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# Federal Habeas Corpus and the Doctrine of Waiver Through the Deliberate Bypass of State Procedures

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## FEDERAL HABEAS CORPUS AND THE DOCTRINE OF WAIVER THROUGH THE DELIBERATE BYPASS OF STATE PROCEDURES

The last decade has seen the concept of "due process" expand until "it appears that there is no present fixed limitation to that concept."[1] Accompanying this expansion has been an equally vigorous development of the "federal system's right of intervention and intrusion into state criminal convictions"[2] through the federal writ of habeas corpus. This latter development has led one Justice of the Supreme Court of Louisiana to conclude that "[u]nder federal review of applications for writs of habeas corpus the doctrine of finality of judgments has been almost totally abandoned, and state procedural laws designed to promote and accomplish prompt, orderly, expeditious, and just determination of criminal prosecutions have been disregarded."[3]

This erosion of the finality of state court convictions gathered momentum in 1963 with the United States Supreme Court's decision in *Fay v. Noia*.[4] The Court, reviewing a petition for habeas corpus from a state prisoner who alleged his murder conviction was based upon an unconstitutionally obtained confession, held that the federal district court had the power to grant relief despite the prisoner's failure to seek state appellate review of his claimed constitutional defect. However, mindful of the impact of the decision on state court convictions, the Court conceded that the federal courts had discretion to deny relief to an applicant who had "deliberately by-passed the orderly procedure of the state courts."[5] The Court also indicated that the bypass of state procedures had to be made deliberately by the petitioner—not solely by defense counsel as part of his trial strategy. Furthermore, the determination of waiver was said to be a federal question because it dealt with federal rights. Thus, a state court's finding of waiver was not binding on the federal court.[6]

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1. LA. CODE CRIM. P. art. 362, comment (i).

2. State *ex rel.* Barksdale v. Dees, 252 La. 434, 442, 211 So.2d 318, 321 (1968). Landmark cases in the development of a broadened view toward federal habeas are Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Brown v. Allen, 344 U.S. 443 (1953).

3. Justice Barham in State *ex rel.* Barksdale v. Dees, 252 La. 434, 441, 211 So.2d 318, 321 (1968).

4. 372 U.S. 391 (1963).

5. *Id.* at 438.

6. *Id.* at 439: "If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for

Later, in *Henry v. Mississippi*,[7] the Supreme Court, by writ of certiorari, reviewed a conviction allegedly based upon illegally seized evidence. The Supreme Court of Mississippi had affirmed the conviction because the petitioner had failed to timely object.[8] The United States Supreme Court held that "a litigant's procedural default in state proceedings does not prevent vindication of his federal rights unless the state's insistence on compliance with its procedural rule serves a legitimate state interest."[9] Although no such legitimate state interest was found in *Henry*, the Court, in remanding the case to determine if the petitioner had intentionally waived his federal claim, cautioned that while "trial strategy adopted by counsel without prior consultation with an accused"[10] would not usually preclude the accused from asserting constitutional claims, "the deliberate by-passing by counsel of the contemporaneous objection rule as a part of trial strategy would have that effect in this case."[11]

Since *Fay* and *Henry*, both state and federal courts have been faced with the problem of determining what constitutes a waiver of federal claims through the deliberate bypass of state procedures. A deliberate bypass is, of course, binding on the petitioner and acts as a waiver of his constitutional claim when he has voluntarily and intelligently bypassed state procedures by his own actions.[12] But the *Fay* and *Henry* directive that has given the courts the most trouble is that strategic bypasses made by defense counsel are binding on the petitioner only when he has acquiesced in them.[13] Some courts have tended to presume this acquiescence—especially where counsel is retained rather than

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strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedure, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claim on the merits. . . . At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. . . . A choice made by counsel not participated in by the petitioner does not automatically bar relief. Nor does a state court's finding of waiver bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question."

7. 379 U.S. 443 (1965).

8. Henry v. Mississippi, 253 Miss. 263, 154 So.2d 289 (1963).

9. Henry v. Mississippi, 379 U.S. 443, 447-48 (1965).

10. *Id.* at 451.

11. *Id.* at 451-52.

12. Henry v. Mississippi, 379 U.S. 443 (1965); Fay v. Noia, 372 U.S. 391 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938).

13. *See* Henry v. Mississippi, 379 U.S. 443 (1965); Fay v. Noia, 372 U.S. 391 (1963); Hale v. Boles, 419 F.2d 389 (4th Cir. 1969); Grimes v. United States, 396 F.2d 331 (9th Cir. 1968).

appointed.[14] Others have required some evidence of this acquiescence.[15] Most courts will not find such a strategic waiver where there is substantial evidence, usually in the form of the petitioner's statements at trial, that the petitioner did not acquiesce in his defense counsel's trial strategy.[16] The dilemma facing a court in considering whether a strategic bypass has taken place was articulated in a recent case by the United States Court of Appeals for the Ninth Circuit which said that to grant relief would have been to allow "counsel for a defendant to try one strategy by deliberately using, for his client's benefit, evidence that could be claimed to be unconstitutionally tainted and then, if not satisfied with the result, to get a second trial by claiming that the constitutional taint requires a reversal in spite of his tactical decision."[17]

The purpose of this Comment is to survey recent federal

14. The waiver was found to be a part of trial strategy and, hence, binding upon the petitioner, without further discussion, in the following cases: United States *ex rel.* Agron v. Herold, 426 F.2d 125 (2d Cir. 1970); Mathis v. Colorado, 425 F.2d 1165 (10th Cir. 1970); Evans v. Cupp, 415 F.2d 844 (9th Cir. 1969); Mize v. Crouse, 399 F.2d 593 (10th Cir. 1968); United States *ex rel.* Budd v. Maroney, 398 F.2d 806 (3d Cir. 1968); Davis v. Dunbar, 394 F.2d 754 (9th Cir. 1968). The court, in United States *ex rel.* Broaddus v. Rundle, 429 F.2d 791 (3d Cir. 1970) held to the same effect, but there it seemed that the defense counsel failed to object because he felt the confessions were actually admissible, not because to fail to object was part of his trial strategy. In Curry v. Wilson, 405 F.2d 110, 113 (9th Cir. 1968), the trial strategy was also held to be binding upon the petitioner, but the court also stated that the strategy would have been binding "even though he [the petitioner] expressly disagreed with it."

15. In Leventhal v. Gavin, 421 F.2d 270, 272 (1st Cir. 1970), "the court found petitioner knew that counsel was not doing this [perfecting appeal], but was engaged in other activities, principally seeking to square petitioner with the parties whom he had allegedly defrauded. This might have resulted in a better solution to his difficulties, in terms of a motion to reduce sentence, as contrasted with the expense of appealing a case which had occupied a great many days. The court found confirmation for this conclusion in the fact that after petitioner inescapably realized that he had lost his right to appeal, he waited five months before claiming in the Superior Court that he had been mistreated or misled." In both Grimes v. United States, 396 F.2d 331 (9th Cir. 1968) and United States *ex rel.* LaMolinare v. Duggan, 415 F.2d 730 (3d Cir. 1969), the court commented upon the tacit consent of the petitioner to the decision by the defense counsel. Hales v. Boles, 419 F.2d 389 (4th Cir. 1969) was remanded to determine if the petitioner participated in the decision to waive appeal. The petitioner in United States *ex rel.* Garcia v. Follette, 417 F.2d 709, 713 (2d Cir. 1969) was bound by the counsel's actions because he "decided to remain mute during the trial when this evidence was introduced." *See also* United States *ex rel.* Kenny v. Follette, 410 F.2d 1276 (2d Cir. 1969) and Poole v. Fitzharris, 396 F.2d 544 (9th Cir. 1968).

16. *See* Lamarr v. Wainwright, 423 F.2d 1104 (5th Cir. 1970); United States *ex rel.* Bolognese v. Brierley, 412 F.2d 193 (3d Cir. 1969); Lessard v. Dickson, 394 F.2d 88 (9th Cir. 1968).

17. Curry v. Wilson, 405 F.2d 110, 113-14 (9th Cir. 1968).

habeas corpus decisions and formulate possible guidelines for predicting the federal court's exercise of discretion in granting writs of habeas corpus to state prisoners. These guidelines will then be compared with the present handling of federal constitutional claims by the Louisiana judiciary; apparent conflicts will be noted accordingly.

*Principles of General Application*

There are certain general principles upon which the doctrine of waiver by deliberate bypass of state procedure is founded. The most obvious principle is that the federal courts do not regard the waiver of constitutional rights lightly.[18] For example, in *Fay v. Noia*,[19] the Supreme Court stated that the bypass of state procedure would be a waiver only if it met the *Johnston v. Zerbst* standard of "an intentional relinquishment of a known right or privilege."[20] Perhaps based on this principle, a rule has arisen that a federal court cannot find a waiver where the state court did not find one.[21] Similarly, a deliberate bypass does not exist where the state court has passed upon the merits of a constitutional claim, even if it considered the merits as an afterthought.[22] As a further limitation on the doctrine of waiver, the United States Court of Appeals for the Ninth Circuit recently held that the discretion to apply the doctrine lies with the federal district court; when it chooses not to apply the doctrine, the court of appeals will likewise choose not to apply it.[23] However,

18. *See* Henry v. Mississippi, 379 U.S. 443 (1965) and Fay v. Noia, 372 U.S. 391 (1963).

19. 372 U.S. 391 (1963).

20. 304 U.S. 458, 464 (1938).

21. In Anders v. Turner, 379 F.2d 46, 50 (4th Cir. 1967), the court said that "when, as in the present case, the state court has not declared a waiver or forfeiture, a federal court is not at liberty to search the state proceedings to identify a legitimate state interest upon which the state court itself has not relied. The federal court's discretion to impose a forfeiture is limited to those instances in which a state court has demonstrated the existence of a legitimate state interest and has sought to vindicate it."

22. In Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 297 n.3 (1967), the Supreme Court, noting that a state court hearing had been held on the merits of the claim, held that "[i]n this circumstance, the Fourth Circuit was correct in rejecting the State's deliberate-bypassing claim. The deliberate-bypass rule is applicable only 'to an applicant who has deliberately by-passed the orderly procedure of the state courts *and in so doing has forfeited his state court remedies.*'"

23. In Selz v. California, 423 F.2d 702, 704 (9th Cir. 1970), the court held that "the decision to apply it [the doctrine of waiver by deliberate bypass of state procedures] rests in the sound discretion of the district court . . . and the district court has not exercised its discretion here." *See also* Fay v. Noia, 372 U.S. 391 (1963).

in spite of their reluctance to find a waiver of a constitutional claim, the federal courts have generally held that a constitutional claim which is not raised at trial or on appeal is waived.[24]

A second principle is that federal writs of habeas corpus are issued to state prisoners only to remedy the violation of constitutional rights which enjoy "due process" status.[25] Hence, only federal rights which may be raised to the level of "due process" may involve the issue of waiver by deliberate bypass of state procedures.[26]

*Failure to Properly and Timely Object*

The doctrine of waiver by deliberate bypass of state procedures arises most often in cases where the defense counsel has failed to properly or timely satisfy the state's objection rules relative to the use at trial of constitutionally defective confessions or illegally obtained evidence. In the case of objection on an improper basis, the state appellate court may hold that the defendant has failed to properly preserve his constitutional claim.[27] After citing the familiar principle that the waiver of a

24. In Lundberg v. Buchkoe, 389 F.2d 154 (6th Cir. 1968), the court held that the issue of the voluntariness of a confession was lost because the petitioner had not raised the issue at trial, not because the petitioner had deliberately bypassed the state procedure in not objecting. The Fifth Circuit, in Zerchauskey v. Beto, 396 F.2d 356, 359 (5th Cir. 1968), emphasized the fact that the petitioner had not raised the issue at trial but based its denial of habeas relief on the grounds that "the appellant's failure to call the accessories to the stand was the result of a voluntary and conscious decision in trial strategy, not mere docile obedience to a Texas statute." *But see* Pineda v. Craven, 424 F.2d 369, 371 (9th Cir. 1970), where the court said that "[t]he failure to assert his Fourth Amendment claim at the time of the trial or on appeal does not foreclose Pineda's federal habeas attack unless that failure was the result of a deliberate bypass or a waiver, complying with the standard of Johnston v. Zerbst."

25. 28 U.S.C. § 2254 (1966): "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

26. *See* Fay v. Noia, 372 U.S. 391 (1963). In Pineda v. Craven, 424 F.2d 369, 371 (9th Cir. 1970), the court held that "no distinction can be drawn between claimed violations of rights secured by the Fourth Amendment and those secured by the Fifth and Sixth Amendments." The Third Circuit, in United States *ex rel.* Cheek v. Russell, 424 F.2d 647 (3d Cir. 1970), rejected a petition for habeas because no harmful error was found, but it is doubtful whether a due process right was involved in the judge's failure to give a requested charge to the jury. In Drew v. Minnesota, 407 F.2d 1307 (8th Cir. 1969), the Eighth Circuit dismissed the habeas petition because there was no federally guaranteed right violated by the state action.

27. *See, e.g.*, Graves v. Beto, 424 F.2d 524 (5th Cir. 1970); Johnson v. Bennett, 414 F.2d 50 (8th Cir. 1969); Hill v. Beto, 412 F.2d 831 (5th Cir. 1969); Patterson v. Brown, 393 F.2d 733 (10th Cir. 1968); Black v. Beto, 382 F.2d 758 (5th Cir. 1967).

federal claim is a federal question, the federal habeas court will usually grant relief if it finds that the defendant did not deliberately bypass the state procedure by willfully objecting on an improper basis.[28]

In *Hill v. Beto*,[29] the prosecutor argued that the truthfulness of a confession was a factor to be considered in deciding the voluntariness of the confession. The defense counsel objected, saying, "I think it is not a proper inquiry under the Lopez case."[30] Although the Texas Court of Criminal Appeals held that this objection was too general and insufficient to present an issue for review, the United States Court of Appeals for the Fifth Circuit held that "the objection was sufficient to point to the existence of the federal constitutional right"[31] and reversed the denial of the writ. Recently, the Fifth Circuit again granted federal habeas corpus where the objection to the use of unconstitutionally obtained evidence was based upon the failure to lay a proper foundation for its introduction rather than upon the proper basis of illegal seizure.[32] In *Patterson v. Brown*,[33] the objection to the use of illegally secured evidence had been directed toward the invalidity of a search warrant on its face, whereas the proper basis for objection was the sufficiency of the affidavit attached thereto. Although the Colorado appellate court refused to hear the constitutional claim for this reason,[34] the Court of Appeals for the Tenth Circuit found no deliberate bypass of state procedures because it was inadvertence that brought them into conflict with the contemporaneous objection requirements and forfeited their state remedies. Under *Fay v. Noia*, such a fictional waiver of rights cannot bar habeas corpus relief."[35]

A slightly different problem arises where defense counsel completely fails to object to the use of improper evidence at trial. It is in this context that most *Henry*-type deliberate, strategic

28. *See* cases cited in note 27 *supra*.
29. 412 F.2d 831 (5th Cir. 1969).
30. *Id.* at 832 n.2.
31. *Id.* at 833.
32. In Graves v. Beto, 424 F.2d 524 (5th Cir. 1970), the defense counsel objected to the admission of a blood sample alleged to have been unconstitutionally obtained.
33. 393 F.2d 733 (10th Cir. 1968).
34. Brown & Glymph v. People, 158 Colo. 561, 408 P.2d 981 (1965).
35. Patterson v. Brown, 393 F.2d 733, 736 (10th Cir. 1968).

bypasses are found.[36] In *Lessard v. Dickson*,[37] the petitioner claimed that a white shirt which had been admitted into evidence without objection was the product of an illegal search. The court upheld the denial of the petition finding a deliberate failure to object for strategic purposes because "counsel believed at the time that objection to the admission of the shirt would have opened up aspects of collateral information and implications which would have been more harmful in the trial than to permit the shirt to go in without objection."[38] The same court reached a similar result where the defense counsel "expressly waived objection" to the introduction of evidence seized during an illegal search.[39] The Eighth Circuit found a strategic waiver of objection to the introduction of a white earring obtained pursuant to an illegal arrest where defense counsel had not objected to its introduction, but had used the earring in his questioning of the key prosecuting witness.[40] It was clear to the court that defense counsel's trial strategy was to attack the credibility of the witness by obtaining inconsistent testimony in regard to the earring.

In a debatable case approaching the limits of *Henry*, the Third Circuit, without discussing defense counsel's strategy,

36. *See, e.g.*, Mathis v. Colorado, 425 F.2d 1165 (10th Cir. 1970); United States *ex rel.* Moore v. Follette, 425 F.2d 925 (2d Cir. 1970); United States *ex rel.* Garcia v. Follette, 417 F.2d 709 (2d Cir. 1969); Evans v. Cupp, 415 F.2d 844 (9th Cir. 1969); United States *ex rel.* LaMolinare v. Duggan, 415 F.2d 730 (3d Cir. 1969); Gilreath v. Eyman, 407 F.2d 811 (9th Cir. 1969); Curry v. Wilson, 405 F.2d 110 (9th Cir. 1968); Mize v. Crouse, 399 F.2d 593 (10th Cir. 1968); United States *ex rel.* Budd v. Maroney, 398 F.2d 806 (3d Cir. 1968); Application of Reynolds, 397 F.2d 131 (3d Cir. 1968); Pope v. Swenson, 395 F.2d 321 (8th Cir. 1968); Davis v. Dunbar, 394 F.2d 754 (9th Cir. 1968); Lessard v. Dickson, 394 F.2d 88 (9th Cir. 1968). However, for cases in which there was no objection at trial, yet no waiver was found, *see, e.g.*, Miller v. Carter, 434 F.2d 824 (9th Cir. 1970); Hizel v. Sigler, 430 F.2d 1398 (8th Cir. 1970); Cooper v. Picard, 428 F.2d 1351 (1st Cir. 1970); Schildan v. Gladden, 426 F.2d 1158 (9th Cir. 1970); United States *ex rel.* Cheeks v. Russell, 424 F.2d 647 (3d Cir. 1970); Pineda v. Craven, 424 F.2d 369 (9th Cir. 1970); Losleau v. Sigler, 421 F.2d 825 (8th Cir. 1970); Moreno v. Beto, 415 F.2d 154 (5th Cir. 1969); Johnson v. Bennett, 414 F.2d 50 (8th Cir. 1969); United States *ex rel.* Snyder v. Mazurkiewicz, 413 F.2d 500 (3d Cir. 1969); United States *ex rel.* Jefferson v. Follette, 396 F.2d 862 (2d Cir. 1968); Woodbury v. Beto, 395 F.2d 189 (5th Cir. 1968); United States *ex rel.* Hill v. Pinto, 394 F.2d 470 (3d Cir. 1968).

37. 394 F.2d 88 (9th Cir. 1968).

38. *Id.* at 92.

39. Davis v. Dunbar, 394 F.2d 754, 756 (9th Cir. 1968), where the otherwise valid constitutional claim was waived because "[t]here was, however, no objection to the introduction of the evidence. In fact, appellant's attorney expressly waived objection."

40. In Pope v. Swenson, 395 F.2d 321, 324 (8th Cir. 1968), the court stated that "[d]efense counsel freely cross-examined the witness concerning the earring and did so with the obvious strategy of attacking Dugan's credibility on the point as well as many others."

found a deliberate bypass of the objection to illegally obtained evidence for strategic purposes, although it appeared defense counsel had failed to object because he felt the evidence was admissible.[41] Similarly, the Ninth Circuit, in *Gilreath v. Eyman*,[42] found an intentional waiver and simply stated that "[a]ppellant's trial counsel made no objection of any kind at any time to the admission of the sellers' testimony." However, that court also found the statements to be voluntary. Where the disputed evidence was actually found to have been illegally obtained, the same court went into a careful discussion of the strategy employed by defense counsel before declaring a strategic bypass.[43]

Where the court finds that a constitutional right has in fact been violated, it is less eager to find a deliberate bypass and looks for either strategic reasons for the failure to object or the active participation of the petitioner in the bypass.[44] In *United States* ex rel. *Montgomery v. Brierley*,[45] the Third Circuit held that failure to object to the introduction of one of defendant's statements was not in and of itself a waiver of the right to raise the issue of voluntariness. However, the facts that counsel failed to object and that the defendant willingly took the stand to testify were held to be important considerations. Another circuit, dealing with the claim of a coerced confession, illustrated how

41. In United States *ex rel.* LaMolinare v. Duggan, 415 F.2d 730, 732 (3d Cir. 1969), the court said that "defense counsel, exercising his best judgment and with at least the tacit consent of his client, decided not to seek to suppress the evidence taken from his car. This procedure was consistent with the line of defense adopted by the accused."

42. 407 F.2d 811, 812 (9th Cir. 1969).

43. Evans v. Cupp, 415 F.2d 844, 846 (9th Cir. 1969). The evidence was obviously the product of an illegal search and seizure, but the court explained the counsel's trial strategy as follows: "Counsel's strategy was to admit that Evans had a shotgun, that he had forced the complaining witness off the road, and that an act of intercourse had taken place, but to deny that there was any lack of consent. By not disputing the testimony of the complainant or any other witness on any issue except consent, and by not objecting to the introduction of such items as the shotgun and blanket, counsel sought to persuade the jury of Evans' sincerity and veracity. Counsel was evidently concerned with avoiding giving the jury the impression that Evans was trying to hide something. Objection would have enhanced the importance of the gun and the blanket in the eyes of the jury. This was certainly a reasonable strategy, even though it did not work. And it is binding on Evans."

44. For cases where the court looked for strategy reasons for the failure to challenge the alleged violation of a constitutional right, *see* Hizle v. Sigler, 430 F.2d 1398 (8th Cir. 1970); Evans v. Cupp, 415 F.2d 844 (9th Cir. 1969); United States *ex rel.* Hill v. Pinto, 394 F.2d 470 (3d Cir. 1968). For cases where the court emphasized the participation or lack of participation of the petitioner, *see* Losieau v. Sigler, 421 F.2d 825 (8th Cir. 1970); United States *ex rel.* Jefferson v. Follette, 396 F.2d 862 (2d Cir. 1968); Woodbury v. Beto, 395 F.2d 189 (5th Cir. 1968).

45. 414 F.2d 552 (3d Cir. 1969).

strictly it looked at the waiver of federal constitutional claims. There, defense counsel had not asked for a voluntariness hearing nor objected to the introduction of the confessions. Yet, the court, emphasizing the mental deficiency of the petitioner, held that the failure to object plus the fact the defendant had testified to the same effect did not establish, without more, an intentional waiver.[46]

At least one circuit has held that there is no deliberate bypass of state procedures through failure to object where defense counsel "did not know that they [the statements] might have been excluded."[47] The court did not make it clear whether this was merely a personal lack of knowledge on the part of the attorney or whether the claimed constitutional right was not recognized at the time and, hence, was not known to any attorney. If the latter were the case, the decision was surely proper since the uniform rule is that a defendant cannot waive a presently unknown constitutional right.[48] However, if the former were the case, the still unsettled question of the relative binding effect of decisions of retained, as opposed to appointed, counsel is presented.

Likewise, inadvertent failure to object will not be deemed a waiver through deliberate bypass where defense counsel has objected to similar testimony previously. His intent to object is considered well known to the court.[49] In *Douglas v. Alabama*,[50] the United States Supreme Court ruled that failure to object after each statement made by a witness pursuant to an improper line of questioning did not amount to an intentional waiver of the right to object to the improper questions. Such a burdensome rule was found to serve no legitimate state interest where counsel had properly objected to the entire line of questioning.

In a few cases, the federal habeas court has even refused to find a deliberate bypass of state procedures where defense counsel voluntarily stated "no objection" or refused to object

46. Hizle v. Sigler, 430 F.2d 1398 (8th Cir. 1970).

47. United States *ex rel.* Hill v. Pinto, 394 F.2d 470, 473 (3d Cir. 1968).

48. Smith v. Yeager, 393 U.S. 122 (1968); Moreno v. Beto, 415 F.2d 154 (5th Cir. 1969); Gladden v. Unsworth, 396 F.2d 373 (9th Cir. 1968).

49. Cooper v. Picard, 428 F.2d 1351 (1st Cir. 1970), where counsel had strenuously objected to the testimony of each witness who had viewed the defendant through a one-way mirror, but failed to object to the testimony of one such witness.

50. 380 U.S. 415 (1965).

upon questioning by the judge.[51] However, these cases usually can be explained by the defendant's failure to acquiesce in defense counsel's trial strategy.[52]

A decision which seems to go beyond all previous cases is *Miller v. Carter*.[53] There, the Cailfornia police placed an undercover agent in petitioner's jail cell in an effort to obtain inculpatory statements from her. At a pre-trial conference, defense counsel objected to the use of this witness at trial. The judge refused to hear this objection, stating that the proper time to object would be after the foundation had been laid at trial for the use of the witness. However, at trial, counsel refused to object, but, instead, cross-examined the undercover agent regarding her statements. On petition for federal habeas corpus relief, the failure to object was not taken as a deliberate bypass because defense counsel argued that his case would be strongly prejudiced in the eyes of the jury if he were forced to object to the use of the witness in their presence, although the grounds for the objection and the hearing on the objection would have been held outside the jury's presence. The dissenters found this to be a classic example of deliberate bypass for strategic purposes.[54] However, the decision might be explained on the basis of a possible failure by the trial judge to follow state law in holding that the objection in chambers was not sufficient.[55]

*Guilty Plea as a Waiver*

Recently, in *McMann v. Richardson*,[56] a consolidation of three habeas corpus petitions, the United States Supreme Court considered whether a guilty plea was a waiver of unconstitutional pre-trial defects when the plea was motivated by a prior coerced confession. Because the trials occurred before *Jackson v. Denno*,[57] which held that the voluntariness of a confession was not an issue for the jury to decide, there had been no avail-

51. United States *ex rel.* Snyder v. Mazurkiewicz, 413 F.2d 500 (3d Cir. 1969); United States *ex rel.* Gockley v. Myers, 378 F.2d 398 (3d Cir. 1967).

52. *See* cases cited in note 51 *supra*.

53. 434 F.2d 824 (9th Cir. 1970). The United States Supreme Court granted certiorari to the California Supreme Court in this case, Miller v. California, 389 U.S. 968 (1967), but the grant was later withdrawn as improvidently granted, 392 U.S. 616 (1968). However, three Justices dissented and drafted an opinion which held to the same effect as the majority in Miller v. Carter, 434 F.2d 824 (9th Cir. 1970).

54. 434 F.2d 824 (9th Cir. 1970).

55. *Id.*

56. 397 U.S. 759 (1970).

57. 378 U.S. 368 (1964).

able way to keep the confessions from the jury. Hence, defendants pleaded guilty on the advice of their counsel. The court of appeals held that because only a voluntary plea of guilty waived unconstitutional pre-trial defects, the presence of a coerced confession was a factor to be considered when deciding the voluntariness of the guilty plea.[58] The Supreme Court reversed, however, holding "that a defendant who alleges that he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing on his petition for habeas corpus."[59]

Thus, it seems that if the guilty plea is voluntarily and intelligently made,[60] it will be taken as a deliberate bypass of state procedures, and a waiver of all unconstitutional pre-trial defects. However, an exception to this rule would exist where the state has provided that the defendant could appeal certain constitutional issues despite his plea of guilty.[61]

*Failure to Appeal Properly in the State Courts*

It is not unusual for a petition for federal habeas corpus to be brought after the time limit has expired for appealing through the state court system.[62] In *Anderson v. Nelson*[63] the United States Supreme Court held, without discussion, that the late filing of a petition for review of constitutional claims in state court did not constitute "a deliberate bypass of state remedies, precluding him from habeas corpus relief in federal courts."[64] Prior to this case, the Fifth Circuit had followed the standard of intentional waiver in remanding a case to determine if petitioner had deliberately allowed the time limit for taking the state appeal to expire.[65] In a 1970 case, *Lamar v. Wainwright*,[66] the Fifth Circuit found a deliberate bypass of state procedure where defendant had filed his petition for federal habeas relief two days after the time for taking the state appeal had expired.

58. United States *ex rel.* Ross v. McMann, 409 F.2d 1016 (2d Cir. 1969); United States *ex rel.* Williams v. Follette, 408 F.2d 658 (2d Cir. 1969); United States *ex rel.* Richardson v. McMann, 408 F.2d 48 (2d Cir. 1969).

59. McMann v. Richardson, 397 U.S. 759, 771 (1970).

60. *See* Boykin v. Alabama, 395 U.S. 238 (1969).

61. *See* United States *ex rel.* Rogers v. Warden of Attica State Prison, 381 F.2d 209 (2d Cir. 1967).

62. *See, e.g.*, Anderson v. Nelson, 390 U.S. 523 (1968); Lamarr v. Wainwright, 423 F.2d 1104 (5th Cir. 1970); Baker v. Lee, 384 F.2d 703 (5th Cir. 1967).

63. 390 U.S. 523 (1968).

64. *Id.* at 525.

65. Baker v. Lee, 384 F.2d 703 (5th Cir. 1967).

66. 423 F.2d 1104 (5th Cir. 1970).

The court found that petitioner knew of his right to appeal but chose to forego it on the injudicious advice of his counsel that the parole board would be more lenient on him.

The right to appeal may similarly be cut off by a deliberate bypass of the state procedure for taking appeals. In *United States* ex rel. *Bolognese v. Brierley*,[67] the Third Circuit held that a defendant who asked his counsel to withdraw his motion for a new trial and to procure his immediate sentencing had waived his right to appeal by deliberately bypassing the state procedure for perfecting the appeal. The First Circuit found a deliberate bypass of the right to appeal where defense counsel was busy trying to "square the petitioner with the parties whom he had allegedly defrauded" and failed to perfect the appeal in time.[68] Although defense counsel did not testify as to why he allowed the time for perfecting the appeal to expire, the court found that his conciliatory activities "might have resulted in a better solution to [the defendant's] difficulties, in terms of a motion to reduce sentence, as contrasted with the expense of appealing a case which had occupied a great many days."[69] The court also stressed the defendant's knowledge of the right to appeal and his active participation in the proceedings. However, where the client has been so dominated by his counsel that the failure to take the necessary procedural steps to perfect the appeal was not acquiesced in by the defendant, the failure to appeal is not considered a deliberate bypass of state procedures.[70]

In a rather unusual California case,[71] the defense attorney failed to appeal a drunken driving conviction to the state court of appeal. Instead, he raised the issue of self-incrimination through a petition for state habeas corpus relief, which was denied. The denial was affirmed by the state supreme court. Although the federal district court found this to be a deliberate bypass of state procedures for strategic purposes, the Ninth Circuit reversed. That court based its decision on the fact that defense counsel, although able and experienced, had not practiced in the state court since the new state appellate procedure had been adopted. Perhaps the true basis for the ruling that the failure to appeal to the intermediate appellate court did not bar

67. 412 F.2d 193 (3d Cir. 1969).
68. Leventhal v. Gavin, 421 F.2d 270, 272 (1st Cir. 1970).
69. *Id.*
70. *See* Hale v. Boles, 419 F.2d 389 (4th Cir. 1969).
71. Newhouse v. Misterly, 415 F.2d 514 (9th Cir. 1969).

his right to appeal was that the issue had been litigated in the state supreme court via the state writ of habeas corpus.[72] The Fifth Circuit has similarly held that litigation of an issue before the state supreme court via state habeas corpus prevents the failure to take a direct appeal from acting as a waiver of a constitutional claim.[73]

*Louisiana and the Federal Waiver Standards*

The Louisiana courts have not indicated a willingness to follow the federal waiver standards for deliberate bypass of state procedures. Considering the previous discussion, there are at least three areas in which the Louisiana courts could come in conflict with the federal waiver standards: the use of illegally seized evidence; the contemporaneous objection rule and the bill of exceptions procedure; and attacks on the racial composition of grand juries.

In two 1965 cases,[74] the Supreme Court of Louisiana ruled that a defendant who fears the use of illegally seized evidence must "file a pre-trial motion either to quash a search warrant or to suppress evidence obtained by the prosecution and that failure to do so, in the absence of a showing of surprise or lack of opportunity to file such a motion, operates as a waiver of any claimed violation of his constitutional rights against illegal search and seizure."[75] This procedure is now codified in article 703 of the Code of Criminal Procedure.[76] It would seem that the state has a legitimate interest in this procedure;[77] however, the federal habeas court can be expected to hold that the illegal search and seizure issue is waived only when the Louisiana procedure is deliberately and knowingly bypassed.[78]

The general rule in Louisiana is that an "irregularity or error in the proceedings cannot be availed of after verdict unless

72. *Id.* at 516. The court said that "counsel's actions are consistent with a desire to obtain rapid review in the higher California courts and are in direct contradiction to the State's argument that failure to seek certification waived rights to review."

73. Graves v. Beto, 424 F.2d 524 (5th Cir. 1970).

74. State v. Rasheed, 248 La. 309, 178 So.2d 261 (1965); State v. Davidson, 248 La. 161, 177 So.2d 273 (1965).

75. State v. Davidson, 248 La. 161, 163, 177 So.2d 273, 275 (1965).

76. *See* LA. CODE CRIM. P. art. 703.

77. *See* United States *ex rel.* LaMolinare v. Duggan, 415 F.2d 730 (3d Cir. 1969).

78. Pineda v. Craven, 424 F.2d 369 (9th Cir. 1970); United States *ex rel.* LaMolinare v. Duggan, 415 F.2d 730 (3d Cir. 1969).

it is objected to at the time of its occurrence and a bill of exceptions reserved to an adverse ruling on such objection."[79] The contemporaneous objection rule is probably valid and would be treated as discussed previously. However, it is foreseeable that the legitimate state interest in the bill of exceptions rule could be questioned, especially in light of the increased tendency to make transcripts of all trials and the increased number of attorneys inexperienced in criminal trials who are forced to defend indigents. It is suggested that the federal waiver standards would be satisfied more readily if the trial judge would aid the inexperienced attorney in preserving his bill of exceptions, especially where the failure to properly preserve the bill would not seem to be part of the attorney's trial strategy or where the defendant's constitutional rights seem to have been actually violated.

The Louisiana procedure for attacking the racial composition of a grand jury was considered in *Labat v. Bennett*.[80] The Fifth Circuit held that the failure to challenge the composition of a grand jury through a timely filed motion to quash[81]

79. State v. Reed, 252 La. 128, 135, 209 So.2d 730, 732 (1968). This rule was codified in articles 841 and 920 of the Code of Criminal Procedure. LA. CODE CRIM. P. art. 841: "An irregularity or error in the proceedings cannot be availed of after verdict unless it is objected to at the time of its occurrence and a bill of exceptions is reserved to the adverse ruling of the court on such objection. Failure to reserve a bill of exceptions at the time of an adverse ruling of the court operates as a waiver of the objection and as an acquiescence in the irregularity or ruling.

"This requirement shall not apply to:

"(1) A ground for arrest of judgment under Article 859, or the court's ruling on a motion in arrest of judgment; or

"(2) The court's ruling on a motion for a new trial based on the ground of bills of exceptions reserved during the trial."

*Id.* art. 920: "The following matters and no others shall be considered on appeal:

"(1) Formal bills of exceptions that have been submitted to and signed by the trial court in accordance with Article 845, whether or not the bills of exceptions were made a ground for a motion for a new trial; and

"(2) Any error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence."

80. 365 F.2d 698 (5th Cir. 1966).

81. LA. CODE CRIM. P. art. 533: "A motion to quash an indictment by a grand jury may also be based on one or more of the following grounds:

"(1) The manner of selection of the general venire, the grand jury venire, or the grand jury was illegal."

*Id.* art. 535. ". . . B. A motion to quash shall be filed at least three judicial days before commencement of trial, and may be filed with permission of the court at any time before commencement of trial, when based on any of the following grounds:

". . .

"(3) A grand jury indictment is invalid because the manner of selection of the general venire, the grand jury venire, or the grand jury was illegal."

was not a deliberate bypass of state procedure. However, the recent United States Supreme Court decision in *Parker v. North Carolina*[82] casts doubts upon the continuing validity of the *Labat* holding. Although the Supreme Court specifically declined to consider whether the North Carolina procedure,[83] calling for a pretrial motion to quash on the basis of the grand jury's racial composition, would bar collateral attack by federal habeas, the Court did indicate that the state had a legitimate state interest in the procedure.[84]

To summarize, it would seem that the Louisiana waiver standards are much stricter than the federal waiver standards. Perhaps it is proper for the Supreme Court of Louisiana to adhere to these Louisiana standards during direct appeal. If so, it is suggested that Louisiana courts could better protect their convictions against federal intervention if the trial judge would force the defense counsel to make deliberate bypasses of the state procedural rules at the trial level. A simple, direct question from the bench, directed to defense counsel, would often accomplish this. Such questions would be particularly valuable where the attorney is inexperienced or where he appears to be allowing a valid constitutional claim to pass unnoticed. Then, when the constitutional issues are brought to the district court or to the state supreme court through an application for state habeas corpus relief, that court would be in a better position to find waivers which satisfy the federal standard of "intentional waivers of known rights or privileges."

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82. 397 U.S. 790 (1970).

83. The procedure is specified in N.C. GEN. STAT. § 9-23 (1969) and has been interpreted in State v. Covington, 258 N.C. 501, 128 S.E.2d 827 (1963) and State v. Rorie, 258 N.C. 162, 128 S.E.2d 229 (1962).

84. Parker v. North Carolina, 397 U.S. 790, 798-99 (1970): "This state rule of practice would constitute an adequate state ground precluding our reaching the grand jury issue if this case were here on direct review. . . . We are under similar constraint when asked to review a state court decision holding that the same rule of practice requires denial of collateral relief.

Whether the question of racial exclusion in the selection of the grand jury is open in a federal habeas corpus action we need not decide. . . . [T]here was an adequate basis in North Carolina procedural law for the North Carolina Court of Appeals' refusal to consider the claim of racial exclusion in the composition of the grand jury that indicted petitioner."