

Winter 1984

Ineffective Assistance of Counsel in Indiana: A Mockery Standard

Timothy R. Newhouse

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Timothy R. Newhouse, *Ineffective Assistance of Counsel in Indiana: A Mockery Standard*, 18 Val. U. L. Rev. 445 (1984).

Available at: <https://scholar.valpo.edu/vulr/vol18/iss2/6>

This Notes is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



INEFFECTIVE ASSISTANCE OF COUNSEL IN INDIANA: A MOCKERY STANDARD

INTRODUCTION

The constitutional right to a fair trial requires that the accused in a criminal case receive the benefit of effective assistance of counsel.¹ The basis of the constitutional right to a fair trial is the belief that all those accused of a crime shall have their day in court.² The accused, a layman, should have the benefit of legal counsel in order to have that "day in court."³ A necessary corollary of this tenet is that the

1. The term "effective assistance" does not appear in the Constitution, rather it stems from the United States Supreme Court's opinion in *Powell v. Alabama*, 287 U.S. 45 (1932):

[T]hat in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of *effective aid* in the preparation and trial of the case.

Id. at 71. Since *Powell*, the Supreme Court has rendered decisions which give greater weight to the "effective representation" dictum. After *Gideon v. Wainwright*, 372 U.S. 335 (1963), the right to effective assistance was imputed to all criminal cases. For more explanation see *supra* note 25 and accompanying text.

For general comments on effective counsel see KRANTZ, SMITH, ROSSMAN, FROYD, HOFFMAN RIGHT TO COUNSEL IN CRIMINAL CASES (1976); Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973); Erickson, *Standards of Competency for Defense Counsel in Criminal Cases*, 17 AM. CRIM. L. REV. 233 (1979); Smithburn, *Effective Assistance of Counsel: In Quest of a Uniform Standard of Review*, 17 WAKE FOREST L. REV. 497 (1981); Staton, *Trial Advocate Competency*, 13 IND. L. REV. 725 (1980); Waltz, *Inadequacy of Trial Defense Representation As a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 28 (1964); Note, *Effectiveness of Counsel in Indiana: An Examination of Appellate Standards*, 7 IND. L. REV. 674 (1974) [hereinafter cited as Note, *Indiana Appellate Standards*]; Note, *Effective Assistance of Counsel: A Constitutional Right in Transition*, 10 VAL. U.L. REV. 509 (1976) [hereinafter cited as Note, *Effective Assistance of Counsel*].

2. One of the foundational tenets in the American judicial system is the belief that anyone accused of a crime or anyone seeking a legal right shall have a "day in court." From that belief stem all other requirements of fair trial and due process. However, without the literal "day in court," all of the other provisions and safeguards are merely empty vessels. The accused must have a "day in court" in order to defend his innocence and promote the ultimate goal of justice.

3. As Justice Sutherland stated in *Powell* 287 U.S. at 69:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without aid of counsel he may be put on trial without a proper charge, and convicted upon incompe-

right to counsel literally means the right to effective counsel.⁴ To have a day in court the accused must be adequately represented by legal counsel⁵ who zealously and ethically pursues the accused's best interest. Without effective counsel, the accused's day in court may be "shocking to a universal sense of justice."⁶ As a result of the court's recognition of the right to effective counsel as a constitutional guarantee, courts have been willing to hear claims for relief from criminal convictions on the basis of ineffective counsel.⁷

In Indiana the right to effective counsel is guaranteed to those

tent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

The laymen is considered unable to understand the subtle nuances of court procedure. As stated by Justice Schaefer of the Illinois Supreme Court: "Of all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956). Justice Schaefer's statement would also apply to ineffective assistance of counsel. For if counsel is inadequate, then the inadequacy necessarily impacts on counsel's ability to assert the defendant's other rights.

4. *Powell*, 287 U.S. 45. See also *McMann v. Richardson*, 397 U.S. 759 (1970) (requiring representation within the range of competence demanded of attorneys in criminal cases), *Gideon*, 372 U.S. 335 (applying the right to counsel to all state criminal proceedings). *Contra Betts v. Brady*, 316 U.S. 455 (1942) (holding that right to counsel does not apply to state proceedings, overruled by *Gideon*).

5. One accused of a crime may waive the right to counsel and proceed *pro se*. For the purposes of this note it will be assumed that no such waiver has taken place. Also, historically, there was a distinction between counsel appointed by the court for an indigent defendant, and counsel privately retained by the defendant. That distinction has little validity today. The United States Supreme Court recently held that the constitutional standard for review of ineffective counsel claims is the same whether counsel is appointed or retained. *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980).

6. Burger, *The Special Skills of Advocacy - Are Specialized Training and Certification of Advocates Essential to our System of Justice?* 42 FORDHAM L. REV. 227 (1973). The shock to the sense of justice can be seen when Justice Burger's three-legged stool metaphor is used. The three legs of the stool represent the three aspects present in trial: the judge, the prosecution and the defense. If one of the legs is short or weak, then the stool of justice wobbles. An incompetent attorney weakens the defense leg and wobbles the stool of justice. *Id.*

7. There is a rising number of claims of ineffective assistance being brought before tribunals. Although many of these claims are frivolous and looked upon with great suspicion, they are being heard. See Note, *Indiana Appellate Standards*, *supra* note 1, at 707.

accused of crimes by Article I, § 13⁸ of the Indiana Constitution and Sixth Amendment⁹ to the United States Constitution, as incorporated through the fourteenth amendment.¹⁰ Indiana courts employ the "mockery of justice" standard in reviewing claims of ineffective counsel. Under this standard of review the attorney's actions or inactions must reduce the trial to a farce or "mockery of justice" before relief will be granted.¹¹ The Indiana Supreme Court has heard challenges to the "mockery" standard, but has consistently refused to alter its application of the standard claiming that it is adequate to preserve the defendant's constitutional rights.¹² In light of the liberalized standards evolving in other jurisdictions¹³ and because the

8. The pertinent part of the clause is: "In all criminal prosecutions, the accused shall have the right to . . . be heard by himself and counsel . . ." IND. CONST. art. I § 13 (1976).

9. The pertinent part is: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. CONST. amend. VI (1976).

10. The fourteenth amendment requires that the accused in all judicial proceedings enjoy the benefit of "due process of law" U.S. CONST. amend. XIV (1976). The sixth amendment is incorporated through the fourteenth amendment and is binding on the states. *Gideon* 372 U.S. at 338-45.

11. *Adams v. State*, ___ Ind. ___, ___, 430 N.E.2d 771, 773 (1982) ("the proper test of adequacy of representation by counsel, taking a totality of the circumstances approach is the 'mockery of justice' standard, as modified by the 'adequate legal representation' standard.").

12. *Duncan v. State*, 272 Ind. 614, 619, 400 N.E.2d 1112, 1115 (1980) ("The present review standard adequately insures that criminal defendants receive competent legal counsel."); *Cottingham v. State*, 269 Ind. 261, 264, 379 N.E.2d 984, 986, (1978) ("We are not persuaded that there is any need to change our existing standard at this time.").

13. Standards of review for ineffective counsel have progressed from the "mockery standard" in the federal circuits. Most circuits have replaced the "mockery standard" with standards which implement higher requirements of performance. *United States v. Easter*, 539 F.2d 663 (8th Cir. 1976) (interpreting the mockery standard to require the customary skills and diligence of a reasonably competent attorney); *United States ex rel. Williams v. Twomey*, 510 F.2d 634 (7th Cir. 1975) (interpreting mockery standard to require that an attorney must meet minimum standards of professional responsibility), *cert. denied*, 423 U.S. 876 (1975).

Other circuits expressly reject the mockery test and apply a sixth amendment approach. *Dyer v. Crisp*, 613 F.2d 275 (10th Cir. 1980) (en banc) (rejects mockery for sixth amendment approach requiring reasonably competent assistance), *cert. denied*, 445 U.S. 945 (1980); *United States v. DeCoster*, 624 F.2d 196 (D.C. Cir. 1979) (en banc) (rejects mockery for a "guidelines approach"), *cert. denied*, 444 U.S. 944 (1979); *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978) (rejecting mockery for sixth amendment standard of reasonably competent and effective representation); *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974) (the proper test is a sixth amendment standard of whether counsel is "reasonably likely to render and rendering reasonably effective assistance"); *Moore*

United States Supreme Court has not established specific guidelines for determining when assistance of counsel is ineffective,¹⁴ the issue of what standard should be used in ineffective assistance of counsel claims in Indiana is ripe for reform.

This note discusses the history of the right and examines recent Indiana cases involving claims of ineffective counsel. It analyzes the rationale behind these decisions and the standard of review applied, comparing them with the new, liberalized standards of review in other jurisdictions. This analysis demonstrates that the "mockery of justice" standard as applied by the Indiana Supreme Court is insufficient to assure criminal defendants their constitutionally guaranteed right to effective assistance of counsel and is in need of reform. Suggestions for reform of Indiana's standard will also be introduced and discussed in light of the need to insure the accused's right to constitutionally effective counsel.

HISTORICAL PERSPECTIVE OF THE RIGHT TO EFFECTIVE COUNSEL

Assistance of counsel is guaranteed by three provisions in the United States Constitution. It is a necessary aspect of due process thereby making it part of the fifth and fourteenth amendments. It is also expressly included in the sixth amendment.¹⁵ Effective assistance of counsel guaranteed in the Constitution is provided in the sixth amendment although the term "effective" does not appear in the text.¹⁶ The right to effective assistance of counsel is a corollary

v. United States, 432 F.2d 730 (3rd Cir. 1970) (rejecting mockery for sixth amendment standard).

Only the 2nd Circuit still applies the "mockery of justice" standard; however, there are dissents calling for its removal. *Langone v. Smith*, 682 F.2d 287, 289 (2nd Cir. 1982) (en banc) (Oaks, J., dissenting) (calling for an abandonment of the "contentless, outmoded farce and mockery" rule).

14. The standard set out by the United States Supreme Court is the "range of competence" standard of *McMann*, 397 U.S. 759. It is a broad generalized standard which contains no specific guidelines in aiding the lower courts.

15. Assistance of counsel is a necessity to perfect due process of law. Therefore, assistance of counsel is included in the fifth amendment and the due process clause. Assistance of counsel in criminal trials is a specific clause in the sixth amendment. The fourteenth amendment incorporates both amendments and makes them binding on the states. Therefore, assistance of counsel is guaranteed to those accused of crimes in state courts by three amendments of the United States Constitution.

16. The term "effective" was first implicitly incorporated in the sixth amendment in *Powell*, 287 U.S. 45. It is now firmly established as a right protected by the sixth amendment. "It has long been recognized that the right to counsel is the right to effective assistance of counsel." *McMann*, 397 U.S. at 771 n.14.

to the basic sixth amendment right to assistance of counsel as established in *Powell v. Alabama*.¹⁷ In *Powell*, the Court determined that an ambiguous appointment of counsel¹⁸ precluded "the giving of effective aid" and resulted in a denial of due process.¹⁹ Consequently, the right to effective assistance of counsel was initially viewed as a minimal due process right. Moreover, subsequent cases dealt with the effectiveness of counsel issue as an element of fair trial in accordance with due process.²⁰

Subsequent Supreme Court cases have held that the right to effective assistance of counsel is a substantive right and not merely an aspect of due process.²¹ In *Glasser v. United States*,²² the Court held that the appointment of counsel to defend co-defendants with potentially inconsistent defenses denied the defendants the "right to have the effective assistance of counsel guaranteed by the sixth amendment."²³ However, it was not until *Gideon v. Wainwright*²⁴ that the right to effective counsel was imputed to criminal defendants in state courts.²⁵ *Gideon* incorporated this aspect of the sixth amendment through the fourteenth amendment making it applicable to the states.²⁶ The corollary right to effective assistance of counsel was therefore implicitly included and also binding upon the states. Moreover, the *Gideon* decision made the right to effective assistance a substantive

17. 287 U.S. 45 (1932).

18. *Powell*, is the famous case of the "Scotsboro boys." Indicted in a hostile southern community the group of black youths, accused of raping two white girls, pleaded not guilty. Before the trial, the court appointed "all the members of the bar," *id.* at 49, to represent the defendants at the arraignment. It was not until a few moments before the trial that an attorney accepted any responsibility for defending the youths. *Id.* at 58. The Court held that the appearance was merely *pro forma* ("in form only") and that the defendants were not accorded the right of counsel in any substantial sense. *Id.*

19. *Id.* at 71.

20. In *Betts*, 316 U.S. 455, the Court refused to apply the sixth amendment through the due process clause to state prosecution. Moreover, the Court stated that the "less rigid and more fluid" concepts of due process were more applicable to such cases. *Id.* at 462.

21. *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978) (when joint representation is ineffective it denies the sixth amendment guarantees); *Von Moltke v. Giles*, 332 U.S. 708, 732 (1948) (duty to appoint counsel is not a procedural formality) *Glasser v. United States*, 315 U.S. 60, 76 (1942) (effective assistance of counsel is "guaranteed by the sixth amendment").

22. 315 U.S. 60 (1942).

23. *Id.* at 76.

24. 372 U.S. 335 (1963).

25. *Gideon* emphasized the importance of the right to counsel as a sixth amendment right and expressly overruled *Betts*. *Id.* at 343.

26. *Id.*

right rather than an aspect of due process by incorporating the sixth amendment into the fourteenth amendment.²⁷

Mockery Standard

Since the United States Supreme Court has recognized the right to effective assistance of counsel as a substantive right but has not established the parameters of what constitutes ineffectiveness, the lower courts have developed standards which attempt to review the right to effective assistance of counsel. The initial test was devised by the District of Columbia Circuit in *Diggs v. Welch*.²⁸ The standard derived from *Diggs* is the "mockery" test which applies a due process analysis.²⁹ Decided after *Powell*, *Diggs* held that when there was a proper appointment of counsel, the defendant was not deprived of his sixth amendment rights regardless of the attorney's actions.³⁰ Furthermore, the *Diggs* court held that the defendant must rely on the due process clause when challenging the effectiveness of counsel.³¹ Even though the holding contradicts *Powell*,³² the *Diggs* court stated that once a proper appointment of counsel was made, the accused's right to counsel was satisfied.³³ The court then declared that the test for ineffective assistance of counsel was whether "the circumstances surrounding the trial shocked the conscience of the court and made the proceedings a farce and a mockery of justice."³⁴

Reasonably Competent Standard

The federal circuits soon adopted the "mockery" standard³⁵ and

27. Effective assistance of counsel still remains an essential aspect of due process. However, it now is a substantive right in its own force through the sixth amendment and, therefore, must be scrutinized by means of a sixth amendment test. See generally, Note, *Effective Assistance of Counsel*, *supra* note 1.

28. 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

29. *Id.* at 669. The court required the defendant to rely on the due process clause which guarantees the accused a fair trial. It recognized that the attorney's incompetency may contribute to a lack of due process but refused to examine the quality of the attorney's actions. Rather, the court looked to the trial as a whole.

30. *Id.* at 668.

31. *Id.* at 669.

32. The position stated in *Powell*, that formal appointment of counsel is insufficient in itself to satisfy the sixth amendment, was reaffirmed in *Avery v. Alabama*, 308 U.S. 444 (1940). The sixth amendment guarantees "due appointment of counsel which cannot be satisfied by mere formal appointment." *Id.* at 446.

33. *Diggs*, 148 F.2d at 668.

34. *Id.* at 670.

35. The "mockery of justice" standard employed by the circuit courts typically required that the actions of counsel turn the trial into a "farce," "sham," "mockery,"

adhered to its approach until the Supreme Court decided *McMann v. Richardson*.³⁶ In *McMann*, the Court stated that there must be "reasonably competent advice,"³⁷ and that the attorney's actions must be "within the range of competence demanded of attorneys in criminal cases."³⁸ The dicta of *McMann* suggests a stricter scrutiny of ineffective assistance claims than under the "mockery" test. The circuit courts then devised standards of review for ineffective assistance claims which employed a stricter sixth amendment examination rather than the due process analysis of the "mockery" standard.³⁹ However, the Supreme Court has not expressly defined what constitutes ineffective assistance.⁴⁰ Consequently, the standards devised by the circuit courts, while attempting to satisfy the *McMann* dicta, are in disarray⁴¹ and create disparities in the minimum level of representation demanded by the sixth amendment.

INDIANA'S STANDARD OF REVIEW OF INEFFECTIVE ASSISTANCE

The Indiana Supreme Court employs the "mockery of justice" standard in reviewing claims of ineffective assistance of counsel. This standard places a heavy burden on a defendant seeking to reverse a criminal conviction.⁴² The defendant labors under a presumption that defendant's counsel performed his tasks adequately.⁴³ That presump-

or "travesty of justice," shocking the conscience of the court. See *Williams v. Beto*, 354 F.2d 698, 704 (5th Cir. 1965); *Fround v. United States*, 301 F.2d 102, 103 (10th Cir. 1962); *O'Malley v. United States*, 285 F.2d 733, 734 (6th Cir. 1961); *Cofield v. United States*, 263 F.2d 686, 689 (9th Cir. 1959); *United States v. Wright*, 176 F.2d 376, 379 (2nd Cir. 1949); *United States ex rel. Feeley v. Ragen*, 166 F.2d 976, 980-81 (7th Cir. 1948).

36. 397 U.S. 759.

37. *Id.* at 770.

38. *Id.* at 771.

39. See *infra* notes 170-75.

40. The Supreme Court has heard petitions to resolve what constitute the minimum standard of competence required to satisfy the sixth amendment and refused to grant *certiorari*. In *Marzullo v. Maryland*, 435 U.S. 1011 (1978), Justices White and Rehnquist authored a strong dissent to a denial of *certiorari*:

[I]n the last analysis, it is this Court's responsibility to determine what level of competence satisfies the constitutional imperative. It also follows that we should attempt to eliminate disparities in the minimum quality of representation required to be provided to indigent defendants. In refusing to review a case which so clearly frames the issue that has divided the Courts of Appeals, the Court shirks its central responsibility as the court of last resort

Id. at 1012-13.

41. *Id.* at 1011.

42. *Duncan*, 272 Ind. at 614, 400 N.E.2d at 1113.

43. See, e.g., *Adams*, ___ Ind. at ___, 430 N.E.2d at 773; *Cowell v. State*,

tion can be overcome only by "strong and convincing evidence."⁴⁴ The evidence must show that what counsel did or failed to do reduced the trial to a "farce," or "mockery of justice" that is "shocking to the conscience of the court."⁴⁵ In examining the evidence, the court will not use the benefit of hindsight nor will it second-guess counsel's strategy or tactical choices.⁴⁶ Under this standard, defense counsel's errors in judgment due to inexperience⁴⁷ or honest mistakes in judgment do not amount to ineffectiveness.⁴⁸ Further, a conviction is not considered tantamount to ineffective counsel.⁴⁹ Instead, the court, in reviewing the claim of ineffective assistance, will look to the totality of circumstances surrounding the trial, and will judge the trial as a whole.⁵⁰

___ Ind. ___, ___, 416 N.E.2d 839, 842 (1981); *Hollon v. State*, 272 Ind. 439, 444, 398 N.E.2d 1273, 1277 (1980); *Merida v. State*, 270 Ind. 218, 220, 383 N.E.2d 1043, 1044 (1979); *Dull v. State*, 267 Ind. 549, 552, 372 N.E.2d 171, 173 (1978).

44. See, e.g., *Hollonquest v. State*, ___ Ind. ___, ___, 432 N.E.2d 37, 39 (1982); *Adams* at ___, 430 N.E.2d at 774; *Crisp v. State*, 271 Ind. 534, 536, 394 N.E.2d 115, 119 (1979); *Cottingham*, 269 Ind. at 263, 379 N.E.2d at 986.

45. See, e.g., *Hollonquest*, ___ Ind. at ___, 432 N.E.2d at 39; *Adams*, ___ Ind. at ___, 430 N.E.2d at 774; *Leaver v. State*, ___ Ind. ___, ___, 414 N.E.2d 959, 960 (1981); *Duncan*, 272 Ind. at 616, 400 N.E.2d at 1114.

46. See, e.g., *Adams*, ___ Ind. at ___, 430 N.E.2d at 775 ("We do not second-guess matters of trial strategy and tactics in evaluating an allegation of incompetence of counsel."); *Leaver* ___ Ind. at ___, 414 N.E.2d at 961 ("[I]n reviewing a claim of inadequate counsel, we will not second-guess the attorney's decisions as to trial strategy and tactics."); *Duncan*, 272 Ind. at 618, 400 N.E.2d at 115 ("[W]e will not pass judgment on the merits or demerits of the strategy employed."). For discussion of tactics see *infra* note 148 and accompanying text.

47. See, e.g., *Duncan*, 272 Ind. at 616, 400 N.E.2d at 1114 ("While these examples may reflect a lack of experience in trying criminal cases, they do not support appellant's conclusion that he was therefore inadequately represented.").

48. See, e.g., *Hollonquest* ___ Ind. at ___, 432 N.E.2d at 39 ("Isolated poor strategy, bad tactics, or inexperience does not necessarily amount to ineffective counsel."); *Adams* ___ Ind. at ___, 430 N.E.2d at 775 ("the decision to move forward with joint rather than separate trials was a strategic one. We do not second-guess matters of trial strategy . . ."); *Hollon* 272 Ind. at 444, 398 N.E.2d at 1277 ("Isolated poor strategy, bad tactics, a mistake, carelessness, or inexperience does not necessarily amount to ineffective counsel . . .").

The error in judgment is an offshoot of the refusal to second-guess trial strategy. The court has stated: "Deliberate choices made by counsel for some contemplated tactical or strategic reason which turn out to be detrimental to the client's cause do not establish ineffective representation." *Field v. State*, ___ Ind. ___, ___, 426 N.E.2d 671, 673 (1981).

49. *Blackburn v. State*, 260 Ind. 5, 22, 291 N.E.2d 686, 696 (1973) ("A poor result alone does not amount to denial of adequate assistance of counsel.").

50. See, e.g., *Quinn v. State*, ___ Ind. ___, ___, 436 N.E.2d 70, 71 (1982) ("[H]e must demonstrate by clear and convincing evidence that the conduct of his counsel reduced the entire criminal proceedings to a mockery of justice."); *Hendrix v. State*,

The "mockery of justice" standard of review for ineffective counsel claims employs a due process analysis instead of a sixth amendment examination. Under due process analysis, the reviewing court judges the attorney's actions in the context of the trial. The crucial question is whether the attorney's actions or inactions turn the trial into a farce or mockery. While that inquiry insures the defendant a fair trial in accordance with due process requirements,⁵¹ it does not insure the defendant's right to effective assistance of counsel.⁵²

The sixth amendment is a constitutional guarantee, thus, a claim of a sixth amendment violation requires a sixth amendment examination. Using a sixth amendment approach, the court will examine the attorney's representation. While in a due process or "mockery" approach, the court will examine the trial as a whole. The right to effective assistance of counsel requires that the court examine the attorney's representation *qua* representation, not examine the trial under a due process test.⁵³

___ Ind. ___, ___, 418 N.E.2d 1161, 1162 (1981) ("Absent a glaring and critical commission or succession of omissions evidencing in their totality a mockery of justice, this Court will not attribute a criminal conviction or affirmation to ineffective assistance of counsel."); *Rahim v. State*, ___ Ind. ___, ___, 417 N.E.2d 343, 345 (1981) ("[A] defendant must show that his representation was so inadequate as to reduce the trial, taken as a whole, to a mockery of justice."); *Leaver* ___ Ind. at ___, 414 N.E.2d at 960 ("In reviewing an issue of this type, we look to the totality of the facts and circumstances . . ."); *Hollon*, 272 Ind. at 444, 398 N.E.2d at 1277; ("In applying the mockery of justice adequacy standard, this Court will look to the totality of the circumstances at trial.")

51. Due process is derived from the fifth amendment which reads in part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V (1976).

52. Since a reviewing court determines whether counsel's actions turned the trial into a "mockery of justice," the court necessarily is reviewing the trial. However, since *Gideon* incorporated the sixth amendment via the fourteenth amendment as binding on the states, and the sixth amendment has been interpreted to mean effective counsel, *McMann*, 37 U.S. at 771, the court must look at the attorney's actions individually as well as collectively in the context of the trial. "One may receive ineffective assistance of counsel even though the proceedings have not been a farce or mockery." *Adams*, ___ Ind. at ___, 430 N.E.2d at 776 (Hunter, J., dissenting) (citing *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974)). For commentary on the variance in the sixth amendment and due process approaches see Note, *Effective Assistance of Counsel*, *supra* note 1.

53. For example, if an attorney failed to call a witness who could establish an alibi for the defendant, either because the attorney neglected to confer with the defendant and learn of such an alibi witness or the attorney merely neglected to call the witness, then the action, or misaction, may go undetected and uncorrected under a due process type of analysis. A due process examination would focus on the rudiments of the trial: did the defendant have counsel, was the defendant apprised of his rights, did the jury selection and makeup conform to constitutional and statutory mandates?

Historical Standard

Prior to the implementation of the "mockery" standard,⁵⁴ the Indiana Supreme Court employed the standard set out in *Castro v. State*⁵⁵:

[M]ere perfunctory action by an attorney assuming to represent one accused of a 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.⁵⁶

By using a standard which reviewed the quality of representation by the attorney, the court employed a test directed at protecting the sixth amendment guarantee rather than one directed at the fifth amendment guarantee of due process.⁵⁷ The "perfunctory" standard of *Castro* looked to the attorney's representation to see if it adhered to a constitutional minimum, thus setting a standard which adequately protected the defendant's right to effective counsel.

The "perfunctory" standard initially employed by Indiana courts was an effective method of reviewing ineffective assistance of counsel

The list goes on. However, such an analysis would not confront the attorney's representation, rather, it confronts the question of whether the trial met a test of inherent fairness required under due process. On the other hand, if the attorney's representation were examined under the sixth amendment, representation *qua* representation, and in compliance with specific guidelines and normative conduct, then the examination would be directed at the attorney's action. A claim of ineffective counsel requires an examination of the counsel's representation, not the overall fairness of the trial.

54. *Shack v. State*, 249 Ind. 67, 231 N.E.2d 36 (1967). The Indiana court apparently thought that the "mockery of justice" standard was merely a restatement of its "perfunctory" standard. Moreover, the court in *Shack* combined the language of the standards in applying the "perfunctory" standard and found the defendant's counsel inadequate. *Id.* at 79-80, 231 N.E.2d at 44. However, in subsequent cases, the court used the language of the "mockery" standard in reviewing ineffective assistance claims. This change was in line with the growth of the "mockery" standard in other state and federal jurisdictions. The change, however, imperceptible in the first case, resulted in a general acceptance of the "mockery test" and a noticeable difference in the standard of review in ineffective counsel claims.

55. 196 Ind. 385, 147 N.E. 321 (1925).

56. *Id.* at 388, 147 N.E. at 323.

57. In applying the "perfunctory" standard the court uses due process language. However, the test is directed at the level of representation rather than the quality of the trial alone. In *Hillman v. State*, 234 Ind. 27, 123 N.E.2d 180 (1954), the court mentions that ineffective representation deprived the defendant of due process of law. However, the court had initially found that the representation violated the defendant's sixth amendment rights. *Id.* at 32-33, 123 N.E.2d at 183.

claims. In *Wilson v. State*,⁵⁸ the court reversed a conviction based upon a claim of ineffective counsel.⁵⁹ Wilson was convicted of receiving and concealing stolen goods valued less than \$25. The same attorney appointed for trial was appointed for appeal but there was no record of anything done by him.⁶⁰ In reversing the conviction, the court stated that "when, as here, there has been a lack of representation as to be equivalent to or worse than no representation whatsoever. . . we are left with no alternative but to . . . reverse."⁶¹ The court examined both the attorney's actions and failures to act⁶² and found representation substantially lacking, thereby denying the accused his constitutional rights.⁶³

Other earlier Indiana cases exemplify the effectiveness of the prior "perfunctory" standard. In *Hillman v. State*,⁶⁴ the defendant alleged that the attorney, among other failures, made no argument, called no witnesses (including known alibi witnesses), and failed to move for a court reporter to record the proceedings.⁶⁵ The attorney testified that he could not locate the alibi witnesses. The court, however, questioned the attorney's failure to pursue the witnesses more diligently.⁶⁶ Such questioning conflicts with the presumption of

58. 222 Ind. 63, 51 N.E.2d 848 (1943).

59. *Id.* at 83, 51 N.E.2d at 856.

60. *Id.* at 68, 51 N.E.2d at 850.

61. *Id.* at 83, 51 N.E.2d at 856.

62. The defendant alleged that the trial judge stepped out of his role by warning defendant, in front of the jury, not to perjure himself thereby casting doubt upon the credibility of defendant's testimony. The defense counsel failed to object and therefore, failed to preserve the error. Defense counsel also allegedly failed to adequately object to inadmissible evidence thereby damaging the defendant's case. (The objection defense counsel raised was, "I object to that stuff, Your Honor, all outside the issues.") *Id.* at 75, 51 N.E.2d at 853. Further, the objection was raised after the testimony had been heard.

63. *Id.* at 83, 51 N.E.2d at 856. The court ended its opinion with a carefully worded paragraph thereby narrowing the holding of the case.

We do not hold that a defeated litigant in every or the usual case where his attorney has ignorantly or carelessly failed to save and present an error may nevertheless have it reviewed and made the basis of reversal of the judgment. Ordinarily, procedural rules must be observed by the litigants and may not be ignored by reviewing courts. To hold otherwise would invite appeals and violate precedents that have given necessary order and stability to our appellate practice.

Id. at 83, 51 N.E.2d at 856. The court obviously was concerned then, as it is now, of opening the floodgates of litigation for convicted defendants on ineffective assistance grounds.

64. 234 Ind. 27, 123 N.E.2d 180 (1954).

65. *Id.* at 29, 123 N.E.2d at 180.

66. *Id.* at 31, 123 N.E.2d at 182.

competence employed by the Indiana courts under the present "mockery" standard.⁶⁷ The court in *Hillman* refuted that presumption when it said:

Under our laws the court must perform its duties with reference to such defense in the utmost good faith, by the appointment of a competent attorney. 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 who has a determined will to defend. . . .⁶⁸

The attorney's actions must be more than perfunctory⁶⁹ and must reveal a certain amount of ability before a presumption of competence may arise. The earlier "perfunctory" standard required a higher level of attorney competence and a more searching critique by courts than does the present day "mockery" test and thereby assured the accused that his right to effective counsel would be adequately protected by the courts.

Present Standard

The present standard of review for a claim based upon ineffective counsel in Indiana is the "mockery of justice" standard⁷⁰ which employs a due process analysis. The court modified the "mockery" test by adding the requirement of "adequate legal representation at each stage of the proceedings."⁷¹ However, the modification has had little, if any, real effect on the "mockery" standard.⁷² Following the modification to the "mockery" standard,⁷³ the court has failed to employ

67. *Id.* at 30, 123 N.E.2d at 181. It appears that the court began its examination of the attorney's actions by questioning the rationale. Such action by the court does little to reinforce a presumption of competence. The court's examination begins by questioning the attorney's adequacy rather than accepting the presumption of competence.

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

69. *Id.* at 33, 123 N.E.2d at 182 (citing *Castro*, 196 Ind. at 391, 147 N.E.2d at 323); *Wilson*, 222 Ind. at 81, 51 N.E.2d at 855.

70. *See, e.g., Adams*, ___ Ind. at ___, 430 N.E.2d at 773 ("the proper test . . . is the mockery of justice standard . . .").

71. *Thomas v. State*, 251 Ind. 546, 242 N.E.2d 919 (1969).

72. *See, e.g., Darnell v. State*, ___ Ind. ___, 435 N.E.2d 250 (1982) (applying the modified "mockery" test but not questioning the adequacy of representation; the court used the presumption of competence principle to pass over the ineffectiveness issue); *Adams*, ___ Ind. at ___, 430 N.E.2d at 773 (applying the *Thomas* modification but not examining the adequacy of the representation of the attorney); *Miller v. State*, ___ Ind. ___, ___, 405 N.E.2d 909, 913 (1980) (applying the "mockery of justice adequacy" standard but merely listing defense counsel's actions as proof of adequacy and proof that the trial was not a "mockery"); *Duncan*, 272 Ind. at 618, 400 N.E.2d at

a test which adequately resolves the question of ineffective counsel or impels the use of the "adequate legal representation" modification. Indiana courts have not changed the rationale utilized in analyzing ineffective counsel allegations and the issue has not been reviewed any more stringently since the modification.⁷⁴

Indiana courts continue to presumptively affirm criminal convictions brought before them requesting relief based upon a claim of ineffective assistance of counsel. The courts do so because the attorney's actions do not reduce the trial into a "mockery of justice." Thus, the "adequate legal representation" modification has had no real effect. For example, in *Crisp v. State*⁷⁵ the Indiana Supreme Court heard and rejected the defendant's claim for relief based on ineffective counsel grounds.⁷⁶ The defendant alleged that counsel failed to make an opening statement, failed to record opening statements and

1115 (applying the modified standard as adequate but holding that none of the strategies by defense counsel turned the proceedings into a "mockery"); *Hollon*, 272 Ind. at 444-46, 398 N.E.2d at 1278-79 (applying the *Thomas* modification but merely going through a list of actions by defense counsel during trial and not examining them for adequacy); *Crisp*, 271 Ind. at 537, 394 N.E.2d at 119-22 (citing *Thomas* as modifying the "mockery" test into a worthy standard but not examining the actions of the attorneys apart from the trial or as being adequate, the court recognized the representation as less than "optimal" and not in line with standard practice of defense attorneys, but held the representation did not make a "mockery" of the proceedings); *Jones v. State*, 270 Ind. 141, 143-44, 387 N.E.2d 440, 442 (1978) (claiming adequate legal representation modification insures competence, but did not delve into the adequacy of representation, instead, the court merely stated that what the attorney did was adequate); *Cottingham*, 269 Ind. at 264, 379 N.E.2d at 986 (claiming "mockery" as modified by "adequate legal representation" will insure competence, but finding that defense counsel did not turn the proceedings into a "mockery").

73. *Thomas*, 251 Ind. at 557, 242 N.E.2d at 925 ("It is reversible error not to provide a defendant in a criminal prosecution with adequate legal representation at each stage of the proceedings. . .").

74. It is an ironic note that *Thomas* is the case which the court cites as providing the modification "adequate legal representation." In *Thomas*, the court found that the public defender presented inadequate representation, *id.* at 555, 242 N.E.2d at 924, and granted a new trial. *Id.* at 557, 242 N.E.2d at 925. In the new trial *Thomas* was again convicted. He then appealed and the conviction was affirmed. *Thomas v. State*, 262 Ind. 590, 321 N.E.2d 194 (1975). He then sought post-conviction relief which was denied, whereupon he appealed the denial of post-conviction relief. *Thomas v. State*, ___ Ind. ___, 417 N.E.2d 1124 (1981). In this appeal *Thomas* again alleged ineffective assistance of counsel. In deciding the ineffective assistance issue the court applied the "mockery of justice" test. *Id.* at ___, 417 N.E.2d at 1127. Ironically, the court does not mention the "adequate legal modification" which stemmed from the initial reversal. The very case which the court cites as modifying the "mockery" standard does not employ the modification.

75. 271 Ind. 534, 394 N.E.2d 115 (1979).

76. *Id.* at 542, 394 N.E.2d at 122.

voir dire, and failed to interview the prosecution's witnesses.⁷⁷ The court recognized that "interviewing all witnesses is standard practice among defense attorneys"⁷⁸ but stated that the decision of this attorney reflects: "A distinction between an exceptionally careful defense lawyer and a defense lawyer who may, in part, conform to trial court practice in carrying out the administration of a busy trial court."⁷⁹ The court concluded that, although the representation was not "optimal,"⁸⁰ it did not amount to a mockery of justice, based on the attorney's other actions during trial.⁸¹ The court thus refused to look at counsel's representation *qua* representation, but rather looked to the entire trial and thereby effectively circumvented the essential examination under the constitutional guarantee to effective counsel.

Defense counsel's apparent lack of expertise in evidentiary matters was the basis of the defendant's appeal in *Duncan v. State*.⁸² The court held that, even if the allegations were true and evidenced defense counsel's inexperience, the allegations did not prove that counsel was ineffective. The court based its decision upon the defendant's failure to show a connection between the alleged errors and the conviction.⁸³ As a result, a defendant claiming ineffective counsel must prove that prejudice to his case resulted from the alleged errors of trial counsel.⁸⁴ In essence, the defendant must show that the conviction was a direct result of counsel's errors.⁸⁵

77. *Id.* at 537-38, 394 N.E.2d at 119.

78. *Id.* at 539, 394 N.E.2d at 121.

79. *Id.* at 537, 394 N.E.2d at 119.

80. *Id.* at 541, 394 N.E.2d at 122.

81. *Id.*

82. 272 Ind. 614, 400 N.E.2d 1112 (1980).

83. *Id.* at 617, 400 N.E.2d at 1114 ("Even if we were to conclude that these incidents reflect mistakes or counsel's lack of expertise on certain questions of evidence, appellant can show no real prejudice.").

84. *Id.* at 617, 400 N.E.2d at 1115 (appellant failed to show how the alleged errors harmed his case). See also *Crisp*, 271 Ind. at 537-38, 394 N.E.2d at 120 (defendant failed to show how his case was prejudiced by the alleged errors of the trial attorney).

85. The requirement of proving prejudice implies the "harmless error" rule as set out in *Chapman v. California*, 386 U.S. 18 (1967). The court in *Chapman* held that not all trial errors concerning constitutional rights required reversal. *Id.* at 22. However, the court required that once constitutional error was shown it must be proved that the error was indeed harmless beyond a reasonable doubt. *Id.* at 24. Moreover, the burden of proof rests on the prosecution; the beneficiary of the error. *Id.* This "harmless error" approach is used in jurisdictions which employ an objective sixth amendment analysis of ineffective assistance claims. See, e.g. *McQueen v. Swenson*, 498 F.2d 207, 218-20 (8th Cir. 1974); *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968). However, the specific time at which the burden rests with

The requirement of proving prejudice conflicts with the court's holding that a conviction is not evidence of ineffectiveness.⁸⁶ The merits of the trial are not at issue in deciding an ineffective counsel allegation, rather, it is the quality of the representation which is at issue. The Indiana Supreme Court under the "mockery" standard requires that the defendant prove that trial counsel's errors resulted in a conviction before relief is granted.⁸⁷ However, in a recent case there appears the first hint that the Indiana Supreme Court is aware of the need for reform of the "mockery" standard. In *Adams v. State*,⁸⁸ the Indiana Supreme Court held that counsel who failed to call an alibi witness who was present at trial, failed to move for separate trials of co-defendants, and failed to allow the defendant to testify, provided constitutionally adequate counsel.⁸⁹

In a strongly argued dissent, one justice called for a reanalysis of the present "mockery" standard.⁹⁰ The dissent emphasized that the modification requiring "adequate legal representation" must be given substantive weight. "One may receive ineffective assistance of counsel even though the proceedings have not been a farce or mockery."⁹¹ In addition, the dissent argued that true application of this "mockery" standard, as modified by "adequate legal representation," demands a constitutional scrutiny of the *quality* of representation by counsel as well as of the rudiments of trial.⁹² The dissent then proceeded to examine the quality of the attorney's actions and found

the prosecution varies. Most jurisdictions require the defendant to couple allegations of ineffective assistance with colorable claims of evidence. Once accomplished, the burden rests on the prosecution to show the errors harmless.

The "mockery of justice" standard, on the other hand, requires the defendant to prove that the alleged instances of ineffectiveness prejudiced his case. The entire burden rests on the defendant. Prejudice may be difficult to prove, especially in a direct appeal when the reviewing court is limited to the record of the case. *McQueen*, 498 F.2d at 221 (applying *United States v. DeCoster*, 487 F.2d 1197, 1204 (D.C. Cir. 1973)). See *infra* note 115. Moreover, placing the burden of proof upon the defendant in essence requires him to prove his innocence, *id.* at 1204, which is contrary to the prevailing standard that a defendant is presumed innocent until guilt is proven beyond a reasonable doubt.

86. *Blackburn*, 260 Ind. at 22, 291 N.E.2d at 696 ("A poor result alone does not amount to denial of adequate assistance of counsel.").

87. See Note, *Effective Assistance of Counsel*, *supra* note 1, at 538-40.

88. ___ Ind. ___, 430 N.E.2d 771 (1982).

89. *Id.* at ___, 430 N.E.2d at 775.

90. *Id.* at ___, 430 N.E.2d at 776 (Hunter, J., dissenting) ("I feel that the circumstances as shown by the record in this case demand a more thorough analysis of our standard.").

91. *Id.* (citing *Herring*, 491 F.2d at 128).

92. *Adams*, ___ Ind. at ___, 430 N.E.2d at 777.

them substantially deficient. The dissent recommended a reversal and new trial on the basis that "the quality of representation by defendant's trial attorney fell far short of the adequate legal representation standard we require."⁹³

In summary, the Indiana Supreme Court currently employs a standard of review for ineffective counsel claims which does not adequately protect the constitutional guarantee of effective counsel. The court has digressed from its previous "perfunctory" standard which provided adequate protection of the defendant's right to effective counsel to the present "mockery" standard, which emphasizes the defendant's due process rights rather than the right to effective counsel. Though the court has modified the "mockery" standard with language that is directed at the right to effective counsel, it has failed to give effect to that language. The Indiana Supreme Court must either give full effect to the modification or adopt a new standard which adequately protects a defendant's right to effective assistance of counsel.

ANALYSIS AND CRITIQUE

Procedural Aspects

The issue of ineffective counsel can be raised at different times in the criminal process.⁹⁴ Ineffectiveness of counsel may be raised on direct appeal⁹⁵ or in post-conviction proceedings.⁹⁶ If not raised on appeal, the issue may be deemed waived,⁹⁷ although waiver is a mat-

93. *Id.* at ____, 430 N.E.2d at 781. It can be argued that the legal system itself requires effective assistance of counsel for its own integrity. If we are to believe in the integrity of the system—that the system works—then there must be effective counsel. This systematic need for effective counsel and adequate representation requires that counsel's *representation*, not only the overall trial, be examined for constitutional and normative deficiencies or there can be no faith or justice in the judicial system.

94. Ineffective assistance of counsel can be raised in a direct appeal or through collateral attack by mean of post-conviction proceedings. See Note, *Developments in the Law—Federal Habeas Corpus* 83 HARV. L. REV. 1038 (1970). See also, Peller, *In Defense of Federal Habeas Corpus Relitigation* 16 HARV. C.R.-C.L. REV. 581 (1982).

95. See, e.g., *Duncan*, 272 Ind. 614, 400 N.E.2d 1112.

96. See, e.g., *Adams*, __ Ind. ____, 430 N.E.2d 771.

97. *Hollonquest*, __ Ind. at ____, 432 N.E.2d at 39 (Saying a post-conviction remedy is not a substitute for a direct appeal. Also, "[T]he failure to raise the issue of inadequacy of his trial counsel is petitioner's direct appeal ordinarily constitutes a waiver of this issue."). See also *Dull*, 267 Ind. at 551, 372 N.E.2d at 174 (defendant waived the ineffectiveness issue by not raising it on his direct appeal).

ter of judicial discretion.⁹⁸ The ineffectiveness issue if raised and reviewed on direct appeal may not be raised in post-conviction proceedings although that is similarly a matter of judicial discretion.⁹⁹ Raising the issue at either time creates several problems.

Raising a claim of ineffective assistance on direct appeal creates practical problems. If the court-appointed attorney on appeal is the same attorney appointed for the trial, he may be less than eager to raise his own incompetence as a basis for relief.¹⁰⁰ The court, if it does not appoint new counsel for appeal, is forcing the appointed attorney either to waive the ineffective assistance issue and thereby possibly deny the defendant that constitutional right, or to raise the ineffective assistance issue and thereby damage his own reputation and possibly ruin his career. This dilemma should never arise. The court, by simply appointing new counsel for the appeal would resolve the problem and guarantee that the defendant's constitutional rights will be protected with the requisite zeal.¹⁰¹ Nevertheless, the dilemma continues to exist.

The result of the dilemma is that many ineffective assistance claims are not heard until raised in post-conviction proceedings. Post-conviction claims are usually heard long after the trial is over, at a time when memories have faded, evidence has disappeared, witnesses have relocated, and courts have tired of rehashing the same issues.¹⁰²

98. See, e.g., *Henson v. State*, ___ Ind. ___, ___, 436 N.E.2d 79, 81 (1982) (the court acknowledged the possibility of waiver, but proceeded to address the issue).

99. *Adams*, ___ Ind. at ___, 430 N.E.2d at 773 ("Issues raised and determined on direct appeal are not reviewable in a post-conviction proceeding."). However, this is easily sidestepped by alleging ineffective assistance of the appellate counsel. *Hollonquest*, ___ Ind. at ___, 432 N.E.2d at 39 (court heard post-conviction petition on ineffectiveness issue because defendant also alleged incompetence of appellate attorney).

100. See *Bazelon*, *supra* note 1, at 24-26.

101. An attorney will obviously pursue a claim of ineffective assistance more zealously if the claim is directed at another attorney's inadequacies. The court's appointment of new counsel for appeal will relieve the trial attorney of the decision whether to pursue a challenge to his own competence as a grounds for overturning his client's conviction.

There are other issues raised by the distinction between retained counsel and counsel assigned by the judiciary. The issues raised by ineffective assistance of counsel claims against retained counsel are beyond the scope of this note.

102. See, e.g., *Hollonquest*, ___ Ind. at ___, 432 N.E.2d at 39 (post-conviction remedy not a substitute for a direct appeal; failure to raise the issue of the inadequacy of his trial counsel in petitioner's direct appeal ordinarily constitutes a waiver of the issue). Post-conviction necessarily happens after trial and appeal. Because of

For these reasons courts tend to deny post-conviction relief in the form of a new trial. However, these reasons are not based on constitutional grounds.¹⁰³ Unlike the guarantee of effective counsel, which has several constitutional bases,¹⁰⁴ denial of post-conviction relief is often based purely on practical grounds.¹⁰⁵ However, practical matters, such as judicial economy, must not be allowed to supersede constitutional rights, especially at the cost of an individual's liberty.

The Indiana Supreme Court uses such pragmatic reasons as a means of evading a direct confrontation of the effectiveness of counsel issue. The court makes its decision on practical grounds and then uses the facts of the specific case to bolster its decision. This method of skirting the issue is prevalent in post-conviction proceedings. In post-conviction proceedings the reviewing judge is given nearly unbridled discretion.¹⁰⁶ The Indiana courts have uniformly held that, in post-conviction proceedings, the judge is the sole arbiter of the weight of the evidence and the credibility of the witnesses. His decision is to be reviewed only where the evidence is without conflict and leads unerringly to a result not reached by the trial court.¹⁰⁷ As a result, the defendant labors under a heavy burden in post-conviction proceedings. The defendant can only overcome the strong presumption of competence of the attorney¹⁰⁸ by clear and convincing evidence.¹⁰⁹

Presumption of Competence

There is sound rationale underlying the presumption of competence which the courts employ.¹¹⁰ Defense counsel has graduated

the heavy court dockets and built-in delays of the system, appeals from denial of post-conviction claims are late in developing.

103. One practical reason for refusing relief on ineffective counsel claims is the belief held by the court that the defendants are "guilty anyway." See Bazelon, *supra* note 1, at 26-29. ("It is the belief—rarely articulated, but I am afraid, widely held—that most criminal defendants are guilty anyway."). This belief undergrids the efficiency arguments. Why allow defendants who are "guilty anyway" to clutter up the courts. *Id.* at 26.

104. See *supra* notes 8-10 and accompanying text.

105. Judicial economy is one practical reason which the courts use to bypass the ineffectiveness issue. See Bazelon, *supra* note 1, at 26.

106. See, e.g., *Adams*, ___ Ind. at ___, 430 N.E.2d at 774 ("In post-conviction proceedings, the judge is the sole judge of the weight of the evidence and the credibility of the witnesses . . . It is apparent the post-conviction judge chose to believe one set of witnesses and not the other. It is within his discretion to do so.").

107. *Id.*

108. See, e.g., *Leaver*, ___ Ind. at ___, 414 N.E.2d at 960 ("There is a strong presumption that an attorney has properly discharged his duties to his client.").

109. See, e.g., *Hollonquest*, ___ Ind. at ___, ___, 432 N.E.2d at 39 ("strong and convincing evidence is required to rebut the presumption").

110. See, e.g., *Field*, ___ Ind. at ___, 426 N.E.2d at 673 ("This presumption

from law school where the basics required to practice law presumably were taught. Additionally, having passed the state's bar examination, counsel has demonstrated that he possesses the requisite skills to competently practice law in that state. These requirements are evidence that an attorney has achieved a certain modicum of competence, but they do not prove that the attorney provided effective assistance during a specific trial.¹¹¹ A presumption of competence is well placed in dealing with claims which are patently frivolous. However, the presumption of competence should not be given overriding priority merely because counsel has exhibited competence in the past. The presumption of competence has been abused by the Indiana courts. The abuse is evident in two aspects of the "mockery" standard and the pragmatic concerns of the court. The court makes the presumption of competence nearly irrebuttable by placing an almost unattainable burden of proof on the defendant. Also, the court defers to counsel's strategy in an effort to bring about its pragmatic concerns of judicial integrity and economy.¹¹²

Rebutting the Presumption

At the appellate level, evidence of alleged incompetence can usually be shown only through the trial record.¹¹³ The record will show only what the attorney did during the trial and, unless totally incongruous with normal court procedure, bolster an already overweighted presumption of competence. The record consists of the attorney's actions during the trial; calling witnesses, conducting direct and cross-examination, and making objections. Thus, the record necessarily demonstrates that the attorney was active at trial.¹¹⁴ However, the record does not show what an attorney may have failed

is rationally grounded in the educational and other requirements for admission to the practice of law.").

111. As the court noted in *Hillman v. State*, 234 Ind. 27, 34, 123 N.E.2d 180, 183 (1954) "It is not sufficient just to appoint [an attorney] who has been admitted to the bar."

112. See *infra* note 147.

113. See, e.g., *Duncan*, 272 Ind. at 617, 400 N.E.2d at 1114 ("Because appellant has chosen to raise the issue on direct appeal, we must decide this question solely on the record of this trial."). The record, however, will not evidence the errors or omissions which occurred during the trial. In other words, the record will rarely show that an attorney was ineffective.

114. *Id.* at 618, 400 N.E.2d at 1114. See also *Miller*, ___ Ind. at ___, 405 N.E.2d at 913 (finding that the record showed that defense counsel filed motions and notices but the court did not examine the adequacy of these actions); *Merida*, 270 Ind. at 220, 383 N.E.2d at 1045 (finding that the record only showed what attorney did); *Kerns v. State*, 265 Ind. 39, 42-43, 349 N.E.2d 701, 703 (1976) (finding that the record showed that attorney did not make a thorough investigation but finding the representation adequate).

to do or even if the actions recorded during the trial were effective.¹¹⁵ In *Crisp v. State*,¹¹⁶ the court held that counsel's failure to demand that opening statements and *voir dire* be recorded did not evidence incompetence because the defendant failed to prove that any prejudice resulted from such a failure.¹¹⁷ Furthermore, the court observed that if anything prejudicial had occurred during opening statements or *voir dire*, defense counsel could have objected and demanded a court reporter.¹¹⁸ However, the unrecorded events are lost for appeal. If defense counsel is incompetent, as the defendant alleges, then counsel's failure to record part of the trial is certainly evidence of that incompetence. The defendant will not be able to identify prejudice on every occasion. Even an attorney appointed for appeal will not be able to discern prejudice if there is no record to examine.¹¹⁹

In direct appeals, allegations of incompetence also may be based on evidence outside of the trial record.¹²⁰ The Indiana courts have heard these allegations and consistently rejected them for lack of

115. The record merely shows what the attorney did. Combining this evidence of action with the strong presumption of competence makes an almost insurmountable obstacle for a defendant alleging ineffective assistance under the "mockery" test. Judge Bazelon of the District of Columbia Circuit recognized that such a problem exists: "[P]roof of prejudice may well be absent from the record precisely because counsel has been ineffective." *DeCoster*, 487 F.2d, at 1204. DeCoster was convicted of aiding and abetting an armed robbery and assault with a deadly weapon and he appealed. *Id.* [hereinafter referred to as *DeCoster I*]. The court raised *sua sponte* the issue of ineffective assistance of counsel and remanded for a new trial. *Id.* at 1205. The district court held a hearing on the competency of counsel issue and denied the motion for a new trial. The Circuit court in a panel decision reversed the conviction but granted the government's motion for a rehearing *en banc*. *United States v. DeCoster*, No. 72-1283 (D.C. Cir. 1976) [hereinafter referred to as *DeCoster II*].

At the rehearing, the circuit vacated the decision of *DeCoster II*. *DeCoster v. United States*, 624 F.2d 196, 200 (D.C. Cir. 1979) [hereinafter referred to as *DeCoster III*]. In a plurality opinion, the circuit court upheld DeCoster's conviction on the grounds that he was provided with adequate counsel. Furthermore, the opinion rejected the strict "guidelines" principle of *DeCoster I*, and set abstract guidelines. Judge Bazelon and Chief Judge Wright authored a strong dissent, underscoring the lack of a majority, which reiterated the guidelines of *DeCoster I* and emphasizing that the burden of proof of prejudice must lie with the prosecution. *DeCoster*, 624 F.2d at 275 (Bazelon, J., Wright, C.J. dissenting).

116. 271 Ind. 534, 394 N.E.2d 115.

117. *Id.* at 537-38, 394 N.E.2d at 119.

118. *Id.*

119. An appeal is usually based on the transcript of the trial. See *supra* note 111. If there is no court reporter there is no trial transcript, and an attorney on appeal has no way of adducing alleged errors during trial.

120. See *supra* note 113. However, the evidence typically consists of attorney's inactions which the defendant must show prejudiced the case. These inactions are not reflected in the trial record. See *supra* note 113.

specificity,¹²¹ or because the claims fail to show how the alleged inadequacies harm the defendant.¹²² The Indiana Supreme Court has stated that "allegations of incompetence, even if unrefuted, are not alone sufficient to rebut the presumption of competence."¹²³ Allegations that defense counsel failed to call or interview witnesses are not enough.¹²⁴ The defendant must show what an uncalled witness would have said.¹²⁵ This requirement demands that the defendant know what the witness will testify to before they actually testify. Moreover, the court has held that allegations as to the testimony of a prospective witness are insufficient without supporting evidence.¹²⁶ The presumption of competence in a direct appeal is difficult to meet and the presumption in a post-conviction hearing is likewise difficult to rebut.

In a post-conviction hearing, the defendant is allowed to testify as to what counsel did or did not do and to any alleged inadequacies.¹²⁷ However, as in the direct appeal, the testimony is given little, if any,

121. See, e.g., *Crisp*, 271 Ind. at 538, 394 N.E.2d at 120 ("Defendant does not state specifically what could have been brought out in favor of defendant had Father Weber been called as a defense witness.").

122. See, e.g., *Rapier v. State*, ___ Ind. ___, ___, 435 N.E.2d 31, 36 (1982) (requiring defendant to show how an objection would have prevented damaging evidence); *Cowell*, ___ Ind. at ___, 416 N.E.2d at 842 ("This Court has consistently sought to determine if and how a defense attorney's alleged inadequacies have harmed defendant at trial.").

123. *Kerns*, 265 Ind. at 42, 349 N.E.2d at 703.

124. See, e.g., *Adams*, ___ Ind. at ___, 430 N.E.2d at 775 ("appellant's counsel did not demonstrate incompetence by failing to call Vails as a witness."); *Beard v. State*, ___ Ind. ___, ___, 428 N.E.2d 772, 774 (1981) (alleged failure to examine tests was insufficient because defendant failed to show how an inquiry would reveal exculpatory evidence); *Duncan*, 272 Ind. at 617, 400 N.E.2d at 1115 ("Appellant has not shown how any of trial counsel's alleged mistakes harmed his cause."); *Crisp*, 271 Ind. at 538, 394 N.E.2d at 120 (the defendant did not show how failure to interview defense witnesses prejudiced the case).

125. See, e.g., *Quinn*, ___ Ind. at ___, 436 N.E.2d at 72 (requiring that the defendant show what witnesses would have testified to had they been called); *Hollon*, 272 Ind. at 445, 398 N.E.2d at 1278 ("To prevail on this issue, defendant must show what these witnesses would have said."); *Crisp*, 271 Ind. at 538, 394 N.E.2d at 120 (not finding inadequate counsel because the defendant failed to show what the witness would have said).

126. See, e.g., *Quinn*, ___ Ind. at ___, 436 N.E.2d at 72. In *Quinn* the court found counsel adequate. The defendant appellant testified that uncalled witnesses would have offered evidence tending to exonerate him. However, as the record below contained "no other testimony concerning those witnesses" the *Quinn* court refused to find counsel inadequate. *Id.*

127. *Baker v. State*, ___ Ind. ___, ___, 435 N.E.2d 990, 992 (1982). Also the courts look to the record which again will only show what the attorney did, not if he was effective or if he failed to do something which may have prejudiced the defendant. *Davis v. State*, ___ Ind. ___, 446 N.E.2d 1317 (1983) (the record does not show that the attorney presented ineffective assistance of counsel).

weight.¹²⁸ It is only if the attorney whose own incompetence is being raised admits to the incompetence that the allegations are sufficient for relief.¹²⁹ If the testimony of the defendant is uncorroborated¹³⁰ or in direct conflict with that of the attorney, then the presumption of competence favors the attorney.¹³¹ Testimony by a second attorney appointed to pursue the post-conviction relief will not overcome the presumption.¹³² Only if the attorney who represented the defendant at trial admits to his ineffectiveness or if the record shows that the representation turned the trial into a mockery will the defendant achieve a favorable result in post-conviction proceedings.¹³³

The reviewing judge in post-conviction proceedings requires that the defendant seeking relief based on ineffective counsel provide specific evidence of the attorney's inadequacies. Often the evidence produced by the defendant seeking relief is rejected as too speculative or unspecific.¹³⁴ In *Adams v. State*,¹³⁵ the defendant alleged that counsel

128. *Davis*, ___ Ind. at ___, 446 N.E.2d at 1321-22.

129. *Quinn*, ___ Ind. at ___, 436 N.E.2d at 72 (testimony of defendant is uncorroborated and the trial lawyer was not a witness and therefore the presumption of competence prevails). See also *DeViliez v. State*, ___ Ind. ___, ___, 416 N.E.2d 846, 850 (1981) (competing evidence between defendant and defense attorney and presumption of competence prevails). But see *Hendrix*, ___ Ind. at ___, 418 N.E.2d at 1162 (hearing trial counsel's testimony as to admitted errors in judgment but finding the representation adequate anyway).

130. *Quinn*, ___ Ind. at ___, 436 N.E.2d at 72.

131. *Cochran v. State*, ___ Ind. ___, 445 N.E.2d 974 (1983) (holding that if there is uncorroborated allegations of error by the trial counsel, then the inference is that counsel was effective); *DeViliez*, ___ Ind. at ___, 416 N.E.2d at 850 (competing evidence between defendant and defense counsel and the court held that defense counsel provided competent counsel).

132. *Leaver*, ___ Ind. at ___, 414 N.E.2d at 961 (saying the post-conviction appellate attorney's criticism of the trial attorney's representation was based merely on the benefit of hindsight).

133. A favorable result does not necessarily mean an acquittal. A reversal of the trial court's conviction results in a new trial. However, since much time has lapsed due to the time requirements of the court, a reversal in post-conviction proceedings may be tantamount to an acquittal.

134. See, e.g., *Quinn*, ___ Ind. at ___, 436 N.E.2d at 72 (requiring that defendant show what witnesses would have testified to if they had been called); *Rapier*, ___ Ind. at ___, 435 N.E.2d at 36 (requiring defendant to show how an objection would have prevented damaging evidence); *Darnell*, ___ Ind. at ___, 428 N.E.2d at 774 (alleged failure to examine tests was not specific because defendant failed to show how an inquiry would reveal exculpatory evidence); *Leaver*, ___ Ind. at ___, 414 N.E.2d at 960 (claiming defendant's allegations of incompetence were no more than bald, bare assertions); *Hollon*, 272 Ind. at 445, 398 N.E.2d at 1278 (requiring defendant to show what witnesses would have said); *Crisp*, 271 Ind. at 538, 394 N.E.2d at 120 (defendant failed to state specifically any evidence an uncalled witness would have testified to in favor of defendant); *Grimes*, 126 Ind. at 687, 366 N.E.2d at 641 (defendant failed to disclose how the lack of consultation resulted in ineffectiveness).

135. ___ Ind. ___, 430 N.E.2d 771 (1982).

was ineffective based on his failure to call witnesses, interview certain witnesses, and disclose the mental state of a specific witness.¹³⁶ The court noted that the defendant did not disclose what the uncalled witnesses would have testified to or what purpose an interview would have served. Similarly, the defendant gave no evidence of the alleged mental state of the specific witness.¹³⁷ As a result, the court concluded that the defendant failed to meet the burden of proof and thus failed to overcome the presumption of competence.¹³⁸ It appears that the court used the presumption of competence to avoid confronting the ineffectiveness of counsel issue.

Similarly, in *Leaver v. State*,¹³⁹ the court refused to grant post-conviction relief because the defendant's allegations of incompetence were boldfaced and bare, backed by no evidence.¹⁴⁰ The defendant contended that trial counsel failed to raise and preserve issues regarding evidence obtained in an unlawful search and seizure.¹⁴¹ The court held that the defendant failed to show that the evidence was "in fact" improperly obtained.¹⁴² Furthermore, the court found that the defendant's allegations that his counsel failed to object to certain testimony and evidence were merely bald assertions without sufficient proof and therefore were insufficient to overcome the presumption of competence.¹⁴³ The court in *Leaver* did not address the issue, presented in the briefs, that defense counsel was ignorant of Indiana law and had signed a sworn affidavit to that effect.¹⁴⁴ The court refused to allow that fact to overcome the presumption of competence. In the face of counsel's admitted ignorance, the great weight given the presumption of competence by the Indiana court is misplaced.¹⁴⁵ A cursory glance shows the Indiana court's intention to give accord to

136. *Id.* at ____, 430 N.E.2d at 774.

137. *Id.* at ____, 430 N.E.2d at 775.

138. *Id.*

139. ____ Ind. ____, 414 N.E.2d 959 (1981).

140. *Id.* at 414 N.E.2d at 960.

141. *Id.*

142. *Id.*

143. *Id.* at ____, 414 N.E.2d at 961.

144. Brief of defendant-appellant at 45-56, *Leaver*, ____ Ind. ____, 414 N.E.2d 959. Furthermore, the defendant's attorney had been "in the clothing business," for thirty (30) years until resuming his law practice three years ago. The attorney was licensed in Kentucky but "ignorant of the laws of the state of Indiana." *Id.* He attempted to procure an attorney familiar with Indiana law, offering his entire fee, but was unable to solicit one. Therefore, he signed the affidavit "to protect my client's civil rights . . . and to [insure his client's] day in court [to] receive a fair and impartial trial." *Id.*

145. *But cf.* *Smith v. State*, ____ Ind. ____, ____, 396 N.E.2d 898, 901 (1979) ("[C]ounsel was ineffective in that, because of his ignorance of the law as set down by the nation's highest court, he could not bring about his intentions.").

the finality of judgments by presumptively affirming convictions. Only when the representation is so inadequate as to be shocking to a sense of justice¹⁴⁶ do the Indiana courts seriously delve into the ineffective assistance issue.

Deferral to Strategy

Another method courts have used to circumvent the substantive incompetency issue is to rely on the multitude of holdings which state that courts will not second-guess trial strategy or tactical decisions.¹⁴⁷ This rationale is based on the theory that anyone, given the benefit of leisurely retrospection and knowledge of the outcome, will choose the most beneficial avenue. However, the attorney does not have the benefit of such hindsight. Counsel must make tactical decisions and strategy choices at the time they arise and the courts will not view an honest, but erroneous, tactical judgment as evidence of incompetence. However, problems arise in determining what constitutes a strategic or tactical decision.¹⁴⁸ It can be argued that everything

146. *Leaver*, ___ Ind. at ___, ___, 414 N.E.2d at 961. However, ineffective counsel may not shock the court. "One may receive ineffective assistance of counsel even though the proceedings have not been a farce or mockery." *Adams*, ___ Ind. at ___, 430 N.E.2d at 776 (Hunter, J., dissenting) (citing *Herring*, 491 F.2d at 128).

147. See, e.g., *Adams*, ___ Ind. at ___, 430 N.E.2d at 775. ("We do not second-guess matters of trial strategy and tactics in evaluating an allegation of incompetence of counsel."); *Duncan*, 272 Ind. at 618, 400 N.E.2d at 1115 ("We will not pass judgment on the merits or demerits of the strategy employed.").

148. For the purpose of ineffective assistance of counsel claims, the Indiana courts seemingly define tactics and strategy as anything which the attorney does. The courts assume that everything the attorney does is based on a tactical or strategic choice. However, this cannot be true. In order to defer to counsel's strategy choices and yet preserve the integrity of the judicial system, the courts should defer to tactical choices which were indeed based on strategy.

Webster's defines tactic as "a device or expedient for accomplishing an end." It defines strategy as "the art of devising or employing plans or stratagems toward a goal." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2327, 2256 (1961). An attorney certainly is basing in court decisions towards a specific end or goal—the client's best interest. However, all actions by an attorney are not necessarily based on a set strategy or tactic. Some are based on ignorance and total oblivion to the existence of choice. If the court's are to defer to counsel's strategy, then that strategy must be an informed choice. Failing to interview witnesses cannot be viewed as strategy when the attorney does not know what the witness will say. It can be nothing less than negligence and lead only to ineffective assistance of counsel.

One way to rectify such a problem is to set guidelines for the attorney. If guidelines are specific, then the attorney will be careful to meet those requirements and create a record of performance in doing so. Furthermore, the choices the attorney makes will be informed choices, thereby validating a deferral to an attorney's strategy. If a definition of tactic or strategy is promulgated by the courts, then a deferral to such strategy and tactics will not prejudice the integrity of the judicial system.

done during trial is based on strategy or tactics. Every action necessarily involves a decision; moreover, a decision to act or not to act can easily be claimed to be based on strategy. Even erroneous, ignorant, or incompetent decisions can be labeled as strategic maneuvers. The Indiana courts, by summarily deferring to trial counsel's strategy, are evading the substantive ineffectiveness issue.

The Indiana Supreme Court defers to counsel's strategy as a means of reinforcing the presumption of competence regardless of the inadequacy of the strategy. In *Crisp v. State*,¹⁴⁹ the court recognized that it is standard practice for a defense attorney to interview all witnesses,¹⁵⁰ but concluded that it was not evidence of incompetence for an attorney not to interview witnesses. The court stated that the defendant failed to show any prejudice by counsel's failure to interview such witnesses and, furthermore, failed to show what the witnesses would have said.¹⁵¹ The court also concluded that the decision not to interview witnesses may have been a strategy decision¹⁵² even though the attorney may not have been aware of the potential help of the witnesses because of his failure to interview.¹⁵³ Since the court noted that the attorney may have been unaware of the potential help of the witnesses and that interviewing such witnesses was standard practice among defense attorneys, the court should have examined the decision. Certainly, if the decision was strategy rather than inadequacy, the decision was questionable and deserving of examination. Yet the court affirmed the conviction deferring to counsel's strategy decisions.¹⁵⁴ It appears that Indiana courts deem most actions by attorneys tactical decisions in order to buttress the overweighted presumption of competence.

Likewise, in *Thomas v. State*¹⁵⁵ the court deferred to counsel's strategy to avoid confronting the ineffectiveness of counsel issue. The defendant alleged that counsel's failure to raise certain issues as error at trial evidenced incompetency and therefore counsel was

149. 271 Ind. 534, 394 N.E.2d 115 (1979).

150. *Id.* at 539, 394 N.E.2d at 121.

151. *Id.*

152. *Id.*

153. *Id.* at 538, 394 N.E.2d at 120 ("Counsel may not have been aware of the potential contribution these witnesses could have made to defendant's case.").

154. *Id.* at 541-42, 394 N.E.2d at 121.

155. ____ Ind. ____, 417 N.E.2d 1124 (1981). *See also McQueen*, 498 F.2d at 216 ("[t]he attorney's] assertion that he never interviews prosecution witnesses is an absurd and dangerous policy which can only be viewed as an abdication - not an exercise - of his professional judgment.").

ineffective.¹⁵⁶ The court acknowledged counsel's errors as ineffective but refused to grant relief because the errors constituted trial strategy.¹⁵⁷ Since the court deferred to counsel's trial strategy, it found that petitioner's counsel was not ineffective.¹⁵⁸ However, if the decisions are "instances of ineffectiveness," then the court should grant relief rather than defer to trial counsel's strategy or at least examine the effectiveness of the attorney's representation.

It appears that the Indiana courts are more than willing to reinforce their usual affirmation of criminal convictions by rhetoric which does not adequately delve into the quality of representation. Strategy and tactics are essential elements of a trial, however, improper decisions must be reviewed in order to determine if the representation was constitutionally adequate. Obviously, poor strategy or lack of any strategy can and will produce ineffective assistance of counsel. The courts should not refuse to examine representation merely to uphold the integrity of tactical choices. If the representation is adequate then it will withstand careful scrutiny. The implementation of a new standard which would allow the court discretion to review tactical choices would insure the protection of a defendant's right to effective counsel.¹⁵⁹

156. The defendant alleged that the failure of his trial and appellate counsels to raise the issues of improper venue and the failure to object to additional charges is evidence of ineffectiveness. *Id.* at ____, 417 N.E.2d at 1127.

157. *Id.*

158. *Id.* ("The instances of ineffectiveness cited by the defendant here, constitute trial strategy, and . . . we will not substitute our judgment for that of counsel.")

159. In implementing the power to use their discretion, the judge would necessarily be reviewing the quality of the choices made by the attorney and thereby reviewing the adequacy of the representation. The right to effective counsel requires no more, but it does require the representation be effective as a mandated minimum.

Another issue raised by the deferral to counsel's strategy decisions is the systemic gap created by the disparity between the standard an attorney is held to in ineffective assistance of counsel claims and the standard required of attorneys to preserve an error for appeal. In ineffective assistance claims anything an attorney does during trial is sufficient to defeat the claim. However, in order to preserve error for appeal, an attorney is required to meet stringent standards. *See, e.g., Boone v. State*, ____, Ind. ____, 449 N.E.2d 1077 (1983).

In *Boone*, the defendant, as part of his claim of ineffective assistance of counsel, claimed that his trial counsel erred in not objecting to potential bias of jurors who had served on previous juries on similar charges. *Boone v. State*, 267 Ind. 493, 495, 371 N.E.2d 708, 709 (1978). However, trial counsel failed to preserve such an objection for the record and the Supreme Court therefore deemed the issue waived. *Id.* However, since the trial counsel failed to preserve the objection to the jury selection and failed to have *voir dire* ("recorded, any prejudice is lost for appeal. Furthermore, the record will only show that counsel was effective in what he did, not that he may have been ineffective by not objecting to biased jurors. In the appeal from denial of post-conviction relief, the defendant claimed that trial counsel attempted to preserve his error in not

Judicial Integrity and Economy

The presumption of competence and the related policies are also evidence that the courts tend to look on claims of ineffective assistance with suspicion. There are several reasons behind the court's suspicion of ineffective assistance claims and their willingness to summarily dismiss those claims. One apparent reason is the protection of the integrity of the court system. By summarily affirming the trial court's decision, the reviewing court is giving more credence to that lower court's decision and perhaps deterring future claims by those convicted. In so doing, the reviewing court is attempting to avoid prolonged litigation of the same issue. By affirming convictions, the court avoids beginning a new trial on an event long past which has already been decided by a judicial tribunal.

Perhaps underlying the customary affirmation of convictions in ineffectiveness claims is the court's tacit belief that the defendant is guilty anyway.¹⁶⁰ Should the reviewing court determine that counsel's assistance was ineffective, the result is a new trial. But if the court believes that the defendant is guilty anyway, it can avoid the problem of adding a new trial to an already overcrowded docket by declaring effective assistance and affirming the conviction. The Indiana Supreme Court uses much of the rhetoric of the "mockery" standard to avoid facing a substantive ineffective assistance claim.

The requirement that the defendant produce "strong and convincing" evidence to overcome the presumption of competence implies the "guilty-anyway syndrome." Evidence of errors by counsel without evidence of how those errors prejudiced the defendant is not enough under Indiana's "mockery" standard. The court has already found the defendant guilty and without further evidence, even if defense counsel was incompetent, any other court will also find the defendant guilty.¹⁶¹

objecting to the biased jurors but had failed. *Boone* ___ Ind. at ___, 449 N.E.2d at 1079. The Supreme Court stated that such an allegation does not support a claim of ineffective counsel because there is no showing of bias in the record. *Id.* However, that is why trial counsel is ineffective.

The disparity of the standards creates a systemic gap wherein attorneys may fall if they have not done enough to preserve an error for appeal but have done enough to defeat an ineffective assistance of counsel claim. Making the standards for ineffective claims more stringent by setting forth guidelines would create better representation by attorneys in that attorneys would preserve their action for the record in order to show that guidelines were met. Thus, attorney's actions would be made a part of the record and therefore diminish the gap between ineffective assistance claims and preserving errors for appeal.

160. See Bazelon, *supra* note 1, at 26-28.

161. The Indiana Supreme Court has stated the underlying philosophy of the presumption of competence:

The very best of lawyers are limited to working with their cases as they

Certainly that logic evades the issue. If defense counsel evidences incompetence during trial, either through error, ignorance, mistake, or failure to act, then the evidence produced and the examination of witnesses at trial may have been incompetent also. A competent attorney may have produced a largely different result.¹⁶² But Indiana, by requiring the defendant to produce evidence as to what might have happened, evades the problem. Such disregard for defendant's constitutional rights should not be tolerated. Courts are designed to protect constitutional rights, not to impose on them.

Another rationale for conclusive affirmation of criminal convictions in ineffective assistance claims is the court's belief that convicted defendant's are using the courts as a playground to alleviate the boredom of prison life.¹⁶³ But, by treating ineffective claims so perfunctorily, the Indiana courts are playing a similar game. Many ineffective assistance claims may be frivolous and not worthy of judicial scrutiny, but certainly some meritorious claims exist.¹⁶⁴ Because Indiana uses a standard of review which imposes a nearly unattainable burden of proof, a meritorious claim may be joined with the frivolous claims and summarily dismissed. Individual constitutional rights must not be violated for the sake of the court's saving time by summarily affirming what they feel might be frivolous claims. Alternative standards may provide one aspect of reform by which the Indiana courts can preserve the constitutional rights of those accused of crimes.

find them. They cannot alter the facts. They cannot make unlawful acts lawful. They cannot undo the crime. If the investigation was brief and limited, perhaps it was because it, nevertheless, revealed that there was no need to explore further. If no defense witnesses were called, perhaps it was because there were none to call. If no plea of insanity was entered, perhaps it was because the defendant was sane.

Kerns, 265 Ind. at 42-43, 349 N.E.2d at 703-04.

162. This is not to say that the end result should be the determining factor in ineffective counsel claims. The court, although not explicitly stating so, recognized this in *Hollonquest*, ___ Ind. at ___, 432 N.E.2d at 30. The court stated that failure to mention the issue of trial counsel's inadequacy on direct appeal waived the issue. However, the court allowed the defendant to raise the issue in his post-conviction hearing because he also alleged the incompetence of his appellate counsel. In essence the court is allowing the defendant to raise the issue because the alleged incompetence of the appellate counsel may have been the factor in the negative result during appeal. *Id.* at ___, 432 N.E.2d at 39.

163. *Diggs*, 148 F.2d at 669-70 ("It is well known that the drafting of petitions for habeas corpus has become a game in many penal institutions.")

164. Judge Bazelon of the District of Columbia Circuit claimed that he came upon walking violations of the sixth amendment week after week in the cases he reviews. Bazelon, *supra* note 1, at 2. Chief Justice Burger has stated: "[F]rom one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation." Burger, *supra* note 6, at 234.

REFORM

Alternative Standards

The United States Supreme Court first acknowledged the right to effective counsel when it determined that the sixth amendment right to counsel meant "effective appointment"¹⁶⁵ of counsel, not merely *pro forma* appointment.¹⁶⁶ The Supreme Court has not yet delineated the scope of that sixth amendment right nor has it set any guidelines by which to determine the effectiveness of counsel. In *McMann v. Richardson*,¹⁶⁷ the Supreme Court did use language which departed from the traditional due process concept of ineffective counsel when it required that criminal defendant's lawyers act "within the range of competence demanded of attorneys in criminal cases."¹⁶⁸ But the *McMann* language is still vague. Although stated in general terms, the dictum does require stricter performance by an attorney than the performance required by a "mockery" test.

As a result of the United States Supreme Court holding that the sixth amendment requires effective assistance without setting specific guidelines to determine effectiveness, there is much confusion in the courts as to the standard to apply in reviewing ineffectiveness of counsel claims. The result is a diversity of standards in federal and state courts.¹⁶⁹ Initially, the standard applied was the "mockery of justice" standard similar to the one presently applied in Indiana.¹⁷⁰ In light of the evolution of the sixth amendment right and the realization that the "mockery" test alone is inadequate, many jurisdictions have turned from the subjective "mockery" test to a more objective approach. The federal circuits have all but abandoned the "mockery" test in favor of standards addressing the quality of representation rather than the quality of the trial.¹⁷¹

The Supreme Court has not established any specific guidelines in determining what constitutes ineffective counsel. Consequently, the courts are setting their own standards. The District of Columbia¹⁷²

165. *Powell*, 287 U.S. at 76.

166. *Id.* at 71-72.

167. 397 U.S. 759 (1970).

168. *Id.* at 771.

169. See *supra* note 13 and accompanying text.

170. *Diggs*, 148 F.2d at 667. Most federal circuit courts applied similar "mockery" standards until the Supreme Court's recognition in *McMann* of the right to effective counsel as a sixth amendment guarantee. The *McMann* holding precipitated a movement towards implementation of standards which adequately protect that right.

171. See *supra* note 13 and accompanying text. See also Note, *Effective Assistance of Counsel*, *supra* note 1.

172. See Bazelon, *supra* note 1. See also *DeCoster*, 624 F.2d at 209-14 (setting out specific guidelines for duties which attorneys must follow).

and the Fourth Circuit¹⁷³ are leaders in establishing standards to safeguard the sixth amendment right to effective counsel. The Fourth Circuit employs a standard which sets specific guidelines which an attorney must meet.¹⁷⁴ These guidelines are essentially derived from the ABA standards for the defense function.¹⁷⁵ Like the Fourth Circuit, the District of Columbia Circuit employs the "guidelines" approach set out in the ABA standards.¹⁷⁶ These guidelines include a duty to: confer with the defendant as often as necessary, discuss potential strategy and tactical choices, advise and protect defendant's rights, conduct pre-trial examinations and, conduct legal and factual investigation.¹⁷⁷ These basic guidelines, although open to interpretation, set specific duties which will aid attorneys and defendants in determining what the sixth amendment requires.

The "guidelines approach" sets out specific duties which an attorney must perform or he is presumed to be ineffective. The "guidelines approach" directly conflicts with the presumption of competence found in Indiana's "mockery" test. In the "guidelines approach," the duties imposed on the attorney are duties which are among the range of competence of attorney conduct.¹⁷⁸ The breach of any one of the duties carries with it a presumption of ineffectiveness which then shifts the burden of proof to the state, requiring the state to prove that the breach caused no prejudice to the defendant.¹⁷⁹ This step alleviates the great burden put on the criminal defendant laboring to prove ineffectiveness under Indiana's "mockery" standard.

The "mockery" standard, as applied in the Indiana courts, is applied in a different manner than the "mockery" test applied by the Seventh Circuit. The Indiana Supreme Court still implements the traditional "mockery" standard, even though modified by "adequate legal

173. *Coles v. Peyton*, 389 F.2d 224 (4th Cir. 1968).

174. The specific duties required of an attorney are: Confer with the client early and as often as necessary, advise him of his rights, ascertain all defenses that may be available and develop all appropriate defenses, conduct all necessary investigations, allow time for reflection and preparation. *Id.* at 226.

175. AMERICAN BAR ASSOCIATION, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION. (App. Draft 1971).

176. *DeCoster*, 624 F.2d at 209-14.

177. *Id.* at 201-214.

178. *McMann*, 397 U.S. at 771.

179. *DeCoster*, 487 F.2d 1197. The court still retains discretion in some part. The breach of duty must be a "substantial" breach which the court has the discretion to determine. "If a defendant shows a substantial violation of any of these requirements he has been denied effective representation unless the government, 'on which is cast the burden of proof . . . can establish lack of any prejudice thereby.'" *Id.* at 1204.

representation," while the Seventh Circuit employs a "mockery" standard modified by "legal assistance which meets a minimum standard of professional representation."¹⁸⁰ The result is confusion on the part of attorneys as to what standard of performance is required. Cases involving ineffective counsel claims which are decided by the Indiana state courts may be reviewed by the Seventh Circuit through the habeas corpus procedural mechanism. Because the Indiana courts and the Seventh Circuit apply different tests in employing the "mockery" standard, a different result may be reached on the same facts.¹⁸¹ This divergence serves to exacerbate the confusion as to the standard of performance required by defense attorneys in criminal cases.

The Seventh Circuit has enacted an approach, although not expressly rejecting the "mockery" test, which requires "legal assistance which meets a minimum standard of professional representation."¹⁸² The Seventh Circuit has thus broadened the "mockery" test.¹⁸³ The court examines each allegation of incompetence individually and then collectively, recognizing that the inquiry goes beyond whether the trial was a sham or a mockery.¹⁸⁴ The Seventh Circuit's approach, although setting no guidelines, uses a sixth amendment examination of counsel's actions to see if the actions reach a minimum standard. Unlike Indiana's "mockery" test, the minimal standard approach assures protection of the constitutional right to effective counsel because it requires the court to examine the quality of the representation, not solely the quality of the trial. The sixth amendment demands that counsel, not the trial, be effective.

180. United States *ex rel.* Williams v. Twomey, 510 F.2d 634 (7th Cir. 1974).

181. The Seventh Circuit has heard cases involving ineffective counsel claims via the *habeas corpus* procedural mechanism and reversed a state court's holding. In Wade v. Franzen, 678 F.2d 56 (7th Cir. 1982), the Seventh Circuit held that the Illinois state court applied the "wrong standard." The Illinois court had distinguished between an appointed and retained counsel. However, the Seventh Circuit court concluded that the distinction did not matter because the state court applied a "mockery" type standard instead of the "minimal professional competence" standard employed by the Seventh Circuit. *Id.* at 58.

Such a result could easily be reached when a case involving a claim of ineffective counsel decided by an Indiana court under a "mockery" standard of review reaches the circuit court. According to the Seventh Circuit, the "farce or sham" standard (synonyms of the "mockery" standard) is the wrong legal standard of review in ineffective assistance of counsel claims. *Id.*

182. Twomey, 510 F.2d at 641.

183. *Id.* at 641 ("On this appeal we have broadened the rule.")

184. The examination of trial counsel's actions will necessarily involve aspects of the trial. But it is not the trial or counsel which is the focus of the issue. It is the defendant's constitutional rights which receive the emphasis.

The Indiana Supreme Court's employment of the "mockery" standard of review in ineffective assistance of counsel claims includes pragmatic concerns. The court uses the rhetoric of the "mockery" standard in furtherance of those concerns. The court places great emphasis on the presumption of competence of trial attorneys in order to avoid confronting the merits of an ineffective counsel claim. Consequently, a defendant alleging ineffectiveness of counsel is required to produce strong evidence to bolster allegations of attorney incompetence. Furthermore, little credence is given to that evidence unless substantially supported. The court also defers to the trial attorney's strategy as a means of evading a direct confrontation of the ineffective counsel issue. The "mockery" standard is vague and allows the court to avoid the merits of ineffectiveness claims. Standards which implement the "guidelines approach" or set minimum standards would better aid attorneys, judges, and defendants in evaluating the quality of attorney representation.

Judicial Duty

The Indiana courts appear to allow inept actions by defense counsel.¹⁸⁵ The Indiana Supreme Court has allowed controversial actions by defense counsel and has rationalized the decisions by claiming that such actions aid the court in carrying out its busy schedule.¹⁸⁶ But the court should not allow attorneys to refrain from actions necessary for constitutionally adequate representation merely for the benefit of the court. To do so raises judicial economy over the constitutional rights of the accused.¹⁸⁷

One method of reform of the ineffectiveness issue mentioned by the United States Supreme Court in *McMann*,¹⁸⁸ but often overlooked, is a directive to trial judges. The court mandated that "judges should strive to maintain proper standards of performance by attorneys who represent defendants in criminal cases in their courts."¹⁸⁹ This statement implicitly imposes a duty on trial judges to insure that defense counsel does not violate defendant's constitutional rights.

185. See *Leaver*, ___ Ind. ___, 414 N.E.2d 959; *Crisp*, 271 Ind. 534, 394 N.E.2d 115.

186. *Crisp*, at 537, 394 N.E.2d at 119. "[A] distinction between an exceptionally careful defense lawyer and a defense lawyer who may in part conform to trial court practice in carrying out the administration of a busy court."

187. 397 U.S. 759. The system is designed to protect the constitutional rights at issue here. The courts must not take priority over constitutional rights.

188. *Id.* at 771.

189. *Id.*

Trial judges should prevent incompetence or correct inadequacies when they arise.¹⁹⁰ This policy has been neither cited often nor given much emphasis, but it has been recognized as imposing a duty on the trial judges to insure the protection of the accused's right to effective counsel.¹⁹¹ The policy is a valid method of preventing constitutionally defective representation. Courts are designed to promote justice and protect rights. These ends cannot be achieved if the trial judge condones attorney incompetence. If the judge becomes cognizant of an attorney's inadequacy it is imperative that action is taken to prevent it. The rationalization that the defendant has other remedies available through appeal or post-conviction relief does not resolve the issue. The fundamental right to liberty requires that no one be deprived of that liberty in contravention of constitutional rights. The trial judge, if he recognizes ineffective assistance and fails to rectify the situation is allowing the defendant's constitutional rights to be violated.

The Indiana Supreme Court has recognized that there is a duty on the part of the trial judge to prevent ineffective assistance by defense counsel. This duty was recognized in *Wilson v. State*¹⁹² where the court found that defense counsel provided incompetent representation and reversed the conviction. In reviewing the trial attorney's actions, the court noted that defense counsel failed to produce a witness who would corroborate the defendant's alibi. The defendant moved for a recess to gather information needed to substantiate his alibi. The court granted a two-hour recess; a wholly insufficient time to do the necessary work. The reviewing court concluded: "The failure to have Martin [the witness] present is attributable in the first instance to appellant's lawyer, but having recognized appellant's need for time, the judge himself is responsible for the inadequacy of the

190. That is not to say that judges should become advocates but that if they see apparent inadequate representation they should intervene. Either a recess or continuance could be granted so counsel could better prepare. Cognizance of such a duty on the part of the trial judges would do much to eliminate claims of ineffective assistance later on. The short term effect may be to initially bog down an already overcrowded court docket, but the long term effect may be a greater efficiency. Attorneys would be more careful in their preparation and handling of cases thereby possibly eliminating future claims of ineffectiveness. The motivational factor would be the fear of reprimand by the court. Judge Bazelon pointed out eight substantial errors made by defense counsel in *United States v. Burks*, 470 F.2d 432 (D.C. Cir. 1972). In Judge Bazelon's words: "When the newspapers reported the case, the big news was not the attorney's inadequacy but rather the fact that a judge had mentioned it." Bazelon *supra* note 1 at 25. If more judges conformed to this practice, the news would reflect the inadequacies of the attorney rather than the judge's action in mentioning it.

191. *McMann*, 397 U.S. at 771.

192. 222 Ind. 63, 51 N.E.2d 848 (1945).

remedy.”¹⁹³ The court went even further: “A fair-minded judge observing the incompetency of an attorney for the defense would be expected to take more than ordinary care to protect the rights of the accused.”¹⁹⁴ This imposes a duty on the trial judge, but it has never been given the import it deserves.

Judges should take an active role in deterring and correcting instances of ineffective counsel as the Indiana and United States Supreme Courts have suggested. If the judge sees that counsel is inadequately prepared, then a continuance should be granted. If counsel is incompetent and a continuance would appear to be fruitless, then new counsel should be appointed. A trial judge who watches while constitutional rights are infringed, merely because of crowded dockets, is in violation of the defendant’s constitutional rights.¹⁹⁵

The “mockery” standard as applied by the Indiana Supreme Court does not protect the right to effective counsel and requires reform. A “guidelines” approach will give attorneys and defendants specific duties by which the trial representation can be judged. These guidelines will provide specific goals which attorneys must meet and will aid in eliminating future inadequacies by attorneys. A new standard with concrete application will help preserve the constitutional rights of those accused of crime.

CONCLUSION

The Indiana Supreme Court is applying an outdated and inadequate standard of review for ineffective assistance of counsel claims. The “mockery of justice” test as applied in Indiana is totally inadequate to insure that criminal defendants receive the constitutionally guaranteed right to effective counsel as interpreted by the United States Supreme Court. The “adequate legal representation” modification is an appropriate step, but not until it is given full weight will it have an effect. To give the modification full weight the Indiana courts must either change the applicable standard or change the meaning of “mockery of justice.” To guarantee the right to effective counsel, the Indiana courts must look at the representation *qua* representation and not solely in the context of the total trial.

An approach much like the “guidelines” standard set out in the

193. *Id.* at 73, 51 N.E.2d at 852.

194. *Id.* at 82, 51 N.E.2d at 855-56.

195. If counsel is retained, then there are additional problems with the judiciary appointing new counsel for the defendant. Such an issue is outside the scope of this note. See *supra* note 101.

ABA standard for the defense function will insure that the right to effective counsel is protected. Specific guidelines would give reviewing courts the ability to judge attorney representation by definable standards. Guidelines would also allow attorneys to judge their performances and remedy obvious deficiencies. The existence of recognizable standards will encourage better, more diligent representation.

Until the United States Supreme Court sets out a workable interpretation of effective counsel there will be varying standards. But the existence of varying standards is no excuse for an inadequate and unjust standard. The "mockery of justice" standard as applied in Indiana does not meet the requirements of the Indiana or United States Constitutions in assuring effective counsel. The adoption of a viable and fair standard is a necessity which demands a quick resolution in order to protect constitutional rights the courts were designed to protect. In the interim, trial judges must take an active role in preventing attorney incompetence. It is the duty of the judge to conduct a trial which provides the justice for which courts were created. To allow attorney incompetence is to obviate that duty and violate the accused's constitutional right to effective counsel, a right which must be adequately protected.

TIMOTHY R. NEWHOUSE

