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Gene R. Nichol Jr.
West Virginia University College of Law

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WAIVER UNDER THE WEST VIRGINIA
HABEAS CORPUS ACT

GENE R. NICHOL, JR.*

INTRODUCTION

In 1967 the West Virginia Legislature responded to both suggestion and pressure from the federal judiciary by enacting the Post-Conviction Habeas Corpus Act. The new statute provided for habeas corpus jurisdiction in all circuit courts of the state, and, more importantly, for the first time expressly provided for review of detentions claimed to be in violation of the United States or West Virginia Constitutions. Case law since the enactment has demonstrated that the scope of habeas corpus relief in West Virginia is moving in the direction of its traditionally broad counterpart in the federal system.

The West Virginia Supreme Court of Appeals has manifested its determination to employ both the expanded jurisdiction over constitutional issues and the stream-lined procedures for summary denial of the writ called for in the statute. The court has yet to develop substantial guidelines, however, with regard to the waiver or procedural default provisions contained in the Post-Conviction Habeas Corpus Act. The following is a discussion of existing case law and a suggestion for future interpretation of those provisions.

I

The basic grant of habeas review in the statute provides that a person convicted of a crime and incarcerated who contends that

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* Assistant Professor of Law, West Virginia University College of Law; B.A., 1973, Oklahoma State University; J.D., 1976, University of Texas.


5 West Virginia Code §§ 53-4A-3(a) and 53-4A-4(a) (Cum. Supp. 1978) provide for the denial of a writ of habeas corpus without a hearing and without appointing counsel for the petitioner if the application and supporting materials demonstrate to the satisfaction of the court that the petitioner is entitled to no relief. See also Perdue v. Coiner, 194 S.E.2d 657 (W. Va. 1973).
his conviction was the result of a violation of his constitutional rights may seek relief on those grounds "if and only if such contention or contentions and the grounds in fact or law relied upon in support thereof have not been previously and finally adjudicated or waived in the proceedings which resulted in the conviction and sentence. . . ." By way of explanation, the statute provides that a constitutional claim has been "previously and finally adjudicated" if at some point in the original trial (or subsequent habeas petition) there was a decision on the merits of the allegation after a full and fair hearing.7 Whether or not a contention has been waived by the failure to pursue properly the claim at trial is specifically addressed in West Virginia Code section 53-4A-1(c) as follows:

[A] contention or contentions and the grounds in fact or law relied upon in support thereof shall be deemed to have been waived when the petitioner could have advanced, but intelligently and knowingly failed to advance, such contention or contentions and grounds before trial, at trial, or on direct appeal . . . unless such contention or contentions and grounds are such that, under the Constitution of the United States or the Constitution of this State, they cannot be waived under the circumstances giving rise to the alleged waiver.8

Despite the broad wording of the act, the burden is clearly placed upon the petitioner to demonstrate that waiver did not occur. If a constitutional claim could have been presented at trial or on direct appeal and was in fact not presented, a rebuttable presumption arises that the petitioner knowingly and intelligently waived the claim.9

The interpretation of these statutory guidelines is determinative of the parameters of habeas corpus review in the courts of the state. If a petitioner in a habeas proceeding claims that his detention is in derogation of certain constitutional rights, he typically would have presented the identical claim to the trial court in which he was convicted. For example, if a petitioner claimed that a confession used by the state at his trial had been coerced, and the court denied such contention on the merits, then the court in which habeas relief is sought should determine whether a "full and fair hearing" on the issue was afforded by the trial court and, if so,

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9 Id.
whether the decision rendered was clearly erroneous. Accordingly, the court hearing the habeas petition would review the opportunity given to present the claim at trial and the findings of fact and conclusions of law drawn by the trial court regarding the voluntariness of the confession. Federal case law has developed significant guidelines, which have been codified in 28 U.S.C. section 2254(d), to aid in the determination of whether a full and fair hearing was provided in the trial court.\textsuperscript{10} West Virginia courts should make use of these provisions when interpreting the analogous state standard.

When a petitioner seeks to present a constitutional claim which was not adjudicated at trial, however, a different analysis is necessary. For example, if a state prisoner claims that evidence seized in violation of his fourth amendment rights was used in his trial, yet that evidence was admitted without objection, it may be that the trial court made no explicit determination regarding the reasonableness of the search and seizure. In this instance, the state court, presented with a constitutional claim which is made for the first time upon application for habeas corpus, faces a different question. The habeas court must determine whether or not the contention (that the use of the fruits of the seizure constituted a deprivation of the applicant’s constitutionally protected rights) was waived under the provisions of the statute\textsuperscript{11} as a result of the procedural default arising from the failure to present the argument at trial. The analysis of waiver, therefore, determines which questions, if any, a court may examine upon application for habeas which were not properly presented to the convicting court. The standard which determines whether or not a procedural default has occurred which will properly prevent review of the claim on application for habeas corpus has proven troublesome to both federal and state courts.

II

Because of the limited scope of the writ prior to the 1967 statute,\textsuperscript{12} development of the doctrine of waiver in the context of habeas corpus is of relatively recent vintage in West Virginia. Although several cases deal with the issue indirectly,\textsuperscript{13} the most thor-

\textsuperscript{12} See, Note, Habeas Corpus in West Virginia, 69 W. Va. L. Rev. 293 (1967).
ough consideration of the waiver provision set forth in section 53-4A-1(c) occurred in the 1972 case *Ford v. Coiner.*

In *Ford*, the habeas petitioner had been convicted and sentenced by the court for first degree murder despite the fact that the jury verdict merely stated that he was "guilty in the within indictment as charged." In accordance with West Virginia law, the indictment did not specify the degree of murder. As a result, John Ford claimed that his constitutional right to trial by jury, and a specific provision of the West Virginia Code requiring the jury to find whether the defendant is guilty of first or second degree murder, were violated.

At trial, however, it appeared that Ford’s counsel failed to object to the form of the verdict despite statements made by the prosecutor which should have brought the issue to his attention. On the basis of waiver, the Circuit Court of Kanawha County denied Ford’s application for habeas corpus. In affirming the circuit court, the West Virginia Supreme Court of Appeals turned to the language of section 53-4A-1(c) which provides for a “rebuttable presumption that the petitioner intelligently and knowingly” waived his claim if it was not presented at trial. The majority of the court held that since Ford’s counsel had failed to present an objection to the form of the verdict, “Ford, ‘intelligently and knowingly failed to advance . . . on direct appeal’ the deficiency in the jury verdict, and that he therefore waived this contention.”

Judge Haden expressed a vigorous and thoughtful dissent. He characterized the right Ford sought to vindicate as “fundamental” and constitutionally protected. More importantly for our purposes (if not for Mr. Ford’s) the dissent criticized the majority’s concept of “knowing and intelligent” waiver. By indicating that Ford’s counsel waived the constitutional claim by failure to object, the majority essentially interpreted the “knowing

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15 Id. at 365, 196 S.E.2d at 93.
17 W. Va. Code § 62-3-15 (1966) provides in part as follows: “If a person indicted for murder be found by the jury guilty thereof, they shall in their verdict find whether he is guilty of murder of the first or second degree.”
18 156 W. Va. at 364, 196 S.E.2d at 94.
19 Id. at 367, 196 S.E.2d at 95. (emphasis supplied by the court).
20 Id. (Haden, J., dissenting).
21 Id. at 377, 196 S.E.2d at 101. (Haden, J., dissenting).
and intelligent” standard to include waiver by judgment, in other words, waiver of a right by failure to present the claim in the proper procedural fashion. Judge Haden, however, stated that the statutory provisions, through the use of the term “knowing and intelligent,” adopted the standard set forth in various federal constitutional decisions requiring the voluntary relinquishment of a known right.22 Accordingly, waiver should occur under the statute only through knowledgeable overt acts of the accused.22 Since Ford himself could not be presumed to have had any knowledge of the propriety of varying forms of jury verdicts, the dissent argued that no waiver was possible. Moreover, the fact that Ford’s counsel advocated “almost every imaginable” point of error on direct appeal, and yet did not mention the jury’s verdict, led Judge Haden to conclude that even Ford’s counsel could not have made a knowledgeable decision to forego the claim.24

The different approaches taken by the majority and the dissent in Ford v. Coiner point directly to the disputed scope of the writ of habeas corpus in West Virginia. Waiver based on principles of foreclosure by judgment allows for greater finality of trial court convictions and, correspondingly, limits the areas of inquiry upon application for habeas corpus. On the other hand, to require that a procedural default under section 53-4A-1(c) be considered a voluntary relinquishment of a known constitutional right before it will bar review upon habeas opens the door for vigorous and substantial review of the state’s criminal process by collateral attack.

If the West Virginia statute is interpreted to allow waiver by judgment, few constitutional defenses could be considered upon habeas which were not determined adversely to the petitioner at trial. Basically, the court faced with a habeas issue would be forced to fall back to the subsequent wording in section 53-4A-1(c) allowing the consideration of those constitutional claims which cannot be waived under the circumstances. If, however, the West Virginia Supreme Court of Appeals makes it clear that the waiver provision is to be interpreted as requiring a voluntary relinquishment of a known right, only intentional decisions by a criminal defendant not to present a claim to the state court would bar subsequent review. Of course the decision of counsel, if knowledgeable and made under such circumstances as to make informing the defen-

23 156 W. Va. at 379, 196 S.E.2d at 102. (Haden, J., dissenting).
24 Id. at 381, 196 S.E.2d at 103. (Haden, J., dissenting).
dant impossible (such as decisions regarding trial tactics) would also constitute voluntary relinquishment of a known right.

Certainly there are situations in which a "knowing" waiver may occur. If, for example, a decision was made by petitioner's counsel to allow an arguably coerced statement to be introduced at trial because of counsel's belief that the confession contained certain exculpatory aspects, the underlying constitutional claim would have been "knowingly" waived. Further, if counsel decided not to object to the admissibility of the fruits of an illegal search and seizure in order to bring the conduct of the police to the attention of the jury, the fourth amendment claim would be similarly waived. Under situations such as these, in which a decision *with some rational basis* is made to forego a constitutional defense, a voluntary relinquishment of a known right occurs, and subsequent review of that constitutional claim on habeas would be barred. If the statute is interpreted to include waiver by judgment, however, a petitioner would be prevented from asserting potentially valid constitutional defenses merely because at trial neither he nor his counsel were aware of the existence of such defenses. The petitioner may indeed have been convicted with the aid of a constitutionally defective identification procedure, or perhaps in violation of his right not to be subjected to double jeopardy; but because of his failure to present such a claim at trial, he would be barred from vindicating his constitutional objection in any court.

Although the course of the West Virginia Supreme Court of Appeals is not totally clear in this regard, it would appear that

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25 The West Virginia Supreme Court of Appeals dealt with waiver in the habeas context in *Dobbs v. Wallace*, 201 S.E.2d 914 (W. Va. 1974). In *Dobbs*, it was held that two indigent parolees were denied their rights to equal protection of the law as guaranteed by the fourteenth amendment to the United States Constitution by the failure to provide counsel at their revocation hearings. In response to the state's allegation that the parolees had waived their right to counsel, the court held that because they were not informed of their right to have counsel appointed "their actions were insufficient to effect a valid waiver of a constitutional right." *Id.* at 919. This decision might be seen as embracing the voluntary relinquishment standard described above. However, *Dobbs* involved a waiver of the right to counsel alleged to have taken place prior to the revocation hearing. Accordingly, *Dobbs* represented a constitutional claim which could not properly "be waived under the circumstances giving rise to the alleged waiver." *See* W. Va. Code § 53-4A-1(c) (Cum. Supp. 1978). Therefore, the *Dobbs* decision does not represent an interpretation of the general waiver provisions of the Post-Conviction Habeas Corpus Act.

The 1975 case of *State ex rel. Grob v. Blair*, 214 S.E.2d 330, 337 (W. Va. 1975), held that habeas petitioner "John Grob did not, by word or deed, waive his right" to confrontation at trial. The *Grob* opinion was authored by Judge Haden and may
the majority in *Ford* adopted waiver by judgment, thus choosing the narrow road and limiting the scope of habeas corpus review in the state. For the reasons discussed below, the adoption of the voluntary relinquishment standard is more consistent with the legislative intent of the Post-Conviction Habeas Corpus Act and certainly more in line with sound criminal procedure policy for the state of West Virginia.

A. Legislative Purpose

Any reading of the waiver provisions which would allow for the extensive forfeiture of constitutional claims is inconsistent with both the language and legislative purpose of the Post-Conviction Habeas Corpus Act. In 1963, the United States Supreme Court held in *Fay v. Noia* that federal courts had power to hear the constitutional claims of prisoners convicted in state courts even if a state court would not hear the claim because of a procedural default. After *Fay*, states were forced to deal with the pressure of extensive intrusion through the use of federal habeas corpus by state prisoners. State jurists and legal commentators deplored the invasion into the prerogatives of state criminal justice. Further,

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indeed be offered as support for the adoption of the voluntary relinquishment standard in West Virginia habeas actions. The *Grob* decision, however, dealt with the right to confrontation which, as the court discussed extensively, had been traditionally considered non-waivable in West Virginia. *Id.* at 334-36. It would appear, then, that *Ford v. Coiner* remains the most authoritative consideration of the general waiver provisions of the act.

24 372 U.S. 391 (1963). *Fay* involved a federal habeas application by a New York petitioner who was convicted on the basis of a coerced confession. The record indicated that the sole evidence offered in the trial of the petitioner, Noia, was his confession. The evidence presented upon habeas clearly established, and the state of New York stipulated as much, that Noia's confession had been obtained through the use of "satanic practices". However, because Noia had failed to appeal his conviction (unlike his co-defendants who had previously been released on the same grounds), the federal habeas court denied relief on the basis of procedural default.

In a sweeping opinion, the U.S. Supreme Court held that Noia's decision not to appeal could not be considered a deliberate by-pass of the state court system, and, therefore, the district court had power to entertain the constitutional question on habeas. The Court recognized a very limited discretion to refuse habeas relief as the result of a procedural default which arises only if the decision not to present the constitutional claim to the convicting court constituted a voluntary relinquishment of a known right. 372 U.S. at 439.

federal district judges were unhappily swamped with habeas applications.

As a result, local district courts expressed the need for expansion of the writ of habeas corpus in West Virginia. Moreover, the United States Supreme Court suggested that state legislatures modernize habeas corpus relief: "The procedure should be swift and simple and easily invoked. It should be sufficiently comprehensive to embrace all federal constitutional claims. In light of Fay v. Noia..., it should eschew rigid and technical doctrines of forfeiture, waiver, or default."29

Recognizing these concerns, the West Virginia Legislature passed the Post-Conviction Habeas Corpus Act in 1967. The statute was hailed by the federal judiciary as an attempt to fully meet "the suggestions of Congress and the federal courts that states enact adequate post-conviction remedies."30 Thus, in order to curb intrusion by the federal judiciary, it is apparent that the West Virginia statute was intended to provide for a state writ fully as comprehensive and broad in scope as federal habeas became after Fay. This meant that state habeas courts had to open their doors to all federal constitutional claims, and the act expressly provides for such review.31 Further, rigid concepts of forfeiture by procedural default had to be discarded. That is what the legislature sought to do in section 53-4A-1(c). Accordingly, any interpretation of the provision which includes waiver by judgment is unacceptable.

It is also clear that the use of the phrase "knowing and intelligent" in the statute indicates that the legislature sought to require overt acts and a knowledgeable decision by the petitioner before review on habeas would be barred. In Fay, the Court held that a procedural default would bar federal habeas review of a constitutional defense only if "a habeas applicant, after consultation with a competent counsel..., understandably and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures..."32

As further explanation of the federal standard, the Court held

that the traditional Johnson v. Zerbst\textsuperscript{33} standard of voluntary relinquishment of a known right was controlling, and that a choice made by counsel, not participated in by petitioner, does not automatically bar habeas relief.\textsuperscript{34} Therefore, when the West Virginia Legislature indicated in section 53-4A-1(c) that a procedural default would bar review on habeas corpus only if it was "knowing and intelligent," it employed a term of art, borrowed from federal constitutional law, which requires, in effect, a deliberate by-pass or a voluntary relinquishment of a known right in order for waiver to exist.

B. Federal Retreat

Even apart from the above consideration of legislative intent, several factors strongly support a liberal waiver standard which would allow extensive review of alleged constitutional defects in trial process through state habeas corpus.

Recent United States Supreme Court decisions have evidenced a marked curtailment of the scope of federal habeas corpus. Under the rationale of Fay discussed above, federal courts were free to entertain constitutional claims not presented to the trial court unless a deliberate decision was made not to pursue the claim in state court. Accordingly, federal supervision of state criminal process was significant. In 1977, however, the Burger Court effectively overruled Fay in Wainwright v. Sykes\textsuperscript{35} and held that a procedural default in state court bars review on federal habeas unless the petitioner can meet the two-prong test of "cause and prejudice."\textsuperscript{36} Although the Supreme Court has yet to give real content to those terms, Wainwright made it very clear that it will have

\textsuperscript{33} 304 U.S. 458 (1937).
\textsuperscript{35} 433 U.S. 72 (1977). In Wainwright, the petitioner sought habeas relief on the ground that he had been intoxicated and, therefore, had not understood the Miranda warnings that had been given him. At his trial he had not challenged the admissibility of the inculpatory statements he made after being given the warnings. Based upon the record, it is safe to assume that the statement went unchallenged because petitioner's counsel was unaware of the propriety of such an objection. Yet, the Supreme Court, speaking through Justice Rehnquist, held that his failure to comply with a state rule requiring contemporaneous objection to the admission of his statement barred review upon habeas. The Court specifically rejected Fay's deliberate by-pass rule and held that a procedural default would prohibit subsequent habeas review unless the petitioner could show adequate cause for his failure to object and demonstrate actual prejudice.
\textsuperscript{36} Id. at 87.
to be a rare case indeed in order for a federal court to intervene on the basis of a constitutional claim not presented to the convicting court.

Moreover, the Court held recently in Stone v. Powell37 that not all constitutional claims are cognizable on federal habeas corpus. There it was held that fourth amendment claims were to be the subject of federal habeas relief only if the state failed to provide an opportunity for a hearing on the issue at trial. Justice Brennan expressed fear in his dissent in Stone that the Court was laying the groundwork for drastic withdrawal of federal habeas jurisdiction "if not for all grounds of alleged unconstitutional detention, then at least for claims—for example, of double jeopardy, entrapment, self-incrimination, Miranda violations, and use of invalid identification procedures—that this Court later decides are not 'guilt related.'"38

These recent decisions signal a decided trend toward a narrowing of the scope of federal habeas. Such a trend would seem to reflect either a decision by the Burger Court to abdicate constitutional review on federal habeas under the belief that the "Great Writ"39 is of limited importance today, or a determination that state court systems should be free to develop their own criminal procedures in such a way as to ensure the protection of the constitutional rights of defendants. In either event, the retreat by the federal judiciary in this area should be followed by a corresponding expansion of the scope of constitutional review in state courts. State court systems are no longer burdened by repeated federal intrusion through habeas. Conversely, however, courts can no longer rely on federal habeas corpus as an ultimate guarantor of civil rights. The West Virginia Supreme Court of Appeals has not only indicated a general reluctance to accept the relaxation of constitutional standards authorized by the Burger Court, but also has recently taken significant steps to protect the rights of criminal defendants.40 Similarly, with respect to the scope of constitutional review allowable on state habeas corpus, the narrowed scope of

38 Id. at 517-18 (Brennan, J., dissenting).
C. The Nature of Procedural Default

Any rational consideration of the effect which a procedural default should have upon subsequent review of constitutional issues must take into account the meaning and import of a typical default. As discussed above, there are undoubtedly situations in which procedural default represents a rational decision not to pursue a constitutional objection before the trial court. Under the suggested interpretation of section 53-4A-1(c), a petitioner would be prevented from asserting such constitutional claims on habeas.

But the typical procedural default does not represent a studied choice of tactical alternatives by defendant's counsel. Nor, indeed, is the typical procedural default a conscious decision of any kind. Rather, the "ordinary procedural default is borne of the inadvertence, negligence, inexperience, or incompetence of trial counsel." Generally, the failure of defense counsel to object to the admissibility of the fruits of an unlawful search and seizure, a coerced confession, the use of uncounseled prior convictions for sentencing purposes, improper make-up of grand jury, etc., can only be attributed to the fact that counsel was unaware of the propriety of such objections. For example, counsel's failure to object to the form of the verdict as discussed above in Ford v. Coiner could hardly have been tactically motivated since his client had already been convicted. It is in situations such as these that the difference between waiver by judgment and waiver only as the result of a voluntary relinquishment of a known right becomes crucial. If the West Virginia waiver provisions set forth in section 53-4A-1(c) are interpreted to include waiver by judgment as occurred in Ford v. Coiner, procedural defaults unrelated to tactical decisions, but based on mistakes by trial counsel, will bar consideration of certain constitutional claims in any forum.43

41 See text accompanying notes 14-24 supra.
43 Regardless of the waiver standard applicable for habeas review, a criminal defendant may, of course, assert inadequate assistance of counsel as a ground for reversal of his conviction. Although West Virginia traditionally embraced the "mockery of justice" test in order to determine the effectiveness of counsel, see State ex rel. Blankenship v. Boles, 149 W. Va. 377, 141 S.E.2d 68 (1965), the West Virginia Supreme Court of Appeals recently liberalized the standard in State v. Thomas, 203 S.E.2d 445 (W. Va. 1974).
Necessarily, the proper weight to be given a procedural default involves a balancing of two factors. Both the integrity of the state procedural system and the protection of the constitutional rights of criminal defendants deserve important consideration. It is suggested that the voluntary relinquishment standard provides proper protection to final state court convictions by preventing habeas review after an intentional by-pass of the trial forum. Yet the standard correctly refuses to bar the presentation of substantial constitutional objections merely because petitioner's counsel was unaware of the propriety of the objection at trial. Certainly the assurance of due process in our trial courts, both for the protection of individual defendants and as a supervisory tool statewide, is a goal worthy of some inconvenience. To employ waiver by judgment and, in effect, insure "an airtight system of forfeitures" constitutes an undue deference to local procedure while cutting off review of constitutional defenses in the state forum. As Justice Brennan stated recently:

    In short, I believe that the demands of our criminal justice system warrant visiting the mistakes of a trial attorney on the head of a habeas corpus applicant only when we are convinced that the lawyer actually exercised his expertise and judgment in his client's service, and with his client's knowing and intelligent participation where possible.\(^4\)

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\(^4\) In \textit{Thomas}, the court held that in the determination of a claim that the accused was prejudiced by ineffective assistance of counsel courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable in criminal law. 203 S.E.2d at 461. Although the \textit{Thomas} case and subsequent decisions, see Cannellas v. McKenzie, 236 S.E.2d 327 (W. Va. 1977); Carter v. Bordenkircher, 226 S.E.2d 711 (W. Va. 1976), have demonstrated that the West Virginia court is willing to undertake closer review of the actions of defense counsel, it remains clear that substantial probability of actual injury, and indeed, significantly unreasonable conduct by counsel must be shown in order for a conviction to be reversed on the basis of inadequate assistance.

As a result, it is very likely that a habeas petitioner could be barred from presenting a constitutional claim, under the concept of waiver by judgment, merely because his counsel unknowingly failed to pursue the objection at trial; and yet counsel's error would not be sufficient to allow review under the more stringent inadequate assistance standard. Such a situation again leaves the habeas petitioner without a forum for the presentation of his constitutional claim. Furthermore, it is preferable to allow open review on habeas application of constitutional issues not presented to the trial court because such review is removed from the implied "trial of counsel" inherent in review for inadequate assistance of counsel.


D. The Necessity of a Broad Right to Habeas Corpus Review in West Virginia

In West Virginia, a person convicted of a criminal offense is not entitled to an appeal as a matter of right. Rather, the West Virginia Constitution and enabling statutes merely create an absolute right to apply for a writ of error to the state supreme court. Accordingly, significant numbers of criminal convictions are simply not subjected to meaningful review. West Virginia's highest court has held this system to be consistent with the federal due process clause. Such may well be the case; however, the absence of appeal as of right speaks forcefully for the necessity of broad review on habeas corpus. If the West Virginia Supreme Court of Appeals is indeed seeking to strengthen procedural due process within the state, it would seem that a viable habeas forum is essential.

Nor would the expanded scope of habeas suggested unreasonably burden the circuit courts. The Post-Conviction Habeas Corpus Act provides for the summary dismissal of an application for habeas relief, without hearing or appointment of counsel, if the petition demonstrates to the court's satisfaction that the applicant is entitled to no relief. Moreover, the statute creates a rebuttable presumption that a claim not presented to the trial court was knowingly waived. Therefore, even with a waiver standard allowing broad review, it would be necessary for petitioner to present a prima facie case in order to overcome the statutory presumption. Accordingly, the statute provides ample means for the disposition of groundless petitions.

CONCLUSION

In light of the above discussion, it is suggested that the waiver provision set forth in section 53-4A-1(c) be interpreted in accordance with the voluntary relinquishment standard of Fay v. Noia. Pursuant to such an interpretation, only a knowing decision to forego a constitutional claim in the convicting court would constitute a sufficient procedural default to bar review of that claim on habeas. The voluntary relinquishment standard, as opposed to the

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concept of waiver by judgment, will necessarily result in a broader habeas forum for the consideration of alleged constitutional deficiencies in the trial process. Furthermore, increased collateral supervision of state criminal procedure would likely follow.

The West Virginia Supreme Court of Appeals has taken significant steps in recent years to increase the procedural safeguards available in criminal cases. Because defendants are not guaranteed an appeal as a matter of right, however, a very significant number of criminal convictions are not subjected to significant scrutiny. Broad review on habeas is therefore essential.

The Post-Conviction Habeas Corpus Act was intended to provide for a comprehensive state writ, discarding rigid concepts of forfeiture and default. This enlarged scope is consistent with the full review of alleged constitutional violations called for in the act. Moreover, it reflects a general trend toward subjecting state criminal process to more rigorous constitutional scrutiny.

The recent limitation of the scope of federal habeas corpus properly calls for an expansion rather than a contraction of state constitutional review. State judges should now be willing to shoulder the difficult burden of constitutional analysis more eagerly, as they are entrusted with a larger share of the responsibility for the protection of the rights of criminal defendants.50 Rather than dependence upon federal adjudication of civil liberties, criminal defendants must increasingly turn to "the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed."51