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## **Confrontation Control**

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# CONFRONTATION CONTROL

Pamela R. Metzger\*

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## I. INTRODUCTION

Before *Crawford*, Justice Scalia, the Supreme Court’s strongest proponent of a vigorous right to confrontation, lamented that

the following scene can be played out in an American courtroom . . . : A father . . . or a mother . . . is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, “it is really not true, is it, that I—your father (or mother) whom you see before you—did these terrible things?”<sup>1</sup>

After *Crawford*, face-to-face confrontation between accused and accuser is the constitutionally normative mode of presentation for testimonial evidence. Surely an anguished and accused parent now has the right to ask Justice Scalia’s fateful question.

Yet, eight years into the *Crawford* revolution, courts routinely hold that it does not violate the Confrontation Clause for counsel to waive a parent’s right to question an accusing child without so much as discussing the matter with the accused parent.<sup>2</sup> Why? Because counsel, not client, has the authority to decide

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1. *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting). While Justice Scalia was complaining about procedures that barred face-to-face confrontation in child witness cases, his complaint speaks directly to the dignitary values served by the Confrontation Clause in any criminal case. *See id.* For further discussion of this issue, *see infra* Part II.A.

2. *See, e.g., Gonzalez v. United States*, 553 U.S. 242, 257 (2008) (Scalia, J., concurring).

whether to confront and cross-examine government witnesses.<sup>3</sup> When a defendant claims that his counsel deprived him of the right to confrontation, most courts ignore the substantive confrontation claim and reframe the issue as one of ineffective assistance of counsel.<sup>4</sup> If counsel was effective, the defendant has no confrontation claim.

At a Symposium devoted to two Sixth Amendment rights—confrontation and counsel—it seems particularly appropriate to explore this peculiar and perplexing result. If confrontation is essential to a constitutionally valid criminal trial, how can defense counsel waive the confrontation right without the accused’s consent? Does the right to counsel truly extinguish a defendant’s right to demand confrontation?

In this Essay, I explain how the artificial fundamental rights doctrine has ceded confrontation control to counsel. Then, I consider and critique the jurisprudence addressing defendant claims about confrontation rights that were waived or forfeited by defense counsel. Along the way, I offer some observations about the implications of ceding confrontation control to counsel. I conclude by arguing that the right to confrontation best serves its purposes when defendants control the exercise of the right.

## II. CONSIDERING CONFRONTATION

### A. *Confrontation: Purpose and Practice*

The Confrontation Clause is a “bedrock procedural guarantee” of the United States’ criminal justice system.<sup>5</sup> The Confrontation Clause serves at least three separate functions.

First, the Confrontation Clause “ensure[s] the reliability of the evidence offered against a criminal defendant.”<sup>6</sup> It is, thus, a partial hedge against empty government accusations and erroneous convictions. The Clause achieves this goal by “subjecting [the government’s evidence] to rigorous testing in the context of an adversary proceeding before the trier of fact.”<sup>7</sup> The physical confrontation between witness and accused and the process of adversary inquiry submit the prosecution’s proof to “the greatest legal engine ever invented for the discovery of truth.”<sup>8</sup>

This reliability function is closely intertwined with a second function of the Confrontation Clause: the preservation of an adversary system of criminal procedure. As the Court recently explained, “the only indicium of

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3. See also discussion *infra* Part II.B.

4. See discussion *infra* note 62.

5. *Crawford v. Washington*, 541 U.S. 36, 42 (2004).

6. *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

7. *Id.*

8. *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 1367 (3d ed. 1940)).

reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.<sup>9</sup> After all, the “principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”<sup>10</sup> Thus, the Confrontation Clause “reflects a judgment, not only about the desirability of reliable evidence . . . but about how reliability can best be determined”; as a result, the Confrontation Clause “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>11</sup>

Finally, the Confrontation Clause serves a legitimizing function, both assuring the public of fair process norms and enforcing a systemic commitment to dignity and fair play for the accused. As the Court has explained, “confrontation serves ends related both to appearances and to reality.”<sup>12</sup> The Confrontation Clause imposes a specific constitutional mandate: “criminal trials of human beings should look human to do ‘justice,’ and should treat the defendant—even an alleged child molester—as an equal, dignified participant in the proceedings against him.”<sup>13</sup> The Confrontation Clause thereby honors “something deep in human nature that regards face-to-face confrontation between accused and accuser as ‘essential to a fair trial in a criminal prosecution.’”<sup>14</sup> It also provides the accused “the intrinsic benefit of the chance to respond” to the witness “with a snort of indignation, a glare, laughter, a cry of dismay, a curse, tears, or stony silence.”<sup>15</sup> Thus, even if the face-to-face confrontation does not change the witness’s testimony, “[t]he opportunity to be seen and heard by one’s accusers nevertheless is of value—intrinsic value—to the accused” and to the public.<sup>16</sup>

The Supreme Court has established three basic rules that govern the exercise of the “bedrock” confrontation right. First, the right to confrontation includes the right to waive confrontation.<sup>17</sup> Second, the confrontation right is lost unless the defendant contemporaneously exercises the right or preserves an objection to the offending testimony or evidence.<sup>18</sup> Third, the exercise of the confrontation right may be regulated by a state’s imposition of rules requiring a

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9. *Crawford*, 541 U.S. at 69.

10. *Id.* at 50.

11. *Id.* at 61.

12. *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988).

13. Toni M. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863, 903 (1988) (footnote omitted). Professor Massaro’s article offers excellent insight into the dignitary values associated with confrontation. *See id.*

14. *Coy*, 487 U.S. at 1019 (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)).

15. Massaro, *supra* note 13, at 906.

16. *Id.* Massaro suggests that this “might be called the ‘shame on you’ value of confrontation.” *Id.*

17. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 314 n.3 (2009); *Diaz v. United States*, 223 U.S. 442, 451-53 (1912).

18. *See Melendez-Diaz*, 557 U.S. at 327.

pretrial demand for confrontation; failure to comply with the pretrial invocation rules results in a loss of the confrontation right.<sup>19</sup>

These rules create procedural requirements for the *exercise* of the confrontation right. They do not establish any procedural requirements for the *waiver* of the confrontation right nor do they explain why counsel can waive a defendant's confrontation right without the defendant's consent. The answers to these questions lie not in Confrontation Clause jurisprudence but in the Supreme Court's fundamental rights doctrine.

### B. Confrontation as a Non-Fundamental Right

The Supreme Court has divided constitutional criminal procedure rights into two categories: fundamental rights and non-fundamental rights.<sup>20</sup> The categorization of a right as fundamental or tactical (non-fundamental) determines whether client or counsel has authority to waive that right and what standard of review applies to an appellate or post-conviction claim about counsel's exercise of the right.

The Supreme Court has described fundamental rights as "basic" rights, so personal to the defendant that the defendant alone can waive them.<sup>21</sup> In contrast, non-fundamental rights are those strategic or "tactical" constitutional rights related to the "conduct of the trial."<sup>22</sup> The Supreme Court has clearly stated that the rights to "plead guilty, waive a jury, testify in [one's] own behalf, or take an appeal" are fundamental.<sup>23</sup> Conversely, the Court has held that the

19. See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2718 (2011). This last "rule" rests upon the Court's recent dicta strongly approving of these pretrial notice-and-demand rules. See *Melendez-Diaz*, 557 U.S. at 327 ("There is no conceivable reason why [the defendant] cannot . . . be compelled to exercise his Confrontation Clause rights before trial."); *Bullcoming*, 131 S. Ct. at 2718 (noting that notice-and-demand statutes lawfully "permit the defendant to assert (or forfeit by silence) his Confrontation Clause right after receiving notice of the prosecution's intent" to rely on testimonial hearsay (quoting *Melendez-Diaz*, 557 U.S. at 326)); see also *State v. Laturner*, 218 P.3d 23, 30 (Kan. 2009) (finding that *Melendez-Diaz* dicta supports the constitutionality of K.S.A. § 22-3437(3), which indicates a failure to timely demand confrontation "constitute[s] a waiver of any objections" to use of testimonial hearsay (quoting KAN. STAT. ANN. § 22-3437(3) (West 2008))). As I have noted elsewhere, I strongly disagree about the constitutionality of requiring the defendant to make a pretrial invocation of the confrontation right. See Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 481 n.20 (2006). However, an assumption that those rules are constitutional is an essential part of the analysis that condones attorney control over the confrontation right.

20. I take issue with the assertion that *any* constitutional right is non-fundamental. However, an argument about the validity of the fundamental rights doctrine is well beyond the scope of this Essay. See Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U.L. REV. 1147 (2010), for an autonomy-based critique of the fundamental rights doctrine.

21. *New York v. Hill*, 528 U.S. 110, 114-15 (2000).

22. *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988). For a critique of the fundamental/non-fundamental rights divide as confusing and unclear, see WAYNE R. LAFAYE ET AL., 3 CRIM. PROC. § 11.6(a), (b) (3d ed. 2011).

23. *Jones v. Barnes*, 463 U.S. 745, 751 (1983); see also *Hill*, 528 U.S. at 114-15; *Taylor*, 484 U.S. at 417-18 & n.24. LaFave, King, Israel, and Kerr offer a slightly more expansive list, suggesting that [t]he Supreme Court has stated, in dictum or holding, that it is for the defendant to decide whether to . . . plead guilty or take action tantamount to entering a guilty plea; waive the right to jury trial; waive his right to be present at trial; testify on his own behalf; or forego an appeal.

choice of appellate claims,<sup>24</sup> the invocation or waiver of trial objections,<sup>25</sup> and decisions about “what agreements to conclude regarding the admission of evidence”<sup>26</sup> involve the exercise of non-fundamental rights.<sup>27</sup>

The waiver of a fundamental right requires the defendant’s consent.<sup>28</sup> This consent “not only must be voluntary but must be [a] knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences.”<sup>29</sup> Thus, counsel cannot waive a defendant’s fundamental rights until counsel has “consult[ed] with the defendant and obtain[ed the defendant’s] consent to the recommended course of action.”<sup>30</sup>

In contrast, counsel has exclusive control over the exercise of non-fundamental rights.<sup>31</sup> The general rule is quite simple: “waiver [of a non-fundamental right] may be effected by action of counsel” without the defendant’s knowledge or consent.<sup>32</sup> “Absent a demonstration of ineffectiveness, counsel’s word on such [non-fundamental rights] is the last.”<sup>33</sup>

Claims that counsel erred by waiving a non-fundamental right are generally viewed as claims of ineffective assistance of counsel.<sup>34</sup>

What does the fundamental rights doctrine mean for confrontation? The Supreme Court has long held that an attorney may not waive a defendant’s right to confrontation if the waiver renders the subsequent trial the functional

LAFAVE ET AL., *supra* note 22, § 11.6(a) (footnotes omitted). Lower federal courts and state courts have suggested a more expansive set of rights as to which a defendant may exercise control. *Id.* These include the waiver of the right to attend important pretrial proceedings; the waiver of the constitutional right to a speedy trial; the refusal (by a competent defendant) to enter an insanity plea; and the decision to withhold defendant’s sole defense at the guilt phase of a capital case and use it solely in the penalty phase.

*Id.*

24. See *Jones*, 463 U.S. at 751.

25. See *Henry v. Mississippi*, 379 U.S. 443, 451 (1965).

26. *Hill*, 528 U.S. at 114-15 (citation omitted).

27. See *id.* (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)); see also *Taylor*, 484 U.S. at 417-18 (applying the ineffective assistance of counsel standard to counsel’s waiver of the right to call defense witnesses because right to compulsory process is not a fundamental right).

28. *Hill*, 528 U.S. at 114-15.

29. *Brady v. United States*, 397 U.S. 742, 748 (1970).

30. *Florida v. Nixon*, 543 U.S. 175, 187 (2004). Some rights, like the right to plead guilty, are validly waived upon compliance with a particular set of procedural requisites. See *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969). There are no similar prescriptive formulas for the valid waiver of other fundamental rights. See *infra* text accompanying note 117.

31. *Taylor*, 484 U.S. at 417-18.

32. *Hill*, 528 U.S. at 114.

33. *Id.* at 115. The rule privileging counsel’s decision over non-fundamental rights assumes, *sub silentio*, that counsel actively waived the defendant’s rights rather than carelessly or negligently forfeiting those rights. See *infra* Part III.A. In turn, this assumption means that trial records never evince any evidence of waiver as opposed to forfeiture. See *infra* Part III.A. When the lawyer’s conduct is later challenged, courts invoke the general rule of deference to an attorney’s “decisions,” and the record’s silence on this matter greatly reduces the defendant’s likelihood of success. As I point out *infra* Part III.A, there is little justification for the initial assumption that confrontation was waived rather than forfeited.

34. LAFAVE ET AL., *supra* note 22, § 11.6(a).

equivalent of a guilty plea.<sup>35</sup> In *Brookhart v. Janis*, counsel agreed to a “prima facie” trial at which counsel stipulated to the submission of the government’s case.<sup>36</sup> On appeal, the Court reversed the conviction, holding that Brookhart’s fundamental rights had been violated because his attorney’s confrontation waiver had deprived the trial proceedings of their adversary character.<sup>37</sup> Although the Court has never addressed lesser waivers of the right to confront, subsequent decisions demonstrate that *Brookhart*’s holding is limited to confrontation waivers that are the functional equivalent of a guilty plea.<sup>38</sup> Otherwise, the Court views confrontation as a non-fundamental right that may be exercised or waived at counsel’s discretion.<sup>39</sup>

The Court has offered three justifications for permitting counsel to control confrontation and other non-fundamental rights. First, the Court has argued that the need for efficiency at trial means that “the lawyer has—and must have—full authority to manage the conduct of the trial.”<sup>40</sup> “To hold that every instance of waiver requires the personal consent of the client himself or herself would be impractical.”<sup>41</sup> According to this logic, “[g]iving the attorney control of trial management matters is a practical necessity,” as the “adversary process could not function effectively if every tactical decision required client approval.”<sup>42</sup>

Second, the Court has suggested that deference to attorney choices is essential to the “fairness” of the trial process.<sup>43</sup> According to this reasoning, lawyers—not defendants—are best positioned to make “correct” judgments about the strategic exercise or waiver of confrontation and other trial rights.<sup>44</sup> “Many of the rights of an accused, including constitutional rights, are such that only trained experts can comprehend their full significance, and an explanation to any but the most sophisticated client would be futile.”<sup>45</sup> Thus, the very justification for the right to counsel—that “presentation of a criminal defense

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35. See *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966); see also *Nixon*, 543 U.S. at 189 (explaining that *Brookhart* presented a violation of the defendant’s fundamental rights because counsel agreed to a “‘truncated’ proceeding, shorn of the need . . . [to establish guilt] ‘beyond a reasonable doubt’” (citation omitted) (quoting *Brookhart*, 384 U.S. at 6)). *Nixon* constitutes an exception, of sorts, to this general rule. See *Nixon*, 543 U.S. at 188-89. However, *Nixon* presents procedurally different facts and appears to be confined to the unique circumstances of a two-phase capital trial in which the defendant declines to assist counsel in making strategic decisions and counsel concedes guilt in an effort to win a sentence of life. See *id.* at 191-92.

36. See *Brookhart*, 384 U.S. at 5-6.

37. See *id.* at 7-8. Any exception to the *Brookhart* rule arises in the unique context of a two-phase capital trial. See *Nixon*, 543 U.S. at 186.

38. See *Nixon*, 543 U.S. at 189-92.

39. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 327 (2009).

40. *New York v. Hill*, 528 U.S. 110, 114-15 (2000) (quoting *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988)).

41. *Gonzalez v. United States*, 553 U.S. 242, 250 (2008).

42. *Id.* at 249 (second quote quoting *Taylor*, 484 U.S. at 417-18).

43. See *id.*

44. See Hashimoto, *supra* note 20, at 1148.

45. *Gonzalez*, 553 U.S. at 249 (citing and quoting ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION 4-5.2 Commentary, at 202 (3d ed. 1993)).

can be a mystifying process even for well-informed laypersons”—is used to justify ceding control to counsel.<sup>46</sup> Because “[t]hese matters can be difficult to explain to a [client,] to require in all instances that they be approved by the client could risk compromising the efficiencies and fairness that the trial process is designed to promote.”<sup>47</sup>

Finally, the Court has suggested that agency theory also justifies ceding control to attorneys. As the Court explained in *Faretta*, “when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas.”<sup>48</sup> This allocation of authority is only justified “by the defendant’s consent, at the outset, to accept counsel as his representative.”<sup>49</sup> However, as the Fourth Circuit recently explained, the relationship between a criminal defendant and his counsel is not truly a traditional agency relationship.<sup>50</sup> In a traditional agency relationship, the principal “has the authority to dictate the manner in which his agent will carry out his duties.”<sup>51</sup> However, when a criminal defendant is the principal, “the law places certain tactical decisions solely in the hands of [his agent,] the criminal defense attorney.”<sup>52</sup> Thus, a defendant is “bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney” and all decisions undertaken regarding his non-fundamental rights.<sup>53</sup>

As I discuss below, none of these explanations adequately justifies ceding confrontation control to counsel.

### III. ANALYZING CONFRONTATION DEPRIVATIONS

An assessment of the consequences of allocating confrontation control to counsel is best made in the context of a review of the dominant federal jurisprudence addressing Confrontation Clause claims.<sup>54</sup> In turn, that review is

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46. *Id.* (citing *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

47. *Id.*; *see also* *United States v. Burke*, 257 F.3d 1321, 1323 (2001) (“If we add to the list of circumstances in which a defendant can trump his counsel’s decision, the adversarial system becomes less effective as the opinions of lay persons are substituted for the judgment of legally trained counsel.”).

48. *Faretta v. California*, 422 U.S. 806, 820 (1975).

49. *Id.* at 820-21.

50. *United States v. Chapman*, 593 F.3d 365, 369-70 (4th Cir. 2010).

51. *Id.* at 370.

52. *Id.*

53. *New York v. Hill*, 528 U.S. 110, 114-15 (2000) (citations omitted) (quoting *Link v. Wabash R.R.*, 370 U.S. 626, 634 (1962)). Of course, the relationship between a criminal defendant and his counsel is not truly a traditional agency relationship. As the Fourth Circuit recently noted, “the attorney’s obligations in a criminal case do not precisely mirror the obligations of a general agent representing his principal on civil matters.” *Chapman*, 593 F.3d at 370. Ordinarily, a principal “has the authority to dictate the manner in which his agent will carry out his duties.” *Id.* In the context of a criminal defendant, “the law places certain tactical decisions solely in the hands of the criminal defense attorney.” *Id.*

54. There is a considerable body of state law addressing the question of confrontation control. State supreme courts are also divided about how to allocate authority for the waiver of confrontation and about how to monitor and enforce that allocation of authority. In general, state courts have been more willing than



best made in comparison to how courts generally assess the constitutionality of claims of Confrontation Clause error.<sup>55</sup>

A properly preserved confrontation claim is evaluated under the harmless error standard.<sup>56</sup> This means that a confrontation claim warrants reversal unless the reviewing court determines, beyond a reasonable doubt, that the error did not contribute to the verdict.<sup>57</sup> If the confrontation error is unpreserved, a court will review the confrontation claim only for plain error.<sup>58</sup> Thus, the likelihood of success on a Confrontation Clause claim depends heavily upon a contemporaneous objection that preserves the claim for harmless error review.<sup>59</sup> But courts do not apply these traditional standards of review to a defendant who complains that his counsel's conduct deprived him of his confrontation right.<sup>60</sup>

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federal courts to enforce a defendant-centered confrontation right. At least ten state supreme courts have considered this issue; three states have adopted the federal majority view: *Hinojos-Mendoza v. People*, 169 P.3d 662, 669-70 (Colo. 2007) (en banc); *Parson v. Commonwealth*, 144 S.W.3d 775, 783-84 (Ky. 2004); *State v. Pasqualone*, 903 N.E.2d 270, 275-76 (Ohio 2009), while six states require that the defendant personally waive his confrontation rights in a demonstrably voluntary and intelligent relinquishment of a known right or privilege: *State v. Sainz*, 924 P.2d 474, 477 (Ariz. Ct. App. 1996); *Thomas v. United States*, 914 A.2d 1, 19-20 (D.C. 2006); *State v. Lopez*, 22 P.3d 1040, 1049 (Kan. 2001); *State v. Caulfield*, 722 N.W.2d 304, 310-11 (Minn. 2006); *State v. Tapson*, 41 P.3d 305, 310 (Mont. 2001); *State v. Muse*, 967 S.W.2d 764, 767-68 (Tenn. 1998). Nevertheless, state defendants who petition for habeas corpus relief are necessarily subject to clearly established federal law about confrontation control. See *Lockyer v. Andrade*, 538 U.S. 63, 70-73 (2003). Accordingly, I focus herein solely on federal decisions.

55. My elision of any distinction between direct review and post-conviction cases is deliberate. As other commentators have explained, “[a]lthough the difference in procedural setting could conceivably influence a court’s analysis of the client-control issue, the courts have tended to treat the issue as basically the same whether presented in one procedural context or another.” LAFAVE ET AL., *supra* note 22, § 11.6(a). “Rulings recognizing attorney or client control with respect to a particular defense decision will be carried over from one procedural context to another.” *Id.*

56. See *Neder v. United States*, 527 U.S. 1, 18 (1999); *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

57. See, e.g., *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *Chapman v. California*, 386 U.S. 18, 24 (1967); see also *United States v. Treacy*, 639 F.3d 32, 45 (2d Cir. 2011) (noting that the strength of other evidence at trial rendered confrontation error harmless beyond a reasonable doubt); *United States v. Hinton*, 423 F.3d 355, 363 (3d Cir. 2005) (same); *United States v. Pryor*, 483 F.3d 309, 313 (5th Cir. 2007) (same); *United States v. Adams*, 628 F.3d 407, 419-20 (7th Cir. 2010) (same); *United States v. Holmes*, 620 F.3d 836, 845 (8th Cir. 2010) (same); *United States v. Ndiaye*, 434 F.3d 1270, 1287 (11th Cir. 2006) (noting that confrontation error was harmless beyond a reasonable doubt when elicited testimony would have been cumulative of marginal relevance); *United States v. Jackson*, 636 F.3d 687, 697 (5th Cir. 2011) (noting that when government relied on tainted evidence, confrontation error was not harmless beyond reasonable doubt); *Dorchy v. Jones*, 398 F.3d 783, 792 (6th Cir. 2005) (noting that when testimony in question was the prosecution’s main proof of guilt, confrontation error was not harmless beyond a reasonable doubt); *United States v. Ward*, 598 F.3d 1054, 1060 (8th Cir. 2010) (noting that when considered cumulatively with due process errors, and in light of government’s circumstantial evidence of defendant’s guilt, confrontation error not harmless beyond a reasonable doubt).

58. See *Puckett v. United States*, 556 U.S. 129, 135 (2009); *United States v. Olano*, 507 U.S. 725, 730 (1993). The plain error standard is far less favorable to the appealing defendant; the defendant-appellant bears the burden of showing that (1) a confrontation error occurred; (2) the error was clear or obvious; and (3) the error affected the defendant’s substantial rights. See *Olano*, 507 U.S. at 734-36. Even if the defendant-appellant meets this burden, the reviewing court may only use its discretion to grant relief if the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.* at 732-34 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

59. See *Puckett*, 556 U.S. at 135; *Sullivan*, 508 U.S. at 279.

60. See *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988).

Instead, a majority of courts focus their appellate inquiry on the strategic merits of the attorney conduct that gave rise to the claim.<sup>61</sup>

How do courts assess the constitutionality of the confrontation choices made by an attorney without the defendant's consent? A minority of federal courts of appeal have held—as I would urge—that a stipulation by counsel validly waives a defendant's confrontation right only if the defendant voluntarily and intentionally agrees to the waiver.<sup>62</sup> In those jurisdictions, a confrontation waiver “requires an intentional relinquishment or abandonment of a known right or privilege.”<sup>63</sup> Thus, the confrontation right is validly waived only if the defendant (1) knew he had the opportunity to confront and cross-examine the witness and (2) was on notice of the consequences if he failed to assert the right.<sup>64</sup>

However, a majority of federal courts of appeal have held that counsel may unilaterally waive a defendant's right to confrontation.<sup>65</sup> In those majority jurisdictions, courts refuse to even to address the substantive confrontation deprivation. Rather than ask whether the defendant has been deprived of his Sixth Amendment right to *confrontation*, these courts ask whether the defendant has been deprived of a *different* Sixth Amendment right: the right to effective assistance of counsel.<sup>66</sup>

Therefore, courts apply *Strickland* analysis to a defendant's complaint about counsel's relinquishment of confrontation. However, they carve out a narrow “*Strickland*-hybrid” exception for cases in which the defendant dissented from counsel's conduct.<sup>67</sup> I strongly believe that the minority view is the correct one. Vindication of this requires an explanation and critique of *Strickland* and *Strickland*-hybrid analysis.

### A. *Strickland* Analysis

At its core, *Strickland* seeks only to identify and remedy situations in which “counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just

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61. *See id.*

62. *See, e.g.,* *United States v. Williams*, 632 F.3d 129, 133 (4th Cir. 2011) (citing *Clemmons v. Delo*, 124 F.3d 944, 956 (8th Cir. 1997), and *Carter v. Sowders*, 5 F.3d 975, 981 (6th Cir. 1993)).

63. *Carter*, 5 F.3d at 981 (quoting *Boyd v. Dutton*, 405 U.S. 1, 2-3 (1972)).

64. *See id.* at 981-82.

65. *See Wilson v. Gray*, 345 F.2d 282, 287-88 (9th Cir. 1965); *see also United States v. Plitman*, 194 F.3d 59, 64 (2d Cir. 1999) (holding that defense counsel may waive a defendant's Sixth Amendment right to confrontation).

66. *See, e.g., Janosky v. St. Amand*, 594 F.3d 39, 47-48 (1st Cir. 2010); *United States v. Cooper*, 243 F.3d 411, 417-18 (7th Cir. 2001); *Plitman*, 194 F.3d at 63-64; *United States v. Stephens*, 609 F.2d 230, 232-33 (5th Cir. 1980); *United States v. Goldstein*, 532 F.2d 1305, 1314-15 (9th Cir. 1976); *accord United States v. Gonzales*, 342 F. App'x 446, 447-48 (11th Cir. 2009) (per curiam); *Hawkins v. Hannigan*, 185 F.3d 1146, 1154-56 (10th Cir. 1999).

67. *See Plitman*, 194 F.3d at 63-64.

result.”<sup>68</sup> *Strickland* offers no relief to a defendant complaining of ineffective assistance of counsel unless the defendant can show that (1) counsel’s performance was deficient and (2) the deficiency prejudiced the defendant.<sup>69</sup> Courts conducting *Strickland* analysis need not consider both prongs of the inquiry “if the defendant makes an insufficient showing on one.”<sup>70</sup> “In particular, a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.”<sup>71</sup> This reflects the Court’s efficiency concerns: “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”<sup>72</sup>

As to the prejudice prong of the inquiry, *Strickland* focuses only on case outcomes; if counsel’s waiver of confrontation did not prejudice the outcome of the case, *Strickland* offers no relief.<sup>73</sup> The *Strickland* prejudice inquiry does not address either the particular confrontation that the jurors were unable to observe or the general systemic values associated with confrontation. Rather, *Strickland* prejudice requires that the defendant show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different” as “the factfinder would have had a reasonable doubt respecting guilt.”<sup>74</sup> A defendant seeking to show prejudice from counsel’s waiver (or forfeiture) of the confrontation right thus faces a heavy burden. He must explain “what he hoped to elicit during a cross-examination of the witness, or what, if anything, the jury would gain by listening to [the witness’s] testimony [and] how the outcome of his trial would have differed” had counsel exercised the confrontation right.<sup>75</sup>

This is in marked contrast to the prejudice associated with a Confrontation Clause claim. The Supreme Court has explicitly distinguished the *Strickland* prejudice standard from the Confrontation Clause prejudice standard. The prejudice in a Confrontation Clause violation arises when the defendant “was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby ‘to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witnesses.’”<sup>76</sup> This is because “[i]t would be a contradiction in terms to conclude that a

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68. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

69. *Id.* at 687.

70. *Id.* at 697.

71. *Id.*

72. *Id.*

73. *See id.*

74. *Id.* at 694-95.

75. *Salter v. McDonough*, 246 F. App’x 623, 626 (11th Cir. 2007) (citing *Fugate v. Head*, 261 F.3d 1206, 1219 (11th Cir. 2001)).

76. *Delaware v. Van Arsdale*, 475 U.S. 673, 680 (1986) (alteration in original) (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)).

defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to ‘confrontation’ because use of that right would not have affected the jury’s verdict.”<sup>77</sup>

However, *Strickland* was not intended to enforce or vindicate individual constitutional criminal procedure rights such as the right to confrontation.<sup>78</sup> Thus, the wholesale deprivation of the right to confront and cross-examine a government witness is only relevant to a *Strickland* inquiry if the defendant proves that the outcome of the trial might have been different. In sum, using *Strickland*’s prejudice inquiry excludes any consideration of harm that flows from a non-outcome determinative deprivation of confrontation as a specific procedural right or as a right of “intrinsic” value to the accused.

In applying the performance prong of *Strickland* to a claim that counsel deprived the defendant of the right to confrontation, courts do not consider whether counsel honored the ethical obligation to consult with the defendant either about the goals of representation or about counsel’s intent to waive confrontation. “Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel.”<sup>79</sup> Rather, “the focus is exclusively upon breach of obligations that would be deemed incompetency.”<sup>80</sup> Thus, while Rule 1.2 of the ABA Model Rules of Professional Conduct requires that a lawyer “abide by a client’s decisions concerning the objectives of representation,” it is not per se deficient performance to decline to ask a client whether his goal is acquittal or his goal is forcing the government to its full burden of proof.<sup>81</sup>

Once communication with the defendant is eliminated as a possible source of deficient performance, the only remaining performance inquiry is about the professional competence of the attorney’s conduct concerning the alleged confrontation deprivation. *Strickland* performance review requires that the court assume that counsel’s conduct reflected professionally competent strategic and tactical choices.<sup>82</sup>

In the context of confrontation, this respect for “the role of defense counsel in fashioning an overall trial strategy” means a presumption of reasonableness attaches to a lawyer’s strategic choices, including a “waiver of

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77. *Id.* (alteration omitted).

78. *See id.* at 684-87.

79. *Nix v. Whiteside*, 475 U.S. 157, 165 (1986); *see also Mickens v. Taylor*, 535 U.S. 162, 176 (2002) (quoting *Nix*).

80. LAFAVE ET AL., *supra* note 22, § 11.6(a) n.5.

81. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (Approved Draft 1983); *see, e.g., Allerdice v. Schiro*, No. CV-07-8049-PCT-NVW, 2008 WL 4541023, at \*7 (D. Ariz. Oct. 8, 2008). Allerdice, who was represented by appointed counsel, repeatedly objected to his counsel’s intent to stipulate to the testimony of several government witnesses. *Allerdice*, 2008 WL 4541023, at \*1. Nevertheless, the Arizona trial court permitted counsel to enter into the stipulations. *Id.* at \*1-2. On habeas review, the federal court concluded that it was “of no moment that in this case, Allerdice objected to his counsel’s actions.” *Id.* at \*4. Whether Allerdice simply wanted, as a matter of principal, to force the government to its full burden of proof was irrelevant, so long as his counsel had been an effective trial lawyer. *See id.*

82. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

the right to confrontation.”<sup>83</sup> Yet an assumption that counsel waived—as opposed to forfeited—confrontation rights may be unwarranted. For purposes of assessing attorney performance, this is a “crucial distinction.”<sup>84</sup>

A “waiver is the ‘intentional relinquishment or abandonment of a known right.’”<sup>85</sup> In contrast, a “forfeiture is the failure to make the timely assertion of a right.”<sup>86</sup> For example, pursuant to notice-and-demand statutes, if an attorney does not timely demand confrontation of the forensic analyst, the trial court will admit the forensic report and instruct the jury that the report is prima facie proof of its contents.<sup>87</sup> If counsel deliberately decided to forgo cross-examination, counsel *waived* the client’s confrontation right.<sup>88</sup> If counsel carelessly ignored the confrontation notice or negligently failed to file a demand, counsel *forfeited* the client’s confrontation right.<sup>89</sup>

Under *Strickland*’s highly deferential review of counsel’s performance, waivers are unlikely to suggest attorney performance below professional norms.<sup>90</sup> Forfeitures, however, are far more suggestive of deficient performance.<sup>91</sup> Thus, a trial court record that clearly established a strategic waiver as counsel’s “intentional relinquishment” of a known opportunity for confrontation would be helpful in distinguishing competent strategic choices from incompetent omissions. Unfortunately for a defendant complaining of counsel’s confrontation conduct, trial courts generally do not require counsel to explain why counsel did not demand confrontation; the resultant trial records cannot distinguish between waiver and forfeiture.<sup>92</sup> This reality of modern trial practice—which is itself a product of the Supreme Court’s categorization of confrontation as a non-fundamental right—is one of many reasons for concern about the application of *Strickland* to counsel-related confrontation claims: it is extremely difficult for a defendant to prove that counsel’s relinquishment of the confrontation right constituted deficient attorney performance.

83. *United States v. Plitman*, 194 F.3d 59, 64 (2d Cir. 1999).

84. *Lloyd v. Whitley*, 977 F.2d 149, 158 (5th Cir. 1992).

85. *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Ironically, in the *Melendez-Diaz* opinion, the Supreme Court used the terms “waive[r]” and “forfeit[ure]” as if they were synonymous. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 326 (2009); see also *State v. O’Cain*, 279 P.3d 926, 932 n.5 (Wash. Ct. App. 2012) (discussing the *Melendez-Diaz* Court’s use of waiver and forfeiture).

86. *Olano*, 507 U.S. at 733.

87. *Metzger*, *supra* note 19, at 482.

88. *Id.*

89. See *id.* at 487, for further discussion of the problem with treating non-demand cases as waivers, rather than as forfeitures.

90. *Premo v. Moore*, 131 S. Ct. 733, 743 (2011).

91. See, e.g., *Lloyd v. Whitley*, 977 F.2d 149, 158 (5th Cir. 1992) (“Whether counsel’s omission served a strategic purpose is a pivotal point in *Strickland* and its progeny.”).

92. See *Metzger*, *supra* note 19, at 517. In contrast, many attorney confrontation waivers are, by their nature, presented and preserved in a way that demonstrates their true character as waivers. For example, when defense counsel stipulates to testimonial evidence or forgoes cross-examination of a witness, the resulting trial record clearly indicates that the attorney waived—rather than forfeited—the confrontation right.

Ultimately, *Strickland* analysis is simply an inadequate tool by which to evaluate claims that counsel deprived a defendant of his confrontation rights. *Strickland* seeks only to identify and remedy situations in which “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”<sup>93</sup> In *Strickland* analysis, courts do not consider whether the defendant consented to—or even knew about—counsel’s waiver of constitutional rights.<sup>94</sup> After all, *Strickland* was not intended to enforce or vindicate individual constitutional criminal procedure rights.<sup>95</sup> *Strickland*’s prejudice inquiry focuses only on case outcomes; if counsel’s waiver of confrontation did not prejudice the outcome of the case, *Strickland* offers no relief.<sup>96</sup>

Of course, a defendant claiming violation of his right to confrontation is not complaining about the fairness of the trial; he is complaining about the deprivation of a specific procedural right that grants him a specific, human moment—the opportunity to face his accusers. In this regard, confrontation is not only a guarantee that reliability assessments will be made in a particular procedural way but also a guarantee that the defendant will experience the deeply personal aspects of that procedure.<sup>97</sup>

Consider Justice Scalia’s anguished parent. Surely, if counsel stipulates to the testimony of the accusing child, the trial may still have a reliable outcome. Indeed, because a testifying child might unduly sway the jury to sympathy for the alleged victim, stipulation might make the trial fairer. Yet there remains “something deep in human nature that regards face-to-face confrontation between accused and accuser as ‘essential to a fair trial in a criminal prosecution.’”<sup>98</sup> But fairness is not the motivation that drives the anguished parent. A rule that focuses only on the outcome cannot remedy the dignitary harms experienced by a parent who cannot pose that awful question.

*Strickland*’s analysis is simply inapposite to a claim of rights deprivation.<sup>99</sup>

After all, a defendant may have a fair trial and a competent trial attorney yet still have been deprived of the opportunity to exercise his constitutional right to confrontation.<sup>100</sup>

### B. *Strickland-Hybrid Analysis*

Notwithstanding their general rule applying *Strickland* to these types of claims, the First, Second, Fifth, Seventh, Ninth, and Tenth Circuit Courts of

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93. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

94. *See id.* at 696.

95. *See id.* at 684-87.

96. *See id.*

97. *See* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 290 (2004).

98. *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)).

99. *See Strickland*, 466 U.S. at 707 (Marshall, J., dissenting).

100. *See* Solum, *supra* note 97, at 262 (connecting “the independent value of process with the dignity of those who are affected by legal proceedings”).

Appeal apply a modified *Strickland* analysis to cases in which a defendant dissented from counsel's confrontation decision. This hybrid standard retains *Strickland's* performance inquiry (described above) but replaces *Strickland's* prejudice inquiry with an inquiry about whether the defendant "dissented" from counsel's decision.<sup>101</sup>

This "dissent" prong of the *Strickland*-hybrid test serves as a screening mechanism that makes relief available to an extraordinarily narrow group of defendants.<sup>102</sup> It is only available to a defendant who knew about the loss of confrontation *at or before the time it occurred* and preserved his dissent to counsel's conduct.<sup>103</sup>

Yet, the fundamental rights doctrine means that counsel need not even *notify* a defendant of a confrontation waiver. True, when an attorney stipulates to testimony or waives cross-examination of a testifying witness, the defendant, by virtue of his presence at trial, may have some minimal notice of the fact of waiver, if not of its constitutional significance.<sup>104</sup> However, when an attorney's silence or extra-judicial conduct results in the non-exercise of confrontation, there is no guarantee that the defendant will ever learn of the lost confrontation opportunity.<sup>105</sup>

The Ninth Circuit's characterization of this problem is poignant.

Day after day in the courts of the United States defense counsel make the decision not to cross-examine without first informing their clients that they have a fundamental constitutional right to insist upon cross-examination and without obtaining from their clients a formal written waiver of this constitutional right. How does a poor, uneducated, non-television-watching

101. See, e.g., *United States v. Dazey*, 403 F.3d 1147, 1169 (10th Cir. 2005). Although the Tenth Circuit used a *Strickland*-hybrid analysis, when a defendant does not dissent from counsel's conduct, "counsel's stipulation to admission of evidence effectively waives the defendant's confrontation rights unless the defendant can show that the waiver constituted ineffective assistance of counsel." *Id.*; see also *Yu Tian Li v. United States*, 648 F.3d 524, 530 (7th Cir. 2011) (conducting *Strickland* ineffective assistance of counsel analysis about counsel's waiver of confrontation despite fact-extensive, district court colloquy with the defendant, who did not object to waiver, and despite the Seventh Circuit's endorsement of the *Strickland*-hybrid analysis).

102. See *United States v. Martinez*, 883 F.2d 750, 759 (9th Cir. 1989). Presumably, a contemporaneous or nearly contemporaneous letter or motion would also adequately demonstrate a defendant's dissent. See *id.*

103. See *id.*; see, e.g., *United States v. Lopez-Medina*, 596 F.3d 716, 731 (10th Cir. 2010) (rejecting defendant's ineffective assistance claim in part because there was no indication that the defendant "dissented from his attorney's decision"). Moreover, even active dissent at the trial level will not protect a state defendant seeking federal habeas relief because there is no clearly established federal rule supporting the *Strickland*-hybrid doctrine. See, e.g., *Allerdice v. Schriro*, No. CV-07-8049-PCT-NVW, 2008 WL 4541023, at \*7 (D. Ariz. Oct. 8, 2008).

104. The cases of defendants who are tried in absentia present a wholly different confrontation analysis.

105. See *Martinez*, 883 F.2d at 759 (noting that there is no requirement to notify the defendant that he is waiving his right of confrontation), *vacated on other grounds*, 928 F.2d 1470 (9th Cir. 1991). Similarly, when the prosecution offers testimonial hearsay and counsel fails to interpose a Confrontation Clause objection, there is no record demonstrating whether this was a counsel's tactical choice or a substantive omission.

defendant know that he has a fundamental constitutional right that he is waiving when his lawyer declines to cross-examine?<sup>106</sup>

The Ninth Circuit's answer is appallingly glib: "We assume, not unreasonably in our culture, that this right is so generally known that it is not necessary to inform the defendant of its existence."<sup>107</sup> A criminal defendant should be presumed to have absorbed an understanding of his right to confrontation through a sort of cultural osmosis, even if that defendant lacks both formal education and the pseudo-legal guidance of Court TV or CSI.<sup>108</sup> And, only a bold and vocal defendant is likely to address the court and dissent from his attorney's actions, thereby preserving a viable record of dissent. Those who remain silent will not receive appellate review under the *Strickland*-hybrid analysis.

Thus, the *Strickland*-hybrid rule gives preferential status to those lucky defendants who understood their right to confrontation and preserved their dissent to counsel's confrontation forfeiture or waiver.<sup>109</sup> Yet, there is no principled justification for singling those defendants out for favorable appellate review. Why should the viability of a defendant's claim be determined by the fortuity of transparent attorney conduct or by the happenstance of a court allowing the defendant to speak? All defendants who suffer confrontation losses through counsel's conduct suffer the same rights deprivation and the same dignitary harm. But only the most vulnerable defendants—those who are ignorant of their confrontation loss—are subjected to the unforgiving *Strickland* rule.

On a deeper level, though, the *Strickland*-hybrid approach is also suggestive of a general unease about ceding all confrontation rights to counsel. After all, if one truly believes that confrontation is a non-fundamental right, one should embrace, wholeheartedly, counsel's unilateral power to stipulate to evidence, forgo cross-examination, withhold a valid confrontation objection, and authorize, by inaction, the introduction of testimonial forensic reports, regardless of a defendant's dissent. *Strickland*-hybrid implies that, as a principal, a defendant *can* direct his attorney-agent's conduct regarding confrontation. This, in turn, suggests reliance upon a true agency theory, rather than the modified agency theory of the Supreme Court's fundamental rights doctrine.<sup>110</sup> How else could a defendant's dissent—no matter how whimsical,

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106. *Id.*

107. *Id.*

108. *See id.*

109. *See id.* (noting that there is no requirement to notify the defendant that he is waiving his right of confrontation).

110. *See* discussion *supra* note 50 (discussing *United States v. Chapman*, 593 F.3d 365 (4th Cir. 2010)); *see also* *Gonzalez v. United States*, 553 U.S. 242, 254 (2008) (Scalia, J., concurring) (suggesting that a defendant's objection to his attorney's tactical decisions may "revok[e] the agency with respect to the action in question").



unwise, or unreasonable—automatically invalidate an attorney’s strategic waiver?

Full extension of this logic should require relief for a defendant who was unaware either of his power to dissent or of the conduct about which he might have dissented. Instead, *Strickland*-hybrid analysis defers to a defendant’s active dissent while simultaneously condoning a system that allows a defendant to languish in utter ignorance about existence of the very right as to which his dissent would be respected.<sup>111</sup> Only a deft judicial sleight of hand could equate an ignorant “non-dissent” with affirmative consent and thereby justify relegating a silent, non-dissenting defendant to the *Strickland* wasteland.

#### IV. CRITIQUING THE CONTROL CONFRONTATION RULE

Application of *Strickland* and *Strickland*-hybrid analysis to defendant claims about attorney confrontation waiver is an unfortunate byproduct of characterizing confrontation as a non-fundamental right that is exercised or lost at counsel’s discretion. And this fundamental-right-divide remains deeply unpersuasive to many judges and scholars.<sup>112</sup> Among others, Justice Scalia has disapproved of the “tactical-vs.-fundamental approach,” as a concept that “is vague and derives from nothing more substantial than [the] Court’s say-so.”<sup>113</sup> He stated,

What makes a right tactical? Depending on the circumstances, waiving *any* right can be a tactical decision. . . .

Whether a right is “fundamental” is equally mysterious. One would think that any right guaranteed by the Constitution would be fundamental. But I doubt many think that the Sixth Amendment right to confront witnesses cannot be waived by counsel. Perhaps, then, specification in the Constitution is a necessary, but not sufficient, condition for “fundamental” status. But if something more is necessary, I cannot imagine what it might be. Apart from [a] constitutional guarantee, I know of no objective criterion for ranking rights.<sup>114</sup>

Perhaps as a result of the weaknesses of this doctrine, the Supreme Court and the federal courts of appeal increasingly sought other doctrinal justifications for giving counsel control over non-fundamental constitutional rights. The emerging trend seems to be an increased reliance upon a bastardized agency theory that rests, in turn, upon a claim that representation by

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111. See *supra* notes 79-82 and accompanying text.

112. See LAFAYE ET AL., *supra* note 22, § 11.6(a)-(b), for a critique of the fundamental/non-fundamental rights divide as confusing and unclear.

113. *Gonzalez*, 553 U.S. at 2564 (Scalia, J., concurring).

114. *Id.* (citation omitted).

counsel is a broad implicit waiver in which a defendant, as principal, cedes all tactical and strategic decisions to his attorney-agent.<sup>115</sup>

Justice Scalia's recent dicta in *Gonzalez* offers an alarming glimpse at the potential consequences of this reasoning:

I would . . . adopt the rule that, as a constitutional matter, all waivable rights (except, of course, the right to counsel) can be waived by counsel. There is no basis in the Constitution, or as far as I am aware in common-law practice, for distinguishing in this regard between a criminal defendant and his authorized representative. In fact, the very notion of representative litigation suggests that the Constitution draws no distinction between them. "A prisoner . . . who defends by counsel, and silently acquiesces in what they agree to, is bound as any other principal by the act of his agent."<sup>116</sup>

This idea might make sense if defendants were advised that the price of representation by counsel was the relinquishment of control over decisions such as confrontation; however, there is no such *Boykin*-like allocution or formal in-court waiver during which criminal defendants knowingly, intelligently, and voluntarily waive their right to control confrontation choices in exchange for representation by counsel.<sup>117</sup> Absent such a knowing, intelligent, and voluntary waiver, how can representation by counsel—in and of itself—constitute a comprehensive waiver of all non-fundamental constitutional rights? In the absence of any explicit waiver, this theory is the most extreme form of judicial wishful thinking. A silent waiver doctrine is inconsistent with our most basic rules of constitutional criminal procedure. It is a dangerous trend and one that we should vigorously oppose.

At a Symposium like this—devoted to the Sixth Amendment rights of confrontation and counsel—we might ask other questions as well. For example: What would be so bad about letting lawyers do what lawyers do—zealously represent criminal defendants by making strategic and tactical decisions using the professional expertise that first justified the *Gideon* rule?<sup>118</sup>

First, basic systemic concerns of efficiency and finality favor a clear resolution of this issue in favor of a defendant's control over confrontation. The absence of procedural prerequisites to a valid waiver of confrontation produces unnecessary uncertainty in trial and appellate litigations. The "anything-the-attorney-says-goes" approach gains small efficiencies by not

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115. See *id.* at 254-58.

116. *Id.* at 257 (second alteration in original) (quoting *People v. Rathbun*, 21 Wend. 509, 543 (N.Y. Sup. Ct. 1839)).

117. See *Boykin v. Alabama*, 395 U.S. 238, 242-45 (1969).

118. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) ("Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him." (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932))).

requiring trial courts to conduct a brief confrontation inquiry but imposes a larger cost by the unnecessary increase in appellate and post-conviction litigation.<sup>119</sup>

But these inefficiencies could be as easily resolved by adopting Justice Scalia's position in *Gonzalez* and allowing an attorney to waive all rights other than the right to counsel.<sup>120</sup> So there must be a deeper, more compelling reason to prefer defendant autonomy over attorney authority.

The answer, I believe, lies in the text of the Sixth Amendment. The Sixth Amendment grants the *accused* the right to "confront and cross-examine" the witness against him.<sup>121</sup> How can counsel or court take that right from the accused? After all,

the counsel clause . . . say[s] that counsel's job is to "assist[]" the accused in making "his"—the accused's—defense, and it is hard to see how the accused would still own his defense if some government-imposed agent took it over against his will; the assistant would be usurping the place of the master.<sup>122</sup>

Another theory justifying delegation of confrontation control to counsel offers counsel's competence as an adequate remedy for the deprivation of defendant autonomy over deeply personal rights like confrontation.<sup>123</sup> It may be true that attorney control will produce "better" outcomes and more efficient trials.<sup>124</sup> However, nothing about our right to counsel doctrine has ever characterized representation by counsel as a quid pro quo in which the courts provide an accused with counsel and, in exchange, the accused cedes most of his rights to his lawyer in order to improve the efficiency and accuracy of the court system.

Moreover, in a constitutional system that values confrontation for its own sake—above and beyond its value in producing reliable trial outcomes—a fair or reliable trial outcome does not satisfy the confrontation right. In Justice Scalia's own words, "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."<sup>125</sup>

The "language and spirit of the Sixth Amendment" focuses not only on procedural mechanisms designed to promote reliable trial outcomes but also on procedures that reaffirm defendants' rights to make deeply personal choices.<sup>126</sup>

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119. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151-52 (2006).

120. See *id.*

121. U.S. CONST. amend. VI.

122. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 114 (1998) (third alteration in original).

123. See discussion *infra* Part II.A.

124. But see Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423 (2007).

125. *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

126. *Faretta v. California*, 422 U.S. 806, 820 (1975); *accord Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Henry v. Mississippi*, 379 U.S. 443, 451 (1965).

It is the individual defendant's deeply personal interest in the conduct of the trial that justifies both the *Faretta* entitlement to self-representation and the *Boykin* requirement that the defendant be personally aware of the rights he is waiving.<sup>127</sup> Just as forcing counsel upon an unwilling defendant "strips" the "right to make a defense . . . of the *personal* character upon which the Amendment insists," so too does forcing a defendant to accept counsel's choices about confrontation strip away the personal opportunity to confront one's accusers.<sup>128</sup>

Our criminal procedure system soundly "reject[s] an approach to individual liberties that 'abstracts from the right to its purposes, and then eliminates the right.'"<sup>129</sup> Confrontation is a mandated entitlement that guarantees a defendant a particular mode of proceeding that protects both a systemic interest in reliability and the defendant's deeply personal interests in accusatory fairness.<sup>130</sup>

Thus, we should worry that the combined effect of jurisprudential uncertainty and prioritization of attorney choices will unduly reduce the amount of confrontation in our trial courts. Delegation of confrontation choices to counsel surely produces less confrontation than defendants might otherwise demand. Less confrontation means fewer exercises of a procedural right that is an essential part of the architecture of adversarial criminal trials. The result is an ever-increasing series of trials that look, more and more, like the inquisitorial system of trial-by-affidavit, which *Crawford* sought to avoid.<sup>131</sup>

Already, the overwhelming majority of criminal cases are resolved by plea bargains. Permitting professional players to negotiate around the Confrontation Clause suppresses the vigorous exercise of a procedural right that is an essential part of the architecture of criminal trials. Notwithstanding the *Crawford* revolution, increasing numbers of testimonial witnesses still provide evidence that is unopposed and unexamined. As to whole categories of witnesses—chief among them forensic witnesses—the systemic norm remains the presentation of evidence by *ex parte* affidavit. This indirect unraveling of *Crawford* cannot be justified by the fig leaf of counsel's consent or waiver.

## V. CONCLUSION

The Confrontation Clause reflects important dignitary values "deep in human nature that regard[] face-to-face confrontation between accused and

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127. See *Faretta*, 422 U.S. 806; see also *New York v. Hill*, 528 U.S. 110, 114-15 (2000).

128. See *Faretta*, 422 U.S. at 820 (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)); see also *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988) (applying the ineffective assistance of counsel standard to counsel's waiver of the right to call defense witnesses right to compulsory process is not a fundamental right).

129. *Indiana v. Edwards*, 554 U.S. 164, 185 (2008) (Scalia, J., dissenting) (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145 (2006)).

130. See *Massaro*, *supra* note 13, at 897.

131. See *id.*

accuser 'as essential to a fair trial.'"<sup>132</sup> "This right is rooted in human nature, in ancient and long-standing legal practice."<sup>133</sup> Only by embracing a defendant's control of the confrontation right can our system of constitutional criminal procedure guarantee the preservation of that right.

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132. *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)).

133. *United States v. Martinez*, 883 F.2d 750, 758 (9th Cir. 1989), *vacated*, 928 F.2d 1470 (9th Cir. 1991) (citing *Coy*, 487 U.S. 1012).