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## Crippling the Defense of an Accused: The Constitutionality of the Criminal Defendant's Right to Testify

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**CRIPPLING THE DEFENSE OF AN  
ACCUSED: THE CONSTITUTIONALITY  
OF THE CRIMINAL DEFENDANT'S  
RIGHT TO TESTIFY**

*H. Mitchell Caldwell\* and Carlo Spiga\*\**

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Prosecutor: You were under an oath to tell the truth when you said these things to the jury . . . weren't you?

Capital Defendant: I was unclear on what I could testify to and what I couldn't on the judge's ruling.

Prosecutor: You knew you could give every description, every detail of what happened between you and Dawn on that morning, . . . didn't you?

Capital Defendant: Like I said, I was unclear on what I could testify to . . . on the judge's ruling.

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Prosecutor: Your honor.

Capital Defendant: I was unclear on it.

The Court: There [was] no such ruling, sir.<sup>1</sup>

As Alfred Gutierrez stepped to the witness stand during the guilt phase of his death penalty trial, he was instructed by the judge to “not testify to too many details” about the violent nature of his fight with the victim just before the victim was killed.<sup>2</sup> So admonished, Gutierrez, under questioning from his lawyer, tailored his answers so as to not violate the court’s instruction concerning instances of violence between himself and the victim as well as the violent nature of his fight with the victim just before she was killed.<sup>3</sup>

Gutierrez’s initial “sanitized” or “tailored” version of events had, not remarkably, some inconsistencies with his later full and unfettered account of those same events and as such left him particularly vulnerable to the prosecutor’s scathing cross examination, which rendered him incredible and ultimately resulted in his conviction and death sentence.<sup>4</sup>

In either wittingly or unwittingly restricting Gutierrez from testifying as to the full extent of his volatile and even vicious fight with the victim that immediately preceded her death, Gutierrez was effectively prevented from establishing a “heat of passion” defense to the murder charge.<sup>5</sup> The restrictions placed on Gutierrez by the trial judge raise a question not heretofore considered: At what point do court rulings limiting or restricting a defendant’s testimony actually impede the defendant’s right to tell his story, to present his defense? Is it possible that the right to testify does not encompass the right to fully testify—the right to be heard?<sup>6</sup> While the trial court’s ruling did not, in a literal sense, deny Mr. Gutierrez his fundamental right to take the stand and testify on his own behalf, it severely limited his testimony. Is the criminal defendant’s right to testify limited solely to the right to take the stand and relate *some* information or rather does the Constitution

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1. Reporter’s Transcript of May 21, 1998, at 2308-28 to 2309-13, *State v. Gutierrez*, (No. KA034049) (L.A. Super. Ct.).

2. Reporter’s Transcript of May 19, 1998, *supra* note 1, at 1908-25 to 1913-16.

3. *Id.* at 1932-15 to 1936-10.

4. See Appellant’s Opening Brief at 9, *State v. Gutierrez*, No. KA034049 (Cal. Sept. 28, 2004).

5. *Id.*

6. A search of U.S. Law Reviews and Journals failed to locate any publications that directly addressed the issue raised in this article. The search did, however, locate an article that reviewed the constitutionality of excluding an entire defense. See Douglas L. Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 STAN. L. REV. 1271, 1291 (1987).

guarantee a defendant's right to testify *fully* to the events surrounding the alleged criminal conduct in order to present a complete defense? This question, of course, does not contemplate those objections and rulings that are normally attendant to any witness examination.<sup>7</sup>

To fully appreciate the problematic nature of the judge's various rulings and admonitions and whether they constituted a restriction on Alfred Gutierrez's "right" to fully testify we must turn back to the quagmire of rulings and admonitions that preceded Gutierrez's testimony. Once so situated, we can turn to the historical basis of the right to testify and ascertain if the policies and rationales inherent in that right were served in this instance.

#### A. FACTUAL BACKGROUND

Alfred Gutierrez and Dawn Nakatani had been in a relationship for about ten months prior to their son Gilbert's birth. Shortly thereafter, they separated. Nakatani, with Gilbert in tow, went to live at her mother's house for a while, and then moved on to live at a number of other locales. Gutierrez, describing Gilbert as "the most important thing in my life," was concerned about the stability of the environment in which Gilbert was being raised.<sup>8</sup> As a result, the relationship between Gutierrez and Nakatani continued to deteriorate and lapsed into several physical altercations. The altercations revolved around Nakatani's living arrangements, and the custody and visitation of Gilbert. Gutierrez described the altercations as involving "yelling, hitting, scratching. Just coming at each other."<sup>9</sup> Gutierrez was twice convicted of battering Nakatani.<sup>10</sup> There were also instances of Nakatani battering Gutierrez.<sup>11</sup>

On September 30, 1996, Gutierrez and Nakatani made telephone arrangements for Gutierrez's parents to pick up the now three-year-old Gilbert from Nakatani the following morning.<sup>12</sup> At 10:30 a.m. Nakatani, now awake, called Gutierrez and complained that since Gutierrez's parents were running late, he should pick up Gilbert. Gutierrez told Nakatani he could get a ride to her apartment and would pick Gilbert up at 11:30 a.m.<sup>13</sup>

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7. Every objection and resulting ruling during a defendant's testimony can place limitations on the right to testify. This article, however, is concerned with rulings that significantly encroach upon the right to testify by restricting a defendant's ability to relay significant details related to his/her defense.

8. Reporter's Transcript of May 19, 1998, *supra* note 1, at 1901-1 to 03-24.

9. *Id.* at 1959-22 to -26.

10. *Id.* at 1903-28 to 1904-5.

11. *Id.* at 1905-11 to -13.

12. *Id.* at 1915-19 to 1916-16.

13. *Id.* at 1921-2 to 1921-26.

Two acquaintances that were never identified by Gutierrez, picked Gutierrez up and drove the short distance to Nakatani's.<sup>14</sup> Gutierrez, with the two others, entered through an open garage door leading to Nakatani's apartment where they saw Nakatani and Gilbert.<sup>15</sup> As Gilbert ran to Gutierrez, Nakatani suddenly changed her mind about relinquishing Gilbert and said, "You're not taking my son." Gutierrez responded, "He's my son, too, Dawn."<sup>16</sup>

The verbal exchange quickly escalated into a physical altercation as, Gutierrez, with Gilbert in his arms, turned away, and Nakatani "grabbed me [Alfred] by the back of the shirt with one hand and pulled me the other way, tried to pull me back. At that point, I believe she scratched me on my chest. I turned around. I kicked her and she kicked me back. And there was a tussle . . . ." Gutierrez attempted to pull away and said, "'Get the fuck off me, bitch' . . . . I . . . turned to walk out of the garage, and that's when I seen, peripherally, them [the two men who had accompanied Gutierrez] go towards her."<sup>17</sup> The two men pulled Nakatani from Gutierrez and told her to calm down.<sup>18</sup> Gutierrez carried Gilbert to the car and didn't see anything else that happened. "I didn't see them push her or – I couldn't really tell because it was a side view. And I exited the garage."<sup>19</sup> "They [the two men] arrived [back at the car] about a minute or two later, and we left."<sup>20</sup>

When the two men entered the car, Gutierrez asked, "What happened?" One of them said "She got crazy with us."<sup>21</sup> Gutierrez asked, "What do you mean?"<sup>22</sup> One of them replied, "I don't want to talk in front of your son."<sup>23</sup>

The three men left Gilbert at the home of Gutierrez's grandmother and then drove Gutierrez to a friend's house in Riverside.<sup>24</sup> During the drive, the two men told Gutierrez that Nakatani, "got crazy with them and they fucked her up." When Alfred asked what that meant, they replied, "Don't worry about it."<sup>25</sup>

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14. When Gutierrez was asked by the court to disclose these acquaintances, he replied, "I cannot disclose those names or my life would be in grave danger." *Id.* at 1923-21 to -28.

15. *Id.* at 1928-15 to 1929-1.

16. *Id.* at 1930-12 to 1932-28.

17. *Id.* at 2280-15 to 2285-5.

18. *Id.* at 1934-18 to -22.

19. Reporter's Transcript of May 21, 1998, *supra* note 1, at 2285-1 to -5.

20. Reporter's Transcript of May 19, 1998, *supra* note 1, at 1933-8 to 1933-9.

21. *Id.* at 1937-14 to -20.

22. *Id.* at 1937-20 to -21.

23. *Id.* at 1937-21 to -22.

24. *Id.* at 1938-24 to 1940-6.

25. Reporter's Transcript of May 19, 1998, *supra* note 1, at 1943-17 to 1944-5.

Gutierrez, fearing the worst, fled to Calexico, a California border town, where he crossed over into Mexico and spent the night.<sup>26</sup> He reasoned, "I just wanted things to calm down. I figured, well, maybe if they beat her up, that she would be all right and she wouldn't say nothing or—I don't know . . . . I didn't know what to think, and I left."<sup>27</sup>

The next day, Gutierrez recalled thinking, "What am I running for? I didn't do anything."<sup>28</sup> He crossed back into the United States and called a friend for a ride back home to Los Angeles County.<sup>29</sup> During the phone call, she informed Gutierrez that Nakatani was dead and that the police were looking for him.<sup>30</sup> The next day, Gutierrez told her about the events surrounding Nakatani's death.<sup>31</sup> He described that he "was feeling awful. It was like a bad dream. I just wished it would end. I told her [the friend] that I wanted to turn myself in . . . . I thought it was the right thing to do."<sup>32</sup> Gutierrez, in fact, did turn himself in and after being questioned was released from custody.<sup>33</sup>

Ten days after the death of Dawn Nakatani and completely unrelated to Nakatani's death there was a gang-related drive-by murder. Gutierrez was eventually linked to the drive-by murder and was charged with both murders in one charging document.<sup>34</sup> He was convicted of both murders and sentenced to death in a single trial<sup>35</sup> under California's death penalty scheme, which includes multiple murders as a capital circumstance.<sup>36</sup>

Throughout the investigation and trial, Gutierrez denied being involved in the drive-by murder.<sup>37</sup> He did, however, admit to being present at Dawn Nakatani's death, although he maintained that the two men who were with him killed her. Gutierrez argued, however, that even if he was found at least partially responsible for her death, his conduct should be mitigated from murder to voluntary manslaughter given the heated verbal and physical altercation between himself and Nakatani just prior to her death.<sup>38</sup>

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26. *Id.* at 1945-2 to -26.

27. *Id.* at 1945-2 to -20.

28. *Id.* at 1945-22.

29. *Id.* at 1945-22 to 1947-11.

30. Reporter's Transcript of May 19, 1998, *supra* note 1, at 1947-5 to -8.

31. *Id.* at 1957-15 to 1958-8.

32. *Id.* at 1958-28 to 1959-2.

33. Despite the fact that Gutierrez was considered a suspect in the murder investigation of Dawn Nakatani, upon questioning Gutierrez the police did not have sufficient evidence to make his arrest and so released him from custody. *See* Appellant's Opening Brief at 14-15, *State v. Gutierrez*, No. KA034049 (Cal. Sept. 28, 2004).

34. *See id.* at 22.

35. *See id.* at 5.

36. *See id.*

37. Reporter's Transcript of May 19, 1998, *supra* note 1, at 1961-23 to 1966-4.

38. *See* Appellant's Opening Brief, *supra* note 33, at 158-65.

It was toward this voluntary manslaughter defense that Gutierrez, through his counsel, attempted to introduce Nakatani's prior misdemeanor battery conviction. The defense maintained that such evidence was essential to establish that Nakatani's death "occurred as a result of a fight, that it was not premeditated, and that she had a propensity to be involved in a fight. The heat of passion, that is the defense . . . ."<sup>39</sup>

The court "sustain[ed] the [prosecutor's] objection, not feeling that it [Nakatani's prior] is relevant at this point."<sup>40</sup>

On the heels of that ruling the following exchange ensued:

Prosecutor: Is the Defendant admonished to make no reference to this incident or other violent conduct by the . . . victim in this case, your honor, alleged violent conduct?

The Court: Well, I –

Defense Counsel: I would—I would stipulate to that. That means a [penal code] 273.5 [domestic violence battery] will not be able to come in because, obviously, if there is any type of violence—

The Court: [The] court wouldn't be in any position to do that. But you are ordered not to attempt to comment upon a misdemeanor battery conviction sustained by Miss Nakatani.<sup>41</sup>

The court further held that the jury was entitled to know that the Gutierrez/Nakatani relationship was volatile, but Gutierrez could not testify to too many details.<sup>42</sup> The court was "not going to litigate those."<sup>43</sup>

So admonished, Gutierrez on the first day of his direct examination was asked to relate a previous incident [apart from Nakatani's prior battery conviction] in which Nakatani struck him. The question was met with a relevance objection.<sup>44</sup> The court ordered both sides to sidebar where defense counsel offered the following: "We want to establish a foundation . . . that

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39. Reporter's Transcript of May 19, 1998, *supra* note 1, at 1890-25 to 1891-1.

40. *Id.* at 1891-7 to -9.

41. *Id.* at 1891-18 to 1892-3.

42. *Id.* at 1908-25 to 1909-3.

43. *Id.* at 1909-23 to -24.

44. *Id.* at 1905-11 to -22.

the event[s] [that preceded Nakatani's death were] in the heat of passion and not one of . . . premeditation."<sup>45</sup>

The court responded: "But to get into all the details surrounding everything there is a—an instance of violence between the two of them, it [Gutierrez's testimony] just can't get into all that."<sup>46</sup>

Defense counsel in seeking a recess to presumably speak to Gutierrez about the court's limitations concerning his testimony said: "I want to make sure he [Gutierrez] doesn't give any outbursts. *I want to make sure he understands he's got to tunnel his answers and not say anything that's going to offend this court, because he's prepared to give the details of the fight.*"<sup>47</sup>

In a further attempt to clarify its restrictions and limitations on Gutierrez's testimony, the court instructed that Gutierrez was "entitled to describe a rocky relationship between [Gutierrez and Nakatani] and say that fights erupted between them. But I'm not saying that he's able to go into every instance and relate every instance where there is a—some kind of confrontation or violent exchange between them."<sup>48</sup>

Defense counsel in an effort to accommodate the court said:

I can be short. I can—I can summarize it. I can bring out the questions to be rather brief to get my point across now that I understand your concerns. All I want is a break just so I can tell Mr. Gutierrez that is what we have got to do, this is the discussion that I had with the court, and this is what you got to limit your testimony to.<sup>49</sup>

The court then took a recess before resuming Gutierrez's direct examination.<sup>50</sup> However, just as Gutierrez's testimony was turning to the mean events which preceded Nakatani's death the court took another brief recess and outside the presence of the jury again admonished Gutierrez and his counsel:

And I just want to comment for the benefit of counsel that if you get into specific instances of misconduct by the victim . . . you are certainly aware the people, might open the door for the people to get into rebuttal type and get into the spe-

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45. Reporter's Transcript of May 19, 1998, *supra* note 1, at 1908-19 to -24.

46. *Id.* at 1909-1 to -3.

47. *Id.* at 1910-7 to -11 (emphasis added).

48. *Id.* at 1910-27 to 1911-4.

49. *Id.* at 1913-4 to -11.

50. Reporter's Transcript of May 19, 1998, *supra* note 1, at 1913-13 to -14.



cific instances and facts surrounding the convictions and any other violence against the victim.<sup>51</sup>

So once again admonished, Gutierrez “tunneled” his testimony as he began relaying the events that took place just prior to Nakatani’s death:<sup>52</sup>

Q. And did this conversation become heated?

A. Yes. She changed her mind. She didn’t want me to take my son.

Q. Okay, and what did you say in response to that comment?

A. I told her, “Why?” “I came to pick him up and I am going to take him to my grandmother’s and tell my parents to pick him up there.”

Q. Then what occurred after you said that?

A. She said, “You’re not taking my son.” And I said, “He’s my son, too, Dawn.” And I proceeded to walk away from her with him in my arms, coming out—from right here (indicating). I had my back faced [sic] the door with my son. I’m walking away, and she charged at me and told me, “You are not taking him.” The two individuals pulled—pulled her away and told her to calm down. I proceeded to the car . . . and I didn’t see anything else that happened. They [the two individuals who had accompanied Gutierrez] arrived about a minute or two later, and we left.

...

Q. Did she physically hit you or strike you in anyway?

A. No, she was tugging at—at me and my son.

Q. When you say tugging at you, you referring to your shirt or what?

A. Tugging—yes.

Q. And what was occurring while she was doing this?

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51. *Id.* at 1926-11 to -18.

52. *Id.* at 1932-18 to 1933-9.

A. She was just yelling. And the two individuals pulled her off me and told her to calm down.

Q. Were you yelling at her?

A. No, sir.

Q. Did you try and fend her off physically in anyway?

A. I pulled away like that when she had ahold of my arm. I pulled away like that (indicating), but I had my son in my arms still.<sup>53</sup>

At this point the court recessed for the day. The following morning after presumably having an opportunity to confer with Gutierrez, defense counsel resumed his direct examination of Gutierrez.<sup>54</sup>

Q. Okay. And as to the confrontation that you had with Dawn [Nakatani] that you described earlier, what, specifically [happened]?

...

A. A scratch on my chest.

Q. And how did you acquire that scratch?

A. Dawn [Nakatani] scratched me. And—

Q. And—

A. I didn't go [into] any further detail yesterday *because I didn't understand the judge's earlier ruling.*

Mr. Sortino [prosecutor]: I'll object to that.

The Court: Sustained.

...

Q. [H]ow did that scratch come about?

A. Yes. We were tussling over Gilbert. She scratched me on my chest.

---

53. *Id.* at 1934-11 to 1935-1.

54. Reporter's Transcript of May 21, 1998, *supra* note 1, at 1981-4 to 1982-5.

...

Q. Was it a single scratch, or was it a number of scratch marks?

A. It was like three fingers in a downward motion.

...

Q. Was there any blood on the shirt that you're aware of?

A. Yes, sir, on the inside.

Q. Do you recall . . . any injuries or anything of that nature that you may have suffered during the course of the—the confrontation, if you will?

...

A. It got out of control, that she was yelling, I was cussing, she was cussing . . . .

...

Q. Is there anything else that you can recall . . . regarding the facts and circumstances concerning the events of that day that you haven't already mentioned?

A. . . . I kicked her after she scratched me.

Q. Anything else?

A. And she kicked me back.

Q. Where did she kick you?

A. On my leg.

Q. What leg?

A. On my right leg.

Q. Anything else?

A. After that, it was a tussle with Gilbert, and she had ahold of my shirt, and ahold of my right shirt sleeve. And we were going back and forth, and I pulled away. That's when I told you, I pulled like that. And it was heated and it was cussing going on.

Q. Anything else that we haven't already covered?

...

A. I told her, "Get off me, you fucking bitch."<sup>55</sup>

During the prosecutor's cross-examination later that same day, he immediately seized on the inconsistencies of Gutierrez's two previous direct examination accounts of the fight:<sup>56</sup>

Q. And you testified yesterday that at that point the two friends of yours who were with you pulled her off of you and told her to calm down, right?

A. Before they did that, I got scratched.

Q. You didn't mention that yesterday, did you?

A. I wasn't asked if I had any injuries yesterday.

Q. You testified yesterday, Mr. Gutierrez, that you were walking away from Dawn when she came after you, did you not?

A. I was walking, yes. I had started to walk.

...

Q. And today you came into court, you have testified about a scratch on your chest?

A. That's right.

Q. And now you are telling this jury, or you told this jury on direct this morning, that there was a tussle where you were facing Dawn, is that right?

A. That's right.

...

Q. While Gilbert was in your arms?

A. Yes, sir.

---

55. *Id.* at 1982-13 to 1986-5 (emphasis added).

56. *Id.* at 2055-5 to 2057-4.

...

Q. And then you also testified today that you then kicked her?

A. Yes, I did.

Q. You—you didn't mention that yesterday in your description of this tussle either, did you?

A. No, I didn't.

On re-direct examination, defense counsel in an attempt to allow Gutierrez to explain the two varying accounts once again went back to the fight:<sup>57</sup>

Q. Now, when the altercation started, did it start with a verbal confrontation and develop into physical—

A. Yes, it started—

Q. —Or was it the other way around?

A. Yes, it started verbal.

Q. And, verbally—and I don't—and I don't want you to cover [up] the language. I want you to repeat the language as it was spoken that night, or that day, to the best of your recollection. I don't want you to paraphrase. I want you to say exactly what you recall was said verbally at the start of that altercation.

A. She had changed her mind. She said, "You ain't taking my fucking kid." I said, "Yes, I am Dawn. He's also my son, too." [W]e were arguing over my son, that he was going with me. And she said, "No, he's not." It was basically just arguing over my son. I didn't understand because she told me to come pick him up and then she changed her mind. But I was—I was used to dealing with that. I mean, usually that—that would always happen. And she would say, "Well, just take him." But she didn't say that this time. At that point, that's—that's basically, it right there.

Q. Okay. Was there any vulgarity used prior to any physical contact?

A. Yes, Sir. On—on my behalf.

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57. *Id.* at 2280-9 to 2284-15.

Q. What did you say?

A. And herself. I told her that I was going to take my son, and I told her, what's her fucking problem.

Q. How did you say it? You are speaking rather subdued right now.

A. I asked—

Q. Why don't you say it to this jury so they can understand and appreciate the way you said it that day.

A. I told her, "What is your fucking problem?" She said, "You are not taking him." I said, "Dawn, he's my son also." She said, "You're not taking him. I don't care." She started yelling at me and calling me names, too.

Q. What names was she calling you?

A. An asshole. That's it, basically it. I had my son in my arms, and I just wanted to leave with my son. That was my intention, just picking up my son. That was—that was my sole intention right there. I didn't intend for anything to get out of control or for any of those other circumstances to happen.

...

Q. Just tell us what was said and what was done, not what was thought.

A. On the altercation part?

Q. Yes.

A. I already had my son in my arms. I was at the doorway, garage part. She came at me. She tried to pull my son back. And I told her, "I'm leaving with him." And she said, "No, you're fucking not." I said, "Yes, I am. Why you got to act like this?" So I turned. She grabbed me by the back of the shirt with one hand and pulled me the other way, tried to pull me back. At that point, I believe she scratched me on my chest. I turned around. I kicked her, and she kicked me back. And there was a tussle. She still had hold of my—my shirt at the time. And there was a tussle back and forth with my son. And I told her I was taking him. And she said, "No, you're not." It was happening rather quickly, and there was cussing going on. But, to this day, I

can't recall. I was cussing also, calling her names. But I – I can't remember vividly what words were being used because I just basically went there to pick up my son and I wanted to leave.

Q. How many times did you kick Dawn?

A. I believe twice.

Q. How many times did Dawn kick you?

A. I know of once. And as she had my—my shirt, there was a – a tussle. So I don't know if she was kicking at me or not, but we were both moving in a rapid motion. So, I—I mean, not that I felt it or anything. I—as I stated, I wanted to just get out of the confrontation.

Q. And there was a point in time that you broke away?

A. Yes, sir.

Q. From the time that you physically were confronting one another, fighting with one another, the manner that you have described, how long did that take until you broke away from her?

A. I believe I stated earlier, around two minutes. Conversation was going rapidly, as was the struggle. So I know it can't have been longer than two minutes.

Not surprisingly during re-cross-examination, the prosecutor once again seized on the differing accounts:<sup>58</sup>

Q. Now, on redirect this morning, you gave a pretty involved description about this fight that you had with Dawn, is that right, the day you picked up Gilbert?

A. Yes, sir.

...

Q. Mr. Gutierrez, in that description of what occurred, you didn't say anything about Dawn swearing at you, did you?

A. No, sir.

---

58. *Id.* at 2304-8 to 2304-12, 2308-6 to 2309-13 (emphasis added).

Q. You didn't say anything about you raising your voice to her, did you?

A. No, sir.

Q. You didn't say anything about her kicking you, did you?

A. No, sir.

Q. You didn't say anything about you kicking her, did you?

A. No.

Q. Okay. You didn't say anything about this struggle where she was hitting you with her fists and pulling you around, did you?

A. No.

Q. You didn't say anything about a scratch, did you?

A. No, I didn't.

Q. Okay. You were under an oath to tell the truth when you said these things to the jury on this day, weren't you?

A. *I was unclear on what I could testify to and what I couldn't on the judge's ruling.*

Q. You knew you could give every description, every detail of what happened between you and Dawn on that morning when you went to get Gilbert? You knew that, Mr. Gutierrez, didn't you?

A. Like I said, I was unclear on what I could testify to and whatnot on the judge's ruling.

Mr. Sortino: Your Honor.

The Witness: I was unclear on it.

The Court: There [was] no such ruling, sir.

#### B. DEVELOPMENT OF THE RIGHT TO TESTIFY

Did the trial judge's pre-testimony rulings and admonitions initially retard Gutierrez's ability to offer a full and complete account of the fight so that, once he did offer his complete version of the events, it seemed incredible? And if so, did the court's rulings effectively preclude Gutierrez from



testifying in his own defense? This is a question that surprisingly has not generated a great deal of discussion.<sup>59</sup> And so, as is often the case, any inquiry must first focus back to the genesis of the “right” before moving forward.

Surprisingly, the right of a criminal defendant to testify on his own behalf is of very recent origin. Contrary to an intuitive sense generated by the massive overhaul of the American criminal justice system during the last forty years of the 20th Century,<sup>60</sup> the criminal defendant’s right to testify is not steeped in English Common Law, nor did it find much support in American jurisprudence until relatively recently.<sup>61</sup> That the full measure of this “right” is still in flux, may strike many students of American and English jurisprudence as odd or inconsistent. Surely, the reasoning goes, a person accused of a crime has always been given the opportunity to testify on his own behalf, to tell his side of the story. This is a fallacy.<sup>62</sup>

Recently, while working on another exercise,<sup>63</sup> we had occasion to study the 1872 criminal trial of Susan B. Anthony, the erstwhile women’s advocate accused of the unspeakable, the unthinkable . . . voting in a presidential election.<sup>64</sup> She was, of course, represented by a male attorney as women were excluded from the practice of law,<sup>65</sup> and she was, of course, tried by an all-male (and all white) jury as women were incompetent (and blacks were seldom called to serve as jurors) to serve in that capacity.<sup>66</sup> In what we considered the final indignity, she was excluded from testifying in

59. See *supra* note 6 and accompanying text.

60. *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that all evidence obtained by searches and seizures in violation of the Constitution will not be admissible in state or federal court); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that an indigent defendant in a criminal prosecution in a state court has the right to have counsel appointed for him); *Massiah v. U.S.*, 377 U.S. 201 (1964) (holding that a defendant is entitled to aid of counsel during police interrogations, including indirect and surreptitious interrogations, from time of arraignment until trial); *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that statements obtained from defendants during incommunicado interrogation in police-dominated atmosphere, without full warning of constitutional rights, were inadmissible as having been obtained in violation of Fifth Amendment privilege against self-incrimination); *Katz v. U.S.*, 389 U.S. 347 (1967) (holding that government intrusion into an area protected by a reasonable expectation of privacy constitutes a search and must adhere to the procedure of antecedent justification required by the Fourth Amendment); *Escobedo v. U.S.*, 378 U.S. 478 (1964) (holding that where an investigation is no longer a general inquiry, but instead focuses on a particular suspect that has been taken into custody, the suspect shall be entitled to the aid of counsel guaranteed by the Sixth Amendment).

61. *Ferguson v. Georgia*, 365 U.S. 570, 577 (1961).

62. 2 WIGMORE, EVIDENCE § 575-87 (Chadbourn rev. 1979).

63. MICHAEL S. LIEF & H. MITCHELL CALDWELL, AND THE WALLS CAME TUMBLING DOWN: CLOSING ARGUMENTS THAT CHANGED THE WAY WE LIVE (Scribner 2004).

64. *Id.* at 176-77.

65. *Id.* at 177.

66. *Id.* at 178.

her own defense.<sup>67</sup> Such exclusion we blithely and ignorantly concluded was the product of her perceived incompetence based on gender. Given the other gender-based exclusions that presumptive conclusion may perhaps be excused. Nonetheless, we were wrong. Anthony was not precluded from testifying on her own behalf because she was a woman; she was precluded because she had an *interest* in the outcome of the trial.<sup>68</sup> She was the defendant.<sup>69</sup> In denying Anthony the right to testify, her trial judge, though laboring under a multitude of other misconceptions, was operating within the bounds of prevailing law.<sup>70</sup>

Returning for a moment to our English heritage, it was not until the 1400's that trial by jury began emerging as a form of dispute resolution.<sup>71</sup> At that time, common understanding dictated that the jury, composed of disinterested persons living in the locale, already knew about the dispute, as did everyone else who lived in the area, and as such these local jurors because of their knowledge of the parties and events were in the best position to determine the issues and thus to render the verdicts.<sup>72</sup> After all, the jurors had taken an oath to their God, and so it was their sworn duty to decide the

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67. *Id.* at 187.

68. Immediately following the prosecution's closing argument, Judge Hunt unfolded a pre-prepared decision and declared, among other things, that the Fourteenth Amendment did not provide women the right to vote and that Ms. Anthony had indeed violated the law. *Id.* at 196. After providing the jury with a detailed analysis of his reasoning, Judge Hunt stated to the jury, "[u]pon this evidence I suppose there is no question for the jury and that the jury should be directed to find a verdict of guilty." *Id.* at 198. Following this statement, met with no challenges from any of the jurors, Judge Hunt directed the clerk to enter a verdict of guilty. *Id.* In sentencing Ms. Anthony, Judge Hunt began by asking "[h]as the prisoner anything to say why sentence shall not be pronounced?" *Id.* at 199. Needless to say, Ms. Anthony seized the opportunity to be heard and proceeded to express her views of the verdict, judge, legal system, and government. *Id.* at 199-201. A heated and passionate verbal exchange ensued between Ms. Anthony and Judge Hunt, wherein he repeatedly attempted to silence Ms. Anthony. *Id.* Finally, Judge Hunt managed to verbalize his penalty of a fine of one hundred dollars including the cost of prosecution. *Id.* at 201. To that, Anthony replied:

May it please Your Honor, I shall never pay a dollar of your unjust penalty. All the stock in the trade I possess is a ten-thousand-dollar debt, incurred by publishing my paper – *The Revolution* – four years ago, the sole object of which was to educate all women to do precisely as I have done, rebel against your man-made, unjust, unconstitutional forms of law, that tax, fine, imprison, and hang women, while they deny them the right of representation in the government; and I shall work on with might and main to pay every dollar of that honest debt, but not a penny shall go to this unjust claim. And I shall earnestly and persistently continue to urge all women to the practical recognition of the old revolutionary maxim that 'resistance to tyranny is obedience to God.'

*Id.* at 202.

69. *Id.* at 177.

70. *Id.* at 202.

71. 2 WIGMORE, *supra* note 62, at 801.

72. *Id.* at 802.

outcome of the case.<sup>73</sup> And so essentially, once a jury was selected and sworn it was for them and them alone to ascertain the facts and make the appropriate findings.<sup>74</sup> The testimony of other individuals, non-jurors, was generally viewed as a “meddlesome intrusion” upon the jurors’ exclusive domain.<sup>75</sup> The only witnesses who were deemed worthy to “interfere” in the process, and thus to offer testimony, were party witnesses – the individuals who actually were at the heart of the dispute. And so, completely at odds with the practice during Anthony’s 19th Century trial, party witnesses were the only persons presumed to have knowledge of the facts that could possibly aid the jury.<sup>76</sup>

By the mid 1500’s when trial by jury had secured its position in England as the primary method of dispute resolution,<sup>77</sup> witnesses in a contemporary sense emerged and grew to play a prominent role in the trial process.<sup>78</sup> As society became more complex and as populations became more dense and diverse it came to be acknowledged that not all affairs in the community could be known by all the residents. It became increasingly necessary to listen to those who had actual knowledge of the disputed events.<sup>79</sup> This “modern witness” was defined as any person who happened to have relevant information concerning the dispute and was summoned to inform the jury<sup>80</sup>—very much like witnesses in contemporary trials.

However, by the early 1600’s, fearful that any interest in the outcome of the dispute would hinder truthful testimony, parties to the suit, once again began losing their footing as competent witnesses, and once again were precluded from testifying.<sup>81</sup> This practice was extended to the disqualification of any *interested* persons (non-parties such as family members or persons collecting rewards) by the mid 1600’s.<sup>82</sup> Whereas in the 1500’s *interested* witnesses (parties to the dispute) were the only witnesses deemed worthy to participate in the trial process, by the 1600’s it was clear that any interest or perceived interest in the outcome of the trial was an absolute disqualifier.<sup>83</sup> Why the shift? It appears that as the jury trial emerged as the

73. *Id.*

74. In civil cases, the parties were permitted to have counsel. *Id.* Thus, the party, or his attorney, was permitted to argue with and produce documents to the jury. *Id.* Persons who shared an interest in the issue (dependents, stewards, tenants, etc.) were also permitted to do so. *Id.* In criminal cases, however, the accused was not allowed to have counsel in felony cases until 1695, where statute permitted counsel only for treason. *Id.* at 809. Finally, in 1836 the statute was again modified to permit counsel for all felonies. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 804.

83. *Id.*

primary means of dispute resolution, jurors became more and more dependent upon witness testimony.<sup>84</sup> As their dependence grew, the necessity for unbiased, credible testimony became paramount.<sup>85</sup> It is interesting to note that during the 1600's, witnesses for the defense were disqualified with virtual impunity based on the interest rule while witnesses for the Crown (prosecution) were often allowed to testify regardless of interest.<sup>86</sup>

By the 1700's the theory of interested witness incompetency had become an axiom of truth:

Total exclusion from the stand is the proper safeguard against a false decision, whenever the persons offered are of a class specially likely to speak falsely; persons having a pecuniary interest in the event of the cause are specially likely to speak falsely; therefore such persons should be totally excluded.<sup>87</sup>

Of course *interested* extended beyond pecuniary interest, especially in criminal trials where the *interested* defendant could not testify on his own behalf.<sup>88</sup>

Indeed while the drafters of the American Constitution recognized the accused's right to counsel,<sup>89</sup> his right to confront witnesses,<sup>90</sup> and his right against self-incrimination,<sup>91</sup> no *right* to testify was included in the Bill of Rights. This, of course, reflected prevailing doctrine. The most heralded criminal trial of that era also bore testament to prevailing practice. The British soldiers on trial for their lives for firing into a Boston mob in 1770 were unable to testify to those tragic events.<sup>92</sup> Rather they were reduced to providing their unsworn testimony by deposition.<sup>93</sup>

84. *Id.* at 803.

85. *Id.*

86. *Id.* at 808. It appears that the "interest disqualification" rule that applied to the defense was based primarily on kinship—either by blood or affinity. Since the same "kinship" concerns were not usually associated with the prosecution's witnesses (as they were testifying against, and not for, the defendant), the rule was not regarded as being necessary or useful for prosecution witnesses. Surprisingly, no attempt was made to exclude testimony of prosecution witnesses based on interest until the mid 1600's. Thereafter, several defendants were successful in excluding testimony or documents produced by prosecution witnesses based on "interest" objections. *See id.* at 808-809.

87. *Id.* at 810.

88. *Id.* at 805.

89. U.S. CONST. amend. VI.

90. *Id.*

91. U.S. CONST. amend. V.

92. HILLER B. ZOBEL, *THE BOSTON MASSACRE* 254-55 (Norton 1970).

93. *Id.* at 253-55.

## C. A SHIFT BACK

This *interested* witness exclusion doctrine prevailed well into the 19<sup>th</sup> century<sup>94</sup> when Englishman Jeremy Bentham's eloquent treatise called the doctrine into question.<sup>95</sup>

Bentham reasoned:

In the view taken of the subject by the man of law,—to judge of trustworthiness, or at least, of fitness to be heard, *interest or not interest* . . . is the only question . . . . Between two opposite propositions, both of them absurd in theory, because both of them notoriously false in fact, the choice is not an easy one. But if a choice were unavoidable, the absurdity would be less gross to say, "No man who is exposed to the action of interest will speak false," than to say, "No man who is exposed to the action of interest will speak true." Of a man's, of every man's being, subject to the action of divers mendacity-restraining motives, you may be always sure: of his being subjected to the action of any mendacity-promoting motives, you cannot be always sure. But suppose you were sure. Does it follow, because there is a motive of some sort prompting a man to lie, that for that reason he will lie? That there is a danger in such a case, is not to be disputed: but does the danger approach to certainty? This will not be contended. If it did, instead of shutting the door against some witnesses, you ought not to open it to any. An interest of a certain kind acts upon a man in a direction opposite to the path of duty: but will he obey the impulse? That will depend upon the forces tending to confine him to that path—upon the prevalence of the one set of opposite forces or the other. All bodies on or about the earth tend to the centre of the earth; yet all bodies are not there.<sup>96</sup>

Bentham's treatise sent shock waves throughout England and the United States.<sup>97</sup> And over time, Bentham and those influenced by his efforts, precipitated a breaking down of the prevailing practice.<sup>98</sup> In 1843 the British Parliament enacted Lord Denman's Act which "enabled all persons, hitherto disqualified by crime or interest, to give evidence, except the parties on the record, or persons on whose behalf the proceedings were taken or

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94. 2 WIGMORE, *supra* note 62, at 811.

95. *Id.*

96. *Id.* at 811-12.

97. *Id.* at 816-17.

98. *Id.* at 816.

defended and their husbands and wives.”<sup>99</sup> So once again harkening back better than a century, anyone, save the parties and their spouses, possessing relevant information was allowed to offer their testimony.<sup>100</sup>

Within the decade, the English courts expanded on Lord Denman’s Act and allowed parties in a civil matter to act as witnesses on their own behalf.<sup>101</sup> And by 1869 further legislation in England declared spouses of parties in civil actions competent to testify in such proceedings.<sup>102</sup> However in criminal cases, change came about more slowly, but with the passage of Britain’s Criminal Evidence Act in 1898 all criminal defendants and their spouses were declared competent witnesses.<sup>103</sup>

While the United States did carry over the English common law, including the rules of incompetency regarding interested persons and parties, it was also quick to follow the English lead abolishing interest as a disqualifying factor.<sup>104</sup> As early as 1842, the Supreme Court in *United States v. Murphy* examined the question of whether the owner of stolen property was competent to testify regarding the description of the stolen property and the guilt of the defendants.<sup>105</sup> The Court boldly parted from traditional constraints and held that although a person interested in the prosecution is generally not a competent witness, there are exceptions.<sup>106</sup> Justice Story, writing for the majority, reasoned that the owner of the stolen property was competent to testify “upon the ground of necessity, and of public policy, and of attaining the manifest objects of the statute, and the ends of justice.”<sup>107</sup> After all, Story concluded, it was sound public policy to identify and convict wrongdoers.<sup>108</sup> In further support of its holding, the Court pointed to a number of state court decisions across the country which held such witnesses to be competent.<sup>109</sup> Story concluded his opinion by emphasizing that although the witness was competent to testify, his credibility was always a matter for the jury.<sup>110</sup>

Another exception sanctioned *interested* witness testimony when evidence could not be reasonably obtained through other means.<sup>111</sup> Revisit-

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99. *Id.* at 817. Up until this point a convicted criminal was unable to testify as a witness in any legal matter. *Id.* at 816-17.

100. *Id.* at 817.

101. *Id.* at 816.

102. *Id.* at 817.

103. *Id.*

104. *Id.*

105. *U.S. v. Murphy*, 41 U.S. 203 (1842).

106. *Id.* at 210.

107. *Id.* at 213.

108. *Id.* at 212-13.

109. *Id.* (citing *Salisbury v. Connecticut*, 6 Conn. 101 (1826) and *Commonwealth v. Moulton*, 9 Mass. 30 (1812)).

110. *Id.* at 214.

111. *Id.* at 212.

ing *Murphy*, the statute under which the defendants were tried required the government to prove that the defendants, "shall take and carry away, with an intent to steal or purloin, the personal goods of another."<sup>112</sup> Because the incident took place upon a ship at sea, it appears that there were not many witnesses to the alleged theft, apart from the victim.<sup>113</sup> Therefore, without the victim's testimony, the United States would not be able to present its case. Since holding the victim as an incompetent witness would essentially render the statute meaningless, the Supreme Court stated, an interested witness could offer testimony to execute a statute because a statute should not be "rendered ineffectual by the impossibility of proof."<sup>114</sup> The Court explained, "where money is stolen from a passenger or an officer of the ship, or from one of the crew; who else besides himself can be expected to establish the identity of the property or the circumstances of the theft?"<sup>115</sup>

Another exception provided that a person who was to receive a reward upon the conviction of the accused was competent to testify.<sup>116</sup> In such situations, witness competency was inferred by implication in that, again, it was good public policy to identify and convict offenders.<sup>117</sup>

In 1851, England statutorily declared parties in civil suits competent witnesses.<sup>118</sup> However, in the United States, as in England, reform regarding the testimonial incompetence of the criminal defendant lagged significantly behind.<sup>119</sup> In 1864, Maine was the first state to pass a general competency statute for criminal defendants.<sup>120</sup> Maine's statute was the first of its kind in the English speaking world.<sup>121</sup> In 1878, the Federal government followed

112. *Id.* at 209.

113. *Id.* at 212.

114. *Id.* at 210.

115. *Id.*

116. *Id.* at 211.

117. *Id.*

118. 2 WIGMORE, *supra* note 62, at 819.

119. *Id.* at 826-27.

120. *Id.*

121. *Ferguson v. Georgia*, 365 U.S. 570, 577 (1961). In 1898 (six years too late for Susan B. Anthony) Congress enacted the first federal general competency statute, which read:

Every person charged with an offense, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defense at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person.

2 WIGMORE, *supra* note 62, at 648 (citing 1898, St. 61 & 62 Vict. c.36, Criminal Evidence Act) (exceptions omitted). A similar statute is still in effect today. The modern version of the this general competency statute, codified as 18 U.S.C. § 3481 (2000), reads:

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged

suit by enacting a general competency statute for criminal defendants.<sup>122</sup> Other states quickly fell in line and by the end of the 19<sup>th</sup> century all states but Georgia had passed similar statutes.<sup>123</sup> England did not pass a general competency statute for criminal defendants until 1898.<sup>124</sup>

The delay in allowing criminal defendants to testify on their own behalf was not founded upon the government's malicious designs or an absence of the notion of fairness implicit in giving the criminal defendant an opportunity to tell his side of the story.<sup>125</sup> On the contrary, a practice of allowing the defendant to give an informal statement (not under oath) of his version of events, similar to a deposition (not elicited by direct examination), which had become commonplace in both England and the United States,<sup>126</sup> was out of concern for the accused.<sup>127</sup> Wigmore maintained:

That formal grant of competency [to the criminally accused], then, was so long withheld was due rather to a hesitation founded on the supposed advantage of the accused himself. If, being competent, he failed to testify, that (it was believed) would damage his cause more seriously than if he were able to claim that his silence were enforced by law.<sup>128</sup>

Additionally, the criminal defendant was insulated from cross examination.<sup>129</sup>

Both rationales certainly provided some measure of protection for an accused. Since the accused was precluded from testifying, his counsel could argue persuasively and with impunity that but for the exclusion the accused would have testified fully about his knowledge of relevant events. All the while the accused could rest on his statement setting forth his view of events without running the considerable risk of cross examination.

shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

18 U.S.C. § 3481 (2000).

122. *Ferguson*, 365 U.S. at 577.

123. 2 WIGMORE, *supra* note 62, at 827. Taking their cue from the *Murphy* decision, American states began, one by one, to statutorily abolish witness disqualification based upon interest. *Id.* at 826-827. As mentioned, Maine was the first state to declare the competency of the criminally accused in 1864, followed closely by Massachusetts in 1866, Connecticut in 1867, New York and New Hampshire in 1869, and New Jersey in 1871. *Id.* at 826 n.2. It should be noted that Georgia, the last state to enact a competency statute, did not do so until 1962. *Id.* at 828 n.7.

124. *Id.* at 827.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 828.

129. *Id.*



Without question both rationales offer substantial benefits to the accused. However, they arbitrarily removed the accused from meaningful involvement in the trial process. And indeed it makes intuitive sense that in a substantial number of prosecutions the accused's actual testimony may well have been a deciding factor in the outcome of the trial. Consequently the patronizing notion that the exclusion was for the benefit of the accused most likely must give way to the historically steeped concern about the credibility of this most *interested* of witnesses.

#### D. COMPLICATIONS

Even in light of such a broad and sweeping law, new questions arose. Could a co-defendant in a multi-defendant criminal prosecution offer testimony against his fellow accused? It remained for the Fifth Circuit Court of Appeals as recently as 1900 to tackle the issue.<sup>130</sup> In *Wolfson v. United States*,<sup>131</sup> the indictments of Wolfson and his co-defendant were consolidated into one case. Under prevailing doctrine a co-defendant could not testify unless he had already plead guilty, been acquitted, or the government had dismissed the case against him.<sup>132</sup> In other words he was *interested* and thus incompetent as long as he was a co-defendant.<sup>133</sup> The court, however, observed that the trend of legislative and judicial decisions was to enlarge sources of evidence, ultimately as evidenced by the federal general competency statute.<sup>134</sup> Following its own reasoning the court, interpreting the statute in its full broad sweep, found the statutory changes made any defendant, co-defendant or otherwise, a competent witness.<sup>135</sup> The Fifth Circuit went on to state:

The statute does not say "a competent witness for himself." [I]t does not say "a competent witness for government." He is made simply "at his own request, but not otherwise," a competent witness . . . . The purpose of the law was to make defendants competent witnesses, but at the time preserve to them the right to remain silence without prejudice. When any defendant chooses to testify, the statute permits him to do so. It does not matter whether his testimony is for or against himself, or for or against his co-defendant.<sup>136</sup>

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130. *Wolfson v. United States*, 101 F. 430 (5th Cir. 1900).

131. *Id.* at 431.

132. *Id.* at 435.

133. *Id.*

134. *Id.* at 435-36.

135. *Id.* at 436.

136. *Id.*

A generation later the Supreme Court re-visited the issue of the competency of co-defendant testimony in *Rosen v. United States*.<sup>137</sup> In *Rosen*, the two defendants, Rosen and Wagner, were charged with conspiracy to purchase stolen goods from one Broder.<sup>138</sup> Broder pled guilty and was sentenced.<sup>139</sup> Broder was then called by the government as a witness against his alleged co-conspirators.<sup>140</sup> Rosen's attorney objected on the grounds that Broder was incompetent to testify since he had plead guilty to a criminal act and been sentenced accordingly.<sup>141</sup> Consequently, Rosen maintained, under the common law, that Broder was rendered incompetent unless pardoned.<sup>142</sup> Broder had not been so blessed.<sup>143</sup> Rosen's motion was denied and Broder was forced to testify.<sup>144</sup> The trial court's decision was affirmed by the court of appeals.<sup>145</sup> The Supreme Court granted *certiorari* to further clarify the evolving doctrine of witness competency.<sup>146</sup> The Court held:

[T]he conviction of our time [is] that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent . . . this principle has come to be widely, almost universally, accepted in this country and in Great Britain.<sup>147</sup>

The Court went on to acknowledge the significant statutory trend declaring convicted criminals competent to testify, noting that "the very great weight of judicial authority" supported the competency of witnesses convicted of crimes.<sup>148</sup>

*Rosen* was but one incremental piece of the much greater whole of virtual universal competence. In 1975, the Federal Rules of Evidence declared all persons competent to testify as long as they possess personal knowledge of the matter at issue.<sup>149</sup>

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137. *Rosen v. United States*, 245 U.S. 467 (1918).

138. *Id.* at 468.

139. *Id.* at 468-69.

140. *Id.*

141. *Id.* at 469.

142. *Id.* at 470.

143. *Id.*

144. *Id.* at 469.

145. *Id.*

146. *Id.*

147. *Id.* at 471.

148. *Id.*

149. FED. R. EVID. 601-02. There are, of course, exceptions to this general rule. See FED. R. EVID. 603-16. But no longer are witnesses routinely disqualified based merely upon interest or criminal record.

### E. IS THERE A CONSTITUTIONAL RIGHT TO TESTIFY?

It was indeed a long and convoluted road that led to an eventual lifting of restrictions on the ability of an accused to testify in his own defense; it then remained to ascertain if the dissipation of the prohibition would develop into some manner of guarantee for the accused. Could something that was prohibited eventually be turned into something that was guaranteed? The first positive assertion that an accused may have a *right* to testify, as opposed to simply clearing away restrictions on that ability, surfaced in 1948 with the Supreme Court's decision in *In re Oliver*.<sup>150</sup> In *Oliver*, the defendant was initially called as a witness in a grand jury investigation.<sup>151</sup> In Michigan's scheme, any witness summoned for questioning before a grand jury who failed to appear or answer questions, or to give believable evidence, may be charged with contempt.<sup>152</sup> After appearing before the judge-directed grand jury, *Oliver's* ensuing testimony was deemed incredible.<sup>153</sup> As a result, within the same proceeding, and outside the presence of counsel, *Oliver* was immediately charged, convicted, and sentenced to jail for contempt.<sup>154</sup> The secrecy and speed of the proceeding denied *Oliver* any opportunity to meet with counsel, prepare a defense, present witnesses, or cross-examine the other grand jury witness.<sup>155</sup> The Supreme Court reversed and held:

A person's right to reasonable notice of a charge against him, and an *opportunity to be heard in his defense*—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, *to offer testimony*, and to be represented by counsel.<sup>156</sup>

The Court explained that grand jury proceedings are held in secrecy to investigate and indict criminal conduct.<sup>157</sup> These proceedings, however, do not license the simultaneous adjudication of the criminal conduct in question.<sup>158</sup> Rather, the accused must be "afforded the procedural safeguards required by due process of law."<sup>159</sup> Likewise, "[e]ven when witnesses before grand juries refuse to answer proper questions, the grand juries do not adjudge the witnesses guilty of contempt of court in secret or in public or at all."<sup>160</sup> Rather, the witness must be tried as a defendant before a judge in

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150. *In re Oliver*, 333 U.S. 257 (1948).

151. *Id.* at 258.

152. *Id.* at 262.

153. *Id.* at 259.

154. *Id.*

155. *Id.*

156. *Id.* at 273 (emphasis added).

157. *Id.* at 264-65.

158. *Id.* at 265.

159. *Id.*

160. *Id.*

open court, and be given the same due process safeguards available to criminal defendants.<sup>161</sup> The grand jury proceeding had not afforded the defendant the opportunity to be heard and in so doing had denied him due process of law.

In 1961, the Supreme Court expanded our knowledge of the right of an accused to tell his story.<sup>162</sup> In *Ferguson v. Georgia*, the Court was confronted with the anachronistic laws of Georgia.<sup>163</sup> Georgia was the only state “indeed, apparently the only jurisdiction in the common-law world to retain the common-law rule that a person charged with a criminal offense [was] incompetent to testify under oath in his own behalf.”<sup>164</sup> Georgia law did, however, permit the criminal defendant to make an unsworn statement in his defense to the court and jury.<sup>165</sup> Ferguson was charged with murder, and was denied, under Georgia statute, the right to present his unsworn testimony.<sup>166</sup> Despite the statutory restriction, Ferguson’s counsel attempted to assist his client in presenting his unsworn statement to the jury.<sup>167</sup> The state objected to counsel’s assistance and was backed by the trial court.<sup>168</sup> Ferguson was convicted and appealed.<sup>169</sup> The *Ferguson* Court after offering an exhaustive history of the right to testify, tracing its roots from English common law to the competency statutes now in place throughout the United States, reasoned that after the creation of competency statutes, “[i]t was seen that the shutting out of [the accused’s] sworn evidence could be positively hurtful to the accused, and that innocence was in fact aided, not prejudiced, by the opportunity of the accused to testify under oath.”<sup>170</sup> The “law permitting criminals to testify . . . aid[s] in the detection of guilt” and “the protection of innocence.”<sup>171</sup>

While the Court did not specifically address the validity of the Georgia statute prohibiting the accused from offering testimony under oath (as the defendant had not offered himself as a sworn witness) it concluded that the Georgia Supreme Court would not have entertained an attack on the statute and therefore the Supreme Court left the issue for another day—choosing instead to address the validity of the application of the statute.<sup>172</sup> The Supreme Court did hold that, “effectuating the provisions of § 38-415, Georgia, consistently with the Fourteenth Amendment, could not, in the con-

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161. *Id.*

162. *Ferguson v. Georgia*, 365 U.S. 570 (1961).

163. *Id.*

164. *Id.*

165. *Id.* at 571.

166. *Id.*

167. *Id.*

168. *Id.* at 571-72.

169. *Id.* at 572.

170. *Id.* at 580-81.

171. *Id.* at 581 (citation omitted).

172. *Id.* at 596.

text of § 38-416, deny appellant the right to have his counsel question him to elicit his statement."<sup>173</sup> The accused had a constitutional right to give his statement aided by counsel.<sup>174</sup>

Following *Ferguson*, a number of Supreme Court decisions referred to or alluded to the constitutional right to testify.<sup>175</sup> But it wasn't until 1987 in the landmark decision *Rock v. Arkansas*<sup>176</sup> that the Supreme Court firmly recognized the right to testify as a constitutional privilege protected by the Fifth, Sixth, and Fourteenth Amendments.

On trial for her husband's death, Vickie Rock underwent hypnosis in an effort to refresh her clouded memory concerning the events immediately preceding her husband's fatal shooting.<sup>177</sup> The prosecution filed a motion to exclude any testimony resulting from the hypnosis, maintaining that Rock's testimony regarding activities prior to the shooting must be limited to what she said at the time of the shooting.<sup>178</sup> The trial court and the Arkansas Supreme Court agreed. The state high court held that the defendant's testimony would "be excluded because of inherent unreliability and the effect of hypnosis in eliminating any meaningful cross-examination on those matters."<sup>179</sup> Further, the court held that any "[t]estimony resulting from post-hypnotic suggestion will be excluded."<sup>180</sup>

The Supreme Court reversed and held, "[a]t this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense."<sup>181</sup>

*Rock* was the first instance in which the Court directly ruled on a defendant's right to testify. Other cases including *Ferguson* could be and were

173. *Id.*

174. *Id.*

175. See, e.g., *Faretta v. California*, 422 U.S. 806, 819 (1975) ("The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense."); *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972) ("Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right."); *Harris v. New York*, 401 U.S. 222, 225 (1971) ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so."); *Washington v. Texas*, 388 U.S. 14, 19 (1967) (The accused's right to establish his own defense "is a fundamental element of due process of law").

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

177. *Id.* at 46.

178. *Id.* at 48 n.4.

179. *Id.* at 48 n.3.

180. *Id.*

181. *Id.* at 49.

resolved by the applicable competency statutes.<sup>182</sup> In *Rock*, the Court declared that the right to testify was established by and protected in the Due Process Clause of the Fourteenth Amendment,<sup>183</sup> the Compulsory Process Clause and the right to make one's own defense found in the Sixth Amendment,<sup>184</sup> and the privilege against self-incrimination found in the Fifth Amendment.<sup>185</sup>

The Court, citing to multiple Constitutional provisions as embodying "[t]he right to testify on one's own behalf at a criminal trial" first turned to the Due Process clause of the Fourteenth Amendment.<sup>186</sup> The Court emphasized that the right to testify "is one of the rights that 'are essential to due process of law in a fair adversary process.'"<sup>187</sup> Expanding upon this assertion, the Court declared that "[t]he necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony."<sup>188</sup> By proclaiming the criminal defendant's right to testify guaranteed by the Fourteenth Amendment, the Court made explicit what was implicit in their earlier decisions including *In re Oliver* and *Ferguson*.<sup>189</sup> The Court also addressed the once popular argument that "a defendant's ability to present an unsworn statement would satisfy this right [the right to testify]."<sup>190</sup> Reaffirming the impact of their holding in *Ferguson* the Court noted that "the right to be heard, which is so essential to due process in an adversary system of adjudication, [can] be vindicated only by affording a defendant an opportunity to testify before the factfinder."<sup>191</sup>

In addition to the support found in the Fourteenth Amendment, the Court held that "[t]he right to testify is also found in the Compulsory Process

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182. *Ferguson v. Georgia*, 365 U.S. 570, 596 (1961) (holding that a state statute which made a criminal defendant incompetent, thereby deprived him of the right to have his counsel question him on direct examination).

183. *Rock*, 483 U.S. at 51 (1987).

184. *Id.* at 52.

185. *Id.* at 52-53.

186. *Id.* at 51.

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

188. *Id.* at 51.

189. See *In re Oliver*, 333 U.S. 257, 273 (1948) ("A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right . . . to offer testimony . . ."); *Ferguson v. Georgia*, 365 U.S. 570 (1961). While the court declined to directly address the question of the defendant's constitutional right to testify, as *Ferguson* did not involve a constitutional challenge to a statute that rendered a defendant incompetent to testify, the Court did allude to such a right and two Justices did in fact argue for such a right to be explicitly recognized. *Id.* at 600-01 (Frankfurter, J., concurring); *Id.* at 601-02 (Clark, J., concurring).

190. *Rock*, 483 U.S. at 51 n.8.

191. *Id.*

Clause of the Sixth Amendment."<sup>192</sup> The Sixth Amendment of the Constitution of the United States reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to *have compulsory process for obtaining witnesses in his favor*, and to have the Assistance of Counsel for his defense.<sup>193</sup>

The Compulsory Process Clause grants a criminal defendant the *right* to call witnesses on his behalf.<sup>194</sup> According to the Court:

Logically included in the accused's right to call witnesses whose testimony is "material and favorable to his defense," is a right to testify himself, should he decide it is in his favor to do so. In fact, the most important witness for the defense in many criminal cases is the defendant himself.<sup>195</sup>

Underscoring the point, the Court turned back and built upon its watershed opinion in *Faretta v. California* in which the right of self-representation was borne of the Sixth Amendment's guarantee that an accused can put forth his own defense.<sup>196</sup> The *Rock* Court advanced the precept that

Even more fundamental to a personal defense than the right of self-representation . . . is an accused's right to present his own version of events in his own words. A defendant's opportunity to conduct his own defense . . . is incomplete if he may not present himself as a witness.<sup>197</sup>

With that, the Court focused their discussion on the third constitutional provision guaranteeing the criminal defendant's right to testify, the Fifth Amendment.<sup>198</sup>

192. *Id.* at 52.

193. U.S. CONST. amend. VI (emphasis added).

194. *Id.*

195. *Rock*, 483 U.S. at 52 (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)).

196. *Faretta v. California*, 422 U.S. 806, 818 (1975) (holding that the various rights explicitly guaranteed by the Sixth Amendment constitutionalizes the right in a criminal trial to make a defense as we know it).

197. *Rock*, 483 U.S. at 52.

198. *Id.* at 52-53.

The Fifth Amendment holds that no person "shall be compelled in any criminal case to be a witness against himself . . ." <sup>199</sup> To underscore the point, the Court referred back to *Harris v. New York*, where it held that "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so." <sup>200</sup> The *Rock* Court again used logic to infer an implicit right—necessarily included in the constitutional right to remain silent is the constitutional right to testify. <sup>201</sup> The *Harris* Court noted: "The choice of whether to testify in one's own defense [or to not testify] must be 'unfettered,' since that choice is an exercise of the constitutional privilege." <sup>202</sup> Expanding on this idea, the Court in *Harris* found that a defendant's Fifth Amendment rights are retarded when an assertion of this right would be costly to the accused. <sup>203</sup> In other words, the defendant's right to choose between testifying or remaining silent is effectively stripped away, because for all ostensible purposes he has no free choice in the matter. <sup>204</sup>

Firmly established as it was, the right of a criminal defendant to testify on his own behalf as set forth in *Rock* was not without limits. <sup>205</sup> The Court referred back to an earlier decision in which it observed that the right to present testimony "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." <sup>206</sup> However, the "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." <sup>207</sup> Rather, as set forth in *Chambers v. Mississippi*, "a state must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." <sup>208</sup>

In *Rock* the Court provided the analytical tools for answering the questions presented at the outset of this article: at what point do court rulings

199. U.S. CONST. amend. V.

200. *Harris v. New York*, 401 U.S. 222, 230 (1971). While such a clear statement would at first glance appear to resolve the conflict surrounding the criminal defendant's right to testify, it is important to note that this statement was made in dicta. The focus of the Court's decision in *Harris* was the use of otherwise inadmissible statements for impeachment purposes. The issue of a criminal defendant's right to testify was not put directly before the Court until the *Rock* decision in 1987. Until *Rock*, the existence of the criminal defendant's right to testify was perhaps assumed, but not unquestionably established.

201. See *Rock*, 483 U.S. at 53.

202. *Harris*, 401 U.S. at 229.

203. See *Harris*, 401 U.S. at 230 (Brennan, J. dissenting) (stating that if an accused's failure to take the stand can be used against him by the prosecution, his ability to exercise this constitutional right is effectively crippled. By using the defendant's silence against him, the defendant is effectively forced onto the stand, thus impairing his ability to exercise his rights guaranteed under the Fifth Amendment).

204. *Id.*

205. *Rock*, 483 U.S. at 55-56.

206. *Id.* (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)).

207. *Id.*

208. *Id.* at 56.



limiting or restricting a defendant's testimony actually impede the defendant's right to tell his story? Is it possible that the right to testify does not encompass the right to fully testify—the right to be heard?

#### F. RECOGNIZING LIMITATIONS

Early in this exercise we mused whether the right to testify in one's defense included the right to be heard. That is, can the criminal defendant offer his testimony without limitation, without restriction? For instance, Alfred Gutierrez's trial judge held that the victim's prior battery conviction was inadmissible.<sup>209</sup> While the propriety of that evidentiary decision is debatable, the trial judge clearly is within his bounds in making that decision.<sup>210</sup> Thus, at least to that extent Gutierrez was properly precluded from testifying to all he might otherwise be inclined to offer.

No one would maintain that such a limitation denied Mr. Gutierrez his fundamental right to testify. Indeed, the *Rock* Court specifically stated, "[t]he right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'"<sup>211</sup> And indeed perhaps the seminal function of a trial judge is to probe the trial mine field and diffuse the hazards lest they explode and impede the fair administration of justice.<sup>212</sup> Indeed, Mr. Gutierrez's trial judge had not only the right to exclude Ms. Nakatani's prior offense because in his estimation it ran afoul of the rules of evidence,<sup>213</sup> but the duty to exclude it "to accommodate other legitimate interests in the criminal trial process."<sup>214</sup> To find otherwise would essentially undermine the court's authority to properly monitor the propriety of the evidence put before the trier of fact.<sup>215</sup> If such were the case, every criminal defendant rallying under the banner of *Rock* could put forth evidence without limitation. Surely a scenario whereby the testifying criminal defendant was not subject to any of the long established rules of evidence would not

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209. See Reporter's Transcript of May 19, 1998, *supra* note 1, at 1891-7 to -9.

210. FED R. EVID. 403.

211. *Rock*, 483 U.S. at 55-56 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)).

212. See *United States v. Jones*, 880 F.2d 55, 60 (1989) (stating that "[w]ithout reasonable rules regulating the presentation of evidence and arguments, courts could not effectively function").

213. FED R. EVID. 403.

214. *Chambers*, 410 U.S. at 295.

215. *Johnson v. Chrans*, 844 F.2d 482, 484 (1988) (recognizing that state has the "sovereign prerogative" to regulate the presentation of evidence in its courts). *McMorris v. Israel*, 643 F.2d 458, 460 (7th Cir.1981), *cert. denied*, 455 U.S. 967 (1982). Therefore, when a defendant's Sixth and Fourteenth Amendment rights to present a defense are involved, the judge must "evaluate the exculpatory significance of . . . [relevant and competent] evidence and then to balance it against the competing state interest in the procedural rule that prevented the defendant from presenting this evidence at his trial." *Id.* at 461 (footnote omitted); see also *Alicea v. Gagnon*, 675 F.2d 913, 923 (7th Cir. 1982)).

serve "legitimate interests in the criminal trial process."<sup>216</sup> Yet such limitations, legitimate and long established though they may be, do restrict the criminal defendant's ability to put forth his full testimony.

So, as in most affairs of any consequence, an appropriate balance is the key. We must find a balance that accommodates the criminal defendant's right to offer his testimony while taking care not to neglect the other "legitimate interests" of the criminal trial process as well.

### G. STRIKING THE BALANCE

The Supreme Court in *Rock*, recognizing that the criminal defendant's right to testify must be balanced with the other legitimate interests of the criminal trial process, noted that the "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve."<sup>217</sup> Is it that "arbitrary" and "disproportionate" are the refuge for the Court when it is at a loss for true direction? Or is it that to offer more specific direction necessarily becomes so fact sensitive as to provide no help beyond the narrow confines of those particular facts?

It would be absurd to suggest that a trial court cannot make rulings concerning the admissibility of evidence brought forth during the testimony of the criminally accused. Indeed, in most cases, the testifying defendant cannot offer improper opinions, character, hearsay or any other testimony that runs afoul of the rules of evidence, even though such rulings place restrictions on his ability to offer "his story."<sup>218</sup> The trial court in its role as gatekeeper must fulfill its function and restrict such improper testimony.<sup>219</sup> Taking it a step further, even should the trial judge as gatekeeper err in determining that certain proffered testimony is inadmissible and preclude the defendant from testifying, it cannot necessarily be maintained that the defendant's right to testify has been abridged. To hold otherwise would lead to *Rock* error in every instance in which a trial judge improperly ruled that a testifying defendant could not testify to a particular point. Certainly such a draconian result is not serviceable at any level. And yet at some point, can it be said that when bench rulings restricting defendant testimony become so pervasive, the right to testify has been impeded? Perhaps not; perhaps it can be said that a trial judge in the diligent performance of his gate keeping function need not be concerned with the holistic effect such rulings might ren-

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216. U.S. v. Almonte, 956 F.2d 27, 30 (1992) (stating that although the right to present a defense is essential to a fair trial, it "does not give criminal defendants carte blanche to circumvent the rules of evidence"). Such a conclusion would not serve "legitimate interests in the criminal trial process." *Rock*, 483 U.S. at 55 (quoting *Chambers v. Mississippi*, 410 U.S. at 295).

217. *Rock v. Arkansas*, 483 U.S. 44, 55-56 (1987).

218. See FED R. EVID. 701, 404, 802.

219. FED R. EVID. 403.

der.<sup>220</sup> That he should not be charged with determining when the cumulative effects of his rulings have effectively precluded the defendant from testifying. Such a position, of course, is untenable; to relieve the trial judge of her basic responsibility to ensure due process during trial is heresy.<sup>221</sup> The trial judge is the bulwark of due process. All else is remedial.

#### H. HONING THE ISSUE

There are no easy answers. However, the analytical error that exacerbates the problem and muddles clear resolution is the tendency by some courts to assume that the right to testify is at best coextensive with a right to present a defense.<sup>222</sup> Consequently, despite *Rock*, many trial courts still tend to analyze the defendant's right to testify as they would analyze any other aspect of the defense case.<sup>223</sup> Such confusion is understandable in that improper restrictions on a defendant's right to testify will necessarily run afoul of the defendant's right to present his defense.<sup>224</sup> However those "legiti-

220. See Comment, *Death Denies Due Process: Evaluating Due Process Challenges to Federal Death Penalty Act*, Joshua Herman, 53 DEPAUL L. REV. 1777, 1820-21 (2004) (citing the Second Circuit for the proposition that trial judges retain the function of gatekeepers "to ensure that unconstitutional evidence otherwise admissible under applicable evidentiary rules is excluded from trial").

221. See Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 CONN. L. REV. 243, 285-86 (2000):

One of the judge's primary roles is to ensure that the accused receives his or her constitutional right to a fair trial. Accordingly, the trial-related [sic] rights set forth in the Constitution are designed to protect only the accused. If the judge discerns anything during the trial that interferes with those rights—such as inadequate defense counsel or prosecutorial or juror misconduct—he or she should intervene to ensure that those issues are addressed and rectified. The judge should take the actions necessary to shield the accused from any violation of his or her constitutional rights.

*Id.*

222. *United States v. Scheffer*, 523 U.S. 303, 315 (1998). The Court did cite *Rock* for the proposition that prohibiting *Rock*'s hypnotically enhanced testimony "violated the defendant's right to present a defense." *Id.* More importantly, the Court went on to say that the rule preventing *Rock* from testifying "infringed on the accused's interest in testifying in her own defense—an interest that we deemed particularly significant, as it is the defendant who is the target of any criminal prosecution. *Id.* (citation omitted). For this reason, we stated that an accused ought to be allowed to 'present his own version of events in his own words.'" *Id.* at 315-16 (quoting *Rock*, 483 at 52).

223. *State v. Neuman*, 371 S.E.2d 77, 82 (1988). Here, the State Court of Appeals of West Virginia held that the trial court erred by allowing defense counsel to waive the defendant's right to testify on his behalf. *Id.* Acknowledging the constitutional significance of the right to testify, the court stated that before a defendant can waive the right, procedural safeguards must be employed to insure that the defendant's waiver of the right is made voluntarily, knowingly, and intelligently. *Id.*

224. *Rock v. Arkansas*, 483 U.S. 48, 62 (1987) (holding that the Supreme Court of Arkansas erred in rejecting petitioner's claim that the limitations on her hypnotically induced testimony violated her right to present her defense).

mate” restrictions imposed on witnesses other than the accused or upon other evidence do not demand the high scrutiny concerning the right of the defendant himself to testify.<sup>225</sup>

Two cases, in particular, bear out the confusion. The first is *Webb v. Texas*, in which a defense witness, in custody at time of his testimony, was warned by the trial judge that several years would be added to his current prison sentence should he commit perjury.<sup>226</sup> The witness, perhaps prudently, opted to forego the opportunity to testify on Webb’s behalf.<sup>227</sup> The Court held that the judge’s threatening remarks effectively drove the witness from the stand, and in so doing deprived Webb of due process of law under the Fourteenth Amendment.<sup>228</sup>

In *DePetris v. Kuykendall*, Kelly DePetris killed her husband in his sleep, and asserted an “imperfect self-defense,” claiming her belief that she was in imminent danger, even if such a belief was unreasonable.<sup>229</sup> To support her claim, she attempted to introduce into evidence her husband’s handwritten journal, which made reference to several of his previous violent episodes.<sup>230</sup> In arguing for admission, she asserted her belief that her husband’s threats against her were to be taken seriously, and thus justified her actions.<sup>231</sup> The trial court disagreed and excluded the journal as irrelevant.<sup>232</sup> The Ninth Circuit reversed, reasoning that the excluded evidence went “to the heart of the [defendant’s] defense.”<sup>233</sup> The court stated, “the trial court not only [improperly] excluded the journal, which would have corroborated petitioner’s testimony, but worse still, it prevented petitioner from testifying fully in her own behalf about why she did what she did—this in a case where proof of the defendant’s state of mind was an essential element of the defense.”<sup>234</sup> The court further reasoned that “because this evidence was critical

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225. See *Burrall v. Maryland*, 724 A.2d 65, 79-80 (Md. 1999). The *Burrall* court recognized that the *Rock* decision was carefully confined to the testimony of the defendant. *Id.* at 79. The court further referred to Justice Marshall’s citation of *Rock* as supporting the principle applied in *Geders v. United States*, 425 U.S. 80, 96 (1976), that “a defendant in a criminal case enjoyed a ‘unique status’ and could not, in all instances, be treated the same as other witnesses.” *Burrall*, 724 A.2d at 79-80.

226. *Webb v. Texas*, 409 U.S. 95, 95-96 (1972).

227. *Id.* at 96.

228. *Id.* at 97.

229. *DePetris v. Kuykendall*, 239 F.3d 1057, 1060 (2001).

230. *Id.* “The journal contained Dana’s own handwritten description of his physical abuse of his homosexual companion, his beating of his stepdaughter, his rape of a friend’s girlfriend, and numerous accounts of his beating of his first wife, including the breaking of her eardrum.” *Id.*

231. *Id.* at 1061. Specifically, DePetris argued that because she had read the journal on several occasions prior to shooting her husband, she had a reasonable belief that her own safety was in danger. *Id.*

232. *Id.*

233. *Id.* at 1062.

234. *Id.* at 1062-63.

to her ability to defend against the charge, we hold that the exclusion of this evidence violated petitioner's clearly established constitutional right to due process of law—the right to present a valid defense as established by the Supreme Court in *Chambers* and *Washington* [sic].<sup>235</sup>

*DePetris* presented the unusual circumstance in which the trial court's exclusion of other defense evidence directly impacted the defendant's own testimony. By excluding the journal, *DePetris*' testimony seemed groundless and uncorroborated.<sup>236</sup> Nonetheless, the concepts are not inextricably linked. It is one thing to exclude defense evidence and or defense witnesses, but it is fundamentally different to limit the accused himself from fully testifying.<sup>237</sup>

The fundamental difference between a defendant's testimony and any other defense evidence including testimony of any other defense witness has been acknowledged by several state courts who have refused to extend the holding in *Rock* to any witness other than the defendant.<sup>238</sup> In *Burral v. Maryland*, the accused attempted to introduce the testimony of the victim's girlfriend who had previously stated under hypnosis that she saw another individual fighting with and stabbing the victim on the night of his murder.<sup>239</sup> The trial court held the hypnotically enhanced testimony inadmissible in that it lacked reliability, and possessed no general acceptance in the scientific community.<sup>240</sup> Unremarkably, *Burral* was subsequently convicted of second degree murder.<sup>241</sup>

On appeal, *Burral*, citing *Rock*, alleged error because the court prevented him from questioning the witness about her exculpatory post hypnosis statements. The Maryland Court of Appeals noted that *Rock* itself was premised on "*the overarching right of the defendant in a criminal case to tell his or her story in his or her own words.*"<sup>242</sup> The Maryland high court also cited numerous subsequent pronouncements by the United States Supreme Court drawing a distinction between the special significance of the defen-

235. *Id.* at 1063.

236. *Id.* at 1061. In addition to excluding the journal, the trial court also excluded *DePetris* from mentioning that she had ever read the journal and from making any reference to its contents. *Id.* Also excluded was a portion of *DePetris*' videotaped police interview in which, in the course of trying to explain her actions on the morning of the shooting, she mentioned the journal and its effect on her. *Id.* Finally, the trial court limited the testimony of an expert in the field of Battered Woman's Syndrome from commenting on how the journal may have influenced *DePetris*. *Id.*

237. *See id.* at 1063.

238. *See Burral v. Maryland*, 724 A.2d 65, 79 (Md. 1999); *State ex rel. Neely v. Sherril*, 799 P.2d 849 (1990); *State v. Johnston*, 529 N.E.2d 284 (1988); *Hall v. Commonwealth*, 403 S.E. 2d 362 (1991); *People v. Zayas*, 546 N.E. 2d 513 (1989).

239. *Burral*, 724 A. 2d at 69.

240. *Id.* at 73.

241. *Id.* at 69.

242. *Id.* at 79 (emphasis added).

dant's right to testify as opposed to any other defense evidence.<sup>243</sup> In reaching its holding, the *Burrall* court directly addressed what so many courts had skirted for over a decade: a *per se* exclusion of hypnotically induced testimony is not unconstitutional, as long as the testimony being excluded is not that of the defendant himself.<sup>244</sup>

*Burrall* got it right, *Rock* stands for the proposition that the right to testify in one's own behalf is based on bedrock constitutional principles over and above the due process right to present a defense.<sup>245</sup> Evidentiary rules that may exclude defense evidence are subject to a lower threshold than that which would limit the testimony of the accused himself.<sup>246</sup> From a reading of *Rock* and its progeny, it is apparent that the courts have drawn a sharp distinction between the right to present a defense and the right of a defendant to testify.<sup>247</sup> Although these two rights are intertwined, *Burrall* renders it clear they are distinguishable.<sup>248</sup>

## I. THE SOLUTION

Where then is the balance? When have the trial court's rulings as to the extent of the defendant's testimony crossed the line distinguishing legitimate limitations from arbitrary and disproportionate exclusions? Of course, there can be no quantifiable answer. We must, of necessity, examine each instance on the facts peculiar to it alone. *Rock* and *Burrall* and those cases that have followed offer immeasurable help, but provide no concrete answers. It is then left to each trial judge in each case to assess the import of the court's rulings on the defendant's right to testify.<sup>249</sup> Unfortunately, identifying the concerns raised by the limits placed on Alfred Gutierrez's testimony is not often clear in the rough and tumble tumult of criminal trials.

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243. See *Clemons v. Mississippi*, 494 U.S. 738, 769 (1990). Justice Blackmun's concurring opinion cited *Rock* for the proposition that the high court "has attached constitutional significance to the individual's interest in presenting his case directly to the finder of the fact." See also *Perry v. Leeke*, 488 U.S. 272, 289 (1989). Justice Marshall's dissent stated that a criminal defendant enjoyed a "unique status" and should not in every instance be treated the same as another witness.

244. *Burrall*, 724 A.2d at 69. Specifically, the court held:

There is no doubt but that *Rock* itself was carefully confined to the testimony of the defendant. That is apparent not only from the footnote added by the Court but from the overall text of the majority opinion. On several occasions, the [*Rock*] Court noted that it was dealing only with the testimony of the defendant and stressed as the basis for its holding the overarching right of the defendant in a criminal case to tell his or her story in his or her own words.

*Id.*

245. *Id.* See also *United States v. Scheffer*, 523 U.S. at 308.

246. See *supra* note 242 and accompanying text.

247. See *supra* note 243 and accompanying text.

248. *Id.*

249. See FED R. EVID. 403.

It is one thing to sit back in some ivory tower and think lofty thoughts of what trial judges should do; it is quite another to recognize all issues from the eye of the maelstrom. Yet this is precisely what we expect trial judges to do. Help is needed. Not so much to ascertain if *Rock* error is in the offing, but rather to simply recognize that the issue is afoot. It now remains for trial counsel and trial judges to recognize when the issue is broached and implicate a fixed procedure to address the concern at the trial level so as to avoid a later reversal. Recognized hearings and procedures provide a catalogue, a mental checklist against which counsel and court can assess potential issues. The mere recognition of a procedure generates significant benefits. Request by either counsel for a particular hearing focuses attention on a concern that might otherwise be missed or might have only raised vague concerns.

Normal ad hoc procedures for judicial evaluation of restrictions on the testimony of the accused are simply not sufficient. Since *Rock*, the right of an accused to testify without arbitrary restrictions has been firmly established, yet there is no recognized procedure to ensure that this right is not abridged short of an appeal. As the case of Alfred Gutierrez makes evident there must be a more comprehensive procedure in the trial court to ensure that a defendant has a fair chance to offer his version of events.

Consequently, some procedure is needed to ensure that this constitutional right not be lightly abridged. When an accused seeks to act as his own counsel, the court holds a *Faretta* hearing.<sup>250</sup> When an accused seeks to rid himself of incompetent, court-appointed counsel, the court holds a *Marsden* hearing.<sup>251</sup> If an accused wishes to vindicate his Fifth Amendment right against self incrimination he can have a hearing pursuant to *Miranda v. Arizona*.<sup>252</sup> If an accused disputes the fairness of the jury selection process he is

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250. *Faretta v. California*, 422 U.S. 806 (1975). A *Faretta* hearing requires that the trial judge inform the defendant of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." *Id.* at 835 (citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)).

251. *People v. Marsden*, 465 P.2d 44 (1970). A *Marsden* hearing requires the judge to view defense counsel's competence from evidence presented beyond the trial record. *Id.* at 1123-24. For example, matters such as "whether the defendant had a defense which was not presented; whether trial counsel consulted sufficiently with the accused, and adequately investigated the facts and the law; whether the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choice of trial tactics and strategy." *Id.* (citing *Brubaker v. Dickson*, 310 F.2d 30, 32 (9th Cir. 1962)). "Thus, a judge who denies a motion for substitution of attorneys solely on the basis of his courtroom observations, despite a defendant's offer to relate specific instances of misconduct, abuses the exercise of his discretion to determine the competency of the attorney." *Id.*

252. *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966). Under *Miranda*, exculpatory or inculpatory statements stemming from a custodial interrogation of the accused may not be substantively used against the accused unless the prosecution can show that proper procedural safeguards were in place. *Id.* This requires that the accused be informed of: his right to remain silent, that any statement he does make may be used as evidence against him, and that

entitled to a *Batson/Wheeler* challenge.<sup>253</sup> These cases and the fundamental rights they protect all have corollary legal procedures where judges can make decisions affecting those rights which are informed by the cases and their progeny.

In cases where the state objects to portions of an accused's anticipated testimony, defense counsel needs to request and the court needs to hold a *Rock* hearing in which the trial court makes its evidentiary ruling informed not just by various state evidentiary rules, but also by *Rock* and its progeny so that there is a clear and informed evaluation of "whether the interests served by a rule justify the limitations imposed on the defendant's constitutional right to testify."<sup>254</sup>

Since the right to testify in one's own behalf is a fundamental principle of constitutional law which expands beyond the simple due process right to present a defense, it follows that a defendant must be allowed to personally rebut or negate the state's evidence as to an element of the crime with which one is charged.<sup>255</sup> If the State produces evidence to the jury to suggest premeditation, the defendant must have the right to present evidence

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he has a right to the presence of an attorney, either retained or appointed. *Id.* The court can only find that an accused has waived his right if it can be established that he has made a voluntary, knowing, and intelligent waiver of these rights. *Id.*

253. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). In *Batson*, the petitioner, a black man, appealed the prosecution's use of peremptory challenges to exclude all four potential black jurors during the *voir dire* examination. *Id.* at 82-83. The Court held that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges. *Id.* at 91-92. To establish such a case, the petitioner must show three things. First, that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of his race. *Id.* at 124. Second, the petitioner is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Id.* at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)). Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the venire men from the petit jury on account of their race. *Id.* at 124. This "combination of factors" in the empanelling of the petit jury, as in the selection of the venire, "raises the necessary inference of purposeful discrimination." *Id.* at 95.

254. *Rock v. Arkansas*, 483 U.S. 44, 56 (1987).

255. *See id.* at 51.

The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony: 'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.'

*Id.* (citing *In re Oliver*, 333 U.S. 257, 273 (1948)).



to the contrary.<sup>256</sup> To deny a defendant this right in effect denies him or her the most fundamental element of due process of law.<sup>257</sup> Limitations on this right which make a defendant's testimony seem incredible or that opens the defendant to an unfair attack cannot avoid running afoul of *Rock* in that such a restriction acts as a form of prior restraint that is arbitrary, disproportionate and usually fatal to the defendant's case.<sup>258</sup>

As has been pointed out, this is not to suggest that the right to testify in one's own behalf is unlimited, the evidence the defendant testifies to must be relevant as there is no constitutional right to introduce irrelevant evidence.<sup>259</sup> Nevertheless it can no longer be countenanced that trial courts limit a defendant's testimony on an ad hoc basis, making evidentiary rulings as they go along. The perils of such an informal approach are evident and illustrated by the restrictions placed on Alfred Gutierrez as he testified on his own behalf during his capital trial. To treat the defendant's testimony in the same manner as any other witness is error.<sup>260</sup> A defendant is the only witness in a criminal proceeding who has an absolute right to testify.<sup>261</sup> Often times the defendant is the only witness to the event and none can deny the impact of a defendant's testimony on the jury.<sup>262</sup> Absent some clear and dominating evidentiary principle, if the right to testify in one's own behalf is to mean anything, a defendant must be allowed to testify in a way that will

256. See *State v. Groschang*, 36 P.3d 231, 236. In response to the State's charge of premeditated murder, Groschang stated that his use of the anti-depressant Zoloft prevented him from forming the requisite intent required for premeditation. *Id.* at 235-36. The state produced evidence that two people associated with the case had used Zoloft without adverse effect, which implied to the jury that the drug could not have adversely affected Groschang's mental state. *Id.* at 236-37. Groschang contended that it was erroneous for the trial court to not allow him to rebut this evidence, but the Supreme Court of Kansas held that he had in fact fully explored the possibility of adverse effects from Zoloft. *Id.* Therefore, Groschang was afforded an opportunity to present contrary evidence regarding the effects of Zoloft.

257. See *Batson v. Kentucky*, 476 U.S. 79, 96 (Md. 1986).

258. See *Gill v. Ayers*, 342 F.3d 911, 920 (2003) (finding that "California's Three Strikes procedure, as interpreted by the California sentencing court and by the intermediary appellate court, similarly subjected [defendant] to an arbitrary process that denied him any right to go beyond the record of conviction and testify" on his own behalf).

259. *United States v. Becker*, 444 F.2d 510, 511 (4th Cir.1971); *People v. Grisset*, 681 N.E.2d 1010, 1019 (Ill. App. Ct. 1997), *appeal denied*, 686 N.E.2d 1167 (Ill. 1997); *O'Rourke v. State*, 90 N.W.2d 820, 823 (Neb. 1958); *State v. Cardenas-Hernandez*, 579 N.W.2d 678, 687 (1998).

260. See *supra* note 243 and accompanying text.

261. See *Gill v. State*, 632 So.2d 660, 663 (Fla. Dist. Ct. App. 1994) (Parker, J., concurring), *overruled on other grounds by* *Oisorio v. State*, 676 So.2d 1363 (Fla.1996). In his concurrence, Judge Parker recommends the following colloquy when informing a defendant who has chosen not to testify, of his right to testify, or conversely, his right to remain silent: "I have noted that you did not testify. That is your absolute constitutional right. The jury will be instructed by this court that you have that absolute right and that the jury must not view this as an admission of guilt or be influenced in any way by your decision. However, I must advise you that you also have an absolute constitutional right to testify here today. . . ." *Id.*

262. *Rock v. Arkansas*, 483 U.S. 44, 52 (1987) ("In fact, the most important witness for the defense in many criminal cases is the defendant himself.").

make sense to the trier of fact. Consequently, evidentiary rulings which are ambiguous and not a product of careful thought and deliberation inevitably undermine this fundamental right guaranteed by the Fifth, Sixth, and Fourteenth Amendments.

A *Rock* hearing can prevent erroneous evidentiary rulings by allowing the court and counsel to carefully review evidentiary issues before the defendant takes the stand. Defense counsel can use *Rock* to inform the court and opposing counsel that it is unconstitutional to force a testifying defendant to cut and paste his testimony in such a way that inures only to the benefit of the prosecution. Second, a *Rock* hearing can force the court to make a clear evidentiary ruling so that when a defendant takes the stand the parameters of his testimony are clear. Third, a *Rock* hearing can preserve for review an important constitutional issue so that the right to testify can be further clarified through appellate review.

A fundamental constitutional right that is not only widely recognized and has no accepted method of enforcement is easily trivialized in the hurly burly environment of the criminal trial process. If defense counsel utilizes the procedure of a *Rock* hearing he can vindicate his client's right to testify and prevent the kind of nonsensical and ambiguous evidentiary ruling as occurred in the trial of Alfred Gutierrez when he was allowed to testify to relevant events as long as his testimony did not contain *too many details*.<sup>263</sup>

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263. See *supra* note 42.

