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Valparaiso University Law Review

Volume 18
Number 2 *Winter 1984*

*pp.*231-284

Winter 1984

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David E. Vandercoy

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Recommended Citation
David E. Vandercoy, *Waiver of Claims by Inadvertent Procedural Defaults: Collateral Attacks on Criminal Judgments in Indiana*, 18 Val. U. L. Rev. 231 (1984).
Available at: https://scholar.valpo.edu/vulr/vol18/iss2/1

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Valparaiso University Law Review

Volume 18 | Winter 1984 | Number 2

WAIVER OF CLAIMS BY INADVERTENT PROCEDURAL DEFAULTS: COLLATERAL ATTACKS ON CRIMINAL JUDGMENTS IN INDIANA

DAVID E. VANDERCOY*

Surely no fair-minded persons will contend that those who have been deprived of their liberty without due process ought nevertheless to languish in prison.[1]

All litigation must come to an end at some time.[2]

These statements reveal the tension inherent in the law regarding collateral attacks on criminal judgments. On one hand, our society considers liberty to be of transcending value.[3] The wrongful[4] deprivation of liberty merits curative action and the process used to deprive one of liberty includes corrective process after "final" judgment.[5] On

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* Assistant Professor of Law, Valparaiso University School of Law. B.A. 1971, Pennsylvania State University; J.D. 1974, Dickinson School of Law; LL.M. 1980, New York University. The author gratefully acknowledges the comments and suggestions of colleagues Paul N. Cox, Bruce G. Berner and David A. Myers.

1. Fay v. Noia, 372 U.S. 391, 441 (1963).

2. Etheridge v. State, 240 Ind. 384, 386, 164 N.E.2d 642, 644 (1960).

3. In re Winship, 397 U.S. 358, 364 (1970). The accused in criminal prosecutions traditionally has enjoyed more protection than is afforded civil litigants. Examples include the requirement of proof beyond a reasonable doubt, the right against self incrimination, the right to a speedy trial and the right to counsel. These reflect a judgment not only on the value of liberty, but also a concern over the state's awesome power to deprive one of liberty.

4. "Wrongful" does not necessarily imply that the original judgment of conviction was factually incorrect. Factual guilt or innocence can never be absolutely determined. Events are not subject to exact re-creation and, even if they were, that which constitutes a "fact" is a function of subjective perception. *See generally* Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1272-74 (1947); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 446-48 (1963). Thus, when a court reviews a criminal conviction all that can be determined is whether there has been compliance with the rules designed to promote a fair determination. If a deviation has occurred, a legal standard can then be applied to determine whether the fairness of the underlying proceedings has been sufficiently compromised to require that relief be provided. *See infra* text accompanying notes 186-195.

5. All states provide for appellate review of criminal convictions. In addition, all states have some type of post-conviction remedy. *See* L. YACKLE, POST

the other hand, the state and society have an interest in attaching finality to criminal judgments. The specter of endless attacks on a criminal judgment generates distaste because of the potential for manipulation and abuse[6] and because such a process may undercut legitimate state interests. Some authors argue that the availability of such process thwarts rehabilitation because a prisoner is never required to accept the justness of his conviction nor the corollary that a wrong has been done.[7] Others contend that the lack of finality demeans the significance of the original trial where the alleged offender must face his accusers and is called to account.[8] Many contend that the availability of collateral relief after final judgment encourages "sandbagging" or the intentional withholding of claims to gain a tactical advantage.[9] Federal and state relations are impaired and the integrity of the entire state process undermined by the availability and broad

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CONVICTION REMEDIES §13 (1981 and Supp 1983). The scope of the review provided by the latter varies from one jurisdiction to another. The common law writs of habeas corpus and coram nobis as well as statutory federal habeas corpus, 28 U.S.C. §§ 2254, 2255 (1976), are also examples of mechanisms designed to provide collateral review. The existence of curative process mechanisms intended to operate out of normal procedural channels supports the contention that contemporary values require the provision of corrective process after final judgment in criminal cases.

Arguably, the provision of post-conviction remedies by the states results not from a desire to cure wrongful incarceration but rather from a desire to minimize federal interference which occurs when federal courts review state court judgments pursuant to 28 U.S.C. § 2254. *See infra* text accompanying notes 27-29. However, the existence of the common law writs of habeas corpus and coram nobis which predated modern state post-conviction remedies suggest otherwise, although these writs were of very limited scope. *See* L. YACKLE, *supra* note 5, at §§ 2, 3, 7, and 8. It may be accurate to suggest that the expansion of state post-conviction remedies, as opposed to the existence of the same, partially resulted from a desire to minimize federal interference with state court judgments by providing the state court system with the initial opportunity to rule on federal issues.

6. The potential for abuse includes repetitious filings, frivolous filings and the intentional withholding of claims to gain a tactical advantage. *See infra* text accompanying notes 215-217. *See generally* STANDARDS FOR CRIMINAL JUSTICE, § 22-6.1, commentary at 22-69 (2d ed. 1982) (questioning the extent of actual abuse) [hereinafter cited as ABA STANDARDS].

7. Bator, *supra* note 4, at 452; Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 149, (1970); Schneckloth v. Bustamonte, 412 U.S. 218, 262 (1973) (Powell, J., concurring); Engle v. Isaac, 456 U.S. 107, 127 (1982). *See also infra* text accompanying notes 218-224.

8. Wainwright v. Sykes, 433 U.S. 72, 89 (1977).

9. *Id.* "We think the rule of *Fay v. Noia*, broadly stated, may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." *Id. See infra* notes 215-217 and accompanying text.

usage of federal habeas review of state court convictions.[10]

Post-conviction review is thus perceived as necessary and desirable to cure instances of wrongful incarceration and undesirable to the extent that the resulting lack of finality undermines the integrity of the original proceedings and the purposes of incarceration. The appropriate scope of post-conviction review is determined by balancing the objectives of finality and those of curative process. State post-conviction rules generally reflect the perception that the scope of such review does not include the opportunity to relitigate claims of error.[11] Rather, state post-conviction remedies are thought to exist to address claims of error not previously tried.[12] In many, if not most, instances the claims could have been raised in the original proceedings. Because this is true, state rules regarding the effect of failing to raise a claim through normal procedural channels are of critical importance. Specifically, the rules or principles utilized to determine whether there has been a waiver[13] of the right to assert a claim by reason of an

10. The reference is to the power of a federal court to review the legality of a state prisoner's confinement pursuant to 28 U.S.C. § 2254. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 263-265 (1973) (Powell, J., concurring). The principal purpose of the exhaustion requirement of 28 U.S.C. § 2254 is "to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." Rose v. Lundy, 455 U.S. 509, 518 (1982). The exhaustion requirement also "serves to minimize friction between our federal and state systems of justice by allowing the state an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 2 (1981) (per curiam).

11. *See* L. YACKLE, *supra* note 4, at §§ 6 and 11 for a discussion of illustrative examples of state post-conviction procedures and §§ 1-13 for a general discussion of such procedures. Most states appear to reach the conclusion that no purpose is served by relitigating a claim that has been fully addressed. Absent a change in the law applicable to such a claim, the conclusion appears to be eminently sound. *See* Bator, *supra* note 4, at 447. "Assuming that there 'exists', in a ultimate sense, a 'correct decision' of a question of law, we can never be assured that any particular tribunal has in the past made it: we can always continue to ask whether the right rule was applied, whether a new rule should not have been fashioned." *Id.* Once an issue has been fully aired, relitigation would not and could not ensure that a more "correct" result would be secured. Note that different considerations control relitigation of claims on federal habeas corpus review of state court judgments concerning federal issues. *See generally* Fay v. Noia, 372 U.S. 391 (1963), for a discussion of those considerations.

12. ABA STANDARDS, *supra* note 6, at § 22-6.1, commentary at 22-63.

13. "Waiver" as a legal term has several definitions. The doctrine of *res judicata* is often referred to as one type of waiver relating directly to finality of judgments, i.e., a final judgment is conclusive not only as to those matters actually litigated, but also as to those matters which *could* have been litigated. Review of claims not timely raised is foreclosed regardless of whether the omission was deliberate or inadvertent. This form of "waiver" seems to be a procedural rule which operates to the exclusion of all other considerations to provide for finality. "Waiver" in the classic sense is the

antecedent procedural default will commonly determine the actual scope of post-conviction review. The waiver doctrine employed in any given jurisdiction becomes the primary vehicle for accomodation between the competing demands of making effective curative process available and yet attaching some measure of finality to criminal judgments.

This article is not about federal habeas corpus review of state court convictions. It is about state post-conviction proceedings, the role served by such proceedings as devices of curative process and the impairment to finality interests which results from such process. Indiana law is used as the vehicle for analysis although the premises are applicable elsewhere.

The central question addressed is whether the scope of review in such proceedings should include claims which were the subject of an inadvertent procedural default. To accomplish this task, the article examines the waiver of claims doctrine in the context of collateral attacks brought pursuant to the Indiana Rules of Procedure for Post-Conviction Remedies, Rule P.C. 1.[14] First, the language and purpose of the Indiana post-conviction rule is examined. The rule appears to make meaningful corrective process available by providing that claims which have not been the subject of a knowing, voluntary and intelligent waiver may be asserted.[15] This aspect of the rule has been

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concept that the individual possesses the right and he or she may choose to assert the same or forego its timely assertion. By consciously foregoing that assertion, the right is surrendered. *See generally* Rubin, *Toward a General Theory of Waiver*, 28 U.C.L.A. L. REV. 478 (1981) (distinguishing various theories of waiver and discussing state preclusion); Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193 (1977); ABA STANDARDS, *supra* note 6, at § 22-6.1, commentary at 22-65.

14. Indiana has established two distinct post-conviction procedures. *See* INDIANA RULES OF PROCEDURE FOR POST-CONVICTION REMEDIES [hereinafter cited as P.C.]. P.C. 1 contemplates true collateral review, i.e., review out of normal procedural channels. On its face, this rule permits the assertion of claims not previously litigated and which have not been the subject of a knowing, voluntary and intelligent waiver. *See* P.C. 1 § 8 (quoted in text accompanying note 31). *See also* text accompanying notes 34-40. The rule provides that the P.C. 1 remedy is not a substitute for direct appeal and requires a defendant to take all available steps to perfect such an appeal including those available under P.C. 2. *See* P.C. 1 § 1(b). P.C. 1 takes the place of all common law, statutory or other remedies which were available prior to the adoption of P.C. 1 for purposes of challenging the validity of a conviction or sentence. *Id.*

P.C. 2 provides the opportunity to seek restoration of the right to post-trial review by the trial court and to review by direct appeal. *See infra* note 17 and accompanying text. If restoration occurs, the proceedings are treated as though timely in all respects. P.C. 2 § 1(c). Therefore, the same "waiver" doctrine as is normally applicable to such proceedings should apply, i.e., the contemporaneous objection rule.

15. P.C. 1 § 8.

eviscerated by case law holdings which effectively bar review of claims not timely raised regardless of whether the antecedent default was inadvertent or deliberate. These holdings are the second subject of scrutiny. Next, this article analyzes the nature of curative process and the cost of making such process available after final judgment for purposes of addressing claims not timely raised due to inadvertence. Such costs are measured in terms of their impairment to the interests served by attaching finality to judgments. The thesis asserted is that claims not timely raised due to inadvertence, usually counsel's inadvertence, should be reviewable in post-conviction proceedings. The conclusion reached is that the state's interest in finality can be served by alternatives less drastic than foreclosure of review by reason of inadvertence.

I. Purposes Underlying the Indiana Rules of Procedure for Post Conviction Hearings.

In 1969 the Indiana Supreme Court adopted rules of procedure to govern post-conviction proceedings. The rules provide for two separate procedures.[16] P.C. 1 provides the means of asserting claims not previously raised at trial or on direct appeal and therefore contemplates the occurrence of an antecedent procedural default.[17] P.C.

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16. *See supra* note 14.

17. P.C. 1 § 1 provides the following grounds upon which relief may be sought:
SECTION 1. Remedy—To whom available—Conditions.

(a) Any person who has been convicted of, or sentenced for, a crime by a court of this state, and who claims:

(1) that the conviction or the sentence was in violation of the Constitution of the United States or the constitution or laws of this state;

(2) that the court was without jurisdiction to impose sentence;

(3) that the sentence exceeds the maximum authorized by law, or is otherwise erroneous;

(4) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(5) that his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint;

(6) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy;

may institute at any time a proceeding under this Rule to secure relief.

The rule makes clear that issues previously litigated may not be relitigated. P.C. 1 § 8. Given the broad statement of available grounds, and that previously litigated issues may not be relitigated, the rule necessarily contemplates litigation of claims not previously raised in normal procedural channels. *See infra* text accompanying note 40.

2 envisions restoring the applicant's right to post-trial review by the trial court or restoration of appellate rights in cases in which the defendant did not avail himself of the opportunity for such review within the appropriate time limits.[18]

The rules appear to have been intended to serve two distinct purposes. In the words of the Indiana Supreme Court, the rules were first intended to promote "justice and fair play" by providing an avenue by which one convicted of a crime could test the correctness of his conviction on appeal.[19] The court has not precisely articulated why notions of fair play require the availability of post-conviction relief. It is nevertheless possible to derive such a rationale from notions of justice and fair play prevailing in the American criminal justice system viewed generally. The purpose of according "rights"[20] is to insure that both the results reached and the process by which those results are obtained are consistent with fundamental notions of fairness as they are defined by society's shared value system and as they are identified in the historical experience of that system.[21] The failure to accord a right necessarily impugns the integrity of the result.[22] Justice and fairness are promoted by providing a corrective process in which such issues may be raised and fully litigated.[23] Because some issues may not be known to the defendant[24] or may be unavailable at the

18. P.C. 2 permits such restoration on a showing that the failure to perfect the right to review was not the fault of the defendant and that the defendant has been diligent in requesting permission to perfect his right to such review. *See supra* note 14.

19. Langley v. State, 256 Ind. 199, 203, 267 N.E.2d 538, 540 (1971). "In the name of justice and fair play this court, through its promulgation of our post conviction remedy rules and by case decision, has sought to ensure that each defendant will have an avenue available by which he may challenge on appeal the correctness of his conviction." *Id.*

20. The term "rights" as used herein connotes both rights in the classical sense, powers one is entitled to assert, and the notion that restraints or limits are placed on governmental conduct.

21. K. LLEWELLYN, THE BRAMBLE BUSH 12, 107-18 (1951). *See also* Estes v. Texas, 381 U.S. 532, 565 (1965) (Warren, C.J., concurring) "[T]he criminal trial has one well-defined purpose—to provide a fair and reliable determination of guilt." *Id.*

22. The point here is simply that a deviation from the rules designed to promote a fair and reliable determination of guilt calls into question whether the result is indeed fair and reliable. *See infra* notes 186-194 and accompanying text. This does not suggest that every deviation requires reversal and that a new determination of guilt or innocence must be made. *See* Chapman v. California 386 U.S. 18 (1967).

23. Although it is clear that the perception of justness and fairness to the accused is promoted by providing corrective process in which the merits of issues may be litigated outside normal channels, a cost in the form of diminished finality also results. *See infra* text accompanying notes 200-232.

24. One basic perception is that a criminal defendant cannot be assured of a fair trial without counsel. Gideon v. Wainwright, 372 U.S. 335 (1963). This is true

time of trial or direct appeal, direct appeal in and of itself is not sufficient corrective process to prevent wrongful incarceration.[25] Thus, the Indiana Supreme Court's statement that the post-conviction rules were intended to promote justice and fairness is properly predicated on the assumption that the fair resolution of criminal cases requires that all issues involved be fully litigated even if such review must occur out of the normal procedural channels.[26]

The second purpose of the rules was to preserve the integrity of state court proceedings by providing Indiana courts with the opportunity to rule on federal constitutional issues before such issues were presented to a federal court via habeas corpus review.[27] At the time the rules were adopted federal law appeared to be well settled that 1) the failure of a habeas petitioner to present his claims to the state courts would bar federal habeas review only if the petitioner had "deliberately bypassed" the state court system, and 2) the habeas exhaustion requirement required exhaustion of state remedies available at the time the habeas petitioner sought federal relief.[28] Thus, if no available state remedy providing for collateral attack existed, the exhaustion requirement would be deemed satisfied and the failure to have presented such claims in the state court would not bar federal habeas review, absent a deliberate bypass, even if those issues were deemed waived by state procedural rules.[29] The only means of assur-

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since "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law . . . . He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be . . . convicted upon incompetent evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one." Powell v. Alabama, 287 U.S. 45, 68, 69 (1932). Thus, our assumption must be that most of the issues or claims which an accused could assert will be unknown to him. Obviously, counsel's knowledge of a claim can be imputed to the client-accused. However, whether counsel's failure to protect the claims should bind the client is a separate question. *See infra* text accompanying notes 70-110. *See generally* Note, *A New Focus on Prejudice in Ineffective Assistance of Counsel Cases: The Assertion of Rights Standard,* 21 AM. CRIM. L. REV. 29, 41 (1983).

25. *See supra* note 5 and accompanying text. *See also* Kissinger v. State, 161 Ind. App. 303, 305, 315 N.E.2d 423, 425 (1974). "The promulgation of the post-conviction remedy rules evidenced the belief that justice and fundamental fairness requires the maintenance of open channels to the courts whereby defendants may challenge the validity of their convictions." *Id.*

26. *See supra* note 5 and accompanying text.

27. *Langley,* 256 Ind. at 204-205, 267 N.E.2d at 541 (1971).

28. Fay v. Noia, 372 U.S. 391 (1963).

29. *Id.* The rule of *Fay* was sharply limited in Wainwright v. Sykes, 433 U.S. 72 (1977). In *Wainwright,* the Court ruled that when a defendant fails to comply with state procedural rules requiring the timely assertion of claims with the result that the state courts decline to consider those claims, the procedural default would constitute an independent and adequate state procedural ground. Review pursuant to 28

ing state review of such issues was to create a procedure to be exhausted in which a state prisoner could assert those claims not previously heard.

To serve these purposes P.C. 1 provides, *inter alia*, that a person whose conviction was in violation of the Constitution of the United States or the constitution or laws of the State of Indiana could institute a P.C. 1 proceeding at any time to secure relief.[30] The waiver rule applicable to individuals seeking relief pursuant to this rule provides:

> SECTION 8. Waiver of or failure to assert claims. All grounds for relief available to a petitioner under this rule must be raised in his original petition. Any ground finally adjudicated on the merits or not so raised and knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the petitioner has taken to secure relief, may not be the basis for a subsequent petition, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original petition.[31]

The plain meaning of the waiver provision is that a claim not raised in the original proceeding or other prior proceeding is waived only if the conduct of the petitioner amounts to a knowing, voluntary and intelligent waiver. Even if such a waiver is found, the court may excuse it on a finding of sufficient reason for the prior failure to assert the claim.[32] The knowing and intelligent standard is obviously distinct from the procedural default rule normally applicable on direct appeal. The latter provides that the failure to present a claim to the trial court precludes consideration of the claim on appeal regardless of whether the default was inadvertent or knowing and intelligent.[33]

U.S.C. § 2254 would be barred absent a showing of cause for the procedural default and prejudice resulting therefrom. The *Fay* deliberate bypass standard was rejected with regard to trial defaults.

30. P.C. 1 § 1(a). *See supra* note 16 for a listing of grounds available to P.C. 1 petitioners.

31. P.C. 1 § 8.

32. *Id.*

33. The procedural default rule applicable on direct appeal in Indiana is the normal contemporaneous objection rule. That rule provides "[e]rrors, to be appealable, must be objected to at trial, thus enabling the trial judge to promptly correct or avoid error as the proceedings progress." *Langley*, 256 Ind. at 206, 267 N.E.2d at 542. Since the major purpose of the rule is to provide an opportunity to the trial court to avoid or timely correct error, it matters not whether the litigant's failure to provide that

II. THE INITIAL JUDICIAL TREATMENT OF THE WAIVER PROVISION.

A case decided shortly after adoption of post-conviction rules suggested the obvious. The procedural default rule applicable to direct appeals would not be applicable to post-conviction procedures.[34] In *McKinley v. State*,[35] a direct appeal was taken by the defendant after he was found guilty of commission of a robbery while armed. In that appeal McKinley argued, for the first time, that the state failed to prove that he used "violence" in the commission of the act as required by the statute.[36] Relying upon the rule requiring a party to present the claimed error to the trial court in order to preserve the issue for appeal, the court held that McKinley was not entitled to litigate the claim on direct appeal.[37] The court in dicta added that the provisions of P.C. 1 afforded McKinley an avenue to present the error to the trial court and to secure appellate review of adverse rulings made by the trial court.[38]

While the *McKinley* court did not attempt to define the exact nature of the waiver doctrine to be applied in post-conviction proceedings, the opinion does suggest that the procedural default rules applicable to direct appeal would not apply to collateral attacks brought pursuant to P.C. 1. Given the explicit language of P.C. 1 § 8 requiring a knowing, voluntary and intelligent waiver, such a conclusion seems inescapable. Furthermore, the rule makes it clear that claims finally adjudicated on the merits are not reviewable in Indiana post-conviction proceedings.[39] If issues previously raised and finally determined are not subject to religitation, and if issues not raised in a timely fashion are unavailable, P.C. 1 proceedings would be restricted to claims which could not have been presented at trial, essentially claims of newly discovered evidence.[40]

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opportunity is intentional or the product of neglect. Additionally, IND. R. APP. P. 8.3(A)(7) generally provides that errors presented on appeal must have been presented to the lower court. The requirements of the contemporaneous objection rule and those of IND. R. APP. P. 8.3(A)(7) yield in cases of fundamental error. Moore v. State, ____ Ind. ____, ____, 440 N.E.2d 1092, 1094 (1982). The fundamental error doctrine is discussed in the text accompanying notes 233-258.

34. McKinley v. State, 253 Ind. 187, 252 N.E.2d 420 (1969).

35. *Id.*

36. *Id.* at 191, 252 N.E.2d at 422.

37. *Id.* at 194, 252 N.E.2d at 423-424.

38. *Id.* at 193, 252 N.E.2d at 423.

39. P.C. 1 § 8.

40. The broad statement of available grounds identified in P.C. 1 § 1, *supra* note 16, when read in conjunction with the waiver rule, P.C. 1 § 8, *supra* text accompanying note 31, suggests that such a construction would be untenable.

Nevertheless, dicta found in *Langley v. State*[41] raised questions regarding both the viability of P.C. 1 as an avenue of relief and the nature of the post-conviction waiver rule. In *Langley* two post-conviction cases involving Langley and one Richardson were consolidated for review.[42] Richardson had been found guilty of the crime of robbery by putting in fear.[43] After conviction, Richardson sought neither post-trial review by the trial court nor appellate review.[44] One year after conviction Richardson sought post-conviction review by filing a petition pursuant to P.C. 1. Langley had sought timely appellate review by direct appeal in which his conviction was affirmed.[45] Langley then sought P.C. 1 relief which was denied by the trial court.[46]

At the trial level, the State responded on the merits to the issues raised by Richardson's and Langley's petitions and did not argue waiver.[47] The Indiana Supreme Court reached the merits of both petitioners' claims and also discussed the waiver issues which were present but had not been raised by the State in the trial court.[48] The court's discussion of the waiver doctrine was not dispositive but rather was intended to provide an overview of the role to be played by post-conviction proceedings *vis-a-vis* normal appellate review.[49] In so doing, the court asserted several rather interesting propositions.

Regarding Richardson's failure to take a direct appeal, the court indicated its belief that such an omission might constitute a waiver of the right to seek post-conviction relief subsequently.[50] Second, the court indicated that the usual procedural default rule applicable on direct appeal, that errors must be objected to at trial in order to be reviewable, would be applied to P.C. 1 proceedings.[51] One justification offered to support this conclusion was that such a rule affords the trial judge the opportunity to rule on the claim and avoid the commission of error.[52] A second justification was also offered:

> [S]uch a requirement bars a litigant from asserting error on appeal, objection to which he chose to forego for strategic reasons at trial. Thus, where a defendant is effectively

41. 256 Ind. 199, 267 N.E.2d 538 (1971).
42. *Id.* at 201, 267 N.E.2d at 539.
43. *Id.*
44. *Id.*
45. *Id.* at 202, 267 N.E.2d at 540.
46. *Id.*
47. *Id.* at 207, 267 N.E.2d at 543.
48. *Id.* at 206-207, 267 N.E.2d at 542.
49. *Id.*
50. *Id.* at 205, 267 N.E.2d at 541.
51. *Id.* at 206, 267 N.E.2d at 542.
52. *Id.*

> represented by trial counsel and objections to trial procedure, admission of evidence, etc. are foregone, a binding waiver of the right to object may be asserted against the defendant.[53]

Stated otherwise, counsel's failure to object would be deemed a knowing, intelligent and voluntary waiver which would be imputed to the defendant.

Finally, in response to Richardson's case, the court stated its belief that when the waiver issue has been raised by the State, the petitioner must show some "substantial basis or circumstance" which would satisfactorily mitigate a petitioner's failure to have pursued or perfected a remedy through the normal procedural routes.[54] Thus, the usual rule that failure to object at trial precludes review on direct appeal would be applied to post-conviction proceedings subject to the modification that a petitioner could attempt to show mitigating circumstances to justify or explain the procedural default.

Langley, unlike Richardson, had previously sought review by direct appeal.[55] One of the issues raised in his direct appeal was the propriety of the trial court denying Langley the right to file a belated motion for a new trial.[56] Langley had sought to file such a motion to assert claims regarding the effectiveness of trial counsel and the admission of certain evidence in addition to those issues raised in his timely filed motion for a new trial.[57] On direct appeal, the Indiana Supreme Court affirmed the trial court's denial of permission to file a belated motion for a new trial on the ground that Langley failed to show the requisite due diligence.[58] Thus, the court ruled that the claim regarding the effectiveness of trial counsel was not properly before the court on the direct appeal.[59] In Langley's post-conviction case, the court addressed the question of the extent to which a petitioner will be permitted to argue an issue raised by his P.C. 1 petition when review of the same issue had been denied on direct appeal. The court's response was as follows:

> . . . [T]he answer to this question depends to a large extent upon the nature of the issue presented, the manner in which

53. *Id.*, (citing Henry v. Mississippi, 379 U.S. 443 (1965)).
54. *Langley*, 256 Ind. at 207, 267 N.E.2d at 545.
55. *Id.* at 202, 267 N.E.2d at 540.
56. *Id.* at 210, 267 N.E.2d at 544.
57. *Id.*
58. *Id.* at 211, 267 N.E.2d at 545. *See also* Langley v. State, 250 Ind. 29, 232 N.E.2d 611, *cert. denied*, 393 U.S. 835 (1968).
59. 256 Ind. 199, 212, 267 N.E.2d 538, 545 (1971).

> appellate review was sought and the reasons advanced for a denial of review on the merits. To unreservedly hold the door open for appellate review under the post-conviction remedy rules, regardless of the circumstances which preceded, would per force characterize post-conviction relief as some sort of "super-appeal" contrary to its intended function.[60]

The various propositions advanced by the court in *Langley* appear to stem from the court's dissatisfaction with the proposition that an issue which could not be reviewed on direct appeal for want of a timely trial objection would be subject to review in a P.C. 1 proceeding. Absent a knowing and intelligent waiver, the prior procedural default would be a bar to review on direct appeal but not in post-conviction proceedings. The court expressly rejected the notion that P.C. 1 was intended to serve as a "super-appeal" process[61] and observed that the "multi-appeals" thought to be afforded by the rule would be a "prostitution of the spirit of criminal justice."[62] The court made clear that the preferred method of obtaining review of a criminal judgment is through direct appeal of a trial court's denial of a motion to correct errors. Such a procedure permits the trial court to rule on issues while they are fresh. Moreover, the court perceived the scope of direct appeal to be broader than that available on collateral attack, thus permitting a fuller airing of the issues.[63] Given the court's perception that the post-conviction rules should not be viewed as a super-appeal process and that the scope of review on direct appeal is and should be broader than that available in post-conviction proceedings, it is not surprising that the propositions advanced all serve to undermine the knowing and intelligent waiver standard set forth in P.C. 1 § 8.

There is little doubt that the propositions advanced by way of dicta in *Langley* are in conflict with the express provisions of P.C. 1. The notion that a waiver of the right to appeal might effectively waive the right to litigate specific issues in a P.C. 1 proceeding is inconsistent with the waiver provision of the rule. Again, the waiver provision envisions the forfeiture of claims only if those claims were the subject of a knowing, voluntary and intelligent waiver.[64] A finding that an accused waived the right to direct appeal says nothing

60. *Id.* at 210, 267 N.E.2d at 544.
61. *Id.* at 211, 267 N.E.2d at 545.
62. *Id.* at 203, 267 N.E.2d at 540.
63. *Id.*
64. P.C. 1 § 8, *supra* text accompanying note 31.

about whether a specific issue or ground which could have been raised on direct appeal was knowingly waived.[65] Fortunately, the premise that waiver of the right to a direct appeal might waive the right to seek review in post-conviction proceedings has not been adopted by Indiana courts although the proposition has been repeatedly offered in dicta.[66]

Unfortunately, the *Langley* court's suggestion that the waiver rule applicable to direct appeals, the contemporaneous objection rule, is applicable as a bar in P.C. 1 proceedings has been adopted and liberally applied by Indiana courts in subsequent cases.[67] A knowing and intelligent waiver is not required. Whether the product of conscious decision-making or of inadvertence, the petitioner's failure to make a timely objection or to assert his claims at trial or on direct appeal results in a forfeiture of those claims unless the defendant demonstrates "sufficient" reason for the non-assertion.[68] This premise undercuts the letter and spirit of P.C. 1. Moreover, cases decided after *Langley* suggest that the Indiana Supreme Court has imposed a very rigorous standard which a petitioner must meet to justify the failure to assert claims on a timely basis. The court effectively requires a demonstration of ineffective assistance of counsel under the farce and mockery standard as one of the few if not the only "sufficient" reason to justify the prior procedural default.[69]

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65. It seems logical to suggest that a defendant could predicate an appeal only on those claims of which he is aware. To suggest that a defendant should appeal solely for purposes of preserving his opportunity to assert claims of which he might subsequently become aware is a most blatant invitation to frivolous appeals.

66. *See, e.g.*, Gross v. State, 162 Ind. App. 649, 652, 320 N.E.2d 817, 820 (1975). "[T]he rules were not intended to create an avenue for untimely challenge of proceedings after a legitimate waiver of the right to appeal." *Id.*

67. Holt v. State, ___ Ind. ___, 408 N.E.2d 538 (1980) (failure to object at trial waives claim of prosecutorial misconduct for purposes of direct appeal and post-conviction relief); Bryant v. State, 77 Ind. 187, 406 N.E.2d 1177 (1980) (failure to object at trial renders issue unavailable for direct appeal and for post-conviction remedies); Harrison v. State, 166 Ind. App. 602, 337 N.E.2d 533 (1975) (failure to object to admission of evidence at trial precludes assertion of the claim on direct appeal or in post-conviction proceedings). *See also* cases cited *infra* note 73.

68. *Id. See* cases cited *infra* note 73.

69. *See infra* notes 154-172 and accompanying text. The appellate courts have suggested only two "reasons" other than ineffective assistance which would constitute justification for a default. In Davis v. State, 164 Ind. App. 331, 328 N.E.2d 768 (1975) the court of appeals responded to a post-conviction petitioner's claim that his trial counsel was ineffective. The usual rule applied by Indiana courts is that "[t]he failure to raise the issue of the inadequacy of trial counsel in petitioner's direct appeal ordinarily constitutes a waiver of this issue." Hollonquest v. State, ___ Ind. ___, ___, 432 N.E.2d 37, 39 (1982). In *Davis*, the court suggested that the state could not prevail

III. EVISCERATION OF THE KNOWING, VOLUNTARY AND INTELLIGENT WAIVER STANDARD.

A) *Waiver By Failure To Object At Trial.*

In *Langley*,[70] one of the justifications offered for application of the rule that errors not objected to at trial are waived was that such a rule prevents a litigant from withholding the objection at trial for strategic reasons and then asserting the claim on appeal. *Langley*'s dicta on this point relied on *Henry v. Mississippi*[71] for the proposition that a binding waiver may be imputed from counsel to the defendant when a defendant is effectively represented by counsel and counsel foregoes an objection.[72] The Indiana Supreme Court has extended the *Henry* binding waiver analysis to reach the conclusion that a post-conviction petitioner may not raise issues which could have been raised in the original trial.[73] A knowing, intelligent and voluntary waiver is

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on a waiver claim arising by reason of the petitioner's failure to raise the issue of trial counsel's effectiveness on direct appeal if the same counsel represented petitioner at trial and on direct appeal. *Davis* appears to assume that a lawyer is unlikely to raise the question of his or her effectiveness. Therefore, such circumstances probably constitute a "mitigating circumstance" sufficient to rebut the waiver arising by reason of the defendant's failure to raise the issue of counsel's effectiveness on direct appeal.

In McKinley v. State, 253 Ind. 187, 252 N.E.2d 420 (1969), the court suggested that an issue which was waived for purposes of direct appeal would be available to the petitioner in a P.C. 1 proceeding. *See supra* text accompanying note 38. In Greer v. State, 262 Ind. 622, 321 N.E.2d 842, the court suggested that the *McKinley* dicta was based on the ground that the defendant's appellate counsel had been appointed just one business day prior to the last day on which a motion for a new trial could be filed. Thus, according to the *Greer* court, it would have been unfair to penalize the defendant in *McKinley* by denying post-conviction review. The *Greer* court seemed to be suggesting that the lack of time to prepare a comprehensive motion to correct errors (the current equivalent of a motion for a new trial) would constitute a mitigating circumstance sufficient to excuse the antecedent waiver and permit post-conviction review. The *McKinley* opinion does note that appellate counsel was appointed one business day prior to the last day for filing such a motion. However, the motion had already been filed by trial counsel at the time appellate counsel was appointed. *McKinley*, 253 Ind. at 189-92, 252 N.E.2d at 421-22. The defendant in *McKinley* was in no different position than any other defendant. Despite the characterization made in *Greer*, the *McKinley* opinion is grounded squarely on the notion that the "waiver" rules applicable on direct appeal are not applicable to post-conviction proceedings.

In any event, the circumstances characterized in *Davis* and *Greer* seem to be the only recognized exceptions to the proposition that ineffective assistance of counsel is the only "sufficient" reason to justify the waiver which arises from a failure to raise an issue in a timely fashion.

70. 256 Ind. 199, 267 N.E.2d 538 (1971).

71. 379 U.S. 443 (1965).

72. *Langley*, 256 Ind. at 206, 267 N.E.2d at 542.

73. *See* Cummings v. State, ___ Ind. ___, ___, 434 N.E.2d 90, 91 (1982). "It is well settled that in a petition for post-conviction relief the appellant may not raise

conclusively presumed from the failure to raise an issue.[74] Such a conclusion does not follow if the trial default occurred by reason of inadvertence, nor does the *Henry* case compel such a conclusion.

In *Henry*,[75] counsel for the defendant failed to object to the admission of evidence which was later claimed to have been obtained illegally,[76] thereby failing to comply with Mississippi's contemporaneous objection rule.[77] Despite the non-compliance, the Mississippi Supreme Court reversed the conviction on the ground that the evidence was obtained illegally.[78] The court acted on the erroneous assumption that the defendant was represented only by nonresident counsel unfamiliar with the Mississippi procedural rule.[79] Thereafter, the State pointed out that the defendant was represented by local counsel as well as nonresident counsel.[80] The Mississippi Supreme Court then withdrew its first opinion and affirmed the conviction holding that the defendant had waived his right to object to the illegally obtained evidence by failing to object contemporaneously with its admission.[81]

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an issue which was or could have been raised in his original trial." *Id. See also* Holt v. State, ___ Ind. ___, 408 N.E.2d 538 (1980); Bryant v. State, ___ Ind. ___, 406 N.E.2d 1177 (1980); Riner v. State, 271 Ind. 578, 394 N.E.2d 140 (1979); Eliacin v. State, 269 Ind. 305, 380 N.E.2d 548 (1978).

74. The case law is clear that the failure to raise an issue timely gives rise to a "waiver." If the state claims such a "waiver" occurred by reason of the prior procedural default, or if the issue is raised by the court *sua sponte*, the petitioner must then demonstrate circumstances that would satisfactorily mitigate or excuse the petitioner's failure to perfect his remedy through normal procedural channels. Rinard v. State, 271 Ind. 588, 592, 394 N.E.2d 160, 163 (1979) (court may raise waiver *sua sponte*); Dull v. State, 267 Ind. 549, 553-554, 372 N.E.2d 171, 173-74 (1978); Langley v. State, 256 Ind. 199, 211, 267 N.E.2d 538, 545 (1971); Wilkins v. State, ___ Ind. App. ___, ___, 426 N.E.2d 61, 65 (1981) (burden on petitioner to justify his failure to object).

P.C. 1 § 8 suggests that even a knowing, intelligent and voluntary waiver may be excused on proof of sufficient reason to justify the previous omission. However, the cases noted above do not discuss whether the procedural default was knowing, intelligent and voluntary. Rather, waiver is presumed from the prior default and the burden then shifts to the petitioner to justify the previous omission. *See, e.g.*, Harrison v. State, 166 Ind. App. 602, 337 N.E.2d 533 (1979) (defendant's failure to object to admission of evidence when represented by competent counsel results in binding waiver of issue despite counsel's concession that no objection was made because of counsel's ignorance of the necessity of an objection at trial after an unsuccessful motion to suppress). Counsel's inadvertence is not an adequate justification. *Id.*

75. 379 U.S. 443 (1965).

76. *Id.* at 444.

77. *Id.* at 445.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 446. For the opinion of the Mississippi Supreme Court, see Henry v. Mississippi, 154 So.2d 289 (1963).

The United States Supreme Court granted certiorari.[82] The Court found that the contemporaneous objection rule served a legitimate state purpose by providing the trial court with the opportunity to avoid error. However, the Court noted that this purpose may have been fulfilled by counsel moving for a directed verdict at the close of the State's case on the ground that the evidence was obtained illegally.[83] The Court did not decide this issue.[84] Rather, it remanded the case for a determination of whether counsel had deliberately withheld making the objection.[85] The Court noted that:

> Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims, see *Whitus v. Balkcom*, 333 F.2d 496 (C.A. 5th Cir. 1964), we think that the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy would have that effect in this case.[86]

The holding in *Henry* that a waiver by counsel could legitimately bar the assertion of a claim of constitutional error by the accused in state or federal courts[87] was expressly conditioned on counsel's conduct amounting to a "deliberate choice of . . . strategy."[88] A second factor should also be considered in determining whether counsel's deliberate act binds the client. That area of inquiry is whether the right is of a type which counsel may waive on behalf of the client or is of a nature which requires action by the client.[89]

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82. Henry v. Mississippi, 376 U.S. 904 (1964).
83. 379 U.S. at 448-449.
84. *Id.* at 449.
85. *Id.* at 453.
86. *Id.* at 452-453.
87. Henry's case was before the Court on certiorari to the Mississippi Supreme Court. Justice Brennan may have intended to limit the effect of the holding that counsel's deliberate acts could be imputed to the accused to cases on direct review. It is not clear that the Court intended to imply that such imputed conduct would also bar federal habeas review. The confusion results from the following statement: "[A] dismissal on the basis of an adequate state ground would not end this case; petitioner might still pursue vindication of his federal claim in a federal habeas corpus proceeding in which the procedural default will not alone preclude consideration of his claim, at least unless it is shown that petitioner deliberately bypassed the orderly procedure of the state courts." *Henry*, 379 U.S. at 452. *See* L. YACKLE, *supra* note 5, at § 78.
88. *Henry*, 379 U.S. at 451.
89. The United States Supreme Court has ruled that an attorney's usurpation of certain fundamental decisions may violate the Constitution. *See, e.g.*, Anders

While the *Langley* decision appears to recognize the wisdom of requiring that counsel's conduct be deliberate before a knowing and intelligent waiver can be imputed from lawyer to client,[90] the decision also embraced the proposition that in order for errors to be appealable an objection must be lodged at trial to permit the trial court to avoid error.[91] At least one case decided after *Langley* acknowledges that someone's conduct, be it that of counsel or accused, has to be deliberate in order to find a knowing and intelligent waiver.[92] Later cases fail to consider the question of whether a claim which could have been but was not raised at trial was foregone by counsel as a deliberate choice of strategy so as to preclude subsequent review under the *Henry* notion of imputed waiver.[93] The cases assume such a waiver from the failure to raise an issue at trial without inquiring whether counsel's failure was deliberate or inadvertent.[94] The state of current Indiana law is clear:

> It is well settled that in a petition for post-conviction relief the appellant may not raise an issue which was or could have been raised in his original trial.[95]

In short, the failure to provide the trial court with the opportunity to avoid error in the original proceedings precludes post-conviction review absent a showing of mitigating circumstances.

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v. California, 386 U.S. 738 (1967); Faretta v. California, 422 U.S. 806 (1975). Moreover, the Court has recognized that certain rights may be waived only with the personal participation of the accused. Such rights include: the right to a jury trial, Patton v. United States, 281 U.S. 276 (1930); the right to appeal, Fay v. Noia, 372 U.S. 191 (1963); the right to counsel, Johnson v. Zerbst, 304 U.S. 458 (1938), and the right to decide whether to plead guilty and therefore waive the rights which a guilty plea necessarily surrenders, Boykin v. Alabama, 395 U.S. 238 (1969) (requirement that a guilty plea be voluntary obviously mandates personal participation). In general, the power to make trial strategy decisions rest with counsel. *Henry*, 379 U.S. 443.

90. Langley v. State, 256 Ind. 199, 206, 267 N.E.2d 538, 542 (1981). "[S]uch a requirement bars a litigant from asserting error on appeal, objection to which he chose to forego for strategic reasons at trial." *Id.*

91. *Id.* at 206, 267 N.E.2d at 542.

92. Dixon v. State, 154 Ind. App. 603, 613, 290 N.E.2d 731, 737 (1972). "Waiver on Dixon's part . . . might be inferred because failure to present the impeaching testimony . . . was by its very nature within the knowledge of Dixon, and he knowingly and voluntarily relinquished the right to present it. . . ." *Id.*

93. Cummings v. State, ____ Ind. ____, 434 N.E.2d 90 (1982); Holt v. State, ____ Ind. ____, 408 N.E.2d 538 (1980); Riner v. State, 271 Ind. 578, 394 N.E.2d 140 (1979); Eliacin v. State, 269 Ind. 305, 380 N.E.2d 548 (1978).

94. *See Cummings*, ____ Ind. at ____, 434 N.E.2d at 91; *Holt*, ____ Ind. at ____, 408 N.E.2d at 540; *Riner*, 271 Ind. at 582, 394 N.E.2d at 144; *Eliacin*, 269 Ind. at 307, 380 N.E.2d at 549.

95. *Cummings*, ____ Ind. at ____, 434 N.E.2d at 91 (1982).

The irony is obvious. P.C. 1 provides that the failure to assert a claim constitutes a waiver of the right to seek post-conviction relief on that claim if the claim was "knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence. . . ."[96] Even if a court finds a knowing, voluntary and intelligent waiver, the waiver may be excused under the rule if the post-conviction court finds sufficient reason for the prior procedural default.[97] The rule assumes that not all claims of error will be presented timely in the original proceedings but concludes that such a failure should not bar review in post-conviction proceedings absent a knowing and intelligent waiver of such claims. Indiana case law nevertheless compels the conclusion that such a waiver may be imputed from counsel to client without inquiry as to whether counsel's conduct was deliberate. The failings of such an analysis are best demonstrated by the case of *Wilkins v. State.*[98]

Loren Wilkins was convicted of first degree burglary.[99] At his trial the jury was instructed that if they believed the State's evidence showing the defendant in possession of stolen property soon after the burglary and if the defendant failed to explain that possession to their satisfaction, an inference would be raised that the accused was guilty of the burglary. Such an instruction had been condemned by the Indiana Court of Appeals approximately two years prior to the Wilkins' trial.[100] Nevertheless, Wilkins' counsel failed to object.[101] Wilkins was convicted. Two years later he sought post-conviction relief claiming, *inter alia*, that the trial court committed fundamental error by giving the instruction and that his counsel was incompetent for failing to object.[102] Wilkins' counsel conceded that he was unaware of the objectionable nature of the instruction and thus did not object.[103]

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96. P.C. 1 § 8.

97. *Id.*

98. ___ Ind. App. ___, 426 N.E.2d 61 (1981).

99. *Id.* at ___, 426 N.E.2d at 62.

100. *See* Abel v. State, 165 Ind. App. 664, 333 N.E.2d 848 (1975).

101. *Wilkins* at ___, 426 N.E.2d at 63.

102. *Id.*

103. *Id.* at ___, 426 N.E.2d at 72-73 (Staton, J., dissenting). The following colloquy appeared in the transcript of the post-conviction hearing:

"Q: Were you aware at that time that there were several cases holding that such an instruction is improper and prejudicial to the defendant?

A: I don't believe I knew there were several cases holding that at that time."

Id.

In addressing the issues, the court observed that since the defendant (more properly his counsel) did not object to the erroneous instruction, that particular claim of error was waived for purposes of post-conviction review.[104] The majority then found that giving the instruction did not constitute fundamental error and the isolated mistake made by counsel did not render the proceedings a mockery of justice so as to require a finding that counsel was ineffective.[105] The majority expressly found that the failure to object was not a calculated decision.[106] The dissent would have found that Wilkins' counsel was ineffective, but accepted the premise that the "absence of an objection closed the avenue of post-conviction relief which would have vindicated Wilkins' claim of prejudicial error."[107] Thus, both the majority and the dissent apparently accepted the proposition that a knowing and intelligent waiver can result even though the defendant and his counsel are unaware of the occurrence of error.

The Indiana case law rule that issues not raised at trial are waived for post-conviction purposes, without further inquiry, is flatly inconsistent with the language of P.C. 1 § 8 which requires a knowing, intelligent and voluntary waiver before a claim is rendered unavailable for post-conviction review. The case law rule seems to be partially based upon the imputed waiver doctrine of *Henry*.[108] Cases such as *Wilkins* demonstrate how far the case law rule has strayed from the *Henry* doctrine. *Wilkins* is inconsistent with *Henry* because the latter clearly requires a deliberate act by counsel.[109] The effect of such a rule is that the burden of counsel's inadvertent omission falls on the client with little possibility of relief.[110]

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104. *Id.* at ___, 426 N.E.2d at 64.

105. *Id.*

106. *Id.* "Here defense counsel's failure to object to the instruction clearly was not a calculated move of trial strategy, and was at worst a mistake." *Id.*

107. *Id.* at ___, 426 N.E.2d at 66.

108. *See Langley*, 256 Ind. at 206, 267 N.E.2d at 542.

109. *See supra* text accompanying notes 75-88.

110. The dissent observed that it "shocks the conscience" that the burden of defense counsel's omission fell on the defendant. *Wilkins*, ___ Ind. at ___, 426 N.E.2d at 74. The dissent's reference is to the Indiana standard governing the right to effective counsel—reversal is required if counsel's mistakes reduce the trial to a farce and mockery shocking to the conscience of the reviewing court. *See supra* note 167. *See also Wilkins*, ___ Ind. at ___, 426 N.E.2d at 62. The statement appears to have been intended as a response to the majority's conclusion that counsel's overall conduct did not violate the defendant's right to counsel. No member of the court considered the possibility that a knowing, intelligent and voluntary waiver should not be imputed from counsel to client when counsel was unaware of the underlying claim.

B) Post-Trial Defaults.

In *Kidwell v. State*,[111] the petitioner raised issues regarding the voluntariness of his confession, the admission of evidence acquired as a result of the confession and the effect of pretrial publicity on his trial.[112] A majority of the Indiana Supreme Court found that all issues raised by Kidwell's post-conviction petition were asserted by his trial counsel in a motion for a new trial filed after Kidwell's conviction in 1964.[113] On direct appeal Kidwell's appellate counsel did not pursue all of the thirty-five claimed errors asserted in the motion for a new trial.[114] The majority therefore concluded that Kidwell was attempting to accomplish that which the post-conviction rules prohibit, i.e., pursuing a second appeal by asserting questions which were or could have been raised in his direct appeal.[115] The language of the rule relied on to support this contention was found in P.C. 1(A)(2)[116] which provided: "This remedy is not a substitute for a direct appeal from the conviction and all available steps including those under Post-Conviction Remedy Rule 2 should be taken to perfect such an appeal . . ."[117]

The precise basis for the *Kidwell* holding is not clear. On the facts of the case, the majority could easily have concluded that appellate counsel made a tactical decision not to assert the issues subsequently raised by Kidwell's post-conviction petition.[118] Reliance on *Henry v. Mississippi*[119] for the proposition that deliberate choices of strategy by counsel would bind the client would have provided the springboard for finding a knowing and intelligent waiver by counsel imputable to Kidwell.[120] However, conspicuously absent from the opin-

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111. 260 Ind. 303, 295 N.E.2d 362 (1973).

112. *Id.* at 307, 295 N.E.2d at 364.

113. *Id.*

114. *Id.* To review the opinion resolving the direct appeal, see Kidwell v. State, 249 Ind. 430, 230 N.E.2d 590 (1967).

115. 260 Ind. at 308-09, 295 N.E.2d at 365.

116. P.C. 1(A)(2) was subsequently altered stylistically and its denomination changed to P.C. 1 § 1(b). The content is for all intents and purposes identical.

117. P.C. 1(A)(2), *reprinted in Kidwell*, 260 Ind. at 306, 295 N.E.2d at 364. *See supra* note 116.

118. The court in fact stated that appellate counsel "chose" not to pursue all thirty-five grounds. *Kidwell*, 260 Ind. at 307, 295 N.E.2d at 364.

119. *See supra* notes 75-88 and accompanying text.

120. Finding such an imputable waiver does not eliminate the possibility that the failure of counsel to consult with the defendant regarding the abandonment of issues for purposes of direct appeal may constitute a mitigating circumstance sufficient to excuse the waiver. *See* Jones v. Barnes, 103 S.Ct. 3308, 3314 (1983) (Blackmun, J., concurring). *See also infra* note 125.

ion is any discussion of whether Kidwell, by his own conduct or that of his counsel, waived the issues asserted under the knowing, voluntary and intelligent standard. The court did examine whether counsel's failure to present the claims on direct appeal amounted to improper representation of the defendant.[121] Such an inquiry is appropriate under *Langley*[122] to determine whether a waiver may be excused by reason of mitigating circumstances. It is arguable that the court, *sub silentio*, applied a knowing and intelligent waiver standard before addressing the question whether mitigating circumstances existed. It is not, however, clear that this was the case.

Confusion regarding the basis for the decision arises as a consequence of the majority's construction of the language in P.C. 1 which provides: "This remedy is not a substitute for a direct appeal from the conviction . . . ."[123] The majority read this language as a specific prohibition against raising, via P.C. 1, those issues which could have been raised in the original appeal.[124] The majority seemed to be advancing a finality rule unrelated to the petitioner's conduct. It would not be necessary to determine that an issue was knowingly and intelligently waived in order to find that the petitioner could have raised the issue on appeal but did not do so.[125] Such a construction of P.C.

121. *Kidwell*, 260 Ind. at 307-08, 295 N.E.2d at 364-65.

122. *See supra* notes 41-69 and accompanying text.

123. P.C. 1 § 1(b).

124. *Kidwell*, 260 Ind. at 308-09, 295 N.E.2d at 365. "He now comes before this Court seeking to do that which the above quoted rule specifically prohibits, i.e., he now seeks what in fact amounts to a second appeal. . . ." *Id.*

125. The "could have been raised" language is subject to at least two interpretations. One could define the language as posing a simple objective test. If the claim made in post-conviction procedures could have been raised on direct appeal, failure to do so forfeits the claim. On the other hand, one could construe the language as setting forth a subjective test which turns on the defendant's knowledge. If the test is subjective—"could have been raised by this defendant"—the defendant's knowledge of the existence of the claim or lack thereof would be controlling. A defendant could not have raised a claim of which he was unaware.

In Kidwell's case, the majority noted that trial counsel's objections at trial demonstrated that he was aware of the claims which were subsequently asserted in the post-conviction petition but which were not pursued on direct appeal. *Kidwell*, 260 Ind. at 307, 295 N.E.2d at 364. The dissent took issue with this factual conclusion. *Id.* at 310, 295 N.E.2d at 366. If we assume the majority is correct, a finding that Kidwell was aware of the claims at the time of direct appeal and yet failed to assert them on appeal does not equate necessarily to a knowing, intelligent and voluntary waiver. The abandonment of grounds on appeal may be a result of institutional constraints and not a product of free choice on the part of the appellate advocate or his client. Justice Jackson has observed: "The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of con-

1 would pose a pure procedural bar which would operate to preclude assertion of a right regardless of whether the petitioner could be said to have voluntarily surrendered that right.[126] This construction contradicts the "knowingly" and "intelligently" language of P.C. 1 § 8, which poses a rule intended to operate as a corollary to the underlying right and addresses the question whether protection of the right itself has been foregone deliberately.[127]

The Indiana Supreme Court again emphasized the "could have raised on appeal" analysis in *Brown v. State.*[128] Brown was charged with first degree murder and convicted of second degree murder.[129] Brown appealed and his conviction was affirmed.[130] Thereafter, Brown sought P.C. 1 relief alleging, *inter alia*, that there was insufficient evidence to sustain his conviction.[131] The court addressed the merits of the issue only after noting that the proper time to raise the issue of insufficiency is on direct appeal. The court reiterated that the P.C. 1 remedy is not a substitute for direct appeal and held that the scope of post-conviction review does not include issues which were available to a petitioner on direct appeal.[132] However, the court appeared to define "available" as known to the petitioner or his counsel and indicated that it is incumbent on a petitioner to demonstrate that the issue was unknown to him or his counsel to escape application of the waiver doctrine.[133]

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fidence in any one." Jackson, *Advocacy Before the Supreme Court*, 25 TEMP. L. Q. 115, 119 (1951).

Indeed, in Jones v. Barnes, 103 S.Ct. 3308 (1983), the Court rejected a claim that appellate counsel was ineffective for failing to assert all colorable issues which the client wanted pressed on appeal. The basis for the decision was that the very function of a good advocate is to select the best arguments for assertion on appeal. Time limits on arguments and page limits on briefs require such professional judgments be made. Applying this rationale to *Kidwell*, one could question whether appellate counsel's decision not to pursue all thirty-five instances of claimed error must inevitably be considered a voluntary abandonment of those issues not asserted.

126. *See supra* note 13.

127. *See supra* note 31 and accompanying text for the language of the post-conviction waiver rule. *See supra* note 13 regarding the distinction regarding waiver and procedural defaults. *See also* Dixon v. State, 154 Ind. App. 603, 290 N.E.2d 731 (1972).

128. 261 Ind. 619, 308 N.E.2d 699 (1974).

129. Brown was sentenced to life imprisonment. *Id.*

130. Brown v. State, 255 Ind. 594, 265 N.E.2d 699 (1971).

131. 261 Ind. 619, 308 N.E.2d 699.

132. *Id.* at 622, 308 N.E.2d at 700.

133. *Id.* "[T]he defendant failed in his burden to prove by a preponderance of the evidence either that the evidence which he asserts was essential to his conviction was devoid of probative value or that the circumstances which render such evidence infirm were unknown to him and his counsel at the time of trial. It was incumbent upon him to prove both. . . ." *Id.*

At this stage the Indiana Supreme Court appeared to be employing a hybrid waiver analysis regarding post-trial defaults. Failure to raise an issue on direct appeal would constitute a waiver unless the defendant could demonstrate that the issue was unknown to him or his counsel.[134] Such a standard is different from the usual contemporaneous objection rule since that rule operates without regard to the defendant's conduct. Nor did the court apply the knowing, voluntary and intelligent waiver standard. A defendant or his counsel may be aware of an issue, fail to assert it and yet not voluntarily abandon the claim.[135]

The court added further confusion regarding the nature of the waiver doctrine by its opinion in *Lamb v. State*.[136] Lamb pled guilty to second degree murder and thereafter sought post-conviction relief based, in part, on rather vague assertions that his rights under the due process and equal protection clauses of the fourteenth amendment as well as the sixth amendment were violated.[137] Lamb's first *pro se* petition was denied after a hearing; a belated motion to correct errors was filed and overruled.[138] Thereafter, the defendant filed a second *pro se* petition entitled "Petition to Withdraw Guilty Plea and Vacate Judgment."[139] This petition was denied by the trial court on the theory that P.C. 1 § 8 requires all available grounds to be raised in the original petition.[140] Thereafter, Lamb filed a third petition claiming that the multiple penalty provisions of the second degree murder statute violated the equal protection clause of the fourteenth amendment and that its coercive effect violated his rights under the sixth amendment as well as his rights under the Indiana Constitution.[141] This petition was also denied by the trial court on the theory that all issues raised in that petition had been determined in the proceedings related to the defendant's first petition.[142] Lamb was again permitted to file a belated motion to correct errors regarding denial of the third petition; Lamb argued that the trial court erred in summarily dismissing the petition. This motion was overruled on the basis

134. *See, e.g.*, Davis v. State, 263 Ind. 327, 330 N.E.2d 738, 742 (1975); Smith v. State, 268 Ind. 79, 373 N.E.2d 884 (1978). *But see also* Gross v. State, 162 Ind. App. 649, 320 N.E.2d 818 (1975) (finding a ground available without addressing whether the defendant was subjectively aware of the ground).

135. *See supra* note 125.

136. 263 Ind. 137, 325 N.E.2d 180 (1975).

137. *Id.* at 140, 325 N.E.2d at 182.

138. *Id.* at 141, 325 N.E.2d at 182.

139. *Id.*

140. *Id.*

141. *Id.* at 141, 325 N.E.2d at 182-183.

142. *Id.* at 141, 325 N.E.2d at 182.

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that Lamb could have raised the issues presented by his third petition in his first post-conviction petition.[143] Lamb was then permitted to take a belated appeal regarding denial of the first petition and denial of the third petition.[144]

The Indiana Supreme Court affirmed the trial court's action of summarily dismissing Lamb's third petition. While the court reiterated that the purpose of P.C. 1 was to provide for full and fair review of claims of error, it added that this purpose applied only to claims not reviewable upon direct appeal.[145] Contrary to the trial court ruling, the court found that the defendant had not presented the issues arising from the multiple sentencing alternatives permissible under the second degree murder statute in his first petition. However, the court ruled that those issues were available at the time the first petition was filed and the failure to raise those claims in that petition resulted in their forfeiture. Thus, the court upheld the summary dismissal of Lamb's third petition.

Quite clearly, the construction given to the word "available" in *Lamb* was not tied to the defendant's knowledge. The court in *Lamb* applied a pure finality rule—if claims could have been raised in a prior post-conviction proceeding but were not raised, the claims are waived for state post-conviction purposes. The court's refusal to provide the defendant with any opportunity to argue that the claims were not "available" in the sense that he was unaware of those claims permits no other conclusion to be drawn. In dissent, Justice DeBruler noted that the ruling was tantamount to a holding that the defendant knowingly, intelligently and voluntarily waived the right to litigate his claims and that such a waiver should not be presumed on the record as it existed.[146] The dissent also observed that the prosecution carries the burden of raising and proving the defense of waiver.[147]

It is probably more accurate to conclude that the majority abandoned the knowing and intelligent standard, at least in *Lamb*, than to say that the majority ruling constitutes a holding that the defendant waived the claims of error under that standard. The latter rationale was not addressed by the majority nor is it supportable from the court's rendition of the facts. Further, notwithstanding the dissent's assertion to the contrary, the case law is absolutely clear that

143. *Id.*
144. *Id.*
145. *Id.* at 144-45, 325 N.E.2d at 184.
146. *Id.* at 148, 325 N.E.2d at 186.
147. *Id.*

the burden of raising the waiver defense is on the state. However, once raised, the defendant carries the burden of demonstrating mitigating circumstances to overcome the waiver conclusion spawned by the simple failure to object.[148]

Some cases decided after *Lamb*[149] rekindle the notion that the failure to raise an issue in proceedings subsequent to trial constitutes a waiver only if the issue was known to the defendant.[150] Other cases do not discuss whether the claim must be subjectively known to the petitioner but instead simply propose that issues which could have been but were not raised on direct appeal are waived for purposes of post-conviction proceedings.[151] Indeed, it appears from the present state of Indiana case law that inconsistent rules govern judicial analysis of waiver by default on direct appeal. The Indiana appellate courts will sometimes find that the failure to raise an issue on appeal constitutes a waiver without determining whether such a waiver was knowing, intelligent and voluntary.[152] On other occasions, the appellate courts appear to require a finding that the issue not previously asserted by the defendant was known to him before finding such a

148. In *Langley*, the court suggested that the burden was on the state to assert and prove that the alleged error was waived. 256 Ind. at 213 n.4, 267 N.E.2d at 546. This language is inconsistent with other language in that case which suggests that once the waiver issue is raised, the "petitioner must then present some substantial basis . . . which would . . . mitigate his failure to pursue . . . a remedy through the normal procedural channels." *Id.* at 207, 267 N.E.2d at 542. Subsequent decisions indicate that the issue may be raised *sua sponte*. Rinard v. State, 271 Ind. 588, 394 N.E.2d 160 (1979). Once raised, the defendant must seek to be excused from the waiver finding with proof of sufficient reason to justify the procedural omission. Dull v. State, 267 Ind. 549, 554, 372 N.E.2d 171, 173-74 (1978). Baynard v. State, 162 Ind. App. 86, 90, 317 N.E.2d 897, 899 (1974); Wilkins v. State, ___ Ind. App. ___, ___, 426 N.E.2d 61, 65 (1981). *See also* P.C. 1 § 8, *supra* text accompanying note 31.

149. 263 Ind. 137, 325 N.E.2d 180 (1975).

150. *See, e.g.*, Davis v. State, 263 Ind. 327, 332, 330 N.E.2d 738, 742. "There has been no showing that the matters claimed were not known or were otherwise unavailable. . . ." *Id.*

151. *See, e.g.*, Eliacin v. State, 269 Ind. 305, 380 N.E.2d 548 (1978) (no discussion of knowledge); Henson v. State, ___ Ind. ___, ___, 436 N.E.2d 79, 81 (1982). "The failure to raise the issue of the inadequacy of his trial counsel in petitioner's direct appeal ordinarily constitutes a waiver on this issue." *Id.*

152. Jewell v. State, 73 Ind. Dec. 52, 397 N.E.2d 946 (1979) (issue regarding impermissible inconsistency in judgments between co-defendants became available when co-defendant pled guilty—availability determined solely by reference to date when issue arose). Lamb v. State, 263 Ind. 137, 325 N.E.2d 180 (1975). *See also* McKinley v. State, 163 Ind. App. 605, 325 N.E.2d 470 (1975); Kissinger v. State, 161 Ind. App. 303, 315 N.E.2d 423 (1974) (court presumed waiver from the simple failure to assert issue on appeal without inquiry as to whether the defendants were aware of the respective claims at the time of direct appeal).

waiver.[153] On the basis of existing case law, it is not possible to predict which analysis will be utilized to resolve any particular case.

IV. Mitigating Circumstances—The Ineffective Assistance Rule

P.C. 1 § 8 provides that any ground which has been knowingly, voluntarily and intelligently waived may not be a basis for relief "unless the court finds a ground for relief asserted which for sufficient reason was not asserted" in prior proceedings.[154] The Indiana Supreme Court has described the rule as follows:

> For relief to be granted where the element of waiver has been introduced at the post-conviction hearing, there must be some substantial basis or circumstance presented which would satisfactorily mitigate a petitioner's failure to have pursued or perfected a remedy through the normal procedural routes.[155]

The court has failed to articulate any principles to be utilized in determining what constitutes a mitigating circumstance sufficient to excuse a procedural default[156] but it has identified ineffective assistance of counsel as one "persuasive circumstance."[157] So few other circumstances have been recognized as sufficient to justify a default that one can conclude that "mitigating circumstances" essentially means ineffective assistance of counsel.[158] Indeed, the Indiana Supreme Court has stated that this is the rule.[159]

In *Langley*,[160] the court observed that "where it could be shown that the alleged waiver resulted from ineffective assistance of counsel" the procedural default should not be binding on the client.[161] This

153. *Brown v. State*, 261 Ind. 619, 308 N.E.2d 699 (1974). *See also* cases cited *supra* note 134.

154. P.C. 1 § 8, *supra* text accompanying note 31.

155. *Langley*, 256 Ind. at 207, 267 N.E.2d at 542.

156. The term "procedural default" is used since the case law suggests that the court is actually employing a rule which results in the forfeiture of claims not raised timely subject to proof of mitigating circumstances to excuse the default. This rule focuses on the procedural requirement that requires timely assertion of a right to avoid forfeiture as opposed to "waiver" which connotes a knowing and voluntary surrender of the right. *See supra* note 13.

157. *Langley*, 256 Ind. at 211, 267 N.E.2d at 545.

158. *See supra* note 69.

159. Davis v. State, 263 Ind. 327, 332, 330 N.E.2d 738, 742 (1979). "Absent a showing of ineffective representation, . . . such matter would be deemed waived." *Id.*

160. 256 Ind. 199, 267 N.E.2d 538 (1971).

161. *Id.* at 211, 267 N.E.2d at 545. *See also supra* notes 41-63 and accompanying text.

language would suggest that the ineffective assistance inquiry should focus on the conduct of counsel in failing to raise or otherwise preserve the claimed error for review. Moreover, *Langley*'s holding that a lawyer's decisions bind the client is based on the premise that a litigant should not be able to assert a claim on appeal which was not asserted at trial for tactical reasons. As noted earlier, the court relied on the *Henry*[162] doctrine that deliberate decisions of the lawyer bind the client[163] to support the imputed waiver theory advanced in *Langley*. Thus, the inquiry to determine whether the lawyer's act or omission binds the client should focus only on the lawyer's act or omission which gave rise to the imputed waiver.[164] The effectiveness of counsel in conducting the entire trial is irrelevant to the narrower question of whether an issue has been waived by counsel's conduct.

Indiana appellate courts have not so restricted the inquiry. Rather, the courts examine the entirety of counsel's conduct to determine whether or not the defendant was denied the right to the effective assistance of counsel guaranteed by the sixth amendment to the United States Constitution[165] and by the Indiana Constitution.[166] A violation of these rights, under the test applied by the Indiana appellate courts, occurs only when the representation is so inadequate as to reduce the trial, taken as a whole, to a mockery of justice.[167]

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162. Henry v. Mississippi, 379 U.S. 443 (1965).

163. *See supra* note 93 and accompanying text. Deliberate choices of strategy bind the client since the lawyer's function is to utilize his or her professional judgment in making the vast array of trial decisions which arise in the course of the criminal trial. Such authority is necessary if the lawyer is to effectively represent the accused. The exigencies of trial require that the lawyer make such decisions without consultation with the client.

164. As previously suggested, the central question should be whether counsel acted deliberately or inadvertently in failing to assert the claim at issue. *See supra* text accompanying notes 70-88. There is no need to assess effectiveness in any other sense for purposes of determining whether the lawyer's omission should bind the client.

165. U.S. CONST. amend. VI.

166. IND. CONST. art. 1, § 13.

167. Rahim v. State, ___ Ind. ___, 417 N.E.2d 343 (1981). "In order to prevail, a defendant must show that his representation was so inadequate as to reduce the trial, taken as a whole, to a mockery of justice." *Id.* at ___, 417 N.E.2d at 345. *See also* Baker v. State, ___ Ind. ___, 403 N.E.2d 1069, *cert. denied*, 449 U.S. 882 (1980); Huggins v. State, ___ Ind. ___, 403 N.E.2d 332 (1980). The farce and mockery test was theoretically modified by the "adequate legal representation" test in Thomas v. State, 251 Ind. 546, 242 N.E.2d 919 (1969). The language of *Thomas* suggests that adequate legal representation is that which rises above perfunctory representation. Perfunctory representation is equated with reducing the trial to a mockery. Crisp v. State, 271 Ind. 534, 394 N.E.2d 115 (1979). Apparently, if an attorney does not reduce the proceedings to a farce or mockery, the representation is adequate. Recent cases refer to and define the standard used to determine ineffective assistance solely as the farce and mockery test. *See* Howland v. State, ___ Ind. ___, 442 N.E.2d 1081 (1982); Cum-

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By utilizing such an analysis, Indiana courts effectively require a petitioner to demonstrate his entitlement to relief on sixth amendment grounds before the petitioner can reach the merits of the issue claimed to have been waived.[168] Furthermore, Indiana courts have held that isolated mistakes of counsel do not *per se* render a lawyer ineffective.[169] Thus, as *Wilkins* demonstrated, a lawyer's inadvertent surrender of a client's right due to the counsel's ignorance of the right's very existence does not necessarily render counsel ineffective. In such cases the underlying right will be deemed waived absent a finding of ineffectiveness in the context of the total trial.[170]

Use of this analysis renders any claim of error independent of the ineffectiveness issue either barred or superfluous. A finding that the petitioner has failed to establish that his counsel's total trial conduct amounted to ineffective assistance equates to a finding that the petitioner has failed to prove mitigating circumstances sufficient to excuse the procedural default; review of the underlying claim is therefore barred. A finding that counsel provided ineffective assistance entitles the petitioner to relief on that ground alone without reference to the underlying issue. The underlying issue is thus rendered superfluous. In effect, the petitioner is punished for the prior procedural default, be it inadvertent or knowing, voluntary and intelligent, by being required to prove a violation of a fundamental right, i.e., the right to counsel,[171] in order to secure relief in a post-conviction proceeding. The focus is not on the underlying claim which was the subject of the procedural default nor on the nature of the prejudice which resulted from the underlying error. Rather, the test employed by the appellate courts focuses on whether a fundamental right distinct

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mings v. State, ___ Ind. ___, 434 N.E.2d 90 (1982); Cochran v. State, ___ Ind. ___, 445 N.E.2d 974 (1983).

168. Moreover, the particular standard utilized in Indiana, the "farce and mockery" test, places a heavier burden on the defendant to demonstrate a sixth amendment violation than that required by tests employed in other jurisdictions. *See generally* C. WHITEBREAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS 545-46 (1980 and Supp. 1982).

169. *See, e.g., Wilkins*, ___ Ind. App. at ___, 426 N.E.2d at 64. "It has been held that although one isolated mistake does not necessarily amount to competent counsel, neither does it result in a determination that counsel was incompetent. . . . A reviewing court must look to the totality of the facts and circumstances to find whether the accused received competent representation." *Id. See also* Leaver v. State, ___ Ind. ___, 414 N.E.2d 959 (1981).

170. *Wilkins*, ___ Ind. App. at ___, 426 N.E.2d at 64. *See also supra* notes 105-114 and accompanying text.

171. Although the punishment aspect of the result may not be intended, it nevertheless results from requiring a defendant to prove a violation of the right to counsel to overcome the presumed waiver which arises from counsel's omission in failing to assert an issue on a timely basis.

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from the underlying claim and itself sufficient to require relief has been denied.[172]

V. A CRITICAL ANALYSIS.

As suggested at the outset of this article, the law regarding collateral attacks on criminal judgments must deal with two conflicting premises: wrongful incarceration merits curative action even after final judgment and final judgments merit protection.[173] If the choice is made to advance the availability of curative process, one creates a process designed to resolve issues on the merits.[174] Such a system would provide for procedures which may be utilized at any time and which allow the assertion of any ground not previously litigated or voluntarily surrendered by the litigant seeking to assert the ground.[175] No sanction would be imposed for inadvertent procedural defaults. Alternatively, if one chooses to emphasize finality of judgments, issues not timely raised would not be reviewable in any subsequent proceeding. The contemporaneous objection rule serves such a function.[176] A sanction in the form of forfeiture of the underlying claim is imposed as a consequence of the procedural default, without regard to whether the default is inadvertent or deliberate.[177] Promoting finality diminishes the availability of meaningful curative process and *vice versa.* Therefore, the relevant questions are: 1) which choice of policy has been made by P.C. 1; 2) which choice has been made by Indiana courts in applying the rule; and 3) which choice or accommodation of policy ought to be made.

The language of P.C. 1 establishes a process which may be utilized at any time and which appears to permit the assertion of all issues not previously litigated nor knowingly, intelligently and voluntarily surrendered.[178] The rule imposes a penalty to the extent that it re-

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172. *See, e.g.,* Cummings v. State, ___ Ind. ___, 434 N.E.2d 90 (1982); Wilkins v. State, ___ Ind. App. ___, 426 N.E.2d 61 (1981).

173. *See supra* notes 1-12 and accompanying text.

174. *See* ABA STANDARDS, *supra* note 6, commentary at 22-63. "Post-conviction remedies exist to try fundamental issues that have not been tried before." *Id.*

175. Claims of error which have been fully litigated would not be available for review because no purpose would be served by such relitigation. *See supra* note 11. The basis for precluding review of claims voluntarily surrendered is discussed in the text accompanying note 197.

176. *See, e.g.,* Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977). Both cases discuss the value of the rule in promoting finality of criminal judgments.

177. *See supra* notes 97-110 and accompanying text.

178. P.C. 1 § 8. "Any ground finally adjudicated on the merits or not so raised and knowingly, voluntarily and intelligently waived in the proceeding . . . may not be the basis for a subsequent petition. . . ." *Id.*

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quires the petitioner to establish grounds for relief by a preponderance of the evidence.[179] This penalty arises because the petitioner failed to utilize normal procedural channels to raise the claim. Depending on the nature of the underlying claim, the imposition of such a sanction may be a very substantial penalty.[180] Nevertheless, the penalty envisioned by the rule does not result in forfeiture of any claims: rather, it relates only to the allocation of the burden of proof regarding the underlying claim. In short, the rule as written advances primarily a policy favoring the availability of curative process.

As was suggested by the earlier summary of Indiana law,[181] Indiana appellate courts impose a penalty in addition to that contemplated by P.C. 1. This penalty is of the forfeiture variety. It is designed to promote finality and is imposed without regard to whether the default was the product of conscious decision-making or of inadvertence. The forfeiture penalty is applied to claims which could have been raised at trial and sometimes is applied to claims of error which could have been raised on direct appeal or in a prior post-conviction proceeding.[182] The case law forfeiture rule is clearly inconsistent with the waiver language of P.C. 1 § 8, since that provision envisions forfeiture of issues only if the same are knowingly, voluntarily and intelligently waived.

The case law rule is apparently intended to mitigate the disparate results which occur when the knowing, intelligent and voluntary waiver standard is applied to post-conviction proceedings and the contemporaneous objection rule is applied on direct appeal. Application of the contemporaneous objection rule to an inadvertent trial default would render the underlying claim unavailable on direct appeal for want of a timely objection.[183] If the "knowingly," "intelligently" and "voluntarily" language of P.C. 1 § 8 were read literally, the inadver-

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179. P.C. 1 § 5. "The petitioner has the burden of establishing his grounds for relief by a preponderance of the evidence." *Id.*

180. For example, if an accused objects to the fruits of a warrantless search at trial, the prosecution carries the burden of proving that the search falls within one of the recognized exceptions to the warrant requirement. State v. Smithers, 256 Ind. 512, 269 N.E.2d 874 (1971). If a petitioner raises the same claim in a post-conviction proceeding, the petitioner carries the burden of demonstrating that the search was not authorized by any exceptions to the warrant requirement. Johnson v. State, 262 Ind. 183, 313 N.E.2d 542 (1974).

181. *See supra* notes 34-153 and accompanying text.

182. *See supra* notes 67-153 and accompanying text.

183. The operation of the contemporaneous objection rule is not without exception. The fundamental error rule would permit review of egregious error. *See infra* text accompanying notes 233-58.

tent default would not bar post-conviction review of the same underlying claim. The occurrence of such disparate results is reduced under the case law by deeming counsel's failure to object to be a knowing and intelligent waiver which is then imputed from counsel to client. Application of this post-conviction waiver standard to a procedural default then yields the same result as would the contemporaneous objection rule.

Indiana's attempt to eliminate disparate results by imputing a waiver from counsel's inadvertent omissions has resulted in the decimation of the knowing and intelligent standard. The prospect of overcoming the effect of such a procedural default for purposes of post-conviction relief by establishing mitigating circumstances is infinitesimally small. Proof of mitigating circumstances under current Indiana case law effectively means proving that counsel's total trial conduct rendered the original proceedings a farce and mockery.[184] Thus, even if counsel concedes that he or she was unaware of an underlying right which could have been invoked at trial, counsel's failure to assert that previously unknown right will not be excused absent a finding that counsel's representation as a whole denied the petitioner the effective assistance of counsel. Application of such a waiver standard to post-conviction proceedings reduces the potential for disparate results but also precludes use of such proceedings for any purpose other than the assertion of a claim that a prisoner's sixth amendment right to effective assistance of counsel was denied at trial.[185] In short, Indiana case law reflects a policy favoring finality to the exclusion or near exclusion of effective curative process.

The policy reflected in the Indiana case law is inconsistent with the language of P.C. 1, unwarranted by finality considerations and incompatible with the interest furthered by curative process. The need exists for a post-conviction waiver standard which furthers the goal of providing meaningful corrective process and accommodates the State's interests in finality of judgments. This article will now attempt to identify such a standard by examining the interests served by the existence of curative process and those served by attaching finality to criminal judgments, and by constructing an accommodation which does not sacrifice the former to the latter.

184. *See supra* notes 154-70 and accompanying text.

185. The fundamental error doctrine applies to Indiana post-conviction proceedings as well as to proceedings on direct appeal. Thus, it is theoretically possible for one to secure review of a claim despite the antecedent procedural default in raising the claim if the same were deemed to be fundamental error. Very few errors rise to the level of "fundamental error" as the term is defined and applied by Indiana appellate courts. *See infra* notes 233-58 and accompanying text.

A) The Nature of Curative Process.

The purpose of according rights is to insure that both the results reached and the process by which those results are obtained are consistent with fundamental notions of fairness as defined by our society's shared value system and as identified in the historical experience of that system.[186] Fairness of result and of process must be analyzed both at the level of individual cases and at a systems level.[187] A defendant has a right to counsel because the preference for the adversary system in Anglo-American history has generated a perception that a fair result is more likely if each side's case is effectively advocated.[188] Advocates are restrained from using hearsay evidence unless its trustworthiness is demonstrated because our collective experience has taught us that first hand information is more trustworthy or factually accurate than second hand information and because of our perception that a fair result turns in large part on factual accuracy.[189]

Rights and restraints do not exist in the abstract but are designed to promote our understanding of that which constitutes a fair and legitimate determination of guilt or innocence.[190] If a defendant is not accorded his rights or if his adversary is not appropriately restrained, the reliability and legitimacy of the judgment reached is called into question. To reach any other conclusion requires that one assume that the rights or restraints afforded at trial are not meaningful aspects of our collective understanding of that which provides

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186. *See supra* notes 20-23 and accompanying text.

187. Providing for fairness of result and process at a systemic level sometimes calls for the use of prophylactic rules such as that established by Miranda v. Arizona, 384 U.S. 436 (1966). *Miranda* requires that a defendant be warned of his fifth amendment rights prior to any in-custody interrogation by police. The purpose of the warnings is to safeguard the citizen's constitutional rights by ensuring awareness of those rights. *Id.* at 467. Failure to provide the warnings renders any confession tainted. "No amount of circumstantial evidence that the person may have been aware of this right will suffice. . . ." *Id.* at 471-72. The Court made clear that "[w]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Id.* at 468. Thus the systemic rule may in some case provide an unfair result in favor of an individual defendant for purposes of advancing fairness at a broader level.

188. *See supra* note 24.

189. C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 245 (E. Cleary, 2d ed. 1972). "[T]he Anglo-American tradition evolved three conditions under which witnesses ordinarily will be required to testify: oath, personal presence at the trial, and cross-examination. The rule against hearsay is designed to insure compliance with these ideal conditions. . . ." *Id.* The right to cross-examination as a separate right was deemed important enough to incorporate into the Bill of Rights. U.S. CONST. amend. VI.

190. *Supra* note 21.

a fair adjudication—that they are without value in promoting a fair and legitimate determination of guilt or innocence. This is not to say that every error requires reversal. Whether the reliability and legitimacy of the result or judgment is sufficiently impugned to require that a new determination of guilt or innocence be made is a collateral question which turns on the nature of error and its impact.[191] The present point is simply that the integrity of the original adjudication is undermined by both the failure to accord an accused his rights under rules established for the purpose of providing and promoting a fair determination and the failure to assess the impact of that deprivation on the legitimacy of the judgment.

This contention is applicable to civil cases as well as to criminal proceedings. However, the interest to be protected by the rights accorded the defendant in a criminal proceeding, i.e., liberty, has generally been viewed as more important than the typical economic interest protected by parallel rights in a civil proceeding.[192] Moreover a government, be it state or federal, is the party attempting to deprive an accused of his liberty. Fear of the power of government and a recognition of the propensity for its abuse is both a central theme of the American historical perspective and the underlying rationale of the guarantees provided by the Bill of Rights.[193] The fear of governmental abuse and the nature of the interest protected suggest that the finality rule bend in favor of full litigation of the issues present in criminal cases. This is true not only because of our sense of fairness owed to a defendant but also because the public must perceive the system to be fair.[194]

Because the failure to accord an accused any given right undermines the integrity of the result reached, one of the functions of curative process is to provide an avenue for determining whether such a failure occurred and, if so, to determine whether that failure sufficiently impaired the validity of the underlying conviction so as to require relief. Such is a function of curative process whether the implementing mechanism is review by the trial court following conviction, direct appeal or a post-conviction proceeding. The purpose of

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191. *See, e.g.*, Chapman v. California, 386 U.S. 18 (1967), for the notion that not all constitutional errors occurring at trial warrant a reversal or new trial. The Court concluded that "[t]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless. . . ." *Id.* at 22.

192. In re Winship, 397 U.S. 358, 364 (1970). *See also supra* note 6.

193. *Winship*, 397 U.S. at 361-64.

194. *Id.*

the criminal process in its entirety is to provide a reliable and legitimate determination of guilt or innocence.[195] Unless claims of error raised, even belatedly, by a defendant are addressed on the merits, it is not possible to determine either the nature of the error or its probable impact. Absent such an inquiry, it is not possible to ascertain whether the result obtained constitutes a fair and legitimate determination of guilt.

Denial of review on the merits frustrates the intended purpose of curative process. Such a denial therefore requires justification. One can accept the intentional relinquishment of a right as justification for denying review of any claim of error based on the relinquished right. This conclusion is acceptable because we recognize that a right may be beneficial in some circumstances and an encumbrance in others.[196] If a litigant chooses to forego a right because of the legitimate cost associated with its assertion, he has made a conscious decision about what is best for his case. He reaps the benefits or suffers the consequences of that decision and therefore is bound by his act.[197] Moreover, if the decision-making ability is properly entrusted to the advocate for the accused with regard to assertion or non-assertion of any given right, the advocate's decision should bind the client.[198]

Whether an inadvertent procedural default should justify denial of review is a much closer question. It is submitted that it should not. This submission obviously calls for a departure from the contemporaneous objection rule. It is, however, not argued here that the rule be abrogated for purposes of direct appeal. Legitimate institutional interests may suggest that issues not timely raised in the trial court should not be entertained on direct appeal.[199] The argument is instead

195. *See* Estes v. Texas, 381 U.S. 532, 544 (1965). "[T]he chief function of our judicial machinery is to ascertain the truth." *Id.*

196. For example, assume a prosecutor desires to present the testimony of a witness by use of an affidavit. A criminal defendant may have a right to confront his accusers and a right to preclude the use of hearsay evidence, but he may choose not to assert these rights if he believes that the live testimony of the witness will be more damaging to him than the testimony contained in the affidavit. Since certain costs attach to rights or their assertion, the accused is permitted to decide whether he will assert his right and bear the cost, or escape the cost by non-assertion of the right. *See* Rubin, *supra* note 13, at 488-89.

197. There are, however, certain rights which society may deem so important as to preclude any waiver. *See* Rubin, *supra* note 13, at 494.

198. Henry v. Mississippi, 379 U.S. 443 (1965).

199. Direct appeal is and should be a reasonably expeditious process. Normally, a direct appeal must be initiated shortly after the proceedings conclude in the trial court. In Indiana, an appeal is commenced by filing a praecipe with the clerk of trial

that at some point in the process a forum must be provided to address claims on the merits despite an inadvertent procedural default in failing to raise such claims in a timely manner.

The assumption underlying this argument is that the very purpose of curative process is to determine whether there occurred a failure to adhere to procedures designed to promote a fair and reliable determination of guilt or innocence, i.e., whether the defendant's rights were violated and, if so, whether that error requires relief. That such is the function of curative process is dictated by the premise that the ultimate function of a criminal trial is to provide a reliable determination of guilt or innocence. When an error occurs, the integrity of the adjudication is diminished regardless of whether a timely objection is made. Unless countervailing interests may be said to outweigh the threat presented by error to the integrity of the adjudication, the conclusion that an inadvertent default should not preclude review of claimed error would follow automatically from these assumptions. The question is, therefore, whether the reasons offered to justify application of the rule that an inadvertent failure to object precludes subsequent review, reasons subsumed within the general claim that finality must attach to criminal judgments, outweigh that conclusion.

B) The Interests Served By Attaching Finality To Criminal Judgments.

Finality is said to be necessary for several reasons.[200] First, procedural rules should encourage trial proceedings to be as free from

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court designating that which is to be included in the record for purposes of the appeal. This praecipe must be filed within 30 days after the trial court's ruling on the motion to correct errors or the right to appeal is forfeited. IND. R. APP. P. 2. Given the short time limits normally associated with direct appeal, it is unlikely that counsel would have a transcript or other record of the proceedings which could be utilized to review the events of trial for purposes of identifying claims of error not previously recognized. To provide any meaningful opportunity for such a review by counsel would significantly delay the processing of claims.

Moreover, there is a benefit to requiring that claims of error be presented first to the trial court. The trial court will be the court most familiar with the case. This does not suggest that claims not presented to the trial court in the original proceedings should be forfeited. It suggests only that such claims should not be initially asserted on direct appeal. P.C. 1 provides the mechanism for presenting such claims to the trial court for the initial review.

The necessity of an expeditious appeal process and the notion that the court most familiar with the case ought to provide the first level of review suggest that the contemporaneous objection rule ought to be retained for purposes of direct appeal.

200. The text which follows sets forth the arguments commonly advanced in support of finality. These arguments are sometimes cast in differing terms. Hopefully,

error as possible since society has concentrated its resources in the form of judge, jury and witnesses at the trial.[201] The contemporaneous objection rule obviously promotes this end by requiring the timely presentation of claims or objections to the trial court for resolution. Error may be avoided by such a timely presentation. However, the defendant can assist in avoiding error or in the timely correction of error only if he or his counsel is aware that error is about to be committed or has been committed. The contemporaneous objection rule can force a defendant to present his claims, but only those claims of which he is cognizant. Proponents of the rule contend that since failing to raise a claim results in its forfeiture, the rule deters the withholding of claims.[202] The rule no doubt deters intentional conduct. However, it is less than clear that the rule deters inadvertent conduct.[203]

Although it may be possible to make a person more careful and less prone to inadvertence by punishing inadvertence, the contemporaneous objection rule visits the punishment on the wrong person. Most procedural defaults occur by counsel's omission, not by reason of any act or omission of the client.[204] It is, after all, the lawyer's function and professional duty to protect a client's rights.[205] Lawyers certainly know that an inadvertent failure to protect a right jeopardizes

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the text captures the essence of all such arguments, but at a minimum the main arguments in favor of finality are addressed.

201. Wainwright v. Sykes, 433 U.S. 72, 90 (1977). "Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable. . . ." *Id.*

202. *Id.*

203. The ability to deter conduct by threatening to impose a sanction if the actor engages in the proscribed conduct apparently assumes rational and conscious decision-making by the actor. If the actor is unaware that he or she is engaging in proscribed conduct, it is difficult to understand how the threat of a sanction can deter such conduct. One possibility is that some small measure of deterrence is acquired by the threat of a sanction to the extent that the threat may make a person more diligent and therefore reduce the occurrence of inadvertent conduct. This premise is discussed in the text which follows.

204. *Wainwright*, 433 U.S. at 104 (Brennan, J., dissenting). The right to counsel arises from the premise that laymen are not skilled in the science of law and thus the aid of counsel is necessary to assure a fair trial. *See supra* note 24. It follows that if a defendant's rights are not protected at trial, the fault, if any, normally rests with counsel. Moreover, it is much more likely that such omissions occur by inadvertence than by intention since there is little, if anything, to be gained from such conduct and much to lose. *Wainwright*, 433 U.S. at 104.

205. The ethical rules governing the conduct of Indiana lawyers require a lawyer to represent a client competently including the safeguarding of the client's interests. *See* IND. CODE OF PROFESSIONAL RESPONSIBILITY Canon 6 (1971). *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 6 (1979).

the potential for a fair result at the trial level. Even if such rights could be vindicated on appeal or in post-conviction proceedings, the client will suffer the stigma of conviction and perhaps incarceration until vindication occurs. If the existence of the professional duty combined with the well recognized likelihood of immediate harm is insufficient to cause counsel to fully protect the client's rights, it is doubtful that visiting additional punishment on the accused, by deeming his claim forfeited, will cause counsel to be more careful in avoiding inadvertent defaults.[206]

Assume, *arguendo*, that a deterrence scheme can be devised to cause lawyers to avoid inadvertent defaults. Two points need be made about such a scheme. First, if the purpose is to deter, one should be clear about that which is to be deterred. It is not simply counsel's inadvertent conduct which is to be deterred. Rather, the scheme should seek to deter counsel's inadvertent failure to secure a client's right. Thus, whether a right was violated must be determined and communicated to counsel as well as the notion that counsel was inattentive. Finding error after finding inadvertence is much more likely to deter the inadvertent failure to protect a right than is a simple finding of inadvertence. Second, a scheme designed to deter lawyers which does not itself impose a formal sanction on lawyers for such inadvertent conduct must be predicated on the assumption that lawyers are interested in fulfilling the professional obligations owed to clients and in avoiding professional embarrassment.[207] If such embarrassment is the informal sanction relied upon to secure deterrence, that sanction is invoked by finding that the lawyer was professionally "inadvertent" in falling to discharge his or her obligation to protect the client's rights. No purpose is served by heaping additional punishment on the client in the form of forfeiture of a claim of error. Indeed, since the

206. The theory that the bar will rise to the task of preserving all meritorious issues if the client is faced with the sanction of forfeiture has been urged for many years. *See, e.g.*, L. ORFIELD, CRIMINAL APPEALS IN AMERICA (1939). "The appellate court should not be compelled to add to its labors because of the bungling of improperly trained lawyers. . . . In civil cases clients are often made to suffer for the ignorance of their attorneys. In criminal cases this is unthinkable. But the way out is not simply in review of objections not raised, but in improving the bar so that the objections will be raised and preserved." *Id.* at 100. If current criticism of the trial bar is a fair indicator, the bar has not responded; perhaps too much is expected of it. *See* Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System?* 42 FORDHAM L. REV. 227 (1973). Additionally, note that Orfield's "unthinkable" scenario (client suffers for ignorance of lawyer) is now the reality. *See supra* notes 70-172 and accompanying text.

207. These assumptions seem valid given the existence of a professional duty to protect the client's interest. *See supra* note 205.

forfeited issue is not addressed on the merits, the forfeiture rule costs the system the ability to advise the lawyer that he or she failed to prevent error. At present, all that need be communicated is that the claim of error is unavailable for review for want of a timely objection.[208]

Another justification offered in support of finality is that the sanctity of safeguards designed to promote a fair determination of guilt or innocence is diminished if there is no need to claim the benefit of those safeguards in a timely manner. Therefore, the argument is made that a penalty must be assessed for failing to claim the protection of those safeguards on a timely basis.[209] This proposition suggests that requiring forfeiture of a right because of an antecedent procedural default actually protects the sanctity of the right. The proposition is both novel and illogical.

Various courts have indicated that some rights may not be the subject of any surrender, intentional or inadvertent.[210] Indeed, some rights appear to be sufficiently important such that their loss requires reversal even when defense counsel participated in the procedure resulting in the loss of such rights.[211] Other rights are deemed so fundamental as to merit a presumption against waiver and to require that any waiver be knowing and intentional.[212] Our jurisprudential history suggests that the more valuable the right the more protection accorded that right. Such doctrines as the fundamental error rule are premised on the notion that procedural defaults must be excused and relief provided if loss of a right so taints the trial as to render it unfair.[213] In short, the significance of a right is enhanced by increasing the protection accorded that right. It follows, then, that the more valuable the right the less likely it is that the right may be inadvertently forfeited.

The argument that forfeiture is necessary to the sanctity of safeguards suggests exactly the opposite. It suggests that the

208. The burden is on the state to raise the waiver issue. Once raised, the petitioner must carry the burden of demonstrating mitigating circumstances to excuse the waiver. *See supra* notes 74 and 148. If a defendant is unable to demonstrate sufficient reason to explain the waiver, the inquiry ends without assessment of the merits of the underlying claim.

209. Engle v. Isaac, 456 U.S. 107, 127 (1982).

210. *See* Rubin, *supra* note 13, at 494.

211. For example, it has long been established that such is the case for waiver of the *Miranda* rights. *See* Miranda v. Arizona, 384 U.S. 436, 475 (1966); Schlecknoth v. Bustamonte, 412 U.S. 218, 240 (1973).

212. United States v. Bosch, 505 F.2d 78, 82 (5th Cir. 1974).

213. *See infra* text accompanying notes 233-44.

significance of rights is enhanced by diminishing the protection accorded such rights. The argument is therefore inconsistent with accepted premises of our criminal jurisprudence. The sanctity of safeguards is promoted by acknowledging the value and purpose of such safeguards in promoting a fair and legitimate result. The conclusion which must follow such an acknowledgment is that loss of those safeguards impairs the integrity of result. If our process is to seek a result with integrity, the rights which promote such a result should be accorded more, not less, protection. To suggest that a safeguard may be inadvertently forfeited disparages the importance of the safeguard in promoting a fair and reliable determination of guilt or innocence.[214]

Another argument advanced in favor of finality is that the failure to punish procedural defaults will lead to "sandbagging" by defendants and their counsel.[215] Meritorious claims will be withheld and a gamble taken that an acquittal will result at trial. If the acquittal does not occur, the meritorious claim will be used to provide a basis for a new trial. Here again is an argument that presumes intentional conduct. Indeed, the argument presumes rather offensive conduct which should be deterred.

However, the remedial brush paints too broadly to the extent that inadvertent failures to object or to assert a claim are punished in the same fashion as intentional failures. The overbreadth of the remedial sanction could only be justified on the basis that a court would be unable to determine whether the omission which gave rise to the procedural default was intentional or inadvertent. It is difficult to understand this position since courts determine such issues on a daily basis.[216] Assuming that courts are unable to determine the reason for procedural defaults, a more limited sanction in the form of placing the burden on the petitioner to demonstrate that his omission was

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214. *Wainwright*, 433 U.S. at 110-11 (Brennan, J., dissenting). "The threatened creation of a more 'airtight system of forfeitures' . . . would disparage the paramount importance of constitutional rights in our system of government." *Id.* The notion that diminishing the protection accorded a right diminishes the significance of the right itself seems to follow the maxim that there is no right absent a corresponding remedy.

215. *See Wainwright*, 433 U.S. at 89. "We think the rule . . . may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." *Id.*

216. The culpability requirement in most criminal actions is based on "intent" in one form or another. Since findings of intent, or lack thereof, are made frequently in this context, there is no reason to assume that a court would be unable to determine whether the waiver of a claim was deliberate or inadvertent.

not intentional would fulfill the intended function of punishing intentional sandbagging, while permitting review of rights which were the subject of an inadvertent default.[217]

The next argument often advanced to support the need for finality is that lack of finality undermines deterrence and rehabilitation.[218] This argument suggests that at some point the law must convey to the convicted person that a wrong has been committed and that he is justly subject to the sanction imposed.[219] The effect of such a message is to direct the individual's focus toward his own need for rehabilitation and away from inquiry into the fairness of his original conviction.[220] Deterrence is said to be served because finality promotes the expectation that a criminal law violator will swiftly and justly be punished.[221] Both propositions speak primarily to the effect generated by the very existence of curative process. The lack of finality results primarily from the right to utilize the various devices of curative process, not from the doctrines which determine whether review of any particular issue is granted within that curative process. It is the availability of federal habeas corpus or state post-conviction review or both which results in a lack of finality. Unless one is willing to eliminate all curative process or time limit their availability,[222] there

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217. The major premise of this argument, that a criminal defendant would withhold a meritorious claim for purposes of asserting the claim collaterally may certainly be challenged. Assuming the accused would be incarcerated pending disposition of his withheld claim, it seems unlikely that the accused would "sandbag" given the pace at which justice proceeds and the present condition of our prisons. According to Justice Brennan, to think that an attorney would intentionally "sandbag" a claim "simply offends common sense." *Wainwright*, 433 U.S. at 104 n.5 (Brennan, J., dissenting). Nevertheless, the "sandbagging" argument is preeminent among those offered to justify the contemporaneous objection rule. *See Langley*, 256 Ind. at 206, 267 N.E.2d at 542.

218. *See* Bator, *supra* note 4. "Surely it is essential to the educational and deterrent functions of the criminal law that we will be able to say that one violating the law will swiftly and certainly become subject to punishment, just punishment." *Id.* at 452. *See also* Friendly, *supra* note 7, at 146. The validity of this argument has been accepted by some members of the United States Supreme Court. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 262 (1973) (Powell, J., concurring); Engle v. Isaac, 456 U.S. 107 (1982).

219. *See* Friendly, *supra* note 7. *See also* Bator, *supra* note 4.

220. Schneckloth v. Bustamonte, 412 U.S. 218, 262 (1973) (Powell, J., concurring). "At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen." *Id.*

221. Bator, *supra* note 4, at 452.

222. In the past, Indiana has set arbitrary time limits for post-conviction remedies. Indiana courts have rejected such limits. *See, e.g.*, State v. Blackford Circuit

will never be complete finality in criminal cases. It is inevitable that both those who are suffering wrongful incarceration and those whose incarceration is just will seek to use available process.[223]

It is nevertheless accurate to suggest that the waiver doctrine used to determine whether particular claims are subject to review may have an impact on rehabilitation and on a prisoner's perception of the justness of the punishment imposed. However, the thrust of this rehabilitation argument is opposite to that imagined by advocates of finality. A perception of justness and fairness on the part of the prisoner as well as society is best promoted by reviewing the claim of error on the merits and, if error occurred, by determining its impact on the integrity of the adjudication. This perception is diminished when a convicted person is advised that review of his claim is foreclosed by an inadvertent procedural default. By refusing to review claims on the merits, courts permit, if not encourage, a prisoner to rationalize his conduct by blaming his counsel or the system for his incarceration.[224]

If the claim of error is addressed on the merits, one of three possibilities would result. If no error is found, the prisoner is advised

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Court, 229 Ind. 3, 95 N.E.2d 556 (1950), wherein the court allowed a lower court to consider a defendant's entitlement to a writ of coram nobis despite a statutory proscription preventing such consideration after the lapse of five years from judgment. The court ruled that "where he (a petitioner) makes a good case, the writ should be granted." *Id.* at 16, 95 N.E.2d at 561. The court suggested that an arbitrary time limit might deprive a defendant of the right to relief in situations in which the defendant did not learn that his rights were violated until after the passage of the statutory period. The court determined that the better rule would be to require due diligence in the assertion of rights after the defendant acquires sufficient knowledge of his rights. *Id.*

223. Because this is true, it seems apparent that one of the tasks to be accomplished by any system of collateral review is to prevent abuse of that process, whether the form of abuse be repetitious filings, meritless filings or attempts to assert claims previously voluntarily surrendered. This problem should be susceptible to a narrower solution than the current Indiana formula. This current formula attempts to eliminate such abuse by use of a forfeiture rule which not only prevents abuse but strips the good faith litigant of meritorious claims. *See supra* notes 70-153 and accompanying text.

224. The clearest example of this is the rule permitting review on the merits of an otherwise forfeited claim on a finding that counsel was ineffective. *See supra* notes 157-59 and accompanying text. As a consequence, prisoners frequently contend that counsel was ineffective as a means of securing review. *See* Kimble v. State, ___ Ind. ___, ___, 451 N.E.2d 302, 307 (1983). One of the better examples of what should not be communicated to a prisoner occurred in Wilkins v. State, ___ Ind. App. ___, 426 N.E.2d 61 (1981). Wilkins was effectively advised that an error occurred, and that a reversal would have been required had the error been preserved and asserted on direct appeal. However, the inadvertence of counsel forfeited the claim. *Wilkins*, ___ Ind. App. at ___, 426 N.E.2d at 63.

that his conviction is just. If error is found and is of sufficient magnitude to require reversal, the prisoner will receive that to which he is entitled—relief from a wrongful conviction. If error is found but is deemed not to have had sufficient impact to justify the conclusion that the conviction was wrongful, the prisoner is clearly advised that his incarceration is not a consequence of legal error, but of his guilt justly determined.

One of the most significant arguments in favor of expeditiously attaching finality to criminal judgments is that allowing delayed collateral attack may cost society the right to punish admitted offenders.[225] The "admitted offenders" language is a reference to guilty plea cases. This cost arises as a consequence of the practical inability of the State to retry a defendant after a lapse of time between the event giving rise to criminal charges and the grant of collateral relief. Such a delay no doubt renders some evidence unavailable either by demise of witnesses, witnesses' loss of recollection or a failure to preserve physical evidence. Since the State carries the burden of proving guilt beyond a reasonable doubt, loss of evidence is usually more adverse to the State than to the accused.

Several points must be made with regard to this particular argument. The argument made here is that an inadvertent default should not foreclose subsequent review on the merits of a claim of error. Let us assume that at some point during the course of criminal proceedings an error is made and that, by reason of inadvertence, no timely objection is lodged. If the case thereafter concludes with a guilty plea, the antecedent error should be deemed waived not by reason of the procedural default, but by the entry of a valid guilty plea.[226] Such a waiver should occur because a valid guilty plea constitutes an admission of factual guilt.[227] An antecedent violation of a

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225. Engle v. Isaac, 456 U.S. 107, 127 (1982).

226. *See* Tollet v. Henderson, 411 U.S. 258, 267 (1973). "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Id.*

227. Note that the United States Constitution does not require that a defendant admit factual guilt as a prerequisite to a court accepting a guilty plea. North Carolina v. Alford, 400 U.S. 25 (1970). However, the *Alford* decision turns, in large part, on the finding that a strong factual basis existed. "In view of the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it." *Id.* at 38.

Moreover, the Indiana Supreme Court has held that Indiana courts may not accept a guilty plea from a defendant who maintains his innocence. Ross v. State, ___ Ind. ___, 456 N.E.2d 420 (1983). In Indiana, a guilty plea necessarily constitutes an admission of factual guilt.

right undermines the integrity of the proceedings because rights are designed to provide a fair and legitimate determination of factual guilt or innocence. The antecedent error may be said to have been rendered moot or waived since the accused admits factual guilt by the entry of a valid guilty plea. After a valid admission of factual guilt there is simply no need to determine whether rights designed to promote a reliable adjudication were given proper adherence because a factually reliable determination has been obtained.[228] Accordingly, guilty plea cases can be excluded from consideration with regard to the argument asserted here since those cases by their nature provide an independent basis on which review may be foreclosed separate and distinct from the question whether an inadvertent default should foreclose such review.

To be responsive to this article's premise that inadvertence should not preclude review, the societal cost argument must be recast in the following form. To permit collateral attack on claims which were the subject of an inadvertent procedural default may cost society the right to punish one who may or may not be guilty because the state's capacity to retry a defendant may be diminished or eliminated by the passage of time. In response to this argument, first note that the risk that the State will be unable to retry the accused is substantially diminished when guilty plea cases are excluded from consideration.

In cases not resolved by a guilty plea, that risk is limited by additional considerations. In cases resolved by bench or jury trial, there exists a record including a transcript of testimony or the ability to produce such a transcript and, presumably, the physical evidence used at the trial. Since the prior testimony was taken under oath and subject to cross examination, it should be admissible in any subsequent retrial.[229] The problem of lost witnesses or failing recollections is therefore simply overstated in the context of cases which were actually tried. The real cost results from the use of dry transcripts which may not be as persuasive as live testimony. Such a cost is not as significant as that suggested by the oversimplified claim that retrial may be impossible. Nor is the actual cost insurmountable. The same could be dealt with by requiring proper maintenance of records.

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228. An exception to the doctrine that a guilty plea waives antecedent claims is the claim that the court which accepted the guilty plea lacked jurisdiction to do so. Blackledge v. Perry, 417 U.S. 21, 30 (1974). In *Perry*, a case decided on double jeopardy grounds, the Court accepted the proposition that the right not to be haled into court at all is one which will not merge with a guilty plea. *Id.*

229. Mattox v. United States, 156 U.S. 237 (1895).

The foregoing discussion demonstrates that the various interests served by finality must be examined in the context of the particular type of collateral attack under consideration in order to determine whether those interests are served or undermined by precluding review.[230] The discussion also demonstrates that the interests served by expeditiously attaching finality to criminal judgments are not as significantly undermined by permitting review of issues inadvertently waived as is commonly assumed by advocates of finality.[231] Nevertheless, those interests, to the extent they remain viable, should be accommodated with the interest served by curative process. The proper accommodation requires a balancing of these interests and clearly involves a value judgment.[232] A more informed judgment can be made after examining the doctrines of accommodation presently utilized in Indiana.

C) Current Doctrines of Accommodation.

1) The Fundamental Error Rule.

To a limited degree, present day doctrines recognize that the contemporaneous objection rule must bend in favor of full litigation in criminal cases. The fundamental error rule is a prime example. Its

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230. For example, assessing the impairment of finality wrought by relitigation of claims would involve considerations much different than does the question addressed herein. Permitting relitigation suggests a complete lack of finality. On the other hand, permitting litigation of claims not previously raised by reason of inadvertence means that finality should attach to claims only after the courts have addressed the same or such claims have been voluntarily abandoned. The difference in the degree of diminishment of finality is obvious. *See also infra* note 231.

231. As suggested in *Langley*, one ought not be able to intentionally withhold claims for purposes of gaining a tactical advantage. 256 Ind. at 206, 267 N.E.2d at 542. Expeditiously attaching finality to judgments prevents such abuse. However, the prevention of abuse argument is devoid of weight in the context of inadvertent defaults. Moreover, principles of fairness suggest the need to distinguish between deliberate and inadvertent defaults in determining the appropriate sanction. Fairness is an appropriate inquiry since the purpose of the entire process is to provide a fair result. Estes v. Texas, 381 U.S. 532, 565 (1965) (Warren, C.J., concurring).

232. The balancing problem is discussed in Hews v. Evans, 99 Wash. 2d 80, 660 P.2d 263 (1983). In *Hews* the court rejected its prior holdings that issues which were known or could have been known but were not raised at trial or on appeal, may not be raised in a collateral attack proceeding. The court found that such a rule was "too blunt an instrument for the delicate operation of determining claims which should be given collateral review." *Hews*, 99 Wash.2d at ____, 660 P.2d at 266 (quoting In re Hagler, 97 Wash. 2d 818, 650 P.2d 1103 (1982)). The Washington court replaced its prior rule with the principle that relief should be granted on a showing of actual prejudice. *Hews* quite clearly represents the conclusion that the forfeiture rule too frequently sacrifices curative process to the desire for finality.

existence adds support to the proposition that procedural defaults should not and do not inevitably preclude review of claims on the merits.[233] The fundamental error rule permits, and perhaps requires, a reviewing court to address errors not properly preserved if the error so taints a trial as to render it unfair and biased.[234] To permit review and relief, the error must be significantly more egregious than that which would merit reversal on direct appeal.[235]

The purpose of the rule was described in *Wilson v. State*[236] wherein defendant's counsel, among other omissions, failed to object to the trial judge's comments that the defendant was perjuring himself or about to perjure himself.[237] On direct appeal, the State argued that the trial judge's conduct in making these remarks was not properly preserved for review for want of a timely trial objection. The court responded as follows:

> With such a record before us, what is our duty? The easy course would have been to examine the motion for new trial and, having found that the errors relied upon are not mentioned therein, to have affirmed the judgment. For such a decision there are many precedents. But in a case involving an appellant's life or liberty we may not ignore prejudicial errors affecting his constitutional rights when, as here, they are clearly and adequately presented in appellant's brief with supporting bill of exceptions. The procedural rules that would prevent their consideration must give way to the fundamental principles of due process. For this course also there are precedents.[238]

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233. The fundamental error rule does not excuse all procedural defaults. *See infra* text accompanying notes 234-45. However, its existence demonstrates the necessity of balancing between finality and fairness and that procedural rules must sometimes bend in the interest of fairness.

234. *See, e.g.*, Lacy v. State, ___ Ind. ___, 438 N.E.2d 968 (1982); Franklin v. State, 266 Ind. 540, 364 N.E.2d 1019 (1977); Winston v. State, 165 Ind. App. 369, 332 N.E.2d 229 (1975).

235. To secure a reversal on direct appeal, a defendant must show error and prejudice resulting therefrom. Brown v. State, ___ Ind. ___, 448 N.E.2d 10 (1983); Smith v. State, ___, Ind. ___, 432 N.E.2d 1363 (1982). The denial of a constitutional right raises a rebuttable presumption of prejudice. Harris v. State, 249 Ind. 681, 231 N.E.2d 800 (1967). On the other hand, the fundamental error rule requires a showing of error that "pervades the climate of the proceedings below, viewed as a whole, depriving the defendant of any realistic opportunity for a fair hearing." Winston v. State, 165 Ind. App. 369, 375, 332 N.E.2d 229, 232 (1975).

236. Wilson v. State, 222 Ind. 63, 51 N.E.2d 848 (1943).

237. *Id.* at 66-7, 51 N.E.2d at 850.

238. *Id.* at 78, 51 N.E.2d at 854.

The basic premise of the fundamental error rule is that one ought not be deprived of his liberty because of the carelessness of defense counsel and of the trial court in failing to prevent error which offends basic notions of fairness.[239] In Indiana, the doctrine has been described by various formulations. The consistent theme of such formulations is that the error must be egregious. Indiana cases suggest that the error must be blatant,[240] or deny fundamental due process,[241] or offend concepts of criminal justice.[242] Moreover, the potential for harm arising from the error must be substantial.[243]

The conclusion to be drawn from fundamental error cases is quite clear and rather simple. When the interest at stake is liberty, procedural defaults do not and should not inevitably prevent correction of significant errors which affect the integrity of the process.[244] The fundamental error analysis assumes that failure to properly preserve an issue precludes review of that issue absent a determination that failure to accord the right at issue rendered the original procedure repugnant to our concepts of basic fairness.[245] Both the right to review of the error and the right to relief from the error are simultaneously determined and turn on the nature of the underlying error and its probable impact.

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239. *See, e.g.*, United States v. Atkinson, 297 U.S. 157 (1936). "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken . . . if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *Id.* at 160. *See also* Young v. State, 249 Ind. 286, 231 N.E.2d 797 (1967). "[O]ne is not to be deprived of his liberty because of carelessness on the part of the trial judge and of defense counsel in failing to call to the attention of this Court a gross error which offends our concept of criminal justice." *Id.* at 289, 231 N.E.2d at 799.

240. Nelson v. State, ___ Ind. ___, ___, 409 N.E.2d 637-38 (1980).

241. Young v. State, 249 Ind. 286, 231 N.E.2d 797 (1967).

242. Wilson v. State, 222 Ind. 63, 51 N.E.2d 848 (1943).

243. Nelson, ___ Ind. at ___, 409 N.E.2d at 638. The federal equivalent, the "plain error rule" is found in FED. R. CRIM. P. 52(b), and states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *Id.* To be a plain error, it must be both "obvious and substantial." United States v. Gerald, 624 F.2d 1291 (5th Cir. 1980), *cert. denied*, 450 U.S. 920 (1981). The plain error rule, however, is not applicable in collateral attacks on a criminal judgment brought pursuant to 28 U.S.C. § 2255. United States v. Frady, 456 U.S. 152 (1982). "[T]he lower court's use of the 'plain error' standard to review Frady's § 2255 motion . . . was contrary to the . . . principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." *Id.* at 166.

244. *See* Screws v. United States, 325 U.S. 91 (1945); United States v. Bosch, 505 F.2d 78 (5th Cir. 1974).

245. *See supra* note 221.

The fundamental error rule's major failing is that it recognizes a right of review which courts of review in most instances are incapable of according. The rule recognizes an obligation on, or at least empowers, such courts to correct errors offensive to our concepts of justice despite antecedent procedural defaults.[246] But curative process, be it direct appeal or post-conviction review, has never entailed an all encompassing review. The litigants or their counsel determine the issues to be presented and which portions of the "trial" record are necessary for the review of those designated issues. Courts of review deal with less than the total record and, with regard to the partial record before such courts, do not and could not engage in any review designed to discover error.[247] Courts rely on the litigants or their representatives to direct the court's attention to particular claims of error. Yet the fundamental error rule recognizes that significant error can occur and be undiscovered by the litigants, their representatives or the court and simultaneously permits or requires that such error be corrected.

The recognition that litigants may fail to identify errors which significantly undermine the integrity of the process coupled with the notion that appellate courts are empowered if not obligated to correct such errors notwithstanding the litigant's default suggest that curative process outside normal channels must be available for purposes of addressing such claims. Post-conviction proceedings serve such a function. Moreover, unless our society is willing to countenance the denial of fundamental due process, this analysis suggests that the scope of review in post-conviction proceedings be at least sufficiently broad to permit the assertion of claims cognizable under the fundamental error doctrine despite an antecedent procedural default.

There is yet another aspect of the fundamental error rule which is relevant to the question whether an inadvertent procedural default should preclude review of claims in post-conviction proceedings. The fundamental error rule recognizes that an inadvertent procedural default does not waive one's right to relief from error which offends society's concepts of criminal justice[248] or denies fundamental due

246. Several cases suggest that a court of review may not ignore such error. *See Wilson*, 222 Ind. at 78, 51 N.E.2d at 854; *Young*, 249 Ind. at 289, 231 N.E.2d at 799. Subsequent cases suggest that review is permissive, not mandatory. *See, e.g.*, Rowley v. State, ___ Ind. ___, ___, 442 N.E.2d 343, 345 (1982).

247. It is not suggested that courts of review conduct such inquiries. The diversion of resources required to accomplish such a task probably would diminish the quality of justice received by all litigants.

248. *See supra* note 239.

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process.[249] The Indiana Supreme Court has defined the relationship between the fundamental error rule and the waiver doctrine as follows:

> Where an alleged error does not rise to the level of fundamental error, it is waived absent a contemporaneous objection.[250]

Each time a court determines that an issue has been waived by procedural default and is therefore not available for review, the court is deciding, consciously or unconsciously, that the claim of error was not fundamental error. Although one may argue that Indiana appellate courts are cognizant of the implicit determination underlying a finding of waiver, the decisions do not suggest that this is the case. Unless a question of fundamental error is raised by a litigant, the Indiana courts will reach a waiver conclusion without addressing the claim of error on the merits.

Such a procedure is inconsistent with the logic of the fundamental error doctrine. One cannot determine whether an error is fundamental error unless and until it is determined that there was error. There is no authoritative list for determining whether an error is fundamental error. Fundamental error is a matter of circumstances requiring an inquiry into circumstances.[251] Thus, the assumption underlying the fundamental error rule, i.e., that an inadvertent procedural default does not divest a litigant of the right to relief from significant error, requires an appraisal of the merits of the claimed error to determine its nature and impact. Furthermore, to conclude that a litigant must denominate his claim as involving fundamental error to trigger a right to review on the merits would be inconsistent with the basic premise of the rule. A timely objection to such error is not a predicate to vindication because correction of such error is intended to vindicate the integrity of the adjudicatory process.[252] If this rationale requires such error to be addressed despite a procedural default, no burden should be placed on a petitioner to claim the benefit of the rule.

At present, a post-conviction petitioner can obtain review on the merits of his claim by denominating the claim as fundamental error. While the Indiana Supreme Court has stated its displeasure with such

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249. *See supra* note 238.

250. Lacy v. State, ___ Ind. ___, ___, 438 N.E.2d 968, 970 (1982).

251. *See* Crosson v. State, ___ Ind. ___, 410 N.E.2d 1194 (1980) (error considered in context of entire trial); Roberts v. State, ___ Ind. App. ___, 419 N.E.2d 803 (1981) (character of error evaluated in light of its effect on trial as a whole).

252. Good v. State, 267 Ind. 29, 366 N.E.2d 1169 (1977).

conduct,[253] the same seems clearly designed to circumvent the otherwise automatic invocation of the contemporaneous objection rule which would preclude review. Denominating a claim as fundamental error forces the court to do what it should be doing in the first instance—addressing the merits to determine whether the nature and impact of the claimed error are sufficiently egregious to excuse the procedural default and require the grant of relief.

The foremost reason for favoring such an approach is institutional integrity. If the purpose of the entire process is to provide a fair and legitimate determination of guilt or innocence, permitting devices of curative process to fulfill that function gives validity to the result. This is only true, however, if the justness of the result is examined on the merits.

Moreover, when a court of review addresses a claim on the merits it promotes the application of uniform standards by lower courts. This result occurs for two reasons. First, a decision on the merits defines the controlling substantive or procedural law. The act of defining the law provides the guidance which courts of review are supposed to provide and promotes uniformity by advising trial courts of the nature of the rules. Second, the availability of review promotes the actual application of such rules by trial courts in that relief is assured if a deviation occurs.[254] Thus, review on the merits by appellate courts promotes uniformity and, more importantly, promotes the actual application of rules designed to provide a fair and reliable result; it therefore reinforces the system's goal of reaching a fair and legitimate result.[255]

While it is suggested that the premises supporting the fundamental error rule require review on the merits of all claims of error, it is not suggested that relief be limited to those cases meeting the fundamental error standard of reversal. The doctrine assumes the validity of the underlying proposition that forfeiture is necessary to protect the interest served by attaching finality to judgments but would find that those interests must yield to the need for curative process in cases of gross error.[256] The focus of the rule is misdirected.

It is submitted that while the question whether relief should be

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253. Kimble v. State, ___ Ind. ___, ___, 451 N.E.2d 302, 307 (1983).

254. L. ORFIELD, CRIMINAL APPEALS IN AMERICA 33-4 (1939).

255. *Id.* at 33.

256. The validity of the first proposition regarding the necessity of forfeiture is certainly debatable. *See supra* notes 200-29 and accompanying text.

granted properly turns on the nature of the error, the question of entitlement to review should normally turn on conduct.[257] An error which affects or otherwise significantly impairs the judgment is the same error whether or not properly preserved and regardless of whether it is asserted on direct appeal or collateral attack. Moreover, the purpose of the entire process, including curative process, is to provide a reliable and legitimate determination of guilt or innocence. Either the presence of error sufficiently impairs the integrity of the result so as to require a new determination be made or it does not. If a determination of guilt would be deemed sufficiently unreliable to require relief on direct appeal it must be deemed unreliable when tested in any other proceeding. The nature of the error does not change. If relief is to be denied it must be denied because the petitioner is not entitled to review of the claimed error.

The refusal to review is obviously a sanction. Such sanctions exist today in the form of forfeitures imposed pursuant to the contemporaneous objection rule. It is not suggested that sanctions are never appropriate. Rather, the present point is that if a sanction is imposed it is clearly predicated on conduct. At present, the conduct which results in forfeiture under the contemporaneous objection rule is the

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257. It is not suggested that all rights are susceptible to surrender by the conduct of an individual defendant. *See generally* Rubin, *supra* note 13, at 493-94. Examples might include the restraint on government which prohibits incarceration of citizens in penal facilities absent conviction for a crime, and the restraint which prohibits conviction for non-existent crimes. Correction of such error is not intended for the benefit of the accused but rather to preserve the integrity of the adjudicatory process. Thus, even if the defendant does not desire correction of such error, correction must occur. Moon v. State, 267 Ind. 27, 29, 366 N.E.2d 1168-69 (1977) (defendant pled guilty to non-existent offense). Obviously, the occurrence of error of this magnitude is very rare. Indiana courts apparently recognize two types of fundamental error. The first type is of the nature identified in *Moon* and constitutes a separate type since the same apparently is not subject to waiver. The second type is error which meets the test of having denied the defendant due process but which is subject to express waiver. Rowley v. State, ___ Ind. ___, ___, 442 N.E.2d 343, 345 (1982) (defendant waived reading of the final instructions to the jury). In *Rowley*, the court held that a litigant could waive his right to a reading of the final instructions for tactical reasons. The waiver must be express. *Id.* Prior to *Rowley*, the Indiana Supreme Court had held that the trial court's failure to instruct the jury constituted fundamental error. Drake v. State, 271 Ind. 400-01, 393 N.E.2d 148 (1979). Apparently, violation of the right to have final instructions read was not deemed to significantly undermine the integrity of the process. No other basis would appear to justify the inconsistency between *Moon* and *Rowley* regarding waiver of fundamental error.

The suggestion here is simply that the first level of inquiry to determine whether a litigant is entitled to post-conviction review after a procedural default is that involving the litigant's conduct. Was the default intentional or inadvertent?

failure to object regardless of whether the omission is deliberate or inadvertent.

It is submitted that one ought not lose a right intended to promote a reliable determination unless as a product of conscious decision-making. In matters involving liberty, one should not suffer the loss of rights designed to provide a fair and reliable result absent a voluntary surrender of those rights. Further, many of the interests served by finality relate to conduct, such as deterring intentional sandbagging or fostering good lawyering. It therefore seems reasonable to suggest that any doctrine of accommodation ought to focus first on conduct rather than the nature or impact of claimed error in determining whether there is an entitlement to review.[258]

Moreover, the fundamental error rule's use of a different standard of reversal—requiring error more egregious than that required on direct appeal—undermines the integrity of the system. A judgment is either legitimate and reliable or illegitimate and unreliable. A determination of guilt does not become more reliable or acquire legitimacy by reason of being tested by a more rigorous standard for reversal. Rather than focus on the quality of the error, the inquiry to determine the right to review should first relate to the conduct of the petitioner.

Any system which ties the entitlement to review solely to the nature of the error should be rejected for failure to address the central question—is the litigant entitled to the protection of a right or has he by his conduct, actual or imputed, given up that right? As a corollary, all systems of curative process should determine the reliability of the judgment under review by a singular standard if for no other reason than to maintain the integrity of the system. Entitlement to review and the right to relief are distinct concepts which should be treated separately.

2) The Mitigating Circumstances Rule.

The perception that only the presence of egregious error will excuse an antecedent procedural default is also reflected in the second

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258. The courts seem preoccupied by the prospect of a litigant intentionally "sandbagging." *See Wainwright*, 432 U.S. at 89; *Langley*, 256 Ind. at 206, 267 N.E.2d at 542. Certainly such conduct should be penalized. But if the primary concern is the prevention of such intentional conduct, the remedial device used to sanction such conduct should be more discriminatory in application than is the forfeiture rule, i.e., inadvertent conduct should not be punished in the same fashion as is intentional conduct. *See supra* notes 215-17 and accompanying text.

doctrine of accommodation of relevance here—the "mitigating circumstances" rule. This rule has been construed in Indiana case law as requiring a post-conviction petitioner to demonstrate a violation of his right to effective assistance of counsel before being excused from the application of the contemporaneous objection rule.[259] Under the mitigating circumstances rule, much like the fundamental error rule, the right to review of the claimed error and the right to relief from the error is simultaneously determined. The precise nature of the rule and its general deficiencies have already been explored.[260] It is sufficient to note that the mitigating circumstances rule "excuses" the prior procedural default only if a petitioner demonstrates the existence of an independent ground for relief—violation of the right to counsel. Once such a violation is proven, the underlying claim of error is superfluous. This reality suggests that the rule imposes far too high a burden of justification on the petitioner.

Whether the limitations to review and relief imposed by the fundamental error rule and the mitigating circumstances rule are justified is simply a restatement of the original question posed in this article. That is, what accommodation is required to protect the State's interests in finality and yet fulfill the function of curative process in the context of claims which were the subject of an inadvertent procedural default? The thesis asserted here is that an inadvertent default should not bar review of a claim on the merits in post-conviction proceedings.

VI. CONCLUSION

Review of claims in post-conviction proceedings should be denied by reason of an antecedent procedural default only if the default was knowing, intelligent and voluntary. The language of P.C. 1 requires such a finding before a litigant is deprived of the opportunity to assert a claim which was not properly preserved. However, one need not rely on the rule to support this conclusion. The costs associated with permitting such review are significantly outweighed by the benefits derived.

The nature of the interests served by attaching finality to criminal judgments has often been ill defined.[261] Finality arguments tend to be stated in terms so broad that such arguments are of little use. A meaningful assessment of those interests can occur only in the context of the particular type of collateral attack being permitted.[262] The

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259. *See supra* notes 165-72 and accompanying text.
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261. *See supra* notes 199-225 and accompanying text.
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cost or impairment of those interests which results by permitting the assertion of claims which were subject to an inadvertent procedural default are real but do not appear overwhelming or insurmountable.[263] On the other hand, the benefits of permitting such review are substantial.

Review of such claims compels curative process to accomplish its intended function—to ascertain whether the result constitutes a fair and legitimate determination of guilt. If we assume the necessity of curative process as inherent in our shared values of fairness in process and result, fulfilling that function is in itself a significant benefit. The chief function of curative process is to see that justice has been done.[264] One cannot make such a determination without addressing the merits. Moreover, addressing issues on the merits forces an appellate court to accept and discharge its leadership role in defining the standards by which we determine whether a fair and reliable result has been obtained.

The costs associated with refusing such review are substantial. Precluding review because of inadvertence, usually counsel's inadvertence, unduly punishes a defendant and robs the system of the ability to determine whether the result reached is fair and legitimate. Such cost could be avoided, the state's interests in finality served, and meaningful curative process be made available by use of a less drastic alternative.

The proposal suggested here is to place the burden of demonstrating that the antecedent procedural default was not a knowing, intelligent and voluntary waiver on the post-conviction petitioner.[265] Obviously such a waiver would not arise by inadvertent omissions. This rule would prevent abuse of process or sandbagging

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263. *See supra* notes 199-225 and accompanying text.

264. L. ORFIELD, CRIMINAL APPEALS IN AMERICA 32-4 (1939).

265. This is the approach resembling, at some level, that suggested in ABA STANDARDS, *supra* note 6, at § 22-6.1(c)(ii). "Where a rule or procedure . . . requires that specified defenses or objections be presented at a certain time, and an applicant raises in a post-conviction proceeding an issue that might have been but was not presented in a timely manner . . . the applicant should be required to show cause for the failure to comply with the rule of procedure." *Id.* A showing of "cause" for a procedural default and prejudice resulting therefrom is also required of state prisoners seeking federal habeas relief pursuant to 28 U.S.C. § 2254. *See* Wainwright v. Sykes, 433 U.S. 72 (1977). Such a showing is also required of federal prisoners on collateral attack pursuant to 28 U.S.C. § 2255. *See* United States v. Frady, 456 U.S. 152 (1982). Some courts have held or suggested that inadvertence of counsel constitutes cause. *See, e.g.*, Rachel v. Bordenkircher, 590 F.2d 200, 204 (6th Cir. 1978); Tyler v. Phelps, 662 F.2d 172, 178 n.10 (5th Cir. 1980). *But see* Engle v. Isaac, 456 U.S. 107, 134 (1982).

and yet permit relief for the defendant who has not engaged in such conduct. An incentive would still exist for counsel and client to avoid error at the first opportunity. That incentive is the avoidance of a wrongful conviction and the incarceration which follows until relief is accorded.

By addressing claims of error on the merits, the court of review would serve the state's interest in rehabilitation. The message communicated to a prisoner would cease to be that the justness of the incarceration is not subject to review because of an inadvertent default. Rather, the message is either the conviction was just or it was unjust.

Moreover, such a course would recognize the sanctity of the safeguards which attach to criminal trials by recognizing that the loss of such safeguards diminishes the integrity of the result and therefore requires scrutiny of that result. These benefits come at no cost to judicial efficiency because the doctrine primarily employed at present, the mitigating circumstances rule, effectively requires examination of counsel's total trial conduct. If a court utilized the proposal suggested herein, the scope of the inquiry would actually be narrowed to one segment of the trial—the claim of error asserted and whether counsel's conduct in failing to assert the claim was deliberate.

The Indiana Supreme Court was correct when it recognized that justice and fairness require that a defendant be provided with an opportunity to test the correctness of his conviction in post-conviction proceedings.[266] The time has come for fulfillment of the promise implicit in that recognition.

266. Langley v. State, 256 Ind. 199, 203, 267 N.E.2d 538, 540 (1971).