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THE MYTH OF FUNDAMENTAL DECISIONS

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Abstract

Criminal defendants have numerous fundamental rights, some of which are so important or personal that only the defendant, not defense counsel, may make decisions regarding those rights. These so-called "fundamental decisions" include whether to: (1) accept a plea bargain and plead guilty; (2) waive the jury in favor of a bench trial; and (3) testify at trial instead of remaining silent.

While the law jealously guards a defendant's fundamental decisions against intrusion by his or her own defense lawyer, it surprisingly offers no protection against intrusion by government agents. Specifically: (1) prosecutors may use illusory promises to induce defendants to plead guilty, thus rendering the decision to do so involuntary; (2) prosecutors may block defendants' attempted jury waivers without any reason or justification; and (3) while judges and prosecutors cannot literally stop defendants from testifying, they often instruct the jury, or argue to the jury, that it should disregard the defendant's testimony because he or she has an interest in the outcome of the case and, therefore, a motive to lie.

All three of the above tactics undermine the defendant's fundamental decisions. Because it is absurd to protect the defendant's decision-making from intrusion by his or her own lawyer while offering no protection from government agents, this Article advocates for simple legal reform. In addition, because reform proposals are rarely implemented, this Article makes a far more valuable contribution: it provides strategies for the defense lawyer to use now, within the current system, to protect the defendant's fundamental decisions against interference by judges and prosecutors.

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INTRODUCTION

Defendants in criminal cases are afforded numerous rights, some of which are so important they are called "fundamental rights."[1] And some of these fundamental rights, in turn, are elevated to even higher ground in that only the defendant, and not even defense counsel, may make decisions regarding these rights. Such decisions are known as "fundamental decisions."[2] For example, while *defense counsel* may decide which theory of defense to pursue and how to cross-examine the State's witnesses, only *the defendant* can decide whether to accept a plea bargain and plead guilty, waive the jury in favor of a bench trial, and testify at trial instead of remaining silent.[3]

But while the law jealously protects the defendant's decision-making authority against intrusion by his or her own legal advocate, the defense lawyer, the law surprisingly—even scandalously—offers the defendant far less protection against intrusion by prosecutors and judges.[4] As a result, these government agents are often able to undermine and even usurp the defendant's fundamental decisions.[5]

Specifically, while only the defendant can decide to plead guilty—a decision which must be voluntary to be valid—prosecutors may use illusory promises to induce the plea, thus rendering the defendant's decision involuntary.[6] While only the defendant can waive the jury, prosecutors are often statutorily permitted to block that waiver, without any reason or justification, thus forcing a jury upon an unwilling defendant.[7] And while a judge or prosecutor cannot literally prevent the defendant from testifying, judges often instruct the jury, and prosecutors often argue to the jury, that it should disregard such testimony because, as a defendant, he or she has an interest in the outcome of the trial and, therefore, a motive to testify falsely.[8]

All three of the above government tactics substantively undermine the defendant's fundamental decisions. Further, it is nonsensical—and certainly contrary to public policy, legal history, and the plain language of the Constitution—to protect the defendant's decision-making authority against the defense lawyer, the trained advocate who is duty-bound to act in the defendant's best interest, while at the same time offering no protection against government agents, including the defendant's adversary.[9] This Article therefore

[1] *See infra* Part I.
[2] *See* id.
[3] *See* id.
[4] *See infra* Part II.
[5] *See* id.
[6] *See infra* Part II.A.
[7] *See infra* Part II.B.
[8] *See infra* Part II.C.
[9] *See infra* Part III.

argues for legal reform and demonstrates how these fundamental decisions should be taken back from the government and returned to defendants.[10]

More importantly, because legal reform proposals, while numerous, are rarely implemented in the real world, this Article makes a more meaningful and immediate contribution: it offers criminal defense lawyers three practical strategies for protecting defendants' fundamental decisions within our existing, flawed legal framework.[11]

Specifically, with regard to the defendant's fundamental decision to plead guilty, this Article provides a model motion for the entry of a conditional guilty plea to protect the defendant against illusory promises.[12] The motion seeks to condition the guilty plea upon the actual fulfillment of the promise that induced the plea in the first place; if the promise is not fulfilled, the plea was not voluntary and the defendant would be allowed to withdraw the plea.[13]

With regard to the defendant's fundamental decision to waive the jury, this Article provides a model waiver notice and request for a bench trial.[14] The notice quotes the plain language of the Constitution, makes a constitutional analogy, cites legal history, and invokes public policy to demonstrate that the defendant's fundamental decision to waive the jury should be superior to the prosecutor's mere statutory right to block that waiver.[15]

Finally, with regard to the defendant's decision to testify, this Article provides a sample motion to modify the judge's witness-credibility instruction to the jury, and to prohibit prosecutorial argument to the jury, that the defendant's testimony should be discredited because of his or her status as a defendant and resulting interest in the outcome of the trial.[16]

I. FUNDAMENTAL RIGHTS AND FUNDAMENTAL DECISIONS

Of the numerous rights afforded criminal defendants, some rights are more deeply-rooted or significant than others. These are loosely called *fundamental rights*. For example, the United States Supreme Court has held that a defendant's right to confront the State's witnesses at trial is a "fundamental right and is made obligatory on the States by the Fourteenth Amendment."[17] Similarly, a defendant also has the right to present his or her own evidence at trial, which the Court has called the "fundamental constitutional right to a fair opportunity to present a defense."[18]

Despite the fundamental nature of these and other rights, it is typically defense counsel, not the defendant, who makes the important decisions regarding such rights.[19] For

[10] *See* id.
[11] *See infra* Part IV.
[12] *See infra* Part IV.A.
[13] *See* id.
[14] *See infra* Part IV.B.
[15] *See* id.
[16] *See infra* Part IV.C.
[17] Pointer v. Texas, 380 U.S. 400, 403 (1965) (reversing a conviction because the defense was unable to cross-examine out-of-court statements that were repeated, and used against the defendant, at trial).
[18] Crane v. Kentucky, 476 U.S. 683, 687 (1986) (reversing a conviction because the judge prohibited the defense from challenging, at trial, the reliability of the defendant's alleged confession).
[19] *See* Todd A. Berger, *The Constitutional Limits of Client-Centered Decision Making*, 50 U. RICH. L. REV. 1089, 1109 (2016) ("decisional law at both the state and federal level, as well as current ethical guidelines,

example, returning to the right of confrontation, it is usually counsel, not the defendant, who decides how or even whether to cross-examine the government's witnesses at trial.[20] Similarly, with regard to the presentation of defense evidence, it is usually counsel, not the defendant, who decides which theory of defense to pursue[21] and which witnesses to call in support of that theory.[22]

Admittedly, the body of law allocating decision-making authority between defense lawyer and defendant is not always clear-cut.[23] But the point is this: decisions impacting fundamental rights are often, even typically, left to defense counsel rather than the defendant.[24] And this makes perfect sense. Not only is counsel the defendant's legal advocate, but counsel is also in a much better position to make such decisions.[25] For example, with regard to which witnesses to call at trial: "Tactical decisions require the skill, training, and experience of the advocate. A criminal defendant, generally inexperienced in the workings of the adversarial process, may be unaware of the redeeming or devastating effect a proffered witness can have on his or her case."[26]

Despite the common allocation of decision-making authority to the defense lawyer, there are certain fundamental rights that are so significant or personal that only the defendant can make decisions regarding those rights. Such decisions are called *fundamental decisions*. As explained below, not even defense counsel, who is duty-bound to act in his or her client's best interest and is usually in a position to make better decisions, can overrule the defendant's choice.

Specifically, the United States Supreme Court has held that "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, [and] testify in his or her own behalf[.]"[27] Nearly identically,

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generally provides the criminal defense attorney with fairly expansive decision-making authority, even in the face of his or her client's objection.").

[20] *See, e.g.*, Gov't of Virgin Islands v. Weatherwax, 77 F.3d 1425 (3rd Cir. 1996) (decisions to be made by defense counsel include "whether and how to conduct cross-examinations") (internal citations omitted).

[21] *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring) (decisions resting with counsel include "what defenses to develop"); Meeks v. Bergen, 749 F.2d 322, 238 (6th Cir. 1984) (decision to select theory of defense rests with counsel). There may, however, be state- or defense-specific exceptions. *See, e.g.*, State v. Byrge, 594 N.W.2d 388, 398 (Wis. Ct. App. 1999) (decision to use insanity defense involves the entry of an "NGI plea" and therefore may rest with the defendant).

[22] *See, e.g.*, United States v. Long, 674 F.2d 848, 855 (11th Cir. 1982) (decision to call witnesses rests with defense counsel); State v. Lee, 689 P.2d 153, 158 (Ariz. 1984) ("the power to decide questions of trial strategy and tactics rests with counsel, and the decision as to what witnesses to call is a tactical, strategic decision.") (internal citations omitted).

[23] Regarding the decision to call witnesses, *see* Rodney J. Uphoff, *Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant's Tactical Choices*, 68 U. CIN. L. REV. 763, 764 ("lawyers, courts, and commentators are sharply divided as to whom should have the final say when lawyer and criminal defendant disagree regarding the decision to call a particular witness."). Regarding the allocation of decision-making authority generally, *see* Steven Zeidman, *What Public Defenders Don't (Have to) Tell Their Clients*, 20 CUNY L. REV. F. 14, 29 (2016) ("If anything is clear it is that the current state of [New York] law is ambiguous.").

[24] *See* Berger, *supra* note 19, at 1109.

[25] *See* Christopher Johnson, *The Law's Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Indignity*, 93 KY. L.J. 39, 132 (2004) (discussing the "empirical premise . . . that lawyers, in general, recognize the best course of defense better than defendants.").

[26] *Lee*, 689 P.2d at 158.

[27] Jones v. Barnes, 463 U.S. 745, 751 (1983) (internal citations omitted). A fourth fundamental decision of whether "to take an appeal" is not addressed in this Article. Id. Another fundamental decision, subject to

attorney ethics rules require that, "[i]n a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."[28]

To begin, the decision to plead guilty—a decision which almost always occurs within the context of a plea bargain with the prosecutor[29]—relates to the defendant's "autonomy" interest to chose the objectives of the representation:

> Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her . . . so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*.[30]

Regarding the two remaining fundamental decisions—whether to waive the jury in favor of a bench trial, and whether to testify or instead remain silent—the reasoning is similar and the law is equally clear that the decisions rest with the defendant:

> Other fundamental decisions, such as whether to . . . waive a jury trial, or to testify in one's own behalf, in a sense may be viewed as strategic decisions because they relate to the means employed by the defense to obtain the primary objective of the representation—ordinarily, a favorable result. Nevertheless, these decisions are *so personal and crucial to the accused's fate* that they take on an importance equivalent to that of deciding the objectives of the representation.[31]

Given the hallowed ground on which these important decisions rest—sacred territory on which not even defense counsel may tread—it should be shocking, even scandalous, that a defendant's fundamental decisions are easily thwarted by judges and prosecutors. Amazingly, while the law governing fundamental decisions jealously guards a defendant's decision-making authority against intrusion by his or her own lawyer—the

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certain limitations, is to reject counsel entirely. *See* Faretta v. California, 422 U.S. 806, 833 (1975) ("[I]t is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want."). There may also be additional fundamental decisions that are jurisdiction specific. *See* Berger, *supra* note 19, at 1103 (describing how some courts have "expand[ed] the number of decisions that are deemed fundamental and therefore reserved to the defendant").

[28] MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2011) (hereafter "MODEL RULES"). The vast majority of states have adopted the ABA's Model Rules, but often in modified form. *See* Jan L. Jacobowitz & Kelly Rains Jesson, *Fidelity Diluted: Client Confidentiality Gives Way to the First Amendment & Social Media in Virginia State Bar, ex rel. Third District Committee v. Horace Frazier Hunter*, 36 CAMPBELL L. REV. 75, 84 (2013) ("Forty-nine states have adopted the ABA Model Rules, however, various states have made their own modifications to the rules.").

[29] With regard to the plea to be entered, the ethics rules state, more descriptively than the case law, that the lawyer "shall abide by a client's decision whether to settle a matter." MODEL RULES r. 1.2(a).

[30] McCoy v. Louisiana, 138 S.Ct. 1500, 1508 (2018) (emphasis original). This ends-means distinction is consistent with the rationale of the ethics rules for the allocation of decision-making authority (for non-fundamental decisions) between lawyer and client. *See* MODEL RULES r. 1.2 cmt. 1.

[31] Gov't of Virgin Islands v. Weatherwax, 77 F.3d 1425, 1435 (3rd Cir. 1996) (emphasis added).

trained advocate who is duty-bound to protect the defendant's interests—the next Part explains that the law offers far less protection against interference by government agents.

II. USURPING THE DEFENDANT'S DECISIONS

That the law would permit the government to thwart a defendant's fundamental decisions is indeed scandalous. That government agents would *attempt* to do so, however, should not be surprising. After all, when defendants make decisions, they tend to make decisions consistent with their own best interests, not the government's. And with legislatures frequently enacting unconstitutional laws at the expense of the citizenry,[32] prosecutors repeatedly striking "foul blows" against defendants,[33] and judges being unable or unwilling to "safeguard the rights of the people,"[34] it should even be expected that government agents would work in concert to usurp defendants' decision-making authority. The sections below demonstrate three of these government tactics.

A. *The Involuntary Guilty Plea*

Superficially, no prosecutor or judge would ever dispute that the decision to plead guilty belongs to the defendant. However, to be a meaningful and legally valid decision, the decision to so plead must be "knowingly, *voluntarily*, and understandingly made."[35] And few if any rational defendants would ever voluntarily self-convict without getting something of value in return.[36] Consequently, plea bargains have become the dominant form of case resolution in criminal courts.[37]

A common plea bargain involves the prosecutor offering the defendant a sentence concession in exchange for a guilty plea to one or more charges. This is known as "sentence bargaining."[38] For example, in exchange for a plea to the sole count in the complaint, the prosecutor may promise to recommend probation instead of jail, jail instead

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[32] *See* "State Laws Held Unconstitutional," JUSTIA: U.S. LAW (cataloging unconstitutional state laws from 1809 to 2017), at https://law.justia.com/constitution/us/state-laws-held-unconstitutional.html.

[33] Mary Nicol Bowman, *Mitigating Foul Blows*, 49 GA. L. REV. 309, 312 (2015) (citing the landmark case of Berger v. United States, 295 U.S. 78 (1935), and noting the "striking gap" between "the strong rhetoric of *Berger* and . . . the realities of prosecutors' behavior"); Michael D. Cicchini, *Combating Prosecutorial Misconduct in Closing Arguments*, 70 OKLA. L. REV. 887 (2018) (discussing numerous foul blows routinely landed by prosecutors in closing arguments to juries).

[34] Crawford v. Washington, 541 U.S. 36, 68 (2006). For examples of anti-defendant judicial misconduct, *see* Abbe Smith, *Judges as Bullies*, 46 HOFSTRA L. REV. 253, 255 (2017) ("When judges become yet another bully in our notoriously punitive criminal justice system, our individual and collective rights don't stand a chance."); Michael D. Cicchini, *Combating Judicial Misconduct: A Stoic Approach*, 67 BUFF. L. REV. 1259, 1292 (2019) ("Despite the trial judge's well-defined role, many jurists cannot resist playing the prosecutor-in-chief.").

[35] Christine M. Wiseman & Michael Tobin, CRIM. PRACTICE & PROCEDURE § 23:1 (West, 2d ed. 2008) (emphasis added) (citing Brady v. United States, 397 U.S. 742, 748 (1970)). Similarly worded, a defendant's "decision to plead guilty must be knowing, voluntary and intelligent." Davis v. State, 675 N.E.2d 1097, 1102 (Ind. 1996) (citing Boykin v. Alabama, 395 U.S. 238, 242-44 (1969)).

[36] *See* People v. Killebrew, 330 N.W.2d 834, 838 (Mich. 1983) ("In essence, the practice [of plea bargaining] involves the act of self-conviction by the defendant in exchange for various official concessions.")

[37] *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) (plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system.").

[38] *Killebrew*, 330 N.W.2d at 836.

of prison, or perhaps a short prison sentence instead of a lengthier term. And it is well-settled that "when a plea rests in any significant degree on a promise or agreement of the prosecutor . . . *such a promise must be fulfilled*."[39]

However, depending on the jurisdiction and the precise form of, or label attached to, the plea bargain, some courts have held that the prosecutor's promise is "fulfilled" as soon as he or she utters the words required by the plea agreement, regardless of the actual sentence the judge imposes.[40] But in reality, defendants aren't bargaining for prosecutors merely to utter certain words in the courtroom. "[T]he truth is that most defendants rely on the prosecutor's ability to secure the sentence" they are recommending.[41] Understandably, then, when judges jump sentence concessions it can be both shocking and life-ruining for defendants:

> In Houston, for example, despite the courts' usual deference to prosecutorial sentence recommendations, a defendant who pleaded guilty in exchange for the recommendation of a ten-year sentence is *currently serving a fifty-year term*, and in a federal court, a defendant who was induced to plead guilty by a promise to recommend his immediate release from custody was sentenced to *two consecutive five-year terms*. Although the prosecutors in these cases did make the promised recommendations, the defendants probably concluded that the plea negotiation process had cheated them of years of their lives.[42]

Bamboozling defendants this way also reeks of conspiracy. As one Pennsylvania court astutely observed, when prosecutors recommend sentences and judges impose harsher ones, thus leaving defendants without recourse, it "create[s] the impression that the court and the prosecutor are *working in conjunction* to deprive defendants of valuable rights."[43]

Conspiracy concerns are heightened when a prosecutor undercuts his or her own sentence recommendation right before the judge imposes the harsher sentence. For example, when a prosecutor recommends the agreed-upon sentence, which is beneath the maximum penalty, but then tells the judge that even the maximum penalty would fail to do justice to this particular defendant's crime, eyebrows will be raised.[44] Concerns are then

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[39] Santobello v. New York, 404 U.S. 257, 262 (1971) (emphasis added).

[40] *See* Michael D. Cicchini, *Deal Jumpers*, 2021 U. ILL. L. REV. 1325, 1329-31 (2021) (providing examples from several different jurisdictions). Not only does the law vary greatly by jurisdiction, but even within a given jurisdiction "the particular label used to describe a plea agreement might dramatically impact the defendant's rights." Id. at 1331.

[41] *Killebrew*, 330 N.W.2d at 842.

[42] Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1069-70 (1976) (emphasis added).

[43] Commonwealth v. White, 787 A.2d 1088, 1093 (Pa. Super. Ct. 2001) (emphasis added) (holding that because the sentence imposed by the judge was greater than that recommended by the prosecutor, the defendant was allowed to withdraw his plea).

[44] *See* State v. Bokenyi, 848 N.W.2d 759, 765 (Wis. 2014) (the prosecutor argued, "I think the felony classifications obviously indicate the extreme seriousness of these offenses that night. But to be honest, I don't think they really do them justice in terms of how serous *this* was.") (emphasis added).

substantiated when the judge imposes a sentence more than triple the prosecutor's ostensible recommendation.[45]

Similarly, the appearance that the judge and prosecutor are "working in conjunction"[46] is even more troubling when the prosecutor blatantly violates the plea deal right before the judge lowers the boom. In one case, for example, the prosecutor induced the defendant to plead guilty in exchange for a constrained sentence recommendation.[47] But at sentencing, the prosecutor argued for the *maximum* penalty.[48] The defense objected and the prosecutor responded, unbelievably, that his maximum-sentence recommendation was actually a "nonrecommendation" and therefore didn't violate the plea bargain.[49] After lengthy post-conviction proceedings, the defendant still received twelve years of initial confinement in prison.[50]

But the important point is that, regardless of the strength of the conspiratorial odor in any given case, the above bait-and-switch, in all of its variations, "removes the basis upon which a guilty plea was entered and draws into question *the voluntariness of the plea*."[51] Why? Because no rational defendant would have entered the guilty plea knowing that he or she would get nothing of value in return. And if the defendant is not making the fundamental decision to plead guilty *voluntarily*, then the decision is not constitutionally valid.[52] An involuntary "decision" is no decision at all.

Even in bait-and-switch cases where the judge and prosecutor could plausibly claim to have acted independently to achieve their separate (yet substantially identical) objectives,

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[45] Id. at 766. The judge imposed more than thirteen years of initial confinement, which was more than triple the "three to four years" the prosecutor ostensibly recommended under the plea deal. Id. at 764.

[46] *White*, 787 A.2d at 1093.

[47] *See* State v. Locke, 833 N.W.2d 189, 193 (Wis. Ct. App. 2013). The prosecutor agreed to cap the State's the sentence recommendation at no more than the recommendation made in the pre-sentence investigation report. Id.

[48] The prosecutor actually recommended a sentence beyond even the maximum permitted by law, but the appellate court interpreted the recommendation as asking for the maximum sentence allowed by law. *See* id., n. 2.

[49] Id.

[50] The judge initially imposed *ten years* of initial confinement, which was reversed on appeal because the prosecutor's so-called "nonrecommendation" was, in substance, a recommendation and it breached the plea agreement. Doing its best to lend credibility to the conspiracy theories, the next trial court re-sentenced the defendant to *thirty years* of initial confinement. That sentence was later reversed because it was based on inaccurate information. The third and final trial court then re-sentenced the defendant to *twelve years* of initial confinement—more than even the first trial judge had imposed. For the lengthy trial-court proceedings, *see* State v. Locke, 2010CF162 (Cir. Ct. Oconto Cty. Wis), at https://wcca.wicourts.gov/caseDetail.html?caseNo=2010CF000162&countyNo=42&index=0.

[51] People v. Walker, 46 P.3d 495, 497 (Colo. Ct. App. 2002) (emphasis added) (holding that because the defendant's guilty plea was not voluntarily made, the defendant was allowed withdraw it). Some courts hold that, even though defendants may get sandbagged on their sentences, their pleas were still voluntarily made because, before pleading guilty, they were warned that the judge is not bound by the prosecutor's recommendation. *See* State v. Williams, 613 N.W.2d 132, 137 (Wis. 2000). However, such a warning does not ensure the voluntariness of the plea. Not only do most defendants view such judicial disclaimers as mere boilerplate verbiage, but warning that the court does not have to follow the recommendation "is one thing, while understanding that the court's rejection of the sentencing recommendation will leave the defendant without recourse [i.e., the ability to withdraw the plea] is another." Commonwealth v. White, 787 A.2d 1088, 1093 (Pa. Super. Ct. 2001).

[52] *See* Wiseman & Tobin, *supra* note 35 (discussing Brady v. United States, 397 U.S. 742, 748 (1970)); Davis v. State, 675 N.E.2d 1097 (Ind. 1996) (citing Boykin v. Alabama, 395 U.S. 238, 242-44 (1969)).

they have still stolen from the defendant the right to voluntarily make one of the three fundamental decisions reserved for defendants: the decision to plead guilty.

B. *The Jury-Waiver Veto*

Although defendants don't assert jury waivers often,[53] there certainly can be good reasons to waive the jury in favor of a bench trial. These reasons include potential juror bias due to the nature of the allegation,[54] the unpopular characteristics or traits of the defendant,[55] or even the slanted, pretrial media coverage of the case.[56] Similarly, the defendant may fear the jury won't understand the complexities of the case[57] or won't be able to properly apply the judge's legal instructions to the evidence.[58] But regardless of the reason, the decision to waive the jury is a fundamental one that is reserved for the defendant.[59]

Unlike the situation where prosecutors use illusory promises to induce the defendant to involuntarily plead guilty, usurping the defendant's decision to waive the jury is far more transparent. Congress and many state legislatures have simply granted prosecutors "unchallengeable and unreviewable" veto power over this supposed fundamental decision.[60]

For example, under the Federal Rules of Criminal Procedure, the defendant may decide to waive the jury, but the waiver is only effective if "the government consents."[61] Many state legislatures, including those in Michigan,[62] Texas,[63] Florida,[64] and elsewhere, have enacted similar laws. Wisconsin's statute, for example, contains typical language

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[53] Of course, *jury-trial* waivers in favor of plea bargains, as opposed to *jury* waivers in favor of bench trials, are quite common—even the norm. *See* John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J. L. & PUB. POL'Y 120 (1992) ("Like those magnificent guarantees of human rights that grace the pretended constitutions of totalitarian states, our guaranteed of routine criminal jury trial is a fraud.").

[54] *See* Richard C. Donnelly, *The Defendant's Right to Waive Jury Trial in Criminal Cases*, 3 U. FLA. L. REV. 247, 247 (1956) ("The crime charged may be of a revolting nature, such as rape; the victim may have been a prominent member of the community or a public official").

[55] *See* id. at 254 (discussing how, at the time that article was written, there was widespread contempt for Communists).

[56] *See* id. ("the crime may have received sensational press notice"); *see also* Adam H. Kurland, *Providing a Federal Criminal Defendant With a Unilateral Right to a Bench Trial: A Renewed Call to Amend Federal Rule of Criminal Procedure 23(a)*, 26 U.C. DAVIS L. REV. 309, 311-12 (1993) (discussing "intense media scrutiny").

[57] Id. at 312 ("a defendant may feel that the case raises factual and legal issues too complex for a jury.").

[58] A classic example is the judge's limiting instruction regarding the jury's use the defendant's prior bad acts. *See* Michael D. Cicchini & Lawrence T. White, *Convictions Based on Character: An Empirical Test of Other-Acts Evidence*, 70 FLA. L. REV. 347 (2018) (finding the limiting instruction tested in the article's study to be ineffective). One appellate court accurately described the ineffectiveness of such instructions to the jury, analogizing them to "throw[ing] a skunk into the jury box" and "instruct[ing] the jury not to smell it." Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962).

[59] *See supra,* Part I.

[60] Kurland, *supra* note 56, at 310.

[61] FED. R. CRIM. PRO. 23(a).

[62] MICH. STAT. § 763.3 (1) (requiring "consent of the prosecutor").

[63] TEX. CODE CRIM. PRO. § 1.13 (a) (requiring "approval of . . . the attorney representing the state.").

[64] FLA. STAT. § 3.260 (requiring "consent of the state").

permitting the defendant to make the fundamental decision to waive the jury, but only with "the consent of the [S]tate."[65]

When prosecutors refuse to consent, courts often refuse to require the prosecutor to give a reason for vetoing the defendant's fundamental decision. Continuing with Wisconsin, for example, "[t]he State is *not* required to offer reasons for refusing to consent."[66] Similarly, in the Supreme Court case of *Singer v. United States*, although the Court wrote that the State may not withhold its consent without good reason, the Court also relieved the prosecutor of any duty even to communicate, let alone justify, the actual reason for trumping the defendant's jury waiver.[67] In what could be deemed, at best, the Court's naiveté in a simpler time, it amazingly wrote:

> Because of this confidence in the integrity of the federal prosecutor, Rule 23 (a) does not require that the Government articulate its reasons for demanding a jury trial at the time it refuses to consent to a defendant's preferred waiver. Nor should we assume that federal prosecutors would demand a jury trial for an ignoble purpose.[68]

In a dramatic understatement, one author warned that putting such blind faith in the defendant's adversary, the prosecutor, is unjustified, as "it is questionable whether he may be relied upon to protect a defendant's rights."[69] Yet, even though the Court's rationale in *Singer* was penned almost twenty years *before* it proclaimed the jury waiver to be a fundamental decision for the defendant,[70] many lower courts still cite *Singer* when granting the prosecutor unrestricted veto power.[71]

To further justify granting veto power to the State, courts have advanced several claims, all of which have been addressed and debunked. For example, a historical analysis does not support granting the prosecutor the final say with regard to juries: "Historically, the right to a jury trial developed as a means for *protecting the accused*—neither the Government nor the 'public' had an independent right to a criminal jury trial."[72] Similarly,

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[65] WIS. STAT. § 972.02 (1) (2019-20).

[66] WIS. CRIM. JURY INSTRUCTIONS No. SM-21 at 1 (2005) (emphasis added) (citing State v. Cook, 413 N.W.2d 647 (Wis. Ct. App. 1987)).

[67] 380 U.S. 24, 37 (1965).

[68] Id.

[69] Donnelly, *supra* note 54, at 256 (discussing Patton v. United States, 281 U.S. 276 (1930), the predecessor case to *Singer*.)

[70] *See* Jones v. Barnes, 463 U.S. 745, 751 (1983).

[71] *See* WIS. CRIM. JURY INSTRUCTIONS No. SM-21 at 1, n. 2 (2005) (discussing how Wisconsin's decision in State v. Cook, 413 N.W.2d 647 (Wis. Ct. App. 1987) was based on Singer v. United States, 380 U.S. 24 (1965)).

[72] Kurland, *supra* note 56, at 316 (emphasis added); *see also* Donnelly, *supra* note 54, at 249 (establishing that, historically, the jury was not "part of the structure of government," but rather was "a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against the oppressive power of the king and . . . the court") (quoting Patton v. United States, 281 U.S. 276 (1930)). This historical analysis is intertwined with other arguments centered on the plain language of the Amendment. For example, the Sixth Amendment states that "the *accused* shall enjoy the right to . . . an impartial jury . . ." U.S. CONST. amend. VI (emphasis added). The right to a jury trial includes the corollary right to waive the jury, and even to waive the trial itself. *See* Jones v. Barnes, 463 U.S. 745, 751 (1983) (defendant's decision alone whether to "waive the jury"); Langbein, *supra* note 53, at 119 (defendants waive nearly all jury trials). Given this, the government's right to a jury, which is strictly statutory, should not trump the defendant's fundamental

the closely related public-policy argument for the prosecutorial veto also fails: "[P]ublic policy [cannot] permit the accused to dispense with *every* form of trial by a plea of guilty, and yet forbid him to dispense with a *particular* form of trial [a jury trial] by consent."[73] Finally, the claim that "reasonable procedural regulations" may be placed on the defendant's jury waiver is indeed true, but it is also grossly misplaced when used to justify the prosecutorial veto.[74]

In sum, this prosecutorial power grab—made possible by legislative grants of absolute veto power and subsequent judicial cooperation at all levels of the court system—has completely usurped the defendant's fundamental decision to waive the jury.

C. *Silenced by Instruction*[75]

Just as with the decision to plead guilty, every prosecutor and judge would ostensibly agree that the decision to testify belongs only to the defendant. "[T]he decision on whether to testify is crucial in governing the defendant's fate."[76] Therefore, "[w]hen a defendant wishes to speak, whatever the consequences to his case, it is fundamentally wrong to allow his conviction 'by a jury which never heard the sound of his voice.'"[77] Yet, despite such grand pronouncements, prosecutors and judges are quick to undercut and even erase the defendant's testimony, thus rendering the decision to testify a substantively meaningless one.

The first time a client of mine was victimized by this joint prosecutorial-judicial effort, it was during the prosecutor's closing argument that I first recognized something devious unfolding. The prosecutor argued that the defendant's testimony could not be trusted, as he was, after all, *the defendant*, and no doubt had tailored his testimony to avoid conviction.[78] I objected, asking the judge to reinstruct the jury, per the standard instruction,

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decisions. *See* Kurland, *supra* note 56, at 313 ("Rule 23(a) simply embodies a statutory standard that is not constitutionally required"; further, "the Government consent requirement can, and should, be eliminated by legislative action.").

[73] Donnelly, *supra* note 54, at 250 (quoting Patton v. United States, 281 U.S. 276 (1930)); *see also* Kurland, *supra* note 56, at 320-21 (debunking the "public policy" argument against defendant waivers of jury trials, and discussing the "fallacy" of the closely related "argument that the prosecution has a constitutional right to block a bench trial.").

[74] Singer v. United States, 380 U.S. 24, 35 (1965). The Court amazingly suggests that granting the defendant's adversary (the prosecutor) unrestricted veto power of the defendant's fundamental decision is a "reasonable procedural regulation[]" over "the waiver of constitutional rights." Id. Examples of *actual* "reasonable procedural regulations" include requiring the judge to engage in a colloquy with the defendant before accepting a guilty plea or permitting a defendant to represent him or herself. However, removing the fundamental decision to waive the jury from the defendant by giving the prosecutor unrestricted veto power is not a procedural regulation of any kind, reasonable or unreasonable.

[75] This section heading is borrowed from the clever title of Vida Johnson's law review article, which is also cited substantively in this Article. *See* Vida B. Johnson, *Silenced by Instruction*, 70 EMORY L.J. 309 (2020).

[76] People v. Curtis, 681 P.2d 504, 513 (Colo. 1984).

[77] Id. (quoting McGautha v. California, 402 U.S. 183, 220 (1971)).

[78] This prosecutorial argument is a popular one which can be adapted to the facts of any case. For example, in one Illinois trial, a prosecutor told the jury to ignore the testimony of an *older* defendant because "she's the Defendant here[.] . . . It's not pleasant to be convicted, especially at her age." People v. Crowder, 607 N.E. 277, 280 (Ill. App. Ct. 1993). In another Illinois trial, a prosecutor told the jury to ignore the testimony of a *younger* defendant because "he's the one on trial here. . . . He's a 17 year old male . . . getting ready to enter into adulthood. Do you think he'd want to go through the rest of his life with a conviction[?]" People v. Watts, 588 N.E.2d 405, 407 (Ill. App. Ct. 1992). Both appellate decisions warned that such arguments

that "you should *not* discredit the testimony just because the defendant is charged with a crime."[79]

The normally sour-faced judge lit up with purpose and, instead of granting my request, gleefully informed the jury that the instruction[80] *also* told the jury to "[u]se the same factors to determine the credibility and weight of the defendant's testimony that you use to evaluate the testimony of any other witness."[81] Further, she told the jury, one of those "factors" is "whether the witness has an interest or lack of interest in the result of this trial," which, she also pointed out, the defendant certainly did.[82] Therefore, the judge concluded, my objection was overruled and the prosecutor was allowed to continue with the argument.

The prosecutor then repeated the State's now judicially-approved argument several more times: the defendant faced consequences if convicted and therefore had "an interest" in the outcome of the case, thus giving him a motive to lie and making his testimony unworthy of the jury's consideration.[83] This argument, of course, is indistinguishable from what the instruction prohibits: "discredit[ing] the testimony just because the defendant is charged with a crime."[84] It also violates the presumption of innocence.[85]

> This [violation] can be demonstrated in three simple but irrefutable steps. First, in any criminal case involving the defendant's testimony, the prosecutor takes the position that the defendant is guilty, but the defendant testifies that he or she is innocent. Second, to argue that the defendant is lying (or slanting his or her testimony or shifting blame) because of his or her status as a defendant necessarily implies that the defendant is guilty. That, after all, is the whole point of the prosecutor's argument. And third,

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were improper, as they "clearly imply that a defendant is presumed to lie simply because of her status as a defendant." *Crowder*, 607 N.E. 277 at 280. However, in a subsequent hair-splitting decision that relied upon a pre-*Crowder* and pre-*Watts* case, the Supreme Court of Illinois held that, while the jury is "not entitled to disregard the accused's testimony merely because he is the defendant in the case, . . . it may consider his interest in the result of the trial in weighing his testimony." People v. Barney, 678 N.E.2d 1038, 1041 (Ill. 1997) (internal quotations and citation omitted). *See also infra* note 86 for more on *Barney*. This is a hyper-technical, form-over-substance approach to allow the prosecutor to do "indirectly" what he or she "cannot do directly," i.e., "tell the jury that a criminal defendant who testifies has a motive to testify falsely." United States v. Solano, 966 F.3d 184, 197 (2nd Cir. 2020) (internal quotations and citation omitted) (addressing the trial judge's instruction on witness credibility).

[79] WIS. CRIM. JURY INSTRUCTIONS No. 300 (emphasis added).

[80] In Wisconsin, the pattern jury instructions are approved by a committee of trial court judges, all of whom are former prosecutors or government lawyers. *See* Michael D. Cicchini, *Spin Doctors: Prosecutor Sophistry and the Burden of Proof*, 87 U. CIN. L. REV. 489, 513 (2018) ("The committee, in its 2018 iteration, is comprised of eleven judges. Eight of the eleven members are former prosecutors, and many were career-long prosecutors until they took the bench. . . . Of the three committee members who haven't worked as prosecutors, all have worked as government lawyers in other capacities, including quasi-prosecutorial positions.").

[81] WIS. CRIM. JURY INSTRUCTIONS No. 300.

[82] Id.

[83] Id.

[84] Id.

[85] *See* United States v. Gaines, 457 F.3d 238, 246 (2nd Cir. 2006) (a jury instruction "that the defendant has a motive to testify falsely undermines the presumption of innocence."); *see also* Johnson, *supra* note 75, at 320 (jury instructions about the defendant's interest in the case "undermine the jury's consideration of his testimony and the presumption of innocence.").

> to argue that a person is guilty merely because he or she has been charged with a crime is blatantly unconstitutional, as such arguments "diminish the defendant's fundamental right to the presumption of innocence."[86]

In other words, despite a defendant's obvious interest in the outcome of the case, "a defendant does not always have a motive to testify falsely. An innocent defendant has a motive to testify *truthfully*."[87] But more to the point for our purposes, telling the jury "that a defendant's testimony should be discredited, dismissed, or ignored because he or she is the defendant is, in substance, the equivalent of *preventing him or her from testifying in the first place*—something the Supreme Court has already deemed unconstitutional."[88]

Sometimes, the level of deft coordination described above—where the prosecutor argues and the judge stresses the pro-state portion of the instruction to reinforce that argument—isn't even needed to effectively silence the defendant. Instead of instructing the jury to evaluate the defendant's testimony the same way it evaluates that of other witnesses, and then pointing out that a person's "interest . . . in the result of this trial" is a relevant factor when doing so,[89] some jurisdictions use a very straightforward, even more pro-state instruction. Such instructions explicitly *differentiate* the defendant's testimony from that of other witnesses, thereby directing the jury, without the aid of any prosecutorial argument, to disregard the defendant's testimony.

> States as diverse as Alabama, Arizona, Rhode Island, Pennsylvania, and New Mexico all allow these troubling instructions that [explicitly and clearly] tell jurors that the defendant has an interest in the outcome of the case when the defendant testifies. For example, the criminal jury instruction in the District of Columbia reads in part, "you may consider the fact that the defendant has [a vital] [an] interest in the outcome of his trial." The Ninth Circuit has approved a jury instruction that directs the jury to consider the defendant's "personal interest in the outcome of the case." The Fifth Circuit has also approved an instruction that reads, in part, "you are entitled to take into consideration the fact that he is the defendant and the very keen personal interest that he has in the result of your verdict."[90]

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[86] Michael D. Cicchini, *Combating Prosecutorial Misconduct in Closing Arguments*, 70 OKLA. L. REV. 887, 897 (2018) (quoting People v. Crowder, 607 N.E. 277, 280 (Ill. App. Ct. 1993)). Depending on the exact wording of the judge's instruction or the prosecutor's argument, *Crowder* and People v. Watts, 588 N.E.2d 405 (Ill. App. Ct. 1992) must be read along with the hair-splitting case of People v. Barney, 678 N.E.2d 1038, 1041 (Ill. 1997). In *Barney*, the prosecutor's argument to the jury—i.e., "the defendant has a interest or bias here, and that interest or bias here is that, you know, he wants to be found not guilty"—was held to be proper based on a pre-*Crowder* and Pre-*Watts* case. Id. at 1040. However, the prosecutorial argument at issue in *Barney* was different than the one in *Crowder* and dramatically different than the one in *Watts*. *See also supra* note 78 for more on *Barney*.

[87] *Gaines*, 457 F.3d at 246 (emphasis added).

[88] Cicchini, *supra* note 33, at 897 (emphasis added) (citing Ferguson v. Georgia, 365 U.S. 570 (1961)).

[89] WIS. CRIM. JURY INSTRUCTIONS No. 300.

[90] Johnson, *supra* note 75, at 324 (internal citations omitted). Johnson also notes that the District of Columbia instruction "cannot be given over objection of the defense." Id., n. 70. I suspect that no defense lawyer who is able to remain awake in court would ever acquiesce to such an instruction.

In sum, regardless of whether judges explicitly instruct jurors to disbelieve a defendant's testimony or, instead, a somewhat coordinated prosecutorial-judicial effort is required to effectively silence the defendant, the end result is the same. The government has, once again, substantively stripped the defendant of a fundamental decision—this time, the decision to testify at trial and have that testimony fairly considered by the jury.

III. LEGAL REFORM: RETURNING DECISIONS TO THE DEFENDANT

Should the law return fundamental decision-making authority to defendants? In other words, should it prevent the prosecutor from using an illusory promise to induce the defendant to plead guilty involuntarily? Should it prevent the prosecutor from vetoing the defendant's decision to waive the jury? Finally, should it prevent the judge and prosecutor from effectively silencing the defendant at trial via jury instruction and argument to the jury?

To play devil's advocate, it could be argued that, although these fundamental rights are so important and personal that only the defendant can make the required decisions involving these rights, such decision-making authority operates *only against defense counsel* and not against the defendant's adversary, the State.[91] However, this argument quickly falls apart for at least three closely related reasons.

First, it would be utterly nonsensical for the Constitution to protect a defendant's decision-making authority vis-à-vis the defendant's own trained advocate, while at the same time allowing government agents to run roughshod over that same decision-making authority.[92] As one commentator explained regarding the decisions to plead guilty, waive the jury, and testify at trial: "The defendant can decide whether to exercise these rights after full consultation with defense counsel. *These decisions are of no concern to the adversary*."[93] This basic reality is necessarily central to, and inherent in, an adversarial system such as ours. It alone is enough to rebut any argument that government agents should be allowed to intrude where even defense counsel may not.

Second, the justification for giving defendants this fundamental decision-making authority in the first place is that the decisions and their consequences are incredibly "personal and crucial to the accused's fate."[94] This justification applies as much, if not more, against the State as it does against defense counsel. For example, with regard to the

[91] The origin of this claim might be the bulk of the existing literature, in which law professors enjoy pitting defendants against their own lawyers. That is, law professors frequently analyze the defendant's autonomy interest within the framework of lawyer-client disagreements. *See, e.g.*, Colin Miller, *The Real McCoy: Defining the Defendant's Right to Autonomy in the Wake of McCoy v. Louisiana*, 53 LOY. U. CHI. L.J. 405, 407 (2022) (arguing "that the right to autonomy is broad and precludes a defense attorney from admitting any opprobrious element" of the crime charged); Erica Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 BOSTON U. L. REV. 1147, 1152 (2010) (arguing that a defendant's autonomy interest goes beyond fundamental decisions and includes the "right of a criminal defendant to control his own case"); Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 317 (1987) (using "the principle of autonomy as the basis for shifting increased authority to the client" and away from the defense lawyer).

[92] *See, e.g., supra* notes 72 and 73.

[93] Kurland, *supra* note 56, at 351 (emphasis added).

[94] Gov't of Virgin Islands v. Weatherwax, 77 F.3d 1425, 1435 (3rd Cir. 1996).

fundamental decision to waive *counsel*[95]—a decision in which counsel actually has little say or interest[96]—the Supreme Court held that "[t]he right to defend is personal. The defendant, and not his lawyer *or the State*, will bear the personal consequences of a conviction."[97] Therefore, "a State" may not "hale a person into its criminal courts and there force a lawyer upon him . . . when he insists that he wants to conduct his own defense."[98] This demonstrates that the defendant's decision-making authority operates against the State at least to the same extent that it does against defense counsel.

Third, as the United States Supreme Court explained, the defendant's decision-making authority is rooted in the individual "autonomy" theory.[99] That is, the defendant's personal choice "must be honored out of 'that respect for the individual which is the lifeblood of the law.'"[100] And in multiple contexts, including criminal law, the Supreme Court uses the word autonomy "to embody the concept of private space within which a person can make and act upon decisions *free from government intervention*."[101] Therefore, from a constitutional perspective, it is when the defendant is at odds with the government, not with his or her own counsel, that the autonomy interest is most threatened. "The Constitution is concerned *only with limits on government*, even though a person's autonomy may be assaulted as much" by non-governmental entities or individuals.[102]

By all accounts, then, fundamental decisions should be taken back from the government and returned to the defendant. On the other hand, how to return this fundamental decision-making authority is a different issue entirely. On this matter, the good news is that the necessary changes to the system are incredibly simple. A state interested in legal reform need not reinvent the wheel; rather, a reform-minded state need

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[95] Recall that there are at least two other fundamental decisions not discussed in this article: the decision to appeal a conviction and the decision to waive the right to counsel entirely. *See supra* note 27. For more on the decision to appeal, *see* Miller, *supra* note 91, at 415-418.

[96] In most situations, defense lawyers must be concerned with the proper allocation of decision-making authority between lawyer and client because, if the lawyer defers to the client when the lawyer shouldn't, the client may later blame the lawyer for ineffectiveness or even malpractice. That is, "[i]f defense counsel solely defers to a defendant, *without exercising his or her professional judgment*, on a decision that is for the attorney . . . the defendant is deprived of the expert judgment of counsel to which the Sixth Amendment entitles him or her." Zeidman, *supra* note 23, at 17 (internal punctuation and citation omitted) (emphasis added). More cynically, when the defendant insists that the counsel follows the defendant's preferred course of action, and later blames counsel for not saving the defendant from his own poor decisions, the "unscrupulous defendant" can "manipulate the judicial system" at the defense lawyer's expense. People v. Gadson, 24 Cal. Rptr. 2d 219, 227 (Ct. App. 1993). However, if the defendant chooses self-representation, then these concerns necessarily disappear as there is no lawyer for the defendant to later blame. In other words, counsel really has no professional interest in whether the defendant decides to waive counsel.

[97] Faretta v. California, 422 U.S. 806, 834 (1975) (emphasis added).

[98] Id. at 807.

[99] McCoy v. Louisiana, 138 S. Ct. 1500, 1508 (2018).

[100] *Faretta*, 422 U.S. at 834 (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970)).

[101] Hashimoto, *supra* note 91, at 1153 (emphasis added). In footnotes 20-22 of that article, the author discusses the concept of autonomy within the frameworks of Sixth Amendment rights, childbearing rights, and free speech rights. Id. For other articles discussing the autonomy interest, *see, e.g.*, Miller, *supra* note 91, at 420-24 (explaining that autonomy is the underlying basis for Supreme Court's decisions in *Florida v. Nixon* and *McCoy v. Louisiana*); Strauss, *supra* note 91, at 336-341 (discussing autonomy as the entire basis for client decision-making).

[102] Hashimoto, *supra* note 91, at 1153, n. 21 (quoting Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 234 (1992) (emphasis added) (discussing the individual autonomy interest within the context of our First Amendment rights)).

only adopt a preexisting statute or jury instruction from one of the states that already protects the defendant's fundamental decision-making authority.

For example, to ensure that a defendant's decision to plead guilty is made freely and voluntarily, state legislatures should simply adopt the plea-bargaining statute of Massachusetts, Kentucky, California, or North Carolina—each of which requires the trial judge to adopt the State's sentence concession or, in the alternative, allow the defendant to withdraw his or her plea.[103] This avoids the illusory-promise problem and ensures that the defendant's decision to plead guilty is a voluntary one.[104]

Similarly, to ensure that the defendant is able to waive the jury in favor of a bench trial, free from interference by meddling prosecutors, state legislatures should simply adopt the jury-waiver statute of Maryland[105] or Iowa[106]—both of which recognize the defendant's "*unilateral right* to waive trial by jury and obtain a non-jury trial."[107]

Likewise, to ensure that the defendant is not effectively silenced by a jury instruction that discredits the testimony merely because of his or her status as a defendant, jury-instruction committees should simply draft instructions that tell jurors "you should not discredit the testimony just because the defendant is charged with a crime."[108]

However, while the above reform measures are incredibly simple and effective, the bad news is that the legal system operates at a snail's pace. Even under normal circumstances, as countless litigants have learned, the system moves "somewhat faster than a tree grows but a lot slower than ketchup coming out of a bottle."[109] And the pace of legal *reform*, if such reform happens at all, is even slower.[110] For that reason, the next Part

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[103] *See* Cicchini, *supra* note 40, at 1344-45 (quoting statutory language from each of the four states); *see also* People v. Walker, 46 P.3d 495, 497 (Colo. Ct. App. 2002) (holding that because the judge imposed a sentence greater than what the plea agreement had contemplated, the defendant was allowed withdraw his plea).

[104] *See* id

[105] *See* MD. CRIM. CAUSES R. 4-246 ("In the circuit court, a defendant having a right to trial by jury shall be tried by a jury unless the right is waived . . . *The State does not have the right to elect a trial by jury.*") (emphasis added).

[106] *See* IOWA R. CRIM. PRO. § 2.17 ("Cases required to be tried by jury shall be so tried unless the defendant voluntarily and intelligently waives a jury trial in writing and on the record . . ."). The statute only requires "consent of the prosecuting attorney" in cases where the defendant misses the designated deadlines for waiving the jury. Id.

[107] Thomas v. State, 598 A.2d 789, 793 (Md. Ct. App. 1991) (emphasis added) (discussing Maryland and Iowa statutes and the associated appellate court decisions); *see also* Kurland, *supra* note 56, at 321-22, n. 39 (listing the various state constitutions honoring the defendant's fundamental decision to waive the jury).

[108] WIS. CRIMINAL JURY INSTRUCTIONS No. 300. This quotation is the *unobjectionable* portion of Wisconsin's instruction on the defendant's testimony. However, the instruction then incorrectly goes on to tell the jurors to "[u]se the same factors to determine the credibility and weight of the defendant's testimony that you use to evaluate the testimony of any other witness." Id. This is erroneous, of course, as those "factors" include "whether the witness has an interest or lack of interest in the result of this trial" which, of course, provides a "possible motive[] for falsifying testimony[.]" Id. In other words, this second part of the instruction obliterates the first, unobjectionable part.

[109] Matthew Stewart, THE MANAGEMENT MYTH: DEBUNKING MODERN BUSINESS PHILOSOPHY at 243 (W.W. Norton & Co. 2009) (describing the author's personal experience as a litigant in a civil case).

[110] *See, e.g.,* Darryl K. Brown, Response, *What's the Matter with Kansas–and Utah?: Explaining Judicial Interventions in Plea Bargaining*, 95 TEX. L. REV. 47, 47 (2017) ("Scholars know their proposals *rarely are put into action*, at least directly. Reform ideas developed in settings with closer ties to policymakers, such as committees under the auspices of bar associations, state courts, or professional organizations likewise *frequently fail to persuade*") (emphasis added).

offers practical strategies for the defense lawyer to use now, within our existing and flawed legal framework.

IV: THE NITTY-GRITTY: INTERIM STRATEGIES FOR THE DEFENSE

Unless and until the law is reformed, the following sections provide practical interim strategies for defense counsel to attempt to protect the defendant's fundamental decision-making authority against interference by prosecutors and judges. However, the documents below are merely models or starting points. Defense counsel must carefully consider the facts of each case and the law of the relevant jurisdiction when deciding the content, form, and timing of any motion or other document that counsel decides to file.

Additional relevant sources of law may include not only statutes and case law, but also state constitutions and pattern jury instructions. Other sources, particularly relating to the form and timing of any documents, may include local rules or court-specific scheduling orders. Finally, to the extent counsel decides to use any of the documents below, he or she must ensure that all sources cited therein are accurate, applicable, and have not been explicitly overruled, or even merely superseded, by more recent law.

A. *Motion for Conditional Plea*

The following is a sample motion for the entry of a conditional guilty plea.[111] If, after accepting the defendant's plea and listening to the parties' sentencing arguments, the judge decides not to honor the prosecutor's sentence concession that induced the defendant to plead guilty in the first place, the defendant would withdraw the plea and go to trial. The motion is designed for jurisdictions where judges are not required to allow, but also are not prohibited from allowing, plea withdrawal under such circumstances.[112]

The motion ensures that the defendant's decision to plead guilty is in fact voluntary. However, defense counsel may decide not to file the motion if the particular judge is known for honoring, rather than jumping, sentence concessions. Further, counsel should only file such a motion when the defendant is truly willing to walk away from the plea bargain in the event the judge will not accept the conditional plea. In other words, the prosecutor's sentence concession must be of tremendous value to the defendant, or counsel should not file the motion; counsel probably would not file the motion when the defendant's benefit of the bargain lies primarily in charge concessions.

For example, if a defendant is charged with four felonies and one misdemeanor, and the State offers to dismiss all felonies in exchange for a plea to the misdemeanor (the charge concession), with a joint sentencing recommendation of three months in jail (the sentence concession), the sentence concession may be of such limited value that the defendant would want the plea bargain regardless of the sentence the judge actually imposes. In such a case, rather than filing the motion and risking the judge's denial of the

[111] This motion is similar to, but has different legal underpinnings than, the sample motion included in the *Deal Jumpers* article. *See* Cicchini, *supra* note 40, at 1354.

[112] One such jurisdiction is Wisconsin, and the sample motion in this section cites that state's legal authorities. If there are no legal authorities on point in the relevant jurisdiction, defense counsel should search the body of law on plea withdrawal generally and apply that standard to argue that the judge has discretion to allow the defendant to withdraw the plea if the judge decides not to adopt the negotiated sentence concession.

motion, the defendant may want to accept the plea deal, have the felonies dismissed, and then take his or her chances on the actual sentence for the misdemeanor.

[STATE] AND [COUNTY]

[STATE OR PEOPLE OR COMMONWEALTH] V. [DEFENDANT]

[CASE NUMBER]

DEFENDANT'S MOTION TO ENTER CONDITIONAL PLEA

The Defendant, appearing specially by [HIS / HER] attorney and reserving the right to challenge the Court's jurisdiction, hereby notifies the Court that the parties have reached a plea agreement that includes a sentence concession in the form of a joint sentencing recommendation.[113] The complete plea agreement is as follows:

[PLACE COMPLETE TERMS OF PLEA AGREEMENT HERE]

The Defendant moves the Court to accept the Defendant's *conditional* plea, pursuant to the above-stated plea agreement and *subject to the conditions set forth below*.

"Whether to plead guilty" pursuant to a plea bargain is a "fundamental decision" to be made by the defendant. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). In order to be legally valid, the defendant's decision to plead guilty must be "intelligent and *voluntary*." *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (emphasis added).

Ours falls into the minority of states in which a court is *not* bound to adopt a sentence concession. However, as other courts have held, when a court accepts the defendant's plea but then imposes a more severe sentence, "it removes the basis upon which a guilty plea was entered and draws into question the *voluntariness* of the plea." *People v. Walker*, 46 P.3d 495, 497 (Colo. Ct. App. 2002) (emphasis added).

A sentence harsher than that contemplated by the plea bargain renders the plea involuntary because the promise that induced the plea to begin with has become illusory. Defendants don't bargain for "the prosecutor's mere act of recommending" the agreed-upon sentence. *Thomas v. State*, 327 So. 2d 63, 64 (Fla. Dist. Ct. App. 1976). Rather, defendants bargain for "the prosecutor's ability to secure the sentence" that he or she recommends. *People v. Killebrew*, 330 N.W.2d 834, 842 (Mich. 1982).

It is true that defendants in our state are warned: "a trial court may exceed the sentence recommended by the prosecutor." *State v. Williams*, 613 N.W.2d 132, 137 (Wis. 2000). However, that does not transform the decision to plead guilty into a voluntary one. "[U]nderstanding that the sentencing court is not bound by the terms of a plea agreement is one thing," but being left "without recourse is another." *Commonwealth v. White*, 787 A.2d 1088, 1093 (Pa. Super. Ct. 2001).

This is not to say that trial courts are bound by the parties' sentence agreements; they are not. Rather, a court may reject a plea bargain up front, or, if a court accepts the plea but later "decides not to grant the sentence concessions contemplated by a plea agreement, it

[113] For simplicity, I have used the terms "sentence concession" and "joint sentencing recommendation" interchangeably. However, it is possible that a sentence concession could take the form of the State's recommendation for, say, one year in jail, and defense counsel may argue for a different sentence. In that situation, the motion would condition the plea upon the judge *not exceeding* the State's sentence recommendation, rather than the judge adopting a joint recommendation.

shall so advise the defendant and then call upon the defendant to either affirm or *withdraw the plea of guilty*." *Walker*, 46 P.3d at 497 (emphasis added).

Again, judges in our state are not required to allow defendants to withdraw their pleas under these circumstances. However, while the practice of "informing a defendant of the judge's intent to exceed a sentencing recommendation and allowing such defendant the opportunity of plea withdrawal" is not required, "*trial judges may employ this practice*." *State v. Marinez*, 756 N.W.2d 570 (Wis. Ct. App. 2008) (emphasis added). Specifically:

> "Some Wisconsin judges prefer the practice of letting the defendant know if a plea agreement recommends a disposition that the judge finds to be unacceptable and afford the defendant *the opportunity to withdraw the guilty plea at that point*. . . . This is similar to the practice recognized by the ABA Standards for Criminal Justice, which allows the parties to give advance notice of the plea agreement to the judge and allows the judge to indicate whether he or she would concur in the agreement . . ." WIS. J.I. CRIM. SM-32 (2021) (emphasis added) (internal citation omitted).

Not only is this practice permitted in our state and consistent with ABA Standards, but other states actually mandate it to ensure the voluntariness of defendants' guilty pleas. In addition to the above-cited case law of Colorado, Florida, Michigan, and Pennsylvania:

> "If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, *the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea*." N.C. GEN. STAT. § 15A-1024 (emphasis added).

> "If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may . . . withdraw its approval in the light of further consideration of the matter, and (3) in that case, *the defendant shall be permitted to withdraw his or her plea if he or she desires to do so*." CALIF. PENAL CODE § 1192.5 (emphasis added).

> "If the court rejects the plea agreement, the court shall . . . *afford the defendant the opportunity to then withdraw the plea*, and advise the defendant that if the defendant persists in that guilty plea the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement." KY. R. CRIM. PRO. 8.10 (emphasis added).

THEREFORE, to ensure the voluntariness of the defendant's fundamental decision to plead guilty, the defendant moves this Court to permit entry of the guilty plea conditioned on the ability to later withdraw it, should the Court decide to exceed the sentence concession included in the plea bargain.

ALTERNATIVELY, if the Court denies this motion to enter a conditional guilty plea, the defendant requests that the Court instead schedule this case for jury trial.[114]

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[114] This part of the motion could instead be drafted to allow the defendant the *option* of withdrawing the plea. However, if the defendant is not committed to walking away from the plea bargain if the judge is unwilling to grant the motion, then defense counsel probably should not file the motion in the first place.

B. *Notice of Jury Waiver*

With regard to jury waivers, one course of action for defense counsel is first to ask the prosecutor, off the record, if he or she will agree to the waiver. If the prosecutor does, the path ahead will likely be smooth sailing.[115] If the prosecutor refuses, defense counsel may then ask the prosecutor, again off the record, the reason refusing.

Recall that, when granting prosecutors their veto power, courts or legislatures sometimes rely on *Singer*,[116] a case that predated *Barnes*[117] and even predated the two cases on which *Barnes* relied.[118] *Singer* held that, while prosecutors are not required to give a reason, their decision to veto the defendant's waiver must not be "for an ignoble purpose."[119] That is because, in addition to being an advocate, the prosecutor is also a "servant of the law."[120] And "it is in this light" they are expected to exercise their veto power.[121] Therefore, although not required to give a reason, if the prosecutor *does* give one in response to defense counsel's off-the-record inquiry, that reason could be analyzed through the *Singer* lens of ignobility.

Depending on the proffered reason, then, *Singer* could be the central theme of defense counsel's written jury waiver. That is, defense counsel may wish to focus on the prosecutor's "ignoble purpose" for refusing to consent and, based on that, urge the judge to accept the defendant's waiver. In other situations, different themes or approaches may be developed based on the rights provided by, and the wording of, the particular state's constitutional provision for jury waiver, jury-waiver statute, and interpretive case law.[122] Such legal authorities may also dictate the form of the waiver.[123]

The written jury waiver, below, assumes the prosecutor refused to provide defense counsel a reason for withholding consent to the defendant's proffered waiver. It also cites Wisconsin's statute, which is nearly identical to the Michigan, Texas, and Florida statutes in that it requires the prosecutor's agreement to waive the jury.[124] The waiver, below, therefore argues that the prosecutor's statutory right to a jury trial was superceded by *Barnes*, and, regardless of that timing, cannot trump what the Supreme Court has declared to be *the defendant's* fundamental decision.

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[115] One other glitch—one not addressed in this article—is judicial approval. At least some jury waiver statutes require not only prosecutorial consent but also the approval of the judge. *See, e.g.*, FED. R. CRIM. PRO. 23(a) (trial must be by jury unless "the government consents" and "the court approves."); WIS. CRIM. JURY INSTRUCTIONS No. SM-21 at 1 (2005) ("The trial court has authority to reject a jury trial waiver even if the State consents. Like the State's decision to withhold consent, the trial court need not explain its decision and, absent extraordinary circumstances, that decision is not reviewable.").

[116] Singer v. United States, 380 U.S. 24 (1965).

[117] Jones v. Barnes, 463 U.S. 745 (1983) (granting the defendant the authority to make five different fundamental decisions, including whether to waive the jury in favor of a bench trial).

[118] *See* id. at 751 (citing Wainwright v. Sykes, 433 U.S. 72, 93 n. 1 (1977) and Faretta v. California, 422 U.S. 806 (1975) for authority in reserving the five fundamental decisions for the defendant).

[119] *Singer*, 380 U.S. at 37.

[120] Id.

[121] Id.

[122] For the tremendous variety in, and the sources of, state law, *see* Kurland, *supra* note 56, at 321-23 (cataloging state constitutional provisions, statutes, and case law).

[123] *See, e.g.*, WIS. STAT. § 972.02 (mandating a jury trial "unless the defendant waives a jury in writing or by statement in open court").

[124] *See* Part II.B

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DEFENDANT'S JURY WAIVER / REQUEST FOR BENCH TRIAL

The Defendant, appearing specially by [HIS / HER] attorney and reserving the right to challenge the Court's jurisdiction, hereby exercises [HIS / HER] constitutional right to waive the jury in favor of a bench trial. The reasons for the waiver are:

[PLACE REASONS FOR WAIVER HERE][125]

By statute, the waiver of a jury requires "the consent of the state." Sec. 972.02, Wis. Stats. Historically, "the Wisconsin legislature granted the accused the right to waive a jury trial and later amended the statute to require the state's consent [in] 1949." *State v. Cook*, 413 N.W.2d 647, 649 (1987) (internal citations and punctuation omitted).

However, *after* the amendment of the statute in 1949, the U.S. Supreme Court declared the jury waiver a constitutional right and among the fundamental decisions for *the defendant*. More specifically, in 1983 the Court held: "*the accused* has the ultimate authority to make certain *fundamental decisions* regarding the case, as to whether to [1] plead guilty, [2] *waive a jury*, [3] testify in his or her own behalf, . . . [4] take an appeal, [and] [5] act as his or her own advocate[.]" *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (internal citations omitted) (numbering and emphasis added).

With regard to the scope of the defendant's decision-making authority, it must be wider than mere disagreements with the defendant's own counsel. It would be nonsensical to protect the defendant's decision-making against intrusion by his or her own advocate, the defense lawyer, while at the same time allowing the defendant's adversary, the prosecutor, to run roughshod over that same fundamental decision-making authority. (It would also be nonsensical for another reason: the prosecutor cannot veto any of the defendant's four other fundamental decisions, enumerated above.) More importantly, the plain language of the Constitution, constitutional analogy, legal history, and public policy also operate against the prosecutorial veto:

> CONSTITUTIONAL LANGUAGE. The language of the Sixth Amendment is clear that the defendant, not the State, has the rights enumerated therein. "In all criminal prosecutions, *the accused* shall enjoy the right to a . . . trial, by an impartial jury . . ." U.S. CONST. amend. VI (emphasis added). These two rights (a trial and a jury determination) include the corollary rights to waive the trial entirely by pleading guilty, or to waive the jury in favor of a bench trial. *Barnes*, 463 U.S. at 751.
>
> CONSTITUTIONAL ANALOGY. The Sixth Amendment also grants the defendant the right to counsel. With regard to its corollary right, i.e., the right and fundamental decision to *waive counsel*, the Court has held: "The defendant, and not his lawyer *or the State*, will bear the personal consequences of a conviction." *Faretta v.*

[125] For reasons to waive a jury in favor of a bench trial, *see* Part II.B. For example, if the State will be using other-acts evidence against the defendant, and the defense is concerned about a jury's ability to follow the cautionary instruction governing the use of such evidence, counsel should state that and cite any favorable case law or other evidence. *See, e.g.*, Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962) (cautionary instructions are as effective as "throw[ing] a skunk into the jury box" and "instruct[ing] the jury not to smell it."); Cicchini & White, *supra* note 58 (empirically demonstrating the ineffectiveness of cautionary instructions in limiting the jury's use of other-acts evidence in a sexual assault case).

> *California*, 422 U.S. 806, 834 (1975) (emphasis added). For that reason, "a State" may not "hale a person into its criminal courts and there force a lawyer upon him[.]" *Id*. at 807. That same reasoning which grants defendants decision-making authority vis-à-vis not only defense counsel *but also the State* applies as much to the defendant's fundamental decision to waive the jury as it does to the fundamental decision to waive counsel.
>
> LEGAL HISTORY. That the Constitution and *Barnes* grant the jury-trial right to the defendant, not the State, is no oversight; rather it is consistent with history. "Historically, the right to a jury trial developed as a means for protecting the accused—neither the Government nor the 'public' had an independent right to a criminal jury trial." Adam H. Kurland, *Providing a Federal Criminal Defendant With a Unilateral Right to a Bench Trial: A Renewed Call to Amend Federal Rule of Criminal Procedure 23(a)*, 26 U.C. DAVIS L. REV. 309, 316 (1993).
>
> PUBLIC POLICY. Finally, the closely related public-policy argument also operates against the prosecutorial veto. "[I]it is fundamentally inconsistent to claim . . . that the Government must have a right to veto a bench trial—but that with Government approval, a defendant can waive a jury trial or plead guilty. Either the jury determination of guilt is sacrosanct or it is not. Whether or not the prosecution decides to waive a jury determination to satisfy some perceived 'public interest,' this decision does not substitute for the role of the jury, if that role is mandatory." *Id*. at 320.

THEREFORE, based on the foregoing, the defendant moves the Court to accept the jury waiver and prevent the State from using a pre-*Barnes* statute to block the defendant's fundamental decision regarding this fundamental constitutional right.

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C. *Motion Regarding Trial Testimony*

The following is a model trial-related motion to correct an erroneous jury instruction and prevent the prosecutor from improperly arguing to the jury that the defendant's testimony should be disregarded due to his or her status as a defendant.

The model motion is designed for numerous jurisdictions where the judge ostensibly instructs the jury to evaluate the defendant's testimony the same way it evaluates the testimony of other witnesses, but then implies in a backhanded way (rather than stating directly) that the jury may disregard the defendant's testimony because of his or her status as the defendant.[126] Sometimes, this ploy is carried out in a single instruction.[127] In other states, judges may issue separate jury instructions—one covering witnesses generally and another dedicated to the defendant as a witness.[128]

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[126] *See* WIS. CRIMINAL JURY INSTRUCTIONS No. 300. The sample motion cites this jury instruction. Of course, counsel should cite the specific jury instruction from the relevant jurisdiction.

[127] *See* id.

[128] *See* Johnson, *supra* note 75, at 329 (naming several states that use apparently benign instructions which, when considered in isolation, "do not seem problematic" but, "when paired *with certain other instructions about credibility*, can still significantly undermine the presumption of innocence" and diminish the impact of the defendant's testimony) (emphasis added).

One of the things defense counsel should consider before filing such a motion is whether the particular prosecutor is likely to pursue this tactic, i.e., argue to the jury that the defendant's testimony should be disregarded because of his or her status. If, in counsel's experience, the assigned prosecutor is not likely to make such an argument, counsel may decide not to raise the issue at all and to accept the flawed pattern instruction as-is, thus keeping the matter entirely off the radar. The strategy of not making trouble where none exists can be a valid approach. Conversely, if the particular prosecutor is known for using this tactic, then counsel may wish to file a motion tailored to the jury instruction, case law, and other legal authorities of the relevant jurisdiction.

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DEFENDANT'S MOTION RE: TRIAL TESTIMONY

The Defendant, appearing specially by [HIS / HER] attorney and reserving the right to challenge the Court's jurisdiction, moves the Court to (1) modify the pattern jury instruction on the credibility of witnesses, and (2) instruct the prosecutor not to make improper arguments to the jury, e.g., that the defendant's interest in the outcome of the case creates a bias, prejudice, or motive to testify falsely.

Modifying a pattern instruction is well within a trial court's authority. *See* State v. Vick, 104 Wis. 2d 678, 690 (1981) ("a trial judge may exercise wide discretion in issuing jury instructions" which "extends to both choice of language and emphasis."). Further, the pattern instructions are only intended as "models" or "checklists" to begin with. WIS. JURY INSTRUCTIONS (Wis. State Law Library, 2022), at https://wilawlibrary.gov/jury/.

Specifically, it is well settled that the defendant has a right to testify. *Ferguson v. Georgia*, 365 U.S. 570 (1961). "When a defendant wishes to speak . . . it is fundamentally wrong to allow his conviction by a jury which never heard the sound of his voice." *People v. Curtis*, 681 P.2d 504, 513 (Colo. 1984) (internal quotes and citation omitted). Whether to testify is also a "fundamental decision" to be made *by the defendant*. *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

Given the fundamental nature of the decision to testify, judges and prosecutors may not undermine the defendant's decision by instructing, or arguing to, the jury that it should discredit the testimony because of his or her status as the defendant. For example:

> In *U.S. v. Gaines*, 457 F.3d 238 (2nd Cir. 2006), the trial court instructed the jury that "the defendant has a deep personal interest in the result of his prosecution. This interest creates a motive for false testimony . . ." *Id*. at 242. The appellate court reversed the defendant's conviction, holding that "any instruction . . . that tells a jury that a testifying defendant's interest in the outcome of the case creates a motive to testify falsely . . . undermines the presumption of innocence." *Id.* at 246. The reason, of course, is that "a defendant does not always have a motive to testify falsely. *An innocent defendant has a motive to testify truthfully*." *Id*. (emphasis added).
>
> Further, the problem is not cured by telling the jury to treat the defendant as it would any other witness. Consider this instruction: "In evaluating the credibility of the witnesses, you should take into account any evidence that *any* witness who

> testified may benefit in some way from the outcome of the case. . . . [The] Defendant . . . chose to testify in this case. You should examine or evaluate his testimony just as you would the testimony of any witness with an interest in the outcome of the case." *U.S. v. Solano*, 966 F.3d 184, 196-97 (2nd Cir. 2020) (emphasis original) (internal quotations and citation omitted).
>
> The above instruction fails to cure the original problem because stating that the interest-in-the-outcome test "applies to 'any witness' suffers the same substantive constitutional defect[.] . . . It is a matter of common sense that the defendant in a criminal case has a profound interest in its outcome; an instruction indicating to the jury that the interest gives him a motive to testify falsely is contrary to the presumption of innocence." *Id.* at 197.
>
> In sum, lumping the defendant in with other, non-defendant witnesses in the same instruction "skirt[s] the spirit" of the rule that the defendant's testimony should not be discounted because of his status as the defendant. *Id*. (internal quotations and citation omitted). The instruction must not do "indirectly" or in a roundabout way that which it "cannot do directly: tell the jury that a criminal defendant who testifies has a motive to testify falsely." *Id*.

In addition, telling the jury to discredit the defendant's testimony renders meaningless the *fundamental decision to testify*. In other words, of what meaning is the underlying decision to testify when the jury is told to discount or ignore the resulting testimony not due to the strength of its content, but because of the witness's status as a defendant?

Due to the above-stated concerns, our state's pattern instruction on witness credibility correctly tells the jury that "[t]he defendant has testified in this case, *and you should not discredit the testimony just because the defendant is charged with a crime*." WIS. J.I. CRIM. 300 (emphasis added). However, it then immediately and erroneously instructs the jury to "[u]se the same factors to determine the credibility and weight of the defendant's testimony that you use to evaluate the testimony of any other witness." *Id*.

The problem is that the "factors" for such an evaluation include: (a) "whether the witness has an interest or lack of interest in the result of this trial"; (b) "bias or prejudice": and (c) any resulting "possible motives for falsifying testimony[.]" *Id*. These are the very things the instruction just *prohibited* the jury from considering when evaluating the defendant's testimony. *Id*.

THEREFORE, the defendant moves the Court:

> FIRST, to modify WIS. J.I. CRIM. 300 by simply deleting the portion of the instruction that reads: "Use the same factors to determine the credibility and weight of the defendant's testimony that you use to evaluate the testimony of any other witness." With that deletion, the remaining portion of the warning—i.e., "[t]he defendant has testified in this case, and you should not discredit the testimony just because the defendant is charged with a crime"—will properly modify the list of "factors" the jury may use when it evaluates the defendant's testimony as opposed to the testimony of other witnesses.
>
> SECOND, to order the prosecutor not to argue to the jury that the defendant's testimony should be disregarded or discounted because of an interest in the outcome of the trial or a resulting bias, prejudice, or motive to falsify testimony.

[DATE]

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CONCLUSION

The decisions to accept a plea bargain and plead guilty, waive the jury in favor of a bench trial, and testify at trial instead of remaining silent are so significant they are called "fundamental decisions."[129] The legal effect of such branding is that only *the defendant*, not defense counsel, may make these important decisions.[130] Quite scandalously, however, while the law protects the defendant from his or her own lawyer, the trained advocate who is duty-bound to act in the defendant's best interest, it actually permits the prosecutor and judge to run roughshod over the defendant's fundamental decision-making authority.[131]

More specifically, although a defendant's decision to plead guilty must be a knowing and voluntary decision, prosecutors are often allowed to induce that guilty plea with an illusory promise, thus rendering the defendant's decision unknowing and involuntary.[132] Although only the defendant has the constitutional right to waive the jury in favor of a bench trial, legislatures often give the prosecutor the statutory right to veto that decision without any reason or justification whatsoever.[133] And although the prosecutor and judge cannot literally prevent the defendant from taking the witness stand at trial, they can instead issue instructions and make arguments to the jury that effectively diminish or even eliminate the impact of the defendant's testimony.[134]

This bizarre state of affairs is nonsensical and, more importantly, is not supported by the plain language of the Constitution, constitutional analogy, legal history, or public policy.[135] Lawmakers should therefore take this decision-making authority away from prosecutors and judges and return it to defendants.[136] But meaningful legal reform is a rare occurrence indeed; because of that, this Article makes a more useful and immediate contribution by providing defense lawyers with three practical strategies for protecting defendants' fundamental decisions from intrusion by government agents.[137]

With regard to the defendant's fundamental decision to plead guilty, this Article provides a model motion seeking the entry of a conditional plea to protect the defendant against illusory promises.[138] The motion seeks permission to enter a guilty plea conditioned upon the fulfillment of the sentence concession that induced the plea in the first place; if the concession is not obtained, the defendant would be allowed to withdraw the plea, as the previous decision to plead guilty would have been involuntary.[139]

With regard to the defendant's fundamental decision to waive the jury in favor of a bench trial, this Article provides a model waiver form.[140] This document quotes the plain language of the Constitution, argues by analogy, cites legal history, and invokes public

[129] *See supra* Part I.
[130] *See* id.
[131] *See supra* Part II.
[132] *See supra* Part II.A.
[133] *See supra* Part II.B.
[134] *See supra* Part II.C.
[135] *See supra* Part III.
[136] *See* id.
[137] *See supra* Part IV.
[138] *See supra* Part IV.A.
[139] *See* id.
[140] *See supra* Part IV.B.

policy to advocate that the defendant's fundamental decision to waive the jury should be superior to the prosecutor's mere statutory right to veto that decision.[141]

Finally, with regard to the defendant's decision to testify, this Article provides a model motion to modify a standard witness-credibility instruction, and to prohibit prosecutorial argument to the jury, that the defendant's testimony should be disregarded or discounted because of his or her status as a defendant, interest in the outcome of the case, or alleged motivation to testify falsely.[142]

[141] *See* id.
[142] *See supra* Part IV.C.