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Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims

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STRUCTURAL REFORM IN CRIMINAL DEFENSE: RELOCATING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Eve Brensike Primus†

This Article suggests a structural reform that could solve two different problems in criminal defense representation. The first problem is that the right to effective trial counsel lacks a meaningful remedy. Defendants are generally not permitted to raise ineffective assistance of counsel claims until collateral review. Given that collateral review typically occurs years after trial, most convicted defendants have completed their sentences by that time and therefore have little incentive to pursue ineffectiveness claims. Moreover, there is no right to counsel on collateral review, and it is unrealistic to expect defendants to navigate the complicated terrain of an ineffectiveness claim without professional assistance. Left unchecked, attorney ineffectiveness grows at the trial level and contributes to the other problem in criminal defense representation—the waste of funds that states invest in appellate defense representation. All criminal defendants are constitutionally entitled to appellate counsel. However, judicial constraints on the claims that appellate attorneys may raise, coupled with trial counsel who fail to preserve issues for appellate review, routinely force appellate attorneys to file frivolous claims.

In this Article, I propose to solve both problems with a single structural reform. In limited circumstances, appellate attorneys should be able to open trial records in order to develop ineffective assistance of trial counsel claims. Defendants would then have a more realistic opportunity to challenge trial attorney performance, and appellate defenders would perform a more constructive role, making more efficient use of scarce appellate resources.

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CORNELL LAW REVIEW

INTRODUCTION

Criminal defense representation faces two problems that may share one structural solution. The first problem is that there is no effective remedy for defendants whose attorneys are constitutionally deficient at trial. Most defendants are unable to challenge their trial attorneys’ performance on direct appeal. Rather, they must first complete their appeals—a process that often takes four years or more—before they can present ineffective assistance of trial counsel claims in collateral review proceedings. By that time, most convicted defendants have served their full sentences, giving them little incentive...

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1 See Commonwealth v. Grant, 813 A.2d 726, 734–36 (Pa. 2002) (noting, while summarizing the practices of other jurisdictions, that the federal courts and the overwhelming majority of state courts refuse to hear ineffective assistance claims on direct appeal).


3 See Grant, 813 A.2d at 735–36 ("[A]s a general rule, the federal courts defer review of ineffectiveness claims until collateral review.").

tive to pursue further challenges. Some jurisdictions even preclude defendants from filing collateral attacks once they have served their sentences. To make matters worse, defendants who can and want to complain about their ineffective trial attorneys often must do so without the aid of counsel, because they have no constitutional right to an attorney on collateral review. Even those defendants who can afford counsel must find witnesses and gather evidence to show that trial counsel was ineffective, a task that is often difficult to accomplish years after the original trial. In short, by forcing defendants to wait until collateral review before allowing them to challenge their trial attorneys' performance, the criminal justice system creates a right to effective trial counsel that, in most cases, has no corresponding remedy.

The second structural problem in criminal defense representation arises at the appellate level. Every convicted defendant is constitutionally entitled to an attorney on the first appeal as of right, with public funds paying for the attorney in the overwhelming majority of cases. However, the issues that the defendant may raise on direct appeal are limited only to those matters that appear on the face of the trial court record. Accordingly, if an attorney fails to preserve issues

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5 See Paul H. Robinson, Proposal and Analysis of a Unitary System for Review of Criminal Judgments, 54 B.U. L. Rev. 485, 495 n.32 (1974) ("Convicted defendants placed on probation are also eligible to file for post-conviction relief, although it is likely that relatively few will do so given the absence of the motivation generated by incarceration." (citation omitted)).

6 See, e.g., Grant, 813 A.2d at 741 (Saylor, J., concurring) (describing 42 PA. CONS. STAT. ANN. § 9543(a)(1) (1998), which provides that in order to be eligible for post-conviction relief, a petitioner must at the time relief is granted be currently serving a sentence of imprisonment or be on probation or parole, be awaiting execution, or be serving a sentence that must expire before the person may commence serving the disputed sentence).

7 See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions and we decline to so hold today." (citation omitted)); see also Murray v. Giarratano, 492 U.S. 1, 10 (1989) (plurality opinion) (applying the rule of Pennsylvania v. Finley to capital cases).

8 See Douglas v. California, 372 U.S. 353 (1963) (holding that the Fourteenth Amendment of the U.S. Constitution requires states to provide effective counsel for defendants on the first appeal as of right).

9 See Robert L. Spangenberg & Marea L. Beeman, Indigent Defense Systems in the United States, 58 Law & Contemp. Probs. 31, 31 (1995) ("It is not uncommon for indigent defense programs to represent up to 90 percent of all criminal defendants in a given felony jurisdiction.").

10 See, e.g., 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 27.5(c) (2d ed. 1999) ("Perhaps no standard governing the scope of appellate review is more frequently applied
at trial, appellate counsel is generally left without grounds for appeal. To a defendant who bears no cost for appealing, however, a groundless appeal is more attractive than no appeal at all. As a result, public defenders routinely spend their time arguing frivolous appeals or preparing special briefs seeking to withdraw as counsel on the ground that there are no issues in the case worth raising. The result is an enormous waste of the funds that states invest in appellate counsel for indigent defendants.

One remedy for both of these structural problems is to allow appellate attorneys to raise ineffective assistance of trial counsel claims on appeal. Because an ineffective assistance of trial counsel claim is often based on what the trial attorney failed to do, rules limiting appellate review to the face of the trial court record effectively prevent appellate defenders from challenging trial attorney performance. Allowing appellate counsel to look outside the trial court record would permit criminal defendants to challenge their trial attorneys' performance at a time when the evidence is still fresh and when the defendants still have both an incentive to file challenges and the opportunity to do so with the aid of counsel. Such a restructuring would also make better use of scarce public resources by assigning a more constructive role to appellate defenders. In addition, there is good reason to believe that many ineffective assistance of trial counsel claims would succeed if defendants could raise them on direct appeal.

Deficient trial attorney performance is pervasive in criminal cases. An overwhelming majority of public defenders are catastrophically

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overworked. In some jurisdictions, the average caseload for a public defender is more than one thousand cases per year—far more than the American Bar Association has determined an attorney can handle effectively. The result is rampant ineffectiveness of trial counsel even among conscientious public defenders, to say nothing of lawyers who sleep through trial or abuse alcohol and drugs while representing their clients. By failing to provide an adequate mechanism for defendants to challenge their trial attorneys' performance, the current structure of criminal litigation leaves this ineffectiveness essentially unchecked.

Without a check, attorney ineffectiveness grows at the trial level and feeds the problem of wasted public resources on appeal. As more trial attorneys fail to investigate their cases, object to impermissible evidence, and present affirmative evidence, more trial court records lack adequately preserved legal errors for appeal. This in turn requires more appellate defenders to brief and argue frivolous issues. Enabling appellate attorneys to raise trial attorney ineffectiveness on appeal would redress this inefficiency while providing a necessary check on trial attorney performance.

Many scholars and judges recognize that the number of criminal convictions that courts reverse due to ineffective assistance of trial counsel is strikingly low when compared to the frequency of ineffec-

18 See, e.g., ABA Standing Comm. on Legal Aid and Indigent Defendants, Gideon's Broken Promise: America's Continuing Quest for Equal Justice 17 (2004) [hereinafter ABA Standing Comm.], available at http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf ("Caseloads are radically out of whack in some places in New York. There are caseloads per year in which a lawyer handles 1,000, 1,200, 1,600 cases." (quoting Jonathan Gradess, Executive Director, New York State Defenders Association)).
20 E.g., Burdine v. Johnson, 231 F.3d 950, 952 (5th Cir. 2000), vacated, 262 F.3d 336 (5th Cir. 2001) (en banc) (involving allegations that defense counsel slept through substantial portions of the trial); see also Paul Duggan, Attorneys' Ineptitude Doesn't Halt Executions, Wash. Post, May 12, 2000, at A1.
21 See Duggan, supra note 20.
22 See Warner, supra note 13, at 632-33 (raising concerns about the procedure developed in Anders v. California, 386 U.S. 738 (1967), to prepare and review cases in which appointed defense counsel cannot find meritorious issues to raise on appeal).
tive assistance in practice.\textsuperscript{23} They have suggested various reforms, including creating a stronger legal standard for judging trial attorney performance,\textsuperscript{24} extending the right to counsel to collateral review proceedings,\textsuperscript{25} or providing additional funding and training for defense counsel.\textsuperscript{26} Although these proposals might improve the situation, none is sufficient to solve the problem of ineffective assistance of trial counsel. A stronger standard for judging attorney performance will have little effect as long as ineffective assistance of trial counsel claims remain relegated to collateral review. Even a right to counsel on collateral review will fail to benefit most criminal defendants, because they never get the opportunity to raise collateral challenges.\textsuperscript{27} While additional funding at the trial level would help reduce public defender caseloads, legislators have little incentive to fund criminal defense.\textsuperscript{28} Moreover, even if legislators did act to increase funding, the

\textsuperscript{23} Compare Calene v. State, 846 P.2d 679, 693 n.5 (Wyo. 1993) (noting that, among opinions published since January 1, 1986, the Wyoming Supreme Court has reversed only three cases on the basis of ineffective assistance of counsel), and Victor E. Flango & Patricia McKenna, Federal Habeas Corpus Review of State Court Convictions, 31 CAL. W. L. REV. 237, 247 tbl.4, 259 tbl.12 (1995) (demonstrating that, although defendants raised ineffective assistance of counsel in 41\% of state post-conviction petitions in the targeted years of 1990 and 1992, state courts granted relief in only 8\% of the cases), with David L. Bazelon, The Defective Assistance of Counsel, 42 U. CIN. L. REV. 1, 2 (1973) ("[A] great many—if not most—indigent defendants do not receive the effective assistance of counsel guaranteed them by the 6th Amendment.").


\textsuperscript{27} See supra text accompanying notes 1-6.

\textsuperscript{28} See, e.g., Donald A. Dripps, Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard, 88 J. CRIM. L. & CRIMINOLOGY 242, 252 (1997) ("Legislatures, responding to voters fearful of crime, have no incentive to devote scarce resources to the defense func-
criminal justice system would still need some mechanism to police lawyers who sleep through trial.

Perhaps the biggest problem with these proposals, however, is that they do not address the inefficient allocation of resources at the appellate level. Although the scholarly literature recognizes both the problem of trial attorney ineffectiveness and the frequency of frivolous appeals, it has not focused on the structural relationship between the two. This is attributable, in part, to the different types of scholars interested in the issues. Proponents of defendants' rights typically highlight the root causes of trial attorney ineffectiveness, while law and economics proponents emphasize efficiency and focus on the resources wasted at the appellate level. Neither group examines the relationship between the trial and appellate stages.

In this Article, I propose a broader, structural solution. States should, within limits, allow appellate defenders to supplement trial court records to support claims of ineffective assistance of trial counsel. This solution not only is politically feasible, but also addresses both the problem of trial attorney ineffectiveness and appellate defender waste.

This Article proceeds in four parts. In Part I, I examine the decision of a majority of jurisdictions to require that criminal defendants litigate ineffective assistance of trial counsel claims on collateral review rather than on direct appeal, illustrating how this structure both underenforces the right to effective trial counsel and exacerbates the ineffectiveness problem. I then explore existing proposals for addressing trial attorney ineffectiveness and explain why those proposals cannot succeed. In Part II, I turn to appellate defense representation and explain how the structural limitations placed on appellate defense counsel waste a substantial amount of appellate defender resources.

Part III of this Article proposes a structural solution to both of these problems. I contend that, in appropriate cases, states should permit appellate attorneys to supplement the trial court record in order to fully support claims of trial attorney ineffectiveness on direct appeal. After setting forth the details of my proposed procedure, I distinguish it from those procedures currently in place in the minority

29 See, e.g., Ogletree, supra note 26 (discussing how the lack of institutional and public support for public defenders impacts their effectiveness).


31 See discussion infra Part III.A.2.
of states allowing trial attorney ineffectiveness claims on appeal. I also
discuss the impact this structural shift might have on the trial and ap-
pellate problems raised in Parts I and II, and the ways states should
implement the proposed procedure given the special considerations
that exist in capital and federal criminal cases. Because my proposal
suggests some fundamental changes in how attorneys raise ineffective
assistance of trial counsel claims and how courts should resolve them,
I devote Part IV to a discussion of some potential challenges to the
proposed procedure. Finally, I return in the Conclusion to the idea of
structural reforms in the criminal justice system and suggest that other
criminal procedure doctrines may benefit from similar restructuring.

I
INEFFECTIVENESS OF TRIAL COUNSEL

A. Personal and Structural Ineffectiveness

More than thirty years ago, Judge David Bazelon of the United
States Court of Appeals for the D.C. Circuit recognized that, "if [his] court were to reverse every case in which there was inadequate coun-
sel, [it] would have to send back half the convictions in [the] jurisdic-
tion."\(^3^2\) Indeed, the problem of ineffective trial attorney performance
has long plagued our criminal justice system.\(^3^3\) There are, however,
two different types of trial attorney ineffectiveness. Any proposal for
reform must address both types.

First, there are the lawyers who sleep through trial,\(^3^4\) abuse alco-
hol and drugs while representing defendants,\(^3^5\) or are out in the
courthouse parking lot while key prosecution witnesses testify.\(^3^6\) This
type of trial attorney ineffectiveness, which I shall call "personal inef-
fectiveness," is attributable to the defense attorney himself. At least as
troubling, although less colorful, is the rampant structural ineffectiv-
ness in our system resulting from heavy defender caseloads. Most
public defenders are incredibly overworked and severely un-
derfunded.\(^3^7\) On average, public defenders in Baltimore, for exam-
ple, have been forced to handle as many as 1,163 misdemeanor cases

\(^{32}\) Bazelon, supra note 23, at 22-23.
\(^{33}\) See, e.g., James A. Strazzella, Ineffective Assistance of Counsel Claims: New Uses, New
Problems, 19 Ariz. L. Rev. 443, 443 (1977) ("The claim of ineffective assistance of counsel
can trace its lineage back nearly a century in American law. . . .").
\(^{34}\) See supra note 20 (collecting sources demonstrating that some defense lawyers sleep at trial).
\(^{35}\) See Duggan, supra note 20.
in which capital defense attorneys provided deficient representation, see Welsh S. White,
\(^{37}\) See supra notes 17-18 (collecting sources discussing public defender caseloads).
per year, nearly three times the maximum number of cases that the American Bar Association has concluded one attorney can handle effectively. And Baltimore is hardly unique. Public defenders in New York are handling up to 1,600 cases per year. In Virginia, the funding problems are so severe that attorneys do not have functioning computers, let alone adequate time and resources to investigate their cases. Unlike personal ineffectiveness, this "structural ineffectiveness" exists through no fault of the attorneys involved. Rather, the problem exists because the structure of the criminal justice system places unrealistic demands on defenders. Given that eighty percent of all criminal defendants are eligible for public defender representa-


39 See Ten Principles, supra note 19, at 2, 5 n.19.


41 See ABA Standing Comm., supra note 18, at 17.

42 See Spangenberg, Virginia, supra note 40, at 20 ("Underfunding of public defender offices leaves them without the most basic of office equipment, such as functioning computers, fax machines and internet access, and insufficient secretarial, paralegal and investigative staff.").

43 See generally ABA Standing Comm., supra note 18, at 7–28 (collecting testimony presented by witnesses at ABA hearings that detailed structural problems and that "clearly revealed that Gideon's promise of effective legal representation for indigent defendants is not being kept").
Structural ineffectiveness has serious ramifications for the quality of defense representation.

Structural ineffectiveness is not limited to public defender offices. Private defense attorneys who take indigent defense cases on a contract basis face similar problems, because they are paid a flat fee to handle any and all indigent defendants who pass through the system. The problem also exists in jurisdictions that cap the fees for private attorneys who take on indigent cases. As a result of fee caps and general market pressures, many private attorneys find it necessary to operate "volume practices," under which they have a monetary incentive to dispose of cases as quickly as possible in order to get to the next case and the next fee. These attorneys have no financial incentive to go to trial or, more generally, to commit significant time and resources to any one case.

B. The Problematic Timing of Ineffective Assistance Claims

A defendant whose constitutional right to effective trial counsel is compromised as a result of personal or structural ineffectiveness may pursue an ineffective assistance of counsel claim in court. Under the Supreme Court's Strickland v. Washington standard, in order to prevail on a claim of trial attorney ineffectiveness, a defendant must show that (1) counsel's performance was deficient, meaning that the attor-

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45 See OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, IMPROVING CRIMINAL JUSTICE SYSTEMS THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS: REPORT OF THE NATIONAL SYMPOSIUM ON INDIGENT DEFENSE 6 (1999) (explaining that, in one California county, a firm with three attorneys won a public defense contract under which the three attorneys handled more than five thousand cases in one year, only twelve of which went to trial, and noting that "the contracting lawyer acknowledged that there is an 'inherent conflict' that every dollar spent on an investigator or an expert means one less dollar in compensation for him"); see also Defense Services, supra note 17, at 9–10 (noting that Alaska, Maine, New Hampshire, Oregon, and Wisconsin have contract systems in which private attorneys competitively bid for indigent criminal defense service contracts).
46 See, e.g., Spanenberg, Virginia, supra note 40, at 1–2 (noting that Virginia employs fee caps for assigned counsel of $112 for a misdemeanor or juvenile case, $395 for a felony with a potential sentence of less than 20 years imprisonment, and $1,096 for a felony with a potential sentence of 20 years or more, and observing that these caps act as a disincentive for lawyers to work hard).
47 See Jane Frisch & David Rohde, Legal Aid's Last Challenge from an Old Adversary, Giuliani, N.Y. TIMES, Sept. 9, 2001, at A41 (discussing a private attorney who took court appointments and handled more than 1,600 misdemeanor cases in one year).
48 See, e.g., Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 HARV. L. REV. 2465, 2477 (2004) (observing that “[a] lawyer who receives a fixed salary or a flat fee per case has no financial incentive to try cases,” but rather has an incentive “to plead cases out quickly in order to handle larger volumes”); see also OFFICE OF JUSTICE PROGRAMS, supra note 45, at 6.
ney performed unreasonably given prevailing norms of practice, and (2) this deficient performance prejudiced the defense, meaning that counsel's errors were serious enough to undermine confidence in the outcome of the trial. Many scholars argue that this standard is too deferential to defense attorneys, and that it has failed to curb the proliferation of incompetent trial representation. While I agree that the Strickland standard is too lax, focusing on the judicial standard puts the cart before the horse. The more fundamental reason why trial attorney ineffectiveness remains unchecked is that the current structure of the criminal justice system prevents most defendants from effectively raising claims that their trial attorneys provided constitutionally deficient representation.

Although defendants can theoretically raise ineffective assistance of trial counsel claims on direct appeal, the vast majority of jurisdictions do not allow defendants to open or supplement the trial court record to support these claims. This prohibition has a devastating effect on defendants' ability to establish that they were deprived of adequate trial representation. Quite often, ineffective assistance of counsel claims are based on what the trial attorney failed to do. Therefore, information outside of the record is essential to support the claim and to show why the defendant was prejudiced as a result of the trial attorney's deficient performance.

The motion for a new trial, however, is the only mechanism currently available in most jurisdictions to supplement a trial court record before appellate review. Once the trial is over, the defendant is given a brief period of time—generally between five and thirty days—in which to file a motion before the trial judge for relief from the judgment in the form of a new trial. In this motion, the defendant

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50 See id. at 687–88.
51 See, e.g., Geimer, supra note 24; Goodpaster, supra note 24; Weaver, supra note 24, at 441–46; see also McFarland v. Scott, 512 U.S. 1256, 1259–60 (1994) (Blackmun, J., dissenting from denial of certiorari).
52 See infra notes 53-55 and accompanying text.
54 See, e.g., Hoffman v. Arave, 236 F.3d 523, 535 (9th Cir. 2001); Grant, 813 A.2d at 736; see also Dripps, supra note 25, at 796.
55 See Grant, 813 A.2d at 736 ("Many [ineffective assistance of counsel] claims are based on omissions, which, by their very nature, do not appear on the record and thus, require further fact-finding, extra record investigation and where necessary, an evidentiary hearing. . .").
56 See, e.g., FED. R. CRIM. P. 33; Ky. R. CRIM. P. 10.02, 10.06; see also § WAYNE R. LaFAVE ET AL., supra note 10, § 11.7(e). In the case of a guilty plea, the defendant may only supplement the trial court record through a motion to withdraw the guilty plea. See, e.g., id. § 21.5(a).
57 See, e.g., FED. R. CRIM. P. 33(b)(2) (seven days); GA. CODE ANN. § 5-5-40(a) (1995) (thirty days); Ky. R. CRIM. P. 10.06(1) (five days); MD. CODE ANN., MD. RULES § 4-331(a) (West 2006) (ten days). Motions to withdraw guilty pleas are similarly subject to strict time
typically asks the trial judge to reconsider adverse legal rulings made throughout the trial. A defendant may also use this motion to argue that a constitutional violation, such as a violation of the right to effective counsel, undermined the trial as a whole. However, because of the time constraints, the attorney who files the motion for a new trial is almost always the attorney who represented the defendant at trial. With so little time available, it is virtually impossible for a defendant to find and hire new counsel, have that counsel investigate the case, and draft and file a motion to supplement the trial court record with information about the trial attorney's deficient performance. As a result, an overwhelming majority of defendants do not raise trial attorney ineffectiveness challenges in their motions for a new trial.

New problems with asserting ineffective assistance of counsel claims then arise on appeal, because the trial court records do not adequately support these claims. Except for the rare case in which ineffectiveness is readily apparent on the face of the trial court transcript, most appellate lawyers understandably opt not to raise ineffective assistance of trial counsel claims on appeal. They know that, if the claim is raised before there is record evidence to support it and the appellate court rejects it on the merits, the defendant will be

Constraints in many jurisdictions. See 3 Wayne R. Lafave et al., supra note 10, § 21.5(a) (discussing the "manifest injustice" test and the general requirements favoring quick filing of motions to withdraw guilty pleas).


See Jonathan G. Neal, "Critical Stage": Extending the Right to Counsel to the Motion for New Trial Phase, 45 Wm. & Mary L. Rev. 783, 813 (2003) (noting a presumption that the attorney filing the motion for a new trial will be the same attorney who represented the defendant at trial); see also 3 Wayne R. Lafave et al., supra note 10, § 11.7(e).

See United States v. Marquez, 291 F.3d 23, 27 (D.C. Cir. 2002). In Marquez, the defendant filed a motion seeking an extension of time to file a new-trial motion. The defendant sought new counsel after trial in order to pursue a claim of ineffective assistance of trial counsel in a motion for a new trial. Although the defendant filed the motion within the seven-day period prescribed by Federal Rule of Criminal Procedure 33 and the trial court granted the request, the court did not do so within the seven-day time period prescribed by the Rule. See id. at 26 (describing the actions taken by the defendant and the District Court). On appeal, the D.C. Circuit held that the trial court did not have the authority to grant the motion once the seven days had passed. See id. at 27.

Cf. United States v. Taglia, 922 F.2d 413, 417 (7th Cir. 1991) (explaining that the ability to present "extrinsic evidence" of trial attorney ineffectiveness in a new trial motion "is more a theoretical than a real possibility").

See supra note 10 and accompanying text.

Even when ineffectiveness is apparent, the record must clearly indicate that the error was not part of the trial attorney's strategy, because "every indulgence will be given to the possibility that a seeming lapse or error by defense counsel was in fact a tactical move, flawed only in hindsight." Taglia, 922 F.2d at 417–18.
barred from raising the claim in later proceedings, when outside information to support the claim would otherwise be admissible.\(^6\)

To avoid this problem, defendants typically wait until their appeals are over, and then attack their convictions collaterally by alleging that their trial attorneys were constitutionally ineffective. Until recently, this strategy was problematic because many courts deemed a defendant's ineffectiveness claims "waived" when the defendant failed to raise them on appeal.\(^6\) This procedure placed defendants in a Catch-22 situation. If they raised the ineffectiveness issue on appeal, they would likely lose an otherwise meritorious claim, because the record was not sufficiently developed to support it.\(^6\) If, on the other hand, they waited until collateral review proceedings, they risked losing their ineffectiveness claim due to procedural default.\(^6\)

The Supreme Court first acknowledged the existence of this Catch 22 more than twenty years ago.\(^6\) It was not until 2003, however, that the Court directly addressed the issue. In Massaro v. United

\(^{65}\) See, e.g., Peoples v. United States, 403 F.3d 844, 849 (7th Cir. 2005) ("[A] defendant who chooses to make an ineffective-assistance argument on direct appeal cannot present it again on collateral review."); cert. denied, 126 S. Ct. 421 (2005); Berget v. State, 907 P.2d 1078, 1085 (Okla. Crim. App. 1995) (holding that "claims not raised on direct appeal which could have been raised are waived," but noting that, if the record must be supplemented, the appellate court may remand for an evidentiary hearing). But see State v. Fontenot, 356 So.2d 1385, 1386 (La. 1978) (per curiam) (declining to address an ineffective assistance of trial counsel claim on direct appeal and encouraging the defendant to raise the claim in habeas proceedings).

\(^{66}\) See, e.g., Billy-Eko v. United States, 8 F.3d 111, 114-15 (2d Cir. 1993); Guinan v. United States, 6 F.3d 468, 471 (7th Cir. 1993); State v. White, 337 N.W.2d 517, 519-20 (Iowa 1983) ("Any claim not properly raised at trial or on direct appeal may not be litigated in postconviction unless there is sufficient reason for not properly raising it previously." (quoting Washington v. Scurr, 304 N.W.2d 231, 234 (Iowa 1981))); State v. Suggs, 613 N.W.2d 8, 11 (Neb. 2000) ("[A] motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred where a different attorney represented a defendant on direct appeal and the alleged deficiencies in the performance of trial counsel were known or apparent from the record."); Calene v. State, 846 P.2d 679, 683 (Wyo. 1993).

\(^{67}\) See supra notes 63-65 and accompanying text.

\(^{68}\) A state court's decision to procedurally default an ineffective assistance of trial counsel claim may constitute an independent and adequate state procedural ground that precludes federal consideration of the claim during federal habeas corpus review of the state court conviction. See, e.g., Hargrave-Thomas v. Yukins, 374 F.3d 383 (6th Cir. 2004) (holding that the state court's decision to procedurally bar the defendant's ineffective assistance of trial counsel claim on state post-conviction review because the defendant failed to raise the claim on direct appeal constituted an independent and adequate state ground that precluded federal review of her ineffective assistance claim unless she could demonstrate cause and prejudice for having failed to comply with the state procedural rule); Sweet v. Bennett, 353 F.3d 135, 140-41 (2d Cir. 2003) (same). But see Brecheen v. Reynolds, 41 F.3d 1343, 1364 (10th Cir. 1994) (holding that the Oklahoma procedural default rules put defendants to a Hobson's choice and could not therefore constitute an adequate state procedural ground entitled to deference).

States, the Court held that an ineffective assistance of trial counsel claim made by a federal criminal defendant would not be procedurally defaulted even if the defendant raised the issue for the first time on collateral review. Moreover, the Court declared, defendants typically should wait until collateral review proceedings to raise such claims, rather than raising them on direct appeal.

Although this last statement was dicta and was made in a federal supervisory decision rather than a constitutionally grounded one, many lower federal courts have adopted its approach. In fact, most state courts have made similar structural declarations requiring defendants to raise ineffective assistance of trial counsel claims in collateral review proceedings rather than on appeal. This structural decision, however, creates a number of serious problems for the vindication of a defendant's right to effective trial representation.

First, these courts, in their seemingly defendant-protective opinions, fail to mention that there is no constitutional right to counsel for indigent defendants in collateral review proceedings. Interestingly, the Massaro Court cited the fact that ineffective assistance of trial

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70 538 U.S. 500, 504 (2003). Before Massaro, two federal circuits had held that, under certain circumstances, ineffective assistance of trial counsel claims must be raised on direct appeal. See Billy-Eko, 8 F.3d at 115 (baring defendant from raising an ineffective assistance of counsel claim on collateral review when it was not raised on direct appeal, defendant had new counsel on appeal, and the trial counsel's deficiencies were apparent on the face of the record); Guinan, 6 F.3d at 472 (holding that, when a defendant relies exclusively on the record to raise a claim of ineffective assistance of counsel, the claim must be raised on direct appeal).

71 Massaro, 538 U.S. at 504-05 ("In light of the way our system has developed, in most cases a motion brought [during collateral review] is preferable to direct appeal for deciding claims of ineffective assistance of counsel. When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose.").


counsel claims often require supplementation of the trial court record as one reason why the claims should be raised for the first time on collateral review. However, by noting this and simultaneously denying indigent defendants a constitutional right to counsel on collateral review, the Court effectively told defendants that they would have to reinvestigate their cases and supplement their trial court records from inside their prison cells. If an indigent defendant cannot raise ineffective assistance of counsel until collateral review and does not have the means to raise the claim effectively at that stage because the defendant has no counsel to conduct the necessary extra-record investigation, then the right to effective trial counsel becomes a right without a remedy.

Moreover, most defendants have served their full sentences by the time they reach the collateral review stage. Under the current system, only defendants sentenced to more than four or five years in prison have an incentive to challenge their convictions on collateral review, because it takes that long to exhaust the appellate process in many jurisdictions. In fact, inmates in many state jurisdictions may work off as much as a third of their sentences by earning "good time" credit. In these states, only those defendants sentenced to six or more years in prison would still be incarcerated after completing the appellate process.

Defendants who have served their sentences or completed their probationary terms often do not see any reason to return to court and

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75 Massaro, 538 U.S. at 505 ("The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them. And evidence of alleged conflicts of interest might be found only in attorney-client correspondence or other documents that, in the typical criminal trial, are not introduced.").
76 See Dripps, supra note 25, at 799 (noting that an incarcerated prisoner cannot interview trial counsel or find witnesses and therefore does not have a "full and fair" opportunity to litigate the issue [of ineffective assistance of counsel] in state court); cf. Halbert v. Michigan, 545 U.S. 605, 621 (2005) (emphasizing the fact that "[s]even out of ten inmates fall in the lowest two out of five levels of literacy" and that many inmates "have learning disabilities and mental impairments" that make it nearly impossible for them to navigate the legal process without assistance (citation omitted)).
77 See Marc M. Arkin, Speedy Criminal Appeal: A Right Without a Remedy, 74 MINN. L. REV. 437, 437–38 (1990) (explaining that, because of the docket backlog in appellate courts, "[d]elays of six years, while 'shocking,' are not 'unusual'" (quoting Mathis v. Hood, 851 F.2d 612, 614 (2d Cir. 1988))); see also Commonwealth v. O’Berg, 880 A.2d 597, 602 (Pa. 2005) (explaining that direct appeals in Pennsylvania may take "more than four years to be completed"); Thirty-Fifth Annual Review of Criminal Procedure: Speedy Trials, supra note 2, at 360 n.1210 (collecting cases involving delays ranging from two to eight years in length).
78 See, e.g., TEX. GOV’T CODE ANN. § 498.002 (1995) (allowing inmates to earn up to thirty days of good conduct time for each thirty days actually served); see also Sharon M. Bunzel, Note, The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows, 104 YALE L.J. 933, 937 n.19 (1995) (explaining that "good time" laws under which inmates can work off up to a third of their original sentence are routine in most states).
fight their convictions. In some jurisdictions, defendants who have completed their sentences are precluded from seeking collateral review of their convictions. As a result, when ineffectiveness claims are not addressed until collateral review, the grim reality is that the performance of trial counsel in almost all misdemeanor and many felony cases is largely unchecked. This is particularly problematic given that such cases (a) make up the great bulk of the cases in the criminal justice system, and (b) have major practical effects on defendants’ lives. Statistics reveal that public defenders who handle misde-

79 See Robinson, supra note 5, at 495 n.32 (“Convicted defendants placed on probation are also eligible to file for post-conviction relief, although it is likely that relatively few will do so given the absence of the motivation generated by incarceration.” (citation omitted)). Given recent increases in the collateral consequences that attach to criminal convictions, the truth is that defendants should fight their convictions whenever possible. See Michael Pinard & Anthony C. Thompson, Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction, 30 N.Y.U. REV. L. & SOC. CHANG 585, 586–87 (2006) (listing “some of the most prominent” collateral consequences of criminal convictions as “permanent or temporary ineligibility for federal welfare benefits, educational grants, public housing, voting, handgun licenses and military service; prohibitions from various forms of employment as well as employment-related licensing; and, for non-citizens, deportation” (citations omitted)). Most offenders (and lawyers) remain wholly unaware of these collateral consequences. See id. at 590.


81 Although misdemeanants and minor felons are unlikely to pursue collateral review of their convictions, they are much more likely to file a direct appeal given that those appeals are filed shortly after judgment in most jurisdictions. See, e.g., FED. R. APP. P. 4(b)(1)(A)(1) (stating requirement of ten days to file a direct appeal); CAL. R. CT. 30.1(a) (sixty days); MD. CODE ANN., MD. RULES § 4-509(a) (West 2006) (thirty days). More defendants are still incarcerated or on probation directly after trial and are motivated to challenge their convictions. Once the appeal is filed, the defendant has his “foot in the door” of the appellate court and is therefore more likely to go through with the appellate process. Cf. DAVID G. MYERS, SOCIAL PSYCHOLOGY 124 (4th ed. 1993) (defining the “foot-in-the-door” phenomenon in social psychology as “[t]he tendency for people who have first agreed to a small request to comply later with a larger request”).

82 See Mayer v. City of Chicago, 404 U.S. 189, 197 (1971) (“The practical effects of conviction of even petty offenses . . . are not to be minimized. A fine may bear as heavily on an indigent accused as forced confinement.”). Potential consequences of convictions for even minor offenses include job loss, loss of housing or disability benefits, and immigration consequences. See id. (noting that a medical student was barred from practicing medicine because of a conviction); United States v. Graham, 169 F.3d 787, 792–93 (3d Cir. 1999) (classifying petit larceny as an “aggravated felony” for purposes of immigration and deportation); 42 U.S.C. § 402(x)(1)(A)(ii)(I) (2000) (denying old-age and disability benefits to anyone confined as a result of a criminal conviction); Pinard & Thompson, supra note 79, at 589–90 (explaining that “[s]everal collateral consequences . . . attach to misdemeanor convictions” including ineligibility for educational loans and employment-related licenses as well as deportation); S.C. Appleseed Legal Justice Ctr., Impact of Criminal Conviction on Public Benefits, http://www.scjustice.org/pdfs/CriminalConviction.pdf (last visited Feb. 11, 2007) (describing the negative impact of a conviction on receiving housing, welfare, disability, and financial aid benefits). The consequences of a conviction are often
meanor and minor felony cases have the largest caseloads, and that their caseloads far exceed recommended maximums. Thus, the structural ineffectiveness problem appears to be at its zenith for precisely those defendants who are least likely to pursue ineffective assistance of counsel claims.

Of those defendants who do fight on in collateral review proceedings, either pro se or with retained counsel, many will face serious practical problems asserting that their trial attorneys were ineffective due to the delay in presenting the claim. After four years, crucial witnesses may have died or disappeared. Even if witnesses are available, their memory of relevant events may have deteriorated. Physical evidence may have disappeared, spoiled, or have been destroyed in the normal course of events. An ineffective assistance of trial counsel claim is ripe for consideration and review after the trial is over, and there is no reason to delay its presentation.

Moreover, waiting four years to tell attorneys of their mistakes does not deter personal ineffectiveness. Given high turnover rates in criminal defense representation, the offending trial attorney may no longer be in practice when the case reaches collateral review proceedings. If she is still practicing, she may have represented hundreds or even thousands of defendants ineffectively in the interim without any check on her behavior. Furthermore, a finding of personal ineffectiveness is unlikely to have any deterrent effect on the offending attorney, as it rarely results in disciplinary action. The delay also dilutes exacerbated if the defendant has prior convictions. See, e.g., Lockyer v. Andrade, 538 U.S. 63 (2003) (affirming defendant’s two consecutive sentences of twenty-five years to life for stealing nine videotapes under California’s three-strikes law).

See notes 17–19, 40 (collecting sources).

See Donald P. Lay, Post-Conviction Remedies and the Overburdened Judiciary: Solutions Ahead, 3 CREIGHTON L. REV. 5, 17 (1969) (emphasizing that timely post-conviction motions facilitate the memory of both judge and defense).


See Lay, supra note 84, at 17.


See supra notes 37–41 and accompanying text; see also Anderson v. Calderon, 276 F.3d 483, 483–85 (9th Cir. 2001) (Reinhardt, J., dissenting) (discussing a capital defense attorney who exhibited a pattern of ineffective performance in capital cases and who was twice deemed constitutionally ineffective by the Ninth Circuit during post-conviction proceedings); White, supra note 36, at 5–6 (discussing the problem of repeated appointment of constitutionally ineffective trial counsel). Furthermore, the offending attorney likely has little memory of a particular case, given that she has had hundreds like it in the interim.

See James S. Liebman, The Overproduction of Death, 100 COLUM. L. REV. 2030, 2121–122 (2000) (“Bar discipline is almost nonexistent; prosecution for malfeasance is all-but-unheard-of and always unsuccessful in the rare instances in which it occurs; and even more rare are investigations by police or prosecuting agencies themselves to find out why
the public stigma of an ineffectiveness claim, which is the primary means of deterring ineffective attorney performance, because judges and attorneys are unlikely to remember the details of the case four years later.

In addition to harming the defendant and diluting the deterrent effect on the offending attorney, the delay also presents practical problems for the State. If an appellate court is going to order a new trial, the State should want that new trial to occur as soon as possible, while it still has access to witnesses and evidence. Moreover, allowing ineffectiveness claims to be raised earlier furthers the State’s interests in finality and in assisting victims and their families to achieve closure.

The judiciary itself also has an interest in preventing delay. When a panel of appellate judges reads the trial court record in a case and addresses the legality of the defendant’s conviction, it is more efficient for that panel to address and resolve all of the potential issues at the same time. Under the Massaro approach, however, the appellate panel of judges considers one set of legal issues, and then another judge or panel considers the effectiveness of the defendant’s trial counsel on collateral review. Needless to say, it is a waste of judicial resources to have two sets of judges review the same trial court record to address independent legal claims when the first panel of judges could review all of the claims at once. Under the current system, appellate courts may spend months or even years addressing a complex legal claim only to have the conviction vacated after a short hearing on collateral review reveals ineffective assistance of trial counsel.

There is another, purely legal, problem with raising extra-record ineffective assistance of trial counsel claims during collateral review proceedings. Under Strickland, a court must analyze whether trial counsel’s performance was deficient and whether the deficiency prejudiced the defendant. If defense counsel made a series of deficient decisions, the prejudice flowing to the defendant from these errors must be analyzed cumulatively. Currently, if trial counsel’s ineffective assistance is apparent on the face of the record, the court will entertain the ineffective assistance claim on appeal. However, under Massaro and its state counterparts, ineffective assistance of trial

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90 See Lay, supra note 84, at 17.
93 See id. at 694–96; see also Cargle v. Mullin, 317 F.3d 1196, 1212 (10th Cir. 2003); Harris ex rel. Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995); Read v. State, 430 So.2d 832, 839 (Miss. 1983).
94 See Massaro, 538 U.S. at 508.
counsel claims that require extra-record development should be presented during collateral review proceedings. Given the cumulative prejudice analysis for judging ineffectiveness under Strickland, such a bifurcation of ineffectiveness claims is highly questionable.

Consider, for example, a case in which trial counsel was arguably ineffective on the face of the record, but was also arguably ineffective based on information that is outside of the trial court record. If the defendant raises an ineffective assistance of trial counsel claim on appeal based on his counsel's performance on the record, an appellate court might reject that claim because it does not believe that counsel's errors prejudiced the defendant. But how could a court sensibly resolve the prejudice inquiry without considering the extra-record claims of ineffectiveness? And what happens on collateral review when the defendant raises the extra-record claims of ineffective assistance? Is the prejudice flowing from the original, rejected claim combined with the prejudice flowing from the claims raised later? Or does the court considering the extra-record claim dismiss the earlier rejected claim and focus only on the claims that could not be raised on appeal? The courts have yet to answer these questions.

For these reasons, the lax Strickland standard for judging trial attorney performance, while a problem, does not fully explain why there is currently no check on the ineffectiveness of trial attorneys. Structurally, we have created a system that precludes most defendants from effectively raising these claims altogether. Far from catalyzing reform, the structural decision to place ineffectiveness claims on collateral review essentially hides the ineffectiveness problem from view. Once we have recognized this problem, the question then becomes how to redress it.

C. Proposed Solutions and Their Flaws

The scholarly literature is replete with doctrinal and administrative suggestions for addressing trial attorney ineffectiveness through various types of reform. The proposals fall into three basic categories: (1) attempts to reinforce the right to effective trial counsel by providing additional protections to defendants seeking to raise the claim on collateral review; (2) attempts to address the problem ex ante through additional funding for the defense, more training for defense attorneys, or other expansions in defendants' pretrial rights; and (3) attempts to take the problem outside the criminal justice system.

95 See id. 504-05.
96 In Massaro, the Court avoided this question. See id., 538 U.S. at 508 (acknowledging that "certain questions may arise in subsequent proceedings under § 2255 concerning the conclusiveness of determinations made on the ineffective-assistance claims raised on direct appeal" but determining that "these matters of implementation are not before us").
altogether and use other legal or administrative means to redress it. Each of these proposals, however, has proven either unrealistic or inadequate in addressing trial counsel ineffectiveness.

1. Additional Protections at the Collateral Review Stage: A Right to Counsel on Collateral Review

In *Coleman v. Thompson*, the Supreme Court left open the possibility of recognizing a right to post-conviction counsel in those cases in which collateral review provides the first opportunity to raise a constitutional challenge. Although the Court in *Coleman* did not reach this question, Professor Donald Dripps has suggested that the Court’s *Massaro* decision raises it once again. Professor Dripps argues that the Court should extend the constitutional right to counsel to collateral review proceedings in cases in which the defendants seek to pursue ineffective assistance of trial counsel claims.

Even if the Court adopted Professor Dripps’s proposal, providing counsel on collateral review would not give all defendants a realistic opportunity to challenge their trial attorneys’ performances. As previously discussed, the only defendants likely to challenge their convictions on collateral review are those who received lengthy sentences. Moreover, providing defendants with a constitutional right to counsel on collateral review does not ameliorate the practical problems associated with the delay or the legal problems that a bifurcated prejudice analysis presents. In short, although post-conviction counsel is a step in the right direction, this proposal fails to redress the structural problems created by placing ineffectiveness claims on collateral review.

2. Addressing the Trial Counsel Problem Ex Ante

Rather than focusing ex post on when and where to address claims of ineffective trial attorney representation, another option is to consider ex ante how to solve the problem of attorney incompetence. Many scholars have argued for additional funding for indigent defense, more training for defense attorneys, or other pretrial expand-

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98 See Dripps, *supra* note 25, at 802.


100 See *supra* notes 77–80 and accompanying text.

101 See *supra* text accompanying notes 92–96.
sions in defendants' rights. Despite these arguments, there is little reason to believe that local, state, or federal legislatures will choose to contribute sufficient funds to solve the problem ex ante. There is no lobby to argue for such changes. In fact, society disenfranchises most convicts, and the public is not exactly clamoring for greater safeguards for criminal defendants. The few legislators who have argued for such changes have done so at their own peril, and are frequently accused of being "soft on crime" in subsequent electoral races. For these reasons, it is unrealistic to believe that legislatures will intervene—without judicial prodding—to solve the ineffectiveness problem by significantly increasing funding for defense at the trial level.

Moreover, even if a legislature did increase the budget for indigent defense at trial, this would not address the problem of attorneys who sleep through trial or fail to investigate their cases. In other words, while additional funding might alleviate structural ineffectiveness in public defender offices by reducing attorney caseloads, it would not solve the problem of personal ineffectiveness or the problem of private defense attorneys who have financial incentives to operate "volume practices." Thus, in order to make the right to effective counsel meaningful, there must be a post-trial mechanism for enforcing it.


103 See, e.g., Dripps, supra note 28, at 252 ("Legislatures, responding to voters fearful of crime, have no incentive to devote scarce resources to the defense function rather than to additional police or prison space [and, therefore,] the defense function is starved for resources.").


106 Rebecca Zeifman, Backlogged DNA Tests Keep Hopes on Ice: Victims, Wrongly Convicted Anxiously Await Resolution, CAPITAL TIMES (Madison, Wis.), October 12, 2004, at 3A, available at http://www.madison.com/archives/read.php?ref=Tct/2004/10/12/0410120174.php (noting that legislation to fund DNA testing in capital cases was "stalled in the Senate because of a provision that allocates $550 million to improved legal representation in death penalty cases," legislation that the Department of Justice and others called "soft on crime").

107 See supra notes 20–21 and accompanying text.

108 See supra text accompanying note 47.
3. Taking the Problem out of the Criminal Justice System

Rather than tax an already overburdened judiciary, another solution would be to address attorney ineffectiveness through the disciplinary boards of state bar associations or other comparable administrative bodies. A problem with this strategy, however, is that it ignores both the inherent weaknesses of the attorney disciplinary system and the resistance within the profession to strengthening it. Disciplinary boards generally rely on complaints as a basis for taking action rather than initiating independent investigations.\footnote{See David L. Dranoff, Comment, Attorney Professional Responsibility: Competence Through Malpractice Liability, 77 NW. U. L. Rev. 633, 647 (1982) ("[B]oards generally refuse to conduct independent investigations, and instead rely almost exclusively on complaints as a basis for action. Because the boards take a passive role, the system is dependent on the existence of incentives for outside parties to file complaints.").} This is problematic as a solution to ineffective assistance of counsel, largely because very few complaints get filed against trial attorneys in criminal cases. Judges and other lawyers rarely file complaints,\footnote{See id. at 647 n.79 (surveying scholarly articles and provisions of the Model Code and Model Rules). In large part, this may be due to the self-regulating nature of the Bar and the "intraprofessional protectionism" that accompanies such self-regulation. Id. at 647. On the other hand, it may be that the lax nature of the punishments imposed by disciplinary boards has caused attorneys to give up on reporting alleged violations. See, e.g., Charles W. Wolfram, Barriers to Effective Public Participation in Regulation of the Legal Profession, 62 MINN. L. Rev. 619, 626–28 (1978) (pointing out that lawyers themselves view disciplinary boards as highly ineffective in punishing unprofessional behavior or unethical conduct). Whatever the reason, members of the Bar seldom report instances of attorney misconduct.} and criminal defendants have little incentive to file them, particularly given that defendants are not compensated for lodging complaints.\footnote{See Dranoff, supra note 109, at 650.} As one commentator noted, the result is that "[a]ttorney misconduct is rarely perceived. If perceived, it is not reported. If reported, it is not investigated. If investigated, violations are not found. If found, they are excused. If they are not excused, penalties are light."\footnote{Richard L. Abel, Why Does the ABA Promulgate Ethical Rules?, 59 TEX. L. Rev. 639, 648 (1981) (citations omitted); see also Eric M. Landsberg, Comment, Policing Attorneys: Exclusion of Unethically Obtained Evidence, 53 U. CHI. L. Rev. 1399, 1401–02 (1986) ("[L]awyers seldom complain to these disciplinary agencies about other attorneys' violations of professional standards, and . . . even if violations are reported, the disciplinary actions these agencies undertake are often ineffective and very costly.").}

Furthermore, neither attorney malpractice nor tort lawsuits against ineffective criminal defense lawyers will adequately protect a defendant's right to effective assistance of trial counsel. For one thing, many states have held that public defenders are entitled to qualified immunity from suit for all discretionary acts or omissions made in the course of executing their official duties.\footnote{See, e.g., Browne v. Robb, 583 A.2d 949, 951–52 (Del. 1990), cert. denied, 499 U.S. 952 (1991); Dziubak v. Mott, 503 N.W.2d 771, 774 (Minn. 1993); Morgano v. Smith, 879 P.2d 735, 737 (Nev. 1994); Coyazo v. State, 897 P.2d 234, 241 (N.M. Ct. App. 1995); Scott v.}
where public defenders are not immune, “criminal malpractice actions are so difficult to win that, for the most part, criminal defense attorneys enjoy special protection from civil liability for substandard conduct.”14 Specifically, defendants often must prove that they have been exonerated or have otherwise obtained post-conviction relief in order to show that they were actually harmed by their attorneys’ malpractice.15 Courts that hear malpractice actions often defer to the criminal justice system’s treatment of the attorneys’ effectiveness in determining whether to award relief.16 Given the current difficulty of proving ineffective assistance of counsel, it is unrealistic to think that civil malpractice suits will serve as an adequate check on trial attorney ineffectiveness.

We need not look outside the criminal justice system to address trial attorney ineffectiveness, since we already have a criminal appellate system specifically designed to fix trial error. Before discussing how a structural alteration of the criminal appellate attorney’s responsibilities should be the first step toward redressing trial attorney ineffectiveness, it is necessary to explain why the appellate defender’s responsibilities are independently in need of reform.

II
UNDERUTILIZATION OF APPELLATE COUNSEL

States spend millions of dollars each year complying with the constitutional mandate to provide effective counsel to the indigent on their first appeals as of right.17 Because the trial process is not perfect, the first level of appellate review is necessary to ensure “that only those who are validly convicted have their freedom drastically curtailed.”18 However, each year a staggering number of appellate attorneys file motions asking the appellate courts to allow them to withdraw from cases because they cannot find any meritorious issues
to appeal. These Anders motions—so named because of the Supreme Court case that first recognized them—comprise up to a third of the criminal cases in states that allow them. For the reasons discussed below, the actual number of frivolous appeals is likely much higher.

A substantial minority of states do not allow appellate attorneys to file Anders motions. In these states, appellate defenders who cannot find a meritorious issue have no choice but to research and brief frivolous arguments. Even in states that allow attorneys to file Anders motions, many lawyers prefer to brief "very weak and terrible issue[s]" than file these motions. They believe that filing Anders motions betrays their clients' interests and conflicts with their ethical obligation to represent their clients zealously. Additionally, attorneys often find that it is more time consuming to file Anders motions than it is to file briefs on the merits. Anders motions typically must be accompanied by "no merits briefs," in which appellate counsel outlines any potentially appealable issues in the trial court record and explains why these issues, if pursued, would not be meritorious. In some cases,
the appellate court will deny the Anders motion and require additional briefing and argument on other issues, only to summarily affirm the conviction after the lawyer has filed the merits brief. Finally, because many appellate defenders know that other defenders will perceive them as lazy if they file Anders motions, many defenders will not file them to avoid this stigma. For these reasons, appellate defenders routinely file frivolous or borderline frivolous appeals, despite the fact that they could be sanctioned for doing so. As a result, an exceedingly high number of such appeals are submitted to appellate tribunals every year.

Why do appellate attorneys routinely find that their cases lack meritorious issues? One possibility is that there are simply no viable issues to appeal, because the justice system worked at the trial level, the convictions are valid, and the trial process was fair and free of prejudicial error. This may be true in some cases, but, with trial attorneys handling more than one thousand cases a year, it is probably not true in many. Some trial attorneys admit to routinely providing ineffective assistance to their clients. These attorneys simply do not have the time to investigate all of the cases, research all of the issues, and prepare adequately for all of the trials that come their way. In fact, it is often trial counsel's failure to object to constitutionally im-

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128 See Etienne, supra note 124, at 1233 (quoting an anonymous interview with an attorney); Charles Pengilly, Never Cry Anders: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal, 9 C R I M. J U S T. J. 45, 62–63 (1986) (stating that courts often deny a motion to withdraw and require the appellate attorney to file a merits brief on one or more issues only to summarily affirm the conviction after the merits brief is filed). But see Miner, supra note 121, at 325 (stating that “Anders applications are granted in the vast majority of cases [in the Second Circuit], leading to summary affirmance” of convictions).

129 See Etienne, supra note 124, at 1231–32 (quoting an anonymous interview with an attorney who said that “[o]thers consider fellow lawyers that file Anders briefs as ‘lazy’ ”).

130 See id. at 1233–34. Recognizing this risk, the American Bar Association recommended that appellate counsel “present to the court whatever there is to present, recognizing that in many instances this will amount to a presentation of contentions that are not well founded in any established case law.” State v. Gates, 466 S.W.2d 681, 683–84 (Mo. 1971) (citing DRAFT, ABA STANDARDS: THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (1970)).

131 See, e.g., Miner, supra note 121, at 324 (noting that, in his experience as a judge on the United States Court of Appeals for the Second Circuit, “far too many frivolous appeals and far too many non-meritorious issues are presented to appellate tribunals”).

132 See supra notes 38–41 and accompanying text.

133 See Symposium, Indigent Criminal Defense in Texas, 42 S. T E X. L. R E V. 979, 998 (2001) (comments of Robert Spangenburg recalling the story of a young Louisiana lawyer with a large caseload who asked the judge to declare him ineffective pretrial in all of his cases); see also Adele Bernhard, Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services, 63 U. PITT. L. R E V. 293, 308 (2002) (“Lawyers who carry too many cases inevitably pressure clients to plead guilty. Crucial decisions in cases are made on the basis of too little fact investigation.” (citation omitted)).

134 See Bernhard, supra note 133, at 308.
permissible evidence or to investigate and present evidence that creates a record devoid of legal issues to raise on appeal.\textsuperscript{135}

If appellate counsel could raise trial counsel's failure to investigate, object, or present evidence, many of these cases would likely have viable appellate issues. However, as discussed above, claims of trial attorney ineffectiveness almost always require attorneys to supplement the trial court record, and appellate attorneys in most states are precluded from asserting claims that require extra-record development.\textsuperscript{136} As a result, the appellate defender typically cannot assert an ineffective assistance of trial counsel claim, leading to the following perverse situation: If the trial attorney is just effective enough to object to impermissible evidence at trial, the defendant may have a viable appellate issue, but if the trial attorney is completely ineffective and fails to object to anything, the issues are waived and the defendant cannot present them on appeal.\textsuperscript{137} Instead, the law requires the appellate attorney to research and brief frivolous issues, rather than the one serious constitutional violation that affected every aspect of the trial—namely, the trial attorney's ineffectiveness.

Thus, appellate attorneys routinely find that their cases lack meritorious appellate issues because the law has narrowly defined the issues that they may raise. The decision to locate ineffective assistance of trial counsel claims in collateral review proceedings\textsuperscript{138} undermines the appellate attorney's role by precluding her from serving as an effective check on the fairness of the underlying trial proceeding. Moreover, this failure to fully utilize appellate counsel leads to an inefficient allocation of state resources. The needless briefing of meritless issues delays the appellate process and makes inefficient use of scarce appellate resources.\textsuperscript{139} Rather than waste time and resources requiring appellate counsel to file \textit{Anders} motions or brief frivolous issues in these cases, appellate attorneys' time would be better spent investigating and briefing trial counsels' ineffectiveness in appropriate cases.

In addition to using appellate resources more efficiently, this structural change would improve the overall quality of appellate defense representation. Appellate attorneys can almost always find some issue to brief if they search hard enough, but it is demoralizing to spend so much time and energy locating and briefing meritless is-

\textsuperscript{135} See Warner, \textit{supra} note 13, at 632–33 (noting that many issues raised in \textit{Anders} briefs would not be legally frivolous if the trial attorney had preserved them for appellate review through a timely objection).
\textsuperscript{136} See \textit{supra} note 53 and accompanying text.
\textsuperscript{137} See \textit{supra} note 11.
\textsuperscript{138} See \textit{supra} notes 71–76 and accompanying text.
\textsuperscript{139} See Carrington, \textit{supra} note 12, at 88; Miner, \textit{supra} note 121, at 325–26.
In order to cope with this problem, many appellate attorneys develop more defense-friendly interpretations of what constitutes a frivolous issue—interpretations that often differ from those of the judges and prosecutors involved in a case. These attorneys then spend equal or even more time researching and briefing these frivolous issues, treating them as though they were meritorious claims. In turn, the judiciary devotes a substantial amount of its resources to reviewing these frivolous claims.

This misguided process leads to the following situation, which occurs in some variation in appellate defender offices nationwide: An appellate attorney visits her client in jail, and the client tells her that (a) his trial attorney never met with him, nor spoke to a single witness, and that, (b) if the attorney had done so, he would have discovered that there were two alibi witnesses who would have testified that the client could not have been at the crime scene. In most jurisdictions, the appellate attorney is not permitted to raise the possibility that the client may be factually innocent and had constitutionally ineffective representation at trial, because these issues are not apparent on the face of the trial court record. Rather, the appellate attorney must inform her client that he must wait until collateral review proceedings to challenge his trial attorney's performance. Further, the appellate attorney must tell the client that he will not have the right to be represented by appointed counsel during collateral review, and that all she is able to do for him now is reiterate the objections that his trial attorney made during the trial.

Suppose also that the attorney, after combing the trial court record, finds either that the trial attorney made no objections or that the trial judge ruled correctly on the few objections that were raised. The appellate attorney has no potentially meritorious issue that she can raise based on the trial court record, but she knows of a glaring constitutional violation of the right to effective trial counsel. Under the current system, the attorney cannot raise that issue, because it re-

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140 See Carrington, supra note 12, at 78 (noting the demoralizing effect on appellate attorneys and the general harm to defense representation when they are forced to brief issues they know to be frivolous).
141 See Etienne, supra note 124, at 1233.
142 See id. at 1232; Yee, supra note 123, at 154 (suggesting that the Anders procedure may ensure that everyone gets mediocre representation because it diverts attention from meritorious appeals).
143 See Carrington, supra note 12, at 88.
144 See Caroline Wolf Harlow, Bureau of Justice Statistics, U.S. Dep't of Justice, Defense Counsel in Criminal Cases 8 tbl.17 (2000) (indicating that in over 13% of state criminal cases nationwide public defenders did not meet with their clients until the day of trial).
145 See supra notes 53–65 and accompanying text.
146 See supra Part I.B.
quires information outside of the trial court record. So, what is an appellate attorney in this position to do?

The attorney must scour the record to find a weak, meritless issue, and then she must spend hours researching and writing up that issue knowing all the while that it will lose. The appellate court then invests hours of staff attorney, law clerk, administrative, and judicial time addressing that frivolous claim only to affirm the defendant's conviction. Thus, the structural decision to remove from the appellate attorneys' arsenal any opportunity to raise trial attorney ineffectiveness not only is inefficient, but also forces attorneys to ignore violations of their clients' constitutional right to counsel. As a result, trial attorney ineffectiveness continues to plague our criminal justice system.

III

THE STRUCTURAL SOLUTION

As Parts I and II of this Article illustrate, the current system overburdens criminal trial attorneys without creating a mechanism to check their resulting ineffectiveness. At the same time, the system underutilizes criminal appellate attorneys and thereby wastes a valuable resource. In this Part of the Article I propose a structural shift in the system that may solve both of these problems simultaneously. Specifically, I maintain that the states can and should alter their procedures to allow defendants to open the record in a limited way to support claims of ineffective assistance of trial counsel on appeal.

First, I detail the proposed procedure and explain why I believe it will succeed where other proposals have failed. I then explore the implications of my proposal and explain how it will ameliorate both structural and personal ineffectiveness problems, while giving appellate attorneys a more meaningful role to play in the criminal justice system. I also address how the proposed procedure should be implemented in state cases and discuss the special circumstances affecting its applicability to capital and federal criminal cases.

A. Moving Ineffective Assistance Claims to Direct Appeal

1. The Proposed Procedure

To be effective, any procedure for the presentation of ineffective assistance claims on direct appeal must provide for the appointment of new counsel on appeal. As many courts and scholars have recognized, counsel cannot be expected to plead his own ineffectiveness. See, e.g., People v. Bailey, 12 Cal. Rptr. 2d 339, 340 (Cal. Ct. App. 1992) ("We believe that there is an inherent conflict when appointed trial counsel in a criminal case is also appointed to act as counsel on appeal. We therefore discourage the practice of al-
For this reason, my proposed procedure requires first and foremost that the defendant receive new appellate counsel as soon as the trial and sentencing are complete.

Once new counsel is appointed, he or she will need an effective procedural mechanism through which to raise a potentially meritorious claim of ineffective assistance of trial counsel. A modified version of the motion for a new trial will serve this purpose.\textsuperscript{148} Currently, defendants in every state and federal prosecution have the opportunity to file a motion for a new trial once the trial is over.\textsuperscript{149} The responsibility for filing this motion is typically assigned to the trial attorney, in large part because the defendant has a limited period of time in which to file these motions.\textsuperscript{150} In most jurisdictions, a motion for a new trial must be filed before a trial transcript has been prepared and before appellate counsel is retained or appointed.\textsuperscript{151} As a result, the motion for a new trial currently has little utility.

When the trial attorney files a motion for a new trial, he routinely recites all of the reasons why the trial judge should reconsider his rulings, and the trial judge routinely denies the motion.\textsuperscript{152} However, if the time for filing a motion for a new trial is extended, and if the responsibility for filing the motion is shifted to the appellate attorney, the appellate attorney would have ample opportunity, and motivation, to supplement the trial court record with the evidence necessary to support a claim of ineffective assistance of trial counsel. Thus, although the trial attorney would still be responsible for filing the notice of appeal, the appellate attorney would be responsible for

\begin{footnotes}
\item[148] For guilty pleas, it would be a modified version of a motion to withdraw the plea. See, e.g., Harris v. State, 474 A.2d 890, 893–94 (Md. 1984) (explaining that a defendant may supplement the record to support an ineffective assistance of counsel claim through a hearing on a motion to withdraw a guilty plea).
\item[149] See, e.g., La. Code Crim. Proc. Ann. art. 851, 853 (1966); 3 Wayne R. LaFave et al., supra note 10, § 24.11(b). Defendants who are convicted pursuant to guilty pleas have an opportunity to file a motion to withdraw the guilty plea. See id. § 21.5(a).
\item[150] See supra notes 57–62 and accompanying text.
\item[151] See Calene v. State, 846 P.2d 679, 684 (Wyo. 1993) (noting that a problem arises where no transcript is available and the only available documentation consists of a letter from the appellant to the trial court and the trial evidence); see also United States v. Taglia, 922 F.2d 413, 417 (7th Cir. 1991); V.R. v. State, 852 So.2d 194, 202–03 (Ala. Crim. App. 2002); Ex parte Torres, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997); 3 Wayne R. LaFave et al., supra note 10, § 11.7(e); see also id. § 21.5(a) (discussing the limited time period in many jurisdictions provided for filing a motion to withdraw a guilty plea).
\item[152] 3 Appellate Justice: 1975, Criminal Justice on Appeal 185 (Paul D. Carrington et al. eds., 1975) ("In many jurisdictions new trial motions are made in nearly every criminal case as a matter of routine. Few are ever granted.").
\end{footnotes}
reinvestigating the case, and, if a potentially meritorious ineffective assistance of trial counsel claim is discovered, the appellate attorney would file a motion for a new trial in the original trial court. The appellate attorney would also file a copy of the motion in the appellate court, which would toll the time for filing the appellate brief until the trial court issued its ruling.

To ensure that the appellate attorney has sufficient time to reinvestigate the case and present any claims of ineffective assistance of trial counsel to the trial judge, the time provided for filing the motion for a new trial would have to be extended. I propose that the appellate attorney be given at least six months from the date that the transcripts are complete to file this motion.\(^\text{153}\) This is consistent with state practice in the trial phase, as many states have determined that allowing six months from the date of indictment to the start of trial is a fair compromise between the defendant’s right to a speedy trial and the attorney’s need to have adequate time to investigate and prepare the case.\(^\text{154}\) Six months is also a fair compromise between the State’s interest in finality and the appellate attorney’s need to reinvestigate the case on appeal.

However, this six-month time period should be treated as a floor, not a ceiling. The requirement is “at least” six months, because some cases may require more time. For example, a complex conspiracy prosecution that went to trial will likely require more investigation than a misdemeanor shoplifting case that pled out. Thus, the trial court should be willing to entertain motions to extend the time period if necessary.

When filing the proposed motion, the appellate attorney would be required to attach supporting documentation, such as affidavits, declarations, and reports, in order to demonstrate trial counsel’s ineffectiveness and the resulting prejudice to the defendant. If necessary, the appellate attorney would request a hearing on the ineffective assistance of trial counsel claim. The trial judge would consider the defendant’s request for a hearing under a standard comparable to that used for motions to dismiss civil cases in federal court.\(^\text{155}\) Specifically, the trial judge would accept all of the facts alleged by the defendant in the

\(^{153}\) The six-month time frame is tied to the date of the transcript preparation, because it would be inefficient to require the appellate attorney to start her reinvestigation at any other point. Moreover, if there is some delay in processing the transcript, this requirement obviates the need to file motions for extensions of time.


\(^{155}\) It would be as if the trial judge were entertaining a Federal Rule of Civil Procedure 12(b)(6) motion filed by the prosecution to dismiss the defendant’s claim of ineffective assistance of trial counsel. See Fed. R. Civ. P. 12(b)(6); see also Neitzke v. Williams, 490 U.S. 319 (1989) (explaining the standard to be applied in deciding Rule 12(b)(6) motions).
new-trial motion as true and draw all reasonable inferences in the defendant's favor. Then, if the trial judge finds that the motion, together with the attached supporting materials, states a colorable claim of ineffective assistance of trial counsel, the defendant would be entitled to a hearing. If state courts distort this standard and routinely deny requests for hearings, the federal courts should hold that the states' procedures, as applied, are not adequate grounds upon which to predicate procedural default. See, e.g., English v. Cody, 146 F.3d 1257, 1261 (10th Cir. 1998) (discussing "the constitutional imperative that this court disregard a state procedural bar for the review of ineffective assistance claims unless the state procedure in question adequately protects a criminal defendant's ability to vindicate his or her constitutional right to the effective assistance of counsel"); Brecheen v. Reynolds, 41 F.3d 1343, 1363 (10th Cir. 1994) (holding that Oklahoma's remand procedure was not an adequate state ground upon which to predicate default).

If the defendant's ineffective assistance of trial counsel claim is rejected after the trial court refuses a defense request to hold a hearing on the claim, the defendant should be able to appeal both the decision to deny a hearing and the decision to deny the motion for a new trial. Whether the trial court held a hearing or not, the defendant should have a reasonable period of time in which to file an appellate brief challenging the trial judge's decision to deny his motion for a new trial. Moreover, that time period should not begin until the transcript of the motion for new trial hearing is complete. Cf Mich. Comp. Laws Ann. § 7.208(B)(6) ("If the motion is denied, defendant-appellant's brief must be filed within 42 days after the decision by the trial court, or the filing of the transcript of any trial court hearing, whichever is later.").
2. Political Feasibility

Unlike asking elected representatives to allocate more funding to indigent defense, moving ineffective assistance of trial counsel claims to direct appeal is a feasible solution because it represents a political compromise. The State may be willing to allow a defendant to challenge his attorney’s performance earlier in the appeals process in exchange for more streamlined post-conviction procedures later. Specifically, the State knows that if the defendant can raise an ineffectiveness claim on appeal and fails to do so, the court will likely deem the issue waived, and the defendant will not be permitted to raise it later on collateral review. Thus, addressing this claim together with the defendant’s other claims on direct appeal serves the State’s interests in finality and conservation of judicial resources.161

3. Improvement on Existing State Structures

Although a majority of states’ procedures comport with the Massaro dicta and locate ineffective assistance of trial counsel claims on collateral review, a minority of states have recognized the virtues of this type of compromise and have experimented with structural shifts of their own. Some states have created “remand” procedures, which require a defendant who wants to raise ineffective assistance of trial counsel on appeal to file a motion in the appellate court requesting a remand of the case to the trial court for an evidentiary hearing.162 Other states have adopted procedures that allow a defendant to raise ineffective assistance of trial counsel claims in the trial court by filing a post-conviction motion while his appeal is pending.163 Still others have created a hybrid set of procedures in which the defendant may file either a remand motion in the appellate court or a post-conviction motion in the trial court seeking to raise a claim of trial attorney inef-

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161 In the 1970s, Paul H. Robinson and others advanced proposals for unitary review procedures in which direct appeal and collateral attack would be collapsed into one comprehensive post-trial consideration of all claims. See Robinson, supra note 5, at 485; Carrington, supra note 12, at 109–13. These scholars opined that, if the claims were heard after trial in one unified review proceeding, the courts could avoid later consideration of the claims on collateral review. See Robinson, supra note 5, at 499; Carrington, supra note 12, at 106.


163 See, e.g., Shepard v. United States, 533 A.2d 1278, 1283 (D.C. 1987); Woods v. State, 701 N.E.2d 1208, 1219–20 (Ind. 1998); cf. State v. McFarland, 899 P.2d 1251, 1257 (Wash. 1995) (declaring that a defendant who wishes to raise issues on appeal that require evidence or facts not in the existing trial record may do so “through a personal restraint petition, which may be filed concurrently with the direct appeal”).
fectiveness. So far, however, none of the proposed state procedures has succeeded in curbing trial attorney incompetence. Recognizing this failure, some states have begun to retreat from their initial efforts at structural reform.

My proposal should succeed where others have failed because it differs from the others in three significant respects. First, it requires states to appoint new counsel to file the motion for a new trial. Although some states have recognized the importance of new counsel, they do not make it a requirement. This often places trial counsel in the untenable position of having to assert his own ineffectiveness. Moreover, to make matters worse, some states categorize the post-trial motion used to supplement the trial court record with evidence of trial attorney ineffectiveness as a “post-conviction” motion. In so doing, these states strip the defendant of any constitutional right to an attorney to investigate, file, or argue the motion.

Second, the state procedures currently in place have unrealistic time limits that require appellate counsel to read the trial transcript, interview the client, speak to the trial attorney, reinvestigate the case, research the law, and file a remand motion or a post-conviction motion in less than two months. The six-month reinvestigation period

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165 See supra notes 22–23.
166 See, e.g., Ingram v. State, 675 So.2d 863, 865 (Ala. 1996) (discussing the problems associated with and ultimately abandoning Alabama's procedure under which appellate counsel could file a motion to toll the time for filing a motion for a new trial so as to give appellate counsel enough time to present ineffectiveness claims to the trial court and then appeal them); Commonwealth v. Grant, 813 A.2d 726, 737–38 (Pa. 2002) (abandoning Pennsylvania's former rule, which required ineffective assistance of trial counsel claims to be raised at the first possible stage in the proceedings when trial counsel no longer represents the defendant).
167 See, e.g., English v. Cody, 146 F.3d 1257, 1263 (10th Cir. 1998) (noting that, under Oklahoma's regime, a defendant can be procedurally defaulted in post-conviction for failing to have raised ineffective assistance of trial counsel on direct appeal even if trial and appellate counsel were the same). Utah provides that if “the appellant's attorney of record on the appeal faces a conflict of interest upon remand, the court shall direct that counsel withdraw and that new counsel for the appellant be appointed or retained.” Utah R. App. Proc. 23B(c) (1998) (emphasis added). However, as this language makes clear, new counsel is appointed only after the remand is granted. Thus, counsel who continues to represent a client on appeal may still have to assert his own ineffectiveness.
168 See State v. Pierce, 713 N.E.2d 498, 502 (Ohio Ct. App. 1998) (discussing the procedural consequences of allowing the same counsel to represent a defendant at trial and on appeal since that counsel cannot be expected to assert his own ineffectiveness).
169 See, e.g., People v. Moore, 797 N.E.2d 631, 637 (Ill. 2003).
170 See generally id. (noting that new counsel is not required when a defendant files a post-conviction motion alleging ineffective assistance of counsel, but rather that the defendant will receive counsel if, in the court's discretion, it finds that the defendant's pro se motion is potentially meritorious).
171 See, e.g., Mich. Comp. Laws Ann. § 7.211(G)(1)(a) (providing that the appellate attorney has until the time provided for the filing of the appellant's brief to file a motion.
in my proposed procedure addresses this problem, giving appellate counsel a real opportunity to raise trial attorney ineffectiveness when necessary.

Third, most states with remand procedures or immediate post-conviction motions give no guidance to the courts regarding when to grant or deny the request for an evidentiary hearing. Rather, the decision is left entirely to the discretion of an already overburdened judiciary. Thus, it comes as no surprise that the courts routinely deny defense requests for evidentiary hearings. Since most requests are denied, the defendant usually never has a chance to present live testimony demonstrating his trial attorneys' ineffectiveness. Given that eighty percent of this country's criminal defendants are represented by public defenders, most of whom are overwhelmed by crushing caseloads, it is unlikely that virtually no defendants are able to state colorable claims of trial attorney ineffectiveness. Rather, it is more likely that the courts are interpreting the discretionary hearing standards in ways that permit them to reject colorable claims of trial attorney ineffectiveness without ever giving defendants an opportunity to present live testimony or evidence at a hearing.

In the small minority of states that have adopted standards for obtaining an evidentiary hearing, the standards are almost impossible to meet. Utah, for example, requires a defendant seeking remand to present the appellate court with "a non-speculative allegation of facts, for a remand); see also id. § 7.212(B)(2)(c) (providing that the appellant's brief is due fifty-six days after the claim of appeal is filed or the transcript is filed with the court, whichever is later). These time limits are at least partially responsible for the demise of Alabama's attempted reform. Alabama courts encouraged defendants to file post-trial motions for new trials alleging ineffective assistance of counsel, but then encountered a series of administrative problems because defendants had only thirty days to file the motions. See, e.g., Ex parte Ingram, 675 So.2d 863, 865 (Ala. 1996) (discussing the difficulties associated with motions that were filed to toll or extend the thirty-day time limit).

172 See, e.g., State v. Van Cleave, 716 P.2d 580, 583 (Kan. 1986) ("The statutes do not provide any specific procedure for the handling and determination of a motion to remand a case from the appellate courts. The granting of a motion to remand a case from the appellate courts for the purpose of the trial court hearing a motion for a new trial ... lies within the sound discretion of the appellate court." (quoting State v. Shepherd, 657 P.2d 1112, 1118 (Kan. 1983))); see also State v. White, 337 N.W.2d 517 (Iowa 1988) (failing to provide standards to guide the appellate court in determining whether to grant a request for a remand); People v. Ginther, 212 N.W.2d 922 (Mich. 1973) (same); Berget v. State, 907 P.2d 1078 (Okla. Crim. App. 1995) (same).

173 See English v. Cody, 146 F.3d 1257, 1264 n.7 (10th Cir. 1998); see also Stuntz, supra note 24, at 5 ("In a system so dominated by discretionary decisions, discrimination is easy.").

174 See supra note 44 and accompanying text.

175 See generally English, 146 F.3d at 1264 n.7 (finding only one case in which the Oklahoma Court of Criminal Appeals remanded for an evidentiary hearing).

176 Cf. N.Y. CRIM. PROC. LAW § 440.30(4) (McKinney 2004) (explaining the various ways that courts can deny post-trial ineffective assistance of counsel claims without a hearing).
not fully appearing in the record on appeal, which, if true, could sup-
port a determination that counsel was ineffective."177 At first blush,
this appears similar to the standard that I propose; however, the Utah
standard requires the defendant to obtain affidavits from any uncalled
witnesses and to explain what the witnesses would have testified to and
how it might have helped the defendant's case.178 Moreover, in order
to be deemed "nonspeculative," these affidavits must come from the
witnesses themselves.179

Utah's structural scheme ignores the fact that a defendant will
often need the subpoena power that accompanies a hearing in order
to compel witnesses to provide this testimony. After all, if the defen-
dant could obtain all of this information without a hearing, he would
not need to request a remand for one. My proposal takes this prob-
lem into account and does not require the defendant to submit affidav-
its from those with personal knowledge of the underlying facts.
Rather, a defense investigator's assertion in an affidavit that he spoke
to a witness and that the witness made certain statements should be
sufficient to warrant a hearing if, taking the statements as true and
drawing all inferences in favor of the defendant, the affidavit and
other supporting materials state a colorable claim of ineffectiveness.

For the reasons described above, current attempts to devise a
mechanism for raising ineffectiveness on appeal have proven unwork-
able and have therefore failed to curb the problem of trial attorney
ineffectiveness. That said, states need not give up or turn a blind eye
to the problems in their current procedures. By requiring states to
appoint new counsel, provide that counsel with sufficient time to
reinvestigate the case and file a motion for a new trial, and establish
standards that guide judges in addressing trial attorney ineffectiveness
claims, states can give defendants a realistic opportunity to raise a
claim of trial attorney ineffectiveness on appeal.

B. Implications for the Trial and Appellate Problems

In addition to giving defendants a more realistic opportunity to
raise claims of trial attorney ineffectiveness on direct appeal, the pro-
posed procedure brings us much closer to solving the problems of
underutilization of appellate counsel and trial attorney ineffective-

177 UTAH R. APP. PROC. 23B(a).
179 See id. Wyoming arguably provides appellate courts with a standard for determin-
ing when to grant a hearing request as well. However, its standard is vague and therefore
suffers from the same problems in application as the Utah standard. See, e.g., Calene v.
State, 846 P.2d 679, 687 (Wyo. 1993) (requiring the defendant to provide the appellate
court with "serious and specific allegations of ineffectiveness" demonstrating "a real issue
before the trial court can be put to the additional requirement of providing an evidentiary
hearing").
ness. With respect to the former, the proposed procedure’s effects are clear: If one of the most pervasive constitutional problems in trials today is the ineffectiveness of trial counsel, then providing appellate attorneys with an opportunity to investigate and raise that claim dramatically increases their utility.

With respect to the problem of ineffective trial counsel, the proposed procedure improves on the current system in multiple ways. First, the procedure solves the problems created by the Supreme Court’s structural decision in Massaro. It provides indigent defendants with a realistic opportunity to challenge their trial attorneys’ performances by giving them the aid of counsel when raising these claims. Additionally, the proposed procedure ensures that all defendants, including misdemeanants and those convicted of minor felonies, have an opportunity to raise challenges to the performance of their trial attorneys. It allows defendants to raise these claims closer in time to the actual trial or plea, when the evidence is still intact and the witnesses’ memories are fresh. The proposed procedure also resolves the legal question of how to conduct a cumulative prejudice inquiry by consolidating all of the ineffectiveness claims in one proceeding, which maximizes both the State’s interests in finality and the judiciary’s interest in conserving judicial resources.

If properly applied, the proposed procedure should decrease personal ineffectiveness problems, because addressing these claims on appeal has a greater deterrent effect than addressing them on collateral review. When ineffective assistance of trial counsel claims are raised on appeal, a more immediate message is sent down to the offending trial attorney, at a time when that lawyer is more likely to be practicing in the same jurisdiction. Moreover, the sooner these claims are raised, the more likely it is that the legal community will remember the case and the circumstances of the conviction. As a result, the trial judge and prosecutor are more likely to be upset at the prospect of retrying the case, which will increase the stigma associated with the offending attorney’s failures.

The preference for a hearing implicit in the proposed procedure should also deter personal ineffectiveness. No attorney wants to participate in a public hearing in which he is accused of being constitutionally ineffective. Furthermore, holding these hearings shortly after trial means that the evidence will be fresh in people’s minds, the witnesses will be interested and more likely to attend, and any publicity and attention surrounding the case will not have subsided. It is far more difficult for the trial attorney to avoid the stigma associated with a public hearing than it is to avoid the consequences of paper filings.

If a trial attorney is accused in hearing after hearing of not meeting with his clients or not investigating his cases, word will spread throughout the legal community, damaging his reputation and harming his practice.

The proposed procedure may also cause trial judges and prosecutors to put more pressure on offending attorneys to perform effectively in future cases. One can easily imagine a situation in which a trial judge, wanting to avoid a post-trial hearing, calls up to the bench an attorney who has routinely been accused of failing to investigate his cases before trial to ask him if he has talked to his client and done a reasonable investigation. Over time, the repeated accusations of poor performance, if substantiated, will make trial judges more likely to consider seriously a motion for a new trial in a case involving that attorney.

And what of the problem of structural ineffectiveness? Although we cannot “deter” public defenders from being structurally ineffective, since they do not control their caseloads, a post-trial hearing will create pretrial incentives that may alleviate the structural problem. For example, in order to avoid a post-trial hearing in which counsel explains that she was unable to investigate the case because it was one of a hundred cases that she had that month, a trial judge may be more inclined to grant the defender’s pretrial continuance request. Over time, the desire to avoid large numbers of post-trial hearings might compel courts to adopt some form of Professor Dripps’s ex ante inquiry and ask pretrial whether indigent defense counsel is able to proceed with the trial and provide effective assistance.\(^1\)

Improvements in the quality of trial attorney performance will also have positive effects on other trial-level actors. Although the number of ineffectiveness claims presented on appeal should decrease over time as the quality of trial representation improves, the appellate courts’ ability to check the legal rulings made by trial judges should improve. Because trial counsel will better preserve legal errors for appeal under the proposed procedure, appellate attorneys will be able to raise all claims of legal error on appeal without having to worry about waiver problems. Appellate judges, in turn, will ensure that trial judges correctly apply the law in all cases. As a result, this proposal may lead to better performance by trial judges in addition to trial attorneys.

At the same time, the proposed procedure may result in deeper improvements in the performance of all trial attorneys by pressuring courts to strengthen the *Strickland v. Washington* standard that they use

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181 See Dripps, *supra* note 28, at 243 (“My thesis holds that the *Strickland* inquiry into counsel’s effectiveness *ex post* should be supplemented by an *ex ante* inquiry into whether the defense is institutionally equipped to litigate as effectively as the prosecution.”).
to judge trial counsel performance. One possible explanation for why appellate courts have deferred to trial counsel under *Strickland* is that, given the current structure of our system, the appellate judges are unaware of—or, more likely, willfully blind to—the widespread nature of the ineffectiveness problem. Because collateral review frequently occurs four or more years after the initial trial, judges who address ineffective assistance of trial counsel claims only on collateral review have an incomplete picture of trial attorney performance and a distorted view of the general competence of trial counsel. An attorney is likely to be more careful when handling felony cases that carry lengthy prison sentences than when handling misdemeanor charges that do not pose any significant threat of lengthy incarceration. If, under our current system, only those prisoners who receive longer prison sentences collaterally attack their convictions and challenge the effectiveness of their trial attorneys, then judges are currently seeing only a fraction of the problem. Moreover, this fraction of cases involves the trials of major felonies, the very cases in which attorneys are most likely to perform at their best.

Moving ineffective assistance of trial counsel claims to direct appeal will highlight the currently hidden problem of attorney incompetence and force the appellate bench to address the issue. If we think dynamically about how the judiciary may respond upon realizing the magnitude of this problem, there are a number of possible outcomes, almost all of which would have some beneficial effect on the defendant’s right to effective trial counsel.

First, appellate judges may start reversing criminal convictions using a stronger, more defense-friendly interpretation of the *Strickland* standard. We already know that some judges are willing to take action to remedy the problem of structural trial attorney ineffectiveness when presented with an opportunity to do so. In Louisiana, for example, when the state supreme court learned that the public defender’s

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182 As previously mentioned, see supra notes 51–52 and accompanying text, the *Strickland* test is very lax, and courts often find that counsel was not constitutionally ineffective even in the most egregious circumstances. *See, e.g.*, George C. Thomas III, *History’s Lesson for the Right to Counsel*, 2004 U. Ill. L. Rev. 543, 544 (collecting cases involving counsel who slept through trial, failed to interview the police officer who allegedly coerced the defendant into confessing, presented no mitigating evidence in the sentencing phase of a capital case, and had a sexual relationship with the defendant’s fiancé).

183 *See, e.g.*, Thirty-Fifth Annual Review of Criminal Procedure: Speedy Trials, supra note 2, at 360 n.1210 (collecting cases involving delays ranging from two to thirteen years).

184 This is true for a number of common-sense reasons. These cases tend to be more visible and get more publicity, and so the attorney’s behavior is more in the public eye. Attorneys who handle larger felony cases often handle fewer cases because they are paid more for these more serious cases; for this reason, their attention is less divided than it would be if they handled many smaller cases. Moreover, the possibility of more severe punishment should weigh on an attorney’s mind and would be likely to provide the attorney with an independent incentive to work hard.
budget was derived from parking ticket revenues, it held that the prosecutions of indigent defendants could be halted until the municipality provided adequate funds for defense counsel.\textsuperscript{185} Courts in Arkansas, Kansas, Massachusetts, and New York have taken similar steps in an attempt to pressure their legislatures to provide more funding for indigent defense.\textsuperscript{186} Given that courts are typically deferential to legislative decision making on funding issues, the willingness of courts to effectuate change on such a controversial issue suggests that courts would be at least as willing to use the quintessentially judicial function of strictly interpreting the \textit{Strickland} standard to address the problem of ineffectiveness. This strict interpretation is particularly likely to occur in misdemeanor and minor felony cases, where the cost of retrial is not as great and thus the cost to the system of reversing the convictions is not as high. A more rigorous interpretation of the \textit{Strickland} standard, in addition to curbing personal ineffectiveness, could also catalyze reforms that would affect structural ineffectiveness. Such an interpretation would require defense attorneys to perform at higher levels, which in turn would pressure legislatures to provide additional funding to indigent defense in order to make higher-level representation possible.\textsuperscript{187}

Additionally, some appellate judges may interpret the \textit{Strickland} standard more rigorously in certain limited circumstances. For example, courts may be less likely to characterize a trial attorney's failures as "tactical" in nature when that attorney systematically provides defense.


\textsuperscript{186} See \textit{Arnold v. Kemp}, 813 S.W.2d 770, 775–76 (Ark. 1991) (holding a $1,000 statutory cap on fees constitutionally unacceptable because it imposed a burden on attorneys so severe as to constitute an unconstitutional taking and noting that the system of appointing attorneys based on attorney residence violated equal protection); \textit{State ex rel. Stephan v. Smith}, 747 P.2d 816, 849 (Kan. 1987) (holding that the State is obligated to establish a statewide scale for compensating counsel for indigent defendants "at a rate that is not confiscatory, considering overhead and expenses"); \textit{Lavallee v. Justices in the Hampden Superior Court}, 812 N.E.2d 895, 901 (Mass. 2004) (recognizing that there was no staff available to represent indigent defendants in many circumstances and holding that "on a showing that no counsel is available to represent a particular indigent defendant despite good faith efforts, such a defendant may not be held more than seven days and the criminal case against such a defendant may not continue beyond forty-five days"); \textit{New York County Lawyers' Ass'n v. State}, 763 N.Y.S.2d 397, 399 (N.Y. Sup. Ct. 2003) (issuing a permanent injunction directing that counsel be paid $90 per hour and removing the statutory fee cap until the legislature changes the rates and increases the appropriation for compensation for indigent defense).

\textsuperscript{187} See \textit{Stuntz}, supra note 24, at 70 (recognizing that rigorous regulation of defense counsel's performance will "force counsel to perform to a given level, thereby forcing states to spend whatever it [takes] to permit counsel to perform to that level").
cient trial representation. Just as appellate courts are acutely aware of those trial judges in their jurisdictions who routinely misapply the law, appellate courts would become acutely aware of those defense attorneys who regularly provide ineffective assistance in specific ways. Consider, for example, the attorney who routinely fails to investigate his cases. The first time the attorney is accused of failing to locate witnesses, the appellate court may give him the benefit of the doubt and treat the decision not to speak to those witnesses as tactical in nature rather than the result of a failure to investigate.\textsuperscript{188} However, when that same attorney is accused of failing to investigate and locate witnesses a third or fourth time, the appellate court may take a closer look at the attorney's performance. Admittedly, there are far more defense attorneys in a given jurisdiction than there are trial judges. As a result, it may take the appellate bench longer to find ineffective attorneys than to find judges who misapply the law. This challenge can be overcome, however, with the help of good appellate advocates, who should highlight repeated accusations of ineffective assistance against a particular trial attorney.

Those judges who are bothered by rampant ineffectiveness but who balk at opening the floodgates to ineffective assistance claims may find other legal errors in the case upon which to predicate a reversal. In order to achieve the desired result, these judges might be less inclined to use the harmless error standard to avoid reversing a conviction. Another group of appellate judges might recognize that the attorney's performance was deficient but conclude that, given the specific facts of the case, the prejudice prong of the \textit{Strickland} test has not been satisfied. Although such a ruling would not aid the defendant in that particular case, the court's finding of deficient performance would serve other defendants' interests as precedent in future cases. Finally, some appellate courts, while not granting relief in a specific case, may urge the legislature to take action to ameliorate structural ineffectiveness problems, thus catalyzing legislative reform.\textsuperscript{189} Each of

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\item\textsuperscript{188} See, e.g., Sandgathe v. Maass, 314 F.3d 371, 381 (9th Cir. 2002) (rejecting ineffective assistance of counsel claim because failure to investigate was tactical); Hunt v. Lee, 291 F.3d 284 (4th Cir. 2002) (same).
\item\textsuperscript{189} See, e.g., State v. Peart, 621 So.2d 780, 791 (La. 1993) ("If legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel."). The Louisiana legislature responded to \textit{Peart} by taking steps to study and remedy the problem of insufficient funding for indigent defense. See State v. Citizen, 898 So.2d 325, 336 (La. 2005) (recognizing the legislative effort to reform). However, the court deemed these measures insufficient and remanded with instructions to halt prosecutions if the legislature did not make available sufficient funding for indigent defense. See id. at 336–39.
\end{enumerate}
\end{footnotesize}
these possible responses would result in a more robust right to effective trial counsel than exists in our current system.

Not every appellate bench would take steps to strengthen the right to effective trial counsel. Some appellate courts, upon seeing the magnitude of the ineffectiveness problem, would probably dilute the *Strickland* standard further in an attempt to avoid large-scale reversals and prevent a backlog of retrials in the lower courts. But even these courts would likely reverse convictions on the basis of trial attorney ineffectiveness in the most egregious cases.

Regardless of how the judiciary responds, it is ultimately better to shed light on the hidden problem of trial attorney ineffectiveness than to allow the judiciary, and the public, to sweep the problem under the rug. There is no better way to do this than by making more efficient use of a currently underutilized resource—namely, appellate counsel. With one reform, we can take the first step toward solving two problems that plague defense representation in our criminal justice system.

C. Application to Special Cases: Capital Defendants and Federal Criminal Defendants

The proposed procedure may be implemented via a simple amendment to the court rules or through a legislative enactment. It may make sense to implement the proposed procedure only in non-capital state criminal cases initially, because the justifications for moving ineffective assistance of trial counsel claims to direct appeal are stronger in non-capital state cases than in capital and federal criminal cases.

Most capital defendants currently have an adequate opportunity to present claims of ineffective assistance of trial counsel on collateral review, because almost all states and the federal government have enacted statutes providing for post-conviction counsel in death cases. Moreover, finality interests in death penalty cases are not served in the same way by earlier presentation of ineffectiveness claims. Because the ultimate punishment is involved, capital defendants routinely pur-

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190 For example, judges could reinterpret *Strickland's* prejudice prong to hold that a defendant is only prejudiced by his attorney's deficient performance if the defendant makes a showing of factual innocence. This narrow interpretation, if adopted, would drastically alter our current conception of the right to counsel by making it a right held only by the innocent. For years, the Supreme Court has indicated that the guilty and innocent alike are entitled to adequate counsel. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 380 (1986). Thus, an interpretation of this nature, if adopted by a lower court, should not survive scrutiny by a reviewing court.

sue every avenue of review.\textsuperscript{192} Providing them with an opportunity to raise ineffectiveness of trial counsel on appeal will thus not decrease the likelihood of a later collateral review petition.\textsuperscript{193}

Additionally, given the typical length of capital trials and the large investment of state resources that routinely accompany the investigation of capital cases, six months is likely to be an insufficient period of time to reinvestigate the trial phase of a capital case.\textsuperscript{194} Even assuming that it is possible to adequately reinvestigate the trial itself, additional time would be necessary to do the same for the penalty phase. Reinvestigation of trial counsel's performance at the penalty phase requires the appellate attorney to consider the client's entire life history and often includes consultation with mitigation specialists and mental health experts.\textsuperscript{195} Although it is possible to extend the time provided for reinvestigation in capital cases, at some point the delay becomes so long that the point of diminishing returns is reached, and the benefits from earlier presentation of the ineffectiveness claim are no longer apparent. For example, there is likely to be little difference between a three-year delay and a four-year delay with respect to witness recollection and destruction of evidence.

Similarly, there is greater need for the proposed procedure to vindicate the right to effective trial counsel in state criminal cases than in federal cases. Federal defender offices are typically better funded.\textsuperscript{196} As a result, caseloads are lighter and there is less structural ineffectiveness in the federal criminal system.\textsuperscript{197} Moreover, most federal criminal defendants already have an opportunity to challenge the effectiveness of their trial counsel on collateral review. This opportu-

\textsuperscript{192} See, e.g., Eric D. Scher, Comment, Sawyer v. Whitley: Stretching the Boundaries of a Constitutional Death Penalty, \textit{59 Brook. L. Rev.} 237, 261 (1993) (explaining that while most defendants have an interest in ending litigation and focusing on rehabilitation and eventual release from prison, "[c]apital petitioners . . . have no such interest. They will never be returned to the community; even if granted habeas relief, they nevertheless will spend the rest of their lives in prison and at best they will get a new trial. Capital petitioners have nothing to lose by repeatedly attacking their sentences and convictions").

\textsuperscript{193} See Eric M. Freedman, Giarrantano is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings, \textit{91 Cornell L. Rev.} 1079, 1100 (2006) (noting that, since 1984, the Supreme Court has found trial counsel ineffective primarily in the penalty phases of capital trials).

\textsuperscript{194} See Justin Brooks & Jeanne Huey Erickson, The Dire Wolf Collects His Due While the Boys Sit by the Fire: Why Michigan Cannot Afford to Buy into the Death Penalty, \textit{13 T.M. Cooley L. Rev.} 877, 891 (1996) (describing capital trials as "long and expensive" and stating that "there is no doubt that capital trials cost a great deal more than non-capital trials").

\textsuperscript{195} Cf. Welsh S. White, Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care, \textit{1993 U. Ill. L. Rev.} 328, 337–56 (detailing the capital defense attorney's duty to investigate, much of which must be repeated in post-conviction proceedings).


\textsuperscript{197} See \textit{id.} at 839, 847, 859–60.
nity exists because, (1) in contrast to state courts, there are very few misdemeanor offenses in federal courts;198 (2) defendants who are convicted in the federal system receive longer sentences, on average, than their state counterparts;199 and (3) the federal "truth in sentencing" enactments have drastically curtailed federal prisoners' abilities to obtain early release.200 As a result, federal defendants generally have more post-conviction opportunities to challenge their trial counselors' effectiveness than state defendants.

These examples illustrate that there is some support for maintaining the status quo in capital and federal criminal cases, or, alternatively, for an exception to the state procedural default doctrine in capital cases if the proposed procedure is adopted. It may be wise for states interested in adopting the proposed procedure to do so only with respect to non-capital cases initially, and then to revisit the application of the procedure to capital cases at a later time. Similarly, it may be wise for federal jurisdictions, which do not experience as much structural ineffectiveness, to wait until the states have experimented with the proposed procedure before considering how to implement it in federal proceedings. This would allow lawmakers to test the procedure first and then to modify it to accommodate the special needs of capital and federal criminal cases. Moreover, excluding capital and federal criminal cases from the first round of implementation would have no significant effect on the ability of the proposed procedure to catalyze reform, because the overwhelming majority of criminal prosecutions in this country are non-capital state criminal prosecutions.201


199 Compare id. at 2 (average federal sentence imposed for felonies is 58.4 months), with Durose & Langan, supra note 4, at tbl.1.3 (average maximum state sentence for felonies is 36 months).


IV
MEETING OBJECTIONS

No reform is perfect. Given that my proposal involves fundamental changes in the way that ineffective assistance of trial counsel claims are raised and resolved, I anticipate that there will be criticisms and objections to the proposed procedure. I now turn to some of those anticipated objections.

A. The Role of the Appellate Attorney

One possible objection to the proposed procedure is that it drastically alters the role of the appellate attorney. As I see it, there are two components to this objection—one practical and one conceptual. The practical objection relates to the realities of current appellate practice and the skills of appellate defenders today. Trial attorneys and appellate attorneys have different roles in our criminal justice system; consequently, these jobs attract individuals with different skill sets. The ideal trial attorney is the nitty-gritty, into-the-facts, charismatic litigator who regularly interacts with clients, witnesses, and jurors. The prototypical appellate attorney, on the other hand, is an erudite bookworm who reads appellate reporters and enjoys holing up in an office to write appellate briefs all day. By forcing appellate attorneys to investigate cases and present testimony at new trial hearings, the proposed procedure arguably does not make efficient use of the appellate attorney's skills.

This objection is weak, however, because the office of the appellate attorney, like all offices, evolves and changes in reaction to outside forces and demands. If the appellate attorney's responsibilities change, the type of person drawn to the job will change, and the nature of the role will be shaped accordingly. Thus, any disruption would be temporary. Moreover, it is important to avoid overstating the distinction between trial and appellate attorneys, since there is substantial overlap in the skills required. Appellate attorneys must possess proficient oratory skills to answer questions effectively during oral arguments, and good trial attorneys should know the law just as well as their appellate counterparts. To the extent that there is concern about the transition to a new conception of the appellate attor-

Probs. 125, 132 (1998) (noting that "[m]urder and nonnegligent homicide account for 1.3% of all criminal convictions" and that roughly 2% of all murder convictions result in the imposition of a death sentence).

202 See, e.g., Woods v. State, 701 N.E.2d 1208, 1216 (Ind. 1998) (stating that appellate lawyers may not have the skills required "to investigate extra-record claims, much less to present them coherently and persuasively to the trial court"); Lissa Griffin, The Right to Effective Assistance of Appellate Counsel, 97 W. Va. L. Rev. 1, 3, 32-38 (1994) (outlining the "Functional Differences between Trial and Appellate Counsel").
ney, appellate defender offices may opt initially to split the responsibilities of appellate attorneys in order to grandfather attorneys into the new regime. The newer attorneys would reinvestigate cases and file new trial motions, whereas the older ones would draft appellate briefs.

A more interesting objection is conceptual, addressing the perceived role of the appellate attorney. Critics may argue that the appellate attorney's purpose is and always has been to review the trial court record for evidence of judicial error, and that expanding that role would make appellate attorneys "second trial attorneys." This objection, however, is premised on a misconception of the appellate attorney's role.

One need look no further than *Douglas v. California* to realize that the Supreme Court originally envisioned the role of the appellate attorney as including the responsibility to raise claims of ineffective assistance of trial counsel. In holding that Mr. Douglas was entitled to a lawyer on appeal, the Court explicitly discussed the role of the appellate attorney and explained that one of the appellate attorney's primary responsibilities was to determine whether a defendant's case had "hidden merit" that was not clear on the face of "the barren record." As the Court explained, without this search for hidden error, "[t]he indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." Thus, as the Supreme Court described, the appellate attorney's role should involve extra-record investigation and, if necessary, the presentation of a claim of trial attorney ineffectiveness.

Moreover, when the Supreme Court later held that there was no constitutional right to counsel for discretionary appeals, it premised its decision on the assumption that by the time a defendant reaches discretionary review, all of his claims have been researched and briefed by an appellate lawyer and passed upon by an appellate lawyer.

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203 See Woods, 701 N.E.2d at 1216 ("[D]irect appeal counsel should not be forced to become a second trial counsel.").

204 372 U.S. 353 (1963). *Douglas v. California* was the first case to recognize the constitutional right to counsel on first appeal as of right. See id. at 357.

205 Indeed, in *Douglas*, one of the underlying issues was ineffective assistance of trial counsel. See id. at 367 n.4 (Harlan, J., dissenting).

206 Id. at 356 (majority opinion).

207 Id. at 358. More recently, the Court has explained that appellate counsel is necessary because "the record may not accurately and unambiguously reflect all that occurred at the trial," and an appellate advocate is in a better position than the court to investigate and "shed additional light on the proceedings below." *Penson v. Ohio*, 488 U.S. 75, 82 n.5 (1988).
court. This assumption presupposes that a defendant can present any and all claims relating to the lawfulness of his conviction to that initial appellate tribunal—including claims of ineffective assistance of trial counsel.

Most recently, in *Halbert v. Michigan*, the Supreme Court extended *Douglas*, holding that a defendant was constitutionally entitled to an appellate attorney to raise an ineffective assistance of trial counsel claim on appeal from a motion to withdraw a guilty plea. Thus, the conceptual role of the appellate attorney has always included the notion that appellate attorneys should examine the trial or plea itself, not just the court record, for legal error, and, in appropriate cases, question the performance of trial counsel.

Even assuming arguendo that the proposed procedure does involve a conceptual change in the role of the appellate attorney, such change hardly justifies rejecting the proposal. The criminal justice system has changed significantly in the forty years since the right to appellate counsel was first recognized, and perhaps the roles of those operating in that system must evolve as well. Whereas in 1963 the primary trial-level problem addressed on appeal may have been judicial error, the primary problem to address today is trial attorney ineffectiveness, and we need to ensure that appellate defenders have the ability to address it.

B. The Requirement of New Counsel on Appeal

Another potential objection to the proposed procedure relates to the requirement that all defendants obtain new counsel on appeal. Initially, this requirement raises questions about when counsel is “new” and whether different lawyers in the same office could handle

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208 See *Ross v. Moffitt*, 417 U.S. 600, 616 (1974); see also *Bounds v. Smith*, 430 U.S. 817, 827 (1977). In *Pennsylvania v. Finley*, 481 U.S. 551 (1987), the Supreme Court held that there is no constitutional right to counsel for collateral attacks on criminal judgments after direct appeal. That decision was similarly premised on the assumption that a defendant's access to the trial court record, appellate briefs from the first appeal as of right, and appellate court opinion would provide sufficient information to the defendant with respect to all of his potential claims such that he could fairly present his claims pro se in post-conviction proceedings. See id. at 557; see also *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (extending *Finley* to capital cases).

209 Cf. *Ross*, 417 U.S. at 616 (reasoning that counsel's initial brief in the court of appeals would reduce the initial handicap suffered by indigent, pro se defendants seeking discretionary review).


211 The Court's *Massaro* decision was, in this respect, a deviation from its precedent. See generally *Massaro v. United States*, 538 U.S. 500 (2003) (holding that ineffective assistance of counsel claims should be raised on collateral review because considering them on direct appeal would require appellate counsel and courts to look beyond the trial court record).

212 See supra Part I.
the trial and the appeal. Courts routinely address conflict of interest issues in civil and criminal cases and are well-equipped to answer such questions. Moreover, some states have addressed this question and have created separate appellate defender offices that are independent of the trial-level defender offices.

The stronger and more important objection to the new counsel requirement is that it is costly, paternalistic, and inefficient to require a defendant to obtain new counsel if the defendant is satisfied with his current attorney and that attorney is already familiar with the defendant's case. However, in many jurisdictions, defendants already obtain new counsel on appeal. Some public defender offices already assign different attorneys to handle appeals. Of those defendants who retained private counsel for their trials, many qualify for public defender representation on appeal, because they are incarcerated without a source of income and have already spent their available resources paying trial attorneys' fees. Thus, the question of whether a person should be entitled to retain trial counsel on appeal will arise primarily in cases in which a defendant with a private attorney desires to continue with the same attorney on appeal.

The very justification for requiring new post-trial counsel suggests that defendants should not have the choice of keeping their trial attorneys on appeal. If a trial attorney cannot be relied upon to challenge his own ineffectiveness, he similarly cannot be relied upon to advise his client adequately about whether to waive the requirement of new appellate counsel. Nor would it be fair to expect defendants to have the necessary legal knowledge to assess whether there is a viable claim of ineffective assistance of trial counsel without any advice from a neutral and detached attorney.

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213 See Massaro, 538 U.S. at 507; see also Dripps, supra note 25, at 796.
214 See, e.g., People v. Banks, 520 N.E.2d 617, 621 (Ill. 1987) ("[W]here an assistant public defender asserts that another assistant from the same office has rendered ineffective assistance, a case-by-case inquiry should be conducted to determine whether any circumstances peculiar to the case indicate the presence of an actual conflict of interest.").
216 See, e.g., United States v. Doe, 365 F.3d 150, 155 (2d Cir. 2004) (noting that efficiency concerns often weigh against providing incentives to change counsel on appeal).
217 See supra note 215. In jurisdictions that currently do not have such a structure, the implementation of a new counsel requirement would force them to adopt this system. Given its success in a number of jurisdictions, there is no reason to believe that such a system would be unworkable or would unnecessarily tax the state.
219 See, e.g., English v. Cody, 146 F.3d 1257, 1260 (10th Cir. 1998) (observing that ineffective assistance of trial counsel claims require the defendant "to consult with different counsel on appeal in order to obtain an objective assessment of trial counsel's perform-
In addition to the inefficiency criticism, defendants may argue that a new counsel requirement infringes on their constitutional right to proceed with counsel of their own choosing. However, this right is not without limitations. Specifically, a court may choose not to honor a defendant’s waiver of conflict-free representation. Because there is an inherent conflict when appellate counsel must investigate his own potential ineffectiveness, the court’s interest in conflict-free representation should trump the defendant’s interest in retaining counsel of his choice. Moreover, a defendant has no right to proceed pro se on appeal and cannot object to the appointment of an attorney against his will. Therefore, appellate courts are not required to provide defendants with counsel of their choice on appeal, particularly when honoring the defendant’s choice would create a conflict of interest for the appellate attorney.

States that do not want to impose new counsel on a defendant could have an alternative. They could require the appointment of new appellate counsel, with the understanding that, once appellate counsel has investigated the case and advised the defendant about the potential merits of an ineffective assistance of trial counsel claim, the defendant could opt out of appellate counsel’s representation at that point. To ensure that the waiver is knowing, intelligent, and voluntary, the defendant should be required to submit a written document
to the appellate court. This document would stipulate that the defendant has discussed all potential claims of ineffective assistance of trial counsel with the new appellate counsel and, knowing that trial counsel would not have an incentive to raise such claims on appeal and that the failure to raise these claims would result in a waiver, the defendant still wishes to opt out of the requirement that new counsel be appointed on appeal.\textsuperscript{224}

In \textit{Massaro v. United States}, the Supreme Court raised an additional concern about the proposed new counsel requirement—namely, that it “puts counsel in\[] an awkward position vis-à-vis trial counsel” because “[a]ppellate counsel often need trial counsel’s assistance in becoming familiar with a lengthy record on a short deadline, but trial counsel will be unwilling to help appellate counsel familiarize himself with a record for the purpose of understanding how it reflects trial counsel’s own incompetence.”\textsuperscript{225} Post-conviction counsel are similarly in need of trial counsels’ help in familiarizing themselves with the record. The real question is whether it is better to put the appellate attorney or the post-conviction attorney in this awkward position. If anything, post-conviction counsel are more in need of trial counsels’ assistance because of the amount of time that has passed since the original proceedings, the difficulty of locating witnesses and records years later, and the nature of most post-conviction claims.\textsuperscript{226} Thus, the cost to the post-conviction attorney who handles the ineffective assistance of trial counsel claim is higher than the cost to the appellate attorney who handles the claim.\textsuperscript{227}

\textsuperscript{224} See \textit{Johnson v. Zerbst}, 304 U.S. 458, 464 (1938) (explaining that waivers must be knowing, intelligent, and voluntary). Although this opt-out system would delay the appellate process, given the limited number of cases in which the problem would likely arise, the delay would not significantly impede consideration of appellate claims. A more important concern, however, is that this opt-out system would provide privately retained appellate counsel with an incentive to tell defendants that there is a viable ineffective assistance of trial counsel claim, even if the claim is very weak, in order to retain the client’s business. If this happened on a large scale, it could result in a flood of weak or meritless ineffective assistance of trial counsel claims. Far from reinvigorating the right to counsel, a flood of weak claims could cause the appellate bench to narrow the \textit{Strickland} standard further. However, given the limited number of cases in which opt-out is likely to be an issue, I do not anticipate that this will pose a serious problem.


\textsuperscript{226} For example, claims alleging that a prosecutor withheld potentially exculpatory information in violation of \textit{Brady v. Maryland}, 373 U.S. 83 (1963), are often raised in collateral review proceedings. These claims typically require testimony from the defendant’s trial attorney regarding what information the government disclosed to her before trial. Cooperation between the defendant’s trial and post-conviction lawyers is therefore critical in these cases.

\textsuperscript{227} Moreover, it is doubtful that there is any real cost to the appellate attorney. In my experience as an appellate public defender, a trial attorney’s cooperation or lack thereof was relatively inconsequential to my ability to represent my clients.
C. Costs

The objection relating to the cost of imposing a new counsel requirement is part of a larger objection pertaining to the cost of the proposed procedure generally.\(^{228}\) To be sure, there are large up-front costs associated with the proposal, but all structural change imposes costs. Moreover, as the Supreme Court has recognized, there is a "flat prohibition against pricing indigents out of as effective an appeal as would be available to others able to pay their own way."\(^{229}\) Of course, that statement cannot be understood woodenly, because the system always must balance the quality of representation against fiscal constraints.\(^{230}\) Although there is a tradeoff, it is better to place greater weight on the defendants’ side of the scale during criminal proceedings than we would in civil cases because of the potential for deprivation of liberty.

Moreover, the significant long-term benefits from allowing ineffective assistance of trial counsel claims to be raised on direct appeal will offset some of the costs. Permitting such claims on direct appeal would reduce the number of claims raised in petitions for collateral review in both state and federal courts.\(^{231}\) This trade-off might not be

\(^{228}\) See, e.g., Woods v. State, 701 N.E.2d 1208, 1217 (Ind. 1998) (discussing the added expense and delay of using motions to correct error as a procedure for reviewing ineffective assistance of counsel claims); see also Richard A. Posner, The Problematics of Moral and Legal Theory 163-64 (1999) (arguing that “[a] bare-bones system for defense of indigent criminal defendants may be optimal” because, if defense lawyers at trial were better, “either many guilty people would be acquitted or society would have to devote much greater resources to the prosecution of criminal cases”).

\(^{229}\) Mayer v. City of Chicago, 404 U.S. 189, 196-97 (1971); see also Kimmelman v. Morrison, 477 U.S. 365, 379 (1986) (“The Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel.”).

\(^{230}\) See, e.g., Bounds v. Smith, 430 U.S. 817, 825 (1977) (affirming that the “costs of protecting a constitutional right cannot justify its total denial,” but permitting states to consider economic factors in deciding how to guarantee meaningful access to courts); see also Lewis v. Casey, 518 U.S. 343, 386 (1996) (noting that federal courts should defer to state legislative and executive budgetary decisions); Ross v. Moffitt, 417 U.S. 600, 612 (1974) (stating that the Fourteenth Amendment does not require a state to “equalize economic conditions” (quoting Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring))).

\(^{231}\) See Lay, supra note 84, at 16-17. Admittedly, the defendant could still raise claims of ineffective assistance of appellate counsel on collateral review. See, e.g., State v. White, 337 N.W.2d 517, 520 (Iowa 1983); Walker v. State, 933 P.2d 327, 334 (Okla. Crim. App. 1997). However, the Supreme Court has emphasized that appellate counsel does not have a duty to raise every colorable claim, and in fact, may want to “winnow[] out weaker arguments on appeal and focus[] on one central issue if possible, or at most on a few key issues.” Jones v. Barnes, 463 U.S. 745, 751-52 (1983); see also Evitts v. Lucey, 469 U.S. 387, 394 (1985) (“[T]he attorney need not advance every argument, regardless of merit, urged by the appellant.” (emphasis in original)). Moreover, asserting an ineffective assistance of appellate counsel claim for failure to raise ineffective assistance of trial counsel is very difficult, because it “requires the petitioner to overcome the double presumption of attorney competence at both trial and appellate levels.” Woods, 701 N.E.2d at 1221; see also Griffin, supra note 202, at 38 (noting that claims of ineffective assistance of appellate coun-
worthwhile given that the increased number of appeals may more than offset the decrease in post-conviction petitions.\textsuperscript{232} That said, it may be more efficient and advantageous to the courts to have these claims presented through counsel on appeal because the court documents will be easier to comprehend than the pro se post-conviction briefs.\textsuperscript{233} Furthermore, although there would be more appeals initially, the deterrent effect from the post-trial hearings and appeals will hopefully lead to more effective performance by trial attorneys which, in turn, will obviate the need for future hearings. Thus, the costs, although likely to be large initially, should decrease over time.

D. Shifting the Problem

Another possible criticism is that assigning an additional responsibility to appellate lawyers will increase their already large workload, making it even harder for them to devote the necessary attention to meritorious legal claims on appeal.\textsuperscript{234} Just as many trial attorneys are currently rendered ineffective because they are overworked,\textsuperscript{235} so too appellate attorneys will be rendered ineffective by this proposed procedure, because it will overload them. Although some appellate attorneys may perform their new duties ineffectively, the likelihood of a defendant getting two “bad apples” in his criminal representation is smaller than the chance that he would get one. Ideally, there would be adequate staff and funding for both trial and appellate representation. Given limited resources, however, time and attention should be focused on the most serious and currently unchecked legal problems facing the criminal justice system. For many defendants, ineffective assistance of counsel is the most (or the only) meritorious legal issue in their cases.\textsuperscript{236} In those instances, appellate attorneys would better serve their clients by pursuing the ineffective assistance of trial counsel claims than by wasting time on other frivolous issues.

\textsuperscript{232} But see Carrington, supra note 12, at 60 (“In some jurisdictions, appeals are taken in over 90% of all cases that go to trial.”).

\textsuperscript{233} See Halbert v. Michigan, 545 U.S. 605, 621 (2005) (explaining that many inmates have either learning disabilities or mental impairments or lack the education necessary to write appellate briefs without a lawyer’s assistance); Haggard v. Alabama, 494 F.2d 1187, 1189 (5th Cir. 1974) (per curiam) (vacating a judgment denying habeas relief to a pro se petitioner because of the incomprehensible nature of his claims and ordering the district court to appoint counsel on remand to assist the petitioner).

\textsuperscript{234} See Halbert, 545 U.S. at 629 (Thomas, J., dissenting) (“[T]he majority’s policy choice to redistribute the State’s limited resources only harms those most likely to have worthwhile claims . . . .”).

\textsuperscript{235} See supra notes 37–42 and accompanying text.

\textsuperscript{236} See supra notes 22, 135 and accompanying text.
E. Delay

Some critics will argue that the proposed mechanism compromises the state’s interest in finality by significantly delaying the appellate process. The time the appellate attorney spends reinvestigating the case does prolong the appeal, but pursuing ineffective assistance claims on direct appeal reduces the likelihood that victims will be forced to reopen old wounds on collateral attack. This is particularly true given the limited nature of the inquiry that would be permitted on collateral review if ineffective assistance of trial counsel claims could be presented on appeal.237

Nor is there any significant prejudice to the state resulting from this delay, because the defendant is typically serving his or her sentence during the appellate investigation period.238 In fact, the delay inherent in pursuing an ineffective assistance of trial counsel claim on appeal may encourage defendants to present only those claims that are meritorious. If, after reading the transcript and talking to the client, the appellate attorney does not believe that there is a viable ineffective assistance of trial counsel claim, the attorney would better serve the client by foregoing presentation of an ineffective assistance of trial counsel claim and obtaining faster appellate consideration of other potentially meritorious issues.

F. Self-Regulation

Some may contend that the requirement of filing a motion for a new trial in the original trial court is inefficient, because it asks the trial judge to police herself. If an attorney slept during trial, the judge presumably should have been aware of that fact and should have done something about it. When the defendant later files a motion for a new trial alleging that counsel’s performance was deficient because he slept through the trial, it is therefore unrealistic to believe that the same trial judge who allowed counsel to do so is then going to rule in favor of the defendant. However, most claims of ineffective assistance of trial counsel will likely focus on trial counsel’s omissions—things the trial judge necessarily did not see—rather than things that she did.239 Thus, more often than not, the trial judge will be asked to

237 See supra note 231 and accompanying text; see also United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981) (emphasizing that the scope of collateral review is limited to “that narrow compass of other injury that could not have been raised on direct appeal”).
238 See Read v. State, 430 So.2d 832, 842 (Miss. 1983) (“[A]bsent extraordinary circumstances, the hearing on the ineffective assistance of counsel issue will occur while the defendant is incarcerated and presumably serving his sentence. . . . Justice, accordingly, will not be delayed pending litigation of the ineffectiveness issue.”). The only exception is the rare case in which an appeal bond is granted. See id. at 842 n.7.
239 See, e.g., Rompilla v. Beard, 545 U.S. 374, 380 (2005) (granting habeas corpus relief to a defendant because his trial attorney failed to examine a file including the defendant’s
police counsel rather than herself. And even when a motion for a new trial calls for some self-regulation, the preference for a hearing allows the defendant to create a record, which allows the appellate court to decide the issue without engaging in fact finding.\(^\text{240}\)

G. Hydraulics

As with any reform that expands criminal defendants' rights, this reform is subject to a hydraulics criticism. The expansion of rights in one area may result in the contraction or compromise of rights in another area.\(^\text{241}\) Critics may argue that it is naïve to rely on procedural change in a system riddled with underfunding, overcriminalization, and racial discrimination, because tinkering with procedures will not overcome these inherent biases. Rather, doing so will only divert attention from investigation of the facts and consideration of the substance of guilt versus innocence.\(^\text{242}\)

My proposed procedure presents a challenge to this cynical view. Rather than avoid hydraulics, the proposed procedure actually relies on them. One of the principal reasons for adopting this type of structural change is because it promises streamlined post-conviction procedures down the line. This trade-off is precisely what makes the proposal feasible.

Moreover, far from obfuscating the search for innocence, the re-location of ineffective assistance of trial counsel claims to direct appeal provides courts with an earlier opportunity to find and correct unjust convictions. Defendants are not typically permitted to assert freestanding claims of actual innocence. Instead, they must argue their innocence through other claims, such as ineffective assistance of trial counsel.\(^\text{243}\) By allowing defendants to raise ineffective assistance of trial counsel claims on appeal, the proposed procedure permits appellate counsel to present actual innocence issues that would other-

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\(^{240}\) Moreover, in truly egregious cases of counsel sleeping throughout the trial, it is possible that the trial judge will become an important witness in an ineffective assistance of trial counsel hearing, and, as a result, a motion asking the judge to recuse herself may be appropriate.\(^{241}\) See Stuntz, supra note 24, at 4 (noting that underfunding, overcriminalization, and oversentencing have increased as criminal procedure has expanded).\(^{242}\) See id. at 4-5, 37-45.\(^{243}\) See Herrera v. Collins, 506 U.S. 390, 416 (1993) ("Our federal habeas cases have treated claims of 'actual innocence,' not as an independent constitutional claim, but as a basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits . . . ."); Jake Sussman, Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 385 (2001) ("To have practical and legal effect, a colorable showing of actual innocence must be linked to some recognized . . . claim [such as] ineffective assistance of counsel.").
wise be hidden from view as outside the scope of the trial court record.

The current crisis of counsel is a real and serious problem. There is, perhaps, no right as fundamental to the defendant as the right to have the assistance of an effective attorney, because that attorney is the conduit through which all other constitutional rights are asserted. For this reason, fear about the contraction or compromise of other rights should not stand in the way of reform.

CONCLUSION

The current system of criminal defense representation is failing. Part of the reason for this failure is structural. As long as the problem of trial attorney ineffectiveness remains hidden in collateral review proceedings, it will go unaddressed. Bringing ineffective assistance claims forward to direct appeal will make the problem more visible, revealing the nature and scope of trial counsel ineffectiveness. At the same time, the shift will more efficiently allocate appellate resources.

Structural considerations regarding when defendants are allowed to raise claims in the criminal process apply to other criminal procedure doctrines besides ineffective assistance of counsel. Whether a claim should be raised initially at trial, on appeal, or during collateral review proceedings is an important issue that scholars frequently overlook.

Upon identifying an impotent criminal procedure doctrine, it is tempting to attack its substance without first considering whether, as is the case here, the structure of the system prevents litigants from presenting, and judges from addressing, the underlying claims. A great deal of criminal procedure doctrine involves malleable, judge-made standards of reasonableness and materiality. Litigants should be permitted to raise these claims when they are ripe and when the parties are still motivated and able to present challenges effectively. Only then will judges shape the standards in ways that fully address the underlying issues.

If one thinks of the justice system as a jigsaw puzzle in which each constitutional criminal procedure claim is a piece, ineffective assistance of trial counsel is currently misplaced. Moving ineffective assistance of trial counsel claims from collateral review to direct appeal would be a step toward completing the puzzle and solving both the trial and appellate defense problems.

244 See supra Part I.A.
245 See Strickland v. Washington, 446 U.S. 668, 685–86 (1984) (stating that effective assistance of counsel is critical in an adversary system because it ensures the adversary system's ability to "produce just results").