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POST CONVICTION REMEDY PROCEDURES IN INDIANA

[I]t may be said that one of the functions of our post conviction remedy rules is to preserve what sanctity remains to this state's disposition of a criminal charge by allowing a convicted criminal defendant ample opportunity to present claims for relief in the courts of this state before resort must be had to the federal courts.

That is how Judge Hunter of the Indiana Supreme Court characterized the plight of state courts regarding direct and collateral criminal appeals. He asserted that, as a result of rulings by the United States Supreme Court in Townsend v. Sain and Fay v. Noia, the "very integrity of a state's criminal proceeding" is being impugned by the readiness of the federal courts to accept habeas corpus petitions from unsuccessful defendants in state criminal prosecutions. In providing avenues of collateral relief from state convictions, the state courts must face the problem of inviting frivolous appeals, which not only consume court and prosecutorial resources, but delay the adjudication of petitions by genuinely aggrieved defendants. The purpose of this note is to examine Indiana's attempt to resolve the problem with a variation of the American Bar Association's Uniform Post-Conviction Procedure Act. The Indiana version is essentially the same as the uniform act. While it is plagued by a number of inherent faults, the Indiana post conviction relief procedure provides a consolidated method by which a person convicted of a crime is able to seek collateral relief from the conviction.

I. Definition

The term "post conviction relief" will be utilized often and should be defined. While the words themselves connote any proceeding after a conviction, their use here refers only to collateral attacks upon a conviction. Neither appeals taken directly from a conviction nor pre appeal motions made in the trial court will be considered. This definition is consistent with that promulgated by the American Bar Association's Advisory Committee on Sentencing and Review—Standards Relating to Post-Conviction Remedies in the comments to the Second Revised Uniform Post-Conviction Procedure Act. Included within this definition are diverse common law and statutory remedies:

4. 267 N.E.2d at 541.
5. ABA ADVISORY COMMITTEE ON SENTENCING AND REVIEW—Standards Relating to Post-Conviction Remedies 102 (1968) (hereinafter cited as ABA REPORT). The uniform act has been adopted in four states other than Indiana according to the last supplement to Uniform Laws Annotated which was released in 1967 for use in 1968. The four states are Maryland, Montana, Oregon and South Dakota. The handicaps of utilizing the various common law and statutory post conviction remedies will be more fully developed later. Suffice it to say that the plethora of such remedies and their more complex procedures necessitates adoption of a procedure which consolidates the remedies available to a petitioner. Such is the purpose of the uniform act and consolidation, in some form, appears to be necessary to meet the standards of Sain and Noia.
6. ABA REPORT at 23.
Principal among them are the common law or statutory writs of habeas corpus, the common law or statutory writs of error coram nobis (or coram vobis), the motion for new trial on newly discovered evidence; the motion to vacate, set aside or correct sentence; the motion to correct illegal sentence; the motion to withdraw a plea of guilty; petition for leave to take a *nunc pro tunc* appeal (or to reopen an appeal).

The uniform procedures, then, provide a consolidated means by which a criminal defendant can test the merits of claims.

In jurisdictions providing for nonconsolidated exercise of these various methods of collateral review there tends to be needless "duplication and overlapping, with resultant uncertainty as to the individual scope and purpose of each." In an effort to bring order to the field of post conviction remedies, the American Bar Association adopted a Uniform Post-Conviction Procedure Act in 1955 and approved the second revised draft in 1968. Indiana's version, *Indiana Rules of Procedure for Post-Conviction Remedies*, became effective August 1, 1969.

II. Constitutional Background

Judge Hunter's fear for the sanctity of state court criminal procedures was prompted by two 1963 United States Supreme Court decisions, *Townsend v. Sain* and *Fay v. Noia* were destined to be the focal points of a heated controversy over the United States Supreme Court's determination to protect the constitutional rights of persons convicted of crimes in state courts. As its vehicle the Court chose the Great Writ—habeas corpus.

When Townsend, a convicted murderer sentenced to death, petitioned the United States District Court for the Northern District of Illinois for a writ of habeas corpus, challenging the admissibility of a confession obtained while he was under the influence of what he asserted to be a truth serum, the district court summarily dismissed the petition. The petition was dismissed in deference to the state

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7 Id. at 24.
8 "Combinations of them exist, or are thought to exist, in most jurisdictions." ABA REPORT at 24.
9 Id.
11 We do well to bear in mind the extraordinary prestige of the Great Writ, *habeas corpus ad subjiciendum*, in Anglo-American jurisprudence: "The most celebrated writ in the English law." 3 Blackstone Commentaries 129. It is "a writ antecedent to statute, and throwing its root deep into the genius of our common law. . . . It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I." *Secretary of State for Home Affairs v. O'Brien*, (1923) A.C. 603, 609 (H.L.). Received into our own law in the colonial period, given explicit recognition in the Federal Constitution, Art. I, § 9, cl. 2, incorporated in the first grant of federal court jurisdiction, Act of September 24, 1789, c. 20, § 14, 1 Stat. 81-82, habeas corpus was early confirmed by Chief Justice John Marshall to be a "great constitutional privilege." *Ex parte Bollman and Swartwout*, 4 Cranch 75, 95.
12 The People v. Townsend, 11 Ill. 2d 30, 141 N.E.2d 729 (1957).
court record which lacked any specific findings of fact or conclusions of law dealing with the critical confession despite the conflicting evidence which appeared in the trial court. The district court decision was upheld by the United States Court of Appeals for the Seventh Circuit which saw no denial of any federal constitutional rights. The United States Supreme Court did not agree.

Chief Justice Warren, writing for the Court, found error in the district court’s denial of the petitioner’s claim without having conducted any evidentiary hearing. The opinion went on to mandate an evidentiary hearing by the federal district court in any case where it appeared the state court had not given the defendant a full and fair hearing on the merits of his federal claims, either at the trial or at a collateral proceeding. The Court ruled that unless the state court trier of facts has “reliably found the relevant facts,” the federal district court must receive the petitioner’s evidence and determine for itself the merits of any asserted abridgments of his federally guaranteed rights. No longer was there any doubt about the authority of the federal courts to intervene in support of a petitioner’s federal constitutional rights where they had been inadequately safeguarded by a state court.

Supplementing its opinion in Townsend, the Supreme Court ruled in Fay v. Noia that a state court could not reject a claim of deprivation of a petitioner’s constitutional rights on the sole ground that procedural errors by the petitioner constituted a waiver of that right. Noia, after receiving a life sentence following his conviction in 1942 for committing murder in the perpetration of a robbery, elected not to appeal. When Noia’s codefendants did appeal and were subsequently released, Noia petitioned the state court for a coram nobis review. The state court predicated its denial of his petition on his failure to make a timely appeal, which, in the court’s opinion, constituted a waiver of his right to do so.

A similar result was reached in the federal district court upon Noia’s subsequent petition for habeas corpus when that court found there was a failure to exhaust state remedies when Noia elected not to appeal. The court conceded, however, that petitioner’s confession had been coerced. The United States Court of Appeals for the Second Circuit reversed the decision of the district court and the Supreme Court affirmed.

The majority in Noia made it clear that the district court gains jurisdiction of such cases upon the allegation that a defendant has been denied a federal

13 Townsend v. Sain, 276 F.2d 324, (7th Cir. 1960).
15 Id. at 317.
16 Id. at 312-313.
17 We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing. Id. at 313.
18 After state collateral proceedings found their convictions were violative of the fourteenth amendment to the United States Constitution, Noia’s alleged accomplices in the robbery were released from prison.
constitutional right by a state court. Regardless of state criminal procedural rules, a defendant must not be deprived of his federal rights. If they were denied, relief may be obtained in federal district courts. Even in cases where a defendant has negligently or inadvertently acted in a manner that was considered a waiver of a constitutional right in a state proceeding, Justice Brennan reasoned that the defendant should still be given a habeas corpus hearing. There was no state interest sufficient to compel a federal court to deny relief to a petitioner whose constitutional rights had been denied, notwithstanding any waiver doctrine or procedural error on the part of the defendant.  

III. Impact of Noia

Prior to Noia federal courts relied upon 28 U.S.C. § 2254 to deny relief to petitioners who had run afoul of state procedural rules. The federal courts reasoned that the “exhaustion of remedies” doctrine prohibited them from hearing habeas petitions from defendants who had failed to make timely appeals directly from their convictions. The final vestiges of this restrictive view were dissolved when the Court held “that § 2254 is limited in its application to failure to exhaust state remedies still open to the habeas applicant at the time he files his application in the federal court.” The ruling opened the federal courts to those defendants who had failed to make a timely appeal as well as to the applicant whose appeal was adversely decided. It is this aspect of the decision which prompts statements like that of Judge Hunter’s decrying the decision as improvidently made and predicting dire consequences from the assumption of such preeminence by the federal courts.

The decisions in Noia and Townsend were prompted not by megalomania in the federal judiciary, but by frustration with state procedures which placed Noia in a position of having to choose between the equally unsavory options of making an appeal with the risk of a re-trial where a death sentence was possible or spending a life sentence in prison as the result of a coerced confession. Equally objectionable, a much more common problem was the defendant whose court-appointed lawyer had failed to object to the admission of an unconstitutionally obtained confession or had neglected to include in a bill of exceptions the failure of the state to prove an essential element of its case. The Court’s message was plain—either the states would provide adequate means for a defendant to maintain his constitutional objections or the federal courts would take habeas petitions and conduct evidentiary hearings anew.

IV. Indiana’s Post Conviction Remedy Rules

One state’s response to the Court’s message is the Indiana Rules of Procedure

19 Id. at 433.  
20 28 U.S.C. § 2254 (c). “An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.”  
for Post-Conviction Remedies. This procedure effectively consolidates the numerous common law and statutory means of collateral relief. The procedure is expressly not a substitute for direct appeal and is unavailable to those who still have an available means of direct appeal or who could obtain delayed appeal by use of the provisions of PC 2 (Indiana Post-Conviction Remedies Rule 2). Just as a defendant must exhaust all of his state remedies prior to requesting a federal habeas hearing, he must exhaust all direct appeal procedures prior to filing a PC 1 motion. The Indiana act supplants the common law and statutory remedies previously noted.

A petitioner need make only one petition irrespective of the relief sought. In order to facilitate the petitioner, a form application was designed and appended to the rules. This form is simple in format and conducive to pro se petitions. The rules further provide that upon receipt of a PC 1 petition and an affidavit of indigency (the form for which is also appended to the rules) the public defender shall serve as counsel for the petitioner. Every petitioner, prior to any evaluation by the court of the merits of a PC 1 motion, has access to the public defender to aid him in the preparation and hearing of his motion, plus any necessary appeal. The petitioner may at his election retain private counsel or proceed pro se. Should the petitioner avail himself of the public defender, the rules require the public defender to discuss the motion with the petitioner and, if necessary, to amend the motion to include grounds of possible relief which the petitioner omitted from his original petition. This procedure is apparently designed to present to the trial court any remaining issues which could be grounds for relief which have not been fully and fairly determined previously. By so doing the possible grounds for federal habeas relief may be reduced and each potential petitioner will be afforded a full hearing at the state level.

V. Frivolous Claims

A logical concomitant of simplified procedures for post conviction relief is an increase in the number of such petitions. This increasing number of claims

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23  PC 1 (b).  PC 2 reads in part as follows:

**SECTION 1.** Any defendant convicted after a trial or plea of guilty may petition the Court of conviction for permission to file a belated motion for a new trial, where:

(a) no timely and adequate motion to correct errors was filed for the defendant;
(b) the failure to file a timely motion to correct errors was not due to the fault of the defendant; and
(c) the defendant has been diligent in requesting permission to file a belated motion to correct error under this rule.

If the trial court finds such grounds, it shall permit the defendant to file the motion, and the motion shall be treated for all purposes as a motion to correct errors filed within the prescribed period.

24  PC 1 (b).  While the drafter did retain the writ of habeas corpus, whenever such a petition is made, the court having jurisdiction over the person of the petitioner is to transfer the cause to whatever court heard the case which rendered the challenged conviction or sentence and that court will treat the transferred cause as if it arose as a PC 1 motion. Whether the drafters could simply not condone total abandonment of the Great Writ or retained it in name for other reasons is uncertain, but the practical result is that the writ of habeas corpus has been merged with the other remedies under PC 1.

25  PC 1 (9) (a).

26  PC 1 (4) (c).
brings with it an ever-increasing number of frivolous petitions. Justice Clark, in
his dissent in Noia, recognized this phenomenon as one which would occur in the
area of federal habeas corpus proceedings following the Court's relaxation of the
requirements. Indeed it was his opinion that as many as ninety-eight per cent of
all federal habeas corpus petitions would be of a frivolous nature.\textsuperscript{27}

The drafters of the Uniform Post-Conviction Procedure Act, which is
essentially the same as Indiana's act, also recognized the likelihood of unmeritori-
ous petitions and suggested that they are often filed merely to allow the petitioner
a trip away from the prison for a day or two.\textsuperscript{28} Frivolous appeals will continue
to be filed and must be considered as an undesirable but an unavoidable by-
product of any attempt to formulate a sufficiently protective post conviction
remedy system. The question remains as to how most efficiently to dispose of these
frivolous petitions without undermining the procedure for handling meritorious
claims.

State courts are faced with the problem of developing a system of disposing
dispose of frivolous appeals and protecting the valid rights of petitioners in accordance
of the Townsend and Noia decisions.\textsuperscript{29} The Indiana act has provided several
methods for summary disposition of those petitions which on their face lack merit.
As previously observed, the drafters of the uniform act contemplated such sum-
mary disposition. The trial court upon its own evaluation of the pleadings may
deny the petition without a hearing or other proceeding if it is satisfied that the
"pleadings conclusively show that the petitioner is entitled to no relief."\textsuperscript{30} This is
a drastic measure and it should be utilized with great caution. The trial court
is required to file specific findings of fact and conclusions of law even though
there is no hearing\textsuperscript{31} which is a difficult task with only pleadings and no evidence.
There will, however, be instances, when such dismissal would be proper. Where
a petitioner alleges that the trial judge erred by not instructing the jury on the
law of lesser included offenses, for example, if the state then cites uncontroverted
precedents holding that there are no lesser included offenses in the stated charge,
the court could grant a motion by the state for judgment upon the pleadings.

The rules specifically provide that a court may grant summary disposition
of any petition upon the motion of either party. When presented with a motion
for summary disposition, the courts are directed to consider "the pleadings,
depositions, answers to interrogatories, admissions, stipulations of fact, and any

\textsuperscript{27} Fay v. Noia, 372 U.S. 391, 445 (1963). Justice Clark's computation is subject to the
criticism that merely because a petition for federal habeas is not granted it should not, for
that reason alone, be deemed "worthless," his basic contention that many of the petitions are
frivolous seems well taken.

\textsuperscript{28} ABA REPORT at 69.

\textsuperscript{29} The ABA Minimum Standards for Criminal Justice Committee has suggested that in
order to determine an appeal frivolous it is necessary to have a hearing consistent with the
Due Process Clause thus, instead of developing means of eliminating frivolous appeals, courts
should concentrate on streamlining their appellate procedure. One proposal for such stream-
lining is contained in, Note, Some Observations on Waiver in Indiana Criminal Appeals: The
Substantial Re-Adoption of Rule 1-14B in Trial Rule 59, 45 IND. L.J. 292 (1970). The Ind-
iana Supreme Court, despite frequent dissents by Justice DeBrular, has given the impression
recently that procedural technicalities will be more severely scrutinized on direct appeal.

\textsuperscript{30} PC 1 (4) (e).

\textsuperscript{31} PC (5).
affidavits submitted,” and only if there is no genuine issue of material fact is the court allowed to grant summary disposition. Since under the Indiana procedure any “rules and statutes applicable in civil proceedings including pre-trial and discovery procedures are available to the parties,” the court should have adequate evidence before it on the issues presented. In addition, the court may order oral argument on legal issues when considering a motion for summary disposition. Where, for example, a petitioner alleges that prospective jurors were excused for cause upon their expressing hesitation to apply the death penalty, summary judgment would be proper upon the submission by the state of an uncontroverted affidavit from the trial judge that only those who refused to follow the existing state law regarding the death penalty were excused for cause. But should the petitioner present a counter-affidavit from an individual claiming to have been a prospective juror who was excused for cause only for saying he would hesitate to apply the death penalty, then an issue of fact would have been created upon which no summary judgment would be proper.

A more difficult question is posed when a petitioner raises an issue such as whether a particular statement made by the prosecuting attorney, in closing argument, was prejudicial where no transcript of the closing argument was made and no objection taken by the defendant at trial. This then raises the question of when waiver may be claimed by the state to defeat a petitioner’s claim. A similar dilemma arose in the appeal of a convicted murderer to the Indiana Supreme Court. The court replied: “A party may not sit idly by and make no objections to matters he might consider prejudicial, awaiting the outcome of a trial, and thereafter raise such question for the first time.” When the petitioner then raises the same issue under PC 1, the trial court must decide whether it was through inadvertence not chargeable to the defendant or through a knowing and intelligent election of tactics that the objection to such statements was not raised at trial.

There is no doubt, even under the Townsend and Noia decisions, that a defendant’s knowing and intelligent waiver is chargeable to him, thus foreclosing review.

VI. Indiana Supreme Court Interpretations of PC 1 and PC 2

One of the initial interpretations of Indiana’s post-conviction rules came in the 1969 case of McKinley v. State. McKinley was convicted of armed robbery and his trial counsel neglected to include in the bill of errors that the state failed to prove violence as alleged in the charging affidavit. When an appeal was sought on the issue, the Indiana Supreme Court declined since the issue had not been properly preserved, but noted the availability of PC 1:

- PC 1 (4) (f).
- PC 1 (5).
- PC 1 (4) (f).
Thus, by availing himself of the provisions of Rule PC 1 the appellant will afford himself an avenue for appellate review of alleged errors committed by the trial court in the trial which resulted in his conviction, and at the same time provide the trial court an opportunity to correct any alleged errors prior to review by this Court.\textsuperscript{39}

Apparently the Supreme Court of Indiana was indicating that virtually any issue could be raised under Rule PC 1, irrespective of its proper preservation.

The \textit{McKinley} decision was followed in 1970 by \textit{Lipps v. State}, wherein the court accepted a technically deficient appeal, noting that "post conviction relief is now available for those whose appeals have been adversely decided on procedural grounds," and that if the court declined to hear the appeal at that time due to its being technically deficient, the result would only be to "create additional burdens later on for both this Court and the trial court since the appellant may pursue post conviction relief under either Rule PC 1 or PC 2."\textsuperscript{40} Once again the Indiana Supreme Court apparently indicated the broad scope of its intentions with regard to the post-conviction procedures.

A further clarification came when the Indiana Supreme Court refused to consider the issue of incompetence of counsel raised by defendant on appeal when the issue was not preserved in the defendant's motion for new trial in \textit{Ayad v. State}.\textsuperscript{41} The court did remind the appellant that his "only remedy at this time on the question of incompetence of trial counsel therefore would be under the post-conviction remedy rules."\textsuperscript{42} Even though the waiver doctrine blocked the defendant from directly appealing his conviction, the Indiana Supreme Court held open the post conviction remedy route.

It was not until 1971 in \textit{Langley v. State},\textsuperscript{43} that the court enunciated a limitation upon its willingness to allow defendants to utilize the PC 1 motion to review an otherwise waived issue.

It was not our intent, however, to provide a means whereby one convicted could repeatedly re-litigate claims of improper conviction, or could unqualifiedly, upon a legitimate waiver of the right to appeal either expressly made or to be inferred through application of appropriate legal principles, raise an untimely challenge directed at some aspect of the proceedings against him.\textsuperscript{44}

The court went on to discuss the function of waiver where there has been a failure to make a timely appeal:

Notwithstanding the guarantee of direct appellate review of a criminal proceeding, it is well settled that a defendant, through a variety of circumstances, may waive his right to appeal. . . . This is not to say that a petitioner must first establish the fact that no waiver has occurred in relation to a particular error from which relief is sought in order to obtain a hearing.

\textsuperscript{39} Id. at 194, 252 N.E.2d at 423.
\textsuperscript{41} 254 Ind. 430, 261 N.E.2d 68 (1970).
\textsuperscript{42} Id. at 433, 261 N.E.2d at 70.
\textsuperscript{43} ___ Ind. ___, 267 N.E.2d 538 (1970).
\textsuperscript{44} Id. at ___, 267 N.E.2d at 540.
It would, however, be a matter which the state might urge as a basis for denying relief. It is therefore apparent that upon being properly raised, the matter of waiver and the collateral issues necessarily involved should be of initial concern to the P.C. hearing.45

The court then explained when waiver may be raised by the state to defeat alleged errors not objected to at the time of trial.

[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 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.46

From the above reasoning it can be inferred that if counsel is competent, then tactical decisions which he makes are binding upon a criminal defendant. If this is the proper inference, Indiana's procedure does not meet the standards approved by Noia which required that for a waiver to exist there must be "an intentional relinquishment or abandonment of a known right or privilege" and before such a waiver is applied the defendant must have consulted "with competent counsel or otherwise, understandingly and knowingly" foregone his rights.47 If McKinley remains the law in Indiana, Judge Hunter's fears of the federal habeas corpus proceeding may be well-founded.

In what circumstances then, may waiver, once raised by the state, be overcome by a petitioner? In Langley, the Indiana Supreme Court stated:

For relief to be granted where the element of waiver has been introduced at the post conviction hearing, there must be some substantial basis or circumstance presented to the trial court which would satisfactorily mitigate a petitioner's failure to have pursued or perfected a remedy through the normal procedural routes.48

The court does not attempt to set forth those circumstances which would negate a waiver, but it does specifically point out the inappropriateness of binding a petitioner by a waiver when his trial counsel was incompetent:

Where the effectiveness of trial counsel's assistance is itself one of the grounds urged for relief, the defense of waiver would only be appropriate where it could be shown that petitioner knowingly, voluntarily and intelligently waived the right to assert the issue . . . .49

Here the court applied the proper test of waiver, yet limited its application to those petitioners who proved their trial counsel incompetent.

The above limitation does not appear to comport with the standards for waiver enunciated by the United States Supreme Court in Noia. As previously

45 Id. at ———, 267 N.E.2d at 541-42.
46 Id. at ———, 267 N.E.2d at 542.
49 Id. at ———, 267 N.E.2d at 545.
noted, the Noia Court accepted the definition of waiver set forth in *Johnson v. Zerbst* which clearly required the waiver be by the defendant. Unless it can be seriously suggested that by selecting competent counsel a defendant foregoes any defense which his counsel's actions are deemed to have waived, then the Indiana rules are below the standards of *Fay v. Noia*.

The alternative would be a finding by the Indiana Supreme Court that counsel is incompetent if he does not either perfect every possible issue for appeal or fully explain his tactical decisions to a defendant in order to bind him by counsel's actions. Neither of these alternatives are practical—the first due to patent impossibility; the second for reasons of efficiency and tactical trial procedure beneficial to both the defendant and the state. While counsel should always seek to inform a defendant of his reasons for particular trial decisions, there are times in a trial when counsel must immediately decide upon the propriety of an objection and a conference with the defendant is simply impossible. If Indiana abides by the criteria for establishing the validity of a defendant's waiver set forth in *McKinley*, then the rules intended to preserve the "sanctity" of Indiana's criminal procedure will fail to provide a full and fair hearing of a petitioner's claims where the state raises a waiver defense on any issue but competency of counsel.

VII. Conclusion

As a result of the latest Indiana Supreme Court interpretation of the waiver doctrine's application to the post conviction remedy procedure, the number of federal habeas corpus petitions from Indiana defendants may again increase. As one commentator has put it: "[If] the states do not adjust their post conviction procedures to harmonize with the doctrines of *Noia* and *Sain*, their judicial tribunals will be reduced to nothing but way stations along the prisoner's path to the federal district court." In 1969 Indiana attempted to develop a post conviction procedure which would adequately meet federal standards. Until the decision in *Langley* the effort appeared successful. Procedural miscues no longer forclosed a full and fair review in the state courts. Subsequent to *Langley*, though, the Indiana rule is in some doubt. Whether the court will adhere to *Langley*, only to have petitioners thwarted on procedural grounds turn again to the federal habeas corpus proceedings, is not yet clear.

Perhaps an answer to the confusion regarding the exact state of the law of post conviction remedies in Indiana is found in the following proposal for rules specifying when an issue is no longer cognizable in post conviction relief proceedings:

> **When an issue is finally litigated or waived.**
>
> (a) For the purposes of this Act, an issue is finally litigated if

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50 304 U.S. 458 (1938).
(1) it has been raised in the trial court, the trial court has ruled on the merits of the issue, and the petitioner has knowingly and understandingly failed to appeal the trial court's ruling; or

(2) a court of appeals has ruled on the merits of the issue and the petitioner has knowingly and understandingly failed to avail himself of further appeals; or

(3) the [highest court] of the state has ruled on the merits of the issue.

(b) For the purposes of this Act, an issue is waived if

(1) the petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted, or in a prior proceeding actually initiated under this Act; and

(2) the petitioner is unable to prove the existence of extraordinary circumstances to justify his failure to raise the issue.

(c) There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure.52

Such an addition to the current Indiana rules would eliminate the uncertainty surrounding the question of waiver. At the same time it would satisfy Judge Hunter's concern for the sanctity of Indiana's criminal procedure while fulfilling the mandate of Sain and Noia.

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52 Finan, supra note 51, at 190-91.