Vindicating the Defendant's Constitutional Right to Testify at a Criminal Trial: The Need for an On-The-Record Waiver, 51 U. Pitt. L. Rev. 809 (1990)

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VINDICATING THE DEFENDANT'S CONSTITUTIONAL RIGHT TO TESTIFY AT A CRIMINAL TRIAL: THE NEED FOR AN ON-THE-RECORD WAIVER†

Timothy P. O'Neill*

In June, 1987, the United States Supreme Court decided Rock v. Arkansas.¹ Rock held that a criminal defendant's hypnotically refreshed testimony could not be held inadmissible per se. Significant academic attention has focused on this aspect of the case.²

Yet another aspect of Rock appears to have been overlooked. Surprisingly, Rock is the first case in which the Supreme Court has directly held that a criminal defendant has a constitutional right to testify at her trial.³ Although for many years Supreme Court opinions had intimated that the defendant's opportunity to testify was constitutionally predicated,⁴ Rock was the first case to identify precisely where in the Constitution this right can be found.⁵

Rock involves the Supreme Court in a controversy which has en-

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3. Rock, 483 U.S. at 49.
4. See, e.g., Harris v. New York, 401 U.S. 222, 225 (1971) ("defendant is privileged to testify in his own defense"); Ferguson v. Georgia, 365 U.S. 570 (1961) (State could not deny accused right to have his counsel question him to "elicit his statement."). See also infra notes 43-73 and accompanying text.
5. See Rock, 483 U.S. at 49-53. See also infra text accompanying notes 84-94.
gaged numerous lower federal and state courts during the last decade. Increasingly, defendants who are convicted without having testified at trial are alleging that they never properly waived their right to testify. Numerous issues arise from such a contention, including the nature of the right to testify, the respective responsibilities of the trial judge and defense attorney in protecting this right, and the manner in which a waiver can be made. At least two states, Colorado and West Virginia, have instituted procedures which impose a duty on the trial judge to warn a defendant of the right to testify and to obtain a knowing and intelligent waiver if the defendant decides not to do so. Other jurisdictions have flatly refused to follow this path, and instead will presume a proper waiver based upon defendant's failure to testify unless the defendant personally expresses some type of objection at trial.

This Article contends that the fundamental nature of the right to testify necessitates a personal, on-the-record waiver of that right at trial. It suggests that those courts which have refused to mandate an on-the-record waiver may have acted out of fear of injecting the trial judge into such a sensitive defense decision. Consequently, it suggests a

6. See, e.g., United States ex rel. Wilcox v. Johnson, 555 F.2d 115 (3d Cir. 1977) (only defendant, not counsel, could validly waive right to testify); People v. Knox, 58 Ill. App. 3d 761, 374 N.E.2d 957 (1978) (defendant must make desire to testify known to the court or waive the right).

7. In the first of these cases, People v. Curtis, 681 P.2d 504 (Colo. 1984), the court found the defendant's right to testify so fundamental as to require for its waiver the same constitutional standards applicable to waiver of the right to counsel. 681 P.2d at 512 (citing Johnson v. Zerbst, 304 U.S. 458 (1938)) (waiver must be voluntary, knowing and intelligent). Citing Curtis, the court in State v. Neuman, 371 S.E.2d 77 (W. Va. 1988) held that the record must reflect that the waiver was made voluntarily, knowingly and intelligently and that a valid waiver could not be presumed where the record was silent. 371 S.E.2d at 81.


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compromise procedure whereby a knowing and intelligent waiver can be obtained without any action on the part of the trial judge.

Part I discusses the early English position that barred a criminal defendant from being a sworn witness at trial. Part II shows that the American reaction to this tradition was essentially to establish a defendant's right to testify through statute. Part III traces the United States Supreme Court's work in this area, culminating with *Rock v. Arkansas*. Since *Rock* has established the constitutional basis of a defendant's right to testify, Parts IV and V examine the contours of that right, specifically whether the right is "personal" and/or "fundamental". Parts VI and VII analyze Colorado's system of having the trial judge obtain an on-the-record waiver from the non-testifying defendant and other jurisdictions' responses to this system. The Article concludes by proposing, in Parts VIII and IX, a system for obtaining an on-the-record waiver without the mandatory participation of the trial judge.

I. THE EARLY ENGLISH CRIMINAL TRIAL

The criminal trial in early English common law bore little similarity to the contemporary American model. First, the sixteenth century trial did not allow the defendant to have counsel.\(^{10}\) Second, the law did not allow the defendant to call witnesses on his own behalf.\(^{11}\) There was no esoteric rationale offered for these rules; rather, defense lawyers and defense witnesses were barred because it was held they were not needed.\(^{12}\) Wigmore finds this statement from 1678 to epitomize the prevailing spirit of the age:

"The fouler the crime is, the clearer and the plainer ought the proof of it to be. There is no other good reason can be given why the law refuseth to allow the prisoner at the bar counsel in matter of fact when his life is concerned, but only this, because the evidence by which he is condemned ought to be so very evident and so plain that all the counsel in the world should not be able to answer upon it."\(^{13}\)

With no counsel and no witnesses, a defendant had to rely on his own skills of persuasion. A defendant was allowed free rein to plead his

13. 2 Id. § 575, at 809 n.44 (quoting L.H. Steward Finch, in Lord Cornwallis' Trial, 7 How. St. Tr. 143, 149 (1678)).
case orally before the jury, including both matters of fact and law. Yet the defendant did not actually "testify" or offer "evidence" _per se._\textsuperscript{14} Since a defendant could not be sworn, he was not a witness; consequently, nothing he said could constitute "evidence." Yet the jury certainly paid close attention to the defendant's presentation. James Fitzjames Stephen characterized the criminal trial of the period as "a long argument between the prisoner and the counsel for the Crown, in which they questioned each other and grappled with each other's arguments with the utmost eagerness and closeness of reasoning."\textsuperscript{16} Thus, the sixteenth century criminal trial lacked three items taken for granted in contemporary trials: defense counsel, defense witnesses, and sworn testimony from the defendant.

The first of these areas to change was that of defense witnesses. During the seventeenth century courts began to allow the defendant to call witnesses; by 1701 defendants had a statutory right to have such witnesses sworn in all felony cases.\textsuperscript{16} It might be assumed that this trend would have naturally led to allowing the defendant to offer sworn testimony on his own behalf. This did not occur because of a civil doctrine which began to be applied in criminal cases: the disqualification of witnesses based on interest in the litigation.\textsuperscript{17} This doctrine took root in the sixteenth century and held that parties to a civil action were incompetent as witnesses; by the first part of the seventeenth century, this rule was recognized in Star Chamber, the Chancery, and courts of common law.\textsuperscript{18} Wigmore described the reason for the rule in this syllogism:

Total exclusion from the stand is the proper safeguard against a false decision, whenever the persons offered are of a class specially likely to speak falsely; persons having a pecuniary interest in the event of the cause are specially likely to speak falsely; therefore such persons should be totally excluded.\textsuperscript{19}

The doctrine gradually spread from parties in civil cases to witnesses in such cases.\textsuperscript{20} By the end of the seventeenth century, the "disqualifica-
tion for interest” rule was firmly ensconced in criminal law, affecting both the defendant and his choice of witnesses.

Thus, only the fear of perjury supplied the rationale for keeping the defendant off the witness stand, for a criminal defendant is clearly “par excellence an interested witness.”

II. THE AMERICAN EXPERIENCE

The disqualification of a criminal defendant from testifying carried over to the American Colonies. In 1762, a Pennsylvania court refused to swear a defendant to testify, stating that issues at trial “must be proved by indifferent witnesses.” At the time of the ratification of the Constitution it was clear that a criminal defendant had no right to testify.

The real impetus for change in the area began in 1827 with the publication of Jeremy Bentham’s *Rationale of Judicial Evidence*. The gist of Bentham’s argument against disqualification for interest was that a witness’s motive for lying should go to the weight, not the admissibility, of testimony. As Lord Macaulay expressed it, “[A]ll evidence should be taken at what it may be worth, that no consideration which has a tendency to produce conviction in a rational mind should be excluded from the consideration of the tribunals.” Bentham’s work first came to fruition in England. Between 1843 and 1853, legislation in that country abolished the incompetency of interested witnesses in civil cases, parties in civil cases, and spouses of parties in civil cases. This progress was mirrored in the United States. Wigmore notes that by the late 1850s most states had abolished disqualification based on interest in civil cases. Yet this progress was not paralleled in the area of criminal law, for by the late 1850s not one American jurisdiction had abolished disqualification based on interest for criminal defendants.

22. Rex v. Lukens, 1 U.S. (1 Dall.) 5, 6 (1762) quoted in Ferguson, 365 U.S. at 575.
27. Popper, supra note 10, at 458.
28. Id.
29. Id.
There were several reasons why jurists and writers did not believe that what was proper for the civil trial was necessarily proper for the criminal trial. Some believed that human nature would prevent a criminal defendant from testifying truthfully. As Stephen wrote:

[T]he prisoner could never be a real witness; it is not in human nature to speak the truth under such a pressure as would be brought to bear on the prisoner, and it is not a light thing to institute a system which would almost enforce perjury on every occasion. It is a mockery to swear a man to speak the truth who is certain to disregard it. . . .

Another objection came from those who believed that allowing a defendant to take the stand would have the ironic effect of weakening both the privilege against self-incrimination and the presumption of innocence. As one court expressed it:

If we were to hold that a prisoner offering to make a statement must be sworn in the cause as a witness, it would be difficult to protect his constitutional rights in spite of every caution, and would often lay innocent parties under unjust suspicion where they were honestly silent, and embarrassed and overwhelmed by the shame of a false accusation. . . . [It would result in] . . . the degradation of our criminal jurisprudence by converting it into an inquisitorial systems from which we have thus far been happily delivered.

These arguments were countered by Chief Justice John Appleton of the Supreme Court of Maine. Appleton was a Benthamite who tirelessly championed the cause of allowing parties in all cases, both civil and criminal, to testify. Appleton argued that it could just as easily be maintained that the accuser, rather than the accused, was lying. The answer was not to exclude one or the other from testifying, but rather to let the jury decide: "With equal means of knowledge, with equal power to instruct, with motives to truth dependent on their relative situations . . . both [the accuser and the defendant] should be heard and believed, . . . until from comparison of their several statements, reasons for belief or disbelief shall be found."

Appleton further contended that disqualifying a criminal defendant from testifying was squarely opposed to the presumption of innocence of the accused, for disqualifying the defendant implicitly showed that the law believed

33. For a discussion of Appleton's influence, see Popper, supra note 10, at 460-63.
34. Popper, supra note 10, at 461 (quoting J. Appleton, Evidence 123-24 (1860)).
the defendant was guilty and that the accuser was truthful. Appleton showed how this turned the presumption of innocence on its head: "But the common law [rule of disqualification of the defendant] selects. Whom? The accuser, presumed a perjurer [by the presumption of innocence], alone is heard. The accused, for whose benefit such favorable presumptions are nominally made; the accused-innocent, is rejected."\(^{35}\) Appleton’s work was directly responsible for reform in his home state. In 1864, Maine became the first state—indeed the first jurisdiction in the English-speaking world\(^ {36}\)—to adopt legislation finding criminal defendants to be competent witnesses.\(^ {37}\) Other states gradually followed Maine’s lead, and by the end of the century all states but Georgia had abolished “disqualification for interest” for criminal defendants.\(^ {38}\) In 1878, a federal statute declaring criminal defendants competent to testify became law.\(^ {39}\)

The American experience in allowing criminal defendants to testify had a profound effect on other common law nations. Stephen, who previously supported the disqualification of criminal defendants,\(^ {40}\) changed his views and wrote in support of the competency of criminal defendants.\(^ {41}\) Gradually, common law nations followed America’s example. By 1955, England, Australia, Canada, New Zealand, Northern Ireland, Ireland, and India had all extended to criminal defendants the opportunity to testify on their own behalf.\(^ {42}\)

III. THE ROAD TO ROCK: FINDING A CONSTITUTIONAL BASIS FOR THE RIGHT TO TESTIFY

The near unanimity with which American jurisdictions established

\(^{35}\) Id.


\(^{37}\) 1864 Me. Laws 280.

\(^{38}\) Ferguson, 365 U.S. at 577.


\(^{40}\) See supra note 31 and accompanying text.

\(^{41}\) Stephen stated:

I am convinced by much experience that questioning, or the power of giving evidence, is a positive assistance, and a highly important one, to innocent men, and I do not see why in the case of the guilty there need be any hardship about it . . . . A poor and ill-advised man . . . is always liable to misapprehend the true nature of his defence, and might in many cases be saved from the consequences of his own ignorance or misfortune by being questioned as a witness.

\(^{42}\) Ferguson, 365 U.S. at 577-78.
a statutory basis for the right to testify may have hindered consideration of whether the opportunity to testify was constitutionally predicated. As recently as 1986, the United States Supreme Court stated that the court had "never explicitly held that a criminal defendant has a due process right to testify in his own behalf." The court did finally recognize such a constitutional right in *Rock v. Arkansas* in 1987. Before examining the court's holding in *Rock*, it is necessary to examine the state of American law on the issue at the time the case was decided.

A. The United States Supreme Court and the Right to Testify: the Record Before *Rock*

There is no dearth of language in Supreme Court opinions establishing that some kind of "right to be heard" is an essential component of due process. Thus, in 1897 the Court declared: "At common law no man was condemned without being afforded opportunity to be heard . . . . Can it be doubted that due process of law signifies a right to be heard in one's defence?" The following year, the Court said that the concept of due process included "certain immutable principles of justice . . . as that no man shall be condemned in his person or property without . . . an opportunity of being heard in his defence." (This latter statement was cited approvingly by the Court in *Powell v. Alabama*.) In dictum in *In re Oliver*, the Court provided details on just what this "right to be heard" entailed. The Court said it "include[d], as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." Again, in *Walder v. United States*, the Court alluded to a right to testify when it stated, "Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him."

The Court appeared to have an opportunity to decide whether the

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43. See Alicea v. Gagnon, 675 F.2d 913, 920-23 (7th Cir. 1982) (finding constitutional right to testify under fifth, sixth, and fourteenth amendments).
49. 333 U.S. 257 (1948).
50. *Id.* at 273 (emphasis added).
Constitution guaranteed a criminal defendant a right to testify when it decided *Ferguson v. Georgia* in 1961. At that time, Georgia law held that any person charged with an indictable offense was incompetent to testify at trial. However, another Georgia statute provided that a criminal defendant had the right to make an unsworn statement to the jury and to remain immune from cross-examination. At trial, defendant Ferguson wanted his attorney to ask him questions, but the court refused to allow it.

When the Supreme Court noted probable jurisdiction in this case, one might have expected that the Court would use it to decide whether a state could constitutionally declare a criminal defendant to be incompetent to testify at his own trial. Indeed, in the first line of Justice Brennan’s opinion for the Court, he states that Georgia may have been the last common law jurisdiction in the world to have retained that particular rule. But the opinion quickly notes both that Ferguson had neither asked to be sworn as a witness at trial, nor asked the Supreme Court to review the constitutionality of the incompetency statute. Consequently, the only issue was whether the trial court’s decision not to allow Ferguson to have his attorney aid him in making his unsworn statement violated due process by depriving him of the “guiding hand of counsel.” The Supreme Court held that Georgia’s action did indeed violate due process.

Although *Ferguson* did not explicitly consider the constitutionality of the law making criminal defendants incompetent to testify, it certainly suggested that such a law was improper. As one commentator noted, “If it is a denial of due process not to permit the defendant to be examined directly by his attorney, then surely it is an even greater denial of due process to refuse the defendant any opportunity to testify in his own behalf.” Moreover, in concurring opinions both Justices

53. Id. at 570.
54. GA. CODE ANN. § 38-415 (1933). In 1973, Georgia abandoned the policy of permitting a criminal defendant the opportunity to make an unsworn statement, and now through statute guarantees the right of the defendant to testify at her own trial. See GA. CODE ANN. §§ 17-7-28 & 24-9-20 (1982).
56. *Ferguson*, 365 U.S. at 570.
57. Id. at 572 n.1.
58. Id. at 572.
59. Id. (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).
60. *Ferguson*, 365 U.S. at 596.
61. Note, Due Process v. Defense Counsel’s Unilateral Waiver of the Defendant’s Right to

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Clark and Frankfurter stated that they would have held the incompetency statute to be unconstitutional. \(^6\)

For the next quarter of a century, the Supreme Court continued to scatter hints that the right to testify was constitutionally predicated. In *Harris v. New York* the Court stated that "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so." \(^6\) The next year in *Brooks v. Tennessee* the Court abandoned the "privilege" terminology by stating "[w]hether the defendant is to testify is an important tactical decision as well as a matter of constitutional right." \(^6\) Although it had never been squarely held, the Court in 1975 wrote that "[i]t is now accepted . . . that an accused has a right . . . to testify on his own behalf." \(^6\)

These references continued unabated during the decade leading up to *Rock*. \(^6\) Yet, as previously discussed, \(^6\) in 1986 the Court conceded in *Nix v. Whiteside* \(^6\) that it had "never explicitly held that a criminal defendant has a due process right to testify in his own behalf." \(^6\) In his concurring opinion in *Nix*, \(^7\) Justice Blackmun wrote that he was "somewhat puzzled" by the majority's assertion that the constitutionality of the defendant's right to testify remained an "open question", and cited *Jones v. Barnes*, \(^7\) *Brooks v. Tennessee*, \(^7\) and *Harris v. New York* \(^7\) to illustrate its constitutional basis.

**B. Lower Courts and the Right to Testify: The Record Before Rock**

The Court's uncertainty about the constitutional nature of the right to testify.

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62. Ferguson, 365 U.S. at 601 (Frankfurter, J., concurring); id. at 602 (Clark, J., concurring).
63. 401 U.S. 222, 225 (1971).
64. 406 U.S. 605, 612 (1972).
67. See *supra* note 44 and accompanying text.
69. *Id.* at 164.
70. *Id.* at 186 n.5 (Blackmun, J., concurring).
73. 401 U.S. 222 (1971).
right to testify, exhibited in the 1986 *Nix* opinion, was reflected in the decisions of both state and lower federal courts which had grappled with the issue. Although the trend in these courts was in the direction of finding a constitutional basis for the defendant’s right to testify, the record was hardly unanimous. A number of jurisdictions which examined the issue recognized no constitutional basis for the defendant’s right to testify, finding the right to be solely a statutory matter. This was the state of the law at the time the Supreme Court granted certiorari in *Rock v. Arkansas*.

C. *Rock v. Arkansas: Establishing a Constitutional Foundation for the Defendant’s Right to Testify*

In 1983, Vicki Lorene Rock was charged with manslaughter in the shooting death of her husband. Because of her inability to remember the details surrounding the shooting, her attorney arranged two hypnosis sessions with a licensed neuropsychologist. Following the sessions,


Ms. Rock remembered certain exculpatory details. In response to the state’s motion to bar defendant’s “hypnotically refreshed” testimony, the trial judge ordered that Ms. Rock’s testimony should be limited to “matters remembered and stated to the [hypnosis] examiner prior to being placed under hypnosis.” With this limitation on her testimony, Ms. Rock was convicted of manslaughter. On appeal, the Arkansas Supreme Court held as a matter of law that a witness’s hypnotically refreshed testimony was inadmissible per se.

The United States Supreme Court found such a per se rule as applied to a defendant to be unconstitutional. Before reaching this decision, however, the Court first had to squarely confront the issue of whether a defendant has a constitutional right to testify in her own behalf.

After briefly reviewing the historical transition from defendant’s incompetency to competency in common law jurisdictions, Justice Blackmun’s opinion for the Court stated that the right of the defendant to testify “has sources in several provisions of the Constitution.” First, citing Faretta v. California, In re Oliver, and Ferguson v. Georgia, the Court held that the right to testify was a fundamental part of the adversary system and was thus guaranteed by the due process clause of the fourteenth amendment. Second, the Court found this right implicit in the compulsory process clause of the sixth amendment. Relying on Washington v. Texas and United States v. Valenzuela-Bernal, the Court reasoned that, if the clause supported the right of a defendant to present witnesses who will provide material and favorable evidence on his behalf, then it would a fortiori support the defendant’s choice to offer such testimony himself. Indeed, the

78. Id. at 46-47. For example, she recalled that her fingers had never been on the trigger, thus supporting a claim that the gun discharged accidentally.
79. Id. at 47.
81. Rock, 483 U.S. at 62.
82. Id. at 51.
83. 422 U.S. 806 (1975).
84. 333 U.S. 257 (1948).
87. Id. at 52.
88. 388 U.S. 14 (1967).
89. 458 U.S. 858 (1982).
90. Rock, 483 U.S. at 52.
Court noted that often "the most important witness for the defense in . . . criminal cases is the defendant himself."[981]

Third, the Court found yet another way in which the right to testify is guaranteed under the sixth amendment. The Court pointed out that Faretta v. California held that the sixth amendment supported the right of a defendant to waive the assistance of counsel and represent himself at trial, if he so desires, because so many of the rights in the amendment accrue personally to the defendant.[982] Rock then concluded that even more basic than the right to represent oneself would be a defendant's right to actually testify in his own words concerning the events in question.[983]

Finally, Rock found yet a fourth constitutional basis for the defendant's right to testify embodied in the fifth amendment. The Court held that the right of a defendant not to be compelled to be a witness against himself necessarily included the right to testify on one's behalf if one so desires.[984]

Thus, Rock v. Arkansas established once and for all that a criminal defendant does indeed have a federal constitutional right to testify on his own behalf. Yet the resolution of this issue has spawned several new ones. The first issue is whether the defendant or his attorney should have the final decision on whether a defendant takes the stand.

IV. THE RIGHT TO TESTIFY: WHOSE RIGHT IS IT, ANYWAY?

Constitutional rights possessed by criminal defendants can generally be divided into two categories: those which can be waived through the actions of defendant's counsel, and those which can be waived only by the defendant himself.[985] Some commentators discuss this in terms of "allocation of decision-making responsibility;"[986] others speak in terms

91. Id.
92. As the Rock court expressed it:
[I]n Faretta . . . the Court recognized that the Sixth Amendment "grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'"

483 U.S. at 52 (quoting Faretta v. California, 422 U.S. 806, 819 (1975)).
93. Id. at 52.
94. Id. at 52-53 (citing Harris v. New York, 401 U.S. 222 (1971) and Malloy v. Hogan, 378 U.S. 1 (1964)).
95. See generally Note, supra note 61, at 529-32.
and still others employ a "fundamental rights versus trial decisions" dichotomy. Yet whatever nomenclature is used, the common idea that runs through the schemes is that the decision to waive certain constitutional rights is solely the defendant's prerogative.

Several decisions of the United States Supreme Court illustrate this concept. For example, a jury trial can be waived only with a criminal defendant's "express, intelligent consent." A guilty plea cannot be taken without the defendant's personal agreement. The decision whether or not to appeal a conviction is one for the defendant, not his attorney, to make.

On the other hand, numerous decisions concerning trial strategy and tactics are the responsibility of the trial counsel. Such a list would include decisions as to which witnesses should be called; what questions should be asked on direct and cross examination; what stipulations should be made; what objections should be lodged; and what pre-trial motions should be made. This is not to say that an attorney is not responsible for the decisions he makes in these areas. Ineptitude resulting in ineffective assistance of counsel may be raised pursuant to the standard of Strickland v. Washington. Yet the mere fact that a defendant disagrees with his attorney's decisions in these areas does not provide grounds for reversal. As Justice Harlan succinctly noted, on most trial-related issues "a lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval."


Professor Marcy Strauss has suggested yet another way of differentiating these functions: the "means-ends" paradigm. Viewed in this way, the client decides the "ends" of the lawsuit while the attorney controls the "means." Thus, in the criminal setting, Strauss characterizes decisions such as whether to plead, whether to waive a jury, and whether to appeal as "ends" which must be left to the defendant, while "trial tactics" such as whether and how to cross-examine and whether to lodge an objection are "means" decisions which can be left to the discretion of the attorney. Strauss, Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy, 65 N.C.L. REV. 315, 318-19 (1987).


102. See, e.g., 1 STANDARDS FOR CRIMINAL JUSTICE, Standard 4-5.2 (2d ed. Supp. 1986) [hereinafter CRIMINAL JUSTICE].


In *Rock v. Arkansas*, the Supreme Court did not need to decide whether the right to testify is the kind of right which requires a personal waiver from the defendant or whether it is in the area of "trial tactics" to be left to the defense attorney. Yet evidence suggests that, if faced with this precise issue, the Court would find it to be a personal right of the defendant. For example, the majority opinion in *Rock* characterizes the defendant's right to testify on her own behalf as a "fundamental" constitutional right.\(^{105}\) Similarly, when the Supreme Court in *Johnson v. Zerbst*\(^ {106}\) formulated its test for finding waivers by a defendant, it spoke in terms of "fundamental constitutional rights."\(^ {107}\) As one commentator has noted, "[i]t appears that the decisive factor in the decision to require personal waiver is the fundamental nature of the right at stake."\(^ {108}\) This is emphasized by the *Rock* Court's quotation of a statement from *Jones v. Barnes*\(^ {109}\) that the defendant has the "ultimate authority to make certain fundamental decisions regarding the case, [such as] whether to . . . testify in his or her own behalf."\(^ {110}\) In support of this dictum, *Jones* cited two sources: Justice Burger's concurring opinion in *Wainwright v. Sykes*\(^ {111}\) and the American Bar Association Standards for Criminal Justice.\(^ {112}\) In his concurrence in *Wainwright*, Chief Justice Burger relied on the A.B.A. Standards for the dictum that a basic decision such as whether to testify in his own behalf is ultimately one for the accused alone to make.\(^ {113}\)

The A.B.A. standard discussed by both Chief Justice Burger and the *Jones* Court, which is now Standard 4-5.2, states:

(a) Certain decisions relating to the conduct of the [criminal] case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: (i)

106. 304 U.S. 458 (1938).
107. *Id.* at 464.
112. *Id.* at 753 (citing Criminal Justice, *supra* note 102).
what plea to enter; (ii) whether to waive jury trial; and (iii) whether to testify in
his or her own behalf.114

Interestingly, the Commentary to the Standard cites absolutely no case
support for the proposition that the decision to testify is personal to the
defendant.116 Yet there is lower court support suggesting that the de-
fendant must make the ultimate decision on whether or not to
testify.118

Thus, prevailing case law suggests that the Supreme Court would
find that the right to testify can only be waived personally by the de-
fendant. Several policy reasons also argue in favor of recognizing that
such a decision should be the defendant’s alone. First, if the defendant
should have final say over whether to exercise those rights deemed “in-
herently personal and basic,”117 it would seem proper to include among
these the right to testify, deemed by one court to be “of inestimable
value.”118 The Supreme Court has noted that “[t]he most persuasive
counsel may not be able to speak for a defendant as the defendant
might, with halting eloquence, speak for himself.”119 As noted above,120
the Rock court itself analogized the situation to a defendant’s decision
to represent himself at trial if he so chooses,121 and concluded that the

114. CRIMINAL JUSTICE, supra note 102. The remainder of the standard reads:
(b) The decisions on what witnesses to call, whether and how to conduct cross-examination,
what jurors to accept or strike, what trial motions should be made, and all other strategic
and tactical decisions are the exclusive province of the lawyer after consultation with the
client.
(c) If a disagreement on significant matters of tactics or strategy arises between the lawyer
and the client, the lawyer should make a record of the circumstances, the lawyer’s advice
and reasons, and the conclusion reached. The record should be made in a manner which
protects the confidentiality of the lawyer-client relationship.

115. See id. The only authority cited are two articles: Levy, Some Comments on the Trial
of a Criminal Case, 10 Rec. A. B. City N.Y. 203 (1955); Steinberg & Paulsen, A Conversation

116. See, e.g., Wright v. Estelle, 572 F.2d 1071, 1080 (5th Cir.) (Godbold, J., dissenting),
cert. denied, 439 U.S. 1004 (1978); Winters v. Cook, 489 F.2d 174, 179 (5th Cir. 1973) (dictum);
Hughes v. State, 513 P.2d 1115, 1119 (Alaska 1973) (defendant should be permitted to testify if
he requests); State v. McKinney, 221 Kan. 691, 561 P.2d 432, 433 (1977); State v. Rosillo, 281
N.W.2d 877 (Minn. 1979); Ingle v. State, 29 Nev. 104, 546 P.2d 598 (1976).

117. People v. Curtis, 681 P.2d 504, 511 (Colo. 1984). See also infra notes 153-61 and
accompanying text.

118. Yates v. United States, 227 F.2d 844, 846 (9th Cir. 1955), aff’d in part and rev’d in

119. Green v. United States, 365 U.S. 301, 304 (plurality opinion) (discussing right of allo-

120. See supra notes 92-93 and accompanying text.

121. This was the issue in Faretta v. California, 422 U.S. 806 (1975).
decision whether or not to testify is an equally personal decision. If the defendant should be given every opportunity to make those decisions which may result in his remaining free from incarceration, clearly the right to testify is one of them.

Even if the majority of defendants were to make foolish tactical decisions on this issue, there is a second, more philosophical, reason why a defendant should still be given this power. At least one commentator has expressed it in terms of "human dignity":

If the right to testify in one's own behalf is to have any meaning, it cannot be taken away from a defendant who feels the human instinct to meet the accusations against him despite counsel's advice that unfortunate consequences may result. A defendant should be recognized as having a basic right to plead his case before his peers, and neither the court nor defense counsel should be permitted to deprive a defendant of that right to exercise his free will.122

As Judge Godbold wrote in Wright v. Estelle, regardless of whether choosing to testify is tactically correct, the defendant's "desire to tell 'his side' in a public forum may be of overriding importance to him . . . . The wisdom or unwisdom of the defendant's choice does not diminish his right to make it."123

The legal literature points out a third consideration, namely that in practice defense attorneys accede to a defendant's desire to testify over an attorney's objection. A review of the literature in the area led one commentator to conclude that it was the "general belief of expert criminal attorneys" that the defendant must agree before his right to testify is waived.124 Professor Amsterdam perhaps best summarized this view from the defense attorney's perspective: "Counsel may properly urge the defendant that it is unwise or dangerous for the defendant to take the stand. If, however, a defendant wishes to testify despite advice to the contrary, it is probably best to yield to his or her stubbornness."125 This is not to suggest that courts are unanimous in finding the decision of whether or not to testify to be personal to the defendant.126 Yet the potent combination of lower court case law, legal

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124. See Note, supra note 61, at 536-37.
126. See, e.g., United States v. Norwood, 798 F.2d 1094, 1100 (7th Cir.) ("counsel's decision not to have [defendant] testify clearly should be considered sound trial strategy"), cert. denied, 479 U.S. 1011 (1986); United States v. Dyer, 784 F.2d 812 (7th Cir. 1986) (characterizing
literature, and signals from the Supreme Court would seem to suggest that this will be firmly established in the future.

V. JUST HOW "FUNDAMENTAL" IS THE FUNDAMENTAL RIGHT OF A DEFENDANT TO TESTIFY?

Rock v. Arkansas has firmly established that the defendant's right to testify is constitutionally predicated.127 And, although not directly decided by the Supreme Court, there is good reason to believe that the defendant's right to testify is one of those few "fundamental rights" that can be waived only by the defendant herself, and not by the defense attorney.128 Many courts already accept this proposition.129

In Johnson v. Zerbst,130 the Supreme Court characterized the waiver of a fundamental right as "an intentional relinquishment or abandonment of a known right or privilege."131 In other words, there can be no waiver of a fundamental right unless the person is aware that he has such a right.132 Thus, to insure that waivers of fundamental rights are "knowing," mechanisms are often used to guarantee both that defendants understand the rights and that any waivers of those rights are matters of record. Thus, in the Federal Rules of Criminal Procedure, the taking of guilty pleas is governed by Rule 11;133 the making of a jury waiver is governed by Rule 23;134 and the right to counsel is covered by Rule 44.135

Despite all the case law that refers to the defendant's right to testify as being a "personal," "fundamental" right,136 similar mechanisms

the decision to testify as "attorney's tactics"); United States v. Cariello, 536 F. Supp. 698 (D.N.J. 1982) (characterizing decision as a strategic one for defense counsel); State v. McKenzie, 17 Md. App. 563, 303 A.2d 406 (1973) (characterizing the issue as one of "trial tactics" to be made by the defense attorney).

127. See supra notes 82-94 and accompanying text.
128. But see supra note 126.
129. See supra note 116.
130. 304 U.S. 458 (1938).
131. Id. at 464 (emphasis added).
136. See, e.g., Wainwright v. Sykes, 433 U.S. 72 (1977) (Burger, C.J., concurring) (whether to testify ultimately decision for accused to make); United States v. Martinez, 883 F.2d 750, 756 (9th Cir. 1989) (characterizing the right to testify as "fundamental" and "personal" and holding that it can be relinquished only by the defendant); United States ex rel. Wilcox v. John-
are curiously absent in most American jurisdictions. An excellent illustration of this problem is provided by the Wisconsin Supreme Court case of *State v. Albright*. Following a felony conviction, Sharon Albright filed a state post-conviction petition alleging that she had been denied the right to testify on her own behalf. At a post-conviction hearing, she asserted that she asked her attorney four times if she could testify at trial. Her attorney said that prior to trial he told Albright that he did not believe it would be good strategy for her to testify. He reiterated this two days before the trial.

On the day of the trial, a conference was held in the judge's chambers. Ms. Albright, her lawyer, the prosecutor, and the judge were present. The prosecutor inquired whether the defendant planned to testify. Her lawyer said he did not expect her to do so. The defendant said nothing at the time. However, following the conference, she again asked her attorney if she could testify. She admitted that at no time did she speak to the trial judge because "she did not know or understand her attorney's 'reasoning.'"

This is the factual record which faced the Wisconsin Supreme Court. The court began its opinion by first concluding that a defendant's right to testify is guaranteed by the due process clause of the fourteenth amendment. It characterized this as an "important constitutional right." Next, the court considered who should make such a decision and concluded that "the decision whether to testify should be made by the defendant after consulting with counsel."

Up to this point, the court held that the defendant's right to testify is an important, personal, constitutional right. But then the court distinguished the right to testify from a traditional fundamental right. First, it held that a personal waiver of the right to testify was unnecessary; it concluded that "counsel, in the absence of the express disapproval of the defendant on the record during the pretrial or trial pro-

son, 555 F.2d 115 (3d Cir. 1977) (dictum); United States v. Pinkney, 551 F.2d 1241 (D.C. Cir. 1976) (defendant must personally participate in waiver of right to testify); People v. Curtis, 681 P.2d 504 (Colo. 1984) (procedural safeguards are necessary to protect fundamental right to testify).

137. 96 Wis. 2d 122, 291 N.W.2d 487, cert. denied, 449 U.S. 957 (1980).
138. 291 N.W.2d at 488-89.
139. Id.
140. Id. at 489-90.
141. Id. at 491.
142. Id. at 492.
ceedings, may waive the defendant's right to testify."\textsuperscript{143} Second, it rejected a proposal that the trial judge should have a duty to advise the defendant \textit{sua sponte} that she indeed has a right to testify. The court curtly noted that "\textquotedblleft[s]uch admonition is subject to abuse in interpretation and may provoke substantial judicial participation that could frustrate a thoughtfully considered decision by the defendant and counsel who are designing trial strategy.\textquotedblright\textsuperscript{144}

Turning to the facts of the case at bar, the court noted that the trial record included nothing to suggest that Albright did not agree with her attorney's decision that she not testify. Consequently, her silence at trial waived any issue on this point in her motion for a new trial. Thus, the court affirmed the order dismissing her motion for a new trial.

Justice Abrahamson, in dissent, focused on the analytical quagmire created by the majority opinion:

\begin{quote}
The majority has in effect created a third category of constitutional rights, namely, "an important constitutional right" which lies somewhere between a "fundamental" right, which only the defendant may personally waive, and a less fundamental constitutional right labeled a "trial or tactical decision," which is left exclusively to the determination of defense counsel without any necessity for consultation with or concurrence by the defendant. The majority puts the "right to testify" into this new category.\textsuperscript{145}
\end{quote}

The dissent went on to criticize the majority opinion's rule that a defendant waives her right to testify unless she makes known to the trial court her disagreement with counsel's actions. The dissent found it "unrealistic"\textsuperscript{146} to believe that the average defendant would "do battle"\textsuperscript{147} with her attorney in this way. More importantly, the dissent faulted the majority for not discussing what the obligations of defense counsel are in advising a defendant of her constitutional right to testify or not to testify.\textsuperscript{148}

The \textit{Albright} majority approaches the question of a defendant's right to testify in a curiously paradoxical way. On the one hand, it hails the right to testify as an "important constitutional right" and empha-

\begin{flushleft}
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 493 (Abrahamson, J., dissenting).
\textsuperscript{145} Id.
\textsuperscript{146} Id. at 495.
\textsuperscript{147} Id.
\textsuperscript{148} The majority also failed to indicate whether counsel's failure to advise the defendant of her constitutional right to testify constituted ineffective assistance of counsel or whether counsel's waiver of the defendant's right should be examined as a mere tactical decision. \textit{Id.}
\end{flushleft}
sizes that the decision is a personal one for the defendant. On the other hand, the majority is essentially willing to view silence on the part of the defendant as constituting a waiver. Moreover, it fails to establish a mechanism to insure that the defendant even knows that she possesses this important constitutional right. The majority opinion expressly refused to place a duty on the trial judge to inform defendant of this right. As the dissent noted, it refused to discuss exactly what defense counsel's obligations are in this matter.

The Albright approach is "see no evil, hear no evil;" if the defendant does not testify and does not complain, the court is willing to presume that there is no problem. This laissez-faire method is totally at odds with the "knowing and intelligent" waiver approach of Johnson v. Zerbst. Thus, as the dissent asserts, the majority indeed reached out to create a "third category" of constitutional rights to cover its anomalous approach.

Wisconsin is by no means alone in placing a burden on the defendant to object to counsel's failure to allow him to testify. As will be shown, several other jurisdictions also insist that a defendant should personally decide whether to testify, but likewise consider that a defendant's failure to raise an objection at trial will constitute a waiver of the issue. One court has characterized this as the "contemporaneous request" approach. What is particularly troubling is the failure of most of these jurisdictions to establish any mechanism to guarantee that the defendant is aware that he has such a right. Most of these "contemporaneous request" jurisdictions require neither judicial warnings nor an on-the-record waiver of the defendant's right to testify. Before analyzing why so many jurisdictions follow the "contemporaneous request" system, it is useful to consider Colorado, a jurisdiction which requires full judicial warnings and an on-the-record waiver. An analysis of the Colorado system—and the largely negative response it has received from other jurisdictions—will further illustrate the problems in this area.

VI. PERSONAL WARNINGS AND PERSONAL WAIVER—THE COLORADO SYSTEM

In 1984, the Colorado Supreme Court confronted the issue of a

149. Id. at 493.
150. 304 U.S. 458 (1938).
151. See infra notes 164-75 and accompanying text.
defendant's right to testify in *People v. Curtis*. The court began its analysis by first finding that a criminal defendant has a constitutional right to testify at his trial. It then established that it was the kind of "fundamental" right which required personal waiver by the defendant under the "knowing and intelligent" standard established by *Johnson v. Zerbst*. Rather than stopping there, the court then concluded that "procedural safeguards" were necessary to guarantee that the defendant understood the significance of waiving such a right. *Curtis* proceeded to assign the trial judge the burden of ascertaining whether the defendant has properly exercised such a waiver, and established the following procedure:

A trial court . . . [should] advise[e] the defendant outside the presence of the jury that he has a right to testify, that if he wants to testify then no one can prevent him from doing so, that if he testifies the prosecutor will be allowed to cross-examine him, that if he has been convicted of a felony the prosecutor will be entitled to ask him about it and thereby disclose it to the jury, and that if the felony conviction is disclosed to the jury then the jury can be instructed to consider it only as it bears upon his credibility . . . . [T]he defendant should also be advised that he has a right not to testify and that if he does not testify then the jury can be instructed about that right.

*Curtis* stressed that the essential purpose of placing the warnings and waiver on the record was to ensure a knowing and intelligent waiver, to prevent post-conviction disputes on the issue, and to facilitate appellate review. Thus, the court stressed that it would even be proper for defense counsel to give the warnings to the defendant, so long as the colloquy was conducted on the record in the presence of the trial judge. *Curtis* thus established that the issue of whether a defendant was knowingly and intelligently waiving his right to testify had to be established by the trial court on the trial record. Other jurisdictions have

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154. *Id.* at 510.
155. *Id.* at 512 (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)). The *Curtis* court provided several reasons why this right was important enough to be "fundamental": 1) the crucial role the right to testify plays in determining the outcome of a criminal case; 2) how incalculably important it could be for a defendant to be able to tell his own story to the jury in his own words; and 3) how allowing the defendant to make such a key trial decision lends dignity and legitimacy to the entire criminal trial process. *Id.* at 512-14.
156. *Id.* at 514.
157. *Id.* at 515.
158. *Id.*
given the *Curtis* approach a largely negative reaction. While West Virginia whole-heartedly adopted the *Curtis* rule in 1988, every other jurisdiction which has been asked to adopt *Curtis* has flatly refused. Yet it is one thing for a court to refuse to adopt a specific mechanism for guaranteeing a proper waiver, *i.e.*, the *Curtis* approach; what is troubling is the failure of these courts to suggest any alternative mechanism. Instead, these courts cling to Albright's "see no evil, hear no evil" position, providing stirring rhetoric about a defendant's sacred right to testify, while remaining curiously silent on how a defendant can learn about, much less exercise, this right.

As noted previously, the jurisdictions which reject the *Curtis* approach generally follow the "contemporaneous request" standard. One court described the standard as follows:

[If a] defendant has acquiesced in the competent advice of his attorney not to take the stand, and has failed to assert his right at or before the trial, he is deemed to have waived it. That is, while the decision to testify is one ultimately for the defendant to make, the right is "subject to the limitation that the defendant make his objection known at trial, not as an afterthought."

A substantial number of courts follow this standard.

The concept of "contemporaneous request" appears to be based on


161. The phrase "contemporaneous request" appears to have been first used in Polster, *The Dilemma of the Perjurious Defendant: Resolution, Not Avoidance*, 28 CASE W. RES. L. REV. 3, 12 (1977).


premises totally lacking in empirical support. People v. Knox\textsuperscript{164} provides a good illustration of the problem. Following his conviction at a bench trial, defendant filed a \textit{pro se} motion before being sentenced in which he alleged that his attorney had prevented him from testifying. In the exact language of the defendant, the motion declared, \textit{inter alia}:

\begin{quote}
I told [my attorney] that I wanted to testify about Nine time But he said I shouldn't Because the Judge would take my testimony As A Lie. I was patiently sitting there waiting for the Judge to Ask me Did I have anything to say Before I was found Guilty or not Guilty And if I wanted to testify.\textsuperscript{166}
\end{quote}

The trial court denied the motion. On appeal, defendant argued that the trial court erred in not holding an evidentiary hearing.

The \textit{Knox} court emphatically held both that a defendant had a constitutional right to testify\textsuperscript{166} and that the ultimate decision on whether to testify belonged to the defendant.\textsuperscript{167} Yet the appellate court held that there was no need for the trial court to have held an evidentiary hearing, stating:

\begin{quote}
If defendant had desired so strongly to testify he certainly could have made this evident to the court, and when defense counsel rested and closing arguments commenced \textit{it would be clear to anyone that defendant should have asserted his desire to testify at that point in the proceedings . . . Based on this record . . . we believe the trial court could properly conclude that defendant acquiesced in his counsel's decision not to place him on the stand.}\textsuperscript{168}
\end{quote}

Consider the court's confident assertion about what is "clear" to a defendant concerning technical concepts such as "closing arguments," the "defense resting," and when and how an objection is properly raised. Now compare this to the language used by the defendant in his \textit{pro se} motion.\textsuperscript{169} The court's assumptions obviously have no basis in reality.

Other "contemporaneous request" decisions make equally absurd statements concerning the level of technical legal knowledge a defendant is expected to have in asserting his right to testify.\textsuperscript{170} They often

\begin{footnotes}
\item[164.] 58 Ill. App. 3d 761, 374 N.E.2d 957 (1978).
\item[165.] 374 N.E.2d at 959.
\item[166.] \textit{Id.} at 960.
\item[167.] \textit{Id.} at 961.
\item[168.] \textit{Id.} at 962 (emphasis added).
\item[169.] \textit{See supra} text accompanying note 165.
\item[170.] \textit{See, e.g.,} People v. Blye, 233 Cal. App. 2d 143, 43 Cal. Rptr. 231 (1965). The court held that since the defendant did not place the conflict he had with his attorney regarding his right to testify on the record, he had waived the issue on appeal. 43 Cal. Rptr. at 236. The court blithely held that, "[i]n such circumstances, a defendant should first request the court to remove
\end{footnotes}
place heavy personal burdens on the defendant: a presumption that the defendant understands he has the right to testify; a presumption that he knows this right is personal; a presumption that the defendant knows he must personally raise the issue at trial if his attorney does not; and a presumption that he should realize that he must ask for his attorney to be replaced if there is a conflict on this issue. Yet they almost never create any mechanism whereby a defendant is directly told on the record about these rights and duties. "Contemporaneous request" jurisdictions are usually the staunchest opponents of any suggestion that a defendant be formally apprised on the record concerning his right to testify.

It would seem elementary that the best way to eliminate appeals by defendants claiming that they were denied their right to testify at trial would be to mandate that, whenever a defendant does not take the stand, the trial record must include a knowing and intelligent waiver of that right by the defendant. Why are courts rejecting the Curtis approach and thus opening themselves to appeals by defendants alleging they never properly waived their right to testify?

VII. THE RELUCTANCE OF COURTS TO MAKE THE TRIAL JUDGE A FORMAL PARTICIPANT IN THE DEFENDANT'S DECISION WHETHER TO TESTIFY

Clearly, instituting the Curtis system would go a long way towards eliminating post-conviction attacks on convictions by defendants claim-
ing they were denied the right to testify. An on-the-record waiver would clear up the ambiguity that now exists in so many trial records.

Considering this, it is interesting to note the mixed feelings exhibited by some courts in rejecting a Curtis system of on-the-record waiver. For example, the Florida Supreme Court expressly rejected Curtis in Torres-Arboledo v. State, and yet in a footnote stated it would be “advisable” for the trial judge to make a record inquiry as to defendant’s decision not to testify. In rejecting an on-the-record waiver, the Supreme Judicial Court of Massachusetts nonetheless suggested in a footnote that it “may be the better practice” for a judge to warn a defendant before trial of his rights to testify and not to testify. In rejecting on-the-record warnings by the judge, the Court of Appeals of Georgia nonetheless said it “may be the better practice” to give such warnings, and that “under some circumstances it must be done.”

Why do courts engage in this “cat and mouse” game? What explains the reluctance simply to institute a Curtis system of mandatory warnings and on-the-record waiver? The answer appears to lie in the reluctance of courts to formally involve the trial judge in the defendant’s decision of whether to testify.

In our adversary system, the judge generally does not intrude on trial decisions made by the defendant and his attorney. In holding, for example, that a trial judge had no duty to inquire whether a defendant was deliberately choosing to wear jail clothes during his trial, the United States Supreme Court stated that “the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney.” Courts are wary of what Sir Francis Bacon dubbed the “overspeaking judge.”

Courts profess a special reason to be concerned about the role of the trial judge vis-a-vis a defendant’s decision on whether to testify. This was expressed by the Appeals Court of Massachusetts in 1987. In the course of rejecting a Curtis system of on-the-record warnings and waiver, the Court stated:

176. 524 So. 2d 403 (Fla.), cert. denied, 488 U.S. 901 (1988).
177. Id. at 411 n.2.
180. 318 S.E.2d at 765.
Unlike the right to a jury trial and the right to plead not guilty, the right to testify has a mirror image which is constitutionally protected, viz., the right not to testify, to remain silent. When a trial judge intercedes with a colloquy regarding jury trial or the right to plead not guilty, the judge’s intentions are clear. He is informing the defendant of constitutionally provided protections. The right to testify is more complex. There is a risk that in explicating the right to testify the judge will cast in unflattering light the right not to testify.\footnote{183}

Indeed, courts have criticized judges for remarks made to defendants which appear to suggest how a defendant should decide the issue.\footnote{184} This fear of judicial interference with the right of the defendant to choose whether or not to testify is often cited as a reason not to require any on-the-record waiver.\footnote{185} Even the Colorado Supreme Court—the court that produced the \textit{Curtis} decision—understands the potential problems created by involving the trial judge in the defendant’s decision. Several years after deciding \textit{Curtis}, the court noted that even a colloquy which appears proper in the appellate record might create difficulties:

A trial judge, however, must be especially sensitive not to suggest by words, tone of voice or demeanor that waiver is or is not a wise course of action when


\footnote{184. \textit{See} United States v. Goodwin, 770 F.2d 631, 637 (7th Cir. 1985) (describing as “disturbing” a colloquy between judge and defendant, after which defendant testified against advice of attorney), \textit{cert. denied}, 474 U.S. 1084 (1986); United States v. Watkins, 519 F.2d 294, 297 (D.C. Cir. 1975) (judge’s remarks placed unacceptable burden on appellant’s fifth amendment privilege to remain silent); United States v. Von Roeder, 435 F.2d 1004, 1009 (10th Cir.) (noting possibility of judicial coercion in this area), \textit{cert. denied}, 403 U.S. 934, \textit{vacated sub nom.} Schreiner v. United States, 404 U.S. 67 (1971).}

\footnote{185. \textit{See} United States v. Edwards, 897 F.2d 449 (9th Cir. 1990); United States v. Martinez, 883 F.2d 750 (9th Cir. 1989) (the trial judge’s advising the defendant of his right to testify could influence the defendant to waive his right not to testify); Siciliano v. Vose, 834 F.2d 29, 30 (1st Cir. 1987) (“To require the trial court to follow a special procedure, . . . could inappropriately influence the defendant to waive his constitutional right \textit{not} to testify, thus threatening the exercise of [the right to testify].”); United States v. Wagner, 834 F.2d 1474, 1483 (9th Cir. 1987) (judge’s involvement directly with defendant might raise fifth and sixth amendment concerns); United States v. Bernloehr, 833 F.2d 749, 752 n.3 (8th Cir. 1987) (“danger of improper comment”); United States v. Ives, 504 F.2d 935, 940 (9th Cir. 1974) (“[I]t would introduce possible error . . . to require that the court . . . ask the defendant whether he wishes to testify.”), \textit{vacated}, 421 U.S. 944 (1975), \textit{on remand}, 547 F.2d 1100 (9th Cir. 1976) (reinstating portions of original opinion), \textit{cert. denied}, 429 U.S. 1103 (1977); Schertz v. State, 380 N.W.2d 404, 415 (Iowa 1985) (trial court should not be involved in defendant’s decision to testify); Commonwealth v. Waters, 399 Mass. 708, 506 N.E.2d 859, 865 (1987) (where judge urges defendant to exercise right to testify, judge might appear to be urging defendant to waive right not to testify).}
the judge advises the defendant concerning either the waiver of the right to testify or the waiver of the privilege against self-incrimination. 186

One would assume from these opinions that a system of on-the-record waiver must, a fortiori, require substantial judicial involvement. One court, in refusing to adopt a Curtis system of on-the-record waiver, explicitly stated that "[s]uch a requirement would necessarily entail the trial court's advising defendant of his right to testify." 187 Yet even the Curtis opinion does not so hold. Significantly, what Curtis does say about alternative ways of obtaining an on-the-record waiver may hold the key to solving the dilemma faced by those courts which understand the utility of an on-the-record waiver of the right to testify, but are wary of involving the trial judge in such a sensitive constitutional area.

VIII. A Possible Solution: On-the-Record Waiver Without Judicial Involvement

In Curtis, the Colorado Supreme Court described in some detail how a waiver should be obtained from a defendant who does not choose to testify. 188 Courts in other jurisdictions have heatedly debated the propriety of having a trial judge obtain a waiver in the manner suggested by Curtis. 189 Yet it does not appear that any court has noticed footnote 13 of the Curtis opinion and the accompanying text. 190 There, the court directly confronted the concern, voiced by the Wisconsin Supreme Court in State v. Albright, 191 that injecting the trial judge into the defendant's decision to testify was fraught with difficulty. Curtis rejected Albright's concerns, holding that the trial court "generally" will advise the defendant properly. 192 Yet Curtis went on to say: "The trial judge could discharge this duty by permitting defense counsel to question the defendant on-the-record in the presence of the judge. There may be situations where it would be preferable to determine the defendant's wishes in that manner." 193 Curtis makes no attempt to describe what these "situations" might be. It does not appear that any court has no-

189. See supra notes 160 & 184-85.
191. 96 Wis. 2d 122, 291 N.W.2d 487 (1980).
192. See Curtis, 681 P.2d at 515 n.13.
193. Id. at 515.
ticed this important suggestion in *Curtis* that it might be possible to obtain an on-the-record waiver of the right to testify while avoiding judicial involvement in the procedure. Yet such a procedure would seem ideal for those courts which desire an on-the-record waiver but wish to exclude the trial judge.

Obtaining a waiver through a procedure which circumvents the trial judge would not seem to raise any constitutional problem *per se*, even if the right is considered personal to the defendant. For example, a guilty plea is valid only if the defendant tenders it voluntarily, intelligently, and understandingly. Yet the Supreme Court has refused to require on constitutional grounds any specific warnings from the trial judge; rather, the focus is on whether the plea itself is voluntary and intelligent. Likewise, it is not constitutionally required that the trial judge and the defendant engage in a colloquy in order for a jury waiver to be found valid. There is no reason, then, why a colloquy between judge and defendant concerning the defendant’s right to testify should be required as a constitutional matter even if the right to testify is considered a fundamental personal right.

Moreover, placing the onus of establishing the waiver on the defense solves another problem that arises when courts confront this issue: “When then ought the colloquy between judge and defendant occur? The judge cannot know that the defendant has not testified until the defense has rested. That is surely an awkward time to engage in a discussion with the defendant which might lead to a rupture with defense counsel . . . .” In a system in which the defense takes the ini-

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196. See United States v. Cochran, 770 F.2d 850 (9th Cir. 1985); United States v. Martin, 704 F.2d 267 (6th Cir. 1983); United States v. Scott, 583 F.2d 362 (7th Cir. 1978).

A lawyer’s duty should be no different in those situations in which she believes the defendant may wish to lie on the witness stand. In such a situation, the lawyer must carefully distinguish between “right to testify” issues and sixth amendment issues.

Certainly the Supreme Court has made it clear that the right to testify does not include the right to testify falsely. Nix v. Whiteside, 475 U.S. 157, 173 (1986) (citing Harris v. New York, 401 U.S. 222 (1971) and United States v. Havens, 446 U.S. 620 (1980)). Yet there is no authority suggesting that the fear of a defendant’s possible perjury should ever permit an attorney to refuse to inform the defendant that he indeed has the right to testify. Rather, from the attorney’s perspective, the perjurious defendant raises *sixth amendment* concerns.

The Supreme Court has suggested that “the attorney’s first duty when confronted with a
tiative, this problem is avoided. It is up to the defendant and his attorney to decide when they wish to place the waiver of the right to testify into the record.

The courts which have rejected the Curtis system of on-the-record waiver have simply assumed that the trial judge must take the leading part in such a procedure. It is time, then, to consider seriously Curtis's suggestion of an alternative which bypasses the trial judge.

IX. INSURING A PROPER WAIVER OF THE DEFENDANT'S RIGHT TO TESTIFY: AN ALTERNATIVE TO CURTIS

The alternative system would be comprised of the following:

1. At every criminal trial, the defendant must either a) testify on his own behalf or b) waive his right to testify on the record.

2. Consistent with A.B.A. Standards, it is the responsibility of the defense attorney to tell the defendant a) that the defendant has the right to testify and b) that, although the defense attorney will offer advice on this matter, the ultimate decision of whether to testify rests with the defendant.

3. If, after weighing the advice of counsel, the defendant decides not to testify, it is the responsibility of the defense attorney to request a hearing outside the presence of the jury at some point during the defense case.

4. At this hearing, through questions posed by the defense attorney, the defendant should affirm that a) he understands he has the right to testify; b) that he understands that no one can prevent him from exercising this right; c) that if he testifies the prosecutor will have the opportunity to cross-examine him; and, if applicable, d) that there is a possibility that his testimony might be impeached with prior criminal convictions. His waiver should then be made orally as part of the trial record.

5. A written waiver should also be made part of the trial record.

proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct." Nix, 475 U.S. at 169 (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983)). The decision to commit perjury implicates sixth amendment concerns, since "the right to counsel includes no right to have a lawyer who will cooperate with planned perjury." Id. at 173. In such a situation, the lawyer is allowed to withdraw from the case. Id.

Thus, a defendant has no right to lie on the stand; moreover, such behavior may result in his losing the assistance of his counsel. Yet these issues are totally separate from the idea that the defendant must know he has the right to testify and must ultimately decide whether to exercise that right.

198. See CRIMINAL JUSTICE, supra note 102.
6. As a general rule, the prosecution and the trial judge should play no role in the proceedings. However, the trial judge may pose questions to the defendant and/or the defense counsel if the judge, in her discretion, believes that there is evidence that the defendant is not making a knowing and intelligent waiver of the right to testify.

CONCLUSION

Rock v. Arkansas promises to spawn even more appeals from non-testifying defendants alleging infringement of the right to testify. It is one thing for a jurisdiction to reject a Curtis approach with its heavy reliance on the trial judge; it is quite another for a jurisdiction to utilize no system at all. Relying on a defendant’s “contemporaneous request” is simply not consonant with the gravity of this right, which may very well be construed as both personal and fundamental. The approach suggested in this Article attempts to guarantee a knowing and intelligent waiver from the defendant, to create an appellate record which discourages post-conviction challenges from the non-testifying defendant, and to meet the objections of those jurisdictions which fear that the trial judge’s participation in the decision might be coercive. It is imperative that American jurisdictions understand the significance of Rock and institute a mechanism for protecting a defendant’s constitutional right to testify.