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COMMENTS

WAIVER OF CONSTITUTIONAL RIGHTS BY COUNSEL IN A CRIMINAL PROCEEDING

The recent Illinois Supreme Court opinion in People v. Williams highlights one of the most troublesome problems in the administration of criminal justice: the standards governing the waiver by counsel of constitutional rights belonging to a defendant. In other words, how far may counsel go, for whatever reason, in surrendering the constitutional rights of his client and still have his acts binding on the defendant, regardless of whether the latter knowingly consents or acquiesces in such waiver?

As a general proposition, counsel in a criminal as well as in a civil case is the master of the lawsuit, and his actions or inactions during the course of the trial are binding on his client. That the rule is not only proper and necessary, but also a fair one, is apparent. The defendant is generally less well-informed in matters associated with a lawsuit than is his counsel; therefore, placing the responsibility of the lawsuit in the attorney's hands increases the chances for a successful outcome and gives to the proceedings some semblance of consistency and direction. Even where it turns out that errors were committed, either because of miscalculation of strategy, or through the negligence of the attorney, the client is generally held bound by his attorney's conduct, partially on the basis that it is not unreasonable to as-

1 36 Ill. 2d 194 (1966).
3 The decisions emphasizing an accused's constitutional right to the assistance of counsel are premised on this assumption. See Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 373 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932). "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Schaefer, Federalism and State Criminal Procedure, 70 HARV. L. REV. 1, 8 (1956).
4 Thus, counsel's errors of judgment have been held not to constitute a lack of effective representation by counsel nor of a constitutional lack of due process. Snead v. Smyth, 273 F. 2d 838, 842 (4th Cir. 1959). And to justify a writ of habeas corpus on grounds of counsel's incompetence an extreme case must be presented. Anderson v. Bannan, 250 F. 2d 654, 655 (6th Cir. 1958). That improvident strategy, bad tactics, mistake, carelessness or inexperience is not necessarily ineffective assistance unless as a whole the trial was a mockery was held in Edwards v. United States, 256 F. 2d 707,
sume that the defendant was at least in better hands than if he had represented himself. Further, by employing the services of an attorney, or by accepting the appointment of counsel by the court, the defendant implicitly gives counsel authority to speak and act for him, and where he allows counsel to proceed without objection, the implication is that such conduct is concurried in by the client.

The rule is equally necessary from the standpoint of orderly procedure. Authority to proceed with the suit must lie somewhere. Were counsel forced to consult with his client at every step of the proceedings, the trial itself would be delayed interminably. Moreover, to allow every unsuccessful defendant relief on the basis of his counsel's mistakes would open the door to unlimited claims of counsel's lack of authority or of a lack of effective assistance by counsel. Thus, counsel is presumed to have

708 (D.C. Cir.), cert. denied 358 U.S. 847 (1958). Moreover, the right to the assistance of an attorney does not mean successful assistance. Johnson v. United States, 362 F. 2d 43, 47 (8th Cir. 1966). In Kennedy v. United States, 259 F. 2d 880, 886 (6th Cir. 1958), cert. denied 359 U.S. 994 (1959), the court stated that unless a prisoner on habeas corpus petition alleges and proves misconduct of counsel amounting to breach of his legal duty to represent his client's interests, a defendant is ordinarily bound by his attorney's conduct. For an exhaustive treatment of the incompetency of counsel as a basis for alleging denial of due process, pointing out the reluctance of the courts to treat any action which may be characterized as trial strategy as a denial of due process, see Incompetency and Inadequacy of Counsel as a Basis for Relief in Federal Habeas Corpus Proceedings, 20 Sw. L. J. 135 (1966) and Effective Assistance of Counsel, 49 VA. L. Rev. 1531 (1963).

5 It is only where the client is as badly off as though he had no representation, or worse off because of counsel's assistance, or where the ineffectiveness of the assistance reduced the trial to a sham or a mockery, that the defendant will not be bound by his attorney's action or inaction. See Whittaker v. Warden, Maryland Penitentiary, 362 F. 2d 835, 840-41 (4th Cir. 1966); Dodd v. United States, 251 F. 2d 240, 243 (9th Cir. 1958); Hensley v. Overlake, 244 F. 2d 108, 110 (7th Cir. 1957); Jones v. Huff, 152 F. 2d 14, 15 (D.C. Cir. 1945); People v. Ibarra, 60 Cal. 2d 460, 464-66, 34 Cal. Rptr. 863, 866-67, 386 P. 2d 487, 489-91 (1963); Roper v. Territory, 7 N. Mex. 255, 264, 33 P. 1014, 1016 (1893).

6 That a defendant cannot apparently acquiesce in his attorney's actions or inactions, and after the trial has resulted adversely, have the judgment set aside on the grounds of alleged incompetency of counsel was set forth in United States ex rel. Darcy v. Handy, 203 F. 2d 407, 426 (3rd Cir.) (separate opinion), cert. denied 346 U.S. 865 (1953). Where counsel has been employed by the accused, he has been held to be the other self of the client, and unless his objection to counsel's method of proceeding is somehow manifested, the client is held bound. State v. Dangelo, 182 Ia. 1253, 1256, 166 N.W. 587, 588 (1918): Sayre v. Commonwealth, 194 Ky. 338, 343, 238 S.W. 737, 739 (1922).

7 Thus, it has been pointed out that a rule that a defendant was not bound by his attorney's actions in the ordinary situation where no incompetence such as to offend due process was indicated, would pose many serious problems. It would seriously disrupt the ordinary functions of the trial judge and force him to interfere in the relationship between counsel and his client every time he saw a mistake being committed. Further, it would place the duty on counsel every time he determined that he had made a mistake to ask for a mistrial, and if it were determined that he had erred, to request a mistrial. In addition, it is usually impossible to evaluate trial tactics retrospectively. Finally, no member of the bar would take on the defense of an indigent accused if the courts allowed clients to bring a public
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authority to determine the evidence to be offered, defenses to be raised, witnesses to be heard, pleas and objections to be made, and authority to waive even important rights of his client.⁸

While such authority is generally conceded, a somewhat different question arises where there is a waiver by counsel of a known constitutional right of the defendant; for in this instance the deprivation of such right may result not in mere irregularity, but in error of such magnitude as to render the entire proceedings void. Constitutional rights have always been jealously guarded; furthermore, there is a presumption against their waiver.⁹

EARLY DEVELOPMENTS

While the early view seems to have been that a defendant should not be permitted to waive certain constitutional rights,¹⁰ the prevailing view is that most, and perhaps all, constitutional rights may be waived. The concern is not with whether such inquiry into an attorney's professional competence by allegations as to his trial tactics. Mitchell v. United States, 259 F. 2d 787, 792-93 (D.C. Cir.) cert. denied 358 U.S. 850 (1958).

⁸ Thus, for example, counsel's conduct was held binding on the accused where there was no objection to the admission of certain objectionable evidence in Johnson v. United States, 362 F. 2d 43 (8th Cir. 1966); where counsel did not raise objection to certain statements of prosecution witnesses in Davis v. Bomar, 344 F. 2d 84 (6th Cir.), cert. denied, 382 U.S. 883 (1966); where there was no objection to a technically defective indictment in Sneed v. Smyth, 278 F. 2d 838 (4th Cir. 1960); where counsel made formal admissions of fact in Dick v. United States, 40 F. 2d 609 (8th Cir. 1930); where counsel failed to raise a question of double jeopardy in State v. Klein, 91 N.J. Super. 508, 221 A. 2d 550 (1966); where counsel withdrew a motion for a mistrial in People v. Watson, 244 Advance Cal. App. 90, 52 Cal. Rptr. 821 (1966). A failure to arraign, alleged defects in the indictment and failure to call upon a defendant to make a statement in his own behalf were held to be matters which may be waived, and if made by counsel the waiver is binding on the accused. Kennedy v. United States, 259 F. 2d 883, 886 (6th Cir. 1958), cert. denied 359 U.S. 994 (1959).


¹⁰ See, e.g., Thompson v. Utah, 170 U.S. 343 (1898); Lewis v. United States, 146 U.S. 370 (1892); United States v. Taylor, 11 F. 470 (D. Kan. 1882). Some of the early cases drew a distinction between those constitutional rights which were personal to the accused, and those in which it was said the state had an interest or which it would be against public policy to waive. See Patton v. United States, 281 U.S. 276 (1929); Levin v. United States, 5 F. 2d 598 (9th Cir.), cert. denied 269 U.S. 562 (1925).

¹¹ See Hallinger v. Davis, 146 U.S. 314 (1892) (right to trial by jury); Diaz v. United States, 223 U.S. 442 (1911) (right of confrontation and cross-examination of witnesses); Frank v. Mangum, 237 U.S. 309 (1915) (right to be present at all stages of the trial); Escobedo v. Illinois, 378 U.S. 478 (1964) (right to counsel); Dillon v. United States, 279 F. 639 (2nd Cir. 1921) (immunity from search and seizure); State v. Dehler, 257 Minn. 544, 102 N.W. 2d 696 (1960) (right to a speedy trial); Wilcoxen v. Aldridge, 192 Ga. 634, 15 S.E. 2d 873 (1941) (right to suppress a coerced confession). Of course, there are limitations on the doctrine of waiver. Lack of jurisdiction of the subject matter cannot be waived, nor could there be waiver of a trial so lacking in fairness as to be a deprivation of due process. Thus, a deliberate attempt to waive trial by an impartial jury would not be sanc-
rights may be waived, but rather with how, by whom, and under what circumstances they may be waived.

The earliest important Supreme Court decision on waiver is the case of Johnson v. Zerbst,12 wherein the Court for the first time laid down the controlling standards for waiver, and in which it held that the sixth amendment includes the right of indigent defendants in federal courts to be furnished with counsel to represent them.13 In a habeas corpus petition presented to the district court, the petitioner alleged that he had been deprived of his constitutional right to the assistance of counsel at his trial for the crime of uttering and passing of counterfeit money. At the arraignment, the petitioner and a co-defendant were asked if they had counsel. They answered that they did not, upon which the judge inquired if they were ready to proceed to trial. They indicated that they were. They were not advised of their right to counsel; they did not request such assistance, and the trial proceeded without the aid of counsel. Shortly after their conviction they requested leave to appeal, which was denied on the grounds that it was not timely made. Subsequently, their petition for a writ of habeas corpus presented to the district court was denied,14 the judge concluding that the deprivation of petitioner's constitutional right to counsel was not a jurisdictional defect, remediable by habeas corpus, but rather a mere irregularity, the proper remedy for which lay by way of appeal. The time to appeal from this denial having passed, a second writ was sought. It, too, was denied on the same grounds. An appeal was taken from this denial and the court of appeals.

tioned. Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding, 74 Harv. L. Rev. 1315, 1333 (1961). It has been pointed out that refusal to accept a waiver would place the court in a position where it would be impossible for it to avoid error. If, for example, evidence were received under a stipulation, the defendant might complain that his constitutional right had been violated, and if the court refused to receive it when he consented, the defendant would be entitled to have his conviction set aside. Diaz v. United States, supra, at 452. For an analysis of the historical development of the concept of waiver of fundamental rights, and of the reasons for the disappearance of the early common-law reluctance to hold such rights waivable, see Patton v. United States, 281 U.S. 276 (1929).

12 304 U.S. 458 (1938).
13 Prior to Zerbst, the right to assistance of counsel in criminal cases had been held a fundamental right secured to every person by the due process clause of the fourteenth amendment. See Powell v. Alabama, 287 U.S. 45 (1932). Under Zerbst, the denial of the right by a federal agency was cognizable in the federal courts as a violation of the constitutional right secured by the sixth amendment, while the denial of the assistance of counsel by a state agency was cognizable in the federal courts only where it amounted to a denial of due process under the fourteenth amendment. Amrine v. Tines, 131 F. 2d 827, 832 (10th Cir. 1942). It was not until 1963 that the sixth amendment right to the assistance of counsel was incorporated per se into the due process clause of the fourteenth amendment. See Gideon v. Wainwright, 372 U.S. 335 (1963).

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affirmed. On certiorari, the Supreme Court held that a court's jurisdiction at the beginning of trial may be lost in the course of the proceedings by a failure to complete the court, as the sixth amendment requires, by providing counsel for an accused who is not able to obtain his own, and who has not intelligently waived his constitutional right to the assistance of an attorney. If this requirement were not complied with, it was held, the trial court had no jurisdiction to proceed, and the judgment of conviction was void. In response to the contention that the petitioner had waived his right, the Court stated that every reasonable presumption is to be indulged in against such a waiver. It then laid down the standards to be applied in determining whether the constitutional right to legal assistance had been waived. The Court held that a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. Furthermore, the determination of whether there has been an intelligent waiver of the right to counsel must depend in each case upon the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused. Finally, the Court held that the burden of proving that there was no intelligent waiver of this constitutional right fell on the accused, but that it could be established by a mere preponderance of the evidence.

In equating the deprivation of the right to counsel in federal courts with a lack of jurisdiction to proceed with the judgment, but nonetheless concluding that such right was waivable, the Court indicated that there was no constitutional error as such in permitting a trial to proceed without the presence of counsel. A court could be duly constituted without an attorney to represent the defendant's interests, provided the defendant had waived his right to the assistance of counsel. If an accused expressly stated that he did not want counsel, the court would not be justified in forcing counsel upon him, where it appeared that the choice was a voluntary and intelligent one. But the incurable error in Zerbst lay in the deprivation of defendant's right to the assistance of counsel; that is, in depriving him of his choice, and there could be no choice where there was no knowledge of the existence of the right.

16 Johnson v. Zerbst, 92 F. 2d 748 (5th Cir. 1937).
17 For a discussion of the significance of the Court's granting of habeas corpus relief where no jurisdictional defect appears at the outset, noting that Zerbst was one of a series of cases in which the Court had begun to equate unconstitutionality with a lack of jurisdiction to proceed, see Note, 24 CORNELL L. Q. 270 (1939). Another brief analysis may be found in Note, 24 IOWA L. REV. 170 (1938).
Though the Court limited its discussion to the sixth amendment right to the assistance of counsel, it seemed to indicate that the standard of waiver thus laid down would apply whenever a constitutional right guaranteed the accused had been violated, and that federal habeas corpus relief would be available whenever a constitutional safeguard was lost through the application of an impermissible standard of waiver. Thus, though a state court had found a waiver of a constitutional right, and such right were one of those deemed enforceable against the states, the federal waiver standard would have to be met. The standard of waiver laid down in *Zerbst* made it clear that the accused must know of the existence of the right, and the consequences of forfeiting it, before a waiver could be found. Though the question of the authority of an attorney to waive constitutional rights for the defendant was not reached, as such, in *Zerbst*, the implication seemed unavoidable that it was a knowing, voluntary consent of the accused which was essential to establish a waiver of such rights.

In the decisions following *Zerbst* the standard of waiver there laid down was generally applied to the constitutional right to assistance of counsel. However, as applied to other constitutional rights, once counsel had been retained, the *Zerbst* requirement of a voluntary and knowing consent of the accused, though followed by some courts, did not appear to be the controlling standard. By virtue of the concept of an implied consent, counsel's decisions to forego a constitutional right, or his failure to assert such right or object to its violation, were held

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19 Waiver of federal rights is a federal question. See *e.g.*, Rice v. Olson, 324 U.S. 786 (1945). Of course, the number of such rights was not as broad as it is today with the judicial incorporation of many of the provisions of the Bill of Rights into the fourteenth amendment.

20 See, *e.g.*, Carnley v. Cochran, 369 U.S. 506, 515-16 (1962), where the Court held that the right does not depend upon a request, and that to presume waiver from a silent record is impermissible. And in Moore v. Michigan, 355 U.S. 155, 164-65 (1957), where the defendant said that he did not want counsel, the Court refused to find a waiver when the choice was motivated by fear. In Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116, 118 (1956), it was pointed out that a waiver of the right to counsel must be intelligently and understandingly made. Where the accused does not know of his right to counsel, his failure to request such was held not to constitute a waiver in *Uveges v. Pennsylvania*, 335 U.S. 437, 441 (1948). And where a defendant was asked if he had counsel and if he desired counsel, but was not informed of his right to such at the court's expense if he could not afford one, it was held that he had not waived his right in State v. Thurlow, 85 Ida. 96, 102-03, 375 P. 2d 996, 999-1000 (1962).

21 See, *e.g.*, Smith v. United States, 337 U.S. 137 (1949); United States *ex rel.* Seals v. Wiman, 304 F. 2d 53 (6th Cir. 1962); United States *ex rel.* Goldsby v. Harpole, 263 F. 2d 71 (5th Cir.), cert. denied, 361 U.S. 850 (1959); People v. Smith, 6 Ill. 2d 414, 129 N.E. 2d 164 (1956); State v. Forsythe, 38 N.J. Super. 578, 120 A. 2d 127 (1956). In *Harpole*, supra, at 83, the court pointed out that even in civil litigation there are limitations on counsel's implied authority to make decisions for his client, and that such limitations are all the more important where life is at stake.
binding on the accused. By virtue of the concept of implied waiver, failure to assert a right, or conduct inconsistent with an intent to assert it, constituted a waiver. Failure to follow a procedural rule prescribed by statute for the assertion of a right was equated to a waiver, and a state procedural rule was an adequate state ground for barring relief in the federal courts. In addition, the violation of a constitutional right in a state court was barred relief in federal courts by a failure to exhaust the state remedies available for objections to such violation.

Practical considerations seemed to call for a holding of waiver in numerous instances where it was apparent that the defendant had not known of the constitutional right involved or had intended to relinquish it. Admittedly, the state had a legitimate interest in prescribing the time or manner in which a constitutional right could be asserted. Where a defendant had failed to assert a constitutional right, or had acted in such manner as to lead the court to believe that he did not wish to assert

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See, e.g., United States v. Richmond, 295 F. 2d 83 (2nd Cir. 1961) (waiver of right to contest admissibility of confession); Cruzado v. Puerto Rico, 210 F. 2d 789 (1st Cir. 1954) (waiver of right of confrontation); Brown v. United States, 182 F. 2d 953 (8th Cir. 1950) (plea of guilty); United States v. Sorrentino, 175 F. 2d 721 (3rd Cir.), cert. denied 338 U.S. 868 (1949) (waiver of right to a public trial); Eury v. Hugg, 141 F. 2d 554 (4th Cir. 1944) (waiver of right to jury of twelve). Cruzado, supra, at 791, suggested that the Zerbst holding that waiver must be by the accused personally, was limited to the right to assistance of counsel, since by the very nature of things, the defendant did not have counsel to waive the right for him.

See Harriet Cotton Mills v. Textile Workers Union, 251 N.C. 218, 111 S.E. 2d 457, cert. denied 362 U.S. 941 (1959); Jackson v. Olson, 146 Neb. 885, 22 N.W. 2d 124 (1946). Even the Zerbst court had agreed that a waiver could be implied by a failure to assert a constitutional right, and that thereafter the burden would be on the accused to show that he did not competently and intelligently waive the right. Generally, the courts did not pause to note whether the defendant was aware of either the consequences of his own or counsel's failure to assert a right, or of counsel's or his own conduct as being inconsistent with an intent to assert a right. Counsel's actions were generally deemed determinative.

See Michel v. Louisiana, 350 U.S. 91, 97 (1955); Jennings v. Illinois, 342 U.S. 104, 109 (1951); Yakus v. United States, 321 U.S. 414, 444 (1944). In Herb v. Pitcairn, 324 U.S. 117, 125-26 (1946), the Court explained the reason for the adequate state ground rule as being found in the partitioning of power between the state and federal judicial systems, and in the limitations on the Court's jurisdiction, whereby its only power over state judgments is to correct them insofar as they incorrectly adjudicate federal rights.


Thus, if error were asserted in time, a retrial might be avoided. A long delay in asserting the right might result in making it impossible for the State to overcome the defendant's claim of violation of his constitutional right. Further, there is a presumption of regularity in the proceedings; it is not unreasonable to require the defendant to call any irregularity to which he objects to the court's attention. Then, too, all lawsuits must eventually be concluded.
it, the courts felt justified in holding the defendant to his apparent waiver. In addition, the dangers of fabrication and collusion in this area were formidable. A claim of lack of knowledge was easy to assert, and difficult to disprove, and it was not beyond speculation that an attorney might deliberately fail to assert a constitutional right to preserve error for purposes of appeal.

**EVOLUTION OF THE ZERBST STANDARD**

In 1962, in the case of *Fay v. Noia*, the Supreme Court re-examined the question of waiver of constitutional rights. The Court was presented with an application for a writ of habeas corpus by a petitioner who had been charged and convicted of felony murder. At the trial the only evidence against Noia and his co-defendants was a coerced confession. All three were convicted and sentenced to life imprisonment. Noia’s two co-defendants appealed; he did not. Although the appeals of the two co-defendants were unsuccessful, they were released in subsequent proceedings. An application for *coram nobis* review was then made by Noia to the state court and ultimately denied because of his failure to appeal. He then made application to the federal district court for a writ of habeas corpus; this, too, was denied on the ground that his failure to appeal was a failure to exhaust available state remedies. The court of appeals reversed, holding that in view of the coincidence of the circumstances involved in Noia’s situation (the unquestioned violation of an important constitutional right, the clear knowledge of the violation by the federal court at the institution of the habeas corpus proceeding, and the freedom of Noia’s co-defendants by virtue of their vindication of the same constitutional right) the state procedural ground — a failure to appeal — was in this particular case neither reasonable nor adequate. The court further held that Noia’s failure to appeal was not a waiver of his constitutional right under the circumstances.

The Supreme Court granted certiorari. It affirmed the court orders.

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28 One was released on a federal habeas corpus writ. United States *ex rel.* Caminito *v.* Murphy, 222 F. 2d 698 (2nd Cir.), *cert. denied* 350 U.S. 896 (1955). The other defendant’s conviction was set aside on rehearing in the state court. People *v.* Bonino, 1 N.Y. 2d 752, 135 N.E. 2d 51 (1956).
29 Noia first applied to the sentencing court and his conviction was set aside. People *v.* Noia, 3 Misc. 2d 447, 158 N.Y.S. 2d 683 (1956). This was reversed by the Appellate Division of the Supreme Court, 4 App. Div. 2d 698, 163 N.Y.S. 2d 796 (1957). The New York Court of Appeals affirmed the appellate division *sub nom.* People *v.* Caminito, 3 N.Y. 2d 596, 148 N.E. 2d 139 (1958).
31 United States *v.* Fay, 300 F. 2d 345 (2nd Cir. 1962). The court questioned whether federal habeas corpus relief was barred by failure to exhaust state remedies no longer available, but held that regardless, exceptional circumstances were present which excused compliance with this requirement.
of appeals, but on different reasoning. In treating the question of whether Noia's failure to appeal was a waiver of his constitutional right, the Court laid down the following guideline for such waiver: the controlling standard for waiver of constitutional rights is that enunciated in Johnson v. Zerbst. It is open to a federal habeas corpus court to deny relief to a defendant who, with or without consultation with competent counsel, understandably and knowingly fails to avail himself of the privilege of vindicating his claims in a state court, whether for strategic, tactical, or other reason which might be described as a deliberate by-passing of a state procedural rule. The standard, however, depends upon the petitioner's considered choice; a choice made by counsel, where not participated in by the defendant, does not automatically bar relief. Further, under Noia, the choice must be a meaningful one; a choice limited to alternatives involving a substantial risk of extremely prejudicial consequences in either direction is no choice at all. The Court cautioned that this is not to say that in every case where there is any risk of a heavier penalty incurred in foregoing a procedural right that a waiver cannot be found. Each case is to stand on its own facts.

Though the broad sweep of Noia's language was criticized,

Noia's decision not to appeal had been a deliberate one, make after consultation with counsel, though it had been motivated by fear that upon a second trial he might be sentenced to death, there being a substantial risk of this in view of the remarks of the trial judge who had indicated that he would have imposed a death sentence had it not been for his wife's request that morning to give Noia a chance. Noia had also by-passed the state procedural remedies available for relief. Thus, the "exhaustion of state remedies" rule and the "adequate state ground" rule seemed a bar to federal habeas corpus relief. The Court, however, held that the doctrine that state procedural defaults are adequate to bar direct Supreme Court review was not to be extended to limit the power granted federal courts under the federal habeas corpus statute. It further held that the "failure to exhaust state remedies" requirement referred only to remedies available at the time the habeas application was filed in federal court. For an earlier lower court treatment of a fact situation similar to that presented by Noia, in which the court declined relief, see Larson v. United States, 275 F. 2d 673 (5th Cir.), cert. denied 363 U.S. 849 (1960).

Justice Harlan filed a vigorous dissent to the majority opinion. While agreeing that there were certain rights which could only be waived expressly and intelligently by the defendant himself, for example, the right of an accused to counsel, he saw no purpose in applying this principle in full force where the defendant was represented by competent counsel. He raised the specter that not only would waiver be ineffective if some adverse consequence might be expected to follow from the exercise of such right, but that there could never be a binding waiver, "since only an incompetent would give up a right without any good reason, and an incompetent cannot make an intelligent waiver." 372 U.S. at 472. The decision was also criticized for inviting state prisoners to let the right to appeal constitutional claims in state court systems lapse, under such circumstances that, relying on Noia, it would be hard to say that the defendant's main purpose in allowing such lapse was to obtain a hearing in a federal habeas court. Case Notes, 13 Am. U. L. Rev. 78, 79 (1963). The Court was also criticized for administering a brand of "relative justice." Recent Developments, 9 Vill. L. Rev. 168, 173 (1963).
lower court decisions after *Noia* reflected a more careful examination of alleged waivers of constitutional rights by the courts. But it was apparent that the question of counsel's ability to waive such rights for his client was not a settled one. *Noia* had not actually involved the problem of a waiver by counsel without his client's knowledge or consent, for it appeared that Noia was aware of his right to appeal and had decided, after consultation with counsel, to forego the right because of the substantial risk of the imposition of the death penalty upon a second trial, and because he did not want to impose an additional financial burden on his family. Moreover, in holding that counsel's choice did not automatically bar relief, the Court indicated that under some circumstances counsel's waiver of a constitutional right would be binding on the defendant. It did not, however, indicate clearly just what these circumstances were. Some courts adopted a liberal interpretation of *Noia*, and held that an attorney's action or inaction, without the knowing consent of the defendant, did not constitute a waiver of an accused's constitutional rights. Others held that the defendant was bound by his counsel's conduct.

In two subsequent Supreme Court cases involving the alleged waiver of constitutional rights by counsel, the Court redefined the guidelines to be followed in determining whether waiver by counsel was effective to bind the defendant. In *Henry v. Mississippi*, the petitioner had been convicted for disturbing the peace. On appeal, the state supreme court first reversed the conviction and remanded the case for a new trial, holding that out-of-state counsel, who was unfamiliar with a state procedural rule requiring contemporaneous objection to the admission of illegally seized evidence, did not waive the right to suppress by his failure to act within the prescribed time. However, the state filed a suggestion of error, indicating that the defendant was represented by local as well as out-of-state counsel. The state

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34 372 U.S. at 397 n.
35 See *Floyd v. United States*, 365 F. 2d 388 (5th Cir. 1966); *Dupes v. Johnson*, 363 F. 2d 103 (6th Cir. 1965); *Bowler v. Warden, Maryland Penitentiary*, 334 F. 2d 202 (4th Cir. 1964); *Whitus v. Balkcom*, 333 F. 2d 496 (5th Cir.), *cert. denied* 379 U.S. 931 (1964).
39 This opinion was reported in the Southern Reporter advance sheets, 154 So. 2d 289 (1963), and was withdrawn when the second opinion was filed. 379 U.S. at 444, n.1.
Supreme Court then reversed its original opinion, and held that the defendant was bound by his counsel's mistakes. On certiorari, the United States Supreme Court remanded the case to the state court for a determination as to whether the petitioner had either, through himself or counsel, knowingly waived his privilege of raising his federal claim by a failure to make a timely objection. In noting that a state procedural rule providing for the timely assertion of a constitutional right was not adequate to bar federal relief unless the state's insistence on compliance served a legitimate state interest, the Court held that the state rule here did serve such an interest, but that that interest might have been satisfied by counsel's motion for a directed verdict, in which reference was made to the illegal search and seizure. The federal claim was not passed on by the Court, the indications being that the constitutional right may have been waived by counsel as a part of his trial strategy, since there appeared to be evidence that at some point in the trial one of the petitioner's attorneys stood up to object to the admission of the tainted testimony but was pulled down by co-counsel. The Court held that counsel's deliberate choice of strategy would amount to a waiver binding on the defendant, unless "exceptional circumstances" intervened. The Court, however, did not elaborate on what constituted "exceptional circumstances."

Nevertheless, under the Henry and Noia approach there was a recognition that a choice by counsel does not automatically waive the alternative right by-passed in making the choice. The choice by counsel must be a considered choice as indicated by Noia and acquiesced in by Henry. In effect, these cases may be viewed as recognizing the applicability of the Zerbst standard of waiver to the conduct of counsel, with the emphasis on his knowledge of the import of his acts. It is not made clear by either of these cases the extent to which any such considered choice by counsel must also be accompanied by a fully considered choice by the client. Thus, the extent to which the Zerbst stand-

\[40\] 154 So. 2d 289 (1963).

\[41\] Thus, the Court pointed out that a prompt objection to the introduction of illegally seized evidence would give the trial judge an opportunity to conduct the trial without using the objectionable evidence. Should the objection prove to be well-taken, the fruits of the illegal search could be excluded from the jury's consideration and a reversal and new trial avoided. 379 U.S. at 448.

\[42\] In Mirra v. United States, 255 F. Supp. 570, 575 (S.D. N.Y. 1966), the court seemed to suggest what might be regarded as exceptional circumstances as far as by-passing appellate procedures is concerned, that is, mistake, inadvertence, ignorance, inadequacy of appellate remedy, change in the law, and lack of jurisdiction.
ard applies to the client in the presence of his counsel was still open.\textsuperscript{43}

In the subsequent case of \textit{Brookhart v. Janis},\textsuperscript{44} the Court indicated that, in determining whether counsel's strategic decision to forego a constitutional claim was binding on his client, a clear showing of nonacquiescence by the defendant in his counsel's choice constituted an "exceptional circumstance," thereby rendering counsel's attempted waiver ineffective to bind his client. In \textit{Brookhart} the petitioner had been convicted of forgery and other offenses. The question before the Court was whether counsel had the power to agree to a "prima facie" trial,\textsuperscript{45} in the face of his client's expressed refusal to enter a plea of guilty. The Court held that counsel had no such power. Quoting \textit{Henry} as holding that counsel may under some conditions, where no exceptional circumstances are apparent, effectively waive his client's constitutional rights, the Court subtly shifted the emphasis of \textit{Henry}'s "exceptional circumstances" criterion,\textsuperscript{46} and appeared to indicate that the category of such exceptional circumstances was not as limited as \textit{Henry} seemed to indicate. The \textit{Brookhart} Court asserted that there was nothing in \textit{Henry} compelling the proposition that where the defendant was induced to acquiesce unknowingly in a plea to which he was manifestly opposed, that counsel can enter, in the name of his client, a plea which would shut off the defendant's constitutional right to confront and cross-examine the witnesses against him. The Court noted that the petitioner had neither personally waived his right nor acquiesced in counsel's attempted waiver. Thus, under \textit{Brookhart}, it appeared that a clear and open showing of a failure by the defendant's conduct to meet the requirements of waiver enunciated

\begin{footnotes}
\item[43] This question is more academic than real since it is unrealistic to expect defendant to exercise more knowledgeable than counsel. Consequently, the failure of counsel's choice to meet the requisite \textit{Zerbst} standard of knowledgability does not require any further reflection as to whether there was acquiescence by defendant.
\item[44] 384 U.S. 1 (1966).
\item[45] A prima facie trial was explained as being a trial at which a defendant will plead not guilty, and by arrangement, defense counsel will require the prosecution to prove only a prima facie case, and will also agree that he will neither offer evidence on the defendant's behalf nor cross-examine any of the state's witnesses. \textit{Id} at 9-10. \textit{Brookhart} had emphatically stated to the trial judge that he was in no way pleading guilty. The Court found that the prima facie plea was the equivalent of a plea of guilty. 384 U.S. at 7.
\item[46] In \textit{Henry}, the Court had held that although trial strategy adopted by an attorney without prior consultation with an accused, "\textit{will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims}" the deliberate by-passing of the contemporaneous-objection rule by counsel as a part of his trial strategy would have that result in this case. \textit{Henry v. Mississippi}, 379 U.S. at 451-52. (emphasis added) But in \textit{Brookhart}, the Court interpreted \textit{Henry} as reading that counsel "\textit{may, under some conditions, where the circumstances are not 'exceptional,' preclude the accused from asserting constitutional claims}. . ." \textit{Brookhart v. Janis}, 384 U.S. at 7. (emphasis added)
\end{footnotes}
in Zerbst would constitute an "exceptional circumstance" and preclude an effective waiver by counsel.

WAIVER AND PEOPLE v. WILLIAMS

The standard for waiver of constitutional rights enunciated by these cases has been a difficult one for lower federal courts and state courts to apply. Illinois courts are no exception. In 1966, in People v. Williams, the Supreme Court of Illinois entertained a combined appeal from a dismissal of defendant's petition under the Illinois Post-Conviction Hearing Act, and a writ of error. Williams, who at the time of trial was a sixteen-year-old with a limited educational background, had been indicted along with five other co-defendants for the crime of rape. In a joint bench trial, at which the defendants were represented by a public defender, all the defendants were found guilty and sentenced to the penitentiary. In his petition Williams raised two basic arguments. He asserted an "ineffective appointment" of counsel, in that a single public defender represented all six defendants whose interests were conflicting, and the denial of due process because of the admission of a coerced confession. At the trial, defense counsel stipulated to the admission into evidence of a joint "confession" signed by Williams and two others on condition that the confession would not be considered against the remaining defendants. When Williams testified, he denied making certain incriminating statements in the confession. In his post-conviction petition Williams alleged that he confessed because of threats and promises of leniency. He further alleged that he was not represented by counsel or advised of his rights when he confessed, and that defense counsel stipulated to the confession solely to exculpate certain of his co-defendants. As the Illinois Supreme Court viewed it, his basic complaint was that his counsel should have demanded a preliminary hearing to determine its admissibility.

The court affirmed the conviction, holding that counsel's failure to move to suppress was a part of his trial strategy and was therefore a waiver which was binding on the defendant. The court drew a distinction between those instances where an attorney makes a deliberate choice to forego a constitutional right as a part of his trial strategy, and instances in which the right is lost through an "honest mistake." In the latter instance, the court held, there is no waiver. The Williams case further recog-

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47 36 Ill. 2d 194 (1966).
48 The court disposed of this contention by holding that Escobedo v. Illinois, 378 U.S. 478 (1964), and the guidelines laid down in Miranda v. Arizona, 384 U.S. 436 (1966), should not be applied to trials commenced in Illinois prior to the date those decisions were announced. 36 Ill. 2d at 205-06.
nized that there are certain constitutional rights which under no circumstances can be waived by counsel, but can only be waived by the affirmative act of the defendant himself. These rights set forth in the opinion are: trial by jury, a preliminary examination, grand jury indictment, a refusal to plead guilty, and the right of the accused to be present at the trial. The court at the very outset determined that the admission of this confession did not fall within the category of these foregoing rights which are waivable only by the affirmative act of the defendant. Thus, the issue was limited to whether counsel's conduct was a matter of trial strategy, mistake or inadvertence. The court determined that counsel's action was a matter of trial strategy which the defendant could not now attack. It therefore refused to remand for a hearing on this issue.

The Williams decision has established a most rigid rule of waiver. If the waiver by counsel does not come within the narrow category of those constitutional rights described by the court as being waivable only by the defendant himself, it is binding on the accused when made as a matter of strategy, unless bad faith or incompetence can be shown. And if it is possible to perceive from the record that the choice was deliberate for the purpose of serving some ostensible tactical purpose, a hearing will not be required to determine whether in fact the ostensible strategic purpose was the reason for the waiver, and further, whether that ostensible purpose was in fact well-founded. In other words, the Williams court refused to consider whether such presumed strategic purpose could have forseeably benefited the client to any appreciable degree or that the degree of benefit was far out-

49 In a separate opinion in Brookhart, Justice Harlan had pointed out a distinction as to tactical decisions of a lawyer which he believed could be made by counsel without his client's comprehension, or even with his express disapproval; for example, the decision whether or not to cross-examine a particular witness. He held that in the Brookhart case, however, for federal constitutional purposes, the procedure involved such a significant surrender of the rights normally incident to a trial, that under the due process clause of the fourteenth amendment, such a plea, amounting to a plea of guilty, could not be entered by counsel over his client's protest. 384 U.S. at 8-9.

50 36 Ill. 2d at 202. The court pointed out that the necessity of defendant's personal waiver of these rights was presently required by Illinois statute. A comprehensive analysis of the relationship between the nature of the right waived and the necessity for defendant's personal waiver of "fundamental" rights may be found in Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest, 54 CALIF. L. REV. 1262 (1966).

51 36 Ill. 2d at 203.

52 In Henry, the Court had held that a hearing in the state court was necessary to establish whether there had been a waiver, where it was not clear whether counsel had deliberately chosen to bypass the state procedural rule for asserting the constitutional claim, or because of unfamiliarity with local rules of procedure, had made an "honest mistake" in not asserting the constitutional claim in a timely manner. 379 U.S. 443, 449-53.
weighed by the benefits which might have accrued had the constitutional right been asserted.

In the Williams case counsel chose between moving to suppress a confession which on its face was invalid, and permitting the defendant to rebut the confession from the witness chair at the trial, by testifying that the answers recorded by a court reporter who transcribed the confession were not correct. In holding that the defendant's right to move to suppress his confession was effectively waived by his counsel, the court failed to evaluate or even consider the following countervailing factors apparent from the record. First, the court did not consider that the assertion of the constitutional right surrendered far outweighed any advantage to be gained from waiving it and permitting the defendant to testify, since counsel clearly might have anticipated that any trier of fact would be skeptical in believing a boy of sixteen that he did not make the statement attributed to him as set forth in a transcript recorded by a court reporter. Second, the choice made by counsel was not required, for as the Williams court recognized, the defendant could have both moved to suppress the confession, and, if his motion was denied, subsequently testified that the answers attributed to him were not correct, without losing his right to appeal the constitutional point. Third, the record disclosed the strong possibility that counsel's motive in entering the stipulation was not to secure a hoped-for advantage for Williams, but to assure that the confession would not be used against the other defendants. The suggestion of such a possible conflict of interest alone should suffice to merit re-evaluation of the binding effect of the waiver.

Thus, the standard applied in Williams, while purporting to be consistent with the Noia-Henry-Brookhart precedents, did not meet the test demanded by these decisions. Williams agreed that there are certain constitutional rights that can never be waived by counsel without full participation by the client. Moreover, Williams conceded that under Noia, Henry and Brookhart, counsel cannot be deemed to have waived a constitutional right of his client where such waiver reflects counsel's ignorance of the procedural rules which determine when and under what circumstances such constitutional right may be asserted. Williams further conceded that even where there is an awareness of the procedural requirements limiting the manner in which a constitutional right may be asserted, the waiver will nevertheless not

53 36 Ill. 2d at 204.
54 In Lee v. Mississippi, 332 U.S. 742, 745 (1947), the Supreme Court held that a conviction resulting from the use of a coerced confession is no less void because the defendant testified at some time in the trial that he had never in fact confessed, and that testimony of such nature can hardly legalize a procedure which conflicts with accepted standards of due process.
bind where it is made arbitrarily without some ostensible prospect of gain to the client. What the court in *Williams* refused to recognize was that the knowledgeable waiver by counsel must extend not merely to the formal rules of the court, be they substantive or procedural, but to the strategic or tactical consequences of such waiver as well. There can be no magical significance to the fact that an attorney made a choice for "strategic purposes" if any reasonable practitioner would have recognized that the purported strategy was abortive rather than effective. *Noia, Henry* and *Brookhart* drew no such arbitrary distinction, but required that the waiver be made understandingly and knowingly. Understanding and knowledgeability do not stop with the formal rules but continue on into the choice of tactics and strategy as well.

Applying the standards of the *Noia, Henry* and *Brookhart* cases, the following factors should have guided the court's determination in the *Williams* case. Inasmuch as counsel may waive a defendant's constitutional rights only in unexceptional circumstances, such waiver should be binding on the accused only when the trial strategy is clear and the benefits thereof can be said to at least equal or outweigh the constitutional right surrendered.

When presented with a question of waiver, a court should first inquire whether the right waived falls into the category of rights which only the defendant can affirmatively waive. Second, the court should determine whether the waiver was a matter of error or mistake as to the law. This normally should require a hearing. Third, the court should determine whether it was necessary for counsel to surrender the right in question in order to accomplish his desired end. Fourth, a determination should be made whether the right waived could be said to have outweighed the benefit of the strategy pursued. And fifth, the court should search the record for any condition which would suggest that the waiver might not have been in the defendant's best interest, but was made for reasons other than some hoped-for advantage to the accused. If any of the above factors exists the waiver should not be binding on the defendant.

**CONCLUSION**

Waiver is "an intentional relinquishment or abandonment of a known right or privilege," and the decision to waive a right generally belongs to the one possessed of such right. Counsel's waiver of certain constitutional rights of an accused, as a part of his trial strategy, will under ordinary circumstances be bind-

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ing on the accused because counsel is presumed to have authority to act for the defendant, and it is presumed that he will act in the defendant's best interests. Moreover, counsel's familiarity with the law will generally offer the advantage of a more knowledgeable choice. But where it clearly appears that counsel did not have authority to waive the right, or that counsel did not act in the defendant's best interests, or that no advantage was gained by permitting counsel to make the choice, counsel's waiver should not be held binding on the accused. It is, after all, the defendant's life or liberty which are involved, and the rights in question are constitutional rights, personal to the accused. The sixth amendment guarantees to a defendant the right to the assistance of counsel only; to allow counsel complete mastery not only over the ordinary manipulations of a trial, but over a defendant's fundamental constitutional rights as well, and to eliminate from consideration the knowledgeable choice of the only one who is ultimately to be faced with the consequences of such decision, where no purpose beneficial to the defendant is apparently served by such elimination, seems opposed to fundamental fairness. He who pays the piper ought to have something to say about calling the tune. And needless to say, it is not sufficient to satisfy the standard of waiver that defendant is simply permitted to make his choice, but such choice must be one which meets the Zerbst requirement of knowledgability, and voluntariness, together with the prospect of some potential advantage to be gained from the waiver.

One fact is apparent in the recent cases dealing with the problem of waiver of constitutional rights, and that is that any question of such alleged waivers will be subject to closer scrutiny. In cases involving the sixth amendment right to counsel and the fifth amendment privilege against self-incrimination, the Court has been most specific in outlining the steps which must be followed to assure an intelligent and voluntary waiver of these rights by a defendant. Whether all important constitutional rights will eventually be so rigidly protected is uncertain. But the Court has indicated that the rights of individuals deemed basic to a free society must not be held forfeited too easily. "... [N]o system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights." If the

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56 Such lack of authority would exist either because the defendant had affirmatively refused to acquiesce in his counsel's waiver, or because the law refused to grant such authority with regard to specific constitutional rights.
fact that a right has been safeguarded in the Constitution has any significance, it does not seem amiss to insist that it is the defendant's considered choice to forego such a right which ought to be determinative of the issue of waiver, or at least that the act of his counsel be subjected to rigid scrutiny to determine that it was reasonable and made solely in the defendant's interest.

Dolores Knapp