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Rights of Accused Not Violated by Trial in Prison Clothing If No Objection Is Made during Trial or Pretrial Proceedings.

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ced objective of the rules.[61]

The ruling in *Stieler* is sound in that it is consonant with the well reasoned judicial definition of "reasonable explanation" as set forth by the dissent in *Sloan*. The significant relaxation of requirements for timely filing that are reflected by the *Stieler* opinion and the *Sloan* dissent seem consistent with the judicial policy which favors the disposition of appeals on their merits and not by procedural dismissal. The judicial policy indicated by the majority in *Sloan*, which maintains outmoded procedural burdens, should be regarded as contrary both to the spirit of the 1976 amendments[62] and to the positive and obligatory objective of the rules.[63]

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CONSTITUTIONAL LAW—Due Process—Rights of Accused Not Violated by Trial in Prison Clothing if No Objection Is Made During Trial or Pretrial Proceedings

Estelle v. Williams,

— U.S. —, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

Henry Lee Williams was indicted for assault with intent to murder with malice and was incarcerated for failure to post bond. Williams requested his civilian clothing for trial, but his request was refused by prison officials. The accused appeared at trial in clothing distinctively marked as prison issue, but no objection was made to the trial judge by Williams or his attorney. The jury returned a verdict of guilty.

On direct appeal the Texas Court of Criminal Appeals affirmed,[1] and on subsequent habeas corpus petition, the federal district court denied relief on

61. TEX. R. CIV. P. 1 states:
The proper objective of the rules of civil procedure is to obtain a just, fair, equitable, and impartial adjudication of the rights of the litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at least expense both to litigants and to the state as may be practicable, these rules shall be given a liberal construction.

62. Graves v. Dullnig, 538 S.W.2d 149, 150 (Tex. Civ. App.—San Antonio 1976, no writ) (per curiam).

63. TEX. R. CIV. P. 1.

1. Williams v. State, 477 S.W.2d 24 (Tex. Crim. App. 1972).

grounds of harmless error.[2] The Court of Appeals for the Fifth Circuit disagreed with the finding of harmless error and reversed, holding that prosecution of defendant before a jury in clothing identifiable as prison issue was a fundamental denial of due process.[3] On appeal to the Supreme Court the government urged reinstatement of the conviction on grounds of waiver based on the failure to object to the prison clothing. Held—*Reversed.* Although clearly constitutional error to force an accused to appear at jury trial in prison clothing, the failure to object to trial in such clothing, regardless of the reason, is sufficient to negate the inference of compulsion necessary to establish a constitutional violation of due process requirements.[4]

The fourteenth amendment provides all persons the fundamental right to a fair trial and guarantees every individual the presumption of innocence.[5] Criminal trials must be conducted in an atmosphere of fairness; guilt must be established beyond a reasonable doubt solely on the basis of probative evidence.[6] These guarantees are individual refinements of the aggregate principle that no person shall be deprived "of life, liberty, or property without due process of law."[7] Nonevidentiary factors introduced by the prosecution at trial which might tend to influence jurors in the determination of guilt or innocence of the accused are subject to close judicial scrutiny to prevent dilution of these fundamental protections.[8]

Due process violations vary in prejudicial severity and do not require reversal for a new trial in every case. A second trial is never awarded in situations where the alleged error is "harmless."[9] Even where a due process error is shown to exist, the judgment of the court below will be affirmed if the evidence of guilt is overwhelming and the error could not reasonably have been a significant factor in obtaining conviction.[10] Harmless error statutes or rules are in effect in all states and closely correspond to the federal standard that judgments will "not be reversed for errors or defects which do not affect the substantial rights of the parties."[11]

2. Williams v. Beto, 364 F. Supp. 335, 344 (S.D. Tex. 1973).
3. Williams v. Estelle, 500 F.2d 206, 212 (5th Cir. 1974).
4. Estelle v. Williams, — U.S. —, —, 96 S. Ct. 1691, 1697, 48 L. Ed. 2d 126, 135 (1976).
5. *See, e.g.*, Drope v. Missouri, 420 U.S. 162, 172 (1975); *In re* Winship, 397 U.S. 358, 364 (1970); Turner v. Louisiana, 379 U.S. 466, 471-73 (1965); Coffin v. United States, 156 U.S. 432, 453 (1895).
6. *See, e.g., In re* Winship, 397 U.S. 358, 364 (1970); Speiser v. Randall, 357 U.S. 513, 525-26 (1958); Leland v. Oregon, 343 U.S. 790, 795 (1952); Brinegar v. United States, 338 U.S. 160, 174 (1949).
7. U.S. CONST. amend. XIV, § 1.
8. Estes v. Texas, 381 U.S. 532, 540-41 (1965); *In re* Murchison, 349 U.S. 133, 135-36 (1955).
9. *See, e.g.*, Kotteakos v. United States, 328 U.S. 750, 757 (1946); Gay v. United States, 322 F.2d 208, 209 (10th Cir. 1963); Addison v. United States, 317 F.2d 808, 816-17 (5th Cir. 1963); Naval v. United States, 278 F.2d 611, 614 (9th Cir. 1960).
10. Chapman v. California, 386 U.S. 18, 22 (1967).
11. *Id.* at 22.

Reversal is also denied whenever the circumstances indicate the accused has waived one or more of his guarantees under the fourteenth amendment.[12] Convoluted questions of legal presumption and factual circumstance appear to have introduced uncertainty and disagreement in the waiver cases, but the proper definition of waiver must clearly include situations of intentional relinquishment of known rights and procedural by-pass of legal options effectively suspending the defendant's right to demand reversal on the basis of due process error.[13]

In *Johnson v. Zerbst*[14] the Supreme Court established guidelines for determining whether due process rights have been intentionally waived. The accused must be shown to have engaged in conduct indicating "an intentional relinquishment or abandonment of a known right or privilege."[15] Procedural by-pass was more difficult for the courts to adequately describe or define, but was limited to situations where the convicted defendant deliberately chose to forego the orderly procedures available in the state court in order to seek release by federal habeas corpus.[16] Where the accused knowingly and deliberately, regardless of reason, failed to pursue adequate remedies available in the state courts for vindication of federal rights, habeas corpus has been routinely denied in the federal courts.[17] This logic culminated in the landmark decision of *Fay v. Noia*,[18] where the controlling standard for procedural by-pass was established. Where the state processes for vindication of federal rights suppressed at trial were deliberately by-passed on the considered choice of both the accused and his counsel, relief by habeas corpus is ordinarily denied.[19]

Habeas corpus petitions grounded on due process arguments should thus be dismissed unless it affirmatively appears that constitutional error resulted

12. Johnson v. Zerbst, 304 U.S. 458, 464 (1938); *see* Barker v. Wingo, 407 U.S. 514, 525-29 (1972); Henry v. Mississippi, 379 U.S. 443, 452 (1965); Fay v. Noia, 372 U.S. 391, 439 (1963). The term "waived" is used here without precise legal definition; rather, it is meant to imply some action or inaction on the part of the defendant indicating an intent not to rely legally on the due process guarantee in issue.

13. *Compare* Fay v. Noia, 372 U.S. 391, 439 (1963), *with* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

14. 304 U.S. 458 (1938).

15. *Id.* at 464; *accord*, Hatcher v. United States, 352 F.2d 364, 365 (D.C. Cir. 1965) (direct communication between accused and trial judge ordinarily necessary to establish waiver of constitutional rights); United States *ex rel.* West v. LaVallee, 335 F.2d 230, 231 (2d Cir. 1964) (failure to object at trial to introduction of illegally seized evidence does not give rise to inference of waiver); Naples v. United States, 307 F.2d 618, 625-26 (D.C. Cir. 1962) (knowing and intentional waiver of trial by jury).

16. *See* Lefkowitz v. Newsome, 420 U.S. 283, 290 n.6 (1975); Moore v. Michigan, 355 U.S. 155, 162-65 (1957); Bates v. Dickson, 226 F. Supp. 983, 987 (N.D. Cal. 1964).

17. *See, e.g.*, Key v. Holman, 346 F.2d 153 (5th Cir. 1965); Gravette v. Maxwell, 340 F.2d 95, 96 (6th Cir. 1965); Wampler v. Warden, 224 F. Supp. 37, 39 (D. Md. 1963).

18. 372 U.S. 391 (1963).

19. *Id.* at 439-40.

at trial, that such error was not harmless, and that the petitioner had not waived his right to claim error by relinquishment or by-pass of due process protections.[20] As these tests were applied in *Williams*, the Court felt that appearance in clothing identifiable as prison issue has a negative impact on the presumption of innocence since defendant's clothing is likely to introduce impermissible considerations in the minds of the jurors.[21] This was in accord with considerable previous authority.[22]

The harmless error question, however, remained substantially unresolved by the available precedent. Requiring the defendant to stand trial in prison clothing was commonly considered a due process error, but reversal was granted primarily in situations where actual prejudice had resulted or could be strongly inferred.[23] For example, where the accused was on trial for an offense allegedly committed while he was in prison, the appearance of defendant in prison clothing was clearly harmless error since "no prejudice can result from seeing that which is already known."[24]

Despite the rather lengthy discussion of harmless error, Williams' conviction was ultimately upheld on grounds of waiver established by the failure to object during trial.[25] By guidelines established in *Johnson*, intentional waiver must be demonstrated by some affirmative action of the defendant communicating his desire not to invoke the due process protections afforded.[26] In this case there was no such communication by Williams or by his attorney. Similarly, the procedural by-pass tests established in *Fay* were not met because of the absence of any indication of intent and joint consideration by Williams and counsel to by-pass the procedures available for vindication of

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20. In the absence of other factors sufficient to deny federal relief, proof of prejudicial constitutional error, validly asserted, will entitle the petitioner to relief under habeas corpus. Gaito v. Brierly, 485 F.2d 86, 90 (3d Cir. 1973); United States *ex rel.* Lowery v. Murphy, 245 F.2d 751, 752 (2d Cir. 1957).

21. Estelle v. Williams, — U.S. —, —, —, 96 S. Ct. 1691, 1693, 1699, 48 L. Ed. 2d 126, 130-31, 139 (1976).

22. *See, e.g.*, Gaito v. Brierly, 485 F.2d 86, 88 (3d Cir. 1973); Brooks v. Texas, 381 F.2d 619, 624 (5th Cir. 1967); Miller v. State, 457 S.W.2d 848, 849-50 (Ark. 1970).

23. Williams v. Estelle, 500 F.2d 206, 212 (5th Cir. 1974), *rev'd*, — U.S. —, 96 S. Ct. 1691, 48 L. Ed. 2d 126; Gaito v. Brierly, 485 F.2d 86, 88 (3d Cir. 1973); Hernandez v. Beto, 443 F.2d 634, 636-37 (5th Cir.), *cert. denied*, 404 U.S. 897 (1971); Hall v. Cox, 324 F. Supp. 786, 787 (W.D. Va. 1971); People v. Shaw, 164 N.W.2d 7, 10 (Mich. 1969).

24. United States *ex rel.* Stahl v. Henderson, 472 F.2d 556, 557 (5th Cir.), *cert. denied*, 411 U.S. 971 (1973); *see* Boswell v. State, 537 F.2d 100, 102 (5th Cir. 1976) (error was harmless where jury venire saw accused in prison clothing before jury was selected); Wright v. Texas, 533 F.2d 185, 187 (5th Cir. 1976) (error was harmless where clothing was not typical of or identifiable as prison issue). *Contra*, People v. Roman, 365 N.Y.S.2d 527, 528 (1975) (irrespective of where the offense occurs, the accused has a right to trial in civilian clothing).

25. Estelle v. Williams, — U.S. —, —, 96 S. Ct. 1691, 1695-96, 48 L. Ed. 2d 126, 134-35 (1976).

26. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

federal rights.[27] Waiver as used here must then depend upon other considerations independent of the tests established in *Johnson* and *Fay*.

Analysis of the *Williams* decision indicates the probable introduction of two factors not considered in either *Johnson* or *Fay*. For purposes of intentional waiver, the Court distinguished between fundamental constitutional rights on one hand, and strategic and tactical decisions with constitutional implications on the other, holding the exacting standards of *Johnson* inapplicable in the latter instance.[28] Where the accused obviously understands the issue involved and is subjected to no prejudicial effect from entering an objection, the defendant and his attorney have the burden of directing the attention of the trial court to the error before the state may be held accountable for the effects of trial in prison clothing.[29]

As an independent consideration, the Court relegated showing of actual prejudice or possibility of prejudice to a position of little importance in determining the issue of procedural by-pass and raised the question of state compulsion to controlling prominence.[30] This is perhaps the most startling product of the majority decision, and the one which sparked the most vigorous argument in the dissent.[31] The issue of state compulsion had been previously discussed by the Court of Appeals for the Ninth Circuit, but in other jurisdictions it was of primary importance only in self-incrimination problems involving the fifth amendment.[32] At least for the majority of courts, the

27. *See* Fay v. Noia, 372 U.S. 391, 438-39 (1963). In *Williams*, defendant requested his civilian clothing from prison officials, at no time indicated a desire to be tried in prison clothing, and was never questioned by the trial judge concerning his attire. Estelle v. Williams, — U.S. —, —, 96 S. Ct. 1691, 1692, 48 L. Ed. 2d 126, 129-30 (1976).

28. Estelle v. Williams, — U.S. —, —, 96 S. Ct. 1691, 1695 n.3, 48 L. Ed. 2d 126, 133 n.3 (1976), *citing* On Lee v. United States, 343 U.S. 747 (1952) and United States v. Indiviglio, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966), as examples of rights which may be considered waived by failure to object at trial.

29. Estelle v. Williams, — U.S. —, —, 96 S. Ct. 1691, 1696-97, 48 L. Ed. 2d 126, 134-35 (1976); *see* United States *ex rel.* Stahl v. Henderson, 472 F.2d 556, 557 (5th Cir.), *cert. denied*, 411 U.S. 971 (1973) (offense committed while in prison confinement); Hernandez v. Beto, 443 F.2d 634, 637 (5th Cir. 1971) (defendant, though he did not object at trial, was deemed to have met his burden of directing attention of trial court to due process error).

30. Estelle v. Williams, — U.S. —, —, 96 S. Ct. 1691, 1694-95, 48 L. Ed. 2d 126, 132-33 (1976) (judicial focus is on compelling defendant, against his will, to be tried in jail attire). Derogation of the question of actual prejudice occurs by omission in the *Williams* decision. In reaching its decision, the majority discussed prejudice in a general review of harmless error, but never affirmatively considered whether *this* defendant was actually or probably prejudiced by wearing prison garments. *See id.* at —, 96 S. Ct. at 1694, 48 L. Ed. 2d at 132.

31. *Id.* at —, 96 S. Ct. at 1700, 48 L. Ed. 2d at 139-40 (Brennan, J., dissenting).

32. Bently v. Crist, 469 F.2d 854, 856 (9th Cir. 1972); *see* Garner v. United States, — U.S. —, 96 S. Ct. 1178, 1182, 47 L. Ed. 2d 370, 374 (1976) (discussing compulsory self-incrimination); Maness v. Mayers, 419 U.S. 449, 466 (1975) (discussing state compulsion in fifth amendment problems); People v. Du Bose, 89 Cal. Rptr. 134, 137-38

introduction of state compulsion into the field of due process was a significant modification of existing law.[33] Preliminary consideration of the impact of *Williams* would thus indicate that, as to due process questions which may involve trial tactics, it is less important that prejudice has resulted than that prejudice was compelled by the state. In securing the protection of the fourteenth amendment, a defendant must object to any possible errors where a question of trial tactics might be involved, but may maintain absolute silence if the error relates to a more fundamental right of due process.[34]

Unfortunately, beyond the issue of prison marked clothing, the Supreme Court made little attempt to distinguish those rights which are fundamentally protected from those which are subsidiary and require objection at trial.[35] This failure, with its ramifications of uncertainty in future trials and possibility of unfairness to the presentation of an adequate criminal defense, seemed to bring the sharpest comment from the *Williams* dissent.[36] No significant definitional guidelines were provided for determination of future due process errors. Absent objection at trial, *Williams* clearly requires a showing of state compulsion in order to secure reversal of convictions where the accused was tried in prison clothing;[37] it remains unclear, however, whether this should be extended to other due process situations. Although *Williams* did not overrule the *Johnson* and *Fay* tests for intentional waiver and procedural by-pass, the application of these decisions was limited to the protection of fundamental due process rights beyond the privilege of appearing at trial in civilian clothing.[38] Trial courts will thus be forced to interpret *Williams* to determine other situations where waiver of due process rights may be found without intentional relinquishment. The inherent difficulty in making a correct interpretation in the midst of trial could thus open the door to a complete rever-

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(Dist. Ct. App. 1970) (reversal for due process error arising from trial in prison clothing requires showing that trial in such garments was compelled).

33. *See* Miller v. State, 457 S.W.2d 848, 849-50 (Ark. 1970). Even the limited authority cited by the *Williams* majority indicates that a showing of actual prejudice may be sufficient for reversal, even where the defendant did not object during trial. *See* Thomas v. State, 451 S.W.2d 907, 909 (Tex. Crim. App. 1970); Wilkinson v. State, 423 S.W.2d 311, 313 (Tex. Crim. App. 1968); Xanthull v. State, 403 S.W.2d 807, 809 (Tex. Crim. App. 1966). The *Williams* dissent by Justice Brennan carried this argument still further to distinguish state compulsion from previous applications of the intentional waiver and procedural by-pass doctrines. *See* Estelle v. Williams, — U.S. —, —, 96 S. Ct. 1691, 1700-01, 48 L. Ed. 2d 126, 140-41 (1976) (Brennan, J., dissenting).

34. An entirely different result may obtain, however, if the accused is acting without the benefit of counsel at trial. There is a strong indication that under those circumstances, the rights of the accused will be more stringently protected. Estelle v. Williams, — U.S. —, —, 96 S. Ct. 1691, 1695 n.3, 48 L. Ed. 2d 126, 133 n.3 (1976).

35. *Id.* at —, 96 S. Ct. at 1697, 48 L. Ed. 2d at 135.

36. *Id.* at —, 96 S. Ct. at 1701 n.5, 48 L. Ed. 2d at 141 n.5 (Brennan, J., dissenting).

37. *Id.* at —, 96 S. Ct. at 1697, 48 L. Ed. 2d at 135.

38. *Id.* at —, 96 S. Ct. at 1695 n.3, 48 L. Ed. 2d at 133 n.3.

sal of the intentional waiver and procedural by-pass doctrines.[39] Where a trial judge has an inadequate standard on which to determine questions of law, the possibility of error multiplies dramatically, and extension of the *Williams* principles to require objection at trial in order to preserve any due process error might subsequently present the most desirable solution.

Although *Williams* may auger sweeping changes in the procedural protection of the due process rights of a criminal defendant, these modifications were not necessarily delineated.[40] New factors have, however, been introduced with insufficient guidance in application; it is difficult to determine the extent to which these factors will control in future criminal trials.[41] A clear definition of the class of due process protections requiring objection at trial to preserve the error would be a first and major step toward eliminating the uncertainty of a defendant and his counsel. A second and more drastic step would involve the complete reconsideration of the legitimacy of the *Johnson* and *Fay* standards for waiver. Ultimately, this would be necessary to arrive at an unobstructed view of the rationale behind all due process protections presently in effect: the assurance of a fair trial and the presumption of innocence require that the defendant be protected from prejudicial trial circumstances unrelated to evidentiary and probative matters of guilt or innocence. The question left unresolved by *Williams* is whether the courts will ensure that the trial is fair or will place the burden on the shoulders of the accused and his counsel.

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39. *Id.* at —, 96 S. Ct. at 1701 n.5, 48 L. Ed. 2d at 141 n.5 (Brennan, J., dissenting).

40. Since *Williams* made no attempt to distinguish any particular class of cases requiring objection at trial to preserve error, it is impossible to determine the extent to which this holding may be extended beyond the narrow situation of trial in clothing readily identifiable as prison issue.

41. Again, the Court expressed no opinion as to the class of cases where the possibility of trial tactics will bar a claim of due process error and effectively prohibit reversal on grounds of actual prejudice. *See id.* at —, 96 S. Ct. at 1701 n.5, 48 L. Ed. 2d at 141 n.5 (Brennan, J., dissenting). The Supreme Court has subsequently indicated that the issue of state compulsion may be extended into other areas of waiver, but established no boundaries on possible development. Frances v. Henderson, — U.S. —, 96 S. Ct. 1708, 48 L. Ed. 2d 149 (1976). In *Henderson*, failure to object to jury composition before trial began operated as a waiver of this right under subsequent habeas corpus proceedings. *Id.* at —, 96 S. Ct. at 1710, 48 L. Ed. at 153.