11-1-1977

Estelle v. Williams and the Waiver of Due Process Trial Protections

Steven D. Krieg

Follow this and additional works at: https://digital.sandiego.edu/sdlr

Part of the Law Commons

Recommended Citation
Available at: https://digital.sandiego.edu/sdlr/vol14/iss5/13

This Comments is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in San Diego Law Review by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.
"The presumption of innocence requires the garb of innocence."\(^1\)

In *Estelle v. Williams*,\(^2\) the United States Supreme Court lent this maxim constitutional support, holding that an accused may not be compelled to appear at his jury trial dressed in a prison uniform. The Court’s decision was based upon the defendant’s presumption of innocence guaranteed by the due process clause of the fourteenth amendment,\(^3\) and concluded that the presumption is undermined by a defendant appearing in a prison uniform at his jury trial.

However, the thrust of *Williams* concerned not the due process right itself, but rather the method by which such protections may be waived.\(^4\) The Court held that an accused’s right not to be compelled to appear at trial in prison garb is *not* a fundamental right relinquished only by a knowing, intelligent, and voluntary waiver.\(^5\) Instead, the right was considered a secondary safeguard which is waived unless it is timely and intelligently asserted by counsel.\(^6\) By declaring that Williams had waived his right not to appear at trial in prison garb, the Court jeopardized the accused’s right to a fair trial.

This Comment will examine the *Williams* case and the development of the right not to wear prison garb at trial. It will analyze the Court’s rejection of the traditional framework for examining the waiver of fourteenth amendment due process trial rights. This analysis will provide the foundation for a critical evaluation of the decision and its effect upon the defendant’s right to a fair trial. Finally the Comment will compare Williams with similar decisions regarding prejudicial information which may interfere with the decision-making process.

---

3. Id. at 504–05.
4. Id. at 506–13.
5. Id. at 508 n.3.
6. Id. at 512–13.
BACKGROUND OF THE RIGHT NOT TO WEAR PRISON GARB AT TRIAL

Federal Cases

The majority of the federal cases on the wearing of prison garb at trial have arisen in the Fifth Circuit Court of Appeals. In *Brooks v. Texas*, a leading case, the accused was tried in prison garb and his counsel did not object. Nevertheless, the appellate court declared it inherently unfair to try an accused while he was dressed in prison garb. The court held that prison garb may infringe the accused's right to the presumption of innocence.

The basis upon which the accused's right is founded—the presumption of innocence—is not articulated in the Constitution. However, courts have not hesitated to find constitutional support for the presumption. Some cases have traced the right from biblical times through Roman and English common law and have concluded that the presumption of innocence "lies at the foundation of the administration of our criminal law." The presumption has been termed "a basic component of a fair trial under our system of criminal justice." The necessity of a fair trial is then based on

---

7. It is difficult to determine why the majority of cases have come from the Fifth Circuit. One possible explanation is that unlike the judges in other circuits, trial judges within the Fifth Circuit do not care whether the accused is dressed in prison garb. The Fifth Circuit includes Texas, Louisiana, Mississippi, Alabama, Georgia, Florida, and the Canal Zone. Also, of the 11 prison garb cases to come from within this circuit in the past 10 years, seven began in Harris County (Houston), Texas. Furthermore, out of six cases involving defendants not out on bail tried in Williams' courtroom, in the two months surrounding his trial, all six appeared in prison garb. 425 U.S. at 533 (Brennan, J., dissenting). The practice of placing uniformed defendants on trial may therefore be local, instead of circuit-wide.

8. 381 F.2d 619 (5th Cir. 1967).

9. "It is inherently unfair to try a defendant for crime while garbed in his jail uniform, especially when his civilian clothing is at hand. No insinuations, indications or implications suggesting guilt should be displayed before the jury, other than admissible evidence and permissible argument." *Id.* at 624.

10. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). In *Bently v. Crist*, 469 F.2d 854 (9th Cir. 1972), the Ninth Circuit stated that "[a]lthough the presumption of innocence is not specifically mentioned in the Constitution, it has been recognized as a requirement of due process." *Id.* at 855 n.2.


the due process clause of the fourteenth amendment.\textsuperscript{13}

In Brooks, and in cases following it,\textsuperscript{14} exceptions to the rule that a trial in prison garb is inherently unfair were established. There are three situations in which the wearing of prison garb at trial by the defendant will not constitute reversible error.

The first exception arises when the evidence presented against the accused is so strong that the error committed is harmless.\textsuperscript{15} Thus, while the Brooks rule is violated, this violation does not constitute reversible error.\textsuperscript{16} In this situation the evidence is so compelling against the accused that his clothing is deemed not to have affected the outcome of the trial.\textsuperscript{17} However, the evidence establishing guilt must be overwhelming.\textsuperscript{18} Furthermore, the errors committed must be “so unimportant and insignificant that they may, consistent with the United States Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.”\textsuperscript{19}

\begin{enumerate}
\item In re Murchison, 349 U.S. 133, 136 (1955): “A fair trial in a fair tribunal is a basic requirement of due process.” Courts have used another approach to confer constitutional status on the presumption of innocence. The presumption is sometimes called the converse of the government’s burden to prove an accused’s guilt beyond a reasonable doubt. United States v. Cummings, 463 F.2d 274, 280 (9th Cir. 1972). The reasonable doubt standard has been held to be a necessary component of the due process clause of the fourteenth amendment. In re Winship, 397 U.S. 358, 364 (1970). Thus, by tying this presumption to either the right to a fair trial, or the reasonable doubt standard, courts have found a constitutional basis for the presumption of innocence in the due process clause.
\item See note 15 supra.
\item Id.
\item Hernandez v. Beto, 443 F.2d 634, 637 (5th Cir. 1971). The court cites Chapman v. California, 386 U.S. 18, 24 (1967), for the proposition that “[b]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” Chapman involved a district attorney commenting upon a defendant’s failure to testify.
\item Chapman v. California, 386 U.S. 18, 22 (1967). The Fifth Circuit reversed Williams because it believed that the reasonable doubt standard as
\end{enumerate}
The second exception arises when a defendant is tried for an offense which occurred while he was in prison.\textsuperscript{20} In this situation the jury will eventually learn during the course of the trial that the defendant is a prisoner. The Fifth Circuit therefore holds that there is no prejudice when the jury sees the accused in a prison uniform.\textsuperscript{21}

The third exception to the Brooks rule is the most complex. This exception occurs when the defendant and his counsel knowingly and willingly agree that the defendant will go to trial in prison garb in the hope of gaining sympathy from the jury.\textsuperscript{22} This tactic has been held to constitute a waiver of the accused’s right.\textsuperscript{23} The

\textsuperscript{20} Williams v. Estelle, 500 F.2d 206, 211-12. After reviewing the evidence, the court concluded that “we find the evidence of malice aforethought and of intent to kill insufficient to sustain the conviction under the standard promulgated in Chapman.... The evidence in this case is not so strong as to warrant the conclusion that the constitutional error of trying Williams in prison garb was harmless.”

\textsuperscript{21} Stahl v. Henderson, 472 F.2d 556 (5th Cir.), cert. denied, 411 U.S. 971 (1973):

Stahl’s complaint of being tried in prison garb, if indeed he was, gives us little pause. He was on trial for the murder of a fellow inmate in the Louisiana State Prison where prison garb was Stahl’s normal attire. The jury necessarily knew that he was a prison inmate both at the time that he was alleged to have committed the crime and at the time of his trial. No prejudice can result from seeing that which is already known.

\textsuperscript{22} An argument could be made that a prison uniform does much more than inform the jury that the defendant is a prisoner. The uniform gives the appearance of one whom the state regards as deserving to be so attired. It brands him as convicted in the state’s eyes.... It separates him from the ordinary defendant who may appear in his best ‘Sunday suit’ and fittings. The defendant is thereby placed in a psychological, emotional disadvantage.


\textsuperscript{24} Hernandez v. Beto, 443 F.2d 634, 637 (5th Cir. 1971).
Fifth Circuit has held that an accused “may not remain silent and willingly go to trial in prison garb and thereafter claim error.”

Difficulties occur, however, when the defendant and his counsel unintentionally fail to object to the prison garb. Many cases have been appealed to the Fifth Circuit on the ground that the defendant had not willingly waived his right. The court has remanded such cases for a determination of whether the failure to object was motivated by hopes of a tactical advantage, or was an unknowing, involuntary waiver. If no deliberate desire to be tried in prison garb is shown, the defendant must be retried.

McWilliams v. Estelle, which preceded Williams, attempted to streamline this cumbersome system of determining the defendant’s motive. In McWilliams, the court declared that the waiver of the right should be knowing, intelligent, and voluntary. This holding made it impossible for the right not to wear prison garb at trial to be waived unless the accused positively relinquished it.

The cases arising out of other circuits generally follow these rules. A Third Circuit case, Lemons v. United States, was remanded for a determination of whether the defendant’s failure to object had been a deliberate tactical decision, or an involuntary re-

24. Id.

In this present case the record does not show that appellee objected to being tried in jail clothing, nor does it show an express waiver on his part. The district court erred in granting relief without considering whether there was a voluntary waiver. We reverse and remand for an evidentiary hearing on this issue....

Id. at 952.
29. Id. at 1381. There is some doubt whether the court actually advocated a total change to the standard set forth in Johnson v. Zerbst, 304 U.S. 458 (1938). While the court declared that “the question of waiver must be determined under the traditional standard of ‘an intentional relinquishment or abandonment of a known right or privilege,’” it nevertheless stated that this analysis must be “read in connection with the Fifth Circuit's treatment of waiver in the jail clothes context.” 378 F. Supp. at 1381. This latter statement seems to qualify the advocacy of a complete change to the Johnson analysis. Instead, this may be only a tentative first step in that direction.
31. Lemons v. United States, 489 F.2d 344 (3d Cir. 1974); Bently v. Crist, 469 F.2d 854 (9th Cir. 1972).
32. 489 F.2d 344 (3d Cir. 1974).
linquishment of his right. In the Ninth Circuit the court declared that the defendant's appearance at trial in prison garb was prejudicial error.33

However, some federal courts have declined to follow the Fifth Circuit's analysis.34 The Tenth Circuit in Watt v. Page35 declared that a trial in prison garb is not inherently prejudicial. Rather, all the facts and circumstances at trial must be examined to determine whether the defendant was prejudiced.36

State Courts

Prison garb cases from state courts fall into three general categories. Many cases have followed the Fifth Circuit's analysis.37 Other cases have held that the wearing of prison garb is not inherently prejudicial,38 and that the defendant on appeal has the burden of showing actual prejudice.39 An objection by counsel is generally also necessary to appeal.40 Finally, at least one court has held that no prejudice will result from an accused appearing at trial in prison garb.41

The Facts of Williams

On May 29, 1970, a fight took place between Williams and Neatherlin, the landlord of an apartment complex in which Williams had previously been a tenant.42 The fight apparently re-

33. Bently v. Crist, 469 F.2d 854 (9th Cir. 1972).
34. Anderson v. Watt, 475 F.2d 881 (10th Cir. 1973); Watt v. Page, 452 F.2d 1174 (10th Cir. 1972).
35. 452 F.2d 1174 (10th Cir. 1972).
36. Id. at 1176-77. The trend of the Burger Court to favor the use of the "totality of the circumstances" test would permit the conclusion that the Court's holding in Williams would adopt the reasoning in Watt v. Page. See Address by Yale Kamisar, Kenneth J. Hudson Lecture on Criminal Law: The Burger Court Slides Down the Mountain (Feb. 1, 1973).
40. Id.
sulted from the landlord's belief that Williams owed him money. Neatherlin was allegedly stabbed and critically injured by Williams. Williams was subsequently charged with assault with intent to commit murder.\textsuperscript{43}

During his trial, Williams wore a uniform clearly marked "Harris County Jail."\textsuperscript{44} His counsel did not object to Williams' clothing at any time during trial.\textsuperscript{45} Convicted, Williams subsequently filed a writ of habeas corpus in the Federal District Court,\textsuperscript{46} Southern District of Texas, claiming that his jury trial in prison garb unconstitutionally infringed his right to the presumption of innocence.\textsuperscript{47}

The district court agreed that the trial court had erred but held the error harmless because the evidence against Williams had been so overwhelming that his wearing of prison clothing could have made no difference.\textsuperscript{48} The Court of Appeals for the Fifth Circuit reversed\textsuperscript{49} on the ground that the prison uniform might have influenced the outcome of the trial.\textsuperscript{50} The Supreme Court granted certiorari to decide whether the wearing of prison garb at a jury trial\textsuperscript{51}

\begin{itemize}
\item \textsuperscript{43} Id. at 336-38.
\item \textsuperscript{44} Id. The clearly marked uniform precluded the raising of the issue of whether the clothes were really prison garb. Several cases have stated what does not constitute prison clothing: Klingler v. Erickson, 328 F. Supp. 674 (S.D. 1971) (plain gray shirt, jacket, and pants with no distinctive marks); Barksdale v. State, 255 Ark. 272, 329 S.W.2d 851 (1958) (white bell-bottom pants, a gold shirt, white and brown striped jacket and house shoes with no evidence of any name or number on any of the clothing); State v. Thomas, 325 So. 2d 593 (La. 1976) (gray coveralls); State v. Tennon, 262 La. 941, 265 So. 2d 230 (1972) (all four defendants in blue and white striped pants, three with white undershirt, the other in a blue and white striped shirt); State v. Moon, 44 Ohio App. 2d 275, 337 N.E.2d 794 (1972) (non-descript blue jeans and light blue shirt); State v. Archuleta, 28 Utah 2d 255, 501 P.2d 263 (1972) (undershirt and denim overalls).
\item Bently v. Crist, 469 F.2d 854, 856 n.4 (9th Cir. 1972), described prison clothing as "any attire with the word 'jail' or 'sheriff' stenciled on it . . . ." See United States v. Fideler, 457 F.2d 921 (5th Cir. 1972), in which petitioner argued that he wore prison clothing at trial, but evidence showed that the jail in which he was held did not issue prison uniforms.
\item \textsuperscript{45} Id. at 343.
\item \textsuperscript{46} Id. v. Estelle, 500 F.2d. 206 (5th Cir. 1974).
\item \textsuperscript{47} Id. at 212.
\item \textsuperscript{48} Id. at 212.
\item \textsuperscript{49} Id. at 336-38.
\item \textsuperscript{50} Id. at 343.
\item \textsuperscript{51} Courts have consistently held that wearing prison garb during a bench trial is not prejudicial, apparently because the trial judge is able to overlook the situation. Diamond v. Social Serv. Dep't, 263 F. Supp. 971 (E.D. Pa. 1967); People v. Arntson, 10 Mich. App. 718, 160 N.W.2d 386 (1968).
\item However, an argument can be made that although the trial judge may not be prejudiced by the prison garb, the clothing is nevertheless an "af
\end{itemize}

1258
was inherently prejudicial.\textsuperscript{52}

\textit{The Majority Opinion}

The Supreme Court, noting cases from the Fifth Circuit, declared that an accused should not be compelled to go to trial in prison clothing because of the possible impairment of the presumption of innocence.\textsuperscript{53} The remainder of the decision was concerned with the method by which the right is waived.

The Court began its examination of the waiver of the right by noting that the rule set forth by the lower courts was not a mechanical, per se rule.\textsuperscript{54} Instead, the Court described the three major exceptions to the rule that a defendant is not considered inherently prejudiced by a jury trial in prison clothing.\textsuperscript{55} Relying on the third exception, the Court noted the "frequent" practice of a defendant standing trial in prison garb as a defense tactic to elicit sympathy from the jury.\textsuperscript{56}

Because of the prevalence of this practice, the majority concluded that an accused must make a timely objection to his trial in jail garments. Otherwise, the failure to object would negate the presence of state compulsion which is necessary to establish a violation of the Constitution.\textsuperscript{57} The Court noted that the trial judge should not be faulted for failing to ask the accused about his motives for going to trial in jail clothes.

To require the judge to make such an inquiry would suggest that he has the same duty as in a \textit{Johnson v. Zerbst}\textsuperscript{58} situation. In that case the Court declared that the trial judge must ascertain that the accused personally waives his right to counsel knowingly, intelligently, and voluntarily.\textsuperscript{59} The Court in \textit{Williams} declared that, "we are not confronted with an alleged relinquishment of a fundamental right of the sort at issue in \textit{Johnson v. Zerbst} . . . ."\textsuperscript{60}

\begin{itemize}
\item 425 U.S. at 502.
\item Id. at 504. The Court tied the presumption of innocence to the due process clause of the fourteenth amendment through both the fair trial right and the reasonable doubt standard. Id. at 503.
\item Id. at 507.
\item Id. at 506-08.
\item Id. at 508.
\item Id. at 512-13.
\item 304 U.S. 458 (1938).
\item Id. at 508 n.3.
\end{itemize}
Looking at the facts in the Williams case, the Court found no objection made by the defendant or his counsel. Objections should be interposed in order to call the matter to the trial judge's attention so that he will have an opportunity to remedy the situation. Thus, the Court refused to overturn Williams' conviction.

The Dissenting Opinion

Justice Brennan, in dissent, raised two objections to the Court's analysis. First, he argued that prison garb robs the defendant of dignity and respect. Furthermore, the fact-finding process is endangered by a defendant wearing a prison uniform because juries will be influenced by his appearance. The objection requirement is "irrational on its face" because these dangers will exist whether the defendant makes a timely objection or not.

Justice Brennan's second argument advocates the use of the Johnson v. Zerbst test. The majority defined the prison garb right as a contingent one, which does not come into existence unless it is affirmatively asserted. The dissent argued that the right should not be lost unless the accused knowingly, intelligently, and voluntarily consents to a trial in prison garb. The higher level of waiver is necessary because the right involved is a fundamental constitutional safeguard that seriously affects the fairness and accuracy of the judicial fact-finding process.

In concluding the argument, the dissent voiced fears that the objection requirement could spread to other trial rights guaranteed by the due process clause of the fourteenth amendment. Rights which traditionally have been measured by Johnson v. Zerbst's knowing, intelligent, and voluntary waiver analysis could be eroded by the Court's decision. "By defining the due process right in prison garb cases in terms of state compulsion, the Court opens the

61. Id. at 509-10.
62. Id. at 508. Two justices concurred with the majority. They agreed that the defendant lost his right by failing to assert it at the proper time, and declared that because it was a "trial-type right" defendant's counsel could effectively bind the accused to his waiver. Id. at 514 (Powell & Stewart, JJ., concurring).
63. Id. at 508.
64. Id. at 518.
65. Id.
66. Id. at 520.
67. Id. at 521.
68. Id.
69. Id. at 522-23.
70. Id. at 521 n.5.
71. Id.

1260
door for the complete abandonment of this Johnson v. Zerbst doctrine.”

**CRITICAL EVALUATION OF Williams**

**The Johnson-Noia-Henry Analysis Framework**

The Williams decision must be compared to previous holdings on the waiver of the accused's due process rights. The first major case on the waiver of rights was Johnson v. Zerbst. In Johnson the Court held that a knowing, intelligent, and voluntary decision is needed to waive the right to counsel. The Court expressly stated that this rule applied to the right to the assistance of counsel. However, after Fay v. Noia its application to other rights remained in doubt. In Noia, the lower court denied an accused habeas corpus relief because he had failed to make a timely appeal of his conviction. The Supreme Court stated instead that an accused may waive his rights only pursuant to the rule in Johnson. The Court also ruled that waivers must be "the considered choice of the petitioner. A choice made by counsel, not participated in by the petitioner, does not automatically bar relief." The Court in Noia expanded the Johnson doctrine to all rights that an accused can waive.

However, this ruling was limited two years later in Henry v.

---

72. Id. at 523 n.6.
73. 304 U.S. 458 (1938).
75. Id. at 399. The Johnson-Noia standard concerns the grant of habeas corpus to state-court prisoners with constitutional claims. A grant of the writ allows the argument to be heard by the federal courts. The petitioner must show he has exhausted his state remedies before his petition will be granted. Fay v. Noia, 372 U.S. 391, 419 (1963); Cook v. Hart, 146 U.S. 183, 194-95 (1892). The examination of habeas corpus procedure, therefore, would seem to cover only a portion of the prison garb cases. As a practical matter, however, this procedure covers many prison garb appeals. This is because only in the first category of state cases—where courts declare the wearing of prison garb violative of the presumption of innocence—will petitioner be granted relief. In all other cases, the defendant will have to appeal his case to the federal courts by filing a writ of habeas corpus.
77. Id.
Mississippi. In Henry, the petitioner applied for habeas corpus relief because his counsel had failed to object to inculpatory evidence introduced at trial. He argued that under Noia his counsel could not waive his right to object, that such rights may be waived only by the accused knowingly, intelligently, and voluntarily. The Court disagreed, stating that absent "exceptional circumstances," counsel's deliberate decision not to object will constitute an effective waiver.

The Noia and Henry decisions appear to conflict. In Noia the Court ruled that a defendant may not be bound by his counsel's waiver of his rights. The ruling in Henry declared that the defendant's right had been effectively waived by his counsel's decision. However, other courts have declared that Noia and Henry are distinguishable by the fact that the former did not involve a "trial-type" right.

In Henry the objection dealt directly with "a matter which only trial counsel would be equipped to pass on in the exercise of judgment under the circumstances presented by the exigencies of trial." By comparing the two cases, lower courts have held decisions made during the trial must be entrusted to counsel because he is more familiar with courtroom procedure, and because such decisions must be made quickly—frequently in response to an unexpected situation. Therefore, in these situations the accused must be bound by his attorney's decision.

Conversely, the decision in Noia affects a non-trial-type right. The right to habeas corpus relief is asserted as the result of pre-trial consultations between the defendant and his counsel, rather than

80. Id. at 451.
81. Id.
82. Bruno v. Herold, 408 F.2d 125 (2d Cir. 1969); Nelson v. People, 346 F.2d 73 (9th Cir.), cert. denied, 382 U.S. 964 (1965); People v. Williams, 36 Ill. 2d 194, 222 N.E.2d 321 (1966), cert. denied, 388 U.S. 923 (1967); Grano, supra note 78, at 1215; Tigar, supra note 78, at 17-18.
84. See cases listed in note 82 supra.
85. Id.
86. The decisions covered by Noia are ones made pre-trial. Noia is concerned with the pre-trial aspect of a criminal proceeding—when the attorney and client have time to consult over matters such as the decision whether to stipulate a trial on the preliminary hearing transcript (Wilson v. Gray, 346 F.2d 282 (9th Cir.), cert. denied, 382 U.S. 919 (1965); Wood v. United States, 128 F.2d 265 (D.C. Cir. 1942)), or whether to contest the state's case (Brookhart v. Janis, 384 U.S. 1 (1966)). Accord, Nelson v. People, 346 F.2d 73, 81 (9th Cir.), cert. denied, 382 U.S. 964 (1965); Grano, supra note 78, at 1271.
during trial. In this situation, the opportunity for the defendant to personally waive his rights according to the Johnson standard still exists.\textsuperscript{87}

Thus, the question of waiver focuses upon the degree of consultation between counsel and accused and the stage of the proceeding when the waiver was made.\textsuperscript{88} If the decision was made during the trial when there was no time for consultations between accused and counsel, Henry permits a waiver of rights by the attorney to bind the accused. When the decision takes place outside the courtroom, Noia requires that the accused personally waive his rights.

However, the inquiry into waiver depends upon the right involved as well. In Henry, the Court stated that counsel’s waiver would also bind the accused, absent “exceptional circumstances.”\textsuperscript{89} What constitutes exceptional circumstances has been infrequently articulated by the courts.\textsuperscript{90} Nevertheless, the Supreme Court’s decision in Brookhart v. Janis\textsuperscript{91} supports the view that exceptional circumstances exist whenever fundamental or significant rights are waived. In Brookhart, counsel did not contest the state’s case nor cross-examine witnesses. Instead, counsel stated that he would require that the state prove only a prima facie case. The Court ruled that this so crippled the defendant’s right to confront his accusers that it was tantamount to a plea of guilty.\textsuperscript{92} The defendant was required to personally waive his rights knowingly, intelligently, and voluntarily, despite the fact that counsel’s decision was trial-based.\textsuperscript{93} Thus, certain fundamental rights may not be waived by counsel as a trial tactic.

The conclusion that fundamental rights may not be waived except through the Johnson method has also been reached outside the “ex-

\textsuperscript{87} Grano, supra note 78, at 1215; Tigar, supra note 78, at 17-18.
\textsuperscript{88} Grano, supra note 78, at 1215. See Tigar, supra note 78, at 17-18.
\textsuperscript{89} 379 U.S. at 451.
\textsuperscript{90} Wilson v. Gray, 345 F.2d 282 (9th Cir.), cert. denied, 382 U.S. 919 (1965) (exceptional circumstances can be decided only on a case-by-case basis). See Grano, supra note 78, at 1219.
\textsuperscript{91} 384 U.S. 1 (1966).
\textsuperscript{92} Id. at 7.
\textsuperscript{93} Id. In Ledbetter v. Warden, 368 F.2d 490 (4th Cir. 1966), cert. denied, 386 U.S. 971 (1967), defense counsel waived all objections to a confession which was the sole evidence against the accused. The court held that counsel’s waiver could not bind the accused because the waiver “went to the very foundation of the proceeding.” Id. at 494.
ceptional circumstances" framework. Other courts have concluded that certain trial safeguards are so fundamental to the accused's right to due process that they may not be waived by counsel, even if they might be trial-type-decisions.94

Fundamental Rights

As a result of Johnson, Noia and Henry, courts have generally taken a two-step approach to analyzing a waiver of due process rights. The first step is to determine whether the right waived is fundamental. Either under the special circumstances rule in Henry, or out of general due process considerations, fundamental rights must be waived by the accused personally.95

Determining the existence of fundamentality has not been outlined by any specific test.96 Courts generally examine the impact the waiver has upon the accused's ability to obtain a fair trial.97 In Boykin v. Alabama,98 the Court held that the accused was required to personally announce his decision of a plea of guilty because the plea entailed the waiver of three fundamental constitutional rights: trial by jury, confrontation, and the privilege against self-incrimination.99 Johnson v. Zerbst elevated to this fundamental rights category the accused's right to the assistance of counsel.100 The Court also declared that the right to a jury trial

94. Bruno v. Herold, 408 F.2d 125, 138 (2d Cir. 1969); People v. Williams, 36 Ill. 2d 194, 222 N.E.2d 321 (1966), cert. denied, 388 U.S. 923 (1967); Grano, supra note 78, at 1208. This concept was succinctly stated in Comment, Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest, 54 Calif. L. Rev. 1262 (1966):

Certain basic protections . . . have been deemed to be essential; and most courts have refused to accept a nonpersonal waiver of these rights without first ascertaining from the defendant himself that this action was done with both his permission and his awareness of the consequences. Thus, most courts, either expressly or impliedly, have made a distinction between such "fundamental rights" and other "trial decisions."

Id. at 1267.

95. See authority cited note 94 supra.

96. The courts have not used one specific test to measure the fundamentality of due process rights in criminal law. In Johnson v. Zerbst, the right to counsel was deemed "necessary to insure fundamental human rights of life and liberty," 304 U.S. at 462. In Ledbetter v. Warden, 368 F.2d 490 (4th Cir. 1966), cert. denied, 386 U.S. 971 (1967), the defense counsel's waiver of objections to the only evidence against the accused was not binding on the defendant because the right waived "went to the very foundation of the proceeding." Id. at 494.


99. Id. at 243.

100. 304 U.S. at 464.

1264
must be knowingly, intelligently, and voluntarily waived by the accused personally. 101

The fundamentality of the right in question is weighed against considerations of administrative efficiency and effective representation. 102 The court cannot stop the proceedings every time the accused faces a waiver decision and ascertain whether he knowingly, intelligently, and voluntarily waives any objection. This process would not only slow trials considerably, but would also usurp counsel's role as the accused's representative. 103 The Court has thus been reluctant to increase the number of fundamental rights. 104

When considering the issue of fundamentality against the accused's right to stand trial in civilian clothing, the majority of courts do not find the right fundamental. 105 This fact is illustrated by the appellate courts' practice of remanding cases to determine whether counsel had deliberately waived the right as a matter of trial tactics. 106

Lesser Rights

Once the court determines that the right involved is not fundamental, Noia and Henry require the court to make a further analysis. 107 The Court in Henry stated that "counsel's deliberate choice of strategy would amount to a waiver binding upon petitioner." 108 When a prisoner petitions the federal court with a writ of habeas

102. Comment, supra note 94, at 1269.
104. Comment, supra note 94, at 1269.
105. Although this issue was not examined by the Fifth Circuit cases, with the exception of McWilliams v. Estelle, 378 F. Supp. 1380 (S.D. Tex. 1973), appeal dismissed, 507 F.2d 1278 (5th Cir. 1975), the court's practice of remanding the cases for a determination of counsel's motives is evidence of the court's conclusion that the right is not fundamental.
106. The fact that the courts examined counsel's actions in determining waiver necessitates the conclusion that the right was not considered fundamental, because fundamental rights may be waived only by the accused personally. Hollins v. Beto, 467 F.2d 951 (5th Cir. 1972); Hernandez v. Beto, 443 F.2d 634 (5th Cir. 1971); St. Jules v. Beto, 371 F. Supp. 470 (S.D. Tex.), appeal dismissed, 505 F.2d 656 (5th Cir. 1974).
107. See note 88 and accompanying text supra.
corpus, the district court must conduct an evidentiary hearing to determine whether counsel deliberately and knowingly waived the accused's right. While the attorney could have waived the right through silence at trial, at the evidentiary hearing the court will determine whether counsel knew of the right and deliberately remained silent, or whether the right was waived inadvertently. This hearing can cause difficulty for trial counsel. On the one hand, an admission that the decision was a deliberate, tactical choice would deny the accused relief. On the other hand, admitting inadvertence erodes the counsel's reputation for professional competence.

The Noia-Henry distinction also requires the court to decide whether the right involved was waived during the exigencies of trial or was the result of considered consultations with the accused. If it is a trial-type right, then and only then may counsel's waiver bind the accused. In other situations Noia requires that the accused personally waive the right under the restrictions listed in Johnson. Therefore, in determining the question of waiver of lesser due process rights, the district court must first determine whether the right is trial based. If it is not, Noia still requires the defendant to personally waive the right according to the Johnson standards. If the right is considered a trial-type, counsel's knowing and deliberate waiver can bind the accused. However, the court must decide whether counsel waived the right knowingly and deliberately. If the right was waived by counsel deliberately and with knowledge, the accused is bound by that waiver. However, if the right was inadvertently waived by the

109. The requirement of an evidentiary hearing was mandated in Townsend v. Sain, 372 U.S. 293 (1963). The hearing is required whenever the facts are in conflict about whether counsel's failure to object was deliberate and knowing. Id. at 312-13.

110. In Kuhl v. United States, 370 F.2d 20 (9th Cir. 1966), the court stated that "deliberate and knowing" meant defense counsel's knowledge of the right to present a contention to the court. Id. at 26. If the court finds that counsel's silence was not deliberate and was without knowledge of the right to object, the prisoner's rights were not properly waived and a new trial is ordered. Townsend v. Sain, 372 U.S. 293 (1963).

111. Grano, supra note 78, at 1222.

112. Bruno v. Herold, 408 F.2d 125, 129 (2d Cir. 1969); Nelson v. People, 346 F.2d 73 (9th Cir. 1965). "The decision as to whether to appeal is not part of trial strategy. It is one that is made by the client, not his attorney. There are numerous others . . . that fall in this class." Id. at 81 n.6.

113. See cases listed in note 112 supra.

114. 372 U.S. at 399.


116. See note 82 and accompanying text supra.

117. See text accompanying note 108 supra.
defense counsel, the accused's rights were not properly waived and a new trial is ordered.\textsuperscript{118}

The lower court cases concerning prison garb give inadequate discussion to the question of trial-type rights.\textsuperscript{119} However, the examination of counsel's motives implies that the courts consider the right to be trial associated. In \textit{Garcia v. Beto},\textsuperscript{120} the court examined only counsel's acts in concluding that his knowing and deliberate decision bound the accused.\textsuperscript{121} Thus, the lower courts have generally adhered to the analysis set forth in the \textit{Johnson-Noia-Henry} line.

\textbf{Williams and the Johnson-Noia-Henry Framework}

At first, the Court in \textit{Williams} appears to follow the prior method of analysis. The majority finds that the prison garb issue does not involve "an alleged relinquishment of a fundamental right of the sort at issue in \textit{Johnson v. Zerbst}."\textsuperscript{122} This finding is consistent with the majority of the lower court decisions and follows the pre-existing analytical framework of first determining the fundamentality of the right involved.

When the Court turns to the second step, however, it breaks with the previous cases. The majority, without discussing either \textit{Noia} or \textit{Henry}, states that the right will be waived by counsel if he fails to make a timely objection.\textsuperscript{123} There is no discussion of where this decision fits into the previous method of analysis. In prior cases, the next step had involved a determination of whether the right was trial or non-trial associated. In \textit{Williams}, the Court mentions that the right involves a "strategic and tactical" decision.\textsuperscript{124} This statement could be interpreted to mean the same thing as a trial-

\begin{footnotesize}
\begin{enumerate}
\item[118.] See note 110 and accompanying text \textit{supra}.
\item[119.] The federal court cases did not expressly mention whether the right was trial-based, but the examination of counsel's motives implies that it was.
\item[120.] 452 F.2d 655 (5th Cir. 1971).
\item[121.] \textit{Id.} at 656.
\item[122.] 425 U.S. at 508 n.3.
\item[123.] \textit{Id.} at 512-13.
\item[124.] "[O]nce a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney." \textit{Id.} at 512 (emphasis supplied).
\item[125.] Although the Supreme Court does not expressly state it is changing "trial-type" to "strategic and tactical," such an inference can be drawn from
\end{enumerate}
\end{footnotesize}
However, "strategic and tactical" decisions can also be made outside of the courtroom. If the Court intends to equate "strategic and tactical" with "trial-type" it expands the scope of the Henry exception to Noia. Thus counsel may effectively waive the accused's rights whenever the choice involves a strategic and tactical decision, instead of only during the pressurized atmosphere of trial.

The Court did more than expand the situations in which counsel may waive an accused's rights. It completely changes the method by which the right is waived. Traditionally, district courts would next decide whether counsel had knowingly and deliberately waived the accused's right. In Williams, however, the Court makes no such analysis. Instead, the majority mentions that defense counsel "frequently" presents the defendant in jail clothes in the hope of eliciting sympathy from the jury. Because this tactic is prevalent, the Court believes that attorneys are aware of the possibility that an accused's right to a trial in civilian clothes may be waived. Therefore, whenever counsel fails to make a timely objection to the accused's trial in prison garb, the Court irrebuttably presumes that he was aware of the possible prejudice and failed to object deliberately and knowingly.

This is the first time that the Court has used this method of waiver. The Court finds that the prevalence of a tactic means universal awareness of the opportunity to object. The only reference made to the type of rights which counsel may waive is quoted in note 124 supra. The assumption that the Court intended to widen the scope of trial-type rights is not without support. At least one court, United States v. Warden, 417 F. Supp. 970 (N.D. Mich. 1976), has agreed with this interpretation of Williams:

Although the contours and limits of the Court's holdings [in Williams and Francis v. Henderson, 425 U.S. 536 (1976)] are obscure and their impact on other habeas proceedings is uncertain, we discern that the Court is applying a less stringent standard for determining waiver with respect to essentially strategic and tactical decisions by a counselled accused.

Id. at 973.

See note 86 and accompanying text supra.

See note 125 supra.

Id.

Hollins v. Beto, 467 F.2d 951 (5th Cir. 1972); Goodspeed v. Beto, 460 F.2d 398 (5th Cir. 1972).

425 U.S. at 508.

Id.

Id. at 508-12.

Id. at 508-10. The Court's argument lacks sound logic. Merely because there exists a frequent practice of placing an accused on trial in prison garb, it does not follow that all—or even most—counsel are aware of the accused's right to appear in civilian clothes. Moreover, the logical extension of this argument would mean that the frequent practice of choosing a bench trial would make the right to a jury trial waivable by silence, or the not
awareness, counsel can now waive the accused's rights through silence. This waiver-by-silence is in sharp contrast to the Johnson requirement of a knowing, intelligent, and voluntary waiver. Under Henry, counsel's silence did not necessarily mean a waiver. Instead, the district court examined counsel's actions to determine whether his silence had been the result of a knowing and deliberate decision not to object. The Williams decision eliminated the last step and replaced it with the irrebuttable presumption that silence demonstrates a knowing and deliberate decision to waive the right.

The scope of this decision remains unresolved. The holding may introduce a third group of trial rights, having less importance than fundamental or other rights, which can be waived by counsel's silence. However the decision is more likely a partial reversal of the Johnson-Noia-Henry line, requiring a timely objection to circumstances which might negate the presumption of innocence.

The Effect of Williams

Two aspects of the Williams decision will produce harmful results. First, the Court should have declared the right not to be compelled to appear at jury trial in prison garb to be fundamental. The effect

uncommon practice of appearing pro se would mean that the right to counsel could be similarly relinquished.

134. Id. at 508-12.
135. See note 110 supra.
136. The declaration of a new form of waiver in Williams could signal the establishment of a new category of rights which can be very easily waived. Thus there would exist three basic categories of due process criminal safeguards: fundamental rights which would have to be waived by the accused personally, adhering to the Johnson standards; lesser rights which could be waived by defendant's attorney, but only if they are knowingly and deliberately waived; and Williams-type rights that can be waived by silence.
137. The conclusion that Williams applies to all rights based upon the presumption of innocence has been followed in Wright v. Texas, 533 F.2d 185 (5th Cir. 1976), which was decided after Williams: "We glean from [Williams] that courts should not release state prisoners on a writ of habeas corpus because of jurors seeing a defendant in a situation which might negate the presumption of innocence, unless the defendant has taken the steps at trial which might eliminate any possible prejudice." Id. at 188. This chipping away at the traditional test of waiver can also be seen in Francis v. Henderson, 425 U.S. 536 (1976), which was decided the same day as Williams. In that case the Court held that counsel's failure to object to the composition of the grand jury waived the right to object for the accused as well. See State v. Reid, 559 P.2d 136 (Ariz. 1976).
of not finding the right fundamental will erode the accused's presumption of innocence and will jeopardize his right to a fair trial because of jury prejudice.

There can be no doubt that the presumption of innocence is a fundamental right accorded the accused.\textsuperscript{138} The Williams decision, however, could make this presumption meaningless. The probable effect of the decision will be to require a timely objection to threats to the presumption of innocence.\textsuperscript{139} Although the presumption itself will remain a fundamental right, due process rights based upon the presumption will be diminished by allowing counsel to waive them inadvertently by silence.\textsuperscript{140} Moreover, the Williams decision runs counter to other cases which have implied that presumption-of-innocence-based rights can be waived only knowingly, intelligently, and voluntarily by the accused himself.\textsuperscript{141} The Court in Williams failed to consider these cases.\textsuperscript{142} The effect of the decision will mean that other rights based upon the presumption of innocence will also be subject to waiver by counsel's silence. To protect the presumption's fundamental status, the Court should have declared the right to wear civilian clothes at trial a fundamental right.

In addition, the possibility of prejudice resulting from a trial in prison garb is so strong\textsuperscript{143} that the right should be declared funda-

\textsuperscript{139} Wright v. Texas, 533 F.2d 185, 188 (5th Cir. 1976). In Wright the prisoner petitioned the district court, arguing that his trial in prison garb and handcuffs was prejudicial. The court held that in light of Williams, a failure to object at trial to the garb or handcuffs would constitute a waiver. \textit{See} note 137 supra.
\textsuperscript{140} \textit{See} note 137 supra.
\textsuperscript{142} The dissent does mention the cases in support of its argument that the right should have been declared fundamental. 425 U.S. at 521-22 n.5 (dissenting opinion).
\textsuperscript{143} Numerous studies have shown that an unattractive defendant receives harsher treatment from juries: H. Kalven & H. Zeisel, \textit{The American Jury} (1966) ("It is now clear that the jury is often alienated by the unattractiveness of the defendant . . . . In the cases examined it is apparent that there is a considerable link, in the eyes of the jury, between the unattractiveness of the defendant and his credibility." \textit{Id.} at 385); Efran, \textit{The Effect of Physical Appearance on the Judgment of Guilt}, 8 \textit{J. Research in Personality} 45 (1974) (a non-attractive defendant has a greater certainty of being found guilty and of more severe punishment); Nemeth & Sosis, \textit{A Simulated Jury Study: Characteristics of the Defendant and the Jurors}, 90 \textit{J. Soc. Psych.} 221 (1973) (a non-attractive defendant received harsher sentencing); Willick, \textit{Social Class as a Factor Affecting
mental. The sight of a defendant wearing a prison uniform can produce a subtle and elusive prejudice in the minds of the jurors.\textsuperscript{144} Judicial warnings to the jury would have little effect because, “the influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man.”\textsuperscript{146}

Courts have recognized the dangerous influence of information other than admissible evidence contaminating the impartiality of jurors in pre-trial publicity cases.\textsuperscript{146} When the danger of a prejudiced jury exists, the defendant is granted a change of venue,\textsuperscript{147} additional peremptory challenges of prospective jurors,\textsuperscript{148} or a continuance.\textsuperscript{149} Similarly, the inherent prejudice when an accused is shackled at trial has caused the court to declare the practice uncon-
stitutional, except in cases where the state can show the necessity for extreme security measures.

In situations similar to Williams, when the jury is in danger of being influenced by information other than testimony and argument at trial, the Court has provided the accused with adequate safeguards. In Williams, however, the Court has increased the likelihood of a defendant going to trial in a prison uniform, a practice which can endanger his right to a fair trial. The likelihood of an unknowing waiver is apparent when the timing of the objection is examined. Although Williams is unclear on this point, several cases have held that counsel must make an objection as soon as the uniformed accused appears in the presence of the jury. While a tardy objection should allow the defendant to change his clothes at the soonest opportunity, the damage already done cannot be effectively remedied.

The Williams decision greatly increases the danger of a contaminated jury, because the right involved is so easily waived and the effect of the waiver is so serious. Furthermore, the new method of waiver produces a substantial risk of a jury trial in prison garb. By granting the right fundamental status, the Court would require the trial judge to assure that the accused's waiver was knowingly, intelligently, and voluntarily made, thus eliminating the danger of an unfair trial.

The Court's second error involves the conclusion that attorneys "frequently" present the accused at trial to hopefully garner jury sympathy. This statement is the basis for the Court's ruling that the prison garb right can be waived by counsel's silence. Unfor-

153. Boswell v. Alabama, 537 F.2d 100 (5th Cir. 1976). In this post-Williams decision, the defense counsel objected to the prison garb during the voir dire of the venire. The court then allowed defendant to change from his uniform, but held that there was no ground for a mistrial because counsel had waived the defendant's right until the time of the objection.
155. The trial judge may not have a strict legal duty to inquire into the voluntariness of an involuntary waiver. As a practical matter, however, he does have such a duty, because if the record does not show a waiver which adheres to the Johnson standards, the waiver is assumed to be involuntary. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
156. 425 U.S. at 508.
157. Id. at 508-512.
tunately, there is no evidence that this is a frequent practice. In support of its contention, the Court cited four cases. Upon examination of these decisions, however, only one instance of this practice has actually been reported. The other three cases simply cite the first as an example of this tactic. Therefore, the Court's basis for its departure from the Johnson-Noia-Henry analysis rests on a scant factual basis.

The Court's departure from the traditional test signals the possibility of a dangerous trend in the area of criminal waiver. The Williams holding could entail the complete demise of the Johnson standard. There are now instances in which the accused's rights can be waived through silence by an unknowing counsel. This occurrence certainly conflicts with the proclamation that, "courts indulge every reasonable presumption against waiver" of constitutional rights.

The Williams decision is another example of the Burger Court's erosion of criminal law doctrines declared to be axiomatic by the Warren Court. The Williams decision is particularly significant in view of the Court's limiting the situations in which prisoners' writs of habeas corpus will be granted. The Court in Williams expands the rights which counsel—instead of the accused—may waive, and relaxes the method by which rights are waived by allowing silence to constitute a knowing and deliberate waiver. If a right is deliberately waived or by-passed in the state courts, there may be no grant of habeas corpus by the federal courts.

---

158. Garcia v. Beto, 452 F.2d 655 (5th Cir. 1971), is the only reported case where this tactic was actually used. The other three cases, Anderson v. Watt, 475 F.2d 881 (10th Cir. 1973), Watt v. Page, 452 F.2d 1174 (10th Cir. 1972), and Barber v. State, 477 S.W.2d 868 (Tex. Crim. App. 1972), merely cite Garcia as evidence of the tactic. The dissent commented that the existence of only one case "hardly supports the Court's conclusion that defendants 'frequently' hope to benefit by this 'tactic'." 425 U.S. at 521 n.4 (Brennan, J., dissenting). The majority mentions no case where a defendant free on bail asked to appear at trial in jail clothes. This fact further undermines the contention that this is truly a "frequent" trial tactic.

159. See note 158 supra.

160. Id.


163. See text following note 128 supra.

Two other cases subsequent to *Williams* demonstrate the trend of the Burger Court in restricting the use of habeas corpus in the federal courts. In *Francis v. Henderson*, the Court ruled that a prisoner waived habeas corpus relief challenging the composition of the indicting grand jury, if counsel fails to make a timely objection, absent actual prejudice. The Court in *Stone v. Powell* stated that a prisoner will not be granted habeas corpus on grounds that evidence obtained in an unconstitutional search and seizure was introduced at trial, if the state court has provided for full and fair litigation of the fourth amendment claim.

Like the *Miranda* rule, the *Johnson-Noia* safeguards have been the subject of the Court's gradual limitation of the accused's criminal rights. This bit-by-bit destruction could eventually lead to the complete reversal of landmark cases in criminal law.

**CONCLUSION: A SOLUTION TO THE Williams PROBLEM**

The decision in *Williams* makes it clear that the right to wear civilian clothing at trial will not be granted fundamental status in the near future. However, the harmful results of the decision can be limited in a way other than that of declaring the right fundamental. A practical solution to this issue would be to place the burden on the trial judge to make certain that no accused appears before a jury in prison garb unless he desires such clothing. Putting the burden on the trial judge is not only more convenient, but also follows logically from similar burdens in analogous circumstances involving jury prejudice.

---

167. Several Burger Court opinions have eroded the *Miranda* rule: Oregon v. Mathiason, 97 S. Ct. 711 (1977) (restricting the definition of "custodial interrogations" which triggers the necessity of *Miranda* warnings); Michigan v. Mosley, 423 U.S. 96 (1975) (repeated interrogations allowed without rewarning the suspect); Michigan v. Tucker, 417 U.S. 433 (1974) (conduct which violates the *Miranda* rule but not the accused's right against self-incrimination may be permissible); Harris v. New York, 401 U.S. 222 (1971) (statements made after defective warning may still be used for impeachment purposes).
168. The so-called "revolutionary" criminal procedure decisions of the Warren Court . . . have been largely ignored or circumvented in practice by law enforcement officials and riddled with holes by hostile lower courts. . . . Unlike the Warren Court, the Burger Court has not tried to firm up the much publicized criminal procedure decisions or closed the emerging loopholes or blocked end runs. Indeed, too often the Burger Court has run with the resisting lower courts, cheered them on . . ., or out run them.
The trial judge is charged with the duty of ensuring the defendant's fair trial in cases where pretrial publicity poses the risk of a biased jury: 170 "The courts shall take such steps by rule and regulation that will protect their processes from prejudicial outside influences." 171 The trial judge is charged not only with guarding against swaying the jury with his own statements, but also with ensuring that the jury is shielded from outside influences "that disturb the impartiality and judicial serenity of the trial." 172

A similar duty should also arise in the case of an accused in prison garb, not only because it follows logically from the previous cases concerning jury contamination, but also because it is the most convenient and practical way of handling the problem. 173 Unlike other issues which can be raised or waived at any time during trial, the defendant's prison garb is an obvious situation. 174 The American Bar Association agrees that the trial judge should be given this responsibility, reasoning that this duty arises because the presumption of innocence can easily be undermined by an appearance in prison clothing. 175

The Court in Williams should have required the trial judge, rather than defense counsel, to determine the accused's wishes before going to trial. This determination could have been accomplished by requiring the trial judge to make certain that the right

171. Id. at 363.
173. Trial judges should not allow a uniformed defendant in the court until his motives are examined. In State v. Kinchen, 290 So. 2d 860 (La. 1974), when the judge noticed the defendant in prison garb, "he immediately caused the appellant to be returned to the jail to be dressed in civilian clothes." Id. at 862. People v. Moon, 44 Ohio App. 2d 275, 337 N.E.2d 794 (1975): "[t]here is a long-standing practice at the jail that when a person is brought over for a jury trial he dresses in civilian clothes." When the defendant appeared in prison garb, "the court went out and immediately told the deputy to bring him out." Id. at 276, 337 N.E.2d at 796.
174. See note 173 supra.
175. ABA Standards, Function of the Trial Judge § 5.3 (1972). "The trial judge should not permit a defendant or witness to appear at trial in the distinctive attire of a prisoner."
has not been waived unknowingly.176 That result would eliminate the danger of a uniformed defendant unknowingly prejudicing his right to a fair trial. If the presumption of innocence requires the garb of innocence, the accused should at least be asked whether he wishes to wear his prison garb at trial.

STEVEN D. KNIEG

176. In order to meet the duty outlined by the ABA (see note 175 supra), the trial judge would have to insure that the defendant knowingly, intelligently, and voluntarily waives his right to appear at trial in civilian clothes. This duty could be met just before the accused is to appear in court at the first day of trial.