NOTES

EFFECTIVENESS OF COUNSEL IN INDIANA: AN EXAMINATION OF APPELLATE STANDARDS

An accused's right to counsel constitutes a fundamental principle in the American scheme of justice.[1] An essential corollary embodied in that right is the requirement that counsel render adequate, not just perfunctory, assistance to his client.[2] This

---

[1]Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45 (1932); Knox County Council v. State *ex rel.* McCormick, 217 Ind. 493, 29 N.E.2d 405 (1940); Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1920); Webb v. Baird, 6 Ind. 13 (1854).

A defendant in a criminal trial has a right to have any attorney of his own choice if he is financially able to employ such attorney. If he is not financially able to do so, the court has a duty to select a competent attorney for him at public expense. Fitzgerald v. State, 254 Ind. 39, 257 N.E.2d 305 (1970); State v. Minton, 234 Ind. 578, 130 N.E.2d 226 (1955); Bradley v. State, 227 Ind. 131, 84 N.E.2d 580 (1949). Thus an indigent does not have the right to counsel of his own choosing. State v. Irvin, 291 N.E.2d 70 (Ind. 1973); Burton v. State, 246 Ind. 197, 204 N.E.2d 218 (1964); McDowell v. State, 225 Ind. 495, 76 N.E.2d 249 (1947). Such selection is wholly within the sound discretion of the trial court and reviewable only for abuse of discretion. State *ex rel.* Brown v. Thompson, 226 Ind. 392, 81 N.E.2d 533 (1948); Schuble v. Youngblood, 225 Ind. 169, 73 N.E.2d 478 (1947); State *ex rel.* Shorter v. Allen Super. Ct., 292 N.E.2d 286 (Ind. Ct. App. 1973).

[2]As early as 1925, the Indiana Supreme Court noted in Castro v. State, 196 Ind. 385, 147 N.E. 321 (1925):

> And mere perfunctory action by an attorney assuming to represent one accused of crime which falls short of presenting the evidence favorable to him and invoking the rules of law intended to prevent conviction for an offense of which the accused is innocent, or the imposition of a penalty more severe than is deserved, should not be tolerated.

Id. at 391, 147 N.E. at 323. In Powell v. Alabama, 287 U.S. 45 (1932), the United States Supreme Court emphasized that when due process requires the appointment of counsel, "that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of *effective* aid in the preparation and trial of the case." *Id.* at 71 (emphasis added).

right to effective counsel is guaranteed by the Indiana Constitution, article 1, section 13, and by the United States Constitution, sixth amendment, as applied to the states through the fourteenth amendment.[3] Recent cases expanding the right to counsel to "every critical stage of a criminal prosecution,"[4] liberalized rules for postconviction relief, and more diligent enforcement of the code of professional ethics increase the likelihood that criminal appellants in Indiana will seek to reverse their convictions on the ground of incompetency of counsel.

This Note will examine the grounds upon which Indiana appellants have based their incompetency challenges and the standards which Indiana courts have utilized to evaluate these charges. Possible modifications of those standards will be discussed in light of recent federal decisions which may help effectuate the high principles of zealous representation demanded of a responsible legal community.

I. Standards of Effectiveness

Indiana courts have imposed a heavy burden upon any appellant who seeks to reverse his conviction on grounds of incom-

---

[3]Wilson v. Phend, 417 F.2d 1197 (7th Cir. 1969); Johns v. Overlade, 122 F. Supp. 921 (N.D. Ind. 1953); Thomas v. State, 251 Ind. 546, 242 N.E.2d 919 (1969); Blincoe v. State, 243 Ind. 387, 185 N.E.2d 729 (1962); Hillman v. State, 234 Ind. 27, 123 N.E.2d 180 (1954); Abraham v. State, 228 Ind. 179, 91 N.E.2d 358 (1943); Hartman v. State, 292 N.E.2d 293 (Ind. Ct. App. 1973).

[4]*See* Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964) (custodial interrogations); Kirby v. Illinois, 406 U.S. 682 (1972); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967) (lineups); Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing); Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment); Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963) (trial); Mempa v. Rhay, 389 U.S. 128 (1968) (sentencing); Douglas v. California, 372 U.S. 353 (1963) (appeal); *In re* Gault, 387 U.S. 1 (1967) (juvenile proceedings).

Indiana has long held that an accused is entitled to counsel not only at the time of trial, but also to consult with counsel "at all stages of the proceedings." Lloyd v. State, 241 Ind. 192, 170 N.E.2d 904 (1960); State v. Lindsey, 231 Ind. 126, 106 N.E.2d 230 (1952); Hoy v. State, 225 Ind. 428, 75 N.E.2d 915 (1947); State *ex rel.* White v. Hilgemann, 218 Ind. 572, 34 N.E.2d 129 (1941); Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1920). Moreover, note that prior to *Argersinger*, Indiana, at least in principle, made no distinction between felonies and misdemeanors with respect to the

petency or ineffectiveness of counsel. A presumption exists that defense counsel in a criminal proceeding has fully and competently discharged his duties.[5] An appellant must present "strong and convincing proof" to overcome this presumption.[6] Specifically, he must prove that his attorney's acts or omissions made the proceedings a "farce," "mockery of justice," or "shocking to the conscience" of the appellate court.[7] In making its final determination, the reviewing court will look to the "totality of the circumstances."[8] An appeal based on inadequate representation, therefore, may not rest upon a mere mistake in judgment on a certain aspect of the trial, but must consider pretrial preparation, the handling of the trial, and the necessary steps for appeal.[9]

While it is the duty of an attorney, whether appointed or retained, to represent his client fully and adequately, utilizing reason-

---

right to counsel. *See* Bolkovac v. State, 229 Ind. 294, 299, 98 N.E.2d 250, 253 (1951).

[5]Payne v. State, 301 N.E.2d 514, 516 (Ind. 1973); Kelly v. State, 287 N.E.2d 872, 874 (Ind. 1972); Shuemak v. State, 254 Ind. 117, 121, 258 N.E.2d 158, 160 (1970); Langley v. State, 250 Ind. 29, 37, 232 N.E.2d 611, 615, *cert. denied*, 393 U.S. 835 (1968); Schmittler v. State, 228 Ind. 450, 467, 93 N.E.2d 184, 191 (1950); Wilson v. State, 291 N.E.2d 570, 573 (Ind. Ct. App. 1973).

[6]Conley v. State, 284 N.E.2d 803, 808 (Ind. 1972); Isaac v. State, 274 N.E.2d 231, 237 (Ind. 1971); Hathaway v. State, 251 Ind. 374, 379, 241 N.E.2d 240, 243 (1968); Dowling v. State, 233 Ind. 426, 431, 118 N.E.2d 801, 804 (1954); Lenwell v. State, 294 N.E.2d 643, 646 (Ind. Ct. App. 1973).

[7]Haddock v. State, 298 N.E.2d 418, 420 (Ind. 1973); Robbins v. State, 274 N.E.2d 255, 258 (Ind. 1971); Johnson v. State, 251 Ind. 17, 23, 238 N.E.2d 651, 655 (1968); Shack v. State, 249 Ind. 67, 80, 231 N.E.2d 35, 44 (1967); Harrison v. State, 292 N.E.2d 612, 613 (Ind. Ct. App. 1973); Poindexter v. State, 290 N.E.2d 512, 513 (Ind. Ct. App. 1972). *See also* United States v. Izzi, 385 F.2d 412, 413 (7th Cir. 1967); Lunce v. Overlade, 244 F.2d 108, 110 (7th Cir. 1957); Pelley v. United States, 214 F.2d 597, 602 (7th Cir. 1954), *cert. denied*, 348 U.S. 915 (1955).

[8]Lowe v. State, 298 N.E.2d 421, 422 (Ind. 1973); Blackburn v. State, 291 N.E.2d 686, 696 (Ind. 1973); State v. Irvin, 291 N.E.2d 70, 73 (Ind. 1973); Sargeant v. State, 299 N.E.2d 219, 222 (Ind. Ct. App. 1973).

[9]Johnson v. State, 251 Ind. 17, 23, 238 N.E.2d 651, 655 (1968); Brown v. State, 248 Ind. 11, 15, 221 N.E.2d 676, 679, *cert. denied*, 387 U.S. 925 (1966), *rehearing denied*, 389 U.S. 891 (1967); Stice v. State, 228 Ind. 144, 152, 89 N.E.2d 915, 918 (1950).

able skill and diligence, the law does not require perfection.[10] Thus the failure of a lawyer to claim for his client every possible legal advantage does not constitute inadequacy of counsel.[11] Nor is the mere fact that another attorney might have conducted the defense differently sufficient to require a reversal.[12] Thus, poor strategy, bad tactics, honest mistakes in judgment, mere carelessness, or inexperience do not necessarily amount to ineffective representation.[13] Most clearly, an unfavorable result alone does not amount to a denial of the right to competent counsel.[14]

---

[10]Calhoun v. United States, 454 F.2d 702, 703 (7th Cir. 1971), *cert. denied*, 405 U.S. 1019 (1972); Conley v. State, 284 N.E.2d 803, 808 (Ind. 1972); Bays v. State, 240 Ind. 37, 50, 159 N.E.2d 393, 399 (1959), *cert. denied*, 361 U.S. 972 (1960); Poindexter v. State, 290 N.E.2d 512, 513 (Ind. Ct. App. 1972). As the court in Riggs v. State, 235 Ind. 499, 135 N.E.2d 247 (1956), observed:

> The mere fact that greater skill might have been employed by counsel or looking in retrospect, that better judgment or discretion might have been employed is not incompetency, since no professional man has absolute skill, perfect judgment or foresight.

Id. at 504, 135 N.E.2d at 250.

[11]Bays v. State, 240 Ind. 37, 50, 159 N.E.2d 393, 399 (1959), *cert. denied*, 361 U.S. 972 (1960); Poindexter v. State, 290 N.E.2d 512, 513 (Ind. Ct. App. 1972).

[12]Blackburn v. State, 291 N.E.2d 686, 696 (Ind. 1973); Callahan v. State, 247 Ind. 350, 356, 214 N.E.2d 648, 652 (1966); Wagner v. State, 243 Ind. 570, 579, 188 N.E.2d 914, 919 (1963); Groover v. State, 239 Ind. 271, 280, 156 N.E.2d 307, 311 (1959); Hendrickson v. State, 233 Ind. 341, 344, 118 N.E.2d 493, 495 (1954).

[13]Lowe v. State, 298 N.E.2d 421, 422 (Ind. 1973); Isaac v. State, 274 N.E.2d 231, 237 (Ind. 1971); Johnson v. State, 251 Ind. 17, 23-24, 238 N.E.2d 651, 655 (1968); Brown v. State, 248 Ind. 11, 15, 221 N.E.2d 676, 679, *cert. denied*, 387 U.S. 925 (1966), *rehearing denied*, 389 U.S. 891 (1967); Haley v. State, 235 Ind. 333, 340, 133 N.E.2d 565, 568 (1956).

[14]Blackburn v. State, 291 N.E.2d 686, 696 (Ind. 1973). The court's statement in DeBruler v. State, 247 Ind. 1, 210 N.E.2d 666 (1965), is illustrative of the disdain expressed by courts toward a defendant who loses and then claims incompetency of his counsel:

> So long as a counsel is competent, clients must either choose to represent themselves or be represented by an attorney skilled in such proceedings. They cannot have their cake and eat it. They cannot take the benefits of counsel's services if they win and then reject the services if they lose.

Id. at 4, 210 N.E.2d at 668.

Since the appellant has the burden of establishing incompetency of counsel by a preponderance of the evidence,[15] he must present a sufficient record to permit an intelligent review of the issue.[16] Appellant's testimony at the postconviction hearing standing alone, even though uncontradicted, may not be sufficient to establish incompetency of his counsel.[17] When appellant's trial attorney testifies at or submits an affidavit at the hearing,[18] Indiana courts have given strong credence to the attorney's allegations that he conducted himself in a proper and competent manner.[19] Failure of an appellant to produce the testimony of his trial attorney may raise an inference that the attorney would

---

[15]IND. P.C.R. 1, § 5 states: "The petitioner has the burden of establishing his grounds for relief by a preponderance of the evidence."

[16]State v. Irvin, 291 N.E.2d 70 (Ind. 1973); Johnson v. State, 293 N.E.2d 532 (Ind. 1972); Burns v. State, 255 Ind. 1, 260 N.E.2d 559 (1970). Appellant should also make the trial transcript a part of the record. Harrison v. State, 292 N.E.2d 612 (Ind. Ct. App. 1973); Miles v. State, 284 N.E.2d 551 (Ind. Ct. App. 1972).

[17]Schmittler v. State, 228 Ind. 450, 93 N.E.2d 184 (1950). In Finger v. State, 293 N.E.2d 25, 27 (Ind. 1973), the court held that appellant's uncontradicted affidavit was largely "conclusive and opinionative" and did not relate to matters of which the State could have any knowledge. *But see* Johns v. State, 227 Ind. 737, 742, 89 N.E.2d 281, 283 (1949) (Emmert, J., dissenting); Schmittler v. State, 228 Ind. 450, 471-72, 93 N.E.2d 184, 192-93 (1950) (Emmert, C. J., dissenting). In *Schmittler*, Judge Gilkison also dissented:

> The fact that the state made no effort to produce this evidence when it was its duty and within its power to do so raises the presumption that had it done so this evidence would have been against the state and would have corroborated appellant's statement.

Id. at 484, 93 N.E.2d at 197-98.

[18]The client waives the attorney-client privilege once he places the professional integrity and competency of his counsel into issue. Moore v. State, 231 Ind. 690, 111 N.E.2d 47 (1953); Fluty v. State, 224 Ind. 652, 71 N.E.2d 565 (1947).

[19]State v. Irvin, 291 N.E.2d 70, 73 (Ind. 1973); Kelly v. State, 287 N.E.2d 872, 874 (Ind. 1972); Canan v. State, 242 Ind. 576, 578-79, 179 N.E.2d 746, 747 (1962); Moore v. State, 231 Ind. 690, 693-94, 111 N.E.2d 47, 48 (1953); Harrison v. State, 292 N.E.2d 612, 613 (Ind. Ct. App. 1973). Even when the attorney is unable to clearly recall the specifics of his representation, the court may still find adequacy of counsel. *See* Haddock v. State, 298 N.E.2d 418, 419 (Ind. 1973).

not have corroborated the defendant.[20] But when an attorney supports appellant's allegations, the court is likely to place great reliance upon his testimony.[21]

When an appellant fails to disclose counsel's specific errors and actual prejudice due to such errors, he has not provided sufficient evidence of incompetency.[22] Furthermore, in determining whether appellant made such charges in good faith, the court will take into account any delay by appellant in pressing the incompetency charge.[23] However, mere procedural errors in the presentation of such challenge may not prevent the consideration of a fundamental constitutional issue such as the right to effective counsel.[24]

Aside from the attorney's particular acts or omissions in the case at hand, Indiana courts have frequently considered a number of additional, although not decisive, factors in determining the

---

[20]Conley v. State, 284 N.E.2d 803, 807 (Ind. 1972); Schmittler v. State, 228 Ind. 450, 467, 93 N.E.2d 184, 190 (1950). However, Chief Justice Emmert in a strong dissent in *Schmittler* suggested this view is contrary to precedent and wholly fallacious. He argued that since the attorney's interest in protecting his professional reputation would have made him an adverse witness, the State's failure to produce the attorney raised an inference that appellant's allegations were true. *Id.* at 474, 93 N.E.2d at 194. Similarly, Judge Gilkison in dissent wrote: "I cannot imagine a case in which a party is required to place his adversary or his adversary's witnesses on the stand." *Id.* at 485, 93 N.E.2d at 198.

[21]Shack v. State, 249 Ind. 67, 231 N.E.2d 35 (1967). Similarly, when the State admits that the defendant had not received a fair trial, a finding of incompetency is likely. *See* Riggs v. State, 235 Ind. 499, 135 N.E.2d 247 (1956).

[22]Spight v. State, 248 Ind. 287, 226 N.E.2d 895 (1967); Wallace v. State, 247 Ind. 405, 215 N.E.2d 354 (1966); Willoughby v. State, 247 Ind. 210, 214 N.E.2d 169 (1966); Carraway v. State, 236 Ind. 45, 138 N.E.2d 299 (1956); Haley v. State, 235 Ind. 333, 133 N.E.2d 565 (1956).

[23]*In re* Sobieski, 246 Ind. 222, 204 N.E.2d 353 (1965); *In re* Lee, 246 Ind. 7, 198 N.E.2d 231 (1964); Jennings v. State, 297 N.E.2d 909 (Ind. Ct. App. 1973).

[24]Johns v. State, 227 Ind. 737, 749, 89 N.E.2d 281, 285-86 (1949) (dissenting opinion); Wilson v. State, 222 Ind. 63, 78, 83, 51 N.E.2d 848, 854, 856 (1943). However, recent cases indicate that the increasing caseload of the appellate courts may necessitate greater care by appellate attorneys in conforming to procedural requirements. *See, e.g.*, Haddock v. State, 298 N.E.2d 418, 420 (Ind. 1973); Lipps v. State, 254 Ind. 141, 145, 258 N.E.2d 622, 625 (1970).

competency of defense counsel, including the attorney's legal qualifications, the nature of the case, and the method by which counsel was selected. First, courts often look to counsel's legal qualifications, including his experience, education, admission to the bar, and reputation in the legal community. An attorney's widespread legal experience generally,[25] or as a defense counsel or judge in criminal trials specifically,[26] strengthens the reviewing court's presumption of counsel's competency. On the other hand, the court may consider an attorney's substantial lack of experience in criminal defense work as one factor contributing toward his incompetency.[27] Counsel's graduation from a reputable law school[28] and admission to practice in the state where the accused was tried also reinforces this rebuttable presumption of competency,[29] but

---

[25]Sweet v. Howard, 155 F.2d 715, 718 (7th Cir. 1946), *cert. denied,* 336 U.S. 950 (1949) (forty years of legal practice, service as president of bar association, and favorable comment on his legal abilities by the Indiana Supreme Court); United States v. Hartenfeld, 113 F.2d 359, 362 (7th Cir. 1940) (thirty-six years of legal practice).

[26]Moore v. State, 231 Ind. 690, 693, 111 N.E.2d 47, 49 (1953); Sargeant v. State, 299 N.E.2d 219, 221 (Ind. Ct. App. 1973) (tried between two and three hundred criminal jury cases); Wilson v. State, 291 N.E.2d 570, 572 (Ind. Ct. App. 1973). In Canan v. State, 242 Ind. 576, 580, 179 N.E.2d 746, 748 (1962), the court noted that twelve members of the bar had testified as to the competency of defendant's attorney and as to his experience in criminal matters.

[27]In Shack v. State, 249 Ind. 67, 75, 231 N.E.2d 35, 42 (1967), the court, in finding counsel incompetent, noted that he had graduated from law school six years previously, but emphasized that he had spent only five percent of his practice in criminal matters, had participated in only one criminal jury trial, and had never prepared a homicide case before. But in Achtien v. Dowd, 117 F.2d 989 (7th Cir. 1941), the court stressed that counsel's youthfulness and inexperience alone did not constitute incompetency:

> There is a rather well-defined recollection on the part of the court, backed by our observations, that all lawyers must have their first cases, that in said first case diligence and anxious effort are often quite the equivalent of experience. . . . [A young inexperienced counsel] may, therefore, give his client full, valuable and vigorous service, which will compare favorably with that which his more experienced and better established brethren of the Bar render.

Id. at 992-93.

[28]Fluty v. State, 224 Ind. 652, 661, 71 N.E.2d 565, 569 (1947); Wilson v. State, 291 N.E.2d 570, 572 (Ind. Ct. App. 1973).

[29]Achtien v. Dowd, 117 F.2d 989, 992 (7th Cir. 1941). *See also* cases cited note 5 *supra.* Courts often note that the defense attorney has been ad-

when an out-of-state attorney appears on behalf of defendant, no such presumption arises.[30] Certainly, when counsel misrepresents himself as an attorney at law, defendant has been denied effective representation.[31]

Secondly, Indiana courts have considered the nature of the case in terms of its difficulty,[32] severity of the charges, and the

---

mitted to the state bar. *See, e.g.*, Casey v. Overlade, 129 F. Supp. 433, 434 (N.D. Ind. 1955); Moore v. State, 231 Ind. 690, 693, 111 N.E.2d 47, 48 (1953). In Fluty v. State, 224 Ind. 652, 661, 71 N.E.2d 565, 569 (1947), the court additionally observed that counsel had been admitted to practice before the federal district court, the circuit court of appeals, and the United States Supreme Court. *But see* Hillman v. State, 234 Ind. 27, 123 N.E.2d 180 (1954):

> It is not sufficient just to appoint one who has been admitted to the bar, but it must be an attorney who not only has the ability to defend but one who has a determined will to defend, and "Never to reject, from any consideration personal to himself, the cause of the defenseless or oppressed."

Id. at 34, 123 N.E.2d at 183.

[30]In Lunce v. State, 233 Ind. 685, 687-88, 122 N.E.2d 5, 6 (1954), *cert. denied*, 349 U.S. 960 (1955), Judge Emmert in dissent noted that counsel, who was from Ohio and not a member of the Indiana bar, had submitted a motion for a new trial which totally failed to comply with Indiana rules and had grossly failed to discharge his duties as a lawyer. He suggested that if any presumption should be drawn, it should be that an out-of-state attorney "is not qualified to take the grave duty of safeguarding the legal and constitutional rights of his clients." The Seventh Circuit adopted Judge Emmert's views in Lunce v. Overlade, 244 F.2d 108, 109-10 (7th Cir. 1957), finding that counsel was so ignorant of Indiana law and procedure that it was virtually impossible for him to protect defendant's rights. However, in Isaac v. State, 274 N.E.2d 231, 237 (Ind. 1971), the court held that out-of-state counsel, contrary to defendant's allegations, had conducted a vigorous and effective defense.

[31]In Riggs v. State, 235 Ind. 499, 135 N.E.2d 247 (1956), defense "counsel," a bail bondsman, falsely represented himself to be an attorney at law to both defendant and to a local practicing attorney who assisted in the defense only on the day of the trial. *See also* CODE OF PROFESSIONAL RESPONSIBILITY, Canon 3 (unauthorized practice of law).

[32]Fairly cursory conduct by defense counsel may be adequate when the defense position is untenable. As Chief Justice Arterburn concluded in Lowe v. State, 298 N.E.2d 421, 422-23 (Ind. 1973): "In our view, there are, realistically speaking, some cases that just cannot be won simply because the evidence and witnesses against an accused are so overwhelming as to approach irrefutability. This is just such a case." Similarly, in Groover v. State, 239 Ind. 271, 156 N.E.2d 307 (1959), many witnesses observed defendant shoot his estranged wife in the back as she departed from church. Given the diffi-

personal characteristics of the defendant. When a black, poor, young, ignorant, or foreign defendant has been charged with a serious crime, courts frequently have imposed upon counsel a higher standard of effective representation.[33]

Thirdly, some Indiana cases have required a more extreme showing of incompetency when counsel is privately retained rather than court-appointed. It is argued that since the defendant had an opportunity to select whomever he wanted as counsel and since he could discharge such counsel for ineffectiveness at any time during the judicial proceedings, he cannot in retrospect challenge the competency of such representation.[34] This distinction is contrary, however, to a long line of cases holding that the Indiana and federal constitutions require competent counsel in all criminal cases, regardless of the method of counsel's selection.[35]

---

culty of the case, counsel asserted the defense of temporary insanity and sudden heat of passion, but the jury was not persuaded. The court concluded that although other counsel might have employed a different strategy, the consequences were not likely to have been different. *See also* Achtien v. Dowd, 117 F.2d 989, 993 (7th Cir. 1941); Nicholas v. State, 300 N.E.2d 656, 663-64 (Ind. 1973); Ferguson v. State, 301 N.E.2d 382 (Ind. Ct. App. 1973).

[33]Powell v. Alabama, 287 U.S. 45 (1932) (three illiterate black youths were sentenced to death for the alleged rape of two white girls). Indiana courts have similarly reviewed these factors in holding counsel incompetent. Shack v. State, 249 Ind. 67, 231 N.E.2d 35 (1967) (poor, uneducated defendant sentenced to death for first degree murder); Hillman v. State, 234 Ind. 27, 123 N.E.2d 180 (1954) (poor, uneducated, young black sentenced to life imprisonment for rape); Sweet v. State, 233 Ind. 160, 117 N.E.2d 745 (1954) (poor youth sentenced to life imprisonment for kidnapping); Sanchez v. State, 199 Ind. 235, 157 N.E. 1 (1927) (eighteen year-old Mexican, with only limited knowledge of English, sentenced to death for first degree murder).

[34]United States v. Hack, 205 F.2d 723, 726-27 (7th Cir.), *cert. denied*, 346 U.S. 875 (1953); Gibson v. State, 251 Ind. 231, 236, 240 N.E.2d 812, 814 (1968); Johnson v. State, 251 Ind. 17, 23, 238 N.E.2d 651, 654-55 (1968); Rice v. State, 248 Ind. 200, 205, 223 N.E.2d 579, 582 (1967).

[35]Payne v. State, 301 N.E.2d 514, 516 (Ind. 1973); Lunce v. State, 233 Ind. 685, 692-93, 122 N.E.2d 5, 8 (1954) (dissenting opinion), *cert. denied*, 349 U.S. 960 (1955); Abraham v. State, 228 Ind. 179, 185, 91 N.E.2d 358, 360 (1950); Wilson v. State, 222 Ind. 63, 80, 51 N.E.2d 848, 855 (1943); Sanchez v. State, 199 Ind. 235, 246, 157 N.E. 1, 5 (1927). Note the willingness of federal courts to entertain such actions when state remedies have failed. Lunce v. Overlade, 244 F.2d 108, 110-11 (7th Cir. 1957); Achtien v. Dowd, 117 F.2d 989, 993 (7th Cir. 1941). The court's argument in Wilson v. Phend, 417 F.2d 1197 (7th Cir. 1969), merits consideration:

At least three rationales underlie the strictness of the Indiana standard for incompetency of counsel. First, appellate judges do not want to "second guess" the trial attorney's honest errors in judgment or mistakes in trial tactics.[36] Counsel's extensive personal contact with the defendant, the witnesses, and the facts of the case, it is argued, place him in a superior position to select the most effective defense strategy. Second, Indiana courts are concerned that convicted criminal defendants, in the leisure of retrospection, will overburden the courts with claims of incompetency of their trial lawyers.[37] Thus, courts frequently emphasize that "hindsight

---

> The distinction between retained and appointed counsel overlooks the fact that, in either case, the state has obtained a conviction against the accused under such grossly unfair circumstances as to cast doubt upon the factual basis upon which proof of guilt rests. We agree with other courts which have held that in such circumstances sufficient state action exists to invoke the protections of the Fourteenth Amendment.

Id. at 1200.

[36]Blackburn v. State, 291 N.E.2d 686, 696 (Ind. 1973); Isaac v. State, 274 N.E.2d 231, 237 (Ind. 1971); Langley v. State, 250 Ind. 29, 36, 232 N.E.2d 611, 615, *cert. denied*, 393 U.S. 835 (1968); Brown v. State, 248 Ind. 11, 16, 221 N.E.2d 676, 680, *cert. denied*, 387 U.S. 925 (1966), *rehearing denied*, 389 U.S. 891 (1967); Haley v. State, 235 Ind. 333, 340, 133 N.E.2d 565, 568 (1956). Perhaps the most quoted passage in Indiana opinions on incompetency originated in Hendrickson v. State, 233 Ind. 341, 118 N.E.2d 493 (1954):

> Frequently, even the best of attorneys make decisions during the course of a trial which later may appear to have been errors in judgment. This is the natural result of the imperfections of man and are circumstances which cannot be avoided and must be expected. We cannot "second guess" a trial attorney and reverse a case simply because some other attorney might, under the attending circumstances, have pursued a different course.

Id. at 344, 118 N.E.2d at 495.

[37]Robbins v. State, 274 N.E.2d 255, 258 (Ind. 1971); Hoy v. State, 225 Ind. 428, 435, 75 N.E.2d 915, 920 (1947); Wilson v. State, 291 N.E.2d 570, 573 (Ind. Ct. App. 1973); Poindexter v. State, 290 N.E.2d 512, 513 (Ind. Ct. App. 1972). As the court in Schmittler v. State, 228 Ind. 450, 93 N.E.2d 184 (1950), observed:

> If the uncorroborated statements of a man so vitally interested in the result must be accepted as true merely because such assertions have not been expressly denied, and when other facts and circumstances point in a different direction, it would obviously furnish a ready avenue of escape for any and all who have been convicted and imprisoned.

Id. at 465, 93 N.E.2d at 190.

is not the test" in evaluating counsel's effectiveness.[38] Finally, since most allegations of incompetency reach the court only after appellant has either failed to seek a timely appeal or after he has exhausted the normal routes of appeal, many courts view the defense as an attempt to circumvent normal procedure and unnecessarily prolong litigation through piecemeal, and often frivolous, attacks.[39] This, it is argued, imposes needless demands upon the time and resources of both the court and the public defender system.

An appellant may challenge the effectiveness of his attorney's representation in numerous areas, including conflict of interest, adequacy of preparation, pretrial advice and motions, trial acts and omissions, and adequacy of appellate counsel.

II. Conflict of Interest

The constitutional right to effective counsel necessarily includes the corollary that counsel should exercise independent pro-

---

[38]Robbins v. State, 274 N.E.2d 255, 258 (Ind. 1971); Thomas v. State, 251 Ind. 546, 554, 242 N.E.2d 919, 923-24 (1969); Shack v. State, 249 Ind. 67, 80, 231 N.E.2d 35, 44 (1967); Wilson v. State, 291 N.E.2d 570, 573 (Ind. Ct. App. 1973); Poindexter v. State, 290 N.E.2d 512, 513 (Ind. Ct. App. 1972).

[39]Probably the best statement of this position may be found in Callahan v. State, 247 Ind. 350, 214 N.E.2d 648 (1966):

> A case cannot be strung out indefinitely by bringing one issue after another before a court in piecemeal fashion at the option and with the delays which a defendant may see fit to use. . . . The petitioner has attempted to string out endless technical contentions regarding the trial and appeal. The ultimate purpose of a criminal trial is to determine the guilt or innocence of a defendant. It is not a game in which technical issues should be permitted to overshadow the real question of guilt. It is humanly impossible to hold a trial, no matter how many are granted, without some slight irregularity.

Id. at 356-57, 214 N.E.2d at 650. Similarly, in Canan v. State, 242 Ind. 576, 179 N.E.2d 746 (1962), the court quoted Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir. 1945):

> The opportunity to try his former lawyer has its undoubted attraction to a disappointed prisoner. In many cases there is no written transcript and so he has a clear field for the exercise of his imagination. He may realize that his allegations will not be believed but the relief from monotony offered by a hearing in court is well worth the trouble of writing them down.

242 Ind. at 581, 179 N.E.2d at 748. *See also* United States v. Hack, 205 F.2d 723, 727 (7th Cir.), *cert. denied*, 346 U.S. 875 (1953); Nicholas v. State, 300

fessional judgment by avoiding even the appearance of conflicting interests.[40] Competent counsel will not permit his personal interests, the interests of other clients, or the interests of third persons to compromise his loyalty to his client. A conflict of interest commonly arises when an attorney serves in two different employment capacities. Under the canons of professional ethics, it is entirely proper for an attorney who serves as a part-time assemblyman, city councilman, county commissioner, or in any similar legislative position, to represent a defendant charged with violation of a statute or ordinance when the defense is upon the merits.[41] However, it is unethical for a prosecuting attorney or any of his deputies, law partners, or associates to defend a person accused of a crime anywhere in Indiana or an adjoining state.[42] Moreover, when an attorney represents a person accused of a gruesome murder and simultaneously owns and publishes a local newspaper which gives extensive coverage to the alleged crime and subsequent trial, the lawyer's objectivity may be unduly impaired.[43]

N.E.2d 656, 663 (Ind. 1973); Haddock v. State, 298 N.E.2d 418, 420 (Ind. 1973); Hendrickson v. State, 233 Ind. 341, 344, 118 N.E.2d 493, 495 (1954).

[40]As the Supreme Court emphasized in Glasser v. United States, 325 U.S. 60 (1942): "The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client." *Id.* at 70. *See also* Von Moltke v. Gillies, 332 U.S. 708, 726 (1948); CODE OF PROFESSIONAL RESPONSIBILITY, Canons 5, 9.

[41]IND. STATE BAR ASS'N LEGAL ETHICS COMM., OPINIONS, No. 10 (1965). *See also* CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 5-105.

[42]IND. STATE BAR ASS'N LEGAL ETHICS COMM., OPINIONS, No. 2 (1972); No. 12 (1963). This is true even if the attorney never participates in any prosecutions. *See id.* No. 2 (1964).

[43]Wilson v. Phend, 417 F.2d 1197 (7th Cir. 1969). On remand, the district court found no conflict of interest sufficiently prejudicial to justify reversal. The court of appeals in Wilson v. Lash, 457 F.2d 106 (7th Cir.), *cert. denied*, 409 U.S. 881 (1972), only reluctantly affirmed saying:

> Normally an attorney—assuming a similar dual role in a gruesome murder trial likely to create a hostile environment within a small community—would need heroic virtue to adhere steadfastly to the requisite neutral line between such conflicting interests. . . . [Attorney] Bang's role nonetheless was grossly inappropriate, even if not prejudicial, and we condemn the acceptance of the dual role as inimical to the interest of a sound and trustworthy administration of justice.

Id. at 109.

An attorney's personal interests may also adversely influence the independence of his judgment. Thus, in *Pelley v. United States,*[44] appellant alleged that the prosecution intimidated one of his two attorneys into withholding an effective defense by threatening to deport counsel's wife, a German alien. But the court concluded that the attorney's possible conflict of interest did not constitute ineffective representation, since competent co-counsel was capable of adequately presenting appellant's case.[45] Similarly, a defense attorney's business connections with a bank allegedly robbed by defendant may constitute a conflict of interest when such attorney fails to fully disclose this relationship to his client.[46]

A defense attorney's effectiveness may also be impaired when he represents two or more clients who may have inconsistent or diverse interests. Because public defenders frequently handle large case loads, a few appellants have argued that such overloads presented a conflict of interest which rendered it physically impossible for counsel to devote sufficient time to adequate trial preparation.[47] But absent a specific showing that pauper counsel's other cases conflicted with defendant's trial, a lawyer is not incompetent on the theory that he has engaged in too many criminal cases as a pauper attorey.[48] The additional burden imposed upon an attorney representing codefendants in a criminal action may substantially

---

[44]214 F.2d 597 (7th Cir. 1954), *cert. denied,* 348 U.S. 915 (1955).

[45]*Id.* at 601-02. However, the dissent persuasively argued that:

> . . . the presence in the case of an able, conscientious and honest associate counsel might not necessarily offset the damaging effects resulting from the consequent dereliction of the chief counsel. If one hires a team of horses to pull a loaded wagon, he is not getting proper service if only one of the horses is performing its proper function while the other is pulling back.

Id. at 603 (Schnackenberg, J., dissenting).

[46]Zurita v. United States, 410 F.2d 477, 480 (7th Cir. 1969). The court remanded for a hearing to determine if counsel represented the bank during the defendant's trial. If such a conflict existed, said the court of appeals, the situation was so "fraught with the dangers of prejudice" that a new trial would be required. *Id.*

[47]Thomas v. State, 251 Ind. 546, 242 N.E.2d 919 (1969); Brown v. State, 248 Ind. 11, 221 N.E.2d 676, *cert. denied,* 387 U.S. 925 (1966), *rehearing denied,* 389 U.S. 891 (1967).

[48]Brown v. State, 248 Ind. 11, 17, 221 N.E.2d 676, 680 (1966). In Thomas v. State, 251 Ind. 546, 557, 242 N.E.2d 919, 925 (1969), the court observed that since the public defender was confronted with twice his normal case load, he may have done all he could within the time restrictions. However, when

impair the counsel's effectiveness.[49] However, courts have been reluctant to reverse convictions on such grounds. In *Wilson v. State*,[50] counsel defended both father and son against charges of first degree burglary. Relying upon explicit instructions from the codefendants, their attorney successfully negotiated with the state to obtain charges carrying lesser penalties. On appeal, the father alleged that his guilty plea was sacrificial in nature to insure that his son received a lesser sentence. But the court held that representation of codefendants for the purpose of negotiating a plea was not per se a conflict of interest.[51]

Potentially improper relationships with others in the judicial process may also evoke charges of conflicting interests. But the mere sharing of office space by retained counsel with a law firm which serves as counsel for the sheriff does not necessarily constitute a conflict of interest.[52] Moreover, a lawyer may ethically serve as a court-appointed attorney in circuit court even though the lawyer is the father and law partner of a city court judge within the same circuit.[53] Clearly, a lawyer should not accept employment as an advocate in any matter in which he has previously acted in a judicial capacity. Thus, a conflict of interest arises when a judge pro tempore sets defendant's arraignment, continues the proceedings, sets the cause for trial, and later serves as defendant's court-appointed trial counsel.[54] In short, any criminal appellant in Indiana who seeks to reverse his conviction based upon his counsel's conflicting interests must normally demonstrate not only

---

such a public defender becomes overloaded, the court has the affirmative duty to appoint other counsel to assist him in providing adequate legal representation.

[49]Glasser v. United States, 315 U.S. 60, 75 (1942).

[50]291 N.E.2d 570 (Ind. Ct. App. 1973).

[51]*Id.* at 573. *See also* Jennings v. State, 297 N.E.2d 909, 914 (Ind. Ct. App. 1973).

[52]Callahan v. State, 247 Ind. 350, 214 N.E.2d 648 (1966). The court even suggested that such an affiliation may have motivated defendant to choose such counsel on grounds that his attorney might obtain more information and accommodation through such a relationship.

[53]Ind. State Bar Ass'n Legal Ethics Comm., Opinions, No. 8 (1964).

[54]Tokash v. State, 232 Ind. 668, 115 N.E.2d 745 (1953).

that such compromising influences existed, but also that they actually prejudiced his defense.

III. Adequacy of Preparation

The adequacy of defense counsel's preparation also constitutes an essential element of the right to effective counsel.[55] While our judicial system should strive toward the efficient disposition of criminal cases, this desirable goal cannot be achieved at the expense of depriving a defendant of his fundamental rights. Thus, Indiana courts have frequently held that mere "perfunctory representation" is not constitutionally sufficient.[56] However, the adequacy of an attorney's preparation must be determined by the facts of each case.[57] The total number of attorney-client consultations, the length and content of such consultations, and the extent of counsel's outside preparation and investigation of the case are all factors to be considered by the reviewing court.

Indiana courts have refused to fix a minimum amount of time necessary for adequate client consultation and case preparation.[58] Preparation periods of four days,[59] sixty-five hours,[60] two and

---

[55]Powell v. Alabama, 287 U.S. 45, 71-72 (1932); Thomas v. State, 251 Ind. 546, 242 N.E.2d 919 (1969); Sweet v. State, 233 Ind. 160, 112 N.E.2d 745 (1954); Bradley v. State, 227 Ind. 131, 84 N.E.2d 580 (1949); Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1920); Hartman v. State, 292 N.E.2d 293 (Ind. Ct. App. 1973).

[56]Shack v. State, 249 Ind. 67, 79, 231 N.E.2d 35, 43 (1967); Lloyd v. State, 241 Ind. 192, 196, 170 N.E.2d 904, 906 (1960); Abraham v. State, 228 Ind. 179, 185, 91 N.E.2d 358, 360 (1950); Wilson v. State, 222 Ind. 63, 80, 51 N.E.2d 848, 855 (1943); Castro v. State, 196 Ind. 385, 391, 147 N.E. 321, 323 (1925).

[57]State v. Irvin, 291 N.E.2d 70, 73 (Ind. 1973); Thomas v. State, 251 Ind. 546, 550, 242 N.E.2d 919, 921 (1969); Shack v. State, 249 Ind. 67, 78-79, 231 N.E.2d 35, 43 (1967); Hoy v. State, 225 Ind. 428, 433, 75 N.E.2d 915, 918 (1947); Lenwell v. State, 294 N.E.2d 643, 645 (Ind. Ct. App. 1973).

[58]Thomas v. State, 251 Ind. 546, 242 N.E.2d 919 (1969); Lloyd v. State, 241 Ind. 192, 170 N.E.2d 904 (1960); Fluty v. State, 224 Ind. 652, 71 N.E.2d 565 (1947); Hartman v. State, 292 N.E.2d 293 (Ind. Ct. App. 1973).

[59]Sweet v. State, 233 Ind. 160, 117 N.E.2d 745 (1954). The judge did not appoint counsel until seven days after defendant's request and only four days before trial.

[60]Bradley v. State, 227 Ind. 131, 84 N.E.2d 580 (1949).

one-half hours,[61] one hour,[62] and twenty minutes[63] have been held insufficient under the facts of a particular case. In *Shack v. State*,[64] the Indiana Supreme Court held that an attorney did not adequately prepare in a first degree murder case when he expended only eighteen hours in factual investigation, legal research, and client consultation. The court, after noting the inexperience of trial counsel, emphasized that even a "seasoned trial lawyer would deem it unthinkable to go to trial with only eighteen (18) hours of preparation."[65] An experienced, mature practitioner, it added, would spend "several times eighteen hours in legal research alone" in order to properly prepare just the instructions concerning the various elements of murder.[66]

On the other hand, surprisingly brief periods of time, including eleven hours,[67] two hours,[68] one hour,[69] thirty minutes,[70] fifteen minutes,[71] and ten minutes[72] have been found sufficient for an

---

[61]Thomas v. State, 251 Ind. 546, 242 N.E.2d 919 (1969); Lloyd v. State, 241 Ind. 192, 170 N.E.2d 904 (1960).

[62]Hoy v. State, 225 Ind. 179, 91 N.E.2d 358 (1950); Rhodes v. State, 199 Ind. 183, 156 N.E. 389 (1927).

[63]Abraham v. State, 228 Ind. 179, 91 N.E.2d 358 (1950); Rhodes v. State, 199 Ind. 183, 156 N.E. 389 (1927).

[64]249 Ind. 67, 231 N.E.2d 35 (1967).

[65]*Id.* at 79-80, 231 N.E.2d at 42.

[66]*Id.* at 80, 231 N.E.2d at 42.

[67]State v. Irvin, 291 N.E.2d 70 (Ind. 1973).

[68]Lenwell v. State, 294 N.E.2d 643 (Ind. Ct. App. 1973); Wilson v. State, 291 N.E.2d 570 (Ind. Ct. App. 1973).

[69]Canan v. State, 242 Ind. 576, 179 N.E.2d 746 (1962). The defendant alleged only ten minutes of consultation, while the attorney alleged sixty minutes consultation plus additional time spent in outside preparation. *See also* Sargeant v. State, 299 N.E.2d 219, 221 (Ind. Ct. App. 1973), in which the trial attorney conferred with defendant on the day of trial "probably less than an hour or an hour and a half."

[70]Johns v. State, 227 Ind. 737, 89 N.E.2d 281 (1949). However, the result was overturned by the federal court in Johns v. Overlade, 122 F. Supp. 921 (N.D. Ind. 1953).

[71]Finger v. State, 293 N.E.2d 25 (Ind. 1973); Schmittler v. State, 228 Ind. 450, 93 N.E.2d 184 (1950). In Haddock v. State, 298 N.E.2d 418, 420 (Ind. 1973), the attorney testified that appellant's allegation that he conferred with him only fifteen minutes before trial was "mistaken."

[72]Mitz v. State, 233 Ind. 537, 121 N.E.2d 874 (1954).

attorney to adequately advise defendant and prepare his case. It should be noted, however, that many of these cases contain strong and eloquent dissents which raise substantial doubts as to the ability of any lawyer to adequately prepare a case in such a brief time span.[73]

An attorney must make an adequate independent investigation of the facts of the case by thoroughly interviewing the defendant and double-checking his story.[74] Effective preparation also includes researching the relevant statutory and case law, interviewing all available prosecution and defense witnesses, procuring compulsory process for defense witnesses to be called, and possibly visiting the scene of the crime.[75] When a knowledgeable defendant intends to plead guilty to the offense, neither a lengthy consultation nor an extensive investigation by his lawyer is necessary since no purpose would be served in spending countless hours gathering

---

[73]For example, in Schmittler v. State, 228 Ind. 450, 93 N.E.2d 184 (1950), Chief Justice Emmert wrote:

> No one contends that an accused is entitled to the services of a Darrow or a Choate. Our profession has never made any claim of infallibility in either criminal or civil litigation. But we know from the many laborious hours that were spent by prior members of this court in writing the many cases on unlawful search and seizure, that such problems could not be adequately considered by any lawyer in fifteen minutes.

Id. at 477, 93 N.E.2d at 195. Similarly, Judge Gilkison dissented in Mitz v. State, 233 Ind. 537, 121 N.E.2d 874 (1954):

> I do not think the lawyer has ever lived who could discharge his duties to a client so charged, by consulting with him for only ten minutes. The ten minute consultation with their client by the pauper attorneys conclusively shows that they were rendering merely perfunctory service, attempting to supply the requirements of due process but doing nothing for their client whatever. This is the shortest consultation to be found in the books.

Id. at 544, 121 N.E.2d at 877.

[74]Hillman v. State, 234 Ind. 27, 123 N.E.2d 180 (1954); Abraham v. State, 228 Ind. 179, 91 N.E.2d 358 (1950); Johns v. State, 227 Ind. 737, 89 N.E.2d 281 (1949) (dissenting opinion); Rhodes v. State, 199 Ind. 183, 156 N.E. 389 (1927); Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1920).

[75]Shack v. State, 249 Ind. 67, 231 N.E.2d 35 (1967); Johns v. State, 227 Ind. 737, 89 N.E.2d 281 (1949) (dissenting opinion); Hoy v. State, 225 Ind. 428, 75 N.E.2d 915 (1947); Hartman v. State, 292 N.E.2d 293 (Ind. Ct. App. 1973).

evidence for a trial which is destined never to occur.[76] Thus, in *Wilson v. State,*[77] the court held that counsel's failure to investigate the facts or to interview witnesses did not establish incompetence when he was requested by defendant to plea bargain his case.[78] Similarly, extensive preparation was held unnecessary in *Mitz v. State,*[79] in which defendant had admitted his guilt to both the police and his attorney and had asked the latter to work out the "best deal" possible.[80]

On the other hand, when a trial is actually held, a court will require more extensive preparation by defense counsel. Clearly, when on the day of trial the court appoints an attorney who is unfamiliar with the case and who is permitted only a brief time for client consultation, the defendant's lawyer has been denied a sufficient time to prepare adequately for trial.[81] In *Hartman v. State,*[82] the court of appeals held that defendant's right to adequate preparation time was violated when the trial judge appointed an attorney who "happened to be in the courtroom" and allowed him only a few minutes to discuss the case with his client.[83] However, when a defendant has had ample opportunity before trial to confer with counsel, his failure to take full advantage of such time does not constitute inadequate preparation.[84]

When an attorney fails to interview readily avaliable alibi witnesses and key prosecution witnesses[85] or when he makes no

---

[76]Lenwell v. State, 294 N.E.2d 643, 645 (Ind. Ct. App. 1973).

[77]291 N.E.2d 570 (Ind. Ct. App. 1973).

[78]*Id.* at 575. *See also* Ferguson v. State, 301 N.E.2d 382, 386 (Ind. Ct. App. 1973), in which the court held that appointed counsel's independent investigation and three discussions with his client prior to his guilty plea "were entirely consistent with sound defense strategy."

[79]233 Ind. 537, 121 N.E.2d 874 (1954).

[80]*Id.* at 539, 121 N.E.2d at 875.

[81]Lloyd v. State, 241 Ind. 192, 170 N.E.2d 904 (1960) (two and one-half hours); Hoy v. State, 225 Ind. 428, 75 N.E.2d 915 (1947) (one hour). *See also* Wilson v. State, 222 Ind. 63, 51 N.E.2d 848 (1943).

[82]292 N.E.2d 293 (Ind. Ct. App. 1973).

[83]*Id.*

[84]Boatman v. State, 235 Ind. 623, 137 N.E.2d 28 (1956). Two months elapsed between the time defendant obtained counsel and trial.

[85]Hillman v. State, 234 Ind. 27, 123 N.E.2d 180 (1954). *See also* Shack v. State, 249 Ind. 67, 231 N.E.2d 35 (1967).

effort to obtain the defendant's explanation of the facts surrounding a homicide, his preparation is clearly inadequate.[86] In *Abraham v. State,*[87] the court held that counsel had not made a sufficient investigation of the facts when he failed to determine how a suspect's confession had been obtained, to seek defendant's version of the alleged offense, to obtain defense witnesses, or to ascertain the testimony of prosecution witnesses.[88] In *Thomas v. State,*[89] the court found counsel negligent in his preparation when he delayed contacting key defense witnesses until the night before the trial.[90] However, in *Irvin v. State,*[91] the court refused to find inadequacy of investigation when defendant failed to name specific witnesses or explain how they would have been helpful to the defense.[92]

Consistent with adequate preparation, the right to effective assistance of counsel clearly includes the right of unfettered communication between attorney and client.[93] Thus, in *Johns v. Overlade,*[94] the court held counsel's representation ineffective when defendant pleaded guilty immediately after a brief attorney-client conference in an adjoining courtroom not more than twenty feet from police officers.[95] In *Parker v. United States,*[96] defendant alleged that the presence of a listening device in the room used for attorney-client conferences prevented private communications. The court rejected the argument on grounds that the defense had made no effort to ascertain whether the device was ever used or was

---

[86]Rhodes v. State, 199 Ind. 183, 156 N.E. 389 (1927).

[87]228 Ind. 179, 91 N.E.2d 358 (1950).

[88]*Id.* at 184, 91 N.E.2d at 360.

[89]251 Ind. 546, 242 N.E.2d 919 (1969).

[90]*Id.* at 554, 242 N.E.2d at 924.

[91]291 N.E.2d 70 (Ind. 1973).

[92]*Id.* at 73.

[93]Parker v. United States, 358 F.2d 50 (7th Cir. 1965), *cert. denied,* 386 U.S. 916 (1967).

[94]122 F. Supp. 921 (N.D. Ind. 1953).

[95]*Id.* at 922.

[96]358 F.2d 50 (7th Cir. 1965).

even capable of recording conversation.[97] In summary, Indiana courts have tended to find inadequacy of preparation only when the facts clearly indicated that either the attorney was performing only in a perfunctory manner or when state action had jeopardized the privacy of attorney-client communications.

IV. Pretrial Advice and Motions

A defense attorney bears an affirmative obligation to adequately advise his client regarding the nature of the criminal charges against him, the possible penalty, the existence of defenses, and the consequences of an insanity or guilty plea. Counsel should also inform his client of his constitutional rights to counsel, trial by jury, compulsory process, confrontation of witnesses, and the privilege against self-incrimination.[98] Indiana courts presume that an attorney has properly informed defendant of his rights and an appellant must present strong and convincing proof to overcome this presumption.[99] Thus, the absence of a clear and unequivocal advice of rights in the record does not necessarily prove that defendant was not fully advised.[100] Moreover, the trial court's acceptance of the attorney's testimony that he fully advised defendant of his rights will normally be upheld.[101] Finally, even though an attorney failed to advise his client, defendant's acknowledgment to the court that he heard and understood his rights may suffice.[102]

---

[97] *Id.* at 53.

[98] Conley v. State, 284 N.E.2d 803 (Ind. 1972); Penn v. State, 242 Ind. 359, 177 N.E.2d 889 (1961); Rhodes v. State, 199 Ind. 183, 156 N.E. 389 (1927); Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1920).

[99] Canan v. State, 242 Ind. 576, 179 N.E. 746 (1962); Penn v. State, 242 Ind. 359, 177 N.E.2d 889 (1961); Dowling v. State, 233 Ind. 426, 118 N.E.2d 801 (1954).

[100] Penn v. State, 242 Ind. 359, 177 N.E.2d 889 (1961).

[101] *See, e.g.*, Smith v. State, 243 Ind. 432, 186 N.E.2d 571 (1962); Canan v. State, 242 Ind. 576, 179 N.E.2d 746 (1962). In Schmittler v. State, 228 Ind. 450, 93 N.E.2d 184 (1950), the Indiana Supreme Court held, in a three-to-two opinion, that appellant's failure to produce his attorney's affidavit or testimony raised a presumption that this evidence, if produced, would have been unfavorable to him. However, the forceful dissenting opinions by Chief Justice Emmert and Judge Gilkison suggested that the court should not disregard uncontradicted testimony of appellant counsel's failure to advise him of his rights. *Id.* at 472, 481, 93 N.E.2d at 192, 197.

[102] Penn v. State, 242 Ind. 359, 177 N.E.2d 889 (1961).

Nevertheless, many an appellant has argued that since his attorney failed to properly advise him of his rights, he was incapable of knowingly, freely, and understandingly entering a guilty plea.[103] Indiana courts have held that counsel has no duty to oppose defendant's voluntary desire to plead guilty unless he is aware of his client's innocence.[104] However, when the court finds substantial evidence that the attorney never conferred with his client at all[105] or failed to sufficiently investigate the facts to understandingly advise him regarding a guilty plea,[106] defendant has been denied effective assistance of counsel. In *Rhodes v. State*,[107] court-appointed counsel conferred with defendant no more than twenty minutes, failed to advise him that intent to kill and premeditation were necessary elements of first degree murder, and made no effort to obtain defendant's side of the story. Further inquiry by the attorney would have revealed that the shooting was probably accidental and that defendant, who was totally ignorant of the law constituting homicide, may have pleaded guilty under fear of mob violence. The court permitted appellant to withdraw his guilty plea and enter one of not guilty.[108]

Appellant may allege that his counsel did not advise him of his right to a jury trial. Whether in fact the attorney advised defendant of this right is an issue of fact for the trial court to determine.[109] However, when a defendant proceeds without objection, the court will treat his failure to demand a jury trial as a waiver of this right.[110]

---

[103]*See, e.g.*, Canan v. State, 242 Ind. 576, 179 N.E.2d 746 (1962); State v. Lindsey, 231 Ind. 126, 106 N.E.2d 230 (1952); Schmittler v. State, 228 Ind. 450, 93 N.E.2d 184 (1950); Rhodes v. State, 199 Ind. 183, 156 N.E. 389 (1927).

[104]Canan v. State, 242 Ind. 576, 179 N.E.2d 746 (1962).

[105]State v. Lindsey, 231 Ind. 126, 106 N.E.2d 230 (1952).

[106]Abraham v. State, 228 Ind. 179, 91 N.E.2d 358 (1950).

[107]199 Ind. 183, 156 N.E. 389 (1927).

[108]*Id.* at 195, 156 N.E. at 393-94.

[109]Lucas v. State, 227 Ind. 486, 490-91, 86 N.E.2d 682, 685 (1949); Fluty v. State, 224 Ind. 654, 660, 71 N.E.2d 565, 568 (1947).

[110]Lucas v. State, 227 Ind. 486, 488, 86 N.E.2d 682, 684-85 (1949). In Fluty v. State, 224 Ind. 652, 71 N.E.2d 565 (1947), the court noted: "It would be a mockery of justice to say that having voluntarily tried his case before the judge and losing, he [defendant] may then try it again by jury in hope

Incompetency allegations may focus upon other areas of counsel's pretrial representation. Appellant may argue that his attorney prejudicially filed an insanity plea without his permission, but most courts have deemed defendant bound by the particular strategy and tactics which his counsel believed appropriate. Thus, when defense counsel's filing of an insanity plea in *Brown v. State*[111] enabled the prosecution to admit into evidence defendant's prior sex offenses, the court refused to question counsel's belief that such evidence would bolster his client's insanity defense.[112] Similarly, in *Wilson v. Lash*,[113] the court concluded that the insanity plea may have helped support the defense of intoxication and may have placed an additional burden upon the State to prove defendant's capacity.[114] Appellant may alternately claim that his attorney failed to investigate the filing of an insanity plea. In *Shack v. State*,[115] the court declared that an experienced trial attorney would consider it malpractice not to seek a psychiatric examination of his client in order to determine whether to enter a plea of insanity.[116]

In establishing incompetency of counsel, appellant may also challenge his attorney's failure to quash a defective indictment. In so doing, appellant must not only show that the indictment was in fact defective,[117] but also that such an oversight was prejudicial to his case.[118] However, when an attorney's failure to

---

of doing better." *Id.* at 660, 71 N.E.2d at 568. *See also* Hillman v. State, 234 Ind. 27, 123 N.E.2d 180 (1954).

[111]248 Ind. 11, 221 N.E.2d 676, *cert. denied*, 387 U.S. 925 (1966), *rehearing denied*, 389 U.S. 891 (1967).

[112]*Id.* at 16, 221 N.E.2d at 680. *See also* DeBruler v. State, 247 Ind. 1, 210 N.E.2d 666 (1965).

[113]457 F.2d 106 (7th Cir.), *cert. denied*, 409 U.S. 881 (1972).

[114]*Id.* at 109.

[115]249 Ind. 67, 231 N.E.2d 35 (1967).

[116]*Id.* at 80, 231 N.E.2d at 44.

[117]Lindsey v. State, 246 Ind. 432, 437, 204 N.E.2d 357, 361 (1965). In Fluty v. State, 224 Ind. 652, 660, 71 N.E.2d 565, 568 (1947), the court suggested that the merit of such a claim is basically within the discretion of counsel to determine, not the court.

[118]Robbins v. State, 274 N.E.2d 255 (Ind. 1971); Bays v. State, 240 Ind. 37, 48-49, 159 N.E.2d 393, 398 (1959), *cert. denied*, 361 U.S. 972 (1960); Boatman v. State, 235 Ind. 623, 626-27, 137 N.E.2d 28, 29-30 (1956). In

object indicates such ignorance of Indiana law and procedure that it was virtually impossible for him to protect defendant's rights, the court will find inadequacy of counsel.[119]

Allegations of incompetency of counsel may also arise in respect to an attorney's failure to obtain a change of judge or change of venue. Certainly, when counsel properly files for a change of venue, his failure to secure one is not evidence of incompetency.[120] However, even when an attorney fails to apply for a change of venue, appellant must show that he could not have obtained a fair and impartial trial because of prejudicial publicity or the particular bias of the judge.[121] Thus, failure to seek a change of venue does not constitute incompetency of counsel when the pretrial publicity may have benefited defendant's case. For example, in *Kidwell v. State*,[122] defense counsel actively sought a television interview during the trial to obtain maximum coverage for his side of the case. The court refused to "second guess" counsel's diligent pursuit of such a strategy.[123] When combined with other deficiencies, however, counsel's total failure to

---

Boatman, the court stated that since appellant made no such showing, the court would not "attempt to second guess one's trial counsel as to what theoretical questions he should raise on behalf of an appellant." *Id.* at 627, 137 N.E.2d at 29-30. In *Robbins*, the indictment omitted to allege that defendant was over the age of sixteen, a necessary element of the crime. However, since defendant was at least nineteen at the time of the alleged crime, no prejudice resulted since the prosecution could have corrected the defect by filing a new indictment under IND. CODE § 35-1-23-29 (1971). *See also* Sawyer v. State, 298 N.E.2d 440, 444 (Ind. 1973), in which counsel's "technical oversight" in failing to quash a defective arrest warrant was held not to constitute ineffective representation.

[119]Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957). *See also* Lunce v. State, 233 Ind. 685, 122 N.E.2d 5, 7 (1954) (Emmert, J., dissenting), *cert. denied*, 349 U.S. 960 (1955).

[120]Hendrickson v. State, 233 Ind. 341, 118 N.E.2d 493 (1954). In Boatman v. State, 235 Ind. 623, 627, 137 N.E.2d 28, 30 (1956), the court emphasized that the granting or refusal of a change of venue is discretionary with the court.

[121]*See* Sweet v. Howard, 155 F.2d 715, 717 (7th Cir. 1946), *cert. denied*, 336 U.S. 950 (1949); Kidwell v. State, 295 N.E.2d 364 (Ind. 1973); State v. Irvin, 291 N.E.2d 70, 72 (Ind. 1973); Callahan v. State, 247 Ind. 350, 352, 214 N.E.2d 648, 650 (1966).

[122]295 N.E.2d 362 (Ind. 1973).

[123]*Id.* at 364-65.

protect his client from substantial community hostility created by prejudicial publicity may constitute ineffectiveness of counsel.[124]

In short, an appellant faces a difficult task in showing ineffectiveness of his counsel based upon his pretrial representation. To overcome the court's presumption of competency, appellant must demonstrate that counsel's failure to inform him of his rights or to file the proper pretrial motions substantially prejudiced his constitutional rights.

V. Trial Acts and Omissions

In examining the totality of the facts, the reviewing court looks to the kind and quantity of affirmative actions which the trial counsel took on behalf of his client. If it appears from the record that the attorney frequently consulted with defendant, called witnesses, presented exhibits, objected to the admission of evidence, submitted instructions and the like, the court is more inclined to overlook certain of counsel's errors and omissions and find his representation competent.[125] For example, in *Hendrickson v. State*,[126] appellant alleged that his attorney failed to obtain a change of venue, secure a reduction of bail bond, object to the admission of certain evidence, and object to instructions given by the court. In finding counsel competent, the court noted that he had called nine witnesses, had filed a motion for change of judge and venue, had submitted a motion to quash the original affidavit, had objected to the introduction of numerous pieces of evidence including appellant's confession, had cross-examined prosecution witnesses, and had tendered five instructions.[127]

Appellants frequently allege that their attorney's failure to suppress or object to the admission of illegally seized or other-

---

[124]Wilson v. Phend, 417 F.2d 1197 (7th Cir. 1969). On remand, however, the district court held that the publicity in this case was "factually oriented" and that petitioner offered no proof that the jury was in any way prejudiced by such coverage. *See* Wilson v. Lash, 457 F.2d 106, 108 (7th Cir.), *cert. denied*, 409 U.S. 881 (1972).

[125]Calhoun v. United States, 454 F.2d 702 (7th Cir. 1971), *cert. denied*, 405 U.S. 1019 (1972); Lowe v. State, 298 N.E.2d 421 (Ind. 1973); Blackburn v. State, 291 N.E.2d 686 (Ind. 1973); Schmittler v. State, 228 Ind. 450, 93 N.E.2d 184 (1950); Poindexter v. State, 290 N.E.2d 512 (Ind. Ct. App. 1972).

[126]233 Ind. 341, 118 N.E.2d 493 (1954).

[127]*Id.* at 343, 118 N.E.2d 494-95.

wise incompetent evidence rendered their representation ineffective. Many appellants are unsuccessful in such attempts because they fail to prove that the evidence was in fact inadmissible[128] or prejudicial to their cases.[129] Even when such evidence would normally be objectionable, courts are reluctant to question counsel's honest errors in judgment or trial tactics.[130] In *Blackburn v. State,*[131] appellant alleged that his counsel made no effort to suppress or object to certain unconstitutionally seized evidence including incriminating statements by appellant and an illegally seized letter to his wife. The court concluded that failure to object to the admission of this evidence was a matter of trial strategy since both the statement and the letter contained material which bolstered the defense position.[132] In *Haley v. State,*[133] counsel failed to object to prosecution questioning of the defendant concerning an illegally obtained confession. The court concluded, however, that defendant was not necessarily prejudiced by such inquiry since his replies may have impressed upon the jury the illegal force allegedly used upon him by the officers to obtain his confession.[134] Similarly, in *United States v. Hack,*[135] defendant's attorney failed to object to the admission of hearsay testimony of a prosecution witness. The court held that it may have been good trial strategy to permit the witness to personally narrate his version of the case and later impeach him through cross-

---

[128]Robbins v. State, 274 N.E.2d 255 (Ind. 1971); Brown v. State, 248 Ind. 11, 221 N.E.2d 676, *cert. denied,* 387 U.S. 925 (1966), *rehearing denied,* 389 U.S. 891 (1967); Lindsey v. State, 246 Ind. 431, 204 N.E.2d 357 (1965); Bays v. State, 240 Ind. 37, 157 N.E.2d 393 (1959), *cert. denied,* 361 U.S. 972 (1960). The court in Isaac v. State, 274 N.E.2d 231 (Ind. 1971), expressed the most common rationale: "Certainly an attorney cannot be considered incompetent for failing to do a futile thing." *Id.* at 237.

[129]Blackburn v. State, 291 N.E.2d 686 (Ind. 1973); Castro v. State, 196 Ind. 385, 147 N.E. 321 (1925).

[130]Robbins v. State, 274 N.E.2d 255 (Ind. 1971); Wagner v. State, 243 Ind. 570, 188 N.E.2d 914 (1963); Groover v. State, 239 Ind. 271, 156 N.E.2d 307 (1959); Haley v. State, 235 Ind. 333, 133 N.E.2d 565 (1956); Hendrickson v. State, 233 Ind. 341, 118 N.E.2d 493 (1954).

[131]291 N.E.2d 686 (Ind. 1973).

[132]*Id.* at 696-97.

[133]235 Ind. 333, 133 N.E.2d 565 (1956).

[134]*Id.* at 339-40, 133 N.E.2d at 567.

[135]205 F.2d 723 (7th Cir.), *cert. denied,* 346 U.S. 875 (1953).

examination and contradictory testimony by defendant.[136] However, when defendant's substantial constitutional rights are flagrantly violated through the improper admission of damaging evidence, the court may conclude that counsel's failure to object constituted a denial of effective counsel.[137] For example, in finding counsel incompetent in *Wilson v. State*,[138] the court noted that he had not objected at trial to the admission of allegedly stolen goods seized from the defendant's home by police during a warrantless search.[139]

Appellant may support his charge of incompetency of counsel by alleging that his attorney failed to call certain witnesses, to permit defendant to testify, or to offer particular evidence at trial for the defense. Many appellants, however, do not provide sufficient proof that such witnesses were available and willing to testify[140] or that such testimony would have actually benefited their case.[141] For example, in *Willoughby v. State*,[142] neither defendant nor any persons living in the vicinity of the fatal shooting were able to give the public defender the names or identifications of the alleged witnesses.[143] In *Wilson v. Lash*,[144] appellant claimed his attorney failed to call an alibi witness or pursue exculpatory leads. On remand, the district court found that defendant's lawyer had pursued all leads given to him, that the alleged alibi witness not called at trial refused to even sign an

---

[136] *Id.* at 726.

[137] Lunce v. Overlade, 244 F.2d 108, 110 (7th Cir. 1957); Lunce v. State, 233 Ind. 685, 122 N.E.2d 5 (1954) (dissenting opinion), *cert. denied*, 349 U.S. 960 (1955); Sanchez v. State, 199 Ind. 235, 157 N.E. 1 (1927).

[138] 222 Ind. 63, 51 N.E.2d 848 (1943).

[139] *Id.* at 77, 51 N.E.2d at 854-55.

[140] Sweet v. Howard, 155 F.2d 715, 718 (7th Cir. 1946), *cert. denied*, 336 U.S. 950 (1949); Lindsey v. State, 246 Ind. 431, 441, 204 N.E.2d 357, 363 (1965).

[141] Sweet v. Howard, 155 F.2d 715, 718 (7th Cir. 1946); Johnson v. State, 278 N.E.2d 577, 655 (Ind. 1972); Shumak v. State, 254 Ind. 117, 120, 258 N.E.2d 158, 159-60 (1970); Callahan v. State, 247 Ind. 350, 355, 214 N.E.2d 648, 651 (1966); Johnson v. State, 300 N.E.2d 369, 371 (Ind. Ct. App. 1973).

[142] 242 Ind. 183, 167 N.E.2d 881, *rehearing denied*, 242 Ind. 183, 177 N.E.2d 465 (1961), *cert denied*, 374 U.S. 832 (1963).

[143] *Id.* at 187-88, 177 N.E.2d at 467.

[144] 457 F.2d 106 (7th Cir.), *cert. denied*, 409 U.S. 881 (1972).

affidavit on behalf of defendant, and that defendant's testimony of proffered help from friends in Germany was "nebulous."[145] Counsel's failure to file a timely notice of an alibi to the prosecution often precludes defendant from offering the testimony of an alibi witness at trial.[146] But Indiana courts have consistently held that failure to file such notice does not render counsel incompetent.[147]

Moreover, most Indiana courts have refused to question counsel's decisions concerning the presentation of evidence because such judgments fall into the category of strategy and tactics.[148] Thus, in *Lindsey v. State*,[149] the court upheld counsel's failure to introduce character witnesses on grounds that their testimony would allow the prosecution to introduce evidence of defendant's prior misconduct, convictions, or bad moral character.[150] In *Jen-*

---

[145]*Id* at 109-110. In Calhoun v. United States, 454 F.2d 702 (7th Cir. 1971), *cert. denied*, 405 U.S. 1019 (1972), appellant argued that his trial attorney presented no expert medical witnesses to testify regarding his alleged incompetency to plead guilty. The court noted that defense counsel had introduced a "great deal of evidence" from a number of witnesses and that there was no indication more persuasive testimony was available. *Id.* at 703.

It is clear that adequacy of representation cannot be based upon the mere number of witnesses called. Stice v. State, 228 Ind. 144, 151, 89 N.E.2d 915, 918 (1950).

[146]IND. CODE § 35-5-1-1 (1971) requires that notice of alibi be filed at least ten days prior to trial.

[147]Isaac v. State, 274 N.E.2d 231 (Ind. 1971); Callahan v. State, 247 Ind. 350, 214 N.E.2d 648 (1966); Wagner v. State, 243 Ind. 570, 188 N.E.2d 914 (1963); Jennings v. State, 297 N.E.2d 909 (Ind. Ct. App. 1973).

[148]Casey v. Overlade, 129 F. Supp. 433 (N.D. Ind. 1955); Johnson v. State, 251 Ind. 17, 238 N.E.2d 651 (1968); Wagner v. State, 243 Ind. 570, 188 N.E.2d 914 (1963); Fluty v. State, 224 Ind. 652, 71 N.E.2d 565 (1947); Johnson v. State, 300 N.E.2d 369, 371 (Ind. Ct. App. 1973).

[149]246 Ind. 431, 204 N.E.2d 357 (1965).

[150]*Id.* at 441, 204 N.E.2d at 363. In Sims v. State, 246 Ind. 660, 208 N.E.2d 469 (1965), *cert. denied*, 384 U.S. 922 (1966), defendant's attorneys threatened to withdraw from the case if defendant testified. The court held such conduct was justified in view of defendant's contemptuous attitude toward the court and his general lack of credibility. "Counsel had a duty to control the conduct of the case and to protect the interests of their client to the best of their ability, or to withdraw from the case." *Id.* at 667, 208 N.E.2d at 472. *See also* United States v. Hartenfeld, 113 F.2d 359, 362 (7th Cir. 1940).

nings v. State,[151] appellant contended that he had supplied his attorney with a list of alibi witnesses, but that only one of the witnesses was called to testify. In refusing to speculate on counsel's rationale, the court held that attorneys must be given "ample latitude" for variations in strategy and tactics.[152] Similarly, in *Poindexter v. State,*[153] counsel advised defendant to testify in his own behalf, thus permitting the prosecution to cross-examine defendant about his prior convictions, but the court held counsel's advice constituted trial strategy, not grounds for incompetency.[154]

Clearly, when counsel presents no evidence at all, his representation is inadequate. In *Thomas v. State,*[155] the public defender presented no evidence to rebut the uncorroborated testimony of the state's chief witness in spite of the fact that defendant had requested his counsel to subpoena two named witnesses to support his side of the story.[156] In *Hillman v. State,*[157] counsel presented no argument whatsoever in defense of his client. He made no opening or closing statement. He failed to question, have subpoenaed, or offer at trial three alibi witnesses, even though defendant gave him their names and the locality of their residences. Additionally, the court noted that counsel did not advise defendant to testify on his own behalf regarding an allegedly illegal confession.[158] Counsel was held incompetent in both cases.

---

[151] 297 N.E.2d 909 (Ind. Ct. App. 1973).

[152] *Id.* at 912.

[153] 290 N.E.2d 512 (Ind. Ct. App. 1972).

[154] *Id.* at 513.

[155] 251 Ind. 546, 242 N.E.2d 919 (1969).

[156] *Id.* at 555, 242 N.E.2d at 923.

[157] 234 Ind. 27, 123 N.E.2d 180 (1954).

[158] The court concluded that counsel never uttered "one word from the beginning to and including the close of the trial proceedings." *Id.* at 31-32, 123 N.E.2d at 180-81. *But see* Nicholas v. State, 300 N.E.2d 656 (Ind. 1973), in which defense counsel waived opening and closing arguments, refused to cross-examine, and introduced no evidence. In holding counsel competent, the court concluded that the attorney's failure to present evidence was outweighed by the following exceptional circumstances: (1) the state's witnesses were unimpeachable and appellant had no credible evidence to be presented, (2) appellant did not tell the truth concerning a number of areas of his counsel's representation, (3) appellant requested the same defense counsel to represent him on two occasions subsequent to the trial in question,

Even when counsel presents some evidence, his failure to interview, subpoena, or call certain witnesses listed by defendant may result in a finding of incompetency. Thus, in *Shack v. State,*[159] defendant furnished his attorney with names of witnesses to testify, but counsel admitted that he did not subpoena them for trial on grounds that he was unable to locate them or he believed that they would not benefit defendant's case.[160] In *Wilson v. State,*[161] counsel neglected to call defendant's "best witness." Counsel did call a bookkeeper, but her testimony was "worthless" because counsel acquiesced in her failure to produce the necessary records upon which her testimony was predicated.[162] Again, the court held counsel's representation inadequate in both cases.

In conjunction with other shortcomings, appellants frequently allege in their incompetency charges that their trial counsel failed to file a motion for a new trial after their convictions.[163] A trial attorney has a duty to keep adequate notes during the trial and from such notes to prepare a proper and timely motion for a new trial.[164] However, his duty to actually file the motion arises only when

---

and (4) since the district court had already determined the issue of effectiveness of counsel, it was res judicata. However, note the dissenting opinion of Justice DeBruler concluding that this case involved the kind of representation which Indiana courts have condemned as perfunctory. *Id.* at 664-65.

[159]249 Ind. 67, 231 N.E.2d 35 (1967).

[160]*Id.* at 76, 231 N.E.2d at 42.

[161]222 Ind. 63, 51 N.E.2d 848 (1943).

[162]*Id.* at 75-76, 81, 51 N.E.2d at 851-52, 855. In Blincoe v. State, 243 Ind. 387, 185 N.E.2d 729 (1962), defendant submitted a list of alibi witnesses to his attorney, but he neither subpoened them nor filed the necessary notice of intention to prove an alibi. In Sanchez v. State, 199 Ind. 235, 244, 157 N.E. 1, 4-5 (1927), counsel did not subpoena any witnesses to testify as to defendant's good character for peacefulness in a first degree murder trial. Counsel was found incompetent in both cases.

[163]Wilson v. Phend, 417 F.2d 1197 (7th Cir. 1969); Rice v. State, 248 Ind. 200, 223 N.E.2d 579 (1967); *In re* Sobieski, 246 Ind. 222, 204 N.E.2d 353 (1965); Riggs v. State, 235 Ind. 499, 135 N.E.2d 247 (1956); Fluty v. State, 224 Ind. 652, 71 N.E.2d 565 (1947). It should be noted that the motion for a new trial is now included under Indiana Rule of Trial Procedure 59 as the motion to correct errors.

[164]Turner v. State, 249 Ind. 533, 233 N.E.2d 473 (1968); Macon v. State, 248 Ind. 81, 221 N.E.2d 428 (1966), *cert. denied,* 386 U.S. 1038 (1967); Bullard v. State, 245 Ind. 190, 197 N.E.2d 295 (1964); Sparks v. State, 245 Ind. 245, 196 N.E.2d 748 (1964); State *ex rel.* Macon v. Orange Cir. Ct.,

there are meritorious grounds for a new trial.[165] Thus, the failure of counsel to file a motion for new trial raises a presumption that no meritorious grounds existed for such a motion.[166] Indeed, some courts have suggested that a trial lawyer might subject himself to disciplinary action if he knowingly filed such a motion upon frivolous and nonmeritorious grounds.[167] However, a recent holding by the Indiana Court of Appeals requiring public defenders to pursue even frivolous appeals casts significant doubt upon this prior Indiana case law.[168]

The fact that an attorney had committed certain alleged errors at or before trial does not normally render his representation ineffective. The failure of a lawyer to challenge the absence of defense counsel at arraignment,[169] to move for a continuance,[170]

---

243 Ind. 376, 185 N.E.2d 619 (1962). This responsibility is based upon two factors. First, since trial counsel is the person most familiar with any errors committed in the course of the trial, he is best prepared to present such errors for review. Second, the sixty day time limit for filing of the motion may not provide sufficient time for an attorney to procure a trial transcript and to inform himself adequately concerning the evidentiary record and the applicable law. *See* Willoughby v. State, 242 Ind. 183, 167 N.E.2d 881, *rehearing denied*, 177 N.E.2d 465 (1961), *cert. denied*, 374 U.S. 832 (1963). Some courts have held that court-appointed counsel should not be paid unless he files such a motion or a waiver thereof. *See, e.g.*, Lindsey v. State, 246 Ind. 431, 204 N.E.2d 357 (1965).

[165]Turner v. State, 249 Ind. 533, 233 N.E.2d 473 (1968); Rice v. State, 248 Ind. 200, 223 N.E.2d 579 (1967); *In re* Sobieski, 246 Ind. 222, 204 N.E.2d 353 (1965); Sparks v. State, 245 Ind. 245, 196 N.E.2d 748 (1964); State *ex rel.* Macon v. Orange Cir. Ct., 243 Ind. 376, 185 N.E.2d 619 (1962).

[166]Turner v. State, 249 Ind. 533, 233 N.E.2d 473 (1968); Macon v. State, 248 Ind. 81, 221 N.E.2d 428 (1966); Lindsey v. State, 246 Ind. 431, 204 N.E.2d 357 (1965); Bullard v. State, 245 Ind. 190, 197 N.E.2d 295 (1964); State *ex rel.* Macon v. Orange Cir. Ct., 245 Ind. 269, 195 N.E.2d 352 (1964), *cert. denied*, 380 U.S. 981 (1965). This presumption is overcome when the same attorney fails to file such motion and later inconsistently accepts the court's appointment as appellate counsel in the same case. *See* Sparks v. State, 245 Ind. 245, 196 N.E.2d 748 (1964).

[167]Macon v. State, 248 Ind. 81, 221 N.E.2d 428 (1966); *In re* Lee, 246 Ind. 7, 198 N.E.2d 231 (1964).

[168]*See* Dixon v. State, 284 N.E.2d 102 (Ind. Ct. App. 1972).

[169]Lindsey v. State, 246 Ind. 431, 437, 204 N.E.2d 357, 361-62 (1965).

[170]Sweet v. Howard, 155 F.2d 715, 717-18 (7th Cir. 1946), *cert. denied*, 336 U.S. 950 (1949); Sargeant v. State, 299 N.E.2d 219, 222 (Ind. Ct. App. 1973). *But see* Shack v. State, 249 Ind. 67, 76, 231 N.E.2d 35, 42, (1967), in

to question the constitutionality of a statute,[171] to request a jury trial,[172] to interrogate jurors during voir dire,[173] to cross-examine state witnesses,[174] to raise a particular defense,[175] or to tender an instruction[176] is not ipso facto evidence of counsel's inadequacy. Nor does counsel's failure to object to improper prosecution ques-

---

which the court condemned counsel's failure to move for a continuance to allow additional preparation time when defendant was temporarily unable to speak due to a throat injury.

[171]Callahan v. State, 247 Ind. 350, 352-53, 214 N.E.2d 648, 650 (1966).

[172]Johnson v. State, 251 Ind. 17, 24, 238 N.E.2d 651, 655 (1968).

[173]Groover v. State, 239 Ind. 271, 280, 156 N.E.2d 307, 310-11 (1959).

[174]Langley v. State, 250 Ind. 29, 36, 232 N.E.2d 611, 615, *cert. denied*, 393 U.S. 835 (1968); Spight v. State, 248 Ind. 287, 291, 226 N.E.2d 895, 897 (1967); Groover v. State, 239 Ind. 271, 280, 156 N.E.2d 307, 311 (1959). In Lowe v. State, 298 N.E.2d 421 (Ind. 1973), appellant argued that his attorney failed to properly cross-examine various witnesses, particularly the key prosecution witness. Chief Justice Arterburn concluded that appellant had failed to show how the cross-examination was inadequate:

> It is true that defense counsel did not ask all the questions he could have asked, and did not explore all the details as minutely as is conceivable. Yet, he did attempt to test the recall and veracity of the prosecuting witnesses. . . . As most careful lawyers know, cross-examination can be a trap for the unwary. On many occasions, the decision whether or not to cross-examine, and if so, how to accomplish it, is one of the most difficult decisions a trial attorney has to make. It is not a decision that an appellate court can lightly second guess.

Id. at 422.

However, counsel's failure to cross-examine may constitute one aspect of inadequate representation. *See, e.g.*, Shack v. State, 249 Ind. 67, 72, 231 N.E.2d 35, 40 (1967); Blincoe v. State, 243 Ind. 387, 389, 185 N.E.2d 729 (1962).

[175]United States v. Izzi, 285 F.2d 412, 413 (7th Cir. 1967).

[176]*In re* Sobieski, 246 Ind. 222, 226-27, 204 N.E.2d 353, 356 (1965); Wagner v. State, 243 Ind. 570, 578, 188 N.E.2d 914, 918 (1963); Bays v. State, 240 Ind. 37, 50-51, 159 N.E.2d 393, 399 (1959), *cert. denied*, 361 U.S. 972 (1960); Hendrickson v. State, 233 Ind. 341, 343, 118 N.E.2d 493, 495 (1954); Stice v. State, 228 Ind. 144, 150-51, 89 N.E.2d 915, 918 (1950). However, counsel's failure to tender or object to instructions may contribute toward a finding of incompetency of counsel. *See, e.g.*, Lunce v. Overlade, 244 F.2d 108, 110 (7th Cir. 1957); Shack v. State, 249 Ind. 67, 80, 231 N.E.2d 67, 80, 231 N.E.2d 35, 40 (1967); Wilson v. State, 222 Ind. 63, 77, 51 N.E.2d 848, 854 (1943); Sanchez v. State, 199 Ind. 235, 243, 157 N.E. 1, 4 (1927).

tioning,[177] to prejudicial remarks by the prosecuting attorney,[178] to separation of the jury,[179] or to sentencing of defendant[180] necessarily constitute ineffectiveness of counsel.

VI. Adequacy of Appellate Counsel

Incompetency challenges normally arise on appeal or during postconviction relief hearings. After the court appoints counsel to represent an indigent on appeal, such counsel may find no merit in appellant's allegations and wish to withdraw. The traditional Indiana view has been that a public defender, after proper investigation, is not obliged to pursue what he believes to be an obviously frivolous and futile appeal.[181] However, in

---

[177]Isaac v. State, 274 N.E.2d 231, 237 (Ind. 1971); Langley v. State, 250 Ind. 29, 36, 232 N.E.2d 611, 615 (1968). Nevertheless, an attorney's failure to object to improper prosecution questioning may constitute one aspect of ineffective representation. *See, e.g.*, Sanchez v. State, 199 Ind. 235, 243, 157 N.E. 1, 4 (1927).

[178]Woods v. State, 255 Ind. 483, 265 N.E.2d 244 (1970). Appellant failed to prove that the remarks were "so gravely prejudicial" as to "conclusively seal his guilt." *Id.* at 490, 265 N.E.2d at 245. *But see* Wilson v. State, 222 Ind. 63, 51 N.E.2d 848 (1943), in which counsel's failure to object to flagrantly prejudicial remarks of the judge contributed toward a finding of ineffectiveness. The court emphasized: "A competent lawyer for the defense, very early in the trial, would by objection have reminded the judge of his judicial duty." *Id.* at 83, 51 N.E.2d at 855-56.

[179]In Baker v. State, 298 N.E.2d 445 (Ind. 1973), trial counsel agreed to a separation of the jury for six days after the trial had commenced because of the death of a juror's father. In holding counsel's conduct reasonable, the court observed:

> When faced with the factual situation of the death of the father of one of the jurors, counsel would most assuredly have prejudiced his client's case had he insisted that the trial continue, and that the affected jurors be forced to continue to serve notwithstanding his personal tragedy. Such conduct on the part of counsel would approach asininity and would itself have been far greater grounds for this court to declare incompetency than the course chosen to which appellant now so strongly objects.

Id. at 453. *See also* Packwood v. State, 244 Ind. 585, 591, 193 N.E.2d 494, 497 (1963), in which the court permitted a recess of thirty-nine days because of the illness of counsel.

[180]Lindsey v. State, 246 Ind. 431, 443, 204 N.E.2d 357, 364 (1965).

[181]State *ex. rel.* Henderson v. Boone Cir. Ct., 246 Ind. 207, 204 N.E.2d 346 (1965); Johnson v. Dowd, 244 Ind. 496, 193 N.E.2d 906 (1963), *cert. denied*, 376 U.S. 965 (1964); Brown v. State, 241 Ind. 298, 171 N.E.2d

Anders v. California,[182] the United States Supreme Court held that the court, not the public defender, must determine whether meritorious grounds exist for an appeal.[183] In 1972, the Indiana Court of Appeals in *Dixon v. State*,[184] went beyond *Anders* and held that Indiana postconviction rules prohibited a public defender from withdrawing from a case even if he felt the appeal was wholly frivolous.[185]

Once the court has appointed counsel, appellant may allege that the inadequacy of his appellate representation deprived him of the right to an effective appeal of his conviction. But the failure of appellate counsel to raise all those errors which appellant wishes him to raise does not constitute grounds for incompetency unless appellant can show he was thereby prejudiced.[186] Similarly,

---

825, *cert. denied*, 366 U.S. 954 (1961); State *ex rel.* Casey v. Murray, 231 Ind. 74, 106 N.E.2d 911 (1952); State *ex rel.* White v. Hilgemann, 218 Ind. 572, 34 N.E.2d 129 (1941).

[182]386 U.S. 738 (1967).

[183]*Id.* at 744. The Court held that the public defender could withdraw if he utilized the following procedure. Counsel had to accompany his request for permission to withdraw with a brief summary of any evidence in the record that might arguably support an appeal. He also had to submit a copy to the indigent who might, in turn, respond to the court. Finally, if the court, after full examination of the proceedings, determined the appeal non-meritorious, it could allow the attorney to withdraw. *See also* Frazier v. Lane, 282 F. Supp. 240, 245 (N.D. Ind. 1968), in which the court, approving *Anders*, held violative of the equal protection clause Indiana's requirement that an indigent make a preliminary showing of merit in the appeal before the public defender could represent him.

[184]284 N.E.2d 102 (Ind. Ct. App. 1972).

[185]*Id.* at 106-07. The court adopted the position of the ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES § 5.3 (Approved Draft 1968):

> Counsel should not seek to withdraw because he believes that the contentions of his client lack merit, but should present for consideration such points as the client desires to be raised provided he can do so without compromising professional standards.

The court emphasized that its previous rulings had been based upon an interpretation of IND. CODE § 33-1-7-5 (1971), which gave the public defender discretion regarding the pursuance of appeals. However, the new IND. P.C.R 1(9), it argued, mandated that the public defender represent indigents on appeal. 284 N.E.2d at 106.

[186]Black v. State, 246 Ind. 550, 207 N.E.2d 627 (1965); State *ex rel.* Henderson v. Boone Cir. Ct., 246 Ind. 207, 204 N.E.2d 346 (1965).

appellate counsel is not required to pursue all the specifications of error raised by the trial counsel in his motion for a new trial. In *Kidwell v. State*,[187] trial counsel alleged thirty-five errors at trial, but appellate counsel chose to press only three of the allegations. The court held that appellate counsel may evaluate the possible trial errors and choose the most meritorious ones to press on appeal.[188] Finally, appellate counsel is not incompetent because he fails to furnish appellant with a copy of appellee's brief for personal examination.[189]

VII. Conclusion

As the cases herein reviewed indicate, Indiana courts have viewed incompetency allegations with great suspicion. They have implicitly considered incompetency charges against one member of the bar as a subtle attack upon the integrity of the entire legal profession.[190] A heavy burden of proof has been imposed upon an appellant to show that his attorney's representation rendered the proceedings a "mockery and a farce." The courts have rushed to the defense of attorneys by labeling their alleged errors and omissions as "strategy and tactics." Because they have required only a minimal level of effectiveness to defeat an incompetency challenge, appellants have faced only slight prospects of ever winning such a contest.[191]

It would appear that the recent flurry of incompetency petitions from convicted prisoners has made the courts even less sensitive to such petitions. Admittedly, judges face a burdensome task of distinguishing the few meritorious allegations from the

---

[187]295 N.E.2d 362 (Ind. 1973).

[188]*Id.* at 364-65.

[189]Black v. State, 246 Ind. 550, 207 N.E.2d 627 (1965).

[190]The Indiana Supreme Court impliedly expressed such an attitude, for example, in the case of *In re* Sobieski, 246 Ind. 222, 204 N.E.2d 353 (1965):

> Such allegations [of incompetency of counsel] constitute a grave attack on the character and ability of a duly admitted member of the bar of this state and are not to be taken lightly. The presumption is in favor of the competency of such counsel.

Id. at 224, 204 N.E.2d at 355.

[191]*See* the honest appraisal of Justice DeBruler in Conley v. State, 284 N.E.2d 803, 811 (Ind. 1972).

many frivolous ones. Certainly, the "mockery or farce" standard renders this task easier. But as recently applied in Indiana, this standard implies that an incompetent attorney must be guilty of intentional misconduct or near-total inaction. However, earlier Indiana cases have held that the constitutional mandate for *effective* counsel demands more than such perfunctory service by attorneys for their clients.[192]

Indiana has made substantial progress in its legal system since its first case dealing with incompetency of counsel in 1925. The quality of legal education in the state has vastly improved. Applicants for admission to the bar today must be graduates of recognized law schools and must pass an increasingly stringent bar examination. The state has instituted a system for handling representation for indigent criminal defendants at the trial, post-conviction, and appellate levels. The Indiana Supreme Court has established an effective method of disciplining negligent attorneys.[193]

Indiana courts should reconsider their standards and the application of those standards in light of this progress and in view of recent federal court decisions. The United States Court of Appeals for the District of Columbia Circuit gave impetus to the "mockery or farce" standard in the landmark case of *Mitchell v. United States*[194] in 1958. However, cases from that circuit in the past three years have expressly disapproved the strictness of that criterion.[195] Indiana courts should consider the new standard

---

[192]Wilson v. State, 222 Ind. 63, 80, 51 N.E.2d 848, 855 (1943); Sanchez v. State, 199 Ind. 235, 245, 157 N.E. 1, 5 (1927); Castro v. State, 196 Ind. 385, 391, 147 N.E. 321, 323 (1925).

[193]Disciplinary actions have included permanent disbarment and temporary suspensions from practice. *See In re* Healey, 295 N.E.2d 594 (Ind. 1973); *In re* Perrello, 295 N.E.2d 357 (Ind. 1973); *In re* Taylor, 293 N.E.2d 779 (Ind. 1973); *In re* Underwood, 286 N.E.2d 828 (Ind. 1972); *In re* Ewing, 283 N.E.2d 536 (Ind. 1972); *In re* Gibbs, 271 N.E.2d 729 (Ind. 1971).

Shack v. State, 249 Ind. 67, 81, 231 N.E.2d 35, 45 (1967) (Arterburn, J., concurring), is the only Indiana incompetency case in which the court recommended disciplinary action be taken against the negligent attorney.

[194]259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

[195]In Scott v. United States, 427 F.2d 609 (D.C. Cir. 1970), the court stated that the "mockery" standard existed only as a "metaphor." It concluded that since its retention even as a figure of speech tended to confuse rather than clarify, courts should drop the language altogether. *Id.* at 610. *See also* Bruce v. United States, 379 F.2d 112, 116-17 (D.C. Cir. 1967).

evolving in that circuit: that appellant has the burden of demonstrating "requisite unfairness" by showing that his attorney's "gross incompetence blotted out the essence of a substantial defense."[196] Most recently, the United States Supreme Court in *Tollett v. Henderson*[197] outlined a standard of competency which may also serve to guide Indiana courts. In *Tollett*, appellant pleaded guilty to first degree murder on advice of counsel and was convicted and sentenced to life imprisonment in 1948. On appeal, he argued that his plea of guilty was not based upon competent advice because the indictment to which he pleaded was returned by an unconstitutionally selected grand jury. Justice Rehnquist, writing for the majority, agreed that criminal counsel has a duty to reasonably inform himself of and evaluate those facts which may give rise to a possible constitutional claim.[198] The standard, he concluded, was whether the resulting advice was "within the range of competence demanded of attorneys in criminal cases."[199]

The fair and conscientious judicial application of these standards is equally important. Indiana courts should examine the entire record to determine that "substantial justice" was achieved and that no constitutional rights were violated.[200] In weighing the testimony of the attorney involved, they should recognize the great pressure upon him to defend his own reputation and should resist the natural tendency to automatically resolve any conflict

---

[196]*Id. See also* Matthews v. United States, 449 F.2d 985, 994 (D.C. Cir. 1971); United States v. Hammonds, 425 F.2d 597, 601 (D.C. Cir. 1970); United States v. Tucker, 328 F. Supp. 1312, 1313 (D.D.C. 1971). The more liberal test was also adopted by the court in Monsour v. Cady, 342 F. Supp. 353, 359 (E.D. Wis. 1972).

[197]93 S. Ct. 1602 (1973).

[198]*Id.* at 1608.

[199]*Id.* The majority and dissenting opinions disagreed as to whether a reasonable criminal lawyer in Tennessee in 1948 would have objected to the racial composition of the grand jury. The majority concluded that this was a peripheral issue and the appellant was adequately advised. *See also* McMann v. Richardson, 397 U.S. 759 (1970).

[200]This test was recognized in Stice v. State, 228 Ind. 144, 152, 89 N.E.2d 915, 918 (1950). *See also* People v. Cox, 12 Ill. 2d 265, 146 N.E.2d 19 (1957);

> However, even without exploring the issue of whether defendant's representation was such as to reduce the trial to a sham or farce, it is our opinion that the total facts, peculiar to this case, disclose a violation of the ideas of fundamental fairness and right which attaches to present-day concepts of due process of law.

in the facts in favor of a fellow member of the bar.[201] Nor should judicial fears of prolonged litigation prevent a careful examination of an appellant's petition, for as Justice Brennan once emphasized: "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."[202] By diligently enforcing these higher standards, Indiana courts will encourage more conscientious and faithful representation, will help fulfill the constitutional command of effective counsel, and will ultimately heighten public esteem for the legal system.

JEFFREY J. LEECH

Id. at 272-73, 146 N.E.2d at 24.

[201]*See* Conley v. State, 284 N.E.2d 803, 811 (Ind. 1972) (DeBruler, J., dissenting).

[202]Sanders v. United States, 373 U.S. 1, 8 (1963).