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LEFKOWITZ V. NEWSOME: THE SUPREME COURT TAKES ANOTHER LOOK AT GUILTY PLEAS

The attention given to criminal law by the Supreme Court in recent years has often involved guilty pleas and federal habeas corpus relief. Although the federal courts initially issued writs of *habeas corpus ad subjiciendum*[1] only if the trial court lacked jurisdiction,[2] the scope of inquiry in habeas corpus proceedings has long exceeded merely jurisdictional questions.[3] The writ is now granted to any person who is in custody[4] in violation of his constitutional rights,[5] unless

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[1] There are other forms of habeas corpus, *see generally* 3 W. BLACKSTONE, COMMENTARIES *129-31, but only *ad subjiciendum* concerns the legality of the detention of the petitioner. For a history of state habeas corpus, see Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243 (1965). Federal habeas corpus was not made available to state prisoners until 1867. Act of February 5, 1867, ch. 28, § 1, 14 Stat. 385.

[2] *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830). *See also Ex parte* Kearney, 20 U.S. (7 Wheat.) 38 (1822).

[3] The history of the expansion of habeas corpus relief has been variously interpreted. In Fay v. Noia, 372 U.S. 391, 404 (1963), Mr. Justice Brennan, speaking for the Court, noted: "Nor is it true that at common law habeas corpus was available only to inquire into the jurisdiction, in a narrow sense, of the committing court." He urged that habeas corpus was "available to remedy any kind of governmental restraint contrary to fundamental law." *Id.* at 405. Justice Brennan also stated that the decision in *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830), may have turned on a narrow view of the Court's original jurisdiction, rather than a restrictive view of the availability of the writ, and that, in any event, *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873), marked a return to the broad availability of habeas corpus to redress restraint contrary to fundamental law. 372 U.S. at 407-08. Mr. Justice Harlan, however, stated in *Fay* that prior to 1915 the federal courts examined " *only* the jurisdiction of the sentencing tribunal." 372 U.S. at 450 (Harlan, J., dissenting) (emphasis in original). Moreover, from 1915 until the decision of Brown v. Allen, 344 U.S. 443 (1953), the federal courts would examine only whether the petitioner had been given a fair opportunity to litigate his claim in the state courts, in addition to the traditional jurisdictional inquiry. *Id.* Mr. Justice Powell, concurring in Schneckloth v. Bustamonte, 412 U.S. 218, 252 (1973), referred to the Court's historical interpretation in *Fay* as "revisionist." He stated that "recent scholarship has cast grave doubt on *Fay's* version of the writ's historic function." *Id.* at 253.

[4] 28 U.S.C. § 2254(a) (1970) requires that a person be "in custody pursuant to the judgment of a State court" before a federal court may entertain a petition for a writ of habeas corpus. The custody requirement is liberally construed. *See, e.g.*, Hensley v. Municipal Court, 411 U.S. 345 (1973), where the Court held that releasing a prisoner on his own recognizance prior to sentencing was sufficient "custody."

[5] 28 U.S.C. § 2241(c)(3) (1970) states that the writ will not be granted unless the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." The requirements for federal habeas corpus are set out in 28 U.S.C.

he has deliberately bypassed the remedial procedures available in the state courts.[6] Since the writ has evolved into a "roving commission of inquiry"[7] into possible violations of individual rights, the Court often has examined the constitutional aspects of guilty pleas in the context of federal habeas corpus relief.

By pleading guilty, an accused waives his privilege against self-incrimination[8] and his rights to trial and to confront witnesses;[9] a guilty plea, therefore, like all waivers of constitutional rights, must be voluntary and intelligent.[10] After the accused pleads guilty, he generally may attack only the voluntary and intelligent character of his plea.[11] Thus, subsequent constitutional challenge to proceedings antecedent to the plea is normally barred.[12] In *Lefkowitz v. Newsome*,[13] however, the Supreme Court announced an exception to the general rule that a valid guilty plea bars federal habeas corpus relief: when a defendant, pursuant to state law, pleads guilty without waiving his right to state appellate review of unsuccessful pretrial

§§ 2241-2255 (1970). To invoke federal habeas corpus jurisdiction, a state prisoner must be in custody, 28 U.S.C. § 2241(c)(3) (1970); he must have exhausted the remedies available to him in the state courts, 28 U.S.C. § 2254(b) (1970); and he must allege that his custody is in violation of the Constitution or laws or treaties of the United States, 28 U.S.C. § 2254(a) (1970). The prisoner is required to exhaust only those remedies currently available to him in the state courts. Fay v. Noia, 372 U.S. 391, 435 (1963).

[6] If the petitioner has deliberately bypassed state remedies the federal district judge, in his discretion, may deny relief. Fay v. Noia, 372 U.S. 391, 438 (1963). Denial of relief under these circumstances is not founded upon any constitutional or statutory requirement, but is an exercise of "comity" between federal and state courts. *Id.* at 418-19, 436-37.

[7] *Id.* at 469 (Harlan, J., dissenting).

[8] Brady v. United States, 397 U.S. 742, 748 (1970).

[9] *Id.*; Boykin v. Alabama, 395 U.S. 238, 243 (1969).

[10] Brady v. United States, 397 U.S. 742, 748 (1970). The essence of a plea of guilty, and the "foundation for entering judgment against the defendant[,] is the defendant's admission in open court that he committed the acts charged in the indictment." *Id.* Although the defendant's admission is "central to the plea and the foundation for entering judgment," *id.*, the Supreme Court in North Carolina v. Alford, 400 U.S. 25, 37 (1970), held that "while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter elememt is not a constitutional requisite to the imposition of crimimal penalty." Much of the importance of a guilty plea stems from the fact that "it is itself a conviction," and once it is accepted "the court has nothing to do but give judgment and sentence." Kercheval v. United States, 274 U.S. 220, 223 (1927).

[11] Tollett v. Henderson, 411 U.S. 258, 267 (1973).

[12] *Id.*

[13] 420 U.S. 283 (1975).

motions to suppress, he also preserves his right to review of these issues through federal habeas corpus.

Newsome was arrested in the lobby of a New York City apartment house for loitering.[14] When a search incident to his arrest yielded a small quantity of heroin and several hypodermic instruments, Newsome was also charged with possession of a dangerous drug[15] and criminal possession of a hypodermic instrument.[16] He was subsequently convicted of loitering. At the pretrial suppression hearing on the drug charge, Newsome argued that the arresting officer lacked probable cause to make the loitering arrest, that there was insufficient evidence to support the loitering conviction, and that the loitering statute was unconstitutional and could support neither the loitering conviction nor the search incident to his arrest.[17] The New York City Criminal Court, however, denied the motion to suppress. Newsome then withdrew his plea of not guilty, pleaded guilty to the lesser charge of attempted possession of dangerous drugs,[18] and was sentenced to ninety days confinement.[19]

In accordance with New York procedure which permits suspects to plead guilty and still preserve claims of unauthorized search and seizure for appellate review,[20] Newsome appealed the denial of his motion to suppress. The Appellate Term of the New York Supreme Court reversed the loitering conviction but sustained the drug conviction.[21] Leave to appeal to the New York Court of Appeals was denied,

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[14] *Id.* at 284.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* Imposition of Newsome's sentence was stayed pending appeal; he was never imprisoned under the sentence. United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166, 1169 (2d Cir. 1974).

[20] N.Y. CODE CRIM. PROC. § 813-c, *now recodified as* N.Y. CRIM. PRO. LAW §§ 710.20(1), 710.70(2) (McKinney 1971). Similarly, appeals from denials of motions to suppress allegedly coerced confessions can be made under N.Y. CRIM. PRO. LAW §§ 710.20(3), 710.70(2) (McKinney 1971), and appeals from denials of motions to suppress identifications claimed to be improper may be made under N.Y. CRIM. PRO. LAW §§ 710.20(5), 710.70(2) (McKinney 1971). California and Wisconsin also permit appeal after a guilty plea. CAL. PENAL CODE § 1538.5(m) (West 1970); WIS. STAT. ANN. § 971.31(10) (1971).

[21] 420 U.S. at 285. The Appellate Term upheld the drug conviction on the ground that since there was probable cause to arrest Newsome, the drugs and paraphernalia were the fruits of a search incident to a lawful arrest. *Id.* The Appellate Term disposed of Newsome's appeal by issuing a summary order which did not address the constitutional claims. United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166, 1169 n.3 (2d Cir. 1974).

as was a petition for a writ of certiorari.[22] Newsome then sought habeas corpus relief in federal court, arguing that the New York loitering law was unconstitutional, that his arrest was therefore illegal, and that the evidence seized during the search incident to his arrest should have been suppressed.[23] After an initial dismissal, the district court issued the writ.[24] When the Second Circuit affirmed,[25] the Attorney General of New York petitioned for a writ of certiorari. The Supreme Court granted the petition,[26] limited to the question of whether Newsome's guilty plea waived federal habeas corpus relief notwithstanding the availability of state appellate review.[27] In a five-to-four decision, the Court held that under these circumstances a plea of guilty would not foreclose federal habeas corpus relief.

The rule that a voluntary and intelligent guilty plea generally bars later habeas corpus attack on pre-plea proceedings was developed in the "guilty plea trilogy" of *Brady v. United States*,[28] *McMann v.*

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[22] Newsome v. New York, 405 U.S. 908 (1972).

[23] 420 U.S. at 286.

[24] The district court initially dismissed the writ because Newsome was not in custody. *Id.* at 286 n.2. Newsome appealed to the Court of Appeals for the Second Circuit which remanded the cause for a decision on the merits in view of the Supreme Court's decision in Hensley v. Municipal Court, 411 U.S. 345 (1973). *See* note 4 *supra*. On remand, after the New York Court of Appeals had declared the loitering law unconstitutional in People v. Berck, 32 N.Y.2d 567, 300 N.E.2d 411, 347 N.Y.S.2d 33, *cert. denied*, 414 U.S. 1093 (1973), the district court issued the writ.

[25] United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166 (2d Cir. 1974).

[26] Lefkowitz v. Newsome, 417 U.S. 967 (1974). The Court granted the petition because of a conflict between decisions of the Court of Appeals for the Ninth Circuit and the Second Circuit. In McMann v. Richardson, 397 U.S. 759, 770 n.13 (1970), the Supreme Court expressly reserved decision on the question of whether federal habeas corpus review was foreclosed when a state permits an appeal from a conviction based on a guilty plea. In Mann v. Smith, 488 F.2d 245 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974), the Ninth Circuit held that the Supreme Court's decision in Tollett v. Henderson, 411 U.S. 258 (1973), overruled the reservation in *McMann*. In United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166 (2d Cir. 1974), the Second Circuit noted the decision in *Mann v. Smith*, but did not reach the same result. Since the Supreme Court decision in *Tollett* did not specifically overrule the reservation set out in *McMann*, the Second Circuit did not "undertake the hazardous task of elevating silence to the level of *stare decisis*." 492 F.2d at 1171 (emphasis in original). The Second Circuit has held in other cases that federal habeas corpus review is not foreclosed under the New York guilty plea system. United States *ex rel.* Daneff v. Henderson, 501 F.2d 1180 (2d Cir. 1974); United States *ex rel.* Stephen J.B. v. Shelly, 430 F.2d 215 (2d Cir. 1970); United States *ex rel.* Molloy v. Follette, 391 F.2d 231 (2d Cir.), *cert. denied*, 391 U.S. 917 (1968); United States *ex rel.* Rogers v. Warden, 381 F.2d 209 (2d Cir. 1967).

[27] 420 U.S. at 287 n.4.

[28] 397 U.S. 742 (1970). In *Brady*, the defendant, while represented by counsel,

Richardson,[29] and *Parker v. North Carolina*,[30] and refined in *Tollett v. Henderson*.[31] Prior to these decisions, the Court had viewed challenges to convictions based on guilty pleas as questioning only the voluntariness and intelligence of the pleas;[32] the challenges had not been based on constitutional infirmities which had preceded the guilty plea. The *Brady* trilogy and *Tollett*, however, presented the

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changed his plea from not guilty of kidnapping to guilty when a co-defendant pleaded guilty and became available to testify against him. Brady later petitioned for federal collateral relief, claiming that his plea was involuntary, and asserting as one of the grounds for his petition that the possibility of receiving the death penalty, had he gone to trial, coerced his plea. Congress deleted the death penalty provision of the kidnapping statute after it was declared unconstitutional in United States v. Jackson, 390 U.S. 570 (1968). Act of Oct. 24, 1972, Pub. L. No. 92-539, Title II, § 1201, 86 Stat. 1072, *amending* 18 U.S.C. § 1201(a) (1970) (codified at 18 U.S.C. § 1201(a) (Supp. III, 1973)).

[29] 397 U.S. 759 (1970). In *McMann*, three convicts sought on federal habeas corpus to attack their convictions on the ground that coerced confessions caused their guilty pleas. The standards which New York used to determine the voluntariness of the confessions in *McMann* were declared unconstitutional in Jackson v. Denno, 378 U.S. 368 (1964).

[30] 397 U.S. 790 (1970). In *Parker*, the petitioner, after pleading guilty to a charge of first degree burglary, sought state collateral relief claiming that his plea was the product of a coerced confession, that the indictment to which he pleaded guilty was invalid because of unconstitutional racial exclusion in the selection of the grand jury, and that his plea was involuntary because North Carolina statutes then in effect allowed defendants to plead guilty and thus avoid the possibility of capital punishment on conviction after trial. *Parker* was the only one of the guilty plea trilogy which did not involve federal habeas corpus relief.

[31] 411 U.S. 258 (1973). In *Tollett*, the defendant asserted that his murder conviction based on a guilty plea was invalid because of unconstitutional racial exclusion in the selection of the grand jury. The Court rejected the defendant's argument, and held that even if a criminal defendant could prove that the indictment to which he pleaded guilty was returned by an unconstitutionally selected grand jury, and even if at the time of his plea neither the defendant nor his attorney knew of this failing, the defendant would not be entitled to federal collateral relief. *Id.* at 266. Furthermore, the Court in *Tollett* expressly stated that the finality of a guilty plea was not founded on the procedural concept of waiver. *Id.* at 267. The Court did not, however, further develop what other concepts were involved.

[32] "The requirement that a plea of guilty must be intelligent and voluntary to be valid has long been recognized." Brady v. United States, 397 U.S. 742, 747 n.4 (1970). These standards evolved in a series of cases from Kercheval v. United States, 274 U.S. 220, 223 (1927), where the Court premised the importance of the voluntary and intelligent requirements on the fact that a guilty plea "is itself a conviction," to Boykin v. Alabama, 395 U.S. 238, 242 (1969), where the Court developed the requirement that the record must show that a valid waiver of the sixth amendment right to trial by jury occurred. *See* Brady v. United States, *supra* at 748 nn. 5 & 6 and cases cited therein.

Court with claims that concerned antecedent constitutional deprivation.[33]

In all four cases, the Court refused to address the merits of the constitutional claim and sustained the convictions because the guilty pleas were found to have been both voluntary[34] and intelligent.[35] Since a guilty plea is "a break in the chain of events which has preceded it in the criminal process," once a defendant has pleaded guilty "he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."[36] Therefore, a defendant who has pleaded guilty normally may attack his conviction only by proving that his plea was involuntary or unintelligent.[37] Claims of antecedent constitutional deprivation may be used only to challenge the intelligence of the plea by evaluating the advice rendered by the defendant's counsel.[38]

The Supreme Court's refusal to grant habeas corpus relief in *Tollett* and the *Brady* trilogy could have provided a sufficient doctrinal basis to foreclose the availability of such relief to the defendant in *Lefkowitz*.[39] The Court, however, rejected contentions that the

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[33] *See* notes 28-31 *supra*.

[34] The voluntariness of a guilty plea is determined from "all of the relevant circumstances surrounding it." Brady v. United States, 397 U.S. 742, 749 (1970). Thus, the possibility of a more severe sentence upon conviction following a trial is but one factor in examining the validity of the guilty plea. *Id.* Even if the possibility of a heavier sentence is the "but for" cause of the plea, the guilty plea still will not necessarily be involuntary. *Id.* at 750.

[35] The touchstone for determining the intelligence of a plea is the advice of counsel. If a defendant's guilty plea is based on advice which is "within the range of competence demanded of attorneys in criminal cases," the plea is intelligent. McMann v. Richardson, 397 U.S. 759, 771 (1970). The conviction may not be challenged on the ground that counsel misjudged the admissibility of incriminating evidence by failing to foresee future court decisions that, if in effect at the time of the guilty plea, would have led to its withdrawal. *Id.* at 770-71. The defendant's counsel need only provide advice based upon the law existing at the time of the plea. Brady v. United States, 397 U.S. 742, 757 (1970). Once a defendant pleads guilty, therefore, "[h]e may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards ['demanded of attorneys in criminal cases']." Tollett v. Henderson, 411 U.S. 258, 267 (1973).

[36] Tollett v. Henderson, 411 U.S. 258, 267 (1973).

[37] *Id.*

[38] *Id.*

[39] Under the *Tollett-Brady* trilogy decisions, federal collateral relief is unavailable to a defendant who has voluntarily and intelligently pleaded guilty. Newsome never claimed that his plea was entered involuntarily. Brief for Respondent at 13 n.5, Lefkowitz v. Newsome, 420 U.S. 283 (1975); neither did Newsome claim that his plea was unintelligent. His guilty plea "plainly qualifies" as voluntary and intelligent. 420 U.S. at 299 (White, J., dissenting).

Brady trilogy and *Tollett* were controlling. Observing that a question analogous to that under consideration in *Lefkowitz* had been expressly left open in *McMann*,[40] the Court noted that due to the special nature of a guilty plea under New York procedure, there was an exception to the general rule that a voluntary and intelligent guilty plea bars federal habeas corpus relief.[41] Because in most states appellate review is available only to defendants who proceed to trial, the *Lefkowitz* majority reasoned that "[a] defendant who chooses to plead guilty rather than go to trial in effect deliberately refuses to present his federal claims to the state court in the first instance."[52] In addition, the Court found that when a "defendant chooses to bypass the orderly procedure for litigating his constitutional claims . . . the State acquires a legitimate expectation of finality in the conviction thereby obtained."[43] This expectation of finality, observed the Court, is the "break in the chain of events" to which the Court referred in *Tollett*.[44]

The *Lefkowitz* majority then compared the notions of bypass and finality, which normally accompany a guilty plea, with the special circumstances that accompany a plea made under the New York procedure. By permitting a defendant to plead guilty and still appeal the denial of a pretrial motion, New York asserts no right to the finality of a conviction based on a plea of guilty.[45] The Court determined that since a defendant may appeal his constitutional claims, "[a]s to those claims, therefore, there is no 'break' at all in the usual state procedure for adjudicating constitutional issues."[46] Thus, the Court concluded that a guilty plea under New York's procedure did not have the characteristics of bypass and finality which usually accrue from a guilty plea.[47]

If Newsome's plea were unintelligent or involuntary, the Court could easily have decided the case on this narrow ground alone, rather than exploring other reasons for granting him relief.

[40] The Court in *McMann v. Richardson* stated, "We do not here consider whether a conviction, based on a plea of guilty entered in a State permitting the defendant pleading guilty to challenge on appeal the admissibility of his confession . . . would be open to attack in federal habeas corpus proceedings on the grounds that the confession was coerced." 397 U.S. at 770 n.13.

[41] 420 U.S. at 288.

[42] *Id.* at 289.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

The Supreme Court also based its decision in *Lefkowitz* on the expectations of the state and defendant under the New York guilty plea system, and the supposed effects which would follow from a denial of federal habeas corpus relief. Since the Court of Appeals for the Second Circuit had held that federal collateral relief was not precluded by a guilty plea in New York,[48] the *Lefkowitz* majority presumed that denying Newsome relief "would make New York's law a trap for the unwary."[49] The Court noted that New York's expectations also supported the availability of habeas corpus relief. Because defendants were permitted under state procedure to plead guilty, yet still appeal the denial of pretrial motions, the Court found that New York's expectations differed materially from those of states where a guilty plea forecloses further litigation on the merits.[50] In the majority's view, Newsome's guilty plea was merely a procedure through which the constitutional issues may be litigated without the burden of trial.[51] The plea was entered with the expectation that it would "not foreclose judicial review of the merits of the alleged constitutional violations."[52] This judicial review, the Court stated, necessarily included federal habeas corpus relief.[53] Furthermore, the Court was concerned that a denial of habeas relief to Newsome "would eviscerate New York's commendable efforts to relieve the problem of congested criminal trial calendars."[54] "Because of the entirely different expectations surrounding Newsome's plea and the completely different legal consequences flowing from it," the Court held that the *Brady* trilogy and *Tollett* decisions were "simply inapposite."[55] Accordingly, the Court focused on Newsome's and New York's expectations and not on the voluntariness or intelligence of his guilty plea.

The Court's reliance on the expectations present in *Lefkowitz*, however, is questionable.[56] Newsome's personal expectations would

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[48] Newsome pleaded guilty on May 7, 1970. At that time the Second Circuit had twice held that federal habeas corpus relief was available under the New York guilty plea procedure. *See* note 26 *supra*.

[49] 420 U.S. at 293 (footnote omitted).

[50] *Id.* at 289.

[51] *Id.* at 289-90.

[52] *Id.* at 290 (footnote omitted).

[53] *Id.* at 290 n.6. *See* notes 85 & 88 *infra*.

[54] 420 U.S. at 293.

[55] *Id.* at 291.

[56] Why either the defendant's or New York's expectations should be relevant to determining if the defendant's custody is "in violation of the Constitution," 28 U.S.C. § 2241(c)(3) (1970), is not readily apparent, unless frustrating those expectations somehow would violate the fourteenth amendment. This potentiality, however, was not discussed by the Court.

seem to have been satisfied by the effects of his guilty plea. Newsome received state appellate review of his pretrial motion to suppress notwithstanding his plea. He also may have elected to plead guilty to a lesser offense in order to avoid the possibility of a longer sentence after trial,[57] and by pleading guilty he avoided the expense and difficulty of trial.[58] Furthermore, Newsome never claimed that he pleaded guilty in reliance on the availability of federal habeas corpus under the New York procedure.[59] Newsome's expectations thus were substantially fulfilled.

Rather than Newsome's subjective expectations, however, the Court may have intended to focus upon the expectations that Newsome as a defendant might reasonably have as a result of the operation of the New York statute. While such an approach avoids the difficulties inherent in evaluating Newsome's subjective intentions,[60] it is nevertheless subject to the Court's holding in *Tollett* which indicates that a defendant's expectations, like a claim of constitutional deprivation, should be used only to evaluate the advice of counsel.[61] Discussion of Newsome's expectations, therefore, provides little support for the decision in *Lefkowitz*.[62]

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[57] Although he was originally charged with possession of a dangerous drug, Newsome pleaded guilty to attempted possession. *See* text accompanying notes 15 & 18 *supra*.

[58] In Brady v. United States, 397 U.S. 742, 750, 752 (1970), the Court discussed these and other factors which can motivate a defendant to plead guilty.

[59] Brief for Respondent, Lefkowitz v. Newsome, 420 U.S. 283 (1975). While Newsome expressly relied on the "post plea features" of state appellate review notwithstanding his guilty plea, he never claimed that he relied on the availability of federal habeas corpus under the statute. *Id.* at 19-20. The statute refers only to state procedure and makes no mention of federal habeas corpus. N.Y. CODE CRIM. PROC. § 813-c, *now recodified as* N.Y. CRIM. PRO. LAW §§ 710.20(1), 710.70(2) (McKinney 1971).

[60] However, considering the expectations a defendant might reasonably have under the New York statute introduces a new problem. The defendant's expectations apparently would change depending on the state of the law at the time the defendant elected to plead guilty. For example, the defendant who pleaded guilty after the Second Circuit originally held that federal collateral relief was available under the New York statute, United States *ex rel.* Rogers v. Warden, 381 F.2d 209 (2d Cir. 1967), but before the *Brady* trilogy was decided, did not have to consider the effects of Supreme Court decisions on the finality of a guilty plea. This defendant's expectation of the effects of the law upon his plea would be different from the defendant in *Lefkowitz*. Newsome pleaded guilty three days after the *Brady* trilogy was decided, and thus his counsel arguably had to consider the effect of the trilogy on the previous decisions of the Second Circuit. Likewise, a defendant's legal expectations would have changed immediately following the *Tollett* decision. *See* text accompanying notes 34-38 *supra*.

[61] *See* text accompanying note 38 *supra*.

[62] The Court's reliance on the decisions of the Second Circuit, *see* note 26 *supra*, is misplaced. Prejudice to Newsome could easily have been avoided, as Mr. Justice

The Court's discussion of New York's expectations seems equally misplaced. There is little evidence to support the majority's assertion that refusing habeas corpus relief "would eviscerate [the state's] efforts to relieve the problem of congested criminal trial calendars."[63] Indeed, defendants who are innocent will likely insist on trial notwithstanding the availability of federal collateral relief to those who plead guilty.[64] There will also be defendants who feel that their best interests will be served by a guilty plea regardless of the scope and nature of post-conviction review. More important, however, the Court cited no evisceration of the criminal process in states which prohibit appeals after pleas of guilty by defendants who insist on trial merely to preserve federal review on the merits.[65] Furthermore, al-

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White stated in dissent, by permitting Newsome to replead. 420 U.S. at 301. *Cf.* McMann v. Richardson, 397 U.S. 759, 768-69 (1970), where the Court stated that if the defendant's guilty plea was involuntary, the "Constitution will afford him another chance to plead." *Id.* at 769. In addition, Newsome withdrew his not guilty plea and pleaded guilty on May 7, 1970, three days after the *Brady* trilogy was decided. Newsome's counsel may arguably be assumed to have recommended the plea with the knowledge of the trilogy decisions; and he, like Judge Moore of the Second Circuit dissenting only a month later in United States *ex rel.* Stephen J. B. v. Shelly, 430 F.2d 215, 221 n.1 (2d Cir. 1970), may have believed the trilogy to have foreclosed attacks on guilty pleas via habeas corpus beyond the questions of the voluntariness and intelligence of the plea.

The Court included as one of Newsome's expectations the fact that he had satisfied the jurisdictional prerequisites for federal habeas corpus review. 420 U.S. at 291-92. *See* note 5 *supra*. Since the defendants in *Brady, McMann*, and *Tollett* had also satisfied the prerequisites but were nonetheless denied relief, this consideration should be irrelevant.

[63] 420 U.S. at 293.

[64] *See* Bishop, *Waivers in Pleas of Guilty*, 60 F.R.D. 513 (1974), where the author makes the somewhat extreme statement that no sane person would ever plead guilty if he were innocent. This position ignores the situation where the accused has reason to believe that his conviction is assured because of pretrial publicity, adverse evidence that he is unable to rebut, or emotional reaction to the alleged crime notwithstanding his innocence. Upon weighing these considerations, the innocent man might well plead guilty to a lesser offense, or plead guilty in order to obtain a favorable sentence recommendation from the prosecutor.

Although the great majority of defendants who plead guilty are actually guilty, indisputably some are innocent. Davis, *The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy*, 6 VAL. U.L. REV. 111, 129 (1972), *citing* D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 22 (1966).

[65] The Court was referring only to the evisceration of New York's efforts to decrease the number of criminal trials by increasing the guilty plea rate. Nevertheless, if large numbers of defendants in New York would be dissuaded from pleading guilty solely because a guilty plea barred federal collateral relief, as was apparently envisioned by the Court, it would be expected that jurisdictions without a New York-type guilty plea procedure would have experienced a significant decline in the rate of guilty

though the *Lefkowitz* majority implied that New York expected federal habeas review to be available under the guilty plea procedure,[66] Mr. Justice White's dissent noted that "[t]here is absolutely no reason to suppose that New York intended to create such expectations."[67] In fact, Newsome conceded that nothing in the legislative history indicated whether the New York Legislature had intended to make federal relief available.[68] The Court's expectations rationale thus fails to provide an adequate basis for distinguishing *Tollett* and the *Brady* trilogy as "inapposite" to *Lefkowitz*.

Apart from the expectations rationale, there remains the Court's proposition that the "completely different legal consequences"[69] that followed Newsome's guilty plea require a different result from that which would have been anticipated had the plea been analyzed in light of the *Brady* trilogy and *Tollett*. The Court reasoned that Newsome, unlike the defendant who pleads guilty in a state which prohibits appeal on the merits after a guilty plea, did not "deliberately [refuse] to present his federal claims to the state court in the first instance."[70] Thus, Newsome did not choose to bypass state procedures for litigating his constitutional claims. New York, therefore, acquired no "legitimate expectation of finality in the conviction,"

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pleas. The federal courts have no such system as New York's, yet the guilty plea rate has remained relatively constant. For example, in fiscal year 1969 86% of the defendants convicted in the United States district courts were convicted on pleas of guilty. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS FOR THE FISCAL YEAR ENDED JUNE 30, 1969, at 273 Table D-4 (1969). For fiscal year 1973 the figure was 84%. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS FOR THE FISCAL YEAR ENDED JUNE 30, 1973, at 402 Table D-4 (1973).

Since federal habeas corpus petitioners are rarely successful in obtaining release, it seems unlikely that the unavailability of habeas corpus should dissuade many defendants who would otherwise plead guilty. *See* Fay v. Noia, 372 U.S. 391, 446 (1963) (Clark, J., dissenting, noting that 98% of habeas corpus petitions are "frivolous").

[66] *See* text accompanying notes 52 & 53 *supra*.

[67] 420 U.S. at 300.

[68] Brief for Respondent at 12 n.4, Lefkowitz v. Newsome, 420 U.S. 283 (1975). Newsome argued that New York's intent to make federal habeas corpus relief available was shown by the 1971 recodification of the statutes in light of the decisions of the Court of Appeals that habeas corpus would be available under the statutes. This is a *post hoc* assumption subject to the objections of the continuing absence of any relevant legislative history, and the probability that the Legislature repromulgated the statutes for reasons other than court decisions it was all but powerless to change. The Legislature could just as well have acted in spite of the Second Circuit decisions as because of them.

[69] 420 U.S. at 291.

[70] *Id.* at 289.

and there was no "break in the chain of events" as there was in *Tollett*.[71] The Court held that Newsome had preserved his cause for federal collateral review by presenting his claim to the state courts.

While the majority's analysis of the plea's consequences has some appeal, it fails to dispose adequately of all objections. Instead of considering how a New York defendant preserves his claim for federal review, as the Court did, the issue should be restated to ask why defendants who plead guilty under procedures different from New York's are denied federal habeas corpus relief. Contrary to the Court's assertion, the bar effect can not result from the fact that a "defendant who chooses to plead guilty in effect deliberately refuses to present his federal claims to the state court."[73] For example, although the defendant in *Tollett* pleaded guilty, he could not reasonably be held to have deliberately refused to present a claim of which neither he nor his attorney was aware.[74] In *Brady*, the defendant could not have deliberately refused to present a claim that did not exist at the time he pleaded guilty.[75] It would appear that while Newsome's guilty plea

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[71] *Id.*

[72] *Id.* at 291-92.

[73] *Id.* If the test for determining whether a voluntary and intelligent guilty plea bars later federal habeas corpus relief is now whether the defendant has presented his federal claims to the state court, the Supreme Court has developed a doctrine similar to res judicata. The claims which the defendant did not present to the state courts are effectively merged in the state court's judgment, and the defendant is barred from litigating them anew in the federal courts on collateral review. This is the "functional equivalent" of res judicata. *See* note 88 *infra*. *But see* Fay v. Noia, 372 U.S. 391, 423 (1963), where the Court discussed "the familiar principle that res judicata is inapplicable in habeas proceedings."

More important, however, if presenting the claim to the state court is now the test, the general rule that a voluntary and intelligent guilty plea bars later federal collateral relief may be engulfed by the exception established in *Lefkowitz*. Since the Constitution does not require states to furnish appellate review of criminal judgments, Griffin v. Illinois, 351 U.S. 12, 21 (1956) (Frankfurter, J., concurring), a defendant who pleads guilty only after the denial of a motion to suppress has also presented "his federal claims to the state court in the first instance." The logical result of this test would be that all defendants will make a pro forma motion to suppress, and thereby preserve their claims for collateral review. *Tollett* and the *Brady* trilogy would thus be effectively overruled.

[74] *See* note 31 *supra*.

[75] In 1968 the Supreme Court held that the death penalty provision of the Lindbergh Act, 18 U.S.C. § 1201(a) (1970), *as amended*, 18 U.S.C. § 1201(a) (Supp. III, 1973), was unconstitutional, United States v. Jackson, 390 U.S. 570 (1968). In *Brady*, the defendant pleaded guilty in 1959. It would have been impossible for Brady to have contested the validity of the statute. Nevertheless, the Court in *Brady* held that even if the possibility of capital punishment on conviction after trial was the "but for" cause of the guilty plea, relief would still be foreclosed. 397 U.S. at 750.

was not a deliberate refusal to present his claims in state court, neither were the guilty pleas in *Brady* and *Tollett*. Therefore, the Court's deliberate-refusal rationale[76] is unconvincing.

Although the majority's reasoning does not satisfactorily explain the decision that federal collateral review remained available to Newsome notwithstanding his guilty plea, there are other arguments which can be advanced to support the decision in *Lefkowitz*. The most important of these[77] is the "principle that [the Supreme] Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the copresence of federal grounds."[78] The doctrine of adequate and independent state

[76] The Court's contention that a defendant who pleads guilty "chooses to bypass" the state's procedures for litigating constitutional claims, 420 U.S. at 289, is basically the same as the "deliberate refusal" rationale, since bypass of state procedures necessarily includes refusal to present a claim to the state courts. In Fay v. Noia, 372 U.S. 391, 438 (1963), the Court held that if a defendant deliberately bypasses the state's procedures, "the federal habeas judge may in his discretion deny relief." In the *Brady* trilogy and *Tollett* decisions, however, the Court held that collateral relief was absolutely barred to defendants who plead guilty; under those decisions the federal judge has no discretion to grant relief. The bar effect of a valid guilty plea thus cannot adequately be explained as a bypass of state procedures.

[77] Theories of comity and waiver might also justify the decision in *Lefkowitz*. The case can be viewed as an unstated exercise of comity, and thus as one of many recent Supreme Court decisions respecting the separate powers of the states. Younger v. Harris, 401 U.S. 37 (1971), is the primary example of this doctrine. *See also* Gibson v. Berryhill, 411 U.S. 564 (1973); Perez v. Ledesma, 401 U.S. 82 (1971); Samuels v. Mackell, 401 U.S. 66 (1971). Under this approach, the federal courts would be bound to respect the weight the states place upon guilty pleas in their own criminal systems. Since New York does not choose to regard guilty pleas as inviolable, neither will the federal courts. Comity is not a constitutional requirement, however, Fay v. Noia, 372 U.S. 391, 418-19, 436-37 (1963), and thus should not affect the granting of a writ which is not available unless the petitioner is in custody in violation of the Constitution. 28 U.S.C. § 2241(c)(3) (1970).

The doctrine of waiver might also be argued to distinguish Newsome's plea from the pleas in the *Brady* trilogy and *Tollett*. In *Tollett*, however, the Court specifically rejected the doctrine of waiver as the sole basis for foreclosing federal habeas corpus relief beyond the questions of the voluntariness and intelligence of the plea. 411 U.S. at 267. Furthermore, the "classic definition" of waiver, "an intentional relinquishment or abandonment of a known right or privilege," Fay v. Noia, 372 U.S. 391, 439 (1963), *citing* Johnson v. Zerbst, 304 U.S. 458, 464 (1938), could not sustain the convictions of the defendants in either *Brady* or *Tollett*. A defendant cannot waive a right the law has not yet given him. *See* note 75 *supra*. Neither can a defendant waive a right he does not know he has. *See* note 31 *supra*.

[78] Fay v. Noia, 372 U.S. 391, 428 (1963). If a state court judgment rests on questions of state law independent from accompanying questions of federal law, the Supreme Court will decline to decide the questions of federal law because they will be moot; nothing will turn on their resolution. *Id.* at 429. The state grounds must not only

grounds presents a stronger rationale for explaining the *Lefkowitz* decision than any of the majority's stated grounds. Applying this doctrine to *Lefkowitz*, the argument would be that a guilty plea itself provides an adequate and independent state ground for an accused's conviction: by pleading guilty a defendant normally does not present his federal claim to the state courts, and the state may therefore imprison him. Since the copresence of an adequate and independent state ground precludes federal review of constitutional claims, a federal court would decline to review collaterally a conviction based on a guilty plea, even if the defendant has a valid constitutional claim. In *Lefkowitz*, there would thus be no adequate and independent state ground because Newsome presented his claim to the state courts.[79] New York, therefore, could not contend that Newsome failed to contest his guilt[80]—a failure which would have given the state an adequate and independent ground for his conviction. In *Fay v. Noia*,[81] however, the Supreme Court severely undercut the force of the adequate and independent state ground doctrine in federal habeas corpus proceedings. There, the Court noted that "the adequate state-ground rule is a function of the limitations of *appellate* review;"[82] the rule does not so limit collateral review. The Court further observed that "no habeas decision has been found which expressly rests upon [the doctrine]. Thus, to apply the rule in habeas would be to set sail on quite unchartered seas."[83] To subscribe to the doctrine of adequate and independent state grounds as a basis for decision in the guilty plea cases, therefore, would be inappropriate and unprecedented.[84]

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be independent, however, they must also be "adequate," that is, the state grounds must rest "upon a fair or substantial basis." Lawrence v. State Tax Comm'n, 286 U.S. 276, 282 (1932). Thus, if a state court is empowered to decide questions of federal law, yet in its discretion refuses in one case to decide such questions although it has decided them in others, this will not constitute an adequate state ground. Williams v. Georgia, 349 U.S. 375, 384, 389 (1955). Similarly, state court refusal to grant review because of the defendant's failure to use the right type of paper is not an adequate state ground. Shuttlesworth v. City of Birmingham, 376 U.S. 339 (1964) (per curiam), *rev'g* 42 Ala. App. 1, 149 So. 2d 921 (1962).

[79] Whether Newsome presented his federal claim to a state trial or appellate court should be irrelevant. *See* note 73 *supra*.

[80] A defendant can contest his guilt either by asserting that he did not commit the acts charged, or by admitting that he committed the crime but nevertheless is not guilty because the state has abridged his fourteenth amendment rights. Here, Newsome admitted the attempted possession of heroin, but contested the admissibility of the heroin on the ground that it was seized subsequent to an illegal search.

[81] 372 U.S. 391 (1963).

[82] *Id.* at 429 (emphasis in original).

[83] *Id.* at 429 n.39.

[84] In Parker v. North Carolina, 397 U.S. 790 (1970), the Court rejected the peti-

Nevertheless, of all the arguments which have been considered, the doctrine of adequate and independent state grounds provides the least objectionable reasoning for the decision in *Lefkowitz.*

The propositions of state and defendant expectations, deliberate bypass of state procedures, and refusal to present claims to the state court relied upon by the majority in *Lefkowitz*, and even the adequate and independent state grounds doctrine, do not satisfactorily explain the Court's decision. That unsatisfactory explanation results because the *Brady* trilogy and *Tollett* were not decided on procedural views of preserving federal claims under state law; those decisions, instead, established a "rule of substantive constitutional law limiting the federal constitutional grounds upon which a defendant may attack a judicial admission of guilt."[85] Although the dissenting justices[86] and the Attorney General of New York[87] based their objections to granting Newsome relief on the ground that substantive federal law concerning guilty pleas provided him no remedy, this objection was

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tioner's argument that the indictment to which he pleaded guilty was invalid because of unconstitutional racial exclusion in the selection of the grand jury. The Court held that Parker's failure to raise this objection in the timely manner required by state law

> would constitute an adequate state ground precluding our reaching the grand jury issue if this case were here on direct review. *See* Fay v. Noia, 372 U.S. 391, 428-429 (1963). We are under a similar constraint when asked to review a state court decision holding that the same rule of practice requires denial of collateral relief.

Id. at 798. Although the Court relied upon the presence of an adequate state ground to deny Parker's grand jury claim, the Court distinguished the bar effect of a voluntary and intelligent guilty plea from the doctrine of adequate state grounds. *Id.* at 799. The two concepts, therefore, would seem to be independent.

[85] 420 U.S. at 295 (White, J., dissenting). If the bar effect of a voluntary and intelligent guilty plea is a matter of substantive constitutional law, it should apply to bar relief in either the direct review or habeas corpus context. Nevertheless, in *Lefkowitz* the state conceded that Newsome's conviction would have been reviewable on certiorari from the Appellate Term. *Id.* at 290 n.6. That the Supreme Court could grant Newsome relief on direct review, and yet deny federal collateral relief, is not the anomaly it seems at first blush. Under 28 U.S.C. § 2241(c)(3) (1970), a court may grant habeas corpus relief only if the petitioner's custody is "in violation of the Constitution." Congress has not so limited the Supreme Court's certiorari power to review state court decisions. 28 U.S.C. § 1257(3) (1970). On direct review from the Appellate Term, the Court would have been presented only with the narrow issue of Newsome's fourth amendment claim. The constitutionality of his custody would not have been before the Court. *See* also note 88 *infra.*

[86] 420 U.S. at 297 (White, J., dissenting). Justice White was joined by the Chief Justice and Justice Rehnquist. Justice Powell filed a separate dissenting opinion in which he concurred with Justice White's dissent.

[87] Brief for Petitioner at 10, Lefkowitz v. Newsome, 420 U.S. 283 (1975).

virtually disregarded by Mr. Justice Stewart's majority opinion.[88] By not considering the comparative merits of substantive and procedural bases for the bar effect of guilty pleas, the majority in *Lefkowitz* assumed that denial of relief was founded on a rule of procedure.[89]

The procedural assumption, however, has obscured the rule of finality developed in the *Brady* trilogy and *Tollett. Lefkowitz* establishes different standards for granting federal collateral review of convictions based on guilty pleas in the three states that permit appeal on the merits after a guilty plea from the forty-seven states that prohibit appeal.[90] Since Congress has directed that habeas corpus

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[88] The majority opinion discusses two arguments which may have been intended to counter the contentions of the dissent and the petitioner. Since the petitioner conceded that Newsome's conviction would have been reviewable on certiorari from the decision of the Appellate Term, the Court reasoned that federal habeas corpus relief must also be available. 420 U.S. at 290 n.6. This follows from the decision in Fay v. Noia, 372 U.S. 391, 429 (1963), where the Court held that even when there is an adequate and independent state ground which will bar direct review, federal habeas relief will nevertheless be available. The Court in *Fay* stated that "[i]n Noia's case the only relevant substantive law is federal—the Fourteenth Amendment. State law appears only in the procedural framework for adjudicating the substantive federal question." 372 U.S. at 431. In *Lefkowitz*, however, the state law has substantive as well as procedural aspects. While the New York law establishes the procedural framework for adjudicating the substantive federal question, it also creates a new right for defendants that they would not otherwise enjoy—the right to plead guilty yet still retain the right to state appellate review on the merits. The Court's reliance on *Fay* was thus inapposite. *Cf.* Flores v. Beto, 374 F.2d 225, 227 (5th Cir.), *cert. denied*, 387 U.S. 948 (1967), where the court held that although there might be an adequate ground for the Supreme Court to grant a writ of certiorari, federal collateral relief would nevertheless be denied. *But see* Note, *Constitutional Law—Guilty Plea—Federal Habeas Corpus Relief Available When State Statute Permits Post-Guilty Plea Appellate Review of Constitutional Challenges*, 28 VAND. L. REV. 898, 908 (1975), where reference was made to the "essentially procedural function of the plea in this situation." *See also* note 85 *supra*.

The *Lefkowitz* majority's second argument was based on the conclusion that in terms of "functional reality," 420 U.S. at 291 n.7, there was "no meaningful difference between Newsome's conviction and a New York conviction entered after trial." *Id.* at 290. According to the Court, New York could have required defendants who wished to avoid trial to plead not guilty, but stipulate to all prosecution evidence. Upon conviction, the constitutional issues would be reviewable in the state courts, and since there was no plea of guilty, federal habeas corpus would still be available. In terms of "functional reality," the Court reasoned that there was no difference between the two procedures. Consequently, habeas relief should be available in both circumstances. As Mr. Justice White pointed out, however, the Court's argument applies equally well in states that prohibit appeal after a guilty plea. 420 U.S. at 299 n.6 (White, J., dissenting).

[89] *See* 420 U.S. at 295 (White, J., dissenting).

[90] *See* note 20 *supra*.

relief will be unavailable unless the petitioner "is in custody in violation of the Constitution,"[91] uniform application of the habeas corpus statutes would seem to be essential.[92] The Court in *Lefkowitz* advanced no overriding explanation, however, why federal law should vary because states have chosen diverse guilty plea procedures. Although the Supreme Court has often indicated a desire to give the states maximum leeway in the development of their own criminal procedures,[93] *Lefkowitz* is the first instance where the Court has suggested that a state's efforts can justify expanding federal habeas corpus relief. The different standards that the Court now applies in adjudicating the finality of a guilty plea create tension between *Lefkowitz* and the *Tollett-Brady* trilogy decisions, and raise doubt as to the direction of future Supreme Court decisions on the availability of federal habeas corpus to defendants who plead guilty.

If *Lefkowitz* is limited to its facts, the Court will have carved out only a small exception to prior law concerning federal habeas corpus and guilty pleas. The majority's reliance upon an expectations rationale[94] and its dependence on procedural reasoning at odds with previous decisions,[95] however, suggest more extensive application. Because the finality of a guilty plea will no longer be determined solely by its voluntariness and intelligence, the significance of *Lefkowitz* may be that it can compromise the effects of the *Tollett* and *Brady* trilogy decisions. Under the *Tollett-Brady* trilogy rationale, post-conviction federal collateral relief is foreclosed to defendants who plead guilty in ignorance of constitutional rights later declared and held to be retroactive in effect.[96] The defendant who pleaded guilty consequently remains convicted, while the defendant who demanded trial is freed, although the circumstances surrounding their cases may

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[91] 28 U.S.C. § 2241(c)(3) (1970).

[92] There should be a strong federal policy in favor of a uniform application of the habeas corpus statutes. *Cf.* Hanna v. Plumer, 380 U.S. 460 (1965); Byrd v. Blue Ridge Electric Cooperative, Inc., 356 U.S. 525 (1958).

[93] *See, e.g.*, Lego v. Twomey, 404 U.S. 477, 489 (1972), where the Court stated that the states are always free to make "their own law, to adopt a higher standard."

[94] *See* text accompanying notes 48-68 *supra.*

[95] *See* text accompanying notes 73-75 & 85-89 *supra.*

[96] *See generally* Note, *The Guilty Plea as a Waiver of "Present But Unknowable" Constitutional Rights: the Aftermath of the* Brady *Trilogy*, 74 COLUM. L. REV. 1434 (1974). In *McMann*, for example, had the defendants proceeded to trial instead of pleading guilty, their convictions would have been overturned because New York unconstitutionally permitted the jury to evaluate the voluntariness of their confessions. Jackson v. Denno, 378 U.S. 368 (1964). By pleading guilty, the defendants in *McMann* remained convicted.

have been identical. The decision in *Lefkowitz* may have ameliorated such a result.[97]

Regardless of its future effects, *Lefkowitz* has undercut developed doctrines relating to guilty pleas. The majority neglected the gravity of an admission of guilt made in open court, a point repeatedly emphasized throughout a half-century of Supreme Court decisions.[98] Instead of a solemn admission of guilt which is itself a conviction,[99] the Court viewed Newsome's plea as essentially a resource saver for the state and a means through which the accused preserves appellate review of pretrial motions.[100] More important, the Court dismissed the doctrines relating to a voluntary and intelligent guilty plea as "simply inapposite." To ignore those doctrines because New York has chosen to permit appellate review of pretrial motions notwithstanding a guilty plea is inconsistent with the treatment and development of those doctrines in the *Brady* trilogy and *Tollett* cases.

By substituting procedural notions and the state's and defendant's expectations for the developed doctrines concerning the effects of valid guilty pleas, the Court has sanctioned state prescription of federal collateral relief and nonuniform application of the federal habeas corpus statutes. The Court's denigration of the solemnity and finality of a guilty plea, and its reliance on arguments equally applicable to states without New York's guilty plea procedure[101] indicate

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[97] *See* Blackledge v. Perry, 417 U.S. 21 (1974), where similar considerations may have led the Court to affirm the grant of habeas corpus relief to a prisoner notwithstanding his voluntary and intelligent guilty plea. In *Blackledge*, the defendant sought relief on the ground that his indictment on a felony charge, after he had been convicted of a lesser-included misdemeanor, functioned as a penalty for exercising his statutory right to appeal the misdemeanor conviction, and was therefore in violation of the Due Process Clause of the fourteenth amendment. The Court concluded that there was a violation of due process, and discussed why the defendant's guilty plea would not preclude him from habeas corpus relief:

> While petitioners' reliance upon the *Tollett* opinion is understandable, there is a fundamental distinction between this case and that one. Although the underlying claims presented in *Tollett* and the *Brady* trilogy were of constitutional dimensions, none went to the very power of the State to bring the defendant into court to answer the charge brought against him.

Id. at 30. As Mr. Justice Rehnquist pointed out in dissent, however, without a valid indictment the state in *Tollett* also lacked the power to bring the defendant into court. *Id.* at 35. Whether the faulty indictment could have been corrected was irrelevant since no correction was made.

[98] *See* note 32 *supra*.

[99] Kercheval v. United States, 274 U.S. 220, 223 (1927).

[100] 420 U.S. at 289.

[101] *See* notes 62, 73, & 88 *supra*.

that the heretofore impenetrable bar created by a voluntary and intelligent guilty plea may now be subject to reconsideration.[102] While the *Lefkowitz* decision has thus unsettled previously confirmed law without providing a sound alternative, narrow construction of the Court's procedural view would ease the conflict with the substantive law set out in *Tollett* and the *Brady* trilogy. This course would best avoid casting further doubt on doctrines in the areas of federal habeas corpus and guilty pleas which prior to *Lefkowitz* were well established, and would reconcile the rationales to a more peaceful, if somewhat uncomfortable, coexistence.

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[102] *See* text accompanying notes 93-97 *supra.*