Attorney and Client—Control of the Case—Who Decides What Theory of Defense to Use

Archie Taylor was arrested and charged with the first degree murder of Jimmy Lee Mason. There were four witnesses to the killing. Each had known Taylor prior to the incident, and each swore that he had shot Mason. Taylor was apprehended a few blocks from where the killing occurred. Since he was indigent, an attorney was appointed to represent him. The lawyer’s investigation showed that the deceased was drunk at the time he was shot, and that a policeman had found an open pocket knife beside his body. On this basis, he told his client that a plea of self-defense was his best chance for acquittal. However, Taylor said that he did not kill Mason. He maintained that he was in a nearby cafe at the time, eating an egg. Therefore he insisted on a defense of alibi. No witnesses could be found to place the defendant in the cafe, and the other evidence was overwhelmingly contrary to Taylor’s story, but he insisted that this is what he would testify to. Defense counsel made several attempts, including one immediately before the trial, to convince his client that a plea of self-defense was the only practical defense. However, he was unsuccessful and Taylor stuck to his story. Counsel therefore pursued a defense of alibi at trial, and Taylor was convicted and sentenced to life imprisonment. Taylor’s appeal contended that his trial lawyer had an obligation to conduct the defense according to the theory which was most likely to succeed, regardless of the theory that the client wanted to pursue. By not doing so, the appeal argued, the defense attorney was depriving the defendant of his constitutionally guaranteed right to effective counsel. The Alabama Court of Criminal Appeals accepted this analysis and reversed the conviction. However, the Alabama Supreme Court, in *Taylor v. State*, held that the decision of which defense to employ at trial was for the defendant to make, and it reversed the Court of Appeals.

The Constitution requires that all criminal defendants be given effective counsel. In *Gideon v. Wainwright*, the U.S. Supreme Court said that the sixth amendment guarantees a lawyer to all defendants in felony prosecutions. If the accused cannot afford to

hire a lawyer, one must be provided for him by the state. Only where the defendant knowingly and intelligently waives counsel may he be tried without an attorney representing him.\textsuperscript{5} \textit{Powell v. Alabama}\textsuperscript{6} held that when counsel is constitutionally required, it takes more than a lawyer's presence in the courtroom to meet the requirement. \textit{Powell} involved the trial of several indigent defendants for rape. A definite appointment of counsel was not made in time for adequate preparation and investigation. It was found that the defendants' constitutional right to counsel was not met because their lawyers were not prepared. There was no representation in any substantial sense.\textsuperscript{7} Thus, the accused is entitled, not just to an attorney, but to effective counsel.\textsuperscript{8} Even a negligent lawyer may be considered inadequate counsel.\textsuperscript{9} For example, in \textit{United States ex rel. Johnson v. Vincent},\textsuperscript{10} the trial judge made an error in his charge to the jury which should have been obvious to a capable attorney. However, the lawyer who handled the appeal failed to raise the issue, and the conviction was affirmed. The federal district court ruled that the defendant had been denied his right of effective counsel, and ordered the appeal heard again.\textsuperscript{11}

A defendant who is attempting to show that he has been denied his right to counsel carries a heavy burden when in fact he had a lawyer representing him.\textsuperscript{12} Failure of one side to win does not establish that his counsel was constitutionally inadequate,\textsuperscript{13} nor does a showing that his lawyer made tactical errors or strategic blunders.\textsuperscript{14} In \textit{United States ex rel. Crispin v. Mancusi},\textsuperscript{15} the defense attorney dwelled on the details of her client’s assault on the victim and

\begin{itemize}
\item \textsuperscript{4} Id.
\item \textsuperscript{5} Id.
\item \textsuperscript{6} 287 U.S. 45 (1932).
\item \textsuperscript{7} Id.
\item \textsuperscript{8} Id.
\item \textsuperscript{9} United States ex \textit{rel.} Maselli v. Reincke, 383 F.2d 129 (2d Cir. 1967); Wainwright v. Simpson, 360 F.2d 307 (5th Cir. 1966); Bland v. Alabama, 356 F.2d 8 (5th Cir. 1966).
\item \textsuperscript{10} 370 F. Supp. 379 (S.D.N.Y. 1974).
\item \textsuperscript{11} Id.
\item \textsuperscript{12} United States v. Baca, 451 F.2d 1112 (10th Cir. 1971); Bruner v. United States, 432 F.2d 931 (10th Cir. 1970); Holnagel v. Kropp, 426 F.2d 777 (6th Cir. 1970).
\item \textsuperscript{13} United States v. Baca, 451 F.2d 1112 (10th Cir. 1971); Meyer v. United States, 424 F.2d 1181 (8th Cir. 1970).
\item \textsuperscript{14} United States \textit{ex rel.} Walker v. Henderson, 492 F.2d 1311 (2d Cir. 1974); United States \textit{ex rel.} Crispin v. Mancusi, 448 F.2d 233 (2d Cir. 1971); United States v. Garguilo, 324 F.2d 795 (2d Cir. 1963).
\item \textsuperscript{15} 448 F.2d 233 (2d Cir. 1971).
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elicited evidence which actually identified the defendant. This tactic probably prejudiced the jury against the accused, and helped the prosecution. However, since counsel was pursuing what the court considered a rational, though mistaken, strategy, the defendant still had effective counsel in the constitutional sense. Many courts have held that a conviction will not be overturned because the lawyer was incompetent unless the trial was a "farce" or a "mockery of justice." Other cases have stated that this language is too broad, and that the real test is "whether gross incompetence blotted out the essence of a good defense."

Several decisions have held that the attorney is the manager of the lawsuit. He acts for his client, who is bound by what he does in court. An agreement made by a lawyer is binding on his client as well. Rhay v. Browder holds that a party is bound by his lawyer’s failure to object to a jury instruction. Any other rule would make trials virtually impossible, for the court would have to repeatedly inquire whether or not the parties were in accord with their attorney’s actions and non-actions, unless the case were to be tried over and over.

People v. Mattson established that an indigent defendant has no right to share control of his defense with his appointed lawyer. In that case, the accused wanted to appear as counsel in his own defense, but he also wanted an attorney appointed to assist him. The California Supreme Court said that he could have an attorney appointed, or he could represent himself, but he had to make a choice. He had no right to both manage the case and have assistance of counsel.

People v. Ferry also held that the lawyer was the manager of the case. The defendant wanted to dismiss his appointed attorney

16. Bruner v. United States, 432 F.2d 931 (10th Cir. 1970); Holnagel v. Kropp, 426 F.2d 777 (6th Cir. 1970); United States v. Wright, 176 F.2d 376 (2d Cir. 1949).
18. Rhay v. Browder, 342 F.2d 345 (9th Cir. 1965); People v. Ferry, 237 Cal. App. 2d 880, 47 Cal. Rptr. 324 (1965).
19. Poole v. Fitzharris, 396 F.2d 544 (9th Cir. 1968); Wilson v. Gray, 345 F.2d 282 (9th Cir. 1965).
21. 342 F.2d 345 (9th Cir. 1965).
23. Id.
because they had a disagreement over trial strategy. He was allowed to do so only on the condition that he obtain another attorney himself. When he failed to do that, he was forced to represent himself. This procedure was approved on appeal because it was counsel’s "right and duty to control the trial." Therefore, the defendant had no basis for replacing his lawyer, and the court was justified in making him do so at his own risk.

The American Bar Association set up a committee to draft guidelines for the conduct of a criminal prosecution. The chairman, now Chief Justice Warren Burger, reported that the result was a concrete reflection of what the committee members had learned from experience. They insisted that the lawyer must control the case. The alternative was compared with a patient telling his surgeon how to conduct an operation. As a result, the Standards Relating to the Prosecution Function and the Defense Function of the American Bar Association Project on Minimum Standards for Criminal Justice (hereinafter referred to as the The Defense Function or ABA standards) states, "The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client." The Defense Function has been cited with approval by several courts. And State v. Harper, a Wisconsin decision, endorsed its use as a guide in determining what constitutes effective counsel.

25. Id. at 899.
26. Id.
28. Id. at 5.
29. Id. at 4-5.
30. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 5.2 (Approved Draft Feb. 8, 1971) [hereinafter cited as THE DEFENSE FUNCTION] (unless otherwise noted, all citations to sections are to the Defense Function standards).
31. Id.
33. 57 Wis. 2d 543, 205 N.W.2d 1 (1973).
There is an exception in the ABA's *Defense Function* to control of the trial by counsel. It states that the defendant must decide "(i) what plea to enter; (ii) whether to waive jury trial; (iii) whether to testify in his own behalf." Chief Justice Burger, in remarks on *The Defense Function*, said that section (i) was intended to place the decision of whether to plead guilty or not guilty with the accused. According to the commentary accompanying this standard, these decisions should be made by the defendant because of their "fundamental nature" and because they are crucial in matters determining his fate.

There are some other areas in which counsel does not control. Where a federal right is not asserted, the Supreme Court of the United States in *Fay v. Noia* indicated, by way of dictum, that the right is not waived unless counsel fully consults with the defendant and obtains his consent. Lower federal courts have applied this doctrine. In *Cobb v. Balkcom*, the defendant was indicted by a grand jury and tried by a jury from which blacks had been systematically excluded. Defense counsel failed to object to this, and he did not discuss the matter with his client. The Fifth Circuit ruled that in this case the defendant was not bound by his lawyer's failure to act, and the defendant had to personally approve it to be bound.

The American Bar Association *Code of Professional Responsibility* seemingly gives the defendant even wider authority to decide on a course of action. Since the lawyer's duty is to represent the client, the major decisions are the client's. The Ethical

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38. *Id.* at § 5.2, p. 239.
39. *Id*.
43. 339 F.2d 95 (5th Cir. 1964).
44. *Id*.
46. ABA, *Code of Professional Responsibility* [hereinafter cited as ABA Code], Ethical Consideration 7-1 [hereinafter cited as EC].
47. *Id.* at 7-7 and 7-8.
Considerations of the Code state, "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer." By way of example, they say that a criminal defense lawyer should allow the defendant to decide what plea to enter, and whether or not to appeal. This overall policy contrasts sharply with The Defense Function, which makes decisions by the client the exception, and those by the attorney the rule. It is true that the Code seems to point more toward privately hired and paid counsel; however, the Ethical Considerations of the Code stress the importance of free legal services and appointed counsel. They state that every lawyer should, on occasion, undertake free legal services for those who cannot afford them and that court appointment should only be declined for compelling reasons. Thus, the Ethical Considerations cannot be said to have overlooked court appointed counsel, and when they refer to an attorney, we should assume that this includes appointed counsel, unless it is specified otherwise.

Another instance exists in which the defendant may control the case. He does not have to be represented by counsel at all. He may, instead, represent himself. Faretta v. California found that the right to waive counsel and personally conduct the defense was implicit in the fifth and sixth amendments. Thus, the accused may have complete control of the case, so long as he has waived counsel.

The Alabama Court of Criminal Appeals decision in Taylor v. State held that the defense attorney had an obligation to pursue the theory of the case that he thought best. He was not only permitted to use his best judgment, he was required to. He should have

48. Id. at 7-7.
49. Id.
50. The Defense Function § 5.2.
51. ABA Code, EC 2-25, 2-29.
52. Id. at 2-25.
53. ABA Code, EC 2-29.
55. 95 S. Ct. 2525 (1975).
56. Id.
ignored his client's wishes and put on evidence of self-defense, despite the fact that it contradicted Taylor's story and despite his intention to testify in accordance with that story. The lawyer was the manager of the trial, and Taylor's attorney had not conducted the defense as if he was in complete charge. Therefore, the defendant did not have effective counsel.

The Alabama Supreme Court thought otherwise when it reviewed the case. It felt that the decision of what theory of defense to employ was really a decision as to what "plea to enter." Thus, according to the ABA's *Defense Function*, it was a decision for the defendant to make. Therefore, defense counsel acted properly in the view of a unanimous court.58

The Alabama Supreme Court was probably mistaken in its reliance on *The Defense Function* requirement that the defendant decide what "plea to enter."59 Chief Justice Burger described the choice as whether the defendant "will plead guilty or whether he will plead not guilty and stand trial."60 In Taylor, the defendant had already pleaded "not guilty" and had decided to stand trial. The issue was what theory was to be advanced at trial, and what evidence produced to convince the jury to acquit. Though we speak of a "plea of justifiable homicide,"61 this is not the type of formal plea that *The Defense Function* standards appear to mean. Their focus seems to be on whether the defendant will give up, or contest the case, not on how he will contest it.62

Nevertheless, the result that the Alabama Supreme Court reached in *Taylor v. State* is correct. The defendant had a right to testify,63 and the ABA standards acknowledge that the decision as to whether or not to testify is to be made by him.64 In the course of testifying, he may tell what he believes occurred. By doing this, he is dictating the theory of the defense for all practical purposes. And this implies a right to do so at the beginning of the trial, when it would be most effective. Further, if defense counsel presented evidence that contradicted what his client intended to say, as the Court of Criminal Appeals suggested, this would either force the

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59. *Id.* at 761, 287 So. 2d at 906.
60. *Burger, Minimum Standards*.
62. *See The Defense Function* § 5.5; *Burger, Minimum Standards*.
63. *Burger, Minimum Standards*.
64. *The Defense Function* § 5.2.
defendant to change his story or force him not to take the stand at all. This would arguably violate his right to testify in his own behalf.

The reason for the three exceptions to control by the lawyer in *The Defense Function* is that the choices involved are of a "fundamental nature" and crucial in matters determining the defendant's fate. This policy would appear to support letting the defendant decide the basic theory of the defense. Surely whether to claim that the accused was not present during the incident or to admit that he killed the deceased is a decision of a "fundamental nature," and it certainly is crucial to his fate. The exceptions to control by counsel which *Fay v. Noia* and *Cobb v. Balkcom* created demonstrate that decision making by the defendant is not rigidly limited to the three decisions listed in the ABA standards. And the policy of allowing the defendant to have some control over his fate is further shown by the fact that he may represent himself. It seems inconsistent to permit the defendant to have complete authority over the trial by representing himself, but to forbid his attorney to even listen to his wishes on basic matters if he obtains counsel.

The ABA *Code of Professional Responsibility* not only supports the Alabama Supreme Court ruling, it seems to require that the accused be given even wider authority to make crucial decisions. It indicates that in areas affecting his rights and prejudicing his case the client is to decide what to do. Perhaps this would not apply to technical, strategic matters such as which witnesses to call to prove a given set of facts, but the *Code* does not even make that distinction. And though one might argue that in case of apparent conflict, the ABA standards ought to prevail because they focused on criminal trials, the *Code* also specifically considered criminal trials when it discussed this problem. On the other hand, the *Code* could have made the point more forcefully than it did. The discussion of control of the case is found in the Ethical Considerations and not in the Disciplinary Rules. To have included it in the Disciplinary Rules would have made the *Code*'s position on the subject much stronger.

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65. *Id.*
66. *Id.*
68. ABA Code, EC 7-7, 7-8.
69. *See* *The Defense Function* § 5.2.
70. *See* ABA Code, EC 7-7, 7-8.
71. *See* ABA Code, EC 7-7.
However, the Ethical Considerations are guidelines for the attorney and for the courts, and ABA standards can claim to be little more than that. The fact that the Code does not specifically deal with an indigent defendant telling his appointed counsel what to do should make no difference. Neither the Code, the standards, the Alabama Court of Appeals decision in Taylor v. State,72 nor the Supreme Court decision in that case73 make any distinction in regard to control of the case between when counsel is appointed and when he is privately hired. The right to control the case is the same, and the Code says that it rests with the client.

When a client insists upon an approach to a trial which his attorney considers to be unwise, Taylor v. State74 indicates that the lawyer should honor the client’s wishes so long as the issue can be regarded as involving a “plea.” It need not be a formal plea in the sense of a document turned over to a court. It may simply be a theory of the defense, such as a plea of justifiable homicide. As to any other decisions, which do not relate to waiving a jury trial or taking the stand, there is authority which indicates that counsel must act without regard to his client’s wishes. However, a strong argument can be made for having the defendant decide the major issues involving his fate.

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73. 291 Ala. 756, 287 So. 2d 901 (1973).
74. Id.