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POST-CONVICTION RELIEF IN MISSOURI— FIVE YEARS UNDER AMENDED RULE 27.26

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I. INTRODUCTION

On January 9, 1967, this court adopted a revised S. Ct. Rule 27.26. The effective date of the revised rule is September 1, 1967. . . . The amended rule was adopted after considerable study and is intended to provide a post-conviction procedure in accord with the principles enunciated in the so-called trilogy of *Sanders v. United States*, 373 U.S. 1, . . . *Fay v. Noia*, 372 U.S. 391, . . . and *Townsend v. Sain*, 372 U.S. 293. . . . Further in keeping with the teachings of the trilogy, the amended rule is designed to discover and adjudicate all claims for relief in one application and avoid successive motions by requiring motions to be in questionnaire form and by providing for the appointment of counsel if the motion presents questions of law or issues of fact and the movant is shown to be indigent. . . .¹

Thus did the Supreme Court of Missouri introduce a new era of post-conviction relief under a "radically amended"² rule 27.26.³ Even before it went

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1. *State v. Stidham*, 415 S.W.2d 297, 298 (Mo. En Banc 1967).

2. *State v. Maxwell*, 411 S.W.2d 237, 240 (Mo. 1967).

3. Prior to September 1, 1967, Missouri Supreme Court Rule 27.26 consisted of a single paragraph:

A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this State or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside or correct the same. Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the prosecuting attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and con-

into effect, the amended rule was described in *Garton v. Swenson*⁴ as "the most enlightened postconviction procedure of any state,"⁵ and the Supreme Court of Missouri was given "the highest commendation for again demonstrating its traditional position of leadership in the field of judicial administration."⁶

Because the amended rule was designed to discover and adjudicate all claims for relief in one application in order to avoid successive post-conviction motions, the supreme court may not have anticipated a very substantial increase in its appellate caseload as a result of amending the rule.⁷ In 1966, the year before the amended rule went into effect, the supreme court handed down 26 opinions in rule 27.26 appeals. In five years after September 1, 1967, however, counting all decisions prior to January 1, 1973, the supreme court handed down a staggering total of 325 opinions in rule 27.26 appeals,⁸ an average of about 60 opinions per year. The opinion

clusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner. An order sustaining or overruling a motion filed under the provisions of this Rule shall be deemed a final judgment within the purview of Rules 28.03 and 28.04.

Mo. SUP. CT. R. 27.26, RSMo 1959.

4. 266 F. Supp. 726 (W.D. Mo. 1967).

5. *Id.* at 728.

6. *Id.*

7. The court may have anticipated a substantial decrease in the filing of "nuisance" applications for post-conviction relief. The author served as co-counsel for an indigent 27.26 movant who filed 16 pro se petitions and motions in the supreme court alone before he finally received an evidentiary hearing and took an appeal under amended rule 27.26. Starting soon after his murder conviction in 1949, he also filed 11 petitions and motions in the trial court seeking post-conviction relief, and 6 petitions for habeas corpus in the federal courts. Until 1968, when the supreme court applied the principles of amended rule 27.26, most of his petitions and motions were denied without a hearing for failure to state a claim upon which relief could be granted or because the matters that he sought to raise had previously been ruled upon without a hearing. One plenary 27.26 evidentiary hearing soon after conviction, with adequate counsel, might have resulted in finality in the conviction at least 20 years before it was finally achieved and the saving of untold days of judicial time wasted in considering pro se applications for relief. *Mahurin v. State*, 477 S.W.2d 33 (Mo. En Banc 1972).

8. The caseload, broken down into years following September 1, 1967, was as follows:

1967-1968	.....	14	opinions
1968-1969	.....	59	opinions
1969-1970	.....	57	opinions
1970-1971	.....	76	opinions
1971-1972	.....	82	opinions
Sept. 1, 1972 to end of 1972	.....	37	opinions

325 opinions

The 73 opinions that the supreme court handed down in 1972 were all in appeals

rate rose to 82 per year in the last 4 months of 1971 and the first 8 months of 1972. Fortunately, under the judicial amendment to the constitution effective January 1, 1972,⁹ most of the rule 27.26 appeals are now being distributed among the geographical divisions of the court of appeals.¹⁰

Although the supreme court has been very busy in the past 5 years writing rule 27.26 opinions, it has granted little relief. In 37 of the 325 appeals, it granted some type of relief. The "relief" in 20 of the appeals was limited to a remand for further proceedings, usually an evidentiary hearing.¹¹ In 17 appeals the supreme court ruled that the case required major relief. The state obtained major relief in 4 appeals;¹² therefore, 27.26 movants obtained major relief in only 13 cases.

In no case did the supreme court hold that the movant was entitled to be released from custody after the judgment was vacated and set aside. In 2 cases it vacated the conviction and ordered a new trial.¹³ In 8 cases involving attacks on pleas of guilty, it permitted the movants to withdraw their pleas.¹⁴ In the 3 other cases in which the supreme court

pending prior to January 1, 1972, the effective date of the judicial amendment to article V of the Missouri Constitution, which was amended at a special election held August 4, 1970. Mo. CONST. art. V, § 31 (4). A substantial backlog of such appeals still exists. The Clerk of the Missouri Supreme Court reported that on January 1, 1973, 111 rule 27.26 appeals with transcripts were still pending. Thus, another year or two will pass before the court decides all the backlog cases. Telephone conversation with Thomas F. Simon, Clerk of the Missouri Supreme Court, Feb. 16, 1973.

9. Mo. CONST. art. V, § 31 (4).

10. The leading case on the present jurisdiction of the supreme court in 27.26 cases and criminal appeals is *Garrett v. State*, 481 S.W.2d 225 (Mo. En Banc 1972). Unless a 27.26 case involves "the construction of the Constitution of the United States or of this state," or a crime "punishable by a sentence of death or life imprisonment," the court of appeals has jurisdiction. Mo. CONST. art. V, § 3. Apparently, constitutional issues governed by "well-established principles" do not involve the construction of the constitution, and the phrase "punishable by . . . death or life imprisonment" embraces "only those offenses having as alternative punishments life imprisonment or death." *Garrett v. State*, 481 S.W.2d 225, 226-27 (Mo. En Banc 1972). In light of *Furman v. Georgia*, 408 U.S. 238 (1972), the supreme court could find that it has no exclusive jurisdiction in "capital" cases, because there are none under current Missouri law.

11. *E.g.*, *Noble v. State*, 477 S.W.2d 417 (Mo. 1972); *Warren v. State*, 473 S.W.2d 427 (Mo. 1971); *Thomas v. State*, 465 S.W.2d 513 (Mo. 1971); *State v. Rose*, 440 S.W.2d 441 (Mo. 1969); *State v. Brown*, 436 S.W.2d 724 (Mo. 1969); *State v. Gerberding*, 433 S.W.2d 820 (Mo. 1968); *State v. Sayre*, 420 S.W.2d 303 (Mo. 1967).

12. *Winford v. State*, 485 S.W.2d 43 (Mo. En Banc 1972); *Hulett v. State*, 468 S.W.2d 636 (Mo. 1971) (trial court without authority to amend sentence); *State v. Frey*, 441 S.W.2d 11 (Mo. 1969) (erroneous discharge of movant entitled to appeal conviction); *State v. Todd*, 433 S.W.2d 550 (Mo. 1968) (attack on action of Department of Corrections rather than judgment).

13. *Bullington v. State*, 459 S.W.2d 334 (Mo. 1970); *Montgomery v. State*, 454 S.W.2d 571 (Mo. 1970). Both cases involved allegations of lack of jurisdiction. In the *Montgomery* case the court had no jurisdiction because there was no information on file. In *Bullington* the indictment was insufficient to charge the crime established.

14. *Morris v. State*, 482 S.W.2d 459 (Mo. 1972); *State v. Reese*, 481 S.W.2d 497 (Mo. En Banc 1972); *Williams v. State* 473 S.W.2d 97 (Mo. 1971); *Doepke v.*

granted major relief, the movants obtained something less than a new trial or an opportunity to plead not guilty and to stand trial.¹⁵

Considering how infrequently the supreme court grants relief after Missouri trial courts have denied 27.26 motions, it may seem surprising that so many prisoners continue to appeal. Perhaps the primary reason for appeal is the hope of obtaining federal habeas corpus relief after the prisoner has exhausted his Missouri post-conviction remedies, which include a 27.26 appeal.¹⁶ Here again, however, the chance of obtaining substantial relief is slight. The federal courts wrote opinions in 44 of the 312 cases in which the supreme court granted no major 27.26 relief. Many more federal petitions for habeas corpus are denied without published opinions, so that a much higher proportion of the 312 cases probably reached the federal courts. Federal courts granted habeas corpus relief in only 8 of the 44 cases in which opinions were published. In 4 of these cases the ultimate "relief" may have been an evidentiary hearing to determine whether a new trial¹⁷ or resentencing¹⁸ would be necessary. However, the granting of federal habeas corpus probably resulted in new trials in 2 cases¹⁹ and in an opportunity to plead not guilty and to stand trial in 2 others.²⁰

State, 465 S.W.2d 507 (Mo. 1971); *Burrell v. State*, 461 S.W.2d 738 (Mo. 1971); *State v. Reese*, 457 S.W.2d 713 (Mo. 1970); *Morris v. State*, 456 S.W.2d 289 (Mo. 1970); *State v. Arnold*, 419 S.W.2d 59 (Mo. 1967). A movant seeking to withdraw his plea should file a combined motion under rules 27.25 and 27.26 to set aside the sentence and judgment and to withdraw his plea of guilty.

15. In *Ball v. State*, 479 S.W.2d 486 (Mo. 1972), the supreme court set aside the judgment and sentence so that the movant could file a motion for a new trial with the assistance of counsel. In *State v. Dixon*, 434 S.W.2d 564 (Mo. 1968), the supreme court set aside the judgment and sentence and ordered the trial court to consider further evidence on the applicability of the habitual criminal statute. The trial court was without jurisdiction to impose sentence until it determined this issue, because the defendant was entitled to jury sentencing and a new trial if he had not previously been convicted and sentenced. In *State v. Garner*, 432 S.W.2d 259 (Mo. 1968), the supreme court set aside the sentence and judgment because of a defective information even though the movant's sentence had been commuted and served before it decided the appeal.

16. Four of the 27.26 movants who later petitioned for federal habeas corpus had their petitions dismissed for failure to exhaust available state remedies. *Larson v. Swenson*, 425 F.2d 1076 (8th Cir. 1970); *Williams v. State*, 317 F. Supp. 338 (W.D. Mo. 1970) (had not appealed to highest state court); *Holland v. Swenson*, 305 F. Supp. 1093 (W.D. Mo. 1969); *Fritz v. Swenson*, 287 F. Supp. 707 (W.D. Mo. 1968). Most "exhaustion" dismissals do not result in published opinions.

17. *Renfro v. Swenson*, 315 F. Supp. 733 (W.D. Mo. 1970); *Gray v. Swenson*, 302 F. Supp. 1162 (W.D. Mo. 1969), *aff'd*, 430 F.2d 9 (8th Cir. 1970); *White v. Swenson*, 301 F. Supp. 447 (W.D. Mo. 1969).

18. *Garrett v. Swenson*, 459 F.2d 464 (8th Cir. 1972).

19. *Spidle v. Swenson*, 313 F. Supp. 203 (W.D. Mo. 1970) (double jeopardy); *Brizendine v. Swenson*, 302 F. Supp. 1011 (W.D. Mo. 1969) (failure to conduct hearing on competency, counsel ineffective).

20. *Pedicord v. Swenson*, 431 F.2d 92 (8th Cir. 1970) (involuntary plea of guilty); *Turley v. Swenson*, 314 F. Supp. 1304 (W.D. Mo. 1970) (involuntary plea, no waiver of right to effective counsel).

II. STANDARDS RELATING TO POST-CONVICTION REMEDIES

Since 1967, the year the Missouri Supreme Court amended rule 27.26, the American Bar Association Project on Minimum Standards for Criminal Justice has prepared an excellent set of Standards Relating to Post-Conviction Remedies²¹ that merit consideration. Although amended rule 27.26 was clearly an "enlightened postconviction procedure"²² in 1967, in many respects it fails to conform to the ABA Standards Relating to Post-Conviction Remedies.²³

Section 2.1 of the ABA Standards,²⁴ entitled "Grounds for Relief," is relevant to the following review of decisions under amended rule 27.26. Although rule 27.26 defines broadly the Missouri grounds for post-conviction relief, the supreme court has not literally followed the language of the rule in all cases; the scope of relief available is narrower than that recom-

21. ABA STANDARDS RELATING TO POST-CONVICTION REMEDIES (Approved Draft, 1968). The ABA House of Delegates approved these standards in February, 1968.

22. See note 5 and accompanying text *supra*.

23. R. POPPER & J. SCURLOCK, COMPARATIVE ANALYSIS OF AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE WITH MISSOURI LAW, RULES AND LEGAL PRACTICE 99-114 (1971). The authors compare 14 different sets of ABA Standards for Criminal Justice with Missouri law and practice.

24. ABA STANDARDS RELATING TO POST-CONVICTION REMEDIES § 2.1 (Approved Draft, 1968) recommends:

A post-conviction remedy ought to be sufficiently broad to provide relief

(a) for meritorious claims challenging judgments of conviction, including claims:

(i) that the conviction was obtained or sentence imposed in violation of the Constitution of the United States or the constitution or laws of the state in which the judgment was rendered;

(ii) that the applicant was convicted under a statute that is in violation of the Constitution of the United States or the constitution of the state in which judgment was rendered, or that the conduct for which the applicant was prosecuted is constitutionally protected;

(iii) that the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter;

(iv) that the sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;

(v) that there exists evidence of material facts, not theretofore presented and heard, which require vacation of the conviction or sentence in the interest of justice;

(vi) that there has been a significant change in law, whether substantive or procedural, applied in the process leading to applicant's conviction or sentence, where sufficient reasons exist to allow retroactive application of the changed legal standard;

(vii) on grounds otherwise properly the basis for collateral attack upon a criminal judgment:

(b) for meritorious claims challenging the legality of custody or restraint based upon a judgment of conviction, including claims that a sentence has been fully served or that there has been unlawful revocation of parole or probation or conditional release.

mended by section 2.1 of the ABA Standards.²⁵ Thus any practitioner or law student²⁶ preparing a 27.26 motion, or assisting a prisoner to amend his motion,²⁷ must be familiar with the grounds for relief that the Missouri case law permits. In addition, he should understand how difficult it usually is to prove that a basis for relief exists.

III. PROBLEM AREAS UNDER AMENDED RULE 27.26

A. Attacks on Guilty Pleas

The most frequent complaint in 27.26 motions has been that the plea of guilty was involuntary. Prisoners made this complaint, based on a wide variety of circumstances surrounding guilty pleas, in 143 of the 325 appeals that the supreme court decided in the past 5 years. However, the supreme court granted major relief, in the form of leave to withdraw the guilty plea, in only 7 of the 143 appeals.²⁸

25. Mo. Sup. Ct. R. 27.26 provides, in language identical to former rule 27.26 (note 3 *supra*):

A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this State or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside or correct the same. . . . (emphasis added).

The supreme court could interpret the emphasized language to cover most grounds delineated in ABA STANDARDS, *supra* note 24, § 2.1. R. POPPER & J. SCURLOCK, *supra* note 23, at 100. In view of the cases limiting the scope of rule 27.26, however, the supreme court should consider including more specific descriptions of certain categories of relief if it amends the rule again. A suggested formulation, containing 13 categories, is found in 2 HARV. J. LEGIS. 189-90 (1965). This would not only aid movants and practitioners preparing 27.26 motions, but it would also help to minimize the number of appeals involving questions of the scope of the remedy.

26. The University of Missouri-Columbia School of Law sends students to the state penitentiary in Jefferson City to work in a legal aid clinic sponsored by the Missouri Department of Corrections. Under the direction of a supervising attorney, law students spend much of their time assisting indigent inmates in preparing motions for post-conviction relief under rule 27.26. The law school provides training in the civil and criminal law areas relevant to problems of prisoners. The program is funded by a grant from the Missouri Law Enforcement Assistance Council.

27. Mo. Sup. Ct. R. 27.26 (h) provides:

If a motion presents questions of law or issues of fact, the court shall appoint counsel immediately to assist the prisoner if he is an indigent person. Counsel shall be given a reasonable time to confer with the prisoner and to amend the motion filed hereunder if desired. Counsel shall have the duty to ascertain from the prisoner whether he has included all grounds known to the prisoner as a basis for attacking the judgment and sentence and to amend the motion to include any claims not already included. . . .

28. Cases cited note 14 *supra*, except *Morris v. State*, 456 S.W.2d 289 (Mo. 1970), where the ground for relief was denial of counsel at the time of the guilty plea.

"Involuntary plea" complaints are of several common types. The most common allegation is that the movant's attorney, or sometimes the prosecuting attorney, misled him into believing that he would receive a lenient sentence.²⁹ The common practice of plea bargaining with the prosecuting attorney often results in what the defendant interprets, or claims to interpret, as a promise of leniency.³⁰ If the sentence is longer than the defendant expected, he often thinks that the court should grant a motion to withdraw the plea because he did not receive the "consideration" for his plea.

Another frequent complaint, which sometimes accompanies an allegation that movant was misled, is the "coerced plea" complaint. Many types of coercion have allegedly caused involuntary pleas. Some defendants have pleaded guilty because they feared, or had received threats of, imposition of the death penalty as the result of standing trial.³¹ Others have argued that they pleaded guilty because of fear that the prosecution would use illegally obtained evidence to convict them at trial.³² Allegedly inhumane jail conditions have caused some defendants to plead guilty so that they could move to a new environment.³³ Often a movant alleges a combination of coercive factors, perhaps realizing that courts seldom grant relief except in extreme cases.³⁴

Many obstacles will probably block the desired relief. In most cases, especially those involving pleas of guilty entered within the past few years,

29. *E.g.*, Pugh v. State, 485 S.W.2d 65 (Mo. 1972) (alleged promise of 2 years); Billington v. State, 478 S.W.2d 395 (Mo. 1972) (alleged promise of 10 years); Barylski v. State, 473 S.W.2d 399 (Mo. 1971) (alleged promise of probation or parole); Doepke v. State, 465 S.W.2d 507 (Mo. 1971) (defendant misled, relief granted); Roe v. State, 459 S.W.2d 371 (Mo. 1970) (alleged promise of parole for violent crimes); State v. Rose, 440 S.W.2d 441 (Mo. 1969) (remanded for finding); State v. Edmondson, 438 S.W.2d 237 (Mo. 1969) (defendant misled, lower court relief affirmed).

30. If the 27.26 motion states a factual basis for an evidentiary hearing, this type of complaint should be heard as soon as possible after sentencing. Some prisoners wait until key state witnesses die before complaining that improper inducement secured a plea. *E.g.*, Donaldson v. State, 477 S.W.2d 84 (Mo. 1972), where the defendant waited 22 years to protest that his deceased attorney had promised him a sentence of 15 years if he pleaded guilty.

31. *E.g.*, Skaggs v. State, 476 S.W.2d 524 (Mo. 1972); McClure v. State, 470 S.W.2d 548 (Mo. 1971); Richardson v. State, 470 S.W.2d 479 (Mo. 1971); State v. Harris, 467 S.W.2d 876 (Mo. 1971); State v. Townsend, 462 S.W.2d 754 (Mo. 1971); Collins v. State, 450 S.W.2d 186 (Mo. 1970); Fleck v. State, 443 S.W.2d 100 (Mo. 1969); Crosswhite v. State, 426 S.W.2d 67 (Mo. 1968).

32. *E.g.*, Lee v. State, 460 S.W.2d 564 (Mo. 1970) (coerced confession); Jefferson v. State, 442 S.W.2d 6 (Mo. 1969); *see* Rew v. State, 472 S.W.2d 611 (Mo. 1971) (illegal arrest, search, confession).

33. *E.g.*, Coleman v. State, 473 S.W.2d 692 (Mo. 1971) ("basement" of penitentiary); Collins v. State, 450 S.W.2d 186 (Mo. 1970) (16 months inhumane confinement); Dickson v. State, 449 S.W.2d 576 (Mo. 1970) (inhumane conditions of city jail).

34. *E.g.*, Brodkowicz v. State, 474 S.W.2d 822 (Mo. 1971) (physical torture, threats, prolonged solitary confinement); Peck v. State, 467 S.W.2d 884 (Mo. 1971) (threat to life by deceased sheriff, beating); Collins v. State, 450 S.W.2d 186 (Mo. 1970) (fear of death, coerced confession, improper lineup, inhumane confinement).

a record is made of the plea proceedings.³⁵ For the purpose of making a good record and to provide a basis for finding that a plea is voluntary, the trial judge usually asks the defendant whether he was threatened or induced in some way to plead guilty. Even if plea bargaining occurred, with a prosecutor making some promise to the defendant in exchange for his plea, the response is usually in the negative.³⁶ If it becomes apparent that the plea is the result of proper plea bargaining, the judge will continue by asking the defendant whether he understands that the court is not bound by any recommendations of leniency or impressions that the defendant or his lawyer may have had about the sentence, and that it is solely within the realm of the court to assess punishment. If the court receives an affirmative answer, it will, after determining that the defendant understands the nature of the charge and the possible punishment, accept the plea as being made "voluntarily with understanding of the nature of the charge."³⁷ The state may then use the record of the plea proceeding at any subsequent hearing under Missouri Supreme Court Rules 27.25 and 27.26³⁸ to show that the plea was voluntary, because it indicates that no threats or promises were made that might have coerced or misled the defendant into pleading guilty. As most 27.26 movants have discovered, to "directly contradict the verity of records of the court"³⁹ in a later evidentiary hearing is usually quite difficult.

Even if the state has no evidence of record to establish that the plea was voluntary, the 27.26 movant normally must rely on his own testimony to prove his allegations. Persons who allegedly "coerced" the defendant or

35. After *Boykin v. Alabama*, 395 U.S. 238 (1969), a court can expect automatic reversal if the record is inadequate to show that the defendant intelligently and knowingly pleaded guilty.

36. The following statement accurately describes the position of the defendant if the court does not expose plea bargaining in open court:

If the judge, the prosecution, or the defense counsel makes a statement in open court that is contrary to what he has been led to believe, especially as to promises by the prosecutor or his defense counsel, . . . [the defendant] would no more challenge that statement in open court than he would challenge a clergyman's sermon from the pulpit.

A. TREBACH, *THE RATIONING OF JUSTICE* 159-60 (1964). The ABA standards contemplate full disclosure of plea agreements to the court. ABA STANDARDS RELATING TO PLEAS OF GUILTY § 3.3 (c) (Approved Draft, 1968). Such disclosure will help insulate the plea from collateral attack.

37. Mo. Sup. Ct. R. 25.04.

38. Any application after sentence to withdraw a plea of guilty is an attack on the validity of the sentence; the court will treat it as a proceeding to vacate under rule 27.26. *State v. Mountjoy*, 420 S.W.2d 316, 323 (Mo. 1967). Therefore, a defendant who applies to the court under rule 27.25 to set aside the sentence and judgment of conviction and permit the defendant to withdraw his plea should submit the application to the court on a form substantially like the form appended to rule 27.26.

39. Mo. Sup. Ct. R. 27.26 (e) provides:

This hearing shall be an evidentiary hearing if issues of fact are raised in the motion, and if the allegations thereof directly contradict the verity of records of the court, that issue shall be determined in the evidentiary hearing. . . .

"promised" him something usually deny such complaints. However, even in cases where the state has no evidence to rebut movant's testimony, the court frequently does not believe his self-serving complaints of coercion or promises.⁴⁰ In short, an allegedly "coerced" or "misled" movant faces substantial difficulty in any attempt to prove that the court should permit him to withdraw his plea after sentencing "to correct manifest injustice."⁴¹

Many prisoners have attacked pleas of guilty as being "technically involuntary" in that the court failed to determine that the plea was "made voluntarily with understanding of the nature of the charge,"⁴² as rule 25.04 requires. While a poor plea record will help a movant who has other evidence that his plea was involuntary, it will not by itself insure a finding of involuntariness. If after a 27.26 hearing a court finds voluntariness based on evidence outside the plea record, the supreme court will sustain the finding unless it is clearly erroneous.⁴³ The supreme court has reversed lower court findings of voluntariness in a few extreme cases involving poor plea records.⁴⁴

40. The trial court is the judge of credibility; the supreme court defers to fact findings of the trial judge unless a clear abuse of discretion appears. *Watson v. State*, 475 S.W.2d 8 (Mo. 1972). This is another way of saying that the supreme court will not disturb the trial court's findings of fact unless they are "clearly erroneous." Mo. SUP. CR. R. 27.26 (j).

41. Mo. SUP. CR. R. 27.25 provides:

A motion to withdraw a plea of guilty may be made only before sentence is imposed or when imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea (emphasis added).

On appeal, the supreme court has limited its review under rule 27.26 (j) to "a determination of whether the findings, conclusions and judgment of the trial court are clearly erroneous." However, in a guilty plea case under rule 27.25 the court also determines whether the trial court abused its discretion in deciding that it was not necessary to "set aside the judgment of conviction and permit the defendant to withdraw his plea" in order to correct "manifest injustice." *E.g.*, *Skaggs v. State*, 476 S.W.2d 524 (Mo. 1972); *Fleck v. State*, 443 S.W.2d 100 (Mo. 1969); *State v. Mountjoy*, 420 S.W.2d 316 (Mo. 1967).

42. *E.g.*, *Tyler v. State*, 485 S.W.2d 102 (Mo. 1972); *McGinnis v. State*, 465 S.W.2d 540 (Mo. 1971); *Peterson v. State*, 444 S.W.2d 673 (Mo. 1969); *Drew v. State*, 436 S.W.2d 727 (Mo. 1969); *State v. Mountjoy*, 420 S.W.2d 316 (Mo. 1967) (leading case).

43. In *Winford v. State*, 485 S.W.2d 43 (Mo. En Banc 1972), the lower court cited failure to comply with rule 25.04 as the sole reason for permitting the movant to withdraw his plea. On appeal by the state, the supreme court reversed, holding the conclusion that failure to comply with rule 25.04 required relief to be clearly erroneous. A majority of the court thought that the plea was clearly voluntary under the facts found by the lower court, despite the failure to comply with rule 25.04.

In most cases the movant appeals from a specific finding of voluntariness. In such cases the supreme court holds that the failure of the trial court to comply with rule 25.04 is immaterial if the evidence at the 27.26 hearing provides support for the finding that the defendant pleaded guilty voluntarily with understanding of the nature of the charge. *See, e.g.*, *Flood v. State*, 476 S.W.2d 529 (Mo. 1972); *State v. Mountjoy*, 420 S.W.2d 316 (Mo. 1967) (leading case).

44. *State v. Reese*, 481 S.W.2d 497 (Mo. En Banc 1972); *Williams v. State*, 473 S.W.2d 97 (Mo. 1971) (defendant would not talk); *State v. Reese*, 457 S.W.2d 713

The frequent post-conviction argument that a plea was "technically involuntary" because not sustained by the plea record may have led to the 1969 decision of the United States Supreme Court in *Boykin v. Alabama*.⁴⁵ Boykin never claimed that he pleaded guilty under coercion or in ignorance of the consequences,⁴⁶ but the record was silent on whether he had waived several federal constitutional rights by pleading guilty.⁴⁷ The court held that a conviction cannot stand without an affirmative showing of record that the defendant pleaded guilty voluntarily and understandingly.⁴⁸ A minority of the Court⁴⁹ and some commentators⁵⁰ have read *Boykin* expansively as indicating that due process may require state trial courts to follow the basic procedural requirements of rule 11 of the Federal Rules of Criminal Procedure when accepting guilty pleas.⁵¹ Later cases indicate, however, that upon collateral attack a court is not bound to grant relief simply because the record made at the time of the guilty plea is de-

(Mo. En Banc 1970) (related to *State v. Reese*, 481 S.W.2d 497 (Mo. En Banc 1972)) (partial relief); *State v. Arnold*, 419 S.W.2d 59 (Mo. 1967).

45. 395 U.S. 238 (1969) (Douglas, J.).

46. In his dissent, Justice Harlan emphasized the failure of defendant to allege "that his guilty plea was involuntary or made without knowledge of the consequences." *Id.* at 245. He would always require a defendant to make "sufficiently credible allegations that his state guilty plea was involuntary" in order to be "entitled to a hearing as to the truth of those allegations." *Id.* at 246.

47. *Id.* at 243. Justice Douglas listed these constitutional rights waived by a plea of guilty:

First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. . . . Second, is the right to trial by jury. . . . Third, is the right to confront one's accusers. . . . We cannot presume a waiver of these three important federal rights from a silent record. *Id.*

A plea of guilty waives many other constitutional rights that Justice Douglas did not list; e.g., the right to compulsory process for obtaining defense witnesses, the right to be free from unreasonable searches and seizures and to have illegally seized evidence excluded from trial. Carried to its logical extreme, *Boykin* would require affirmative evidence that the defendant had been informed of each right waived by a guilty plea before the court could accept the plea. No court has ever gone that far.

48. 395 U.S. at 244.

49. Justice Harlan, joined by Justice Black, concluded:

So far as one can make out from the Court's opinion, what is now in effect being held is that the prophylactic procedures of Criminal Rule 11 are substantially applicable to the States as a matter of federal constitutional due process. . . .

Id. at 247.

50. See, e.g., *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 184-85 (1969).

51. FED. R. CRIM. P. 11 contains language that goes beyond the related provisions of Mo. SUP. CT. R. 25.04:

The court . . . shall not accept such plea without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.

FED. R. CRIM. P. 11 (italics indicate additional requirements).

ficient in one or more respects.⁵² If other available evidence, such as counsel's prior explanation of constitutional rights, shows that the defendant entered the plea voluntarily and understandingly, an "affirmative showing of record" has been made that will probably satisfy a majority of the Supreme Court.⁵³ The Missouri courts are unlikely to go beyond the federal cases to hold that rule 25.04 requires a "perfect record" at the time a plea of guilty is accepted.⁵⁴

Although the Missouri courts are not reading *Boykin* expansively as requiring state courts to follow the procedural requirements of federal rule 11, they are beginning to read it expansively in another respect. Dictum in the majority opinion in *Boykin* suggests that a court may be able to insulate a plea of guilty from federal collateral attack by leaving "a record adequate for any review that may be later sought,"⁵⁵ and thereby forestalling "the spin-off of collateral proceedings that seek to probe murky memories."⁵⁶ Under a broad reading of this dictum, courts could avoid post-conviction evidentiary hearings by holding that the record of the plea proceeding is conclusive on the issue of whether the plea was entered voluntarily and understandingly.⁵⁷

52. See, e.g., *United States v. Frontero*, 452 F.2d 406 (5th Cir. 1971) (court did not inform defendant of right to confront accusers and of privileges against compulsory self-incrimination).

53. See *North Carolina v. Alford*, 400 U.S. 25 (1970) (guilty plea acceptable although motivated by fear of death penalty), where the Court noted:

At the state court hearing on post-conviction relief, the testimony confirmed that Alford had been fully informed by his attorney as to his rights on a plea of not guilty and as to the consequences of a plea of guilty. Since the record in this case affirmatively indicates that Alford was aware of the consequences of his plea of guilty and of the rights waived by the plea, no issue of substance under *Boykin* . . . would be presented even if that case was held applicable. . . .

Id. at 29 n. 3 (emphasis added).

54. Recent cases continue to rely on the leading case of *State v. Mountjoy*, 420 S.W.2d 316 (Mo. 1967). *Tyler v. State*, 485 S.W.2d 102 (Mo. 1972); see note 43 *supra*.

55. 395 U.S. at 244.

56. *Id.* This language is also susceptible to a narrow reading; so read, it would indicate that the Court is urging that the creation of better evidence is a means to discourage and decide collateral attacks. See *McCarthy v. United States*, 394 U.S. 459 (1969) (related case), where the Court said with regard to strict application of federal rule 11 to federal defendants pleading guilty:

Second, the Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination. Thus, the more meticulously the Rule is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas.

Id. at 465.

57. *But see Jones v. United States*, 384 F.2d 916 (9th Cir. 1967) (federal prisoner), rejecting this approach and holding that the plea record is "evidential on the issue of voluntariness . . . not conclusive." *Id.* at 917. The court said:

It is not the logical converse of [*Boykin*] . . . that compliance with Rule 11 bars a subsequent . . . petition containing allegations as to *factual mat-*

In applying such a broad reading of the *Boykin* dictum, the main problem is determining when a plea record "conclusively show[s] that the prisoner is entitled to no relief."⁵⁸ A recent Missouri decision, *Colbert v. State*,⁵⁹ is a leading case on that problem. *Colbert* indicates that the supreme court would like to reduce substantially the number of 27.26 motions attacking Missouri guilty pleas and the number of evidentiary hearings and appeals on such motions. Judge Donnelly,⁶⁰ writing for the court in *Colbert*, chose to ignore the evidence and finding of voluntariness from the 27.26 evidentiary hearing in order to announce that rule 27.26 (e)⁶¹ did not even require a hearing in the case. A hearing was unnecessary, said Judge Donnelly, because the record made at the time of the plea was sufficient to show conclusively that the defendant pleaded guilty "voluntarily with understanding of the nature of . . . [each] charge."⁶² Relying heavily on language in a 1971 federal decision,⁶³ he concluded that under *Boykin* a good record⁶⁴ made at the time of the plea is sufficient "to insulate . . . convictions from subsequent attack in federal habeas corpus proceedings" as well as from attack under rule 27.26. Unfortunately, the opinion in *Colbert* failed to describe the plea record;⁶⁵ why the case was thought to be an

ters outside the record of the arraignment which cannot be conclusively resolved by reference to that record. . . .

Id. (emphasis added).

58. Mo. Sup. Cr. R. 27.26 (e) provides:

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, a prompt hearing thereon shall be held. . . . This hearing shall be an evidentiary hearing if issues of fact are raised in the motion, and if the allegations thereof directly contradict the verity of records of the court, that issue shall be determined in the evidentiary hearing. . . . (emphasis added).

59. 486 S.W.2d 219 (Mo. 1972).

60. Judge Donnelly wrote a precursory concurring opinion in *Flood v. State*, 476 S.W.2d 529 (Mo. 1972). There, he suggested that Missouri courts follow an outlined procedure, based on a recommended federal procedure under rule 11, as a prerequisite to accepting any guilty plea. He cited *Missouri v. Turley*, 443 F.2d 1313 (8th Cir. 1971) because it contained an expansive interpretation of *Boykin* that "invites the trial judges of Missouri to utilize a procedure which could insulate most guilty pleas from successful subsequent attack in Rule 27.25 and 27.26 proceedings, and in federal habeas corpus proceedings." 476 S.W.2d at 537. The court in *Colbert* also cited *Turley*, 486 S.W.2d at 220.

61. Note 58 *supra*.

62. 486 S.W.2d at 221.

63. *Missouri v. Turley*, 443 F.2d 1313 (8th Cir.), cert. denied, 404 U.S. 965 (1971); note 60 *supra*.

64. Apparently the state court must, at the time of accepting a plea, elicit "sufficient information from the parties so that the propriety of accepting the plea is established in a manner analogous to the dictates of Rule 11." 486 S.W.2d at 221, quoting from *Missouri v. Turley*, 443 F.2d 1313, 1318 (8th Cir. 1971). See *Flood v. State*, 476 S.W.2d 529, 537 (Mo. 1972) (concurring opinion) for a list of recommended procedures for conducting a guilty plea proceeding "which could insulate most guilty pleas from successful subsequent attack."

65. The *Colbert* opinion is one page long. Ordinarily the supreme court sets out important parts, or a summary, of the plea record when a movant attacks a plea of guilty in order to show why the lower court's finding of voluntariness was not clearly erroneous. In *Colbert*, Judge Donnelly failed even to set out the grounds for relief alleged in the 27.26 motion. 486 S.W.2d at 220.

“opportunity to eliminate from post-conviction judicial process in Missouri much unnecessary and time-consuming activity”⁶⁶ is uncertain.

Although *Colbert* may appear to be an aberrational decision with little precedential value, the court seems determined to follow the *Colbert* approach in some situations. In *Pauley v. State*⁶⁷ the circuit court summarily denied a 27.26 motion attacking the voluntariness of a guilty plea. The supreme court held that the circuit court had properly denied an evidentiary hearing because “the transcript conclusively shows that appellant is entitled to no relief and is sufficient to insulate the plea of guilty from subsequent attack in collateral proceedings, under *Boykin v. Alabama*.”⁶⁸ The court explained its decision:

The allegation that counsel told petitioner that the most time he would receive would be 7 years . . . did not require an evidentiary hearing because, even if true, the record clearly shows that the court disabused petitioner of any such idea. . . . Neither in the presence of the court, nor in private interview with the officer of the state board of probation and parole in the course of the presentence investigation, did he mention the 7-year limit his attorney is now alleged to have placed on the punishment he would receive. We have concluded that this contention is an afterthought, thrown in his 27.26 motion for good measure.⁶⁹

The opinion in *Pauley* also contains essential portions of the plea proceeding record;⁷⁰ it thereby indicates how far a court must go in personally

66. *Id.* On appeal, Colbert argued that the evidence adduced at the 27.26 hearing showed that the prosecuting attorney promised leniency in exchange for Colbert's guilty plea. Further, he argued that it showed that he pleaded guilty because he thought the prosecutor would recommend a five-year sentence; the prosecutor made no such recommendation. Brief for Appellant at 1, *id.* Thus, he had challenged the record made at the time of the plea; that record showed that he answered “no” upon the inquiry: “Has there been any statement by any official other than your counsel indicating . . . that if you do enter a plea the Court will be easier on you than if you stand trial?” Brief for Respondent at 7, *id.* Despite this record, Judge Donnelly evidently thought the plea record was sufficient to decide the issue of voluntariness on the merits without a hearing. Perhaps Colbert did not sufficiently allege in his 27.26 motion “the facts which support . . . the grounds . . . and the names . . . of the witnesses or other evidence upon which [he intended] to rely to prove such facts.” Mo. Sup. Cr. R. 27.26 (c) and appended form. See *Pauley v. State*, 487 S.W.2d 565 (Mo. 1972) (no issues of fact raised). However, even if his allegations of fact did not “directly contradict the verity of records of the court” (Mo. Sup. Cr. R. 27.26 (e)), his evidence at the 27.26 hearing was directly contradictory of part of the plea record. *Colbert* should have been decided on the basis of the 27.26 hearing record rather than on the basis of the plea record and the possibly inadequate 27.26 motion.

67. 487 S.W.2d 565 (Mo. 1972).

68. *Id.* at 566, citing *Missouri v. Turley*, 443 F.2d 1313, 1318 (8th Cir. 1971), and *Colbert v. State*, 486 S.W.2d 219 (Mo. 1972).

69. 487 S.W.2d at 567. Note the use of the presentence investigation record in making this determination.

70. *Id.* Key portions of the plea proceedings included the following questions and answers:

To the question “Has anyone told you or promised or suggested to you

questioning and informing the defendant in order to insulate the plea of guilty from subsequent attack. More decisions like *Pauley* would help courts, attorneys, and 27.26 movants determine when a plea record is good enough to "conclusively show that the prisoner is entitled to no relief."⁷¹

Recent Missouri and federal decisions show clearly that prospects for obtaining post-conviction relief after a plea of guilty are rapidly diminishing. The courts are developing better procedures for accepting guilty pleas; consequently, they give greater weight to good plea records.⁷² Courts are now developing better "plea hearings" that both protect the defendant and reduce the need for post-conviction hearings and judicial review.

B. Denial of Effective Assistance of Counsel

The second most frequent complaint of 27.26 movants is that they lacked "effective assistance" of counsel.⁷³ Prisoners made this complaint in 130 of the 325 appeals decided in the past 5 years. This ground must be distinguished from the related claim of denial of counsel at a critical stage of the criminal proceedings,⁷⁴ which movants raised less frequently.⁷⁵ Despite the frequency of the complaint, the supreme court granted no major relief on this ground in any of the 130 appeals;⁷⁶ it ordered minor relief

that you would receive a lighter sentence or probation or parole or any other favors to get you to say you are guilty of this charge?" petitioner answered "No sir." To the question "You understand that any agreements or proposals between yourself, your attorney, and the Prosecuting Attorney are not binding on the Court, it's up to me to determine what to do in your case?" petitioner answered "Yes, I do." . . . To the question "And you are not pleading guilty under any duress, coercion, or compulsion, or because of any promises, inducements, or representations, is that correct?" petitioner answered "Yes, sir."

Id. Note the "leading" nature of the last question; see note 36 *supra* for possible problems with this approach.

71. Mo. SUP. CT. R. 27.26 (e). Brief opinions like the one in *Henderson v. State*, 487 S.W.2d 527 (Mo. 1972) (issue submitted on the plea transcript) furnish no guidance to lower courts or to attorneys advising prospective 27.26 movants.

72. See Note, *Post-Conviction Relief from Pleas of Guilty: A Diminishing Right*, 38 BROOKLYN L. REV. 182 (1971). The authors of the note suggest adoption of qualitative rules for the acceptance of guilty pleas to better protect defendants who have had marginal legal representation. They recognize, however, that brief plea proceedings offer a defendant minimal protection, because they often have little fact-finding value. Thus, a need for post-conviction judicial review of guilty pleas will continue to exist, even in cases where a good plea record was made.

73. See U.S. CONST. amends. VI, XIV; Mo. CONST. art. I, §§ 10, 18 (a). Most decisions are based on federal constitutional precedents.

Prisoners complain of involuntary pleas and denial of effective assistance of counsel three times as often as they raise any of the next three grounds for relief discussed: Denial of counsel at a critical stage (pt. III, § C of this article); illegal procurement or use of an incriminating statement (pt. IV, § D of this article); and lack of jurisdiction because of a defective indictment or information (pt. IV, § E of this article).

74. U.S. CONST. amends. VI, XIV and Mo. CONST. art. I, §§ 10, 18 (a) provide the basis for relief in "no counsel" as well as "inadequate counsel" situations.

75. Thirty-nine out of 325 appeals involved this claim.

76. The state obtained relief on appeal in *State v. Frey*, 441 S.W.2d 11 (Mo. 1969), after the trial court had ordered the movant discharged because he had been

in the form of remands for evidentiary hearings in 2 decisions.⁷⁷ Perhaps the popularity of this ground for relief is partly due to 3 related federal cases in which "ineffective assistance of counsel" provided a basis for habeas corpus relief.⁷⁸ However, the federal courts rejected the claim in 16 out of 20 cases and granted minor relief in 1 case.⁷⁹

Given the Missouri appellate record, it can be assumed that most claims of ineffective assistance of counsel are frivolous, at least by current standards for determining the issue. The supreme court noted this in several extreme cases.⁸⁰ The basic obstacles to relief are summarized in *State v. Worley*.⁸¹

[T]he constitutional right to the effective assistance of counsel does not vest in the accused the right to the services of an attorney who meets any specified aptitude test in point of professional skill. And common mistakes of judgment on the part of counsel, common mistakes of strategy, or common errors of policy in the course of a criminal case do not constitute grounds for collateral attack upon the judgment and sentence It is instances in which resulting from the substandard level of the services of the attorney the trial becomes *mockery and farcical* that the judgment is open to collateral attack⁸²

Even uncommon mistakes seldom provide a basis for relief under this vague "farce and mockery" standard⁸³ that state and federal courts generally ap-

deprived of effective assistance of counsel after conviction. The supreme court limited the relief to vacating the sentence and resentencing so that movant could appeal after resentencing.

77. *Holbert v. State*, 439 S.W.2d 507 (Mo. 1969); *State v. Keeble*, 427 S.W.2d 404 (Mo. 1968).

78. *Turley v. Swenson*, 314 F. Supp. 1304 (W.D. Mo. 1970); *Pedicord v. Swenson*, 304 F. Supp. 393 (W.D. Mo. 1969), *aff'd on other grounds*, 431 F.2d 92 (8th Cir. 1970); *Brizendine v. Swenson*, 302 F. Supp. 1011 (W.D. Mo. 1969).

79. *Renfro v. Swenson*, 315 F. Supp. 733 (W.D. Mo. 1970) (suggested expansion of state hearing to include this claim).

80. *E.g.*, *Aguilar v. State*, 452 S.W.2d 225, 226 (Mo. 1970) (movant admitted ground included at insistence of fellow prisoner); *Dickson v. State*, 449 S.W.2d 576 (Mo. 1970), where the court stated:

The attribution of incompetent or ineffective counsel will come as a surprise to the bar at large and is perhaps a bit of a shock to these six renowned trial lawyers—all with more than state-wide reputations. . . . [T]his proceeding is another of a large and increasing number of instances of the depths to which post-conviction remedies have been degraded. In short, this is all but a frivolous appeal in a proceeding in circumstances not within the contemplation and spirit of the post-conviction remedies.

Id. at 583.

81. 371 S.W.2d 221 (Mo. 1963).

82. *Id.* at 224 (emphasis added), *quoting and relying on* *Frاند v. United States*, 301 F.2d 102, 103 (10th Cir. 1962). Subsequent Missouri decisions have cited this standard. *See, e.g.*, *Holt v. State*, 433 S.W.2d 265, 267 (Mo. 1968).

83. The same standard is often stated in other language. *E.g.*, *Cardarella v. United States*, 375 F.2d 222, 230 (8th Cir.), *cert. denied*, 389 U.S. 882 (1967), where the court used the formula "made the proceedings a farce and mockery of justice, shocking to the conscience of the Court." The Missouri Supreme Court relied on *Cardarella* in *Jackson v. State*, 465 S.W.2d 642, 645 (Mo. 1971).

ply to determine whether the defendant lacked effective assistance of counsel.

Recently the standard has come under attack. Judge Seiler, concurring in *Jackson v. State*,⁸⁴ stated his disapproval of the test:

I continue to have grave doubts about the usefulness of the so-called "farce and mockery" test and believe it offers little, if any, guide to the practicing lawyer who is appointed to represent an indigent defendant. "Farce and mockery" are so extreme and so rare that they may mislead a lawyer into believing the court intends to set some lower standard for representing indigents than it does other litigants. . . . "Mockery and farce" does not fit an analysis of whether a lawyer has used normal competence in getting ready for trial.⁸⁵

In *McQueen v. State*,⁸⁶ a later case, the court observed how poor the "mockery and farce" test is when the complaint focuses on inadequate preparation for trial. In *McQueen*, a murder case in which defendant's counsel admitted that he interviewed none of the 25 state's witnesses prior to trial because he had "never been one to go out and interview [state's witnesses],"⁸⁷ the court denied relief because defendant did not clearly show that counsel's failure to investigate was prejudicial to him. The court concluded:

The circumstances of this case do not demonstrate that the trial court's conclusion that the failure on the part of defense counsel to interview the state's witnesses did not prevent defendant from having a fair trial and that there was no proof that representation of defendant was inadequate was clearly erroneous.⁸⁸

Under this approach a movant must show not only that counsel's preparation for trial was inadequate, but also that he was denied a "fair trial" as a result.⁸⁹ If the lower court concludes as a matter of law that counsel's failures did not deprive the defendant of a "fair trial," it will probably find a failure to prove inadequate representation; and the supreme court will sustain those conclusions unless they are "clearly erroneous."⁹⁰

84. 465 S.W.2d 642 (Mo. 1971).

85. *Id.* at 647-48.

86. 475 S.W.2d 111 (Mo. En Banc 1971).

87. *Id.* at 112.

88. *Id.* at 115.

89. Concurring in the result, Chief Justice Finch wrote an opinion explaining that while most courts continue to cite the "farce and mockery" test, he believes they usually seek to ascertain whether there was a denial of a fair trial. Chief Justice Finch stated:

The question we must determine here is whether, as a result of the conduct of counsel, appellant should be granted a new trial on the basis that he was improperly convicted as a result of not having had a fair trial.

Id. at 117.

Judge Donnelly, in dissent, agreed that the trial court should apply a "fair trial" standard to determine claims of ineffectiveness of counsel, but he believed that the supreme court should remand the case for a redetermination under the standard. *Id.* at 119.

90. In a strong dissent, Judge Seiler stated that the conclusion of the trial

Recently the supreme court has indicated that it may currently follow a different standard for determining claims of ineffective assistance of counsel. In *O'Neal v. State*,⁹¹ the court applied the following test: "The 'circumstances must [but in this case do not] demonstrate that which amounts to a lawyer's *deliberate* abdication of this [sic] ethical duty to his client.'"⁹²

While this test has the advantage of focusing on the lawyer's ethical obligation to fairly represent the defendant,⁹³ it makes it unduly difficult for a defendant to establish inadequate representation. Few lawyers would admit that they consciously abdicated their ethical duties to the defendant.⁹⁴ If the defendant can establish that no reasonable basis existed for the conduct of counsel that is attacked, and if this conduct may have affected the outcome of the case, the state of mind of the lawyer should be irrelevant.⁹⁵

As long as Missouri courts follow the "farce and mockery," "deliberate abdication of ethical duty," or "fair trial" tests for determining the adequacy of assistance of counsel, few 27.26 movants will obtain relief on this ground in the trial courts, even in clear cases of negligence that probably had some effect on the outcome of the case. On appeal, application

court on the issue of ineffective assistance was clearly erroneous. *Id.* at 120. Again, as in the *Jackson* case (*see* text accompanying notes 84, 85 *supra*) he was concerned about furnishing guidance to appointed lawyers:

[On] the record counsel did not meet the standard of normal competence. Endorsement of the kind of representation which was provided here would lead to relaxation of the standards adopted by the court, particularly Canon 6 and DR 6-101 (A) (2). Relaxation of this standard degrades the administration of justice and burdens the courts and public, as well as imperiling Sixth Amendment rights of an accused.

Id. On the matter of prejudice. Judge Seiler cited the leading case on right to counsel, *Powell v. Alabama*, 287 U.S. 45 (1932), where the Supreme Court said:

It is not enough to assume that counsel . . . exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts.

Id. at 58.

91. 486 S.W.2d 206 (Mo. 1972).

92. *Id.* at 208 (emphasis added). The court took the quoted test from *Robinson v. United States*, 448 F.2d 1255 (8th Cir. 1971). The *Robinson* court elaborated on the test: "There must be such conscious conduct as to render pretextual an attorney's legal obligation to fairly represent the defendant." *Id.* at 1256. The first Missouri case relying on the *Robinson* test was *Smith v. State*, 473 S.W.2d 719 (Mo. 1971).

93. *See* note 90 *supra*.

94. Without an admission from the lawyer, proving ineffective assistance would be very difficult. In the *McQueen* case (*see* notes 86-88 and accompanying text *supra*) counsel would probably not have admitted to deliberate abdication of his ethical duty to prepare adequately for trial. His "strategy" in the case and his failure to interview any state witnesses appeared to be negligent, but probably not "deliberate abdication."

95. *See* Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1263 (1970).

of the subjective "clearly erroneous" limitation further reduces the chances of relief.⁹⁶

C. Denial of Counsel at a Critical Stage

Prisoners complained of denial of counsel at a critical stage of the criminal proceedings in 39 of the 325 appeals decided in the last 5 years. The supreme court granted major relief in 2 of these cases⁹⁷ and minor relief in 1 case.⁹⁸ In 20 of the 39 cases the movant combined this complaint with the closely related complaint of ineffective assistance of counsel.⁹⁹ None of the 7 subsequent federal decisions involving this contention granted major relief.¹⁰⁰

In most cases it is easy to determine whether the defendant had counsel at a particular stage of the proceedings. If the defendant did not have counsel, the state usually contends that he waived his right to counsel¹⁰¹ or that the stage was not "critical" in the particular case¹⁰² or in general.¹⁰³

In 15 of the 39 appeals the Supreme Court considered complaints that the right to counsel had been denied at the preliminary hearing¹⁰⁴ or at the time the hearing was waived.¹⁰⁵ In almost all of these cases the preliminary

96. When the lower court "feels" that the trial was not a "farce or mockery," or that the defendant was not denied a "fair trial," few appellate judges could "feel" with any assurance that this judgment was "clearly erroneous." The "clearly erroneous" standard, first announced in the leading case of *Crosswhite v. State*, 426 S.W.2d 67 (Mo. 1968), is essentially a subjective test:

A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Id. at 70-71, quoting from *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

97. *Ball v. State*, 479 S.W.2d 486 (Mo. 1972) (judgment and sentence set aside, remanded so that motion for new trial with counsel's assistance could be filed); *Morris v. State*, 456 S.W.2d 289 (Mo. 1970) (denial of counsel at time of plea, no waiver of right shown).

98. *Garrett v. State*, 459 S.W.2d 378 (Mo. 1970) (hearing to determine if represented by counsel in prior case of conviction).

99. *E.g.*, *Tucker v. State*, 481 S.W.2d 10 (Mo. 1972); *State v. Bobbitt*, 465 S.W.2d 579 (Mo. En Banc 1971).

100. In *Garrett v. Swenson*, 459 F.2d 464 (8th Cir. 1972), the court of appeals relied on a recent decision, *United States v. Tucker*, 404 U.S. 443 (1972), in holding that the petitioner was entitled to an evidentiary hearing to determine whether the trial court had considered an invalid conviction in imposing sentence. The petitioner had alleged denial of counsel in connection with a 1952 conviction.

101. *E.g.*, *McBride v. State*, 484 S.W.2d 480 (Mo. 1972); *Meller v. State*, 438 S.W.2d 187 (Mo. 1969).

102. *E.g.*, *Montgomery v. State*, 461 S.W.2d 844 (Mo. 1971) (arraignment); *Collins v. State*, 454 S.W.2d 917 (Mo. 1970) (arraignment).

103. *E.g.*, *State v. Grapper*, 484 S.W.2d 234 (Mo. 1972) (no right to counsel during medical examination); *Fields v. State*, 466 S.W.2d 679 (Mo. 1971) (nitrate test not critical stage).

104. *E.g.*, *Carpenter v. State*, 479 S.W.2d 466 (Mo. 1972); *Sallee v. State*, 460 S.W.2d 554 (Mo. 1970); *Harroald v. State*, 438 S.W.2d 202 (Mo. 1969).

105. *E.g.*, *Veneri v. State*, 474 S.W.2d 833 (Mo. 1971); *Hegwood v. State*, 465 S.W.2d 476 (Mo. 1971).

hearings had been held prior to the decision in *Coleman v. Alabama*,¹⁰⁶ in which the Supreme Court determined that such hearings constitute a "critical stage" in the criminal process. When *Coleman* does not apply, the court will examine the record to determine whether the denial of counsel at the hearing was prejudicial to the defendant.¹⁰⁷

Assuming that the 27.26 movant establishes the absence of counsel at a critical stage, he is entitled to relief unless the state produces evidence of a voluntary and understanding waiver of the right to counsel¹⁰⁸ or of a waiver of the constitutional defect in later proceedings.¹⁰⁹ If the state produces evidence of waiver, the burden falls on the movant to prove by a preponderance of the evidence that the waiver was involuntary, unintelligent, or based on a lack of understanding.¹¹⁰ Movants who have nothing more than their own testimony to support their "improper waiver" contentions should expect to lose in most cases.¹¹¹

D. Involuntary Confession or Statement

Prisoners complained that the state obtained a statement or confession by unconstitutional means,¹¹² including failure to give adequate warn-

106. 399 U.S. 1 (1970). The Court held that the preliminary hearing is a "critical stage" in Alabama's criminal process; the accused is as much entitled to the aid of counsel at that time as at the trial itself. *Coleman* will not apply retroactively to preliminary hearings conducted prior to June 22, 1970, the date of the decision. *Adams v. Illinois*, 405 U.S. 278 (1972).

107. *E.g.*, *Norris v. State*, 449 S.W.2d 606 (Mo. 1970); *Harris v. State*, 446 S.W.2d 758 (Mo. 1969).

108. In *Carnley v. Cochran*, 369 U.S. 506 (1962), the Supreme Court held that to presume waiver of counsel from a silent record is impermissible. The record must show, or an allegation and evidence must show, that the defendant intelligently and understandingly rejected an offer of counsel.

In *Meller v. Swenson*, 309 F. Supp. 519 (W.D. Mo. 1969), *aff'd sub nom.* *Meller v. Missouri*, 431 F.2d 120 (8th Cir. 1970), the court summarizes the law on "burden of proof" in post-conviction review of alleged denial of fundamental constitutional rights. The supreme court follows the federal approach. *Morris v. State*, 456 S.W.2d 289 (Mo. 1970).

109. In Missouri a plea of guilty waives all nonjurisdictional, procedural, and constitutional infirmities in prior stages of the proceeding. *E.g.*, *Geren v. State*, 473 S.W.2d 704 (Mo. 1971) (waiver of preliminary hearing, told no attorney would be appointed); *State v. Brown*, 449 S.W.2d 664 (Mo. 1970) (illegal evidence). For the federal view, see *McMann v. Richardson*, 397 U.S. 759 (1970).

110. *Meller v. Swenson*, 309 F. Supp. 519, 524 (W.D. Mo. 1969); Mo. Sup. Ct. R. 27.26 (f).

111. In *Meller v. State*, 438 S.W.2d 187 (Mo. 1969), the supreme court recognized a "presumptive regularity" of a court judgment and record at the time of a plea of guilty. *Id.* at 192. For a movant to attack a court record successfully is almost impossible, even though rule 27.26 (e) permits a movant to have an evidentiary hearing if his allegations "directly contradict the verity of records of the court."

112. Prior to *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court had defined involuntariness of confessions and statements in terms of physical or psychological pressures that overcome the suspect's will to remain silent. Failure to warn the suspect of his right to silence, or to allow him access to counsel, were simply *relevant factors* in determining the issue of voluntariness. See, *e.g.*, *Haynes v. Washington*, 373 U.S. 503, 516-17 (1963); *Columbe v. Connecticut*, 367 U.S. 568, 601-02 (1961).

ings as required by *Miranda v. Arizona*,¹¹³ in 41 of the 325 appeals decided in the last 5 years. The supreme court granted no major or minor post-conviction relief in any of these appeals. Of the five prisoners who later sought federal habeas corpus relief, two succeeded.¹¹⁴

In 24 of the 41 cases, the 27.26 movants combined an attack on an involuntary confession or statement with an attack on the voluntariness of their guilty pleas. Typically, the movant alleged that the plea of guilty was the product of an involuntary confession and that both the plea and the confession were involuntary.¹¹⁵ An allegation that a movant gave an involuntary confession or statement before he pleaded guilty provides no basis for collateral attack;¹¹⁶ a plea of guilty voluntarily and understandingly made waives all constitutional and nonjurisdictional defects in prior proceedings.¹¹⁷ An involuntary confession or statement is a factor to be considered, however, in determining whether a subsequent plea of guilty was voluntarily and understandingly made.¹¹⁸ A defendant may plead guilty "voluntarily and understandingly" even though he is unaware at the time of the plea that his prior confession was involuntary and inadmissible.¹¹⁹

In the remaining 17 appeals in this area (those not involving pleas of guilty), the supreme court often did not resolve the involuntary confession issue on the merits. Rather, the court sometimes cited and apparently relied on a state doctrine of "procedural default,"¹²⁰ as distinguished from true

113. 384 U.S. 436 (1966).

114. *Renfro v. Swenson*, 315 F. Supp. 733 (W.D. Mo. 1970) (plenary hearing on issue in state trial court, or a new trial); *Gray v. Swenson*, 302 F. Supp. 1162 (W.D. Mo. 1969), *aff'd*, 430 F.2d 9 (8th Cir. 1970) (plenary hearing on issue, state waiver rule rejected).

115. *E.g.*, *Lee v. State*, 460 S.W.2d 564 (Mo. 1970) (coerced confession); *Jefferson v. State*, 442 S.W.2d 6 (Mo. 1969) (fear confession would be used).

116. *E.g.*, *Wright v. State*, 476 S.W.2d 605 (Mo. 1972); *Nolan v. State*, 446 S.W.2d 754 (Mo. 1969).

117. *E.g.*, *Mitchell v. State*, 447 S.W.2d 281 (Mo. 1969); *Jefferson v. State*, 442 S.W.2d 6 (Mo. 1969); *Turley v. State*, 439 S.W.2d 521 (Mo. 1969). *See McMann v. Richardson*, 397 U.S. 759 (1970).

118. *Redus v. State*, 470 S.W.2d 539 (Mo. 1971). Apparently this is an unimportant factor in most cases, because the court often assumes for the sake of argument that there was an involuntary confession prior to the plea of guilty. *See, e.g.*, *McClure v. State*, 470 S.W.2d 548 (Mo. 1971); *Lee v. State*, 460 S.W.2d 564 (Mo. 1970).

119. *Mitchell v. State*, 447 S.W.2d 281, 283-84 (Mo. 1969). The court relied on the leading case of *Edwards v. United States*, 256 F.2d 707 (D.C. Cir. 1958); in that case, the court concluded:

It may be argued that a plea of guilty is not understandingly made when defendant is unaware of certain technical defenses which might very well make the prosecutor's job more difficult or even impossible were he put to his proof. However, we think "understandingly" refers merely to the *meaning* of the charge, and what acts amount to being *guilty* of the charge, and the *consequences* of pleading guilty thereto, rather than to dilatory or evidentiary defenses.

Id. at 710.

120. Under a "procedural default" doctrine, litigants who may otherwise have valid claims are automatically denied relief because of some procedural misstep

"waiver,"¹²¹ in order to avoid a decision on the merits. In *State v. Gray*,¹²² after the defendant testified, the prosecution used his statement on cross-examination.¹²³ Defense counsel objected to partial use of the statement and offered to "read the whole statement from start to finish."¹²⁴ Defendant Gray then testified that he was willing to have the whole statement submitted to the jury. Defendant raised the involuntary statement issue for the first time in the 27.26 motion.¹²⁵ After the trial court found "waiver,"¹²⁶ the supreme court affirmed, stating:

We hold on this record that the appellant understandingly and intelligently waived his right to have a preliminary determination by the Court as to voluntariness by his failure to object to the use of the statement and by expressly offering to agree and agreeing that the statement be read to the jury in its entirety.¹²⁷

Although the court professed to rely on the federal waiver principles of *Johnson v. Zerbst*¹²⁸ and *Fay v. Noia*,¹²⁹ it also quoted the Missouri "proce-

at an earlier stage of the litigation. In determining whether a procedural default bars a later determination on the merits, courts ordinarily do not check carefully to see whether the previous misstep was intentional and inexcusable. The concept of "waiver" discussed in the succeeding footnote is frequently confused with the forfeiture of a remedy because of some "procedural default."

121. Generally, a litigant "waives" a right when he understands it and intelligently relinquishes it. A defendant may waive many rights in a criminal prosecution: e.g., the right to counsel, to have a jury trial, or to have a trial. The elements of waiver vary, depending on the particular right in question. In the area of post-conviction relief, the Federal Constitution creates most rights in question; further, it provides, through court decisions, the definition of what constitutes "waiver" of the particular rights.

When courts deny relief because of a "procedural default" (note 120 *supra*), the litigant loses what may have been a meritorious claim because of a procedural misstep that is classified as an abuse of process, resulting in a forfeiture of remedy. On the other hand, denial of relief because of "waiver" involves a decision on the merits; a right cannot be violated if it has been intelligently and understandingly relinquished.

122. 432 S.W.2d 593 (Mo. 1968).

123. *Id.* at 595.

124. *Id.*

125. *Id.* at 595-96.

126. The supreme court construed the trial court's findings that defendant had "ample opportunity . . . to object at the trial to any reference to his statements" and that defendant "failed to show any abuse of his constitutional rights" as a "determination of voluntary waiver on the part of the appellant." *Id.* at 597.

127. *Id.* at 596.

128. 304 U.S. 458 (1938). *Johnson v. Zerbst* is the leading case on the right to counsel in federal courts under the sixth amendment. The Court held this to be an absolute right; absent an "intentional relinquishment or abandonment of a known right or privilege" a court has no jurisdiction to hear a case if it fails to appoint counsel for an indigent defendant.

129. 372 U.S. 391 (1963). *Fay* is the leading case rejecting state "procedural default" limitations on federal habeas corpus jurisdiction. The Court held that state prisoners are not automatically precluded from raising in federal habeas corpus proceedings those constitutional issues that the state court had refused to consider because of the defendant's failure to comply with state procedural rules. The pris-

dural default" case of *State v. Meiers*:¹³⁰

Our rule is that constitutional questions must be raised in the trial court at the earliest opportunity consistent with orderly procedure; they may not be raised for the first time in the appellate court. The defendant in a criminal case, if he proposes to raise a question pertaining to the violation of such right, must object to the introduction of his confession or admission, clearly and specifically stating his constitutional grounds for the objection . . . In other words, his constitutional grounds for objection must be kept alive and preserved throughout the case. . . . To abandon these rules would be to invite a defendant to sit back, elect not to object to his constitutionally inadmissible confession or admission, take his chances that the verdict might be acquittal; then, if the verdict is adverse, raise the question of denial of constitutional rights for the first time on appeal with some assurance that the case would be remanded. Only by adhering to these rules and decisions may we prevent such tactics.¹³¹

Despite dual state findings of "waiver" and "procedural default" in *Gray*, defendant Gray sought and obtained federal habeas corpus relief in *Gray v. Swenson*.¹³² The federal district court, under an obligation to examine the facts to determine whether there was true waiver or a "deliberate by-passing of state procedures,"¹³³ found no evidence to support the state finding of waiver.¹³⁴ Trial counsel's failure to object properly to the use of the statement did not preclude relief, because the state introduced no evidence of a deliberate by-pass by the defendant himself.¹³⁵ The court held that defendant Gray was entitled to a plenary state evidentiary hearing on

oner must exhaust all state remedies still open to him, however, before he files his application for federal habeas corpus. *Id.* at 435.

Although state procedural defaults do not affect federal habeas corpus jurisdiction, the decision in *Fay* gives the judge in federal habeas corpus proceedings discretion to "deny relief to an appellant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies." *Id.* at 438. The controlling standard for the exercise of this discretion is the classic definition of waiver in *Johnson v. Zerbst*, 304 U.S. 458 (1938), and the following explanation in *Fay*:

If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself . . . of the facts bearing upon the applicant's default.

Id. at 439.

130. 412 S.W.2d 478 (Mo. 1967) ("plain error" rule not applied on direct appeal from conviction).

131. *State v. Gray*, 432 S.W.2d 593, 596 (Mo. 1968).

132. 302 F. Supp. 1162 (W.D. Mo. 1969), *aff'd*, 430 F.2d 9 (8th Cir. 1970).

133. *Fay v. Noia*, 372 U.S. 439 (1963).

134. 302 F. Supp. at 1167.

135. *Id.* at 1168.

the issue of the voluntariness of his statement in accordance with the standards articulated in *Jackson v. Denno*.¹³⁶

The statement in *State v. Meiers*¹³⁷ that the defendant must "clearly and specifically [state] his constitutional grounds for the objection" provides the basis for another "procedural default" rule applicable to post-conviction proceedings as well as to direct appeals. In *State v. Price*¹³⁸ the court held that defense counsel's objection that defendant "was not fully advised of his constitutional rights" prior to giving a statement was too broad to preserve for appellate review the question of whether all required *Miranda* warnings had been given.¹³⁹ In *Evans v. State*,¹⁴⁰ a poorly argued case, the court extended this rule to prevent state collateral attack; once again, however, this rule of "procedural default" did not prevent the federal courts from deciding the issue on the merits.¹⁴¹

When a defendant or his counsel fails to raise or preserve a constitutional issue properly in the trial court, this ordinarily does not represent an "abuse of process," *i.e.*, a "deliberate by-passing of state procedures," perhaps with the intention to raise the issue later.¹⁴² However, under the many "procedural default" rules that the decision in *State v. Meiers*¹⁴³ and its progeny suggest, a court may automatically conclude that defendant engaged in an "abuse of process" justifying denial of post-conviction relief. The 27.26 movant may not even have a chance to show that he did not "deliberately by-pass" an earlier state procedure for vindication of his consti-

136. 378 U.S. 368 (1964).

137. 412 S.W.2d 478 (Mo. 1967).

138. 422 S.W.2d 286 (Mo. 1967).

139. The court stated: "He [the defendant] is required to be as specific in stating the grounds or reasons for his objection as the authorities are required to be specific in advising him of each of his rights." *Id.* at 289.

140. 465 S.W.2d 500 (Mo. 1971). The defendant offered no argument or authority for his request that the court re-examine the *Price* decision.

141. *Evans v. Swenson*, 455 F.2d 291 (8th Cir. 1972). In dictum, the Missouri Supreme Court had said that the warning given to the defendant did not meet the *Miranda* requirements. *State v. Evans*, 439 S.W.2d 170, 172 (Mo. 1969). However, the court of appeals in *Evans v. Swenson* held that the warnings complied with *Miranda* and that defendant "knowingly and intelligently waived his privilege against self-incrimination and his right to have retained or appointed counsel present at the interrogation." 455 F.2d at 296.

142. Automatic "procedural default" rules applicable to post-conviction relief are hardly needed as an additional deterrent to "abuse of process" when one considers the many other common sense factors encouraging early assertion of constitutional rights: *e.g.*, the added danger of conviction if the defendant does not assert all available rights; the probability that the assertion of an issue for the first time on appeal will be unsuccessful; the time spent in prison waiting for a 27.26 hearing; and the probability that a court will be able to spot a "deliberate by-pass" or will not believe a defendant who, although properly advised by counsel, never previously asserted the alleged ground for relief.

The drafters of the ABA Standards Relating to Post-Conviction Remedies state that "[a]buse of process should always be an affirmative defense, pleaded and proved by the state, and cautiously invoked." ABA STANDARDS RELATING TO POST-CONVICTION REMEDIES § 6.1, Commentary at 89-90 (Approved Draft, 1968).

143. 412 S.W.2d 478 (Mo. 1967); see text accompanying notes 130 & 131 *supra*.

tutional rights until he reaches a federal court;¹⁴⁴ if no deliberate by-pass is found, the federal court may have to hold an evidentiary hearing before it can determine the constitutional claim on its merits.¹⁴⁵

E. Defective Formal Charge—Jurisdiction

A basic constitutional requirement of our system of criminal justice is that the defendant "be informed of the nature and cause of the accusation"¹⁴⁶ against him. To be effective, the formal indictment or information must set forth the constituent elements of the crime charged and sufficiently apprise the defendant of what he must be prepared to meet. It must also be sufficient to protect the defendant from being put in jeopardy twice for the same offense.¹⁴⁷

In 36 of the 325 post-conviction appeals decided in Missouri in the last 5 years, prisoners complained that the formal charge against them, either an indictment or a prosecuting attorney's information, was so insufficient or defective that the court lacked jurisdiction to convict or sentence them.¹⁴⁸ The court granted major relief in 3 cases¹⁴⁹ and minor relief

144. See *Evans v. Swenson*, 455 F.2d 291 (8th Cir. 1972); *Renfro v. Swenson*, 315 F. Supp. 733 (W.D. Mo. 1970); *Gray v. Swenson*, 302 F. Supp. 1162 (W.D. Mo. 1969), *aff'd*, 430 F.2d 9 (8th Cir. 1970).

145. This is a prime reason why Missouri should adopt ABA STANDARDS RELATING TO POST-CONVICTION REMEDIES § 6.1 (b) (d) (Approved Draft, 1968), which provides:

(b) Claims advanced in post-conviction applications should be decided on their merits, even though they might have been, but were not *fully and finally* litigated in the proceedings leading to judgments of conviction.

....

(d) Because of the *special importance of rights subject to vindication in post-conviction proceedings*, courts should be reluctant to deny relief to meritorious claims on procedural grounds. In most instances of unmeritorious claims, the litigation will be simplified and expedited if the court reaches the underlying merits despite possible procedural flaws. (emphasis added).

146. U.S. CONST. amend. VI. MO. CONST. art. I, § 18 (a): "[I]n criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation. . . ."

147. The common law rule, requiring the criminal charge to be set out with sufficient precision and fulness to enable the defendant to make his defense and to avail himself of his conviction or acquittal in a subsequent prosecution for the same offense, has been crystallized in the United States Constitution and in the constitutions of a great majority of the United States.

R. MORELAND, MODERN CRIMINAL PROCEDURE 211 (1959).

148. *E.g.*, *O'Neal v. State*, 486 S.W.2d 206 (Mo. 1972) (27 separate contentions on this, mostly trivial); *Johnson v. State*, 485 S.W.2d 73 (Mo. 1972) (amended information allegedly charging different offense); *Veneri v. State*, 474 S.W.2d 833 (Mo. 1971) (mistake in judgment, inconsistent with information); *DeLuca v. State*, 465 S.W.2d 609 (Mo. 1971) (alleged insufficient second offender allegation); *Wilkinson v. State*, 461 S.W.2d 283 (Mo. 1970) (defective information, leave to amend); *Russell v. State*, 446 S.W.2d 782 (Mo. 1969) (incorrect date of offense); *Meller v. State*, 438 S.W.2d 187 (Mo. 1969); *State v. Ball*, 432 S.W.2d 265 (Mo. 1968) (vagueness as to building burglarized).

Four of the prisoners unsuccessfully sought federal habeas corpus relief on this ground. *Keeny v. Swenson*, 458 F.2d 680 (8th Cir. 1972) (verdict and informa-

in 1.¹⁵⁰ The court granted relief only in extreme cases.¹⁵¹ Moreover, movants may face the obstacle of waiver.¹⁵²

Most prisoner complaints of this nature are highly technical and frivolous,¹⁵³ often because the prisoner files a pro se 27.26 motion and insists that his subsequently appointed counsel retain the contention in the motion.¹⁵⁴ When a prisoner tries to make a case from an obvious mistake in the record, the supreme court will point out why the complaint is excessively technical.¹⁵⁵

Many post-conviction complaints about the formal charge would not be made¹⁵⁶ if prisoners and their lawyers would examine Missouri Supreme

tion inconsistent, no federal question); *Deckard v. Swenson*, 335 F. Supp. 992 (W.D. Mo. 1971) (no exhaustion of state remedies, dismissal); *Wilkinson v. Haynes*, 327 F. Supp. 967 (W.D. Mo. 1971) (proposed amendment by interlineation, sufficiently informed of charge); *Holland v. Swenson*, 305 F. Supp. 1093 (W.D. Mo. 1969) (no exhaustion of state remedies, dismissal).

149. *Bullington v. State*, 459 S.W.2d 334 (Mo. 1970) (indictment insufficient, new trial); *Montgomery v. State*, 454 S.W.2d 571 (Mo. 1970) (no information on file at time of plea, no jurisdiction); *State v. Dixon*, 434 S.W.2d 564 (Mo. 1968) (second offense hearing, resentencing or new trial).

150. *State v. Garner*, 432 S.W.2d 259 (Mo. 1968) (judgment set aside although sentence commuted).

151. In *Montgomery v. State*, 454 S.W.2d 571 (Mo. 1970), the prosecuting attorney failed to file a robbery information before the defendant pleaded guilty to robbery. Obviously the defendant could not read or waive the reading of a nonexistent charge; moreover, a court is without jurisdiction of the subject matter until a formal charge is on file. In *Bullington v. State*, 459 S.W.2d 334 (Mo. 1970), and *State v. Garner*, 432 S.W.2d 259 (Mo. 1968), the formal charges did not contain an essential element of the crime.

152. A plea of guilty waives some types of defects in the formal charge. *See, e.g., Miller v. State*, 473 S.W.2d 413 (Mo. 1971) (information allegedly signed by an unauthorized person); *Walster v. State*, 438 S.W.2d 1 (Mo. 1969) (clerical error, date on information).

Where the formal charge sufficiently alleges "the essential facts constituting the offense charged but fails to inform the defendant of the particulars of the offense sufficiently to prepare his defense," the defendant should move for a bill of particulars. Mo. SUP. CR. R. 24.03. Failure to move for a bill of particulars waives any insufficiency as to such details. *Abercrombie v. State*, 457 S.W.2d 758 (Mo. 1970); *State v. Frankum*, 425 S.W.2d 183 (Mo. 1968).

153. *E.g., O'Neal v. State*, 486 S.W.2d 206 (Mo. 1972) (27 separate contentions, mostly trivial); *Cavallaro v. State*, 465 S.W.2d 635 (Mo. 1971) (plea to second degree murder, no information specifically charging that offense); *State v. Holland*, 438 S.W.2d 275 (Mo. 1969) (assault plea, not clear whether gun used to shoot or as club).

154. In *Tucker v. State*, 481 S.W.2d 10 (Mo. 1972), movant alleged that the information charging stealing was defective because it failed to allege that the defendant took the property from a "person," failed to allege "ownership," and failed to state "where" the offense occurred. The court found all the allegations clearly sufficient, however, and added: "These objections are really frivolous, but it is obvious from viewing the pro se motion that they originated with the defendant himself, and counsel is not to be blamed." *Id.* at 14.

155. *E.g., Veneri v. State*, 474 S.W.2d 833 (Mo. 1971) (mistake in judgment, can be corrected after the fact); *Wilkinson v. State*, 461 S.W.2d 283 (Mo. 1970) (leave to amend defective information, case tried as if amendment made).

156. *E.g., Russell v. State*, 446 S.W.2d 782 (Mo. 1969) (information contained improper date of offense).

Court Rule 24, concerning indictments and informations.¹⁵⁷ Rule 24.11 lists minor imperfections that do "not tend to the prejudice of the substantial rights of the defendant upon the merits." If the indictment or information is "a plain, concise and definite written statement of the essential facts constituting the offense charged,"¹⁵⁸ it usually will not be subject to attack under rule 27.26.

If the Missouri Supreme Court decides to follow federal precedents on collateral attack of indictments or informations,¹⁵⁹ it will not hold a formal charge insufficient in the face of collateral attack unless it is "so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had."¹⁶⁰ The position of the Court of Appeals for the Eighth Circuit is summarized in the leading case of *Keto v. United States*:¹⁶¹

The rule . . . is that the sufficiency of an indictment or information is not open to collateral attack . . . unless it appears that the circumstances are exceptional, that the questions raised are of "large importance", that the need for the remedy sought is apparent, and that the offense charged was one of which the sentencing court manifestly had no jurisdiction.¹⁶²

F. *Illegal Search and Seizure*

Both the United States Constitution¹⁶³ and the Missouri Constitution¹⁶⁴ protect the right of the people "to be secure in their persons, papers, homes and effects, from unreasonable searches and seizures."¹⁶⁵ In accord with this basic right, the Missouri Supreme Court first held in 1925¹⁶⁶ that evidence obtained as a result of unlawful searches and seizures is subject to suppression in any criminal prosecution.¹⁶⁷ Not until 1961 did the United States Supreme Court hold, in *Mapp. v. Ohio*,¹⁶⁸ that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."¹⁶⁹

Prisoners complained of illegal search and seizure in 25 of the 325 post-

157. Rules 24.01 to 24.11 are particularly relevant.

158. Mo. SUP. CT. R. 24.01.

159. The court in *DeLuca v. State*, 465 S.W.2d 609, 611 (Mo. 1971), relied heavily on federal cases decided under 28 U.S.C. § 2255 (1971), upon which rule 27.26 is patterned.

160. *Cain v. United States*, 349 F.2d 870, 872 (8th Cir. 1965).

161. 189 F.2d 247 (8th Cir. 1951).

162. *Id.* at 251.

163. U.S. CONST. amend. IV.

164. Mo. CONST. art. I, § 15.

165. *Id.*

166. *State v. Horton*, 312 Mo. 202, 278 S.W. 661 (En Banc 1925).

167. *See State v. Wilkerson*, 349 Mo. 205, 159 S.W.2d 794 (1942) (illegal search warrant, new trial granted).

168. 367 U.S. 643 (1961).

169. *Id.* at 655.

conviction proceeding appeals decided in Missouri in the last 5 years.¹⁷⁰ The supreme court granted no relief on this ground, although it considered the issue on the merits in 11 appeals.¹⁷¹ Later, at least 8 prisoners applied for federal habeas corpus on illegal search and seizure grounds. Only 1 obtained relief.¹⁷² However, the federal courts considered the issue on the merits in 7 of the 8 cases.¹⁷³

The primary obstacle that a prisoner raising a search and seizure issue must face in attempting to obtain a decision on the merits in a 27.26 proceeding is "procedural default." In *State v. Fields*,¹⁷⁴ the Missouri Supreme Court stated:

The procedural rules of this state, with an exception not here material, require that the contention of an unlawful search and seizure be made by motion to suppress the evidence in advance of trial The validity of a search and the admissibility in evidence of the fruits of that search present issues collateral to the issue of guilt which are to be tried independently. . . . He must also keep the question alive by timely objection . . . and by preservation of the issue in a motion for new trial The only exception under our procedural rule is where the defendant "had no reason to anticipate the evidence would be introduced and was surprised."¹⁷⁵

Although in *Fields* the court was avoiding the resolution of a constitutional issue raised for the first time on *direct appeal*, the *Fields* decision became

170. *E.g.*, *Schleicher v. State*, 483 S.W.2d 393 (Mo. En Banc 1972); *Mahurin v. State*, 477 S.W.2d 33 (Mo. En Banc 1972); *Smith v. State*, 473 S.W.2d 719 (Mo. 1971); *Fields v. State*, 468 S.W.2d 31 (Mo. 1971); *Wilkinson v. State*, 461 S.W.2d 283 (Mo. 1970); *Mace v. State*, 458 S.W.2d 340 (Mo. 1970); *State v. Caffey*, 457 S.W.2d 657 (Mo. 1970); *Collins v. State*, 454 S.W.2d 917 (Mo. 1970); *Redding v. State*, 452 S.W.2d 229 (Mo. 1970); *Stanfield v. State*, 442 S.W.2d 521 (Mo. 1969); *White v. State*, 430 S.W.2d 144 (Mo. 1968).

171. *Tucker v. State*, 482 S.W.2d 454 (Mo. 1972); *Fields v. State*, 466 S.W.2d 679 (Mo. 1971); *McGlathery v. State*, 465 S.W.2d 496 (Mo. 1971); *Wilkinson v. State*, 461 S.W.2d 283 (Mo. 1970); *Mace v. State*, 458 S.W.2d 340 (Mo. 1970); *Spica v. State*, 457 S.W.2d 683 (Mo. 1970); *Redding v. State*, 452 S.W.2d 229 (Mo. 1970); *Mace v. State*, 452 S.W.2d 130 (Mo. 1970); *Stanfield v. State*, 442 S.W.2d 521 (Mo. 1969); *Ciarelli v. State*, 441 S.W.2d 695 (Mo. 1969); *White v. State*, 430 S.W.2d 144 (Mo. 1968). In some of these cases the court noted the procedural failure of the defendant but decided the issue in spite of it.

172. *White v. Swenson*, 301 F. Supp. 447 (W.D. Mo. 1969) (writ granted, new trial or release).

173. *Fields v. Swenson*, 459 F.2d 1064 (8th Cir. 1972); *Keeny v. Swenson*, 458 F.2d 680 (8th Cir. 1972); *Collins v. Swenson*, 443 F.2d 329 (8th Cir. 1971); *Caffey v. Swenson*, 332 F. Supp. 624 (W.D. Mo. 1971); *Caffey v. Swenson*, 318 F. Supp. 704 (W.D. Mo. 1970); *Stanfield v. Swenson*, 332 F. Supp. 497 (W.D. Mo. 1969); *White v. Swenson*, 301 F. Supp. 447 (W.D. Mo. 1969). In *Deckard v. Swenson*, 335 F. Supp. 992 (W.D. Mo. 1971), the court dismissed the application for habeas corpus without prejudice in order to permit exhaustion of state remedies on another ground for relief.

174. 442 S.W.2d 30 (Mo. 1969); *cf.* *State v. Meiers*, 412 S.W.2d 478 (Mo. 1967) ("procedural default" on involuntary confession issue; on direct appeal).

175. 442 S.W.2d at 33.

one basis for later search and seizure decisions defining and restricting the scope of relief available under amended rule 27.26.¹⁷⁶

In 1970, the court decided *State v. Caffey*.¹⁷⁷ Defendant Caffey filed no motion to suppress, made no objection to the admission of the evidence, and failed to raise the search and seizure issue in his motion for a new trial.¹⁷⁸ The *Caffey* decision was unusual because the defendant's counsel consolidated and argued together the appeal from conviction and the appeal from denial of 27.26 relief.¹⁷⁹ It was also unusual because in the consolidated brief on appeal, Caffey's counsel lumped the two appeals together in argument and apparently "conceded in his brief [that] this Court has ruled that the scope of postconviction review in Missouri is governed by the rule of *Henry v. Mississippi*¹⁸⁰ . . . and not by the rule of *Kaufman*."¹⁸¹ In conceding this very doubtful point, counsel cited the *Fields* case, where the court had appropriately cited *Henry* in refusing to

176. See *Schleicher v. State*, 483 S.W.2d 393 (Mo. En Banc 1972). The court in *Schleicher* quotes language from *State v. Caffey*, 457 S.W.2d 657, 659 (Mo. 1970) that the court in *Caffey* had quoted from *Fields*.

177. 457 S.W.2d 657 (Mo. 1970).

178. *Id.* at 659.

179. The court set aside an earlier affirmance of conviction because Caffey was not represented by counsel on the original appeal. In the meantime, Caffey had appealed from a decision overruling his 27.26 motion.

Consolidating an ordinary appeal with a 27.26 appeal could easily result in a tendency to apply the same "procedural default" rules to post-conviction relief that are applied in cases of direct appeal. With regard to direct appeals, the case for a "default" approach in order to encourage the utilization of state procedures and to cut down on the appellate caseload is compelling; but, determining whether the law should permit a collateral attack in the state trial court, subject to limited appellate review under the "clearly erroneous" standard, involves different considerations. A primary consideration is the availability of federal habeas corpus relief if the state "procedural default" rules restrict the scope of state post-conviction relief. See note 142 *supra*.

180. 379 U.S. 443 (1965).

181. 457 S.W.2d at 660. The case mentioned is *Kaufman v. United States*, 394 U.S. 217 (1969), where the Supreme Court held that the claim of a federal prisoner that he was convicted on evidence obtained in an unconstitutional search and seizure is cognizable in a post-conviction proceeding under 28 U.S.C. § 2255 (1970). Prior to *Kaufman*, the Missouri Supreme Court had at times relied on lower federal court decisions holding that prisoners could not raise this issue under section 2255, because rule 27.26 was based on section 2255. In *State v. Holland*, 412 S.W.2d 184 (Mo. 1967), a leading "procedural default" decision on search and seizure, the court cited not only prior Missouri cases holding that a prisoner may not raise a claim of illegal search and seizure on collateral attack, but also cited comparable holdings under section 2255, such as *Cox v. United States*, 351 F.2d 280 (8th Cir. 1965). See text accompanying notes 193-97 *infra*, for a discussion of Missouri cases stating a purported absolute proscription against hearing search and seizure questions in 27.26 cases.

Because *Kaufman* overruled the *Cox* line of decisions, one could argue that Missouri should follow suit and overrule the *Holland* line of decisions. However, state prisoners were *never* barred from seeking federal habeas corpus relief on the unconstitutional search and seizure ground under 28 U.S.C. § 2254 (1970). 394 U.S. at 225. As the *Kaufman* court reasons:

The provision of federal collateral remedies rests . . . fundamentally upon a recognition that adequate protection of constitutional rights relating to

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decide a search and seizure question *on direct appeal* where defendant had not timely raised the issue and kept it alive below.¹⁸² In *Henry*, the Supreme Court strongly suggested in dictum that a state procedural ground is adequate to bar *direct review*¹⁸³ if it serves a legitimate state interest,¹⁸⁴ but added:

[A] dismissal on the basis of an adequate state ground would not end this case; petitioner might still pursue vindication of his federal claim in a federal habeas corpus proceeding in which the procedural default will not alone preclude consideration of his claim, at least unless it is shown that the petitioner *deliberately bypassed* the orderly procedure of the state courts.¹⁸⁵

the criminal trial process requires the *continuing availability* of a mechanism for relief. This is no less true for federal prisoners than it is for state prisoners.

Id. at 226 (emphasis added).

182. *State v. Fields*, 442 S.W.2d 30, 34 (Mo. 1969) (appeal); See text accompany notes 174-76 *supra*. In *Fields* the appellant argued that by reason of *Kaufman v. United States*, 394 U.S. 217 (1969) (applicable to federal prisoners only), "the contention of unlawful search and seizure can be raised at any time without regard to state procedural requirements." 442 S.W.2d at 34. Rejecting the *Kaufman* decision as irrelevant, the court said, "[W]e consider the rule set forth in *Henry v. State of Mississippi*, 379 U.S. 443, . . . to be controlling in this case." *Id.* (emphasis added).

183. The Court in *Henry* was concerned with limiting its certiorari jurisdiction.

184. In *State v. Harrington*, 435 S.W.2d 318 (Mo. 1968) (appeal), cited by the court in *Fields* (442 S.W.2d at 34), the court relied on *Henry* as holding "that a state procedural requirement that there be a 'contemporaneous objection' to the introduction of illegally obtained evidence does serve a legitimate state interest." 435 S.W.2d at 321. The *Harrington* decision listed the "legitimate state interests" of Missouri:

[T]o prevent delays during trial in determining collateral issues not bearing on guilt or punishment. . . . [W]hen no motion is filed before trial . . . to indicate to the prosecution that the reasonableness of the search is not an issue . . .

Id.

185. 379 U.S. at 452 (emphasis added).

In *Caffey* the defendant did not deliberately by-pass his chance to raise the search and seizure question by motion to suppress. Failing to make this motion could have gained no possible strategic advantage. Moreover, Caffey's lawyer admitted that he did not think of or contemplate a motion to suppress because he was ignorant of the relevant line of cases. 457 S.W.2d at 660-61. By discussing the issue of deliberate by-pass together with the separate issue of denial of effective assistance of counsel, the court avoided directly addressing the deliberate by-pass issue and indicated that Caffey would have to show that the legal representation was "so woefully inadequate as to shock the conscience of the court and make the proceedings a farce and mockery of justice" before the court would hear and determine his illegal search and seizure complaint. *Id.* at 660-62. Judge Seiler dissented, arguing that through ineffective assistance of counsel, Caffey lost his illegal search and seizure defense. *Id.* at 665-66 (dissenting opinion).

The *Henry* Court indicated a willingness to bind a defendant by his counsel's actions or failures in some situations, particularly where counsel makes a deliberate choice of *trial strategy* that could prove beneficial to the defendant. 379 U.S. at 451. The Court remanded the case to the state court to determine whether counsel's failure to comply with Mississippi's contemporaneous objection rule was a deliberate by-pass of state procedures. Apparently the same waiver

Thus, the Supreme Court did not adopt an "adequate state ground" rule for determining the scope of federal habeas corpus relief; no federal district court could accept a concession that "the scope of postconviction review . . . [in habeas corpus] is governed by the rule of *Henry v. Mississippi* . . ." ¹⁸⁶ Yet, as stated above, the *Caffey* court chose to accept *Henry's* "procedural default" rule for direct appeals as controlling in collateral attack (*i.e.*, 27.26) proceedings. Later, in *Caffey v. Swenson*,¹⁸⁷ the federal district court rejected this "procedural default" approach, held that *Caffey* had not deliberately bypassed orderly state procedure, and decided the search and seizure issue on its merits.¹⁸⁸

Later decisions firmly entrenched *Henry's* "procedural default" rule as the controlling standard for courts seeking to avoid deciding search and seizure issues in 27.26 proceedings, despite the rule's origin as a standard for direct federal review. In the 27.26 appeal in *Fields v. State*,¹⁸⁹ defendant *Fields* again asked the court to consider his search and seizure claim on the merits. The court relied on its decision in the original *Fields*

standard applicable to the defendant—knowledgeable and deliberate—is to be applied to defense counsel, who, although presumed to be knowledgeable, may not be in the particular case.

The *Caffey* approach to determining whether a defendant "waived" his constitutional rights would not be acceptable to the federal courts. *Frazier v. Roberts*, 441 F.2d 1224, 1229 (8th Cir. 1971) (opinion on petition for rehearing). No *presumption* of waiver or deliberate by-pass should arise when counsel fails to exercise those rights. Unless the record convincingly demonstrates a factual background for a finding of deliberate by-pass, the law requires an evidentiary hearing in federal court to determine this issue. *Henry v. Mississippi*, 379 U.S. 443 (1965); *United States ex rel. Snyder v. Mazurkiewicz*, 413 F.2d 500 (3d Cir. 1969).

186. *State v. Caffey*, 457 S.W.2d 657, 660 (Mo. 1970); see note 180 and accompanying text *supra*.

187. 332 F. Supp. 624 (W.D. Mo. 1971) (habeas corpus petition denied).

188. 332 F. Supp. at 634. No evidentiary hearing was required in federal court, because, fortunately, a full evidentiary hearing had been held on the issue in the 27.26 proceedings. The federal district court cited *Losieau v. Sigler*, 421 F.2d 825 (8th Cir. 1970), for the proposition that a federal court is not bound to find deliberate by-pass of state remedies simply because the state court did. The federal district court commented in *Caffey*, after reviewing federal waiver decisions:

The state may still hold that it is within their procedural interests to bar a prisoner from raising constitutional issues for the first time in post-conviction proceedings. However, whenever a state does so, *such a holding can only be frowned upon* because, as was the rule prior to *Kaufman*, a federal court must still inquire whether the procedural by-pass was a knowing and deliberate waiver under federal standards. . . . On the evidence at the Rule 27.26 hearing, no knowing waiver is shown under applicable federal standards. Petitioner testified without contradiction that he did not have any familiarity with the law of search and seizure at that time. Further, his counsel admitted that it did not occur to him to file a motion to suppress Again . . . the Missouri Supreme Court applied a *strictly procedural rule* in noting the failure of petitioner to object or assign error on motion for new trial.

332 F. Supp. at 634-35 n.3. (emphasis added).

189. 468 S.W.2d 31 (Mo. 1971).

appeal¹⁹⁰ that *Henry* is controlling, this time as to post-conviction relief.¹⁹¹ The court candidly stated:

We acknowledge the rejection of this position by the United States Court of Appeals for the Eighth Circuit on May 24, 1971. *Frazier v. Roberts* (Steed), 8 Cir., 441 F.2d 1224 (opinion written on petition for rehearing). We regret the extent to which the problem presented may endanger "the delicate federal-state relationship in the criminal law enforcement field." However, we decline to consider appellant's unlawful search and seizure claim *under the circumstances of this case*. Our holding, of course, "will not preclude inquiry into appellant's claim in a federal habeas corpus proceeding." . . . 441 F.2d 1224.¹⁹²

Statements in some Missouri cases that "a claim of illegal search and seizure is not such a matter as may be raised in a collateral attack upon a judgment of conviction"¹⁹³ have obscured the outline of the "procedural default" rule as it applies to search and seizure issues in 27.26 proceedings. However, the absolute proscription quoted in the preceding sentence loses much of its weight upon consideration that, first, most cases in which it appears involve some definable "procedural default"¹⁹⁴ under the Missouri standards,¹⁹⁵ and, second, the court has decided search and seizure issues

190. *State v. Fields*, 442 S.W.2d 30 (Mo. 1969); see notes 174-75 and accompanying text *supra*.

191. In addition, the court relied on *State v. Caffey*, 457 S.W.2d 657 (Mo. 1970), which also relied on *Henry*. See notes 177-86 and accompanying text *supra*, for criticism of reliance on *Henry* in post-conviction cases.

192. 468 S.W.2d at 32 (emphasis added). In the cited case of *Frazier v. Roberts*, 441 F.2d 1224 (8th Cir. 1971) (opinion on petition for rehearing), the court of appeals held:

The inadvertent failure to raise a constitutional claim at the appropriate juncture . . . regardless of its effect as a waiver of later litigation or review in the State system, will not preclude inquiry into that claim in a federal habeas corpus proceeding.

Id. at 1230. The Eighth Circuit reversed the federal district court in *Frazier* for taking the position that "the Constitution . . . does not protect criminal defendants from mere mistakes of counsel, even though they may be serious ones." *Frazier v. Roberts*, 310 F. Supp. 504, 511 (E.D. Ark. 1970). Compare this rejected approach with note 185 *supra*.

193. *E.g.*, *Schleicher v. State*, 483 S.W.2d 393, 394 (Mo. En Banc 1972); *Smith v. State*, 473 S.W.2d 719, 720 (Mo. 1971); *Burnside v. State*, 473 S.W.2d 697, 700 (Mo. 1971); *Fields v. State*, 468 S.W.2d 31, 32 (Mo. 1971); *State v. Caffey*, 457 S.W.2d 657, 659 (Mo. 1970); see *State v. Holland*, 412 S.W.2d 184, 185 (Mo. 1967) (decided before amended rule 27.26 became effective).

194. See, *e.g.*, *Schleicher v. State*, 483 S.W.2d 393 (Mo. En Banc 1972) (no motion to suppress, objections at trial, or mention of the issue in brief on appeal); *Smith v. State*, 473 S.W.2d 719 (Mo. 1971) (no motion to suppress); *State v. Caffey*, 457 S.W.2d 657 (Mo. 1970) (no motion to suppress, objections at trial, or mention of the issue in brief on appeal); *State v. Holland*, 412 S.W.2d 184 (Mo. 1967) (no motion to suppress, no mention of issue in motion for new trial); Brief for Respondent at 10, *Burnside v. State*, 473 S.W.2d 697 (Mo. 1971) (no objections at trial).

195. See quote in text accompanying note 175 *supra*.

on the merits in a number of cases since rule 27.26 was amended *and* since cases referring to an absolute proscription have come down.¹⁹⁶ This is not to say that the court will never adhere to an absolute proscription absent ascertainable "procedural default."¹⁹⁷

Finally, the court en banc spoke on the question of search and seizure issues in 27.26 proceedings in *Schleicher v. State*.¹⁹⁸ The discussion is not illuminating. In *Schleicher*, the defense did not move to suppress, object to the evidence at trial, or mention the issue in the motion for new trial or on appeal. The court held that the defendant had therefore "waived" the right to raise the fourth amendment question under rule 27.26.¹⁹⁹ The court made no effort to determine whether a "deliberate bypass" was involved;²⁰⁰ the "waiver" was merely a state rule of forfeiture based on prior "procedural default."²⁰¹ The *Schleicher* court went beyond the necessities

196. In *White v. State*, 430 S.W.2d 144 (Mo. 1968), the first of the search and seizure cases decided after the effective date of amended rule 27.26, the defendant filed a motion to suppress but then failed to object to the evidence at trial and failed to raise the issue on appeal. The court said, "Notwithstanding the circumstances . . . , we shall rule the contention on its merits." *Id.* at 145. For other cases involving decisions on the merits of search and seizure issues in 27.26 proceedings since the effective date of amended rule 27.26, see note 171 *supra*.

197. See *Mahurin v. State*, 477 S.W.2d 33 (Mo. En Banc 1972). *Mahurin* is an unusual case because the defendant moved to suppress, objected to the evidence at trial, and later raised the search and seizure issue in his motion for a new trial. Thus, the court had before it a defendant who had done everything he could to enforce the exclusionary rule before trial and at trial in 1949. In holding that the issue was not reviewable under rule 27.26, the court thought of an original approach to avoid the issue:

Missouri followed the exclusionary rule on illegally obtained evidence . . . before such rule was made obligatory on the states as a matter of federal constitutional right in *Mapp v. Ohio*. . . . *Mapp* has no retroactive application. . . . Therefore, the question here does not involve a federally protected constitutional right. Inasmuch as the matter . . . is one of state law, we adhere to the rule laid down in prior cases that the matter is not one for review on collateral attack under Supreme Court Rule 27.26.

Id. at 35 (citing cases decided before rule 27.26 was amended).

If the defendant in *Mahurin* had taken a direct appeal on the issue, rule 27.26 (b) (3) probably would have foreclosed any later attempt for 27.26 relief: "A proceeding under this Rule ordinarily cannot be used . . . as a substitute for a second appeal." *Caffey v. State*, 454 S.W.2d 518, 519 (Mo. 1970). *But see Ciarelli v. State*, 441 S.W.2d 695 (Mo. 1969) (27.26 proceeding, evidence considered after direct appeal on issue).

198. 483 S.W.2d 393 (Mo. En Banc 1972).

199. *Id.* at 394.

200. The trial court found, and the supreme court agreed, that movant has *waived* the right to raise . . . any question pertaining to his arrest and "booking" by *failure* to properly raise and preserve the point by pre-trial motion, trial objection, motion for new trial, or on original appeal. . . . *Unless raised by pretrial motion* the same cannot be the subject of a collateral attack under Rule 27.26, *State v. Caffey*

Id.

201. *Id.* Relying on the dissent in *State v. Caffey*, 457 S.W.2d 657, 665-66 (Mo. 1970) (dissenting opinion), counsel in *Schleicher* argued for the first time on appeal that trial counsel's failure to object to the evidence had deprived the defendant of effective assistance of counsel. Brief for Appellant at 24-26, *Schleicher v. State*, 483 S.W.2d 393 (Mo. En Banc 1972). Thus, under *Caffey* a finding of

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of the case in quoting from *State v. Caffey*;²⁰² *Caffey* referred to an absolute proscriptio (albeit gratuitously, as the facts of *Caffey* clearly showed "procedural default");²⁰³

In . . . *Caffey* . . . we stated that "a claim of illegal search and seizure is not such a matter as may be raised in a collateral attack upon a judgment of conviction." . . . "Not only must defendant file a motion to suppress the controverted evidence, but he has the burden of presenting evidence to sustain his contentions." . . . "He must also keep the question alive by timely objection, . . . and by preservation of the issue in a motion for new trial."²⁰⁴

If the Missouri courts follow this broad dictum²⁰⁵ in future cases, Judge Seiler's conclusion in dissent that "our divisional decisions have written Fourth Amendment claims out of rule 27.26"²⁰⁶ will be a correct statement of the law. Missouri trial courts will not consider illegal search and seizure complaints at 27.26 evidentiary hearings;²⁰⁷ further, federal courts examining Missouri law will see clearly that no state post-conviction procedure is available to vindicate federal fourth amendment claims.²⁰⁸ Judge Seiler's dissent in *Schleicher* summarizes the problem:

"waiver" might have been avoided. See 457 S.W.2d at 660-61. The *Schleicher* court applied another "procedural default" rule in holding that the "contention cannot be considered because it is mentioned for the first time on this appeal." 483 S.W.2d at 394.

202. 457 S.W.2d 657, 659 (Mo. 1970).

203. See text accompanying note 178 *supra*.

204. *Schleicher v. State*, 483 S.W.2d 393, 394 (Mo. En Banc 1972).

205. The *Schleicher* court first stated that it agreed with the trial court that "[u]nless raised by *pretrial motion* the same cannot be the subject of a collateral attack under Rule 27.26, *State v. Caffey*, . . ." *Id.* (emphasis added). This holding of *Caffey* and *Schleicher* should not be confused with the dictum in *Schleicher* that the defendant must go beyond the motion to suppress and keep the issue alive by timely objection and in a motion for new trial. In quoting from *Caffey* (see text accompanying note 204 *supra*), the *Schleicher* court included a quote from *State v. Fields*, 442 S.W.2d 30, 33 (Mo. 1969) (appeal), which the *Caffey* court used as the reason for not determining the search and seizure issue on *direct appeal*. See 457 S.W.2d at 659.

206. 483 S.W.2d at 395 (dissenting opinion). Judge Seiler continued:

If the defendant does not file a motion to suppress and follow it with appropriate motions and objections, he is held to have waived the point. If he files the proper motions and objections but loses on appeal, he is foreclosed because he is then said to be using 27.26 as a second appeal. It is true many early Missouri decisions took the view the only way to reach an illegal search and seizure was by motion to suppress and this view has been carried forward into our application of rule 27.26, *even after its revision in 1967*, but I do not believe it is tenable in view of *Townsend v. Sain*, . . . and *Fay v. Noia*. . . .

Id. (emphasis added).

207. The court might make an exception if the legal question involved was novel at the time of trial. See *id.* at 394 (trial court finding). Also, the court might make an exception if the prisoner raised the issue through the motion for a new trial, but for some reason other than a "deliberate by-pass" failed to appeal. See *Mahurin v. State*, 477 S.W.2d 33 (Mo. En Banc 1972); note 197 *supra*.

208. Federal courts will not require exhaustion of state remedies before considering habeas corpus applications if analysis of state substantive holdings shows

The basic question is, who is going to hear federal constitutional search and seizure questions arising from Missouri state convictions? Our divisional position is that it is to be done by the federal courts This leads to conflicts and does not promote finality A defendant cannot constitutionally be convicted on evidence obtained in violation of the Fourth Amendment . . . and we accomplish little by declining to meet the issue, particularly in a case where there is no evidence of any abuse of process by the defendant.²⁰⁹

G. Infrequent Complaints

Some complaints appear much less frequently on appeal from 27.26 hearings than do the complaints previously discussed. The following categories of complaints are discussed in descending order of their frequency in 27.26 appeals.

1. Excessive, Incorrect, and Expired Sentences

Rule 27.26 specifically authorizes attacks on illegal sentences, whether on constitutional or statutory grounds. Seventeen appeals decided in the past five years involved complaints about allegedly excessive, incorrect, or expired sentences. The court granted relief to no prisoner, but the state obtained relief in two cases in which prisoners had obtained unauthorized post-conviction relief in the trial court.²¹⁰ No subsequent federal cases involved this type of complaint.

The most common sentencing complaint was that the sentence was excessive under all the circumstances, either because it allegedly constituted "cruel and unusual punishment"²¹¹ or because the court allegedly exceeded its statutory sentencing authority.²¹² Some prisoners made very original but frivolous sentencing arguments to the court.²¹³ Although the

that it would be futile for the prisoner to seek state relief. 28 U.S.C. § 2254 (b) (1970); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1098-1100 (1970).

209. 483 S.W.2d at 395 (dissenting opinion).

210. *Hulett v. State*, 468 S.W.2d 636 (Mo. 1971) (no authority to amend sentence, court lists authorized 27.26 remedies); *State v. Todd*, 433 S.W.2d 550 (Mo. 1968) (law, not trial court, fixes starting date of sentence).

211. *See, e.g., Phillips v. State*, 486 S.W.2d 237 (Mo. 1972) (due process and equal protection arguments combined); *Crump v. State*, 462 S.W.2d 809 (Mo. 1971) (two 75-year sentences to commence at end of two life sentences); *State v. Grimm*, 461 S.W.2d 746 (Mo. 1971) (three consecutive life sentences, within statutory limits).

212. *State v. Weaver*, 486 S.W.2d 482 (Mo. 1972) (crediting jail time); *Mullin v. State*, 473 S.W.2d 429 (Mo. 1971) (trial court authority to make sentences consecutive); *Wynes v. State*, 468 S.W.2d 7 (Mo. 1971) (misdemeanor, escape, felony conviction within statutory limits).

213. In *Tucker v. State*, 482 S.W.2d 454 (Mo. 1972), the prisoner asserted that his unusual sentence of 14 years and 1 day was illegal because it consisted of 2 sentences. Perhaps even more ingenious was the argument in *McBride v. State*, 484 S.W.2d 480 (Mo. 1972). The prisoner alleged that he had been "unlawfully banished" from Missouri as a condition of parole. He then testified that going to Texas was his idea, formulated in order to avoid parole supervision. *Id.* at 483.

courts will consider most sentencing complaints on the merits, the prisoner must attack the judgment and sentence rather than an action of the Department of Corrections in computing the sentence²¹⁴ or some other collateral matter.²¹⁵

2. Unconstitutional Identification Procedures

Relying on 3 leading federal cases,²¹⁶ 17 prisoners also complained about allegedly unconstitutional identification procedures. The court granted minor relief in 1 case.²¹⁷ Two prisoners later unsuccessfully sought federal habeas corpus relief.²¹⁸

Ten of the appeals involved complaints that under the "totality of the circumstances" the identification of the defendant was "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law."²¹⁹ Few prisoners can expect to obtain post-conviction relief even if they did not have counsel during the identification procedure²²⁰ and the identification was "unnecessarily suggestive." Courts are adept at finding an "independent source" for any in court identification of the defendant.²²¹

214. *State v. Todd*, 433 S.W.2d 550 (Mo. 1968) (starting date of second sentence changed by record department, inconsistent with judgment recitation).

215. *Davis v. State*, 460 S.W.2d 549 (Mo. 1970) (sought declaration of order in which sentences were to be served).

216. *Stovall v. Denno*, 388 U.S. 293 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967).

217. *Arnold v. State*, 484 S.W.2d 248 (Mo. 1972) (remanded for hearing on use of lineup identification evidence).

218. *Robertson v. Haynes*, 459 F.2d 456 (8th Cir. 1972); *Grant v. Swenson*, 313 F. Supp. 1117 (E.D. Mo. 1970).

219. *Stovall v. Denno*, 388 U.S. 293, 302 (1967). Most of the earlier Missouri decisions were based on this decision. *E.g.*, *Robertson v. State*, 464 S.W.2d 15 (Mo. 1971); *State v. Jones*, 446 S.W.2d 796 (Mo. 1969); *Grant v. State*, 446 S.W.2d 620 (Mo. 1969); *State v. Reeder*, 436 S.W.2d 629 (Mo. 1969); *State v. Moore*, 435 S.W.2d 8 (Mo. En Banc 1968).

220. Until recently, few cases have involved the issue of denial of counsel at the time of the identification procedure. The constitutional rule of *Gilbert v. California*, 388 U.S. 263 (1967) and *United States v. Wade*, 388 U.S. 218 (1967) applies only to cases involving identification confrontations conducted in the absence of counsel after June 12, 1967. *Stovall v. Denno*, 388 U.S. 293 (1967).

Recent cases involving the issue of right to counsel include *Arnold v. State*, 484 S.W.2d 248 (Mo. 1972) (remanded for hearing); *Fields v. State*, 484 S.W.2d 208 (Mo. 1972) (plea waives such nonjurisdictional defect); *Tucker v. State*, 482 S.W.2d 454 (Mo. 1972) (photographic identification).

221. *See, e.g.*, *Robertson v. Haynes*, 459 F.2d 456 (8th Cir. 1972); *Davis v. State*, 482 S.W.2d 468 (Mo. 1972); *Robertson v. State*, 464 S.W.2d 15 (Mo. 1971); *State v. Jones*, 446 S.W.2d 796 (Mo. 1969).

The courts often find other reasons for denying post-conviction relief in this situation. *See, e.g.*, *Robinson v. State*, 482 S.W.2d 492 (Mo. 1972) (plea of guilty, confrontation shortly after crime); *Schuler v. State*, 476 S.W.2d 596 (Mo. 1972) (plea); *Murray v. State*, 475 S.W.2d 67 (Mo. 1972) (*Wade* not retroactive); *Balle v. State*, 467 S.W.2d 888 (Mo. 1971) (issue decided on appeal); *Fields v. State*, 466 S.W.2d 679 (Mo. 1971) (no prejudice).

3. Knowing Use of Perjured Testimony

Ten prisoners complained that the prosecution used perjured evidence in securing their convictions.²²² Although two prisoners obtained minor relief on this ground,²²³ the court granted no major relief. That is not surprising, considering the almost insurmountable obstacles involved. First, the prisoner must prove that a witness committed perjury at his trial.²²⁴ Further, he must prove that the prosecution knowingly used the perjured testimony or knowingly failed to correct testimony that it knew to be false.²²⁵ Because these are questions of fact, a hearing must be held if the prisoner pleads facts in support of the complaint.²²⁶ No prisoner sought federal habeas corpus relief on this ground.

4. Suppression of Favorable Evidence

Relying upon the leading case of *Brady v. Maryland*,²²⁷ 10 prisoners complained that the state suppressed favorable evidence in connection with their prosecution.²²⁸ One prisoner who obtained minor relief after alleging knowing use of perjured testimony also obtained minor relief on this ground,²²⁹ but no prisoner obtained major relief. Again, no prisoner subsequently sought federal habeas corpus relief.

Most courts appear reluctant to broaden the constitutionally required scope of criminal discovery by reading the *Brady* decision expansively.

222. The leading federal case is *Mooney v. Holohan*, 294 U.S. 103 (1935) (contriving a conviction denies due process). Missouri recognized this ground for collateral attack in *State v. Eaton*, 280 S.W.2d 63 (Mo. 1955).

223. *Harris v. State*, 443 S.W.2d 191 (Mo. 1969) (evidentiary hearing); *State v. Keeble*, 427 S.W.2d 404 (Mo. 1968) (evidentiary hearing and appointment of counsel).

224. In *State v. Shields*, 441 S.W.2d 719 (Mo. 1969), defendant tried to prove that an officer who testified that defendant admitted participation in a robbery committed perjury. He and his co-defendant testified that he did not rob anyone; the trial court found that perjury was not proved. Trial court findings against credibility will seldom be held "clearly erroneous." See *Mahurin v. State*, 477 S.W.2d 33, 37 (Mo. En Banc 1972).

225. *Moore v. State*, 453 S.W.2d 958 (Mo. 1970); *State v. Shields*, 441 S.W.2d 719 (Mo. 1969); *State v. Harris*, 428 S.W.2d 497 (Mo. 1968).

226. *Harris v. State*, 443 S.W.2d 191 (Mo. 1969); *State v. Moore*, 435 S.W.2d 8 (Mo. En Banc 1968).

227. 373 U.S. 83 (1963), where the Supreme Court ruled that:

[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to the guilt or punishment, irrespective of the good faith, or bad faith of the prosecution.

Id. at 87.

The *Brady* decision raised a number of questions in the area of criminal discovery that the Court has not answered. See generally Cannon, *Prosecutor's Duty to Disclose*, 52 MARQ. L. REV. 516 (1969).

228. E.g., *Warren v. State*, 482 S.W.2d 497 (Mo. En Banc 1972); *Mason v. State*, 468 S.W.2d 617 (Mo. 1971); *Spica v. State*, 457 S.W.2d 683 (Mo. 1970) (citing state and federal cases); *Garton v. State*, 454 S.W.2d 522 (Mo. 1970); *McGlathery v. State*, 435 S.W.2d 677 (Mo. 1969).

229. *Harris v. State*, 443 S.W.2d 191 (Mo. 1969) (permitted to amend, include ground in motion for hearing).

The supreme court has found a variety of reasons for denying applications for relief based on this ground.²³⁰

5. Denial of a Speedy Trial

Nine prisoners complained that they were denied the constitutional²³¹ or statutory²³² right to a speedy trial. The court granted no relief. Two prisoners unsuccessfully sought federal habeas corpus relief.²³³

Although dictum in one of these nine cases indicated that a prisoner cannot raise this issue in a collateral attack,²³⁴ the dictum was based on an old federal "procedural default" rule that the sixth amendment right to a speedy trial must be asserted early or it will be deemed waived.²³⁵ The United States Supreme Court rejected this approach in *Barker v. Wingo*.²³⁶ Later Missouri decisions indicate that unless the issue has been decided on

230. *Warren v. State*, 482 S.W.2d 497 (Mo. 1972) (alleged suppressed document not properly identified, not considered); *Mahurin v. State*, 477 S.W.2d 33 (Mo. 1972) (credibility); *Shoemaker v. State*, 462 S.W.2d (Mo. En Banc 1971) (no showing transcript not available to lawyer); *Malone v. State*, 461 S.W.2d 727 (Mo. 1971) (evidence sought irrelevant to defense theory); *Patrick v. State*, 460 S.W.2d 693 (Mo. 1970) (prosecutor unaware of evidence); *Spica v. State*, 457 S.W.2d 683 (Mo. 1970) (nothing helpful in wiretap activity sheets); *Garton v. State*, 454 S.W.2d 522 (Mo. 1970) (statement consistent with testimony).

231. U.S. CONST. amends. IV, VI; Mo. CONST. art. I, § 18 (a). Most decisions are based on federal constitutional precedents.

232. §§ 545.890-.920, RSMo 1969.

233. *Keeny v. Swenson*, 458 F.2d 680 (8th Cir. 1972) (16-month delay, defendant partly responsible); *Morton v. Haynes*, 332 F. Supp. 890 (E.D. Mo. 1971) (trial 10 months after arrest, no prejudice).

234. In *State v. Deckard*, 459 S.W.2d 342 (Mo. 1970), where 14 months elapsed between crime and arrest, the court said: "No case cited by appellant and none which we have found considered the question upon a collateral attack of a conviction." *Id.* at 345 (citing federal cases). The trial court had expressed an opinion at the time of sentencing that the defendant had no right to appeal and that his remedy was under rule 27.26; therefore, the supreme court said, "[W]e will not dispose of this case on the grounds of nonavailability of the remedy." *Id.* Judge Seiler concurred but did "not agree in the implication there is doubt whether a claim of denial of speedy trial can be reached under Rule 27.26," because "Rule 27.26 states in so many words that it is for sentences claimed to be imposed in violation of the state and federal constitutions." *Id.* at 346 (concurring opinion).

235. *Chapman v. United States*, 376 F.2d 705 (2d Cir. 1967); *D'Ercole v. United States*, 361 F.2d 211 (2d Cir.), cert. denied, 385 U.S. 995 (1966). The Supreme Court has called this approach the "demand-waiver doctrine." *Barker v. Wingo*, 407 U.S. 514, 525 (1972).

236. 407 U.S. 514, 528 (1972). The Court stated its strong opposition to "procedural default" approaches:

Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights. The Court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1933). Courts should "indulge every reasonable presumption against waiver" . . . and they should "not presume acquiescence in the loss of fundamental rights". . . .

Id. at 525-26.

appeal²³⁷ or waived by a plea of guilty,²³⁸ it may be considered on its merits in a 27.26 proceeding.²³⁹

6. Double Jeopardy

Nine prisoners complained that they were "twice put in jeopardy" for the same offense.²⁴⁰ The court granted minor relief in one case.²⁴¹ One prisoner subsequently sought and obtained federal habeas corpus relief.²⁴² The courts will ordinarily consider the various types of double jeopardy claims on the merits.²⁴³

7. Mental Incompetency to Defend

The due process clause of the fourteenth amendment prohibits the conviction of a defendant who is incompetent to stand trial; further, it requires that a state provide procedural safeguards sufficient to insure that this does not happen.²⁴⁴ After a federal court granted habeas corpus relief in *Brizendine v. Swenson*,²⁴⁵ nine Missouri prisoners sought post-conviction relief on the ground that because of "reasonable cause to believe that the accused ha[d] a mental disease or defect excluding fitness to proceed,"²⁴⁶

237. *Murray v. State*, 475 S.W.2d 67 (Mo. 1972); *Morton v. State*, 468 S.W.2d 638 (Mo. 1971); *Keeny v. State*, 461 S.W.2d 731 (Mo. 1971); *Malone v. State*, 461 S.W.2d 727 (Mo. 1971) (second term rule).

238. *Schuler v. State*, 476 S.W.2d 596 (Mo. 1972); *Rew v. State*, 472 S.W.2d 611 (Mo. 1971) (statutory and constitutional issues waived); *Dickson v. State*, 449 S.W.2d 576 (Mo. 1970) (frivolous appeal).

239. A reading of the Missouri cases suggests that no rigid "procedural default" rule as mentioned in note 234 *supra* is imminent.

240. The double jeopardy clause of the fifth amendment is applicable to the states via the fourteenth amendment. *Benton v. Maryland*, 395 U.S. 784 (1969). Mo. Const., art. I, § 19 provides: "[N]or shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury . . ." (emphasis added). Because of the limited protection under the Missouri constitution (*see, e.g., Murray v. State*, 475 S.W.2d 67, 70 (Mo. 1972)), most decisions are based on federal constitutional precedents.

241. *Durham v. State*, 473 S.W.2d 397 (Mo. 1971) (hearing on whether justification existed for two mistrials).

242. *Spidle v. Swenson*, 313 F. Supp. 203 (W.D. Mo. 1970) (new trial on lower charge after acquittal on higher charge).

243. *See, e.g., McCulley v. State*, 486 S.W.2d 419 (Mo. 1972) (stiffer sentence after second plea); *Robinson v. State*, 482 S.W.2d 492 (Mo. 1972) (two crimes arising from same facts); *Murray v. State*, 475 S.W.2d 67 (Mo. 1972) (jury panel dismissed, manifest necessity to abort proceedings).

244. *Pate v. Robinson*, 383 U.S. 375 (1966). The state contended that Robinson had intelligently waived the issue of incompetence by failure to request a hearing on the issue at trial and that the trial judge had no duty to order a hearing *sua sponte*. The Court rejected the argument because "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Id.* at 384.

245. 302 F. Supp. 1011 (W.D. Mo. 1969). The federal court found substantial doubt about Brizendine's competency; the principles of *Pate v. Robinson*, 383 U.S. 375 (1966) require a competency hearing after such a finding. The Missouri Supreme court had attempted to distinguish *Pate* in *State v. Brizendine*, 433 S.W.2d 321 (Mo. En Banc 1968).

246. § 552.020 (2), RSMo 1969.

the trial court should have held a competency hearing.²⁴⁷ The supreme court granted minor relief in one case,²⁴⁸ but no major relief has been granted in reported state or federal decisions.²⁴⁹ Most of these complaints apparently were "afterthoughts"²⁵⁰ by prisoners who had the "capacity to understand the proceedings . . . or to assist in . . . defense."²⁵¹

8. Miscellaneous Complaints

This section mentions complaints that have arisen infrequently and that warrant only brief discussion.

Seven prisoners complained on appeal²⁵² of denial of their right to a preliminary hearing.²⁵³ However, no constitutional right to a preliminary hearing exists.²⁵⁴ Moreover, a defendant waives the statutory right by entering a plea of guilty²⁵⁵ or by going to trial without objecting to denial of the right.²⁵⁶ One prisoner remained unconvinced that the constitutional ground was frivolous until he reached the federal court of appeals.²⁵⁷

Although a prisoner clearly may not use a 27.26 proceeding to retry the issue of guilt,²⁵⁸ prisoners sometimes present "newly discovered evidence" at their post-conviction hearings, hoping thereby to secure a new trial.²⁵⁹ Language in two 27.26 cases²⁶⁰ indicates that the court might be willing to

247. *E.g.*, *Griggs v. State*, 479 S.W.2d 478 (Mo. 1972); *Donaldson v. State*, 477 S.W.2d 84 (Mo. 1972); *Jones v. State*, 471 S.W.2d 223 (Mo. 1971) (plea of guilty); *Patrick v. State*, 460 S.W.2d 693 (Mo. 1970) (plea of guilty).

248. *Carpenter v. State*, 449 S.W.2d 584 (Mo. 1970) (hearing on issue).

249. Prisoners subsequently sought federal habeas corpus relief in two cases. *Jones v. Swenson*, 339 F. Supp. 789 (E.D. Mo. 1972); *McCormick v. Swenson*, 328 F. Supp. 646 (E.D. Mo. 1971).

250. *McCormick v. State*, 463 S.W.2d 789 (Mo. 1971) (mental report, competent to stand trial).

251. § 552.020 (1), RSMo 1969.

252. *E.g.*, *Johnson v. State*, 485 S.W.2d 73 (Mo. 1972) (waiver, then motion to remand for hearing); *State v. Ivey*, 442 S.W.2d 506 (Mo. 1969) (grand jury indictment, no hearing required).

253. See generally Anderson, *The Preliminary Hearing—Better Alternatives or More of the Same?*, 35 Mo. L. Rev. 281 (1970).

254. See *id.* at 283-84 n.8. Section 544.250, RSMo 1969 provides:

No prosecuting or circuit attorney in this state shall file any information charging any person . . . with any felony, until such person . . . shall first have been accorded the right of a preliminary examination . . .

255. *State v. Maloney*, 434 S.W.2d 487 (Mo. 1968).

256. *State v. Hamel*, 420 S.W.2d 264 (Mo. 1967) (after trial started, plea of guilty).

257. See *Collins v. Swenson*, 443 F.2d 329 (8th Cir. 1971) (no constitutional right to hearing).

258. *Beishir v. State*, 480 S.W.2d 883 (Mo. 1972) (two men admitted robbery, thereafter died); *Webb v. State*, 447 S.W.2d 513 (Mo. 1969).

259. Mo. SUP. CT. R. 27.19 (1) authorizes granting a new trial "for newly discovered evidence." A defendant must file any motion for a new trial not later than 40 days after the return of the verdict. Mo. SUP. CT. R. 27.20 (a).

260. *Whitaker v. State*, 451 S.W.2d 11 (Mo. 1970); *State v. Harris*, 428 S.W.2d 497 (Mo. 1968). In *Whitaker*, the defendant had hearsay evidence that he was not guilty of robbery. "Assuming, but not holding or implying, that the trial court has jurisdiction to grant a new trial . . . after more than thirteen years," the court found the evidence insufficient. 451 S.W.2d at 15. In *Harris*, the defendant had

vacate a conviction "in the interest of justice"²⁶¹ in an appropriate case involving newly discovered evidence. Unless the evidence clearly exculpates the defendant, however, it provides no basis for post-conviction relief.²⁶²

Some prisoners complained unsuccessfully of an "unfair trial" that denied them due process, relying on the "totality of the circumstances"²⁶³ or on particular instances of alleged unfairness.²⁶⁴ Usually no glaring errors at trial are involved; the court treats "mere trial errors" as "errors . . . to be corrected by direct appeal."²⁶⁵ However, "trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal."²⁶⁶ Ordinarily, in 27.26 proceedings the court will not consider trial errors that it has already considered, regardless of whether they affect constitutional rights.²⁶⁷

moved for a new trial, but after the court overruled the motion he abandoned his appeal. Although the supreme court at first indicated that it might grant a new trial if the defendant could show that his conviction rested on perjury, it later said:

By this opinion we do not intend to relax or depart from the rule that in order to vacate a judgment claimed to have been procured by false testimony under . . . Rule 27.26 it is a requirement that it be alleged and proved that the State knowingly used false testimony or knowingly failed to correct testimony which it knew to be false.

428 S.W.2d at 502-03.

261. ABA STANDARDS RELATING TO POST-CONVICTION REMEDIES § 2.1 (a) (v) (Approved Draft, 1968); note 24 *supra*.

262. See *Whitaker v. State*, 451 S.W.2d 11 (Mo. 1970). In *Whitaker*, which involved hearsay evidence, the court suggested that the remedy should be executive pardon under article IV, section 7 of the Missouri Constitution, because the governor "is not restricted by strict rules of evidence." *Id.* at 15. *Richardson v. Swenson*, 293 F. Supp. 275 (W.D. Mo. 1968), involved "newly discovered evidence" that, if true, would exculpate the defendant; it tended to show that the deceased died accidentally rather than at the hands of a felon. The federal district court dismissed the habeas corpus petition without prejudice to give the defendant an opportunity to present his "newly discovered evidence" to a Missouri court under rule 27.26. The defendant might logically seek either a pardon or 27.26 relief in that situation.

263. *E.g.*, *O'Neal v. State*, 486 S.W.2d 206 (Mo. 1972); *State v. Grimm*, 461 S.W.2d 746 (Mo. 1971); *Sallee v. State*, 460 S.W.2d 554 (Mo. 1970). In the *Sallee* case the court criticized this approach:

Supreme Court Rule 27.26 plainly provides that a motion to vacate cannot be used as a substitute for direct appeal or for a second appeal to review trial errors. We view this point as a subterfuge to obtain a review of a number of trial errors by simply saying that they caused defendant to be deprived of a fair trial.

Id. at 558-59.

264. *E.g.*, *Tucker v. State*, 481 S.W.2d 10 (Mo. 1972) (failure to give instruction); *Elbert v. State*, 462 S.W.2d 685 (Mo. 1971) (second offender errors); *McGlathery v. State*, 435 S.W.2d 677 (Mo. 1969) (prosecutor's remarks).

265. Mo. SUP. CT. R. 27.26 (b) (3). The remedy for "mere trial errors" is direct appeal "unless the error is so glaring as to make the trial unfair." *Tucker v. State*, 481 S.W.2d 10, 14 (Mo. 1972).

266. Mo. SUP. CT. R. 27.26 (b) (3).

267. Rule 27.26 (b) (3) provides: "A proceeding under this Rule ordinarily cannot be used . . . as a substitute for a second appeal." In *Gailes v. State*, 454 S.W.2d 561 (Mo. 1970), the court stated:

It is our view that where an issue is raised and decided on direct appeal the defendant cannot obtain another review thereof in a 27.26 proceeding.

And that is true even though he may have a new citation to offer, or a

Several prisoners unsuccessfully attacked the constitutionality of statutes connected with their conviction.²⁶⁸ Some complained that they were denied "compulsory process for obtaining witnesses in [defendant's] favor."²⁶⁹ One prisoner obtained major relief after alleging obstruction of his right to appeal;²⁷⁰ one obtained a hearing;²⁷¹ and two others were held to have waived the right.²⁷² Several black prisoners complained of systematic exclusion of black jurors.²⁷³ Some prisoners thought that their right "to be confronted" with the witnesses against [them]"²⁷⁴ was denied.²⁷⁵ A few complained of denial of allocution.²⁷⁶ One prisoner obtained a hearing on his contention that the trial court denied his right to a jury trial,²⁷⁷ but other prisoners have had difficulty proving denial of such a fundamental right.²⁷⁸ One prisoner complained that the trial court erred in revoking his parole.²⁷⁹

somewhat different theory for seeking a favorable decision. . . . The purpose of [the last clause of rule 27.26 (b) (3)] . . . is to provide a review of constitutional issues where such were not reviewed on appeal. . . .

Id. at 563 (citing authority).

In some cases, direct appeal is an inadequate means of reviewing constitutional issues, because the record does not contain the facts essential to a meaningful review. In those cases, the court should allow full disclosure of the facts in a 27.26 proceeding; the supreme court should review the issue only after the trial court states findings and conclusions. *See Williams v. State*, 460 S.W.2d 688 (Mo. 1970) (reviewing denial of effective assistance of counsel issue although considered on direct appeal). Since *State v. Cluck*, 451 S.W.2d 103 (Mo. 1970), the court has declined to review on direct appeal contentions of ineffective assistance of counsel, because of the need for a 27.26 hearing to develop the facts.

268. *Brown v. State*, 470 S.W.2d 543 (Mo. 1971) (jury selection statute); *Garton v. State*, 454 S.W.2d 522 (Mo. 1970) (jury selection statute); *Wilwording v. State*, 438 S.W.2d 447 (Mo. 1969) (second offender statute).

269. U.S. CONST. amend. VI. This portion of the sixth amendment is applicable to the states. *Washington v. Texas*, 388 U.S. 14 (1967). The decisions are *Hulstine v. State*, 472 S.W.2d 422 (Mo. 1971); *Lansdown v. State*, 464 S.W.2d 29 (Mo. 1971); *State v. Cook*, 440 S.W.2d 461 (Mo. 1969).

270. *State v. Frey*, 441 S.W.2d 11 (Mo. 1969). After the 27.26 hearing, the trial court erroneously discharged the defendant; it should have vacated for resentencing. *Id.* at 15. The time for appeal would start from the date of resentencing.

271. *Noble v. State*, 477 S.W.2d 417 (Mo. 1972).

272. *Burnside v. State*, 473 S.W.2d 697 (Mo. 1971); *Newland v. State*, 454 S.W.2d 21 (Mo. 1970) (standard of waiver).

273. *Brown v. State*, 470 S.W.2d 543 (Mo. 1971); *Hall v. State*, 470 S.W.2d 473 (Mo. 1971); *Clark v. State*, 465 S.W.2d 557 (Mo. 1971); *State v. Selman*, 433 S.W.2d 572 (Mo. 1968).

274. U.S. CONST. amend. VI. The sixth amendment confrontation clause is applicable to the states. *Pointer v. Texas*, 380 U.S. 400 (1965).

275. *Covington v. State*, 467 S.W.2d 929 (Mo. 1971); *Malone v. State*, 461 S.W.2d 727 (Mo. 1971); *State v. Ivey*, 442 S.W.2d 506 (Mo. 1969).

276. *Goodloe v. State*, 486 S.W.2d 430 (Mo. 1972) (no right on plea of guilty); *Richardson v. State*, 470 S.W.2d 479 (Mo. 1971) (plea of guilty); *State v. Friedman*, 431 S.W.2d 72 (Mo. 1968) (trial court granted "allocution" at 27.26 hearing).

277. *Burrage v. State*, 477 S.W.2d 118 (Mo. 1972) (hearing on question of waiver, movant entitled to impeach record).

278. *Watson v. State*, 475 S.W.2d 8 (Mo. 1972); *Young v. State*, 473 S.W.2d 390 (Mo. 1971) (knowing and intelligent waiver, burden of proof question).

279. *Woody v. State*, 445 S.W.2d 288, 292 (Mo. 1969) (substantial basis for revocation); *see ABA STANDARDS, supra* note 124, § 2.1 (b).

IV. CONCLUSION—AT THE CROSSROADS

The United States Supreme Court has made clear in the so-called trilogy of *Sanders v. United States*,²⁸⁰ *Fay v. Noia*,²⁸¹ and *Townsend v. Sain*²⁸² that a criminal defendant must receive a full evidentiary hearing on the merits of every federal constitutional right that he asserts, unless he has previously waived the right or deliberately by-passed his state procedural opportunities to assert the right. If the state courts do not conduct full hearings on the merits of each federal right, the federal courts often must hold evidentiary hearings years after the original state proceedings that led to conviction. The failure to hold a hearing at the state level means that there is no state record "adequate for any review that may be later sought" or to forestall "the spin-off of collateral proceedings that seek to probe murky memories."²⁸³ In such cases, a prisoner might finally obtain federal habeas corpus relief at a time so late that the state could no longer retry the case and obtain a conviction. Thus, in the absence of early findings of fact and conclusions of law on the asserted federal right, a guilty prisoner may go free, not because "the constable blundered," but because the state courts failed to provide a plenary hearing on the merits either at some early point in the criminal process, or at the post-conviction stage.

Faced with the expansion of federal habeas corpus jurisdiction under the trilogy, the Missouri Supreme Court wisely amended rule 27.26 to "provide a post-conviction procedure in accord with the principles enunciated in the . . . trilogy" that was "designed to *discover and adjudicate all claims for relief in one application*."²⁸⁴ By "radically amending" the rule and encouraging prisoners to assert all claims for relief in one motion, the supreme court probably intended to maximize Missouri's control over criminal convictions, maximize the finality of convictions, secure the federal constitutional rights of defendants in Missouri courts, and thus reduce the number of federal habeas corpus hearings and the number of instances in which federal courts would feel compelled to grant habeas corpus in order to protect federal constitutional rights.²⁸⁵ Missouri's leadership in accepting and promoting the trilogy philosophy that conventional notions of finality have no place when federal constitutional rights are at stake no doubt pleased the federal courts.²⁸⁶

280. 373 U.S. 1 (1963).

281. 372 U.S. 391 (1963).

282. 372 U.S. 293 (1963).

283. *Boykin v. Alabama*, 395 U.S. 238, 244 (1969); see notes 55 & 56 and accompanying text *supra*.

284. *State v. Stidham*, 415 S.W.2d 297, 298 (Mo. En Banc 1967); see text accompanying note 1 *supra*.

285. See Meador, *Accommodating State Criminal Procedure and Federal Post-conviction Review*, 50 A.B.A.J. 928, 929 (1964).

286. See *Fay v. Noia*, 372 U.S. 391 (1963), where the Court concluded, after reviewing the history of federal habeas corpus:

[C]onventional notions of finality in criminal litigation cannot be per-

In 1967, then, it appeared that Missouri had found an ideal way to reach an accommodation between state criminal procedure and federal post-conviction review; hopefully, amended rule 27.26 would greatly improve "the delicate federal-state relationship in the criminal law enforcement field."²⁸⁷ The Missouri courts apparently had assumed complete responsibility for protecting federal constitutional rights in accordance with federal principles; the federal courts still might review questions of federal law. The extensive case history since 1967 indicates that, with few exceptions, the federal-state accommodation under amended rule 27.26 works well. Missouri courts fully consider most federal constitutional questions on their merits. In most instances, Missouri courts have properly applied federal law to Missouri findings of fact; over a five-year period, federal courts have granted habeas corpus relief in only eight cases that the Missouri courts had previously decided.

Some major problems have arisen, however, in connection with the administration of amended rule 27.26. For a variety of reasons, including limited criminal discovery and wholesale retention of traditional state notions of "procedural default",²⁸⁸ the state courts frequently do not fully consider federal constitutional issues on the merits until the post-conviction stage. This has led to large post-conviction proceeding caseloads, with resulting complaints by judges and lawyers who must struggle to resolve constitutional issues that they believe the courts should have considered earlier in the criminal process. Appellate judges, concerned with a growing backlog of undecided 27.26 appeals,²⁸⁹ have begun searching for ways to reduce the trial and appellate caseloads. Limiting the constitutional jurisdiction of the supreme court²⁹⁰ has begun to spread the appellate caseload,²⁹¹ but the supreme court continues to hear and decide a large backlog of 27.26 appeals initiated prior to January 1, 1972.²⁹²

mitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.

Id. at 424.

287. *Frazier v. Roberts*, 441 F.2d 1224, 1230 (8th Cir. 1971).

288. *See, e.g.*, cases cited and text accompanying notes 130-31 & 174-75 *supra*. Perhaps these rigid rules of "procedural default" are retained in their traditional form, and on some occasions extended to prevent post-conviction consideration of federal issues, because of judicial concern that availability of a federal habeas corpus forum will tend to undermine state procedural requirements. This concern is basically unjustified. *See* note 142 *supra*; Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1350-52 (1961). In addition, protecting state rules of procedure through the sacrifice of federal constitutional rights, absent a deliberate by-pass by the defendant, exalts procedure over substance. *See* *Fay v. Noia*, 372 U.S. 391, 438-39 (1963).

289. *See* note 8 *supra*. The table indicates only the rising number of appeals the court was able to decide.

290. *See* notes 9-10 and accompanying text *supra*.

291. No 27.26 decisions of the court of appeals have been reported as of February 1, 1973.

292. The Clerk of the Missouri Supreme Court reported that on January 1, 1973, 111 27.26 appeals with transcripts were still pending. The supreme court

In 1970, a resurgence of the supreme court's excessive pre-1967 concern for the protection of state procedural rules occurred, at the expense of finality of convictions and state protection of federal constitutional rights. Before September 1, 1967, the Missouri law had long been that the defendant-victim of an alleged unconstitutional search and seizure had to move to suppress the resulting evidence and preserve the issue by objection at trial. Otherwise, he had "waived" his state exclusionary rule remedy. This meant that he could not raise the issue on appeal or in a post-conviction attack.²⁹³ *Mapp v. Ohio*²⁹⁴ gave the defendant a federal constitutional exclusionary rule remedy backed up by federal habeas corpus, unless the defendant had actually waived his fourth amendment rights or deliberately by-passed his state procedural opportunities to raise the issue. Presumably, after *Mapp*, any state court following the principles of the trilogy would abandon its "procedural default" rule, at least in post-conviction cases, in order to follow the "deliberate by-pass" test of *Fay v. Noia*.²⁹⁵ For a time, the Missouri trial courts and the supreme court did so.²⁹⁶ In 1970, however, perhaps as a result of an unusual turn of events,²⁹⁷ the supreme court began to regard the "legitimate state interest" theory²⁹⁸ of a 1965 United States Supreme Court decision, *Henry v. Mississippi*,²⁹⁹ as important in determining the scope of post-conviction review in Missouri; at least *Henry* contained language that seemed to support a return to the old state "procedural default" rule in order to dispose of tardy illegal search and seizure complaints without a hearing.³⁰⁰ *Henry*, however, was not a federal habeas corpus decision.³⁰¹ Moreover, the holding in *Fay v. Noia* specifically rejected reliance on "legitimate state interests" in order to limit the scope of federal habeas corpus,³⁰¹ except to the extent that the defendant deliberately by-

might need two years to decide those appeals. Telephone conversation with Thomas F. Simon, Clerk of the Missouri Supreme Court, Feb. 16, 1973.

293. *State v. Holland*, 412 S.W.2d 184 (Mo. 1967).

294. 367 U.S. 643 (1961).

295. 372 U.S. 391 (1963). The court held that the federal judge may in his discretion deny relief to a state prisoner who has forfeited his state court remedies by deliberately by-passing the orderly procedure of the state courts. *Id.* at 438. Thus, the Court attempted to accommodate both the interests of the state in protecting the integrity of its procedural rules and the countervailing interest in protecting a state prisoner's federal constitutional rights.

296. *E.g.*, *White v. State*, 430 S.W.2d 144 (Mo. 1968); see cases cited note 171 *supra*.

297. See notes 179-80 and accompanying text *supra*.

298. 379 U.S. 443 (1965); see notes 183-84 and accompanying text *supra*.

299. 379 U.S. at 447-48.

300. See note 183 *supra*.

301. *Fay v. Noia*, 372 U.S. 391 (1963), where the Court concluded:

[W]e reject as unsound in principle, as well as not supported by authority, the suggestion that the federal courts are without power to grant habeas relief to an applicant whose federal claims would not be heard on direct review in this Court because of a procedural default furnishing an adequate and independent ground of state decision.

Id. at 434.

passed a reasonable state procedural remedy. Even the 1965 *Henry* decision noted this continuing principle of *Fay v. Noia*.³⁰²

Because no basis exists in federal cases for the supreme court's deviation from the principles of the trilogy in "procedural default" cases; the court should reconsider, at the earliest opportunity, its recent decisions concerning illegal search and seizure issues in 27.26 proceedings.³⁰³ It should also reconsider the "procedural default" rule recently extended to 27.26 cases; that rule often precludes consideration of allegations that officers obtained confessions or statements in an unconstitutional manner.³⁰⁴ No "procedural default" cases, sometimes mistakenly called "waiver" cases,³⁰⁵ decided prior to September 1, 1967, should be resurrected or extended to post-conviction cases as authority for refusing to decide constitutional issues on the merits. The court should apply the "deliberate bypass" standard of the trilogy as the only rule of "procedural default" in post-conviction cases. If the Missouri Supreme Court follows these suggestions, it will bring the scope of post-conviction relief in Missouri into line with the scope of relief available in federal habeas corpus under the principles of the trilogy. The federal courts will be pleased that Missouri has again achieved the most desirable accommodation between state criminal procedure and federal post-conviction review.³⁰⁶ Missouri judges and lawyers will be pleased because they will no longer have to become familiar with two lines of post-conviction authority, state and federal, on some issues. Further, Missouri lawyers who now face the possible necessity of both state and federal post-conviction evidentiary hearings in order to

302. *Henry v. Mississippi*, 379 U.S. 443, 452 (1965); text accompanying note 185 *supra*.

303. See *Schleicher v. State*, 483 S.W.2d 393, 395 (Mo. En Banc 1972) (dissenting opinion); see text accompanying note 209 *supra*.

304. *Evans v. State*, 465 S.W.2d 500 (Mo. 1971); see notes 140-41 and accompanying text *supra*.

305. *E.g.*, *Schleicher v. State*, 483 S.W.2d 393, 394 (Mo. En Banc 1972) (movant "waived" the right to raise fourth amendment question); see notes 120-21 *supra*, distinguishing "procedural default" from "waiver."

306. In 1971 the Missouri Supreme Court and the Judicial Council of the United States Court of Appeals for the Eighth Judicial Circuit established the State-Federal Judicial Council for Missouri. The membership consists of seven state judges, including two judges of the supreme court and one judge of the court of appeals, and five federal judges, including two judges of the Eighth Circuit Court of Appeals. The supreme court approved the following statement of objectives:

The general objectives to be effectuated and furthered by the establishment of the Council are to promote and harmonize a better relationship between the state and federal courts, to eliminate or minimize any conflicts which may have developed or could result from the operation of the dual federal and state judicial systems, and generally to improve and expedite the administration of justice by state and federal courts in Missouri.

Per Curiam Order In the Supreme Court of Missouri En Banc, Feb. 5, 1971 (emphasis added).

Perhaps this Council should actively seek to eliminate conflicts like those produced by decisions like *Schleicher v. State*, 483 S.W.2d 393 (Mo. En Banc 1972). It should at least provide a forum for discussion of the problems.

fully protect the constitutional rights of their clients will be pleased that they can combine "all claims for relief in one application" (*i.e.*, a Missouri 27.26 motion).

If the judges and lawyers of Missouri think that administrative problems under amended rule 27.26, including the heavy trial and appellate caseloads, indicate a need for reform, that reform should also be consistent with the principles of the trilogy. Amending rule 27.26, either gradually by case law or swiftly by changing its provisions to eliminate certain federal constitutional grounds for relief, would do little to reduce the caseload. Moreover, this would certainly damage "the delicate federal-state relationship." Missouri courts should be masters of their own criminal proceedings; they should maximize the finality of Missouri convictions.