

Conceding Guilt

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Consider the following scenario. The government charges a defendant with first degree murder and the defendant pleads not guilty. Through discovery, defense counsel learns that the state has substantial evidence against the defendant, including video surveillance, an eyewitness statement that places the defendant in the vicinity of the crime, and DNA analysis establishing that the victim's blood was found on the defendant's hands. Counsel explains to the defendant that the best strategy to avoid a conviction of first degree murder and a possible death sentence is to concede guilt on the lesser charge of second degree murder and argue for the jury to reject the charge of first degree murder based on lack of premeditation and deliberation. The defendant rejects this strategy. At trial may defense counsel pursue the strategy the client rejected of conceding guilt to second degree murder in order to gain credibility with the jury to argue against a verdict of first degree murder and avoid the possibility of the death penalty? Or, is the choice to concede guilt a decision reserved to the client? If it is the client's decision and defense counsel concedes guilt over a client's objection, what, if any, remedy does the client have?

Analyzing a strategic concession of guilt—sometimes referred to as a “strategic retreat”—involves a series of distinct questions. Some of these focus on whether the client's constitutional rights were violated. Others focus on whether the defendant should receive the remedies of reversal and a new trial if there was a constitutional violation.

In this column we focus on three of these questions. First, we examine the classic dichotomy used to allocate decision-making authority—the client decides the objectives, or ends, of representation and counsel decides the strategy, or means. Next, we examine how courts distinguish between complete and partial concessions of

guilt. Finally, we address how courts often blur remedy and violation in analyzing ineffective assistance of counsel claims arising out of defense counsel concession of guilt. We begin by identifying what we mean by a concession of guilt.

Concession of Guilt

We use the phrase “concession of guilt” to mean an explicit or implicit acknowledgment by defense counsel at trial that the government's evidence establishes all of the elements necessary to convict the defendant of a crime. A concession of guilt includes a defense counsel's concession to one or more charged offenses, or to a lesser included offense.

We do not use concession of guilt to describe, and we do not examine here, defense counsel actions or inactions that may concede or stipulate an element of an offense or an evidentiary issue critical to conviction. Accordingly, we do not examine defense counsel stipulating to or conceding the content or accuracy of a lab report, the qualifications of an expert witness, or the identification of the defendant. Nor do we examine other decisions that may have a negative impact on the defendant's case, such as a decision not to cross-examine a key witness, to cross-examine a key witness in a manner that may imply a client's guilt, or not to introduce evidence necessary to rebut critical evidence against the defendant.

In the following section, we examine the constitutional and ethical aspects of the allocation of authority between client and attorney implicated by a defense counsel's concession of guilt.

Allocation of Authority

Both constitutional law and legal ethics rules give the client the authority to decide what plea to enter. The client and not defense counsel controls the right to plead guilty because entering a plea of guilty waives several important constitutional rights, including the right to a jury trial, the right to confront witnesses, the right to present evidence in one's defense, and the right against compelled self-incrimination. If defense counsel seeks to enter a guilty plea on behalf of a client, the record must be clear that the client has given informed consent to the guilty plea. (*Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966).)

Defense counsel is also ethically required to follow the client's plea decision. Rule 1.2 of the Model Rules of Professional Conduct provides that in criminal cases “the lawyer shall abide by a client's decision, after consultation with the lawyer, as to the plea to be entered.” Indeed, a defense lawyer may face professional discipline for refusing to follow a client's instructions as to the plea to be entered. (*See, e.g., In re Garnett*, 603



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S.E.2d 281 (Ga. 2004) (disciplining lawyer for refusing client's instructions to enter guilty plea.)

Although both constitutional law and the ethics rule protect the client's decision to plead guilty, a client's authority to control the decision to make a concession of guilt at trial is much less clear. Should a concession of guilt be considered the functional equivalent of a guilty plea? A guilty plea and a trial concession of guilt share an important feature. Both involve an admission of the client's guilt. But they differ in other important aspects. Unlike a guilty plea, a defense counsel's concession of guilt does not waive the defendant's rights to trial, compulsory process, confrontation, or appeal.

Complete and Partial Concession of Guilt

We have observed that courts look to both the scope of and motivation for the concession in analyzing who should control decisions to concede guilt. Courts currently tend to give clients ultimate decision-making power over complete concessions of guilt where there is no apparent strategic advantage to the concession but lawyers' ultimate power over partial concessions when the courts find that the concessions have strategic value. Courts usually find a complete concession of guilt in two ways.

First, if the concession of guilt also waives the defendant's right to cross-examine and confront witnesses, such as agreeing not to challenge the government's evidence, then the court will view that as a complete concession of guilt. For example, in *Brookhart v. Janis*, 384 U.S. at 6-7, the Supreme Court equated a complete concession of guilt with the waiver of the defendant's Sixth Amendment right of confrontation and required that the defendant make the waiver personally or acquiesce to defense counsel's attempt to waive this right. The Court did not address whether such a complete concession of guilt could have potential strategic value but none is apparent from the facts described in the Court's opinion.

Other courts have viewed a concession to be a complete concession of guilt if it relieves the government of its evidentiary burden of convincing the fact finder of the defendant's guilt. If the concession relieves the government of its burden of proof, then there is a violation of the defendant's due process right because there is a breakdown in the adversary process and ineffective assistance of counsel occurs. (See *United States v. Swanson*, 943 F.2d 1070, 1073 (9th Cir. 1991); *Wiley v. Sowders*, 647 F.2d 642, 648-50 (6th Cir. 1981).) In these cases, the courts either do not consider whether a complete concession of guilt could have potential strategic value or they reject the argument that a complete concession of guilt is strategic value when the concession provides no apparent benefit to the client.

On the other hand, courts usually view a concession to be partial if, as in our opening example, defense counsel concedes guilt to a lesser included offense, or if defense counsel concedes to some but not all of the charges. The concessions do not completely relieve the government of its burden of proof, and courts find a plausible strategic reason for the concession. In such instances, the federal circuits confronting the issue characterize the concession of guilt as a "strategic decision" that defense counsel may make even over the objection of the defendant. (See *Haynes v. Cain*, 298 F.3d 375 (5th Cir. 2002) (en banc), cert. denied. 537 U.S. 1072 (2002); *Lingar v. Bowersox*, 176 F.3d 453, 458-59 (8th Cir. 1999); *Underwood v. Clark*, 939 F.2d 473, 474 (7th Cir. 1991).)

Although the Supreme Court has not addressed a concession of guilt over a client's objections, in *Florida v. Nixon*, 543 U.S. 175, 192 (2004), the Court approved a concession of guilt when the client was unresponsive to his attorney and acquiesced to the strategy. The Court also expanded the concept of a partial concession to guilt to include a concession of guilt in a two-stage capital case in which defense counsel's strategy is to present extensive mitigation evidence during the penalty phase. (*Id.*)

In our view, the courts' "complete" versus "partial" concession of guilt analysis confuses this area of the law. Courts often appear to assume that a partial concession has strategic value even if the record is silent on this issue. Another source of confusion is that courts routinely fail to separate clearly *violation* from *remedy* when analyzing concession of guilt cases. Why and how does this occur?

Mixing Remedy with Violation

A major source of trouble for courts in analyzing concession of guilt cases is the ineffective assistance of counsel test in *Strickland v. Washington*, 466 U.S. 668 (1984), which measures a violation of a defendant's Sixth Amendment right by considering whether the outcome at trial would have been different if not for counsel's acts or omissions. By using likely impact on outcome, a factor that is essentially part of a remedial inquiry, to assess a violation, the contours of a violation of rights and the question of remedy become confused.

The courts dealing with counsel concessions of guilt tend to leapfrog in their analysis past examination of the alleged constitutional violation and go directly to a remedial inquiry about whether a new trial would likely produce a different result. If a different result is not likely, the courts reason there is no need to examine or resolve the alleged constitutional violation. This approach impedes thoughtful development of the con-

tours of the constitutional dimensions of lawyer concessions of guilt at trial.

Appellate courts dealing with evidence issues raised in criminal trials, by contrast, proceed in a very different fashion. They tend to examine the evidentiary question raised and then, if an evidence rule was violated, separately perform a harmless error analysis to determine if the remedy of a new trial is warranted. The law of evidence would be poorly developed if appellate judges routinely looked first to harmless error, and, if finding the evidentiary claim harmless, refused to address the hearsay, relevance, or character question presented by the case.

Conclusion

Whether the client or attorney controls the decision to concede guilt at trial is a question that the courts have not analyzed with the care the issue deserves. In this column, we have explored how the courts currently address this issue and some of the problems with their analysis. Our adversary system of justice relies on defense counsel acting as a client's advocate and putting the government's evidence to the test unless the client agrees to enter a plea of guilty. Since this advocacy function is so central to our justice system, the issue of when a criminal defense lawyer may concede guilt without the client's consent deserves more attention from and greater clarification by the courts. ■