in original).

103 STANDARDS RELATING TO CRIMINAL JUSTICE, THE DEFENSE FUNCTION Standard 4-5.1(a) (2d ed. 1982).

104 *Id.* Standard 4-4.1.

105 *Id.* Standard 4-6.1(a).

106 *See id.* Standard 4-1.6 (client's interests are paramount); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC7-7 (1979) (counsel's duty is to zealously advocate client's cause).

107 *See infra* text accompanying notes 108 & 109.

108 714 F.2d 1481 (11th Cir. 1983).

109 *Id.* at 1491.

110 STANDARDS RELATING TO CRIMINAL JUSTICE, THE DEFENSE FUNCTION Standard 4-5.2(b)(2d ed. 1982); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC7-7 (1979). For examples of court decisions that agree with the ABA standards, see cases cited *infra* note 111.

111 *See, e.g.*, Wallace v. Lockhart, 701 F.2d 719, 726 (8th Cir. 1983) (attorney not ineffective when hindsight reveals reasonable judgment mistaken); *id.* at 726-27 (well-founded strategical decision cannot be premise of ineffectiveness claim, even if later proven imprudent); United States v. Salovitz, 701 F.2d 17, 20-21 (2d Cir. 1983) (waiver of opening statement a strategic decision insufficient to support ineffectiveness claim); Hubbard v Jeffies, 653 F.2d 99, 104 (3d Cir. 1981) (attorney's decision not to object to prosecutor's inflammatory summation was part of successful trial strategy).

112 *See, e.g.*, *McMann*, 397 U.S. at 770, 774.

ing that counsel's decision was so profoundly lacking a reasonable foundation as to be "patently" ineffective[113] and that that ineffectiveness clearly prejudiced the defendant.[114] In *United States v. Salovitz*,[115] for example, an attorney's election to waive an opening statement was declared by the Second Circuit to be a "simple matter of trial strategy . . . [which] ordinarily will not form the basis for a claim of ineffective assistance of counsel."[116]

At the appellate level, applicable ABA standards provide that the authority to decide whether to appeal, as well as whether to urge a particular claim on appeal, rest ultimately with the defendant once counsel has fulfilled his duty to explain the implications of the client's decision.[117] In the few instances in which the authority to choose issues on appeal has been considered, however, courts have refused to impose on appellate counsel any duty to accommodate the wishes of their clients. In *Holcomb v. Murphy*,[118] the Tenth Circuit held that appellate counsel's failure to raise specific issues which were requested by the defendant did not constitute a denial of the latter's right to appeal.[119] The *Holcomb* court, however, did not address whether such failure alone diminished counsel's effectiveness. In *Hooks v. Roberts*,[120] the Fifth Circuit asserted that appointed appellate counsel is not "constitutionally required to confer with his client about the legal issues to be presented on appeal."[121] The *Hooks* court did acknowledge, though, that counsel's failure to raise particular issues on appeal, if those issues are of "sufficient merit," might render counsel's performance ineffective.[122] The court did not specify that a

---

113 *E.g.*, Birt v. Montgomery, 709 F.2d 690, 701-02 (11th Cir. 1983) (counsel ineffective where decision not to traverse jury was not "fully informed strategic decision"); Adams v. Wainwright, 709 F.2d 1443, 1446 (11th Cir. 1983) (counsel's tactical decision must be patently unreasonable to be ineffective).

114 Strickland v. Washington, 104 S. Ct. 2052, 2067-70 (1984)(requiring showing of "reasonable probability" that ineffectiveness affected outcome of proceeding).

115 701 F.2d 17 (2d Cir. 1983).

116 *Id.* at 20-21.

117 STANDARDS RELATING TO CRIMINAL JUSTICE, CRIMINAL APPEALS Standard 21-3.2 commentary (2d ed. 1980). That standard provides that

> [w]hen, in the estimate of counsel, the decision of the client to take an appeal, *or the client's decision to press a particular contention on appeal*, is incorrect[, c]ounsel has the professional duty to give to the client fully and forcefully an opinion concerning the case and its probable outcome. *Counsel's role, however, is to advise. The decision is made by the client.*

Id. (emphasis added).

118 701 F.2d 1307 (10th Cir. 1983).

119 *Id.* at 1309.

120 480 F.2d 1196 (5th Cir. 1973).

121 *Id.* at 1196-97.

122 *Id.*

finding of ineffectiveness under such circumstances would be predicated on counsel's breach of a defendant's decision making authority. *Hooks* thus suggests that the assistance provided by assigned appellate counsel may be judged ineffective on the basis of the impropriety of a tactical decision—the actual choice of issues—rather than because counsel's choice constituted a misappropriation of decision making authority.[123]

While the guidance afforded by ABA codes is certainly helpful, the standards they seek to establish and maintain are ultimately only expressions of the profession's ideals; noncompliance will not necessarily render an attorney's service constitutionally deficient.[124] Despite this limitation, professional codes and practices figured prominently in the Supreme Court's analysis in *Barnes*.[125] The Court refused to recognize, however, a constitutional right granting defendants the type of discretion demanded by David Barnes.[126]

Chief Justice Burger, writing for the majority, emphasized at the outset those benefits of representation that had previously compelled the Court to deem the right to counsel fundamental.[127] The Chief Justice noted the *Douglas* Court's recognition of the marked advantages of an attorney's expert insight and training in the law—the impetus for requiring appointment of counsel for indigents on an appeal as of right.[128] Yet, the majority contended, those benefits were precisely the ones jeopardized by the Second Circuit's adoption of a per se rule which "seriously undermine[d]" an attorney's freedom to exercise, and to act in accordance with, his professional judgment.[129]

The *Barnes* Court perceived freedom to exercise professional judgment as particularly essential on appeal, claiming "[t]here [could] hardly be any question" of the importance of counsel's evaluation of the record to ascertain the most viable issues for appellate review.[130] Chief Justice Burger noted that limitations on brief and

---

123 The *Hooks* court, after suggesting that a failure to raise certain issues might result in ineffectiveness, *id.*, evaluated the claims petitioner alleged appellate counsel should have raised. *Id.* at 1197-98. The court found they were without merit and therefore could not serve as the bases for a claim of ineffectiveness. *Id.*

124 *See* Strickland v. Washington, 104 S. Ct. 2052 (1984).

125 *See Barnes*, 103 S. Ct. at 3313 n.6; *id.* at 3317 & nn.4-5 (Brennan, J., dissenting).

126 *Id.* at 3312, 3314. Chief Justice Burger, joined by Justices O'Connor, Rehnquist, Powell, White, and Stewart, wrote the majority opinion, which was concurred in by Justice Blackmun. Justice Brennan, joined by Justice Marshall, dissented.

127 *Id.* at 3312.

128 *See id.*

129 *Id.*

130 *Id.* at 3313.

argument length, which are routinely imposed by appellate courts, may preclude attorneys from addressing potentially meritorious arguments.[131] In light of those limitations, the Court reasoned, attorneys are required to distinguish those issues that are most likely to succeed on appeal.[132] Moreover, the Chief Justice observed, established notions of effective appellate advocacy have long recommended that counsel prioritize issues and choose only the most promising for review.[133] The *Barnes* majority maintained that the wisdom of its delegation to counsel of ultimate control over the selection of issues was corroborated by professional code provisions conferring upon defense attorneys exclusive authority to make "strategic and tactical decisions" regarding the presentation of a defense.[134]

Lastly, Chief Justice Burger emphatically rejected the Second Circuit's interpretation of *Anders*.[135] *Anders*'s mandate that appointed attorneys not be permitted summarily to abandon appeals they believe to be frivolous did not, the Court asserted, lend any support to the circuit court's holding that failure to argue nonfrivolous claims requested by a client was similarly proscribed.[136] To the contrary, compliance with *Anders*'s decree that counsel "support [a] client's appeal to the best of [one's] ability" was impeded, the *Barnes* majority opined, when appellate counsel was not free to choose issues in accordance with his professional judgment.[137]

Justice Blackmun concurred with the Court's judgment but expressed his belief that an attorney is *ethically* required to implement

---

131 *Id.* at 3312.

132 *See id.*

133 *Id.* at 3312-13. The *Barnes* Court opined that presenting a multitude of arguments poses the initial risk that no one issue will be adequately addressed, *id.* at 3313 (quoting R. STERN, APPELLATE PRACTICE IN THE UNITED STATES 266 (1981)), as well as the additional risk that the most favorable arguments will be obscured or diluted by the aggregate. *Id.*; *see also id.* at 3313 n.5 (Second Circuit practice manual advises against assertion of more than three or four issues in brief). The majority further warned that presenting too many issues on appeal "hint at [a] lack of confidence in any one." *Id.* at 3313 (quoting Jackson, *Advocacy Before the Supreme Court*, 25 TEMP. L.Q. 115, 119 (1951)).

134 *Id.* at 3313 n.6 (citing STANDARDS RELATING TO CRIMINAL JUSTICE, THE DEFENSE FUNCTION Standard 4-5.2 (2d ed. 1982)). *But cf. id.* at 3317 (Brennan, J., dissenting). Justice Brennan maintained that the majority had erroneously referred to an ABA provision governing allocation of decision making power at *trial*. *Id.* For the ABA standards Justice Brennan found applicable, see *infra* note 161.

135 *Barnes*, 103 S. Ct. at 3312-13.

136 *Id.*

137 *See id.* at 3314 (quoting *Anders*, 386 U.S. at 744). Chief Justice Burger maintained that "impos[ing] on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders*." *Id.* *But cf. Anders*, 386 U.S. at 744 ("Counsel [must act] in the role of an active advocate in behalf of his client. . . .").

his client's preferences on appeal once the client has been advised.[138] Yet, Justice Blackmun maintained, compliance with the Constitution requires only that counsel " 'assure[] the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process,' "[139] and that counsel render legal services that fall " 'within the range of competence demanded of attorneys in criminal cases.' "[140] The concurrence posited that, should an exercise of decision making authority render an attorney's performance deficient under either of these standards, a constitutional question suitable for habeas corpus review might be presented.[141] Once compliance with these standards was established, however, Justice Blackmun believed that allocation of authority became strictly an ethical issue.[142] A different problem, he cautioned, arises when an attorney refuses to accede to a client's request that a constitutional claim be argued on appeal.[143] The concurrence believed that such a refusal could render counsel's assistance ineffective and thus may appropriately be remedied by a writ of habeas corpus.[144]

Justice Brennan, dissenting, strongly objected to what he contended was the majority's misappropriation of decision making authority that properly resides with a defendant.[145] Arguing that the wishes of properly advised defendants should control the selection of issues on appeal,[146] the dissent emphasized a defendant's strong per-

---

138 *Barnes*, 103 S. Ct. at 3314 (Blackmun, J., concurring) (citing STANDARDS RELATING TO CRIMINAL JUSTICE, CRIMINAL APPEALS Standard 21-3.2 commentary (2d ed. 1980)).

139 *Id.* (quoting Ross v. Moffitt, 417 U.S. 600, 616 (1974)).

140 *Id.* (quoting *McMann*, 397 U.S. at 771).

141 *Id.*

142 *Id.* Justice Blackmun concluded that Melinger had complied with both *McMann* and Ross v. Moffitt, 417 U.S. 600 (1974), and was therefore effective. *Barnes*, 103 S. Ct. at 3314 (Blackmun, J., concurring).

143 *See Barnes*, 103 S. Ct. at 3314 (Blackmun, J., concurring). Justice Blackmun's analysis thus distinguished the following two habeas corpus claims: failure of counsel to raise a requested constitutional issue on appeal (which renders important the constitutional status of the *issue*), and failure of counsel to satisfy the constitutional standard of competence as a result of a misallocation of authority (which emphasizes the constitutional status of counsel's *performance*). *See id.*

144 *Id.*

145 *Id.* at 3316 (Brennan, J., dissenting). Justice Brennan contended that

> [w]hat is at issue [in *Barnes*] is the relationship between lawyer and client—who has ultimate authority to decide which nonfrivolous issues should be presented on appeal? I believe the right to the "assistance of counsel" carries with it a right, personal to the defendant, to make that decision, against the advice of counsel if he chooses.

Id.; *see also id.* at 3319 (Brennan, J., dissenting) (defendants are capable of intelligently deciding issues for appeal; when they do so their decisions should be honored).

146 *Id.* Justice Brennan would have remanded for a determination of whether Barnes,

sonal interest in the conduct and outcome of his case.[147] Justice Brennan urged that the sixth amendment should not be viewed merely as a right to counsel; rather, he maintained that the paramount interest protected by the provision is a defendant's right personally to defend himself.[148] Justice Brennan concluded that the amendment grants to a defendant ultimate control over appellate claims.[149] This conclusion, he asserted, was supported by both the text of the amendment and previous Supreme Court interpretations thereof.[150]

Justice Brennan construed strictly the right to counsel clause,[151] and insisted that the language " '*[a]ssistance* of counsel' "[152] connotes one called upon only to help a client "mak[e] choices that are his to make, not to make choices for him."[153] Thus, the dissent reasoned, the supplementary, or ancillary, role of counsel implied by the provision[154] reflects its intended purpose—to protect a defendant's right to control his own defense.[155]

The dissent relied upon Court precedent to fortify its contention that the sixth amendment was intended primarily to protect the de-

---

despite Melinger's advice to the contrary, did in fact *insist* that Melinger raise the nonfrivolous claims Barnes had suggested previously. *Id.* at 3315 (Brennan, J., dissenting). If Barnes had not, Justice Brennan would have found that he was not denied the right to effective assistance. *Id.* at 3319 (Brennan, J., dissenting).

147 *Id.* at 3316 (Brennan, J., dissenting). Because "[t]he defendant, and not his lawyer or the State, will bear the personal consequences of a conviction[,]" the right to defend, Justice Brennan asserted, is a very personal right. *Id.* (quoting *Faretta*, 422 U.S. at 834).

148 *Id.* The dissent argued that "the right to counsel is more than a right to have one's case presented competently and effectively" and that counsel's role is to function in the capacity of an "assistant" in order to help a defendant exercise his rights. *Id.*

149 *Id.* at 3317 (Brennan, J., dissenting). The dissent maintained that a defendant's control over aspects of his defense should be limited only when the exercise of such control poses conflicts with a "lawyer's conscience, the law, and his duties to the court[,]" *id.*, or with "the State's interest in a speedy, effective prosecution." *Id.* at 3318 (Brennan, J., dissenting).

150 *See id.* at 3315-17 (Brennan, J., dissenting).

151 *See id.* at 3314-15 (Brennan, J., dissenting). Justice Brennan fervently disagreed with the majority over the significance of the right to counsel clause, observing that

> [t]he import of words like "assistance" and "counsel" seems inconsistent with a regime under which counsel appointed by the State to represent a criminal defendant can refuse to raise issues with arguable merit on appeal when his client, after hearing his assessment of the case and his advice, has directed him to raise them.

Id.

152 *Id.* at 3314 (Brennan, J., dissenting)(emphasis in original)(quoting U.S. CONST. amend. VI).

153 *Id.* at 3316 (Brennan, J., dissenting).

154 *See id.*; *see also Faretta*, 422 U.S. at 829-30.

155 *See Barnes*, 103 S. Ct. at 3316 (Brennan, J., dissenting) (citing *Faretta*, 422 U.S. at 806).

fendant's "dignity and autonomy."[156] Noting the Court's previous acknowledgment that the amendment protects more than "the State's interest in substantial justice," the dissent maintained that the amendment guarantees a personal right to defend.[157] Justice Brennan cited *Faretta* as illustrative of his position that a defendant is constitutionally entitled to determine the composition of his defense.[158] He reasoned that *Anders*, which requires appointed attorneys who believe an appeal is meritless to brief nonetheless potentially arguable claims, is consistent with *Faretta* because it affords a defendant the option of pursuing his appeal pro se if counsel does withdraw.[159] The dissent observed that its conception of the proper role of counsel—an "instrument and defender" of a client's right to defend himself—[160] was corroborated by the legal profession's own similarly restrictive characterization of its role in the appellate process.[161]

Justice Brennan recognized that the complexity of the modern legal system makes the assistance of counsel a practical necessity for most defendants.[162] Yet, the dissent maintained, a defendant's right to the "autonomy and dignity" necessary to exercise his right personally to defend himself should be compromised no more than is absolutely required to accommodate the "State's interest in a speedy, effective prosecution."[163] Allowing an attorney to ignore his client's express request that specific nonfrivolous issues be argued on appeal, Justice Brennan believed, accomplished precisely the opposite result.[164]

The Supreme Court's analysis of the effectiveness of Barnes's appellate counsel rests on two presumptions. The *Barnes* Court assumed that standards developed to address the exigencies of trial are appropriate in an appellate forum,[165] and it implicitly characterized the choice of issues for appeal as a purely tactical decision.[166] If both of these premises are true, then the majority was correct in delegating to

---

156 *Id.* at 3316, 3318 (Brennan, J., dissenting) (citing *Faretta*, 422 U.S. at 744).

157 *Id.* at 3316 (Brennan, J., dissenting) (citing *Faretta*, 422 U.S. at 834).

158 *Id.*; *accord* McKaskle v. Wiggins, 104 S. Ct. 944, 949-50 (1984).

159 *Barnes*, 103 S. Ct. at 3316 (Brennan, J., dissenting).

160 *Id.* at 3319 (Brennan, J., dissenting).

161 *Id.* at 3317 (Brennan, J., dissenting) (citing STANDARDS RELATING TO CRIMINAL JUSTICE, CRIMINAL APPEALS Standard 21-3.2 commentary (2d ed. 1980) and MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC7-7, -8 (1979)).

162 *Id.* at 3318 (Brennan, J., dissenting).

163 *Id.*

164 *See id.* at 3318-19 (Brennan, J., dissenting).

165 *See id.* at 3313 n.6.

166 *See id.* at 3312-14. The majority spent the greater portion of the opinion discussing the strategic aspects of choosing issues for appeal. *See id.*; *see also supra* note 133 (discussion of Court's comments on strategy).

counsel final authority to select issues for appeal,[167] and it should not be surprising that the Court refused to deem Melinger, who had exercised reasonable judgment in making a "tactical" decision, ineffective.[168] The *Barnes* majority's delegation of authority was in error, however, for two reasons. First, the selection of appellate issues should not be considered purely tactical. The Court failed to recognize, secondly, that a defendant's constitutionally protected interest in "dignity and autonomy" is invaded when counsel elects not to raise an issue upon which his client insists.[169] The Supreme Court has recognized that a pro se defendant accompanied by standby counsel retains control over the content of his defense;[170] it seems anomolous to require a defendant to forfeit that autonomy merely because he avails himself of the "assistance" of counsel.

At the trial level, a defendant's autonomy is not forfeited because he is represented by counsel.[171] His authority to make certain fundamental decisions[172] includes exclusive control over how he will plead.[173] The plea is a decision which necessarily shapes the content of the defense, and power over the plea reflects a defendant's right to have his "theory" of the case argued at trial.[174] Counsel may advise a particular plea as being strategically more prudent,[175] but because the decision involves a fundamental right, counsel's "tactical" recommendation may not supersede his client's wishes.[176] A defendant's insistence that particular nonfrivolous issues be argued on appeal should similarly be honored as a legitimate invocation of the sixth amendment's protection of client autonomy.[177] Once a defendant rejects the strategic advice of his attorney and opts for presentation of particular issues, those issues are imbued with a substantive dimen-

---

167 *See Barnes*, 103 S. Ct. at 3312.

168 *See id.* at 3314; *supra* note 111.

169 *See Barnes*, 103 S. Ct. at 3318 (Brennan, J., dissenting); *cf.* High v. Rhay, 519 F.2d 109, 110, 112 (9th Cir. 1975) (failure to raise issues requested by defendant constitutes denial of equal protection and due process under *Anders*).

170 McKaskle v. Wiggins, 104 S. Ct. 944 (1984). For a discussion of *McKakle*, see *supra* notes 63 & 65.

171 *See supra* text accompanying notes 90-98.

172 See *supra* text accompanying notes 90-93 for decisions controlled by a defendant at trial.

173 *See supra* notes 90, 99 & 100 and accompanying text.

174 *See* United States v. DeLoach, 504 F.2d 185, 189, 191 (D.C. Cir. 1974).

175 *See, e.g.*, McMann v. Richardson, 397 U.S. 759, 763 (1970) (counsel recommended guilty plea anticipating admission of illegally obtained confession).

176 *See, e.g.*, Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983).

177 Counsel's recommendation as to which issues should be raised is necessarily tactical. Thus, when a client chooses to ignore counsel's advice and insists upon particular issues, those issues become substantive in nature, as they reflect the defendant's personal stake in his defense, and are measured by the degree of his insistence.

sion—they become the content, or "theory," of the appeal. If the sixth amendment's protection of "autonomy and dignity" does indeed extend to defendants on appeal,[178] those decisions should be made by the client, just as they are at trial.

Even if, as the *Barnes'* majority indicated, the choice of issues for appeal is a tactical decision, the significant difference between the dynamics of trial and appellate forums[179] makes parallel treatment of them unwise. The exigencies that justify trial counsel's control over tactical decisions are absent in the appellate context. In marked contrast to the appellate forum, compliance with procedural and evidentiary requirements remains a significant concern throughout the entire course of a trial.[180] The decisions that must be made regularly throughout a trial require spontaneous application of sophisticated and technical knowledge that is the expertise of lawyers. Hence, the state's interest in justice and order[181] is more acute at the trial stage and is best served by delegating complete dominion over tactical and strategic decisions to counsel, who are more capable of serving that interest.[182] Such a delegation prevents situations in which a defendant's lack of expertise in making the tactical decisions that present themselves at trial diminishes the likelihood of a just result, thereby threatening the integrity of the judicial system.[183]

The state's interest in a fair and orderly appellate proceeding is not as immediate, however, because of the inherent regularity of appellate procedure. The more circumscribed nature of the appellate proceeding does not require counsel regularly to make tactical decisions in pursuit of a strategy.[184] The only decision required on appeal that might be characterized as "tactical" is the selection of

---

178 The Supreme Court has recently stated that the right of self-representation "exists to affirm the dignity and autonomy of the accused," McKaskle v. Wiggins, 104 S. Ct. 944, 950 (1984), implying that only an accused arguing pro se is afforded the constitutional guarantee of dignity and autonomy. *But see Barnes*, 103 S. Ct. at 3316 (Brennan, J., dissenting) (function of counsel is to protect dignity and autonomy of accused); *Faretta*, 422 U.S. at 820 (right to counsel a "defense tool" afforded by sixth amendment to aid exercise of primary and personal right to defend). The protection of a defendant's autonomy and dignity should, therefore, be an ever-present concern whether a defendant chooses to proceed pro se or with the aid of counsel.

179 *See Barnes*, 103 S. Ct. at 3317 (Brennan, J., dissenting); *see also* Ross v. Moffitt, 417 U.S. 600, 610 (1974) (noting some of the differences between trial and appellate proceedings).

180 *See Barnes*, 103 S. Ct. at 3317 (Brennan, J., dissenting).

181 *See id.* at 3318 (Brennan, J., dissenting).

182 *See* Washington v. Strickland, 693 F.2d 1243, 1251 (5th Cir. 1982) (en banc), *rev'd*, 104 S. Ct. 2052 (1984).

183 Gideon v. Wainright, 372 U.S. 335, 344-45 (1963); *see* Washington v. Strickland, 693 F.2d 1243, 1251 (5th Cir. 1982) (en banc), *rev'd*, 104 S. Ct. 2052 (1984).

184 *See Barnes*, 103 S. Ct. at 3317 (Brennan, J., dissenting).

issues. That choice, however, is deliberate; it is made well before counsel addresses an appellate court. Thus, allowing a defendant to make the final decision concerning which nonfrivolous claims are to be raised does not jeopardize the integrity of the system by threatening to disrupt an appeal.

There is a significant difference, therefore, between deferring to counsel's tactical decisions during trial and on appeal. Such deference at the trial stage protects the state's interest without encroaching upon the fundamental rights of the accused. At the appellate level, however, such deference is not only unnecessary to serve the interests of the state, but it frustrates a defendant's autonomy as well.

The *Barnes* Court's adamant refusal to grant defendants ultimate authority over the determination of issues for appeal was precipitated in part by its fear that such a grant would "seriously undermine[] the ability of counsel to present the client's case in accord with counsel's professional evaluation."[185] That a defense consistent with counsel's evaluation is necessary to comply with the sixth amendment was evidenced, the Court indicated, by prior decisions emphasizing counsel's superior ability to defend.[186] The majority implied that interference with an attorney's professional judgment could prevent him from satisfying the obligation to render effective assistance imposed by the sixth amendment.[187]

This view and its consequent inflation of the role of counsel reflect the Court's confusion of two distinct notions of effectiveness: the constitutional requirement of effectiveness,[188] and "effectiveness," or success, in procuring a judgment favorable to a client. The *Barnes* majority contended that minimizing the exercise of counsel's professional judgment posed the risk that he might be rendered less "effective" and thus run afoul of the quite different sixth amendment requirement of effectiveness.[189] Such a restriction may indeed diminish an attorney's "effectiveness" in obtaining favorable judgments,[190]

---

185 *Id.* at 3312.

186 *See id.* (citing *Douglas*, 372 U.S. at 358).

187 *See id.* The Court, by not permitting a defendant to forego some of the benefits of counsel, implied that those benefits were requirements of effective assistance. *See infra* note 193.

188 See *supra* notes 75-80 and accompanying text for a discussion of the sixth amendment's requirement of effective representation.

189 *See Barnes*, 103 S. Ct. at 3312. The Court maintained that *Douglas* extended the right to counsel to first appeals as of right because of the benefits of counsel, and implied that a defendant who was appointed counsel could not refuse those benefits without jeopardizing an attorney's sixth amendment effectiveness. *See id.*; *see also id.* at 3314 (duty to " 'support [a] client's appeal to the best of [one's] ability' " is hindered when counsel's exercise of judgment is limited) (quoting *Anders*, 386 U.S. at 744).

190 For instance, a defendant might insist on pleading not guilty even though his law-

and perhaps adversely affect his reputation. A defendant, however, is not required to forfeit decision making authority to accomodate an attorney's personal interest in his reputation. An attorney's first and paramount consideration is loyalty to his client, and he is prohibited from taking a case if his personal interests will interfere with that loyalty.[191]

While the *Barnes* majority correctly cited *Douglas*'s recognition of attorney expertise,[192] it attributed more to *Douglas* than that opinion would properly allow by indicating that the "effectiveness," or advantages, of representation noted in *Douglas* cannot be interfered with.[193] *Douglas* did not render the various benefits of representation necessary requisites of constitutional effectiveness. Hence, interference with the "effectiveness" that makes access to counsel desirable does not compromise an attorney's ability to comply with the sixth amendment.

Since encroachment upon a defendant's autonomy is not necessary to accommodate any interest of the state, a client should have ultimate authority in the choice of the nonfrivolous issues to be argued in his appeal. An attorney's obligation to provide effective assistance, with respect to decisions that the client controls, is satisfied when his advice regarding such decisions falls within "the range of competence demanded of attorneys in criminal cases."[194]

If defendants' increasing reliance upon counsel[195] reflects confidence in the latter's superior ability to defend them, then Justice

---

yer, because of overwhelming evidence against his client, advises plea bargaining as the course likely to yield the lesser punishment.

191 STANDARDS RELATING TO CRIMINAL JUSTICE, THE DEFENSE FUNCTION Standard EC5-2, n-1 (2d ed. 1982).

192 *See Barnes*, 103 S. Ct. at 3312 (citing *Douglas*, 372 U.S. at 357-58).

193 *See id.* The Court reversed the Second Circuit at least in part because it believed the lower court's decision would disrupt the benefits of counsel acknowledged in *Douglas* and curtail counsel's exercise of professional judgment. *Id.* Because the Court's desire to eliminate any such disruption or curtailment was one of the reasons for it holding as it did, *id.*, the inference can be drawn that it considered the benefits of representation noted in *Douglas* as elements of constitutional effectiveness. Similarly, the Court maintained that such interference contravened counsel's duty under *Anders*. *Id.* at 3314.

194 McMann v. Richardson, 397 U.S. 759, 771 (1970). In *McMann*, counsel's effectiveness in advising a plea—over which a defendant has complete authority—was judged by whether the advice fell within the "range of competence." *Id.* Likewise, when a defendant relies on counsel's advice regarding the nonfrivolous issues to be argued on appeal, assuming defendants have ultimate authority over the selection, that advice should be subject to that same effectiveness standard. It should be noted, however, that if counsel's recommendations are based on purely tactical considerations, there lies the danger that the entire subject matter of the appeal will be unassailable because of courts' general agreement that tactical decisions are ordinarily not challengeable as ineffective. *See supra* note 111.

195 *See* Faretta v. California, 422 U.S. 806 (1975).

Brennan's contention that they will more often than not accept counsel's advice as to the most favorable issues for appeal[196] is correct. Those instances wherein a client insists upon pursuing a patently unwise course of action on appeal, contrary to the advice of competent counsel, should be few. The unlikelihood of such a situation further justifies honoring a defendant's wish to control the content of his appeal. Regardless, the risks inherent in rejecting counsel's advice are ones that the sixth amendment permits—the realization of which does not render counsel's assistance ineffective. To vest counsel with the authority to make choices affecting client autonomy, solely because his decisions may be more likely to yield advantageous results, is not contemplated by the sixth amendment's requirement of effectiveness and is contrary to that amendment's primary guarantee—protection of "autonomy and dignity."[197]

Moira E. Halpin

---

196 *Barnes*, 103 S. Ct. at 3317 (Brennan, J., dissenting).

197 The result of the Supreme Court's decision in *Barnes*, that paying defendants are able to exercise a greater degree of control than indigents over the content of their appeals, may pose future equal protection problems as well. Historically, all rights of indigents on appeal have been the fruits of equal protection violations. *See* Anders v. California, 386 U.S. 738 (1967); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). As the establishment of a constitutional right to an appeal sems unlikely in the near future, *Barnes*, 103 S. Ct. at 3315 n.1 (Brennan, J., dissenting), the Court will probably continue to expand indigents' rights on appeal by ensuring equal access to, and equal quality of, appellate review.