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WAIVER OF THE CRIMINAL DEFENDANT'S RIGHT TO TESTIFY: CONSTITUTIONAL IMPLICATIONS

INTRODUCTION

Although the Constitution does not explicitly grant a criminal defendant a right to testify on his own behalf, the Supreme Court expressly held, in 1987, that such a right does exist.¹ Since this decision, federal courts have disagreed over how a criminal defendant waives his constitutional right to testify.² All the federal appellate courts addressing this issue have held that the right to testify is a personal and fundamental constitutional right.³ Furthermore, all agree that only a “knowing, voluntary and intelligent”⁴ waiver by the defendant himself⁵ is sufficient to relinquish this right.⁶ The courts, however, differ in their application of this standard.

Under one approach to the waiver of the criminal defendant's constitutional right to testify—the silent record approach—an appellate court looks only to the trial record to determine if there was a valid waiver of this right. If the defendant fails to make an on-the-record objection to not being called to testify, he is considered to have implicitly waived his

1. See *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987); *infra* notes 36-40 and accompanying text.

2. See *United States v. Teague*, 908 F.2d 752, 758 (11th Cir. 1990); *Galowski v. Murphy*, 891 F.2d 629, 636 (7th Cir. 1989); *United States v. Martinez*, 883 F.2d 750, 756 (9th Cir. 1989); *United States v. Bernloehr*, 833 F.2d 749, 751 (8th Cir. 1987).

3. See *Teague*, 908 F.2d at 758; *Galowski*, 891 F.2d at 636; *Martinez*, 883 F.2d at 756; *Bernloehr*, 833 F.2d at 751.

4. Courts use different terminology for the constitutional standard for waiver of rights where the waiver requires the personal consent of the defendant. Compare, *Teague*, 908 F.2d at 759 (waiver must be “knowing, voluntary and intelligent”) and *Martinez*, 883 F.2d at 756 (waiver must be knowing and intentional). The Supreme Court has also used different language to describe the constitutional standard for waiver. See, e.g., *Faretta v. California*, 422 U.S. 806, 835 (1975) (defendant must voluntarily exercise his own free will and must knowingly and intelligently relinquish the right); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (waiver needs “an affirmative showing that it was intelligent and voluntary”); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (a waiver is an “intentional relinquishment” of a “known right”). To summarize, for there to be an effective waiver under this standard (i) the defendant must know of the right's existence, (ii) the defendant's choice to waive it must be voluntarily made and not coerced, (iii) the defendant must intelligently waive the right—he must be competent and aware of what he is doing, and (iv) there must be an intentional waiver—a conscious, informed choice. See *People v. Mozee*, 723 P.2d 117, 121-22 (Colo. 1986). For purposes of this Note, this standard is “knowing, voluntary and intelligent” unless referred to otherwise by a case under discussion.

5. The right to testify is deemed so fundamental a constitutional right that the defendant only may waive it. See *Teague*, 908 F.2d at 759; *Galowski*, 891 F.2d at 636; *Martinez*, 883 F.2d at 756; *Bernloehr*, 833 F.2d at 751; note 42 *infra* and accompanying text.

6. See *United States v. Teague*, 908 F.2d 752, 758 (11th Cir. 1990); *Galowski v. Murphy*, 891 F.2d 629, 636 (7th Cir. 1989); *United States v. Martinez*, 883 F.2d 750, 756 (9th Cir. 1989); *United States v. Bernloehr*, 833 F.2d 749, 751 (8th Cir. 1987).

right to testify.⁷

Under another approach to waiver of the right to testify, the absence of an on-the-record objection is not considered dispositive on the issue of whether a defendant has waived his right to testify.⁸ Rather, appellate courts employ a case-by-case analysis to determine whether the defendant intended to waive the right.⁹

Determining how a criminal defendant waives his right to testify is important, not only for defendants whose constitutional right to testify may be violated—thus depriving them of a fair trial—but also for counsel and judges. A clear and consistent test for waiver must be formulated so that counsel can properly apprise his client of this right and so that judges can take steps to safeguard the right and determine whether it has been violated.

This Note examines various approaches to the waiver of the constitutional right to testify in a criminal proceeding and recommends the creation of a procedure by which trial courts may affirmatively safeguard this right. Part I gives an historical overview of the development of the right to testify. Part II explores various approaches to the waiver of the right to testify by examining the principal federal decisions that have determined whether a defendant waived his right to testify. Part III analyzes these approaches in light of Supreme Court precedent and fairness and autonomy considerations. This section concludes that the silent record approach to the waiver of the constitutional right to testify is not only contrary to Supreme Court precedent, but also antithetical to considerations of fairness and autonomy. This section recommends that, at a minimum, a case-by-case approach should be adopted by courts. Part IV recommends that the trial court procedurally safeguard the right to testify by engaging in a two-part dialogue with the criminal defendant. The first part of this dialogue informs the defendant of his right to testify. The second part is a colloquy between the defendant and the court, during which the court determines whether there has been a knowing, voluntary and intelligent waiver of the right to testify.

I. HISTORICAL DEVELOPMENT OF THE RIGHT TO TESTIFY

A. *Origins*

The right of a defendant to be heard during a criminal proceeding against him is firmly entrenched in Anglo-American legal tradition. The right to be heard is found in the Anglo-Saxon “wager of law,” whose

7. See *Martinez*, 883 F.2d at 760; *Bernloehr*, 833 F.2d at 751-52.

8. See *Teague*, 908 F.2d at 759; *Galowski*, 891 F.2d at 636; accord *United States v. Vargas*, 920 F.2d 167, 170 (2d Cir. 1990) (“We regard as highly questionable . . . 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.”).

9. See *Teague*, 908 F.2d at 761; *Galowski*, 891 F.2d at 636.

origin Thayer traced to the fifth century.¹⁰ At this form of trial, the accused offered proof by swearing his innocence under oath.¹¹ His oath was supported by compurgators, who swore that they believed the defendant would swear truthfully, not that they knew the defendant's oath to be true.¹² Wager of law was a great favorite in local courts¹³ and continued to be used in criminal trials at least until the mid-fifteenth century.¹⁴

Trial by jury was the dominant mode of criminal trial from the medieval period forward. During the nascency of this form of trial, neither witnesses nor counsel were allowed for either the prosecution or the defendant.¹⁵ Rather, a self-informed jury acting under oath decided questions of guilt and innocence.¹⁶

From the very beginning of jury trial, however, the defendant spoke during proceeding.¹⁷ In fact, initially, the only voices heard during trial were those of the presiding jurist and the defendant.¹⁸ Although not under oath, the defendant was asked questions by the jurist and was allowed to make an exculpatory statement to the jury.¹⁹ The defendant's in-court statements were the focal point of the medieval criminal trial.²⁰

Similarly, in the sixteenth and early seventeenth centuries in England, a defendant in a criminal trial, while not sworn and allowed neither witnesses nor counsel,²¹ was expected to respond to witnesses presented against him and was questioned during trial.²² Beginning in the middle of the seventeenth century, the accused was gradually allowed to call witnesses.²³ Then, in 1701, the defendant was given, by statute, the right to have witnesses testify under oath on his behalf.²⁴ The defendant him-

10. See J. Thayer, *A Preliminary Treatise on Evidence at the Common Law* 25 (1898).

11. See *id.* at 24-25 (1898).

12. See *id.* at 25.

13. See *id.*

14. See *id.* at 26.

15. See T.A. Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800* 16 (1985).

16. See *id.*

17. See *id.*

18. See *id.*

19. *Id.*; see also Powell, *Jury Trial at Gaol Delivery in the Late Middle Ages*, in *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800* 106 (1988) (during the fifteenth century the primary source of evidence was the defendant himself and the "plausibility of [the defendant's] denials, as well as [his] general demeanor, must have weighed heavily with the jury").

20. See Green, *supra* note 15, at 137.

21. See 1 J. Stephen, *A History of the Criminal Law of England* 350, 440 (1883); 2 Wigmore, *Evidence*, § 575 at 684-86 (1940); Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263, 307-09 (1978); Popper, *History and Development of the Accused's Right to Testify*, 1962 Wash. U.L.Q. 454, 455.

22. See Stephen, *supra* note 21, at 440; Wigmore *supra* note 21, at 684; Langbein, *supra* note 21, at 285, 311.

23. See Wigmore, *supra* note 21, at 685-86 and n.46; Popper, *supra* note 21, at 455-56.

24. See *An Act for Punishing of Accessories to Felonies and Receivers of Stolen*

self, however, was deemed incompetent to give sworn testimony.²⁵ Nevertheless, he was expected to respond to the evidence against him and his responses were accorded evidentiary weight.²⁶

The practice of disqualifying a defendant from testifying under oath was inherited by American courts. By the mid 1800s, however, this practice was much criticized.²⁷ In 1864, Maine adopted a statute estab-

Goods, and to Prevent the Wilful Burning and Destroying of Ships, 1 Anne, St. 2, c.9 (1701).

25. See Stephen, *supra* note 21, at 440; Wigmore, *supra* note 21, at 684; Popper, *supra* note 21, at 456; Note, *Due Process v. Defense Counsel's Unilateral Waiver of the Defendant's Right to Testify*, 3 Hastings Const. L.Q. 517, 520 (1976) [hereinafter, Note, *Due Process*]. The practice of disqualifying a criminal defendant from testifying under oath was borrowed from civil common law where all parties with an interest in the outcome of a litigation were disqualified from testifying. See Stephen, *supra* note 21, at 440; Wigmore, *supra* note 21, at 685-86. The disqualification was based largely on the fear that a party with an interest in the outcome of a litigation would testify falsely. See Wigmore, *supra* note 21, at 686.

In most felony cases, however, defendants were without counsel and thus acted as sole advocate on their own behalf. See D. Phillips, *Crime and Authority in Victorian England: The Black Country 1835-1860* 104 (1977); Stephen, *supra* note 21, at 440. Until 1836, even if represented by counsel the defendant was still expected to make an exculpatory statement before the court. See *id.* Thus, although incompetent to testify formally under oath, a defendant retained the right to speak in his defense. See Stephen, *supra* note 21, at 440-41; Wigmore, *supra* note 21, at 684; J.M. Beattie, *Crime and the Courts in England: 1660-1800* 348-49 (1986); see also Langbein, *supra* note 21, at 283 (At the Old Bailey, "[s]o long as [the defendant] was without counsel there was scarcely any possibility of distinguishing the accused's role as defender and as witness. Throughout the period . . . it was expected the he would reply to any evidence adduced against him that lay within his knowledge."). In fact, the defendant's "mouth was not only open, but the evidence given against him operated as so much indirect questioning, [that] if he omitted to answer the questions it suggested he was very likely to be convicted." Stephen, *supra* note 21, at 440. Thus, through self-representation, the defendant presented "evidence" even though he was not a qualified witness. See Wigmore, *supra* note 21, at 684; Beattie, *supra*, at 348.

26. See Stephen, *supra* note 21, at 440; Wigmore, *supra* note 21, at 684; see also Beattie, *supra* note 25, at 349 (when the defendant spoke, his statements were given great weight). But see *United States v. Martinez*, 883 F.2d 750, 753 (9th Cir. 1989)(unsupported assertion that English courts did not give evidentiary weight to a defendant's testimony).

27. Jeremy Bentham, the British legal reformer, led the fight for competency in England. One of his devotees, John Appleton, Chief Justice of the Supreme Court of Maine, led the fight for competency of both civil and criminal parties in the United States. See Popper, *supra* note 21, at 460. Appleton criticized the practice of disqualifying criminal defendants from testifying as being a hinderance to prosecution and benefit to the accused: "When [a] deficiency of evidence is the result of exclusionary rules, the law aids and abets the criminal. It does on a grand, what the perjured withholder of facts does, on a small scale." Popper, *supra* note 21, at 461 (quoting Appleton, *Evidence* 120 (1860)).

Such reform, however, met with resistance from those who feared perjury would result:

The proposal to make the prisoner a competent witness has an appearance of system about it, . . . but there are strong objections to it. In the first place the 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.

lishing testimonial competency for criminal defendants.²⁸ By the turn of the century the federal government and all but one state had followed suit.²⁹

B. Recent Developments

After the enactment of statutes granting competency to criminal defendants to testify on their own behalf, but before courts recognized a constitutional right to testify, the decision to testify was considered a matter of trial strategy.³⁰ Consequently, the right to testify could be unilaterally waived by defense counsel³¹ and appeals based on right-to-testify claims were limited to competency-of-counsel issues.³² Beginning in 1948, however, the Supreme Court indicated that the right to testify was constitutionally protected.³³ In the late 1970s, subsequent to Judge

Popper, *supra* note 21, at 458-59 (quoting Stephen, A General View of the Criminal Law of England 201-02 (1863)).

Others believed competency would be hurtful to the defendant because the jury would draw a negative inference from a defendant's failure to testify. See Popper, *supra* note 21, at 459; *Ferguson v. Georgia*, 365 U.S. 570, 578-79 (1961). This prediction proved accurate; today, juries have a strong tendency to infer guilt from a defendant's failure to take the stand. See *infra* note 109 and accompanying text.

28. Me. Pub. Laws 1864, ch. 280 (cited in Popper, *supra* note 21, at 463 n.47).

29. See Popper, *supra* note 21, at 463-64; *Ferguson*, 365 U.S. at 577.

30. See Hammerman, *A Criminal Defendant's Constitutional Right to Testify—The Implications of United States Ex Rel. Wilcox v. Johnson*, 23 Vil. L. Rev. 678, 686 (1977); Note, *Due Process*, *supra* note 25, at 529; *United States v. Janoe*, 720 F.2d 1156, 1161 (10th Cir. 1983), *cert. denied*, 465 U.S. 1036 (1984); *Sims v. Lane*, 411 F.2d 661, 664 (7th Cir.), *cert. denied*, 396 U.S. 943 (1969), *overruled in pertinent part*, *Alicea v. Gagnon*, 675 F.2d 913, 923 (7th Cir. 1982); *United States v. Garguilo*, 324 F.2d 795, 797 (2d Cir. 1963); *Newsom v. Smyth*, 261 F.2d 452, 454 (4th Cir. 1958), *cert. denied*, 359 U.S. 969 (1959). *But see Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("the accused has the ultimate authority to make certain fundamental decisions regarding the case, [including] whether to . . . testify in his or her own behalf"); *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1, 94 (1977) (Burger, C.J., concurring) (although trial decisions are a matter of trial strategy, the decisions of "whether to plead guilty, waive a jury, or testify in one's own behalf" ultimately rest with the accused).

31. See Hammerman, *supra* note 30, at 685; Note, *Due Process*, *supra* note 25, at 529; *Sims*, 411 F.2d at 664; *Garguilo*, 324 F.2d at 797; *Newsom*, 261 F.2d at 454.

32. See Hammerman, *supra* note 30, at 686; Note, *Due Process*, *supra* note 25, at 529; *Sims*, 411 F.2d at 665; *Garguilo*, 324 F.2d at 797; *Newsom*, 261 F.2d at 454.

33. See, e.g., *In re Oliver*, 333 U.S. 257, 273 (1948) (the Court, in dicta, noted that a "person's right . . . to offer testimony" was one of the components of an accused's right to defend); *Ferguson v. Georgia*, 365 U.S. 570, 602 (1961) (Justice Clark, concurring, strongly urged recognition of a defendant's right to testify based on the due process clause); *Harris v. New York*, 401 U.S. 222, 225 (1971) (in dicta, the Court stated that "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so"); *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972) (in dicta, the court stated "[w]hether the defendant is to testify is an important tactical decision as well as a matter of constitutional right"); *Faretta v. California*, 422 U.S. 806, 820 n.15 (1975) (the Court recognized a right to testify based on the due process clause); See also *United States v. Bifield*, 702 F.2d 342, 349 (2d Cir.), *cert. denied*, 461 U.S. 931 (1983) (holding there is a constitutional right to testify); *Alicea v. Gagnon*, 675 F.2d 913, 923 (7th Cir. 1982) (same); *Poe v. United States*, 233 F. Supp. 173, 176 (D.C. Cir. 1964) (same).

Godbold's eloquent dissent in *Wright v. Estelle*,³⁴ courts began to hold that the criminal defendant's right to testify was a constitutionally protected right and so substantial that its waiver required the personal consent of the defendant.³⁵

Then, in the 1987 case, *Rock v. Arkansas*,³⁶ the Supreme Court held that a criminal defendant had a constitutional right to testify on his own behalf.³⁷ The Court located this right in several constitutional sources. First, the Court found it a "necessary ingredient[]" of the fourteenth amendment's due process clause, noting that "[i]t is one of the rights that [is] 'essential to due process of law in a fair adversary process.'" ³⁸ Next, the Court cited the compulsory process clause of the sixth amendment, stating that the right to testify is "[e]ven more fundamental to a personal defense than the right of self-representation."³⁹ The Court then located the right in the fifth amendment as "a necessary corollary to the . . . guarantee against compelled testimony."⁴⁰

Federal courts after *Rock* have determined the right to testify to be a personal and fundamental right⁴¹ that is so fundamental in nature that its waiver must be effected knowingly, voluntarily and intelligently by the defendant himself.⁴² As a result, the decision of whether to have the

34. 572 F.2d 1071, 1074 (5th Cir.), *cert. denied*, 439 U.S. 1004 (1978).

35. *See* United States v. Curtis, 742 F.2d 1070, 1076 (7th Cir. 1984), *cert. denied*, 475 U.S. 1064 (1986); United States v. Bifield, 702 F.2d 342, 347-49 (2d Cir.), *cert. denied*, 461 U.S. 931 (1983).

36. 483 U.S. 44 (1987).

37. *See id.* at 49. The issue in *Rock* was whether Arkansas' *per se* rule of excluding a defendant's hypnotically refreshed testimony was constitutional. The Court found that Arkansas' over-broad exclusion of testimony violated an accused's constitutional right to testify. *See id.* at 62.

38. *Id.* at 51 (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)).

39. *Id.* at 52.

40. *Id.*

41. *See* United States v. Teague, 908 F.2d 752, 758 (11th Cir. 1990); *Galowski v. Murphy*, 891 F.2d 629, 636 (7th Cir. 1989); United States v. Martinez, 883 F.2d 750, 756 (9th Cir. 1989); United States v. Bernloehr, 833 F.2d 749, 751 (8th Cir. 1987).

42. *See Teague*, 908 F.2d at 759; *Galowski*, 891 F.2d at 636; *Martinez*, 883 F.2d at 756; *Bernloehr*, 833 F.2d at 751. Although the validity of such determination is outside the scope of this Note, it is presumed, for purposes of this Note, that the right to testify is a constitutional right so fundamental to the criminal defendant that its waiver requires the personal consent of the defendant. Such presumption is based on the historical importance of the criminal defendant's rights to testify and be heard at trial, *see supra* notes 10-28 and accompanying text, decisions prior to *Rock* finding the waiver of the right to testify to require the defendant's personal consent, *see* United States v. Curtis, 742 F.2d 1070, 1076 (7th Cir. 1984) *cert. denied*, 475 U.S. 1064 (1986); United States v. Bifield, 702 F.2d 342, 349 (2d Cir.), *cert. denied*, 461 U.S. 931 (1983); United States v. Butts, 630 F. Supp. 1145, 1147-48 (D. Me. 1986), Supreme Court recognition that the decision of whether to testify is for the accused to make and not a matter of trial strategy, *see* Jones v. Barnes, 463 U.S. 745, 751 (1983); *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C. J., concurring), American Bar Association Standards recognizing that the ultimate decision of whether to testify belongs to the accused and not counsel, *see* Standards for Criminal Justice, Vol. I, § 4-5.2. at 4-65 to -67 (2d ed. 1986 Supp.) [hereinafter Standards for Criminal Justice], and recognition in commentary that the right to testify is no longer a "trial-type" right but rather may only be waived by the defendant.

criminal defendant testify was removed from the sphere of trial tactics and strategy.⁴³ Additionally, defense counsel could no longer unilaterally waive the right to testify.⁴⁴ Consequently, courts now must develop strategies to safeguard this right and develop approaches to determine whether the right has been violated.

II. DIFFERING APPROACHES TO WAIVER OF THE CONSTITUTIONAL RIGHT TO TESTIFY

Thus far, four federal circuits have examined the issue of whether a criminal defendant has personally waived his constitutional right to testify. Two have employed a silent record approach. The other two have adopted a case-by-case approach.

A. Silent Record Waiver

Under the silent record approach, a defendant is deemed to have waived his right to testify if he does not make an on-the-record objection in response to his not being called to testify. The Eighth Circuit, in *United States v. Bernloehr*,⁴⁵ was the first federal court of appeals to employ this approach.⁴⁶

During trial, the defendant in *Bernloehr* wanted to testify on his own

See Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—a Dead End?*, 86 Colum. L. Rev. 9, 31 n.123 (1986); Hammerman, *supra* note 30, at 684-85; O'Neill, *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, 823-26 (1990); Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 Minn. L. Rev. 121, 142 n.117 (1985); Note, *Due Process*, *supra* note 25, at 527-29; see also Model Rules of Professional Conduct, Rule 1.2(a)(1989)[hereinafter Model Rules](attorney shall abide by client's decision on whether to testify).

43. See O'Neill, *supra* note 42, at 821-26; Rieger, *supra* note 42, at 142 n.117; Note, *Due Process*, *supra* note 25, at 529-32; *Teague*, 908 F.2d at 759; *Galowski* 891 F.2d at 636; *Curtis*, 742 F.2d at 1076; see also *Jones v. Barnes*, 463 U.S. 745, 751, (1983)(defendant has ultimate authority to decide whether to testify); *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring)(whether to testify is not a matter of trial strategy); Standards for Criminal Justice, *supra* note 42, standard 4-5.2. at 4-65 to -66, commentary at 4-67 to -69 (whether to testify is for defendant to decide and not a matter of trial strategy).

44. See Standards for Criminal Justice, *supra* note 42, standard 4-5.2. at 4-65 to -66, and commentary at 4-67 to -69; Hammerman, *supra* note 30, at 684-85; O'Neill, *supra* note 42, at 821-22; Note, *Due Process*, *supra* note 25, at 529-32; *United States v. Teague*, 908 F.2d 752, 759 (11th Cir. 1990); *Galowski v. Murphy*, 891 F.2d 629, 636 (7th Cir. 1990); *Curtis*, 742 F.2d at 1076.

45. 833 F.2d 749 (8th Cir. 1987).

46. Prior to *Bernloehr*, a number of federal appellate courts decisions held that a criminal defendant had a constitutional right to testify. None, however, reached the question of how a defendant waives this right. See, e.g., *United States v. Curtis*, 742 F.2d 1070, 1075 (7th Cir. 1984), *cert. denied*, 475 U.S. 1064 (1986)(constitutional right to testify does not include right to testify perjurally); *United States v. Bifield*, 702 F.2d 342, 350 (2d Cir. 1983)(defendant's constitutional right to testify does not include right to testify on inadmissible evidence); *Alicea v. Gagnon*, 675 F.2d 913, 925 (7th Cir. 1982)(defendant has constitutional right to testify, but it was harmless error that he was denied it).

behalf. His attorney, however, wanted to keep him off the stand.⁴⁷ When presenting the defense, the defense attorney advised the judge of their disagreement.⁴⁸ Shortly thereafter, the defense rested without calling the defendant to the stand.⁴⁹ The defendant claimed on appeal that his right to testify had been violated when, against his will, his attorney prevented him from taking the stand.⁵⁰

In a brief opinion citing *Rock v. Arkansas*, the court found the right to testify to be a personal and fundamental constitutional right. Additionally, the court found that this right could be waived only by the defendant and that its waiver had to be knowingly, voluntarily and intelligently effected.⁵¹ The court, however, erroneously relying on a pre-*Rock*, appellate court decision that based its holding on the statutory grant of the right to testify, and not the constitutional right to testify,⁵² stated that "[t]he accused must act affirmatively" at the time of trial to preserve his right to testify.⁵³ The court reasoned that, because "[n]othing in the record support[ed] . . . a claim" that the defendant's will to testify was overcome by his counsel, he had effectively waived his right to testify.⁵⁴

At one point, the court appeared to limit its holding to "sophisticated" criminal defendants who should have known to object when the defense

47. See *Bernloehr*, 833 F.2d at 750-751.

48. See *id.* at 750. The defense attorney approached the bench and, out of the hearing of his client, stated: "Your Honor, I'm somewhat in a dilemma, my client wants to testify and I don't want to have him testify. He has announced to the court that he is going to testify, he is willing to accede to my advise that we rest at this point." *Id.*

49. See *id.*

50. See *id.* at 751.

51. See *id.*

52. See *United States v. Systems Architects, Inc.*, 757 F.2d 373, 375 (1st Cir.), cert. denied, 474 U.S. 847 (1985). Under jurisprudence concerning the waiver of the statutory right to testify, defense counsel could unilaterally waive a defendant's right to testify. See *supra* notes 30-31 and accompanying text.

53. *Bernloehr*, 833 F.2d at 752 (quoting *Systems Architects*, 757 F.2d at 375). *Systems Architects* also states: "18 U.S.C. § 3481 does provide for testimony by the accused: '. . . the person charged shall, at his own request, be a competent witness.'" *Systems Architects*, 757 F.2d at 375 (emphasis in original). The *Systems Architects* court gave only a cursory glance at possible constitutional implications, stating the "due process clause of the Fifth Amendment may . . . grant [to] the accused the right to testify." *Id.* (emphasis added). The basis for the *Systems Architects*' decision, however, is that the right to testify is merely a statutory privilege. See *id.* Thus, the *Bernloehr* court mixed apples and oranges when it relied on *Systems Architects*.

Furthermore, although the court in *Systems Architects* does not expressly set forth what kind of 'affirmative action' is necessary for a defendant to secure his statutory right to testify, the court indicates that all the defendant need do is inform his attorney of his desire to testify: "the instant case is not a situation where the [defendant] wanted to testify and [was] prevented from doing so by the trial court or counsel." *Id.* Thus, the *Systems Architects* court implies that there may be a violation of the statutory right to testify if the defendant, after requesting to do so, was denied the opportunity to testify.

Therefore, the court in *Bernloehr* not only erroneously relied on a case which solely interpreted the statutory right to testify, but also misinterpreted what that case meant by "acting affirmatively" to secure the statutory right to testify.

54. *Bernloehr*, 833 F.2d at 752.

rested without calling the defendant to testify.⁵⁵ Later in the opinion, however, the court indicated that its holding could be construed to cover all defendants, whether sophisticated or not.⁵⁶ Unfortunately, the court did not clarify this aspect of its decision.⁵⁷

The Ninth Circuit, however, expressly held that any criminal defendant waives his constitutional right to testify by merely failing to make an on-the-record objection to his not being called to testify.⁵⁸ In *United States v. Martinez*, the defendant expressed his desire to testify before trial,⁵⁹ when the prosecution rested⁶⁰ and again, immediately after the defense rested.⁶¹ His attorney, however, not only refused to place him on the stand,⁶² but also made a veiled threat that he would withdraw from the case if the defendant went on the witness stand.⁶³ On appeal, the defendant alleged, based on his repeated requests to testify throughout

55. The court noted that the defendant, "an apparently mature and sophisticated businessman, represented by able and experienced counsel, made no objection when his counsel rested without calling [him] to the stand." *Id.* at 751-52. Here, the court echoed language of the *Systems Architects*' holding on the waiver of jury trial. The *Systems Architects* court held that because the defendants were "well-educated owners and managers" of a company dealing with sophisticated computer systems, they were competent to voluntarily and knowingly waive their right to a jury trial. *Systems Architects*, 757 F.2d at 375. The *Systems Architects* court thus held that, based on written, signed waivers and colloquies with the trial judge, the defendants had waived their right to a jury trial. *See id.*

56. "The defendant may not . . . indicate at trial his apparent acquiescence in his counsel's advice that he not testify, and then later claim that his will to testify was 'overcome.'" *United States v. Bernloehr*, 833 F.2d 749, 752 (8th Cir. 1987).

57. *See id.* at 751-52.

58. *See United States v. Martinez*, 883 F.2d 750, 758-60 (9th Cir. 1989).

59. *See id.* at 752.

60. *See id.*

61. Immediately after the defense rested, "Martinez urged [his attorney] to move for a recess so that he could again try to persuade him that he should be allowed to testify." *Id.* at 761 n.1 (Reinhardt, J., dissenting).

62. As the attorney later testified in an evidentiary hearing: "I just made the decision he was not going to testify, I refused to call him and that was the way it went down." *Id.* at 761 (Reinhardt, J., dissenting).

63. "[I]mplicit in what I told [the defendant] was that implied threat, [to withdraw from the case if the defendant testified]." *Id.* at 752 (quoting post-conviction hearing testimony of the defense attorney). Forcing the defendant to choose between proceeding with counsel or asserting his right to testify has been found to be a violation of the right to testify. *See Nichols v. Butler*, 917 F.2d 518, 521 (11th Cir. 1990). In *Nichols*, as in *Martinez*, counsel for the defendant threatened to withdraw from the case if the defendant testified. *See id.* at 520. The court found that because the attorney placed the defendant in a position where he had to make a choice between two fundamental constitutional rights—the right to assistance of counsel and the right to testify—the case "present[ed] a clearer example of a violation of the defendant's right to testify than that presented in *Teague*." *Id.* at 521; *see also United States v. Scott*, 909 F.2d 488, 493 (11th Cir. 1990)(trial judge's forcing defendant to choose between right to testify and right to counsel is a violation of defendant's constitutional rights); *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 120-22 (3d Cir. 1977)(same). Such coercion violates the ABA Standards for Criminal Justice: "Certain decisions relating to the conduct of the case are ultimately for the accused [including the decision of] whether to testify in his or her own behalf." Standards for Criminal Justice, *supra* note 42, Standard 4-5.2. at 4-65; *see also Model Rules, supra* note 42, at Rule 1.2(a).

the course of the trial and his attorney's categorical refusal to place him on the stand, that he did not intentionally waive his right to testify.⁶⁴

The *Martinez* court unanimously agreed that a defendant in a criminal trial has a personal and fundamental constitutional right to testify on his own behalf.⁶⁵ Further, the court held that the defendant alone could waive this right and that the waiver had to be knowingly and intentionally effected.⁶⁶ A divided panel, however, held that because the defendant did not object on the record to his not being called to testify, he had waived his right to testify.⁶⁷

Thus, under the silent record approach to waiver of a criminal defendant's right to testify, a reviewing court does not look to the facts of an individual case but looks only to the record to determine whether a defendant knowingly, voluntarily and intelligently waived his right to testify. Thus, if the defendant makes no objection to his not being called to testify, he is deemed to have waived this right.

B. *The Case-by-Case Approach*

Under the case-by-case approach, a reviewing court examines the facts of a given case to determine whether a criminal defendant has waived his right to testify.⁶⁸ The Eleventh Circuit, for example, employed this approach in *United States v. Teague*,⁶⁹ a case factually similar to *Martinez*,

64. See *Martinez*, 883 F.2d at 756.

65. See *United States v. Martinez*, 883 F.2d 750, 756 (9th Cir. 1989); *id.* at 762 (Reinhardt, J., dissenting).

66. See *id.* at 756.

67. See *id.* at 760. While *Martinez* was decided in 1989, on rehearing the panel reversed the conviction on other grounds and vacated the published opinion on April 9, 1990. See *United States v. Martinez*, 928 F.2d 1470 (9th Cir. 1991). While this belated action by the Ninth Circuit robs the earlier decision of its precedential impact, nonetheless, subsequent decisions by the Ninth and other Circuits have relied on the rationale and analytic framework of the *Martinez* panel's decision. See *United States v. Edwards*, 897 F.2d 445 (9th Cir.), *cert. denied*, 111 S. Ct. 560 (1990).

68. See, e.g., *United States v. Teague*, 908 F.2d 752, 759-60 (11th Cir. 1990)(post-conviction hearing was basis for finding defendant's right to testify was violated); *Galowski v. Murphy*, 891 F.2d 629, 636-37 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1953 (1990)(post-conviction hearing was basis for determining that defendant's right to testify was not violated); *United States v. DiSalvo*, 726 F. Supp. 596, 597 (E.D. Pa.1989)(post-conviction hearing was basis for finding defendant's right to testify was violated); *United States v. Butts*, 630 F. Supp. 1145, 1148-49 (D. Me. 1986)(same).

69. 908 F.2d 752 (11th Cir. 1990). Although *Teague* was the first federal court of appeals case to find that a defendant's right to testify had been violated by his attorney, prior decisions by two district courts also differed with the *Martinez* analysis. In *United States v. Butts*, the court, on facts similar to *Martinez*, ordered a new trial for the defendant, finding that the defendant's right to testify had been violated. See 630 F. Supp. at 1148-49.

In *United States v. DiSalvo*, the government, on the basis of the *Martinez* holding, made a motion for reconsideration of a judge's prior holding that a defendant's right to testify had been violated. See 726 F. Supp. at 597. The court, however, expressly rejected *Martinez* even though the facts were similar, and implicitly rejected the silent record approach of *Martinez* by stating, "[t]o the extent that the majority in *Martinez* is to be understood as holding that a defense attorney's decision not to call the defendant to the

in reaching an opposite conclusion.

The defendant in *Teague*, like the defendant in *Martinez*, expressed his desire to testify both before and during trial, including immediately after the defense rested.⁷⁰ As in *Martinez*, the attorney made a unilateral decision not to have the defendant testify⁷¹ and the record was silent as to the defendant's desire to testify.⁷²

The Eleventh Circuit, like the Ninth Circuit, held that a defendant's constitutional right to testify is fundamental and personal and that only the defendant may waive it.⁷³ Citing *Martinez*, the court held that a waiver of this right must be "knowing, voluntary and intelligent."⁷⁴ The Eleventh Circuit, however, parted company with *Martinez* in its interpretation of a silent record. The court found that "the absence of an on the record objection by the defendant himself is of little, if any, probative value in determining whether the decision that the defendant would not testify was the defendant's own decision."⁷⁵ The court noted that "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."⁷⁶ The court also observed that defendants who speak out of turn are faced with swift reprimand from the trial court and face possible discipline.⁷⁷

Rather than divining waiver from a silent record, the Eleventh Circuit focused on whether the defendant had in fact made an affirmative knowing, voluntary and intelligent waiver of his right to testify. It thus stated that the right to testify may not be unilaterally waived by counsel against the will of the defendant,⁷⁸ holding that only when "the defendant does not personally waive the right to testify and defense counsel fails to allow the defendant to take the stand, [is] the defendant's right to testify . . . violated."⁷⁹ The *Teague* court thus found that the defendant's right to

stand conclusively establishes client-waiver, I disagree for the reasons developed at length by Judge Reinhardt in his careful dissenting opinion." *Id.* at 598.

70. *See Teague*, 908 F.2d at 760; *United States v. Martinez*, 883 F.2d 750, 752 (9th Cir. 1989).

71. *See Teague*, 908 F.2d at 760.

72. *See id.*

73. *See id.* at 759.

74. *Id.*

75. *Id.* *See also* *United States v. Vargas*, 920 F.2d 167, 170 (2d Cir. 1990) ("We regard 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."); *United States v. DiSalvo*, 726 F. Supp. 596, 598 (E.D. Pa. 1989) (rejecting the silent record approach).

76. *United States v. Teague*, 908 F.2d 752, 759 (11th Cir. 1990).

77. *See id.*; *see also* *United States v. Martinez*, 883 F.2d 750, 770 (9th Cir. 1989) (Reinhardt, J., dissenting) (defendant speaking out of turn faces contempt charges). The *Teague* court further noted that as the defendant is unskilled in courtroom procedure, he may not realize until jury deliberations that the time for him to testify is past. *See Teague*, 908 F.2d at 759.

78. *See id.* at 757.

79. *Id.* at 761.

testify had indeed been violated.⁸⁰

Like *Teague*, the Seventh Circuit similarly employed a case-by-case approach in *Galowski v. Murphy*.⁸¹ The *Galowski* court also found the right to testify to be a personal and fundamental constitutional right.⁸² Noting that an attorney may not unilaterally waive his client's right to testify, the court held that whether a defendant has waived this right is a factual question.⁸³ Like the Eleventh Circuit, the Seventh Circuit did not look to the absence of an on-the-record objection in determining whether the defendant had waived this right.⁸⁴ Rather, it relied on testimony from a post-conviction hearing in finding that the defendant had, in fact, made the decision not to take the stand. Consequently, the court found the defendant's right to testify had not been violated.⁸⁵

III. SUPREME COURT PRECEDENT, FUNDAMENTAL FAIRNESS, DIGNITY AND AUTONOMY CONSIDERATIONS

The two approaches adopted by federal courts of appeal to determine whether a defendant has waived his right to testify are not reconcilable. The silent record approach conclusively finds waiver of this right merely where the defendant has not made an on-the-record objection to his not being called to testify. The case-by-case approach rejects this implicit finding of presumptive waiver. Instead, waiver is determined from the totality of the circumstances of a given case. To determine the proper approach to waiver of the right to testify, Supreme Court precedent and other countervailing policy considerations should be investigated.

A. *Supreme Court Standards for the Waiver of Fundamental Rights of Criminal Defendants*

In *Johnson v. Zerbst*,⁸⁶ the Supreme Court articulated the standard by which waivers of constitutionally protected rights are to be measured where the waiver requires the personal consent of the criminal defendant. As stated by the Court, "[a] waiver is . . . an intentional relinquishment or abandonment of a known right or privilege."⁸⁷ After *Zerbst*, the

80. *See id.*

81. *See Galowski v. Murphy*, 891 F.2d 629 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1953 (1990).

82. *See id.* at 636.

83. *See id.*

84. *See id.*

85. *See id.*

86. 304 U.S. 458 (1938).

87. *Id.* at 464. *See also* *Faretta v. California*, 422 U.S. 806, 835 (1975)(defendant must be voluntarily exercising his own free will and must knowingly and intelligently relinquish the right to counsel); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)(waiver needs "an affirmative showing that it was intelligent and voluntary"); *Miranda v. Arizona*, 384 U.S. 436, 475 (1966)(reasserting *Zerbst* standards for waiver of right against self-incrimination in custodial interrogations); *Carnley v. Cochran*, 369 U.S. 506, 512-13 (1962)(defendant must intelligently and understandingly waive fundamental right to counsel); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277 (1942) (defendant

Supreme Court has consistently held that a case-by-case factual inquiry is necessary when determining whether there has been such a waiver.⁸⁸ Additionally, the Court has repeatedly rejected the use of a silent record approach in determining whether a criminal defendant has waived such a right.⁸⁹

The silent record approach thus ignores the dictates of Supreme Court precedent.⁹⁰ Courts employing this approach, to avoid conflict with Supreme Court holdings, have either side-stepped precedent by resting their holdings on cases that do not consider the constitutional dimension of the right to testify⁹¹ or have disregarded outright the requirement of case-by-case analysis through invocations of “[c]ustom and common sense.”⁹²

must be competent to make an intelligent, informed choice of whether to waive a fundamental right). For a further explanation of the general requirements of this standard, see *supra* note 4.

88. See, e.g., *North Carolina v. Butler*, 441 U.S. 369, 373 (1979) (waiver depends on facts of each case); *Faretta*, 422 U.S. at 835-36 (employing a case-by-case approach to determine if defendant waived his right to counsel); *Carnley*, 369 U.S. at 513 (same); *Adams*, 317 U.S. at 278 (determination of waiver “depend[s] upon the unique circumstances of each case”); *Zerbst*, 304 U.S. at 464 (whether there has been a waiver of a fundamental right “depend[s], in each case, upon the particular facts and circumstances surrounding that case”).

89. See, e.g., *Barker v. Wingo*, 407 U.S. 514, 525 (1972) (“Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court’s pronouncements on waiver of constitutional rights.”) (footnote omitted); *Carnley*, 369 U.S. at 516 (“[p]resuming waiver from a silent record is impermissible”); *Boykin*, 395 U.S. at 242 (holding there must be an on the record showing that guilty plea was made knowingly and voluntarily); *Zerbst*, 304 U.S. at 464 (courts should not “‘presume acquiescence in the loss of fundamental rights’”) (citation omitted); cf. *Butler*, 441 U.S. at 373 (mere silence is not enough but prosecutor can prove through course of conduct and an understanding of right that defendant knowing and intelligently waived right to have counsel present at custodial interrogation).

90. See *United States v. Martinez*, 883 F.2d 750, 768 (9th Cir. 1989) (Reinhardt, J., dissenting). The silent record approach presumes that by not making an on-the-record objection, a defendant knows he has the right to testify, knows the ultimate decision on whether to testify is his, is competent to waive the right, makes a conscious choice not to testify and makes a voluntary, uncoerced decision not to testify. See *id.*; O’Neill, *supra* note 42, at 832-33. Such presumption turns the “basic rule of constitutional construction on its head.” *Martinez*, 883 F.2d at 768 (Reinhardt, J., dissenting); see also O’Neill, *supra* note 42, at 829 (“[t]his . . . method is totally at odds with the ‘knowing and intelligent’ waiver approach”).

91. See *United States v. Bernloehr*, 833 F.2d 749, 752 (8th Cir. 1987); *supra* notes 52-53 and accompanying text.

92. *Martinez*, 883 F.2d at 756. The *Martinez* court would impute knowledge of the constitutional right to testify through “[e]duc[ation] by television.” *Id.* at 761. Notwithstanding that ‘education by television’ may be a contradiction in terms, it is extremely problematic to “stake fundamental constitutional rights on the vagaries of network programming.” *Id.* at 770 n.27 (Reinhardt, J., dissenting).

The *Martinez* court further offers three specious analogies to buttress its custom and common sense argument. First, the court notes that because a defendant waives his right not to testify by taking the stand, conduct alone is also sufficient to waive the right to testify. See *id.* at 756-57. Silence and inaction, however, are qualitatively distinct from such affirmative conduct. See, e.g., *North Carolina v. Butler*, 441 U.S. 369, 373 (1979) (recognizing that mere silence is not enough to waive a constitutional right, prosecution

In contrast, because the case-by-case approach to waiver of the right to testify employs a case-specific factual inquiry, it is consistent with Supreme Court precedent concerning waiver of other fundamental rights.⁹³ Moreover, this approach has proved successful for determining whether a defendant's right to testify has been violated. For example, in *United States v. Teague*,⁹⁴ the Eleventh Circuit examined the record of a post-conviction hearing and found that the defendant's right to testify had been violated because the attorney had unilaterally waived this right against the defendant's will.⁹⁵ Similarly, in *Galowski v. Murphy*,⁹⁶ the Seventh Circuit relied upon a post-conviction hearing to determine that the defendant had personally made the decision not to testify.⁹⁷ There is thus no persuasive reason to abandon the Supreme Court mandated, case-by-case approach in determining whether a defendant has given his personal consent to the waiver of his constitutional right to testify. In fact, there are other grounds that support the adoption of this approach.

must prove defendant's understanding of the right and a course of conduct to establish waiver). Additionally, the Supreme Court has repeatedly held that "[p]resuming waiver from a silent record is impermissible." *Carnley v. Cochran*, 369 U.S. 506, 516 (1962). Thus, this analogy is not compelling reason to abandon Supreme Court precedent on waivers of fundamental rights.

Next, the *Martinez* court observed that by the conduct of appearing with counsel, the defendant is deemed to have waived his right of self-representation, and thus, similarly by remaining silent a defendant waives the right to testify. *See Martinez*, 883 F.2d at 757-58. Appearing with counsel, however, is more than mere silence. It is affirmative conduct. Furthermore, the right of self-representation "cut[s] against the grain of [Supreme Court] decisions," as courts consider an attorney's assistance "essential to assure the defendant a fair trial." *Faretta v. California*, 422 U.S. 806, 832-33 (1975)(citations and footnote omitted). Thus, the right to self-representation is disfavored by courts. *See Martinez*, 883 F.2d at 765 (Reinhardt, J. dissenting). The right to testify, however, like the right to counsel, goes to the very heart of the fairness of a trial. *See Wright v. Estelle*, 572 F.2d 1071, 1079 (5th Cir. 1978)(Godbold, J., dissenting). Thus, this analogy does little to buttress *Martinez*' "common sense" disregard of Supreme Court precedent.

As a final analogy, the court posited that because a defendant waives his right to cross-examine witnesses through his attorney, similarly, he waives his right to testify through his attorney. *See Martinez*, 883 F.2d at 758-59. The right to cross-examine witnesses, however, is a matter of trial strategy, ultimately for the attorney to decide. *See Standards for Criminal Justice*, *supra* note 42, Standard 4-5.2(b), at 4-65 to -66, commentary at 4-67 to -68. The decision of whether to testify belongs to the defendant. *See Standards for Criminal Justice*, *supra* note 42, at 4-65, commentary at 4-66 to -67; *supra* notes 41-44 and accompanying text; *see also* Model Rules, *supra* note 42, at Rule 1.2(a) ("the lawyer shall abide by the client's decision, after consultation with the lawyer, as to . . . whether the client will testify"). Thus the *Martinez* court offers no compelling evidence from which to disregard decades of Supreme Court precedent.

93. *See supra* notes 86-89 and accompanying text.

94. 908 F.2d 752 (11th Cir. 1990).

95. *See id.* at 760; *see also* *United States v. DiSalvo*, 726 F. Supp. 596, 598 (E.D. Pa. 1989)(post-conviction hearing was basis for finding defendant's right to testify had been violated).

96. 891 F.2d 629 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1953 (1990).

97. *See id.* at 636.

B. Considerations of Fairness and Autonomy

Fairness and autonomy considerations further support the use of a case-by-case approach. The perceptions of both the public at-large,⁹⁸ and the criminal defendant of a right's importance to a fair trial should be considered when determining the proper standard for the waiver of a constitutional right.⁹⁹ Thus, in *Faretta v. California*,¹⁰⁰ the Supreme Court conceded that self-representation would work to the detriment of most defendants,¹⁰¹ but nevertheless found it to be unfair to "force a lawyer on a defendant"¹⁰² because "[i]t is the defendant himself and not his lawyer or the State [who] bear[s] the personal consequences of a conviction".¹⁰³ The Court further stated that a defendant in such a position "can only . . . believe that the law contrives against him."¹⁰⁴ Similarly, a defendant who wishes to testify but is wrongfully denied the opportunity by his attorney or the court¹⁰⁵ will likely believe that he has been denied a fair hearing.¹⁰⁶

The public also must be satisfied that a defendant has not been silenced by the machinations of his counsel or the court, or through ignorance or mistake.¹⁰⁷ Indeed, actual unfairness often results when a defendant does not testify because often the defendant is the most effective witness for the defense¹⁰⁸ and juries, despite limiting instructions, are highly prone to infer guilt from criminal defendant's failure to take the stand.¹⁰⁹

98. See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951)(Frankfurter, J., concurring)("The heart of the matter is that democracy implies respect for the elementary rights of [people], however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.")(footnote omitted); *Adams v. United States ex. rel. McCann*, 317 U.S. 269, 279 (1942)("[t]he public conscience must be satisfied that fairness dominates the administration of justice").

99. See Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 Mich. L. Rev. 1, 120 (1984).

100. 422 U.S. 806 (1975).

101. See *id.* at 834.

102. *Id.*

103. *Id.*

104. *Id.* As eloquently stated by Judge Godbold in his dissenting opinion in *Wright v. Estelle*:

To deny a defendant the right to tell his story from the stand dehumanizes the administration of justice. I cannot accept a decision that allows a jury to condemn to death or imprisonment a defendant who desires to speak, without ever having heard the sound of his voice.

Wright v. Estelle, 572 F.2d 1071, 1078 (5th Cir. 1978)(citation omitted).

105. This was what happened in *Martinez*. See *supra* notes 58-66 and accompanying text. The court, however, because it employed a silent record approach found that the defendant's right to testify had not been violated. See *supra* note 67 and accompanying text.

106. See *Wright*, 572 F.2d at 1078-79 (Godbold, J., dissenting).

107. See *People v. Curtis*, 681 P.2d 504, 513-14 (Colo. 1984).

108. See *Rock v. Arkansas*, 483 U.S. 44, 52 (1987); see also *Green v. United States*, 365 U.S. 301, 304 (1961)("[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself").

109. See, e.g., McCormick, *Handbook on the Law of Evidence* 89 (2d ed. 1972) (a

Thus, forcing a defendant to accept, against his will, his attorney's decision that he not testify, smacks of the unfairness the case-by-case approach seeks to avoid.¹¹⁰

Additionally, a defendant is told from the start of a trial that all communications with the court must be made through counsel.¹¹¹ In fact, a defendant is not only prohibited from speaking openly in court but also is threatened with swift punishment if he does.¹¹² To presume that a defendant waives his right to testify by being silent, therefore, works unfairly against a well-behaved defendant who wishes to testify but who obeys instructions and remains silent at trial.

Furthermore, defendants are often not acquainted with the intricacies of courtroom procedure.¹¹³ A defendant may not realize until jury deliberation that his time to testify has passed.¹¹⁴ It is thus unfair to hold that an uninformed defendant waives his right to testify by not making an objection at the proper time.¹¹⁵

defendant who does not testify is severely prejudiced); L. Mayers, *Shall We Amend the Fifth Amendment 21* (1959 and reprint 1978) (Gallup poll shows 71 per cent of those interviewed would imply guilt from defendant's failure to testify); Dolinko, *Is There a Rationale for the Privilege against Self-Incrimination?*, 33 *UCLA L. Rev.* 1063, 1075 (1986) ("jurors are so likely to regard a defendant's failure to testify as evidence of guilt that the innocent defendant [with prior convictions] is usually better off taking the stand") (footnote omitted); Nichol, *Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609*, 82 *W. Va. L. Rev.* 391, 401 (1980) (jurors naturally presume that defendant's are fearful of being shown to be liars under cross-examination); Williams, *The Trial of a Criminal Case*, 29 *N.Y. St. B. Bull.* 36, 42 (1957) ("The fact of the matter is that a defendant who does not take the stand does not in reality enjoy any longer the presumption of innocence."); Robinson, *The Defendant as Witness*, 29 *Dicta* 266, 266 (1952) (a prejudicial presumption is bound to arise if the defendant does not testify); Note, *Character Evidence By Any Other Name . . . : A Proposal to Limit Impeachment by Prior Conviction Under Rule 609*, 58 *Geo. Wash. L. Rev.* 762, 762-63 (1990) (jury almost inevitably draws inference of guilt from failure to take the stand).

110. See *Caruley v. Cochran*, 369 U.S. 506, 510-13 (1962); *Johnson v. Zerbst*, 304 U.S. 458, 463-64 (1938).

111. See *United States v. Teague*, 908 F.2d 752, 759 (11th Cir. 1990); *United States v. Martinez*, 883 F.2d 750, 770 (9th Cir. 1989) (Reinhardt, J., dissenting).

112. See *Teague*, 908 F.2d at 759; *Martinez*, 883 F.2d at 770 (Reinhardt, J., dissenting).

113. See Tigar, *Forward: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 *Harv. L. Rev.* 1, 26 (1970); *Teague*, 908 F.2d at 759.

114. See *Teague*, 908 F.2d at 759. An example of this can be seen in the defendant's testimony at a post-conviction hearing from *United States v. DiSalvo*, where the defendant talked about the presentation of the defense:

So we get inside . . . And he called one witness to the stand . . . And it never, before I knew it, the defense rested. And that was it, and the case was over as far as I was concerned. But I never, like I didn't know I could get up and say wait a minute, your Honor, I want to say something . . .

726 *F. Supp.* 596, 598 n.2 (E.D. Pa. 1989) (testimony of the defendant as reported in the Magistrate's Report and Recommendation).

115. See *United States v. Teague*, 908 F.2d 752, 759 (11th Cir. 1990). As one commentator stated: "It palter[s] in a double sense, therefore, to admonish [the defendant] to observe the arcane rituals of the courtroom and to entrust his future to the remote world of judges and lawyers—only to discover at the end of the process that his rights have mysteriously evanesced through 'waiver.'" Tigar, *supra* note 113, at 26.

C. Courtroom Dignity

The case-by-case approach also preserves the dignity of courtroom proceedings. The American Bar Association notes that one frequently criticized aspect of the criminal trial is the undignified atmosphere of the courtroom.¹¹⁶ To ensure an appropriate setting for trials, courts demand that the defendant be silent and that any communication with the court be made through his attorney.¹¹⁷ The silent record approach, by demanding that a defendant disrupt the courtroom by making an on-the-record objection to preserve his right to testify is thus antithetical to the preservation of courtroom dignity.¹¹⁸

Therefore, precedent, considerations of fairness and autonomy, and preservation of courtroom dignity all dictate that the silent record approach be abandoned. At a minimum, a case-by-case approach should be employed to ensure that a defendant's right to testify is protected from unilateral waiver by his attorney.

IV. THE CASE FOR PROCEDURALLY SAFEGUARDING THE CONSTITUTIONAL RIGHT TO TESTIFY

The case-by-case approach is not without its drawbacks. For instance, it looks primarily to the defendant's intent, rather than his knowledge. Accordingly, it does not directly address the defendant who is unaware of his constitutional right to testify.¹¹⁹ It should be apparent that a person without knowledge of the right to testify could not waive it knowingly.¹²⁰ Similarly, a case-by-case approach does not address the defendant who does not realize that the ultimate decision of whether to testify belongs to him rather than to his attorney.

116. See Standards for Criminal Justice, *supra* note 42, Standard 6-1.1(b), at 6-6, commentary at 6-8; see also Tigar, *supra* note 113, at 26 n.81 (problem of courtroom disruption is subject of renewed interest).

117. See *Teague*, 908 F.2d at 759.

118. As noted by the dissent, the *Martinez* holding "requires the defendant to . . . interrupt the trial proceedings, and interject himself, uninvited, into the fray." *United States v. Martinez*, 883 F.2d 750, 770 (9th Cir. 1989) (Reinhardt, J., dissenting). Furthermore, once criminal defendants become aware that they must disrupt the court proceedings to preserve their right to testify, they may feel compelled to disrupt the court to object to other decisions made by their attorneys with which they disagree. See Tigar, *supra* note 113, at 27.

119. See, e.g., *United States v. Teague*, 908 F.2d 752, 761 (11th Cir. 1990) (limiting its holding to cases where the attorney, against the defendant's will, waives the right to testify); *Galowski v. Murphy*, 891 F.2d 629, 636 (7th Cir. 1989) (does not address the question of whether a defendant without knowledge of the right can waive it).

120. The Ninth Circuit, in *United States v. Edwards*, 897 F.2d 445, *cert. denied*, 111 S. Ct. 560 (1990), has held otherwise. See *id.* at 447. In *Edwards*, the defendant claimed he was unaware of his right to testify and therefore claimed he could not knowingly waive it. See *id.* at 446. While noting that *Martinez* stated that the defendant needed to know the right existed in order to waive it, the court found that knowledge of the right to testify was not necessary for its knowing and intentional waiver. See *id.* at 446-47. To find otherwise, the court determined, would undermine *Martinez*' broad rule that a court had no duty to inform the defendant of his right to testify. See *id.*

Relying upon defense counsel to inform his client of the nature and existence of his constitutional right to testify poses several significant problems. First, an attorney who does not want his client to testify could slant information to dissuade the defendant from testifying.¹²¹ Second, an incompetent or overworked attorney may simply not supply the information necessary for the defendant to make an intelligent choice.¹²² Additionally, through incompetency, the attorney himself may be unaware of the right or may give incorrect information.¹²³ In any case, even if the defense attorney accurately relays this information, there is no assurance that counsel will not simply prevent a defendant from testifying even though the defendant desires to testify.¹²⁴

To ensure that a criminal defendant's right to testify is safeguarded, trial judges should be given the responsibility for both informing the defendant of this constitutional right and making a record of the defendant's knowing, voluntary and intelligent waiver of this right.¹²⁵ Assigning this role to the trial judge is consistent with Supreme Court precedent¹²⁶ and such procedures are not foreign to trial courts. Indeed,

121. See, e.g., Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C.L. Rev. 315, 342 (1987) (an attorney may "shade . . . information to ensure that the client reaches the decision deemed appropriate by the attorney").

122. See, e.g., *United States v. DiSalvo* 726 F. Supp. 596, 598 (E.D. Pa. 1989) (Magistrate concluded the defense attorney "did not advise [the defendant] of his right to testify despite [the defendant's] having told him that he wanted to testify").

123. Several articles have addressed the high rate of the incompetency of defense counsel. See, e.g., Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 Fordham L. Rev. 227, 240 (1973) (then Chief Justice Burger proposed certification of trial advocates to combat the problem of incompetency); Schwarzer, *Dealing with Incompetent Counsel—the Trial Judge's Role*, 93 Harv. L. Rev. 633, 633-34 (1980) (incompetency of counsel is a growing concern and it is up to the trial judge to monitor a defense attorney's competence); Stuntz, *Waiving Rights in Criminal Procedure*, 75 Va. L. Rev. 761, 796 (1989) ("[a]ppointed counsel are . . . often of poor quality"). See also *DiSalvo*, 726 F. Supp. at 598 (defense attorney did not provide defendant with information necessary to make a meaningful choice as to whether to testify).

124. This is what happened in *Teague*. The defense attorney had informed the defendant of his right to testify and that it was his decision to make. Even though the defendant repeatedly told his attorney that he wanted to testify, however, the attorney rested the defense without calling him as a witness or consulting him. See *United States v. Teague*, 908 F.2d 752, 760 (11th Cir. 1990). The court found this to violate the defendant's constitutional right to testify. See *id.* at 761.

The Model Rules of Professional Conduct state "the lawyer shall abide by the client's decision, after consultation with the lawyer, as to . . . whether the client will testify." Model Rules, *supra* note 42, at Rule 1.2(a). Provisions similar to the Model Rules were in effect in the *Martinez* case, yet this did not stop the defendant's attorney from unilaterally keeping the defendant off the stand. See *United States v. Martinez*, 883 F.2d 750, 755 (9th Cir. 1989).

125. Judge Schwarzer stated in a recent article that where a right requires a knowing, voluntary and intelligent waiver, "[t]he judge has a duty to conduct a hearing to satisfy himself . . . that the waiver is the product of the defendant's decision." See Schwarzer, *supra* note 123, at 657.

126. See, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) ("[t]he constitutional right

the Supreme Court has required an on-the-record waiver in cases where the right involved requires a knowing, voluntarily and intelligent waiver at the time of trial.¹²⁷ This has been found necessary for the waiver of right to counsel,¹²⁸ right to trial¹²⁹ and right to trial by jury.¹³⁰

Additionally, the American Bar Association's *Standards for Criminal Justice* squarely place the responsibility for safeguarding the rights of the criminal defendant on the shoulders of the trial judge.¹³¹ Commentators have also approved of the trend to place increased responsibility on trial judges to ensure fair trials for criminal defendants.¹³² Furthermore, judicial efficiency is promoted by requiring trial courts to advise the defendant of his right to testify and to elicit an on-the-record waiver when a defendant does not testify. Such advisement and inquiry provides an appellate court with a strong evidentiary basis for determining whether the "knowing, voluntary and intelligent" standard was met.¹³³ Additionally, a defendant would have little room left to assert that his right to testify

of an accused to be represented by counsel invokes, of itself, the protection of a trial court").

127. See, e.g., *Faretta v. California*, 422 U.S. 806, 835 (1975)(right to counsel); *Carnley v. Cochran*, 369 U.S. 506, 516 (1962)(same); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938)(same); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)(right to trial); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277-78 (1942)(trial by jury).

128. See *Faretta*, 422 U.S. at 835; *Carnley*, 369 U.S. at 516; *Zerbst*, 304 U.S. at 465.

129. See *Boykin*, 395 U.S. at 242.

130. See *Adams*, 317 U.S. 277-78. The Federal Rules of Criminal Procedure require a written waiver by a defendant to waive his right to a jury trial. See Fed. R. Crim. P. 23(a); see also *United States v. David*, 511 F.2d 355, 361 (D.C. Cir. 1975) (written waiver under Rule 23(a) not always enough to insure competent waiver; some cases require an on-the-record discussion to ensure constitutional standard of waiver is met).

131. See *Standards for Criminal Justice*, *supra* note 42, Standard 6-1.1, at 6 ("[t]he trial judge has the responsibility for safeguarding . . . the rights of the accused").

132. See generally Remington, *The Changing Role of the Trial Judge in Criminal Cases—Ensuring that the Sixth Amendment Right to Assistance of Counsel is Effective*, 20 U.C.D.L. Rev. 339, 351 (1987) (arguing that judges must take proactive role in ensuring effective assistance of counsel); Schwarzer, *supra* note 123, at 651-65 (urging intervention by trial judge to ensure that attorneys represent their clients competently).

133. See *United States v. Martinez*, 883 F.2d 750, 767-68 (9th Cir. 1989)(Reinhardt, J., dissenting). See also *People v. Curtis*, 681 P.2d 504, 515 (Colo. 1984) (purpose of advisement includes facilitating appellate review); *LaVigne v. State*, 788 P.2d 52, 55 (Alaska Ct. App. 1990) ("the case at bar and the cases which we have consulted in our attempt to resolve this issue point out a serious problem: if the court does not establish on the record that the defendant has waived his right to testify, it is extremely difficult to determine . . . whether such a waiver occurred").

The court in *Martinez* lists seven reasons, culled from other cases, why courts should have no duty to make an on-the-record determination as to whether the defendant in a criminal trial has knowingly and intentionally waived his right to testify. See *United States v. Martinez*, 883 F.2d 750, 760 (9th Cir. 1989). Three of these reasons implicitly rest on the assumption that the right to testify is not a constitutional right and therefore may be unilaterally waived by counsel.

One reason is that "the right to testify is . . . the kind of right that must be asserted in order to be recognized." *Id.* The court, for this proposition, relies on cases which suggest that the right to testify on one's own behalf is merely a statutory "privilege" which can be taken away at the whim of Congress, not a fundamental and personal constitutional right. See *United States v. Ives*, 504 F.2d 935, 939-40 (9th Cir. 1974), *vacated*, 421

was violated, if its waiver were on-the-record. Moreover, this would avoid attorney-client complicity in seeking a new trial.¹³⁴

In *People v. Curtis*,¹³⁵ the Colorado Supreme Court adopted such a procedure. The court in *Curtis* held it to be necessary for the trial court to advise the criminal defendant of his right to testify and ensure that the defendant has made a knowing, voluntary and intelligent waiver of this right.¹³⁶ The Colorado experience is noteworthy, particularly concern-

U.S. 944 (1975). This reasoning does not withstand constitutional scrutiny. *See supra* notes 39, 86-93 and accompanying text.

Another reason is that in "advising a defendant [a court] might improperly intrude on the attorney-client relation". *Martinez*, 883 F.2d at 760. It is, however, the responsibility of a trial judge, irrespective of defense counsel, to ensure that rights that require the defendant's personal consent to be waived are protected. *See supra* notes 131-32 and accompanying text. Additionally, inquiries into the waiver of other fundamental rights have not been found to impinge unnecessarily on the attorney-client relation. *See Martinez*, 883 F.2d at 767 (Reinhardt, J. dissenting).

A third reason is that "the judge should not interfere with defense strategy." *Id.* at 760. The right to testify, however, is held by federal courts to be a constitutional right so fundamental that its waiver is not a matter for defense strategy. *See supra* notes 41-44 and accompanying text. A judge engaging in such inquiry is properly following American Bar Association standards. *See supra* note 129 and accompanying text. As Judge Reinhardt points out, "[t]he defense strategy, in regards to the decision to testify, is ultimately shaped by the defendant. The discussion between trial court and defendant would assist, not interfere with, that decision." *Martinez*, 883 F.2d at 767 (Reinhardt, J., dissenting).

The remaining four grounds posited by the *Martinez* court for not procedurally safeguarding a defendant's right to testify are not compelling. One is that "it is important that the decision to testify be made at the time of trial and that the failure to testify not be raised as an afterthought after conviction." *Id.* at 760. This statement does not withstand close scrutiny. If a proper inquiry were made, it would ensure that defendant's decision to testify was made at the time of trial. *See id.* at 766 (Reinhardt, J., dissenting).

Second, the court notes that "by advising the defendant of his right to testify, the court could influence the defendant to waive his right not to testify." *Id.* at 760 (emphasis in original). An adequate advisement, however, would inform a defendant of his right not to testify as well as the consequences of taking the stand. *See id.* at 766-67 (Reinhardt, J., dissenting). Further, the advisement and inquiry would be attended by counsel, thus ameliorating its effect on the defendant's fifth amendment privilege. *See id.*

Third, the majority expresses its concern that an inquiry "would introduce error into the trial." *Id.* at 760. In fact, such an advisement and inquiry would diminish the chance of error, as there would be "a strong evidentiary basis for the trial court's rulings." *Id.* at 767 (Reinhardt, J., dissenting); *accord*, *LaVigne v. State*, 788 P.2d 52, 55 (Alaska Ct. App. 1990).

Finally, the majority expresses its concern over the correct timing of such an inquiry, opining that the point at which the defense rests is "not an opportune moment to conduct a colloquy". *Martinez*, 883 F.2d at 760. These concerns can be allayed by establishing a procedure for an advisement and inquiry. The advisement could be conducted before trial and an inquiry done after the defense rests. *See infra* notes 141-43 and accompanying text; *see also Martinez*, 883 F.2d at 767 (Reinhardt, J., dissenting) ("when the defense rests is a perfectly appropriate—as well as an administratively convenient—time to conduct the colloquy").

134. Under this scenario, an unscrupulous attorney would offer evidence that he waived, against his client's will, his client's right to testify in order to secure a new trial.

135. 681 P.2d 504 (Colo. 1984).

136. *See id.* at 515. Other states have adopted similar views. *See, e.g., State v. Neuman*, 371 S.E.2d 77, 82 (W. Va. 1988)(adopting *Curtis* procedure for West Virginia);

ing the scope and timing of the advisement and inquiry.

As to the scope of the advisement, the Colorado Supreme Court recommended that the trial court advise the defendant that he has the right to testify, that the ultimate decision of whether to testify is his, that by testifying he will likely be cross-examined, and that any prior convictions may be used to impeach his testimony.¹³⁷ Because of the advisory nature of the *Curtis* instructions, however, trial courts in Colorado have not been uniform in advising the defendant.¹³⁸ Additionally, the *Curtis* opinion does not mention whether the court should inform the defendant of his right *not* to testify.¹³⁹ This right, however, should be included in any instruction to fairly balance the trial court's advice and to avoid unduly influencing the defendant to waive this right.¹⁴⁰

The *Curtis* opinion offers trial courts little guidance regarding the timing of the advisement. Indeed, the court does not mention a specific time to conduct the advisement and inquiry.¹⁴¹ In a footnote to a later case, however, the Colorado Supreme Court stated that the appropriate time for an advisement and inquiry would be "at the time [the] defendant chooses not to testify."¹⁴² Presumably, this is when the defense rests. At least one trial court in Colorado, however, advised the defendant of his right to testify prior to the end of the prosecution's case and this was deemed sufficient to satisfy the *Curtis* requirement.¹⁴³

Culberson v. State, 412 So. 2d 1184, 1186-87 (Miss. 1982)(adopting similar procedures for purposes of judicial efficiency); accord *LaVigne v. State*, 788 P.2d 52, 55 (Alaska Ct. App. 1990)("It 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.")

137. See *Curtis* 681 P.2d at 514.

A trial court [should advise] 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 prosecution 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.

Id.

138. See, e.g., *People v. Woodward*, 782 P.2d 1212, 1213 (Colo. Ct. App. 1989) (although trial court advised defendant of right to testify, it did not advise defendant that the decision to testify was his to make); *People v. McMullen*, 738 P.2d 23 (Colo. Ct. App. 1986) (defendant claimed trial court failed to warn him of disadvantages of testifying).

139. See *Curtis*, 681 P.2d at 514-15. Thus, in a later case, the Supreme Court of Colorado was faced with the issue of whether by not advising the defendant of his right *not* to testify that this right had been violated. See *People v. Mozee*, 723 P.2d 117, 122 (Colo. 1986). The court decided that, even though the right not to testify must be knowingly, intelligently and voluntarily waived, the lack of an on-the-record advisement and determination of waiver concerning this right "will not automatically render a defendant's waiver [of this right] invalid." *Id.* at 124.

140. See *United States v. Martinez*, 883 F.2d 750, 766-67 (Reinhardt, J. dissenting).

141. See *People v. Curtis*, 681 P.2d 504, 514-17 (Colo. 1984).

142. *Mozee*, 723 P.2d at 125 n.8.

143. See *People v. Roelker*, 780 P.2d 17, 18 (Colo. Ct. App. 1989), *aff'd*, 804 P.2d 1336 (Colo. 1991). The Colorado Supreme Court, in affirming *Roelker*, limited *Curtis* to

To avoid confusion and ensure that a defendant's waiver of his right to testify is knowing, voluntary and intelligent, a two-part colloquy is advisable. The first part should be on the record, prior to the beginning of evidence and outside the hearing of the jury. It should inform the defendant of his constitutional rights both to testify and *not* to testify and the consequences of invoking either right. The content of the advisement should be consistent in order to avoid appellate claims alleging a violation of the right to testify based on the insufficiency of the trial court's advice.¹⁴⁴ It should be done before the trial so the defendant has an informed basis, as the trial progresses, for deciding whether it is in his best interest to take the stand. This pre-trial discussion would also encourage defense counsel to discuss the decision more fully with the defendant. To this end, it is recommended that a fixed litany, based on the suggestions of the *Curtis* court,¹⁴⁵ but including mention of the right *not* to testify, should be established.¹⁴⁶

The second part of the colloquy should occur after the defense has rested if the defendant has not been called to testify on his own behalf. This should also be on the record and out of the jury's hearing. The judge should question the defendant to determine whether there was a knowing, voluntary and intelligent waiver of the right to testify.

CONCLUSION

The silent record approach to the waiver of the constitutional right to testify should be abandoned because it is contrary to the standard for the waiver of constitutionally protected rights of criminal defendants. Such

requiring that a trial court merely advise the defendant of his right to testify. See *Roelker v. People*, 804 P.2d 1336, 1338-39 (Colo. 1991) Thus, the court held that no inquiry was necessary when determining whether the defendant made a knowing, voluntary and intelligent waiver. See *id.* at 1339. The court then employed a silent record approach to determine if the defendant had waived his right to testify noting that "[the defendant] did not make any objection when his attorney said, on the record, that the defense was not going to present any evidence." *Id.* For a discussion of the flaws of the silent record approach, see *supra* notes 89-121 and accompanying text. The opinion in *Roelker* was written by Justice Erickson who dissented in *Curtis* on the grounds that the right to testify is not a fundamental constitutional right and, therefore, can be unilaterally waived by counsel. See *Curtis*, 681 P.2d at 517-19 (Erickson, C.J., dissenting).

144. See, e.g., *People v. Woodward*, 782 P.2d 1212, 1213 (Colo. Ct. App. 1989) (although trial court advised defendant of right to testify, it did not advise defendant that the decision to testify was defendant's to make); *People v. McMullen*, 738 P.2d 23 (Colo. Ct. App. 1986) (trial court failed to warn defendant of disadvantages of testifying).

145. See *supra* note 137 and accompanying text.

146. The following is an example of a model advisement:

You have the constitutional right to testify on your own behalf. You also have the right not to testify. If you choose to testify, any prior felony convictions may be brought to the attention of the jury. Also, if you testify the prosecutor will be allowed to cross-examine you. If you choose not to testify, the jury may be told not to draw any adverse inferences from such choice. You should discuss your options with your attorney and listen carefully to his/her advice. The ultimate choice on whether or not to testify, however, is yours.

The judge should then question the defendant to see if he understands the advice.

approach is also inconsistent with considerations of fairness, autonomy and courtroom dignity. At a minimum, courts should adopt a case-by-case approach to determine whether a defendant has waived his constitutional right to testify.

In order to best ensure protection of this right, however, trial judges should procedurally safeguard it by advising the criminal defendant of his right to testify and, if the defendant is not called to testify, an on-the-record waiver should be elicited. This procedural safeguard is an efficient and effective means for ensuring that the defendant's right to testify will not be violated.

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