less he has or waives the assistance of counsel." [268] Any waiver, the Court ruled, must be by the intelligent choice of the defendant, will not be presumed from a silent record, and must be determined by the trial court before proceeding in the absence of counsel.[269]

An effort to obtain the same rule in the state courts in all criminal proceedings was rebuffed in *Betts v. Brady*.[270] Justice Roberts for the Court observed that the Sixth Amendment would compel the result only in federal courts but that in state courts the Due Process Clause of the Fourteenth Amendment "formulates a concept less rigid and more fluid" than those guarantees embodied in the Bill of Rights, although a state denial of a right protected in one of the first eight Amendments might "in certain circumstances" be a violation of due process. The question was rather "whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment." [271] Examining the common-law rules, the English practice, and the state constitutions, laws and practices, the Court concluded that it was the "considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right essential to a fair trial." Want of counsel in a particular case might result in a conviction lacking in fundamental fairness and so necessitate the interposition of constitutional restriction upon state practice, but this was not the general rule.[272] Justice Black in dissent argued that the Fourteenth Amendment made the Sixth applicable to the states and required the appointment of counsel, but that even on the Court's terms counsel was a fundamental right and appointment was required by due process.[273]

Over time the Court abandoned the "special circumstances" language of *Powell v. Alabama* [274] when capital cases were in-

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[268] 304 U.S. at 462, 463.

[269] 304 U.S. at 464–65. The standards for a valid waiver were tightened in Walker v. Johnston, 312 U.S. 275 (1941), setting aside a guilty plea made without assistance of counsel, by a ruling requiring that a defendant appearing in court be advised of his right to counsel and asked whether or not he wished to waive the right. *See also* Von Moltke v. Gillies, 332 U.S. 708 (1948); Carnley v. Cochran, 369 U.S. 506 (1962). A waiver must be knowing, voluntary, and intelligent, but need not be based on a full and complete understanding of all of the consequences. Iowa v. Tovar, 541 U.S. 77 (2004) (holding that warnings by trial judge detailing risks of waiving right to counsel are not constitutionally required before accepting guilty plea from uncounseled defendant).

[270] 316 U.S. 455 (1942).

[271] 316 U.S. at 461–62, 465.

[272] 316 U.S. at 471, 473.

[273] 316 U.S. at 474 (joined by Justices Douglas and Murphy).

[274] 287 U.S. 45, 71 (1932).