CRIMINAL LAW — RIGHT TO TESTIFY — SEVENTH CIRCUIT HOLDS THAT DEFENDANT'S WAIVER OF THE RIGHT TO TESTIFY WAS VALID DESPITE DISTRICT COURT'S FAILURE TO ENGAGE IN AN ON-THE-RECORD COLLOQUY REGARDING THE DECISION. — *United States v. Stark*, 507 F.3d 512 (7th Cir. 2007).

It has been over two decades since the Supreme Court declared that "[t]here is no justification today for a rule that denies an accused the opportunity to offer his own testimony."[1] Despite years of bearing the responsibility for carrying out that mandate, lower federal courts have failed to ensure that criminal defendants always have the opportunity to testify when they wish to do so. Recently, in *United States v. Stark*,[2] the Seventh Circuit held that a criminal defendant knowingly and intelligently waived his fundamental right to testify at his trial, reaffirming the rule that a district court judge usually need not inquire into a defendant's desire to take the stand. The decision's disregard for proposals to require on-the-record waiver of the right to testify whenever a criminal defendant does not take the stand is consistent with precedent of the Seventh Circuit and other courts of appeals; it demonstrates, however, that the rule courts instead employ fails to achieve its purported goal of protecting attorney-client relationships and can even harm them.

Federal law enforcement officers searched, pursuant to a warrant, the Illinois home of Daniel W. Stark, Sr. on September 11, 2003; upon finding firearms and stolen tractors on the premises, they arrested him.[3] He was indicted for the federal crime of being a felon in possession of a firearm,[4] and his defense attorney, Charles Stegmeyer, encouraged him to engage in plea negotiations.[5] In the course of the resulting discussions with the government, Stark signed a proffer letter stating that he knew the tractors found at his home were stolen.[6] Stark — who maintained even after trial that he did not know the tractors were illegally obtained[7] — ultimately decided not to enter a guilty plea, and the government filed superseding indictments charging him with additional federal crimes stemming from the discovery of the

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[1] Rock v. Arkansas, 483 U.S. 44, 52 (1987).

[2] 507 F.3d 512 (7th Cir. 2007).

[3] *Id.* at 514; Brief and Required Short Appendix of Defendant-Appellant Daniel W. Stark, Sr. at 3, 5, *Stark*, 507 F.3d 512 (No. 06-1916) [hereinafter Brief of Defendant-Appellant].

[4] *See* 18 U.S.C. § 922(g) (2000).

[5] *Stark*, 507 F.3d at 514.

[6] *Id.* Stark later testified that he did not read this proffer letter before he signed it and that it was his understanding that after he submitted it, the government would drop the "gun charges" against him. Transcript of Motion Hearing at 52–54, United States v. Stark, No. 03-30190 (S.D. Ill. Feb. 22, 2006).

[7] Transcript of Motion Hearing, *supra* note 6, at 10–12.

weapons and tractors at his residence.[8] Because of a disagreement with Stegmeyer regarding preparation for trial,[9] Stark hired a new attorney, Theodore Barylske, Jr., to serve as his counsel at trial.[10]

On September 23, 2005, after a three-week trial before Judge Michael J. Reagan of the U.S. District Court for the Southern District of Illinois, a jury found Stark guilty of twenty-seven of the thirty-one counts of which he was accused.[11] Stark did not testify.[12] Barylske had attempted to convince the jury that Stark's son, Daniel Stark, Jr., was responsible for the thefts and that Stark himself — although he had participated in selling the tractors — had not been aware that the tractors were stolen.[13] Judge Reagan stated on the record before the trial began that he would inquire as to whether the defendant would testify before the trial concluded, and he did later ask Barylske, at a time when Stark was present in court.[14] Throughout the proceedings, Barylske and Stark made Judge Reagan aware of conflict between them regarding the selection of witnesses, but neither suggested in conversations with the court regarding those disagreements that Stark's decision not to testify was in dispute.[15] After his conviction, Stark moved for a new trial on the ground that he had been denied his right to testify.[16] On February 22, 2006, the district court held a post-trial hearing on the matter.[17] Stark told Judge Reagan that he had wanted to testify but believed he was not permitted to do so; he said Stegmeyer had told him that signing the proffer letter during plea negotiations made him ineligible to testify at trial[18] and that Barylske

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[8] *Stark*, 507 F.3d at 514. In addition to the initial count, Stark was charged with thirty other crimes, including conspiracy to possess and sell stolen motor vehicles, *see* 18 U.S.C. § 371 (2000), possession of stolen property, *see* 18 U.S.C. § 2315 (2000), possession and sale of stolen motor vehicles, *see* 18 U.S.C.A. § 2313 (West 2000 & Supp. 2007), conspiracy to engage in monetary transactions in criminally derived property, *see* 18 U.S.C. § 1956(h) (2000), and engaging in a monetary transaction in criminally derived property, *see* 18 U.S.C.A. § 1957 (West 2000 & Supp. 2007). *Stark*, 507 F.3d at 514; Brief of Defendant-Appellant, *supra* note 3, at 2.

[9] *See* Transcript of Motion Hearing, *supra* note 6, at 59.

[10] *Stark*, 507 F.3d at 514.

[11] Brief of Defendant-Appellant, *supra* note 3, at 3. On March 30, 2006, Judge Reagan sentenced Stark to 292 months in prison and ordered him to pay $522,506.17 in restitution. *Id.* at 3.

[12] *See Stark*, 507 F.3d at 515.

[13] *Id.* at 514; Brief of Defendant-Appellant, *supra* note 3, at 5–9.

[14] *Stark*, 507 F.3d at 514.

[15] *Id.* at 515. The witnesses at trial were the officers who searched Stark's home, victims of the tractor thefts, purchasers of the stolen tractors, and alleged co-conspirators. Brief of Defendant-Appellant, *supra* note 3, at 5.

[16] *See Stark*, 507 F.3d at 515.

[17] *Id. See* Transcript of Motion Hearing, *supra* note 6.

[18] Transcript of Motion Hearing, *supra* note 6, at 6–7, 63, 100. Because there is no legal basis for Stark's understanding of the result of the letter, presumably Stegmeyer intended to indicate that Stark's testifying after having made a written statement with which the prosecutor could impeach him on such a crucial point would be inadvisable.

did not correct that misunderstanding.[19] Barylske, however, told the court that he and Stark had discussed whether Stark would testify and neither believed he should[20]: Barylske was concerned about the admissions in the proffer letter as well as Stark's prior conviction for being a felon in possession of a firearm, and he claimed Stark had not wanted to call his son a liar on the stand.[21] The district court found the attorney more credible than his client and denied the motion.[22]

The Seventh Circuit affirmed. Writing for the panel, Judge Wood[23] noted that though "[a] defendant's right to testify is fundamental, . . . there is no ironclad rule that a district court judge must always explore the question whether the defendant knowingly and voluntarily waived that right every time a defendant does not testify."[24] Although a district court judge is *permitted* to inquire into a defendant's decision not to take the stand, she is not *required* "to question a defendant *sua sponte* in order to ensure that his decision not to testify was undertaken knowingly and intelligently unless there is some indication that the defendant has been prevented from exercising that right."[25] Judge Wood quoted her own court's previously expressed concern that in

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[19] *See id.* at 9 ("Well, I mean I always wanted to testify and I think — I thought [Barylske] knew it, you know. I just — every time it came up, it was you can't testify. I am not saying that he deliberately misled me. I am not saying that at all, but when he is saying you can't testify and you already have your first attorney telling you that you can't testify, you assume that is why you can't testify."); *see also id.* at 7–9, 49–50, 61–62, 99.

[20] The district court required Barylske, who would otherwise have refused to violate his duty to maintain attorney-client confidentiality, to answer questions regarding communications between himself and Stark to which Stark already had referred at the hearing. *See id.* at 41–44.

[21] *Id.* at 114–18, 146; *see also Stark*, 507 F.3d at 515. Stark's testimony at the post-trial hearing offered reasons he did not share his attorney's concerns: he seemed not to understand the contents and significance of the proffer letter, *see* Transcript of Motion Hearing, *supra* note 6, at 50–52, or to believe that convictions from 1983 and earlier would be harmful to his credibility, *see id.* at 49.

[22] *See* Transcript of Motion Hearing, *supra* note 6, at 176–77 ("In this case I have to choose between the testimony of Mr. Stark and the testimony of Mr. Barylske. . . . I think the decision for Mr. Stark not to testify was a good one and to the extent I have to choose between Mr. Stark's version and Mr. Barylske, I would choose Mr. Barylske. He was more persuasive. His rationale made more sense."); *see also Stark*, 507 F.3d at 515.

[23] Senior Judge Bauer and Judge Williams joined Judge Wood's opinion.

[24] *Stark*, 507 F.3d at 514. Judge Wood first noted that review of infringement of the right to testify, a mixed question of law and fact, is de novo, and the court held that a finding of invalid waiver would require harmless error analysis. *Id.* at 516.

[25] *Id.* at 516 (quoting United States v. Manjarrez, 258 F.3d 618, 623 (7th Cir. 2001)) (internal quotation mark omitted). Judge Wood remarked later in the opinion that other circuits have expressed slightly different standards, though none requires on-the-record colloquy in every case in which the defendant does not testify. The Second Circuit, she noted, mandates that judges question defendants who are silent on the issue of testifying but permits a finding that waiver was appropriate where, as in *Stark*, "a defense attorney's post-trial credible testimony suffice[s] to show waiver [of the right to testify] in the absence of contradicting evidence other than the defendant's general statements." *Id.* at 519 (citing Chang v. United States, 250 F.3d 79, 86 (2d Cir. 2001)).

directly questioning defendants about the decision to testify, district courts would "insert themselves into a sensitive aspect of trial strategy, thereby intruding inappropriately on the attorney-client relationship."[26] A judge must risk interfering only when she has a clear reason to do so, Judge Wood reasoned, such as when she is aware of "'a conflict between the defendant and his lawyer *on the matter' of whether the defendant should testify*;"[27] otherwise, the district court "retains discretion either to engage in this kind of colloquy or not."[28] The panel rejected the idea that Stark had not felt able to alert the court to his desire to testify because his attorney had primary responsibility for communicating with Judge Reagan; the fact that the defendant had made other complaints to the court "suggests that [his right to testify] was not one of Stark's concerns."[29] The court went on to reject Stark's other claims, including an assertion that Barylske's failure to ensure that Stark waived his right to testify on the record constituted ineffective assistance of counsel.[30]

Calls for requiring on-the-record waiver of the right to testify in criminal cases have invoked several strong arguments — premised on the importance of truly informed waiver, consistency in protecting fundamental rights, and dignity interests — in favor of enforcing the right through such a regime. The facts of *United States v. Stark* supplement those rationales by demonstrating drawbacks of the rule the Seventh Circuit and other federal courts of appeals have adopted instead. Courts offer avoidance of interference with the attorney-client relationship as a justification for the scheme rearticulated in *Stark*, but a post-trial hearing on the issue may do greater damage to that relationship than a judicial colloquy would. Furthermore, by declining to conduct an on-the-record inquiry regarding the defendant's decision

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[26] *Id.* at 516 (quoting *Manjarrez*, 258 F.3d at 624) (internal quotation mark omitted).

[27] *Id.* (quoting *Manjarrez*, 258 F.3d at 624) (emphasis added).

[28] *Id.* In addition to a fear of disrupting the attorney-client relationship, Judge Wood expressed but did not elaborate on a concern that seems to be about the judicial resources expended when colloquies occur, writing that "[i]f a district court were compelled to inquire into every potential conflict it thought it had spotted, there would be a risk of multiple, unnecessary proceedings." *Id.*

[29] *Id.* at 518. Judge Wood noted that the district court permitted Stark to express his concerns regarding Barylske's other decisions at length, suggesting both that Stark did not have a disagreement with his attorney about whether he should testify — a right he knew he had because he was present in court when Judge Reagan mentioned it, *id.* at 517 — and that he would have had no reason to feel discouraged from mentioning such a dispute had it existed, *id.* at 518.

[30] *Id.* at 521–22. Because of the panel's finding in the waiver analysis that "Stark himself agreed that he would not testify," "[t]he lack of an on-the-record colloquy is . . . unimportant." *Id.* at 521. Furthermore, "the district court found that this decision reflected a reasonable trial strategy," which shielded it from attack under *Strickland v. Washington*, 466 U.S. 668 (1984). *Stark*, 507 F.3d at 521. Stark also challenged the government's alleged reference to his failure to testify in its closing statement, *id.* at 519–21, and raised two other ineffective assistance of counsel claims regarding Barylske's handling of his failure to testify, *id.* at 521–22.

not to testify, a trial judge foregoes an opportunity to encourage attorney-client communication, which is essential to the success of an attorney-client relationship, both overall and in particular with respect to ensuring the defendant's control over a choice he alone is entitled to make.

In 1987, the Supreme Court held in *Rock v. Arkansas*[31] that every criminal defendant has the right to testify on his own behalf.[32] Since then, at least ten circuit courts of appeals have further held that the right to testify is personal,[33] "which means it can only be waived by the defendant himself, and not by his counsel."[34] Supreme Court dicta and national professional standards reinforce the requirement that this decision be left to the defendant.[35] Circuit courts have also addressed how district courts are to protect the right to testify, establishing fairly consistent methods for evaluating its waiver: trial judges need not ask defendants directly about the choice not to testify unless there is some indication of a special need to do so.[36] One such indication, as noted

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[31] 483 U.S. 44 (1987).

[32] *Id.* at 49. *Rock* cemented a significant shift from historical practices: in the colonies, testimony by the accused was prohibited because of his interest in the outcome of the litigation; states began to permit defendants to testify in the 1800s, and the Supreme Court acknowledged a right to be heard as early as 1870, but the Court did not announce the constitutional guarantee of the right of criminal defendants to testify until *Rock*. *See* Louis M. Holscher, *The Legacy of* Rock v. Arkansas*: Protecting Criminal Defendants' Right To Testify in Their Own Behalf*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 223, 226–29 (1993); Timothy P. 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, 813–16 (1990).

[33] *See* United States v. Mullins, 315 F.3d 449, 454 (5th Cir. 2002); United States v. Manjarrez, 258 F.3d 618, 623 (7th Cir. 2001); United States v. Webber, 208 F.3d 545, 550–51 (6th Cir. 2000); Brown v. Artuz, 124 F.3d 73, 77–78 (2d Cir. 1997); United States v. Ortiz, 82 F.3d 1066, 1070 (D.C. Cir. 1996); United States v. Pennycooke, 65 F.3d 9, 10 (3d Cir. 1995); United States v. Teague, 953 F.2d 1525, 1532 (11th Cir. 1992); United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991); United States v. Martinez, 883 F.2d 750, 756 (9th Cir. 1989), *vacated on other grounds*, 928 F.2d 1470 (9th Cir. 1991); United States v. Bernloehr, 833 F.2d 749, 751 (8th Cir. 1987).

[34] *Manjarrez*, 258 F.3d at 623. Furthermore, the defendant's waiver must be "knowing and intelligent." *Id.*; *see also* United States v. Joelson, 7 F.3d 174, 177 (9th Cir. 1993) ("[T]he defendant's relinquishment of the right [to testify] must be knowing and intentional.").

[35] *See* Jones v. Barnes, 463 U.S. 745, 751 (1983) (stating, in dicta, that "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to . . . testify in his or her own behalf"); MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007) ("In a criminal case, the lawyer shall abide by the client's decision . . . as to . . . whether the client will testify."); ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-5.2(a) (3d ed. 1993) [hereinafter ABA STANDARDS] ("The decisions which are to be made by the accused after full consultation with counsel include . . . whether to testify in his or her own behalf.").

[36] *Stark*, 507 F.3d at 516. For examples of other circuits' articulations of the rule, see *Webber*, 208 F.3d at 552; and *Ortiz*, 82 F.3d at 1071. Another alternative would have been to adopt the "demand rule," according to which district courts would never be required to inquire about the right to testify; under such a regime, a defendant waives the right unless he makes an affirmative request to the court to testify. *See* Holscher, *supra* note 32, at 224. On appeal, Stark's attorneys argued for a different variation, asking the Seventh Circuit panel to announce a rule requiring

and found lacking in *Stark*, is a dispute between defense counsel and the defendant regarding whether the defendant should testify.[37] A defendant can challenge his waiver of the right to testify as invalid in a motion for a new trial.[38] If, as in *Stark*, the record does not already contain sufficient information to rule on the motion, the district court will hold a post-trial hearing to evaluate the issue.

As courts were developing these rules, some judges and scholars argued that trial judges should protect the right to testify by requiring criminal defendants who choose not to exercise it to state their waivers on the record.[39] When the Ninth Circuit addressed the issue in 1989, Judge Reinhardt wrote a dissenting opinion arguing that without proof in the trial record that the defendant made a knowing and intelligent waiver of the right to testify, a reviewing court cannot conclude that one occurred.[40] Judge Clark of the Eleventh Circuit wrote a noncontrolling opinion in 1992 similarly arguing that "when a criminal defendant has not testified on his or her own behalf at trial, the trial record should reflect that the defendant's waiver of his or her right to testify was knowing and intelligent."[41] Commentators have also argued that

district courts to conduct on-the-record waiver inquiries whenever there is evidence of a dispute between defense counsel and the defendant, regardless of its substance. *See* Brief of Defendant-Appellant, *supra* note 3, at 18.

[37] *Stark*, 507 F.3d at 516–17 (citing, in support of the point that the judge must have knowledge of a dispute on this particular issue, *Webber*, 208 F.3d at 552; *Pennycooke*, 65 F.3d at 11; and United States v. Sys. Architects, Inc., 757 F.2d 373, 375–76 (1st Cir. 1985)). Other situations necessitating inquiry might include instances where "the defendant has taken a position that threatens to jeopardize the defense case and there appears to be no rational explanation for the decision." *Ortiz*, 82 F.3d at 1071.

[38] A defendant can also raise the issue on appeal in a claim of ineffective assistance of counsel.

[39] On-the-record waiver would consist of a simple colloquy between the court and the defendant. The judge would "advise a defendant that he has a constitutional right to testify and that neither the court nor defense counsel can under ordinary circumstances prevent him from exercising that right" and would also explain "that he has a constitutional right not to testify and that a decision to take the stand waives the privilege against self-incrimination." United States v. Martinez, 883 F.2d 750, 764 n.11 (9th Cir. 1989) (Reinhardt, J., dissenting), *vacated on other grounds*, 928 F.2d 1470 (9th Cir. 1991). Next, the judge would ask the defendant questions to determine whether he understands the ramifications of deciding to take the stand, such as "that the prosecution can cross-examine and that he may be impeached by past criminal behavior or prior inconsistent statements." *Martinez*, 883 F.2d at 764 n.11.

[40] *Id.* at 762 ("[According to the majority opinion,] relinquishment is inferred from the defendant's failure to interrupt the proceedings and take over the case from his lawyer, despite the absence of any indication on the record that [the defendant] was aware of his rights or how to assert them. Under this definition of a 'knowing and intelligent' waiver, even a wholly uninformed defendant can through inaction give informed consent to an otherwise constitutionally deficient proceeding.").

[41] United States v. Teague, 953 F.2d 1525, 1542 (11th Cir. 1992) (Clark, J., concurring in part and dissenting in part).

mandatory on-the-record waiver would provide the best protection of the right.[42]

Several rationales articulated in these opinions and articles support a policy of requiring on-the-record waiver. First, judicial colloquies better ensure that waiver is informed and intelligent, and they prevent unwitting relinquishment of the right by a defendant who is either unaware of his control over the decision or not sufficiently sophisticated to raise the issue with the court;[43] defendants would always be directly notified that they control the decision and directly asked to make it. In Stark's case, rather than assuming that the defendant was listening to and understood Judge Reagan when he asked if Stark would testify, the judge could have used a short but thorough colloquy to be certain that Stark had made the choice to keep silent. Second, the Supreme Court has made on-the-record statements the mandatory procedure for waiving other personal rights; for example, a court always engages a defendant in a colloquy when he forgoes his right to trial by entering a guilty plea.[44] The right to testify is somewhat distinct from these other rights because it is so inextricably connected to the theory and strategy of the defense, which is under the control of the attorney.[45] This reality may be an underlying reason for the policy courts have adopted; judges do not want to lead defendants to reveal or disrupt trial strategy through a misunderstanding or outburst during the colloquy. Nevertheless, this right merits no less protection than do others even if its administration must occur with extra care. Third, direct engagement with the defendant regarding his decision promotes dignity values.[46] Whether questioning by the court would have corrected real or feigned ignorance about Stark's ability to exercise the right, personal communication from Judge Reagan would have afforded Stark respect.[47]

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[42] *See* Holscher, *supra* note 32; O'Neill, *supra* note 32; Reed Harvey, Note, *Waiver of the Criminal Defendant's Right To Testify: Constitutional Implications*, 60 FORDHAM L. REV. 175 (1991). It is also notable that some state supreme courts require on-the-record waiver of the right to testify in all criminal trials in which the defendant does not take the stand. *See, e.g.*, LaVigne v. State, 812 P.2d 217, 222 (Alaska 1991); People v. Curtis, 681 P.2d 504, 514–15 (Colo. 1984).

[43] *Martinez*, 883 F.2d at 764 (Reinhardt, J., dissenting).

[44] *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969); *cf.* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 277–78 (1942) (waiver of the right to jury trial); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (waiver of the right to counsel).

[45] *See* ABA STANDARDS, *supra* note 35, 4-5.2(b) ("Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call . . . .").

[46] *Martinez*, 883 F.2d at 766–67 (Reinhardt, J., dissenting) ("[B]asic values of personal dignity and fairness are enhanced when the defendant is presented with an opportunity to choose among relevant alternatives.").

[47] It is also worth noting that on-the-record waiver could, contrary to Judge Wood's concern about unnecessary proceedings, conserve judicial resources: the district court (not to mention the attorneys on both sides of the case) need not spend time conducting post-trial hearings if the right

On-the-record waiver is warranted not only because of the rationales that support it but also because the system courts have adopted instead can, as in *Stark*, generate the damage to the attorney-client relationship that it is ostensibly meant to avoid. Judge Wood justified the rule she applied on the basis of her concern — which echoes a sentiment expressed in other circuit court opinions — that colloquies would interfere with the attorney-client relationship.[48] Though the goals of protecting that relationship in general and trial strategy considerations in particular are laudable, Judge Wood's opinion affirmed a district court proceeding that did not advance them. Judge Reagan could have briefly explained the right to testify to Stark and asked a few well-crafted questions of him about his decision not to testify, thus putting enough evidence on the record to uphold the waiver against a challenge while carefully avoiding prying into the substance of his decisionmaking. Instead, the court left the record devoid of such information and thus later had to oversee an intensive, detailed inquiry into the timing and substance of conversations between Barylske and his client.[49] Barylske was required to breach his confidentiality obligations in order to testify, adversely to his client, in the post-trial motion hearing; Stark surely felt less comfortable with Barylske's representation after that event.[50] A colloquy during trial need not — in fact, should not — include questions about the strategic considerations a

to testify is addressed at trial, and presumably appeals contesting the validity of waiver of the right would decrease or nearly disappear if the record contained evidence resolving the issue. *See* Holscher, *supra* note 32, at 243; O'Neill, *supra* note 32, at 833. The expenditure of time and effort to conduct on-the-record colloquies would be minimal, requiring at most a delay to allow the defendant to discuss any concerns the questioning raises with his attorney.

48 *Stark*, 507 F.3d at 516; *see also, e.g.*, United States v. Ortiz, 82 F.3d 1066, 1071 (D.C. Cir. 1996) (rejecting a "*per se* rule" requiring a colloquy on the record because it "would be an inappropriate interference with the client-counsel relationship").

49 *See* Transcript of Motion Hearing, *supra* note 6, at 5–18, 39–41, 46–66, 98–102 (questioning Stark); *id.* at 112–19, 125–27, 145–47, 154 (questioning Barylske). The transcript of the post-trial hearing, which also includes testimony about other issues, fills 190 pages. *See id.*

50 Perhaps courts of appeals think that encouraging district courts to interject themselves into defense decisionmaking — if a colloquy can be properly characterized as doing so — before the jury has reached a verdict is more potentially harmful than inquiring into a decision after trial has concluded. Although the post-trial hearing occurs later than a colloquy at the close of the defense's case, it is not so late that its repercussions for the relationship are irrelevant. Though Stark retained new counsel prior to sentencing, *see* Brief of Defendant-Appellant, *supra* note 3, at 11–12, other defendants do not have the wherewithal to change representation so quickly and at such a late stage in the proceedings. Furthermore, an attorney may represent a client on appeal after trial or in other cases, and thus the relationship can continue long after the post-trial hearing, possibly damaged by the requirement of adverse testimony before a court. If the relationship is so affected that the attorney can no longer represent the client, at the client's or her own insistence, the defendant is again potentially harmed by having to find or accept a new lawyer who is unfamiliar with his situation, personality, and interests.

defendant has taken into account or has discussed with his lawyer in order to be sufficient to establish a knowing and intelligent waiver.[51]

In addition to preempting the need for searching post-trial inquiries into discussions between attorneys and clients regarding the right to testify, judicial colloquies about waiver can promote such communications during and before trial. Had Judge Reagan conducted a colloquy at the conclusion of the defense presentation in Stark's case and received answers from Stark he found inadequate, the court could have taken a recess to allow Stark and Barylske to discuss Stark's decision.[52] Perhaps Stark would have insisted on testifying, or perhaps Barylske would have convinced his client that declining to do so would be the tactically better choice, but at least this essential conversation would without doubt have taken place and Stark would not have had reason to feel later — which, by his account, he did — that his attorney had not fully explained his options to him. In many cases, the colloquy would simply serve as a reminder of a conversation that already occurred; in others, it would result in prodding an attorney to correct a meaningful omission in her representation of her client. Furthermore, a consistent requirement of on-the-record waiver creates an incentive for counsel to act properly in this regard. An attorney who may be tempted not to discuss the decision about testifying with a client, and whose relationship with the client is thus in at least one way deficient, will nevertheless do so in preparation for the questions the court will necessarily address to the defendant at the close of the defense presentation.

Federal courts have now had two decades to determine how to enforce the right announced in *Rock*, and the system they have developed fails to do so in a way that is doctrinally or practically justified. Years of insufficient protection of a fundamental, personal right, coupled with instances — such as *Stark* — of hindering defendants' receipt of the most effective representation, offer hard evidence of the inadequacy of the current regime. The time is ripe for serious reconsideration of proposals for on-the-record waiver of the right to testify.

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[51] Judge Reinhardt noted in *Martinez* that on-the-record waivers "have never created a problem [of interference with the attorney-client relationship] with respect to the right to counsel, plea bargaining, [or] jury trial." United States v. Martinez, 883 F.2d 750, 767 (9th Cir. 1989) (Reinhardt, J., dissenting), *vacated on other grounds*, 928 F.2d 1470 (9th Cir. 1991). As an additional precaution, the colloquy could include a preliminary statement making clear to the defendant that the judge is not reviewing the decision itself but merely ensuring that the defendant has, after consultation with his attorney, made it for himself.

[52] Had Judge Reagan received satisfactory replies to his colloquy, the trial could have continued to summations. Such answers would presumably have indicated that the relevant attorney-client communication had already occurred, as Barylske claimed, and so needed no reminder or encouragement from the court.