Duquesne Law Review

Volume 15 | Number 3 Article 9

1977

Constitutional Criminal Procedure - Due Process - Right to a Fair Trial - Presumption of Innocence - Trial in Prison Garb - Failure to Object

James A. Prostko

Follow this and additional works at: https://dsc.duq.edu/dlr

 Part of the Law Commons

Recommended Citation
James A. Prostko, *Constitutional Criminal Procedure - Due Process - Right to a Fair Trial - Presumption of Innocence - Trial in Prison Garb - Failure to Object*, 15 Duq. L. Rev. 519 (1977).
Available at: https://dsc.duq.edu/dlr/vol15/iss3/9

This Recent Decision is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

CONSTITUTIONAL CRIMINAL PROCEDURE—DUE PROCESS—RIGHT TO A FAIR TRIAL—PRESUMPTION OF INNOCENCE—TRIAL IN PRISON GARB —FAILURE TO OBJECT—The Supreme Court of the United States has held that although compelling a defendant to stand trial in prison clothing would unconstitutionally deny him a fair trial, the defendant's failure to make a timely objection, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation.

Estelle v. Williams, 425 U.S. 501 (1976).

In November, 1970, Harry Lee Williams was tried in Harris County, Texas, for assault with intent to kill.[1] Unable to post bond, Williams was held in custody while awaiting trial. Before being taken to trial, he asked an officer at the jail for his civilian clothes. His request was denied. Neither Williams nor his counsel raised an objection to Williams' appearance at trial in prison garb.[2] In light of his past experience and knowledge of the customary practice in Harris County, Williams' counsel had determined that such a motion would be futile.[3] The jury returned a verdict of guilty and Williams was sentenced to ten years of imprisonment.

On appeal, Williams contended that being tried in jail clothes denied him due process of law since it infringed his fundamental right to be presumed innocent until proven guilty.[4] The Texas Court

1. The charges stemmed from a knifing incident in which Williams inflicted severe wounds on his ex-landlord. Williams v. Beto, 364 F. Supp. 335, 337-38 (S.D. Tex. 1973), *rev'd sub nom.* Williams v. Estelle, 500 F.2d 206 (5th Cir. 1974), *rev'd on other grounds and vacated,* 425 U.S. 501, *aff'g district court on remand,* 537 F.2d 856 (5th Cir. 1976).

2. 425 U.S. at 502. There was no dispute that Williams' clothing was immediately recognizable as prison garb. Williams v. Estelle, 500 F.2d 206, 207 n.1 (5th Cir. 1974). He appeared at trial wearing a white T-shirt with "Harris County Jail" stenciled across the back, oversized white dungarees with the same stencil down the legs, and shower thongs. *See* 425 U.S. at 515 n.1.

3. At the evidentiary hearing Williams' counsel stated it was his belief that all non-bailed defendants were tried in prison clothes. He also testified that his failure to object was due to the fact a similar objection had been denied by another Harris County judge. He was unaware of the particular trial judge's practice of permitting defendants to stand trial in civilian clothes when such a request was made. Williams v. Beto, 364 F. Supp. 335, 338 (S.D. Tex. 1973).

4. Williams v. State, 477 S.W.2d 24 (Tex. Crim. App. 1972). Williams also contended that he had been denied effective assistance of counsel. *Id.* at 27. The Supreme Court did not address this issue in *Estelle.* The dissent found the Court's failure to do so incongruous in light of its finding that the right to be tried in civilian clothing could be waived by counsel and counsel's decision was binding on the accused. 425 U.S. at 528 (Brennan, J., dissenting).

of Criminal Appeals rejected his contention and affirmed the conviction.[5] Williams then petitioned the United States District Court for the Southern District of Texas for a writ of habeas corpus.[6] After an evidentiary hearing, the court found that in view of the common practice in Harris County of trying defendants in jail clothes, and the fact that the defendant asked to wear his civilian clothes, his failure to object at trial did not constitute a waiver of the right to be tried in civilian clothing.[7] The district court further concluded that in light of the strength of the evidence against Williams the error was harmless.[8] The Fifth Circuit Court of Appeals agreed with the district court on the waiver issue but nonetheless reversed. In its view, the error was not harmless.[9] The Supreme Court disagreed with both courts on the waiver issue and reversed the circuit court; Williams' failure to object to being tried in prison clothes was "sufficient to negate the presence of compulsion necessary to establish a constitutional violation."[10]

The Court, speaking through Chief Justice Burger, acknowledged that the presumption of innocence is a basic component of the right to a fair trial.[11] Trying an accused in identifiable prison attire would be a constant reminder to the jury of the accused's inmate status and may affect its judgment, thus presenting an unacceptable risk

---

5. The state court found that "[a]bsent an objection, it is presumed that he was willing to go to trial in jail clothing." 477 S.W.2d at 26.

6. The petition was made pursuant to 28 U.S.C. § 2254 (1970), which provides that a district court shall entertain an application for a writ of habeas corpus where the applicant establishes that he did not receive a full, fair, and adequate hearing in a state court or was otherwise denied due process of law.

7. Williams v. Beto, 364 F. Supp. 335 (S.D. Tex. 1973). The district court stated:

> [E]vidence points to the strong likelihood that the trial climate at that time acted as a natural deterrent to the raising of objections to what was commonplace—a trial in jail clothes, even assuming that defendants or their counsel thought about the problem and considered its legal implications. In the absence of such consideration it can scarcely be concluded that either petitioner in this case or his trial counsel knowingly, willingly and voluntarily waived the right to be tried in civilian clothing.

Id. at 343.

8. *Id.*

9. Williams v. Estelle, 500 F.2d 206 (5th Cir. 1974). The court found the evidence of malice and intent to kill insufficient to sustain the conviction, and all evidence taken into account was not so strong "as to warrant the conclusion that the constitutional error of trying Williams in prison garb was harmless." *Id.* at 211-12.

10. 425 U.S. at 513.

11. *Id.* at 503. "[The presumption of innocence] is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Id.* at 503, *citing* Coffin v. United States, 156 U.S. 432, 453 (1895).

to the presumption of innocence.[12] The Court refused, however, to adopt a per se rule invalidating all convictions where a defendant appears in prison garb. Chief Justice Burger focused instead on compulsion as the standard for determination of a constitutional violation; if a defendant were compelled to wear his prison clothes before the jury, fourteenth amendment due process standards would be violated.[13]

Since the defendant's counsel was conscious of the prison garb issue[14] and knew that he could have objected, and because the particular judge presiding over Williams' case had a policy of permitting defendants to appear in civilian clothes,[15] Chief Justice Burger concluded that Williams was in no way compelled to stand trial in his prison attire.[16] The Court was not persuaded that an objection would have been futile despite the fact the general practice in Harris County was to try non-bailed defendants in prison garb. There being no evidence that such an objection would have been prejudicial to the defendant, the Court reasoned that to reverse the conviction when this practice was not compelled would permit defense counsel to use prison attire to elicit juror sympathy at the trial while at the same time preserving the clothing issue as a basis for an appeal if his client were convicted.[17]

Although the Court's opinion avoided terming Williams' failure to object a waiver, he was effectively foreclosed from later raising the issue of his appearance at trial. In the Chief Justice's view, the Court was not confronted with the relinquishment of a fundamental right of the type presented in *Johnson v. Zerbst,*[18] where the issue was waiver of the right to counsel. Thus, the knowing and intelligent waiver test enunciated there need not be applied. The decision to object to trial in prison garb was instead determined to be a tactical, trial-type right, which rendered an exacting waiver analysis unnecessary.[19] Whereas compelling an accused to stand trial before a jury

12. 425 U.S. at 505. Unlike the case where physical restraints are necessary, forcing an accused to wear prison clothes furthers no state interest. *See* note 31 *infra.*

13. 425 U.S. at 507.

14. *Id.* at 510.

15. *See* text accompanying notes 39-41 *infra.*

16. 425 U.S. at 512.

17. *Id.* at 508.

18. 304 U.S. 458 (1938) (accused must intelligently and competently waive his constitutional right to counsel).

19. 425 U.S. at 508 n.3. Later in his opinion, Chief Justice Burger referred to *Johnson* as

in prison garb violates due process, the failure to object, for whatever reason, was sufficient to negate any possible allegations of compulsion; therefore no constitutional violation had occurred.[20]

Justice Powell, joined by Justice Stewart, concurred. He identified two methods of waiving possible due process claims which would permit upholding convictions despite the claimed infringement of a constitutional right. The first arises where the defendant consensually relinquishes a substantive constitutional right. The other occurs where the defendant makes an inexcusable procedural default. Failure to make a timely objection at a time when an accused's rights could have been protected would be an inexcusable default amounting to a waiver. In Justice Powell's view, Williams' actions constituted such a default. His failure to object, which might be interpreted as a strategic choice involving a trial-type right, should operate as a matter of federal law to preclude him from subsequently raising the substantive right.[21]

Justice Brennan wrote a dissenting opinion in which Justice Marshall concurred. He challenged the appropriateness of defining a material right which affects the accuracy of the fact-finding process in terms of compulsion.[22] He argued that the voluntary and knowing waiver test enunciated in *Johnson* must be applied in this situation; to delineate the defendant's rights in terms of compulsion results in imputing waiver whenever a defendant could object to a particular procedure but remains silent.[23] The Court's compulsion standard would eviscerate the traditional doctrine that loss of such fundamental rights cannot be presumed from inaction,[24] and would intro-

---

imposing a "burden" on trial judges who must take steps to insure that an accused was deliberately waiving a particular right. *Id.* at 512.

20. *Id.* at 512-13.

21. *Id.* at 515 n.4 (concurring opinion). Justice Powell construed the right to be tried in civilian attire as a trial-type right in which an attorney's conduct may bind his client. He relied on Henry v. Mississippi, 379 U.S. 443 (1965), where the Court found that a defense counsel's choice not to object to tainted evidence amounted to a waiver binding on the defendant. The evidence had suggested that counsel's actions were part of a deliberate trial strategy. *Id.* at 451. *Cf.* text accompanying notes 51-53 *infra.*

22. Justice Brennan observed: "[T]he only area in which the concept of compulsion is relevant to the definition of a substantive right is the Fifth Amendment privilege against self-incrimination. . . . [D]ue process rights to a fair trial do not, however, depend on the existence of state compulsion.'" 425 U.S. at 516 n.2 (dissenting opinion).

23. *Id.* at 516. *Accord,* Carnley v. Cochran, 369 U.S. 506 (1962) (the right to counsel does not depend on whether defendant requested one, and to presume waiver from a silent record is impermissible).

24. 425 U.S. at 523 (dissenting opinion). Justice Brennan declared that a basic tenent of

duce a test for determining the surrender of basic due process protections which did not adequately safeguard those constitutional rights.[25]

Although the Supreme Court had never before addressed the specific issue, lower courts considering the effect of appearing before a jury in prison garb, and its impact on the presumption of innocence, have determined that such a practice undermines the fairness of the fact-finding process.[26] One of the functions of the presumption is to insure that in reaching its verdict, the jury will consider only evidence actually presented during trial.[27] The constant reminder of the accused's incarceration may affect a juror's judgment,[28] since the sight of the defendant clad in prison attire conveys the impression that the defendant's position is not that of a peer.[29] This could result in a subtle inclination, if not an outright tendency, to be predisposed to return the defendant to prison where he belongs.[30] The dilution of the presumption of innocence is difficult to justify,

---

Supreme Court jurisprudence has been that constitutional rights which affect the fairness of the fact-finding process are not lost unless the state shows that a knowing and intelligent waiver has taken place. *Id.* at 523 n.6. In Barker v. Wingo, 407 U.S. 514 (1972), which involved the right to a speedy trial, the Court summarized its standard for waiver of fundamental rights: "[P]resuming waiver of a fundamental right from inaction is inconsistent with this Court's pronouncements on waiver of constitutional rights. . . . Courts should 'indulge every reasonable presumption against waiver' . . . and they should 'not presume acquiescence in the loss of fundamental rights.'" *Id.* at 525-26 (citations omitted). *See* Aetna Ins. Co. v. Kennedy, 301 U.S. 389 (1937); Ohio Bell Tel. Co. v. Public Utils. Comm'n, 301 U.S. 292 (1937). The *Barker* Court cited both cases. *See also* Carnley v. Cochran, 369 U.S. 506 (1962) (presuming waiver of the right to counsel from a silent record is impermissible).

25. 425 U.S. at 516 (dissenting opinion).

26. *See, e.g.*, Thomas v. Beto, 474 F.2d 981 (5th Cir.), *cert. denied*, 414 U.S. 871 (1973); Hollins v. Beto, 467 F.2d 951 (5th Cir. 1972); Bentley v. Crist, 469 F.2d 854 (9th Cir. 1972); Eaddy v. People, 115 Colo. 488, 174 P.2d 717 (1946); Commonwealth v. Keeler, 216 Pa. Super. Ct. 193, 264 A.2d 407 (1970). *See also* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, TRIAL BY JURY § 4.1(b), at 91 (1968), which states: "An incarcerated defendant or witness should not be required to appear in court in the distinctive attire of a prisoner or convict."

Other courts have rejected any per se rule and have concluded that trial in jail uniform is not inherently prejudicial. *See* Anderson v. Watt, 475 F.2d 881 (10th Cir. 1973); Watt v. Page, 452 F.2d 1174 (10th Cir.), *cert. denied*, 405 U.S. 1070 (1972); Xanthull v. Beto, 307 F. Supp. 903 (S.D. Tex. 1970).

27. *See* 24 VAND. L. REV. 412, 414 (1971), *citing* 9 J. WIGMORE, EVIDENCE § 2511 (1940 & Supp. 1970).

28. *See* 425 U.S. at 505.

29. *See id.* at 518 (Brennan & Marshall, JJ., dissenting).

30. *Id.* at 519. *See also* Commonwealth v. Keeler, 216 Pa. Super. Ct. 193, 195, 264 A.2d 407, 409 (1970) (prejudical error occurred in prosecution for firearms violation when defendant was ordered, over objection, to appear before jury in prison garb).

especially in view of the Court's concession that it serves no legitimate state interest to try defendants in prison clothes.[31]

Although the *Williams* Court agreed with the majority of lower courts that appearing in prison garb affects the fairness of the proceedings,[32] its decision to limit the scope of the constitutional violation to circumstances where the defendant was *compelled* to appear before the jury in such clothes prevented the overturning of an otherwise valid conviction. The Court's emphasis on compulsion is not as new as the dissent suggested, but it has heretofore been limited to cases where the defendant's request at trial to be tried in civilian clothes was expressly denied.[33] The difficulty with the Supreme Court's analysis in *Williams* lies in its conclusion that this defendant was not compelled to wear prison garb merely because he made no objection, although he felt, perhaps justifiably, he had no alternative than to be tried in prison attire. The Fifth Circuit had previously dealt with this precise problem in *Hernandez v. Beto.*[34] There, the defendant proceeded to trial in prison garb and made no request to be tried in civilian clothing. The court held that an accused could not remain silent, *willingly* go to trial in prison clothes, and later claim error.[35] The court of appeals did not presume that the defendant's silence indicated willingness; instead it examined the circumstances surrounding his trial. Defendant's counsel argued it would have been futile to object due to the trial court's common practice of trying defendants in prison clothes.[36] Thus, Hernandez's

31. 425 U.S. at 505. The Court distinguished cases where the interests of the state outweigh the adverse effects that identifiable prison attire may have on the presumption of innocence. Such a situation may occur, for example, when safety and administrative efficiency require that disruptive defendants be bound or gagged. Illinois v. Allen, 397 U.S. 337 (1970). *See generally* Comment, *Disruptive Defendants and Prejudice-Prone Jurors: Toward an Implied Waiver of Trial by Jury?*, 75 DICK. L. REV. 572 (1971).

32. *See* note 26 *supra.* However, courts in at least one circuit have held that absent a showing of prejudice, requiring the defendant to appear before a jury in prison garb over his objection is not a denial of the right to a fair trial. Hall v. Cox, 324 F. Supp. 786 (W.D. Va. 1971); McFalls v. Peyton, 270 F. Supp. 577 (W.D. Va. 1967), *aff'd,* 401 F.2d 890 (4th Cir. 1968), *cert. denied,* 394 U.S. 951 (1969).

33. Courts which have previously used compulsion language have done so where an element of coercion was found to exist, such as where an objection to being tried in prison garb is overruled. *See* Gaito v. Brierley, 485 F.2d 86 (3d Cir. 1973) (defendant himself asked trial judge to declare mistrial so that new jury could be picked, since some jurors had seen him in prison attire); Bentley v. Crist, 469 F.2d 854 (9th Cir. 1972) (counsel's objection to his client's appearance in prison garb overruled).

34. 443 F.2d 634 (5th Cir.), *cert. denied,* 404 U.S. 897 (1971).

35. *Id.* at 637.

36. *Id.* at 636. This same situation was present in *Williams. See* 425 U.S. at 531.

waiver should not be deemed a knowing one. The state contended, as in the *Williams* case, that the defendant had appeared in prison clothes as a matter of strategy, seeking to evoke juror sympathy.[37] Upon questioning counsel for defendant, the court found no basis for this contention and therefore upheld the defendant's due process claim.[38]

Although the Supreme Court purported to follow the *Hernandez* case, it interpreted *Hernandez* as requiring objection to trial in prison garb in order to preserve the constitutional right to be tried in civilian clothing;[39] finding no objection, the Court concluded the right could not subsequently be asserted. This is not an inevitable reading of *Hernandez;* both the district court and circuit court in *Williams* also held *Hernandez* controlling. Yet these courts found no waiver. The district court held an evidentiary hearing to determine whether there had been a voluntary waiver, and examined the trial judge's disposition toward prison attire. Even though the trial judge's affidavit stated his policy of permitting defendants to appear in civilian clothes,[40] the court determined that counsel did not know of this practice. Furthermore, as in *Hernandez,* Williams' counsel felt the request to be tried in civilian clothing would be denied.[41] The district court also rejected the contention of tactical choice.[42] The circuit court agreed with these findings of the district court. In effect, the two courts read *Hernandez* as requiring a knowing waiver, consistent with the past practice in the Fifth Circuit.[43] The Supreme Court's rejection of this view and injection of a compulsion requirement therefore deserves close examination.

---

37. The state made a similar contention in *Williams. Compare* 443 F.2d at 637, *with* 425 U.S. at 508.

38. 443 F.2d at 637. The *Hernandez* methodology of inquiring into a voluntary waiver of the right to be tried in civilian clothing has been consistently applied in the Fifth Circuit. *See, e.g.,* Goodspeed v. Beto, 460 F.2d 398 (5th Cir. 1972); Hollins v. Beto, 467 F.2d 951 (5th Cir. 1972).

39. 425 U.S. at 509. The Court looked to a Fifth Circuit case which explained *Hernandez* as requiring the defendant and his attorney "to make known that the defendant desired to be tried in civilian clothes before the state could be accountable for his being tried in jail clothes." *Id.* at 509, *citing* United States *ex rel.* Stahl v. Henderson, 472 F.2d 556 (5th Cir.), *cert. denied,* 411 U.S. 971 (1973). In *Stahl,* however, the defendant was charged with having murdered another inmate while confined in prison. Thus, the jury would have known of his incarceration in any event.

40. *See* 364 F. Supp. at 338.

41. *Id.*

42. *Id. See* note 3 *supra.*

43. *See* note 38 *supra.*

The Court effectively rejected the *Hernandez* waiver analysis by shifting from a subjective test of determining whether the defendant, in light of all the circumstances, was unwilling to proceed in prison garb, to an objective inquiry, reviewing the trial record for evidence of compulsion. But the defendant's failure to object, for *any reason,* not only negated any finding of compulsion but also was construed as a willingness to proceed in prison garb.[44] While other courts have scrutinized the record to determine whether an element of compulsion existed, they have not implied a lack of compulsion from the mere fact the defendant remained silent.[45] Chief Justice Burger sought to justify this need to show compulsion on the ground it would preclude defendants from wearing prison clothes as a tactic to elicit juror sympathy and later claim error.[46] Since there are obvious deleterious effects of appearing in prison clothes it seems unlikely that a defendant would intentionally appear before a jury in such attire absent unusual circumstances. Nonetheless, the result of *Williams* is to deny protection to defendants who did not object to wearing prison clothing although they may have felt forced to proceed due to the trial climate and custom of the district. While the compulsion test admittedly prevents appeals by individuals who choose to wear prison clothes for tactical purposes, it also bars defendants who, despite having counsel, simply lack the knowledge that they have the right to object to such procedures or believe their objections would be futile.

Another significant aspect of *Williams* is the majority's refusal to subject this alleged due process violation, which the Court conceded affects the very presumption of innocence upon which our criminal justice system is based, to an "exacting waiver analysis."[47] This refusal was predicated on the Court's view that the right to stand trial in civilian clothing is a trial-type right similar to the privilege

---

44. *See* 425 U.S. 512.

45. *See* note 33 *supra.*

46. 425 U.S. at 510. The evidence showed that the defendant was in his sixties, that he felt he had no real case, and that the testimony against him was clear and consistent. Under these circumstances the Court assumed the tactic was utilized to elicit juror sympathy. *Id.* at 510 n.5. Although the Supreme Court contended the tactic was "prevalent," the dissent pointed out that counsel admitted such a tactic in only one reported case. *Id.* at 520 n.4 (dissenting opinion). *See* Garcia v. Beto, 452 F.2d 655 (5th Cir. 1971) (prison clothes worn to persuade jury that defendant had drinking problem and did not have the requisite specific intent to commit the crime).

47. 425 U.S. at 508 n.3. *See* notes 18 & 19 and accompanying text *supra.*

to object at trial to the admission of certain evidence.[48] The Court has long recognized that even fundamental due process rights can be waived if the waiver takes place knowingly.[49] In *Johnson*, which involved the right to be tried with the assistance of counsel, the Court held that in order to find that the right had been waived there must be an "intentional relinquishment or abandonment of a known right or privilege."[50] Furthermore, the personal participation of the defendant, not merely the consent of his counsel, is generally required in order to find a knowing waiver.[51] Not only is personal participation considered necessary when the right is deemed fundamental, but it might also be required if certain exceptional circumstances are found to exist.[52] On the other hand, once a defendant has counsel and the exercise of a right is labeled as tactical or strategic, the defendant's counsel may waive those rights and bind the accused by that decision.[53] It seems certain that had the stringent *Johnson* standard been applied in *Williams*, the Court would have reached a different result; there was no showing that Williams of his own volition had intelligently waived his right to stand before the jury in civilian attire. By characterizing the right as less than "fundamental," however, the Court could forego applying this standard and permit Williams' conviction in a proceeding that it conceded was something less than a fair trial.

---

48. 425 U.S. at 508 n.3, *citing* On Lee v. United States, 343 U.S. 747 (1952); United States v. Indiviglio, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966). In *On Lee*, the petitioner attempted to exclude evidence obtained when an undercover agent, wearing a hidden microphone, engaged in conversation with him and elicited incriminating statements. Counsel made general objections which were insufficient to preserve the specific claim. The Court stated that the court of appeals would have been within its discretion in refusing to consider the point. 343 U.S. at 749 n.3.

49. *See, e.g.*, Brady v. United States, 397 U.S. 742 (1970) (right to trial by jury); Johnson v. Zerbst, 304 U.S. 458 (1938) (right to counsel).

50. 304 U.S. at 464.

51. *See* Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest*, 54 CALIF. L. REV. 1262, 1266 (1966) [hereinafter cited as *Criminal Waiver*].

52. *See* note 54 *infra*.

53. *See* note 54 and accompanying text *infra*. The *Williams* Court emphasized the fact counsel was aware of the prison garb issue. Although a defendant has the right to the assistance of counsel, to allow counsel to make trial decisions such as when to object to leading questions is not to grant him complete control over the defendant. Placing the disposition of the defendant's fundamental rights totally in the hands of counsel eliminates consideration of knowledgable choice by the person who may ultimately lose those rights. *See* Comment, *Waiver of Constitutional Rights by Counsel in a Criminal Proceeding*, 1 J. MAR. J. 93 (1967).

The Court's waiver analysis is also troubling since there is precedent which supports the view that the waiver of a procedural right cannot occur without the accused's personal, intelligent waiver, even when the right involved is characterized as nonfundamental. In *Henry v. Mississippi,*[54] the Supreme Court noted that trial strategy adopted by counsel without prior consultation with the accused would not, where circumstances were exceptional, constitute a waiver.[55] In *Brookhart v. Janis,*[56] the Court held that in determining whether counsel's strategic decision to forego a constitutional claim was binding on his client, nonacquiescence by the defendant was an exceptional circumstance under *Henry,* therefore rendering counsel's waiver ineffective to bind his client.[57] Since Williams asked the prison guard for his civilian clothes, clearly he did not wish to be tried in prison clothes. This nonacquiescence might therefore have been deemed an exceptional circumstance preventing a finding of waiver under a *Brookhart* analysis. At the very least, it seems a safe assumption that in light of his earlier request, had Williams known he had a right to be tried in his civilian clothes, he would not have acquiesced in his attorney's decision not to object to proceeding in prison garb.

To eschew an exacting waiver analysis when trial-type rights are involved makes sense. In many situations counsel must be able to make decisions independent of his client. When the defendant does not possess the legal knowledge necessary to understand the ramifications of a particular decision, or when there is not time for con-

54. 379 U.S. 443 (1965). The defendant in *Henry* was convicted of disturbing the peace. The Supreme Court remanded the case to the state court for a determination of whether the defendant or his counsel had waived the right to exclude illegally obtained evidence by failing to make a timely objection. The waiver issue was not decided by the Court, but it indicated that if counsel's strategy in delaying objection to the illegally obtained evidence was an attempt to deliberately bypass the state procedure, it would amount to a waiver binding on the defendant unless exceptional circumstances existed. *Id.* at 451-52. The Court did not explain what would constitute such exceptional circumstances. *Cf.* note 57 *infra.*

55. 379 U.S. at 451.

56. 384 U.S. 1 (1966).

57. *Id.* at 7. In *Brookhart,* the defendant was convicted of forgery in state court and was denied the right to confront and cross-examine witnesses. The Ohio Supreme Court ruled that this right had been waived. The United States Supreme Court held that since the defendant had emphasized in open court that he was not pleading guilty, he did not intelligently waive his right to confront and cross-examine witnesses even though his counsel agreed to a "prima facie trial," the practical equivalent of a guilty plea. The "exceptional circumstances" were the client's desire, as expressed in court, not to plead guilty. As a result, the defendant was not bound by his counsel's action.

sultation, it would unduly burden counsel to be required to check with his client each time he acts.[58] Certainly, when litigation requires counsel to make quick decisions on such topics as evidentiary objections during trial, the defendant cannot expect to be consulted, and assuming his attorney is competent, he should be bound by his attorney's actions. *Williams,* however, was not such a case. There was ample time for consultation prior to Williams' trial. Under these circumstances, the reasons for allowing counsel to bind his client disappear,[59] and personal participation should be required to find a waiver of constitutional rights.

The majority's departure from the *Johnson* waiver standard, by characterizing the right involved in *Williams* as a trial-type right, may have a pervasive impact. Although the knowing and intelligent waiver standard was first espoused in circumstances where the defendant was without counsel, the standard has been extended to situations where the defendant had counsel.[60] The *Williams* decision may make possible the waiver of a wide range of important constitutional rights unless an accused's counsel makes a timely objection. For example, unconstitutional jury instructions[61] and delays which violate an accused's constitutional right to a speedy trial[62] have been

58. One of the grounds on which courts have justified the binding effect of a nonpersonal waiver is the theory that the attorney must be in charge of the lawsuit. In addition, there are many times when a defendant may do more harm than good by attempting to make decisions in which difficult legal concepts are involved. Finally, during the heat of courtroom battle, consultation with the defendant would cause delay and distract the jury. *See Criminal Waiver, supra* note 51, at 1269.

59. One author has argued:

> [The] justifications for the attorney's control—and thus for nonpersonal waiver—do not cover every courtroom situation, however. There would be little loss of either judicial or advocate efficiency if the defendant were allowed to participate in those decisions made by the defense at a time when there was a definite opportunity for consultation between counsel and client.

Criminal Waiver, supra note 51, at 1271.

60. *See, e.g.,* Grosso v. United States, 390 U.S. 62 (1968) (privilege against self-incrimination); Brookhart v. Janis, 384 U.S. 1 (1966) (right to trial by jury); Fay v. Noia, 372 U.S. 391 (1963) (scope of habeas corpus jurisdiction).

61. *See* Mullaney v. Wilbur, 421 U.S. 684 (1975). The Supreme Court, in *Mullaney,* held that Maine's rule requiring a defendant charged with murder to prove by a preponderance of the evidence that he acted in the heat of passion in order to reduce the charge from murder to manslaughter violated due process; the burden should be on the prosecution to prove this factor beyond a reasonable doubt. A jury instruction to the effect that the defendant must carry this burden was therefore unconstitutional. However, Justice Rehnquist wrote a concurring opinion, joined by Chief Justice Burger, in which he suggested that failure to object to such a jury instruction may bar habeas corpus relief. *Id.* at 704 (concurring opinion).

62. *See* Barker v. Wingo, 407 U.S. 514 (1972). In *Barker,* the prosecution, by obtaining

considered denials of fundamental procedural rights. Yet, both of these matters arguably involve strategic and tactical considerations; they therefore might be amenable to a reevaluation by the Court. These rights, too, may be held to be surrendered without a knowing and intelligent waiver by the defendant. How far the Court will extend this notion is uncertain. It nonetheless is clear that in cases where a court does find a waiver of a trial-type right, unless the defendant can succeed in the difficult task of showing ineffective assistance of counsel,[63] he is left without a remedy despite the fact important constitutional rights may have been forfeited in the course of determining his guilt or innocence.

James A. Prostko

---

sixteen continuances, delayed the defendant's murder trial until five years after his arrest. In holding that the defendant was not denied his right to a speedy trial, the Court pointed out that although he did move to dismiss the indictment after the twelfth continuance, counsel's lack of motion for a speedy trial suggested tht he hoped to take advantage of the delay. *Id.* at 535.

63. *See* Comment, *Ineffective Assistance of Counsel—Standards and Remedies*, 41 Mo. L. REV. 483, 488 (1976), where the author observes that claims of ineffective assistance of counsel are usually dismissed unless the court finds no reasonable justification for the attorney's acts. In at least one case on point, however, a writ of habeas corpus was granted to a defendant on the ground he had been denied effective assistance of counsel. Among numerous errors, the defendant's counsel made no objection to his client's appearance before the jury in prison garb. Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967).