The Burger Court Opinion Writing Database

Wainwright v. Sykes

433 U.S. 72 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 13, 1977

Re: 75-1578 - Wainwright v. Sykes

Dear Bill:

I join.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: JUN 13 1977

Recirculated: _____

No. 75-1578 - Wainwright v. Sykes

MR. CHIEF JUSTICE BURGER, concurring in the judgment and in the Court's opinion.

I concur fully in the judgment and in the Court's opinion. I write separately to emphasize one point which, to me, seems of critical importance to this case. In my view, the "deliberate bypass" standard enunciated in Fay v. Noia, 372 U.S. 391 (1963), was never designed for, and is inapplicable to, errors -- even of constitutional dimension -- alleged to have been committed during trial.

In Fay v. Noia, the Court applied the "deliberate bypass" standard to a case where the critical procedural decision -- whether to take a criminal appeal -- was entrusted to a convicted defendant. Although Noia, the habeas petitioner, was represented by counsel, he himself had to make the decision whether to appeal or not; the role of the attorney was limited to giving aid and counsel. In giving content to the new deliberate bypass standard, Fay looked to the Court's decision in Johnson v. Zerbst, 304 U.S. 458 (1938), a case where the defendant had been called upon to make the decision whether to request

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 27, 1977

RE: No. 75-1578 Wainwright v. Sykes

Dear Bill:

In due course I will circulate a dissent in the above. My primary message will be that it is, for the most part, unfair and unnecessary for the Court to order habeas courts to deny any and all consideration to constitutional claims that, as here, were never adjudicated at any time solely because of the incompetence, negligence or ignorance of a trial attorney.

Sincerely,

Mr. Justice Rehnquist

cc: The Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 6-8-77

Recirculated: _____

No. 75-1578, WAINWRIGHT v. SYKES

JUSTICE BRENNAN, dissenting.

Over the course of the last decade, the deliberate by-pass standard announced in Fay v. Noia, 372 U.S. 391, 438-439 (1963), has played a central role in efforts by the federal judiciary to accommodate the constitutional rights of the individual with the States' interests in the integrity of their judicial procedural regimes. The Court today decides that this standard should no longer apply with respect to procedural defaults occurring during the trial of a criminal defendant. In its place, the Court adopts the two-part "cause" and "prejudice" test originally developed in Davis v. United States, 411 U.S. 233 (1973) and Francis v. Henderson, 425 U.S. 536 (1976).[1/] As was true with these earlier cases, however, today's decision makes no effort to provide concrete guidance as to the content of those terms. More particularly,

Style changes

1, 2, 4, 16, 17-18

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

6/20/77

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1578

Louie L. Wainwright, Secretary, Florida Department of Offender Rehabilitation, Petitioner, *v.* John Sykes.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1977]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

Over the course of the last decade, the deliberate bypass standard announced in *Fay* v. *Noia*, 372 U. S. 391, 438–439 (1963), has played a central role in efforts by the federal judiciary to accommodate the constitutional rights of the individual with the States' interests in the integrity of their judicial procedural regimes. The Court today decides that this standard should no longer apply with respect to procedural defaults occurring during the trial of a criminal defendant. In its place, the Court adopts the two-part "cause" and "prejudice" test originally developed in *Davis* v. *United States*, 411 U. S. 233 (1973), and *Francis* v. *Henderson*, 425 U. S. 536 (1976). As was true with these earlier cases,[1]

[1] The Court began its retreat from the deliberate bypass standard of *Fay in Davis* v. *United States*, *supra*, where a congressional intent to restrict the bypass formulation with respect to collateral review under 28 U. S. C. § 2255 was found to inhere in Rule 12 (b) (2) of the Federal Rules of Criminal Procedure. By relying upon Congress' purported intent, *Davis* managed to evade any consideration of the justifications and any shortcomings of the bypass test. Subsequently, in *Francis* v. *Henderson*, *supra*, a controlling congressional expression of intent no longer was available, and the Court therefore employed the shibboleth of "considerations of comity and federalism" to justify application of *Davis* to a § 2254 pro-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 8, 1977

75-1578, Wainwright v. Sykes

Dear Bill,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

/

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 31, 1977

Re: No. 75-1578 - Wainwright v. Sykes

Dear Bill:

I shall await the dissent and other writing in the mill.

Sincerely,

Mr. Justice Rehnquist

Copies to Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 6-14-77

Recirculated: _____

No. 75-1578 - Wainwright v. Sykes

MR. JUSTICE WHITE, concurring in the judgment.

Under the Court's cases a state conviction will survive challenge in federal habeas corpus not only when there has been a deliberate bypass within the meaning of Fay v. Noia, 372 U.S. 391 (1963), but also when the alleged constitutional error is harmless beyond reasonable doubt within the intendment of Harrington v. California, 395 U.S. 250 (1969), and similar cases. The petition for habeas corpus of respondent Sykes alleging the violation of his constitutional rights by the admission of certain evidence should be denied if the alleged error is deemed harmless. This would be true even had there been proper objection to the evidence and no procedural default whatsoever by either petitioner or his counsel. Milton v. Wainwright, 407 U.S. 371 (1972).

It is thus of some moment to me that the Court makes its own assessment of the record and itself declares that the evidence of guilt in this case is sufficient to "negate any possibility of actual prejudice resulting to respondent from the admission of his inculpatory statement." Ante, at ___.

V

Pp. 2-3

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 6-20-77

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1578

Louie L. Wainwright, Secretary, Florida Department of Offender Rehabilitation, Petitioner, *v.* John Sykes.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1977]

MR. JUSTICE WHITE, concurring in the judgment.

Under the Court's cases a state conviction will survive challenge in federal habeas corpus not only when there has been a deliberate bypass within the meaning of *Fay* v. *Noia*, 372 U. S. 391 (1963), but also when the alleged constitutional error is harmless beyond reasonable doubt within the intendment of *Harrington* v. *California*, 395 U. S. 250 (1969), and similar cases. The petition for habeas corpus of respondent Sykes alleging the violation of his constitutional rights by the admission of certain evidence should be denied if the alleged error is deemed harmless. This would be true even had there been proper objection to the evidence and no procedural default whatsoever by either petitioner or his counsel. *Milton* v. *Wainwright*, 407 U. S. 371 (1972).

It is thus of some moment to me that the Court makes its own assessment of the record and itself declares that the evidence of guilt in this case is sufficient to "negate any possibility of actual prejudice resulting to respondent from the admission of his inculpatory statement." *Ante*, at —. This appears to be tantamount to a finding of harmless error under the *Harrington* standard and is itself sufficient to foreclose the writ and to warrant reversal of the judgment.

This would seem to obviate consideration of whether, in the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 8, 1977

Re: No. 75-1578 - Wainwright v. Sykes

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

✓

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 14, 1977

Re: No. 75-1578 - Wainwright v. Sykes

Dear Bill:

Please join me.

Sincerely,

HAB.

Mr. Justice Rehnquist

cc: The Conference

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 14, 1977

Re: No. 75-1578 - Wainwright v. Sykes

Dear Bill:

Please join me.

Sincerely,

HAB.

Mr. Justice Rehnquist

cc: The Conference

P.S. [to Justice Rehnquist only]: In the fifth line of the first full paragraph on page 3, would it not be advisable to specify the particular Florida district?

May 31, 1977

No. 75-1578 Wainwright v. Sykes

Dear Bill:

I had an opportunity over the weekend to read your first draft in the above case. It is a fine summary of a field of the law in which I have a special interest, and subject to the comments below, I will be happy to join you.

In my view, Francis v. Henderson, extending the procedural default rule of Davis v. United States to federal habeas review of state cases, is a sound and necessary decision. Davis and Francis involve pretrial procedural default, and this case involves default (failure to object to admission of the confession) during trial.

You seem to think that applying the Davis/Francis rule to default during trial "would mark a significant shift away from the general principles enunciated in Fay." (p. 12). Perhaps this would be a significant shift away from some of the sweeping language (dicta in Fay). But as I made clear in my concurring opinioniin Bustamonte, I have not felt bound by the expansive and unnecessary language in Fay - language that departed dramatically from traditional habeas corpus doctrine. Thus, I donnot view this case as requiring any appreciable additional "shift away" from Fay than the Court's decisions in Davis, Francis and Estelle v. Williams. In short, I see no good reason - certainly no compelling one - for distinguishing in theordinary case between pretrial and trial defaults. If I were writing this case I would construe the Florida rule as you have (consistently with the view of the Florida courts) and, absent any indication of genuine prejudice, I would hold quite simply that Francis controls. It seems to me that for the most part the reasons you state on pages 16 and 17 for applying a procedural default rule apply equally to

pretrial and trial defaults. I also would omit the discussion of stare decisis as I think it unnecessary and weakens the force and long term precedential effect of the opinion.

My one substantive reservation is that the language (especially the rather sweeping language on pages 19 and 20) can be read as affording no room for recognition of plain constitutional errors bearing on guilt or innocence. I am a disciple in this respect of Henry Friendly in thinking that the principal doctrinal error of Fay is that it wholly ignores the relevance of guilt or innocence in a criminal trial. The historic purpose of habeas corpus - and virtually its only reason for existence - is to provide a safeguard against incarceration of innocent persons. I therefore suggest that we recognize a "plain error" exception to the procedural default rule where genuine prejudice bearing upon guilt or innocence is shown. In this case, although the default related to a confession there is no suggestion that it was coerced from an arguably innocent defendant.

As Potter and I had a guarded opportunity (we were riding in the Court car) to discuss this case briefly and inconclusively, I am sending him a copy hereof. I will be happy to talk to you and Potter or either of you. The case is important to the administration of justice, and I hope you will obtain a Court.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: Mr. Justice Stewart

Bill: For purely personal reasons, I hope you will consider citing Stone in the text, possibly at page 7, and my concurrence in Bustamonte. In that opinion I tracked a good deal of the ground which you have covered although not as thoroughly or eloquently, but largely expressing similar views.

✓

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 8, 1977

No. 75-1578 Wainwright v. Sykes

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: MAY 25 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1578

Louie L. Wainwright, Secretary, Florida Department of Offender Rehabilitation, Petitioner, *v.* John Sykes.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1977]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari to consider the availability of federal habeas to review a state convict's federal constitutional claim which the state court's have found to be barred on state procedural grounds. Petitioner Wainwright, on behalf of the State of Florida, here challenges a decision of the United States Court of Appeals for the Fifth Circuit requiring review on the merits of respondent's claim that his own inculpatory statements were improperly admitted against him. The Florida courts have previously refused to consider the merits of the claim because of noncompliance with a state contemporaneous objection rule.

Respondent Sykes was convicted of third-degree murder after a jury trial in the Circuit Court of DeSoto County. He testified at trial that on the evening of January 8, 1972, he commanded his wife to summon the police because he had just shot Willie Gilbert. Other evidence indicated that when the police arrived at respondent's trailer home, they found Gilbert dead of a shotgun wound, lying a few feet from the front porch. Shortly after their arrival, respondent came from across the road and volunteered that he had shot Gilbert, and

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 1, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-1578 - Wainwright v. Sykes

Correspondence, some circulated to the Conference and some directed to me personally, has made it clear to me that if I am to get a Court in this case I will have to make some revisions in the presently circulating draft. The changes I propose to make are roughtly these:

(1) De-emphasize the discussion of stare decisis in the text, while continuing to recognize that if we allow state contemporaneous objection rules to prevail here we are moving Davis and Francis, which dealt with the selection of grand juries, forward to the trial stage, where evidence bearing on guilt or innocence is received.

(2) Omit the portion of the present draft dealing specifically with lawyers' mistakes, and leave for future cases the formulation of meaning for the phrases "cause" and "actual prejudice" and "miscarriage of justice", just as was done in Davis and Francis. Here, as the present draft indicates, there was neither pleaded nor proved anything that would amount to "cause" under the most generous definition of that word.

(3) I do not propose to sharply alter the analysis so as to focus principally on the weakness of the constitutional claim on its merits, because I think that would result in a decision which really served no purpose. The petition for certiorari, the briefs and arguments in this Court, and most of the Conference discussion, focused on the federal habeas corpus aspect of

the problem. I would not, however, rule out any change in emphasis along these lines.

If any who then or now will vote to reverse the Court of Appeals in this case want to put in their two cents' worth and have not yet done so, now is the time. I hope to circulate a second draft around the beginning of next week.

Sincerely,

WM

✓

Pp 1, 3, 7, 12-15, 7-19

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr Justice Blackmun
Mr. Justice Powell
Mr Justice Stevens

From: Mr Justice Rehnquist

Circulated: _____

Recirculated: JUN 7 1977

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1578

Louie L. Wainwright, Secretary, Florida Department of Offender Rehabilitation, Petitioner, *v.* John Sykes.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1977]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari to consider the availability of federal habeas to review a state convict's claim that testimony was admitted at his trial in violation of his *Miranda* rights, a claim which the Florida courts have previously refused to consider on the merits because of noncompliance with a state contemporaneous objection rule. Petitioner Wainwright, on behalf of the State of Florida, here challenges a decision of the Court of Appeals for the Fifth Circuit ordering a hearing in state court on the merits of respondent's contention.

Respondent Sykes was convicted of third-degree murder after a jury trial in the Circuit Court of DeSoto County. He testified at trial that on the evening of January 8, 1972, he commanded his wife to summon the police because he had just shot Willie Gilbert. Other evidence indicated that when the police arrived at respondent's trailer home, they found Gilbert dead of a shotgun wound, lying a few feet from the front porch. Shortly after their arrival, respondent came from across the road and volunteered that he had shot Gilbert, and a few minutes later respondent's wife approached the police

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 14, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-1578 Wainwright v. Sykes

I am sending to the printer this morning the following minor modifications of the opinion in this case:

Page 2, line 14: Insert "by his counsel" after "challenged." Change "he" to "respondent."

Page 3, line 1: Insert "made to police" after "statements."

Page 3, line 8: Insert "Middle" before "District."

Page 14, n.11, line 3: Insert "voluntariness or" after "actual."

Page 17, line 9 from bottom: Change "frailty" to "fallibility."

Sincerely,

WER

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 17, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-1578 Wainwright v. Sykes

I am making one additional change in the opinion in this case. On page 18, lines 6 and 7 from the botton, I am changing "that standard" to "those terms," and "it has not been met" to "they do not exist."

Sincerely,

STYLISTIC CHANGES THROUGHOUT

Pp 2, 3, 4, 14, 17

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: JUN 17 1977

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1578

Louie L. Wainwright, Secretary, Florida Department of Offender Rehabilitation, Petitioner, *v.* John Sykes. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1977]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari to consider the availability of federal habeas to review a state convict's claim that testimony was admitted at his trial in violation of his *Miranda* rights, a claim which the Florida courts have previously refused to consider on the merits because of noncompliance with a state contemporaneous objection rule. Petitioner Wainwright, on behalf of the State of Florida, here challenges a decision of the Court of Appeals for the Fifth Circuit ordering a hearing in state court on the merits of respondent's contention.

Respondent Sykes was convicted of third-degree murder after a jury trial in the Circuit Court of DeSoto County. He testified at trial that on the evening of January 8, 1972, he commanded his wife to summon the police because he had just shot Willie Gilbert. Other evidence indicated that when the police arrived at respondent's trailer home, they found Gilbert dead of a shotgun wound, lying a few feet from the front porch. Shortly after their arrival, respondent came from across the road and volunteered that he had shot Gilbert, and a few minutes later respondent's wife approached the police

P.18

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: JUN 30 1977

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1578

Louie L. Wainwright, Secretary, Florida Department of Offender Rehabilitation, Petitioner, *v.* John Sykes.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1977]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari to consider the availability of federal habeas to review a state convict's claim that testimony was admitted at his trial in violation of his *Miranda* rights, a claim which the Florida courts have previously refused to consider on the merits because of noncompliance with a state contemporaneous objection rule. Petitioner Wainwright, on behalf of the State of Florida, here challenges a decision of the Court of Appeals for the Fifth Circuit ordering a hearing in state court on the merits of respondent's contention.

Respondent Sykes was convicted of third-degree murder after a jury trial in the Circuit Court of DeSoto County. He testified at trial that on the evening of January 8, 1972, he commanded his wife to summon the police because he had just shot Willie Gilbert. Other evidence indicated that when the police arrived at respondent's trailer home, they found Gilbert dead of a shotgun wound, lying a few feet from the front porch. Shortly after their arrival, respondent came from across the road and volunteered that he had shot Gilbert, and a few minutes later respondent's wife approached the police

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 21, 1977

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 75-1578 - Wainwright v. Sykes

1. In Garrison v. Resendez, No. 76-301, the respondent was sentenced to life imprisonment after conviction for murdering a prison guard. He wrote his attorney a letter saying that he did not want to appeal, but said that he might seek post-conviction relief at a later date. In a subsequent federal habeas action, respondent contended that his trial had been unfair in several specific respects. The District Court dismissed, saying that respondent had deliberately by-passed his claims by deciding not to appeal. A divided CA 4 panel reversed on the ground that the decision not to appeal had been motivated by fear of the death penalty on re-trial, which Fay v. Noia had held not to constitute a deliberate waiver. It remanded for consideration on the merits.

Wainwright explicitly reserves the question of the continuing applicability of the Fay test where a defendant has surrendered right to any appellate review. Slip op., at 15, n.12. Until we have more idea of how the lower federal courts will react to this reservation, I would be inclined not to get into it. Because the District Court has yet to rule on the merits of the underlying contentions, I will vote to deny.

2. In Estelle v. McDonald, No. 76-724, a state prisoner convicted of sodomy argued in a federal habeas action that the trial judge had improperly allowed the sentencing jury to consider an uncounseled 1960 conviction for cattle theft, along with previous convictions for sodomy and misdemeanor

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 27, 1977

RE: 75-1578 Wainwright v. Sykes

Dear Bill:

Although I agree with the result, I am afraid that I will not be able to join your opinion. My primary objection is that I believe your opinion commits the same sin as Fay v. Noia; its dicta is apparently intended to decide a great many cases which may differ significantly from the one before the Court.

More specifically, I do not agree with your discussion of stare decisis. A refusal to follow all of the dicta in Fay v. Noia is consistent with the doctrine of stare decisis; your suggestion that past decisions concerning habeas corpus may be freely disregarded is not.

I believe our decision in this case should not unnecessarily assume that all mistakes by trial counsel are equally preclusive, or that all constitutional errors are equally waivable. In this case, I believe that there may well have been a reasonable tactical basis for trial counsel's failure to raise this rather tenuous constitutional claim at trial; and the constitutional error, if any, did not affect the integrity of the truth-finding process or involve any violation of fundamental standards of decency. In short, as I indicated at Conference, my reasons for reversal are those that I expressed in my opinion in Allum v. Toomey, 484 F.2d 740, the case which created the conflict we granted cert. to resolve.

Respectfully,

John

Mr. Justice Rehnquist

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

75-1578 Wainwright v. Sykes

From: Mr. Justice Stevens

Circulated: 6/13/77

Recirculated: _____

MR. JUSTICE STEVENS, concurring.

Although the Court's decision today may be read as a significant departure from the "deliberate bypass" standard announced in Fay v. Noia, 372 U.S. 391, I am persuaded that the holding is consistent with the way other federal courts have actually been applying Fay.[1/] The notion that a client must always consent to a tactical decision not to assert a constitutional objection to a proffer of evidence has always seemed unrealistic to me.[2/] Conversely, if the constitutional issue is sufficiently grave, even an express waiver by the defendant himself may sometimes be excused.[3/] Matters such

1/ The suggestion in Fay that the decision must be made personally by the defendant has not fared well, see United States ex rel. Cruz v. LaVallee, 448 F.2d 671, 679 (CA2 1971); United States ex rel. Green v. Rundle, 452 F.2d 232, 236 (CA3 1971); although a decision by counsel may not be binding if made over the objection of the defendant, Paine v. McCarthy, 527 F.2d 173, 175-176 (CA9 1975). Courts have generally found a "deliberate by-pass" where counsel could reasonably have decided not to object, United States ex rel. Terry v. Henderson, 462 F.2d 1125, 1129 (CA2 1972); Whitney v. United States, 513 F.2d 326, 32[illegible] (CA8 1974); United States ex rel. Broaddus v. Rundle, 429 F.2d 791, 795 (CA3 1970); but they have not found a by-pass when they consider the right "deeply embedded" in the Constitution, Frazier v. Roberts, 441 F.2d 1222, 12224 (CA5 1971), or when the procedural default was not substantial, Minor v. Black, 527 F.2d 1, 5 n.3 (CA6 1975); Black v. Beto, 382 F.2d 758, 760 (CA5 1967). Sometimes, even a deliberate choice of trial counsel has been held not to be a "deliberate bypass" when the result would be unjust, Moreno v. Beto, 415 F.2d 154, 157 (CA5 1969). In short, the actual disposition of these cases seems to rest on the court's perception of the totality of the circumstances, rather than on mechanical application of the "deliberate bypass" test.

2/"If counsel is to have the responsibility for conducting a contested criminal trial, quite obviously he must have the authority to make important tactical decisions promptly as a trial progresses. The very reasons why counsel's participation is of such critical importance in assuring a fair trial for the defendant, see Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

1st DRAFT Recirculated: JUN 20 1977

SUPREME COURT OF THE UNITED STATES

No. 75–1578

Louie L. Wainwright, Secretary, Florida Department of Offender Rehabilitation, Petitioner, *v.* John Sykes.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1977]

MR. JUSTICE STEVENS, concurring.

Although the Court's decision today may be read as a significant departure from the "deliberate bypass" standard announced in *Fay* v. *Noia*, 372 U. S. 391, I am persuaded that the holding is consistent with the way other federal courts have actually been applying *Fay*.[1] The notion that a client

[1] The suggestion in *Fay* that the decision must be made personally by the defendant has not fared well, see *United States ex rel. Cruz* v. *LaValle*, 448 F. 2d 671, 679 (CA2 1971); *United States ex rel. Green* v. *Rundle*, 452 F. 2d 232, 236 (CA3 1971); although a decision by counsel may not be binding if made over the objection of the defendant, *Paine* v. *McCarthy*, 527 F. 2d 173, 175–176 (CA9 1975). Courts have generally found a "deliberate by-pass" where counsel could reasonably have decided not to object, *United States ex rel. Terry* v. *Henderson*, 462 F. 2d 1125, 1129 (CA2 1972); *Whitney* v. *United States*, 513 F. 2d 326, 329 (CA8 1974); *United States ex rel. Broaddus* v. *Rundle*, 429 F. 2d 791, 795 (CA3 1970); but they have not found a bypass when they consider the right "deeply embedded" in the Constitution, *Frazier* v. *Roberts*, 441 F. 2d 1222, 1224 (CA5 1971), or when the procedural default was not substantial, *Minor* v. *Black*, 527 F. 2d 1, 5 n. 3 (CA6 1975), *Black* v. *Beto*, 382 F. 758, 760 (CA5 1967). Sometimes, even a deliberate choice of trial counsel has been held not to be a "deliberate bypass" when the result would be unjust, *Moreno* v. *Beto*, 415 F. 2d 154, 157 (CA5 1969). In short, the actual disposition of these cases seems to rest on the court's perception of the totality of the circumstances, rather than on mechanical application of the "dliberate bypass" test.