

Winter 1970

# Some Observations on Waiver in Indiana Criminal Appeals: The Substantial Re-Adoption of Rule 1-14B in Trial Rule 59

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## Recommended Citation

McCloskey, Francis X. (1970) "Some Observations on Waiver in Indiana Criminal Appeals: The Substantial Re-Adoption of Rule 1-14B in Trial Rule 59," *Indiana Law Journal*: Vol. 45 : Iss. 2 , Article 7.  
Available at: <http://www.repository.law.indiana.edu/ilj/vol45/iss2/7>

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## SOME OBSERVATIONS ON WAIVER IN INDIANA CRIMINAL APPEALS: THE SUBSTANTIAL RE-ADOPTION OF RULE 1-14B IN TRIAL RULE 59

At a time of generally increased concern on the part of bench and bar for substantive justice in the criminal process, the Indiana Supreme Court has constructed a labyrinth in which substantive claims may be dismissed because of inadvertent procedural default. Without an intelligent and knowing waiver, the criminal defendant may lose an opportunity to assert substantive claims because of a failure to specify error on motion for new trial or motion to correct error. This situation poses considerable difficulties for requirements of due process and Indiana's absolute right of appeal.<sup>1</sup> The problem arose under old Supreme Court Rule 1-14B<sup>2</sup>

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1. Warren v. Indiana Telephone Co., 217 Ind. 93, 26 N.E.2d 399 (1940). In acknowledging the appellant's right to review by the Supreme Court, the Indiana Supreme Court said:

The Constitution of Indiana says that: "The Supreme Court shall have jurisdiction, co-extensive with the limits of the State, in appeals and writs of error, under such regulations and restrictions as may be prescribed by law." Article 7, § 4. It is to be noted that the jurisdiction of this court in appeals and writs of error is absolute, which is quite different than if the Constitution had provided that such jurisdiction should be exercised in such cases as the Legislature might direct. The only power of the General Assembly over such jurisdiction is to regulate and restrict it. The words, "regulate and restrict," as used in the Constitution, have long had a clear and definite meaning. They do not imply the right to prohibit or forbid.

217 Ind. at 107, 26 N.E.2d at 406. The court also noted:

Generally speaking, there is ample authority for the proposition that there is no inherent right of appeal. When due process has been provided, the unsuccessful litigant has no inherent right to carry the case to another tribunal, in the absence of some constitutional guaranty. The confusion in our decisions on the subject appears to be due to the fact that this court has loosely adopted the language of other courts that were not hampered by any such constitutional provisions as obtain in this state. We therefore disapprove of the language contained in many cases which seem to suggest that the right of appeal to this court exists only in the grace of the legislative branch of the government.

217 Ind. at 110, 111, 26 N.E.2d at 406.

The constitutional right to appeal was explicitly recognized in criminal cases in State *ex rel.* White v. Hilgemann, 213 Ind. 572, 34 N.E.2d 129 (1941), in which the Indiana Supreme Court said:

In Warren v. Indiana Telephone Co. . . . it was concluded upon careful consideration of the authorities, that the Constitution of Indiana guarantees an absolute right to review by this court; that the legislature has the right to regulate and provide procedure for obtaining a review, but not to curtail or deny the right. Review has been made available by the statutory appeal, but the right to review is available in all cases, and, where the statutory appeal is inadequate, the writ of error or other appropriate means may be resorted to.

218 Ind. at 575, 576, 34 N.E.2d at 130.

2. Ind. Sup. Ct. R. 1-14B provided:

Whenever a new trial is requested on the ground or grounds that the verdict or decision is not sustained by sufficient evidence or is contrary to law,

which "was intended to allow a trial court some opportunity to review and correct its errors and thereby, in some instances, avoid the extra travail and expense of an appeal," by requiring the specification of error on motion for new trial.<sup>3</sup> In adopting the new Indiana Rules of Procedure,<sup>4</sup> however, the Indiana Supreme Court rejected an explicit opportunity to rectify the problem.

#### UNINTENTIONAL WAIVER OF ERROR

In *Graham v. State*<sup>5</sup> the defendant, convicted of second degree burglary, sought appellate review alleging that the verdict was contrary to law and not sustained by sufficient evidence.<sup>6</sup> The Supreme Court quoted the requirements of old Rule 1-14B and declined to consider the specifications of error on appeal since they had not been presented to the trial court.<sup>7</sup> The rule of *Graham* was in accord with a line of earlier cases in which the memorandum requirement had been construed as an absolute prerequisite to the consideration of criminal appeals.<sup>8</sup>

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the moving party shall file a memorandum stating specifically under such itemized cause wherein such evidence is insufficient or the verdict or decision is contrary to law. The party filing such motion shall be deemed to have waived any ground not specified in the accompanying memorandum.

3. *Graham v. State*, —Ind.—, 249 N.E.2d 25, 26 (1969).

4. On January 1, 1970, new Indiana Rules of Procedure became effective. Rule 1-14B has not been carried forth verbatim in the new rules. However, the requirements of Rule 1-14B apparently are perpetuated in Trial Rule 59, which expressly applies to criminal appeals under new Criminal Rule 16. Trial Rule 59(B) contains the memorandum requirement of old Rule 1-14B phrased not in terms of a memorandum but in terms of "a statement of the facts and grounds upon which the errors are based." Trial Rule 59(G) contains the waiver requirement of old Rule 1-14B. Although the word "waived" is not expressly mentioned, the same effect is achieved by the provision that "Issues which could be raised upon a motion to correct errors may be considered on appeal only when included in the motion to correct errors filed with the trial court." Thus, the references to Rule 1-14B throughout this note must be read as including new Trial Rule 59 in the absence of an indication that the Indiana Supreme Court will put a different construction upon Trial Rule 59. Under Trial Rule 59, an accompanying memorandum is required for any of the numerous reasons a party may make a motion to correct error. Trial Rule 59(A). Old Rule 1-14b required memoranda only when the new trial was requested on the ground or grounds "that the verdict or decision is not sustained by sufficient evidence or is contrary to law." See note 2 *supra*.

5. — Ind. —, 249 N.E.2d 25 (1969).

6. *Id.*

7. — Ind. —, 249 N.E.2d at 26 (1969).

8. Cf. *Rugirello v. State*, — Ind. —, 246 N.E.2d 481 (1969); *Lynch v. State*, — Ind. —, 245 N.E.2d 334 (1969).

In *Lynch*, a defendant appealed a conviction for possession and control of marijuana. The Indiana Supreme Court ruled that specifications in the motion for a new trial were not accompanied by a memorandum and would not be considered on appeal. This was the first instance of the Rule 1-14B waiver provision being applied to preclude appellate review in a criminal proceeding.

In *Rugirello*, a defendant appealed a conviction of entering to commit a felony. Following his conviction the defendant filed a motion for new trial *pro se* without a memorandum, and later counsel was appointed to represent him on appeal. Appointed counsel filed a pleading designated as an amended motion for new trial but did not attach a

Judge DeBruler dissented vigorously from the holding of *Graham* arguing that:

I believe that it is a violation of the fundamental, constitutional law of this State for this Court to hold that a defendant in a criminal case has waived an error on appeal, no matter how serious and fundamental the error. . . .

I believe that this fundamental right of a criminal defendant to an appeal means that this court is required to indulge a presumption in favor of reaching all errors in an appellant's brief and deciding them on the merits. Only in the clearest case should we find a waiver by an appellant of the constitutional right to appeal. . . .

It is obvious that appellant and his attorney were actively seeking a review of certain specified errors. There is no possible way to infer from this defective motion that the appellant intelligently and knowingly waived his right to appeal these errors.<sup>9</sup>

In *Lewis v. State*,<sup>10</sup> where the court was next confronted with errors, raised on appeal, but not on a motion for new trial, the court did not, as it did in *Graham*, ignore the fact that substantive justice might be frustrated by strict application of Rule 1-14B. Yet, in *Lewis*, the court failed to confront the issue directly. First, the case was decided by finding a waiver. Only after this decision, and by dicta, did the court consider the appeal on its merits. In dealing with appellant's contention that there was no evidence to show any force or threat against the victim of an alleged kidnapping, the court held that the matter was not stated in the motion for new trial and therefore could not be urged on appeal.<sup>11</sup> Speaking for the majority, Judge Hunter added that, even if the argument had been properly presented, there was ample evidence which proved this contention to be without merit.<sup>12</sup> The court thus preserved its interpretation of Rule 1-14B as set forth in *Graham* while disposing of the substantive issue on its merits.

In a concurring opinion, Judge DeBruler pointed to the ambivalence of the court:

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supporting memorandum. The court said the defendant waived this right to review by reason of failing to attach the required memorandum.

9. — Ind. —, 249 N.E.2d 25, 27-28 (1969).

10. — Ind. —, 250 N.E.2d 358 (1969). *Lewis* presented a somewhat different aspect of the problem in that there was a memorandum with the motion for a new trial, but a specific assertion of error later contended on appeal was not contained in it.

11. *Id.* at —, 250 N.E.2d at 361 (1969).

12. *Id.*

I concur fully in the opinion of the majority wherein they ignore the procedural defects in the appellant's motion for a new trial and supporting memorandum, and do not base their decision on these procedural defects. I would prefer that this Court remand this case to the trial court for his consideration of those issues not properly presented in the motion for new trial. See my dissenting opinion in *Graham v. State* (1969), 249 N.E.2d 25.<sup>13</sup>

The Supreme Court in *Lewis* might have been on solid ground had it elected to base its decision on the substantive merits of the case. The disposition of *Lewis*, however, has failed to resolve the problem. By hedging its bets, the court cannot ignore the issue of unintentional waiver of error.<sup>14</sup>

Application of the same standards of procedure to criminal as to civil cases is at the root of much of the problem in motions for new trial and accompanying memoranda as conditions precedent to appellate review. Potentially severe sanction by imprisonment and the corresponding social stigma which attach upon conviction form the basis of the law's detailed concern for justice in the criminal law. In Indiana "civil cases procedural rules are strictly observed, but in criminal cases it is more important that justice be done than to abide by the rules of procedure."<sup>15</sup> Although economic and social liabilities which attach to adverse judgment in civil litigation can be heavy, obviously they do not match the disadvantages which accompany criminal conviction. The first Rule 1-14B cases were of a civil character, and, accordingly unspecified errors were found to be waived without any consideration of knowledge or intent.<sup>16</sup> When the rule was applied to criminal cases, however, the court failed to observe

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13. *Id.* at —, 250 N.E.2d at 362, 363.

14. The confusion is emphasized by the fact that in some cases the Indiana Supreme Court has refused to preclude consideration of the merits where it appeared that failure to comply with procedural rules was the result of ineffective representation of counsel. Cf. *Smith v. State*, — Ind. —, 249 N.E.2d 493 (1969) and *Hayden v. State*, 245 Ind. 591, 199 N.E.2d 102 (1964). The court has not explained why failure to comply with Rule 1-14B does not suggest ineffective representation of counsel. See Judge DeBruler's dissenting opinion in *Graham v. State* — Ind. —, 249 N.E.2d 25, 28 (1969).

15. *Ford v. State*, 248 Ind. 438, 445, 229 N.E.2d 634, 638 (1967). In *Ford*, the Indiana Supreme Court waived the requirements of old Rule 2-6 requiring errors be specified in the motion for new trial.

16. See *Niemeyer v. Lee*, — Ind. App. —, 245 N.E.2d 178 (1969); *Resolute Ins. Co. v. Lippman*, — Ind. App. —, 242 N.E.2d 44 (1968); *Carson v. Associated Truck Lines, Inc.*, — Ind. App. —, 241 N.E.2d 78 (1968); *Stetch v. Stetch*, — Ind. App. —, 240 N.E.2d 557 (1968); *Buford v. Doe* — Ind. App. —, 239 N.E.2d 593 (1968); *Clark v. Harness*, — Ind. App. —, 238 N.E.2d 31 (1968); *Anderson v. Irwin*, — Ind. App., 234 N.E.2d 276 (1968); *Farmers Mutuals Ins. Co. v. Wolfe*, — Ind. App. —, 233 N.E.2d 690 (1968).

the significance of the distinction between civil and criminal litigation.<sup>17</sup> Specifically, a concept of civil waiver was used in the criminal context.

The *Johnson v. Zerbst*<sup>18</sup> concept of waiver as intentional relinquishment of a known right should be the controlling standard for consideration of all substantive claims in the criminal process. The need for strict adherence to this standard becomes particularly obvious when an alleged error is dismissed because of counsel's procedural failure which in no way can be imputed to a defendant. In referring to the *Johnson v. Zerbst* definition in *Graham*, dissenting Judge DeBruker asserted:

Under this test we could not presume from the fact that an appellant's trial counsel failed to file a motion for a new trial, that appellant knowingly and intelligently waived his right to appeal. It is the appellant's liberty at stake, his rights at issue, and it is he who must waive his right to an appeal if it is to be waived.<sup>19</sup>

Though established by case law, in Indiana there is a clear state constitutional right to appeal in criminal cases.<sup>20</sup> *Ford v. State*<sup>21</sup> considered the problem of waiver in relation to the state constitutional right to jury trial.<sup>22</sup> The court concluded that the appropriate standard of waiver was that formulated in *Johnson v. Zerbst*:<sup>23</sup> knowing and intelligent waiver.<sup>24</sup> Unless the Supreme Court of Indiana is willing to apply inconsistent standards of waiver to different rights protected by the Indiana Constitution, it must conclude that the logic of *Graham v. State*<sup>25</sup> and *Lewis v. State*<sup>26</sup> is wrong.

Further, *Griffin v. Illinois*<sup>27</sup> indicates the possibility of a federally protected right in the problem at hand. In *Griffin* the state refused to supply a certified copy of the trial record free to indigents appealing their convictions. The Supreme Court of the United States held that such a

17. See note 8 *supra*.

18. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). This definition of waiver must be utilized whenever a question of federal right is involved. Indiana, too, has adopted this definition of waiver. In *Ford v. State*, 248 Ind. 438, 445, 229 N.E.2d 634, 638-39 (1967), the court said, "The facts in the present case clearly show that appellant did not intelligently waive his constitutional right to a jury trial."

19. — Ind. —, 249 N.E.2d 25, 28 (1969). The court's decision in *Graham*, Judge DeBruker contended, violated the requirements of due process and state and federal rights to assistance of counsel. *Id.* at —, 249 N.E.2d at 27, 28.

20. See note 1 *supra*.

21. 248 Ind. 438, 229 N.E.2d 634 (1968).

22. IND. CONST. art. I, § 19.

23. 304 U.S. 548 (1938).

24. *Id.* at 464.

25. — Ind. —, 249 N.E.2d 25 (1969).

26. — Ind. —, 250 N.E.2d 358 (1969).

27. 351 U.S. 12 (1956).

refusal violated the due process and equal protection clauses of the fourteenth amendment, since the state was, in effect, denying appellate review to defendants solely on account of their indigency. The Court noted:

It is true that a state is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. . . . But that is not to say that a state that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently, at all stages of the proceedings the Due Process and Equal Protection clauses protect persons like petitioner from invidious discrimination.<sup>28</sup>

It may be noted that due process and equal protection are intertwined in *Griffin* on the basis of the economic status of defendants, who cannot be discriminated against because of this status. This intertwining was necessary perhaps in *Griffin* because the due process clause alone did not demand that Illinois furnish a defendant with a transcript for appeal. However, the case may logically be read in a more liberal manner to suggest that once a state grants a mechanism for appellate review, all criminal defendants seeking appellate review should be so entitled in the absence of a voluntary, knowing and intelligent waiver. The right to appeal, when established, itself becomes a federally protected right subject to due process standards. The protected right would be not equal protection but appeal. Michelman recently noted that such cases as *Griffin*

. . . can easily be explained as belonging to a family which treats as meriting special support the interest in strong opposition to the state's prosecutorial thrusts. There is, again, no need to fabricate a no-pecuniary-discrimination doctrine.<sup>29</sup>

Assuming that Michelman's analysis of *Griffin* is valid, clearly the right to appeal could not be waived in the absence of a voluntary, knowing and intelligent waiver as defined in *Johnson v. Zerbst*. Just as the defendants in *Griffin* could not be said to have knowingly waived their rights to appeal when they lacked sufficient means to obtain a trial transcript, neither can defendants in Indiana be said to have knowingly waived their right to appeal when there are technical defects in procedures surrounding a motion to correct error. In either case, preclusion of

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28. *Id.* at 18.

29. Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 25 (1969).

appellate review would constitute a violation of the due process clause.

Although the state obviously has a legitimate interest in establishing definitive procedures for motions for new trial and the entire appellate process, it is settled that federal courts will nonetheless stand by with the power to remedy a denial of federal rights.<sup>30</sup>

. . . [A] defendant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence of compliance with its procedural rule serves a legitimate state interest. If it does not, the state procedural rule ought not to bar vindication of important federal rights.<sup>31</sup>

A possible legitimate state interest will not alone preclude an attack based on a federal question when the particular rule is unreasonable.<sup>32</sup> Although efficiency in the trial and appellate process is a legitimate interest, this does not give a state supreme court or legislature an absolute right to find waiver in situations where there has been a procedural default for which a defendant is in no way responsible.

#### A PROBLEM REMAINS

It is possible that defendants who have been denied review of substantive claims by the strict enforcement of Rule 1-14B or the corresponding provisions of Trial Rule 59 could obtain review under the provisions of Post Conviction Rules 1 and 2 recently adopted by the Indiana Supreme Court. Post-Conviction Rule 1 is a broad provision which provides an opportunity for ultimate and final review in the state system when all other measures—including direct appeal, belated motion to correct error or belated appeal—have failed.<sup>33</sup> Post-Conviction Rule 2 establishes procedures for filing belated motions to correct error and belated appeals.<sup>34</sup> Section A of Post-Conviction Rule 2 permits a defendant to petition the trial court for permission to file a belated motion to correct error when, *inter alia*, no timely and adequate motion to correct error was filed and the failure to file was not petitioner's fault.<sup>35</sup>

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30. As allegations of error on appeal invariably will assert not only the denial of motion for new trial or motion to correct errors but specifications as to why the conviction was contrary to the evidence or the law, a federal question often will be involved.

31. *Henry v. Mississippi*, 379 U.S. 443, 447 (1956).

32. *See Id.* at 448 n.3 (1965):

This will not inevitably lead to a plethora of attacks on state procedural rules; where the state rule is a reasonable one and clearly announced to defendant and counsel, application of the waiver doctrine will yield the same result as that of the adequate nonfederal ground doctrine in the vast majority of cases.

33. IND. POST-CONVICTION R. 1.

34. *Id.* R. 2.

35. *Id.*

As Post-Conviction Rule 2(A) now reads, a defendant should be able to obtain relief when his appeal has been dismissed for failure to comply with Rule 1-14B or Trial Rule 59. When Post-Conviction Rule 2 (A) was originally promulgated by the Supreme Court, under the old rules,<sup>36</sup> it permitted a petition only where a "timely" motion for new trial had been filed. Under the new rules, a petition may be filed where no "timely and adequate" motion to correct error has been filed. The addition of the word "adequate" to new Post-Conviction Rule 2(A) clearly broadens the coverage of that rule. Under the old rule, a motion could well have been timely—although futile—without a memorandum, and thus Post-Conviction Rule 2 relief could have been denied. The present language of Post-Conviction Rule 2(A), however, should be construed to make it impossible for a motion to correct error to be "timely and adequate" if appellate review has previously been denied for inadvertent failure to comply with Rule 1-14B or Trial Rule 59.

Yet, even on this construction of Post-Conviction Rules 1 and 2 a defendant would still be forced into an unnecessary procedural maze if review upon direct appeal were refused only to be granted later upon proper filing of a belated motion. The merits of the case are identical whether they come before the court by means of direct appeal from the denial of a motion to correct error or by a belated appeal. In view of this identity of issues, the interests of substantive justice and judicial efficiency would be best served by considering the case on the merits as early as possible. It cannot be argued that the defendant ultimately will have his appeal heard on the merits and so is not harmed. The delay itself may mean time spent in prison by the defendant. The defendant is harmed by delay.

In the event direct appeal and belated motion to correct error fail, Post Conviction Rule 1 is available to a defendant who asserts error in his conviction. Hearings may be allowed at the trial judge's discretion. Direct appeal to the Supreme Court may be taken from the trial judge's disposition of the matter. Further, Post Conviction Rule 1 defines waiver in narrow terms suggestive of *Johnson v. Zerbst*<sup>37</sup> in contrast to the use of waiver in motions for new trial, or to correct error.

Any grounds for relief available to a petitioner under this

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36. Section 1 of Post-Conviction Rule 2 when first released allowed a defendant to petition the court of conviction for permission to file a belated motion for new trial when, *inter alia*, "No timely Motion for New Trial was filed for the defendant." The date of adoption was July 7, 1969. See 248 N.E.2d no. 5 at LIII (Aug. 13, 1969). Post-Conviction Rule 2 as later released with the new Indiana Rules of Procedure refers to a "timely and adequate motion to correct error." These rules also state July 7, 1969, as the date of adoption.

37. 304 U.S. 548 (1938).

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.<sup>38</sup>

The recent adoption of Post Conviction Rules 1 and 2 makes their exact construction and application uncertain. Apparently, however, a remedy has been provided which mitigates the effect of *Graham v. State*.<sup>39</sup> However, if *Graham* is in error, clearly there is little to be gained and much to be lost in forcing the defendant into the circuitous route of Post Conviction Rules 1 and 2.

#### ALTERNATIVE IN THE CORRECTION OF ERROR

The simplest remedy to the situation presented by the memorandum provisions of Trial Rule 59 and the varying applications of its predecessor Rule 1-14B would be to eliminate the motion to correct errors and the memorandum as conditions precedent to appeal. It is unfortunate that this alternative was not adopted in the new Indiana Rules of Procedure.

In the proposed final draft of the new Indiana rules prepared by the Civil Code Study Commission, an alternative to Trial Rule 59 (G) which would not make the motion to correct errors a condition precedent to appeal was given as preferred.<sup>40</sup> This version received less than unanimous support, and as a result the proposed draft also contained a rule which retained the condition precedent to appeal.<sup>41</sup> The Commission, in a lengthy comment urging elimination of the condition noted:

First, it will assure consideration of cases upon the merits, rather than solutions on technical grounds which must be blamed only on the lawyer taking the appeal or the very uncertainty of the technical law involved.

Second, the motion to correct error seldom is effective below. It is common knowledge that not more than 2% to 3% of all cases are reversed when the motion is made. It, therefore, wastes everybody's time.<sup>42</sup>

38. IND. POST-CONVICTION R. 1.

39. — Ind. —, 249 N.E.2d 25 (1969).

40. IND. R. CIV. P. (Proposed Final Draft 218 (1968)).

41. *Id.*

42. *Id.* at 222. Another disadvantage noted in the Commission's comment was: Third: The transcript of evidence seldom, if ever, is available to aid a

The Commission described as unconvincing the reasons for retaining the rule. "The new rule meets the argument that the judge below should be able to correct his errors, since the parties have the option of presenting a motion to correct errors and the judge may do so on his own motion."<sup>43</sup>

The sentiments of the majority of the Civil Code Study Commission are in accord with those of the American Bar Association Project on Minimum Standards for Criminal Justice. The ABA committee recently commented unfavorably on unnecessarily complicated barriers to appellate review. Although the committee did not specifically mention motions to correct error and motions for new trial, it did say:

A requirement of the trial court's certificate as a condition of appellate review is inconsistent with the right to appeal unless a decision to refuse the certificate is itself appealable. If such decision is appealable, the procedure for transition of cases to the appellate court has been substantially increased.<sup>44</sup>

In many other states<sup>45</sup> and the federal system<sup>46</sup> motions for new trial exist, but not as conditions precedent to appellate review. With rates of appeal steeply rising,<sup>47</sup> such a procedure would seem ultimately to be the most efficient means of dealing with criminal appeals on the merits, minimizing time lost and energy expended through other procedural routes.

Judge DeBruler has written that he would favor such a change except for the present system of electing judges in Indiana and the detrimental impact reversals can have on judicial careers.<sup>48</sup> Even if this

party in determining whether or not a prejudicial error was committed. Consequently a lawyer cannot fairly present the issues for correction within the time provided, and out of caution he is forced to raise issues which may prove not to be reversible error.

The new rules provide that the motion to correct errors must be filed within 60 days after judgment. IND. TRIAL RULE 59(C). Previously, the time limit was 30 days. See old Rule 1-14A.

43. IND. R. CIV. P. (Proposed Final Draft 223 (1968)).

44. Am. Bar Ass'n, Standards Relating to Criminal Appeals (Tentative draft, March 1969), reproduced in 5 CRIM. L. REP. 3049 (1969). [Hereinafter cited as The ABA Minimum Standards for Criminal Justice Committee.]

45. See N.Y. CRIM. P. CODE §§ 522 and 465 (McKinney 1958); Calif. Pen. Code § 1237 (West's 1956).

46. See FED. R. CRIM. P. 33, 37.

47. The ABA Minimum Standards for Criminal Justice Committee for the American Bar Association recently reported that rates of appeal in criminal cases were climbing steeply, approaching 100 per cent. See ABA Minimum Standards for Criminal Justice Committee at 3049.

48. *Graham v. State*, — Ind. —, 249 N.E.2d 25, 26 (1969).

While agreeing with the purpose of the Rule as stated by the Court (see text accompanying note 5 *supra*), dissenting Judge DeBruler submitted in *Graham* that another reason for the Rule is the detrimental effect a reversal can have on a judge's career. He said:

consideration is relevant, however, the extent of public awareness of judicial reversals is problematical at most.

Another possible solution to the problem would be to serve a copy of the appellate brief on the trial court as if it were a motion to correct error. As Judge DeBruler said in the *Graham* dissent, "The trial court would then have a chance to correct any errors raised in the appeal brief prior to review in this Court."<sup>49</sup> Of course this proposal is premised on the notion that there is utility in establishing the extra step on appeal, that trial judges will correct their own errors. If it is necessary to retain the substance of Trial Rule 59, at least the need for knowing and intelligent waiver should be admitted either by explicit amendment or judicial interpretation.

### CONCLUSION

Rule 1-14B and its incorporation into Trial Rule 59 represents an attempt to improve judicial efficiency at the expense of the defendant's need for speedy appellate review. To find waiver of a right to review, even if temporary, where none has occurred, is of questionable utility from the standpoint of administration of justice,<sup>50</sup> where the appellant may utilize other state and federal remedies for claims which could have been considered and efficiently dispatched on first appeal. Preclusion of prompt appellate review may well embitter the defendant and thus harm

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This effect is to be deplored for two reasons. First, reversals are seldom an indication of the quality of the trial judge's work; and second, the inordinate amount of public comment on the rare reversals distorts the true picture of the job a trial judge is doing. So long as the present system of selecting trial judges exists in Indiana there is some justification for a rule which permits a trial judge to be apprised of the alleged errors for which he might be reversed. If this system of selecting trial judges were to be changed I would favor abolishing the Rule which makes mandatory the presentation of alleged errors to trial judges as a condition precedent to appeals. As an example, in the federal system there is a motion for new trial but it is not a mandatory condition precedent to appeal. Therefore, the federal appeal process is simpler, it eliminates the type of waiver problems discussed in this opinion, and it gives the federal appellate court more complete control over the appellate process.

*Id.* at —, 249 N.E.2d at 26.

49. *Id.* at —, 249 N.E.2d at 30.

50. The Minimum Standards for Criminal Justice Committee of the ABA also pointed out that various mechanisms designed to eliminate appeals at the threshold of the appellate court all suffer from a basic flaw:

In order to establish that an appeal is frivolous, it is necessary to make an evaluation of its merit. If that evaluation is done with due process, the case would have been through the essential steps of an ordinary appeal. There is no litmus paper test that can replace the judgmental process. The solution to frivolous appeals, therefore, is not to create an elaborate screen at the threshold, but rather to find administrative ways to expedite the flow of cases through the appellate forum to the final decision on the merits of the controversies.

See ABA Minimum Standards for Criminal Justice Committee at 3049.

his chances for rehabilitation.<sup>51</sup> The importance of this area was noted by Chief Justice Warren in *Coppedge v. United States* :

When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps. No general respect for, no adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. . . . [T]he preference to be accorded criminal appeals recognizes the need for speedy disposition of such cases. Delay in the final judgment of conviction, including its appellate review, unquestionably erodes the efficacy of law enforcement.<sup>52</sup>

Even if the state right to appeal is protected by Post Conviction Rules 1 and 2, the court's retention of Rule 1-14B in Trial Rule 59 does not serve the need for prompt dispatch in criminal cases.

FRANCIS X. McCLOSKEY

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51. See generally K. MENNINGER, *THE CRIME OF PUNISHMENT* (1968). In a psychiatrist's view of the overall system, Dr. Menninger writes, "I suspect that all the crimes committed by all the jailed criminals do not equal in total social damage that of crimes committed against them." *Id.* at 28.

52. 369 U.S. 438, 449 (1962).