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A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHT
TO TESTIFY — THE IMPLICATIONS OF *UNITED
STATES EX REL. WILCOX v. JOHNSON*

MARY BELL HAMMERMAN†

THE SECOND TRIAL OF NORMAN WILCOX on the charge of rape was argued before a jury in the County Court of Philadelphia.¹ The defendant believed that his defense would be predicated on an alibi theory;² however, at the close of the Commonwealth's case, defendant's counsel informed him for the first time that a consent theory would be advanced instead.³ Defendant thereupon protested this change of strategy to his counsel, demanding to testify in his own behalf and to introduce evidence to support an alibi defense.⁴ Believing that the defendant's testimony would be perjured,⁵ the defense counsel refused to permit him to take the stand.⁶ Moreover, counsel advised the trial judge in a sidebar conference that she would request to withdraw from the case if the defendant were permitted to testify over her objection.⁷

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Ms. Hammerman was the attorney for appellee, Norman Wilcox, in *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115 (3d Cir. 1977), the case which is the focal point of this article.

1. See *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 116 (3d Cir. 1977). The defendant had been previously tried on the same charge in a nonjury trial before the County Court of Philadelphia. See *id.* Finding that the defendant's constitutional rights were violated when the state court judge delivered a verdict before affording the defense an opportunity to present a closing statement, the federal district court granted a writ of habeas corpus. *United States ex rel. Wilcox v. Pennsylvania*, 273 F. Supp. 923, 924 (E.D. Pa. 1967). However, issuance of the writ was stayed to allow a retrial in the state court. *Id.* at 926.

2. See 555 F.2d at 116. Since an alibi theory had been advanced at defendant's first trial, he expected the same defense to be presented at his retrial. See *id.*

3. See *id.* The defense counsel had previously indicated, during the *voire dire* examination of jury members, that she would rely on a consent theory rather than an alibi defense. See *id.* The potential jurors were asked "whether they [felt] that a man should be punished for having sexual relationships with a woman out of wedlock." *Id.* at 116 n.3.

4. See *id.* at 117.

5. See *id.* In a subsequent proceeding for a writ of habeas corpus, the defense counsel could not provide an explanation for this belief, but merely "recall[ed] that that was her conclusion." Notes of Testimony at 90, *United States ex rel. Wilcox v. Johnson*, No. 73-313 (E.D. Pa. June 8, 1976). For a discussion of the habeas corpus proceeding, see notes 12-22 and accompanying text *infra*.

6. See 555 F.2d at 117. Counsel advanced several reasons other than fear of perjury for refusing the defendant's request to testify. First, by not presenting a defense, she would be able to make the final argument to the jury. See *id.* at 117 n.4. Second, she wished to avoid impeachment of defendant's credibility on cross examination. See *id.*

7. See *id.* at 117.

Confronted with the trial judge's ruling that counsel would be allowed to withdraw and that he would have to represent himself if he insisted on taking the stand,⁸ the defendant decided not to testify.⁹ Consequently, the defense rested without presenting any evidence.¹⁰ Defendant was convicted and sentenced to a prison term.¹¹

Having exhausted his state remedies,¹² defendant sought a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania.¹³ The district court concluded that the defendant had a constitutional right to testify under the due process clause of the fourteenth amendment.¹⁴ The court ruled further that only the defendant, and not his counsel, could validly waive this right.¹⁵ Finding no effective waiver by the defendant, the district court held that the trial judge's ruling infringed upon defendant's constitutional right to testify and denied him the right to a fair trial.¹⁶ Based upon the deprivation of the defendant's constitutional rights, the district court granted the writ of habeas corpus.¹⁷

The Commonwealth of Pennsylvania appealed to the United States Court of Appeals for the Third Circuit, alleging that the defendant was not denied a fair trial.¹⁸ The state maintained that there was no constitutional right to testify and that counsel's waiver of defendant's statutory right to testify¹⁹ was valid because it was made as a matter of trial strategy.²⁰ The Third Circuit, in *United*

8. *See id.* Although a record of the sidebar conference is inexplicably absent from the transcript of the state trial, the federal district court found that the trial judge had ruled that defense counsel would be permitted to withdraw if the defendant persisted in his demand to testify. *See id.*

9. *See id.* In granting defendant's petition for a writ of habeas corpus, the federal district court concluded that the defendant would have taken the stand but for the trial judge's ruling that the consequence of testifying would be the loss of his right to counsel. *See id.* *See also* notes 12-17 and accompanying text *supra*.

10. *See* 555 F.2d at 117.

11. *See id.*

12. *See id.* Defendant petitioned for a writ of habeas corpus after post-trial motions, direct appeals and collateral attacks proved unsuccessful in the state courts. *See id.*

13. *United States ex rel. Wilcox v. Johnson*, No. 73-313 (E.D. Pa. June 8, 1976).

14. U.S. CONST. amend. XIV. *See* 555 F.2d at 117.

15. *See* 555 F.2d at 117.

16. *See id.*

17. *See id.* *See also* note 68 *infra*.

18. 555 F.2d at 117.

19. Section 681 of Pennsylvania's criminal procedure statute provides that "all persons shall be fully competent witnesses in any criminal proceeding before any tribunal." 19 PA. STAT. ANN. § 681 (Purdon 1964).

20. 555 F.2d at 117. *See* notes 5-6 and accompanying text *supra*.

States ex rel. Wilcox v. Johnson,²¹ affirmed the grant of the writ of habeas corpus, holding that the defendant was “unconstitutionally deprived of the right to testify at his own trial.”²²

Historically, the right of a criminal defendant to testify in his own behalf was not recognized at common law.²³ Several theories have been advanced to justify the rule that criminal defendants were incompetent to give sworn testimony. One of the original reasons given for this infirmity was that the prosecution was required to prove a case so completely that no defense was possible.²⁴ Also, it was considered treasonous for anyone, including the defendant, to be a witness against the English Crown.²⁵ The belief that a right to testify would place the defendant at a disadvantage was another reason for refusing the defendant the opportunity to testify.²⁶ According to this line of thought, if a defendant were permitted to take the stand, but decided not to, a jury would most likely interpret his silence as proof of guilt.²⁷ Similarly, if a defendant did testify, he would be subjected to cross examination, which “might place him in a situation where even an innocent man might appear at a disadvantage”²⁸ The final, and perhaps most important, justification for not recognizing a right to testify was the fear that if allowed to take the stand, the defendant’s own interest in the outcome of the case would cause him to perjure himself.²⁹

21. 555 F.2d 115 (3d Cir. 1977). The case was heard before Circuit Judges Gibbons, Forman and Rosen. Circuit Judge Forman wrote the opinion of the court.

22. *Id.* at 116. For a discussion of the Third Circuit’s holding, see notes 37–53 and accompanying text *infra*.

23. Popper, *History and Development of the Accused’s Right to Testify*, 1962 WASH. U.L.Q. 454, 454; Note, *Due Process v. Defense Counsel’s Unilateral Waiver of the Defendant’s Right to Testify*, 3 HASTINGS CONST. L.Q. 517, 519 (1976).

24. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711, 717 (1976).

25. *Id.*

26. See *Ferguson v. Georgia*, 365 U.S. 570, 578 (1961); *United States v. Bentvena*, 319 F.2d 916, 943 (2d Cir.), *cert. denied sub nom. Ormento v. United States*, 375 U.S. 940 (1963).

27. *United States v. Bentvena*, 319 F.2d 916, 943 (2d Cir.), *cert. denied sub nom. Ormento v. United States*, 375 U.S. 940 (1963). See *Ferguson v. Georgia*, 365 U.S. 570, 578 (1961).

28. *Id.* See Clinton, *supra* note 24, at 740.

29. Clinton, *supra* note 24, at 740; Popper, *supra* note 23, at 456; Note, *supra* note 23, at 519–20; 3 HOFSTRA L. REV. 839, 843 (1975). In explaining this reason, one state supreme court remarked: “The common law regarded the testimony of a defendant in criminal actions as incompetent upon the theory, among others, that the frailty of human nature and the overpowering desire for freedom would ordinarily induce a person charged with a crime, if permitted to testify, to swear falsely.” *State v. Wilcox*, 206 N.C. 691, 693, 175 S.E. 122, 123 (1934).

The rule that criminal defendants were incompetent to give sworn testimony persisted until the 19th century.³⁰ During that century, however, the right to testify slowly emerged in this country as a number of state legislatures began enacting statutes that removed the common law testimonial incompetence of criminal defendants.³¹ At present, all the states and the federal government have statutes that guarantee a criminal defendant the right to testify in his own behalf.³²

In the past, the issue of whether there was a constitutional right to testify was rarely addressed by the courts, largely because the right was created and protected by statute.³³ Although the right to testify appears to be acquiring a constitutional dimension as an element of due process,³⁴ there is considerable disagreement over

30. See, e.g., *Batre v. State*, 18 Ala. 119 (1850); *Welchell v. State*, 23 Ind. 89 (1864); *State v. Laffer*, 38 Iowa 422 (1874); *State v. Bixby*, 39 Iowa 465 (1874). See also Note, *supra* note 23, at 521 n.28.

31. See Note, *supra* note 23, at 522.

32. See, e.g., 18 U.S.C. § 3481 (1976); 19 PA. STAT. ANN. § 681 (Purdon 1964). The federal statute provides: "In trial of all persons charged with the commission of offenses against the United States . . . the person charged shall, at his own request, be a competent witness." 18 U.S.C. § 3481 (1976). For the text of the Pennsylvania statute, see note 19 *supra*. For a list of all of the state statutes rendering a criminal defendant competent to give sworn testimony, see Note, *supra* note 23, at 541-42.

33. See 3 HOFSTRA L. REV. 839, 841 (1975).

34. See Note, *supra* note 23, at 523-29; 3 HOFSTRA L. REV. 839, 842-45 (1975). Although never specifically holding that there is a constitutional right to testify, the Supreme Court has on several occasions described the right in constitutional terms. In *Ferguson v. Georgia*, 365 U.S. 570 (1961), the Court avoided reaching the issue of whether Georgia's incompetency statute was unconstitutional. However, in a concurring opinion, Justice Clark expressed the view that the statute "does not meet the requirements of due process and that, as an unsatisfactory remnant of an age gone by, it must fall . . ." *Id.* at 602 (Clark, J., concurring). In *Brooks v. Tennessee*, 406 U.S. 605 (1972), a state statute which required a criminal defendant to testify before any other defense testimony was given was held to violate the privilege against self-incrimination. *Id.* at 612. The Court also found that the statute infringed upon the right to due process, stating that "whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right." *Id.* (emphasis added). Similarly, in *Faretta v. California*, 422 U.S. 806 (1975), a case involving a defendant's right to refuse representation by counsel, the Court commented: "This Court has often recognized the constitutional stature of rights that, though not literally expressed in the document, are essential to due process of law in a fair adversary process. It is now accepted, for example, that an accused has a right to . . . testify on his own behalf . . ." *Id.* at 819 n.15 (citations omitted). For a discussion of *Faretta*, see notes 73-75 and accompanying text *infra*.

Lower federal courts have also referred to the right to testify in constitutional terms. See, e.g., *United States v. McCord*, 420 F.2d 255 (D.C. Cir. 1969); *United States v. Bentvena*, 319 F.2d 916, 943 (2d Cir.), *cert. denied sub nom. Ormento v. United States*, 375 U.S. 940 (1963); *Poe v. United States*, 233 F. Supp. 173, 176 (D.D.C. 1964), *aff'd*, 352 F.2d 639 (D.C. Cir. 1965). In *McCord*, the court stated that "as a matter of law, a defendant is always vouchsafed the constitutional right to testify . . ." 420 F.2d at 257.

The right to testify has been linked to the constitution by state courts as well. See, e.g., *Arizona v. Nobel*, 109 Ariz. 539, 541, 514 P.2d 460, 462 (1973); *People v. Mosqueda*, 5 Cal. App. 3d 540, 545, 85 Cal. Rptr. 346, 349 (1970); *Pigg v. State*, 253 Ind.

whether a right to testify is specifically guaranteed by the Constitution.³⁵ With the increasing distinction between statutory and constitutional rights,³⁶ however, resolution of this issue by the Supreme Court seems to be inevitable.

In holding that the defendant was "unconstitutionally deprived of the right to testify at his own trial,"³⁷ the Third Circuit in *Wilcox* concluded that the district court's articulation of a constitutional right to testify "fairly reflects the recognition of such a right by the federal courts."³⁸ The Third Circuit determined, however, that an alternate ground for relief existed — the sixth amendment right to counsel.³⁹ The court found that regardless of whether there is a constitutional right to testify, the defendant in the instant case clearly had a statutory right to do so.⁴⁰ Moreover, the court observed that the defendant was entitled to be represented by counsel under the sixth amendment.⁴¹ The Third Circuit then determined that the trial judge's ruling forced the defendant to choose which of these rights he wanted to preserve.⁴² In the words of the court: "The appellee [defendant] here 'was put to a Hobson's choice:' decline to testify and lose the opportunity of conveying his version of the facts to the jury, or take the stand and forgo his fundamental right to be assisted by counsel."⁴³ Determining that a criminal defendant

329, 330, 253 N.E.2d 266, 267 (1969). For example, the California court in *Mosqueda* remarked that "a defendant's right to testify in his own behalf is merely one of many rights guaranteed by the Fourteenth Amendment to the federal Constitution to insure a fair trial." 5 Cal. App. 3d at 545, 85 Cal. Rptr. at 349.

35. For cases holding that the right to testify does not have a constitutional source, see *Sims v. Lane*, 411 F.2d 661, 664 (7th Cir.), cert. denied, 396 U.S. 943 (1969); *State v. McKenzie*, 17 Md. App. 563, 576, 303 A.2d 406, 413 (1973); *State v. Hutchinson*, 458 S.W.2d 553, 554 (Mo. 1970) (en banc).

36. For a discussion of some of the differences between a statutory and constitutional right to testify, see notes 56-69 and accompanying text *infra*.

37. 555 F.2d at 116.

38. *Id.* at 119. For a discussion of the district court's holding, see text accompanying notes 12-17 *supra*.

39. 555 F.2d at 120-21. The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for this defense." U.S. CONST. amend. VI.

40. 555 F.2d at 120. For the text of the Pennsylvania statute, see note 19 *supra*.

41. 555 F.2d at 120.

42. *Id.* See notes 8-9 and accompanying text *supra*.

43. 555 F.2d at 120, quoting *United States v. Garcia*, 544 F.2d 681, 685 (3d Cir. 1976). In *Garcia*, the court held that the defendants' fifth amendment rights against self-incrimination were violated when they were required to give incriminating evidence in order to obtain a lenient sentence. *United States v. Garcia*, 544 F.2d 681, 685 (3d Cir. 1976). The *Garcia* court commented:

The appellants were put to a Hobson's choice: remain silent and lose the opportunity to be the objects of leniency, or speak and run the risk of additional prosecution. A price tag was thus placed on appellants' expectation of maximum consideration at the bar of justice: they had to waive the protection afforded them by the Fifth Amendment. This price was too high.

Id.

should not be forced to trade one right for another, the court held that the threatened loss of counsel and the denial of the defendant's statutory right to testify in the instant case amounted to a deprivation of the right to a fair trial.⁴⁴ Accordingly, on this alternate basis, the Third Circuit affirmed the district court's grant of the writ of habeas corpus.⁴⁵

Although apparently dicta, the significance of the *Wilcox* decision lies in the Third Circuit's conclusion that a constitutional right to testify, as pronounced by the district court,⁴⁶ is recognized by federal courts.⁴⁷ The Third Circuit began its analysis of this issue with the observation that at common law criminal defendants were incompetent to give sworn testimony on their own behalf.⁴⁸ Since the right to testify is not specifically granted by the Constitution, the court concluded that the constitutional basis for such a right would have to be the due process clause of the fourteenth amendment.⁴⁹ Reviewing many of the cases that have held either that there is no constitutional right to testify,⁵⁰ or that no relief could be granted when the defense counsel determines as a matter of strategy that the

44. 555 F.2d at 120-21. In so holding, the Third Circuit stated:

A defendant in a criminal proceeding is entitled to certain rights and protections which derive from a variety of sources. He is entitled to all of them; he cannot be forced to barter one for another. When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted.

Id. at 120. The court also noted that if the consequence of testifying would have been the withdrawal of defense counsel, the defendant should have been informed of his right to substitute counsel. *Id.*

45. *Id.* at 121. The court found it unnecessary to decide whether defendant was denied effective assistance of counsel. *Id.* However, the court did address itself to the problem a defense counsel faces when he believes his client's testimony will be perjured. *Id.* at 121-22. The Third Circuit concluded that a breach of confidence with the client would occur if counsel discussed a belief of perjury with the trial judge "without possessing a firm factual basis for that belief . . ." *Id.* at 122. The court further stated:

While defense counsel in a criminal case assumes a dual role as a "zealous advocate" and as an "officer of the court," neither role would countenance disclosure to the court of counsel's private conjectures about the guilt or innocence of his client. It is the role of the judge or jury to determine the facts, not that of the attorney.

. . . It is apparent that an attorney may not volunteer a mere unsubstantiated opinion that his client's protestations of innocence are perjured.

Id. See notes 5-7 and accompanying text *supra*.

46. See text accompanying notes 12-17 *supra*.

47. 555 F.2d at 119.

48. *Id.* at 118. See notes 23-29 and accompanying text *supra*.

49. 555 F.2d at 118. See notes 34-35 and accompanying text *supra*.

50. See 555 F.2d at 118, citing *Sims v. Lane*, 411 F.2d 661 (7th Cir.), cert. denied, 396 U.S. 943 (1969), *Sims v. State*, 246 Ind. 660, 208 N.E.2d 469 (1965), *Kinder v. Kentucky*, 269 S.W.2d 212 (Ky. 1954), and *State v. Hutchinson*, 458 S.W.2d 553 (Mo. 1970) (en banc). See also note 35 *supra*.

defendant should not testify,⁵¹ the Third Circuit agreed with the district court's conclusion that such holdings are of dubious validity in light of recent federal and state decisions.⁵² The Third Circuit examined several of these recent cases, stating that "[they] teach that a criminal defendant's right to testify in his own defense is of such fundamental importance that no defendant should 'be deprived of exercising that right and conveying his version of the facts to the court or jury, regardless of competent counsel's advice to the contrary.'"⁵³

As the district court noted, because the common law testimonial incompetence of criminal defendants has been removed by statute in every jurisdiction,⁵⁴ the question of whether a right to testify can be derived from the Constitution is rarely at issue.⁵⁵ However, the significance of finding a constitutional, as opposed to statutory, source for the right to testify has growing importance in a few limited areas.

Waiver may be the most important area in which the distinction between a constitutional and statutory right to testify is significant. The Supreme Court has generally imposed a higher standard for waiver of constitutional rights than for rights derived from other sources.⁵⁶ Furthermore, when the waiver of a "fundamental" right is at issue, the defendant's personal participation is required.⁵⁷

51. See 555 F.2d at 118, *citing* *United States v. Poe*, 352 F.2d 639 (D.C. Cir. 1965), *United States v. Gargulio*, 324 F.2d 795 (2d Cir. 1963), *Sims v. State*, 246 Ind. 660, 208 N.E.2d 469 (1965), and *Kinden v. Kentucky*, 269 S.W.2d 212 (Ky. 1954).

52. 555 F.2d at 118. See *United States ex rel. Wilcox v. Johnson*, No. 73-313, slip op. at 13 (E.D. Pa. June 8, 1976). See also note 34 *supra*.

53. 555 F.2d at 119, *quoting* *Hughes v. State*, 513 P.2d 1115, 1119 (Alas. 1973).

54. See notes 31-32 and accompanying text *supra*.

55. *United States ex rel. Wilcox v. Johnson*, No. 73-313, slip op. at 11 (E.D. Pa. June 8, 1976).

56. See, e.g., *Johnson v. Zerbst*, 304 U.S. 458 (1938). In *Johnson*, which involved the right to counsel, the Supreme Court announced the traditional standard for waiver of constitutional rights: "[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights' . . . we 'do not presume acquiescence in the loss of fundamental rights.'" *Id.* at 464 (footnotes omitted), *quoting* *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937), and *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937).

57. See *Developments in the Law — Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1111 & n.102 (1970) [hereinafter cited as *Federal Habeas Corpus*]. The personal participation of an accused is required in the following situations: 1) entering of guilty pleas, *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969); 2) waiver of the right to counsel and the privilege against self-incrimination, *Miranda v. Arizona*, 384 U.S. 436, 475-76 (1966); 3) waiver of the right to appeal, *Fay v. Noia*, 372 U.S. 391, 439 (1963); and 4) waiver of the right to a jury trial, *Patton v. United States*, 281 U.S. 276, 312 (1930). In *United States v. Pinkney*, 551 F.2d 1241 (D.C. Cir. 1976), the District of Columbia Circuit stated that the defendant's personal participation in a waiver of the right to testify is required. *Id.* at 1251 n.60. See generally Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence And Legitimate State Interest*, 54 CALIF. L. REV. 1262 (1966).

Therefore, it is much less likely that a defense counsel's actions with regard to constitutional guarantees will unilaterally be able to bind his client.⁵⁸

Courts that have refused to recognize a constitutional basis for the right to testify have been willing to find a counsel's waiver of the statutory right to testify effective, even over the defendant's objection.⁵⁹ When the testimonial right is held to be "fundamental" or constitutional, however, the courts demand that the defendant completely understand the significance of the waiver before holding it effective.⁶⁰ Thus, the dicta in *Wilcox* regarding the constitutional origin of the right to testify may suggest that courts will be required to assure themselves that a decision whether or not to testify is made voluntarily, personally, and intelligently by the defendant before finding an effective waiver of that right.⁶¹

Another area that is affected by the distinction between a constitutional and statutory basis for the right to testify is the appeal of harmless error. Ordinarily, an error will be deemed harmless if it does not "affect the substantial rights of the parties,"⁶² or if it has not "resulted in a miscarriage of justice."⁶³ Where federal constitutional rights are involved, however, the Supreme Court has declared that the normal standard of harmless error does not apply.⁶⁴ Rather, a court must determine that an error of constitu-

58. See *State v. Noble*, 109 Ariz. 539, 514 P.2d 460 (1973). In *Noble*, the Arizona court noted: "Fundamental constitutional rights such as the right to testify should not be deemed waived by an independent determination on the part of defendant's counsel and the matter should be subject to the defendant's consideration before the waiver is made part of trial strategy." *Id.* at 541, 514 P.2d at 462. For a discussion of the waiver issue in federal habeas corpus actions, see *Federal Habeas Corpus*, *supra* note 57, at 1103-12.

59. See *Sims v. Lane*, 411 F.2d 661 (7th Cir.), *cert. denied*, 396 U.S. 943 (1969). After concluding that the federal privilege to testify was "merely statutory," the Seventh Circuit in *Sims* stated that "the federal rule seems to be that the exercise of this right is subject to the determination of competent trial counsel and varies with the facts of each case." 411 F.2d at 664. See also *Hodgens v. United States*, 340 F.2d 391, 396 (3d Cir. 1965) (decision of counsel not to permit defendant to testify was not proof of counsel's incompetence, rather it was an example of good trial tactics); *United States ex rel. Dancy v. Handy*, 203 F.2d 407, 426-28 (3d Cir. 1953) (trial judge should not interfere with counsel's decision not to call defendant to the stand in a criminal action).

60. See *Hughes v. State*, 513 P.2d 1115, 1119-20 (Alas. 1973) (defendant must make final decision to waive the right to testify).

61. For a discussion of this aspect of the court's holding, see notes 46-53 and accompanying text *supra*.

62. See 28 U.S.C. § 2111 (1970); FED. R. CRIM. P. 52(a). See also *Gillian v. City of Omaha*, 524 F.2d 1013 (8th Cir. 1975). The *Gillian* court, in a civil case, held that the error must affect the "substantial rights of the objecting party" to constitute reversible error. *Id.* at 1015, citing 28 U.S.C. § 2111 (1970).

63. See, e.g., CAL. CONST. art. 6, § 13.

64. *Chapman v. California*, 386 U.S. 18, 24 (1967).

tional magnitude is harmless beyond a reasonable doubt before it can uphold the trial court decision.⁶⁵ Moreover, the Court has indicated that some constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error"⁶⁶ Hence, if, as *Wilcox* suggests, the fourteenth amendment provides a federal constitutional right to testify,⁶⁷ its denial in a particular case will most likely constitute an error compelling reversal. Furthermore, this right may be found to be so fundamental that its denial will always require reversal.

Additionally, the recognition of a constitutional source for the right to testify would permit a collateral attack of a state court denial thereof in a federal habeas corpus proceeding.⁶⁸ Finally, if the right to testify is protected by the fourteenth amendment, then it is axiomatic that a state could not, without violating the Federal Constitution, repeal its competency statute in order to render a defendant unable to give sworn testimony in his own behalf.⁶⁹

In most of the cases involving the right to testify, the underlying policy issue appears to be the degree of control a criminal defendant should have in the preparation of his own defense. Courts that refuse to find a constitutional right to testify seem to allocate substantial power to the defense counsel, holding his decisions to be binding, even if vigorous disagreement and objection is voiced by his client.⁷⁰ Those cases finding a constitutional right to testify, in contrast, recognize more authority in the defendant; therefore, counsel's tactical actions which are made without consultation or over objection will not necessarily be upheld.⁷¹ Obviously, allocation of

65. *Id.* at 24. See Comment, *A Multi-Rule Approach to Harmless Constitutional Error*, 18 U.C.L.A. L. Rev. 202 (1970). See also *United States v. DeLoach*, 504 F.2d 185 (D.C. Cir. 1974), *aff'd on rehearing*, 530 F.2d 990 (D.C. Cir. 1975), *cert. denied*, 426 U.S. 909 (1976).

66. *Chapman v. California*, 386 U.S. 18, 23 (1967). See *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963) (right to counsel); *Payne v. Arkansas*, 356 U.S. 560, 568 (1958) (coerced confessions); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (impartial judge).

67. See notes 46-53 and accompanying text *supra*.

68. Section 2241 of the federal judicial code provides in pertinent part: "The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3) (1970). If the origin of the right to testify is merely statutory, no federal habeas corpus relief would be available for denial of a state statutory right to testify. Thus, recognizing a constitutional basis for the right to testify would provide federal habeas corpus relief for state court deprivations of that right. See *id.*

69. *Accord*, Note, *supra* note 23, at 527.

70. See *Sims v. Lane*, 411 F.2d 661, 664 (7th Cir.), *cert. denied*, 396 U.S. 943 (1969); *United States v. Poe*, 352 F.2d 639, 641 (D.C. Cir. 1965); *United States v. Garguilo*, 324 F.2d 795, 797 (2d Cir. 1963).

71. See *Hughes v. State*, 513 P.2d 115, 119 (Alas. 1973); *People v. Robles*, 2 Cal.3d 205, 215, 406 P.2d 710, 716, 85 Cal. Rptr. 166, 172 (1970). Cf. *United States v. Pinkney*, 551 F.2d 1241, 1251 (D.C. Cir. 1976).

power between attorney and client is necessary, *inter alia*, to foster judicial economy and efficiency.⁷² When attorney and client disagree on a matter of central importance to basic trial strategy, however, it seems clear that the client's will must control.

In *Faretta v. California*,⁷³ the Supreme Court held that a criminal defendant has an independent constitutional right to proceed in the absence of counsel upon his voluntary and intelligent election.⁷⁴ Implicit in the Court's conclusion is the recognition that crucial decisions affecting the management of an accused's defense are to be made by the defendant himself.⁷⁵ In intimating a constitutional right to testify, the Third Circuit in *Wilcox* has likewise perceived that control of a defense with respect to basic strategic decisions ultimately belongs to the defendant rather than his attorney. Therein lies the true significance of *Wilcox*.

In suggesting a constitutional source for the right to testify, the *Wilcox* decision represents the Third Circuit's awareness that the ability to give sworn testimony on one's own behalf is basic among a criminal defendant's rights. While constitutional protection of the right is ordinarily not significant due to the existence of statutes rendering criminal defendants competent witnesses,⁷⁶ it becomes vital in several areas, particularly waiver, harmless error, and habeas corpus relief from state court judgments.⁷⁷ More importantly, however, *Wilcox* represents a basic policy determination that controlling authority in the presentation of a criminal defense must be given to the defendant. An attorney is, after all, his client's servant and not his master.

72. See *Federal Habeas Corpus*, *supra* note 57, at 1110-11.

73. 422 U.S. 806 (1975).

74. *Id.* at 832-35.

75. See *id.* at 834. The *Faretta* court noted: "The right to defend is personal. The defendant, and not his lawyer or the state, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage." *Id.* In discussing *Faretta*, the Second Circuit in *United States v. Arnedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975), stated that "the right to manage one's own defense is at the heart of the Sixth Amendment guarantees." *Id.* at 492.

76. See notes 31 & 32 and accompanying text *supra*.

77. See notes 56-68 and accompanying text *supra*.