

Inequitable Treatment of Ineffective Assistance Litigants

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I. INTRODUCTION

A criminal defendant has a federal constitutional right to the effective assistance of counsel.¹ A defendant, therefore, may challenge his conviction on the basis of ineffective assistance by his counsel.² If the defendant is able to prove such ineffectiveness, he is entitled to a new trial.³

Most claims of ineffective assistance of counsel involve challenges to an attorney's acts or omissions that may be characterized as trial tactics and strategies. The courts will not, however, question an attorney's conduct if it is based on reasoned trial tactics or strategies.⁴ Thus, because the defendant must prove that the acts or omissions complained of were *not* the product of reasoned trial strategy, the need for an evidentiary hearing to probe the challenged attorney's reasoning is great.⁵ In spite of this great need for an evidentiary hearing, Indiana law often fails to provide a defendant with a right to an evidentiary hearing when such a hearing is crucial to his success in an ineffective assistance of counsel claim.

Indiana case law requires that ineffective assistance claims be raised at the earliest possible opportunity;⁶ thus, a claimant must raise his claim on direct appeal if an attorney different from the lawyer whose inadequacy is asserted files the motion to correct error or belated motion to correct error.⁷ If the "inadequate" trial counsel files the motion to correct error, the claimant's forum is a post-conviction proceeding because, obviously, the trial lawyer will not assert his own ineffectiveness in a motion to correct error he drafted.⁸ Although there is a right to an evidentiary hearing in post-conviction proceedings,⁹ there is no such right in connection with a motion or belated motion to correct error.¹⁰ This

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¹*E.g.*, Strickland v. Washington, 104 S. Ct. 2052 (1984). The right to the effective assistance of counsel is guaranteed by the sixth amendment to the United States Constitution. *Id.*

²*See id.*

³*See, e.g.*, Dillon v. Duckworth, 751 F.2d 895 (7th Cir. 1984).

⁴*See infra* text accompanying notes 7-12.

⁵*See infra* text accompanying notes 7-18.

⁶*See infra* notes 39-46 and accompanying text.

⁷*Id.*

⁸*See infra* notes 45-46 and accompanying text.

⁹IND. RULE OF PROCEDURE FOR POST-CONVICTION REMEDIES 1 § 4(f).

¹⁰IND. R. TR. P. 59; *see also infra* notes 20-30 and accompanying text.

disparity in the right to an evidentiary hearing has nothing to do with the substance of the claims, but depends only on the procedural posture of the litigants.

During the Survey period, several cases were decided that perpetuate this inequitable disparity. This Article will analyze the problem created by this disparity, discuss tactical options presently available for obtaining an evidentiary hearing, and suggest a fair resolution to the state appellate courts.

II. THE NEED FOR AN EVIDENTIARY HEARING

Obtaining an evidentiary hearing is critical to the success of most ineffective assistance claims. In *Strickland v. Washington*,¹¹ the United States Supreme Court decided that the proper standard for attorney performance was "reasonably effective assistance."¹² The Court stated that the burden of proof was on the proponent of the claim,¹³ and that "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"¹⁴ Thus, a proponent must prove that the trial attorney's actions or omissions complained of were *not* sound trial strategy.

The *Strickland* Court discussed the parameters of sound trial strategy and adopted the following guidelines for assessing an attorney's strategic decisions: "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."¹⁵ The Court clearly envisioned that an ineffective assistance litigant would have to probe his former lawyer's legal and factual investigation in order to establish that a given act or

¹¹104 S. Ct. 2052 (1984).

¹²*Id.* at 2064.

¹³*Id.* at 2065.

¹⁴*Id.* at 2066 (quoting *Michel v. New York*, 350 U.S. 91, 101 (1955)). According to the Court, the presumption of competency is justified by "the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the [Sixth] Amendment envisions." *Id.* at 2065.

One with sufficient resources should be able to muster evidence showing that in Indiana, only three credit hours of criminal law are required to practice felony criminal law, and no continuing education is required. See IND. RULE FOR ADMISSION 13. Therefore, no standard of educational requirements sufficient to justify the presumption of competency exists. One might reply that the Code of Professional Responsibility requires a lawyer in over his head to attach himself to another more competent lawyer, but the breach of that ethical duty is necessarily concomitant to any proven inadequacy claim, and therefore of no use as a standard justifying a presumption of competency.

¹⁵104 S. Ct. at 2066.

omission was not sound strategy. This entails proving the act or omission itself, the attorney's reason for the act or omission, and an unreasonable lack of investigation.

Consider the following example: The defendant is convicted of intentionally burning a house to collect insurance proceeds. Although the state's assertion that the fire was deliberate rests on thin evidence, the defense attorney stipulates to the correctness of that claim, and proceeds solely on the theory that someone other than his client set the fire. Perhaps the lawyer introduces evidence tending to prove that the defendant's ex-wife, bitter over a divorce, set the fire. The client asserts that his lawyer rendered ineffective assistance by stipulating the fire was arson. Without an evidentiary hearing, the record of proceedings proves that the stipulation was made, but fails to provide any evidence of the lawyer's reason. In addition, the only evidence of investigation is a motion for discovery. The court on review will note that *there might have been* a valid reason for the lawyer's decision to concentrate the defense on who set the fire rather than on whether it was set. Because the burden of proof is on the defendant, and the record does not show that the lawyer *did not* have a good reason for stipulating the fire was arson, the court will conclude that "[t]he alleged [error is] primarily in the [area] of tactics and strategy. This Court does not second-guess trial counsel in these areas. . . ."¹⁶

Suppose, however, that an evidentiary hearing is held. The subpoenaed trial lawyer testifies that he gave the arson report only a cursory reading and stipulated the fire was arson primarily because he assumed the state was correct on that point. He also admits he did not attempt to interview the arson investigator and never considered an independent investigation or review of the data on which the state's conclusion was based. Now the claimant has proven the stipulation, the reason for the stipulation, and the inadequacy of the lawyer's investigation. The reasonable conclusion is that the lawyer's reason was not supported by adequate inquiry into the facts. The claimant has succeeded in proving his lawyer's ineffectiveness.

Indiana appellate courts, while denying direct appeal litigants the right to an evidentiary hearing, seemingly recognize the necessity of an evidentiary hearing to explore the reasons for a lawyer's incompetence and the extent of his investigation. In *Majors v. State*,¹⁷ an appeal from a denial of post-conviction relief, an evidentiary hearing was held. The trial attorney was not called as a witness. In refusing to reverse the

¹⁶Cox v. State, 475 N.E.2d 664, 674 (Ind. 1985). See also Seaton v. State, 475 N.E.2d 51, 54 (Ind. 1985); Bennett v. State, 470 N.E.2d 1344, 1347 (Ind. 1984); Elliott v. State, 465 N.E.2d 707, 710 (Ind. 1984).

¹⁷441 N.E.2d 1375 (Ind. 1982).

denial of post-conviction relief, the Indiana Supreme Court stated, "We do not speculate on why [the trial attorney] was not called. *But without evidence in the record as to his reason* [for the act of alleged incompetency], appellant's task of proving by the preponderance of the evidence that his trial attorney was incompetent . . . is not accomplished. *In sum, appellant has failed to meet his burden of proof.*"¹⁸

A similar failure occurred in *Owens v. State*,¹⁹ also an appeal from the denial of post-conviction relief. As in *Majors*, the post-conviction attorney did not subpoena trial counsel to the post-conviction hearing. The court pointed out the resulting blow to the petitioner's ability to meet his burden of proof. "[W]here, as in the case at bar, the petitioner does not call trial counsel as a witness, the post-conviction court is justified in inferring that trial counsel would not have corroborated the allegations of ineffective counsel."²⁰ Again, the court affirmed the necessity of showing the reason behind the "incompetent" act or omission: "Without the benefit of counsel's testimony here, we will conclude that counsel's decision was a tactical judgment and not necessarily indicative of ineffective representation."²¹ "Significantly, since petitioner failed to call counsel as a witness at the post-conviction hearing, *there is no evidence as to why counsel made the decision he did, or even if he did not consult with petitioner.*"²²

Both *Majors* and *Owens* demonstrate the Indiana Supreme Court's recognition of the need for the allegedly "inadequate" attorney's testimony to satisfy the claimant's burden of proof. In spite of this implicit admission of the need for that testimony to overcome the presumption of competency, some claimants are denied an evidentiary hearing at which such evidence could be presented.

¹⁸*Id.* at 1377 (emphasis added).

¹⁹464 N.E.2d 1277 (Ind. 1984).

²⁰*Id.* at 1279.

²¹*Id.* at 1280.

²²*Id.* (emphasis added) *See also* *McCann v. State*, 446 N.E.2d 1293 (Ind. 1983). In *McCann*, as in *Majors* and *Owens*, the post-conviction lawyer did not call the trial attorney. He stated at the post-conviction hearing, "[W]e're putting a man on the spot as a professional and I just don't think that's appropriate." *Id.* at 1299. Justice Hunter dissented from the majority's affirmance, believing the ineffective assistance of the post-conviction lawyer had been proven. "The lack of evidence solicited on petitioner's behalf was not the product of strategy or trial tactics; rather it was the result of post-conviction counsel's expressly stated misunderstanding of his responsibilities to petitioner. In the circumstances present here, I find that petitioner was denied the effective assistance of counsel at the post-conviction relief hearing. . . . [I] believe the judgment of the trial court denying post-conviction relief should be reversed." *Id.* at 1302. Justice Hunter obviously considered that the testimony of the trial lawyer would have been important, and that the lack of that testimony prejudiced the petitioner.

III. DENIAL AND WAIVER: THE INEQUITABLE DISPARITY

A. *Hearing Denial on Direct Appeal*

The Indiana Trial Rules are silent concerning the right to an evidentiary hearing on a motion to correct error.²³ And in *Keys v. State*,²⁴ an ineffective assistance of counsel case, the Indiana Supreme Court specifically stated there was *no right* to an evidentiary hearing on a motion to correct error. The court noted the permissibility of supplementing a motion to correct error with affidavits, and further reasoned that “[f]irst, the trial rules do not require a hearing. Second, *the record provides a substantial factual basis* for the court’s determination. . . .”²⁵

Although nothing in the *Keys* opinion indicated that the record of proceedings would provide a substantial factual basis for the court’s determination on ineffective assistance claims in every case, in *Harris v. State*,²⁶ the court, relying on *Keys*, broadly stated that no evidentiary hearing on the motion to correct error is required *or needed* when one of the errors alleged was incompetency of trial counsel. “[T]he record provides a substantial factual basis for the court’s determination of the issue. . . .”²⁷ The court noted that affidavits may be filed with the motion to correct error and stated, “Thus there is a mechanism available to a defendant to bring facts *dehors* the record before the trial court and the Court of Appeals.”²⁸ Recently, in *Bennett v. State*,²⁹ the supreme court reaffirmed the expansive reading of *Keys* that “the record provides a substantial factual basis for a determination on that issue,”³⁰ and again implied that the filing of affidavits was an adequate substitute for an evidentiary hearing.³¹

B. *The Inadequacy of Affidavits*

Affidavits in combination with the record are no substitute for an evidentiary hearing. Although challenged acts or omissions can generally

²³IND. R. TR. P. 59.

²⁴271 Ind. 52, 390 N.E.2d 148 (1979). The court stated, “We do not believe that the trial rules necessitate such a hearing. IND. R. TR. P. 59(D) and IND. R. TR. P. 16 and 17 contemplate the use of affidavits served with the motion itself whenever errors are based upon evidence outside the record” *Id.* at 57, 390 N.E.2d at 151.

²⁵*Id.* (emphasis added).

²⁶427 N.E.2d 658 (Ind. 1981).

²⁷*Id.* at 662 (citing *Keys v. State*, 271 Ind. 52, 390 N.E.2d 148 (1979)).

²⁸*Id.* (emphasis added).

²⁹470 N.E.2d 1344 (Ind. 1984).

³⁰*Id.* at 1347.

³¹*Id.*

be proved by the record, the record generally will not reveal the "inadequate" lawyer's reasoning and investigation. The scope of the attorney's investigation often cannot be shown even with the use of affidavits. Moreover, if the "inadequate" attorney refuses to execute an affidavit, or even to be interviewed, there is no procedural mechanism by which a defendant may order him to submit to interrogatories or a deposition in connection with a motion to correct error.³²

Consider the arson hypothetical discussed above. Assuming that the arson investigator would cooperate, he could state he was not interviewed or contacted by the defense attorney. His affidavit, if unopposed, would establish as fact that he was not contacted.³³ To the proponent's detriment, the record would show a defendant's motion for discovery and a state's notice of compliance indicating delivery of the arson report. Assuming no cooperation from the trial lawyer, there would be no evidence *why* he stipulated to the fire as arson and no evidence *why* he did not interview the arson investigator or examine the raw data from which the investigator drew his conclusions. Even with the attached affidavit, a reviewing court would still note that the trial lawyer made discovery of the state's case³⁴ and would reiterate the familiar judicial refusal to speculate "as to what may have been the most advantageous strategy in a particular case."³⁵ Furthermore, an affidavit executed by the litigant, stating his belief that the lawyer had no valid tactical reason for his action, could only prove as fact the sincerity of his belief, *not* the correctness of the belief. Thus, such an affidavit would not help the claimant meet his burden of proof.³⁶

Finally, even if some type of court-enforced discovery were available in connection with a motion or belated motion to correct error, the challenged attorney might not be truthful. In those cases, the affidavit would be no substitute for a hearing where the trier of fact could observe the lawyer's demeanor and thereby judge the lawyer's credibility.

³²See *supra* notes 11-14 and accompanying text.

³³Harris v. State, 427 N.E.2d 658 (Ind. 1981).

³⁴Cf. McCann v. State, 446 N.E.2d at 1300.

³⁵Bennett v. State, 470 N.E.2d at 1347.

³⁶A review of the Record of Proceedings in *Keys v. State*, 271 Ind. 52, 390 N.E.2d 148 (Ind. 1979), revealed that the appellate attorney executed and attached an affidavit to the motion to correct error which stated the trial attorney did not interview or investigate the victim or any eyewitness. The affiant also asserted that the trial attorney conducted no independent investigation of the facts and did not investigate the possibility of pursuing an intoxication defense. Record at 119-20.

The appellate attorney also attached a memorandum to the motion to correct error alleging faulty pretrial preparation and noting that the specifics would have to be brought out in an evidentiary hearing unless the trial attorney would agree to file an affidavit. Record at 109. The supreme court stated that "nothing in the motion to correct errors, memorandum in support, or accompanying affidavits suggests more than speculation about preferable pretrial and trial tactics." 271 Ind. at 57, 390 N.E.2d at 151.

C. Post-Conviction Rule 1 Waiver

Given the unavailability of an evidentiary hearing in connection with a motion to correct error and the inadequacy of affidavits, the logical forum for ineffective assistance litigation is a post-conviction Rule 1 proceeding;³⁷ there is a *right* to an evidentiary hearing in a post-conviction proceeding.³⁸ Rule P.C.1. section 1(b), however, states that a post-conviction "remedy is not a substitute for a direct appeal";³⁹ and in *Rivera v. State*,⁴⁰ the Indiana Court of Appeals interpreted that language to mean that an ineffective assistance of counsel claim raised in a Rule P.C.1 proceeding is waived if the issue was not raised in the motion to correct error filed by appellate counsel.⁴¹ The practical effect of such a holding is to deny an evidentiary hearing to an ineffective assistance litigant if an attorney other than trial counsel files the motion to correct error or belated motion to correct error. The supreme court, in *Hollonquest v. State*,⁴² and more recently, in *Williams v. State*,⁴³ affirmed the *Rivera* holding.⁴⁴

D. Present Options for Obtaining a Hearing

Fortunately, some exceptions to the hard line in *Rivera* have developed. In *Snider v. State*,⁴⁵ the Indiana Supreme Court identified three ways for a post-conviction litigant to overcome waiver: 1) raising the issue as fundamental error;⁴⁶ 2) raising the ineffective assistance of

³⁷IND. RULES OF PROCEDURE FOR POST-CONVICTION REMEDIES 1.

³⁸*Id.* § 4(f).

³⁹*Id.* § 1(b).

⁴⁰179 Ind. App. 295, 385 N.E.2d 455 (1979).

⁴¹*Id.* at 296, 385 N.E.2d at 456.

⁴²432 N.E.2d 37, 39 (Ind. 1982). Although the court in *Hollonquest* reiterated the waiver holding of *Rivera*, the court reached the merits because the post-conviction petition also alleged the ineffective assistance of appellate counsel for not raising the trial lawyer's incompetency on direct appeal. *Id.*

⁴³464 N.E.2d 893, 894 (Ind. 1984).

⁴⁴The court in *Majors v. State*, 441 N.E.2d at 1376, went so far as to state in dicta that even where trial counsel filed the motion to correct error, the appellate attorney could file a belated motion to correct error raising the issue. This is inconsistent with the settled rule that a motion to correct error not otherwise inadequate is not rendered so by failure to include a particular allegation of error. See *Brown v. State*, 442 N.E.2d 1109, 1114-15 (Ind. 1982).

⁴⁵468 N.E.2d 1037 (Ind. 1984).

⁴⁶*Id.* at 1039. In *Williams v. State*, 464 N.E.2d 893 (Ind. 1984), decided earlier the same year, the court also identified fundamental error as a means of overcoming waiver, but imposed an increased burden of proof: " 'It is not enough, in order to invoke this doctrine, to urge that a constitutional right is implicated. Only when the record reveals clearly blatant violations of basic and elementary principles, and the harm or potential for harm could not be denied, will this Court review an issue not properly raised and preserved.' " *Id.* at 894 (quoting *Nelson v. State*, 409 N.E.2d 637 (Ind. 1980)).

Thus, the court reviewed the ineffective assistance claim although waived under *Keys*

appellate counsel as the petitioner did in *Hollonquest*;⁴⁷ and 3) justifying the prior default in some manner.⁴⁸

Bailey v. State,⁴⁹ however, recently modified *Snider* by requiring that a fundamental error claim be asserted within the framework of an ineffective assistance of counsel claim.⁵⁰ Apparently, the defendant must allege that the lawyer on direct appeal was ineffective for not raising the issue of fundamental error on direct appeal. Thus, raising the ineffective assistance of trial counsel alone as fundamental error is no longer viable; instead, the "waived" issue must be coupled with a claim of the ineffective assistance of appellate counsel.

The other option, justification of the waiver, has its roots in *Langley v. State*,⁵¹ the first comprehensive opinion explaining the function of the Rule P.C.1 proceeding. In *Langley* the court stated:

For relief to be granted where the element of waiver has been introduced at the post-conviction hearing, there must be some substantial basis or circumstance presented to the trial court which would satisfactorily mitigate a petitioner's failure to have pursued or perfected a remedy through the normal procedural routes.⁵²

In *Tope v. State*, Justice DeBruler noted in dissent that while *Bailey* modified *Snider* as to fundamental error, it did not alter or discredit the *Langley* doctrine of justification.⁵³ DeBruler dissented because he believed circumstances existed which justified the petitioner's not having raised the issue earlier.⁵⁴ Thus, according to Justice DeBruler, justification of the prior default is still a viable argument against waiver.

In sum, for attorneys faced with a waiver problem in a post-conviction posture, coupling the claim of the trial lawyer's ineffective assistance with a claim of the appellate lawyer's inadequacy for not raising the issue is the most certain method of overcoming a waiver argument.⁵⁵ Justification of the failure to raise the issue on direct appeal could also be argued. As no cases have yet affirmed the validity of the

and *Hollonquest*, but under a stricter standard. The proponent not only was required to prove that his attorney's representation was below the level of reasonably effective assistance, but also that the record reflected "blatant violations" over and above the fact that the constitutional right was implicated.

⁴⁷468 N.E.2d at 1039.

⁴⁸*Id.*

⁴⁹472 N.E.2d 1260 (Ind. 1985).

⁵⁰*Id.* at 1263.

⁵¹256 Ind. 199, 267 N.E.2d 538 (1971).

⁵²*Id.* at 207, 267 N.E.2d at 542.

⁵³477 N.E.2d 873, 876 (Ind. 1985) (DeBruler, J., dissenting).

⁵⁴*Id.* at 876-77.

⁵⁵*Hollonquest v. State*, 432 N.E.2d at 39.

justification argument, however, the result is uncertain. The justification, of course, would be the undeniable need for an evidentiary hearing.⁵⁶

Although the post-conviction attorney must confront waiver problems, the direct appeal attorney has a more fundamental decision whether to abstain deliberately from litigating the ineffectiveness issue. Currently, the most serious consequence of the present state of law is not that a post-conviction claim will be dismissed on waiver grounds, but that a direct appeal attorney, aware of *Rivera* and other waiver cases, will allow the claim to be decided on the merits even if it means foregoing an evidentiary hearing. Because a claimant has little chance of succeeding on the merits without the type of proof that can only be produced at a hearing,⁵⁷ it is not in the client's best interests to have the claim decided on direct appeal unless counsel is certain of securing a hearing on the motion or belated motion to correct error.⁵⁸ Although a lawyer not raising the claim on direct appeal may be challenged as ineffective in a Rule P.C.1 proceeding,⁵⁹ the client stands a better chance of refuting waiver at the post-conviction hearing than winning without an evidentiary hearing.

⁵⁶Of course, if the state does not assert waiver in its answer to the petition for post-conviction relief, the post-conviction court should hold an evidentiary hearing, reach the merits of the claim, and the appellate court should review the merits of the issue. See *Langley v. State*, 256 Ind. at 207, 267 N.E.2d at 542-43. ("Where, however, the state, as it did in this case, chooses to meet a petitioner's allegations on their merits at the hearing, we must do likewise on appeal.") See also *Williams v. State*, 464 N.E.2d at 895-96 (DeBruler, J., concurring in result).

⁵⁷A dramatic example of the need for a hearing can be found in *Helton v. State*, 479 N.E.2d 538, 539 (Ind. 1985). In *Helton*, the trial attorney did not object to the admission of a defectively stipulated to polygraph. The prosecutor's signature was not on the form, and had the attorney objected, the polygraph results would not have been admitted. The attorney *might* not have objected for some tactical reason. The court certainly would not have decided otherwise in the face of the presumption of competency and a lack of evidence as to the lawyer's reason. However, there was a hearing and the attorney stated he did not object because he thought the form was "good and followed the statute." With evidence in the record of his reason, based on a faulty interpretation of the law, the court reversed. *Id.*

⁵⁸There will be an occasional ineffective assistance claim where there is no need for a hearing. For example, IND. CODE § 35-36-6-1 provides for a mandatory hearing when a change of venue from the county is sought. However, if the motion is defective, it is not an abuse of discretion for the judge to deny the motion without a hearing. See *Haskett v. State*, 179 Ind. App. 655, 386 N.E.2d 1012 (1979). In such a case, the lawyer's strategy, to obtain a change of venue from the county, would be apparent from the record. Also, the defectively drafted motion could not possibly have been a tactical decision. Of course, "isolated errors" may not amount to overall ineffectiveness, because the touchstone is whether or not counsel was so deficient as to cause a breakdown in the adversarial process. See, e.g., *Strickland*, 104 S. Ct. at 2064-67; *Elliott v. State*, 465 N.E.2d 707, 710 (Ind. 1984).

⁵⁹*Hollonquest*, 432 N.E.2d at 39.

Paradoxically, a lawyer foregoing litigation of the ineffective assistance claim on direct appeal as described above is making a strategic decision, which militates against a finding of appellate inadequacy. Indeed, a lawyer can hardly fulfill his ethical duty to represent his client zealously by knowingly litigating a claim at a point where the client is deprived of the means of proving the claim.

The appellate lawyer's reasons for not raising the issue, which make success less likely on a claim of appellate ineffectiveness, however, make success more likely on a justification argument. Accordingly, an ineffective assistance allegation against the appellate lawyer should be posed alternatively with a justification argument, i.e., that the failure to raise the issue on direct appeal was grounded in "some substantial basis or circumstances"⁶⁰ — futility.

An appellate attorney certain of securing an evidentiary hearing should do so; but, if no hearing is obtained, he should not raise the issue in his appellant's brief. If the issue is decided by the appellate court on the merits, almost certainly against the defendant, *res judicata* will effectively bar relitigation on a post-conviction petition far more assuredly than would waiver for failure to raise the issue on appeal.

IV. CONCLUSION: A SUGGESTION TO THE COURTS

The problem described here is a classic example of rules founded in reason gradually becoming senseless dogma. There is generally good reason for the lack of a right to an evidentiary hearing pursuant to trial rule 59. The motion to correct error is properly an opportunity for the trial judge, after the heat of battle, to reexamine rulings made at trial and to correct his own mistakes.⁶¹ No evidentiary hearing is usually needed because the nature of the inquiry, primarily legal, does not demand it.

It is with equally good reason that post-conviction proceedings are "not a substitute for direct appeal," or a "super appeal." Principles of finality, economy of legal resources, and the orderly resolution of direct appeal issues before the resolution of collateral issues support the principle of waiver.⁶² However, when these rules combine to deny an individual the ability to prove the infringement of a constitutional right, the rules must change.

⁶⁰*Langley v. State*, 256 Ind. at 207, 267 N.E.2d at 542. The fact that both the appellate lawyer and the post-conviction lawyer (who is raising the justification argument) believe in the futility of direct appeal litigation strengthens the argument made to the post-conviction judge.

⁶¹See BAGNI, GIDDINGS, STROUD, *INDIANA PRACTICE*, 4A, § 21 (1979).

⁶²256 Ind. at 199, 267 N.E.2d at 538.

Because trial rule 59 applies to civil as well as criminal proceedings, the consequences of making an exception to that rule could become unmanageable. The cleanest way to resolve this situation would be to declare that because an evidentiary hearing is necessary to afford a litigant a fair chance at meeting his burden of proof, the ineffective counsel issue cannot be adequately litigated in the motion to correct error-direct appeal forum. If that is admitted, the Rule P.C.1 section 1(b) language stating that a post-conviction proceeding is not a substitute for direct appeal ceases to be applicable to ineffective assistance claims because it is not an issue that can be adequately handled within the framework of direct appeal.

Allowing all ineffective assistance claims to be litigated in post-conviction proceedings would not necessarily result in more hearings. *Strickland* identified two components to an ineffective assistance claim: inadequacy and prejudice.⁶³ The *Strickland* court stated that the components could be decided in any order.⁶⁴ Some inadequacy claims rest on allegations which, even if true, are neither indicia of incompetence, nor could they have prejudiced the claimant. Rule P.C.1 section 4(f) provides that an evidentiary hearing is necessary only on issues of material fact.⁶⁵ If a court, assuming the facts to be true, found a lack of prejudice, or found the facts did not indicate incompetency, no hearing would be needed because the disputed facts would cease to be material.⁶⁶ For example, a claim that the lawyer did not object to the admission of gruesome photographs would not indicate incompetence if the photographs were admissible. A lawyer's failure to interview a defense witness *might* support an ineffective assistance claim if the lawyer had no reasonable basis for his omission, but harmless if the witness' testimony would not have added materially to the defense.

By allowing all ineffectiveness of counsel claims to be litigated in the Rule P.C.1 forum, two benefits could be realized. Under the summary judgment analysis of the prejudice component, meritless claims could be disposed of without the judicial cost of an evidentiary hearing; all meritorious claims would receive a hearing.

⁶³104 S. Ct. at 2064.

⁶⁴*Id.* at 2069.

⁶⁵IND. RULE OF PROCEDURE FOR POST-CONVICTION REMEDIES 1 § 4(f): "The court may grant a motion by either party for summary disposition of the petition when it appears from the pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted, that there is no genuine issue of material fact"

⁶⁶Although proving prejudice could involve questions of fact, in most cases the facts would be subject to proof by depositions, answers to interrogatories, and affidavits. To this author's knowledge, this "summary judgment" approach to ineffective assistance claims is not being used, although the rules exist which permit it.

The present inequitable situation cannot continue. The appellate courts engender no respect by requiring a type and quantum of proof that can only be gathered through an evidentiary hearing, and then denying that necessary hearing to some litigants on a basis not connected to the merits.