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# CRIMINAL WAIVER, PROCEDURAL DEFAULT AND THE BURGER COURT

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The Warren Court expanded both the scope and the availability of the constitutional protections that a criminal defendant (or prospective defendant) might claim. Side by side with such decisions as *Gideon* [1] and *Miranda* [2]—rulings that have to do with the content of constitutional rights—stand the cases that widened the door to federal review of constitutional claims in collateral proceedings: *Brown v. Allen;* [3] *Fay v. Noia;* [4] *Townsend v. Sain.*[5] Since an overwhelming proportion of criminal proceedings are initiated in state courts, since those courts, with some notable exceptions, have been less receptive than the federal courts to federal constitutional claims (a condition not likely to change dramatically) and since simple logistics limit the number of cases that the Supreme Court can effectively examine on direct review, the act of providing greater access to the lower federal courts through liberalization of federal habeas was a vital ingredient of the Warren Court's revolution in criminal procedure. Implementation of the Court's decisions would have been halting indeed had it depended solely on the enthusiasm of state court judges.

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1 Gideon v. Wainwright, 372 U.S. 335 (1963).

2 Miranda v. Arizona, 384 U.S. 436 (1966).

3 344 U.S. 443 (1953). *Brown* was decided some months prior to Chief Justice Warren's appointment to the bench. The case is treated here as belonging to the era of the Warren Court since its implementation became such an important part of that Court's business.

4 372 U.S. 391 (1963).

5 372 U.S. 293 (1963).

Although the Burger Court has been challenged in some quarters on the ground that it has cut back on the content of constitutional rights in the criminal area, perhaps the most serious questions arise from those of its decisions that bear on an individual's ability to guard against loss of an acknowledged right or his ability to assert it effectively.

This Article distinguishes between the content or scope of a constitutional right as it is judicially defined and the fulness of its availability in practice. "Rights" may go by the board because they are not known or understood, because they are not asserted or not asserted in a prescribed fashion or because, for one reason or another, they are deemed to have been relinquished. They may be lost by "waiver" or by default. The aim here is to examine developments in this area, particularly those of the recent past, and, also, to advance certain proposals.

## I. The Definitional Framework

The classic formulation of waiver of constitutional rights is that articulated by Mr. Justice Black, almost forty years ago, in *Johnson v. Zerbst*.[6] Drawing on earlier opinions, he stated that every reasonable presumption is against the loss of "fundamental" rights.[7] "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel [the right there at issue] must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." [8]

The standard, perhaps inevitably, left some unanswered questions. Which constitutional rights are to be deemed fundamental? If a waiver is "ordinarily" an intentional relinquishment of a known right, what conditions warrant an exception? How much knowledge and intelligence must an accused have in relation to the factual and legal implications of what he is doing before the waiver will be given effect? The last question would seem to depend on an analysis of several factors: the nature of the right relinquished; the mental competency of the accused; the extent of his knowledge and information; the setting in which the alleged abandonment of the right took place. Despite the inherent limitations of any general standard of waiver, the *Johnson v. Zerbst* formulation serves

[6] 304 U.S. 458 (1938).

[7] *Id.* 464.

[8] *Id.*

at least to focus attention upon two critical factors in the concept of waiver: first, he who "waives" must have a minimal degree of personal awareness (how much will depend on the context) of what is being relinquished; second, the relinquishment must be a matter of personal choice. In addition there is a third factor, implicit in *Johnson v. Zerbst* and made explicit, a few years later, in *Walker v. Johnston*:[9] the choice must be free from the influence of improper or coercive pressures.[10]

Although *Johnson v. Zerbst* is widely honored by citation, its precepts are frequently blurred or compromised in practice. As its author had occasion to comment, a generation later, the term "waiver" is vaguely employed "for a great variety of purposes, good and bad, in the law."[11] A major source of confusion is the failure to distinguish waiver from the concept of procedural default, which may be defined simply as the loss of a right through a failure by the accused or his representative to assert the claim in a prescribed manner or at a required time. The loss by procedural default may take place without personal participation by the individual whose right is at stake and it may be the result of unawareness or neglect rather than design.

Two contrasting examples may sharpen the point. In *Boykin v. Alabama*[12] the Court held that it was constitutional error for the trial judge to accept petitioner's plea of guilty without an affirmative showing on the record that his abandonment of the right to trial "was intelligent and voluntary"[13]—a clear application of the waiver principle.

Suppose, now, the case of a defendant who has gone to trial. The prosecution offers, without objection from defense counsel, hearsay that might have been challenged as a violation of the confrontation clause. The record is silent as to the reason for the failure to object. After the defendant is convicted he raises the point on appeal but fails because of the state's rule that objections of this character must be contemporaneously raised in the trial court or lost. The appellate court has applied a rule of procedural default.

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[9] 312 U.S. 275 (1941).

[10] *Id.* 286. An example of official pressure held to be coercive is Garrity v. New Jersey, 385 U.S. 493 (1967) (police officers threatened with removal if they failed to cooperate in attorney general's investigation of irregularities). *See also* Gardner v. Broderick, 392 U.S. 273 (1968); Lefkowitz v. Turley, 414 U.S. 70 (1973).

[11] Green v. United States, 355 U.S. 184, 191 (1957).

[12] 395 U.S. 238 (1969).

[13] *Id.* 242.

Both concepts may come into play in what is essentially the same case. The state court may apply a rule of procedural default to the accused's claim and a federal court, considering it on collateral attack, may apply a waiver standard—a result consistent with the proposition that, though the state may have a legitimate interest in its procedural rule, the question whether a federal constitutional right is to be vindicated is ultimately a question of federal law.[14]

Clarity of definition is important to analysis of two sets of issues: first, in determining whether a standard of procedural default or the higher waiver standard is appropriate to the subject matter at hand; second, in making a sound application of the governing principle—procedural default or waiver—to the particulars of the case.[15]

In the "guilty plea" case noted above there are impressive reasons for adopting the waiver standard. There is no question that the rights being abandoned—the totality of rights associated with the criminal trial—are of the most basic character. The defendant is not giving up a single privilege or prerogative that might affect the result; he is forfeiting the entire ball game. Moreover, the setting in which the plea is tendered—a formal proceeding before the judge—is one ideally suited to the kind of inquiry that the waiver principle dictates. Finally, it is difficult to perceive any legitimate societal interest in the acceptance of a plea that is the product of improper influence or misapprehension. Once it is decided that the waiver principle is appropriate to the situation, there remain those questions that have to do with its application, for example, the extent of the advice and explanation that the trial judge should be required to give, and the lines of inquiry he should be required to pursue, in order to satisfy himself that the defendant is making an uncoerced and informed choice.

Other factors play a role in the "hearsay" case; the question whether a waiver standard should be applied there is more doubtful. While the right of confrontation is fundamental in an adversary system, counsel may have foregone his objection for poor reasons or good ones. He may have been inattentive or incompetent. Or he may have concluded, for example, that an objection would merely give added emphasis to a matter that the prosecution

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[14] Brown v. Allen, 344 U.S. 443 (1953); Townsend v. Sain, 372 U.S. 293 (1963).

[15] The widespread failure of the courts to adhere to a consistent analysis of the waiver concept has been perceptively documented by Professor Dix. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193 (1977).

could prove equally well by other testimony if put to it. A trial, of course, is a shifting setting in which counsel is repeatedly obliged to make tactical decisions. Understandably, the judge may be loath to intervene. And for the judge to inquire at every stage whether the defendant understands and concurs in his lawyer's tactics would make the conduct of an effective trial inordinately difficult.[16] Moreover, a contemporaneous objection rule serves a salutary function: it brings possible error to the trial judge's attention; it gives him opportunity to explore the issue and, if necessary, take corrective measures on the spot; and it thus minimizes the likelihood of protracted litigation and the possible need for a retrial. The countervailing consideration is that where the lawyer had a *poor* reason for his failure to object to damaging testimony, a rule of preclusion penalizes the hapless client. Assuming that such a rule is adopted, other questions may remain: whether the rule, in its particulars, is reasonably tailored to the state's legitimate interest, whether it is uniformly applied, whether it has been fairly applied to the defendant.

Turning now to the foreground, in what directions has the Court been moving in choosing between the principles of waiver and default and in applying the respective standards?

## II. Waiver in Context

### A. *The Consent Search*

It is perhaps unkind, but not inaccurate, to say that in *Schneckloth v. Bustamonte*[17] the Court struck out on a path of maximum confusion. The facts of the case were simple. Local police officers stopped a vehicle for a traffic violation. They had no probable cause to search the vehicle but, upon request of the officers, one of the occupants acquiesced in an examination of the car trunk. The ensuing discovery of three checks led to a prosecution for possession of a check with intent to defraud. The Ninth Circuit, granting collateral relief following a state court conviction,[18] ruled that the search and seizure violated the fourth amendment unless there had

[16] The hypothetical case stated in the text illustrates, in simplified form, the tension between the value of judicial efficiency and the value of providing extraordinary latitude to defendants claiming constitutional error in criminal cases. It is precisely this conflict that divides the Court in the not too dissimilar situation presented in Wainwright v. Sykes, 97 S. Ct. 2497, 2506-08, 2521 (1977); *see* text accompanying notes 170-84 *infra*.

[17] 412 U.S. 218 (1973).

[18] Bustamonte v. Schneckloth, 448 F.2d 699 (9th Cir. 1971), *rev'd*, 412 U.S. 218 (1973).

been a valid consent; that in "many circumstances a reasonable person might read an officer's 'May I' as the courteous expression of a demand backed by force of law;" [19] and that the seized evidence was tainted because of the state's failure to show that the consenting party was aware of his right to withhold consent.

The Supreme Court, in an opinion by Justice Stewart, reversed with Justices Douglas, Brennan and Marshall dissenting. Agreeing that the constitutionality of the search depended on the validity of the consent,[20] the Court concluded that the "strict standard of waiver" enunciated in *Johnson v. Zerbst* need not be satisfied because Fourth Amendment protections "have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial." [21] The test in such cases, Justice Stewart stated, is "voluntariness." [22] That, the Court explained, "is a question of fact to be determined from [a totality] of all the circumstances." [23] The "state of the accused's mind, and the failure of the police to advise him of his rights were factors to be evaluated in assessing the 'voluntariness' of an accused's responses" but were not "in and of themselves determinative." [24] Moreover, the Court observed, "it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning." [25]

It would be comprehensible, albeit a grudging interpretation of the fourth amendment, to say that a search is reasonable whenever a suspect acquiesces without threat or intimidation (a view that would penalize those who were ignorant of their rights or too apprehensive to assert them). It would also be understandable, as well as more obviously in keeping with the underlying protective purposes of the fourth amendment, to say that a consent, to be meaningful, must be made with an awareness of the right of refusal.[26] To hold, however, that lack of awareness is relevant to a

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[19] *Id.* 701.

[20] Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973).

[21] *Id.* 242.

[22] *Id.* 248.

[23] *Id.* 249.

[24] *Id.* 227.

[25] *Id.* 231.

[26] Justice Stewart states, in support of his "voluntariness" standard, that a waiver standard would be inconsistent with cases that have approved third party consent, *id.* 245, such as Frazier v. Cupp, 394 U.S. 731 (1969) (authorization by defendant's cousin to search duffel bag shared with defendant). But that case, like United States v. Matlock, 415 U.S. 164 (1974), decided subsequent to *Schneckloth*, turns on the scope of the fourth amendment's protection—whether and in what circumstances one has a reasonable expectation of privacy with respect to property committed to joint ownership or control. *See* United States v. Miller, 425

determination of "voluntariness", but is not determinative, is to leave matters wholly in the air. Suppose the officer testifies that he exerted no coercion but the defendant states that he did not believe that he was free to withhold consent. What is the judge, believing both witnesses, to decide? By what scale does one balance the absence of coercion against the non-determinative lack of awareness?

The net of the decision, as a practical matter, is that one who gives leave to conduct what would otherwise be an unconstitutional search, and who does so only because he believes he has no effective choice in the matter, will probably be held to have relinquished his rights unless it appears that he was abused or is feebleminded. While the Court's sodden concept of "voluntariness" does not dictate the outcome, it invites the trier of the facts to rely simply on evidence that the police asked for permission and got it.

Since the Constitution does not elaborate the means by which the Bill of Rights is to be implemented, one must consider the nature of the right, the setting or stage in which it comes into play, the available means of effectuating the constitutional purpose, and the costs and benefits of adopting a particular procedure. When, however, the question is whether an undoubted constitutional right has been abandoned, it seems unexceptionable to say, as *Johnson v. Zerbst* held, that every reasonable measure should be adopted to safeguard the individual's capacity for choice and to avoid an uninformed or unintentional relinquishment.[27] The Court gives no plausible reason why that principle should apply any less to fourth amendment protections than to constitutional rights directly associated with a criminal trial. Certainly, from the accused's point of view, the search made in *Schneckloth* was no less critical than the trial that followed; in fact, without the search there would have been no trial.

Is it then true, as Justice Stewart declares, that it would be "thoroughly impractical" [28] to advise the subject of a proposed search, before eliciting his consent, that he has a right to refuse? The Justice points out that this kind of confrontation between policeman and citizen will ordinarily take place in an informal

U.S. 435 (1976) (no expectation of privacy over bank account records exists to support a fourth amendment claim challenging legality of subpoena duces tecum); Stoner v. California, 376 U.S. 483 (1964) (guest in hotel room entitled to constitutional protection against unreasonable searches, hotel clerk having no authority to permit police to search room).

[27] 304 U.S. at 465.

[28] Schneckloth v. Bustamonte, 412 U.S. 218, 231 (1973).

setting that is "a far cry from the structured atmosphere of a trial",[29] and concludes that the "detailed requirements of an effective warning" cannot be fit into the picture.[30] But how detailed need the warning be? No one would suggest that the policeman on patrol should be expected to undertake a refined exposition of fourth amendment law. Justice Marshall, in dissent, asks merely that the officer be required to advise the subject that he has a right to refuse and that a decision to refuse will be respected.[31] For many years, he observes, that has been the routine practice of the FBI.[32]

Can it be sensibly urged that this is beyond the competency of a law officer or too much to demand of him? Certainly, he is obliged to know that, save in certain exceptional circumstances, he cannot make a warrantless search. Presumably, it is the very knowledge of the constraints upon his authority that leads him to seek consent. What possible objection, then, to his advising the subject that he is not claiming lawful authority to search, that consent may be refused, and that a refusal will be respected? The suggested procedure would not only be of aid to the ignorant; it might also afford some sense of security to that large class of persons who have some awareness of their rights but are too apprehensive to demur to a request that might be thought to cloak an official demand.[33]

### B. *The Fifth Amendment Privilege*

The same reluctance to adopt the waiver standard is apparent in recent cases involving the fifth amendment privilege to withhold incriminatory information. While *Miranda*[34] has not been overruled, it has been closely confined to in-custody interrogation even where its logic would seem to carry beyond.

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[29] *Id.* 232.

[30] *Id.* 231.

[31] *Id.* 286.

[32] *Id.* 287.

[33] In the term following its *Schneckloth* decision, the Court denied review in United States v. Gentile, 493 F.2d 1404 (5th Cir.), *cert. denied,* 419 U.S. 979 (1974). Justice Douglas wrote a dissent from the denial in which Justice Marshall joined. The case involved the interrogation of petitioner following an arrest and a *Miranda* warning. While in custody he was presented with a consent-to-search form which he signed. The ensuing search implicated him in an offense other than that under investigation, and he was tried and convicted for that offense. Noting that the record was silent as to whether petitioner knew he had a right to refuse consent, Justice Douglas observed that "[w]hen a suspect is in custody the situation is in control of the police. The pace of events will not somehow deny them an opportunity to give a warning, as the Court apparently feared would happen in noncustodial settings." 419 U.S. at 981.

[34] 384 U.S. 436 (1966).

*Miranda,* to be sure, was directly addressed to the "inherently compelling pressures" [35] that may induce a person under investigation to abandon his privilege when he is held in custody or significantly deprived of his freedom of action.[36] To insure that the accused would know and understand his rights and to provide him some assurance that they would be respected, the Court prescribed in detail the familiar set of warnings to be given him.[37] It also made clear that a valid waiver was not to be presumed from silence, and that the burden of demonstrating that the warnings had been given and that there had been valid waiver rested with the prosecution.[38] Although the holding is limited to the accused's rights while under restraint,[39] it is fair to say that the opinion has a broader thrust: that, to the extent practicable, the ignorant and the weak, no less than the sophisticated and strong, should be enabled to protect themselves from the unwitting loss of the privilege.

It seems obvious, rather than far-fetched or radical, to conclude that the privilege is badly in need of some light and air if it is to survive in the backroom of the stationhouse. The furor that followed hard upon the decision can only be understood as a reflection of the heavy "law and order" psychology of the day. It is ironic that so much of that spirit was vented on *Miranda* since there was, from the beginning, reason to doubt that the Court's remedy, however well intentioned, would have great impact. If the atmosphere of the police station is inherently compelling, how often will the warnings be effective when administered by hostile officers bent on interrogation and proceeding in the absence of a neutral observer? How often, when there is a dispute whether the accused waived his rights and the resolution depends on a swearing contest between the officers and the accused, is the accused likely to prevail? To both questions, experience suggests that the answer is "not very." [40]

Nonetheless, the reaction to *Miranda* may have played a role in the apparent determination of the Burger Court to confine that decision. In all events, that has been the Court's course.

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[35] *Id.* 467.

[36] *Id.*

[37] *Id.* 478-79.

[38] *Id.* 475.

[39] *Id.* 444, 467.

[40] *See generally Interrogations in New Haven: The Impact of Miranda,* 76 YALE L.J. 1519 (1967); Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Study,* 29 U. PITT. L. REV. 1 (1967); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda,* 66 MICH. L. REV. 1347 (1968).

To be sure, *Miranda*'s approach is not adaptable—certainly not in unmodified form—to all of the many situations in which the privilege may be unwittingly lost. Thus, a witness in a civil case may unexpectedly respond to a question with information that proves incriminatory. Not surprisingly, in civil proceedings the courts have generally held that the privilege must be claimed or it will go by default,[41] although it should be noted that a sensitive judge will intervene and warn an uncounseled witness when he perceives imminent danger of self-incrimination.[42] To take another example, it would be too much to insist that the policeman on the street preface every inquiry, no matter how unfocused, by a warning.[43] The Court, however, has declined to apply the waiver prin-

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[41] In Garner v. United States, 424 U.S. 648 (1976), involving the government's use of incriminatory information provided in defendant's income tax return, the Court stated:

> Unless a witness objects, a government ordinarily may assume that its compulsory processes are not eliciting testimony that he deems to be incriminating. Only the witness knows whether the apparently innocent disclosure sought may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege. If, instead, he discloses the information sought, any incriminations properly are viewed as not compelled.

424 U.S. at 655. *See* United States v. Kordel, 397 U.S. 1, 7-10 (1970).

[42] United States v. Jorn, 400 U.S. 470 (1971), provides an instance of a trial judge's carrying his solicitude to excessive lengths. Convinced that certain witnesses called by the prosecution were likely to incriminate themselves and that they might lack an intelligent understanding of their situation, he declared a mistrial in order to afford them an opportunity to consult counsel. His failure to take the lesser step of ordering a continuance enabled the defendant to prevail on a claim of double jeopardy when reprosecution was instituted.

[43] Elaborating the difficulties of applying *Miranda* to questioning on the street, Professor La Fave has suggested that either it should be held totally inapplicable or applied in all instances where the subject is being questioned about his own conduct. La Fave, *"Street Encounters" and the Constitution:* Terry, Sibron, Peters, *and Beyond,* 67 MICH. L. REV. 39 (1968). In the absence of an arrest, the lower courts have generally concluded that questioning of a suspect outside the stationhouse is not governed by *Miranda. See, e.g.,* Allen v. United States, 390 F.2d 476 (D.C. Cir. 1968); United States v. Messina, 388 F.2d 393 (2d Cir.), *cert. denied,* 390 U.S. 1026 (1968). The Supreme Court's application of *Miranda* in Orozco v. Texas, 394 U.S. 324 (1969), where police officers entered petitioner's bedroom at 4:00 a.m. and proceeded immediately to question him, stressed the fact that petitioner was plainly deprived of his freedom of action. 394 U.S. at 325. Distinguishing *Orozco,* the Court concluded in Oregon v. Mathiason, 429 U.S. 492 (1977), that there was no deprivation of respondent's freedom of action, even though he was questioned at police headquarters behind closed doors, because he voluntarily appeared in response to a police officer's request and was immediately told that he was not under arrest. Justice Marshall's dissenting opinion reasons that, notwithstanding the advice that respondent was not under arrest, he may have felt constrained to remain. He argues further that, in any event, *Miranda* warnings were required because of the coercive elements present when one suspected of crime is questioned in private and unfamiliar surroundings by a police officer. Justices Brennan and Stevens dissented on the ground that the case should have been set for oral argument rather than decided summarily.

ciple to situations that are far from ambiguous and would readily lend themselves to safeguards.

A striking example is when a person suspected of crime is summoned before a grand jury to be interrogated by a prosecutor, the situation in *United States v. Mandujano*.[44] Suspected of being a dealer in drugs on the basis of information provided by an undercover agent, Mandujano was subpoenaed to testify. The prosecutor told him at the outset that he was required to answer all questions except those that might tend to incriminate him. He proceeded to answer questions concerning his knowledge of drug traffic and participation in it, and was subsequently indicted for perjury. The Fifth Circuit upheld a motion to suppress the grand jury testimony on the ground that Mandujano was "in the position of a virtual or putative defendant" [45] and should have received full *Miranda* warnings.

The Supreme Court reversed. All eight participating Justices were of the view, previously expressed by the Court in *Bryson v. United States*,[46] that even where the government may have exceeded its constitutional powers in making an inquiry, the subject may not with impunity adopt the course of answering fraudulently. "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." [47]

However, the plurality opinion by Chief Justice Burger, joined by Justices White, Powell and Rehnquist, goes well beyond this proposition.[48] The Chief Justice makes plain his view that *Miranda* should be confined to interrogation in custody.[49] Grand jury witnesses must claim privilege or lose it by default. If any warning of Mandujano was necessary—and he expressly refrains from stating that it was [50]—the warning given was sufficient. Moreover, no sixth amendment right to counsel attached because Mandujano was not under indictment.[51]

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[44] 425 U.S. 564 (1976).

[45] United States v. Mandujano, 496 F.2d 1050, 1052 (5th Cir. 1974), *rev'd*, 425 U.S. 564 (1976).

[46] 396 U.S. 64 (1969).

[47] *Id.* 72.

[48] Justice Brennan, joined by Justice Marshall, wrote an opinion concurring in the judgment on the *Bryson* rationale, but disagreeing with the other views expressed in the Chief Justice's opinion. Justices Stewart and Blackmun concurred in the judgment without reaching issues other than the *Bryson* point. Justice Stevens did not participate.

[49] United States v. Mandujano, 425 U.S. 564, 579 (1976).

[50] *Id.* 582 n.7.

[51] *Id.* 581.

Justice Brennan's opinion, on the other hand, argues that when the government calls before the grand jury a target of the investigation, very careful measures must be adopted to assure that any abandonment of the privilege is "intentional and intelligent." [52] "[A] waiver could readily be demonstrated by proof that the individual was warned prior to questioning that he is currently subject to possible criminal prosecution for the commission of a stated crime, that he has a constitutional right to refuse to answer any and all questions that may tend to incriminate him, and by record evidence that the individual understood the nature of his situation and privilege prior to giving testimony." [53] Pointing out that a prosecutor is in a position to defer indictment of one upon whom he has already focused and that the putative defendant is in need of professional skill if he is to avoid the intricate possibilities of waiver which surround the privilege,[54] he insists that the target witness be accorded opportunity to consult with counsel and be provided counsel if he is indigent.[55]

Certainly the case of a putative defendant like Mandujano is one in which the danger of incrimination is pointed. Far from being a situation in which the government, in pursuing an inquiry, might reasonably assume, absent an objection, that answers would not be incriminatory,[56] the government was actively seeking from Mandujano admissions of criminal activity. The purpose of the fifth amendment to provide a safeguard against inquisitorial techniques could hardly be more plainly implicated. The plurality opinion is doubtless correct in emphasizing that there is a dimension of threat in the isolated atmosphere of the stationhouse backroom that is not present in the grand jury room, where physical safety is at least secure. But there is surely no lack of compulsion in the grand jury room—not only the compulsion of the subpoena and the threat of contempt, but the heavy psychological pressures to which a witness is subject when, unaided by counsel, he faces a skilled and aggressive prosecutor. The Chief Justice's observation

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[52] *Id.* 598.

[53] *Id.* 600.

[54] A familiar example of the possibilities to which Justice Brennan refers is when a witness, having answered some questions, is told that it is too late to invoke privilege with respect to other questions relating to the subject matter. *See* Rogers v. United States, 340 U.S. 367, 373 (1951).

[55] United States v. Mandujano, 425 U.S. 564, 605 (1976).

[56] *Cf.* Garner v. United States, 424 U.S. 648 (1976) (where petitioner did not claim fifth amendment privilege before filing income tax returns, introduction of returns in evidence over petitioner's objection did not violate privilege against compulsory incrimination).

that it is the "historic function" of the grand jury to provide a "shield against arbitrary accusations" [57] cannot obscure the fact that the procedure is inquisitorial and invariably dominated by the prosecutor. In this setting, it is peculiarly important, if the suspect's constitutional rights are to be protected, that he have a clear understanding of the scope and limits of the privilege and its application to his situation.

To give an appropriate warning to a grand jury witness would impose no significant administrative burden. Nor can it be said that the further step of assuring the target witness some assistance by counsel would seriously interfere with the functioning of the institution.[58] The grand jury witness who has a retained lawyer can consult with him prior to appearing and he is commonly permitted further consultations outside the grand jury room during ongoing proceedings.[59] It is difficult to justify anything less for the target witness who happens to be indigent.

In *United States v. Washington,*[60] the Court revisited the issues explored in *Mandujano.* Respondent Washington, one of the targets of a grand jury investigation, was given a series of warnings after he was sworn. He was told that he had a right to remain silent, that he had a right to the assistance of a lawyer with whom he would be free to consult, and that if he wished to have a lawyer, but could not afford one, counsel would be provided. He declined assistance and proceeded to answer the questions put to him. Subsequently he was indicted for the offenses concerning which he was interrogated.

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[57] United States v. Mandujano, 425 U.S. 564, 573 (1976).

[58] With respect to assistance of counsel, Justice Brennan stated his position as follows:

> It may be that a putative defendant's Fifth Amendment privilege will be adequately preserved by a procedure whereby, in addition to warnings, he is told that he has a right to consult with an attorney prior to questioning, that if he cannot afford an attorney one will be appointed for him, that during the questioning he may have that attorney wait outside the grand jury room, and that he may at any and all times during questioning consult with the attorney prior to answering any question posed.

*Id.* 605. Some commentators, the Justice further notes, *id.* 605 n.22, have persuasively argued that counsel for grand jury witnesses should be permitted inside the grand jury room for the purpose of giving advice with respect to the testimonial privileges. *See, e.g.,* Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change,* 37 U. CIN. L. REV. 671, 701 (1968). At its 1977 convention, the American Bar Association endorsed this view.

[59] Justice Brennan's opinion cites some of the numerous reported instances in which that procedure has been followed. United States v. Mandujano, 425 U.S. 564, 606 n.23 (1976).

[60] 97 S. Ct. 1814 (1977).

The Superior Court of the District of Columbia suppressed his grand jury testimony and quashed the indictment on the ground that it did not sufficiently appear from the grand jury record that the defendant had knowingly and understandingly waived his privilege.[61] The District of Columbia Court of Appeals affirmed the suppression order, finding that the most significant failing of the prosecutor was in not advising Washington that he was a potential defendant.[62] Washington, it appears, was told that he was wanted as a witness against others.[63]

On the government's petition, the Supreme Court reversed, Justices Brennan and Marshall dissenting. The Chief Justice, speaking for the Court, again declined to decide "whether any Fifth Amendment warnings whatever are constitutionally required for grand jury witnesses." [64] That was unnecessary, he said, since warnings were in fact given.[65] He then stated that "[t]he test is whether, considering the totality of the circumstances, the free will of the witness was overborne," [66] citing *Rogers v. Richmond*,[67] a pre-*Miranda* confession case employing the traditional "voluntariness" test. The implication is that the privilege is lost if not asserted, unless there is evidence of overt coercion.[68]

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[61] United States v. Washington, 328 A.2d 98, 100 (D.C. 1974). It was held, however, that the dismissal of the indictment was error, even though without Washington's testimony there would have been insufficient evidence to sustain the indictment. *Id.* 100 (citing United States v. Blue, 384 U.S. 251, 255 (1966)). The Supreme Court declined to review this holding, Washington v. United States, 426 U.S. 905 (1976).

[62] United States v. Washington, 328 A.2d 98 (1974). It also stated that the prosecutor should have provided advice in advance of the witness' appearance in the grand jury room. *Id.* 100.

[63] *Id.*

[64] 97 S. Ct. at 1818.

[65] *Id.*

[66] *Id.* 1819.

[67] 365 U.S. 534, 544 (1961).

[68] Justice Brennan, in dissent, stated:

> I would hold that a failure to warn the witness that he is a potential defendant is fatal to an indictment of him when it is made unmistakably to appear, as here, that the grand jury inquiry became an investigation directed against the witness and was pursued with the purpose of compelling him to give self-incriminating testimony upon which to indict him. I would further hold that without such prior warning and the witness' subsequent voluntary waiver of his privilege, there is such gross encroachment upon the witness' privilege as to render worthless the values protected by it unless the self-incriminating testimony is unavailable to the Government for use at any trial brought pursuant to even a valid indictment.

97 S. Ct. at 1822 (Brennan, J., dissenting).

Although the setting is somewhat different, the Court's opinion in *Beckwith v. United States*[69] is in the same vein. There, the interrogation of petitioner was conducted in a private home where petitioner occasionally stayed and at his place of employment. The investigators were special agents of the Internal Revenue Service assigned to the Intelligence Division, and their avowed purpose was to determine whether Beckwith was guilty of criminal tax fraud. Beckwith was duly advised of the agents' authority to investigate criminal offenses, told that he might refuse to provide information that might tend to incriminate him, and informed that he might have the assistance of counsel. He stated that he understood, and proceeded to make substantial disclosures that led to his indictment. Prior to trial he moved unsuccessfully to suppress his statements and evidence derived therefrom, contending that the agents should have given him the full protections of *Miranda*.[70]

Sustaining the conviction, the Court was not content to rule that in the circumstances the warnings given were sufficient, that petitioner understood what he was about, and that the agents' conduct was unmarked by coercive tactics.[71] Rather, it stated that the question was whether petitioner's will was overborne by the law enforcement officials.[72] "Proof that some kind of warnings were given or that none were given would be relevant evidence only on the issue of whether the questioning was in fact coercive." [73]

On the facts of Beckwith's case, there were at least plausible grounds for concluding that he was not unduly influenced and that he was intelligently aware of his rights when he elected to cooperate with the agents.[74] It is quite another matter, however, to indicate that in situations of this type warnings are dispensable—a premise, incidentally, that the I.R.S. has itself discarded. Surely, when a law enforcement officer confronts the citizen and invokes his official authority to investigate the latter's conduct, significant pressures are brought to bear. That is enough to signal the likelihood that the constitutional privilege may be submerged.

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[69] 425 U.S. 341 (1976).

[70] *Id.* 343.

[71] Justice Marshall concurred in the judgment on the ground that in the circumstances the warnings given were sufficient. *Id.* 347-48. Justice Brennan dissented, arguing that *Miranda* should apply in full. *Id.* 349-51. Justice Stevens did not participate.

[72] 425 U.S. at 348 (citing Rogers v. Richmond, 365 U.S. 534, 544 (1961)).

[73] *Id.*

[74] Justice Brennan was of the view that "the practical compulsion" to respond to the agents' questions was such as to require full *Miranda* warnings. 425 U.S. at 349-50 (Brennan, J., dissenting).

Variant situations admit of different measures, as Justice Marshall pointed out in his *Schneckloth* dissent.[75] *Miranda* is no panacea and certainly not adaptable to all confrontations with authority. But it is not too much to insist upon such measures as are available and practicable to guard against unwitting loss of the privilege in the course of an official investigation. To apply a waiver principle in the police station and to opt elsewhere for a rule of default reflects scant regard for the fifth amendment's purposes. Not a few officials will read the Court's opinions to say, "You can't twist the suspect's arm, but if he ignorant, confused, apprehensive or unwary of consequences, so much the better." [76]

### C. *Guilty Pleas*

In 1969, as noted above, the Court ruled in *Boykin v. Alabama* [77] that the surrender of constitutional rights [78] by a plea of guilty must rest upon a valid waiver.[79] Referring to an earlier course of decision involving the right to counsel,[80] it stated that waiver might not be inferred from a silent record; the judge is bound to canvass the "matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences." [81] This, said Justice Douglas, "demands the utmost solicitude of which courts are capable." [82]

Several of the Court's later decisions, however, are difficult to reconcile with this declaration of principle. More broadly, it must be said that the Court's implementation of the objective has been weak and that we still lack a detailed set of requirements of the

[75] 412 U.S. at 282.

[76] Indeed, under the Court's recent ruling in Oregon v. Mathiason, 429 U.S. 492 (1977), questioning of a criminal suspect in the police station may proceed without warnings where the interogee appears upon request and is told that he is not under arrest. A less benign view of that procedure is that it amounts to a command performance on hostile turf.

[77] 395 U.S. 238 (1969).

[78] Justice Douglas' opinion refers specifically to the fifth amendment privilege, to the right of trial by jury and to the right of confrontation, all of which had previously been made applicable to the states. *Id.* 243.

[79] Earlier in the same term, the Court had ruled in a federal case that a guilty plea was invalid because of the failure of the trial judge to address the defendant personally and to ascertain that the plea was made voluntarily and with understanding of the charge. McCarthy v. United States, 394 U.S. 459 (1969). That decision, however, rested upon rule 11 of the Federal Rules of Criminal Procedure rather than the Constitution.

[80] *See* Carnley v. Cochran, 369 U.S. 506, 516 (1962).

[81] 395 U.S. at 244.

[82] *Id.* 243-44.

kind necessary to assure that "utmost solicitude" is in fact being exercised by trial judges.

The year after *Boykin* came the *Brady* trilogy.[83] Brady had pleaded guilty to a violation of the federal kidnapping statute [84] and sentenced to a long prison term. Subsequently, the Supreme Court decided *United States v. Jackson,*[85] holding the death penalty provision of the kidnapping law invalid because it permitted the imposition of a death sentence only upon a jury recommendation and thus made the risk of death the price of exercising the constitutional right to a jury trial. Thereupon, Brady sought relief under 28 U.S.C. Section 2255 on the ground that his plea was not voluntary because the penalty scheme of the statute had coerced it. The Court, per Justice White, pointed out that defendants often find it advantageous, for a variety of reasons, to plead guilty rather than go to trial. But even assuming "that Brady would not have pleaded guilty except for the death penalty provision", the Justice continued, he would not be entitled to relief.[86] *Jackson* "neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test theretofore fashioned by courts and since reiterated that guilty pleas are valid if both 'voluntary' and 'intelligent'." [87] If we accept the Court's conclusion that the plea was intelligent because Brady's counsel was not to be faulted for the failure to anticipate *Jackson,* it is nonetheless inordinately difficult, on the assumption that Brady was influenced to surrender his rights by threat of the death sentence, to fit that within a standard of voluntariness. Indeed, the sole basis of the *Jackson* holding was that the structure of the statute created a threat that was constitutionally intolerable. As stated by Justice Brennan, in opposition to the Court's reasoning, "Since the death penalty provision . . . remains void, those who resisted the pressures identified in *Jackson* and after a jury trial were sentenced to death receive relief, but those who succumbed to the same pressures and were induced to surrender their constitutional rights are left without any remedy at all." [88]

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[83] Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970).

[84] 18 U.S.C. § 1201(a) (Supp. V 1975).

[85] 390 U.S. 570 (1968).

[86] 397 U.S. at 750.

[87] *Id.* 747.

[88] *Id.* 807. Justice Brennan's separate opinion, in which Justices Douglas and Marshall joined, concurred in the *Brady* result on the ground that though "Brady

*McMann v. Richardson* [89] is of a piece with *Brady*. Defendant Richardson pleaded guilty at a time when New York's practice was to submit a confession to the jury without a prior determination by the judge of disputed issues going to voluntariness. After the subsequent ruling in *Jackson v. Denno* [90] that this procedure undercut the fifth amendment privilege, Richardson sought collateral relief alleging that his confession was in fact coerced and that it motivated his plea. Rejecting his claim, the Court stated that the vulnerability of the plea did not depend "on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." [91] Justice Brennan's observation in *Brady* applies here as well; if Richardson had pleaded not guilty and had been convicted after a trial in which his confession was submitted to the jury, his conviction would have been voidable under *Jackson v. Denno* since that decision was given retrospective application.

Three years later in *Tollett v. Henderson* [92] the Court relied on the *Brady* trilogy even though *Tollett* was a case in which the constitutional right at stake had been long established at the time the guilty plea was entered. In 1948, respondent Henderson was indicted for murder in Davidson County, Tennessee. On advice of counsel he pleaded guilty and was sentenced to 99 years. Years later he sought federal habeas on the ground that there had been systematic exclusion of Blacks from the indicting grand jury. This was undoubtedly true. The names of Blacks appearing on the lists from which the county's grand jurors were selected were specially designated and prior to 1948 none had ever been chosen to serve.[93] Counsel, it appeared, had never considered the point and, of course, had never advised Henderson of its availability as a ground for attacking the indictment.[94]

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was aware that he faced a possible death sentence, there is no evidence that this factor alone played a significant role in his decision to enter a guilty plea." *Id.* 815. The same three Justices dissented in the companion case of Parker v. North Carolina, 397 U.S. 790 (1970), involving a claim that a state statute similar in structure to the federal kidnapping provision had motivated the petitioner's guilty plea.

[89] 397 U.S. 759 (1970). Justice White again wrote for the Court. Justices Douglas, Brennan and Marshall were in dissent.

[90] 378 U.S. 368 (1964).

[91] 397 U.S. at 771.

[92] 411 U.S. 258 (1973).

[93] *Id.* 274 (Marshall, J., dissenting).

[94] *Id.* 260.

Justice Rehnquist's opinion for the Court [95] acknowledged that if the issue were cast solely in terms of waiver of the grand jury right, the lower federal courts were correct in granting Henderson relief.[96] He concluded, however, that if the accused, in tendering his plea, acted voluntarily and had advice of counsel that was within the normal range the habeas court should undertake no "inquiry into the merits of [the] claimed antecedent constitutional violations." [97] In short, the Court's view, as frankly stated in Henderson's case, now appears to be that constitutional rights "antecedent" to a plea of guilty are to be judged by a default standard: If counsel was mistaken or negligent, but not more than most of his brethren, the client loses.

If, as is evident, the Court is loath to reopen old guilty plea cases and disposed to place heavy reliance on the fact that the defendant was counseled when he pleaded, it becomes the more important that trial judges be required to act with "utmost solicitude" before accepting the plea. That means, among other things, making a reasonable effort to ascertain whether counsel in fact has done his job. Counsel may be ignorant of developments in the law; he may be careless; he may be more interested in the personal advantages he sees in a quick plea and a quick fee than in the pains of research, investigation and trial preparation.

The need for penetrating judicial supervision of what lies back of the guilty plea is underscored by the fact that plea bargaining has become the order of the day, with perhaps eighty percent of all criminal charges disposed of by pleas of nolo contendere or guilty.[98]

Plea bargaining, it should be observed, was officially encouraged by the *Brady* decision. Noting that Brady might have chosen to plead for various reasons other than fear of the death sentence, Justice White pointed out that numerous defendants tender pleas in the expectation or assurance that they will get a reduction in charges or a reduced sentence. This, he indicated, may be of benefit to the state and defendants alike.[99] Recognizing the possibility

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[95] Justice Marshall, joined by Justices Douglas and Brennan, dissented.

[96] 411 U.S. at 266.

[97] *Id.* The Court further explains that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Id.* 267. Once the chain is broken, the accused "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann.*" *Id.*

[98] *See* White, *A Proposal for Reform of the Plea Bargaining Process,* 119 U. PA. L. REV. 439 (1971); Note, *The Unconstitutionality of Plea Bargaining,* 83 HARV. L. REV. 1387 (1970).

[99] 397 U.S. at 752.

that an innocent defendant might be tempted to avoid the risks and burdens of trial by an offer of leniency, he expressed the belief that counsel and the courts might be relied upon to guard against that eventuality.[100]

The conceptual difficulty, however, goes deeper. The guilty defendant and the defendant whose innocence is questionable are also entitled to stand on their constitutional rights and to put the state to its proof without paying a price. If defendants who do so and suffer conviction incur greater penalties than those who successfully negotiate with the system, the former pay a price. Some plea bargaining, open or covert, is inevitable short of an insistence that guilty pleas be banned and that all legally sufficient charges be brought to trial. None of the Justices, however, has suggested that. On the contrary, they have concurred in the view that "[w]hatever might be the situation in an ideal world . . . the guilty plea and the often concomitant plea bargaining are important components of this country's criminal justice system." [101]

The question remains: What has the Court done—and what might it do—by way of assuring that the guilty plea is knowing and intelligent and, where it is the result of a bargain, that the dangers of misunderstanding and overreaching inherent in that process are minimized?

Despite the wealth of guilty pleas there have been few significant decisions by the Supreme Court in this area during the past several years.[102] In *Johnson v. Ohio*,[103] Justice Douglas, dissenting from a denial of certiorari,[104] deplored the Court's failure to grant review in cases in which the trial judge gave incomplete advice

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[100] *Id.* 757-58.

[101] The language is Justice Stewart's, speaking for the Court in Blackledge v. Allison, 97 S. Ct. 1621, 1627 (1977). Plea bargaining was also given explicit approval in Santobello v. New York, 404 U.S. 257, 260-61 (1971).

[102] Apart from the decisions discussed in the text, the following may be briefly noted. In Fontaine v. United States, 411 U.S. 213 (1973) (per curiam), the Court held that petitioner's allegations that his plea of guilty was induced by fear, coercive police tactics and physical and mental illness entitled him to an evidentiary hearing despite his statements, when he tendered the plea, that he was doing so knowingly and voluntarily. In Menna v. New York, 423 U.S. 61 (1975) (per curiam), the Court permitted the accused, following a plea of guilty, to attack his conviction on grounds of double jeopardy. Distinguishing constitutional violations antecedent to a plea that were not "logically inconsistent with the valid establishment of factual guilt," 423 U.S. at 62 n.2, it reasoned that Menna's case was one in which the State might not convict irrespective of his factual guilt. To similar effect, see Blackledge v. Perry, 417 U.S. 21 (1974).

[103] 419 U.S. 924 (1974).

[104] Justices Brennan and Marshall joined in the dissent.

concerning an accused's constitutional rights.[105] The Justice stated that "[s]ince the Court has now held that a guilty plea forecloses constitutional challenge to the process that brought the defendant to the bar . . . strict scrutiny over the standards for acceptance of the plea becomes all the more imperative." [106]

In *Henderson v. Morgan* [107] the Court did reach the merits and decide them in the accused's favor. Respondent Morgan, a retarded 19-year-old, had been charged with first degree murder. His attorney, having unsuccessfully sought a reduction of the murder charge to manslaughter, agreed with the prosecutor that Morgan would plead guilty to the lesser included offense of second degree murder. He did so and was sentenced to a term of 25 years to life. In subsequent collateral proceedings it became clear that neither counsel nor the court had advised Morgan that intent to kill was an element of second degree murder. Moreover, at the sentencing hearing, defense counsel, in explaining Morgan's version of the offense, stated that the accused had "meant no harm" to the victim.[108] Holding that the failure to explain to Morgan a "critical element" [109] of the offense precluded a finding that there had been an intelligent admission of guilt, the Court agreed that the conviction must be set aside.[110]

The opinion, however, is a narrow one, stating that "it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." [111] The concurring opinion also notes that the case was unusual in that the offense to which the defendant pleaded was not charged in the indictment and that its elements were not set forth in any document read to the defendant or to which he had access.[112]

Thus, the case may be as significant for its caveats as for its result. It indulges again the presumption that at least ordinarily counsel do an effective job of explaining, advising and representing.

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105 The trial judge had advised petitioner of her right to jury trial and to confront witnesses against her. He failed to advert to the privilege against self-incrimination, the necessity that one be found guilty beyond a reasonable doubt and the right to a speedy trial. 419 U.S. at 926.

106 *Id.*

107 426 U.S. 637 (1976).

108 *Id.* 643.

109 *Id.* 645.

110 Chief Justice Burger and Justice Rehnquist dissented.

111 426 U.S. at 647.

112 *Id.* 649 n.2.

At best that is a risky proposition. If our courts and judges encourage plea bargaining and guilty pleas, as indeed they have done, in order to save the criminal justice system the burden of innumerable trials, it is not too much to ask that a portion of those saved resources be devoted to careful scrutiny of what lies behind the plea. It is not enough that the trial judge catalogue the constitutional rights associated with the trial process and be satisfied that the accused understands the charge and its potential consequences. The judge should also be satisfied that there is a factual basis for the plea; [113] that defense counsel has appraised and investigated available defenses; and that the defendant's decision to plead is based upon adequate consultation and competent advice. All of these matters should be pursued in open court and on the record. In sum, the "utmost solicitude" mandated by *Boykin* should be held to embrace a requirement that the trial judge, before accepting a plea, determine that the accused has enjoyed his constitutional right to the *effective* assistance of counsel. One can understand the reluctance of courts to explore, years after the event, the question whether such assistance was in fact provided, even though one may disagree with their refusal to do so in particular cases. That, however, can hardly justify a failure to call for measures designed to flush out instances of ineffective assistance before acceptance of a guilty plea; on the contrary, it underscores the need to do so.

To be sure, there are limits to what a judge can accomplish even in a penetrating colloquy with counsel and the accused. He can, however, do much. He can acquaint himself with the elements of the case by calling upon the prosecutor to set forth in summary form the evidence appearing in the police report and in statements of witnesses. He can explore with defense counsel whether the latter has looked into any possible or apparent defects in the prosecution or violations of constitutional right, and whether he has investigated the availability of particular defenses. He can probe the defendant's knowledgeability and understanding of his situation. If unresolved questions exist or it appears for any rea-

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113 In a federal criminal case this is explicitly required by rule 11 of the Federal Rules of Criminal Procedure. In McCarthy v. United States, 394 U.S. 459 (1969), the Court had held, in an opinion by Chief Justice Warren, that, in the event a plea is accepted in violation of rule 11, a defendant shall be entitled to plead anew. It rejected the government's argument that it should still be allowed to prove that the defendant had in fact pleaded voluntarily and understandingly. Compliance with procedural safeguards, the Court observed, "will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate." *Id.* 472.

son that the defendant should consult further with his counsel, the judge can adjourn the proceedings.[114]

There is an added dimension when the plea is the result of a bargain. The recent case of *Blackledge v. Allison*[115] provides an apt illustration. Allison pleaded guilty in a North Carolina state court to attempted safe robbery, an offense carrying a penalty of ten years to life imprisonment. He received a sentence of seventeen to twenty-one years. Subsequently he sought federal habeas alleging that his lawyer had informed him that he had spoken to the prosecutor and the judge and had secured their agreement to a ten-year sentence. Responding to the petition, the state produced a printed questionnaire showing Allison's monosyllabic responses to questions read to him at the plea hearing. Specifically, the state relied on the fact that he had answered "no" to the question whether his plea had been influenced by threats or promises and "yes" to the question whether he understood that he might be sentenced to anything from ten years to life imprisonment. Allison's explanation was that he had given those answers because his counsel had instructed him to do so in order to get the plea accepted.

Stressing that guilty pleas are to be "accorded a great measure of finality"[116] and that statements to the judge may not ordinarily be repudiated, the Supreme Court nonetheless concluded that Allison's petition should not have been denied by the district court out of hand. It reasoned that the allegations of an unkept promise were specific;[117] that Allison's explanation of his answers was given

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[114] Some years ago, Professor Tigar urged that, at a minimum, a defendant tendering a guilty plea

> should be asked by the court whether he knows the elements of the offense with which he is charged and understands what the government would have to prove under the indictment. He should be asked how many conferences he has had with his lawyer and how long each conference lasted. He should be asked whether he has been shown a copy of the police report and any other prosecution evidence which might indicate the strength of the case against him. He should be asked if he knows what the trial would involve in terms of procedural rights, and he should be given a brief explanation of what those rights are and how they would operate. The judge should then question the lawyer carefully about the factors involved in pleading his client guilty, including the availability of legal defenses such as unlawful search, coerced confession, and sufficiency of the indictment.

Tigar, *Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 23 (1970). Individual judges may do as much but that is surely not the prevailing pattern.

[115] 97 S. Ct. 1621 (1977).

[116] *Id.* 1628.

[117] In Santobello v. New York, 404 U.S. 257 (1971), the Court, while expressly approving plea bargaining, had recognized that an unkept promise—in that instance, a promise by the prosecutor to make a sentencing recommendation to the judge—

some credence by the fact that it was the practice in North Carolina, when he tendered his plea, to conceal plea bargains; and that the record disclosed no exploration of Allison's actual understanding beyond that revealed by the "yes" and "no" answers to the form questions.

The opinion goes on to note with approval that North Carolina has since authorized plea bargaining and that its revised practice calls for open disclosure of all plea agreements between prosecutor and defense counsel and for a full verbatim transcript of the hearing on the plea. So much is certainly sound. Misinformation and misunderstanding thrive when the bargaining is covert. It is unfortunate, however, that the Court, having undertaken to discuss at some length the procedures that should attend plea bargaining, did not call for disclosure *by* the judge as well as disclosure *to* the judge. In many state courtrooms judges will respond to counsel's disclosure of a bargain by stating to the defendant, "Now, you understand that I am not bound by any agreement between counsel." The defendant is then left to guess whether this is merely the litany of judges or a signal of rejection. Fundamental fairness would seem to require, as the Federal Rules of Criminal Procedure now provide,[118] that the judge tell the defendant whether he is accepting or rejecting the struck bargain and, if he is rejecting it, that the defendant may withdraw his plea without prejudice.[119] Plea bargaining is not easy to accept in principle; it offers sentencing concessions for reasons unrelated to sentencing objectives and asks as a price the relinquishment of constitutional rights. If the device is nonetheless accepted for pragmatic reasons, it should be administered in a manner calculated to minimize the danger of unfairness to the bargaining defendant.[120] He who pays the price should be assured of his return; he should not be asked to buy a pig in the poke.

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was ground for relief. It left it to the state courts to decide on remand whether there should be specific performance of the agreement at a resentencing before a different judge or whether leave should be granted to withdraw the guilty plea.

118 FED. R. CRIM. P. 11 (amended 1975).

119 The rule also contains the salutary provision that the judge shall not participate in bargaining discussions between the prosecution and the defense.

120 This does not, of course, address the danger of unfairness to those defendants who do not choose to bargain—the likelihood that, if convicted, they will receive more substantial sentences than defendants who commit comparable offenses and plead guilty. That some judges are disposed to deal more heavily with defendants who have been convicted after a trial can hardly be doubted. Were it otherwise, plea bargaining would surely be less prevalent. On occasion judges have openly stated that they follow a policy of differential sentencing. *See, e.g.*, Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969).

## III. Federal Habeas and the New Procedural Default

By the time Chief Justice Warren left the bench in 1969 federal collateral review was broadly available to both state and federal prisoners. *Brown v. Allen*[121] had established that the merits of any federal constitutional claim bearing on the validity of the conviction could be reexamined in a federal habeas proceeding even though there had been a fair hearing on the issue in state court. A decade later, the Court ruled that, although a state court's findings as to the facts underlying a federal constitutional claim presented by a state prisoner were entitled to deference, re-examination would not be confined to "the 'exceptional circumstances' and 'vital flaw' tests" that had been enunciated in *Brown v. Allen*.[122] Rather, a habeas applicant would be entitled as of right to an evidentiary hearing in federal court if

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.[123]

The same year, the Court decided *Fay v. Noia*[124] in which respondent Noia sought federal habeas on a claim that his conviction in state court was vitiated by the introduction of a coerced confession. Noia had not appealed the conviction and his effort to secure collateral relief under the state's procedures had been held barred for that reason. Justice Brennan's opinion for the Supreme Court, departing from a prior line of cases,[125] held that "the doc-

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[121] 344 U.S. 443 (1953).

[122] Townsend v. Sain, 372 U.S. 293, 313 (1963).

[123] *Id.* The opinion states further that "[a]lthough the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law." *Id.* 318. The *Townsend* approach was substantially incorporated in the 1966 amendments to 28 U.S.C. § 2254 (1970). That provision accords presumptive correctness to a state court's factual findings evidenced by "adequate written indicia" but provides, albeit with some modifications, for a federal evidentiary hearing if it appears that there were deficiencies of the kind enumerated in *Townsend.*

[124] 372 U.S. 391 (1963).

[125] *See* Daniels v. Allen, 344 U.S. 443 (1953); *Ex parte* Spencer, 228 U.S. 652 (1913).

trine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review" does not "limit the power granted the federal courts under the federal habeas statute." [126] As a matter of comity the federal judge might exercise a "limited discretion" to deny relief to a defendant who had "deliberately by-passed" the state's procedures and thus forfeited its remedies.[127] However, deliberate by-pass, the Court emphasized, means waiver in the sense of *Johnson v. Zerbst*—a knowing, intelligent and uncoerced choice by the defendant himself not to raise the constitutional claim.[128]

This was somewhat qualified in *Henry v. Mississippi*,[129] in which Justice Brennan again wrote for the Court. Henry's lawyer had failed to make a fourth amendment objection to the prosecution's introduction of certain inculpatory evidence at trial. Raising the issue in the Mississippi Supreme Court, Henry ran afoul of the state's contemporaneous objection rule. Considering the case on direct review, the United States Supreme Court concluded that, although such a rule serves a legitimate interest, its purpose was substantially served when the objection was brought to the trial judge's attention by the defendant's motion for a directed verdict at the close of the state's evidence. Enforcement of the rule was therefore not essential and would not be considered an adequate state procedural ground barring direct review.[130] The opinion then considered the question whether the initial failure to object was a deliberate by-pass of the state's orderly procedures or an inadvertent failure of compliance. Justice Brennan concluded that the cause should be remanded for a determination of that issue. He stated:

> Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims . . . we think that the deliberate by-

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126 372 U.S. at 399. The Court also held the provision of 28 U.S.C. § 2254 that federal habeas shall not be granted unless it appears that the applicant has exhausted state remedies applicable only "to failure to exhaust state remedies still open" as of the time federal relief is sought. *Id.* 435.

127 *Id.* 438.

128 *Id.* 439. Although Noia's decision not to appeal was deliberate, the Court ruled that it was not an effective waiver because he was faced with a "grisly choice"; the trial judge had intimated that a retrial following an unsuccessful appeal might result in his imposing a death sentence. *Id.* 440.

129 379 U.S. 443 (1965).

130 *Id.* 447-50. *Fay v. Noia* had already held that state procedural default would not bar review on federal habeas. 372 U.S. at 398-99.

> passing by counsel of the contemporaneous objection rule as a part of trial strategy would have that effect in this case.[131]

Thus the opinion indicates that counsel's performance may in some circumstances cost the accused his constitutional claim despite the accused's unawareness of what is happening, i.e., when the matter arises in the midst of trial and counsel's response is presumed or found to be a deliberate tactic.[132]

Explaining his earlier position in a recent dissent, Justice Brennan says that "the ordinary procedural default is born of the inadvertence, negligence, inexperience, or incompetence of trial counsel." [133] *Fay*'s commitment, he adds, was "to enforcing intentional but not inadvertent procedural defaults. . . . The threatened creation of a more 'airtight system of forfeitures' would effectively deprive habeas petitioners of the opportunity for litigating their constitutional claims before any forum and would disparage the paramount importance of constitutional rights in our system of government." [134]

The combined effect of these decisions, then, was to impose upon the federal district courts, in the exercise of their habeas jurisdiction, a duty, subject to only narrow exception, to pass upon the validity of all federal constitutional claims presented by the applicant—a duty that entailed, in appropriate cases, the conduct of an evidentiary hearing. The Court was not unaware that relitigation involved costs and inefficiencies. Moreover, a state court's considered adjudication of the facts was to be accorded deference.

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[131] 379 U.S. at 451-52.

[132] Vexing questions may, of course, arise as to what is and what is not within the competence of counsel to decide on his own. *See* Brookhart v. Janis, 384 U.S. 1, 8-9 (1966) (separate opinion of Harlan, J.); Gibbons, *Waiver: The Quest for Functional Limitations on Habeas Corpus Jurisdiction*, 2 SETON HALL L. REV. 291, 301-9 (1971).

Whether counsel's failure to take a particular course of action was tactical or inadvertent may likewise be difficult to determine. When Henry's case was remanded, the Mississippi courts held that there had been a "waiver." Henry v. State, 198 So. 2d 213 (Miss. 1967); 202 So. 2d 40 (Miss. 1967). The Supreme Court denied certiorari "without prejudice to the bringing of a proceeding for relief in federal habeas corpus." Henry v. Mississippi, 392 U.S. 931, 931 (1968). On application for habeas, the district court ruled that "objecting to unconstitutionally acquired evidence at the wrong time and for the wrong purpose is not tantamount to waiver unless it was done as a matter of trial strategy, and there is an absence of evidence that such here occurred." Henry v. Williams, 299 F. Supp. 36, 49 (N.D. Miss. 1969). Considering the merits of the constitutional claim, the court ruled in Henry's favor and ordered his release.

[133] Wainwright v. Sykes, 97 S. Ct. 2497, 2515 (1977) (Brennan, J., dissenting).

[134] *Id.* 2519.

The opportunity to secure a determination of the federal right in a federal forum, however, was deemed a higher value than the interests associated with finality.

In a series of cases beginning in 1973 there has been a shift of major significance. The expression of the Court's changing attitude may be traced in four cases. Listed chronologically, they are *Davis v. United States,*[135] *Francis v. Henderson,*[136] *Stone v. Powell* [137] and *Wainwright v. Sykes.*[138] Three of the cases deal with procedural default and lead to the adoption of a standard sharply differentiated from Fay's "deliberate by-pass" test. The fourth, *Stone v. Powell,* involved prisoners who had properly pursued their state remedies but were nonetheless held not entitled to review of their constitutional claims on federal habeas. While the decision is explicable in large part as a reflection of the majority's skepticism concerning the value of the fourth amendment exculsionary rule, its radiations go beyond.

In Powell's case, the state courts, following a procedurally adequate hearing, rejected his fourth amendment claim. Subsequently, the Court of Appeals for the Ninth Circuit, on appeal from an application for collateral relief, sustained the claim as a matter of law.[139] Granting certiorari on the state's petition, the Supreme Court did not disagree with that ruling but concluded, three Justices dissenting, "that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." [140] The decision did not overrule *Mapp v. Ohio,*[141] although it expressed doubts as to the efficacy of the exclusionary rule there adopted. Rather, it determined that in this constitutional area a state court's considered determination ought not be disturbed on collateral review.

Justice Powell's opinion for the Court reasoned that a resort to federal habeas generally intrudes on important values, including

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[135] 411 U.S. 233 (1973).

[136] 425 U.S. 536 (1976).

[137] Decided together with Wolff v. Rice, 428 U.S. 465 (1976).

[138] 97 S. Ct. 2497 (1977).

[139] 507 F.2d 93 (9th Cir. 1974), *rev'd,* 428 U.S. 465 (1976). The companion case of Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1975), *rev'd,* 428 U.S. 465 (1976), had followed a similar course.

[140] 428 U.S. at 494. The opinion of the Court was written by Justice Powell. Justice Brennan wrote a dissent in which Justice Marshall joined. Justice White dissented separately.

[141] 367 U.S. 643 (1961).

"(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded." [142] These considerations carry especially heavy weight, he stated, where the issue, as in fourth amendment cases, does not go to innocence or guilt. Moreover, in this context the application of an exclusionary rule may have a consequence—precluding the conviction of a guilty defendant—disproportionate to the gravity of the constitutional breach. Assuming that the exclusionary principle may nonetheless be defensible as a means of discouraging violations of law by law enforcement officials and, more importantly, as a means of encouraging those who formulate law enforcement policies "to incorporate fourth amendment ideals into their value system," [143] the opinion stated that there is no "reason to assume that any specific disincentive already created by the risk of exclusion of evidence at trial or the reversal of convictions on direct review would be enhanced if there were the further risk that a conviction obtained in state court and affirmed on direct review might be overturned in collateral proceedings often occurring years after the incarceration of the defendant." [144] The Court noted that it was not holding that there is a lack of statutory jurisdiction to grant collateral relief in fourth amendment cases. Rather, it explains that the exclusionary rule is a judicially created remedy and that the state-conviction habeas statute, 28 U.S.C. Section 2254, permits an equitable discretion to withhold relief in circumstances where the Court concludes that the contribution of the remedy to fourth amendment purposes will be minimal.[145] The result is that for the first time since *Brown v. Allen,* almost a quarter of a century ago, state court adjudications of a class of federal constitutional claims have been given substantial immunity

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142 428 U.S. at 491 n.31, quoting from Justice Powell's concurring opinion in Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973).

143 *Id.* 492. The assumption is prefaced by the statement that there is a lack of "supportive empirical evidence." *Id.* The prognosis for Weeks v. United States, 232 U.S. 383 (1914), and Mapp v. Ohio, 367 U.S. 643 (1961), appears somewhat shaky.

144 428 U.S. at 493.

145 This rationale would appear to apply fully to federal criminal cases in which the defendant has already had opportunity to present his fourth amendment claim in a federal forum and thereafter seeks collateral relief under 28 U.S.C. § 2255. Although *Stone* rejected the holding of Kaufman v. United States, 394 U.S. 217 (1969), that such relief is available, only to "the extent [that] . . . *Kaufman* did not rely upon the supervisory role of this Court," 428 U.S. at 481 n.16, *Kaufman's* days are probably numbered.

from the exercise of federal habeas.[146] To the extent that the immunity is less than complete, the habeas applicant must establish that he was denied fair opportunity to secure the state's adjudication, a test considerably more demanding than *Fay*'s "deliberate by-pass" standard.[147]

The dissenters argued, *inter alia,* that the majority's approach was inconsistent with section 2254, not only because that section in terms provides broadly for relief to a state prisoner "in custody in violation of the Constitution," [148] but also because they regard the provision, in its present revised form, as approving, at least implicitly, the case law development from *Brown v. Allen* to *Townsend* and *Fay.*[149] Cutting off the federal forum, Justice Brennan contended, "plainly does violence to congressional power to frame the statutory contours of habeas jurisdiction." [150]

Although the effectiveness of the exclusionary rule as a deterrent is somewhat removed from this Article's concern with waiver and procedural default, perhaps it is not amiss to say something of Justice Powell's ready assumption that the intervention of the federal courts on habeas can contribute little, if anything, in that

[146] Under the Court's ruling, as noted above, the immunity is contingent upon the state courts having followed adequate procedures. Given that, it seems clear that both a state court's legal conclusions and its factual findings are "home free", barring only the unlikely event of direct review by the Supreme Court. Note that in Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1975), *rev'd,* 428 U.S. 465 (1976), the Eighth Circuit disagreed with the state court's legal conclusions *and* with critical findings of fact. It follows that 28 U.S.C. § 2254, insofar as it authorizes the habeas court to determine whether a state court's factual determinations are fairly supported by the record, is inapplicable to fourth amendment cases in which the state's procedures were adequate. The statute would appear to have continuing relevance insofar as its provisions bear on procedural fairness. Some of the problems the lower federal courts face in deciding whether a state court met the *Stone* standard of opportunity for full and fair litigation of the federal claim are illustrated by Gates v. Henderson, No. 76-2065 (2d Cir., filed Jan. 12, 1977), in which the defendant's fourth amendment contention was inartfully presented and was rejected by the state court for somewhat obscure reasons.

[147] It seems plain from *Stone* that a defendant whose lawyer failed to present his fourth amendment claim, or failed to present it in accordance with rules of procedure reasonably prescribed and enforced, had his opportunity even if the failure was not deliberate. Indeed, since *Stone* denies a federal habeas forum when defense counsel did his job and the state court erred, it would be anomalous to grant a federal forum as a reward for the defense's deficiency.

[148] That a state prisoner convicted on the basis of illegally obtained evidence is being held "in violation of the Constitution" necessarily follows from the proposition (to which the *Stone* Court adheres) that the Supreme Court may set aside the conviction in the exercise of its appellate jurisdiction.

[149] The revision was in 1966 and was substantially modeled on *Townsend v. Sain.* Neither *Townsend* nor section 2254 expressed any concept of procedural default, though both accorded a measure of deference to findings based upon an adequately developed record, thus inviting the states to adopt procedures that would provide plenary consideration of federal constitutional claims.

[150] 428 U.S. at 516 (footnote omitted).

direction. Liberalized habeas was predicated on the view, not without some foundation in experience, that state judges tended to be less sensitive to federal constitutional claims, lacked the independence shown by life-tenured federal judges, and were much more subject to local pressures pushing for conviction.[151] The prospect of re-examination of the federal claim in federal court was believed, in Justice Harlan's phrase, to provide an added incentive to the state court to "toe the constitutional mark." [152] This view is blandly discarded in *Stone* with the statement that "we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States." [153] Yet it seems to this author that no conscientious reader of the criminal law reports of the last fifteen years could seriously question that the federal courts have repeatedly shown themselves to be much more receptive to fourth amendment claims than most state courts, as was indeed the precise situation before the Court in both *Stone* and its companion case. If the state courts have become somewhat more attuned to such claims since *Mapp v. Ohio* was decided, surely that has been in large measure the result of the quasi-appellate review provided by the lower federal courts in innumerable cases.[154] That influence has now been

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[151] There are some recent indications that state court judges have shown increasing receptiveness to civil rights claims based on state law. See Comment, *Protecting Fundamental Rights in State Courts: Fitting a State Peg to a Federal Hole*, 12 HARV. C.R.-C.L. L. REV. 63, 87-88 n.119 (1977); Note, *Of Laboratories: State Court Protection of Political and Civil Rights*, 10 GA. L. REV. 533, 536 n.12-14 (1976).

[152] Mackey v. United States, 401 U.S. 667, 687 (1971).

[153] 428 U.S. at 493-94 n.35.

[154] The number of cases in which state prisoners have sought examination of fourth amendment claims on federal habeas is substantial. While figures for the district courts are lacking, some measure of this is provided by W. P. Murphy & K. L. Morrill, Analysis of Reported State Prisoner Habeas Corpus Opinions of the United States Courts of Appeals, 1969-1973 (August 9, 1974). The report was prepared for the Commission on Revision of the Federal Court Appellate System under the supervision of Professor Curtis R. Reitz of the University of Pennsylvania Law School; it is on file with the Commission and in the University of Pennsylvania Law School Library. The analysis covers 2,278 habeas corpus opinions of the ten numbered circuit courts handed down over the five-year period, July 1, 1968 through June 30, 1973 (Table I-1). The constitutional issues raised in these cases numbered 3,447 of which 342 were based upon the fourth amendment (Table III-2). The "success rate" of habeas applicants on fourth amendment issues was 18.51%. The four other issue categories most litigated were voluntariness of guilty plea (294 issues; success rate 9.46%); trial due process (356 issues; success rate, 18.27%); claims relating to the appointment or effectiveness of counsel (435 issues; success rate, 16.93%); claims relating to coerced confessions and unlawfully obtained statements (289, success rate, 20.93%) (Table III-16). The above figures, it should be cautioned, are based solely on appellate cases in which there was a reported opinion.

excised.[155]

*Stone*'s effect on procedural default was a by-product of the Court's determination to remove fourth amendment claims from the scope of habeas jurisdiction. Having decided that in that area it would cut out review of state court adjudications on the merits, the Court almost inevitably decided that the federal district courts would also be closed to one who had been deficient in presenting his claim within the state system. The three other cases noted above directly involve procedural default.[156] Moreover, the ruling in the most recent case, *Wainwright v. Sykes*,[157] extends to claims that, unlike fourth amendment claims, do bear on guilt or innocence.

The first of the cases was *Davis v. United States*,[158] in which the prisoner, proceeding under the federal-conviction habeas statute,[159] challenged his conviction. Davis' claim, presented neither at trial nor on appeal—allegedly, through an inadvertent default—, was that there had been unconstitutional discrimination in the composition of the grand jury that indicted him. Disposing of the case on statutory grounds, the Court ruled that he was properly excluded from relief because of his failure to comply with rule 12 (b) (2) of the Federal Rules of Criminal Procedure. That rule provides in pertinent part that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment . . . may be raised only by motion before trial," and that a failure to present the same "constitutes a waiver thereof, but the court for

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[155] It is true enough, as stated in the *Stone* opinion, that the decision on habeas is bound to be a delayed one. But even when a search and seizure is held invalid at trial or on direct review the impact on the offending officer is diluted by the passage of time. The exclusionary rule, though still tardier when effectuated on application for habeas, may have significant influence in two ways. First, as noted in the text, it is calculated to influence state courts in their disposition of similar issues in the future. Second, implementation of the rule may have a long-term influence on law enforcement officials at the policymaking and supervisory levels. Those officials have a continuing interest in not jeopardizing their cases, especially those cases that are serious enough to become prime candidates for collateral attack. This is not to deny that the exclusionary rule is an imperfect remedy and that achievement of its objectives depends on support from quarters outside the judiciary. It is to suggest, however, that such efficacy as it has is dependent to a considerable degree upon federal support of the federal right. Given the institutional constraints upon the Supreme Court, that support will be minimal in state cases now that factfinding and review by the lower federal courts have been excluded.

[156] *See* text accompanying notes 135-38 *supra*.

[157] 97 S. Ct. 2497 (1977).

[158] 411 U.S. 233 (1973).

[159] 28 U.S.C. § 2255 (1970).

cause shown may grant relief from a waiver." [160] Acknowledging that the rules "do not *ex proprio vigore* govern post-conviction proceedings," [161] the Court reasoned that it would "perversely negate the Rule's purpose [to permit] an entirely different but much more liberal requirement of waiver [the "deliberate by-pass" standard adopted in *Fay v. Noia* [162] and followed in *Kaufman v. United States* [163]] in federal habeas proceedings." [164] The Court concluded that, as on direct appeal, the applicant would be required to show "cause" for his failure of compliance with the rule and, additionally, that there had been some actual prejudice.

Justice Marshall's dissent [165] protested that the case was not fairly distinguishable from *Kaufman,* in which the Court had considered the applicant's fourth amendment claim on collateral attack without regard to rule 41 (e) (providing that a motion to suppress the use of evidence obtained in an unlawful search "shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion").[166] In the dissenters' view "the provision of federal collateral remedies rests . . . upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief." [167]

Three years later, in 1976, the Court revisited the *Davis* issue in the context of a state court conviction.[168] Petitioner Francis, convicted of felony murder in Louisiana, sought post-conviction relief, first in the state and subsequently in the federal courts, on his claim that the indicting grand jury had been discriminatorily selected. The state's response was that Francis, having failed to raise the issue in the original proceedings, was precluded by Louisiana's rule that such an objection must be raised before trial or

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[160] FED. R. CRIM. P. 12(b)(2) (1970) (amended 1974). The use of the term "waiver" in the rule is an example of the indiscriminate mixing of the concepts of procedural default and waiver.

[161] 411 U.S. at 241.

[162] 372 U.S. 391 (1963).

[163] 394 U.S. 217 (1969).

[164] 411 U.S. at 242.

[165] Justices Douglas and Brennan joined in the dissent.

[166] FED. R. CRIM. P. 41(e). The majority had leaned on the proposition that rule 12 contained an "express waiver provision." 411 U.S. at 239-40. The dissent argued that "[n]othing in the opinion of the Court suggests why the use of the word 'waiver' makes such a difference, so that *Kaufman* permits consideration of claims not made in the time set by rule 41(e) in a § 2255 proceeding, while claims not made in the time set by rule 12(b)(2) may not be considered." *Id.* 249.

[167] *Id.* 254.

[168] Francis v. Henderson, 425 U.S. 536 (1976) (Brennan, J., dissenting).

considered waived. The Supreme Court's holding was that, although the federal district court clearly had power to consider the claim under section 2254, relief should be denied for reasons of comity and the orderly administration of criminal justice, unless there was both a showing of "cause" and of "actual prejudice." [169]

The following term, in *Wainwright v. Sykes*,[170] the Court made clear that the substitution of the "cause and prejudice" standard for the "deliberate by-pass" test was not confined to claims addressed to the makeup of the grand jury. The constitutional claim asserted by respondent Sykes, convicted of murder in Florida's courts, was based upon the admission of an inculpatory statement made without benefit of *Miranda* warnings. There had been no contemporaneous objection as required by the state's rules of criminal procedure. The issue, a stated by the Supreme Court, was, "Shall the rule of *Francis v. Henderson* . . . barring federal habeas review absent a showing of 'cause' and 'prejudice' attendant to a state procedural waiver, be applied to a waived objection to the admission of a confession at trial?" [171] The answer was "yes."

The opinion of Justice Rehnquist emphasizes the values to which the Court adverted in *Stone v. Powell* [172] and in *Francis v. Henderson*: [173] the interests of comity and federalism; the promotion of efficiency and finality in criminal trials. A contemporaneous objection rule imposed by a "coordinate jurisdiction," he stated, "deserves greater respect than *Fay* gives it." [174] It reasonably requires the defense to bring its claims promptly to the attention of the trial judge for consideration and disposition while the matter is fresh. It provides assurance that the trial will be the "main event" rather than "a tryout on the road." [175] If the objection is sustained, the issue is laid to rest—a major "contribution to finality in criminal litigation." [176] If it is overruled and the defendant is

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[169] 425 U.S. at 542. Justice Brennan dissented, stating his adherence to "the holding of *Fay* and our other precedents establishing that, absent a deliberate bypass of state procedures, a procedural default cannot justify the withholding of habeas relief from a state prisoner who was convicted in derogation of his constitutional rights." *Id.* 547. He also questioned the meaning of the Court's requirement that there be a showing of "actual prejudice." How would a defendant demonstrate what would have been done by the grand jury that never was?

[170] 97 S. Ct. 2497 (1977).

[171] *Id.* 2506 (footnote omitted).

[172] 428 U.S. 465 (1976).

[173] 425 U.S. 536 (1976).

[174] 97 S. Ct. at 2507.

[175] *Id.* 2508.

[176] *Id.* 2507.

convicted, the federal habeas court "will gain significant guidance from the state ruling." [177]

Not unexpectedly, the dissenters' view is that the values protected by *Fay*'s approach have a higher priority.[178] To treat the "simple mistakes of attorneys . . . as binding forfeitures," Justice Brennan argues, is "to subordinate the fundamental rights contained in our constitutional charter to inadvertent defaults of rules promulgated by state agencies, and would essentially leave it to the States, through the enactment of procedure and the certification of the competence of local attorneys, to determine whether a habeas applicant will be permitted the access to the federal forum that is guaranteed him by Congress." [179] Moreover, to punish "a lawyer's unintentional errors by closing the federal courthouse door to his client is both a senseless and misdirected method of deterring the slighting of state rules." [180]

It would overstate the implications of the majority's decision to say that the concept of procedural default has obliterated the standard of waiver. Assuredly, there are areas in which the personal and understanding participation of the defendant will continue to be required before the constitutional right is deemed abandoned.

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[177] *Id.*

[178] Justice Brennan, joined by Justice Marshall, dissented. Justice Stevens, in concurring with the majority, expressed the view that, in light of other incriminating statements made by the accused, counsel could well have made a deliberate decision not to object to the statement later challenged on habeas. Justice White concurred in the judgment because in his view the facts warranted a finding of harmless error. He stated further, "[a]s long as there is acceptable cause for the defendant's not objecting to the evidence, there should not be shifted to him the burden of proving specific prejudice to the satisfaction of the habeas corpus judge." *Id.* 2512.

[179] *Id.* 2517 (footnote omitted).

[180] *Id.* 2520. He explains further:

> It is senseless because unplanned and unintentional action of any kind generally is not subject to deterrence; and, to the extent that it is hoped that a threatened sanction addressed to the defense will induce greater care and caution on the part of trial lawyers, thereby forestalling negligent conduct or error, the potential loss of all valuable state remedies would be sufficient to this end.

*Id.* (footnote omitted).

Since the state's remedy may be valuable and since its invocation in no event forecloses access to the federal remedy, *see* Brown v. Allen, 344 U.S. 443 (1953), Justice Brennan also disputes the suggestion in the majority opinion that *Fay v. Noia* invited "sandbagging", or surreptitiously holding back a constitutional claim with a view to presenting it later on collateral attack. The answer is persuasive. Diligent lawyers will not ordinarily hold back on a point that can be renewed, especially when waiting may mean that the client will do his waiting in jail. There is one situation, however, in which that could be thought advantageous—where the constitutional claim turns on disputed facts, where the trial judge is believed likely to be hostile to the claim, and where counsel considers that it might therefore be better to make the first record on that issue before a federal judge.

The most obvious examples are foregoing the right to counsel and giving up the right to trial by entry of a guilty plea. But it does appear, under the reasoning of *Wainwright* and *Francis,* that the preservation of a variety of constitutional claims and objections, both at trial and pre-trial stages, will be held to require counsel in criminal cases to toe the state's procedural mark on pain of losing both the state and federal forums. Since the constitutional objection in *Wainwright* went to the admissibility of a confession—a claim that is by any standard fundamental and guilt-related—it is evident that the new regime of procedural default occupies a large territory.[181]

It should be added that the meaning of the newly declared "cause and prejudice" standard is far from definitively settled. Indeed, the Court is at some pains to point out that, though the standard is "narrower" than *Fay*'s, the "precise content" of the terms "cause" and "prejudice" is being left to "later cases." [182]

This much, however, can be said. The Court apparently means the requirements of showing cause and prejudice to be cumulative rather than either/or requirements.[183] Moreover, the entire thrust of *Wainwright* signifies that a lawyer's ignorance, negligence, mistake or inadvertence will not avail the habeas applicant. Presumably, the habeas court will have to be satisfied that counsel's failure to preserve his client's position was for some excusable reason.[184]

So far as "prejudice" is concerned, the habeas court is again being given considerable impetus to turn the applicant aside. Since the Court had long since made clear that the federal courts need

[181] One would hardly expect, for example, that a due process objection based on inflammatory comments of the prosecutor or an objection based on the right of confrontation would fare better than the objection held to have been lost in *Wainwright.* The same would appear true of a failure to move for dismissal on the ground of a denial of speedy trial or a lack of contemporaneous objection to jury instructions that failed to articulate the beyond-a-reasonable-doubt standard of guilt. As to the latter issue, see Hankerson v. North Carolina, 97 S. Ct. 2339, 2345-46 n.8 (1977).

[182] *Id.* 2508. In *Wainwright* the Court found it unnecessary to define the terms since he "advanced no explanation whatever for his failure to object at trial" and the "other evidence of guilt . . . was substantial to a degree that would negate any possibility of actual prejudice." *Id.* 2508-09 (footnote omitted).

[183] The requirements are repeatedly set forth in the conjunctive. Perhaps, nonetheless, sufficient discretion is left to the habeas judge so that he may overlook the weakness of "cause" if the "prejudice" appears sufficiently strong. At one point the Court says that it thinks its "cause and prejudice" standard will not prevent the habeas court from correcting "a miscarriage of justice." *Id.* 2508. See note 187 *infra* as to the possibility of an ineffective-assistance-of-counsel claim.

[184] In a footnote the Court refers, with apparent approval, to Justice Powell's use of the term "inexcusable procedural default" in Estelle v. Williams, 425 U.S. 501, 513 n.13 (1976) (Powell, J., concurring). *Id.* 2507 n.13.

not address a harmless constitutional error,[185] the adoption of the new standard, particularly when viewed in the context of an opinion frankly solicitous of the interest in finality, obviously implies a greater latitude to withhold relief.

If one had high confidence in the skill and zeal of the American criminal bar there would be far less reason for concern that a tightening system of forfeitures is emerging. There is, however, little basis for such confidence. The Chief Justice, who has been a strong supporter of the tightening rules, has himself repeatedly deplored the ineptitude of many of our trial lawyers. Most criminal cases, moreover, involve indigent defendants. Doubtless, some of the defender organizations that have been established in the post-*Gideon*[186] era are performing services of commendable quality, but one would be rash indeed to suggest that state defender units are generally of a high order. Also, in many local jurisdictions indigent cases are assigned to private counsel with little or no compensation. Some of these counsel may extend themselves out of a sense of duty, but it would be foolish to ignore the fact that their economic incentive is to rid themselves of the obligation as quickly as feasible. The short of the matter, as responsible members of the bar know, is that the legal services performed for criminal defendants are at best a very mixed bag.[187]

## IV. Measures of Avoidance

As observed above, the move from the *Fay* to the *Wainwright* standard shifts the focus from the values served by a criterion of waiver to the values promoted by more rigorous enforcement of rules of procedural default—from a heavy concern with the protection of constitutional rights from unwitting loss to an increased concern with orderly administration and the conservation of judi-

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185 Chapman v. California, 386 U.S. 18 (1967).

186 Gideon v. Wainwright, 372 U.S. 335 (1963).

187 If trial counsel has inexcusably failed to raise a viable claim, the habeas applicant can always assert a denial of the constitutional right of effective assistance of counsel. A tightened system of forfeitures may well lead to an increase in such claims. Yet it seems plain that the *Wainwright* court, having erected the stricter requirement of "cause" in place of *Fay's* standard of deliberate by-pass, does not now propose to re-admit the newly excluded claims *en masse* through another portal. Justice Brennan notes in his *Wainwright* dissent that "most courts, this one included, traditionally have resisted any realistic inquiry into the competency of trial counsel." 97 S. Ct. at 2522-23 (footnote omitted). While this resistance is not likely to melt in the current climate, acceptance of an "ineffective assistance" claim would offer an escape hatch from the *Wainwright* rule in an egregious case, for example, where there was no excuse for the lawyer's default and the client suffered extreme prejudice.

cial resources. The conflict of views reflected in the cases is one of judicial philosophy and the currently prevailing view is not likely to change markedly without substantial change in the composition of the Court. Yet, pragmatic questions remain. What might the legal establishment do consistently with the new standard, to minimize the incidence of procedural default? If the federal courts are to give more bite to state rules by enforcing defaults, is it not meet to call upon the state to go some distance in alerting defendants and counsel to those rules and to take such other measures as may make unwitting default less likely? There are practicable means of reducing the risks to individual defendants who are threatened by a tightened scheme of forfeitures. What follows is designed to illustrate the point, not to exhaust the possibilities.

One means would be for the Court to insist, in appropriate cases, upon a greater exercise of care and initiative by the trial judge. A judge is not a mere arbiter. Within limits he has a protective role to perform. If a state trial judge might have readily avoided a default, but failed to do so, there is surely less reason to be deferential to state interests in orderly procedure. The facts of *Estelle v. Williams*[188]—though not the Court's disposition of the case—provide a good example.

Williams was charged in a Texas court with assault to commit murder. Unable to make bond, he was jailed pending trial. On the morning of trial he unsuccessfully requested jail officials to provide him with his civilian clothes so that he would not be obliged to appear before the jury in prison garb. No objection, however, was made to the trial judge. Counsel's explanation of this failure, given at the federal habeas hearing when Williams challenged his conviction, was that he thought objection would be futile because it was commonplace in the county to try non-bailed defendants in jail attire.[189] Reversing a Fifth Circuit decision favorable to Williams, the Supreme Court agreed that having a defendant appear before a jury in prison clothing creates a likelihood of serious prejudice. The Chief Justice's opinion for the Court concluded, however, that there is a violation of due process only if the unfavorable appearance is compelled.[190] On the record before it, the Court

188 425 U.S. 501 (1976).

189 It appears from the evidence at the habeas hearing that counsel may well have been wrong in his perception. Testimony was offered to show that it was the trial judge's practice to permit defendants to wear civilian clothing at trial when they requested it. *Id.* 510-11 & n.6.

190 Since the jail officials had balked Williams' effort to obtain his civilian clothing, the Court's obvious meaning is that there was no compulsion by the trial judge. Justice Brennan's dissent, joined by Justice Marshall, correctly points out

found no evidence of coercion and "no sufficient reason for the failure to raise the issue before trial." [191]

Putting aside the question whether the lawyer's lack of objection should have been judged by a "good excuse" rather than a "deliberate by-pass" standard, was there no responsibility on the judge's part to ascertain for himself whether the defendant before him wished to go to trial under conditions which, in the Court's own view of the matter, were apt to be seriously prejudicial? The Chief Justice denies this:

> Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system.[192]

The argument would have plausibility if the question were one of debatable trial tactics arising in the midst of trial, though even in such circumstances a brief sidebar conference will often avoid a problem. In Williams' case, his attire was noted when the process of selecting the jury began. To find out whether, contrary to the probabilities, the defendant wished to appear before the jury clad as a convict would have had no disturbing effects and would have required but a few moments. Texas judges, moreover, had been on notice for four years, when Williams was tried, that the Fifth Circuit regarded it as "inherently unfair to try a defendant for crime while garbed in his jail uniform." [193] Far from being a case in which judicial initiative would have been out of place or at odds with our legal system, the case appears to be one in which minimal sensitivity to the defendant's interests demanded it. If the Court is prepared, as it has indicated, to rewrite the standard of waiver in wide areas where it has previously been applied in order to give greater effect to state rules of procedural default, it is not too much to expect state judges to make a modest effort to avoid unintended defaults. Where the judge has fallen short of that, the argument for denying collateral relief out of solicitude for the state's interests is a feeble one.

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that the right to a fair trial does not depend on a showing that the judge acted coercively. The real question, in their view, was whether the lack of objection by counsel was fatal—a question they would have answered in the negative.

[191] 425 U.S. at 512 (footnote omitted).

[192] *Id.* 512.

[193] Brooks v. Texas, 381 F.2d 619, 624 (1967).

The likelihood of procedural default can also be minimized by specific, as opposed to constructive, forms of notice. In *Henry v. Mississippi,* the Supreme Court remanded with instructions to determine whether Henry's counsel had deliberately failed to make timely objection or had been unaware of the state's contemporaneous objection rule.[194] Had the rule been specifically brought to his attention it would have been obvious that the omission was not attributable to ignorance of the governing rule of practice. Rules relating to pre-trial motions and trial objections are ordinarily few in number and briefly stated. A routine procedure whereby copies of the pertinent rules are served upon the defendant and his counsel at or shortly after the time of indictment would be useful and relatively inexpensive. Some appellate courts now follow the practice of having the clerk of court issue to court-appointed counsel specific instructions concerning the court's practice. Instructions to all defense counsel at the trial level would serve a more critical need.

It may be said, however, that it is not the function of the federal courts to dictate to state tribunals how their rules shall be administered. This is true, of course, insofar as the rules do not impinge upon the assertion of a federal claim. But there is no question that the Supreme Court might condition non-exercise of federal habeas jurisdiction upon a showing that any procedural default under state law was preceded by specific notice of the pertinent state rule. Or, short of making that a fixed condition, the Court might rule that, in deciding whether there was "cause and prejudice" under the current federal standard, the federal courts shall take into account the specificity of notice that was provided within the state system.[195] Neither of these approaches would mark a return to the liberality of the "deliberate by-pass" standard; given requisite notice, the defense would be obliged to show that a default was excusable, not merely inadvertent. The merit of a requirement of specific notice would simply be that it would make unwitting default a less likely occurrence.

The principle of specific notice might be carried a step further: To require the prosecution to notify the defense, with appropriate particulars and within a brief specified time following indictment,

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194 *See* text accompanying notes 129-32 *supra.* The difficulties that may be involved in determining whether a by-pass was deliberate or inadvertent is indicated by the fact that in the subsequent proceedings in *Henry* the state and federal courts reached different conclusions.

195 *Cf.* Blackledge v. Allison, 97 S. Ct. 1621 (1977) (adequacy of state's exploration of voluntariness of bargained guilty plea).

whether any statements or admissions have been obtained from the defendant and whether any information pertaining to the charge has been acquired by any form of search or seizure, including electronic surveillance. The advantages of such a procedure are plain. Assertions of violation of fourth and fifth amendment rights are among the most common claims presented in post-conviction proceedings.[196] Those claims are frequently countered by an argument based on procedural default—an argument of more severe consequence now that federal habeas is no longer the "continuing . . . mechanism for relief" [197] that it was. The suggested measure would promptly signal the existence of any issue relating to illegally obtained evidence. Taken together with the procedure suggested above, whereby the defense would be given specific warning when and how motions to suppress or objections to evidence must be presented, it would make pointed the responsibilities of defense counsel and would tend to reduce the incidence of neglectful and unwitting defaults. Such a requirement of pre-trial notification by the prosecution is fairly comparable to the rule adopted in a number of states, and upheld by the Supreme Court, requiring the defense in a criminal case to give notice of an intended alibi defense.[198]

The Supreme Court could readily provide the impetus to adopt procedures of the kind indicated by qualifying the positions taken in *Stone v. Powell*[199] and *Wainwright v. Sykes*,[200] i.e., by ruling that "fair opportunity" (*Stone*) and "cause" (*Wainwright*) would be appraised in light of the procedures for specific notification adopted within the state system. Pending the possibility of that development, there is a need for the bar—particularly that segment of the bar engaged in the fashioning of standards and rules of practice and procedure—to seek more specific requirements of notice at the state and federal levels.[201]

## V. Conclusion

The concepts of waiver and procedural default serve different values. Waiver (as used herein) depends on personal participation and proceeds on the premise that the law should strive to guard

196 *See* note 154 *supra*.

197 Kaufman v. United States, 394 U.S. at 226.

198 *See* Williams v. Florida, 399 U.S. 78, 80-86 (1970).

199 428 U.S. 465 (1976).

200 97 S. Ct. 2497 (1977).

201 Judge Gibbons of the Third Circuit has stressed the point that the quality of notice is frequently critical to the sound exercise of federal habeas jurisdiction. Gibbons, *supra* note 132, at 307-10.

against the individual's inadvertent or uninformed loss of a valuable right. Procedural default may occur through the act or omission of the client or his representative and need not be advertent or informed. It reflects the law's concern with orderly administration—that claims be presented in a timely and efficient manner and disposed of with a modicum of finality.

The propriety of adopting the one standard or the other depends on a variety of factors: the nature of the right at stake; the stage or setting in which it is asserted; the costs and benefits attendant upon the choice made. As a guiding principle, however, it is sound to say that every reasonable measure should be adopted to safeguard the individual's capacity for choice and to avoid an uninformed or unintentional relinquishment of a protected right. Only when it is infeasible, or involves substantial costs to the functioning of the legal system, to ascertain whether the apparent abandonment of a protected right represents a knowing and intelligent choice by the individual affected should there be any occasion to balance the diminution in protection against the gain in efficiency.

On this view, the Burger Court has failed to adopt the waiver standard, or to implement it fully, in areas where its application is appropriate. Notable examples are the consent search, the questioning of criminal suspects in non-custodial settings and the administration of the guilty plea.

In the realm of federal habeas, the Court has reassessed the competing values represented by the waiver (or "deliberate bypass") standard and a strict system of forfeitures, opting for an approach that puts on the defendant the burden of establishing that there was "cause" for a procedural failure and resultant "prejudice." The shift is a marked one; how serious its impact will be upon poorly represented defendants (of whom there are many) will depend in considerable part upon the stringency with which the new requirement is defined and administered. In all events, it is submitted that the Court should condition non-exercise of the federal habeas jurisdiction upon the employment of strengthened measures to avoid procedural default in the first place. In some instances, this may be accomplished by the simple exercise of care and initiative on the part of the trial judge. In a variety of situations, the objective may be promoted by measures of specific notification, as opposed to reliance upon constructive notice. These procedural devices are relatively costless and give promise of minimizing the incidence of unwitting defaults; they can and should be developed by the bench and bar.