No. 10-7042

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL PARSONS - PETITIONER

v.

JOSH TEWALT – RESPONDENT

ON PETITION FOR WRIT OF CERTORARI TO

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

PETITION FOR WRIT OF CERTORARI

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QUESTION PRESENTED

The District of Idaho Court acknowledge that Petitioner's Confrontation Clause right is at issue. Petitioner was convicted, in large part, upon evidence that the prosecution used of co-defendant's out-of-court statement, guilty plea and video recording that denied him the opportunity to cross-examine co-defendant. The United States District Court for the District of Idaho has decided an important question of federal law that has not been but should be, settled by this Court, and has decided an important federal question in a way that conflicts with relevant decisions of other Appeal Courts and this Court. The case thus presents the following questions.

I. Has the accused's right of confrontation been converted from the prosecutor's duty under Confrontation Clause into the accused's privilege under the Compulsory Process Clause. Shifts the consequences of adverse – witness no-show from the State to the accused?

II. When, the prosecutor used co-defendant's video statement at crash scene to prove the, motivation for the crime. Is it a violation of the Confrontation Clause, not to provide co-defendant for cross-examination?

III. When, counsel stipulated to admission of co-defendant's guilty plea without defendant allowed the opportunity to cross-examine. Should plain error or harmless error analysis be conducted?

IV. Did counsel knowingly relinquish or abandon his client's confrontation clause right when he may have open the door to waiver over his client's dissent?

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PETITION FOR WRIT OF CERTIORARI TO THE IDAHO SUPREME COURT

The Petitioner, Daniel Parsons, respectfully prays that a writ of Certiorari issue to review the judgment and opinion of the United States District Court for the District of Idaho rendered in these proceedings on March 29, 2019.

OPINION BELOW

The opinion of the United States, District of Idaho Court D.C. No. 1:15-cv-00531-DCN.

The opinion is unpublished, and is reprinted in the Appendix B to this petition at page 2a, infra.

JURISDICTION

The date on which the United States Ninth Circuit Court of Appeals decided case was October 25, 2019.

An extension of time to file petition for rehearing was filed November 7, 2019.

A timely petition for rehearing was denied by the United States Ninth Circuit Court of Appeals on the following date: January 10, 2020, and a copy of the order denying rehearing appears at Appendix G page 112a.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. CONST. AMEND. VI

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.

U.S. CONST. AMEND. XIV

Section1. All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2254

(a) the supreme court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigence or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court

shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

Petitioner was convicted of Aiding and Abetting I.C. §§ 18-6501, 6502, 18-264 and Eluding a Peace Officer I.C. §§ 49-1404(a)(c) (R. p. 506) Petitioner was also convicted for persistent violator. I.C. § 19-2514 (Id) The district court sentenced Petitioner to a fixed life term of imprisonment for aiding and abetting and a consecutive fixed life term for eluding a peace officer, inclusive of the persistent violator enhancement. (R., p 506).

Petitioner direct appealed, and in a published decision, the Idaho Court of Appeals affirmed his convictions of aiding and abetting robbery and eluding a peace officer with a persistent violator enhancement. (R., p. 508 (citing State v. Parsons, 153 Idaho 666, 289 P.3d 1059 (Ct. App. 2012).)

Petitioner filed a Petition and Affidavit for Post-Conviction Relief. Petitioner requested post-conviction counsel, which was granted.

The state filed an Answer to Petitioner's Post-Conviction Petition and for summary dismissal. The state stipulated to an extension of the deadline for Petitioner to respond to the State's Motion for Summary Dismissal. Petitioner filed an Objection and Response to the state's Motion for Summary Dismissal. The State district court heard argument on the state's motion to dismiss.

May 1, 2014 the district court filed a Notice of Intent to Dismiss, No. 42308, case no. CV-2012-20472, Appendix K, Exhibit GGG. July 1, 2014 the district court entered the Order Dismissing Petition. Petitioner timely appealed.

On appeal to the Court of Appeals, August 24, 2015, unpublished Opinion, No.577, Appendix H page 113a. Judgment summarily dismissing petition for post-conviction relief, case no. CV-2012-20472, affirmed.

A petition for rehearing by the Idaho Court of Appeals and Supporting Brief was filed on August 19, 2015 of behalf of Appellant, pro se. The petition was denied August 24, 2015. Appendix I page 114a. A petition for review by the Idaho Supreme Court and Brief in Support were filed on September 9, 2015. The petition was denied (Parsons v. State, Docket No. 42308-2014) on October 28, 2015. Appendix J page

115a) Petitioner then filed an habeas corpus action under 28 U.S.C. § 2254 on November 5, 2015.

Appellant filed in Case no: 1:15-cv-00531-EJL, to Motion to Expand the Record to include attach 37 exhibits, Appellant had attached to the Habeas Corpus Writ, on September 22, 2016. This same court granted the motion to expand the record to include the 37 exhibits, on January 19, 2017.

Relief was denied by the United States District Court for the District of Idaho on the above Habeas Corpus Writ Appendix B and denied a certificate of appealability on the issue presented in this petition. And the Ninth Circuit denied relief and a certificate of appealability Appendix A. And the Ninth Circuit D.C. No. 1:15-cv-00531-DCN, No. 19-35322 on September 13, 2019, denied combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 19) on January 10, 2020, Appendix G.

Pre-trial Petitioner met counsel (Laurence G. Smith) on December 8, 2010. On the telephone, he explained to counsel, that, when he pulled over and stopped for the police his wife (Felicia Parsons), pulled out a gun, cocked it, and told him she just robbed a bank, and yelled for him to drive, or she would kill him and then herself.

After, numerous letters to counsel, Petitioner complained that his attorney failed to consult and informed him of his strategy for his defense. March 2, 2011, Petitioner requested substitute counsel for case no: CR-FE-2010-18161 by writing a letter to attorney and judge. (Exhibits N, Appendix K) and (Exhibits T, Appendix K). The transcript of the hearing is (Exhibit VV, Appendix K). Substitute counsel was denied.

The Prosecution and Detectives met with Felicia Parsons and her attorney on April 21, 2011. She had continued to claim that Petitioner was not guilty of helping her to commit the bank robbery. On April 26, 2011, this same group met again with Felicia and they had come to a plea agreement. April 27, 2011, Felicia change her plea of not guilty to guilty. The transcript of that proceeding (Exhibit D, Appendix K). Quote from Daniel Parsons Affidavit:

"11) I, Daniel Parsons, received a visit from Mr. Smith on April 28, 2011, before my trial was to begin on May 2, 2011, the day of trial Mr. Smith told me that Felicia Parsons would be used as a witness against me. My answer was that it would be a good opportunity for counsel to cross-examine Felicia about the events that led up to October 20, 2010 and about what she did in the car." (Exhibit XX, Appendix K)

April 28, 2011, after counsel's one and only meeting, during a phone conversation:
"I insisted, that counsel call Felicia Parsons as a defense witness, because I wanted to prove my innocence.
Counsel said: 'He would not call her as a witness, that you do not have to prove that you are innocent,' ...I asked, if I had any say in my own defense. His reply was, (NO), if you don't like it, you can go Pro Se." (Exhibit XX, Appendix K)

Petitioner had notified counsel he would decide on Monday, May 2, 2011, about self-representation. A letter from counsel made it clear: "HOWEVER, it is very clear to me that if WE call her to testify, we will not only open the door to any questions the State may wish to ask, ... it is my intention NOT to call Felicia as a witness." (Exhibit Y, Appendix K)

April 28, 2011 at 2 p.m. the prosecution filed a Motion in Limine:

"Although the details of her allocution are not admissible unless she testifies to the contrary, the State submits the fact of her guilty plea should be deemed admissible.[1]Accordingly, the State seeks permission to elicit in our case in chief, evidence that Mrs. Parsons pled guilty. (Exhibit F) The State does not currently intend to call Mrs. Parsons in our case-in-chief, but may do so in rebuttal. "(Exhibit I, Appendix K)

May 2nd, 2011. In the 4th District Court in and for the County of Ada, Cheri C. Copsey, District Court Judge:
THE COURT: Are the parties ready to proceed then?
MR. SMITH: Judge, there is at least one very significant preliminary matter. I have visited with Mr. Parsons recently in the jail and have spoken to him a number of times on the telephone and we have a disagreement with respect to how to proceed with his defense.
And he – we discussed this at great length on the telephone and again this morning. He has elected to represent himself...

[1] The fact of her plea and any inducements from the State would likely be admitted, in any event, if she testified. See State v. Garcia, 102 Idaho 378, 630 P.2d 665 (1981)

THE COURT: Mr. Parsons has your attorney indicated correctly that you would like to represent yourself?
THE DEFENDANT: "That's right. "(Exhibit WW, App. K, Tr. p. 16)

Petitioner was forced to proceed to trial with Mr. Smith.

The state's argument is "Petitioner opened the door to this testimony by asking about other statements in Felicia's confession on cross-examination." (Dkt 53 p.62, Appendix B) The question to be answer by this Court is either defense counsel intended to waive his client's Confrontation Clause Right, when his client clearly dissented on the issue. Or, he committed ineffective assistance of counsel to violate such an important right, which harmed Petitioner to bring to the fore that Felicia threaten to kill Petitioner and herself.

His decision essentially allowed the state to pick and choose favorable portions of the otherwise inadmissible confession while – at the same time- keep Petitioner from cross-examination her about what occurred before and after her robbery. The jury, thus manipulated, would see a skewed picture of reality.

In addition, "[i]f counsel's decision to waive his client's confrontation right [on cross-examination] was made over the client's dissent or was not a legitimate trial tactic, the client might have a viable claim of ineffective assistance of counsel." ***United States v. Lopez-Medine, 596 F.3d 716, 733 (10th Cir. 2010),*** (Dkt. 53 p.68, Appendix B) As stated herein, counsel's decision was over his client's dissent to have Felicia confession admitted into evidence in this manner other that having her testify was unsound and ineffective assistance because it allowed the state to characterize events most favorable to their theory of the case.

Even, if defense counsel intended to open the door for the admission of the out-of-court statements by asking Detective Wigington about his conversation with Felicia Parsons. Once the door was opened, was the state entitled to create a false impression about what Felicia had said? Or, should the state have call Felicia to testify to the correct any false impression?

The District of Idaho argue counsel's cross-examination of the state's witnesses reveals that his strategy was to place all the blame on Felicia, and to put the prosecution to its burden of showing that Petitioner was aware of what Felicia intended when she entered the Key Bank on October 20, 2010. (Dkt 53, p5-6, Appendix B).

The District of Idaho ackknownledges that counsel failed to interview Felicia before choosing not to call her as a defense witness. Rather, counsel evaluated information from the prosecutors about Felicia's potential trial testimony. (Dkt 53, p14-16, Appendix B)The District of Idaho acknowledge that Felicia's confession made by Detective Wigington is "subject to the Confrontation Clause". (Dkt 53, p65, Appendix B)

The District of Idaho Court wrote:

> "When Smith discussed the origin of the bills found at the scene of the car wreck, the prosecutor was permitted to ask the investigator if Felicia had stated where the money had come from...Finally, the court notes that the law is not well-settled whether the Confrontation Clause is subject to harmless error analysis..." (Dkt 53, p68, Appendix B) "While whether harmless error analysis of these issues present an interesting legal issue because the law is not well-settled in the Ninth Circuit or in the United States Supreme Court, there is no real factual issue here." (Dkt 53, p69, Appendix B)

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE PETITIONER'S CONFRONTATION CLAUSE RIGHT SHOLD BE SUBJECT TO PLAIN ERROR OR HARNLESS ERROR ANALYSIS. THE STATE FAILED TO ADDRESS, LET ALONE, PROVE THE PLAIN ERRORS WERE "HARMLESS BEYOND A REASONABLE DOUBT." THIS COURT NEEDS TO SETTLED WHETHER THE CONFRONTATION CLAUSE IS SUBJECT TO HARMLESS ERROR ANALYSIS.

In Chapman v. California, The Supreme Court held a constitutional error require reversal unless the state proves the error was "harmless beyond a reasonable doubt."

The District of Idaho Notes "that the law is not well-settled whether the confrontation clause is subject to harmless error analysis...because the law is not well-settled in the Ninth Circuit or in the United States Supreme Court,"

(DKT 53, P. 68-69, Appendix B)

In ***Chapman v. California, 366 U.S. 18, 24, 87 S. Ct. 824, 17L. Ed. 2d 705 (1967)*** "An assessment of harmlessness cannot include consideration of whether the witness testimony would have been unchanged, or the jury's assessment unalter, had there been confrontation, such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence."

The Supreme Court created a couple of new rules (1) constitutional errors can be "harmless," and (2) constitutional errors require reversal unless the government proves the error was "harmless beyond a reasonable doubt." In the 1990s, the Supreme Court ruled that "harmless-error analysis is triggered only after the

reviewing court discovers that an error has been committed." Yes, the Ninth Circuit Court routinely ignore this ruling, skip the question of error; and conclude that any error, assuming one occurred, was "harmless." By refusing to decide whether a constitutional error occurred, courts fail to perform one of the most basis functions; clarifying the law that governs the actions of police, prosecutors, defense attorneys, and trial judges.

United States v. Tuyet Thi-Bach Nguyen, 565 F.3d 668 (9th Cir. 2009)

> The government argues that Merke's statement was not inculpatory. But this is not controlling on the existence of error, Crawford does not require that a statement inculpate a defendant to trigger error under the Confrontation Clause. Simply, Confrontation Clause error occurs at admission of a testimonial statement without an opportunity to cross-examine. Crawford, 541 U.S. at 68-69. If the statement is not inculpatory, that might be probative of the harmlessness of an error, but not to the existence of a Confrontation Clause error. (565 F.3d 675) Because Merke's statement was testimonial and admitted for its truth, we hold its admission at Nguyen's trial was error. The prosecution bears the burden of proving the error was harmless beyond a reasonable doubt. ***United States v. Gillan, 167 F.3d 1273, 1277 (9th Cir. 1999)*** ("Once we find a [Confrontation Clause] error, the prosecution has the burden of showing that the error was harmless beyond a reasonable doubt.").

Ultimately, this case turns on the way in which the state must meet its burden by showing that other evidence in the record demonstrates that the error in admitting Felicia's testimony was harmless beyond a reasonable doubt. The Court's focus is on the possibility of harm arising from Felicia's testimony and not necessarily on the possibility of its relationship to the other evidence.

The Court's task would be difficult were it not for the states' insistent reliance on Felicia's confession, guilty plea, and state exhibit #16 in closing argument,

considering which the state cannot say the error was harmless. In that argument, the state said:

> "Ms. Buttram: This was no ordinary vacation, if you could even call it a vacation, because what the Parsons did when they came up here last October was not come to Boise for vocation, but they came here to commit robbery. How do we know that? Instruction No. 3 tells you Felicia Parsons pled guilty to the robbery on October 20, 2010. Your job is to determine if the state has proven beyond a reasonable doubt that the defendant aided and abetted her in the commission of that robbery and if we've shown you that he then committed the crime of eluding in getting them away from that robbery." Appendix K, Exhibit WW, Tr. P. 584.

In other words, the state relied on Felicia's confession, guilty plea, and video Exhibit #16 to prove the aiding and abetting, by implication. Petitioner participation in it. Petitioner cannot see how all the cumulative hearsay can conclusively show that the tainted evidence did not contribute to the conviction, because the state's closing argument relied on that very evidence. There is no way to determine whether the jury would have convicted Petitioner purely based on the other evidence.

The state received a windfall. Not only did the jury view the videotape, without Felicia's being cross-examine, but it received the opinion from the prosecutor who used the admission of crash site video (State Exhibit #16) to denied Petitioner the full and fair opportunity to cross-examine Felicia. Whereas, Felicia was under the control of the state, and should have been made available for cross-examination. The state used Felicia in the video as their witness to prove its belief as to motivation for the crime. The prosecutor's closing argument:

> "On the video the officers' video that you see of the crash scene ...The money is also the motivation for the crime. You heard that on the video, state's exhibit #16. They didn't commit this for adrenalin...They needed the money. Felicia told that... [Audio played] Ms. Buttram: They needed the money to pay for doctor bills. That's why they came up here. That's why they robbed this bank. The money is the part of the puzzle to show you beyond reasonable doubt that the defendant actually aided and abetted in the commission of this crime." Appendix K, Exhibit WW, Tr. P. 595.

The admission of hearsay statements of co-defendant, used by prosecution, is not harmless error because of reasonable inference exists that this prejudiced and influenced the jury verdict. ***Crawford v. Washington, 541 U.S. 36, 68 (2004); U.S. v. Jones, 371 F.3d 363, 369 (7th Cir. 2004); U.S. v. Mejia, 545 F.3d 179, 199 (2nd Cir. 2008); U.S. v. Tuyet Thi-Bach Nguyen, 565 F.3d 668, 674-75 (9th Cir. 2009); U.S. v. Rodriques-Morreno, 340 F.3d 1, 18-21 (1st. Cir. 2004).***

In other cases, the Supreme Court has found a Confrontation Clause violation when hearsay evidence was admitted and the State failed to make any showing that the declarant was unavailable. ***Brookhart v. Janis, 384 U.S. 1, 16 L. Ed. 2d 314, 86 S. Ct. 1245 (1966); Pointer v. Texas, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965); Motes v. United States, 178 U.S. 458, 44 L. Ed. 1150, 20 S. Ct. 993 (1900); Kirby v. United States, 174 U.S. 47, 43 L. Ed. 890, 19 S. Ct. 574 (1899).***

In ***Delaware v. Van Arsdall, 475 U.S. at 684, (1986)***, the Court was concerned with Confrontation Clause violations arising from the denial of a defendant's right to impeach a witness for bias. See ***Van Arsdall, 475 U.S. at 684.*** The Court's test make sense considering the specific Confrontation Clause violation.

To determine whether a defendant was harmed by not being able to impeach a witness, it is necessary to look at what the full exercise of cross-examination could have disclosed. In ***Harrington v California,*** which involved the erroneous admission of harmless testimony. Because it is impossible to know how wrongfully excluded evidence would have affected the jury, the argument runs, reversal is mandated. But Harrington cannot be so easily dispatched. Petitioner, like Harrington, was denied an opportunity to cast doubt on the testimony of an adverse witness. In both cases the prosecution was thus able to introduce evidence that was not subject to constitutionally adequate cross-examination. And in both cases the reviewing court should be able to decide whether the not-fully-impeached evidence might have affected the reliability of the fact finding process at trial.

Accordingly, we hold that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to Chapman harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the

prosecution's case. Cf. ***Harrington, 395 US, at 254, 23 L Ed 2d 284, 89 S Ct 1726; Schneble v Florida, 405 US, at 432, 31 L Ed 2d 340, 92 S Ct 1056.***

The District of Idaho Court acknowledge there was a confrontation clause error. In light of Crawford, the error is "plain". Based on Crawford's affirmation of the importance of the constitutional right of confrontation, this Court readily can determine that Petitioner's substantial rights were affected by these violations. In the context of a case as close as this one on the central issue of whether the defendant was involved in any illegal activities, the admission of these statements directly tying Petitioner to the crime likely impacted the outcome of the trial. Because this plain error compromised the fairness and integrity of Petitioner's trial.

The trial court argues that trial counsel made a strategic decision when he stipulated to Jury Instruction No. 3 (Exhibit F) to waive to confront. When Felicia pled guilty to bank robbery, without Petitioner having opportunity to cross-examine.

Petitioner asserts that his counsel did not consult with him about the stipulation to co-defendant's guilty plea being admitted as evidence against him, such that he, as the client, cannot be said to have made a knowing and voluntary waiver of his confrontation rights. He clearly dis-agree with his counsel about not calling co-defendant as a defense witness and was not consulted about counsel's 'strategic decision' to waive his confrontation rights. However, because there is a presumption against the waiver of constitutional rights, for a waiver to effective it must be clearly established that there was "'an intentional relinquishment or abandonment of a

known right or privilege'" See Id. ***(quoting Johnson v. Zerbst, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938)).***

Counsel should have expressed to the trial court that the jury would conclude from co-defendant's guilty plea that Petitioner must also be guilty. Indeed, the admission of guilty plea of co-defendant's not subject to cross-examination is generally plain error. ***U.S. v. Jozwiak, 954 F.2d 458,460 (7th Cir. 1992),*** "The admission of guilty plea of co-defendant not subject to cross-examination is considered plain error"; ***U.S. v. Becker, 502 F.3d 122, 135-36 (2nd Cir. 2007),*** "the erroneous admission of guilty plea not harmless because it may well have influenced the jury". Therefore, it is unreasonable for the district court to speculate about counsel's "strategic decision". To claim that counsel "strategic decision" was to only cross-examination to show Petitioner was not aware of what co-defendant intended.

Plain Error: When a petitioner fails to object to an error in the district court, the appellate court reviews for plain error. Fed. R. Crim. P.52(b). Plain error review, an appellate court may only correct an error not raised at trial if there is (1) "error," (2) that is "plain," and (3) that "affects substantial rights." If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

The fact that petitioner's attorney may have opened the door to out-of-court statement was not sufficient to erase the Confrontation Clause violation. However, the trial court as required to give petitioner Faretta warnings because petitioner was

forced to continue with appointed counsel instead of availing himself of his right of self-representation where he sought merely to replace his counsel's representation; thus, he dissented to waive his right to the confrontation clause.

At trial, Petitioner's attorney stipulated to the admission of co-defendant's guilty plea without cross-examination. "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." ***United States v. Koeberlein, 161 F.3d 946, 949 (6th Cir. 1998).*** Plain error review applies even if the forfeited assignment of error is a constitutional error. ***United States v. Jones, 108 F.3d 668, 676 (6th Cir. 1997).*** Pursuant to plain error review, an appellate court may only correct an error not raised at trial if there is "(1) 'error,' (2) that is 'plain,' and (3) that 'affects substantial rights.'" ***Johnson v. United State, 520 U.S. 461, 466-67, 137 L. Ed. 2d 718, 117 S. Ct. 1544 (1997) (quoting United States v. Olano, 507 U.S. 725, 733, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993)).*** If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" ***Johnson at 467 (quoting Olano, 507 U.S. at 732***) (internal quotation marks omitted).

United States v. Olano, 507 U.S. 725, 733, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993), that opinion distinguishes sharply between waiver, "the intentional relinquishment or abandonment of a known right," and forfeiture, "the failure to make the timely assertion of a right." 507 U.S. at 733. The violation of forfeited rights may be reviewed on an appeal under the limited conditions set forth in Olano. Id. at

733-34. Petitioner argues that he did not intentionally and in full knowledge relinquish his right to confront "Felicia" hearsay declarant who is a co-defendant who plead guilty. Therefore, the stipulation could not be a waiver as that term is used in Olano, leaving Petitioner eligible for plain error review.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE PETITIONER'S CONFRONTATION CLAUSE RIGHTS [ON CROSS-EXAMINATION] WAS DENIED. HAS, THE ACCUSED'S RIGHT OF CONFRONTATION BEEN CONVERTED FROM THE PROSECUTOR'S DUTY UNDER CONFRONTATION CLAUSE INTO THE ACCUSED'S PRIVILEGE UNDER THE COMPULSORY PROCESS CLAUSE. THIS COURT NEEDS TO SETTLED THE CONFLICT BETWEEN NINTH AND TENTH CIRCUITS WITH THE DECISION OF THE UNITED STATES SUPREME COURT IN CRAWFORD AND THE SIXTH CIRCUIT TO WHETHER COUNSEL'S DECISION MAY HAVE WAIVE HIS CLIENT'S CONFRONTATION RIGHT.

In ***Brookhart v. Janis, 384 U.S. 1, 16 L. Ed. 2d 314, 86 S. Ct. 1245 (1966).***

The Sixth Amendment provides that: "In all criminal prosecutions the accused shall enjoy the right...to be confronted with the witnesses against him..." And in ***Pointer v. Texas, 380 U.S. 400, 406, 13 L. Ed. 2d 923, 927, 85 S. Ct. 1065***, we held that the confrontation guarantee of the Sixth Amendment including the right of cross-examination "is 'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.' And "means more than being allowed to confront the witness physically." ***Davis v Alaska, 415 US, at 315, 39 L Ed 2d 347, 94 S Ct 1105.*** Indeed, " '[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.' " Id., ***at 315-316, 39 L Ed 2d 347, 94 S Ct 1105*** (quoting J. Wigmore, Evidence § 1395, p 123 (3d ed 1940)) (emphasis in original). Of,

particular relevance here, "[w]e have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." ***Davis, supra, at 316-317, 39 L Ed 2d 347, 94 S Ct 1105 (citing Green v McElroy, 360 US 474, 496, 3 L Ed 2d 1377, 79 S Ct 1400 (1959)). Molloy v. Hogan, Supra, 378 U.S. at 10, 12 L. Ed. 2d at 661.*** See also ***Douglas v. Alabama, 380 U.S. 415, 13 L. Ed. 2d 934, 85 S. Ct. 1074.*** It follows that unless petitioner did actually waive his right to be confronted with and to cross-examine these witnesses, his federally guaranteed constitutional rights have been denied in two ways. In the first place he was denied the right to cross-examine at all any witnesses who testified against him. In the second place they were introduced as evidence against him an alleged confession, made out-of-court by one of his co-defendants, Mitchell, who did not testify in court, and petitioner was therefore denied any opportunity whatever to confront and cross-examine the witness who made this very damaging statement. We therefore pass on to the question of waiver.

The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights, see, e.g., ***Glasser v. United States, 315 U.S. 60,70-71, 86 L. Ed. 680, 699, 62 S. Ct. 457,*** and for a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." ***Johnson v. Zerbst, 304 U.S. 458, 464, 82 L. Ed. 1461, 1466, 58 S. Ct. 1019, 146 ALR 357. (1938).***

In deciding the federal question of waiver raised here we must of course, look to the facts which allegedly support the waiver. Upon an examination of the facts shown in this record,...

The U.S. Constitution imposes on the prosecution the burden of showing the unavailability of a witness before it may seek to introduce less reliable account of co-defendant's out-of-court statement in a criminal trial.

This testimonial statement was hearsay that Detective Wigington provided: "she was initially counting the money", Appendix K, Exhibit WW, Tr. P. 483, was admitted to show conscious of guilt. Which was false because she said: "I start to". Appendix K, Exhibit SS, P 14. See e.g. ***United States v. Trala, 386 F.3d 536, 544-45 (3rd Cir. 2004)*** (holding in a case where the government sought to prove bank robbery, conflicting hearsay statements by a co-defendant regarding the origin of the money were admitted to show consciousness of guilt and were "obviously false"). The Confrontation Clause ultimate goal is to ensure reliability of evidence, but it is a procedural rather that a substantive guarantee. It commands, not that evidence be reliable, but the reliability be assessed in a particular manner by testing in the crucible of cross-examination. Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribed.

Crawford v. Washington, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004). "The admission of the wife's testimonial statement against her husband

despite the fact that he had no opportunity to cross-examine her, alone was sufficient to make out a violation of the Sixth Amendment." Criminal Law § 51 (4).

The Supreme Court of the United States held: An attorney undoubtedly has a duty to consult with the client regarding "important decision," including questions of over-arching defense strategy. ***Strickland v. Washington, 466 U.S., at 688, 802 Ed. 2d 674, 104 S. Ct. 2052 (1984)***; ***Wainwright v. Sykes, 433 U.S. 72, 93, n1, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977)***, (Burger, C. J., concurring). Concerning those decisions, an attorney must both consult with defendant and obtain consent to the recommended course of action.

Other courts reviewing the issue have come to different conclusions. Compare ***United States v. Cromer, 389 F.3d 662 (6th Cir. 2004)***, with ***United States v. Lopez-Medine, 596 F. 3d 716, 733 (10th Cir. 2010)***. The Sixth Circuit has held that the admission of a testimonial statements, without the opportunity to cross-examine, violate the Confrontation Clause even if the defendant has first opened the door by asking about a portion of that statement. ***Cromer, 389 F.3d at 379*** (If there is one theme that emerges from Crawford, it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admission of hearsay statements. Thus, the mere fact that Cromer may have opened the door to the testimonial, out-of-court statement that violated his confrontation right is not sufficient to erase that violation."). "There is no question that Felicia Parsons out-of-court statements to Detective Wigington

were testimonial and therefore subject to the Confrontation Clause." (Appendix B, Dkt 53, P 68).

The prosecutor failed to request a sidebar conference after public defender elicited Detective Wigington's testimony about the money found by the police which may have open the door. Or the door was opened by the state?

Id P.478

Q BY MS. DUNN: My last question, sir, is recognizing that money was found in several locations and that you detailed that and kept track of it, I'm not going to have you walk through where all of the money was found, but was any money found in the locked compartment of the truck?
A No, it was not.
MS. DUNN: That's all I have for you sir, Thank You.
THE COURT: Thank you. Cross-examination.

CROSS-EXAMINATION

BY MR. SMITH: Good morning detective, How are you today?
A Good
Q So the state asked you – I believe the state offered an opinion that the money was fungible. Do you know what fungible means?
Id. 479
A No, I don't
Q Well, neither did I until I went to law school and that was a long time ago. The definition of fungible is it's pretty much exchangeable. So, for example, a 45 caliber round would be fungible with another. They're essentially interchangeable. So would you accept that definition? I assume counsel would agree.
MS. DUNN: That's fair.
BY MR. SMITH: Accepting that definition, would you agree that all the money that was described as fungible to you would be one $20 bill is pretty much the same as another one.
A Yes
Q So without actually having a record of serial numbers, you wouldn't be able to say whether one $20 bill was a particular one that was retrieved – or was taken from the bank or if it was just another $20 bill in circulation; is that right?
A With the exception of the bait bills, yes.
Q So if there was bait bill and there was a record of that, you'd be able to track

Id. 480

that because you'd have a record of the serial number; correct?

A Yes

Q But any other $20 bill that was found in a back yard or a parking lot or a wallet could just be another $20 bill; right?

A Correct

Q And so with respect to the money that you found in the car or in the yard, you can't necessarily say whether any of that was from the bank, can you?

A With-no, again, with the exception of the bait bills.

Q The bait bills -- were the bait bills recovered?

A Yes, they were.

Q Do you know were these admitted into evidence? Have you seen these?

A Yes, I have.

Q You were asked about the sunglasses and I believe counsel asked if those were consistent with the sunglasses that you saw in the photograph from the security camera; is that true?

A Yes, they were.

Id. P 481

Q They're also consistent with probably millions of other pairs of sunglasses floating around the country, are they not?

A Yes, they are.

Q I believe you just told the state that you had the opportunity to meet with and/or talk with Mr. Parsons back on October 20th or 21st; is that right?

A Yes, I did.

Q Did you have a conversation with him?

A A very brief conversation. He requested counsel.

Q Did you have a conversation with Felicia Parsons?

A Yes, I did.

Q At all times is it true that she took responsibility and said that Mr. Parsons did not rob any bank ever?

A She did, yes, during that interview.

Q And did you, in fact, visit the bank that was robbed on October 20th?

A I have not visited the bank that was on October 20th.

Q So, you don't know who actually robbed it?

Id. P.481

A Other than speaking with witnesses after the fact, those are the only facts that I have.

So, Mrs. Parsons took responsibility for doing that and several other banks, is that right?

A Yes, she did.

Q And she at all times maintained that Mr. Parsons never robbed any banked; is that right?

A Up until recently, yes.
Q I don't think I'm going to ask for clarification of that question. What I'm asking is when you spoke to her on October 20th or 21st is it not true that she maintained Mr. Parsons never robbed a bank?
A Yes
MR. SMITH: Thank you. I have no other questions, Judge.
THE COURT: Redirect

REDIRECT EXAMINATION

On redirect, the prosecutor immediately began exploring more of Felicia's statements:

BY MS. DUNN
Q Has Felicia Parsons reported to you that she's pretty much in love with Daniel Parsons?
A Yes, every conversation.
Q And she has reported that she is solely responsible for this event; is that true?
Id. P. 483
At various times she's told you she's the only one that should be held accountable?
A Yes
Q In those same conversations has she reiterated to you how much she loves him?
A Oh, yes
Q You indicated to counsel that you didn't know that this money that was kind of all over the car and in the back yard came from this robbery; is that—you don't have firsthand observer's knowledge; is that correct?
A Correct
Q But, during your conversation with Felicia Parsons, where does she report this money came from?
A The Broadway Bank.
Q And what was she doing with it that ended up getting spread out all over this car?
A. She stated that while they were traveling from the bank toward Canyon County, she was initially counting the money at one point inside the vehicle.
Q Thank You
Appendix K, Exhibit WW, Pages 478 to 483

The question this court must answer is: Did counsel intentional relinquish or abandon his client's confrontation clause right [on cross-examine] over his client's

dissent? If, yes. Does the Petitioner have a viable claim of ineffective assistance of counsel?

"[i]f counsel's decision to waive his client's confrontation right [on cross-examine] was made over the client's dissent or was not a legitimate trial tactic, the client might have a viable claim of ineffective assistance of counsel." ***United States v. Lopez-Medine, 596 F. 3d at 731 n8 (10th Cir. 2010).*** The Tenth Circuit disagreed with Cromer and held that the defendant had waived his Confrontation Clause claim in a limited manner: "If the Cromer rule were correct, a defendant would be free to mislead a jury by introducing only parts of an out-of-court statement, confident that the remainder of the statement could not be introduced because the Confrontation Clause would provide a shield." ***United States v. Lopez-Medine, 596 F. 3d at 733 (10th Cir. 2010).*** That is exactly what the state did in this case. Since the trial counsel may have open the door to allow the prosecutor to pick and choose favorable portions of an otherwise inadmissible out-of-court statement, while – at the same time – stating counsel made a strategic decision to waive his client's confrontation clause right, that client dissent to.

The District of Idaho Court agree with Tenth Circuit "[t]he Confrontation Clause is a shield, not a sword," and therefore, "a defendant can open the door to the admission of evidence otherwise barred by the Confrontation Clause" and afterward he may not prevent the State from rebutting those statements. ***United States v. Lopez-Medine, 596 F. 3d at 732 (10th Cir. 2010).*** The prosecutor should have call

Felicia Parsons to rebut what Detective Wigington said in order to be sure for a correct and clear statement about the facts. If, that was the prosecutor's goal.

"[T]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.' ***Anders v. California, 386 U.S. 738, 743 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967)***. The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted...the kind of testing envisioned by the Sixth Amendment had occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." ***United States v. Cronic, 466 U.S. 648, 656-657, 104 S.Ct. 2039, 80 L. Ed. 2d 657 (1984) (footnotes omitted).***

The ***Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314, (2009)***. The U.S. Supreme Court held that admission of the certificates violated petitioner's Sixth amendment right to confront the witnesses against him. The certificates were affidavits, which fell within the core class of testimonial statements covered by the Confrontation Clause, and they were made under Circumstances which would have led an objective witness reasonably to believe that they were made for use in a criminal trial. Although petitioner could have subpoenaed the analysts, the right was not a substitute for his right to confront them.

Here, the U.S. Supreme Court decision in Melendez-Diaz does not call Cromer into question. It, the Supreme Court stated in Melendez-Diaz. The Sixth Amendment

guarantees a defendant the right to be confronted with the witnesses against him. While the Confrontation Clause guarantees a defendant the right to be confronted with the witnesses "against him," the Compulsory Process Clause guarantees a defendant the right to call witnesses "in his favor." U.S. Const. Amend. IV. The text of the Amendment contemplates two classes of witnesses – those against the defendant and those in his favor. The prosecutor must produce the former; the defendant may call the latter. There is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.

The power to subpoena witness - whether pursuant to state law or the Compulsory Process Clause – is no substitute for the right of confrontation. Unlike the Confrontation Clause those provisions are of no use to a defendant when a witness is unavailable or simply refuses to appear. Converting the prosecutor's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse – witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. It's value to the defendant is not replaced by a system in which the prosecution presents its evidence via ex parte affidavits and waits for the defendant to subpoena the affiants if he chooses.

The Confrontation Clause may make the prosecution of criminals more burden some, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause - like those other constitutional

provisions - is binding, and the United States Supreme Court may not disregard it at its convenience. (Scalia, J., joined by Stevens, Souter, Thomas, and Ginsburg, JJ.)

Whereas, the issue of the witnesses unavailability. The Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admission of hearsay statements. Thus, the mere fact that a defendant's <attorney> may have opened the door to the testimonial, out-of-court statement that violated his confrontation right is not sufficient to erase that violation. A defendant only forfeits his confrontation right if his own wrongful conduct is responsible for his inability to confront the witness. If, for example, the witness is only unavailable to testify because defendant has killed or intimidated her, then the defendant has forfeited his right to confront that witness. A foolish strategic decision does not rise to the level of such misconduct and so will not cause the defendant to forfeit his right under the Confrontation Clause.

The Idaho District Court held: "There is no question that Felicia's out-of-court statements to Detective Wigington were testimonial, and therefor subject to the Confrontation Clause." Appendix B, Dkt. 53, P. 65. ***Stewart v. Cowan, 528 F.2d 79, 86 n4 (6th Cir. 1976)*** (find Confrontation Clause and hearsay violations where out-of-court statements implicated defendant as the perpetrator of the crime and thus went "to the very heart of the prosecutor's case"). The prosecutor attempted to link this statement by a co-defendant [Felicia] with an action taken by Petitioner, driving a car; however, any such linkage is a sham. The central issue at Petitioner's trial was not whether illegal activity occurred at the bank, but whether Petitioner

knowingly participated in that illegal activity. The evidence on this point was so tenuous that the jury in Petitioner's trial asked the court for clarification. Counsel failed to request a clear, direct, and proper statement of law from the trial court to define the meaning of the jury's question "when does the commission of the robbery end, when does the commission of the robbery begin" Appendix K, Exhibit WW, Tr. P. 613.

Because there was no dispute as to the subjects of the State's investigation or the reason Petitioner was believed to be involved, evidence that the State focused its investigation on Petitioner is helpful to the jury only insofar as it relates to the difficult question of whether Petitioner was involved in the illegal activity. No such argument was made in this case, however, and no other explanation was given why the testimony would be relevant. ***Stewart, 528 F. 2d at 88*** (finding the admission of highly inculpatory out-of-court statement to violate Confrontation Clause). In other words, we are forced to conclude that the purpose of this testimony was to establish the truth of the matter asserted; to prove that Petitioner was, indeed, involved in the illegal activity, as stated by Detective Wigington.

The state used Felicia in the video as their witness to prove its belief as to motivation for the crime. The prosecutor's closing argument:

> "On the video the officers' video that you see of the crash...The money is also the motivation for the crime. You heard that on the video, state's exhibit #16. They didn't commit this for adrenalin...They needed the money. Felicia told that... [Audio played] Ms. Buttram: They needed the money to pay for doctor bills. That's why they came up here. That's why they robbed this bank. The money is the part of the puzzle to show you beyond reasonable doubt that the defendant actually aided and abetted in the commission of this crime." Appendix K, Exhibit WW, Tr. P. 595.

When the prosecutor used Felicia's video statement at crash scene to prove the motivation for the crime. Is it violation of the Confrontation Clause, not to provide Felicia for cross-examination?

The State argues that any error in the admission of this video is error that Petition invited, even when he did not knowingly consent, or provoked any part of this failed defense strategy. As Crawford demonstrates, however, the Confrontation Clause, when properly applied, is not dependent upon "the law of Evidence for the time being." ***Crawford, 124 S. Ct. at 1364, 1370*** (quoting J. Wigmore, Evidence § 1397, p 101 (2d ed. 1923)) ("Where testimonial statements are involved, we do not think the framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence...."); see also Friedman, Confrontation, 86 Geo. L.J. at 1020 ("We might well pause at a doctrine that in effect conforms a constitutional right, a part of the Bill of Rights, to the contours designed – in a process not bearing the remotest resemblance to the amendment procedure established by Article V of the Constitution – by a committee of drafters of evidentiary rules for the federal courts.").

The pertinent question, however, is not whether the co-defendant's statements were properly admitted pursuant to "the law of Evidence for the time being." ***Crawford, 124 S. Ct. at 136***4. Rather, the relevant inquiry is whether Petitioner, right to confront the witnesses against him was violated by the video without cross-examination of co-defendant. If, there is one theme that emerges from Crawford, it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admission of hearsay

statements. Thus, the mere fact that counsel failed to object to the video is plain error and that violated his confrontation right is not sufficient to erase that violation. In this, too, we agree with Professor Friedman, who has postulated that a defendant only forfeits his confrontation right if his own wrongful conduct is responsible for his inability to confront the witness. Friedman, Confrontation, 86 Geo. L.J. at 1031. If, for example, the witness is only unavailable to testify because the defendant has killed or intimidated her, then the defendant has forfeited his right to confront that witness. A foolish strategic decision does not rise to the level of such misconduct and so will not cause the defendant to forfeit his rights under the Confrontation Clause. Wigington's redirect testimony relating the co-defendant's out-of-court statement as does the guilty plea and video, therefore violated Petition's right of Confrontation. The prosecution should have called Felicia Parsons as a rebuttal witness if they felt that defense counsel was misleading the jury.

Pro to Crawford, the 10th Circuit Court held there was "no doubt" a defendant could waive his rights under the Confrontation Clause. See, ***Hawkins v. Hannigan, 185 F. 3d 1146, 1154 (10th Cir. 1999)***; see also ***United States v. Aptt, 354 F.3d 1269, 1282 (10th Cir. 2004); Bullock v. Carver, 297 F.3d 1036, 1057 (10th Cir. 2002)***. The parties do not argue Crawford changed this rule. "[B]ecause there is a presumption against the waiver of constitutional rights, for a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege." ***Hawkins, 185 F.3d at 1154*** (quotations and citation omitted). That standard is not satisfied here.

It is clear from a counsel's letter (Exhibit Y) that he refused to call Felicia Parsons as a defense witness. When, his client had requested her to be called as one. Petitioner twice attempted to dismiss his attorney because as stated at the beginning of the trial they had "disagree on how to proceed." This may be a case of counsel's ignorance of the law, or a legitimate trial tactic and part of a prudent trial strategy that his client had not consented to or knowledge of.

The determination that a particular right has been waived "does not end our inquiry." ***Aptt, 354 F.3d at 1281.*** The procedures and circumstances required for effective waiver depend on the right at stake. Id. Similar to waiver by stipulating to the admission of evidence, counsel in a criminal case may waive a client's Sixth Amendment right of confrontation by opening the door, "so long as the defendant does not dissent from his attorney's decision and so long as can be said that the attorney's decision was a legitimate trial tacit or part of a prudent trial strategy." Id. at 1282 (quotations omitted); see also ***United States v. Dazey, 403 F.3d 1147, 1169 (10th Cir. 2005)*** ("Defense 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.") Here there is a showing Petitioner dissented from his attorney's decision not to call co-defendant as a defense witness. Similarity, there is indication the decision was not a legitimate trial tactic because it did not get to the heart of Petitioner intention to assist, or aid co-defendant in the crime.

The Tenth Circuit in ***United States v. Aptt. 354 F.3d 1269 (10th Cir. 2004)***, relied on three circuit court opinions for the proposition that "counsel in a criminal case may waive his client's Sixth Amendment right of confrontation by stipulating to the admission of evidence, so long as the defendant does not dissent from his attorney's decision and so long as it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy." ***United States v. Stephens, 609 F.2d 230, 232-33 (5th Cir. 1980)***, quoted in ***Hawkins, 185 F.3d at 1153;*** see also ***Cruzado v. Puerto Rico, 210 F.2d 789, 791 (1st. Cir. 1954)*** ("Where an accused is represented by counsel, we do not see why counsel, in his presence and on his behalf, may not make an effective waiver of [the right of confrontation]."); ***Wilson v. Gray, 345 F.2d 282, 286 (9th Cir. 1965)*** ("The accused may waive his right to cross-examination and confrontation and...the waiver of this right may be accomplished by the accused's counsel as a matter of trial tactics or strategy.") Here, there is no evidence that Defendant clearly established that there as "' an intentional relinquishment or abandonment of a known right or privilege.'" See Id. (quoting ***Johnson v. Zerbst, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938)).***

United States v. Lopez-Medine, 596 F. 3d at 732 (10th Cir. 2010). Prior to trial, the government filed a motion in limine informing the court defense counsel has represented to the government that Lopez-Medine's defense would be that the government had already convicted the guilty individual, Lopez-Ahumado, and Lopez-Medine was merely an innocent bystander. The government stated it did not plan to call Lopez-Ahumado as a witness in its case-in-chief due to his refusal to answer

questions. The government asked the court to prohibit Lopez-Medine from introducing the fact of Lopez-Ahumado conviction through other witness' testimony on the grounds it was irrelevant and inadmissible hearsay. The government argued if "the Court allow[ed] [Lopez-Ahumado's] conviction to come in as an exception to the hearsay rule, the government should be allowed under the rule of completeness to put in [Lopez-Ahumado's] factual statement in support of his guilty-plea" to prevent the jury from assuming Lopez-Ahumado admitted sole responsibility for the crime.

At the pre-trial conference, both parties said they did not intend to call Lopez-Ahumado as a witness. The government repeated its objection to the admission of testimony relating to Lopez-Ahumado's conviction but stated if defense counsel "wants to put in the conviction...as long as the government is allowed to give the rest of the story, that he has admitted and assisting [Lopez-Medine] in distributing meth, we have no problem." (R. Supp. Vol 1, Doc. 186 at 16.) The court responded: "I will let [defense counsel bring out that this guy also said... Lopez-Ahumado's plea and conviction], but then I'm going to let the government point out that this guy also said...that he knowingly aided and abetted [Lopez-Medine]." (Id at 17) After further discussion, the following exchange took place:

THE COURT: Let's see how it develops. My preliminary notion is that if the conviction comes in, that the government is probably entitled to introduce the rest of the – the important part of the plea agreement, but let's see how it develops. All right?