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## A Criminal Defendant's Right to Testify: Constitutional Implications of Presuming Waiver from a Silent Record

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# A CRIMINAL DEFENDANT'S RIGHT TO TESTIFY: CONSTITUTIONAL IMPLICATIONS OF PRESUMING WAIVER FROM A SILENT RECORD

## ABSTRACT

The area of criminal law is constantly being refined and developed. At trial, criminal defendants are often faced with the potential reality of waiving their most basic fundamental rights. As a result, careful consideration is necessary when analyzing a waiver of these rights. In *Rock v. Arkansas*, the Supreme Court held that the Fifth, Sixth, and Fourteenth Amendments guaranteed a criminal defendant the right to testify at trial on his own behalf. But where courts require criminal defendants to affirmatively waive most of their constitutionally guaranteed rights, such as the right to an attorney or the right to a jury trial, most circuit courts, as well as the state of North Dakota, do not require criminal defendants to affirmatively waive their constitutionally guaranteed right to testify at their own criminal trial. Instead, courts presume a waiver has occurred when, at the trial's conclusion, the defendant's attorney has rested the case without the defendant having testified. This Article discusses the dangers of this presumption, including an analysis of the evolution of a criminal defendant's fundamental constitutional rights. When freedom is at stake, it is important for criminal defendants to receive their full day in court. In light of the vulnerable position they find themselves, it is imperative for criminal defendants to retain the ability to fully exercise their constitutionally guaranteed rights.

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I. INTRODUCTION

Criminal law is inherently interesting. People are fascinated with the facts underlying criminal cases. The constitutional protections afforded to criminal defendants, however, often take a backseat to the details surrounding the criminal act. Many criminal defendants are not aware of our most basic rights in the criminal setting, such as the right to an attorney or the right to a jury trial.<sup>1</sup> These basic constitutional rights are of the

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1. See U.S. CONST. amend. VI.

utmost importance considering that a person's freedom is in jeopardy should they be found guilty. Because of the importance of defendants' rights in the criminal setting, this is an area of law that is constantly evolving and being perpetually developed and refined.<sup>2</sup>

Unlike the right to a jury trial or the right to an attorney, the criminal defendant's right to testify is not explicitly mentioned anywhere in the Constitution or its Amendments. In *Rock v. Arkansas*,<sup>3</sup> however, the Supreme Court held that the Fourteenth Amendment guaranteed a criminal defendant the right to testify at trial on his own behalf, holding "[t]here is no justification today for a rule that denies an accused the opportunity to offer his own testimony."<sup>4</sup> Since this decision, courts have disagreed in interpreting how a defendant may waive this constitutionally protected right.<sup>5</sup> Although courts agree that in order to waive the right to testify, a criminal defendant must do so knowingly, voluntarily, and intelligently,<sup>6</sup> courts disagree on how to apply this standard. Today, most courts hold that a defendant's right to testify is waived if the defendant has not testified by the end of trial.<sup>7</sup> If the defendant himself does not make an objection on the record, it is presumed that he has waived that right.<sup>8</sup> In other words, courts simply assume a defendant has waived his right to testify absent any sort of record or confirmation that the defendant actually wishes to waive this very important right.

There are several problems with this approach. First, defendants do not usually address the court directly. Rather, it is their attorney who does so. If a defendant speaks, he often faces swift reprimand from the court.<sup>9</sup> Second, defendants and their attorneys also often disagree on whether it would be beneficial for the defendant to testify on his own behalf, and it is

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2. See, e.g., *United States v. Alleyne*, 133 S. Ct. 2151, 2151 (2013) (holding that any fact that increases the mandatory minimum sentence for a crime is an actual element of the crime and must be proved to the jury beyond a reasonable doubt, overruling *Harris v. United States*, 536 U.S. 545 (2002)).

3. 483 U.S. 44 (1987).

4. *Id.* at 49-53.

5. See *United States v. Teague*, 908 F.2d 752 (11th Cir. 1990), *vacated*, 932 F.2d 899 (11th Cir. 1991); *Galowski v. Murphy*, 891 F.2d 629 (7th Cir. 1989). *But see* *United States v. Bernloehr*, 833 F.2d 749 (8th Cir. 1987); *United States v. Martinez*, 883 F.2d 750 (9th Cir. 1989), *vacated*, 928 F.2d 1470 (9th Cir. 1991).

6. See *Martinez*, 883 F.2d at 756 (requiring a waiver of the right to testify to be "intentional and to be intentional must be known to the one who gives it up"); *Teague*, 908 F.2d at 759 (waiver must be "knowing, voluntary[,] and intelligent"); *United States v. Pino-Noriega*, 189 F.3d 1089, 1094 (9th Cir. 1999) (waiver of the right must be "knowing and intentional").

7. See *Martinez*, 883 F.2d at 760; *Bernloehr*, 833 F.2d at 751-52; *Pino-Noriega*, 189 F.3d at 1094-95.

8. *Pino-Noriega*, 189 F.2d at 1094-95.

9. *Martinez*, 883 F.2d at 770 (Reinhardt, J., dissenting).

obvious that attorneys are in a position of power over the defendants, as they speak directly to the court and are more knowledgeable in criminal law and procedure. Third, because attorneys have the responsibility to advise the defendant of his right to testify, whether or not it is wise to do so, as well as the strategic implications of that decision,<sup>10</sup> attorneys may pressure and advise their clients not to testify even when the defendant may desperately wish to do so. Because of criminal defendants' general lack of knowledge of the law and the vulnerable position they find themselves in at their own criminal trial, it is irresponsible for courts to assume defendants have waived their constitutionally guaranteed right to testify without making an affirmative record of him or her doing so. This is especially true in light of the fact that an affirmative record must be made of defendants waiving other constitutionally guaranteed rights, such as the right to an attorney and the right to a jury trial.<sup>11</sup>

This Note will examine several of these issues. It will examine the problems associated with presuming a waiver of the right to testify from a silent record. It will discuss several constitutional rights guaranteed to criminal defendants, such as the right to effective assistance of counsel and the right to a jury trial. It also examines how courts approach the waiver of these constitutional rights versus the current approach of assuming a defendant has waived the right to testify when the record is silent on the issue.

After a historical and procedural analysis of these constitutional rights in the criminal setting, this Note proposes a simple solution to the inconsistencies surrounding the waiver of a defendant's constitutional right to testify. Specifically, a judge may simply ask the defendant, outside the presence of the jury, if he or she wishes to testify. An affirmative record of this interaction between the defendant and the court ultimately may safeguard this fundamental, constitutionally guaranteed right and facilitate effective communication in the attorney-client relationship. Courtroom efficiency would also benefit, as there will no longer be doubt as to whether a defendant was denied his right to testify, thereby eliminating the grounds for an appeal on the issue. In order to fully understand the many constitutional rights guaranteed to criminal defendants, a comparison of these rights and how they have evolved is an important starting point.

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10. *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir. 1992).

11. *See Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *Carnley v. Cochran*, 369 U.S. 506, 512-13 (1962).

## II. THE DEFENDANT’S FUNDAMENTAL CONSTITUTIONAL RIGHTS IN THE CRIMINAL SETTING

This section explores, compares, and contrasts several rights guaranteed to criminal defendants through the Constitution and its Amendments. The right to an attorney and the right to a jury trial, among others, are found within the Sixth Amendment, while the right to testify is not. The right to testify, however, is firmly rooted in the Fifth, Sixth, and Fourteenth Amendments and is arguably the most important of these rights, as evidenced by the language used in several United States Supreme Court and circuit court decisions.<sup>12</sup>

### A. THE RIGHT TO COUNSEL

The Sixth Amendment to the Constitution states:

[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.<sup>13</sup>

The language granting a defendant the right to an attorney is explicit in the Sixth Amendment. In *Miranda v. Arizona*,<sup>14</sup> Chief Justice Warren held that the “precious” right to an attorney was “fixed in our Constitution only after centuries of persecution and struggle.”<sup>15</sup> And in the words of Chief Justice Marshall, “[our rights] were secured ‘for ages to come, and designed to approach immortality as nearly as human institutions can approach it[.]’”<sup>16</sup>

In *Johnson v. Zerbst*,<sup>17</sup> the Supreme Court set forth the standard to be used in measuring a criminal defendant’s waiver of his or her constitutionally guaranteed rights. “A waiver is . . . an intentional relinquishment or abandonment of a known right or privilege.”<sup>18</sup> Further

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12. See, e.g., *Rock v. Arkansas*, 483 U.S. 44, 52 (1987) (“[A]n accused’s right to present his own version of events in his own words” is “[e]ven more fundamental to a personal defense than the right of self-representation.”) (emphasis added).

13. U.S. CONST. amend. VI.

14. 384 U.S. 436 (1966).

15. *Id.* at 442.

16. *Id.* (quoting *Cohens v. Commonwealth of Virginia*, 19 U.S. 264, 387 (1821)).

17. 304 U.S. 458 (1938).

18. *Id.* at 464.

and specifically regarding the right to counsel, *Faretta v. California*<sup>19</sup> held that a defendant must be voluntarily exercising his own free will and must knowingly and intelligently relinquish the right to counsel.<sup>20</sup> Other Supreme Court cases have reiterated this sentiment.<sup>21</sup>

The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. Such rights rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. Evidence and truth are, however, of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in court. But the Constitution does not force a lawyer upon a defendant. A defendant may waive the Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open.<sup>22</sup>

It is clear that a criminal defendant's right to counsel is extremely important, and the Supreme Court has noted it will not be taken for granted. Due to the defendant's right to counsel being of such importance, the Supreme Court has held that a waiver of the constitutionally guaranteed right to counsel cannot be implied from a silent record.<sup>23</sup> "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."<sup>24</sup> Much like this fundamental right to counsel, the right to a trial by jury has also been found to be of significant importance in the eyes of the Supreme Court, and it also requires an affirmative, on-record waiver in order to be relinquished.<sup>25</sup>

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19. 422 U.S. 806 (1975).

20. *Id.* at 835.

21. See *Carnley v. Cochran*, 369 U.S. 506, 512-13 (1962) (holding that a defendant must intelligently and understandingly waive the fundamental right to counsel); *Adams v. United States ex rel McCann*, 317 U.S. 269, 277 (1942) (holding that a defendant must be competent to make an intelligent, informed choice of whether to waive a fundamental right).

22. *Adams*, 317 U.S. at 279.

23. See *Carnley*, 369 U.S. at 516 (holding that "[p]resuming waiver from a silent record is impermissible.").

24. *Id.*

25. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

## B. THE RIGHT TO A JURY TRIAL

Like the fundamental right to be assisted by counsel, the right to a jury trial is also explicit in the language of the Sixth Amendment.<sup>26</sup> *Boykin v. Alabama*<sup>27</sup> also held that, much like the fundamental right of assistance of counsel, the right to a jury trial cannot be presumed from a silent record.<sup>28</sup>

For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards.<sup>29</sup>

*Boykin* also noted that several constitutional provisions are implicated if a defendant seeks to waive the right to a jury trial and enter a guilty plea.<sup>30</sup> First, the Fifth Amendment protection against compulsory self-incrimination is implicated when a defendant chooses to plead guilty.<sup>31</sup> Along with the guarantee of the right to a jury trial, the Sixth Amendment guarantee of the right to confront one's accusers is also implicated.<sup>32</sup> Further, whether an accused has waived his right to a trial by jury is dependent upon the unique facts and circumstances of each case.<sup>33</sup>

*Boykin* then explicitly held that a waiver of all of these fundamental rights cannot be presumed from a silent record.<sup>34</sup> When a defendant's life and freedom are at stake, courts must be as careful as possible in determining whether a waiver of fundamental constitutional rights has taken place, and courts must make sure a defendant has a full understanding of the consequences of his guilty plea.<sup>35</sup> When a judge does these things, an adequate record is then preserved, the subsequent conviction is now further insulated from burdensome appeals and attacks,<sup>36</sup> and the record of the conviction is no longer ambiguous. As *Boykin* stated, making an

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26. U.S. CONST. amend. VI.

27. 395 U.S. 238 (1969).

28. *Id.* at 242.

29. *Id.* at 242-43 (internal citation omitted).

30. *Id.* at 243.

31. *Id.*

32. *Id.*

33. *Adams v. United States ex rel McCann*, 317 U.S. 269, 278 (1942); *see also Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). (determining a waiver of a fundamental right "depend[s] . . . upon the particular facts and circumstances surrounding the case").

34. *Boykin*, 395 U.S. at 243.

35. *Id.* at 243-44.

36. *Id.*



affirmative record of such a waiver “forestalls the spin-off of collateral proceedings that seek to probe murky memories.”<sup>37</sup>

Both the right to counsel and the right to a jury trial are constitutionally guaranteed rights. These fundamental rights trigger many constitutional implications and are protected by several Amendments.<sup>38</sup> The criminal defendant’s right to testify on his or her own behalf at his or her own trial is no different.

### C. CRIMINAL DEFENDANTS’ RIGHT TO TESTIFY ON THEIR OWN BEHALF

The right to testify was not always a guaranteed right. It was not until recently that the Supreme Court officially recognized that the right of a criminal defendant to testify on his or her own behalf was fundamental and protected by the Fifth, Sixth, and Fourteenth Amendments.<sup>39</sup> In 1864, Maine became the first state to adopt a statute establishing criminal defendants as competent to offer testimony, and other states followed suit.<sup>40</sup> But the criminal defendant’s right to testify did not become constitutionally guaranteed until 1987.<sup>41</sup> It was only through statute that the federal government granted the right of criminal defendants to testify.<sup>42</sup>

Before *Rock v. Arkansas* held the right to testify to be constitutionally guaranteed, the First Circuit, in *United States v. Systems Architects, Inc.*,<sup>43</sup> ruled on the statutory grant of the right to testify. *Systems Architects* held that defendants were misguided in asserting that the court had an affirmative duty to confirm that defendants had knowingly and intelligently waived their right to testify.<sup>44</sup> Because the right to testify was not constitutionally guaranteed at the time this decision was rendered, the

37. *Id.*

38. *See supra* Parts II.A-B.

39. *See Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987).

40. *See* Act of Mar. 25, 1864, ch. 280, 1864 ME. LAWS 214 (codified as amended at ME. REV. STAT. tit. 15, § 1315 (2011)).

41. *See Rock*, 483 U.S. at 49-53.

42. *See* 18 U.S.C. § 3481 (1982)

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, *at his own request*, be a competent witness. His failure to make such request shall not create any presumption against him.

(emphasis added).

43. 757 F.2d 373 (1st Cir. 1985).

44. *Id.* at 375.

*Systems Architects* court based its holding and reasoning on the statutory grant of the right to testify.<sup>45</sup>

In rendering its decision, the First Circuit relied heavily on the actual statutory language, which specifically stated that the defendant may testify “at his own request.”<sup>46</sup> This language led the court to hold that the defendant “must act affirmatively” at the time of trial to preserve his right to testify.<sup>47</sup> The First Circuit’s statement that “[t]here is no constitutional or statutory mandate that a trial court inquire further into a defendant’s decision to not testify *under the facts here*” further limited its holding.<sup>48</sup> Because *Systems Architects* was decided before the right to testify was deemed to be fundamental and constitutionally guaranteed, the decision only gave a cursory glance at the possible constitutional implications regarding a waiver of this right, stating that the “due process clause of the Fifth Amendment may be understood to grant to the accused the right to testify[.]”<sup>49</sup>

It was not until two years later that the landmark case of *Rock v. Arkansas* held that criminal defendants have a fundamental and constitutionally guaranteed right to testify on their own behalf.<sup>50</sup> In *Rock*, the defendant was convicted of manslaughter, and the Arkansas Supreme Court affirmed this conviction.<sup>51</sup> The defendant then appealed to the Supreme Court, which granted certiorari and reversed and remanded the case,<sup>52</sup> holding that the Arkansas rule excluding the defendant’s hypnotically refreshed testimony impermissibly impinged on the defendant’s right to testify on her own behalf.<sup>53</sup>

*Rock* noted that the right to testify is derived from the Fifth, Sixth, and Fourteenth Amendments.<sup>54</sup> In recognizing that criminal defendants have a constitutionally guaranteed right to testify, as opposed to a statutorily guaranteed right to testify, the Supreme Court noted that the right to testify is a “necessary ingredient[] of the Fourteenth Amendment’s guarantee that no one shall be deprived of liberty without due process of law.”<sup>55</sup> The right

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45. *Id.*; see also *supra* note 42.

46. *Sys. Architects*, 757 F.2d at 375 (emphasizing the statutory language).

47. *Id.*

48. *Id.* at 376 (emphasis added).

49. *Id.* at 375.

50. 483 U.S. at 49-53.

51. *Id.* at 44.

52. *Id.*

53. *Id.*

54. See *infra* notes 55-63 and accompanying text.

55. *Rock*, 483 U.S. at 51.

to testify is a right that is “essential to due process of law in a fair adversary process.”<sup>56</sup>

This right is also grounded in the Compulsory Process Clause of the Sixth Amendment, which grants an accused the right to call witnesses whose testimony is material and favorable to his defense.<sup>57</sup> Simply put, the Sixth Amendment “grants to the accused personally the right to make his defense.”<sup>58</sup> Further, the right to testify is “a necessary corollary to the Fifth Amendment’s guarantee against compelled testimony.”<sup>59</sup> It is also exceedingly important to note that “an accused’s right to present his own version of events in his own words” is “[e]ven more fundamental to a personal defense than the right of self-representation[.]”<sup>60</sup>

Furthermore, *Rock* also noted that the Supreme Court has “[o]n numerous occasions . . . proceeded on the premise that the right to testify on one’s own behalf in defense to a criminal charge is a *fundamental constitutional right*.”<sup>61</sup> Citing *Harris v. New York*,<sup>62</sup> the Court noted that “[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so.”<sup>63</sup> *Rock* articulated the constitutional foundations for a criminal defendant’s right to testify. Today, however, courts are divided in interpreting how a defendant waives this constitutional right.

### III. HOW COURTS HAVE INTERPRETED A CRIMINAL DEFENDANT’S RIGHT TO TESTIFY

In order to waive the constitutional right to counsel, there must be an affirmative record made showing that the defendant understood his right to counsel, and that he knowingly, intelligently, and voluntarily waived that right.<sup>64</sup> Put another way, a defendant’s waiver of the right to counsel

56. *Id.* (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)).

57. *Id.* at 52.

58. *Id.*

59. *Id.*; see also U.S. CONST. amend. V. The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

*Id.* (emphasis added).

60. *Rock*, 483 U.S. at 52 (emphasis added).

61. *Id.* at 53 n.10 (emphasis added).

62. 401 U.S. 222 (1975).

63. *Rock*, 483 U.S. at 52-53 (quoting *Harris*, 401 U.S. at 225).

64. See *supra* Part II.A.

cannot be presumed from a silent record.<sup>65</sup> The same is also true when a defendant wishes to plead guilty and waive his right to a jury trial.<sup>66</sup> But most courts do not follow this line of reasoning when it comes to a defendant waiving right to testify.<sup>67</sup> Instead, most courts hold that if the defendant himself does not make an objection on the record, it is presumed that he has waived his right to testify.<sup>68</sup> Even though a defendant has the “ultimate authority to make certain fundamental decisions regarding the case,” including whether or not to testify,<sup>69</sup> most courts simply make the assumption that a defendant has waived his constitutional right to testify absent any sort of record or confirmation that the defendant actually wished to waive this very important right.

#### A. THE EIGHTH CIRCUIT

In *United States v. Bernloehr*,<sup>70</sup> the Eighth Circuit Court of Appeals held that a criminal defendant’s waiver of his right to testify, like his waiver of other constitutional rights, should be made voluntarily and knowingly.<sup>71</sup> The Eighth Circuit, however, also held that an accused “must act affirmatively” when his defense counsel rests its case without calling the defendant to the stand.<sup>72</sup> Interestingly, *Bernloehr* was decided the same year as *Rock*.<sup>73</sup> In fact, in holding that an accused must affirmatively object if he would like to testify, the Eighth Circuit erroneously relied on *United States v. Systems Architects, Inc.*<sup>74</sup> which, as previously discussed, was decided two years before *Rock v. Arkansas* held that the right to testify was a fundamental right guaranteed by the Constitution.<sup>75</sup> *Systems Architects*, as well as the other cases cited by the Eighth Circuit in its holding,<sup>76</sup> were all cases decided based on the fact that the right to testify was statutorily,

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65. *Id.*

66. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *see also* Part II.B.

67. *See supra* notes 7-8 and accompanying text

68. *See supra* note 7.

69. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983).

70. 833 F.2d 749 (8th Cir. 1987).

71. *Id.* at 751.

72. *Id.* at 751-52 (quoting *United States v. Systems Architects, Inc.*, 757 F.2d 373, 375 (1st Cir. 1985)) (other internal citations omitted).

73. *See supra* notes 3, 5.

74. 757 F.2d 373 (1st Cir. 1985).

75. *See Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987).

76. *Bernloehr*, 833 F.2d at 751-52 (citing *United States v. Sys. Architects, Inc.*, 757 F.2d 373, 375 (1st Cir. 1985); *United States v. Janoe*, 720 F.2d 1156, 1161 n.9 (10th Cir. 1983) (right to testify not denied where, *inter alia*, “defendant made no objection to his attorney’s statements that defendant would not testify and made no request to testify”); 18 U.S.C. § 3481 (1982) (“the person charged shall, *at his own request*, be a competent witness”) (emphasis added)).

rather than constitutionally, guaranteed.<sup>77</sup> In support of its holding, *Bernloehr* even cited to 18 U.S.C. § 3481, the statutory grant of the right to testify, which states that the defendant must act affirmatively if he wishes to testify but is being prevented from doing so.<sup>78</sup> *Bernloehr*, although based on an irrelevant law, still stands today, as it has not been overturned. In fact, *Bernloehr's* language is cited to by other circuit courts in holdings echoing the Eighth Circuit's language.<sup>79</sup>

## B. THE NINTH CIRCUIT

In *United States v. Martinez*,<sup>80</sup> the Ninth Circuit Court of Appeals held that a defendant's right to testify may be waived by his conduct.<sup>81</sup> Again relying on *Bernloehr's* incorrect holding, the Ninth Circuit held that "courts have no affirmative duty . . . to address a silent defendant and inquire whether he knowingly and intelligently waives the right to testify."<sup>82</sup> In *United States v. Pino-Noriega*,<sup>83</sup> the Ninth Circuit further elaborated, stating that a defendant who wants to reject his attorney's advice and take the stand may do so by insisting on testifying, speaking to the court, or discharging his lawyer.<sup>84</sup> The court also stated that when a defendant remains silent in the face of his attorney's decision not to call him as a witness, he waives the right to testify.<sup>85</sup>

In a rather powerful dissent to *Martinez*, Judge Reinhardt found this holding incorrect. Reinhardt noted that it is unwise to require a defendant to "ignore admonishments of counsel, interrupt the trial proceedings, and interject himself, uninvited, into the fray."<sup>86</sup> He further stated that defendants "are trained to be seen and not heard. Court dictates are clear and authoritative; defendants who speak without invitation are not only silenced but threatened with the judicial contempt power."<sup>87</sup> Judge Reinhardt was extremely dissatisfied with the majority holding, and noted its inconsistencies, stating that "[t]his court unanimously concludes that the right to testify is a fundamental right that belongs to the defendant. By

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77. *See id.*

78. *See supra* note 46; *see also supra* note 75.

79. *See infra* Parts III.B-D.

80. 883 F.2d 750 (9th Cir. 1989).

81. *Id.* at 759.

82. *Id.* at 760 (citing *United States v. Bernloehr*, 833 F.2d 749, 751-52 (8th Cir. 1987) (internal citations omitted)).

83. 189 F.3d 1089 (9th Cir. 1999).

84. *Id.* at 1095.

85. *Id.* (internal citations omitted).

86. *Martinez*, 883 F.2d at 770 (Reinhardt, J., dissenting).

87. *Id.*

definition, the majority concedes that only the defendant, himself, may make the decision, and that he does not cede it to his attorney by electing to be represented by counsel.”<sup>88</sup> However, “what the majority giveth with one hand, it taketh away with the other.”<sup>89</sup> Judge Reinhardt’s statement referred to the fact that although the decision on whether or not to testify belongs with only the defendant himself, the defendant’s attorney in *Martinez* explicitly testified that he made the decision that his defendant would not take the stand.<sup>90</sup>

### C. THE ELEVENTH CIRCUIT

Contrary to the Ninth Circuit, the Eleventh Circuit Court of Appeals, in *United States v. Teague*,<sup>91</sup> held that a defendant’s right to testify is fundamental and personal to the defendant himself, such that it may not be effectively waived by counsel against the defendant’s will, and that the defendant in *Teague* was prejudiced by the denial of this right to testify, thus requiring a new trial.<sup>92</sup> The Eleventh Circuit stated that there are certain tactical decisions made by defense attorneys over the course of their representation of defendants that “implicitly involve the waiver of constitutional rights” but do not require the defendant’s consent.<sup>93</sup> But “[w]here an inherently personal right of fundamental importance is involved, the defendant’s [personal] consent is required.”<sup>94</sup> *Teague* noted several inherently personal rights with such fundamental importance that only the defendant, not counsel, may waive them, including the right to plead guilty,<sup>95</sup> the right to a jury trial,<sup>96</sup> the right to counsel,<sup>97</sup> and the right to an appeal.<sup>98</sup> The Ninth Circuit held that a defendant’s right to testify is

88. *Id.* at 762.

89. *Id.*

90. *Id.* at 761 (citing to *Martinez*’s attorney’s testimony during post-trial proceedings, Judge Reinhardt notes that;

Bobby Martinez sought to testify in his own defense. He repeatedly asked his attorney to put him on the stand, but he was refused the opportunity to testify in absolute terms. “I told Mr. Martinez that I was not going to call him as a witness in his defense. He expressed to me the desire to testify; and I said no way, that I thought it was suicidal for him to testify, and it would be an error in judgment; and that was it. I just made the decision he was not going to testify, I refused to call him, and that was the way it went down.”

91. 908 F.2d 752 (11th Cir. 1990), *vacated*, 932 F.2d 899 (11th Cir. 1991).

92. *Id.* at 752.

93. *Id.* at 758 (citing *United States v. Joshi*, 896 F.2d 1303, 1307 (11th Cir. 1990)).

94. *Id.*

95. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

96. *Adams v. United States ex rel McCann*, 317 U.S. 269, 278 (1942).

97. *Faretta v. California*, 422 U.S. 806, 835 (1975).

98. *Faye v. Noia*, 372 U.S. 391, 439 (1963).

no different, citing *Rock*'s holding in that the right to testify is rooted in the Fifth, Sixth, and Fourteenth Amendments.<sup>99</sup>

*Teague* noted that *Rock*'s holding states that Sixth Amendment granted the accused "personally" the right to make his defense.<sup>100</sup> *Rock*'s holding, in turn, cited *Faretta v. California*,<sup>101</sup> which held that the right of the defendant to conduct his own defense is the defendant's own choice to make.<sup>102</sup> The defendant's choice "must be honored out of that respect for the individual which is the lifeblood of the law."<sup>103</sup> *Teague* then reasoned that implicit in *Faretta*'s holding is the notion that when the government brings an individual to face criminal charges, "that respect for the individual which is the lifeblood of the law" requires that the defendant be allowed, if he so desires, to speak directly to his accusers, at which point the court and jury will decide his fate.<sup>104</sup>

The fact that a defendant has failed to speak up, out of turn, and object on the record was "of little, if any, probative value in determining whether the decision that the defendant would not testify was the defendant's own decision."<sup>105</sup> In support, the Eleventh Circuit offered a logical and compelling argument, stating:

In affording a criminal defendant a fundamental right to counsel, the Constitution recognizes that criminal defendants are often unschooled in the intricacies of our criminal justice system, and that without the assistance of counsel, will likely suffer an overwhelming disadvantage in presenting their defense. The defendant relies on his counsel to understand the process of the trial itself and to recognize the proper time for the defendant to be called as a witness. The defendant may not realize until after the jury has retired to deliberate that the proper time for his testimony has passed. Furthermore, once a defendant elects to take advantage of his right to counsel, he is told that all further communications with the court and the prosecutor should be made through his attorney. Aside from any testimony he may give at pre-trial hearings or during trial, a defendant is not permitted to speak directly to the court. In fact, in the interests of decorum and

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99. *Teague*, 908 F.2d at 758; *see also* *Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987).

100. *Teague*, 908 F.2d at 758.

101. 422 U.S. 806 (1975).

102. *Teague*, 908 F.2d at 759; *see also* *Rock*, 483 U.S. at 51; *Faretta*, 422 U.S. at 834.

103. *Faretta*, 422 U.S. at 834 (citation omitted).

104. *Teague*, 908 F.2d at 759 (quoting *Faretta*, 422 U.S. at 834).

105. *Id.* (citing *Foster v. Wainwright*, 686 F.2d 1382 (11th Cir. 1982) (holding that a defendant had forfeited his right to be present at trial by interrupting proceedings after warning by judge, even though defendant's behavior was neither abusive nor violent)).

the smooth administration of justice, defendants who speak out of turn at their own trials are quickly reprimanded, and sometimes banned from the courtroom, by the court. It would be anomalous to consider the right to counsel of fundamental importance because of the common lack of understanding of the trial process by defendants, and to require a defendant to rely on his attorney to be his sole spokesperson in the courtroom, while at the same time holding that by failing to speak out at the proper time a defendant has made a knowing, voluntary and intelligent waiver of a personal right of fundamental importance such as the right to testify.<sup>106</sup>

*Teague* makes a sound argument. Disappointingly, however, this holding was vacated and the Eleventh Circuit granted a rehearing en banc.<sup>107</sup> The court then filed another opinion affirming the defendant's fundamental right to testify, although framing the issue (defense counsel's alleged refusal to let *Teague* testify) as one of ineffective assistance of counsel.<sup>108</sup> Alaska's Supreme Court, however, found this erroneous, and for good reason. Characterizing the issue as one of ineffective assistance of counsel "does not provide the proper framework for reviewing the constitutional violation at issue."<sup>109</sup> The defendant's personal decision regarding whether or not to testify implicates a defendant's Fifth, Sixth, and Fourteenth Amendment rights, not merely the Sixth Amendment right to effective assistance of counsel.<sup>110</sup>

#### D. NORTH DAKOTA'S POSITION

The Supreme Court of North Dakota has also weighed in on the matter several times. Unfortunately, North Dakota's decisions, much like the Ninth Circuit's, rely on the incorrect *Bernloehr* holding from the Eighth Circuit. In *State v. Antoine*,<sup>111</sup> North Dakota held that a defendant has the duty to act affirmatively in circumstances when the defendant did not voluntarily agree on the decision not to testify.<sup>112</sup> The decision stated that "if the defendant wants to testify, he can reject his attorney's tactical decision by insisting on testifying, speaking to the court, or discharging his

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106. *Id.* at 759-60.

107. *United States v. Teague*, 908 F.2d 752 (11th Cir. 1990), *vacated*, 932 F.2d 899 (11th Cir. 1991).

108. *United States v. Teague*, 953 F.2d 1525, 1534-35 (11th Cir. 1992).

109. *LaVigne v. State*, 812 P.2d 217, 220 (Alaska 1991).

110. *Id.*

111. 1997 ND 100, 564 N.W.2d 637.

112. *Id.* ¶ 6, 564 N.W.2d at 639 (citing *United States v. Bernloehr*, 833 F.2d 749, 751 (8th Cir. 1987)).



lawyer.”<sup>113</sup> The North Dakota Supreme Court also found the facts in *Antoine* “analogous to *Bernloehr*,” which, as previously mentioned, is based on the now irrelevant statutory grant of a criminal defendant’s right to testify, rather than the constitutionally guaranteed right to do so.<sup>114</sup>

Ten years later, North Dakota decided *State v. Mulske*.<sup>115</sup> In the decision, the North Dakota Supreme Court held that “if an accused desires to exercise her constitutional right to testify[,] the accused must act affirmatively and express to the court her desire to do so at the appropriate time or a knowing and voluntary waiver of the right is deemed to have occurred.”<sup>116</sup> These decisions are incorrect in that they cite to cases that are no longer on point nor relevant. These decisions also do nothing to rebut *Teague*’s clear and succinct reasoning as to why a defendant does not know the “appropriate time” to speak to the court, nor the fact that the defendant is often not allowed to even speak to the court in the first place.<sup>117</sup>

### E. OTHER COURTS

There are a few jurisdictions that hold that a defendant’s fundamental right to testify cannot be presumed from a silent record. The Second Circuit Court of Appeals “regard[s] as highly questionable the proposition that a defendant’s failure to object at trial to counsel’s refusal to allow him to take the stand constitutes a waiver of the defendant’s constitutional right to testify on his own behalf.”<sup>118</sup> After all, it is the defendant, not his lawyer or the state, who will bear the personal consequences of a conviction.<sup>119</sup>

In some jurisdictions, in order for a defendant to waive his or her right to testify, the trial court must make an on-the-record inquiry into whether the defendant understands his or her right and wishes to waive it.<sup>120</sup> Other jurisdictions have held that an on-the-record inquiry, though not required, is advisable.<sup>121</sup> In *United States v. DiSalvo*,<sup>122</sup> the District Court for the Eastern District of Pennsylvania rejected the Ninth Circuit’s holding in

113. *Id.* (quoting *United States v. Joelson*, 7 F.3d 174, 177 (9th Cir. 1993)).

114. *Id.* ¶ 8, 564 N.W.2d at 639; *see also supra* Part III.A.

115. 2007 ND 43, 729 N.W.2d 129.

116. *Id.* ¶ 6, 729 N.W.2d at 131 (citing *Bernloehr*, 833 F.2d at 752).

117. *See supra* Part III.C.

118. *See United States v. Vargas*, 920 F.2d 167, 170 (2d Cir. 1990).

119. *Faretta v. California*, 422 U.S. 806, 834 (1975).

120. *State v. Tuplin*, 901 A.2d 792, 797 (Me. 2006) (citing *People v. Curtis*, 681 P.2d 504, 507-08 (Colo. 1984); *LaVigne v. State*, 812 P.2d 217, 222 (Alaska 1991); *Tachibana v. State*, 900 P.2d 1293, 1303 (Haw. 1995)).

121. *Tuplin*, 901 A.2d at 797 (citing *State v. Gulbrandson*, 906 P.2d 579, 598 (Ariz. 1995); *Barron v. State*, 452 S.E.2d 504, 505 n.2 (Ga. 1995); *Phillips v. State*, 782 P.2d 381, 382 (Nev. 1989); *Commonwealth v. Siciliano*, 471 N.E.2d 1359, 1362 n.1 (Mass. App. Ct. 1984)).

122. 726 F. Supp. 596 (E.D. Pa. 1989).

*Martinez* that a defendant waives his right to testify if he does not affirmatively object, instead agreeing with Judge Reinhardt's powerful dissent.<sup>123</sup> In order to fully protect the fundamental constitutional rights of a criminal defendant, "[i]t appears that the only clear way to establish whether the defendant is waiving his right to testify is to require trial judges to establish on the record that the defendant understands his right to testify and is waiving that right."<sup>124</sup>

#### IV. WHY THIS AREA OF CRIMINAL LAW SHOULD BE EXAMINED BY THE SUPREME COURT

The Supreme Court must examine a criminal defendant's constitutional right to testify for several reasons. The inconsistencies in circuit courts' interpretations of *Rock v. Arkansas* are being exacerbated by the Eighth Circuit's reliance upon the outdated and no longer relevant statutory granting of the right of criminal defendants to testify. Other circuit courts, as well as North Dakota's Supreme Court, have since relied on the incorrect Eighth Circuit precedent, further compounding the problem. In addition to this, there are also a number of practical considerations regarding a criminal defendant's right to testify.

##### A. THE IMPACT A DEFENDANT'S TESTIMONY HAS ON THE JURY

A criminal defendant's testimony can have a tremendous impact on the jury. It is important that defendants alone should hold the "ultimate authority to make certain fundamental decisions regarding [his or her] case," including whether or not to testify on their own behalves.<sup>125</sup> While defense counsel bears the primary burden of advising the defendant of his right to testify or not to testify and the strategic implications of each choice, the decision on whether or not to testify ultimately rests with the defendant.<sup>126</sup>

A defendant's failure to become a witness might well be considered as a circumstance unfavorable to the defendant, which is why it is necessary to instruct the jury not to consider it unfavorable.<sup>127</sup> The very fact that a jury could consider unfavorable the defendant not testifying on his own behalf, thus necessitating an instruction on the matter, must raise suspicions regarding the actual prejudice it creates for a defendant. In fact, actual

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123. *Id.* at 598; *see also supra* Part III.B.

124. *LaVigne v. State*, 788 P.2d 52, 55 (Alaska Ct. App. 1990), *conviction rev'd*, 812 P.2d 217, 222 (Alaska 1991).

125. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983).

126. *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir. 1992).

127. *State v. Wisniewski*, 102 N.W. 883, 884 (N.D. 1905).

unfairness often results when a defendant does not testify because the defendant himself is often the most effective witness for the defense.<sup>128</sup> “The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.”<sup>129</sup> Furthermore, juries, despite limiting instructions, are highly prone to infer guilt from a criminal defendant’s failure to take the stand.<sup>130</sup>

## B. PRACTICAL CONSIDERATIONS

A number of practical considerations also exist regarding whether or not a defendant must affirmatively waive his right to testify on the record. These practical considerations emphasize the importance of a truly informed waiver and consistency in protecting fundamental rights. Courts often use the excuse of not wanting to pry into the attorney-client relationship in support of not determining on the record whether a defendant is knowingly and intelligently relinquishing his right to testify.<sup>131</sup> This argument is unpersuasive.

A simple on-the-record inquiry at trial may be done outside the presence of the jury and would take up very little time in court. This small inquiry by the court encourages, rather than undermines, the attorney-client relationship. In asking the defendant if he wishes to give up his right to testify, both the client and his attorney have a chance to rethink the matter. If the defendant is in any way unsure about testifying, he and his attorney have another chance to effectively communicate with each other and discuss this very important constitutional right, as well as anything else they may wish to discuss.<sup>132</sup>

In any event, this small inquiry at trial does far less damage, if any, to the attorney-client relationship than an entire post-trial hearing on the matter, which forces the client to waive his attorney-client privilege in order to testify on the matter.<sup>133</sup> Further, without any indication in the trial record

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128. *Rock v. Arkansas*, 483 U.S. 44, 52 (1987).

129. *Green v. United States*, 365 U.S. 301, 304 (1961).

130. *See, e.g.*, McCormick, HANDBOOK ON THE LAW OF EVIDENCE 89 (2d ed. 1972).

131. *See Case Comment, Criminal Law—Right to Testify—Seventh Circuit Holds That Defendant’s Waiver of the Right to Testify Was Valid Despite District Court’s Failure to Engage in an On-The-Record Colloquy Regarding the Decision*, 121 HARV. L. REV. 1660, 1663-64 (2008).

132. *Id.*

133. *Id.* at 1666 (explaining that judges can briefly explain to defendants the right to testify and ask a few “well-crafted questions” about the decision of testifying. Doing this puts enough evidence on the record to uphold the waiver against a challenge while carefully avoiding prying into the substance of the attorney-client relationship. When the record is devoid of such information, this leaves room for an intrusive, detailed inquiry into the timing and substance between the attorney and defendant at a post-trial hearing. Defendants must waive the attorney-

that the defendant knowingly and intelligently waived his right to testify, reviewing courts will have a difficult time proving that a waiver actually occurred.

### C. RECOMMENDATION

It is this Note's recommendation that trial courts should seek an on-the-record waiver of a defendant's right to testify in order to ensure that this waiver is indeed knowing, intelligent, and voluntary. An inquiry by the court would prevent the unwitting relinquishment of this right by a defendant who is either unaware of his control over the decision or not sufficiently sophisticated to raise the issue with the court.<sup>134</sup> By doing this, a record would be made that a defendant has been notified about this right that he himself controls.

The Supreme Court has made on-the-record statements mandatory for waiving other personal rights, such as the right to a jury trial when a defendant pleads guilty and the right to an attorney.<sup>135</sup> These on-the-record statements can promote communications between the attorney and client before and during trial.<sup>136</sup> Effective attorney-client communication before and at trial, along with courts making an on-the-record colloquy of the defendant's knowledge of his right to testify, as well as an informed decision to waive that right, all ensure that defendants have no doubt as to their rights and the implications of waiving them. This prevents a muddled appeals process with an ambiguous record. It also prevents the defendant from feeling like his attorney did not effectively explain his right to him and unilaterally waived it without the defendant's consent. At the very least, a trial court's on-the-record inquiry will serve as a quick reminder to both the attorney and client that they need to communicate with each other regarding the decision of whether the defendant should testify.

### V. CONCLUSION

There are several reasons why the defendant's right to testify is an issue that needs readdressing by the Supreme Court. First, there is confusion among circuit and district courts in how to properly ensure that a defendant is making a knowing, voluntary, and intelligent waiver of this

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client privilege and attorneys must breach their confidentiality obligations at these hearings. The attorney and client are in the "uncomfortable" position of being directly in opposition of one-another, when a few simple questions at trial could prevent complicated and unnecessary proceedings and appeals).

134. *United States v. Martinez*, 883 F.2d 750, 764 (9th Cir. 1989) (Reinhardt, J., dissenting).

135. *See supra* Parts II.A-B.

136. *See supra* notes 128-30 and accompanying text.

right. Some district courts hold that an on-the-record inquiry is required, while a minority of other courts have stated that such an approach is highly advisable. The majority of courts, however, hold that there is no requirement for a court to do so. The majority of courts fail to recognize the inconsistency in their approaches in determining waiver of constitutional rights. The right to counsel and the right to a jury trial must be affirmatively waived on the record, while the right to testify, which is arguably the most important of these rights, is presumed to be waived absent any indication that the defendant actually wishes to do so. Even more disturbing is the reliance by some circuit courts on outdated and irrelevant law regarding the statutory grant of the right to testify, rather than the guaranteed constitutional right found in *Rock v. Arkansas*. The issue is ripe for consideration, and the Supreme Court would be very wise in reconsidering this extremely important issue.

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\* 2014 J.D. candidate, University of North Dakota School of Law. Thanks to Mom and Dad for their twenty-five years of unconditional love, support, and guidance. Thanks to Uncle Charlie for inspiring this Note and being a great mentor. I would also like to thank everyone who has ever been a part of my life. I would not be who I am today without you.